

2019

Nova Scotia Court of Appeal

C.A. No.

495035

Between:

THE TRANSPORTATION SAFETY BOARD OF CANADA

Appellant

KATHLEEN CARROLL-BYRNE, ASHER HODARA,
GEORGES LIBOY, AIR CANADA, AIRBUS S.A.S., NAV
CANADA, HALIFAX INTERNATIONAL AIRPORT AUTHORITY,
THE ATTORNEY GENERAL OF CANADA representing Her
Majesty the Queen in right of Canada, JOHN DOE #1 and
JOHN DOE #2, and the AIR CANADA PILOTS'
ASSOCIATION



Respondents

Proceeding under the *Class Proceedings Act*, S.N.S. 2007, c. 28

Notice of Application for Leave to Appeal and Notice of Appeal (Interlocutory)

To: Kathleen Carroll-Byrne, Asher Hodara and Georges Liboy
c/o Raymond Wagner, QC and Joe Fiorante, QC

Air Canada, John Doe #1 and John Doe #2
c/o Tim Trembley

Airbus S.A.S.
c/o John P. Brown

NAV Canada
c/o Robert Bell

Halifax International Airport Authority
c/o Scott Campbell

The Attorney General of Canada
c/o Angela Green

Appellant's appeal

The Appellant, the Transportation Safety Board of Canada (the "TSB"), was made an intervener by order of the Honourable Justice Patrick J. Duncan issued July 3, 2019. The Appellant applies for leave to appeal and, if granted, will appeal from the decision of the Honourable Justice Patrick J. Duncan given orally on September 4, 2019 and provided by written reasons issued November 19, 2019 in the proceedings in the Supreme Court of Nova Scotia showing court number Hfx No. 438657. The order was issued on December 18, 2019.

Order or decision appealed from

An oral decision was made on September 4, 2019 in Halifax, Nova Scotia. Written reasons were released on November 19, 2019. An order was issued on December 18, 2019. A copy of the written reasons and order are attached.

Grounds of appeal

The grounds of appeal are the following:

1. That the Learned Chambers Judge erred in failing to afford the TSB an opportunity to make *in camera* representations with respect to the CVR in accordance with section 28(6)(b) of the *Canadian Transportation Accident Investigation and Safety Board Act*, S.C. 1989, c. 3 and in exercising his discretion without the benefit of such representations as required by the Act;
2. That the Learned Chambers Judge erred in failing to provide sufficient reasons for his refusal to allow the TSB an opportunity to make *in camera* representations with respect to the CVR;
3. That the Learned Chambers Judge erred by determining that the public's interest in the proper administration of justice outweighed the importance of the statutory privilege associated with the CVR.

Authority for appeal

The Appellant relies on the following legislation, Rules, or points of law:

1. *Judicature Act*, RSNS 1989, c 240, s 38(1);
2. *Civil Procedure Rule* 90; and
3. *Canadian Transportation Accident Investigation and Safety Board Act*, S.C. 1989, c. 3.

Order requested

The Appellant says that the Court should allow the appeal and that this decision appealed from be reversed with:

1. An order reversing the motion judge's decision and remitting the matter back to be heard before a new judge with the stipulation that the Intervener, the TSB, be permitted to make *in camera* submissions with respect to the contents of the CVR, or
2. An order dismissing Airbus S.A.S.'s motion to have the TSB produce the CVR and instead upholding the statutory privilege associated with the CVR.

Motion for date and directions

The appeal will be heard on a time and date to be set by a judge. The Appellants will ask a judge of the Court of Appeal to set that date and give directions at 10 a.m. on January 2, 2020 at the Law Courts, 1815 Upper Water Street, Halifax, Nova Scotia. You have the right to be present or represented by counsel. If you are not represented, the judge may proceed without you.

Contact information

The Appellant designates the following address:

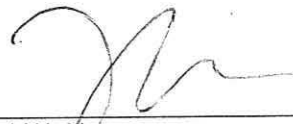
c/o Richard W. Norman
Cox & Palmer
1100 - 1959 Upper Water Street
Halifax, NS B3J 3N2
Tel: (902) 491 4128
Fax: (902) 421-3130

Documents delivered to this address will be considered received by the Appellant on delivery.

Further contact information is available to each party through the Prothonotary.

Signature

Signed on December 20, 2019.



Richard W. Norman
Counsel for the Appellants
Cox & Palmer
1100 - 1959 Upper Water Street
Halifax, NS B3J 3N2
Tel: (902) 491-4128
Fax: (902) 421-3130

Registrar's Certificate

I certify that this Notice of Appeal was filed with the Court on December 20, 2019.



Caroline McInnes
Registrar

SUPREME COURT
OF NOVA SCOTIA

DEC 18 2019

HALIFAX, N.S.

Hfx. No. 438657

SUPREME COURT OF NOVA SCOTIA

BETWEEN:

**KATHLEEN CARROLL-BYRNE, ASHER HODARA
and GEORGES LIBOY**

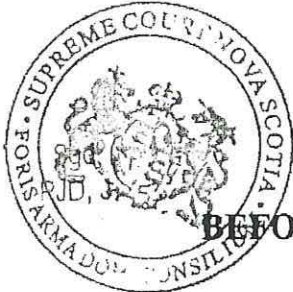
PLAINTIFFS

-and-

**AIR CANADA, AIRBUS S.A.S., NAV CANADA, HALIFAX INTERNATIONAL
AIRPORT AUTHORITY, THE ATTORNEY GENERAL OF CANADA representing Her
Majesty the Queen in right of Canada, JOHN DOE #1 and JOHN DOE #2**

DEFENDANTS

Proceeding under the *Class Proceedings Act*, S.N.S. 2007, c. 28



ORDER

BEFORE THE HONOURABLE JUSTICE PATRICK J. DUNCAN

UPON MOTION of the Defendant Airbus, S.A.S. for an Order that the cockpit voice recording and any transcript or excerpt thereof (the "CVR") relating to Flight AC 624 from Toronto to Halifax on 28-29 March 2015 be produced by the Transportation Safety Board of Canada (the "TSB") and be designated confidential and not form part of the public record in the within action and any associated crossclaims, counterclaims, and third party or subsequent party claims (collectively referred to as the "Action") and that it shall be controlled and protected from dissemination outside the Action, as set forth in this Order;

AND UPON HAVING ORDERED that the TSB and the Air Canada Pilots' Association ("ACPA") be granted Intervenor status with respect to Airbus, S.A.S.'s motion;

AND UPON HEARING counsel on behalf of the Plaintiffs, counsel on behalf of the Defendants, Counsel on behalf of the Intervenor, the TSB and counsel on behalf of the Intervenor, the ACPA with respect to the TSB's request to make *ex parte in camera* submissions with respect to the CVR, and upon the merits of the motion itself;

AND UPON the decision Court having been delivered orally on September 4, 2019, with reasons to follow, which reasons were issued November 19, 2019, and reported at 2019 NSSC 339;

AND UPON IT APPEARING that the Attorney General of Canada takes no position regarding the terms set out in this Order;

AND UPON having heard submissions of the other parties with respect to the form of Order;

IT IS ORDERED THAT:

1. The Motion of the Defendant Airbus, S.A.S. is granted;
2. The TSB's request seeking permission to make *ex parte in camera* submissions with respect to the CVR is denied;
3. Subject to the terms of this Order, the TSB shall produce a copy of the CVR to counsel for each party;
4. The CVR disclosed pursuant to this Order shall not be used for any other purpose other than for the purposes of the within action, and that all copies of the CVR shall be designated with the following label:

<p style="text-align: center;">PROTECTED DOCUMENTS - CVR Solely for use in Halifax Action 438657 and any associated crossclaims, counterclaims, third and subsequent party claims.</p>

5. The CVR or any copies or any electronic versions of the CVR shall not be disseminated to anyone not authorized by this order to examine the CVR. The CVR and any copies or any electronic versions of the CVR shall be used solely in connection with the Action and shall be subject to this Order.
6. The CVR may be disclosed to the following persons:
 - (a) counsel for a party and their office staff;
 - (b) any named party, full-time employee of a named party, or insurers of a named party if, in the judgment of the solicitors of the party, disclosure is reasonably necessary for the purposes of advising their clients or advancing their interests in the Action;

- (c) experts or consultants who are assisting counsel in the prosecution or defense of the Action;
- (d) the court, court personnel, mediators, and court reporters;

7. Before disclosing the CVR to any of the persons listed in paragraphs 6 (a), (b), (c) or (d), counsel shall provide that person with a copy of this Order and obtain the person's agreement that he or she will be bound by this Order. The contents of the Order must be explained to that person and their agreement to be bound by its terms will be signified by their witnessed signature on a copy of this Order. Each counsel shall keep a copy of the signed Order. Counsel are required to maintain an accurate list of all persons to whom he or she produces the CVR and shall provide such a list to the court on a confidential basis, upon request by the court.

8. The CVR tendered with the court in this motion hearing will be sealed. The Prothonotary shall keep it separate from publicly available exhibits or documents, and it shall not be made available for any purpose to any person, firm, corporation or other entity except in accordance with a further order of the court, which may only be made upon motion with notice to the parties and the Interveners, in accordance with the *Civil Procedure Rules* or Directions of the court.

9. This confidentiality order prevails unless and until the court decides otherwise. A party to this Action that seeks to file or introduce as evidence the CVR or a portion of it in any proceeding in this matter shall give notice of intention to do so to the other parties and to the TSB in accordance with the direction of the court when setting down the proceeding for hearing, and in any event not less than 30 days prior to the hearing at which the CVR contents are intended to be introduced.

10. Unless otherwise ordered by the court, in the event any portion of the CVR is included with, or the contents thereof are in any way disclosed in pleadings, motion documents, an examination for discovery transcript, or other material filed with the Court, the material shall be delivered under seal to the Prothonotary for filing with a written Notice to the Prothonotary that confidential materials subject to this order are included. The Prothonotary will keep the filed documents under seal in the same manner as set out in paragraph 8 of this order, with copies thereof made available only to counsel for the parties and to the court.

11. Counsel for the parties shall destroy any copies of the CVR in their possession or control within 30 days of the conclusion of the Action or appeal therefrom but shall not be required to destroy any work product which contains information obtained from the CVR.

12. Experts or consultants who have been provided copies of the CVR shall destroy any copies of the CVR in their possession or control within 30 days of the conclusion of the Action or appeal therefrom but shall not be required to destroy any work product which contains information obtained from the CVR. Their consent to comply with this paragraph is signified by their compliance with paragraph 7 of this Order.

13. Counsel who provided copies of the CVR to experts or consultants shall make reasonable efforts to ensure that the experts or consultants have destroyed any copies of the CVR in their possession. Counsel for the parties shall confirm this has been done by filing affidavits attesting to same at the conclusion of the proceeding. The filed affidavits shall also be sent to the TSB.

14. Any party in the Action, and the TSB, may at any time move before the Court on proper notice and upon proper grounds to amend, vary, or discontinue the whole or any part of this Order.

15. Airbus SAS is entitled to its costs of this motion in the amount of \$1,000.00 from the defendants Air Canada, John Doe #1 and John Doe #2.

16. The Plaintiffs are entitled to their costs of this motion in the amount of \$1,000.00 from the defendants Air Canada, John Doe #1 and John Doe #2.

DATED December 18, 2019


Prothonotary

AMANDA HAWBOLDT
Deputy Prothonotary

SUPREME COURT OF NOVA SCOTIA

Citation: *Carroll-Byrne v. Air Canada*, 2019 NSSC 339

Date: 20190904

Docket: HFX438657

Registry: Halifax

Between:

Kathleen Carroll-Byrne, Asher Hodara, and Georges Liboy

Plaintiffs

v.

Air Canada, Airbus S.A.S., NAV Canada, Halifax International Airport Authority, The Attorney General of Canada, representing Her Majesty the Queen in right of Canada, John Doe #1, and John Doe #2

Defendants

and

The Canadian Transportation Accident Investigation and Safety Board
and Air Canada Pilots Association

Intervenors

MOTION TO PRODUCE: REASONS FOR DECISION

Judge: The Honourable Justice Patrick J. Duncan

Heard: July 3, 2019, in Halifax, Nova Scotia

Decision: September 4, 2019

Reasons: November 19, 2019

Counsel: Plaintiffs: Kate Boyle and Jamie Thornback

Defendants:

- Clay Hunter and Melanie Comstock (Air Canada, John Doe #1 and John Doe #2)
- John Brown and Christopher Odell (Airbus S.A.S.)
- Robert Bell (NAV Canada)
- Scott Campbell and Sarah Gray
(Halifax International Airport Authority (HIAA))
- Angela Green and Heidi Collicutt (Attorney General of Canada)

Intervenors:

- Christopher Rootham (Air Canada Pilots Association (ACPA))

The Privilege

[6] Section 28(2) of the *Canadian Transportation Accident Investigation and Safety Board Act* S.C. 1989, c. 3 (the Act) creates the privilege over the recordings being sought in this motion:

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.

[7] The privilege is not absolute – it is subject to statutorily prescribed exceptions.

[8] Sections 28(3) and (4) provides authority for the TSB to acquire and use the on-board recordings:

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.

[9] The qualifying language in Subsection (4) is that the TSB cannot communicate any of the contents that are "... unrelated to the causes or contributing factors of the transportation occurrence under investigation or to the identification of safety deficiencies." The necessary implication is that the TSB

Analysis

[13] In considering the current motion I have taken guidance from the decision of Strathy J. (as he then was) in *Société Air France et al v. Greater Toronto Airports Authority*, [2009] O.J. No. 5337, affirmed on appeal at *Société Air France v. Greater Toronto Airports Authority*, 2010 ONCA 598.

[14] Now Chief Justice Strathy was presented with many of the same arguments that have been made in the current motion as to the history and continuing importance of the statutory privilege. He provided a thorough review of the development of the policy which underlies the creation of this privilege. I do not need to repeat it.

[15] Beginning his analysis, he stated:

110 In order to apply the statutory test in s. 28 of the TSB Act, I must first consider the content of the CVR and the circumstances of this case. I must then determine whether, in the circumstances of the case, the public interest in the proper administration of justice outweighs in importance the privilege attached to the on-board recording by virtue of that section. This in turn requires that I consider the meaning and content of the "public interest in the proper administration of justice" and the "importance of the privilege attached to the CVR". This necessarily involves a balancing of the two interests. If, having engaged in this balancing process, I determine that production is desirable, I may impose such restrictions and conditions as I deem appropriate.

Reliability of the CVR

[16] The contents of the CVR are reliable. There has been no suggestion that it is otherwise. I have reviewed the transcript and listened to the audio. There is no indication that the audio recording has been altered, and there are no unexplained gaps.

Relevance of the CVR

Evidence is relevant where it has some tendency as a matter of logic and human experience to make the proposition for which it is advanced more likely than that proposition would appear to be in the absence of that evidence. To identify logically irrelevant evidence, ask, "Does the evidence assist in proving the fact that my opponent is trying to prove?"

The Law of Evidence, 5th ed., (Paciocco, Struesser)

instructions and training in relation to the aircraft and aircraft systems that would be pertinent to the possible causes of the accident.

[22] In Paragraphs 50-58, the plaintiffs set out the particulars of negligence of Transport Canada. It is alleged to have failed to fulfill its responsibility as an industry regulator, including how it assessed and approved Air Canada's non-precision approach procedures. (para. 58 (k) and (l)).

[23] The pleadings make the flying officers' perceptions, observations, considerations and decision-making in electing to land where they did, when they did, and the manner in which they elected to execute the landing, central to the action of the plaintiffs.

[24] The Summary included in the Transportation and Safety Board of Canada Aviation Investigation Report A15H0002, published in 2017, described concisely the context and mechanism of the accident:

On 29 March 2015, an Air Canada Airbus Industrie A320-211 (registration C-FTJP, serial number 233), operating as Air Canada flight 624, was on a scheduled flight from Toronto/Lester B. Pearson International Airport, Ontario, to Halifax/Stanfield International Airport, Nova Scotia, with 133 passengers and 5 crew members on board. At approximately 0030 Atlantic Daylight Time, while conducting a non-precision approach to Runway 05, the aircraft severed power lines, then struck the snow-covered ground about 740 feet before the runway threshold. The aircraft continued airborne through the localizer antenna array, then struck the ground twice more before sliding along the runway. It came to rest on the left side of the runway, about 1900 feet beyond the threshold. The aircraft was evacuated; 25 people sustained injuries and were taken to local hospitals. The aircraft was destroyed. There was no post-impact fire. The emergency locator transmitter was not activated. The accident occurred during the hours of darkness.

[25] Section 28 permits the TSB to only communicate that information which is related to the causes or contributing factors of the transportation occurrence under investigation or to the identification of safety deficiencies. (s. 28(5))

[26] In its Findings, the Board's report concluded that:

- ... once the flight path angle was selected and the aircraft began to descend, the flight crew did not monitor the altitude and distance from the threshold, nor did they make any adjustments to the flight path angle. (3.1.2)

views as to the consequences to the public interest when the privilege yields to court ordered production.

[33] The TSB, for example, submits that the investigative work they undertake on behalf of the public has a “a hierarchy of protections” which safeguard its ability to work independently and to obtain the best information possible from witnesses and parties.

[34] Jean Laporte is the Chief Operating Officer of the TSB. His affidavit evidence is that the TSB:

... functioning will be prejudiced if orders are made for disclosure of information gathered in the course of its investigations, falling within the limited categories for which the court has authority to order disclosure.

(Laporte affidavit, para.46)

[35] Daniel Cadieux, Flight Safety Division, National Chair for the Air Canada Pilots Association, in his affidavit, expresses the opinion that:

28 ... any order for disclosure of information or recordings from the TSB will impair its members' ability to speak freely while flying and will reduce their willingness to speak openly with the TSB in investigating accidents.

29 If CVRs are routinely, or even more regularly, produced in the course of litigation, it will impact my, and my colleagues' ability to speak freely while flying our aircraft. Indeed, I am aware that in most cases where the CVR has been sought during the litigation process it has been ordered to be produced. As the privilege that surrounds the CVR is eroded, pilots will become increasingly mindful of what they say in the cockpit. This, in turn, could affect the way that we deal with issues that arise while flying and landing, and could raise significant safety concerns.

[36] Contrasting views have been expressed in evidence provided by the applicants.

[37] Jim Hall served a term of seven years as the Chairman of the United States National Transportation Safety Board. In that country the statutory provisions do not permit release to the public of the audio recordings, however the NTSB is

[43] Mr. Heuter spoke to the significance of the CVR information that should be available in this case. He notes, among many observations, that the most important time in the flight occurred when the plane was below 10,000 feet at which time “sterile cockpit rules are in effect”. In short, the conversations in the cockpit should only have been about flight operational issues, not personal matters.

[44] He referred to his review of the discovery evidence of the flight crew. He observed that there are significant gaps in their ability to provide material information as to their awareness, discussions, and ultimate decision making in relation to factors that are thought to have contributed to the cause of the accident.

Evidentiary Gaps in the Flying Crew's Discovery Evidence

[45] Counsel for Airbus SAS provided a detailed chart comparing the Discovery evidence of AC 624's flying crew with excerpts from the TSB report.

[46] The chart identifies a number of questions asked during the Discovery examinations of the flying crew which are material to the issues in the litigation, but which could not be answered, apparently due to the impaired memory of the officers. The Captain, in particular, could not recall many important details that the TSB found important to report on.

[47] The chart also identifies “Excerpts from the TSB Report that address the Evidentiary Gaps” in the evidence of the Captain, and separately in the evidence of the First Officer. The problem, of course, is that the TSB report cannot be introduced in evidence.

[48] Counsel for the respondents submitted that there are other sources than the CVR to obtain the information that would fill the evidentiary gaps. While that was true for some questions, my overall observation is that the discovery evidence of these two officers has been demonstrated to be necessary to answering important questions, and since they have not been able to do so satisfactorily, the CVR represents the only way to get that information.

[49] In summary, the production of the CVR has important evidentiary value and is necessary. That does not end the analysis, however.

[53] I would add that greater transparency generally encourages faster resolution of disputes at less cost to the parties, which is in the public interest as well as that of the parties to litigation.

Privacy Interests/ Safety Interests

[54] Returning to the Decision in *Société Air France*, Chief Justice Strathy wrote:

130 ... section 28 privilege has two purposes. The first, as pointed out by the report of the Dubin Commission, is to protect the pilots' privacy, which has been infringed by the intrusion of the CVR into their workplace - an intrusion they have accepted in the interests of aviation safety. The second is to encourage free and uninhibited communications between the pilots.

131 On the subject of privacy, and to deal with an obvious concern, it is difficult to imagine that anyone would demand, still less order, production of purely personal communications, made outside critical time periods that are irrelevant to the issues in the case. ...As I have pointed out earlier, Air France' sterile cockpit policy would prohibit non-operational communications during the descent in any event.

132 For the same reason, the judicial examination process would screen out any irrelevant exclamations in the agony of impending impact. I repeat that there are no such communications in this case.

133 The more substantial concern is the pilots' general interest in privacy. In my view, the concern is largely illusory for the reasons identified in the report of the TSB Act Review Commission. Much of the content of the communications between the pilots has already been disclosed in the report of the TSB which, although not quoting the conversations verbatim, has given its own summary of them. The pilots' privacy has already been infringed by the disclosure in the TSB report of the substance of their communications and conversations. This report has been publicly released and posted on the TSB web site. I fail to see how the disclosure of the actual conversations, to the parties to this litigation, for use only in this litigation and subject to a confidentiality order, could be a more serious invasion of the pilots' privacy than the public disclosure of the report itself. As well, the privacy concern is generally illusory because, in at least some jurisdictions, the CVR transcript is included in the report of the investigating authority and in others it is routinely published. Thus, in both the particular sense and the general sense, the pilots' privacy has already been infringed.

134 The second reason for the privilege attached to on-board recordings is the desire to encourage open and timely communications between aircraft flight crew - counsel for the TSB suggests that the disclosure of CVRs would have a chilling effect on communication that would ultimately impair safety because pilots would limit their communications due to the electronic "fly on the wall".

[60] In response to the argument that the privilege is being eroded by release, I note that there are few reported cases where this issue has been litigated, and there is little objective evidence offered in support of this assertion. In any event, whether the exemption from the privilege is just is subject to court oversight and exercise of discretion to ensure that such production honors the privilege to the extent that is necessary and appropriate in the circumstances of the matter before the court.

Conclusion

[61] Video recordings are used in places where safety and security of the person or of property are important concerns. Thus, audio and visual recordings in the workplace are common today. As a general observation we have found that societal interests are well served where the frailties of human observation and memory can be supplemented by such recordings to ensure that the truth-seeking exercise is best served.

[62] Parliament has accorded a privilege to the recorded workplace communications that take place in an aircraft's cockpit. In doing this, however, Parliament has seen fit to give discretion to the courts to determine how the public interest is best served when competing interests clash over whether there should be exemption to the privilege granted.

[63] I have concluded that, in the circumstances of this case, the public interest in the administration of justice outweighs the importance attached to the statutory privilege protecting the cockpit voice recorder.

[64] The contents of the CVR are relevant and reliable. The conversation recorded does not contain private or scandalous material.

[65] This litigation is important and substantial both in personal, and in monetary, terms. It is important that the process of determining the claims is fair to all parties and provides the best opportunity for the court to fulfill its function in trial. The public interest is served in this way.

[66] Section 7(1)(d) of the *Class Proceedings Act* provides that in certifying an action it is, among other things, important to achieving a fair and efficient resolution of the dispute. Behaviour modification is an objective of a class action. This too provides a public interest rationale for transparency in the litigation process.