TATC File No. C-3696-41
MoT File No. Z5504-067205 P/B

TRANSPORTATION APPEAL TRIBUNAL OF CANADA

BETWEEN:

Farm Air Ltd., Appellant

- and -

Minister of Transport, Respondent

LEGISLATION:
Canadian Aviation Regulations, SOR/96-433; ss 700.02(2)

Appeal decision
Suzanne Racine, J. Richard W. Hall, Arnold Marvin Olson

Decision: September 17, 2013

Citation: *Farm Air Ltd. v. Canada (Minister of Transport)*, 2013 TATCE 25 (Appeal)

Heard in: Regina, Saskatchewan, on March 26 and 27, 2013

APPEAL DECISIONS AND REASONS

Held: The Appeal is dismissed. The charges against Farm Air Ltd. are upheld. However, the $5 000 penalties levied against Farm Air Ltd. for Counts 1 and 2 are each reduced to $50, and the $5 000 penalties for Counts 3 and 4 are each maintained. As such, the total penalty owing is reduced from $20 000 to $10 100.

The total amount of $10 100 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 Decision.

TATC File No. C-3696-41 (Farm Air Ltd.)

TATC File No. C-3697-41 (Lumsden Aero Ltd.)

I. BACKGROUND

[1] On May 13, 2010, the Minister of Transport (Minister) issued a Notice of Assessment of Monetary Penalty to each Appellant for alleged breaches of the *Canadian Aviation Regulations*, SOR/96-433 (*CARs*). The first Notice of Assessment of Monetary Penalty (Notice 1) alleges that Farm Air Ltd. (Farm Air) operated a United States of America (U.S.) registered aircraft to conduct aerial work involving the dispersal of product on four occasions in July 2009, when it did not hold an Air Operator Certificate, contrary to subsection 700.02(2) of the *CARs*. The total penalty assessed for the counts in Notice 1 was $20 000.

[2] The second Notice of Assessment of Monetary Penalty (Notice 2) alleges that Lumsden Aero Ltd. (Lumsden Aero) operated the same aircraft when there was no flight authority in effect on seven different occasions, contrary to subsection 605.03(1) of the *CARs*. The total penalty assessed for the counts in Notice 2 was $35 000.

[3] The Appellants filed a request for review with the Transportation Appeal Tribunal of Canada (Tribunal) regarding the alleged contraventions. A Review Hearing in this matter occurred in Regina, Saskatchewan from October 24 to 28, and November 1 to 2, 2011.

[4] In his Review Determination dated October 26, 2012, the Review Member found that the Minister had proven the allegations against both Farm Air and Lumsden Aero, and upheld the penalties assessed by the Minister.

[5] On November 7, 2012, the Appellants requested an appeal of the Review Member's Determination. The Appeal Hearing took place in Regina, Saskatchewan on March 26 to 27, 2013.

II. PRELIMINARY ISSUES

[6] Prior to the Appeal Hearing, Norman Colhoun, representing the Appellants, submitted several requests for the Appeal Panel's consideration; namely, he requested to submit additional evidence on appeal, including a new Special Airworthiness Certificate (SAC), dated November 20, 2012, obtained from the U.S. Federal Aviation Administration (FAA), as well as an email dated June 8, 2004. The Appellants also submitted two requests for clarification stemming from the Review Determination.

[7] The Minister also made a request to postpone the scheduled Appeal Hearing due to a pending FAA investigation of the new SAC obtained by the Appellants.

[8] The Appeal Panel disposed of these issues by way of an Interlocutory Ruling dated March 18, 2013, which dismissed the Appellants' request in part. In deciding whether or not the Appellants could enter new evidence on appeal, the Appeal Panel considered whether the new evidence was necessary for the purposes of the appeal and whether it was previously available, pursuant to section 14 of the *Transportation Appeal Tribunal of Canada Act*, S.C. 2001, c. 29 (*TATC Act*).

[9] The Appeal Panel held that the Appellants could submit the new SAC, but that the Minister would be given the opportunity to cross-examine the Representative of the Appellants on this evidence, and would also be allowed to provide rebuttal evidence.

[10] The Appeal Panel found that the SAC was relevant to the proceedings at hand and was not previously available to the Appellants. Indeed, if the Appellants could prove that the old SAC was erroneous, then it could affect whether the *CARs* were contravened in this instance. However, in fairness to the Minister, the Appeal Panel felt it was appropriate to allow the Minister the opportunity to cross-examine the Appellants' Representative on this new evidence, as well as to allow the Minister to provide rebuttal evidence if necessary.

[11] The Appeal Panel denied the Appellants' request to submit the email dated June 8, 2004, as well as their requests for clarification. The Appeal Panel decided not to accept the June 8, 2004 email on the basis that the Review Member had already considered accepting this evidence and declined to do so, finding that the threshold test of section 14 of the *TATC Act* had not been met.

[12] With regard to the clarifications sought by the Appellants, the Appeal Panel notes that it is not in a position to provide the Appellants the requested clarification with regard to the Review Member's Determination. Moreover, such statutory recourse is not available to the Appellants under the *Aeronautics Act*, R.S.C. 1985, c. A-2, or the *TATC Act*.

[13] The Appeal Panel also denied the Minister's request for a postponement because the Appeal Panel determined that the Minister had adequate time to obtain information from the FAA prior to the Appeal Hearing, and that there was no need to wait until the outcome of the FAA investigation to hold the Appeal Hearing.

III. EVIDENCE

A. Appellants

(1) Norman Colhoun

[14] Mr. Colhoun entered several pieces of evidence on appeal, including the corrected copy of the SAC, as well as an email chain from Eric Barr of the FAA (Exhibit A-A-3). Mr. Colhoun stated that this evidence is significant because it classifies the aircraft as an S-2R, as opposed to an S2R as it was classified on the previous SAC. Mr. Colhoun stated that this was significant because, in accordance with Inspector Gaudry's testimony, if the aircraft was an S-2R, it did not require validation of a foreign flight authority to operate in Canada. Mr. Colhoun notes that the date of issuance for the new SAC is also significant, as it was back-dated to when the aircraft was built in 1974.

[15] On cross-examination, the Minister entered the U.S. FAA's Operating Limitations Restricted Aircraft for Aircraft N4190X (Exhibit A-M-1). Mr. Colhoun conceded that the operating limitations attached to the S-2R were similar to those attached to the S2R. Mr. Colhoun also conceded that Exhibit A-M-1 requires that evidence of special permission from a foreign country be kept on board the aircraft, although he argued that it did not apply in this

instance because of the Bilateral Aviation Safety Agreement (BASA). Mr. Colhoun also conceded that Exhibit A-A-2 lists the aircraft as being a restricted category aircraft, and noted that he does not have a standard Certificate of Airworthiness for the aircraft in question.

[16] When asked, Mr. Colhoun agreed that he has transitioned the aircraft from having spray gear to not having spray gear. According to Mr. Colhoun, the aircraft has been transitioned "not frequently, but it's been done since 2004 when we acquired the aircraft". Although Mr. Colhoun stated that he had an Aircraft Maintenance Engineer (AME) inspect the aircraft to say that it met type certificate A3SW, he did not bring any documentation to that effect.

B. Minister

(1) Joseph David Gaudry

[17] Given the unusual circumstances surrounding the new evidence the Appellant requested to enter on appeal, the Appeal Panel allowed the Minister to provide rebuttal evidence. The Minister called Inspector Joseph David Gaudry to provide the rebuttal evidence regarding the updated SAC that was introduced on Appeal (Exhibit A-A-2).

[18] Inspector Gaudry reports having spoken to Mr. Barr of the FAA regarding the updated SAC that Mr. Barr issued on behalf of the FAA. Mr. Barr confirmed to Inspector Gaudry that he received a letter from Mr. Colhoun requesting a change in the model number found on the SAC. Inspector Gaudry states that Mr. Barr referred to the type certificate in effect at that time, and noted that both aircraft types were in the restricted category, so Mr. Barr did not see any issue with changing the model number on the SAC. However, in so doing he also attached a separate document of operating limitations (Exhibit A-M-1).

[19] Inspector Gaudry reports that the operating conditions attached to the updated SAC include that persons and cargo shall not be carried for compensation or hire, as well as that the aircraft may not be operated over a foreign country without the special permission of that country. These conditions are contained on the backside of the updated SAC.

[20] Inspector Gaudry notes that, as a result of these conditions, the aircraft at issue would still require permission from the Minister to operate in Canada. Moreover, Inspector Gaudry states that an aircraft that has aerial spraying gear cannot operate in the normal category.

[21] On cross-examination, Inspector Gaudry agreed that Revision 30 of type certificate number A4SW was not in effect at the time of the Review Hearing, rather Revision 28 was in effect at that time.

[22] On cross-examination, Inspector Gaudry agreed that normal category aircraft do not require a validation of foreign flight authority, and stated that how and where the aircraft is operated will determine what type of Certificate of Airworthiness is required. Mr. Gaudry testified that the aircraft in question was always operated under the restricted category.

[23] On re-examination, Inspector Gaudry stated that the restricted category type certificate is the A4SW, while a standard Certificate of Airworthiness would be issued for a normal category aircraft.

IV. REVIEW DETERMINATION

[24] The Review Determination dated October 26, 2012, found that the Minister had proven that both Farm Air and Lumsden Aero had contravened the *CARs*,and the respective penalties of $20 000 and $35 000 were upheld. In reaching his conclusion, the Review Member made a variety of factual and legal findings, which the Appellants have contested on appeal.

[25] The Review Member found that the Appellants had not demonstrated that the doctrine of estoppel should be applied in this case, nor did the Appellants have any legitimate expectation that their behaviour was being condoned by the Minister.

[26] The Review Member also found that the aircraft at issue was no longer registered in the U.S. because of the expiration of its Certificate of Registration. Accordingly, the Review Member found that "the evidence before the Tribunal seems to show that the aircraft has been operating illegally in Canada for a number of years". However, the Review Member then noted that in the event that his statutory interpretation on this point was wrong, he would nevertheless consider the case on its merits. As such, the Review Member then considered each charge in isolation to determine whether the Minister had proven her case.

[27] In upholding the charges against Lumsden Aero, the Review Member weighed the evidence correlating to each alleged flight. Regarding the flight dated July 3, 2009, the Review Member considered the photographs taken by eyewitnesses to the event, and also relied on the Appellants' Representative's admission that spraying occurred on this date.

[28] In considering the alleged flights on or about July 7, 12, and 17, 2009, the Review Member relied on invoices from Farm Air to Hanmer Seeds regarding work done on or about July 8, 13 and 18, 2009, as well as corresponding accounts payable statements from Hanmer Seeds. He also noted that eyewitness testimony existed.

[29] In upholding the violation of August 24, 2009, the Review Member relied on a photograph that was published in the Regina newspaper, the *Leader-Post*, on August 25, 2009, on which the registration number for the aircraft is visible using a magnifying glass.

[30] The Review Member found that thecontravention of November 28, 2009 had been proven by the testimony of a witness who reported that the Appellants' aircraft arrived in Moose Jaw, Saskatchewan on this date. The witness also identified this aircraft as the one he had worked on in Moose Jaw, Saskatchewan at around the same time.

[31] The Review Member held that the violation of March 29, 2010 had been proven by the testimony of a variety of witnesses, one of whom saw the aircraft land and also identified the Appellants' Representative as being the person he spoke with upon the aircraft's landing. Other witness testimony corroborated this evidence, including witness testimony that the Appellants' Representative entered his shop and asked for work to be done on his aircraft, as well as witness testimony from a person who claims that he drove Mr. Colhoun's vehicle from Moose Jaw back to Regina after Mr. Colhoun indicated that he was going to leave with the aircraft.

[32] The Review Member then considered that even if the foreign flight authority were valid, the aircraft nonetheless required proper validation before flying in another country. According to

the Review Member, "even if I were to find that the aircraft held a SAC, flying over a foreign country is not allowable without special permission of the country, which did not exist in this case. Because the aircraft did not have the appropriate validation at the relevant time, it was clearly not operated in accordance with its flight authority".

[33] The Review Member next considered charges against a third company that were dismissed. As such, they are not relevant to the Appeal Hearing and will not be considered.

[34] The Review Member then analysed the four charges against Farm Air. He found that the contravention of July 3, 2009 had been proven on the basis of an admission of Mr. Colhoun that he sprayed on this date, as well as a witness who testified that Mr. Colhoun was hired to disperse product to control mosquitos and insects for an event. The Review Member found that a contravention of the *CARs* had occurred, and that the flying farmer exemption did not apply in this instance.

[35] In upholding the alleged contraventions that occurred on or about July 7, 12, and 17, 2009, the Review Member relied on a variety of evidence, including eyewitness testimony from those who observed the aircraft spraying and smelled the spray, as well as invoices from Farm Air to Hanmer Seeds for aerial spraying and related accounts payable statements.

[36] The Review Member then went on to address a variety of arguments made by the Appellants, some of which were raised by the Appellants on appeal. For instance, the Review Member noted that "Mr. Colhoun was repeatedly advised that the issue of one production order and its accompanying affidavits was irrelevant and moot because… the Member would not consider them in reaching his Determination". He also found that "in the other production order, there were explainable and regrettable errors made by Transport Canada in citing the wrong Criminal Code sections".

[37] The Review Member also considered the BASA put forth by the Appellants and held that it was not relevant to the issues before the Tribunal. He found that the BASA applied only to new aircraft, and as such did not apply to the aircraft at hand.

[38] In terms of the penalties imposed, the Review Member found that while aggravating circumstances might have existed, the Minister did not impose an increased penalty due to aggravating circumstances. Consequently, the Review Member upheld the penalties imposed by the Minister.

V. GROUNDS OF APPEAL

[39] The Appellants submitted Grounds for Appeal dated November 10, 2012, which included the following:

1. The Appellants were unable to make full answer and defence at the Review Hearing because the Minister wilfully delayed Access to Information requests;
2. The aircraft had the required validation;

3. The Review Member erred in allowing into evidence the affidavits signed by Inspector Gaudry used to obtain the Production Orders because Inspector Gaudry presented false evidence under oath in order to obtain these Production Orders;
4. The Review Member erred in relying on evidence obtained as a result of the Production Orders;
5. The Review Member erred in determining that the aircraft was not properly registered in the U.S.;
6. The Minister cannot charge the Appellants with contraventions after having failed to act for so many years, due to the doctrine of estoppel;
7. The Review Member erred in his interpretation and application of the BASA;
8. The flights that occurred took place under the flying farmer exemption;
9. The Appellants were denied procedural fairness because they did not have the opportunity to present oral arguments at the Review Hearing;
10. The new SAC establishes that the aircraft is an S-2R model.

VI. ISSUES

[40] The issues to be determined on this Appeal are as follows:

1. What is the appropriate standard of review?
2. Did the Review Member err in finding that the aircraft did not have a valid flight authority?
3. Did the Review Member err in considering the evidence obtained as a result of the Production Orders?
4. Did the Review Member err in finding that the aircraft was not properly registered in the U.S.?
5. Was the Minister prevented from laying charges against the Appellants due to estoppel or legitimate expectations?
6. Were the Appellants unable to make full answer and defence because of inadequate disclosure?
7. Did Farm Air conduct the flights in question under the flying farmer exemption?
8. Was the Appellants' right to procedural fairness breached as a result of not presenting oral arguments at the Review Hearing?
9. Did the Minister proceed against the wrong parties?
10. Were the penalties appropriate in this instance?

VII. ARGUMENTS

A. Appellants

(1) Updated SAC

[41] The Appellants contend that the updated SAC (Exhibit A-A-2) serves to correct a typographical error that existed in the original SAC that was issued by the FAA on April 23, 1974. The Appellants allege that this new evidence demonstrates that the aircraft at issue is an S-2R model, and as a result the aircraft does not require any authorization in order to operate in a foreign country, pursuant to type certificate A3SW, Revision 18.

[42] Furthermore, the Appellants note that even if the updated SAC had not corrected the aircraft model at issue, that the Multiple Airworthiness Certification Procedures listed in a service letter from the Ayres Corporation (A-1) note that a model S2R aircraft may carry both a normal and a restricted category airworthiness certificate concurrently.

(2) The Aircraft had a Valid Flight Authority

[43] The Appellants submit that the aircraft had a valid flight authority at the time of the alleged contraventions. They note that section 507.05 of the *CARs* titled Validation of Foreign Flight Authority states as follows:

> **507.05** Where an aircraft is operating under a foreign flight authority that is issued in respect of the aircraft or the fleet of which it is a part and that does not conform to Article 31 of the Convention, and the Minister determines that the aircraft is safe for flight, the Minister shall validate the foreign flight authority, thereby authorizing the operation of the aircraft in Canadian airspace.

[44] They note further that the regulation of a validation for a foreign flight authority does not impose a cancellation date. Rather, they submit that the standardised validation of an SAC for light sport or experimental light-sport aircraft for the purpose of operating a U.S. registered light-sport aircraft in Canadian airspace (A-A-1) states that this validation is valid for an indefinite period.

[45] The Appellants further allege that the FAA confirmed by email that a validation is not required when a restricted category aircraft is handled in accordance with 14 CFR § 21.25(a)(1) and (b)(1-7), as well as § 21.185, pursuant to Exhibit A-18.

[46] Moreover, the Appellants note that no validation was required in 2004, nor was validation required after the implementation of the BASA in 2008.

[47] Moreover, the Review Member erred in finding that the BASA applies to new products only, as it also applies to replacement parts.

(3) The Review Member erred in admitting the Affidavits

[48] The Appellants submit that the Review Member erred in allowing the affidavits signed by Inspector Gaudry (Exhibits M-30 and M-32) in order to obtain the Production Orders (Exhibits M-29 and M-31).

[49] The Appellants allege that Inspector Gaudry falsely stated under oath that he spoke to Robert Meyer about Mr. Colhoun's farming activities. Inspector Gaudry admitted at the Review Hearing that he spoke to Remington Walker rather than Mr. Meyer, but the Appellants note that Mr. Walker testified at the Review Hearing that he did not recall having such a conversation with Inspector Gaudry.

[50] The Appellants allege that Inspector Gaudry also falsely stated under oath that Paul Hofer told him that Mr. Colhoun rented out his farmland in 2007 and 2008 to a man named Jim Latrace. The Appellants contend that contrary to what Inspector Gaudry affirmed in the affidavit, Mr. Hofer stated that he told Inspector Gaudry that Mr. Colhoun rented some of his farmland to a man named Jim Lagrace. Furthermore, Mr. Hofer testified that at no time did he see the aircraft in question take off, contrary to Inspector Gaudry's affirmation.

[51] The Appellants also note that Inspector Gaudry used the wrong section of the *Criminal Code*, R.S.C., 1985, c. C-46, when he applied for the Production Orders before the Provincial Court.

(4) The Review Member erred by relying on evidence obtained by the Production Orders

[52] While the Review Determination states at paragraphs [145] and [227] that the Review Member dismissed the two Production Orders and the information contained therein for a lack of relevance, the Appellants note that the Review Member nevertheless relied on the Hanmer Seeds invoices (Exhibit M-35) that were obtained from Production Order at Exhibit M-31 in reaching his Determination. The Appellants state that the Review Member erred in so doing, and that his findings were inconsistent.

[53] The Appellants contend that, for the above-noted reasons, the evidence obtained as a result of the Production Orders should be excluded from evidence.

(5) The Review Member erred in finding that the aircraft was not properly registered in the U.S.

[54] The Appellants contend that the Review Member also erred in finding that the aircraft was not properly registered in the U.S. during the period of time at issue in this case. Rather, they argue that the aircraft was in fact registered at all times in the U.S. during the time period at issue.

(6) Estoppel

[55] The Appellants submit that the Minister was aware that the Appellants had been operating the aircraft since 2004, and that by not charging them sooner, the Minister is now estopped from doing so. Indeed, the Appellants submit that it is unreasonable to now charge

them for flights operated without validation when the Minister knew that they had been operating the aircraft for over five years.

[56] The Appellants submit that they relied on the Minister's failure to charge them for a period of several years as evidence that the validation issued by Transport Canada in June 2004 was open-ended.

(7) Wilful delay in disclosure

[57] The Appellants submit that they were unable to make full answer and defence at the Review Hearing because the Minister wilfully delayed access to the Appellants' access to information requests until after the Review Hearing.

[58] The Appellants submit that the access to information requests show email exchanged in June 2004 between the Minister and the FAA in relation to the Appellant's SAC and the BASA, and that these emails demonstrate the FAA's position that a validation was not required if the aircraft met the requirements of 14 CFR § 21.25.

[59] Indeed, the Appellants note that by June 2010—almost a year after the date of the alleged offences—Transport Canada was still in the process of determining whether a validation was necessary.

[60] The Appellants submit that documents that were not disclosed by the Minister support the Appellant's assertion that the wrong parties were proceeded against, and furthermore that information redacted by the Minister in the email chain at Exhibit A-16 would have answered the question as to the requirement of a validation.

(8) Flying Farmer Exemption

[61] The Appellants also submit that the flights operated in this instance were conducted under the flying farmer exemption pursuant to the *CARs*; indeed, they claim that a validation was not required in this case because the Appellants were operating under subsection 700.02(3) of the *CARs*.

[62] Moreover, the Appellants submit that they were misdirected by the Review Member as to whether or not they were required to prove that the flights occurred under this exemption. They argue that the errors made by the Review Member in this case affected the Appellants' ability to prove their case.

[63] Furthermore, the Appellants submit that the Minister did not establish that the flights occurred outside of 25 miles from the centre of the Appellants' Representative's farm. They submit that the Minister's evidence demonstrates that she was unsure where the centre of the farm was, or how many farms the Appellants' Representative owns.

(9) Oral Arguments

[64] Finally, the Appellants submit that they were denied procedural fairness as a result of not being able to present their arguments orally at the end of the Review Hearing. The Appellants

submit that the Review Member should not have requested written arguments only, and that according to section 17 of the *Transportation Appeal Tribunal of Canada Rules*, SOR/93-346 (*TATC Rules*), written arguments can only be made in addition to, rather than in lieu of oral arguments.

[65] The Appellants submit that the Review Member erred in his interpretation of the *TATC Act*, and in so doing, breached the Appellants' right to a procedurally fair hearing.

[66] Moreover, the Appellants submit that they were prejudiced by not having the opportunity to present oral arguments. The Appellants submit that presenting oral arguments would have been easier for their Representative as the issues of the case would have still have been fresh in the Appellants' Representative's mind at the end of the Review Hearing.

(10) Wrong Party Charged

[67] Although not in the Appellants' Request for Appeal, while at the Appeal Hearing, the Appellants also argued that the Minister erred in charging Farm Air and Lumsden Aero. The Appellants argue that the care, custody and control of the aircraft were with Colhoun Farm rather than the Appellants. They also note that most of the documentation that has been submitted in this case is addressed to Colhoun Farm.

B. Minister of Transport

(1) New SAC

[68] The Minister submits that even if the new SAC presented by the Appellant shows the aircraft in question as an S-2R model, it is nonetheless in the restricted category and subject to clause D(2) on the back of the SAC, which states that no person may operate the aircraft over any foreign country without the special permission of that country.

[69] Moreover, the Minister notes that Type Certificate Data Sheet No. A4SW, Revision 30 shows that both the S2R and S-2R models are included in the restricted category, and as such are subject to the same requirement to obtain permission to operate in a foreign country. As a result, there has been no change in the conditions of operation of the aircraft and it still requires special permission to operate in a foreign country.

[70] The Appellants' aircraft was not issued a standard certificate that would have allowed the Appellants to operate flights over a foreign country without the need for validation. Indeed, the Appellants never applied for a standard airworthiness certificate, and the aircraft was only ever issued a restricted SAC.

[71] Furthermore, the Minister notes that the Appellants produced no evidence to show that the procedures for multiple airworthiness certification as noted in the service letter from Ayres Corporation (A-1) were completed in order to allow the aircraft to hold both a normal and restricted classification simultaneously.

(2) Validation required

[72] The Minister notes that the FAA's operating limitations for the Appellants' restricted aircraft (A-M-1) states that the aircraft may not be operated over any foreign country without the special permission of that country. The new evidence brought on appeal indicates the same at clause D(2) on the reverse of the updated SAC (A-A-2). The Minister submits that the updated SAC (A-A-2) is no different than the SAC submitted at the Review Hearing (Exhibit M-19), as they are both certificates for a restricted aircraft.

[73] The Minister contends that the implementation procedures of the BASA have no effect on the conditions of airworthiness of the aircraft and do not provide the Appellants the authority to operate in Canada. The Minister also argues that the BASA is intended to address the importation of aircraft rather than the operation of aircraft in foreign countries, and the evidence before the Tribunal shows that the aircraft was not imported into Canada.

[74] Furthermore, the Minister submits that the BASA applies to aircraft type designs to be certified by the FAA and Transport Canada for a standard Certificate of Airworthiness and for certain type designs in the restricted category that are not eligible for a standard certificate. The Minister contends that the Appellants' aircraft was eligible for a standard Certificate of Airworthiness, but they did not apply for one. As such, the Appellants' aircraft was operated under a restricted Certificate of Airworthiness without the proper validation.

[75] In summary, the Minister notes that the BASA does not apply in this case because the aircraft at issue is a restricted category aircraft that was not imported into Canada. Indeed, even though the aircraft in question meets the requirements of the BASA, the Appellants did not follow the correct procedure to import it under the BASA, and as such the BASA does not apply in this case.

(3) Production Orders

[76] The Minister submits that the Appellants wanted the Production Orders and affidavits to be entered into evidence to demonstrate the errors they contained in order to test the credibility of a witness, while requesting that the documents produced as a result of the Production Orders be excluded from evidence.

[77] The Review Member found Inspector Gaudry's testimony about the error in the Production Orders to be credible and made no reviewable error on this point. Furthermore, the Minister contends that the Review Member's findings on this point were reasonable and should be given deference.

[78] The Minister notes that the Member does not consider or rely on the Production Orders or the information in the Production Orders in reaching his Determination. While he does consider the invoices from Hanmer Seeds, these were documents that were produced as a result of the Production Orders and were not the Production Orders themselves, or the information they contained.

[79] The Minister also notes that if the Appellants had concerns about the Production Orders, they could have requested to have the Production Orders quashed by an appropriate court.

[80] The Minister submits that no reviewable errors occurred with respect to the Production Orders, the related affidavits, or the exclusion of evidence. Indeed, the Minister submits that the Production Orders and affidavits were entered as desired by the Appellants, and the resulting information was properly admitted and weighed by the Review Member.

[81] The Minister submits that the issues of credibility and weighing of evidence are the proper functions of the Review Member, and that deference is owed to those findings.

(4) U.S. Registration

[82] The Minister notes that the Review Member concluded that it seemed that the aircraft was no longer registered in the U.S. The Minister submits that even if the Review Member was wrong on this point, the Appeal Panel should defer to his findings of fact, because even if the aircraft was registered in the U.S., the flight authority would have needed to be validated prior to flying over a foreign country.

[83] Furthermore, the Minister notes that even though she did not ask the Review Member to make a finding of fact on this issue, the Review Member was not precluded from doing so.

[84] Furthermore, even if the Review Member was in error on this point, the Minister submits that this factual finding is not determinative of the charges, and that the Review Member nevertheless did a full assessment and analysis of the charges at issue. Moreover, the Minister notes that the Review Member's finding on this point did not affect the outcome in this case, since the outcome in either instance would be that there was no valid flight authority in place at the time of the flights.

(5) Estoppel / Legitimate Expectations

[85] The Minister submits that the Review Member made no reviewable error on this issue, and that there was no evidence submitted by the Appellants that could have led the Review Member to conclude that the Appellants had legitimate expectations that the Minister would not charge them in the future.

(6) Disclosure

[86] The Minister submits that the Review Member found in his Determination as well as during a post-hearing application that the undisclosed documents in question in this instance were not relevant, not necessary, and also previously available.

[87] The Minister notes that the Appellants made the same request prior to and during the Review Hearing, as well as on Appeal, without success. Indeed, the Review Member was satisfied with the Minister's disclosure of evidence to the Appellants in this instance.

(7) Flying Farmer Exemption

[88] The Minister submits that the flying farmer exemption was a defence that was open to the Appellants to make, but that the Appellants never raised such a defence. Moreover, the Minister

notes that the Review Member suggested to the Appellants during the Review Hearing that the flying farmer exemption could be a possible defence.

[89] The Minister contends that she did not have to prove that the Appellants were not eligible to an exemption pursuant to subsection 700.02(3) of the *CARs*. The Minister charged Farm Air under subsection 700.02(2) of the *CARs*, and was only required to prove on the balance of probabilities the elements of that provision, which are that the Appellants operated an aircraft to conduct aerial work without an Air Operator Certificate.

(8) Oral Arguments

[90] The Minister argues that both parties agreed to submit written submissions, which indicates that there was a discussion on the issue even though it does not appear in the transcript.

[91] The Minister contends that the intention of section 17 of the *TATC Rules* is to allow each party the opportunity to present their arguments, and that in this instance both parties had the same opportunity to present their arguments in the same format. Moreover, the Appellants were provided six weeks to present their arguments in writing.

[92] The Minister submits that if the Appeal Panel were to decide that there was a breach of procedural fairness in this instance, then the Appeal Panel must also conclude that the breach was cured by the appellate process, as was done in the Tribunal decision of *Sharp Wings Ltd. v. Minister of Transport*, 2012 TATCE 13, TATC file no. P-3698-41 (Appeal).

(9) Care and Control of the Aircraft

[93] In reply to the Appellants' allegation that the wrong party was charged, the Minister notes that the Review Member dealt with this issue in his Determination and that his findings should not be overturned. Indeed, the Minister contends that the Appellants brought no evidence that the care and control of the aircraft had been transferred to Colhoun Farm. Furthermore, the aircraft could not have been in the care and control of Colhoun Farm because it is not a legal entity.

VIII. ANALYSIS

A. Issue 1 – What is the appropriate standard of review?

[94] The first step in reviewing the Determination made by the Review Member is to determine the appropriate standard on which to review the Review Determination. The Supreme Court of Canada determined in *Dunsmuir v. New Brunswick*, 2008 SCC 9 at paragraph 57, that a full standard of review analysis is not necessary if the appropriate standard has previously been established.

[95] In *Billings Family Enterprises Ltd. v. Canada (Minister of Transport)*, 2008 FC 17, the Federal Court addressed the appropriate standard of review applicable to an appeal panel reviewing first level Tribunal decisions. *Billings* established that review members are owed considerable deference with regard to findings of fact and issues of credibility. As such, so long

as a decision on review is within a range of reasonable outcomes based on the evidence that was before the review member, the appeal panel should not interfere.

[96] However, no deference is due to a review member with regard to issues of law (see *Billings,* and *NAV CANADA v. Canada (Minister of Transport)*, 2010 TATCE 28, TATC file no. H-3472-40 (Appeal)). Accordingly, issues of law are to be determined on a standard of correctness.

B. *Issue 2* – Did the Review Member err in finding that the aircraft did not have a valid flight authority?

[97] The updated SAC presented by the Appellants at the Review Hearing describes the aircraft as being an "S-2R" model, rather than the "S2R" model described in the initial SAC. The updated SAC is dated April 23, 1974, the same date that the initial SAC was issued. The Appeal Panel decided to let the Appellants enter this evidence on appeal, understanding that it could determine whether or not the aircraft required validation to fly in Canada.

[98] However, while the model numbers are different on these SACs, other aspects of the SACs remain consistent. Notably, the new SAC is also for a restricted aircraft. In this respect, both SACs are the same. Similarly, both are subject to clause D(2) on the back of each SAC which states that no person may operate the aircraft over a foreign country without the special permission of that country. As such, the Minister contends that the updated SAC is no different than the SAC submitted at the Review Hearing as they are both certificates for restricted aircraft.

[99] While the Appellants have asked the Appeal Panel to look at the model number alone in determining whether a valid flight authority was required for the series of flights undertaken by the Appellants, to do so would be to ignore the fact that the updated SAC is still subject to clause D(2) found on the back of the SAC, which states that no person may operate the aircraft over a foreign country without the special permission of that country. Indeed, both SACs that were before the Appeal Panel were for restricted aircraft. As such, the Appellants required special permission to operate in a foreign country. This permission was not obtained by the Appellants as required.

[100] The Appellants have also argued that they were operating the aircraft pursuant to the BASA. However, the Appeal Panel notes that the aircraft at issue did not meet the implementation procedures of the BASA because it remained U.S. registered. In his Determination, the Review Member found that the BASA was not "germane to the issues before the Tribunal" and as such did not apply. The Appeal Panel finds that the Review Member's findings on this point were reasonable, while recognizing that the Review Member's conclusions as to the limitations on the BASA's application to new aircraft only may have been incorrect.

[101] While the Appellants have attempted to argue that the new evidence before the Tribunal implies that the FAA should have issued a standard Certificate of Airworthiness in this case, the Appeal Panel notes that the Appellants cannot reasonably rely on their belief of what the documents they possess *should* say. Rather, the Appeal Panel is only interested in whether or not the aircraft was operated in accordance with what the aircraft documentation *does* say.

[102] For the above-noted reasons, the Appeal Panel finds that the Review Member was reasonable in finding that the aircraft did not have a valid flight authority at the time of the flights in question.

C. *Issue 3* - Did the Review Member err in considering the evidence obtained as a result of the Production Orders?

[103] The Appellants contend that the Review Member erred in admitting the affidavits signed by Inspector Gaudry that were used to obtain the Production Orders. The Appellants allege that the Production Orders contained a variety of errors, including the names of people Inspector Gaudry had allegedly spoken to and the section of the *Criminal Code* under which he applied for the Production Orders.

[104] Furthermore, the Appellants submit that the Review Member erred in stating that he was dismissing the Production Orders and the information they contained due to a lack of relevance, but then relying on the Hanmer Seeds invoices that were obtained as a result of one of the Production Orders. For these reasons, the Appellants submit that the evidence obtained as a result of the Production Orders should have been excluded from evidence.

[105] The Minister submits that the Appellants' demands are inconsistent, as they wanted the Production Orders and affidavits to be entered into evidence to demonstrate the errors they contained in order to test the credibility of a witness, while nevertheless requesting that the documents produced as a result of the Production Orders be excluded from evidence.

[106] The Minister contends that the Review Member did not rely on the Production Orders or the information contained in the Production Orders in reaching his Determination. While he did consider the invoices from Hanmer Seeds, the Minister notes that these documents were produced as a result of the Production Orders, and were not the Production Orders themselves or the information they contained.

[107] The Minister submits that no reviewable errors occurred with respect to the Production Orders, the related affidavits, or the exclusion of evidence; that the Production Orders and affidavits were entered as desired by the Appellants; and that the resulting information produced was properly admitted and weighed by the Review Member.

[108] The Review Member wrote in his Determination that:

> Mr. Colhoun was repeatedly advised that the issue of one production order and its accompanying affidavits was irrelevant and moot because the Minister's Representative would not use them as evidence to support his case and the Member would not consider them in reaching his Determination. In the other production order, there were explainable and regrettable errors made by Transport Canada in citing the wrong *Criminal Code* sections.

[109] The Appeal Panel notes that the only Production Order and related information to obtain a Production Order at issue in this instance is that entered as Exhibit M-31.

[110] Indeed, the Appellants have raised a concern that the Review Member erred in stating that he did not rely on the Production Orders and the Information to Obtain a Production Order while then relying on the Hanmer Seeds evidence in upholding the charges against Farm Air.

[111] In considering the Production Orders and the Information to Obtain a Production Order, the Review Member found that the errors contained within these documents were "explainable and regrettable", but he found that the errors in these documents were moot because he did not consider this evidence in reaching his Determination.

[112] As noted by the Minister, the Review Member's statement on this point was accurate. Indeed, while he relied on the evidence resulting from the Production Order, he did not rely on the Production Order itself or the information contained therein in making his Determination.

[113] Both parties agree that there were errors with the Production Orders and their supporting documents. The disagreement between the parties on this issue concerns whether the evidence resulting from the faulty Production Orders—specifically the Production Order entered as Exhibit M-31—was properly considered and relied on by the Review Member.

[114] While the Appeal Panel recognizes the errors contained in both the Production Order and related affidavit, the Appeal Panel cannot say that the Review Member erred in his treatment of this evidence. Indeed, although the Appellants have shown that the information contained in Inspector Gaudry's affidavit was incorrect, the Appeal Panel cannot simply speculate as to how a judge would have treated the issue differently had these flaws been made known. Indeed, such a decision is outside of the Tribunal's jurisdiction, and better left to a court of competent jurisdiction.

[115] As such, the Tribunal cannot simply quash the Production Order and deny the admission of documents produced as a result of the Production Order. Given the facts at hand and the jurisdictional limitations on the Tribunal, the Appeal Panel finds that the Review Member followed the right course of action in accepting and considering this evidence, despite the "regrettable errors" it may have contained.

[116] Nevertheless, the Appeal Panel wishes to highlight its concern with the quantity and significance of the errors in these documents. The errors contained in these documents suggest that Transport Canada took a careless and cavalier approach to obtaining these Production Orders and related documents. Accordingly, the Appeal Panel feels that this requires further consideration in the penalty portion of this Decision.

D. Issue 4 - Did the Review Member err in finding that the aircraft was not properly registered in the U.S.?

[117] In his Determination, the Review Member found that because the Certificate of Registration had expired on September 11, 2004, the SAC was automatically cancelled. The Review Member based this finding on his interpretation of the Triennial Aircraft Registration (Exhibit A-22) which updates the FAA aircraft registry files when no registration activity has occurred in the past 36 months. However, in so doing, it seems that the Review Member failed to consider that Exhibit A-22 is an update report based on recent activity. While the Review Member concluded that the lack of activity was an indication that the aircraft remained unregistered, the Appeal Panel finds that the lack of activity indicated the opposite—that the aircraft remained registered. This finding is supported by the evidence before the Appeal Panel. For instance, the FAA Registry N-Number Inquiry Results, dated December 8, 2008

(Exhibit M-21), indicate that the aircraft was registered as a restricted aircraft in the U.S. Moreover, the fact that the Appellants were able to submit an updated SAC also demonstrates that the aircraft was registered in the U.S. on November 20, 2012 (Exhibit A-A-2).

[118] Although the Appeal Panel finds that the Review Member erred in his factual finding on this point, it is nonetheless not fatal to the Determination. Even a properly registered aircraft requires the appropriate validation prior to flying in another country. Moreover, after making his faulty finding on the U.S. registration point, the Review Member nevertheless went on to consider the case on its merits to determine if the contraventions had been proven on the balance of probabilities. It is this analysis that is crucial to the appeal before us.

E. Issue 5 - Was the Minister prevented from laying charges against the Appellants due to estoppel or legitimate expectations?

[119] The Appellants have attempted to argue that the Minister was estopped from laying charges against them due to the Minister's failure to act on this knowledge despite the amount of time that the Minister knew that these flights were being conducted.

[120] The Review Member examined this issue through the consideration of legitimate expectations, that being, whether due to the passage of time without having been charged for such offences, the Appellants had legitimate expectations that they would not later be charged for their actions.

[121] Where legitimate expectations are found to exist, they affect the content of the duty of fairness owed to the individuals affected. The fact that the Minister was aware that the Appellants were operating flights since 2004 and did not take action until 2009 does not result in legitimate expectations for the Appellants that they would not be proceeded against. Furthermore, no representation was ever made by Transport Canada to the Appellants that it was acceptable for them to operate the aircraft in question without special permission. In June 2004, the Minister provided the Appellants with a validation of the SAC to fly in Canada, complete with a list of conditions to be met as well as an expiry date of July 21, 2004 (Exhibit M-24). From there, the Appellants could have imported the aircraft into Canada, leased the aircraft to an air operator under subpart 3 of the *CARs*, or conducted work as a U.S. specialty air service pursuant to the North American Free Trade Agreement. However, the Appellants did not partake of any of these options and continued to fly the aircraft with a restricted SAC provided by the FAA.

[122] The Appellants have not given any convincing reason as to why the Minister's position would be different five years later. It is unreasonable for the Appellants to assume that they are entitled to operate the aircraft without the proper authorization because the Minister did not take action sooner.

[123] The Appeal Panel finds that the Review Member was reasonable in determining that no legitimate expectations existed in this instance.

F. Issue 6 - Were the Appellants unable to make full answer and defence due to inadequate disclosure?

[124] The Appellants have attempted to argue that they were unable to make full answer and defence in this case due to inadequate disclosure. The Minister submits that full disclosure was made, and that the Review Member was satisfied with the Minister's disclosure of evidence.

[125] The Appeal Panel notes that the issue of disclosure was raised prior to, during, and after the Review Hearing, and that the Review Member was satisfied with the disclosure provided to the Appellants in this case. The Appeal Panel notes that this finding is reasonable.

[126] Insofar as the Appellants' concern with disclosure relates to the access to information process, the Appeal Panel notes that the Tribunal has no jurisdiction in issues relating to the access to information process and the timing of requests made under the *Access to Information Act*, R.S.C., 1985, c. A-1.

G. Issue 7 - Did Farm Air conduct the flights in question under the flying farmer exemption?

[127] In this instance, the charges against Farm Air were made under subsection 700.02(2) of the *CARs*. Subsection 700.02(3) provides an exemption to subsection 700.02(2) whereby a person may prove that he or she was operating an aircraft as a flying farmer, therefore providing a defence to a charge under subsection 700.02(2).

[128] As subsection 700.02(3) provides a defence against the charges, it is up to the defendant to prove the existence of the defence by proving the four cumulative conditions listed in subsection 700.02(3).

[129] The Review Member was reasonable in determining that this defence was not proven. Indeed, it is clear that the dispersal of products on July 7, 12 and 17, 2009 occurred outside of 25 miles of the Appellants' Representative's farm, and it is equally as clear that the dispersal of products that took place on July 3, 2009 was for non-agricultural purposes. The Appellant did not bring any evidence to demonstrate otherwise.

[130] The Appellants suggest that they were misdirected by the Review Member as to whether or not they were required to prove that the flights occurred under this exemption, and that the errors made by the Review Member on this point affected the Appellants' ability to prove their case.

[131] However, an examination of the transcript demonstrates that even if there was confusion early on in the Review Hearing as to the flying farmer issue, this issue was clarified by all parties prior to the end of the Review Hearing. For instance, on page 753 of the Review Hearing transcript, Mr. Colhoun is noted as having asked, “so the flying farmer is a defence, correct?” to which the Review Member responded, “I think in this situation it would be”.

[132] In a later discussion of the flying farmer defence found on page 756 of the transcript, Mr. Colhoun asks for clarification as to whose burden it is to prove the elements of the flying

farmer defence. Specifically, he asked, “do I have to say that or do they have to prove it?” The Review Member responded to this question with “no, they don't have to prove it”.

[133] Although any confusion about this possible defence is unfortunate, it is clear to the Appeal Panel that the Appellants' Representative had an understanding of his opportunity to provide this defence prior to the end of the Review Hearing. Furthermore, the Appeal Panel notes that it is not the responsibility of the Review Member to guide the Appellants through making a defence. Despite any confusion that may have occurred on this point, it is clear that the Appellants had the information they required prior to the close of the Review Hearing.

[134] Accordingly, we find that any confusion related to the flying farmer defence in this instance was not fatal to the Determination, and that the Review Member was reasonable in determining that the Appellants did not prove the flying farmer defence pursuant to subsection 700.02(3) of the *CARs*.

H. Issue 8 - Was the Appellants' right to procedural fairness breached as a result of not presenting oral arguments at the Review Hearing?

[135] The Appellants submit that their right to a procedurally fair hearing was breached when they were forced to make written arguments instead of oral arguments at the end of the Review Hearing. The Minister, however, notes that the Appellants were indeed able to make arguments and that no breach of procedural fairness occurred. Moreover, the Minister states that if a breach of procedural fairness did occur, it was cured during the Appeal Hearing.

[136] Because the discussion regarding the provision of written submissions occurred off the record, it is impossible to know whether the decision to provide written submissions in lieu of oral arguments was strongly objected to as stated by the Appellants, or whether the Appellants seemed comfortable with this arrangement, as suggested by the Minister.

[137] There is little doubt that the best practice in this instance would have been to have oral arguments as planned and supplement these oral arguments with written submissions, as contemplated in Rule 17 of the *TATC Rules*. However, changing procedural aspects of a Review Hearing does not automatically result in a breach of procedural fairness. The Appeal Panel is inclined to agree with the Minister's argument that the right at issue is the right to make arguments. In this case, both parties had the opportunity to make arguments in the same fashion. Furthermore, the Appellant was given ample time to provide these arguments to the Tribunal.

[138] While it is unfortunate that the Appellants did not have the opportunity to provide oral arguments as they would have preferred, the Appeal Panel cannot say that the entire Review Hearing was procedurally unfair as a result of this omission. As noted, both parties had an equal opportunity to provide arguments, and were provided ample time to do so. Since both parties had the opportunity to have their arguments fully considered by the Review Member, the Appeal Panel finds that no breach of procedural fairness occurred in this instance.

[139] However, if the Appeal Panel is wrong and this omission did result in a breach of procedural fairness, the Appeal Panel finds that this breach was cured on appeal. Indeed, the alleged error that occurred at the Review Hearing was minor and had no apparent prejudicial effect on the Appellants. Moreover, the Appellants were provided great latitude in terms of the

arguments they were able to address on appeal, and were also provided the rare opportunity to present new evidence on appeal.

I. Issue 9 - Did the Minister proceed against the wrong parties?

[140] The Appellants allege that the Minister proceeded against the wrong parties in this case, and should have instead proceeded against Colhoun Farm.

[141] This issue was also raised by the Appellants at the Review Hearing and dealt with by the Review Member in his Determination. The Appeal Panel believes that the Review Member addressed this issue reasonably, noting thatColhoun Farm is not a legal entity and finding that the Minister made no error in proceeding against the Appellants in this case.

[142] Moreover, while the Appellants have attempted to rely on an alleged aircraft lease between Colhoun Farm and Skynorth Aviation Ltd., the Appeal Panel accepts the Minister's argument that the lease was invalid because Colhoun Farm is not a legal entity. Moreover, the lease was signed on the date of expiration and was not registered with Transport Canada.

J. Issue 10 – Were the penalties appropriate?

[143] The penalties issued against the Appellants in this instance are the maximum available penalties pursuant to Schedule II to Part I of the *CARs*. As such, any change in the penalties in this instance would be to lower the penalties as a result of mitigating factors. With this in mind, the Appeal Panel has determined that the carelessness on the part of the Minister in obtaining the Production Orders and the resulting evidence should be considered as a mitigating factor affecting the penalties in this instance.

[144] The Appeal Panel notes that the Minister holds the flying public to a high standard, requiring that those who fly aircraft adhere strictly to the *CARs* and other relevant legislation. In this instance, however, Transport Canada did not live up to a similarly high standard in conducting its investigatory and preparatory work.

[145] The Appellants' Representative contends that he was negatively impacted by the errors contained in the Production Orders and the Information to Obtain a Production Order. Indeed, the Appellants' Representative states that he has lost business as well as a good rapport with people in his community who now mistakenly believe that he is being investigated for serious criminal activity because of these errors.

[146] The Appeal Panel finds that the negative financial and personal impacts experienced by the Appellants as a result of these errors should be reflected in the penalties assigned to them. The Appeal Panel notes that two counts against each Appellant rely solely on the Hanmer Seeds evidence as proof of the contraventions. While the Appeal Panel acknowledges the validity of this evidence, it nonetheless finds that the penalty attached to these occurrences should be altered to reflect the negative repercussions already experienced by the Appellants as a result of obtaining this evidence. As such, the Appeal Panel finds that the charges against Farm Air and Lumsden Aero dated July 7 and 12, 2009 should be lowered to $50 per count.

[147] It is hoped that this lowered penalty will compensate to some degree for the negative impacts experienced by the Appellants because of the errors made in this instance. Furthermore, it is the Appeal Panel's hope that this reduction in penalty will encourage the Minister to take every precaution to avoid making similar errors in the future.

IX. DECISIONS

A. Farm Air Ltd.

[148] The Appeal is dismissed. The charges against Farm Air Ltd. are upheld. However, the $5 000 penalties levied against Farm Air Ltd. for Counts 1 and 2 are each reduced to $50, and the $5 000 penalties for Counts 3 and 4 are each maintained. As such, the total penalty owing is reduced from $20 000 to $10 100.

B. Lumsden Aero Ltd.

[149] The Appeal is dismissed. The charges against Lumsden Aero Ltd. are upheld. The $5 000 penalty for each count is upheld, except for Counts 2 and 3, the penalties for which are reduced to $50 per count. As such, the total penalty owing is reduced from $35 000 to $25 100.

September 17, 2013

(Original signed)

Reasons for the Appeal Decision: J. Richard W. Hall, Chairperson

Concurred by: Suzanne Racine, Member

Arnold Olson, Member