

Date: 20080129

Docket: T-746-06

Citation: 2008 FC 109

Ottawa, Ontario, January 29, 2008

PRESENT: The Honourable Mr. Justice O'Reilly

BETWEEN:

INSIGHT INSTRUMENT CORPORATION

Applicant

and

MINISTER OF TRANSPORT

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] Insight Instrument Corporation manufactures specialty instruments for small aircraft. Since 1990, Transport Canada has designated Insight as an approved maintenance organization (AMO). Insight's AMO status requires it to comply with its Quality Program Manual (QPM), which includes periodic self audits (s. 573.09, *Canadian Aviation Regulations, 1996*, SOR 96-433; incorporating subparagraphs 573.09(2)(f)(i) and (ii) of the *Airworthiness Manual*; relevant enactments are set out in an Annex). In turn, inspectors from Transport Canada carry out conformance audits to ensure that AMOs are complying with their QPMs.

[2] In February 2004, an inspector found that Insight had not carried out a self-audit between September 2001 and February 2004. Transport Canada issued a Notice of Assessment of a Monetary Penalty (\$1250.00) to Insight in November 2004 (under s. 7.7 of the *Aeronautics Act*, R.S.C. 1985, c. A-2). Insight sought to review that decision before the Transportation Appeal Tribunal of Canada (TATC). The TATC member confirmed the assessment but reduced the amount to \$400.00. Insight appealed to the TATC Appeal Panel. The Appeal Panel dismissed the appeal.

[3] Insight argues that the Appeal Panel erred in finding that it had not carried out a self-audit during the relevant time period. Insight also submits that the one-year limitation period in s. 26 of the *Aeronautics Act*, should have precluded Transport Canada from initiating any proceedings against it for alleged non-compliance. Insight asks me to overturn the Appeal Panel's decision and order a new hearing before a different panel. I can find no basis for doing so, however, and must, therefore, dismiss this application for judicial review.

I. Issues

1. Did the Appeal Panel err in finding that Insight had failed to carry out a self-audit during the relevant period?
2. Did the Appeal Panel err when it found that the proceedings were not outside the one-year limitation period?

[4] In addition to these main issues, Insight raised a preliminary question about an affidavit filed by Transport Canada for purposes of this judicial review. Insight argues that I should draw an adverse inference from the fact that the affidavit and supporting exhibits, sworn by Mr. Imtiazali Waljee and which make reference to Insight's compliance history, are incomplete and should have been disclosed earlier. Transport Canada submits that the affidavit was intended to address certain representations made by Insight's deponent, Mr. John Youngquist, in the affidavit filed in support of the application for judicial review. In addition, Transport Canada notes that the information contained in the Waljee affidavit was, in any case, in Insight's possession and could have been presented and supplemented if Insight believed it supported its position.

[5] Insight concedes that the information in the Waljee affidavit constitutes fresh evidence before me. There exists a well-established rule that an application for judicial review must be decided on the basis of the record before the decision-maker. Both parties had ample opportunity to present evidence before the tribunals below. I see no reason to receive fresh evidence at this point nor any basis for drawing an adverse inference from the conduct of the parties in respect of the evidence they previously submitted or chose not to submit.

I. Analysis

1. *Did the Appeal Panel err in finding that Insight had failed to carry out a self-audit during the relevant period?*

(a) The Decision of the TATC

[6] Insight's QPM requires it to carry out an audit of its quality assurance program over a "one year period". Insight carried out an audit in 2003, which it says satisfied its obligation for that year. The 2003 audit was conducted for the benefit of the Cessna Corporation which was evaluating Insight's operations to determine if it would be a suitable supplier to Cessna. The TATC found that the evaluation done for Cessna in 2003 was not an acceptable substitute for the self-audit required under the QPM. The member was of the view that audits should be carried out according to a standard procedure. If the Cessna audit were to satisfy Insight's self-audit obligation, other AMOs could put forward their own versions of self-audits and there would cease to be a standard reporting requirement. This would be contrary to the purposes of the *Aeronautics Act* and Regulations, which are aimed at setting uniform standards across the aviation industry.

[7] The TATC found that Insight had contravened s. 573.09 of the Regulations. It also found that Transport Canada's own conduct was problematic in that it had advised Insight in September 2004 that Insight had satisfactorily corrected the shortcomings noted in the February 2004 inspection. Subsequently, Transport Canada advised Insight that it was in contravention of its QPM because of its failure to carry out a self-audit. In light of this confusion, the Member reduced Insight's monetary penalty from \$1250.00 to \$400.00.

(b) The Decision of the Appeal Panel

[8] The Appeal Panel found that while the Cessna audit was a “rigorous exercise” it did not fulfill Insight’s obligation to carry out a self-audit under the Regulations and its own QPM. The Panel rejected Insight’s submission that the “one-year” period for self-assessments was not necessarily a calendar year, as well as its suggestion that there was confusion about when audits were required. The Panel agreed with Transport Canada that the one-year period should be interpreted as a calendar year unless specified otherwise in a QPM.

[9] The Panel also noted that Insight had been in the aviation manufacturing business since 1980 and had held its AMO status since 1990. If there had been actual confusion about the requirement for yearly audits, Insight could have asked Transport Canada for clarification. The fact that Transport Canada could have taken the initiative to make Insight’s obligation clearer, and had failed to do so, had already been taken into account in determining the amount of the monetary penalty.

(c) Discussion and Conclusion

[10] I can overturn the Appeal Panel’s finding that Insight had contravened the Act if I conclude that it was unreasonable: *Hudgin v. Canada (Minister of Transport)* 2002 FCA 102, [2002] F.C.J. No. 369 (F.C.A.) (QL); *Asselin v. Canada (Minister of Transport)*, [2000] F.C.J. No. 256 (F.C.T.D.) (QL); *Butterfield v. Canada (Attorney General)*, 2006 FC 894, [2006] F.C.J. No. 1132 (F.C.) (QL).

[11] In my view, the Appeal Panel's conclusion was reasonable. Insight may well have considered the Cessna audit to have been rigorous and assumed that it had done enough self-analysis in 2003 to satisfy its regulatory obligations. Further, it might well have thought that it was entitled to carry out self-audits within rolling twelve-month periods. However, I cannot conclude that the Appeal Panel's characterization of the Cessna audit was unreasonable. Further, if Insight had wished to establish a reporting period other than a calendar year, it could easily have done so by amending its QPM.

2. *Did the Appeal Panel err when it found that the proceedings were not outside the one-year limitation period?*

(a) The Decision of the TATC

[12] The TATC noted that s. 26 of the *Aeronautics Act* states that no proceedings can be commenced "after twelve months from the time when the subject-matter of the proceedings arose". Insight was informed of the assessment of a monetary penalty in November 2004. Given that Insight's alleged non-compliance with the self-audit obligation had come to light in February 2004, the TATC found that proceedings against Insight had been properly commenced within twelve months of that inspection.

(b) The Decision of the Appeal Panel

[13] Before the Appeal Panel, Insight argued that any non-compliance with the Act or Regulations was out of time in November 2004. It said that it had completed a self-audit in February 2004 and, given that it had an obligation to conduct audits over a one-year period, any non-compliance must have occurred prior to February 2003. Proceedings in relation to any such non-compliance could not, therefore, be commenced any time after February 2004.

[14] Given its conclusion that self-audits must be carried out within each calendar year, the Appeal Panel found that the February 2004 audit satisfied Insight's obligations for the year 2004. The question was whether Insight had complied with its obligation to conduct a self-audit in 2003. The Appeal Panel found that there was no evidence of Insight's compliance with that obligation in the twelve months prior to the date when proceedings were commenced against Insight (*i.e.* after November 17, 2003) or, for that matter, earlier in 2003, having already rejected the proposition that the 2003 Cessna audit could be considered a self-audit for purposes of the Regulations. Accordingly, at the end of 2003, Insight was in a situation of non-compliance and proceedings against it could be commenced within the ensuing twelve months. The notice of assessment, dated November 28, 2004 was, therefore, valid.

(c) Discussion and Conclusion

[15] On this issue, which involves the interpretation of a statutory limitation period, I can overturn the Appeal Panel's decision if I find that it was incorrect. To repeat, s. 26 states that no proceedings "may be instituted after twelve months from the time when the subject-matter of the

proceedings arose.”

[16] I agree with the Appeal Panel’s conclusion that the “subject matter” referred to in s. 26 is a contravention of the regulations. Accordingly, proceedings must be commenced within twelve months of an infraction. Here, the proceedings were commenced in November 2004, less than eleven months after the end of 2003. At that point, Insight, having failed to conduct a self-audit in 2003, had contravened the Act. Therefore, the proceedings were commenced within the required twelve months of the infraction and are valid.

[17] Accordingly, this application for judicial review must be dismissed, with costs.

JUDGMENT

THIS COURT'S ORDER IS that

1. The application for judicial review is dismissed, with costs.

“James W. O’Reilly”

Judge

Annex

Canadian Aviation Regulations, 1996, SOR 96-433

Règlements de l'aviation, 1996, DORS 96-433

573.09 (1) The holder of an approved maintenance organization (AMO) certificate shall establish and maintain a quality assurance program consisting of provisions for sampling maintenance processes to evaluate the AMO's ability to perform its maintenance in a safe manner.

(2) The person responsible for maintenance shall ensure that records relating to the findings resulting from the quality assurance program are distributed to the appropriate manager for corrective action and follow-up in accordance with the policies and procedures specified in the maintenance policy manual (MPM).

(3) The person responsible for maintenance shall establish an audit system in respect of the quality assurance program that consists of the following:

- (a) an initial audit within 12 months after the date on which the AMO certificate is issued;
- (b) subsequent audits conducted at intervals set out in the MPM;
- (c) checklists of all activities controlled by the MPM;
- (d) a record of each occurrence of compliance or non-compliance with the MPM found during an audit referred to in paragraph (a) or (b);

573.09 (1) Le titulaire d'un certificat d'organisme de maintenance agréé (OMA) doit établir et maintenir un programme d'assurance de la qualité qui comporte des dispositions qui permettent l'échantillonnage des processus de maintenance pour évaluer la capacité de l'OMA à effectuer la maintenance d'une manière sécuritaire.

(2) Le responsable de la maintenance doit veiller à ce que les dossiers concernant les constatations qui découlent du programme d'assurance de la qualité soient distribués au gestionnaire compétent pour que des mesures correctives soient prises et que le suivi soit assuré conformément aux lignes de conduite et aux marches à suivre précisées dans le manuel de politiques de maintenance (MPM).

(3) Le responsable de la maintenance doit établir un système de vérification à l'égard du programme d'assurance de la qualité qui comprend les éléments suivants :

- a) une vérification initiale dans les 12 mois qui suivent la date de délivrance du certificat OMA;
- b) des vérifications ultérieures effectuées à des intervalles indiqués dans le MPM;
- c) des listes de contrôle de toutes les activités régies par le MPM;
- d) une inscription de chaque cas de conformité ou non-conformité avec le

(e) procedures for ensuring that each finding of an audit is communicated to them and, if management functions have been assigned to another person under subsection 573.04(4) or (5), to that person;

(f) follow-up procedures for ensuring that corrective actions are effective; and

(g) a system for recording the findings of initial and periodic audits, corrective actions and follow-ups.

(4) The records required under paragraph (3)(g) shall be retained for the greater of

(a) two audit cycles; and

(b) two years.

(5) The duties related to the quality assurance program that involve specific tasks or activities within an AMO's activities shall be fulfilled by persons who are not responsible for carrying out those tasks or activities.

Canadian Aviation Regulations 2007-1

Quality Assurance Program
(amended 1998/06/01; previous version)

573.09 (1) Pursuant to section 573.09 of the CARs, each AMO Certificate holder must establish and maintain a program to ensure that the maintenance system continues to comply with the regulations.

[...]

(2) The program must:

MPM qui est relevé au cours d'une vérification visée aux alinéas a) ou b);

e) une marche à suivre pour que chaque constatation qui découle d'une vérification lui soit communiquée et, si des fonctions de gestion ont été attribuées à une autre personne en application des paragraphes 573.04(4) ou (5), soit communiquée à cette dernière;

f) des modalités de suivi pour faire en sorte que les mesures correctives soient efficaces;

g) un système pour consigner les constatations qui découlent des vérifications initiales et des vérifications périodiques, les mesures correctives et les mesures de suivi.

(4) Les dossiers exigés par l'alinéa (3)g) sont conservés pendant la plus longue des périodes suivantes :

a) deux cycles de vérification;

b) deux ans.

(5) Les fonctions relatives au programme d'assurance de la qualité qui comportent des tâches ou activités particulières dans le cadre d'activités de l'OMA doivent être remplies par des personnes qui ne sont pas responsables de leur exécution.

Règlement de l'aviation canadien 2007-1

Programme d'assurance de la qualité
(modifié 1998/06/01; version précédente)

[...]

(f) employ audit checklists to identify all functions controlled by the MPM. Having regard to the complexity of the AMO's activities, checklists must be sufficiently detailed to ensure that all maintenance functions are addressed. Specifically, the program must include the following elements:

- (i) an initial internal audit, using the audit checklists, that covers all aspects of the AMOs technical activities, within 12 months of the date on which the certificate is issued;
- (ii) a recurring cycle of further internal audits, conducted at intervals established in the approved MPM;

Aeronautics Act, R.S. 1985, c. A-2

Notice of assessment of monetary penalty

7.7 (1) If the Minister believes on reasonable grounds that a person has contravened a designated provision, the Minister may decide to assess a monetary penalty in respect of the alleged contravention, in which case the Minister shall, by personal service or by registered or certified mail sent to the person at their latest known address, notify the person of his or her decision.

Limitation period

26. No proceedings under sections 7.6 to 8.2 or by way of summary conviction under this Act may be instituted after twelve months from the time when the subject-matter of the proceedings arose

573.09 (1) En vertu de l'article 573.09 du RAC, chaque titulaire de certificat d'OMA doit établir et mettre en oeuvre un programme garantissant que le système de maintenance respecte toujours la réglementation.

...

(2) Le programme doit :

...

f) prévoir l'utilisation de listes de vérifications pour identifier les fonctions dont le contrôle est défini dans le MPM. Ces listes doivent être suffisamment détaillées, en fonction de la complexité des activités de l'OMA, pour s'assurer que toutes les fonctions de maintenance sont abordées. Plus précisément, le programme doit inclure les éléments suivants :

- (i) une vérification interne initiale, à l'aide des listes de vérifications, de tous les aspects des activités techniques de l'OMA, dans les 12 mois de la date de délivrance du certificat;
- (ii) d'autres vérifications internes périodiques à effectuer aux intervalles établies dans le MPM approuvé;

Loi sur l'aéronautique, L.R. 1985, ch. A-2

Avis établissant le montant de l'amende

7.7 (1) Le ministre, s'il a des motifs raisonnables de croire qu'une personne a contrevenu à un texte désigné, peut décider de déterminer le montant de l'amende à payer, auquel cas il lui expédie, par signification à personne ou par courrier recommandé ou certifié à sa dernière adresse connue, un avis l'informant de la décision.

Prescription

26. Les poursuites au titre des articles 7.6 à 8.2 ou celles visant une infraction à la présente loi ou à ses règlements punissable sur déclaration de culpabilité par procédure sommaire se prescrivent par douze mois à compter de la perpétration de l'infraction.

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: T-746-06

STYLE OF CAUSE: INSIGHT INSTRUMENT CORPORATION v.
MINISTER OF TRANSPORT

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: September 25, 2007

**REASONS FOR JUDGMENT
AND JUDGMENT:** O'REILLY J.

DATED: January 29, 2008

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