MacKenzie v. Canada (Minister of Transport), [2017] C.T.A.T.D. No. 8

Canada Transportation Appeal Tribunal Decisions

Canada Transportation Appeal Tribunal

Vancouver, British Columbia

Panel: Arnold Olson, Member

Heard: January 17-19, 2017.

Decision: March 23, 2017.

2017 TATCE 08 (Review)

Dockets: P-4265-33, P-4266-02

MoT File No.: Z 5504-89019

[2017] C.T.A.T.D. No. 8

IN THE MATTER OF the review hearing requested by Henry James Gordon MacKenzie with respect to contraventions of the Canadian Aviation Regulations (SOR/96-433), as alleged by the Minister of Transport Between Henry James Gordon Mackenzie, Applicant, and Minister of Transport, Respondent

(90 paras.)

Case Summary

Tribunal Summary:

Held: The Minister of Transport has proven, on a balance of probabilities, that the applicant, Henry James Gordon MacKenzie, contravened subsection 605.31(1) of the *Canadian Aviation Regulations*. The monetary penalty of $750.00 is upheld.

Held: The Minister of Transport has proven, on a balance of probabilities, that the applicant, Henry James Gordon MacKenzie, contravened subsection 602.11(2) of the *Canadian Aviation Regulations*. The monetary penalty of $1,000.00 is upheld.

Held: The Minister of Transport has proven, on a balance of probabilities, that the applicant, Henry James Gordon MacKenzie, contravened subsection 605.31(1) of the *Canadian Aviation Regulations*. The 20-day suspension of his commercial pilot licence is reduced to 10 days.

The total amount of $1,750 is payable to the Receiver General for Canada and must be received by the Transportation Appeal Tribunal of Canada within thirty-five (35) days of service of this determination.

Appearances

For the Applicant: Michael Culhane.

For the Respondent: Dana Kripp.

REVIEW DETERMINATION AND REASONS

I. BACKGROUND

1 On August 11, 2016, the Minister of Transport issued a Notice of Assessment of Monetary Penalty for two contraventions of the *Canadian Aviation Regulations* (*SOR/96-433*) and one licence suspension in respect of occurrences on January 15, 2016. For readability, the charges are listed below in the order in which they are alleged to have occurred that day:

> **Charge 2**: On or about 15 January, 2016, between approximately 0656 and 0801 hours Pacific Standard Time, en route from Vancouver, British Columbia (CYVR) to Prince George, British Columbia (CYXS), you, Henry James Gordon MacKenzie, as pilot-in-command operated an unpressurized Beech 99 aircraft, registration C-FMKH, when, there was no available oxygen supply for all persons on board the aircraft for the entire period of flight at cabin-pressure-altitudes above 13,000 feet ASL, thereby contravening subsection 605.31(1) of the *Canadian Aviation Regulations*.
>
> Monetary Penalty Assessed: $750.00
>
> **Charge 1**: On or about 15 January, 2016, at approximately 0900 hours Pacific Standard Time, at or near Prince George, British Columbia (CYXS), you, Henry James Gordon MacKenzie, as pilot-in-command, conducted a take-off in a Beech 99 aircraft, registration C-FMKH, that had ice adhering to its critical surfaces, thereby contravening subsection 602.11(2) of the *Canadian Aviation Regulations*.
>
> Monetary Penalty Assessed: $1,000.00
>
> **Charge 3**: On or about 15 January, 2016, between approximately 1817 and 1923 hours Pacific Standard Time, en route from Prince George, British Columbia (CYXS) to Vancouver, British Columbia (CYVR), you, Henry James Gordon MacKenzie, as pilot-in-command, operated an unpressurized Beech 99 aircraft,, registration C-FMKH, when, there was no available oxygen supply for all crew members for the entire period of flight exceeding 30 minutes at cabin-pressure-altitudes above 10,000 feet ASL but not exceeding 13,000 feet ASL, thereby contravening subsection 605.31(1) of the *Canadian Aviation Regulations*.
>
> Suspension Assessed: Commercial Pilot Licence -- Aeroplane -- 20 days

II. STATUTES AND REGULATIONS

2 Subsection 6.9(1) of the *Aeronautics Act* (R.S.C., 1985, c. A-2) states:

> **6.9 (1)** If the Minister decides to suspend or cancel a Canadian aviation document on the grounds that its holder or the owner or operator of any aircraft, airport or other facility in respect of which it was issued has contravened any provision of this Part or of any regulation, notice, order, security measure or emergency direction made under this Part, the Minister shall by personal service or by registered or certified mail sent to the holder, owner or operator, as the case may be, at that person's latest known address notify the holder, owner or operator of that decision and of the effective date of the suspension or cancellation, but no suspension or cancellation shall take effect earlier than the date that is thirty days after the notice under this subsection is served or sent.

3 Subsection 7.7(1) of the *Aeronautics Act* states:

> **7.7 (1)** If the Minister believes on reasonable grounds that a person has contravened a designated provision, the Minister may decide to assess a monetary penalty in respect of the alleged contravention, in which case the Minister shall, by personal service or by registered or certified mail sent to the person at their latest known address, notify the person of his or her decision.

4 Subsection 605.31(1) of the *Canadian Aviation Regulations* states:

> **605.31 (1)** No person shall operate an unpressurized aircraft unless it is equipped with sufficient oxygen dispensing units and oxygen supply to comply with the requirements set out in the table to this subsection.

5 Subsection 602.11(2) of the *Canadian Aviation Regulations* states:

> **602.11 (2)** No person shall conduct or attempt to conduct a take-off in an aircraft that has frost, ice or snow adhering to any of its critical surfaces.

III. EVIDENCE

A. Minister

(1) Kent Wickens

6 Inspector Wickens is the Transport Canada aviation enforcement investigator who notified Mr. MacKenzie by letter (Exhibit M-1) that he was investigating a report of alleged contravention of CAR 605.31(1), *Oxygen Requirements for Unpressurized Aircraft*, and also an alleged contravention of CAR 602.11(2), *Aircraft Icing*.

7 Pertinent pages of the aircraft journey log were requested (Exhibit M-2) and obtained (Exhibit M-3), showing flights made on January 15, 2016 for C-FMKH. A photocopy and CD image of the aircraft log page (Exhibit M-3A) was ruled admissible as hearsay evidence. The page bears Mr. MacKenzie's signature and licence number as Captain of aircraft C-FMKH for January 15, 2016.

8 Inspector Wickens conducted a recorded telephone conversation with Mr. MacKenzie on February 29, 2016. Exhibit M-4 is the inspector's handwritten notes of that conversation. The last page consists of a typed "Warning to Alleged Offender", which is a script that inspectors read to advise someone of their *Charter* rights. On the audio recording and in the accompanying transcript (Exhibit M-5), Mr. MacKenzie made a number of incriminating statements. He stated that for the first flight from Vancouver to Prince George, the crew was rushing out the door and, through oversight, forgot to bring the oxygen bottle. Whereas sometimes an oxygen bottle was left on board from a previous flight, on this day it was not.

9 In the transcript, Mr. MacKenzie clearly admits to flying at 14,000 feet from Vancouver to Prince George.

10 Mr. MacKenzie also said that prior to leaving Prince George, they "brushed and sprayed" the aircraft [ice] immediately after the inspectors left.

11 Exhibit M-6 is Inspector Wickens's notes of a telephone conversation initiated by Mr. MacKenzie on May 4, 2016. The notes say, in relation to the flight from Prince George to Vancouver, "He said he flew [at] 13,000 [feet] and that he had no [oxygen] bottle on board the aircraft".

12 Exhibit M-7 is an email thread from July 6-13, 2016, requesting further information from Mr. MacKenzie regarding the de-icing of the aircraft. Exhibit M-8 is an excerpt from the Transport Canada Distributed Air Personnel Licensing System (DAPLS) showing that Mr. MacKenzie's commercial pilot licence is valid. Exhibit M-9 is the type certificate information for the Beech 99 and Exhibit M-10 is the type certificate data sheet showing a maximum certified altitude of 12,000 feet for operations "without oxygen".

13 Further exhibits were introduced into evidence as follows:

* M-11 is the ATC (air traffic control) audio for flight 340 from Vancouver to Prince George;

* M-12 is the ATC audio for the return flight 345 from Prince George to Vancouver;
* M-13 is the combined transcript of those audio files;
* M-14 is information derived from the NARDS (Nav Canada auxiliary radar display system) for flight 340, both screenshots and video information. The video was viewed and Orca Airways flight ORK 340 is depicted climbing to 14,000 feet;
* M-15 is screen shots and information from the NARDS for flight 345. ORK 345 is depicted climbing through 10,100 feet at 0217:18 (UTC), cruising at approximately 13,000 feet and descending through 10,100 feet at 0323:24;
* M-16 consists of a video and screenshots showing aircraft C-FMKH in Prince George and what appears to be ice on various critical surfaces;
* M-17 is a METAR (meteorological terminal aviation routine weather report) from the commercial weather site www.wunderground.com, showing a temperature of minus three degrees at Prince George airport for the time period 1600-1712Z (UTC) when flight 341 departed;
* M-18 is Enroute Low Altitude and High Altitude charts depicting the approximate route flown by flight 340 from Vancouver to Prince George and flight 345 from Prince George to Vancouver. An alternate route is also shown that can be flown by an aircraft without supplemental oxygen between Vancouver and Prince George. The area minimum altitudes for the direct routing to waypoint KEINN flown by flight 345 are all depicted as above 12,000 feet;
* M-19 is a collection of sample flight routings from the commercial source www.skyvector.com, showing that flight times for the alternate routing are 15-18 minutes longer than the routes actually flown by flights 340 and 345.
* M-20 is the Notice of Assessment of Monetary Penalty and Notice of Suspension, both dated August 11, 2016.

14 Inspector Wickens recommended to Mr. Toke Adams, Regional Manager, Enforcement, a first-level monetary penalty for Charge 1, a first-level monetary penalty for Charge 2, and a first-level licence suspension for Charge 3. The reason for the suspension was his belief that there was no possibility that the crew did not know they did not have supplemental oxygen on the aircraft, and that they flew the flight at 13,000 feet.

Cross-examination of Kent Wickens

15 On cross-examination, Inspector Wickens said the reason the recorded transcript does not include the question, "Do I have your permission to record this conversation?" is that Mr. MacKenzie had not yet given his permission. Only after Mr. MacKenzie gave his permission to record the conversation did he turn on the recorder. Inspector Wickens also agreed that the transcript of the conversation has the word "[indiscernible]" in the place where his *Charter* warning script has the words "and instruct legal counsel".

16 Inspector Wickens agreed that on the radar tape for the return flight 345 from Prince George to Vancouver, there were points where the flight went "off screen" for approximately 18 minutes. On the basis of the radar there is, during that gap, no information on the aircraft altitude.

17 Though Inspector Wickens agreed that if, at any point, the aircraft had descended below 10,000 feet, a "30-minute clock" would have to be reset, he disagreed that if the aircraft were to fly at a higher altitude than 13,000 feet, the 30-minute clock would have to be reset. His reasoning was that the same regulation, CAR 605.31(1), requires oxygen *above* 13,000 feet. Though the portion of 605.31(1) under which Mr. MacKenzie was charged reads "...above 10,000 feet ASL but not exceeding 13,000 feet ASL", one can apply the same "buffer" of approximately 200 feet used by Nav Canada. Inspector Wickens agreed that the radar of flight 345 showed periods of times during which the aircraft altitude was greater than 13,000 feet, perhaps 13,100 feet or 13,200 feet.

(2) Kevin Mori

18 Kevin Mori is the Nav Canada air traffic controller who was on duty in the Vancouver Area Control Centre during flight 340. The extract of radar data video (M-14) was played and ORK 340 was depicted at 14,000 feet ASL (above sea level).

19 On cross-examination, Mr. Mori agreed that in some areas the radar can "blank out". In those areas, apart from the pilot telling him, he has no way of knowing the aircraft altitude.

(3) Gordon Leask

20 Gordon Leask is the Nav Canada air traffic controller who was on duty during the period of flight 345 from Prince George to Vancouver. Portions of the audio recording (M-12) were played and ORK 345 is heard to accept an ATC clearance, "...climb and maintain 13,000 in controlled airspace, Orca 345". Mr. Leask indicated that all area ATC radio frequencies and radar sources were operational on January 15, 2016.

21 The NARDS radar video portion of Exhibit M-15 for flight 345 was played. At 0217:20 (all times UTC) the aircraft is seen to be climbing through 10,100 feet. Mr. Leask then noted periods of short duration when the radar depicted aircraft altitude was at 13,100 feet and then returned to 13,000 feet. At 0255:59 there was the "gap" when the radar screen went to CST, "coasts out", with no altitude read-out, then the radar target disappeared completely. Approximately thirteen minutes later, at 0309:32, the target reappeared. From that time until the aircraft was seen to be in descent, there were more occurrences of a momentary altitude of 13,100 feet and one of 13,200 feet. At 0323:24 the aircraft is seen to descend through 10,000 feet.

22 With reference to the accuracy of the depicted altitude, Mr. Leask said, "...our manual permits plus or minus 200 feet". He provided, as an example, that when an aircraft claims to be level at 15,000 feet but radar shows 15,100 feet, that aircraft is considered to be level after four consecutive sweeps of the radar. He confirmed that "...plus or minus 200 feet we consider ...verified valid".

(4) Fraser McKinnell

23 Mr. McKinnell is a Transport Canada aviation enforcement regulatory standards inspector, flight operations, based in Prince George, B.C. On the morning of January 15, 2016, he and his colleague, Inspector John Vandene, were looking at a commercially available flight-following website and noticed an aircraft inbound to Prince George at a displayed altitude of 14,000 feet. They decided to conduct a ramp inspection. While at the airport they heard, on a VHF radio, ORK 340 request a descent from ATC. Because the voice transmission from the aircraft did not have a muffled, "tinny" aspect, they speculated that the crew was not using oxygen masks. They found the aircraft outside the Northern Thunderbird hangar as the crew was unloading cargo from their cargo-configured aircraft. They approached the crew at approximately 0830, identified themselves as Transport Canada inspectors and conducted a ramp inspection. After the crew presented their pilot licences for inspection, he asked Captain MacKenzie where they had flown in from and he replied "Vancouver". He then asked at what altitude they flew up, and Captain MacKenzie replied "altitude 14,000". He asked if they had been using supplemental oxygen at that altitude and Captain MacKenzie replied "no". Inspector McKinnell asked how long they had been at 14,000 feet and it was his recollection that the reply was "45 minutes". When asked if he was aware of the [regulatory] requirements, Captain MacKenzie replied that he was aware; normally they take it [the supplemental oxygen] but that morning had forgotten to bring it. The inspectors then viewed and photographed the aircraft documents.

24 A photo of the crew's operational flight plan was admitted as Exhibit M-21. The first leg on the flight plan is flight 340 from Vancouver to Prince George with an altitude of 14,000 feet. For flight 345 from Prince George to Vancouver, the altitude is 13,000 feet. At the bottom of the page there is a typed statement, "The PIC hereby certifies that the above-completed plan follows the requirements of the AOC, COM and CAR's. *Signed:*-" and a written signature. A photo of the aircraft journey log page for January 15, 2016 was accepted as Exhibit M-22.

25 The one-minute video recording (M-16) of the aircraft on the ground at Prince George, taken by Inspector McKinnell at approximately 0850 PST, was viewed together with the associated screen shots. From these images, Inspector McKinnell identified some ice remaining on both the left and right wing leading edges after the operation of the pneumatic de-icing boots, and ice on the leading edges of both the left and right horizontal stabilizers.

26 Inspector McKinnell said that shortly after they took the video, the crew was observed to board the aircraft, the engines were started and the aircraft moved a minute or so later. After they left the aircraft, the inspectors stood inside the hangar and watched through a window from a distance of about 60 feet as the aircraft taxied away at approximately 0853. They did not see the aircraft stop and de-ice. After the aircraft taxied away, it disappeared from view during a three to four-minute period as they exited the hangar toward the parking lot. From their vehicle, they observed the aircraft continue taxiing, backtrack and depart from runway 33 at approximately 0900.

27 He stated it would take a crew approximately 10 minutes to conduct a manual de-ice of the aircraft in the photos. He did not see any de-ice equipment when he looked inside the aircraft. Exhibit M-23 was introduced as an excerpt from Inspector McKinnell's notes for January 15, 2016; Exhibit M-24 as the Detection Notice sent in relation to the lack of supplementary oxygen on board ORK 340; and Exhibit M-25 as the Detection Notice he subsequently sent in relation to the take-off of ORK 341 with ice adhering to its critical surfaces.

Cross-examination of Fraser McKinnell

28 Upon cross-examination, Inspector McKinnell could not rule out the possibility that, once the engines were started, actuating the de-ice boots could remove ice from leading edges of the wings and horizontal stabilizer, though that was highly unlikely. He agreed that it was possible that some de-ice equipment was on board the aircraft but not seen. Also, he allowed that the maximum amount of time the aircraft was out of view as it taxied around the building could possibly have been as much as five minutes. He said the only time the inspectors could have stopped the aircraft was at the ramp when it started to taxi but added, "I wasn't thinking about stopping the aircraft"; he had faith in the pilot to take care of his aircraft.

29 Although the Detection Notice (M-24) quotes the alleged violation as CAR 605.32(2), a non-designated provision and potentially an offence to be dealt with in provincial court, he said the inspectors had not issued a *Charter* warning to the pilots when they inspected the aircraft and questioned the pilots.

30 He said they did not search the aircraft for an oxygen bottle; they took Captain MacKenzie's word that it was not on board. As the aircraft taxied away, he said he didn't know it was going to take off right away; he "didn't know what the plan was". As it is common practice to de-ice at a place other than where engines are started, he didn't have a safety concern. Moreover, he said, "Even if they were to depart with that ice on the aircraft, I didn't think that anything bad was going to happen with that amount of ice on that aircraft".

(5) John Vandene

31 Inspector Vandene is a Transport Canada civil aviation inspector, flight operations, and was the other person conducting the aircraft inspection at Prince George. He told of essentially the same sequence of events as did Inspector McKinnell. He heard Inspector McKinnell ask if they had flown in at 14,000 feet, and the Captain had said "yes". Inspector Vandene noted a "fairly significant ice accumulation on the aircraft", and that that amount of ice would cause a reasonable crew some concern; they would want it removed prior to departure.

32 He identified the de-icing facilities on a Google map of Prince George airport (Exhibit M-26) and stated that no de-icing by the crew was observed prior to taxi. After exiting the hangar, he lost sight of the aircraft for approximately three minutes and, based on his personal experience in taxiing that route, the time interval was consistent with a continual taxi.

Cross-examination of John Vandene

33 On cross-examination, Inspector Vandene stated that had he known the aircraft would take off without de-icing, he would have stopped the aircraft. However, the only opportunity to stop the aircraft was at the point that it began to taxi and at that time, it was heading in the direction of de-icing facilities and the area for refueling. Therefore, they had no reason to detain the aircraft as it began to taxi. He said that since a de-icing procedure would take at least 10 minutes with hard work, it was not possible that the aircraft had been de-iced in the time it was out of sight.

34 He said the basis of the decision to inspect that flight was an increase in traffic at 14,000 feet on that route, by that type of aircraft from a particular carrier.

(6) Toke Adams

35 Mr. Adams is the Transport Canada Regional Manager, Civil Aviation, Enforcement. He applied a first-level sanction for each of the contraventions because Mr. MacKenzie did not have an aviation record. However, he considered as an aggravating circumstance that Mr. MacKenzie had been "ramped" by two inspectors in Prince George and there had been a discussion on the lack of supplemental oxygen on the aircraft for the altitude being flown. Yet 10 hours later, Mr. Mackenzie conducted a subsequent flight also requiring oxygen to be carried, though none was on board. So, in an effort to reinforce the necessity of change, he applied a licence suspension at the top of the level one: 20 days. He referred to Exhibit M-27, an excerpt of the Staff Instruction (SI) Manual, Table of Sanctions, that lists 10 days as the recommended sanction for a first offence. However, he is not bound by the recommendations as regional manager.

B. Applicant

36 No evidence was introduced on behalf of the applicant. However, with mutual agreement between the parties, a METAR from the same commercial weather site as used by the Minister (M-17), www.wunderground.com, was accepted as information, with appropriate weight to be assigned. The METAR shows a temperature at Vancouver on January 15, 2016 at the time of the departure of flight 340 as minus two degrees.

IV. ARGUMENTS

A. Minister

37 The journey log (M-3) for aircraft C-FMKH is a required technical record and, according to section 28 of the *Aeronautics Act*, provides proof that Captain MacKenzie was pilot-in-command of the aircraft on flights conducted on January 15, 2016, specifically flight 340 from Vancouver to Prince George; flight 341 from Prince George to Dawson Creek; and flight 345 from Prince George to Vancouver.

38 Inspectors McKinnell and Vandene appropriately exercised their delegated authority under section 8.7 of the *Aeronautics Act* to inspect the aircraft and to question the applicant to determine if he had complied with the requirement of CAR 605.31(1) to have an available oxygen supply for all persons on flight 340. As such, the search cannot be characterized as an unreasonable search and seizure pursuant to section 8 of the *Canadian Charter of Rights and Freedoms*. The inspectors were not conducting an investigation but rather an inspection; they can ask questions to determine whether or not there has been compliance.

39 Respecting the admissibility of self-incriminating statements in evidence against himself in the recorded telephone conversation of February 29, 2016 (M-5), and the telephone conversation that Mr. MacKenzie initiated to Inspector Wickens on May 4, 2016 (M-6), Mr. MacKenzie was provided with both written and verbal warnings on multiple occasions. No inducements or threats were made; the interview was not conducted in oppressive circumstances, and since Mr. MacKenzie initiated the phone call on May 4, 2016, it is certainly voluntary.

40 When Inspector Wickens conducted the telephone interview of February 29, 2016, he did not arrest or detain Mr. MacKenzie, thus the rights to a *Charter* warning under section 8 are not triggered. Nevertheless, the warning was provided in the interest of fairness.

41 The Minister presented argument that section 11 *Charter* protections are not available to Mr. MacKenzie since he was not charged with a criminal offence; rather, this is an administrative proceeding. Quoting from *Guindon v. Canada*, *2015 SCC 41*, paragraph 44:

> Section 11 protections are available to those charged with criminal offences, not those subject to administrative sanctions...

42 Even in a criminal context, having the highest burden of proof, the Court acknowledges the strong evidence provided by a voluntary confession. Accordingly, Mr. MacKenzie's admissions that he flew at 14,000 feet from Vancouver to Prince George, that he had no supplemental oxygen on the aircraft, and that he later flew from Prince George to Vancouver at 13,000 feet without supplemental oxygen on the aircraft, are admissible, reliable, and should be granted considerable weight; they are inherently reliable as they are against his own interest.

43 Flight 345 flew from Prince George to Vancouver at an altitude above 10,000 feet for more than 30 minutes, between approximately 1817 and 1923 PST. The aircraft was likely above 10,000 feet ASL during the period of the "gap" since the area minimum altitudes for the route were all above 12,000 feet ASL.

44 In respect of the applicant's argument that the aircraft flew above 13,000 feet during the first period of radar coverage and is therefore not subject to the charge that specifies, "not exceeding 13,000 feet...," the highest radar altitude depicted during that segment of flight is 13,100 feet, within the +/- 200-foot accuracy of the ATC radar system. Thus it is not proven, on the balance of probabilities, that the aircraft did exceed 13,000 feet ASL.

45 It is not a reasonable interpretation of CAR 605.31(1) to suggest it is permissible to operate an unpressurized aircraft not equipped with supplemental oxygen if the altitude exceeds 13,000 feet. Rather, item 1 of the Table requires supplemental oxygen to be provided for altitude above 10,000 feet ASL but not exceeding 13,000 feet ASL if the period of flight exceeds 30 minutes. However, flying above 13,000 feet ASL would not "reset the clock" since flying in an unpressurized aircraft without supplemental oxygen is not permitted at all, as stated in item 2 of the regulation.

B. Applicant

46 In the Civil Aviation Tribunal decision *Minister of Transport v. Captain Glenn D. Wakal*, [1996] C-0398-33, the appeal panel found that the Minister had to establish the scientific validity of radar technology, demonstrate by expert witnesses that the technology used was generally accepted as accurate and reliable by the civil aviation community, provide independent empirical evidence as to the accuracy of the system, and prove that the persons operating the system had the required level of skill and expertise. In the present case, as with *Wakal*, without those requirements being met, the radar plot should be excluded.

47 If the flight was made at 14,000 feet ASL (from Vancouver to Prince George), there are various errors of the pressure sensitive altimeter that call into doubt whether the flight exceeded a cabin pressure altitude of 13,000 feet ASL, as required by the charge. In winter, there will be errors associated with cold temperatures that will cause the altimeter to over-indicate. Using the temperature in Vancouver of minus two degrees, and applying cold temperature altitude corrections, an indicated altitude of 14,000 feet becomes an approximate true altitude of 13,000 feet ASL. Other errors of the altimeter including mountainous terrain error, temperature inversion, IFR altimeter tolerance, in addition to pilot flying accuracy, all suggest that a cabin pressure altitude above 13,000 feet ASL has not been proven.

48 The defence of due diligence is available to Mr. MacKenzie, as provided in the case of *R. v. Sault Ste. Marie*,

[1978] 2 S.C.R. 1299, if:

a) the person charged with the offence reasonably believed in a mistaken set of facts which, if true, would render the act innocent;

b) the person charged took all reasonable steps to avoid the particular incident.

49 The charges are the failure to carry oxygen equipment under CAR 605.31(1), not for the failure *to use* the oxygen equipment. If Mr. Mackenzie's February 29, 2016 telephone confession is admitted, on page 3 he said to Inspector Wickens that the oxygen equipment is normally on board the aircraft but was not this particular day. Thus, even if Mr. Mackenzie is found blameworthy for the oversight, responsibility should be shared with the operator. Also, Mr. MacKenzie mistakenly believed in a set of facts that would render the infringement innocent, that is, that the oxygen equipment was on board.

50 Mr. MacKenzie was not advised of his *Charter* rights when inspectors spoke to him in Prince George. A criminal charge under CAR 605.32(2) [requirement to use oxygen] was a possibility. The inspectors had concerns about not only whether or not the crew was carrying the required oxygen equipment, but also if they were using it. Therefore, the inspectors ought to have advised Mr. MacKenzie of what he was being investigated for under subsection 10(a) of the *Charter*, and that he had the right to retain and instruct counsel without delay under subsection 10(b).

51 The flight departing Prince George was clearly delayed and Mr. MacKenzie had clearly been "detained" within the meaning of section 10 of the *Charter*. The total time of the detention appears to be about 20 to 30 minutes. At no time in this process was Mr. MacKenzie ever apparently advised of his rights under section 10 of the *Charter*. The decision of *R. v. Therens*, *[1985] 1 S.C.R. 613*, page 644, provides authority for the meaning of detention:

> Detention may be effected without the application or threat of application of physical restraint if the person concerned submits or acquiesces in the deprivation of liberty and reasonably believes that the choice to do otherwise does not exist.

52 It is submitted that the denial of Mr. MacKenzie's right to counsel and to be informed properly of that right has resulted in him making incriminating statements. The following evidence should be excluded: Mr. Mackenzie's statement to Inspectors McKinnell and Vandene that the flight was made at 14,000 feet and that there was no oxygen supply on board the aircraft; the operational flight plan and journey log; and the lack of oxygen equipment on board the aircraft following the search of the aircraft.

53 The search was conducted without reasonable and probable grounds, contrary to section 8 of the *Charter*, and evidence obtained from unreasonable search and seizure should be excluded from evidence. Section 8 of the *Charter* provides:

> **8.** Everyone has the right to be secure against unreasonable search or seizure.

54 Though the *Aeronautics Act*, section 8.7, provides powers of the Minister to enter, seize and detain, there must be "reasonable and probable grounds" for making a search (*R. v Mellenthin*, *[1992] 3 S.C.R. 615*) and such searches cannot be arbitrary. The observation of the inbound aircraft on flightaware.com and lack of a "tinny sound" on the radio do not constitute a reasonable basis for the search. The search is thus arbitrary and therefore unreasonable. Where evidence is being collected that could result in a summary conviction, that is, an allegation that CAR 605.32(2) has been violated, the *Charter* right to be free from unreasonable search and seizure applies. *R. v. Collins*, *[1987] 1 S.C.R. 265*, at paragraph 22, is an authority for the presumption of unreasonableness of a warrantless search:

> ...once the appellant has demonstrated that the search was a warrantless one, the Crown has the burden of showing that the search was, on a balance of probabilities, reasonable.

55 The telephone admissions of February 29, 2016 are inadmissible due to a failure to give Mr. MacKenzie his full *Charter* rights. Inspector Wickens said he asked, "Do I have your permission to record this conversation?" Yet on the transcript of the recorded conversation, this question is never asked. Since it was not asked, it was never answered by Mr. MacKenzie, meaning he had not formally given his consent to the recording of the conversation. Secondly, the script used by Inspector Wickens has the words, "You have the right to retain and instruct legal counsel without delay" but the official transcript reads, "...you have the right to retain [indiscernible] legal counsel without delay". The warning does not make clear nor properly affirm the existence of full *Charter* rights as per subsection 10(b):

> **10.** Everyone has the right on arrest or detention
>
> (b) to retain and instruct counsel without delay and to be informed of that right;...

As this particular conversation could result in the collection of evidence to be used in a criminal proceeding, that is, a charge under CAR 605.32(2), complete compliance with advising Mr. MacKenzie of his *Charter* rights is required. Failure to fully and completely advise of these rights should result in the exclusion from evidence of the recording.

56 Admissions made in the recorded evidence of February 29, 2016 should be excluded on the basis of not being voluntary. *R. v. Oickle*, [2000] 2 S.C.R. 3, provides authority to determine whether or not confessions are without inducements, "fear of prejudice" or "hope of advantage". In *Oickle*, at paragraph 24, Iacobucci quotes from *Ibrahim v. The King*, [1914] A.C. 599 (P.C.):

> ...no statement by an accused is admissible in evidence against him unless it is shewn by the prosecution to have been a voluntary statement, in the sense that it has not been obtained from him either by fear of prejudice or hope of advantage exercised or held out by a person in authority.

57 Statements made by Inspector Wickens operated to un-nerve Mr. MacKenzie, such as: "That's something that would normally go in front of a judge"; "this is considered very serious"; "it's kind of like a criminal court pardon". These statements create both fear (that he could face a criminal court) and hope of advantage (that if he fully cooperates with Mr. Wickens, less severe treatment may result). Inspector Wickens's interview invokes the "operating mind" doctrine of the voluntary rule such that it must be investigated whether the statements were freely and voluntarily made even if no hope of advantage or fear of prejudice could be found (as per paragraph 26 of *Oickle*). Mr. MacKenzie's statements in the recorded telephone interview did not satisfy the voluntary rule and should be excluded from evidence.

58 If the surveillance of the aircraft was not continuous, it is possible the crew may have conducted a de-icing procedure while the aircraft was not in view. There are several possibilities: when the inspectors were walking back into the NT hangar, when they were in the NT hangar, and when they left the hangar and walked out to the parking lot. There is also the possibility that the crew inflated and deflated the aircraft de-ice boots. The Civil Aviation Tribunal decision *Massimo Santarossa v. Minister of Transport*, [1996] C-1253-02 determined that if witnesses could not be certain there was ice on the wings at the moment of take-off, the charge would not hold. In *Jean-François Roch v. Minister of Transport*, Q-1950-02, it was determined that it must be proven that ice was actually *adhering* to the aircraft critical surfaces. Thus, it cannot be said with certainty that ice was adhering to critical surfaces at the moment when take-off was attempted.

59 The failure of the inspectors to stop the aircraft displays a reckless disregard for the safety and lives of the crew, when they knew or ought to have known that the flight would be at risk. This failure amounts to an infringement of Mr. MacKenzie's right to life under section 7 of the Charter. In pursuing their collection of evidence for a contravention of the Canadian Aviation Regulations, the inspectors breached their duty to alert the flight crew of their concerns about the observed critical contamination. The breach of duty amounts to negligence under the definition. There has been an infringement of Mr. MacKenzie's Charter right to life under section 7, and the remedy

is provided in subsection 24(2) as follows:

> **24. (2)** Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

The Minister cannot use any evidence from the moment the aircraft took off because the act that is alleged to be the *Charter* violation is the act of allowing the aircraft to depart without doing whatever was necessary to stop the flight.

60 The radar plot does not confirm that the aircraft was at cabin pressure altitudes from 10,000 feet to 13,000 feet ASL for a period that exceeded 30 minutes. There are 30 minutes to be counted from the first moment that the aircraft climbs above 10,000 feet and remains between 10,000 feet and not exceeding 13,000 feet ASL. If the aircraft should descend to less than 10,000 feet ASL and then climb again, then the "clock" must be reset to zero if 30 minutes has not yet been counted. Similarly, as the charge states "but not exceeding 13,000 feet ASL", anytime the aircraft rises above 13,000 feet ASL cabin pressure altitude, the 30-minute clock must also be reset. When the entire radar recording (M-15) is played, we can see that flight 345 is, on at least 31 separate instances, shown to be at an altitude of 13,100 feet or higher. If we apply the principle of starting and re-setting the 30-minute clock as above, we are unable to obtain a continuous period of at least 30 minutes.

V. ANALYSIS

61 The standard of proof imposed on the Minister is the standard specified in the *Transportation Appeal Tribunal of Canada Act*, subsection 15(5): proof on the balance of probabilities.

62 There are a number of questions that follow, requiring solution, as they touch on multiple charges.

63 Is radar data admissible as evidence, in the absence of expert witnesses, and is the technology accurate and reliable? In 1996, an appeal panel of the Civil Aviation Tribunal found in *Wakal* that the Minister had to establish through expert evidence the scientific validity of the technology, its accuracy and reliability. I note the passage of 20 years since that decision and the evolution of electronic radar technology since then. At the present time, the accuracy and reliability of radar is well established in the civil aviation community and is the cornerstone upon which the worldwide air traffic control system infrastructure is based, allowing this Tribunal to consider such evidence without the need for an expert witness to testify on the scientific validity of the technology. At this time, it is unnecessary to re-establish that as fact through expert evidence. It is necessary to establish what the accuracy limits of the radar system are, and that it was fully functional during the time periods in question. I find it is established that radar data is accurate for aircraft at cruise altitude to +/- 200 feet and that the radar system was fully functional.

64 Is cabin pressure altitude, as specified in the regulation (subsection 605.31(1) of the *Canadian Aviation Regulations*), the same as indicated aircraft altitude in a non-pressurized aircraft? What is the relevance of true aircraft altitude in determining the violation? I take official notice that in a non-pressurized aircraft, cabin pressure altitude is essentially the same as that indicated to the pilots on their pressure-sensitive aircraft altimeter. Further, it is the altitude indicated on the pilot's pressure-sensitive altimeter that is transmitted to the air traffic control radar system for display, not the true altitude of the aircraft above sea level. The altitude displayed on the air traffic control system is based on what altitude the pilots are looking at on their pressure-sensitive altimeter. For the purpose of determining whether or not a violation of CAR 605.31(1) occurred, the true, or actual, aircraft altitude above sea level is not relevant. Thus, corrections applied to determine the true aircraft altitude are not relevant. Of relevance is the cabin pressure altitude and that is the same as the pilot's indicated altitude and, subject to the accuracy limits of the system, the displayed ATC altitude.

65 Is the February 29, 2016 recorded telephone conversation between Mr. MacKenzie and Inspector Wickens admissible? The further questions that follow must first be considered.

66 Was it recorded improperly? I accept as credible Inspector Wickens's testimony that he only turned on the recorder after Mr. MacKenzie gave him permission to do so. In this case, the best practice would have been to begin the recorded interview with a statement that permission to record had been granted. Nevertheless, his testimony that he had received Mr. MacKenzie's prior permission to record, in combination with the initialed box on the script which indicates permission, is sufficient evidence that he obtained permission to record.

67 Was the conversation voluntary? While Inspector Wickens was reading a *Charter* warning to Mr. MacKenzie, the words "and retain" are recorded in the transcript as "indiscernible". Nevertheless, the words are discernible to me on the audio recording of the conversation. Moreover, Mr. MacKenzie is asked if he wants legal counsel, to which he replies "no". He is asked if he wants to give a statement, and in the recording (M-5) he is heard to answer in a single statement, "Yeah. I wish to give a statement, and I do not want to seek counsel". More importantly however, in the prior Notice of Investigation (M-1) dated January 27, 2016, the words "and instruct" appear in the *Charter* warning. Accordingly, I find that Mr. MacKenzie was fully and completely advised of his subsection 10(b) *Charter* rights.

68 I have considered the "operating mind" doctrine of the voluntary rule developed in *Oickle*. I find that Inspector Wickens made no threats, did not create an oppressive atmosphere and did not engage in trickery. Mr. MacKenzie knew what he was saying and knew it could be used to his detriment. Throughout the conversation, the applicant seems very aware that his actions will result in a sanction that would stay two years on his record and he expresses his regret that this might affect his employment opportunities with another carrier. Also, he still felt the liberty to voluntarily telephone Inspector Wickens on May 4, 2016 to offer further self-incriminating statements.

69 In the audio recording, it is apparent that Mr. Mackenzie grew concerned later in the interview when Inspector Wickens spoke of the possibility of charges being brought "...in front of a judge, like a civil court judge" and stated "...this is considered very serious". Earlier in the interview, Mr. MacKenzie had made certain incriminating admissions. However, since this anxious state of mind was created after that time, it has no bearing on whether or not the statements within this interview were made voluntarily.

70 In consideration of the above factors, I find that both the recorded telephone interview on February 29, 2016, as well as the subsequent telephone call on May 4, 2016, to be made voluntarily. Therefore, the incriminating statements therein are admissible.

71 Is evidence obtained during the inspection at Prince George airport admissible? Yes. Section 8.8 of the *Aeronautics Act* creates a duty on the owner or the person who is in control of a place, including an aircraft for instance, to give the Minister assistance in carrying out an inspection and a duty to provide the Minister with any information relevant to the administration of the Act and its regulations. *R. v. Collins* [*[1987] 1 S.C.R. 265*](), paragraph 23, states:

> A search will be reasonable if it is authorized by law, if the law itself is reasonable and if the manner in which the search was carried out is reasonable.

72 The basis for the decision to inspect the aircraft was an observed increase in flights by Orca Airways at 14,000 feet on that route. Therefore, it appears that the purpose of the inspection was to check the compliance of Orca Airways with oxygen requirement regulations. The lack of a muffled tone to the voice they heard on the VHF radio created a suspicion that oxygen masks were not being worn, but the decision to inspect had already been made before the inspectors headed to the airport. Though no evidence was presented of information or a "tip" that these aircraft were not compliant, this inspection clearly had a purpose. It was not a "shake the tree and see what falls out" inspection. Since the goal of the search was to determine general compliance of the carrier with the regulation, I find that it was a reasonable application of section 8.7 of the *Aeronautics Act* and that the evidence obtained under section 8.8 of the Act is admissible.

73 It was established in evidence that no *Charter* warning was given to the crew during the inspection. *R. v. Jarvis*,

2002 SCC 73, uses the expression "cross the Rubicon" to describe when officials move beyond the exercise of their inspection powers to an investigation of which the primary purpose is the determination of laying charges. At that point, certain section 8 *Charter* protections may apply, such as the right to receive a *Charter* warning. In this case, once the inspectors realized that no supplementary oxygen was on board, yet the flight had been observed on flightaware.com at 14,000 feet, there was the possibility of an enforcement action. Moving from an inspection to such an investigation is considered "crossing the Rubicon". When the inspectors approached the crew and asked to see their pilot licences and aircraft documents, then photographed the flight plan and aircraft journey log, that was clearly an inspection. They asked if the crew was carrying supplemental oxygen, to which the reply was "no." That too was part of an inspection. Inspector McKinnell then was heard to ask, "Did you fly up at 14,000 feet?" Now, that is a different question than, "At what altitude did you fly up"? Asking a question to which you already know the answer has the beginning elements of an investigation rather than an inspection. Still, the inspectors have not "crossed the Rubicon"; at most they have one foot in the boat. Rather than pursue the question of whether the inspectors were conducting an inspection or an investigation, I consider the evidence of Mr. MacKenzie's reply of "yes" to be inadmissible.

74 Was the aircraft "detained" by the inspectors in Prince George within the meaning of section 10 of the *Charter*? If it is established that the aircraft was detained, then Mr. Mackenzie's Charter right to retain and instruct counsel without delay was triggered under subsection 10(b). The arrival and shutdown at the ramp was at approximately 0830, according to Inspector McKinnell's notes (M-23). The video was taken at 0849:57, and the door was closed and engines started soon thereafter. It was during those 20 minutes that the crew was unloading boxes into a truck, and was being inspected and questioned. It seems reasonable to assume that unloading the boxes took five minutes. Does the remaining fifteen minutes of delay constitute "detention"? I note the decision of *Therens* that describes a restraint of liberty other than arrest. I cannot, however, categorize this particular inspection as a restraint of liberty. Further, section 8.8 of the *Aeronautics Act* places a duty on persons being inspected under section 8.7 to give reasonable assistance to carry out the inspection. In view of the shortness of the delay and the specified duty of the crew to give reasonable assistance, I find that the aircraft was not detained within the meaning of section 10 of the *Charter*.

75 To the specific charges, in chronological order: Charge 2 - the flight from Vancouver to Prince George. It is undisputed that Mr. MacKenzie was operating as the pilot-in-command of an unpressurized Beech 99 aircraft, C-FMKH, on the morning of January 15, 2016, from Vancouver to Prince George, between approximately 0656 and 0801 PST. From both radar evidence and Mr. MacKenzie's direct admission in the recorded interview of February 29, 2016, it is established that the flight flew at 14,000 feet ASL and that there was no available oxygen supply on the aircraft. The aircraft inspection in Prince George also established that there was no oxygen bottle on board.

76 For the defence of due diligence for this Charge to be available to Mr. MacKenzie, it must be shown that he reasonably believed that supplemental oxygen was already on the aircraft the morning of January 15, 2016 when in fact it was not. In the recorded interview of February 29, 2016, Mr. Mackenzie clearly admits that it was his normal practice to bring the supplemental oxygen with him, but on this particular day he forgot to do so. Since it was his normal practice to bring the portable oxygen bottle, it cannot be said that he had a mistaken belief. Though he makes a claim that sometimes the supplemental oxygen is on the aircraft from a previous flight, the fact is he forgot the bottle that day. Therefore, I find that the defence of due diligence is not available to him for that flight, and Charge 2 is established.

77 For Charge 1, departing from Prince George with ice adhering to critical aircraft surfaces, the elements of the violation are:

a) Does the videotape (M-16) establish the presence of ice adhering to critical aircraft surfaces? The video shows some ice, though not a significant amount, adhering to the wing leading edges after the operation of the de-ice boots. However, an uninterrupted thin covering of ice is clearly seen to be adhering to the leading edges of the left and right horizontal stabilizers. Wings and horizontal stabilizers fall within the definition of "critical surfaces", according to CAR 602.11(1). Therefore it is

established that, at the moment the video was taken at 0850 PST, ice is adhering to critical aircraft surfaces.

b) Could the aircraft have been de-iced prior to take-off or the ice otherwise removed prior to take-off? Mr. MacKenzie states in the recorded interview of February 29, 2016 that the crew "brushed and sprayed" the aircraft immediately after the inspectors left. However, the aircraft was under observation through the hangar windows during that time, so the possibility of de-icing is fanciful at best. The time interval between when the aircraft disappeared from the inspector's view as it taxied around the hangar and then re-appeared was a maximum of five minutes. Both inspectors said that 10 minutes would be the minimum period of time required to conduct a manual de-icing. The aircraft had to taxi a long distance and the times of engine start after 0850, taxi at 0853 and take-off at 0900 (journey log M-3), have been established. It is not believable that the aircraft taxied around the hangar, shutdown engines, was de-iced, engines restarted and taxi resumed during the period of time it was out of view. Furthermore, at minus three degrees, it is also not possible that the ice simply melted and disappeared during that time interval.

c) By not stopping the aircraft from departing, did the inspectors display a negligent or reckless disregard for the safety of the crew - an infringement of Mr. MacKenzie's right to life under section 7 of the *Charter*? The inspectors did not stop the aircraft from departing just after taking a video that showed ice adhering to critical surfaces on the aircraft. To establish a breach of duty amounting to negligence, it would have to be determined that the inspectors had a duty to act and did not do so, thus showing a wanton or reckless disregard for the lives or safety of the crew. Did they have a duty to stop the aircraft in this situation? There is no evidence that any discussion took place between the inspectors and the crew such that inspectors knew, or should have known, that the aircraft was not going to de-ice. As Inspector McKinnell put it, they didn't know the plan. Their only opportunity to stop the aircraft was while they were inside the NT hangar and the aircraft started engines and taxied away. Immediately after engine start, the aircraft taxied in the direction toward where the de-ice facilities were located and also where the fuel pump ramp area is located - a prime spot where manual de-icing could be accomplished by the crew. When the aircraft taxied away from them, the inspectors had the reasonable expectation that the crew would de-ice the aircraft prior to take-off somewhere else. The inspectors acted reasonably, did not breach their duty of care, and were not reckless or negligent. Therefore, I find that Mr. MacKenzie's section 7 *Charter* right was not breached.

d) Is a defence of due diligence available on the basis that possibly the crew activated the de-ice boots on the taxi-out and may have been successful in removing ice from the aircraft? For the defence of due diligence to be successful, it must be established in evidence that the person charged "took all reasonable steps". It is insufficient to say that possibly they might have done this or that. It has not been established that the crew did activate the de-ice boots on taxi-out, that in doing so all adhering ice was removed, and that in doing so had taken all reasonable steps. Accordingly, the defence of due diligence is not available. Therefore, I find that the aircraft did take off with ice adhering to its critical surfaces.

78 For Charge 3, it is established from the aircraft inspection and Mr. MacKenzie's admissions, both on February 29 and during the May 4, 2016 telephone call to Inspector Wickens (M-6), that there was no oxygen bottle on board.

79 The remaining component of the charge is the time period and cabin pressure altitude. On May 4, 2016, Mr. MacKenzie admits that he flew at 13,000 feet. The radar data for the flight (M-15) shows the aircraft climbing through 10,100 feet ASL at 0217:18 (all times UTC), cruising at altitudes within several hundred feet of 13,000, and descending through 10,100 feet at 0323:24. There is a "gap" in radar coverage between 0255:59 and 0309:32. Notwithstanding the "gap", the time interval between the climb through 10,000 feet observed on radar, and the descent observed on radar, was 66 minutes.

80 It has been argued that the specific wording of the charge is "...but not exceeding 13,000 ASL" and therefore the "30-minute clock" must be reset if the aircraft goes above 13,000 feet, and that a continuous period of 30

minutes between 10,000 and 13,000 feet must be established. Several points apply. First, I note that the regulation (subsection 605.31(1) of the *Canadian Aviation Regulations*) states, "*Entire* period of flight exceeding 30 minutes" [emphasis added], and makes no reference to the requirement that the period be continuous. "Entire period" refers to the entire period of flight that is between 10,000 feet and 13,000 feet. There is no "reset clock." Furthermore, it is clearly the intent of the regulation that a flight between 10,000 feet ASL and 13,000 feet ASL is subject to a 30-minute limitation, after which time oxygen is to be boarded so as to be available to all crew members. Second, it is not a reasonable interpretation of the regulation to say that if the flight momentarily exceeds 13,000 feet, a "30-minute clock" resets, since elsewhere in the *same* regulation, flying above 13,000 feet cabin pressure altitude without supplemental oxygen for all persons on board the aircraft is prohibited. Third, though it is true that there is a momentary display of 13,300 feet when radar data is re-established at 0309:33, the displayed altitudes are otherwise within the +/- 200 feet accuracy of the system.

81 As for the 13-minute "gap" in radar coverage, could Mr. MacKenzie have descended the aircraft and ducked below 10,000 feet ASL during that interval, thus "resetting the clock", if there is one? He was flying at night, in winter, on an instrument flight plan, over rugged mountainous terrain with area minimum altitudes in excess of 12,000 feet so, on the balance of probabilities, not a chance. For the purpose of establishing the violation, on the balance of probabilities, I find that the flight exceeded 30 minutes at cabin pressure altitudes above 10,000 feet ASL, but not exceeding 13,000 feet ASL, and Charge 3 is established.

Sanction and Conclusion

82 The Civil Aviation Tribunal case *Minister of Transport v. Kurt William M. Wyer*, [1988] O-0075-33, is referenced and has been considered for principles as they apply to establishing the monetary penalties. They include:

- Denunciation, as in public repudiation of the wrongful conduct;
- Deterrence, both specific to the offender and general deterrence to the aviation community;
- Rehabilitation, eliminating risk of repeating the wrongful act;
- Enforcement Recommendations; and
- Aggravating and mitigating factors.

Charge 1 and Charge 2

83 No aggravating or mitigating circumstances are identified. Accordingly, the assessed monetary penalty of $1,000.00 for Charge 1, and the assessed monetary penalty of $750.00 for Charge 2, is upheld.

84 It must be remembered that the offence for both Charge 2 and Charge 3 is the failure to carry a piece of equipment, not failure to use it. The sanction specified in CAR 103.08(1), column I of Schedule II, is the same as would be generated for failure to carry a first aid kit.

Charge 3

85 A 20-day licence suspension was assessed for Charge 3. Mr. Adams believed an aggravating factor to be that Mr. Mackenzie had been "ramped" that morning by two inspectors, yet he made the decision to operate the return flight to Vancouver knowing supplemental oxygen was not on board. However, there are other factors, specified in Transport Canada's Aviation Enforcement Policy Manual, to be considered. Under section *10.2 Policy for Selecting Administrative Action*, a licence suspension is to be applied when a monetary penalty would be inadequate to achieve compliance, or when the individual is a "repeat offender". Further, in section *12.1 General*, it is stated, "A second offence is considered to have taken place when the record of a previous similar offence is still on the offender's file". It must be remembered that, at the time of the occurrence, Mr. MacKenzie did not have an aviation record; no infractions had been noted on his file. Later, when the Minister referenced prior charges up for that day, those charges had not been proven nor had Mr. MacKenzie had an opportunity to mount a full and fair defence.

Therefore, it cannot be considered that an offence was already on his record when the decision was made to increase the sanction to a licence suspension.

86 Finally, it cannot be determined after-the-fact that safety was compromised by the failure of the crew to carry supplementary oxygen on board the aircraft for a period of 36 minutes over the maximum allowable limit. As with Charge 2, the infraction itself (failure to carry, not failure to use) as determined by the schedule of penalties, has the same minor equivalence as failing to carry a first aid kit.

87 In consideration of the above, I find the hand of the regulator too heavy on Mr. MacKenzie and reduce the suspension to 10 days.

VI. DETERMINATION

88 The Minister of Transport has proven, on a balance of probabilities, that the applicant, Henry James Gordon MacKenzie, contravened subsection 605.31(1) of the *Canadian Aviation Regulations*. The monetary penalty of $750.00 is upheld.

89 The Minister of Transport has proven, on a balance of probabilities, that the applicant, Henry James Gordon MacKenzie, contravened subsection 602.11(2) of the *Canadian Aviation Regulations*. The monetary penalty of $1,000.00 is upheld.

90 The Minister of Transport has proven, on a balance of probabilities, that the applicant, Henry James Gordon MacKenzie, contravened subsection 605.31(1) of the *Canadian Aviation Regulations*. The 20-day suspension of his commercial pilot licence is reduced to 10 days. The total amount of $1,750 is payable to the Receiver General for Canada and must be received by the Transportation Appeal Tribunal of Canada within thirty-five (35) days of service of this determination.

March 23, 2017

(Original signed)
Arnold Olson
Member

End of Document