Date: 20080107

Dockets: T-2272-06
T-2295-06
T-2297-06

Citation: 2008 FC 17

Docket: T-2272-06

BETWEEN:

BILLINGS FAMILY ENTERPRISES LTD.

Applicant

and

THE MINISTER OF TRANSPORT

Respondent

Docket: T-2295-06

AND BETWEEN:

THE ATTORNEY GENERAL OF CANADA

Applicant

and

BRANT PAUL BILLINGS

Respondent

Docket: T-2297-06

AND BETWEEN:

THE ATTORNEY GENERAL OF CANADA

Applicant

and

CHALLENGER INSPECTIONS (2006) LTD. formerly BILLINGS FAMILY ENTERPRISES LTD.

Respondent

REASONS FOR ORDERS

HARRINGTON J.

[1] These three intertwined judicial reviews concern one man, two helicopters, three corporations and nineteen alleged contraventions of the *Canadian Aviation Regulations* under the *Aeronautics Act*. It is common ground that 13 of the 19 contraventions occurred. The defence on those 13 belongs more to corporate law than it does to aeronautics. The defence is that the contraventions were committed by someone else, a related corporation which, for the flights in question, was operating the helicopters which were then in its possession, legal custody and control. This defence succeeded for the individual who was an officer and director as well as the alter ego of the corporations. It did not succeed for the corporation which was listed as the registered owner of the helicopters. There are three groups of alleged contraventions which must be segregated, and analyzed.

Airworthiness Directive

[2] The Minister of Transport was of the view that Billings Family Enterprises Ltd. (BFEL), the registered owner of the two helicopters, authorized 10 flights while the helicopters were in its "legal custody and control", at a time when a required maintenance inspection of a tail rotor pitch control bearing was overdue, the whole in contravention of section 605.84 of the *Canadian Aviation Regulations* (CARs). He imposed a penalty of $5,000 for each of the 10 flights. On review, the Transportation Appeal Tribunal of Canada (TATC) agreed that it was BFEL, now known as Challenger Inspections (2006) Ltd., which committed the contraventions, but reduced the penalty to $4,000 for each of the 10 flights. On appeal therefrom, the TATC's three-person Appeal Panel upheld the finding on the contraventions, but further reduced the penalty to $500 for each of the 10 flights.

[3] This has led to two judicial reviews. In T-2272-06, BFEL seeks to set aside the finding that it was in legal custody and control of the two helicopters. In T-2297-06, the Minister seeks judicial review of the $500 penalty. He submits that the $4,000 penalty for each of the 10 flights should be reinstated.

Air Transport Service/BFEL

[4] The Minister was further of the view that BFEL operated an air transport service on six occasions without holding the air operator certificate required by CAR 700.02. He imposed a penalty of $5,000 for each of the six flights.

[5] On first review, which took the form of a hearing *de novo*, the TATC quashed the Minister's decision on the ground that it was not BFEL which operated the air transport service. However, the TATC's Appeal Panel maintained the Minister's appeal and reinstated his decision both on liability and penalty.

[6] BFEL seeks a judicial review under court docket number T-2272-06. It denies it was operating an air transport service. In the alternative, its position is that nobody was operating an air transport service on the flights in question. In any event, it submits the penalty is too high.

Air Transport Service/Brant Paul Billings

[7] Finally, the Minister took the position that Brant Paul Billings, the man behind BFEL, had personally on three occasions operated an air transport service without holding the required air operator certificate. His pilot's licence was suspended for 14 days for each of the three contraventions. On review, the Minister's decision was upheld. Mr. Billings appealed that decision and succeeded before the TATC's Appeal Panel, which dismissed the charges against him. The Minister seeks a judicial review of that decision under docket T-2295-06.

[8] Mr. Billings and BFEL complain about the conduct of the review hearing. Certificates were allowed in as evidence without their being given an opportunity to cross-examine the maker thereof, and the member failed to take proper account of a motion made at the close of the Minister's case to dismiss on the grounds of no evidence. They add that their liberty rights under section 7 of the Charter were violated.

The Corporate Structure

[9] The tactics of the parties were driven to some extent by their perception of the burden of proof, and so the record is not as complete as it could have been. Records from the British Columbia registry were filed with respect to the three "Challenger" corporations.

[10] The registered owner of the two helicopters is now known as Challenger Inspections (2006) Ltd. To avoid confusion, I will refer to it under its name at the time the events in question took place in 2004; Billings Family Enterprise Ltd. or BFEL. Brant Paul Billings is the president and a director thereof. The British Columbia registry does not give shareholding details.

[11] The second company is Challenger Helicopters Ltd. Mr. Billings is also the president and director of that corporation. The third is Challenger Inspections Ltd. Mr. Billings is its president, secretary and director.

[12] Mr. Billings, who was considered to be an honest and forthright witness, readily called the companies his own. Of course he was speaking as a layman, not as a corporate lawyer. There is no doubt, however, that he was the directing mind behind the three corporations.

[13] As Viscount Haldane said in *Lennard's Carrying Company, Limited v. Asiatic Petroleum Company, Limited*, [1915] A.C. 705 at page 713

> My Lords, a corporation is an abstraction. It has no mind of its own any more than it has a body of its own; its active and directing will must consequently be sought in the person of somebody who for some purposes

> may be called an agent, but who is really the directing mind and will of the corporation, the very ego and centre of the personality of the corporation.

[14] Nevertheless, a corporation is a person in law, distinct from its officers, directors and shareholders (*Salomon v. Salomon & Co.*, [1897] A.C. 22 (H.L.), *Kosmopoulos v. Constitution Insurance Co. of Canada*, [1987] 1 S.C.R. 2, 34 D.L.R. (4th) 208).

[15] The defence of BFEL and Mr. Billings is that at the relevant times the two helicopters were in the legal custody, possession and control, and operated by Challenger Inspections Ltd. It was Challenger Inspections Ltd. which issued commercial invoices and which received payment. Although it is a separate and distinct corporation, in some correspondence it stated it was a division of Challenger Helicopters Ltd. Challenger Helicopters Ltd. in turn advertized itself as being specialized in oil field aviation. The helicopters were simply one way of getting to remote well sites. Land vehicles were also used. Be that as it may, neither Challenger Inspections Ltd. nor Challenger Helicopters Ltd. was charged with the contraventions in issue.

Offences under the *Aeronautics Act*

[16] The Minister considers that BFEL contravened subsection 605.84 (1)(*c*)(i*)*, and that on separate occasions both BFEL and Mr. Billing contravened subsection 700.02 (1) of the CARs issued pursuant to the *Aeronautics Act*.

[17] Paragraph 605.84(1)(*c*) of the CARs provides:

> **605.84** (1) […] no person shall conduct a take-off or permit a take-off to be conducted in an aircraft that is in the legal custody and control of the person […], unless the aircraft
>
> > *(c)* […] meets the requirements of any notices that are equivalent to airworthiness directives and that are issued by
> >
> > > (i) the competent authority of the foreign state that, at the time the notice was issued, is responsible for the type certification of the aircraft, engine, propeller or appliance […]
>
> **605.84 (1)** […] il est interdit à toute personne d'effectuer […] le décollage d'un aéronef dont elle a la garde et la responsabilité légales ou de permettre à toute personne d'effectuer le décollage d'un tel aéronef, à moins que l'aéronef ne réponde aux conditions suivantes :

[…]

> il est conforme aux exigences relatives aux avis qui sont des équivalents des consignes de navigabilité, le cas échéant, et qui sont délivrés par :
>
> > (i) l'autorité compétente de l'État étranger qui était, au moment où les avis ont été délivrés, responsable de la délivrance du certificat de type de l'aéronef, des moteurs, des hélices ou des appareillages […]

[18] Subsection 700.02(1) of the CARs reads :

> **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.
>
> **700.02** (1) Il est interdit d'exploiter un service de transport aérien à moins d'être titulaire d'un certificat d'exploitation aérienne qui autorise l'exploitation d'un tel service et de se conformer à ses dispositions.

[19] Section 605 is in the division of the CARs dealing with aircraft maintenance requirements. In essence, the person with legal custody and control of the helicopters is prohibited from permitting a take-off when a maintenance inspection is overdue.

[20] The two helicopters were American built. There was a requirement of Air Direction 2003-04-04 issued by the (U.S.) Federal Aviation Administration which applied to Robinson R22 Helicopters, one of the two helicopter models in question. In order to detect possible corrosion of a tail rotor pitch control bearing, an inspection was to be carried out within 20 hours time-in-service and thereafter at intervals not to exceed 300 hours time-in-service or 12 months, whichever came first. At the time of the contraventions more than 12 months, but less than 300 hours in-service, had elapsed since the last inspection. When finally carried out, the inspection revealed no corrosion.

[21] Turning to the air transport service contraventions, CAR 700.02(1), subsection 101.01(1) of the CARs defines “air transport service” as meaning “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”. According to subsection 3(1) of the *Aeronautics Act*, “commercial air service” is defined as meaning “any use of aircraft for hire or reward”, and “hire or reward” is defined as meaning “any payment, consideration, gratuity or benefit, directly or indirectly charged, demanded, received or collected by any person for the use of an aircraft”.

[22] CAR 703.07 deals with the issuance of Air Operator Certificates. Among other things, the applicant must demonstrate to the Minister the ability to maintain an adequate organizational structure, an operational control system, meet the *Commercial Air Service Standards* for the operation and have in place an appropriate training program. The applicant must have legal custody and control of at least one aircraft of each category of aircraft that is to be operated.

[23] The Act establishes various offences, some of which are indictable (s. 7.3(1)(ii)). However the contraventions in this case are of a different order all together. They are strict liability administrative infractions, with the burden of proof falling upon the Minister on the balance of probabilities. However, the person charged with the contravention is not a compellable witness. Subsection 7.6(1) of the Act permits the Governor in Council, by regulation, to treat certain regulations as a "designated provision" the contravention of which may be dealt with in accordance with the procedures set out in subsections 7.7 to 8.2. CAR 605.84 (1)(*c*)(i) and CAR 700.02 (1) are designated provisions.

[24] The "designated provision" procedure has four phases. Initially, if the Minister believes on reasonable grounds that a person contravened a designated provision he may decide to assess a penalty. The person affected may seek a review by a member of the Transportation Appeal Tribunal of Canada (TATC), which was established under the *Transportation Appeal Tribunal of Canada Act*, R.S. 2001, c. 29. As aforesaid, the review is a hearing *de novo* with the burden of proof resting with the Minister. Thereafter either the Minister or the person may appeal to a three-person appeal panel of the TATC. Leaving aside medical issues, which are not relevant here, the member, and the

review panel (members sometimes sit in first instance and sometimes in appeal), must have expertise in the transportation sector involved. The reviewing member and the three members of the appeal panel were all pilots, and lawyers. The norm, which was followed in this case, is that the appeal is on the record which was before the reviewing member. Thereafter the appeal decision is subject to judicial review by this Court in accordance with section 18 and following of the *Federal Courts Act*. An appeal from the decision on judicial review may be taken to the Court of Appeal.

Standard of Review

[25] Two issues arise. The first is the deference this Court owes the Appeal Panel of the TATC. The second is the deference, if any, the Appeal Panel owed its member who reviewed the Minister's decision. As stated by Chief Justice McLachlin in *Dr. Q v. College of Physicians and Surgeons,* 2003 SCC 19, [2003] 1 S.C.R. 226 at paragraphs 22 and 26:

> 22. To determine standard of review on the pragmatic and functional approach, it is not enough for a reviewing court to interpret an isolated statutory provision relating to judicial review. Nor is it sufficient merely to identify a categorical or nominate error, such as bad faith, error on collateral or preliminary matters, ulterior or improper purpose, no evidence, or the consideration of an irrelevant factor. Rather, the pragmatic and functional approach calls upon the court to weigh a series of factors in an effort to discern whether a particular issue before the administrative body should receive exacting review by a court, undergo "significant searching or testing" ([*Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748], at para. 57), or be left to the near exclusive determination of the decision-maker. These various postures of deference correspond, respectively, to the standards of correctness, reasonableness *simpliciter*, and patent unreasonableness.
>
> […]
>
> 26. In the pragmatic and functional approach, the standard of review is determined by considering four contextual factors -- the

> presence or absence of a privative clause or statutory right of appeal; the expertise of the tribunal relative to that of the reviewing court on the issue in question; the purposes of the legislation and the provision in particular; and, the nature of the question -- law, fact, or mixed law and fact. The factors may overlap. The overall aim is to discern legislative intent, keeping in mind the constitutional role of the courts in maintaining the rule of law. […]

[26] There have been decisions of this Court dealing with the TATC, or one of its predecessors, the Civil Aviation Tribunal, but most either deal with issues of law on which the standard of review is correctness or procedural fairness which is beyond the scope of the functional and pragmatic approach (See: *Air Nunavut v. Canada (Minister of Transport)*, [2001] 1 F.C. 138, [200] F.C.J. No. 1115; *Canada (Attorney General) v. Woods*, [2002] F.C.T. 928, [2002] F.C.J. No. 1267; *Canada (Attorney General) v. Yukon*, 2006 FC 1326, [2006] F.C.J. No. 1671; and *Sierra Fox Inc. v. Canada (Minister of Transport)*, 2007 FC 129, [2007] F.C.J. No. 166). Nevertheless, these cases are helpful in putting the legislation in context.

[27] One must take into account both the relevant provisions of the *Aeronautics Act*, as well as the *Transportation Appeal Tribunal of Canada Act* as well as the pertinent regulations. The decision of the Appeal Panel is final, without right of appeal, but subject to judicial review. The Tribunal has greater expertise than the Court with respect to aeronautics in general, and air safety in particular. Safety is paramount in this case. One of the Minister`s responsibilities under section 4.2 of the Act is to "investigate matters concerning aviation safety". In my view, Parliament intended that upholdings of fact of the Appeal Panel not be disturbed unless patently unreasonable, that mixed questions of fact and law are to be reviewed on a reasonableness *simpliciter* standard and no deference is owed on questions of law.

[28] As to the deference the Appeal Panel owed the member, Mr. Ogilvie, who first reviewed the Minister's decision, *Dr. Q.* is again helpful. In that case, the relevant legislation authorized an appeal from a decision of the Inquiry Committee of the College of Physicians and Surgeons of British Columbia to the British Columbia Supreme Court. Drawing on paragraph 18 thereof, I hold the findings of fact or credibility made by Mr. Ogilvie were entitled to considerable deference. The Appeal Panel was entitled to its own view of the law.

[29] The issue of deference, according to the Minister, lies in the Appeal Panel's apparent willingness to consider *de novo* the amount of the penalty imposed on BFEL for operating an air transport service. I am of the view that the TATC Appeal Panel was explicitly authorized by Statute to advance its own opinion as subsection 8.1(3) of the *Aeronautics Act* provides that the Appeal Panel "…may dispose of the appeal by dismissing it or allowing and, in allowing the appeal, the panel may substitute its decision for the determination appealed against."

[30] Indeed, I think this position is consistent with what was said by the Supreme Court in *Paul v. British Columbia (Forest Appeals Commission),* 2003 SCC 55, [2003] 2 S.C.R. 585 at paragraphs 43 and 44. That was an appeal within an administrative scheme to a specialized appeal panel, a panel one would think would be expected to use the expertise its members were required to have.

The Case against Mr. Billings – Air Transport Service: T-2295-06

[31] To repeat, CAR 700.02(1) reads:

No person shall operate an air transport service unless the	Il est interdit d'exploiter un service de transport aérien à

person holds and complies with the provisions of an air operator certificate that authorizes the person to operate that service.	moins d'être titulaire d'un certificat d'exploitation aérienne qui autorise l'exploitation d'un tel service et de se conformer à ses dispositions.

[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.	**8.4** (3) Lorsqu'une personne peut être poursuivie en raison d'une infraction à la présente partie ou à ses textes d'application relative à un aéronef, le commandant de bord de celui-ci peut être poursuivi et encourir la peine prévue, à moins que l'infraction n'ait été commise sans le consentement du commandant.

However, he was not.

The Case against BFEL - Air Transport Service: T-2272-06

[36] It now becomes necessary to determine whether BFEL, or either of the two Challenger corporations, or indeed if all three were operating an air transport service. Distinctions have to be drawn among different concepts: registered ownership of as opposed to legal title to the helicopters; ownership as opposed to legal custody and control; and operation of an air transport service as opposed to operation of the helicopters themselves.

[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.

[38] It is the registered owner of the aircraft who receives Air Directives and other matters pertaining to the safe operation and maintenance of the aircraft. In this case, Mr. Billings received Air Directives in his capacity as a director of BFEL.

[39] CAR 202.35 (2) requires the registered owner of a Canadian aircraft who transfers any part of the legal custody and control of the aircraft to notify the Minister in writing within seven days thereof. The then current Certificate of Registration is cancelled. No such notice is in the record.

[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.

[41] However, should I have misinterpreted the Act and the CARs, I am of the view that the evidence as a whole shows that the Minister discharged the burden of proof. Once it was established

that BFEL was the registered owner of the helicopters, the burden shifted to it. The only evidence in the record is that invoices were issued by Challenger Inspections Ltd., called at times a division of Challenger Helicopters Ltd., and that the latter advertised in trade journals. No evidence whatsoever was led as to the contractual arrangements which may, or may not, have been in place among the three corporations. This was information within the exclusive knowledge of Mr. Billings, and the corporations. It was not information within the knowledge of the Minister, who is entitled to rely upon public records. Speculation is not called for. This is not to say that "Challenger" could not also have been charged.

[42] Counsel for BFEL argued that the evidence that no air operator certificate was in place was insufficient. Certificates had been issued by the Secretary of the Department of Transport pursuant to section 27 of the *Aeronautics Act* stating that during the period between 1 January 2004 and 31 August 2004 no AOC was issued either to Brant Paul Billings or to Billings Family Enterprises Ltd. authorizing the operation of an air transport service. These certificates are deficient in that they do not preclude the possibility that a certificate may have been issued prior to 1 January 2004, or that certificates may have been issued to either of the two Challenger corporations. However, Mr. Ogilvie, who was upheld in his finding that BFEL operated an air transport service without an AOC in place, was alert to the shortcomings of the certificates, and did not rely upon them. I am satisfied that it was reasonably open to Mr. Ogilvie to make the findings he did. Mr. Billings testified with respect to a safety audit from one of the customers. It was not patently unreasonable for Mr. Ogilvie to conclude that neither Mr. Billings nor BFEL nor either Challenger corporation held an AOC:

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

Was anybody operating an Air Transport Service?

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

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

[45] The basis of counts 1 and 2 was the log book for the helicopter in question together with an invoice to a customer. The invoice states "sign installed". The overall evidence of Mr. Billings, including pre-hearing statements, certainly led to the implication that the signs which were installed at well sites were signs belonging to the customers, and carried to the sites by helicopter. Vice-Chairman Ogilvie's conclusion that signs were carried on these flights were not patently unreasonable, nor was the decision of the Appeal panel to uphold him. Counts 3, 5 and 6 relate to "brush cutting of leaves". Again it was not patently unreasonable for Mr. Ogilvie to conclude on

the basis of the record that the necessary equipment was carried to the site by helicopter. Whether the equipment could be considered as personal belongings, goods or cargo, the activity fell within the definition of an "air transport service".

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

Natural Justice

[47] It had been agreed at the outset of the review hearing that the Minister would put in his evidence on all alleged contraventions of the regulations, before Mr. Billings and BFEL were called upon to reply. The record shows that they were aware that they were not compellable witnesses. At the close of the Minister's case, counsel for Mr. Billings and BFEL moved for dismissal on the basis of no evidence. The essence of the submission was that if anyone had contravened the regulations it was Challenger Inspections Ltd. Counsel argued that at the very least Mr. Ogilvie should take the motion under advisement. The effect would be that if Mr. Billings testified, then Mr. Ogilvie was

required to make a double analysis. If satisfied that the Minister had not made out a case he could not take into account Mr. Billings' testimony. Only if the Minister made out a case, would it become necessary to consider that testimony.

[48] Mr. Ogilvie pointed out that the TATC was an administrative tribunal and not bound by the rules of evidence (except as regards privileged information). He said the motion was:

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

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

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

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

> with the rules of fairness and, where they exercise judicial or quasi-judicial functions, the rules of natural justice."

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

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

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

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

[53] For reasons already given, I am satisfied based on the limited evidence in the record that the Minister discharged the initial burden upon him to show that the two helicopters were in the legal custody and control of BFEL. Either it did not lie in its mouth to invoke its own turpitude as a

defence or it did not shift the burden back by providing evidence that legal custody and control had been transferred to one or the other of the two Challenger corporations.

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

[55] It is common ground that, pursuant to section 8 of the Act, the reviewing member in this case, Mr. Ogilvie, was entitled to determine the amount payable in respect of the contraventions.

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

[57] He was of the view that denunciation and general deterrence needed strong emphasis. He did not consider specific deterrence as important, especially as there was an honest misinterpretation

of the Air Directive, and no previous offences. As far as denunciation is concerned, he pointed out that Transport Canada distributed a misleading press release which declared that BFEL had failed to replace a tail rotor pitch control bearing. Mr. Billings testified to having received numerous calls from clients on this point. The directive was only to inspect and to replace if necessary.

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

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

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

[60] As stated earlier in these reasons, subsection 8.1(3) of the Act provides that the appeal panel "may dispose of the appeal by dismissing it or allowing it, and, in allowing the appeal, the panel may substitute its decision for the determination appeal against."

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

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

[63] It had the expertise, and the Court will not interfere with its view that the overall penalty should be reduced because there was only a single error in misinterpreting the AD. However, neither Mr. Ogilvie nor the Appeal Panel should have taken into account the Minister's misleading press release. That was quite a different matter, irrelevant or extraneous to the penalty. Perhaps BFEL has a cause of action against the Minister, perhaps not. My only comment is that the press

release is not a factor to be taken into consideration when fixing a penalty for contraventions of Regulations under the *Aeronautics Act*, the purpose of which is to promote air safety.

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

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

Costs

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

[67] **In summary:**

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

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

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

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

"Sean Harrington"

Judge

FEDERAL COURT

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	T-2272-06
STYLE OF CAUSE:	BILLINGS FAMILY ENTERPRISES LTD. v. THE MINISTER OF TRANSPORT
PLACE OF HEARING:	VANCOUVER, B.C.
DATE OF HEARING:	November 15 & 16, 2007
REASONS FOR ORDER BY:	HARRINGTON J.
DATED:	JANUARY 7, 2008

APPEARANCES:

Mr. Leslie G. Dellow	FOR THE APPLICANT
Mr. Steven C. Postman	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Leslie G. Dellow Barrister and Solicitor Dawson Creek, B.C.	FOR THE APPLICANT
John H. Sims, Q.C. Deputy Attorney General of Canada	FOR THE RESPONDENT

FEDERAL COURT

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	T-2295-06
STYLE OF CAUSE:	THE ATTORNEY GENERAL OF CANADA v. BRANT PAUL BILLINGS
PLACE OF HEARING:	VANCOUVER, B.C.
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Leslie G. Dellow Barrister and Solicitor Dawson Creek, B.C.	FOR THE RESPONDENT

FEDERAL COURT

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	T-2297-06
STYLE OF CAUSE:	THE ATTORNEY GENERAL OF CANADA v. CHALLENGER INSPECTIONS (2006) LTD. formerly BILLINGS FAMILY ENTERPRISES LTD.
PLACE OF HEARING:	VANCOUVER, B.C.
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