



TRANSPORTATION APPEAL TRIBUNAL OF CANADA

Citation: *Rivage 3 Inc. / Dizi Films v. Canada (Minister of Transport)*, 2023 TATCE 2 (Review)

TATC File No.: Q-4684-43

Sector: Aviation

BETWEEN:

Rivage 3 Inc. / Dizi Films, Applicant

- and -

Canada (Minister of Transport), Respondent

[Official English translation]

Heard by: Videoconference on September 15 and 16, 2022

Before: Caroline Desbiens, Member

Rendered: January 19, 2023

REVIEW DETERMINATION AND REASONS

Held: The Minister of Transport has not demonstrated, on a balance of probabilities, that the pilot or his observer failed to have the remotely piloted aircraft system in visual line-of-sight at all times during flight on January 29, 2020. The first contravention of the Notice of Assessment of Monetary Penalty for contravening subsection 901.11(1) of the *Canadian Aviation Regulations* is therefore dismissed.

The Minister has demonstrated, on a balance of probabilities, that the applicant contravened section 901.33 of the *Canadian Aviation Regulations* by failing to ensure that the site set aside for the landing of the remotely piloted aircraft system was suitable and, more specifically, by failing to take appropriate measures to secure the perimeter of that site.

The Tribunal reduces the amount of the administrative monetary penalty to \$1,250 for this infraction.

The total amount of \$1,250 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 decision.

I. BACKGROUND

[1] On January 12, 2021, the Minister of Transport (Minister) issued a Notice of Assessment of Monetary Penalty (Notice) to the applicant alleging that:

[TRANSLATION]

1. On or about January 29, 2020, at approximately 8:45 a.m. EST, in the vicinity of Canada Malting, Montreal, Quebec, David-Étienne Durivage, of your firm Rivage 3 Inc., doing business as Dizi Films, operated a remotely piloted aircraft system consisting of a DJI Inspire 2 Cinema Premium aircraft, registration C-1926439004, without Mr. Durivage or a visual observer having the aircraft in visual line-of-sight at all times during flight, thereby contravening subsection 901.11(1) of the *Canadian Aviation Regulations* (CARs).

Pursuant to subsection 8.4(2) of the *Aeronautics Act*, a penalty is imposed on Rivage 3 Inc., doing business as Dizi Films, in its capacity as operator of the aircraft.

Administrative monetary penalty: \$2,500

2. On or about January 29, 2020, at approximately 8:45 a.m. EST, in the vicinity of Canada Malting, Montreal, Quebec, David-Étienne Durivage, of your firm Rivage 3 Inc., doing business as Dizi Films, operated a remotely piloted aircraft system consisting of a DJI Inspire 2 Cinema Premium aircraft, registration C-1926439004, without ensuring before take-off, in order to mitigate the risks of collision with a person or obstacle, that the site set aside for take-off, launch or landing, the perimeter of which had not been secured, was suitable for the intended operation, thereby contravening section 901.33 of the CARs.

Under subsection 8.4(2) of the *Aeronautics Act*, a penalty is imposed on Rivage 3 Inc., doing business as Dizi Films, in its capacity as operator of the aircraft.

Administrative monetary penalty: \$2,500

Total administrative monetary penalties: \$5,000

[2] On January 18, 2021, the applicant filed a request for review with the Transportation Appeal Tribunal of Canada (Tribunal).

[3] On March 11, 2022, a case management conference was held.

[4] During the review hearing, the applicant was represented by David Etienne Durivage¹ and the Minister was represented by Alexandre Petterson.

[5] The respondent called four witnesses, including Mathieu Sauvé, Sylvain Melançon, Martin Forget and Jean-François Lyras. The applicant called two witnesses, namely David Etienne Durivage and Alexi Durivage.

II. PRELIMINARY ISSUE

[6] At the outset of the hearing, the respondent's representative requested that Jean-François Lyras be recognized as an expert witness in the use of remotely piloted aircraft systems (RPASs)

¹ The name of the applicant's representative is spelled "David Etienne Durivage" in the Tribunal's official record. However, in some of the documents filed in evidence, his name is spelled "David-Étienne Durivage."

and, more specifically, the applicable regulations. Mr. Lyras' curriculum vitae was filed as Exhibit 1. It was demonstrated that Mr. Lyras has extensive aviation experience, including 25 years as a commercial helicopter pilot and as a pilot examiner certified by Transport Canada (TC). He joined TC as an inspector in 2019. He is a member of the working group on special flight operations certificates (SFOCs) for RPASs and is himself an RPAS pilot.

[7] The applicant did not object to the presence of Mr. Lyras as an expert witness for the respondent in relation to the applicable regulations, but it did object to his presence as an expert witness as a pilot of the type of RPAS covered by the Notice in this case.

[8] Mr. Lyras was recognized as an expert witness for the respondent on the operation of RPASs within the regulatory framework governing them.

III. ANALYSIS

A. Issues

[9] In connection with the Notice, has the respondent demonstrated, on a balance of probabilities, that the applicant was the operator of the RPAS on January 29, 2020?

[10] If so, and in connection with the first alleged contravention, has the respondent demonstrated, on a balance of probabilities, that Mr. D. E. Durivage operated the RPAS on January 29, 2020, without Mr. D. E. Durivage himself or a visual observer having said aircraft in visual line-of-sight at all times during flight, thereby contravening subsection 901.11(1) of the *Canadian Aviation Regulations (CARs)*?

[11] If so, was the respondent's administrative monetary penalty (AMP) of \$2,500 justified?

[12] In connection with the second alleged contravention, if the respondent demonstrates that the applicant was the operator of the RPAS on January 29, 2020, has the respondent demonstrated, on a balance of probabilities, that Mr. D. E. Durivage operated the RPAS without ensuring before take-off that the site set aside for take-off, launch or landing was suitable for the intended operation by failing to secure the perimeter, thereby contravening section 901.33 of the *CARs*?

[13] If so, is the amount of the AMP imposed by the respondent, namely \$2,500, justified?

B. Legal framework

[14] If the Minister believes on reasonable grounds that a person has contravened a designated provision, the Minister may decide to issue a notice of assessment of monetary penalty pursuant to subsection 7.7(1) of the *Aeronautics Act (Act)*.

[15] Subsection 8.4(2) of the *Act* provides as follows:

The operator of an aircraft may be proceeded against in respect of and found to have committed an offence under this Part in relation to the aircraft for which another person is subject to be proceeded against unless, at the time of the offence, the aircraft was in the possession of a person

other than the operator without the operator's consent and, where found to have committed the offence, **the operator** is liable to the penalty provided as punishment therefor. [Emphasis added.]

[16] Subsection 101.01(1) of the *CARs* defines the word “operator” as follows: “in respect of an aircraft, means the person that has possession of the aircraft as owner, lessee or otherwise”.

[17] Subsection 901.11(1) and section 901.33 of the *CARs* set out the alleged violations:

901.11 (1) Subject to subsection (2), no pilot shall operate a remotely piloted aircraft system **unless the pilot or a visual observer has the aircraft in visual line-of-sight at all times during flight.**

(2) A pilot may operate a remotely piloted aircraft system without the pilot or a visual observer having the aircraft in visual line-of-sight if the operation is conducted in accordance with a special flight operations certificate — RPAS issued under section 903.03.

...

901.33 A pilot of a remotely piloted aircraft shall, before take-off, launch, approach, landing or recovery,

(a) ensure that there is no likelihood of collision with another aircraft, person or obstacle; and

(b) ensure that **the site set aside** for take-off, launch, landing or recovery, as the case may be, **is suitable for the intended operation.** [Emphasis added.]

[18] Section 900.01 of the *CARs* defines “visual line-of-sight” or “VLOS” as meaning “unaided visual contact at all times with a remotely piloted aircraft that is sufficient to be able to maintain control of the aircraft, know its location, and be able to scan the airspace in which it is operating in order to perform the detect and avoid functions in respect of other aircraft or objects.”

[19] Schedule II to subsections 103.08(1) and (2) of the *CARs* sets out the following maximum amounts of AMPs for corporations:

- \$5,000 for a violation of subsection 901.11(1); and
- \$5,000 for a violation of section 901.33.

[20] Section 8.5 of the *Act*, for its part, provides for a defence of due diligence:

8.5 No person shall be found to have contravened a provision of this Part or any regulation, notice, order, security measure or emergency direction made under this Part if the person exercised all due diligence to prevent the contravention.

[21] Under section 8 of the *Act*, this Tribunal may determine that the applicant has not contravened the designated provision and set aside the decision of the respondent; **or** determine that the applicant has contravened the designated provision and confirm or revise the amount of the imposed penalty.

C. Evidence

(1) *The operator of the RPAS*

[22] It is appropriate to first question the evidence in relation to the application of subsection 8.4(2) of the *Act*, since if the Tribunal concludes that the applicant was not the operator of the RPAS on January 29, 2020, the two contraventions referred to in the Notice should be dismissed.

[23] Sylvain Melançon was the TC investigator responsible for the investigation that led to the two contraventions referred to in the Notice against the applicant. At the hearing, he stated that the applicant, Rivage 3 Inc., was doing business under the name of Dizi Films in January 2020, and that it was Dizi Films that had operated the RPAS through Mr. D. E. Durivage, who holds the certificate of registration (Exhibit 16). Mr. Melançon explained that it was the applicant who had been employed by Canada Malting Co. Ltd. (Canada Malting) to make a commercial video and who had requested authorization from the Port of Montreal (where Canada Malting's site is located) and from NAV CANADA for this purpose. He filed as evidence various emails exchanged between the Montreal Port Authority and Mr. D. E. Durivage, who was using his professional email address with Dizi Films (Exhibits 8 and 11).

[24] In particular, although the contract between Canada Malting and the applicant was not filed in evidence, Mr. D. E. Durivage provided the following evidence: emails from Canada Malting (Exhibit 18) confirming that the video was produced for commercial purposes as part of Country Malt Group's promotional film and that Dizi Films had come to film Canada Malting's malt production plant; Dizi Films' emergency plan (Exhibit 9) and safety plan (Exhibit 10) submitted as part of the request for authorization from the Montreal Port Authority, where Canada Malting is located; the Port Authority's authorization for video shooting with an RPAS at the Canada Malting site (Exhibit 11), sent to Mr. D. E. Durivage's business email address at Dizi Films; the NAV CANADA flight authorization issued to Mr. D. E. Durivage for January 29, 2020, and sent to his business email address at Dizi Films (Exhibit 7); and the statement from the Quebec business registry showing that the applicant was doing business under the name Dizi Films on January 29, 2020.

[25] The applicant did not dispute that it was the operator of the RPAS. In his testimony, Mr. D. E. Durivage acknowledged that Dizi Films had been hired by Canada Malting to make video recordings with an RPAS on January 29, 2020.

[26] Under section 101 of the *CARs*, the **operator** of an aircraft is the person who has **possession** of the aircraft as owner, lessee or **otherwise**. In this case, although Mr. D. E. Durivage was the registered owner of the RPAS on January 29, 2020, when it was being operated, the respondent has demonstrated, on a balance of probabilities, that the RPAS was operated by the applicant, since it would have had possession of the RPAS for the purposes of carrying out the filming contract with Canada Malting, the existence of which has been acknowledged by Mr. D. E. Durivage. It follows that if the Tribunal concludes that the respondent has proven the elements of the two alleged contraventions, on a balance of probabilities, the applicant may be held liable under subsection 8.4(2) of the above-mentioned *Act* if it fails to provide evidence to the effect that the RPAS was being operated by

Mr. D. E. Durivage without the applicant's consent or if it fails to demonstrate that it exercised all due diligence to prevent the contravention (section 8.5 of the *Act*). In this case, the applicant has not provided any evidence or even alleged that the RPAS was being operated by Mr. D. E. Durivage without the applicant's consent.

(2) Was the RPAS operated in contravention of subsection 901.11(1) of the CARs?

[27] According to the evidence presented at the hearing, the applicant acknowledges that Mr. D. E. Durivage operated a DJI Inspire 2 Cinema Premium RPAS, registration number C-1926439004, on January 29, 2020, in the vicinity of Canada Malting, Montreal, Quebec. The documentary evidence filed as to the registration of the RPAS (Certificate of Registration, Exhibit 16) and its weight of 3,440 grams (Technical Specifications of the Inspire 2, Exhibit 29) was not disputed by the applicant, and Mr. D. E. Durivage stated (both in his testimony at the hearing and in his email to TC during the investigation, Exhibit 21) that he operated this RPAS during several flights on January 29, 2020, at the Canada Malting site to take aerial videos of the site. The parties also acknowledge that the applicant did not hold an SFOC for the purpose of using the RPAS on January 29, 2020, and that an SFOC was not required for the intended use. As no SFOC was obtained, the parties agree that subsection 901.11(1) of the *CARs* did, however, require that either the pilot or a visual observer has the RPAS in visual line-of-sight at all times while it was in use.

[28] With the above facts acknowledged, the other key elements to be proven by the Minister are the route of the flight in question and the failure of the pilot or observer to have visual line-of-sight at all times during flight.

[29] Indeed, for a violation of subsection 901.11(1) of the *CARs*, at issue is whether the Minister has demonstrated, on a balance of probabilities, that the RPAS was not in Mr. D. E. Durivage's visual line-of-sight for the entire duration of the flight on January 29, 2020. According to section 900.01 of the *CARs*, visual line-of-sight means unaided visual contact at all times with a remotely piloted aircraft that is sufficient to be able to maintain control of the aircraft, know its location, and be able to scan the airspace in which it is operating in order to perform the detect and avoid functions in respect of other aircraft or objects.

[30] On this issue, the respondent's evidence is based on the testimony of Mathieu Sauvé, special agent for systems and processes at the Montreal Port Authority, who reported the incident; the testimony of Mr. Melançon, TC investigator; documentary evidence; an audio tape (a conversation between Mr. Melançon and Mr. Sauvé, Exhibit 14); a video (obtained from the Port Authority's camera, Exhibit 13) and photographs of the site taken by Mr. Melançon (Exhibits 6 and 12, in a bundle).

[31] For its part, the applicant's counter-evidence is based on the testimony of Mr. D. E. Durivage, who was the pilot of the RPAS, and of his son, Alexi Durivage (Mr. A. Durivage), who was the observer while the RPAS was in operation on January 29, 2020.

[32] The evidence is contradictory or different in several respects.

[33] At the hearing, Mr. Sauvé testified **that he was at his office** on January 29, 2020. From his office window, he saw an RPAS flying over the Bonaventure Expressway at low altitude,

heading towards the administrative offices of the Montreal Port Authority, which immediately triggered a verification on his part. Mr. Sauvé contacted the Port of Montreal control centre to confirm authorization to fly over the Canada Malting site, which took him about a minute. This authorization from the Port Authority was filed as Exhibit 11 and specified that take-off was to occur within the area of Canada Malting's facilities and that the applicant was to notify the control centre at the start of operations. Mr. D. E. Durivage allegedly failed to communicate with the control centre upon arrival.

[34] Mr. Sauvé also verified the area authorized for RPAS flight at the Canada Malting site by going to the office of the director of security, which was next to his. The director of security confirmed to Mr. Sauvé that an RPAS flight authorization had been issued by NAV CANADA for an RPAS on January 29, 2020. The NAV CANADA authorization was filed as Exhibit 7. The flight plan is part of the chain of emails filed as Exhibit 8. When Mr. Sauvé spotted it, the RPAS was above the trees opposite his office, at an approximate altitude of 75 to 100 feet. These verifications would have taken about 4 to 5 minutes.

[35] Mr. Sauvé drew up an incident report, filed as Exhibit 2. This incident report states that he spotted the RPAS in flight at 8:45 a.m. on January 29, 2020, while conducting **a patrol around the port's administrative offices** at 2100 Pierre-Dupuy Avenue, Montreal. His report states that, at the time, the RPAS was over the Bonaventure Expressway. This information differs from his testimony as to the activities he was engaged in when he spotted the RPAS (being at his office versus conducting a patrol around the offices).

[36] This information also differs from that provided by Mr. D. E. Durivage, who stated that he arrived at the Canada Malting site very early on January 29, 2020, at around 6:00 a.m., in order to make sure that no one was around and to be able to operate the RPAS in complete safety. In his email filed as Exhibit 21, he stated that the total duration of the operation was about 20 minutes, whereas at the hearing he stated that the flights had totalled between 45 minutes and an hour, with the first flight starting at about 6:30 a.m. The end of the filming would therefore have occurred at around 7:30 a.m., yet Mr. Sauvé allegedly saw the RPAS at around 8:45 a.m.

[37] In his testimony, Mr. Sauvé mentioned that he left the building and went to his vehicle near the office entrance in order to look for the pilot of the RPAS. He stated that he left the building around 8:37 to 8:50 a.m. and that it was very cold. He immediately got into his car to try and find the RPAS pilot on the basis of the flight plan area. The distance between where he first saw the RPAS and the Bonaventure Expressway would have been 250 metres (in direct flight).

[38] With regard to the route he took to get to the RPAS landing site, Mr. Sauvé filed Exhibit 12, consisting of maps from the Google Maps website, on which he reconstructed the incident from the time he left the office until he arrived at the landing site, where he was able to see the RPAS land. He had to take public roads such as Riverside Street and Pierre-Dupuy Avenue. On the basis of the second map, he stated that the distance between the two points (his office and the landing site) was 552 metres. On the last map in Exhibit 12, he marked the location of his office with a "B" and the location of the RPAS he saw from his office with a "D". He stated that his driving time between his office and the site where he found Mr. D. E. Durivage was 5 to 7 minutes.

[39] While driving to the interception site, Mr. Sauvé stated that he did not encounter any pedestrians or see any parked vehicles on the streets he drove along. His vehicle did, however, pass moving vehicles on the public roads. Mr. Sauvé stated that he lost sight of the RPAS between the time he got to his car and the time he found Mr. D. E. Durivage.

[40] Mr. Sauvé stated that Mr. D. E. Durivage was on the Canada Malting site, where his Dodge Journey vehicle was parked when Mr. Sauvé arrived. Mr. Sauvé saw Mr. D. E. Durivage and another person sitting in the front of the Dodge Journey. Mr. D. E. Durivage acknowledged this fact in his testimony. Upon arrival, Mr. Sauvé stated that he got out of his vehicle and waited near its passenger side to see the RPAS land in front of his car, about three metres from his position. Mr. Sauvé was surprised to see the RPAS land there, since no perimeter had been marked and he had received no instructions from the people in the vehicle about the landing of the RPAS in order for this to be done safely. At the hearing, Mr. D. E. Durivage stated that he had told Mr. Sauvé that he should stand back given that he would be landing the RPAS but did not testify as to where the RPAS landed.

[41] Mr. Sauvé identified several photographs of the site taken by investigator Melançon in order to locate where Mr. D. E. Durivage's vehicle was parked, where his own vehicle was parked and where the RPAS landed. In his testimony, Mr. Melançon acknowledged taking these photographs, which were filed as Exhibit 6. Using these photographs, Mr. Sauvé indicated that the vehicles were parked under a walkway parallel to the building (his vehicle was parked where the black TC vehicle can be seen in these photographs taken at the site to reconstruct what happened, and Mr. D. E. Durivage's vehicle was parked where the white vehicle can be seen), facing the street and the fence adjacent to the railway line, and facing away from the Bonaventure Expressway. Mr. Sauvé explained that the RPAS **landed in front of the vehicles**, passing over the fence adjacent to the railway line (either over or next to the nearby terminal) **to finally end up landing in front of the cars**. Mr. Sauvé stated that, at the time of landing, Mr. D. E. Durivage and another person were still seated in the front seats of the Dodge Journey vehicle. Mr. Sauvé met with Mr. D. E. Durivage after the landing and identified him.

[42] Given the positions of the pilot and the observer in the vehicle, Mr. Sauvé concluded that they could not have had the RPAS in their visual line-of-sight as it travelled, since he himself could not see the Port Authority's administrative offices, from which he first saw the RPAS, from the landing site due to the buildings located between the two sites. Mr. Sauvé therefore deduced that maintaining visual line-of-sight with the RPAS would have been impossible, given the buildings between the two locations and the fact that both people had been sitting in the vehicle. On this basis, he filed a complaint with TC, assuming that only one flight had been flown between the time he first saw the RPAS and the time he saw it land.

[43] With regard to the fencing he identified on the various photographs filed as Exhibit 6, Mr. Sauvé specified that the first fence delimits the railroad, while the second fence delimits the Empire terminal, which is adjacent to the Canada Malting site. According to the RPAS flight plan approved by the Port Authority and attached as Exhibit 8, the red line delimiting the no-fly zone coincides with the fence delimiting the Empire terminal. The green line, namely the permitted flight area, coincides with the first fence where the railroad is located, which would be about 10 feet from the terminal fence. In order to identify the landing site, Mr. Sauvé referred to the sixth photograph in Exhibit 6. He stated that the RPAS had landed where the lighter line

(crack) appears on the asphalt, about three metres in front of his vehicle. According to Mr. Sauvé, the RPAS was not authorized to fly over the neighbouring terminal and was supposed to remain in the green zone for its operation. The RPAS therefore had no authorization to fly over the Empire terminal, since it would have needed Empire's authorization to fly there. In his testimony, however, he was unable to state whether the RPAS had actually flown over or past the Empire terminal area. He stated that the RPAS had appeared in the vicinity of the Hillman's truck identified in the first photograph in Exhibit 6.

[44] At the hearing, Mr. Sauvé did not describe the RPAS trajectory, only the positions where he first saw the RPAS and its landing. It should be remembered that he stated that he had lost sight of the RPAS when he travelled by vehicle in an attempt to locate Mr. D. E. Durivage. Mr. Sauvé's conclusions are therefore based on a premise that has not been demonstrated or put into evidence, namely that there was a single flight.

[45] Mr. D. E. Durivage did not comment on the photographs filed as Exhibit 6, apart from the fact that they showed the location of his vehicle when Mr. Sauvé came to find him. Mr. D. E. Durivage added that this site was the last site from which he had flown the RPAS and that the RPAS had made several flights to shoot video images and take the best possible angles for the film. According to Mr. D. E. Durivage, he never had the RPAS fly behind him. The operation would have taken between 45 minutes and an hour. His son, Mr. A. Durivage, who acted as an observer, confirmed that several flights were made on January 29, 2020. Both also stated that in very cold weather, as was the case on January 29, they would frequently have to warm up inside the vehicle. Also, the RPAS battery did not last as long in cold weather and had to be changed often, so flights had to be kept short.

[46] Mr. Sauvé also obtained a video (Exhibit 13) taken by a Port Authority camera which, according to him, shows when the drone landed. According to him, this video shows the white car with flashing lights on, which was his vehicle, as well as another vehicle parked next to it. Four seconds into the video, he said, a drone could be seen landing and no one could be seen getting out of the other vehicle when the drone landed. Mr. D. E. Durivage pointed out that the video was blurred, did not identify the vehicles or a drone, and provided no conclusive evidence.

[47] Unfortunately, the video is of poor visual quality and it is very difficult to see that an RPAS is landing. For a very short time, we see a "shaded object" presumed to be the RPAS moving up and down towards a vehicle with flashing lights. We can't see which way the vehicle with no lights on was parked, nor the exact landing spot. From this video, it appears that the RPAS is coming from behind the vehicle with flashing lights and is not coming from the railway fences described above, contrary to Mr. Sauvé's assertion at the hearing. However, Mr. Sauvé claimed to have obtained the video footage himself from the Port Authority and that it is indeed a video of the January 29, 2020, incident. The video is so blurred that it has to be viewed several times to understand what is going on, and even then, the RPAS's path appears to differ from the one described at the hearing. The Tribunal is of the opinion that this video does not provide conclusive evidence because it is too blurred.

[48] Mr. Sauvé also confirmed that the recording of his telephone conversation with investigator Melançon on May 26, 2020, was indeed the one filed in evidence as Exhibit 14. Mr. Sauvé stated that he had seen the RPAS flying over the Bonaventure Expressway when he

was at his office. What is surprising is that during this telephone conversation, Mr. Sauvé specified that the RPAS's path allegedly **originated from the rear of the vehicle** and not from the front of the vehicle as he mentioned at the hearing. The respondent's evidence, based on Mr. Sauvé's testimony, therefore contains contradictions concerning the flight path of the RPAS, for which the respondent must prove a failure to maintain visual line-of-sight.

[49] Both Mr. Sauvé's testimony at the hearing and his telephone conversation with investigator Melançon indicate that Mr. Sauvé met with and identified Mr. D. E. Durivage after the RPAS had landed. It was at this point that they exited the vehicle. Mr. D. E. Durivage confirmed these facts, but pointed out that they still had a clear view of the RPAS. His son, Mr. A. Durivage, hesitated, but stated that he had "probably" exited the vehicle for the landing and not afterwards, because visibility would have been better that way. Given Mr. A. Durivage's hesitation on this point, and the fact that Mr. D. E. Durivage's testimony and that of Mr. Sauvé concur on the position of the two people in the vehicle, the Tribunal concludes that Mr. D. E. Durivage and his son were indeed seated in the vehicle when the RPAS landed.

[50] At the hearing, Mr. D. E. Durivage stated that Mr. Sauvé was mistaken in assuming that the RPAS had flown a single flight from the site where they met on January 29. He stated that several flights (5 to 7) had been flown from this site, which was the last location from which the flights had been operated. Mr. D. E. Durivage also stated that five deployment sites had been used at Canada Malting for the RPAS to operate, identifying them with a red star on the plan filed as Exhibit 32. Looking at this plan, one sees that the star on the far left represents the last take-off and landing site used and where Mr. Sauvé apparently met up with the pilot and his observer. According to Mr. D. E. Durivage, the site identified by the star on the right was probably the site used for the flight during which the RPAS was spotted by Mr. Sauvé near the Bonaventure Expressway. Mr. D. E. Durivage stated that several flights had been needed to get the best angles and shots, to not lose contact with the RPAS and to use several lenses. Several flights had also been necessary because of the cold weather, given that the RPAS battery ran out more rapidly in such conditions. Mr. D. E. Durivage stated that the pilot and his observer had to move around frequently, to produce quality work safely.

[51] Mr. D. E. Durivage stated that he used his vehicle to get to the various take-off zones identified on his plan, all of which were located in the vicinity of the silos shown on the maps (Exhibit 12). The plan shows that it was possible to drive from one place to another through the alley behind the silos, without necessarily using Riverside Street, which Mr. Sauvé had taken with his car.

[52] Mr. D. E. Durivage also stated that, as a pilot, he and his observer were either in or out of the car during the various RPAS flights, always within visual line-of-sight. He added that he never put his drone in danger and that he never let his \$35,000 drone out of his visual line-of-sight. In addition, he explained that this type of RPAS could not be operated if an obstacle or building stood between him and the RPAS, as he would lose the signal and risk having his RPAS fall and break. When cross-examined by Mr. D. E. Durivage, the expert Mr. Lyras was unable to contradict this technical element as he did not know enough about the transmission frequency of this type of RPAS to be able to invalidate it. In this context, Mr. D. E. Durivage argued that he could not technically have taken the flight path from the Bonaventure Expressway to the landing

site, as alleged by the respondent, because obstacles on the alleged flight path would have cut off the transmission of the signal.

[53] No direct evidence was adduced by the respondent to contradict the fact that the RPAS had been flown a number of times, or to contradict the landing sites identified by Mr. D. E. Durivage. Only expert Mr. Lyras challenged Mr. D. E. Durivage's theory of multiple flights, arguing that he had been vague about the number and speed of the flights. It should be remembered, however, that the burden of proof as to the alleged flight path lies not with the applicant, but with the respondent.

[54] Moreover, Mr. Sauvé acknowledged that he did not see the RPAS when he was driving his car and that he lost sight of it when he left his office, since he was concentrating on his driving. Mr. D. E. Durivage may have moved his vehicle on the Canada Malting site without using a public street and therefore without crossing paths with Mr. Sauvé. If one also assumes that Mr. Sauvé saw the RPAS from his office and that he took 5 to 7 minutes to get to the landing site, in addition to the time required to double-check the authorizations and flight plan before leaving his office (about 4 to 5 minutes), get dressed to protect himself from the cold and start his vehicle, one concludes that a period of 9 to 12 minutes elapsed from the moment he first saw the RPAS. Within this period, it is plausible that the pilot and his observer could have moved around and flown more than one flight with the RPAS, as mentioned by Mr. D. E. Durivage and the observer, Mr. A. Durivage.

[55] In this context, Mr. Sauvé's conclusion that the pilot and his observer flew the RPAS while seated in the front of their car without having the RPAS in visual line-of-sight for what he presumed was a trip from the Bonaventure Expressway to the landing site is unfounded, given that the premise itself (a single flight) has not been demonstrated. The explanations provided by Mr. D. E. Durivage as to the need to make several short flights from different locations were logical and consistent. The technical configuration of the RPAS did not allow for such a flight, given the buildings separating the two sites. His son also confirmed that there had been several flights and that there were about four deployment sites.

[56] Although the facts provided by Mr. A. Durivage do not all align exactly with those provided by Mr. D. E. Durivage with respect to the number of flights from the last site (3 to 4 according to Mr. A. Durivage versus 5 to 6 according to Mr. D. E. Durivage), the number of take-off sites (5 according to Mr. D. E. Durivage versus 3 to 4 according to Mr. A. Durivage) and where they were during the last landing (both in the car according to Mr. D. E. Durivage versus probably one in the car and Mr. A. Durivage outside according to Mr. A. Durivage), Mr. D. E. Durivage's testimony was very credible and logical. In addition, it is to be expected that two people whose job involves doing multiple drone flights on multiple contracts would not be able to recall exactly what happened 2 years and 9 months ago. Their testimony was credible and generally consistent. The respondent is asking the Tribunal to disregard Mr. D. E. Durivage's testimony because he is an interested party in the matter. On the contrary, the Tribunal finds that Mr. D. E. Durivage was credible and much more consistent than Mr. Sauvé in his description of that RPAS's operations.

[57] It is indeed surprising to note that Mr. Sauvé's incident report filed as Exhibit 2 does not match his testimony at the hearing as to where he was when he first saw the RPAS (patrolling the

area around the administrative offices versus sitting at his desk and seeing the RPAS through the window). In addition, the versions of the RPAS's flight path described in his testimony at the hearing and in his conversation with the investigator (RPAS coming from the front of the vehicles versus behind them) were divergent. The priority for Mr. Sauvé on the morning of January 29 was observing the RPAS. It is therefore surprising that his own versions of the facts are not consistent.

[58] If we consider the RPAS landing witnessed by Mr. Sauvé, the positions of the Dodge Journey vehicle in which the Durivages were seated and of the landing site (asphalt crack in front of the vehicles) described by Mr. Sauvé with the help of the photographs filed as Exhibit 6, combined with the fact that the RPAS came from the front of the vehicle, and was therefore in front of the pilot and his observer and not behind (again according to Mr. Sauvé's testimony at the hearing), it was up to the Minister to prove that Mr. D. E. Durivage or his observer did not have the RPAS in visual line-of-sight in this context. The respondent would have us presume that either one or the other of them did not have a visual line-of-sight during this phase of the flight directly observed by Mr. Sauvé because they were seated in the car. However, both Mr. D. E. Durivage and Mr. A. Durivage stated that they had visual line-of-sight to be able to maintain control of the RPAS during each flight, including the last one. It was in Mr. D. E. Durivage's best interest to have the \$35,000 RPAS in visual line-of-sight, and it has been demonstrated that Mr. D. E. Durivage and his son are experienced professionals in the field of RPAS filming, having done this for many years on multiple large-scale projects (theatrical films and television series, television films and special events, as appears from Mr. D. E. Durivage's CV filed as Exhibit 33).

[59] In view of the foregoing, the Minister has not demonstrated on a balance of probabilities that the pilot or his observer did not have the RPAS in visual line-of-sight at all times during flight on January 29, 2020. The first contravention of the Notice, relating to subsection 901.11(1) of the *CARs*, is therefore dismissed.

(3) *Was the RPAS operated in contravention of section 901.33 of the CARs?*

[60] The second contravention involves determining whether, in the incidents described above and below, the pilot operated the RPAS without ensuring before take-off that the site set aside for take-off, launch, landing or recovery, as the case may be, was suitable for the intended operation.

[61] Subsection 901.33 of the *CARs* requires pilots to comply with two conditions, namely, to ensure before take-off, launch, approach, landing or recovery (i) that there is no likelihood of collision with another aircraft, person or obstacle; and (ii) that the site set aside for take-off, launch, landing or recovery, as the case may be, is suitable for the intended operation. Failure to comply with one of these conditions is sufficient to conclude that subsection 901.33 of the *CARs* was contravened. **The wording of the contravention in this case was critical of the site set aside for the operation because it had not been secured.**

[62] At the hearing, the respondent argued that the perimeter of the landing zone had not been secured with markers (cones or tape) and that pilot Mr. D. E. Durivage had not provided Mr. Sauvé with any instructions for him to stay away from the landing zone before the landing in

order to avoid a risk of collision with him or his vehicle, which is a contravention of subsection 901.33 of the *CARs*. In his testimony, Mr. Sauvé did indeed state that there were no cones or markings indicating the boundaries of the RPAS landing site and that he had been surprised not to have received any instructions from the pilot. Being a drone pilot himself, Mr. Sauvé found this operation unsafe, as the RPAS had landed only three metres away from him.

[63] In his testimony, Mr. D. E. Durivage acknowledged that the landing zone had not been marked off but specified that the entire area authorized for flights on the Canada Malting site had itself been secured, since the entrance to the site was controlled by a gatehouse and a guard. This was confirmed by Mr. A. Durivage in his testimony at the hearing. In addition, he stated that he had chosen to fly the RPAS very early in the morning (first flight at 6:30 a.m.) precisely to avoid flying it at a time when employees would be on site. As his operation lasted about an hour in total, he explained that he had made sure it was done safely. Mr. A. Durivage confirmed these same elements. He pointed out that there was no one in the parking lot where the landing took place on January 29, aside from when Mr. Sauvé came out to meet them during the landing, and that the Canada Malting site was a private site controlled by a gatehouse and a guard precisely to prevent members of the public from entering the site.

[64] The issue therefore involves asking whether the boundaries of the landing zone had to be marked out or indicated for the purposes of the operation in the circumstances.

[65] The *CARs* do not state that the area should be marked out as such. Section 901.33 of the *CARs* refers to the choice of a suitable site for the planned operation. The Tribunal must therefore defer to the best practices applicable to this type of operation and to the choice a diligent pilot would have made for a safe landing site in the same circumstances.

[66] The respondent's expert witness, Mr. Lyras, stated that indicating site boundaries using markers is one of the standards recommended by TC in connection with the choice of take-off, launch, approach, landing or recovery site for RPASs. In this regard, he produced the TC publication, *Aeronautical Information Manual* (TP 14371) in effect from October 8, 2020, to March 25, 2021, as Exhibit 31 and the same manual in effect from March 24, 2022, to October 6, 2022, as Exhibit 30 with respect to paragraph 3.2.21, which applies to RPAS take-off, launch, approach, landing and recovery. These manuals were not in effect on the day of the incident, but he pointed out that they represent good practices that a diligent pilot should have applied even before they came into effect. In particular, he referred to subsection 3.2.21 of these manuals, mentioning that the chosen site must be secured to ensure that no one in the vicinity ventures too close to, or enters, the take-off and landing area. This subsection suggests that a site can be secured by erecting physical barriers **to ensure that the public does not access** the area during the operation **or by having crew members perform a crowd control function**. These recommendations aim to prevent public access to the area. In this case, the operation took place on a private site secured to prevent access by the general public.

[67] The applicant's security plan filed as Exhibit 10 states that the operations perimeter, and the take-off and landing zones would be secured according to the established plan, without defining how they would be secured. In this case, the plan drawn up by the applicant for the take-off site was the green zone, which is quite large and identified on the Google Maps aerial map as

part of the authorization request (see Felixpier Bergeron's email and the map filed as Exhibit 8). No other plans were submitted. According to the applicant's witnesses, the entire green zone was secured by the fact that the Canada Malting site was itself secured and not accessible to the public. They stated that perimeter indicators or markers are more commonly used on public sites during special events such as the RPAS operation during the Pope's visit last July.

[68] Although it is recommended that prudent and diligent pilots indicate the boundaries of the landing zone by means of physical barriers, this is not the only recommendation. A crew member doing crowd control can compensate for the absence of physical barriers, as specified in the *Aeronautical Information Manual*. The Tribunal is of the opinion that the recommendation of installing physical barriers must be analyzed in the specific context of each situation, the intention of the legislator in subsection 901.33 of the *CARs* being to prevent any collisions with a person, an obstacle or another aircraft.

[69] The context of this case is particular, and different from a situation in which an RPAS is operated as part of a public event or from a public site. In order to be able to carry out the operation safely, the applicant chose to conduct its operation very early in the morning before Canada Malting employees were on site and when the Canada Malting site was not accessible to the general public (secured by a gatehouse and a guard controlling access). Mr. Sauvé confirmed that he had not encountered any pedestrians on his way to the interception site. In this context, the Tribunal concludes that the installation of physical barriers was not necessary to ensure that the chosen site was suitable and that, to prevent anyone from accessing the site, it may have been sufficient for a crew member to control the chosen take-off and landing site located on a controlled-access private site.

[70] In his testimony, the expert Mr. Lyras acknowledged that these recommendations were alternatives and that control of the selected take-off and landing area by a crew member was sufficient. He pointed out, however, that according to the evidence, Mr. D. E. Durivage did not give Mr. Sauvé clear instructions as to the distance to be respected, namely at least five metres from the landing site, which represents the distance set out in Mr. D. E. Durivage's pilot certificate filed as Exhibit 17 (in terms of approved safe distances). According to Mr. Lyras, the observer would also have needed to be outside the vehicle to ensure that the landing area was properly secured and controlled.

[71] The Tribunal is also of the opinion that, even if the operation of an RPAS takes place on a private site, in the absence of physical barriers, a prudent and diligent pilot should ensure that the site chosen for the operation in question is suitable within the meaning of section 901.33 of the *CARs*, by ensuring that access was controlled and thus preventing any potential collision with a bystander. In this case, the only issue that remains to be analyzed is whether the pilot controlled the chosen site to prevent anyone from approaching it.

[72] The fact that the RPAS landed three metres away from Mr. Sauvé was not contradicted by the pilot or the observer. A drone pilot himself, Mr. Sauvé stated at the hearing that he had received no instructions and had been surprised that the landing site was only three metres away from him. However, during his telephone conversation with Mr. Melançon (Exhibit 14), Mr. Sauvé stated that Mr. D. E. Durivage had told him to wait before making his way over to him, so that he could land the RPAS. Mr. D. E. Durivage indicated that he had asked Mr. Sauvé

to stand aside, as he needed to land the RPAS. He reportedly issued his instructions by rolling down the vehicle window. Mr. A. Durivage did not testify to this fact. The Tribunal concludes that Mr. D. E. Durivage did speak to Mr. Sauvé before landing the RPAS. There are, however, discrepancies in the testimony as to the exact subject of the conversation.

[73] Mr. D. E. Durivage acknowledged that he and the observer remained in the vehicle when the RPAS landed. The Tribunal is of the opinion that, with the crew members remaining in the vehicle, the pilot did not fulfill his duty to secure the chosen landing site, given the absence of physical markers. The Tribunal agrees with the expert opinion of Mr. Lyras that the observer should have been outside the vehicle to ensure that the landing site was properly secured and controlled. At the very least, the observer should have stepped out of the vehicle to ensure that Mr. Sauvé was kept away from the site chosen for take-off, even if a verbal warning may have been issued from the vehicle (either to indicate that the RPAS had to be landed before the meeting, or to say to stay away). Such a warning would not have been as clear as an in-person control or the physical presence of a crew member (and more specifically the observer) near the chosen site, so that he could intervene to clearly indicate the boundaries of the chosen site (a distance of five metres as prescribed by the pilot certificate) and thus prevent Mr. Sauvé from approaching it. The evidence shows that the landing occurred three metres from Mr. Sauvé, which demonstrates that the site was not sufficiently secured so as to comply with the prescribed five-metre distance.

[74] In these circumstances, the Tribunal is of the opinion that the respondent has demonstrated, on a balance of probabilities, that the applicant contravened section 901.33 of the *CARs* by failing to ensure that the site chosen for the landing of the RPAS was suitable and, more specifically, by failing to take appropriate measures to control access to the perimeter of the chosen area.

[75] The applicant has not invoked the due diligence defence under section 8.5 of the *Act*, nor has it adduced any evidence to demonstrate that it exercised all due diligence to prevent contravening section 901.33 of the *CARs*.

D. Administrative monetary penalty

[76] Schedule II to subsections 103.08(1) and (2) of the *CARs* provides that the maximum AMP amount for a corporation violating section 901.33 is \$5,000.

[77] The onus is on the respondent to show that the amount of the penalty is justified. At the hearing, Martin Forget, enforcement advisor for the respondent Minister, explained that he had recommended a penalty of \$2,500 as indicated in the Notice, even though investigator Melançon had recommended an amount of \$1,250. At the hearing, Mr. Melançon filed his report as Exhibit 23, indicating that the applicant had no previous enforcement record with respect to aeronautics and that the applicant had contributed to the investigation, and that he had therefore recommended an amount of \$1,250.

[78] Mr. Forget justified the increase in the penalty to \$2,500 (double the amount) by pointing out that the applicant's owner or affiliated persons had a similar history of drone operation, demonstrating a disregard of the regulations that should be taken into account in punishing the

applicant. Exhibit 22 (statement of information of a corporation in the business registry) shows that Communications Rivage Inc. is the majority shareholder of the applicant and that Pierre Durivage is its director. No evidence has been provided as to the corporate relationship with Mr. D. E. Durivage (whether in relation to the applicant or Communications Rivage Inc.). No evidence was provided as to the shareholders of Communications Rivage Inc. The only corporate link proven was between the applicant and Communications Rivage Inc., which is the majority shareholder. The respondent is using this corporate link to try to lift the corporate veil and justify an aggravating factor, but is applying it to all the offences covered by the notices filed as Exhibit 25. It is up to the Minister to justify and prove an aggravating factor.

[79] Five notices of assessment of monetary penalty were filed in bundles (Exhibit 25), along with three receipts for payments made by Mr. D. E. Durivage, for four enforcement cases, and one receipt for a payment made by Communications Rivage Inc. for another offence (Exhibit 26). If we analyze the notices of monetary penalty filed as Exhibit 25, four notices concern the failure of **Les Films Dizi inc.** (another corporation distinct from the applicant now doing business as Dizi Films) or **David-Étienne Durivage** to operate an unmanned aerial vehicle in flight except in accordance with a flight operations certificate, thereby contravening section 602.41 of the *CARs*, during the period from August 5, 2013, to January 22, 2017. Another Notice of Monetary Penalty concerns an offence alleging that **Communications Rivage Inc.** operated an unmanned aerial vehicle except in accordance with an SFOC, operating it within 2,000 feet from a built-up area and within 5 nautical miles from the centre of an aerodrome and in controlled airspace, contrary to section 603.66 of the *CARs*. The offences under section 602.41 of the *CARs* do not describe how the operation in question contravened the air operations certificate, and they involved persons for whom no corporate link with the applicant has been proven by the respondent. Mr. D. E. Durivage contested the use of these notices of penalty, notably on the grounds that they were not directed at the applicant. In this context, the evidence is not sufficient to allow the Tribunal to use these offences in analyzing the amount of the AMP.

[80] Communications Rivage Inc. is the majority shareholder of the applicant and is the subject of a contravention of section 603.66 of the *CARs*. The facts of the case, namely the failure to comply with an SFOC regarding the area of operation of a drone flight in relation to a built-up area and controlled airspace, are different from those alleged in this case.

[81] It should be pointed out that if the alleged facts had been similar to previous offences, or if corporate links had been proven with regard to all these previous offences, the respondent has in any case provided no legal justification or evidence to lift the corporate veil. The courts agree to lift the corporate veil when a company is incorporated or used to circumvent laws or contractual obligations or as a shield for fraud or improper conduct,² and no evidence was provided in that regard.

[82] Mr. D. E. Durivage indicated that the persons concerned by the contraventions filed as Exhibit 25 were not the applicant, and added that they had been required to pay these notices of

² *Kosmopoulos v. Constitution Insurance Co.*, [1987] 1 S.C.R. 2, paragraph 12, *Mitchell v. Lewis*, 2016 ONCA 903, paragraph 18, and *Minister of Transport v. Stage Air South Ltd.*, 2004 File No. P-2585-41 of CA TAT (Appeal).

monetary penalty and had not been able to contest them because the Minister refused to issue SFOCs for their operations while the penalties remained unpaid. A halt to the companies' operations was inevitable, according to Mr. D. E. Durivage, if the AMPs had not been paid, given the pressure exerted by the Minister.

[83] Mr. D. E. Durivage added that these earlier cases were irrelevant, as the rules governing RPAS operations have changed significantly since 2013. Indeed, Mr. Forget acknowledged that the new provisions of the *CARs* concerning drones had been in force since 2020.

Mr. D. E. Durivage said that, because of his experience in drone operations, he had helped with the development of the rules governing drones in meetings with the Minister to better adapt them to the commercial operations of RPAS operators. He argued that it was therefore unfair for the Minister to rely on those offences, which were unrelated to the one at issue and involved other people, to justify an aggravating factor and involving regulations that had evolved.

[84] The Tribunal's appeal decision in *Minister of Transport v. Kurt William M. Wyer*, 1988, CAT File No. O-0075-33 (Appeal), sets out, without limitation, the aggravating and mitigating factors that may be considered in striking the appropriate balance in light of the principles governing the imposition of a fine or other penalty, as follows:

1. Aggravating factors:

- infractions involving dishonesty
- planned breaches
- premeditated breaches
- extent of harm to victims of the offence
- **past record of similar offences**
- prevalence of the offence

2. Mitigating factors:

- no previous offences
- time since last offence
- degree of remorse
- whether or not an admission of the offence
- degree of cooperation with authorities
- delay between the commission of the offence and the time of the sentence
- conduct (involvement) of any "victims"
- restitution
- type of operation (commercial or private flight)
- impact on aviation community
- special factual circumstances
- relevance of *Enforcement Manual* recommendations
- effect of a monetary v. suspension penalty on individual
- occurrence impact on aviation safety

- manner of proceeding by authorities

Ultimately, the principles annunciated and the factors effecting the level of penalty must be considered on an individual basis in the context of the circumstances of the specific occurrence. The list noted above is not intended to be in any particular prioritized order, nor is the list necessarily complete. [Emphasis added.]

[85] Aggravating factors include **past record of similar offences**. In the case at hand, the offence found concerning Communications Rivage Inc. and section 603.66 of the *CARs* was not similar. Moreover, the evidence does not show that the applicant acted dishonestly, in a planned or premeditated manner, nor that any harm was caused. It also targets a separate legal entity without demonstrating that the corporate veil should be lifted. Contrary to the respondent's claim, there are therefore no aggravating factors.

[86] Furthermore, the fact that there were **no previous offences** constitutes a mitigating factor. The prior offence of Communications Rivage Inc., the applicant's shareholder, cannot be considered because it is a separate legal entity and the respondent has neither justified nor proven that the corporate veil should be lifted in order to consider this offence.

[87] The absence of previous offences and the applicant's cooperation in the investigation and at the hearing (through its numerous admissions), as well as the particular circumstances of the operation (a secure private site and the applicant's voluntary choice to conduct the operations early in the morning for greater safety and at a time when there was no one at the site of the operations except Mr. Sauvé) are mitigating factors that the Minister should have taken into account in assessing the penalty.

[88] In the circumstances, the Tribunal reduces the AMP to \$1,250. This amount is sufficient to dissuade the applicant from reoffending and to encourage it to take more appropriate measures to control for the take-off and landing sites chosen for future RPAS operations. This amount is also sufficient to dissuade members of the aviation community who operate RPASs on private sites from not taking measures to secure RPAS take-off and landing sites.

IV. DETERMINATION

[89] The Minister of Transport has not demonstrated, on a balance of probabilities, that the pilot or his observer failed to have the remotely piloted aircraft system in visual line-of-sight at all times during flight on January 29, 2020. The first contravention of the Notice of Assessment of Monetary Penalty for contravening subsection 901.11(1) of the *Canadian Aviation Regulations* is therefore dismissed.

[90] The Minister has demonstrated, on a balance of probabilities, that the applicant contravened section 901.33 of the *Canadian Aviation Regulations* by failing to ensure that the site set aside for the landing of the remotely piloted aircraft system was suitable and, more specifically, by failing to take appropriate measures to secure the perimeter of that site.

[91] The Tribunal reduces the amount of the administrative monetary penalty to \$1,250 for this infraction.

[92] The total amount of \$1,250 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 decision.

January 19, 2023

(Original signed)

Caroline Desbiens
Member

Representations

For the Minister:	Alexandre Petterson
For the Applicant:	David Etienne Durivage