

CIVIL AVIATION TRIBUNAL

BETWEEN:

Minister of Transport, Applicant

- and -

Robert Kirby Funnell, Respondent

LEGISLATION:

Aeronautics Act, R.S.C. 1985, c.A-2, s.7.7,
Air Regulations, C.R.C. 1978, c.3, ss. 210(1)(a), 826(1)

Unauthorized Flight, Entries in Log Books, Certificate of Airworthiness

Review Determination
Robert J. MacPherson

Decision: January 17, 1996

I find that Robert Kirby Funnell did fly aircraft C-GTMP while the Certificate of Airworthiness was not in force and therefore did contravene paragraph 210(1)(a) of the Air Regulations. The Civil Aviation Tribunal must receive payment of the \$3,300.00 penalty, made to the order of the Receiver General for Canada, within fifteen days following service of this determination.

The Review Hearing on the above matter was held Tuesday, January 9, 1996 at 10:00 hours, at the Watson Lake Community Centre, in Watson Lake, Yukon Territory.

BACKGROUND

During the course of another independent ongoing investigation, Corporal Byers of the Watson Lake RCMP detachment had reason to believe that aircraft C-GTMP was being flown in a non-airworthy condition. This information was related to Mr. Pollock of Transport Canada in Edmonton on April 8, 1994. Mr. Pollock passed the information on to his superiors. As a result, Inspector David Hilchie of Transport Canada, Whitehorse was dispatched on April 9, 1994 to examine the aircraft in Watson Lake.

The allegations against Cassiar Mountain Outfitters Ltd. and Mr. Kirby Funnell, were a result of the investigation begun on April 9, by Inspector Hilchie.

THE ALLEGATIONS

CASSIAR MOUNTAIN OUTFITTERS

By double registered letter dated December 1, 1994, Cassiar Mountain Outfitters was advised as follows:

NOTICE OF ASSESSMENT OF MONETARY PENALTY

Pursuant to section 7.7 of the *Aeronautics Act*, the Minister of Transport has decided to assess a monetary penalty on the grounds that you have contravened the following provision(s):

Air Regulation Section 826, Subsection (1).

See attached Appendix "A"

The foregoing provision(s) has/have been designated pursuant to the *Designated Provisions Regulations*, SOR/86-596 (Air Regulations, Series 1, Number 3), and the procedures in sections 7.7 to 8.2 of the *Aeronautics Act* respecting monetary penalties apply.

The total assessed penalty of \$1200.00 must be paid on or before the 9th of January, 1995 to the Regional Manager, Aviation Enforcement, Transport Canada at the address above. Payment may be made in cash or by certified cheque or money order payable to "Receiver General for Canada".

Subsection 826(1) of the *Air Regulations* reads as follows:

826. (1) Every owner of an aircraft, other than an ultra-light aeroplane, registered under these Regulations shall maintain for that aircraft an aircraft journey log and an aircraft technical log.

ROBERT KIRBY FUNNELL

By double registered letter dated December 2, 1994, Robert Kirby Funnell, was advised as follows:

NOTICE OF ASSESSMENT OF MONETARY PENALTY

Pursuant to section 7.7 of the *Aeronautics Act*, the Minister of Transport has decided to assess a monetary penalty on the grounds that you have contravened the following provision(s):

Air Regulations Section 210(1)(a)

See Attached Appendix

The foregoing provision(s) has/have been designated pursuant to the *Designated Provisions Regulations*, SOR/86-596 (Air Regulations, Series 1, Number 3), and the procedures in sections 7.7 to 8.2 of the *Aeronautics Act* respecting monetary penalties apply.

The total assessed penalty of \$3300.00 must be paid on or before 9 January, 1995 to the Regional Manager, Aviation Enforcement, Transport Canada at the address above. Payment may be made in cash or by certified cheque or money order payable to "Receiver General for Canada".

Paragraph 210(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 ultra-light 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

JOINT HEARING

At the outset of the hearing it was agreed by both Mr. Ribout and Mr. Earmme that the hearings on Robert Kirby Funnell and Cassiar Mountain Outfitters would be held concurrently, as they involve the same people, places and dates.

MOTION

Prior to evidence being given, Mr. Earmme raised an objection to the use of evidence obtained as a result of tracking warrants. The tracking warrants had been legally obtained by both the Province of British Columbia and the Yukon Territories Conservation departments. Mr. Earmme's objection was based on the fact that a "Sealing Order" had been applied to both tracking warrants. Mr. Earmme contended his client was prejudiced in that he could not challenge the basis on which the warrants were issued, if the information was not available.

The basis for issuance of a tracking warrant is found in section 492.1 of *Tremear's Criminal Code* and reads as follow:

492.1 (1) A justice who is satisfied by information on oath in writing that there are reasonable grounds to suspect that an offence under this or any other Act of Parliament has been or will be committed and that information that is relevant to the commission of that offence, including the whereabouts of any person, can be obtained through the use of a tracking device, may at any time issue a warrant authorizing a person named therein or a peace officer

(a) to install, maintain and remove a tracking device in or on any thing, including a thing carried, used or worn by any person; and

(b) to monitor, or to have monitored, a tracking device installed in or on any thing.

(2) A warrant issued under subsection (1) is valid for the period, not exceeding sixty days, mentioned in it.

(3) A justice may issue further warrants under this section.

(4) For the purposes of this section, "tracking device" means any device that, when installed in or on any thing, may be used to help ascertain, by electronic or other means, the location of any thing or person.

1993, c. 40. s. 18.

Commentary — The section responds to the legislative *lacunae* identified in *R. v. Wise* (1992), 70 C.C.C. (3d) 193 (S.C.C.). It permits warranted use of a "tracking device", as defined in s. 492.1(4), to obtain information relevant to the commission of an offence, including the whereabouts of any person.

The procedure to obtain a tracking device warrant is commenced by laying an information on oath in writing before a justice. The applicant need not be a peace or public officer, nor have any special designation to bring the application, or, for that matter, to swear the information. No statutory form is prescribed for the information.

Under s. 492.1(1), a tracking device warrant may be issued provided the justice is satisfied by the information on oath in writing that

i. there are reasonable grounds to suspect that an offence under the *Code* or other federal Act has been or will be committed; and,

ii. there are reasonable grounds to suspect that information that is relevant to the commission of the offence, including the whereabouts of any person, can be obtained through the use of the device.

Information is not the equivalent of evidence, *a fortiori* evidence which may be admissible in subsequent proceedings, though it plainly includes both.

Under s. 492.1(1), the warrant may be issued to a peace officer or person named therein and permit installation, maintenance, monitoring and removal of a tracking device. A warrant may be valid for a specified period not exceeding 60 days under s.492.1(2). Further warrants may be issued under s.492.1(3), but there is no provision for renewals.

The reasons for the issuance of the tracking warrants on aircraft C-GTMP were sealed by the courts. The reasons for the Sealing Orders were (1) to protect the identity of the informant. (2) to protect the location and technology related to the tracking device. There were other reasons, but they were not entered into evidence by Daryl Anderson, the Conservation officer who handled the tracking warrants.

The tracking warrants were not issued to pursue matters under the *Air Regulations* or the *Aeronautics Act*. The tracking warrants were issued to pursue matters related to the duties of the conservation officers in the Yukon and British Columbia.

From the evidence before me, I can only conclude the tracking warrants were correctly applied for in both jurisdictions. Reasons for both were accepted by separate authorities and issued. Reasons for the Sealing Order were accepted by both authorities and the warrants were sealed.

Specific evidence as to the airworthiness of aircraft C-GTMP was not gathered as a result of the tracking device. Specific evidence as to the pilot of the aircraft was not gathered as a result of the tracking warrants. The only information that passed from the RCMP to Transport Canada regarding the aircraft was the suspicion that the aircraft was being flown in a non-airworthy condition. Transport Canada responded, as it is mandated to do, and dispatched an inspector to look at the aircraft and review the log books.

I find the issuance and handling of the tracking warrants and tracking device to have been handled in a manner so as to have not contravened the rights of the accused or his company.

I find the passing of information, being the suspicion of a breach of the *Air Regulations*, by the RCMP to Transport Canada to be proper. Transport Canada is the department charged with investigation of breaches of the *Air Regulations*.

I find the responsibility of getting the Sealing Orders lifted is incumbent upon the accused, and not Transport Canada as suggested by counsel.

For the reasons stated, I am denying the motion to postpone the Review Hearing.

THE FACTS

The RCMP of Watson lake, Yukon, and the Conservation departments of the Yukon and British Columbia were involved in a wildlife investigation of Mr. Funnell. During the course of the investigation, Corporal Byers of the Watson Lake RCMP telephoned Transport Canada in Edmonton to relate his suspicions that aircraft C-GTMP was being operated in a non-airworthy condition. The date of the telephone call to Transport Canada in Edmonton was April 8, 1994.

On April 9, 1994, Inspector David Hilchie of the Transport Canada office in Whitehorse was instructed to travel to Watson Lake, Yukon and inspect aircraft C-GTMP for suspected airworthiness violations. Inspector Hilchie observed numerous mechanical deficiencies related to the aircraft. A suspension of the flight authority was issued that day. Inspector Hilchie confiscated the Certificate of Airworthiness. A review of the log books showed the last flight of

the aircraft was August 26, 1993. According to the log book entries, the last "annual inspection" had been carried out on September 9, 1992. He asked Leo Dionne, the engineer who serviced the aircraft, about the maintenance on C-GTMP. He was told the aircraft was overdue for its annual inspection. Inspector Hilchie made photocopies of the log book entries (Exhibit M-1). On April 13, 1994 the "Notice of Suspension" and "Notice of Inspection Report" were sent to Mr. Funnell by registered mail. The forms were returned to Inspector Hilchie in June 1994 and the Suspension Order was lifted on June 22, 1994.

The facts surrounding the flights of the aircraft were discovered as follows. Mr. Pollock of the Regulatory Compliance Branch of Transport Canada was the person who received the original phone call from Corporal Byers of the Watson Lake RCMP. As a result of the inspection completed by Inspector Hilchie, Mr. Pollock requested the RCMP in Watson Lake to further investigate any flights aircraft C-GTMP may have made between August 26, 1993 and May 1994. Corporal Byers requested and received from Daryl Anderson, a district Conservation Officer, evidence related to the movements of aircraft C-GTMP. The letter is dated May 31, 1994 and covers aircraft movements between February 3, 1994 and March 23, 1994 and is listed in the evidence as Exhibit M-2.

After reviewing the evidence contained in Exhibit M-2, Mr. Pollock requested the RCMP seize the log books of C-GTMP as part of their investigation. In October 1994, Corporal Everett Parker of the Whitehorse RCMP secured a search warrant to search for the log books of C-GTMP. The search was carried out in Watson Lake October 26, 1994 by Corporal Parker and the log books were seized and sent to Transport Canada, Regulatory Compliance Branch in Edmonton. Investigation of the log books now showed that Mr. Funnell had flown the aircraft on numerous flights after August 26, 1993. The log books further showed the last annual inspection to have been completed on September 15, 1994.

THE EVIDENCE

CASSIAR MOUNTAIN OUTFITTERS

Aircraft Airworthiness Inspector Hilchie testified the aircraft was not airworthy on April 9, 1994. He suspended the Certificate of Airworthiness of C-GTMP. He reinstated the Certificate of Airworthiness after the aircraft defects had been rectified and signed off by a licensed engineer. Inspector Hilchie asked the engineer Leo Dionne on April 9, 1994 if the annual inspection had been completed on aircraft C-GTMP. Mr. Dionne replied he did not recall doing it and said the aircraft was overdue for its inspection. The seized log books were received by Mr. Pollock on November 2, 1994. As part of his investigation Corporal Parker telephoned Leo Dionne, the engineer who maintained C-GTMP in Watson Lake, and asked him if he had done an annual inspection on the aircraft in 1993. He replied he could not recall doing it, but would check his records and get back to Mr. Pollock. On November 30, 1994 Mr. Dionne telephoned Mr. Pollock and advised him he had checked all his files and had no record of completing the annual inspection for C-GTMP in 1993. (Exhibit M-5)

Inspection of Exhibit M-1 and M-6 copies of the aircraft journey log shows no entries of an annual inspection being completed prior to September 15, 1994.

No evidence or testimony was produced to show the annual inspection had been completed in the period between September 1992 and September 1994.

Based on the foregoing, I conclude there was not a Certificate of Airworthiness in force for aircraft C-GTMP from September 9, 1993 through September 15, 1994.

FLIGHTS BY ROBERT KIRBY FUNNELL

Inspector Hilchie made photocopies of the aircraft journey log for C-GTMP on April 9, 1994. The last entry in the log book on that day was August 26, 1993.

Corporal Byers requested and received from Daryl Anderson, conservation officer, information regarding flights of aircraft C-GTMP (Exhibit M-2). The information in the report dated May 31, 1994 was gathered by two methods, personal observation of the aircraft and information obtained from a "tracking device" that had been installed in the aircraft. The report showed a total of 24 flights. The air time of these flights was 16 hours and 33 minutes. The report covered the period February 4, 1994 through March 23, 1994.

James Hart, a conservation officer in British Columbia, had a 5-hour meeting with Mr. Funnell on April 28, 1994 regarding conservation matters. During the meeting Mr. Funnell was asked to write up a description of his activities for the past winter (1993) (Exhibit M-3). Mr. Funnell replied on April 29, 1994 by fax (Exhibit M-4). Mr. Funnell detailed his movements of this winter (1993/94) in the faxed letter, as well as the number of times he flew and destinations.

Corporal Parker of the Whitehorse RCMP spoke to Kirby Funnell, giving him the standard RCMP warning used in such cases. Mr. Funnell replied, on the advice of his legal counsel, he (Funnell) would not make a statement. Corporal Parker then asked Mr. Funnell one question: does anyone else fly your aircraft? The answer was No, no one else ever flies the aircraft. A review of the journey log (Exhibit M-6) shows Kirby Funnell to be the only pilot of the aircraft from January 1992 through September 1994.

A review of Exhibits M-1 and M-6 shows a number of flights were entered into the aircraft journey log after Inspector Hilchie made a copy of same on April 9, 1994. At that time the last flight had been entered in the log as being August 26, 1994. Exhibit M-6 shows that, by the time Corporal Parker seized the log books in November 1994, 17 flights had been entered in the log book covering the period August 30, 1993 through April 7, 1994. All of the flights in question show Mr. Funnell as the crew, (Column 3) and the information entered by Kirby Funnell (Column 14).

Based on the foregoing, I must conclude that Kirby Funnell was the pilot of the aircraft on the dates entered in the log book and signed by himself.

THE USE OF TRACKING WARRANTS AND A TRACKING DEVICE AS EVIDENCE

In accepting the evidence obtained under the tracking warrants and produced by the tracking device installed in the aircraft C-GTMP, I refer to the following in *R. v. Wise*, (1992) 1 SCR, page 527 at p. 541 (Cory J):

In this case, I agree with the Court of Appeal that the movements of the car constituted real evidence. There was no police compulsion or enticement which required the appellant to enter or drive his car. Rather he exercised his own free will. It was the accused who determined that he would drive his car, the routes he would follow and the manner in which he drove. The movement of an object may be transitory but it is real. The movement of a terrestrial body can be and often is plotted. That movement is transitory but real. The migratory route of the caribou herds is transitory, but it is vital and real to those who depend upon that movement for food and clothing. So too is the movement of a motor vehicle real. This evidence could be considered conscriptive if the actions of the police forced or perhaps enticed the accused to utilize his vehicle and to follow prefixed routes in arriving at destinations selected by them.

It has been conceded that visual surveillance of motor vehicles by the police is permissible. Further, there is agreement that visual surveillance may properly be augmented by the use of binoculars. The use of this particular beeper, similarly, simply augments visual surveillance. The installation and use of the beeper did not affect in any way the movement of the car. It simply enhanced the ability of the police to observe its movements. (Emphasis added)

I find the use of the tracking device in this case to be similar in condition to the foregoing. There was no police compulsion or enticement which required the accused to enter or fly the aircraft. It was Mr. Funnell who decided he would fly his aircraft and chose the routes he would follow. The installation and use of the tracking device did not in any way affect the movement of the aircraft. It simply enhanced the ability of the conservation officers to observe its movements.

DISCUSSION OF THE EVIDENCE

Transport Canada by direct testimony and evidence has demonstrated that aircraft C-GTMP was not airworthy on April 9, 1994. The last annual inspection took place September 9, 1992; the next annual inspection was due September 9, 1993. There is no evidence that the 1993 annual inspection was ever completed. The engineer, Mr. Dionne, who maintains the aircraft for Cassiar was asked on two separate occasions, by Inspector Hilchie and Corporal Parker, if the inspection had been done; the answer was no. There are no entries in the log book to substantiate an annual inspection being completed in 1993.

Having decided the aircraft's Certificate of Airworthiness was not in force after September 9, 1993, I shall now address the question of whether Kirby Funnell flew the aircraft between September 9, 1993 and September 15, 1994.

On April 9, 1994 Inspector Hilchie made a copy of the journey log. The last flight was entered as August 26, 1993. The log book copies made in November 1994 show numerous flights added to the journey log after Inspector Hilchie had inspected the aircraft.

Section 827 of the *Air Regulations* reads as follows:

Every entry in a log maintained pursuant to section 826 shall be made accurately and in ink by a competent person and signed by that person as soon as possible after the events they record.

The entries in the log book were obviously made after Inspector Hilchie photocopied the journey log on April 9, 1994.

The journey log entries are in Mr. Funnell's handwriting and signed by Mr. Funnell.

In addition to the foregoing, the evidence gathered by the tracking device shows the aircraft being flown on a total of 24 flights during the period January 31 to March 31, when the tracking device was installed in the aircraft.

Mr. Funnell stated to Corporal Parker that "He was the only person who flew C-GTMP."

Based on the facts that Mr. Funnell made and signed the entries in the log book and further stated he was the only person who flew C-GTMP, I must conclude he flew the aircraft C-GTMP while the Certificate of Airworthiness was not in force.

DETERMINATION

CASSIAR MOUNTAIN OUTFITTERS

I find Cassiar Mountain Outfitters did not maintain the journey log of aircraft C-GTMP and therefore has contravened subsection 826(1) of the *Air Regulations*.

ROBERT KIRBY FUNNELL

I find that Robert Kirby Funnell did fly aircraft C-GTMP while the Certificate of Airworthiness was not in force and therefore did contravene paragraph 210(1)(a) of the *Air Regulations*.

COMMENT

Cassiar Mountain Outfitters and Robert Kirby Funnell called no witnesses, nor did they present any evidence in this matter.

Mr. Earmme wanted to cross-examine Mr. Leo Dionne, the engineer who was on the list of witnesses supplied by Transport Canada. Mr. Dionne had been summoned by Transport Canada but did not appear. Transport Canada decided to close its evidence without Mr. Dionne.

Mr. Earmme, in his closing arguments, argued that photocopies entered in evidence by Transport Canada may have been tampered with. He argued whether or not the RCMP or Transport Canada personnel had the authority to certify anything as a "certified true copy." The Tribunal has often relied on such evidence to come to a decision. The copies were always attested to by the person who created them while under oath. I was presented with no evidence to suggest any of the testimony given by the witnesses was in question.

Mr. Earmme's suggestion that the warnings given by police, conservation officers or Transport Canada were not correct does not stand in the face of the evidence. In all cases Mr. Funnell refused to give statements, or sign statements on advice of counsel. He surely understood the warnings given.

The fact that none of the witnesses saw Mr. Funnell flying the aircraft is overshadowed by the log book entries made by Mr. Funnell and by his own signature after each entry. Further, he told Corporal Parker that no one else "flies the airplane." I have no doubt that Kirby Funnell was the pilot of the flights in question.

I should like to thank both parties for their well prepared presentations in this matter.

R.J. MacPherson
Member
Civil Aviation Tribunal