R.S.C. 1970, c. A-3 AERONAUTICS CA 11002

IN THE COURT OF APPEAL FOR THE NORTHWEST TERRITORIES

Court: The Honourable Mr. Justice McDermid
The Honourable Mr. Justice Prowse
The Honourable Mr. Justice Moir

BETWEEN:

HER MAJESTY THE QUEEN

Appellant

- and -

WILLIAM A. LASERICH and
ALTAIR LEASING LTD.

Respondents

REASONS FOR JUDGMENT OF
THE HONOURABLE MR. JUSTICE MOIR

This appeal raises, for the first time, an important question of law under the *Aeronautics Act*, (Ch. A-3, R.S.C. 1970). Is it an offence to transport your own goods in your own aircraft, when you are not a licensed commercial carrier, and sell them at a higher price than you paid for them at the point of origin?

The respondents were charged that they both

> "between the 23rd day of September, A.D. 1974 and the 22nd day of October, A.D. 1974 did operate a commercial air service in the Northwest Territories, while not being the holder of a valid commercial air service licence or permit to wit: did operate a Douglas model C 54G-DC aircraft registered as C-FIQM to transport fuel oil from Resolute Bay to Pelly Bay, contrary to section 17 (1) of the *Aeronautics Act* of Canada."

At the trial the respondents were acquitted. The Crown appealed by way of trial *de novo*. Mr. Justice Dechene heard the appeal, with the consent of both counsel, on the basis of the transcript of the evidence taken before the magistrate and written argument. He affirmed the acquittal. The Crown now appeals to this Court on a question of law alone.

The facts are relatively simple. Altair Leasing Ltd. is an incorporated company in the Northwest Territories under the Provisions of the Company's Ordinance. It is licensed to sell fuel oil in the Northwest Territories of Canada. William A. Laserich is a major shareholder, director and officer of that Company. The Company owns the DC4 aircraft mentioned in the information.

The facts are that the respondent Company entered into a contract for the sale to the Government of the Northwest Territories of 25,000 gallons of P50 heating oil, f.o.b. the Government tank farm at Pelly Bay. At about the same time the respondent Company purchased 22,000 gallons of P50 heating oil from Imperial Oil at Resolute Bay. It is clear that the respondent Company paid Imperial Oil $0.64 per gallon for the heating oil they purchased from Imperial Oil at Resolute Bay. It further appears by invoice that the respondent Company supplied to the Government of the Northwest Territories 22,130 gallons of P50 heating oil at a price of $1.7878 per gallon or a total of $39,546. The respondent Company was paid as per invoice. Cross-examination of the Crown witnesses by counsel for the defendants clearly indicate that Altair Leasing Ltd. admit it purchased the heating oil at Resolute Bay and sold the same oil f.o.b. Pelly Bay to the Government of the Northwest Territories. The question is, does this conduct of transporting its own goods from Resolute Bay to Pelly Bay and then selling the goods at an increased price constitute an offence under section 17(1) of the *Aeronautics Act*?

Section 17 (1) of the *Aeronautics Act* reads as follows:

"17. (1) No person shall operate a commercial air service unless he holds a valid and subsisting licence issued under section 16."

It is admitted that the respondent Company does not have a licence pursuant to section 16 of the Act. However, the defence is that the respondent Company, in transporting its own goods from Resolute Bay to Pelly Bay, was not operating a "commercial air service". I now turn to deal with this defence. The two statutory definitions that require interpretation are contained in section 9 of the *Aeronautics Act*.

"'commercial air service' means any use of aircraft in or over Canada for hire or reward"

"'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.:

The simple question is, do the definitions of "commercial air service" and "hire or reward" make it an offence for a person to carry his own goods by air so that he is guilty of an offence under the provisions of the *Aeronautics Act* when he sells those goods at an increase in price? That Act provides that a violation may attract a fine up to $5,000 or to a term of imprisonment not exceeding one year, or both.

The Crown has referred us to a number of cases where persons or corporations have been charged for alleged violations of section 17 (1). None of the cases has been decided at the appellate level but they show what conduct has been held to constitute a violation of section 17 (1). The first of these cases is *R. v. Uscan Engineering Corporation Limited* (1949) 7 C.R. 417. The accused sold shares to eight companies. The purchasers were companies who had personnel and equipment that they required to be transported in the Northwest Territories. They were promised priority in the carriage of their goods and personnel if they purchased the shares. The money from the sale would be used to purchase additional aircraft. The shareholder customers were then charged a fee for the transportation of their personnel and equipment. The defence was that as the customers were shareholders in the Company that fell outside

of section 17 (1) of the *Aeronautics Act*. It was held that the shareholders are distinct from the Company and as a result the defendant was operating a commercial air service. Thereafter the accused carried the personnel and freight of the shareholders and received payment therefor. It was held that the shareholders are distinct from the Company and as a result the defendant was operating a commercial air service for hire or reward as it was paid for its services by the shareholders who owned the freight and for whom the passengers worked. It is a very clear case and really stands for the proposition that the Company is a separate entity from its shareholders.

Gibson, S.M. said at page 421:

> "The true construction of what happened in the case of Uscan in my view is that it obtained cash by selling shares to the member companies. With that cash it purchased airplanes for the purpose of extending or increasing its earning power. The situation then was that it had a number of shareholders who were prepared to give the company all their flying business. But the purchase of the planes was the act of Uscan, the planes were its planes, the business was Uscan's business, and in law is strictly to be so regarded."

Next, the Crown referred to the case of *R. v. Race & Race* (1973) 14 C.C.C. (2d) 165. In that case the accused owned and operated a hunting lodge and two outpost camps. The guests, upon payment of an overall fee, were entitled to lodging, food, guides and all other services. If a guest wished to hunt from an outpost camp he was flown there at no extra charge. The guests in the case being tried specified that they wished to hunt only from an outpost camp or they would not come.

The learned County Court judge held that in the all inclusive rate was an amount for the use of the aircraft. It is, of course, apparent that the rate was one to provide all the services required for moose hunting, including the movement of the hunters.

The Crown also referred to *R. v. Mel Air Ltd.* (1973) 14 C.C.C. (2d) 170. The Company air sprayed the crops of two named persons for a fee. The Court held that this was the operation of a commercial air service and, as they had no licence, they were found guilty - not a surprising result.

Another reported case relied upon by the Crown was *R. v. Gayle Air Ltd. and Belluz* (1974) 28 C.R.N.S. 114. This was a case in which the accused transported gasoline - the property of another party - to an isolated part of Manitoba for money. The facts were admitted but the defence was emergency. The defence of emergency failed. Likewise it was said the payment of money did not cover the expense of the trip. That is of no importance as it is the payment of money for the use of an aircraft that is an offence and no element of profit is necessary. In the result the accused were convicted.

On the other side the respondents' counsel cites a long list of authorities to the effect that people have always been allowed to transport their own goods and own employees without requiring licensing as a public carrier, or without being held to have transported goods or persons for hire or reward. The earliest of these cases is *Tadhunter v. Buckley* (1862) L.T. (N.S.) 273. That case was concerned with the meaning of the words "hire or gain" as used in the *Watermen's Act* 22 & 23 Vict. c. cxxxiii. In that case an employee was charged that not being licensed pursuant to the *Watermen's Act* did navigate a boat for "hire or gain". The facts established that the accused rowed a boat for his employer carrying his co-workers to their place of employment. He was convicted but the conviction was quashed. The Court of Appeal held that this activity of rowing the workmen of a common employer to their place of work was not something done for "hire or gain".

A similar result was reached in *Showell v. Skittrell* (1889-90) VI Ann. Digest of T.L.R. 120.

There are numerous American authorities dealing with the carriage by the owner of his own goods in his own vehicles or vessels.

As an example I cite *City of Sioux Falls v. Collins* (1920) 178 Northwestern R. 950, a decision of the Court of Appeal of South Dakota. The ordinance required a special licence for all vehicles kept for use for "hire or reward". It was held that this did not apply to a bakery truck used to transport the baker's own products to his customers.

There are a number of American decisions such as *People v. Montgomery* (1933) 19 P. (2d) 205 (S.C. of Colo.), *Weller v. Kolb's Bakery and Dairy, Inc. et al.* (1939) 4 A. (2d) 130 (Md. C.A.), *Greater Baton Rouge Port Commission v. Cargill, Inc.* (1967) 205 So. (2d) 151 (Louisiana C.A.), dealing with a variety of American statutes and ordinances. The common theme is that where the statute makes it an offence to use vehicles or vessels in the business of transporting persons or property for compensation or hire, that it contemplates the transportation of the persons or property of another.

To take the most favourable words to the Crown, it seems to me that we must determine whether or not there was a "benefit directly or indirectly received by any person for the use of an aircraft". There is no doubt that the respondents used an aircraft to transport their own goods. The respondents purchased and took delivery of the P50 heating oil at Resolute Bay. They transported their own oil to Pelly Bay. There they sold it to the Government of the Northwest Territories.

The negotiation for the sale and purchase of the oil did not specify where it was to be purchased, how it was to be delivered, or that the DC4 specified in the count, or any other aircraft, was to be used to transport the oil. To fulfil the contract the respondent had delivered to the tank farm at Pelly Bay the specified quantities of P50 heating oil. The respondent could have purchased the oil from Imperial Oil at Pelly Bay

or from any other person who owned oil at Pelly Bay.

To my mind the definition of "hire or reward" requires that the benefit must flow from "the use of the aircraft". Here the benefit did not so arise. It arose from the sale by the respondents of its own oil to the Government at Pelly Bay. To my mind the phrase "for the use of an aircraft" qualifies all that has gone before. It is one thing to be paid a benefit for the use of an aircraft but it is another thing to gain a benefit by using an aircraft.

To illustrate the difference, an Edmonton lawyer may own an aircraft. He flies himself to court in Calgary. He earns a fee thereby appearing in court in Calgary for his client. Surely, he is not operating a commercial air service where he transports himself to court in his own aircraft. It is true that he gains a benefit by saving time and using his own aircraft. The same is true of a doctor. He flew in his patient in his own aircraft and thereby earns his fee. He could not get to the patient by any other means of transportation. In my opinion, he is not operating a commercial air service even though he indirectly gets a benefit by using his own aircraft. Likewise an engineer may take on the supervision of a construction job in a remote area accessible only by air. He receives 1.5% of the cost of the construction for supervising that construction. He is able to do so only by flying his own aircraft. In my respectful opinion, he is not operating a commercial air service in using his own plane for his own transportation even though it enables him to obtain a benefit or fee. Like arguments can be made in respect of all the mining and exploration companies operating in outlining areas of Canada. In my opinion, the statute is simply not aimed at this type of activity where a person uses his own aircraft for his personal transportation and to transport his own goods and equipment.

In this case I have stated the respondent Company was licensed as a fuel dealer in the Northwest Territories. It is clear that this is not an isolated transaction. We were told that the respondent has fuel dumps all over the high Arctic. It is clear that in these cases the respondent transported his own fuel to specific locations in the Territories for sale at a future date, if the opportunity for sale ever arose. To this extent the transaction questioned here only differs from what may be called the respondent's normal operation in that the purchasers of the oil f.o.b. Pelly Bay was known before the oil was transported and not afterwards. It seems to me that in law that fact can make no difference as it is still a transportation of the respondent's own goods in his own aircraft with a sale to be completed upon delivery. That is not a charge for "the use of an aircraft".

It is true that the language can bear another interpretation. However, this is a quasi-criminal statute calling for substantial penalties both by way of fine or imprisonment or both. It is axiomatic that we must give the language its clear meaning, but where there are two meanings the subject is entitled to the benefit of the less onerous meaning. That meaning is that it is not an offence to transport one's own goods by air for sale at an increased price over what was paid for the goods at another place. That payment is not a payment for the use of an aircraft, but is a benefit that the respondents obtained because they made use of their own aircraft.

I would dismiss the appeal.

Harold F. Veit

J.A.

Dated at Edmonton, Alberta

this 24th May, 1977.

Counsel:

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for the appellant

Vern Schwab, Esq., Q.C.,
for the respondents.

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