Date: 19980416
Docket: CR03469

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

HER MAJESTY THE QUEEN

- and -

ROBERT OLE JENSEN; SPUR AVIATION LTD.; SPUR AVIATION carrying on business under the firm name and style of "Great Bear Aviation"; and GREAT BEAR AVIATION

---

Prosecution of an offence of unlawfully operating a commercial air service contrary to the *Aeronautics Act*. Accused convicted.

---

Heard at Yellowknife, Northwest Territories
on March 16, 17, 18 and 19, 1998

Reasons filed: April 16, 1998

Counsel for the Crown: Alan R. Regel

Counsel for the Defendants: John Bassie, Q.C.

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

HER MAJESTY THE QUEEN

- and -

ROBERT OLE JENSEN; SPUR AVIATION LTD.; SPUR AVIATION carrying on business under the firm name and style of "Great Bear Aviation"; and GREAT BEAR AVIATION

REASONS FOR JUDGMENT

[1] The defendants, Robert O. Jensen and Spur Aviation Ltd., are jointly charged in an Indictment as follows:

> On or between October 31, 1995 and October 7, 1996, at or near the city of Yellowknife in the Northwest Territories, not being the holder of a valid and subsisting certificate issued pursuant to s.700 of the Air Regulations, willfully operated a commercial air service, by providing flying training to, Bernard Lewall, Andre Langlois, Daniel Sanford, and Kevin Woelk, using aircrafts bearing Canadian Registration marks C-GWAI, C-GXSC and CF-EKY, contrary to sections 7.3(1)(f) and (g) of the *Aeronautics Act*, R.S.C. c. A-3, as amended.

[2] The charge is the wilful operation of a commercial air service without the certification necessary to do so. Section 700 of the Air Regulations provides:

> 700. No person shall operate a commercial air service in Canada unless he holds a valid and subsisting certificate issued by the Minister certifying that the holder thereof is adequately equipped and able to conduct a safe operation as an carrier.

[3] The *Aeronautics Act*, R.S., c.A-3, s.3(1), defines the term "commercial air service" as "any use of aircraft for hire or reward". The phrase "hire or reward" is in turn defined as "any payment, consideration, gratuity or benefit, directly or indirectly charged, demanded, received or collected by any person for the use of an aircraft".

[4] The evidence in this case includes the admitted facts that Spur Aviation Ltd. was the holder of certain "Canadian aviation documents": (i) Operation Certificate No. 6707, issued in 1987 to Spur carrying on business as "Great Bear Aviation", authorizing a domestic air service; (ii) Operating Certificate No. 3432, issued in 1988, authorizing a flight training service; and (iii) an Approved Maintenance Organization Certificate, issued in 1991, authorizing the company to perform maintenance work on commercially operated aircraft. All of these certificates were suspended in 1994 and eventually cancelled in 1996. The reasons for the suspension and cancellation are not relevant. None of the certificates were valid during the time frame set out in the Indictment. The prosecution alleges that during that time the accused Jensen, who is the owner and directing mind of Spur, gave flying lessons for payment. The offence is not giving flying lessons since Jensen was the holder of an airline transport license with a Class II instructor's rating. The prosecution alleges that, in giving these lessons, Jensen charged for the use of the aircraft, thus making it a commercial air service as that term is defined in the legislation. The prosecution, therefore, alleges that Jensen and Spur together violated the prohibitions set out in s.7.3(1)(f) and (g) of the Act and thereby committed the offence charged:

> 7.3 (1) No person shall...
>
> (f) wilfully do any act or thing in respect of which a Canadian aviation document is required except under and in accordance with the required document; or
>
> (g) wilfully do any act or thing in respect of which a Canadian aviation document is required where
>
> (i) the document that has been issued in respect of that act or thing is suspended, or

(ii) an order referred to in subsection 7.5(1) prohibits the person from doing that act or thing.

(2) Every person who contravenes subsection (1) is guilty of

(a) an indictable offence; or

(b) an offence punishable on summary conviction.

[5] Although this is a regulatory offence, it is much closer to the sphere of criminal law in terms of what the Crown must establish. That is primarily because of the use of the word "wilfully" in the statute which, as I will discuss further, imports a high *mens rea* element to the offence. It is also because of the significantly more severe penalties that can be imposed, including imprisonment of the personal defendant, as a result of the Crown's choice to proceed by way of indictment. The standard to be met by the Crown is proof beyond a reasonable doubt. No one at the trial suggested otherwise.

[6] For the reasons that follow, I have concluded that the defendants are guilty of the offence charged in the Indictment.

**EVIDENCE:**

[7] The most convenient way to review the evidence, because of the particulars contained in the Indictment, is to summarize those portions of the evidence that relate to each designated aircraft and to each person who allegedly received flying training.

1. **Aircraft C-GWAI**:

[8] Aircraft "WAI" is a Cessna 150 single-engine airplane that, at the start of the relevant time period, was owned by James Gray. In 1994 Gray loaned approximately $12,000.00 to Jensen and he was given the registration for WAI to hold as security. The aircraft was registered with Transport Canada as a "private" purpose one and insured as "non-commercial". Gray's evidence was that he kept the airplane at Spur's hangar and that Jensen had unrestricted use of it. Gray did not receive any money for the use of the airplane. He sold it in July, 1996.

2. **Aircraft C-GXSC**:

[9] Aircraft "XSC" is a Piper 23-250 twin-engine airplane. It is owned by a company known as 931051 N.W.T. Ltd. This company was set up in 1991 by Jensen and his then partner, Yvonne Quick, as a holding company to own some assets. This company leased XSC to Spur in 1992. The airplane was originally registered to Spur, as lessee, for commercial use. It was insured by Spur for commercial use. In September, 1995, after renewing the lease, Jensen, on behalf of Spur, changed the registration designation for XSC from "commercial" to "private". I was told by witnesses from Transport Canada that even if a company, such as Spur, did not have authorization to operate commercially, it could nevertheless use aircraft for its own private purposes (such as flight training for its own personnel).

[10] Quick testified as to how she and Jensen are in litigation against each other. The two of them apparently went their separate ways in 1991. Jensen kept control of Spur and Quick kept control of 931051 N.W.T. Ltd. She testified that, while XSC was leased to Spur, Jensen, although in control of the airplane, did not have authority to use it for his personal purposes.

3. **Aircraft CF-EKY**:

[11] Aircraft "EKY" is also a Cessna 150 single-engine airplane. It was owned by a company called Great Bear Aviation Ltd. (a company also set up by Jensen and Quick). In March, 1995, Jensen, on behalf of this company, sold the airplane to Dan and Gerri Sanford for $12,000.00. The airplane was registered in the name of the Sanfords as a private purpose one. It was, however, insured under Spur's commercial policy. The airplane was left at Spur's hangar and leased back to Spur. Mr. Sanford testified that he never received money for the use of this airplane.

[12] At the time of the sale to the Sanfords, they and Jensen executed a document entitled "Aircraft Sales Agreement between Robert Jensen/Great Bear Aviation and Dan and Gerri Sanford". It provided for the lease back to Jensen of EKY (although the actual lease document named Spur Aviation Ltd. carrying on business as "Great Bear Aviation"). It also gave Jensen the first right to buy back the plane for the same amount paid by the Sanfords. This agreement also contained the following clauses:

> 8) Dan Sanford will fly A/C for the cost of fuel and oil only.
>
> 9) Robert Jensen will be responsible for all other expenses occurred (sic) and will receive any revenue derived from the A/C.

10) There are no restrictions as to the number of hours Dan or Gerri fly.

11) Dan and Gerri have the use of any other C-150 at any time.

The Sanfords sold EKY, for the sum of $12,000.00, in February, 1998, to Jensen's current common-law partner.

4. **Bernard Lewall**:

[13] Bernard Lewall is a professional pilot. He received his private pilot's license in July, 1995, and undertook training with Jensen for the purpose of qualifying for his commercial license.

[14] Lewall testified that he obtained a rate sheet from Jensen. This was an exhibit at the trial. The rate sheet was on the stationary of "Great Bear Aviation". By this time, Spur's operating certificates had been suspended. Jensen testified that he used this rate sheet because he was going to charge the same rates personally. This rate sheet lists under "Private Pilot Course" the following:

| | | Solo | Dual |
|---|---|---|---|
| Cessna 150 | - | 59.00 | 93.00 |

Under "Commercial Pilot Course":

65 hours (35 hours dual and 30 solo):

Cessna 150 - $5,025.00

Under "Instructors":

our aircraft - 34.00/hour

your aircraft - 40.00/hour dual

\- 00/hour solo

Under the term "Rental":

Cessna 150 - 59.00/hour

55/hour on 10 hour (prepaid block time)

The terms "solo" and "dual" refer to whether a flight is a solo one (student only) or a dual one with both the instructor and the student in the airplane.

[15] Lewall kept a personal pilot's log and a record of his training sessions (both items were entered as exhibits). These records show that he paid over $11,600.00 for the training. In the period from October 31, 1995, to October 7, 1996, he took 66 flights (of varying durations) on WAI, 20 flights on XSC, and 22 flights on EKY. He knew that

Jensen did not own these airplanes but he was told by Jensen that he was offering free-lance instruction. All payments were made payable to "Great Bear Aviation" but given to Jensen. Lewall understood that the fees covered both the instruction and a rental fee for the use of the aircraft.

[16] One of the items also entered as an exhibit was an invoice from "Great Bear Aviation" to Lewall for the period October 31, 1995, to November 15, 1995. This invoice shows: "A/C rental 9.5 hours @ 59/hour - $560.50". This is the regular per hour Cessna rental rate. Lewall's log shows flights on WAI on October 31 and November 5, 8, 9, 10, and two on the 15th, totalling 8.4 hours. His record of costs lists the "rate" for each session as $89.00. This would be the amount if one adds the instructor's rate of $34.00 per hour and the Cessna rental rate of $55.00 per hour (on the prepaid block of time rate).

[17] Lewall testified that he normally paid $320.00 per hour for training on the twin-engine XSC. This is corroborated by another invoice, dated April 5, 1996, with the entry: "2 blocks on flying - 10 hours multi-engine - $3,200.00". There were, however, some flights on XSC for which he was not charged. These were flights taken with Jensen when Lewall was asked to do some labour work for Jensen's son.

[18] Lewall also testified that Jensen offered to hire him when Spur got back its commercial authorizations. He did some casual work for Jensen in Spur's hangar but never worked as part of Spur's flight crew. This evidence is important because of Jensen's contention that the training done with Lewall was "staff training" and thereby permissible even though Spur had no commercial license. Jensen testified that he had "tentatively hired" Lewall. He acknowledged, however, that Lewall could not be hired as a pilot until Lewall got his commercial license. That was the point of the instruction. It was not proficiency testing as may take place for pilots already on staff.

[19] The defence contention that Lewall's instructional sessions were "staff training" is also undermined by the fact, an undisputed one, that Lewall was charged for these sessions. Jensen, however, testified that there were no charges for rental of aircraft. The instruction rates, according to him, were set on the basis of solo or dual instruction and the "use" of the aircraft during those instruction sessions. If the defendants' contention is that there is some distinction between charges for "use" and fees for "rental" then I must admit I fail to see it.

5. **Andre Langlois**:

[20] Andre Langlois, whose testimony from the preliminary inquiry was admitted on consent, took lessons from Jensen in 1995 and 1996. His logs show that he used WAI on six occasions and EKY on two occasions in May and July, 1996. He testified that he made all arrangements with Jensen whom he paid either by cash or by cheque payable to "Great Bear Aviation".

[21] Langlois testified that he paid, to the best of his memory, $50.00 to $60.00 per hour for use of an airplane and $35.00 for Jensen's time. The price varied as between solo and dual flights. He said that he always received one invoice covering both use of the airplane and the instruction. He had a chance to refer to one invoice, dating from August, 1995, in which he was charged $59.00 for the airplane and $34.00 for instruction. These are the same rates as set out on the "Great Bear Aviation" sheet given to Lewall: $59.00 for the "rental" of a Cessna and $34.00 for instruction when using the company's aircraft (which is also the equivalent of the $93.00 rate for dual instruction). While this evidence is not proof of the alleged offence, since the invoice predates the time frame of the Indictment, it is indicative of the practice of the defendants and their intention with respect to how these charges are to be treated. It also supports Langlois' testimony as to paying for rental of the aircraft.

6. **Daniel Sanford**:

[22] Daniel Sanford received instruction using his own airplane, aircraft EKY, from July to October, 1996. He only paid fuel charges. He also took some flights on WAI but there was no evidence that he was charged for these flights.

[23] Counsel are agreed that, insofar as any instruction sessions were conducted using Sanford's own airplane, then there is no offence. The applicable regulations permit Jensen to give instruction to an owner when using the owner's airplane. The significance of this evidence, however, is in the Crown's position that Spur and Jensen nevertheless received a benefit in that they were able to use Sanford's airplane in the other instruction sessions.

7. **Kevin Woelk**:

[24] Kevin Woelk is a professional pilot who, in 1996, was receiving temporary Workers' Compensation benefits as a result of an injury. He and his compensation claim supervisor, Jim Lynn, agreed that he would benefit from a refresher programme and instruction for a float endorsement to his license. Jensen sent Lynn a proposal on August 1, 1996. He proposed a four-hour refresher course on a Cessna 150 (two 45 minute dual flights and 2 ½ hours of solo practice). The cost was set out in the proposal:

| | | | | |
|---|---|---|---|---|
| A/C Rental | - | 4 X $59.00 | - | $236.00 |
| Flight Instructor | - | 1.5 X $45.00 | - | $60.00 |

Jensen also proposed five hours of training for the float endorsement (4 hours dual and 1 hour solo). The cost was also set out:

| | | | | |
|---|---|---|---|---|
| A/C Rental | - | 5 X $185.00 | - | $925.00 |
| Flight Instructor | - | 4 X $45.00 | - | $185.00 |

[25] Lynn wrote back to Jensen accepting the proposal and authorizing direct billing to the Workers' Compensation Board. For some reason, and no one could tell me why, Lynn's letter was addressed to "Direct North Airways" at P.O. Box 806, Yellowknife. The letter was headed "Dear Bob" and I note that the box number is one used by Jensen from time to time (for example, on his Aircraft Maintenance Engineer License issued in 1992).

[26] Jensen testified that he erred on the proposal. He said the term "rental" in reference to the Cessna 150 should have simply been listed as "solo" flights. On this point I note that the one and only flight taken by Woelk was on EKY with Jensen. The airplane log shows it was a "dual" flight. Also, if Jensen is correct, that means that all four hours of the refresher course would be solo flights. I reject Jensen's evidence on this point.

[27] Jensen also testified that the "rental" for the airplane to be used for the float instruction (a Cessna 206 or 185) would be paid to Direct North Airways, the owner of the airplane. There was no evidence as to any arrangement between Jensen and Direct North Airways. There was testimony from Quick who said that Direct North Airways was a separate company (she worked for it in 1996) and that one float plane, a Cessna 206, was leased by 913051 N.W.T. Ltd. to Direct North Airways. She said that Direct North was not in the business of renting airplanes or giving flight instruction and that she knew of no agreement by Direct North to make its airplanes available to Spur or Jensen.

[28] Woelk, as noted above, took only one flight with Jensen. The reasons why he quit are immaterial. However, as a result, Jensen never billed the Board nor did he receive any payment. Hence there is no offence (except perhaps an attempt to commit the offence). The evidence is nonetheless important as also being probative of Jensen's practice and possible intentions. No one at the trial talked about the use of evidence relating to one of the particulars in proof of the whole count (even though that particular

is not proven). It seems to me that under any standard this evidence is admissible to show an accused's motive or state of mind.

**DISCUSSION**:

[29] One of the points everyone involved in this trial can agree on is that the regulation of the aviation industry in Canada is a highly complicated business. There is a plethora of statutory provisions, regulations, rules and orders that must be mastered by those who enter the field and those who regulate it. That in itself offers no relief to the defendants in this case. The jurisprudence places a great responsibility on those who choose to engage in a regulated activity to satisfy any applicable requirements. That is because they are the ones in control of their activities, activities which, in cases like aviation, could pose a danger to the public. This point was made by Cory J. in *Wholesale Travel Group Inc. v The Queen* (1991), 67 C.C.C. (3d) 193 (S.C.C.), at page 245:

> The licensing concept rests on the view that those who choose to participate in regulated activities have, in doing so, placed themselves in a responsible relationship to the public generally and must accept the consequences of that responsibility. Therefore, it is said, those who engage in regulated activity should, as part of the burden of responsible conduct attending participation in the regulated field, be deemed to have accepted certain terms and conditions applicable to those who act within the regulated sphere. Foremost among these implied terms is an undertaking that the conduct of the regulated actor will comply with and maintain a certain minimum standard of care.

[30] In this case there is no suggestion that Jensen was personally not competent to instruct students. He was qualified to give flying instruction. Nor is there evidence to suggest that the aircraft were either operated or in a condition that was dangerous to the public. The case comes down to the provision of services for reward at a time when neither Spur nor Jensen were authorized to do so. In analyzing the issues I will address them under the four headings employed by counsel in their submissions: (1) Was there a "commercial air service"? (2) If so, whose act was it? (3) Was the conduct wilful? (4) Is there an exemption?

1. **Was there a "commercial air service"?**

[31] The evidence clearly leads me to conclude that Lewall and Langlois were charged and paid a fee for the use of the aircraft. Whether it is called a "rental fee" or a fee for "use" of the aircraft is immaterial. The documents entered as exhibits, in particular the Great Bear Aviation rate sheet, the invoices, and the proposal to the W.C.B., reflect an

intention to charge for the use of the aircraft. Having regard to the statutory definition of the term "hire or reward", these aircraft were used in a commercial air service. The aircraft were used to earn revenue over and above the fees charged by Jensen for his instruction time.

[32] With respect to Sanford, there was no evidence of cash paid for the use of any airplane. The one that was used most often was owned by Sanford. But, as Crown counsel submitted, while it is not an offence to give flying training to an owner using that owner's airplane, here there was an exchange of benefits. Sanford received free instruction in exchange for letting Jensen have free use of his airplane. Jensen benefitted because he was able to use Sanford's airplane to provide instruction to others. He paid no fees to Sanford for use of the airplane. So, anything that was earned must have gone to Spur and Jensen. There does not need to be an exchange of money to constitute "hire or reward". The arrangements with the Sanfords suffice to bring Jensen's use of EKY into the commercial category.

[33] With respect to Woelk, Crown counsel argued that there was a "demand" for payment. I am not prepared to hold that the proposal submitted by Jensen and accepted by the W.C.B. is tantamount to a demand when there is no subsequent invoice. At most it was an aborted attempt to obtain revenue from the use of an aircraft.

[34] With the exception of the incident involving Woelk, I am satisfied that these aircraft were used for reward and therefore these activities constitute a commercial air service.

2. **Whose act was it?**

[35] This question refers to the distinction, if any, between Jensen as an individual actor and the corporate entity of Spur Aviation Ltd. It was submitted by defence counsel that the corporate defendant did not take part in or benefit from these activities.

[36] In the above-noted *Wholesale Travel Group* case, Lamer C.J.C. made the following comment in the context of an individual claiming that he should not be convicted as a party to a regulatory offence technically committed by his company (at page 210):

> The corporate form of business organization is chosen by individuals because of its numerous advantages (legal and otherwise). Those who cloak themselves in the corporate veil, and who rely on the legal distinction between themselves and the corporate entity

> when it is to their benefit to do so, should not be allowed to deny this distinction in these circumstances (where the distinction is not to their benefit).

The curious point in this case is that Jensen does not seek to limit culpability to the corporate entity. His counsel's submission is that the company had no part in these activities. It seems to me, however, that the observations of Lamer C.J.C. are equally appropriate no matter who attempts to hide behind what. In this case I think it is reasonable to infer that there may be some benefit to shielding the corporate defendant from culpability, that being its continuing effort to have its operating certificates reinstated.

[37] Clearly the acts complained of were the acts of Jensen. But, as Crown counsel put it, the activities of Jensen and his company were so interconnected that the actions of one can be considered to be the actions of both. Jensen testified as to how he considered the assets of Spur, including Spur's bank account, to be his to use as he pleased. Payments for lessons were made to Spur (as "Great Bear Aviation"). Jensen arranged for unrestricted use of the aircraft that were owned by others. Those were left at Spur's hangar and, in two cases (EKY and XSC), leased to Spur. What the evidence as a whole suggests is a scheme whereby Jensen arranged, even though there was a transfer of title to some of the aircraft, a way of still using the aircraft to earn revenue. He identified himself as a "free-lance" instructor but the fees charged for that "instruction" clearly included, as the most significant component, charges for the use of the aircraft. The aircraft were under Spur's control. The acts were therefore the acts of both Jensen and Spur.

[38] Crown counsel noted a further ground for imposing liability on Spur. The *Aeronautics Act*, s.8.4(2), provides for a type of vicarious liability for the "operator" of an aircraft:

> (2) The operator 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, at the time of the offence, the aircraft was in the possession of a person other than the operator without the operator's consent and, where found to have committed the offence, the operator is liable to the penalty provided as punishment therefor.

[39] The term "operator" is not defined in the Act. But, with respect to both aircraft EKY and XSC, these were under formal lease to Spur. It had effective control over

them so Spur can be considered to be the "operator" of these airplanes. Hence, this section is also a basis for imposing liability on Spur.

3. **Was the conduct "wilful"?**

[40] The offence charged is "wilfully do any act or thing in respect of which a Canadian aviation document is required". The "act or thing" in this case is the "operation" of a commercial air service. How one does it is by using aircraft for hire or reward.I have already concluded that what the defendants did amounted to the operation of a commercial air service as interpreted by the legislation. The prohibited act, the *actus reus* of the offence, has been established. What is left to consider is whether the defendant Jensen had the requisite *mens rea*, the intent to do the act, i.e., were these acts done wilfully.

[41] One would think that "wilful" is a word of familiar usage but its legal meaning varies depending on the context. Professor Glanville Williams, in his famous **Textbook of Criminal Law** (2nd ed.), wrote (at page 140):

> The word "wilfully" is best regarded as meaning "intentionally or recklessly," but the courts have failed to attach a fixed meaning to it and the authorities are chaotic.

[42] Defence counsel referred me to s.429(1) of the Criminal Code which provides a definition of "wilfully" causing something to occur:

> 429.(1) Every one who causes the occurrence of an event by doing an act or by omitting to do an act that it is his duty to do, knowing that the act or omission will probably cause the occurrence of the event and being reckless whether the event occurs or not, shall be deemed, for the purposes of this Part, wilfully to have caused the occurrence of the event.

This definition is of limited assistance, however, coming as it does in Part XI of the Code dealing with "Wilful and Forbidden Acts in Respect of Certain Property".

[43] An example of the judicial approach to use of the word "wilfully" is to be found in *R v Docherty* (1989), 51 C.C.C. (3d) 1 (S.C.C.), at page 7:

> The word "wilfully" is perhaps the archetypal word to denote a *mens rea* requirement. It stresses intention in relation to the achievement of a purpose. It can be contrasted with lesser forms of guilty knowledge such as "negligently" or even "recklessly". In short, the

> use of the word "wilfully" denotes a legislative concern for a relatively high level of *mens rea* requiring those subject to the probation order to have formed the intent to breach its terms and to have had that purpose in mind while doing so.

That case dealt with the offence of "wilfully" failing to comply with a probation order, contrary to what was then s.666(1) of the Criminal Code. It imposed a requirement for what in criminal law is called specific intent. Perhaps not surprisingly, because of the burden of proving this high *mens rea* requirement, the Code was amended to delete the word "wilfully". The present s.733.1 of the Code simply makes it an offence to fail to comply with a probation order "without reasonable excuse".

[44] The fact that we are dealing here with a regulatory offence brings further considerations into play. In the well-known case of *R v City of Sault Ste. Marie* (1978), 40 C.C.C. (2d) 353 (S.C.C.), Dickson J. (as he then was) set out three categories of offences (at pages 373-374):

> I conclude, for the reasons which I have sought to express, that there are compelling grounds for the recognition of three categories of offences rather than the traditional two:
>
> 1. Offences in which *mens rea*, consisting of some positive state of mind such as intent, knowledge, or recklessness, must be proved by the prosecution either as an inference from the nature of the act committed, or by additional evidence.
>
> 2. Offences in which there is no necessity for the prosecution to prove the existence of *mens rea*; the doing of the prohibited act *prima facie* imports the offence, leaving it open to the accused to avoid liability by proving that he took all reasonable care. This involves consideration of what a reasonable man would have done in the circumstances. The defence will be available if the accused reasonable believed in a mistaken set of facts which, if true, would render the act or omission innocent, or if he took all reasonable steps to avoid the particular event. These offences may properly be called offences of strict liability. Mr. Justice Estey so referred to them in *Hickey's* case.
>
> 3. Offences of absolute liability where it is not open to the accused to exculpate himself by showing that he was free of fault.
>
> Offences which are criminal in the true sense fall in the first category. Public welfare offences would, *prima facie*, be in the second category. They are not subject to the presumption of full *mens rea*. An offence of this type would fall in the first category only if such words as "wilfully", "with intent", "knowingly", or "intentionally" are contained in the

> statutory provision creating the offence. On the other hand, the principle that punishment should in general not be inflicted on those without fault applies. Offences of absolute liability would be those in respect of which the Legislature had made it clear that guilt would follow proof merely of the proscribed act.

[45] In this case the use of the word "wilfully" would, in the *Sault Ste. Marie* formulation, place this offence in the first category. The prosecution would be required to prove an intention to use particular means to produce a particular result. The "means" are using these aircraft for flying instruction; the "result" is the conduct of a commercial air service, meaning, the use of these aircraft for hire or reward. What completes the offence is the knowledge of the accused that there is no Canadian aviation document authorizing this activity.

[46] The matter is further complicated, however, by s.8.5 of the *Aeronautics Act*:

> 8.5 No person shall be found to have contravened a provision of this Part or of any regulation or order made under this Part if the person exercised all due diligence to prevent the contravention.

This section applies to all provisions of Part I of the Act (including the offences in s.7.3(1) of the Act). This would seem to place the offence in the second category outlined by Dickson J. above. In such cases, while the prosecution must prove beyond a reasonable doubt that the defendants committed the prohibited act, the defendants may avoid liability by establishing on a balance of probabilities that they exercised reasonable care to avoid the particular result.

[47] What s.8.5 does is to legislate the defence of due diligence, a defence that is always available to strict liability offences. Part I of the *Aeronautics Act* creates a wide range of offences for violations of the Act, or any regulation or order made under the Act. The vast majority undoubtedly come within the strict liability category. Perhaps, therefore, it is merely an oversight in having this section apply to the full *mens rea* offences created by s.7.1(1)(f) and (g) of the Act. It seems to me that a defence of due diligence is incompatible with the requirement to prove specific intent. Proof of the latter surely negates the former.

[48] Jensen's position at trial was that, if he did anything illegal, then he did so without the requisite intent. Jensen testified that he reviewed the regulations and directives issued by Transport Canada; he spoke with representatives of Transport Canada about what he

was doing; he conducted everything above-board. Therefore, he honestly believed that he was acting lawfully.

[49] Jensen made a number of statements, particularly on cross-examination, relevant to these points. He testified that he thought he had authority to give instruction and to charge money for it using these aircraft so long as the aircraft were registered as "private". He said that he was also told that he could use these aircraft to train Spur's staff. When asked what staff Spur had, Jensen referred to people who did work for Spur and people who were going to work for Spur once the company recovered its operating certificates.

[50] There was evidence at the trial of two meetings between Jensen and representatives of Transport Canada. The first was with Doug Parker, an airworthiness inspector, on April 19, 1996. Parker spoke with Jensen after receiving a report that Jensen was using XSC for flying training. Parker's evidence was that Jensen told him that he expected to get Spur's certificates back shortly and that the flights in question were to train Spur's own crew and pilots. Parker confirmed with Jensen that so long as XSC was registered as a "private" airplane and that the flights were only to train Spur's own crew, then there was no violation. Parker's evidence was put before me by way of an agreed statement of facts. Jensen, however, acknowledged only that these statements were made, not that they were complete.

[51] The second meeting was with John Pollock, a Transport Canada investigator, on October 30, 1996. Pollock testified that Jensen told him that the training sessions with Lewall were proficiency-testing since Lewall, who Jensen claimed was working on a part-time basis for Spur, would be hired full-time once the certificates were restored. Pollock reported Jensen as saying that Lewall paid only an instructor's fee and the cost of fuel and time (although no one explained what "time" meant). Jensen admitted making these statements but said, again, that they do not reflect the full extent of the discussion. Pollock further testified that, during his review of the airplane log books, Jensen told him that the entry "C/T" referred to "company training". However, he found no "C/T" entries in the log books for the flights recorded in which Lewall, Langlois, Sanford or Woelk participated.

[52] Some of the points raised in this evidence relate to possible exemptions available in the regulations. I will deal with those later in these reasons. For now, I will address the intent issue.

[53] It is trite to say that, with a *mens rea* offence, the accused's intention is a fact that must be proved as other facts are proved. The trier of fact must consider the whole of the evidence relevant to it as a fact in issue. Intent may be inferred from the accused's conduct. Where, as here, an accused gives evidence as to what his intentions were, the trier of fact must weigh his testimony along with whatever inferences as to his intentions that can be drawn from his conduct or from other relevant facts. The merely personal belief of the accused that what he is doing is not wrong is not a defence.

[54] In *R v Buzzanga* (1979), 49 C.C.C. (2d) 369 (Ont. C.A.), Martin J.A. explained the analytical method to be used when considering an offence that requires proof of an intention to bring about a certain result. There the charge was the Criminal Code one of "wilfully" promoting hatred against an identifiable group by communicating statements. He wrote (at pages 386-387):

> Where the prosecution, in order to establish the accused's guilt of the offence charged, is required to prove that he intended to bring about a particular consequence or foresaw a particular consequence, the question to be determined is what was in the mind of this particular accused, and the necessary intent or foresight must be brought home to him subjectively: see *R v Mulligan* (1974), 18 C.C.C. (2d) 270 at pp. 274-5, 26 C.R.N.S. 179; affirmed 28 C.C.C. (2d) 266, [1977] 1 S.C.R. 612, 66 D.L.R. (3d) 627.
>
> What the accused intended or foresaw must be determined on a consideration of all the circumstances, as well as from his own evidence, if he testifies, as to what his state of mind or intention was.
>
> Since people are usually able to foresee the consequences of their acts, if a person does an act likely to produce certain consequences it is, in general, reasonable to assume that the accused also foresaw the probable consequences of his act and if he, nevertheless, acted so as to produce those consequences, that he intended them. The greater the likelihood of the relevant consequences ensuing from the accused's act, the easier it is to draw the inference that he intended those consequences. The purpose of this process, however, is to determine what the particular accused intended, not to fix him with the intention that a reasonable person might be assumed to have in the circumstances, where doubt exists as to the actual intention of the accused. The accused's testimony, if he gives evidence as to what was in his mind, is important material to be weighed with the other evidence in determining whether the necessary intent has been established. Indeed, Mr. Justice Devlin, in his charge to the jury in *R v Adams* (The Times, April 10, 1957), said that where the accused testified as to what was in his mind and the jury "thought he might be telling the truth", they would "have the best evidence available on what was in his own

> mind". ... The appellants' evidence as to their state of mind or intention is not, of course, conclusive.
>
> In some cases the inference from the circumstances that the necessary intent existed may be so strong as to compel the rejection of the accused's evidence that he did not intend to bring about the prohibited consequence.

[55] In this case the relevant question to ask is not did the accused intend to operate a commercial air service. The relevant question is: Did the Accused intend to use these aircraft for hire or reward? It is that use that results in their activities being a commercial air service.

[56] The evidence establishes beyond a reasonable doubt that Jensen charged for his instruction and for use of the aircraft. This is established directly from the evidence of Lewall and Langlois and indirectly from the evidence as to how the rates were set. The arrangements whereby the aircraft were owned by others but left in the control of Spur and Jensen, without any evident accountability to the owners as to their use, provided the defendants with the opportunity to earn revenue from these airplanes. With respect to aircraft EKY, the prospect of using the airplane to earn revenue was obviously contemplated since the "Aircraft Sales Agreement" executed by Jensen stated that he would be responsible for all expenses and would receive any revenue derived from the aircraft. This was executed after Spur's operating certificates had been suspended. The ownership arrangements also provided a camouflage for the defendants' use of these airplanes. The registrations were put in the "private" category so it would appear as if these airplanes were not used in commercial operations.

[57] There is no support for the proposition that these aircraft were used for crew training. The only person for whom that argument could be advanced, Lewall, testified that, while he was promised a job in the future, he had no position with Spur when he took the instruction. Furthermore, he paid quite handsomely for the instruction sessions, including those for solo flights, something that undermines the claim that this was staff training.

[58] Jensen's evidence respecting his discussions with officials from Transport Canada raises broadly the question of due diligence and the issue of a mistake as to the applicable law. They are inter-related.

[59] Due diligence can refer, in the context of strict liability offences, to both taking all due care so as to avoid the prohibited act (such as safety measures) or acting under a

reasonable belief in a mistaken set of facts that, if true, would render the act innocent. In this case, the only thing Jensen can possibly claim that he was duly diligent about was his own review of the regulations and his discussions with Transport Canada officials. This is not a mistake of fact case. Jensen was not mistaken as to the existence of any facts which, if true, would have exonerated him. He was aware of exactly what he was doing. Every facet of what was occurring was present to his mind. He was using these aircraft to give flying training and he was charging for their use. He knew that Spur's commercial operating authorities were not in force. What he did not know, so he claims, was that the things he was doing amounted to the operation of a commercial air service. His position is that he made an honest mistake in the legal result of his actions.

[60] The Criminal Code sets out the common law rule that ignorance of the law does not excuse the commission of an offence: s.19. This rule applies equally to ignorance of the existence of the law and a mistake as to its meaning, scope or application: *Molis v The Queen* (1980), 55 C.C.C. (2d) 558 (S.C.C.). This principle effectively answers the defendants' position. But what of Jensen's evidence that he was told that his activities were lawful?

[61] In *R v Cancoil Thermal Corporation* (1986), 27 C.C.C. (3d) 295 (Ont. C.A.), the court recognized the defence of "officially induced error of law" with respect to a provincial regulatory offence. It was held to be not a defence per se but an excuse that relieves the accused of culpability (at page 304):

> Where the advice is given by an official who has the job of administering the particular statute, and where the actor relies on this advice and commits what is in fact an offence, even if the agency cannot be estopped does it follow that the actor should not be excused? To do so is not to condone an illegality or say that the agency is estopped into a position of illegality, but to recognize that the advice was illegal but excuse the actor because he acted reasonably and does not deserve punishment.

[62] In *Jorgensen v The Queen* (1995), 102 C.C.C. (3d) 97 (S.C.C.), Lamer C.J.C., in comments that were strictly obiter, left open the possibility of extending this defence to all offences, including, as in that case, a criminal offence. He set out five requirements that the accused must satisfy: (a) the accused considered the legal consequences of his action and sought advice on it; (b) the advice came from an appropriate official; (c) the advice was reasonable in the circumstances; (d) the advice was erroneous; and (e) the accused relied on the advice. As Lamer C.J.C. stated (at page 114): "This can be shown, for example, by proving that the advice was obtained before the actions in question were

commenced and by showing that the questions posed to the official were specifically tailored to the accused's situation."

[63] Assuming, without deciding, that this defence is available in these circumstances, the evidence fails to establish that these conditions were satisfied. The contact between Jensen and the officials came after Jensen had already started giving and charging for the flying lessons. The advice that was given was given in the context of staff training, not flying training for unconnected clients. I reject Jensen's evidence that he received advice about more than just staff training. His evidence is undermined by his misleading statements to the investigators about Lewall's training. Lewall was not on staff in any capacity. There was no evidence that Jensen tailored his inquiries specifically to the real activities in which he was engaging. Hence I reject the defence argument that Jensen's inquiries of these officials excuse the defendants' conduct or somehow negate Jensen's intent.

[64] Even if one can say that evidence of these inquiries can be evidence of due diligence, I reject it. The due diligence referred to in s.8.5 of the Act must refer to due diligence to avoid doing the prohibited act, not just to ascertaining one's legal status. The inquiries, as evidenced by Jensen himself, fail to cover all the necessary points. They were limited to staff training. This is not conclusive evidence of "all due diligence" (as stipulated in s.8.5).

[65] I am satisfied beyond a reasonable doubt that Jensen intended to use the aircraft for the purpose of hire or reward, and thereby, with the intent of operating a commercial air service as defined by the legislation. His conduct was therefore "wilful". Since he is the operating mind of the corporate defendant, and because Jensen's affairs are so inter-mingled with those of Spur as to be indistinguishable, that intent is also fixed to the corporate defendant. In my opinion there is no evidence of either due diligence to avoid committing the offence or an error of fact or law that would excuse the offence.

## 4. **Is there an exemption?**

[66] Much of counsels' submissions referred to various regulations and directives that could possibly exempt the defendants from the offence. There are two that are relevant.

[67] Air Navigation Order, Series VII, No. 1, cited as the "Private Aircraft Exemption Order", s.7, provides an exemption for the holder of an airline transport pilot license, such as Jensen, from the provisions of s.700 of the Air Regulations (the requirement for a commercial operating certificate) when "he uses an aircraft for hire or reward for the

sale purpose of familiarizing another licensed pilot therewith so as to enable the other pilot to obtain authority to operate aircraft of that type." As counsel observed, the key words are "familiarizing" and "type".

[68] The Air Regulations divide aircraft into categories (glider, aeroplane, helicopter, etc.), classes (single-engine or multi-engine, land or sea), and type. Pilot's licenses also have endorsed on them an aircraft type rating as well as any authority additional to the coverage of the blanket rating. For example, the holder of a private pilot's license has a blanket rating for "all single-pilot, non-high performance single-engine land aeroplanes". Any other authority requires a further rating.

[69] In this case, Sanford did not hold a pilot's license at all. Therefore the section 7 exemption cannot apply to him. The others already held licenses that authorized them to operate single-engine aircraft such as a Cessna 150 (like EKY and WAI). Therefore any training on those aircraft could not be said to be "familiarization" to enable them to operate that "type" of aircraft. They already had the authority. With respect to Lewall's training on XSC (a twin-engine airplane), he was training so as to get his rating for multi-engined airplanes, a class of airplane, not for authority to operate that specific type of aircraft. Therefore I conclude that s.7 of the Exemption Order does not apply to Jensen's activities in this case. And, in any event, the exemption could not apply to the corporate defendant.

[70] The other possible exemption is found in s.1(b) of the Minister's Order of October 13, 1990:

> 1. Pursuant to subsection 5.9(2) of the *Aeronautics Act*, I hereby exempt owners and operators of the following commercial air services from section 700 of the *Air Regulations*, subject to the conditions specified...
>
> (h) the lease or rental of an aircraft by the owner thereof to a licensed pilot, subject to compliance with section 708 of the *Air Regulations* and the aircraft is maintained in the same manner as an aircraft to which paragraph 571.1(b) of the *Airworthiness Manual* applies;

The intent of this exemption seems to me to excuse the "owner" of an airplane from the requirement of a commercial operating certificate if the owner leases or rents his or her airplane to a licensed pilot. The purpose of the lease or rental is immaterial but the airplane must be insured and maintained to a commercial standard. That is the effect of the references to the *Air Regulations* and *Airworthiness Manual.*

[71] In this case, WAI was owned by Gray, EKY was owned by the Sanfords, and XSC was owned by 913051 N.W.T. Ltd. So if anyone would benefit from the exemption it would be them. Even if one can say that the "operator" or "lessee" of an airplane should be considered as the "owner" for the purpose of the exemption, the defendants are not able to benefit from it. The aircraft, on the basis of the log book records kept by Jensen, were not maintained as required for commercial purposes. The primary reason for that is because a commercial airplane must be maintained by an "Approved Maintenance Organization". Spur's "Approved Maintenance Organization Certificate" was suspended in 1994. Further, only EKY and XSC were insured commercially. Therefore this exemption does not apply.

[72] I therefore conclude, from the whole of the evidence, that Jensen charged for the use of the airplanes during his instruction sessions, that the purpose of these charges was to earn revenue from the use of the airplanes, that he knew what he was doing, that he knew that Spur's operating certificates were suspended, and, finally, he had no excuse, legal or otherwise, for doing so. He and Spur were using these aircraft for hire or reward. Hence their activities constituted the operation of a commercial air service.

[73] For these reasons, I find the accused, Robert O. Jensen and Spur Aviation Ltd., guilty. A conviction will be entered.

[74] The accused are directed to appear in court on April 30, 1998, to speak to the matter of sentencing.

J. Z. Vertes
J.S.C.

Dated at Yellowknife, Northwest Territories
this 16th day of April, 1998

Counsel for the Crown: Alan R. Regel

Counsel for the Defendants: John Bassie, Q.C.

CR 03469

IN THE SUPREME COURT OF THE
NORTHWEST TERRITORIES

BETWEEN:

HER MAJESTY THE QUEEN

- and -

ROBERT OLE JENSEN; SPUR AVIATION LTD.; SPUR AVIATION carrying on business under the firm name and style of “Great Bear Aviation”; and GREAT BEAR AVIATION

REASONS FOR JUDGMENT OF THE
HONOURABLE JUSTICE J.Z. VERTES