TRANSPORTATION APPEAL TRIBUNAL OF CANADA

Citation: *Minister of Transport v. Coulson Aircrane Ltd.*, 2019 TATCE 48 (Appeal)

TATC File No.: P-4234-41

Sector: Aviation

BETWEEN:

Minister of Transport, Appellant

- and -

Coulson Aircrane Ltd., Respondent

Heard in: Nanaimo, British Columbia, on May 7, 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 dismissed. 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*. Therefore, the monetary penalty of $5,000 is cancelled.

I. BACKGROUND

[1] By Notice of Assessment of Monetary Penalty (Notice) dated April 19, 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 202.42(1).

[2] The Notice stated:

> On or about October 19, 2015, at or near Alberni Valley Regional Airport (CBS8) in Port Alberni, British Columbia, you, Coulson Aircrane 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, …

[3] The review hearing before the Transportation Appeal Tribunal of Canada (Tribunal) took place on September 20 and 21, 2017 in Port Alberni, British Columbia. The hearing was held immediately following the review hearing of a prior matter between the same parties, TATC File no. P-4223-36. By agreement between the parties, extensive evidence was incorporated by reference from that other hearing into the present matter. In a determination dated April 17, 2018, the review member found that in respect of the hearing on this matter, the Minister of Transport (Minister) had not made its case on a balance of probabilities, and cancelled the monetary penalty of $5,000. Based on the submissions of parties, the review member excluded several of the Minister's documents on the basis that the applicant's rights under the *Canadian Charter of Rights and Freedoms* (*Charter*) had been infringed, and that admitting the contested evidence would bring the administration of justice into disrepute.

[4] In this appeal, the parties likewise agreed that in order to avoid repetition, the same evidence and arguments, particularly as they relate to the *Charter*, should be used for both cases. The parties also agreed that, while at the review stage P-4223-36 was heard first, on appeal they would prefer to have this case, P-4234-41, heard first. The panel concurred, and the appeals proceeded accordingly.

II. GROUNDS FOR APPEAL

[5] In its request for an appeal dated May 14, 2018, the Minister listed the following grounds:

a. The review member erred when he found that TC inspectors had not carried out an inspection under the authority of subsection 8.7(1) of the *Act*.

b. The review member erred when he found that TC inspectors should have sought a judicial warrant under the authority of subsection 8.7(2) of the *Act*.

c. The review member erred when he held that reasonable notice should have been given by the Minister under the authority of subsection 103.02(1) of the *CARs*.

d. The review member erred in applying the traditional hallmarks of a criminal proceeding and the protections of the *Charter* in an administrative process. This ground of appeal was withdrawn by the Minister and is not considered further.

e. The review member erred when he found that the TC inspectors had used "misleading and forceful tactics" to enter CAL's facility.

f. The review member erred when he found that the TC inspectors had acted without jurisdiction.

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] The provisions of the *CARs* relevant to this proceeding are contained in section 202.42, which states:

> **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
>
> **(ii)** in any operation other than an operation that would require a private operator certificate if the aircraft were registered in Canada.
>
> **(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.

[9] The provisions of the *Act* relevant to the appeal grounds are contained in section 8.7, provided below:

> **3(2)** … ***Minister***, in relation to any matter referred to in … 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.
>
> […]
>
> **(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.
>
> […]

[10] The provisions of the *Charter* relevant to the appeal are as follows:

> **8.** Everyone has the right to be secure against unreasonable search or seizure.
>
> […]
>
> **24.** (1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.
>
> (2) Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

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

[11] The Minister took the position that this finding was one of mixed fact and law, whereas CAL argued that the review member's finding was one of fact. In either case, the standard of reasonableness applies. The appeal panel finds that the answer to the question of whether the TC inspectors had conducted an investigation, as opposed to an inspection, under the authority of

subsection 8.7(1), was established by Mr. Coulson's uncontested evidence and confirmed by Mr. Namazi's testimony. We find that the review member's determination that the inspectors had carried out an investigation is not only reasonable, but correct. It is therefore upheld by this appeal panel.

[12] The review member determined that the central issue before him was the admissibility of pages of the Aircraft Journey Log Book photographed by the TC inspectors as a result of the manner in which the Log Book was obtained by the TC inspectors. Without the Log Book, the Minister could not establish the number of days that US-registered aircraft N604EF was in Canada during the preceding 12-month period. The review member found that the Log Book was not admissible because it had been obtained as a result of an investigation, rather than an inspection, under subsection 8.7(1) of the *Act*. Because such investigations must be conducted in accordance with section 8 of the *Charter*, the review member found that the *Charter* rights of CAL had been breached during the investigation and, as a result, the Log Book was excluded from evidence. Having no evidentiary basis, the Minister had not proven the contravention of *CARs* subsection 202.42(1).

[13] In excluding the Log Book, the review member concluded, "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 tip, or complaint, 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 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?", to which Mr. Namazi responded in the affirmative. In finding that the predominant purpose of the visit to the CAL property was an investigation, rather than an inspection under the authority of subsection 8.7(1) of the *CARs*, the review member relied on the uncontested evidence of Mr. Coulson as well as the corroborating testimony of Investigator Namazi.

[14] 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) must be treated differently from an investigation. The Supreme 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. The evidence before the review member showed that, although the inspectors had concocted a cover story, their predominant purpose was to gather information about the Dublin incident. He found that

> [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 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. […]

[15] At appeal, the Minister argued that the review member incorrectly applied the legal standard set forth in *Jarvis* to the facts before him. The Minister quoted from *Jarvis* as follows:

> [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.

[16] 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 the regulatory scheme, it constitutes an inspection.

[17] 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.

[18] CAL argued on appeal that the facts speak for themselves. One need only review Mr. Coulson's uncontested account of the TC inspectors' visit to find, as did the review member, that an investigation rather than an inspection had occurred. Based on paragraph 88 of *Jarvis* quoted above and referred to by the Minister, it is clear that the predominant purpose of the TC inspectors in visiting the CAL facility involved an enforcement investigation and not a mere regulatory inspection. Moreover, Investigator Namazi should be taken at his word: "… we were investigating the incident …".

[19] CAL also directed the appeal panel to consider the recent decision of *R. v. MV Marathassa*, 2018 BCPC 125 (*Marathassa*). In that case, it was found that 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.

[20] 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".

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

[22] It is CAL's position 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 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 cleared away, it appears that an investigation had in fact taken place.

[23] 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*.

[24] 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".

[25] 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.

[26] The member's consideration of this distinction is revealed at paragraph 117 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.

[27] 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. Furthermore, we find that the review member properly interpreted the Court's direction in *Jarvis* and concur with his statement at paragraph 109 that "… the predominant purpose for which a public official enters a property or makes demands for information is essential in making the distinction". Therefore, this appeal panel

concludes that the review member did not err in his determination that the TC inspectors 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*?

[28] This ground relates to the following finding of the review member:

> [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*.

[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' power to search and seize. The Minister submitted that the review member erred by not recognizing other authorities, apart from the broad powers granted in subsection 8.7(1) of the *Act* for the purpose of inspections or audits, upon which a search and seizure can be grounded. In this case, the Minister submitted that the TC inspectors did not have "reasonable and probable grounds" to find that an offence had been committed. The Minister stated that 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 situated 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 could 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 the Minister again referred to the finding of the Court 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 further argued 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 contended that the fundamental purpose of the *Act* and the *CARs* is aviation safety. Thus 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. During the conduct of an enforcement investigation that is not an inspection, powers of search and seizure are not applicable 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, the 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. Under that theory, 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. Therefore 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 instance, 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, a person's *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 on this matter, then its latitude to search and seize would be based primarily on the Minister's belief that an offence has been committed, rather than being based on the predominant purpose of each inspection having first been determined, in line with applicable case law.

[38] We reject the Minister's argument. Not only would the Minister's position contradict court decisions concerning 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 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 by the Minister 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 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 the *Charter* rights of the alleged offender are not violated. If entry or the production of evidence is refused by the alleged offender, then TC should seek a judicial warrant in order to search and seize facilities, the log book or other documentation.

C. Did the member err when he held that reasonable notice should have been given by the Minister under the authority of subsection 103.02(1) of the *CARs*?

[41] *CARs* subsection 103.02(1) states:

> **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.

[42] In his determination, the review member stated:

> [110] … The testimonial evidence showed that the 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 …

[43] In our view, this ground is based on a misreading by the Minister of the review member's reasons. The review member's finding that the search was in breach of the *Charter* did not turn on *CARs* subsection 103.02(1), which by its terms applies only to inspections. Rather, the review member's decision was based on his finding that what occurred was an investigation and not an inspection. We agree with that finding.

[44] On its face, *CARs* subsection 103.02(1) puts an obligation on the "owner or operator" of the aircraft to permit a search of the aircraft on reasonable notice. That necessarily implies a corresponding right of TC to inspect an aircraft under this subsection, provided reasonable notice is given, and then only in accordance with the notice. Therefore, if the review member intended to find that, in the case of an inspection of an aircraft under *CARs* subsection 103.02(1), reasonable notice must be given, we concur with this determination and conclude that no error has been committed by the review member in this regard. Accordingly, we reject this ground of appeal.

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

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

[46] The review member considered the uncontested sworn testimony of Mr. Coulson as to the inspectors' conduct. He described the misleading pretext the inspectors used for their visit. 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.

[47] At the appeal hearing, the Minister referred to *Jarvis* in support of a distinction between "misleading" and "using misleading tactics in order to obtain information":

> [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.
>
> [emphasis in original]

[48] Having considered the above reference, this appeal panel finds the Minister's argument to be without merit. Advancing an investigation was precisely what the inspectors had in mind and was the predominant purpose of the visit. This appeal panel considers the review member's description of those actions as being "misleading and forceful" to be a fair and reasonable assessment of the events, and finds that the review member did not err in this assessment.

E. Did the member err when he found that the TC inspectors had acted without jurisdiction?

[49] The review member's finding that the TC inspectors acted without jurisdiction is based on his conclusion that they had conducted an investigation rather than an inspection and failed to obtain a warrant to carry out the investigation.

> [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.

[50] This appeal panel agrees with the review member's findings that an investigation had been conducted and that either informed consent or a warrant was required. It was therefore unnecessary for the review member (or for us) to decide whether this denial of a *Charter* right also amounted to a loss of jurisdiction. The review member's comments regarding "jurisdiction", whether correct or not, do not vitiate his decision. In his decision as a whole, he identified and applied the proper legal tests, and his findings of fact and mixed fact and law were reasonable. We therefore reject this ground of appeal.

F. Conclusion

[51] This appeal panel agrees with the review member that the Aircraft Journey Log Book and the List of Flights could not be admitted into evidence as a result of the manner in which they were accessed by the TC inspectors contrary to section 8 of the *Charter*. Moreover, though it was not a ground of appeal by the Minister, the appeal panel notes that the review member also cited subsection 24(2) of the *Charter* to exclude these documents. He found they had been obtained from an unreasonable warrantless search and to admit them into evidence would bring the administration of justice into disrepute. As a result of the exclusion of these documents, there is insufficient evidence to establish the offence for which CAL has been charged pursuant to *CARs* subsection 202.42(1).

IV. DECISION

[52] The appeal is dismissed. 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*. Therefore, the monetary penalty of $5,000 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