Federal Court  Cour fédérale

Date: 20170609

Docket: T-1793-16

Citation: 2017 FC 567

Ottawa, Ontario, June 9, 2017

PRESENT: The Honourable Mr. Justice Mosley

BETWEEN:

THE ATTORNEY GENERAL OF CANADA

Applicant

and

BRADLEY FRIESEN

Respondent

JUDGMENT AND REASONS

I. INTRODUCTION

[1] Bradley Friesen thought that it would be a good idea to film a video of a helicopter sliding between skaters playing hockey on an alpine lake for online publication. The Minister of Transport disagreed and fined him $1000 for contravening section 602.01 of the *Canadian Aviation Regulations*, SOR/96-433 [CAR]. A Review Panel of the Transportation Appeal Tribunal of Canada (TATC) upheld that finding and penalty. An Appeal Panel reversed the

Review Panel's decision. In this application, the Attorney General of Canada seeks judicial review of the Appeal Panel's ruling, under section 18.1 of the *Federal Courts Act*, RSC, 1985, c F-7.

[2] For the reasons that follow, the application is granted.

II. BACKGROUND

[3] Mr. Friesen has been a helicopter pilot for approximately 25 years with up to 3,500 hours of experience. On December 8, 2013, he staged an event to create a YouTube video of a helicopter sliding on the ice through a group of hockey players on a frozen lake in British Columbia. In these proceedings, the event was described as a "stunt" in the sense of an exciting manoeuvre. The stunt was performed with the assistance of a stunt coordinator and eight skaters, two of whom were helicopter pilots. Each of the players was an expert skater; some had played hockey at the semi-professional level. Mr. Friesen was the pilot operating the helicopter.

[4] On December 7, 2013, a day before conducting the stunt, Mr. Friesen flew his helicopter to a nearby lake and measured the ice thickness at 11 inches. He took precautions before the event such as conducting a safety briefing for the participants, demonstrating the ice slide and positioning the hockey players on the ice on either side of a ten-foot gap. Ultimately, the maneuver was conducted without incident and the video was posted online. Following the publication of some comments about the stunt, Mr. Friesen reported the event to Transport Canada officials and explained the safety precautions that had been taken.

[5] On January 14, 2014, the Minister of Transport issued a Notice of Assessment of Monetary Penalty of $1,000 to Mr. Friesen for contravening section 602.01 of the CAR. The Minister alleged that Mr. Friesen, as the pilot-in-command, operated the helicopter in such a reckless or negligent manner as to be likely to endanger the property or life of any person.

[6] Mr. Friesen applied for a review of that Notice. He was unsuccessful at the first level of review by the TATC, which upheld the finding of a contravention and the imposition of the monetary penalty. Mr. Friesen appealed that determination to a TATC Appeal Panel. In a decision dated September 20, 2016, the Appeal Panel found that the Minister had failed to prove that Mr. Friesen violated section 602.01 of the CAR, and cancelled the monetary penalty of $1,000. It is that decision which is the subject of this application by the Attorney General.

III. DECISION UNDER REVIEW

A. *TATC Review Determination*

[7] At the initial review stage, the only witness appearing on behalf of the Minister was Ross Bertram, an investigator for Transport Canada, with 13 years of experience in the enforcement branch. Mr. Bertram expressed the view that the stunt was a dangerous operation. He testified that the hockey players could have been hit by the helicopter or rotor blade, or could have slipped on the ice and been run over.

[8] Mr. Friesen had failed to obtain a Special Flight Operations Certificate (SFOC) prior to conducting the stunt. A person can request such a certificate if they are planning something that

could create an additional danger or would contravene the CAR. According to Mr. Bertram, the SFOC application would lead to an exchange of information, and if certain conditions were met, an exemption from the CAR might be given. Mr. Friesen's evidence was that it was impossible for him to obtain an SFOC in the time-frame available to him. Also, it was his understanding that they were only available to commercial aircraft operations whereas he was a private operator.

[9] Mr. Friesen described the safety precautions that he had undertaken prior to and while conducting the stunt. In an email from Mr. Friesen to Mr. Bertram, dated December 10, 2013, he had described the precautions as follows:

(a) he measured the ice thickness the day before the stunt was conducted;

(b) he confirmed the weight supporting ability of that thickness of ice;

(c) he practised sliding on the ice with the helicopter, with 100 to 150 lbs. of the helicopter's weight on the ice;

(d) on the day of the event, he conducted an initial safety briefing with all participants;

(e) he personally walked the area of the proposed ice slide and confirmed that there were no ridges or holes in the ice;

(f) two of the skaters were themselves commercial helicopter pilots and brought their hand-held radios to act as coordinators;

(g) a detailed safety briefing and walk-through was conducted on-site and positions for the players established, leaving "a small hole" between them;

(h) he then flew the helicopter, slowly descended onto the ice at a speed of 15 knots and slid toward the hole in the line of skaters;

(i) he placed the two helicopter pilots on the rotor side, to the left, to keep the other players as far from the rotor as possible;

(j) once completely past the line of players, he waited an additional two seconds before lifting into the air and turning; and,

(k) three helicopters were on standby in case of an incident and first aid-trained individuals were present.

[10] Evidence was also called on Mr. Friesen's behalf from several other witnesses. They included one of the hockey players on the ice during the stunt who testified that he had at no time feared for his safety. In addition, a former Royal Canadian Air Force pilot with 15,000 hours of flight experience, including 5,000 hours of helicopter experience, was qualified as an expert witness. Both he and the on-site stunt coordinator, who had 21 years of experience in the film industry, gave evidence that there were no other safety measures that Mr. Friesen could have taken short of not performing the stunt at all.

[11] Having reviewed the evidence submitted at the hearing, the Review Member identified and considered the following three issues in his analysis:

(1) Did the maneuver endanger, or was it likely to endanger, the lives of the participants?

(2) If the maneuver did endanger or was likely to endanger the lives of the participants, was Mr. Friesen reckless or negligent, or both?

(3) If the maneuver did endanger or was likely to endanger the lives of the participants, was the danger mitigated by the due diligence of Mr. Friesen?

[12] The Member found that the act of sliding the helicopter through the gap between the hockey players constituted a danger or a likelihood of danger to them. He gave the expert witness's evidence diminished weight primarily because he had based his report solely on what he had been told by Mr. Friesen and it conflicted somewhat with what was shown in the video.

[13] Based on his own viewing of the video, the Member concluded that there was a "very real possibility" that the players would have been struck by the Helicopter's skids, had they not moved out of the way. If not struck, the players would have been approximately two to three feet from the spinning tail rotor. In the Member's view, that was an insufficient distance from the tail rotor for it to pose no risk at all.

[14] The Member found that Mr. Friesen was not reckless due to the precautions he had taken. However, Mr. Friesen was found to be negligent in that he did not operate his helicopter as a "reasonable and prudent pilot" would have, because he put the safe outcome of the maneuver in the hands of the hockey players. In other words, Mr. Friesen, as the pilot-in-command, was not in control because others had to move out of the way to maintain an adequate margin of safety.

[15] The Member cited section 8.5 of the *Aeronautics Act*, RSC, 1985, c A-2 [*Aeronautics Act*], to say that a person is required to exercise all due diligence. The Member found that Mr. Friesen could have sought relief from the regulations by obtaining an SFOC. The Member also concluded that Mr. Friesen could have created a wider pre-existing gap between the players, such that they would not have been required to move in order to avert a likelihood of danger. The

Member concluded that, as a finding of negligence had been made, the defence of due diligence was not open to Mr. Friesen.

B. *TATC- Appeal Decision*

[16] The Appeal Panel limited the scope of the appeal to the following issues: (1) the Review Member's handling of the expert evidence; and (2) the issues of standard of care and negligence; and (3) the defence of due diligence. The panel framed all of these issues as questions of law attracting the standard of correctness.

[17] In rendering its decision, the Appeal Panel first identified the standard of review in the context of a statutory appeal within an administrative tribunal. Relying on the Federal Court's decision in *Huruglica v Canada (Citizenship and Immigration)*, 2014 FC 799, [2014] FCJ No 845 [*Huruglica FC*], the Panel noted that the standard to apply in such situations went hand in hand with the statutory intent found in the enabling legislation. The Panel further noted that a TATC appeal is a proceeding that allows for a revision of the Review Member's determination by an appeal panel that has the same specialized expertise as the Review Member.

[18] The Panel concluded that the standard of review to be applied to the Review Member's decision was one of reasonableness for questions of fact, including credibility, and mixed fact and law, and one of correctness for questions of law.

[19] With regard to the expert evidence received at the review stage, the Appeal Panel found that it was uncontroverted. The only difference between the expert evidence and the evidence

presented by the Minister (i.e. Mr. Bertram's evidence), the Panel noted, is that Mr. Bertram was giving opinion evidence but was not qualified as an expert at the review hearing.

[20] Citing the Supreme Court's decision in *R v Molodowic*, 2000 SCC 16, [2000] SCJ No 17 [Molodowic], the Appeal Panel stated that it could be unreasonable to reject expert evidence if there is no contradictory evidence and the opinion of the expert is not seriously challenged. As the expert evidence presented on behalf of Mr. Friesen was not diminished, the Appeal Panel concluded that it was not reasonable for the Review Member in this instance to reject or give it diminished weight.

[21] The Appeal Panel found that in the context of this case, the appropriate standard of care must be that of an experienced helicopter pilot conducting a specialized maneuver involving people on the ground as opposed to the standard of a "prudent pilot". This had not been addressed by the Minister's evidence at the review hearing. Moreover, the Minister made no submissions to establish what standard would be required where a helicopter pilot is conducting a unique, but not prohibited, maneuver involving people on the ground.

[22] The Minister's witness had identified any number of things that "could have" occurred during the helicopter slide sequence. The key question for the panel was whether "could have" equates to "likely to" as required by section 602.01 of the CAR. Given the uncontroverted expert evidence that there was no risk of injury, the Appeal Panel concluded that a finding of "likely to endanger" could not be made, and decided that the Minister failed to prove this necessary element of the offence.

[23] Section 8.5 of the *Aeronautics Act*, provides for a defence of due diligence to charges of contraventions of the Act and regulations. As noted, the Review Member found that Mr. Friesen had failed to take all reasonable steps to minimize the possible dangers because he could have applied for an SFOC, or could have required a wider gap between the skaters prior to beginning the manoeuvre.

[24] The Appeal Panel disagreed with this finding. Based on the facts established in the evidence regarding the precautionary steps taken by Mr. Friesen, and the expert evidence to the effect that the precautions implemented by Mr. Friesen resulted in a "no risk" scenario, the Appeal Panel determined that Mr. Friesen did meet the requirement of due diligence under section 8.5 of the *Aeronautics Act*.

IV. RELEVANT LEGISLATION

[25] The relevant provisions of the *Aeronautics Act*, RSC, 1985, c A-2, the *Transportation Appeal Tribunal of Canada Act* SC 2001, c 29 and the *Canadian Aviation Regulations* are attached as a schedule to this decision.

V. ISSUES

[26] Having considered the parties' submissions, I would frame the issues as follows:

A. What is the standard of review to be applied by this Court to the TATC Appeal Panel's decision

B. What is the standard of review to be applied by the TATC Appeal Panel to the Review Member's decision

i. Did the TATC Appeal Panel err in its treatment of the expert evidence?

ii. Did the TATC Appeal Panel err in extending the standard of care to that of an "experienced helicopter pilot conducting a specialized maneuver involving people on the ground"?

VI. ANALYSIS

A. *What is the standard of review to be applied by this Court to the TATC Appeal Panel's decision?*

[27] The applicant submits that the question of whether the Appeal Panel chose the proper standard of review is a question of law that does not engage the Appeal Panel's specialized expertise in aeronautics and air safety. Therefore, the standard of review to be applied by this Court to the Appeal Panel's decision is correctness: *Monsanto Canada Inc v Ontario (Superintendent of Financial Services)*, [2004] 3 SCR 152, 2004 SCC 54, at para 6 [*Monsanto*]; *Billings Family Enterprises Ltd v Canada (Minister of Transport)*, 2008 FC 17, [2008] FCJ No 17, at paras 26-27 [*Billings*].

[28] The respondent submits that the standard to be applied by this Court is reasonableness: *Gabila v Canada (Minister of Citizenship and Immigration)*, 2016 FC 574, [2016] FCJ No 560 at para 19, citing *Huruglica v Canada (Minister of Citizenship and Immigration)*, 2016 FCA 93, [2016] FCJ No 313 at para 35 [*Huruglica FCA*].

[29] *Monsanto* and *Billings* both predate *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] SCJ No 9 [*Dunsmuir*] and *Huruglica FCA*. In *Monsanto*, the Supreme Court applied the pragmatic and functional approach to reach the conclusion that the appropriate standard of review of a decision by the Ontario Financial Services Tribunal was correctness.

[30] *Billings* involved multiple findings of contraventions of the CAR in relation to the operation of helicopters. An appeal panel of the TATC upheld the contravention findings but reduced the monetary penalties imposed by the Minister. On judicial review and applying the pragmatic and functional test, Justice Sean Harrington found, at paragraph 27, that the standard was patent unreasonableness for questions of fact, reasonableness for mixed questions of fact and law, and that no deference was owed by this Court to the TATC on questions of law.

[31] *Huruglica FCA* arose in the context of judicial reviews of decisions of the Refugee Appeal Division under the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA]. As stated by Justice Gauthier at paragraph 30, there is now a presumption that reasonableness applies to all questions of law arising from the interpretation of an administrative body's home statute: *McLean v. British Columbia (Securities Commission)*, 2013 SCC 67, [2013] 3 S.C.R. 895; *Smith v. Alliance Pipeline Ltd.*, 2011 SCC 7, [2011] 1 S.C.R. 160; and *Canadian National Railway v. Canada (Attorney General)*, 2014 SCC 40, [2014] 2 S.C.R. 135.

[32] More recently, a majority of the Supreme Court of Canada confirmed in *Edmonton (City) v Edmonton East (Capilano) Shopping Centres Ltd.*, 2016 SCC 47, [2016] SCJ No 47 at paragraph 22 [*Edmonton East*], that the reviewing court should begin by considering whether the

issue involves the interpretation by an administrative body of its own statute or statutes closely connected to its function. If so, the standard of review is presumed to be reasonableness.

[33] In *Dunsmuir*, above, at paragraph 57, the Supreme Court held that an exhaustive analysis is not required in every case to determine the proper standard of review, as "existing jurisprudence may be helpful in identifying some of the questions that generally fall to be determined according to the correctness standard" [emphasis added].

[34] In a case post-dating *Dunsmuir*, Justice James O'Reilly noted that judicial review of decisions of a TATC appeal panel is "generally conducted on a reasonable standard": *Canada (Attorney General) v Annon*, 2013 FC 5, [2013] FCJ No 8, at para 13 [*Annon*]. This was because the appeal panel is regarded as having expertise in transportation matters and renders its decisions largely on findings of fact or mixed questions of fact and law. He concluded that the same should apply to decisions of a single member of the TATC. Justice O'Reilly singled out issues of jurisdiction, at paragraph 14 of *Annon*, as attracting the correctness standard.

[35] The Supreme Court and Federal Court of Appeal have warned against expansive interpretations of jurisdiction or of overlapping jurisdiction: see *Huruglica FCA*, above, at para 33. No questions of jurisdiction are at issue in these proceedings.

[36] The applicant argues that this Court owes no deference to the TATC Appeal Panel's decision on the proper standard of review to be applied, as that is a question of law which does not engage the Appeal Panel's specialized expertise in aeronautics and air safety. However, as

mentioned above, relying on *Huruglica FCA*, the respondent submits that the standard to be applied by this Court to the TATC Appeal Panel decision is reasonableness.

[37] The applicant contends that *Huruglica FCA* is irrelevant to this judicial review and distinguishable on the ground that it has no precedential value outside the IRPA scheme. She points to comments in *Huruglica FCA*, at paragraphs 31 and 66, where the Federal Court of Appeal states that "it is not useful to look at decisions regarding the role of administrative appeal bodies other than those created under the IRPA" as the language in the statutes varies. It is the applicant's position that the language authorizing the Refugee Appeal Division's (RAD) powers in sections 67, 110, and 111 of the IRPA cannot be found in the TATC statutory scheme or its regulations.

[38] Moreover, the applicant submits that the TATC Appeal Panel's expertise is in aeronautics and aviation safety, not necessarily helicopter safety. In this case, the applicant argues, the Appeal Panel is not in a better place than the Court to determine what standard of review should be applied to the Review Panel's determination. Moreover, this Court has already determined the standard of review to be correctness in *Billings*, above, at paragraphs 26-27.

[39] Gauthier J.A.'s reasons in *Huruglica FCA* focused on the statutory scheme and language used in the IRPA. She agreed with the Minister's submission that the Federal Court judge in that case (and others who had applied the same reasoning) misconstrued the limited exceptions where the standard of correctness may be applied.

[40] The applicant relies on the following statement in paragraph 31 where Justice Gauthier said:

> […] I simply cannot conclude that a question of law involving the interpretation of an administrative body's home statute so as to determine its appellate role has any precedential value outside of the specific administrative regime in question […].

[41] However, I note that this followed a broader statement made in paragraph 30 regarding the "presumption that reasonableness applies to all questions of law arising from the interpretation of an administrative body's home statute". Further, at paragraph 32, Gauthier J.A. stated the following:

> **32** Just as legal principles applicable to cost awards and to time limitations have been found to fall within the expertise of the administrative bodies involved in *Canada (Canadian Human Rights Commission) v Canada (Attorney General),* 2011 SCC 43 at para. 25, [2011] 3 S.C.R. 471 and *McLean* at para. 21, defining the scope of its appellate function (or its standard of review) must be within the RAD's expertise. [Emphasis added]

[42] The applicant also relies on *Monsanto,* above, to argue that where an Appeal Panel chooses the wrong standard of review, the Court should correct the error. In my view, the applicant's reliance on *Monsanto* is misplaced in light of the FCA's decision in *Huruglica* and the Supreme Court's decisions in *Dunsmuir* and subsequent decisions including, *Edmonton East*.

[43] In *Monsanto,* the only issue in the appeal before the Supreme Court was whether the Financial Services Tribunal properly interpreted subsection 70(6) of the Ontario *Pension Benefits Act* as not requiring distribution of the actuarial surplus on a partial plan wind-up. Notably, interpreting subsection 70(6) was a pure question of law which concerned the establishment of

statutory rights. As such, the Supreme Court deemed it necessary to engage in strict statutory interpretation to determine the meaning of that provision.

[44] The present matter can easily be distinguished from the nature of the issue in *Monsanto*. The TATC Appeal Panel's determination of its appellate role is indeed a question of law, but it is inextricably linked to an interpretation of its home statute. An administrative tribunal determines its appellate role by interpreting its home statute and regulations: *Huruglica FCA*, above, at para 31. Further, there is a presumption that deference will usually apply where a tribunal is interpreting its own statute or statutes closely connected to its function, with which it will have particular familiarity: *Dunsmuir*, above, at para 54. Therefore, this Court owes deference to the TATC Appeal Panel's determination of its appellate function.

[45] At the hearing, the applicant argued that the kind of language used in sections 67, 110 and 111 of the IRPA does not exist in the TATC statutory context. According to the applicant, the absence of such language means that the TATC lacks the powers and authority that the RAD enjoys.

[46] A review of the relevant provisions in the IRPA, the TATC Act, and the *Aeronautics Act*, suggests that the RAD and the TATC appeal panel enjoy a similar statutory foundation. For example, a comparison of the language used in section 110 of the IRPA and section 14 of the TATC Act, demonstrates that both the RAD and the TATC Appeal Panel are authorized to review the whole record which was before the tribunal below on the merits. Moreover, the

TATC Appeal Panel is empowered to dispose of an appeal under subsection 8.1(3) of the *Aeronautics Act* in much the same manner that the RAD can under section 111 of the IRPA.

[47] Therefore, I am not persuaded that the Federal Court of Appeal's decision in *Huruglica* is distinguishable due to the unique statutory provisions of the IRPA. In my view, the reasoning in *Huruglica FCA* is applicable to the case at bar, and thus, the proper standard of review to be applied by this Court to the TATC Appeal Panel's decision is reasonableness.

[48] In the event that I err in that conclusion, I would add that applying the factors set out by the Supreme Court in *Dunsmuir* at paragraph 55 arrives at the same result. Section 21 of the TATC Act provides that a decision of an appeal panel is final and binding on the parties to the appeal. As noted in *Dunsmuir*, at paragraph 52, the existence of a privative clause "gives rise to a strong indication of review pursuant to the reasonableness standard" as it is evidence of Parliament's intent that an administrative decision maker be given greater deference and that interference by reviewing courts be minimized.

[49] While the existence of a privative clause is not determinative, the other factors also point to the reasonableness standard. The purpose of the regime underpinning the TATC is to deal with matters pertaining to aviation security informally and expeditiously: see TATC Act, s. 15(1). The TATC Appeal Panel is regarded as having expertise in transportation matters and charged with making decisions to protect public safety: *Billings,* above, at para 27; *Annon*, above, at para 13. Deference is presumed where an administrative tribunal has developed particular expertise in the application of rules in relation to a specific statutory context: *Dunsmuir,* above, at para 54.

[50] While the underlying issue regarding the TATC Appeal Panel's determination of the appropriate standard of review is a question of law, this does not automatically result in an application of the correctness standard. The Supreme Court in *Dunsmuir*, at paragraph 55, stated that the nature of the question of law must also be examined. The question of law at issue is neither of central importance to the legal system nor does it fall outside the specialized area of expertise of the TATC Appeal Panel. A question of law that does not rise to this level may be compatible with a reasonableness standard where the two other factors also indicate a reasonableness review: *Dunsmuir*, above, at para 55.

[51] Considering the privative clause, the nature of the regime as set out by the TATC Act and the *Aeronautics Act*, and the nature of the question of law at issue here, I conclude that the appropriate standard to be applied by this Court to the TATC Appeal Panel's decision is reasonableness.

B. *What is the standard of review to be applied by the TATC Appeal Panel to the Review Member's determination?*

[52] The TATC Appeal Panel found that questions of credibility, fact and mixed fact and law attract a reasonableness standard, while questions of law attract a correctness standard: *Huruglica FCA*, above; *Farm Air Ltd v Canada (Minister of Transport)*, 2011 TATCE 20; *Canada (Minister of Transport) v NAV Canada*, 2010 TATCE 28 (Appeal) at para 11; *Canada (Minister of Transport) v Air Saguenay (1980) Inc.*, 2015 TATCE 13 (Appeal) at paras 8-11; *Annon*, above, at para 16.

[53] The applicant does not take issue with the Appeal Panel's conclusion that a question of law, which is on appeal before the TATC, is to be reviewed on a correctness standard. Instead, the applicant submits that the Appeal Panel erred in its characterization of the matters before it as questions of law. According to the applicant, all of the issues before the Appeal Panel involved questions of mixed fact and law subject to the standard of review of reasonableness.

[54] The respondent submits that the appeal panel applied the correct standard as mandated by *Huruglica FCA*, above. Further, the respondent relies on the Supreme Court's decision in *Housen v Nikolaisen*, 2002 SCC 33, [2002] 2 SCR 235 [*Housen*], at paragraph 27, to argue that it is an error of law to apply an incorrect principle of law. Moreover, the respondent submits, "what appears to be a question of mixed fact and law, upon further reflection, can actually be an error of pure law": *Housen*, above, at para 27.

[55] The respondent further argues that it was open to the appeal panel to extricate a question of pure law from an issue of mixed fact and law: *Sattva Capital Corp v Creston Moly Corp*, 2014 SCC 53, [2014] 2 SCR 633 at para 53 [*Sattva*].

[56] The Appeal Panel found errors of law regarding (1) proof of the relevant standard of care and whether there was any evidence of a breach of that standard, (2) the rules of law applicable to expert evidence, and (3) the required test for due diligence. The respondent submits that whether these issues constituted pure errors of law, or errors of law extricated from what might be initially characterized as an error of mixed fact and law is a matter for determination by the Appeal Panel, which is owed deference by this Court on judicial review.

[57] I find that the Appeal Panel erred in characterizing the Review Member's handling of the expert evidence as a question of law subject to the standard of review of correctness. In giving the expert evidence diminished weight, the Review Member had taken into consideration the factual foundation underpinning that evidence. As such, the treatment of the expert evidence was a question of mixed fact and law which should have been reviewed by the Appeal Panel on a reasonableness standard. I note that there is language in the Panel's analysis that indicates that it may have actually applied the appropriate standard. At paragraph 59, the Appeal Panel found that "it was unreasonable for the review member to reject or give diminished weight to the opinion evidence of Mr. Swallow".

[58] However, the Appeal Panel did not err in characterizing the standard of care and defence of due diligence issues as questions of law. It properly applied the standard of correctness to the questions of law it identified on those issues as provided by the established jurisprudence.

(i) Did the TATC appeal panel err in its treatment of the expert evidence?

[59] The Appeal Panel found that it was unreasonable for the Review Member to reject or give diminished weight to the expert evidence since there was no contradictory evidence and the opinion of the expert was not seriously challenged: *R v Molodowic*, 2000 SCC 16, [2000] 1 SCR 420 [*Molodowic*]. In doing so, the Appeal Panel noted that so long as there is some admissible evidence to establish the foundation of an expert's opinion, the opinion evidence is admissible. Citing *R v Abbey*, [1982] 2 SCR 24, the Appeal Panel stated that any failure to prove parts of the factual foundation of an opinion would go to the weight to be given that opinion.

[60] The applicant contends that the Review Member provided clear and cogent reasons for giving reduced weight to the expert's opinion. For instance, the Review Member found the expert's conclusion that the stunt posed no risk at all to be overstated, because that conclusion was not supported by a screen shot from the video. It is the sole purview of the trier of fact to determine the weight to be given to expert evidence. That assessment is owed deference on appellate review, especially where the Review Member and Appeal Panel have the same level of specialized expertise with respect to aviation safety. Ultimately, it is for the trier of fact alone to reach a conclusion on the ultimate issue based on the totality of the evidence: *R v Sekhon,* 2014 SCC 15, [2014] SCJ No 15 at paras 45-48 [*Sekhon*], citing *R v Mohan*, [1994] 2 SCR 9 [*Mohan*].

[61] In the respondent's view, the Review Member erred in law by substituting his own opinion for that of a qualified expert: *R v Lavallee,* [1990] 1 SCR 852 (QL) [*Lavallee*] at para 74. Moreover, the respondent argues, an expert is permitted to base his opinion on the facts in evidence without conducting his own investigation: Sopinka and Lederman, *The Law of Evidence in Canada* at para 12.34.

[62] In *Molodowic,* above, at paragraph 8, the Supreme Court held that, as a general principle, a jury may reject the opinion of experts, even when the experts called are unanimous and uncontradicted by other experts. However, the Court noted, there has to be a rational foundation in the evidence for the jury to reasonably reject the opinion of the experts.

[63] It was, therefore, open to the Appeal Panel in the present matter to assess the foundation upon which the Review Member rejected the expert evidence. However, the Appeal Panel found

that the Review Member erred because the expert's report was not refuted by any evidence presented by the Minister. In doing so, it appears to have provided significant weight to the expert evidence because it found that (1) the facts relied on by the expert were proven in evidence, (2) the expert's evidence was uncontroverted, and (3) the expert's evidence was not seriously challenged.

[64] The Appeal Panel focused on the expert's evidence with respect to the finding of "no risk" and Mr. Friesen's actions to mitigate the risk. The Appeal Panel noted that the Review Member's assessment of the ultimate issue of safety and conclusion on the finding of "no risk" was too narrow. In reaching this conclusion, it appears that the Appeal Panel accepted the opinion evidence of the expert on the ultimate issue of "risk" and took issue with the Review Member's own or different assessment of the video evidence presented during the hearing.

[65] At one time, opinion evidence that went directly to the ultimate issue would be excluded on that ground alone. That is no longer the case: *R v D.R.,* [1996] 2 SCR 291 at paras 38-39 (QL). However, the closer the evidence approaches the ultimate issue, the closer must be the scrutiny to which it is subjected: *R v J.-L.J.,* 2000 SCC 51, [2000] SCJ No 52 at para 37. It was not unreasonable for the Review Member; an individual specialized in the matters of aeronautics and transportation safety, to subject the expert evidence to closer scrutiny, especially in relation to the ultimate finding of "risk" to safety. Therefore, I conclude that the appeal panel erred in its treatment of the expert evidence.

(ii) Did the TATC appeal panel err in extending the standard of care to that of an "experienced helicopter pilot conducting a specialized maneuver involving people on the ground"*?*

[66] The applicant submits that the issues of whether Mr. Friesen met the standard of care and whether he exercised due diligence are entwined. Both issues require an assessment of the reasonableness of Mr. Friesen's actions in all the circumstances of the case.

[67] In particular, the applicant argues, the Review Member's determination that Mr. Friesen was negligent was owed deference; he had, the Member found, ceded an unacceptable level of control over the situation by engaging in a stunt that required other people to get out of his way in order for a margin of safety to be maintained. In addition, the Member found, Mr. Friesen had failed to exercise due diligence by applying for an SFOC, through which he could have obtained the benefit of Transport Canada's expertise and guidance regarding the safety issues inherent in the helicopter stunt.

[68] The respondent submits that the Review Member applied the wrong standard of proof of negligence under the CAR, as he made a finding of contravention on the basis of a "possibility" of endangerment. Section 602.01 of the CAR provides that "[n]o person shall operate an aircraft in such a reckless or negligent manner as to endanger or be likely to endanger the life or property of any person". This requires, the respondent argues, either actual endangerment or a likelihood of danger.

[69] Moreover, the respondent contends, the Review Member erred in law in finding that the Minister established negligence without tendering any evidence of the requisite standard of care

to be met by a helicopter pilot. The respondent argues that the Review Member applied the "reasonable man on the street" standard, rather than the standard for negligence applicable to a skilled helicopter pilot.

[70] The respondent relies on a line of authority in the British Columbia courts for the proposition that proof of the requisite standard of care is required in circumstances involving a specialized skill and knowledge: *Qureshi v Nickerson*, [1988] BCJ No 1659 at 2 [*Qureshi*]; *Gadsby v MacGillivray*, [1997] BCJ No 1564 at para 96.

[71] This line of authority stems from a decision of the Queen's Bench Division of the High Court of England and Wales which laid down what is known as the *Bolam* test: *Bolam v Friern Hospital Management Committee* [1957] 2 All ER 118 [*Bolam*]. This statement from *Bolam* was adopted by the British Columbia Supreme Court in *Qureshi*, above, at page 2 and in *Gadsby*, above, at para 96:

> But where you get a situation which involves the use of some special skill or competence then the test whether there has been negligence or not is not the test of the man on the top of a clapham omnibus because he has not got this special skill. The test is the standard of the ordinary skilled man exercising and professing to have that special skill.

[72] At paragraph 62 of its reasons, the Appeal Panel relied on the *Bolam* test in arriving at the conclusion that a specialized, as opposed to a general standard, is required when reviewing conduct involving specialized skills. However, the Panel failed to explain why the standard of a "prudent pilot" is a general standard and not a specialized standard. The standard of a "prudent

pilot" recognizes a special skill beyond the general standard of the "reasonable man" or "the man on the top of a Clapham omnibus" as discussed in *Bolam*.

[73] There is no doubt that Mr. Friesen is an experienced helicopter pilot. Mr. Friesen has been a helicopter pilot for approximately 25 years with up to 3,500 hours of flying experience. It is also clear that he took extensive safety precautions before performing the stunt. However, there was no evidence to support the proposition that Mr. Friesen has a special skill or competence in executing maneuvers or stunts, such as the one in this case.

[74] The TATC Appeal Panel erred, in the particular circumstances of this case, in concluding that the appropriate standard of care was that of an experienced helicopter pilot conducting a specialized maneuver involving people on the ground as opposed to the standard of a "prudent pilot". The Panel reached this conclusion in the absence of any evidence establishing that Mr. Friesen was experienced in conducting a specialized maneuver involving people on the ground.

[75] In the absence of any evidence to establish a specialized standard beyond that of a "prudent pilot" applicable to these circumstances, the Appeal Panel's conclusion on the standard of care is not reasonable.

[76] My finding on either the standard of care or expert evidence issue is determinative. I do not find it necessary to consider the Appeal Panel's treatment of the defence of due diligence issue as it is entwined with these two issues. The Panel accepted that Mr. Friesen exercised due

diligence because of the evidence that the steps he took resulted in a "no risk" scenario. In my view that conclusion should be revisited once the two key errors I have found are addressed.

[77] I would, therefore, grant the application and remit the matter to the TATC for reconsideration by a different Appeal Panel. The applicant shall have her costs in accordance with the normal tariff.

JUDGMENT in T-1793-16

THIS COURT'S JUDGMENT is that:

1. the application is granted;

2. the matter is remitted for reconsideration by a different Appeal Panel; and

3. the applicant shall have her costs in accordance with the normal tariff.

"Richard G. Mosley"
Judge

SCHEDULE

***Aeronautics Act*, RSC, 1985, c A-2**	***Loi sur l'aéronautique*, LRC (1985), ch. A-2**
Disposition of appeal	***Sort de l'appel***
8.1 (3) The appeal panel of the Tribunal assigned to hear the appeal may dispose of the appeal by dismissing it or allowing it and, in allowing the appeal, the panel may substitute its decision for the determination appealed against.	**8.1 (3)** Le comité du Tribunal peut rejeter l'appel ou y faire droit et substituer sa propre décision à celle en cause.
Defence	**Moyens de défense**
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.	**8.5** Nul ne peut être reconnu coupable d'avoir contrevenu à la présente partie ou aux règlements, avis, arrêtés, mesures de sûreté et directives d'urgence pris sous son régime s'il a pris toutes les précautions voulues pour s'y conformer.
***Canadian Aviation Regulations*, SOR/96-433**	***Règlement de l'aviation canadien*, DORS/96-433**
Reckless or Negligent Operation of Aircraft	***Utilisation imprudente ou négligente des aéronefs***
602.01 No person shall operate an aircraft in such a reckless or negligent manner as to endanger or be likely to endanger the life or property of any person.	**602.01** Il est interdit d'utiliser un aéronef d'une manière imprudente ou négligente qui constitue ou risque de constituer un danger pour la vie ou les biens de toute personne.
***Transportation Appeal Tribunal of Canada Act*, SC 2001, c 29**	***Loi sur le Tribunal d'appel des transports du Canada*, L.C. 2001, ch. 29**
Nature of appeal	**Nature de l'appel**

14 An appeal shall be on the merits based on the record of the proceedings before the member from whose determination the appeal is taken, but the appeal panel shall allow oral argument and, if it considers it necessary for the purposes of the appeal, shall hear evidence not previously available.

14 L'appel porte au fond sur le dossier d'instance du conseiller dont la décision est contestée. Toutefois, le comité est tenu d'autoriser les observations orales et il peut, s'il l'estime indiqué pour l'appel, prendre en consideration tout élément de preuve non disponible lors de l'instance.

Nature of hearings

15 (1) Subject to subsection (2), the Tribunal is not bound by any legal or technical rules of evidence in conducting any matter that comes before it, and all such matters shall be dealt with by it as informally and expeditiously as the circumstances and considerations of fairness and natural justice permit.

Audiences

15 (1) Sous réserve du paragraphe (2), le Tribunal n'est pas lié par les règles juridiques ou techniques applicables en matière de preuve lors des audiences. Dans la mesure où les circonstances, l'équité et la justice naturelle le permettent, il lui appartient d'agir rapidement et sans formalisme.

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1793-16
STYLE OF CAUSE:	THE ATTORNEY GENERAL OF CANADA V BRADLEY FRIESEN
PLACE OF HEARING:	VANCOUVER, BRITISH COLUMBIA
DATE OF HEARING:	MARCH 27, 2017
JUDGMENT AND REASONS:	MOSLEY, J.
DATED:	JUNE 9, 2017

APPEARANCES:

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