

TRANSPORTATION APPEAL TRIBUNAL OF CANADA

BETWEEN:

Catherine Martyn, Applicant

- and -

Minister of Transport, Respondent

LEGISLATION:

Aeronautics Act, R.S.C. 1985, c. A-2, s. 7.7

Canadian Aviation Regulations, SOR/96-433, section 103.03, subsections 202.01(1) and 605.03(1)

**Review Determination
Sandra Lloyd**

Decision: June 7, 2006

The applicant has contravened CAR 103.03 and the \$250.00 penalty assessed is upheld. The applicant has contravened CAR 605.03(1) as alleged in count 2 and the \$250.00 penalty is upheld. The applicant did not contravene CAR 202.01(1) as alleged and the \$500.00 total penalty assessed is dismissed. The applicant did not contravene CAR 605.03(1) as alleged in count 1 and the \$250.00 penalty is dismissed. The total penalty of \$500.00 is to be made payable to the Receiver General for Canada and must be received by this Tribunal within thirty-five days of receipt of this determination.

A **review hearing** on this matter was held Wednesday, March 8, 2006 at Robson Square in Vancouver, British Columbia at 10:00 hours.

BACKGROUND

The applicant Ms. Martyn is the registered owner of Canadian registered aircraft Beech C-50 Twin Bonanza C-GVCZ ("VCZ"). Pursuant to a Notice of Suspension dated June 23, 2004, the Minister of Transport (the "Minister") suspended VCZ's Certificate of Airworthiness ("C of A") due to a number of maintenance defects. The applicant did not return the C of A to the Minister as required.

Subsequently the Minister issued to the applicant a Notice of Assessment of Monetary Penalty (the "Notice") dated March 23, 2005 assessing monetary penalties as follows:

- 1) \$250.00 for contravening section 103.03 of the *Canadian Aviation Regulations* (CARs);
- 2) \$250.00 for each of two counts alleging contraventions of CAR 202.01(1);
- 3) \$250.00 for each of two counts alleging contraventions of CAR 605.03(1);

for a total penalty of \$1,250.00.

By letter dated April 18, 2005, Ms. Martyn requested a Transportation Appeal Tribunal of Canada ("TATC") review of the Notice.

LAW

Section 103.03 of the CARs:

103.03 Where a Canadian aviation document has been suspended or cancelled, the person to whom it was issued shall return it to the Minister immediately after the effective date of the suspension or cancellation.

Section 4.1 of the *Aeronautics Act*:

4.1 Every person who commits an act or omission outside Canada that if committed in Canada would be a contravention of a provision under this Part shall be deemed to have committed a contravention of the provision under this Part and may be proceeded against and punished in the place in Canada where the person is found as if the contravention had been committed in that place.

Subsection 8.4(1) of the *Aeronautics Act*:

8.4 (1) The registered owner 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 owner without the owner's consent and, where found to have committed the offence, the owner is liable to the penalty provided as punishment therefor.

Subsection 202.01(1) of the CARs:

202.01 (1) Subject to subsection (2), no person shall operate an aircraft in Canada unless its marks are visible and are displayed

(a) in the case of a Canadian aircraft, in accordance with the requirements of the Aircraft Marking and Registration Standards; and

(b) in the case of an aircraft registered in a foreign state, in accordance with the laws of that foreign state.

Subsection 605.03(1) of the CARs:

605.03 (1) No person shall operate an aircraft in flight unless

(a) a flight authority is in effect in respect of the aircraft;

(b) the aircraft is operated in accordance with the conditions set out in the flight authority; and

(c) subject to subsections (2) and (3), the flight authority is carried on board the aircraft.

Subsection 19(1) of the *TATC Act*:

Costs

19. (1) The Tribunal may award any costs, and may require the reimbursement of any expenses incurred in connection with a hearing, that it considers reasonable if

(a) it is seized of the matter for reasons that are frivolous or vexatious;

(b) a party that files a request for a review or an appeal and does not appear at the hearing does not establish that there was sufficient reason to justify their absence;
or

(c) a party that is granted an adjournment of the hearing requested the adjournment without adequate notice to the Tribunal.

EVIDENCE

Although Ms. Martyn was notified of the TATC hearing she did not attend nor send anyone to represent her.

Transport Canada inspector Brent Wallace testified that in June 2004, he received a telephone call from the Federal Aviation Administration ("FAA") in Washington State advising that complaints had been received about the maintenance status of VCZ. Mr. Wallace understood that VCZ was at Skagit Regional Airport ("Skagit Airport") in Washington.

Mr. Wallace went to the Skagit Airport to inspect the aircraft. There he met the pilot of VCZ, Jim Martyn, who is the applicant's husband. Mr. Martyn advised Mr. Wallace that VCZ was at Wes Lupien Airport ("Lupien Airport"), also in Washington State. Lupien Airport is also known as Oak Harbor Airport, with identifier 76S. A chart of the area shows that the straight line

distance between Skagit and Lupien Airports is about 17 miles. Mr. Wallace proceeded to Lupien Airport to inspect VCZ there.

Mr. Wallace did an external inspection and noted a number of defects which he recorded and photographed. A number of these photographs were submitted as evidence at the hearing. Many defects were evident.

Mr. Wallace drafted a Letter of Notification of aircraft defects as well as a Notice of Suspension of VCZ's C of A. These documents were served on Ms. Martyn on June 25, 2004 at 18:35 local time.

Mr. Wallace said he made several unsuccessful attempts to contact Ms. Martyn to get the C of A returned and to ensure the aircraft was not flown.

Mr. Wallace interviewed persons associated with Skagit and Lupien Airports including Mr. Joe Clonan, Mr. Peter Morgan, and Mr. Thomas C. Downey, and obtained written statements from them about VCZ.

Mr. Peter Morgan is a contractor at the Lupien Airport who testified that he is very familiar with VCZ. He saw the aircraft being fuelled on Friday, June 25, 2004. He did not see it at the airport again after Friday night at about 17:00 hours.

Witness Mr. Thomas Downey is an aircraft mechanic for the U.S. Department of Transport. He has a hangar at Lupien Airport and is also familiar with VCZ. He testified that he saw VCZ at Lupien Airport at about 17:00 hours on Friday, June 25, 2004 and noted that it was gone the next morning.

Mr. James Hultgrien is an FAA inspector. He took photos of VCZ at Skagit Airport on June 28, 2004, which he e-mailed to Mr. Wallace and which he identified at the hearing.

Mr. Clonan's written statements were submitted as evidence at the hearing. At the time he gave the statements, Mr. Clonan was an airport attendant at Skagit Airport. One of Mr. Clonan's statements says that he saw VCZ at Skagit Airport on June 28, 2004. The other says that he had observed the aircraft on numerous occasions at Skagit Airport and saw it flying over Lake Samish on July 11, 2004. Mr. Wallace said he believed Mr. Clonan's statement that he saw VCZ flying on July 11, 2004 because Mr. Clonan told him he was very familiar with the aircraft and it is a unique aircraft.

Mr. Steve Ray is a Transport Canada inspector. He had interviewed Mr. Joe Clonan by telephone to confirm the written statements that Mr. Clonan had given to Mr. Wallace. Mr. Ray said that Mr. Clonan also told him that he was very familiar with VCZ, had seen VCZ at Skagit Airport on June 28, 2004, and had seen it in flight on July 11, 2004.

Mr. Clonan is no longer employed at Skagit Airport and his whereabouts are unknown. Therefore it was not possible for him to be called as a witness at the hearing.

Mr. Ray confirmed that Mr. Wallace had made multiple unsuccessful attempts to contact Ms. Martyn. He also confirmed that VCZ's C of A had not been returned.

DISCUSSION

The evidence proves on a balance of probabilities that the applicant Ms. Martyn contravened CAR 103.03 as alleged, by failing to return VCZ's C of A to the Minister.

The evidence does not prove that the applicant contravened either count of CAR 202.01(1) as alleged because:

- 1) there is no evidence that the aircraft was operated in Canada; and
- 2) section 4.1 of the *Aeronautics Act* does not apply because at no relevant time was Ms. Martyn found in Canada. Rather, the evidence shows that she is resident in Washington State. Each time the Minister served her, they did so in Washington State, and she did not attend the hearing in Canada.

The evidence does not prove that the applicant contravened CAR 605.03(1) on or about June 26, 2004 as alleged. The Notice of Suspension of VCZ's C of A was served on Ms. Martyn at 18:35 hours on June 25, 2004. Witnesses testified that they last saw the aircraft at Lupien Airport at about 17:00 hours that day. One witness saw the aircraft being fuelled that afternoon at Lupien Airport. There is no proof that VCZ departed Lupien Airport after 18:35 hours to fly the 17 miles to Skagit Airport. It is quite possible that VCZ departed Lupien Airport for Skagit Airport after 17:00 hours but prior to 18:35 hours on June 25, 2004.

A written statement of Mr. Clonan obtained by Mr. Wallace, which Mr. Ray confirmed by evidence of a telephone interview that he had with Mr. Clonan, shows that VCZ flew on July 11, 2004. Although that evidence is hearsay evidence, on its face it appears to be valid. The aircraft involved is unique in its appearance. The Minister was unable to locate the witness to ask him to attend the hearing. The written statement and the evidence of the telephone interviews with Mr. Clonan were uncontested at the hearing. I accept them as proof, on a balance of probabilities, that VCZ flew on July 11, 2004.

COSTS

The Minister filed at the hearing a written motion for costs.

Section 19(1) of the *TATC Act* provides that the Tribunal may award costs, and may require the reimbursement of any expenses incurred in connection with a hearing, that it considers reasonable if a party that files a request for a review does not appear at the hearing and does not establish that there was sufficient reason to justify their absence.

As stated above, Ms. Martyn requested the hearing by letter dated April 18, 2005. In that letter she stated reasons for her request. However, she did not attend the hearing nor send a representative on her behalf.

At the hearing, the onus is on the Minister to prove the offences alleged. The awarding of costs is at the discretion of the Tribunal and I decline the Minister's motion for costs in this matter.

DETERMINATION

I uphold the Minister's finding that the applicant contravened CAR 103.03 as alleged and confirm the \$250.00 penalty assessed. I also uphold the Minister's finding that the applicant contravened CAR 605.03(1) on July 11, 2004 and confirm the \$250.00 penalty assessed.

The evidence does not prove the two allegations that the applicant contravened CAR 202.01(1). Therefore, I cancel the \$500.00 total penalty assessed as a result of those allegations.

The evidence does not prove that the applicant contravened CAR 605.03(1) on or about June 26, 2004 as alleged. Therefore, I cancel the \$250.00 assessed as a result of that allegation.

The total penalty payable by the applicant is therefore reduced from \$1,250.00 to \$500.00.

June 7, 2006

Sandra K. Lloyd
Member
Transportation Appeal Tribunal of Canada