

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))

- Richard Norman, Tanner McInnis, and Patrizia Huot
(Transportation Safety Board of Canada)

By the Court:

Introduction

[1] On March 29, 2015, Air Canada flight 624 from Toronto to Halifax crashed 740 feet short of the runway at the Halifax International Airport, when attempting to land in a snowstorm. The plaintiffs in this matter represent a class that alleges acts of negligence on the part of the defendants, which negligence is said to have caused injury to the members of the class for which they should be compensated. The action has been certified as a class proceeding.

The Current Motion

[2] Airbus SAS, a defendant in this proceeding, moved for an Order to require the Canadian Transportation Accident Investigation and Safety Board (TSB) to produce forthwith to Airbus the audio data from the on-board Cockpit Voice Recorder (CVR) made during the flight of AC 624. They also seek any transcripts made of the recorded data.

[3] The plaintiffs, together with the defendants Halifax International Airport Authority (HIAA) and NAVCAN, joined with Airbus in seeking the production requested.

[4] The recording and transcripts sought are in the possession of the TSB, which has been granted Intervenor status. The TSB claims a statutory privilege over the materials sought and has argued that the court should not exercise its discretion to order production in the face of that privilege. The TSB is joined in its opposition by the defendants Air Canada, John Doe #1 and John Doe #2. The Air Canada Pilots Association was also granted Intervenor status and it has also objected to the production motion.

[5] The Attorney General of Canada, on behalf Transport Canada, is also a named defendant, represented at the hearing and has taken no position in relation to the motion.

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

can, subject to the statute, communicate contents that are related to the causes or to the identification of safety deficiencies.

[10] This motion relies on the exception set out in Section 28(6) which reads:

Power of court or coroner

(6) Notwithstanding anything in this section, where, in any proceedings before a court ..., a request for the production and discovery of an on-board recording is made, the court ... 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 ... 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 ...deems appropriate, and may require any person to give evidence that relates to the on-board recording.

[11] Sections 28(6)(a) and (b) have been complied with. I have listened to the on-board recording and reviewed the transcript. The TSB has been joined as an Intervenor in this motion and has made representations with respect to the recordings.

[12] It is Clause (c) that creates the test which must be applied by the court in determining whether to order production, and if so, the appropriate restrictions or conditions to attach to the production.

Issues

1. In the circumstances of this case, does the public interest in the proper administration of justice outweigh in importance the privilege attached to the on-board recording by Section 28 of the *Canadian Transportation Accident Investigation and Safety Board Act*?
2. If so, then what restrictions or conditions should be ordered in relation to production or discovery?

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)

(Toronto: Irwin, 2008) at p. 30.

[17] The pleadings frame the issues by which relevance is assessed. In their claim, the representative plaintiffs set out their allegations against each of the defendants.

[18] Paragraphs 41-43 (Amended statement of claim, filed August 31, 2016) set out the particulars of the negligence alleged against Air Canada. In Paragraph 43, Air Canada is said to be vicariously liable for losses and damages caused by the flight crew, the particulars of which included:

- (a) operating the aircraft in such a manner that it violently struck terrain approximately 300 metres short of the runway touchdown zone;
- (b) ignoring and not complying with applicable regulatory minimums as to required visibility prior to approach;
- (c) choosing not to abort the landing on the runway and divert the flight to another airport when they knew or ought to have known that a safe touchdown was impaired or prevented by the weather conditions;
- (d) choosing not to request updated weather information from Halifax ATC including snowfall conditions and prevailing wind speed and direction;
- (e) choosing not to follow the instructions of Halifax ATC;
- (f) choosing not to declare an emergency and/or to alert Halifax ATC and/or the HIAA and emergency personnel in a timely manner of the true nature of the situation that arose; and
- (g) operating the aircraft without due care and skill despite knowing that damage would probably result.

[19] Paragraphs 44-45 set out extensive particulars of alleged negligence by the HIAA that includes allegations of the inadequacy and poor maintenance of available systems to support the runway and lighting, and to support the operation of the aircraft by the flying crew.

[20] In Paragraphs 46-47, the plaintiffs set out extensive particulars of alleged negligence by NAV Can that include "... a failure to inform the flight crew of unsafe weather conditions, unserviceable equipment, and poor visibility conditions..." (para. 47 (d))

[21] In Paragraphs 48-49, the plaintiffs set out the particulars of alleged negligence by Airbus, which includes allegations of a failure to provide adequate

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)

- The flight crew did not notice that the aircraft had drifted below and diverged from the planned vertical descent angle flight profile, nor were they aware that the aircraft had crossed the minimum descent altitude further back from the threshold. (3.1.3)
- Considering the challenging conditions to acquire and maintain the visual cues, it is likely the flight crew delayed disconnecting the autopilot until beyond the minimum descent altitude because of their reliance on the autopilot system. (3.1.4)
- The limited number of visual cues and the short time that they were available to the flight crew, combined with potential visual illusions and the reduced brightness of the approach and runway lights, diminished the flight crew's ability to detect that the aircraft's approach path was taking it short of the runway. (3.1.7)
- The flight crew's recognition that the aircraft was too low during the approach would have been delayed because of plan continuation bias. (3.1.8)

[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.

[30] From my review of the CVR, it is evident that there was information taken from the flying officers’ conversation upon which to formulate the TSB’s analysis and conclusions as it related to the interrelationship of weather, pilot calculations for angle of descent and what in fact occurred.

[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.

Balancing the Competing Interests

[32] I have been presented with affidavit evidence of witnesses who speak to the policies and considerations which underpin the privilege. They provide contrasting

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

required to make public any part of a transcript of such conversations that are determined to be relevant to the accident. Only pertinent conversations are disclosed, not personal conversations of the flight crew.

[38] In his opinion:

The release of pertinent information off a CVR transcript can 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.

(Hall affidavit, at paras. 22-23)

[39] Thomas Haueter is an independent aviation accident investigator and safety consultant for aircraft operators and major aircraft manufacturers. He is also from the United States. He provided an expert rebuttal report on behalf of the applicants. In preparation for his report he had access to regulatory, industry and Air Canada materials relevant to this accident and to the factual circumstances at issue in this case. He identified what he would expect that could be captured in a CVR. He concluded:

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.

[40] His evidence compared the treatment of CVR information in various countries around the world. These vary in the degree to which they require the CVR information to be disclosed or withheld.

[41] He concluded that, in over 50 years of experience, the NTSB has found no evidence that disclosure of the CVR recordings had a negative impact on aviation safety, nor resulted in a "chilling" effect on witness cooperation with investigations, nor in how pilots communicate in the cockpit.

[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.

[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.

[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.

The Public Interest: "Proper Administration of Justice"

[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.

[52] I accept this as a correct statement of law and principle relating to the public interest. I also find that these comments apply to the current circumstances, in that there are issues of trial fairness and fulfillment of the objectives of class proceedings present.

[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".

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.

[55] I could not state this better. The facts and submissions in this motion are very similar to those that the Chief Justice was considering. I endorse his comments and find them to be applicable in the current motion.

[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.

[59] I have adopted Chief Justice Strathy's reasons to reject the suggestion that privacy interests will be inappropriately invaded by release with conditions - such as is intended in this case.

[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.

[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.

[69] For these reasons, the TSB is required to produce a copy of the CVR and transcript to counsel for use in this litigation. Subject to any further order of the trial judge, these records shall remain confidential and shall be used for the purposes of these proceedings only. They shall not be disclosed by the parties to anyone other than their experts, consultants, insurers and lawyers, without further order of the court. The provisions of Section 28(7) of the TSB Act will apply.

[70] I have previously been presented with a draft order prepared by the moving parties. Counsel for the responding parties, following my oral decision, indicated that they wanted to make proposals for changes to the draft which they would discuss with counsel for the moving parties. If the parties can agree on a draft order, it shall be submitted to me for approval. If the parties are unable to agree, submissions may be made in writing or a hearing may be convened upon request.

Costs

[71] If the parties are unable to agree as to costs, submissions may be made in writing or a hearing may be convened upon request to resolve the question.

Duncan, J.