



TRANSPORTATION APPEAL TRIBUNAL OF CANADA

Citation: *Matthew Hamilton v. Canada (Minister of Transport)*, 2021 TATCE 12 (Review)

TATC File No.: O-4560-27

Sector: Aviation

BETWEEN:

Matthew Hamilton, Applicant

- and -

Canada (Minister of Transport), Respondent

Heard by: Videoconference on February 23, 2021

Before: Keith Whalen, Member

Rendered: May 10, 2021

REVIEW DETERMINATION AND REASONS

Held: The Minister of Transport has proven that, on the balance of probabilities, the applicant did not meet the qualifications for the issuance of a Commercial Pilot Licence – Helicopter in accordance with paragraph 6.71(1)(b) of the *Aeronautics Act*.

I. BACKGROUND

[1] Mr. Matthew Hamilton started helicopter flight training with Central Helicopter Training Academy on February 13, 2017. On September 20, 2017, he successfully completed a private pilot helicopter flight test and was subsequently issued a Private Pilot Licence – Helicopter (PPL-H) (Exhibit M-D).

[2] He then changed flight schools to Great Lakes Helicopters and continued with his helicopter flight training on November 17, 2017 (Exhibit A-1). In conjunction with his Commercial Pilot Licence – Helicopter (CPL-H) flight training, he also trained for his Commercial Pilot Licence– Aeroplane (CPL-A) and upon completion of this training, applied for and received a CPL-A on December 21, 2018 (Exhibit M-F). Mr. Hamilton completed his commercial helicopter flight training, successfully did a flight test on August 21, 2019 (Exhibit M-B, page 45), and was issued temporary CPL-H privileges. He submitted his application for a CPL-H to Transport Canada (TC) on August 23, 2019.

[3] By letter dated November 8, 2019, TC advised Mr. Hamilton that the Minister of Transport (Minister) had refused to issue his CPL-H, in accordance with paragraph 6.71(1)(b) of the *Aeronautics Act (Act)* and paragraph 421.31(4)(b) of the *Personnel Licensing and Training Standards*. The letter confirmed that the review of his application identified that he required 20.2 hours dual and 8 hours solo flight time to meet the required 60 hours of commercial pilot flight training. The letter also served to cancel the applicant's temporary CPL-H privileges issued after the flight test in August 2019 (Exhibit M-B, page 3).

[4] On November 15, 2019, Mr. Hamilton requested that the Transportation Appeal Tribunal of Canada (TATC/Tribunal) review the Minister's decision. The parties agreed prior to the hearing that the cancellation of temporary privileges would not be subject to review.

II. PRELIMINARY ISSUE

[5] Mr. Lindsay, the Minister's representative, raised the argument that the burden of proof is on the applicant in cases where the Minister exercises its discretion in making a decision. However, Mr. Lindsay did not provide any specific evidence or information to support this argument. Mr. Clark, for the applicant, stated that the burden of proof is on the Minister, and that this was the intent of the legislation. No further discussion was made on this point, and I ruled that the burden was on the Minister. My reasons follow.

[6] The Tribunal operates on the basis that the Minister has the burden of proving its case where it exercises its discretion to refuse to issue a Canadian aviation document.

[7] The Federal Court has examined the Tribunal's role in reviewing Ministerial decisions in *Canada (Attorney General) v. Bethune*, 2016 FC 583. In that decision, the Court stated:

[12] The statutory scheme for aviation approvals, licences and related matters vests a broad discretion in the Minister to act in the interests of public security.

[13] That broad discretion is not absolute. The TATC is a specialized tribunal, with members who have relevant experience, tasked with reviewing decisions such as the one at issue.

[14] This is an instance where the Court must accord great deference to the TATC in acting within its expertise. It was Parliament's intention that the Tribunal act as an oversight on the Minister, and most particularly his officials. There is no issue of the Tribunal usurping Ministerial responsibilities. [...]

I find that the Tribunal's approach to reviewing Ministerial decisions has been endorsed by the Federal Court.

[8] In addition, in a previous case concerning a refusal to issue a Canadian aviation document, the TATC found that the burden of proof is on the Minister [*Msattef v. Canada (Minister of Transport)*, 2015 TATCE 20]. Although not binding, I agree with the Tribunal's reasons in that case:

[7] The Minister is responsible for applying and enforcing the *Act* and its regulations. When the Minister decides to refuse to issue a Canadian aviation document, the reasons and legal basis of this refusal must be provided to the applicant: paragraph 6.71(2)(b) of the *Act* requires the Minister to explain to the applicant the qualifications or conditions that are not met or fulfilled for the issuance of a document. The *Act* also allows the applicant to request a review of this decision by the Tribunal, but in no way does it place an onus on the applicant to prove to the Tribunal that the Minister's decision was unreasonable.

[9] I find that there is no reason to deviate from the Tribunal's approach that the burden is on the Minister to prove that it was justified in refusing to issue the CPL-H. Accordingly, the Minister is required to prove that it was justified in refusing to issue the CPL-H because the applicant does not meet the qualifications or fulfil the conditions necessary for the issuance of the document.

III. ISSUES

[10] The question that needs to be answered is whether the Minister was justified in refusing to issue a Canadian aviation document in this case as per paragraph 6.71(1)(b) of the *Aeronautics Act*, and specifically, did Mr. Hamilton meet the qualifications for the issuance of a CPL-H in accordance with paragraph 421.31(4)(b) of the *Personnel Licensing and Training Standards*.

[11] The issue of the application of subparagraph 421.31(7)(b)(i) of the *Personnel Licensing and Training Standards*, experience credit for holding a CPL-A, also arose during the hearing and will be discussed below.

IV. LEGAL FRAMEWORK

[12] TC based its decision on paragraph 6.71(1)(b) of the *Aeronautics Act*, which states:

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;

[13] Part IV of the *Canadian Aviation Regulations (CARs)* refers to *Personnel Licensing and Training Standards*. Standard 421.31 specifies the Commercial Pilot Licence – Helicopter application requirements, and provides:

(4) Experience

(a) An applicant shall have completed a minimum of 100 hours pilot flight time in helicopters, of which a minimum of 35 hours shall be pilot-in-command flight time, including 10 hours cross-country pilot-in-command flight time; and

(b) an applicant who holds a Private Pilot Licence - Helicopter or a Private Pilot Licence - Helicopter issued by a Contracting State other than Canada shall have completed 60 hours of commercial pilot flight training in helicopters consisting of a minimum of:

(i) 37 hours dual instruction flight time, under the direction and supervision of the holder of a flight Instructor Rating - Helicopter, including:

(A) 15 hours of advanced dual instruction, emphasizing the improvement of general flying ability and skill, including a minimum of 5 hours of cross-country flight;

(B) 5 hours night flight time including a minimum of 2 hours cross-country flight time;

(C) in addition to (A) and (B), 10 hours of instrument flight time, using suitable radio navigational facilities to complete elementary navigation procedures and two-way radio to comply with Air Traffic Control procedures and clearances including a minimum of 5 hours in helicopters. A maximum 5 hours of the 10 hours may be conducted on an approved helicopter simulator or flight training device.

(D) Credit for a maximum of 5 hours of dual instrument time acquired during training for issue of the Private Pilot Licence - Helicopter shall be given towards the 10 hours of dual instrument time.

(ii) 23 hours solo flight time emphasizing the improvement of general flying ability and skill, including:

(A) a cross-country flight of at least 2 hours duration and to a point a minimum of 45 minutes flight time at normal cruising speed from the point of departure including a minimum of 3 landings at points other than the point of departure, and

(B) 5 hours solo flight time by night, including a minimum of 10 takeoffs, circuits and landings.

(c) An applicant who does not hold a Private Pilot Licence – Helicopter shall have completed a minimum of 100 hours commercial pilot flight training in helicopters, ...

[...]

(7) Credits

[...]

(b) Experience

Where an applicant holds a pilot permit or licence in another aircraft category, flight time credits shall be claimed as follows:

(i) Commercial Pilot Licence or higher - Aeroplane

Where an applicant holds a Commercial Pilot Licence - Aeroplane or higher type licence in the aeroplane category, the 100 hours total flight time in helicopters required by paragraph (4)(a) above shall be deemed to have been met provided the applicant has completed a minimum of 60 hours flight time in helicopters, including all of the experience requirements demanded by paragraph (4)(b) above.

V. ANALYSIS

[14] The Minister argued that the applicant did not meet the requirements of *CARs* paragraph 421.31(4)(b), as the required 60 hours commercial pilot flight training are *in addition* to the total number of hours flown to obtain the PPL-H. Further, the Minister argued that the credits for a CPL-A under subsection 421.31(7) are not applicable to the applicant, as the training for the CPL-A was not completed prior to starting the CPL-H.

[15] The applicant argued that the time used to obtain his PPL-H should count towards the commercial pilot flight training requirement and that he is eligible for credits for his CPL-A.

[16] The Minister's only witness, Mr. Serge Côté, testified by way of affidavit (Exhibit M-A) and in person. Mr. Hamilton testified at the hearing and called five witnesses: Mr. Duncan Chalmers, Mr. Kevin Woytaz, Mr. Nick Booth, Mr. Fred Jones, and Ms. Catherine Press.

(1) *Commercial helicopter flight training / standard*

[17] The Minister's representative argued that Mr. Hamilton was initially enrolled in a PPL-H flight training program and that the flight time accumulated during this training was not considered as part of the required hours for commercial flight training.

[18] Mr. Hamilton argued that he enrolled in the commercial pilot licence program with both Central Helicopter Training Academy and Great Lakes Helicopters. He testified that his objective was to train for his CPL-H and CPL-A at the same time and apply the flight time credits from his CPL-A to his application for a CPL-H in accordance with subparagraph 421.31(7)(b)(i). He stated that this was a way to reduce the high costs of helicopter instruction and still meet the qualifications for the CPL-H, and because he was enrolled in a commercial flight training program from the beginning, the flight instruction should be considered as commercial pilot flight training.

[19] Exhibit M-B, Pilot Training Record (PTR) Great Lakes Helicopters (page 38) and Exhibit M-C, PTR, Central Helicopter Training Academy (page 2) both have the "Commercial" training box checked, indicating that Mr. Hamilton enrolled in a commercial helicopter training program.

[20] Both Mr. Woytaz, Chief Flying Instructor (CFI), Central Helicopter Training Academy and Mr. Booth, CFI, Great Lakes Helicopters, testified that Mr. Hamilton had enrolled in a commercial helicopter training program and that all the flight instruction provided to him was to the commercial flight training standard.

[21] Mr. Côté, Transport Canada Civil Aviation Safety Inspector (CASI), explained in his affidavit that the minimum 60 hours of commercial pilot flight training required under paragraph 421.31(4)(b) for a CPL-H is *in addition* to the total number of hours required to obtain the PPL-H (affidavit, para. 11). Mr. Chalmers, Transport Canada CASI, also testified that he is in agreement with Mr. Côté that “60 hours of commercial pilot flight training in helicopters” means training conducted after the issuance of the PPL-H (Exhibit M-B, page 13).

[22] Mr. Côté testified that the applicant had received 39 hours of private pilot flight training in helicopters, in addition to his 1.4 hours during the flight test, for a total of 40.4 hours. Since those hours were part of the PPL-H application, they are not considered part of the required 60 hours under this provision for qualification for the CPL-H (affidavit, paras. 12-13).

[23] Mr. Côté also testified that the hours flown for the issuance of the PPL-H are not considered as meeting the commercial helicopter flight training standard, as the 40 hours of initial helicopter instruction are more basic. The additional 60-hour minimum commercial helicopter flight training is more advanced flight instruction, required to achieve the commercial licence standard.

[24] Mr. Côté, Mr. Woytaz, Mr. Booth, and Mr. Jones all testified that the “initial” training (approximately the first 40 hours flight training) is the same for a private or commercial helicopter pilot licence. These initial flight training hours are used to bring the pilot’s skill to a level required for the safe control and operation of the helicopter. Once the basic skills are taught and mastered, the next step is to develop the advanced skills for the CPL-H. There will be different levels of abilities and competencies that each student possesses when starting flight training and this will dictate how much flight time will be needed to achieve the desired skill levels.

[25] I accept the testimony of all four witnesses that the initial flight hours for a flight student are fundamentally the same for a private or commercial helicopter pilot licence and will form the basis for which to build on during subsequent flight training. I also accept that a commercial pilot needs a higher skill level to operate in the commercial helicopter environment. I find that the initial 40 hours (approximate, depending on pilot skill level) are considered to be part of the foundation for all helicopter pilots to build on for the continuance to the commercial licence.

[26] However, I conclude that these initial hours, where the basic flight skills are taught and mastered, are not intended to be considered as the advanced training required for a pilot to operate in a commercial environment. In the absence of submissions on this issue by the parties, I have come to my conclusion based on a cursory analysis of the principles of statutory interpretation, including the object of the *Act* – aviation safety – and the entire context and scheme of the *Act*.

[27] This finding is supported by the language of subparagraphs 421.31(4)(b)(i) and (ii), which state in both the advanced dual and solo flight time requirements that the instruction should be “emphasizing the improvement of general flying ability and skill”. I find that the language of this provision demonstrates the intent that advanced instruction is required to improve the general flying ability and skill which is in line with the commercial helicopter pilot

training. This requirement for advanced training for commercial instruction is in line with the object of the *Act*.

[28] The parties disagree on the interpretation of the provision, but neither referred to the Supreme Court's endorsement of Elmer Driedger's approach, commonly known as the modern principle, as the guide to statutory interpretation:

Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament. (*Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, paras. 20-21; *Medovarski v. Canada (Minister of Citizenship and Immigration)*, [2005] 2 S.C.R. 539, para. 8; *British Columbia Human Rights Tribunal v. Schrenk*, [2017] 2 S.C.R. 795, para. 30).

[29] Further, the application form for the CPL-H has the following declaration in section 4, Flight Experience: "I have completed 60 hours of Commercial Flight Training *following the issuance of a PPL-H*" (emphasis added). This is also an indication that the intent of the 60 hours of commercial training be in addition to the PPL-H training, to ensure proper training of advanced techniques required for the commercial application.

[30] I note that in Mr. Hamilton's application for the CPL-H, he declared that he completed the 60 hours of commercial flight training following the issuance of the PPL-H, and that he had not completed a minimum of 100 total flight hours in helicopters (Exhibit M-B, page 17). The applicant testified that this declaration was marked in error, but no further explanation was presented as to the reasons for this error.

[31] I also note that for an application for a CPL-H, without a PPL-H, the provisions of paragraph 421.31(4)(c) apply, and the flight training hour requirement is different and requires more commercial flight time, again, indicating the intent of the legislation that appropriate commercial flight training is required for those with and without a PPL-H.

[32] For all these reasons, when reading the relevant sections in their grammatical and ordinary sense, in context and in a manner that is harmonious with the scheme of the *Act*, I must agree with the Minister's interpretation of the provision.

[33] Therefore, I conclude that even though Mr. Hamilton was enrolled in a commercial pilot training program, his helicopter flight training completed up to the point of issuance of his PPL-H is the basic flight training required for the safe operation of the helicopter and is not intended to count towards his commercial helicopter pilot flight training requirement as specified in paragraph 421.31(4)(b).

[34] Mr. Hamilton testified that he sought advice from Transport Canada, Mr. Woytaz, and Mr. Booth on taking a private helicopter flight test during his commercial helicopter flight training. Mr. Hamilton testified that he was told that he was able to obtain the PPL-H during his CPL-H training. However, Mr. Hamilton's testimony was silent as to whether or not he was advised that the hours of training for the PPL-H would be included as commercial pilot flight training towards his application for the CPL-H.

[35] This issue was discussed in an email conversation between Mr. Jamie Bionda and Mr. Ken Walsh of TC, and Mr. Booth (Exhibit M-B, pages 31-35). Mr. Booth confirmed that Mr. Hamilton had completed a PPL-H at Central Helicopter Training Academy and then attended Great Lakes Helicopters to upgrade to a commercial helicopter licence.

[36] In this correspondence, Mr. Booth indicated that he was told by Ms. Debbie Fyke of TC (exactly how long ago was not specified) that as long as the intent is to show continuation, TC would acknowledge the normal hours for the commercial course. Mr. Bionda stated that Mr. Booth “likely misunderstood” as he was not aware of any allowance in the *Commercial Air Service Standards (CASS)* that would allow for this. Mr. Booth further stated, “a while ago ... flight schools were telling students they could do private and continue on to commercial in order to do their night time post private licence all within the 100 hours, we don’t do that as we don’t see the reason to do two written tests and two flight tests”.

[37] I heard testimony from Mr. Booth and Mr. Woytaz that in the past, the practice of doing a private helicopter flight test while enrolled in a commercial helicopter pilot training course was used to achieve two goals: the first being that it gives the student pilot exposure to the flight test procedure while continuing to take their commercial helicopter flight training. Second, it allows students to continue their flight training and gain experience in certain solo helicopter manoeuvres with another pilot who is not a flight instructor. This can assist the student in reducing the cost of flight training while still completing the required flight training for the CPL-H.

[38] However, neither witness specified whether, when completing the PPL-H flight test during commercial training, the hours of training for the PPL-H would be used towards the application for the CPL-H.

[39] I note the applicant’s testimony and the apparent confusion regarding the effect of completing the PPL-H flight test and being issued a PPL-H while undertaking CPL-H training. However, there was not sufficient evidence presented to demonstrate that the hours of the PPL-H would have counted as commercial pilot flight training towards the CLP-H. Further, this does not change my conclusion that the proper interpretation of the provision in question is that the commercial hours must be obtained *after* the issuance of a PPL-H. And if the applicant is applying for a CPL-H and possesses a PPL-H, then in the *CARs*, the provisions of paragraph 421.31(4)(b) apply.

(2) *Simultaneous CPL-A and CPL-H training and use of experience credits*

[40] Mr. Hamilton trained for his CPL-A at the same time that he was doing his CPL-H. He received his CPL-A on December 21, 2018 and he continued to train for his CPL-H, which he completed eight months later on August 21, 2019.

[41] Mr. Côté testified that the application for the credit of time under subparagraph 421.31(7)(b)(i) towards the CPL-H could not be accepted, as Mr. Hamilton did not hold a CPL-A when he started the CPL-H training. He argued that this provision is allowed on the basis that the experience and knowledge gained from obtaining that licence will affect the subsequent training for the CPL-H (affidavit, paras. 14-15).

[42] Mr. Côté noted that Mr. Hamilton applied for a CPL-A on December 12, 2018 (Exhibit M-F) and started his CPL-H training on October 14, 2017 (Exhibit M-B, page 41) (affidavit, paras. 16-17). Mr. Côté stated that prior to obtaining his CPL-A, the applicant had completed 39 hours of training for his PPL-H and 9.5 hours of training towards his CPL-H. After having obtained his CPL-A, Mr. Hamilton completed 22 hours of helicopter flight training (affidavit, para. 18).

[43] Mr. Chalmers testified that he agreed with using the credits from the CPL-A towards the CPL-H, and that Mr. Hamilton qualified for the flight time credits, however, he did not recall speaking to Mr. Hamilton directly on this matter.

[44] Ms. Press, CEO of Chinook Helicopters (1982) Ltd., and Mr. Jones, President and CEO of the Helicopter Association of Canada, testified concerning the crediting of time for private versus commercial licences. Both witnesses testified that it is their understanding that the requirements for the crediting of flight time towards the CPL-H when holding a CPL-A have to be met at the time the application is submitted.

[45] Paragraph 421.31(7)(b) states “Where an applicant holds a pilot permit or licence in another aircraft category, flight time credits shall be claimed as follows: ...” and subparagraph 421.31(7)(b)(i) states “Where an applicant holds a Commercial Pilot Licence -Aeroplane or higher ...”, certain credits can be met. The word “holds” is used in both of these paragraphs and, with no guidance from the legislation on its meaning, the Tribunal relies on the *Black’s Law Dictionary*, which defines the word “hold” as: “to possess by a lawful title.” The Minister did not present any evidence to substantiate the statement that the CPL-A has to be completed prior to the commencement of the flight training for the CPL-H.

[46] I find that the licence requirements have to be met on the day of the application for the higher licence. On the date of application for the CPL-H, Mr. Hamilton held (possessed by a lawful title) a CPL-A and was entitled to apply for the experience credit under subparagraph 421.31(7)(b)(i). Under this provision, he was deemed to have met the 100 hours total flight time in helicopters required by paragraph 421.31(4)(a), provided he had completed a minimum of 60 hours flight time in helicopters, including all of the experience requirements demanded by paragraph 421.31(4)(b). He had a total helicopter flight time of 72.2 hours at the time of application.

(3) Paragraph 421.31(4)(b) requirements

[47] Given that I have already found that the applicant’s helicopter flight training completed up to the point of issuance of his PPL-H does not count towards his commercial helicopter pilot flight training requirement as specified in paragraph 421.31(4)(b), and that the applicant was eligible for the CPL-A credit under subsection 421.31(7), I must now determine whether the experience requirements demanded by paragraph 421.31(4)(b) have been met.

[48] I note that based on the total number of hours completed by the applicant, which was fewer than 100 hours, it would appear that the Minister may have accepted the applicant’s eligibility for the CPL-A credit, as it was not listed as a reason for the refusal of the Canadian

aviation document. However, if this is not the case, and regardless of whether the CPL-A credit was applied, the applicant must still have met the requirements of paragraph 421.31(4)(b).

[49] Mr. Hamilton did hold a PPL-H and therefore the provisions of paragraph 421.31(4)(b) applied to his application for his CPL-H. His total flight time in helicopters was 40.4 hours when he submitted his application for the PPL-H and as I determined, these hours are not part of “the commercial helicopter pilot flight training” requirements.

[50] The commercial pilot flight training hour requirement in paragraph 421.31(4)(b) is 60 hours of commercial pilot flight training, including the minimums listed in subparagraphs (i) and (ii) of 37 hours dual and 23 hours solo.

[51] My analysis of the evidence submitted, including Pilot Training Records, Private and Commercial Helicopter Application forms, and Mr. Côté’s affidavit, determined that after completion of his PPL-H, Mr. Hamilton acquired a total of 31.8 flight hours of commercial helicopter training, 16.8 hours dual and 15.0 hours solo. I agree with the Minister that this leaves a shortfall of 20.2 hours dual and 8 hours solo, as quoted on the Minister’s letter to Mr. Hamilton dated November 8, 2019.

[52] I find that Mr. Hamilton did not meet the commercial helicopter flight hours requirement in paragraph 421.31(4)(b).

VI. DETERMINATION

[53] The Minister of Transport has proven that, on the balance of probabilities, the applicant did not meet the qualifications for the issuance of a Commercial Pilot Licence – Helicopter in accordance with paragraph 6.71(1)(b) of the *Aeronautics Act*.

May 10, 2021

(Original signed)

Keith Whalen
Member

Appearances

For the Minister: John Lindsay
For the Applicant: Bill Clark