

Transportation Notes: Contents of Cockpit Voice Recorder Released in Class Action

June 8, 2021

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In *Canada (Transportation Safety Board) v Carroll-Byrne*, [2021 NSCA 34](#) ("Carroll-Byrne"), the Nova Scotia Court of Appeal upheld a lower court's authorization of the conditional release of the contents of the cockpit voice recorder ("CVR") to the parties to a class action. The appeal court unanimously affirmed the motion judge's holding that the public interest in the proper administration of justice outweighed the statutory privilege that attaches to the CVR.

Background

In its final approach to Halifax International Airport just after midnight on March 29, 2015, Air Canada Flight 624 severed power lines and then struck snow-covered ground short of the runway, impacted a localizer antenna array – causing the Airbus A320's landing gear to separate – bounced twice more, and then skidded on its belly before coming to a rest. Approximately two dozen of the 133 passengers, as well as both pilots, and a flight attendant, were taken to hospital with non-life-threatening injuries.

A class proceeding was commenced on behalf of the passengers against Air Canada; the pilot and first officer of Flight 624; as well as Airbus; the airport; NAV Canada, which operates Canada's civil air navigation system; and the Canadian government.

The class action was certified on consent in December 2016.

Meanwhile, the Transportation Safety Board of Canada (the "TSB" or "Board") carried out an investigation into the accident. The TSB's investigation report was released in May 2017. Among its findings was that Air Canada's applicable standard operating procedure ("SOP") and practice did not accord with its or Airbus's flight crew operating manuals. As a result, Flight 624's flight crew did not monitor the aircraft's altitude or distance from the runway after selecting the flight path angle and, therefore, did not notice that the aircraft had descended below the minimum descent altitude too early in its final approach. (Air Canada amended its SOP following the accident. It also sued Airbus.)

The TSB's report is publicly available, but its findings are not binding, and the opinions of TSB investigators are not admissible in other legal proceedings, by virtue of ss. 7(4) and 33 of the *Canadian Transportation Accident Investigation and Safety Board Act* (the "Act").

As part of its investigation, the TSB took possession of and considered the contents of the CVR. Section 28(2) of the Act prohibits the disclosure of the CVR or its contents except in accordance with that section.

Section 28(6) allows a court to order the "production and discovery" of the CVR if the public interest in the proper administration of justice outweighs the importance of the statutory privilege attached to the CVR. That provision also references certain procedural considerations that came into play in *Carroll-Byrne* – it reads:

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.

Airbus, along with the plaintiffs, the Halifax airport and NAV Canada, moved for the production and discovery of the CVR in the class action. The TSB and the Air Canada Pilots' Association were granted intervenor status and opposed the requested disclosure order, along with Air Canada.

The Appeal

The motion judge ordered the conditional release of the CVR to the parties to the class action. The TSB appealed, with the support of the Pilots' Association and Air Canada. On appeal, the TSB's primary arguments were that the court below had erred

1. by failing to give it the opportunity to make *in camera* representations with respect to the CVR and
2. by determining that the public interest in the proper administration of justice outweighed the importance of the privilege in the CVR.

The Pilots' Association argued that disclosure of the CVR compromises pilot privacy interests and public safety by discouraging candour in flight officer communications.

"In camera" non est "ex parte"

The TSB argued that s. 28(6)(b), in its inclusion of the words "*in camera*", entitled it to make "*ex parte*" representations to the judge prior to any decision to release the contents of the CVR. That is, the TSB asserted that the motion judge should have allowed it to make submissions not only in the absence of the public (*in camera*) but also in the absence of any other adverse parties (*ex parte*).

In detailed reasons, the Court of Appeal held that the TSB's interpretation was not correct. In particular, the fact that s. 28(6)(b) uses the words "*in camera*" and not "*ex parte*" presented a considerable challenge to the TSB's argument. As noted by the court, there is a clear distinction between *in camera* and *ex parte*, and it can be assumed that Parliament will use *ex parte* when that is what it means – as it has in s. 19(3) of the Act and in various other federal legislation.

In addition, the court held that on a plain reading of s. 28(6), it

authorizes the Court – not the parties – to listen to the cockpit recorder *in camera*. The Board – which is not a party in the ordinary sense – is then given an opportunity to make representations with respect to the recording – something non-parties ordinarily cannot.

While the court did not make a clear finding on this issue, there is good reason to interpret the “*in camera*” in s. 28(6)(b) as applying only to the court’s examination of the CVR, and not to any representations the TSB is allowed to make in respect of it. As Airbus argued, to the extent there is any ambiguity in the English version of the provision, the French version appears to support this conclusion in providing that a court to which a request for the production of a CVR is made must “...examine celui-ci à huis clos et donne à la Régie la possibilité de présenter des observations à ce sujet...” This phrasing more clearly states that only the examination of the CVR is to be done *in camera* (“à huis clos”).

The public interest favoured conditional release of the CVR

The TSB faulted the motion judge for following and applying the analysis of a 2009 Ontario decision rendered by Justice Strathy in *Société Air France v Greater Toronto Airports Authority*, [2009 CanLII 69321](#), which canvassed many of the arguments raised in *Carroll-Byrne* in some detail.

The Nova Scotia Court of Appeal held that the motion judge had not erred in relying on the *Air France* articulation of the applicable test, which rejected the inclusion of a “possibility of a miscarriage of justice” threshold as unwarranted and unsupported by the language of s. 28(6). That decision was unanimously upheld on appeal (and Strathy J was subsequently elevated to Ontario’s court of appeal and appointed Chief Justice of the province).

The appeal court also found no error in the motion judge’s assessment of the facts before him, which findings were entitled to deference. In particular, the motion judge held that:

- the CVR was both reliable and material to a central focus of the claim: the flight officers’ perceptions, observations, considerations and decision-making in Flight 624’s final approach;
- the flight crew’s discovery evidence revealed gaps in their ability to provide facts about their conduct at material times in the flight, which could be filled by production of the CVR;
- disclosure of the CVR under the stringent conditions proposed would not unduly compromise flight officer privacy, especially given that the most important part of the recording occurred when the aircraft was below 10,000 feet when “sterile cockpit rules are in effect”, meaning that only operational issues are to be discussed; and
- disclosure of the CVR would not unduly compromise safety by having a “chilling effect” on pilot communication or witness cooperation with investigators, having weighed competing evidence from the TSB and the experience of the United States National Transportation Safety Board, where no such effect had been found.

The Act attaches privilege to cockpit voice recorders and their contents to promote safety and to protect the privacy interests of flight crews. However, CVRs contain critical data that are usually of critical importance to understanding the causes of an aviation accident. Like the TSB, a court’s function is to uncover the truth and, in recognition of this fact, the Act allows for the production of CVRs in the civil litigation discovery process in appropriate circumstances.

The information and comments herein are for the general information of the reader and are not intended as advice or opinion to be relied upon in relation to any particular circumstances. For particular application of the law to specific situations, the reader should seek professional advice.

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