TRANSPORTATION APPEAL TRIBUNAL OF CANADA

Citation: *Bradley Friesen v. Canada (Minister of Transport)*, 2019 TATCE 46 (Appeal)

TATC File No.: P-4283-02

Sector: Aviation

BETWEEN:

Bradley Friesen, Appellant

- and -

Canada (Minister of Transport), Respondent

Heard in: Vancouver, British Columbia, on November 1, 2018

Before: Tracy Medve, Member (chairing)

Arnold Olson, Member

Andrew Wilson, Member

Rendered: October 29, 2019

APPEAL DECISION AND REASONS

Held: The appeal is dismissed and the review determination is upheld. The suspension will commence thirty-five (35) days following service of this decision.

I. BACKGROUND

[1] On November 9, 2016, the Minister of Transport (Minister) issued a Notice of Suspension to the appellant, Mr. Bradley Friesen. The Notice suspended Mr. Friesen's private pilot licence for a period of 10 days, pursuant to section 6.9 of the *Aeronautics Act*.

[2] The suspension was given in connection with a flight on or about November 22, 2015 over Thomas Crater Lake in Golden Ears Provincial Park, British Columbia. Mr. Friesen, as pilot-in-command of a Robinson R44 II helicopter, registration C-GYYW, was alleged to have operated his helicopter at a distance less than 500 feet from a person, thereby contravening paragraph 602.14(2)(b) of the *Canadian Aviation Regulations*.

[3] On November 16, 2016, Mr. Friesen applied to the Transportation Appeal Tribunal of Canada (TATC or Tribunal) for a review of the Minister's decision. The applicant also requested a stay of suspension until the review was concluded. The stay was granted by the reviewing member on November 21, 2016.

[4] The review hearing took place in Vancouver, B.C., on June 27 and 28, 2017. The review member upheld the Minister's decision to suspend Mr. Friesen's licence for 10 days.

[5] The appellant filed a request for appeal on October 10, 2017. The appeal hearing took place on November 1, 2018.

[6] The main facts of the case are as follows:

a. The purpose of the flight was to shoot a video of Elizabeth Putnam skating on the unusually clear surface of the ice at Thomas Crater Lake. Ms. Putnam is a professional figure skater and had made videos previously with Mr. Friesen. Mr. Friesen's helicopter was fitted with externally-mounted cameras and he was wearing a go-cam.

b. Also in attendance for the video shoot was Robin Leveille, a videographer who took video from the ground with a wide-angle lens. A still photographer, Shayd Johnson, was also present at the shoot but was not called to testify. Rick White and Jeff Williams participated in the shoot as drone operators but were not called as witnesses.

c. A video entitled "Figure Skating on Top of the World", which was a compilation of shots taken from various cameras at the site that day, was posted on Mr. Friesen's YouTube channel. The video was colour-enhanced by Treven Lepage. Mr. Lepage testified at the review hearing.

d. The flight in question was conducted without incident.

II. REVIEW DETERMINATION

[7] The review member found that the Minister had proven, on a balance of probabilities, that the appellant had flown his helicopter at a distance of less than 500 feet from Ms. Putnam and had therefore contravened paragraph 602.14(2)(b) of the *Canadian Aviation Regulations*.

[8] While acknowledging that the YouTube video tendered by the Minister as evidence had been "extensively" edited, he accepted it as evidence and confirmation of the violation of CAR 602.14(2)(b). The review member noted in his analysis that Mr. Friesen had presented no evidence at the review hearing.

[9] The review member indicated he had accepted the Minister's evidence that the surface of Thomas Crater Lake is about 5,100 feet above sea level (ASL). He found that a frame from the YouTube video submitted by the Minister clearly showed Ms. Putnam skating with a Canadian flag. Further, the member relied on the altimeter reading that was visible from the same frame indicating the helicopter was flying at 5,250 feet ASL. From this, he concluded that Mr. Friesen's helicopter was flying at about 150 feet above the ice surface where Ms. Putnam was skating.

[10] The review member also found there was no evidence of any other helicopter in the area at the time of the alleged contravention.

III. SUMMARY OF GROUNDS FOR APPEAL

[11] The appellant presented the following grounds for appeal:

a. The review member erred in law in ruling that videotape evidence found on the internet was admissible with no proof of the authenticity of the video. The member noted that the video was extensively edited.

b. If the video was correctly admitted in evidence, the member erred in law by basing his ruling on evidence that was not tendered by the Minister. The member relied on his own reading of the altimeter without any proof that the instrument was an altimeter or that the instrument was accurate at the time of the screen shot. The appellant was not given the opportunity to cross-examine the member on his evidence.

c. If the video was correctly admitted in evidence, no evidence was tendered by the Minister to establish that the helicopter was not conducting a take-off, approach or landing at the time of the screen shot relied upon by the member.

d. The member erred in law in finding there was evidence of the altitude of the ice surface shown in the screen shot he relied upon. The ice surface was clearly shown to be in a depression of indeterminate depth in the video.

e. The member erred in law by saying in the course of the hearing that pilots charged with an offence normally testify, and by indicating in his review determination that Mr. Friesen had called no evidence, given that subsection 6.9

(7.1) of the *Aeronautics Act* provides that an operator is not required to give evidence.

f. The member erred in law in ruling that the operation was not an external load operation under subparagraph 602.15(2)(b)(iii) of the *Canadian Aviation Regulations*.

[12] The appeal panel indicated at the appeal hearing that it would request written submissions from the parties concerning several questions arising from the grounds of appeal in order to ensure the panel had the full benefit of the parties' arguments. The parties availed themselves of the opportunity and the panel has considered in detail these written submissions in its deliberations.

IV. ANALYSIS OF GROUNDS OF APPEAL

Ground One – Admissibility of the Video

[13] The appellant submits as follows:

a. The review member should not have allowed the video as evidence, as the onus is on the Minister to establish the authenticity and accuracy of the video and no expert witnesses were called by the Minister to provide this proof.

b. The member's decision to admit the video despite it being heavily edited, and in the absence of verification as to its accuracy, is an error of law.

c. While Parliament clearly intended the TATC to have flexibility in the conduct of hearings, as per subsection 15(1) of the *Transportation Appeal Tribunal of Canada Act (TATC Act)*, that flexibility is limited where a procedural decision infringes upon an applicant's right to natural justice and fairness. Admission of the video without proof of authenticity or the extent to which it has been altered, was incorrect in law. While the TATC is not bound by strict rules of evidence, it is bound by rules of fairness, natural justice and the requirement that the Minister establish its case on a balance of probabilities.

d. The video is classified as real evidence and its admissibility depends on its i) accuracy in truly representing the facts; ii) fairness and absence of any intention to mislead; and iii) verification on oath by a person capable of doing so.

e. The Minister did not submit any expert evidence as to the accuracy of the video in representing the facts, the fairness of the video or the absence of an intention to mislead. Nor did the Minister obtain expert evidence on the extent to which the video was edited and the effect those edits may have had on the ability to estimate the actual distance between the helicopter and the skater. The appellant submits that the onus is on the Minister to provide this proof. The appellant agreed that video evidence is admissible in accordance with *R v Bulldog*, 2015 ABCA 251, 124 W.C.B. (2d) [*Bulldog*] "… so long as the Crown proves that it is a substantially accurate and fair representation of what it purports to show." The appellant argues, however, that the *Bulldog* case is distinguishable from this case.

No expert evidence was required because the issue in *Bulldog* was the identity of the individuals in the video. The maker of the original video in that case testified that it was not edited and there were eyewitnesses to the event who could testify as to its accuracy. In this case, Ms. Putnam and Mr. Leveille were not qualified to authenticate the video as they were not in a position to opine on the effects of editing and camera lenses, and therefore could not establish that the video was a substantially accurate and fair representation of what it purported to depict.

f. In the alternative, if the onus is on the appellant to demonstrate the video was not an accurate depiction of the day's event, the burden was met when the Minister admitted at the review hearing there was no doubt that the video was subsequently edited or altered, at which point the burden shifts to the Minister to prove those edits did not undermine the accuracy, authenticity and fairness of the video.

g. The member's stated reason for his decision to admit the video as evidence was that it had been his long-established policy to accept every piece of evidence tendered and then put the weight on the evidence that he saw. The appellant argued that because the video was the only evidence submitted by the Minister of a potential breach of CAR 602.14(2), the materiality of the evidence, paired with the fact that it presented an adulterate, non-sequential depiction of the events of that day, necessitated the member determining its admissibility with a higher degree of scrutiny than what the reasons indicate. This is especially so given the member's finding of fact that the video "was unquestionably edited". While the Tribunal is not bound by strict rules of evidence, it is bound by rules of fairness, natural justice, and the requirement that the Minister establish its case on a balance of probabilities.

h. The member's acceptance of the video without related expert evidence as to its authenticity, fairness or accuracy, lowered the standard of proof that must be met by the Minister to prove an infringement of CAR 602.14(2).

i. The Minister's submission that a YouTube video was admitted in a previous decision (*Canada (Attorney General) v. Friesen*, 2017 FC 567, 281 A.C.W.S. (3d) [*Friesen*]) is distinguished, as the video was tendered for an entirely different purpose.

j. If the video was correctly admitted, the lack of evidence as to the effect the editing would have on the accuracy of the video should have resulted in a decision to give the video little evidentiary weight.

[14] The Minister submits as follows with respect to the matter of the admission of the video:

a. The TATC does not strictly apply the rules of evidence and it is not bound by them, as set forth in subsection 15(1) of the *TATC Act*. It is better for a tribunal to admit irrelevant evidence than to exclude evidence that would have been relevant (*Syndicat des employés professionnels de l'Université du Québec à Trois-Rivières c. Université du Québec à Trois-Rivières*, [1993] 1 S.C.R. 471, 101 D.L.R. (4th) 494 at para. 45 [*Syndicat*]).

b. The courts admit video evidence, even when it has been altered. In *R. v. Nikolovski*, [1996] 3 S.C.R. 1197, 141 DLR (4th) 647 *(Nikolovski)*, the court found that videos are real evidence when they are actual recordings of real events. Further, a video can constitute original evidence from which the trier of fact can draw his or her own inferences (*Nikolovski* at para. 23).

c. A video recording may be admitted into evidence even though it has been altered, provided it is shown to be a substantially accurate depiction of the event in question. The mere fact of alteration does not automatically render a video recording inadmissible (*Bulldog* at para. 33).

d. From *Bulldog* at para. 32:

> What matters with a recording, then, is not whether it was altered, but rather the degree of accuracy of its representation. So long as there is other evidence which satisfies the trier of fact of the requisite degree of accuracy, no evidence regarding the presence or absence of any change or alteration is necessary to sustain a finding of authentication.

e. *Nikolovski* did not create a test whereby the party submitting the video as evidence must prove that the video has not been altered or changed (*Bulldog* at paras. 26-29).

f. The degree of clarity and quality of the video goes to weight, not admissibility.

g. The Minister adduced considerable evidence to support the authenticity of the video. The witnesses, Ms. Putnam and Mr. Leveille, confirmed they participated in the shooting of the video; the skating portion of the video took place over several hours on or about November 22, 2015; the shoot took place in Canada near Golden Ears Park; Mr. Friesen was the only person to fly the helicopter during the shoot; Mr. Friesen flew his helicopter above and to the side of Ms. Putnam while she was skating; and the video submitted as evidence contains footage shot by Mr. Leveille with his video camera on the day of the shoot, including Mr. Friesen flying his helicopter in the vicinity of Ms. Putnam on the lake.

h. Ms. Putnam also testified that the video did not appear to be edited or manipulated to be different than it was in reality.

i. Mr. Leveille testified that Mr. Friesen flew less than 300 feet above Ms. Putnam more than once and that Mr. Friesen took off and landed several times during the shoot, but never on the lake.

j. Additional corroborating elements include that the video depicts Mr. Friesen; it was posted on his YouTube channel; and he was the one who conceived of the video and had been promoting it on various platforms (Exhibits M-12 and M-13).

k. Exhibits M-15 and M-16 are still images taken from website or social media accounts that depict Mr. Friesen's flight and the content of the video.

l. It is a question of fact, or mixed fact and law, whether the video should have been admitted into evidence subject to a standard of reasonableness.

Appeal Panel Finding on Ground One

[15] The standard of review on this issue is that of reasonableness, as this is a question of mixed fact and law. The test for the admission of a video is a question of law, but it is necessary to determine whether the facts satisfy the test for admission of the video [*Canada (Director of Investigation and Research) v. Southam Inc*., [1997] 1 SCR 748, para. 35].

[16] The court cases on admissibility of video evidence (called real evidence) support the requirement that some amount of authentication is required prior to the admission of the video. The essential criteria for admissibility include: 1) accuracy in representing the facts; 2) fairness and absence of any intention to mislead; and 3) verification on oath by a person capable of doing so (*Regina v. Creemer and Cormier*, [1967] N.S.J. No. 3 at para. 18, 4 N.S.R. 1965-69 546 [*Creemer*]). All that is required is some evidence to support the authenticity and accuracy of the recording (Michelle Fuerst, Sidney N. Lederman, Alan W. Bryant, *Sopinka, Lederman & Bryant: The Law of Evidence in Canada*, 5th ed, LexisNexis, 2018). The level of authentication is relatively low and videotapes can be self-authenticating with respect to the issue of identity (*Nikolovski* at para. 26).

[17] The videotape must also be introduced for some purpose other than to be purely prejudicial to the appellant (*Creemer* at paras. 18, 19).

[18] In this case at the review hearing, the Transport Canada investigator, Ms. Thirukumaran, did not authenticate the video. She merely established that the video viewed at the review hearing was an accurate representation of the video she saw on the appellant's YouTube Channel.

[19] The review member summarized Ms. Putnam's testimony as follows from the review determination *Friesen v. Canada (Minister of Transport)*, 2017 TATCE 26 (Review)]:

> She testified that she never looked up, never heard the helicopter and did not know how long it was above her. [para. 13]
>
> On cross-examination, her evidence was summarized as follows:
>
> The applicant's representative stated that Ms. Putnam has nothing to do with editing, and suggested that she cannot say that the helicopter was closer than 500 feet. [para. 14]
>
> And on re-examination:
>
> The Minister's representative asked Ms. Putnam if she knew the distance the helicopter was above her. She answered "No". [para. 15]

[20] The review member summarized Mr. Leveille's evidence-in-chief as follows:

> He shot video from the opposite side of the lake with a wide-angle lens with many distortions. He spoke at length about cameras and said that this hearing is about measurements. [para. 16]
>
> And on cross-examination:

> Based on the naked eye, the applicant's representative asked Mr. Leveille if he can say if Mr. Friesen's helicopter came closer than 500 feet to Ms. Putnam. Mr. Leveille replied that he cannot say, as he was looking at the monitor. [para. 17]

[21] It should be noted that the Minister's representative who called Mr. Leveille as a witness, on several occasions in his submissions at the review hearing, suggested that Mr. Leveille's testimony was not credible, stating:

> … I think Mr. Leveille demonstrated quite clearly that his interests lie with Mr. Friesen, and his testimony was both inconsistent and not credible at times.
>
> … I would be very cautious in giving his evidence any weight.
>
> So how could he have offered the opinion that he observed flying below the minimum when he didn't even know what the minimum was? I mean it's laughable.
>
> But I mean, if that doesn't give the Tribunal pause about relying on anything Mr. Leveille has said, I don't know what would.
>
> Again during closing arguments:
>
> So, it's simply that we shouldn't, the Tribunal shouldn't be accepting the testimony on this issue from Leveille because he wasn't an expert.

[22] We are given no indication from the review member's determination how much weight he placed on Mr. Leveille's testimony. And, it seems evident from the review member's abbreviated summary of the evidence given by all the Minister's witnesses, that authentication did not specifically factor into the review member's considerations regarding the admissibility of the video.

[23] In *Filippone v. Canada (Minister of Transport)*, 2008 TATCE 31 (Review), the Minister sought to introduce a video which had been found on the internet by a Transport Canada inspector. The Minister's representative acknowledged that there was no assurance that it could submit satisfactory evidence that would link the content of the video to the case under consideration. The Tribunal [at paras. 46 and 47] determined that the video would not be admitted into evidence because relevancy of the evidence could not be established, the Minister could not demonstrate that the video had not been altered, and that accuracy and reliability were essential as the video had been taken from the internet and such accuracy would be very difficult for Mr. Fillippone to rebut. We find this case distinguishable from the present case in that there was independent eye witness testimony about the events portrayed in the video, and because the video was taken from the appellant's own YouTube channel.

[24] Despite the lack of clarity provided by the review member on the matter of authentication, and even if we accept the admonition of the Minister's representative to avoid giving any weight to Mr. Leveille's testimony and rely on Ms. Putnam's alone, we see that she provides enough evidence to meet a threshold for admissibility, even though her testimony reflected that she was concentrating primarily on her skating and not on her surroundings:

> The Minister's representative asks:
>
> … is there anything about any of the video footage that looks inaccurate? That looks like it was manufactured, or edited, or manipulated to be different than it was in reality?

> Answer:
>
> Not really.

[25] There were also submissions by the parties as to whether the video was admissible given that it had been altered. The review member acknowledged that a "collective of video" was posted on the appellant's YouTube channel [para. 3 of the review determination]. In his summation of the evidence, the review member, at paragraph 11, states:

> Mr. Smith, the applicant's representative, objected on the basis that the video had been highly altered. He was overruled with the review member's acceptance that the video was unquestionably edited and that the editing would be taken into account.

[26] Given the review member's acknowledgement that the video had been altered, on what basis was the video deemed acceptable by the review member? We are provided with no clarity on this matter in the review determination. However, at the review hearing there was considerable debate between counsel for the parties about the admissibility of the video. The applicant suggested that it be admitted for identification purposes only in order to permit the review member to watch the video and then decide as to its admissibility. The member accepted the video "right now as submission". After watching it, he marked it as an exhibit but did not at that point in the hearing directly address the applicant's submission that it be accepted for identification only. However, during closing arguments on the matter of admissibility of the video by the applicant's counsel, the review member advised the parties that:

> It has been my long-established policy to accept every piece of evidence tendered, even though some of them are absolutely easily dealt with and disposed.
>
> So, I've always accepted everything, and then put the weight on the evidence that I see. And I am not going to change that policy because I have watched this very carefully, and I'll watch it again very carefully.
>
> I am going to accept the evidence you have put forward.

Here then is the best insight we have as to the review member's reasons for admitting the video. The question is, was the review member reasonable in doing so?

[27] The *Transportation Appeal Tribunal of Canada Act*, ss. 15(1), establishes that the Tribunal is not bound by legal or technical rules of evidence. It also requires its members to conduct hearings "as informally and expeditiously as the circumstances and considerations of fairness and natural justice permit." The common practice at the TATC is therefore that, unless a matter of privilege or Charter violation arises, and except in the case of a complete absence of relevance or some patent breach of the rules of natural justice, tendered evidence will generally be admitted for consideration by the Tribunal, which will then attach the requisite weight to it, if any. This policy is consistent with the dicta of the Supreme Court of Canada in *Syndicat*, which favours the broad admission of evidence in a tribunal setting.

[28] As already mentioned, the objection raised by the appellant was essentially that the video had not been properly authenticated in accordance with court precedent, including the requirement of expert evidence.

[29] The "authentication" requirement is a "legal or technical rule of evidence", which need not be considered by the Tribunal at the admissibility stage. In addition, no issue of privilege or the Charter is raised. Nor do we see anything inherently unfair in admitting this evidence, since it originated with the appellant who had himself placed it in the public domain, he was not taken by surprise by its presentation at the review hearing, and he had ample opportunity to make full answer and defence. Since there is no other bar to admissibility in this Tribunal, we find the review member's admission of the video to be reasonable.

[30] However, we should add that in our opinion the video would have met the authentication test in any event, "… since 'authentication' simply refers to the process of convincing the court that certain tangible evidence matches the claims made about it". (*Bulldog* at para. 20). This does not require expert testimony, "[r]ather, other kinds of evidence or different combinations of witnesses may be employed to satisfy a court of the video recording's substantial accuracy and fairness." (*Bulldog* at para. 34). Therefore, "[a] trial judge is entitled to authenticate a video recording by using circumstantial evidence of one or more witnesses, provided such evidence establishes to the requisite standard of proof that the video in question is a substantially accurate and fair depiction of what it purports to depict." (*Bulldog* at para. 37).

[31] Here, the circumstantial evidence is strong. The video was found on Mr. Friesen's website and is attributed to him. In it, Mr. Friesen is observed in his helicopter with Ms. Putnam on the way to the lake, discussing the upcoming video shoot. The video proceeds accordingly. Although no witness could testify as to Mr. Friesen's height above ground at any particular time, there was no disagreement from any witness present regarding the purpose of the trip or Mr. Friesen's activities in the helicopter. Although Ms. Putnam stated she was focussing on her skating and not the helicopter, she agreed that Mr. Friesen had taken video footage of her from the helicopter. She agreed that nothing in the video was contrary to her recollection of the events in question. On a balance of probabilities, we therefore find that the video is a substantially accurate depiction of what it purports to be - footage taken from that video shoot, at that location, on that particular day. In accordance with *Bulldog* (paras. 32-33), the fact that the video takes the form of a compilation of shots from various cameras and angles rather than one continuous take is not fatal to its admission, particularly in this instance because the precise sequence of the editing of the various clips was not material to the case presented by the Minister. In summary, even if the "authentication" requirements had applied, the test was met.

[32] We acknowledge, but cannot accept, the appellant's submission that the fact that the video was the only evidence of a potential breach of the regulations, paired with the fact that the video was non-sequential, attracts a higher standard of scrutiny with respect to admissibility. We are unaware of any principle whereby the fact that a conviction may turn on a single piece of evidence somehow goes to its admissibility *per se*. Rather, the question is always whether the totality of the evidence, comprising a single exhibit or any number of exhibits, is sufficient to meet the burden of proof. Further, as stated in *Nikolovski*, the quality of the video goes to weight, not admissibility. The combination of these two factors, neither of which go to admissibility, does not assist the appellant.

[33] The reason given by the review member for the admission of the video is found in the review hearing transcript, as cited in paragraph 26 above. We find this reason to be sufficient, as it falls within the spirit of the *TATC Act* and does not breach the requirements for fairness and natural justice. However, even if his reason had not been sufficient, and therefore no deference been owed to the review member on this point, we would have decided ourselves that the video was properly admissible, for all the reasons set out above.

Ground Two – Basing Ruling on Altimeter Reading

[34] On the second ground of appeal, the appellant submits that if the video was rightly admitted into evidence, the member erred in law by basing his ruling on the altimeter that appeared in a frame from the video.

a. The altimeter reading was evidence submitted by the review member, not an interpretation of evidence presented by the Minister. If he wished to rely on the altimeter reading, he should have put the issue to the parties for submissions. He did not receive an image of the altimeter until after the parties had closed their submissions. As a consequence, the appellant was deprived of his rights to know and respond to the case against him. While subsection 15(1) of the *TATC Act* is intended to give the Tribunal flexibility in determining the admissibility of evidence, it cannot do so at the expense of fairness and natural justice.

b. The review member is not entitled to make inferences from evidence tendered where a particular detail of the evidence is not the subject of submissions by the parties.

c. The appellant did not have sufficient opportunity to make submissions on the altimeter reading. The appellant could not have known that a brief exchange regarding screen shots not yet in evidence would be material to the outcome of the hearing. The failure of the member to ask for submissions on the point amounts to a breach of the appellant's right to procedural fairness and should be reviewed on a correctness standard.

[35] The Minister submits on this issue:

a. The video was admitted as real evidence and included images of the altimeter. The review member observed the video and drew conclusions from it, as he is entitled to do. The evidence was submitted by the Minister and interpreted by the member.

b. Triers of fact are permitted to draw inferences from real evidence adduced by the parties. Relying on *R. v. Palmer*, [1994] O.J. No. 105, 22 W.C.B. (2d) 374 at paras. 33 and 36, the Minister cited:

> Where real evidence is introduced, a trier of fact applies its own senses to the evidence and draws its own conclusions and inferences. In essence, the trier of fact acts as a witness. It uses its own senses to make observations and draw conclusions, rather than relying upon the testimony of witnesses …

> The weight to be attributed to individual items of evidence, further, their total and cumulative effect, lies within the exclusive domain of the trier of fact. It is the trier of fact, no other, that decides what, if anything, an individual item of evidence proves.

c. Expert evidence is only required where the trier of fact cannot draw an inference due to the technical nature of the facts because they are outside the experience and knowledge of the trier of fact (*R v. Abbey*, [1982] 2 S.C.R. 24 at paras. 44, 138 D.L.R. (3d) 202). In this case, reading an altimeter was within the experience of the review member and no expert evidence was required.

d. In the case of videos in particular, the trier of fact is to "make findings about what is actually shown" and the trier is "not bound by or limited to a consideration of what other persons … say is on the video" (*R. v. Millington*, 2015 BCSC 515 at para. 111, W.C.B. (2d) 160, Ehrcke J) [*Millington*]).

e. A member is entitled to base his or her decision on the evidence adduced, whether or not the evidence was intended to be used for this particular purpose.

f. The TATC regime contemplates that members draw on their experience and expertise in relation to aeronautics and aviation safety in assessing expert evidence and making common sense findings during hearings (*Canada (Attorney General) v. Friesen*, 2017 FC 567 at paras. 60-65). The review member in this case had extensive experience as a pilot. Given this experience, it was reasonable for him to identify an altimeter and read that altimeter when making his determination.

Appeal Panel Finding on Ground Two

[36] This is a three-fold issue: (i) did the review member give the parties an opportunity to respond to the altimeter reading question he raised during the review hearing? (ii) was the member entitled to rely on the altimeter reading even though it was not specifically raised by the parties? and (iii) was the member's factual conclusion as to the altitude of the aircraft reasonable?

[37] During the Minister's closing arguments the review member, while looking at the video at the 2:53 mark, asks: "There's an altimeter there. What does the altimeter read?", and further: "We know the altitude of the lake and we know the altitude of the helicopter because you can read the altimeter there."

[38] In *IWA v. Consolidated-Bathurst Packaging Ltd.*, [1990] 1 S.C.R. 282 [*IWA*], the Supreme Court recognized that no new evidence may be presented in the absence of the parties (page 336). It found that the *audi alteram partem* rule [the principle that no person should be judged without a fair hearing in which each party is given the opportunity to respond to the evidence against them] was only breached where a new policy or argument is proposed and a decision is rendered on the basis of that policy or argument without giving the parties an opportunity to respond (page 338).

[39] In *Lahnalampi v. Canada (Attorney General)*, 2014 FC 1136 at para. 38, Mosley J. concluded:

> First, a decision-maker may raise and decide a new issue if the parties have been given a fair opportunity to respond to it. Second, non-compliance with the previous rule will amount to a breach of procedural fairness only if it inflicts surprise or prejudice upon a party. Third, these principles apply to administrative decision-makers in addition to courts.

[40] When the review member raised the question about the altimeter reading during the Minister's closing arguments, there was some comment from the Minister's representative about taking a screenshot of the video at that timeline and coming back to the matter later. However, no further discussion ever occurs about the issue of the altimeter during the review hearing and the Minister's representative goes on to conclude his arguments. The applicant's counsel raises no objection whatsoever and does not request the member to subject himself to questioning on the matter, nor does he elect to reopen the evidentiary record and make submissions on this point. When he makes his own closing arguments, the applicant's counsel does not raise the matter of the altimeter and there is no further discussion on the point for the balance of the hearing.

[41] While the issue of the altimeter should more properly have been raised during the evidentiary portion of the review hearing, the conduct of the proceedings does not provide anything to suggest that had the applicant's counsel chosen to do so, he would have been denied the opportunity to delve further into the matter of the altimeter reading. Had he made the request, there is nothing to suggest that he may not have been given the chance to call evidence on this issue or insist that the Minister's representative call evidence. The fact is, the applicant's counsel did not raise the matter with the review member at all. Consequently, we find that the appellant cannot claim to have been surprised by the altimeter issue and that he had adequate opportunity to respond to the altimeter issue raised by the review member but chose, for whatever reason, not to do so. It also cannot be claimed by the appellant that he did not have prior access to the altimeter reading information, as it was his own video. We find, therefore, no breach of procedural fairness or natural justice as it pertains to the way the question of the altimeter reading was handled by the member.

[42] The next question is whether the review member was entitled to focus on the information afforded by the altimeter reading, even though it was not specifically addressed by the parties, without being required to testify himself and be subjected to cross-examination.

[43] The case law does establish that the trier of fact is permitted to draw inferences from real evidence submitted by the parties. In *Millington*, Justice Ehrcke, after concluding the video in question depicted the scene in question, that it had not been altered or tampered with, and that it was of reasonably good quality, accepted the video as being the most accurate, independent and unbiased evidence of what actually transpired, despite the evidence of various eye witnesses. He says [at para. 111]:

> As this is a judge alone trial, it falls to me to make findings about what is actually shown on the Pritchard Video. In making my findings in this regard, I am not bound by or

> limited to a consideration of what other persons … say is on the video, although I have taken all of the evidence into account.

And at para. 112: "As the trier of fact in this case, I am entitled to view the video and make my own findings, based on what I observe on it." He based this finding on *Nikolovski* at para. 28, which states:

> Once it is established that a videotape has not been altered or changed, and that it depicts the scene of a crime, then it becomes admissible and relevant evidence … It can and should be used by a trier of fact in determining whether a crime has been committed and whether the accused before the court committed the crime. It may indeed be a silent, trustworthy, unemotional, unbiased and accurate witness who has complete and instant recall of events. It may provide such strong and convincing evidence that of itself it will demonstrate clearly either the innocence or guilt of the accused.

[44] While the matter of the altimeter was never raised by either of the parties, it was identified to the parties by the member at the review hearing. Tribunal members do have their own expertise and are entitled to rely on that when reviewing evidence submitted on the record.

[45] On the last question of whether the review member's factual conclusion as to the altitude of the aircraft was reasonable, it was clear that the review member understood the operation of an altimeter. Despite acknowledging the video had been altered in that it was a compilation of various camera shots from various angles, the frame on which the review member relied in his determination came from a camera inside the appellant's helicopter and there was no evidence to suggest that camera shot was not accurate. Furthermore, it was reasonable for the review member to assume the appellant had correctly set the altimeter. Therefore, we find that the member's factual conclusion was reasonable.

Ground Three – Burden of Proof of Take-off, Approach or Landing

[46] On the third ground, the appellant submits that the burden was on the Minister to prove that the helicopter was not conducting a take-off, approach or landing at the time of the screen shot of the altimeter relied upon by the review member.

a. The Minister must prove that the aircraft was owned by Mr. Friesen, that it was being operated by him at the time and date of the alleged contravention and that the helicopter was being operated at less than 500 feet from a person. Based on the Minister's own submission: "… all we have to prove is that he flew within 500 feet of Ms. Putnam when he wasn't taking off or landing."

b. Only when the Minister has established all the constituent elements of CAR 602.14(2)(b), including that the conduct does not fall into one of the two exceptions, is a violation proven.

c. The exception of take-off, approach or landing is within the language of CAR 602.14(2)(b) and therefore proof of the absence of the exception falls within the burden of the Minister.

d. The second exception in CAR 602.15, while referenced in CAR 602.14(2)(b), could be considered a stand-alone provision and therefore falls to the appellant to prove. However, that section relates to exceptions to the prohibition in CAR 602.14(2)(b) rather than to a defence for breaching the provision. Requiring the appellant to prove he fell under one of the exceptions to the prohibition would reverse the onus Parliament placed on the Minister. This conclusion is supported by the fact that the Tribunal in *Maguire v. Canada (Minister of Transport)*, 2007 TATCE 9 (Appeal) [*Maguire*] did not distinguish or give preference to one exception over the other and that in both *Foxair Héliservice-Hélico Pro Inc. v. Canada (Minister of Transport)*, 2017 TATCE 34 (Appeal) [*Foxair*] and *Maguire*, the member considered whether the exceptions applied in the absence of any submissions from the accused pilots or aircraft owners.

e. The review member gave no reasons why he believed the exemptions were "invalid in this case" (review determination, paras. 24-27).

[47] The Minister submits on this point that:

a. Section 602.14 creates an absolute prohibition against operating an aircraft at a distance of less than 500 feet from a person where para. 602.14(2)(a) does not apply. The Minister must prove only that the person operated an aircraft within Canada at a distance of less than 500 feet from any person, vessel or structure. Upon this proof, the burden shifts to the person in question to establish that he or she was in the course of a take-off, approach or landing, or that the flight was permitted under section 602.15.

b. To the extent the Minister's previous submissions during the review hearing may be interpreted otherwise, the Minister submits the position taken at the appeal reflects the legislation and established case law.

c. *Minister of Transport v. Stéphane Giguère*, (2004) TATC File No. Q-2834-33 (Appeal) [*Giguère*] established that once the Minister had proven, on a balance of probabilities, all of the elements of the offence, "the Appellant had to prove the exceptions to these offences or his defence on the balance of probabilities". See also *Francis Yvon Paquin v. Minister of Transport* (2005) TATC File No. A-3021-33 (Review) [*Paquin*]: "Except where conducting a take-off, approach or landing" as a "defence to the offence" that, if established by the offender, could "exculpate himself from culpability".

d. This conclusion is also supported in *Killen v. Canada (Minister of Transport)*, 1997 C.A.T.D. No. 51 (Appeal) [*Killen*], (decided under the *Air Regulations*), which held that once the Minister makes out the breach of the regulation, the onus shifts to the applicant to prove that the exception applies, in which case the applicant must prove that the flight was conducted without creating a hazard to persons or property and that the operation necessitated flight at such a low altitude. In that case, the applicant called no evidence proving the flight was conducted without hazard and that it was necessary to fly below 500 feet for the training flight in question.

e. It makes little sense for the Minister to bear the burden of proving a take-off, approach or landing was not occurring or of proving that the manoeuvre was not permitted under CAR 602.15. In each case, the Minister would have to prove the offender was not conducting an aerial inspection, not engaged in aerial photography, not conducting an external load operation and not conducting flight training. This would be contrary to the spirit and intent of the *TATC Act* and *Rules*.

f. If the Minister does have the burden, that burden has been discharged as the evidence clearly establishes that Mr. Friesen was not in the process of taking off, approaching or landing when he flew near Ms. Putnam. Some of this evidence was captured in the video:

   i. Portions of the video show Mr. Friesen circling Ms. Putnam at ice level;

   ii. Portions of the video show Mr. Friesen circling above Ms. Putnam with the nose of the helicopter pointed down;

   iii. During his time circling Ms. Putnam, Mr. Friesen displayed no momentum towards the landing area, or towards where Mr. Leveille was filming;

   iv. There was no apparent effort by Mr. Friesen to take off or land during the flight manoeuvres in question and his manoeuvres are inconsistent with taking off or landing;

   v. Video was taken from Mr. Friesen's helicopter while he was circling Ms. Putnam at ice level and above, indicating that he was flying close to her to get "the shot", not flying to take off or land;

   vi. Both Ms. Putnam and Mr. Leveille testified that Mr. Friesen did not land on the lake, so he was not circling Ms. Putnam on the lake for the purpose of taking off or landing.

g. This is an issue of mixed fact and law. The member's decision that none of the exceptions applied was not unreasonable. He stated he had considered all the evidence and found the exceptions to be invalid.

h. In the two cases cited by the appellant, *Foxair* and *Maguire*, neither appeal panel made a ruling on every possible exception and, instead, focused on the exceptions put forward by the appellants in those cases to absolve themselves of liability.

Appeal Panel Finding on Ground Three

[48] We are afforded no indication of the reason why the review member concluded as he did that the exemptions were invalid in this case [review determination, para. 27]. However, this is a question of law and the standard of review is one of correctness. We are entitled to draw our own conclusions on the question of the burden.

[49] The concept of the shift of the burden of proof to prove an exception to a prohibition, once the elements of the offences have been established by the Minister, has been supported by this Tribunal since the time of the *Air Regulations*. The appeal case

Minister of Transport v. Gordon E. Boklaschuk, (1990) CAT File No. C-0142-33 (Appeal) [*Boklaschuk*] concluded that:

> If Transport proves a breach of the rule, the *onus* shifts to the Respondent to establish that he falls within one of the exceptions; it is not up to Transport to prove the exception.

[50] The *Killen* case confirmed the conclusions in *Boklaschuk* and concluded, at paragraphs 31-33:

> In the instant case, we have the evidence of Mrs. Matheson regarding the circumstances of the flight placing the aircraft in close physical [sic] propinquity to herself and the horses. The onus shifts to Mr. Killen to prove that the flight was conducted without hazard, and this he has not done.
>
> … No evidence was adduced regarding the conduct of such training flights, and hence there is no evidence on record to satisfy this panel that flight below 500 feet was necessary for this training flight.
>
> …this panel finds that there was a contravention of paragraph 534(2)(b) of the *Air Regulations*, the facts of the flight having been made out and there being a lack of evidence to satisfy the application of the exemption set out in subsection (5) of the *Regulations*.

[51] The *Paquin* case sets out as follows in reference to an alleged violation of subparagraph 602.14(2)(a)(iii):

> This section presents a strict liability offence. If the Minister proves on a balance of probabilities that the elements of the offence as alleged occurred and that the pilot of the aircraft flew below 1,000 feet over a built-up area, the burden of proof shifts to the document holder to show that one of the defences included in the section or that the defence of due diligence as provided for in section 8.5 of the *Aeronautics Act* is applicable.

[52] In *Giguère*, regarding an offence contrary to paragraph 602.14(2)(b), the appeal panel found that:

> … once the Minister had proven, on the balance of probabilities, all the elements of the offences, namely:
>
> - that the Appellant flew his paraplane less than 500 feet from the vessel;
> - that he was carrying a passenger during this flight;
> - that the passenger left the cockpit to jump into the lake while the paraplane was in flight;
>
> the Appellant had to prove the exceptions to these offences or his defence on the balance of probabilities …

[53] Based on the foregoing, we find that there is ample Tribunal precedent to establish that the legal burden of proof as to whether the appellant was conducting a take-off, approach or landing, fell to the appellant upon the Minister having established the basic elements of the contravention of paragraph 602.14(2)(b).

Ground Four – Ice Surface Altitude Finding

[54] On ground four, the appellant submits the member erred in law in finding there was evidence of the altitude of the ice surface shown in the screen shot upon which he relied. The ice surface was shown to be in a depression of indeterminate depth in the video.

a. The conclusion that Thomas Crater Lake sat at 5,100 feet was a conclusion arrived at by the member in the absence of submissions. Using Google Earth, the Minister elicited evidence that Thomas Crater was at 5,447 feet. The review member and the Minister both noted that official government sources, as opposed to Google Earth, should have been used to ascertain the height of Thomas Crater Lake. The fact that the review member concluded that Thomas Crater Lake was at a different altitude than what the Minister submitted supports the conclusion the review member made in his own calculations of the height of Thomas Crater Lake.

b. In the absence of information about how the member arrived at the calculation of 5,100 feet, the appellant could not argue an alternative methodology or challenge the assumptions made by the member. The appellant is entitled to have the opportunity to meet the case against him. In this instance, the appellant's right to procedural fairness and natural justice was violated.

[55] On the issue, the Minister submitted:

a. The Minister tendered evidence about the altitude of Thomas Crater Lake (Exhibit M-23). This exhibit was a map of the area with contour lines showing elevations. It is unclear on what evidence the review member based this conclusion, other than at para. 25 of his review determination where he states: "From the evidence that was submitted by the Minister, we know that the surface of Thomas Crater Lake is about 5,100 feet ASL (above sea level)."

b. Tribunal members are entitled to review the evidence and draw their own conclusions based on that evidence and are not restricted in their findings of fact to the submissions of the parties. It follows that the member was entitled to draw inference from the map introduced into evidence by the Minister.

c. The appellant knew that the elevations of Thomas Crater and the lake were an issue in the proceedings and chose not to submit contrary evidence.

d. The appellant's argument that the use of Google Earth was inappropriate is contrary to what has been accepted by the Tribunal in other cases. Although there was discussion during the hearing regarding the suitability of Google Earth, there are examples in other Tribunal determinations which have accepted Google Maps and Google Earth images from both the Minister and applicants.

e. The review member based his determination of the distance between the appellant and Ms. Putnam on the full body of evidence adduced at the hearing, much of which was not related to the altitude of the lake.

Appeal Panel Finding on Ground Four

[56] Did the review member err in finding there was evidence of the altitude of the ice surface shown in the screen shot he relied on? This is a question of fact and is reviewable on a standard of reasonableness.

[57] The review member concluded in his review determination that the surface of Thomas Crater Lake is about 5,100 feet ASL. From the altimeter reading of 5,250 ASL, the member concluded that the helicopter was approximately 150 feet above the surface of the lake.

[58] It is well established Tribunal precedent that if the decision on review is within a range of reasonable outcomes, based on the evidence that was before the review member, we should not interfere with it [*Farm Air Ltd. v. Canada (Minister of Transport)*, 2013 TATCE 25 (Appeal) at para. 95]. A finding of fact should not be overturned unless there is an entire absence of evidence to support it, or notwithstanding that there is some evidence concerning the finding, it is an unreasonable finding incapable of being supported by the remainder of the evidence.

[59] Neither the transcript nor the review member's determination reveal information to specifically support the conclusion by the member that Thomas Crater Lake was at 5,100 feet. Ms. Thirukumaran, on behalf of the Minister, testified that Thomas Crater (not necessarily Thomas Crater Lake) was at a height of 5,447 feet using Google Earth. Pages 3 and 5 of Exhibit M-17, and page 2 of Exhibit M-23, all show Thomas Crater as being at a different pinpoint than Thomas Crater Lake. She did provide testimony indicating that the hills surrounding the lake were approximately 40 metres but it is not clear how Ms. Thirukumaran arrived at that conclusion. She references a topography map she acquired from Atlas Canada but it is not apparent that such a map was entered as evidence. The contour maps which were admitted as M-23 are from Google Maps and pinpoint Thomas Crater, not the lake. And during the hearing, the Minister's representative stated: "I am not going to ask the witness any questions about it because she's not qualified, but I would like to just mark them as [an] exhibit."

[60] We find that there was no oral evidence to support the review member's conclusion that the lake surface was at 5,100 feet. However, there is other evidence to support the member's conclusion that the helicopter was less than 500 feet from the lake surface where Ms. Putnam was skating. The Google contour map, Exhibit M-23, indicates that the contour lines are separated by 66 feet (20 metres). The surface of Thomas Crater Lake is below the 5,118' contour, and while there is no contour depicted at the lake, it is reasonable to conclude that the lake is below the 5,118' contour. Therefore the review member's conclusion that the lake surface was at 5,100' is reasonable. On this point, the Google map M-23 is real evidence. We find that it is reliable evidence. It is well known that Google maps are the product of satellite imagery, and that they are widely used by both industry and various levels of government in a host of applications. Google Maps is now very commonly used in criminal trials in Canada and has often been accepted as authoritative (*R v. Ghaleenovee*, 2015 ONSC 1707 at para. 1, 120 W.C.B. (2d) 213). Amongst others, the Court of Appeal for Ontario has

specifically found that a trial judge may rely on Google Maps when taking judicial notice as a readily accessible source of indisputable accuracy (*ibid* at paras. 15-19).

[61] In addition to the map evidence, we have the testimony of Ms. Thirukumaran about the calculations she made using the dimensions of the Robinson R44 helicopter (from Exhibit M-19) and applying those dimensions to the photo at page 7 of Exhibit M-17. We have the frame shot from the video taken from inside the helicopter which shows the appellant flying over top Ms. Putnam, and with Ms. Putnam clearly visible in the shot. We have the shot from a camera mounted on the exterior of the helicopter just above the starboard skid showing Ms. Putnam at an altitude that is clearly far less than 500 feet from the helicopter. We have the external shot showing the helicopter in an extreme nose-down attitude circling over Ms. Putnam at an altitude of clearly far less than 500 feet.

[62] We therefore find the review member's conclusion that the surface of the lake is 5,100 feet is reasonable.

Ground Five – Referencing the Appellant's Lack of Testimony and Submission of No Evidence

[63] The appellant's fifth ground of appeal is that the member erred in law by stating that pilots charged with an offence normally testify, and by indicating in the review determination that Mr. Friesen called no evidence.

a. In the review member's determination, he states that "The applicant did not submit any evidence at the hearing." [para. 19]. He further writes: "No evidence was provided in support of the applicant's arguments." [para. 25].
b. The review member also commented during the review hearing that a pilot charged with an offence would normally testify.
c. Based on these comments from the review member, the appellant argues the member "counted it against him" that he did not give evidence.

[64] The Minister submits there is no evidence the review member drew an adverse inference from the fact that the appellant did not testify. The member pointed out, which was factual, that the appellant did not call any evidence. It is entirely his right to do so, but the choice has legal implications, as the only evidence before the decision-maker is what is entered by the Minister.

Appeal Panel Finding on Ground Five

[65] This is an issue of law, as it pertains to the matter of ensuring the principles of fairness and natural justice are adhered to. The standard of review is one of correctness.

[66] One of the principles of natural justice is the right to a decision made by an independent and unbiased decision-maker. The question is whether there is an apprehension of bias that may have prejudiced a party or affected the decision (*Van Brabant v. Canada (Minister of Transport)*, 2016 TATCE 32 (Appeal) [*Van Brabant*].

The test for considering a reasonable apprehension of bias (*Committee for Justice & Liberty v. Canada (National Energy Board)*, [1978] 1 S.C.R. 369, 68 D.L.R. (3d) 716.) is whether an informed person, viewing the matter realistically and practically and having thought the matter through, would conclude that there was a reasonable apprehension of bias. *Van Brabant* at para. 109 states: "The principles of natural justice provide that a person affected by a decision is given the opportunity to present their case, the right to be heard, and the right to a decision that is untainted by bias."

[67] We have reviewed the transcript in detail and can find no reference by the review member that a pilot charged with an offence would normally testify. He did say that the Tribunal almost always deals with an unrepresented applicant and that lawyers from the Crown understand "… what we're doing at the tribunal level is to quite often let someone have their say." We acknowledge that it is perfectly within the applicant's right not to testify. We find that the review member did not give any indication in his review determination that the applicant would normally be expected to testify. He did make a simple statement of fact at paragraph 25 of his review determination that: "No evidence was provided in support of the applicant's arguments."

[68] In reviewing the entire transcript of the hearing, it is noted that there are a multitude of occasions where the review member made negative comments directed at Transport Canada. He did not make similar comments targeted at the applicant or pilots in general.

[69] Based on the foregoing, we find that the principles of fairness and natural justice as they pertain to the applicant were not violated at the review hearing and no negative inferences about the applicant appear to have been drawn by the review member in his determination.

Ground Six – External Load Exemption

[70] The appellant's sixth and final ground of appeal is that the review member erred in law in ruling that the operation of the helicopter on the day in question was not an external load operation under subparagraph 602.15(2)(b)(iii) of the *Canadian Aviation Regulations.*

a. Determining the relevant class of external load is a fact-specific determination based on the type of load being carried. In this case, the external load was a Class A load, as the exterior cameras could not be moved freely, be jettisoned, or extend below the landing gear.

b. The Minister has the burden of satisfying the Tribunal on a balance of probabilities that the exemption was not applicable.

[71] The Minister argues that:

a. The appellant has the burden to prove that the cameras mounted on his helicopter were an external load and that he was conducting operations with that external

load that required him to be within 500 feet of Ms. Putnam. He adduced no evidence to establish any of the requisite elements.

b. It would be impractical to require the Minister to disprove every possible exception in the absence of any evidence or argument made regarding such an exemption.

c. The question of whether the appellant was conducting an external load operation is one of mixed fact and law and the review member's decision on this point is subject to deference from the appeal panel.

Appeal Panel Finding on Ground Six

[72] This is a question of mixed fact and law. Therefore, we must determine whether the review member was reasonable in finding the exemptions as invalid in this case.

[73] In this case, paragraph 23 of the review member's reasons identifies the "external load" exemption as an issue, and at paragraph 27 he finds that none of the pleaded exemptions apply. In other words, it is apparent that the review member was alive to the external load issue and provided a "bottom line" conclusion thereto but did not explain the reasoning behind this conclusion.

[74] This sparsity of reasons is less than ideal but it does not, on the totality of the record, prevent this appeal panel from assessing whether the review member's rejection of the external load exemption falls within the range of acceptable and reasonable outcomes.

[75] In *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para. 13, [2011] 3 S.C.R. 708, Abella J relied on *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 [*Dunsmuir*] as confirmation that in determining whether a decision is reasonable, the inquiry for a reviewing court is about "justification, transparency and intelligibility". To determine whether a decision-maker's reasons are sufficient, and therefore reasonable, does not require a separate analysis apart from the result. Reasons need not include all the arguments or details the reviewing judge would have preferred, but that does not impugn the validity of either the reasons or the result. If the reasons allow the reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes, the *Dunsmuir* criteria are met. Alleged deficiencies or flaws in the reasons do not fall under the category of a breach of the duty of procedural fairness [para. 16]. This analysis is further supported in the Supreme Court of Canada case *Delta Air Lines Inc. v. Lukács*, 2018 SCC 2, [2018] 1 S.C.R. 6.

[76] The burden for proving that the operation on the day in question was an external load operation and therefore exempt from the minimum altitude requirements would fall to the appellant for the same reasons as in the case of the shift of burden of proof that the appellant was conducting a take-off, approach or landing and was therefore entitled to be below 500 feet. The appellant submits that the cameras mounted on his helicopter

constituted a Class A external load in that it cannot move freely, cannot be jettisoned and does not extend below the landing gear.

[77] We acknowledge there was evidence contained in the video that the appellant's helicopter was equipped with external cameras. Does this constitute an external load for the purposes of the regulations? The *Canadian Aviation Regulations* do not define "load". And section 602.15 references "external load operations", suggesting there is a requirement in the exemption for some related activity beyond merely what is attached to or carried by the helicopter.

[78] Whatever the meaning of "load", we are not convinced that the mere attachment of an object to the skid of a helicopter was intended by the legislators to permit a helicopter to fly below the 500-foot minimum. If this were taken to the logical extreme, as argued by the Minister in its written submissions, a pilot could simply attach any item to the skid of the helicopter for no particular purpose other than to claim the right to be able to operate below 500 feet.

[79] Furthermore, if a camera could constitute an external load for the purposes of this section, it would not be necessary to provide a separate exemption under subparagraph 602.15(2)(b)(ii) for aerial photography by the holder of an air operator certificate.

[80] For the foregoing reasons, we find that the review member did not err in law in determining that the flight in question did not qualify for an exemption under subparagraph 602.15(2)(b)(iii) because it was not an external load operation within the meaning of that subparagraph.

V. DECISION

[81] The appeal is dismissed and the review determination is upheld. The suspension will commence thirty-five (35) days following service of this decision.

October 29, 2019

(Original signed)

Reasons for the appeal decision:	Tracy Medve, Member (chairing)
Concurred by:	Arnold Olson, Member
	Andrew Wilson, Member

Appearances

For the Minister:	Craig Cameron
	Dana Kripp
For the Applicant:	Self-represented