

## [Douglas v. Canada \(Minister of Transport\), \[2017\] C.T.A.T.D. No. 12](#)

Canada Transportation Appeal Tribunal Decisions

Canada Transportation Appeal Tribunal

Vancouver, British Columbia

Panel: Arnold Olson, Member

Heard: January 26, 2017.

Decision: April 13, 2017.

Docket: P-4248-27

MoT File No.: 5802-259342 (TAR)

**[2017] C.T.A.T.D. No. 12** | 2017 TATCE 12 (Review)

IN THE MATTER OF the request for a review hearing by Karen Joy Douglas with respect to a Notice of Refusal to Issue or Amend a Canadian Aviation Document issued by the Minister of Transport pursuant to section 6.71 of the Aeronautics Act, R.S.C., 1985, c. A-2. Between Karen Joy Douglas, Applicant, and Minister of Transport, Respondent

(56 paras.)

### Case Summary

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#### **Tribunal Summary:**

**Held:** The decision to refuse to renew the applicant's delegated authority as an aviation language proficiency test (ALPT) rater/tester is referred back to the Minister for reconsideration.

### Appearances

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For the Applicant: Karen Douglas (self-represented).

For the Respondent: Eric Villemure.

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## REVIEW DETERMINATION AND REASONS

### I. BACKGROUND

1 Ms. Karen Douglas, the applicant, was the holder of a Canadian aviation document, namely an aviation language proficiency test (ALPT) rater/tester delegation. On June 3, 2016, the Minister of Transport (Minister) issued a Notice of Refusal to Issue or Amend a Canadian Aviation Document (Notice) to Ms. Douglas pursuant to section 6.71 of the *Aeronautics Act*, R.S.C., 1985, c. A-2. Appendix A of the Notice provided the following grounds for the refusal to

renew the delegation under "Public interest reasons for refusal (par. 6.71(1)(c))":

- A. Failure to follow guidelines to alternate Aviation Language Proficiency Tests (ALPT) as outlined in Staff Instruction 400-003 (as listed below in Statutes and Regulations). [...]

And

- B. Failure to cooperate with Transport Canada, namely, your failure to permit Transport Canada to conduct a site visit to perform oversight activities.

Specific examples for item A noted above are as follows:

1. On August 25, 2015 Aviation Language Proficiency Test # 2011-03 was given to a student who failed. The same student was retested using the same test #2011-03 on October 1, 2015 and passed.
2. On August 26, 2015 Aviation Language Proficiency Test # 2011-03 was given to a student who failed. The same student was retested using the same test #2011-03 on November 20, 2015 and passed.
3. On September 23, 2015 Aviation Language Proficiency Test # 2011-02 was given to a student who failed. The same student was retested using the same test #2011-02 on November 30, 2015 and passed.
4. On September 25, 2015 Aviation Language Proficiency Test # 2011-02 was given to a student who failed. The same student was retested using the same test #2011-02 on December 10, 2015 and passed.
5. On September 28, 2015 Aviation Language Proficiency Test # 2011-02 was given to a student who failed. The same student was retested using the same #2011-03 on October 16, 2015 and failed again. On November 30, 2015 test #2011-02 was used again and the student passed.
6. On September 24, 2015 Aviation Language Proficiency Test # 2014-01 was given to a student who failed. The same student was retested using the same test #2014-01 on December 10, 2015 and passed.
7. On September 28, 2015 Aviation Language Proficiency Test # 2014-01 was given to a student who failed. The same student was retested using the same test #2014-01 on December 10, 2015 and failed. On December 28, 2015 test #2011-02 was used and the student passed.
8. Respecting item 7.9(1) of the Staff Instruction 400-003, you failed to ensure that all examinations in a series receive equal distribution. Specifically, from January 7, 2015 to January 19, 2016, you administered 78 tests comprising of: test #2011-03 (37 times); test #2011-02 (21 times); test #2014-01 (19 times); test #2011-04 (1 time).

Respecting item B above:

9. On multiple occasions from January 13, 2016 to June 2, 2016, Transport Canada contacted you, Karen Douglas, to try to discuss its concerns and to arrange a time to perform oversight; however, no site visit could be scheduled.

## II. STATUTES AND REGULATIONS

2 Paragraph 6.71(1)(c) of the *Aeronautics Act* reads as follows:

**6.71 (1)** The Minister may refuse to issue or amend 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 applicant or of any principal of the applicant, as defined in regulations made under paragraph (3)(a), warrant the refusal.

3 Paragraph 401.06(1.1)(b) of the *Canadian Aviation Regulations*, SOR/96-433 (CARs), reads as follows:

**401.06 (1.1)** An application shall also include:

(b) in the case of a licence, documentation establishing that the applicant demonstrated, by means of an evaluation, their ability to speak and understand English or French, or both, at the operational or expert level in accordance with the language proficiency scale set out in the table to subsection 421.06(4) of the personnel licensing standards.

### III. EVIDENCE

#### A. Minister

##### (1) *Examination-in-Chief of Carmela Kramer*

4 Ms. Kramer manages the Transport Canada ALPT program in the Pacific Region. She described the purpose of the program as ensuring that the CARs requirement for language testing is met. This was determined by international standards so that communications between aircraft and ground stations could be readily understood.

5 The witness explained that ALPT raters/testers are delegates authorized by the Minister to conduct the actual language proficiency testing. In 2008, Transport Canada prepared four available standard tests in English and four in French. ALPT testers administer the oral examination, verify candidate identification, fill out exam sheets and advise candidates of the resulting assessment: Level 6 -- Expert, Level 4 -- Operational, or Below Operational. A Level 6 assessment means the candidate will never need to be tested again, whereas a Level 4 assessment expires after five years. A candidate must attain at least a Level 4 assessment in order to be issued a Canadian pilot's licence. The level of proficiency is printed on the licence and is internationally recognized. The witness introduced the ALPT test form (Exhibit M-2), and the Transport Canada Advisory Circular 400-002 describing the ALPT program (Exhibit M-3).

6 ALPT testers are expected to follow the Minister's guidelines as laid out in the Advisory Circular and training materials, work harmoniously with Transport Canada, follow instructions related to the ALPT program and adhere to the Statement of Acceptance of Responsibilities and Obligations. Ms. Douglas attended a training workshop on May 21, 2014. She had signed the Statement of Acceptance of Responsibilities and Obligations on February 2, 2014 and her certification had been renewed as an ALPT rater/tester until February 1, 2016 (Exhibit M-4).

7 As Ms. Douglas's February 2, 2016 renewal date approached, anomalies were noticed in the exam results that she had been submitting. A spreadsheet was prepared and it became clear that certain exams were being favoured and some exams repeated on re-tested candidates that had failed. These specific results are detailed in the Notice issued to the applicant (Exhibit M-1). The training materials provided to Ms. Douglas refer to Staff Instruction 400-003 (Exhibit M-5), section 7.9 -- Systematic Examination Use, and the requirement to alternate exams. Although the staff instruction makes no specific reference to language testing, it is to be assumed that this requirement was applicable to that type of examination as well as to others.

8 When Ms. Douglas had enquired about the progress of her renewal of authority, Ms. Kramer replied that her renewal had been prepared and was ready for pick-up, adding that she would like to conduct a "monitor" (i.e. monitor Ms. Douglas as she administered an ALPT test). She also requested that Ms. Douglas come to the Transport Canada office in person to discuss some anomalies in her exam submissions. At that time, the intent was to discuss what had been discovered through the spreadsheet, and to renew her delegation of authority. Ms. Douglas did not follow up on the invitation to meet; her authority expired and was not renewed.

##### (2) *Cross-examination of Carmela Kramer*

9 Ms. Kramer described complaints that had been received from the international aviation community, specifically Korea and Japan, about the ALPT program as it was conducted in Canada. Some Korean and Japanese pilots were not proficient in English yet had received a Level 6 -- Expert assessment in Canada. The ALPT program in the Pacific Region was most affected, so in an attempt to respond quickly, a regional decision was made, approved at the national level, to establish a pilot program to make it more difficult to obtain a Level 6 -- Expert assessment. The marking scale was changed when the test was conducted in the Pacific Region. Also, due to a concern in relation to the *Privacy Act*, the Minister's delegates themselves were instructed not to collect and write down candidates' personal information, while still being expected to verify their identity.

10 Ms. Kramer agreed that an email written on January 29, 2016, only several days before her authority expired, was the only correspondence sent to Ms. Douglas regarding anomalies in exam submissions during the entire period of her delegated authority. In order to accommodate Ms. Kramer's request to conduct a monitor, some dates were proposed by both parties. However, due to prior vacation plans, business hour constraints and advance notice requirements by Transport Canada, in addition to a lack of available candidates, neither a monitor nor an in-person meeting took place.

### **(3) Examination-in-Chief of Michele d'Eon**

11 Ms. d'Eon was the acting service team lead for the ALPT program from April 11, 2016 to August 2016. The day after she started in that role, she received a letter from Ms. Douglas's counsel, Connor McGarry, demanding issuance of her renewal of authority (Exhibit M-6). Ms. d'Eon replied by letter that, although the letter of renewal had been prepared, Transport Canada had advised Ms. Douglas both in writing and by telephone that an in-person visit was necessary to ensure that she was following program criteria accurately (Exhibit M-7). No decision at that time had been made to issue or not issue Ms. Douglas's authority. Had the meeting occurred it was quite likely that Ms. Douglas would have received her delegated authority. Extensive email exchanges during May and June indicate meetings were proposed by both parties then cancelled. Matters had concluded with "my lawyer will contact you". With candour, Ms. d'Eon said the parties didn't just have a communication breakdown, they had a "relationship breakdown". It had become apparent to her that Ms. Douglas didn't want to work with Transport Canada in a collegial manner. After receiving the email mentioning her lawyer would be in contact, they had waited a day or so before sending the Notice of Refusal on June 3, 2016.

## **B. Applicant**

### **(1) Examination-in-Chief of Blair Parrent**

12 Mr. Parrent is the chief flight instructor of Montair Aviation and described that a major component of their business is the flight instruction of Chinese airlines' cadet pilots. After flight training is completed they return to China and join their airline. All Chinese students who come to Montair are graduates of the Civil Aviation Flight University of China, where part of the training includes English studies. About 30 percent of students fail the ALPT test in Canada on their first attempt.

13 In April 2016, two of Montair's Chinese students passed their language proficiency tests but Transport Canada requested that the two students come to the downtown office. Upon arrival, the two students were called sequentially into separate meetings and given a panel-style English language proficiency examination. One student passed and received the Private Pilot Licence. The other student failed the examination, was subsequently re-tested by another language examiner and failed again. That examiner informed Mr. Parrent that the Pacific Region was using a more difficult exam marking scale than the rest of the country. The student who had just been re-tested and had failed would have passed if assessed according to the national standard. The student in question received a third language assessment from an examiner from the Prairie and Northern region and passed.

14 The witness testified that during the last six months, it had been difficult to get language examiners in the Pacific

Region to conduct language assessments on Montair students; they were now using Alberta-based examiners to conduct the tests over the telephone. Delays in conducting the tests had created additional costs to Montair and delays in student progress.

**(2) Cross-examination of Blair Parrent**

**15** Mr. Parrent said the reason given by Transport Canada for the changes in the marking scale in the Pacific Region was a safety concern created by large numbers of ESL students with limited English language skills flying in the greater Vancouver airspace.

**(3) Examination-in-Chief of Karen Douglas**

**16** Karen Douglas is an authorized examiner for pilot flight tests, has been a chief flight instructor and was selected by Transport Canada to be an ALPT rater/tester. She described her initial one-day ALPT training in January 2008 as including the instruction to use one language examination until proficient and only then to move on to using the next exam. No rotation of exams was suggested.

**17** Extensive summaries of her involvement in the ALPT program, her training and interactions with Transport Canada administrators were introduced (Exhibits A-1 and A-2). The Code of Ethics from the Manual on the Implementation of ICAO Language Proficiency Requirements (Exhibit A-3) was quoted as describing the importance of respect for all cultures. The Transport Canada Pilot Examiner Manual (Exhibit A-4) was also quoted as stating that prior to making a final decision not to renew a delegated authority, the pilot examiner must have been given "a formal opportunity to respond".

**18** Ms. Douglas referred to areas specified in the Transport Canada Flight Test Guide (Exhibit A-5), such as aircraft performance or navigation, in which extensive use of English must be demonstrated on a pilot flight test as a matter of course. The witness also highlighted that according to the Flight Test Statistics Report from Transport Canada's Flight Training Aviation Education database (Exhibit A-6), the failure rate of private pilot flight tests during 2015 and 2016 due to radio communication was very low at less than one percent.

**19** Exhibit A-7 consists of photos of the hangar and filing cabinet where Ms. Douglas retains her aviation documents. She stated that she considered this to be her actual place of business and when Ms. d'Eon wanted to conduct a "site inspection" she thought such a visit would be a "waste of this lady's day". That was the reason she had not wanted to set up such a visit.

**20** The ALPT training manual (Exhibit A-8) that Ms. Douglas received at the May 21, 2014 workshop she attended contains Staff Instruction 400-003 (which states the requirement to rotate examinations). However, she said the Staff Instruction was not specifically referenced in her training.

**21** An e-mail dated April 3, 2014 from Kerry Mackenzie, the acting service team lead for the Pacific Region, to ALPT delegates (Exhibit A-9), reported that some language examiners had noted test scores much higher than the candidates' apparent conversational ability, possibly because the same four tests have been in use since 2008. The email recommended that in these cases, the examiner generate some additional questions of their own. This recommendation and the new examination score sheet to be used (Exhibit A-10) provided evidence that the Pacific Region had departed from the national standard of language testing. The witness also introduced into evidence the contents of the training manual for the January 14, 2008 ALPT examiner workshop (Exhibit A-11).

**22** Changes to the ALPT program were presented during the one-day training seminar in May 2014. Koreans pilots were coming to Canada for their English language assessment as the tests were easier in Canada. Korean airline pilots, while in Vancouver on a layover, would pass an English language competency exam, take that certification back to Korea and have their Korean licence endorsed for Expert English competency. So the Pacific Region made a "fix" to make it more difficult to pass the test. Ms. Douglas recalled hearing that Transport Canada inspectors had

called some of these airline pilots "into a back room", interviewed them and stripped them of their language certification. Due to a concern of similar treatment for herself, she had reservations about meeting with Transport Canada without a lawyer.

**23** Exhibit A-12 summarizes the changes the Pacific Region had made to ALPT tests. Exhibit A-13 is a letter sent to all language proficiency examiners in the Pacific Region requiring that all examinations be recorded and the audio file submitted to Transport Canada for evaluation.

**24** Ms. Douglas was concerned that these new procedures were in violation of a person's right to privacy so she contacted the regional Transport Canada privacy officer. Shortly thereafter, on May 28, 2015, a directive (Exhibit A-14) was issued to all regions stating that in the interest of protecting personal privacy, effective immediately, these audio recordings were to cease, and a candidate's personal identification should not be copied or retained by the examiner.

**25** Ms. Douglas read from a thick sheaf of emails and telephone records between her and Transport Canada from December 27, 2015 to June 9, 2016 (Exhibit A-15). Ms. Douglas came in to the Transport Canada office on January 13, 2016, applied to renew her delegation and proposed a meeting and monitor on February 10, 2016. Subsequent communications were cordial except for one occurrence when Ms. Douglas became angry and hung up the phone. The reason for her anger was that Ms. Kramer had requested a non-native English speaker as an ALPT candidate for the monitor. Ms. Douglas reacted very strongly to that request, believing that she would have to engage in racial profiling in order to comply, something she would not do. Ms. Douglas described her state of mind: she would no longer meet with Transport Canada without legal representation. Relations deteriorated when her lawyer sent a letter demanding the issuance of her delegation. He initially said he would be available to come with Ms. Douglas to a meeting on June 1 and it was scheduled for that date. The lawyer's availability then changed to the afternoon of June 2. Transport Canada officials were not available that afternoon, a new meeting was not scheduled, and one day later, on June 3, 2016 the Notice of Refusal was issued.

#### **(4) *Cross-examination of Karen Douglas***

**26** Ms. Douglas agreed that she had misunderstood some of the communications and had taken offence to the word "anomalies". The email of January 29, 2016 was referenced indicating that Transport Canada was willing to forgo the monitor but only required an in-person meeting in order to provide her with her renewal certificate. Ms. Douglas replied that she was wary of going into a meeting with Transport Canada by herself without legal counsel.

**27** Ms. Douglas recalled writing to the Minister of Transport with her concerns about the ALPT program, the retention of personal information, and how the Pacific Region was using a marking standard different to the national standard. Though Korean pilots had "corrupted the exam" by memorizing all the questions on all four exams, she did not agree that the changes the Pacific Region had made in order to make the examinations more difficult were justified. She thought the obvious solution was to create some new national exams.

**28** She recalled writing a personal letter to the Minister outlining her concerns about how the Pacific Region was dealing with matters of race, ethnicity, and breaches of the Privacy Act. She wrote that she had been "bullied" by certain Transport Canada officials when they requested she present a non-native speaker as an ALPT candidate to whom she would administer the test while being observed.

#### **(5) *Examination-in-Chief of Paul Harris***

**29** Mr. Harris is the manager of operations at the Pacific Flying Club and has been involved with the ALPT program since its inception, having personally conducted between 500 and 600 language proficiency tests. He said the original 2008 training placed no emphasis at all on rotating the language exams--quite the opposite: attendees were told to "pick an exam and make it [their] own". However, he recalled that at the May 21, 2014 training workshop, concerns were expressed that exams had been compromised. He also recalled that if a candidate were to fail an

exam and have to repeat it, a different exam should be used. The obvious problem was stated that, since no candidate records were to be retained by ALPT testers, if a re-test candidate sought out a different examiner there would be no way of knowing what exam had previously been administered. The examiner would have to rely on the candidate to know what exam had been previously attempted.

#### **IV. ARGUMENTS**

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

**30** The Minister referred to paragraph 6.71(1)(c) of the *Aeronautics Act*, which allows the Minister to refuse to issue a Canadian aviation document on the grounds that the public interest warrants the refusal. Paragraph 401.06(1.1)(b) of the *CARs* specifies the requirement to speak and understand English or French in order to receive a Canadian pilot's licence. In this case, the Minister exercised statutory discretion in good faith, in accordance with the principles of natural justice, and only relied on considerations relevant to the statutory purpose, that being the public interest in aviation safety. Since this is an administrative rather than an enforcement matter, in keeping with the Supreme Court's decision in *Maple Lodge Farms v. Government of Canada*, [1982] 2 SCR 2, the Tribunal should not interfere.

**31** The anomalies in the record of language proficiency examinations submitted by Ms. Douglas are not in dispute. In good faith, Transport Canada gave her four months to come in and discuss the anomalies, and as early as January 29, 2016, Transport Canada no longer required a language proficiency monitor; they just required an in-person meeting with Ms. Douglas to discuss the anomalies before they would provide her with a renewed certificate of authorization. Unfortunately there was a breakdown in communication, lawyers became involved, accusations were made and Transport Canada lost its trust in this Minister's delegate. All that was required was that Ms. Douglas come in for a discussion about the ALPT program requirements related to the rotation of examinations and that did not happen; therefore, her delegation was not renewed.

##### **B. Applicant**

**32** From April 2014, changes were made to the ALPT program in the Pacific Region and examiners were instructed to administer and score tests in a way that was different from the national standard. For example, in 2015 testers in the region were no longer trusted to evaluate candidates but were asked to record an audio file as they conducted the language exam and to forward the file to Transport Canada for evaluation. Ms. Douglas had grave concerns that these regional changes did not conform to the requirements of the national program. Further, she believed Transport Canada to be in breach of federal privacy legislation when they asked her to produce a non-native English speaker for her monitor. These concerns resulted in miscommunication between the parties.

**33** She recalled signing an agreement to conform to ALPT guidelines. However, these guidelines were contained in Staff Instruction (SI) 400-003, which specifies that it only applies to Transport Canada "employees", and thus not to ALPT examiners who are contractors rather than employees. Section 7.9 of SI 400-003 only applies to computer-generated or written examinations; there is no reference to oral examinations such as the language proficiency test. It also states that a candidate's examination history should be checked to ensure that the same exam is not repeated. However, in the case of ALPT examiners in the field, there is no way to check the examination history apart from asking the candidate because ALPT testers were specifically instructed not to record or retain information about a candidate's identification. As candidates go from examiner to examiner, they may not remember or be honest about what tests they have taken. In this context, it does not make sense for SI 400-003 to apply to ALPT examiners.

**34** Moreover, SI 400-003 does not even appear in training manuals outside the Pacific Region, so it cannot be said that it is to be relied upon by ALPT examiners. Finally, the version of SI 400-003 quoted by Transport Canada in the Notice of Refusal has been superseded by a later version. Therefore, the Notice of Refusal is based on a voided document.

**35** The email record shows that Ms. Douglas was unable to schedule a meeting with Transport Canada on June 2, 2016. She was willing to meet but there were scheduling problems and she wanted a lawyer present at the meeting. Therefore, it cannot be said that she would not agree to a meeting.

**36** The Tribunal has previously considered the case of *Bancarz v. Minister of Transport*, [2007 FC 451](#), in which the Minister's decision was referred back for reconsideration. Ms. Douglas submitted that her work as a Minister's delegate had been performed to a much higher standard than in that case. She requested to be treated similarly to Mr. Bancarz and to have the matter sent back for reconsideration by Transport Canada.

## V. ANALYSIS

### (1) *Jurisdiction of the Tribunal*

**37** The Minister's representative submitted that based on the Supreme Court's *Maple Lodge Farms* judgement, the Tribunal should not interfere with the Minister's decision because this decision is of an administrative nature and not an enforcement matter. The Federal Court has addressed this argument in *Canada (Attorney General) v. Bethune*, [2016 FC 583](#), by stating that the Transportation Appeal Tribunal of Canada acts as an oversight on the Minister and his officials. The Federal Court also added that the Tribunal, in exercising its power to refer back a Minister's decision, was not usurping ministerial responsibilities but simply directing the Minister to look at the matter with better evidence. The statutory scheme at play in *Maple Lodge Farms* provided a ministerial discretion to issue permits rather than a duty to issue permits if a set of conditions were met. The Supreme Court found that such statutory discretion must be exercised in good faith, in accordance with the principles of natural justice and without placing reliance on considerations that are irrelevant or extraneous to the statutory purpose. The case at hand involves a similar ministerial discretion; therefore, as long as the Minister's decision is reviewed under the parameters set out by the Supreme Court, the Tribunal is acting within its jurisdiction.

### (2) *Matter at issue: Was Transport Canada's refusal to issue a delegated authority to Ms. Douglas justified?*

**38** The public interest as it pertains to the present case is aviation safety, not only in Canada, but also in international air travel as pilots certified through the ALPT program fly with commercial carriers worldwide. The introduction to the ICAO Manual (Exhibit A-3) states that "inadequate language proficiency has played a role in accidents and incidents". Transport Canada has a duty, through its ICAO obligations, to ensure that language proficiency is established. In upholding the public interest, the elements that Transport Canada put forth in support of its decision in this case are the following:

1. seven instances of failed candidates being re-tested with the same test (repeating);
2. a failure to ensure that all examinations received equal distribution; and
3. a failure to cooperate with Transport Canada, specifically with respect to accommodating a site visit to perform oversight activities.

**39** Some of the requirements that apply to ALPT testers are found in Staff Instruction 400-003 (Exhibits M-5 and A-8, and as quoted in the Notice). Staff Instructions, however, are not law, so a failure to conform does not necessarily mean that any law was breached. Furthermore, because they constitute policy, they are non-binding on the Tribunal. Therefore, the applicability and weight of Staff Instruction 400-003 in this case must first be established.

**40** Ms. Douglas argues that SI 400-003 only applies to employees and not to those who, like her, are outside contractors. However, as Minister's delegates under subsection 4.3(1) of the *Aeronautics Act*, ALPT testers perform the duties of the Minister. For the purpose of their training of May 21, 2014 on the performance of those duties, the Staff Instruction was placed in the ALPT training manual and reference was made to it. Therefore, I find that in this

case it applies to ALPT testers, whether employees or contractors, since they are performing by legal delegation the same ministerial duties.

41 The applicant also argues that the Staff Instruction does not apply since the Notice relies on a document that had been superseded prior to issuance of the Notice. Nevertheless, the relevant consideration is not when the Notice was issued but rather when the non-compliance occurred. It is a well-established principle that a document may be applied during the time it was valid and in effect, and this was the case when the exams were being repeated. Therefore, the requirements within the Staff Instruction apply in this case.

**(a) Requirement not to repeat a test**

42 Staff Instruction 400-003 is a broad, generic document for administering various aviation examinations, whether written or computer-based, and it reasonably applies by extension in the case of oral examinations as the essence of the guidance is the same in each case, that is, not to give a re-test candidate the same test as the first time. Moreover, Mr. Harris indicated that during the May 21, 2014 training workshop, language examiners were instructed not to use the same examination for a re-test. Taken together, I find the requirement not to repeat the same examination on a re-test is established.

43 That said, the applicant asks an insightful question: Since ALPT testers in the field have no way of reliably knowing the exam history of candidates because they have been specifically instructed not to keep identity records, how can they be expected to reliably ensure that an exam is not given a second time on a re-test?

44 This instruction by Transport Canada seemed to be based on privacy concerns instead of aviation safety concerns. (Perhaps a review of this instruction by Transport Canada would be helpful in order to ensure that the objectives of the *Aeronautics Act* with regard to aviation safety are adequately provided for.) Whether candidates go "shopping" from tester to tester or are re-tested by the same examiner months later, it is not reasonable to rely on candidates to recall what exam had previously been administered to them. ALPT testers have been intentionally blinded by the regulator to the examination history of the candidate as they were specifically instructed on May 28, 2015 not to retain identity records (Exhibit A-14). The seven instances of a test being repeated are not in dispute, but they all occurred after May 28, 2015. Assuming Ms. Douglas was entirely compliant with the instruction, she would have had no way of knowing whether or not she was administering a repeated test, apart from relying on the candidate to remember and be honest.

45 Test repeating is a very poor practice that Staff Instruction 400-003 aims to prevent, but testers in the field must then have a mechanism by which they can know what tests they are not to use in each case. For a tester who was in compliance with the instruction of May 28, 2015, that mechanism did not exist at the time of the seven occurrences. To be clear: requiring that examinations not be repeated is common-sense good practice. However, it is unreasonable for Transport Canada to require that examinations not be repeated but at the same time to require that identity records, and thus prior examination history, not be available to the tester. Without that information, testers are denied a critical mechanism they require in order to do their job in a way that complies with all requirements. Therefore, I dismiss this ground for the refusal as the evidence shows that compliance with this requirement was hindered by the very instruction given by the Minister not to keep identity records.

**(b) Requirement to rotate between examinations**

46 The requirement to rotate between examinations is clearly laid out in Staff Instruction 400-003. Ms. Douglas argues on the other hand that rotation of tests was not a significant part of ALPT training, apart from an oblique reference to the Staff Instruction. Additionally, Mr. Harris stated that in the 2008 training course no emphasis was placed on exam rotation; testers were instead instructed to use only one exam until they could administer it in a proficient manner and only then to move to another exam. So it does not appear that ALPT training specified a strict adherence to a rotation schedule.

47 In the last 12 months of Ms. Douglas's delegation period, 78 tests were administered, among which one test was used 37 times and another only once. Her evidence (Exhibit A-15, tab 31), however, showed that during the last two months in which she held a delegation she did rotate through exams 1 through 3 fairly equally.

48 Apart from the generic Staff Instruction, no evidence was offered of guidance to ALPT testers to the effect that strict exam rotation was so critically important that one could lose their delegation over it. For these reasons I find that the applicant's alleged failure to strictly rotate exams is possibly unfounded and, in any event, insufficient to warrant the refusal and dismiss this ground.

### **(c) Cooperation with Transport Canada**

49 Though the Notice specifies the failure to permit a site visit for oversight as one of the grounds for the refusal to issue in the public interest, I note that the letter from Regina Kumar (Exhibit A-15, tab 12) said that it could be scheduled subsequent to the renewal of Ms. Douglas's delegation. Accordingly, I find the evidence to show that the requirement of a site visit was of secondary interest to Transport Canada and insufficient to warrant the refusal.

50 Cooperation with Transport Canada for program oversight, however, is a far larger issue than just a site visit. The email record shows a consistent and reasonable request for Ms. Douglas to come to an in-person meeting with administrators to discuss her history of exam submissions. The regulator had the duty to ensure compliance with the ALPT delegation and, since concerns arose, an in-person meeting to discuss them was a logical first step.

51 As a Minister's delegate, Ms. Douglas also had a duty to cooperate. The email record shows some willingness on her part to meet, but it also shows a growing distrust of ALPT administrators and a "relationship breakdown". In the end, Ms. Douglas was willing to meet with Transport Canada on June 1, and then on the afternoon of June 2, the only time her lawyer was available. Unfortunately, Transport Canada was not. In frustration, Ms. Douglas said her lawyers would contact Transport Canada. Only two days later the Notice of Refusal was issued.

52 No matter how one looks at it, this reaction to the applicant's determination to be represented by a lawyer seems to be arising out of considerations that are irrelevant and extraneous to the statutory objectives of the *Aeronautics Act*. This was too short a period of time to permit Ms. Douglas or her lawyer the opportunity to re-establish communication and to try to reschedule a meeting. I find the shortness of that time period to be a breach of the principle of procedural fairness as stated in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817:

The values underlying the duty of procedural fairness relate to the principle that the individual or individuals affected should have the opportunity to present their case fully and fairly, and have decisions affecting their rights, interests, or privileges made using a fair, impartial, and open process, appropriate to the statutory, institutional, and social context of the decision.

### **(3) Obiter Dictum**

53 An important matter must be addressed in the interest of fairness. Ms. Douglas wrote to the Minister and accused specific Transport Canada officials in the Pacific Region of "bullying". She had been requested to provide a non-native English speaker as a candidate while being monitored as she conducted an ALPT test. She wrote that such a request was bullying on the part of Transport Canada individuals and an investigation into their conduct was the result. However, in context, Transport Canada had identified a problem specific to the Pacific Region and was trying to fix it. International complaints had been received by ICAO, specifically from Korea and Japan, in relation to non-native English speakers who were not proficient in the language yet were gaining Expert certification in Canada. So Transport Canada wished to ensure that ALPT testers in the Pacific Region were being sufficiently rigorous as they examined non-native speakers. In that context, the request for a non-native English speaker as a candidate was reasonable and in the over-riding public interest of aviation safety. While racial discrimination is not acceptable in any context, as she pointed out in her reference to the ICAO Code of Ethics for the International

Language Testing Association, the Code itself makes reference to "non-native speakers". Accordingly, Ms. Douglas was wrong in her accusation of bullying.

**(4) Conclusion and recommendations**

**54** I refer the matter back to Transport Canada for reconsideration. However, this determination does not imply that Ms. Douglas should necessarily receive a renewal delegation as an ALPT tester. If a regional need exists, it would be entirely within the Minister's discretion to consider her application or not, just like anyone else's. If Transport Canada were to consider her application they would likely require an in-person meeting, her assurance of ongoing full compliance with the delegation, and her commitment to work much more collegially than she has in the past.

**55** I also make the following recommendations: a mechanism should be established enabling ALPT testers in the field to determine a candidate's test history so that exam repeating can be avoided, many more ALPT tests should be provided so they are not easily memorized, and more ALPT-specific training and guidance material would be useful. Finally, as a safety consideration in congested airspace, student pilots should be required to have at least Level 4 -- Operational proficiency in English prior to flying solo.

**VI. DETERMINATION**

**56** The decision to refuse to renew the applicant's delegated authority as an ALPT rater/tester is referred back to the Minister for reconsideration.

April 13, 2017

(original signed)  
Arnold Olson  
Member

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