

Canada Transportation Appeal Tribunal

Montreal, Quebec

Panel: Mr. Charles S. Sullivan, Member

Heard: December 14, 2016.

Decision: April 6, 2017.

Docket: H-4202-68

MoT File No.: 5802-734744

[2017] C.T.A.T.D. No. 11 | 2017 TATCE 11 (Review)

IN THE MATTER OF the review hearing requested by Jason Nadler, in regard to the refusal to issue a Canadian aviation document, pursuant to paragraph 6.71(1)(b) of the *Aeronautics Act*, R.S.C., 1985, c. A-2. Between Jason Nadler, Applicant, and Minister of Transport, Respondent

(89 paras.)

Case Summary

Tribunal Summary:

Held: The Minister has proven on a balance of probabilities that the applicant, Jason Nadler, failed to meet the qualifications or conditions necessary for the issuance of a Canadian aviation document, namely a B73C pilot proficiency check (PPC), as per paragraph 6.71(1)(b) of the *Aeronautics Act*.

Appearances

For the Applicant: Mr. Jason Nadler (self-represented).

For the Respondent: Mr. Martin Forget; Mr. John Lindsay.

REVIEW DETERMINATION AND REASONS

I. BACKGROUND

1 On January 28, 2016, the Minister of Transport (Minister) issued a Notice of Refusal to Issue or Amend a Canadian aviation document (Notice) to the applicant, Mr. Jason Nadler, pursuant to paragraph 6.71(1)(b) of the *Aeronautics Act*, R.S.C., 1985, c. A-2 (*Act*). According to the Notice, the grounds for the refusal were that Mr. Nadler did not meet the qualifications or conditions necessary for the issuance of a pilot proficiency check (PPC) on a B73C aircraft. The Minister alleged that during the flight test that occurred on December 16, 2015, Mr. Nadler

demonstrated that he did not meet the required standard for a PPC, in accordance with Transport Canada's Pilot Proficiency Check and Aircraft Type Rating Flight Test Guide (TP 14727). Mr. Nadler's attempt to receive a PPC was assessed as a FAIL due to unacceptable levels of technical proficiency and/or depth of knowledge, as described in the Flight Test Report (FTR) dated December 16, 2015.

2 On January 13, 2016, the applicant requested a review of the Minister's decision by the Transportation Appeal Tribunal of Canada (Tribunal).

II. STATUTES AND RELEVANT STANDARDS

3 Subsection 6.71(1) of the *Aeronautics Act* reads, in part, as follows:

6.71 (1) The Minister may refuse to issue or amend a Canadian aviation document on the grounds that

[...]

(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

[...]

4 Pursuant to subsection 6.72(3) of the *Act*, the purpose of this hearing is to provide the Minister and the person who filed the request with an opportunity, consistent with procedural fairness and natural justice, to present evidence and make representations in relation to the refusal to issue or amend that is under review.

III. PRELIMINARY MOTIONS

5 On August 17, 2016, the applicant submitted a motion to have the Tribunal quash the Flight Test Report. Mr. Nadler argued that:

- * Transport Canada (TC) engaged in forgery, as two contradictory FTR documents had been produced for the same pilot proficiency check conducted on December 16, 2015;
- * Contrary to Transport Canada's Flight Test Guide, TC had failed to send a formal Notice [of Refusal]; and,
- * The PPC was completed successfully on December 22, 2015.

6 On August 17, 2016, the Tribunal advised Transport Canada that it would consider the motion to quash through written submissions.

7 On August 24, 2016, Transport Canada requested the Tribunal dismiss Mr. Nadler's motion to quash based on the following points: pursuant to paragraph [30] of *Lomas v. Rio Algom Ltd.*, [2010 ONCA 175](#) and subsection 6.72(4) of the *Act*, the Transportation Appeal Tribunal of Canada can only confirm or refer back the Minister's decision on a PPC; the Tribunal has no jurisdiction under the Criminal Code of Canada for alleged criminal acts, such as forgery, in its determinations; Mr. Nadler did not file sufficient evidence with his motion to quash; the application is premature, as an allegation of criminal misconduct must be proven in a court with criminal jurisdiction; the two FTRs are the product of an administrative process. (i.e. after a PPC, the approved check pilot provides a preliminary FTR which, after consultation with TC, may be followed by a revised FTR); the grades and assessment do not change from the preliminary FTR to the revised FTR; and, the Notice was delayed, however, Mr. Nadler suffered no resulting prejudice.

8 On August 29, 2016, Mr. Nadler stated the following points in his written submission: TC provided no evidence to support the statement that the administrative process was an approved procedure; there was no change in the

dates of the Flight Test Reports and that the preliminary FTRs were not correctly labelled; the change from "promptly" to "properly" is a change in assessment, as an inability to promptly identify the malfunction is not grounds for a failure in TC's ACP Manual; he does not intend to pursue criminal action and that the Criminal Code was referenced to provide meaning and context to forgery; the delay to issue the Notice was contrary to "the next working day" requirement in TC's Flight Test Guide; and, email communications with the ACP confirmed that Mr. Nadler had properly identified the malfunction.

9 On October 25, 2016, the Tribunal notified the parties that December 14, 2016 was the scheduled review hearing date. In his opening remarks of the hearing, the member acknowledged Mr. Nadler's motion to quash the PPC Flight Test Report. The member ruled that the motion was dismissed, stating that the Tribunal and its members do not have the authority to quash flight test reports or consider offences under the Criminal Code of Canada such as forgery, which Mr. Nadler alleged against Transport Canada. The member stated that he is able to receive evidence through testimony and exhibits on matters related to the issue before the Tribunal, including the authenticity of reports and documents, all of which would be considered in order to arrive at a decision.

10 The member ruled that the motion to quash the PPC Flight Test Report was dismissed.

IV. EVIDENCE

A. Minister

(1) Mr. Bradley Russell

11 Mr. Russell has been an employee with Sunwing Airlines since 2006. His current duties include training pilot and approved check pilot (ACP). Prior to Sunwing Airlines, Mr. Russell worked with Jazz Aviation for approximately 18 months, Jetsgo for two years and Air Georgian for six years. Mr. Russell has been involved in the aviation industry for approximately 20 years.

12 The respondent introduced Exhibit M-1, Mr. Russell's ACP Delegation of Authority dated January 9, 2013. Mr. Russell testified that the Delegation of Authority authorized him to carryout Type A and Type B pilot proficiency checks, and initial, upgrade and recurrence line checks on company pilots. He was authorized to issue type ratings and instrument ratings on the Boeing 737-6, 7 and 8 series.

13 The respondent introduced Exhibit M-2, a Flight Test Report for Mr. Jason Nadler, dated December 16, 2015.

14 The applicant objected to Exhibit M-2 being introduced as evidence, stating that he had a second document signed and dated on the same day concerning the Flight Test Report PPC where the wording under "Comments -- General Assessment" had been changed. The member ruled that Exhibit M-2 would be accepted into the evidentiary record, and that Mr. Nadler would have the opportunity to challenge the document and present a second document as evidence later in the hearing. The applicant and respondent accepted the member's ruling.

15 Mr. Russell testified that Exhibit M-2 was a Flight Test Report related to a recurrent flight test on Mr. Nadler, which was carried out on December 16, 2015 in a simulator, ID number 820, in Toronto. He stated that he was the ACP for the flight test; it involved two crew members, and Mr. Nadler was acting as the pilot not flying (PNF) during the flight check.

16 Mr. Russell explained that the aim of the exercise was to introduce a minor malfunction to the flight crew that would render part of the aircraft's electrical system inoperative. The flight crew was to properly identify the malfunction, call for and properly perform the Quick Reference Handbook (QRH) items for the malfunction, in this case the Transfer Bus Off checklist, run the checklist to a proper conclusion, and then consider any necessary course of action based on the results of operating the non-normal checklist.

17 The respondent introduced Exhibit M-3, a copy of the "Non-Normal Checklists -- Electrical" for the Boeing 737. In response to a query from the member, Mr. Russell stated that during the conduct of the PPC check ride, he occupied a position located immediately behind the two pilots who were flying the simulator, at the instructor's console. Mr. Russell stated that with regard to item number 21 on the Flight Test Report, PNF Duties, Mr. Nadler was awarded a "level 1" rating, which was a failing grade.

18 Mr. Russell stated that the flight crew had initially called for the proper checklist and performed the Transfer Bus Off checklist procedure. Step three in the checklist was a decision point that offered two courses of action: "APU [auxiliary power unit] is available for start" or "APU is not available". The flight crew selected "APU START" and "APU GEN switch (affected side) ON". The selected course of action did not resolve the malfunction.

19 Mr. Russell stated that the Transfer Bus Off malfunction presented to the flight crew was the failure of the transfer bus itself. The backup source of electrical power, which was the APU generator, was therefore unable to power the transfer bus. The next step in the Transfer Bus Off checklist procedure was "APU is not available", after which it states "Plan to land at the nearest suitable airport. Only one main AC power source remains".

20 Mr. Russell stated that the flight crew did not continue to the final step. Instead, the PF asked the PNF to carry out the same checklist procedure a second time, which produced the same result. At that point, the flight crew decided to call "Company Maintenance", which resulted in the following message: *If you run the Transfer Bus Off non-normal checklist and you are unable to restore power to the bus, then that's all you can do.* At that point, the flight crew chose to run the Transfer Bus Off checklist a third time, which produced the same result. The aircraft captain then passed control of the aircraft to Mr. Nadler and carried out the QRH a fourth time, which produced the same result. At that point, the aircraft captain placed the QRH on the glare shield of the airplane and stated "I don't know what's going on".

21 Mr. Russell testified that the minor malfunction that was presented to the flight crew usually takes five to ten minutes to resolve, which includes identifying the malfunction, completing the checklist procedure, concluding that the APU is not available to provide power, and then state the requirement to proceed to an alternate suitable airport. During the PPC, the flight crew did not accurately assess the nature of the minor malfunction or complete the final step in the procedure, which was an action plan to divert to a suitable alternate airport.

22 Mr. Russell testified that the weather in Montreal was below landing limits for an aircraft with a single source of electrical power, which required the flight crew to divert to a suitable alternate airport. He stated that after 30 minutes of trying to resolve the malfunction, the flight crew was not able to advance to the final step in the checklist procedure. At that point, Mr. Russell terminated the exercise and advised the flight crew that their response to the minor malfunction had been assessed as a fail.

23 The respondent introduced Exhibit M-4, Mr. Russell's post-debrief notes. Mr. Russell testified that immediately following the PPC, he carried out a debriefing session with the flight crew. During his discussion with them on the electrical malfunction, he concluded that the flight crew did not have an in-depth knowledge of the electrical system and were unable to resolve the inflight minor malfunction. Mr. Russell stated that once he drew a schematic of the electrical system on a white board and explained how it functioned, the flight crew understood the problem. They understood why their actions did not resolve the malfunction and why the final step in the procedure was to proceed to a suitable alternate airport. Mr. Russell stated that during the debriefing session, the flight crew did not challenge his explanation of the malfunction or his assessment. He concluded that they lacked an adequate level of knowledge of the electrical system to successfully complete the checklist procedure.

24 The respondent introduced Exhibit M-5, the initial Flight Test Report. Mr. Russell testified that he was the author of the report, which was presented to Mr. Nadler immediately following the debriefing session. The respondent pointed out that there had been two Flight Test Reports (Exhibits M-2 and M-5), both of which were produced by Mr. Russell following the PPC. Mr. Russell explained that the initial Flight Test Report stated in the comments section that the candidate "failed to demonstrate an in-depth understanding of the aircraft electrical system",

whereas the final Flight Test Report stated that he "failed to demonstrate an adequate knowledge of the aircraft electrical system". He also pointed out that the initial Flight Test Report stated "... resulting in an inability to properly identify the malfunction", whereas the final Flight Test Report stated "...resulting in an inability to promptly identify the malfunction".

25 Mr. Russell stated that his initial wording of "*properly* identify the malfunction" was due to the fact that while they did call for the correct non-normal QRH checklist, the flight crew was unable to arrive at the proper conclusion. They called for the correct checklist but didn't properly identify the malfunction, and believed that by switching the APU electrical generator on to the bus, that it would restore power to that bus. The fact that it did not restore power and they didn't understand why, indicated that the flight crew hadn't properly identified the malfunction.

26 Mr. Russell stated that after he had submitted the initial Flight Test Report, he received an email from Transport Canada inspector Tom Kuilder, stating that the language in the report needed to be strengthened to support the result of the flight test. Mr. Russell stated that it was on Mr. Kuilder's recommendation that he changed the wording from "in-depth" to "adequate", and from "properly" to "promptly".

27 Mr. Russell stated that the recommended changes to the initial Flight Test Report were based on guidance from the Approved Check Pilot Manual and the Flight Test Guide. Mr. Russell used the wording from the Flight Test Guide, whereas Mr. Kuilder recommended the ACP Manual. In Mr. Kuilder's opinion, the words "adequate" and "promptly" would better support the assessment of the PPC.

Cross-examination of Mr. Russell

28 Under cross-examination, Mr. Russell confirmed that the initial Flight Test Report included the phrase "properly identify the malfunction", which was changed to "promptly identify the malfunction" in the final report. Mr. Russell stated that when presenting a malfunction during a PPC, it was the script that was provided to the company check pilot (CCP) by Transport Canada that identified the electrical fault as a minor fault.

29 Mr. Russell stated that the role of the PNF during the PPCs would include providing the PF with assistance with the operation of the aircraft, the safety of the flight, and the running of non-normal checklists. The PF is expected to ask for and direct any necessary responses to QRH or non-normal checklist items. Mr. Russell stated that in the case of the PPC, the PNF should have, in his opinion, stepped in at the point where the APU was not available to provide electrical power to the transfer bus. Either crew member should have spoken up and said "we have not restored power to the transfer bus because the transfer bus has failed".

30 Mr. Russell testified that he did not recall hearing the flight crew request the weather in Montreal or Ottawa after the fault was introduced. He also stated that he did not recall the flight crew going through the Operational Information section of the QRH to check the CAT II requirements. Mr. Russell emphasized that he did not observe the flight crew put in place an action plan for diverting to a suitable alternate airport. He stated that the minor malfunction would have been successfully concluded if either flight crew member had talked to Air Traffic Control (ATC) and stated that they were unable to land and would like to divert to an alternate airport. He stated that there is no set time limit to resolve the malfunction, however, at some point, the flight crew does have to conclude that the checklist is complete, that the fault cannot be restored, and that they need to proceed to land at the nearest suitable airport. Mr. Russell stated that the checklist procedure was not successfully completed.

Re-direct Mr. Russell

31 Under questions re-directed, Mr. Russell testified that during the PPC, both the PF and the PNF are being evaluated. He stated that part of the decision-making process to divert to the nearest suitable airport includes the weather, available facilities, runway length, runway conditions, ground handlers, refueling capability and passenger facilities. Mr. Russell stated that if the flight crew had called ATC to request clearance to a nearest airport after they had deemed it suitable, they would have successfully concluded the exercise. However, the final step was not

carried out.

(2) Mr. Terry Bishop

32 Mr. Bishop has been a civil aviation inspector with the Airline Division of Transport Canada since 2001. He has worked as a check pilot for 20 years, and as a chief pilot, director of Flight Operations, and airline captain before becoming a manager with TC. His primary role with TC is related to monitoring delegated ACPs that have been appointed to carry out flight tests on company flight crew.

33 Mr. Bishop stated that the Flight Test Report (Exhibit M-2) indicates that the company check pilot, Mr. Russell, was monitored by a Transport Canada civil aviation inspector. In the section "ACP Monitor", the code AA203552 is Mr. Bishop's licence number and indicates that he was the civil aviation inspector assigned to monitor Mr. Russell's conduct of Mr. Nadler's PPC.

34 Mr. Bishop stated that company check pilots are nominated by their respective companies and are usually senior pilots that have the right combination of experience and demeanor to be a check pilot. Mr. Russell's duties as a CCP are restricted to company Sunwing Airline pilots and the Boeing 737C aircraft. Mr. Bishop highlighted that his primary role and function during the PPC was to oversee the evaluation, and assess Mr. Russell's conduct of the PPC and the preparation of the Flight Check Report. He stated that during the PPC flight, he was located beside Mr. Russell on the flight deck immediately behind the flight crew.

35 Mr. Bishop stated that to ensure fairness during the conduct of the PPC, a standardized approach is used, which includes a script of the PPC procedure. The purpose of the Bus Transfer Off exercise was to evaluate the flight crew's use of the QRH. When the minor malfunction was presented to the flight crew, the pilot flying identified the malfunction correctly and called for the QRH. Mr. Nadler accessed the QRH, went to the proper checklist and carried out the checklist as per the QRH. Mr. Nadler advised the pilot flying that the APU would not power the "bus", which meant the malfunction had not been resolved.

36 Mr. Bishop stated that during that part of the exercise, the captain was hand-flying the aircraft, which he found to be abnormal and an indication that the flight crew was not familiar with the electrical system with a Bus Transfer Off malfunction. Either pilot could have elected to engage the auto pilot, which would have allowed both flight crew members to focus on resolving the malfunction and completing the checklist procedure.

37 Mr. Bishop stated that when the minor malfunction was not resolved by following the checklist procedure, the flight crew elected to carry out the same QRH procedure again. Mr. Nadler completed the checklist procedure a second time without success and advised the captain that he didn't know why it wasn't working. Mr. Nadler recommended that in the case he was doing something wrong, the captain should try to carry out the checklist procedure to resolve the malfunction. The captain disagreed and directed Mr. Nadler to carry out the procedure a third time, which Mr. Nadler did, but without success.

38 Mr. Bishop stated that after the third attempt, the flight crew elected to call Company Maintenance and request assistance. Company Maintenance, which was being played by Mr. Russell from a console position on the flight deck, advised the flight crew that if they had completed the checklist procedure as outlined in the QRH, there was nothing more they could do. The flight crew elected to carry out the checklist procedure a fourth time, but this time by the captain, and with Mr. Nadler hand-flying the aircraft. The fourth attempt produced the same result and the captain then dropped the QRH on the glare shield above the instrument panel and stated "I have no idea". Mr. Bishop stated that it was at that point he mentioned to Mr. Russell that he could stop the PPC at any time, as it was his assessment that the PPC was a failure.

39 The respondent introduced Exhibit M-6, Mr. Bishop's notes from the PPC. Mr. Bishop testified that based on his observations during the PPC, the flight crew failed to resolve the minor malfunction and complete the necessary

steps associated with the malfunction, and that Mr. Russell accurately assessed the PPC and the performance of the flight crew.

40 Mr. Bishop stated that the flight crew did not make contact with ATC with regard to identifying a suitable alternate airport. Mr. Bishop stated that if he would have been the ACP evaluating the PPC, he would have terminated the exercise after the flight crew's second attempt to resolve the malfunction, and certainly after the flight crew called Company Maintenance and was given the answer to the malfunction. Mr. Bishop stated that the debriefing session conducted by Mr. Russell was exemplary in that he took time to draw a schematic of the electrical system on the white board so the flight crew could understand the malfunction.

Cross-examination of Mr. Bishop

41 Under cross-examination by the applicant, Mr. Bishop stated that the role of the pilot not flying is to serve as a flight crew member for all exercises that are conducted. The goal is for the PF and the PNF to act together as a flight crew and not allow the other flight crew member to go down the wrong path. ACPs expect the PF to do his role as the pilot flying, and the PNF to assist. Mr. Bishop emphasized that it is paramount that the pilots act together as a flight crew.

42 Mr. Bishop stated that on the day the PPC was conducted, the simulator was fully serviceable. He remembered hearing the flight crew talk about the weather in Montreal and Ottawa, and CAT II and CAT I approach minima. He stated that when the minor malfunction was initially presented to the flight crew, they did not identify the nature of the malfunction. Mr. Nadler, as the PNF, was looking at the lights on the panel and going through the QRH looking for different checklists. Mr. Nadler eventually came to the right checklist procedure, but didn't identify the minor malfunction as Bus Transfer Off.

43 Under questions re-directed, Mr. Bishop stated that he recalled that the flight crew had asked for the weather in Montreal and Ottawa, however, he emphasized that they did not advise ATC that they couldn't land in Montreal and that they needed to land at the nearest suitable airport. Mr. Bishop testified that the flight crew failed the PPC when, after repeated attempts in carrying out the checklist procedure, they were unable to accurately assess the nature of the minor malfunction.

(3) Mr. Tom Kuilder

44 Mr. Kuilder has been an inspector with Transport Canada, National Flight Operations, for five years. He has worked in the Certification and Quality Assurance Office for two years. Prior to joining TC, Mr. Kuilder was a check pilot and chief of standards for Skyservice Airlines from 2008 to 2010.

45 The respondent introduced Exhibit M-7, an extract from the Approved Check Pilot Manual, Ninth Edition. Mr. Kuilder testified that under the *Aeronautics Act*, the Minister of Transport can delegate his authorities and duties to external delegates, such as an ACP, who are authorized to conduct flight tests on behalf of the Minister. Section 1.4 addresses the Authorized Person program which allows designated persons to perform licensing functions. Section 1.5 addresses the authorities that ACPs have and their related duties. When an ACP conducts a flight check, it is for the purpose of determining whether the applicant meets all the criteria as outlined in the applicable Pilot Proficiency Check and Aircraft Type Rating Flight Test Guide.

46 The respondent introduced Exhibit M-8, the Pilot Proficiency Check and Aircraft Type Rating Flight Test Guide (Aeroplanes), First Edition. Mr. Kuilder stated that with regard to the Flight Test Report (Exhibit M-2), Mr. Nadler received a failing grade for item 21, PNF Duties. The Flight Test Guide specifies that ACPs conducting a PPC/IFR in a multi-crew aircraft will evaluate the flight crew under the crew concept and not on an individual basis. Mr. Kuilder cited page 3 which states that:

A strict adherence to procedures associated with each crew position is essential. To check the proper division of duties between the PF and the PNF requires observation during normal and abnormal procedures. ACPs must ensure satisfactory compliance with PNF duties as detailed in the [Aircraft Operating Manual] and company [standard operating procedures].

The aim of the evaluation is to determine the candidate's ability to complete recommended checks and procedures in accordance with the Pilot Operating Handbook, Aircraft Flight Manual or other applicable publications in the event of system malfunctions or other emergencies.

47 Mr. Kuilder also cited the performance criteria in the Flight Test Guide, which specifies to base the assessment on the candidate's ability to: demonstrate familiarity with the procedures contained in the Quick Reference Handbook or paper checklist; demonstrate adequate knowledge of the emergency procedures appropriate to the approved Air Flight Manual (as may be determined by the ACP) relating to the particular aeroplane type; promptly identify the malfunctions; demonstrate knowledge and discipline in the use of the electronic checklist and alerting system, as applicable; and develop a reasonable course of action for the remainder of the flight.

48 Mr. Kuilder stated that the Flight Test Guide contains a 4-point grading framework that provides guidance to ACPs on how to distinguish performance levels in order to determine the final grade to be awarded. The final Flight Test Report states that the applicant "failed to demonstrate adequate knowledge", which links to a knowledge element in the 4-point marking scale, which states "Technical skills and knowledge reveal unacceptable levels of technical proficiency and/or depth of knowledge". With regard to the changes that appeared between the initial and final Flight Test Reports, Mr. Kuilder stated that it is not uncommon to receive an initial draft of a Flight Test Report that, for many reasons, would require a re-submission, particularly in the event of a failure.

49 Mr. Kuilder stated that Mr. Russell did a much better job than most with his comments, however, the narrative didn't fit their business practice for the development of comments when supporting a failing grade. Mr. Kuilder stated that he contacted Mr. Russell and outlined what was expected for supporting comments, and to determine if Mr. Russell had performed an adequate assessment of Mr. Nadler's performance.

50 Mr. Kuilder stated that based on the evidence that Mr. Russell had given him over the phone, he was confident that he had made a valid assessment of Mr. Nadler's performance against the performance criteria. Mr. Kuilder stated that he completely understood how he came up with his initial comments using the 4-point marking scale, however, he asked Mr. Russell to support his assessment using the performance criteria found on the elements themselves. Mr. Russell drew language from those elements, thereby using the terminology of "promptly" and "adequate knowledge", which aligns with the performance criteria and reflects a failing grade.

51 The respondent introduced Exhibit M-9, the *Canadian Aviation Regulations* paragraph 705.106(1)(c), which Mr. Kuilder read aloud. The paragraph states:

705.106 (1) Subject to subsection (3), no air operator shall permit a person to act and no person shall act as the pilot-in-command, second-in-command or cruise relief pilot of an aircraft unless the person

[...]

(c) has successfully completed a pilot proficiency check, the validity period of which has not expired, for that type of aircraft, in accordance with the *Commercial Air Service Standards*;

52 The respondent introduced Exhibit M-10, the *Canadian Aviation Regulations*, Part VII, Commercial Air Services, Standard 725.106(2)(a), (c) and (g), under Pilot Qualifications, which Mr. Kuilder read aloud. This standard prescribes, in part, that the pilot proficiency check shall be conducted in accordance with Schedule 1, which is a description of the events that need to be captured during a PPC for pilots who are operating for subpart 705 Air Operators, as is the case for Sunwing; in a manner that enables the pilot to demonstrate the knowledge and the skill respecting the air operator's aeroplane, its systems and components; that a PPC of a pilot-in-command shall be completed in the seat normally occupied by the pilot-in-command, and a check of a second-in-command shall

be completed in the seat normally occupied by the second-in-command; and that the PPC shall consist of a demonstration of both pilot flying duties and pilot not flying duties.

53 The respondent introduced Exhibit M-11, the *Canadian Aviation Regulations*, Part VII, Commercial Air Services, Standard 725, Schedule I. Mr. Kuilder referred to paragraph (h), subparagraphs (i) and (ii), Abnormal and Emergency Procedures, and read them aloud. This standard prescribes that the crew shall demonstrate use of as many of the air operator's approved standard operating procedures, and abnormal and emergency procedures, for as many of the situations as are necessary to confirm that the crew has an adequate knowledge and ability to perform these procedures. It is further prescribed that systems malfunctions shall consist of a selection adequate to determine that the crew has satisfactory knowledge and ability to safely handle malfunctions. Mr. Kuilder stated that each pilot, before being able to fly, should do a PPC check ride where the items mentioned in the Flight Test Guide will be evaluated by an ACP. An evaluation is done for the pilot flying and also for the pilot not flying.

54 Mr. Kuilder stated that as part of the qualification criteria for Mr. Russell or any check pilot, they must complete not only an initial monitor, but recurrent monitors. The role of Mr. Bishop was to monitor and grade Mr. Russell's performance as an ACP. Related to this type of PPC, a TC monitor may intervene in a PPC test and stop the PPC at his own discretion.

55 Finally, the respondent introduced Exhibit M-12, the Notice of Refusal to Issue or Amend a Canadian aviation document sent to Mr. Nadler by Transport Canada, which Mr. Kuilder read aloud.

B. Applicant

(1) Mr. Jason Nadler

56 The applicant, Mr. Jason Nadler, represented himself and took the witness stand.

57 Mr. Nadler started his aviation career as a bush and charter airline pilot, and has flown over 38 different types of aircraft. He has been flying the 737-800 at Sunwing for over three and a half years. Prior to Sunwing, he was a pilot with Jazz on regional jets for over five years. He holds licences in Canada, New Zealand and Fiji.

58 Mr. Nadler stated that during the PPC, he was the first officer acting as pilot not flying. He recounted that while in a hold, setting up for a CAT II approach in Montreal, one of the transfer buses failed and the pilot flying directed him to "identify". Mr. Nadler stated that he responded, saying "Transfer Bus Off". The PF called for the Transfer Bus Off checklist. Mr. Nadler completed the checklist procedure, however, he was unable to restore power to the bus.

59 Mr. Nadler stated that the APU generator was unable to power the transfer bus, which left them at "a dead end" without further checklist guidance. The crew elected to continue the checklist under "APU not available", which directed them to land at the nearest suitable airport.

60 Mr. Nadler stated that at the time of the transfer bus failure, "autopilot A" disengaged, which added to the confusion of the scenario. He stated that the autopilot should not have disengaged, as the transfer bus that failed was on the right-hand side, which would have affected autopilot B.

61 Mr. Nadler stated that they were in a situation where they could not land in Montreal due to weather, the malfunction had not been resolved, and the checklist directed the flight crew to land at the nearest suitable airport. He stated that the weather in Montreal was below CAT I minima, therefore their only option was to divert to another airport. The flight crew requested the weather in Ottawa, which was assessed by the flight crew as an acceptable option.

62 Mr. Nadler stated that the flight crew had elected to run the Transfer Bus Off checklist again to see if they had missed something. The flight crew then elected to contact Company Maintenance, however, they were unable to

help. Mr. Nadler stated that it is important to note that throughout this whole scenario, they had plenty of fuel, safety of flight was never in jeopardy, they were not holding in icing conditions, no aircraft limitations were exceeded and they had plenty of time remaining to complete the simulator PPC. He stated that the worst case possible was that the other transfer bus could have failed, leaving the flight crew with a minimum of 30 minutes flying time on standby instruments powered by the main battery, which he assessed as ample time to divert to Ottawa.

63 Mr. Nadler stated that in the pre-flight briefing, the ACP stated that the PF would initiate necessary responses to any events and direct required follow-up action, and that the PNF would assist. Mr. Nadler stated that he recommended the captain give him control of the aircraft so that the captain could better evaluate the current situation and make a decision. Mr. Nadler stated that he was required to hand-fly the aircraft with no instruments on his side of the instrument panel. A few minutes later, the PPC was terminated and the flight crew was advised of the failure.

64 Mr. Nadler stated that the ACP Manual states that the operator should introduce a minor fault prior to the CAT II approach to observe the flight crew's ability to assess the approach capability of the aircraft. According to the PPC script, the fault is to be restored when the checklist procedure is complete and the flight crew has consulted the Required Equipment for a CAT II Approach checklist in the QRH.

65 Mr. Nadler stated that they had completed the Transfer Bus Off checklist, verified that they were unable to fly a CAT II approach, informed ATC, and yet, the malfunction had not been cleared. He cited Exhibit M-7, 6.3.19, page 63, "Minor Abnormal" 6.3.19 (a): "The aircraft system fault requires crew recognition and simple action(s) to remedy. The fault is related to a single system or has minimal impact on crew or aircraft operations". He stated that in their situation, the Transfer Bus Off fault is not qualified as a minor fault due to the fact it was not remedied with simple actions. Since the required crew recognition and action affected several aircraft systems, and crew and aircraft operations, it would qualify as a major abnormal and not a minor, as called for by the script. Mr. Nadler asserted that the ACP did not follow the scripted PPC, as he inserted a major fault instead of a minor fault and did not clear the malfunction once the checklist had been complete, as per the approved script.

66 Mr. Nadler stated that section 5.1 of the ACP Manual states that the Flight Test Report must be submitted no later than five working days after the flight check, however, this was not done. Mr. Nadler stated that he was the one who personally advised Transport Canada of the failure after he had called the Tribunal to contest the decision, at which time the Tribunal mentioned that he should have received a Notice [of Refusal]. Mr. Nadler called Transport Canada to explain the situation, at which time the Notice was forwarded to him. When he received it, he discovered that the general assessment was different from the original (Exhibits M-2 and M-5). Mr. Kuilder advised Mr. Nadler that it was an administrative process.

67 Mr. Nadler stated that the main point Transport Canada was trying to make in order to justify the failure is that the flight crew did not complete the checklist. However, Mr. Bishop confirmed that the flight crew did in fact request the Montreal and Ottawa weather. Mr. Nadler testified that with that information, it can be assumed that the flight crew was planning to land at the nearest suitable airport, even though they did not get to the point of formally requesting the diversion to Ottawa with ATC.

Cross-examination of Mr. Nadler

68 Under cross-examination, Mr. Nadler testified that the flight crew contacted ATC after the first checklist, and after they had checked the requirements for the Category II approach. They had requested from ATC the weather for Ottawa and Montreal because they were unable to do the Category II approach. Mr. Nadler stated that after he received the field condition information that the weather for Montreal was below Category I minima, meaning that they had to do the auto land approach, that's when he informed ATC that they were unable to do a CAT II approach due to systems' failure.

69 Mr. Nadler stated that they realized that they could not power the transfer bus after having done the checklist. However, the PPC scenario script states that the power should be restored once the checklist is complete. The

power wasn't restored, which caused confusion for the flight crew. Mr. Nadler stated that the flight crew was working on solving the problem. In the pre-mission briefing, it was said to let the pilot flying make the decisions, and as pilot monitoring, be there to assist but not lead. Mr. Nadler did not step in because he didn't think there was any immediate danger.

70 Mr. Nadler stated that the PPC debriefing session lasted 20 to 30 minutes. The applicant agreed that during the session, Mr. Russell explained where errors were made by the flight crew and outlined the operation of the electrical system of the aircraft to explain why the Transfer Bus Off did not re-energize. Mr. Nadler stated that he did not offer any comments during the debriefing session or refute Mr. Russell's assessment of the PPC.

V. ARGUMENTS

A. Minister

71 The Minister submitted that pursuant to section 6.71 of the *Act*, the evidence adduced through the testimony of three witnesses and 12 exhibits supports Transport Canada's assessment that Mr. Nadler did not meet the required standard for the issuance of a PPC on the B73C aircraft.

B. Applicant

72 In his closing argument, Mr. Nadler argued that he had carried out his pilot not flying duties properly, by promptly identifying the malfunction and completing the proper checklist. At no time was the safety of flight in jeopardy.

VI. ANALYSIS

73 The *Aeronautics Act* states at paragraph 6.71(1)(b) that the Minister can refuse to issue a Canadian aviation document if the applicant of such document does not meet the qualifications or fulfil the conditions necessary for its issuance. As per paragraph 705.106(1)(c) of the *Canadian Aviation Regulations*, it is required that a pilot-in-command or second-in-command of an aircraft successfully complete a PPC in accordance with the *Commercial Air Service Standards* (the Standards). Standard 725.106 relates to pilot qualifications and its Schedule 1 applies to pilot proficiency check on a synthetic training device, as in the case before this Tribunal. As per this standard, a crew shall demonstrate use of as many of the air operator's approved standard operating procedures, and abnormal and emergency procedures, for as many of the situations as are necessary (such as system malfunctions) to confirm that the crew has an adequate knowledge and ability to perform these procedures, among other things.

74 Transport Canada issued a Notice of Refusal to Issue or Amend a Canadian aviation document to the applicant, on January 28, 2016, stating that Mr. Nadler had not met the qualifications or conditions necessary for the issuance of a PPC on a B73C aircraft. In the Notice, the Minister cited as reasons for the refusal that the applicant's PPC assessment revealed unacceptable levels of technical proficiency and/or depth of knowledge and referred to TP 14727 (Pilot Proficiency Check and Aircraft Type Rating Flight Test Guide). The Flight Test Report introduced as M-2, dated December 16, 2015, stated that Mr. Nadler failed to demonstrate adequate knowledge of the aircraft electrical system, resulting in an inability to promptly identify the malfunction (Transfer Bus Off). The key phrases used by Transport Canada to justify the PPC failure were "failed to demonstrate adequate knowledge" and "inability to promptly identify the malfunction".

75 The issue before this Tribunal is: was the Minister justified to refuse to issue a Canadian aviation document to Mr. Nadler and assessing his PPC test as a fail?

76 Mr. Nadler claimed that the PPC failure was not justified, as he had carried out his PNF duties properly, and had promptly identified the malfunction and completed the proper checklist. However, as introduced in evidence by Mr. Russell, the Transfer Bus Off malfunction presented to the flight crew was the failure of the transfer bus itself. The

backup source of electrical power, which was the APU generator, was therefore unable to power the transfer bus. Mr. Nadler stated that while the flight crew was setting up for a CAT II approach in Montreal, they experienced a Transfer Bus Off malfunction. The PNF identified the malfunction and carried out the Transfer Bus Off checklist, however, the malfunction was not resolved. Mr. Nadler stated that the APU generator was unable to power the transfer bus, which left them at "a dead end", without further checklist guidance.

77 Mr. Russell testified that the minor malfunction that was presented to the flight crew usually takes five to ten minutes to resolve, which includes identifying the malfunction, completing the checklist procedure, concluding that the APU is not available to provide back the power, and to then develop an action plan to proceed to a suitable alternate airport. During this PPC, the flight crew did not accurately assess the nature of the minor malfunction or complete the final step in the procedure, which was an action plan to divert to a suitable alternate airport.

78 The flight crew elected to continue the checklist under "APU not available", which directed them to land at the nearest suitable airport. With the ACP and Transport Canada inspector monitoring their response to the malfunction, the flight crew elected to run the Transfer Bus Off checklist a second time to see if they had missed something. The flight crew then contacted Company Maintenance, however, Mr. Nadler stated that they were unable to help.

79 Mr. Nadler testified that the flight crew contacted ATC after completing the first checklist procedure to request weather information for Ottawa and Montreal. When they learned that the weather was below approach minima in Montreal, they informed ATC that they were unable to carry out a CAT II approach due to a systems failure. Mr. Bishop confirmed that the flight crew had requested weather information, however, it was not in the context of identifying a suitable alternate airport. Mr. Nadler testified that it should be assumed that their request for weather was related to their plan to land at the nearest suitable airport, even though Mr. Nadler stated the flight crew did not formally request a diversion to Ottawa with ATC. Unfortunately, the Tribunal cannot subscribe to assumptions or hypothetical situations; the script and the successful completion of the flight check required that the crew land at the nearest suitable airport and this was not done or clearly manifested by the crew.

80 The respondent adduced evidence from three witnesses and 12 exhibits to support the assessment of the PPC, as written in the Flight Test Report by the ACP, Mr. Bradley Russell. Mr. Russell stated that the aim of the exercise was to introduce a minor malfunction to the flight crew that would render part of the aircraft's electrical system inoperative. The flight crew was to properly identify the malfunction, run the QRH items for the malfunction, run the checklist to a proper conclusion, and then consider a necessary course of action, which was to request a diversion to a suitable alternate airport.

81 Evidence adduced by the respondent indicated that the flight crew had initially called for the proper checklist and performed the Transfer Bus Off checklist procedure. Step three in the checklist was a decision point that offered two courses of action: "APU is available for start" or "APU is not available". The flight crew selected "APU START", however, the selected course of action did not resolve the Transfer Bus Off malfunction. As explained by the ACP, the malfunction was a failure of the transfer bus itself. The backup source of electrical power, which was the APU generator, was therefore unable to power the transfer bus. The next step in the Transfer Bus Off checklist procedure was "APU is not available" and "Plan to land at the nearest suitable airport. Only one main AC power source remains".

82 Evidence adduced by the respondent indicated that the crew did not continue to the final step. Instead, the PF directed the PNF to carry out the same checklist procedure a second time, which produced the same result. At that point, the flight crew decided to call Company Maintenance for assistance, which provided the following message: *If you run the Transfer Bus Off non-normal checklist and you are unable to restore power to the bus, then that's all you can do.*

83 At that point the flight crew chose to run the Transfer Bus Off checklist a third time, which produced the same result. The PF then passed control of the aircraft to the PNF and carried out the QRH a fourth time, which produced the same result. At that point, the aircraft captain placed the QRH on the glare shield of the airplane and stated "I

don't know what's going on". Mr. Nadler testified that during the pre-flight briefing, the ACP stated that the PF would initiate necessary responses to any events and direct required follow-up action, and that the PNF would assist. Mr. Nadler added that the PNF is there to assist, not lead.

84 Evidence adduced from the testimony of Mr. Terry Bishop was consistent with Mr. Russell's testimony. Mr. Bishop stated that when the minor malfunction (Transfer Bus Off) was not resolved by following the checklist procedure, the flight crew elected to carry out the same procedure again. The PNF completed the checklist procedure a second time without success and advised the PF that he didn't know why it wasn't working. The PNF recommended that, in case he was doing something wrong, the PF should carry out the checklist procedure himself to resolve the malfunction. The PF disagreed and directed the PNF to carry out the procedure a third time, which he did, but without success. After the third unsuccessful attempt, the flight crew called Company Maintenance to request assistance. Company Maintenance advised the flight crew that if they had completed the checklist procedure as outlined in the QRH, there was nothing more they could do.

85 Instead of advancing to the final step in the procedure, which was to develop an action plan to divert to the nearest suitable alternate airport, the flight crew elected to carry out the checklist procedure a fourth time, but this time by the PF with the PNF hand-flying the aircraft. The fourth attempt produced the same result, at which time the PF stated "I have no idea". It was at this point that Mr. Bishop mentioned to Mr. Russell that he could stop the PPC at any time, as it was his assessment that the PPC was a failure. Mr. Bishop stated that based on his observations of the PPC, the flight crew failed to resolve the minor malfunction and complete the necessary steps associated with the malfunction, and that Mr. Russell had accurately assessed the PPC and the performance of the flight crew.

86 Mr. Nadler claimed that changes had appeared between the initial Flight Test Report (M-5) and the final Flight Test Report (M-2), which changed the Flight Test Report assessment. Evidence adduced from Mr. Kuilder's testimony stated that it is not uncommon to receive an initial draft of a Flight Test Report that, for many reasons, would require a resubmission, particularly in the event of a failure. Mr. Kuilder stated that he contacted Mr. Russell and outlined what was expected for supporting comments and to determine if he had adequately assessed Mr. Nadler's performance. Based on the evidence passed along during their discussion, he determined that Mr. Russell had made a valid assessment of Mr. Nadler's performance against the performance criteria. Mr. Kuilder understood how he came up with his initial comments using the 4-point marking scale; however, he asked Mr. Russell to support his assessment using the performance criteria found on the elements themselves. Mr. Russell drew language from those elements, thereby using the terminology of "promptly" and "adequate knowledge", which aligns with the performance criteria and reflects a failing grade. Changing "in-depth" to "adequate", and "properly" to "promptly", did not change the assessment, which supported a failing grade.

87 Mr. Nadler claimed that section 5.1 of the ACP Manual states that the Flight Test Report must be submitted no later than five working days after the flight check, however, this directive was not followed. The respondent adduced evidence from Mr. Kuilder that the ACP had submitted the Flight Test Report in a timely manner to the air operator, in accordance with accepted practices. However, due to the air operator's responsible manager being on leave during the Christmas period (the PPC was carried out on December 16, 2015), the report sat on his desk awaiting the air operator's quality control review before forwarding to Transport Canada. Although all efforts are made by TC to operate within the published levels of service periods, there are no time limits associated with the issuance of a Notice of a refusal to issue. It is acknowledged that the Notice was delayed, however, the applicant suffered no resulting prejudice.

88 The respondent adduced evidence from three credible witnesses that the candidate failed to demonstrate adequate knowledge of the aircraft electrical system, resulting in an inability to promptly identify the malfunction. In their attempt to resolve the malfunction, the flight crew carried out the same checklist procedure a total of four separate times, each time achieving the same result. After completing the checklist procedure the second time, the PNF advised the PF that he didn't know why it wasn't working. The flight crew contacted Company Maintenance for assistance and was told that there was nothing more that could be done. Instead of moving to the final step in the checklist procedure, which was to develop an action plan to divert to the nearest suitable alternate airport, the flight crew repeated the checklist procedure again, after which time the PF dropped the QRH on the glare shield above

the instrument panel and stated that he had "no idea". The flight crew did not complete the final step in the checklist procedure, which was to notify ATC that they needed to land at the nearest suitable airport.

VII. DETERMINATION

89 The Minister has proven on a balance of probabilities that the applicant, Jason Nadler, failed to meet the qualifications or conditions necessary for the issuance of a Canadian aviation document, namely a B73C pilot proficiency check (PPC), as per section 6.71 of the *Aeronautics Act*.

April 6, 2017

(Original signed)
Charles S. Sullivan
Member

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