CAT File No. C-0064-02
MoT File No. 6504-P140586-007386

CIVIL AVIATION TRIBUNAL

BETWEEN:

Donald R. Fonger, Appellant

- and -

Minister of Transport, Respondent

LEGISLATION:
Aeronautics Act, R.S.C. 1985, c. A-2, s. 6.3(1)(c) (now s. 7.3(1)(c))
Air Regulations, C.R.C. 1978, c. 2, s. 210(1)(a),
Air Regulations, C.R.C. 1978, c. 2, s. 218(a)

Standards to be met, Overweight aircraft, Certificate of airworthiness

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Appeal decision
Gordon R. Mitchell, James W. Snow, Robert J. Rushford, Q.C.

Decision: June 6, 1988

Heard: Winnipeg, Manitoba, April 7 and May 27, 1988

(1) The appeal under section 210(1)(a) of the Air Regulations is dismissed.

(2) The appeal under section 6.3(1)(c) of the Aeronautics Act is dismissed.

Appeal Hearing on the above application heard by the Civil Aviation Tribunal at Department of Justice, 301 Centennial House, 310 Broadway, 3rd Floor Board Room in the city of Winnipeg, Manitoba, on April 7, 1988, and reconvened hearing held at the International Inn in Winnipeg, Manitoba, on May 27, 1988.

The Respondent, Donald Ross Fonger, was charged as follows:

1. *Air Regulations* C.R.C., C. 2 section 210, subsection (1), paragraph (a): in that for the period July 13, 1987, to July 24, 1987, you acted as pilot-in-command of Piper PA30 aircraft bearing Canadian registration C-GPZX on flights commencing in Oakland, California, and terminating in Darwin, Australia, when the certificate of airworthiness was not in force by reason of the fact the

aircraft was operated in excess of the gross take-off weight permitted by the aircraft type certificate. - 60-day suspension.

2. *Aeronautics Act* section 6.3, subsection (1), paragraph (c): between the dates of July 12, 1987, and July 24, 1987, you did make or cause to be made, false entries in the journey log for PA30 aircraft bearing Canadian registration C-GPZX with intent to mislead - 60-day suspension to be served concurrently with "1." above.

Section 210, subsection (1)(a) of the *Air Regulations* reads as follows:

> 210.(1) No person shall fly or attempt to fly an aircraft, other than a hang glider or an ultralight aeroplane, unless there is in force in respect of that aircraft
>
> (a) a certificate of airworthiness issued under this Part or under the laws of the country in which the aircraft is registered.

Section 6.3(1)(c) of the *Aeronautics Act* reads as follows:

> 6.3 (1) No person shall
>
> (c) make or cause to be made any false entry in a record required under this Part to be kept with intent to mislead or wilfully omit to make any entry in any such record.

The member hearing the case dismissed both charges and the Minister appeals that decision.

At the conclusion of the hearing, the Respondent produced a search warrant which he used as yet another example of numerous errors in the Appellant's documentation. The search warrant produced by the Respondent was unsigned and referred to a "Beaver" Aircraft C-GPZX. The Respondent's aircraft is a Piper Commanche. It is on the strength of this search warrant that the Appellant obtained the pictures which were put in evidence. It is also on the strength of this search warrant that the Minister's witness, Mike Bresina, testified that the aircraft had an additional fuel cell sitting in the back of the aircraft, a modified system of seat belts restraining the tank and a radio on top of the additional fuel cell on the face of it. The search warrant would appear to be invalid raising the question of whether the evidence obtained on the strength of an invalid search warrant is admissible.

Following the conclusion of the appeal, the Minister launched an application under section 10 of the *Civil Aviation Tribunal Rules* for a supplementary hearing to enable the Minister to respond to the allegations that their search had been conducted on an invalid search warrant. Following notice to the Respondent and with the Respondent's consent, the Appeal Tribunal reconvened at Winnipeg, Manitoba, at 13:00 hours on May 27, 1988. Faye Smith appeared for the Appellant and the Respondent appeared without representation. A court reporter was not available, however, both the Appellant and the Respondent agreed that the hearing could proceed without a court reporter. The hearing was limited to hearing evidence relating to obtaining and execution of the search warrant. The Minister called two witnesses who had been sworn on the initial

hearing and whose evidence was given on the basis that they were still under oath. In addition, the original case presenting officer, Mr. Hiscock, affirmed and gave evidence. The two sworn witnesses are Mike Bresina and Dennis Dale Hoeppner. It is clear from the witnesses that the information to obtain the warrant was completed in the offices of the Department of Transport in Winnipeg and taken to a Provincial Court judge in Winnipeg, who swore the information and then issued and signed the search warrant. It is on the strength of this search warrant that the evidence previously referred to was obtained.

The Tribunal have not had to rule prior to this hearing on the admissibility of evidence obtained under a search warrant and it is for that reason that we intend to review the law in respect thereto because this issue will undoubtedly arise in future cases.

The statutory basis for obtaining a search warrant is found in section 443 of the *Criminal Code of Canada*. The relevant portions of that section are as follows:

> 443. (1) A justice who is satisfied by information upon oath in Form 1, that there is reasonable ground to believe that there is in a building, receptacle or place
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> (a) anything on or in respect of which any offence against this Act or any other Act of Parliament has been or is suspected to have been committed;
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> (b) anything that there is reasonable ground to believe will afford evidence with respect to the commission of an offence against this Act or any other Act of Parliament; or
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> (c) anything that there is reasonable ground to believe is intended to be used for the purpose of committing an offence against the person for which a person may be arrested without warrant
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> may, at any time, issue a warrant under his hand authorizing a person named therein or a peace officer;
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> (d) to search the building, receptacle or place for any such thing and to seize it; and
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> (e) subject to any other Act of Parliament, to, as soon as practicable, bring the thing seized before, or make a report in respect thereof to, the justice or some other justice for the same territorial division in accordance with section 445.1.

Under the provisions of section 443, the justice issues the search warrant on the basis of a sworn information. The information must satisfy the requirements of section 443 of the *Criminal Code*. The Tribunal are entitled to examine the information and determine whether the Justice had some evidence upon which he could, acting judicially, be satisfied that reasonable grounds exist that

(1) an offence has or is being committed;

(2) the objects to be searched for will afford evidence of that offence; and

(3) the objects are located in the place to be searched.

R. v. Christianson (1986) 47 Sask. R. 143 (Sask. Q.B.) 150.

The standard to be met in determining the "reasonable grounds" was established by the Supreme Court of Canada in *Hunter v. Southam* 1984 14 CCC (3d) 97.

The State's interest in detecting and preventing crime begins to prevail over the individual's interest in being left alone at the point where credibly-based probability replaces suspicion (emphasis added).

This standard was also discussed in *R. v. Debot* 1987 30 CCC (3d) 207 (Ont. C.A.).

The standard of "reasonable ground to believe" or "probable cause" is not to be equated with proof beyond or reasonable doubt or a *prima facie* case. The standard to be met is one of reasonable probability. Page 219 (emphasis added).

In determining whether a search warrant issued pursuant to section 443 of the *Criminal Code* is invalid, the Tribunal should determine whether the Justice had some evidence upon which he could, acting judicially, be satisfied that reasonable grounds exist that

(1) an offence has or is being committed;

(2) the objects to be searched for will afford evidence of that offence; and

(3) the objects are located in the place to be searched.

If the Tribunal determines, on the basis of the above test, that the search warrant is valid, the evidence obtained pursuant thereto should be admitted in evidence.

If, however, the Tribunal determines that the search warrant is invalid, that does not necessarily mean that the evidence is inadmissible. The Tribunal must then determine whether the search conducted on an invalid search warrant is an unreasonable search and seizure contrary to section 8 of the Charter. Section 8 of the Charter reads as follows:

> 8. Everyone has the right to be secure against unreasonable search or seizure.

If the Tribunal determines that the search and seizure was an unreasonable search and seizure contrary to section 8 of the Charter, the Tribunal must then decide whether the evidence obtained pursuant to the search should be excluded pursuant to section 24(2) of the Charter. Section 24(2) reads as follows:

> 24(2) Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms

> guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings could bring the administration of justice into disrepute.

A decision to exclude or not to exclude evidence under section 24(2) is a question of law. There are two requirements for the exclusion of evidence pursuant to section 24(2):

(1) that the evidence has been obtained in a manner that infringed or denied a right or freedom guaranteed by the rights guaranteed by the Charter; and

(2) that the admission of the evidence could, having regard to all the circumstances, bring the administration of Justice into disrepute.

The phrase "if it is established" in section 24(2) places the burden of persuasion on the proponent, the standard of persuasion is on "a balance of probabilities". *R. v. Louis Leon Turcotte* Sask. C.A. File 2803.

If the first requirement is satisfied, to satisfy the second requirement, it must be established having regard to all the circumstances that the admission of the evidence could bring the administration of Justice into disrepute. The guidelines to be used in determining whether the administration of Justice could be brought into disrepute were summarized in *Canadian Charter of Rights and Freedoms: What To Do and What Not To Do* (1984) 29 McGill L. J. 521 at 538 and are as follows:

1. If the admission of the evidence in some way affects the fairness of the trial, it should be excluded;

2. The nature and circumstances of the Charter violation having particular reference to whether the infringement was committed in good faith, was inadvertent or technical as opposed to deliberate and flagrant; and

3. The effect of the exclusion of the evidence on the repute of the system of Justice. One must determine whether the administration of Justice will be better served by the admission or exclusion of the evidence.

The Tribunal is not bound by strict rules of evidence in deciding the various issues which come before it; however, search warrants are a different matter. A search warrant authorizes an intrusion by the State over the individual's right to be left alone. The authority is found in the *Criminal Code* and the standard to be applied by the Tribunal in determining issues relating search warrants ought to be the same standard applied in a court of law. To do otherwise would allow the State a greater degree of intrusion in aviation-related matters than in other areas and would mean that the aviation community would have less protection against state intrusion than other members of society.

We must now turn our attention to the case at hand and apply the above standards to the evidence before us.

1. Did the Justice who swore the information and issued the search warrant have some evidence upon which he could, acting judicially, be satisfied that reasonable grounds exist that

(i) An offence has or is being committed. The information discloses an offence known to law i.e. an infraction of section 210(1)(a) of the *Air Regulations*. It states that the informant has reasonable grounds for believing that an offence has been committed, namely, being over gross weight without having obtained approval from Transport Canada. It gives some detail of the items being sought which will provide evidence of the infraction and that the items are in a Canadian aircraft bearing Canadian registration marks C-GPZX located at the Winnipeg International Airport and owned by the Respondent.

(ii) The objects to be searched for will afford evidence of that offence. The objects set out in the information would provide evidence of an offence of being overweight.

(iii) The objects are located in the place to be searched. This requirement presents more difficulty in that the objects are identified to be in an aircraft bearing Canadian registration C-GPZX. This is the registration of the Respondent's aircraft, however, it is described as being at the Winnipeg International Airport, which is a large area in which numerous buildings are located. The aircraft was found in a hangar owned by Perimeter Aviation, and the information ought properly to have so stated. The Tribunal are, however, not entitled to substitute what they might have done in the same circumstances. The Tribunal's review is limited to determining whether there was some evidence to provide the Justice with reasonable grounds to believe that there was, in Aircraft C-GPZX, evidence which will afford evidence with respect to the commission of an offence, namely, 210(1)(a) (overweight). The Tribunal are not entitled to say that the Justice should not have been satisfied and should not have issued the warrant.

We, therefore, conclude that the issue of the warrant was valid.

The actual warrant presents another problem. The issued warrant refers to "Aircraft Beaver Canadian registration marks C-GPZX". The warrant, as issued, was not in accordance with the information. The Respondent's aircraft is a Piper Commanche where the warrant refers to a Beaver. The registration is the same, but a Beaver is a very different aircraft from a Piper Commanche. We, therefore, conclude that the warrant was not the warrant to which the information referred and that the warrant is invalid.

Any evidence obtained was obtained as a result of an invalid warrant. Was the search then an unreasonable search and seizure contrary to section 8 of the Charter? The Tribunal conclude that the search made on an invalid warrant was in fact an unreasonable search and is contrary to section 8 of the Charter. The Minister's officials must be more accurate in the preparation of search warrants, and, having discovered the mistake, ought to have referred the matter back to the Justice who issued it. This is not a case where the evidence was going to disappear, and the Minister's representatives had ample time to correct their error.

The search being unreasonable and contrary to section 8 of the Charter does not necessarily mean that the evidence obtained pursuant thereto is inadmissible and should be excluded pursuant to section 24(2) of the Charter. The evidence was obtained in a manner that denied a

right or freedom guaranteed by the Charter but, could the admission of such evidence bring the administration of Justice into disrepute? This question must be decided on a balance of probabilities.

Applying the test referred to on page 7 of the judgment we conclude:

(1) The admission of the evidence did not affect the fairness of the trial. In fact, the Respondent referred to much the same evidence when testifying at the initial hearing.

(2) The error was not deliberate and flagrant but resulted from a typist's error in stating "Beaver" instead of "bearing". This comment should not be interpreted as encouragement for sloppy and careless inattention to detail in the preparation of search warrants.

(3) The administration of Justice is better served by the admission of the evidence than by its exclusion.

All of the evidence obtained is for the reasons stated being considered by the Tribunal in reaching its decision in this case.

The facts surrounding both charges are as follows:

Between July 13 and 24, 1987, the Respondent and his son made a trip around the world in a twin Commanche PA-39 Aircraft C-GPZX.

The charges arose as a result of a newspaper article which was drawn to the attention of the Minister's officials.

The type certificate for the aircraft in question with tip tanks filled shows a maximum allowable takeoff gross of 3,725 pounds. The logbook for the flight in question shows the maximum gross weight on takeoff at the beginning of the trip at 4,100 pounds. Evidence given by the Minister relates to the first leg of the Respondent's trip which was from Oakland, California, to Honolulu, a distance of 2,000 nautical miles. The aircraft in question including tip tanks holds a total of 114 usable U.S. gallons.

The Minister's witness, Mike Brezina, using the general specifications from the *Aircraft Flight Manual* calculates that with a fuel consumption of 14 gallons an hour, that for the first leg of the trip from Oakland to Honolulu, 210 U.S. gallons would be required and with a 45-minute reserve, another seven U.S. gallons would be required. If the aircraft had a 3-hour reserve, this witness calculates the aircraft would require 259 U.S. gallons for this leg of the trip, or a total of 1,554 pounds.

The evidence of this witness is that with a 45-minute reserve, fuel consumption of 14 U.S. gallons per hour, the weight of the two pilots and 100 pounds of luggage, the minimum gross weight of the aircraft on takeoff would be 4,300 pounds.

The Minister's witnesses first saw the aircraft after it had returned to Winnipeg following the successful completion of the world trip. On the occasion of this inspection of the aircraft, it had one additional fuel cell sitting in the back of the aircraft, a modified system of seat belts restraining the tank and a radio on top of the additional fuel cell.

The Minister also called Dennis Dale Hoeppner, an airworthiness engineer with Transport Canada. This witness holds a bachelor's degree in mechanical engineering and is a member in good standing in the Professional Engineers of Manitoba. The witness does not have a degree in aeronautical engineering but was involved in design approval of De Havilland Aircraft and the Saunders ST-27. The witness also has taken some specialized courses in the U.S.

The evidence given by this witness was to the effect that the Piper Commanche PA-39, which is the subject of these proceedings, was certified in Canada under a *Bilateral Airworthiness Agreement* between Canada and the U.S. and that, in order to keep the certificate of airworthiness in force in Canada, the aircraft has to be operated in accordance with the requirements stated in the *Engineering and Inspection Manual*, the type approval and the *Flight Manual*. The modifications on the aircraft which were observed at Winnipeg following completion of the world trip were not in accordance with the type approval or the equipment list for the aircraft. The witness testified that if the aircraft were as grossly overloaded as alleged by the Minister's witness, Mike Brezina, it would not have been able to maintain altitude on one engine and that if the tanks, as observed by the witness, were not properly secured, they could have come forward and impeded the occupants' ability to exit the aircraft. The witness calculated an ARM of 95.92 and a total weight of 4,631.7 pounds for the first leg of the trip, from Oakland to Honolulu. All of the calculations were based on the following assumptions:

(a) two pilots at 170 pounds each;

(b) full outboard fuel tanks;

(c) full tip tanks;

(d) two full rear tanks containing 176 gallons; and

(e) the location of the two rear tanks being located where the second and third row of seats, which had been removed, were formerly located.

All of the above are assumptions. The only person who gave evidence at the hearing and who knows how much of a load was on the aircraft is the pilot, Donald Fonger.

With a weight of 4,631.7 pounds and an arm of 95.92, the witness concludes that the stability of the aircraft was compromised, its tendency to get into an unrecoverable flat spin was greater and its control forces would be light, which would make it easy to overstress the airframe.

The maximum gross weight of the aircraft at takeoff for the first leg of the trip, from Oklahoma to Honolulu, is entered in the journey log at 4,100 pounds. The Minister alleges that this entry is false and constitutes an infraction of section 6.3(1)(c) of the *Aeronautics Act*. This allegation is

also based on calculations which would be correct only if the assumptions on which they were based are correct.

There was entered into evidence by the Minister (Exhibit 5) a "Foreign Civil Aircraft Special Flight Authorization" issued to the Respondent by the Federal Aviation Administration. This permit allowed a maximum gross take-off weight of 10% in excess of the allowable gross take-off weight for the aircraft in question, increasing its allowable gross take-off weight to 4,100 pounds (rounded), the figure shown in the journey log.

The witness, Hoeppner, testified that this authority is not recognized in Canada under a *Bilateral Airworthiness Agreement* between Canada and the U.S. and that any modification done to a Canadian aircraft must meet the Canadian rule, and that, as this was not done, the special flight authorization is not valid in Canada and the aircraft's certificate of airworthiness is invalidated. While Mr. Hoeppner may be an expert in aeronautics and qualified to give opinion evidence in that area of expertise, he is not an expert in the area of whether the special flight authorization issued by the Federal Aviation Authority is covered by the Canada-U.S. *Bilateral Airworthiness Agreement*. That is a matter of law which this Tribunal must decide. A copy of the *Bilateral Airworthiness Agreement* was not filed at the hearing.

The evidence of the Respondent is that he is a graduate civil engineer, semi-retired. The Respondent owns the aircraft in question. He and his son wanted to fly around the world. Two years previous, the Respondent and his son, both of whom are qualified pilots, flew the same aircraft in a 68 aircraft air rally to Paris, France. No extra fuel was carried or required on this trip. In May 1986, an initial inquiry was made with the Department of Transport to determine what was required to obtain a flight permit which would permit an increase in the maximum gross weight sufficient to enable the trip to be undertaken. In August of 1986, the Department answered asking that answers to numerous questions be provided by the manufacturer, Piper Aircraft. Piper responded saying that the engineering data necessary would be so voluminous that it would be impossible to carry on their normal business. As a result, the Respondent was unable to meet the requirement imposed by the Transport Department. Some seven months had elapsed and the Respondent turned his inquiries elsewhere. The Respondent's efforts to ensure that the flight could be made legally and safely were meticulous in every detail. A brief summary is as follows:

(a) The Respondent thoroughly investigated ferry companies in California and settled on one Victor Koss of San Francisco, a person with considerable experience equipping aircraft with extra tanks approved by the Federal Aviation Administration.

(b) He determined that two extra tanks would fit in the aircraft which would provide sufficient fuel to make the trip and keep the centre of gravity below 92.

(c) He consulted with an aeronautical engineer in Kansas doing major aircraft work who test flew the aircraft at various weights, up to gross weight. The data was then put through computers and engineering data and he extrapolated it all to see how the aircraft performed at loads and situations beyond the test data.

(d) He tested fuel burns to determine if his fuel charts were accurate.

(e) He used his own engineering expertise to ensure that the support for the extra tanks was over the main structural cross beams of the aircraft.

(f) Following installation of the two extra tanks, the Respondent and his aeronautical engineering consultant test flew the aircraft using water in the extra tanks starting with light loads and increasing the amount to determine how the aircraft handled after each increment of water was added.

(g) He made a comprehensive weather study to determine long-term weather trends and planned his takeoff for a time when a tailwind would most likely be encountered.

The result of all the investigation and testing was that the aircraft had been test flown just as near as possible to the actual weights on the first leg of the trip. The conclusion reached after the testing was that the aircraft worked well with heavy loads.

The installation of the extra fuel tanks was approved by the U.S. Federal Aviation Agency pursuant to *Federal Aviation Regulations*, Part 91, section 91.28(b), and a special permit was issued authorizing the Respondent to conduct a long-distance overwater flight from Oakland, California, to Melbourne, Australia, via Honolulu, Hawaii. The maximum gross weight as provided in the permit is 4,097.5 pounds (110% CW). Maximum fuel carried in the auxiliary tank could not exceed 88 gallons (U.S.) and the aft centre of gravity limits were not to exceed 91.3811.

The evidence of the Respondent is that he adhered to the restrictions contained in the special permit.

After Majero in the Marshall Islands, the Respondent testified that the rest of the trip could be made without additional fuel and he removed one of the auxiliary tanks and the tank restraint system and moved the remaining tank aft. The Respondent's sworn testimony that he was within the limits of his special permit is believable and should be accepted. All other evidence is based on assumptions.

The charge under section 210(1)(a) is not an "absolute liability" offence. This offence falls into the category of a "strict liability" offence. The classic case in this regard is *Regina v. City of Sault Ste. Marie*, 1987 2 Supreme Court Reports. That decision defines the two types of offences. Absolute liability entails conviction on proof merely that the accused committed the prohibited act. No mental element or *mens rea* is required. In an absolute liability offence, it is no defence that the accused was entirely without fault. The wording of section 210 would appear to be mandatory. It uses the words "no person shall fly", etc. and the section, therefore, meets the requirements of one of the tests set out in the Sault Ste. Marie case; however, the Tribunal must also take into account the provisions of section 7.4 of the *Aeronautics Act*, which reads as follows:

> 7.4 No person shall be found to have contravened a provision of this Part or of any regulation or order made under this Part if the person exercised all due diligence to prevent the contravention.

This section provides an opportunity for an accused to avoid liability if that person can satisfy the Tribunal that he exercised due diligence to prevent the commission of the offence. The Tribunal must examine the evidence and determine whether the Respondent in this case took all the reasonable care that a reasonable man would have taken in the circumstances. The Appellant argues that the Respondent is presumed to know the law and that his failure to obtain a special flight permit from Transport Canada is not an excuse in view of that presumption.

The Tribunal do not agree. The Respondent worked within the framework of the special flight authorization received by him from the U.S. Federal Aviation Administration. That document "Exhibit 5" is entitled "Foreign Civil Aircraft Special Flight Authorization". It contains the name and address of the Respondent and refers to registration of the Respondent's aircraft C-GPZK. The flight originated in the U.S. and never, at any time, entered Canadian airspace. When the Respondent made inquiries of the U.S. officials, he was told to "come down here and we can do it all for you." That is just what he did.

The Appellant suggests that the Respondent is wrong, that he required a special flight permit from Transport Canada. The Appellant suggests that the U.S. Flight Authorization is not something recognized in Canada under a *Bilateral Airworthiness Agreement* between Canada and the U.S., that any modification done to a Canadian aircraft must meet the Canadian rule, and that it is not sufficient to the meet the American rule. This evidence is from the Appellant's witness, Dennis Hoeppner, who is a civil engineer with some special courses in aeronautics and practical experience in that area. Mr. Hoeppner was qualified as an expert by the hearing officer and, while he may give opinion evidence in aeronautical matters, he does not qualify as an expert in the interpretation of the provisions of any *Bilateral Airworthiness Agreement* between Canada and the U.S.

This Agreement was not provided to the hearing officer nor was one provided to the Appeal Tribunal. The interpretation of such an agreement is a matter of law, it is for the Tribunal to decide after reviewing the relevant provisions what the effect of the agreement is. The Appellant may very well be right, but the Tribunal are left without any basis on which to make a determination in this regard. Even if the Appellant is correct in this regard, the Tribunal are satisfied that everything done by the Respondent and that all the information given to him by the Federal Aviation Administration and others lead him to honestly believe that he had legal authority under the FAA special flight authorization to make the flight in question. The Respondent has displaced the *onus* on him in a strict liability offence. He has proven to the Tribunal's satisfaction that he did what a reasonable man would have done in the circumstances, and that all of his actions are such that he took reasonable care to avoid the commission of the alleged offence.

The charge under section 6.3(1)(c) of the *Aeronautics Act* is not either an "absolute liability" offence or a "strict liability" offence. This section uses the words "with intent" to mislead or wilfully omit, etc. To prove this offence, the Appellant must establish that the Respondent made

the entries in his log showing total weight on take off at 4,100 pounds when the total weight was in fact over 4,100 pounds and that the Respondent did so "with intent to mislead". This is a *mens rea* offence; the Appellant must prove that the Respondent had a guilty mind. The burden of proof on the Appellant is on "a balance of probabilities".

The FAA special flight authorization provided for a gross weight on takeoff of 4,100 pounds (rounded). The only person who knows the gross weight is the Respondent, and his sworn testimony is that he complied with the provisions of the special authorization. All other evidence is based on assumptions, many of which are incorrect and, if the assumptions are incorrect, the calculations made on those assumptions are incorrect. The Tribunal believe the evidence given by the Respondent. The Appellant has failed to prove on a balance of probabilities that the gross weight on takeoff was over 4,100 pounds and even if it were, the Tribunal are satisfied that any entries made by the Respondent in connection therewith were not made with "the intent to mislead".

The appeal is dismissed insofar as section 6.3(1)(c) of the *Aeronautics Act* is concerned.

The members hearing this appeal were unanimous in their view that some comment should be made regarding the actions of the Minister's officials in their investigation of this case and subsequent presentation before the hearing officer.

Quite apart from carelessness and inattention to detail in the preparation of the search warrant, the Minister's officials required that the aircraft be recertified in Canada by a B engineer on the ground that there was an immediate threat to aviation safety. The Notice of Suspension is dated August 21, 1987, and in the same document, advised the Respondent that he had until August 21, 1987, to appeal.

After having suspended the certificate of airworthiness, the Respondent's certificate of airworthiness was, in fact, returned to him along with his logs. The Notice of Suspension dated October 9, 1987, refers to a Piper PA-30. The Respondent's aircraft is a PA-39.

The result of all of this was that a flight which had been conducted on a special flight authorization issued by the Federal Administration Authority resulted in the Respondent being required to have the aircraft recertified in Canada. Had the Respondent chosen to register his aircraft in the U.S. prior to his flight, the U.S. authorities would not have required recertification. The expense of recertification cost the Respondent some $3,000, all based on evidence obtained on an invalid search warrant.

One must question why this aircraft constituted an immediate threat to aviation safety in Canada when no such threat would have existed in the United States.

We would comment with gratitude upon the well prepared and articulate arguments of the counsel for the Appellant and Mr. Fonger, and thank them for their assistance.