

CITATION: Société Air France v. NAV Canada, 2010 ONCA 598
DATE: 20100917
DOCKET: C51542

COURT OF APPEAL FOR ONTARIO

Goudge, MacPherson and Simmons JJ.A.

BETWEEN

Société Air France, Gie Appollo Finance 1 and Arch Insurance Co,
Generali Assurances Iard, Mapfre Industrial Sas, Les Mutuelles Du Mans
Iard, Sompo Japan Insurance Co, and Groupama Transport and ACE
Global Markets (Lloyds Syndicate 2488), GE Frankona Reinsurance A/X,
Axis Specialty Europe LTD., New Hampshire Insurance Company, Allianz
Marine & Aviation, Axa Corporate Solutions Assurance SA, Global
Aerospace Underwriting Managers, International Insurance Company of
Hannover, Wellington (Lloyds Syndicate 2020), Faraday (Lloyds
Syndicate 435) SR International Business Insurance Company, Great
Lakes Reinsurance (UK) PLC, Tokio Marine & Nichido Fire Insurance
Company, Assicurazioni Generali Spa, Nissay Dowa General Insurance Company, XL
(Lloyds Syndicate 1209), Samsung Fire and Marine Insurance Company, and General
Insurance Company of India

Plaintiffs

and

Greater Toronto Airports Authority,
NAV Canada, Mark Patrick, Claude Deschamps,
Chris Cole, David Mastell,
Andy Damer, Arlene Harrold, and Attorney General of Canada

Defendants (Respondent)

and

Alain Rosaye, Frederic Naud, Pierre Caussade,
John Doe 1, John Doe 2, John Doe 3, John Doe 4,
John Doe 5, John Doe 6, John Doe 7, John Doe 8,
John Doe 9, and John Doe 10

Third Parties

and

BETWEEN

Hussein Abdulrahim and Fadi Abedrabbo

Plaintiffs

and

Air France, Greater Toronto Airports Authority,
Nav Canada, Alain Rosaye, Frédéric Naud, Goodrich Corp.
and Airbus S.A.S.

Defendants (Respondent)

and

BETWEEN

Greater Toronto Airports Authority

Plaintiffs

and

Air France, Nav Canada,
Alain Rosaye, and Frédéric Naud

Defendants (Respondent)

and

BETWEEN

Mariana Stefanova Strugarova, Miroslav Pavlov Kissiov,
Stefan Miroslavov Kissiov

Plaintiffs

and

Air France, Greater Toronto Airports Authority,
Nav Canada, Alain Rosaya, Frédéric Naud,

Goodrich Corp, and Airbus S.A.S.

Defendants (Respondent)

Peter J. Pliszka and Richard D. Butler, for the Transportation Safety Board of Canada, the appellant

Gail Misra, for the Air Line Pilots Association and the Air Canada Pilots Association, the interveners

Robert J. Fenn, Richard Rohmer Q.C., Patrick Floyd, and Ryan Moriarty, for NAV Canada

Tim Trembley, for Air France, Alain Rosaye and Frédéric Naud

Ann Christian-Brown, for Mariana Stefanova Strugarova *et al.*

Heard: June 3, 2010

On appeal from the order of Justice George R. Strathy of the Superior Court of Justice, dated December 12, 2009, with reasons reported at 2009 CanLII 69321 (ON S.C.).

Goudge J.A.:

Introduction

[1] The issue in this appeal is the test that s. 28(6) of the *Canadian Transportation Accident Investigation and Safety Board Act*, R.S.C. 1989 C-3 (the Act) requires the court to apply before ordering production of an aircraft's cockpit voice recorder (CVR) that the Act deems otherwise privileged. In a thoughtful and comprehensive set of reasons, the motion judge found the test satisfied and ordered production of the CVR on certain terms. For the reasons that follow, I agree with him and would dismiss the appeal.

Background

[2] On August 2, 2005 an Air France flight landed in a severe thunderstorm at Toronto's Pearson International Airport. It overshot the runway, pitched into a ravine, and burst into flames. The aircraft was totally destroyed. Fortunately, no lives were lost, but passengers were injured, some of them seriously.

[3] A class action was commenced on behalf of the passengers against a number of parties. A multi-million dollar lawsuit was also commenced by Air France and its insurers. The respondent NAV Canada (NAV) is responsible for air traffic control at the airport. It is one of the defendants in both lawsuits. Its pleadings allege that the Air France pilots were negligent in the way in which they approached the runway and landed the aircraft that night.

[4] Under the Act, the appellant Transportation Safety Board of Canada (the Board) is charged with investigation of aircraft accidents. It is mandated to make findings as to their causes in order to advance transportation safety.

[5] It is not a party to any of the litigation arising out of this crash, but in the course of its investigation, it took possession of the aircraft's CVR. The CVR contained complete recordings of the conversations between the pilots, and their communications with air traffic control prior to the crash. The Board investigators interviewed the two pilots at length, and used the CVR to assist the pilots in refreshing their memories and reconstructing the final two hours of the flight. As the motion judge found, not surprisingly, there is some concern about their imperfect recollection without such assistance.

[6] After completing its investigation, the Board made public a very detailed report. While it is prevented by the Act from assigning fault or determining liability, the motion judge found that the Board's report suggests that certain acts and omissions of the pilots during the last two hours of the flight, particularly in the last thirty minutes, may have contributed to the crash. While the report does not quote the pilots' conversations verbatim, it does contain the substance of much of their communications.

[7] Section 28 of the Act provides that an on-board recording like the CVR is privileged, and not required to be produced in any legal proceeding. It also allows the

Board to make use of the recording in discharging its mandate but prohibits the Board from communicating it to anyone.

[8] However, the section also allows a court to order its production if a request is made, and a court, after listening to it, and giving the Board an opportunity to make representations, concludes that the public interest in the proper administration of justice outweighs in importance the privilege that the section accords to it. The relevant subsections of s. 28 read as follows:

Definition of “on-board recording”

28.(1) In this section, “on-board recording” means the whole or any part of (a) a recording of voice communications originating from, or received on or in,

(i) the flight deck of an aircraft,

...

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.

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.

...

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.

[9] Pursuant to s. 28(6), NAV moved for production of the CVR. The Board opposed the order being sought.

[10] As a preliminary matter, the motion judge determined that, while the procedure for a motion seeking production of the CVR from a non-party may be governed by r. 30.10

of the *Rules of Civil Procedure*, if NAV meets the requirements of s. 28(6) of the Act it also meets the requirements of the Rule. That is not in issue in this court.

[11] Following a review of the authorities, the motion judge began the explanation of his decision by describing the task he set for himself:

[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.

[12] Having listened to the recording and read the transcript, he then described his conclusions about the contents of the CVR:

[113] Having listened to the recording and read the transcript, I have no doubt whatsoever that the contents of the CVR are highly relevant, probative and reliable and that they are of incalculable value in the investigation of *this accident*. Neither the TSB nor the interveners dispute this as a general proposition and indeed the TSB’s report makes it clear, as noted earlier, that the use of the CVR was a very useful tool in interviewing the pilots and in reconstructing the final critical minutes of the flight. In the context of this litigation, in which the communications between the pilots is an important issue, I am satisfied that the contents of the CVR are very relevant to the issues, very reliable, and contain no private, prejudicial or scandalous material. [Emphasis in original.]

[13] He then summarized the factors he considered in determining that, in the circumstances of this case, the public interest in the administration of justice outweighs the importance attached to the statutory privilege at paragraph 138:

1. **The CVR:** contains highly relevant, probative and reliable evidence that is central to the issues in the litigation

2. The **circumstances of the case** include:

(a) it is important and substantial litigation involving a class of some 300 people and damages in the hundreds of millions of dollars;

(b) there is a large volume of evidence from other sources including FDR data, air traffic control data and evidence from the pilots;

(c) there is some concern about the reliability of the pilots' evidence;

(d) the CVR has already been used to refresh the pilots' recollections;

(e) one of the pilots consents to the release of the CVR; the other, and Air France, take no position;

(f) the CVR contains no personal communications or communications of a sensational or disturbing nature;

(g) there are no pending disciplinary or criminal proceedings against the pilots;

(h) concerns as to privacy can be addressed pursuant to the existing confidentiality order and the limited scope of disclosure of the CVR.

3. The **public interest in the administration of justice:** without the CVR evidence in this case, there is a real risk that the parties, and the trier of fact, will not have the best and most reliable evidence concerning the central issue in these cases.

4. The **importance of the privilege attaching to the CVR:** there is no basis on which one could conclude that the release of the CVR in this case, under appropriate restrictions of confidentiality, would interfere with aviation safety, would damage relations between pilots and their employers, or would impede investigation of the aviation accidents. [Emphasis in original.]

[14] He concluded by attaching to the production order the condition that, subject to further order of the court, the CVR remain confidential, be used only for the litigation and not disclosed to anyone not involved in it.

[15] In the final paragraph of his reasons, the motion judge considered the separate request by NAV made in its notice of motion that the Board produce the animation of cockpit activity that it prepared from the data gathered in its investigation. Although this was the Board's work product, the motion judge nonetheless ordered it produced.

Analysis

[16] In seeking to reverse the order at first instance, the appellant Board raises three arguments. None attack the balancing done by the motion judge or the weight he attached to the factors he considered. These exercises of judicial discretion would attract considerable deference on appellate review. Rather, the arguments allege errors of law for which the standard of review is correctness.

[17] First, the appellant argues that the motion judge rejected the proper legal test for determining whether production should be ordered, and in doing so applied a threshold that must be met to order production that is lower than that provided by the legislation.

[18] I do not agree. The motion judge clearly understood that the test he was required to apply is that prescribed by s. 28(6) of the Act, particularly s. 28(6)(c). His description of the task he set for himself, quoted above, puts this beyond doubt.

[19] He then proceeded to carry out the task exactly as described by the Act. Having examined the CVR recording and found it highly relevant, probative and reliable on the issues central to the litigation, he went on to an examination of the circumstances of the particular case before him, and concluded that the public interest in the administration of justice served by production outweighs the importance attached to the statutory privilege served by non-production.

[20] Nor do I think that by proceeding in this way the motion judge lowered the bar set by s. 28(6) by effectively diminishing the importance attached to the privilege. There is no doubt about that importance. It is reflected in the requirement of the Act that the privilege prevail in all circumstances. The only exception is if a particular case can be brought within the circumstances described in s. 28(6). The reasons of the motion judge make clear that he was well aware of that importance. However, contrary to the appellant's argument, s. 28(6) does not require the moving party to prove or the court to describe the circumstances to be "exceptional" or "rare" or "compelling" or "unusual" for production to be ordered. What the court must find is that in the particular case, the public interest in the administration of justice outweighs the importance attached to the statutory privilege. That is what the motion judge did here. In doing so he put the bar exactly where the Act specifies.

[21] The appellant's second argument is that the test used by the motion judge displays three legal errors.

[22] The appellant says the motion judge equated the public interest in the proper administration of justice with whether the CVR contained the best and most reliable evidence of the cockpit conversations.

[23] I do not agree. The motion judge did not hold that the public interest in the administration of justice prevails here only because the CVR is the best and most reliable evidence. In assessing the importance of production of the CVR to the public interest in the proper administration of justice, the motion judge considered a number of factors beyond whether the CVR is the best and most reliable evidence. These include that the contents of the CVR concern the central issue in the litigation; there is some concern about the reliability of the pilots' *viva voce* evidence; that the CVR has already been used to refresh their recollections; that one pilot consents to the release of the CVR and Air France takes no position; that the CVR contains no communications that are personal or sensational or disturbing; and that this is important and substantial litigation. All these circumstances add to the importance of the public interest in the administration of justice when production of the CVR is being considered. They were appropriate for the motion judge to consider.

[24] The appellant says that the motion judge also erred in law by failing to require NAV to establish that there would be a miscarriage of justice if the CVR were not produced.

[25] The motion judge held that a “miscarriage of justice” test is more stringent than s. 28 requires. I agree. The section does not limit production only to a case where otherwise a miscarriage of justice would occur. That is not what s. 28 provides, nor, as the motion judge said, would it be a test easy to apply prospectively.

[26] That said, just as the factors that the motion judge considered that make production of the CVR important if the public interest in the administration of justice is to be properly served, these factors also mean that failure to order production makes an unjust result more likely.

[27] Viewed either way, the court must take the impact of the decision about production on the public confidence in the administration of justice and weigh it against the impact of that decision on the statutory privilege. I disagree with the appellant however that unless a miscarriage of justice would result without production the latter must always outweigh the former in importance. The Act requires the court to consider all the circumstances of the case in assessing the balance.

[28] Finally, the appellant argues that the motion judge erred in law in misapprehending the evidence of the importance of the CVR privilege. It says that he failed to appreciate that the disclosure of the contents of the CVR would, in the

appellant's opinion, remove or greatly diminish the trust pilots have in the confidentiality of the appellant's investigation process, thus reducing the information they would provide to it in future.

[29] Although his reasons address in more detail any possible impact of disclosure on pilot communications in the cockpit, the motion judge concluded that, in general, the appellant's suggestion of a chilling effect from production has no evidentiary basis and is nothing more than speculation. While the appellant's opinion is otherwise, it is simply baldly asserted and is unsubstantiated by evidence, for example, that previous orders for disclosure have caused pilots to be less cooperative with subsequent investigations. It was entirely open to the motion judge to discount the appellant's opinion as he did.

[30] The appellant's third argument is that the motion judge erred in ordering production of the flight animation because counsel had agreed beforehand that this issue would not be part of the motion. As a consequence, the appellant says that the issue was not argued at first instance. The respondent does not seriously contest this, and indeed the record appears to substantiate the appellant's position. I would therefore find in the appellant's favour on this issue and order that paragraph five be removed from the order appealed from.

[31] In summary, therefore, except to the limited extent just referred to, the appeal is dismissed.

[32] Costs of the appeal to the respondent fixed at \$17,500 inclusive of disbursements and applicable taxes.

RELEASED: SEP 17 2010 ("S.T.G.")

"S. T. Goudge J.A."

"I agree. J. C. MacPherson J.A."

"I agree. J. M. Simmons J.A."