

“Determining Qualified Privilege Applicable to On-Board Recordings in Transportation Cases – The Canadian Perspective”

By Arie Odinoeki

“In any discussion about privileges, one must keep in mind the constant conflict between two countervailing policies. On the one hand, there is the policy which promotes the administration of justice requiring that all relevant probative evidence relating to the issues be before the court so that it can properly decide the issues on the merits. On the other hand, there may be a social interest in preserving and encouraging particular relationships that exist in the community at large, the viability of which are based upon confidential communications.”¹

Late in the evening on August 5, 2011, an Air Canada Airbus 330 bound for Frankfurt, with 265 people on board, inadvertently taxied onto the grass at Pearson International Airport. According to Air Canada, there was no major damage to the aircraft. However, the passengers were trapped in the aircraft for three hours and had to remain in Toronto overnight. Some of them missed connecting flights.²

On August 20, 2011, in Canada’s High Arctic, near Resolute Bay, Nunavut, a First Flight Boeing 737 crashed with 15 people on board. Tragically, twelve people were killed and three suffered serious injuries.³

Both planes were equipped with cockpit voice recorders (“CVRs”), recording, on a two hour loop, everything that may be overheard in the cockpit, including all conversations involving the flight crew. Both incidents are under investigation by the Canadian Transportation Accident Investigation and Safety Board (“TSB”). As part of the investigation, the CVRs will be thoroughly scrutinized and statements will be obtained from witnesses, including air and ground crew. Although the magnitude of the two incidents cannot be compared, both may give rise to litigation. At some point, counsel for the plaintiffs are likely to seek access to the CVRs and statements. However, the content of the CVRs and the TSB statements are protected in Canada by statutory privilege and cannot be used in litigation, unless a Court determines that “the public interest in the proper administration of justice outweighs in importance the privilege attached to the on-board recording.”⁴ Whether the plaintiffs are ultimately entitled to the production of this evidence will involve a detailed analysis of all available evidence and a careful weighing of competing interests. Since each case will be considered on its own unique facts, the results will vary.

A recent decision of the Ontario Superior Court of Justice in *Société Air France et al v. Greater Toronto Airports Authority*⁵, affirmed by the Ontario Court of Appeal⁶, is of great assistance in interpreting the provisions of the Canadian Transportation Accident Investigation and Safety Board Act (“the Act”) governing the application of the qualified privilege to on-board recordings, such as CVRs. Significantly, since the provisions of the Act apply to communications originating from the bridge or control room of a ship, cab of a locomotive and the control room or a pumping station of a pipeline⁷, the test set out in *Société Air France* has application beyond aviation litigation.

Why are on-board recordings and statements given to TSB protected by statutory privilege?

The objects of the TSB are to advance transportation safety by conducting independent investigations into transportation accidents, reporting publically on their causes and making recommendations concerning safety.⁸ It is beyond the mandate of the TSB to assign fault.⁹ The provisions of the Act conferring privilege on certain evidence are consistent with an international regime established to promote navigation safety by giving accident investigators access to the most reliable evidence and encouraging frankness of the pilot, master and crew.¹⁰ It is commonly accepted that the aircraft or ship owners and members of the crew will be more forthcoming in the investigation if they can be reasonably assured that their statements will not be used against them in subsequent litigation. However, Recordings may be produced to a court or coroner under certain circumstances, where the court or coroner concludes that the public interest in the administration of justice outweighs the importance of the privilege.¹¹ Written or recorded statements taken by TSB investigators from masters, pilots, crew members and others following a transportation accident are additionally protected under the Act¹², but again, the court has discretion in certain circumstances to order their production.¹³

The privilege provisions of the Act originate from the recommendations of a Commission of Inquiry on Aviation Safety, appointed by the Federal Government in 1979, chaired by The Honourable Mr. Justice Dubin. The three-volume Dubin Commission’s Report, released in 1982, addressed confidentiality of CVRs, air traffic control tapes and witness statements. The Commission noted that these recordings were an important tool for accident investigators. However, because the CVRs recorded everything in their range, private or personal conversations which cast no light on the cause of the accident were also recorded. It was felt that the publication of such material could expose the crew to unnecessary embarrassment. For that reason, the Commission recommended insertion in the Act of the privilege provisions and the process for disclosure of records where the court is convinced that “the public interest in the proper administration of justice outweighs the importance of any reasons advanced for maintaining confidentiality.”¹⁴

In cases where applications had been brought for disclosure of voice recordings and statements, parties objecting to disclosure usually advance two arguments, examined in detail in the *Société Air France* decision. First, it is generally argued that:

[The] privilege related to CVR data is necessary to encourage full, accurate and objective communication between air traffic regulators and pilots, and between crew members, in times of crisis. (. . .) [The] release of CVR data, as with other privileged materials under the Act, would 'chill' the relationship between investigators and parties involved in accident investigation (e.g. pilots, manufacturers, traffic controllers, regulators, brokers, transporters, operators, crew members).¹⁵

Second, it is argued by the representatives of the crew that:

[The] airline cockpit is the pilots' place of employment, like an office, and that the introduction of a recording device into that location is a substantial infringement of the pilots' privacy and dignity."¹⁶ (. . .) [The] level of candour of discussion in the cockpit environment would be markedly decreased were pilots no longer able to assume that their cockpit conversations would be confidential and secure from broader dissemination and scrutiny by third parties.¹⁷

The Court agreed that there is no purpose in disclosure of purely personal conversations between pilots except in the exceptional cases where there is a concern that such conversations have interfered with the performance of their duties. However, the Court rejected the suggestion that disclosure of CVR data to parties other than the TSB would impair the free exchange of information between pilots any more than the potential release to the TSB would do.¹⁸

Qualified Privilege Test

Justice Strathy in *Société Air France* set out a test for determining whether, in the circumstances of the case, the public interest in the administration of justice outweighs the importance attached to the statutory privilege afforded to CVRs. The test can be summarized as follows:

1. Does the CVR (or other evidence sought) contain highly relevant, probative and reliable evidence that is central to the issues in the litigation?
2. Does the balance of the circumstances of the case favour disclosure?
3. Is there a real risk that without the CVR the parties and the trier of fact will not have the best and most reliable evidence concerning the central issues in the case?
4. Would the release of the CVR interfere with aviation safety, damage relations between the pilots and their employers or impede the investigation of aviation accidents?

Applying the test in the *Société Air France* case, the Court found that the public interest in the administration of justice outweighs the importance attached to the statutory privilege and ordered production of the CVR. The Ontario Court of Appeal upheld the ruling below.

Conclusions

The adoption of the test articulated in *Société Air France* by the Ontario Court of Appeal is a major step in clarifying the statutory privilege respecting on-board electronic evidence and statements obtained by TSB set out in the Act. The central issue which the case addresses is whether the disclosure of this evidence, in the context of litigation subsequent to an accident, may impair frank discussions and exchange of information by the crew during the operation of the aircraft or a vessel, and whether crew may be less forthcoming with the TSB investigators in the aftermath of an accident. While each case must be examined on its own facts, and exceptions will certainly arise, production will likely be ordered in most cases where damages are substantial and liability is seriously contested.

¹ Sopinka, Lederman and Bryant, *The Law of Evidence*, 2nd ed., (Toronto: Butterworths, 1999) at page 713.

² “Air Canada plane taxis onto grass at Toronto’s Pearson Airport,” *The Globe and Mail*, August 5, 2011.

³ “Plane crash near resolute Bay kills 12”, *CBC Canada* (www.cbc.ca). Retrieved 21 August 2011.

⁴ Section 28(6) of the Canadian Transportation Accident Investigation and Safety Board Act, S.C. 1989, c.3, as amended (“the Act”).

⁵ [2009] O.J. No. 5337; 85 C.P.C. (6th) 334.

⁶ [2010] 324 D.L.R. (4th) 567; 90 C.P.C. (6th) 205.

⁷ Section 28(1) of the Act.

⁸ Section 7 of the Act.

⁹ Section 7(3) of the Act.

¹⁰ Canada is a signatory to the Chicago Convention on Civil Aviation. The United Nations International Civil Aviation Organization recommends standards and practices for aircraft accident investigations in signatory countries, set out in Annex 13 to the Convention, entitled “Aircraft Accident and Incident Investigation.” Section 3.1 of Annex 13 provides that the sole objective of the investigation of an incident shall be the prevention of accidents, to the exclusion of apportionment of liability. Section 5.12 of Annex 13 provides that states conducting the investigation shall not make cockpit voice recordings available for purposes other than investigation, unless a Court of competent jurisdiction determines that their disclosure outweighs the adverse domestic and international impact of disclosure.

¹¹ Section 28(6) of the Act.

¹² Section 30(2) of Act.

¹³ Section 30(5) of the Act.

¹⁴ The Dubin Commission Report, 1982, at page 234.

¹⁵ *Société Air France*, at paragraph 53.

¹⁶ *Société Air France*, at paragraph 68.

¹⁷ *Société Air France*, at paragraph 70.

¹⁸ *Société Air France*, at paragraph 71.