

**TRANSPORTATION APPEAL TRIBUNAL OF CANADA**

BETWEEN:

**Ross William Bertram**, Appellant

- and -

**Minister of Transport**, Respondent

**LEGISLATION:**

*section 7.1 of the Aeronautics Act, R.S.C., 1985, c. A-2*

---

**Interlocutory Decision  
Elizabeth MacNab**

---

**Decision: January 15, 2014**

Citation: *Bertram v. Canada (Minister of Transport)*, 2014 TATCE 3 (Ruling)

Heard by: Written Submissions

**RULING ON THE TRIBUNAL'S JURISDICTION TO HEAR THIS MATTER**

**Held:** I find that the Tribunal has jurisdiction to review the Pilot Proficiency Check, but I decline to hear the matter because the issue is moot.

**I. BACKGROUND**

[1] On November 2, 2012, the Applicant, Ross William Bertram, filed with the Transportation Appeal Tribunal of Canada (Tribunal) a review of an assessment of a “fail” on a Pilot Proficiency Check (PPC) carried out on September 19, 2012. It is common ground between the parties that the Applicant passed a subsequent flight test carried out two days later on September 21, 2012. On July 9, 2013, the Minister of Transport's (Minister) representative proposed a motion for dismissal on the basis that the Tribunal lacks jurisdiction to hear the matter. Written submissions in support of the motion were submitted to the Tribunal by the Minister on August 20, 2013. The Applicant sent his submissions to the Tribunal on September 17, 2013, and the Minister's reply was submitted to the Tribunal on October 3, 2013.

This Ruling has been made on the basis of these written submissions on the assumption that the facts on which I have relied would eventually have been proven in evidence.

## **II. SUBMISSIONS**

### **A. Minister**

[2] The Minister's submissions set out her version of the facts, stating that the flight test of September 19, 2012 was never validated by the Minister, and that Transport Canada officials indicated this in a letter to the Applicant dated June 19, 2013, which further indicated that the notation of failure would be removed from his record. Consequently, the reason given by the Applicant for his request for review, that being possible damage to his reputation since the failure notation remained on his record, could be “laid to rest”. The Minister submitted that Transport Canada never made a decision to fail the Applicant's PPC.

#### **(1) Jurisdiction**

[3] The Minister submits that the Tribunal's jurisdiction is limited to that which is given under various statutes. In this matter, the relevant authority to review a decision by the Minister to suspend, cancel or refuse to renew a Canadian Aviation Document (CAD) is given under section 7.1 of the *Aeronautics Act*, R.S.C., 1985, c. A-2 (*Act*). The Minister argues that it was determined in *Canada (Minister of Transport) v. Beingsessner*, [1996] FCJ No. 787, that a denied PPC results in the loss of the privilege of flying the aircraft to which it relates, and is thus reviewable by the Tribunal as a suspension or cancellation of a privilege that is part of a CAD. The Minister submits, however, that this decision does not apply in this matter because the Minister never accepted the impugned flight test report and the Applicant never lost the privilege associated with the PPC. Consequently, there was never a decision made that comes within the description of the review authority established by section 7.1 of the *Act*. The Minister further submits that the Tribunal has held that where no CAD exists, it has no jurisdiction to review the matter, and cites *Camille v. Canada (Minister of Transport)*, 2007 TATC file no.: P-3326-27, TATCE 18 (Ruling) to support this point.

#### **(2) The Request for Review is Moot**

[4] Alternatively, the Minister submits that, even if there is jurisdiction to review the PPC, the Tribunal should decline to hear the matter on the basis that the issue is moot in that its determination would have no practical effect on the rights of the Applicant.

[5] The Minister refers to *Borowski v. Canada*, [1989] 1 SCR 342, where it was held that the doctrine of mootness will apply in a judicial context “when the decision of the court will not have the effect of resolving some controversy which affects or may affect the rights of the parties. If the decision of the court will have no practical effect on such rights, the court will decline to decide the case”. The Minister also referred to *Lepage v. Canada (Attorney-General)*, [1999] FCJ No. 481, where the Federal Court held that an appeal panel established under the *Public Service Employment Act*, S.C. 2003, c. 22, did not err in law in refusing to hear an appeal regarding an appointment to a position that was later abolished because the matter had consequently become moot.

[6] The Minister submits that the same reasoning should apply in this matter because the Minister has already determined that the flight test of September 19, 2012 was invalid, and that its results should be removed from the Applicant's record. A hearing on the matter would involve a substantial expenditure of time and resources for both the Tribunal and Transport Canada, and a determination in favour of the Applicant would have no effect since he would continue to hold a valid PPC, and his record would not include the flight test of September 19, 2012.

## **B. Applicant**

[7] The Applicant's submission included his explanation of the Transport Canada procedures for carrying out PPCs for Transport Canada pilots. He explained that the flight test conducted on September 19, 2012 related both to his PPC and his instrument rating. While the PPC was marked as failed, the instrument rating portion of the flight test was marked as passed, and on November 13, 2012, he received the appropriate sticker for an instrument rating to be attached to his Licence Booklet (please note that the instrument rating was sometimes referred to as the "IFR rating" in submissions). This rating was valid until October 1, 2014. The Applicant submitted, however, that he received an email from a Transport Canada official on May 22, 2013, indicating that the Minister had been instructed to reissue the instrument rating sticker to reflect a validity period ending on May 1, 2013, the period that had been established by a flight test taken on April 4, 2011. The Applicant states that this is an effective revocation of the instrument rating based on the September 19, 2012 flight test. He was not given any explanation for the revocation, nor was he told that he could ask that the matter be reviewed by the Tribunal. He alleges that this should have been done pursuant to section 7.1 of the *Act*.

[8] At the same time, the Distributed Air Personnel Licensing System (DAPLS) was amended to reflect this decision. While the Applicant discussed the matter with Transport Canada officials, he was told that the September 19, 2012 flight test was invalid since it had been carried out by a person who had also conducted one of the Applicant's training flights. On June 19, 2012, the Applicant received a letter from the Regional Director, Civil Aviation, Ontario Region, advising him that the flight test of September 19, 2012 had been found to be invalid "since it was not conducted in accordance with the procedures outlined in the Approved Check Pilot Manual, 9th Edition, TP6533" and that accordingly the notation of failure of the PPC would be removed from his record. The Applicant states that he had conversations with Transport Canada officials where it was acknowledged that a number of errors had been made, and that they were adamant that no Tribunal review would take place. In support of his version of the facts, he included an affidavit, dated September 17, 2013, attaching certified true copies of his Licence Booklet, his DAPLS entry, and the Flight Training and Aviation Education (FTAE) Flight and Written test results of his record that showed his September 19, 2012 PPC as failed.

### **(1) Jurisdiction**

[9] The Applicant argues that both the PPC and instrument rating are CADs and that the Tribunal has jurisdiction to review the decision of the Minister to suspend or cancel these privileges as provided by section 7.1 of the *Act*. Apart from the debriefing given by the Approved Check Pilot (ACP) after the September 19, 2012 flight test, the Minister, in notifying the Applicant of her decisions, has failed to inform the Applicant of his right to ask for a Tribunal review and has not given an indication of the reasons for that decision. Errors made on

behalf of the Minister and the failure to relay the decisions appropriately are not a defence for ignoring the actions that have been taken.

[10] The Applicant submits that in *Beingessner*, the Federal Court agreed with the Tribunal's decision that it had jurisdiction to review a failed PPC. Moreover, he submits that *Camille* does not apply because it was determined in regard to a flight test taken before the initial issue of a licence.

**(2) *The Request for Review is Moot***

[11] The Applicant argues that the issue in this case is not moot since there are continuing CAD privileges that have been unjustly removed. The issues, including systems that affect all Transport Canada pilots, the standards used by ACPs, and the DAPLS database, affect all Canadian pilots and justify the expenditure of time and resources needed to review this matter. He suggests that the cases cited regarding mootness are irrelevant since they both relate to matters that were already before a lower judicial or quasi-judicial level.

**(3) *Validity of Respondent's Motion***

[12] The Applicant argues that the Respondent's motion is invalid because the Minister did not follow the Tribunal's instructions regarding its filing. These instructions were that each party should file its submissions *simultaneously* with the Tribunal and the other party. The Minister sent her submissions only to the Tribunal on August 20, 2013 in the expectation that it would be forwarded to the Applicant. The Applicant requested a copy from the Tribunal on August 25, 2013, which emailed a copy the next day. A copy was received by courier from the Respondent on September 3, 2013. This constitutes a failure to follow the Tribunal's instructions, and as such the motion should be refused.

**C. *Minister's Reply***

[13] In her response, the Minister pointed out that the Applicant's reply to her submission raised new issues and asked for a ruling as to whether he is permitted to expand the scope of the Tribunal's review to encompass these new issues. Until the matter is clarified, the Minister indicates that she will take no position regarding the Tribunal's jurisdiction in the matter.

[14] She further submits that the Applicant's original request for review raised complaints concerning the ACP's recommendation to the Minister that the Applicant receive a fail mark on the PPC portion of the September 19, 2012 flight test, and also set out his concerns that the notation of failure on his record would affect his reputation as a pilot. With respect to the ACP's recommendation of a failure, the Minister stands by her position in her original submission.

[15] With regard to possible effects on the Applicant's professional reputation, the Minister repeats the information concerning the letter of June 19, 2013, stating that the September 19, 2012 flight test was found to be invalid and that the notation of failure would be removed from his record. While there were administrative delays in amending the record so that the failure continued to be noted on September 17, 2013, the date of the Applicant's reply, the attached affidavit showed that the notation has now been removed from the DAPLS and FTAE

databases. Furthermore, damage to professional reputation is not a ground for a Tribunal review since a pilot's reputation is not a reviewable decision relating to a CAD.

[16] The Respondent also argues that, as a result of the amendments to the record, the issue is moot since the Tribunal could not provide any further relief other than that which has already been carried out administratively.

### **III. DISCUSSION**

#### **A. Jurisdiction**

[17] A function of the Tribunal is to review decisions of the Minister (which may, in fact, be made by a person acting on behalf of the Minister) that are made for reasons set out in sections 6.71 to 7.1 of the *Act*. In this matter, the request for review can only be based on a Ministerial decision described in paragraphs 7.1(1)(a), (b), or (c) of the *Act*, which provide as follows:

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

(a) the holder of the document is incompetent,

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

(c) the Minister is of the opinion that the public interest and, in particular, the aviation record of the holder of the document or of any principal of the holder, as defined in regulations made under paragraph 6.71(3)(a), warrant it,

the Minister shall, by personal service or by registered or certified mail sent to the holder or the owner or operator of the aircraft, airport or facility, as the case may be, at their latest known address, notify that person of the Minister's decision.

[18] The Minister argues that Transport Canada never accepted the flight test and that because it was found to be invalid, there is no jurisdiction to review its result. I cannot agree with this analysis. The Minister has acted in this situation through her officials and it seems quite clear that these officials accepted the result of the flight test and noted it on the relevant Transport Canada databases. There was no indication that the flight test was considered to be invalid until the letter of June 19, 2013, although there may have been informal discussions with the Applicant after his instrument rating was amended in May 2013. Certainly, there is no reason to believe that a decision that the flight test was invalid had been made at the time the Applicant requested a review of the matter. Furthermore, it would seem that the Minister has already decided that a failed PPC in itself results in the suspension of a CAD privilege. In section 4.9 (Post Flight Debriefing Procedures) of Transport Canada's document, the *Approved Check Pilot Manual*, 9<sup>th</sup> Edition, TP6533, Transport Canada sets out the procedures to be followed in the debriefing of a candidate who has failed the PPC, as follows:

The debrief for a failed PPC will not use the self debrief method. When a failure occurs, debrief the candidate on the reason for the failure and where applicable, on the administrative suspension procedures that will follow including the candidate's rights to appeal the assessment to the TATC. In the event of an unsatisfactory performance, the ACP must advise the pilot(s) of the following:

1. for PPCs, they have the right to appeal the assessment to the Transportation Appeal Tribunal of Canada (TATC) within 30 days;
2. the re-test will be very similar to the original test and may be conducted by either a Transport Canada Inspector or another ACP;
3. the ACP must offer to provide a copy of the Flight Test Report Pilot Proficiency Check (form 26-0249/26-0279) to the candidate(s); and
4. where applicable and if known, any company-specific procedures to be followed.
5. Remember, the wording of remarks to support a "2" must not describe performance that would warrant a failure. A mark of 1 (below standard) describes the appropriate item or items that resulted in an assessment of fail.

[19] In fact, the Applicant states that the information required by point 1. above was provided to him by the ACP. I also note that at paragraph 6 of *Beingessner*, it was held that the Minister's failure to issue the notice required under section 7.1 of the *Act* does not demonstrate that there was no decision made to suspend. The Minister cannot rely on her own failure to comply with that provision to show that there was no decision.

[20] Consequently, I find that at the time the request was made, there was a valid Ministerial decision that the PPC had been failed, and that the Applicant had the right to request a review of that failure. The Tribunal, therefore, has the jurisdiction to review the matter.

[21] I note that the Tribunal has, as pointed out by the Applicant, reviewed the failure of a PPC flight test where a further test has been successful. See, for example, *Ferrara v. Canada (Minister of Transport)*, 2002 CAT file no.: Q-2312-60 (Review), where the original failure was upheld, and *Williams v. Minister of Transport*, 2000 CAT file no.: O-1835-60 (Review), where the original failure was also upheld.

## **B. The Request for Review is Moot**

[22] The Minister argues that even if the Tribunal has jurisdiction to review the matter, it should decline to exercise that jurisdiction because the issue is moot in that its determination following a review would have no practical effect on the rights of the Applicant, since it has already been determined that the flight test was invalid. On this basis, she argues that a hearing would involve the expenditure of time and resources with no practical result. The Applicant argues that the matter is not moot because there are continuing CAD privileges that have been unjustly removed, and that the relevant issues justify the expenditure of time and resources involved in a hearing.

[23] While I have found that there was a decision by the Minister that the Applicant failed his PPC, it is clear that on a subsequent review, Transport Canada made a decision that the flight test was not valid and did not affect the Applicant's status. The Minister also determined that any notations concerning the flight test should be removed from the Applicant's record. Since the Tribunal's jurisdiction in this matter is limited to either upholding the Minister's original decision or referring the matter back to the Minister for reconsideration, and since the Minister has already reconsidered the original decision, it would be impossible for the Tribunal to uphold it, and a referral back would only repeat a reconsideration that has already taken place. I find, therefore, that there would be no practical result from a determination at a hearing, and that the

Tribunal should decline to hear the matter on the basis that the issue is moot, and that a hearing would serve no purpose.

[24] The Applicant argues that the matter should not be considered moot because it relates to the unjust removal of CAD privileges and issues that affect all pilots, including the standards used by ACP pilots and for the DAPLS database. While these may all be matters of legitimate concern, especially in view of the confusion and lack of communication among the Minister's officials regarding the matter, they are beyond the scope of the Tribunal's jurisdiction, which is limited to considering whether the failed portion of the PPC—specifically, Item 17, Confined area—was the result of properly applying existing standards. Consequently, even if the Tribunal exercised its jurisdiction, many of the issues raised by the Applicant would be excluded from its consideration.

### **C. New Issues Raised by the Applicant**

[25] In her response to the Applicant's Reply to the motion, the Minister points out that the Applicant has raised new issues concerning his instrument rating and asks for a ruling as to whether the Applicant would be permitted to expand the scope of the hearing to include a discussion of these issues. It is clear that the decision by the Minister had an adverse effect on the Applicant's instrument rating, and had the effect of cancelling a rating that would have been in effect until October 1, 2014. Even if the Tribunal had agreed to exercise its jurisdiction, however, the effect of the withdrawal of the instrument rating could not be considered at the hearing since it was not included in the original request for review. Furthermore, the withdrawal of the instrument rating was not based on any of the grounds set out in section 7.1 of the *Act* that could give rise to a request for review. Consequently, while questions may be raised concerning the fairness of the Minister's actions in this regard, they are not within the scope of the Tribunal's authority to determine.

### **D. The Validity of the Minister's Motion**

[26] The Applicant argues that the Minister's motion should be dismissed because she failed to follow the Tribunal's instructions that she file her submissions simultaneously with the Tribunal and the Applicant. This failure does not justify a dismissal. It is administrative only, and any prejudice to the Applicant could have been resolved by extending the time for his reply by the length of the delay in providing him with the Minister's submissions.

## **IV. RULING**

[27] I find that the Tribunal has jurisdiction to review the Pilot Proficiency Check, but I decline to hear the matter because the issue is moot.

January 15, 2014

(Original signed)

Elizabeth A. MacNab

Member