TRANSPORTATION APPEAL TRIBUNAL OF CANADA

Citation: *Coulson Aircrane Ltd. v. Canada (Minister of Transport)*, 2019 TATCE 47 (Appeal)

TATC File No.: P-4223-36

Sector: Aviation

BETWEEN:

Coulson Aircrane Ltd., Appellant

- and -

Minister of Transport, Respondent

Heard in: Nanaimo, British Columbia, on May 8, 2019

Before: Arnold Olson, Member (chairing)

Laura Safran, Q.C., Member

Andrew Wilson, Member

Rendered: November 4, 2019

APPEAL DECISION AND REASONS

Held: The appeal is allowed. The Minister of Transport has not proven, on a balance of probabilities, that Coulson Aircrane Ltd. contravened subsection 573.05(1) of the *Canadian Aviation Regulations*. The monetary penalty of $5,000 for the alleged offence is cancelled.

I. BACKGROUND

[1] By Notice of Assessment of Monetary Penalty (Notice) dated February 24, 2016 and pursuant to section 7.7 of the *Aeronautics Act* (*Act*), Transport Canada (TC) assessed a monetary penalty of $5,000 against Coulson Aircrane Ltd. (CAL) for an alleged breach of the *Canadian Aviation Regulations* (*CARs*), subsection 573.05(1).

[2] The Notice stated:

> 2. On or about February 25, 2015, at or near Port Alberni, B.C., you, Coulson Aircrane Ltd. (CAL), an approved maintenance organization (AMO), authorized a maintenance release certifying specialized maintenance work performed on a Canadair CL600 Challenger aircraft, registered as N604EF, when the person who signed the maintenance release had not successfully completed the training required by section 573.06 of the *Canadian Aviation Regulations*, specifically:
>
> > a. Jacob Erickson signed the maintenance release for N604EF when he had not successfully completed a Challenger CL600 aircraft systems training course for avionics or an aircraft type course for the Challenger CL600 aircraft; …

[3] A review hearing before the Transportation Appeal Tribunal of Canada (Tribunal) in respect of this matter took place on September 19 and 20, 2017 in Port Alberni, British Columbia, followed immediately by a review hearing on TATC File no. P-4234-41, involving the same parties. By agreement between the parties, extensive evidence was incorporated by reference from one review hearing into the other. In his determination of April 17, 2018 on this matter, the review member upheld the contravention and the monetary penalty of $5,000.

[4] The parties have agreed that in order to avoid repetition, the same arguments, particularly as they relate to the *Canadian Charter of Rights and Freedoms* (*Charter*), apply to both this appeal and the appeal on TATC File no. P-4234-41. However, whereas at the review stage, P-4223-36 was heard first, the parties sought to have the appeal on P-4234-41 heard first. The appeal panel concurred, and the appeals proceeded accordingly.

II. GROUNDS FOR APPEAL

[5] In its May 16, 2018 request for an appeal on this matter, CAL listed the following grounds:

> *Errors of fact:*
>
> > (a) The review member found that notwithstanding that Mr. Erickson had a blanket avionics licence with no restrictions (aircraft maintenance engineer E or AME-E) for all systems, he did not complete a systems training course.
> >
> > (b) The review member ignored the TC guidance documents, which specifically stated that the avionics licence in question, the AME-E licence, was a systems based licence and not an aircraft type based licence.
>
> *Errors of law:*
>
> > (a) The review member erred in determining that *CARs* sections 571.10 and 571.11 applied to the completion and submission of US Federal Aviation Administration (FAA)

> regulatory documentation (FAA Form 337) required for work done on a US registered aircraft, prepared in accordance with the specific review and instructions of the FAA.
>
> (b) The review member erred in determining that the mistake on the charging document referring to Mr. Erickson (a holder of an AME-E system based licence) requiring an "aircraft type systems course" (which does not exist) was the same as an "aircraft systems course or an aircraft type course".
>
> (c) The review member erred in allowing the Minister of Transport (Minister) at the review hearing to revise the reference in the Notice from "aircraft type systems course" to "aircraft system or aircraft type course".
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> (d) The review member erred in deciding that the Minister's amendment of the Notice at the review hearing did not prejudice CAL in the hearing of the revised charge.
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> *Want of jurisdiction:*
>
> (a) The review member did not have jurisdiction to allow the Minister to interpret and explain that an "aircraft type course" referred to in the Notice is the same as an "aircraft system course or aircraft type course".
>
> (b) The review member did not have jurisdiction to determine the US training requirements for an AME-E holder in respect of a maintenance release on an FAA form.
>
> (c) The review member did not have jurisdiction to decide that the Minister's amendment of the Notice at the review hearing did not prejudice CAL in the hearing of the revised charge.

III. ANALYSIS

[6] The appropriate standard of review for an appeal panel of this Tribunal was established by the Federal Court in *Billings Family Enterprises Ltd. v. Canada (Minister of Transport)*, 2008 FC 17, and more recently in *Canada (Attorney General) v. Friesen*, 2017 FC 567. The standard of reasonableness applies to findings of credibility, fact, and mixed fact and law, and an appeal panel must give considerable deference to the review member. On questions of law, the standard is one of correctness, and an appeal panel is entitled to take its own view.

[7] An appeal panel is to analyze both the reasons and the findings of a review member. In *Dunsmuir v. New Brunswick*, 2008 SCC 9, the Supreme Court of Canada stated at paragraph 47 that "Tribunals have a margin of appreciation within the range of acceptable and rational solutions. A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes".

[8] In the decision on the appeal of P-4234-41, this appeal panel concluded that the review member did not err in excluding from evidence at the review hearing the Aircraft Maintenance Journey Log Book (Exhibit M-11) (Log Book) as a result of the infringement of CAL's rights under the *Charter* due to the manner in which the Log Book was obtained. The appeal decision in P-4234-41 was based in part on the consideration of whether the review member erred in regard to three findings: firstly, that an investigation rather than an inspection had been conducted by TC; secondly, that a judicial warrant should have been obtained; and thirdly, that the TC inspectors used misleading and forceful tactics. Those three findings by the review member, as upheld by the appeal panel, are incorporated into and apply to this appeal since they form the basis of the decision by this appeal panel that the Log Book, as well as other documents

obtained from a warrantless search conducted by TC inspectors, should be excluded from evidence.

[9] The provisions of the *CARs* relevant to this proceeding are contained in subsection 573.05(1), which states:

> **573.05(1)** No approved maintenance organization (AMO) certificate holder shall authorize a person to sign a maintenance release unless the person meets the applicable requirements of section 571.11 and has successfully completed the training required by section 573.06.

[10] *CARs* subsection 571.11(4) states:

> **(4)** Except as provided in subsection (5), no person shall sign a maintenance release in respect of maintenance performed on a transport category aeroplane or a turbine-powered helicopter, unless the person
>
> > **(a)** has successfully completed a course of maintenance training that has been approved by the Minister and that is applicable to the type of aircraft, engine or system on which the maintenance is performed, in accordance with Appendix M of Chapter 571 of the *Airworthiness Manual*; or
> >
> > **(b)** held a type rating applicable to the type of aircraft, engine or system on which the maintenance is performed, issued by the Minister before August 1, 1999.

[11] The relevant provisions of *CARs* section 573.06 provide:

> **573.06(1)** An approved maintenance organization (AMO) certificate holder shall implement a training program to ensure that persons authorized to perform or supervise the performance of any function under this Subpart are trained in respect of the regulations, the standards and the AMO procedures applicable to that function.
>
> **(2)** The program required by subsection (1) shall include initial training, updating and any other training necessary, within the meaning assigned to those terms in section 573.06 of Standard 573 — *Approved Maintenance Organizations*, to ensure continued qualification that is appropriate to the function to be performed or supervised.

A. Did the review member err when he found that the TC inspectors had not carried out an inspection under the authority of subsection 8.7(1) of the *Act*?

[12] The Minister took the position that the review member's finding on this question was one of mixed fact and law, whereas the appellant argued that the finding should be one of fact. This appeal panel finds that, in either case, whether the TC inspectors conducted an investigation, rather than an inspection, under the authority of subsection 8.7(1), the standard of review on this matter is one of reasonableness and the review member's determination should be given deference and be upheld.

[13] The review member determined that the central issue before him was the admissibility of pages of the Log Book photographed by the TC inspectors. He found that the Log Book had been obtained as a result of an enforcement investigation carried out by the TC inspectors, rather than an inspection under subsection 8.7(1) of the *Act*, and therefore the Log Book was not admissible.

[14] In excluding the Log Book, the review member concluded that "The testimonial evidence does not support the Minister's pretention that this was an inspection … TC inspectors went to Coulson's facility on an inquiry about an incident in Ireland following a tip from an undisclosed

third party". Mr. Coulson testified that the substance of the third party tip, or complaint, made to TC was that a Log Book entry had not been made after a fuel cap replacement in Dublin and that the tipster was a disgruntled former employee of CAL who was a personal friend of one of the TC inspectors. The review member asked the TC investigator, Mr. Namazi, "So your understanding after the inspection was that they [the inspectors] told you they went up to specifically inspect this aircraft because of the Dublin incident; is that correct?" Mr. Namazi responded in the affirmative. Therefore, in finding that the predominant purpose of the TC visit to CAL was an investigation, rather than an inspection, the review member was relying on both the uncontested evidence of Mr. Coulson as well as the corroborating testimony of Investigator Namazi.

[15] The review member referenced *R. v. Jarvis*, [2002] 3 SCR 757 (*Jarvis*), which dealt with a tax audit versus an investigation and pursuant to which the Supreme Court of Canada held that a compliance audit (or inspection) and an investigation must be treated differently since the predominant purpose for which a public official enters a property or makes demands for information is essential in making the distinction. The evidence before the review member in this matter showed that the inspectors had concocted a cover story, although their predominant purpose was to gather information about the Dublin incident. He found that:

> [125] 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 predominant 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. […]

[16] On appeal, the Minister argued that the review member incorrectly applied the legal standard in *Jarvis* to the facts before him. The Minister quoted the court finding at paragraph 88:

> [88] In our view, where the predominant purpose of a particular inquiry is the determination of penal liability, the CCRA [Canada Customs and Revenue Agency] officials must relinquish the authority to use the inspection and requirement powers under ss. 231.1(1) and 231.2(1). In essence, officials "cross the Rubicon" when the inquiry in question engages the adversarial relationship between the taxpayer and the state. There is no clear formula that can answer whether or not this is the case. Rather, to determine whether the predominant purpose of the inquiry in question is the determination of penal liability, one must look to all factors that bear upon the nature of that inquiry.

[17] The Minister contended that *Jarvis* stands for the proposition that if the predominant purpose is to establish penal liability, the inquiry amounts to an investigation. However, if the predominant purpose is to monitor compliance with a regulatory scheme, it constitutes an inspection.

[18] It is the Minister's position that *Jarvis* also establishes that suspicion alone does not trigger a search for penal liability, based on paragraph 90:

> … the test cannot be set at the level of mere suspicion that an offence has occurred. Auditors may, during the course of their inspections, suspect all manner of taxpayer wrongdoing, but it certainly cannot be the case that, from the moment such suspicion is formed, an investigation has begun. On what evidence could investigators ever obtain a search warrant if the whiff of suspicion were enough to freeze auditorial fact-finding? The state interest in prosecuting those who wilfully evade

> their taxes is of great importance, and we should be careful to avoid rendering nugatory the state's ability to investigate and obtain evidence of these offences.

[19] CAL argued on appeal that the facts speak for themselves and that a review of Mr. Coulson's uncontested account of the TC inspectors' visit indicates that an investigation rather than an inspection had occurred. This appeal panel, reviewing *Jarvis* at paragraph 88 quoted above, also finds that the predominant purpose of the TC inspectors' visit involved an enforcement investigation and not a mere regulatory inspection. Moreover, Investigator Namazi should be taken at his word: "… we were investigating the incident …".

[20] CAL also directed the appeal panel to the recent decision in *R. v. MV Marathassa*, 2018 BCPC 125 (*Marathassa*). In that case, the Court determined that the TC inspectors were conducting an investigation to gather evidence of a contravention, the discharge of pollutants from a ship, and were not conducting an inspection. The TC inspector in that matter argued that he was conducting an inspection to gain entry to the vessel. The Court in *Marathassa* quoted *R. v. Nolet*, 2010 SCC 24 (*Nolet*), as follows:

> As noted in *Nolet*; "A valid regulatory purpose, whether predominant or not, would not sanitize or excuse a *Charter* violation." In this case, the potential *Charter* violation began on the morning of April 9, when Inspector Waheed used the ruse of conducting a compliance inspection to actually conduct an enforcement investigation.

[21] The *Nolet* decision in turn cited the lower Court in *R. v. Nolet*, 2009 SKCA 8, to the effect that a "lawful aim cannot be used as a pretext, ruse or subterfuge to perpetuate the unlawful aim. That, ultimately, is the focal point of the inquiry".

[22] In the case at hand, the TC inspectors similarly claimed to have a valid regulatory purpose, when in fact they were conducting an investigation during the course of which CAL's *Charter* rights under section 8 were violated.

[23] CAL maintained that the review member had evidence before him that the tip given to the TC inspectors came from a personal friend of one of the TC inspectors and that this tip referred to a specific CAL Log Book entry related to a specific occurrence. The TC inspectors were therefore acting on more than "mere suspicion" and "crossed the Rubicon" since their inquiry involved, as its predominant purpose, the collection of proof that would establish a violation, resulting in a monetary penalty. When the TC inspectors' misleading reasons for the inquiry are set aside, it appears that an investigation had in fact taken place.

[24] As the appeal panel considered the arguments of the parties, it was aided by the clearly articulated reasons of the review member as to how he arrived at his conclusion. Most notably, the review member found that a contextual approach to *Charter* rights is necessary. In arriving at a determination as to whether the actions of TC employees on November 24, 2015 amounted to an inspection or an investigation, the member looked to the provisions of the *Act* and considered the specific enforcement practices developed by the Minister pursuant to that *Act*.

[25] First, the member affirmed the wide-reaching powers of inspectors under subsection 8.7(1) of the *Act*, but also noted that the *Act* does not draw a distinction between offences and violations. Indeed, the panel notes that subsection 7.6(2) of the *Act* indicates that a person who contravenes a designated provision is "guilty of an offence and liable to the punishment imposed

in accordance with sections 7.7 to 8.2", which are the *Act*'s administrative monetary penalty provisions. The member also looked to the wording of subsection 8.7(2), which requires a search warrant "in respect of any offence committed or suspected to have been committed under this Part".

[26] Next, the member considered the evidence presented, including the specific enforcement functions within TC. Evidence was presented to the review member of the distinctions between investigations and inspections, specifically through the testimony of Toke Adams, Regional Manager of Aviation Enforcement with TC. Mr. Adams explained the process followed during TC investigations as distinct from inspections, in that it involves determining whether a contravention has occurred, collecting evidence and sending a letter of investigation to the person concerned to advise them of an investigation.

[27] The member's consideration of this distinction is revealed at paragraph 130 of the determination, where reference is made to the difference between (targeted) investigations of a suspected offence and unannounced inspections of an aerodrome or other facility unrelated to a suspected offence. Because aviation inspections operate separately from investigations in practice, the member's determination considered this distinction in assessing the intent and purpose of the search on November 24, 2015. It is in this context that the distinction between inspections and investigations and the notion of predominant purpose as set out in *Jarvis* becomes relevant.

[28] We find that the review member had ample evidence before him to support the inference that the predominant purpose of the TC inspectors was to collect evidence to document a specific violation, and that this inference was reasonable. We find that the review member properly interpreted the Court direction in *Jarvis* and concur with his statement at paragraph 123 that "… the predominant purpose for which a public official enters a property or makes demands for information is essential in making the distinction". Therefore, we find that the review member did not err in his determination that the TC inspectors had conducted an investigation rather than an inspection under subsection 8.7(1) of the *Act*.

B. Did the review member err when he found that TC inspectors should have sought a judicial warrant under the authority of subsection 8.7(2) of the *Act*?

[29] The appeal panel has already concurred with the review member that TC was conducting an investigation rather than an inspection at the relevant time; what remains is a question of law. Under such circumstances, and absent consent, was a judicial warrant required in order to conduct the search of the aircraft? As this is a question of law, the correctness standard applies.

[30] The review member found that, since the Minister was conducting an investigation rather than an inspection, then the inspection powers under subsection 8.7(1) of the *Act* did not apply. Therefore, barring consent, any search would have to be conducted under the authority of subsection 8.7(2), which imports sections 487–492 of the *Criminal Code*. This appears to be a straightforward literal construction of the subsections concerned.

[31] The Minister argued that the review member had a misconception of the rule of law as it applied to the TC inspectors' authority to search and seize and erred in not recognizing other

authorities under which search and seizure can be carried out (apart from inspection or audit rights pursuant to subsection 8.7(1) of the *Act*). The Minister also submitted that the TC inspectors did not have "reasonable and probable grounds" to find that an offence had been committed, since a mere tip from a disgruntled former employee would not constitute reasonable and probable grounds enabling the issuance of a warrant under section 487 of the *Criminal Code*. If the only way to obtain reasonable and probable grounds is through issuance of a warrant, then in some situations, the hands of investigators may be tied, such that offences committed may never be uncovered. That, argued the Minister, is a "black hole" that should not exist.

[32] Further, the Minister claimed that the review member did not properly appreciate other circumstances in which authorities are empowered to search and seize, such as when an item is in plain view or when exigent circumstances exist (i.e. when evidence sought is believed to be present on an aircraft that can take off at any time). Moreover, the Minister contended that the review member did not sufficiently consider the low expectation of privacy that a regulated approved maintenance organization (AMO) may claim. The Minister stated that the review member simply concluded that a privacy interest, if any, was automatically breached in the absence of a search warrant and, in that regard, the Minister referred again to the finding in *Jarvis*:

> [71] The context-specific approach to s. 8 inevitably means, as Wilson J. noted in *Thomson Newspapers*, *supra*, at p. 495, that "[a]t some point the individual's interest in privacy must give way to the broader state interest in having the information or document disclosed". Naturally, if a person has but a minimal expectation with respect to informational privacy, this may tip the balance in the favour of the state interest …
>
> [72] Generally, an individual has a diminished expectation of privacy in respect of records and documents that he or she produces during the ordinary course of regulated activities …

[33] The Minister also claimed that in a regulated aviation environment, the aircraft journey log book is a day-to-day working document and there is no expectation of privacy in the information that is required to be maintained therein. The review member, argued the Minister, erred in finding that a privacy interest, if any, was automatically breached in the absence of a judicial warrant.

[34] CAL argued that the fundamental purpose of the *Act* and the *CARs* is aviation safety and that the facts differ significantly from those considered in *Jarvis*, which dealt with the purpose and scope of taxation audits and ensuring proper reporting by taxpayers. CAL stated that during the conduct of an enforcement investigation that is not an inspection, powers of search and seizure do not apply and, absent such powers, there is no remaining regulatory basis for a warrantless search and seizure.

[35] We accept, in accordance with *Jarvis*, that there is a reduced expectation of privacy regarding information subject to regulatory oversight. However, *Jarvis* is careful to avoid stating that there is no expectation of privacy whatsoever, as proposed by the Minister. We see no basis for taking this further step. At the very least, for instance, aircraft log books necessarily provide information as to the locations and flights of the particular aircraft. In the case of a private aircraft, this information may be inseparable from the business and personal movements and activities of a private nature of the aircraft owner or operator and its principals.

[36] In considering the arguments as to whether the review member erred, this appeal panel first examined the Minister's reference to other authorities or examples that would permit warrantless searches. The Minister's proposal was to define the boundary between "inspecting" and "investigating" as being the point at which the Minister has reasonable and probable grounds to believe that an offence has been committed. According to that proposal, when the Minister merely suspects an offence, i.e. an offence is possible but not probable, then the Minister is by definition merely inspecting and *Charter* rights do not apply. In such an event, the Minister can enter, search and seize at will under its inspection power. Once the Minister has reasonable and probable grounds, it can enter, search and seize under a warrant. The result would be that, in almost every conceivable circumstance, the Minister would always have the right to enter, search and seize.

[37] As discussed above, the courts have drawn a line concerning instances in which, in a regulatory framework, *Charter* rights apply with respect to search and seizure and the state cannot intrude without a warrant, based on the predominant purpose of the inspection. If the Minister's position is upheld in this matter, then its latitude to search and seize would be based on its belief that an offence has been committed, rather than on the predominant purpose of each inspection having first been determined.

[38] We reject the Minister's argument. Not only would the Minister's position contradict court decisions regarding the predominant purpose concept, but it would have the effect of rendering all privacy and *Charter* rights nugatory under the *Act*. That is clearly illustrated by the Minister's "black hole" concept and the proposition that the Minister should always be permitted to search and seize, either under its inspection power or under warrant, regardless of the predominant purpose, privacy expectations or *Charter* protections against unreasonable search and seizure.

[39] This appeal panel notes that, in this case, a claim of exigent circumstances that could authorize the inspectors to seize the Log Book without a warrant was not raised in argument at the review hearing and therefore is not considered further on appeal. It cannot be said that exigent circumstances exist in respect of every aircraft capable of flight, and no evidence was presented that the departure of aircraft N604EF from CAL property was imminent.

[40] This appeal panel finds that the review member did not err when he found that the TC inspectors should have sought a judicial warrant under the authority of subsection 8.7(2) of the *Act*. A TC investigation must proceed in compliance with the *Charter* and an inspector, if not inspecting but rather investigating, has a duty to ensure that *Charter* rights are not violated. If entry or the production of evidence is refused, TC should seek a judicial warrant to search and seize facilities, the log book or other documentation.

C. Did the member err when he found that TC inspectors had used "misleading and forceful tactics" to enter CAL's facility?

[41] This question is clearly one of fact, or of mixed fact and law. It concerns the review member's colloquial characterization of events.

[42] The review member considered the uncontested sworn testimony of Mr. Coulson as to the inspectors' conduct. He described the misleading pretext used by the inspectors for their visit to CAL facilities. Once their pretext was discovered, Inspector Burger admitted that the inspectors in fact were responding to a complaint and therefore demanded immediate access to the locked aircraft N604EF, threatening to seize the Log Book and take it with them. During the appeal hearing, the Minister referred to *Jarvis* in support of distinguishing between "misleading" and "using misleading tactics in order to obtain information", as follows, at paragraph 101:

> While Goy-Edwards did on several occasions mislead the appellant and his accountant as to the status of the file, she did not use misleading tactics **in order to obtain information** under ss. 231.1(1) and 231.2(1) for the purpose of advancing an investigation into penal liability.
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> [emphasis in original]

[43] This appeal panel does not accept this distinction and finds that "advancing an investigation" was the predominant purpose of the TC visit and that the ostensible reason given and tactics used by the TC inspectors were, as noted by the review member, "misleading and forceful".

[44] The above arguments were presented on appeal by the parties in P-4234-41 and, for the reasons given in that appeal determination, formed the basis of the appeal panel's conclusion that the review member did not err when he excluded from evidence the Log Book. Similarly, in this appeal, and for the same reasons, we find that the review member did not err when he excluded the Log Book as evidence, together with other documents (Exhibits M-5, M-6 and M-10) obtained by the TC inspectors during their warrantless search of the aircraft.

D. Having excluded the Log Book as well as other documents seized during the warrantless search, what other evidence is available to this appeal panel? Is testimony in relation to FAA Form 337 admissible?

[45] The review member determined that the search of the aircraft was not reasonable and was not conducted reasonably. He found that subsection 24(2) of the *Charter* also allowed him to "exclude documents obtained from a warrantless search found to be unreasonable where the admission of this evidence would bring the administration of justice into disrepute".

[46] Since much of the Minister's evidence was excluded at the review hearing as a result of CAL's *Charter* protections being violated, the review member stated that:

> [169]… the Log Book was not the only source of probative evidence the Minister relied on to establish the facts necessary to prove the elements of the offence on a balance of probabilities. Specifically, the Minister proferred Mr. Namazi's testimony concerning Exhibit M-16, being Federal Aviation Administration Form 337, which was signed off by Mr. Erickson on February 24, 2015, and which outlines the avionics maintenance work he performed on Challenger aircraft N604EF on behalf of Coulson Aircrane Ltd. as a Canadian AMO (140-90). In addition, the Minister can rely on Mr. Erickson's own testimony that he was instructed by the FAA to make a maintenance release entry in the aircraft's Log Book after completing and signing FAA Form 337. A reasonable inference of fact from this evidence is that Mr. Erickson would then do so. […]

[47] CAL argued that the review member made an error of law when he considered evidence that was the fruit of an illegal search and, in particular, the evidence of Inspector Namazi in *voir dire* concerning FAA Form 337 (Exhibit M-16). CAL submitted that both the testimony of Mr.

Namazi and FAA Form 337 constitute part of a chain of events that involved a *Charter* breach and that they should therefore be excluded as evidence. But for the unreasonable search and seizure, argued CAL, the Minister would not have made requests of the FAA relating to the alleged breach of *CARs* section 573.05. It also argued that the review member erred in relying on Mr. Erickson's testimony in relation to FAA Form 337, which *ought* to have been excluded from evidence, given also that testimony in relation to the Log Book *was* excluded from evidence.

[48] CAL directed the appeal panel to the findings of the Court in *R. v. Bartle*, [1994] 3 SCR 173:

> [47] There are two requirements for exclusion of evidence under 24(2) … First, there has to have been a *Charter* violation in the course of obtaining the evidence. Second, it must be found that having regard to all the circumstances, admission of the evidence would bring the administration of justice into disrepute.
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> [48] Under the first threshold requirement, there must be some connection or relationship between the infringement of the right or freedom in question and the obtaining of the evidence which is sought to be excluded. However, a strict causal link between the *Charter* infringement and the discovery of the evidence is not required … Generally speaking, so long as it is not too remotely connected with the violation, all the evidence obtained as part of the "chain of events" involving the *Charter* breach will fall within the scope of s. 24(2) …

[49] The Minister conceded that the production of FAA Form 337 was part of the chain of events that resulted from the seizure of the Log Book. However, the Minister also stated that the applicant did not object during the review hearing to this form being admitted into evidence. Therefore, the Minister argued that it would be unreasonable for this appeal panel to exclude such derivative evidence at the appeal stage.

[50] In reply, CAL referred to *R. v. Lauriente*, 2010 BCCA 72:

> [5] The respondents raise the preliminary objection that the Crown should not be permitted to raise either of these issues on appeal since they were not raised as issues before the trial judge. The Crown replies that the first issue concerning standing did not become a live issue until the trial judge released her reasons for judgment on the *voir dire*, and that the second issue arises from the evidence at trial, does not require further evidence to decide, and does not prejudice the respondents.

Similarly, the exclusion of FAA Form 337 and testimony concerning that form did not become a live issue until the review member released his review determination, but, in any event, CAL takes the position that the review member erred in law by relying on evidence that should have been excluded.

[51] This appeal panel finds that it is reasonable to consider this derivative issue on appeal. In making this determination, the panel has considered fairness to the parties, and particularly the fact that the Minister was given an opportunity to speak to this issue on appeal and accepted that the "chain of events" includes FAA Form 337; the completeness of the review record available for the panel's consideration; the importance of the issue at stake; and the fact that the Tribunal, as an administrative body, is not bound by procedural rules applicable to courts of law.

[52] Having considered the issue, we find that FAA Form 337 and related testimony should be excluded, since both were obtained in relation to a search conducted by TC in breach of CAL's *Charter* rights. We also find that admission of evidence obtained as a result of the misleading

and forceful tactics of the TC inspectors brings the administration of justice into disrepute. The production of FAA Form 337 and testimony concerning it were part of a chain of events that were temporally connected and resulted from an improper, warrantless search by TC. Therefore, this appeal panel finds that the review member erred in law by admitting into evidence both FAA Form 337 and the testimony concerning it.

E. Conclusion

[53] For the reasons stated, this appeal panel concurs with the finding of the review member that the Log Book and other documents improperly searched by the TC inspectors (Exhibits M-5, M-6, and M-10) should have been excluded and that FAA Form 337 and the testimony concerning it are also inadmissible. In the absence of remaining evidence, we are unable to consider the case on its merits. We find that the Minister has not proven, on a balance of probabilities, that CAL contravened subsection 573.05(1) of the *CARs*.

IV. OBITER DICTUM

[54] Having insufficient admissible evidence with which to consider the case on its merits, we nonetheless refer to a significant issue raised in this case, namely, did Mr. Erickson, as an AME-E, have the proper training qualifications to install a SKYTRAC satellite tracking unit? Our interest is to provide in obiter comments concerning a proper interpretation of the extensive evidence introduced and arguments heard from the parties on the matter.

[55] It is the Minister's position that Mr. Erickson did not have the type training required by the *CARs* to sign the maintenance release under CAL's AMO authority. The training required in order to obtain an E rating (AME-E) does not include the type training that is required to sign the maintenance release for the avionics system work that Mr. Erickson performed. *CARs* subsection 573.06(1) requires that AMOs ensure that persons are properly trained and authorized to perform work, and *CARs* subsection 573.06(2) specifies that training shall be within the meaning of section 573.06 of Standard 573 – *Approved Maintenance Organizations*. Subsection 573.06(6) of Standard 573 refers to the requirement, pursuant to section 571.11 of the *CARs*, that an AME successfully complete a "Transport Canada approved training course on the type of aircraft, engine or system concerned". Paragraph 571.11(4)(a) states that in respect of maintenance performed on "transport category" aircraft (as in this case), maintenance personnel require training that is applicable to the type of aircraft, engine or system, in accordance with Appendix M of Chapter 571 of the *Airworthiness Manual* (which sets out specifications for maintenance training). Therefore, since Mr. Erickson's training records did not show that he had completed the training required by paragraph 571.11(4)(a) specific to the applicable type of aircraft, engine or system (in this case, the SKYTRAC satellite tracking unit), he was not qualified to sign the maintenance release under CAL's AMO authority.

[56] In CAL's view, it is not that simple. At the review hearing, CAL submitted two TC documents providing guidance and clarity on peculiarities related to the AME-E rating. The first document, Exhibit A-3, is an Airworthiness Notice and states that "The purpose of this notice is to provide guidance when assessing the scope of maintenance release privileges …". Appendix C of the document refers specifically to the AME-E rating:

> **This is a blanket rating and the scope of privileges is not dependent on the aircraft type certification basis.** The scope of privileges is based on the type of aircraft electronic system and includes certification following the … installation/removal … of the following systems: … communications systems …

[57] A second document introduced into evidence by CAL is Exhibit A-4, "Training required for E rated AMES / issue of ACA [Aircraft Certification Authority]". That document states:

> TC never intended for E rated AMEs to obtain TC approved training on all 'systems' nor do we approve 'systems' training per say (sic). The E rating is a blanket rating …
>
> Prior to obtaining ACA for avionics an AME should have completed training on the system in question. This training can be obtained through various methods – a complete aircraft type course, applicable portions of a full aircraft type course **or an OEM [Original Equipment Manufacturer] course on the system in question.** OEM training may or may not have been specifically approved by TC but indirectly approved through the AMOs MPM [Maintenance Procedures Manual]. […]

[58] CAL argued that such guidance documents themselves are inconsistent with the requirement for a "Transport Canada approved training course" or the requirement for "type training" as stated in *CARs* section 571.11 and that the Minister is incorrect in his submission that installation of a SKYTRAC system, a satellite tracking communications system, on the Challenger aircraft requires a type course training.

[59] In our view, these "guidance" documents are insufficient to provide clarity as to the training requirements for AME-Es. If it is the intent of TC to require that every AME-E must complete a specific training course for each manufacturer and type of avionics installation, it is suggested that further and more specific guidance from TC be provided to the aviation maintenance community.

V. DECISION

[60] The appeal is allowed. The Minister of Transport has not proven, on a balance of probabilities, that Coulson Aircrane Ltd. contravened subsection 573.05(1) of the *Canadian Aviation Regulations*. The monetary penalty of $5,000 for the alleged offence is cancelled.

November 4, 2019

(Original signed)

Reasons for the appeal decision: Arnold Olson, Member (chairing)

Concurred by: Laura Safran, Q.C., Member

Andrew Wilson, Member

Appearances

For the Minister:	Eric Villemure
	Micheline Sabourin
For the Respondent:	Michael Dery
	Shaun Foster