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Drone operators, do you know the rules?

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Drones, also known as "UAVs" (for Unmanned Aerial Vehicles) have become more popular in Quebec over the past few years. From the surveillance of quarries and gravel pits, industrial sites, pipelines, farmland, open air mines and construction sites to package delivery, the collecting of aerial images to promote municipalities, film-making and property sales, there are countless uses for drones. However, it should be kept in mind that the use of drones is regulated by the federal government, and certain uses are subject to special rules that may include obtaining a special flight operations certificate ("SFOC").

Legislative and regulatory framework

The use of drones is governed by the *Aeronautics Act*[1], and in particular the Canadian *Aviation Regulations*[2]. The applicable rules differ depending on whether the drone constitutes an "unmanned air vehicle" or a "model aircraft" within the meaning of the Regulations.

The difference between these types of aircraft depends on how much they weigh (more or less than 35 kg) and the proposed use (whether recreational or non-recreational).

A "model aircraft" is an aircraft weighing up to 35 kg that is used for recreational purposes and that is not designed to carry persons or other living creatures[3].

An "unmanned air vehicle" is a power-driven aircraft, other than a model aircraft, that is designed to fly without a human operator on board[4]. In other words, an unmanned air vehicle is a drone that weighs over 35 kg, or one that weighs less than 35 kg if it is used for nonrecreational purposes.

Unmanned air vehicles: SFOC required unless exempted

Section 602.41 of the Regulations[5] prohibits the operation of an unmanned air vehicle in flight except in accordance with an SFOC or an air operator certificate[6]. Section 603.66 of the Regulations also prohibits the use of an unmanned air vehicle unless the terms of an SFOC issued by the Minister are complied with.

An SFOC is issued by the Minister pursuant to section 603.67 of the Regulations. The applicant must demonstrate the ability to conduct the proposed flight operation in accordance with the *Special Flight Operations Standards*[7], which also indicate the form and manner of submitting an application.

In theory, an SFOC is therefore required to use an unmanned air vehicle. However, the Act[8] allows the Minister or a Department of Transport official authorized for such purpose to exempt, on any

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terms and conditions that may be specified, any person, aeronautical product, aerodrome, facility or service, or any class of persons, aeronautical products, aerodromes, facilities or services, from the application of Regulations.

Two exemptions are currently available for individuals operating unmanned air vehicles for non-recreational purposes.

The first exemption covers the use of drones with a take-off weight of more than 2 kg but less than 25 kg, subject to compliance with several conditions, including the following:

> **General conditions:** have at least $100,000 of civil liability insurance and at least $100,000 of insurance covering the operation of a UAV, not operate a UAV within eight hours after consuming an alcoholic beverage, not operate a UAV if the pilot is likely to suffer from fatigue making him unfit to properly perform his duties, make operational and emergency equipment available to the flight crew, etc.
> **Flight conditions:** be able to see the UAV directly, not fly the UAV at an altitude of more than 300 feet, not fly in Class G airspace[9], only operate the UAV from a single control station, not conduct a take-off if the UAV has frost, ice or snow on its critical surfaces, not operate a UAV over a built-up area or open-air assembly of persons, maintain unassisted visual contact with the UAV to be aware of its position and able to visually scan the airspace in which it is being used in order to identify and avoid air traffic or objects, etc.
> **Conditions related to the crew (pilot):** have successfully completed a ground training program for pilots and be trained on the UAV system and qualified for the area and type of flight, etc.

The second exemption applies to drones weighing less than 2 kg that are used for non-recreational purposes, which involve similar conditions to the first exemption, although they are fewer in number. If these conditions are not met, an SFOC must be obtained, just as for the use of drones weighing more than 35 kg for recreational purposes.

Model aircraft: safety first

The use of a “model aircraft” (a drone weighing less than 35 kg used for recreational purposes) does not require a specific permit. However, such an aircraft must be flown safely. Section 602.45 of the Regulations prohibits any person from flying a model aircraft into a cloud or in a manner that is or is likely to be hazardous to aviation safety.

In the absence of a definition in the Regulations of what constitutes the “safe” use of a model aircraft, Transport Canada has published a circular to inform operators of model aircraft and unmanned air vehicles of the general guidelines and safety practices. In the circular, Transport Canada recommends for example that certain safety considerations be followed, such as not using a drone:

> within 9 km of an aerodrome (ex. an airport);
> within 150 m of people, animals, buildings, structures or vehicles;
> in populated areas or over a crowd, such as during sporting events, concerts, festivals or fireworks;
> near moving vehicles, highways, bridges, busy streets or any other place where drivers could be endangered or distracted;
> in restricted airspace (over military bases, prisons or forest fire areas), etc.[10]

Penalties for not following the rules

A person operating a flight without an SFOC when one is required is liable to a fine of up to $5,000 for an individual and $25,000 for a corporation, and a person who fails to comply with the conditions of an SFOC is liable to a fine of up to $3,000 for an individual and $15,000 for a corporation[11].

The *Criminal Code*[12] also creates an offence for the unsafe operation of an aircraft that endangers the safety of other aircrafts,[13] which could lead to a fine or imprisonment for life.

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Compliance with the Regulations does not release the drone operator from complying with applicable provincial (and municipal)[14] or federal[15] regulations.

In conclusion, note that an SFOC is required in the following cases:

> The aircraft weighs more than 35 kg, regardless of the proposed use;
> The aircraft weighs less than 35 kg and the proposed use is nonrecreational.

Where an aircraft weighing less than 25 kg is used for non-recreational purposes, the operator may be exempt from the requirement of obtaining an SFOC provided he meets several conditions. If the operator cannot comply with the conditions to be met for any of the applicable exemptions, he will have no choice but to apply for an SFOC.

Lastly, no permit is required to use a drone weighing 35 kg or less for recreational purposes, although the drone must be operated safely.

Since the current exemptions will expire on December 21, 2016, the rules could change.

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1. *Aeronautics Act*, R.S.C. 1985, c. A-2 (the "Act"). Aviation is considered by the courts to be a matter of national importance and it therefore falls under the federal government's jurisdiction to make laws for the peace, order and good government of Canada; see in this regard *Johannesson* v. *Municipality of West St. Paul*, [1952] 1 S.C.R. 292; *Air Canada* v. *Ontario (Liquor Control Board)*, [1997] 2 SCR 581; *Quebec (Attorney General)* v. *Canadian Owners and Pilots Association* [2010] 2 SCR 536.
2. *Canadian Aviation Regulations*, 1996, SOR/96-433 (Can. Gaz. II) (the "Regulations").
3. *Supra*, footnote 2.
4. S. 101.01 of the Regulations.
5. *Supra*, footnote 2.
6. We will not discuss this type of certificate, which applies to commercial air service operators.
7. *Special Flight Operations Standards*, in the "General Operating and Flight Rules Standards", Part VI, Standard 623 of the Regulations.
8. *Supra*, footnote 1.
9. Section 601.02 (1) of the Regulations states that "Class G" is uncontrolled airspace.
10. *General Safety Practices*, in "Model Aircraft and Unmanned Air Vehicle Systems", 2014, Advisory Circular (AC) No. 600-002.
11. Section 103.08 (1) and (2).
12. R.S.C. 1986, c. C-46.
13. For example, section 77 of the Criminal Code, supra, footnote 12.
14. For example, section 85 of the *Municipal Powers Act*, CQLR, c. C-47.1 (which allows municipalities to adopt a by-law to ensure peace, order, good government and the general welfare of its citizens) could give municipalities the authority to regulate drones. Would such a regulation be constitutional? According to the jurisprudence, the federal government's jurisdiction over aviation is exclusive, which means, according to the doctrine of interjurisdictional immunity, that a province would not have the authority to regulate or prohibit the use of drones. However, if the effect of a valid provincial statute (adopted in accordance with a matter of provincial jurisdiction) is to govern the use of drones, the question is whether the courts would apply the doctrine of federal paramountcy, allowing the provincial legislation to apply concurrently in the absence of an actual conflict.
15. See, among other things, the *Canadian Charter of Rights and Freedoms*, S.C. 1982, c. 11 (U.K.); the *Criminal Code*, R.S.C. 1986, c. C-46.; the *Environment Quality Act*, CQLR 1978, c. Q-2; the *Privacy Act*, R.S.C. 1985, c. P-21; the *Personal Information Protection and Electronic Documents Act*, S.C. 2000, c. 5; the *Radiocommunication Act*, R.S.C. 1985, c. R-2; the *Transportation of Dangerous Goods Act*, S.C. 1992, c. 34 and the *National Parks of Canada Aircraft Access Regulations*, 1997, SOR/97-150 (Can. Gaz. II).

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