NOVA SCOTIA COURT OF APPEAL

Citation: *Canada (Transportation Safety Board) v. Carroll-Byrne*, 2021 NSCA 34

Date: 20210416
Docket: CA 495035
Registry: Halifax

Between:

The 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, 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

Judge:	The Honourable Justice Peter M. S. Bryson
Appeal Heard:	December 7, 2020, in Halifax, Nova Scotia
Legislation:	*Canadian Transportation Accident Investigation and Safety Board Act*, S.C. 1989, c. 3, ss. 7(4), 19(3), 28(2), 28(6); *Judicature Act*, R.S.N.S. 1989, c. 240; *Canada Evidence Act*, R.S.C. 1985, c. C-5, s. 38.11; *Access to Information Act*, R.S.C. 1985, c. A-1, s. 52; *Criminal Code*, R.S.C. 1985, c. C-46, s. 688(1)(a);
Cases Considered:	*Aliant Inc. v. Ellph.com Solutions Inc.*, 2012 NSCA 89; *Innocente v. Canada (Attorney General)*, 2012 NSCA 36; *Budd v. Bertram*, 2018 NSCA 95; *Hogeterp v. Huntley*, 2007 NSCA 75; *Sydney Steel Corporation v. MacQueen*, 2013 NSCA 5; *Amirault v. Westminer Canada Ltd.* (1993), 125 N.S.R. (2d) 171 (NSCA); *Automattic Inc. v. Trout Point Lodge Ltd.*, 2017 NSCA 52; *Baker Estate v. Baker*, 2018 NSCA 80; *American Cyanamid Co. v. Ethicon Ltd.*, [1975] AC 396; *RJR - MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311; *Fulton Insurance Agencies Ltd. v. Purdy*, 1990 NSCA 23; *Brown v. Brown* (1999), 173 N.S.R. (2d) 41; *Bell ExpressVu Limited Partnership v. Rex*,

2002 SCC 42; *Sparks v. Nova Scotia (Assistance Appeal Board)*, 2017 NSCA 82; *Martell v. Halifax (Regional Municipality)*, 2015 NSCA 101; *R. v. S.A.C.*, 2008 SCC 47; *Gordon v. Canada (Minister of National Defence)*, 2004 FC 1556; *Wappen-Reederei GmbH & Co. KG v. Hyde Park (The)*, [2006] 4 FCR 272; *Jetport Inc. v. Global Aerospace Underwriting Managers*, 2014 ONSC 6860; *Ruby v. Canada (Solicitor General)*, 2002 SCC 75; *R. v. Herman*, 2017 BCSC 241; *Aeronautics Act*, S.C. 2001, c. 38, s. 4.79; *R. v. O'Brien*, 2011 SCC 29; *Teva Canada Limited v. Novartis Pharmaceuticals Canada Inc.*, 2016 FCA 230; *McAleer v. Farnell*, 2009 NSCA 14; *Société Air France et al v. Greater Toronto Airports Authority*, [2009] O.J. No. 5337, aff'd 2010 ONCA 598; *Horne v. Queen Elizabeth II Health Sciences Centre*, 2018 NSCA 20; *R. v. Morrissey* (1995), 97 C.C.C. (3d) 193; *Air France*, *Jetport*, or *Cohen and others v. Northern Thunderbird Air Inc.*, 2017 BCSC 315;

Subject: Evidence. Admissibility. Privileged Communications.

Summary: An Air Canada flight struck the ground short of the runway while landing at Halifax International Airport. A class action proceeding was brought against various defendants. An application was made to have the cockpit recorder contents released to the parties. The Transportation Safety Board and the Air Canada Pilots' Association were granted leave to intervene. Section 28(6) of the *Canadian Transportation Accident Investigation and Safety Board Act*, S.C. 1989, c. 3 permits disclosure if the court "concludes in the circumstances of the case that the public interest in the administration of justice outweighs in importance the privileged attached to the on-board recording …" Subject to confidentiality conditions, the application judge ordered disclosure. The Board appealed.

Issues: (1) Did the judge err in not giving the Board an opportunity to make *ex parte* submissions to the judge?

(2) Were the judge's reasons for (1) insufficient?

(3) Did the judge err in determining that the public interest in the proper administration of justice outweighed the statutory privilege associated with the cockpit voice recorder?

Result: Leave granted. Appeal dismissed. The Board had an opportunity to make *inter partes* submissions. The *Act* did not grant a right to make submissions *ex parte*. The judge required no special assistance in understanding the contents of the recorder. His reasons were adequate to permit appellate review. He did not err in applying the test in *Société Air France et al v. Greater Toronto Airports Authority*, [2009] O.J. No. 5337. He made no clear and material error in assessing the evidence. His order contained confidentiality provisions. His balancing of interests was entitled to deference.

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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

Judges:	Bryson, Derrick and Beaton, JJ.A.
Appeal Heard:	December 7, 2020, in Halifax, Nova Scotia
Held:	Leave granted; appeal dismissed, per reasons for judgment of Bryson, J.A.; Derrick and Beaton, JJ.A. concurring
Counsel:	Richard W. Norman and David Taylor, for the appellant Raymond Wagner, Q.C., Kate Boyle, and Jamie Thornback, for the respondents Kathleen Carroll-Byrne, Asher Hodara and George Liboy Clay Hunter, for the respondent Air Canada, John Doe #1 and John Doe #2 Christopher Hubbard and Brittany Cerqua, for the respondent Airbus S.A.S. Robert Bell, for the respondent NAV Canada Scott Campbell and Michelle Chai, for the respondent Halifax International Airport Authority Angela Green and Heidi Collicutt, for the respondent Attorney General of Canada Chris Rootham, for the respondent Air Canada Pilots' Association

Reasons for judgment:

Introduction

[1] The Transportation Safety Board of Canada seeks to appeal the interlocutory decision of the Honourable Justice Patrick Duncan (as he then was), which authorized the conditional release of the contents of the cockpit voice recorder of an Air Canada flight which struck the ground short of a runway at Halifax Stanfield International Airport during a snowstorm on March 29, 2015. Justice Duncan determined that the public interest in the proper administration of justice outweighed the importance of the statutory privilege attached to the cockpit voice recorder (2019 NSSC 339).

[2] The Board asks for leave to appeal and, if granted, asserts that Justice Duncan erred by:

> (a) Failing to afford the Board an opportunity to make *in camera* representations with respect to the cockpit voice recorder in accordance with section 28(6)(b) of the *Canadian Transportation Accident Investigation and Safety Board Act*, and in exercising his discretion without the benefit of such representations as required by the *Act*;
>
> (b) Failing to provide sufficient reasons for (a);
>
> (c) Determining the public's interest in the proper administration of justice outweighed the importance of the statutory privilege associated with the cockpit voice recorder.

[3] The Air Canada Pilots' Association supports the appeal, arguing that disclosure compromises pilot privacy interests and public safety by discouraging candour in flight officer communications. Air Canada makes no independent submissions, but also supports the appeal. The other respondents either oppose the appeal or take no position.

[4] The issues raised by the Pilots' Association are largely subsumed in the Board's issue (c) and will be considered in that context.

[5] Accordingly, these reasons will begin with a factual summary, address leave to appeal, and then consider the three issues raised by the Board.

Factual Summary

[6] On March 29, 2015, Air Canada Flight 624 attempted to land at the Halifax International Airport. It was just after midnight. Weather conditions were difficult. When landing, the aircraft hit the ground short of the runway before skidding along the tarmac, eventually coming to a stop.

[7] The individual litigants commenced a class proceeding against 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 (pilot and first officer of Flight 624). The Transportation Safety Board and the Air Canada Pilots' Association were granted intervenor status to oppose the disclosure motion.

[8] Pleadings are now closed. Documentary production and discovery examinations are complete. The parties now must obtain and exchange expert reports with respect to liability and causation. The action will then proceed to a common issues trial which will address among other things:

a) Whether Air Canada's pilot training, policies, procedures, and decision making caused or contributed to the crash;

b) Whether any act or omission by Air Canada or its pilots, including with respect to landing, was negligent, wrongful, below standard of care, or done recklessly and with knowledge that damage would probably result;

c) Whether any act or omission or breach of the standard of care by Air Canada or its pilots, including with respect to the landing, caused or contributed to the crash.

(Class Action Certification Order December 14, 2016)

[9] The Board investigated the crash and prepared a report setting out its findings. Their report included consideration of the contents of the cockpit voice recorder. The report has been produced to the parties. It is not admissible in the lawsuit (*Canadian Transportation Accident Investigation and Safety Board Act*, S.C. 1989, c. 3, s. 7(4)). A copy of the cockpit voice recording was not provided, prompting the disclosure motion before Justice Duncan.

Should leave to appeal be granted?

[10] The judge's decision to order production of the contents of the cockpit voice recorder was discretionary and is entitled to deference on appeal. Discretionary interlocutory decisions that do not terminate the litigation will only be overturned if wrong principles of law have been applied or a patent injustice would result (*Aliant Inc. v. Ellph.com Solutions Inc.*, 2012 NSCA 89; *Innocente v. Canada (Attorney General)*, 2012 NSCA 36; *Budd v. Bertram*, 2018 NSCA 95).

[11] No interlocutory appeal is available to this Court, except with leave as provided for in the *Judicature Act*, R.S.N.S. 1989, c. 240, or other statute. *Rule* 90.09 contemplates interlocutory appeals with leave, but gives no guidance concerning the granting of leave.

[12] Typically leave applications are heard with the main appeal (see *Hogeterp v. Huntley*, 2007 NSCA 75, ¶ 20), although there are exceptions. *Workers' Compensation Act* leave applications are heard separately by a panel; leave to appeal a certification order in a class action proceeding is heard by a single judge (see *Sydney Steel Corporation v. MacQueen*, 2013 NSCA 5). The Court does not usually provide reasons for granting or refusing leave (*Hogeterp*, ¶ 20). When it does, the question is whether the appeal raises "arguable issues".

[13] This Court routinely relies on *Amirault v. Westminer Canada Ltd.* (1993), 125 N.S.R. (2d) 171 (NSCA), ¶ 11, for a description of "arguable issue":

> [11] ***"An arguable issue" would be raised by any ground of appeal which, if successfully demonstrated by the appellant, could result in the appeal being allowed. That is, it must be relevant to the outcome of the appeal;*** and not be based on an erroneous principle of law. It must be a ground available to the applicant; if a right to appeal is limited to a question of law alone, there could be no arguable issue based merely on alleged errors of fact. An arguable issue must be reasonably specific as to the errors it alleges on the part of the trial judge; a general allegation of error may not suffice. But if a notice of appeal contains realistic grounds which, if established, appear of sufficient substance to be capable of convincing a panel of the court to allow the appeal, the chambers judge hearing the application should not speculate as to the outcome nor look further into the merits. Neither evidence nor arguments relevant to the outcome of the appeal should be considered. Once the grounds of appeal are shown to contain an arguable issue, the working assumption of the chambers judge is that the outcome of the appeal is in doubt: either side could be successful.
>
> [Emphasis added]

[14] The definition of "arguable issue" in *Amirault* has been frequently cited by this Court as a threshold test in leave applications (*Sydney Steel Corporation v. MacQueen, supra*, ¶ 18; *Burton Canada Company v. Coady*, 2013 NSCA 95, ¶ 18; *Automattic Inc. v. Trout Point Lodge Ltd.*, 2017 NSCA 52, ¶ 23; *Baker Estate v. Baker*, 2018 NSCA 80, ¶ 13-14). It is worth recalling that *Amirault* was a stay application, applying a test first adopted in Canada in the interlocutory injunction context from the House of Lords in *American Cyanamid Co. v. Ethicon Ltd.*, [1975] AC 396, approved by the Supreme Court in *RJR - MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 (see *Fulton Insurance Agencies Ltd. v. Purdy*, 1990 NSCA 23). These cases shifted the injunction analysis from the merits to a consideration of relative harm, pending a ruling on the merits. The balance of Justice Freeman's comments in *Amirault* respect that deferral of a merits analysis. Unless the grounds of appeal plainly fail to raise potentially successful issues, the grounds are usually said to be arguable (for an example of grounds not "arguable" see *Brown v. Brown* (1999), 173 N.S.R. (2d) 41, ¶ 8, per Cromwell J.A.).

[15] In a leave application, heard simultaneously with the merits, there is a natural tendency to focus on the latter, rather than arguability; and so the reticence of an "arguable issue" analysis, that defers to a later consideration of the merits sometimes recedes before the merits on the appeal proper. Nevertheless, the proper threshold is "arguable issue".

[16] With respect to the balancing required to determine whether the cockpit voice recorder contents should be disclosed (¶ 2(c) above), the Board has alleged an error of law regarding the test to be applied, citing competing authority; so there is an arguable issue. Airbus argues that the first two grounds of appeal—*ex parte* submissions and insufficient reasons—would have no impact on the fundamental issue of whether the recordings should be released to the parties. It therefore contends that leave should be confined to the disclosure issue. But this submission anticipates a successful analytical outcome for Airbus on the first and second issues.

[17] Although the Board has advanced and argued three discrete grounds of appeal, it would offend the principle of contextual analysis when both the grounds advanced and the statutory provision under consideration, are related. The subsections of s. 28(6) must be read together as serving the ultimate goal of balancing the interests described in ss. 28(6)(c). Accordingly, leave to appeal

should not be confined to the issue of the balancing required in s. 28(6)(c), as Airbus has argued. Leave should be granted on all three grounds.

Does the *Act* authorize *ex parte* submissions?

[18] Statutory interpretation is a question of law, reviewable on a correctness standard.

[19] In civil litigation, all relevant and probative evidence is typically admissible, subject to assertions of privilege. The most familiar form of privilege is that of solicitor/client communications but there are many others. In this case, s. 28(2) of the *Act* protects against disclosure of the cockpit voice recorder or its contents:

> **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.

[20] Section 28(6) of the *Act* provides for disclosure of cockpit voice recordings if the public interest in the proper administration of justice outweighs the importance of the privilege:

> **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.
>
> [Emphasis added]

[21] The Board argues that 28(6)(b) entitles it to make what is in effect an *ex parte* submission to the judge prior to any decision to release the contents of the cockpit voice recorder.

[22] When interpreting a statute, this Court applies the Supreme Court of Canada decision in *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, ¶ 26, which requires that the words of the statute "are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament" (*Sparks v. Nova Scotia (Assistance Appeal Board)*, 2017 NSCA 82, ¶ 24).

[23] Genuine ambiguity may be resolved by resorting to external interpretative aids but is not a precondition of a proper contextual analysis. In *Martell v. Halifax (Regional Municipality)*, 2015 NSCA 101, the Court put it this way:

> [32] The Appellant's assertion that the existence of an ambiguity in the by-law was a necessary springboard to permit the interpretation which followed, is flawed. ***A finding of ambiguity is not a precondition of a proper contextual analysis.*** As this Court said in *Isaac Walton Killam Health Centre v. Nova Scotia (Human Rights Commission)*, 2014 NSCA 18, citing the Supreme Court of Canada, such an analysis is required in any event:
>
> > [26] In *McLean*, the Supreme Court was satisfied that the plain meaning of the statutory words were consonant with the British Columbia Security Commission's interpretation. But the court went on to say:
> >
> > > [43] However, satisfying oneself as to the ordinary meaning of the phrase "is not determinative and does not constitute the end of the inquiry" *ATCO Gas and Pipelines Ltd. v. Alberta (Energy and Utilities Board)*, 2006 SCC 4, [2006] 1 S.C.R. 140, at para. 48). ***Although it is presumed that the ordinary meaning is the one intended by the legislature, courts are obliged to look at other indicators of legislative meaning*** as part of their work of interpretation. That is so because
> > >
> > > > ***[w]ords that appear clear and unambiguous may in fact prove to be ambiguous once placed in their context.*** The possibility of the context revealing a latent ambiguity such as this is a logical result of the modern approach to interpretation.

> (*Montréal (City) v. 2952-1366 Québec Inc.*, 2005 SCC 62, [2005] 3 S.C.R. 141, at para. 10)
>
> [Emphasis added]

[24] The plain language of the section does not authorize the Board to make *ex parte* submissions to the motions judge. The Board claims its right is *ex parte* by pointing out that s. 28(6)(b) is prefaced by the words "*in camera*" which it submits modifies everything that follows. The Board says not only should the Court examine the recording *in camera*, but also the Board should be entitled to make its representations *in camera*. The Board interprets this as *ex parte*.

[25] There is a clear distinction between "*in camera*" and "*ex parte*" which appears throughout legislation. The first, from the Latin literally means "within the room", excluding those who don't belong there. In legal parlance, that generally means the public. *Ex parte* in a legal context means to do something without notice to, and thus in the absence of other adverse parties. It is not synonymous with "*in camera*". The terms have well known and different legal meanings. As Ruth Sullivan explains in *Sullivan on Construction of Statutes*, 6th ed (Markham: LexisNexis Canada, 2014) at p. 66, "… when legal terms of art are used in a legal context like legislation, it is plausible to suppose that they are meant to have their legal meaning". As Airbus points out, the *Act* itself refers to *ex parte* applications for a warrant in s. 19(3).

[26] Airbus provides other examples. Section 38.11(1) of the *Canada Evidence Act* authorizes private hearings, while s. 38.11(2) permits *ex parte* submissions. A similar distinction between an *in camera* application and an *ex parte* submission appears in s. 52(2) and (3) of the *Access to Information Act*, R.S.C. 1985, c. A-1.

[27] The Board rejoins that "*ex parte*" in s. 19(3) of the *Act* is an adjective, describing the type of application, while "*in camera*" in s. 26 is a prepositional phrase, capturing the right of the Board to make submissions "*in camera*", effectively making them *ex parte*. The simple response is that Parliament—well aware of the different meanings of these Latin phrases—could have incorporated "*ex parte*" into s. 28(6)(b), but did not.

[28] Both the Board and Airbus also claim that the English and French versions of s. 28(6)(b) are unambiguous and support their interpretation of each. Alternatively, Airbus says that to the extent the comma after *in camera* in the English version creates any ambiguity, the absence of a comma in the French version resolves the ambiguity in favour of Airbus:

> […] examine celui-ci à huis clos et donne à la Régie la possibilité de présenter des observations à ce sujet après lui avoir transmis un avis de la demande, dans le cas où celle-ci n'est pas partie aux procédures. […]

[29] The Board responds that neither version is ambiguous and both support its interpretation. Alternatively the Board says the French version may be ambiguous because Parliament's use of the words "et donne au Bureau la possibilité de présenter des observations à ce sujet […]" begs the question about which "subject" the Board is entitled to make representations: regarding the recording itself or the method of examination?; in the absence of the parties and public, or just the public, or neither? In that case, the Board resorts to insisting that the English version is unambiguous and should be preferred.

[30] The law begins by favouring a "shared meaning" when possible, and resolves ambiguity in one version in favour of clarity in the other (*R. v. S.A.C.*, 2008 SCC 47). With respect, the absence of *ex parte* in both English and French versions leaves no linguistic ambiguity, although that itself is not conclusive.

[31] The Board is really advancing a contextual analysis to argue that *ex parte* submissions are implicitly authorized by s. 28(6). Context may alter apparently clear language: *Martell*, ¶ 23 above.

[32] Airbus points out that the Transportation Safety Board's interpretation offends the general principle against *ex parte* proceedings. The Board's interpretation not only ignores the open court principle but also the *audi alteram partem* principle which permits parties to make submissions with respect to the merits of a hearing that will affect them. That may be, replies the Board, but there are exceptions to the rule and this case is one of them, citing authorities which endorse the policy of confidentiality serving the interests of candour and ultimately, public safety (see *Gordon v. Canada (Minister of National Defence)*, 2004 FC 1556).

[33] Furthering its contextual analysis, the Board submits that the purpose of the legislation is public safety, arguing this goal is better served by confidentiality:

> 64. The context within which s. 28 of the Act exists is clear: a regime intended to protect public safety and ensure that safety investigations can be conducted in a candid, forthright, and confidential manner. […]
>
> 65. It follows that a pragmatic, purposive, and contextual approach to the interpretation of s. 28(6)(b) requires a judge hearing a motion for production to be

> fully briefed on the meaning and import of the [cockpit voice recorder] rather than to make a decision in an informational vacuum. […]
>
> [Appellant's Factum]

[34] No jurisprudence clearly supports the Board's claimed right to make *ex parte* submissions. Rather the Board argues by analogy or implication.

[35] The Board begins with *obiter* comments in *Wappen-Reederei GmbH & Co. KG v. Hyde Park (The)*, 2006 FC 150 (CanLII), [2006] 4 FCR 272, which it says endorses the argument that it can make *ex parte* submissions because they appear to be consistent with other types of privilege such as those described in ss. 37 and 38 of the *Canada Evidence Act*. As we have seen, the distinction between private hearings and *ex parte* submissions is one that is made elsewhere in the *Act* and was not introduced into s. 28(6) of the *Act*. *Hyde Park* does not decide that the Board is entitled to make *ex parte* submissions.

[36] The Board next cites *Jetport Inc. v. Global Aerospace Underwriting Managers*, 2014 ONSC 6860, where the court said:

> [16] […] As required by s. 28(6)(b) of the TSB Act, I have examined the "on-board recordings" *in camera*. Counsel for the TSB made representations with respect to the production of the on-board recordings during submissions on the motion ***and did not ask for the opportunity to make any further representations following my examination of the recordings.***
>
> [Emphasis added]

[37] The Board says the emphasized language implies the Board in that case could have had an opportunity to make *ex parte* submissions. That question was not asked or answered by *Jetport*.

[38] The Board then turns to *Ruby v. Canada (Solicitor General)*, 2002 SCC 75, to support its claimed right to make *ex parte* submissions. *Ruby* is of no help. *Ruby* involved a constitutional challenge to statutory authorization of *in camera* proceedings and *ex parte* submissions by government in the context of a claimed national security interest authorizing non-disclosure of sensitive information. In *Ruby* the statute authorized *ex parte* submissions. The *Act* in this case does not.

[39] More pertinently, the Board refers to *R. v. Herman*, 2017 BCSC 241, as a helpful analogy. In *Herman*, the Court conducted an *in camera* hearing under s. 4.79 of the *Aeronautics Act* and allowed the Minister to make *ex parte*

submissions. The Board notes the similarity between s. 4.79(2) of that *Act* and s. 28(6)(b) of the *Act* in this case:

> 68. As a further example, in *R. v. Herman*, 2017 BCSC 241 (Tab 10) at para. 11, the B.C. Supreme Court conducted an *in camera* and *ex parte* hearing pursuant to 4.79 of the *Aeronautics Act*. That section is similar to s. 28(6) of the Act, and reads:
>
> > **Unauthorized disclosure — security measures**
> >
> > 4.79 (1) Unless the Minister states under subsection 4.72(3) that this subsection does not apply in respect of a security measure, no person other than the person who made the security measure shall disclose its substance to any other person unless the disclosure is required by law or is necessary to give effect to the security measure.
> >
> > **Court to inform Minister**
> >
> > (2) If, in any proceedings before a court or other body having jurisdiction to compel the production or discovery of information, a request is made for the production or discovery of any security measure, the court or other body shall, if the Minister is not a party to the proceedings, cause a notice of the request to be given to the Minister, **and, in camera, examine the security measure and give the Minister a reasonable opportunity to make representations with respect to it.**
>
> [Board's Emphasis]

[40] Mr. Herman was advancing a s. 8 *Charter* challenge regarding the validity of the search of his checked luggage that revealed large quantities of marijuana and hashish. The Canadian Air Transport Security Authority resisted releasing unredacted documents to the Crown and thus Mr. Herman, owing to concerns that disclosure of security measures developed in response to criminal and terrorist activities may be revealed, thereby compromising public safety.

[41] The Board is correct that the language in *Herman* is very similar to s. 28(6)(b) of the *Act*, although the protected public interest is not the same. Even so, *Herman* does not discuss or decide the issue of *ex parte* submissions—it simply proceeded in that manner.

[42] Plainly read, s. 28(6) 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.

[43] Certainly the Board has the advantage of knowing the contents of the cockpit voice recorder when it makes its submissions following an *in camera* review by the Court alone. But the Board lacks the benefit of full documentary and discovery disclosure. It does not have the same advantage as the parties to the lawsuit regarding issues and relevant evidence.

[44] Yet the Board insists it is uniquely situated to assist the Court:

> 75. In keeping with s. 28, the TSB's proposed in camera representations concern "the on-board recording". That includes context with regard to the actual CVR narrative, assistance interpreting technical aspects of the exchanges, and identifying alternative sources of availability for the information contained on the CVR.
>
> […]
>
> 77. TSB is the only party who is aware of the contents of the CVR and is uniquely placed to assist the Court in determining the significance of those contents.
>
> [Appellant's Factum]

[45] These submissions assume that the court cannot properly conduct the 26(b)(c) analysis without *ex parte* submissions from the Board. There are at least two impediments to that interpretation in this case. The Board does not describe how its *ex parte* submissions would have had any impact on the court's analysis, and Justice Duncan himself found in his oral decision that he needed no assistance to understand the contents of the cockpit voice recorder:

> I can say that I have had no difficulty in understanding the privileged materials and how they relate to the pleadings.

[46] If there were alternative sources of information to those contained on the cockpit voice recorder, which would address the gaps identified by Airbus, the Board has failed to identify them.

[47] If the Board is correct that the judge erred in law by denying it *ex parte* submissions, the Board must still establish that the error was material in the sense of potentially affecting the outcome (*R. v. O'Brien*, 2011 SCC 29; *Teva Canada Limited v. Novartis Pharmaceuticals Canada Inc.*, 2016 FCA 230, ¶ 10). It has failed to do so.

Sufficient reasons?

[48] The Board also complains that the judge did not provide sufficient or adequate reasons for refusing *ex parte* submissions by the Board regarding disclosure of the cockpit voice recorder. Inadequacy of reasons is not a freestanding ground of appeal. Rather, the reasons must fail to permit meaningful appellate review. As this Court said in *McAleer v. Farnell*, 2009 NSCA 14, citing *R.E.M.*:

> [15] For this reason, our role on appeal is not to criticize the level of detail or expression. Instead it is to determine if the functions noted above have been fulfilled to the point where a meaningful appeal is available:
>
> > ¶ 53 However, the Court in *Sheppard* also stated: "The appellate court is not given the power to intervene simply because it thinks the trial court did a poor job of expressing itself" (para. 26). To justify appellate intervention, the Court makes clear, there must be a functional failing in the reasons. More precisely, ***the reasons, read in the context of the evidentiary record and the live issues on which the trial focussed, must fail to disclose an intelligible basis for the verdict, capable of permitting meaningful appellate review.***
> >
> > [Emphasis added]

[49] The Board says the judge's reasons fail to disclose an intelligible basis for his denial of its request to make *ex parte* submissions. The judge provided both oral and written reasons on this point. In his written reasons, he found that the requirements of s. 28(6)(a) and (b) of the *Act* had been met because he had reviewed the cockpit voice recorder *in camera* and had allowed the Board to make submissions on the motion. Implicit in his ruling is that s. 28(6) did not give the Board a right to make *ex parte* submissions.

[50] In his oral reasons, the judge said he was not convinced the *Act* permitted the Board to make *ex parte* submissions. Alternatively he said that if he had the discretion to allow *ex parte* submissions, they were unnecessary in this case because he had no difficulty understanding the cockpit voice recorder transcript.

[51] The judge's conclusions are plain enough. They must be read "… in the context of the evidentiary record and the live issues … [and] must fail to disclose an intelligible basis for the verdict …" (*McAleer*, ¶ 15). The judge did not think that the Board was entitled to make *ex parte* submissions. If he had a discretion, he would not exercise it. He had no difficulty understanding the recorder. The Board made *inter partes* submissions. Any claimed inadequacy of the judge's reasons has no impact on whether his interpretation was correct. And as earlier

described, any error of law with respect to his interpretation must be material to the decision on the merits of disclosure. The Board has failed to show how that occurred in this case.

Did the judge err by determining the public interest in the administration of justice outweighed the importance of the statutory privilege in this case?

[52] The Board says the judge erred because he:

a) Failed to appreciate the content of the cockpit video recorder and the strength of the case of privilege because he failed to permit the Transportation Safety Board to make *in camera* submissions;

b) Ignored or misapprehended jurisprudence regarding the power of the court to order production of the cockpit voice recorder. In particular, the judge failed to properly assess the impact of release of the contents of the recorder upon aviation safety, pilot relations between themselves and their employer and the investigation of aviation occurrences;

c) Misapprehended evidence of the importance of privilege in this case because release of the contents of the cockpit voice recorder would remove or greatly diminish the trust the pilots have in the confidentiality of the Transportation Safety Board's investigative process;

d) Erred in law by adopting the decision of the Ontario Superior Court in *Société Air France et al v. Greater Toronto Airports Authority*, [2009] O.J. No. 5337.

[53] Points (a), (b), and (c) fundamentally allege errors in analysis of the evidence, reviewable for clear and material (palpable and overriding) error. To some extent (a) reiterates the complaint that the judge did not receive the Board's submissions *ex parte*—an argument addressed above.

[54] Accordingly, these reasons will next address whether the judge erred when considering:

- the correct balancing test;
- the reliability and relevance of the evidence in the context of the case;
- the public interest in the administration of justice; and,
- the importance of the privilege.

The test

[55] The Board does not elaborate on its first three submissions, except in the context of criticizing the judge for relying on *Air France* and failing to mention or apply the Federal Court's decision in *Hyde Park*.

[56] Fundamentally the Board says the judge applied the wrong test. He is faulted for relying on *Air France* rather than *Hyde Park*. The Board adds that the judge did not refer to *Hyde Park* although it was put to him in argument. This is not compelling. The judge is not required to restate all of a party's arguments. Moreover, the judge adopted the analysis in *Air France*, which in turn had considered *Hyde Park*. The test outlined in *Hyde Park* did not persuade Justice Strathy (as he then was) in *Air France* nor did it persuade Justice Duncan in this case. The criteria in *Hyde Park*—looking at the subject matter of the litigation, the nature, necessity and probative value of the evidence, as well as alternative means of obtaining the same information—are all subsumed in the *Air France* analysis. The only material distinction is *Hyde Park's* addition of "the possibility of a miscarriage of justice" as a required threshold for admitting the contents of the cockpit voice recorder—a test not described in legislation and not approved of in *Air France*. *Air France* was affirmed by the Ontario Court of Appeal, (2010 ONCA 598).

[57] In this jurisdiction, a "miscarriage of justice" is a term more commonly associated with the criminal law, although it occasionally receives mention in civil cases, usually involving instructions to a jury or a jury verdict (e.g. *Horne v. Queen Elizabeth II Health Sciences Centre*, 2018 NSCA 20, ¶ 62). A "miscarriage of justice" is one of the tests a successful appellant must meet under s. 688(1)(a) of the *Criminal Code*, R.S.C. 1985, c. C-46. An apt description of a miscarriage of justice in that context, frequently approved by the Supreme Court of Canada, comes from the judgement of Doherty J.A. in *R. v. Morrissey* (1995), 97 C.C.C. (3d) 193 at p. 221:

> Where a trial judge is mistaken as to the substance of material parts of the evidence and those errors play an essential part in the reasoning process resulting in a conviction then, in my view, the accused's conviction is not based exclusively on the evidence and is not a "true" verdict. […] If an appellant can demonstrate that the conviction depends on a misapprehension of the evidence then, in my view, it must follow that the appellant has not received a fair trial, and was the victim of a miscarriage of justice. This is so even if the evidence, as actually adduced at trial, was capable of supporting a conviction.

[58] Plainly, miscarriage of justice is a retrospective test, ill-suited to the prospective balancing required by s. 28(6)(c) of the *Act*, which for convenience is reproduced here:

> 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
>
> […]
>
> (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.

[59] The "possibility of a miscarriage of justice" test described in *Hyde Park* was rejected in *Air France* as a bar too high, considering the balancing language of s. 28 of the *Act* and the difficulty of applying such a test prospectively. These are strong reasons to reject the "possibility of a miscarriage of justice" test, and Justice Duncan clearly agreed.

[60] Although not important to the legal test, it is also worth noting two significant factual distinctions between *Hyde Park* and this case. In *Hyde Park*, the issue was the disclosure of bridge recordings from a vessel involved in an accident at sea. In *Hyde Park*, the Court was satisfied that the bridge recordings were not crucial and the information contained in them would be available from other sources. The recordings were found to be of "little evidentiary value" in that case. Justice Duncan found otherwise here. *Hyde Park* is distinguishable on its facts.

[61] Duncan J. considered what balance must be struck in order to determine whether to order disclosure of the contents of the cockpit voice recorder, relying upon the test set out in *Air France*, which the judge described at ¶15 of his decision:

> [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.

[62] The judge did not err in adopting the *Air France* articulation of the test, supported as it is by the language of the *Act*.

Reliability and relevance

[63] Next, turning to the content of the cockpit voice recorder and the circumstances of this case, Justice Duncan looked at the evidence.

[64] The judge first determined that the cockpit voice recorder was reliable. That was not in issue. He then went on to find that it was relevant to causation and the particulars of negligence leading to loss and damages pleaded by the plaintiffs. After reviewing the pleadings, the judge noted the "central" connection between the pleadings and the flying officers' perspective:

> [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.***
>
> [Emphasis added]

[65] Relying on the Transportation Safety Board's findings in its own report, the judge observed:

> [27] ***These "Findings" rely, to some extent, on 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.***
>
> [28] The body of the Report contains very detailed discussions relating to the factors relevant to calculation of the Vertical Descent Angle (VDA) and weather-related factors to be considered in preparing for the approach and landing.
>
> [29] Therefore, ***when the Report refers to the pilot communications, the TSB acknowledges by implication that the information contained in the flying crew's communications is relevant and material to their determination as to causation.*** These communications include those captured only by the CVR.
>
> [Emphasis added]

[66] The judge concluded with respect to the contents of the cockpit voice recorder and the circumstances of the case:

> [31] In summary, my review of the pleadings, the TSB report and the CVR makes it clear that the cockpit audio recording contains relevant and material information to the issues in this litigation.

[67] Not only was the evidence from the cockpit voice recorder relevant and material—the judge found as a fact that the cockpit voice recorder was the only way to obtain certain 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.***
>
> […]
>
> [50] The litigation before the court is important. At least 25 people were injured, and property damage to the plane and to ground installations at the airport was significant. The TSB report cites a number of failures that appear to rest, to varying degrees and with varying consequences, on each of the defendants. ***The communications between the Captain and the First Officer, particularly just before and during their descent, is central to liability.***
>
> [Emphasis added]

[68] Justice Duncan's conclusions regarding the importance of the recorder's contents, in the context of the issues and other available evidence, are entitled to deference. The Board has not identified a legal error in his analysis or a clear and material error in his consideration of the evidence.

Public interest in the administration of justice

[69] With respect to the public interest in the proper administration of justice, the judge again relied upon *Air France*, quoting directly from that decision:

> [51] Returning to Chief Justice Strathy's decision, he held:
>
> > [122] This brings me to the next branch of the test: what do we mean by the "public interest in the proper administration of justice?" What is the content of that public interest? How do we balance the public interest in

> the proper administration of justice against interests of a different kind and with a different subject matter?
>
> [123] It seems to me that, in this context, the ***"public interest in the proper administration of justice" refers primarily to the public interest in the fairness of the trial process - a trial in which the party can fairly make out its case and can fairly meet the case of the other party***. ...
>
> ...
>
> [126] In considering the public interest in the administration of justice, it is worth keeping in mind that ***it is an interest that extends beyond the immediate interests of the parties***. The public interest in the administration of justice includes an interest in the integrity of the judicial fact-finding process and the reliability of the evidence before the court.
>
> [127] ***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 TSB 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]

[70] The judge characterized this as a "correct statement of law and principle" and continued:

> [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.

[71] The Board claims that the judge failed to consider the nature and probative value of the cockpit voice recorder evidence, how necessary it was and alternative sources of evidence. To the contrary, the judge found:

> [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.***
>
> […]

> [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.
>
> […]
>
> [67] ***The flight crew's Discovery evidence showed gaps in their ability to provide relevant and material facts about their conduct at material times in the flight. This information is important*** to having 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.
>
> [Emphasis added]

[72] The judge did not misapprehend the evidence, noting two differences between the facts in this case and *Air France*:

> [56] In saying this, I am alert to two factual differences as between that case and the present one. In the Air France case, the TSB used the CVR to refresh the memories of the pilots. The court held that this fact:
>
> > 121 ... raises questions about the ability of a party to the litigation, and the trier of fact, to rely on the recollection of the pilot without the assistance of the CVR and, equally important, to test the current veracity of the witnesses "refreshed" recollection, without access to the underlying evidence
>
> [57] I do not have evidence that this occurred in this case. Instead the flying crew have been subject to discovery examination and have been unable to provide important information. The use of the CVR to refresh their memories has the potential to assist the trier of fact in its truth-seeking function.
>
> [58] The second difference is that one of the pilots consented to the release of the CVR and Air France took no position. In this case, both members of the flying crew, and Air Canada oppose release. I considered the bases of their opposition and have not found them to be sufficiently compelling in the overall balancing of the competing interests created by Section 28(6)(c) of the Act.

[73] The judge considered these factual distinctions from *Air France*. They were not sufficiently material to alter his conclusion. The judge did not err in his assessment of the recorder's evidence in the context of the issues raised and other evidence available.

[74] The Pilots' Association objects that the judge erred by "failing to assess the potential use" of the cockpit voice recorder "at trial". The recorder cannot be used to demonstrate pilot responsibility because this is prohibited by s. 28(7):

> (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.

[75] These replies can be made to this submission:

(a) A s. 28(6) order releases the cockpit voice recorder for "production and discovery"; it does not purport to decide what use could be made of that evidence at trial if any, which would be a matter for the trial judge.

(b) Arguably, the s. 28(7) restriction is subject to the s. 28(6) disclosure because the latter says "notwithstanding anything in this section".

(c) The s. 28(7) prohibition does not apply to parties not described in that section.

(d) The s. 28(7) prohibition did not deter the court from ordering disclosure in *Air France*, *Jetport*, or *Cohen and others v. Northern Thunderbird Air Inc.*, 2017 BCSC 315.

(e) There is a confidentiality order closely circumscribing disclosure in this case.

Importance of the Privilege

[76] With respect to the privacy and safety interests asserted by the Board and the Airline Pilots' Association, the judge again adopted this language from *Air France*:

> [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' [*sic*] 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".

[135] 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 TSB 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.
>
> 136 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]

[77] During oral submissions, the Board suggested that *Air France* could be distinguished because in that case pilot privacy dominated the analysis, whereas in this case there was pilot evidence supporting safety by protecting cockpit recorder confidentiality. The Pilots' Association made similar submissions. In fact, there was opinion evidence from pilots in *Air France* that made this point (¶ 67 of *Air France*). Justice Strathy was unpersuaded. Justice Duncan referred to the pilot evidence in this case and was similarly unmoved.

[78] With respect to the importance of the privilege, the judge quoted from evidence relied upon by the Board from its Chief Operating Officer and the National Chair of the Air Canada Pilots' Association, expressing concerns about compromised investigations resulting from disclosure and privacy concerns of pilots:

> [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.

[79] The judge contrasted this evidence with that of Jim Hall, the former Chairman of the United States National Transportation Safety Board, who opined that release of pertinent information from a cockpit voice recorder could "only assist the public's and the aviation industry's knowledge of the circumstances of an accident and therefore improve aviation safety for all of us".

[80] Airbus's expert, Mr. Thomas Haueter, an aircraft accident investigator and safety consultant, added that the United States National Transportation Safety Board had found no evidence that disclosure of cockpit voice recordings had a negative impact on aviation safety or had a "chilling" effect on witness cooperation with investigations or how pilots communicate in the cockpit. In other words, he contradicted the public policy concerns raised by the Board and the Airline Pilots' Association with respect to policy concerns in defending the privilege. The judge noted that Air Canada flies into the United States and so would be subject to disclosure of cockpit voice recordings in that jurisdiction:

> [42] On this latter point, it was specifically noted that Air Canada flies into the United States and so the company and its flight crews are subject to these disclosure provisions when an incident involving them is investigated by the NTSB. No evidence has been led to indicate that complying with these provisions for the NTSB has had the chilling effects predicted by Mr. Cadieux.

[81] Again, adverting to the opinion of Mr. Haueter, the judge concluded by quoting from his affidavit:

> 21. In summary, the CVR is the cornerstone providing a definitive understanding of the causes of an aircraft accident. When carefully studied and evaluated, the CVR provides a deeper understanding and appreciation of all of the combined factors that have led to a tragedy. More importantly, the CVR provides critical data that are free of human bias.
>
> [*Decision*, ¶ 39]

[82] Regarding the privacy interests of the pilots, the judge referred to Mr. Haueter's evidence regarding the type of information that would be obtained:

> [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

[83] The pilots' privacy interest in this case is not comparable to those cases cited by the Pilots' Association which protect personal and private information in the workplace. Here what the pilots were doing and saying was in the context of a highly regulated environment intimately involved with public safety. Pilots would be aware of no privilege in an American setting and qualified privilege in Canada. Any expectation of privacy is diminished in such circumstances.

[84] The judge balanced relevance and reliability against the asserted privilege:

> [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.
>
> [67] ***The flight crew's Discovery evidence showed gaps in their ability to provide relevant and material facts about their conduct at material times in the flight.*** This information is important to having 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.
>
> [68] Notwithstanding the able arguments to the contrary, ***I am not convinced that the release of the CVR under the very stringent conditions proposed would interfere with aviation safety, damage relations between pilots and their employers, or would impede investigation of aviation accidents.***
>
> [Emphasis added]

[85] The Board discounts the judge's analysis by arguing that it "emasculates the privilege contained in the *Act* by reducing the statute's question of whether or not the privileged information is relevant". If that were all the judge had done, one could agree. But he did more. He found the evidence from the cockpit recorder:

1. Was reliable (¶ 16, 31);

2. Was relevant (¶ 16, 31);
3. Was central to the reliability issues raised (¶ 23)
4. Contained evidence otherwise unavailable to plaintiffs and the Court (¶ 48, 49, 67);
5. Would not unduly compromise flight officer privacy (¶ 64); and,
6. Would not compromise safety by a limited disclosure of the otherwise confidential communications or the recorder (¶ 68).

Disposition

[86] The judge weighed public interest in the administration of justice against privacy/safety and concluded that disclosure was warranted in this case. He granted an order maintaining confidentiality and limiting the purposes for which the recorder information could be used. He was not persuaded that the evidence supported the policy concerns raised against disclosure. He applied no wrong principle; he did not misapprehend the evidence. His discretionary decision is entitled to deference.

[87] I would grant leave but dismiss the appeal, without costs.

Bryson, J.A.

Concurred in:

Derrick, J.A.
Beaton, J.A.