

Citation: *Coulson Airplane Ltd. v. Canada (Minister of Transport)*, 2018 TATCE 12 (Review)

Date: 2018-04-17

Docket: P-4234-41

MoT File No.: EMS 88782

IN THE MATTER OF the review hearing requested by the applicant, Coulson Airplane Ltd., in respect of a contravention of subsection 202.42(1) of the *Canadian Aviation Regulations*, SOR/96-433, as alleged by the Minister of Transport.

BETWEEN:

COULSON AIRPLANE LTD., Applicant

and

MINISTER OF TRANSPORT, Respondent

Before: Alexander C. Phillips, Member

Heard in: Port Alberni, British Columbia, September 20 and 21, 2017

For the Applicant: P. Floyd

For the Respondent: J. Regehr

REVIEW DETERMINATION AND REASONS

Held: The Minister of Transport has not proven, on a balance of probabilities, that Coulson Airplane Ltd. contravened subsection 202.42(1) of the *Canadian Aviation Regulations*. The monetary penalty of \$5,000 for the alleged offence is cancelled and the applicant's motion for costs is dismissed.

I. BACKGROUND

[1] On April 19, 2016, pursuant to section 7.7 of the *Aeronautics Act*, R.S.C., 1985, c. A-2, the Minister of Transport (Minister) issued a Notice of Assessment of Monetary Penalty in the amount of \$5,000 against Coulson Airplane Ltd. (CAL), claiming in Schedule A that:

On or about October 19, 2015, at or near Alberni Valley Regional Airport (CBS8) in Port Alberni, British Columbia, you, Coulson Airplane Limited, operated in Canada a Canadair/Bombardier Challenger 600 aircraft registered in the United States of America and bearing US registration N604EF that had been present in Canada for a total of 90 days or more in the immediately preceding twelve-month period, thereby contravening subsection 202.42(1) of the *Canadian Aviation Regulations*.

II. STATUTES AND REGULATIONS

[2] Subsection 103.02(1) and section 202.42 of the *Canadian Aviation Regulations*, SOR/96-433 (CARs) states, in part:

103.02 (1) The owner or operator of an aircraft shall, on reasonable notice given by the Minister, make the aircraft available for inspection in accordance with the notice.

202.42 (1) Subject to section 203.03, no person shall operate in Canada an aircraft that is registered in a foreign state that has been present in Canada for a total of 90 days or more in the immediately preceding twelve-month period unless

- (a) the foreign state is a contracting state;
- (b) the operator of the aircraft is
 - (i) the foreign state,
 - (ii) an individual who is not a Canadian citizen or a permanent resident but is a citizen or subject of the foreign state, or
 - (iii) an entity that is incorporated or otherwise formed under the laws of the foreign state; and
- (c) if the operator of the aircraft is an entity described in subparagraph (b)(iii), the aircraft is operated in Canada
 - (i) in accordance with an air operator certificate, or
 - [...]

202.42 (2) For the purposes of calculating the 90-day period,

- (a) if the aircraft is present in Canada for any part of a calendar day, that part shall be counted as one day; and
- (b) an aircraft is deemed to be present in Canada as soon as it enters Canadian airspace.

[3] Subsections 3(2), 8.7(1) and 8.7(2), and section 8.8 of the *Aeronautics Act* state, in part:

3 (2) Notwithstanding the definition *Minister* in subsection (1), *Minister*, in relation to any matter referred to in paragraph 4.2(n), 4.9(p), (q) or (r), section 6.3 or paragraph 8.7(1)(b), means the Minister of National Defence.

8.7 (1) Subject to subsection (4), the Minister may

- (a) enter, for the purposes of making inspections or audits relating to the enforcement of this Part, any aircraft, aerodrome or other aviation facility, any premises used for the design, manufacture, distribution, maintenance or installation of aeronautical products or any premises used by the Canadian Air Transport Security Authority, regardless of whether or not the inspection or audit relates to that place or to the person who possesses or controls it;
- (a.1) remove any document or other thing from the place where the inspection or audit is being carried out for examination or, in the case of a document, copying;
- (b) enter any place for the purposes of an investigation of matters concerning aviation safety;
- (c) seize anything found in any place referred to in paragraph (a) or (b) that the Minister believes on reasonable grounds will afford evidence with respect to an offence under this Part or the causes or contributing factors pertaining to an investigation referred to in paragraph (b); and
- (d) detain any aircraft that the Minister believes on reasonable grounds is unsafe or is likely to be operated in an unsafe manner and take reasonable steps to ensure its continued detention.

[...]

8.7 (2) Sections 487 to 492 of the *Criminal Code* apply in respect of any offence committed or suspected to have been committed under this Part.

8.8 The owner or person who is in possession or control of a place that is inspected or audited under subsection 8.7(1), and every person who is found in the place, shall

(a) give the Minister all reasonable assistance to enable the Minister to carry out the inspection or audit and exercise any power conferred on the Minister by that subsection; and

(b) provide the Minister with any information relevant to the administration of this Act or the regulations, notices, orders, security measures or emergency directions made under this Part that the Minister may reasonably require.

III. EVIDENCE

A. Minister

Toke Adams

[4] Counsel for the Minister presented one witness, Mr. Toke Adams, who was sworn.

[5] Mr. Adams testified that Transport Canada employs him in its Civil Aviation Branch as the acting Associate Director of Operations, and that on the date he issued the Notice of Assessment of Monetary Penalty, on April 19, 2016, he was the Regional Manager of Enforcement in the Civil Aviation Branch, based in Vancouver, British Columbia.

[6] After setting out his experience in the aviation industry, Mr. Adams explained how he became involved in this file. When reviewing certain documents attached to an aviation enforcement investigation report prepared by one of his investigators on an unrelated charge concerning an allegation of unqualified crew operating the aircraft in question in Canadian airspace, Mr. Adams elected to change that recommended charge and issue a Notice of Assessment of Monetary penalty on behalf of the Minister against CAL for violation of section 202.42 of the *CARs*.

[7] The Minister then entered the following documents as evidence through its witness:

[8] Exhibit M-1: Notice of Assessment of Monetary Penalty dated April 19, 2016. This document shows that Mr. Adams signed and issued this Notice of Assessment of Monetary Penalty on that date to CAL on behalf of the Minister.

[9] Exhibit M-2: Aircraft Bill of Sale dated November 21, 2014. This document shows the sale of the Canadair Limited CL-600 Challenger, US Registration Number N604EF, by CAL to Wells Fargo Bank, in its capacity solely as an Owner Trustee under a Trust Agreement dated November 20, 2014.

[10] Exhibit M-3: Power of Attorney dated December 15, 2014. This document shows that on December 15, 2014, the Wells Fargo Bank in Salt Lake City, Utah, executed a power of attorney to an individual, Vaughan Raymond, in force until December 31, 2015, to execute the US Federal Aviation Administration (FAA) and foreign Civil Aviation Authority documentation related to the Bombardier CL-600 aircraft bearing current US registration mark N604EF in the name and on behalf of the Owner Trustee, Wells Fargo Bank. Mr.

Adams testified that to the best of his knowledge, Vaughan Raymond worked as an employee for one of the Coulson companies in Port Alberni, but he could not say whether or not it was CAL.

[11] Exhibit M-4: FAA Registry dated February 10, 2016. Mr. Adams testified that this document is from the US Federal Aviation Administration's Registry showing that registration number N604EF was assigned on November 25, 2014 to aircraft serial number 1068, which is a Canadair Limited CL-600 Challenger aircraft whose registered owner is the Wells Fargo Bank in Salt Lake City, Utah, as Trustee.

[12] At this point, Counsel for the applicant objected to the entry into evidence of a series of documents by the Minister, claiming they were the product of an unreasonable search and seizure at CAL's premises.

[13] Both parties then agreed with me that this objection would be handled in the same way as the evidentiary objection that was raised in the preceding hearing on TATC File: P-4223-36 (MOT File: EMS 88786) and that the voir dire testimony taken in that hearing would apply in this hearing as well.

[14] As a result, the documents the applicant was objecting to were identified and they were then taken under advisement when introduced through Mr. Adams as outlined below. I have also elected to outline the voir dire testimony after outlining the evidentiary record with respect to this case, which now continues.

[15] Exhibit M-5: (under advisement) FAA Form 8100-2, Standard Airworthiness Certificate dated June 27, 2003. This document was issued on this date by the FAA for the Bombardier CL-600 aircraft with serial number 1068 and bearing registration mark N604EF.

[16] Exhibit M-6: (under advisement) Certificate of Aircraft Registration dated November 25, 2014. Mr. Adams testified this document shows the registration of the aircraft on this date by the US Department of Transportation - Federal Aviation Administration and it shows the same information from the FAA Registry in Exhibit M-4, including: the registration number, the serial number, the type of aircraft, and who it is issued to, Wells Fargo Bank, as the owner of the aircraft.

[17] Exhibit M-7: Letter to Wells Fargo Bank dated December 18, 2015. Mr. Adams testified that this was a letter sent to Wells Fargo Bank by Transport Canada requesting information regarding the nature of any arrangement or agreement between their company and the air operator concerning N604EF and requesting the name of the operator between April and October 2015. He stated these requests were made as part of an investigation into a report that aircraft N604EF operated within Canadian airspace during that period by a pilot acting as second-in-command who did not have the type rating required by subsection 604.143(1) of the *CARs*.

[18] Exhibit M-8: Letter to Transport Canada from Wells Fargo Bank dated January 14, 2016. Mr. Adams testified that this letter is a reply from Wells Fargo Bank in response to the letter of investigation (Exhibit M-7). This letter is from a vice-president of Wells Fargo Bank and it advises Transport Canada that the Challenger CL-600 N604EF aircraft is registered in trust to Wells Fargo Bank as Owner Trustee and is operated via an operating agreement by CAL.

[19] Exhibit M-9: (under advisement) Certificate of Insurance dated February 25, 2015. Mr. Adams testified this is a Certificate of Insurance that was issued by Dulude, Taylor Inc. to Coulson Aircrane Ltd. and a/o Subsidiary, Associated or Affiliated Companies, and it covers aircraft N604EF from October 21, 2014 to October 21, 2015.

[20] Exhibit M-10: B.C. Company Summary for Coulson Aircrane Ltd. dated September 12, 2017. Mr. Adams testified this document was obtained from B.C. Registry Services in Victoria, B.C. and it shows that CAL is an incorporated company in British Columbia and that it was incorporated in 1985 - 32 years ago. Its last annual report was filed in 2016. It also shows that there was a name change from Coulson Helicopters in 1988.

[21] Exhibit M-11: (under advisement) N604EF Aircraft Maintenance Journey Log Book dated February 10, 2015 to October 19, 2015. Mr. Adams testified that he was personally familiar with the series of sequentially numbered and dated pages in this Log Book. He also testified that the Log Book records all the maintenance performed on the N604EF aircraft, who signed off on that maintenance, and all the flight dates for this aircraft, including the airport of departure, the airport of arrival, air time, the aircraft model, registration and serial number, and the pilot licence numbers of the flight crew that were operating this aircraft, between February 10, 2015 to October 19, 2015. He further stated that keeping a Log Book was mandated by the CARs and that the Log Book is a complete record setting out the maintenance performed on, and the movements of, a particular aircraft. He testified that these Log Book pages were obtained from the N604EF aircraft by an investigator who was on site at CAL.

[22] Exhibit M-12: (under advisement) List of N604EF Flights Between February 11, 2015 and October 19, 2015. Mr. Adams testified that he created this List of Flights for the N604EF aircraft that were conducted within Canada between February 11, 2015 and October 19, 2015, from the above Log Book (Exhibit M-11) during his review and adjudication of the case report he received from his investigator. He stated that the first to last entries on the List provide an unbroken chronology of flights and airports that match up with the journey Log Book and it was created by him to assist with determining how many days the aircraft was in Canada. He indicated that the fourth column of this List outlines a running total of days the aircraft was in Canada, meaning the days the aircraft either operated in Canadian airspace or was on the ground in Canada.

[23] Mr. Adams indicated that as of the aircraft flight recorded in Log Book page entry 16853, dated October 19, 2015, the list he created shows that the N604EF aircraft had been present in Canada for a total of 193 days since February 11, 2015. He further testified that October 19, 2015 is the date that he entered into the Notice of Assessment of Monetary Penalty that as of October 19, 2015, the aircraft had been operated in Canada for more than 90 days. He then stated that October 19 is the date of the offending flight on page 16853 of the Log Book and that pilots Halbert and Hansen listed there were employees of CAL, and that the aircraft landed back in Port Alberni on that date.

[24] Mr. Adams stated that he therefore concluded there was a contravention of section 202.42 of the CARs, and that the N604EF aircraft, being a foreign aircraft, had operated in Canada for more than 90 days in the last 12 months.

[25] Mr. Adams then testified that he determined that section 203.03 of the CARs was not operable as an exception to section 202.42, in that the foreign aircraft in question was not operated by a Canadian air operator under a leasing operation because the Minister had not

issued a written leasing authorization for it under subsection 203.03(2) of the *CARs*. Mr. Adams testified that he confirmed that a written leasing authorization had not been issued by the Minister authorizing CAL to operate the Challenger aircraft pursuant to a leasing operation before issuing the charge against CAL pursuant to section 202.42 of the *CARs*. He testified that: CAL was the operator of the aircraft. There was no lease agreement between Wells Fargo Bank and CAL. There was only an operating agreement between them, and there was no agreement that shows that that aircraft was then leased to another entity.

[26] Mr. Adams further testified that he confirmed through a NASIMS database search that CAL did not have an air operator certificate for a fixed wing aircraft in Canada, nor did it have a private air operator certificate for the Challenger, as required under section 604 of the *CARs*.

[27] In terms of penalty, Mr. Adams indicated the maximum penalty for offending section 202.42 of the *CARs* was \$25,000 but that he issued a \$5,000 penalty in the circumstances because this was CAL's first offence and there were no aggravating factors.

Cross-examination of Mr. Adams

[28] Counsel for the applicant, Mr. Floyd, questioned Mr. Adams if he had reviewed any evidence that showed Coulson Aviation (USA) was the operator of the Challenger. Mr. Adams stated that the certificate of registration, the insurance, and the letter that had been provided by Wells Fargo all indicated that CAL was the operator.

[29] Mr. Floyd asked Mr. Adams if he knew in what capacity Mr. Vaughan Raymond worked for the Coulson companies in reference to the Power of Attorney granted to Mr. Raymond by the Wells Fargo Bank in Exhibit M-3. Mr. Adams testified that he knew Mr. Raymond worked for "Coulson in Port Alberni but not his specific capacity".

[30] Mr. Floyd also asked Mr. Adams if he had any knowledge of whether Coulson was seeking to obtain a private air operator certificate under section 604 of the *CARs*, pending an application for a commercial air operator certificate under section 704 of the *CARs* which was delayed due to a minimum equipment list needing to be approved. Mr. Adams responded, "Not that I'm aware".

[31] Mr. Floyd then questioned Mr. Adams on Exhibit M-11, the Log Book at page 16351 which indicated two ferry flights for maintenance purposes. He asked Mr. Adams if he excluded the time the aircraft was in maintenance in Canada from his calculation of time that the aircraft was operated in Canada. Mr. Adams indicated that a ferry flight for maintenance was not an exception to section 202.42 of the *CARs* in his opinion, nor was any time on the ground for maintenance while in Canada.

[32] Mr. Floyd then questioned Mr. Adams in respect of the last page of Exhibit M-12 which showed a gap in counting days in Canada from September 9 to 15, 2015. Mr. Adams replied that it was an error not to count these additional days (i.e. add them to his total of 193 days) in his analysis when the aircraft remained in Port Alberni from a flight on September 8 until it departed on September 15 to Campbell River.

[33] Mr. Floyd asked if there was an exception under subsection 202.42(1) of the *CARs* for bringing an aircraft into Canada under a cross-border services agreement under NAFTA.

[34] Mr. Adams replied as follows:

For NAFTA? No, you've got the foreign state is a contracting state, which this aircraft wasn't; the operator of an aircraft is the foreign state, which it isn't; an individual who is not a Canadian citizen or a permanent resident but is a citizen or subject of the foreign state. In this case it wasn't. The aircraft was operated by Coulson Aircrane Limited. An entity that is incorporated or otherwise formed under the laws of the foreign state, which again it wasn't; and if the aircraft is an entity described in paragraph (b)(iii), it's operated in Canada in accordance with an AOC, an air operator certificate, for which Coulson had applied for one but had not yet received to use for that aircraft; and in any operation other than an operation that would require a private operator certificate if the aircraft were registered, and that type of aircraft would require a private operator certificate. ... Short answer, no.

[35] Mr. Adams went on to state:

If you're bringing an aircraft up from the United States under NAFTA, then the operator of the aircraft would have a US air operator certificate, and it would be an agreement that would have gone to Ottawa advising the Minister that the aircraft had been brought into Canada to conduct specialty air services. So there's provisions in the NAFTA agreement of what information has to be provided to the state.

B. Applicant

Paul Rivas

[36] Mr. Paul Rivas was sworn as a witness and gave the following testimony:

[37] He is the Challenger operations manager and a pilot for Coulson Aviation (USA). In that capacity, he is responsible for the operational needs, flights and maintenance of the Challenger CL-600 N604EF aircraft. This aircraft is operated under a US Part 91 FAA operating certificate dealing with private aircraft and it is not a commercial aircraft in that it does not operate under Part 135 for hire and reward with a commercial operating certificate.

[38] This Challenger aircraft is exclusively used to transport Coulson Aviation (USA) employees to the United States for meetings. Specifically, the Coulsons live in Canada and Mr. Rivas takes them to the United States to work. The aircraft is not operated by CAL.

[39] Maintenance on this aircraft is done in either Canada or the United States "whenever it pops up" and when it needs to be done. He supervises this maintenance done by an Aircraft Maintenance Organization (AMO) in the US or Canada.

[40] Mr. Floyd then directed his witness to Exhibit M-11, the aircraft's journey Log Book. Mr. Floyd then asked his witness to turn to page 16353 and identify what times the Challenger CL-600 N604EF aircraft was in maintenance and unserviceable (i.e. not flying). Mr. Rivas explained from the written entries on this page, and on subsequent pages to page 16357, that this aircraft was in maintenance from February 10, 2105 until March 11, 2015 and then it flew on March 13, 2015.

[41] Mr. Floyd then asked Mr. Rivas about maintenance entries on Log Book Page 16357. Mr. Rivas testified about the aircraft's flight history and maintenance work by referring to numerous line entries on this page and on subsequent pages of the Log Book.

[42] At this point, in the interests of running an efficient hearing and excluding irrelevant evidence, and given that Exhibit M-11 has numerous written entries on each page and there

are 55 pages from page 16351 to 163400 and from 16851 to 16854, I temporarily stopped the direct examination of Mr. Rivas and excused him from the hearing room.

[43] I then asked Counsel for the applicant, Mr. Floyd, to explain to me the relevance of having Mr. Rivas consider every entry on every page of Exhibit M-11 in order for him to identify and then testify about every date and for how long the aircraft was in maintenance and was not flying.

[44] Mr. Floyd explained that "operated in Canada" is part of the charge and the issue is whether "maintenance" is part of operation. For the period of time the aircraft was in maintenance, it is not available to be operated and it cannot be operated. Mr. Floyd explained that the days of being inoperable in Canada should not count under section 202.42 of the *CARs*.

[45] Counsel for the Minister effectively objected, when asked his view, by stating that the issue whether the aircraft was operable or not while it was present in Canada is not relevant to the charge under section 202.42 of the *CARs*. Counsel for the Minister argued that the correct legal test is whether the aircraft was present in Canada and that the operability of it, and whether it is being maintained, is irrelevant. Counsel for the Minister pointed out that subsection 101.01(1) of the *CARs* defines "operator", in respect of an aircraft, and it means the person who has the possession of the aircraft as owner, lessee or otherwise.

[46] At this point, I asked Mr. Floyd:

... in the interests of running an efficient hearing, is not the issue whether Coulson US is the operator or Coulson Aircrane Ltd. is the operator. So it really does not come down to an issue of whether it was sitting on the ground and whether maintenance is part of operation or not.

[47] After further exchanges, I asked both counsel what "shall operate" means in subsection 202.42(1) of the *CARs* - if it means actually flying the aircraft when it is serviceable only.

[48] Counsel for the Minister then argued that the real issue is the flight on October 19, 2015 and if the aircraft had been in Canada for more than 90 days as of that date, and if so, then the section is violated.

[49] Counsel for the applicant argued that the real issue is to "operate" (in reference to "no person shall operate in Canada..."), not physical presence.

[50] At this point, I made the following procedural ruling:

I want to thank Counsel for their submissions on this issue, and I would like to make the following ruling. It seems to me that Coulson USA Limited would be an entity incorporated or otherwise formed under the laws of the United States, and if Coulson USA is found by me to be the operator, then section 202.42 doesn't apply to them at all. It's an exception. So the argument really is who is the operator? ... Is it Coulson Aircrane Limited, or is it Coulson USA Limited?

Now, the Minister has charged Coulson Aircrane Limited under this section. So the issue is, and I agree with the Minister's position, that it's a flight or an operation of that aircraft by Coulson Aircrane Limited that is relevant after 90 days in the immediately preceding 12-month period as it operates that aircraft.

Now, if it has been in maintenance, that's irrelevant because it is the operation on the 91st day after it comes out of maintenance or -- sorry, whether it's in maintenance or comes out of

maintenance is irrelevant to the interpretation of this section. It's the operation on the 91st day that's relevant by Coulson Aircrane Limited.

If, in fact, an airplane is -- for example, an airplane is in maintenance and is inoperable being operated by a Canadian company, and it sits on the ground for more than 90 days and it comes out of maintenance, the Canadian operator would need to seek authorization to fly the aircraft. I understand that's normally a ferry permit.

So given that interpretation, I think taking this particular witness through every document to determine when the plane was inoperable is irrelevant. And if you would like to lead evidence with respect to who the operator of the aircraft was, you're free to do so. But in the interests of efficiency, and given my interpretation of the section, I think that hearing further evidence on every listing in the logbook with respect to whether it was in maintenance and capable of flying is irrelevant.

[51] Mr. Rivas was then called back to the hearing room and I reminded him that he was still under oath.

[52] Counsel for the applicant, Mr. Floyd, continued with his direct examination of Mr. Rivas.

[53] Mr. Rivas then testified with respect to the locations of flights listed in Exhibit M-12 (i.e. between airport identifiers) and he indicated the nature of Coulson Aviation (USA) business at those locations, including Reno, Las Vegas, Washington DC, San Francisco, Sacramento, and at all the US forest fire bases. He also testified that he never flies for CAL and always flies for Coulson Aviation (USA).

[54] Counsel for the Minister elected not to cross-examine Mr. Rivas.

Britton Coulson

[55] Mr. Britton Coulson was sworn as a witness and gave the following testimony:

[56] Mr. Coulson lives in Port Alberni, B.C., Canada. He has worked for the family company since he was 14 years old. He is the accountable manager of Canadian, US and Australian Air Operator Certificates (AOCs) and its airline maintenance organizations (AMOs). He holds the title Vice-President of Aviation for Coulson Aviation (USA) and in that position controls all aspects of that business, including operation and maintenance. He also holds the same title and scope of duties for all Coulson aviation companies, including CAL.

[57] Coulson Aviation (USA) operates two to three Sikorsky S-61s and three Lockheed C-130s under an FAA Part 133 rotary wing external load certificate and a Part 137 large fixed wing certificate. Its primary client is the US Forest Service with standing offers from the States of Washington, Oregon and California. The US Forest Service headquarters is in Boise, Idaho. Coulson Aviation (USA)'s home bases are in Reno and Portland, and the above aircraft operate from one of 52 US Forest Service air tanker bases. CAL does not do any business with these clients.

[58] Mr. Coulson oversees all aspects of the Challenger N604EF aircraft, including directing his US flight crews where that aircraft is going and what that aircraft is going to do. When he directs this aircraft, it carries people in support of their US operations. Though he is physically located in Canada, 95 per cent of his total time working for all three Coulson companies is spent on its US business. In addition, 60 to 80 per cent of total revenue is

derived from the US business and the Australia business. As Mr. Coulson stated, "we essentially do no business in Canada".

[59] The principal passengers on the Challenger N604EF are his father, Wayne Coulson, and General Manager, Matt, who are taken to visit their USA C-130 rotary wing airplanes that are on contract, their crews and the air tanker base managers employed by the US Fire Service. The aircraft is also used to attend meetings in Reno, Nevada; Boise, Idaho; Las Vegas, Nevada; and Marietta, Georgia. The Challenger is not used for CAL business.

Cross-examination of Mr. Coulson

[60] Under cross-examination by the Minister, Mr. Coulson clarified that he is the Vice-President of Aviation for CAL in Canada, Coulson Aviation (PTY) in Australia, and Coulson Aviation (USA).

[61] Referring to Exhibit M-2, Mr. Coulson admitted that Wayne Coulson, his father, sold the Challenger to the Wells Fargo Bank not in its individual capacity but solely in its capacity as the Owner and Trustee under an amended and restated trust agreement dated November 20, 2014.

[62] Referring to Exhibit M-6, Britton Coulson admitted that this certificate of registration provides that Wells Fargo Bank is the registered owner as Trustee of the Challenger.

[63] Having been shown Exhibit M-7, Mr. Coulson admitted he had seen the letter before and that it is a letter that was sent to the same Wells Fargo Bank by Transport Canada asking them if they have any information respecting the operation of the Challenger aircraft.

[64] Mr. Coulson also admitted he had seen Exhibit M-8 before, being that it was the response from the same Wells Fargo Bank to Transport Canada. He also admitted that in that letter, the vice-president for Wells Fargo tells the Canadian Government that the Challenger aircraft is being operated by CAL pursuant to an operating agreement.

[65] When asked if that operating agreement was still in force today, Mr. Coulson replied that he did not believe that it was and when asked if it was in force at the time, he would have to go back (and check).

[66] When asked if he was familiar with that operating agreement with Wells Fargo Bank, Mr. Coulson, as the VP of Aviation for CAL, testified: "I would not say intimately".

[67] When asked if he was aware of the specific documentation respecting that operating agreement, Mr. Coulson responded "not that I would specifically recall". He then admitted he could not say that what the VP of the Bank had written in respect of the Challenger aircraft N604EF was untrue.

[68] When asked by the Minister if he was aware of any operating agreement between Wells Fargo Bank and Coulson Aviation (USA) for the operation of the Challenger aircraft, Mr. Coulson testified, "I am not aware of one".

[69] When asked for clarification whether he was aware of an operating agreement that CAL entered into with Wells Fargo Bank, Mr. Coulson testified, "I am aware it was operated under trust with Wells Fargo".

Re-examination of Mr. Coulson

[70] Upon re-examination by his counsel, Mr. Coulson testified that all Coulson aircraft are under trusts and they do transfer aircraft between companies, and that when they lease aircraft from the Canada company to the US company, or from the US company to the Australia company, he does not believe they notify the Trustee because it is an internal lease document.

[71] The evidentiary record was then closed.

Applicant's Evidentiary Objections and Voir Dire Evidence

[72] Counsel for the applicant objected to the above series of documents (marked Under Advisement) that he submits were obtained by Inspector Brian Burger on a "false" inspection or investigation pursuant to "a warrantless search of a foreign aircraft" on the tarmac, when the purpose of Mr. Burger's presence was to audit another CAL aircraft that was in CAL's hangar for maintenance.

[73] Counsel for the Minister then said, "I think what Mr. Floyd has raised is a section 8 Charter argument" related to unreasonable search and seizure. Counsel for the applicant replied, "This actually goes to jurisdiction, reasonable notice and warrantless search. Yes, it is also a section 8 but it also deals with the jurisdiction of the investigators to seize the evidence at that time. ... Coulson had a reasonable expectation of privacy".

[74] I then asked Counsel for the applicant how many documents he was objecting to. He stated he was objecting to the following documents being put into evidence:

Document M-5 – Standard Airworthiness Certificate;

Document M-6 – Certificate of Aircraft Registration;

Document M-9 – Certificate of Insurance;

Document M-11 – Maintenance Journey Log Book for the Challenger aircraft N604EF;

Document M-12 – List of N604EF Flights Between February 11, 2015 and October 19, 2015 (because it was created by Mr. Adams using the flight information recorded in Exhibit M-11).

[75] I then indicated that "effectively we are having a voir dire on the admissibility of these documents".

[76] Counsel for the Minister indicated that Documents M-5 and M-6 were not crucial to his case in that they do not add anything that Exhibit M-4 does not already cover, but they merely add background to the story behind the Challenger aircraft. Counsel advised that Document M-9 showed that CAL took out the insurance for the aircraft, which goes to its operating the aircraft, though Wells Fargo Bank was the registered owner as Trustee.

[77] Most importantly, Counsel for the Minister then referred to the relevance of Document M-11 (i.e. the same comments will apply to Document M-12 in this case too because the information on M-12 was created from the flight information in M-11) and he stated:

If we go to the final document, which my friend has raised an objection towards, we see the Log Book. And I think it goes without saying, but this is obviously fundamental, critical, if you will, to the Minister's case. This is the Maintenance Journey Log Book that Coulson maintained over the Challenger aircraft.

[78] At this point, Counsel for the applicant reiterated his objection to the admissibility of the Log Book, saying that his objection was for "unreasonable search and seizure and also statutory jurisdiction to conduct (a search) that was unreasonable".

[79] Counsel for the Minister then stated, "even if you find the search, for whatever reason, was a witch hunt or unreasonable ... even if you do, there's just no possible basis to find under section 24.2 (of the Charter) that the admission of this evidence will bring the administration of justice into disrepute".

[80] At this point, I asked for written legal argument to be provided by both Counsel on the unreasonable search and seizure issue after the hearing. After further discussions with both Counsel, I advised that I would be taking the disputed documents under advisement to determine after the hearing whether they should be excluded and not admitted by me into evidence, and that to complete the voir dire, I would next hear evidence on the alleged unreasonable search. Once the voir dire evidence was in, I indicated the hearing would then continue. Once I completed the hearing and when I decided the matter, I would then first rule on the unreasonable search and seizure objection made by Counsel for the applicant.

[81] I then indicated I wanted to hear voir dire evidence going to the issue of the particular purpose for which the inspectors arrived at CAL. Counsel for the Minister replied, "Yes, what he needs to show is that they weren't acting within the bounds of the legislative authority, is a way to put that". Counsel for the Minister then cited section 8.7 and section 8.8 of the *Aeronautics Act* as the relevant sections I should consider to determine that legislative authority.

[82] The following exchange is helpful to understand the issue in the voir dire in relation to the main issue in the hearing per se:

THE MEMBER: Right. So the question is, under section 8, is whether it was reasonable to search a US aircraft on the premises of Coulson Aircrane Limited?

MR. REGEHR: However he wants to frame it is fine with me. Whether he wants to say it was a search of the aircraft, it was a search of the premises, it was the search of that particular glove box it was in, I don't --

THE MEMBER: And you're saying it's not a violation. It's clearly authorized by the statutes.

MR REGEHR: Yes, clearly.

MR. FLOYD: The issue I have is it's a bait-and-switch. It's a warrantless search on a nefarious purpose for one purpose and doing something different, and then investigating that purpose and ending up in another place does cause the administration of justice in disrepute. And that's the issue I have with those documents is the witch hunt and how it evolved over time and how we ended up here.

THE MEMBER: So we would here -- you need to call evidence of bait-and-switch.

MR FLOYD: Yes. ...

THE MEMBER: So effectively are you not challenging the broad scope of section 8.7 of the statute itself?

MR. FLOYD: I'm saying there are certain limits to that broad scope.

Applicant's Direct Examination of Britton Coulson – Voir Dire

[83] Counsel for the applicant then presented his witness in the voir dire, Mr. Britton Coulson, who was sworn.

[84] Mr. Coulson was asked to describe what happened on the day the investigators attended at CAL's maintenance facility in Port Alberni, B.C. His evidence is as follows:

... We were working on an AOC for our part 704 application, which is commercial air carrier (operating certificate), and we were working with Transport Canada in Victoria to add two Challenger 600s onto that 704 certificate. ... **So Transport Canada had asked for a meeting to come up and discuss the ... new 704 application**, and take a look at the aircraft that we were proposing to Canadian register and be the lead primary aircraft on that 704 application.

So Mr. Bryant was the -- I guess the PMI that we were working with on that new AOC. He informed me that he would be coming up with another gentleman, Brian Burger, and they would be coming up again to specifically talk about the 704 AOC application. They wanted to have a quick call with a gentleman named Peter, who was from Transport Canada back East somewhere, and he was working on approving our minimum equipment list, which is a requirement for the 704 AOC application. And it was delayed. Peter was a Challenger expert in Transport Canada. He was very busy so Dave thought if he came up with Brian and we had a call all together that we may be able to expedite the process. ...

So they came up. ... Dave appeared somewhat agitated when he got there. We walked upstairs to our boardroom where we had a very quick, you know, five-minute call with Peter, which was -- to talk about the MEL which was not what our understanding was. Then he wanted -- then we walked down from our boardroom into the hangar, and **we had the aircraft that we were in discussion about in the hangar** because we were actively working to Canadian register it. He came down. He reviewed the serial number, data plate on it, just to confirm what it was. Then he got a call and he excused himself. He went outside. He then came back in and asked that -- just look around. So we said, yeah, no problem. So we continued to discuss the Challenger in question which was serial no. 1010.

Then he walked outside of the hangar, which is where the aircraft in question, November 604 echo foxtrot was positioned, and they started to take pictures. He was taking pictures of the aircraft. Brian Burger was out measuring some paint cracks that we had in both the aircraft wings.

So I questioned Dave, you know. I said, "This is not what you guys came up to do. This is, you know, an N registered aircraft (U.S.) not owned by Coulson Aircrane, what are you doing?" **He said there had been complaints, and they received a call from the airport in Dublin, Ireland, and they had reason to believe that we had a fuel issue in Dublin.** I know exactly what he was talking about because I was on the flight. We were coming back from a meeting with Airbus in Spain.

And so I queried him as to why the Dublin airport would phone Transport Canada Victoria for an incident that happened -- or, you know, what he perceived to be an incident that happened in Dublin with an N registered aircraft where the aircraft is -- you know, they can look at it and it's operated out of Reno, Nevada, through our FISDO down there. He said he didn't know why -- at first he said he didn't know why the Dublin airport phoned him. Then he changed his mind and stated that it was actually the Dublin airport had phoned the FISDO, which is our airworthiness kind of office in the US that governs our aeroplane, and that the FISDO had phoned Transport Canada and made the complaint to come up and look.

I questioned Dave again on that because I'm also our accountable manager in the US, which is the same as an accountable manager here, for that operation. And I talked to FISDO all the time because I would say 80 to 90 percent of my time is spent on our US company. So I told Dave that I had just talked to the FISDO that day -- earlier that morning and that the FISDO mentioned nothing about this so, you know, maybe we should go phone FISDO and see where this all came from because **the story didn't seem right. It kept changing.**

Then Dave said that it actually wasn't the FAA that phoned him. It was a complaint that they had filed by -- he didn't say who it was. I know who it was. It was a disgruntled employee that was Dave (Bryant's) personal friend.

So I told him that until he had proper -- I told him I was very disappointed by the actions and the misrepresentations that Transport Canada had done when they came to our facility, you know, using a different reason to be there. . **He said that if he didn't unlock the aeroplane and let him board that he was going to seize all of our data on it and that we would not**

be able to continue to operate the aeroplane. . And then that's when Brian stepped in, **Brian Burger, and said Transport Canada is conducting a ramp inspection on this aeroplane. You will unlock it; you will provide us all the detail or we will seize your logbooks ... from the aeroplane.** I think it was like Exhibit 11, was the logbook.

And the reason was they wanted to validate the complaint that was made by our disgruntled employee if there was an entry or not for the fuel caps we replaced in Dublin. (my emphasis).

[85] When asked what happened next with Mr. Burger and Mr. Bryant, Mr. Coulson testified:

So Brian said that he was going to ramp the aeroplane again if we didn't unlock it and let him in. He was going to seize all the records. **He said that they were interested -- or that they were following up on an enforcement complaint or -- whatever they call it -- a complaint that was made by this gentleman that a logbook entry was not done for the fuel cap replacement that happened in Dublin.**

So they were following up on a complaint that an entry was not done in the maintenance logbook for the fuel cap replacement. **He said** they would not be photocopying any log pages; they would not be taking pictures of any log pages; and they would not be taking any log pages. **All they were there for was to review if this entry was or was not made on the specified date that the incident -- or that their complaint identified that it happened.**

I said okay, we provided them the logbooks. He then started to take pictures of many -- basically from the time that -- I think -- I don't exactly remember what the time frame was. He started to take pictures of many log pages. I asked him what was going on because that's not what we discussed. **He said he was there to follow up on a complaint. He knew what the date was. He told me he was just going to look to verify that the entry was or was not made.**

He said that they've -- when they ramp the aeroplane that basically they can do whatever they want, and he wants to take pictures of the logbook now and that he will take it, or I will either allow him to take the pictures of it or he will seize the logbook, provide us with a temporary logbook, and he will take our logbook with him.

So at that point I said, well, okay, if you're going to seize it anyways, then you might as well just take the pictures. I've never been through -- I've been through ramp inspections. I've never been through anything like what happened here. I brought up that I was not happy, and I would not be part of supporting a witch hunt of one of our ex-contractors that we used. **They just said that they as Transport Canada, they're the regulation authority and they can ramp and take whatever type of data they want whenever they want to take it.** (my emphasis).

Voir Dire - Cross-examination of Britton Coulson

[86] On cross-examination by Counsel for the Minister, Mr. Coulson confirmed that Dave Bryant and Brian Burger were the only inspectors that came up to CAL's maintenance facility. He also confirmed that these inspectors took a photograph of page 16353 from the Maintenance Journey Log Book which contains a February 25 maintenance release entry concerning Jacob Erickson. He also stated that Document M-5, the standard airworthiness certificate; Document M-6, the certificate of US aircraft registration; and Document M-9, the insurance certificate; were carried on the airplane and that the inspectors took photographs of these documents.

[87] Mr. Coulson further testified, when asked specifically, that the aircraft door was locked and that he let the inspectors in. Mr. Coulson also stated that CAL has an AMO certificate and that 140-90 is their AMO number.

[88] At this point, under questioning about the AMO keeping the Log Book presumably in the maintenance facility, Mr. Coulson testified that an air operator would normally monitor and retain the Log Book, but he did concede that the Log Book may or may not have been in the aircraft.

[89] When I asked the witness whether the purpose of Transport Canada's request for the meeting would have included the US registered aircraft in question, Mr. Coulson answered, "No, ... it was solely to discuss the 704 application with respect to the Challenger 1010 (which was in for maintenance in the hangar) awaiting Canadian registration, and the requirements for a minimum equipment list approval".

Voir Dire – Re-examination of Britton Coulson

[90] When asked by Counsel for the applicant how many Challengers are in their fleet, Mr. Coulson advised there are three – bearing serial numbers 1010, 1048, and 1068.

[91] He further stated that Challenger 1068 is registered as N604EF, which was the plane outside the CAL hangar that was searched. Challenger 1010 is registered as N2105, which was the plane in the hangar that was inspected to make sure the proposed minimum equipment list matched the equipment that was physically installed on that aircraft because it is a Transport Canada requirement (i.e. for the section 704 commercial AOC). Lastly, Mr. Coulson testified that he believed Challenger 1048 was in Vancouver for maintenance.

Voir Dire – Minister's Direct Examination of Mr. Namazi: (Rebuttal Evidence)

[92] When I asked if the Minister would like to provide rebuttal evidence on the voir dire, Counsel for the Minister replied as follows:

So that's the issue I wanted to address. I guess the Minister is in a difficult position now because of the evidence which we heard from my friend's witness calls into question the mindset -- the intention of these inspectors. Were they up there to discuss adding this other Challenger to their air operator's certificate and then just happened to inspect the Challenger aircraft while they were up there, ... or were they up there as part of a malicious witch hunt and therefore used that as a guise to go up there and inspect this plane?

On the face of it, I tried -- you know, it depends how -- I just don't want to be in a position where I haven't called evidence. He's put into question the intentions, the mindset, whatever, with respect to these investigators. And I'm not able to establish that the search was reasonable, that this was an inspection that fell within 8.7 of the *Aeronautics Act*. ...

I have confidence that if I call those witnesses, they're going to go up and they're going to say, yes, we met with them like we said we would and we searched this aircraft as part of that section. I have no doubt that's what those witnesses are going to say, and I don't want to put everybody to the time and expense of saying, you know what, let's carry on with the evidence but set another date to hear my rebuttal evidence, because he's calling into question what they were really doing up there, regardless of whether or not he can say where this evidence came from.

I guess I'm in your hands. I don't want to put, like I said, everybody to the unnecessary expense to come up here and have two witnesses sit there just so I can then in my written submissions say we have evidence this was nothing more than an inspection in accordance with 8.7. I don't want to be in the position where you can't make that finding because I haven't led any evidence. Not to point fingers or whatever, with appropriate notice I could have had those inspectors here today.

[93] After further discussion with me, Counsel for the Minister agreed to call Mr. Namazi to testify and provide rebuttal evidence.

[94] Mr. Namazi was then recalled as a rebuttal witness and reminded that he was still under oath. He was advised by Counsel for the Minister that his testimony was to be given in the context of a voir dire to determine the admissibility of photos taken by his inspectors from Coulson's premises in November 2015, based on whether or not the inspectors' actions were reasonable.

[95] During his rebuttal testimony, Mr. Namazi outlined that he communicated back and forth with these inspectors when he conducted his investigation (i.e. after receiving their Detection Notice) to get a general context of how the inspection unfolded.

[96] When asked what he knew about the inspection that took place in November 2015 with respect to the Challenger aircraft that is the subject of the monetary penalty, Mr. Namazi effectively corroborated the voir dire testimony of Mr. Britton Coulson, when Mr. Namazi stated:

Based on my knowledge from the case and my discussions with the inspectors, my understanding was that they went up to Coulson's facility **based on the report that they received that there was an issue with an aircraft Challenger 604EF**. This aircraft had an **incident in Ireland. On take-off they had a fuel leak**, fuel leaking over the wings on both sides which resulted in the return of the aircraft back to ... Ireland. (my emphasis).

[97] When asked if the inspectors expressed any reasons to him post-inspection why the inspectors went to CAL's premises, Mr. Namazi testified:

Based on my recollection of the discussions, **they went up there to inspect this particular aircraft or look at the aircraft**. I'm not sure about the details of how and why they went up there, but this was my understanding at the time. (my emphasis).

[98] To clarify this point, I then asked Mr. Namazi, "So your understanding after the inspection was that they told you they went up to specifically inspect this aircraft because of the Dublin incident, is that correct?" Mr. Namazi responded "Yes".

[99] Counsel for the Minister then asked Mr. Namazi if the inspectors were aware of fuel leak issues with respect to the Challenger N604EF before they went to Coulson Aircrane Ltd.'s premises to inspect. Mr. Namazi testified as follows:

I'm not sure. I can't say for sure, for certain, but based on the information that was given to me, **they went up there for that reason**. ... The main topic of discussion was this particular issue with the aircraft and their concern. (my emphasis).

Voire Dire – Cross-examination of Mr. Namazi:

[100] Counsel for the applicant then cross-examined Mr. Namazi and obtained the following admissions from him:

[101] First, Mr. Namazi admitted Transport Canada did not contact the FAA in the United States but rather the maintenance person in Ireland to "try to figure out what happened" in respect of the fuel leak incident.

[102] Second, Mr. Namazi testified that Transport Canada contacted the maintenance person in Ireland but that person did not make it out to look at the aircraft, and that the aircraft left Ireland without any maintenance and an "open snag" or open defect.

[103] Third, Mr. Namazi testified, "we're **just investigating** so we weren't sure exactly what the result of the **investigation** would be". He further testified that the inspectors determined

that there was **no Log Book entry made in Ireland for the fuel cap replacement but there was an entry made after the aircraft landed in Canada**, according to the flight co-pilot who was interviewed. (my emphasis).

[104] Mr. Namazi stepped down as a witness and the voir dire was closed.

IV. ISSUES AND ANALYSIS

Unreasonable Search and Admissibility of Evidence Taken Under Advisement

[105] Written arguments following the voir dire were submitted after the hearings by both Counsel. I have reviewed and considered these arguments.

[106] The critical issue to be determined concerns the validity and admissibility of Transport Canada's evidence that was objected to, particularly the Maintenance Journey Log Book, the List of Flights, and any other evidence tendered through testimony that was based on the facts recorded within these documents, given the circumstances under which it was obtained by Transport Canada.

[107] The evidentiary objection made by the applicant earlier is granted.

[108] I find this was not an inspection or an audit under paragraphs 8.7(1)(a), (a. 1) and (c) of the *Aeronautics Act*. Subsection 103.02(1) of the *Canadian Aviation Regulations* state that the operator of an aircraft shall, on reasonable notice given by the Minister, make the aircraft available for inspection in accordance with the notice. The testimonial evidence does not support the Minister's pretention that this was an inspection or that a reasonable notice was given to the applicant for the inspection. As the evidence showed, TC inspectors went to Coulson's facility on an inquiry about an incident in Ireland following a tip from an undisclosed third party.

[109] In *R. v. Fitzpatrick*, [1995] 4 S.C.R. 154, the Supreme Court reminded us that "searches and seizures of documents relating to activity known to be regulated by the state are not subject to the same high standard as searches and seizures in the criminal context". However, as stated by the same Court in *R. v. Jarvis* [2002] 3 SCR 757, a compliance audit (or inspection) and an investigation must be treated differently; the Court found that the predominant purpose for which a public official enters a property or makes demands for information is essential in making the distinction. *Jarvis* also reminded us that there is a contextual approach to Charter Rights and that the requirements of fundamental justice relevant to section 8 of the Charter vary according to the context in which they are invoked.

[110] In applying those provisions and case law principles to the case at hand, I find that a TC inspector has wide reaching powers under subsection 8.7(1) in order to ensure compliance with the *Aeronautics Act* and the *Canadian Aviation Regulations* but this provision is not about collecting evidence for the purpose of charging a person with an offence (note that the Act does not make a distinction between a violation and an offence). If the TC inspector suspects that an offence was committed and the predominant purpose of the visit is to gather evidence, then we are not talking about an inspection under paragraph 8.7(1)(a). The testimonial evidence showed that TC inspectors had as a predominant purpose to inquire about a specific incident related to an aircraft, N604EF, and they demanded to go onboard the aircraft and seized documents presented as exhibits at the hearing instead of being transparent

and give notice to the applicant, as required by section 103.02 of the *CARs*, to make the aircraft available for inspection in order to inspect compliance following a lead. As stated in *Jarvis*, not all leads are substantiated and public officials could do audits or inspections to clear a lead (paragraph 8) as long as they operate under all combined provisions applicable to the situation.

[111] The misleading and forceful tactics used by the inspectors to enter Coulson's facilities and aircraft respectively, as per the testimonial evidence, show a different prominent purpose: that of gathering evidence under the suspicion or belief that an offence had been committed; this way of proceeding is contrary to the spirit of the *Aeronautics Act* in subsections 8.7(2), 8.7(4) and 8.7(6) which reinforce the principle of section 8 of the Charter against unreasonable search and seizure. The principle of section 7 of the Charter against self-incrimination is also present in the *Aeronautics Act* under subsection 7.91(5).

[112] I find that the Aircraft Maintenance Journey Log Book and the List of the Challenger N604EF Flights between February 11, 2015 and October 19, 2015, were the product of an unreasonable search and seizure by the Minister without a judicial warrant as required by subsection 8.7(2) of the *Aeronautics Act*.

[113] In undertaking a warrantless "search" for evidence in respect of an offence "... suspected to have been committed" at the applicant's maintenance facility and on the Canadair CL-600 Challenger aircraft N604EF operated by the applicant, Transport Canada "inspectors" acted without jurisdiction.

[114] By conducting a warrantless "search" clearly for the purposes of subsection 8(2) of the Act, I also find, therefore, the Minister was not simultaneously conducting a permissible "inspection" or "audit" pursuant to paras. 8.7(1)(a) of the Act, as the Minister argued.

[115] I also find that failing to follow the procedure outlined in subsection 8.7(2) of the Act in these circumstances amounts to an unreasonable search and seizure of the Log Book contrary to section 8 of the *Canadian Charter of Rights and Freedoms* (Charter), and that admissibility into evidence of the Log Book and the information it contains, as well as the List of N604EF Flights between February 11, 2015 and October 19, 2015 created from it, would bring the administration of justice into disrepute, contrary to subsection 24(2) of the Charter.

[116] With respect to the section 8 Charter argument put forth by the applicant, in addition to the absence of jurisdiction argument, I agree with the Minister that the applicant, being a corporation within a federally regulated aviation industry, has a very low expectation of privacy which can include being subject to inspections that respect the spirit of paragraph 8.7(1)(a) of the Act and subsection 103.02(1) of the *CARs*. (*HMTQ v Wilder*, 2003 BCSC 859 at paras. 177-178; *Thompson Newspapers*, (1990) 1 SCR 425 at paras. 506-508; *R. v. Fitzpatrick*, [1995] 4 S.C.R. 154, paragraph 49).

[117] However, I also find that this low expectation of privacy must at the very least prohibit a warrantless investigation and search by Transport Canada when made for the purpose of looking for proof of a suspected offence based on a prior complaint which gave rise to that suspicion (as opposed to an unannounced inspection of an aerodrome or other aviation facility unrelated to a suspected offence). This finding would be consistent with subsection 8(2) of the Act that requires a search warrant to be obtained from a justice in these circumstances or the consent to search from the regulated person.

[118] Both Counsel correctly identified that the correct section 8 Charter test to be applied is outlined in *R v Collins*, (1987) 1 SCR 265 at para. 21-23: "A search will be reasonable if it is authorized by law, if the law itself is reasonable and if the manner in which the search is carried out is reasonable".

[119] The applicant has established through the voir dire evidence of Mr. Coulson that the search was a warrantless one. The onus falls to the Minister to establish that the search was nevertheless reasonable given the above factors in the *Collins* test. In this regard, the Minister argued that the search was either an inspection or type of safety investigation which requires no warrant and the search was therefore reasonable under section 8.7 of the Act and under section 8 of the Charter.

[120] On the facts, were I to find that the inspectors were truly conducting an inspection, it would have been an act authorized by law pursuant to para. 8.7(1)(a) of the Act, as well as one not falling within the relatively low expectation of privacy as I have described it above, as required by section 8 of the Charter in a regulatory context.

[121] Furthermore, the permissible scope of a para. 8.7(1)(b) investigation which permits a warrantless search must be interpreted in light of subsection 3(2) of the Act, which states that matters under paragraph 8.7(1)(b) are related to the Minister of National Defence.

[122] I cannot interpret para. 8.7(1)(b) then to include an investigation that, according to subsection 3(2) of the Act, is a provision that applies to the Minister of National Defence. Even if paragraph 8.7(1)(b) included the Minister of Transport, I find not **all** aviation safety investigations with warrantless searches to be reasonable in the context of section 8 of the Charter. To do so would make subsection 8.7(2) of the Act incapable of ever being enforced. This is not what Parliament intended.

[123] Moreover, the evidence of Mr. Coulson was not contradicted. The inspectors came to CAL's premises with the specific intention to search for evidence concerning a fuel cap incident in Ireland. The inspectors were clearly investigating a complaint made prior to their attendance at CAL's premises and they arrived with the intention to search for evidence to corroborate that prior complaint which they suspected amounted to an offence under the CARs. This was ultimately admitted to by Mr. Namazi under cross-examination.

[124] As a result, I find the search in question was conducted during a form of investigation that requires a warrant. Because no warrant was sought as authorized by law (i.e. by subsection 8.7(2) of the Act), the search itself was not reasonable, nor was it conducted reasonably in the absence of the warrant, despite the law (the entire framework of section 8.7 of the Act) itself being reasonable. In short, the Minister failed to rebut the presumption that the search of CAL's premises and the aircraft in question was reasonable.

[125] Subsection 24(2) of the Charter allows me to exclude documents obtained from an unreasonable warrantless search where the admission of this evidence would bring the administration of justice into disrepute. Three avenues of inquiry viewed with a long-term, forward-looking and societal perspective must be considered to meet this secondary test (*R v Grant*, 2009 SCC 32 at para. 71): (i) the seriousness of the infringing state conduct, (ii) the impact of the breach on the Charter-protected interests of the applicant, (iii) society's interest in the adjudication of the case on its merits.

[126] Not seeking the required warrant in the specific and limited circumstances when an offence is suspected to have been committed (i.e. based on a prior complaint) as required by the governing statute is a serious matter. It shows disrespect for the law. Granted, the applicant is a regulated AMO and has a very low expectation or right of privacy. But this expectation surely includes the requirement that subsection 8(2) of the Act will be followed when it applies. This very limited expectation of privacy would count for nothing if the conditions precedent to enforcing subsection 8(2) of the Act were ignored. Lastly, society's interest in adjudicating on the merits of this case in terms of how safety is enforced has been considered by my interpreting and applying the balanced framework established by Parliament as set out in paras. 8.7(1)(a) and (b) versus subsection 8(2) of the Act.

[127] Given these considerations, I find that admitting into evidence the following documents would bring the administration of justice into disrepute: Document M-5 – Standard Airworthiness Certificate; Document M-6 – Certificate of Aircraft Registration; Document M-9 – Certificate of Insurance; Document M-11 – Maintenance Journey Log Book for the Challenger aircraft N604EF; and Document M-12 – List of N604EF Flights Between February 11, 2015 and October 19, 2015 (because it was created by Mr. Adams using the flight information recorded in Document M-11).

[128] As a result, the information in these Documents must be excluded from the evidence to be considered in respect of the alleged offence.

Alleged Violation of subsection 202.42(1) of the CARs

[129] The elements of the violation are:

- a. the applicant operated in Canada an aircraft that is registered in a foreign state;
- b. Said aircraft was present in Canada for a total of 90 days or more in the immediate twelve-month period.

[130] The CARs define operator as follows: "in respect of an aircraft, means the person that has possession of the aircraft as owner, lessee or otherwise". The testimonial evidence showed that the applicant had possession of the aircraft and used it to transport Coulson employees to meetings. The applicant therefore meets the definition of an operator. As the Log Book (M-11) and the List of Flights (M-12) created from the Log Book are the evidentiary sources of the critical facts and time calculations the Minister sought to rely on to establish the duration element of the offence outlined below, I find the Minister has failed to prove the offence outlined in the Notice of Assessment of Monetary Penalty on a balance of probabilities.

[131] Specifically, I find that the Minister has not proven that CAL operated on October 19, 2015 at or near Alberni Valley Regional Airport (CBS8) in Canada, a Challenger 600 aircraft registered in the United States of America (US registration N604EF) that had been present in Canada for a total of 90 days or more in the immediately preceding 12 months, contrary to subsection 202.42(1) of the CARs, as outlined in Schedule A of the Notice of Assessment of Monetary Penalty issued on April 19, 2016 by the Minister.

Conclusion

[132] The Minister must prove, on a balance of probabilities, every element of the offence. The proof must come from the evidence presented, whether through witness testimony or documentary evidence such as exhibits, or through other acceptable means.

[133] With the Aircraft Maintenance Journey Log Book and the List of Flights not being admitted into evidence, I find that there is insufficient evidence to establish the offence with which the applicant was charged.

V. DETERMINATION

[134] The Minister of Transport has not proven, on a balance of probabilities, that Coulson Aircrane Ltd. contravened subsection 202.42(1) of the *Canadian Aviation Regulations*. The monetary penalty of \$5,000 for the alleged offence is cancelled and the applicant's motion for costs is dismissed.

April 17, 2018

(Original signed)

Alexander Phillips
Member