Citation: *Jules Selwan v. Canada (Minister of Transport),* 2018 TATCE 4 (Review)
Date: 2018-01-30
Docket: A-4295-41
MoT File No.: 5504-90106

IN THE MATTER OF the review hearing requested by Jules Selwan with respect to a Notice of Assessment of Monetary Penalty issued by the Minister of Transport pursuant to section 7.7 of the *Aeronautics Act,* R.S.C., 1985, c. A-2, for a contravention of subsection 700.02(1) of the *Canadian Aviation Regulations,* SOR/96-433, as alleged by the Minister.

BETWEEN:

JULES SELWAN, Applicant

and

MINISTER OF TRANSPORT, Respondent

Before:	Caroline Desbiens, Member
Heard in:	Ottawa, Ontario, on July 6 and September 6, 2017
For the Applicant:	Andrew J. Wilson
For the Respondent:	Éric Villemure and Ryan McNeil

REVIEW DETERMINATION AND REASONS

Held: The Minister has proven on a balance of probabilities that the applicant contravened subsection 700.02(1) of the *Canadian Aviation Regulations,* however the assessed monetary penalty of $2,500 is reduced to $1,875.

The revised monetary penalty is payable to the Receiver General for Canada and must be received by the Transportation Appeal Tribunal of Canada within 35 days of service of this determination.

I. BACKGROUND

[1] The applicant organized a flight to transport Mr. David McIver and himself from Carp, Ontario to St. Catharines, Ontario, aboard a private aircraft owned by Académie de Pilotage Internationale Inc. (APII). The aircraft was a Piper Seneca bearing the registration mark C-GPWF, and the pilot-in-command was Mr. Douglas Zahody. The applicant received the following 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 because he/ she has reasonable grounds that you have contravened the following provisions:

> 1. On or about January 7, 2016, at approximately 10:56 local time, at or near Carp ON, you Jules Selwan, operated an air transport service when you did not hold an air operator certificate that authorized you to operate that service, thereby contravening subsection 700.02(1) of the *Canadian Aviation Regulations.*
>
> Monetary Penalty Assessed: $2500

[2] The applicant, represented by his attorney Andrew J. Wilson, filed a written request for a review of the facts and penalty of the alleged contravention on January 13, 2016.

II. STATUTES AND REGULATIONS

[3] Subsection 700.02(1) of the *Canadian Aviation Regulations,* SOR/96-433 *(CARs),* reads as follows:

> **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.

[4] "Air transport service" is defined in section 101 of the *CARs* 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.

[5] The same section of the *CARs* also defines "operator" as follows:

> **Operator,** in respect of an aircraft, means the person that has possession of the aircraft as owner, lessee or otherwise.

[6] "Commercial air service" is defined in the *Aeronautics Act,* R.S.C., 1985, c. A-2, as follows:

> **Commercial air service** means any use of aircraft for hire or reward.

[7] Section 3 of the *Aeronautics Act* also defines "hire or reward" as follows:

> **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.

[8] Subsection 700.02(1) of the *CARs* is a designated provision pursuant to Part I, Schedule II of the *CARs*, and the maximum amount of penalty is $5,000 for an individual and $25,000 for a corporation.

A. Admission of facts

[9] At the hearing, the following facts were admitted by both parties:

1. On January 7, 2016, APII was the registered owner of the aircraft bearing the registration mark C-GPWF;
2. At that time, APII was a corporation incorporated under the *Canadian Business Corporations Act;*
3. After January 7, 2016, the registered owner of the aircraft was changed to the applicant, Mr. Jules Selwan;
4. The Minister of Transport had in its file an application submitted by APII signed by the applicant, as accountable executive for APII, on January 4, 2016 which requested

that the aircraft be added to the flight training unit operator certificate of APII. In this respect, the certificate of registration was filed as Exhibit A-5. It shows that the aircraft is registered in the name of APII on December 16, 2015. Exhibit A-6 was also filed, which is the application for a flight training unit operator certificate under the name of APII indicating i) that Mr. Jules Selwan is responsible for the maintenance control system, ii) that the Seneca bearing the registration mark C-GPWF is listed as one of the aircraft, and iii) the training authority requested;

5. The application submitted by APII was refused as concerns the aircraft C-GPWF;
6. In late March 2016, an application was made to change the registered owner of the aircraft to the name of the applicant, pursuant to a lease entered into between APII and Jules Selwan.

B. Issue

[10] The main issue of this case is to determine whether the applicant violated subsection 700.02(1) of the *CARs* by operating an air transport service and receiving $900 for the flight on January 7, 2016 with aircraft C-GPWF, even though he was not the registered owner of the aircraft on that date.

III. EVIDENCE

A. Minister

(1) Mr. Nick Taylor

[11] Mr. Taylor is employed by Transport Canada, Ontario region. He has been a technical team lead of in-flight operations at the Ottawa Transport Canada Centre since 2003. In this capacity, he supervises the team of inspectors who conduct surveillance and service for Eastern Ontario air operations, airports, flight schools, and anything that involves the flying of aircraft and pilots. The events leading to the charge came to his attention in two forms: First, he had a meeting with Mr. David McIver concerning the certification of a recreational aircraft he had purchased, during which he mentioned that the applicant had helped him get this aircraft to Ottawa. Secondly, he received information from a former employee of APII confirming that a flight had taken place in a twin engine aircraft bearing the registration mark "Golf Papa Whisky Foxtrot" (C-GPWF) and that it was a privately registered aircraft under the name of APII that was used for, as he was told, a charter flight to St. Catharines for which $900 was paid. He explained that APII was previously operating from Carp, Ontario at the time of the incident. He added that APII operates a flight training unit and holds a flight training unit operator certificate, and confirmed that the applicant is listed as the accountable executive for that company with Transport Canada. When this incident came to his attention, Mr. Taylor accessed a copy of the aircraft's journey log book in Transport Canada's file in order to assess its eligibility as a commercial aircraft. Such assessment was eventually negative and the aircraft was not eligible to be operated commercially. The log book copy was filed as Exhibit M-1.

[12] Mr. Taylor reviewed all the flights that occurred and obtained confirmation from the journey log book that the aircraft flew to St. Catharines on January 7, 2016 and back to Carp that same day. The log book showed that the pilot-in-command for both flights was Douglas Zahody, an employee of Transport Canada. Mr. Taylor indicated that the first log book entry

for January 7, 2016 lists Douglas Zahody and Jules Selwan as pilot and co-pilot respectively, although the aircraft did not require a co-pilot. The flight is listed from Carp (CYRP) to St.Catharines (CYSN), along with a takeoff time, a landing time and a total time of 1.4 hours in the air. The return flight entered for the same day in the log book shows that the pilot-in-command was Douglas Zahody and that at this time, the co-pilot listed was Adam Zahody, who is Douglas Zahody's son. This flight returned from St. Catharines to Carp with a total time in the air of 1.2 hours.

[13] Mr. Taylor then conducted several interviews. He met with David McIver in Carp at his place of work, who confirmed to Mr. Taylor that the flight to St. Catharines had taken place, that he was a passenger and that he had paid money for the flight. Mr. McIver explained to Mr. Taylor that the purpose of the flight was to get to St.Catharines to pick up an aircraft that he had purchased and to fly it back to Carp. He said that there were two pilots in front, Mr. Zahody and the applicant, and two passengers in the back for the flight to St. Catharines.

[14] The applicant's representative objected to all this evidence based on hearsay, i.e. that all the evidence of Mr. McIver as related by the witness, Mr. Taylor, was not given by Mr. McIver directly. The objection was taken under advisement.

[15] Mr. Taylor introduced a document (Exhibit M-2) that he obtained directly from Mr. McIver. It describes the payment by Mr. McIver of $900 for the flight to pick up his aircraft.

[16] An exchange of emails between Mr. McIver and the applicant was filed as Exhibit M-3. This exchange, provided by Mr. McIver to Mr. Taylor, effectively shows the arrangements to be made by the applicant, and that discussions were held regarding the cost of getting to St. Catharines to pick up Mr. McIver's aircraft. The first email on page 2 of the chain of emails is dated December 31, 2015 and it is from Mr. McIver, who wrote: "Jules, I have Jonathan going down on the 6th to do the pre buy". Mr. Taylor explained that Jonathan would presumably be the engineer who would have been conducting a pre-purchase inspection. He then added that the email said: "He is going to drive down and do the inspection, if he green lights it, it will be good to come home. What is your schedule like?" On the same day, the applicant answered to Mr. McIver as follows: "Hi Dave, Wed or Thurs works for me". Then on the same day, Mr. McIver replied to the applicant: "Jonathan is driving down Wednesday to do the inspection. Once he gives it the go, I guess we can go down. Just so I budget it, how much am I looking at roughly to get us there and back?" The applicant responded again on the same day to Mr. McIver as follows: "Check how much it will cost us to fly commercial and I will see if we can use the seneca for same price or cheaper". On the same day, Mr. McIver responded to the applicant: "I think Pearson is the closest for commercial and it is still not that close". Mr. Taylor explained that Pearson presumably is Lester B. Pearson International Airport. He then added that a response on the same day was made from the applicant to Mr. McIver as follows: "Check Porter". Mr. Taylor inferred that they were discussing Porter Airlines, an airline that flies from Toronto to Ottawa, or from Ottawa to the Toronto area. Mr. Taylor added that two days later, on Saturday the 2nd, Mr. McIver wrote to the applicant the following: "Jonathan is doing Wednesday, if it checks out can you go Thursday to pick it up?" On the same day, the applicant confirmed his availability.

[17] Mr. Taylor then filed an email chain between Mr. McIver and himself, as Exhibit M-4, in which Mr. McIver confirmed that he did pay $900 in total when he picked up the aircraft; $500 was to offset the cost of the fuel and $400 was for his instruction and Mr. Selwan's time.

[18] Mr. Taylor also interviewed Mr. Douglas Zahody at his place of work and questioned him on his involvement in the flight and other flights where he appeared as the pilot-in-command on aircraft C-GPWF. With respect to the flight from Carp to St. Catharines on January 7, 2016, he confirmed that he was the pilot-in-command and that the applicant was the co-pilot. Mr. Zahody explained that he was the pilot-in-command because the applicant did not hold a multi-engine rating for that aircraft. He confirmed that his son Adam Zahody and Mr. McIver were on board as passengers, and that the purpose of the flight was to get Mr. McIver and the applicant to St. Catharines to return Mr. McIver's new aircraft to Carp. He also confirmed that he did not personally receive any money or any payment for the flight.

[19] Finally, Mr. Taylor met with the applicant who confirmed that the flight to St. Catharines had occurred as explained by Mr. Zahody and that money was charged, i.e. $500 paid by Mr. McIver for the fuel and an amount of approximately $300 to $400 paid for the applicant's services that day.

[20] Mr. Taylor explained that afterwards, the investigation was re-assigned to the Atlantic Region because the Ontario Region was already in the middle of an enforcement case against APII and the applicant, and also because the pilot-in-command of the aircraft, Douglas Zahody, was a Transport Canada inspector.

[21] Mr. Taylor filed Exhibit M-5, the detection notice that he prepared regarding this case, which summarizes the facts described above.

[22] Mr. Taylor was cross-examined by the applicant's representative. His cross-examination revealed the following: Mr. Taylor supervises the team of inspectors and is not an enforcement officer. Once he is confident that a non-compliance has occurred, which he was in the circumstances through the various interviews that he had conducted, he transfers the responsibility of the file to an enforcement investigator who can then determine if, in fact, a non-compliance occurred. Exhibit A-1, a website extract from Transport Canada, was filed through the witness.

[23] Mr. Taylor stated that when someone gives money for the transportation of passengers, there is no direct threat to aviation safety, but he added that the transportation of passengers for hire and reward by someone who does not hold an aviation certificate that permits the latter to do so, is in fact a threat to aviation safety. Mr. Taylor also stated that if a violation is of a minor nature and inadvertent, or is a safety-related violation where there is no direct flight safety hazard, the inspector *may* simply counsel the individual orally. He then added that if oral counselling is inappropriate, it is the policy to write a detection notice. When asked whether in this particular case there was a direct or immediate threat to aviation safety, Mr. Taylor indicated that any violation of safety regulations is a threat to aviation safety.

[24] During cross-examination, the applicant filed Exhibit A-2, Transport Canada's *Aviation Enforcement Policy Manual.* Mr. Villemure objected to any questions with regard to enforcement, considering that Mr. Taylor has an investigation role but not an enforcement role. Consequently, the questions were limited to Mr. Taylor's personal knowledge with regard to some extracts of the policy.

[25] Mr. Taylor confirmed that the obligation of a Transport Canada inspector is to forward a detection notice without delay to the enforcement department. He added that when he conducts surveillance work on an air operator, he searches for documentation, and that the

documentation he obtained in this particular case was given to him. He also confirmed that only aviation enforcement inspectors who have been trained as investigators will conduct investigations. As concerns the start of the investigation in this case, Mr. Taylor reiterated that two of Transport Canada's inspectors had a discussion with Mr. McIver concerning the purchase of his aircraft with the help of the applicant to pick it up. Information about the purchase/ pickup was also provided to Mr. Taylor by an ex-employee of APII. Mr. Taylor verified the flights in the journey log book of the aircraft and confirmed their significance in light of the other facts that he had learned. He then interviewed Mr. McIver, Mr. Zahody, and the applicant.

[26] The applicant's representative then cross-examined Mr. Taylor on Exhibit A-3, which is a visit record signed by Mr. Mike Smith, a Transport Canada inspector, dated April 12, 2016. Mr. Taylor confirmed that the circumstances of the visit with Mr. McIver were to obtain information from him about the flight to St. Catharines. He also clarified that the two inspectors from Transport Canada had made an inspection concerning the maintenance of an ultralight aircraft of Mr. McIver and that it was during this visit that Mr. McIver mentioned that the applicant had assisted him in bringing another aircraft to Ottawa. Mr. Taylor declared that it is normal for a Transport Canada officer to travel to a place of business of a student pilot and another potential witness to gather this kind of information.

[27] Cross-examined on the chain of emails filed as Exhibit M-4, Mr. Taylor stated that it does not mention that $900 was paid to the applicant but to APII. Exhibit M-4 also indicates the following in an email from Mr. McIver to Mr. Taylor: "As mentioned, I will completely co-operate with Transport Canada and do not want to do anything to jeopardize my training now or in the future". When asked whether Mr. McIver's training was in jeopardy, Mr. Taylor replied in the negative.

[28] The applicant's representative then filed the notes from the interview of Mr. Douglas Zahody, dated May 5, 2016, made by Mr. Scott Veinotte, as Exhibit A-4 and cross-examined Mr. Taylor. Exhibit A-4 shows the following:

> Doug feels Jules is scared to death of TC - fears money changing hands. Doug feels TC has not been "neutral" in its approach with Jules. Doug questioned why [oral counseling] has not been used - presented us with safety letter on oral [counseling]. Concerned about previous cases/levelled against Jules/IPA. Doug feels, since "starting" 2013 at IPA - they have a positive attitude about working with TC.

[29] During cross-examination, Mr. Taylor confirmed that this extract reflected what Mr. Zahody had said at his interview. He added that Mr. Zahody had been with Transport Canada for over 20 years as a civil aviation safety inspector at headquarters, though in a different part of the department, dealing with the operation of large aircraft.

[30] Mr. Taylor then stated that the applicant cooperated with the investigation with respect to the alleged infraction, but that he was not cooperative with respect to the interview conducted with him. He does not agree with Mr. Zahody's statement on the fact that APII had a positive attitude about working with Transport Canada. He added that Mr. Zahody had a very biased opinion.

[31] Mr. Taylor stated that he believed that Mr. Zahody, the pilot, had received a multitude of favours and benefits from the applicant which had put him in a very precarious situation and that, in the past, the applicant had frequently relied on Mr. Zahody to get him out of trouble. Mr. Taylor added that he could speak very openly to any of those circumstances

where that was the case. He believes it is wrong to be an informal consultant or a consultant of any kind to an air operator when you are a delegated authority for safety inspections by Transport Canada. Mr. Zahody, like any TC civil aviation inspector, has the authority to inspect and grant approvals to APII. Consequently, Mr. Taylor concluded that when Mr. Zahody gives informal or formal consultation to an air operator, he is in a very strong violation of the conflict of interest guidelines of Transport Canada. Mr. Taylor added that Mr. Zahody was benefiting from the use of the aircraft for his son's training and use, and this is why, in his interview, Mr. Zahody stated to Transport Canada that he was doing a favour free of charge. Mr. Taylor stated that in his interview with the applicant, the latter also indicated that Mr. Zahody was doing him a favour. Mr. Taylor added that it is a benefit for APII to have a pilot work for free.

[32] Through cross-examination, Mr. Taylor also explained that there are other charges against the applicant and his company as a maintenance organization relating to incorrect or missing log book entries; one with regard to an instruction without a flight instruction rating and the other related to conducting maintenance on an aircraft without being a maintenance organization and having the log book signed off when the maintenance had not been conducted. Mr. Taylor stated that those issues are unrelated to operating an aircraft in non-compliance with the *CARs* 700 regulations.

[33] As concerns the Transport Canada detection notice that was filed as Exhibit M-5, dated June 7, 2016, Mr. Taylor confirmed that the alleged offender is described as being APII because at that time, Transport Canada knew that APII was the registered owner of the aircraft.

[34] It was at the end of the cross-examination of Mr. Taylor that some statements of facts were admitted by both parties and such admissions are described above in subsection A of the preliminary issues section of this determination.

[35] At the end of his cross-examination, Mr. Taylor stated that a reasonable estimate of cost of fuel for the flight legs would be $336. He made that calculation based on an average fuel burn for this type of aircraft, as calculated by the amount of hours that it flew and the amount of litres it would burn during such period of time.

[36] As concerns APII, Mr. Taylor confirmed that the applicant is a director and an officer of the corporation, and that officially, according to Transport Canada, he is the accountable executive for APII.

(2) Mr. Michael Munro

[37] Mr. Munro is a civil aviation enforcement investigator for flight operations with Transport Canada. He was assigned to investigate the alleged contravention of the regulation in this case and to make a recommendation to the regional manager of enforcement as to the outcome. He has been an aviation investigator for a year and half with Transport Canada, prior to which he was involved in aviation for 20 years as a flight instructor, a charter pilot and air ambulance pilot.

[38] When he was assigned the case, he received the detection notice and the accompanying documents which included the emails between Mr. McIver and the applicant filed as Exhibit M-3. He also had copies of the journey log book for the aircraft and some notes from interviews that Mr. Taylor conducted with various individuals. At that point, he

began a search in the Transport Canada database for licensing and certification documents related to the aircraft identified in the detection notice. After his initial search, he was not able to find any authorization that would have permitted the flight of January 7, 2016 to be operated as a commercial flight.

[39] He then decided to interview Mr. McIver who confirmed to him what was described in the detection notice, i.e. that he flew from Carp to St. Catharines for the purpose of purchasing an aircraft and flying that aircraft home with the applicant, that the four persons identified in the journey log book entries were on board, and that he had paid the applicant $900 for services that day.

[40] Mr. Munro explained that Mr. McIver also sent him a copy of an invoice issued by Azimuth Aviation Group to Mr. McIver, with the amount of $400 for the applicant's professional services and the amount of $500 for the fuel. Mr. Munro added that through his research, he found out that Azimuth Aviation Group was, and is in fact, a business name or a trade name associated with the applicant and that there were several applications related to the transfer of ownership of the aircraft in Transport Canada's database. One of the applications was from Azimuth Aviation Group to assume ownership of the aircraft from APII. The invoice was entered into evidence as Exhibit M-6. According to Mr. Munro, since Azimuth Aviation Group is one and the same as the applicant, such evidence shows that Mr. McIver paid $900 to Mr. Selwan, operating under the name of Azimuth Aviation Group. Mr. Munro also filed Exhibit M-7, which is the master business licence of Azimuth Aviation Group referring to the legal name of Jules Selwan.

[41] At that point, Mr. Munro wrote a letter of investigation to the applicant to inform him that he was being investigated for the alleged contravention that occurred on January 7, and to give the applicant the opportunity to speak to Transport Canada and explain the circumstances around the events. While Mr. Munro felt that a contravention had occurred and that he had sufficient evidence to proceed, the letter was an opportunity for the applicant to communicate with Transport Canada and correct any misinformation or provide the department with any additional information to continue the investigation. Following such letter, the applicant contacted Mr. Munro and explained what happened that day. Mr. Munro confirmed that the applicant's description of the events was similar to Mr. McIver's, as well as to the circumstances and supporting documents that Transport Canada had in its file. The applicant described that he had flown to St. Catharines that day with the people identified in the journey log book, and that he had collected money from Mr. McIver in the amounts of $400 for services and $500 for fuel, specifying that it was for aircraft C-GPWF. Mr. Munro explained that the applicant felt he was able to collect money under CAR 401.28 which relates to a private pilot licence privilege that allows cost recovery. However, according to Mr. Munro, there are two conditions that need to be met under this section of the *CARs;* one being that you have to be the owner of the aircraft and the second being that you have to be the pilot-in-command of the aircraft on the occurrence date, and in this particular case, he was not. Consequently, Mr. Munro advised the applicant that he was not in fact allowed to collect money for fuel in his case and that he would be recommending to the regional manager of enforcement that a contravention had occurred. The notice of investigation that Mr. Munro sent to the applicant was filed as Exhibit M-8.

[42] Mr. Munro explained that he recommended to the regional manager a monetary penalty at the first level, i.e. of $1,000, based on the circumstances surrounding the contravention, and on aggravating and mitigating factors that Mr. Munro identified during the investigation. According to Mr. Munro, the aggravating factors considered were a previous

history of non-compliance, two incidents that were related offences, and the fact that the applicant was an accountable executive for an aviation certificate holder, i.e. APII, and had a strong knowledge of the regulations. As concerns the related offences, one was for a failure to make an entry in the journey log book for a defect on an aircraft; the applicant had made some repairs to an aircraft himself, exercising the privilege of a licence he did not hold. The second was for providing flight instruction when he did not possess a valid flight instructor rating.

[43] The mitigating factor that Mr. Munro considered was the fact that the applicant believed he was following CAR 401.28 at the time of the offence. However, the regional manager did not accept this factor, i.e. relying incorrectly on an inapplicable regulation, as a valid defence and recommended a second level monetary penalty of $2,500. Consequently, Mr. Munro removed this mitigating factor. According to the enforcement policy, and based on three aggravating factors, the contravention would mandate a second level sanction at $2,500.

[44] During his cross-examination, Mr. Munro confirmed that the applicant cooperated during their phone conversation, and that he described the occurrence accurately. He also confirmed that the applicant had expressed to him that he had collected the money thinking he was allowed to do so under the regulation. Mr. Munro added that the narrative of the detection notice was aligned with the applicant's statements.

[45] Mr. Munro's notes concerning a conversation with Mr. Taylor, dated June 25, 2016, were filed as Exhibit A-7. Mr. Munro confirmed that these notes were from several interviews he conducted during the course of his investigation. He confirmed that the first three pages are his interview notes with Mr. Taylor. The fourth page is an interview with Mr. Mark Braithewaite, who fueled the aircraft in Carp, on June 29, 2016. The fifth page is an interview with the applicant on September 23, 2016, and the last page is an interview with Mr. McIver on September 20, 2016.

[46] Mr. Munro stated that when he spoke with the applicant, the latter made it clear during his interview that the amount of $400 was for his services as a flight instructor returning the aircraft from St. Catharines, i.e. as a ferry pilot. As concerns the gas costs, Mr. Munro confirmed that he focused on the fuel consumption per hour and the cost of fuel but also explained that he ceased doing the calculation because it was irrelevant. When he discovered that there was no allowance for cost recovery, he ceased doing the calculations. He stated that there are many costs associated with operating an aircraft but none of them are eligible for reimbursement under the regulations. In this case, Mr. Munro did not consider whether the applicant operated the aircraft for profit since he did not know what the operating costs were.

[47] During cross-examination, Mr. Munro explained that at the outset, the detection notice identified APII but, based on the document that he later uncovered in the course of the investigation proving that money was exchanged with the applicant directly, it was decided that the applicant was operating the commercial air service. Mr. Munro also indicated that before he questioned the applicant, he gave him a warning, i.e. the standard warning advising him of his rights. Mr. Munro added that since there was a history of two records of aviation enforcement, the applicant was not eligible for oral counselling under the enforcement policy. He confirmed that the applicant did not dispute the allegation nor did he admit to it because he felt that he was complying with section 401.28 of the *CARs*. The Minister did not provide any further evidence.

B. Applicant

[48] The applicant made a nonsuit motion for failure of the Minister to present sufficient evidence to meet the minimum requirements in this case. The applicant argued that he should be entitled to decide whether or not the Minister met the minimum standard of evidence before deciding if he should testify or not. The applicant based his motion on the criminal right to plead a nonsuit before electing to testify. The applicant explained that the procedure in his case is much closer to a penal offence, notwithstanding that it is an assessment of a monetary penalty.

[49] The Minister objected to the motion and argued that he provided sufficient evidence on all the elements of the offence, and that the case is dealing with an administrative matter and not a criminal proceeding. Consequently, the nonsuit motion is not justified. He added that the applicant is asking the Transportation Appeal Tribunal of Canada (Tribunal) to tell him if it is satisfied with the Minister's evidence and if the Tribunal is going to reject or dismiss the motion and then introduce evidence on the record.

[50] To support his argument, the Minister relied on the Supreme Court's decision of *Guindon v. Her Majesty the Queen (Canada)* [2015] 3 S.C.R. 3, where it was decided that administrative monetary penalties under the *Income Tax Act* are not criminal in nature and are not even considered penal infractions.

[51] In order to determine if the nonsuit motion is a procedure that could be applicable to the Tribunal, it was asked that the applicant provide jurisprudence, however he did not provide any justifying jurisprudence to assist the Tribunal and reply to the Minister's arguments. The applicant only explained that although an administrative penalty is imposed in his case, it could eventually affect his job because the next sanction that could be imposed against him, should he fail to respect the *CARs* again, would probably lead to a suspension of his licence which, according to the applicant, is more penal in nature.

[52] It was decided to take the arguments of the applicant and the Minister on the nonsuit motion under advisement, after which the applicant decided not to testify or file any further evidence.

[53] After analysis, it appears that the arguments on the motion are more legal than factual and basically the same as the applicant's arguments on the merits of the case. Part V of this determination deals with such arguments. The applicant submitted that the only evidence provided by the Minister on the fact that he was paid $500 for the cost of fuel for the aircraft is not sufficient to justify that he operated an air transport service when he was not the registered owner of the aircraft, as the Minister failed to prove that he had legal custody and control of the aircraft; the undisputed evidence being that APII was the registered owner. The applicant submitted that both the Tribunal appeal decision and the Federal Court decision in *Brant Paul Billings and Billings Family Enterprises Ltd. v. Minister of Transport* (TATC file no. P. 3115-02 and 2008 FC17) support the argument that only the registered owner of the aircraft can be charged under subsection 700.02(1) of having operated an air transport service without an air operator certificate.

[54] This Tribunal also agrees with the Minister's position that this matter is an administrative proceeding, not a criminal proceeding, and that the nonsuit motion could not be allowed in the circumstances. The contravention involves a monetary penalty; there are no penal consequences involved.

[55] Section 15 of the *Transportation Appeal Tribunal of Canada Act (TATC Act)* provides that the Tribunal is not bound by any legal or technical rules of evidence in conducting any matter that comes before it, and that all such matters shall be dealt with by it **as informally and expeditiously as the circumstances and considerations of fairness and natural justice permit.** In addition, section 4 of the rules of this Tribunal provides that:

> 4. Where a procedural matter not provided for by the Act or by these Rules arises during the course of any proceeding, the Tribunal may take any action it considers necessary to enable it to settle the matter effectively, completely and fairly.

[56] Consequently, this Tribunal has the power to proceed informally and determine that a nonsuit motion based on criminal principles is not applicable in an administrative proceeding of this Tribunal if fairness and natural justice are respected. By refusing to address the nonsuit motion prior to rendering a judgment on the merits of the case, the Tribunal did not prevent the applicant from cross-examining the Minister's witnesses, from filing his own evidence through the Minister's witnesses, from testifying and arguing his case with the assistance of his counsel, or from commenting on the Minister's evidence. The principles of natural justice were respected toward the applicant. On the other hand, it would not have been fair to the respondent for the Tribunal to render a decision on the nonsuit motion prior to the applicant's decision to testify or not, since it could have provided an advantage to the applicant and enabled him to adjust his case if the motion were dismissed. In order to decide if he will testify or not, a document holder cannot rely on a decision of this Tribunal or try to obtain its guidance as to the sufficiency of the Minister's evidence. It is even more the case when a document holder is represented by a legal counsel who should advise him accordingly.

IV. ARGUMENTS

A. Minister

[57] The Minister's arguments comprise an overview of the legislative scheme, the *Billings* case and the evidence presented to the Tribunal.

The legislative scheme

[58] The applicant is accused of having operated an air transport service (ATS) without holding an air operator certificate (AOC). He received a Notice of Assessment of Monetary Penalty pursuant to section 7.7 of the *Aeronautics Act* from the Minister of Transport because he had reasonable grounds that the applicant contravened subsection 700.28 of the *CARs.*

[59] The Minister submits that in order to determine if subsection 700.02(1) was contravened, we have to refer to the definitions in the *CARs* and in the *Aeronautics Act.* These definitions are important in order to determine whether or not the applicant himself, on January 7, 2016, was operating an ATS. It is the Minister's respectful submission that he was.

[60] The term "air transport service" as well as the word "operate" are most important to consider in this case, since the payment of money for the use of the aircraft is not in dispute. With regard to the word "operate", as used in the "air transport service" definition, we have to refer to the definition of "operator". The term "air transport service" is defined in section 101 of the *CARs* as 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**".

The same section of the *CARs* defines the "operator" as follows: "in respect of an aircraft, means the person **that has possession of the aircraft** as owner, lessee **or otherwise**". The Minister argues that the definition of the word "operator" is very important in this matter since the possession of the aircraft is not limited to the owner or the lessee but also extends, through the words "or otherwise", to the possession of an aircraft in another capacity.

[61] The definition of "commercial air service", provided for in the *Aeronautics Act*, is "any use of aircraft for hire **or reward**"**.** The Minister submits that such expression means "any payment, consideration, gratuity or benefit, directly or indirectly charged, demanded, received or collected by any person for the use of an aircraft".

[62] With regard to the legislative scheme, the Minister submits that subsection 700.02(1) of the *CARs* is a designated provision for which the Minister is entitled to proceed by way of issuing a monetary penalty. This subsection is listed in Part 1, Schedule II of the *CARs* and provides for a maximum penalty of $5,000 for an individual.

The decisions in the Billings case

[63] An overview of the different *Billings* decisions is necessary, as the applicant is relying on such decisions, particularly the Federal Court's decision, to argue that the case against him should be dismissed.

[64] The Minister submits that the series of decisions in the *Billings* case are a red herring in the sense that they are misleading or distracting, since the facts in the applicant's case versus those in the *Billings* case are totally different. In Mr. Billings' case, he was charged for operating an ATS when he did not hold and comply with the provisions of an AOC authorizing the service. His company, Billings Family Enterprises Ltd. (BFEL), was also charged for operating helicopters in an ATS without holding an AOC. Mr. Billings was also a director and officer of BFEL and of Challenger Inspections Ltd. (CIL), and CIL demanded and received payment for the flights. In the *Billings* case, everyone charged was a person who had not collected any money for the ATS provided. Mr. Billings himself had many corporate entities in which he was a shareholder. Mr. Billings was personally charged for operating an ATS. However, the invoice that had been sent in the *Billings* file to collect money for the service itself had been sent by CIL. So, obviously, the question was to determine Mr. Billings' role in all of this.

[65] The approach taken by the Minister in the *Billings* case was that the definition of "hire or reward", which includes the word "indirectly", was broad enough to apply to Mr. Billings because he was a shareholder of that company, and if such company was charging money and making money, it was indirectly profitable to Mr. Billings himself. At the review level, the hearing member gave reasons to agree with the Minister from a legal standpoint but the appeal panel was not of such opinion. The Minister submits that with regard to the *Billings* case, it should be remembered that Mr. Billings was charged but he was not the one who had sent the invoice for the service itself. There was also a charge against another corporate entity, the BFEL, which was separate from Mr. Billings himself, and again, BFEL had never sent an invoice to any of the clients that had benefitted from the ATS. The applicant's case is different because he was the one who charged and received money for the ATS, and who organized the service, according to the evidence presented, with no opposing evidence from the applicant. Consequently, there is a significant distinction between these two cases.

The evidence provided to the Tribunal

[66] The Minister submits that the key components of the evidence comprise Exhibits M-1 to M-8 which were introduced through its witnesses, Mr. Taylor and Mr. Munro.

[67] Based on all these exhibits and the testimonies of the witnesses, the Minister respectfully submits that it met its burden to prove all the elements of the offence on a balance of probabilities. The evidence given by the witnesses on the elements of the infraction is undisputed, as are all the exhibits. The applicant did not testify. The Minister submits that the witnesses obtained confirmation, through their conversations with the applicant and with Mr. McIver, that on or about January 7, 2016, the aircraft was flown down to St. Catharines from Carp, Ontario and then back to Carp, and that the purpose of the flight, which the applicant was organizing, was to transport Mr. McIver and Mr. Selwan between two points in order to pick up another aircraft that Mr. McIver had just purchased. Such evidence is also confirmed by Exhibit M-3, which is an email conversation between Mr. McIver and the applicant on the trip itself, its purpose, how much the applicant should charge, and the cost. Consequently, although the witnesses reported hearsay evidence, their testimonies were similar and corroborated by the exchange of emails filed as Exhibit M-3. Such evidence is not disputed by the applicant and is compelling. The Minister adds that the email from Mr. McIver to Mr. Taylor, filed as Exhibit M-4, confirms that Mr. McIver paid the applicant $900 total when he picked up his aircraft on that day. The invoice provided as Exhibit M-6 shows that the payment was demanded and received by the applicant himself and not by APII, since Azimuth Aviation Group is in fact Mr. Selwan, as confirmed by Exhibit M-7. Finally, the evidence shows that Mr. Selwan did not hold an AOC as required by subsection 700.02(1) of the *CARs*. Both Mr. Taylor and Mr. Munro testified on the fact that a search of the database was made at Transport Canada and it showed that Mr. Selwan did not hold an AOC for the ATS that he conducted on January 7, 2016.

[68] With respect to the definition of "operator", the Minister argues that the Tribunal can easily conclude that the applicant was the operator since the evidence supports that he clearly used the aircraft that day. He was the one who decided who would be onboard the aircraft, who would pilot it and where it would fly. He therefore obviously had custody and control of that aircraft on January 7, 2016, perhaps not as the owner or lessee, but as a person having possession of the aircraft that day. He was certainly using the aircraft "otherwise", as specified in the definition of the word "operator".

[69] The Minister submits that the applicant did not testify in this matter and never introduced evidence to contradict the fact that he had custody and control of the aircraft on January 7, 2016. He only introduced a few exhibits on the record through the cross-examination of both of the respondent's witnesses and such exhibits were filed in order to focus on the issue of oral counselling that Transport Canada should have used, according to the applicant.

[70] The Minister insists on the fact that the applicant also focused attention on Mr. Zahody, who was the person who flew the aircraft on the trip that day. Mr. Zahody was a Transport Canada official who flew the aircraft because the applicant did not have the appropriate rating to fly a twin engine aircraft. Through cross-examination, the applicant tried to put into evidence the fact that Mr. Zahody was of the view that oral counselling would have been sufficient to deal with this matter. On this issue, the Minister submits that Mr. Zahody's view, reflected in the hearsay evidence provided, is irrelevant because he was never tasked to look into this matter from an enforcement perspective. He was not the person with

the expertise as far as the enforcement process is concerned for this particular matter. Secondly, the Minister submits that he was biased. The evidence, according to the journey log books, shows that he flew that aircraft more than once. Obviously, the applicant and Mr. Zahody had a particular relationship, suggesting that he could not have an independent opinion in this matter and that he was therefore a biased individual. Consequently, the Minister asks the Tribunal not take into consideration Mr. Zahody's opinion, reported through Exhibit A-4, which is a visit record made by a Transport Canada inspector after talking with Mr. Zahody.

[71] As concerns oral counselling, the Minister submits that the applicant had a previous enforcement history with Transport Canada, and therefore oral counselling was not the first option that could be used. Both of the respondent's witnesses explained that the applicant was not offered oral counselling because of his previous enforcement record and because he was still disputing that he did not provide an ATS in the circumstances. Mr. Munro testified as to the specifics of these enforcement matters, both of which incurred monetary penalties that have been paid by the applicant.

[72] As concerns Exhibit A-2 filed by the applicant, an extract of the *Aviation Enforcement Policy Manual*, the Minister underlines that section 4.3 provides that oral counselling is not an option when the alleged offender disputes the allegation. In this case, even if the applicant did not dispute the facts, he obviously disputed the allegation. According to the Minister, such a position sets aside the possibility of discussing oral counselling.

[73] The Minister notes that the applicant is not disputing the fact that the aircraft was registered to APII, as shown in Exhibit A-5. The Minister adds that this is where the situation differs from the *Billings* matter. If the invoice would have been addressed to APII and Transport Canada would be issuing a monetary penalty to Mr. Selwan, then it would be a situation identical to *Billings*, but this is not the case. The applicant sent the bill and collected the money himself, and he organized the trip with the aircraft that he used on January 7, 2016.

[74] As concerns the amount of the monetary penalty that was assessed, the Minister suggests an amount of $2,500 based on its enforcement policy. Mr. Munro explained the rationale behind his evaluation. It is a second level sanction. A first level sanction would have been a $1,250 penalty but in the present circumstances, it was established that a second level sanction was appropriate because of the applicant's enforcement history. Even if the previous infractions were not identical, the Minister argues that they were similar in nature since the applicant was dealing in aviation matters without the appropriate licence, one of them being that he continued to be a flight instructor for a rating (aerobatic) that he did not hold, as his rating had expired. The Minister submits that the applicant has a habit of waiting for Transport Canada to declare that he is not allowed to fly an aircraft. It is likewise for operating an ATS without holding an AOC; instead of being proactive and verifying with the department to determine if an action requires a licence for a certain type of activity, the applicant prefers to exercise such activity and wait to see if Transport Canada will catch him in violation. The Minister is also of the opinion that the applicant did not have an excuse, especially because he was flying with a Transport Canada inspector, namely Mr. Zahody, whom he could have asked if he was allowed to use the aircraft and charge $500 for the fuel and other expenses to operate it.

[75] The Minister explains that when the Tribunal has to determine the appropriate amount for a penalty, the principles of denunciation, deterrence and rehabilitation have to be

considered. It is important to send a message to the aviation community that if persons want to operate an ATS, they must hold an AOC and comply with the requirements to obtain such certificate; a message to the effect that if you risk it and get caught, it will cost you something. In terms of deterrence, considering that $500 was charged for the fuel and that there were other costs, the penalty must be much higher than the amount of the compensation. In this particular case, if the penalty was $1,250, i.e. a first level sanction, the message sent would not be strong and would not encourage rehabilitation, as this amount is not much higher than the amount collected. Rather, the Minister recommends an amount of $2,500 in these circumstances as a fair amount that will have more deterrence on Mr. Selwan and the public, and one that will encourage Mr. Selwan's rehabilitation.

B. Applicant

[76] The applicant submits that the facts, generally speaking, are not in dispute. The applicant admitted that in March 2016 when he spoke to the inspector, he actually received money for the flight. His explanation was that it was money to reimburse the cost of fuel for the aircraft. The applicant also confirms the evidence shows that Mr. McIver was a student at APII and that before getting his licence, he bought an aircraft that was located in St. Catharines and that he wanted Mr. Selwan to help him bring it back to Carp. The chain of emails shows generally that they discussed an airline flight and they decided that it was quite expensive so the applicant suggested they could use APII's aircraft with the help of Mr. Zahody, the pilot, to fly to St. Catharines if Mr. McIver would pay the gas. The applicant also submits that the Minister acknowledged that the aircraft was owned by, and registered to, APII on the date of the flight. The evidence also confirms that on January 4, 2016, APII applied for an amendment to its flight training unit operating certificate for permission to do multi-engine training using this aircraft. The flight to St. Catharines took place three days later. Transport Canada put the aircraft on the flight training unit operating certificate and determined that, because of the state of the engine, it could not be used in a commercial operation. This determination occurred after the event because the application was only made on January 4, 2016. The evidence is that sometime around the end of March 2016, APII leased the aircraft to Azimuth Aviation Group, which is a business name for the applicant, Jules Selwan, as an individual. Consequently, as a private individual on January 7, 2016, Mr. Selwan could not authorize anyone to use the aircraft since it was not his; it belonged to APII and only they could permit anyone to use it. APII is an active corporation that acts through its officers and its employees, and from a legal standpoint, it was APII that allowed the use of the aircraft through its officer, Mr. Selwan. The evidence also shows that APII was not a sham corporation. The Tribunal must therefore bear in mind which hat the applicant was wearing on the date of the incident.

[77] Based on the jurisprudence of this Tribunal in the *Billings* case, as confirmed by the Federal Court, the applicant argues that there is not only a technical distinction but also a critical legal distinction which must be respected. Based on the *Billings* appeal decision, the applicant submits that you cannot have custody and control of an aircraft for a day. In the *Billings* case, notwithstanding that Mr. Billings was the pilot of the aircraft at that time and was a directing mind of the corporation that owned it, he did not have custody and control of the aircraft and did not own it, consequently, he was not charged with the contravention of having operated an ATS without holding an AOC.

[78] The applicant refers to paragraphs 43 to 46 of the Tribunal's appeal decision in *Billings*, which indicate that:

> [43] We overturn the member's determination that Mr. Billings operated an ATS without an AOC authorizing the service.
>
> [44] Mr. Billings was not the owner of the aircraft. Therefore, he did not have custody and control of the subject aircraft, notwithstanding that he was the pilot of the aircraft at that time. It is trite law that an individual in a small closely held corporation is capable of wearing many hats. In this case, his role as pilot of the aircraft was that of an employee.
>
> [45] The role of a pilot and employee does not carry with a requirement to be licensed to operate an ATS. The requirement for the licence rests with the registered owner who has custody and control of the aircraft.
>
> [46] We set aside the finding of the member at review regarding this matter and cancel the suspension of Mr. Billings' licence. Mr. Billings' appeal is allowed.

[79] In addition, the evidence confirms that the applicant was not the pilot-in-command of the aircraft during the flight from Carp to St. Catharines. On that flight, he was at most a student or maybe a passenger, but he was not a pilot-in-command. The applicant is of the view that he is being charged in his personal capacity for having personally operated an ATS and not in any representative or vicarious capacity. According to the applicant, the sole evidence to justify being charged as an individual is that he received money for fuel.

[80] The applicant also submits that with respect to the charge against the corporation that operated the flight in the *Billings* case, the appeal decision provides in paragraph 39 that:

> [39] Given BFEL had custody and control of the subject aircraft, it is incumbent upon them to ensure that the aircraft is operated in compliance with the CARs. CIL was charging for the flights carried out by BFEL aircraft. Although there is no direct proof that any of the funds flowed from CIL to BFEL for a direct benefit, to suggest that BFEL operated its aircraft and received no benefit is not believable. It is our decision that BFEL, the registered owner having custody and control of the subject aircraft, received indirect benefit for the operation of its aircraft.

[81] The applicant is of the opinion that the appeal decision in *Billings* clearly states the legal distinction between a corporation and an individual, and that only the registered owner has legal custody and control of an aircraft since it is their responsibility to ensure that an aircraft is operated in compliance with the *CARs.* Consequently, only the registered owner is required to hold an AOC, while a pilot is not; only the registered owner can be charged under section 700.02 and the case against an individual is dismissed if he is not charged under a vicarious liability.

[82] The applicant refers to paragraph 32, and those that follow, of the Federal Court's decision in *Billings* which state:

> [32] Although Mr. Billings was the pilot in charge of the helicopters for the three flights in question, it is not in that capacity that he was charged with the contravention. The reviewing member of the TATC, Mr. Ogilvie, its vice-chair, was of the view that although the payments were demanded and received by Challenger Inspections Ltd., Mr. Billings was the sole owner and operator thereof and therefore personally fell within the definition of "hire or reward".
>
> [33] The Appeal Panel did not share that legal opinion. As Mr. Billings was not the owner of the helicopters and did not have custody and control in his own name, notwithstanding he was the pilot, he in effect was acting as an employee. As a pilot and employee, there was no requirement that he be personally licensed to operate an air transport service.
>
> [34] The role of the registered owner is quite contentious in the Billings Family Enterprise matters. However, whether the operator was BFEL or Challenger Helicopters Ltd. or Challenger Inspection Ltd., the result is the same as far as the case against Mr. Billings is concerned. Although he undoubtedly indirectly benefited from the service, be it as a director, officer or shareholder of whichever corporation or corporations were operating the service, as

> well as through his employment as pilot on the flights in question, he was not personally operating an air transport service. The corporations were not a mere front, or sham. The Appeal Panel of the TATC was correct. This judicial review shall be dismissed.
>
> [35] If anyone knew the corporate structure it was Mr. Billings. Perhaps he could have been charged under subsection 8.4 (3) of the Act which provides:
>
> > **8.4** (3) The pilot-in-command of an aircraft may be proceeded against in respect of and found to have committed an offence under this Part in relation to the aircraft for which another person is subject to be proceeded against unless the offence was committed without the consent of the pilot-in-command and, where found to have committed the offence, the pilot-in-command is liable to the penalty provided as punishment therefor.
>
> However, he was not.
>
> [...]
>
> [37] BFEL holds title to and is the registered owner of the two helicopters. In aeronautics, where many aircraft are leased, the two concepts are quite distinct. Section 3 of the Act identifies a "registered owner" as a "...person to whom a certificate of registration for the aircraft has been issued by the Minister". The registered owner may or may not have title to the aircraft, but is supposed to have legal custody and control thereof (See: CAR 202.35). This distinction is borne out by the decision of the Supreme Court in *Canada 3000 Inc., Re; Inter-Canadian (1991) Inc. (Trustee of),* 2006 SCC 24, [2006] 1 S.C.R. 865) particularly at paragraph 55.
>
> [...]
>
> [40] Having undertaken a contextual and purposive analysis of the Act and the CARs, particularly the safety aspects thereof, as required by such cases as *Bell ExpressVu Limited Partnership v. Rex,* 2002 SCC 42, [2002] 2 S.C.R. 559, I conclude that even if BFEL had transferred custody and control to either of the Challenger companies it does not lie in its mouth to say so. The transfer was not legal as no notification was given. It cannot invoke its own breach of one regulation to avoid liability under another.

[83] The applicant reiterates that even if the Federal Court found that Mr. Billings did receive an indirect benefit, he could not be charged because he was not the registered owner of the aircraft. The applicant submits that there is no legal distinction between his case and the *Billings* case, except for a factual difference. In his own case, the applicant was an employee and officer of APII. As such, he arranged for the flight in an aircraft owned and registered to APII, and in law, if there was an ATS, it was operated by APII and not by the applicant. The question of hire or reward is not a disputed issue since the invoice for the cost of fuel confirms "hire or reward", which is broadly defined. According to the applicant, the Federal Court's decision in *Billings* stands for the proposition that the evidence of receiving a benefit is not evidence of operating an ATS, and, in the present case, this is the only evidence that was presented by the Minister.

[84] As concerns the invoice, the applicant submits it is dated August 1, 2016 and was obviously created after the fact, i.e. when the applicant was the registered owner of the aircraft. The applicant added that there is no evidence on what he did with the money, whether such money was reimbursed to APII or not, but according to the applicant, the chain of emails filed as Exhibit M-4 shows that the intention was that $500 be paid to offset the cost of fuel for APII.

[85] The applicant submits in his defence that since only the registered owner has legal possession or legal "custody and control", and therefore only the registered owner can operate the aircraft within the meaning of the *CARs*, then only the registered owner can be charged under section 700.02 of the *CARs*.

[86] The applicant urges this Tribunal to follow the Federal Court's decision in the *Billings* case where the court had undertaken a conceptual and positive analysis of the *Aeronautics Act* and the *CARs.* He adds that we cannot speculate whether Judge Harrington failed to consider the word "operator" as per the *CARs* and as submitted by the Minister. According to the applicant, this Tribunal has to follow the rule of *stare decisis* and there is a clear ruling of law in *Billings,* in both the appeal decision and the Federal Court's decision.

[87] As concerns the quantum of the monetary penalty, the applicant asks that it should be minimal and no more than $500. The case involves a technical offence; there is no evidence that there was any profit or that there was a danger or immediate threat to aviation safety. Inspector Munro's evidence confirmed that the flight did not present a danger and that the aircraft was flown by an experienced Transport Canada inspector. The evidence also shows that the applicant cooperated fully with the investigation at every phase. This was also confirmed by Mr. Munro in cross-examination. The applicant openly explained all of the facts leading to the contravention. Evidence shows that the flight took place and that Mr. McIver paid $500 for gas. Receipts later showed that the gas might have cost slightly less, i.e. around $300, pursuant to Mr. Munro's calculation. However, according to the applicant, gas is just one of the costs associated with flying an aircraft and there is no evidence that APII made a profit from this flight. While this does not go to guilt or innocence, it surely is a mitigating factor, according to the applicant. Evidence shows that there was no intent to make a profit from this flight; the only purpose being that it was to save Mr. McIver money to get his aircraft. According to applicant, it is common knowledge that no one can operate a Piper Seneca to and from St. Catharines for $500.

[88] The applicant also submits that the evidence provided by Mr. Munro with regard to the applicant's incorrect assumption that he could share the cost for a pilot, as authorized by the *CARs*, should be a mitigating factor since an incorrect view of the law makes one less morally culpable than a willing flouting of the law. This was rejected by Mr. Munro's superior but the applicant requests the Tribunal to consider his incorrect assumption as a mitigating factor.

[89] The applicant argues that his role as an accountable executive of APII is not an aggravating factor since everyone can be mistaken as to the law. In addition, the applicant is not charged as "an accountable executive" but as an individual, so it is not relevant that he was an accountable executive.

[90] As concerns his previous offences, the applicant submits that they are completely unrelated to the case at hand. One of the charges concerned a maintenance issue and has nothing to do with the operation of an ATS. The other charge was related to having given aerobatic instructions when his aerobatic instructor rating had just expired. This also is completely unrelated. According to the applicant, the only connecting factor here is the fact that he was using an aircraft, which is not enough evidence.

[91] The applicant asks the Tribunal to award legal costs against the respondent because the proceeding is frivolous or vexatious. The applicant submits that due to the lack of the legal merit of the proceedings, they can be qualified as frivolous and consequently, the Minister can be ordered to reimburse the extra-judicial costs of the applicant. Since the law is very clear that only a registered owner of an aircraft is responsible for its operation and that consequently only the registered owner requires an AOC, the Minister could not undertake legal proceedings against the applicant for having operated an ATS without an AOC. In addition, separate legal identities of the corporation and the shareholders is trite law. Had the

Minister charged APII it would not be frivolous, but charging the applicant is frivolous since the Minister has no chance of success. Again, the applicant bases his submissions on the *Billings* case discussed above. The applicant did not provide any evidence as to such extra-judicial costs but reserved his right to do so if the Tribunal concludes that the proceedings in this case are frivolous.

C. Minister's reply

[92] The Minister replies that the Tribunal's appeal decision and the Federal Court's decision in the *Billings* case did not decide that only the registered owner can be charged with operating an ATS without an AOC. Again, the facts of the *Billings* case are different from the facts of the present case in that Mr. Billings did not charge and receive payment himself for the use of the aircraft. In support of this argument, the Minister refers the Tribunal to paragraph 41 of the Federal Court's decision where the judge analyzed the evidence and indicated that the only evidence on record was that the invoices had been issued by CIL and that the latter advertised in trade journals. Judge Harrington noted that there was no evidence whatsoever as to the contractual arrangements which may or may not have been in place among the three corporations, and that this information was within the exclusive knowledge of Mr. Billings and the corporations. Consequently, with no such information within its knowledge, the judge indicated that the Minister was entitled to rely upon public records to establish that BFEL was the registered owner of the helicopters, and that once such evidence was established, the burden shifted to BFEL to prove the contrary. At the end of the paragraph, the judge also clearly indicates that his conclusion does not mean that CIL could not also have been charged. The Minister recalls that CIL was the corporation that issued the invoice and was paid for the use of the aircraft in the *Billings* case.

[93] Considering the foregoing, the Minister argues that the Federal Court also decided that a person who charges and receives payment is obviously someone who can also be liable under subsection 700.02(1) of the *CARs* and this is exactly what happened in the case of the applicant. The Minister adds that there is nothing pertaining to a registered owner in the definitions supporting subsection 700.02(1) of the *CARs*. In accordance with this offence-creating provision, the Minister had to show that the applicant had possession of the aircraft for the flight in question even if he was not the owner or lessee of the aircraft. Consequently, the applicant was in fact operating the aircraft on the date of the infraction.

[94] Considering the foregoing, the Minister concludes that the proceedings are obviously not frivolous. There is nothing frivolous either from a legal or factual standpoint. The Minister reserves the right to make further comments on this subject or on any amount that this Tribunal might allow in terms of awarding costs if this Tribunal decides to reject the charge against the applicant.

V. ANALYSIS

[95] If we take into consideration all of the definitions in the *CARs* and in the *Aeronautics Act* with regard to the elements provided for in subsection 700.02(1) of the *CARs*, this subsection would read as follows: No person shall operate (the word "operate" meaning in respect of an aircraft; the "person" being the one who has possession of the aircraft as owner, lessee or otherwise) an air transport service (meaning any use of aircraft for hire or reward and operated for the purpose of transporting persons, personal belongings, baggage, goods or

cargo in an aircraft between two points) unless the person holds and complies with the provisions of an air operator certificate that authorizes the person to operate that service.

[96] The expression "hire or reward" is defined in section 3 of the *Aeronautics Act* and is very broad in that it includes any payment, consideration, gratuity or benefit, directly or indirectly charged, demanded, received or collected by any person for the use of an aircraft. The applicant does not dispute that the amount of $500 paid for the use of the aircraft on January 7, 2016 falls within such definition.

[97] In the present case, the Minister has also proven the following and this is not disputed by the applicant: That on or about January 7, 2016, at approximately 10:56 local time, at or near Carp, Ontario, the applicant used the aircraft C-GPWS, registered in the name of APII, to carry passengers to St. Catharines, Ontario. He received a payment of $500 for the use of the aircraft, i.e. the approximate cost of fuel. The applicant, using his business name "Azimuth Aviation Group", charged Mr. David McIver an amount of $900. The invoice filed as Exhibit M-6 clearly shows that $400 was charged for the applicant's professional services and $500 for the aircraft fuel. Such exhibit shows that it was paid by Mr. McIver to the applicant doing business under the name of "Azimuth Aviation Group". The date of the invoice is unclear and the evidence did not show exactly when it was issued. It is either dated August 1, 2016 or January 8, 2016. It is not disputed that the purpose of the flight was to get to St. Catharines to pick up an aircraft that Mr. McIver had purchased and to fly that aircraft back to Carp, and that Mr. Douglas Zahody was the pilot-in-command and that the applicant and two passengers were aboard the flight to St. Catharines.

[98] Although the applicant's representative objected to all the hearsay evidence provided by Mr. Taylor and Mr. Munro, the facts are corroborated by the exhibits (M-1 to M-7) filed by the Minister.

[99] In addition, the testimonies of both witnesses on the elements of the infraction were the same and were very credible.

[100] The applicant does not dispute the fact that he does business under the name of "Azimuth Aviation Group".

[101] The Minister does not dispute the fact that on January 7, 2016, the aircraft was registered under APII with Transport Canada. The Minister also does not dispute the fact that the applicant is an officer and shareholder of APII.

[102] The Minister has proven, and this is not disputed either, that the applicant does not hold an AOC to operate an ATS.

[103] Based on the foregoing, this Tribunal finds that all the elements of the Notice of Assessment of Monetary Penalty have been proven on a balance of probabilities and that all the elements of subsection 700.02(1) of the *CARs,* which should be read together with the definitions of "air transport service", "operator", "commercial air service" and "hire or reward", have been proven on a balance of probabilities considering that the applicant did not testify to rebut the evidence. The applicant received an amount of $500 for the use of the aircraft and as such, this falls within the definition of "hire or reward". The applicant had possession of the aircraft, not necessarily as owner or lessee but certainly in another capacity, and such possession falls under the definition of the word "operator" in section 101 of the *CARs*. The aircraft was used for the purpose of transporting persons from Carp to St.

Catharines, Ontario, and the evidence shows that the applicant did not hold an AOC for that flight. The exchange of emails filed as Exhibit M-3 and the invoice as Exhibit M-6, for which no contradictory evidence was provided, demonstrate that the applicant organized the use of the aircraft, and determined the cost and received payment for its use. Although he was not the registered owner of the aircraft on the date of the infraction, the evidence provided shows that the applicant had custody and control of the aircraft on January 7, 2016.

[104] If we look at the definitions under subsection 700.02(1) of the *CARs,* there is no reference to the registered owner of the aircraft; rather, there is reference to any "person" operating an ATS. While it is true that it is presumably the registered owner who has legal custody and control of the aircraft and who would normally be the person applying for an AOC, this Tribunal believes that the intention of the legislator in subsection 700.02(1) of the *CARs* is to include the possession of an aircraft by any person, as owner, lessee **or otherwise,** and for which such person receives hire or reward for the purpose of transporting persons between two points. The word "operator", as defined in the *CARs,* is broad and not limited to the registered owner, although the registered owner will be presumed to be the operator in Transport Canada's records. Interpreting subsection 700.02(1) otherwise would mean that a person who does not update his registration record with Transport Canada and who would charge and receive payment for the transportation of persons between two points with an aircraft could not be charged under subsection 700.02(1) of the *CARs.* This is contrary to the intent of this provision and the definition with respect to operating an aircraft. As provided for in section 10 of the *Interpretation Act* (R.S.C., 1985, c. I-21), **the law shall be considered as always speaking,** and where a matter or thing is expressed in the present tense, it shall be applied to the circumstances as they arise, **so that effect may be given to the enactment according to its true spirit, intent and meaning.** In addition, paragraph 2 of section 15 of the *Interpretation Act* provides that where an enactment contains an interpretation section or provision, it shall be read and construed a) as being applicable only if a contrary intention does not appear; and b) as being applicable to all other **enactments relating to the same subject matter** unless a contrary intention appears.

[105] Consequently, this Tribunal cannot ignore and must give effect to the broad definition of the word "operator" as drafted by the legislator in order to construe the word "operate" in the definition of "air transport service" and this is what the applicant is asking the Tribunal to do.

[106] This Tribunal also concurs with the Minister's opinion on the interpretation to be given to the Federal Court's decision in the *Billings* case. Judge Harrington explained, in paragraph 41 of his decision, that the Minister discharged its burden of proof and was entitled to rely upon public records in order to establish that BFEL was the registered owner of the helicopters. The burden shifted to the Challenger companies to establish that BFEL had transferred custody and control to either one of them if BFEL did not want to be charged with having operated an ATC without an AOC. Since BFEL did not provide any evidence as to the contractual arrangements, it was decided that BFEL, as registered owner of the helicopters in the public records, was operating the ATS. Judge Harrington adds that **"this is not to say that Challenger could not also have been charged"** in the last sentence of paragraph 41 of the decision. I am of the opinion that the *stare decisis* of the Federal Court's decision in the *Billings* case is not that only the registered owner can be charged for having operated an ATC without an AOC, as suggested by the applicant.

[107] In the present case, once the Minister proved the elements of the infraction and in particular that it was the applicant who organized the use of the aircraft and decided who

would fly the aircraft and where, including who received payment notwithstanding that APII was the registered owner, the burden of proof shifted to the applicant who had to provide more evidence to justify that he was not the operator. Such evidence might have been, for example, a reimbursement of the amount of $500 to APII if that was the case. Unfortunately, the applicant did not testify or provide any evidence as to the contractual arrangements between him and APII for the use of the aircraft. Mr. Munro's testimony shows that the applicant believed he could personally charge the cost for fuel under section 401.28 of the *CARs*. This contradicts the applicant's argument that APII was operating the aircraft. It rather corroborates that he was personally operating it.

[108] The applicant relies only on the presumption that he must have been arranging for the use of the aircraft on January 7, 2016 only in his capacity as an officer or employee of APII, as only APII, the registered owner, could have authorized the use of the aircraft and because the evidence shows that he was an officer of APII. This presumption is not enough to contradict the Minister's evidence on the possession and use of the aircraft by the applicant and the amount of $500 that he personally received. In addition, although Exhibit M-4 (the email from Mr. McIver to Mr. Taylor) provides that money was paid to APII, this is contrary to the evidence submitted, i.e. the invoice marked "PAID" and filed under Exhibit M-6, addressed to and paid by Mr. McIver to the applicant himself.

[109] Consequently, this Tribunal concludes that the Minister has proven on a balance of probabilities that the applicant contravened subsection 700.02(1) of the *CARs*.

[110] This Tribunal does not agree with the applicant on oral counselling instead of a monetary penalty. It is the Minister's prerogative and discretionary power to determine if a sanction should be imposed in a particular circumstance when a contravention occurs, or if only oral counselling would be sufficient.

[111] With regard to the monetary penalty assessed in an amount of $2,500, the Tribunal believes that it should be reduced to an amount of $1,875. The *CARs* provides for a maximum amount of $5,000. This Tribunal is not bound by the policy of Transport Canada with regard to the monetary penalties.

[112] This Tribunal, in the appeal decision of *Kurt William M. Wyer v. Minister of Transport*, CAT File O-0075-33, gave a good overview of the principles of determining an appropriate monetary penalty and stated that such principles include at least the following: denunciation, deterrence, rehabilitation and enforcement recommendations. The appeal panel was of the opinion that arriving at an appropriate penalty involves not only knowing the sentencing principles and the relevant facts in circumstances that give them meaning in an individual case, but also the high art of balancing various policy considerations implicit in the principles and in the facts of the case. The appeal panel wrote that there are certainly a number of factors which exist in finding the proper balance within the principles of sentencing the assessment of a penalty or other sanction and that these factors will be considered, some in aggravation and others in mitigation. In particular, the appeal panel wrote the following:

> Without attempting to limit what such factors may include, the following may be considered:
>
> 1. Aggravating factors:
>
> - infractions involving dishonesty
> - planned breaches

- premeditated breaches
- extent of harm to victims of the offence
- past record of similar offences
- prevalence of the offence

2. Mitigating factors:

- no previous offences
- time since last offence
- degree of remorse
- whether or not an admission of the offence
- degree of cooperation with authorities
- delay between the commission of the offence and the time of the sentence
- conduct (involvement) of any "victims"
- restitution
- type of operation (commercial or private flight)
- impact on aviation community
- special factual circumstances
- relevance of *Enforcement Manual* recommendations
- effect of a monetary v. suspension penalty on individual
- occurrence impact on aviation safety
- manner of proceeding by authorities

Ultimately, the principles annunciated and the factors effecting the level of penalty must be considered on an individual basis in the context of the circumstances of the specific occurrence. The list noted above is not intended to be in any particular prioritized order, nor is the list necessarily complete.

[113] In the present case, the Minister's policy recommends $1,250 for a first offence and $2,500 for a second offence. It was established that the applicant was already charged with, and paid a monetary penalty for, having exercised an aviation privilege without holding the proper rating or certification at the time he exercised such privilege. In particular, the applicant gave aerobatic instruction when his rating had expired. The Tribunal finds that such charge, although not similar, is comparable to the charge in the present case in that the applicant exercised a privilege without holding the appropriate certification. The fact that the applicant is an accountable executive of APII is not relevant in the present circumstances. This Tribunal does not consider that relying on an applicable section of the *CARs*, which allowed the sharing of cost of fuel in a different situation, is a mitigating factor. However, the applicant, who is also a flight instructor, is expected to lead by example. His actions or omissions have an impact on the aviation community and his previous non compliances combined with the fact that he is a flight instructor are considered to be aggravating. Deterrence, not only for a particular offender but also for the public, is important in weighing all the factors to determine the penalty.

[114] The Tribunal, however, agrees with the applicant on the other mitigating factors provided, namely: i) the cooperation of the applicant with Transport Canada by confirming the facts of the infraction; ii) no profit having been made for the flight; and iii) the fact that there was no immediate danger or threat to aviation safety when the flight was taken.

[115] A document holder should also be allowed to discuss a case on a "without prejudice" basis with Transport Canada and should not be punished if he cooperates but also disputes the legality of the charge. Disputing the offence is not an aggravating factor. However, the admission of an offence should be a mitigating factor.

[116] Even if no profit was made, the amount of the monetary penalty should be sufficient enough to deter the applicant from repeating the offence, encourage rehabilitation and ensure that the applicant will no longer use an aviation privilege without holding the appropriate rating or certification. This is why in the circumstances, this Tribunal believes that an amount of $500, as suggested by the applicant, is too low. The applicant should be assessed an amount higher than $1,250 recommended for a first offence because of the aggravating factors mentioned above, but lower than $2,500 recommended for a second offence, considering the mitigating factor discussed above. An amount of $1,875 would be more appropriate and encourage rehabilitation. It would also send a signal to the aviation community that: (i) the monetary penalty assessed for having operated an ATS without an AOC is higher than the amount received for the cost of using an aircraft for transporting persons between two points without holding an AOC; and (ii) that if you are an instructor and have a history of comparable non compliances, i.e. exercising privileges without holding the proper certification, you will be assessed more than the amount of the first offence even if the previous non compliances are not similar.

[117] Considering the foregoing, the Minister's assessment of a monetary penalty is not frivolous and the claim for the extrajudicial costs is rejected.

[118] Since a lot of emphasis was made by the applicant on the frivolity of the case against him and his right to be reimbursed for his legal costs, this Tribunal finds that it is appropriate to remind that the Tribunal is limited by section 19 of the *TATC Act* with respect to awarding costs. Subsection 19(1) refers to the reimbursement of any reasonable expenses incurred in connection with a hearing. In addition, an action is not frivolous simply because it is not supported by the evidence, as it is not that unusual for a case to be dismissed for want of evidence attributed to human frailties such as faulty memory of a witness, reluctant evidence, loss of documents as well as error in judgment. Costs would be awarded under section 19 against the Minister only in the rarest of circumstances where there was serious or egregious action, or malice on the part of the Minister's officials.

[119] In the review determination of *International Express Aircharter Ltd. v. Minister of Transport*, TATC file P-3247-10, the review member discussed the criteria to be met under paragraph 19(1)(a) of the *TATC Act* as follows:

> [114] The question for the Tribunal is whether the revocation and suspension actions taken by the Minister were "frivolous or vexatious". *Black's Law Dictionary* (8th ed., edited by Bryan A. Garner, St. Paul, Minn.: Thomson/West, 2004) defines "frivolous" as "lacking a legal basis or legal merit; not serious; not reasonably purposeful". It defines "vexatious" as "without reasonable or probable cause or excuse; harassing; annoying" and "vexatious suit" as "a lawsuit instituted maliciously and without good cause".
>
> [115] It seems clear that paragraph 19(1)(*a*) should operate only in the rarest of circumstances, where there was serious or egregious action, perhaps even malice on the part of the Minister's officials. The question here is whether there was any ill intent on the part of Transport Canada in taking the action it did against Mr. Chapman and IEL.

[120] In addition, in the review determination of *Eugene Drader v. Minister of Transport*, TATC file P-3203-33, the member concluded that while there were significant oversights in the conduct of the investigation by Transport Canada, the Tribunal did not believe that there

was anything malicious or anything that would constitute bad faith on the part of the Minister which would justify that the proceedings were frivolous and vexatious as contemplated by paragraph 19(1)(a) of the *TATC Act.* In this particular case, there were errors in judgment in the investigation by Transport Canada.

VI. DETERMINATION

[121] The Minister has proven on a balance of probabilities that the applicant contravened subsection 700.02(1) of the *Canadian Aviation Regulations,* however the assessed monetary penalty of $2,500 is reduced to $1,875.

[122] The revised monetary penalty is payable to the Receiver General for Canada and must be received by the Transportation Appeal Tribunal of Canada within 35 days of service of this determination.

January 30, 2018

(Original signed)

Caroline Desbiens
Member