

**TRANSPORTATION APPEAL TRIBUNAL OF CANADA**

BETWEEN:

**Farm Air Ltd.**, Applicant

- and -

**Minister of Transport**, Respondent

**LEGISLATION:**

*Aeronautics Act*, R.S.C. 1985, c. A-2, s. 7.1(1)(b)

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**Review Determination  
Elizabeth MacNab**

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**Decision: March 14, 2011**

Citation: *Farm Air Ltd. v. Canada (Minister of Transport)*, 2011 TATCE 5 (Review)

Heard at Regina, Saskatchewan, on October 27, 2010

**Held:** The decision of the Minister of Transport to cancel the Air Operator Certificate of Farm Air Ltd. is confirmed.

## **I. BACKGROUND**

[1] On August 31, 2009, the Minister of Transport ("Minister") issued a Notice of Cancellation ("Notice") of Air Operator Certificate ("AOC") number 8646 to Farm Air Ltd. ("Farm Air"), pursuant to paragraph 7.1(1)(b) of the *Aeronautics Act* ("Act"), on the grounds that Farm Air "ceases to meet the qualifications necessary for the issuance of the document or to fulfil the conditions subject to which the document was issued".

[2] The specific condition that was not met was set out in the attachment to the Notice which reads as follows:

Farm Air Ltd. does not have legal custody and control of at least one aircraft of each category of aircraft that is to be operated as required by paragraph 702.07(2)(g) of the *Canadian Aviation Regulations*.

[3] Norman Colhoun, acting on behalf of the Applicant, Farm Air, requested a review of this matter by the Transportation Appeal Tribunal of Canada ("Tribunal") on September 16, 2009. A Review Hearing was scheduled for April 7, 2010, and later rescheduled for October 27, 2010. Before the Hearing, Mr. Colhoun made a number of requests to the Minister relating to disclosure and, unsatisfied by the responses, filed a Motion before the Tribunal on September 30, 2010, seeking disclosure of specific items. On October 8, 2010, this Motion was denied but the Minister was ordered to provide the Applicant with the names of its witnesses and their "can-say" statements, as well as any information from Mr. Welwood's investigation into Farm Air, Mr. Colhoun and Colhoun Farm, that relates to the Notice.

## II. STATUTES AND REGULATIONS

[4] Paragraph 7.1(1)(b) of the *Act* provides the following:

**7.1** (1) If the Minister decides to suspend, cancel or refuse to renew a Canadian aviation document on the grounds that

...

(b) the holder or any aircraft, airport or other facility in respect of which the document was issued ceases to meet the qualifications necessary for the issuance of the document or to fulfil the conditions subject to which the document was issued.

[5] The qualification that was alleged not to be met is set out in paragraph 702.07(2)(g) of the *Canadian Aviation Regulations* ("CARs"), SOR/96-433 as follows:

...

(2) For the purposes of subsection (1), an applicant shall have

...

(g) legal custody and control of at least one aircraft of each category of aircraft that is to be operated;

...

[6] Section 103.07 of the *CARs* reads as follows:

### ***Administrative Grounds for Suspension, Cancellation or Refusal to Renew***

**103.07** In addition to the grounds referred to in Sections 6.9 to 7.1 of the *Act*, the Minister may suspend, cancel or refuse to renew a Canadian aviation document where

(a) the Canadian aviation document has been voluntarily surrendered to the Minister by its holder;

(b) the Canadian aviation document has been mutilated, altered, or rendered illegible;

(c) the aircraft in respect of which the Canadian aviation document was issued has been destroyed or withdrawn from use; or

(d) the commercial air service, other service or undertaking in respect of which the Canadian aviation document was issued has been discontinued.

### **III. PRELIMINARY MOTIONS**

[7] On October 23, 2010, Mr. Colhoun filed three further Motions relating both to this matter, and three other files before the Tribunal, two of which named other entities. These Motions were not argued at that point but a Motion to adjourn for a period of at least 30 days was made at the opening of the Hearing by Mr. Colhoun and was the subject of argument.

[8] Mr. Colhoun argued that the adjournment was necessary to allow him to receive the information requested, pursuant to the *Access to Information Act*, R.S.C., 1985, c. A-1. In support, he offered an email dated October 25, 2010, from Réginald Laurent, Director, Access to Information and Privacy, Transport Canada, stating that he expected to complete the outstanding requests within 30 days. I accepted this email as supporting the Motion and had it marked as Exhibit A-1.

[9] Mr. Colhoun further argued that this information would be relevant to the matter before me since it concerned the desire to use an aircraft that, although not authorized for use in commercial air application operations, he considered to be safer than those aircraft which were so authorized. He also pointed out that such aircraft could be used by "flying farmers" and by United States of America (USA) operators operating a specialty service in Canada under the North American Free Trade Agreement (NAFTA).

[10] In response, the Minister argued that any information relating to the proposed use of the aircraft was irrelevant to the issue before the Tribunal.

[11] Upon further questioning from the Tribunal Member, both parties agreed that the use of the aircraft in question was not currently permitted in the type of commercial operation carried out by the Applicant. On this basis, I ruled against the Motion on the grounds that the matter before me was restricted to the issue of whether the Applicant met the qualifications necessary for an AOC. Any material relating to an aircraft that could not be used to meet these qualifications was irrelevant. I noted, however, that I would be prepared to reconsider the matter later in the proceedings if any such relevance became apparent.

### **IV. EVIDENCE**

## **A. Minister of Transport**

### *(1) Paul Anthony McCulloch*

[12] Paul Anthony McCulloch, a Civil Aviation Inspector with Commercial and Business Aviation in Winnipeg, has worked at Transport Canada for the past five years and before that operated an air taxi service. He testified that in March 2008, he was the Principal Operations Inspector assigned to Farm Air when he was informed that there was no aircraft registered to the company. He confirmed this with the Operations Manager, Mr. Colhoun, by telephone and informed him that there were three options available: the company could purchase and register another aircraft; it could voluntarily surrender its AOC; or it could be the subject of an investigation by Transport Canada that most probably would lead to a suspension or cancellation of its AOC.

[13] Farm Air chose to apply for a voluntary suspension for one year on the basis that it was attempting to purchase a "safer aircraft". Subsequently, Mr. Colhoun was sent an email on April 3, 2008, saying that he would be granted a voluntary suspension for one year (Exhibit M-4) on the basis that if the conditions for issuance were not met at the end of that period, Transport Canada would take steps to formally cancel the AOC.

[14] On August 12, 2009, Mr. Colhoun was asked to justify his request for an extension to the voluntary suspension, and on August 13, 2009, he responded saying that the Enforcement Branch of Transport Canada was preparing charges against the company that reflect directly on its AOC and that the suspension should continue until those charges were disposed of by the Tribunal (Exhibit M-6). Mr. Colhoun was informed by Terry Davis, Superintendent, Certification, that the possible enforcement action was not an adequate basis for granting an extension (Exhibit M-6).

[15] In reply, Mr. Colhoun suggested that the AOC not be cancelled on the basis that the Tribunal could find that the basis for the suspension was that the company was trying to operate a safer, less noisy, and more economical aircraft. On August 31, 2009, Superintendent Davis responded that the enforcement action was irrelevant and that he would be preparing a formal Notice. (Exhibit M-7).

[16] In cross-examination, Mr. Colhoun asked a number of questions concerning the relative safety of piston and gas turbine engines. These questions were objected to on the basis that Mr. McCulloch was not qualified as an expert in that area. I allowed the questions with the caveat that any evidence would most likely be given very little weight given Mr. McCulloch's lack of expertise. In any event, his evidence was that relative safety was affected by a number of factors and for that reason, he could not give an answer other than "it depends". He stated that he was aware of occasions where there had been engine failures in both types of engines.

### *(2) Terrance Ronald Davis*

[17] Terrance Ronald Davis is the Superintendent of Certification in the Commercial and Business Aviation Division of Transport Canada in Winnipeg. He testified that he issued a formal letter confirming Farm Air's voluntary suspension on May 20, 2008 (Exhibit M-9), based

on section 103.07 of the *CARs* on the grounds that the commercial air service had been discontinued. Mr. Davis explained that Transport Canada's database, the National Air Carrier Information System, maintains a list of air operators, and another database lists registered aircraft. He explained the extracts from these databases that showed that Farm Air was no longer the registered owner of any aircraft, and consequently did not meet the requirements of paragraph 702.07(2)(g) of the *CARs*, that it have legal custody and control of at least one aircraft of each category to be operated.

[18] Mr. Davis also discussed the *Air Operator Certification Manual* (Exhibit M-10) which sets out Transport Canada policies relating to suspensions. According to this Manual, a suspension for a seasonal operator should be no longer than one year and for other operators should be limited to 90 days.

[19] In cross-examination, I allowed discussion of a possible reinstatement of the AOC and the costs that would be involved. While I allowed this discussion to take place, it was clear that it related to a possible settlement as opposed to clarifying Mr. Davis' testimony in chief. I adjourned the Hearing to allow the parties to further discuss the matter. After the adjournment, the parties had not come to an agreement and after a further adjournment, it was clear that no agreement would be reached. At that point I would not allow any further questions relating to fees for reinstatement although Mr. Colhoun felt that this refusal limited his ability to make full answer and defence.

## **B. Applicant**

[20] Before offering any evidence, Mr. Colhoun pointed out that he felt he could not take full answer and defence in the matter because he had not yet received materials requested under the *Access to Information Act*. He also suggested that Transport Canada had ignored my Ruling concerning disclosure of Mr. Welwood's material. While I had earlier not precluded re-examining the Motion for Adjournment, it became clear that any information that would be forthcoming related to the Applicant's wish to use a specific gas turbine aircraft in its business. On the basis that this Hearing was concerned only with the very narrow issue of whether the conditions for having an AOC had been met, I determined that the Hearing should continue. At that point, Mr. Colhoun decided not to present any evidence.

## **V. FURTHER DISCLOSURE MATTERS**

[21] In response to Mr. Colhoun's allegation regarding the failure to provide Mr. Welwood's information in accordance with my Ruling of October 8, 2010, the Minister's representative stated that any information in the hands of Mr. Welwood relating to this matter had been disclosed, and he offered a letter from Mr. Welwood to that effect.

[22] After some discussion, I stated that in the absence of any sworn evidence on the matter, I would not consider the issue related to disclosure and offered Mr. Colhoun the opportunity to provide such evidence under oath. Mr. Colhoun declined once again to give evidence.

## **VI. ARGUMENTS**

## **A. Minister of Transport**

[23] The issue before the Tribunal is a very simple one. Was the Minister justified in cancelling Farm Air's AOC on the basis that it did not meet the qualifications set out in paragraph 702.07(2)(g) of the *CARs*? This provision requires an air operator to have legal custody and control of at least one aircraft of the category to be operated.

[24] The documentary evidence shows that Farm Air was not the registered owner of any aircraft since July 30, 2007. [I note that legal custody and control is signified by registration as owner of an aircraft.] Transport Canada treated the Applicant fairly and with consideration. It agreed to a voluntary suspension of one year and, in fact, allowed the suspension to continue past the one year anniversary until August 31, 2009. The suspension was granted on the basis that the Applicant was attempting to purchase a suitable aircraft but there has been no evidence of any attempt to do so. The Minister's witnesses testified that no AOC will be issued unless the applicant for the certificate is the registered owner of an aircraft. Registration is necessary so that Transport Canada can ensure aviation safety in general and adherence to the *CARs*.

## **B. Applicant**

[25] Mr. Colhoun repeated his concerns regarding disclosure and the *Access to Information Act*. He also mentioned the issues raised in the Motions filed on October 23, 2010.

## **VII. ANALYSIS**

[26] Subsection 7.1(7) of the *Act* provides that the Tribunal Member hearing a matter relating to the suspension, cancellation or refusal to renew a Canadian aviation document, pursuant to subsection 7.1(1), may confirm the Minister's decision or refer the matter back to the Minister for reconsideration. In this case, a Notice cancelling the Applicant's AOC was issued pursuant to paragraph 7.1(1)(b) of the *Act*.

[27] The basis for the cancellation is that the Applicant does not have legal custody and control of at least one aircraft that is to be operated as required by paragraph 702.07(2)(g) of the *CARs*. There was no real dispute by Mr. Colhoun that this was not the case. Instead, he argued that he wished to operate an aircraft that he considered to be safer than those he was authorized to use but one that could not be used in commercial operations. In effect, he was challenging the validity of the regulatory requirements and Transport Canada's policies. The Tribunal's authority, however, does not extend to a review of these policies but is limited to applying the law as it exists.

## **VIII. DETERMINATION**

[28] On the basis of the evidence before me, the decision of the Minister of Transport to cancel the Air Operator Certificate of Farm Air Ltd. is confirmed.

March 14, 2011

Elizabeth MacNab

Member