

Supreme Court Judgments

Canada (Transportation Safety Board) v. Carroll-Byrne

Collection: Supreme Court Judgments

Date: 2022-11-25

Neutral citation: 2022 SCC 48

Case number: 39661

Judges: Wagner, Richard; Moldaver, Michael J.; Karakatsanis, Andromache; Côté, Suzanne; Brown, Russell; Rowe, Malcolm; Martin, Sheilah; Kasirer, Nicholas; Jamal, Mahmud

On appeal from: Nova Scotia

Notes: [Case in Brief](#)
[SCC Case Information](#)



SUPREME COURT OF CANADA

CITATION: Canada (Transportation Safety Board) v. Carroll-Byrne, 2022 SCC 48

APPEAL HEARD: March 17, 2022
JUDGMENT RENDERED: November 25, 2022
DOCKET: 39661

BETWEEN:

Transportation Safety Board of Canada
Appellant

and

Kathleen Carroll-Byrne, Asher Hodara, Georges Liboy, Air Canada, Airbus S.A.S., NAV CANADA, Halifax International Airport Authority, Attorney General of Canada representing His Majesty The King in Right of Canada, John Doe #1, John Doe #2 and Air Canada Pilots' Association
Respondents

CORAM: Wagner C.J. and Moldaver, Karakatsanis, Côté, Brown, Rowe, Martin, Kasirer and Jamal JJ.

REASONS FOR JUDGMENT: Kasirer J. (Wagner C.J. and Moldaver, Karakatsanis, Rowe, Martin and Jamal JJ. concurring)
(paras. 1 to 125)

DISSENTING REASONS: Côté J. (Brown J. concurring)
(paras. 126 to 186)

NOTE: This document is subject to editorial revision before its reproduction in final form in the *Canada Supreme Court Reports*.

Transportation Safety Board of Canada

Appellant

v.

**Kathleen Carroll-Byrne,
Asher Hodara,
Georges Liboy,
Air Canada,
Airbus S.A.S.,
NAV CANADA,
Halifax International Airport Authority,
Attorney General of Canada representing His Majesty The King in Right of Canada,
John Doe #1,
John Doe #2 and
Air Canada Pilots' Association**

Respondents

Indexed as: Canada (Transportation Safety Board) v. Carroll-Byrne**2022 SCC 48**

File No.: 39661.

2022: March 17; 2022: November 25.

Present: Wagner C.J. and Moldaver, Karakatsanis, Côté, Brown, Rowe, Martin, Kasirer and Jamal JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR NOVA SCOTIA

Transportation law — Statutory privilege for on-board recording — Power of court to order production and discovery of on-board recording — Aircraft striking ground when attempting to land in snowstorm — Passengers bringing class action for damages for negligence against airline, manufacturer and others — Manufacturer bringing motion for disclosure of audio and transcript of cockpit voice recorder held by federal agency who investigated crash — Agency opposing disclosure and requesting to make submissions to motion judge in absence of public and other parties — Motion judge refusing permission to make such submissions and ordering disclosure of cockpit voice recorder — Whether agency entitled to make submissions before motion judge in absence of public and other parties — Whether motion judge committed reviewable error in ordering disclosure of cockpit voice recorder based on weighing of public interest in proper administration of justice and importance of statutory privilege — Canadian Transportation Accident Investigation and Safety Board Act, S.C. 1989, c. 3, s. 28(6)(b), (c).

An accident occurred when an Air Canada flight landed in wind and snow at Halifax Stanfield International Airport. A number of people were injured. Following the accident, a class action was commenced on behalf of certain passengers alleging that negligence on the part of the airline, its pilots, the aircraft manufacturer, the airport and others had caused them harm. As part of its defence and cross-claim, the manufacturer filed an interlocutory motion pursuant to s. 28(6) of the Canadian Transportation Accident Investigation and Safety Board Act (“Act”) for disclosure of the audio and transcript of the cockpit voice

recorder (“CVR”). The CVR had been collected from the aircraft by the Transportation Safety Board of Canada (“Board”), an independent federal agency, which investigated the accident pursuant to its statutory mandate to advance transportation safety and released a report to the public indicating the causes or contributing factors of the accident and the safety measures to be taken by those concerned. As an “on-board recording”, the CVR is privileged under s. 28(2) of the Act; no one can be required to produce it or give evidence relating to it in legal proceedings, except with the authorization of a court or coroner.

The Board, a stranger to the litigation, relied on the statutory privilege to oppose the motion for disclosure. In advance of the hearing on the motion, the Board sought to make representations to the chambers judge as to the admissibility of the CVR in the absence of the public and of all the other parties in order to protect privileged information. The chambers judge refused the Board’s request, as in his view further submissions from the Board were not necessary. The chambers judge then granted the motion for production of the CVR, as he was satisfied that it had important evidentiary value and was necessary to resolve the litigation. The Court of Appeal dismissed the Board’s appeal. It found that the Board had not demonstrated that *ex parte* submissions would have had any impact on the chambers judge’s analysis, as the chambers judge had determined that he did not need any assistance in understanding the recording. Further, it concluded that no legal error or clear and material error in the chambers judge’s consideration of the evidence had been identified and that he had thus not erred by ordering disclosure.

Held (Côté and Brown JJ. dissenting): The appeal should be dismissed.

Per Wagner C.J. and Moldaver, Karakatsanis, Rowe, Martin, **Kasirer** and Jamal JJ.: Section 28(6) (b) of the Act neither grants the Board the right to make submissions in the absence of the public or the other parties, nor does it preclude the court or coroner from asking for them should they be necessary to decide the issue. Accordingly, the chambers judge made no reviewable error in not allowing the Board to make submissions in the absence of the public and the parties. Furthermore, the chambers judge did not commit a reviewable error when he ordered the disclosure of the CVR pursuant to s. 28(6)(c) of the Act. The chambers judge’s overall weighing of the relevant factors was fact-driven and discretionary. In the absence of an error of law, a palpable and overriding error of fact or proof that discretion has been abused, his balancing should not be disturbed.

Section 28(6)(b) of the Act provides that when a request for production and discovery of an on-board recording is made, the court or coroner shall “*in camera*, examine the on-board recording and give the Board a reasonable opportunity to make representations with respect thereto”. A request to make submissions in the absence of the public and other parties is in substance a request to make submissions both *in camera* and effectively *ex parte*, in the sense of “without a party”. Although the term *ex parte* is often defined as a proceeding undertaken without notice to an adverse party, providing notice to adverse parties does not convert what would otherwise be a hearing held in the absence of the parties into one held *in camera*. Properly understood, “*in camera*” refers to the exclusion of the public, not the exclusion of parties. A proceeding in which an adverse party is aware of the hearing but is prevented from making submissions is not an *in camera* proceeding.

The words “*in camera*” in the English text of s. 28(6) of the Act, like the equivalent expression “*à huis clos*” in the French text, only refer to the judge’s examination of the recording and not to the Board’s ability to make submissions. The legislative history of s. 28(6) supports the view that when Parliament made largely formal changes to the structure of the provision, it did not seek to extend to the Board an opportunity to make submissions in the absence of the other parties. Further, there is no ambiguity in s. 28(6)(b) arising from a discordance between the English and French texts. The presence of a comma following the term “*in camera*” in the English text, which is absent from the French, does not create a consequential discordance of meaning because both “*in camera*” and “*à huis clos*” refer to the same idea. The comma in the English text does not suggest that the English text, unlike the French, is reasonably capable of meaning something different, namely that the Board’s submissions are to be made in the absence of the other parties. Even if the comma following “*in camera*” created a true disparity between the French and English texts, their shared meaning aligns with the unambiguous French text, which would be preferred on the basis of both its narrower meaning as well as other indicia of legislative intention.

While s. 28(6)(b) does not provide the Board with a general entitlement to make submissions in the absence of the public and the other parties, a decision-maker faced with a disclosure request nevertheless has the discretion to invite such submissions. The general rule is that the Board should make the submissions contemplated in s. 28(6)(b) in open court and in the presence of other parties. Exceptionally, should the decision-maker determine that assistance from the Board is needed in order to decide on the motion for

disclosure, the decision-maker may permit or ask the Board to make further submissions in the absence of the public, in the absence of other parties, or both, so that the recording can be properly reviewed without defeating the applicable statutory privilege. Such submissions should be done in a manner that would be fair to all parties, by providing them with notice. In the instant case, the chambers judge decided that, having regard to the evidence and submissions already received, as well as the questions that had to be answered to determine the motion, it was not appropriate or necessary to receive such submissions. The Board was more than capable of arguing its case without disclosing the contents of the CVR or defeating the statutory privilege.

Under s. 28(6)(c) of the Act, an on-board recording must only be disclosed for production and discovery if, upon request, a court or coroner is satisfied that the “public interest in the proper administration of justice outweighs in importance the privilege attached to the on-board recording by virtue of this section”. Notably, the public interest informs both sides of the balance: the public has an interest in the proper administration of justice as it does in ensuring transportation safety. The balancing model used by Parliament in s. 28(6)(c) directs that non-disclosure applies by default; it falls to the party seeking production to explain why the privilege should not apply, as an exception to the default rule. The test under s. 28(6)(c) invites the court or coroner to undertake a discretionary balancing of the interests at stake, in a manner similar to the test used for case-by-case privileges.

What Parliament has designated as the public interest in the proper administration of justice concerns a party’s right to a fair trial and to present all relevant evidence that is necessary to resolve the dispute. At its core, this relates to the question of whether withholding evidence will interfere with the fact-finding process to such an extent that it would undermine a party’s right to a fair trial and, consequently, public confidence in the administration of justice. The very existence of the privilege suggests that Parliament is prepared to subordinate the truth-finding function of a civil trial to what it sees as potentially higher values. The burden is on the moving party to establish that the CVR may contain relevant, probative but also necessary evidence, in that it is not obtainable elsewhere.

Properly understood, the test for production developed by the Federal Court in *Wappen-Reederei GmbH & Co. KG v. Hyde Park (The)*, 2006 FC 150, [2006] 4 F.C.R. 272, does not stand in substantial opposition to the test applied by the Ontario Superior Court in *Société Air France v. Greater Toronto Airports*

Authority (2009), 85 C.P.C. (6th) 334, aff'd on this point 2010 ONCA 598, 324 D.L.R. (4th) 567. *Air France* neither imposes a simple relevance test to outweigh the privilege in the name of the public interest in the administration of justice nor reduces the interest in the administration of justice to a consideration of mere relevance. In practice, the factors and balancing articulated in the two decisions are not discordant. Disclosure should not be routinely authorized simply because audio recordings offer reliable or trustworthy evidence. Necessity is an essential component of the analysis. Where evidence is crucial to a central issue in the case, its exclusion on any basis may threaten trial fairness. Class actions should not be isolated as having heightened significance in the weighing exercise. However, the chambers judge's comments on class actions in this case were not shown to have had a material effect on his ultimate decision to order production and discovery of the CVR.

The privilege attached to the on-board recording by virtue of [s. 28](#) of the [Act](#) is animated by two purposes: first, protecting pilot privacy and second, promoting aviation safety. The ultimate balancing requires the court or coroner to identify the relevant factors and decide whether, in light of all of the circumstances, the public interest in the administration of justice commands production and discovery of the CVR, notwithstanding the weight accorded to the privilege by Parliament. When measuring the public interest in the administration of justice, the decision-maker should consider the recording's relevance, probative value and necessity to resolving the issues in dispute as factors that point to the importance of the recording to a fair trial. On the privilege side of the scale, the decision-maker should consider the effect of release on pilot privacy and on aviation safety, as fostered by free communications in the cockpit. *Air France* and *Hyde Park* correctly identified most of these factors as relevant to the balancing exercise.

The test for production is not a simple relevance test. A court must consider not only the existence or number of gaps in the evidence but also the significance of the gaps in relation to the facts and legal issues in dispute. Other ways of filling gaps, including by refreshing pilots' memory using the Board's report or through witness statements, should also be considered. As the decision to order or refuse production is a discretionary one, a judge's conclusion is entitled to deference, insofar as the proper test and the relevant factors to be weighed were identified and applied in an appropriate manner.

In the instant case, when the chambers judge's reasons are read as a whole, it is evident that he applied the correct test under s. 28(6)(c). He properly identified the two competing interests — the public interest in the proper administration of justice and the public interests underlying the privilege — and how they are relevant on the facts of this case, and he weighed these competing interests against each other. Importantly, the chambers judge considered all of the evidence supporting the statutory privilege. Further, he did not order the production of the CVR to achieve a complete understanding of the pilots' role in the accident. Rather, he found that the disclosure of the CVR was necessary in order to fill the gaps in the pilots' evidence that were central to determining causation and thus liability for the accident. This conclusion was plainly open to him.

Per Côté and Brown JJ. (dissenting): The appeal should be allowed. The chambers judge erred by refusing to permit the Board to make submissions *in camera*. Furthermore, although there is agreement with much of what the majority says about the test for production under s. 28(6)(c) of the Act, there is disagreement on the application of the standard of review. The chambers judge's reasons disclose numerous errors of law. As a result, his discretionary decision to order production of the CVR is fundamentally tainted and is owed no deference. Given that no member of the Court has heard the CVR or read the transcript of its contents, it is simply not in a position to reweigh the evidence and conduct the discretionary balancing required under s. 28(6)(c) of the Act. The matter should therefore be remitted to be heard by a different chambers judge.

In *Ruby v. Canada (Solicitor General)*, 2002 SCC 75, [2002] 4 S.C.R. 3, the Court explained that *ex parte*, in a legal sense, means a proceeding, or a procedural step, that is taken or granted at the instance of and for the benefit of one party only, without notice to or argument by any adverse party. *Ex parte* proceedings are therefore distinct from *in camera* proceedings. Given that the Board agreed to provide notice to the other parties as well as to provide them with a non-privileged summary of its submissions, its request to make its submissions in the absence of the public and the other parties cannot be characterized as a request to make *ex parte* submissions; rather, it is more properly characterized as a request to make *in camera* submissions.

A textual and purposive interpretation of s. 28(6)(b) of the Act leads to the conclusion that the Board is entitled to make its submissions *in camera* — that is, in the absence of the public and the other parties. The expression “*in camera*”, at the beginning of the provision, followed by a comma, means that “*in camera*” qualifies all of the words that follow. Accordingly, both the examination of the CVR by the court as well as the

Board’s “reasonable opportunity” to make representations concerning the CVR are to be *in camera*. The structural difference between the former s. 34(1) of the *Canadian Aviation Safety Board Act* and [s. 28\(6\)\(b\)](#) of the [Act](#) is also relevant in discerning legislative intent. Any ambiguity under the former provision has now been resolved by collapsing former paragraphs (b) and (c) and by removing the comma after “recording”, thus bringing the phrase “opportunity to make representations” within the scope of the “*in camera*” qualifier. Accordingly, the only plausible interpretation is that “*in camera*” was intended to apply to both the examination of the recording and to the opportunity to make representations. As to the French version of the provision, it has a fundamentally different structure than the English version. The text of the English version indicates that submissions are to be made *in camera*, whereas the text of the French version is silent on the nature of the Board’s submissions. The discordance between the two versions justifies having recourse to the purposive approach rather than looking for a shared meaning that is simply absent, and only the English version is consistent with a purposive interpretation of the provision. The Board’s right to make reasonable representations must be interpreted in light of the Board’s statutory object as well as Parliament’s decision to create a statutory privilege. To the extent that it is necessary to protect the privilege, the Board has a right to make submissions *in camera*. Such an interpretation furthers the object of the Act and helps to protect the privilege, ensuring that it yields only when it is truly in the public interest to do so.

The test for production of the CVR under s. 28(6)(c) requires the court to assess whether “the public interest in the proper administration of justice outweighs in importance the privilege attached to the on-board recording by virtue of this section”. There are two sides of the scale that must be assessed and weighed: (i) the public interest in the proper administration of justice; and (ii) the importance of the statutory privilege attached to the CVR. This weighing, and the corresponding decision about whether to order production of the CVR, is discretionary. The test as articulated in *Air France*, and as adopted by the chambers judge in the instant case, places the wrong weights on both sides of the scale. On the side relating to the public interest in the administration of justice, *Air France* overemphasizes irrelevant factors, such as the existence of a class action, thereby inappropriately inflating the need to ensure that the evidence before the court is as complete and reliable as possible. On the other side of the scale, regarding the importance of the privilege, *Air France* diminishes the privacy and safety goals that animate the privilege conferred by Parliament, thereby eviscerating the privilege. As a result, *Air France* effectively reduces the test for production of the CVR to a consideration of relevance and reliability. Requiring only that relevance and reliability be established — without otherwise requiring proof

that production of the CVR is necessary to the resolution of a core issue in the litigation — would be fundamentally inconsistent with the creation of a privilege in the first place. As properly stated in *Hyde Park*, when considering the side of the scale relating to the public interest in the administration of justice, the court should focus on the nature and probative value of the evidence in the particular case and how necessary this evidence is for the proper determination of a core issue before the court. Conversely, when balancing the importance of the privilege, the court should give appropriate weight to the privilege, including both the privacy and the safety considerations that animate the privilege, in order to avoid routinely allowing disclosure simply because of the probative value normally attached to audio recordings of events.

On the public interest side of the scale, the chambers judge based his analysis on a specific consideration of the policies and objectives of class actions, by taking into account the behaviour modification goal of class actions. By doing so, he incorrectly considered an irrelevant factor, adding undue weight to this side of the scale. Such an improper statement of the law amounts to a reviewable error. Contrary to the position adopted by the majority, an incorrect legal finding need not be “decisive” to the overall outcome in order to taint a discretionary decision. The exercise of judicial discretion is governed by legal criteria, and consequently, their definition as well as a failure to apply them or a misapplication of them raise questions of law which are subject to appellate review. If a judge considers an irrelevant factor and gives it any weight whatsoever, he or she has effectively applied the wrong legal test, and any conclusion that follows is inherently flawed. Moreover, while there is agreement with the majority that care should be taken to not order production merely because the CVR would be helpful and provide complete evidence, the chambers judge explicitly ordered production for this very reason, which amounts to a reviewable error.

On the side of the scale relating to the importance of the privilege, again, the chambers judge’s reasons disclose multiple errors. There is disagreement with the majority’s reading of *Air France* regarding the two principles that animate the statutory privilege, namely, the protection of privacy and the protection of safety. With respect to privacy, there is agreement with the majority that the concern for pilot privacy does not become “largely illusory” simply because the Board releases a report that may document in some manner what the pilots said. However, this more nuanced understanding of privacy was not adopted in *Air France* or by the chambers judge. In *Air France*, the Ontario Superior Court of Justice was of the view that judicial vetting of the CVR and sterile cockpit rules already addressed pilot privacy concerns. According to its reasoning then, there is no need

to account for privacy concerns in the balancing test given that those concerns are addressed by other mechanisms. This is not the law. By adopting those reasons to reject the suggestion that privacy interests will be inappropriately invaded, the chambers judge erred in law. As to safety, there is agreement with the majority's statement of the law, but once again, this is not the law as articulated in *Air France* or by the chambers judge. By endorsing the court's statement in *Air France* that rejected aviation safety and its relevance as a factor in the analysis, the chambers judge, whose reasons are notably silent on any potential safety considerations, erred in law.

In addition, the chambers judge's findings are incomplete and conclusory. They do not provide sufficient information for the Court to conclude that production of the CVR was necessary to resolving the dispute. The chambers judge made a vague finding that production of the CVR was necessary to answer important questions, but there is nothing in his reasons that indicates what questions or how many questions from the flight crew's discovery evidence can be answered only with the disclosure of the CVR. The nature and probative value of the evidence in this particular case and how necessary this evidence is for the proper determination of a core issue before the court are therefore unclear. Moreover, to the extent that the chambers judge found that production of the CVR was necessary, this needs to be understood in light of his statements, made two separate times in the reasons, that it was important to have complete information before the court. These erroneous statements cast doubt on the chambers judge's purported finding of necessity.

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By Kasirer J.

Considered: *Société Air France v. Greater Toronto Airports Authority* (2009), 85 C.P.C. (6th) 334, aff'd in part 2010 ONCA 598, 324 D.L.R. (4th) 567; *Wappen-Reederei GmbH & Co. KG v. Hyde Park (The)*, 2006 FC 150, [2006] 4 F.C.R. 272; **referred to:** *Imperial Oil v. Jacques*, 2014 SCC 66, [2014] 3 S.C.R. 287; *Canada (Attorney General) v. Fontaine*, 2017 SCC 47, [2017] 2 S.C.R. 205; *P. (W.) v. Alberta*, 2014 ABCA 404, 378 D.L.R. (4th) 629; *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235; *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748; *C.B. v. The Queen*, [1981] 2 S.C.R. 480; *R. v. D.L.W.*, 2016 SCC 22, [2016] 1 S.C.R. 402; *Ruby v. Canada (Solicitor General)*, 2002 SCC 75, [2002] 4 S.C.R.

3; *Society of Composers, Authors and Music Publishers of Canada v. 960122 Ontario Ltd.*, 2003 FCA 256, 26 C.P.R. (4th) 161; *Hover v. Metropolitan Life Insurance Co.*, 1999 ABCA 123, 91 Alta. L.R. (3d) 226; *R. v. Basi*, 2009 SCC 52, [2009] 3 S.C.R. 389; *Reference re Manitoba Language Rights*, [1985] 1 S.C.R. 721; *R. v. Daoust*, 2004 SCC 6, [2004] 1 S.C.R. 217; *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559; *Laurentide Motels Ltd. v. Beauport (City)*, [1989] 1 S.C.R. 705; *R. v. Mac*, 2002 SCC 24, [2002] 1 S.C.R. 856; *Medovarski v. Canada (Minister of Citizenship and Immigration)*, 2005 SCC 51, [2005] 2 S.C.R. 539; *R. v. S.A.C.*, 2008 SCC 47, [2008] 2 S.C.R. 675; *Doré v. Verdun (City)*, [1997] 2 S.C.R. 862; *Hunter v. Canada (Consumer and Corporate Affairs)*, [1991] 3 F.C. 186; *ATCO Gas and Pipelines Ltd. v. Alberta (Energy and Utilities Board)*, 2006 SCC 4, [2006] 1 S.C.R. 140; *R. v. Gruenke*, [1991] 3 S.C.R. 263; *Lizotte v. Aviva Insurance Company of Canada*, 2016 SCC 52, [2016] 2 S.C.R. 521; *R. v. National Post*, 2010 SCC 16, [2010] 1 S.C.R. 477; *Babcock v. Canada (Attorney General)*, 2002 SCC 57, [2002] 3 S.C.R. 3; *Globe and Mail v. Canada (Attorney General)*, 2010 SCC 41, [2010] 2 S.C.R. 592; *Denis v. Côté*, 2019 SCC 44, [2019] 3 S.C.R. 482; *Carey v. Ontario*, [1986] 2 S.C.R. 637; *M. (A.) v. Ryan*, [1997] 1 S.C.R. 157.

By Côté J. (dissenting)

Ruby v. Canada (Solicitor General), 2002 SCC 75, [2002] 4 S.C.R. 3; *Re Associated Commercial Protectors Ltd. and Mason* (1970), 13 D.L.R. (3d) 643, aff'd (1970), 16 D.L.R. (3d) 478; *Bathurst Paper Ltd. v. Minister of Municipal Affairs of New Brunswick*, [1972] S.C.R. 471; *R. v. Daoust*, 2004 SCC 6, [2004] 1 S.C.R. 217; *Société Air France v. Greater Toronto Airports Authority* (2009), 85 C.P.C. (6th) 334, aff'd 2010 ONCA 598, 324 D.L.R. (4th) 567; *Wappen-Reederei GmbH & Co. KG v. Hyde Park (The)*, 2006 FC 150, [2006] 4 F.C.R. 272; *Canada (Attorney General) v. Fontaine*, 2017 SCC 47, [2017] 2 S.C.R. 205; *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235; *British Columbia (Minister of Forests) v. Okanagan Indian Band*, 2003 SCC 71, [2003] 3 S.C.R. 371.

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APPEAL from a judgment of the Nova Scotia Court of Appeal (Bryson, Derrick and Beaton JJ.A.), [2021 NSCA 34](#), 70 C.P.C. (8th) 142, [2021] N.S.J. No. 158 (QL), 2021 CarswellNS 251 (WL), affirming a decision of Duncan J., 2019 NSSC 339, 45 C.P.C. (8th) 124, [2019] N.S.J. No. 493 (QL), 2019 CarswellNS 816 (WL). Appeal dismissed, Côté and Brown JJ. dissenting.

David Taylor, Richard W. Norman and Alyssa Holland, for the appellant.

Jamie L. Thornback, Raymond F. Wagner, K.C., and Kate Boyle, for the respondents Kathleen Carroll-Byrne, Asher Hodara and Georges Liboy.

Clay Hunter, for the respondents Air Canada, John Doe #1 and John Doe #2.

Christopher Hubbard, Emmanuelle Poupart, Jesse Hartery and Brittany Cerqua, for the respondent Airbus S.A.S.

Stephen Ronan and Robert B. Bell, for the respondent NAV CANADA.

Michelle L. Chai, Scott R. Campbell and Erin J. McSorley, for the respondent the Halifax International Airport Authority.

John Provart, for the respondent the Attorney General of Canada representing His Majesty The King in Right of Canada.

Christopher C. Rootham, Andrew Montague-Reinholdt and Adrienne Fanjoy, for the respondent the Air Canada Pilots' Association.

The judgment of Wagner C.J. and Moldaver, Karakatsanis, Rowe, Martin, Kasirer and Jamal JJ. was delivered by

KASIRER J. —

I. Overview

[1] An accident occurred when a commercial flight from Toronto landed in Halifax. A number of people were hurt. Property, including the aircraft, was damaged. Some of the passengers commenced a class action alleging that negligence on the part of the airline, its pilots, the aircraft manufacturer, the airport and others had caused them harm.

[2] In an exercise unrelated to the civil action, the Transportation Safety Board of Canada (“Board”), an independent federal agency, investigated the accident pursuant to its statutory mandate to advance transportation safety. The Board released a report to the public indicating the causes or contributing factors of the accident and the safety measures to be taken by those concerned. In keeping with its role, the Board did not assign blame for the incident.

[3] One of the defendants in the class action, Airbus S.A.S., brought an interlocutory motion before the Supreme Court of Nova Scotia seeking an order that the Board release the cockpit voice recorder (“CVR”) containing the flight crew’s communications — part of the so-called “black box” from the aircraft — as well as the transcripts made of the recorded data. The Board, a stranger to the litigation, had the only copy of the CVR and used it in the preparation of its report. The defendant Airbus, the aircraft manufacturer, said the release of the device was necessary for a fair trial, in particular to resolve the causation issue that would be central to the civil action. The motion alleged that what happened on landing, key to determining who was responsible for the alleged losses, was not clear from the pilots’ testimony on discovery and this missing evidence was otherwise unobtainable. The Board opposed the motion for disclosure. It was joined in this by the defendant airline, Air

Canada, and its pilots, who are alleged to have acted negligently. For the Board, the CVR was subject to a statutory privilege and consequently could not be produced in evidence in the civil action.

[4] As an “on-board recording”, the CVR is indeed privileged under s. 28 of the Canadian Transportation Accident Investigation and Safety Board Act, S.C. 1989, c. 3 (“Act”).^[1] No one can be required to produce the CVR or give evidence relating to it in legal proceedings, except with the authorization of a court or coroner.

[5] After listening to the CVR *in camera*, the chambers judge decided it was reliable and relevant evidence that was necessary to resolving the dispute. He ordered the Board to release the privileged recording to the parties, subject to what he called “very stringent conditions” to protect its confidentiality. In the judge’s view, production of the CVR was permitted because, according to the test set forth in the Act, the public interest in the proper administration of justice outweighed in importance the privilege attached to the on-board recording. His interlocutory judgment was confirmed on appeal. The Board appeals to this Court to assert the statutory privilege. It says, in essence, that Parliament’s purposes in establishing the privilege — protecting pilot privacy and promoting public safety in air transportation — would be undermined if the CVR were disclosed in the class action.

[6] Where a person seeks to exclude relevant evidence in a civil action on the strength of a statutory privilege, they pit the search for truth — what this Court called “the cardinal principle in civil proceedings” in *Imperial Oil v. Jacques*, 2014 SCC 66, [2014] 3 S.C.R. 287, at para. 24 — against matters of public policy, distinct from the trial process, that the legislature has seen fit to protect by preventing disclosure of information before the courts. The truth-seeking function of the law of evidence in a civil trial is thus in “tension” with these other values that the legislature has chosen to champion by statute in establishing the privilege (I borrow the term [TRANSLATION] “tension” in this context from scholar Julien Fournier, “Les privilèges en droit de la preuve: un nécessaire retour aux sources” (2019), 53 *R.J.T.U.M.* 461, at p. 468). Often, the legislature will stipulate how this tension should be resolved, for example by directing that the privilege is absolute, or by recognizing discrete exceptions, or again by providing a decision-maker with the discretion to decide whether or not the truth-seeking should give way to the privilege. Subject to constitutional constraints, the courts should abide by the choice reflected in a statutory privilege and recognize that, where the legislature has given pride of place to a

privilege, otherwise relevant and trustworthy evidence that might advance the just resolution of a civil trial will be excluded by “overriding societal interests” (S. N. Lederman, M. K. Fuerst and H. C. Stewart, *Sopinka, Lederman & Bryant: The Law of Evidence in Canada* (6th ed. 2022), at ¶14.1).

[7] This appeal invites the Court to consider the circumstances in which Parliament has said that the privilege over the CVR should take precedence over the presumably relevant and trustworthy evidence that the CVR might provide at trial on the merits of the class action. The outcome of the appeal turns on the will of Parliament as to how this tension should be resolved under the Act. In my view, the courts should not impose their own sense of when evidence should be produced where, by valid statute, the legislature has said how values other than the truth-seeking function of the law of evidence should take precedence in civil, administrative or criminal proceedings.

[8] As I shall endeavour to explain, in this instance, Parliament has tempered its preference that the CVR be inaccessible to civil litigants. The privilege it created is [TRANSLATION] “discretionary”, as opposed to a non-discretionary statutory privilege with or without fixed exceptions (see Fournier, at p. 495). Unlike absolute statutory privileges, for which a court has no power to weigh the relative merits of the societal interests against the search for truth in a civil trial, a discretionary privilege typically tasks a decision-maker with weighing the public interest reflected in the privilege against the truth-seeking role of the law of evidence according to identifiable criteria. On the contrary, where the legislature chooses to create or recognize a non-discretionary privilege, the decision-maker does not have a weighing function. Rather, the decision-maker must apply the privilege, as the statute directs, subject to any exception recognized by law.

[9] By creating a privilege under s. 28 of the Act that excludes the CVR from production and discovery in proceedings before a court or coroner, Parliament recognized that the values of pilot privacy and aviation safety presumptively outweigh the values underlying the administration of justice, such as trial fairness. But Parliament has invested courts and coroners with the power to order the production of the CVR where “the public interest in the proper administration of justice outweighs in importance the privilege attached to the on-board recording by virtue of this section”. Unlike certain other statutory privileges, Parliament has not expressly set out the criteria for the exercise of this discretion. This appeal turns on the identification and application of those criteria. A court or coroner seized of a request for production and discovery of an on-board

recording pursuant to s. 28(6)(c) is charged with deciding whether the public's stake in the administration of justice — ultimately rooted in trial fairness — outweighs in importance the interests Parliament sought to protect in establishing the privilege. In this balancing exercise, the decision-maker must place two competing public interests on the scales: on one side, the relevance, probative value and necessity of the on-board recording to the fair resolution of the dispute and, on the other, the effects of disclosure on pilot privacy and aviation safety.

[10] For the reasons that follow, I would uphold the chambers judge's discretionary decision to permit production and discovery of the CVR at trial and dismiss the appeal. First, the chambers judge correctly identified, as a matter of law, the underlying purposes of pilot privacy and public safety in air transportation relevant to weighing the "importance of the privilege" as recognized by Parliament. Second, he did not adopt an interpretation of the counterweighted "public interest in the proper administration of justice" that undermined the statutory privilege bearing on the CVR. He did not, for example, suggest that the importance of the privilege could be outweighed merely because the CVR was relevant and trustworthy. The judge was satisfied that the information in the privileged on-board recording could not be produced in evidence by any other reasonable means. He thus ordered disclosure of the CVR not just because it was highly probative but, first and foremost, because it was necessary to resolve the civil action. To exclude it could have precluded a fair trial on a matter central to the dispute.

[11] Mindful of the constraints on his task, the chambers judge exercised the discretion afforded to him by Parliament. He ordered the release of the CVR subject to conditions that would, notwithstanding disclosure, assure a measure of confidentiality and, as Parliament directed, prohibit the use of the on-board recording in certain other proceedings (s. 28(7) of the Act). In my view, the judge's discretionary choice deserves deference on appeal; that was Parliament's intention under the Act when it created a discretionary privilege.

[12] I would also reject the Board's argument that, as a general proposition, the Act provides it with the right to make submissions on the scope of the privilege privately with the judge and in the absence of other parties. Properly interpreted, the Act provides no such general entitlement. While Parliament does not preclude a court or coroner from asking the Board for assistance with its *in camera* review of the on-board recording, the

chambers judge made no error in refusing the Board's request as such submissions were not, in his view, necessary in this case.

II. Background

[13] The accident occurred when Air Canada Flight AC624 landed in wind and snow late on a March night in 2015 at Nova Scotia's Halifax Stanfield International Airport. The Airbus Industrie A320-211 was carrying 133 passengers and 5 crew members. On descent, the aircraft struck the ground about 740 feet short of the runway before sliding to an eventual stop. A number of people were injured, including 25 who were taken to local hospitals. While there was no post-impact fire, the aircraft was later destroyed.

[14] The Board has a statutory mandate to advance transportation safety by conducting independent investigations into "transportation occurrences" (s. 2 of the Act; the French-language equivalent, "*accident de transport*", is arguably more telling than "transportation occurrence"). The Board undertook an investigation into the Halifax accident in order to make findings, as charged by s. 7(1) of the Act, as to its causes and contributing factors, to identify and reduce or eliminate safety deficiencies evidenced by the event and to report on the investigation to the public. In keeping with its mandate, the Board's purpose in conducting and reporting on the investigation was not to assign fault. Its findings cannot be construed as assigning fault or used to determine civil or criminal liability (s. 7(2), (3) and (4)).

[15] The Board collected two flight recorders from Flight AC624 following the accident. The CVR contains sounds in the cockpit, including conversations among members of the flight crew. The flight data recorder ("FDR") records flight parameters, including altitude and airspeed. After retrieving the CVR, the Board downloaded the data electronically. It then erased the material before returning the recorder to the aircraft owner.

[16] Drawing on a range of materials, including interviews with the flight crew and the CVR, the Board prepared a report of the occurrence that was subsequently released to the public. According to affidavit evidence produced by Mr. Jean L. Laporte, the Board's Chief Operating Officer, investigators reviewed the CVR and used it along with the data in the FDR to "recreate the cockpit environment on descent and landing" (A.R., at p. 1862, para. 57).

[17] While the CVR is privileged, the Board may make such use of the recording as it considers necessary in the interests of transportation safety (s. 28(4) of the Act). The Board's report in this case includes references to and quotations from the CVR contents. The first page of the report notes that the Board is not permitted to communicate the contents of the CVR on matters unrelated to the causes or contributing factors of the accident or to the identification of safety deficiencies. It also states that the CVR information included in the report has been "carefully examined in order to ensure that it is required to advance transportation safety" (Transportation Safety Board of Canada, *Aviation Investigation Report A15H0002* (2017), at p. 1).

[18] According to the Board's reported findings as to the causes and contributing factors of the occurrence, the aircraft touched down in advance of the runway because of low visibility, airline standard operating procedures and inappropriate decisions made by the flight crew, including a failure to monitor the angle of the aircraft while it was descending. Among the other factors mentioned, the Board also concluded that the lighting conditions on the runway were inadequate.

[19] Following the accident, a class action was commenced on behalf of certain passengers seeking damages against Air Canada (the air carrier responsible for the flight and employer of the pilots), Airbus (the aircraft manufacturer), Halifax International Airport Authority (the airport operator), NAV CANADA (the air navigation service provider), the Attorney General of Canada (representing Transport Canada as the owner and occupier of the airport), and John Doe #1 and #2 (the Captain and First Officer). The plaintiffs allege that the injuries and financial losses they suffered as a result of the accident were caused by the negligence of the defendants, including the negligence of the flight crew, inadequate training of the flight crew, inadequate runway lighting and landing systems, as well as inadequate weather observations and communications and inadequate safety precautions taken in anticipation of landing.

[20] The plaintiffs' claim against Air Canada and the flight crew is of particular relevance to this appeal. In addition to allegations that Air Canada provided substandard training for the flight crew, the plaintiffs allege that the airline improperly managed the risks associated with the procedure for landing the aircraft used by the flight crew and adopted an approach procedure that lacked an adequate margin of safety. They also say that Air Canada is vicariously liable, as employer, for loss caused by the flight crew's negligence, which they allege includes not complying with regulatory minimums for visibility prior to approach, choosing not to abort the landing and divert to another airport, not requesting updated weather information from air traffic control, not following the instructions of air traffic control, not declaring an emergency in a timely manner, and operating

the aircraft without due care and skill. The other defendants, Airbus, the Attorney General of Canada, NAV CANADA, and Halifax International Airport Authority, filed cross-claims against Air Canada and the flight crew on the same basis as part of their defences. Air Canada denies negligence on its part or on the part of its employees and similarly cross-claims against its co-defendants.

[21] The Board is not a party to the proceedings. The class action was certified in 2016. Pleadings are now closed and disclosure and discovery are complete.

[22] As part of its defence and cross-claim, Airbus filed an interlocutory motion pursuant to s. 28(6) of the Act for disclosure of the audio and transcript of the CVR from the Board. In its application, which is at the origin of this appeal, Airbus stated that it does not seek release of portions of the CVR that contain purely personal discussions amongst members of the flight crew. It only seeks the flight crew's utterances that are directly relevant to a matter in issue. Airbus noted several key questions essential to resolving the liability of Air Canada and the flight crew that require release of the CVR. These include whether the flight crew noticed that the airplane diverted from the pre-set descent path; why they failed to notice the divergence or, if they noticed the divergence, why they did not take steps to avoid the accident; and whether they had sufficient visual cues to continue with the landing. Airbus noted, too, that this evidence could not be obtained from the flight crew, as they could not remember crucial details when questioned at examination on discovery. Without the CVR to fill these evidentiary gaps, says Airbus, a fair trial of the class action would not be possible because there are no other reliable or admissible sources for much of this evidence. Noting that the Board relied on the CVR for its report, Airbus alleges that it is plain that the Board needed this material to supplement information received from the pilots in order to understand what happened on the flight. At paragraph 55 of its motion, Airbus states:

In short, the CVR recording contains unique information that is highly relevant to the claims and defenses and may reveal crucial evidence that is absent from the current evidentiary record. It is evidence that cannot be obtained from any other sources, and is necessary to ensure the parties obtain a fair trial.

(A.R., at p. 1300)

[23] Furthermore, Airbus proposed that the production of the CVR be subject to stringent conditions to protect the confidentiality of the on-board recording. Airbus's application was supported by the plaintiffs and several other defendants, who generally expressed agreement that production of the CVR is necessary to the success of their respective positions.

[24] The Board remains in possession of the CVR. It was granted intervener status and permitted to make submissions before the chambers judge. The Air Canada Pilots' Association ("ACPA") was also granted intervener status. They both argued against disclosure of the CVR. Air Canada and the flight crew opposed disclosure before the chambers judge. They continue to support the position advanced by the Board but made no written or oral submissions before our Court.

III. Decisions Below

A. *Supreme Court of Nova Scotia*

(1) Decision Rendered Orally on September 4, 2019 (Duncan J.)

[25] In advance of the hearing on the production of the on-board recording before the Supreme Court of Nova Scotia, the Board wrote the court, with copies to all the parties to the class action litigation, requesting to make "*ex parte* representations to the [c]ourt with respect to the contents of the CVR" (A.R., at p. 1511). It argued that the reference to "*in camera*" in s. 28(6)(b) of the Act meant that the Board should have a reasonable opportunity to make submissions relating to disclosure both *in camera* and *ex parte*. In other words, the Board should be able to make representations as to the admissibility of the CVR in the absence both of the public and of the other parties and interveners. The Board said it intended to make submissions on two points: first, on the CVR's contents and the availability of alternative sources for the information it contained and, second, on certain technical aspects of the CVR in order to help the court understand the materials. Speaking to either of these matters in open court would, said the Board, reveal confidential information and undermine the very protection Parliament intended when it put the privilege in place.

[26] In reasons rendered orally, the chambers judge refused the Board's request to make further submissions in the absence of the other parties. After listening to the CVR in private and considering the evidence and the open court submissions of all counsel, including those of the Board, he found that he had no difficulty understanding the materials and how they related to the pleadings on the determination of liability in the principal action. In the circumstances, the further submissions the Board sought to make were therefore not

needed, and accordingly, it was unnecessary to resolve the question of whether the Act permitted the Board to make representations in the absence of the public and the parties.

[27] The chambers judge also announced his decision to grant the motion for production of the CVR, with written reasons to follow. In the interval, counsel on all sides could make submissions as to whether it would be appropriate, out of an “abundance of caution and having regard to the statutory privilege”, to redact or otherwise limit the publication of the written reasons to ensure compliance with the confidentiality requirements under the Act (A.R., at pp. 9-10).

(2) Reasons for Decision, 2019 NSSC 339, 45 C.P.C. (8th) 124 (Duncan J.)

[28] In his written reasons ordering the Board to produce the CVR and transcripts, the chambers judge concluded that the recording contained information that was reliable, relevant and material to the determination of causation, an issue that was central to civil liability in the class action (paras. 29, 31 and 50). Specifically, he wrote that the flying officers’ perceptions and decision-making in electing to land how and where they did was “central to the action of the plaintiffs” (para. 23). He found that the pilots could not remember many key details of the events leading up to the accident. The discovery evidence of these two flight officers was “necessary to answering important questions” and, since the pilots themselves could not fill the evidentiary gaps, the CVR represented the “only way” to get that information (para. 48). The chambers judge was satisfied that the CVR had important evidentiary value and was “necessary” to resolve the litigation (para. 49).

[29] The chambers judge relied on the law as stated by the Ontario Superior Court of Justice in *Société Air France v. Greater Toronto Airports Authority* (2009), 85 C.P.C. (6th) 334, aff’d on this point 2010 ONCA 598, 324 D.L.R. (4th) 567, in which Strathy J. (as he then was) examined the history and purpose of s. 28 of the Act and ordered the production of an on-board recording. In particular, the chambers judge agreed with Strathy J. that the public interest in the administration of justice protects the ability of the parties to make out their case and meet the case against them and preserves the integrity of the judicial fact-finding process (para. 51). These concerns apply to the current circumstances because “there are issues of trial fairness and fulfillment of the objectives of class proceedings present” (para. 52).

[30] He also relied on *Air France* for the conclusion that the purposes of the statutory privilege are to protect pilot privacy and to protect public safety by encouraging free and uninhibited communications between

the pilots (para. 54). The chambers judge held that the pilot privacy and public safety interests in this case were similar to those in *Air France*, but he did note two factual differences. First, although there were gaps in the pilots' evidence, the CVR was not used to refresh their memories, unlike in *Air France*. Second, the pilots in this case opposed the motion for disclosure, while in *Air France* the pilots did not object to the CVR's release. Given the gaps in the evidence here and the fact that the pilots had been unable to provide important information, the CVR "has the potential to assist the trier of fact in its truth-seeking function" (para. 57).

[31] The chambers judge balanced the two interests referred to under s. 28(6)(c) and found that the importance of the recording to the administration of justice in the class action outweighed the importance of the statutory privilege. The release of the CVR was necessary to resolve the civil dispute. Disclosure would not interfere with aviation safety, damage relations between pilots and their employers, or impede the investigation of accidents. Moreover, the CVR did not contain private or scandalous material (paras. 63-68).

[32] The chambers judge directed the Board to produce a copy of the CVR and transcript to counsel for use in the class action "under . . . very stringent conditions", specifying that disclosure would be limited to the parties and their experts, consultants, insurers and lawyers in order to preserve confidentiality (paras. 68-69).

B. *Nova Scotia Court of Appeal, 2021 NSCA 34, 70 C.P.C. (8th) 142 (Bryson, Derrick and Beaton J.J.A.)*

[33] The Board was granted leave to appeal from the interlocutory judgment ordering disclosure. It argued that the chambers judge erred in law by failing to allow the Board to make *ex parte* submissions prior to his decision authorizing disclosure of the CVR. Further, the chambers judge erred in interpreting s. 28(6)(c) when he held that the public's interest in the proper administration of justice outweighed the importance of the statutory privilege associated with the CVR.

[34] On the first issue, Bryson J.A., writing for the court, observed that "*in camera*" and "*ex parte*" have different meanings. The term "*ex parte*" means "in the absence of other parties to litigation" as opposed to the exclusion of the public. Section 28(6)(b) only refers to "*in camera*". He considered the English version of s. 28(6)(b) and the relevant portion of the French version of s. 28(6) before concluding that the provision created no ambiguity. Plainly read, the Act authorizes the court, not the parties, to listen to the CVR *in camera*. The Board, which is not a party in the ordinary sense, is then given an opportunity to make representations, but it is not entitled to do so either *in camera* or *ex parte*.

[35] On the facts of the case, the Board had not demonstrated that *ex parte* submissions would have had any impact on the court's analysis. Moreover, the chambers judge found that he did not need any assistance in understanding the recording. If there were alternative sources for the information contained in the CVR that could address the gaps identified by Airbus, the Board failed to identify them.

[36] On the second issue, Bryson J.A. concluded that the chambers judge did not err by ordering disclosure. The chambers judge did not apply the wrong test by relying on Strathy J.'s reasons in *Air France* rather than *Wappen-Reederei GmbH & Co. KG v. Hyde Park (The)*, 2006 FC 150, [2006] 4 F.C.R. 272. The criteria in *Hyde Park* are largely subsumed in the *Air France* analysis. As for a "possibility of a miscarriage of justice", alluded to in *Hyde Park* (at para. 74) as a threshold requirement for admitting the CVR, this criterion is not mentioned in the Act and was not retained in *Air France*. A term more commonly associated with criminal law, a "miscarriage of justice" is a retrospective test that is ill-suited to the prospective analysis for balancing under s. 28(6)(c). As a bar, it is too high. In any event, the recordings in *Hyde Park* were not "crucial" and the information contained in them would have been available from other sources. The chambers judge found otherwise here. *Hyde Park* is thus distinguishable on its facts (para. 60).

[37] Bryson J.A. was satisfied that the chambers judge did not "emasculat[e]" the statutory privilege by reducing the balancing test in s. 28(6)(c) to one of simple relevance (para. 85). Instead, the chambers judge found that the information contained in the flight crew's communications was relevant to causation, was necessary for answering important questions central to the dispute, and could be obtained only through the CVR (para. 67, citing paras. 48 and 50 of the N.S.S.C. reasons). The chambers judge weighed the public interest in the administration of justice against the purpose of the privilege and concluded, after reviewing all the evidence, that disclosure was warranted. The Board identified no legal error or clear and material error in his consideration of the evidence. The discretionary decision of the chambers judge to order disclosure of the CVR was thus entitled to deference.

IV. Issues

[38] There are two issues on appeal. First, is the Board entitled to make submissions in the absence of other parties and the public pursuant to s. 28(6)(b) of the Act? Second, did the chambers judge commit a reviewable error when he ordered the disclosure of the CVR pursuant to s. 28(6)(c)?

[39] Insofar as the Board alleges that the chambers judge erred in his interpretation of s. 28(6)(b) by denying it the right to make submissions in the absence of the public and the parties, the first question engages a question of law reviewable on a standard of correctness. If, however, the chambers judge had the discretionary authority to invite or to refuse such submissions, his choice is deserving of deference on appeal.

[40] The parties disagree on the standard of review for the second issue. The Board argues that the standard is correctness, as it relates to whether the chambers judge applied the correct legal test. Some of the respondents disagree. They say that the Board is, instead, asking this Court to reweigh the factors and to revisit findings of fact, which are entitled to deference.

[41] The disagreement is more apparent than real. A discretionary decision, such as the one contemplated by Parliament in s. 28(6)(c), is generally entitled to deference and may only be interfered with if there is a legal error (considered to be an error in principle), a palpable and overriding factual error (viewed as a material misapprehension of the evidence) or a failure to exercise discretion judicially (which includes acting arbitrarily or being “so clearly wrong as to amount to an injustice”) (*Canada (Attorney General) v. Fontaine*, 2017 SCC 47, [2017] 2 S.C.R. 205, at para. 36, quoting *P. (W.) v. Alberta*, 2014 ABCA 404, 378 D.L.R. (4th) 629, at para. 15). An error in the interpretation of s. 28(6)(c) of the Act plainly raises a question of law reviewable on correctness. Thus, if the chambers judge applied the wrong test in weighing the public interest in the administration of justice, or misunderstood the privilege in law by misidentifying its statutory purpose, as the Board alleges, he erred in law (see *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, at para. 27; *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748, at para. 36). I would add that such an error would preclude affording the deference that is ordinarily given to a judge who undertakes the fundamentally discretionary exercise of weighing interests provided for by the Act. Should it be determined that, due to a misapprehension of the law, the chambers judge put the wrong weights on the scales, his balancing would be inherently flawed. If, on the other hand, the chambers judge correctly identified the factors to be weighed but, in his appreciation of the evidence, assigned different weights than the Board would have wished, the alleged error should be understood as one that attacks the discretionary character of the balancing contemplated by s. 28(6)(c). Absent a palpable and overriding error in his appreciation of the evidence, or proof that the chambers judge did not exercise his discretion under the Act judicially, his decision on the production and admissibility of the CVR deserves deference.

V. Analysis

[42] Before considering whether the chambers judge erred in refusing the Board the opportunity to make submissions on the CVR in the absence of the public and the parties (B) and whether he erred in weighing the interests in play when he chose to set the privilege aside (C), I turn first to an overview of the statutory scheme (A).

A. *The Statutory Scheme*

[43] Section 28 of the Act is the provision most directly engaged by this appeal. Section 28(2) sets out the statutory privilege, s. 28(6)(b) speaks to the Board's entitlement to make submissions to the chambers judge and s. 28(6)(c) provides for the discretionary authority to order disclosure of the CVR. Under the heading "Privilege", s. 28 provides:

Definition of *on-board recording*

28 (1) In this section, *on-board recording* means the whole or any part of

- (a) a recording of voice communications originating from, or received on or in,
 - (i) the flight deck of an aircraft,
 - (ii) the bridge or a control room of a ship,
 - (iii) the cab of a locomotive, or
 - (iv) the control room or pumping station of a pipeline, or
- (b) a video recording of the activities of the operating personnel of an aircraft, ship, locomotive or pipeline

that is made, using recording equipment that is intended to not be controlled by the operating personnel, on the flight deck of the aircraft, on the bridge or in a control room of the ship, in the cab of the locomotive or in a place where pipeline operations are carried out, as the case may be, and includes a transcript or substantial summary of such a recording.

Privilege for on-board recordings

(2) Every on-board recording is privileged and, except as provided by this section, no person, including any person to whom access is provided under this section, shall

- (a) knowingly communicate an on-board recording or permit it to be communicated to any person; or
- (b) be required to produce an on-board recording or give evidence relating to it in any legal, disciplinary or other proceedings.

Access by Board

(3) Any on-board recording that relates to a transportation occurrence being investigated under this Act shall be released to an investigator who requests it for the purposes of the investigation.

Use by Board

(4) The Board may make such use of any on-board recording obtained under this Act as it considers necessary in the interests of transportation safety, but, subject to subsection (5), shall not knowingly communicate or permit to be communicated to anyone any portion thereof that is unrelated to the causes or contributing factors of the transportation occurrence under investigation or to the identification of safety deficiencies.

Access by peace officers, coroners and other investigators

(5) The Board shall make available any on-board recording obtained under this [Act](#) to

(a) [Repealed, 1998, c. 20, s. 17]

(b) a coroner who requests access thereto for the purpose of an investigation that the coroner is conducting; or

(c) any person carrying out a coordinated investigation under section 18.

Power of court or coroner

(6) Notwithstanding anything in this section, where, in any proceedings before a court or coroner, a request for the production and discovery of an on-board recording is made, the court or coroner shall

(a) cause notice of the request to be given to the Board, if the Board is not a party to the proceedings;

(b) *in camera*, examine the on-board recording and give the Board a reasonable opportunity to make representations with respect thereto; and

(c) if the court or coroner concludes in the circumstances of the case that the public interest in the proper administration of justice outweighs in importance the privilege attached to the on-board recording by virtue of this section, order the production and discovery of the on-board recording, subject to such restrictions or conditions as the court or coroner deems appropriate, and may require any person to give evidence that relates to the on-board recording.

Use prohibited

(7) An on-board recording may not be used against any of the following persons in disciplinary proceedings, proceedings relating to the capacity or competence of an officer or employee to perform the officer's or employee's functions, or in legal or other proceedings, namely, air or rail traffic controllers, marine traffic regulators, aircraft, train or ship crew members (including, in the case of ships, masters, officers, pilots and ice advisers), airport vehicle operators, flight service station specialists, persons who relay messages respecting air or rail traffic control, marine traffic regulation or related matters and persons who are directly or indirectly involved in the operation of a pipeline.

Definition of *court*

(8) For the purposes of subsection (6), *court* includes a person or persons appointed or designated to conduct a public inquiry into a transportation occurrence pursuant to this [Act](#) or the [Inquiries Act](#).

[44] Under the Act, the Board's object is to advance transportation safety by several designated means. Section 7 sets forth the Board's mission in service of that object, which includes "conducting independent investigations . . . into selected transportation occurrences in order to make findings as to their causes and contributing factors" and to report publicly on its findings (s. 7(1)(a) and (d)). The Board is also charged with identifying "safety deficiencies" that come to light following accidents and making recommendations designed to eliminate or reduce those deficiencies (s. 7(1)(b) and (c)).

[45] In conducting investigations, the Board does not assign fault or determine civil or criminal liability (s. 7(2) to (4)). The purpose of the Board is not to "arrive conclusively at a cause" but instead to "make recommendations with respect to aviation safety" (Canadian Transportation Accident Investigation and Safety

Board Act Review Commission, *Advancing Safety* (1994), at p. 145, quoting *Estey report respecting the Arrow Air accident at Gander, Newfoundland, Dec. 12, 1985* (July 21, 1989), at p. 28).

[46] Although the Board's findings cannot be used to establish liability, blame "might be inferred by others from the Board's findings" (*Advancing Safety*, at p. 143). The Board need not "concern itself with what outsiders may speculate about who was at fault" when publishing its report as to the causes of an accident (*Advancing Safety*, at p. 144). Yet Parliament contemplates that the Board's investigators, its reports, and the evidence it gathers may have information relevant to legal proceedings. Importantly, s. 7(2) explicitly recognizes the possibility of an overlap between the Board's findings on investigation of an occurrence and matters relating to fault or liability where it states that "the Board shall not refrain from fully reporting on the causes and contributing factors merely because fault or liability might be inferred from the Board's findings".

[47] The Act puts many of the sources of the Board's findings on the causes of accidents beyond the reach of litigants, criminal prosecutors and employers. Investigators are not competent or compellable in legal proceedings, except in special circumstances, nor are their opinions admissible in evidence (ss. 32 and 33). Similarly, some of the Board's investigative sources, notably the CVR and witness statements, are presumptively privileged and can only be disclosed in limited circumstances (ss. 28 and 30). Air traffic control records, while not privileged, cannot be used in designated legal proceedings (s. 29).

[48] The rules bearing on aircraft accident investigations were significantly reviewed in the 1980s, following the publication of the *Report of the Commission of Inquiry on Aviation Safety* in 1981 ("Dubin Report"). After public criticism of an investigation into an aircraft accident in British Columbia, Justice Charles L. Dubin was appointed to chair an inquiry relating to the management of air transportation and to recommend changes to the legislative scheme to improve air safety (Dubin Report, at pp. 1-10).

[49] The Dubin Report recommended that on-board recordings be protected by a new statutory privilege (p. 258). It did so for two reasons. First, CVRs presented the risk of a "unique invasion of [pilot] privacy" (p. 235). The Dubin Report noted that pilots complained "that no other employees are subjected to electronic eavesdropping in their work place" (p. 225). It recognized that pilots have a right to be protected against invasions of privacy except when safety or the administration of justice require otherwise (pp. 235-36). Second, the Dubin Report documented a widely held conviction amongst accident investigators that

“confidentiality is essential to the effectiveness of their work” (p. 147). The Dubin Report recorded concerns that information obtained could be used in litigation to the benefit of the Crown, which might result in investigators being viewed as “partisan” and cause their information sources to dry up (p. 147).

[50] While the Dubin Report recognized the important interests supporting some form of confidentiality over such recordings, it also acknowledged that the information contained in these recordings could be relevant for other legal proceedings, including civil actions (see pp. 234-37). The Dubin Report recommended against granting an absolute privilege over on-board voice recordings such as CVRs, as that would effectively prevent their use in other proceedings and would “decide, once and for all, against the public interest in the administration of justice” (p. 234). This might deprive an injured person of the only evidence that could establish the cause of, or liability resulting from, an accident (p. 234). As a result, the Dubin Report proposed a middle ground between an absolute statutory privilege and the unlimited accessibility of CVRs under the ordinarily applicable rules for the production of evidence. Recordings should be presumptively privileged and only available for use by the Board in investigations. However, a discretionary power should be established for setting the privilege aside in civil proceedings where the public interest in the administration of justice outweighs the importance of the reasons for the privilege (pp. 236-37).

[51] Soon after the publication of the first volume of the Dubin Report, Parliament enacted the precursor to the present Act, the *Canadian Aviation Safety Board Act*, S.C. 1980-81-82-83, c. 165 (“*CASB Act*”), to implement the recommendations. On second reading of the bill, the federal Minister of Transport noted that many of the recommendations in the Dubin Report were adopted and that Parliament had never “gone against what Dubin had recommended” (*House of Commons Debates*, vol. XXIII, 1st Sess., 32nd Parl., June 28, 1983, at p. 26842). The *CASB Act* established an independent aviation safety board to investigate aviation accidents (see *House of Commons Debates*, at p. 26841). In setting down the procedure for investigations, Parliament accepted the Dubin Report’s recommendation to provide a statutory privilege for evidence obtained by Board investigators, including a privilege over CVRs (see Dubin Report, at pp. 258-61; *CASB Act*, ss. 26 to 28).

[52] Transportation safety was again significantly reformed in 1989 with the introduction of the *Canadian Transportation Accident Investigation and Safety Board Act*. The Act established a multimodal scheme for oversight of aviation, marine, railway and pipeline occurrences (s. 3). The Act did not significantly change the mechanics of the statutory privilege attached to CVRs and witness statements, although more modes of transportation are now covered by the legislative scheme.

[53] The privilege in the Act still largely accords with what was recommended by the Dubin Report. An on-board recording is privileged and may only be disclosed for use in litigation if, on request, a court or coroner concludes that the public interest favours disclosing the recording. If disclosure and production are ordered, appropriate restrictive conditions may be put in place (s. 28(6)(c)). Significantly, the use of the on-board recording is prohibited in certain legal settings, for example in proceedings against air traffic controllers (s. 28(7)).

[54] The use of evidence gathered by accident investigators has also been the subject of attention by international bodies charged with aviation safety. The international sources, while not decisive for the interpretation of s. 28(6), generally align with the recommendations in the Dubin Report. Section 16 of the Act requires the Board to “take all reasonable measures” to ensure that its investigation practices are consistent with international agreements and conventions to which Canada is a party. This underscores Parliament’s intention that the Act conform to Canada’s international obligations. Annex 13 of the *Convention on International Civil Aviation*, Can. T.S. 1944 No. 36 (“*Chicago Convention*”), ratified by Canada, provides that certain accident investigation records (including CVRs) should not be made available for purposes other than investigation unless, following an exercise of balancing interests, “their disclosure or use outweighs the likely adverse domestic and international impact such action may have on that or any future investigations” (International Civil Aviation Organization, *Annex 13 to the Convention on International Civil Aviation: Aircraft Accident and Incident Investigation* (12th ed. 2020), at p. 5-5, standard 5.12). Further, Appendix 2 of Annex 13 recognizes that disclosure of such records in proceedings or to the public “can have adverse consequences for persons or organizations involved in accidents and incidents, likely causing them or others to be reluctant to cooperate with accident investigation authorities in the future” (p. APP 2-1). Further, CVRs and other recordings “may be perceived as constituting an invasion of the privacy of operational personnel if disclosed or used for purposes other than those for which the recordings were made” (p. APP 2-2).

[55] These materials confirm the purposes of the statutory privilege. First, it protects pilot privacy by preventing access to the CVR except when requested by investigators. Second, it protects transportation safety by “encourag[ing] full, accurate, and objective communication between flight crew members” and by protecting potential witnesses who may otherwise decline to provide statements to the Board out of fear of repercussions (see Laporte Affidavit, A.R., at pp. 1871-72, paras. 83-85). Importantly, the privilege is not absolute. Parliament contemplated that it may be set aside when warranted in the interests of justice on a discretionary basis and

charged courts and coroners with making that decision. Even when on-board recordings are disclosed, they may be subject to restrictions as deemed appropriate by the court or coroner. And, as noted, their use is prohibited outright in some legal proceedings.

B. *Can the Board Make Submissions Without the Other Parties or the Public Present?*

[56] Before presenting arguments as to whether production was properly ordered in this case, the Board raises a preliminary issue about the nature of its entitlement to make submissions to the chambers judge. As the Board observes, Parliament has provided it with “heightened participatory rights” in proceedings where disclosure of an on-board recording is sought, including the right to receive notice of a proceeding (s. 28(6)(a) and (b); A.F., at para. 40). It recalls that even when it is not a party to proceedings, such as the class action in this case, s. 28(6)(b) requires that it be given a reasonable opportunity to make representations with respect to an on-board recording where a request for disclosure has been made before a court or coroner.

[57] Section 28(6)(b) provides that when a request for production and discovery of an on-board recording is made, the court or coroner shall “*in camera*, examine the on-board recording and give the Board a reasonable opportunity to make representations with respect thereto” (in French, s. 28(6) provides: “*examine celui-ci à huis clos et donne au Bureau la possibilité de présenter des observations à ce sujet*”). The Board argues that a contextual and purposive interpretation of s. 28(6)(b) confirms that Parliament’s intent in enacting this rule was to allow the Board to make submissions with respect to the CVR in the absence of the public and of the other parties. Both courts below are said to have misinterpreted the text as only permitting the Board to make submissions in open court, following a review of the CVR by the judge in private. The Board says that this does not take proper account of the purpose of the Act to advance transportation safety and fails to consider the object of the Board in service of that goal. Because the Board is the only actor who can meaningfully assist the court with the CVR’s contents, it should have the right to make submissions in private and in the absence of the other parties. By concluding otherwise, the courts below have left the Board in the “untenable position” of either undermining the privilege by making submissions in open court or refraining from making proper submissions on the contents altogether (A.F., at para. 34).

[58] The Board also says its reading of s. 28(6)(b) aligns with the plain meaning of the provision. Relying principally on the English version of the Act, the Board says the expression “*in camera*”, followed by a

comma, qualifies all the words of para. (b) of s. 28(6). Thus, “*in camera*” applies both to the examination of the CVR by the decision-maker and to the Board’s submissions. Moreover, the Board argues that, in this context, “*in camera*” means not just in the absence of the public but in the absence of the other parties. In this regard, the Board acknowledges that it has changed the position that it took before the courts below where it expressly sought to make “*ex parte*” submissions before the chambers judge (A.R., at pp. 1511 and 1518). It now says that *ex parte* means “without notice” and that the sense of “in the absence of the parties” is, in this context, properly conveyed by the term “*in camera*” in s. 28(6)(b) (A.F., at para. 42).

[59] For the respondents, the Board’s arguments are not supported by the text, purpose or context of s. 28(6)(b) or by its legislative history. Not only is the term “*ex parte*” not used, the words “*in camera*” (or “*à huis clos*” in the French text of s. 28(6)(b)) only refer to the judge listening to the recording at the step prior to the weighing of interests. The terms do not apply to the setting in which the Board makes its submissions. They argue that the Board is ostensibly seeking to make *ex parte* submissions, as it argued in the courts below, in the sense often given to that term, i.e. “without the other parties”. This is different than the meaning this Court gave to *in camera* in *C.B. v. The Queen*, [1981] 2 S.C.R. 480, at p. 493, quoting *Jowitt’s Dictionary of English Law* (2nd ed. 1977): “. . . when the judge either hears it in his private room, or causes the doors of the court to be closed and all persons, except those concerned in the case, to be excluded”.

[60] The respondents contend that this is confirmed by the plain meaning of the French text. There, the term “*à huis clos*” is used, which conforms to the ordinary meaning of “*in camera*” in the English text, and it is not followed by a comma. Insofar as there may be a discordance between the two linguistic texts, the French should be preferred as it is both unambiguous and reflects the shared meaning. The Attorney General of Canada adds that the legislative history of the provision does not support the right to make *in camera* and *ex parte* submissions. Airbus argues that it is a rule of natural justice that a party be heard and be able to hear the other side in open court. This principle may only be set aside when there is statutory authority or inherent jurisdiction to do so.

[61] I agree with the respondents that the reference to “*in camera*” and “*à huis clos*” in s. 28(6) only applies to a court or coroner’s examination of the recording and not to the Board’s reasonable opportunity to make submissions. Section 28(6)(b) is silent on the specifics of the manner and form by which the Board should make its submissions. Here, s. 28(6)(b) neither grants the Board the right to make submissions in the absence of

the public or the other parties nor does it preclude the court or coroner from asking for them should they be necessary to decide the issue.

[62] First, the Board’s argument that s. 28(6)(b) gives it a general entitlement to make submissions “in the absence of the other parties” cannot succeed (A.F., at para. 5). The request to make submissions in the absence of other parties is not in substance, as the Board argues, “a request to make submissions *in camera*” (A.F., at para. 45). It is, instead, a request to make submissions both *in camera* and effectively *ex parte*, in the sense of [TRANSLATION] “without a party” (A. Mayrand, *Dictionnaire de maximes et locutions latines utilisées en droit* (4th ed. 2007), at p. 168). An *in camera* hearing is one held in the absence of the public, either in the judge’s private chambers or in a courtroom (*C.B.*, at p. 493; Mayrand, at p. 214). This ordinary, legal meaning of an “*in camera*” hearing is, barring clear indication to the contrary, to be preferred. As Cromwell J. wrote in *R. v. D.L.W.*, 2016 SCC 22, [2016] 1 S.C.R. 402, “[w]hen Parliament uses a term with a legal meaning, it intends the term to be given that meaning” (para. 20). Proceedings held in the absence of other parties are not *in camera* proceedings and are often held in open court (see *Ruby v. Canada (Solicitor General)*, 2002 SCC 75, [2002] 4 S.C.R. 3, at paras. 25-26, speaking to *ex parte* proceedings taken “without notice to or argument by any adverse party”).

[63] The Board argues that it is not, strictly speaking, seeking an opportunity to make *ex parte* submissions because *ex parte* proceedings are conducted without notice to adverse parties. It says that it does not seek to proceed *without* notice to the other parties, but instead simply to make submissions in their absence, *with* notice.

[64] The term “*ex parte*” is often defined as a proceeding undertaken without notice to an adverse party (see, e.g., *Ruby*, at para. 25; *Society of Composers, Authors and Music Publishers of Canada v. 960122 Ontario Ltd.*, 2003 FCA 256, 26 C.P.R. (4th) 161, at para. 29; *Hover v. Metropolitan Life Insurance Co.*, 1999 ABCA 123, 91 Alta. L.R. (3d) 226, at para. 22; see also *Nova Scotia Civil Procedure Rules*, r. 23.14(1)(b) (the moving party on an *ex parte* motion must explain “why it is appropriate for the judge to grant the order *without notice* to another person”)). But even on this understanding of the term, I disagree with the Board that providing notice to adverse parties converts what would otherwise be a hearing held in the absence of the parties into one held *in camera*. Properly understood, “*in camera*” refers to the exclusion of the public from a proceeding, not the exclusion of parties. A proceeding in which an adverse party is aware of the hearing but is prevented from making submissions is not an *in camera* proceeding (see, e.g., *R. v. Basi*, 2009 SCC 52, [2009] 3 S.C.R. 389).

[65] Second, I agree with the respondents that the words “*in camera*” in the English text, like the equivalent expression “*à huis clos*” in the French text of s. 28(6), only refer to the judge’s examination of the recording and not to the Board’s ability to make submissions.

[66] The legislative history supports the respondents’ interpretation of s. 28(6)(b). The predecessor to the Act as it appeared in the 1985 Revised Statutes of Canada, the *Canadian Aviation Safety Board Act*, R.S.C. 1985, c. C-12, contained a provision similar to s. 28(6)(b), but stated slightly differently. In s. 34(1) of the *Canadian Aviation Safety Board Act*, the decision-maker was required to,

- (b) *in camera*, examine the cockpit voice recording, and
- (c) give the Board a reasonable opportunity to make representations with respect thereto

These requirements were separated into two paragraphs, thereby indicating that “*in camera*” in the English text only applied to the decision-maker’s examination of the recording and not to the Board’s representations. The English text of the present s. 28(6)(b) of the Act maintains the use of subparagraphs but combines paras. (b) and (c) of s. 34(1). The comma following “*in camera*” in the English text remains in place.

[67] It is true that there is a presumption that legislative changes are to be viewed as purposive. However, this presumption can be displaced where the change to the law was not so intended (see R. Sullivan, *The Construction of Statutes* (7th ed. 2022), at § 23.02; P.-A. Côté and M. Devinat, *Interprétation des lois* (5th ed. 2021), at paras. 1470 and 1767). This is, in my respectful view, just such a case. In a clause-by-clause overview of the present Act prepared when the bill was introduced, Transport Canada observed that s. 28(6) “allows a court or coroner in any proceedings to examine in camera an on-board recording” (*Bill C-2: Transportation Accident Investigation Board — Clause by Clause*, at p. 33, reproduced in the Attorney General of Canada’s book of authorities, at p. 76). Transport Canada noted that the new bill contained the “[s]ame privileged conditions for information as in [the] CASB [Act]” (*TAIB Act — C-2: Overview of Bill*, reproduced in the Attorney General of Canada’s book of authorities, at p. 68). I agree with the Attorney General of Canada that the history of s. 28(6) suggests that the amendments did not change the underlying meaning of the section from the law as it was stated in s. 34(1) of the Revised Statutes version it replaced. Parliament did not seek to extend to the Board an opportunity to make submissions in the absence of the other parties when it made largely formal changes to s. 28(6). Rather, the legislative history demonstrates Parliament’s continuous

intention that the words “*in camera*” in the English version of the text apply only to the court or coroner’s review of the on-board recording.

[68] I also reject the Board’s argument that s. 28(6)(b) is ambiguous based on a discordance between the English and French texts. The two texts should be read together, as befits the interpretation of federal statutes given that they are equally authoritative expressions of Parliamentary intention (see, e.g., *Reference re Manitoba Language Rights*, [1985] 1 S.C.R. 721; M. Doucet, “Le bilinguisme législatif”, in M. Bastarache and M. Doucet, eds., *Les droits linguistiques au Canada* (3rd ed. 2013), 179, at pp. 224-25). While Parliament presented the French text in a single subsection rather than in separate paragraphs, neither text uses terminology that would suggest that the Board’s submissions should be made in the absence of the other parties. It is clear that the words “*in camera*” and “*à huis clos*” speak to the decision-maker’s examination of the on-board recording in the absence of the public and not the Board’s opportunity to make submissions in the absence of the other parties. I disagree with the view that the presence of a comma following the term “*in camera*” in the English text, which is absent from the French, creates a consequential discordance of meaning. To my mind, both “*in camera*” and “*à huis clos*” refer to the same idea. The comma in the English text does not suggest that the English text, unlike the French, is “reasonably capable” of meaning something different, namely that the Board’s submissions are to be made in the absence of the other parties (see *R. v. Daoust*, 2004 SCC 6, [2004] 1 S.C.R. 217, at para. 28, quoting *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559, at para. 29).

[69] The Board is right that the comma in the English text of s. 28(6)(b) cannot be ignored in the interpretation of the Act. Punctuation is “an integral part of the legislative text, to be taken into account in every case” (Sullivan, at § 14.07). However, while comma placement may sometimes assist in discerning the scope of qualifying phrases, Professor Ruth Sullivan observes that Canadian courts are “unwilling to place much reliance on [punctuation] as an aid to interpretation” due to its “inherent unreliability”. She writes that “[m]any of the conventions governing punctuation, especially comma placement, are fluid and unstable.” Professor Sullivan recalls the comments of L’Heureux-Dubé J. in *Laurentide Motels Ltd. v. Beauport (City)*, [1989] 1 S.C.R. 705, at p. 755: “A debate on punctuation cannot take the place of an interpretation based on the legislative context and ordinary meaning of words. The reliability of punctuation as a tool of interpretation has indeed been questioned . . .” (§ 14.07).

[70] Professors Pierre-André Côté and Mathieu Devinat are of a comparable view. They write that punctuation is part of a statute and say that commas can serve in interpretation (para. 260). But like Professor Sullivan, they note the [TRANSLATION] “unreliability” of punctuation as an instrument of communication and cite examples in which courts rely on other indicia of statutory meaning “to reject arguments based on punctuation”, including what they call the “misplaced comma” (para. 262).

[71] The comma in the English text of s. 28(6)(b) cannot therefore be ignored, but neither can the absence of its grammatical equivalent in the French text. The legislative history of the English text of s. 28(6)(b), canvassed above, suggests that this punctuation may well be, as Professors Côté and Devinat say, a [TRANSLATION] “misplaced comma”. Moreover whatever import, in a literal sense, one might be inclined to give to the comma, it does not change the sense of *in camera* from “1. privately; not in public. 2. Law in a judge’s private room” (*Canadian Oxford Dictionary* (1998), at p. 204) to “without notice to or in the absence of the other parties”, which is confirmed by its pairing with “à huis clos”. The French phrase “à huis clos” means [TRANSLATION] “[1.] with all doors closed. [2.] Law. Without the public being admitted” (*Le Grand Robert de la langue française* (2nd ed. 2001), vol. 3, at p. 1935). Paradoxically, the Board seems to ask us to read the comma literally, so that it governs the interpretation of s. 28(6)(b), but, at the same time, read the consecrated expression “*in camera*” in a non-literal sense.

[72] Finally on this point, even if the comma following “*in camera*” created a true disparity between the French and English texts, their shared meaning aligns with the unambiguous French text here (see, e.g., *R. v. Mac*, 2002 SCC 24, [2002] 1 S.C.R. 856, at para. 6; *Daoust*, at paras. 29 and 44). Where, as here, one linguistic version is ambiguous and the other is unequivocal, the shared meaning that should be preferred, *a priori*, is the meaning of the version that is free from ambiguity (Côté and Devinat, at para. 1130). Moreover, the French text would be preferred on the basis that it has a narrower meaning (*Medovarski v. Canada (Minister of Citizenship and Immigration)*, 2005 SCC 51, [2005] 2 S.C.R. 539, at para. 25; Côté and Devinat, at para. 1131).

[73] The phrase “à huis clos” follows “*examine celui-ci*” and comes before the balance of the sentence, which speaks to the Board’s opportunity to make submissions, separated by the word “*et*”. The French text thus clearly indicates that the court or coroner examines the recording in private *and* the court or coroner then provides the opportunity to make submissions. The French text plainly and unambiguously indicates that it is the

court or the coroner — not the parties or the Board — who is authorized to listen to the recording *in camera*. As counsel for Airbus submitted, to respect the presumptive confidentiality of the recording at this stage, the decision-maker must listen to it in the absence of the parties (s. 28(2); transcript, at p. 80). Thereafter, submissions, including those of the Board, are made in open court (C.A. reasons, at para. 42). In short, insofar as the comma in the English text of s. 28(6)(b) creates an ambiguity, it would be resolved by the plainer and narrower meaning of the French text (see, e.g., *R. v. S.A.C.*, 2008 SCC 47, [2008] 2 S.C.R. 675, at para. 15).

[74] Isolating the shared meaning is, of course, only an indication of legislative intent. In some circumstances, that indication might be revealed to be imperfect by other valid methods of interpretation (see, e.g., *Doré v. Verdun (City)*, [1997] 2 S.C.R. 862, at para. 25; *Côté and Devinat*, at para. 1141). The Board argues here that whatever the shared meaning, the purpose of the Act is compatible with the English version which, in its view, grounds its entitlement to make submissions in the absence of the other parties. I agree with the Board that one of the purposes of the Act is to advance transportation safety and that the Board has a duty, to that end, to defend the privilege. This justifies, as I have noted, a heightened role for the Board in litigation such as the class action here where it would otherwise be a stranger to the dispute. But while the Board's statutory mission justifies giving it a reasonable opportunity to make submissions, it does not give it the extraordinary right to make those submissions in the absence of the public and of the other parties. To be sure, the Board has a duty to protect the privilege over the CVR. But, it should be recalled, Parliament did not intend for the CVR to be protected by an absolute privilege, but rather by a discretionary one. It makes sense to interpret the rule on the Board's entitlement to make submissions in light of the balance that Parliament sought to strike between the public interests at stake. And, of course, the Board is not deprived of the opportunity to make submissions *inter partes*, in which setting it can make representations concerning pilot privacy and public safety. As I note below, the Board would also be able to argue that the court or coroner needs its assistance, in the form of private submissions, to understand the CVR.

[75] While s. 28(6)(b) does not therefore provide the Board with a general entitlement to make submissions in the absence of the public and the other parties, can the decision-maker faced with a disclosure request nevertheless invite such submissions if they would be useful? The purpose and scheme of the Act suggest that, notwithstanding the absence of a general rule allowing for such submissions, there must be a way for the Board to make representations about the content of a recording without defeating the privilege entirely.

Parliament chose to give the Board heightened participatory rights when production of an on-board recording is requested (s. 28(6)(a) and (b)). It would be absurd for Parliament to create such rights but also prevent the court or coroner tasked with reviewing the recording from doing so without defeating the privilege. Thus, the answer to the question of whether a decision-maker can request, where it perceives the necessity, submissions from the Board in the absence of the public and of the parties, notwithstanding the statute's silence on the issue, must be yes.

[76] To facilitate the proper adjudication of the request for production and discovery of the presumptively privileged recording, the court or coroner must, as a first step, examine the recording in private (s. 28(6)(b)). The Board must also be afforded a "reasonable opportunity" to make submissions, in the presence of the other parties who have no access to the on-board recording, in relation to the privilege. When the Board is making submissions, the privilege established in s. 28(2) still governs and the Board still has a statutory duty to safeguard the contents of the CVR.

[77] In particular, as the Board notes, there may be instances in which the court or coroner does not understand the technical contents of the recording that it has examined *in camera*. The Board will already have reviewed the recording and, of course, has the expertise to elucidate its technical aspect. There may be other narrow instances in which, after exploring alternatives, the Board shows that advertent to the contents of the recording is both necessary and unavoidable for its submissions on production.

[78] In such circumstances, the court or coroner must have an ability to seek assistance from the Board without defeating the privilege. In other words, the decision-maker must have an ability to ask for submissions from the technically expert Board, in the absence of other parties and the public, "before the question of . . . disclosure is decided [as that] might well render the whole process utterly useless and frustrate the end result of the proceedings" (*Hunter v. Canada (Consumer and Corporate Affairs)*, [1991] 3 F.C. 186 (C.A.), at p. 202). Indeed, it would be absurd to read the statute in a way that precludes a court or coroner from receiving the Board's submissions with other parties and the public excluded if such submissions cannot otherwise be made without defeating the privilege. To read the [Act](#) in such a way as to preclude the very work that [s. 28](#) asks the court to undertake would have the effect of undermining Parliament's plain intent at this stage of the proceedings.

[79] Despite the statute's silence on this issue, the authority to receive submissions from the Board in the absence of other parties and the public may be "practically necessary" to accomplish the goal of the section (see *ATCO Gas and Pipelines Ltd. v. Alberta (Energy and Utilities Board)*, 2006 SCC 4, [2006] 1 S.C.R. 140, at para. 51; Sullivan, at ch. 12). As a result, the authority to receive submissions from the Board in the absence of the public and of the other parties, including on technical matters, must be necessarily implicit in the statutory scheme. It is not an entitlement of the Board, but the Act does not preclude the decision-maker from calling for or obtaining such assistance, when otherwise unavoidable. The Act does not, and logically cannot, preclude the decision-maker from seeking this assistance where it is necessary to decide on the motion for disclosure. In this case, it suffices to say that the Supreme Court of Nova Scotia had the discretion to hear additional submissions from the Board on the contents of the CVR privately and in the absence of other parties.

[80] To be clear, the general rule is that the Board should make the submissions contemplated in s. 28(6)(b) in open court and in the presence of other parties. Exceptionally, should the decision-maker determine that assistance from the Board is needed in order to decide on the motion for disclosure, the decision-maker may permit or ask the Board to make further submissions in the absence of the public, in the absence of other parties, or both, so that the recording can be properly reviewed without defeating the privilege. Should the Board seek to make such submissions, the request may be allowed, if the decision-maker concludes that excluding other parties and restricting court openness is necessary and unavoidable in order to protect the privilege. Such submissions should be done in a manner that would be fair to all parties, by providing them with notice.

[81] In this case, the chambers judge concluded that he was not prepared to receive submissions from the Board in the absence of the other parties. He noted that he "had no difficulty in understanding the privileged materials and how they relate to the pleadings", including the determination of liability in the class action (A.R., at p. 8). He decided that, having regard to the evidence and submissions already received, as well as the questions that must be answered to determine the motion, it was not appropriate or necessary to receive such submissions (A.R., at pp. 8-9).

[82] Before our Court, the Board argued that the chambers judge erred in refusing to hear these further submissions. The Board said that it could have provided the chambers judge with a chart containing alternative non-privileged sources for the privileged information on the CVR. This, it said, would have assisted the judge in determining whether the information on the CVR could be obtained from non-privileged sources.

[83] I am not satisfied that it was necessary for the Board to make such submissions in this case. The chambers judge found that the parties could not obtain information from non-privileged sources. This finding was made on the strength of a chart provided by one of the defendants, which detailed gaps in the discovery evidence of the Captain and First Officer related to details of the flight that they could not remember and compared those gaps with excerpts from the Board's report. The information detailed in the report, which was gathered from many sources, including the CVR, suggested that some of the gaps could be filled using data contained on the CVR.

[84] The Board was more than capable of refuting this chart by showing that all the information contained in it could have been obtained from non-privileged sources, without disclosing the contents of the CVR or defeating the statutory privilege. Indeed, that is exactly what the Board attempted to do. The chambers judge found that, although the Board had shown that some of the evidentiary gaps could be filled with other evidence, the CVR was the only way to obtain important information to fill gaps in the flight crew's testimony (para. 48). The Board has not provided any basis to conclude that this finding was in error.

[85] As a result, I agree with Bryson J.A. that the chambers judge made no reviewable error in not allowing the Board to make the submissions it requested. This was a discretionary decision that is entitled to deference.

C. *The Test for Production Under Section 28(6)(c)*

[86] Following the recommendation of the Dubin Report, Parliament enacted a balancing test for the production of on-board recordings. The privilege would be discretionary rather than absolute, similar to some, but not all, statutory privileges (Dubin Report, at pp. 258-59). As noted, the approach adopted by Parliament aligns with the *Chicago Convention*, which similarly proposes a balancing test for disclosure of accident records, like CVRs, for use outside of accident investigation (Annex 13, at pp. 5-5 and 5-6, standard 5.12). Under s. 28(6)(c), an on-board recording must only be disclosed for production and discovery if, upon request, a court or coroner is satisfied that the "public interest in the proper administration of justice outweighs in importance the privilege attached to the on-board recording by virtue of this section". Notably, the public interest informs both sides of the balance: the public has an interest in the proper administration of justice as it does in ensuring transportation safety.

[87] The statutory privilege in this case, like with all privileges, “block[s] the flow of potentially relevant and even highly reliable and important information into the truth-finding mechanism of the trial” (S. C. Hill, D. M. Tanovich and L. P. Strezos, *McWilliams’ Canadian Criminal Evidence* (5th ed. (loose-leaf)), at § 14:1). A statutory privilege thus can exclude relevant evidence, preferring other values or interests designated by the legislature as superior. The author Fournier has observed that [TRANSLATION] “these values or interests protected by privileges are generally external to the objectives of the judicial system . . . [A] privilege under the law of evidence represents a limit on the search for truth by courts or parties” (pp. 471 and 474). In the case of the privilege over the CVR, s. 28 of the Act recognizes that the Parliamentary goals of safeguarding pilot privacy and advancing transportation safety can justify, in some circumstances, the non-disclosure of the on-board recording notwithstanding its potential relevance to the search for truth at trial. The balancing model used by Parliament in s. 28(6)(c) directs that non-disclosure applies by default; it falls to the party seeking production to explain why the privilege should not apply, as an exception to the default rule (see, e.g., *R. v. Gruenke*, [1991] 3 S.C.R. 263, at p. 286). To that extent, Parliament has indicated a preference for non-disclosure insofar as the CVR is presumptively privileged. That presumption can, however, be rebutted by the party seeking disclosure. The test for production under s. 28(6)(c) invites the court or coroner to undertake a discretionary balancing of the interests at stake, in a manner similar to the test used for case-by-case privileges (*Lizotte v. Aviva Insurance Company of Canada*, 2016 SCC 52, [2016] 2 S.C.R. 521, at para. 32; *R. v. National Post*, 2010 SCC 16, [2010] 1 S.C.R. 477, at paras. 53 and 58). Unlike some other statutory privileges, the privilege in s. 28(6)(c) is thus a discretionary one rather than an absolute privilege, with or without exceptions (see, e.g., *Babcock v. Canada (Attorney General)*, 2002 SCC 57, [2002] 3 S.C.R. 3, at paras. 17 and 23).

[88] As a point of comparison, it is useful to refer to the statutory privilege bearing on journalistic sources set out in s. 39.1 of the Canada Evidence Act, R.S.C. 1985, c. C-5 (“CEA”), which is similar in substance to s. 28 of the Act. Before the enactment of s. 39.1 of the CEA, the confidentiality of journalistic sources was protected on a case-by-case basis: it was a journalist’s burden to show that the disclosure of information might reveal the identity of a source (*National Post*, at paras. 50-69; *Globe and Mail v. Canada (Attorney General)*, 2010 SCC 41, [2010] 2 S.C.R. 592, at para. 22). The legislative scheme in s. 39.1 enhanced protection for journalistic sources by shifting the burden of proof: once the court is satisfied that the definitions of “journalist” and “journalistic source” are met, non-disclosure is the starting point. It is up to the party seeking to obtain the information to rebut this presumption by demonstrating that, following a balancing exercise, the

public interest in the administration of justice outweighs the public interest in protecting the source (see CEA, s. 39.1(7); *Denis v. Côté*, 2019 SCC 44, [2019] 3 S.C.R. 482, at paras. 33-34; Fournier, at p. 490). Section 28 of the Act invites a comparable analysis here. As noted in the Dubin Report, prior to the enactment of the Act, a privilege over CVRs would have been asserted either under Crown privilege or on a case-by-case basis (pp. 231-32). In either situation, the burden was on the Crown or the party claiming privilege. Like s. 39.1 of the CEA, s. 28(6) reverses the presumption: the burden of proof falls to the party seeking disclosure since, under the Act, the privilege presumptively applies until the party seeking disclosure has shown that the public interest in protecting the CVR from disclosure has been displaced by the public interest in the administration of justice. In this sense, disclosure of a recording is the exception to the rule.

[89] The Board advances two types of arguments in its submissions on the application of s. 28(6)(c) to this case. First, it says that the courts below “distorted” the test for balancing required under the section. The inevitable result of the test used by the chambers judge, it says, is to order disclosure whenever relevance is made out. The chambers judge thereby erred in law by failing to apply the correct test for production. This represented a failure to account for Parliament’s intent when it enacted the privilege, specifically a failure to identify properly Parliament’s goals in establishing the privilege. The chambers judge erred, it says, by following the reasoning of *Air France*, which similarly failed to give weight to the purpose behind the statutory privilege and instead gave too much importance to the reliability of the CVR and its relevance to the class action. Drawing on *Hyde Park*, it says that the proper test is whether there is a possibility of a miscarriage of justice. Second, the Board says that the judge also failed to attribute the proper weight to Parliament’s purpose, even if the purpose was correctly identified, thereby erring in fact. The Board is supported by the ACPA, which argues that the courts below gave too little weight to the privacy interests that the privilege is meant to protect.

[90] The other respondents argue that the chambers judge applied the proper test for production. Airbus contends that the *Air France* test is consistent with the text of the statute and the Dubin Report recommendations. It also notes that the chambers judge considered all of the factors raised by the Board, including privacy and safety. While the Board may disagree with the weight he assigned to different factors, his findings and exercise of discretion were well supported by the evidence and deserve deference on appeal.

[91] I turn now to the test for production, the purposes behind the statutory privilege and the balancing undertaken by the chambers judge under s. 28(6)(c).

(1) The Public Interest in the Proper Administration of Justice

[92] What Parliament has designated as the public interest in the proper administration of justice concerns a party's right to a fair trial and to present all relevant evidence that is necessary to resolve the dispute (see Dubin Report, at p. 234; International Civil Aviation Organization, *Manual on Protection of Safety Information, Part I — Protection of Accident and Incident Investigation Records*, Doc. 10053 (1st ed. 2016), s. 3.3.37.1; *Hyde Park*, at para. 74; *Air France*, at paras. 121 and 138). At its core, this relates to the question of whether withholding evidence would interfere with the fact-finding process to such an extent that it would undermine a party's right to a fair trial and, consequently, public confidence in the administration of justice. But relevancy and trustworthiness are not absolute values; the very existence of the privilege suggests that Parliament is prepared to subordinate the truth-finding function of a civil trial to what it sees as potentially higher values.

[93] It follows, then, that in assessing the public interest in the proper administration of justice, a decision-maker must consider the CVR's relevance, its probative value, and its necessity to the proceedings, including whether the evidence is available from other, non-privileged sources. The more important the contents of the CVR are to establishing or defending an action, the greater the risk that withholding the CVR would threaten trial fairness. If the CVR contains evidence that is relevant and probative but available from other sources, withholding production generally will not interfere with the fact-finding process or put the administration of justice at risk. The burden is on the moving party to establish that the CVR may contain relevant, probative but also necessary evidence, in that it is not obtainable elsewhere. Although identifying the necessity component in particular may be challenging without having access to the CVR, the moving party in this instance correctly relied on the Board's report, which included multiple references to data contained on the CVR, to demonstrate its importance to resolving the underlying dispute.

[94] The Board argues that the test in *Hyde Park*, rather than *Air France*, ought to be followed because *Hyde Park* better reflects the balancing required under s. 28(6)(c). It argues that the balancing done in *Air France*, relied upon by the courts below, "departs from the high threshold for setting aside privilege . . . and debilitates the very privilege enacted by Parliament" (A.F., at para. 55). It says that *Air France* essentially imposes a simple relevance test to outweigh the privilege in the name of the public interest in the administration of justice, which is too low a bar for disclosure.

[95] In response, Airbus argues that the standards proposed by the Board — either a “possibility of a miscarriage of justice” or insufficient evidence to make out a case — do not reflect the correct test, which calls for a weighing exercise. Airbus recalls that the statute does not fix a single factor. Indeed, it requires that a decision-maker exercise their discretion to balance the public interest in the administration of justice against the privilege attached to the recording.

[96] In my view, the Board’s characterizations of both *Air France* and *Hyde Park* lack nuance. Contrary to the Board’s assertion, *Air France* did not reduce the interest in the administration of justice to a consideration of mere relevance. Strathy J. found that the CVR in *Air France* captured communications that were “central to liability” and that the evidence available from the flight crew was not without concern (paras. 116 and 119-20).

[97] Properly understood, the *Hyde Park* test does not stand in substantial opposition to *Air France*. In *Hyde Park*, Gauthier J. (as she then was) identified a non-exhaustive list of four factors that would be relevant to assessing whether to set aside the statutory privilege (para. 74). She noted, quite rightly, that the privilege should not be set aside too readily:

As it is the case in respect of other statutory privileges which are subject to a similar balancing exercise, the Court must give appropriate weight to the privilege and avoid routinely allowing disclosure simply because of the probative value normally attached to audio recordings of events. In all cases, the Court must consider among other things:

- (i) the nature and subject-matter of the litigation;
- (ii) the nature and probative value of the evidence in the particular case and how necessary this evidence is for the proper determination of a core issue before the Court;
- (iii) whether there are other ways of getting this information before the Court;
- (iv) the possibility of a miscarriage of justice. [Emphasis added.]

[98] Gauthier J. was right that disclosure should not be routinely authorized simply because audio recordings offer reliable or trustworthy evidence. She was also right to highlight, in items (ii), (iii), and (iv) of her list, that necessity is an essential component of the analysis. While some criticism has been visited upon the “possibility of a miscarriage of justice” factor in the courts below and in *Air France*, in my view, these comments unfairly ignore the inherently prospective “possibility” qualifier. In making this statement, Gauthier J. was not drawing upon the purely criminal law idea of a miscarriage of justice. Instead, I understand her to be

saying that the risk of judicial error increases when highly relevant, probative and necessary evidence related to a key issue is withheld from the fact-finding process. Where evidence is crucial to a central issue in the case, its exclusion on any basis may threaten trial fairness. The more central the evidence, the higher the risk of distorting fact-finding to the point of civil justice being improperly thwarted. Similarly, on the facts of *Air France*, Strathy J. concluded that there was a “real risk” that without disclosure, the parties would be deprived of evidence related to the central issue in the case (para. 138). In practice, the factors and balancing articulated in *Air France* and *Hyde Park* are not as discordant as the Board suggests.

[99] In *Air France*, Strathy J. also considered the nature of the proceeding, as did the chambers judge here (N.S.S.C. reasons, at paras. 51-52 and 66; *Air France*, at para. 127). They both concluded that the public interest in the adjudication of class actions, given their potential for broad-based behaviour modification, as well as the high monetary value of the claims, pulled in favour of production. While the concern for the fair adjudication of a class action is legitimate, I would respectfully resist the view that it is relevant to balancing here. The public interest in the administration of justice and a fair trial is not materially different in a class action in a manner that affects weighing under s. 28(6)(c). Achieving a “fair and efficient resolution” to a dispute is a goal of all civil proceedings, and there is a public interest in the fair and efficient resolution of all disputes. Isolating class actions as having heightened significance in the weighing exercise could inappropriately upset the balancing process and devalue the importance Parliament has attributed to the privilege.

[100] But the chambers judge did not treat this factor as decisive here, nor did Strathy J. in *Air France*. Strathy J. described it as “another aspect” distinct from that associated with trial fairness (at para. 127), and the chambers judge drew a similar distinction (para. 52). Moreover, in *Air France*, as in this case, a key consideration was the risk to trial fairness that arises when evidence that is necessary to the resolution of the dispute is blocked by the privilege. Notwithstanding his comments on the importance of behaviour modification by class action, the chambers judge recognized the necessity of the CVR for a fair trial as a matter of negligence law. As he observed, the communication between the flight officers, particularly just before the descent, “is central to liability” (para. 50). His reasoning on the causation issue would not have changed had the representative plaintiffs sought damages for their losses on an individual basis rather than as representatives of a class, nor would this issue have been any less central to liability. The public interest in trial fairness on its own, in both *Air France* and this case, justified the decision to order disclosure as a necessity to resolve the liability issues at trial. What mattered was the fact that the CVR was necessary to the fair prosecution of the civil action,

regardless of whether it was pursued on a class basis. The chambers judge's comments on class actions have not been shown to have had a material effect on the ultimate decision to order production and discovery and thus do not amount to a fatal error.

[101] I note, without commenting further, that the nature of the proceeding may be relevant to the final balancing, in that criminal or disciplinary proceedings may engage different interests (see, e.g., Dubin Report, at pp. 234-35, which stated that the considerations that apply to criminal and disciplinary cases may differ from civil proceedings). There are also additional procedural protections that limit the use of CVR evidence, including a firm prohibition on the use of CVRs in disciplinary proceedings against pilots or proceedings related to the competency of pilots, in addition to other legal proceedings involving, in particular, air traffic controllers (s. 28(7)). The chambers judge did not lose sight of this, recalling the prohibition in s. 28(7) explicitly in making his order (para. 69).

(2) The Privilege Attached to the On-Board Recording by Virtue of Section 28

[102] The court or coroner must decide if, in the circumstances of the case, the public interest in the proper administration of justice outweighs in importance the privilege attached to the recording by virtue of s. 28. The Board argues that there are two purposes relevant to the importance, for Parliament, of the statutory privilege: first, to protect pilot privacy and second, to protect safety, by reducing adverse impacts on disclosure in future investigations. Privacy and safety were recognized in the Dubin Report and the International Civil Aviation Organization's recommendations, and I accept that these two principles animate the statutory privilege.

[103] Privacy was a primary concern of the Dubin Report. It was a key factor behind the recommendation to provide privilege over on-board recordings, as the Dubin Report recognized the unique invasion of privacy that a CVR can represent to the flight crew in particular (pp. 233-37). I generally agree with Strathy J.'s careful analysis of privacy in *Air France*. First, purely personal conversations between pilots immaterial to resolving the civil dispute ought not to be disclosed, and judicial screening should prevent the disclosure of those conversations (*Air France*, at paras. 131-32). Sterile cockpit rules, which prevent discussion of personal matters in the cockpit when the plane is below an altitude of 10,000 feet, will also limit the disclosure of purely personal conversations (see N.S.S.C. reasons, at para. 43).

[104] Pilots' general privacy interest must be considered when determining whether to produce a CVR. Strathy J. concluded, in considering general privacy interests, that the publication of a Board report that discusses the content of the CVR can be a more serious invasion of a pilot's privacy than the disclosure of the CVR to parties to litigation (*Air France*, at para. 133).

[105] Drawing on a broad range of sources, Strathy J. did recognize that the statutory privilege served an important purpose in supporting pilot privacy and specifically said so at various points in his reasons (see, e.g., paras. 71, 112-13 and 130-31). His comment that the concern for pilots' general interest in privacy is "largely illusory" in para. 133, when read in context, is neither a dismissal nor an erroneous discounting of privacy as a purpose protected by s. 28 of the Act. Instead, Strathy J. merely observed that the concern for privacy would already be met because disclosure of purely personal communications, or those made "in agony" prior to a crash, would not be in the public interest. He observed, quite rightly, that "judicial vetting of the CVR", as well as sterile cockpit rules, would bar non-operational communications "in any event" (para. 131). Otherwise, he noted, the Board would have already disclosed the substance of communications in many instances when it published its report. In that sense, the pilots' concern for their privacy was, for Strathy J., one that could properly be accounted for in the balancing regime established in s. 28(6)(c). Importantly, too, Strathy J. rightly recognized that the privacy interests in *Air France* were diminished, as the airline and the pilots did not oppose disclosure on the facts of that case. Finally, Strathy J. was not wrong to say that pilots are unlikely to prize personal privacy over the safety of their passengers. The decision in *Air France* did not, in my view, unfairly discount pilot privacy as a legitimate purpose for which the privilege was enacted.

[106] On the second purpose of the privilege, the Dubin Report recognized investigators' concerns that disclosure of investigative materials could have negative consequences for witness cooperation in future cases (see pp. 147 and 231) and that disclosure of CVRs to the public could mean the "cause of aviation safety would be prejudiced" (p. 235). The International Civil Aviation Organization's *Manual on Protection of Safety Information* states that when records have been collected for the purpose of conducting an investigation and advancing safety, their disclosure or use for other reasons may "cause persons or organizations to refuse to provide information or be reluctant to cooperate with accident investigation authorities" (s. 3.1.2). Similarly, the affidavit from the Board's representative, Mr. Laporte, speaks to the importance of the privilege in ensuring that the flight crew is able to communicate freely in the cockpit, despite the continuous recording of their conversations.

[107] The Board takes this a step further. It argues that the safety implications of disclosure must be taken into account because if disclosure is too routine, pilots may intentionally erase CVR data to make it unavailable to investigators. Mr. Laporte noted that, in recent years, investigators have observed “a number” of cases where pilots may have erased or overwritten CVR data, although it is unclear whether this was done intentionally (A.R., at p. 1874, para. 88). The Board points to the experience of New Zealand, where flight crews may have disabled CVRs in response to a court ruling.

[108] This argument should be rejected. I agree with the Dubin Report’s conclusion that it would be “undesirable to create a privilege on the ground that those seeking it would otherwise not obey the law” (p. 234). The risk of intentional erasing or sabotage of a CVR cannot legitimately support the statutory privilege. This supposed justification runs counter to the Act’s goal of improving transportation safety and is predicated on the implausible and undocumented premise that professional pilots would wilfully put aircraft at risk. Strathy J. correctly dismissed the concern of intentional sabotage as incapable of supporting the privilege (*Air France*, at para. 135).

[109] However, safety considerations exist beyond the presence of a risk of sabotage of recording devices. I recognize that there is merit to the pilots’ argument that they may speak less freely if they sense that on-board recordings will be more routinely disclosed. This is what some have referred to as a “chilling effect” associated with disclosure. But this consideration should not be overemphasized. In another context, this Court noted that it is “very easy to exaggerate [the] importance” of the risk to candour that disclosure may pose (*Carey v. Ontario*, [1986] 2 S.C.R. 637, at p. 657). In that case, La Forest J. observed that, while communications may be better conducted in private, there is doubt that “the candidness of confidential communications would be measurably affected by the off-chance that some communication might be required to be produced for the purposes of litigation” (p. 657). I note, too, that “assurance that disclosure will be ordered only where clearly necessary and then only to the extent necessary” may also assist in ensuring that pilots feel less inhibited from speaking freely in the cockpit (see *M. (A.) v. Ryan*, [1997] 1 S.C.R. 157, at para. 35, in the context of a case-by-case privilege). I do not take Strathy J.’s statements at paras. 135-36, relied upon by the chambers judge, as rejecting aviation safety and its relevance as a factor in the analysis. Instead, Strathy J. was properly relying upon the Dubin Report when he concluded that there was no evidentiary basis for the risk of sabotage of the CVR (paras. 135-36). The chambers judge’s reliance on these portions of *Air France* was not an error. When his reasons are read as a whole, it is plain that the chambers judge recognized the importance of aviation safety

to the statutory privilege and the importance of considering the adverse impact that the CVR's release might have on aviation safety (see, e.g., *Air France*, at paras. 80, 129 and 138(4)).

(3) Balancing the Interests

[110] As stated in the Dubin Report, if CVRs were unobtainable and absolutely privileged, an injured or deceased passenger could be “deprived of the only evidence available with respect to the cause of the accident”, which would “decide [the matter], once and for all, against the public interest in the administration of justice” (p. 234). Although the statutory privilege protects important interests and advances transportation safety, s. 28(6) (c) recognizes that, in some circumstances, this privilege must give way in order to ensure that courts can make findings of fact and deliver justice for litigants. Indeed, by setting up a balancing mechanism, Parliament signalled its intention that, sometimes, the truth-seeking function of civil proceedings will take precedence over the privilege. Parliament could have chosen an absolute privilege, but it preferred a discretionary one.

[111] The ultimate balancing requires the court or coroner to identify the relevant factors and decide whether, in light of all of the circumstances, the public interest in the administration of justice commands production and discovery of the CVR, notwithstanding the weight accorded to the privilege by Parliament. When measuring the public interest in the administration of justice, the decision-maker should consider the recording's relevance, probative value and necessity to resolving the issues in dispute as factors that point to the importance of the recording to a fair trial. On the privilege side of the scale, the decision-maker should consider the effect of release on pilot privacy and on transportation safety, as fostered by free communications in the cockpit. *Air France* and *Hyde Park* correctly identified most of these factors as relevant to the balancing exercise.

[112] All parties recognize that the test for production is not a simple relevance test. Care should be taken to not order production merely because the CVR would be helpful and provide complete evidence, something that Gauthier J. in *Hyde Park* rightly brought to light (para. 74). As the ACPA notes, testimony from the pilots will often have gaps. That is the nature of memory and live testimony. A court must consider not only the existence or number of gaps in the evidence but also the significance of the gaps in relation to the facts and legal issues in dispute. Other ways of filling gaps, including by refreshing pilots' memory using the Board's report or through witness statements, should also be considered (see Laporte Affidavit, A.R., at p. 1877, para. 99). A

party seeking to set aside the statutory privilege must undertake reasonable measures to obtain the necessary information from other non-privileged sources. A similar idea is expressed in the journalistic source privilege: disclosure is only possible where the “information or document cannot be produced in evidence by any other reasonable means” (*CEA, s. 39.1(7)(a)*; see also *National Post*, at para. 66, on the “alternate sources” principle).

[113] As provided in s. 28(6)(c), the nature and scope of a production order can also include conditions on disclosure that limit the adverse effects on the policy pursued by Parliament in establishing the privilege. The decision-maker may impose the restrictions or conditions it deems appropriate to preserve pilot privacy and to inhibit free communications in the cockpit as little as possible. For example, a decision-maker may choose to redact irrelevant material recorded on a CVR that could trench on privacy if disclosed, limit the persons to whom disclosure is made, require undertakings from those with access to the recording, or require the recording’s destruction once the legal proceedings have ended, as the chambers judge did in this case (Duncan J.’s order, December 18, 2019, reproduced in A.R., at pp. 25-28). Other restrictions may also be tailored to the circumstances of the case to protect the interests of pilots and transportation safety.

[114] As the decision to order or refuse production is a discretionary one, the chambers judge’s conclusion is entitled to deference, insofar as the proper test and the relevant factors to be weighed were identified and applied in an appropriate manner. Importantly, it is not enough to state the test and the conclusion without undertaking a fact-driven weighing exercise, as contemplated by the discretionary mechanism in s. 28(6)(c). When the chambers judge’s reasons are read as a whole, it is evident that he applied the correct test by properly identifying the two competing interests and how they are relevant on the facts of this case, and weighing the competing interests against each other. Importantly, he considered all of the evidence supporting the statutory privilege, including affidavit evidence provided by the Board and the ACPA.

[115] The Board argues that the chambers judge placed too much weight on relevance and reliability and did not consider whether there were other ways that the parties could obtain the evidence. I disagree. The chambers judge’s analysis centred on the necessity of the recording to the resolution of the dispute. In coming to the view that disclosure was necessary to fill the evidentiary gaps, he plainly understood that the relevance and reliability of the evidence that the CVR might provide was not enough. The importance of necessity to the analysis was recognized in *Hyde Park*, a case the Board contends was correctly decided, which considered the evidence’s “necessity to determine a core issue” and “other ways of getting the information before the [c]ourt” as key factors (A.F., at paras. 81-82; see also *Hyde Park*, at para. 74).

[116] Respectfully, it is best to acknowledge, as Airbus did at the hearing in this Court, that the chambers judge's reference to information being important to having a "complete understanding of the crew's awareness", in para. 67 of his reasons, is mistaken. It is not a useful description of the evidence required by the component of the test that relates to the public interest in the administration of justice. A civil trial will rarely have evidence adduced that provides a "complete understanding" of a matter in dispute and, given the standard of proof required in civil trials, this cannot be the measure under s. 28(6)(c).

[117] But the judge did not order the production of the CVR to achieve a "complete understanding" of the pilots' role in the accident. As a result, he did not err in a material way by considering an irrelevant factor. Instead, he rightly said that the production of the CVR was "necessary" (para. 49) and that the CVR "represents the only way" to fill the gaps in the pilots' discovery evidence (para. 48). Had completeness been the judge's true measure for disclosure, he would have had no need to consider whether the CVR was necessary to resolve the dispute.

[118] Thus, insofar as the chambers judge may have misspoken in alluding to evidence that provides a "complete understanding" of a matter in dispute, this was not the test he applied in deciding to make the order. His conclusion that the disclosure of the CVR was necessary in order to fill the gaps in the evidence that were central to liability was plainly open to him.

[119] Before the chambers judge, Airbus prepared a chart in which it identified a number of matters that the flight crew could not remember about the events leading to the crash, including whether they had received weather updates or if they had discussed landing on a different runway or diverting the flight after receiving reports that visibility had decreased. Airbus also noted that the Board relied on audio captured by the CVR in its own report and that this evidence was otherwise unobtainable. Insight into the pilots' decision making during landing is, of course, important to resolving the question of whether they operated the aircraft with due care and skill.

[120] The chambers judge considered the Board's findings in its report, in particular the flight officers' "perceptions, observations, considerations and decision making" in electing to land how and where they did (para. 27). On the basis of his review of the CVR, the chambers judge wrote that "it [was] evident" that the Board had taken information from the flight officers' communications when it reported on the causal factors of the accident (para. 30; see also para. 46). He found that the evidence was not available from other sources for

the purposes of the civil action (para. 48). This was the basis for his decision that the CVR, used by the Board in its report, was not just relevant and reliable evidence but was necessary to determining the causation and related issues in the action for civil liability (para. 49). After having considered the pleadings, evidence and submissions, the chambers judge concluded that the CVR was the only way to fill important gaps.

[121] The connection the chambers judge made between the findings in the Report, based in part on the CVR, and the issues at stake in the civil action was again open to him. There is a possible overlap between the issues of causation germane to the findings in the Report and causation as an element of the cause of action in the civil suit. As noted above, the possibility of such an overlap is recognized in s. 7(2) of the Act. For the chambers judge, the CVR was necessary to resolving the civil action because of the failings in the pilots' recollections of the descent. Plainly, the chambers judge's chain of reasoning was based on his understanding of all the evidence, the submissions of the parties, his *in camera* review of the CVR and the Board's use of it in the Report. His decision to order disclosure deserves deference on appeal.

[122] Finally, the chambers judge considered the affidavit evidence provided by the Board and the ACPA relating to the public interest in upholding the privilege, including privacy interests and the potential chilling effect that could occur if production were ordered too readily (N.S.S.C. reasons, at paras. 34-35). He acknowledged that pilot privacy and encouraging free communications in the cockpit were the two purposes behind the privilege (para. 54, quoting *Air France*, at para. 130). The chambers judge was also alive to important differences between *Air France* and this case, which affected the importance of the privilege. For example, unlike in *Air France*, the flight crew here opposed the CVR's release (paras. 57-58). In the end, after considering all of the evidence, he found that placing strict conditions on the release of the CVR would properly protect pilot privacy, as he was entitled to do (para. 69). In doing so, he expressed agreement with Strathy J.'s conclusion that, notwithstanding the privacy and safety concerns animating the privilege, disclosure of the CVR "in this case" would not have a detrimental effect on either privacy or safety (paras. 54-55, quoting *Air France*, at para. 135). He concluded by finding that production in this case would not erode the privilege and that court oversight over the production would "hono[ur] the privilege to the extent that is necessary" (para. 60). Thus, the chambers judge did not fail to consider a relevant factor, nor did he err in his balancing by assigning no weight to a relevant factor. Ultimately, he considered both purposes behind the privilege, weighed those purposes against the public interest in the administration of justice, and concluded that Parliament's goals would not be unduly harmed by disclosure in this case.

[123] The overall weighing of the factors by the chambers judge was fact-driven and discretionary. Based on the evidence and the strength of his findings of fact, he was entitled to conclude that limited production should be ordered. Others might have balanced differently by assigning more weight to some of the factors and less to others in the circumstances. But absent an error of law, a palpable and overriding error of fact or proof that discretion has been abused, the chambers judge's balancing should not be disturbed. No basis for intervention has been shown.

VI. Conclusion

[124] The appeal is dismissed. The appellant did not seek costs and asked that no costs be awarded against it. The class action plaintiffs seek costs, as they note that the Board's appeals have "delayed the prosecution of the class action for over two years" (R.F., at para. 141). Airbus and the Halifax International Airport Authority also request costs. The remaining respondents either seek no costs or take no position on costs.

[125] I acknowledge that appeals to the Court of Appeal and this Court, initiated by the Board, may have delayed the prosecution of the underlying class action. However, all parties in this dispute have a stake in safe air transportation; they share a stake in the public interest in the administration of justice and the public interest concerns underlying the statutory privilege. The Board, in bringing appeals of the chambers judge's decision, sought legitimate clarification on how these shared public interests must be balanced. In such circumstances, I would thus not order costs against it in this Court or disturb the Court of Appeal's decision to award no costs. That said, I would not interfere with the discretion the chambers judge exercised to award costs as he did at first instance.

The reasons of Côté and Brown JJ. were delivered by

CÔTÉ J. —

I. Overview

[126] I have had the benefit of reading the reasons of my colleague Kasirer J. As my colleague outlines, there are two principal issues in this appeal, both of which involve the interpretation of the *Canadian*

Transportation Accident Investigation and Safety Board Act, S.C. 1989, c. 3 (the “Act”). The first issue is procedural in nature. It relates to whether s. 28(6)(b) of the Act entitles the Transportation Safety Board of Canada (the “Board”) to make submissions in the absence of the public and the other parties. The second issue is substantive in nature. It relates to whether the chambers judge erred in his articulation and application of the legal test when he ordered production of the contents of the privileged on-board cockpit voice recorder (the “CVR”) pursuant to s. 28(6)(c) of the Act.

[127] With respect to the procedural issue, I disagree with my colleague’s conclusion that the Board’s request to make submissions in the absence of the public and the other parties is, in substance, a request to make *ex parte* submissions. In my view, the Board’s request to make submissions in the absence of the public and the other parties is more accurately characterized as a request to make submissions *in camera* (“*à huis clos*” in French). Moreover, I am of the view that a textual and purposive interpretation of s. 28(6)(b) indicates that the Board has a statutory right to make submissions *in camera*. In order to uphold the Board’s statutory duty to protect the privilege attached to the CVR in a manner that preserved the Board’s right to make meaningful submissions, the chambers judge should have permitted it to make its submissions *in camera*.

[128] With respect to the substantive issue, my colleague and I part company on two main points. First, I agree with much of what my colleague says about the test for production under s. 28(6)(c) of the Act. However, I disagree with his application of the standard of review. Even on my colleague’s generous reading, the chambers judge’s reasons disclose numerous errors of law. His discretionary decision to order production of the CVR is fundamentally tainted by these errors and is owed no deference. I am particularly concerned that by endorsing the chambers judge’s decision, my colleague is undermining the more rigorous and nuanced test he sets out. Second, my colleague attempts to get around various errors of law by relying heavily on the chambers judge’s findings of fact. By doing so, he appears to conduct the discretionary balancing of considerations himself. However, this Court is not in a position to conduct the balancing exercise required to order disclosure under s. 28(6)(c): the CVR is not part of the record and no member of this Court has listened to it or read the transcript of its contents. In the circumstances of this case, only a decision maker who has examined the contents of the CVR is in the position to weigh the relevant factors appropriately.

[129] Therefore, and with respect, I cannot agree with parts of my colleague’s reasons and with his disposition of this appeal. For the reasons that follow, I would allow the appeal and remit the matter to the Supreme Court of Nova Scotia.

II. Analysis

A. *Can the Board Make Submissions Without the Public and the Other Parties Present?*

[130] Section 28(6)(b) of the Act states that where a request for the production and discovery of an on-board recording is made, “the court or coroner shall . . . *in camera*, examine the on-board recording and give the Board a reasonable opportunity to make representations with respect thereto”. The Board submits that the expression “*in camera*”, followed by a comma, is intended to qualify all the words that follow. According to the Board, the court *shall* (i) examine the on-board recording *in camera*; and (ii) provide the Board with a reasonable opportunity to make representations with respect to the on-board recording *in camera*.

[131] In the lower courts, the Board framed its request using the words “*ex parte*” rather than “*in camera*”. In this Court, however, the Board altered its language, arguing that it has a statutory right to make *in camera* submissions. Despite this change in language, the Board has consistently sought the same outcome: it wants to make, at least in part, submissions in the absence of the other parties and the public. In other words, it wants, to the extent necessary, to make private and confidential submissions (transcript, at pp. 37-38).

[132] Contrary to my colleague’s conclusion, I agree that the Board is properly seeking to make *in camera*, rather than *ex parte*, submissions. In *Ruby v. Canada (Solicitor General)*, 2002 SCC 75, [2002] 4 S.C.R. 3, this Court explained that “[*e*]x parte, in a legal sense, means a proceeding, or a procedural step, that is taken or granted at the instance of and for the benefit of one party only, without notice to or argument by any adverse party” (para. 25 (emphasis added)). *Ex parte* proceedings are therefore distinct from *in camera* proceedings. Some proceedings, by their nature, must be both *ex parte* and *in camera* — that is, they must be conducted in private and without notice to or submissions by the adverse party. However, *ex parte* proceedings need not be held *in camera*, as “*ex parte* submissions are often made in open court” and “an order will still be

considered *ex parte* where the other party happens to be present at the hearing but does not make submissions” (*Ruby*, at para. 26).

[133] I respectfully disagree with my colleague’s conclusion (at para. 60) that the Board’s request to make its submissions in the absence of the public and the other parties is, in substance, a request to make *ex parte* submissions. In my view, given that the Board agreed to provide notice to the other parties as well as to provide them with a non-privileged summary of its submissions, its request to make its submissions in the absence of the public and the other parties cannot be characterized as a request to make *ex parte* submissions; rather, it is more properly characterized as a request to make *in camera* submissions. My colleague emphasizes that Parliament could have used the term “*ex parte*”, as it did in [s. 19\(3\)](#) of the [Act](#), but that it chose not to do so. With respect, the use of the term “*ex parte*” in [s. 19\(3\)](#) of the [Act](#) is consistent with my definition of “*ex parte*”, as this section relates to an *ex parte* application — that is, one made without notice and without submissions from the adverse party. Accordingly, had Parliament used the phrase “*ex parte*” in [s. 28\(6\)\(b\)](#), as my colleague implies that it could have done, then the Board would either not be required to provide notice of its submissions or the adverse parties would not be permitted to make arguments related to the production of the CVR.

[134] As well, I agree with the Board’s statutory interpretation argument. In my view, a textual and purposive interpretation of [s. 28\(6\)\(b\)](#) leads to the conclusion that the Board is entitled to make its submissions *in camera* — that is, in the absence of the public and the other parties.

[135] For the reasons set out below, I agree with the Board’s submission that the expression “*in camera*”, at the beginning of the provision, followed by a comma, means that “*in camera*” qualifies all of the words that follow. Therefore, both the examination of the CVR by the court as well as the Board’s “reasonable opportunity” to make representations concerning the CVR are to be *in camera*.

[136] First, the presence or absence of a comma may indicate whether an adjective or qualifier is intended to apply only to the nearest word or all the words that follow it or precede it, as the case may be. As Professor Ruth Sullivan explains,

[a] comma before the qualifying words is sometimes taken to indicate that they are meant to apply to all antecedents while the absence of a comma indicates that they are meant to apply to the last

antecedent alone.

(*The Construction of Statutes* (7th ed. 2022), at p. 463)

[137] The case *Re Associated Commercial Protectors Ltd. and Mason* (1970), 13 D.L.R. (3d) 643 (Man. Q.B.), aff'd (1970), 16 D.L.R. (3d) 478 (C.A.), provides an example of how the above principle was relied upon to interpret a statutory provision, s. 78 of Manitoba's *Consumer Protection Act*, S.M. 1969 (2nd Sess.), c. 4:

78(1) The director may refuse to grant a licence as a vendor, direct seller, or collection agent

(a) to any person who has been convicted of any offence against the Criminal Code (Canada) or against this Act, or of any other offence committed in Canada, that, in the opinion of the director, involves a dishonest act or intent on the part of the offender;

Relying on punctuation to resolve the ambiguity in the provision, Nitikman J. stated:

I take the view that the concluding words “involves a dishonest act or intent on the part of the offender” qualify all the offences mentioned in the clause and not merely the last-mentioned category “any other offence committed in Canada”, because if it were not so then a comma would not be required after the words “committed in Canada”. [p. 644]

[138] Put differently, with some of the irrelevant words omitted, the section without the comma would read as follows:

. . . who has been convicted of any offence against the Criminal Code (Canada) or against this Act, or of any other offence committed in Canada that involves a dishonest act or intent

[139] This change shows the relevance of the comma. Once the comma is omitted, the words “involves a dishonest act or intent on the part of the offender” would apply only to the phrase “any other offence committed in Canada” and not to offences in the Criminal Code or the *Consumer Protection Act*. The same reasoning can be followed in the case at bar.

[140] In s. 28(6)(b) of the Act, the comma following the expression “*in camera*” qualifies the words subsequent to it. “*In camera*” applies to everything after the comma because of the comma. By contrast, when

the comma is omitted, s. 28(6)(b) reads as follows:

in camera examine the on-board recording and give the Board a reasonable opportunity to make representations with respect thereto;

Without the comma, “*in camera*” applies only to the word “examine”. This, however, lacks grammatical sense. One does not “*in camera* examine” something. It is therefore plainly obvious that “*in camera*”, as a qualifier, only makes sense when followed by a comma. Had Parliament intended for “*in camera*” to apply only to “examine”, the Latin expression would follow the term “examine” — “examine *in camera*”.

[141] Second, the structural difference between the former s. 34(1) of the *Canadian Aviation Safety Board Act*, R.S.C. 1985, c. C-12 (“*CASB Act*”), and s. 28(6)(b) of the Act is relevant in discerning legislative intent. Under s. 34(1) of the *CASB Act*, the decision maker was required to

(b) *in camera*, examine the cockpit voice recording, and
(c) give the Board a reasonable opportunity to make representations with respect thereto

By comparison, s. 28(6)(b) of the Act reads as follows:

(b) *in camera*, examine the on-board recording and give the Board a reasonable opportunity to make representations with respect thereto;

[142] This structural change should not be overlooked. As my colleague notes, s. 34(1) of the *CASB Act* separated the requirements now set out in s. 28(6)(b) of the Act into two paragraphs, “thereby indicating that ‘*in camera*’ in the English text only applied to the decision-maker’s examination of the recording” (para. 66). On that point, he is plainly right; the words “*in camera*” could not apply to a paragraph which they were not a part of. However, drawing on extrinsic evidence, my colleague concludes that “[t]he legislative history supports the respondents’ interpretation of s. 28(6)(b)” (para. 66).

[143] With respect, the problem with this conclusion is that it disregards the text of s. 28(6)(b) as enacted. While it is true that the words “*in camera*” in s. 34(1)(b) of the *CASB Act* applied only to the decision maker’s examination of the recording, the text of the current provision has changed significantly. As previously noted, former paras. (b) and (c) were combined, and the comma after the word “recording” was removed, thereby bringing the phrase “opportunity to make representations” within the scope of the “*in camera*” qualifier. It follows that any ambiguity under the former provision has now been resolved by collapsing paragraphs (b) and (c) and by removing the comma after “recording”. In my view, all of this rather indicates that the English version of the text has one meaning, and only one meaning, contrary to the ambiguity which my colleague does not readily perceive but still somehow detects (para. 73).

[144] Another problem that arises from my colleague’s argument is that it conflicts rather strongly, given the structural change and removal of the comma, with the presumption that changes to the law are purposeful. As Laskin J. explained in *Bathurst Paper Ltd. v. Minister of Municipal Affairs of New Brunswick*, [1972] S.C.R. 471, the presumption must be that Parliament intended to bring about some change in the manner of the law’s application:

There is another consideration that is equally telling. Legislative changes may reasonably be viewed as purposive, unless there is internal or admissible external evidence to show that only language polishing was intended. [pp. 477-78]

[145] It follows that meaning ought to be given to Parliament’s choice of combining paras. (b) and (c) in s. 28(6) of the Act. In this instance, the only plausible interpretation is that “*in camera*” was intended to apply *both* to the examination of the recording *and* to the opportunity to make representations.

[146] Readily citing and deferring to the observations of Transport Canada, my colleague concludes that the presumption of purposeful change is displaced in this case (para. 67). In my respectful view, the legislative history surrounding the enactment of s. 28(6) cannot trump the plain meaning of the text. The law, as duly enacted by Parliament, is the law. It does not matter what Transport Canada said; what matters is what Parliament did. Here, Parliament clearly made a substantive change to the law, as revealed by the text of the provision. Put simply, what someone, at some time, says about the law is not the law.

[147] I acknowledge that the French version of the provision has a fundamentally different structure than the English version. The relevant portion of the French version provides as follows:

(6) Par dérogation aux autres dispositions du présent article, le tribunal ou le coroner qui, dans le cours de procédures devant lui, est saisi d'une demande de production et d'examen d'un enregistrement de bord examine celui-ci à huis clos et donne au Bureau la possibilité de présenter des observations à ce sujet après lui avoir transmis un avis de la demande, dans le cas où celui-ci n'est pas partie aux procédures.

[148] In my view, the text of the English version indicates that submissions are to be made *in camera*, whereas the text of the French version is silent on the nature of the Board's submissions. My colleague's understanding of the French version, however, may be accepted, and it may be readily acknowledged that the French version has one meaning and the English version another. In any case, there is a discordance between the two versions, which justifies having recourse to the purposive approach rather than looking for a shared meaning that is simply absent.

[149] My colleague concludes that, even if there is a true disparity between the two provisions, their "shared meaning aligns with the unambiguous French text" (para. 72). With respect, even if the shared meaning aligns with the French text, the analysis does not end there. As Bastarache J. instructed in *R. v. Daoust*, 2004 SCC 6, [2004] 1 S.C.R. 217, the next step is to "determine whether the common or dominant meaning is, according to the ordinary rules of statutory interpretation, consistent with Parliament's intent" (para. 30). As I will explain below, only the English version is consistent with a purposive interpretation of the provision. For this reason, it should be preferred.

[150] My colleague recognizes that "[t]he purpose and scheme of the Act suggest that, notwithstanding the absence of a general rule allowing for such submissions, there must be a way for the Board to make representations about the content of a recording without defeating the privilege entirely" (para. 75). Yet, despite recognizing that the broader meaning of the provision is supported by the purpose and scheme of the Act, he rejects that interpretation in favour of the narrower one. With respect, I see no principled reason for presuming that the narrower version is the clearest expression of legislative intent when that interpretation is refuted by a purposive analysis.

[151] A purposive interpretation of s. 28(6)(b) supports the Board’s position that it has a right, to the extent necessary, to make *in camera* submissions about the contents of the CVR. Pursuant to s. 28(6)(b), the Board must be provided with a “reasonable opportunity to make representations” regarding the request for production of the CVR. In my view, the Board’s right to make reasonable representations must be interpreted in light of the Board’s statutory object as well as Parliament’s decision to create a statutory privilege.

[152] First, as outlined in [s. 7\(1\)](#) of the [Act](#), the object of the Board is to advance transportation safety by conducting independent investigations, identifying safety deficiencies, making recommendations, and reporting publicly on its investigations. The CVR is used in the course of the Board’s investigation, and it is privileged to protect the privacy of pilots and to aid the Board in fulfilling its mandate. Moreover, the Board has a statutory obligation to protect and maintain the privilege, as it is prevented from knowingly communicating the contents of the CVR or permitting them to be communicated to any person (s. 28(2)(a)).

[153] Second, Parliament’s choice to create a statutory privilege over the CVR must be given effect. If the Board is limited to open-court submissions, it cannot go into any detail about the contents of the CVR without risking breaching the privilege it is duty-bound to uphold. The Board is uniquely positioned to assist the court in determining whether, pursuant to [s. 28\(6\)\(c\)](#) of the [Act](#), “the public interest in the proper administration of justice outweighs in importance the privilege attached to the on-board recording”. The Board has technical expertise in transportation safety and is the only entity (besides the court) in possession of the CVR. The Board is therefore uniquely positioned to assist the court in understanding the contents of the CVR as well as identifying other, non-privileged sources that may duplicate important information in the CVR.

[154] In conclusion, to the extent that it is necessary to protect the privilege, I agree with the Board that it has a right to make submissions *in camera*. Such an interpretation furthers the object of the Act and helps to protect the privilege, ensuring that it yields only when it is truly in the public interest to do so.

[155] In any event, I note that even on my colleague’s interpretation, the court, by necessary implication, retains the discretion to permit the Board to make submissions in the absence of the other parties. In my view, given the Board’s expertise and statutory obligation to protect the privilege, sufficient weight must be given to its request to make private or confidential submissions.

[156] It follows that the chambers judge erred by refusing to permit the Board to make submissions *in camera*.

B. *Test for Production Under Section 28(6)(c)*

(1) The Chambers Judge's Reasons Disclose Legal Errors and Are Owed No Deference

[157] The test for production under s. 28(6)(c) of the Act requires the court to assess whether “the public interest in the proper administration of justice outweighs in importance the privilege attached to the on-board recording by virtue of this section”. There are two sides to the scale that must be assessed and weighed: (i) the public interest in the proper administration of justice; and (ii) the importance of the statutory privilege attached to the CVR. This weighing — and the corresponding decision about whether to order production of the CVR — is discretionary.

[158] With respect, I disagree with my colleague's assertion that the test for production of the CVR as articulated in *Soci t  Air France v. Greater Toronto Airports Authority* (2009), 85 C.P.C. (6th) 334 (Ont. S.C.J.), aff'd on this point 2010 ONCA 598, 324 D.L.R. (4th) 567, “does not stand in substantial opposition to” (para. 97) the test as articulated in *Wappen-Reederei GmbH & Co. KG v. Hyde Park (The)*, 2006 FC 150, [2006] 4 F.C.R. 272. The test as articulated in *Air France*, and as adopted by the chambers judge in this case, places the wrong weights on both sides of the scale. On the side relating to the public interest in the administration of justice, *Air France* overemphasizes irrelevant factors, such as the existence of a class action, thereby inappropriately inflating the need to ensure that the evidence before the court “is as complete and reliable as possible” (*Air France*, at para. 127). On the other side of the scale, regarding the importance of the privilege, *Air France* diminishes the privacy and safety goals that animate the privilege conferred by Parliament, thereby eviscerating the privilege. In my view, *Air France* effectively reduces the test for production of the CVR to a consideration of relevance and reliability. With respect, much more is required.

[159] The CVR will almost always provide a more reliable account of what the pilots said than the pilots' own memory of the cockpit discussions. By recording real-time events in the cockpit, the CVR provides a contemporaneous recording of the cockpit discussions as well as other sounds captured by it. Similarly, in

litigation relating to an aviation accident, the CVR will almost always — if not always — be relevant to various issues in the litigation.

[160] As such, a party seeking production of the CVR must establish more than relevance and reliability. Indeed, requiring only that relevance and reliability be established — without otherwise requiring proof that production of the CVR is necessary to the resolution of a core issue in the litigation — would be fundamentally inconsistent with the creation of a privilege in the first place: “Unlike most other rules of exclusion, privilege rules are not designed to facilitate the truth-finding process. They operate where there is an overriding public policy interest in excluding relevant, reliable evidence . . .” (D. M. Paciocco, P. Paciocco and L. Stuesser, *The Law of Evidence* (8th ed. 2020), at p. 287). I accept that Parliament created only a partial privilege that, when necessary, must yield to the public interest in the administration of justice. However, in my view, in order for the public interest to outweigh the privilege, much more is required than mere relevance and reliability.

[161] Accordingly, when considering the side of the scale relating to the public interest in the administration of justice, the court should focus on “the nature and probative value of the evidence in the particular case and how necessary this evidence is for the proper determination of a core issue before the [c]ourt” (*Hyde Park*, at para. 74). Conversely, when balancing the importance of the privilege, the court should “give appropriate weight to the privilege”, including both the privacy and the safety considerations that animate the privilege, in order to “avoid routinely allowing disclosure simply because of the probative value normally attached to audio recordings of events” (*Hyde Park*, at para. 74).

[162] This was not the test that the chambers judge applied. He therefore erred in law and his decision to order production of the CVR is owed no deference. It is trite law that deference is generally owed to discretionary decisions. However, appellate courts do not blindly adopt a deferential posture: deference is owed when the first instance judge has considered and weighed all relevant considerations and where the exercise of discretion is not based on an erroneous principle (*Canada (Attorney General) v. Fontaine*, 2017 SCC 47, [2017] 2 S.C.R. 205, at para. 36). No deference is owed when the judge errs in principle, considers irrelevant factors, or fails to consider relevant factors. These are errors of law that are reviewed on a correctness standard (*Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, at para. 27).

[163] Although I largely agree with my colleague’s description of the standard of review, I cannot endorse his application of it. With respect, the chambers judge’s reasons, which closely follow the law as articulated in *Air France*, illustrate that he erred when considering both sides of the scale. The chambers judge applied the wrong test, as he effectively reduced the test for production to a test of relevance and reliability. To borrow my colleague’s apt description of the standard of review, the chambers judge put the “wrong weights on the scales”. His balancing is therefore “inherently flawed” (para. 41). Given the legal errors, the chambers judge’s discretionary decision to order production of the CVR is owed no deference.

(a) *Public Interest in the Administration of Justice*

[164] On the public interest side of the scale, the chambers judge considered irrelevant factors. The chambers judge based his analysis on a specific consideration of the policies and objectives of class actions. As my colleague correctly notes, the public interest in the administration of justice is the same in class actions as it is in other civil proceedings. Indeed, I completely agree with my colleague that “[i]solating class actions as having heightened significance in the weighing exercise could inappropriately upset the balancing process and devalue the importance Parliament has attributed to the privilege” (para. 99). Yet, this is exactly what the chambers judge did. He took into account the behaviour modification goal of class actions when considering the public interest in the administration of justice. By doing so, he incorrectly considered an irrelevant factor, adding undue weight to the public interest side of the scale. I find that the chambers judge’s improper statement of the law amounts to a reviewable error.

[165] The standard of review that applies when a lower court considers irrelevant or erroneous factors is clearly stated in para. 35 of *Housen*:

Stated differently, the lower courts committed an error in law by finding that sub-delegation was a factor identifying a person who is part of the “directing mind” of a company, when the correct legal factor characterizing a “directing mind” is in fact “the capacity to exercise decision-making authority on matters of corporate policy”. This mischaracterization of the proper legal test (the legal requirements to be a “directing mind”) infected or tainted the lower courts’ factual conclusion that Captain Kelch was part of the directing mind. As this erroneous finding can be traced to an error in law, less deference was required and the applicable standard was one of correctness. [Emphasis added.]

[166] My colleague suggests that an incorrect legal finding must be “decisive” to the overall outcome in order to taint a discretionary decision (para. 100). I respectfully disagree with this formulation of the inquiry. The exercise of judicial discretion is governed by “legal criteria,” and consequently, “their definition as well as a failure to apply them or a misapplication of them raise questions of law which are subject to appellate review” (*British Columbia (Minister of Forests) v. Okanagan Indian Band*, 2003 SCC 71, [2003] 3 S.C.R. 371, at para. 43). Be it as it may, if a judge considers an irrelevant factor and gives it any weight whatsoever, he or she has effectively applied the wrong legal test, and any conclusion that follows is inherently flawed. Although I acknowledge that, in principle, a judge may misspeak and name a factor without considering it *per se*, thereby not tainting the overall conclusion, I do not believe this is what happened in this case.

[167] If my understanding of my colleague’s reasons is accurate, he rejects the idea that the chambers judge’s ultimate factual conclusion can be traced to his incorrect legal finding. My colleague writes that “[n]otwithstanding his comments on the importance of behavior modification by class action, the chambers judge recognized the necessity of the CVR for a fair trial as a matter of negligence law” (para. 100). As a result, he concludes that the chambers judge’s consideration of class actions (based on *Air France*, at para. 127) was not “decisive” (para. 100). In other words, he states that consideration of this factor did not have “a material effect on the ultimate decision to order production and discovery and thus do[es] not amount to a fatal error” (para. 100).

[168] I respectfully disagree. Even applying my colleague’s test of “decisiveness”, I would still find that the judge erred. This factor had a material impact on the ultimate result and to conclude otherwise ignores that the chambers judge effectively said so himself. Indeed, he relied heavily on the decision of Strathy J. (as he then was) in *Air France*, as revealed by the extensive and numerous excerpts he cites from that case. The chambers judge quoted the following passage from *Air France*:

There is another aspect of the public interest in the administration of justice that is particularly applicable to class proceedings litigation such as this. Behaviour modification is an important goal of class actions. Just as the [Board] serves an important function in exposing shortcomings in the transportation system and making recommendations to correct them, so too the class action identifies the causes of a mass wrong and encourages those responsible to modify their behaviour. It seems to me that there is a public interest in ensuring that the information available to the court, in the performance of this important responsibility, is as complete and reliable as possible. [Emphasis added.]

(2019 NSSC 339, 45 C.P.C. (8th) 124, at para. 51, quoting *Air France*, at para. 127.)

[169] The chambers judge “accept[ed] this as a correct statement of law and principle relating to the public interest” (chambers judge’s reasons, at para. 52). Moreover, when subsequently summarizing his rationale for finding that the public interest outweighed the privilege, the chambers judge reiterated the behaviour modification objective of class actions, claiming that “[t]his too provides a public interest rationale for transparency in the litigation process” (para. 66).

[170] In my view, the judge wholeheartedly endorsed the above passage from *Air France* and relied upon it not once but twice in his balancing exercise. This, in turn, added undue weight to the public interest side of the scale and tainted his overall conclusion. In this context, if the chambers judge explicitly says that an irrelevant factor “appl[ies] to the current circumstances” (para. 52), what more is needed for his factual conclusion to be traceable to this incorrect legal finding? The inescapable conclusion is that his mischaracterization of the legal test tainted his overall balancing exercise. Correctness should therefore prevail.

[171] With regard to the public interest in the administration of justice, my colleague states at para. 112 of his reasons that “[c]are should be taken to not order production merely because the CVR would be helpful and provide complete evidence”. Once again, I agree with him.

[172] However, the chambers judge did not adhere to this approach. To the contrary, he wholly endorsed the law as stated in *Air France*, which emphasized that the information available to the court for determining liability in a class action should be “as complete and reliable as possible” (para. 51, quoting *Air France*, at para. 127). Later in his reasons, the chambers judge again stated that disclosure of the CVR was needed to have “a complete understanding of the crew’s awareness and response to factors that were significant to the decision to land the aircraft in the conditions existing at that time” (para. 67 (emphasis added)). Thus, rather than taking care not to order production simply because the CVR would provide complete evidence, the chambers judge explicitly ordered production for this very reason.

[173] My colleague attempts to downplay these errors, stating that when the reasons are read as a whole, it is evident that the chambers judge applied the correct test (Kasirer J.’s reasons, at para. 114). With respect, there is no basis to conclude, as my colleague does, that the chambers judge misspoke on two separate

occasions. Ultimately, the chambers judge's reasons disclose multiple legal errors in his discussion of the public interest in the administration of justice. These errors improperly tipped the scales in favour of disclosure.

(b) *Importance of the Privilege — Privacy and Safety*

[174] On the side of the scale relating to the importance of the privilege, again, the chambers judge's reasons disclose multiple errors. I agree with my colleague that the protection of privacy and the protection of safety are the two principles that animate the statutory privilege. However, I respectfully disagree with my colleague's reading of *Air France* regarding these principles.

(i) Privacy

[175] My colleague states, correctly in my view, that the publication of a report by the Board does not mean that the concern for pilot privacy is "largely illusory" when the court is considering whether the CVR should be released under s. 28(6)(c). However, in *Air France*, Strathy J. came to the opposite conclusion, stating that the concern for pilot privacy was "largely illusory" or "generally illusory" in light of the fact that a summary of the pilots' conversations may have been disclosed in the Board's publicly available report (*Air France*, at para. 133). To be clear, Strathy J. was of the view that judicial vetting of the CVR and sterile cockpit rules already addressed pilot privacy concerns. According to his reasoning then, there is no need to account for privacy concerns in the balancing test given that those concerns are addressed by other mechanisms. With respect, I say that is not the law. Nevertheless, the chambers judge in this case "adopted Chief Justice Strathy's reasons to reject the suggestion that privacy interests will be inappropriately invaded" (chambers judge's reasons, at para. 59), writing that he "could not state this better" (para. 55).

[176] This is an error of law. I agree with my colleague that the concern for pilot privacy does not become "largely illusory" simply because the Board releases a report that may document in some manner what the pilots said. However, this more nuanced understanding of privacy was not adopted in *Air France* or by the chambers judge in this case. In my respectful view, my colleague's discussion overlooks what the chambers judge actually stated, as his statement of the law on the importance of privacy is manifestly inconsistent with my colleague's view of the law.

(ii) Safety.

[177] With respect to safety, I once again agree with my colleague’s statement of the law. As my colleague notes, the *Report of the Commission of Inquiry on Aviation Safety* (1981) recognized “investigators’ concerns that disclosure of investigative materials could have negative consequences for witness cooperation in future cases . . . and that disclosure of CVRs to the public could mean the ‘cause of aviation safety would be prejudiced’” (para. 106 (citations omitted)). There is therefore “merit to the pilots’ argument that they may speak less freely if they sense that on-board recordings will be more routinely disclosed” (Kasirer J.’s reasons, at para. 109). I similarly agree that concerns about pilots intentionally erasing the CVR cannot legitimately support the statutory privilege (Kasirer J.’s reasons, at para. 108).

[178] Yet, and once again with respect, this is not the law as articulated in *Air France* or by the chambers judge in this case. Indeed, it is worthwhile to quote the exact passage from *Air France* that was wholly “endorse[d]” by the chambers judge (chambers judge’s reasons, at para. 55). The judge quoted the following passage from *Air France*:

As I stated above, I have great difficulty in accepting that the disclosure of the CVR in this case would have a “chilling” effect on communications between pilots. This argument carried no weight with the Dubin Commission, which concluded that the CVR could be released by the court, in appropriate cases, without impairing aviation safety. As I have noted, the transcripts are released as a matter of course in some countries. The Review Panel has recommended that the [Board] be permitted to disclose the CVR record in its reports. The suggestion of a chilling effect has no evidentiary basis and is nothing more than speculation.

The public places a great deal of trust in pilots. I am certain that pilots take this responsibility very seriously indeed and that they deserve the public’s trust. I cannot imagine that pilots would curtail critical communications, endangering their own safety and the safety of their passengers, simply because those communications might be disclosed in some future legal proceedings in the event of an accident. [Emphasis added.]

(Chambers judge’s reasons, at para. 54, citing *Air France*, at paras. 135-36.)

[179] My colleague writes that he does “not take Strathy J.’s statements at paras. 135-36, relied upon by the chambers judge, as rejecting aviation safety and its relevance as a factor in the analysis” (para. 109). With respect, this interpretation is inconsistent with what was said in *Air France* and endorsed by the chambers judge. Indeed, after quoting the above passage from *Air France*, the chambers judge’s reasons are notably silent on any

potential safety considerations, other than a conclusory statement that he was “not convinced” that the release of the CVR with conditions would “interfere with aviation safety, damage relations between pilots and their employers, or would impede investigation of aviation accidents” (para. 68). In my view, this demonstrates that the chambers judge rejected aviation safety as a factor to be considered. He thus erred in law.

(2) This Court Cannot Reweigh Based on Conclusory and Vague Findings

[180] For the reasons discussed above, I am of the view that the chambers judge’s decision is owed no deference. Nonetheless, my colleague attempts to sidestep the chambers judge’s legal errors by emphasizing various findings of fact made by him.

[181] In my respectful view, the chambers judge’s findings are incomplete and conclusory. For example, he found that there were gaps in the flight crew’s discovery evidence (paras. 46-48). While “some questions” could be answered by other means, his “overall observation” was that disclosure of the CVR was “necessary to answering important questions” (para. 48). He then concluded that the “CVR has important evidentiary value and is necessary” (para. 49).

[182] However, these findings do not provide sufficient information for this Court to conclude, as my colleague does, that production of the CVR was “necessary to resolving the dispute” (Kasirer J.’s reasons, at para. 5; see also paras. 10, 28, 31 and 121). No finding was made that it was necessary to resolve the dispute; rather, the chambers judge made a vague finding that production of the CVR was necessary to answer important questions. There is nothing in the chambers judge’s reasons that indicates what questions or how many questions from the flight crew’s discovery evidence can be answered only with the disclosure of the CVR. The nature and probative value of the evidence in this particular case and how necessary this evidence is for the proper determination of a core issue before the court are therefore unclear.

[183] Moreover, to the extent that the chambers judge found that production of the CVR was “necessary” (para. 49), this needs to be understood in light of his statements — made two separate times in the reasons — that it was important to have “complete” information before the court (see paras. 51 and 67). With respect, these erroneous statements cast doubt on the chambers judge’s purported finding of “necessity”. Was

disclosure of the CVR “necessary” to ensure that the court had complete information before it, or was disclosure of the CVR “necessary” for the court to determine the ultimate issue of liability?

[184] In my view, given that no member of this Court has heard the CVR or read the transcript of its contents, this Court is simply not in a position to reweigh the evidence and conduct the discretionary balancing required under s. 28(6)(c) of the Act. This Court should not selectively overemphasize some of the chambers judge’s conclusory and ambiguous findings while discounting other statements from his reasons that disclose a misapprehension of the legal test. Doing so reduces the discretionary test under s. 28(6)(c) to a perfunctory consideration of factors on a checklist rather than a judicious weighing of factors in an exercise of discretion.

III. Disposition

[185] For the foregoing reasons, I would allow the appeal and remit the matter to the Supreme Court of Nova Scotia to be heard by a different judge.

[186] The Board did not seek costs. I would therefore order no costs in this Court.

Appeal dismissed without costs, CÔTÉ and BROWN JJ. dissenting.

Solicitors for the appellant: Conway Baxter Wilson, Ottawa; Cox & Palmer, Halifax.

Solicitors for the respondents Kathleen Carroll-Byrne, Asher Hodara and Georges Liboy: Camp Fiorante Matthews Mogerma, Vancouver; Wagners, Halifax.

Solicitors for the respondents Air Canada, John Doe #1 and John Doe #2: Paterson MacDougall, Toronto.

Solicitors for the respondent Airbus S.A.S.: McCarthy Tétrault, Toronto.

Solicitors for the respondent NAV CANADA: Lerner, Toronto.

Solicitors for the respondent the Halifax International Airport Authority: Stewart McKelvey, Halifax.

Solicitor for the respondent the Attorney General of Canada representing His Majesty The King in Right of Canada: Department of Justice, National Litigation Sector, Halifax.

Solicitors for the respondent the Air Canada Pilots' Association: Nelligan O'Brien Payne, Ottawa.

[1] As the equivalent of the French term “*protection*”, Parliament employs “privilege” to refer to the privilege set forth in [s. 28\(6\)\(c\)](#) of the [Act](#).