Federal Court  Cour fédérale

Date: 20150616

Docket: T-31-15

Citation: 2015 FC 755

Vancouver, British Columbia, June 16, 2015

PRESENT: The Honourable Mr. Justice Hughes

BETWEEN:

TREVOR ANTHONY CORNEIL

Applicant

and

TRANSPORTATION APPEAL TRIBUNAL OF CANADA AND MINISTER OF TRANSPORT

Respondents

JUDGMENT AND REASONS

[1] This is a judicial review of a decision of a three-member panel of the Transportation Appeal Tribunal dated December 16, 2014 wherein an appeal by the Applicant from a decision of a one-member panel upholding a refusal by the Minister of Transport to issue him a civil aviation licence, was dismissed.

[2] The Applicant is a medical doctor who has practiced as such for many years and currently, is the Medical Health Officer for the Interior Health Authority in British Columbia. In 2012, he decided to take up flying and took lessons for that purpose. His intention apparently is recreational as there is no evidence that flying is a requirement for his job. Having successfully taken certain courses and training, he applied for a civil aviation licence.

[3] By a letter from Transport Canada dated August 29, 2012, the Applicant was advised that he did not meet all the requirements of the Medical Standards for Civil Aviation. In part, the letter stated:

> *Therefore, we are unable to issue you a Medical Certificate for any type of Civil Aviation Permit or License. This "unfit" assessment is based upon your inability to satisfy the Medical standards set out in Canadian Aviation Regulations (CAR) 424.17(4), Physical and Mental Requirements Table, Category 1, item 1.3d, Category 3, item 3.3d and Category 4, item 4.3b.*

[4] That letter informed the Applicant could seek a review of this decision by the Transportation Appeal Tribunal. That is what he did.

[5] A single member of the Transportation Appeal Tribunal held a hearing wherein both the Applicant and the Respondent were represented by Counsel who made submissions on behalf of their respective clients. The Minister of Transport led the evidence of Dr. Raudzus, Regional Medical Aviation Officer, and Dr. Lange, a psychiatrist with particular expertise is aviation psychiatry. Both were examined and cross-examined at the hearing. The Minister made of record an e-mail exchange involving, among others, Dr. Brook, Senior Consultant Education and Safety Civil Aviation at the Ministry.

[6] The Applicant gave evidence on his own behalf and called Mr. Vanderaegan, Flight School Director where the Applicant was a student, who gave evidence by telephone. Both were cross-examined. Also submitted into evidence by the Applicant, were medical reports as to the Applicant from Dr. Remick and Dr. Sestak.

[7] The member provided a written decision dated May 29, 2014 confirming the decision not to issue a licence to the Applicant.

[8] That decision of a single member of the Transportation Appeal Tribunal was appealed by the Applicant to a three-member panel of the Tribunal. That panel received written submissions from Counsel for the parties and held an oral hearing where Counsel made submissions. No further evidence was made of record. On December 16, 2014, the three-member panel issued a written decision which is the one under review here, dismissing the appeal.

[9] The basic concern is that the Applicant has, since at least 2004, been taking prescription medications; in particular, venlafaxine and clonazepam for obsessive compulsive disorder and significant associated generalized anxiety disorder. He takes this medication regularly and regularly sees his doctor in this regard. These disorders are well controlled. In the period from about 2006 and 2007, two further medications were prescribed, bupropion and mirtazapine, to control certain side effects of the two previous medicines. Again, these two medications have been taken regularly by the Applicant, as prescribed. Thus, since about 2007, the Applicant has regularly been taking four different prescribed medications and continues to do so. He did not decide to take up flying until 2012.

[10] I provide the following Index, by paragraph number, to these Reasons:

I. REVELANT LEGISLATION

[11] The Applicant was deemed to be "unfit" to be given a pilot's licence. The relevant legislation begins with the *Aeronautics Act*, RSC 1985, c. A-2 which, in subsection 6.71(1), states that the Minister of Transport may refuse to issue an "aviation document" (defined in section 6.6 to include any privilege accorded by a Canadian aviation document) if the applicant is incompetent or does not meet the necessary qualifications or conditions:

6.71 (1) The Minister may	*6.71 (1) Le ministre peut*

refuse to issue or amend a Canadian aviation document on the grounds that	*refuser de délivrer ou de modifier un document d'aviation canadien pour l'un des motifs suivants :*
(a) the applicant is incompetent;	*a) le demandeur est inapte;*
(b) the applicant or any aircraft, aerodrome, airport or other facility in respect of which the application is made does not meet the qualifications or fulfil the conditions necessary for the issuance or amendment of the document; or	*b) le demandeur ou l'aéronef, l'aérodrome, l'aéroport ou autre installation que vise la demande ne répond pas aux conditions de délivrance ou de modification du document;*
(c) the Minister is of the opinion that the public interest and, in particular, the aviation record of the applicant or of any principal of the applicant, as defined in regulations made under paragraph (3)(a), warrant the refusal.	*c) le ministre estime que l'intérêt public, notamment en raison des antécédents aériens du demandeur ou de tel de ses dirigeants — au sens du règlement pris en vertu de l'alinéa (3) a) —, le requiert.*

[12] The *Canadian Aviation Regulations*, SOR/97 – 433, subsection 404.03(1) prohibits anyone from obtaining a pilot's license without a valid medical certificate:

404.03 (1) No person shall exercise or attempt to exercise the privileges of a permit, licence or rating unless the person holds a valid medical certificate of a category that is appropriate for that permit, licence or rating, as specified in section 404.10.	*404.03 (1) Il est interdit à toute personne d'exercer ou de tenter d'exercer les avantages d'un permis, d'une licence ou d'une qualification, à moins qu'elle ne soit titulaire d'un certificat médical valide de la catégorie propre au permis, licence ou qualification, telle qu'elle est précisée à l'article 404.10.*

[13] Section 404.04 of the *Regulations* provides that a person must be "medically fit" so as to receive a licence:

404.04 (1) Subject to subsection (2) and subsection 404.05(1), the Minister shall issue or renew a medical certificate on receipt of an application therefor if	*404.04 (1) Sous réserve du paragraphe (2) et du paragraphe 404.05(1), le ministre délivre ou renouvelle un certificat médical sur réception d'une demande de délivrance ou de renouvellement, lorsque le demandeur satisfait à l'une ou l'autre des conditions suivantes :*
(a) where the applicant is applying for a medical certificate in connection with an application for a student pilot permit-aeroplane, pilot permit — recreational, pilot or student pilot permit — ultra-light aeroplane, a pilot licence — glider or student pilot permit — glider, the applicant has completed and submitted a medical declaration, in accordance with the personnel licensing standards, that attests to the fact that the applicant is medically fit to exercise the privileges of the permit or licence that is applied for; or	*a) dans le cas où il fait la demande d'un certificat médical en vue d'un permis d'élève-pilote — avion, d'un permis de pilote de loisir, d'un permis de pilote ou d'élève-pilote — avion ultra-léger, d'une licence de pilote — planeur ou d'un permis d'élève-pilote — planeur, il a rempli et présenté une déclaration médicale conformément aux normes de délivrance des licences du personnel, attestant qu'il est physiquement et mentalement apte à exercer les avantages du permis ou de la licence demandé;*
(b) in any case not referred to in paragraph (a), it is established, by means of a medical examination conducted by a physician referred to in section 404.16, that the applicant meets the medical fitness requirements specified in the personnel licensing standards.	*b) dans les cas autres que ceux visés à l'alinéa a), il est démontré, au moyen d'un examen médical fait par un médecin visé à l'article 404.16, que le demandeur répond aux exigences relatives à l'aptitude physique et mentale précisées dans les normes de délivrance des licences du*

	personnel.
(1.1) A medical certificate is also renewed if it is signed, dated and stamped in accordance with paragraph 404.18(a).	*(1.1) Un certificat médical est aussi renouvelé s'il est signé, daté et estampillé conformément à l'alinéa 404.18a).*
(2) The Minister	*(2) Le ministre :*
(a) may request an applicant for the issuance or renewal of a medical certificate to undergo, before a specified date, any medical tests or examinations that are necessary to determine whether the applicant meets the medical fitness requirements specified in the personnel licensing standards;	*a) peut demander que, avant une date prévue, la personne qui demande la délivrance ou le renouvellement d'un certificat médical subisse les tests ou examens médicaux nécessaires pour déterminer si elle répond aux exigences relatives à l'aptitude physique et mentale précisées dans les normes de délivrance des licences du personnel;*
(b) shall not issue or renew a medical certificate until the applicant has undergone all of the tests and examinations requested by the Minister pursuant to paragraph (a); and	*b) ne peut délivrer ou renouveler un certificat médical avant que le demandeur n'ait subi les tests ou examens demandés par le ministre en application de l'alinéa a);*
(c) may suspend, or refuse to issue or renew, the applicant's medical certificate if the applicant fails to comply with the request referred to in paragraph (a) before the specified date.	*c) peut suspendre, ou refuser de délivrer ou de renouveler, le certificat médical du demandeur si celui-ci ne se conforme pas à la demande visée à l'alinéa a) avant la date prévue.*

[14] Subsection 404.05(1) of the *Regulations* says that the Minister "may" issue a medical certificate to an applicant who does not meet the requirement of subsection 404.04(1) where it is in the public interest and it not likely to affect aviation safety:

404.05 (1) The Minister may, in accordance with the personnel licensing standards, issue a medical certificate to an applicant who does not meet the requirements referred to in subsection 404.04(1) where it is in the public interest and is not likely to affect aviation safety.	*404.05 (1) Le ministre peut, conformément aux normes de délivrance des licences du personnel, délivrer un certificat médical à un demandeur qui ne répond pas aux exigences visées au paragraphe 404.04(1) à condition que ce soit dans l'intérêt public et que la sécurité aérienne ne risque pas d'être compromise.*

[15] Part IV of the *Regulations* deals with Personal Licensing and Training. In section 424.01, "medical certificate" (MC) is defined:

424.01 … "medical certificate" (MC) - is a document issued periodically to validate aviation licences which require special standards of medical fitness as laid down in the Personnel Licensing Standards Respecting Medical Requirements. MCs are issued by the Minister of Transport following receipt of a medical examination report assessed medically fit or fit subject to any restriction or limitation.	*424.01… « certificat médical (cm) » - Document délivré périodiquement pour valider les licences d'aviation qui nécessitent des normes spéciales d'aptitude physique et mentale énoncées dans les Normes de délivrance des licences du personnel relatives aux exigences médicales. Le CM est délivré par le ministre des Transports sur réception d'un rapport d'examen médical établissant que le demandeur a été jugé apte ou jugé apte sous réserve d'une limite ou d'une restriction (medical certificate - MC).*

[16] Subsection 424.04(1)(a) of the *Regulations* defines medical fitness in broad terms having regard to certain international standards:

424.04(1)(a) Minimum medical fitness requirements for the various types of licence are	*424.04(1)a) Les exigences minimales d'aptitude physique et mentale à l'égard des divers*

broadly defined by international agreement through the International Civil Aviation Organization (ICAO). Canadian medical requirements honour this agreement, and procedures and standards outlined in this document reflect International Standards and Recommended Practices.	*types de licence sont définies de façon générale dans une convention internationale par l'entremise de l'Organisation de l'Aviation civile internationale (OACI). Les exigences médicales canadiennes se conforment à cette convention et les normes et procédures énoncées dans le présent document reflètent les normes et pratiques internationales recommandées.*

[17] Subsection 424.05(1)(a) of the *Regulations* provides certain flexibility where persons cannot meet the standard but may be given a licence where the reasons for not meeting the standard are not likely to affect air safety:

424.05(1) Under special circumstances such as monocular or paraplegic applicants, flexibility may be applied and the permit or licence issued or validated where the following conditions are met:	*424.05(1) Lors de circonstances particulières telles les demandeurs monoculaires ou les demandeurs paraplégiques, les normes médicales peuvent être appliquées avec souplesse et le permis ou la licence peut être délivré ou renouvelé si les conditions suivantes sont remplies :*
(a) Accredited medical conclusion indicates that the applicant's failure to meet any requirement, whether numerical or otherwise, is such that exercise of the privileges of the permit or licence applied for is not likely to affect air safety. The Licensing Authority shall be satisfied that any relevant ability, skill or experience of the applicant has been given due consideration.	*a) Les conclusions d'un médecin agréé montrent que, malgré l'inaptitude d'un demandeur à remplir une exigence, numérique ou autre, son état physique et mentale est tel que l'exercice des avantages conférés par le permis ou la licence demandé ne constitue pas un risque du point de vue de la sécurité aérienne. Le service de délivrance des licences aura la preuve qu'il a été*

tenu compte comme il se doit des capacités physiques et mentales, de l'habileté et de l'expérience du demandeur.

[18] Part IV of the *Regulations*, Standard 424, deals with the Physical and Mental Requirement for issuing a licence. The categories of licences are presented in four columns of categories 1, 2, 3, and 4.

[19] These are the categories referred to in the refusal letter dated August 29, 2012 which, I repeat, namely category items 1.3(d), 3.3(d) and 4.3(b).

Nervous System			
1.3 The applicant shall have no established medical history or clinical diagnosis which, according to accredited medical conclusion, would render the applicant unable to exercise safely the privileges of the permit, licence or rating applied for or held, as follows: … (d) other significant mental abnormality	2.3 … …	3.3 The applicant shall have no established medical history, or clinical diagnosis which, according to accredited medical conclusion, would render the applicant unable to exercise safely the privileges of the permit or licence applied for or held, as follows: … (d) other significant mental abnormality …	4.3 An applicant shall have no mental history or clinical diagnosis likely to interfere with the safe operation of an aircraft as follows: … (b) psychiatric illness; …

[20] The discretion vested in the Minister as to whether a person is medically fit to receive a pilot's licence or may be exempted from a seeming failure to comply is quite broad and discretionary. I repeat what Justice Frederick Gibson wrote in *Kiss v Canada (Minister of Transport)*, 1999 CanLII 8509 (FC) at paragraph 25:

> *25 The Aeronautics Act14 vests broad discretion in the Minister to refuse to issue a "Canadian Aviation Document", an expression that includes any license, permit, accreditation, certificate or other document issued by the Minister under Part I of the Act. In particular, the Minister may refuse to issue a Canadian Aviation Document where he or she is of the opinion that the public interest warrants it. The "public interest", and in particular the public interest in safety, was acknowledged by counsel for the applicant to be an overriding consideration underlying the pilot licensing scheme under the Aeronautics Act. I am satisfied that the decision here under review should be classified as a "discretionary decision".*

II. WHAT WAS DONE IN THIS CASE

[21] The reason why the Applicant was turned down for a pilot's licence was succinctly put in the cross-examination of Dr. Raudzus at pages 55 - 56 of the transcript of the hearing before the one-member Tribunal:

> *Q Okay. So the reason for the refusal of Dr. Corneil's attempt to get a licence was that he was taking two medications for his medical condition, have I got that?*
>
> *A Four.*
>
> *Q Four, but he was taking more than one?*
>
> *A He was taking four medications simultaneously, correct.*
>
> *Q And that's the reason?*
>
> *A That's the reason.*

[22] The reason for refusal was also stated in the e-mail exchange with Dr. Brook in an e-mail from Dr. Lange sent August 27, 2012:

> *I have reviewed the file on theis (sic) 41 year old initial applicant.*
>
> *According to the note of Dr. Remick (psychiatrist) he began with symptoms in 1990/2000. I suspect that is a typo and it should read since 1999/2000. At that time he apparently was treated with venlafaxine and clonazepam. Subsequently, 2 medications were to deal with side effects. He had bupropion added to deal with sexual side effects and mirtazapine to deal with sleep disruption, presumably capitalizing on the fact that mirtazepione (sic) is sedative.*
>
> *He is said to be in remission since 8 years that the treatment is "keeping anxiety at bay".*
>
> *He does have a family history of Mood disorders.*
>
> *I cannot find this man fit to hold a medical certificate for any flying category as he take[s] a range of medications to keep his symptoms "at bay". Two of the medications are well know[n] to be very sedative, i.e. clonazepam and mirtazapine.*

III. WHAT THE ONE-MEMBER PANEL FOUND

[23] The one-member panel of the Transportation Appeal Board (Dr. Pugh) heard from two expert medical witnesses, Dr. Raudzus and Dr. Lange, and had the reports of two other medical experts filed by the Applicant. The panel's analysis was, as reported 2014 TATCE 18, at paragraphs 55 - 60:

> ***ANALYSIS***
>
> *[55] I find it significant that both Dr. Raudzus and Dr. Lange express their clear concern that both clonazepam and mirtazapine are sedating when taken for control of psychiatric symptoms. These experience doctors in aviation medicine express concern that sedation in an individual will not be self-reported and that sedation may not be revealed until such time as an extreme emergency occurs, particularly in altitude.*

> *[56] Transport Canada has clearly communicated the reasons for refusing to issue a medical certificate. Dr. Raudzus has sought and received an expert opinion from an experienced clinician within the aviation psychiatry field.*
>
> *[57] Flexibility has been introduced by Transport Canada for certifying pilots on approved psychiatric medications and that leeway was made known to the applicant. Dr. Lange has stated that future changes in medication would be reviewed by the AMRB, and that restrictions would change as new information becomes available.*
>
> *[58] I find that the established medical clinical diagnosis implies a chronic condition that is never very far under the surface. The requirement of four medications to keep symptoms at bay suggests to Dr. Lange and Dr. Raudzus a hazard that is likely to interfere with the safe operation of an aircraft. In addition, I note that Dr. Corneil was well known to both Drs. Sestak and Remick, and no recommendation from the attending physicians was made to change the current medication regime, despite their knowledge that medical certification would be denied.*
>
> *[59] A strong endorsement by Dr. Corneil's actual flight instructor was not available. The evidence entered by Mr. Vanderaegen, concerning the applicant's pilot training record, does not add appreciable weight to my decision because Mr. Vanderaegen was not directly involved in Dr. Corneil's flight training.*
>
> *[60] I find that the Minister has established that the medical policy in place at the time of issuing the decision was fairly and duly applied.*

[24] The record before me does not show whether arguments as to the *Charter* or *Canadian Human Rights Act*, RSC 1985, c. H-6, were raised before the one-member panel. Counsel for the Applicant appearing before me was also Counsel at the hearing before the one-member Tribunal and stated, quite candidly, that he could not recall if it was raised or not.

IV. ISSUES BEFORE THE THREE-MEMBER PANEL AND DETERMINATION

[25] The three-member panel considered two grounds of appeal:

> *1. The member (Dr. George Pugh) erred in law in allowing a medical policy of the respondent to fetter his discretion in reaching his conclusion that the appellant;*
>
> *(a) was not able to exercise safely the privileges of a licence as required by CARs Standard 424.17(4), paragraphs 1.3 and 3.3.; and*
>
> *(b) had a medical history or clinical diagnosis likely to interfere with the safe operation of an aircraft, as required by CARs Standard 424.17(4), paragraph 4.3.*
>
> *2. The member erred in law in failing to interpret the CARs consistently with the Canadian Charter of Rights and Freedoms and with the Canadian Human Rights Act, R.S.C. 1985, c. H-6, which require the Minister, prior to refusing to grant a licence, to perform an individual assessment of the applicant to determine whether he can be licensed without jeopardizing the goal of reasonable air safety.*

[26] Counsel for the Applicant advised the Court that only the second ground, the *Charter* and *Human Rights Act* ground, needed to be considered by this Court on this judicial review. The determination of the three-member panel in that regard is set out at paragraphs 40 to 44 of its decision, 2014 TATCE 41:

> ***lssue #:3: Did the member err by failing to adequately consider the Canadian Charter of Rights and Freedoms and also the Canadian Human Rights Act?***
>
> *[40] Dr. Corneil's case differs from those of Grismer and of Meiorin. In the latter cases, the individuals were denied activities based on unreasonable criteria for disqualifying them from their duties they had otherwise proved they were capable of. In both cases, the applicants had no way of meeting these criteria. In Dr. Corneil 's case, particularly given his condition has been reported as stable for the last 10 years, he could, to avoid withdrawal*

> *symptoms, slowly withdraw from his usage of clonazepam and change his SSRI to one that is acceptable to Transport Canada.*
>
> *[41] There is extensive documentation between Drs. Raudzus, Corneil and Lange, suggesting efforts to provide Dr. Corneil with possible avenues by which he could meet the medical qualifications, such as modifying his medications.*
>
> *[42) Excluding someone from flying while on a high dose of a benzodiazepine, such as in Dr. Corneil's case, is based on sound medical consideration and not unreasonable criteria as in the Grismer and Meiorin cases.*
>
> *(43) There was debate between Mr. Kasting and Mr. Forget as to whether flying was a right or a privilege under the Canadian Human Rights Act. However, this issue is outside the scope of the matters over which the Tribunal has jurisdiction.*
>
> *[44] The appeal panel finds that the member did not err by failing to adequately consider the Canadian Charter of Rights and Freedoms, and lacks the jurisdiction to consider complaints regarding the Canadian Human Rights Act.*

[27] The three-member panel also took note of the suggestion made by one of the Minister's medical experts that consideration should be given to substituting other medications for those taken. It wrote at paragraph 15:

> *[15] ... Dr. Raudzus also advised that Dr. Corneil should discuss modifying the medications with his attending physicians, to those that are acceptable in pilots such as fluoxetine, citalopram, or escitalopram.*

V. ISSUES BEFORE THIS COURT

[28] The Applicant has requested that the decision of the three-member appeal panel be quashed, and sent back with a direction that the Tribunal direct the Minister to conduct an individualized medical test of the Applicant to determine if he can safely receive a licence.

[29] The Respondents resist this request and ask that this application be dismissed. Further, they say, in any event, a sufficiently personalized test of the Applicant's medical condition has been conducted.

[30] The Applicant's basis for arguing that the decision be set aside is that an improper balancing of the *Charter* rights, section 15, of the Applicant together with his rights under section 2 of the *Human Rights Act* has resulted in an improper denial of a pilot's licence to the Applicant.

[31] In order to deal with all of this, I must consider:

1. What is the standard of review for considering the decision at issue?
2. Was the decision correct/reasonable having regard to the *Charter* and *Human Rights Act*?
3. Was a sufficiently personalized review of the Applicant's medical condition in fact conducted?

VI. STANDARD OF REVIEW

[32] I cannot resist beginning with quotations from two recent decisions of other Canadian Courts. The first is from Slatter J.A. of the Alberta Court of Appeal in *Edmonton East (Capilano) Shopping Centres Limited v Edmonton (City)*, 2015 ABCA 85 at paragraph 11:

> *11. The day may come when it is possible to write a judgment like this without a lengthy discussion of the standard of review. Today is not that day.*

[33] The second is from Layh J. of the Saskatchewan Court of Queen's Bench who wrote in *Skyline Agriculture Financial Corp v Saskatchewan (Farm Land Security Board),* 2015 SKQB 82 at paragraph 35:

> *35. Respecting the first conclusion and notwithstanding the Supreme Court's continuing leadership in setting the standards of judicial review, locating the goalposts of correctness and reasonableness has remained an elusive target for those obliged to follow this leadership. The Supreme Court, itself, has acknowledged that its efforts to bring clarity to the standard of review analysis are dogged with different views, obliging it to continually hone and reshape standard of review tests….*

[34] The most recent pertinent pronouncements of the Supreme Court of Canada in this regard are those of *Doré v Barreau du Québec*, [2012] 1 SCR 395 and *Loyola High School v Quebec (Attorney General),* 2015 SCC 12.

[35] In *Doré,* Abella J. for the Court wrote that an administration tribunal, when dealing with *Charter* issues, is expected to apply proportionality between the objectives of the legislation at hand and the requirements of the *Charter*. She wrote at paragraphs 7 and 56:

> *7. As this Court has noted, most recently in Catalyst Paper Corp. v. North Cowichan (District), 2012 SCC 2, [2012] 1 S.C.R. 5, the nature of the reasonableness analysis is always contingent on its context. In the Charter context, the reasonableness analysis is one that centres on proportionality, that is, on ensuring that the decision interferes with the relevant Charter guarantee no more than is necessary given the statutory objectives. If the decision is disproportionately impairing of the guarantee, it is unreasonable. If, on the other hand, it reflects a proper balance of the mandate with Charter protection, it is a reasonable one.*
>
> …
>
> *56. Then the decision-maker should ask how the Charter value at issue will best be protected in view of the statutory objectives. This is at the core of the proportionality exercise, and requires the*

> *decision-maker to balance the severity of the interference of the Charter protection with the statutory objectives. This is where the role of judicial review for reasonableness aligns with the one applied in the Oakes context. As this Court recognized in RJR-MacDonald Inc. v. Canada (Attorney General), [1995] 3 S.C.R. 199, at para. 160, "courts must accord some leeway to the legislator" in the Charter balancing exercise, and the proportionality test will be satisfied if the measure "falls within a range of reasonable alternatives". The same is true in the context of a review of an administrative decision for reasonableness, where decision-makers are entitled to a measure of deference so long as the decision, in the words of Dunsmuir, "falls within a range of possible, acceptable outcomes" (para. 47).*

[36] Further, in *Doré*, Abella J. wrote that, on a judicial review, whole deference to the decision maker's expertise is required; the Court must consider reasonableness in the context of proportionality. She wrote at paragraphs 54 and 57:

> *54. Nevertheless, as McLachlin C.J. noted in Catalyst, "reasonableness must be assessed in the context of the particular type of decision making involved and all relevant factors. It is an essentially contextual inquiry" (para. 18). Deference is still justified on the basis of the decision-maker's expertise and its proximity to the facts of the case. Even where Charter values are involved, the administrative decision-maker will generally be in the best position to consider the impact of the relevant Charter values on the specific facts of the case. But both decision-makers and reviewing courts must remain conscious of the fundamental importance of Charter values in the analysis.*
>
> ...
>
> *57. On judicial review, the question becomes whether, in assessing the impact of the relevant Charter protection and given the nature of the [page427] decision and the statutory and factual contexts, the decision reflects a proportionate balancing of the Charter protections at play. As LeBel J. noted in Multani, when a court is faced with reviewing an administrative decision that implicates Charter rights, "[t]he issue becomes one of proportionality" (para. 155), and calls for integrating the spirit of s. 1 into judicial review. Though this judicial review is conducted within the administrative framework, there is nonetheless conceptual harmony between a reasonableness review and the*

> *Oakes framework, since both contemplate giving a "margin of appreciation", or deference, to administrative and legislative bodies in balancing Charter values against broader objectives.*

[37] Abella J. revisited *Doré* in her decision, for the majority, in *Loyola* restating that the expertise of the decision makers in striking a balance is to be respected. She wrote at paragraphs 39 to 42:

> *39. The preliminary issue is whether the decision engages the Charter by limiting its protections. If such a limitation has occurred, then "the question becomes whether, in assessing the impact of the relevant Charter protection and given the nature of the decision and the statutory and factual contexts, the decision reflects a proportionate balancing of the Charter protections at play": Doré, at para. 57. A proportionate balancing is one that gives effect, as fully as possible to the Charter protections at stake given the particular statutory mandate. Such a balancing will be found to be reasonable on judicial review: Doré, at paras. 43-45.*
>
> *40. A Doré proportionality analysis finds analytical harmony with the final stages of the Oakes framework used to assess the reasonableness of a limit on a Charter right under s. 1: minimal impairment and balancing. Both R. v. Oakes, [1986] 1 S.C.R. 103, and Doré require that Charter protections are affected as little as reasonably possible in light of the state's particular objectives: see RJR-MacDonald Inc. v. Canada (Attorney General), [1995] 3 S.C.R. 199, at para. 160. As such, Doré's proportionality analysis is a robust one and "works the same justificatory muscles" as the Oakes test: Doré, at para. 5.*
>
> *41. The Doré analysis is also a highly contextual exercise. As under the minimal impairment stage of the Oakes analysis, under Doré there may be more than one proportionate outcome that protects Charter values as fully as possible in light of the applicable statutory objectives and mandate: RJR-MacDonald, at para. 160.*
>
> *42. Doré's approach to reviewing administrative decisions that implicate the Charter, including those of adjudicative tribunals, responds to the diverse set of statutory and procedural contexts in which administrative decision-makers operate, and respects the expertise that these decision-makers typically bring to the process of balancing the values and objectives at stake on the particular*

> *facts in their statutory decisions: para. 47; see also David Mullan, "Administrative Tribunals and Judicial Review of Charter Issues After Multani" (2006), 21 N.J.C.L. 127, at p. 149; and Stéphane Bernatchez, "Les rapports entre le droit administratif et les droits et libertés: la révision judiciaire ou le contrôle constitutionnel" (2010), 55 McGill L.J. 641. As Lorne Sossin and Mark Friedman have observed in their cogent article:*
>
> > *While the Charter jurisprudence can shed light on the scope of Charter values, it remains for each tribunal to determine ... how to balance those values against its policy mandate. For example, while personal autonomy may be a broadly recognized Charter value, it will necessarily mean something different in the context of a privacy commission than in the context of a parole board. [p. 422]*

VII. DECISION MAKER'S EXPERTISE

[38] The *Transportation Appeal Tribunal of Canada Act*, SC 2001, c. 29, provides for a Tribunal of that name which, by subsection 2(2) of that *Act*, has jurisdiction in respect of reviews and appeals, *inter alia*, as expressly provided for in the *Aeronautics Act*. Subsection 3(1) of the *Transportation Appeal Tribunal of Canada Act* provides that the members of the Tribunal collectively have expertise in the transportation sectors in respect of which the federal government has jurisdiction.

3. (1) The Governor in Council shall appoint as members of the Tribunal persons who, in the opinion of the Governor in Council, collectively have expertise in the transportation sectors in respect of which the federal government has jurisdiction.	*3. (1) Le gouverneur en conseil nomme au Tribunal des membres — ci-après appelés « conseillers » — possédant collectivement des compétences dans les secteurs des transports ressortissant à la compétence du gouvernement fédéral.*

[39] A Court, in reviewing a decision of that Tribunal, is entitled to presume that the members of the Tribunal have such collective expertise. Applicant's Counsel invited me to question or

conduct some kind of review as to the expertise of each panel member. I will not do so. This Court must review the decisions of many different tribunals. It would be a tedious, indeed futile exercise if, as an element of each judicial review, the expertise of a panel member by the Court was to be examined. Perhaps there may be an exceptional reason to do so, but it is the party making the challenge who must offer such a reason clearly; it is not the duty of the Court to conduct such an inquiry routinely or without a proper evidentiary basis.

[40] Having said that, the expertise of the Tribunal lies in this case in matters covered by the *Aeronautics Act*. They are not necessarily lawyers and they are probably most certainly not experts in the matters raised; for example, by the *Charter* or our *Constitution*.

[41] The inquiry of this Court is not to examine the manner to which the *Charter* was, *per se*, handled by the Tribunal because that would expect, for instance, Professor Mullan to sit on every panel. Rather, the exercise of the Court is to consider whether the Tribunal's decision reflects a reasonable balancing of *Charter* rights and the objectives of the legislation.

[42] As previously discussed, there is no mention at all of the *Charter* or *Human Rights Act* in the decision of the one-member panel of the Tribunal and, in fact, there is no clear record that it was raised. The three-member panel made specific mention only briefly to such matters at pages 43 and 44 of its decision which I repeat:

> *[43] There was debate between Mr. Kasting and Mr. Forget as to whether flying was a right or a privilege under the Canadian Human Rights Act. However, this issue is outside the scope of the matters over which the Tribunal has jurisdiction.*
>
> *[44] The appeal panel finds that the member did not err by failing to adequately consider the Canadian Charter of Rights and*

> *Freedoms, and lacks the jurisdiction to consider complaints regarding the Canadian Human Rights Act.*

VIII. IN SUMMARY – STANDARD OF REVIEW

[43] In summary, I will review the decision of the three-member of the Tribunal dated December 16, 2014 on the basis of reasonableness, with deference to the expertise of the Tribunal. The issue before me is whether the decision reasonably, in its result, reflected a proportionate exercise as between *Charter* rights as well as the *Human Rights Act* and the objectives of the *Aeronautics Act*.

IX. WAS THE DECISION REASONABLE HAVING REGARD TO THE STANDARD OF REVIEW?

[44] The decision, in its result, was to refuse a pilot's licence to the Applicant. That refusal was based on the fact that the Applicant was taking four different prescription medicines, two of which are well known to be very sedative.

[45] Counsel for each of the parties acknowledged at the hearing that the objective of the *Aeronautics Act* is air safety. The *Act* itself requires "medical fitness" to be established before a person receives a pilot's licence. A general reference to a test or tests for such fitness is set out in the *Act* or *Regulations*. It is acknowledged that provisions are made for the Minister to exercise some flexibility in the case of some disabilities provided that it is not likely to affect air safety.

[46] The Tribunal was required to consider medical evidence adduced by the Applicant and the Respondents. Applicant's Counsel refers not only to the fact that the Applicant has not, in fact, exhibited any adverse symptoms, but to evidence such as the following from Dr. Remick's report filed by the Applicant:

> *Q1. Does Dr. Corneil's medical condition render him unable to exercise safely the privileges of a pilot's license?*
>
> *A1. There is no medical evidence to suggest that he cannot.*
>
> *Q2. Does Dr. Corneil's medical condition render him unable to exercise safely the privileges of a student pilot permit?*
>
> *A2. There is no medical evidence to suggest that he cannot.*
>
> *Q3. Is Dr. Corneil's medical condition likely to interfere with the safe operation of an aircraft?*
>
> *A3. There is no medical evidence to suggest this.*

[47] The "policy" followed by the Minister's office with respect to persons taking medications was explored by Counsel cross-examining Dr. Raudzus, one of the Minister's medical experts, before the one-member Tribunal. I would repeat what was recorded at pages 92 to 94 of the transcript:

> *Q Okay. So, just to summarize to the tribunal, what was your -- while analyzing and studying this file, you base your conclusion on what? What was the reason why you declared your recommendation was unfit?*
>
> *A Well, my reason was first, primarily driven by the guidelines which says that you need to have a condition that is treated with one of the accepted medications, with a possible addition of a second one to deal with sexual side effects. Under those circumstances, we would consider granting a licence. However, this man was taking two medications to treat the underlying condition, one of which is not accepted, clonazepam is not one of the accepted medications, because it is a sedating drug. And secondly,*

he has two drugs to deal with side effects, one of which is also not accepted, again because it is very sedating.

Q *Okay, so if I understand you well, if a person has only one medication, it could be "fit" or "fit with restrictions" for a pilot licence?*

A *That's correct.*

Q *Okay, but if you are taking more than one, then it is over?*

A *It is not acceptable, particularly if one of the ones is clearly not on the list of drugs that we accept, and secondly, is also very sedating.*

Q *Okay, I am right to say that in the past, even if you had an OCD, obsessive compulsive disorder, you were automatically unfit?*

A *In the past, that obsessive compulsive disorder led to an automatic disqualification.*

Q *So, with this guidelines, I am right to say the Minister of Transport just opened a little bit the door to say, okay, if you are taking one medication, we can be flexible?*

A *That is correct.*

Q *But if you are taking more than one, they close the door.*

A *That's right.*

Q *Okay. And why? Why don't want to --*

A *Because what -- when we first started opening the door to being less restrictive, we really wanted to look at people whose condition was not so complex that it need to have multiple medications to treat it. And the more medications that would be introduced, the more risk we have of interactions, drug interactions, and because some of these drugs have not been properly tested in terms of their impact on cognition. So, for instance, the drugs that we have accepted, we actually did some trials at the Defence Research Institute in Toronto, to test peoples' cognition while taking those drugs. So, we know the drugs that we have accepted are clearly not -- do not lead to cognitive impairment in and of themselves.*

[48] I have not reproduced all of the relevant evidence but what I have set out gives a flavour as to what the one-member Tribunal had to consider and the three-member Tribunal had to review. This evidence is, by its nature, somewhat speculative; the Applicant has not had a problem – yet – and his medical expert says, in the double negative, that there is no evidence that he cannot. The Minister's medical evidence is to the effect that, while one cannot say for certain, the more drugs that are being taken, the more one has to be cautious as to their effect, particularly with respect to sedating drugs.

[49] These questions are precisely what the panels, the one-member then three-member, are to consider having regard to their expertise and the concern for air safety. No doubt the Applicant wants to fly and has exercised his right to apply for a licence. It should not be presumed that every applicant has a right to receive a licence.

[50] Applicant's Counsel referred to the *Meiorin* test which was summarized by the Chief Justice of the Supreme Court of Canada in *Grismer v British Columbia (Council of Human Rights)*, [1999] 3 SCR 868 at paragraphs 19 to 22:

> *19. Meiorin announced a unified approach to adjudicating discrimination claims under human rights legislation. The distinction between direct and indirect discrimination has been erased. Employers and others governed by human rights legislation are now required in all cases to accommodate the characteristics of affected groups within their standards, rather than maintaining discriminatory standards supplemented by accommodation for those who cannot meet them. Incorporating accommodation into the standard itself ensures that each person [page881] is assessed according to her or his own personal abilities, instead of being judged against presumed group characteristics. Such characteristics are frequently based on bias and historical prejudice and cannot form the basis of reasonably necessary standards. While the Meiorin test was developed in the*

employment context, it applies to all claims for discrimination under the B.C. Human Rights Code.

20. Once the plaintiff establishes that the standard is prima facie discriminatory, the onus shifts to the defendant to prove on a balance of probabilities that the discriminatory standard is a BFOR or has a bona fide and reasonable justification. In order to establish this justification, the defendant must prove that:

> *(1) it adopted the standard for a purpose or goal that is rationally connected to the function being performed;*
>
> *(2) it adopted the standard in good faith, in the belief that it is necessary for the fulfillment of the purpose or goal; and*
>
> *(3) the standard is reasonably necessary to accomplish its purpose or goal, in the sense that the defendant cannot accommodate persons with the characteristics of the claimant without incurring undue hardship.*

21. This test permits the employer or service provider to choose its purpose or goal, as long as that choice is made in good faith, or "legitimately". Having chosen and defined the purpose or goal -- be it safety, efficiency, or any other valid object -- the focus shifts to the means by which the employer or service provider seeks to achieve the purpose or goal. The means must be tailored to the ends. For example, if an employer's goal is workplace safety, then the employer is entitled to insist on hiring standards reasonably required to provide [page882] that workplace safety. However, the employer is not entitled to set standards that are either higher than necessary for workplace safety or irrelevant to the work required, and which arbitrarily exclude some classes of workers. On the other hand, if the policy or practice is reasonably necessary to an appropriate purpose or goal, and accommodation short of undue hardship has been incorporated into the standard, the fact that the standard excludes some classes of people does not amount to discrimination. Such a policy or practice has, in the words of s. 8 of the Human Rights Code, a "bona fide and reasonable justification". Exclusion is only justifiable where the employer or service provider has made every possible accommodation short of undue hardship.

22. "Accommodation" refers to what is required in the circumstances to avoid discrimination. Standards must be as inclusive as possible. There is more than one way to establish that the necessary level of accommodation has not been provided. In Meiorin, the government failed to demonstrate that its standard

> *was sufficiently accommodating, because it failed to adduce evidence linking the standard (a certain aerobic capacity) to the purpose (safety and efficiency in fire fighting). In Mr. Grismer's case, a general connection has been established between the standard (a certain field of peripheral vision) and the purpose or goal of reasonable highway safety. However, the appellant argues that some drivers with less than the stipulated field of peripheral vision can drive safely and that the standard is discriminatory because it does not provide for individualized assessment. Failure to accommodate may be established by evidence of arbitrariness in setting the standard, by an unreasonable refusal to provide individual assessment, or perhaps in some other way. The ultimate issue is whether the employer or service provider [page883] has shown that it provides accommodation to the point of undue hardship.*

[51] In brief, an employer, and here by analogy, the Minister of Transport, can choose its purpose or goal as long as it is done in good faith and legitimately. If the policy or practice is reasonably necessary to an appropriate purpose or goal, and accommodation short of undue hardship has been incorporated into the standard, the fact that some classes of persons are excluded does not amount to discrimination.

[52] In the present case, the *Act* and *Regulations* are directed to air safety. Medical fitness of a pilot is required. Discretion is given to the Minister, in the case of a disability, to grant a licence when air safety is not compromised.

[53] Here, evidence was given that the taking of multiple drugs, particularly sedative drugs, may have an effect on a pilot's medical fitness. While no effects have yet manifested themselves in respect of this particular Applicant, the Tribunal has to consider all the evidence and come to a conclusion. The conclusion reached by the one-member and by the three-member Tribunal was that the risk to air safety outweighed the individual benefit to the Applicant to receive a licence.

The three-member panel offered an alternative to the Applicant of changing one of the drugs to another so as to accommodate him. There is no record that this has been done.

[54] The decision of the three-member Tribunal (as well as the one-member Tribunal) was reasonable and adequately took into consideration rights of the Applicant afforded by the *Charter* and the *Human Rights Act*.

X. WAS A SUFFICIENT PERSONALIZED REVIEW OF THE APPLICANT'S MEDICAL CONDITION IN FACT CONDUCTED?

[55] The Applicant seeks, as part of the relief, an "individualized medical test". The nature of that test is not clearly set out in the Applicant's material nor is there an indication as to whom and how it is to be conducted or who will pay for it.

[56] In the proceedings before the Tribunal, the Applicant was afforded the opportunity to lead evidence as to his medical fitness, and did. So did the Minister. To that extent, the Applicant had a personalized review of his medical fitness.

[57] The Applicant is a senior medical doctor; if he believed that certain tests could be appropriately conducted, he should propose what they are. Perhaps he should have conducted such tests and provided the results to the Tribunal. We have the evidence that he did provide, and the resulting decision to refuse a licence is, as I have determined, reasonable.

XI. CONCLUSION AND COSTS

[58] I find that the application to this Court for judicial review of the three-member Tribunal dated December 16, 2014 will be dismissed.

[59] The Respondents have been successful and are entitled to costs. Column III is the appropriate level for costs in this case. In lieu of taxation, I fix those costs at $2,500.00 inclusive of all disbursements and taxes.

JUDGMENT

FOR THE REASONS PROVIDED, THIS COURT ORDERS AND ADJUDGES that:

1. The application is dismissed.
2. The Respondents are entitled to costs fixed at $2,500.00 inclusive of all disbursements and taxes.

"Roger T. Hughes"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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