

## Mants v. Canada (Minister of Transport), [2017] C.T.A.T.D. No. 7

Canada Transportation Appeal Tribunal Decisions

Canada Transportation Appeal Tribunal

Victoria, British Columbia

Panel: Tracy Medve, Member

Heard: November 24, 2016.

Decision: March 13, 2017.

2017 TATCE 07 (Review)

Docket: P-4238-67

MoT File No.: 5802-502197

### [2017] C.T.A.T.D. No. 7

IN THE MATTER OF the request for a review hearing by Gerald Mants with respect to a cancellation of the applicant's Authorized Examination Invigilator authority, pursuant to paragraph 7.1(1)(c) of the Aeronautics Act, R.S.C., 1985, c. A-2. Between Gerald Mants, Applicant, and Minister of Transport, Respondent

(110 paras.)

## Case Summary

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### Tribunal Summary:

**Held:** The matter is referred back to the Minister for reconsideration of the decision to cancel the applicant's Authorized Examination Invigilator authority and the decision to cancel is stayed during the reconsideration period.

## Appearances

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For the Applicant: Gerald Mants (self-represented).

For the Respondent: Christine Lewis Cossette.

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## REVIEW DETERMINATION AND REASONS

### I. BACKGROUND

1 The applicant has been an Authorized Examination Invigilator (AEI) since 2008. On June 24, 2014, the applicant was the AEI for a private pilot exam taken by Mr. A. Although he was not supposed to have any type of camera in

the examination room, Mr. A was able to take photographs of the exam questions on the screen. As a result of this infraction, Mr. A was prevented by the Minister from rewriting the exam for a period of one year.

**2** On December 4, 2014, Transport Canada (Minister) sent a letter to the applicant's employer, the Victoria Flying Club (VFC), advising of its intent to monitor the VFC Examination Centre until further notice for written exams conducted by the applicant and by the applicant's colleague, another AEI employed by the VFC.

**3** Also on December 4, 2014, the Minister sent a letter to the applicant indicating that he was required to provide a corrective action plan (CAP) to address issues identified in the letter which arose in connection with Mr. A's exam invigilated by the applicant on June 24, 2014.

**4** On August 11, 2015, Mr. A retook the private pilot exam and was permitted to leave the examination room with his examination scrap paper, in contravention of the rules pertaining to the conduct of Transport Canada exams. This exam was being invigilated by the applicant and monitored by the civil aviation licensing officer, Ms. Tammy Hamilton. Monitor Reports from six other monitored exams invigilated by the applicant between February 20, 2015 and August 11, 2015 identified invigilation procedure issues in each case.

**5** On September 28, 2015, the Minister sent a registered letter to the applicant advising him to review the provisions of, and adhere to, the guidelines in Transport Canada's document TP 13802, and that due to the most recent violation of the examination procedures with Mr. A, grounds existed for cancellation of his appointment as an AEI. This letter also advised the applicant that further evidence of non-compliance would result in cancellation of his authority as an AEI.

**6** On March 17, 2016, the Minister sent the applicant a registered letter advising that his AEI authority was being cancelled effective March 23, 2016. It further advised that the Minister's decision could be reviewed pursuant to section 6.72 of the *Aeronautics Act*.

**7** On April 1, 2016, the Minister sent the applicant another registered letter advising that the effective date of the cancellation of the applicant's AEI authority was May 1, 2016. This letter reiterated that the decision could be reviewed pursuant to section 6.72 of the *Aeronautics Act*.

**8** On May 11, 2016, the Minister sent the applicant a third registered letter indicating that the *Aeronautics Act* section 6.72 referenced in the letter of April 1, 2016 should have been section 7.1. The letter also indicated that it was in the public interest to cancel the applicant's appointment effective May 1, 2016 due to his failure to maintain the integrity of any examination or the Computer Delivered Examinations System, and failure to maintain the security of the examination.

**9** On May 17, 2016, the applicant requested a review of the matter by the Transportation Appeal Tribunal of Canada (TATC). The review hearing was conducted on November 24, 2016.

## **II. STATUTES AND REGULATIONS**

**10** Paragraph 7.1(1)(c) of the *Aeronautics Act* provides:

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

[...]

**(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.

11 Subparagraph 7.1(2)(a)(iii) of the *Aeronautics Act* provides:

7.1 (2) A notice under subsection (1) shall be in such form as the Governor in Council may by regulation prescribe and shall, in addition to any other information that may be so prescribed,

(a) indicate, as the case requires,

[...]

(iii) the elements of the public interest on which the decision of the Minister is based; and

12 Subsection 7.1(7) of the *Aeronautics Act* provides:

7.1 (7) On a review under this section of a decision of the Minister to suspend, cancel or refuse to renew a Canadian aviation document, the member of the Tribunal who conducts the review may determine the matter by confirming the Minister's decision or by referring the matter back to the Minister for reconsideration.

### III. EVIDENCE

#### A. Minister

##### (1) *Tammy Hamilton*

13 Ms. Hamilton is a civil aviation licensing officer whose primary role is to ensure regulatory compliance of pilot permit licence ratings and their issuance. She is also the program manager for the Authorized Person Program with oversight of the Minister's AEI delegates in the Pacific region. She has worked at Transport Canada for 19 years.

14 It was Ms. Hamilton's testimony that the applicant was approved by Transport Canada as an AEI, entitling him to administer Transport Canada Computer Delivered Examinations (CDEs). Ms. Hamilton submitted *Accreditation as an Authorized Exam Invigilator Agreements* (Agreements) between the Minister and the applicant, confirming that his accreditation ran from March 30, 2008 to April 1, 2010 (Exhibit M-3) and then continuously from March 29, 2012 to May 1, 2014 (Exhibit M-4). The most recent Agreement was valid from April 14, 2014 to May 1, 2016 (Exhibit M-5). There was no explanation of the absence of an Agreement for the period between April 1, 2010 and March 29, 2012. Ms. Hamilton also confirmed that, at least for the period from March 30, 2008 to May 1, 2014, little or no monitoring of the applicant was done due to budgetary constraints.

15 Ms. Hamilton introduced the *Industry Invigilation of Computer Delivered Examinations* (TP 13802) (Exhibit M-1), which is the nationally-issued information and guidance material for AEIs. She also introduced the *Industry Invigilation of Computer Delivered Examinations Advisory Circular* (400-004) (Exhibit M-2) which replaced TP 13802. It was Ms. Hamilton's testimony that 400-004 replaced TP 13802 effective January 1, 2016.

16 Ms. Hamilton presented a July 5, 2014 email (Exhibit M-6) between the applicant and Dorothy Geen (program manager of the AEI program, now retired). The applicant had asked Ms. Geen if they could use the exam room at VFC for purposes other than pilot exams. Ms. Hamilton indicated this information was presented to show that it was unusual for the applicant to have asked this question after being an invigilator for six years, as he should have known that the room could not be used for other purposes.

17 Ms. Hamilton submitted in evidence an email dated October 6, 2014 (Exhibit M-7a) from Tom Dunn, Program Manager, Flight Crew Training, Evaluation and Examinations, Transport Canada, to Kerry Mckenzie, who was

acting service team lead, referencing *AEI0058 -- Gerry Mants (Victoria Flying Club)-Cheating Incident*. It was Ms. Hamilton's testimony that the regional office had requested guidance from the national group in Ottawa on how to handle issues which had arisen with respect to the incident on June 24, 2014 where Mr. A took photographs of the screen during the examination. The applicant had been the exam invigilator at the time of the incident. The email from Mr. Dunn requested that the regional office in British Columbia provide the applicant with a written notice of the actions necessary to gain compliance with documented requirements and maintain a copy on the applicant's file. The email also requested that the student, Mr. A, be sent a letter in accordance with Staff Instruction 400-003. The email outlined grounds for cancellation of appointment of an AEI in accordance with TP 13802 as follows:

5. Allowing or assisting cheating.
7. Compromising the integrity of any examination or the Computer Delivered Examinations System.
- 8, Failure to maintain security of the examination, examination materials including the software passwords.

**18** A copy of this email was forwarded to Dorothy Geen on October 8, 2014 for her information. Ms. Hamilton did not testify regarding any action taken by Mr. Mackenzie in connection with this email request.

**19** Ms. Hamilton also submitted a November 3, 2014 email (Exhibit M-7b) from Dorothy Geen to Kerry Mckenzie with Mr. Dunn's October 6th email attached. The email indicated they were to follow up on the request from Mr. Dunn and confirmed that a letter had been sent to Mr. A, suspending him from writing any exam for a period of one year. She indicated she was looking for further information on conversations Mr. Mckenzie had with the applicant, as they were planning a visit with Mr. Mants and it would be helpful if they knew how the matter was resolved between him and the applicant.

**20** As part of the above exhibit, Ms. Hamilton also presented an email dated November 17, 2014, from Kerry Mckenzie to Dorothy Geen, reporting on conversations and emails he had with the applicant regarding the Mr. A incident. Mr. Mckenzie indicated that he had obtained additional details from the applicant and Mr. A's flight instructor about what had happened with Mr. A. He indicated that the applicant had been cooperative but not sure what more he could have done to prevent the event from happening. Mr. Mckenzie concluded that he got the impression that the applicant was unhappy that the event occurred and was going to pay more attention during exams. His email did not indicate any further follow up or other requirements. Mr. Mackenzie was not called as a witness at this review hearing.

**21** Ms. Hamilton testified that she and Ms. Geen did an on-site briefing inspection and retraining of the applicant on December 2, 2014. Ms. Hamilton also referred to the applicant having received extensive oral counselling from Mr. Mckenzie but there was no evidence provided of when this counselling occurred, the nature of the counselling or the number of instances of such counselling. She also indicated Mr. Mackenzie advised the applicant that because of the breach by Mr. A, it was necessary to pull that particular exam from the national databank of exams, together with four supplemental and related exams, at a considerable cost and inconvenience to the Minister.

**22** It was Ms. Hamilton's testimony that, as a result of the Mr. A incident, the applicant had been advised by the service team lead and the program manager of the authorized AEI program, that he was under monitor and was required to contact Transport Canada prior to invigilating exams. No documentary evidence of this requirement was presented by Ms. Hamilton nor did she provide any further details regarding the dates when this may have occurred, or the nature or proposed duration of the requirement to report.

**23** Ms. Hamilton presented an email report dated February 20, 2015 (Exhibit M-14), as well as a series of monitoring reports dated March 6, 2015; May 14, 2015; May 15, 2015; July 20, 2015; and two from August 11, 2015 (Exhibits M-8, M-9, M-10, M-11, M-12, M-13). These reports contained Ms. Hamilton's observations of examinations being invigilated by the applicant on these dates.

**24** Issues noted by Ms. Hamilton during the February 20, 2015 monitoring session included the following:

- \* White scrap paper was used instead of coloured paper. Colour is normally used to make it more apparent which pages are scrap and which pages are exam materials;
- \* The record of exams was locked in the cabinet and not used to record in and out times, nor was it signed by the candidate;
- \* The appendix provided to the candidate had pencil marks on it which had to be erased prior to the start of the exam. The proper procedure is to remove any marks after each prior exam, so the marks should have been removed before the candidate began writing the exam;
- \* There was no sign in the room indicating that the candidate was under surveillance, which is a requirement;
- \* While the candidate was writing the exam, the applicant was found to be in the lobby and did not have the portable monitor with him, and was therefore not constantly monitoring the candidate.

**25** The second monitoring was on March 6, 2015. Ms. Hamilton noted in her report that the candidate's letter of recommendation was dated 2013. The letter is only valid for 60 days but the applicant had accepted the letter of recommendation as valid.

**26** The third monitoring occurred on May 14, 2015. Ms. Hamilton observed that the applicant failed to check the photo identification of the candidate. However, she did confirm that the candidate worked for VFC. The applicant also needed prompting on what type of calculator was permitted in the exam room. He needed coaching on what the procedure was should a candidate challenge an exam question. He failed to remove the portable keyboard during the exam. Ms. Hamilton also observed that the applicant did not follow the procedure of ensuring that all supplementary material and the appendix pages were present and cleaned at the end of the exam. It was the applicant's habit to wait until the beginning of the next exam to clean the appendix of any marks. There is a check list in TP 13802 outlining the step-by-step invigilation process. The applicant did not use this as a guide. Ms. Hamilton confirmed that the use of the check list is not mandatory but best practice.

**27** The fourth monitoring was on May 15, 2015. Ms. Hamilton's report indicated that the applicant did not check the photo identification nor did he verify the candidate's signature. He told Ms. Hamilton he did not check it as he knew the candidate personally. The applicant did not complete the exam log as required, waiting until the candidate completed the exam to have him sign the log, as opposed to having him sign at the start of the exam as outlined in TP 13802.

**28** Ms. Hamilton indicated that because the exam invigilation by the applicant had been inconsistent throughout the monitoring events, on June 2, 2015, Ms. Hamilton, Ms. Sandy Turk, the new exam invigilator program manager, and Dorothy Geen attended at VFC and provided in-depth analysis and training of the exam invigilator process to the applicant and his colleague, equivalent to what would have been provided for an initial AEI.

**29** The fifth monitoring took place on July 20, 2015. It was Ms. Hamilton's evidence that the applicant did not confirm the validity of the candidate's medical. Photo identification and signature were not confirmed and the candidate's letter of recommendation was missing ground school hours and experience information.

**30** The sixth monitoring was on August 11, 2015. The report for that monitoring indicated that the applicant failed to confirm the candidate's signature from the photo ID against the signature on the Admission to Exam form. He failed to record the exam number and version on the log. He failed to have the candidate sign the log at the beginning of the exam invigilation process. The applicant also did not fully brief the candidate on the protocol for leaving the exam room, talking, cheating and unforeseen problems such as power failure or fire.

**31** The seventh monitoring was also on August 11, 2015. The student was Mr. A, the same candidate who brought a camera into the exam room in June 2014. The applicant was found to be in the foyer and did not have the portable monitor with him. Ms. Hamilton indicated that he did not check the photo ID, as he said he knew the candidate. The applicant required prompting on how to properly complete the Admission to Exam form. The

examination number and version were missing from the log report. The candidate wanted to bring in two pieces of paper to the exam room, which is not permitted. The applicant asked Ms. Hamilton whether one of the papers was allowed, which she said was not. The applicant was going to allow the second paper, and when challenged by Ms. Hamilton on this decision, he indicated that he recalled asking her about it in the past and being told by Ms. Hamilton that it would be okay. Ms. Hamilton's testimony is that she would never have said that. The candidate was not briefed on the rules with respect to reference materials in the exam room, nor on the procedure for leaving the exam room, talking, cheating or unforeseen problems. Further, the applicant failed to remove a box of Kleenex from the room prior to the exam and had to come in and remove it later. Finally, the appendix page provided to the candidate had pen marks on it from a prior candidate and should have been cleaned prior to giving it to Mr. A. Upon completion of the exam, Ms. Hamilton observed the candidate leaving the exam room with one piece of scrap paper, which is contrary to the rules. The applicant did not notice the paper had been retained by Mr. A; Ms. Hamilton was the one who took the paper from Mr. A.

**32** Ms. Hamilton introduced Staff Instruction document SI 400-003 (Exhibit M-15), which contains national standards for Transport Canada with respect to the invigilation of exams, including administrative procedures. She indicated these were the standards by which Transport Canada invigilates exams.

**33** During cross-examination by the applicant, he pointed out that the response he got from Dorothy Geen to his July 5, 2014 email about other uses of the room indicated it was okay as long as the room was secure. A copy of this response was never tendered in evidence. Ms. Hamilton reiterated that the answer is to be found in TP 13802 and it does not say it can be used for other purposes.

**34** The applicant asked for clarification on the impact of the first incident with Mr. A and Ms. Hamilton confirmed that it was necessary to pull an entire series of exams (i.e. the exam and all other related supplementary exams) and redo them for national distribution.

**35** The applicant also tried to clarify the procedure around the correct use of the appendix but did not refute that Ms. Hamilton's explanation of the proper process was correct.

## **(2) Buffy Bill**

**36** Ms. Bill is currently a team lead of the operational support staff which invigilates exams for Transport Canada, however from October 2014 to March 2016, she was the service team lead of the pilot licensing group. Dorothy Geen reported to Ms. Bill. It was Ms. Bill's testimony that a key responsibility in her new role in October 2014 was to reinvigorate the oversight of the delegated invigilation program.

**37** Ms. Bill testified that Mr. A paid a visit on September 3, 2014 to her office in Vancouver to apologize for the incident in June 2014. He said that he did not intend to do anything with the photos he had taken other than discuss the questions with his instructor.

**38** Ms. Bill introduced the letter she sent to VFC on December 4, 2014 (Exhibit M-16), which was sent as a result of this heightened focus on oversight. The letter indicated that it was the Minister's intent to monitor the school's examination centre for written exams conducted by the applicant and his colleague. The letter, confirmed by Ms. Bill's testimony, indicated that the monitoring was a routine practice to review applicable regulations, standards, policies, guidelines and procedures of examination invigilation. The letter did not specify that the monitoring was due to any previous specific concerns about the performance of the applicant or his colleague. Ms. Bill confirmed in her oral testimony that the monitoring was routine practice and being done with intent to resurrect the oversight of the delegated AEI program, and that they decided to start with VFC due to the issues which had arisen with the applicant.

**39** Ms. Bill also introduced the letter dated December 4, 2014 (Exhibit M-17), addressed to the applicant as a follow up to a conversation Ms. Bill testified she had with him on December 2, 2014. The letter summarized the

conversation whereby they had discussed the invigilation guidelines with regard to proper supervision, grounds for cancellation of an appointment, the compromising of the integrity of an examination, and the failure to maintain the security of the examination and examination materials. The letter also requested that the applicant submit a written corrective action plan. Ms. Bill did not recall whether he complied with the request for a written CAP.

**40** Ms. Bill introduced a series of emails (Exhibit M-18) relating to the applicant's request as to when Mr. A could rewrite the examination that he took on August 11, 2015. The applicant had rescheduled Mr. A to rewrite it on August 13, 2015. That same day, Ms. Bill sent an email to Ms. Hamilton and Ms. Lydia Morrison (who had since replaced Sandra Turk) confirming that she instructed the applicant to cancel the exam as they were looking into what actions they would be taking against Mr. A. Ms. Bill also said in the email that she was concerned about the applicant's comprehension of his responsibilities as an AEI. Ms. Bill reiterated this concern in her testimony.

**41** On August 14, 2015, the applicant emailed Ms. Bill for an update on the status of the rewrite. On the same day, Ms. Bill received an email from Ms. Morrison confirming that there were insufficient grounds to give Mr. A another one-year suspension for this particular infraction. She also suggested, subject to possible confirmation by Chantal Avon (who oversees exam invigilation for National Standards in Ottawa) and Tom Dunn, that Mr. A be instructed to write the exam at the Transport Canada examination centre in Victoria, and "review procedure/process of AEI and how Enhanced Monitoring is completed" and "complete review of Mr. Mants according to guidelines". On August 17, 2015, Ms. Bill emailed the applicant to advise that she was checking into the matter of Mr. A's rewrite and would be back to him later that week.

**42** Also as part of the above-referenced email series from Exhibit M-18, Ms. Bill introduced an email dated August 18, 2015, in which Ms. Bill sent background information on the matter to Ms. Avon. Ms. Bill also testified to having a conversation with Ms. Avon about this matter. Nothing by way of a response in writing was tendered in evidence but it was Ms. Bill's testimony that Ms. Avon had advised that they continue with enhanced monitoring. Ms. Bill also testified that Dorothy Geen went to VFC and did refresher training, however Ms. Bill did not specify when this enhanced training occurred.

**43** Also as part of Exhibit M-18, Ms. Bill submitted a copy of an email from Mr. A to her dated August 19, 2015, explaining the incident of August 11, 2015. In this email, he indicated that he removed the scrap paper without thinking, and that he had not intended to use it to threaten the integrity of the exam process. Mr. A's handwritten notes, attesting to the fact that he had taken the exam photos in the June 2014 incident, were also entered into evidence as Exhibit M-18b.

**44** Ms. Bill tendered a registered letter dated August 31, 2015 (Exhibit M-19) which she sent to the applicant asking for a detailed written account of the examination incident with Mr. A on August 11, 2015. The request was made based on the requirement in the letter of accreditation as an AEI that the AEI is required to notify Transport Canada immediately if a candidate is caught cheating or trying to remove any portion of an examination from the examination room. Ms. Bill could not recall whether the applicant provided the required written confirmation.

**45** Ms. Bill introduced a registered letter to the applicant dated September 28, 2015 (Exhibit M-20), signed by Gordon Swanson, Associate Director Operations, Civil Aviation, Transport Canada, recommending that he carefully review the invigilation procedures and invigilator guidelines in TP 13802. The letter summarized the June 24, 2014 incident with Mr. A taking photos of the examination, and the August 11, 2015 incident with Mr. A while the applicant was under enhanced monitoring. The letter reminded him that grounds for cancellation of his AEI authority included: history of poor performance in carrying out the responsibilities of an Authorized Examination Invigilator; compromising the integrity of any examination or the Computer Delivered Examination System; and failure to maintain the security of the examination. The letter also stated that further evidence of non-compliance would result in cancellation of the applicant's authority as an AEI. Ms. Bill said the letter was a warning that "in fact we intended to remove his privileges if we found further grounds to do so".

**46** The next correspondence relating to this matter presented by Ms. Bill was an email from her to Mr. Swanson on March 31, 2016 (Exhibit M-18), supporting the decision to cancel the applicant's AEI authority. It was Ms. Bill's

testimony that Ms. Avon was also prepared to support the decision. She described this as "a big deal" because of the importance placed on the integrity of the examination process as a means of ensuring pilots are properly qualified, and the importance of delegated invigilators to adhere to the guidelines. She also reiterated the time and cost of having to prepare a replacement exam for the one that was compromised by Mr. A in the first instance.

**47** Ms. Bill then testified about the registered letters from Transport Canada to the applicant advising him that his AEI authority was being cancelled. Ms. Bill introduced the letter dated April 1, 2016 (Exhibit M-21) from Mr. Swanson, advising the applicant of the cancellation of his authority to take effect May 1, 2016. She also submitted the letter dated May 11, 2016 (Exhibit M-22), containing the correction to the section of the *Aeronautics Act* as well as including the two grounds to support why their decision to cancel was in the public interest.

**48** During cross-examination, the applicant clarified that in fact there had been a first cancellation letter dated March 17, 2016 (Exhibit M-23), which indicated the cancellation would take effect in one week from that date. He had questioned Mr. Swanson by email about the timing of the cancellation which led to the second letter, dated April 1, 2016, indicating an effective date of May 1, 2016.

**49** The applicant had Ms. Bill confirm that he was instructed verbally, not in writing, not to reschedule Mr. A for a rewrite after the August 11, 2015 incident.

**50** The applicant provided Ms. Bill with a copy of the corrective action plan he developed in response to the request for one after the first incident with Mr. A, dated December 19, 2014 (Exhibit A-1).

**51** The applicant had Ms. Bill confirm that she did not believe that he had prompted Mr. A to send her the email dated August 19, 2015 explaining what had happened with the scrap paper during the August 11, 2015 incident.

**52** Ms. Bill also testified about the cost associated with having to recreate the exam that was compromised by Mr. A's first infraction because that exam had to be pulled from the national examination bank (which also included four subsets of the exam). The evidence was that the process of having to recreate a replacement exam was costly, at about \$100,000 per exam.

## **B. Applicant**

### ***Gerald Mants***

**53** Mr. Mants confirmed that the first incident with Mr. A did occur on June 24, 2014. He also confirmed that he advised the Minister of the incident on or about June 26th or 27th.

**54** The applicant confirmed that letters outlining the details of the incident from Mr. A's instructor and the applicant were sent to Mr. Mckenzie from the period August 25 to 28, 2014. No copies of these letters were tendered in evidence.

**55** The applicant confirmed that there were a series of audits, emails and phone conversations with Ms. Bill, Ms. Geen and Mr. Mckenzie between the time of the first incident with Mr. A in June 2014 and August 2015.

**56** The applicant stated that on December 4, 2014, he received a letter signed by Ms. Bill saying that the school would be audited. He confirmed they were audited until about September 2015. It was his testimony that the Minister advised they were no longer required to contact Transport Canada whenever they had an exam candidate, which he took to mean that the audit was complete. The applicant testified that he confirmed with his colleague his understanding that they did not have to advise the Minister of any future exams. From this he concluded that the retraining, the counselling and the audits were complete, and the improvements and any changes they made were implemented and accepted. The applicant did not tender any written evidence to substantiate this testimony regarding the advice from the Minister that they were no longer being monitored.

**57** The applicant confirmed receiving the letter dated September 28, 2015 from Mr. Swanson containing the statement that "*further evidence of non compliance will result in cancellation of your authority as noted in 13802*". It was the applicant's testimony that there was no further evidence of non-compliance or any other communication or follow up, and that he assumed the matter had been settled and dealt with. He was, therefore, very surprised when he got the letter dated March 17, 2016 advising that his authority had been cancelled.

**58** On March 18, 2016, the applicant sent an email to Mr. Swanson asking why, in his March 17, 2016 letter, he was not being given the required 30 days' notice of termination and whether section 6.9 was the appropriate section of the *Aeronautics Act*. He also said he had no indication of any further evidence of non-compliance and referred Mr. Swanson to the language to that effect in the September 28, 2015 letter. What he received in return was another letter dated April 1, 2016 from Mr. Swanson, with the effective date of the cancellation amended to May 1, 2016. There was nothing in the April 1 letter to indicate any grounds for cancellation. He then received another letter from Mr. Swanson, dated May 11, 2016, correcting the provision of the *Aeronautics Act* under which the cancellation was being effected, from section 6.72 to section 7.1, and outlining the two grounds to support the decision to cancel in the public interest.

**59** The applicant challenged the statement in Ms. Bill's email to Mr. Swanson of March 31, 2016 indicating that "*he was under enhanced monitor*". He reiterated that both he and his colleague understood they were no longer under enhanced monitoring. He did not agree with Ms. Hamilton's statement that he was to continue contacting the Minister prior to invigilating any further exams and questioned why he would ignore this directive if it were true.

**60** It was the applicant's testimony that he received disclosure of additional materials from the Minister on November 15, 2016, only ten days prior to the hearing. This information included the email from Tammy Hamilton dated February 20, 2015 (Exhibit A-2), containing notes relative to the monitoring event which occurred on that date, as testified to by Ms. Hamilton. The applicant raised several points in connection with the findings in Ms. Hamilton's email. In some instances he refuted her findings. For example, he said that the bathroom procedure was covered properly. In other instances, he confirmed the observation of Ms. Hamilton but provided explanations (e.g. although he allowed pens to be brought into the room; he had checked them for cameras) and he did confirm that there was no sign in the exam room that the student was under surveillance, but he said they always indicated verbally to the student they were being monitored and pointed out the camera.

**61** The applicant made it clear that the compromise of the initial exam by Mr. A was only one incident, affecting the main exam and four sub-exams, not four separate incidents.

**62** On cross-examination, the applicant confirmed that there were four or five visits from Transport Canada after the first incident with Mr. A in June 2104. Between the time of receipt of his initial AEI authority in 2008 and the commencement of the enhanced monitoring on December 4, 2014, there were no visits from the Minister that he recalled.

**63** The applicant indicated he did not use a checklist to assist with the invigilation process but that the process did not vary much from student to student.

**64** He did confirm that he did not take additional measures after the incident with Mr. A leaving the exam room with scrap paper, as he would eventually have noticed it was missing. He submitted that the process his office uses now, including the guidance materials, is more well-developed thanks to the assistance of Ms. Hamilton and some things they have done internally to do things better. Their process is more secure, rigid and mapped out.

#### **IV. ARGUMENTS**

##### **A. Minister**

**65** The Minister's representative argued that it is appropriate to cancel the applicant's AEI authority in the public

interest, pursuant to section 7.1 of the *Aeronautics Act*, because, as she stated, "compromising examinations nationwide should not be happening". She referenced the *Canadian Aviation Regulations* (CARs) 400.02(1) and said that Mr. A violated the requirements while under the applicant's watch.

66 The Minister's representative also argued that *Standard 421, Part IV of the Personnel Licensing and Training, Division 2, 421.13 Examination Prerequisites* is applicable, and that the applicant did not follow these procedures in that he failed to confirm the identity of the person prior to permitting them to write the exam. While the applicant could argue that he knew the person and therefore this is not necessary, the language of section 421.13 specifies "shall" not "may" in the procedures therein.

67 The Minister relied on 400-004 as containing the grounds for cancellation including the need for repeated direction in the proper conduct and administration of the examinations, history of poor performance, and compromising the integrity of the examination.

68 The Minister's representative submitted *Maple Lodge Farms v. Government of Canada*, [\[1982\] 2 S.C.R. 2](#), as precedent for the contention that the Minister has broad discretion with respect to the issuance of permits.

69 *Gill v. Canada (Minister of Transport)*, [2015 BCCA 344](#), was submitted as supporting the Minister's power to cancel or revoke Canadian aviation documents in the public interest.

70 The Minister's representative argued that the reason it took so long to cancel the applicant's AEI authority was because it was the first of such a case and that the Minister was crossing its T's and dotting its I's.

71 The Minister's representative indicated that, based on the facts of the case, they would argue against setting aside the cancellation of the applicant's AEI authority in the event of a refer-back to the Minister.

## **B. Applicant**

72 The applicant stated that the process had dragged out for almost two years. He noted that it passed through a multitude of different people at Transport Canada; by his count 14 in total.

73 The applicant was not arguing that the events with Mr. A did not happen. His concern was about how long the process took, how many different people from Transport Canada weighed in with their opinions, and the existence of some misinformation. He was also concerned that he received the Notice of Cancellation many months after the September 28, 2015 letter. He assumed from that letter that the enhanced monitoring was over and that it would only result in a cancellation if there was evidence of further errors. No further errors were ever brought to his attention.

74 The applicant argued that, while the VFC does have another invigilator, it is more convenient for the students of the school to have two AEIs because when his colleague is away, they would be unable to offer examinations. For this reason, it would be good to have his authority reinstated during the period of refer-back.

## **V. ANALYSIS**

75 The onus is on the Minister to provide justification that cancellation of the applicant's AEI authority is in the public interest.

76 The May 11, 2016 letter to the applicant provides, pursuant to paragraph 7.1(1)(c) of the *Aeronautics Act*, that the cancellation is in the public interest due to his failure to maintain the integrity of any examination or the Computer Delivered Examinations System, and failure to maintain the security of the examination.

77 There are no regulations specifically related to the requirements to be met by an AEI. Therefore, the Minister

has relied on the following documents:

- \* the *Accreditation as an Authorized Exam Invigilator Agreements* signed between the AEI and the Minister of Transport for Canada (Agreements);
- \* *Industry Invigilation of Computer Delivered Examinations*, TP 13802, and *Advisory Circular 400-004*. TP 13802 was cancelled effective April 20. All the evidence presented pre-dated April 20, 2016 with the exception of the May 11, 2016 letter from Mr. Swanson amending the *Aeronautics Act* section under which the cancellation was being effected. Therefore, for the purposes of my analysis, I conclude that TP 13802, not 400-004, was the guidance document in effect for governing AEs at all relevant times for the purpose of this review matter;
- \* SI 400-003 *Staff Instruction for Administering Examinations for Flight Crew, Chief Pilots, Operations Managers and Dispatchers*, effective date June 6, 2012.

**78** Transport Canada documents such as TP 13802, Staff Instructions, Advisory Circulars and the Agreements, are not law and are not binding on the TATC. Breach of these documents may, but does not necessarily, provide that the public interest was jeopardized. Accordingly, the TATC should only give these documents weight insofar as they are in line with the statutory purpose of the *Aeronautics Act*; in this case, that purpose is to protect the public interest.

**79** The TATC finds that these documents contain guidelines for examination invigilation which are designed to ensure that only appropriately qualified candidates receive a Transport Canada licence, which does protect the public interest and so are relevant to this analysis.

**80** The Minister's letter of September 28, 2015 provided that **further evidence** of non-compliance would result in cancellation of the applicant's AEI authority. Hence, the Minister must demonstrate that the events it relies on as grounds for cancellation occurred after September 28, 2015. Otherwise, the Minister must demonstrate that despite this letter, it can rely on events that took place prior to September 28, 2015.

### ***Analysis of the Evidence***

**81** The evidence has established that the applicant was the invigilator for the examination in June 2014 when Mr. A took photos of the computer examination screen, and it has not been refuted that Mr. A took the offending photos. TP 13802 specifies that "*Portable telephones or pagers are not allowed in the room during the writing of an examination*". SI 400-003 section 8.1(7) states that "*Portable telephones, pagers, organizers, etc. are not allowed in the room during the examination*".

**82** SI 400-003 at 10.0(2) states that "*Persons administering examinations perform an essential safety role by ensuring that cheating does not occur. This is done by proper identification of applicants, ensuring that nothing that enables cheating is brought into the examination room, monitoring the writing of the examination, and ensuring that nothing that would compromise the examination leaves with the individual*". At 10.0(3) it states that "*Practices that help thwart cheating include: monitoring the examinations in progress; ensuring that all scrap paper taken into the examination is returned after the examination; being conscious of bathroom visits (time, number of people, stops at the coat rack, etc.); and ensuring that candidates writing the same examination do not sit in positions where they can collaborate*".

**83** While TP 13802 does not specifically say that cameras are not permitted in the examination room, it is apparent from the intent of TP 13802 that the invigilator has the obligation to ensure that the candidate does not cheat or attempt to cheat. In this case, taking photos of the examination screen with a camera would undoubtedly constitute a breach. The applicant did not deny that this incident occurred nor did he attempt to suggest that he was not the invigilator at the time of the incident.

**84** The evidence bears out that the breach with the taking of the screen photos did occur on June 24, 2014, and

the incident with the removal of the scrap paper did occur on August 11, 2015, both while under the applicant's watch. Assuming that these two events were the ones relied upon by the Minister to support the cancellation of the applicant's AEI authority, the Minister has provided evidence relevant to whether the applicant failed to maintain the integrity of an examination or CDE, or failed to maintain the security of the examination as specified in the May 11, 2016 letter. Although the Minister had cited a history of poor performance as a possible ground for cancellation in earlier correspondence to the applicant and presented evidence of performance issues identified in various monitoring reports, they did not include this as a basis for their cancellation decision in the May 11, 2016 letter.

**85** Despite the evidence of shortfalls with the applicant's invigilation practices, the Minister's decision to cancel the applicant's AEI authority cannot be supported and must be sent back for reconsideration. The basis for this finding is the Minister's failure to meet its obligations for procedural fairness and natural justice. There are several reasons for arriving at this conclusion.

**86** Notwithstanding the Minister's characterization of the June 24, 2014 incident with Mr. A as being of a serious nature and having been notified about it within a day or two of its occurrence, there was no evidence presented by the Minister regarding any specific immediate action taken by the Minister against the applicant other than some general references to phone calls and emails, and the decision to prevent Mr. A from rewriting the examination for a period of one year. It was not until nearly six months later that there was evidence of the on-site briefing, inspection and retraining by Ms. Hamilton and Ms. Geen on December 2, 2014. This was followed by the December 4, 2014 letter to VFC advising of **routine** monitoring and the letter that same day to the applicant asking for a corrective action plan. Even then, Ms. Bill was unable to recall whether the CAP was ever provided. We know from the applicant that he had provided a CAP on December 19, 2014, but there was no evidence from the Minister as to whether this was accepted by the Minister or whether the applicant adhered to the CAP. At no time was there evidence that either the applicant or VFC were advised, in writing, of any enhanced monitoring specifically related to the Mr. A incident.

**87** Even after notifying VFC in December 2014 that they would be doing a routine monitoring of the applicant and his colleague, we have no indication of any such monitoring activity for two and a half months until February 20, 2015, which was eight months after the June 2014 incident.

**88** After the August 11, 2015 incident, Ms. Bill indicated they had requested guidance from their Ottawa headquarters about how they should proceed. There was no evidence of anything specific coming back from Ottawa until the email from Mr. Dunn nearly two months later on October 6, 2015 with a request that they give the applicant written notice of the actions necessary to gain compliance with documented requirements, and have a copy maintained on the AEI's file. There was no evidence that Mr. McKenzie acted on the request, other than to respond on November 17, 2015 to a request from Dorothy Geen made on November 3, 2015 with some information about discussions he had in late August with the applicant. In the absence of any further evidence from Mr. McKenzie, who was not called as a witness, it must be assumed that he had not spoken to the applicant since late August 2015 and that, from his email, he did not appear to be alarmed or intent on taking any further action against the applicant.

**89** Following the August 11, 2015 incident with Mr. A, there is no evidence as to what, if any, further action was taken against the applicant as a result of this incident, other than the registered letter to the applicant on August 29, 2015 requiring him to provide a detailed written account of the incident with Mr. A, and the email traffic between various Transport Canada representatives indicating that there were insufficient grounds to prevent Mr. A from writing the exam for another year. There is no evidence of further monitoring having occurred after August 11, 2015. There is also no evidence that the Minister followed up on the requirement for the applicant to continue advising them of future examination invigilations. Everything was apparently quiet until the applicant received the letter of September 28, 2015.

**90** Despite the very clear language in the September 28, 2015 letter that further evidence of non-compliance would result in cancellation of his authority as noted in TP 13802, the Minister presented no evidence of further non-compliance prior to advising the applicant of the cancellation decision. Ms. Bill's testimony fully supported the notion

of a requirement for further evidence of non-compliance prior to cancellation when she stated that she had drafted the letter and "In fact we received ... our guidance from national standards, and in following all of our procedures for enhanced monitoring and for notification that the individual ... is on enhanced monitoring, and of the grounds for cancellation for the consequences of not monitoring properly and our intent **with further evidence** to remove his authority". She further stated: "This was a warning that in fact we intended to remove his privileges **if we found further grounds to do so**". [Emphasis added]

**91** Even once the Minister decided to take action, we are not given any enlightenment, based on the cancellation letters of March 17, 2016 and April 1, 2016, as to the grounds for cancellation. They simply say: "*In review of your activity as an Authorized Examination Invigilator, we have concluded the grounds for cancellation of appointment will be effective on...*". There is no reference back to the September 28, 2015 letter and there is nothing in the intervening period to demonstrate what "activity" the Minister is referring to.

**92** It is not until May 11, 2016, eleven days after the effective date of the cancellation of the applicant's AEI authority, that he receives yet another letter from the Minister amending the section of the Act under which the Minister purports to take action, finally providing him with two grounds on which they relied to take this action. In fact, it takes nearly two full months for the Minister to provide the applicant with anything approaching a proper cancellation notice.

**93** The Minister is required by subparagraph 7.1(2)(a)(iii) of the *Aeronautics Act* to indicate in the Notice of Cancellation the elements of the public interest on which the decision of the Minister is based. The elements relied on by the Minister in the May 11, 2016 letter were inadequate, as it contained no specifics in terms of dates or incidents upon which the Minister relies to conclude that these grounds are appropriate.

**94** The applicant has not specifically raised the form of the Notice as an issue. He did, however, testify to being surprised by the cancellation and uncertain of the basis for it. I raise the form of the Notice here as another example of the lack of clarity, diligence to detail and promptness which characterized the Minister's actions throughout the course of this matter. The applicant should know with certainty the case against him. From the evidence tendered by the Minister, we can presume the grounds for cancellation all relate to matters occurring between June 2014 and August 2015. If so, these are not proper grounds, as the Minister made it clear in the September 28, 2015 letter that any future evidence of non-compliance would result in a cancellation. No evidence of such additional non-compliance was tendered.

**95** The case law provided by the Minister's representative in support of the Minister's decision to cancel does not serve to support the actions of the Minister in this matter. The *Maple Lodge Farms* case deals with the discretion of a Minister to issue permits without creating a duty to issue permits. This authority is not in dispute here. However, there is one comment by McIntyre, J., writing on behalf of the Supreme Court of Canada, that raises an important point, as follows:

In construing statutes such as those under consideration in this appeal, which provide for far-reaching and frequently complicated administrative schemes, the judicial approach should be to endeavour within the scope of the legislation to give effect to its provisions so that the administrative agencies created may function effectively, as the legislation intended. In my view, in dealing with legislation of this nature, the courts should, wherever possible, avoid a narrow, technical construction, and endeavour to make effective the legislative intent as applied to the administrative scheme involved. It is, as well, a clearly-established rule that the courts should not interfere with the exercise of a discretion by a statutory authority merely because the court might have exercised the discretion in a different manner had it been charged with that responsibility. **Where the statutory discretion has been exercised in good faith and, where required, in accordance with the principles of natural justice, and where reliance has not been placed upon considerations irrelevant or extraneous to the statutory purpose, the courts should not interfere.** [Emphasis added]

**96** In this case, it bears considering whether the exercise of the Minister's discretion to cancel the applicant's AEI

authority was done in good faith and in accordance with the principles of natural justice, or whether reliance was placed on considerations irrelevant or extraneous to the statutory purpose.

**97** The evidence presented about the number of incidents where the applicant failed to meet the requirements as an examination invigilator in June 2014 and during the various monitoring events from February 20, 2015 to August 11, 2015, together with the evidence about remedial training for the applicant, lead me to conclude that the actions taken by the Minister in cancelling the applicant's AEI authority were not done in bad faith nor were they based on irrelevant or extraneous considerations.

**98** However, the time between the original infraction in June 2014 and the letters in December 2014 notifying of monitoring in keeping with "routine practice", is troubling. The long period of time between the initial incident in June 2014 and the commencement of monitoring in February 2015 is troubling. However, the absence of any evidence of further monitoring or non-compliance after August 11, 2015, together with the letter of September 28, 2015 which clearly indicates it is a warning that any further infractions would result in cancellation, and the failure to provide any evidence of further infractions, is fatal to the Minister's case. Finally, the extended cancellation notification process and the lack of proper notice for cancellation are also fatal. The net effect of this course of conduct on the part of the Minister supports the conclusion that the Minister's discretion to cancel was not applied in accordance with the principles of fairness and natural justice.

**99** While we may agree that the *Maple Lodge Farms* case makes out that the Minister's discretion may be quite broad and that the Minister has a considerable responsibility for ensuring the integrity of the AEI authority program in the public interest, it was also confirmed in the case of *Canada (Attorney General) v. Bethune*, [2016 FC 583](#), that the Minister's discretion is not unlimited. Justice Phelan says:

The statutory scheme for aviation approvals, licences and related matters vests a broad discretion in the Minister to act in the interests of public security. That broad discretion is not absolute.

**100** In *Baker v. Canada (Minister of Citizenship and Immigration)*, [\[1999\] 2 S.C.R. 817](#), Justice L'Heureux-Dube confirms:

The fact that a decision is administrative and affects "the rights, privileges or interests of an individual" is sufficient to trigger the application of the duty of fairness.

**101** In *Bancarz v. Canada (Transport)*, [2007 FC 451](#), Justice Phelan says:

The reality is that an AME licence is important to the aviation system and to the individual licence holder. Its importance underscores the need for regulation and enforcement as well as the need for fair and proper consideration when the licence is to be taken away ... The Respondent owed the Applicant a high degree of procedural fairness which it failed to accord.

This is precisely the situation we have in this case and for this reason, I conclude that the appropriate decision is to refer the matter of the cancellation of the applicant's AEI authority back to the Minister for reconsideration.

### ***Stay of Cancellation Decision***

**102** Given the decision to refer this matter back to the Minister for reconsideration, it falls to be considered whether it is appropriate to stay the Minister's decision to cancel the applicant's AEI authority in the interim.

**103** Both parties made brief submissions on the appropriateness of a stay. The Minister's representative indicated simply that "considering the facts in this case, I don't think a stay should be granted if you go that route for the reconsideration". The applicant limited his comments about the granting of a stay to the beneficial impact it would have on their customers and students, as they currently have only one invigilator and when he is away the school is unable to schedule exams. Their preference is for two invigilators.

**104** I must be satisfied in so doing that granting a stay would not constitute a threat to aviation safety.

**105** A key point raised by the Minister with respect to the June 2014 incident with Mr. A was the cost to the public of having to reissue the examinations. This is clearly not an aviation safety concern.

**106** It is apparent that the integrity of the examination system must be upheld in order to ensure that those individuals who are issued a pilot's licence are, in fact, qualified to do so in order to preserve the public's safety. While the Minister has characterized the taking of the screen shots by Mr. A as "cheating", the evidence was that he took the photos to discuss with his instructor. Nothing in the evidence specifically indicates that Mr. A was intent on cheating. The evidence presented by the Minister highlighted shortcomings in the applicant's invigilation procedures. However, there was no evidence that any of the other candidates invigilated by the applicant during the monitoring period received a pilot's licence in error.

**107** Furthermore, many of the alleged behaviors of the applicant which purported to fall short of meeting the responsibilities of an AEI (e.g. using coloured paper, lack of signage, leaving the room without a monitor, asking questions about alternate uses of the examination room, failing to ask for identification of individuals known to the applicant, etc.) were in the nature of administrative shortcomings and could not be said to constitute a threat to public safety.

**108** Given that it took the Minister nearly two years to cancel the applicant's AEI authority following the initial incident with Mr. A, and seven months after the second incident, it is difficult to conclude that the Minister had a serious concern about the applicant's being a threat to aviation safety if he continued to invigilate examinations.

**109** In the absence of any compelling reasons to conclude that having the applicant continue to invigilate examinations constitutes a threat to aviation safety, I hereby stay the Minister's decision to cancel the applicant's AEI authority.

## **VI. DETERMINATION**

**110** The matter is referred back to the Minister for reconsideration of the decision to cancel the applicant's Authorized Examination Invigilator authority and the decision to cancel is stayed during the reconsideration period.

March 13, 2017

(Original signed)  
Tracy Medve  
Member

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