

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

December 16, 2022

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.

By

[Jean-Marie Fontaine](#)

Expertise

[Disputes](#), [Aviation](#), [Railway](#), [Shipping](#)

---

## BLG | Canada's Law Firm

As the largest, truly full-service Canadian law firm, Borden Ladner Gervais LLP (BLG) delivers practical legal advice for domestic and international clients across more practices and industries than any Canadian firm. With over 725 lawyers, intellectual property agents and other professionals, BLG serves the legal needs of businesses and institutions across Canada and beyond – from M&A and capital markets, to disputes, financing, and trademark & patent registration.

[blg.com](http://blg.com)

### BLG Offices

#### Calgary

Centennial Place, East Tower  
520 3rd Avenue S.W.  
Calgary, AB, Canada  
T2P 0R3

T 403.232.9500  
F 403.266.1395

#### Ottawa

World Exchange Plaza  
100 Queen Street  
Ottawa, ON, Canada  
K1P 1J9

T 613.237.5160  
F 613.230.8842

#### Vancouver

1200 Waterfront Centre  
200 Burrard Street  
Vancouver, BC, Canada  
V7X 1T2

T 604.687.5744  
F 604.687.1415

#### Montréal

1000 De La Gauchetière Street West  
Suite 900  
Montréal, QC, Canada  
H3B 5H4

T 514.954.2555  
F 514.879.9015

#### Toronto

Bay Adelaide Centre, East Tower  
22 Adelaide Street West  
Toronto, ON, Canada  
M5H 4E3

T 416.367.6000  
F 416.367.6749

The information contained herein is of a general nature and is not intended to constitute legal advice, a complete statement of the law, or an opinion on any subject. No one should act upon it or refrain from acting without a thorough examination of the law after the facts of a specific situation are considered. You are urged to consult your legal adviser in cases of specific questions or concerns. BLG does not warrant or guarantee the accuracy, currency or completeness of this publication. No part of this publication may be reproduced without prior written permission of Borden Ladner Gervais LLP. If this publication was sent to you by BLG and you do not wish to receive further publications from BLG, you may ask to remove your contact information from our mailing lists by emailing [unsubscribe@blg.com](mailto:unsubscribe@blg.com) or manage your subscription preferences at [blg.com/MyPreferences](http://blg.com/MyPreferences). If you feel you have received this message in error please contact [communications@blg.com](mailto:communications@blg.com). BLG's privacy policy for publications may be found at [blg.com/en/privacy](http://blg.com/en/privacy).

© 2025 Borden Ladner Gervais LLP. Borden Ladner Gervais LLP is an Ontario Limited Liability Partnership.