



# **ACP Bulletin 02/11**

## **Subject**

Clarification of national policy with regards to action taken under subsections 6.71(1) and 7.1(1) of the *Aeronautics Act* (the *Act*), and subsection 401.17(1) of the *Canadian Aviation Regulations*.

## **Purpose**

To update and amend where needed the instructions to be followed when taking action involving Canadian aviation documents, and specifically pilot proficiency checks under subsections 6.71(1) or 7.1(1) of the *Act*, and instrument ratings under subsection 401.17(1) of the *Canadian Aviation Regulations*.

## **Background**

Transport Canada Civil Aviation recently published Staff Instructions SUR-014 *Suspension or Cancellation of Canadian Aviation Documents for Safety Reasons* and SUR-016 *Suspension or Cancellation of Canadian Aviation Documents for Regulatory Purposes*. Although there had been no recent amendment to the *Act* that would warrant the issue of new guidance on these topics, Transport Canada Civil Aviation felt that a comprehensive review of these provisions under the *Act* and detailed guidance given their respective context had been missing and was in fact much needed.

In the wake of their publication, it also became necessary to evaluate if the guidance contained in these documents reflected instructions currently offered in the *ACP Manual* and the *Pilot Proficiency Check and Type Rating Flight Test Guides* where applicable.

*ACP Manual* guidance, with respect to the refusal to issue initial pilot proficiency checks and instrument ratings, is already consistent with the content of the Staff Instructions. However, guidance with respect to failed attempts at renewing pilot proficiency checks (and instrument ratings if applicable) needs to be revised. The section below provides a review of subsections 6.71(1) and 7.1(1) of the *Act* as well as subsection 401.17(1) of the *Canadian Aviation Regulations* in the context of failed attempts at renewing these Canadian aviation documents, and provides updated guidance for Civil Aviation Safety Inspectors tasked with drafting and serving notices under these sections of the *Act* or under provisions of the *Canadian Aviation Regulations*.

As Approved Check Pilots do not serve notices but merely inform pilot proficiency check candidates and other stakeholders of its outcome, they need not be aware of all the

ramifications included therein but must note that the practice of serving Notices of Suspension in the case of failed attempts at renewing a pilot proficiency check (and an instrument rating if applicable) will give way, for most failure cases, to other notices served under the *Act*, and notifications of suspensions for regulatory reasons served in accordance with the principles of administrative law under the *Canadian Aviation Regulations*.

### **Intended Staff Guidance**

It must be noted that pilot proficiency checks and instrument ratings both meet the definition of a Canadian aviation document, which under the *Act* means “*any licence, permit, accreditation, certificate or other document issued by the Minister under Part I to or with respect to any person or in respect of any aeronautical product, aerodrome, facility or service*”.

Pilot proficiency checks and instrument ratings share an important characteristic in that the validity periods of both are regulated under the *Canadian Aviation Regulations*. Following initial issuance, both are subject to renewal via testing such as, specifically in the case of commercial air operations, a pilot proficiency check under Part VII of the *Canadian Aviation Regulations*.

Subsection 7.1(1) of the *Act* states that “*if the Minister decides to suspend, cancel or refuse to renew a Canadian aviation document on the grounds that*

*(a) the holder of the document is incompetent,*

*(b) the holder or any aircraft, airport or other facility in respect of which the document was issued ceases to meet the qualifications necessary for the issuance of the document or to fulfill the conditions subject to which the document was issued, or*

*(c) the Minister is of the opinion that the public interest and, in particular, the aviation record of the holder of the document or of any principal of the holder, as defined in regulations made under paragraph 6.71(3)(a), warrant it,*

*the Minister shall, by personal service or by registered or certified mail sent to the holder or the owner or operator of the aircraft, airport or facility, as the case may be, at their latest known address, notify that person of the Minister's decision.”*

In instances of a failed attempt at renewing a pilot proficiency check (and instrument rating if applicable), it is deemed inappropriate to invoke paragraph 7.1(1)(b) of the *Act* as grounds for taking action, since the qualification required for issuance of the document (namely the successful completion of the flight check mentioned above) was met, and cannot be undone or “cease” to be met. Canadian aviation documents, namely a pilot proficiency check and/or an instrument rating in the cases that interest us, are not issued otherwise.

This is not to say that subsection 7.1(1) of the *Act* can never be used in any case. If a strong case can be made that would support action because of either incompetence as per paragraph 7.1(1)(a) or in the public interest as per paragraph 7.1(1)(c) of the *Act*, then

action in the form of suspending, cancelling, or refusing to renew the applicable Canadian aviation document becomes warranted. A strong case however implies far more than a failed attempt at renewing a pilot proficiency check (and instrument rating where applicable) and additional guidance should be sought whenever action on grounds of incompetence or in the public interest is contemplated.

For instances of a failed attempt at renewing a pilot proficiency check (and instrument rating if applicable) and without reasonable grounds to invoke either incompetence or the public interest, appropriate directions are supplied in Staff Instruction SUR-014 that can be used with respect to addressing the pilot proficiency check failure, and in Staff Instruction SUR-016 with respect to addressing the instrument rating failure (where applicable). These directions relate to the serving of two separate notices affecting two separate Canadian aviation documents (namely the pilot proficiency check and the instrument rating) and issued under different authorities (namely the *Act* and the *Canadian Aviation Regulations*).

- **With respect to a failed pilot proficiency check renewal**

For instances of a failed attempt at renewing a pilot proficiency check (whether or not an instrument rating is associated with it) and without reasonable grounds to invoke either incompetence or the public interest, Transport Canada Civil Aviation must use paragraph 6.71(1)(b) of the *Act* as grounds for taking action. Subsection 6.71(1) of the *Act* states that “*the Minister may refuse to issue or amend a Canadian aviation document on the grounds that*

*(a) the applicant is incompetent;*

*(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 fulfill the conditions necessary for the issuance or amendment of the document; or*

*(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.”*

The note in section 5.5 of Staff Instruction SUR-014 additionally recommends that the wording to be used in the applicable Notice of Refusal be drafted to specifically reflect the **refusal to issue the renewal** of the applicable pilot proficiency check.

The guidance above now points to the fact that, in the absence of reasonable grounds to invoke either incompetence or the public interest, a pilot proficiency check will not be suspended following a failed attempt at its renewal; instead, Transport Canada Civil Aviation will serve the Canadian aviation document holder a notice issued under subsection 6.71(2) of the *Act*, which will not suspend pilot proficiency check privileges but will merely maintain its current status until a subsequent attempt at its renewal is successful or its privileges lapse by virtue of reaching the end of its validity period, whichever comes first. The avenue for reviewing the Minister’s decision remains unchanged and takes place before the Transportation Appeals Tribunal of Canada.

- **With respect to a failed instrument rating renewal**

Section 6.8 of the *Act* allows for the making of regulations permitting the Minister to suspend, cancel or refuse to issue, amend or renew a Canadian aviation document in the circumstances and on the grounds prescribed by regulation of the Governor in Council, such as subsection 401.17(1) of the *Canadian Aviation Regulations*, which reads “*where, during a flight test, the holder of a rating fails to meet the requirements specified in the personnel licensing standards for the lowest class of that rating, the Minister shall suspend the rating.*”

Therefore, for instances of a failed attempt at renewing an instrument rating (concurrently with a pilot proficiency check failure) and without reasonable grounds to invoke either incompetence or the public interest, Transport Canada Civil Aviation must use subsection 401.17(1) of the *Canadian Aviation Regulations* as grounds for taking action.

It is important to note that such a suspension is not being served under the authority of the *Act* but under a specific provision of the *Canadian Aviation Regulations*; this effectively means that a decision to suspend an instrument rating and to serve the resulting notification under this subsection of the *Canadian Aviation Regulations* cannot be reviewed before the Transportation Appeals Tribunal of Canada but can be reviewed by the Federal Court.

Staff Instruction SUR-016 provides important information on serving such a notification in accordance with the principles of administrative law. Consequently, when drafting a notification suspending an instrument rating under subsection 401.17(1) of the *Canadian Aviation Regulations*, Civil Aviation Safety Inspectors must apply the guidelines found under section 6.2 of Staff Instruction SUR-016, bearing in mind that the action taken is a suspension (and not a cancellation), that the proposed timeframe within which the recipient of the notification may make submissions to the Minister need not be 30 days as suggested but must afford sufficient time for the recipient to adequately do so, and that the condition for termination of the suspension is a successful demonstration of skills as per the requirements of subsection 421.46(c) of the *Personnel Licensing Standards* (namely a flight test in accordance with the *Flight Test Standards - Instrument Rating*, a pilot proficiency check conducted under Instrument Flight Rules in accordance with the applicable subpart of Part VII of the *Canadian Aviation Regulations*, or a line operational evaluation from an approved Advanced Qualification Program).

A standard notification form for an instrument rating suspension served under subsection 401.17(1) of the *Canadian Aviation Regulations* does not currently exist and must be developed and produced at the regional level for the time being.

### **Summary**

In instances of failed attempts at an initial pilot proficiency check or at renewing a pilot proficiency check (and an instrument rating if applicable), the *ACP Manual* already

proposes procedures that adequately mitigate the risks of flight crewmembers operating revenue flights before remedial training and a successful pilot proficiency check take place.

Specifically, section 5.2 of the manual requires that, following the failure of a pilot proficiency check (and the associated instrument rating if applicable), the Approved Check Pilot will notify the candidate's Chief Pilot and/or Operations Manager of failed items and make recommendations as to corrective action, fill out a pilot proficiency check flight test report and offer a copy to the candidate, and immediately notify the issuing authority of the failure. These actions should effectively ensure that proper and timely actions are taken with respect to re-qualifying the candidate.

Guidance is being amended however so that, in the absence of reasonable grounds to invoke either incompetence or the public interest, Civil Aviation Safety Inspectors will refrain from using suspension procedures in accordance with paragraph 7.1(1)(b) of the *Act* as currently explained in the *ACP Manual*, and will use instead a refusal process in accordance with subsection 6.71(1) of the *Act* with respect to a failed attempt at renewing a pilot proficiency check, and a suspension process in accordance with subsection 401.17(1) of the *Canadian Aviation Regulations* with respect to a failed attempt at renewing an instrument rating.

While debriefing unsuccessful candidates, Approved Check Pilots must be mindful to supply correct information with respect to the types of action that will take place (a refusal to issue a PPC renewal v. a suspension of the instrument rating), their different avenues for judicial review (the Transportation Appeals Tribunal of Canada v. the Federal Court), and the appropriate contact information (of the licensing or issuing authority as appropriate) for making representations in the event of a suspension of the instrument rating.

### **Effective Date**

These instructions take effect immediately. The next editions of the *ACP Manual*, and specifically its Chapter 5, and the *Pilot Proficiency Check and Type Rating Flight Test Guides*, in their sections dedicated to pilot proficiency check failures, will reflect this policy change.

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