

CIVIL AVIATION TRIBUNAL

BETWEEN:

**Stewart Lake Airways Ltd.**, Applicant

- and -

**Minister of Transport**, Respondent

**LEGISLATION:**

*Aeronautics Act*, R.S.C. 1985, c. A-2, s. s. 6 (now s. 7)

*Air Navigation Orders*, Series VII, No. 3, s. 12(1)

**Immediate threat to aviation safety.**

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**Review Determination**  
**Robert J. Rushford, Q.C.**

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**Decision: August 2, 1988**

*The Minister has not proven "on a balance of probabilities" that an immediate threat to aviation safety exists, and the continued suspension of the certificates of registration of aircraft C-GYXY, C-GRAG and C-FWMM is not warranted.*

The Applicant and Respondent agreed that the certificate of airworthiness for C-FWMM became valid June 10, 1988, and for C-GRAG on June 24, 1988. C-GYXY is valid until August 26, 1988. The certificate of registration (commercial category) for all three aircraft was suspended by the Minister pursuant to section 6 of the *Aeronautics Act* on the grounds that an immediate threat to aviation safety exists or is likely to occur. Subsection (2) of section 6 requires the Minister to specify in the Notice of Suspension the immediate threat to aviation safety that the Minister believes exists or is likely to occur as a result of an act or thing having been done or being proposed to be done under the authority of the Canadian aviation document concerned and the nature of the act or thing. In all three cases the Notice of Suspension purported to comply with subsection (2) by stating:

That the operating certificate of Stewart Lake Airways Ltd. has been suspended and there is no method in place to ensure that effective and approved aircraft maintenance practices are followed.

The Minister's witness, Frank Michael Murphy, who is acting regional director for Aviation Regulations, testified that the lack of effective and approved aircraft maintenance practices as set out in the Notice of Suspension is a failure by the Applicant to comply with *Air Navigation Order*, VII, No. 3, Part II, section 12 which reads as follows:

12. (1) An air carrier shall provide adequate shelter, workshops and facilities, and such equipment as may be necessary for the proper maintenance of aeroplanes and auxiliary equipment in use.

(2) An air carrier shall have an approved maintenance manual that shall contain a description of his maintenance system including the maintenance organization, inspection schedule and maintenance personnel responsibilities relating to servicing, rectification, inspection and certification as prescribed in the *Engineering and Inspection Manual*.

(3) No air carrier shall release for flight or operate an aeroplane unless that aeroplane has been maintained and released in accordance with the approved maintenance manual.

(1) Did the Applicant fail to comply with any of the requirements of ANO, VII, No. 3, section 12?

(2) If the Applicant failed to so comply, did the failure to comply create an immediate threat to aviation safety or is an immediate threat to aviation safety likely to occur as a result of failure to comply?

The Applicant did not call any evidence. All of the witnesses called at this hearing were called by the Minister.

The acting director of Aviation Regulations, Frank Michael Murphy, became convinced from the reports given to him by his officials that the Applicant, Stewart Lake Airways Ltd., were operating a commercial air service in spite of a suspension of their operating certificate sometime previously. The evidence indicates that none of the Minister's officials were aware of the leases (M9) between the Applicant and Silver Wings Leasing Ltd. until July 15, 1988, when Mr. Murphy had a conversation with William Krolyk, an officer, director and shareholder of the Applicant, to the effect that the leases have been in place since May 5, 1988, (the actual date is May 12, 1988). Mr. Krolyk did not explain the leases or offer to send copies, however, copies were picked up by one of the Minister's officials on July 19, 1988. The notices suspending the certificate of registration for all three aircraft are dated July 13, 1988. The decision to suspend was therefore made before any of the Minister's officials became aware of the leases.

Under the provisions of section 208.2(2)(a) of the *Air Regulations*, the Applicant's certificate of registration for the aircraft in question would remain valid for a period of 90 days from the date of the lease. At this stage, it appeared to the Minister's officials that a commercial air service was being operated with no operating certificate, no approved operations manager, no chief pilot and no apparent maintenance procedure in place. Mr. Murphy says "everywhere we looked we had

problems". Mr. Murphy made a judgment call and issued the suspension notices. With the evidence available to him at this point in time, it would have been irresponsible to do otherwise. Mr. Murphy is a public official charged with the responsibility of maintaining aviation safety. I conclude that he exercised his duties responsibly.

Two days later, on July 15, 1988, the Department became aware of the three leases. The Department concluded that the leases were "bogus", that they were, in effect, phoney and were made in an attempt to deceive. The evidence in relation to the leases is that of Donald Winston Graham, who was called by the Minister, and whose evidence, therefore, is the evidence of the Minister. This witness is the sole shareholder, officer and director of the lessee, Silver Wings Leasing Ltd., the lessee in all three leases. The three leases (Exhibit M-9) contain seven basic provisions, paragraphs A to G inclusively, which provide as follows:

- A. The lessor shall surrender all operating rights to the above aircraft to the lessee upon its acceptance.
- B. The lessee shall assume all fuel, oil, running maintenance and operating costs other than major engine and propeller and components at the time of overhaul.
- C. The lessee shall pay to the lessor the sum of \$1 and other valuable considerations.
- D. The lease shall be a dry lease only.
- E. The lessee shall insure the aircraft for hull and liability risks.
- F. Only those pilots who are employed on the payroll of the lessee shall have the right to operate the above aircraft, which excludes the lessor, legal title owner.
- G. The lease agreement may be cancelled by either party with 30 days' written notice.

Mr. Graham's evidence is that the leases are valid. The terms of the leases were, however, not strictly followed. Mr. Graham says that the arrangement was that the lessee, who operates from Sioux Lookout, Ontario, has first call on all three aircraft. When the aircraft were not being used at Sioux Lookout, they were kept at Stewart Lake, the lessor's base of operations. All maintenance on all three aircraft was done by the witness, Graham, who is a licensed AME. Insurance was carried in the name of the lessee but was paid for by the lessor. Fuel was paid for by the lessee only when the lessee was using the aircraft. William Krolyk, an officer, director and shareholder of the lessor, acted as one of the pilots of the aircraft when required by the lessee. The two Cessna 185s were also flown by Frank Acquino, a pilot employed by the lessee. There is no suggestion that Mr. Graham is not telling the truth. On the basis of the Minister's evidence, I find that there is no evidence on which I can conclude that the leases are "bogus". I, therefore, find that the leases are valid and subsisting leases.

Having concluded that the leases are valid, it is not necessary to determine what the engineering and maintenance practices of the lessor are because those responsibilities shift to the lessee under the terms of the lease and the provisions of section 208.2(1) of the Regulations. Mr. Graham testified that he was responsible for maintenance. The Minister must, therefore, prove "on a balance of probabilities" that the lessee, Silver Wings Leasing Ltd., has breached the provisions of the *Air Navigation Order*, VII, No. 3, Part II, section 12. It is not the Applicant who must prove that Silver Wings complied, it is the Minister who must establish that they didn't. I am sympathetic with the Minister's position in this case. If a finding were made on the basis of suspicion and conjecture, it would not be difficult to conclude that something must be wrong in the circumstances. In arriving at my decision, I must, however, remain objective. Suspicion and conjecture are not proof.

Section 12(1) of ANO, VII, No. 3, requires an air carrier to provide adequate shelter, workshops and facilities as may be necessary for the proper maintenance of aeroplanes. No evidence was presented by the Minister in relation thereto, and I, therefore, find that no infraction of section 12(1) has been proven.

Section 12(2) of ANO, VII, No. 3, provides:

12.2 An air carrier shall have an approved maintenance manual that shall contain a description of his maintenance system including the maintenance organization, inspection schedule and maintenance personnel responsibilities relating to servicing, rectification, inspection and certification as prescribed in the *Engineering and Inspection Manual*.

The evidence presented by the Minister in this regard consists of Exhibit M-2 entitled "Silver Wings Leasing Ltd. Maintenance Manual" and consists of two pages. Reference is made on page 1 to Cessna 100 Series Aircraft, De Havilland DHC-3, Otter Aircraft and Noorduyn Norseman Aircraft. In relation to Cessna 100 Series Aircraft, page 1 of Exhibit M-2 provides that this aircraft will be maintained in accordance with the requirements contained in the *Cessna Progressive Care Operations Manual* and the inspection schedule contained therein. No reference is made to a Beaver DH-2 Aircraft. Page 2 of the Exhibit M-2 refers to the type of aircraft operated, referring to one Cessna 185, one DHC-3 Otter and two Norseman. No reference is made to a Beaver DH-2.

Exhibit M-8 was also entered in evidence, which is the organization charge of Silver Wings Leasing Ltd. It contains a DoT stamp "September 22, 1987". Presumably as of September 22, 1987, the areas of responsibility were:

Managing Director - Don Graham  
Operations Manager - Frederick Bryan  
Chief Pilot - Frederick Bryan  
Chief Maintenance Engineer - Don Graham

The Minister's witness, Graham, testified that the areas of responsibility have changed and are now:

Maintenance Engineer- George Allen, approved by the Minister  
Operations Manager- Don Baas, who has to go to Winnipeg for interim approval  
Chief Pilot- Donald Winston Graham, not yet approved, application is in Winnipeg

No evidence was presented in relation to the managing director or to the actual date the areas of responsibility changed.

If the onus of proof were on the Applicant, I would not have any difficulty holding that an infraction of 12(2) had occurred and that the suspension was justified. The onus, however, is not on the Applicant, it is on the Minister to prove its case "on a balance of probabilities". The evidence, while pointing to suspicion and conjecture, is not sufficient to satisfy that onus, and I, therefore, conclude that the Minister has not proven that an infraction of *Air Navigation Order*, VII, No. 3, section 12, has occurred, and having failed in that regard, it has not been established "on a balance of probabilities" that an immediate threat to aviation safety exists.

The continued suspension of the certificates of registration of all three aircraft is, therefore, not warranted.

I am not called upon to determine whether, in all circumstances involved, other infractions of the Regulations, the Act or the *Air Navigation Orders* have been established as a result of the evidence presented at this hearing.

I thank the presenting officer, Gerry Langen, his assistant counsel, Mr. Platana and Mr. Robert Tapper for their presentations and assistance throughout.