



Canadian Nuclear  
Safety Commission

Commission canadienne  
de sûreté nucléaire

## Record of Proceedings, Including Reasons for Determination

In the Matter of

Applicant Canadian Air Transport Security Authority

Subject Request for Commission Review of Notice of  
Violation and Administrative Monetary Penalty  
Issued on August 29, 2014

Hearing Date December 12, 2014

## RECORD OF PROCEEDINGS

Applicant: Canadian Air Transport Security Authority

Address/Location: 99 Bank Street, 5<sup>th</sup> Floor, Ottawa ON, K1P 6B9

Purpose: Request for Commission Review of Notice of Violation and Administrative Monetary Penalty Issued on August 29, 2014

Request received: September 29, 2014

Date of hearing: December 12, 2014

Location: Canadian Nuclear Safety Commission (CNSC)  
280 Slater St., Ottawa, Ontario

Members present: M. Binder, Panel

Secretary: M. Leblanc

Recording Secretary: M. Hornof/S. Dimitrijevic

General Counsel: L. Thiele

<b>Licensee/Person Named in or Subject to AMP Represented By</b>		<b>Document Number</b>
<ul style="list-style-type: none"><li>• D. Sipes</li><li>• S. Desjardins</li><li>• M. Corrigan</li></ul>		CMD 14-H118.1
<b>CNSC staff</b>		<b>Document Number</b>
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**Administrative Monetary Penalty Amount: Corrected**

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## 1.0 INTRODUCTION

1. The Canadian Air Transport Security Authority (CATSA) holds Canadian Nuclear Safety Commission<sup>1</sup> (CNSC) licence No. 13400-2-14.4. CATSA's licence allows for the possession, use, storage and transfer of the CNSC certified radiation device R-147-0002-0-2004, specifically the Smiths Detection IonScan 500 DT model, at designated locations listed on the licence.
2. The IonScan 500DT radiation device (device) is certified by the CNSC to contain up to a maximum of 1400 MBq of Ni<sup>63</sup>, which is a weak emitter of beta radiation, and makes it a low-risk radiation device. Although the dose to a person standing next to one of these devices would be expected to be negligible, the device requires CNSC licensing and safe regulatory control by the licensee.
3. In early March 2014, CATSA purchased approximately 139 devices from a CNSC licensed supplier and they were subsequently stored at locations in Vancouver, BC and Halifax, NS. These locations were not listed among the permitted storage locations on the CNSC licence issued to CATSA.
4. On or about March 27, 2014, CATSA purchased an additional 239 devices from a CNSC licensed supplier. Between March 27 and April 22, 2014, CATSA arranged for the devices to be stored at a location in Mississauga, ON that was not listed as one of the permitted storage locations on the CNSC licence issued to CATSA.
5. CATSA filed for a licence amendment to include the Halifax and Vancouver storage locations on their licence on or about April 22, 2014. At this time, CNSC staff became aware of the non-compliances, including the storage of the devices in Mississauga, for which CATSA did not seek a licence amendment.
6. On August 29, 2014, in accordance with subsection 65.02(1) of the *Nuclear Safety and Control Act*<sup>2</sup> (NSCA), a CNSC Designated Officer issued to CATSA a Notice of Violation with an associated Administrative Monetary Penalty (AMP), 2014-AMP-06, in the amount of \$4,900.00. As stated in the Notice of Violation, an AMP was issued to the licensee based on the potential safety consequences from storage of nuclear substances at unlicensed locations, arising from the contravention of paragraph 26(b) of the NSCA, which states: "Subject to the regulations, no person shall, except in accordance with a licence, mine, produce, refine, convert, enrich, process, reprocess, package, transport, manage, store or dispose of a nuclear substance."
7. On September 29, 2014, in accordance with subsection 65.1 of the NSCA, CATSA made a request to the Commission for a review of the facts of the violation and the amount of the AMP (CMD 14-H118.1).

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<sup>1</sup> The *Canadian Nuclear Safety Commission* is referred to as the "CNSC" when referring to the organization and its staff in general, and as the "Commission" when referring to the tribunal component.

<sup>2</sup> Statutes of Canada (S.C.) 1997, chapter (c.) 9.

### Issue

8. Pursuant to subsection 65.14(1) of the NSCA, and as per the request made by CATSA, the Commission was required to determine (1) whether CATSA committed the violation as stated in 2014-AMP-06 and, (2) whether the amount of the penalty for the violation was determined in accordance with the *Administrative Monetary Penalties Regulations*<sup>3</sup> (AMPs Regulations).

### Hearing

9. Pursuant to section 22 of the NSCA, the President of the Commission established a Panel of the Commission to consider the request from CATSA. The Commission, in making its determination, considered information presented for a hearing held on December 12, 2014, with CNSC staff and CATSA representatives in Ottawa, Ontario. During the hearing, the Commission considered written submissions and heard oral presentations from CATSA (CMD 14-H118.1) and CNSC staff (CMD 14-118).
10. During the hearing, CNSC staff added to the record a May 12, 2014 email from CATSA to CNSC staff entitled "Delivery of Smiths Detection IONSCAN 500 DT Units under License 13400-2-14.3." A copy of this email was provided to the Commission during the hearing, and CATSA representatives indicated that they already had a copy of it.

## **2.0 SUMMARY DETERMINATION**

11. Based on its consideration of the matter, as described in more detail in the following sections of this *Record of Proceedings*,

the Commission, pursuant to section 65.14(1) of the *Nuclear Safety and Control Act*, determines that the Canadian Air Transport Security Authority committed a violation of paragraph 26(b) of the *Nuclear Safety and Control Act*. The Commission also determines that the amount of Administrative Monetary Penalty, 2014-AMP-06, was not determined in accordance with the *Administrative Monetary Penalties Regulations*, and corrects the amount from \$4,900.00 to \$2,170.00.

## **3.0 ISSUES AND COMMISSION FINDINGS**

12. In accordance with section 65.15 of the NSCA, the burden of proof is on the person who issued the Notice of Violation to show, on a balance of probabilities, that the violation was committed. In this regard, the Commission considered the facts of the violation

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<sup>3</sup> SOR-2013-139.

presented by CATSA and CNSC staff. The Commission also considered the seven factors set out in Section 5 of the AMPs Regulations to determine the reasonableness of the penalty amount.

### Review Hearing

13. On December 12, 2014, the Commission conducted the review under section 65.14 of the NSCA. Specifically, CATSA was given an opportunity to provide the Commission with more information regarding the events that led to the issuance of the Notice of Violation/AMP.
14. A CATSA representative stated that CATSA applied to the CNSC for a licence amendment for the storage locations of the devices in Vancouver and Halifax on April 22, 2014. At this time, CATSA also advised CNSC staff of the delivery of an additional 239 devices to a Mississauga warehouse in late March 2014. CATSA acknowledged that the amendment request was submitted after the March 2014 delivery of the devices to Vancouver and Halifax, and that a licence amendment for the devices in Mississauga was not requested.
15. A CATSA representative indicated that through this hearing, CATSA seeks:
  - to characterize the facts of the violation, as well as to clarify the regulations associated with the licensable activities in question;
  - to state, on the record, that CATSA did request a licence amendment with respect to storage location of the devices. CATSA did, however, acknowledge that the request was not made in a timely manner;
  - to state, on the record, that from CATSA's perspective, the devices were under the care and control of CATSA at all times, and remained in their original packaging; and
  - to state, on the record, that the cause of this situation from CATSA's perspective was an inadvertent delay in communication with CNSC staff, regarding the storage locations of the devices. The CATSA representative further indicated that CATSA had no intention of committing a violation and does not perceive this error to be due to intention or negligence, as described in the Notice of Violation.
16. CNSC staff stated that the 239 devices stored at a Mississauga warehouse were not part of the licence amendment request for additional storage locations. The CATSA representative responded that CATSA considered the devices that were stored at the Mississauga location, the warehouse of CATSA's authorized shipping contractor Colbeck & Clarke, to be in transit awaiting transfer and not in storage, and therefore exempt from licensing as per the *Packaging and Transport of Nuclear Substances Regulations*<sup>4</sup>. CNSC staff stated that, since CATSA had possession of these devices prior to notification of the CNSC of the location change, they were in violation of the NSCA, as this did not comply

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<sup>4</sup> SOR-2000-208.

with their licence. Furthermore, Colbeck & Clarke were not licensed to store the devices and, as such, CATSA did not have control over the devices while they were stored at the third party Mississauga warehouse.

17. The CATSA representative stated that, after the non-compliance was identified, and as per CNSC staff's direction, all of the devices stored at the unlicensed Mississauga warehouse were moved to CATSA's main warehouse location in Ottawa.
18. The Commission asked for submissions on the difference between packages in transit and packages in storage. CNSC staff responded that packages containing nuclear substances are shipped from a licensed consignor to a licensed consignee. The package is considered to be in transit when the package has left the consignor but the consignee has not yet taken possession of it. Once the consignee has signed for the package and taken possession of it, the package is no longer considered to be in transit and is in storage. As such, CNSC staff concludes that the devices in question were not in transit and were under the possession of CATSA while stored at the unlicensed locations, and therefore subject to regulatory control.
19. Further to its previous question, the Commission asked for views on whether the condition of the device packaging (i.e., original manufacturer packaging versus open packaging) would affect the consideration of whether the devices are in transit or in storage. CNSC staff responded that it would not and that, once CATSA took possession of the devices, their storage was a licensable activity under the NSCA. CNSC staff explained that, although CATSA considered the Mississauga warehouse a transiting station, the location was actually a distribution warehouse since CATSA had taken possession of the devices and was distributing them to various locations. Therefore, it was CATSA's responsibility to ensure licensed control over the storage of the devices. Since Colbeck & Clarke is not licensed to store the devices at its Mississauga warehouse, this regulatory control was not maintained. CNSC staff also provided an example of how another licensee's distribution warehouse for radiation devices in Canada operates under proper regulatory control.
20. A CATSA representative acknowledged that the devices were stored, and not in transit as previously stated, at the Mississauga warehouse. However, as per section B.5 of *RD/GD 371: Licence Application Guide, Nuclear Substances and Radiation Devices*, the CATSA representative stated that CATSA understood that storage for less than 90 days was exempt from licensing and requested clarification from the CNSC on this matter. The CATSA representative also stated that the devices at the Mississauga warehouse were going to be distributed to alternate licensed locations within 90 days and therefore CATSA understood that a licence amendment was not required. CNSC staff responded that the 90-day guideline is intended for field operations and portable devices, such as portable nuclear gauges. CNSC staff further noted that RD/GD 371 is a guidance document and does not have regulatory requirements associated to it. In this case, since CATSA was operating the warehouse as a distribution center, storage of the devices was a licensable activity for which a license amendment approving the new storage location was required.

21. A CATSA representative stated that Colbeck & Clarke are trained in the storage and handling of hazardous materials, including packages containing nuclear substances, and that the packages were labelled with the appropriate UN 2911 labels. CNSC staff responded that a warehouse is not a carrier under the *Packaging and Transport of Nuclear Substances Regulations*. A carrier under those regulations must have a radiation protection program in place and, in the case of Colbeck & Clarke, they did not have one. Therefore, CATSA, as the responsible entity for the devices, did not apply a radiation protection program to them, contrary to their licence conditions and paragraph 12(1)(f) of the *General Nuclear Safety and Control Regulations*<sup>5</sup>.
22. The Commission enquired about who had care and control of the devices while they were at the Mississauga warehouse. The CATSA representative responded that while in Mississauga, the devices were put into Colbeck & Clarke's warehouse. The CATSA representative stated that, while in the warehouse, the devices were not outside CATSA's care and control. CNSC staff disagreed and stated that, by storing the devices at a third party warehouse, CATSA effectively transferred them to a different person, which is contrary to section 13 of the *General Nuclear Safety and Control Regulations*<sup>6</sup>.
23. The Commission enquired about who had care and control over the devices at the Halifax and Vancouver storage locations. CNSC staff responded that CATSA had care and control over the devices at those locations and, therefore, the licence amendment for the storage of those devices at the new locations was approved. CNSC staff further clarified for the Commission the criteria used to approve locations for licensed activities such as storage, and emphasized that, when approving a storage location, CNSC staff certifies that the licensee has control at the location.
24. The Commission enquired about how long CATSA has been a CNSC licensee. The CATSA representative stated that CATSA has been a CNSC licensee for more than 10 years.
25. The Commission asked CATSA why it had failed to apply for a licence amendment for storage of the devices, since it had done so on previous occasions. A CATSA representative stated that, while CATSA does not dispute that it knows that their licence has to be amended for new storage locations, CATSA did not intend for the warehouse in Mississauga to be a permanent storage location. CNSC staff stated that CATSA was an experienced licensee that has requested similar licence amendments in the past. As such, CATSA was aware that adding storage locations for radiation devices to their licence was a regulatory requirement.

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<sup>5</sup> SOR-2000-202. Section 12(1)(f) of the *General Nuclear Safety and Control Regulation* states: "Every licensee shall take all reasonable precautions to control the release of radioactive nuclear substances or hazardous substances within the site of the licensed activity and into the environment as a result of the licensed activity."

<sup>6</sup> Section 13 of the *General Nuclear Safety and Control Regulations* states: "No licensee shall transfer a nuclear substance, prescribed equipment or prescribed information to a person who does not hold the licence, if any, that is required to possess the nuclear substance, prescribed equipment or prescribed information by the (NSC) Act and the regulations made under the Act."



26. The CATSA representative stated that CATSA understands the principle behind the CNSC's AMPs process and, as a public institution, it wants to ensure that it addresses the Notice of Violation appropriately. The CATSA representative further stated that security is very important to CATSA in terms of its mandate and the responsibility that it has to Canadians, and that there was virtually no possibility that the devices could be transferred to another entity or that they would be mishandled by Colbeck and Clarke. CNSC staff responded that while they are encouraged that there was a high level of safety in storing the devices at the Colbeck & Clarke warehouse, this does not absolve the licensee from ensuring that a licensed activity will be carried out in accordance with regulations prior to beginning this activity.
27. The Commission asked whether CATSA has had any previous non-compliance issues. CNSC staff indicated that, since 2009, annual compliance reports have been submitted as required and no compliance issues have previously been identified. The Commission noted that it would expect a long-time licensee with no previous violations, such as CATSA, to understand the conditions of its licence. CNSC staff noted that this is the first instance in recent history that a licensee has indicated ambiguity in the regulations for the storage of radiation devices.
28. The Commission asked whether CNSC staff has conducted any on-site inspections of CATSA facilities. CNSC staff responded that the devices under consideration are considered low-risk and, therefore, for compliance purposes, CNSC regulatory activities with respect to CATSA's licence for these devices include reviewing annual compliance reports submitted by CATSA, as well as conducting inspections through desktop reviews.
29. Based on the information discussed, the CATSA representative responded that any determination of the Commission should include the clarification of the 90-day storage guideline in RD/GD 371, paragraph B.5. CNSC staff stated that they are committed to enhancing clarity for all licensees with respect to these issues.

#### Penalty Calculation

30. The Commission enquired about the trigger for the issuance of the AMP to CATSA since this is the first non-compliance identified with this licensee. CNSC staff responded that several factors contributed to the decision to issue an AMP:
  - CATSA did not request to add additional storage locations to their licence in a timely manner;
  - After the licence amendment request was submitted, CATSA did not indicate to CNSC staff that the storage activity was already being undertaken at the new locations;
  - CATSA stored devices at an unlicensed location under control of a third party and a licence amendment was not requested for this location;
  - CATSA did not maintain adequate control over its licensed radiation devices at all times.

31. The factor “degree of intention or negligence”, paragraph 5(b) of the AMPs Regulations, was assessed as a +3 by the Designated Officer, with the following rationale: “On CATSA’s request, the CNSC previously (April 8, 2013) amended the licence issued to CATSA to add new locations where radiation devices were to be stored or used. Therefore, CATSA was aware that the devices mentioned above cannot be stored or used at locations not listed on their licence. CATSA is also fully aware that they must request an amendment to their licence prior to storing these devices at a new location. CATSA stored a large number of radiation devices at three unlicensed locations. Furthermore, there was no request received by the CNSC from CASTA to have the CNSC amend their licence to add the Mississauga, Vancouver and Halifax locations until CNSC staff identified the non-compliance to the licensee in April 2014.”
32. The Commission enquired about the factor “degree of intention or negligence” and why a score of +3 was assigned to it. CNSC staff responded that the score was assigned because CATSA knew or ought to have known that they were required to amend their licence to include the new storage locations. Because of the large number of devices involved in this situation, a score of +3 was assigned.
33. The Commission asked how the score of +1 for the factor “harm” was determined. CNSC staff responded that, because CATSA stored licensed devices in unlicensed locations, loss of regulatory control over the devices occurred. The devices could have potentially been transferred to someone else. Furthermore, in an emergency situation, first responders would not have been aware of the presence of nuclear substances on the site since there was no radiation protection program at the Mississauga Colbeck & Clarke warehouse, contrary to paragraph 12(1)(f) of the *General Nuclear Safety and Control Regulations*.
34. The Commission enquired about how the score of -1 for the factor “assistance to the Commission” was determined. CNSC staff responded that, once the situation was identified, CATSA provided information to CNSC staff and cooperated with the investigation. CNSC staff added that, due to the difficulty in obtaining some of the documentation, a better score was not given to CATSA.
35. The factor “self-reporting”, paragraph 5(g) of the AMPs regulations, was assessed a 0 by the Designated Officer, with the following rationale: “Once the initial non-compliance was identified by the CNSC, CATSA requested an amendment to their CNSC licence to add the locations in Vancouver, BC, and Halifax, NS, after the devices had been in storage at those locations. CATSA also arranged to properly store the devices, in a location already on the CATSA licence that had been stored in Mississauga. Therefore, the licensee was forthright in identifying the remaining outstanding issues to CNSC staff.”
36. The Commission asked why CNSC staff determined a score of 0 for the factor “self-reporting” since it appears that this factor is interconnected with the factor “assistance to the Commission.” CNSC staff responded that, in CATSA’s notification to the CNSC on April 22, 2014, CATSA indicated that it was proposing the storage of the devices at the

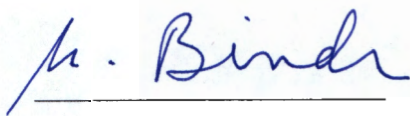
Vancouver and Halifax locations when, in fact, CATSA had been storing the devices there since early March 2014, and a violation had already been committed.

37. CNSC staff submitted that the relevant facts presented in the Notice of Violation 2014-AMP-06 are accurate and the determining factors should remain unchanged. Therefore, CNSC staff recommended that the penalty amount as set out in the Notice of Violation 2014-AMP-06 issued to CATSA should remain unchanged at \$4,900.00.

#### **4.0 DETERMINATION**

38. The Commission has considered the information and submissions from CATSA and the Designated Officer, and determines that CATSA committed the violation of paragraph 26(b) of the NSCA. Specifically, the evidence showed that, by storing the IonScan 500DT radiation devices at the Mississauga, Vancouver and Halifax locations without first seeking a licence amendment from the CNSC, contrary to its CNSC licence 13400-2-14.4, CATSA violated paragraph 26(b) of the NSCA.
39. Based on the evidence, the Commission further determines that :
- CATSA was storing the devices at the Mississauga Colbeck & Clarke warehouse, contrary to its CNSC licence and in violation of paragraph 26(b) of the NSCA, and the devices were not in transit as stated by CATSA;
  - CATSA did not have care and control over the devices at the Mississauga Colbeck and Clarke warehouse;
  - The Colbeck and Clarke warehouse was not a carrier under the *Packaging and Transport of Nuclear Substances Regulations* since the devices were no longer in transit while at the warehouse;
  - while acknowledging CATSA's submission that it may have been confused by the text of RD/GD-371, the Commission is satisfied that the 90-day device-storage guideline in RD/GD-371 is for guidance only and does not apply to the storage of the radiation devices in question;
  - Furthermore, the Commission determines that, as an experienced licensee, CATSA ought to have known that storing the devices at the Mississauga warehouse was a licensable activity; and
  - based on licence amendments initiated by CATSA in the past, CATSA was aware that adding storage locations for radiation devices to their licence was a regulatory requirement under their licence and paragraph 26(b) of the NSCA.
40. With this determination, the Commission instructs CNSC staff to review the 90-day storage guideline in RD/GD 371, paragraph B.5, and take steps to clarify it, as appropriate.
41. With this determination, the Commission instructs CNSC staff to clarify in its regulatory documents, as appropriate, the difference between nuclear substances/radiation devices that are in storage versus those that are in transit.

42. The Commission also determines that, based on the information that was submitted about the event by both CATSA and CNSC staff, there was an error in the determination of the penalty amount.
43. The Commission acknowledges that CATSA, as an experienced licensee, ought to have been aware of the requirement to amend their licence for the new storage location. The Commission finds that, based on the evidence presented by CATSA and CNSC staff, the factor “degree of intention or negligence” was assigned a score that was not commensurate with the actual degree of intention or negligence by CATSA. As a result, and in accordance with section 65.15 of the NSCA, it corrects the assessed score for this factor to a +2.
44. The Commission finds that the factor “self-reporting” was assigned a score that was not commensurate with the actual level of self-reporting done by CATSA. In this regard, the Commission finds that the self-reporting done by CATSA is worthy of greater recognition in light of the additional information provided by CATSA to CNSC staff during its consideration of the matter. As a result, and as per section 65.15 of the NSCA, it corrects the assessed score for this factor to a -1.
45. With this determination, in accordance with subsection 64.14(3) of the NSCA, the Commission corrects the amount of the penalty from \$4,900.00 to \$2,170.00.
46. With this determination, in accordance with subsection 64.14(4) of the NSCA, the Commission directs the Canadian Air Transport Security Authority to submit payment for the 2014-AMP-06 in the amount of \$2,170.00 within 30 days of the date of this determination.
47. In accordance with subsection 65.14(5) of the NSCA, this determination is final and binding.



Michael Binder  
President,  
Canadian Nuclear Safety Commission

JAN 12 2015

Date