

Occupational Health
and Safety Tribunal Canada



Tribunal de santé et
sécurité au travail Canada

Ottawa, Canada K1A 0J2

Case No. 2007-33
Decision No. OHSTC-09-005

CANADA LABOUR CODE
PART II
OCCUPATIONAL HEALTH AND SAFETY

171817 Canada Inc. -
Artic Sunwest Charter
appellant

February 10, 2009

This case was decided by Appeals Officer Pierre Guénette.

For the appellant

Lawrence W. Olesen, Counsel for Artic Sunwest Charter
Heather S. Smith, Counsel for Artic Sunwest Charter

For the respondent

No one appeared as respondent in this appeal.

A. The case at appeal

- [1] This appeal, dated December 7, 2007, was made by 171817 Canada Inc. operating as Artic Sunwest Charter (Artic Sunwest) under subsection 146(1) of the *Canada Labour Code*, Part II (*Code*) against a direction issued by health and safety officer (HSO) René Sheir¹ on November 21, 2007.
- [2] Concurrently, the appellant applied to have the application of the direction stayed pending disposition of the appeal. This matter was heard on December 18, 2007, by way of a teleconference. On December 21, 2007, I dismissed the stay application in a written decision.
- [3] A hearing was held in Yellowknife, Northwest Territories (NWT) on August 12-14, 2008.
- [4] The issue to be decided in this case is whether Artic Sunwest is in contravention of paragraph 125(1) (q) of the *Code*, as HSO Sheir found following an investigation into the hazardous occurrence which took place in the area near Blatchford Lake Lodge (the Lodge), NWT, on January 3, 2007, and resulted in the death of Jason Watt, a pilot employed by Artic Sunwest.
- [5] Through the following analysis, I must decide whether the direction issued to Artic Sunwest is to be confirmed, varied or rescinded.

B. Background

- [6] Artic Sunwest is a passenger and cargo charter aviation company based in Yellowknife, NWT. In January 2007, the company operated 13 aircrafts. Artic Sunwest has been certified by Transport Canada to operate under specific sections (702, 703, 704 and 705) of the *Canadian Aviation Regulations (CARs)* (SOR/96-433 as amended).
- [7] Under section 703 of the *CARs*, Artic Sunwest is authorized to use a pilot self-dispatch system and accordingly the operations manager, as a rule, delegated the operational control and flight release of aircrafts to the pilot-in-command (PIC)².

¹ René Sheir is a Health and Safety Officer at Transport Canada, Civil Aviation, Commercial and Business Branch, Aviation Occupational Health and Safety. The Minister of Labour is responsible to Parliament for the administration and enforcement activities of the *Code*. However, through a Memorandum of Understanding (please refer to Transport Canada website) with Human Resources and Skills Development Canada (HRSDC)-Labour Program, Transport Canada is responsible for the administration and enforcement of the *Code* as it applies to employees working on board aircraft in operation..

² The *Aeronautics Act* defines “pilot-in-command” as follows: “pilot-in-command” means, in relation to an aircraft, the pilot having responsibility and authority for the operation and safety of the aircraft during flight time.

- [8] On January 3, 2007, Jason Watt, as the pilot-in-command, was assigned to operate a Cessna 185 for a flight from Yellowknife, NWT to Blatchford Lake Lodge, NWT.
- [9] On his way to the Lodge, Jason Watt encountered unexpected icing conditions. The pilot-in-command lost control of the aircraft and crashed on the frozen lake. The pilot-in-command and two passengers suffered fatal injuries. Only one passenger survived the crash.
- [10] HSO Sheir was assigned to investigate the fatal accident of Jason Watt.

C. The evidence

- [11] The report and documents submitted by HSO Sheir, as well as his testimony, the testimony of other witnesses and documents introduced by the appellant establish the following chronology of events leading to the direction.
- [12] On the morning of January 3, 2007, Mr Watt, as PIC, was assigned to fly a round trip from Yellowknife to Blatchford Lake Lodge. The duration of the flight was estimated at approximately 30 minutes.

Early on that morning, the weather was foggy and, from his testimony, the Chief Pilot did recommend to Jason Watt to postpone the flight until the weather improved. Mr Watt agreed to wait.

One hour later, the weather having improved in Yellowknife, the Chief Pilot and Jason Watt assumed it would also have cleared up in the area of the flight destination.

The Chief Pilot briefed Mr Watt and discussed with him the location of the Lodge, the weather conditions and the loading and balance of the aircraft. Following that discussion, the flight was authorized by the Chief Pilot and Jason Watt decided to make that flight.

Mr Watt was then assigned to operate a Cessna A185F (Cessna) equipped with land and ski gear for the round trip to the Lodge.

Prior to the flight and as part of his duties as pilot-in-command, Jason Watt examined weather reports, the aircraft load/balance and he prepared a flight plan..

As baggage and groceries of the three passengers were determined to exceed the load capacity of the aircraft, the Ramp Manager and Cargo Agent informed Jason Watt and the passengers of the situation. In his pre-

flight briefing Jason Watt discussed the excess weight issue with the Chief Pilot who offered the option of operating a larger aircraft. However, Jason Watt decided to operate the Cessna and accordingly asked passengers to limit their on-board baggage.

According to the employer's investigation report, Jason Watt filed an Operational Flight plan that included weight and balance calculations. However there is no indication that he submitted a modified calculation with respect to the new cargo load.

J. Watt took off at the controls of the Cessna from Yellowknife airport at approximately 10:19 a.m. with the three passengers on board.

At the beginning of the flight, Jason Watt sent a radio transmission to Artic Sunwest's Flight Follower³ to inform him of his estimated time of arrival, as required in Artic Sunwest operations manual. In his last radio transmission to the Flight Follower, Jason Watt made no mention of worsening weather conditions.

Halfway into the flight, unexpected icing conditions were encountered. The weather started to get foggy and visibility was low because of ice on the aircraft windshield that reduced or blocked vision from the cockpit. Jason Watt did try to find the Lodge by circling over the lake. Soon thereafter, the PIC lost control of the aircraft which crashed near the shore of the frozen lake, resulting in 3 fatalities (the PIC and two passengers) and one severely injured passenger. According to the surviving passenger, Jason Watt did not send a distress or emergency message prior to the crash.

- [13] The General Manager of Artic Sunwest informed Transport Canada about the missing aircraft on the same day (January 3, 2007).
- [14] Rescue teams found the aircraft approximately 24 hours after the accident and the surviving passenger was rescued. The Royal Canadian Mounted Police (RCMP) and the Transportation Safety Board of Canada⁴ (TSB) initiated separate investigations. However, no health and safety officer

³ According to Artic Sunwest operations manual "The pilot-in-command is solely responsible for Flight Watch but is supported by a Flight Following System containing the following elements:

- a) The flight follower is qualified and knowledgeable in the Artic Sunwest Charter alerting procedures, on duty and able to respond to requests by the pilot-in-command for information related to the flight. Such information includes meteorological information without analysis or interpretation.
- b) The flight follower will monitor the progress of each flight from its commencement to its termination, including any intermediate stops (...)"

⁴ The Transportation Safety Board of Canada is an independent agency that investigates marine, pipeline, railway and aviation transportation occurrences which has been created by an Act of Parliament (the Canadian Transportation Accident Investigation and Safety Board Act).

from Transport Canada, Aviation Occupational Health and Safety, went to the accident site to initiate an occupational health and safety investigation under the *Code*. HSO Sheir stated that it was not required to be on-site because the RCMP and TSB were already on site to investigate the accident. HSO Sheir wrote in his investigation report that «It was not required for the Health and Safety Officer (HSO) to be present at the hazardous occurrence site, since detailed information would be available at a later date».

[15] HSO Sheir was informed of the employee fatality on January 11, 2007, when he received the Hazardous Occurrence Investigation Report (HOIR) from Artic Sunwest. He then initiated an investigation in accordance with the *Code*.

[16] On January 11 and 12, 2007, two inspectors from Transport Canada Flight Operations – Commercial & Business Aviation⁵ conducted a focused inspection of Artic Sunwest as a result of the aircraft accident. The audit examined the following items:

- Company manuals,
- Management Personnel and Operational Co-ordination,
- Flight Crew Training Program,
- Flight Crew Training Records,
- Operational Control System, and
- Flight Documentation.

Transport Canada inspectors identified four compliance failures under the *Canadian Aviation Regulations* and Commercial Air Service Standards. The employer replied to Transport Canada on April 27, 2007 with a corrective action plan that was accepted by Transport Canada on May 9, 2007.

[17] In the course of the occupational health and safety investigation, HSO Sheir obtained a copy of the RCMP's investigation report, including their pictures of the accident and a copy of the focused inspection report from Transport Canada Flight Operations – Commercial & Business Aviation, which includes the Artic Sunwest replies. HSO Sheir did brief telephone interviews with the Chief Pilot at Artic Sunwest and the surviving passenger.

⁵ According to Transport Canada website "Commercial & Business Aviation is responsible for the safety regulation, inspection and monitoring of all Canadian business and commercial air operators, as well as foreign air operators who operate in Canadian airspace." In this case, the mandate of those Branch inspectors was to conduct an inspection in the areas of flight operations and cabin safety on board the Artic Sunwest aircraft. Their mandate was not related to occupational health and safety.

[18] As part of his investigation report, HSO Sheir identified the following as contributing factors to the accident:

- 1- the loss of control of the aircraft caused by icing conditions,
- 2- the pilot's limited experience of the terrain and type of aircraft, in this case a Cessna C-185 equipped with skis,
- 3- the lack of a secondary inspection of the cargo load resulting in the aircraft taking off overloaded and with unsecured cabin and carry-on baggage,
- 4- the unavailability of accurate updated local weather conditions.

[19] HSO Sheir concluded his investigation report by issuing a direction to Artic Sunwest on November 21, 2007:

IN THE MATTER OF THE CANADA LABOUR CODE
PART II – OCCUPATIONAL HEALTH AND SAFETY

DIRECTION TO THE EMPLOYER
UNDER SUBSECTION 145(1)

On November 15, 2007, the undersigned Health and Safety officer concluded an investigation of the Hazardous Occurrence which took place on January 3, 2007, in the vicinity of Blatchford Lake Lodge, NT, and resulted in the fatality of a Pilot employed by 171817 Canada Inc., 171817 Canada Inc. being an employer subject to the Canada Labour Code, Part II.

After completing the investigation, the said Health and Safety officer is of the opinion that the following provision of the Canada Labour Code, Part II, have (sic) been contravened:

Paragraph 125.(1)(q) of Canada Labour Code Part II

“... provide in the prescribed manner, each employee with the information, instruction, training, and supervision necessary to ensure their health and safety at work”.

The employer did not provide the employee with necessary supervision, pertaining to Flight Preparation and Pre Flight Duties, such as: Flight Planning, Aircraft Loading, Carry On Baggage & Commissary, and Weight and Balance Control. Therefore you are HEREBY DIRECTED, pursuant to paragraph 145(1)(a) of the Canada Labour Code, Part II, to terminate the contraventions no later than December 20, 2007.

Further, you are HEREBY DIRECTED, pursuant to paragraph 145(1)(b) of the Canada Labour Code, Part II, to take steps, no later than December 20, 2007, to ensure that the contravention does not continue or reoccur.

Issued at Winnipeg, Manitoba, this 21st day of November, 2007.

René Sheir
Health and Safety officer

[20] On January 3, 2007, Artic Sunwest held a valid Air Operator Certificate

issued by the Minister of Transport pursuant to the *Aeronautics Act*.

- [21] Jason Watt held a commercial pilot licence valid for all single-pilot, non-high performance, single-and multi-engine land and sea aeroplanes. Prior to the accident, Mr Watt had approximately 1750 hours of flight experience, 150 of which were operating Cessna 185 aircrafts. He had flown approximately 755 hours on aircrafts equipped with floats and 50 hours on aircrafts equipped with retractable skis in Northern Ontario, Nunavut and Northwest Territories. According to the covering letter for his job application at Artic Sunwest, Jason Watt specified that he was "... well experienced in operating from short gravel/grass strips; in all weather conditions, with little or no weather information available ...".
- [22] Jason Watt had been an employee of Artic Sunwest since November 20, 2006. Artic Sunwest had provided him with the required Transport Canada⁶ approved training program. His training had been completed on December 7, 2006.
- [23] According to Mr Watt's training record, Artic Sunwest provided him with the following courses which were in accordance with the Company Operations Manual – Training Program:
- General Company Indoctrination
 - General Knowledge and Operations Exam for Pilots⁷
 - Safety Management System
 - Minimum Equipment List and Deferred Defects
 - Crew Resource Management
 - Controlled Flight into Terrain
 - Critical Surface Contamination⁸
 - Survival
 - Emergency Response Plan
 - Dangerous Goods
 - Workplace Hazardous Materials Information System
 - Accessibilities for Persons with Disabilities.
- [24] Prior to January 3, 2007, Jason Watt had flown two local flights in a Cessna 185, for an approximate total flying time of five hours.
- [25] On January 3, 2007, with weather conditions improving, Jason Watt decided to do the flight to the Lodge. As per operations procedures, he had a pre-flight briefing with the Chief Pilot. The issues addressed were:

⁶ To obtain a valid Air Operator Certificate, a Canadian Air Operator has to comply with several conditions and one of those is the company training program.

⁷ This exam is designed to test the basic knowledge required to hold a Commercial Pilots Licence.

⁸ This training is about airframe icing, ways to minimize the effects of icing and the properties of de-icing and anti-icing fluids.

- the weather conditions in the morning;
- the weight and balance of the aircraft;
- option of using a larger aircraft for that flight; and
- option during the flight to return to base in case of bad weather.

- [26] Prior to the flight, no destination weather information was available to the pilot because the Lodge had no means of communication. However the weather package provided by the Chief Pilot informed Jason Watt that there was a possibility of icing conditions during the flight. For that reason, the Chief Pilot instructed Jason Watt that he might need to return to base before reaching his destination.
- [27] The Artic Sunwest flight operations manual specifies the following duties that a pilot-in-command has to complete prior to a flight:
- 1- check the weather and determine the fuel and oil requirements that are sufficient for the type of flight and area of operations;
 - 2- calculate the aircraft weight and balance;
 - 3- complete a pre-flight inspection prior to each departure;
 - 4- supervise or carry out the loading and securing of cargo and freight;
and
 - 5- complete all post flight duties.
- [28] It is company procedure that baggage has to be tied down before any flight. However, the evidence showed that baggage was not tied down in the aircraft operated by Jason Watt on January 3, 2007. According to the surviving passenger, the luggage inside the aircraft had not been stored properly.
- [29] This statement is supported by TSB investigators who established that the cargo was not secured with a cargo net or ropes. As required by company procedure, it is always the responsibility of the PIC to make sure the cargo is properly secured before any flight.
- [30] It is a fact that the passengers had a large amount of baggage before the trip and the Chief Pilot offered Mr Watt the option of using a Turbo Beaver aircraft which is larger than a Cessna C-185.
- [31] As for weather conditions in the area of the Lodge, Jason Watt encountered icing conditions. However it appears from the evidence that he neither tried to return to base nor attempted to communicate with the Flight Follower.
- [32] According to the TSB report, the Cessna 185 was not equipped for or approved to operate in icing conditions.

[33] The accident site was about 5 km east of the Lodge on Blatchford Lake.

D. Appellant submissions

[34] In his written submissions, the appellant raised two issues concerning HSO Sheir's direction:

I) What was the prescribed manner of information, instruction, training and supervision at Artic Sunwest?

II) Was Artic Sunwest providing information, instruction, training and supervision to employees in the prescribed manner?

[35] I retain the following regarding the first issue raised by the appellant.

I) What was the prescribed manner of information, instruction, training and supervision at Artic Sunwest?

[36] It was submitted that the meaning of "manner prescribed" in paragraph 125(1) (q) of the *Code* is the manner set out in the Transport Canada *Aeronautics Act*, the *Canadian Aviation Regulations*, and the Commercial Air Service Standards.

[37] The appellant described the role of Transport Canada with respect to the Aviation industry in Canada and how Artic Sunwest complies with the *Aeronautics Act*, the *Canadian Aviation Regulations* and appropriate aviation standards. It concluded by stating that the Artic Sunwest Operations Manual includes directly or by reference the provisions of the *Aeronautics Act*, the *Canadian Aviation Regulations* and appropriate aviation standards. Therefore the meaning of "manner prescribed" is the manner that is specified in the company's Operations Manual.

[38] The appellant submitted that HSO Sheir failed to determine or did not consider what was the prescribed manner of instruction.

[39] I retain the following from the second issue raised by the appellant.

II) Did Artic Sunwest Charter provide the information, instruction, training and supervision to its employees in the prescribed manner?

[40] It is submitted that contrary to HSO Sheir's statement, the evidence establishes that Jason Watt had:

1- considerable and varied experience in Visual Flight Rule (VFR) flying in Northern Ontario, Northwest Territories and Nunavut,

- 2- experience in operating in different weather conditions with minimal or no weather information available,
- 3- experience with a Cessna 185 on retractable skis, wheels and floats, and
- 4- 1609.8 hours as a pilot-in-command, including 47.9 hours on aircraft equipped with retractable skis.

[41] The appellant submitted that Jason Watt received the training in accordance with the employer's Transport Canada approved Operations Manual and some initial flights were supervised by Artic Sunwest.

[42] It is submitted that HSO Sheir did not verify the instruction and training provided by Artic Sunwest to Jason Watt.

[43] In its submissions, the appellant stated that the required training provided by Artic Sunwest had made Jason Watt aware of his responsibilities as a pilot-in-command, those being:

- 1- pre-flight planning (including weight and balance),
- 2- passenger briefing to check all documentation, and
- 3- initiating flight watch.

[44] The appellant introduced evidence that Jason Watt was aware of his responsibilities as a PIC with respect to pre-flight planning (weight and balance calculation, passenger briefing), securing the load and ensuring the aircraft is adequately equipped to operate in in-flight conditions. The evidence established which exams were written by Jason Watt following the employer's Pilot Indoctrination Training Program:

- The General Knowledge and Operations Exam for pilots,
- C185 Skywagon – Systems Exam, and
- Critical Surface Contamination & Airborne Icing Exam.

[45] The Chief Pilot stated that Jason Watt had loaded aircraft and secured loads in accordance with the industry requirements on several occasions in the past.

[46] The appellant submitted that it is the PIC who is responsible for ensuring he has the available weather information before every flight. L. Olesen referred to the *Canadian Air Regulations* (CARs) to support his submission:

602.71 *The pilot-in-command of an aircraft shall, before commencing a flight, be familiar with the available information that is appropriate to the intended flight.*

Weather Information

602.72 *The pilot-in-command of an aircraft shall, before commencing a flight, be familiar with the available information that is appropriate to the intended flight.*

- [47] The Chief Pilot testified that it is Artic Sunwest's policy to instruct their pilots to return to base in case of bad weather during a flight. In such situations, pilots are not subjected to financial penalty.
- [48] The Chief Pilot stated that pilot experience should be related to the type of flying instead of to the number of hours flown, contrary to the testimony of HSO Sheir.
- [49] The Chief Pilot said that it is the pilot-in-command who ultimately decides whether or not to fly.
- [50] The Chief Pilot testified that he gave a lot of supervision to Jason Watt prior to his flight on January 3, 2007, discussing weather conditions on that morning and the loading and balance of the aircraft.
- [51] The Chief Pilot testified that the Cessna 185 had been put out of service because of the risk. However he did not specify what risks he was referring to. He added that a risk assessment had been done, although not in writing. L. Olesen submitted that the employer decided to remove that type of aircraft from service because they want to rely on aircraft piloted by two people instead of one.
- [52] As to HSO Sheir's investigation, it is further submitted that:
- He did not attend the accident site or the premises of the employer;
 - He conducted a telephone interview with the Chief Pilot more than 7 months after the accident and did not interview other employees;
 - HSO Sheir's findings are not supported by any evidence or fact;
 - HSO Sheir did not present evidence that the employer had failed to follow its procedures;
 - Between the day of the accident and the day when the direction was issued, HSO Sheir did not check with the employer as to what had been corrected to avoid a repetition of such accident; and
 - HSO Sheir gave no consideration to an audit conducted by Transport Canada Flight Operations – Commercial & Business Aviation that was completed following the accident and the written reply from Artic Sunwest.
- [53] In conclusion the appellant submitted that HSO Sheir had no grounds to

issue a direction. He did not ascertain what the prescribed manner was and did not consider whether the employer had complied with the prescribed manner for providing its employees with information, instruction, training and supervision that is necessary for insuring their health and safety.

- [54] L. Olesen added that the direction should not stand and therefore it should be rescinded.

E. Relevant statutory provisions

- [55] The appeal was filed pursuant to subsection 146(1) of the *Code* which states:

146. (1) An employer, employee or trade union that feels aggrieved by a direction issued by a health and safety officer under this Part may appeal the direction in writing to an appeals officer within thirty days after the date of the direction being issued or confirmed in writing.

- [56] Subsection 146.1(1) of the *Code* specifies the role of the Appeals Officer when a decision is rendered following the hearing of an appeal:

146.1(1) If an appeal is brought under subsection 129(7) or section 146, the appeals officer shall, in a summary way and without delay, inquire into the circumstances of the decision or direction, as the case may be, and the reasons for it and may
(a) vary, rescind or confirm the decision or direction; and
(b) issue any direction that the appeals officer considers appropriate under subsection 145(2) or (2.1).

- [57] The relevant provision of the *Code* respecting the employer's duty to provide each employee with the information, instruction, training and supervision reads as follows:

125(1) Without restricting the generality of section 124, every employer shall, in respect of every work place controlled by the employer and, in respect of every work activity carried out by an employee in a work place that is not controlled by the employer, to the extent that the employer controls the activity,
(q) provide, in the prescribed manner, each employee with the information, instruction, training and supervision necessary to ensure their health and safety at work.

Analysis and decision

- [58] The issue to be decided in this case is whether or not HSO Sheir erred in issuing the direction to Artic Sunwest.
- [59] Following his investigation, HSO Sheir found that Artic Sunwest was in violation of the *Code* with respect to the necessary supervision that had not been provided to Jason Watt prior to the fatal flight. The supervision concerned flight preparation and pre-flight duties. As a consequence of the violation, HSO Sheir issued a direction to Artic Sunwest. HSO Sheir opined that the *Aviation Occupational Safety and Health Regulations (Aviation Regulations)* (SOR/87-182, as amended) do not have specific provisions related to paragraph 125(1) (q) of the *Code* and thus the words "prescribed manner" mean as prescribed by Artic Sunwest's flight operations procedures.
- [60] HSO Sheir conducted his investigation mostly from his office located in Winnipeg, Manitoba. He stated that he did not go to the accident site because there is no clear direction from Transport Canada to attend an accident site and it is not a common practice at Transport Canada. Also, he did not meet managers, employees or members of the OSH Committee at Artic Sunwest after the accident. On August 16, 2007,, he had a telephone conference with Artic Sunwest representatives where he asked questions to the Chief Pilot and the Operations Manager of the company. For the purpose of his investigation, HSO Sheir relied mostly on the RCMP investigation report, the Transport Canada Audit Report, the Office of the Coroner report and Artic Sunwest's investigation report.
- [61] HSO Sheir raised several issues and identified contributing factors without key supporting facts. In my opinion, an investigator should obtain all relevant evidence prior to making determinations and issuing directions to an employer or an employee. It appears that HSO Sheir did not verify those assumptions with the appropriate persons.
- [62] Despite a substantial investigation report by HSO Sheir, I cannot put much weight on its content and must rely mostly on the appellant's evidence and submission. In *Douglas Martin and Public Alliance of Canada*⁹, the Federal Court of Appeal stated at paragraph 28 that "An appeal before an appeals officer is de novo". This confirms my authority to receive evidence that was not considered by HSO Sheir or may not have been available during his investigation.
- [63] I have to underline the fact that there is no respondent with respect to this appeal. I have been informed in writing that the Workplace Health and Safety Committee employee member who took part in the Artic Sunwest

⁹ *Douglas Martin and Public Service Alliance of Canada*, 2005-05-06, Docket A-491-03

accident investigation did not intend to make representations at the hearing.

- [64] Before deciding on the merit of the case I will address the two issues raised by the appellant in its final submissions.

I) What was the prescribed manner of information, instruction, training and supervision at Artic Sunwest?

- [65] The appellant submitted that "(...) the Minister of Transport through Transport Canada mandates the prescribed manner of information, instructions, training and supervision done by an air operator, and in this case, Artic Sunwest." Then the appellant added "(...) that the "manner prescribed" is the manner set out in the Operations Manual."

- [66] The word "prescribe" is defined at subsection 122 (1) of the *Code* as follows:

"prescribe" means prescribe by regulation of the Governor in Council or determine in accordance with rules prescribed by regulation of the Governor in Council".

«règlement» Règlement pris par le gouverneur en conseil ou disposition déterminée en conformité avec des règles prévues par un règlement pris par le gouverneur en conseil.

- [67] The case before me involves an employee employed on an aircraft while in operation, therefore the *Aviation Regulations* made under the *Code* apply in this case. Section 1.3 of the *Aviation Regulations* reads as follows:

1.3 These Regulations apply in respect of employees employed on aircraft while in operation and in respect of persons granted access to such aircraft by the employer.

- [68] In addition the Prescription for the *Aviation Regulations* reads as follows:

1.2 These Regulations are prescribed for the purposes of sections 125, 125.1, 125.2 and 126 of the Act.

- [69] Contrary to the appellant's submissions and HSO Sheir's interpretation, the meaning of "prescribed manner" is in reference to specific occupational health and safety regulations, prescribed by the Governor in Council. In the case before me those are the *Aviation Occupational Safety and Health Regulations* which provide specific requirements to ensure the safety of the employees employed on aircraft while in operation and of the persons granted access to such aircraft by the employer. In addition, the *Code* provides the legislative framework and specifies the duties and responsibilities of the employer and employees.

Canadian Aviation Regulations (CARs), Part VI – General Operating and Flight Rules.

- [78] According to the Chief Pilot, Mr Watt complied with those sections of *CARs* before commencing his flight on January 3, 2007. Also there were discussions between the Chief Pilot and Jason Watt on that day with respect to the location of the Lodge, the baggage on-board, the weight and balance of the aircraft and the weather conditions.
- [79] On this point, I received no evidence to the effect that Jason Watt failed to comply with those *CARs* requirements.
- [80] As to the carry-on baggage and cargo, it is the responsibility of the pilot-in-command to make sure it is properly secured in accordance with the Company Operations Manual developed in accordance with the *Canadian Aviation Regulations*. The Chief Pilot testified that ramp employees are not trained to secure an aircraft load. Only the pilot-in-command has that type of qualification.
- [81] According to the TSB Report and the surviving passenger, baggage and cargo were not secured and some passengers had carry-on baggage on them, which is contrary to the Company Operations Manual.
- [82] It is the employee's duty to always comply with employer instructions, as stated in paragraph 126 (1)(d) of the *Code*:
- 126(1) While at work, every employee shall
(d) comply with all instructions from the employer concerning the health and safety of employees.
- [83] Chapter 1 (General) of Artic Sunwest Charter's Company Operations Manual specifies that the pilot-in-command has the responsibility to:
- Supervise or carry-out the loading and securing of cargo/freight in accordance with procedures set out in Chapter 2..
- [84] In chapter 2 (Flight Authorization) it is specified that:
- (...) The load must be secured to prevent the contents from becoming a hazard by shifting and to protect any controls, wiring, lines, equipment or accessories whose damage or failure would affect safe operations. Appropriate restraints will be used as necessary to protect occupants from injury by the load when the load is located aft of the occupants. (...)
- [85] The TSB investigators found that the Cessna has no means on board to secure the baggage and cargo to the tie-down rings. I received no evidence that the employer was aware of that situation on January 3,

- [70] HSO Sheir issued a direction under paragraph 125(1)(q) of the *Code* and he did not specify what were the prescribed *Aviation Occupational Safety and Health Regulations* he was referring to. The reason is that there is no prescribed supervision obligation in these regulations. There is therefore no basis for the issuance of a direction on supervision.

II) Did Artic Sunwest provide the prescribed information, instruction, training and supervision set out in the Operations Manual?

- [71] Having stated that there is no prescribed manner related to information, instruction, training and supervision with respect to paragraph 125(1)(q) of the *Code*, obviously I do not have to address the second issue raised by the appellant.
- [72] However, while paragraph 125(1)(q) of the *Code* may not apply, the employer general protection duty under section 124 of the *Code* does continue to apply. I will therefore consider the evidence put before me to determine if the employer fulfilled its general duty under section 124 of the *Code*.

III) Was Artic Sunwest in violation of the Code on January 3, 2007?

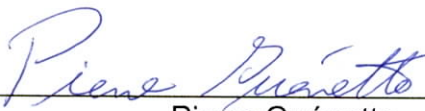
- [73] Under section 124 of the *Code*, the employer general duty is the following:
124. Every employer shall ensure that the health and safety at work of every person employed by the employer is protected.
- [74] The general employer obligation under the *Code* is to ensure that employees at work have a safe working environment. To achieve this, the employer has to put in place and apply health and safety procedures, training and supervision.
- [75] On the training provided by Artic Sunwest to Jason Watt, the evidence submitted by the appellant demonstrates that Mr Watt received the training outlined in the Artic Sunwest's Operations Manual. His exams show that Jason Watt knew what his duties were as a pilot-in-command, and those include weight and balance calculations, securing the load prior to take off and determining flight icing conditions.
- [76] The training program was previously approved by Transport Canada, as part of the flight operation certification.
- [77] Prior to a flight, the pilot-in-command has to be familiar with the available information with respect to destination and the available weather information appropriate to the flight. This is in accordance with the

2007.

- [86] The evidence submitted to me did not demonstrate that baggage and cargo not secured on board were contributing factors to the fatal injuries suffered by Jason Watt.
- [87] However, employees should be aware of those instructions from the training provided by the employer. The evidence demonstrates that Jason Watt was trained through the employer indoctrination training program and consequently knew his responsibilities before and during the flight on January 3, 2007.
- [88] As to the weight and balance of the aircraft, it has been established in the TSB report that the Cessna was not overweight, contrary to HSO Sheir's statement. According to the calculations for a proper balance of the Cessna, the maximum allowable gross weight was 3350 pounds. However it has been estimated that the aircraft's total weight at the time of the accident was 3316 pounds.
- [89] Regarding the bad weather conditions during a flight, pilots are instructed by the company to return to their base. Furthermore, Artic Sunwest's Operations Manual specifies that departures are not allowed when there are icing conditions. The Cessna operated by Jason Watt was not equipped for or approved to operate in icing conditions. The Chief Pilot testified that Jason Watt was informed and trained on the company's procedure in such weather conditions. However, the evidence showed that Jason Watt tried to reach his final destination despite the worsening of weather conditions with some freezing fog. Prior to the Cessna crash, Jason Watt's visibility was obstructed by ice over the aircraft windshield.
- [90] The Chief Pilot testified that pilots are not subject to financial penalty when a flight is not completed because of bad weather conditions. The evidence established that this employer policy is in writing. However no evidence was introduced regarding whether Sunwest Charter managers comply with the policy.
- [91] The evidence before me established that at the time of the accident, the employer did have in place flight safety procedures and a training program that had been approved by Transport Canada.
- [92] At the time of the accident, Artic Sunwest had a valid Air Operator Certificate issued by the Minister of Transport, pursuant to Part VII of the *Canadian Aviation Regulations*, under the authority of the *Aeronautics Act*.
- [93] Based on my inquiry into the circumstances of the direction and the above analysis, it is my determination that HSO Sheir erred in issuing a direction

to Artic Sunwest on November 21, 2007.

- [94] I find that there is no indication that Artic Sunwest was in violation of the *Code* on January 3, 2007, contrary to the determination by HSO Sheir.
- [95] For the reasons stated above and based on my authority pursuant to paragraph 146.1(1)(a) of the *Code*, I rescind the direction issued by HSO Sheir on November 21, 2007.



Pierre Guénette
Appeals Officer