On-board audio recordings: Supreme Court of Canada rules they may be disclosed in a lawsuit

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The Transportation and Safety Board of Canada (the TSB) is mandated under the *Canadian Transportation Accident Investigation and Safety Board Act* (the Act) to investigate air, rail and shipping incidents to determine the root cause(s) of an accident in order to prevent its re-occurrence in the future.

During these investigations, the TSB inspectors will habitually seize the video data recorder (VDR) on a vessel or other on-board recording devices on planes or trains. This can be quite frustrating to ship owners who do not have access to the VDR in subsequent litigation.

In *Canada (Transportation Safety Board) v. Carroll Byrne*, 2022 SCC 48, the Supreme Court rendered a decision on Nov. 25, 2022, explaining in what circumstances an on-board recording can be released.

Background

In March 2015, an Air Canada flight from Toronto had an accident upon landing in unforgiving weather conditions at Halifax airport, causing injuries to several passengers. Certain passengers commenced a class action in the courts of Nova Scotia against the airline, the pilots, the aircraft manufacturer, and the airport.

Independently of the litigation, the TSB investigated the accident pursuant to its mandate to improve safety under the Act. The TSB published its investigation report focusing on the causes and contributing factors leading to the accident without assigning any civil or criminal liability to any party. The TSB is not a party to the class action proceedings.

In order to establish the circumstances surrounding the landing, the aircraft manufacturer requested the disclosure of the on-board recording of the pilots' communications, which are part of the "black box" from the aircraft, officially a cockpit voice recorder (the CVR).

The TSB refused to release the CVR, claiming that it is protected by statutory privilege under section 28 of the Act and cannot be used as evidence in legal proceedings unless ordered by a court or coroner. After listening to the CVR *in camera* (not in public), the judge allowed the admission of the CVR into evidence, claiming that the fair administration of justice outweighed the statutory privilege. This decision was upheld on appeal.

The case made its way to the Supreme Court, which confirmed that the CVR can be admitted into evidence.

The decision

In ruling on whether the on-board recording should be disclosed, the Court must consider two criteria:

i. the public interest in the administration of justice; and
ii. the public interest underlying the legislative protection of the on-board recordings.

When measuring the public interest in the administration of justice, the Court will consider the recording's relevance in the litigation, probative value and necessity to resolving the issues in dispute.

On the second criterion, the Supreme Court noted that legislative protection is granted to on-board recordings to protect the privacy of pilots and crew and preserve public security in aviation or shipping. The Court agreed that a CVR can be disclosed in a lawsuit if the public interest in the proper administration of justice outweighs the importance of the privilege attached to the on-board recording. After analysis, the Justices concluded that the disclosure of the CVR was necessary in order to fill the gaps in the pilots' evidence that were central to determining causation and thus liability for the accident.

Comment

This decision will have a major impact on the aviation, rail and marine industry as it diminishes the importance of the privacy and safety goals that animate the prohibition to use on-board recordings. It also gives the parties in a litigation where a VDR or other on-board recording is relevant a roadmap to obtain and use the VDRs.

For further advice on VDRs, on-board recordings or other shipping and transportation matters, do not hesitate to contact us.

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