

CIVIL AVIATION TRIBUNAL

BETWEEN:

France Trottier, Applicant

- and -

Minister of Transport, Respondent

LEGISLATION:

Aeronautics Act, S.C., c.A-2, s. 6.9, 7.3(1)(a)

Suspension, Medical Examination, Interim Order, False Representation, Canadian Aviation Document

**Review Determination
Pierre Rivest**

Decision: December 7, 1998

TRANSLATION

I am satisfied that the Applicant knowingly made a false representation during her medical examination of April 23, 1998. I confirm the Minister's decision to suspend her pilot licence for seven days. Said suspension will come into force on the fifteenth day following service of notice of this determination.

A **Review Hearing** on the above matter was held Wednesday, November 18, 1998 at 10:00 hours at the Federal Court of Canada in Montreal, Quebec. The witnesses were sworn in.

BACKGROUND

Pursuant to section 6.9 of the *Aeronautics Act*, the Applicant is alleged to have contravened paragraph 7.3(1)(a) of the said act on April 23, 1998.

Specifically, the Applicant, during her medical examination, allegedly made a false representation for the purpose of obtaining a Canadian aviation document by not informing the medical examiner of LASER surgery to both eyes performed October 9, 1997.

A suspension of her pilot licence for seven days was imposed.

At the beginning of the Review Hearing, before presenting evidence, the Respondent's representative submitted a document entitled "Agreed statement of facts of the parties" (Exhibit M-1). In this document, it is established at the outset that the allegation is based on paragraph 7.3(1)(a) of the *Aeronautics Act*, which was not mentioned in the notice. The other parts of this statement will be dealt with in the ensuing report.

THE LAW

Paragraph 7.3(1)(a) of the *Aeronautics Act* stipulates:

7.3 (1) No person shall

(a) knowingly make any false representation for the purpose of obtaining a Canadian aviation document or any privilege accorded thereby;

THE FACTS

For the Minister (the Respondent)

The Respondent's representative called two witnesses, **Dr. Claude Bélanger**, the medical examiner who examined the Applicant, and **Dr. François Dubé** who appeared as an expert witness.

Since the point of this case is not to determine the medical state of the Applicant nor to determine the importance of the surgery performed on her, with all its consequences, but rather to determine whether there was or not a false representation during the medical examination, the Tribunal was primarily concerned with Dr. Bélanger's testimony.

The main points raised by Dr. Bélanger were the following:

- During her medical examination, the Applicant did not report her LASER surgery (M-1, para. 2).
- When a pilot goes in for a medical certificate renewal, the procedure followed by Dr. Bélanger's secretary (Ms. Lucie Roger—see statement on page 2, M-1) is always the same, that is to complete Part **A** of the "Civil Aviation Medical Examination Report" (Exhibit M-2), and have the pilot sign Part **B** of the form.
- During the Applicant's eye examination, the witness did not notice that the Applicant was not wearing her contact lenses, which apparently should have been the case in light of the restriction indicated on her medical certificate, and information from her previous examination in 1997 (Exhibit M-3).
- If he had been made aware of the LASER surgery, the witness would not have sent the Applicant's medical report to Transport Canada until other tests were submitted.

Under cross-examination, it was found that Dr. Bélanger uses two forms for the medical examination, one in which Part **A** is completed by the secretary and Part **B** remains blank, yet signed by the pilot in the presence of the secretary (M-2); a second form, unsigned, serves as a draft for the physician which is used to complete the first (signed) form that is then sent to Transport Canada.

The result of which is that the pilot signs a partially blank form, that is, that Part **B** of the final form is not completed by the medical examiner when it is signed. However, the examiner does inform the pilot of the results of the examination.

Therefore, a situation of trust must be established between the pilot and the physician.

- Finally, the witness stated that when he knows the candidate, he asks a question on their general health. In this case, however, he is not certain he asked if there had been any changes since the last medical examination, but as far as he knows this question is always asked.

As explained above, I will not comment on Dr. Dubé's testimony.

Mr. Tamborriello concluded his evidence by entering document M-4, dated June 9, 1998, which consists of a note to Dr. Dubé informing him that the Applicant underwent LASER surgery and that she did not mention that fact to Transport Canada or to Dr. Bélanger during her examination of April 23, 1998.

Another document, Exhibit M-5, dated July 2, 1998 notifies the Applicant that she no longer meets the medical standards to exercise the privileges of her licence. It is this decision that the Applicant appealed, not to the Tribunal as suggested in the letter in question, but to Dr. Wallace, senior consultant for Transport Canada in Ottawa (M-1, para. 7).

For France Trottier (the Applicant)

The first witness, **Rita Hanan**, pilot, merely confirmed the procedures followed by Dr. Bélanger during medical examinations. She also confirmed that the health questions are of a general nature, and that Dr. Bélanger does not explicitly inquire if the candidate consulted another physician since the last medical examination. However, Part **A** of the examination form is completed by the secretary and Part **B**, left blank, is signed in front of her. The pilot's medical certificate is then attached to the form for the medical examiner.

The second witness, **Nicolas Charette**, is the chief pilot for Avionair who hired the Applicant in October 1997. After having verified her medical certificate, he confirmed that she told him she underwent LASER surgery in both eyes. He did not feel it necessary to question her any further on this matter because the Applicant had a valid medical certificate.

Mr. Jenner, the representative of **Ms. Trottier**, then had the Applicant testify. The following points were raised:

- At the beginning of October 1997, the Applicant consulted Dr. Michel Pop, an ophthalmologist.
- She indicated to Dr. Pop that she was a commercial pilot, and asked him if LASER surgery (photorefractive keratectomy) would likely create any problems; Dr. Pop answered no, and that she would be able to work four days after the surgery (M-1, para. 5). Dr. Pop even added that it was not necessary to inform Transport Canada (M-1, para. 6).
- The Applicant confirmed that she signed the blank form in Dr. Bélanger's office, without having read it, and that the doctor asked general health questions, but he never asked if she had consulted another physician.
- She also confirmed the testimony given by Nicolas Charette. She added that during a conversation with M. Tamborriello on July 13, 1998, she informed him of her LASER surgery.
- However, meanwhile, she had already received a letter, dated June 23 and signed by Dr. Dubé of Transport Canada, in which her medical certificate was suspended until Dr. Pop could provide him a report on the results of the surgery. This letter was not submitted in evidence.

Subsequently, in light of her difficulties in getting a response from Dr. Dubé, she appealed directly to Dr. Wallace, the senior consultant for Transport Canada in Ottawa, who provided authorization to fly that same day (M-1, para. 7).

Under cross-examination, the Respondent's representative primarily aimed at testing the Applicant's credibility by showing that she possessed sufficient qualifications to know what she was doing, and that she knowingly did not inform Dr. Bélanger of her surgery for fear of being without work for a prolonged period of time (up to six months).

The Applicant reaffirmed that Dr. Bélanger did not ask her if there had been any changes in her health status since her last medical examination.

However, her medical certificate apparently indicates the requirement to wear spectacles or contact lenses. Yet, during her medical examination with Dr. Bélanger the Applicant was not wearing spectacles and did not tell the doctor that she was not wearing her contact lenses. The Applicant did not see the necessity because Dr. Pop had told her it was not necessary to inform Transport Canada of her new health status.

Finally, the Applicant affirms that after her surgery, she did not know that there could be a six-month suspension of her medical certificate. It was only later, in December 1997, that she learned of the possibility while reading an article in a magazine.

ARGUMENT

For the Respondent

Mr. Tamborriello's argument may be summed up as follows:

- The fact that the Applicant did not declare her LASER surgery to Dr. Bélanger constitutes a false representation.
- The fact that the Applicant's medical certificate had a restriction, namely that glasses or contact lenses must be worn, and that during the medical examination the Applicant was not wearing any, and did not mention it, also amounts to a false representation.
- Given the knowledge and the experience of the Applicant as a commercial pilot, flight instructor, "Designated Flight Test Examiner" (DFTE), board member of AQTA (Association québécoise des transporteurs aériens inc.), and given her fear of having her licence suspended and not being able to fly for six months, this gives the omission or false representation the character of a voluntary act committed knowingly. Mr. Tamborriello supports his allegations on the review determination in the case of *Richard Whitney Bailey vs. Minister of Transport*^[1]. In its conclusion the Tribunal declares (Exhibit M-6, page 5, paragraphs 1, 2 and 3):

In summary, I am satisfied that the Airworthiness Inspector was correct in his assessment that this Cessna 185 required the replacement of its circuit breakers. I am further satisfied the Applicant was aware that prior to the writing of his letter of June 3, 1991, Transport Canada would not issue a C. of A. until such time as the authorities were satisfied that the circuit breakers had been replaced. Further, I am satisfied that the letter of June 3, 1991, was written by the Applicant with a view to satisfy the condition imposed by Treleven for its issuance.

Bailey knew that, in submitting the handwritten letter to Transport Canada stating that the requirements for AMA 571/207, Para (9) had been met in regard to the circuit breakers and switches, he made a false representation.

On the basis of my findings of fact, I conclude that the Applicant knowingly made the false representation for the purpose of obtaining a Canadian aviation document, and has therefore contravened paragraph 7.3(1)(a) of the *Aeronautics Act*.

- As for Dr. Michel Pop, his responsibility is to inform Transport Canada if he sees fit to do so; that he did not, is another matter; the Applicant for her part had the obligation to declare to Dr. Bélanger that she no longer wore contact lenses as a result of LASER surgery.
- He finished by saying that if the period of time required before flying again after having such surgery is normally six months, then the Tribunal should increase the penalty to a six-month suspension.

For the Applicant

Mr. Jenner refers to the following facts:

- It was up to Dr. Michel Pop to inform Transport Canada. He refers to subsection 6.5(1) of the *Aeronautics Act*:

6.5 (1) Where a physician or an optometrist believes on reasonable grounds that a patient is a flight crew member, an air traffic controller or other holder of a Canadian aviation document that imposes standards of medical or optometric fitness, the physician or optometrist shall, if in his opinion the patient has a medical or optometric condition that is likely to constitute a hazard to aviation safety, inform a medical adviser designated by the Minister forthwith of that opinion and the reasons therefor.

It seems that Dr. Pop was not of the opinion that the Applicant's state was likely to constitute a hazard to aviation safety.

As for subsection 6.5(2) of the Act, also cited, the Applicant informed Dr. Pop that she was a commercial pilot (M-1, para. 4):

(2) The holder of a Canadian aviation document that imposes standards of medical or optometric fitness shall, prior to any medical or optometric examination of his person by a physician or optometrist, advise the physician or optometrist that he is the holder of such a document.

- The ophthalmologist's conclusion is that the Applicant could return to piloting activities four days after the surgery (M-1, para. 6).
- The Applicant has shown an honest disposition as she stated to Dr. Pop that she was a pilot, and she informed her employer as well as the Transport Canada representative, Mr. Tamborriello, that she had undergone LASER surgery.
- As well, the question of not being authorized to fly for six months after the surgery is not proven, at least not according to current regulations. Subsection 424.17(3) of the *Canadian Aviation Regulations* does not mention it. (See however the note on page 26 of the table that follows the section in question: "NOTE: 'Correcting lenses' shall be interpreted to mean spectacles or contact lenses. Contact lenses shall not be approved prior to six months trial wear." May it be concluded that the contrary is equally true?)
- In paragraph 7.3(1)a) of the *Aeronautics Act*, the expression "knowingly" is very important. Yet, nothing in the evidence brought forward by the Respondent proves any act committed knowingly. The fact that there is a signed blank form does not prove the will to make a false representation, not any more than that there was negligence or lack of thoroughness; because the Applicant proved that it was routine for Dr. Bélanger to proceed in such a way, and that mutual trust had long been established between the physician and the pilots.
- As for the important question of knowing whether the Applicant's health status had changed since her last medical examination, Mr. Jenner submits that the Respondent did not clearly prove whether the question had been asked or not. As well, given that the surgery had been performed seven months earlier and that the Applicant was well, it did not occur to her to declare the surgery, especially if a precise question was not put to her. It was up to Dr. Bélanger to be clearer on the previous health status of the Applicant. Hence the conclusion that there had been no intent to make a false representation and that there was no maliciousness on the part of the Applicant, nor any careless attitude.

- To prove his allegations, Mr. Jenner cited several articles and extracts of criminal law taken from a document entitled *TRAITÉ DE DROIT PÉNAL CANADIEN*^[2], where the notion of "*mens rea*" is described, namely to cause prejudice or to violate a statute "in a guilty mind," with "the intent to commit the act."
- Finally, to find guilt, the accuser must show that the accused is aware of what is being reproached. In this case, it is not up to the Applicant to know the importance of the surgery she has undergone, but up to the physician performing the surgery. Dr. Pop told her that it was not necessary to inform Transport Canada, from which the Applicant concluded that it was not necessary to mention it to Dr. Bélanger.

ANALYSIS AND CONCLUSION

Since this is a matter of strict liability, it is known that it is up to the Minister to prove, on a balance of probabilities, that the fault lies with the holder of a Canadian aviation document. Furthermore, in this case, a distinction must also be made between the purely medical aspect of the person (her physical condition after having undergone LASER surgery), and the false representation relating to that surgery. It is only the latter part of the issue that we must address. Finally, it is important to know if the Applicant had really been asked if she had seen a physician since her last aviation medical examination.

Therefore, what is the basis for the Minister's proof to declare that the Applicant **knowingly** made a **false representation** during her medical examination on April 23, 1998?

1. First, upon the statement of Dr. Bélanger who allegedly always asks if there have been any changes in the pilot's health since the last medical examination.
2. Then, on the fact that the medical certificate of the Applicant had a restriction indicating that glasses or contact lenses must be worn and, that at the time of the medical examination of April 23, 1998, the Applicant was not wearing glasses or contact lenses.
3. And, finally, on the fact that the knowledge and experience of the Applicant, in spite of Dr. Pop's statement not to inform Transport Canada of the surgery, are above those of the average pilot and that the Applicant should be treated as such, and that she knowingly did not declare her medical situation during her examination with Dr. Bélanger. An appreciation of due diligence must therefore be made in regard to the qualifications and the experience of the person involved and cannot in this case excuse the Applicant even if the surgery did take place seven months earlier (see *Noël Parent vs. Minister of Transport*^[3], where in review as well as in appeal, the Tribunal accepted the notion of evaluating the Applicant's behaviour).

For his part, Mr. Jenner submitted that the Applicant did not have to mention her eye surgery if the question had not been put to her, and that there was no blameworthy intent on her part in not mentioning anything about the surgery.

After analysing the facts, I have come to the following conclusions:

1. Dr. Bélanger's testimony does not seem to be conclusive evidence of whether he did or did not ask the question of there having been any "change in the health" of the pilot.

Rather, it is the statement made by Mrs. Lucie Roger, the physician's secretary (M-1, 2nd page, para. 6), that answers this question by affirming that she asks if there have been "any changes in health." For their part, the witnesses Hanan and Trottier are vague on this subject. This statement is part of the "Agreed statement of facts of the parties" (M-1) and it was not questioned during the Review Hearing. I therefore conclude that the question was asked.

Furthermore, on the seventh line of the medical examination form (M-2), the following question is asked: "Have you consulted a physician since your last aviation medical examination?" On the report of 1998 (M-2), just as on the report of 1997 (M-3), there is no answer. In the same box, it says "If yes, give reason." Since there is nothing noted, I conclude that the Applicant answered **no** to this question and did so in front of the secretary, Mrs. Roger (M-1, page 2), which constitutes a false representation.

2. As for the wearing of glasses or contact lenses as required by the Applicant's medical certificate, the fact that she did not meet this requirement, at least without approval, constitutes another error. I admit that this requirement applies only to piloting and does not apply in other situations. However, the medical examination of a pilot is conducted in the pursuit of obtaining or maintaining a licence to fly an aircraft. The conditions on the medical certificate must therefore be shown during the said examination. If, for example, a pilot was obliged to wear a prosthesis on a leg to pilot an aircraft, there would be no fault if the prosthesis were not worn in circumstances other than flying, but during the examination, in order to renew a medical certificate, it is normal to think that the prosthesis would have to be worn to show that it works correctly.

It is worth noting that the medical certificate was not presented as evidence in the Review Hearing but was not contested by the Applicant, either.

3. There remains the question of knowing whether the Applicant "knowingly" made the false representation. I think yes. Maliciously or perniciously? No, but consciously enough to state that it was done in a "blameworthy" manner. Especially since anything relating to the eyes is of capital importance in every normal human being, and is never treated with indifference. This is especially true for a pilot for whom visual acuity is fundamental. The fact that the Applicant knew that she could now throw away her contact lenses is certainly not insignificant and easily forgotten, even seven months after the surgery.

The Applicant's only excuse would be that Dr. Pop told her it was not necessary to report the fact to Transport Canada. However, that concerned Dr. Pop, and not the pilot who during the examination to renew her medical certificate should have answered yes to the question: "Have you consulted a physician since your last aviation medical examination?"

DETERMINATION

I am satisfied that the Applicant knowingly made a false representation during her medical examination of April 23, 1998, and I confirm the Minister's decision to suspend her pilot licence for seven days.

Pierre Rivest
Member
Civil Aviation Tribunal

^[1] CAT File No. O-0318-04.

th 4 Edition, *Les éditions Yvon Blais inc.*, pages 373 to 409.

^[3] File no. Q-1191-02