TATC File No. H-3474-40
MoT File No. AARB 5504-C11368 E29 12233 SV A

TRANSPORTATION APPEAL TRIBUNAL OF CANADA

BETWEEN:

Minister of Transport, Appellant

- and -

Nav Canada, Respondent

LEGISLATION:
Canadian Aviation Regulations, SOR/96-433, subsection 803.01(2)

Appeal decision
Suzanne Racine, J. Richard W. Hall, Elizabeth MacNab

Decision: December 14, 2010

Citation: *Canada (Minister of Transport) v. NAV CANADA*, 2010 TATCE 30 (appeal)

Heard at Ottawa, Ontario, on February 3, 2010

Held: The Appeal is allowed. The Appeal Panel finds that the Review Member erred in law in analyzing the entire circumstances relevant to this matter by not properly taking into account all of the other relevant factors relating to the assessment of penalties. The penalty is increased from $1 000 to $12 500.

File Nos. H-3472-40

H-3473-40

H-3474-40

I. THREE FILES WERE APPEALED BY TRANSPORT CANADA

(H-3472-40, H-3473-40 and H-3474-40)

A. Background

[1] The provision of air navigation services internationally is governed by the *Convention on International Civil Air Navigation* ("*Convention", "Chicago Convention"*) and its Annexes. Until 1996, air navigation services in Canada were provided

by the federal Department of Transport (Transport Canada). That year, however, responsibility for the provision of these services was transferred to NAV CANADA, a private not-for-profit corporation, by the *Civil Air Navigation Services Commercialization Act*, S.C. 1996, c. 20 ("*CANSCA*"). This statute gave Nav Canada the exclusive authority to provide certain air navigation services, including aeronautical information services ("AIS") and, by section 9, it required Nav Canada to

> . . . provide all users with the civil air navigation services that the Department of Transport provided immediately before the transfer date and shall do so to the same extent as the services were provided by the Department of Transport.

[2] In addition to this requirement, regulations were made under the *Aeronautics Act* ("*Act*") regarding the provision of such services, including section 803.01 of the *Canadian Aviation Regulations ("CARs*").

[3] This Appeal relates to three files that will be discussed separately. They all involve alleged contraventions of subsection 803.01(2) of the *CARs*, which states:

> 803.01(2) No person shall provide aeronautical information services except in accordance with the standards set out in Annexes 4 and 15 to the Convention.

[4] A Review Hearing on all three matters was held before the Review Member, Faye H. Smith, who was at that time the Chairperson of the Transportation Appeal Tribunal of Canada ("Tribunal"), on November 24, 25 and 26, 2008, and March 3, 2009, and a determination was issued on August 26, 2009.

File No. H-3472-40

[5] This file deals with six occasions where it was alleged that services were not provided in accordance with subsection 803.01(2), on the grounds that NAV CANADA did not demonstrate adequate aeronautical information quality management in accordance with the standards set out in Annexes 4 and 15 to the *Convention.* The Review Member found that the Minister of Transport failed to prove this charge.

File H-3473-40

[6] This file is based on a failure to comply with the standards set out in Annex 15 by failing to issue a timely Notice to Airmen (NOTAM). The Review Member found that this contravention had been proven but that a defence of due diligence applied.

File H-3474-40

[7] This file is also based on the failure to issue timely NOTAMs. The Review Member found that the contravention had been proven but she reduced the penalty assessed by the Minister from $25 000 to $1 000.

B. Grounds of Appeal

[8] The Minister set out 10 grounds of appeal that related to specific files, and they will be discussed in that context.

[9] In addition, two general grounds of appeal were listed as follows:

> 11. The Member made an error in law in relying on uncorroborated hearsay evidence in certain instances, and
>
> 12. Such further and other grounds in fact and in law that the transcript of the proceedings may disclose.

II. STANDARD OF REVIEW ON APPEAL

A. Arguments

[10] The Appellant referred to *Minister of Transport v. Arctic Wings Ltd.*, [2006] TATC file no. W-2902-41 (appeal) for the proposition that, in an appeal, the standard of review for findings of fact is "reasonableness" and for questions of law it is "correctness".

[11] The Respondent referred to *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R., for the same proposition. As well, the Respondent referred to *Billings Family Enterprises v. Canada (Minister of Transport)*, [2008] F.C.J. No. 17, where it was held that an Appeal Panel should give considerable deference to the Review Member's findings of fact and credibility, but that the Appeal Panel is entitled to its own view of the law.

B. Analysis

[12] There seems to be substantial agreement between the parties on the standard of review and the Appeal Panel accepts their analysis.

[13] Section 14 of the *Transportation Appeal Tribunal of Canada Act* ("*TATC Act*") provides that an appeal shall be on the merits based on the record of the proceedings of the Review Hearing and any oral argument put forth by the parties at the Appeal Hearing. The Appeal Panel has reviewed the record and has heard argument at the Appeal Hearing.

III. FILE H-3472-40

A. Background

[14] The six counts of this charge are based on the existence of NOTAMs making permanent changes to the information on various aeronautical charts that, on February 5, 2007, had been outstanding for more than three months without the changes being made on the charts. In fact, these NOTAMs had all been issued between April and September 2005. It was alleged that the long-standing nature of these NOTAMs constituted a failure to provide AIS in accordance with the Annexes, as required by section 803.01(2) of the *CARs*, in that their long standing nature showed that there was inadequate aeronautical information quality management as required by Annex 15.

[15] The inadequacies were first, the failure to produce a non-conformance report relating to an operationally significant permanent change as required by its internal Quality Management System ("QMS") and, second, the failure to publish a timely Aeronautical Information Publication ("AIP") amendment reflecting the change. The full wording of the six counts is set out in the Annex to this Appeal Decision.

[16] The first of the six counts in relation to the long-standing NOTAMs also alleged that the requirements of section 1.3.3 of Annex 4 had not been met. Section 1.3.3 provides as follows:

> 1.3.3 A Contracting State shall take all reasonable measures to ensure that the information it provides and the aeronautical charts made available are adequate and accurate and that they are maintained up to date by an adequate revision service.

[17] While section 1.3.3 is not mentioned in the other five counts, each count alleges that ". . . nor did NAV CANADA publish a timely aeronautical information publication amendment reflecting this change."

[18] In dealing with this issue, the Review Member agreed with NAV CANADA's argument that the requirement for timely notice of a revision could be met by the issuance of a NOTAM.

[19] Annex15 is entitled "*Aeronautical Information Services*. Section 3.2 is headed "Quality System", and section 3.2.1 provides as follows:

> Each Contracting State shall take all necessary measures to introduce a properly organized quality system containing procedures, processes and resources necessary to implement quality management at each function stage as outlined in 3.1.7. . . The execution of such quality management shall be made demonstrable for each function stage, when required.

[20] The function stages referred to in section 3.1.7 of Annex 15 require an aeronautical information service to

> . . . receive and/or originate, collate or assemble, edit, format, publish/store and distribute aeronautical information/data concerning the entire territory of the State as well as areas in which the State is responsible for air traffic services outside its territory . . . .

[21] Section 3.2.2 of Annex 15 is a recommendation that the quality system required by section 3.2.1 of Annex 15 ". . . should be in conformity with the International Organization for Standardization (ISO) 9000 series of quality assurance standards . . . ."

[22] NAV Canada has a quality system certified as meeting the requirements of ISO 9000 and was subject to audits respecting it by authorized companies. The Review Member found that, in spite of the failure to provide non-conformance reports as requested by Transport Canada, there were adequate tracking mechanisms relating to the status of the NOTAMs to indicate that there was adequate quality control.

B. Grounds of Appeal

(***1) Minister of Transport***

[23] The grounds of appeal concerning file H-3472-40 are as follows:

1.
    1. The Member erred in law in the interpretation and applications of section 1.3.3 of Annex 4 and sections 3.1.7, 3.2.1, 4.2.8 and 4.3.1 of Annex 15 of the *Convention on International Civil Aviation* (Convention also known as the *Chicago Convention*and the *International Civil Aviation Organization (ICAO) Convention*;
    2. The Member's finding of fact at paragraph 82, that there was insufficient evidence to demonstrate a failure of Nav Canada's Quality Management System ("QMS") was unreasonable;
    3. The Member's finding of fact at paragraph 82, in determining that failure to provide six non-conformances for NOTAMs that were over 90 days old within a week did not result in proof of failure to have quality control, was unreasonable;
    4. The Member's finding of fact at paragraph 82 that implied that the maintaining of an ISO certification is an indication that the company has a QMS, was unreasonable.

C. Arguments

(1) Appellant

[24] The Minister argues that the Review Member made an error in law in determining that an error could be corrected either by amending an AIP or by the issue of a NOTAM. This interpretation ignores the requirement to "take all reasonable measures to ensure that the information . . . and the aeronautical charts made available are adequate and accurate and that they are maintained up to date by an adequate revision service", as required by section 1.3.3 of Annex 4. While the Minister accepted that the initial notice of a permanent change could be given by a NOTAM, to hold that this would be the only notification required would lead to the possibility that no changes would be made other than by a NOTAM and pilots consulting a large volume of them could miss important safety information. Further, the correction of charts by a NOTAM violates the requirement in Annex 4 that such charts be "adequate and accurate".

[25] The Minister also argues that in paragraph [56] of her determination, the Review Member erred in holding that ". . . expert members of specialized tribunals cannot substitute their opinions for those of the witnesses and are not entitled to cast about and create evidence", in reaching her conclusion that the *Convention* does not require amendments to be effected within any particular number of days. While the Minister agrees that no specific number of days is required, the amendments were not made in accordance with NAV CANADA's own internal policies. The words "adequate and accurate" (section 1.3.3 of Annex 4) must be given some meaning, and NAV CANADA has established a meaning in its policies.

[26] Further, the Minister argues that the Review Member erred in law in concluding that a failure to provide a non-conformance report 90 days after a NOTAM still in existence, making a permanent change to a chart does not show a failure to have adequate quality control and does not mean that NAV CANADA does not have an adequate QMS as required by Annex 15.

[27] While the Appellant agrees that failure to issue a non-conformance report does not automatically show an inadequate QMS, in reaching her conclusion on this matter, the Review Member failed to take into account evidence of numerous long-term NOTAMs, coupled with NAV CANADA's unawareness of the magnitude of the issue until May 2006. The Minister maintains that NAV CANADA's QMS was inadequate because, even after the problem was identified during Transport Canada audits in

2003 and 2004, NAV CANADA did not take corrective action in accordance with its internal procedures document that required the issue of a non-conformance report within 90 days, nor did NAV CANADA amend the charts within its "realistic standard" of 144 days. In fact, NAV CANADA was not aware of the full extent of the problem until May 2006. At that time, there were 170 long-standing NOTAMs, and that number had not changed by the time the Notice of Assessment Monetary Penalty ("NAMP") was issued, although it had been reduced to 70 by the time of the Review Hearing. Benoit Tardif, in testifying for NAV CANADA, said that it did not have sufficient resources to meet Transport Canada's concerns relating to the NOTAMs.

[28] The Minister argues that although the Review Member relied heavily on the testimony of Marc Rougeot, a qualified ISO auditor employed by the British Standards Institution ("BSI") Management Systems, in reaching her conclusion, his testimony supports the opposite conclusion. While he stated that not all instances of non-conformance require the issue of a non-conformance report, repetitive issues warrant such reports. ISO standards require that discrepancies be tracked, if not through reports, then through management meetings, and that there be objective evidence that corrective action is implemented. Further, neither Mr. Rougeot nor BSI audited this aspect of NAV CANADA's operations, although Mr. Rougeot's testimony was that, even if such an audit had taken place, it would not have affected the ISO certification. According to the Minister, although Mr. Rougeot may be qualified to determine whether an ISO certification is in effect, he cannot, however, determine whether the requirements of the *CARs*, and consequently of Annex 15, have been met.

[29] The Appellant submits that the evidence establishes that NAV CANADA failed to maintain a quality system "containing procedures, processes and resources necessary to implement quality management at each function stage".

(2) Respondent

[30] The Respondent, NAV CANADA, argues that the Appellant had provided no evidence to establish the meaning of the standards in the Annexes or the standard of conduct necessary for compliance with them. International standards that are incorporated into domestic law, as was done in section 803.01 of the *CARs*, while applying domestically, retain their character as international law and must be interpreted in accordance with the rules of treaty interpretation. According to the *Vienna Convention on the Law of Treaties* ("*Vienna Convention"*), these rules include the legislative history of a convention and its preparatory work. Further, only the Respondent had provided any evidence in relation to the usual practices of other countries in carrying out the obligations established by the standards, and this evidence did not support a finding that these obligations had been breached.

[31] The Respondent also argues that section 9 of *CANSCA* should be taken into account. This section stipulates that NAV CANADA must provide the same services as those provided by Transport Canada immediately before the transfer, and provide those services to the same extent as they had been provided previously by Transport Canada. This should be interpreted as limiting NAV CANADA's statutory obligation to acting in the same manner as Transport Canada in complying with Annexes 4 and 15. The Respondent noted, however, that it was committed to improving the system both to better serve its clients and to observe its contractual obligations under the Transfer Agreement with Transport Canada.

[32] With regard to the long-standing NOTAMs, the Respondent noted that there was no dispute that the information in the NOTAMs was ". . . adequate, of the required quality and timely. . . . ", in the terms of section 3.1.1.2 of Annex 15 and argued that this section does not require that information be provided through AIP amendments. While acknowledging that permanent changes to information require an AIP amendment, the Respondent argued that an error may be corrected by an AIP amendment or a NOTAM. Annex 15 does not require one or the other, and if an amendment to the AIP is required, Annex 15 imposes no particular time frame for publication.

[33] The Respondent submits that the Review Member was not in error in relying on the hearsay evidence in the email of Jean-François Mathieu, Chief, Aviation Enforcement, Transport Canada, setting out his conclusion that there was no offence in relation to NAV CANADA's QMS. Such evidence is admissible before the Tribunal, which is free to determine its weight. In this situation, the evidence was corroborated by testimony that also indicated that it reflected international practice. No contrary evidence was adduced.

[34] On the basis of the evidence presented, the Respondent argues that the Review Member did not err in holding that there had been no breach of the applicable standards in Chapters 3 and 4 of Annex 15 or that amendments to the AIP need not be made within a three month period. That NOTAMs may be in effect for longer periods is consistent with prior Transport Canada and international practices.

[35] The Respondent disagreed with the Appellant's assertion that the Review Member should have taken into account the evidence of other long standing NOTAMs in determining the adequacy of NAV CANADA's QMS. In response, it pointed out that the Appellant's own witness, Denis Blanchet, a Civil Aviation Inspector with Transport Canada, testified that, in his view,

the six long standing NOTAMs that were in the NAMP demonstrated a QMS failure. The Respondent also argued that to bring up other NOTAM issues at this point was an abuse of process, since none were mentioned in the NAMP.

[36] The Respondent's position is that the Review Member was entitled to rely on Mr. Rougeot's testimony regarding the effect of failure to provide a non-conformance report on an ISO certification of an adequate QMS. There was adequate managerial follow-up once the problem was discovered and the status of the NOTAMs was being tracked by the Publication Amendment NOTAM Tracking System ("PANTS"), thus rendering the report unnecessary. While it is true that Mr. Rougeot never audited the NOTAM process, his testimony was that, if such an audit had been carried out, it would not have affected the ISO certification.

[37] Further, the Respondent argues that the Review Member did not rely solely on the ISO certification in making her determination that there was an adequate QMS. She also took into account Mr. Rougeot's testimony that a QMS will be effective if management is aware of the weakness.

[38] Therefore, the Review Member did not make an unreasonable finding of fact in determining that there was insufficient evidence to demonstrate a failure of NAV CANADA's QMS, that failure to file non-conformance reports within 90 days does not prove failure to have quality control, and that maintaining ISO certification is evidence or an indication that NAV CANADA had a QMS.

(3) *Appellant's Argument in Reply*

[39] The Appellant replied to the Respondent's arguments regarding interpretation of the standards, by pointing out that their wording is clear and unambiguous and, according to the*Vienna Convention*, should be interpreted in accordance with their ordinary meaning.

[40] The jurisprudence referred to by the Respondent relates to international treaties, which are necessarily broadly worded as opposed to the standards in Annexes 4 and 15, which are prepared by panels of experts in the field and constitute a detailed code of conduct.

[41] The argument, based on section 9 of the *CANSCA*, that because there may have been some long-standing NOTAMs while Transport Canada was responsible for providing AIS, does not override section 11 of that statute, which provides that NAV CANADA is designated as the authority responsible for providing AIS for the purposes of Annexes 4 and 15. Even admitting that there were long-standing NOTAMs when Transport Canada was responsible for their issue, without more evidence of the surrounding circumstances, no comparison can be made. Further, the issue is not whether NAV CANADA failed to cancel the NOTAMs within 90 days, but rather the failure to take any action on the matter for extensive periods of time.

[42] Section 9 of the *CANSCA* cannot be used to justify the failure to have a QMS because none was in effect at Transport Canada at the time of the transfer. The obligation specified in Annex 15 only came into effect in 2000, and any argument that section 9 obviates NAV CANADA's responsibilities to comply with the Annexes as they evolve ignores its responsibility to provide AIS in accordance with the Annexes.

[43] The Respondent's characterization of the Appellant's arguments concerning the existence of other long-standing NOTAMs, as reflecting an abuse of process because it was a new argument, ignores the numerous times they were referred to in evidence and documents such as the detection notices. NAV CANADA developed the PANTS in response to Transport Canada's concerns and included it in its *AIS Procedures Manual*, and listed it in its *AIS Business Management Systems Manual* among the documents forming part of its QMS. The transcript shows that the argument was made during closing arguments at the Review Hearing.

D. Analysis

(1) Interpretation of International Civil Aviation Organization (ICAO) Standards

[44] The Respondent suggests that the Minister has failed the threshold issue of establishing the standards against which the Respondent's conduct should be measured since he had presented no evidence concerning the interpretation of the standards of international practices regarding them.

[45] Further, the Respondent argues that, in order to interpret the standards, there should have been evidence of the legislative history and preparatory work at ICAO to determine the intention behind them. In support of this argument, the Respondent cited Articles 31 and 32 of the *Vienna Convention* and jurisprudence holding that common law rules of interpretation did not apply to

international law, as well as texts stating that the governing principle of international law interpretation is to give effect to the intention of the parties; therefore on this basis, the Respondent states that monetary penalties should be set aside.

[46] The Appellant replies that the words in Annexes 4 and 15 have clear meanings, as part of a detailed code of conduct prepared by experts and, according to the *Vienna Convention,* should be given their ordinary meaning.

[47] Article 31 of the *Vienna Convention* sets out the general rule of interpretation. Paragraph 1 of the Article provides as follows:

> 1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

The Article defines the context of a treaty as including other agreements relating to the treaty and provides that subsequent agreements and practices relating to it should be taken into account. Article 32 of the *Vienna Convention* provides that, where interpretation in accordance with Article 31 of the *Vienna Convention* leads to a result that is ambiguous or manifestly absurd, recourse may be had to supplementary sources such as the preparatory work and the circumstances of the Treaty's conclusion.

[48] In this matter, the Appeal Panel finds that the words of Annexes 4 and 15 are clear, plain and unambiguous and the issue is how they should apply to the circumstances set out. The object and purpose of Annex 15 is set out in its Chapter 1 and should be used in determining such application. While the Respondent has indicated that it provided evidence regarding international practices in relation to provisions in Annex 15, the evidence amounts to simple statements that such practices exist without elaboration or explanation. For example, Mr. Tardif, the Appellant's witness, testified that he knew ". . . that some countries have AIPs that are out of date" (transcript, vol II at 469) but he did not mention which countries nor did he explain in what respect they were out of date. In discussing the proposition that Annex 15 does not preclude the practice of issuing NOTAMs that remain in effect indefinitely, Mr. Tardif said that it is something that has been observed in other countries, without identifying the countries or the nature of the NOTAMs (transcript, vol III at 557).

[49] Both parties have pointed out that, in its review, the Appeal Panel is entitled to its own view of the law. In relation to the interpretation of the standards at issue, the Appeal Panel concludes that the wording of Annexes 4 and 15 is such that it does not require evidence of its preparatory work or international practice to determine its meaning. The wording of the sections in question is clear. The only issue is how they should be applied to the circumstances in these matters.

(2) Necessity for Aeronautical Information Publication Amendments

[50] The first ground of appeal is that the Review Member erred in law in interpreting and applying section 1.3.3 of Annex 4 and sections 3.1.7, 3.2.1, 4.2.8 and 4.3.1 of Annex 15.

[51] The Appellant argues that the Review Member's finding, that an error on a chart may be corrected either by a NOTAM or an AIP amendment, ignores the requirements set out in section 1.3.3 of Annex 4 that aeronautical charts be accurate and maintained by an adequate revision service.

[52] In reply, the Respondent argues that the information in the NOTAMs met the requirements in section 3.1.1.2 of Annex 15 and that, notwithstanding the requirement of section 1.3.3 of Annex 4, an error in an AIP may be corrected by either an amendment or a NOTAM.

[53] The Review Member adopted the Respondent's position on this point, on the basis of Mr. Tardif's testimony, that all the charts were eventually amended to show the changes, and this position was consistent with her own interpretation of Chapters 3 and 4 of Annex 15.

[54] It is common ground between the parties that the aeronautical charts at issue are AIPs while NOTAMs are not. Consequently, Annex 4 must be interpreted in concert with Annex 15, as it relates to such publications. Section 4.3 of Annex 15 is entitled "Specifications for AIP Amendments" and section 4.3.1 provides as follows: "Permanent changes to the AIP shall be published as AIP amendments." To the Appeal Panel, this wording seems to be clear and unequivocal. If a change to an AIP is permanent, it must be published as an AIP amendment. While the Respondent, in paragraph 98 of its written submissions, seems to accept this proposition, it argues that where the change is a correction of an error in an AIP, it can be done either by an amendment or a NOTAM. The Respondent gives no explanation other than the statements of the witness, as to why there is a distinction between a change that is substantive and one that corrects an error. While the Appellant has accepted that an initial notification of a change or correction may be given by a NOTAM, reading the reference to "an adequate revision service" in

section 1.3.3 of Annex 4 together with the requirement, section 4.3.1 of Annex 15 leads to the conclusion that an adequate revision system must include an amendment to the AIP Chart. In light of this, the Appeal Panel disagrees with the decision reached by the Review Member on this aspect of her determination.

[55] Each count of the NAMP alleges that NAV Canada did not publish a timely AIP amendment reflecting the change to the Chart. Given that the Appellant has accepted that the initial notice of the change may be given by a NOTAM, the issue is then whether there was a timely failure to publish an AIP amendment. While section 4.3.1 of Annex 15 requires that an amendment be published, it does not establish a time frame for doing so. However, the Appellant has argued that a time frame of 90 days was established by NAV Canada's own internal policies. While these policies may set goals for NAV Canada, and it was admitted during testimony that they may be unrealistic, this argument cannot, from the Appeal Panel's perspective, support a charge related to a breach of sections 3.2.1 or 4.3.1 of Annex 15.

[56] While the number of long-standing NOTAMs is not relevant to determine the adequacy of the QMS, it may be taken into account in determining what constitutes timelines. The Appeal Panel recognizes that the number of NOTAMs outstanding would require time both to determine how to deal with the necessary amendments and to actually indicate these amendments to the specific charts. Given that this process had begun by the time of the Review Hearing, the Appeal Panel finds that, in the circumstances, the amendments were being made in a timely manner.

(3) Quality Management System (QMS) Requirements

[57] The Appellant also appealed on the basis that the Review Member erred in law in her interpretation of sections 3.1.7 and 3.2.1 of Annex 15, relating to the requirement for a QMS. This matter will be considered together with the second, third and fourth grounds of appeal, each of which alleges that the Review Member made an unreasonable finding of fact concerning the QMS. These grounds will be dealt with in reverse order, since that order best fits the contextual development of the arguments before the Tribunal.

[58] Section 3.2.1 of Annex 15 requires the establishment of a QMS that contains "procedures, processes and resources" necessary to implement and demonstrate quality management at each of the function stages, set out in section 3.1.7. Section 3.2.2 is a recommendation that the QMS should be in conformity with ISO 9000. This section is followed by a note that ISO 9000 provides a QMS framework but the details will be formulated by each State and, in most cases, will be unique to that State.

[59] The fourth ground of appeal advanced by the Appellant is that the implied finding by the Review Member, that the maintaining of an ISO certification as an indication that NAV Canada had a QMS, is unreasonable. The Appeal Panel finds that this ground of appeal cannot be sustained. The recommendation in Annex 15 is clear that ISO certification provides, at the least, a framework for a QMS and consequently, the existence of such a certification indicates that a system is in place. Whether that system is adequate to meet the requirements of section 3.2.1 of Annex 15 may remain to be determined in the light of all the circumstances, but it is not unreasonable to take its existence into account as a factor in that determination.

[60] The third ground of appeal is that the Review Member's finding of fact, that the failure to provide six non-conformance reports for NOTAMs that were over 90 days old within a week did not result in proof of failure to have quality control, is unreasonable. In argument, however, the Appellant takes the position that it was not the failure to provide non-conformance reports alone that showed a failure to have an adequate QMS, but rather the surrounding circumstances of the existence of numerous long-standing NOTAMs over several years with little improvement in the situation. The Appellant also points out that in dealing with the matter, NAV Canada did not follow its own internal procedures manuals, which required that a non-conformance report be filed after a NOTAM had been in existence for 90 days.

[61] In response, the Respondent argues that a QMS does not require non-conformance reports, but rather must include a means for management to be aware of and monitor problems in the system. In this case, a monitoring system, PANTS, was established to track NOTAMs. The Respondent also refers to the evidence of the ISO auditor that a QMS allows for errors, so long as corrective measures are being taken.

[62] As pointed out by the Appellant, there were systemic problems that resulted in numerous long-standing NOTAMs being in effect. The evidence shows that, in an effort to correct the situation, a series of changes were put into effect, including the transfer of responsibility from one office to another and eventually to NAV CANADA Headquarters and the introduction of the PANTS.

[63] The Appeal Panel accepts that a QMS will allow for errors. The requirement in Section 3.2.1 of Annex 15 requires that the QMS demonstrate quality management at each function stage mentioned in section 3.1.7 of Annex 15. The "function stage" at issue seems to be the publication of the information. Both parties seem to agree that the requirement is, not that the publication process be perfect, but rather that there be a means of identifying and tracking problems and a system for correcting them.

[64] The six counts of the NAMP allege that the failure to provide a non-conformance report is a failure to comply with NAV CANADA's QMS. As pointed out, however, there was a tracking system available in PANTS. In addition to tracking, however, a function of a non-conformance report is to establish the root cause of the non-conformance. In this situation, the root cause had already been established. Therefore, the Appeal Panel finds that the determination, by the Review Member, concerning the failure to provide the six non-conformance reports, was reasonable.

[65] Similarly, the second ground of appeal that the Review Member's finding of fact, that there was insufficient evidence to demonstrate a failure of Nav Canada's QMS, is unreasonable and must fail in the opinion of the Appeal Panel. The only issue raised with respect to the adequacy of the QMS is the failure to provide the non-conformance reports. As discussed above, the Appeal Panel finds that the failure was not determinative of the system's adequacy.

[66] Given that the Appeal Panel finds that the Review Member's finding of fact with regard to the adequacy of NAV CANADA's QMS were not unreasonable, the Appeal Panel also finds that she made no error in law in interpreting the provisions of Annex 15 on this point.

(4) Section 9 of the Civil Air Navigation Services Commercialization Act ("CANSCA")

[67] It should be noted that part of the Respondent's argument was based on section 9 of the*CANSCA*, which provides that Nav Canada

> . . shall . . . provide all users with the civil air navigation services that the Department of Transport provided immediately before the transfer date and shall do so to the same extent as the services were provided by the Department of Transport.

[68] Since Transport Canada did not have a QMS at the time of the transfer, the Respondent argues that it is not obligated to establish one, and that by doing so, it has voluntarily exceeded its statutory obligations. The Appeal Panel finds that this position is untenable.

[69] Any argument that the services provided by NAV Canada need only be exactly the same as those provided by Transport Canada at the time of the transfer can only be based on the phrase "to the same extent as the services were provided by the Department of Transport". According to the *Canadian Oxford Dictionary* (Second Edition), the primary meaning of the word "extent" is "the space over which a thing extends". This meaning imports a geographic aspect to NAV Canada's obligation and requires it to provide the services that Transport Canada provided outside Canada in international airspace, in accordance with international arrangements.

[70] The general principle of statutory interpretation is that words in a statute should be interpreted in a manner that is consistent with the entire Act. It is clear that the *CANSCA* is not intended to limit NAV Canada's activities to continually accord with the exact activities of Transport Canada at a single instant in time. The various air navigation services are defined in the *CANSCA* and the term "aeronautical information service" is defined as ". . . services necessary to meet those requirements of Annexes 4 and 15 to the *Chicago Convention* that relate to aeronautical information", without limiting the requirements to those in effect on a specific date. Section 14 and following of the *CANSCA* provide authority for changing services and set out procedures that must be followed in so doing.

(5) Hearsay Evidence

[71] A general ground of appeal is that the Review Member made an error in law in relying on uncorroborated hearsay evidence in certain instances. While the Appellant did not argue this ground in relation to the email of Mr. Mathieu, the Respondent suggested that it was corroborated by oral evidence and that it reflected international practice.

[72] The Appeal Panel notes that the Review Member was free to give the email whatever weight she considered appropriate. It would seem, however, that the only weight given to the email was to treat it as corroborating the testimony of Mr. Tardif, the Respondent's witness (paragraph [76] of the Review Determination). The Appeal Panel takes no issue with how the Review Member treated the email evidence.

[73] Taking all the above factors and arguments into account, the Appeal Panel does not believe that any error was committed by the Review Member in respect of the allegations in this file.

IV. FILE H-3473-40

A. Background

[74] Schedule A of the NAMP reads as follows:

> 1. On or about 10 May 2007, between 17:01 and 18:14 Universal Time Co-ordinated (UTC), in Ottawa, Ontario, NAV CANADA did not provide adequate aeronautical information services in accordance with the standards set out in Annex 15 to the *Convention on International Civil Aviation*, twelfth edition, specifically:
>
> a. NAV CANADA did not issue a timely NOTAM, containing required aeronautical information, that the LOC/DME RWY 11 Instrument Approach Procedure at Gaspé, QC, was not authorized;
>
> thereby contravening section 803.01(2) of the *Canadian Aviation Regulations*.
>
> Monetary Penalty Assessed: $25,000.00.

[75] On April 27, 2007, Transport Canada informed NAV CANADA that problems associated with the Gaspé instrument approach were not clearly defined and asked NAV CANADA to issue a NOTAM indicating that the approach was not authorized. NAV CANADA issued, as directed, a "not-authorized" NOTAM that stated it would expire on May 10, 2007 at 17:00 UTC. On April 30, 2007, Transport Canada reminded NAV CANADA about the expiry of the "not-authorized" NOTAM and asked for an appropriate corrective action. On May 10, 2007, Transport Canada advised NAV CANADA that the "not-authorized" NOTAM had, in fact, expired. NAV CANADA issued a NOTAM at 18:15 UTC to extend the previous NOTAM. Thus, for an hour and fifteen minutes, there was no NOTAM in place to inform the aviation community about the problems with the LOC/DME RWY 11 instrument procedure at Gaspé airport (Quebec).

[76] The Review Member found that there had been a breach of the requirement to issue a timely NOTAM. However, she concluded that NAV CANADA was not liable for the contravention because it had established that it exercised the appropriate degree of due diligence pursuant to section 8.5 of the *Act*.

B. Grounds of Appeal

[77] The grounds of appeal concerning file H-3473-40 read as follows:

> 5. The Member erred in law in interpreting the law of due diligence;
>
> 6. The Member erred in law in applying the law of due diligence to the facts of the case;
>
> 7. The Member's finding of fact at paragraph 104, that the timing of the NOTAM with respect to the allegations in file H-3473-40 was not inappropriate or unreasonable, as NAV CANADA was entitled to rely on the daylight hours and favourable weather that existed prior to the issuance of NOTAM, was unreasonable;
>
> 8. The Member's finding of fact at paragraph 105, that "nothing more could have been done", was patently unreasonable.

C. Arguments

(1) Appellant

[78] The Minister submits that NAV CANADA did not demonstrate that it took every reasonable precaution to avoid the commission of the offence. The NAV CANADA due diligence defence is established entirely on the basis of uncorroborated hearsay. Therefore, the Review Member should not have accepted this evidence as the sole source of the Respondent's due diligence defence. The Appellant submits that the Review Member erred in fact in considering that the Respondent was entitled to rely upon daylight hours and favourable weather that existed prior to the issuance of a new NOTAM. NAV CANADA could and should have issued a NOTAM before the expiry of the previous one. In support of its position, the Minister noted that the Respondent conceded that it was a simple NOTAM to draft, that it had the capacity to issue it and that such a NOTAM could have been issued before the expiry of the previous NOTAM.

(2) Respondent

[79] NAV CANADA submits that it exercised due diligence and that the Review Member did not err in interpreting the law of due diligence or made an unreasonable assessment of the facts and evidence in applying the law of due diligence to the facts of the case. NAV CANADA's defence of due diligence is not based on uncorroborated hearsay. It is based on the testimony of Charles Montgomery, Director, AIS and Flight Operations, NAV CANADA, which is corroborated by the evidence adduced on the same issue by Mr. Tardif and Michael Hohm.

[80] The Respondent argues that the Review Member did not err in considering that, before the issuance of a new NOTAM, NAV CANADA could rely upon the daylight hours, the favourable weather and the fact that the pilots could fly VFR. As a result, the Respondent submits that the Appeal Panel should not interfere with these findings of fact, as they are reasonable and supported by the evidence. Indeed, NAV CANADA took all reasonable steps to avoid the 75-minute period during which no NOTAM was issued. The Respondent was in control of the situation and re-issued the same NOTAM while working on a more accurate and effective version. Moreover, NAV CANADA submits that the simple existence of a 75-minute period between NOTAMs is no basis for finding a breach of any of the standards in Annex 15.

[81] In summary, the Respondent submits that it provided adequate aeronautical information throughout and that the new NOTAM was issued in a timely manner in accordance with the circumstances.

D. Analysis

[82] The Review Member found that, on the balance of probabilities, the Minister had established that NAV CANADA failed to issue a timely NOTAM, in accordance with the standards set out in Annex 15. The failure to issue a NOTAM for a 75-minute period after the expiry of the "not-authorized" NOTAM was a failure to issue a timely NOTAM, which is a contravention of subsection 803.1(2) of the *CARs*. Despite that conclusion, the Review Member found that, although NAV CANADA did not meet the expiry date, it was not liable because it had demonstrated that it exercised all due diligence to prevent the contravention.

[83] The Review Member relied on the fact that NAV CANADA did not overlook the matter during the 75-minute period it chose to let the NOTAM lapse because it was already working on a NOTAM with a more appropriate content for the resolution of the IFR approach at Gaspé. The Review Member also accepted that NAV CANADA's position that it was entitled to rely upon daylight hours and favourable weather in Gaspé during the 75-minute period it took before re-issuing the "not-authorized" NOTAM. She concluded that nothing more could be done.

[84] The Minister submits that NAV CANADA did not take all reasonable steps to avoid the offence. If it had taken all reasonable steps, a NOTAM would have been issued immediately, without a delay of 75-minutes, to advise the aviation community that the LOC/DME RWY 11 instrument approach procedures at Gaspé were not authorized or unreliable. NAV CANADA had the capacity to issue a NOTAM on time, and the same "not-authorized" NOTAM was re-issued as directed by the Minister, only after NAV CANADA was alerted that the NOTAM had expired. The Respondent did not present direct evidence that it was working on the resolution of the matter. The Review Member relied on the testimonies of Messrs. Montgomery, Hohm and Tardif, based on information received from others. These witnesses were not directly involved in the resolution of this matter. In doing so, the Review Member accepted uncorroborated hearsay evidence as the sole source of NAV CANADA's due diligence defence.

E. Due Diligence Defence

[85] The Minister submits that the Review Member did not properly assess whether NAV CANADA exercised due diligence, as set out in *R. v. Sault Ste. Marie*, [1978] 2 S.C.R. 1299 and also codified in section 8.5 of the *Act.*

[86] In strict liability offences, the burden of proof rests with the Minister to establish each of the elements of the offence to the standard of the balance of probabilities. Once this has been done, the burden then shifts to NAV CANADA to prove, on the balance of probabilities, that it has exercised all due diligence to prevent the offence.

[87] NAV CANADA submits that it was already covering the problem associated with the approach at Gaspé with two NOTAMs. One NOTAM indicated that the localizer was reliable only 15 degrees on either side of the runway, while the other indicated that the LOC/DME was not reliable along the south arc between radial 183 and 285. Besides describing the conditions that were producing limitations, the two NOTAMs were also informing pilots on what they could or could not do at Gaspé. These two NOTAMs had no expiry date. Although Mr. Blanchet conceded that the two NOTAMs were giving accurate information on the situation at Gaspé, he found them confusing and asked NAV CANADA to issue a NOTAM indicating that the approach was not authorized until more information could substantiate that it was safe.

[88] NAV CANADA issued a "not-authorized" NOTAM with a fixed expiry day and time of May 10, 2007 at 17:00 UTC. While NAV CANADA was not convinced that the issuance of a "not-authorized" NOTAM was the solution to deal with the situation in Gaspé, it proposed to work meanwhile on a more appropriate NOTAM. On April 27, 30 and May 1, 2007, the Minister informed NAV CANADA that he was expecting a corrective action before the expiration of the NOTAM on May 10, 2007 at 17:00 UTC. When that NOTAM expired, NAV CANADA was still in the process of developing an appropriate NOTAM and decided not to extend the existing NOTAM since the flying and meteorological conditions were visual at Gaspé. The 75-minute period without a NOTAM was a deliberate exercise of judgement by NAV CANADA, who had not lost sight of the situation.

[89] Due diligence involves a consideration of what a reasonable person or company would have done under the same circumstances and whether the alleged offender took all reasonable steps to avoid the offence. The required degree of care is related to the special circumstances of each case's factual setting: see e.g. *R. v. Gonder* (1981) 62 C.C.C. (2d) 326.

[90] In *Grain Growers Export Co. v. Canada Steamships Lines Ltd.* (1918) 43 O.L.R. 330, Justice Hodgins wrote that due diligence entails: ". . . not merely a praiseworthy or sincere, though unsuccessful, effort, but such an intelligent and efficient attempt as shall make it so, as far as diligence can secure it." In that case, the "make it so" expression related to the obligation of an operator to make its ship seaworthy.

[91] Did NAV CANADA take all reasonable steps to issue a timely NOTAM, with respect to the approach procedure at Gaspé, and therefore avoid a 75-minute gap, where it was impossible to know if the LOC/DME instrument approach was authorized at Gaspé?

[92] The Appeal Panel agrees with the Appellant that NAV CANADA did not exercise all due diligence to issue a timely NOTAM and prevent the 75-minute gap. NAV CANADA deliberately issued a "not-authorized" NOTAM with an expiry date, choosing to work on developing a more appropriate NOTAM. Although NAV CANADA was informed several times that a corrective action should be taken at Gaspé, NAV CANADA deliberately let the "not-authorized" NOTAM expire so that there was a lapse of 75 minutes.

[93] Had NAV CANADA issued the "not-authorized" NOTAM without an expiry date, it could have drafted the appropriate NOTAM, which needed time, consultation and effort while the "not-authorized" NOTAM was still in force. Alternatively, the Appeal Panel agrees that NAV CANADA could have re-issued the "not-authorized" NOTAM, even though it was not the preferred option before it expired, while it prepared the ideal NOTAM to deal with the approach procedure at Gaspé.

[94] While it might be said that NAV CANADA had not lost sight of the matter, that the weather was favourable for visual flying conditions during the 75-minute gap and that there was no need for the pilots to fly IFR, these defences ignore NAV CANADA's capacity to issue a NOTAM on time to deal with the situation at Gaspé. NAV CANADA, which is responsible for the management, operations and development of AIS, had the capacity and the expertise to resolve the matter with a NOTAM. The eventual decision by NAV CANADA to re-issue the "not-authorized" NOTAM is due largely to the Minister's diligence in overseeing the situation.

[95] In the Appeal Panel's opinion, the Review Member erred in her application of the due diligence defence. Her conclusion that "nothing more could have been done" contradicts clearly the testimony of NAV CANADA's own witness, Mr. Tardif, that NAV CANADA had the capacity to issue a NOTAM before the expiry of the previous one.

F. Hearsay

[96] The Minister submits that NAV CANADA did not present direct evidence that it was working on the resolution of the instrument approach procedure at Gaspé. Messrs. Montgomery, Tardif and Hohm were not directly involved and did not have direct knowledge of the issue. The Appellant argues that the Review Member erred in law while relying on uncorroborated hearsay evidence as the sole proof of the Respondent's due diligence defence. By choosing to adduce the evidence through members of its management, the Minister submits that NAV CANADA shielded the evidence from cross-examination.

[97] NAV CANADA argues that the availability of the defence of due diligence to a corporation depends upon whether such due diligence was taken by those who are the directing mind and will of the corporation as noted in *R. v. Sault Ste-Marie* cited above. Although he may not have had a first-hand knowledge of the facts on the issue, Mr. Montgomery, who is the Director of AIS and Flight Operations, NAV CANADA, could nevertheless attest to the events. Mr. Montgomery's testimony was corroborated by the testimonies of Messrs. Tardif and Hohm on the same issue.

[98] Section 15(1) of the *TATC Act* states as follows:

> **15.** (1) Subject to subsection (2), the Tribunal is not bound by any legal or technical rules of evidence in conducting any matter that comes before it, and all such matters shall be dealt with by it as informally and expeditiously as the circumstances and considerations of fairness and natural justice permit.

[99] Before administrative tribunals, evidence is considered a procedural matter and administrative law decision makers are masters of their own procedure. This is because Tribunal Members are expected, in part, to apply common sense to the consideration of evidence. Hearsay evidence is therefore admissible and its weight is a matter for the Tribunal to decide, unless its receipt would be a clear denial of justice or if it is irrelevant to the matter to be judged.

[100] Although Mr. Montgomery had some knowledge that NAV CANADA was assessing the situation and was developing a more appropriate NOTAM, he testified that he was not personally involved in the resolution of the approach procedure at Gaspé. He received or obtained his information from others. The same observation applies to Messrs. Tardif and Hohm's testimonies. The evidence adduced from Messrs. Montgomery, Tardif and Hohm is considered hearsay evidence, although relevant evidence. NAV CANADA did not present any direct evidence that it was working at developing a NOTAM to bring a solution to the Gaspé issue.

[101] The Tribunal has repeatedly affirmed that uncorroborated hearsay evidence should not be relied upon as the sole proof of an allegation. In *Canada (Minister of Transport) v. Rowan*, 1997 CAT file no. A-1500-33 (review), it was alleged that a pilot did not comply with an air traffic control clearance. Evidence adduced as to one of the elements of the offence was uncorroborated hearsay. The Member found that he could not accord that evidence any weight and, therefore, dismissed the allegation.

[102] In *Canada (Minister of Transport) v. 641296 Ontario Inc. (North East Air Services)*, 1997 CAT file no. O-1342-37 (review), it was alleged that there were flights flown but they were not entered in a journey log book. The evidence relied on aircraft movement records compiled by an employee of Statistics Canada, who was unable to confirm or deny that flights took place, was rejected as being insufficient proof. In *Sierra Fox Inc. v. Canada (Minister of Transport*), 2005 TATC file no. O-2997-41 (appeal), the Appeal Panel rejected Daily Air Traffic Records submitted otherwise than in testimony at the proceedings, as proof of the truth of their contents because the proof of the allegation relied solely on uncorroborated hearsay.

[103] The Appeal Panel finds that the evidence adduced by NAV CANADA on the question of knowing whether NAV CANADA was working at resolving the issue at Gaspé with a more appropriate NOTAM is based on uncorroborated hearsay evidence. In the context of this case, the Appeal Panel cannot accept this uncorroborated hearsay evidence to support NAV CANADA's position.

G. Breach of Annex 15 to the Convention

[104] The Respondent also asks the Appeal Panel to uphold the determination on the grounds that there was no breach of Annex 15.

[105] NAV CANADA bases its arguments that the Appeal Panel may overturn the Review Member's finding that a breach occurred on statements by the Supreme Court of Canada in *R. v. Keegstra,* [1995] 2 S.C.R. 38, where it was held that a Respondent in an appeal may raise any argument that supports the decision appealed from even if that argument had been unsuccessful in the court below. The Respondent submits that the provisions of Annex 15 do not establish a specific time requirement for the issue of a NOTAM, and a 75-minute period between NOTAMs is not a basis for finding a breach of the standards in Annex 15. The Respondent stated that it provided adequate aeronautical information throughout, and the NOTAM was issued in a timely manner or promptly, in accordance with the circumstances based on the weather and on the fact that Gaspé was not a busy airport.

[106] The Appellant argues that, if the Review Member's finding with regard to a breach of Annex 15 (and consequently of subsection 803.01(2) of the *CARs)* is to be challenged, a cross-appeal should have been filed by NAV CANADA. In support of this, the Minister cited *R. v. Guillemette,* [1986] 1 S.C.R. 356, where it was held that only the Crown could appeal an acquittal so that a decision to order a new trial on an appeal by the accused, who had been convicted of a lesser offence, amounted to an error in law since it implicitly overturned the acquittal on the original charge. The Appeal Panel notes that *R. v. Guillemette* was cited in*R. v Keegstra*, as an example of a limitation on appellate jurisdiction where the respondent itself had not appealed on an issue. Further, in *R. v. Keegstra*, the Court held that the provision in section 29 of the *Rules of the Supreme Court of Canada*, SOR/83-74, that specifically authorizes a respondent to seek to uphold a judgement on grounds not raised in the reasons for that judgement, does not establish an independent avenue for cross-appeals.

[107] In this matter, the Review Member found that the alleged breach had taken place. It is difficult to see how an argument that there was, in fact, no such breach could be said to support this finding. It seems to the Appeal Panel to be more in the nature of a direct challenge to the Review Determination that could only be founded upon a cross-appeal by the Respondent.

[108] Consequently, the Appeal Panel finds that the Respondent's position on this matter does not meet the criterion set out in *R. v. Keegstra* and so does not believe that it could substitute its own decision with respect to whether the Review Member was right to find that NAV CANADA contravened subsection 803.01(2) of the *CARs*.

[109] The fact that NAV CANADA's written submissions only ask the Appeal Panel to dismiss the Appeal, and not overturn the original decision, certainly strongly suggests that NAV CANADA originally appreciated this distinction.

[110] Transport Canada has assessed a $25 000 monetary penalty to NAV CANADA for having failed to provide information services that comply with Annex 15 to the *Convention*. NAV CANADA has indeed failed to have a NOTAM in place to advise the aviation community about the problems with the instrument procedure at Gaspé airport for one hour and fifteen minutes. The $25 000 monetary penalty assessed by Transport Canada is the maximum amount available for a subsequent offence to subsection 803.01(2) of the *CARs*.

[111] The Appeal Panel agrees that several facts constitute aggravating circumstances. First NAV CANADA did not issue a NOTAM until April 5, 2007, although the problem with the instrument procedure at Gaspé airport existed in July 2006. Second, NAV CANADA has been unable to issue a NOTAM clearly explaining the problem associated with the approach. NAV CANADA also had to be directed by Transport Canada to issue a not authorized NOTAM until more information could substantiate the safety of the approach. NAV CANADA chose to issue the not authorized NOTAM with an expiry date and let the NOTAM lapse for one hour and fifteen minutes, despite being informed twice by Transport Canada of its impending expiry. Lastly, NAV CANADA could have easily reissued the not authorized NOTAM with a different expiry date but failed to do so.

[112] The Appeal Panel also agrees that it is necessary that the penalty assessed has a deterrent effect in order to achieve its goal. Since the Appeal Panel has dismissed the Appeal in five prior alleged contraventions to subsection 803.01(2) of the *CARs*, this contravention now constitutes a first offence to this subsection. The Appeal Panel is of the opinion that the recommended maximum amount of $5 000, set out in the *Aviation Enforcement Procedures Manual* ("AEPM"), is justified in the circumstances and has the necessary deterrent effect.

V. FILE H-3474-40

A. Background

[113] Concerning the charge in this matter, Schedule A of the NAMP reads as follows:

> 1. On or about 23 July 2007, in Ottawa, Ontario, NAV CANADA did not provide adequate aeronautical information services in accordance with the standards set out in Annex 15 to the *Convention on International Civil Aviation*, twelfth edition, specifically:
>
> a. NAV CANADA did not issue a timely NOTAM, containing required aeronautical information, that CYA 140 and CYA 165 on the Vancouver, British Columbia VFR Navigational Chart (VNC) 19th edition should read "*CYR 140 and CYR 165*" respectively;
>
> thereby contravening subsection 803.01(2) of the *Canadian Aviation Regulations*. Monetary Penalty Assessed: $25,000.

[114] In reviewing the 19th edition of the Vancouver VNC, Transport Canada discovered that there were two errors where specified areas of airspace were described as CYA (Advisory) when they should have been described as CYR (Restricted). Transport Canada advised NAV CANADA of these errors in late July, and asked, on August 2 and 10, 2007, that NOTAMs correcting the errors be issued. On August 14, 2007, some 25 days after NAV CANADA was first informed of the error, Transport Canada directed that NOTAMs be issued, and they were issued the same day. NAV CANADA argued that the correct information was available to pilots in other documents that they should consult before entering the airspace. In the case of CYR 165, it was properly described in the planning section of the *Canada Flight Supplement* (CFS) and CYR 140 was properly designated in the Vancouver VTA Chart. While this latter document is not a required chart under Annex 4, it describes a portion of the Vancouver VNC on a larger scale and includes information not available on that Chart.

[115] The Review Member found that the errors on the Chart should have been corrected and that the delay in doing so did not accord with the timelines requirements of Annexes 4 and 15. She found, however, that there were mitigating circumstances in that Transport Canada had not shown that there were any safety implications involved and that the correct information was available. She also noted that the assessed penalty of $25 000 was five times the amount suggested in Transport Canada's guidelines for a first offence. Taking these matters into account, the Review Member reduced the penalty to $1 000.

B. Grounds of Appeal

[116] The grounds of appeal concerning file H-3474-40 are as follows:

> 9. The Member erred in law the application of mitigating factors to the decision with respect to sanction;
>
> 10. The Member's finding of fact at paragraph 133-134, that there were no safety implications with regard to the two NOTAMs at issue, was patently unreasonable.

C. Arguments

(1) Appellant

[117] To begin with, the Appellant submits that the Review Member did not err in finding that the failure to issue NOTAMs correcting two errors on the Vancouver VNC Chart, which wrongly identified CYR airspace as CYA airspace, was deliberate and contravened subsection 803.01(2) of the *CARs*. However, the Appellant argues that the Review Member did err in concluding that deterrence was not an issue in the proceeding and in that she only considered the safety implications of the breach and did not give weight to other relevant considerations, such as security, efficiency and regularity of civil aviation, in reducing the penalty from $25 000 to $1 000.

[118] In *Canada (Minister of Transport) v. Wyer*, 1988 CAT file no. O-0075-33 (appeal), the Tribunal has held that the appropriate considerations in determining the amount of a monetary penalty include at least denunciation, deterrence, rehabilitation and enforcement recommendations.

(2) Respondent

[119] The Respondent argues that the Review Member properly applied the law in relation to penalties, and that the findings of fact upon which she based her determination of mitigation were not unreasonable. It noted that there was no minimum penalty prescribed.

[120] Alternatively, the Respondent submits that the Review Member erred in her interpretation of the law and that the Appeal Panel is entitled to substitute its own opinion on legal issues. From the Respondent's perspective, the Review Member erred by ruling that pilots could be confused, as to which information could be relied on in the differences between the VNC and the CFS and between the VNC and the VTA. The correct information in one case was in the CFS, which is more authoritative than the Chart. The VNC also directs the user to consult the VTA, which contained the correct classification of the other airspace. The Respondent's position is that the Review Member erred in law in holding that a pilot was not obligated to consult the VTA because it is not an AIP, since the obligation to consult arises from section 602.71 of the*CARs,* which requires pilots to use the best available information regarding flights.

[121] The Respondent argues that the Review Member also erred in law in holding that Annexes 4 and 15 require that a NOTAM be issued in these circumstances. No specific provisions of Annex 15 were identified in the NAMP but the Minister essentially relied on section 5.1.1.1*n*) of Annex 15, which provides that a NOTAM must be issued where there are changes "in the status of prohibited, restricted or danger areas" and on section 5.1.1.2. of Annex 15, which recommends that NOTAMs be considered in any other circumstances that may affect aircraft operations. In this case, there was no obligation to issue a NOTAM since the information on the VNC was an error and not a change in the status of the airspace that requires a change in the Transport Canada's *Designated Airspace Handbook.* Section 5.1.1.2 of Annex 15 is only a recommendation.

(3) Appellant's Argument in Reply

[122] The Appellant responded that, in the absence of a cross-appeal, there was no means of rearguing the question of whether there had been a breach of Annex 15**.**

D. Analysis

[123] The Respondent's argument, that the Review Member erred in finding that there was a breach of Annex 15, and thus subsection 803.01(2) of the *CARs* has been addressed in the discussion relating to the finding of a breach in file H-3473-40. That reasoning also applies in this file.

[124] The Review Member based her decision on section 3.1.1.2 of Annex 15, which requires that aeronautical information provided be "adequate, of required quality and timely". She found that adequacy required that the errors on the Chart be corrected, and that a delay of 25 days in correcting the erroneous information by NOTAM did not meet the requirement of timeliness. The Appeal Panel agrees with that observation.

[125] In considering the amount of the penalty, the Review Member noted that it was far in excess of the recommended amount of $5 000 for a first offence, as set out in Transport Canada's AEPM. She also considered that there were mitigating factors that justified a reduction of the recommended penalty for a first offence, in that there was no evidence of a safety threat and that pilots were directed to consult documents that included the correct information. She also held that deterrence was not a factor to be considered in this matter, although she did not expand on this conclusion. She did mention, however, that NAV Canada did issue the NOTAMs as soon as Transport Canada directed them to do so.

[126] The Appellant claimed that the Review Member's finding, that there were no safety implications with regard to the two NOTAMs at issue, was patently unreasonable. The Appeal Panel finds that this ground is not justified. There was no evidence presented to show that any safety issue had actually arisen nor was there evidence to show that any effect on safety was likely.

[127] The other ground of appeal on this issue was that the Review Member had erred in law in the application of mitigating factors with respect to sanction. The argument on this point seems to focus more on the lack of consideration of all factors relating to the determination of a monetary penalty than to specific issues of mitigation.

[128] As noted above, the Tribunal has set out the principles relevant to determining an appropriate monetary penalty in *Canada (Minister of Transport) v. Wyer*, (1988), CAT file no. O-0075-33 (appeal). The factors articulated by the Tribunal in that case included both general and specific deterrence. While the Appellant has admitted that there is no element of general deterrence involved, once an offence has been found to be committed, some consideration must always be given to deterring the offender from further contraventions.

[129] In this situation, NAV Canada had its own interpretation as to what was required once the errors on the Chart had been discovered. Once NAV CANADA was aware that the attitude of Transport Canada as regulator was different, it maintained its position that no NOTAMs were necessary. That said, NAV CANADA does not seem to have explained or tried to justify their position to Transport Canada. While NAV Canada may form an opinion about the meaning of the Annexes, it cannot ignore a different interpretation by Transport Canada.

[130] The Appeal Panel agrees with the Review Member's statement at paragraph [135] of her determination that Transport Canada was not attempting to interfere with the management of NAV Canada but was rather carrying out the Minister's responsibility under section 4.2 of the*Act* for the regulation and supervision of all matters relating to aeronautics. The attitude of NAV Canada in holding to its position without explanation is a matter to be considered in relation to deterrence.

[131] The Review Member based her assessment of the amount of the penalty, in part on the assumption that it was a first offence and that the recommended penalty in the AEPM for a first contravention of subsection 803.01(2) is $5 000. In fact, the offence is at least the second contravention of the subsection, and the recommended penalty is $12 500. While the Review Member found that there was a mitigating circumstance in that there were no direct safety implications resulting from the errors, the Appeal Panel is of the opinion that any mitigation is balanced by the aggravating factor that NAV CANADA ignored Transport Canada's position on the matter, without explanation, and took no action until directed to do so. Further, the Appeal Panel considers that deterrence is a factor that should be taken into account when assessing the penalty. Consequently, the Appeal Panel finds that the appropriate penalty is $12 500.

[132] The Appeal Panel would like to thank Counsels for the Minister of Transport and NAV CANADA for their very helpful submissions and conduct.

VI. DECISIONS

A. File No. H-3472-40

[133] The Appeal is dismissed. The Appeal Panel finds that the Review Member did not err in her interpretation of the law relating to NAV CANADA's QMS nor did she make any unreasonable findings of fact concerning it.

B. File No. H-3473-40

[134] The Appeal is allowed. The Appeal Panel finds that the Review Member erred in law in the application of the defence of due diligence. Consequently, the monetary penalty assessed by the Minister is reinstated, but it is decreased from $25 000 to $5 000.

C. File No. H-3474-40

[135] The Appeal is allowed. The Appeal Panel finds that the Review Member erred in law in analyzing the entire circumstances relevant to this matter by not properly taking into account all of the other relevant factors relating to the assessment of penalties. The penalty is increased from $1 000 to $12 500.

December 14, 2010

Reasons for appeal decision by: Suzanne Racine, Member

Elizabeth MacNab, Member

Concurred by: J. Richard W. Hall, Chairperson

ANNEX

FILE H-3472-40

The wording of the six counts is set out as follows:

1. On or about 05 February 2007, in Ottawa, Ontario, NAV CANADA did not provide adequate aeronautical information services by not demonstrating aeronautical information quality management in accordance with the standards set out in Annex 4 (section 1.3.3) and Annex 15 (sections 3.1.7, 3.2.1, 4.2.8 and 4.3.1) to the *Convention on International Civil Aviation*, tenth edition and twelfth edition respectively and by not complying with these standards, specifically:

a. NAV CANADA did not comply with their internal quality management system by not raising the required quality management non-conformance report relating to an operationally significant permanent change to the Vancouver, British Columbia, Visual Flight Rules (VFR) Terminal Area (VTA) Chart for the King George VFR *Check Point Coordinates*, following the 3-month period after notification of this permanent change, by NOTAM number 050236 under NOTAM File CZVR, nor did NAV CANADA publish a timely aeronautical information publication amendment reflecting this change;

thereby contravening subsection 803.01(2) of the *Canadian Aviation Regulations*. Monetary Penalty Assessed: $5,000.00.

2. On or about 05 February 2007, in Ottawa, Ontario, NAV CANADA did not provide adequate aeronautical information services by not demonstrating aeronautical information quality management in accordance with the standards set out in Annex 15 (sections 3.1.7, 3.2.1, 4.2.8 and 4.3.1) to the *Convention on International Civil Aviation*, twelfth edition and by not complying with these standards specifically:

a. NAV CANADA did not comply with their internal quality management system by not raising the required quality management non-conformance report relating to an operationally significant permanent change to the Enroute Low Altitude L 01 Chart, for the V 317/V440 YZP VOR to HECAT, *Minimum Enroute Altidude*, following the 3-month period after notification of this permanent change by NOTAM number 050286 under NOTAM File CZVR, nor did NAV CANADA publish a timely aeronautical information publication amendment reflecting this change;

thereby contravening subsection 803.01(2) of the *Canadian Aviation Regulations*. Monetary Penalty Assessed: $5,000.00.

3. On or about 05 February 2007, in Ottawa, Ontario, NAV CANADA did not provide adequate aeronautical information service by not demonstrating aeronautical information quality management in accordance with the standards set out in Annex 15 (sections 3.1.7, 3.2.1, 4.2.8 and 4.3.1) to the *Convention on International Civil Aviation*, twelfth edition and by not complying with these standards, specifically:

NAV CANADA did not comply with their internal quality management system by not raising the required quality management non-conformance report relating to an operationally significant permanent change to the Enroute Low Altitude L 01 Chart, for the V 368 MITEK Intersection to read *Change Over Point* to the ZK1 NDB, following the 3-month period after notification of this permanent change by NOTAM number 050873 under NOTAM File CZVR, not did NAV CANADA publish a timely aeronautical information publication amendment reflecting this change;

thereby contravening subsection 803.01(2) of the *Canadian Aviation Regulations*, Monetary Penalty Assessed: $5,000.00.

4. On or about 05 February 2007, in Ottawa, Ontario, NAV CANADA did not provide adequate aeronautical information services by not demonstrating aeronautical information quality management in accordance with the standards set out in Annex 15 (sections 3.1.7, 3.2.1, 4.2.8 and 4.3.1) to the *Convention on International Civil Aviation*, twelfth edition and by not complying with these standards specifically:

NAV CANADA did not comply with their internal quality management system by not raising the required quality management non-conformance report relating to an operationally significant permanent change to the Enroute Low Altitude L 01 and L 02 Chart for the V 317-440 YOLKK to HECAT, *Minimum Enroute Altitude*, following the 3-month period after notification of this permanent change by NOTAM number 050339 under NOTAM File CZVR, nor did NAV CANADA publish a timely aeronautical information publication amendment reflecting this change;

thereby contravening subsection 803.01(2) of the *Canadian Aviation Regulations*. Monetary Penalty Assessed: $5,000.00.

5. On or about 05 February 2007, in Ottawa, Ontario, NAV CANADA did not provide adequate aeronautical information services by not demonstrating aeronautical information quality management in accordance with the standards set out in Annex 15 (sections 3.1.7, 3.2.1, 4.2.8 and 4.3.1) to the *Convention on International Civil Aviation*, twelfth edition and by not complying with these standards, specifically:

NAV CANADA did not comply with their internal quality management system by not raising the required quality management non-conformance report relating to an operationally significant permanent change to the Enroute Low Altitude L 02 Chart, for the V 354*Minimum Enroute Altitude* between Grase and LW, following the 3-month period after notification of this permanent change by NOTAM NUMBER 050604 under NOTAM File CZVR, nor did NAV CANADA publish a timely aeronautical information publication amendment reflecting this change;

thereby contravening subsection 803.01(2) of the *Canadian Aviation Regulations*. Monetary Penalty Assessed: $5,000.00.

6. On or about 05 February 2007, in Ottawa, Ontario, NAV CANADA did not provide adequate aeronautical information services by not demonstrating aeronautical information quality management in accordance with standards set out in Annex 15 (sections 3.1.7, 3.2.1, 4.2.8 and 4.3.1) to the *Convention on International Civil Aviation*, twelfth edition and by not complying with these standards, specifically:

NAV CANADA did not comply with their internal quality management system by not raising the required quality management non-conformance report relating to an operationally significant permanent change to the Enroute Low Altitude L 01 Chart, for the *Change Over Point* on V 368 between YYD/227 and ZKI NDB following the 3-month period after notification of this permanent change by NOTAM number 050875 under NOTAM file CZVR;

thereby contravening subsection 803.01(2) of the *Canadian Aviation Regulations*. Monetary Penalty Assessed: $5,000.00.