

A COMPARISON OF AMERICAN AND CANADIAN GOVERNMENT ENFORCEMENT
PROCEDURES INVOLVING REGULATORY VIOLATIONS BY AIRMEN

©

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American/Canadian Enforcement
Procedures against Violations
by Germans

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DEDICATION

This thesis is dedicated to the advancement of knowledge
in the area of aviation safety among all those professionals
who work in the North American aviation environment.

FOREWORD

I would like to thank Dr. N.M. Matte, the Director of the Institute of Air and Space Law for giving me the opportunity to somewhat belatedly finish my thesis for the Master of Law degree. Furthermore I would like to thank Dr. Matte for his untiring loyalty in developing and promoting the air and space programs at the Institute, and we all know what a difficult task this has been from time to time.

Dr. Magdelénat's assistance in supervising this project under some difficult time constraints has been greatly appreciated. Mrs. Ileana Silion's friendly help and encouragement must also be acknowledged. Again, many thanks to all of you for your assistance.

ABSTRACT

A COMPARISON OF AMERICAN AND CANADIAN GOVERNMENT
ENFORCEMENT PROCEDURES INVOLVING REGULATORY
VIOLATIONS BY AIRMEN

The economic de-regulation of the airline industry in the United States of America in 1978 created public fears of unsafe aircraft operations as the competitive environment evolved. The American government, through the Federal Aviation Administration gradually increased its safety enforcement activities regarding airmen's activities as a major step in preventing any diminution of safety in the commercial and general aviation fields. This evolution and tightening of enforcement procedures has produced some very complex and adversarial situations in the industry.

Canada instituted a partial economic de-regulation of its airline industry by enacting the National Transportation Act 1987. A 1979 Royal Commission on aviation safety focused attention on the need for better enforcement procedures, however the de-regulation activity has spurred the public interest much more in the safety aspects of aviation.

This paper attempts to compare and contrast the two aviation enforcement systems as they currently operate in these two countries.

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PREFACE

La déréglementation économique de l'industrie du transport aérien aux États-Unis en 1978 a engendré chez le public l'inquiétude que l'évolution d'un environnement compétitif rende dangereuses les activités aériennes. Par l'intermédiaire de l'Administration fédérale d'aviation, le gouvernement américain a graduellement augmenté ses activités de renforcement de la sécurité en ce qui a trait aux activités des aviateurs comme mesure principale de prévention contre la diminution de la sécurité dans les domaines de l'aviation commerciale et générale. Cette évolution et ce resserrement des procédures de renforcement ont donné lieu à des situations très complexes et adverses dans l'industrie.

Le Canada a institué une déréglementation économique partielle de son industrie du transport aérien en passant le National Transportation Act 1987. En 1979, une commission royale sur la sécurité aérienne a concentré son attention sur le besoin de meilleures procédures de renforcement, toutefois, l'activité de déréglementation a attiré l'intérêt public encore plus sur les aspects de sécurité de l'aviation.

Cet essai tente de comparer et mettre en contraste les deux systèmes de renforcement aérien tels qu'ils fonctionnent présentement dans ces deux pays.

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TABLE OF ABBREVIATIONS

The Canadian Aeronautics Act, R.S.C.1985, Ch.3 = the Act

The Canadian Department
of Transport-Aviation Group = Transport Canada

The Civil Aeronautics Board = the CAB or C.A.B.

The Civil Aviation Tribunal = CAT or Tribunal

Enforcement Investigative Report = E.I.R.

Federal Aviation Administration = FAA

Federal Aviation Act of 1958 = FA Act

FAA Order No. 2150.2A = FAA Enforcement Manual

Federal Aviation Regulations = FARs

Ministry of Transport in Canada = MOT

National Transportation Safety Board = NTSB or N.T.S.B.

Royal Canadian Mounted Police = RCMP or R.C.M.P.

Regional Manager-Aviation Enforcement = RMAE

The United States of America = US or USA

N.T.S.B. Administrative Law Judge = ALJ or A.L.J.

CHAPTER I

HISTORICAL PERSPECTIVE

No two nations on the earth share so much in common as the United States of America and Canada. Both use the english language, have common cultural foundations of sport, theatre, entertainment, education and religion. Both countries have a strong tradition of liberal democracy, based on a federalist system of national government. In both countries the Federal Governments have been given the almost exclusive control over the regulation and control of aeronautics.

In 1978 the United States Congress (The Senate and House of Representatives) implemented The Airline Deregulation Act ⁽¹⁾ of 1978. This Act essentially disbanded the economic regulation activities of the Civil Aeronautics Board (hereinafter referred to as the "C.A.B."). While this legislative move was greeted by many as a progressive step forward, others, including members of the Congress felt that aviation safety could be compromised as the competitive forces between airlines became more intense. In enacting this historic piece of legislation the Congress added this cautionary declaration about the public interest and air safety:

The prevention of any deterioration in established safety procedures, recognizing the clear intent, encouragement , and dedication of the Congress to the furtherance of the highest degree of safety in air transportation and air commerce, and the maintenance of the safety vigilance that has evolved within air transportation and air commerce and has come to be expected by the travelling and shipping public.

(2)

The Administrator of the Federal Aviation Administration (hereinafter referred to as the "FAA") clearly stated in 1982 that aviation safety was the first priority for his agency:

The central mission of the agency is the promotion of safety in air commerce. Its accomplishment requires that all members of the aviation community have the highest possible awareness of the Federal Aviation Regulations and respect for the system by which they are enforced.

(3)

More recently the Administrator of the FAA, Mr. Donald D. Engen reiterated this emphasis on safety in a enforcement policy statement issued in April 22, 1987:

A strong, fair Federal Aviation Administration enforcement policy is crucial to a vital national air transportation system in the United States, in that such a policy will promote, as effectively as possible, a healthy respect for the laws which keep our airports and airways safe.

(4)

CANADIAN EXPERIENCE WITH ECONOMIC DEREGULATION

Deregulation of the governmental economic controls in Canadian commercial aviation occurred by the enactment of (5)
The National Transportation Act 1987 . While this piece of legislation spawned a great deal of concern over aviation safety, as was the case in 1978 in the USA, another event previous to this focused attention on the need for improved enforcement of federal aviation standards and regulations.

The Canadian Commission of Inquiry into Aviation Safety

In 1979, The Honorable Donald Mazankowski, federal Minister of Transport appointed the "Commission of Inquiry on Aviation Safety" headed by Mr. Justice Charles L. Dubin. The Chief Commission Counsel was Mr. John Sopinka, who was later appointed to the bench of the Supreme Court of Canada in 1988. The Commission produced a three volume report in 1982. Where many Commission reports end up collecting dust on politician's and bureaucrat's bookshelves, it would be fair to say that this report has exerted a huge impact on the current state of aviation regulation in Canada. The Commission's report (hereafter the "Dubin Report") became even more important as the country moved toward deregulation of the economic controls exerted by the Air Transport Committee of the Canadian Transport Commission. The prospect of economic deregulation conjured up a number of concerns on the consumer side of the industry. Just as the 1978 United States experience indicated, the most important and relevant issued raised was that of aviation safety in any deregulated environment.

The Dubin Report was an excellent framework for responding to the public's concern over future air safety. In June of 1985 Bill C-36, An Act to Amend The Aeronautics Act,⁽⁶⁾ was given Royal assent. The amendment was "the most comprehensive revision of the Aeronautics Act ever undertaken."⁽⁷⁾

It would be fair to say that the main thrust of the 1985 amendment was to increase the regulatory enforcement provisions of the Aeronautics Act. Canada had an enviable aviation safety record in the past, however the enforcement of the safety provisions in the legislation was administered in a very ad hoc manner. Furthermore, the over all legislative mandate given to the civil aviation administration in the Ministry of Transport was historically confusing. On one hand the main duty of Transport Canada was to promote the development of civil aviation in (8) Canada and the other was to regulate the industry (9). It was difficult for the civil aviation field inspectors to wear "two hats" -one as a public relations man and the other as a policeman. Invariably the role of the policeman, with all its attendant difficulties was given a minor part in the day to day activities of the inspectors. Even with all the emphasis on enforcement of aviation standards at this time the confusion of roles persists:

While every inspector is responsible for preventing violations through education and other conciliatory means, each has a responsibility, shared by all Aviation Group employees, to report violations. Inspectors who detect violations are required to perform preliminary investigations, while the conduct of comprehensive investigations and the processing of cases to their conclusion is the responsibility of the Enforcement Specialist who will work with police agencies and Federal Department of Justice officials...

The Inspector has a dual role, that of encouraging the development of civil aeronautics in Canada and that of ensuring safety in aviation. These roles can best be exercised in an atmosphere of cooperation between the Aviation Group and the Canadian Aeronautics community. However, the Inspector must never hesitate to take strong enforcement action when it is necessary to ensure aviation safety. (10)

FAA LEGISLATED MANDATE IS ALSO CONFUSING

Canada is not alone in its dilemma. The Federal Aviation
(11)
Act of 1958 (hereafter referred to as the "FA Act") also gives
the FAA a somewhat contradictory or ambiguous aviation mandate.
In carrying out his duties, the Administrator of the FAA is charged
with the following responsibilities:

- (1) The regulation of air commerce in such a manner
as to best promote its development and safety.
- (2) The promotion, encouragement, and development
of civil aeronautics.

(12)

Two recent written statements illustrate the complex nature
of the "enforcement and compliance " issue in the United States.
The first statement is an exert from the President's column in
the National Air Transport Association July 1988 monthly
magazine:

Reflecting on the workshops presented during
NATA's 48th Convention and Trade Show held last
April, I have to stop and wonder just whose side
our own government is on. Specifically, I'm
referring to those sessions that dealt with air
charter operations and the vexing regulations
and swarm of federal agents that have been, and
will be swooping down on the scores of small
businesses, all in the name of safety.

Now I'm not against safety. But, I'm afraid that the FAA has forgotten what "compliance" is all about. Instead, their lead objective seems to be "enforcement", and on too many occasions, severe penalties have been assessed on diminimus paper-work infractions.

Less than two decades ago, it was common to view the local FAA inspectors (and often the guys from Region too!) as friends, helpers, an integral part of the aviation community. Sure, they were heavy into enforcement, but only as a means to achieve compliance with the FARs. That's my point: back then the "friendlies" were around to ensure safety through compliance and used enforcement as a tool to get the job done. Today's climate is much different. It seems to be enforcement, first, last and always... (13)

Lawrence L. Burian- President

(The full text of Mr. Burian's Column is included in Appendix " ").

The following quotes are taken from the April 22, 1987 statement of Donald D. Engen, the FAA Administrator entitled Statement of Federal Aviation Administration Enforcement

Philosophy:

A strong, fair Federal Aviation Administration enforcement policy is crucial to a vital national air transportation system in the United States, in that such a policy will promote, as effectively as possible, a healthy respect for laws which keep our airports and airways safe. The agency's enforcement policy must be focused on this primary goal of achieving maximum compliance with the FARs. A policy which is too strong will achieve only a grudging, half-hearted attempt to follow the regulations and an unhealthy antagonism toward the FAA...

Our enforcement practices also should clearly signal that a lack of respect for the FAA, or its inspectors, as the duly authorized enforcement representatives of the Federal Government will not be tolerated...

On the other hand our enforcement practices must be thoughtful measured, and consistent...

We should apply a "Golden Rule" in enforcement by conducting ourselves as we would want others to conduct themselves if they were enforcement officials and we were the alleged violators of the rules. We should be interested enough in the alleged violator to listen carefully and meaningfully to his side of the story... In areas in which policy guidance from headquarters for the region requires a particular course of action, we should carefully explain the safety reason behind the policy rather than just applying it without discussion.

I am convinced that if we display this firm, but caring attitude toward those we regulate, we will achieve our primary enforcement goal of maximizing compliance with the FARs. By taking the time to listen, to explain, and to make those with whom we deal understand why we are doing what we are doing, we will generate an understanding of, and a respect for our regulations and our enforcement program. And by fostering this understanding and respect we will achieve a far greater compliance rate than would ever be possible if we were to attempt to obtain compliance by simply causing people to fear our enforcement programs.

(14)

The two above referenced articles illustrate the fine line the Federal enforcement personnel must tread in their activities.

The Canadian aviation literature to date has not displayed any serious criticism of Canadian enforcement practices as is evidenced in the US trade media. In fact a number of informative and positive articles on Transport Canada's enforcement activities recently appeared in leading Canadian aviation publications.

(15)

In reviewing this chapter it is very easy to notice the striking similarities in the legislative mandates of Transport Canada and the FAA. The following chapters also show the striking similarity in the enforcement policies and remedies of both countries. However it is the implementation of these policies and remedies where the contrasts exist. There are various reasons why these contrasts exist. As with many innovations, the USA is often one of the first to implement new policies and practices. Economic deregulation of commercial aviation was first tried in the USA. Typically cautious Canadians implemented their style of deregulation approximately ten years later. During these ten years the USA has experienced a gradual, and to be anticipated, increased emphasis on enforcement activities. The public reaction to any aviation accidents and incidents over the past decade has heightened the political requirement for a more adversarial style of FAR enforcement. The American public felt that the FAA should not be too friendly with the industry that it was supposed to regulate. Accordingly, the FAA has gradually moved towards a more strict enforcement posture than in the past. While the official emphasis since 1978 has always been on compliance, the current enforcement policy appears to have evolved towards a "zero tolerance" of any deviation from the FAR's. It is the author's point of view that as time passes, the Canadian experience will probably mirror this evolutionary process towards a more adversarial relationship between the regulators and the regulated.

FOOTNOTES

1. The Airline Deregulation Act of 1978, 49 U.S.C. . . et seq.
2. The Federal Aviation Act of 1958, 49 U.S.C. § 102(a)(2)
3. FAA Enforcement Policy Statement by J. Lynn Helms
Administrator, FAA Order No. 1000.9D, October 10, 1982
4. FAA Enforcement Policy Statement by Donald D. Engen
Administrator, FAA Memorandum Dated April 22, 1987
5. The National Transportation Act 1987, R.S.C. Chapter 34
6. An Act to Amend the Aeronautics Act, Bill C-36
7. Crosbie, The Honorable John, Canadian Minister of
Transport, foreword in the Transport Canada publication
The Aeronautics Act Amendments: an Overview, Document No.
TP 7748E 1986
8. The Aeronautics Act, R.S., Chapter 2, Section 3.2(a)
9. Ibid. Section 3.9
10. Enforcement Manual, Transport Canada Enforcement and
Legislation Branch, 3rd. Edition January 1, 1988 Page 1-3
11. Federal Aviation Act of 1958, 49 U.S.C. 1301 et seq.
12. Ibid. Section 103
13. National Air Transport Association, Alexandria, Va.,
Monthly news magazine, June, 1988
14. See fn. 4 Donald D. Engen-Memorandum
15. Canadian Aviation, published by Maclean Hunter, Toronto, Ontario
Canada, June 1988 Volume 61 NO. 6 Page 26

CHAPTER II: LEGISLATIVE AND ORGANIZATIONAL FRAMEWORK

CANADIAN LEGISLATION AND ORGANIZATIONAL FRAMEWORK

The statutory foundation of Canadian aviation legislation is found in two main Acts.

- (1) The Aeronautics Act, R.S.C. 1970. Ch. A-3, As amended; and (hereinafter referred to as "the Aeronautics Act")
- (2) The National Transportation Act, 1987, R.S.C. Chapter 34, (hereinafter referred to as the "NTA")

The NTA deals with the continuing, but diminished economic regulation of air transport in Canada, as administered by the National Transportation Agency. The subordinate legislation written under this Act is called The Air Transportation
(1)
Regulations.

The Aeronautics Act is divided into five (5) Parts:

- Part I- deals generally with the control of the operational aspects of aeronautics.
- Part II- deals with the economic regulation of commercial air services in Canada and works in conjunction with Part 2 of the National Transportation Act
- Part III- outlines certain administrative procedures
- Part IV -outlines the role and function of the Civil Aviation Tribunal- which was created in response to a specific recommendation by the Dubin Commission of Inquiry on Aviation Safety.

The subordinate regulatory legislation that emanates from the Aeronautics Act is found in two bodies of law:
(2)

- (a) The Air Regulations
 - (b) The Air Navigation Orders
- (3)

From a constitutional law point of view, the Canadian Federal Government has exclusive jurisdiction over the control and regulation of aeronautics in Canada. (4)

The focus of this thesis is on the enforcement of the federal legislation which applies to aircrew members operating aircraft in commercial or non-commercial settings. Besides the above referenced legislation, the Transport Canada has published other material of an informative nature for pilots who may become subject to enforcement action. The "bible" in this area is the Enforcement Manual published by the Enforcement Branch of the Aviation Regulation section of the Aviation Group in Transport Canada and available through the Queen's Printer outlets across Canada. (5) (6)

Other informative publications in this area are:

- (1) The Aeronautics Act Amendments- an Overview (7)
- (2) Administrative Enforcement Action: Rights and Remedies Before the Civil Aviation Tribunal (8)
- (3) Aeronautical Information Publication Transport Canada (9)

Current information or any up dated publications in the enforcement area can be obtained from:

Director of Enforcement and Legislation
Transport Canada
Centennial Towers
200 Kent Street
Ottawa, Ontario
(613)990-1225

Enforcement of aeronautical standards in Canada is carried out by the Aviation Group of The Department of Transport, whose headquarters are located in Ottawa. The Aviation Group (hereafter referred to as "Transport Canada") has geographically divided Canada into six (6) regions:

<u>REGION</u>	<u>REGIONAL OFFICE</u>
Pacific	Vancouver, B.C.
Western	Edmonton, Alberta
Central	Winnipeg, Manitoba
Ontario	Toronto, Ontario
Quebec	Montreal, Quebec
Atlantic	Moncton, New Brunswick

(See geographic map of Canada in Appendix B)

The headquarters enforcement staff is located in the Enforcement and Legislation Division of the Aviation Regulation Directorate of the Aviation Group. The most senior enforcement official at headquarters is the Chief of Enforcement. He is assisted by four (4) Superintendents and related staff. One of Superintendents is legally trained and serves as a legal resource person for officers in headquarters and in the field. In each Region there is a Regional Manager of Aviation Enforcement (hereinafter "RMAE"), and depending on the size of the region, a number of Enforcement Specialists. The national enforcement policy states that all Aviation Group employees are charged with the general responsibility of detecting and reporting violations of the aeronautical regulations however, it is the responsibility of the Regional Enforcement Specialist to take the initial violation reports and process them through to their ultimate conclusion, including any routine appeals that may arise therefrom.

AMERICAN LEGISLATIVE AND ORGANIZATIONAL FRAMEWORK

The Federal Aviation Administration (hereinafter referred to as the "FAA") is the largest of the seven administrations in the United States Department of Transportation. The FAA has geographically divided the Continental United States into eight (8) regions. Additional regional offices are located in Alaska, Hawaii, and Brussels, Belgium. The Administrator is the chief executive officer of the agency. He is assisted by the eleven Regional Directors, and the headquarters and regional administrative personnel. There are 80 "district offices" located within the various eight Regions. (Please refer to FAA Organizational Chart and Map in Appendix C)

Over the past 30 years the FAA has experienced a number of organizational and administrative changes, however the legislative (10) mandate that it was given under the Federal Aviation Act of 1958 by the Congress remains the same today. Under the 1958 legislation however, the FAA was given independent agency status and appropriately called the "Federal Aviation Agency". In 1966 legislators enacted the Department of Transportation Act which brought the FAA into the Department of Transportation as a modal committee. The name was consequently changed to the Federal Aviation Administration. The 1966 Act also created the National Transportation Safety Board (hereinafter referred to as the "NTSB"). The NTSB assumed the role of aircraft accident investigator and appellate tribunal formerly carried out by the Civil Aeronautics Board (hereinafter referred to as the "CAB").

The NTSB was originally placed under the umbrella of the Department of Transportation, however in 1974 it was totally removed from any any Department by the Independent Safety Board Act.⁽¹²⁾

The economic regulatory functions of the CAB were subsequently done away with in the Aviation Deregulation Act of 1978.

The main piece of subordinate legislation enacted under the FA Act is the Federal Aviation Regulations.⁽¹³⁾ Part 13 of these regulations deals with the "Investigation and Enforcement Procedures. Further valuable information on the enforcement process at the FAA is available in the Compliance and Enforcement Program Manual.⁽¹⁴⁾

Organizationally, the enforcement activities of the FAA are very decentralized, with the vast majority of the cases being disposed of at the Regional level. While the FAA Chief Counsel, the Associate Administrator for Aviation Standards and the Associate Administrator for Airports normally set the over all enforcement policy, very few cases are completely⁽¹³⁾ handled at the headquarters level.

The Regional Administrators standardize the enforcement policies in the various district offices within their jurisdiction because most matters are investigated and initially dealt with on the district level.

FOOTNOTES

1. The Air Transportation Regulations, C.R.C. Chapter 4
2. The Air Regulations, C.R.C. Chapter 2
3. The Air Navigation Orders, C.R.C. Chapter 2
4. Johannesson v The Rural Municipality of West St. Paul [1952] S.C.R.292, was the key case in establishing the Federal Government's overriding jurisdiction in aeronautical matters in Canada. For further discussion of this matter see "Legal Aspects of Airport Operations in Canada", 1978 Master of Law thesis submitted by J.M. Corrigan to the Faculty of Graduate Studies at McGill University, June, 1978.
5. The terms "airman", "aircrew" and "pilot" are not defined in the US or Canadian legislation. "Pilot-in-command" is defined in both countries as the pilot responsible for the operation and safety of an aircraft during flight time.
6. The Enforcement Manual- Transport Canada Publication No. TP 3352E.
7. The Aeronautics Act Amendments- An Overview, Transport Canada Publication No. TP 7748E 1986
8. Administrative Enforcement Action: Rights and Remedies Before the Civil Aviation Tribunal- Transport Canada Information Circular No. TP 2300E August 28, 1988
9. Aeronautical Information Publication-Transport Canada Publication No. TP 2300E
10. Idem. Chapter 1 fn.
11. 49 U.S.C. §1651-1659
12. 49 U.S.C. § 1901-1907
13. 14 C.F.R. Part 1-399
14. FAA Order 2150.3, Compliance and Enforcement Program Manual Dated May 16, 1980 as amended incorporating Changes 1 to 8.
15. Ibid. Chapter 10, § 1002(d) Page 127

CHAPTER III-THE INVESTIGATIVE PROCESS

SOURCES OF ALLEGED VIOLATIONS

Enforcement action against aircrew members begins with the detection of an alleged violation. In the United States the three main sources for discovering violations of the FARs (1) by airmen are the following:

- (1) Surveillance activities by the FAA inspectors in the normal course of their duties as air carrier inspectors, flight test examiners, small aircraft accident investigators, et cetera is the primary source.
- (2) Air Traffic Service (hereinafter "ATS") is the second largest source of alleged violations. It should be noted that ATS's ability to document violations with audio recordings of communications, and radar readouts of aircraft course directions and altitudes, results in high conviction rates in these cases.
- (3) Public complaints are the third greatest source of alleged violations. This includes fellow pilots who report violations of their peers.

The Canadian experience parallels that of the US. With the same three sources of violation detection ranking in the same order. The Canadian Enforcement Manual (2) addresses this point in the following short paragraph:

3.3 DETECTION

Detection, the discovery of possible violations may result from inspection, public or Aviation Group surveillance, ATS infraction reports, accident investigations, etc.

THE INVESTIGATORY STAGE

In the FAA procedures this stage is divided into the "informal" and the "formal" investigation. In Canada the process is called the "preliminary" and the "comprehensive" investigative stages. While the words may differ, the process has the same object- to determine firstly, if a violation has taken place and secondly, to establish if the violation can be proven before an administrative tribunal or a court of law.

At this point there are some significant differences between the Canadian and American procedures.

There are no FAA field inspectors who are specifically directed to be enforcement specialists. All inspectors are instructed in the detection and documenting of alleged violations by aircrew members. In fact the field inspector who detects the alleged violation handles the complete investigation and subsequent disposition of the case in conjunction with, and under the direction of an attorney from the Regional Legal Counsel's office.

At this stage of the investigation the major difference between the two systems occurs. The FAA involves the legal department at a very early stage of the proceedings, and the FAA Regional Counsel's office effectively takes charge of the matter after the informal investigation has been completed. It is the staff

attorney who makes an initial review of the "enforcement investigative report" ⁽³⁾ (hereafter the "EIR"):

Upon receipt of the EIR, the Regional Counsel will review the file for the sufficiency of evidence to support the type of action recommended by the regional division... When Regional Counsel decides that sufficient evidence exists to support the recommended legal enforcement action, and a sanction has been determined, legal enforcement action will be initiated as provided in Chapter 12.(4)

The staff attorney also presides over any informal or formal conferences or meetings between the FAA and the accused. The strength of the delegated authority given to the regional lawyers in handling enforcement matters is illustrated in the following quote:

Once legal enforcement action has been initiated, Regional Counsel has the final authority to change the type of action or sanction, or enter into settlement agreement... The legal enforcement file held by Regional Counsel is the official FAA record copy... (5)

In Canada the Regional Manager-Aviation Enforcement directs any further activities after the preliminary investigation has been completed. As a rule the Regional Manager ("RMAE") and staff are familiar with law enforcement procedures and techniques, however none are attorneys. The fact that the FAA involves the regional staff attorneys at such an early stage in enforcement proceedings, and gives them the leadership responsibility, indicates that there is a much more adversarial posture taken in the US than in Canada. As previously mentioned, Canada may adopt this attitude as deregulation evolves in that country.

CANADIAN ENFORCEMENT SPECIALISTS

Another area where the Canadian and American systems differ is in the use of "enforcement specialist". As previously mentioned all FAA field inspectors are expected to handle enforcement cases on a regular basis. In Canada all field inspectors are expected to do surveillance work on the detection of violations during the normal course of their workday, however Transport Canada has enlisted a corps of inspectors who are specially trained in enforcement work. "Enforcement Specialists" are assigned to each region, and take over a case after a field officer has completed a preliminary investigation, or when public complaints are made. These specialists, who work directly under the Regional Manager-Aviation Enforcement, usually combine a para legal background and operational flying experience, so they are knowledgeable in all aspects of enforcement action. One of the criticisms of the FAA approach is that they have operationally inexperienced attorneys leading the enforcement activities. This lack of aviation experience and judgement can alienate the industry that the FAA is attempting to regulate. Transport Canada is attempting to balance the legal and the aviation experience, so that good judgement and common sense will prevail through out the enforcement system.

THE LETTER OF INVESTIGATION

Both countries inform airmen when their actions are being investigated for alleged regulatory violations. If the preliminary or informal investigation indicates that there is not a very serious infraction involved, a verbal notification is often used. However, if the matter is serious enough to warrant a fine or suspension of a license, the airman is notified in writing by registered or certified mail. The "Letter of Investigation" used by Transport Canada differs in a very material way from the one used by the FAA. The following excerpts illustrate this point: (See sample letters in Appendix F)

This letter is to inform you that this matter is under investigation by the FAA. We would appreciate receiving any evidence or statements you might care to make regarding this matter within 10 days of receipt of this letter. Any discussion or written statements furnished by you will be given consideration in our investigation.

The Transport Canada version:

I am investigating a possible violation of Section XYZ of the Air Regulations...
You are invited, but not obliged to respond with any statement or evidence you wish to submit. Any statement you have to make may be used as evidence in this case...

The FAA letter has come under great criticism from the industry for failing to properly warn individuals that their

statements may be used as evidence against them in subsequent
(6) proceedings. The FAA's position is that no warning needs to
be given since the proceedings are not criminal in nature. The
analogy often cited by the FAA is " why should a policeman
(7) have to give a motorist a "Miranda" type warning when enforcing
a speeding section of the highway code". This point of view has
(8) been upheld on appeal.

The irony of the situation is that in Canada evidence gathered
without a "Miranda" type warning can be used in administrative or
criminal matters. Yet it is Transport Canada, and not the FAA that
is clearly warning the airmen against self incrimination in these
situations.

In summary of this section it should be pointed
out that there are many more similarities than differences
between the two systems at the investigative stage. However,
noticeable differences exist in the use of attorneys and
enforcement specialist. The FAA's lack of full disclosure in
the "letter of investigation" could and should be corrected
to reflect a more candid approach in dealing with airmen.

FOOTNOTES

1. Pangia, M.J., " Handling FAA Enforcement Proceedings: A View From The Inside" 46 Journal of Air Law and Commerce 573 (1981)
2. Enforcement Manual, Transport Canada Enforcement and Legislation Branch, 3rd. Edition, January 1, 1988
3. See generally-Chapter 9 "Preparation of Enforcement Investigative Reports" FAA Order 2150.3 Compliance and Enforcement Program Manual
4. Ibid. Page 127 Paragraph 1002(c)(1)
5. Ibid. Page 127 Paragraph 1002(c)(3)
6. Hamilton, Scott J. "Administrative Practice Before The FAA and NTSB: Problems, Trends and Developments" 46 Journal of Air Law and Commerce 615 (1981)

Jodice, John, Aviation Lawyer's Manual-Representing the Pilot in FAA Enforcement Actions, Maryland Historical Press, Lanham, MD. 1986 Chapter IV.
7. See: Miranda v Arizona 384 U.S. 436 (1966) for a discussion on the need for a warning in a criminal investigation.
8. Administrato v Salkind 1 N.T.S.B. 714 (1970)

CHAPTER IV - ENFORCEMENT REMEDIES

The remedies open to the regulatory authorities on both sides of the border may vary in nomenclature, but vary little in substance. The remedies can best be generally compared by the use of the following table:

FAA ENFORCEMENT

CANADIAN ENFORCEMENT

ADMINISTRATIVE ACTION

Warning Notice

Letter of Compliance

Letter of Correction

Letter of Counsel

Aviation Document Action
(Suspend or revoke pilot license)

Monetary Penalty
(Impose a fine)

LEGAL ACTION

Civil Penalty
(Impose a fine)

Pilot Certificate Action
(Suspend or Revoke pilot License)
(Re-examination of Airman)

JUDICIAL ACTION

Prosecution of Individual
in Law Courts before a Judge
and/or Jury for criminal activity

Prosecution of Individual
in Law Courts before a Judge
and/or Jury.

EMERGENCY SUSPENSION OR REVOCATION OF CERTIFICATES OR DOCUMENTS

Pilot Certificates

Pilot Documents

ADMINISTRATIVE ACTION

American Administrative Action

In the USA, the term "administrative action" refers to the first and least aggressive remedy in the compliance and enforcement program of the FAA. The purpose of this remedy is to afford the field officers "a means for disposing of minor types of violations which do not require the use of legal enforcement sanctions."⁽¹⁾

This type of enforcement action is normally taken only in cases where there is conclusive evidence of a violation. Furthermore this action does not charge the pilot involved with a violation. It is intended to bring the incident to the attention of the person involved, document the corrective action and encourage future compliance with the regulations.⁽²⁾

FAA directives in this area of enforcement further state that administrative enforcement action may be taken in lieu of legal enforcement action only when all of the following elements are present:⁽³⁾

- a. No significant unsafe condition existed;
- b. Lack of competency or qualification was not involved;
- c. The violation was not deliberate; and
- d. The alleged violator has a constructive attitude toward complying with the regulations, and has not been involved in previous similar violations."

Photocopies of some sample Warning Notices and Letters of Correction are appended hereto in Appendix G.

CANADIAN ADMINISTRATIVE ACTION

As illustrated in the above referenced table, Transport Canada classifies enforcement remedies into only two distinct categories: Administrative or Judicial. The four administrative remedies will be discussed firstly.

The administrative "Letter of Counsel" is the least aggressive remedy and used in response to a minor one-time contravention. This is not considered by Transport Canada to be a sanction and should not be considered during sanctions for subsequent offenses.

The administrative "Letter of Compliance" is stronger than the "Letter of Counsel" and is used to correct a minor, continuing violation "where an agreement has been reached with the offender regarding future compliance." No mention is made of whether this remedy should be considered during sanctions for subsequent offenses, however, the general policy has been to treat it the same as a "Letter of Counsel" type of violation.

The Canadian system, like the US system, does not consider the first two administrative remedies-the letters- to be overly serious in nature. The FAA does not report a violation on a pilot's file if a letter was the outcome of an alleged enforcement action. Transport Canada is of the same lenient point of view and does not consider either of the "letters" to be a "sanction" in any future enforcement matters involving a pilot. In Canada, sanctions are only incurred when an enforcement action results in a monetary penalty, pilot document suspension, or revocation, or a court conviction.

The FAA situation is very similar in that a "violation" is recorded if the pilot receives a "civil penalty"(monetary fine), a "certificate suspension"(pilot license suspension) or a court conviction. Semantically the two national systems are different, substantively they are very similar. However, the Canadian system is uniquely complex in its classification and designation of various offenses set out in the legislation. (10)

DESIGNATED PROVISION OFFENSES, SUMMARY
CONVICTION OFFENSES, AND HYBRID OFFENSES

In order to understand this complex classification some basic Canadian legal terms need to be defined.

In Canadian criminal law there are basically two types of offenses: those punishable by way of summary conviction and those punishable by way of indictment. The US analogue would be the designation of offenses into misdemeanors and felonies. A "hybrid" offense is one which can be prosecuted by either summary conviction or indictment. (11)

Transport Canada decided to arrange a hierarchy of offenses so that the public and the courts could determine the seriousness of an offense by its area of classification. Certain sections in the legislation were classified as "designated provisions". These sections were deemed to be potentially the least serious of all the possible offenses and therefore were to be exclusively handled through "administrative action"; which in Canada includes the letters of counsel, and compliance, monetary fine, and pilot license suspension or revocation. (12)

No court prosecution or court appeal is allowed from an administrative action involving a designated provision, however, the accused may appeal the case to the Civil Aviation Tribunal (hereinafter referred to as the "CAT"). A definitive list of all the "designated provisions" in the Canadian aviation legislation can be found in Air Regulation Series 1, No. 3. (A photocopy of this is found in Appendix F)

All other aviation offenses in Canada are divided into either "summary conviction" or "hybrid" offenses. There are only seven "hybrid" offenses and they are outlined in Section 6.3(1) of the Aeronautics Act ⁽¹³⁾ which is referenced here below:

No person shall

- (a) Knowingly make any false representations for the purpose of obtaining a Canadian aviation document or any privilege accorded thereby;
- (b) wilfully destroy any document required under this Part to be kept;
- (c) make or cause to be made any false entry in a record required under this Part to be kept with the intent to mislead or wilfully omit to make any entry in any such record;
- (d) wilfully obstruct any person who is performing duties under this Part;
- (e) except as authorized under this Part, wilfully operate or otherwise deal with an aircraft that has been detained under this Part;
- (f) wilfully do any act or thing in respect of which a Canadian aviation document is required except under and in accordance with the required document; or
- (g) wilfully do any act or thing in respect of which a Canadian aviation document is required where
 - (i) the document that has been issued in respect of that Act or thing is suspended, or
 - (ii) an order referred to in subsection 6.5(1) prohibits the person from doing that act or thing.

In order to more clearly outline the three types of offenses under the Canadian legislation, a comparative table is formulated below:

TABLE OF CANADIAN OFFENSES

	DESIGNATED PROVISION	SUMMARY CONVICTION OFFENSE	HYBRID OFFENSE
Number of Offenses	94	146	7
Legal Reference	Air Regulations Series 1 No. 3	Aeronautics Act § 6.3(3) All offenses not designated or "hybrid"	Aeronautics Act § 6.3(1)(2)
Administrative Treatment	All <u>must</u> be treated administratively	<u>May</u> be treated administratively BUT no fines- just suspension Aeronautics Act: §5.9 §6.6(1)	<u>May</u> be treated administratively BUT no fines- just suspensions Same as Summary Conviction
Court Action	Not Allowed	Yes, by way of Summary Conviction only	Yes, by way of Summary Conviction or Indictment
Maximum Penalty	Imposed by Transport Canada \$1,000 per offense Unlimited suspension of pilot license Revocation of License	Imposed by Courts \$5,000 fine per offense No imprisonment § 6.3(7)	Imposed by Courts
			If Summary Conviction \$5,000 fine per offense Maximum 1 year in Jail
			If by Indictment Unlimited Fines Maximum 5 years in Jail Forfeiture of Aircraft §6.1
Special Penalties		Prohibition- suspension for unlimited duration Aeronautics Act § 6.5(1)	Prohibition- suspension for unlimited duration Aeronautics Act §6.5(1) Forfeiture of Aircraft
Standard of Proof	Balance of Probabilities or Preponderance of Evid. <u>MOT v Selbstaedt 1988</u>	Beyond a Reasonable Doubt	Beyond a Reasonable Doubt
Limitation of Action	12 months from date of offense Aeronautics Act §22	12 months from date of offense Aeronautics Act § 22	Summary Conviction 12 months Indictment: no limit

There are a total of two hundred and forty seven (247) different offenses outlined in the current Canadian aviation operational regulatory law. Designated provisions account for ninety four(94). There are seven (7) hybrid offenses. The other one hundred and forty six (146) are summary conviction offenses.

It is important to understand that Transport Canada has the prerogative or discretion to deal with any of the two hundred and forty seven offenses in an "administrative" manner if the offense is detected and handled exclusively by Transport Canada officials.
(14)
The Royal Canadian Mounted Police (hereinafter the "RCMP") is the federal police force and it can, on its own information, prosecute in court anyone for a breach of any Federal laws-such as the Aeronautics Act. The RCMP can only take summary conviction and hybrid offenses before the courts. Any violation of a "designated provision" must be referred to Transport Canada for "administrative" enforcement action.

It should also be pointed out that if Transport Canada chooses to deal administratively with a summary conviction or hybrid offense rather than refer the matter to the courts, Transport Canada loses its power to impose a monetary penalty or fine- even though the courts could impose a fine for the same offense. Transport Canada can normally impose a monetary penalty in dealing with the designated provisions, however under the provisions of the Aeronautics Act it (15)
loses this power when dealing with non-designated offences in an "administrative manner.

This enigma has its roots in the constitutional law of
(16)
Canada. Under The Canada Act, 1982 there is a delineation of powers
between the Judicial and the Executive Branches of the Federal
Government of Canada. The 1985 amendment to the Aeronautics Act
granted Transport Canada the power to, de facto, determine guilt
or innocence of airmen concerning alleged violations of
federal laws, and to hand down penalties in the form of fines
and/or license suspensions. By giving Transport Canada an
adjudicative prerogative in dealing with offenses under the
aviation regulatory legislation, it was feared that this may
have created a court of parallel jurisdiction. To avoid this
appearance, Transport Canada was only allowed to impose monetary
fines in dealing with matters that were "designated" as
administrative provisions or offenses.

Conversely, on the judicial side of the issue, the courts
were technically prohibited from dealing with any of the
(17)
"designated" administrative offenses, and when dealing with
the summary conviction and hybrid offenses the courts could not
apply any "administrative" remedies such as the suspension or
revocation of "aviation documents" like pilots licenses or
air carrier operating certificates.

CANADIAN COURTS MAY USE PROHIBITION

As with most general principles, there are often exceptions to the rule. Although the courts were denied the authority to amend, suspend, or revoke pilot licenses, they were given a very similar power to issue orders prohibiting a pilot from operating an aircraft:

(1)Where a person is convicted of an offence under this Part, the Court may, in addition to any other punishment it may impose, make and order

(a) Where the person is the holder of a Canadian aviation document or is the owner or operator of any aircraft.

(b)prohibiting the person from operating an aircraft...

(18)

It is interesting to note that there is no limit on the length of the order of prohibition, therefore the courts appear to have been given, under a different name , the same powers to deal "administratively" with an offense as Transport Canada.

CANADIAN COURTS MAY ORDER FORFEITURE OF AIRCRAFT

Another interesting prerogative given to the court in Canada is the power to order an aircraft forfeited to the state if it is used by an airman in a commercial air service while he is under a court order of prohibition, or under administrative suspension by Transport Canada. The legislation states:

Where a person is convicted on indictment of an offence referred to in paragraph 6.3(1)(f) or (g) in relation to the operation of a commercial air service, the court may, in addition to any other punishment it may impose, order that any aircraft used in the commercial service be forfeited and, on the making of such an order, the aircraft is forfeited to Her Majesty in right of Canada.
(18)

This punishment is to be utilized only under the most extreme cases where the accused has been prosecuted and convicted by way of indictment. The accused must also be in flagrant disregard of previous enforcement sanctions imposed upon him, by way of suspension, or prohibition.

With the widespread use of leases and rental arrangements innocent third parties could be harmed by an aircraft forfeiture. The legislation recognizes this potential problem and makes accommodation for it. Relief from forfeiture may be granted if the court is satisfied that there was no "complicity or collusion in the offence, and that the applicant exercised reasonable care to satisfy himself/herself that the aircraft was not likely to be used in contravention of the provisions of Part I or the regulation and orders."
(19)

CANADIAN TABLE OF SANCTIONS

In an effort to standardize the administration of sanctions for aviation offenses, Transport Canada has set up a unique section in the Enforcement Manual called The Table of Sanctions
(20)
This chapter discusses the various ramifications in the sentencing process, and then sets up a very explicit list of "recommended sanctions" for a violation of any of the ninety four "designated" provisions, or the one hundred and forty six summary conviction

offenses. There are no recommendations for dealing with the seven "hybrid" offenses.

There appears to be no similar source of reference from the FAA on the uniform administration of sanctions for violations of the FARs in the US. (21)

THE SANCTION OF IMPRISONMENT

In Canada only the seven "hybrid" offenses carry the threat of imprisonment. If any of these offenses are prosecuted by way of summary conviction, the court can impose a maximum fine of five thousand dollars (\$5,000) or imprisonment of up to one year. If prosecuted by indictment, the court can impose up to a five year term of incarceration and an unlimited fine. Prohibition, as previously mentioned is also available to the court under these circumstances.

US CRIMINAL PROCEEDINGS AND IMPRISONMENT

The sanction of imprisonment is not generally used in FAA enforcement proceedings, however criminal proceedings can arise from an investigation which could result in imprisonment to an (22) airman. These offenses are normally considered to be in the area of criminal law, and like the seven "hybrid" offenses in Canada, normally involve a willful disregard of serious safety rules, or (23) fraud involving records or certificates. A succinct summary of the criminal investigative procedure is outlined in the following:

When a field office becomes aware of violations other than those which the FAA is charged with investigating or when it appears that a criminal violation has occurred, the subject FAA regional counsel notifies the Federal Bureau of Investigation which takes over the investigation. If sufficient facts are disclosed during the FBI's investigation, the case is referred to the US attorney in the jurisdiction where the crime was allegedly committed. If there is enough evidence the office of the Chief Counsel or regional counsel may refer the matter to the United States Attorney without having an FBI investigation conducted. Of course, the due process requirements provided by the criminal law system apply to any criminal investigation or action that may follow.

(24)

STANDARD OF PROOF IN PROCEEDINGS

In Canadian proceedings the standard of proof is a very important element of the investigation. If Transport is handling an offense in an "administrative" fashion, the offense must be proven only on a balance of probabilities. (25) However, if a summary conviction or hybrid offence is taken before the courts, Transport's case must be proven "beyond a reasonable doubt". Normally Transport Canada picks the manner of handling the alleged violation and the accused cannot change the procedure. If Transport wants to handle a summary conviction offense in an "administrative" manner, with the lower standard of proof, the accused cannot opt to have the case heard before the courts where the case would have to be proven beyond the reasonable doubt. In this regard Transport Canada holds a distinct advantage.

The FAA procedures employ the preponderance of evidence in all its enforcement proceedings, except those of a criminal nature as discussed above. Even the proceedings before the Federal District Courts are conducted on the basis that the FAA must only prove its case on a preponderance of evidence.

SPECIAL CANADIAN ENFORCEMENT LEGISLATION

A very crucial element in most enforcement action is the identification of the pilot-in-command of the aircraft involved in the alleged violation. The itinerant nature of aircraft operations makes this element very difficult to prove in many circumstances. The US literature is highly critical of the FAA's attitude regarding airmen's self incriminating statements, since many pilots-in-command openly identify themselves while responding to the FAA's "Letter of Investigation". The FAA is still required to prove proper identity of any airmen involved in enforcement proceedings.

By a clever amendment to the Aeronautics Act, Transport Canada was, in large measure, able to avoid this difficult problem. The amended legislation made the registered owner responsible for any alleged violations involving his aircraft, unless the owner could prove that at the time of the offence, "the aircraft was in the possession of a person other than the owner without the owner's consent."

(27)

(28)

In subsequent sections the "operator of an aircraft" and the "pilot-in-command of an aircraft" were also made liable for any alleged violations, unless they could prove that the offences were committed without their consent. Perhaps this is why Transport Canada appears to so understanding about warning pilots about self incriminating statements in their replies to the "Letter of Investigation", since aircraft identification is the key element to prove in most Canadian investigations- not pilot identification.

FOOTNOTES

1. FAA Order No. 2150.3 Compliance and Enforcement Program Manual, Dated May 16, 1980, as amended. Referred to as "The FAA Enforcement Manual" Paragraph 1100 Page 141
2. Ibid. Paragraph 1101
3. Ibid. Paragraph 1102
4. Enforcement Manual, Transport Canada Enforcement and Legislation Branch, 3rd. Edition, January 1, 1988, hereafter referred to as the "TC Enforcement Manual". Chapter 7 Section 7.1
5. Ibid. Section 7.5.3
6. Ibid. Section 7.5.3
7. Ibid. Section 7.5.1(2)
8. Supra. Footnote No. 1 Section 1101
9. Supra. Fn. 4 Section 7.5.3
10. Ibid. Section 7.1.1 Quote: "It is crucial to determine whether a particular offence is a hybrid offence, a summary conviction offence, or a designated provision."
11. Sulhany, Roger E., Canadian Criminal Procedure, Canada Law Books Limited, Agincourt, Ontario, Canada, 1972, Page 1
12. Supra. Fn. 4, Section 7.5.1(1)-(4) Transport Canada's authority to suspend or revoke an "aviation document" (such as a pilot license) because of a violation of a designated offense is currently in doubt, since the Civil Aviation Tribunal recently ruled in the case of LaRonge Aviation Services Ltd. v The Attorney General of Canada C-0029-10 Dated October 1987, that under the current provisions of the legislation, Transport Canada did not have this power delegated to it. Transport Canada could impose fines, but not suspensions or revocations. Transport Canada, under the review provisions of Section 28 of the Federal Court Act R.S.C. 1985 Ch.10. has taken the matter to the Federal Court. The case will be heard in October, 1988. Unofficial sources within Transport Canada confirm that the legislation will be amended if Transport loses the case.

13. The Aeronautics Act, R.S.C.1985, Ch.2 § 6.3
14. The Aeronautics Act Amendments:an Overview, Transport Canada Document No. TP 7748E 1986 Section 9, Paragraph C.
15. Supra. Fn. 13, Section 5.9
16. The Canada Act, R.S.C. 1985, Chapter 44, Section 96 of the British North America Act, as incorporated.
17. Supra. Fn. 13 at Section 6.5
18. Ibid. Section 6.4
19. Ibid. Section 6.4(5)
20. Supra Fn. 10, Chapter 10
21. Yodice, John, Aviation Lawyer's Manual-Representing the Pilot in FAA Enforcement Actions, Maryland Historical Press, Lanham, MD. 1986 Page30-31

FAA Enforcement Manual, Page 17 Section 206

The FAA recommends that ten factors be used in determining the appropriate sanction for a given offense:

- (1) The degree of hazard to others during the offence
- (2) Inadvertence vs. deliberate, or premeditation
- (3) Past violation history (4) Accused's aviation experience
- (5) Accused's attitude (6) Type of operation-private/commercial
- (7) Ability of violator to absorb the sanction.
- (8) Indirect impact on other segments of the industry.
- (9) Need for a special deterrent in a specific area.
- (10) Punitive action taken by employer etc.

While the N.T.S.B. has never given a great deal of guidance to the FAA in this regard, it basically endorsed the above set of guidelines in the case of Administrator v. Whitaker 1 N.T.S.B. 1982(1972)

22. FAA Enforcement Manual Fn. 1, Page 83 §600
23. 49 U.S.C. § 1472(a)-(p)
24. Pangia, M.J. "Handling FAA Enforcement Proceedings: A view From The Inside" 46 Journal of Air Law and Commerce 573 (1981) at Page 585
25. M.O.T. v. Selbstaedt CAT C-0081-02 August 18, 1988
26. Hamilton, Scott. "Administrative Practice Before the FAA and NTSB: Problems, Trends and Developments, 46 Journal of Air Law and Commerce 615(1981); Kovarik, "Procedures Before the FAA" 42 Journal of Air Law and Commerce 11(1976); Yodice, John. Airmen Certification and Enforcement Procedures, 37 Journal of Air Law and Commerce 281(1971); Martin, G.D. "Enforcement of Federal Aviation Regulations by the FAA" 53 Journal of Air Law and Commerce, 543 (1987)
27. Aeronautics Act, R.S.C.1985 Ch. 2, as amended, § 7.3(1)
28. Ibid. §7.3(2)
29. Ibid. §7.3(3)

CHAPTER V REMEDIES - FAA LEGAL PROCEEDINGS

As outlined above in the first Table, the FAA considers legal actions in enforcement proceedings to involve two sanctions:

- (1)
Civil Penalties, which are basically monetary fines, and,
- (2)
Certificate Actions, which result in pilot license suspensions or revocations.

Some perspective on how these sanctions are invoked is given in the following excerpt:

Which action is selected is largely a matter of judgement on the part of the FAA people involved. The Administrative action is used in relatively minor violations... If the case is more serious, the FAA will choose between a certificate action and a civil penalty. Again the matter is a matter of judgement. Generally the certificate action is used in violations of an operational nature (buzzing, busting minimums, etc.) and the civil penalty is used in non operational violations (aircraft out of license, expired medical certificate, etc.) The civil penalty may also be used where a suspension would be a manifestly unfair or unjust by reason of the impact on the certificate holder as, for example, when the pilot uses his certificate to earn his livelihood.

(3)

THE CIVIL PENALTY

This sanction is not like your everyday traffic ticket in that it has some very subtle, but complex aspects to it. The first complexity concerns the FAA's legislative authority to levy monetary penalties and enforce them. Section 901 of the FA Act empowers the FAA to compromise civil penalties, but then fails to give it the authority to enforce them. This arrangement creates all sorts of problems.

This problem is best illustrated in a directive contained in the FAA Enforcement Manual:

Because the Administrator has no authority to impose a civil penalty, but only to either accept settlement or refer the matter to a U.S. Attorney, all civil penalty letters and other correspondence or documents referring to the FAA's action in civil penalty matters must be phrased to indicate that we "would accept (a specified amount) in settlement" rather than "impose" or "assess" a civil penalty.

(4)

The maximum penalty per violation is one thousand dollars (\$1,000 and it is, de facto, the FAA, through its officials who determine the quantum to be assessed under each set of circumstances.

The civil penalty procedure follows this line of events. While the alleged violation is being informally investigated, a letter of investigation (see Appendix F) is sent to the accused informing him of the investigation and inviting an explanation of the situation. After the informal investigation, and possibly a formal investigation have been completed, the regional FAA field officers and an assigned attorney from the Regional Counsel's office determine whether a civil penalty is appropriate for the violation. The quantum is fixed and a "civil penalty" letter is sent to the accused (see Appendix I). The letter lays out the facts surrounding the alleged violation, the FAR's contravened, and stipulates the amount of penalty, and invites the accused to either submit more information about the alleged violation or offer a monetary settlement to close the matter. Included in
(5)
each letter is an enclosure, which outlines the salient portions

of Section 901 of the FA Act and details the various options open to the accused, which are:

- (1) Pay the fine.
- (2) Submit additional information in the matter.
- (3) Have the merits of the case tried before the U.S. District Court.
- (4) If the accused filed an Aviation Safety Report with NASA, under certain circumstances this may constitute a valid defense, and the penalty would be waived.

If the accused agrees to pay the penalty, it is very important that the letter tendering the payment be worded very explicitly in order to avoid certain repercussions in the future. It appears to be a question of form rather than substance. The following quote illustrates this technicality:

Furthermore, a civil penalty compromise in the FAA pilot file will be considered in any future enforcement actions against the pilot. If the compromise does not contain the pilot's disclaimer of guilt or an explanation of the circumstances, the FAA may well consider it to be an admission of guilt.

(6)

ENFORCEMENT OF CIVIL PENALTIES BY FEDERAL COURT ACTION

If the accused airman does not respond to the letter of
(7)
civil penalty within the required fourteen days, the matter is handed over to the U.S. Attorney's office for prosecution before
(8)
the Federal District Court. At this point the FAA loses some control over the matter, even though its officials work closely with
(9)
the Department of Justice in presenting the case to the court.

It should be pointed out that this transfer can cause some serious complications. As outlined in the FAA Enforcement Manual,⁽¹⁰⁾ there may be a lot of other matters at the U.S. Attorney's office that take priority over the collection of a fine from a pilot, and there may be an unwillingness to proceed with the matter on a timely basis. On the other hand the U.S. Attorney may not feel that the case may be successful at trial for any number of reasons and refuse to take the matter further. If the U.S. Attorney does not wish to pursue the matter before the courts, the FAA may take the matter before the courts itself, after securing the acquiescence⁽¹¹⁾ of the Department of Justice.

At trial the onus for proving the matters in dispute is on the FAA, and the standard of proof is on a preponderance of evidence or balance of probabilities. An appeal of the outcome of the trial may be taken by either party in the normal manner to the Federal⁽¹²⁾ Court of Appeal.

The limitation of action period for taking a matter before the⁽¹³⁾ Federal District Courts is five years. Because of the N.T.S.B. "stale complaint" rule in certificate actions, which generally requires the FAA to take any enforcement action within six months of the alleged violation, the FAA will often resort to the civil penalty remedy, if a violation has gone undetected for more than six months.

FAA SEIZURE OF AIRCRAFT FOR NON PAYMENT OF CIVIL PENALTY

A small point, but of unique significance to the civil penalty remedy, is that under Sections 901(b) and 903(b)(1), the FAA can enforce a civil penalty by seizing an aircraft for payment, if the aircraft was involved in the violation. The legislation, on face value accords the FAA some very strong, ex parte, powers to seize aircraft under certain circumstances. ⁽¹⁴⁾ Fortunately, the aircraft owner can avoid this problem by simply posting a bond.

CIVIL PENALTY ASSESSMENT DEMONSTRATION PROGRAM

In an effort to make the assessment and enforcement of civil penalties a more straight forward administrative procedure, the U.S. Congress passed a recent amendment to the FA Act (Public Law # 100-223 Dated December 30, 1987) which enabled the FAA, among other things, to assess and enforce civil penalties of up to fifty thousand dollars (\$50,000). Under the two year demonstration project, the FAA will be able to enforce civil penalties by having the merits tried before an administrative law judge, instead of having to take the matter to the U.S. District Courts using Department of Justice lawyers. In other words, the FAA will handle its own cases in the adjudicative process, and the proceedings will be placed before an administrative law judge, who will have some experience in handling these matters. As of September 1988, the process is just being implemented. The U.S. Department of Transportation administrative law judges will be hearing the cases. The project will run until December 1990, at which time a formal report will be completed and submitted to Congress.

FAA CERTIFICATE ACTIONS

The most commonly used remedy by the FAA is the pilot certificate action. For clarity, this remedy is divided into two areas:

- | | |
|-----------------------------|------------------------------------------------------------------------------------|
| (1) Reexamination of airmen | (2) Amendment, modification, suspension, or revocation of an airman's certificate. |
|-----------------------------|------------------------------------------------------------------------------------|

REEXAMINATION OF AIRMEN

Section 609 of the FA Act gives the FAA the following power to reexamine an airman: (15)

- (a) The Administrator may, from time to time, reinspect any civil aircraft, aircraft engine, propeller, appliance, air navigation facility, or air agency, or may reexamine any civil airman.

This wide power to reexamine airmen has been modified by the case law in the area, which stipulates that the FAA must have "reasonable grounds" upon which to question an airman's competence or qualifications. The obvious occasions when an airman may be legitimately asked to submit to a reexamination are after an accident/incident or after a violation of the FARs. (16)

The request for a reexamination is sent to the airman via certified mail outlining the grounds upon which a reexamination is being requested. The airman is invited to call the field officer issuing the letter to discuss the details of the exam, and to set a time and location. (See Appendix J for sample letter)

Failure on the part of the airman to submit himself for reexamination results in the FAA field office issuing an emergency order of suspension and filing an airman's certificate stop order with the central records division in Oklahoma City. (17)

The airman will be given a number of opportunities to pass the reexamination. If unsuccessful, in due course the airman's certificate will be suspended or revoked. Of course this is not an indefinite bar to the airman, who may apply at any time in the future-unless he is forbidden by certificate action, to have a flight test for reinstatement of the certificate.

Another interesting point of the reexamination process is that the FAA may choose to only question an airman's competency in one area and allow the airman to exercise flight privileges in another area, even though the airman may have failed or (18) refused the reexamination. For example, a commercial pilot, having an instrument rating and a fixed and rotary wing endorsement, could have been involved in a VFR helicopter accident. The FAA would probably only request a reexamination on the helicopter competency, thus allowing the pilot to exercise any fixed wing privileges- even if the airman refused to submit to a reexamination.

The N.T.S.B. is the appeal tribunal for any suspensions or revocations that the pilot may receive from this request.

It should be pointed out that an airman could be faced with a reexamination and certificate action evolving out of something like

an accident situation. It is therefore important to realize that these two divisions of the certificate action are not mutually exclusive, and can operate independently, or concurrently.

The Enforcement Branch in Transport Canada does not use reexamination as an enforcement remedy in any of its activities involving pilots.

AMENDMENT, MODIFICATION, SUSPENSION AND REVOCATION
OF AN AIRMAN'S CERTIFICATE

After the completion of the investigative stage of the alleged violation, and a decision has been made to impose a certificate sanction, the accused is sent a letter entitled "Notice of Proposed Certificate Action". (See Appendix K) This is simply a notice which outlines the salient facts in the case, as determined by the FAA investigation, and lists the FARs that were contravened under the circumstances. The final paragraph gives a notice of the proposed certificate sanction, and gives the accused fifteen days to respond before a Final Order is issued.

It is important to note that the airman can exercise all his privileges until the Order is issued. Unless the sanction was issued on an emergency basis (emergency revocation and suspensions are discussed in more detail in Chapter VI) the airman may continue to exercise the privileges of his certificate past the date of the Order, if an appeal is filed with the N.T.S.B.. The filing of the appeal automatically stays the suspension or revocation until all of the Board's
(19)
appeal procedures have been exhausted.

An addendum to the "Notice of Proposed Certificate Action" is
(20)
an information sheet and pilot reply form. The latter two forms
outline five various procedures for responding to the Notice.
The five options are:

- (1) Accept the suspension or revocation.
- (2) Have the Order issued so that an appeal
to the N.T.S.B. may be launched forthwith.
- (3) Answer the charges in the notice and hope that
the new facts will change the FAA's position.
- (4) Request an informal meeting with the FAA.
- (5) Request a waiver of penalty under the terms
of the Aviation Safety Reporting Program.

It is important to note that only the airman's certificate
action can be appealed to the N.T.S.B.. The civil penalty is tried
(21)
at the US District Court level and appealed within that system.

THE AVIATION SAFETY REPORTING PROGRAM (ASRP)

As mentioned above, an accused airman can shield himself
from any FAA enforcement sanction if he voluntarily participates
in the Aviation Safety Reporting Program within ten days after
(22)
the violation occurred..(See Information Circular in Appendix L)
This program, was set up in 1975 by the FAA to "encourage the
reporting and identification of deficiencies and discrepancies in
(23)
the system." The National Aeronautics and Space Administration
(hereafter "NASA") is used as an independent party to receive

the information, screen out any identification of the reporter, and send on the information to the FAA for analysis, and possible
(24)
corrective action. In the first ten years of the program there were over forty two thousand reports processed by NASA.

A pilot's voluntary and timely participation in the ASRP will not act as a complete defense to enforcement action. The following conditions must be met before any sanction will be waived:

- (1) The violation was inadvertent and not deliberate;
- (2) The violation did not involve a criminal offense, or accident, or action under Section 609 of the FA Act which discloses a lack of qualification or competency, which are wholly excluded from this policy;
- (3) The pilot has not been found in an prior FAA enforcement action to have committed a violation of the FA Act, or of any regulation promulgated under the Act for a period of 5 years prior to the date of the occurrence; and
- (4) The person proves that, within 10 days after the violation, he completed and delivered or mailed a written report of the incident or occurrence to NASA under ASRP.

(25)

Some important items must be noted in this potential defense. Firstly, the ASRP does not apply to aviation accidents. The pilot must report accidents to the N.T.S.B. and take any enforcement heat that follows. Secondly, the pilot must prove that he filed the report. Telephone calls do not count. Thirdly, ASRP participation only gives the airman immunity against the imposition of a sanction by the FAA. The violation will be recorded on the airman's file, and used in future enforcement actions. Forthly, if a lack of

competency or qualification is involved, the defense fails. In piloting operations the alleged violations normally involve competency or qualification, therefore this partial defense is rarely available to the airman.

In Canada there is an anonymous aviation incident reporting program which is administered by the Canadian Aviation Safety Board, which is the Canadian counterpart to the N.T.S.B. and located in Ottawa. The Canadian program, called the Confidential Aviation Safety Reporting Program, has many of the same goals as the ASRP in the US, however there is no similar waiver provision for participants facing enforcement action.

STALE COMPLAINT RULE

One of the more important defenses for the airman in a certificate action is the N.T.S.B. "stale complaint" rule. (26)
Stated simply, it means that the N.T.S.B. will allow any appeals from airmen where the FAA has not charged the airman within six months of the alleged offense taking place. Therefore this defense can be raised at any point in the proceedings, even at the time of receiving the initial Notice of Proposed Certificate Action.

As usual there are exceptions to this rule and they are outlined in the N.T.S.B. Rules of Practice In Air Safety Proceedings: (27)

- (1) If the airman's qualifications are in issue, this rule will not apply.
- (2) If the FAA can prove that it had "good cause" for the delay, or for imposing a sanction on the airman, the rule will not apply.

Notwithstanding the rule, it has been noted that the N.T.S.B. greatly prefers to decide "a case on the merits rather than on a
(28)
procedural deficiency."

The main point to bear in mind is that the two above mentioned defenses are very narrow in their applications for airmen. An airman's qualifications or competence can be questioned in nearly every enforcement related issue, therefore these defenses are unavailable in many situations.

SIMULTANEOUS CIVIL AND CERTIFICATE SANCTIONS

The FAA currently has a policy of not pursuing simultaneous civil and certificate actions. Certainly the courts have the jurisdiction to handle many non-aviation offenses by imposing a variety of sanctions, such as a fine and a suspension for a single offense, but the FAA has not pursued this course of action in the past. The following quote clarifies this policy:

As a matter of law, an election to impose one sanction is not a bar to a concurrent proceeding to impose another; however, such action has the appearance of "double jeopardy" and, in the usual situation, it is not necessary, as the FAA's enforcement powers to proceed either by way of civil penalty or certificate action are sufficient to satisfy the public interest with respect to even the most serious violations.

This is the current FAA policy. There is no legislative prohibition against the FAA imposing multiple sanctions for a single FAR offense, so this area may very well change in the future if public reaction to air safety demands more punitive sanctions for violators.

On the Canadian side of this issue, it is interesting to note that Transport Canada also has the legislative mandate to impose fines and license suspension or revocations for single offenses, but rarely does so as a matter of internal policy. The Canadian courts can impose a fine, a term of incarceration, (30) and an order of prohibition for a single offense, however the record indicates very few cases of mixed sanctions for a single offense.

FOOTNOTES

1. Federal Aviation Act of 1958, § 901; 49 U.S.C. §1471
2. Ibid. §609
3. Yodice, John. Aviation Lawyer's Manual Idem. Page 24
4. FAA Enforcement Manual supra. Fn.1 Page 36, Section 1202(b)(3)
5. The enclosure is found in Appendix I, along with the sample "Civil Penalty Letter".
6. Supra. Yodice, Page 26
7. See Appendix I
8. FAA Enforcement Manual, supra. §1202
9. Ibid. § 1202 (e)(4)
10. Ibid. § 1202 (e)(5)
11. Ibid. §1202 (e)(6)
12. FAR 13.15(e)
13. 26 U.S.C.A. Section 2462(West Supp.1985)
14. Pangia, M., "Handling FAA Enforcement Proceedings: A View From the Inside" 46 Journal of Air Law and Commerce, 606-607 (1981)

In giving relief to an owner of a seized aircraft the courts will "give great weight to four factors:

- (1) the existence of an application to the court;
- (2) the government interest to be protected;
- (3) the ability of the aircraft owner to post a bond;
- (4) the availability of an opportunity for an early hearing.

15. Supra. Fn.1 § 609(a)
16. Administrator v. Hinman 2N.T.S.B. 2496 (1976)
17. FAA Enforcement Manual, Chapter 8, Section 801(d)
18. Administrator v. Bradford 3N.T.S.B. 336(1977)
Yodice, supra. Page 19
19. 49 C.F.R. Part 821 § 821.30(c) N.T.S.B. Rules of Practice in Air Safety Proceedings
20. FAR 13, Enforcement Procedures §13.19(c)
21. Ibid. § 13.15(e)
22. FAA Advisory Circular AC No. 00-46C Dated February 4, 1985- Aviation Safety Reporting Program.
Yodice, supra Page 151
23. Ibid. Section 1
24. Ibid. Section 8
25. Ibid. Section 9(b)
26. Supra. Fn. 19 N.T.S.B. Rules, Section 821.33
27. Ibid. Section 821.33(a)1-3
28. Administrato v. Pratt 2N.T.S.B. 2233(1976)
Yodice, supra. Page 35.
29. FAA Enforcement Manual, supra.Fn. 4, Page 163
30. The Aeronautics Act R.S.C. 1985 Ch 2,
as amended. Section 6.5(1)

CHAPTER VI EMERGENCY SUSPENSION OR REVOCATION OF PILOT
CERTIFICATES IN CANADA AND THE USA

The FAA has been given sweeping powers, under emergent situations, and in the name of air safety, to issue suspension or revocation orders of pilot licenses. Section 1005 of the (1)
FA Act states:

That whenever the Administrator is of the opinion that an emergency requiring immediate action exists in respect of safety in air commerce, the Administrator is authorized, either upon complaint or his own initiative without complaint, at once, if he so orders, without answer or other form of pleading by the interested person, or persons, and with or without notice, hearing, or the making or filing of a report, to make such just and reasonable orders, rules, or regulations, as may be essential in the interest of safety in air commerce to meet such emergency...

The FAA policy in this area is very clear. Emergency powers concerning the suspension of airmen's certificates are to be invoked only if the following two conditions co-exist:

- (1) When the certificate holder has demonstrated a lack of necessary qualifications; or when there is a substantial question about the existence of such qualifications; or when the certificate holder has clearly demonstrated a determination not to act in accordance with existing regulations; and
- (2) It is likely because of the nature of the certificate holder's connection with aviation or because of other indications that the certificate holder will continue using the certificate.

(2)

The issue of "due process" before the law has been debated in both countries for many years. At what point do the accused's rights to a fair hearing become abused when the FAA exercises its emergency powers of license suspension?

(3)

The leading FAA case in this area, which is an appeal case from the District Court, clearly supported the FAA's right to invoke the emergency suspension. The court felt that Congress recognized the need for someone to safeguard the public safety and delegated this serious task to the FAA. These emergency powers of suspension and revocation may be needed, from time to time,

in order to carry out this onerous duty. The only issue that is reviewable before any appellate body is whether the FAA, given the facts in each case, exercised its emergency powers

(4)

in a proper manner. The cases to date support the above referenced excerpt from the FAA Enforcement Manual. If the two above referenced conditions co-exist, the emergency suspension will be probably be upheld on appeal.

In order to minimize any compromise to an airman's right to due process, the N.T.S.B. appeal procedures in the case of emergency orders has been accelerated.

(5)

An important point in the appeal process of an emergency order is that there is no automatic stay of the effect of the order pending the outcome

(6)

of the appeal, as is the case in a N.T.S.B. appeal of a regular suspension or revocation order.

In Canada, Transport Canada has been given the power under Section 6 of the Aeronautics Act to "suspend a Canadian aviation document(which includes pilot licenses) on the grounds that an threat to aviation safety exists or is likely to occur as a result of an act or thing having been, being or proposed to be done under the authority of the document..."⁽⁷⁾

It is curious to note that an emergency action of Transport Canada can only suspend a license, not revoke it.

Any emergency suspension is reviewable by the Canadian Civil Aviation Tribunal or the pilot can apply for a "reconsideration" of the suspension by Transport Canada staff. In any event the application for appeal does not stay the suspension.⁽⁸⁾⁽⁹⁾

The notice of suspension issued by Transport Canada in these emergent conditions includes the following points:⁽¹⁰⁾

- (1) the reasons for the suspension;
- (2) the conditions for the reinstatement of the license; and
- (3) the last date for requesting a review.

In conclusion, one can see that the issue of public air safety is at the root of the emergency revocation and suspension powers delegated to both the FAA, and Transport Canada. This power is not to be exercised as a punitive measure,⁽¹¹⁾ and while this issue has never surfaced in any of the appellate cases, there is a good chance that a review tribunal would side with the airman if there was a punitive element in the emergency action.

The accelerated review provisions in these cases acknowledges that there has been a compromise of an airman's rights to due process, however the lack of stay in the implementation of the suspension or revocation during the review process indicates that the airman's conduct or intentions must be considered to be a serious threat to public safety. When an airman conducts himself in this manner, the public interest must outweigh the normal rights of the individual.

FOOTNOTES

1. Federal Aviation Act of 1958 49 U.S.C. §1301 et seq. (1982), § 1005
2. FAA Enforcement Manual, FAA Order No.2150.2A, Page 174
3. Stern v. Butterfield 529 F.2nd 407 (5th Cir. 1976)
Pangia, M.J."Handling FAA Enforcement Proceedings" supra.
4. Ibid. P. 532
5. 49 C.F.R. Part 821 Subpart I §821.54
6. Supra. Fn. 1 § 609(a)
7. Aeronautics Act, R.S.C. 1985 Ch. 2
8. Ibid. § 6.0(8)(9)
9. Ibid. § 6.0(4)
10. Transport Canada Enforcement Manual, supra. § 3-10(2)(c)
11. FAA Enforcement Manual. supra. Page 173 § 1203(g)(1)(b)

CHAPTER VII- APPEAL PROCEDURES FROM ENFORCEMENT ACTIONS
OF THE FEDERAL AVIATION ADMINISTRATION

The common law traditions of both countries have established the legal principle that an aggrieved party should always have the right to a review or appeal of an imposed penalty, like an enforcement sanction. From a legal point of view it is most often the appeal decisions which shape and refine the enforcement procedures. Therefore any comparison of enforcement procedures without a comprehensive look at the appeal process in each country would be incomplete.

In the United States administrative actions such as the "warning notice" and the "letter of correction" are not formally recognized as violations of the regulations and do not require any imposition of sanctions. It follows that there does not need to be any appeal process from this type of enforcement action.

Legal enforcement action against airmen, on the other hand can result in some very heavy penalties. For a senior airline captain, a thirty day suspension can result in a loss of salary exceeding ten thousand dollars, plus any legal fees incurred in the defense of the matter. Then there is the added penalty of gaining a violation record in ones' profession, with all the attendant employment problems that can arise from it.

Any system that can impose such severe penalties must afford the accused individual the right to a fair and unbiased review of the case.

APPEAL FROM A CIVIL PENALTY DECISION

The civil or monetary penalty is normally
(1)
enforced and appealed through the Federal court system in the US. If an airman does not want to pay the penalty, the matter will be automatically referred to the US Attorneys office to be tried before one of the District Circuit Courts. While this hearing is referred to as a trial de novo, it is, in essence, a first level of review of the FAA's case against the airman. The aggrieved airman can take an appeal from this
(2)
court to the next level of appeal in the Federal District Court system, where all the normal appellate procedures apply.

CIVIL PENALTY ASSESSMENT DEMONSTRATION PROJECT

The much heralded "Civil Penalty Assessment Demonstration Project", which was recently established, and described in Chapter V, has a few appeal modifications from the normal situation. After the FAA has sent the accused airman the letter of civil penalty, the airman can elect to have the merits of

the case placed before a Department of Transportation Administrative Law judge at a full hearing. The Judge can uphold the penalty, modify it, or cancel it completely.

The airman can appeal this initial decision back to the "FAA Decision Maker". Current FAA departmental information indicates that this appeal body will not be comprised of any individuals who had anything to do with the assessment of the civil penalty in the first instance. It is proposed that the FAA Administrator will have assigned to his office a few attorneys from the General Counsel's staff to act as review officers. Using the record that was taken at the Administrative Law Judge's hearing, the review officers will make a determination on the case. If the airman feels that he has not received a fair review of his case, the matter can be further appealed to the Federal Court of Appeals for review. At the time of writing this thesis, the formal rules of procedure for the demonstration Project were not available, therefore it is somewhat difficult to critique in detail the proposed system of appeal.

The only perceived compromise in the appeal procedures, appears to be at the review stage conducted by the "FAA Decision Maker". There is an appearance of bias. If the FAA is internally reviewing its own civil penalty action, albeit after the Administrative Law Judge has reviewed it, the procedure looks

biased. It appears as if one side of the FAA legal office is prosecuting the actions and the other side is reviewing them. Congress passed the Independent Safety Board Act in 1974 to remove the appearance of bias from the relationship between the N.T.S.B. and the Department of Transportation. This proposed arrangement appears to be a step backwards. Furthermore, the fact that the Administrative Law Judges are employed by the Department of Transportation gives the appearance that undue influence from departmental officials may be possible.

In all fairness the problem of apparent bias in the proposed system is somewhat reduced by the availability of review to the Federal Courts of Appeals.

There are benefits to both parties in this proposed appeal procedure. From the FAA's point of view, it will allow the Administration to proceed with the review of its civil penalty assessments in an orderly way. The FAA will no longer have to persuade the US Attorney's office to give a high priority to the prosecution of civil penalties before the Federal Courts. The US attorney's office was, under the old system, able to refuse to prosecute a case, if it did not feel that the merits of the case were squarely on the FAA's side. In aviation matters this judgement is best made by aviation attorneys rather than unspecialized counsel in the US Attorney's offices. This project

will allow the FAA to present its case directly to the trier of fact using its own attorneys, thus keeping total control of any possible settlement negotiations or court strategies.

The benefits to the accused airman are less obvious. Using the less structured forum of an administrative hearing, the airman may be able to present his case without the additional cost of an attorney. This apparent saving may, however, prove to be fatal to the case in the long run, since all the subsequent appeals are based on the record kept in the initial hearing before the Administrative Law Judge. The largest benefit may come from the fact that the appeal process has been lengthened so much that the airman can avoid payment of any penalty for an indeterminate period, if he wants to exhaust all appeal routes.

In summary, it should be reiterated that the Demonstration Project appears to give many more benefits to the FAA than the accused airman. It is hoped that this benefit will be accompanied by an increase in the wise use of the enforcement powers granted to the FAA.

APPEALS FROM CERTIFICATE ACTIONS

An initial appeal from a suspension or revocation order is made to the National Transportation Safety Board.

Any person whose certificate is affected by such an order of the Administrator under this section may appeal the Administrator's order to the Board and the Board may, after notice and hearing, amend, modify, or reverse the Administrator's order if it finds that the safety in air commerce or air transportation and the public interest do not require affirmation of the Administrator's order.

(3)

A subsequent judicial review or appeal of the N.T.S.B. hearing may be taken before the Federal Courts of Appeal:

Orders of Board and Administrator Subject to Review

Any order, affirmative or negative, issued by the Board or Administrator under the Act, except any order in respect of any foreign air carrier subject to the approval of the President as provided in Section 801 of this Act, shall be subject to review by the courts of appeals of the United States or the United States Court of appeals for the District of Columbia upon petition, filed within sixty days after the entry of such order, by any person disclosing a substantial interest in such order. After the expiration of said sixty days a petition may be filed only by leave of court upon a showing of reasonable grounds for failure to file the petition theretofore.

(4)

THE N.T.S.B. APPEAL PROCESS

In 1966 the US Congress passed the Department of Transportation
(5) Act. Among other things it took the aircraft accident investigation role from the Civil Aeronautics Board and created the N.T.S.B. to do this function. In addition the new N.T.S.B. was given the task of being the appellate tribunal for certificate disputes between the FAA and airmen. At this time the N.T.S.B. was a branch of the FAA. For obvious reasons, Congress made the N.T.S.B. fully
(6) independent in 1974, by passing The Independent Safety Board Act. This arrangement has remained unaltered to the present.

The N.T.S.B appeal process for airmen charged with FAR
(7) violations is divided into two main sections. The first
(8) appeal level is referred to as the "appeal to the Board", and is defined as "a request to the Board for the review by a law judge of an order of the Administrator". The second
(9) level is referred to as the "appeal from an initial decision" and is defined as "a request to the Board to review a law judge's decision." There is no accelerated procedure to enable an airman to go directly to the second level of appeal. The matter must initially go before an administrative law judge.

APPEAL TO THE BOARD

This appeal can only be initiated after the FAA has issued
(10)
an Order of suspension or revocation. For this reason the Notice
of Proposed Certificate Action, which is sent to the airman before
an order is issued, contains an option to have the Order issued
as soon as possible so that the airman can initiate the appeal
(11)
process to the N.T.S.B.

One of the most important factors for the accused airman
at this stage of the appeal process is that the filing of the
appeal with the N.T.S.B. automatically stays the effect of the
(12)
FAA's Order. (The Canadian situation does not follow this example)
(13)
Unless the Order is issued on an emergency basis, the stay will
remain in effect until all N.T.S.B. appeals have been exhausted.
On the other hand a stay of the FAA Order while the matter is
under judicial review by the courts must be obtained through a
(14)
motion for interlocutory relief to the court reviewing the matter.

PRE HEARING PROCEDURES

While the initial impression of the N.T.S.B. procedures
may indicate a rather informal manner, the Rules of Practice
(15)
have made provisions for the normal pre-hearing legal posturing.
The ALJ assigned to the case rules on interlocutory motions and
may convene pre-hearing conferences to try and isolate the
(16)
relevant issues for the hearing.

DISCOVERY

Discovery of witnesses is allowed in the rules,
(17) however, the practice of the N.T.S.B. has limited the FAA's
use of this tool. As was pointed out, the FAA is supposed
to have good and probable grounds for initially issuing
a suspension, so why should they need to interrogate the
(18) accused airman after the fact? The Board's practice in
(19) this area is best described in the following quote:

The Board's rules allow the FAA to take the testimony
of the pilot by deposition, either by oral examination
or written questions. This is not a common practice of
the FAA and it is not always permitted by the NTSB.
The Board has stated that it will "carefully scrutinize
any departure from the normal and better practice of the
Administrator presenting his case without calling the
respondent as a witness."

Whether the Board will compel a pilot to be deposed by
the FAA seems to depend primarily on the impact of the
pilots refusal, in terms of legal prejudice, on the
FAA's ability to present its case; and on whether FAA's
case rests solely on the deposition... A pilot's refusal
to be deposed in order to establish the basis for FAA's
action, after the order is issued, and an appeal to the
N.T.S.B. is made, hardly seems prejudicial.

It is obvious that there is no hard and fast rule in this
area. The ALJ also has the power to entertain any motion that
is not specifically referenced in the Rules, thus allowing

(20)
a wide range of potential legal posturing before the hearing:

- (a) General. An application to the Board or to a law judge for an order or ruling not otherwise specifically provided for in this part shall be by motion... All motions not specifically provided for in any other section of this part shall be made at the appropriate time, depending upon the nature thereof and the relief requested.

The upshot of these loose provisions is to give the ALJ a certain amount of discretion to allow the parties to isolate and clarify the relevant issues before the hearing.

VENUE AND JUDGE "SHOPPING"

The FA Act outlines the normal rules for determining the
(21)
venue for the hearing:

The trial of any offense under this Act shall be in the district in which such offense is committed...

The reason the venue becomes an important issue is that a determination of venue also determines which judge will hear the case. Up until a few years ago, the Chief Law Judge assigned
(22)
cases to each Administrative Law Judge. Under this system the accused airman's attorney could informally go before the Chief Law Judge and try to get his client's case put before a specific judge. The system became unmanageable over time and a more definite procedure was set up to try and avoid any Judge

"shopping" that may have crept into the system. The five ALJs are currently assigned to a specific geographic area for a certain period of time. The location of the offense now determines venue and the ALJ. Counsel may still attempt to change the venue to try and find a more sympathetic ALJ for a particular case, however the motion to change location is now heard before the judge assigned to the original venue. (23) Unless the reasons are extremely compelling, there is little chance of a change.

THE ADMINISTRATIVE LAW JUDGES

Currently there are five full time and one part time judges who handle all the review cases on certificate actions. Three judges work out of Washington, D.C.; one judge is based in Denver Colorado, the other in Los Angeles, California. The part time judge is normally employed in the summer months to fill in as needed. Of the six judges, three are licensed aviation pilots, or have held licenses at one time. All of the six judges have been with the Board for more than nine years, with the Chief Judge having more than nineteen years of service.

Administrative law judges are selected through the Office of Personnel Management, which is the personnel department for the US Federal Government, and reports directly to the President.

The judges are selected from a pool of applicants who are required to qualify through written and oral competitions. The successful judges go on a roster, which is available to any of the Federal Government departments and agencies. If one of these departments or agencies needs a judge, they can chose one from the roster. An administrative law judge's appointment is considered "career permanent", and normally ends on death or voluntary retirement.

One very important aspect of the terms of employment with an agency or department is that once hired, a judge can not be removed from office unless there is good and reasonable cause to (24) do so, and the Merit System Protection Board has conducted an independent review. The N.T.S.B. judges are particularly insulated from removal from office by any acts of the FAA, since the N.T.S.B. is the only agency that can initiate the removal process of one of its own judges. In other words the ALJ's position is very secure, and cannot be threatened if some outside agency does not approve of the judge's decisions.

THE PLEADINGS

The FAA's order is considered to be the Administrator's (25) formal pleadings before the Board. The appellant can formulate his pleadings in any manner, however they should address the allegations of fact and contravention outlined in the FAA's order. The FAA's charges often follow a pattern which can be anticipated like the matter of carelessness and recklessness.

When an airman is charged with an operational violation i.e. an offense involving the actual operation of an aircraft, the charges against him are normally references of Part 91 of the FARs. This is the part dealing with Air Traffic and General
(26)
Operating Rules. In particular the FAA normally concludes the charge section of an Order of Suspension or Revocation by alleging that the airman violated Section 91.9:

No person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another.

(27)

A law dictionary defines carelessness and recklessness as:

Careless: synonymous with "negligent", the latter being probably the better word in pleadings.
Absence of ordinary or proper care.

Reckless: heedless, wanton conduct. The state of mind accompanying an act, which either pays no regard to its possibly or probably injurious consequences, or which, though foreseeing such consequences, persists in spite of such knowledge. Conduct amounting to more than negligence.

The charges in Section 91.9 are very serious. Taken at face value, these allegations in the pleadings could trigger a very strong defensive reaction on the part of the accused airman and his counsel. There is, fortunately, a mitigating side to this matter.

Since the FAA uses this charge in so many of its pleadings,
(28)
the Board often refers to it as a "residual charge" as opposed
to a primary or consequential charge. The difference between
these classifications is subtle, but important to the final
determination of any sanctions that may be imposed against the
airman. If the charges allege, for example, failure to follow
air traffic control instructions, failure to take enough fuel
for an intended flight, and careless/reckless operations, the
latter charge may be deemed to be either a residual or independent
charge by the judge at the end of the hearing. If it is considered
residual, the judge will conclude that the other charges are of
primary relevance and the careless/ reckless charge is a simple
residue of the other charges. However, after viewing the totality
of evidence, the judge can conclude that the careless/reckless
allegation is the primary charge and impose a very severe
sanction on the airman. Therefore, it becomes crucial to the
airman's case that even if he is guilty of some isolated,
technical violations, the judge not find that the airman was
also independently guilty of careless or reckless conduct.

A finding that the recklessness/carelessness was a
residual matter in the case will have little effect on the
sanction the judge will impose on the airman. This point is
verified by the following excerpt from such a case:

This case, as presented to the Board, represents another example of the increasing preoccupation of the parties with the question of whether a residual or consequential violation of Section 91.9 of the FAR has been proven. As the Board has repeatedly stated, the resolution of this question is of little consequence since the finding of a Section 91.9 violation has no bearing on sanction, which can be determined from the facts which include other established regulatory violations.

(29)

There is another problem for the airman charged with a violation of Section 91.9. The FAA's filing system in Oklahoma City does not record on an airman's file whether a conviction under Section 91.9 was found to be a residual or the primary offense. The only certain way to determine this fact is to review the written judgement in the case.

THE HEARING BEFORE THE ADMINISTRATIVE LAW JUDGE

(30)

The hearing is like a trial de novo. A verbatim transcript is kept throughout, and along with the exhibits becomes the official record that is used on all subsequent appeals. (31)

BURDEN OF PROOF

The dynamics of the hearing can best be described by discussing the shifting of the burden of proof between the parties. At the outset, the burden of proof is squarely on the FAA. (32) However, as stated above, the FAA very often include

in their pleadings and particularly after an accident situation that an alleged violation of Section 91.9. has occurred.

In these cases the practice of the Board has stated that (33)
the FAA only needs to create a prima facie case or inference of carelessness or recklessness for the burden to shift to the accused airman. The respondent, at this point, must come (34)
"forward with the evidence, and explain away the case thus made."

This shifting of burden was established some time ago in (35)
the Lindstam case. Captain Lindstam was an airline pilot who had the misfortune of landing his Boeing 720 jet airliner just short of the active runway at Ft. Lauderdale, Florida in 1962. He was charged, along with other technical violations, of contravening Section 91.9. The CAB, which conducted the review proceedings at that time, held that when an accident occurs, the FAA need not prove specific acts of carelessness by the pilot in order to make an inference of carelessness.

In the Lindstam case the FAA proved there were no mechanical problems with the aircraft at the time of the accident, and that the weather was not a causative factor. The circumstantial evidence pointed toward pilot error. A prima facie case was established and Lindstam failed to discharge the burden that shifted to him to give a reasonable explanation for the accident.

Some individuals have suggested that shifting of the burden can be accomplished by the FAA on establishing a mere inference of carelessness, and that this inference can be easily rebutted. This does not necessarily follow. If a person reviews the current aviation accident investigation reports, it is clear that in the vast majority of cases the aircrew's negligence was a major causative factor. Accordingly, it must be very difficult for any airman in an accident situation to discharge this burden, once the FAA has shifted it onto him.

It is noteworthy in the Lindstam case that the CAB did not allow the FAA to simply plead res ipsa loquitur under the (37) circumstances. The FAA lead evidence to prove: (1) that Lindstam's aircraft landed short of the threshold. (2) that the threshold was clearly marked. (3) that the aircraft landing gear was below the level of the runway at impact. (4) that no mechanical defect or weather condition existed which might have caused the accident. All of this evidence was circumstantial, yet it was substantial, reliable and probative. On reviewing the Lindstam facts, it is clear that the FAA had created more than a mere inference of negligence or carelessness. They created a presumption of carelessness on Lindstam's part. It therefore follows that in any accident cases the FAA must meet the substantive onus of creating more than a mere inference of carelessness or recklessness for the Board to sanction the airman.

It is interesting to note that one author in a recent law revue article has suggested that there appears to be "an (38) apparent decline in the use of the Lindstam doctrine..." His observation was based on the fact that this case is being cited less frequently in the current decisions of the N.T.S.B.. The better conclusion may be that the Lindstam doctrine has become an unofficially recognized standard of procedural practice before the Board and therefore does not need to be referenced in any new cases.

THE RULES OF EVIDENCE AT THE HEARING

The hearing is before an administrative tribunal and therefore the strict laws of evidence that one might find in a formal court setting are not present. The Rules of (39) Practice give a very short direction in this regard:

Every party shall have the right to present his case or defense by oral or documentary evidence, to submit evidence in rebuttal, and to conduct such cross examination as may be required for a full and true disclosure of the facts.

The following general observation on the comportment of (40)
the hearing, from an evidenciary point of view, is instructive:

The rules of evidence are relaxed in proceedings before the ALJ. Hearsay is admissible, but double hearsay is not. However, a finding cannot be based on uncorroborated hearsay. Re recordings of Air Traffic Control tapes are admissible, even though the original tape is not available for inspection...

There is no Fifth Amendment protection afforded the pilot. He may be called by the FAA for cross-examination to testify against himself during the presentation of its case.

As previously mentioned, an airman's self incriminating statements made to FAA personnel during the investigative stage are entirely admissible, and no prior warnings to the (41)
accused are required.

APPEAL FROM THE INITIAL DECISION

Either party to the enforcement action may take an appeal (42)
from the initial decision of the ALJ to the full Board. Subpart H of the Rules of Practice outlines the procedures for initiating (43)
the appeal.

It should be emphasized that the Board is composed of five presidential appointees, most of whom do not have legal or aviation backgrounds. As a matter of actual practice the appeal is initially reviewed by the General Counsel for the Board, who appoints one of his staff attorneys to review the record from the initial

hearing of the ALJ. The attorney reviews the record and makes recommendations to members of the board. By statute, the Board (44)
is to consider only the following issues:

- (a) Are the findings of fact each supported by a preponderance of reliable, probative, and substantial evidence?
- (b) Are the conclusions made in accordance with precedent and policy?
- (c) Are the questions on appeal substantial?
- (d) Have any prejudicial errors occurred?

An experienced attorney who has practiced before the board states that "it has been my observation that the full Board takes a somewhat harsher view of the sanction to be imposed than do the Administrative Law Judges; but , in the main, the Board generally upholds its judges' initial decisions." (45)

From a procedural point of view the Board has a very wide discretion to pursue any issue in the matter before it. It can (46)
allow oral argument or other presentation, but rarely does so. (47)
The exercise is normally a "file hearing" with a written judgement issuing in due course. It should be emphasized that the airman's certificate is not suspended or revoked during this period, unless (48)
the FAA acted on an emergency basis in the interest of safety.

EMERGENCY PROCEDURES

As stated above, the Administrator can suspend or revoke an airman's certificate on an emergency basis by stating that safety in air commerce and air transportation requires the immediate effectiveness of the suspension or revocation order. (49) Under these conditions the Board does not have any discretion to grant a stay. The only alternative open to the Board is to (50) process the appeal in sixty days. During this period the appeal must pass through the initial decision of an Administrative Law Judge and the appeal to the full Board- if appealed by either of the parties. Accordingly, the special rules of procedure (51) which apply to this process are very abbreviated.

As in any other appeal from the N.T.S.B., an airman can seek judicial review of the emergency order, however there is no expedited process before the courts under these circumstances.

JUDICIAL REVIEW OF N.T.S.B. APPEAL DECISIONS

Both the FAA and the respondent airman can take an appeal from the initial decision to the full Board. However, only the airman can take an appeal from the full Board to the courts for a review under Section 1006 of the FA Act, which states:

Any order, affirmative or negative, issued by the Board or Administrator under this Act...shall be subject to review by the courts of appeals of the United States... upon petition... filed... by any person disclosing a substantial interest in such order.

(52)

In the case of Lee v. CAB the phrase "any person disclosing a substantial interest in such order" was interpreted to be any person "whom the agency regulates and affects adversely." In other words the FAA cannot petition the courts for a review of a decision of the full Board. While the original reasoning in the Lee case no longer applies in a strict legal sense, the Administrator has not initiated any appeals since this ruling.

(53)

(54)

(55)

(56)

From a procedural point of view any stay of the FAA's order will be lost during the judicial review procedure, unless the Board's decision states that the stay will remain in effect during any judicial appeals. Otherwise the airman must make an interlocutory application under Section 1006(d) of the FA Act to the court of appeals.

FOOTNOTES

1. 14 C.F.R. 1 et seq.(Part 13 Investigation and Enforcement Procedures)Federal Aviation Regulations
2. Federal Aviation Act of 1958, 49 U.S.C. §1301 et seq. Sections 901 and 1006
3. FAR 13 supra. Fn. 1 § 13.19 FA Act § 609
4. Ibid § 1006
5. 49 U.S.C. § 1651 et seq.
6. 49 U.S.C. § 1901 et seq.
7. N.T.S.B. Rules of Practice 49 C.F.R. § 821
8. Ibid. § 821.1
9. Ibid. § 821.1
10. FA Act supra. Fn.2 § 609
11. FAA Enforcement Manual, FAA Order No. 2150.3 May 16, 1980
12. FA Act, supra. §609
13. Ibid. § 609
14. Ibid. § 1006(d)
15. N.T.S.B. Rules, supra. Fn. 7
16. Ibid. 821.14
17. Ibid. 821.19
18. Yodice, J. Aviation Lawyer's Manual Fn.6 Page 22, at page 18
19. Ibid. Page 36
20. N.T.S.B. Rules, supra. §821.14

21. FA Act. supra. § 903
22. N.T.S.B. Rules, supra. § 821.35
23. Ibid. § 821.35
24. Administrative Procedures Act, 5 U.S.C. 557 et seq.
25. N.T.S.B. Rules, supra. 821.31
26. FAR 91 supra.
27. Blacks Law Dictionary, Revised Fifth Edition, West Publishing Co. St. Paul Minn.
28. Yodice, supra. Page 64
29. Ibid. Page 64 Administrator v. Eger 2 NTSB 862(1974)
30. Martin, G.D., "Enforcement of the FARS By the FAA", 53 Journal of Air Law and Commerce, Page 543
31. N.T.S.B. Rules, supra. § 821.47 Subpart I Appeals From Initial Decisions,
32. Ibid. 821.32
33. Martin, supra. Fn.30 at page 567
34. Administrator v. Davis 1NTSB 1517(1964)
35. Administrator v. Lindstam 41 C.A.B. 841 (1864)
36. Ibid. Page 842
37. Ibid 843 and Martin, supra. Page 566
38. Martin, supra. page 569
39. N.T.S.B. Rules supra. § 821.38
40. Armstrong, A. Pilot Certificate Actions and Civil Penalties 52 Journal of Air Law and Commerce, page 86
41. See generally page 20-21 of thesis
42. N.T.S.B. Rules, supra. § 821.47

43. Ibid. § 821.47
44. Ibid. § 821.49
45. Yodice, supra. at Page 37
46. N.T.S.B. Rules, supra. § 821.49
47. Ibid. 821.48(g)
48. FA Act, supra. § 609
49. Ibid. § 609
50. Ibid. § 609
51. N.T.S.B. Rules, supra. Subpart I §§ 821.54-57
52. Lee v. C.A.B. 225 F. 2nd. 950 (1955)
53. Kriss, D., "Judicial Review for the FAA"
29 American University Law Review, (1980) Page 720
54. Ibid. page 729
55. FA Act, supra. § 1006(d)
56. Administrator v. Reid , Order EA 1959 November, 1983
also in Yodice, supra. page 38.

CHAPTER VIII APPEAL PROCEDURES FROM ENFORCEMENT

ACTIONS OF TRANSPORT CANADA

In Canada the "letters of counsel" and "letters of compliance" are considered part of the administrative remedies available to Transport Canada, however, neither are formally recognized as sanctions for enforcement purposes and therefore have no formal means of appeal.

Document suspension or cancellation, and monetary penalties are more punitive measures and have formalized appeal procedures set out in the federal and provincial legislation.

The complex canadian classification of offenses, and the manner of prosecution of the offense determine the appeal route that must be taken by an accused airman. Appeals can be taken to two bodies in Canada (1) The Civil Aviation Tribunal (hereafter referred to as the "CAT" or the "Tribunal")

(2) The law courts of civil and criminal jurisdiction.

APPEALS TO THE CIVIL AVIATION TRIBUNAL

This administrative or quasi-judicial tribunal was established by the passage of Bill C-36 in 1985. This amendment to the Aeronautics Act, among other changes, added PART IV to the Act, which deals exclusively with the organization and operation of CAT. As outlined in Chapter I, the Inquiry into Aviation Safety in Canada, or the "Dubin Commission" had a great many

suggestions for improving aviation safety. Increased enforcement activity was one of the main recommendations; the establishment of a fair and impartial review tribunal for enforcement sanctions was another.⁽¹⁾

The CAT is an independent government "department, reporting to the Parliament through the Minister of Transport."⁽²⁾ The raison d'être is to provide a review and appeal forum to the Canadian aviation community for enforcement sanctions imposed by Transport Canada.⁽³⁾

The Tribunal has two levels of appeal, much like the N.T.S.B.. The first level is called the "review hearing" which is held before a single member of the CAT. Before the review takes place the CAT may request a "preliminary" hearing under its rules of procedure.⁽⁴⁾ This is more of a pre-hearing conference to clarify and reduce the number of issues that will be treated at the review hearing.⁽⁵⁾

The second level is the "appeal hearing", where normally three members sit on the case. None of the three must have participated in the review hearing.⁽⁶⁾⁽⁷⁾

The final determination of the CAT at the appeal hearing cannot be normally appealed any further.⁽⁸⁾ However, this issue has been placed in question by some recent appeals to the Federal Court of Canada. This will be discussed at the end of this section. (See page 96 infra.)

MEMBERS OF THE CIVIL AVIATION TRIBUNAL

The CAT is composed of a Chairman, Vice Chairman, one full time member, and nineteen part-time members. The members or "hearing officers" as they are referred to in the Annual Report, (9) reside in various locations throughout the Dominion. All members have strong links to aviation in one form or another. In fact the enabling legislation states that the "Governor in Council shall appoint as members of the Tribunal persons who have (10) knowledge and experience in aeronautics." Fifteen of the members hold or have held pilot licenses. Five are medical doctors, two are Air Maintenance Engineers, and only four are lawyers. The part-time members function on an "as and where needed" basis, since there is some effort made to have a member sit on a case where he or she has some previous expertise or knowledge. The medical doctors would sit mostly on cases of medical renewal denials. The engineers would sit on those cases where airworthiness is involved et cetera. This is contrasted with the N.T.S.B. review system where all the ALJs are former attorneys, and only half of them have previous aviation experience.

Unlike the US system, where the ALJs are "career permanent", all the CAT members are appointed for various

(11)
terms, up to a maximum of seven years. A member of the Tribunal
(12)
"may be removed for cause by the Governor in Council."

In comparing the US and Canadian review systems, one can readily see a divergent approach. The US system is much more legalistic in structure, the rules of procedure are more extensive and complex. (The CAT rules cover approximately two pages while the N.T.S.B. rules cover over fifteen) The N.T.S.B. ALJs are all former attorneys, while their Canadian peers are more experienced in the aviation industry and less legally trained. The N.T.S.B. Bar Association, for example, has over two hundred and fifty active members. In Canada there is no similar association.

TYPES OF OFFENSES APPEALABLE TO THE CAT

The three types of offenses in Canada are the "designated" offense, the summary conviction offense, and the "hybrid" offense. The designated offense can only be dealt with by Transport Canada. These offenses must be treated by Transport Canada in an "administrative" manner, by imposing a monetary penalty of up to one thousand dollars per offense or a document or certificate suspension on the accused airman. The CAT is the only appeal forum for alleged violations of
(13)
the designated provisions.

It should be mentioned that the monetary penalty invokes
(14)
a unique review procedure. When the Minister suspends or cancels
a license, the officials can unilaterally initiate the sanction.
In the case of a fine or monetary penalty, arising from the
violation of a designated provision the Minister must
be able to collect the money from the airman. In order to be
able to enforce this penalty, Transport Canada must first
(15)
obtain a favorable decision from the Tribunal. Secondly,
(16)
this decision must be certified by the Tribunal, and then
registered in the jurisdiction where the airman resides
(17)
so that it can be collected as a debt owed to the government.

After completing its investigation and finding the
accused guilty, Transport Canada sends the accused a Notice
of Assessment of Monetary Penalty. (See a copy in Appendix M)
Should the airman not pay the fine within thirty days of
receiving notification thereof, Transport Canada has fifteen
days in which to file an application for review in order
to obtain the required Certificate. The Tribunal serves
notice of the review upon the accused, and proceeds with the
(19)
hearing, whether the accused participates or not. In any event
Transport Canada must prove its case against the accused to
the satisfaction of the member, who may raise, lower or cancel
(20)
the monetary penalty. It is technically possible for the accused
airman and his counsel to be absent from the hearing and still

win the case, because the member did not feel that Transport Canada had a proper case against the accused. This is possible but not probable.

The summary conviction offenses, on the other hand, can (21) be treated in an "administrative" fashion by Transport Canada, by imposing a suspension as a sanction (no fines can be assessed- refer back to Chapter IV- Page 33). This offense can also be placed before the courts, where the judge can impose a fine up to \$5,000 per offense, or an order of prohibition. If the matter is treated administratively, the appeal must go (22) to the Tribunal. If the matter goes before the courts, it must be appealed through that system.

The "hybrid" offense can be treated administratively just (23) like the summary conviction offense. The potential penalties are the same, and the appeal is to the Tribunal. If treated before the courts, the possible sanctions are much harsher, (refer to Table in Chapter IV-page 28) and the appeal must go through the normal court system to the courts of appeal.

PRE HEARING PROCEDURES

As referenced above, the Tribunal has discretion to convene a preliminary conference under Rule 12:

The Tribunal may, orally or in writing, direct that the parties appear before a member of the Tribunal at a specific time and place for a conference, or consult each other and submit suggestions in writing to the Tribunal, for the purpose of assisting it in the consideration of

- (a) the admission or proof of certain facts
- (b) any procedural matter;
- (c) the exchange between the parties of documents and exhibits proposed to be submitted during proceeding;
- (d) the need to call particular witnesses; and
- (e) any other matter that may aid in the simplification of the evidence and disposition of the proceedings.

(24)

One can see by the lack of firm direction in this area that the intent of the Rules is to have the main determinations of fact established at the review hearing. There appears to be no opportunity for the discovery of documents or witnesses before the actual review.

There is an overriding discretion in the matter of procedures that the Tribunal can resort to if something arises that is not specifically mentioned in the Rules:

Where a procedural matter not provided for by the Act or by these Rules arises during the course of any proceeding, the Tribunal may take any action it considers necessary to enable it to settle the matter effectively, completely and fairly.

(25)

The only problem with this type of informal remedy is that certain practices will develop through use, which will not be widely known to those who do not practice before the Tribunal on a regular basis. The better policy would be to formalize any procedures that prove to be generally useful.

APPLICATIONS FOR STAY OF SANCTION

Unlike the N.T.S.B. procedure, there is no automatic stay of the sanction while the matter is under appeal. In Canada the accused airman must make an application to the Tribunal at the time of filing the application for review.

A request for a review of the decision of the Minister under subsection (3) does not operate as a stay of the suspension or cancellation of the Canadian aviation document...

(26)

In anticipation of this petition, the "Application For Review Or Appeal" supplied to the public by the Tribunal has a small addendum at the bottom for applying for the stay. (27) It should be noted that the application must be made for each level of appeal. One stay is granted for the Review Hearing, and another one must be obtained if an appeal is sought before the three member Tribunal.

As previously mentioned, Transport Canada can suspend a license on an emergency basis if there is a threat to aviation safety. The Act states that the CAT must not grant a stay if it would result in this kind of threat. (28) (29)

VENUE AND MEMBER "SHOPPING"

There appears to be no legislative direction as to where the Tribunal should hold its hearings:

On receipt of a request filed in accordance with subsection (3) the Tribunal shall appoint a time and a place for the review of the decision referred to in the request... (30)

The Chairman chooses the venue and the member who will review the case:

The Tribunal or any member thereof shall sit at such times and at such places in Canada as the Chairman of the Tribunal considers necessary for the proper performance of its functions. (31)

This discretion, as the N.T.S.B. found, allows counsel for the enforcement agency, and the accused airman to lobby the Chairman in an effort to have the matter placed before a specific member.

The hearing is normally scheduled for a place that is most convenient for the accused airman, so that his expenses in the defense of his case are minimized. From a practical point of view the member appointed to the hearing normally resides in the general area where the hearing is to be conducted. This appointment is subject to any special requirements that may be encountered at the hearing. For example medical doctors must review the medical cases, and an engineering background is preferred for any highly technical airworthiness cases.

THE PLEADINGS

The overriding aim of creating a Tribunal was to keep it informal enough to allow an average pilot to obtain a fair and impartial review of any enforcement action taken against him, without having to incur a large legal expense. The specific instructions in this area are brief:

- (2) An Application shall fully set out the grounds on which it is based and shall specify the relief or order requested.

(33)

The Tribunal circulates an informative "Guide for Applicants" brochure, which includes a one page blank application form (a photocopy is found in Appendix N hereto). The brevity of the form certainly reflects the apparent intention of the Act.

THE REVIEW HEARING

Burden of Proof

The burden of proof in enforcement actions against airmen rests with Transport Canada and applies to all appeal procedures. With regard to the review of a violation of a designated offense the Act is very specific:

The burden of proving that the person appearing before the member has contravened the designated provision that he is alleged to have contravened is on the Minister;

(34)

Standard of Proof

The standard of proof in matters before the Tribunal is not specified in the legislation. The recent case of MOT v. Selbstaedt (35) established that the standard in matters coming before the CAT shall be on the "balance of probabilities" or as the US system uses, the "preponderance of substantial, reliable, and probative evidence." This standard does not apply to those offenses which are tried before the courts, where the standard is "beyond a reasonable doubt". As previously mentioned in Chapter IV, the lower standard of proof makes Transport Canada's job easier if they treat most regulatory violations "administratively". It is possible to obtain a conviction before the Tribunal, for an offense that would be dismissed before the courts.

Rules of Evidence

The Act succinctly sets out the guidelines in this area and indeed for the entire hearing process:

- (1) Subject to subsection (5), the Tribunal or a member thereof is not bound by any legal or technical rules of evidence in conducting any matter that comes before it or the member and all such matters shall be dealt with by the Tribunal or member as informally and expeditiously as the circumstances and considerations of fairness and natural justice permit...
- (5) The Tribunal or a member thereof may not receive or accept as evidence anything that would be inadmissible in a court by reason of any privilege under the law of evidence.

Self-incrimination

Any self-incriminating statements of the accused airman can and will be admissible at the hearing before the Tribunal. As previously noted in Chapter III, the Transport Canada "Letter of Investigation" is more clear in its warning to the accused airman than the FAA's letter. Also the N.T.S.B. Rules of Practice give the FAA the right, under Section 821.19 to take the testimony of an accused airman. The Canadian legislation specifically states:

(b) the person (the accused pilot) is not required and shall not be compelled to give any evidence or testimony in the matter.

(37)

THE APPEAL HEARING

An appeal hearing may be requested by either party to the
(38)
matter. The time limit for making such application is within ten days after receiving notice of the determination of the
(39)
initial review. The member who presided over the initial review
(40)
cannot be a member of the appeal hearing. The Tribunal Chairman can appoint more than three members to sit on appeal hearing, or
(41)
with the consent of the parties only one. Normally, three members hear the appeal. The record of the review hearing

forms the basis of the appeal, however the Tribunal may allow
(42)
oral argument, and normally does. The tribunal has the
discretion to admit evidence not previously available, if it
(43)
is deemed to "be necessary for the purposes of the appeal."

Statistics gathered from the 1987 Annual Report of the
Civil Aviation Tribunal indicate that in the year past, there
were a total of one hundred and twenty seven review and appeal
hearings held. Of this number twenty five applications were for
appeal, which gives a twenty per cent rate of appeals following
(44)
initial review hearings.

JUDICIAL REVIEW OF TRIBUNAL HEARINGS

The Act stipulates that "a decision of the Tribunal on an
appeal under this Act is final and binding on the parties to
(45)
the appeal." At face value this appears to be a very
definitive statement to the finality of the appeal process.
However, the Act uses the following phrasing in a number of
key locations:

...shall provide the holder of the Canadian
aviation document with a full opportunity
consistent with procedural fairness and
natural justice to present evidence and
make representations in relation to the
suspension or cancellation under review.

(emphasis added) (46)

The courts have long been used to review administrative decisions for breaches of procedural fairness and natural justice, even though there may be a legislative bar to further appeals. In the case of the CAT, the Federal Court has become the "watch dog" for various abuses of jurisdiction or errors of law.

(47)

Section 28 of the Federal Court Act gives the Federal Court the power to review the administrative decisions of, among other bodies, federal tribunals. The scope of this jurisdiction is rather hard to define, but exists in a very real sense. The difficulty in pursuing such a review is borne out in the following statement:

The court's(Federal Court) basic task in dealing with allegations of the breach of the rules of natural justice is to strike a balance between the claims of those affected for procedural fairness and the interests of statutory decision makers in not being forced into a mold of inappropriate court like procedures, with the resulting cost of inefficient decision making.

(48)

Transport Canada is currently appealing the decision of MOT v. La Ronge Aviation Services Ltd. to the Federal Court on the basis that the Tribunal erred in law in concluding that Transport Canada could not suspend an aviation document if it was the result of a breach of a designated provision.

(49)

It, therefore, becomes the role of the Federal Court to be a guardian of the rights of all parties that come before the CAT. This role does not include the power to substitute a new decision on the merits of the case, but rather the duty to redress fundamental errors of procedural fairness or natural justice by striking down the flawed decision and referring the matter back to the Tribunal for re-hearing.

This is somewhat different to the US system of judicial review of the N.T.S.B. decisions allowed under Section 1006 of the FA Act, where it states:

Power of Court

(d) Upon transmittal of the petition to the Board or the Administrator, the court shall have exclusive jurisdiction to affirm, modify, or set aside the order complained of, in whole or in part, and if need be, to order further proceedings by the Board or Administrator...

Both national systems realize the need for a judicial review of this quasi-judicial process, however the US system allows the courts to deal directly with the merits of the cases. This added power could yield some very odd judgements, since a judge who is totally inexperienced in aviation matters could substitute his judgement for that of the Board. The Canadian system seems to recognize that the aviation experts are best able to determine the substantive aviation issues, and that the courts should deal only with the procedural legal errors in the hearing process.

APPEALS TAKEN TO THE COURTS OF CIVIL AND CRIMINAL JURISDICTION

An enforcement matter, other than a designated provision can be taken before the courts of civil and criminal jurisdiction, which are located throughout the country. The Department of Justice normally appoints a prosecutor to work with Transport Canada officials, or the RCMP in presenting the case. The trial is not considered an administrative hearing. The formal rules of evidence apply completely, and the crown has the burden of proof throughout. The standard of proof is "beyond a reasonable doubt". If the proceedings are by way of indictment, the accused airman has a choice of trial by judge alone, or by judge and jury. If prosecuted by way of summary conviction, the matter is decided by judge alone.

The sanctions open to the judge are dependent on the style of prosecution. By indictment, there is an unlimited ceiling on a fine, a jail term of up to five years, an order of prohibition, and under previously discussed circumstances, (50) the aircraft involved in the offense can be forfeited to the state or crown. If prosecuted by way of summary conviction, the maximum fine is five thousand dollars per offense, and possible prohibition. If a "hybrid" offense is prosecuted by summary conviction, a jail term of up to one year can be imposed.

After the trial an appeal can be launched to the appropriate court of appeal by either party. It should be noted that this is a very formalized legal approach to enforcement, with judges, who are normally inexperienced in aviation matters, reviewing some very technical cases at times. On the positive side, the cases that proceed by indictment normally revolve around the issue of willful intent to do something forbidden under the law, in these instances the courts may be better able to determine this type of issue than the Tribunal.

In summary it should be pointed out that Transport Canada has a much more difficult standard of proof before the courts than before the Tribunal. The accused airman has a better chance of having the charges dropped, however, if convicted the courts have a variety of sanctions that are much harsher than those of the Tribunal.

FOOTNOTES

1. Civil Aviation Tribunal, Annual Report, 1987. Department of Supply and Services. Catalogue Number TA51-1987 Page 2
2. Ibid. Page 2
3. Civil Aviation Tribunal, Guide For Applicants Issue Two, July 1988, DSS Catalogue No. TA52-1-1988
4. Ibid. Page 1
5. Civil Aviation Tribunal Rules, SOR/86-594 29 May, 1986, Rule 12
6. Supra. Fn.3 Guide For Applicants, Page 1
7. Aeronautics Act, R.S.C. 1985 Ch.3, Section 7.1(2)
8. Ibid. Part IV Section 33(9)
9. see general Appendix 0 for a profile on CAT Members
10. Supra. Fn. 7 Aeronautics Act Section 25(2)
11. Ibid. Section 25(4)
12. Ibid. Section 25(4)
13. Ibid. Section 6.7
14. Ibid. Sections 6.8 - 7.2
15. Ibid. Section 7.0
16. Ibid. Section 7.1(5)
17. Ibid. Section 7.2(1)
18. Ibid. Section 6.8(2)
19. Ibid. Section 6.9

20. Ibid. Section 6.9(3)
21. Ibid. Section 5.9
22. Ibid. Section 5.9(3)
23. Ibid. Section 5.9(1)
24. Supra. Fn. 5 Rule 12
25. Ibid. Rule 4
26. Supra. Fn. 7 Aeronautics Act Sections 5.9(4) and 6.1(4)
27. See generally Appendix N
28. Supra. Fn. 7 Aeronautics Act, Section 6.0
29. Ibid. Section 5.9(5)
30. Ibid. Section 5.9(6)
31. Ibid. Section 29(2)
32. This point is best illustrated by reference to Section 33(1) of the Act which states:

 ...the Tribunal or a member thereof is not bound by any legal or technical rules of evidence in conducting any matter that comes before it or the member and all such matters shall be dealt with by the Tribunal or member as informally and expeditiously as the circumstances and considerations of fairness and natural justice permit.
33. Supra. Fn. 5, Rules, Rule 10(2) Applications.
34. Supra. Fn. 7 Aeronautics Act Section 6.9(5)(a)
35. MOT v. Selbstaedt, CAT File No. C-0081-02 August 18, 1988
36. Supra. Fn. 7 Aeronautics Act, 33(1)
37. Ibid. Section 6.9(5)(b)

- 38 Ibid. Section 7.1(1)
39. Ibid. Section 7.1(1)
40. Ibid. Section 7.1(2)
41. Ibid. Section 32(2)
42. Ibid. Section 7.1(3)
43. Ibid. Section 7.1(3)
44. Supra. Fn. 1 CAT Annual Report Page 12
45. Supra. Fn. 7 Aeronautics Act Section 33(9)
46. Ibid. Section 5.9(7); 6.9(4); 33(1)
47. Federal Court Act, R.S.C. 1985, Ch. 10
For a Discussion see Fn. 48
48. Mullen, David J, The Federal Court Act: A Study of the Court's Administrative Law Jurisdiction, The Law Reform Commission of Canada, DSS Catalogue No. J32-4/13/1977
49. MOT v. LaRonge Aviation Services Ltd., CAT File No. C-0029
10 Date: October 9, 1987. Appealed by Transport Canada to the Federal Court and to be heard on October 19, 1988 in Ottawa, at 10:30 am.
50. Supra. Chapter IV, Page 32

CHAPTER IX CONCLUSION

The advent of "open skies" following the economic deregulation of commercial aviation in the US has lead to a remarkable growth in the industry. The growth has spawned a deep concern among the travelling public that industry safety may be compromised if a strong regulatory enforcement presence was not maintained by the FAA. The mandate given to the FAA in the legislation is somewhat ambivalent. It is supposed to be a promoter and a regulator of the aviation industry. In recent times, and much to the disappointment of the industry, the FAA has reacted to the public concern by instituting some very aggressive surveillance. N.T.S.B. statistics indicate that their appeal cases per year have more than doubled in the last four years, which clearly mirrors the increased enforcement activities of the FAA over the same period.

Transport Canada also has a somewhat ambivalent mandate to wear the public relations man's and the policeman's hat at the same time. Just as in the US, Transport Canada has recently decided to act more like a policeman. Civil Aviation Tribunal statistics indicate that there were forty three applications for review and appeal in 1986. Last year there were one hundred and twenty seven. While this may be a bit misleading, because the Tribunal was only set up in 1986, it nevertheless indicates a strong growth in the enforcement activities of Transport Canada.

The research for this thesis revealed some very close enforcement similarities between Transport Canada and the FAA; such as the initial warning type letters sent to airmen, and the follow up fines and suspensions for subsequent or more serious offenses. Both systems use the courts for assistance, however, this dependency is fading with the introduction of the Civil Penalty Assessment Demonstration Project in the US, and a trend in Transport Canada to have more of the aeronautical regulations labelled as "designated" offenses.

The contrasts between the two systems are fewer than the similarities. The major contrasts are found in the comparison of the N.T.S.B. and CAT appeal systems. The N.T.S.B. appeal procedures are more structured and comprehensive. The ALJ's are all legally trained; only twenty per cent of the CAT members are. The canadian judges are generally more experienced in aviation matters than their US counterparts. The CAT proceedings are specifically meant to be informal. The N.T.S.B. proceedings are more structured and court like.

Notwithstanding these contrasts, the trend seems to indicate that as the enforcement activities increase in Canada, so will the movement toward a more structured and legalistic type of appeal process, similar to the US model.

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APPENDIX A

National Air Transport Association

June, 1988 Editorial

NATA NEWS

*National Air Transport Association
Alexandria Va*

FROM THE PRESIDENT

FAA's ENFORCEMENT POLICY

A WRONG-HEADED APPROACH

Reflecting on the workshops presented during NATA's 48th Convention & Trade Show held last April, I have to stop and wonder just whose side our own government is on. Specifically, I'm referring to those sessions that dealt with air charter operations and the vexing regulations and swarm of federal agents that have been, and will be swooping down on the scores of small businesses, all in the name of *safety*.

Now I'm not against safety. But, I'm afraid that the FAA has forgotten what "compliance" is all about. Instead, their lead objective seems to be "enforcement," and on too many occasions, severe penalties have been assessed on diminutive paperwork infractions.

Less than two decades ago, it was common to view the local FAA inspectors (and often the guys from Region too!) as friends, helpers, an integral part of the aviation community. Sure, they were heavy into enforcement, but only as a means to achieve compliance of the FARs. That's my point: back then the "friendlies" were around to ensure safety through com-



pliance and used enforcement as a tool to get the job done. Today's climate is much different. It seems to be enforcement, first, last and always.

Just a couple of years ago NATA was represented at a conference of FAA's regional counsels. Primary on their agenda was enforcement. From that meeting came a consensus... "no periods to meet compliance"... "go for the maximum civil penalties." Since then, the "old" compliance/enforcement approach to accomplishing FAA's important job as the nation's watchdog on air safety has been replaced with a not so subtle change to enforcement/compliance.

If someone were to ask me what single event helped bring about such a change in the way the agency is now doing business, I'd have to say that decentralization of the FAA was the culprit. What followed, over time, was the dissipation of the mutual respect between the public and private sectors. And that's a shame.

Here in Washington there's talk of re-centralizing the FAA, and perhaps most important of all, making compliance to the FARs a top priority over enforcement. While it's going to be a tough job to make this happen, I can assure you that NATA will be working hard to make things right again.

Lawrence L. Burian

NEW MEMBERS

Members who joined NATA during the month of May are listed below

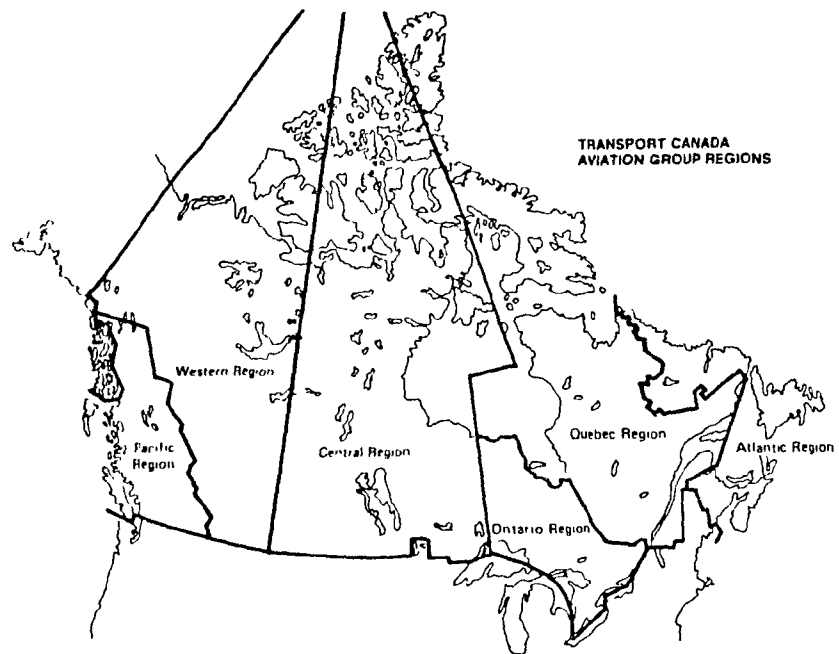
ASI-Aero Services Inc.
Eden Prairie, MN
Blake Tucker & Company
Dallas, TX
Bush Field Aviation Services
Augusta, GA
Clinton Flying Service Inc.
Clinton, NC
Coast Mechanical Sales Inc
Miami, FL
Gantt Aviation Inc
Georgetown, TX
Grand Canyon Airlines
Las Vegas, NV
Helicopters Unlimited Inc.
Oakland, CA
Inter-City Aviation Inc.
Evansville, IN
Marc Fruchter Aviation Inc
Wernersville, PA
Ram Aircraft Corporation
Waco, TX
Seneca Flight Operations
Penn Yan, NY
Spirit Aviation Inc
Tucson, AZ
Sun Quest Inc.
Pacoima, CA
Sunjet
San Antonio, TX
Thrifty Car Rental
Tulsa, OK

For Membership information, contact NATA's Manager - Member Services, Claudette Hurlock at (703) 845-9000

APPENDIX B

Transport Canada Aviation Group

Regional Map

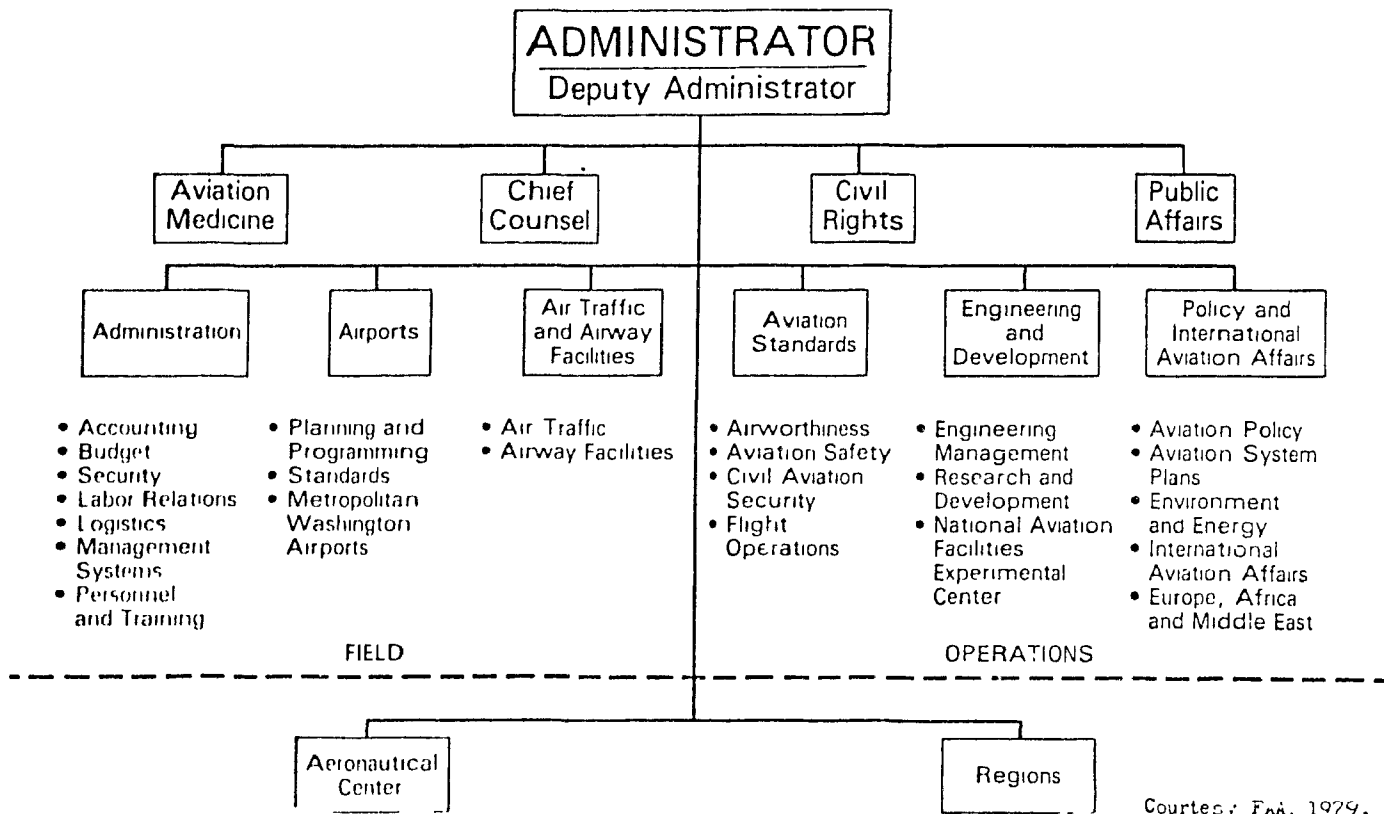


APPENDIX C

FAA Organizational Chart and Map

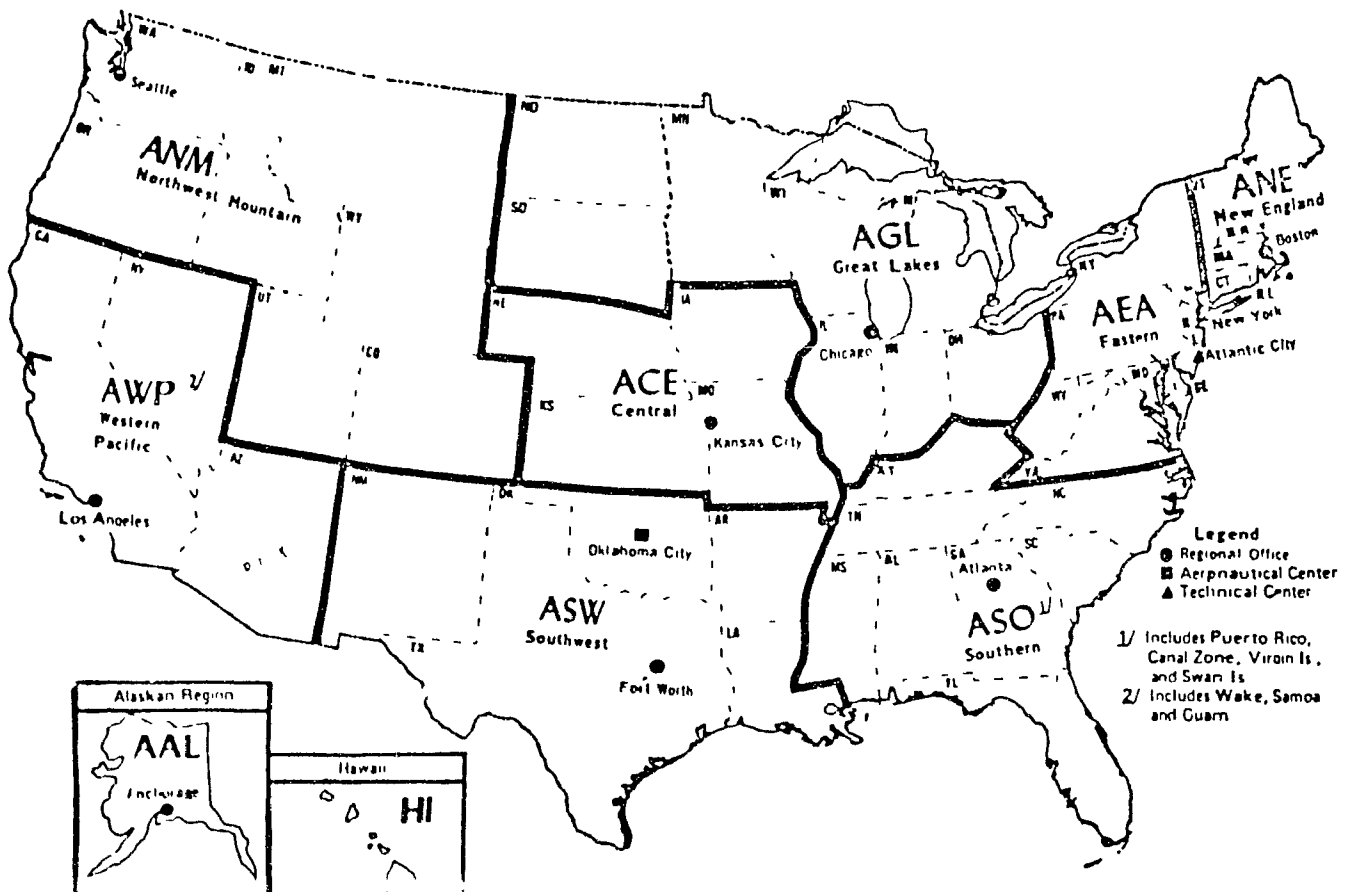
U.S. Department of Transportation

Federal Aviation Administration



Courtesy FAA, 1979.

FEDERAL AVIATION ADMINISTRATION REGIONS AND REGIONAL OFFICES



APPENDIX D

June, 1988 Enforcement Article

in "Canadian Aviation"

THE PLAN

The Dept. of Transport's Master Surveillance Plan is intended to greatly increase its enforcement capability. And there are 900 DoT people who can blow the whistle on you for breaking the air regulations. By Garth Wallace

AFTER HIS LAST FLIGHT on Friday, Clyde Shunter completed his aircraft Journey Log entries and told the operations manager that the light twin was now five hours overdue on a 100-hour inspection.

Shunter enjoyed flying for the small charter outfit. He considered himself lucky to land this first job. The company was busy shuttling crews and equipment to the North for a new construction project and his flying hours were accumulating quickly.

The pilot took his responsibilities seriously, including the airworthiness of the aircraft. The minimal time it spent in the shop bothered him. The aircraft ran well but the snags were mounting up.

Far Nightingale was the operations manager and the company owner. He had taken a chance on Shunter. The insurance company was asking for higher premiums and triple deductibles to cover the youngster's minimal multi-engine experience but the gamble was paying off. Shunter worked well with the other staff and took good care of his aircraft.

The light twin had been in constant use all week so Nightingale knew the 100-hour would come up fast. He was glad to be busy after struggling for so long, but the sudden increase in business was putting a strain on his maintenance people. His chief engineer, Humphrey (Hum) Gage, was taking a badly-needed weekend off. He hoped that his apprentice could do most of the work and Gage would check it off when it was done before the first flight on Monday.

On Sunday afternoon, Nightingale re-

**When Shunter
had finished his
unloading, he was
greeted by a nice
man in a grey suit
—a DoT inspector.**

ceived a call on the company extension phone in his house. It was for a medevac flight, and Shunter's airplane was the only one suitable for the trip. That call started a breakdown in the operation's safety chain.

Reaching Shunter via a pager, Nightingale arranged to meet him at the airport. The twin was sitting at the front of the hangar with the cowlings off and the 100-hour check sheet mostly complete. As they replaced the cowlings, Nightingale explained to his pilot that the inspection was done and that Gage would sign the Journey Log in the morning if he would leave a couple of lines before making any entries.

The weather was good enough for single-pilot operation, so Shunter was satisfied that safety was not being compromised as he departed alone on his mercy mission. Returning several hours later with the patient, a nurse and one family member, he felt good about being a professional pilot.

When he had finished his unloading, Shunter was greeted by a nice man in a grey suit. He identified himself as a Dept. of Transport inspector on a routine visit and asked to see the aircraft documents and Shunter's pilot license. The pilot's good thoughts about his job vanished. He suddenly felt exposed, as if he had just jumped out of an aircraft without a parachute.

If the inspector had been cynical he may have said, "Congratulations, you have just been caught by the new DoT Master Surveillance Plan." But this inspector was true to his training and said little as he checked the documents. He didn't mention the unfinished 100-hour inspection but instructed Shunter on how to start a temporary Journey Log for the aircraft, explaining that he was taking the permanent log to make copies. He said he would return it as soon as possible.

While the above account is fictitious, it helps to illustrate how the Master Surveillance Plan is part of a move by the DoT's Aviation Regulation Branch to dramatically increase the role of aviation enforcement in Canada. Before the Plan was fully in place by 1986, the chances of someone like Shunter meeting a DoT inspector on the ramp of a small airport on a Sunday afternoon were slim indeed.

Like it or not, that has all changed and nobody is trying to keep it a secret. "Let the people know we are coming," said Don McDonald, the DoT's director of enforcement. "Evenings, weekends; we will be out there. If we can get a higher level

The Plan

of compliance because the industry is expecting to see us, then the main objective of enforcement has been met."

In 1985, before McDonald's people were using the new Master Surveillance Plan, there were 1,171 aviation enforcement cases initiated in Canada. During that year there was a maximum of 68,508 aviation personnel licenses in force. Taking into account that not all cases involved licensed personnel (an interesting statistic to be touched on later), 15% of the license holders were involved in enforcement action. About 60% of them were commercial pilots, engineers and operators who represent the vast majority of aviation activity in Canada.

According to the DoT Enforcement Manual, the Air Regulations are there to enforce in the name of safety. Says the Manual, "It is the duty of the Minister (of Transport) to make the necessary rules, and the duty of the users to comply with these rules and ensure good operating practice, thereby achieving flight safety."

There are some people who think Canada's aviation safety record is not very impressive. The most notable is Mr. Justice Charles Dubin, whose Royal Commission of Inquiry into Aviation Safety in Canada has had a large impact on flying in Canada over the last five years. One of the results of the Commission's report has been more enforcement.

The enforcement branch is no longer satisfied to use aircraft accidents as a means of detecting violations. In 1986, under the Master Surveillance Plan, the new enforcement cases in this country jumped by 61%. Pre-Dubin there were 20 enforcement specialists operating in all of Canada, last year there were 63. McDonald has asked for 10 more by the end of this year.

The contents of the Master Surveillance Plan are not really all new. What has changed is the idea of having a structured and pre-planned surveillance program. The Plan is developed and administered regionally and uses all of the DoT's resources.

Air traffic controllers, Flight Service Station specialists and airport management are expected to contribute reports of possible violations. Inspections are carried out by any of 900 people working for the DoT in areas such as licensing, air carriers, airworthiness and flight test standards. Planned surveillance directed at specific areas and activities, as in the mythical case above, is conducted by enforcement personnel and the RCMP.

The objectives of the Plan, as outlined in the DoT Enforcement Manual, include, "The promotion of regulatory compliance by the establishment of regulatory presence." Surveillance under the Plan also provides enforcement personnel with

feedback. Said McDonald, "The program is working. When we return to problem areas we find a high level of compliance. There are very few repeat offenders."

In the imaginary case of Clyde Shunter, the regional manager of aviation enforcement would have reviewed the details of the initial investigation. If he thought it warranted a comprehensive investigation, he would have then classified it as a "Normal Priority", the third of four levels of investigation priorities. Then he would have assigned it to an enforcement specialist.

As time away from his higher priority cases allowed, the specialist would have gathered what evidence he thought necessary. Recognizing the breakdown of what had been solid operating procedures, the specialist may have decided that an adequate level of safety was not being provided by the company. Had he recommended pursuing the case to prevent further occurrence, his supervisor would likely have agreed.

The enforcement branch is no longer satisfied to use aircraft accidents as a means of detecting violations.

Three months after his illegal flight, the pilot probably would have received a Notice of Investigation.

Dear Mr. Shunter:

I am investigating a possible violation of the Air Regulations Section 210 (1)(a) Flying an aircraft without a Certificate of Airworthiness in force due to uncertified maintenance.

You are invited but not obliged to respond with any statement or evidence you wish to submit. Any statement you have to make may be used as evidence in this case.

Shunter would probably have felt betrayed by the system. How could anyone blame him for breaking the regulations? He was just doing his job. Emotions aside, he could have refused to fly the aircraft until it was signed off, but that is easier said than done. He certainly would the next time, which was the point of the whole enforcement exercise.

It wouldn't have made him feel much better, but the increased enforcement activity included a shift in emphasis. The enforcement staff recognized that the major blame for this breach of public trust

fell to the operator. Earl Niparagale should have known better than to dispatch that airplane and so he would have become the focus of the investigation. He would have received a letter similar to the pilot's, citing faulty maintenance and operating procedures.

The purpose of the letters is to make direct contact with the alleged offenders after gathering all the evidence. John Smyth, Ontario regional manager of aviation enforcement explained, "Our enforcement specialists are trained to get all sides of the story. Talking to the manuals involved face to face is the best way. In about 35% of the cases there is no further action." He added that in some of the "no further action" cases, the alleged violators never know they are being investigated.

Enforcement people are allowed to bargain with offenders if they feel the public interest is still being served. Accepting a bargained settlement, offenders waive their right to an appeal.

Punishment, when administered, varies. If you made an honest mistake then it could be a simple "Letter of Counseling."

"Your violation could have resulted in a fine or a suspension of your license, however, the regulations are intended to promote safe flying, not to discourage flying activity."

(This means, "We aren't going to do anything this time but mess up again and we won't be so nice.")

If it is deemed necessary, a fine or suspension will be assessed. There is a list of these "Administrative Action" in the Enforcement Manual. What seems to bring out the "firm" side of the enforcement policy of "be fair but firm" are premeditated violations. In the fictional example of Clyde Shunter's violation of Section 210, which is top of the list of serious violations in 1986, the first offense draws a 14-to-30 day license suspension. Second offense violation penalties are doubled, that and keep doubling with further repeats.

Some offenses can't be dealt with by this process. Said John Smyth, "We can't suspend someone's pilot license if he doesn't have one. These cases are prosecuted through the courts." There were 59 such cases in 1986.

Other enforcement actions found on the list of most common violations in 1986 are flying without a valid certificate of Registration, operating without (or outside the conditions of) an Operating Certificate, low flying, and not maintaining a Journey or Technical Log for an aircraft.

If all this smacks of "Big Brother", then take some comfort in the other changes in the aviation enforcement process.

Industry participation is sought at the annual enforcement workshop held in Ottawa every fall. Howard Goldberg, a vice-

president representing the smaller air carriers at the Air Transport Association of Canada, has been to several "After getting over the fact that you are sitting in a room, outnumbered and surrounded by DoT enforcement types, you find some good things come out of the meetings," he said. "Most recently, we complained that the small operators were being tied up with base inspections by several different branches of the DoT who were all looking at the same thing. As a result, they are making efforts to combine their visits so the operator can meet with them all at once and then get back to work."

"Knowledge" and "awareness" are some of the new bywords in the enforcement branch. Making the Enforcement Manual available to the public (catalogue # TP3352E, Canadian Government Publishing Centre, Ottawa, Ont. K1A 0S9, \$7.50) is a step in that direction. Enforcement specialists are available on a limited basis for audio/visual presentations to aviation groups. John Symth says that this educational aspect of enforcement represents only 3% of his annual budget but it provides the biggest return for the dollar in the form of public compliance.

By far the biggest change in the enforcement process was the formation of the Civil Aviation Tribunal. Consisting of respected people from all walks of life across Canada, the members of the Tribunal hear appeals of administrative action cases. Before CAT was formed, alleged offenders who felt they were dealt a raw deal by the DoT had to use the expensive and time-consuming civil courts as their only recourse.

The first level of CAT appeal is heard before a single member of the Tribunal who may confirm, reject or amend the enforcement action. The hearings are less formal than court proceedings and are held as close to location of the alleged violation as possible. Either the offender or the DoT may appeal the findings of the Tribunal member. In that situation the case is reviewed by a three-member panel of the CAT who read the transcripts of the first appeal and hear arguments from both sides. Their verdict is final and binding on both parties.

A surprisingly large number of appeals result in an altered assessment in favor of the offenders. John Issenman, president of Proav International Services, a company that provides expert witness testimony in aviation litigation, believes the enforcement people are still short-handed despite their increased numbers. "The enforcement specialists are well trained but since they don't have enough time to adequately prepare their cases, so many get thrown out."

The time factor presents another problem, according to Issenman. "What about safety during the three months between the detection of an offense and the assessment of a penalty? Why can't the inspector

tell the guy that he has been caught breaking Air Regs and he better stop it because he is going to get fined or lose his license?"

Issenman believes enforcement is necessary and the present system is good but underfunded. "If an operator spends the time and money to defend himself before the Tribunal, he wants to know it isn't wasted by some poorly-prepared government official," he said.

Issenman believes Canadians are fortunate to have a system that allows for feedback and change. "In the United States they have harassment, not enforcement," he says. "When you start shutting down free enterprise like that, three inspectors is too many. That is not the case in Canada."

So what do you do if the enforcement specialists come after you? Co-operate. The enforcement mandate is to apply punishment when individuals fail to be motivated to voluntarily comply with the law. Falsifying documents, destroying evi-

Enforcement
officials are
allowed to bargain
with offenders if
they feel the public
interest is still
being served.

dence, lying and denying is like waving a red flag at a bull. Enforcement personnel are human and a little co-operation can go a long way.

The other extreme is spilling your guts out and admitting everything you did wrong since your first solo. Enforcement specialists are trained professionals. Each one has had DoT enforcement training at the Cornwall, Ont. training center as well as supplemental Kinesic training (the science of body language).

If it is a serious offense, get a lawyer, preferably one with experience in aviation law. Pilot unions and industry trade organizations are set up to help. For minor violations, you will have to measure whether you want the expense of counsel to fight a \$100 fine or seven-day suspension. Pilots who fly across different DoT administrative regions will have the added burden of dealing with an investigation or appeal over a long distance.

Commercial operators are notified if their staff have been assessed a violation but before you get too upset over having a blemished record, understand that your enforcement file is protected under the Privacy Act and no one outside the government has access to it without your per-

mission. If you are a good citizen for two years, you can apply to have the enforcement action removed from your file. CAT decisions and civil court cases are, however, a matter of public record.

What is the effect of violations on aircraft insurance? Said Dave McCann, a Toronto-based aviation insurance broker, "There is no set policy. Each insurance company varies but generally if the offenses are not too serious they don't seem concerned over one or two violations, especially if they are spread over a large number of flying hours. After that, it may not be a question of increased premiums but whether you can get coverage at all."

Of course, the best thing to do is to keep your nose clean and obey the law or find a different occupation. Our fictitious violator, Clyde Shunter, would likely have accepted his punishment of a two-week suspension and returned to flying with a little less enthusiasm, but wiser. Earl Nightingale would probably have paid a \$500 fine and sacrificed some revenue flying to tighten up his maintenance.

Flying epitomizes the freedom enjoyed by Canadians living in a democratic country. The word "enforcement" makes many people cringe. For the small charter operators who draw the most violations, the increased enforcement activity may be perceived as another nail in the coffin. The manufacturers aren't making aircraft for them, their pilots and mechanics are stampeding to the regional airlines and their insurance companies take premiums away in armored trucks.

There are problems. Enforcement is only fair if it is evenly applied but in any system run by humans, there are inconsistencies. There is some resistance from Air Traffic and Flight Service employees in their role as policemen. They are not given any discretionary powers in their reports of violations but it is evident from flying to different airports that some controllers mount a higher horse than others. If they are expected to report every violation of the Air Regulations in a flight training environment, then they create an avalanche of paperwork.

Another problem is a lack of experienced people in the DoT. It's easy to train someone to check documents, but if the industry's reaction is to improve the way it crosses t's and dots i's, has safety been served? In the list of the top five enforcement actions in 1986, low flying was the only non-paper violation.

The next step may be more enforcement. The process now in place does not include a reaction to airline deregulation. Since deregulation officially began at the beginning of this year, the enforcement branch has yet to see what effect the possible increased competition will have on industry compliance with the law. But with planned surveillance, the DoT won't be waiting for the accident statistics to tell the story. ✈

APPENDIX E

Sample FAA Enforcement Investigative Report

Sample Transport Canada Preliminary Investigative Report

11.13 SAMPLE PRELIMINARY INVESTIGATION REPORT FORMDEPARTMENT OF TRANSPORT
AVIATION ENFORCEMENT
PRELIMINARY INVESTIGATION REPORTDATE
REPORTED: _____

DETECTION SOURCE: _____ PHONE NO.: _____
 ADDRESS: _____ TYPE: _____
 ALLEGED OFFENDER: _____ FILE NO.: _____
 ADDRESS: _____
 PHONE NO.: _____ WARNED STATEMENT TAKEN: Y/N
 AIRCRAFT INVOLVED _____ CO. INVOLVED: _____
 OWNER: _____ ADDRESS: _____
 ADDRESS _____
 PLACE OF OCCURRENCE _____ RMSP AREA: _____
 DATE OF ALLEGED VIOLATION(S) (DDMMYY): FROM: _____ TO: _____
 NARRATIVE: _____ WX: _____

WITNESS(ES)	ADDRESS	PHONE
1. _____	_____	_____
2. _____	_____	_____
3. _____	_____	_____

EVIDENCE (TYPE)	REQUESTED	OBTAINED
_____	_____	_____
_____	_____	_____
_____	_____	_____

POSSIBLE AIR REGULATIONS/AMOs BELIEVED VIOLATED

 CASE OPENED YES/NO IF YES, EMIS CASE NO.: _____
 ASSIGNED ENFORCEMENT SPECIALIST AND CODE (print): _____
 PRIORITY (1/2/3/4): _____
 AUTHORIZING ENFORCEMENT PERSON. _____ DATE: _____

11.15 SAMPLE STATEMENT FORM - B

Place: _____ Date: _____ Time: _____

Statement of: _____

I HAVE BEEN ADVISED THAT I AM NOT OBLIGED TO SAY ANYTHING
UNLESS I WISH TO DO SO AND WHAT I SAY MAY BE GIVEN IN
EVIDENCE.

Witness: _____ Witness: _____ Signature: _____

Date: _____ Date: _____ Date: _____

Time: _____ Time: _____ Time: _____

APPENDIX F

Sample FAA and Transport Canada

Letters of Investigation

FIGURE 4-2. SAMPLE LETTER OF INVESTIGATION
FLIGHT OPERATIONS

July 5, 1979

File Number: 80CE040235

Mr. John D. Smith
1711 Colorado Avenue
River City, Iowa 51649

Dear Mr. Smith:

Personnel of this office are investigating an incident occurring on July 4, 1979, which involved the operation of Cessna aircraft N57785 in the vicinity of City Park at approximately 3:15 p.m.

The aircraft was observed and identified as Cessna N57785 diving on picnickers and bathers from 3:15 to 3:35 p.m. We were informed that Cessna N57785, piloted by you, landed at the airport at 3:45 p.m. Operation of this type is contrary to the Federal Aviation Regulations.

This letter is to inform you that this matter is under investigation by the Federal Aviation Administration. We would appreciate receiving any evidence or statements you might care to make regarding this matter within 10 days of receipt of this letter. Any discussion or written statements furnished by you will be given consideration in our investigation. If we do not hear from you within the specified time, our report will be processed without the benefit of your statement.

Sincerely,

JOHN L. DOE
General Aviation Operations Inspector, GADO-4

CHAPTER 11

SAMPLE LETTERS AND NOTICES

11.1 SAMPLE LETTER OF INVESTIGATION

(Regional Address)

REGISTERED

Mr. A. Pratt
211 2nd Avenue
Chatham, N.B.
F8S 101

Dear Mr. Pratt:

I am investigating a possible violation of section 534(2)(a) of the Air Regulations, low flying over a built up area.

An aircraft identified as Cessna C-PCFO was observed flying at low level in the vicinity of Percé Rock and the town of Percé at approximately 11:02 hours local time. The aircraft journey log and witnesses confirm that you landed at the Gaspé, P.Q. airport at 11:28 hours local time February 2, 1987.

You are invited but not obliged to respond with any statement or evidence you wish to submit. Any statement you have to make may be used as evidence in this case. I can be reached at the above address or by telephone at _____.

If I do not hear from you by _____ (30 days from the date of letter), I will be obliged to make recommendations on your case to the Regional Manager Aviation Enforcement without the benefit of input on your behalf. In any event you will be informed in writing of the outcome.

Frank Brown
Civil Aviation Inspector
Aviation Enforcement

APPENDIX G

Sample of FAA Letter of Warning

and Letter of Correction

8/11/80

2150.3 CHG 1

FIGURE 11-6. SAMPLE LETTER OF CORRECTION
FLIGHT OPERATIONS

May 9, 1979

Mr. John Smith
100 Bush Street
Atlanta, Georgia 30308

Dear Mr. Smith:

This letter is in regard to your operation as pilot in command of Cessna 180 N24689 on May 2, 1979.

On that date you flew from City Airport to Brown Field and returned to City Airport. Available facts and information indicate that without prior permission you flew through a restricted area over the Midtown Atomic Energy Plant during this trip, which is contrary to the provisions of FAR 91.95.

As a result of our discussion of this incident, you agreed to receive additional instruction before May 30, 1979. We understand that you have received 4 hours of ground school instruction in map reading and cross-country flight planning from a certificated flight instructor.

In closing this case, we have given consideration to all available facts and concluded that the matter does not warrant legal enforcement. In lieu of
* such action, we are issuing this letter which will be made a matter of
record. We will expect your future compliance with the regulations. *

Sincerely,

SAM B. EARLY
Chief, ATL GADO

FIGURE 11-2. SAMPLE WARNING LETTER
FLIGHT OPERATIONS

November 20, 1979

Mr. Fred Smith
1075 Victory Boulevard
Los Angeles, California 90009

Dear Mr. Smith:

On October 20, 1979, you were the pilot in command of a Beech Baron N13697 that entered the City Airport traffic pattern and landed at the airport without maintaining radio communications with the airport traffic control tower.

After a discussion with you concerning this flight and your demonstrated effort to adequately familiarize yourself with the local air traffic rules pertaining to City Airport, we have concluded that the matter does not warrant legal enforcement. In lieu of such action, we are issuing this * letter which will be made a matter of record. We will expect your future * compliance with the regulations.

Sincerely,

JOHN J. FRANK
Chief, Van Nuys GADO

APPENDIX H

Designated Provisions in Canada

Air Regulations Series I No. 3

ATTACHMENT 1 - 3

REGULATIONS DESIGNATING REGULATIONS AND ORDERS, PRESCRIBING INFORMATION TO BE INCLUDED IN NOTICES OF ALLEGATIONS AND PRESCRIBING MAXIMUM AMOUNTS PAYABLE IN RESPECT OF CONTRAVENTIONS OF DESIGNATED PROVISIONS

(Air Regulations Series 1, No. 3)

Short Title

1. These Regulations may be cited as the Designated Provisions Regulations.

Interpretation

2. In these Regulations,
"Act" means the Aeronautics Act; (Loi)
"designated provision" means any regulation or order or any part thereof made under
Part I of the Act that has been designated by subsection 3(1) of these
regulations; (texte désigné)
"Minister" means the Minister of Transport. (ministre)

Designated Provisions

3. (1) The provisions listed in column I of the schedule are hereby designated as provisions the contravention of which may be dealt with under and in accordance with the procedure set out in sections 6.7 to 7.2 of the Act.
- (2) The amount set out in an item of column II of the schedule is the maximum amount that may be assessed as a penalty for the contravention of the provision set out in column I of that item.
- (3) A notice issued to a person by the Minister pursuant to subsection 6.7(1) of the Act shall specify
 - (a) the designated provision that the Minister believes has been contravened;
 - (b) the particulars of the alleged contravention;
 - (c) that payment of the amount set out in the notice will be accepted by the Minister as complete satisfaction of the amount of penalty for the alleged contravention and that no further proceedings under Part I of the Act will be taken against the person in respect of that contravention;
 - (d) that if the person fails to pay the amount set out in the notice in accordance with the requirements set out therein, a copy of the notice will be forwarded to the Tribunal and the Tribunal will determine whether the alleged contravention took place; and
 - (e) that the person will be given a full opportunity consistent with procedural fairness and natural justice to present evidence before the Tribunal and make representations in relation to the alleged contravention.

Amendment No. 54
04/07/86

SCHEDULE
(Section 3)

ITEM	COLUMN I DESIGNATED PROVISION	COLUMN II MAXIMUM AMOUNT OF PENALTY
	<u>Air Regulations</u>	
1.	Paragraph 218(c)	\$ 1000
2.	Paragraph 218(d)	1000
3.	Section 221	1000
4.	Section 505	500
5.	Paragraph 506(a)	500
6.	Paragraph 506(b)	500
7.	Paragraph 521(a)	500
8.	Paragraph 521(b)	500
9.	Paragraph 521(c)	500
10.	Paragraph 521(d)	500
11.	Paragraph 521(e)	500
12.	Paragraph 521(f)	500
13.	Paragraph 521(g)	500
14.	Paragraph 534(2)(a)	1000
15.	Paragraph 534(2)(b)	1000
16.	Subsection 534(7)	1000
17.	Section 542	500
18.	Section 543	750
19.	Section 544	1000
20.	Subsection 548(1)	500
21.	Subsection 548(2)	250
22.	Section 551	1000
23.	Section 552	1000
24.	Subsection 555(1)	750
25.	Subsection 555(3)	750
26.	Subsection 555(4)	750
27.	Subsection 555(7)	750
28.	Subsection 555(8)	750
29.	Subsection 555(9)	750
30.	Subsection 555(11)	750

ITEM	COLUMN I DESIGNATED PROVISION	COLUMN II MAXIMUM AMOUNT OF PENALTY
<u>Air Regulations</u>		
31.	Paragraph 825(1)(a)	\$ 250
32.	Paragraph 825(1)(b)	250
33.	Paragraph 825(1)(c)	250
34.	Paragraph 825(1)(d)	250
35.	Subsection 826(1)	500
<u>Aircraft Seats, Safety Belts & Safety Harnesses Order</u>		
36.	Subsection 3(1)	1000
37.	Subsection 3(2)	1000
38.	Subsection 5(2)	1000
39.	Subsection 6(1)	1000
40.	Subsection 6(2)	1000
41.	Section 7	1000
<u>Life-Saving Equipment Order</u>		
42.	Section 3	750
43.	Subsection 5(1)	750
44.	Subsection 5(2)	750
45.	Section 6	750
46.	Section 8	750
<u>Pilot Licence Privileges Order</u>		
47.	Section 3	750

Amendment No. 54
04/07/86

ITEM	COLUMN I DESIGNATED PROVISION	COLUMN II MAXIMUM AMOUNT OF PENALTY
	<u>Aircraft Maintenance Engineer Licence Privileges Order</u>	
48.	Paragraph 3(a)	\$ 750
49.	Subsection 4(1)	750
50.	Subsection 4(2)	750
	<u>Communication Failure in IFR Flight Order</u>	
51.	Paragraph 3(a)	500
52.	Paragraph 3(b)	500
53.	Paragraph 3(c)	500
54.	Section 4	500
55.	Section 5	500
	<u>Classification of Canadian Airspace Order</u>	
56.	Section 5	500
57.	Subsection 7(1)	500
58.	Subsection 7(2)	500
59.	Section 8	500
60.	Paragraph 9(1)(a)	500
61.	Paragraph 9(1)(b)	500
62.	Subsection 9(2)	500
63.	Section 10	500
64.	Section 11	500
65.	Paragraph 12(1)(a)	500
66.	Subparagraph 12(1)(b)(i)	500
67.	Subparagraph 12(1)(b)(ii)	500

ITEM	COLUMN I DESIGNATED PROVISION	COLUMN II MAXIMUM AMOUNT OF PENALTY
	<u>Classification of Canadian Airspace Order</u>	
68.	Paragraph 12(1)(c)	\$ 500
69.	Paragraph 12(1)(d)	500
70.	Paragraph 12(1)(e)	500
71.	Subsection 12(2)	500
72.	Paragraph 12(2)(a)	500
73.	Paragraph 12(2)(b)	500
74.	Paragraph 12(2)(c)	500
75.	Paragraph 12(2)(d)	500
76.	Paragraph 13(a)	500
77.	Paragraph 13(b)	500
78.	Paragraph 13(c)	500
79.	Subsection 14(1)	500
80.	Paragraph 14(2)(a)	500
81.	Paragraph 14(2)(b)	500
82.	Paragraph 14(2)(c)	500
83.	Paragraph 15(1)(a)	500
84.	Paragraph 15(1)(b)	500
85.	Subsection 15(2)	500
86.	Section 18	500
87.	Section 19	500
	<u>Special Aviation Events Safety Order</u>	
88.	Section 3	750
89.	Paragraph 6(a)	750
90.	Paragraph 6(b)	750
91.	Paragraph 6(c)	750
92.	Paragraph 6(d)	750
93.	Paragraph 9(a)	750
94.	Paragraph 9(b)	750

APPENDIX I

Sample FAA Letter of Civil Penalty

FIGURE 12-1. SAMPLE CIVIL PENALTY LETTER
INDIVIDUALS
(Federal Aviation Act)

CERTIFIED AIR MAIL - RETURN RECEIPT REQUESTED

Mr. William C. Jones
77 Underwood Lane
Gardenia, New York 12345

Dear Mr. Jones:

We have received a report that on April 28, 1979, you, the holder of Mechanic Certificate No. 1234567, were assigned by Northern Airways, Inc., to perform maintenance on a jet fuel control unit bearing Serial No. 23332 at New York International Airport, New York. Subsequent to your overhaul of this unit, it was installed on Northern's Boeing 707-331, Registration No. N704NA.

On June 26, 1979, at Wichita, Kansas, during the course of scheduled Flight 2, the aircraft was forced to abort a takeoff as a result of a malfunction in the no. 2 engine. The malfunction resulted in a fire in said engine which required the assistance of ground emergency equipment to extinguish and which resulted in serious damage to the engine.

Further investigation of the incident led to the discovery that during the overhaul of the fuel control unit referred to above, an "O" ring seal was omitted from the throttle valve assembly portion of the unit. Further investigation revealed that you were the mechanic who performed the overhaul of this unit. Inasmuch as records disclose that no further maintenance was performed on the throttle valve assembly prior to the time of the incident, the only reasonable conclusion that can be drawn is that you failed to install the required "O" ring seal. The relevant portions of the carrier's maintenance manual clearly describe the procedure for overhauling the fuel control unit and it is apparent that you should have been acquainted with the proper maintenance procedure for this item.

By reason of the foregoing, you violated Section 43.13(b) of the Federal Aviation Regulations in that, subsequent to your performance of the maintenance, the affected part was not equivalent to its original or properly altered condition with respect to mechanical function, structural strength, and other qualities affecting airworthiness.

Under Section 901(a) of the Federal Aviation Act of 1958, as amended, you are subject to a civil penalty not to exceed \$1,000 for this violation. In determining an appropriate sanction, we have taken into consideration the comments submitted in your letter to us of July 25, 1979, as well as information received from Northern Airways, Inc., indicating that you have received a written reprimand and a suspension from pay status for a period of one day as a result of this incident. In view of the foregoing, but also

5/16/80

considering that safety in air transportation was affected by your violation, we would accept \$100 in settlement of this matter. An explanation of the settlement procedure is enclosed.

We will take no further action for a period of 10 days after your receipt of this letter in order to afford you an opportunity to submit the suggested amount in settlement or furnish additional information pursuant to the described procedure.

Sincerely,

Regional Counsel

Enclosure

(Note: See Figure 12-2 for companion civil penalty letter to the air carrier involved.)

APPENDIX J

FAA Guidelines for Composing
Letter Requesting Reexamination

REEXAMINATION AND REINSPECTION UNDER SECTION 609
OF THE FEDERAL AVIATION ACT

800. AUTHORITY. Under Section 609 of the Federal Aviation Act of 1958, the Administrator is authorized to reinspect any aircraft, aircraft engine, propeller, appliance, air navigation facility or agency, and to reexamine any airman at any time. Reexamination or reinspection does not preclude the taking of punitive enforcement action when appropriate. When any certificate holder fails to comply with a request for reinspection or reexamination, Section 609 provides legal procedures to require that the certificate holder be reinspected or reexamined.

801. PROCEDURES. When an inspector, a Regional Flight Surgeon, the Aeromedical Certification Branch (AAC-130), or the Federal Air Surgeon have reason to believe, either through reliable reports, personal knowledge, or on the basis of evidence obtained through investigation, that a certificate holder may not be qualified to exercise the privileges of a particular certificate or rating, a reexamination or reinspection may be required.

a. The investigating inspector, or office of medical responsibility, will notify the certificate holder by certified mail that a reinspection or reexamination is necessary.

b. The letter should specify the time, place, and subject of the reinspection or reexamination, giving adequate consideration to the convenience of the certificate holder.

c. The inspector should be careful to point out exactly the rating, or ratings in the case of airman or repair station certificate holders, the specific type certificate, or production certificate in the case of certificated manufacturers, on which the inspector wishes to conduct the reinspection or reexamination. The office of medical responsibility should identify the specific information or history needed to determine that the holder of an airman medical certificate meets appropriate medical standards, and the class of medical certification which the FAA wishes to reexamine.

APPENDIX K

FAA Notice of Proposed Certificate Action

Sample



U.S. Department
of Transportation
**Federal Aviation
Administration**

Southwest Region
Arkansas, Louisiana and
New Mexico, Oklahoma
Texas

P.O. Box 1689
4400 Blue Mound Road
Fort Worth, Texas 76101

Case No.

CERTIFIED - RETURN RECEIPT REQUESTED

TO:

NOTICE OF PROPOSED CERTIFICATE ACTION

Take notice that upon consideration of a report of investigation, it appears that you violated the Federal Aviation Act of 1958, as amended, or regulations issued thereunder by reason of the following:

1. You hold Airman Pilot Certificate No. _____ with commercial pilot privileges and various ratings, including airplane multiengine land rating.
2. On March _____, you served as pilot in command of Civil Aircraft _____, a Cessna Model 401 airplane, the property of another, in a flight in air commerce from _____ to _____.
3. You carried on the flight in question, Mr. Kirby Klein, to whom you were giving flight instruction.
4. On approach to Silver City, New Mexico, on the flight in question, you failed to assure that the fuel selector valve was changed from auxiliary tanks to the main tanks for landing, as required by the operating limitations set forth in the Cessna 401 Airplane Flight Manual.
5. The flight in question terminated in an accident on approach to Silver City, New Mexico, as a result of fuel starvation.

By reason of the foregoing, you operated said aircraft in a careless manner so as to endanger the life or property of another.



50 Years of Air Traffic Control Excellence
- A Standard for the World -



U.S. Department
of Transportation
Federal Aviation
Administration

Southwest Region
Arkansas Louisiana
New Mexico Oklahoma
Texas

P.O. Box 1689
4400 Blue Mound Road
Fort Worth Texas 76101

INFORMATION WITH RESPECT TO NOTICE OF PROPOSED CERTIFICATE ACTION

Within fifteen (15) days after your receipt of this letter, you may proceed in one of the ways set forth below. You should use the enclosed form to indicate how you elect to proceed. You may:

1. Surrender your certificate on or before the above date. In this event the Order proposed in the Notice will be issued at once effective the date your certificate is surrendered or mailed to the office listed below.

2. Indicate your desire to have an Order issued as proposed in the Notice of Proposed Certificate Action so that you can appeal to the National Transportation Safety Board (NTSB). This may be done by checking Item No. 2 on the enclosed reply form or by not responding to the Notice.

3. Answer the charges in writing. With such answer you may furnish such additional information, including statements by you or your representative or others, or other documentary evidence as you may wish to have considered.

4. Request that you or your representative be accorded a conference with an attorney --

a. At the FAA Southwest Regional Office, Fort Worth, Texas or at the Flight Standards District Office nearest your home (list of offices attached). Conferences in air carrier cases will be held only at the Regional Office;

b. Or, if you reside outside the Southwest Region, you may request that the case be transferred to your area;

At this conference you may state why the proposed action should not be taken, and you may present evidence and information on your behalf.

5. If you filed an Aviation Safety Report with the National Aeronautics and Space Administration (NASA) concerning the incident set forth in the attached Notice of Proposed Certificate Action you may be entitled to waiver of any penalty. If you claim entitlement to this waiver you must present evidence satisfactory to the Administrator that you filed a report with NASA within 10 days of the incident concerning that incident. If you fail to provide this evidence to the Administrator within two

weeks after receipt of this letter you will not be entitled to the waiver of penalty. You will only be entitled to waiver if it is found:

a. That this alleged violation was inadvertent and not deliberate;

b. That this violation did not involve a criminal offense, or accident, or discloses a lack of competence or qualification to the holder of a certificate; and

c. You have not paid a civil penalty pursuant to Section 901 of the Federal Aviation Act or been found in any prior FAA enforcement action to have committed a violation of the Federal Aviation Act or any regulations of the Federal Aviation Act within a period of five years prior to the date of the incident.

In the event that you prove your entitlement to this waiver of penalty an order will be issued finding you in violation but imposing no civil penalty or certificate suspension. Your claim of entitlement to waiver of penalty shall constitute your agreement that this order may be issued without further notice. You will, however, have the right to appeal the order to the National Transportation Safety Board (NTSB) pursuant to Section 609 of the Federal Aviation Act.

Following issuance of an order, you will have the right to appeal such order to the NTSB under the provisions of Section 609 of the Federal Aviation Act.

Address all communications in this matter to the attorney who signed the Notice of Proposed Certificate Action at the address below:

Office of the Regional Counsel
Federal Aviation Administration
Southwest Region
Post Office Box 1689
Fort Worth, TX 76101

Telephone: 817-877-2450

DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION

Date _____

Office of the Regional Counsel
Federal Aviation Administration
Southwest Region
Post Office Box 1689
Fort Worth, Texas 76101

Subject: Notice of Proposed Certificate Action

In reply to your Notice of Proposed Certificate Action and the accompanying information sheet, I elect to proceed as indicated below:

1. ☐ I hereby transmit my certificate with the understanding that an Order will be issued as proposed effective the date of mailing of this reply.
2. ☐ I request that the Order be issued so that I may appeal directly to the National Transportation Safety Board.
3. ☐ I hereby submit my answer to your Notice and request that my answer and any information attached hereto be considered in connection with the allegations set forth in your Notice.
4. ☐ I hereby request to discuss this matter informally with an attorney from your office at _____.
5. ☐ I hereby claim entitlement to waiver of penalty under the Aviation Safety Report Program and enclose evidence that a timely report was filed.

Signature _____

Telephone No. _____

CERTIFICATION - PRIVACY ACT

The information on this form is solicited under the authority of the Federal Aviation Act, Section 609.

Submission of telephone number is voluntary.

This information will be used to contact you regarding this enforcement case only.

If you do not provide this information, there may be a delay in contacting you regarding your enforcement case.

TEXAS

Federal Aviation Administration
Flight Standards District Office
Love Field
8032 Aviation Place
Dallas, TX 75235

Federal Aviation Administration
Flight Standards District Office
Hobby Airport
8800 Paul B. Koonce Drive, Room 152
Houston, TX 77061

Federal Aviation Administration
Flight Standards District Office
International Airport
Route 3, Box 51
Lubbock, TX 79401

Federal Aviation Administration
Flight Standards District Office
International Airport, Room 201
1115 Paul Wilkins Road
San Antonio, TX 78216

OKLAHOMA

Federal Aviation Administration
Flight Standards District Office
Wiley Post Airport, Room 111
FAA Building
Bethany, OK 73008

ARKANSAS


Federal Aviation Administration
Flight Standards District Office
Adams Field
FAA Building, Room 201
Little Rock, AR 72202

LOUISIANA

Federal Aviation Administration
Flight Standards District Office
Ryan Airport
9191 Plank Road
Baton Rouge, Louisiana 70811

NEW MEXICO

Federal Aviation Administration
Flight Standards District Office
2402 Kirtland Drive, Southeast
Albuquerque, NM 87106



APPENDIX L

NASA Administered Aviation Safety
Reporting Program



U.S. Department
of Transportation
**Federal Aviation
Administration**

Advisory Circular

**Subject: AVIATION SAFETY REPORTING
PROGRAM**

**Date: February 4, 1985
Initiated by: ASF-200**

**AC No. 00-46C
Change:**

1. PURPOSE.

This circular describes the Federal Aviation Administration (FAA) Aviation Safety Reporting Program (ASRP) which utilizes the National Aeronautics and Space Administration (NASA) as a third party to receive and analyze Aviation Safety Reports. This cooperative safety reporting program invites pilots, controllers, and other users of the National Aviation System or any other person, such as maintenance personnel, to report to NASA actual or potential discrepancies and deficiencies involving the safety of aviation operations. The operations covered by the program include departure, enroute, approach, and landing operations and procedures, air traffic control procedures and equipment, pilot/controller communications, aircraft movement on the airport, and near midair collisions provide data for improving the current system and planning for a future system.

2. CANCELLATION.

Advisory Circular 00-46B dated June 15, 1979, is cancelled.

3. BACKGROUND.

a. The primary mission of the FAA is to promote aviation safety. To further this mission, the FAA instituted a voluntary Aviation Safety Reporting Program on April 30, 1975, designed to encourage the reporting and identification of deficiencies and discrepancies in the system.

b. The FAA determined that ASRP effectiveness would be greatly enhanced if the receipt, processing, and analysis of the raw data were accomplished by NASA rather than the FAA. This would ensure the anonymity of the reporter and of all parties involved in a reported occurrence or incident and, consequently, increase the flow of information necessary for the effective evaluation of the safety and efficiency of the system. Accordingly, NASA designed and administers the Aviation Safety Reporting System (ASRS) to perform these functions in accordance with a Memorandum of Agreement

executed by FAA and NASA on August 15, 1975, as modified April 24, 1979. Current ASRS operations are conducted in accordance with a Memorandum of Agreement executed by FAA and NASA on September 30, 1983.

4. NASA RESPONSIBILITIES.

a. The NASA Aviation Safety Reporting System provides for the receipt, analysis, and de-identification of aviation safety reports; in addition, periodic reports of findings obtained through the reporting program are published and distributed to the public, the aviation community, and FAA.

b. A NASA ASRS advisory committee comprised of representatives from the aviation community, including the Department of Defense, NASA, and FAA, advises NASA on the conduct of the ASRS. The committee conducts periodic meetings to evaluate and ensure the effectiveness of the reporting system.

5. PROHIBITION AGAINST USE OF REPORTS FOR ENFORCEMENT PURPOSES.

a. Section 91.57 of the Federal Aviation Regulations (14 CFR 91.57) prohibits the use of any report submitted to NASA under the ASRS (or information derived therefrom) in any disciplinary action, except information concerning criminal offenses or accidents which are covered under paragraphs 7a(1) and 7a(2).

b. When a violation of the Federal Aviation Regulations comes to the attention of the FAA from a source other than a report filed with NASA under ASRS, appropriate action will be taken. See paragraph 9.

c. The NASA ASRS security system is designed and operated by NASA to ensure the confidentiality and anonymity of the reporter and all other parties involved in a reported occurrence or incident. The FAA will not seek, and NASA will not release or make available to the FAA, any report filed with NASA under ASRS or any other information that might reveal the identity of any party involved in an occurrence or incident reported under ASRS. There has been no breach of confidentiality in the over 42,000 reports filed under ASRS.

6. REPORTING PROCEDURES

NASA ARC Form 277 (revised October 1984), which is preaddressed and postage free, is available at FAA offices. This form or a narrative report should be completed and mailed to: Aviation Safety Reporting System, P.O. Box 189, Moffett Field, CA 94035.

7. PROCESSING OF REPORTS

a. NASA procedures for processing Aviation Safety Reports assure that reports are initially screened for:

(1) Information concerning criminal offenses, which will be referred promptly to the Department of Justice and the FAA,

(2) Information concerning accidents, which will be referred promptly to the National Transportation Safety Board and the FAA; and

Note Reports discussing criminal activities or accidents are not de-identified prior to their referral to the agencies outlined above.

(3) Time-critical information which, after de-identification, will be promptly referred to FAA and other interested parties.

b. Each Aviation Safety Report has a tear-off portion which contains the information that identifies the person submitting the report. This tear-off portion will be removed by NASA, time stamped, and returned to the reporter as a receipt. This will provide the reporter with proof that he/she filed a report on a specific incident or occurrence. The identification strip section of the ASRS form provides NASA program personnel with a means by which the reporter can be contacted in case additional information is sought in order to understand more completely the report's content. Except in the case of reports describing accidents or criminal activities, no copy of an ASRS form's identification strip is created or retained for the ASRS files. Prompt return of identification strips is a primary element of the ASRS program's report de-identification process and assures the reporter's anonymity.

8. DE-IDENTIFICATION

All information that might assist in or establish the identification of persons filing ASRS reports and parties named in those reports will be deleted, except for reports covered under paragraphs 7a(1) and 7a(2). This de-identification will be accomplished normally within 72 hours after NASA's receipt of the reports, if no further information is requested from the reporter.

9. ENFORCEMENT POLICY

a. It is the policy of the Administrator of the FAA to perform his responsibility under the Federal Aviation Act for the enforcement of the Act and the Federal Aviation Regulations in a manner that will best tend to reduce or eliminate the possibility of, or recurrence of, aircraft accidents. The FAA enforcement procedures are set forth in Part 13 of the Federal Aviation Regulations (14 CFR Part 13) and FAA enforcement handbooks.

b. In determining the type and extent of the enforcement action to be taken in a particular case, the following factors are considered:

- (1) Nature of the violation;
- (2) Whether the violation was inadvertent or deliberate;
- (3) The certificate holder's level of experience and responsibility;
- (4) Attitude of the violator;
- (5) The hazard to safety of others which should have been foreseen;
- (6) Action taken by employer or other Government authority;
- (7) Length of time which has elapsed since violation;
- (8) The certificate holder's use of the certificate,
- (9) The need for special deterrent action in a particular regulatory area, or segment of the aviation community; and
- (10) Presence of any factors involving national interest, such as the use of aircraft for criminal purposes.

c. The filing of a report with NASA concerning an incident or occurrence involving a violation of the Act or the Federal Aviation Regulations is considered by the FAA to be indicative of a constructive attitude. Such an attitude will tend to prevent future violations. Accordingly, although a finding of a violation may be made, neither a civil penalty nor certificate suspension will be imposed if:

- (1) The violation was inadvertent and not deliberate;
- (2) The violation did not involve a criminal offense, or accident, or action under section 609 of the Act which discloses a lack of qualification or competency, which are wholly excluded from this policy,
- (3) The person has not been found in any prior FAA enforcement action to have committed a violation of the Federal Aviation Act, or of any regulation promulgated under that Act for a period of 5 years prior to the date of the occurrence; and
- (4) The person proves that, within 10 days after the violation, he or she completed and delivered or mailed a written report of the incident or occurrence to NASA under ASRS. See paragraph 5c and 7b.

Note: Paragraph 9 does not apply to air traffic controllers. Provision concerning air traffic controllers involved in incidents reported to NASA under ASRS are addressed in FAA Order 9210.3G, Facility Operation and Administration.

10 OTHER REPORTS.

This program does not eliminate responsibility for reports, narratives, or forms presently required by existing directives.

11 EFFECTIVE DATE

The modified Aviation Safety Reporting Program described by this advisory circular is effective March 1, 1985

12 AVAILABILITY OF FORMS.

a Additional copies of the attached reporting form (NASA ARC Form 277, revised October 1984) may be obtained free of charge from FAA offices, including flight service stations or directly from NASA at the ASRS office, P.O. Box 189, Moffett Field, CA 94035

b Government, State, and organized industry groups may obtain forms in quantity by submitting requests to the ASRS office noted in paragraph 12a

c NASA ARC Form 277 (revised October 1984), Aviation Safety Report, will be stocked in the FAA Depot and will be available to FAA offices through normal supply channels (NSN 0052-00-845-4003, unit of issue: sheet).

ADMINISTRATOR

National Aeronautics and
Space Administration
Ames Research Center
Moffett Field, California 94035

Official Business
Penalty for Private Use \$300



NO POSTAGE
NECESSARY
IF MAILED
IN THE
UNITED STATES

BUSINESS REPLY MAIL

FIRST CLASS PERMIT NO 12078 WASHINGTON DC

POSTAGE WILL BE PAID BY NASA

FIRST CLASS
AVIATION SAFETY DATA —
DO NOT DELAY

NASA Aviation Safety Reporting System
Post Office Box 189
Moffett Field, California 94035



**NATIONAL AERONAUTICS AND
SPACE ADMINISTRATION**

NASA has established an Aviation Safety Reporting System to identify problems in the aviation system which require correction. The program of which this system is a part is described in detail in FAA Advisory Circular 00-46C. Your assistance in informing us about such problems is essential to the success of the program. Please fill out this postage free form as completely as possible, fold it and send it directly to us.

The information you provide on the identity strip will be used only if NASA determines that it is necessary to contact you for further information. **THE IDENTITY STRIP WILL BE RETURNED DIRECTLY TO YOU.** The return of the identity strip assures your anonymity.

**AVIATION SAFETY
REPORTING SYSTEM**

Section 91.57 of the Federal Aviation Regulations (14 CFR 91.57) prohibits reports filed with NASA from being used for FAA enforcement purposes. This report will not be made available to the FAA for civil penalty or certificate actions for violations of the Federal Air Regulations. Your identity strip, stamped by NASA, is proof that you have submitted a report to the Aviation Safety Reporting System. We can only return the strip to you, however, if you have provided a mailing address. Equally important, we can often obtain additional useful information if our safety analysts can talk with you directly by telephone. For this reason, we have requested telephone numbers where we may reach you. Thank you for your assistance.

NOTE: AIRCRAFT ACCIDENTS SHOULD NOT BE REPORTED ON THIS FORM. SUCH REPORTS SHOULD BE FILED WITH THE NATIONAL TRANSPORTATION SAFETY BOARD AS REQUIRED BY 49CFR830.

IDENTIFICATION STRIP Please fill in all blanks. **NO RECORD WILL BE KEPT OF YOUR IDENTITY**

This section will be returned to you promptly

TELEPHONE NUMBERS where we may reach you for further details of this occurrence

(HOME) Area _____ No _____ Hours _____

(WORK) Area _____ No _____ Hours _____

(SPACE RESERVED FOR ASRS DATE/TIME STAMP)

NAME _____

TYPE OF EVENT/SITUATION _____

ADDRESS _____

DATE OF OCCURRENCE _____

LOCAL TIME (24 hr clock) _____

Except for reports of aircraft accidents and criminal activities - which are not included in the ASRS and should not be submitted to NASA - all identities contained in this report will be removed to assure complete reporter anonymity

PLEASE FILL IN APPROPRIATE SPACES AND CHECK ALL ITEMS WHICH APPLY TO THIS EVENT OR SITUATION

REPORTER'S ROLE DURING OCCURRENCE

(pilot flying radar controller cabin crew maintenance etc.) _____

REPORTER	FLYING TIME	CERTIFICATES/RATINGS	ATC EXPERIENCE
<input type="checkbox"/> captain/pilot	total _____ hrs	<input type="checkbox"/> student <input type="checkbox"/> private	<input type="checkbox"/> FPL <input type="checkbox"/> developmental
<input type="checkbox"/> first officer	last 90 days _____ hrs	<input type="checkbox"/> commercial <input type="checkbox"/> ATP	radar _____ yrs
<input type="checkbox"/> other crewmember		<input type="checkbox"/> instrument <input type="checkbox"/> CFI	non radar _____ yrs
<input type="checkbox"/> controller	in acft type _____ hrs	<input type="checkbox"/> multiengine <input type="checkbox"/> F/E	supervisory _____ yrs
			military _____ yrs

DESCRIBE ONE AIRCRAFT IN THIS SECTION (PILOTS DESCRIBE YOUR OWN) AND ADDITIONAL AIRCRAFT IN THE DESCRIBE EVENT/SITUATION SECTION

AIRFRAME/ENGINES	OPERATOR	PURPOSE OF FLIGHT	FLIGHT PLAN
<input type="checkbox"/> low fixed wing <input type="checkbox"/> ultralight <input type="checkbox"/> reciprocating	<input type="checkbox"/> scheduled carrier	<input type="checkbox"/> passenger	<input type="checkbox"/> VFR <input type="checkbox"/> IFR
<input type="checkbox"/> high fixed wing <input type="checkbox"/> wide body <input type="checkbox"/> turboprop	<input type="checkbox"/> supplemental carrier	<input type="checkbox"/> cargo	<input type="checkbox"/> SVFR <input type="checkbox"/> none
<input type="checkbox"/> rotary wing <input type="checkbox"/> small complex <input type="checkbox"/> turbojet	<input type="checkbox"/> FBO/flying school	<input type="checkbox"/> business	
<input type="checkbox"/> advanced/automated cockpit (e.g. CRT's FMS etc.)	<input type="checkbox"/> commuter <input type="checkbox"/> air taxi	<input type="checkbox"/> training	NAVIGATION IN USE
	<input type="checkbox"/> corporate <input type="checkbox"/> charter	<input type="checkbox"/> pleasure	
crew size _____ pax seats _____	<input type="checkbox"/> government <input type="checkbox"/> private		
	<input type="checkbox"/> military (_____)		

gross weight _____ no. of engines _____ ☐ _____ ☐ _____

AIRSPACE/LOCALE			ATC/ADVISORY SERVICE		FLIGHT CONDITIONS		LIGHT AND VISIBILITY	
<input type="radio"/> uncontrolled	<input type="radio"/> ATA	<input type="radio"/> PCA	<input type="radio"/> ground	<input type="radio"/> approach	<input type="radio"/> VMC	<input type="radio"/> IMC	daylight <input type="radio"/> dawn	<input type="radio"/> night
<input type="radio"/> control zone	<input type="radio"/> TRSA	<input type="radio"/> TCA	<input type="radio"/> local	<input type="radio"/> departure	<input type="radio"/> mixed	<input type="radio"/> marginal	" dusk	" night
<input type="radio"/> special use airspace	<input type="radio"/> ARSA	<input type="radio"/> unknown	<input type="radio"/> center	<input type="radio"/> FSS	<input type="radio"/> storm	<input type="radio"/> rain	ceiling _____ feet	
<input type="radio"/> airway/route	<input type="radio"/> MTR	<input type="radio"/> _____	<input type="radio"/> UNICOM	<input type="radio"/> CTAF	<input type="radio"/> turbulence	<input type="radio"/> fog	visibility _____ miles	
ALTITUDE _____ <input type="radio"/> MSL (or) <input type="radio"/> AGL			Name of ATC Facility _____		<input type="radio"/> windshear	<input type="radio"/> snow	RVR _____ feet	
NEAREST CITY _____ STATE _____			<input type="radio"/> ice <input type="radio"/> _____					

SPECIFY LOCATION BY REFERENCE TO AN AIRPORT, NAVAID, OR OTHER FIX (distance, bearing, etc.) _____

AIRCRAFT FLIGHT PHASES AT TIME OF OCCURRENCE (preflight, takeoff, cruise, hover, etc.) _____

IF A CONFLICT: Evasive action? ☐ yes ☐ no ☐ no time ☐ unknown Estimated miss in feet _____ vert. l. _____ horiz. l. _____

DESCRIBE EVENT/SITUATION

Keeping in mind the topics shown below, discuss those which you feel are relevant and anything else you think is important. Include what you believe really caused the problem, and what can be done to prevent a recurrence, or correct the situation. (CONTINUE ON THE OTHER SIDE AND USE ADDITIONAL PAPER IF NEEDED)

CHAIN OF EVENTS

- How the problem arose
- Contributing factors
- How it was discovered
- Corrective actions

HUMAN PERFORMANCE CONSIDERATIONS

- Perceptions, judgements, decisions
- Actions or inactions
- Factors affecting the quality of human performance

APPENDIX M

Sample Transport Canada

Notice of Monetary Penalty

Notice of Suspension

11.7 SAMPLE NOTICE OF ASSESSMENT OF MONETARY PENALTY

TO

DATE
FILE NUMBER
TOTAL PENALTY ASSESSED
TRANSPORT CANADA

NOTICE OF ASSESSMENT OF MONETARY PENALTY

Pursuant to section 6.7 of the *Aeronautics Act*, the Minister of Transport has decided to assess a monetary penalty on the grounds that you have contravened the following provision(s)

The foregoing provision(s) is/are designated provisions under the *Air Regulations* Series 1, Number 3, the *Designated Provisions Regulations*

The total assessed penalty of \$ _____ must be paid on or before _____ 19____ to the Regional Manager, Aviation Enforcement, Transport Canada at the address above. Payment may be made in cash or by certified cheque or money order payable to The Receiver General for Canada.

Full payment of the amount specified above will be accepted in complete satisfaction of the penalty assessed and no further proceedings under Part I of the *Act* shall be taken against you in respect of the contravention(s).

If the full amount of the penalty has not been received on or before _____, 19____, a copy of this Notice will be forwarded to the Civil Aviation Tribunal. The Tribunal will request that you appear before it to hear the allegations against you. You will be afforded a full opportunity consistent with procedural fairness and natural justice to present evidence and make representations in relation to the alleged contravention(s) before the Tribunal makes its determination.

FOR THE MINISTER OF TRANSPORT

APPENDIX 0

Profiles of Members of Civil Aviation Tribunal

MEMBERS AND STAFF OF THE TRIBUNAL

CHAIRMAN AND CHIEF EXECUTIVE OFFICER

James W. Snow

VICE-CHAIRMAN

Ghislaine Richard

FULL-TIME MEMBER

Zita Brunet

PART-TIME MEMBERS

J. Jacques Blouin

James J. Collins

Dr. Kerry A. Crofton

Stanley M. Deluce

Beresford Dryvynsyde

John J. Eberhard

Ed J. Jenson

Dr. Nairn D. Knott

J Lawrence MacKay

Robert J. MacPherson

Edward R. McGill

Gordon R. Mitchell

Dr. Larry R. Ohlhauser

Thomas Prescott

Jocelyne Rouleau

Robert J. Rushford

Alfred R. Spence

Dr. Roy Stewart

Michael Zubko

REGISTRAR

Nancy Styles

ASSISTANT TO REGISTRAR

Giselle Albi

DEPUTY REGISTRAR

Lyne Lavigne

ADMINISTRATION AND FINANCE

Jean-Pierre Thibault

Mary Astle

OFFICES OF THE TRIBUNAL

OTTAWA

Civil Aviation Tribunal,
Canada Building,
344 Slater Street, Room 405,
Ottawa, Ontario.

K1A 0N5

Telephone (613)990-6797

Fax : (613)990-9153

TORONTO

Civil Aviation Tribunal,
Proctor & Gamble Building,
4711 Yonge Street, Suite 702,
North York, Ontario.

M2N 6K8

Telephone : (416)224-7001

Fax : (416)224-7004

TRIBUNAL MEMBER'S RESUMES

JAMES W. SNOW :

Hornby, Ontario.

Appointed to a seven-year full-time term as Chairman of The Civil Aviation Tribunal. Mr. Snow brings with him many years of industry knowledge. He has been a pilot and aircraft owner for more than 30 years. A former Construction Executive, Industrialist, Politician and Farmer, he was first elected to the Ontario Legislature in the 1967 general election and then re-elected in 1971, 1975, 1977 and 1981. He was appointed Minister without portfolio, March 1, 1971, Minister of Public Works, February 2, 1972 and later, Vice-Chairman, Management Board of Cabinet. On October 7, 1975, he was appointed Minister of Transport and Communications, a post which he held until February 8, 1985. Mr. Snow is also the past-president of the Roads and Transportation Association of Canada and past-Chairman of the Council of Ministers Responsible for Transportation and Highway Safety. He is past-president of the Lions Club of Oakville and past District Governor of Lions International, District A11.

GHISLAINE RICHARD :

Montreal, Quebec.

A law graduate from Universite de Montreal, senior researcher and lecturer at the Institute of Air and Space Law, Ms Richard was appointed to the Tribunal for a six-year full-time term as Vice-Chairman. A specialist in accident investigation, air regulations and aviation safety, she has had a number of articles published in the Annals of Air and Space Law. A McGill

Masters graduate in air and space law, she participated in the revision of the Aeronautics Act. She is a past-president of the Quebec Air and Space Law section of the Canadian Bar Association and a former member of the Board of Directors of the Quebec division of the Canadian Bar Association. She is currently a Vice-Chair of the Council of Canadian Administrative Tribunals and a member of the Editorial Board of the Canadian Journal of Administrative Law and Practice.

ZITA BRUNET :

Ottawa, Ontario.

Appointed to a four-year, full-time term as a Hearing Officer. She is a former Air Carrier Inspector (passenger safety) and an Air Carrier Security Inspector with Transport Canada's Aviation Group, and coordinator of Transport Canada's public and employee awareness program on aviation security. She was involved in Civil Aviation Inspector and Engineer Training Analysis Projects and also in passenger safety related studies, was a passenger safety adviser to accident investigation teams, a manager of Nordair's in-flight services and a former Air Canada flight attendant. She is presently a member of the newsletter committee of the Council of Canadian Administrative Tribunals.

BERESFORD DRYVYNSYDE :

Vancouver, British Columbia.

Named to a five-year part-time term. Mr. Dryvynsyde is managing partner in the Vancouver law firm of Bull, Housser and Tupper. Mr. Dryvynsyde holds a Master of

TRIBUNAL MEMBER'S RESUMES

Laws (Company and Air) from the University of London School of Economics and a Diploma (with distinction) in International Air Law from the London Institute of World Affairs. He is Canadian editor of the International Banking Law Bulletin, has extensive experience in banking and security-related transactions. He is a private pilot and aircraft owner with more than 1,000 hours of flying time and was an RCAF reserve flying officer.

JOHN J. EBERHARD :

London, Ontario.

Named to a five-year part-time term. Mr. Eberhard is a senior partner in the Hyde Park Law firm of Eberhard, Morden and a special counsel to the Ontario Ministry of Transportation and Communications enforcement division. He holds a private pilot's licence and is a member of the Canadian Owners and Pilots Association.

EDWARD R. MCGILL :

Brandon, Manitoba.

Named to a three-year part-time term. Mr. McGill is an RCAF veteran, a former MLA in the Manitoba legislature from 1969 to 1981 and was a minister in the Manitoba government from 1977-81. He also managed the Brandon Flying Club for 25 years.

GORDON R. MITCHELL :

Flin Flon, Manitoba.

Named to a four-year part-time term. Mr.

Mitchell, an RCAF veteran has been owner of Mitchell Aircraft Marine Ltd., Flin Flon, since 1947. He is an aircraft engineer and past-president of the Manitoba Chamber of Commerce.

ALFRED R. SPENCE :

Georgetown, Ontario.

Was named to a three-year part-time term. Mr. Spence, a farmer and businessman, he was an air traffic controller and supervisor in the Toronto Area Control Centre for Transport Canada since 1959 until his retirement.

ED J. JENSON :

Lloydminster, Alberta.

Named to a five-year part-time term. Mr. Jenson was president of International Airways of Lloydminster, a fixed-base operation and charter operator, which also ran a small flying school.

DR. LARRY R. OHLHAUSER :

Edmonton, Alberta

Was named to a four-year part-time term. Dr. Ohlhauser is assistant registrar of the College of Physicians and Surgeons, Province of Alberta. He was a Civil Aviation Medical Examiner, is presently a Director and Treasurer of the Alberta Aviation Council being a private pilot and aircraft owner himself.

TRIBUNAL MEMBER'S RESUMES

DR. KERRY A. CROFTON :

Halifax, Nova Scotia.

Named to a four-year part-time term. Dr. Crofton, a consultant in occupational health, has worked with pilots in the assessment and treatment of health and stress problems, as well as the Canadian Armed Forces, the Canadian Air Line Pilots Association and several Canadian Airlines.

STANLEY M. DELUCE :

Timmins, Ontario.

Named to a three-year part-time term. Mr. Deluce, an RCAF veteran, is former president of Austin Airways Ltd., chairman of Air Ontario, a director of Air Alliance, vice-president of Air Creebec and director of Northland Air Manitoba Ltd., which collectively operate about 65 aircraft. He has also served since 1951 as a member of the Air Transport Association of Canada including two terms as director. He has held a commercial pilot's license for over 45 years.

ROBERT J. MacPHERSON :

Regina, Saskatchewan.

Was named to a three-year part-time term. Mr MacPherson is president and general manager of Prairie Flying Service (1976) Ltd., a fixed base operation, charter and courier service and one of the largest Cessna dealers in Canada. He is commercial pilot with a multi-engine rating.

J. LAWRENCE MacKAY :

Westville, Nova Scotia.

Named to a three-year part-time term. Mr MacKay is a B-category aircraft maintenance engineer and a pilot with more than 4,000 flying hours on some 60 different aircraft types. He is a former director of the Atlantic Aviation Maintenance Engineers Association. He is presently Vice-President of the Aviation Council of Nova Scotia and is the major shareholder of the only engine overhaul shop in Atlantic Canada.

THOMAS PRESCOTT :

Riverview, New Brunswick.

Named to a two-year part-time term. Mr Prescott, an RCAF veteran, is a former air navigation commissioner of the International Civil Aviation Organization, and has been a pilot for 45 years. He is a former Air Navigation Regional Administrator for Transport Canada in the Atlantic Region until his retirement.

DR. ROY M. STEWART :

Ottawa, Ontario.

Was named to a two-year part-time term. Dr. Stewart served as a consultant and chief of clinical assessment in the medical services branch of the Department of Health and Welfare as well as an adviser to Transport Canada for 15 years prior to his retirement from the public service. He is a Fellow of the Aerospace Medical Association, past-president of the Civil Aviation Medical Association, and medical

TRIBUNAL MEMBER'S RESUMES

International Civil Aviation Organization in producing the second edition of the Manual of Civil Aviation Medicine.

J. JACQUES BLOUIN :

Sept-Iles Quebec.

Named to a five-year part-time term. Mr. Blouin is a Sept-Iles businessman and helicopter pilot. He trained on float planes and twin-engine aircraft and is certified to fly both piston and turbine helicopters. He has accumulated approximately 6,500 hours of flying as first officer. At one time he was employed with the Iron Ore Company of Canada and later with Cartier Transport Inc. at Sept-Iles. He is former president and founder as well as director general of Golfe Helicoptere Service Ltee. He is also former vice-president of Trans-Quebec Helicoptere Ltee; Matagami Transport Ltee., Les Immeubles B-L-M. He is now president and director general of J.M.D. Blouin Enterprises Ltd.

JOCELYNE ROULEAU :

Quebec City, Quebec.

Was named to a seven-year part-time term. Ms. Rouleau received her law degree from the University of Laval in 1975 and was admitted to the Bar in 1976. She specialized in labour law with the firm of Blanchard, Gaulin et Associes. In 1984-85, she was a legal adviser and project director for the Quebec Air Transport Association.

MICHAEL ZUBKO :

Inuvik, N.W.T.

Was named to a six-year part-time term. Mr. Zubko holds a pilots licence and aircraft maintenance engineers (AME) licence. He completed a heavy maintenance course on Pratt & Whitney PT6 turbine engines at Longueuil, Quebec and obtained a turbine endorsement to his AME licence. He moved to Inuvik in 1959, to work as a pilot. He was appointed a member of the Worker's Compensation Board of the Northwest Territories in November 1982 and named Chairman of the Board's audit committee in May 1986. In July 1985, he was appointed Chairman of the Industrial Adjustment Committee of Inuvik, sponsored by Canada Employment and Immigration, to study and report on the effect on the community of the closure of Canadian Forces Station Inuvik.

ROBERT J. RUSHFORD, QC :

Of Moose Jaw, Saskatchewan.

Named to a seven-year part-time term, Mr. Rushford is a lawyer who is a graduate of the University of Saskatchewan. He is a senior partner with the Law Firm of Grayson and Company, Barristers and Solicitors, of Moose Jaw. Mr. Rushford is a private pilot and has served as a director of the Victorian Order of Nurses, the Moose Jaw Chamber of Commerce and the Saskatchewan section of the Canadian Bar Association. He is a past-president and director of the Saskatchewan Trust, has served as a bencher of the Law Society of Saskatchewan, and has been a member of other community and business organiza-

TRIBUNAL MEMBER'S RESUMES

tions. He has recently been appointed honorary Lieutenant Colonel of the Saskatchewan Dragoons.

JAMES J. COLLINS :

St. John's, Newfoundland.

Named to a seven-year part-time term. Mr. Collins is a retired commercial aviation executive. He is a member of the St John's Airport Advisory Committee. He is a Licensed aircraft maintenance engineer who earned his private pilot's licence and commercial licence at the Moncton Flying Club. He became president, managing director, engineer and chief pilot of Air Transit Limited, between 1960 and 1975. Mr. Collins managed the only fixed base operation in St. John's, leasing it to Innotech Aviation in 1975. He served on the board of directors of that company before retiring from full-time business in 1985. He was a member of the board of directors of the St. John's Board of Trade.

is a fellow of the International College of Angiology, the American College of Chest Physicians and the Royal College of Physicians and Surgeons (Canada). He has been a director of numerous community organizations and president of others including the Victorian Order of Nurses.

DR. NAIRN D. KNOTT :

Vancouver, British Columbia.

Was named to a seven-year part-time term. Dr. Knott, who was in private practice in internal and aerospace medicine in Vancouver until his recent retirement, received his bachelor of arts degree from Columbia University and doctor of medicine degree from New York Medical College. Dr. Knott has been approved as a medical examiner by Transport Canada since 1953 and was medical director of Pacific Western Airline until 1985. A member of the Vancouver, British Columbia and Canadian medical associations, Dr. Knott