> We had a safety audit from one of my customers. So, it's an independent auditor came in and took a look at what we did and how we operated and they found that we had a very good reporting system, a very good program, trip following program, and so on. We weren't perfect, but we — she was very impressed with the fact that we had — and felt that there was some things that we were doing tht the larger — **those with AOC's**, those larger companies, could go ahead and benefit from.
>
> [Emphasis added]

Was anybody operating an Air Transport Service?

43 In its written submissions, BFEL only disputed four of the six flights. It was given leave to file supplemental written argument, and took advantage of that leave to attempt to bring all six flights into issue. I hold that there was absolutely no evidence of a contravention on one of the four flights originally contested. There was sufficient evidence on all the others.

44 There is no doubt that BFEL was operating a commercial air service. However, that service is only an air transport service if operated for the purpose of "transporting persons, personal belongings, baggage, goods or cargo in an aircraft between two points."

45 The basis of counts 1 and 2 was the log book for the helicopter in question together with an invoice to a customer. The invoice states "sign installed". The overall evidence of Mr. Billings, including pre-hearing statements, certainly led to the implication that the signs which were installed at well sites were signs belonging to the customers, and carried to the sites by helicopter. Vice-Chairman Ogilvie's conclusion that signs were carried on these flights were not patently unreasonable, nor was the decision of the Appeal panel to uphold him. Counts 3, 5 and 6 relate to "brush cutting of leaves". Again it was not patently unreasonable for Mr. Ogilvie to conclude on the basis of the record that the necessary equipment was carried to the site by helicopter. Whether the equipment could be considered as personal belongings, goods or cargo, the activity fell within the definition of an "air transport service".

46 Count 4 was that on 10 July 2004 a passenger was carried on helicopter C-FNNE. The basis for Mr. Ogilvie's conclusion that the regulations were contravened was "the log book for aircraft CFNNE indicates a flight of July 10, 2004, by Mr. Billings from Challenger base for 1.6 hours. It indicates the carriage of a passenger." However, I must say that that finding was patently unreasonable, as was the Appeal panel's decision to uphold him. The log book indicates that the person carried was a Mr. Brint, a member of the flight crew. Mr. Brint is shown in the log as the pilot on other occasions. A "passenger" is defined in CAR 101.01 as meaning "a person other than a crew member, who is carried onboard an aircraft". Consequently, this contravention, and the penalty, must be quashed.

Natural Justice

47 It had been agreed at the outset of the review hearing that the Minister would put in his evidence on all alleged contraventions of the regulations, before Mr. Billings and BFEL were called upon to reply. The record shows that they were aware that they were not compellable witnesses. At the close of the Minister's case, counsel for Mr. Billings and BFEL moved for dismissal on the basis of no evidence. The essence of the submission was that if anyone had contravened the regulations it was Challenger Inspections Ltd. Counsel argued that at the very least Mr. Ogilvie should take the motion under advisement. The effect would be that if Mr. Billings testified, then Mr. Ogilvie was required to make a double analysis. If satisfied that the Minister had not made out a case he could not take into account Mr. Billings' testimony. Only if the Minister made out a case, would it become necessary to consider that testimony.

48 Mr. Ogilvie pointed out that the TATC was an administrative tribunal and not bound by the rules of evidence

(except as regards privileged information). He said the motion was:

> — denied because I think there may be some evidence. So, I will disagree. There may be some evidence. I have to look. So, they're denied. So, I am not going to do, I'm having a hard time characterizing this, bifurcating it, if you will, or whatever. I mean, I think everything you've said I can hear in final argument about the whole case. So, no. If you go on and give evidence, or just to warn you on the procedure, if you give evidence, I'll be looking at the evidence as a whole. Does that make it clear?

49 In his reasons Mr. Ogilvie expressed the view that the Minister had made out a *prima facie* case. I agree that the Minister had shifted the burden of proof and that had Mr. Billings not testified, it would still have been open to Mr. Ogilvie to find that the contraventions had occurred.

50 As stated by Mr. Justice Sopinka in *Prassad v. Canada (Minister of Employment & Immigration)*, [1989] 1 S.C.R. 560, [1989] S.C.J. No. 25 (S.C.C.) at paragraph 16:

> 16. We are dealing here with the powers of an administrative tribunal in relation to its procedures. As a general rule, these tribunals are considered to be masters in their own house. In the absence of specific rules laid down by statute or regulation, they control their own procedures subject to the proviso that they comply with the rules of fairness and, where they exercise judicial or quasi-judicial functions, the rules of natural justice.

51 Although not argued before him, section 7 of the Charter has been raised before me. It reads:

> 7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.
>
> 7. Chacun a droit à la vie, à la liberté et à la sécurité de sa personne; il ne peut être porté atteinte à ce droit qu'en conformité avec les principes de justice fondamentale.

52 Reliance was placed on the decision of the Supreme Court in *R. v. Wholesale Travel Group Inc.*, [1991] 3 S.C.R. 154, [1991] S.C.J. No. 79 (S.C.C.). However that reliance was misplaced. That case dealt with criminal offences, not administrative offences. As noted by the Federal Court of Appeal in *Main Rehabilitation Co. v. R.*, 2004 FCA 403, [2004] F.C.J. No. 2030 (F.C.A.), the general principle is that only human beings can enjoy the right to life, liberty and security of the person guaranteed by section 7 of the Charter. The exception is the ability of a corporation charged with a criminal offence to challenge the constitutionality of the statute as part of its defence. The charges in this case are administrative, not criminal.

The Case Against BFEL/Airworthiness Directive: T-2272-06 and T-2297-06

53 For reasons already given, I am satisfied based on the limited evidence in the record that the Minister discharged the initial burden upon him to show that the two helicopters were in the legal custody and control of BFEL. Either it did not lie in its mouth to invoke its own turpitude as a defence or it did not shift the burden back by providing evidence that legal custody and control had been transferred to one or the other of the two Challenger corporations.

54 The Minister first imposed a penalty of $5,000 for each of the 10 flights taken while the maintenance inspection was overdue. On review, Mr. Ogilvie reduced that penalty to $4,000 per flight. In turn, that penalty was reduced by the Appeal Panel to $500 per flight.

55 It is common ground that, pursuant to section 8 of the Act, the reviewing member in this case, Mr. Ogilvie,

was entitled to determine the amount payable in respect of the contraventions.

56 In fixing an appropriate penalty, he set out the circumstances in which the contraventions occurred. Quite rightly, he took into account the importance of following air directives to ensure that an aircraft is in condition for safe operation. The Air Directive was intended to detect corrosion of a bearing and to prevent bearing failure and "subsequent loss of directional control of the helicopter." As Mr. Ogilvie said, the consequences could have been disastrous. He referred to an appeal determination of TATC's predecessor in *Canada (Minister of Transport) v. Wyer* [1988 CarswellNat 1272 (Can. Civ. Aviation Trib.)], [1988] O-0075-33. The principles there summarized include denunciation, deterrence, both specific and general, rehabilitation, and enforcement recommendations. Both aggravating and mitigating factors are to be considered.

57 He was of the view that denunciation and general deterrence needed strong emphasis. He did not consider specific deterrence as important, especially as there was an honest misinterpretation of the Air Directive, and no previous offences. As far as denunciation is concerned, he pointed out that Transport Canada distributed a misleading press release which declared that BFEL had failed to replace a tail rotor pitch control bearing. Mr. Billings testified to having received numerous calls from clients on this point. The directive was only to inspect and to replace if necessary.

58 The Minister had imposed a penalty of $5,000 for each of the 10 flights. The maximum penalty could have been $25,000. However, it should also be kept in mind that there was only one missed inspection. Mr. Ogilvie decided to reduce the penalty to $4,000 per contravention, which he was entitled to do.

59 The Appeal Panel justified the further reduction to $500 per contravention as follows:

> [23] Although the AD was missed, there were no immediate safety consequences for the aircraft in that the inspection revealed no requirement to replace the tail rotor pitch control bearing. We agree with the member at review that there is no need for specific deterrence as Mr. Billings, an officer and director of the company, had satisfied the member at review that he was remorseful and he was at all times cooperative with the regulatory authorities.
>
> [24] We differ from the member at review regarding general deterrence in this case. We consider it a message of general deterrence that a penalty of $5 000 can be assessed for each alleged violation of subparagraph 605.84(1)(c)(i) of the CARs. However, there are multiple counts because there were 10 take-offs following Mr. Haab's one error of missing the 12-month AD. Considering that fact and taking into account the unfortunate wording of the press release and possible consequences to the company, we consider it fair to further mitigate the penalty that would normally be assessed for general deterrence. In going so, we restrict this consideration to the stated facts of this case. We accordingly reduce the penalty to $500 for each of the 10 breaches for a total penalty of $5 000.

60 As stated earlier in these reasons, subsection 8.1(3) of the Act provides that the appeal panel "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 appeal against."

61 However broad the discretion a decision-maker may have in determining the amount of a penalty, that discretion can be no wider than that given to a Minister of the Crown in administrative matters. An administrative discretionary policy decision is not subject to judicial review unless it was made in bad faith, does not conform with the principles of natural justice or relies upon considerations that are irrelevant or extraneous (*Maple Lodge Farms Ltd. v. Canada*, [1982] 2 S.C.R. 2, 137 D.L.R. (3d) 558 (S.C.C.)). Under the modern pragmatic and functional approach to judicial review, this usually translates into patent unreasonableness (*C.U.P.E. v. Ontario (Minister of Labour)*, 2003 SCC 29, [2003] 1 S.C.R. 539 (S.C.C.)).

62 The Appeal Panel did not put Mr. Ogilvie's findings of fact, and credibility, in issue. It decided to reduce the penalty because of its view regarding general deterrence, and "...taking into account the unfortunate wording of the press release and possible consequences to the company."

63 It had the expertise, and the Court will not interfere with its view that the overall penalty should be reduced because there was only a single error in misinterpreting the AD. However, neither Mr. Ogilvie nor the Appeal Panel should have taken into account the Minister's misleading press release. That was quite a different matter, irrelevant or extraneous to the penalty. Perhaps BFEL has a cause of action against the Minister, perhaps not. My only comment is that the press release is not a factor to be taken into consideration when fixing a penalty for contraventions of Regulations under the *Aeronautics Act*, the purpose of which is to promote air safety.

64 BFEL submitted that the penalties were grossly unfair compared to other decisions of the TATC or its predecessor, both in terms of the number of charges laid and the penalties imposed. Perhaps one might conclude that the treatment by the Minister of contraventions in the past, and the review thereof by the TATC, were woefully inadequate given the importance of air safety. The penalties imposed were nowhere near the maximum, and charges could have been made with respect to other flights but were not. I see no legal reason to interfere.

65 Consequently, the matter of the penalty, but not liability, is to be referred back to an Appeal Panel of the TATC, the same panel if practicable.

Costs

66 As success has been divided, as Mr. Billings and BFEL were represented by the same counsel and as the three dockets were heard together, I shall make no order as to costs.

67 *In summary:*

(a) The application by the Attorney General of Canada for judicial review of the decision of the appeal panel of the Transportation Appeal Tribunal of Canada dismissing as against Brant Paul Billings the contraventions of section 700.02(1) (air transport service) is dismissed (T-2295-06).

(b) The application by Billings Family Enterprises Ltd. for judicial review of the decision that it operated an air transport service on six occasions without holding an air operator certificate is maintained with respect to one flight. The decision with respect to count 4 is quashed. The application with respect to the other five flights is dismissed, and the $5,000.00 penalty with respect to each of the said five flights remains in place (T-2272-06).

(c) The application by Billings Family Enterprises Ltd. for judicial review of the decision that it had on ten occasions permitted take-offs when the aircraft did not meet the requirements of an Airworthiness Directive (CAR 605.84(1)(c)(i)) is dismissed (T-2272-06).

(d) The application by the Attorney General of Canada for judicial review of the decision reducing the penalty from $4,000.00 to $500.00 for each of the said ten contraventions of an Airworthiness Directive (CAR 605.84(1)(c)(i)) is granted, and the matter of the penalty is referred back for re-determination in accordance with these reasons (T-2297-06).

Orders accordingly.

END OF DOCUMENT

TAB D

TATC File No. Q-3199-41
MoT File No. N5504-55253

TRANSPORTATION APPEAL TRIBUNAL OF CANADA

BETWEEN:

Aviation 2000 Inc., Applicant

- and -

Minister of Transport, Respondent

LEGISLATION:
Aeronautics Act, R.S.C. 1985, c. A-2, s. 7.7
Canadian Aviation Regulations, SOR/96-433, s. 703.02

Review Determination
Suzanne Racine

Decision: June 12, 2006

TRANSLATION

The Minister of Transport has not shown on the balance of probabilities all the elements of the alleged offence. The Tribunal dismisses the allegations and the monetary penalty assessed by the Minister of Transport.

A review hearing on the above matter was held on March 29 and 30, 2006 in the hearing room at the town hall in La Tuque, Quebec.

Witnesses were excluded.

OBJECT OF THE REVIEW HEARING

On September 7, 2005, the Minister of Transport, pursuant to section 7.7 of the *Aeronautics Act* (Act), served Aviation 2000 inc. (Aviation 2000) with a notice of assessment of monetary penalty (notice of assessment) for having allegedly contravened section 703.02 of the *Canadian Aviation Regulations* (CARs). Appendix A of the notice of assessment states that on or about October 4, 2004, at about 10:30 a.m., local time, in the vicinity of La Tuque, Quebec, Aviation 2000 operated the Cessna 180H aircraft, registered as C-FSGB, in aerial work

involving sightseeing operations that did not meet the conditions and specifications in its air operator certificate. The Minister assessed a monetary penalty of $5 000.

LAW

Section 7.7(1) of the Act states as follows:

7.7 (1) If the Minister believes on reasonable grounds that a person has contravened a designated provision, the Minister may decide to assess a monetary penalty in respect of the alleged contravention, in which case the Minister shall, by personal service or by registered or certified mail sent to the person at their latest known address, notify the person of his or her decision.

Section 703.02 of the CARs reads as follows:

703.02 No air operator shall operate an aircraft under this Subpart unless the air operator complies with the conditions and operations specifications in an air operator certificate issued to that operator by the Minister pursuant to Section 703.07.

Section 703.07 of the CARs states as follows:

Issuance or Amendment of Air Operator Certificate

703.07 (1) Subject to Section 6.71 of the Act, the Minister shall, on receipt of an application submitted in the form and manner required by the *Commercial Air Service Standards*, issue or amend an air operator certificate where the applicant demonstrates to the Minister the ability to

(a) maintain an adequate organizational structure;

(b) maintain an operational control system;

(c) meet training program requirements;

(d) comply with maintenance requirements;

(e) meet the *Commercial Air Service Standards* for the operation; and

(f) conduct the operation safely.

(2) For the purposes of subsection (1), an applicant shall have

(a) a management organization capable of exercising operational control;

(b) managerial personnel who have been approved by the Minister in accordance with the *Commercial Air Service Standards*, are employed on a full-time basis and perform the functions related to the following positions, namely,

(i) operations manager,

(ii) chief pilot, and

(iii) where the applicant does not hold an approved maintenance organization (AMO) certificate, maintenance manager;

(c) operational support services and equipment that meet the *Commercial Air Service Standards*;

(d) aircraft that are properly equipped for and flight crew members who are qualified for the area of operation and the type of operation;

(e) an operational control system that meets the requirements of Section 703.16;

(f) a training program that meets the requirements of this Subpart;

(g) legal custody and control of at least one aircraft of each category of aircraft that is to be operated;

(h) a company operations manual that meets the requirements of Sections 703.104 and 703.105; and

(i) a maintenance control system approved pursuant to Subpart 6.

Preliminary Remark

The applicant's representative, Stéphan Charles-Grenon, acknowledges that the Cessna 180H, registered as C-FSGB, and referred to in the Minister's notice of assessment of September 7, 2005, was not appearing in his client's air operator certificate in 2004. On May 5, 2005, the aircraft was, however, added to the air operator certificate of Aviation 2000.

FACTS

Respondent's Evidence

Counsel for the Minister of Transport, Jean-Guy Carrier, asked that **Alain Charlebois**, who has worked for Transport Canada for 14 years, be qualified as an expert witness. Assigned in turn to the air navigation section, the aerodrome certification section and the aviation enforcement section, Mr. Charlebois is responsible for the certification of commercial and business aviation operations. He approved the air operator certificate of Aviation 2000. He has experience as a pilot and pilot-in-command, as well as formal training in administration and a bachelor's degree in computer management. Mr. Charles-Grenon had no objection to Mr. Charlebois testifying as an expert.

The witness submitted the air operator certificate of Aviation 2000, approved on May 16, 2003. This certificate authorized Aviation 2000 to operate a commercial air transport service using Cessna 185 and Beaver DHC2 aircraft, both to carry persons or goods (section 703 of the CARs) and to provide the specialized air services listed in part I of the certificate (section 702 of the CARs) (exhibit M-1). Transport Canada subsequently authorized the applicant to operate a Cessna 206 aircraft (exhibit M-2) as of September 3, 2004, and a Cessna 180H aircraft (exhibit M-3), for the same types of services mentioned above, as of May 5, 2005, at the request of Marc Leclerc, the owner of Aviation 2000 (exhibit M-4).

An operator must comply, in the required form and manner, with the standards applicable to the type of services covered by its air operator certificate. As the witness stated, it must, among other things, satisfy the requirements with respect to the training and maintenance program. Unlike the operation of private aircraft, the operator of an aircraft for commercial purposes must hold an air operator certificate according to the regulations. Mr. Charlebois was not aware of the insurance requirements for operation of an aircraft for private purposes.

On **cross-examination,** the witness provided the following:

1. He again stated that he examines only the certification applications of commercial aviation operations.
2. In 2004, Aviation 2000 was indeed authorized to operate the Cessna 185 pursuant to sections 702 and 703 of the CARs.
3. He did not know that, during the week of October 4, 2004, Transport Canada was conducting an on-site inspection (audit) of the applicant's operations.
4. A private aircraft can be operated with passengers on board.

Audrey Dupont-Lépine testified next. Early in the morning of October 4, 2004, she purchased a videocassette at the Familiprix in Saint-Georges for the purpose of filming, with a movie camera borrowed from Annabelle Lacombe, her "plane ride" that was to take place that same day at Lac-à-Beauce, located in the vicinity of La Tuque, Quebec, the operating base of Aviation 2000. On her arrival at the site, the witness noticed the presence of a motor coach filled with French tourists. Ms. Dupont-Lépine then testified that she met Mr. Leclerc and asked him for a quick flight. She sat in the back of an aircraft, allowing her mother to sit in front next to the pilot. She had agreed to film her flight "as a favour" to Ms. Lacombe, a woman for whom she had previously worked. The flight, which she said lasted only 20 or 30 minutes, was her first ever. She submitted the videocassette and described what she had filmed during her flight on October 4, 2004 (exhibit M-6).

Counsel for the Minister of Transport then screened the videocassette (exhibit M-6), which Ms. Dupont-Lépine acknowledged she was seeing for the first time. The date of October 4, 2004, appears on the left at the bottom of the screen. The pilot, who identified himself to Ms. Dupont-Lépine as "Franck", told her she was on board a Cessna 180. On take off from Lac-à-Beauce on that date, the time shown on the screen is 10:21 a.m. Next, we see that the aircraft flew over the La Tuque area, and then touched down on Lac-à-Beauce, its starting point, at 10:34 a.m., on October 4, 2004, as shown by the notation at the bottom of the screen. On leaving the aircraft, Ms. Dupont-Lépine filmed the white aircraft with red stripes, registered as

C-FSGB. She said she paid "$50 cash" to the pilot Franck for the flight and asked him for a receipt (exhibit M-5). Ms. Dupont-Lépine told the Tribunal member that she noticed on the receipt she had requested from the pilot Franck that he had written down Cessna 185 as the aircraft flown, rather than Cessna 180, as he had told her verbally, according to the videocassette (exhibit M-6). After the flight, Ms. Dupont-Lépine and her mother left the applicant's base to have a meal in a restaurant called "Le Flores," although she submitted a receipt dated October 4, 2004, from a bar restaurant called "Le Parasol" (exhibit M-7).

The following facts emerged from the **cross-examination** of Ms. Dupont-Lépine:

1. She went to Aviation 2000 to film a flight at the request of Ms. Lacombe, who is the owner of a competing airline based in Lac-à-la-Tortue.
2. She knew [translation] "there was a story", which was connected with this request, but she said that she was not interested in knowing more about it.
3. Ms. Lacombe apparently told Ms. Dupont-Lépine that Aviation 2000 was using a Cessna 180 aircraft for sightseeing operations without authorization to do so.
4. It was not foreseen that the flight would necessarily be on board a Cessna 180.
5. The movie camera loaned to Ms. Dupont-Lépine belonged to Ms. Lacombe.
6. Ms. Dupont-Lépine met Charles Burroughs, a Transport Canada inspector, in December 2004, that is, two months after her flight.
7. She did not film the interior of the buildings of Aviation 2000 at Lac-à-Beauce.
8. She did not ask the pilot Franck to correct the error on the receipt as to the type of aircraft used for the flight.
9. She asked the pilot for the receipt, because the owner was not there.
10. She admitted that she was seeing Mr. Leclerc, seated in the hearing room next to Mr. Charles-Grenon, for the first time.
11. Ms. Lacombe had given her $120 to pay for the flight, the meal and the purchase of the videocassette.

On **re-examination**, Ms. Dupont-Lépine stated that she had not asked for any particular type of aircraft for her flight on October 4, 2004. The pilot had taken her and her mother in a Cessna 180. The witness had worked for Ms. Lacombe over the summer of 2004, but was not working for her in October 2004.

Mr. Carrier called **Ms. Lacombe**, the owner of Aviation Mauricie, which is based at Lac-à-la-Tortue, in Mauricie. The witness said she knew that, contrary to its air operator certificate, Aviation 2000 was operating a Cessna 180H to conduct sightseeing operations. Ms. Lacombe therefore decided to send someone anonymously on an all-expenses-paid sightseeing flight with Aviation 2000. This person would film the flight with a movie camera that she would lend her for the occasion, and would request a receipt and bring it back to her. According to Ms. Lacombe, Ms. Dupont-Lépine was just the person for the task, first, because she did not know Mr. Leclerc, the owner of Aviation 2000, nor did he know her, and second, because she had often expressed a desire to fly. Ms. Lacombe said she asked Ms. Dupont-Lépine to go to Aviation 2000 on October 4, 2004, to take a sightseeing flight. She also asked her to check whether there were any tourists motor coaches there, to try to talk to the guides, and not to

insist on any aircraft in particular. The witness also asked Ms. Dupont-Lépine to bring the videocassette of her flight back to her.

On **cross-examination**, Ms. Lacombe related the following:

1. When she loaned her movie camera to Ms. Dupont-Lépine the morning of October 4, 2004, she explained to her how to record using the cassette and the memory chip.
2. She and Ms. Dupont-Lépine viewed together the content of the videocassette concerning the flight.
3. She had not altered the cassette or the extracts appearing on the memory chip, or changed the date or time appearing at the bottom of the screen on the videocassette.
4. She had kept the videocassette in the company's safe. Ten days later, she turned it over to Inspector Burroughs of Transport Canada.
5. She filed a complaint with Patrick Carrière of Transport Canada.
6. She opposed a business project of Mr. Leclerc and his partner, Alain Priem, in Saint-Étienne-des-Grès.
7. She denied having telephoned people to dissuade them from doing business with Aviation 2000, whether the people in question were managers for the Corporation du Parc de l'Île-Saint-Quentin or [translation] "people of Lac Blanc".

Inspector Burroughs, an inspector with Transport Canada, testified that he was informed of Ms. Lacombe's complaint on about October 12 or 13, 2004. He said that on checking the Transport Canada database, he found that as of October 2004, the aircraft authorized by the air operator certificate of Aviation 2000 were the Cessna 206 and 185 and the DHC2. The Cessna 180H was not authorized. The witness met with Ms. Lacombe of Aviation Mauricie on October 14, 2004. He viewed the content of the videocassette and a few extracts from the film recorded on the memory chip. To obtain a copy of the videocassette purchased and used by Ms. Dupont-Lépine, he had to go to a specialized laboratory of Sûreté du Québec. The copy (exhibit M-6) was then placed in safekeeping at the offices of Transport Canada. Mr. Charles-Grenon agreed that this video could not have been altered after coming into Transport Canada's possession. Inspector Burroughs also took from Ms. Lacombe the receipt that Aviation 2000 had issued and given to Ms. Dupont-Lépine on October 4, 2004 (exhibit M-5). The witness also visited, on October 14, 2004, the base of Aviation 2000 at Lac-à-Beauce; there were no operations that day.

On December 14, 2004, Inspector Burroughs met with François Robichaud, the operations manager of Parc de l'Île-Saint-Quentin, at the location where, according to Ms. Lacombe, Aviation 2000 had committed a number of irregularities. He also questioned someone named Duclos, who told him he did not know of any sightseeing operations at Aviation 2000 on the Cessna 180H. The next day, on December 15, 2004, he took Ms. Dupont-Lépine's statement about the events of October 4, 2004.

A meeting with Mr. Leclerc of Aviation 2000 took place in May 2005. Mr. Leclerc told Inspector Burroughs that he was the owner of the Cessna 180H, registered as C-FSGB, and that he operated it for private purposes. It was actually not until January 2005, according to

exhibits M-3 and M-4, that the applicant applied for an air operator certificate for the Cessna 180H. Inspector Burroughs pointed out that Mr. Leclerc allowed some pilots, whom he trusted, to use his aircraft to increase their pilot hours to become "insurable". Franck Enjalric sometimes took people along on these flights. Mr. Leclerc suggested to Inspector Burroughs that he speaks with Mr. Enjalric. According to Inspector Burroughs, there is no information in his notes that he consulted any document provided by Mr. Leclerc. The witness then said he had tried in vain to contact Mr. Priem.

Finally, Inspector Burroughs stressed that he does not usually handle this type of case. He said that he is an aircraft maintenance engineer certified for several aircraft types. In this capacity, he is generally called on to give his opinion on the analysis and evaluation of compliance with the criteria leading to type certification, rather than to investigate complaints stemming from operation of an aircraft not in compliance with the conditions of its air operator certificate. It was his opinion that Transport Canada had assigned him this investigation because the matter called for tact and diplomacy.

The **cross-examination** revealed the following facts:

1. Ms. Lacombe operates an airline and conducts aviation activities similar to those of the applicant.
2. The witness did not pursue his investigation of the alleged flight irregularities committed by the applicant at Parc de l'Île-Saint-Quentin, because he had no proof of such activities.
3. Inspector Burroughs recorded at page 16 of his notes that Pascal Duclos, a former Aviation 2000 pilot now working for Air Hélibec inc., in La Tuque, did not know of any sightseeing operations involving the applicant's Cessna 180H.
4. There was never any question of Mr. Leclerc asking some pilots, including Mr. Enjalric, for a monetary contribution in exchange for permission to use the Cessna 180H to [translation] "build up their hours."
5. The witness stated that Mr. Leclerc had told him on seeing him [translation] "It's a frame-up!" and possibly [translation] "Was it Ms. Lacombe who sent you?"

Philippe Potvin, a pilot with Aviation Mauricie, said he was [translation] "comfortable with computers". He testified that his employer, Ms. Lacombe, had asked him to record onto a compact disk all the files in the company's computer pertaining to the events filmed by Ms. Dupont-Lépine. He did not view these files.

On **cross-examination**, Mr. Potvin said it is possible to change the date shown on digital videos extracted from files. He recorded several files, [translation] "the whole record." He did not know who had transferred these files onto the computer.

Applicant's Evidence

Mr. Charles-Grenon called **Yvan Noël Guindon**, the general manager of Parc de l'Île-Saint-Quentin in Trois-Rivières, to testify. Mr. Guindon knew Mr. Leclerc, but had met more often with his partner, Mr. Priem, in the fall of 2003 or 2004, in the context of a project to offer sightseeing by float plane in Parc de l'Île-Saint-Quentin.

The witness also knew Ms. Lacombe. She had expressed to him her dissatisfaction about the project. According to the witness, Ms. Lacombe did not at all appreciate that a competitor [translation] "who operates aircraft without insurance" was proposing such a project. She therefore decided to submit the application of her own airline for this project. Mr. Guindon told her that Messrs. Priem and Leclerc would have priority if the town council approved such a venture. After consideration, the town council decided not to go ahead with the project. The witness said he has had no further business relations with Mr. Leclerc since that day.

The **cross-examination** by counsel for the Minister of Transport revealed the following:

1. 1. Mr. Guindon spoke several times with Ms. Lacombe.
2. 2. The witness took no notes of these conversations.
3. 3. Mr. Guindon contacted Mr. Leclerc in January 2005, to inform him that the town council had decided in the end not to go ahead with the project.
4. 4. Mr. Leclerc contacted Mr. Guindon early in 2006 to tell him he would be receiving a summons to appear to testify in March 2006, before the Transportation Appeal Tribunal of Canada in a matter involving his company. He simply asked him to tell the truth.

Mr. Charles-Grenon called **Inspector Burroughs** to testify. The latter explained that, in addition to viewing the videocassette on October 14, 2004, he also viewed, at Ms. Lacombe's suggestion, four digital video files stored on a compact disk, to wit files 39, 40, 41 and 42. The compact disk contained a total of 42 video files. The witness briefly viewed the others. Mr. Charles-Grenon had him view files 25 to 29. Inspector Burroughs confirmed that the files did indeed show Lac-à-Beauce, the base of Aviation 2000, a Fleur de Lys motor coach on the premises, tourists, extracts apparently filmed by Ms. Dupont-Lépine. He acknowledged having forgotten to include these files in the investigation file for disclosure to the applicant. He also acknowledged not having checked with Ms. Lacombe whether the video from the cassette and the one from the memory chip were both recorded using the same camera. On viewing them before the Tribunal member, he noticed that the video from the memory chip showed no date at the bottom of the screen, whereas the date of October 4, 2004 and the time could be seen on the one from the cassette.

Inspector Burroughs was not cross-examined.

Mr. Leclerc, the owner of Aviation 2000, testified. He is simultaneously the chief pilot, the operations manager, the maintenance supervisor and the dispatcher. He has flown for 34 years and has 15 000 pilot hours. He said he had always had good relations with Transport Canada. This was the first time he had been in any trouble with them. He said he got up early the morning of October 4, 2004, to begin work. At 8 a.m., he was waiting for Transport Canada inspectors who were to spend the week at Lac-à-Beauce doing a regulatory audit of his company. He filed an extract of the report of the Transport Canada audit (exhibit R-1) done on the Cessna 185 (C-FDFF), the Cessna 206 (C-FJST) and the DH-2 (C-GAZJ) aircraft. The Cessna 180H (C-FSGB) was his personal aircraft that he used to go hunting. He also loaned it to Mr. Enjalric to build up hours. The witness said he had not hired Mr. Enjalric. However, because the latter was a good worker, he gave him free lodging at the base and let him fly the Cessna 185 and the Cessna 180H to build up hours, in exchange for which Mr. Enjalric helped the witness

with his company. Mr. Enjalric wanted above all else to build up hours: [translation] "It became a real sickness!" the witness said.

On Sunday, October 3, 2004, Mr. Leclerc asked Mr. Enjalric to take the Cessna 180H to Thommy Garvin to have it washed and waxed before he used it to go hunting. A photocopy of an extract from the journey log book of the C-FSGB (exhibit R-2) shows that, on October 3, 2004, Messrs. Enjalric and Mertens made a local flight lasting a total of 1 hour and 25 minutes. There is no sign of an entry in the aircraft journey log book for October 4, 2004. In fact, no flights were made on the Cessna 180H from October 3 to 8, 2004. The aircraft was used on October 8, 2004, for a flight to Arc Ange, then to Lac-à-la-Tortue for maintenance work at Bel Air Laurentien Aviation Inc. (page 2 of exhibit R-2).

A photocopy of an extract from Mr. Enjalric's log book, filed by the witness (exhibit R-3), also shows that he used the Cessna 180H on October 3, 2004. He did not fly again that aircraft until the following October 8th for a flight from Lac-à-Beauce to Arc Ange, then on to Lac-à-la-Tortue. Mr. Leclerc wondered how Mr. Enjalric could have used the Cessna 180H on October 4, 2004, when the aircraft was not even at the base, especially since, knowing he would be busy with the Transport Canada inspectors on October 4, 2004, he had asked Mr. Enjalric that day to help him take calls and do various tasks.

Mr. Leclerc was also surprised at the receipt filed in evidence (exhibit M-5). According to the witness, this receipt, dated October 4, 2004, was not prepared for Ms. Dupont-Lépine and her mother, but rather for two passengers on board the Cessna 185 used by Mr. Lavallée for a sightseeing flight. [translation] "My planes don't take off for $100", the witness said. The photocopy of the extract from the journey log book of the Cessna 185 (C-FDFF) (exhibit R-4) shows that Mr. Lavallée, who is certified for the Cessna 185, made a number of flights during the day of October 4, 2004.

Mr. Leclerc was also surprised that Mr. Enjalric asked for money from passengers he had decided to take with him on the Cessna 180H. He and Mr. Enjalric had a clear understanding that he could not charge for flights made on this aircraft with passengers. In his view, Ms. Dupont-Lépine's flight on the Cessna 180H on October 4, 2004, never took place. The witness also filed a blank receipt from the bar-restaurant Le Parasol (exhibit R-5) which he said he obtained quite easily; he was even offered more. He also stressed that Inspector Burroughs had not asked to see any documents in support of his claims.

Together with his partner and friend, Mr. Priem, the applicant had added a Cessna 206 VIP to his fleet, enabling Aviation 2000 to attract an enviable European clientele. Aviation 2000 is the official carrier for Auberge Sacacomie and Auberge du Lac Taureau. Unfortunately, Ms. Lacombe and her husband were, in his view, waging a campaign to malign his company by telling falsehoods and systematically trying to obstruct all their plans.

The **cross-examination** of Mr. Leclerc revealed the following:

1. 1. On October 4, 2004, the Cessna 180H was with Mr. Garvin who lives in Lac-à-Beauce.

2. 2. Mr. Leclerc has the original journey log book of the Cessna 180H (C-FSGB) and the original of Mr. Enjalric's log book.
3. 3. The dates of the last three entries on the first page of exhibit M-4 have been corrected by changing the "3" to a "4". This is an error. To be convinced of this, one need merely check the sequence of flying hours entered for October 3 and 4, 2004, in the aircraft journey log book. The last flight on October 3 was at about 2 p.m. and the first on October 4 shows a flight at about 10:30 a.m. The entries made in the log make sense and follow in sequence.
4. 4. Transport Canada is needlessly attempting to cast doubt on the entries appearing in the extracts from the log books filed in evidence.
5. 5. According to Mr. Leclerc, in 2004, it cost about $225 an hour to operate the Cessna 180H and $450 an hour for the Cessna 185.
6. 6. Mr. Leclerc issues only one invoice for tourist groups.
7. 7. According to Mr. Leclerc, the two passengers in question in exhibit M-5 undoubtedly joined other passengers who were likely with a tourist group.
8. 8. Mr. Leclerc spent the week of October 4 to 8, 2004, providing documents to the Transport Canada inspectors and overseeing the flights.
9. 9. Mr. Enjalric could not use the Cessna 180H if the weather conditions were unfavourable. He did not pay for the fuel when he used this aircraft.
10. 10. The passenger, Ms. Dupont-Lépine, likely made a flight *before* October 4, 2004.

Mr. Enjalric said that Mr. Leclerc loaned him his Cessna 180H for free in exchange for his doing various jobs for him, such as greeting clients, answering the telephone, making up invoices or refuelling aircraft. The witness pointed out that he did not use the Cessna 180H on October 4, 2004, because Mr. Leclerc had asked him to take it to Mr. Garvin the previous day, that is, October 3, 2004 (second entry in exhibit R-3). Mr. Enjalric said he recorded all his flights in his log book. He was surprised to see the date of October 4, 2004, at the bottom of the screen when viewing the cassette (exhibit M-6). While he was preparing for a training flight on the Cessna 180H, [translation] "these people arrived, they seemed interested... I simply offered to take them for a ride". On October 4, 2004, he was at the base to help out while Mr. Leclerc was with the Transport Canada inspectors. He recognized his signature on exhibit M-5, but maintained that this invoice had not been issued to Ms. Dupont-Lépine, much less for a flight on the Cessna 180H. Mr. Enjalric stated categorically that he received no money from Ms. Dupont-Lépine, nor did he issue her a receipt for her flight. Mr. Leclerc had clearly informed him he was not to take payment from passengers he took on board the Cessna 180H. Mr. Enjalric said he mentioned all these facts to Inspector Burroughs during his investigation.

The **cross-examination** brought the following facts to light:

1. 1. In May 2004, Mr. Enjalric began his training on the Cessna 180H at Aviation 2000. He has accumulated 115 pilot hours on that aircraft.
2. 2. Aviation 2000 began paying him in May 2005.
3. 3. He makes his entries in the log book after every flight.
4. 4. He always had his log book "1" with him, covering the period from May 16, 1999 to August 24, 2005. In December 2005, he left it in a box at Aviation 2000. He picked it up again soon before his appearance.

5. 5. Mr. Garvin was accustomed to washing Mr. Leclerc's Cessna 180H.
6. 6. He learned in the spring of 2005 from Mr. Leclerc that Transport Canada was investigating a flight he had made on October 4, 2004.
7. 7. Inspector Burroughs of Transport Canada contacted him in May 2005.
8. 8. He forgot to tell him that the Cessna 180H was with Mr. Garvin.
9. 9. He remembered having made a short flight with Ms. Dupont-Lépine, but could not recall the date.
10. 10. He viewed the cassette shortly before his appearance.

Mr. Charles-Grenon questioned Mr. **Garvin**, a friend of Mr. Leclerc. He confirmed that an Aviation 2000 pilot had brought him Mr. Leclerc's Cessna 180H on about October 3, 2004, to be washed before hunting season began.

In **cross-examination**, Mr. Garvin stated as follows:

1. 1. He has known Mr. Leclerc for seven or eight years.
2. 2. Mr. Leclerc asked him to wash his plane. He did this two or three times a year, for free. In exchange for his services, Mr. Leclerc occasionally took him on a fishing trip.
3. 3. Mr. Leclerc's aircraft has two bucket seats in front and two bucket seats in back. He is able to differentiate between the Cessna 180 and the 185 because [translation] "it's written in the front".
4. 4. He lives 1.5 kilometres from the operating base of Aviation 2000. He is not a pilot.
5. 5. He sees often Mr. Leclerc's aircraft.

Mr. Priem testified for the applicant. He went into partnership with Mr. Leclerc and purchased a Cessna 206 VIP to meet the needs of European tourists. Mr. Priem said he had heard about Ms. Lacombe while busy contacting Mr. Guindon about the Île-Saint-Quentin project. Mr. Guindon told him he was concerned about the reputation of Aviation 2000 because of conversations he had had with Ms. Lacombe in which she had said that Aviation 2000 [translation] "was not in compliance and was making illegal flights". The witness also pointed out that their Lac Blanc and Lac à l'Éclair clients had suddenly become suspicious of Aviation 2000 and repeatedly asked to see the company's air operator certificate and insurance documents. On consulting an Internet forum on floatplane flights in Canada, he read messages "signed Anabelle" warning readers that the Air Mauricie (now called Aviation 2000) aircraft were in poor condition and that the company had once lost its licence, in his view creating unfounded doubts about this company.

RESPONDENT'S SUBMISSIONS

Counsel for the Minister of Transport argued that he has shown on the balance of probabilities all the facts alleged in appendix A of the notice of assessment based on the following premises:

– Ms. Dupont-Lépine's testimony speaks for itself. Ms. Dupont-Lépine confirmed the date of the flight as being October 4, 2004, and filmed the aircraft registered as C-FSGB, in which she was seated that day on leaving the Aviation 2000 base for a sightseeing flight. She also filmed at the controls of that aircraft the pilot Franck, who told her she was on board a Cessna 180. Franck

acknowledged having made out the receipt (exhibit M-5) and his signature. The date of October 4, 2004 appears at the bottom of the screen when exhibit M-6 is viewed. Ms. Dupont-Lépine's testimony is credible and reliable, since she has no interest to further. The applicant has not succeeded in undermining the credibility of the witness.

– The applicant's evidence to the effect that the Cessna 180H, registered as C-FSGB, was with Mr. Garvin on October 4, 2004, is an "alibi defence". The applicant did not submit this information to the Minister of Transport far enough in advance to allow it to make the necessary verifications. The Tribunal member ought therefore to consider this fact in determining its probative value.

– The photocopies of the extracts from the log books filed by the applicant are not reliable. Some of the entries for flights between October 4 and 8, 2004 have been changed or crossed out.

APPLICANT'S SUBMISSIONS

– On October 4, 2004, Aviation 2000 could not have operated the Cessna 180H, registered as C-FSGB, as alleged in appendix A of the notice of assessment. The aircraft was not at the base that day. Three witnesses have confirmed this fact: Messrs. Leclerc, Enjalric and Garvin.

– The entries made in the log books of the Cessna 180H and of Mr. Enjalric show that it was not flown on October 4, 2004.

– The applicant had no obligation to inform the Minister of Transport of its defence. The Transport Canada investigators simply did not pursue their investigation far enough.

– Ms. Dupont-Lépine and Ms. Lacombe were in collusion to obtain proof that Aviation 2000 had used the Cessna 180H, registered as C-FSGB, on October 4, 2004, for sightseeing operations. They had an interest to further in this case: Ms. Dupont-Lépine took a sightseeing flight at Ms. Lacombe's expense. Ms. Lacombe obtained a video and a receipt from Aviation 2000 to support her allegations and allow the Minister of Transport to proceed against Aviation 2000.

– The testimonies of Ms. Dupont-Lépine and Ms. Lacombe conflict on a number of points. Ms. Dupont-Lépine's testimony does not agree in every respect with the documentary evidence adduced by the Minister of Transport.

DISCUSSION

To discharge its burden of proof, the Minister of Transport must show on the balance of probabilities each and every one of the following facts alleged in appendix A to the notice of assessment, to wit:

- the time, October 4, 2004, at about 10:30 a.m.;
- the place, in the vicinity of La Tuque, Quebec;
- the operation by Aviation 2000 of a Cessna 180H, registered as C-FSGB;

- the existence of aerial work involving sightseeing operations (for remuneration); and
- the non-compliance of this aerial work with the applicant's air operator certificate.

The evidence of the Minister of Transport is based essentially on the testimonies of Ms. Dupont-Lépine and Ms. Lacombe, on the video filmed by Ms. Dupont-Lépine (exhibit M-6), as well as on the receipt issued by Aviation 2000 (exhibit M-5) and a restaurant receipt (exhibit M-7), both dated October 4, 2004. On viewing the videocassette, we plainly see Ms. Dupont-Lépine and her mother at the Aviation 2000 base at Lac-à-Beauce, boarding an aircraft on floats, Ms. Dupont-Lépine's mother taking her place in front with the pilot and Ms. Dupont-Lépine in the back, behind her mother. The aircraft took off, flew over the La Tuque area and touched back down at Lac-à-Beauce. While airborne, the pilot identified himself as "Franck" and told the passengers they were on board a Cessna 180. On leaving the aircraft, Ms. Dupont-Lépine filmed its registration letters, C-FSGB. Aviation 2000 did indeed operate the Cessna 180H, registered as C-FSGB, over the La Tuque area. However, the representative of Aviation 2000 disputes, first, that his client operated the said aircraft on **October 4, 2004,** and second, that it was operated **as a sightseeing flight when its air operator certificate did not permit it to do so.**

Let us look first at whether the Minister of Transport has discharged its burden of proof as to **the date** of the alleged offence.

The evidence of the Minister of Transport shows that Ms. Dupont-Lépine went to Aviation 2000 the morning of October 4, 2004, at the request of Ms. Lacombe to take a "plane ride" with all expenses paid by Ms. Lacombe. Ms. Dupont-Lépine purchased, at Ms. Lacombe's request, on the morning of October 4, 2004, a videocassette to film her flight. Ms. Lacombe loaned her movie camera to Ms. Dupont-Lépine. As instructed by Ms. Lacombe, Ms. Dupont-Lépine gave her the cassette used to record her experience at Aviation 2000 on October 4, 2004, along with the receipt issued by the applicant for the flight (exhibit M-5) and a restaurant receipt (exhibit M-7), both dated October 4, 2004. Ms. Lacombe corroborated these facts by candidly admitting having set up this scenario and sending Ms. Dupont-Lépine to the applicant to find out whether there was any basis for her concerns about the applicant's operation of the Cessna 180H. Ms. Lacombe's scenario did not include Ms. Dupont-Lépine specifically requesting a flight on board the Cessna 180. Counsel for the Minister of Transport also relies on the date of October 4, 2004, and the time shown at the bottom of the screen when viewing the video (exhibit M-6) and on the date of October 4, 2004 showing on the receipts (exhibits M-5 and M-7) to conclude that the event did in fact take place on the date and time in question.

The evidence shows that Ms. Lacombe's movie camera can record data using either a cassette or a memory chip. The date of October 4, 2004 and the time, 10:21 a.m. to 10:34 a.m., did indeed appear at the bottom of the screen when Inspector Burroughs viewed the videocassette. Oddly enough, although the information shown on the cassette and on the memory chip were in fact filmed using the same movie camera, that is, the one belonging to Ms. Lacombe, the date and time did not appear at the bottom of the screen when, at the hearing, Mr. Charles-Grenon viewed the film sequences recorded on the memory chip. Inspector Burroughs made this observation to the Tribunal, because he had not noticed this discrepancy when viewing the film transferred by Ms. Lacombe's employee, Mr. Potvin, from her computer files to a compact disk. When

questioned by Mr. Charles-Grenon, Mr. Potvin said it was possible to change the date and time of events filmed on cassette or digital files. The evidence therefore leaves open the possibility that the date and time shown on the cassette could have been changed between October 4 and 14, 2004. On the latter date, Ms. Lacombe turned the cassette over to Inspector Burroughs. The Minister of Transport has obviously not explored this possibility. According to Mr. Potvin, the content of the compact disk consisted of no fewer than 42 files. At Ms. Lacombe's suggestion, Inspector Burroughs viewed mainly files 39, 40, 41 and 42. He briefly viewed the others, but admitted he had not viewed files 25 to 29, also filmed by Ms. Dupont-Lépine. He disclosed to the applicant's representative only the four files that Ms. Lacombe had specifically suggested he view, that is, files 39 to 42.

Aside from the date and time seen at the bottom of the screen when viewing the videocassette (exhibit M-6), the conversations heard provide no clue as to the date and time of the events, nor do they make any reference or allusion to the payment demanded for the flight.

The receipt (exhibit M-5) clearly bears the date of October 4, 2004, but was issued for a flight on a Cessna 185 with Mr. Lavallée at the controls. If, as counsel for the Minister of Transport claims, Mr. Enjalric erred in entering the name of another aircraft, what would explain his also entering the name of a pilot other than himself when his purpose for being at the Aviation 2000 base was first and foremost to build up pilot hours in exchange for various services? Why, too, would Ms. Dupont-Lépine not have the receipt corrected when she noticed it said "Cessna 185" instead of "Cessna 180"? Why would she take inaccurate proof back to Ms. Lacombe, who had made her well aware of her concerns about the pseudo-commercial activities of the Cessna 180H?

We are unable to verify, based on the results of the investigation of the Minister of Transport, whether the Cessna 180H (C-FSGB) was in fact flown on October 4, 2004. It seems that Inspector Burroughs was satisfied with the testimonies of Ms. Dupont-Lépine and Ms. Lacombe, with the date of October 4, 2004, showing at the bottom of the video screen (exhibit M-6), and with the receipts (exhibits M-5 and M-7). The inspector, who had to refer to his notes a number of times during his examination-in-chief, did not more fully document the evidence as to the date of the event. The fact that this inspector does not usually handle this type of case does not excuse him from obtaining, as is done in any investigation, all the proper information to support the allegations of the Minister of Transport on which the burden of proof depends.

Inspector Burroughs said he did not recall whether, at his meeting with Mr. Leclerc, he consulted documents provided by Mr. Leclerc [translation] "because there was nothing in his notes to that effect". Now, it is not up to the person charged by the Minister of Transport with having contravened the regulations to show the inspector the evidence that would justify his actions. Rather, it is up to the inspector to assume the proactive role that automatically falls to him and document the case of the Minister of Transport. This applies to any type of inspection. It is surprising that the inspector did not place on the record documents of interest, such as the journey log book of the Cessna 180H (C-FSGB) and Mr. Enjalric's pilot log book, or even consult them, when it was not just his right but also his duty to do so.

A photocopy of an extract from the journey log book of the Cessna 180H filed by the applicant (exhibit R-2) shows that the aircraft was not flown from 12:45 p.m. on October 3, 2004 to 8:25 a.m. on October 8, 2004, on which date the aircraft was taken to Lac-à-la-Tortue for maintenance work at Bel Air Laurentien Aviation Inc. An examination of the entries shown in the photocopy from the journey log book of the Cessna 180H (C-FSGB) (exhibit R-2) does not lead one to believe there has been any manipulation or falsification. Moreover, these entries are consistent in every way with those for the Cessna 180H (C-FSGB) in the photocopy from Mr. Enjalric's log book (exhibit R-3).

The photocopy of the extract from the journey log book of the Cessna 185 (exhibit R-4) shows, as does the receipt (exhibit M-5), that the pilot Lavallée conducted a flight on the Cessna 185 on October 4, 2004. In fact, Mr. Lavallée, who is certified for this aircraft, conducted a series of short flights (six) on October 4, 2004, probably for tourists. While counsel for the Minister of Transport has attempted to cast doubt on the last three entries on page 1 (exhibit R-4), it seems clear to us that a mistake was inadvertently made (i.e., five instead of four) and was corrected so that the entries would be consistent with the chronological order of the entries on page 2, which are intact.

The receipt dated October 4, 2004 from the restaurant Le Parasol in La Tuque (exhibit M-7) is not in itself reliable evidence, since this type of document can often be obtained in the desired quantity and completed as one likes. In fact, Mr. Leclerc tried this and obtained a blank receipt from the same restaurant without any difficulty (exhibit R-5).

In addition to proving the date of the event, the Minister of Transport also had to show that the applicant operated the Cessna 180H (C-FSGB) **in aerial work involving sightseeing operations**, as stated in appendix A of the notice of assessment. Mr. Charlebois has shown that the applicant's Cessna 180H was not included on the air operator certificate of Aviation 2000 until May 2005 (exhibits M-1, M-2 and M-3), following an application by Mr. Leclerc (exhibits M-8 and M-9). This aircraft could therefore not be used for other than private purposes in 2004, which Mr. Charles-Grenon has acknowledged since the start of this hearing.

On the one hand, Ms. Dupont-Lépine states that she paid the pilot Franck (Mr. Enjalric) "$50 cash" for the flight and asked him for the receipt which she filed (exhibit M-5). On the other hand, Mr. Enjalric states categorically that he never received any money from Ms. Dupont-Lépine after the brief flight in the Cessna 180H that he offered to make with her, and never made out a receipt for that flight. He made this assertion twice, with equal force both times. Mr. Enjalric acknowledged having made out the receipt (exhibit M-5), but said it could not have been intended for Ms. Dupont-Lépine because he knew full well that Mr. Leclerc had asked him not to request payment from passengers he sometimes took on board the Cessna 180H, as this aircraft was for private use only. Mr. Leclerc repeated this "caution" about the Cessna 180H in his testimony, stressing that he trusted Mr. Enjalric. According to the latter, the receipt (exhibit M-5) had most certainly been intended for passengers who had probably taken a sightseeing flight on the Cessna 185 with the pilot Lavallée on October 4, 2004.

Mr. Leclerc usually makes up only one invoice per group. He multiplies the cost per person by the number of passengers. He sometimes makes out individual receipts for people who turn up at

the base and are not with a group and are paired up with passengers from a group to fill vacant seats, if need be, in the interest of cost effectiveness. This practice, which Mr. Enjalric corroborated, led the latter to believe that the two individuals for whom the receipt (exhibit M-5) was intended were not Ms. Dupont-Lépine and her mother, but rather two people who joined other passengers, members of a group, on a sightseeing flight in the Cessna 185 on October 4, 2004, with Mr. Lavallée at the controls, especially since, according to Mr. Leclerc, the Cessna 185 never takes off when there are fewer than four (paying) passengers, much less for $100.

Inspector Burroughs' inspection revealed that a former pilot of Aviation 2000, now employed by Air Hélibec inc. located in the La Tuque area, did not know of the "sightseeing activities" of the Cessna 180H.

In order to determine where the truth lies when there is a conflict surrounding major elements of the offence, the Tribunal must carefully review *all* the evidence adduced at the hearing and decide the value to be accorded to it.

Ms. Dupont-Lépine is a young 19-year-old mother who, feigning an offhand and familiar attitude towards the Tribunal, was forced, clearly in spite of herself, to testify because of a favour she agreed to do for Ms. Lacombe in exchange for this brief flight. Ms. Dupont-Lépine was able to make precise and complete observations about the events surrounding her first flight. She is the key witness of the Minister of Transport in this case. And yet she did not appear to us to have a good recollection of the events. While plausible, the evidence she gave differs from that given by other witnesses about the same events.

She claimed to be seeing the video she had filmed on October 4, 2004 for the first time on the day of the hearing, whereas Ms. Lacombe said she had viewed it with her the day she brought it to her, that is, on October 4, 2004. She also maintained that she had not filmed the interior of the buildings at the operating base of Aviation 2000, as the batteries of the movie camera were low, whereas she told Inspector Burroughs that she had filmed the interior on arriving at the site. Ms. Dupont-Lépine seemed to us to be thrown off balance and blushed when she realized the inconsistency in her comments. She said she met Mr. Leclerc on October 4, 2004, and asked to be taken on a short flight, then later admitted, on cross-examination, that she was seeing Mr. Leclerc for the first time the day of the hearing. The Tribunal noted, moreover, that she asked the pilot for a receipt precisely because the owner was not there. Finally, she did not recall the name of the restaurant where she ate in La Tuque after her flight. The inconsistencies harboured in her testimony detract greatly from the credibility and reliability of the main aspects.

Obviously Ms. Lacombe, who filed a complaint against Aviation 2000 and also owns an airline that operates in the same region as the applicant, had an interest in the outcome of the case. The testimonies of Messrs. Guindon and Priem also show that Ms. Lacombe had difficulty accepting competition and engaged in practices that are unwarranted in a climate of healthy competition. It is difficult to understand why Ms. Lacombe told Ms. Dupont-Lépine not to ask for "any particular type of aircraft" for her flight when she had sent her precisely for the avowed purpose of finding out if the applicant's Cessna 180H was in fact involved in sightseeing operations.

Mr. Enjalric struck us as a serious-minded individual who has a reserved nature and good judgment. His testimony was honest and consistent; he had nothing to hide. When undergoing lengthy cross-examination, he was composed, patient and unwavering when answering. His answers were spontaneous. He remembered having given Ms. Dupont-Lépine this free ride in the Cessna 180H, but could not remember the date. In his testimony, Mr. Enjalric said that on October 4, 2004, he was at the Aviation 2000 base. This statement is corroborated by the testimony of Mr. Leclerc, who had asked for his help that day because he was busy attending to the Transport Canada inspectors who were there from Monday, October 4, until Friday, October 8, 2004. Mr. Garvin's testimony corroborates that of Mr. Enjalric, who said he took the Cessna 180H to him on October 3, 2004, to be washed at Mr. Leclerc's request.

Mr. Leclerc, a businessman and experienced pilot, testified with resolve and certainty and with the avowed intention and desire to correct the facts and [translation] "set the record straight". His testimony is corroborated by that of Mr. Enjalric. He remained calm throughout the examination and cross-examination when he commented that this was a [translation] "frame-up" by a competitor and talked about the various strategies she had used to hinder his expansion plans and malign his operations (exhibit R-6 and testimonies of Messrs. Guindon and Priem). Mr. Leclerc saw Ms. Dupont-Lépine for the first time the day of the hearing.

The testimonial evidence adduced by the Minister of Transport has not appeared to us to be as consistent and plausible as that adduced by the applicant's witnesses. Ms. Dupont-Lépine contradicted herself on a number of points. Even the testimonies of Ms. Dupont-Lépine and Ms. Lacombe, who acted in concert, were inconsistent. The filing of the receipts (exhibits M-5 and M-7) and the results of the investigation of the Minister of Transport have not tipped the balance of probabilities in its favour. The alibi defence raised by counsel for the Minister of Transport in connection with section 7 of the *Canadian Charter of Rights and Freedoms* applies in criminal proceedings before common law courts and not to an administrative tribunal such as the Transportation Appeal Tribunal of Canada. The Tribunal believes that the consistent testimonies of Messrs. Leclerc, Enjalric and Garvin, supported by the information that appears in the copies of the extracts from the journey log book of the Cessna 180H and the pilot's log book, better represent what actually occurred.

DETERMINATION

The Minister of Transport has not shown on the balance of probabilities all the elements of the alleged offence. The Tribunal dismisses the allegations and the monetary penalty assessed by the Minister of Transport.

June 12, 2006

Suzanne Racine

Member

TAB E

TATC File No. Q-2520-33
MoT File No. N5504-44981

TRANSPORTATION APPEAL TRIBUNAL OF CANADA

BETWEEN:

Minister of Transport, Applicant

- and -

Bruno Tomassini, Respondent

LEGISLATION:
Aeronautics Act, R.S.C. 1985, c. A-2, ss. 7.7, 7.9
Canadian Aviation Regulations, SOR/96-433, ss. 700.02(1), 401.28(2)

Hire or reward, Commercial air service, Air Operator Certificate

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Review Determination
Caroline Desbiens

Decision: August 29, 2003

REASONS FOR REVIEW DETERMINATION

(for electronic publication)

A review hearing on the above matter was held Friday, April 25, 2003, in the Municipal Courthouse in Laval, Québec.

BACKGROUND

On May 1, 2002, the Applicant Minister issued a Notice of Assessment of Monetary Penalty against the Respondent Bruno Tomassini pursuant to section 7.7 of the *Aeronautics Act*, alleging that on July 25, 2001, the Respondent contravened subsection 700.02(1) of the *Canadian Aviation Regulations* (CARs).

The Notice of Assessment of Monetary Penalty reads specifically as follows:

Pursuant to section 7.7 of the *Aeronautics Act*, the Minister of Transport has decided to assess a penalty against you for having contravened subsection 700.02(1) of the *Canadian Aviation Regulations*.

On July 25, 2001, during a flight from Lac Gagnon to a lake situated west of Lac Tudor at the approximate coordinates of N55°45' and W65°30' and a return flight to Lac Gagnon on July 31, 2001, you operated an air transport service without holding an air operator certificate that authorizes the operation of such a service.

The foregoing provision has been designated pursuant to section 103.08 of the *Canadian Aviation Regulations*, and the procedures in sections 7.7 to 8.2 of the *Aeronautics Act* respecting monetary penalties apply.

The total assessed penalty of $1,000 must be paid on or before June 7, 2002, [...].

As the penalty of $1,000 was not paid within the prescribed time limit, a notice of hearing of this case for review by this Tribunal was issued, pursuant to section 7.9 of the *Aeronautics Act*.

THE EVIDENCE

The parties filed by consent as Exhibit M-1 an agreement as to the events, dated March 11, 2003. This document M-1 contains the following admissions:

- Mr. Bruno Tomassini is the owner of the aircraft registered as C-FUIM;

- Bruno Tomassini does not hold an air operator certificate;

- The advertisement published in the April 2001 issue of Sentier Chasse et Pêche in the name of Aventures B"T" is admitted;

- The receipts totalling $1,850.00 are admitted;

- The journey log extract (8 pages) is admitted;

- The total flight time was 15.7 hours;

- The flight left July 25, 2001, from Lac Gagnon bound for a lake situated west of Lac Tudor at the approximate coordinates of N55°45' and W65°30' and returned to Lac Gagnon on July 31, 2001;

- Hourly fuel consumption is 77 litres/hour;

- The cost of fuel is $1.50/litre, taxes included;

• The cost of oil is $5.00/hour.

The advertisement published in the April 2001 issue of *Sentier Chasse et Pêche* was filed as Exhibit M-1A, the receipts totalling $3,700.00, or $1,850.00 paid per person, were filed as Exhibit M-1B and the eight pages from the journey log of aircraft C-FUIM were filed as Exhibit M-1C.

These admissions and these exhibits therefore show that during the month of April 2001, the Respondent caused the following advertisement to be published: "Aventures B.T. Guide Service for combined caribou hunting - trophy fishing (lake trout, brook charr, fresh water salmon) Zone 24. Departure by seaplane from Montréal in late August/early September 2001. Cost: $1,850 per person, per week. For reservations: (450) 667-3433."

Following this advertisement, the Respondent conducted a transport on July 25, 2001, using his Cessna 206A registered as C-FUIM, from Lac Gagnon to a lake situated west of Lac Tudor at the approximate coordinates of N55°45' and W65°30' and back to Lac Gagnon on July 31, 2001, and charged and collected $1,850.00 per person for these flights. The receipts show that payments of $1,850.00 were made in two instalments, namely, $400.00 each on May 1, 2001, and $1,450 on July 25, 2001. The fuel and oil consumption per flying hour for this type of aircraft and their respective cost on the relevant dates were also admitted, such that the main issue to be determined in this proceeding is whether the amount of $1,850.00 charged per person for the flights between Lac Gagnon and the lake situated west of Lac Tudor constitutes a "hire or reward" for the Respondent for the use of his aircraft to carry passengers.

In addition to these admissions, the Applicant Minister called three (3) witnesses, Messrs. Alain Poisson, Luc Bruneau and Marc Foisy.

The Respondent called two (2) witnesses, Mr. Bruno Tomassini and his father, Mr. Antonio Tomassini.

EVIDENCE OF THE MINISTER

Mr. Alain Poisson

Mr. Alain Poisson is a wildlife protection officer and works at the wildlife protection office in Chibougamau. He heads a team of investigators based in Schefferville for the period extending from mid-July to late October. Mr. Poisson oversaw an investigation to determine whether the Respondent was operating an outfitting camp without a licence during the summer of 2001 following the publication of an advertisement in the magazine *Sentier Chasse et Pêche* (Exhibit M-1A) offering a combined hunting and fishing trip in zone 24. As it is not permitted to operate an outfitting camp in this zone, this advertisement drew his attention, leading to the investigation conducted by the Ministry of Natural Resources, Wildlife and Parks.

Mr. Poisson did not know whether this advertisement had been published before in the past or whether this advertisement has subsequently been published again by the Respondent. He checked whether Mr. Tomassini had previously contravened Québec legislation governing

wildlife protection, the operation of outfitting camps and the James Bay Agreement, but no active file was found in Mr. Tomassini's name; he did notice, however, that Mr. Tomassini had previously registered the killing of caribou.

At the times relevant for the purposes of this case, Mr. Poisson was the supervisor of Messrs. Marc Foisy and Luc Bruneau, both of whom are wildlife protection officers with the Ministry of Natural Resources, Wildlife and Parks.

Mr. Luc Bruneau

Following the publication of the advertisement (Exhibit M-1A), Mr. Bruneau was instructed by Mr. Alain Poisson to carry out an investigation into the possibility that Mr. Bruno Tomassini was operating an illegal outfitting camp in zone 24.

He therefore contacted Mr. Tomassini on May 1, 2001. He also met with the Respondent in the presence of the officer, Mr. Marc Foisy.

This meeting took place in the Respondent's offices in Laval, where he practises his profession of chiropractor. Officers Bruneau and Foisy met with the Respondent, who explained to them the purpose of the trip, showing them two topographical maps posted on the walls of his office. The Respondent told them he had gone several times with groups into zone 24. According to Mr. Bruneau's testimony, it seems that the only dates available for a fishing and hunting trip were from July 25 to August 1 because Mr. Tomassini was not available due to his practice, and especially because other hunting and fishing trips were already scheduled with other groups. The Respondent also showed them photographs of hunting and fishing trips made in past years. He showed them two flight routes out of Schefferville for the trip to an unnamed lake situated west of Lac Tudor. On the same occasion, and referring to a map of Québec, Mr. Tomassini also said that he could provide a fishing trip to Gouin Reservoir.

After having explained the trip in question, the Respondent said that the advertised price of $1,850 included round-trip aeroplane transportation, guide service, the provision of boats, motors and gas for the boats, and tent accommodation. The Respondent also offered meal preparation and would look after bringing food.

The Respondent also told them to plan on about seventy dollars ($70) for food, fifty dollars ($50) for their licence to hunt caribou, thirty to forty dollars ($30 - $40) to transport the fish to Montréal, and an additional amount to package and store fish and meat at the establishment of Mr. Claude St-Amant and for accommodation at a motel in Schefferville should the trip be extended because of poor weather conditions. In short, since the return trip was scheduled for August 1 and the caribou hunt opened August 1, it was possible they might get in one day of caribou hunting. During their meeting on May 1, the officers Bruneau and Foisy booked only the trip to the lake situated west of Lac Tudor, and each of the officers gave the Respondent a deposit of four hundred dollars ($400), as shown in Exhibit M-1B. Before their departure, Messrs. Bruneau and Foisy asked the Respondent to keep their deposit in a safe place, and the Respondent reassured them he would, telling them that their deposits and receipts and those of

other groups were kept in a separate drawer of his desk to which no one, including his family, had access.

Mr. Luc Bruneau later contacted the Respondent around May 8 to book a trip to Gouin Reservoir. Mr. Marc Foisy and he made a first fishing trip to Gouin Reservoir with the Respondent. Mr. Guy Racicot objected to the evidence of this other trip, alleging that it had no relevance to the offence alleged against the Respondent. This objection was received without prejudice.

Although the other trip made on board the Respondent's aircraft to Gouin Reservoir does not concern the offence in question, this evidence is allowed since it makes it possible to assess the Respondent's credibility in the context of his defence under section 401.28 of the CARs. This evidence also makes it possible to assess the evidence in its entirety, and in particular the context in which the flights of July 25 and 31, 2001 were made.

Officers Luc Bruneau and Marc Foisy took their places on board the Respondent's aircraft for the trip on July 25, 2001, and its return on July 31, 2001, as alleged in the Notice of Assessment of Monetary Penalty and as admitted by the Respondent.

In cross-examination, Mr. Luc Bruneau confirmed that the Respondent seemed to him to be a very safe man from the standpoint of air transport. In particular, the Respondent was careful to provide two separate itineraries (two routes) for the trip to the lake west of Lac Tudor, to allow for different weather conditions.

In both cross-examination and re-examination, Mr. Bruneau indicated that there had never been any question of a change or adjustment to the price of $1,850.00 depending on the weather conditions or the route taken for the flight and therefore the number of flight hours. The price of $1,850.00 was a lump sum. The only possible adjustments were for food and the packaging of fish, if applicable, transportation to Montréal and one-night's accommodation in Schefferville in the event of bad weather, charged in addition to the lump sum of $1,850.00.

In cross-examination, Mr. Bruneau also indicated that Mr. Tomassini had told him that he had already transported a first group to zone 24 before their trip and was also preparing the site for another hunting trip later, without saying whether it was for members of his family or other persons. In fact, he spent part of the trip repairing a boat because another group was supposed to come and fish. Mr. Bruneau also did not know if other advertisements had been published in the magazine *Sentier Chasse et Pêche* at the Respondent's request. Mr. Bruneau also admitted that the main purpose of his investigation was not to verify a contravention of the *Aeronautics Act*, but rather to verify whether or not an illegal outfitting camp was being operated.

Re-examined about the amount of $1,850.00, Mr. Bruneau indicated that the Respondent had never discussed with them costs related to the use of the aeroplane such as maintenance, fuel, etc., nor how the pilot was paid, except that he understood that this amount covered the cost of fuel. In short, the expense items for the aeroplane were not discussed in the context of the lump sum of $1,850.00 charged by the Respondent.

Mr. Bruneau also indicated that the Respondent had confirmed to him that he had transported four to five (4-5) groups a year for at least five (5) years with clients, mostly for hunting trips.

In re-examination by Mr. Racicot, Mr. Bruneau admitted that the meeting with the Respondent had taken place in his chiropractic office, that the telephone number indicated in the advertisement matched the number of this office, and that the period of July 25 to August 1 was difficult to schedule because of the Respondent's chiropractic practice and also because other groups had already booked a trip for the month of August.

During his testimony, Mr. Luc Bruneau also filed his investigation report as Exhibit M-2. Counsel for the Respondent objected to the filing of his report, alleging that the facts it contained constitute hearsay evidence and that this document refers to the second trip made to Gouin Reservoir, which has nothing to do with the offence alleged in this proceeding.

Contrary to Mr. Racicot's submission, most of the facts concerning the fishing trip to the lake situated west of Lac Tudor and contained in this report have been related to this Tribunal by Mr. Luc Bruneau who was also cross-examined by Mr. Racicot. Mr. Racicot also had the opportunity to cross-examine him about the document and to adduce evidence in rebuttal, and this statement is therefore admissible in evidence. The conditions that existed at the time of the investigation in this case constitute an exception to the prohibition against hearsay evidence. For example, section 2871 of the *Civil Code of Québec* stipulates that previous statements by a person who appears as a witness, concerning facts to which he may legally testify, are admissible as testimony if their reliability is sufficiently guaranteed. In this case, the report of the officer Bruneau in no way contradicts his testimony.

In any event, while it is not bound by the strict rules of evidence applicable before civil tribunals, an administrative tribunal must respect the rules of natural justice and therefore admit all relevant evidence while ensuring that each party has the opportunity to present its arguments. In this case, Mr. Racicot has had the opportunity to cross-examine Mr. Bruneau about his report and to adduce the Respondent's evidence by having him testify.

In addition, in principle, hearsay evidence is admissible before a quasi-judicial tribunal provided the rules of natural justice are respected.[1]

As for the facts concerning the trip to Gouin Reservoir and referred to in this report M-2, the only relevant facts retained are to the effect that Mr. Tomassini was also organizing fishing trips to Gouin Reservoir prior to July 15, that he already had two groups booked for St. Jean Baptiste Day and July 1, 2001, and that Messrs. Foisy and Bruneau also made a fishing trip with the Respondent to Gouin Reservoir after the advertisement appeared in the magazine *Sentier Chasse et Pêche*. The other facts about the trip to Gouin Reservoir are not relevant.

Mr. Marc Foisy

For the purposes of the case, the Respondent acknowledged that Mr. Marc Foisy's testimony was to the same effect as that of Mr. Luc Bruneau, and the Minister's representative therefore decided not to call him to testify.

EVIDENCE OF THE RESPONDENT

Mr. Bruno Tomassini

Mr. Tomassini is a chiropractor and has practised his profession since 1985 in Laval. He has his own practice, and his work schedule therefore prevents him from going away for long periods on hunting or fishing trips. He works four days a week, from 8:00 a.m. to 7:00 p.m., Monday to Thursday. Occasionally during these three days off a week, he flies his aircraft for recreational purposes and makes on average between two and four hunting trips a year, using his own aircraft. Since 1996, he has been hunting in zone 24 in northern Québec. He usually goes in July to prepare his temporary camp. He also goes back in August or September for a hunting and fishing trip to the unnamed lake he has baptized Lac "Fuim," situated west of Lac Tudor.

He usually makes the first trip to this lake with his father, with whom he prepares the gear for his second hunting and fishing trip in August or September. On this second trip, he is usually accompanied by members of his family, namely, his children, his wife or his father, and a friend or a friend of his father's. When making this trip, he shares the cost of fuel and oil for his seaplane as well as the cost of the butchering and transportation of meat, camp costs and food with the members of his family and/or his friends (except his children, whose expenses he pays).

The Respondent filed as Exhibit D-1 the breakdown of costs totalling $1,850.00 that he charged per fisherman for the trip made on July 25, 2001, with the officers Foisy and Bruneau. The Respondent explained that the breakdown of costs of $1,850.00 is based on 22 flight hours, whereas in actual fact the trip from July 25 to 31, 2001, involved a total of 17.15 flight hours.

Mr. Tomassini explained that this discrepancy was due to the fact that the trip was made earlier in the summer than planned (the advertisement put the dates in August or September) so that they did not hunt and therefore did not transport any caribou to Schefferville. According to him, taking two caribou would have necessitated two flights of two hours each, i.e., from Lac "Fuim" to Schefferville and back. Also, hunters or fishermen usually like to make a quick trip to Lac Champdoré, which usually takes another two flight hours. In short, Mr. Tomassini explained that the round trip from Lac Gagnon to Lac "Fuim" usually takes 16 hours and that in addition to these hours, he estimates another four flight hours to transport two caribou from Lac "Fuim" to the butcher in Schefferville plus two hours to go fishing at Lac Champdoré. So it is on this basis that he estimated the amount of $1,850.00 broken down in Exhibit D-1, and on the assumption that Messrs. Bruneau and Foisy would hunt caribou. As it turned out, the return trip was made July 31, 2001, so the caribou hunt was not possible.

According to document D-1 prepared by the Respondent, he estimates the cost of fuel for 22 flight hours to be eight hundred and forty-seven dollars ($847.00) per hunter, for consumption of seventy-seven (77) litres per hour at a price of one dollar and fifty cents ($1.50) per litre. The consumption for his aircraft and the cost of fuel per litre had in any event been admitted in document M-1 on the admission list. However, there is a discrepancy between the number of flight hours in his own estimate filed as Exhibit D-1 and the number in admission document M-1. Moreover, he estimated oil consumption for the trip at six (6) litres, or forty-two dollars

($42.00) per hunter, so the cost of fuel and oil for 22 flight hours was estimated at eight hundred and eighty-nine dollars ($889.00) per hunter according to the Respondent.

The other costs making up the amount of $1,850.00 were estimated costs for the butcher shop in Schefferville, at seventy dollars ($70.00) per caribou for two caribou and seventeen dollars ($17.00) per box to transport the meat, or three boxes per hunter, for a total of one hundred and ninety-one dollars ($191.00), the cost of transportation from the butcher shop to the Schefferville airport, at twenty dollars ($20.00), the cost of the cargo shipment from the Schefferville airport to Montréal, at three hundred and fifty dollars ($350.00) (one hundred and forty pounds of meat for two caribou at $2.50 per pound) and the camp costs of four hundred dollars ($400.00), estimated at fifty dollars ($50.00) per day (which includes boats, motors, gas, tents, propane, dishes, soap, etc.).

According to Mr. Tomassini, it was agreed with Messrs. Bruneau and Foisy that the amount of $1,850.00 would be adjusted on their return according to the number of flight hours and the caribou brought back, if applicable. His testimony in this regard therefore contradicts that of the two officers.

Mr. Tomassini also indicated, as did Mr. Bruneau, that the packaging of fish and the costs of accommodation and food were in addition to the estimate of $1,850.00.

In attempting to recapitulate the flight hours for each segment of the trip, the Respondent realized that he had made errors in the journey log entries (M-1C) and on Exhibit M-1, and the calculation of total flight hours was therefore incorrect. The corrections to be made to the journey log were filed as Exhibit M-3. It also appears that the first entry in the journey log dated July 27 should in fact be dated July 25, since this is the final segment of the flight between Schefferville and Lac "Fuim." For July 27, there should be two entries in the journey log for the flights made to take the fish to Mr. St-Amant's establishment in Schefferville. They are for a one-hour trip from Lac "Fuim" to Schefferville and the return flight of 1.40 hours between Schefferville, the river where they stopped to fish and Lac "Fuim." Finally, for the return on July 31, 2001, the flight time should be broken down as follows: Lac "Fuim"-Wabush: 2.40 hours; Wabush-Lac Sébastien: 2.25 hours and Lac Sébastien-Lac Gagnon: 2.40 hours. The total number of flight hours between July 25 and 31, 2001, was therefore 17.15 hours.

According to the Respondent, the cost of $1,850.00 that was charged in this case is about the same as the cost per person shared with his father and his friends in previous years for trips to the same lake. The elements that vary, according to him, are the amount of caribou and fish and the weather, which affect the number of flight hours.

As for the advertisement published in the magazine *Sentier Chasse et Pêche*, the Respondent explained that it was for a trip in late August/early September when the weather conditions are more uncertain and when hunters have a better chance of returning with caribou, hence the estimate of $1,850.00 for a total of 22 flight hours. As for the camp costs of fifty dollars ($50.00) per day, Mr. Tomassini gave very little explanation, confining himself to saying that it was an empirical average based on the fact that he spent close to ten thousand dollars ($10,000.00) to purchase the gear and transport it to zone 24.

Mr. Tomassini indicated that he caused the advertisement to be published in the magazine *Sentier Chasse et Pêche* in March 2001 because his father could not accompany him on a trip to Lac "Fuim" during the summer. His father had scheduled a trip to Italy and a hunting trip to Anticosti Island. Not wishing to go alone to his temporary camp set up at Lac "Fuim," the Respondent had therefore placed an advertisement to find two companions for a combined hunting and fishing trip in late August/early September. He also wanted to go and check on the condition of his gear at the temporary camp. To this end, he wanted to be accompanied by two healthy people familiar with the lakes of this region, if possible.

The Respondent said he had received several calls as a result of this advertisement. The telephone number in the advertisement matched the telephone number of his chiropractic clinic. This element was confirmed, moreover, by the witness Mr. Bruneau. As it appears in the public register of the Inspector General of Financial Institutions and as Mr. Bruno Tomassini indicated in his testimony, Aventures B.T., the name used in the advertisement, is an assumed name registered for carrying on aircraft leasing activities at the suggestion of Mr. Tomassini's accountant. In his testimony, Mr. Tomassini indicated that this name was registered for future leasing of aircraft.

The Respondent does not deny having offered and made a trip to Gouin Reservoir with the officers Bruneau and Foisy in June 2001 or having made other hunting and fishing trips with other groups during the summer of 2001. Mr. Tomassini explained having told the two fishermen Bruneau and Foisy that he had previously taken other people on a hunting trip to this Lac "Fuim" but denies having said they were "clients." Mr. Tomassini in fact explained that he had patients and not clients, and that it is true he may have mentioned having "brought people" with other groups in the past.

Mr. Tomassini confirmed having met with Messrs. Bruneau and Foisy in his chiropractic office and having asked for a deposit of $400.00 to make sure these people would turn up on the agreed departure date.

In cross-examination, Mr. Tomassini acknowledged having prepared Exhibit D-1 a few weeks before the hearing of this case for the purposes of the case.

Cross-examined again about the number of flight hours between Lac Gagnon and Lac "Fuim," Mr. Tomassini repeated that it was usually necessary to plan on sixteen hours there and back plus another six hours on average for three trips to transport two caribou and bring back fuel, hence the estimate of 22 hours. This estimate of six hours differs from the first estimate in which he referred to four flight hours to transport two caribou and two flight hours to travel to Lac Champdoré.

Re-examined by Mr. Racicot, Mr. Tomassini indicated it was impossible to make the expense adjustments with Messrs. Bruneau and Foisy after their return since he was arrested for operating an illegal outfitting camp upon landing at the wharf in Schefferville.

He therefore had no opportunity to "settle up" with the officers who arrested him. He also indicated that the change of date of the trip from that advertised (that is, late July rather than

early August) meant that the estimate of $1,850.00 based on 22 hours was higher than the expenses actually incurred, particularly as Messrs. Foisy and Bruneau did not go hunting.

Mr. Antonio Tomassini

Mr. Antonio Tomassini is the Respondent's father. He indicated that he has been in the habit of accompanying his son to Lac "Fuim" since 1996, about twice a year, that is, one trip to set up the temporary camp and another to hunt. The year 2001 was an exception because he did not make the first trip and was also unable to make the second trip to hunt because he was to leave for Italy and Anticosti Island. Usually, the expenses for a trip to Lac "Fuim" are shared equally on their return from the trip. He indicated that a trip to Lac "Fuim" usually costs him between one thousand five hundred ($1,500.00) and two thousand dollars ($2,000.00) on average for expenses.

Cross-examined about these amounts for such a trip, Mr. Antonio Tomassini indicated that his son did not usually give him any receipt and that he trusted his calculations. It was in February or March 2001 that he told his son that he could not make the trip with him in the summer of 2001.

Re-examined by Mr. Guy Racicot, Mr. Antonio Tomassini indicated that the other people who usually accompany him on the hunting trip are a friend with whom he has business ties and a friend who has done some excavation for him.

Asked the name of his son's friend who usually accompanies them, Mr. Antonio Tomassini was unable to answer, saying he did not remember it.

DOCUMENTARY EVIDENCE

Finally, the Respondent filed in a bundle as Exhibit D-2, at the Minister's objection regarding relevance, various clippings from brochures showing the prices of different outfitters for hunting and fishing in the same sectors.

For example, Aventures Norpaq advertised in 2003 a package including transportation, a guide service, lodging and meals for one week for the caribou hunt, for three thousand, nine hundred and forty-five dollars ($3,945.00) from Montréal. Similarly, Jack Hume Adventures advertised a package price of three thousand, three hundred and fifty dollars ($3,350.00) per person in 2003 for an eight-day package from Montréal. Cargair, with a departure from LG-4, advertised in 2002 a price of two thousand, one hundred and fifty dollars ($2,150.00) per person for a package of six nights at the camp, round-trip transportation by seaplane from LG-4, return transportation of two caribou and two severed racks per person and one night at the base of LG-4. Finally, Explo-Sylva advertised, for August to September 2002, an eight-day package with round-trip transportation from Montréal for two thousand, nine hundred and ninety dollars ($2,990.00), and a package price of three thousand, nine hundred and ninety dollars ($3,990.00) per person including food.

Mr. Tamborriello's objection concerning the irrelevance of these brochures had to do with the fact that these prices were offered by large outfitters known in the hunting and fishing

community and having all the necessary facilities and gear to operate a legal outfitting camp, and therefore their operating costs were higher than those of the Respondent with his temporary camp. The package prices are therefore necessarily higher than that of the Respondent.

Mr. Luc Bruneau

Re-examined about the price of $1,850.00, Mr. Luc Bruneau again said that he had no discussion with the Respondent about the possibility of the price of $1,850.00 varying depending on the number of actual flight hours. According to Mr. Bruneau, the Respondent presented himself as the operator of an outfitting camp and as a commercial carrier because of the advertisement that was published and the other trips of which he boasted.

THE LAW

Subsection 700.02(1) of the CARs stipulates:

700.02 (1) No person shall operate an air transport service unless the person holds and complies with the provisions of an air operator certificate that authorizes the person to operate that service.

Subsection 101.01(1) of the CARs defines the expression "air transport service" as follows:

"air transport service" means a commercial air service that is operated for the purpose of transporting persons, personal belongings, baggage, goods or cargo in an aircraft between two points; (*service de transport aérien*)

Finally, section 3 of the *Aeronautics Act* defines the expressions "commercial air service" and "hire or reward" as follows:

"commercial air service" means any use of aircraft for hire or reward;

"hire or reward" means any payment, consideration, gratuity or benefit, directly or indirectly charged, demanded, received or collected by any person for the use of an aircraft;

Finally, section 401.28 of the CARs sets out one exception to section 700.02, namely, an exception to the requirement that the holder of a private pilot licence hold an air operator certificate.

Section 401.28, however, sets out the applicable conditions in order for a holder of a private pilot licence to be able to receive reimbursement for costs incurred in respect of a flight.

Specifically, subsections 401.28(1) and (2) are relevant for the purposes hereof and read as follows:

401.28 (1) No holder of a private pilot licence shall act as the pilot of an aeroplane or helicopter for hire or reward unless the conditions set out in subsection (2), (3) or (4), as applicable, are met.

(2) The holder of a private pilot licence may receive reimbursement for costs incurred in respect of a flight where

(*a*) the holder is the owner or operator of the aircraft;

(*b*) the holder conducts the flight for purposes other than hire or reward;

(*c*) the holder carries passengers only incidentally to the purposes of the flight; and

(*d*) the reimbursement

(i) is provided only by the passengers referred to in paragraph (*c*), and

(ii) is for the purpose of sharing costs for fuel, oil and fees charged against the aircraft in respect of the flight, as applicable.

Section 103.08 of the CARs states:

(1) The provisions set out in column I of the schedule to this Subpart are hereby designated as provisions the contravention of which may be dealt with under and in accordance with the procedure set out in Sections 7.7 to 8.2 of the Act.

(2) The amounts set out in column II of the schedule are the maximum amounts payable in respect of a contravention of the provisions set out in column I.

[...]

Subsection 700.02(1) of the CARs is part of column I of this schedule for designated provisions and sets out in column II a maximum amount of penalty, namely, five thousand dollars ($5,000.00) for an individual and twenty-five thousand dollars ($25,000.00) for a corporation.

The Notice of Assessment of Monetary Penalty in this proceeding is therefore dealt with pursuant to sections 7.7 to 8.2 of the *Aeronautics Act*. Subsection 7.9(5) of the *Aeronautics Act* stipulates that on a proceeding before a member of the Tribunal the burden of proving that the person appearing before the member has contravened the designated provision that the person is alleged to have contravened is on the Minister; and the person is not required and shall not be compelled to give any evidence or testimony in the matter.

In this case, the Minister therefore has the burden of proving the elements of the offence under subsection 700.02(1) of the CARs, namely:

(a) that on July 25, 2001, during a flight from Lac Gagnon to a lake situated west of Lac Tudor at the approximate coordinates of N55°45' and W65°30' and during a return flight to Lac Gagnon on July 31, 2001;

(b) Mr. Bruno Tomassini operated an air transport service;

(c) without being the holder of an air operator certificate that authorizes the operation of such a service.

As elements (a) and (c) are not disputed, the Minister must therefore prove, on the balance of probabilities, that during these flights, the Respondent used his aircraft to carry passengers for hire or reward, namely, that he collected payment, consideration, gratuity or benefit, directly or indirectly, for the purpose of transporting persons or goods in that aircraft between two points.

In the event the Minister discharges his burden of proving all the elements of the Notice of Assessment of Monetary Penalty, it then falls to the Respondent to prove that he meets the elements of the exception he invokes as a ground of defence.

Before civil tribunals, a person wishing to assert a right shall prove the facts on which his claim is based.[2]

For example, in common law and under the *Criminal Code*, an accused has the burden of proving his defence that he is not criminally responsible due to a mental disorder. To this end, the doctrine teaches as follows:

In most cases, there are multiple factual and legal issues. Where there are several disputed facts or issues in a case, the legal burden of proof in relation to different issues may be distributed between the parties. For example, the Crown has the legal burden in relation to the external circumstances and the mental element for the crime of murder. However, at common law and under the *Criminal Code*, the accused bears the legal burden for the defence of not criminally responsible due to a mental disorder.

In civil proceedings, the legal burden of proof operates in a similar manner. In an action for assault and battery, the plaintiff must prove that there was an application of force to the victim, that the blow caused the injury, and the quantum of damages. However, the defendant has the burden of proof in relation to a defence of justification and that he or she used no more force than was necessary.[3]

In this case, once the elements of proof meet the applicable conditions of section 700.02 of the CARs, the defence of justification is found in section 401.28.

THE ISSUES

A. Has the Minister shown, on the balance of probabilities, that the Respondent collected any payment, consideration, gratuity or benefit, directly or indirectly, for the use of his aircraft to transport Messrs. Luc Bruneau and Marc Foisy during the two flights admitted to and made on July 25 and 31, 2001?

B. If so, has the Respondent shown, on the balance of probabilities, that the collection of the amount of $1,850.00 per passenger for the use of his aircraft for these flights is permitted according to the conditions set out in the exception covered by section 401.28 of the CARs?

Specifically, assuming that the Respondent is the holder of a private pilot licence and is the owner of aircraft C-FUIM:

(i) has the Respondent shown that he conducted the flights for purposes other than hire or reward?

(ii) has the Respondent shown that he carried the passengers incidentally to the purposes of these flights?

(iii) has the Respondent shown that the payment of $1,850.00 that he collected from each passenger was for the purpose of sharing costs for fuel, oil and fees charged against the aircraft in respect of these flights and that this amount did not include any other consideration, gratuity or benefit for the use of his aircraft?

ARGUMENTS OF THE APPLICANT MINISTER

The Minister submits that he has shown, on the balance of probabilities, all the elements of the Notice of Assessment of Monetary Penalty issued pursuant to section 700.02 of the CARs.

It is admitted that the aircraft registered as C-FUIM is owned by the Respondent, that he does not hold an operator certificate, that he conducted a flight on July 25, 2001, from Lac Gagnon to a lake situated west of Lac Tudor at the approximate coordinates of N55°45' and W65°30' and a return flight to Lac Gagnon on July 31, 2001, during which he carried two passengers, Messrs. Luc Bruneau and Marc Foisy, for an amount of $1,850.00 each. It is also admitted that these flights were made further to an advertisement placed in the April 2001 issue of *Sentier Chasse et Pêche* in the name of Aventures B.T. in which the Respondent advertised a combined hunting and fishing trip for an amount of $1,850.00.

The Respondent also admitted that the total flight time was 17.15 hours (Exhibit M-1C, Exhibit M-3 and Respondent's testimony). The Respondent also admitted to receipts totalling $1,850.00 per person (Exhibit M-1B).

The Minister submits that the Respondent conducted both these flights for hire or reward since he collected an amount of $1,850.00 per person to carry them using his aircraft between two points and that this amount is greater than the costs for fuel, oil and fees charged against the aircraft. Fees would be, for example, landing fees, if applicable, the French expression used being "redevances imputées à l'aéronef." In the present case, there were no such fees.

In fact, based on the hourly fuel consumption of 77 litres per hour, the fuel cost of $1.50 per litre, taxes included, and the oil cost of $5.00 per hour, which are admitted in Exhibit M-1, the amount of $1,850.00 per fisherman far exceeds the costs for fuel and oil, calculated on a basis of 17.15 flight hours and totalling $688.86 ($2,066.58 ÷ 3 = $688.86).

According to Mr. Tamborriello, the Minister has shown, through the testimony of Mr. Bruneau, corroborated by that of Mr. Foisy, that the amount of $1,850.00 was a package price for which no adjustment according to the number of flight hours was discussed with the Respondent. The

only possible variable add-ons, according to their testimony, were for food, the transport of fish to Schefferville and the packaging of fish and meat at the establishment of Mr. Claude St-Amant.

The Minister also submits that the breakdown of the costs totalling $1,850.00 per hunter was only prepared by the Respondent (Exhibit D-1) for the purposes of the hearing. He submits that this document was adjusted at the Respondent's discretion and that it was curious that it totalled exactly the amount of $1,850.00 charged per hunter. In his view, this was a convenient arrangement fabricated from all the exhibits for the purpose of the hearing, thereby placing in doubt the reliability of this evaluation.

Regarding the evidence of the prices of other outfitters, the Minister argues that these are licensed outfitters that hold all the permits required to operate a legal outfitting camp, which must meet certain parameters in terms of structures and facilities. According to the Minister, it therefore makes sense that the package prices quoted in the brochures produced as Exhibit D-2 would be higher than that charged by the Respondent. The Minister does not consider it at all fair to compare these brochures filed for prices in 2002 to the price Mr. Tomassini charged in 2001, and they must therefore be disregarded as they are irrelevant for the purposes of this case.

Regarding the contradictory elements in the testimony of the two officers and the testimony of Mr. Tomassini, the Minister submits that this Tribunal should favour the testimony of the two officers, who are disinterested witnesses in this case, over that of Mr. Tomassini, who has every interest in testifying in his own favour. To this end, he refers to the decision of this Tribunal rendered by Mr. Pierre Beauchamp on January 20, 2000, in *Minister of Transport* v. *Christian Albert*[4] at page 11, where he cites the authors Sopinka and Lederman, who state as follows:

As instructed by Sopinka and Lederman:

Absent extenuating circumstances, the testimony of disinterested witnesses should prevail over that of persons who are or may be interested in the result. The court, however, is not to disbelieve or attribute error to the evidence of a witness solely because he is interested but must, instead, examine such evidence with reference to the facts of the case and other relevant factors. One judge has put it this way:

'... when the evidence of an important fact is contradictory ... the Court must weigh the motives of the witnesses, their relationship or friendship with the parties, their attitude and demeanour in the box, the way in which they gave evidence, the probability of the facts sworn to, and come to a conclusion regarding the version which should be taken as the true one ....'

The Minister therefore argues that the versions of the two officers to the effect that the amount of $1,850.00 was a package price not subject to adjustment at the end of the trip according to the number of flight hours, should be accepted even though they contradict the Respondent's version, since they are independent witnesses in this case. He uses the same argument for the testimony of Messrs. Bruneau and Foisy to the effect that the Respondent organized trips for other "clients" to the same site.

The Minister submits that the definition of "hire or reward" found in the *Aeronautics Act* is to be given a broad interpretation, since it is consistent with the context of the intended purpose of the *Aeronautics Act*, namely, to protect the safety of the public by overseeing the commercial air services that are offered to it.

By way of example, the Minister submits the decision *R.* v. *Biller* handed down by the Saskatchewan Court of Appeal.[5] Specifically, the Minister refers this Tribunal to paragraphs 25 and those following of this decision providing several examples where the courts found that pilots had carried passengers for "hire or reward" and were therefore providing a commercial air service within the meaning of the CARs and the *Aeronautics Act*.

In that case, Mr. Biller and Cree Lake Lodge Inc. were accused of having operated a commercial air service without holding an operator certificate for that purpose since they transported their clients for free to their hunting and fishing outfitting camps as part of their hunting and fishing package. Although the clients paid no monetary consideration, the Court found that this fell within the meaning of hire or reward stipulated in the *Aeronautics Act*. The Saskatchewan Court of Appeal ruled that the owner of the outfitting camp derived a benefit from providing transportation to his outfitting camp.

Basing itself notably on the decisions in *R.* v. *Race*[6] and *R.* v. *Laserich and Altair Leasing Ltd*,[7] the Court states as follows at page 7 of the ruling:

The facts in *R.* v. *Race* were similar to those found in this case. Kenneth Race owned and operated a hunting lodge and also maintained two outpost camps, accessible only by air. If guests chose to hunt from either of the outpost camps, they were flown there by either Kenneth Race or his brother David. While David Race did not receive a salary from the business, he received something in the nature of a bonus if a profit were achieved by season's end. The rate for accommodations and services was the same whether or not guests chose to fly with the Race brothers. Both were found guilty of operating a commercial air service for hire or reward. The Court described the definition of 'hire or reward' as 'extremely broad, broad enough it seems to me to cover almost any possible indirect or direct benefit that might accrue to the person as a result of using the aircraft' (see p. 168). The Court agreed with the assessment that the meaning of 'hire or reward' is not restricted to the notion of payment but would include revenue or income of every kind or nature.

In *R.* v. *Laserich* the accused transported oil to purchasers using the corporately owned aircraft. While the purchasers were not charged for the price of transport, the Court held that the resale price included transportation costs. The benefit the accused received in terms of the higher oil price fell within 'hire or reward.'[8]

In that case, the Saskatchewan Court of Appeal also found that the definition of "hire or reward" contained in the *Aeronautics Act* and referred to in section 700 of the [then] *Air Regulations* does not contravene section 7 of the *Canadian Charter of Rights and Freedoms*. Even broadly interpreted, it includes several situations of hire or reward. In fact, according to the Saskatchewan Court of Appeal, a broad interpretation of section 700 of the *Air Regulations* is

consistent with the purpose of the legislation, namely, to ensure the safety of the Canadian public. The Court of Appeal expresses itself specifically as follows:

Given that the purpose of s. 7.3(1)(f) of the Aeronautics Act and s. 700 of the Air Regulations is the regulation of the economic interests of the air industry and the protection of the public, I must come to the opposite conclusion to that put forward by counsel. What was said in Canadian Pacific (at p. 1068) in relation to the environment can be said with equal force with respect to the aeronautics industry. While s. 7.3(1)(f) of the Aeronautics Act and s. 700 of the Air Regulations are broad, the objectives of economic regulation of the air industry and safety are equally ambitious in scope. As was said in Race (at p. 169) after commenting on the breadth of the provision, '[section 7.3 is] necessary in its strictest interpretation for the benefit of the general public.' Parliament is justified in choosing equally ambitious means for achieving this objective.

[...]

The Courts must be careful not to step beyond their interpretive boundaries. They are not empowered to strike down legislation because of a different opinion as to what activity Parliament should have included. The Courts cannot dictate to Parliament what is appropriate policy except in narrow circumstances which are in themselves carefully circumscribed. They can only comment on the purpose of the legislation to determine whether the ambit of the impugned provision goes beyond its purpose.

The subject matter of many laws precludes precise delineation of the behaviour intended to be encompassed. The general language used does not necessarily mean that the legislation is over broad. In many cases general language is used in anticipation that the Courts will set the boundaries when faced with the particular fact situation.

Therefore, I must conclude that s. 7.3(1)(f) of the Aeronautics Act and s. 700 of the Air Regulations are not overbroad. Their breadth matches the goal of regulation for which the legislation was passed. Accordingly, I would dismiss the appeal against the convictions arising under the Aeronautics Act and the Air Regulations.[9]

Thus, by analogy with the *R.* v. *Biller* ruling, the Minister submits that the Respondent is in an identical situation to that of someone who operates an outfitting camp and provides transportation to get to that camp. In charging camp costs of $50.00 per day, the Respondent therefore received a benefit. In actual fact, these costs allowed him to be paid for his "outfitting camp" even though he denies having operated such an outfitting camp. In short, he directly collected a benefit in receiving payment for his facilities at his camp (as admitted in Exhibit D-1) in the context of the use of his aircraft.

Since the definition of "hire or reward" is broadly interpreted, as the *R.* v. *Biller* ruling attests, the Minister submits that in this case, the payment constitutes hire or reward for the use of his aircraft.

Moreover, according to the Minister, it is clear that Mr. Tomassini operates a *commercial* air service, and the flights covered by the Notice of Assessment of Monetary Penalty therefore fall

within this context. First of all, he published an advertisement offering a hunting and fishing trip, and Mr. Bruneau's testimony, corroborated by that of Mr. Foisy, clearly indicates that the Respondent has made other trips in the past, two to four a year since 1996, to this site with other groups, Mr. Bruneau having used the expression "other clients." Also, the set-up of the Respondent's office gives the impression that hunting and fishing trips were being organized commercially. The receipts for hunting and fishing trips were kept in a separate drawer of his desk (reserved specifically for trip deposits) and it is not disputed that two geographical maps of hunting and fishing regions and photographs of past trips showing catches or hunting trophies were posted on the walls of his office.

Finally, the Minister submits that as a result of the advertisement placed in the magazine *Sentier Chasse et Pêche*, the two officers Bruneau and Foisy were able to make two hunting and fishing trips with Mr. Tomassini. All this shows, according to the Minister, that the flight the Respondent made to the lake situated not far from Lac Tudor was not made for personal reasons but in a commercial context, namely, for hire or reward; that the carrying of passengers was for the purpose of the flight in question and not only incidentally; and that the amount of $1,850.00 advertised for a one-week trip per passenger was similar to a package.

In short, the Minister submits that the Respondent does not meet the conditions of exception set out in subsection 401.28(2) of the CARs to the effect that the holder of a private pilot licence may receive reimbursement for costs incurred in respect of a flight where the conditions set out in this section are met.

In fact, the amounts collected by the Respondent for the use of his aeroplane greatly exceed the costs for fuel, oil and fees charged against the aircraft. The Minister added that the condition set out in paragraph (c) was not met because the passengers were not carried incidentally to the purposes of the flight. In fact, the Respondent advertised this flight and used this advertisement to attract a clientele. The purpose of the flights was to carry passengers, and the carrying of passengers was not incidental to a flight that the Respondent was making for his own benefit.

Finally, the Minister submits that the penalty of $1,000.00, which is based on the *Aviation Enforcement Procedures Manual* for Transport Canada inspectors, is fair in the circumstances, since the maximum stipulated is $5,000.00. According to the Minister, the operation of a commercial air service without an operator certificate is a major offence. The operation of a commercial air service without the Minister's oversight is dangerous. The amount of the penalty must therefore include an element of deterrence, and the amount of $1,000.00 as a penalty is therefore fair in the circumstances.

ARGUMENTS OF THE RESPONDENT

Mr. Guy Racicot began his argument referring to the amount of the penalty. He argued that the penalties manual is not binding on this Tribunal, which has discretion as to the amount of the penalty except for the maximum of $5,000.00 stipulated in the CARs. There is therefore no obligation to assess a penalty of $1,000.00 in this case.

Regarding the ruling in *R.* v. *Biller*, Mr. Racicot argues that the facts differ from those of this case since Mr. Tomassini does not operate an outfitting camp.

According to Mr. Racicot, the testimony of the Messrs. Tomassini shows that the advertisement published in the magazine *Sentier Chasse et Pêche* was not at all usual, that it was a one-time advertisement because Mr. Tomassini's father could not join his son for the hunting and fishing trip. According to Mr. Tomassini's testimony, the Respondent's facilities are temporary for his personal use and the use of his family and friends. The Respondent therefore operated no outfitting camp and received no benefit in the context of operating an outfitting camp by providing transportation to his camp.

Mr. Racicot submits that the sharing of costs indicated in Exhibit D-1 shows no pecuniary benefit but a real sharing of costs for a hunting and fishing trip, including the sharing of costs for the aeroplane, i.e., fuel and oil, totalling eight hundred and forty-nine dollars ($849.00) based on 22 flight hours.

Mr. Racicot submits that the Minister must show a commercial aspect, i.e., an aspect of financial gain and commerce, in the contravention of section 700.02 of the CARs, which the Minister has failed to do. Mr. Racicot argues that judicial notice should be taken that the cost of operating a Cessna 206 is $300.00 to $350.00 per hour (or between $6,600.00 and $7,700.00 for 22 flight hours). Based on this amount, these costs shared among three people come to two thousand, five hundred and sixty-six dollars ($2,566.00) each, more than the Respondent charged. Mr. Racicot also submits that the brochures filed as Exhibit D-2 show that the package prices charged by outfitters for a one-week trip in this region are clearly higher than the amount charged by the Respondent. Mr. Racicot therefore concludes that the Respondent received no pecuniary benefit for the use of his aeroplane on July 25 and 31, 2001, but charged only the costs incurred strictly for a fishing trip.

In closing, Mr. Racicot argued that estimate D-1 is plausible given the time of year to which it pertains (August/September) and that the evidence shows that Mr. Tomassini wished only to find two companions for a single trip in the summer of 2001, since it was impossible for his father to join him. According to him, the mere placement of an advertisement does not constitute a contravention of section 700.02 of the CARs.

He also indicated that the Respondent meets the exception set out in section 401.28 of the Canadian CARs since:

(a) the Respondent is the owner of the aircraft;

(b) the Respondent conducted the flight for purposes other than for hire or reward since his sole purpose was to go on a fishing and hunting trip with two companions;

(c) the Respondent carried passengers only incidentally to the purposes of the flight, which was a hunting and fishing trip;

(d) the Respondent was reimbursed by the passengers whom he carried solely for the purpose of sharing costs for fuel, oil and fees charged against the aircraft in respect of the flights of July 25 and 31, 2001. The only consideration received for the use of the aircraft would be the costs for fuel and oil, which totalled $849.00 based on 22 flight hours estimated for the round trip to Lac "Fuim," the other amounts received being only hunting and fishing costs shared among the fishermen.

Mr. Racicot produced no jurisprudence to support his submissions. In order to interpret the expression "hire or reward," he did, however, submit several definitions from language dictionaries:

Petit Larousse: "Prix d'un travail, d'un service rendu."

Hachette: "Paiement, rétribution."

Harrap's: "Remuneration, payment (for); consideration (for services rendered)."

Robert: "Argent reçu pour prix d'un service, d'un travail."

Webster's: "Hire: payment for the use of a thing."

"Reward: to give in return for; to recompense; what is given in return."

These definitions therefore show that hire or reward involves more than the sharing of costs; it involves payment for a service. In this case, the Minister had to show payment beyond the costs of carrying passengers, which he failed to do since the Respondent has indicated that the amount of $1,850.00 was a cost estimate subject to adjustment.

DISCUSSION

We agree with the Minister's submissions that section 700.02 is to be interpreted broadly as the Saskatchewan Court of Appeal ruled in *R.* v. *Biller* cited above.

The question of hire or reward as defined is consistent with the purpose of the *Aeronautics Act*, namely, to protect the Canadian public during air transport. The Minister of Transport must be able to oversee all air service operations of a commercial nature to ensure the safety of passengers, and to this end does not need to determine the conduct in question, as the Saskatchewan Court of Appeal pointed out. The broad interpretation of section 700.02 of the CARs is also inferred from the fact that the Minister provides for only one exception, namely, that stipulated for the sharing of costs by a holder of a private pilot licence set out in section 401.28 of the CARs.

As the Court of Appeal pointed out in *R.* v. *Biller*, a tribunal must, however, guard against including situations that go beyond the desired aims of the *Aeronautics Act*.

Since the expression "hire or reward" is defined in the legislation, we do not need to refer to the dictionary definitions provided by Mr. Racicot.

Concerning the first issue that we have identified, the Minister has the burden of proving the elements of the offence on the balance of probabilities and, specifically, that the amount of $1,850.00 collected by the Respondent per passenger constitutes a payment, consideration, gratuity or benefit for the use of his aeroplane. It is in fact the only disputed element of the Notice of Assessment of Monetary Penalty and we therefore confine our analysis to this matter.

The advertisement offering a one-week trip for a combined hunting and fishing trip for $1,850.00 per person including the round-trip flight from Montréal to zone 24 for late August/early September 2001, is admitted. This advertisement was published not under the Respondent's name but under the assumed name of "Aventures B.T.", implying the operation of a commercial venture. While Mr. Tomassini testified that the assumed name had been registered for the future leasing of aircraft, we are puzzled by the use of the name of a future company to advertise a hunting and fishing trip.

The evidence clearly shows that the Respondent collected an amount of three thousand, seven hundred dollars ($3,700.00), or $1,850.00 per fisherman, for the trip to Lac "Fuim" situated west of Lac Tudor. Mr. Tomassini also admitted that the total flight time for the trips of July 25, 27 and 31, 2001, was 17.15 hours, that fuel consumption for his Cessna 206 is 77 litres per hour, that the cost of fuel is $1.50 per litre, taxes included, and that the cost of oil is $5 per hour (Exhibits M-1, M-3 and D-1).

Accordingly, the costs for fuel and oil for 17.15 flying hours for this trip totalled $2,066.57, or 1,320.55 litres at $1.50 per litre, totalling $1,980.82, plus $5 per hour for the oil, or $85.73. This amount shared among three people comes to $688.86 per person for fuel and oil, which is clearly lower than the amount of $1,850.00 collected by the Respondent. According to the evidence, no other fee charged against the aircraft was included in the amount collected.

The testimony of the wildlife officers differs from that of the Respondent, however, as to the nature of the amount of $1,850.00 charged by the Respondent. The testimony of Mr. Bruneau, corroborated by that of Mr. Foisy, is that this was a package price that was to cover round-trip transportation (and therefore fuel), guide services, lodging (two framed tent squares, one for eating and the other for sleeping), boats (two fourteen-foot aluminum boats, two 3.5-HP motors) and meal preparation. At no time did Mr. Bruneau say that this amount included the butchering, packaging and transport of meat and cargo fees. According to the wildlife officers, there was never any question of this amount being adjusted after the trip depending on the number of flight hours, which could vary according to whether or not they hunted and/or weather conditions. Moreover, the costs for packaging and transporting fish and meat were charged separately. Mr. Bruneau's testimony was categorical in this regard, though he was asked the question a number of times: the amount of $1,850.00 was a package price not at all subject to an adjustment. This testimony, as we know, has been corroborated by that of Mr. Foisy, given the Respondent's admission that Mr. Foisy testified to the same effect. Moreover, the report M-2 confirms everything.

Mr. Tomassini, for his part, indicated that the amount of $1,850.00 that appeared in the advertisement and was charged to each fisherman was an estimate that was to be adjusted at the end of the trip according to the actual hours flown, which depended on weather conditions and the taking of caribou. Mr. Tomassini explained that his estimate was based on 22 flight hours, given the time of year planned for this hunting and fishing trip, namely, late August/early September. Mr. Tomassini's testimony explaining the six-hour discrepancy in the hours actually flown was not, however, consistent. At one point, he indicated that the six additional hours of his estimate were due to the fact that he had to fly four hours to transport caribou to Schefferville and two hours to go fishing at Lac Champdoré. At another point, he said that the six flight hours had been estimated for transporting caribou to Schefferville and for additional fuel to Lac "Fuim."

We are further puzzled by Mr. Tomassini's explanation of the estimate of $1,850.00 based on the period late August/early September. As of May 1, when he met with the fishermen, the Respondent knew the date of the trip, namely, late July, and he knew at that time that they would have very little time (the day of the return trip) to hunt. He nevertheless kept the price at $1,850.00 and on July 25, collected the balance of $1,450.00.

His testimony is also fraught with inconsistencies as to what is included in the amount of $1,850.00 to justify its covering only the costs of hunting and fishing, including fuel and oil for the aircraft. According to him, this estimate included the costs of butchering, packaging and transport, whereas these are variable costs subject to adjustment. The packaging of fish and the transport of fish and food, also variable costs, were calculated and paid separately. There is agreement in all the testimony on this point. Why include the packaging and transport of meat in his estimate and not of fish? The Respondent has given no logical explanation. Would it not be more fair and logical for the amount of $1,850.00 to be a package price for the trip not including the variable costs of hunting and fishing? In fact, did it not make more sense to make provision for all variable costs separate from the package price, as the officers' testimony shows?

The advertisement also refers to an amount of $1,850.00 for one week without saying that this is an estimate for a sharing of expenses and without mentioning any adjustment whatsoever. This factor, together with the appearance of a venture operated by Aventures B.T., supports the officers' testimony that the amount collected was a package price. In short, the testimony of the wildlife officers is more credible than that of Mr. Tomassini; their versions are consistent, unambiguous and logical regarding the circumstances surrounding this trip, while that of the Respondent is not. Their testimony shows that this was a package price rather than a sharing of expenses that could vary depending on the number of hours flown by the aeroplane and the caribou hunt, the variable costs having been set apart.

In short, as the British Columbia Court of Appeal pointed out in *Faryna* v. *Chorny*,[10] as reported in *Minister of Transport v. Christian Albert*,[11] the following test is to be applied in cases of conflicting versions:

The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of the witness in such a case must be its harmony with the preponderance of the

probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions.

The Respondent's testimony also lacks credibility as to the details of the expense items appearing under item 5 of Exhibit D-1. The Respondent, after having calculated the costs for fuel, oil, meat butchering and transport, arrives at an amount of four hundred dollars ($400.00) for his camp costs, which he justifies empirically by indicating that it cost him approximately $10,000.00 to purchase and transport his gear to his temporary camp on the shores of Lac "Fuim." His explanations in this regard were not very convincing and lacked clarity. The explanation of the $400.00 amount seems to have been patched together from all the exhibits for the hearing, and mainly in an attempt to justify what he collected on the basis of one expenditure.

In light of the foregoing, we favour the testimony of the wildlife officers, independent and disinterested witnesses in this case.

In any event, and even assuming it has been shown that the amount of $400.00 represents camp costs, in our view these costs constitute a benefit received by the Respondent for the use of his aircraft. As the department's representative pointed out, the Respondent's situation is similar to that of Mr. Race mentioned earlier in *R.* v. *Biller*:

The Court agreed with the assessment that the meaning of "hire or reward" is not restricted to the notion of payment but would include revenue or income of every kind or nature.

Even though the Respondent submits not to have operated an outfitting camp, he derived a benefit by charging camp costs.

In short, if we consider the aircraft costs for fuel and oil in the amount $2,066.57 for 17.15 flight hours and the sharing of these costs among three fishermen, the amount of costs for fuel and oil for the use of the aircraft is $688.86 per fisherman, whereas the Respondent charged $1,850.00, a difference of $1,161.14. Although the Respondent considers this amount to include some butchering and transport costs totalling $561.00, which we dismiss for the reasons mentioned earlier, there still remains a balance of over five hundred dollars to the benefit of the Respondent, collected per fisherman for the use of his aircraft.

The fact that the Respondent has a professional practice that occupies him full-time and the fact that the amount of $1,850.00 also represents what Mr. Tomassini senior pays his son do not do away with the fact that the flights of July 25 and 31, 2001, were made for hire or reward within the meaning of the Act.

In this case, it is our view that the Minister has discharged his burden of proving all the essential elements of the Notice of Assessment of Monetary Penalty, and in particular the disputed element of whether the Respondent collected a "hire or reward" for the use of his aircraft.

Also, the Respondent has not discharged his burden of proving that he met the elements of subsection 401.28(2) of the CARs regarding the exception applicable to the holder of a private

pilot licence for the purpose of sharing costs incurred in respect of a flight, which are limited to fuel, oil and fees charged against the aircraft.

Specifically, according to our analysis of the evidence mentioned earlier, the Respondent collected, for the use of his aircraft to carry passengers, more than the costs for fuel, oil and fees charged against the aircraft, the surplus constituting a benefit for the use of his aircraft. The Respondent has not justified, on the balance of probabilities, that the amount collected per passenger was arrived at by a sharing of allowable costs pursuant to subsection 401.28(2) of the CARs and a sharing of hunting and fishing costs alone without constituting a benefit collected for the use of the aircraft. The Minister's evidence shows that the price was a package and not a sharing of costs. Moreover, the camp costs charged by the Respondent constituted a benefit for the use of the aircraft within the meaning of the Act, and the justification of packaging and transport costs for butchering included in an alleged estimate is not credible. While counsel for the Respondent wishes to impute to this Tribunal judicial notice of the operating costs of a Cessna 206A at $300.00 per hour, we cannot accept such a submission. If the Respondent wanted to prove that the amount of $1,850.00 charged per person represented only the costs of operating his aircraft, he had to show it. Instead, he chose to use meat packaging and transport and camp costs to justify his estimate of $1,850.00, as shown in Exhibit D-1, and must suffer the consequences.

The condition set out in paragraph 401.28(2)(*d*) of the CARs is therefore not met.

Moreover, the Respondent has not shown on the balance of probabilities that he made the flights for purposes other than hire or reward and that he carried the passengers only incidentally to the purposes of these flights.

For the reasons already set out, it is more likely that the amount of $1,850.00 represented a package price for the hunting and fishing trip and not an estimate for the sharing of costs subject to adjustment. The advertisement quoting the amount of $1,850.00 for the trip with guide service also has a commercial connotation and this factor, together with the evidence that the amount of $1,850.00 was a package price, prove that the Respondent did not make the flight for purposes other than hire or reward and that the passengers were not carried incidentally, particularly as another trip to Gouin Reservoir had been made further to this advertisement with the two wildlife officers. This contradicts the Respondent's testimony that he travels only for his own pleasure and that of his family and friends.

We cannot conclude from the fact that the advertisement was published only because the Respondent's father was not available to accompany him in 2001 that the flight was made for purposes other than hire or reward and that the carrying of passengers was incidental to the purposes of the flight, if one analyses all the evidence in its context and as a whole. In any event, the Respondent's explanation that the advertisement was published only because his father was not available does not square with the undisputed testimony of the officers Bruneau and Foisy that the Respondent travelled with other groups in the summer of 2001. Repairing the boat for other groups, as well as the clients' deposits in a separate drawer of his desk and the difficulty of booking a date for the trip because of trips the Respondent had with other groups, also show that the Respondent's explanation of the advertisement is not plausible.

Also, since the flights alleged in the offence were planned and booked following the publication of the advertisement, the passengers clearly were not carried incidentally to the purposes of the flights, these flights being specifically for the purpose of carrying these passengers to Lac "Fuim," although in the end this trip consisted in carrying passengers to a hunting and fishing site. In short, the Respondent placed the advertisement and made the flight to transport the officers Bruneau and Foisy and would not have made the flight without passengers. This is not an instance of a private pilot having to get from point A to point B and incidentally to this flight offering to carry the passengers in question to accommodate them.

CONCLUSION

Because of the foregoing, it is our view that the Respondent contravened section 700.02 of the CARs on July 25 and 31, 2001, for the flights mentioned in the Notice of Assessment of Monetary Penalty since he carried passengers for hire or reward, that is, he operated a commercial air service without holding an operator certificate authorizing him to do so.

We therefore uphold the Minister's decision to assess a monetary penalty of one thousand dollars ($1,000.00) against the Respondent.

The offence under section 700.02 of the CARs is a serious offence, since the operation of a commercial air service not overseen by the Department of Transport can constitute a threat to passenger safety. The penalty must include an element of deterrence. Considering that the CARs provide for a maximum penalty of $5,000.00, we believe that an amount of $1,000.00 for a first offence is reasonable in the circumstances. The Respondent must therefore pay the monetary penalty of $1,000.

Caroline Desbiens

Member

Transportation Appeal Tribunal of Canada

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[1] Patrice Garant, *Droit Administratif*, 4th edition, vol. 2, Le contentieux, Les éditions Yvon Blais, p. 271.

[2] Section 2803 of the *Civil Code of Québec*.

[3] J. Sopinka, S.N. Lederman & A.W. Bryant, *The Law of Evidence in Canada*, 2d ed. (Toronto and Vancouver: Butterworths, 1999) at p. 58.

[4] CAT File No. Q-1878-33.

[5] [1999] S.J. No. 202, dated 31 March 1999.

[6] (1974) 14 C.C.C. (2d) 165 (Ont. Dis. Ct.).

[7] [1977] 4 W.W.R. 703 (N.W.T.C.A.).

[8] *R.* v. *Biller* [1999] S.J. No. 202 [p. 7 Quicklaw version].

[9] *R.* v. *Biller*.

[10] (1951) 4 W.W.R. (N.S.) 160.

[11] CAT File No. Q-1878-33.