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***The Supreme Court rules that a cockpit voice recording can be disclosed at an aviation accident class action trial.***

In March 2015, an Air Canada flight from Toronto had an accident upon landing in wind and snow at Halifax's Stanfield International Airport. The flight was carrying 133 passengers and 5 crew members. Several people were injured, including 25 who were taken to local hospitals. Following the accident, some of the passengers filed a class action lawsuit in the Supreme Court of Nova Scotia. They claimed that negligence on the part of the airline, its pilots, the aircraft manufacturer, the airport and others, caused them harm.

In an exercise unrelated to the class action, the Transportation and Safety Board of Canada (the Board) investigated the accident. The Board is a federal government agency mandated to improve aviation safety. Following its investigation, the Board issued a report but did not assign blame as that is not its role. The Board is not part of the class action.

As part of its defence, the aircraft manufacturer filed a motion asking the court to order the release of the cockpit voice recording. It records the communications of the flight crew and is part of the so-called "black box" from the aircraft. The aircraft manufacturer argued that access to the recording was necessary for a fair trial and to determine what caused the accident. The only copy of the recording was with the Board and it opposed its release. So did the airline and its pilots, who wanted to protect pilot privacy.

The Board claimed the recording was protected by "statutory privilege", meaning a specific rule in a law protected it from being disclosed. In this case, section 28 of the *Canadian Transportation Accident Investigation and Safety Board Act* (the Act) states no one can be required to produce an on-board recording or give evidence related to it in legal proceedings unless authorized to do so by a court or coroner. Section 28(6) also states that a judge or coroner must examine the on-board recording "*in camera*", meaning not before members of the public, and give the Board a reasonable opportunity to make observations about the recording. The privilege attached to an on-board recording serves two purposes: to protect pilot privacy and to promote aviation safety.

The motion judge listened to the recording *in camera*, and decided it was reliable, relevant and necessary evidence for resolving the class action. He said the importance of the recording to the administration of justice outweighed the importance of the statutory privilege. The judge refused the Board's request to present observations or arguments about the recording, concluding that such arguments were unnecessary for him to understand what was at stake. The Board appealed the judge's ruling to Nova Scotia's Court of Appeal. The Court of Appeal dismissed the appeal and the Board appealed to the Supreme Court of Canada.

The Supreme Court has dismissed the appeal.

**The judge made no errors in ordering the recording's disclosure, so it can be released.**

Writing for a majority of the judges, Justice Nicholas Kasirer said the motion judge made no reviewable errors in deciding to order the disclosure of the recording. As such, the decision to release the recording stands.

The majority said the judge or coroner who is presented with a request for disclosure has the option of ordering the disclosure or not based on the test set out in the Act. That test is whether the public interest in the proper administration of justice outweighs in importance the privilege attached to the on-board recording.

"In this balancing exercise, the decision-maker must place two competing public interests on the scales: on one side, the relevance, probative value and necessity of the on-board recording to the fair resolution of the dispute and, on the other, the effects of disclosure on pilot privacy and aviation safety", Justice Kasirer wrote.

Having weighed the relevant factors, the majority found the judge made a fact-driven and discretionary decision. Since there was no error of law or palatable and overriding error of fact or proof he abused his discretion, the judge's decision should stand.

The majority also rejected the Board's claims regarding its right to make arguments *in camera* without the other parties present. They noted that the judge had the discretion to hear such arguments or not. While *in camera* necessarily means without the public, the judge also had the discretion to allow other parties to be present or not.

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**Breakdown of the decision:** *Majority:* Justice [Kasirer](#) dismissed the appeal (Chief Justice [Wagner](#) and Justices [Moldaver](#), [Karakatsanis](#), [Rowe](#), [Martin](#) and [Jamal](#) agreed) | *Dissenting:* Justice [Côté](#) would have allowed the appeal, finding errors of law in the judge's ruling and that the Board should have been allowed to make *in camera* arguments (Justice [Brown](#) agreed)

**More information (case # 39661):** [Decision](#) | [Case information](#) | [Webcast of hearing](#)

**Lower court rulings:** [judgment](#) (Supreme Court of Nova Scotia) | [appeal](#) (Nova Scotia Court of Appeal)

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