

CANADA / JUDGMENT

Sierra Fox Inc. v. Canada (Transport)

2007 FC 129

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Ottawa, Ontario, February 06, 2007

PRESENT: The Honourable Mr. Justice Martineau

BETWEEN:

SIERRA FOX INC.

Applicant

and

FEDERAL MINISTER OF TRANSPORT

Respondent

REASONS FOR ORDER AND ORDER

- [1] The applicant Sierra Fox Inc. operates a flight training school at Muskoka Airport and is the registered owner of a Piper PA-28-140 (C-FYTC) (the aircraft or YTC) used for flight training. The Minister of Transport (the Minister) is the respondent to this judicial review proceeding.
- [2] The applicant challenges the legality of a Minister's decision rendered on July 4, 2005 (the impugned decision) after the Transportation Appeal Tribunal of Canada (the Tribunal) had ordered the Minister to reconsider its earlier decision of October 31, 2003 suspending the certificate of airworthiness of YTC (the suspension decision). Both decisions were made under the Aeronautics Act, R.S.C. 1985, c. A-2, as amended (the Act).
- [3] Essentially, the applicant submits that the impugned decision, which upheld the suspension decision, should be set aside and the matter referred back for reconsideration on the ground that the respondent failed to observe a principle of natural justice, procedural fairness and other procedure that it was required by law to observe. The respondent submits on the contrary that all procedures set out in the Act were followed and that there has been no breach whatsoever of a principle of natural justice or procedural fairness.
- [4] For the following reasons, I have come to the conclusion that procedural fairness has been breached by the respondent and that the present application should be allowed.

I - LEGAL FRAMEWORK

- [5] The existence of the duty to act fairly is flexible, variable and depends on a variety of circumstances (Knight v. Indian Head School Division No. 19, [1990] 1 S.C.R. 653). The nature of the decision being made and the process followed in making it, the nature of the statutory scheme, the importance of a decision to the person affected and his legitimate expectations are relevant to determining what is required by the duty of fairness in a given set of circumstances (Baker v. Canada (Minister of Citizenship and Immigration), [1999] 2 S.C.R. 817 at paras. 21-28; Kiss v. Canada (Minister of Transport), [1999] F.C.J. No. 1187 at para. 22; Air Nunavut Ltd v. Canada (Minister of Transport)(T.D.), [2001] 1 F.C. 138 at para. 51). But this list is not exhaustive and other factors may also be relevant in this analysis. As stated by Justice L'Heureux Dubé in Baker, above, at para. 22, "the purpose of the participatory rights contained within the duty of procedural fairness is to ensure that administrative decisions are made using a fair and open procedure, appropriate to the decision being made and its statutory, institutional, and social context, with an opportunity for those affected by the decision to put forward their views and evidence fully and have them considered by the

decision-maker”.

- [6] The Minister bears a heavy responsibility towards the public to ensure that aircraft and air carrier operations are conducted safely. This is especially so for Transport Canada inspectors who are in practice charged with the duty of maintaining safety (*Aztec Aviation Consulting Ltd. v. Canada*, (1990) 33 F.T.R. 210 at para. 6 (T.D.); *Swanson v. Canada (Minister of Transport)*(C.A.), [1992] 1 F.C. 408 at 414 and 424-426 (F.C.A.)). The direct responsibility of the Minister to ensure public safety is to be *inter alia* found in the issuance of the certificate of airworthiness of the aircraft itself, which is subject to the operations specifications and conditions expressed therein. Among these there is the general requirement that the document holder comply with the provisions of the Act and of the Canadian Aviation Regulations, SOR/96-433 (the CARs).
- [7] Under the current statutory scheme, ministerial action in the form of a suspension of document and/or the imposition of a monetary penalty may follow an audit or administrative inquiry conducted by an inspector or other official of Transport Canada. In the case at bar, the suspension decision was made under paragraph 7.1(1)(b) of the Act, which authorises the Minister to suspend, cancel, or refuse to renew an 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...
- [8] It is not contested that the Minister must always act in good faith and has the burden to justify the reasonableness of any action taken against a document holder under the Act. In this regard, the Minister cannot act arbitrarily and in the absence of evidence. However, the Act does not formally require that the document holder be heard prior to the taking of a suspension decision by the Minister. It simply requires that a notice of the decision taken accordingly by the Minister be sent to the person before the decision comes into effect (see subsections 6.71 (2), 6.9 (2), 7 (2), 7.1 (2), 7.21 (2) and 7.7 (2) of the Act). The legality of the Minister’s decision, including the sufficiency of the notice, may in turn be examined by this Court once the document holder has exhausted its right to have the matter reviewed in first instance and in appeal by the Tribunal (*Aztec Aviation Consulting Ltd.*, above, at paras. 17 and 18; *Aviation Québec Labrador Ltée v. Canada (Minister of Transport)* (1998), 157 F.T.R. 24 at paras. 11-13 (F.C.T.D.)).
- [9] Established by section 2 of the Transportation Appeal Tribunal of Canada Act, S.C. 2001, c. 29 (the TATC Act), the Tribunal replaces the Civil Aviation Tribunal previously created under Part IV of the Act and has an extended jurisdiction in respect of reviews and appeals made under other federal legislations pertaining to the marine and railway sectors. The Tribunal is a quasi-judicial tribunal composed of full-time or part-time members appointed by the Governor in Council who collectively have expertise in the multi-modal transportation sectors in respect of which the federal government has jurisdiction (sections 3 and 4 of the

TATC Act). The procedure before the Tribunal is adversarial. The Minister and the holder of the document (or the owner or operator affected by the decision) will have an opportunity, consistent with procedural fairness and natural justice, to present evidence and make representations in relation to the decision under review (subsections 6.9(7), 7(6) and 7.1(6) of the Act).

- [10] In any proceeding before the Tribunal, a party that has the burden of proof discharges it by proof on the balance of probabilities, but the Tribunal is not bound by any legal or technical rules of evidence, except that it shall not receive or accept as evidence anything that would be inadmissible in a court by reason of any privilege under the law of evidence (subsections 15 (1), (2) and (5) of the TATC Act). While informal, proceedings before the Tribunal closely resemble those followed in the courts. Hearings are normally held in public and a party to a proceeding before the Tribunal may appear in person or be represented by another person, including legal counsel (subsections 15(3) and (4) of the TATC Act). Witnesses are sworn in and may be compelled to answer questions and produce documents. Indeed, the Tribunal, and each of its members, has all the powers of a commissioner under Part I of the Inquiries Act, R.S.C. 1985, c. I-11 (section 16 of the TATC Act). Proceedings before the Tribunal shall be recorded, and the record shall show all evidence taken and all determinations, decisions and findings made in respect of the proceedings (section 20 of the TATC Act).
- [11] If the document holder is unsatisfied by the decision rendered by the member of the Tribunal, a right of appeal exists before an appeal panel composed of three members of the Tribunal (subsection 7.2 (1) of the Act). The current statutory scheme also grants a right of appeal to the Minister in cases where the member may determine the matter by confirming the Minister's decision or by substituting his or her own determination (paragraph 7.2 (1)(b) of the Act, which refers to a determination made under subsection 6.9 (8) or paragraph 7 (7) (b) of the Act). An appeal shall be on the merits based on the record of the proceedings before the member from whose determination the appeal is taken, but the appeal panel shall allow oral argument and, if it considers it necessary for the purposes of the appeal, shall hear evidence not previously available. Moreover, both the member who conducts a review and the appeal panel are compelled to provide reasons (section 17 of the TATC Act).
- [12] In the case at bar, a single member of the Tribunal confirmed the validity of the suspension decision taken under section 7.1 of the Act. Section 7.2 of the Act delineates the jurisdiction of the appeal panel of the Tribunal in such a case. Under paragraph 7.2 (3)(a) of the Act, the appeal panel may either dismiss the appeal or refer the matter back to the Minister for reconsideration. That being said, section 21 of the TATC Act provides that "[a] decision of an appeal panel of the Tribunal is final and binding on the parties to the appeal". This gives legal recognition to the binding character of any final determination made by the Tribunal, unless same is judicially reviewed by this Court under sections 18 and 18.1 of the Federal Courts Act, R.S.C. 1985, c. F-7, as amended. In the case at bar, an appeal panel of the Tribunal overturned the decision made by a single member and referred the matter of suspension back to the respondent for reconsideration.

- [13] In the event a matter is referred back to the minister for reconsideration, the Act currently provides that the decision of the Minister remains in effect until the reconsideration is concluded, subject to the granting of a stay by the Tribunal. Nothing further is provided in the Act with respect to the process and particular manner the Minister will reconsider a former decision. Respondent's counsel has submitted in this regard that the basic policy and process followed by the Minister on a reconsideration is still the one previously set out in Civil Aviation Directive (CAD) No. 34 – Reconsideration of Civil Aviation Tribunal Decision (CAD 34), which generally provides that “reconsideration of suspensions or cancellations of Canadian aviation documents must be conducted in a manner that ensures fairness and transparency”.
- [14] Both the impugned decision and the CAD 34 upon which the respondent relies in this case refer to former subsection 7.1(9) of the Act. The latter provision provides that where a matter of suspension or cancellation or refusal to renew an aviation document is referred back to the Minister, the suspension or cancellation shall cease to be of any force or effect until the Minister decides otherwise as a consequence of the reconsideration. However, this provision has been repealed by section 37 of the TATC Act. Be that as it may, in *Aztec Aviation Consulting Ltd*, above, this Court indicated that “should the Minister not agree with [the Civil Aviation Tribunal] decision, he must reconsider the matter and decide the question again. In doing so, he would of course be under a legal obligation to take into account all of the evidence, representations and findings of the review proceedings during which the plaintiff will have had a full opportunity to be heard and to present evidence” [emphasis added].
- [15] That being said, CAD 34 provides that the “responsible authority”, here the Minister's designated delegate, shall appoint a “team” of at least three people having the appropriate expertise to review the case. It is not clear in reading CAD 34 whether or not the “team” or the “responsible authority” may consider documentary evidence that was not previously submitted to the Tribunal or receive the unsworn declarations of persons who did not previously testify before the Tribunal. Questioned at the hearing by the Court in this regard, respondent's counsel answered in the affirmative. This would allow for the presentation of evidence not previously submitted by the applicant who could also ask to be heard in person. It would also permit the presentation of additional hearsay evidence that the “team” or the “responsible authority” has obtained on their own from persons who did not testify before the Tribunal or that comes from documents gathered after the Tribunal's final decision to refer the matter back to the Minister. This issue involves procedural fairness. The applicant submits in this regard that the respondent cannot accept uncorroborated hearsay evidence. CAD 34 also provides that the team shall prepare a report setting out the factors that the team considered, the conclusions it reached and the recommendation the team is making to the responsible authority. The responsible authority shall review the team report and either accept or reject the team's recommendation. CAD 34 provides that the responsible authority shall prepare a letter that sets out the Minister's decision and that explains the reasons for the decision and the factors taken into consideration in coming to

the conclusion. In the event that the responsible authority rejects the recommendation of the team, the responsible authority must document the reasons for rejection.

II- CONTEXTUAL ANALYSIS

[16] It is not possible to dispose of the complex issues of natural justice and procedural fairness raised in this case without first examining in detail the process that has led to the suspension decision, the review determinations and the final decisions of the Tribunal, as well as to the impugned decision following the reconsideration of the matter by the Minister.

A) Suspension decision and penalties assessment

[17] In the case at bar, during a routine maintenance audit of the applicant, Mr. Ross Jackson, a Transport Canada inspector, noticed that YTC seemed to have a low air time for a flight training aircraft. He and one of his colleagues, Mr. Mark Dixon, another inspector, compared the number of flights listed in the aircraft journey log book (the log book) to the Daily Air Traffic Records (DATRs) for the Muskoka Airport.

[18] The aircraft journey log book (the log book) is a document that is required by the Act to be kept for an aircraft in which, among other items, the actual air times flown are to be recorded. In particular, section 605.94 of the CARs provides that the total air time (TAT) for each flight shall be recorded in the log book in accordance with the particulars set out in columns I, II and III of the corresponding item in schedule I. Indeed, a person who wilfully omits to record a flight in the log book is guilty of an indictable offence or an offence punishable on summary conviction by a court of competent criminal jurisdiction (paragraph 7.3(1)(c) and 7.3(2) of the Act). That being said, section 28 of the Act further provides that in any action or proceeding under the Act, an entry in any record required to be kept under the Act “is, in the absence of evidence to the contrary, proof of the matters stated therein as against the person who made the entry or was required to keep the record...”

[19] The DATRs are written records of local air traffic movements for a particular airport that are used by NAV CANADA and Statistics Canada. In the case at bar, the DATRs had recorded aircraft movements for the aircraft that were not listed in the log book. A further investigation ensued. The two inspectors then compared the entries in the log book to the Muskoka DATRs for the period between August 1 and September 30, 2003. They observed that there were a number of discrepancies between the two records, which led them to conclude that YTC had flown on numerous occasions but that the flight times had not been recorded in the log book. As a result, the certificate of airworthiness (the document) of YTC was suspended on October 31, 2003.

[20] The notice of suspension signed on behalf of the Minister by Mr. Jackson, stated in part:

Pursuant to section 7.1 (1)(b) of the Aeronautics Act, the Minister of Transport has decided to suspend the Certificate of Airworthiness, the Special Certificate of Airworthiness or the Flight Permit in respect of the above aircraft on the ground that the aircraft does not comply with conditions subject to which the document was issued for the following reasons:

The aircraft had not been maintained in accordance with the approved maintenance schedule as required by CAR 605.86 (1)(b). It was noted that flights had been conducted and not recorded in the Aircraft Journey Log Book. These discrepancies have rendered the calculation of Total Air Time inaccurate.

- [21] Succinctly put, paragraph 605.86 (1)(b) of the CARs, which is specifically mentioned in the notice dated October 31, 2003, provides that the person who has legal care and control of an aircraft cannot permit the take-off of the aircraft if it has not been maintained in accordance with the individual maintenance plan as detailed in the Small Operator Maintenance Control Manual (the manual). The maintenance plan as approved by the Minister is compulsory and the only variations permitted are those specifically authorized by the Minister.
- [22] From the point of view of the document holder, owner or operator, the suspension, cancellation or refusal by the Minister to renew a certificate of airworthiness has a great importance and is likely to cause severe financial hardship. In this case the applicant's ability to carry on business has been severely affected. On or around November 3, 2003, the applicant requested that the respondent reinstate the document and alleged that he was not aware that he had forgotten to enter flights in the log book. Therefore, the applicant asked the Minister to provide details of those flights so that the applicant's representative could make the required corrections immediately in the log book. Moreover, the applicant also served and filed with the Tribunal a request for review of the suspension decision (TACT File No. O-2988-10). Since the issuance of the notice of suspension on October 31, 2003, the suspension has remained in effect and the Minister has refused to reinstate the document.
- [23] Before the Tribunal had an occasion to review the legality of the suspension decision, on or around March 22, 2004, pursuant to section 7.7 of the Act, the Minister decided to assess monetary penalties totalling \$1,750.00 against the applicant (the assessment decision). First, the Minister alleged that the applicant had contravened subsection 605.86 (1) of the CARs, in that between August 1 and September 30, 2003 (the period in question), the applicant had permitted take-offs to be conducted in YTC when the aircraft had not been maintained in accordance with its approved maintenance schedule; flights conducted but not recorded caused the calculation of the cumulative air time or TAT of the aircraft to be inaccurate. Penalty was assessed at \$1,250.00 (the first charge). Second, the Minister alleged that during the period in question the applicant had operated YTC on several flights at or near Muskoka and had failed to record the TAT in the log book in accordance with the particulars set out in the regulations, thereby violating subsection 605.94 (1) of the CARs. Penalty was assessed at \$500.00 (the second charge). The applicant challenged the legality of the assessment decision and filed a request for review with the Tribunal (TACT File No. O-2997-41).

- [24] Prior to the matter being heard by the Tribunal, the applicant offered to do a one thousand hour inspection on YTC in order to satisfy the respondent's concerns, if any, about the safety of the aircraft. This offer was dismissed by the respondent.

B) Review determinations by the Tribunal

- [25] The requests for review made by the applicant (TACT Files Nos. O-2988-10 and O-2997-41) were heard by a single member of the Tribunal, Mr. James E. Lockyer, on June 16 and July 14, 2004. Both files were decided on common evidence and oral submissions by the parties.
- [26] At the opening of the hearing, the single member took the position that the Minister had to prove, on a balance of probabilities, that the applicant had contravened the Act and the CARs. He also indicated that the applicant had the right to present evidence, cross-examine the respondent's witnesses and make submissions at the end of the proceedings. The single member also characterized the charges in question, which refer to violations of section 605.86 and 605.94 of the CARs, as "strict liability offences". The single member stated that it was entirely within the applicant's right not to adduce evidence. Indeed, no adverse inference would be drawn if the respondent was unable to prove the facts upon which each allegation or infringement was based. (Subsection 7.7(1) of the Act expressly requires that the Minister have "reasonable grounds [to believe] that a person has contravened a designated provision" while subsections 7.91(4) and (5) of the Act further provide that the burden of establishing that a person has contravened a designated provision is on the Minister and that a person who is alleged to have contravened a designated provision is not required, and shall not be compelled, to give any evidence or testimony in the matter).
- [27] However, the single member explained that "once the Minister establishes the elements of [each] offence the burden shifts to the Document Holder to show all due diligence as to why the activity, if it is in fact proved, should not fall within the contravention" (Tribunal's hearing transcript, June 16, 2004, applicant's record at pages 28-29). Asked by applicant's counsel to clarify what this actually meant with respect to the suspension decision (which as mentioned above was taken pursuant to paragraph 7.1(1)(b) of the Act), the single member stated that "if, in fact, the offence is not proved, then the suspension is nullified effectively" (Ibid. at page 29). Whether the single member was right or wrong in making this ruling of law is not at issue in this proceeding, but there was certainly a legitimate expectation that the validity of the suspension would be contingent upon a Tribunal's finding that the applicant had indeed committed the offences in question. It is on these fundamental premises that the hearing was conducted and that the parties presented their evidence and made their submissions to the Tribunal.
- [28] The case presenting officer for the respondent called Mr. Jackson, the investigator who had issued the notice of suspension as well as Mr. Dixon, the other inspector from Transport Canada who had reviewed the DATRs for the Muskoka Airport for August and September 2003. As I already indicated earlier, their conclusion was that YTC had flown more air time than was identified in the aircraft's log book. As a result of this finding, Mr. Dixon forwarded

the file to Mr. David Bland, acting regional manager, aviation enforcement for the Ontario region of Transport Canada. The respondent also called Ms. Tracy Kirkhus who was the NAV CANADA site manager for the Toronto flight service station (FSS) housed in the Buttonville Airport Terminal Building located in Markham, Ontario. The Buttonville Nav Canada facility using the remote aerodrome advisory service (RAAS) system was responsible for monitoring all aircraft movements at Muskoka Airport, and recording these movements on the DATRs. She explained that Muskoka Airport did not have a control tower with a NAV CANADA flight service specialist onsite but that its air traffic and aviation weather advisory service was provided remotely by the Toronto FSS at Buttonville through the RAAS system. A NAV CANADA flight service specialist at Buttonville would monitor the Muskoka Airport radar screen and respond to all calls from an aircraft approaching for landing, and all calls from an aircraft about to enter the manoeuvring area (taxiways, runways, etc.) of the airport prior to the departure. All aircraft movements identified as a result of the radio call would be registered on the Muskoka Airport DATR by the flight service specialist. She indicated there were occasional discrepancies in the DATRs caused by workload or other operational considerations. She explained that the DATR top sheet was sent by NAV CANADA to Transport Canada. After 30 days, the top sheet was destroyed. The second sheet went to the airport manager and the third went to Statistics Canada. She indicated that the DATR sheets produced in this case by the respondent (Exhibits M-1 and M-2) did not appear to have been altered in any material way. The respondent also called Mr. Steve Faulkner, the Muskoka Airport manager. He testified that he would receive fax copies of the DATRs from NAV CANADA on a daily basis. He retained the original copies and brought them to the hearing. He compared the originals with the photocopies of the DATRs admitted into evidence as Exhibits M-1 and M-2 and found no difference in data. Mr. Randy Miller, a Transport Canada Civil aviation inspector and a certified aircraft maintenance engineer (AME) also testified for the respondent. He stated that he found 34 entries for YTC in the DATR of the Muskoka Airport for August and September 2003 for which there were no corresponding entries in the log book of the aircraft. He testified that while accurate computation of flight times or air times from the DATRs is not possible, he suggested that the cumulative air time not recorded in the log book could total in this case to 20 or more hours. He exchanged correspondence with the applicant's representative, Mr. Sandro Ferrari, and subsequently met with him. He said that Mr. Ferrari indicated the log book was correct and that the DATRs contained inaccuracies and were therefore unreliable. Indeed, counsel for applicant, during cross-examination of Mr. Miller, pursued the notion that significant inaccuracies were contained in the DATRs. He pointed to five examples as justification for the premise that DATRs were unreliable and could not be used to substantiate the allegations of the respondent.

[29] Mr. Ferrari did not testify at the hearing. That being said, the applicant called one witness, Mr. Claude Radley. In his testimony, he seriously questioned the reliability of the DATRs. Mr. Radley had been a flight service specialist since 1970 and had worked at the Muskoka FSS for 18 years. He had filled out thousands of DATRs; they were always a low priority item. He explained that the initial information received from the pilot was put on air traffic control

(ATC) “strips” and then transferred to the DATRs when time permitted. His testimony was that the accuracy of the DATRs was “questionable at best”. He testified they were often subject to “padding”. He explained “padding” as being false or erroneous entries in the DATRs made by a flight service specialist to inflate workload. This was done to justify his or her position in order to maintain staffing levels and keep their job. He cited the St. Catharines Airport as an example where this practice had taken place. He also said padding took place at the Muskoka Airport FSS while he worked there until 1996 when it was closed and the service transferred to Buttonville. He pointed out that the DATR for Muskoka Airport for September 6, 2003 identified 56 aircraft movements with the comment, “if they actually occurred this is incredible”. He surmised this was evidence of padding. However, in cross-examination, Mr. Radley stated that he had never padded any DATRs over his 34 years of service. He said he was not working at Buttonville during the period of August to September 2003. He also said that he had no knowledge that any of the entries identified in Exhibits M-1 and M-2 were padded.

- [30] Both review determinations and accompanying common reasons were issued by the Tribunal on August 27, 2004 (the review determinations). First, the Tribunal found that the applicant had contravened subsections 605.86 (1) and 605.94 (1) of the CARs and upheld the monetary penalties assessed by the Minister (TACT File No. O-2997-41). Second, in view of the former determination, the Tribunal confirmed the suspension of the document (TACT File No. O-2988-10).
- [31] In his decision, the single member took a rather straightforward approach in defining the sole issue in this case as being simply “whether there were flights conducted in aircraft C-FYTC between August 1, 2003 and September 30, 2003 which were not entered in the aircraft’s journey log book”. Indeed, he noted that the principal evidence with respect to the allegation in question was “documentary and contradictory”. Therefore, it boiled down to deciding which of the two documents was credible: the DATRs for Muskoka Airport, which indicate YTC made numerous flights during August and September 2003 that were not recorded in the log book, or the log book of the aircraft, which does not show the alleged flights being made. In this regard, the single member was plainly aware that in this instance there were “no eye witnesses of the flights or corroborative evidence to support either document”.
- [32] In his decision, the single member stressed that the applicant’s case was centred on the premise that the DATRs being relied on by the Minister for the period in question were not “accurate, reliable or credible”. Consequently, it was the applicant’s position that the DATRs should not be admitted in evidence because such hearsay evidence would infringe procedural fairness and natural justice. I pause to mention here that all the witnesses agreed that DATRs cannot be used to determine air times and accordingly, the single member accepted that “for the purposes of these matters, air time and therefore TAT cannot be accurately determined from analysis of the DATRs”. In this regard, the single member recognized that the log book is the only record that totals the amount of time the aircraft is

in the air and determines when the required maintenance as set out in the manual must be performed by the document holder.

[33] However, the single member decided that the DATRs (certified copies of the original copies of same) may be admitted into evidence and used for enforcement purposes without corroboration. Indeed, he accepted that the DATRs were admissible in this case notwithstanding the document holder's concerns regarding hearsay: "In view of the fact the document holder has had every opportunity to address and deal with the exhibits and viva voce evidence presented in this case, I am satisfied the admissibility of the DATRs does not infringe on procedural fairness or natural justice". The single member also noted that Mr. Radley's testimony raised the issue of whether any of the entries in the DATRs for August and September 2003 were falsified. However, he noted that there was no evidence from Mr. Radley or anyone else, that any entries in Exhibits M-1 and M-2 were actually the subject of padding or falsification. Accordingly, he found as a fact that they were not padded or falsified.

[34] The crux of the determinations made by the single member with respect to the two ministerial decisions under review was set down in the following key findings:

I have, for the reasons indicated, admitted the DATRs into evidence. Counsel for the document holder did not contest or cross-examine any witnesses in relation to the 34 tabbed entries in Exhibits M-1 and M-2 alleged by the Minister to be flights of aircraft C-FYTC. Their value as to the 34 tabbed entries has not been impeached. Other than the journey log book, there was no corroborative evidence introduced by the document holder to show those flights were not conducted or to call that information into question. The document holder has not provided any evidence of due diligence or the applicability of any exceptions or defences as provided for in section 8.5 of the Aeronautics Act.

I conclude on the evidence before me that the flights identified in the DATRs, as conducted in aircraft C-FYTC, did take place. I also conclude there were no corresponding entries recorded in the journey log book for the 34 flights tabbed in Exhibits M-1 and M-2. I therefore find that Sierra Fox Inc. violated subsection 605.94(1) of the CARs on 34 occasions. I also find that Sierra Fox Inc. violated paragraph 605.86(1)(b) of the CARs in that it allowed aircraft C-FYTC to be flown when the aircraft had not been maintained in accordance with its approved maintenance schedule.

I therefore find the Notice of Suspension of the certificate of airworthiness of aircraft C-FYTC and the Notice of Assessment of Monetary Penalty under paragraph 7.1(1)(b) and section 7.7 of the Aeronautics Act, respectively, were appropriate measures in the circumstances [emphasis added].

[35] The applicant appealed both review determinations.

C) Final decisions of the Tribunal

- [36] The two appeals lodged by the applicant were heard together on January 21, 2005 by a three-member panel of the Tribunal composed of Mr. Allister Ogilvie, vice-chairperson and Mr. William H. Fellows and Mr. Frank Morgan, members (the appeal panel). The appeal panel did not hear witnesses or accept new documentary evidence. However, both parties provided extensive arguments on the issues of law and procedural fairness raised in the proceeding. The appeals centered on questions of admissibility and reliability of the respondent's hearsay evidence. The Tribunal allowed the appeals in both files on March 31, 2005.
- [37] While the appeal panel agreed that the DATRs may be admitted into evidence and used for enforcement purposes, it found that it was an error of law to accept uncorroborated hearsay evidence as the sole source of evidence to uphold an allegation of contravention. I pause to mention that the main allegation made in the notice of suspension is that "[t]he aircraft had not been maintained in accordance with the approved maintenance schedule as required by CAR 605.86 (1)(b)". This allegation is based on the assumption made by the inspectors, based on the DATRs, that during the period in question some "flights had been conducted and not recorded in the Aircraft Journey Log Book".
- [38] Coming back to the final decision of the Tribunal, the appeal panel acknowledged that the Tribunal was relieved of the legal and technical rules of evidence by the operation of section 15 of the TATC Act. However, it added: "Being relieved of the legal and technical rules of evidence does not mean that no rules apply." In the case at bar, the appeal panel found that Exhibits M-1 and M-2, the DATRs, were "hearsay" as they consist of written statements made by persons otherwise than in testimony at the proceeding in which they are offered as proof of the truth of their contents: John Sopinka, Sidney N. Lederman and Alan W. Bryant, *The Law of Evidence in Canada* (Toronto: Butterworths, 1992) at 156. That being said, the appeal panel also found that such hearsay evidence was relevant because, if true, it would go to establishing the factual basis upon which the contravention could be found: "But not all relevant evidence is of equal probative value".
- [39] I note that the inspectors of Transport Canada had no actual or direct proof that the aircraft had not been maintained in accordance with the individual maintenance plan. Here, the DATRs were used by the inspectors to justify the legality of both the suspension decision and the assessment decision made by the Minister. There is no evidence on the record that physical inspection of the aircraft was conducted on site by Mr. Jackson and Mr. Dixon, the two inspectors who testified during the review determination before Mr. Lockyer. Upon review of the applicable jurisprudence, the appeal panel noted that only the Pizzardi case (*Minister of Transport v. Richard Pizzardi and Donald Doyle*, [1996] CAT File No. O-0494-37) "accepted hearsay alone as being sufficient proof of an alleged contravention, but no reasons for such acceptance was provided". Indeed, according to the appeal panel "[m]ost of the jurisprudence found that hearsay, by itself, was not sufficient proof of an alleged offence and some reasoning was provided". In its analysis of the jurisprudence, the appeal referred

to a number of cases decided after the Pizzardi case that supported its conclusion: Minister of Transport v. James Jeffrey Rowan, [1997] CAT File No. A-1500-33; Minister of Transport v. 641296 Ontario (North East Air Services), [1997] CAT File No. O-1342-37; Minister of Transport v. Paul George Daoust, [1999] CAT File No. C-1697-33; Minister of Transport v. Centre École de Parachutisme Para-Nord Inc., [2001] CAT File No. Q-2150-37; William R. Long v. Minister of Transport, [2004] CAT File No. O-2824-02 (appeal).

- [40] The appeal panel also found that accepting hearsay evidence as the sole source of evidence to uphold an alleged contravention would be contrary to the tenets of fairness and natural justice that the Tribunal was bound to respect. The appeal panel noted that section 15 of the TATC Act specifically provides that matters shall be dealt with by the Tribunal as informally and expeditiously as the circumstances and considerations of fairness and natural justice permit, while section 16 of the TATC Act provides that the Tribunal has the powers of commissioners under Part I of the Inquiries Act, which in turn gives members the power to summon witnesses and to require them to give evidence under oath and affirmation: “As the DATR exhibits are hearsay in nature the truth of their contents cannot be given by a witness under oath or affirmation. The document holder is deprived of his right under natural justice to cross-examine anyone on the truth of their contents”. Accordingly, the appeal panel found that when the evidence is documentary and contradictory, corroborative evidence is required. The appeal panel further noted that while the Minister did not introduce corroborative evidence, this did not mean that such corroborative evidence did not exist. The appeal panel pointed to the fact that during the audit of the flight school operated by the applicant, the inspectors would have had access to many records kept by the school. Student pilots could have been “potential eyewitnesses” and “[e]ven student pilots are required by regulation to keep log books, perhaps another source of corroborative evidence.” The appeal panel also indicated that the jurisprudence reveals other sources of possible corroborative evidence such as fuel receipts to prove that the aircraft had actually flown at the dates indicated in the DATRs.
- [41] Therefore, it turned out in this case that the Minister had simply failed to demonstrate to the satisfaction of the Tribunal that the applicant had contravened subsections 605.86(1) and 605.94(1) of the CARs during the period in question. Accordingly, the contraventions of subsections 605.86(1), 605.94(1) of the CARs were dismissed (TACT File No. O-2997-41). Moreover, the suspension of the aviation document was not an appropriate measure and, as a result, the matter was referred back to the Minister for reconsideration (TACT File No. O-2988-10). As mentioned above, both appeal decisions and accompanying common reasons were issued on March 31, 2005.

D) Reconsideration of the suspension decision

- [42] Sometime in June 2005, the applicant received a letter dated June 1, 2005 from Transport Canada signed by Mr. Marquis Monfette, A/Chief, Operations, Aircraft Maintenance & Manufacturing (the reconsideration notice). Mr. Monfette did not submit an affidavit in this

proceeding. According to the Affidavit of Ms. Beverlie Caminsky, Mr. Monfette and two other knowledgeable persons employed by Transport Canada were appointed to review the circumstances of the suspension of the document and make their recommendations to the “Responsible Authority”, here the Minister’s delegate. CAD 34 defines the “Responsible Authority” as meaning “the person who has been authorized to exercise the Minister’s reconsideration authority under subsection 7(9) or 7.1(9) of the Aeronautics Act” (see paragraphs 10-16 of the affidavit of Ms. Beverlie Caminsky and “definitions” of CAD 34).

[43] The reconsideration notice informs the applicant that:

A panel has been convened in the Transport Canada Headquarters pursuant to section 7.9 of the Aeronautics Act, to reconsider the Transportation Appeal Tribunal of Canada (TATC) appeal decision in the matter of Sierra Fox Inc. and Minister of Transport, TATC File No. O-2988-10.

As part of the reconsideration process, it is your right to make representations or submissions to introduce any relevant information other than what has already been disclosed during the review and appeal hearings. This information can be presented to the panel in person, by pre-arranged teleconference, or in writing, but in all cases, no later than June 17, 2005.

[44] According to the applicant’s representative, Mr. Ferrari, the letter on June 1, 2005 was a follow up to a phone call from Mr. Monfette which had taken place a day before and which he summarized during his cross-examination in the following manner:

First of all the telephone call came as a surprise to me, because he said that he had been instructed to convene a committee to investigate the Notice of Suspension. And he said that there were three members and only two of them were there and they had started the investigation at that time, without the third party. And he asked me if I had any new evidence to submit and I said no, that the only evidence was submitted at the review. And I said based on that evidence, that the suspension was not valid.

He informed me then that they were not required to abide by any tribunal decision, they were not obligated to accept any testimony being truthful and they were not obligated to accept any evidence as being factual. Which was pretty much the whole thing (Respondent’s record at page 58).

[45] On or around June 15, 2005, through his legal counsel, the applicant responded to the reconsideration notice in the following manner:

I respond to your letter of June 1, 2005. My client intends to proceed against Transport Canada for damages suffered and caused by the malicious prosecution by your department which proceedings were ultimately dismissed in my clients’ favour. During the time taken by these criminal proceedings my client lost the sale of his business, the airplane (C-FYTC) over which the certificate of air worthiness was suspended has deteriorated and my client has lost revenues not being able to operate his charter business and ground school. He has no interest in providing further information. Your department has investigated and reviewed and had the opportunity of same over the following records:

- 1 the student records;
- 2 the flight sheets;
- 3 the journey log book for the C-FYTC aircraft.

- [46] On or around June 18, 2005, the reconsideration panel submitted its report to the Minister's delegate. The reconsideration panel recommended, inter alia, that the suspension of the certificate of airworthiness remain in effect, and apparently reached that determination by "balancing the value of the log book versus DATRs", concluding that "on the balance of probabilities the DATRs is more likely to be accurate on the whole than the Journey Log Book."
- [47] The reconsideration panel recognized in its report that there was no corroborative evidence of the entries made in the DATRs, which are hearsay in nature. However, while there may be errors or omissions in the DATRs that are used for billing and other purposes by NAV CANADA and Statistics Canada, "[t]here would appear to be little motive for Nav Canada personnel to make false entries to the DATRs, whereas there are reasons for aircraft operator to omit entries in the Aircraft Journey Log Book due to the cost of maintenance tied to aircraft hours (engine maintenance, airframe maintenance, component replacement / overhaul, etc.)."
- [48] The reconsideration panel also found that "[f]or the two-month period reviewed, the aircraft could conservatively be confirmed as flying 3.5 times as many hours as were logged".
- [49] In its report, the reconsideration panel also referred to an offer purportedly made by the applicant's representative, Mr. Ferrari, on May 31, 2005 to the effect that "he was willing to do the highest-level inspection (1000 hour)". The authors of the report noted in this regard that "[w]e did not discuss this as we are not the decision maker, and we did not discuss component overhaul".
- [50] The issue of the 1000 hours inspection came in the course of the discussion Mr. Monfette had with Mr. Ferrari on May 31, 2005 prior to the day the reconsideration notice was sent to the applicant. In his cross-examination on affidavit, Mr. Ferrari has mentioned in this regard:

The one thousand hour inspection came up and basically how that came about is that prior to the initial review, there was a conference where I offered to do a one thousand hour inspection. Their concern was the aircraft was not safe to fly and I said one thousand hour inspection would more than satisfy their concern about the safety of the aircraft. And at that time it was offered as an opportunity to get things resolved; the Transport rejected that offer and that is the reference to the one thousand hour inspection. That offer was never made again after that. So that is the reference to the one thousand hour inspection (Respondent's record at pages 58-59).

- [51] That being said, the reconsideration panel noted in the recommendation section of their report that “[t]he suspension document does not state what conditions are to be met for reinstatement.” Accordingly, the reconsideration panel recommended to the Minister that “[r]einstatement conditions [...] be provided in writing to the owner” and stated that “[t]hose conditions should presume that the aircraft has been operated for a significant period of time without all required maintenance, i.e. that the aircraft has an incomplete maintenance history with what amounts to unknown usage gaps.” The reconsideration panel then referred to the “Approved Maintenance Schedule”. In this regard, “[t]he aircraft owner should be required to demonstrate that the aircraft has been returned to compliance with the maintenance schedule by an inspection to the highest level specified in the Approved Maintenance Schedule”. However, the reconsideration panel added that “[t]he Approved Maintenance Schedule may have some room for amendment prior to undertaking the required maintenance actions.”
- [52] The report prepared by the reconsideration panel was not transmitted for comment to the applicant prior to the taking of the impugned decision.
- [53] The impugned decision was issued some 13 weeks after the final decision of the Tribunal had been rendered in this case. The impugned decision is in the form of a letter dated July 4, 2005 signed by the Minister’s delegate, Ms. Jacqueline Booth-Bourdeau. There appears to have been some confusion concerning the matter which was actually the object of reconsideration by the Minister. At first, the applicant was advised in writing by the Minister’s delegate that “the Minister’s decision to suspend the Applicant’s Approved Maintenance Organization Certificate is upheld” (exhibit 1 to cross-examination of Beverlie Caminsky).
- [54] However, in his corrected version (exhibit 3 to cross-examination of Beverlie Caminsky) which was sent by fax to the applicant on July 4, 2005, the letter of the Minister’s delegate has been modified to now read:

At the conclusion of your TATC proceedings, the Tribunal Members referred your case back to the Minister for reconsideration.

As required by Civil Aviation Directive (CAD) 34, all case referrals, as per subsection 7.1(9) of the Aeronautics Act, must be reviewed by a panel of experts. A team of inspectors who are knowledgeable in this subject matter reconsidered your case file. The minutes of the reconsideration panel’s deliberations are attached as Appendix A.

Having given consideration to the TATC review and appeal determinations, and to the reconsideration panel’s determination and recommendation, it is my determination that the Minister’s decision to suspend the Certificate of Airworthiness for Canadian registered aircraft C-FYTC is upheld [emphasis added].

- [55] Attached to the impugned decision was a copy of the purported “minutes of the reconsideration panel’s deliberations” (the reconsideration panel report).

III- BREACH OF PROCEDURAL FAIRNESS

[56] The present judicial review proceeding follows the refusal of the Minister to rescind the suspension decision after having reconsidered the matter. There are a number of issues raised in this case by the applicant that involve procedural fairness. They cover three aspects:

- 1) the service and content of the original notice of suspension;
- 2) the transparency and fairness of the reconsideration process; and
- 3) the use of uncorroborated hearsay evidence.

[57] I will consider each of these three aspects successively.

A) Service and content of the original notice of suspension

[58] The applicant argues that, from the very start, the procedures set out in the Act were not followed by the respondent. First, the notice of suspension was somewhat deficient as it “failed to identify, set out or list the condition(s) upon which the notice was issued” contrary to paragraph 7.1 (2)(a)(ii) of the Act. Second, the service of the notice was non-compliant with the Act as the respondent “purported to suspend the certificate of airworthiness of the aircraft by faxing a copy to the applicant and by leaving a message on [the applicant’s representative’s] voice machine that the certificate of airworthiness had been suspended”.

[59] I will start with the issue of service by noting that subsection 7.1(1) of the Act requires that the notice be sent to the holder of the document or the owner or operator of the aircraft by “personal service or by registered or certified mail”. Accordingly, the Minister does not comply with the requirements imposed by the latter provision if he simply faxes a copy of the notice and leaves a message on a voice machine. That being said, the applicant acknowledged receipt of the suspension decision by registered mail dated November 3, 2003. Moreover, subsection 7.1(2.1) of the Act provides that the Minister’s decision to suspend or cancel a Canadian aviation document takes effect on the date of receipt of the notice, unless the notice indicates that the decision is to take effect on a later date. Accordingly, the suspension decision could not legally take effect on October 31, 2003, as indicated in the notice. However, considering that the procedural defects noted above are not fatal – as it appears the document holder received the notice of suspension through other means – and that the applicant had suffered no prejudice, I find that the suspension decision actually took effect on November 3, 2003, that is on the date that the applicant acknowledged receipt of the notice of suspension.

[60] The second procedural concern is related to the contents of the notice itself, in that it is missing certain essential elements. The general purpose of the notice is set out in paragraph 7.1 (2)(a)(ii) of the Act, which requires that the Minister indicate “the conditions subject to which the document was issued that the Minister believes are no longer being met or complied with”. In the case at bar, the notice of suspension clearly states the ground upon

which the suspension decision was taken in the first place, which was that in the opinion of the Minister “[t]he aircraft had not been maintained in accordance with the approved maintenance schedule as required by CAR 605.86 (1)(b)”. That being said, a closer reading of the particulars contained in the notice confirms that the suspension decision was indeed taken because some “flights had been conducted and not recorded in the Aircraft Journey Log Book”. Therefore, since the applicant had purportedly contravened section 605.86 of the CARs, the aircraft did not comply “with conditions subject to which the document was issued”. It is important to stress here that the suspension decision was not taken by the respondent on the grounds that “an immediate threat to aviation safety or security exists or is likely to occur” (which is the case where a suspension decision is taken under section 7 of the Act), but because the alleged contravention and failure to record some flights in the log book had caused “... discrepancies [that] have rendered the calculation of Total Air Time inaccurate” as the notice of suspension further explains. While the notice of suspension did not specifically state what these “discrepancies” were, it later became apparent to the applicant in the course of the proceedings before the Tribunal that the respondent was indeed relying on some 34 entries for YTL in the DATRs of the Muskoka Airport for August and September 2003 for which there were no corresponding entries in the log book of the aircraft. But the use of such hearsay evidence without corroborating evidence has been legally questioned and is now raised by the applicant as a specific ground for setting aside the impugned decision which, again, is based again on the same hearsay evidence that was held to be unreliable by an appeal panel of the Tribunal as explained above.

- [61] At the hearing before this Court, respondent’s counsel submitted that the legality of the suspension decision was not contingent upon the notice of suspension setting out what particular conditions had to be met in order to have the suspension lifted by the Minister. It is not necessary to decide this issue. I will only note that on November 3, 2005, the respondent sent to the applicant a copy of the original notice of suspension issued on October 31, 2003, as well as an “appendix” that purported to clarify the conditions required to reinstate the certificate of airworthiness of the aircraft. This letter was prepared precisely two years after the suspension decision had come into effect (the applicant would now have the right under subsection 8.3(1) of the Act to make an application to the Minister to have the notation of the suspension removed from the record, and same shall be granted by the Minister unless “the removal from the record would not be in the interest of aviation safety or security”).

B) Transparency and fairness of the reconsideration process

- [62] There is no mention of CAD 34 in the reconsideration notice. Counsel for the respondent acknowledged at the hearing of this application that the reference to section 7.9 of the Act in the reconsideration notice was wrong and, perhaps, misleading. Indeed, section 7.9 of the Act provides that if a person who is served with a notice of penalty assessment under subsection 7.7 (1) pays the amount specified in the notice, the Minister shall accept the amount as and in complete satisfaction of the amount of the penalty for the contravention

alleged in the notice and “no further proceedings under this Part shall be taken against the person in respect of that contravention”. But in this case, the penalties imposed by the Minister had already been annulled by the Tribunal on March 31, 2005. Following a query made by respondent’s counsel near the conclusion of Mr. Ferrari’s cross-examination on affidavit on April 6, 2006, applicant’s counsel stated that when he looked at the letter dated June 1, 2005, he “didn’t understand how [section] 7.9 [of the Act] had anything to do with the issue” but did not make further enquiries about it “because [Mr. Ferrari] indicated to whoever called from the Panel, that there wasn’t any further evidence other than what was in the record” (Respondent’s record at pages 60-61).

- [63] Moreover, the reasons to uphold “the Minister’s decision to suspend the Certificate of Airworthiness for Canadian registered aircraft C-FYTC”, mentioned in the amended letter of July 4, 2005, are lacking particulars with respect to the evidence and factors considered by the decision-maker, here the Minister’s delegate, Ms. Booth-Bourdeau. However, I am ready to accept respondent’s submission that, in accordance with CAD 34, the reasons for maintaining the suspension are to be found in the report of the reconsideration panel since the Minister’s delegate apparently decided to accept the recommendation that “[s]uspension should remain in effect”. However, I note that the Minister’s delegate decision does not address what seems to be another important aspect of the reconsideration panel report, which is what should be the required level of maintenance that ought to be performed by the applicant under the “Approved Maintenance Schedule”. It is not clear whether the Minister’s delegate was in agreement or disagreement with the particular recommendations made by the reconsideration panel in this regard. The failure to address this issue in the impugned decision certainly affected the transparency of the process.
- [64] I note at this point that the reconsideration panel’s reasons for accepting the DATRs are similar or identical to the reasons earlier provided by the single member of the Tribunal. However, with respect to the particular finding that the aircraft has flown 3.5 times as many hours as were logged during the period in question, it is not clear from the reading of the reconsideration panel report on what documentary and/or testimonial evidence this very important factual assumption was made. That being said, it seems to be a clear departure from the finding previously made by the single member of the Tribunal to the effect that: “[a]ll witnesses agreed that, for various reasons, DATRs cannot be used to determine air times”. The report also mentions the names of Mike Bird, Mel Bushby, Denis Paré, in addition to Mark Dixon who has previously testified. This raises serious doubts as to what was exactly the input of these persons in the decision-making process. We also do not know what they have said to the members of the reconsideration panel.
- [65] There is no evidence on record that the applicant was aware of the policy set out in CAD 34 with respect to the reconsideration cases. Since the applicant’s representative, Mr. Ferrari, had not testified before the Tribunal, the respondent had the duty to provide him with an opportunity to submit any relevant information on the entries made by the applicant in the log book. Procedural fairness also required that the applicant be given the opportunity to

respond to any additional evidence upon which the respondent intended to rely on. The notice that was actually sent to him was deficient and misleading. It appears that during the reconsideration process, persons who had not been witnesses were contacted and interviewed in the absence of the applicant. Moreover, the applicant was not provided with an opportunity to comment on the report and the recommendations made by the reconsideration panel prior to the taking of a final decision by the Minister's delegate. Accordingly, I find that the process followed by respondent to make the impugned decision has been far from being fair and transparent. This finding would be sufficient in my opinion to set aside the impugned decision and return the matter back to the Minister, but I will nevertheless examine the use of uncorroborated hearsay evidence by the Minister in the present circumstance of this case.

C) Use of uncorroborated hearsay evidence

[66] In the case at bar, it is not contested that the Minister had the obligation to consider all the relevant evidence. This certainly included all the admissible evidence previously adduced before the Tribunal. At issue in this proceeding is, inter alia, the Minister's right to base the impugned decision solely on uncorroborated hearsay evidence, which has been held by the Tribunal to be unreliable in the absence of corroborative evidence. It is not necessary to determine, absent of a Tribunal ruling, whether the Minister can generally make a decision based on hearsay evidence. Here, the issue of hearsay must strictly be examined from the point of view of legitimate expectations when a ruling of the Tribunal has been made in regard of evidentiary and procedural fairness matters.

[67] The main submission by the respondent in this case is that the impugned decision was discretionary and that it could be based on uncorroborated hearsay evidence despite the fact that the Tribunal has held such evidence to be unreliable. In my opinion, this submission by the respondent results from a misreading of the Act, which must be read in conjunction with the TATC Act, and cannot withstand an analysis thereof.

[68] It has been stated by this Court in *Kiss*, above, at para. 31, that "the statutory scheme vests broad discretion in the Minister in the interest of public safety". In practice, this ministerial discretion manifests itself in the discretion left to the inspectors of Transport Canada to choose what particular action, monetary penalty or other mean of enforcement or prosecution will be taken in the name of the Minister against a document holder, an owner or an operator of aircraft who does not comply with the Act or the CARs (*Swanson*, above, at 414 and 424-26 (F.C.A.); *Canada (Attorney General) v. Woods* (2003), 223 F.T.R. 298 at paras. 13-15, 26 and 29 (F.C.)). I note that the obligation to record a flight in the log book is a very serious matter. Any dereliction of the duty to record in the log book each and every flight and the corresponding air time may disrupt the maintenance schedule and render it impossible to follow. In the case at bar, no criminal charge has been laid out against the applicant under paragraph 7.3 of the Act for the alleged omission to record during the period in question some flights in the log book. Moreover, an appeal panel of the Tribunal,

by final decision, has dismissed the allegations made by the Minister that the applicant has contravened subsections 605.86 (1) and 605.94 (1) of the CARs during the period in question.

- [69] The discretion vested to the Minister or a delegate to suspend or cancel an aviation document is not absolute and can only be exercised on a ground mentioned in an applicable provision of the Act. In this case, as indicated in the notice of suspension, the certificate of airworthiness of YTC has been suspended in the first place because the Minister purportedly had proof or reasons to believe that “[t]he aircraft had not been maintained in accordance with the approved maintenance schedule as required by CAR 605.85(1)(b)”. While the authority to revoke or maintain the suspension of the document rests exclusively with the Minister, section 21 of the TATC Act provides specifically that “[a] decision of an appeal panel of the Tribunal is final and binding on the parties to the appeal”. It turned out that the evidence upon which the suspension decision was purportedly taken under the authority of paragraph 7(1)(b) of the Act was all hearsay in nature. The appeal panel of the Tribunal found in this regard that when the evidence is documentary and contradictory, as it is here when the log book is compared with the DATRs, corroborative evidence is required. Accordingly, the applicant had a legitimate expectation that following the appeal panel’s decision to refer the matter of suspension back for reconsideration, the Minister would have to seek corroborative evidence to supplement the DATRs if he wished to uphold his initial finding that the aircraft had not been maintained in accordance with the approved maintenance schedule, as required by paragraph 605.85(1)(b) of the CAR.
- [70] I conclude that a document holder would be placed in an intolerable position if the Minister was free to reconsider a suspension decision made earlier without regard to a final decision of the Tribunal or the principle involved in it, in this case, the acceptance of uncorroborated hearsay evidence to uphold an allegation of contravention to the CARs (which was raised by the Minister as a ground to suspend the certificate of airworthiness of the aircraft and to assess monetary penalties against the applicant). There should be strong argumentative reasons not to follow a binding and final decision of the Tribunal. It is not alleged by the respondent that the Tribunal overlooked a statutory provision or a case that ought to have been followed with respect to the use and conditions of use of hearsay evidence. The laconic observations made in the report of the reconsideration panel concerning the effect of the appeal panel ruling, and the lack of reasons in the impugned decision made by the Minister’s delegate, do not come close to a justification. If I were to accept the respondent’s submission in this case, a decision of the Tribunal would have no finality on any legal point. This is contrary to the intent of Parliament, which is clearly expressed in the TATC Act. This would also lead to a sense of injustice on the part of parties who expect a decision rendered by an appeal panel of the Tribunal on a point of law, including an issue of natural justice, to be binding and final. Indeed, in the case at bar, the error of law and the breach of a principle of natural justice mentioned in the decision of the appeal panel of the Tribunal constituted the very reasons why it dismissed the allegations of contravention and returned the matter of suspension back to the Minister for reconsideration.

IV- CONCLUSION

- [71] To summarize, I have found that the Minister has an important role to play in the area of aeronautics and must ensure that aircrafts and airline operations are safe. The suspension decision was of crucial importance to the applicant and its owners and employees and same affected the applicant's ability to carry on business. After a thorough examination of the matter by a quasi-judicial tribunal, the Minister was asked to reconsider the suspension decision. The decision made by the appeal panel of the Tribunal was a final one and has not been overturned by this Court.
- [72] I have also found that the reconsideration process must be fair and transparent. The determinations made by the Minister are factual in nature and must be based on the evidence. In the case at bar, the reconsideration panel was not empowered to make a final decision, but only to make a recommendation to the Minister's delegate. The applicant had the right to present evidence and comment on any new evidence considered by the Minister. The reconsideration panel in this case contacted persons who never testified before the Tribunal and there is no way to ascertain what they actually told the reconsideration panel. Moreover, the applicant was not provided with the opportunity to comment on the report and the recommendations made by the reconsideration panel before a final decision was made by the Minister's delegate.
- [73] I have also found that the logbook is proof of the matter stated therein, absent evidence to the contrary. In the case at bar, the Minister's delegate decided to uphold the suspension based on the evidence contained in the report that "[f]or the two-month period reviewed, the aircraft could conservatively be confirmed as flying 3.5 times as many hours as were logged". This finding is based on the same hearsay evidence that was held to be unreliable by an appeal panel of the Tribunal. The applicant had a legitimate expectation that, in the reconsideration process, the Minister would not accept uncorroborated hearsay evidence. The final determination made by the Tribunal in this regard was not set aside by this Court and must stand.
- [74] Consequently, I have found that the respondent has breached a principle of natural justice or procedural fairness. The impugned decision should be set aside and the matter returned for reconsideration by another reconsideration panel and another Minister's delegate. In view of the result of this proceeding, the applicant is entitled to its costs against the respondent.

ORDER

THIS COURT ORDERS that:

1. The application for judicial review is allowed with costs against the respondent; and

2. The decision rendered on July 4, 2005 on behalf of the Minister to uphold the Minister's initial decision to suspend the certificate of airworthiness of the aircraft is set aside and the matter is referred back for reconsideration by another reconsideration panel and another Minister's delegate.

"Luc Martineau"

Judge

FEDERAL COURT

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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AND ORDER BY: MARTINEAU J.

DATED: February 06, 2007

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