



## TRANSPORTATION APPEAL TRIBUNAL OF CANADA

**Citation:** *Patrick Mroz v. Canada (Minister of Transport)*, 2021 TATCE 25 (Review)

**TATC File No.:** Q-4511-32

**Sector:** Aviation

### **BETWEEN:**

**Patrick Mroz**, Applicant

- and -

**Canada (Minister of Transport)**, Respondent

[Official English translation]

**Heard by:** Videoconference on April 15, 2021

**Before:** Caroline Desbiens, Member

**Rendered:** July 30, 2021

### **REVIEW DETERMINATION AND REASONS**

**Held:** The Minister of Transport's Notice of Assessment of Monetary Penalty dated April 16, 2019, is hereby confirmed along with the penalty in the amount of \$750.

The total amount of \$750 is payable to the Receiver General for Canada and must be received by the Transportation Appeal Tribunal of Canada within 35 days of service of this determination.

## **I. BACKGROUND**

[1] On April 16, 2019, the Minister of Transport (respondent), issued a Notice of Assessment of Monetary Penalty (Notice) to Mr. Patrick Mroz (applicant) alleging the following in Schedule A:

On or about November 29, 2018, at approximately 01:25 a.m. (local time), in the vicinity of a parking lot or vacant lot at the intersection of Des Mille-Îles Boulevard and Paré Street in Laval, Quebec, you operated a DJI Spark model aircraft, during the night, in contravention of paragraph 5(1)(f) of the *Interim Order No. 9 Respecting the Use of Model Aircraft*.

Penalty: \$750

[2] This Notice was issued pursuant to subsection 7.7(1) of the *Aeronautics Act (Act)*.

[3] On May 15, 2019, the applicant filed a request for review by the Transportation Appeal Tribunal of Canada (Tribunal).

[4] The hearing was held by videoconference on April 15, 2021. The applicant represented himself without counsel while the respondent was represented by Mr. Martin Forget.

[5] The Tribunal must determine whether the respondent has shown, on a balance of probabilities, that the applicant **operated a model aircraft at night** on or about November 29, 2018, in contravention of paragraph 5(1)(f) of the *Interim Order No. 9 Respecting the Use of Model Aircraft* (Order). If so, the Tribunal must also determine whether the amount of the monetary penalty is justified under the circumstances.

## **II. PRELIMINARY ISSUE**

### **A. Applicant's request to file audio recordings of a witness**

[6] At the outset of the hearing, the applicant requested to enter into evidence audio recordings of a telephone conversation between him and a witness in relation to the use of his drone on August 23, 2018, an event separate from the one that was the subject of the offence. The respondent objected to the filing of these recordings on the grounds that (1) the event does not relate to the one alleged in this case that is the subject of the Notice, and (2) if the applicant wishes to call a witness, the respondent must be able to cross-examine the witness. Thus, to allow the tapes to be filed without the witness being present and without allowing the witness to be cross-examined would be a breach of procedural fairness and the rules of natural justice.

[7] For the reasons given by the respondent, the Tribunal refused to allow these recordings into evidence. The applicant stated that in any event he did not need the testimony of his friend for the purposes of the case.

### III. ANALYSIS

#### A. Legal framework

[8] The legal framework for the *Interim Order No. 9 Respecting the Use of Model Aircraft*<sup>1</sup> is as follows:

- Pursuant to subsection 6.41(1) of the *Act*, the Minister of Transport makes the Order, and
- The provisions of the Order may be contained in a regulation made pursuant to section 4.9, paragraphs 7.6(1)(a) and (b), and section 7.7 of Part I of the *Act* (the latter being part of the administrative monetary penalty provisions).

[9] The Order has its own designated provisions. Section 5 of the Order is a designated provision, and in particular, for this file, paragraph 5(1)(f) of the Order provides:

##### **Prohibitions**

**5 (1)** A person must not operate a model aircraft

[...]

**(f)** at night; ...

[...]

[10] The Order sets out in a schedule a maximum penalty of \$3,000 (individual) for the alleged offence. In this case, the respondent imposed a monetary penalty of \$750.

[11] Under subsection 1(1) of the Order, the definition of “**model aircraft**” reads as follows:

**model aircraft** means an aircraft, including an unmanned aircraft commonly known as a drone, the total weight of which does not exceed 35 kg (77.2 pounds), that is mechanically driven or launched into flight for recreational purposes and that is not designed to carry persons or other living creatures.

[12] Section 3.1 of the Order provides that it applies in respect of model aircraft weighing more than 250 g but not more than 35 kg.

[13] Section 100.01 of the *Canadian Aviation Regulations (CARs)* defines “**night**” as “the time between the end of evening civil twilight and the beginning of morning civil twilight”. Section 1(2) of the Order incorporates by reference the *CARs* definitions.

[14] Section 2(1) of the Order indicates that the provisions designated in the Order are designated as provisions, the contravention of which may be dealt with under and in accordance with the procedure set out in sections 7.7 to 8.2 of the *Act*.

[15] Under subsection 7.91(4) of the *Act*, the respondent Minister has the burden of establishing that the applicant has contravened the designated provision. The burden of proof is on the balance of probabilities (subsection 15(5) of the *Transportation Appeal Tribunal of*

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<sup>1</sup> This regulatory framework of the Order was in effect on May 31, 2018, and was repealed when the *Regulations Amending the Canadian Aviation Regulations (Remotely Piloted Aircraft Systems)* came into force in 2019.

*Canada Act*). The respondent must therefore prove each element of the offence alleged in the Notice and justify the amount of the monetary penalty imposed.

[16] Section 8 of the *Act* provides that if a member decides that:

(a) the person has not contravened the designated provision that the person is alleged to have contravened, the member of the Tribunal shall forthwith inform the person and the Minister of the determination and, subject to section 8.1, no further proceedings under this Part shall be taken against the person in respect of the alleged contravention; or

(b) the person has contravened the designated provision that the person is alleged to have contravened, the member of the Tribunal shall forthwith inform the person and the Minister of the determination and, subject to any regulations made under paragraph 7.6(1)(b), of the amount determined by the member of the Tribunal to be payable by the person in respect of the contravention and, where the amount is not paid to the Tribunal by or on behalf of the person within such time as the member of the Tribunal may allow, the member of the Tribunal shall issue to the Minister a certificate in such form as the Governor in Council may by regulation prescribe, setting out the amount required to be paid by the person.

[17] Under subsection 8.1(1) of the *Act*, a person affected by the determination or the Minister may, within thirty days after the determination, appeal a determination made under section 8 to the Tribunal.

## **B. Application of the legal framework to the facts**

[18] Mr. Pier-Luk Ferland, a police officer with the Service de police de Laval, testified that he intercepted the applicant at night at about 1:25 a.m. on November 29, 2018, in a parking lot at the intersection of Des Mille-Îles Boulevard and Paré Street in Laval, Quebec (see the Google Map filed as Exhibit M-2). The applicant was sitting in his car at the time, had a console with a screen in his hands and was controlling a hovering drone approximately 15 feet above his car using the console. Mr. Ferland identified the applicant by his driver's licence and asked the applicant if he had a Transport Canada (TC) authorization to operate his drone, which the applicant denied having. The applicant indicated that he did not need authorization to use his drone since he was not in an air corridor.

[19] Mr. Ferland identified the drone as a grey-green DJI Spark with the serial number listed in his report filed as Exhibit M-1. On cross-examination, Mr. Ferland could not recall the exact location of the serial number on the drone and thought he had taken the serial number from the drone.

[20] In his testimony, the applicant stated that the serial number indicated in the report in Exhibit M-1 was not the correct number and that Mr. Ferland had copied it from another Laval police incident report dated August 24, 2018, concerning the applicant (for an incident reported on August 23, 2018). According to the applicant, this factor would affect his credibility as to the facts described in his report and would demonstrate that Mr. Ferland had used the incident of August 23, 2018 (for which the applicant claims to have committed no offence), to further punish the applicant by producing a new report. The applicant explained that his drone was refurbished between August 2018 and November 29, 2018, hence the serial number change. The applicant added that if Mr. Ferland had not consulted the August 24, 2018, report, he would not

have been biased and likely would not have filed a report for the November 29, 2018, incident which is the basis for the Notice issued by the Minister of Transport.

[21] In his testimony, the applicant admitted having used his DJI drone at night on November 29, 2018, on the property located at the intersection of Des Mille-Îles Boulevard and Paré Street in Laval by showing the location of the use of the drone on the map in Exhibit M-2 while specifying that it was a bus terminal. However, he specified that his drone was not flying, but was stationary, suggesting that he could not be in violation of the Order since no flight was being conducted. The purpose was to verify that the programming was working properly. He indicated that he had chosen a safe, secluded area away from houses to do this check at night, being concerned about the safety of people on the ground.

[22] The applicant has therefore confirmed most of Mr. Ferland's testimony, so it is surprising that the applicant should question and attack Mr. Ferland's credibility. Moreover, it should be noted, as the respondent's representative, Mr. Forget, pointed out, and as Mr. Ferland testified, that police officer Ferland only reported facts that he had observed in order to produce a report to TC and that the decision to impose a Notice on the applicant rested with the respondent and not with the Laval police.

[23] In his defence, the applicant also misunderstands the requirement that a flight be conducted with the drone within the meaning of paragraph 5(1)(f) of the Order. Rather, that paragraph refers to the mere operation of a drone and there is no doubt that a hovering drone controlled by a remote console or iPhone is operation within the meaning of that paragraph.

[24] Mr. Patrick Trépanier, an investigator with TC, prepared the Notice of Assessment of Monetary Penalty based on the police report in Exhibit M-1 and recommended the penalty of \$750 to the regional manager who signed the Notice sent to the applicant. Mr. Trépanier obtained the specifications of the DJI Spark drone identified in the report in Exhibit M-1 which he identified and filed as Exhibit M-6. These specifications indicate a total weight of 300 grams for this type of drone. According to the Order he filed as Exhibit M-5, this is a model aircraft since it weighs less than 35 kg. The applicant did not dispute this evidence nor did he provide any evidence to the contrary. The applicant also admitted that the drone was a DJI.

[25] For the purposes of paragraph 5(1)(f) of the Order, Mr. Trépanier explained that "night" is to be determined by reference to civil night, as defined in the aforementioned section 100.01 of the *CARs*. The civil night, as published by the National Research Council of Canada's calculator, began at 4:47 p.m. on November 28, 2018, and ended at 6:39 a.m. on November 29, 2018, according to Mr. Trépanier's research. In this regard, he identified and filed the excerpt from this civil night calculator for November 28 and 29, 2018, as Exhibit M-7. The applicant admitted to operating his drone at night.

[26] The respondent's representative submits that the applicant admitted all the elements of the Notice. The analysis of the evidence shows that the applicant admitted in cross-examination the following, corroborating the evidence of the Minister's witnesses:

- having used a DJI drone for a hovering check or test flight at approximately 15 feet in the air which he controlled with his iPhone and could see through the sunroof of his car;

- the night of November 29, 2018; and
- on a property (bus terminal) at the intersection of Des Mille-Îles Boulevard and Paré Street in Laval.

[27] Only the issue of the weight of the drone was not directly admitted by the applicant and this evidence is necessary to determine the application of the Order. The Tribunal finds, however, that the respondent has demonstrated, without any contradictory evidence being submitted by the applicant, that the DJI Spark drone has a total weight of 300 grams (Exhibit M-5 and testimony of Mr. Trépanier). It should be noted, however, that the applicant acknowledged the model of the drone used. This drone is therefore subject to paragraph 5(1)(f) of the Order.

[28] In his testimony, Mr. Trépanier also indicated that his assessment of the amount of the penalty was based on the fact that this was a first offence for the applicant. He stated that he did not consider the August 23, 2018, incident where the applicant flew his drone and received an educational call on the conditions of drone use. He stated that he relied on the sanction schedule prepared internally by TC (Exhibit M-9) to establish the amount of the penalty, which recommends an amount of \$750 for a first offence in relation to the Order. It should be noted that the Order sets out a penalty amount ranging up to a maximum of \$3,000 (individual) for the alleged offence.

[29] The applicant claims that Mr. Trépanier is biased, since he necessarily took into account the incident of August 23, 2018. The applicant submits that Mr. Trépanier should have issued a warning for the alleged incident and not a notice of monetary penalty since the August 23, 2018, incident did not contravene the provisions of the Order and since the drone regulations are complicated and difficult to understand.

[30] The respondent's representative concedes that the drone flight on August 23, 2018, did not take place at night, but states that the Minister has the discretion to issue a notice of monetary penalty or not. Mr. Yves Thibodeau, an investigator at TC since 1999, Enforcement Division, testified on this discretion of the Minister by specifying that it is up to the Minister of Transport to decide if a warning, a notice of monetary penalty or a licence suspension should be given for a violation of the Order and by specifying that there is no gradation of sanctions. In short, if the Minister finds a violation, it has the power to issue a notice of monetary penalty without having to issue a warning first. The respondent's representative therefore submits that Mr. Trépanier correctly assessed the offence as a first offence and not a repeat offence in the legal sense of the term, i.e., having been found guilty of a similar offence in the past.

[31] Mr. Thibodeau also indicated that he had already spoken to the applicant after the August 23, 2018, incident (reported in Exhibit M-3) and educated him on the various conditions for using a drone under Canadian regulations and the existence of the Order in effect at the time, since the drone regulations were new. Mr. Thibodeau indicated that he also explained the requirement to hold a special flight operations certificate (SFOC) when the use of a drone is for purposes other than recreation. Mr. Thibodeau's preliminary review of this case was filed as Exhibit M-10. The applicant admitted that he had a call with Mr. Thibodeau in October 2018, adding that this call even prompted him to take the exam on drone use offered by TC.

[32] Mr. Thibodeau clarified that the Order applies to model aircraft with a total weight of more than 250 g but not more than 35 kg (section 3.1) operated for recreational purposes. The definition of “model aircraft” in the Order refers to recreational use. For the use of an unmanned aerial vehicle (other than a model aircraft), reference had to be made to section 602.41 of the CARs, which requires the possession of an SFOC or an air operator certificate (AOC).

[33] The applicant claims that the hovering check flight he conducted with his drone on November 29, 2018, was not a recreational flight. In cross-examination, Mr. Thibodeau explained that even if the purpose of the use of the drone was a maintenance or safety certification flight, as proposed by the applicant, the applicant had to either comply with the Order or hold an SFOC issued by the Minister authorizing the use of the drone. He clarified that the model aircraft was therefore used for recreational purposes if the user did not have an AOC or SFOC. Mr. Thibodeau added that these concepts and the difference between recreational and commercial use of the drone were very well explained to the applicant during the education/awareness call.

[34] In this case, the evidence presented by Mr. Trépanier (and the report in Exhibit M-1) shows that the applicant did not hold any authorization issued by TC on November 29, 2018. It must therefore be concluded that the applicant was subject to the Order in the use of his model aircraft at that time because such usage became recreational in the absence of an AOC or SFOC.

[35] In addition to the admissions above, the applicant added that he had taken the exam to be able to use his drones in accordance with the regulations and that he had always been committed to using them safely, including on the night of November 29, 2018, when he chose a remote field to avoid any incident affecting the safety of people on the ground.

[36] Considering the admissions of the applicant set out above and the evidence of the respondent as to the weight of the applicant’s drone and the absence of an operating certificate, the Tribunal finds that the Order applied to the applicant’s use of the model aircraft on November 29, 2018, and that the respondent has shown, on a balance of probabilities, that the applicant contravened the provisions of paragraph 5(1)(f) of the Order by using it at night.

[37] The fact that the applicant took steps to improve his expertise and knowledge of the regulations by taking the TC exam and the fact that he has always been concerned about the safe operation of his drone are not relevant to the offence committed on November 29, 2018, by the applicant in the operation of his drone at night as he admitted. These arguments cannot constitute a due diligence defence within the meaning of section 8.5 of the *Act* since, in order to benefit from this defence, the applicant had to show that he had exercised all due diligence to avoid the offence. However, no evidence was provided by the applicant in this regard, i.e., to demonstrate that he had exercised all due diligence to avoid using his drone at night. On the contrary, the applicant admits to having used it at night. Rather, the applicant misunderstood the prohibition as prohibiting flight (which he believed would exclude hovering) when in fact it prohibits any use of a model aircraft.

[38] With respect to the penalty chosen, the Minister does have discretion to decide to issue a Notice of Assessment of Monetary Penalty instead of a warning for a violation. The respondent indicated that in assessing the penalty, the fact that the applicant had already been warned and

educated about the conditions of use of the drone (and the prohibition on nighttime use) could have been considered as an aggravating factor, but this was not done. Furthermore, the respondent argues that there are no mitigating factors in the circumstances; the prohibition on using a drone at night is clear regardless of the location of the drone or the purpose of the use. While this Tribunal is not bound by the sanction schedule filed as Exhibit M-9, this Tribunal finds that the penalty of \$750 is justified in the circumstances given that this is a first violation of the Order. The confirmation of this amount takes into account the fact that the applicant has shown good faith and cooperation throughout the process. The applicant's argument regarding his concern for not endangering persons or property on the ground by choosing a remote location is not a mitigating factor in the context of the alleged contravention which clearly prohibits nighttime use, regardless of the location of use, especially since the applicant had been made aware of the conditions of use of the drone in August 2018 during a call from Mr. Thibodeau.

[39] In conclusion, the respondent has proven, on a balance of probabilities, that the applicant contravened the provisions of paragraph 5(1)(f) of the *Interim Order No. 9 Respecting the Use of Model Aircraft* in that on or about November 29, 2018, at approximately 1:25 a.m. (local time), the applicant operated a DJI Spark model aircraft at night in the vicinity of a parking lot or vacant lot at the intersection of Des Mille-Îles Boulevard and Paré Street in Laval, Quebec.

#### **IV. DETERMINATION**

[40] The Minister of Transport's Notice of Assessment of Monetary Penalty dated April 16, 2019, is hereby confirmed along with the penalty in the amount of \$750.

[41] The total amount of \$750 is payable to the Receiver General for Canada and must be received by the Transportation Appeal Tribunal of Canada within 35 days of service of this determination.

July 30, 2021

(Original signed)

Caroline Desbiens  
Member

Appearances

For the Minister: Martin Forget  
For the Applicant: Self-represented