PROOF OF FAULT IN COLLISION CASES

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Introduction

The maritime community has been active in adopting conventions and creating new technologies aimed at eliminating collisions between vessels.

Conventions and multilateral agreements which, in our view, have had a measurable impact on the frequency of collisions include the following:

> STCW – The International Convention on Standards of Training, Certification and Watch-keeping for Seafarers
>
> Port State Control

Technical innovations having an impact on the probability of two vessels coming into contact include:

> GPS – Global Positioning System
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> Traffic Separation Zones
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> ECDIS – Electronic Chart Display and Information System
>
> AIS – Automated Identification System
>
> Improvements in radar technology and ARPA (Automatic Radar Plotting Aid)

All of the above has occurred without due consideration to the Admiralty Bar, who enjoy the grinding of iron above all things. The situation has degenerated to the point where one might reasonably predict that young lawyers joining the maritime bar in Canada might not participate in a collision between two major vessels in their practicing life.

Collisions between smaller vessels and between vessels and immovable objects are still available fodder. The enduring persistence of human error also leaves one with a small probability of collisions involving major vessels.

This paper will review applicable statutory provisions relevant to collisions (excluding limitation of liability) as well as common law presumptions. The evidentiary implications of preliminary acts, expert evidence and assessors will then be reviewed with particular emphasis on recent

changes to the Federal Court Rules. Finally, recent developments concerning evidence garnered during Transportation Safety Board investigations will be reviewed

Conventions

The *Convention for the Unification of Certain Rules of Law with respect to Collisions between Vessels (Brussels, 23 September 1910* was acceded to by Canada as of October 28, 1914.

The relevant Articles relating to fault are as follows:

> Article 1
>
> Where a collision occurs between sea-going vessels or between sea-going vessels and vessels of inland navigation, the compensation due for damages caused to the vessels, or to any things or persons on board thereof, shall be settled in accordance with the following provisions, in whatever waters the collision takes place.
>
> Article 2
>
> If the collision is accidental, if it is caused by *force majeure*, or if the cause of the collision is left in doubt, the damages are borne by those who have suffered them.
>
> This provision is applicable notwithstanding the fact that the vessels, or any one of them, may be at anchor (or otherwise made fast) at the time of the casualty.
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> Article 3
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> If the collision is caused by the fault of one of the vessels, liability to make good the damages attaches to the one which has committed the fault.
>
> Article 4
>
> If two or more vessels are in fault the liability of each vessel is in proportion to the degree of the faults respectively committed. Provided that if, having regard to the circumstances, it is not possible to establish the degree of the respective faults, or if it appears that the faults are equal, the liability is apportioned equally.
>
> The damages caused, either to the vessels or to their cargoes or to the effects or other property of the crews, passengers, or other persons on board, are borne by the vessels in fault in the above proportions, and even to third parties a vessel is not liable for more than such proportion of such damages.
>
> In respect of damages caused by death or personal injuries, the vessels in fault are jointly as well as severally liable to third parties, without prejudice however to the right of the vessel which has paid a larger part than that which, in accordance with the provisions of the first paragraph of this Article, she ought ultimately to bear, to obtain a contribution from the other vessel or vessels in fault.

It is left to the law of each country to determine, as regards such right to obtain contribution, the meaning and effect of any contract or provision of law which limits the liability of the owners of a vessel towards persons on board.

Article 5

The liability imposed by the preceding Articles attaches in cases where the collision is caused by the fault of a pilot, even when the pilot is carried by compulsion of law.

Article 6

The right of action for the recovery of damages resulting from a collision is not conditional upon the entering of a protest or the fulfillment of any other special formality.

Article 13

This Convention extends to the making good of damages which a vessel has caused to another vessel, or to goods or persons on board either vessel, either by the execution or non-execution of a maneuver or by the non-observance of the regulations, even if no collision had actually taken place.

While this Convention has not been incorporated by reference into Canadian domestic law by direct reference, the provisions of the Convention are consistent with Canadian Maritime Law.

Statutory Provisions

The Marine Liability Act

The following sections of the MLA have application for the determination of liability, or apportionment of liability, resulting from a marine collision.

> **5.** This Part applies in respect of a claim that is made or a remedy that is sought under or by virtue of Canadian maritime law, as defined in the *Federal Courts Act*, or any other law of Canada in relation to any matter coming within the class of navigation and shipping.
>
> **6.** (1) If a person is injured by the fault or neglect of another under circumstances that entitle the person to recover damages, the dependants of the injured person may maintain an action in a court of competent jurisdiction for their loss resulting from the injury against the person from whom the injured person is entitled to recover.
>
> (2) If a person dies by the fault or neglect of another under circumstances that would have entitled the person, if not deceased, to recover damages, the dependants of the deceased person may maintain an action in a court of competent jurisdiction for their loss resulting from the death against the person from whom the deceased person would have been entitled to recover.

Apportionment of Liability falls under Part II of the *Marine Liability Act*,

> **15.** (1) In this Part, "earnings" includes freight, passage money and hire
>
> (2) For the purposes of this Part, a reference to loss caused by the fault or neglect of a ship shall be construed as including
>
> (*a*) any salvage expenses consequent on that fault or neglect; and
>
> (*b*) any other expenses consequent on that fault or neglect and recoverable at law by way of damages, other than a loss described in subsection 17(3).
>
> **16.** This Part applies in respect of a claim that is made or a remedy that is sought under or by virtue of Canadian maritime law, as defined in the *Federal Courts Act*, or any other law of Canada in relation to any matter coming within the class of navigation and shipping.
>
> **17.** (1) Where loss is caused by the fault or neglect of two or more persons or ships, their liability is proportionate to the degree to which they are respectively at fault or negligent and, if it is not possible to determine different degrees of fault or neglect, their liability is equal.
>
> (2) Subject to subsection (3), the persons or ships that are at fault or negligent are jointly and severally liable to the persons or ships suffering the loss but, as between themselves, they are liable to make contribution to each other or to indemnify each other in the degree to which they are respectively at fault or negligent.
>
> (3) Where, by the fault or neglect of two or more ships, loss is caused to one or more of those ships, their cargo or other property on board, or loss of earnings results to one or more of those ships, their liability to make good such loss is not joint and several.
>
> (4) In this section, a reference to liability of a ship that is at fault or negligent includes liability of any person responsible for the navigation and management of the ship or any other person responsible for the fault or neglect of the ship.

Liability for passengers carried under a contract of carriage is governed by the *Athens Convention relating to the Carriage of Passengers and their Luggage by Sea, 1974, as amended by the Protocol of 1990 to amend the Athens Convention relating to the Carriage of Passengers and their Luggage by Sea, 1974* (The Athens Convention). The Athens Convention has been incorporated into Canadian law as Schedule II of the *Marine Liability Act.* The following provisions of the MLA deal with aspects of liability and fault;

Article 3 - Liability of the carrier

1. The carrier shall be liable for the damage suffered as a result of the death of or personal injury to a passenger and the loss of or damage to luggage if the incident which caused the damage so suffered occurred in the course of the carriage and was due to the fault or neglect of the carrier or of his servants or agents acting within the scope of their employment.

2. The burden of proving that the incident which caused the loss or damage occurred in the course of the carriage, and the extent of the loss or damage, shall lie with the claimant.

3. Fault or neglect of the carrier or of his servants or agents acting within the scope of their employment shall be presumed, unless the contrary is proved, if the death of or personal injury to the passenger or the loss of or damage to cabin luggage arose from or in connexion with the shipwreck, collision, stranding, explosion or fire, or defect in the ship. In respect of loss of or damage to other luggage, such fault or neglect shall be presumed, unless the contrary is proved, irrespective of the nature of the incident which caused the loss or damage. In all other cases the burden of proving fault or neglect shall lie with the claimant.

Article 6 - Contributory fault

If the carrier proves that the death of or personal injury to a passenger or the loss of or damage to his luggage was caused or contributed to by the fault or neglect of the passenger, the court seized of the case may exonerate the carrier wholly or partly from his liability in accordance with the provisions of the law of that court.

The Canada Shipping Act

The *Collision Regulations*, C.R.C. c. 1416, adopt the *Convention on the International Convention on the International Regulations for Preventing Collisions at Sea, 1972 (COLREGS 1972)*, with modifications specific to Canada. *COLREGS 1972* revised the international rules for navigation that had been in place for over a century.[1] The rules, as laid out by the *Collision Regulations* are not specifically designed for the finding of liability, fault, or damages. However, where it is found that a breach of the rules has occurred such a finding often follows.

The Collision Regulations

The *Collision Regulations* are, the 'Rules of the Road'. They are divided into five parts; Part A deals with general principles, Part B deals with steering and sailing rules relevant to collisions, Part C governs the lights and shapes that ships must show for identification, Part D sets out the standard sound and light signals, and Part E has information on exempted vessels.

[1] Maritime Law, Edgar Gold et al. (Irwin Law 2003)

Part B, dealing with navigation, is the section that is particularly relevant in respect to collisions as there will generally be a failure of one or more of these rules when a collision takes place.

Rule #	Title	Some of the Pertinent Factors for this Rule
1	Application	Application to all vessels on the high seas Special Rules may be enacted for roadsteads, rivers, lakes, and inland waters. Traffic separation schemes may be adopted.
2	Responsibility	Nothing in the Rules shall exonerate a vessel, its oner, master or crew from the consequence of neglect to comply with the rules In complying with the rules, due regard shall be had to all dangers of navigation and collision.
3	General Definitions	
PART B – Steering and Sailing Rules		
4	Application	Rules apply in any condition of visibility
5	Look-Out	Every vessel shall at all times maintain a visual and auditory look-out.
6	Safe Speed	Vessels shall at all times proceed at a safe speed with account to the following • state of visibility • traffic density • maneuverability of the vessel • state of the wind, sea, current • draught of the vessel relative to depth of water • etc…
7	Risk of Collision	Every vessel shall use all available means to determine if risk of collision exists Proper use shall be made of radar equipment, if fitted

Rule #	Title	Some of the Pertinent Factors for this Rule
8	Action to Avoid Collision	Action to avoid collision shall be taken in accordance with the rules of this part. • alteration of course and/or speed shall be lare enough to be readily apparent to another vessel • action shall be taken to result in passing at a safe distance • if necessary a vessel shall slow down, or take off all way by stopping or reversing her means of propulsion
9	Narrow Channels	A vessel proceeding along a narrow channel or fairway shall keep as near to the outer limit on her starboard side as possible • a vessel 20m or shorter, or a sailing vessel shall not impede a vessel that can only safely navigate a channel • a fishing vessel shall not impede any vessel in a channel or fairway • No vessel shall cross a fairway if that crossing impedes a vessel in the channel of fairway.
10	Traffic Separation Schemes	Vessels using a traffic separation scheme shall: • proceed in the appropriate lane in the general direction of traffic flow for that lane • keep clear of a traffic separation zone • when leaving or entering a lane or zone, do so at as small an angle to the lane as possible. • avoid crossing lanes, but where necessary, as close to 90° as possible • As far as practical, a vessel shall avoid anchoring in a traffic lane
Section II – Conduct of Vessels in Sight of one Another		
11	Application	Applies to vessels in sight of one another

Rule #	Title	Some of the Pertinent Factors for this Rule
12	Sailing vessels	Sailing vessels approaching one another, • when one has the wind on the port side, the other shall keep out of the way • when both have the wind on the same side, the vessel that is windward should keep out of the way of the other. • The windward side shall be deemed to be opposite to that on which the main sail is carried.
13	Overtaking	Any vessel overtaking any other vessel shall keep out of the way of the vessel being overtaken. • a vessel is deemed to be overtaken when coming up with another vessel from a direction more than 22.5 degrees abaft her beam • when a vessel is in doubt as to whether she is overtaking, she shall assume that this is the case.
14	Head-On Situation	When two power driven vessels are meeting on reciprocal or near reciprocal courses, each shall alter their course to starboard. • when a vessel is in doubt as to whether such a situation exists she shall assume that it does.
15	Crossing Situation	When two power driven vessels are crossing the vessel which has the other on her starboard side shall keep out of the way.
16	Action by Give-Way Vessel	Every vessel that is directed to keep out of the way of another vessel shall, take early and substantial action to keep well clear.
17	Action by Stand-On Vessel	Where one of two vessels to keep out of the way the other shall keep her course and speed. • the vessel maintaining course and speed shall take action toward collision when it becomes apparent to her that the vessel required to keep out of the way is not taking appropriate action. • a power driven vessel, taking action in a crossing situation, shall not, if at all possible, alter course to port.

Rule #	Title	Some of the Pertinent Factors for this Rule
18	Responsibilities Between Vessels	This rule states the general rules of priority for power driven vessels, sailing vessels and vessels engaged in fishing. Specifically stating to whom they must give-way.

The Rules are the guidelines to good seamanship. In *Whitbread v. Whalley*, [1990] 3 S.C.R. 1273 Justice LaForest stated as follows:

> [28] I think it obvious that this need for legal uniformity is particularly pressing in the area of tortious liability for collisions and other accidents that occur in the course of navigation. As is apparent from even a cursory glance at any standard text in shipping or maritime law, the existence and extent of such liability falls to be determined according to a standard of "good seamanship" which is in turn assessed by reference to navigational "rules of the road" that have long been codified as "collision regulations"; see R.M. Fernandes, Boating Law of Canada (1989), at pp. 61-105; N.J.J. Gaskell, C. Debattista and R.J. Swatton, Chorley & Giles' Shipping Law (1987), at p. 365 and at pp. 369-374; and, for example, the decisions of this Court in The "Lionel" v. The "Manchester Merchant", [1970] S.C.R. 538, and in Stein v. The "Kathy K" [1976] 2 S.C.R. 802. It seems to me to be self-evident that the level of government that is empowered to enact and amend these navigational "rules of the road" must also have jurisdiction in respect of the tortious liability to which those rules are so closely related. So far as I am aware, Parliament's power to enact collision regulations has never been challenged; nor, as far as I can tell, has it ever been contended that these regulations do not apply to vessels on inland waterways. They are in fact routinely applied to determine the tortious liability of such vessels; see the cases cited in Fernandes, supra, at pp. 61-105.

Federal Courts Act

Specific jurisdiction in respect of collisions between vessels, or between vessels and fixed or floating objects, can be found in section 22(2) of the Federal Courts Act:

> (2) Without limiting the generality of subsection (1), for greater certainty, the Federal Court has jurisdiction with respect to all of the following:
>
> …
>
> (*d*) any claim for damage or for loss of life or personal injury caused by a ship either in collision or otherwise;

Rules pertaining to Admiralty Practice

Pleadings in a collision case are somewhat unique. the historical practice of the “Preliminary Act” operates to conceal the plaintiff’s particular allegation (beyond the assertion of the collision

and the identity of the parties) until each side has committed their version of the essential facts and alleged breaches of good seamanship to a written and sealed format. The Federal Court Rules are a current iteration of this long standing admiralty practice.

Federal Court Rule 498 states that the following are necessary when commencing an action for collisions between ships:

> Action for collision between ships
>
> **498.** (1) Unless otherwise ordered by the Court, in an action in respect of a collision between ships,
>
> (*a*) the statement of claim need not contain any more particulars concerning the collision than are necessary to identify it to the other parties;
>
> (*b*) the statement of defense need not contain any particulars concerning the collision;
>
> (*c*) a preliminary act shall accompany a statement of claim and a statement of defense or be filed within 10 days after the filing of the statement of claim or the statement of defense, as the case may be; and
>
> (*d*) a preliminary act shall be contained in a sealed envelope bearing the style of cause.
>
> Preliminary act
>
> (2) A preliminary act shall state
>
> (*a*) the date of the collision;
>
> (*b*) the time of the collision at the location of the collision;
>
> (*c*) the location of the collision;
>
> (*d*) the names of the ships that collided;
>
> (*e*) in respect of the ship of the party filing the preliminary act,
>
> (i) the name of the ship,
>
> (ii) the port of registry of the ship,
>
> (iii) the name of the master of the ship at time of the collision,
>
> (iv) the name and address of the person who was in command at the time of the collision and during the period immediately before the collision,

(v) the names and addresses of any persons keeping lookout at the time of the collision and during the period immediately before the collision,

(vi) the course of the ship or, if the ship was stationary, its heading, at the time when the other ship was first seen or immediately before any measures were taken with reference to the other ship's presence, whichever was the earlier,

(vii) the speed of the ship through the water at the time when the other ship was first seen or immediately before any measures were taken with reference to the other ship's presence, whichever was the earlier,

(viii) any alteration made to course after the time referred to in subparagraph (vi) or during the period immediately before the collision, and the time at which the alteration was made,

(ix) any alteration made to the speed of the ship after the time referred to in subparagraph (vii) or during the period immediately before the collision, and the time at which the alteration was made,

(x) any measure taken to avoid the collision, and the time at which the measure was taken,

(xi) any sound or visual signals given, and the time at which the signals were given, and

(xii) the lights carried by the ship and the lights it was showing at the time of the collision and during the period immediately before the collision;

(*f*) in respect of every other ship involved in the collision,

(i) the name of the ship,

(ii) the ship's distance and bearing at the time when its echo was first observed by radar by a person on the ship of the party filing the preliminary act,

(iii) the ship's distance, bearing and approximate heading when it was first seen by a person on the ship of the party filing the preliminary act,

(iv) the lights the ship was showing when it was first seen by a person on the ship of the party filing the preliminary act,

(v) the lights the ship was showing from the time referred to in subparagraph (iv) to the time of the collision,

(vi) any alteration made to the ship's course after it was first seen by a person on the ship of the party filing the preliminary act, and the time at which the alteration was made,

(vii) any alteration made to the ship's speed after it was first seen by a person on the ship of the party filing the preliminary act, and the time at which the alteration was made,

(viii) any measure that the ship took to avoid the collision, and the time at which the measure was taken,

(ix) any sound or visual signals given, and the time at which the signals were given, and

(x) any fault or default attributed to the ship;

(*g*) the state of the weather at the time of the collision and during the period immediately before the collision;

(*h*) the extent of visibility at the time of the collision and during the period immediately before the collision;

(*i*) the state, direction and force of the tide, or of the current if the collision occurred in non-tidal waters, at the time of the collision and during the period immediately before the collision;

(*j*) the direction and force of the wind at the time of the collision and during the period immediately before the collision;

(*k*) the parts of each ship that first came into contact; and

(*l*) the approximate angle, as illustrated by an appropriate sketch annexed to the preliminary act, between the ships at the moment of contact.

Form of preliminary act

(3) The contents of a preliminary act shall be set out in parallel columns and, wherever possible, stated in numerical values.

Opening of envelopes containing preliminary acts

(4) The Administrator shall open the envelopes containing the preliminary acts after the pleadings have been closed and all preliminary acts have been filed or, with the consent of all parties, at any other time.

Order to open envelopes containing preliminary acts

(5) The Court may, on motion brought after all preliminary acts have been filed but before pleadings have been closed, order that the Administrator open the envelopes containing the preliminary acts.

Endorsement of preliminary act

(6) On the opening of an envelope containing a preliminary act, the Administrator shall endorse the preliminary act with the date on which it was filed, the date on which the envelope was opened and the date on which any order was made, or consent filed, pursuant to which the envelope was opened.

Deemed part of statement of claim or defense

(7) A preliminary act shall be read with and form a part of the statement of claim or statement of defense, as the case may be, as though it were a schedule thereto.

Security not required

Examination for discovery of plaintiff

500. Notwithstanding subsection 236(2), in an action in respect of a collision between ships, a defendant may examine the plaintiff for discovery only after filing a statement of defense and preliminary act.

Rule 498 (1) requires that a party to an action file a sealed preliminary act within 10 days of a statement of claim or statement of defence. It shall state the particulars of the collision, and include pertinent details of weather, visibility, tide, a description of the Vessel, as well as the observations of the movement of the other vessel. According to subsection (7), the preliminary act shall be read with and form a part of the statement of claim. The purpose of the preliminary act is "to get a statement from the parties of the circumstances *recenti facto,* and to prevent the defendant from shaping his case to meet the case put forward by the plaintiff." (*British Oil and Cake Mills ltd. v. Hohn H. Whitaker (Tankers) Ltd.*, [1964] 1 W.L.R. 1474 at p. 1476) If, in giving testimony, a party gives oral evidence that is different from that of the preliminary act, the court may hold the party to the admissions in the preliminary act.[2] As stated in *Coy v. "D.J. Purdy" (The),* 19 Ex. C.R. 212, " A Statement of fact in a preliminary act is a formal admission binding the party making it, and can only be departed from by special leave." However, the Court is not bound to what is found within the preliminary acts. Rather, it can proceed to use the information that it deems to be most accurate and trustworthy. A party may seek leave of the Court to amend their preliminary act, but otherwise, it may be used against them if it contradicts the evidence that they, or their witnesses adduce at trial. Where, however, there has been insufficient information provided in the preliminary act, the court may direct a question to be properly answered and the preliminary act amended accordingly (*Montreal Transportation Co. v.*

[2] Marsden on Collisions at Sea, (12th) ed,, London, 1998, p.596.

New Ontario Steamship Co, 40 S.C.R. 160). Even where one vessel claims that no collision has taken place, preliminary acts will be required to be filed (*British Oil and Cake Mills ltd*, supra).

Standard of Care/Causation

The standard of care expected in collision cases was set out in the trial in *Leggat Estate v. Leggat,* 104 A.C.W.S. (3d) 437.

In respect of the Master:

> 25 I understand the application of the maritime law of negligence requires that conduct of the parties be measured against an objective standard. In provincial *tort* law that standard is the ordinary prudent person, historically "*the reasonable man*". In maritime law, I find the standard to which conduct is measured is that of "*the ordinary practice of seamen*" as defined in the *Canada Shipping Act*.
>
> **Section 2 Canada Shipping Act**
>
> "ordinary practice of seamen", as applied to any case, means the ordinary practice of skilful and careful persons engaged in navigation in like cases.
>
> 26 I would apply the principle of tort law. It must be reasonably foreseeable that the failure of a party to meet the required standard of the "ordinary practice of seamen" will result in damage and that damage is not too remote or lacking in proximity and is provable on a balance of probabilities.
>
> 31 I would find that the legal fault of a master of a vessel involves a finding by a Court of Admiralty jurisdiction that that master failed to exercise the ordinary practice of seaman, and that the failure of which is reasonably foreseeable as to compromise the safety of the vessel and the occupants.

In respect of the Owner:

> 32 The legal duty upon an owner of a vessel broadly set out at s.391(1) of the *Canada Shipping Act* is to ensure that the vessel is seaworthy, that it is in command of a competent master and that it is properly equipped for the safe conduct of the voyage intended.
>
> 33 Section 391 of the Canada Shipping act establishes the requirement that the owner must ensure the seaworthiness of the vessel.
>
> > 391. (1) In every contract of service, express or implied, between the owner of a ship and the master or any seaman thereof, and in every instrument of apprenticeship whereby any person is bound to serve as an apprentice on board any ship, there shall be implied, notwithstanding any agreement to the contrary, an obligation on the owner of the ship, that the owner, the master and every agent charged with the loading of the ship,

> the preparing of the ship for sea or the sending of the ship to sea shall use all reasonable means to ensure the seaworthiness of the ship for the voyage at the time when the voyage commences and to keep the ship in a seaworthy condition during the voyage.

The Trial Judge held that the statute imposed liability on the owner.

On appeal to the Ontario Court of Appeal, 64 O.R. (3d) 347, the question of whether there was statutory liability on the owner was challenged. The Court stated as follows:

> 34 Section 567 reads:
>
> > **567.** (1) Where loss of life or personal injuries are suffered by any person on board a vessel owing to the fault of that vessel and any other vessel or vessels, and a proportion of the damages is recovered against the owners of one of the vessels that exceeds the proportion in which the vessel was at fault, those owners may recover by way of contribution the amount of the excess from the owners of the other vessel or vessels to the extent to which those vessels were respectively at fault, but no amount shall be so recovered that could not, by reason of any statutory or contractual limitation of, or exemption from, liability, or could not for any other reason have been recovered in the first instance as damages by the persons entitled to sue therefore.
> >
> > (2) In addition to any other remedy provided by law, the person entitled to any contribution under subsection (1) has, for the purpose of recovering it, subject to this Act, the same rights and powers as the persons entitled to sue for damages in the first instance.
>
> 35 As with s. 566, this section does not impose liability on the owner for the fault of his vessel in circumstances such as these. It too applies only where the damage to the innocent party is due to the joint negligence of two owners. In that circumstance, it simply provides for contribution and indemnity to be claimed by the owner of the vessel who has already been found liable.
>
> 43 In summary, therefore, an analysis of the particular sections of the Act does not support the conclusion that, individually or collectively, they impose a statutory liability on an owner for the fault of his vessel in the circumstances of this case. Thus I think the trial judge erred in finding Douglas Leggat liable on this basis.
>
> 46 This then raises the question of whether the trial judge's disposition of the owner's attempt to limit his damages pursuant to s. 575 of the Act can be taken as equivalent to a determination of negligence that will support the conclusion of liability against Douglas Leggat.
>
> 47 In my view, the answer to this question is no. There is no doubt that in assessing Douglas Leggat's assertion that the accident took place without his actual fault, the trial judge applied the concept of "the ordinary reasonable ship owner" and went on to

> articulate the duties he found to rest on Douglas Leggat in the circumstances of this case. Nonetheless, for a number of reasons, I do not think that his disposition of this issue can serve as a finding of negligence so as to support his conclusion of liability against Douglas Leggat.
>
> 54 Finally, even if those duties could properly be taken as appropriate for an analysis of the negligence of the owner, the trial judge did not deal with other aspects of that analysis, such as foreseeability or remoteness, which might well be matters of debate if the negligence analysis were undertaken directly.
>
> 55 In conclusion, since it cannot be said that the *Canada Shipping Act* imposes liability for this incident on Douglas Leggat as owner, and since the trial judge's other findings cannot serve as a surrogate for the conclusion that Douglas Leggat was himself negligent and therefore liable, the trial judge's finding of liability against him cannot stand.

While finding that the statue did not impose liability on the owner, the Court confirmed that liability on the basis of respondeat superior or on ordinary tort principles was still available. A new trial was ordered to deal with the owner's potential liability.

In a criminal context, proof of a violation of the *Collision Regulations* is determined on a standard of strict liability. The prosecution in those cases would only have to demonstrate that the Defendant had failed to abide by the *Collisions Regulations*. In *R. v. Cloutier*, 2007 QCCQ 13533, the burden on the prosecution was to lead evidence of the "omission on the part of the defendant who failed to reach appropriately under the collision rules when faced with the abnormal conduct of the sailboat that the *Canada Senator* was overtaking, with the meaning of Rule 13 of the Regulations." A strict liability test in a criminal setting still necessitates proof of fault to be demonstrated beyond a reasonable doubt. While it brings in the possibility of a defence of due diligence, it might take away from the deviations that are currently allowed under the rules, if such a deviation is required in the interests of good seamanship.

In the civil context, while it is accepted that a breach of the Collision Regulations is *prima facie* evidence of a breach of the standards of good seamanship, it does not create a presumption of liability or impose a reverse onus on the Defendant that they were not negligent. (See for example, *"Lionel" (The) v. "Manchester Merchant" (The)*, [1970] S.C.R. 538). The Plaintiff must still make the full proof of their assertion and adduce evidence of negligence. Where a defendant is being held accountable for actions allegedly causing an accident, the standard against which they will be measured is that of the ordinary 'seaman'

> "Dr. Lushington has stated: "We are not to expect extraordinary diligence, but that degree of skill and that degree of diligence which is generally to be found in person who discharge their duty." Accordingly, maritime law requires a profession seafarer to exhibit ordinary presence of mind and ordinary skill.[3]

[3] *Gold, supra,* note 1, at pgs. 521-522. The within quote of Dr. Lushington is from *Thomas Powell and Cuba (The)* (1866), 14 L.T. 603 at 603.

Navigating in accordance with the rules will go a long way to making a case that good seamanship was exercised. However, circumstances will arise where following the rules will not be possible, or perhaps even contrary to the exercise of good seamanship. Hodgins J., at para. 19 of *Lake Ontario & Bay of Quinte Steamboat Co. v. Fulford,* (1909) 12 Ex. C.R. 483 quoted Dr. Lushington in the *John Bundle*:

> All rules are framed for the benefit of ships navigating the seas; and no doubt circumstances will arise in which it would be perfect folly to attempt to carry into execution every rule however wisely framed. It is at the same time of the greatest possible importance to adhere as closely as possible to established rules, and never to allow a deviation from them unless the circumstances which are alleged to have rendered such a deviation necessary, are most distinctly proved and established; otherwise vessels would always be in doubt, and doing wrong.

A maritime collision usually amounts to a tort arising out of negligence to exercise due nautical skill or a violation of the rules of navigation. The test of negligence under maritime law will not be the 'ordinary man', but determined rather by an analysis of the 'ordinary seaman'. A professional seafarer is expected to exhibit ordinary presence of mind and ordinary skill. In ordinary circumstances, this will mean that they are expected to follow the rules. Where, however, there has been a violation of the rules, that is not *prima facie* evidence of causation. In *Dominion Shipping Co. v Celeste Admanta D'entremont* [1948] Ex. C.R. 651, stated that no reverse onus is placed on a vessel that has violated a 'rule of the road'. At paragraph 16, O'Connor J. stated,

> It is clear from this that when there is a breach of a rule, it is not for those who have been guilty of the breach of the rule to exonerate themselves or to show affirmatively that their fault did not contribute in any degree to the collision. And only faults which contribute to the accident are to be taken into account and the onus is on the party setting up a case of negligence to prove both.

The "*Princess Adelaide"(The) v. Olsen & Co*., (supra) is a good example of this proposition. In a dense fog in Vancouver Harbour, the passenger vessel "Princess Adelaide" began her run between Vancouver and Victoria. Despite the fog, which limited visibility to 500 feet at most, she was departing the harbour at 12 knots (her maximum speed was 16). "Hampholm" was cautiously crossing the traffic lane trying to seek anchorage in English Bay when "Princess Adelaide" appeared out of the fog. The SCC determined that the only cause for the ensuing collision was "Princess Adelaide's" excessive and reckless speed. It was still for "Hampholm" to prove that the breach of the regulations was the only effective cause of the collision. This case is particularly interesting, since "Hampholm" when she sighted "Princess Adelaide" bearing down on her, reversed her engines and put her helm hard to port, which in itself was found to be an error by the judge of first instance. However, "Hampholm's" error was not considered to be cause of the accident and was not found to bear any contributory negligence.

Presumption – Striking a stationary object

Consistent with the 1910 Convention Canadian Maritime Law affords no presumptions where two vessels, both underway, come into collision.

However, where a vessel strikes a stationary object there is a rebuttable presumption that the striking vessel. In *Wake-Walker v. Steamship Colin W. Ltd.*, [1936] 4 D.L.R. 209, the SCC said at para 2 that "a vessel under steam colliding with a ship at her moorings in daylight is *prima facie* evidence of fault and her owners cannot escape liability except by proving that a competent officer could not have averted the collision by the exercise of ordinary care and skill." The presumption of fault when a vessel strikes one vessel has more recently been confirmed by the SCC in *Rhone v. Peter A.B. Widener*, [1993] 1 S.C.R. 497,(The Rhone). That the presumption is rebuttable, is also clear from The Rhone. In The Rhone, a flotilla of tugs, from two towing companies, were sailing a 'dumb' barge along the St. Lawrence. They took a turn too fast and struck a vessel secured at her berth. The trial judge found that there was liability on the part of the lead tug, the dumb barge, and a second tug of a different company from the first. The Federal Court of Appeal overturned this decision stating that the collision was not the result of any decision on the part of the navigation of that tug, but was properly attributed to the lead tug, whose orders or lack thereof were largely responsible for the accident.

Proving the Case

The Scope of Expert Evidence

The role of expert witnesses, and the role to which they may be used in Court is subject to s. 279 the *Federal Court Rules*

> 279. Unless the Court orders otherwise, no expert witness's evidence is admissible at the trial of an action in respect of any issue unless
>
> (a) the issue has been defined by the pleadings or in an order made under rule 265;
>
> (b) an affidavit or statement of the expert witness prepared in accordance with rule 52.2 has been served in accordance with subsection 258(1), rule 262 or an order made under rule 265; and
>
> (c) the expert witness is available at the trial for cross-examination.

Expert evidence is one of the permitted exceptions to the exclusion on opinion evidence. It is well understood and accepted that the role of an expert is to give the judge a ready-made inference. As stated by Dickson J., in *R. v. Abbey*, [1982] 2 S.C.R. 24, at para 44:

> With respect to matters calling for special knowledge, an expert in the field may draw inferences and state his opinion. An expert's function is precisely this: to provide the judge and jury with a ready-made inference which the judge and jury, due to the technical nature of the facts, are unable to formulate. "An expert's

> opinion is admissible to furnish the Court with scientific information which is likely to be outside the experience and knowledge of a judge or jury. If on the proven facts a judge or jury can form their own conclusions without help, then the opinion of the expert is unnecessary. *R. v. Turner*, [1975] Q.B. 834, per Lawton L.J.

In *R. v. Mohan*, [1994] 2 S.C.R. 9, the SCC dealt again with the matter of expert evidence. In that decision they enunciated that the application of expert evidence depends on the application of four criteria:

1) relevance;
2) necessity in assisting the trier of fact;
3) absence of any exclusionary rule; and
4) a properly qualified expert

Whether expert evidence is relevant is not merely a determination as to whether or not it is related to the issue, but also whether the value of the evidence is worth the cost; where cost is measured in terms of the impact of the evidence on the trial process. Sopinka J., speaking for the Court warned that expert evidence could be misused. Necessity, is considered to be more than merely 'helpful', but less than necessary. Necessity in this context is defined as being "likely to be outside the experience and knowledge of a judge or jury." (page 19). Sopinka goes on to warn that there is a concern that too liberal an approach could result in trials becoming no more than a contest of experts with the trier of fact being left the role of a referee attempting to discern which expert to accept.

Expert witnesses can be extremely helpful to the Court. This is especially so in complex collision cases that can have many different facets beyond the ordinary knowledge of the trier of fact. However, there are risks with the use of experts as highlighted by the following cases.

In *Fraser River Pile & Dredge Ltd. V. Empire Tug Boats Ltd*, 37 C.P.C. (3d) 119, the trial judge was requested to make a determination on the admissibility of an affidavit as expert evidence. Reed J. stated that there are at least two aspects to expert evidence. First, adducing facts through an expert due to their particular knowledge. Under this heading, it would appear that it is necessary as this is the only way to adduce such evidence. The second aspect of expert evidence is the "drawing of inferences from a defined set of facts in circumstances where the making of such inferences are difficult for a trier of fact because they depend on specialized knowledge, skill or experience. In the case here, the expert called was a tug captain. The issue was liability for damage to the Cambie Street Bridge that resulted from it being struck by a crane towed on a barge. The 'expert' tug captain was found to have no particularized knowledge to help the trier of fact make a necessary inference, and was not considered to be different from other witnesses who testified at trial. The danger as seen by Reed J. was that "by labeling the evidence as 'expert evidence', it will be thought of as different in kind from other evidence when in fact it is not." In the end, the Captain was rejected as an expert witness.

Another example of the risks associated with experts is the decision of the British Columbia Supreme Court *Laichkwitach Enterprises Ltd. v. F/V Pacific Faith*, 2007 BCSC 1852 ("*Pacific Faith*"). That case dealt with a collision of two fishing vessels as the defendant, "Pacific Faith", tried to moor behind the Plaintiff, "Western Prince". The defendant's electrical clutch failed suddenly and without warning when "Pacific Faith" was attempting to dock. As a result, the master could not take the transmission out of forward gear and into reverse. "Pacific Faith" contacted the stern ramp of "Western Prince", which was in the lowered position at the time of the collision. In reaching his conclusions, Metzger J. accepted that the Plaintiff's expert was an expert in marine surveying. However, the expert's testimony was given little or no weight on account of the fact that it was impossible to determine whether the report gave the opinion of the Plaintiff's marine surveyor, or that of a former lawyer who wrote the report and gave it to the expert for additions or deletions:

> Given the lack of evidence on how and what information was received by [the lawyer] before he wrote the report, it is impossible to determine if the appropriate boundaries between lawyer and expert have been observed. Thus, [the marine surveyor's] independence and objectivity are compromised. The court is left in the position of not knowing what parts of the opinion are those of [the lawyer] and what parts are those of [the marine surveyor]. (para. 39)

The decision reinforces the concept that the expert's opinion must be given free from influence of the party who commissioned the report. The recent changes to the Federal Court Rules are directed in large part to avoiding this issue.

The Rules concerning experts and assessors underwent revisions which became effective on August 3, 2010 (SOR/DORS 2010-176)

A detailed review of the new rules affecting the use of experts generally are beyond the scope of this presentation, however, a thumbnail sketch of the amendments are as follows:

- 52.1 – two or more parties may jointly name an expert witness.
- 52.2 – an affidavit or statement of an expert witness shall:
    - set out in full the proposed evidence of the expert;
    - the expert's qualifications;
    - be accompanied by a certificate signed by the expert acknowledging that he or she has read the code of conduct for expert witnesses;
- 52.4 – Number of Experts - a party intending to call more than five expert witnesses in a proceeding shall seek leave of the court in accordance with section 7 of the *Canada Evidence Act*.

- 52.6 – Expert Conference - the court may order expert witnesses to confer with one another in advance of the hearing of the proceeding in order to narrow the issues and identify the points on which their views differ.

    - (2) counsel and parties are not precluded from attending an expert conference, but the conference may take place in their absence if the parties agree.

    - (3) the court may order that an expert conference take place in the presence of a judge or prothonotary.

    - (4) a joint statement prepared by the expert witnesses following expert conference is admissible at the hearing of the proceeding. However, discussions in, and documents prepared for, the expert conference are confidential and shall not be disclosed to the judge or prothonotary.

- 282.1 – Expert Witness Panel – the court may require that some, or all, of the expert witnesses shall testify as a panel after the completion of the testimony of the non-expert witnesses. Or, at any time that the court may determine.

- 282.2 – Examination of Panel Members – expert witnesses shall give their views in the panel, and may be directed to comment on the views of the other panel members. If the court permits, they may pose questions of the other panel members.

    - after the panel as completed their testimony, they may be cross-examined and re-examined in the sequence instructed by the court.

The Role of Assessors

The role of an assessor in a proceeding was laid out in *Regional Trust Co. v. Canada (Superintendant of Insurance)*, [1987] 2 F.C. 271. In that case the assessor, from a national firm of chartered accountants, was appointed by the Court to help it in understanding the complex financial transactions at issue. In defining the role of the assessor, Stone J. stated as follows:

> In my opinion the assessor, at our request may assist us in understanding the effect and meaning of the technical evidence in the record or in drawing proper inferences from the facts established by that evidence. I also adopt the view expressed by Lord Summer in *Australia (S.S.) v. Nautilus (S.S.)*, [1927] A.C. 145 (H.L) at page 152 that "assessors only give advice and that judges need not take it."

The traditional role of assessors in collision cases is set out in Marsden; Collisions at Sea:

> **18-157** The function of the assessors is to advise the court upon nautical matters. They are not part of the court. Their advice has the status of expert evidence on all issues of fact about seamanship. Their views are canvassed by the judge, who formulates the questions on which he requires their assistance. In formulating such questions the judge may be assisted by counsel. The judge

> should not ask a question which is tantamount to asking them whether they would find for the plaintiff or the defendant. The parties have no right to cross-examine the assessors. Even in purely nautical matters, the judge is not bound to accept the views of his assessors. It is the duty of the judge to form his own judgment whatever that judgment might be. If he does not accept the views of his assessors, he should have some reason for disregarding them. If the judge cannot decide whether the advice he has received is sound, he may regard the point as not proven and the loss falls on the person who bears the burden of proof on that issue. If the assessors disagree among themselves, the judge may reject the advice of one assessor and accept the advice of the other. A judge should be careful about judging the conduct of an ordinary navigating officer by the high standards applicable by a person with the exceptional knowledge and experience of the elder brethren.

The use of experts and assessors in maritime matters changed with the 1997 SCC case *Porto Seguro Companha de Seguros Gerais v. Belcan S.A.*, [1997] 3 S.C.R. 1278 (the "*Federal Danube*"). In the original trial of the *Federal Danube*, expert witnesses were not allowed to testify as the Trial Judge was being assisted by an Assessor. In making the decision to exclude expert witnesses, the trial judge was following a long line of legal reasoning that stretched back to the first half of the 19th Century. The SCC acknowledged that the trial judge had been bound by the 1982 decision in *Egmont Towing & Sorting Ltd. v the Ship "Teledn*os*"*, 43 N.R. 147, which stated that where an Assessor is assisting the Court in a maritime matter, no expert evidence was permissible.

McLachlin J. (as she then was), determined in *Federal Danube* that the exclusion of expert witnesses in admiralty actions led to a trial that violated the principles of natural justice. The *Federal Danube* dealt with a situation where two vessels collided in the St. Lawrence Seaway. The trial judge had two assessors assisting her and, following the precedents before her, refused to hear the evidence of three expert witnesses. Further, the trial judge did not disclose the questions she asked of the assessors, nor the answers that they provided to her. McLachlin J. said, in reference to the prohibition of a party's right to call expert witnesses,

> 29… the prohibition on expert witnesses violates the principle of natural justice of the right to be heard, *audi alteram partem.* This principle confers the right on every party to litigation to bring forth evidence on all material points. Trial judges possess a discretion to limit evidence or exclude evidence where its relevance is outweighed by the prejudice it may cause to the trial process. But the principle that every litigant has a right to be heard goes against the exclusion of an entire category of evidence. To say that a litigant cannot call any expert evidence on matters that are at issue in the litigation is to deny the litigant's fundamental right to be heard.

The SCC ordered a new trial which featured 6 experts: 3 for the Plaintiff and 3 for the Defendants.

The hearing in *Federal Danube II*, and the varied use to which both sides put their experts, gave effect to McLachlin J.'s comment in *Federal Danube* that assessors will not be masters of all matters that are heard at trial and expert evidence will be needed for those areas in which they are not expert. As stated in *Federal Danube* at paragraph 33:

> 33 This argument brings me to the second problem with the traditional rule: its foundation on the mistaken premise that assessors will be masters of all matters of expertise that arise in the trial. The assumption that assessors are capable of dealing with all matters of opinion that arise in admiralty cases was challenged by Viscount Dunedin in England in 1926 in *Owners of S.S. Australia v. Owners of Cargo of S.S. Nautilus*, [1927] A.C. 145 (H.L.) at p. 150:
>
> > I cannot forget that when assessors were introduced, ships were sailing ships, and the navigation of a sailing ship is an art which the landsman cannot be expected to understand without much explanation. In these modern times it seems to me that it is much oftener a question of common sense in the application of the rules to avoid collision than a question of seamanship in the true sense of the word. So that, speaking for myself, except for the purposes of explanation, I shall always ask an assessor as little as possible. Certainly to find, as we have found not only in this case but in several cases which have lately occupied your Lordships' attention, that the different assessors are at variance is much more of a hindrance than assistance.
>
> Collier J. quoted this passage with approval and confirmed its logic in the Canadian context in *Owners of the Ship "Sun Diamond" v. The Ship "Erawan"* (1975), 55 D.L.R. (3d) 138 (F.C.T.D.) at p. 145:
>
> > In these still more modern times, with considerable technological and scientific advances in the design and equipment of vessels, a qualified assessor, no matter how knowledgeable, cannot have had expert experience in all matters that today may be canvassed and scrutinized in maritime collisions litigation. As one small example, some modern vessels are equipped with course recorders. I have had experience with nautical assessors, very able ones, who, understandably, have had no personal experience with the operation of such devices or of the interpretation of what they purport to record. Should expert evidence on a technical matter such as that be barred from the Court, merely because assessors(who may know nothing of that field) are present?
>
> If this was true in 1975, how much stronger must be the case for no longer relying exclusively on assessors for expertise in 1997, when vessels are operated by complex computerized navigational devices, often individualized to the ship in which they are found?

Recent revisions to the federal Court Rules have more clearly defined the role of assessors.

Rule 52 of the Federal Court Rules states:

> (1) Role of Assessor – The Court may call on an assessor
>
> (a) to assist the Court in understanding technical evidence; or
>
> (b) to provide a written opinion in a proceeding.
>
> (2) Fees and Disbursements – An order made under subsection (1) shall provide for payment of the fees and disbursements of the assessor.
>
> (3) Communications with Assessor – All communications between the Court and an assessor shall be in open Court.
>
> (4) Form and Content of Question – Before requesting a written opinion from an assessor, the Court shall allow the parties to make submissions in respect of the form and content of the question to be asked
>
> (5) Answer by Assessor – Before judgment is rendered, the Court shall provide the parties with the questions asked of, and any opinion given by, an assessor and give them an opportunity to make submissions thereon.

Rule 52(6) allowing expert's to be called notwithstanding that an assessor has been called on, has recently been repealed and replaced with a new Rule 52.1:

> 52.1 (1) A party to a proceeding may name an expert witness whether or not an assessor has been called on under rule 52.
>
> (2) Two or more of the parties may jointly name an expert witness.

The use of assessors in Canadian collision cases has generally fallen from favour and cases utilizing assessors in recent years are few. The question can be asked: Is there any future for the role of the assessors in modern collision cases?

Aside from the fact that the employment of the assessor is at the instance of the Court, the role of the assessor would appear at first view to be identical to that of experts.

The changes to the Rules are designed to ensure the independence of expert opinion and to hone, through experts conferences etc., expert opinion into cohesive and unified inferences for the trier of fact.

Even with expert conferences, there is still the real potential for differences of opinion that hinge upon very technical discrepancies or the limits of the science itself. In the face of such differences, the Court is left to determine whether: Expert A is correct; Expert B is correct, or alternatively; the state of technical knowledge does not permit a conclusion to be drawn.

In situations of this sort, where experts cannot find common ground, the role of an assessor can still be to ensure that the Court has the best understanding possible of the evidence that has been presented to it. As such, the assessor may still have a viable role where expert consensus is unattainable.

The Transportation Safety Board – Use of evidence obtained under the power of the CTAISBA

Mandate of the TSB

The Transportation Safety Board (TSB) is the investigatory body created by the *Canadian Transportation Accident Investigation and Safety Board Act*, S.C. 1989, c. 3 ("CTAISBA").

The TSB has a mandate established by s. 7 of the CTAISBA to conduct investigations into selected transportation occurrences; and to make findings on their causes and contributing factors. They are to identify safety deficiencies, make recommendations to eliminate or reduce these deficiencies and report publicly on the investigations and their findings. However, they are specifically enjoined from making determinations of fault or liability. Any findings of the Board is not to be construed as assigning fault or liability, and are not binding in any legal, disciplinary or other proceeding.

The relevant provisions of the CTAISBA are:

> 3(2) This Act applies in respect of marine occurrences
>
> a. in Canada; and
> b. in any other place, including waters described in subsection (3), if
> i. Canada is requested to investigate the marine occurrence by an appropriate authority
> ii. the marine occurrences involves a ship registered or licensed in Canada, or
> iii. a competent witness to, or person having information concerning a matter that may have contributed to, the marine occurrence arrives or is found at any place in Canada.
>
> 7(1) The object of the Board is to advance transportation safety by
>
> a. conducting independent investigations, including, when necessary, public inquiries into selected transportation occurrences in order to make findings as to their causes and contributing factors;
> b. identifying safety deficiencies as evidenced by transportation occurrences;
> c. making recommendations designed to eliminate r reduce any such safety deficiencies; and
> d. reporting publicly on its investigations and on the findings in relation thereto.

(2) In making its findings as to the causes and contributing factors of a transportation occurrence, it is not the function of the Board to assign fault or determine civil or criminal liability, but the Board shall not refrain from fully reporting on the causes and contributing factors merely because fault or liability might be inferred from the Board's findings

(3) No finding of the Board shall be construed as assigning fault or determining civil or criminal liability.

19(1) Where an investigator believes on reasonable grounds that there is, or may be, at or in any place, anything relevant to the conduct of an investigation or a transportation occurrence, the investigator may, subject to subsection (2), enter and search that place for any such thing that is found in the course of that search.

…

(9) An investigator who is investigating a transportation occurrence may

(a) where an investigator believes on reasonable grounds that a person is in possession of information relevant to that investigation

(i) by notice in writing signed by the investigator, require the person to produce the information to the investigator or to attend before the investigator and give a statement referred to in section 30, under oath or solemn affirmation if required by the investigator, and

(ii) make such copies of or take such extracts from the information as the investigator deems necessary for the purposes of the investigation;

(b) where the investigator believes on reasonable grounds that the medical examination of a person who is directly or indirectly involved in the operation of an aircraft, ship, rolling stock or pipeline is, or may be, relevant to the investigation, by notice in writing signed by the investigator, require the person to submit to a medical examination;

(c) where the investigator believes on reasonable grounds that a physician or other health practitioner has information concerning a patient that is relevant to that investigation, by notice in writing signed by the investigator, require the physician or practitioner to provide that information to the investigator; or

(d) where the investigator believes on reasonable grounds that the performance of an autopsy on the body of a deceased person, or

the carrying out of other medical examinations of human remains, is, or may be, relevant to the conduct of the investigation, cause such an autopsy or medical examination to be performed and, for that purpose, by notice in writing signed by the investigator, require the person having custody of the body of the deceased person or other human remains to permit the performance of that autopsy or that medical examination.

(10) No person shall refuse or fail to produce information to an investigator, or to attend before an investigator and give a statement, in accordance with a requirement imposed under paragraph (9)(*a*), or to provide information in accordance with a requirement imposed under paragraph (9)(*c*) or to make the body of a deceased person or other human remains available for the performance of an autopsy or medical examination in accordance with a requirement imposed under paragraph (9)(*d*).

(11) No person shall refuse or fail to submit to a medical examination in accordance with a requirement imposed under paragraph (9)(*b*), but information obtained pursuant to such an examination is privileged and, subject to the power of the Board to make such use of it as the Board considers necessary in the interests of transportation safety, no person shall

(*a*) knowingly communicate it or permit it to be communicated to any person; or

(*b*) be required to produce it or give evidence relating to it in any legal, disciplinary or other proceedings.

20. (1) Any thing seized pursuant to section 19, except recordings as defined in subsection 28(1), shall, unless

(*a*) the owner thereof or a person who appears on reasonable grounds to be entitled thereto consents otherwise in writing, or

(*b*) a court of competent jurisdiction orders otherwise,

be returned to that owner or person, or to the person from whom it was seized, as soon as possible after it has served the purpose for which it was seized.

(2) A person from whom any thing was seized pursuant to section 19, except recordings as defined in subsection 28(1), or the owner or any other person who appears on reasonable grounds to be entitled thereto, may apply to a court of competent jurisdiction for an order that the seized thing be returned to the person making the application.

(3) Where, on an application under subsection (2), the court is satisfied that the seized thing has served the purpose for which it was seized or should, in the interests of justice,

be returned to the applicant, the court may grant the application and order the seized thing to be returned to the applicant, subject to any terms or conditions that appear necessary or desirable to ensure that the thing is safeguarded and preserved for any purpose for which it may subsequently be required by the Board under this Act.

(4) This section does not apply in respect of any thing seized and tested to destruction in accordance with subsection 19(5).

22 (2) An investigator authorized by the Chairperson may attend as an observer at an investigation conducted by a department referred to in subsection (1) or during the taking of remedial measures by that department following a transportation occurrence.

23 (2) Subject to any conditions that the Board may impose, a person may attend as an observer at an investigation of a transportation occurrence conducted by the Board if the person

(*a*) [Repealed, 1998, c. 20, s. 14]

(*b*) is designated as an observer by the Minister responsible for a department having a direct interest in the subject-matter of the investigation;

(*c*) has observer status or is an accredited representative or an adviser to an accredited representative, pursuant to an international agreement or convention relating to transportation to which Canada is a party; or

(*d*) is invited by the Board to attend as an observer because, in the opinion of the Board, the person has a direct interest in the subject-matter of the investigation and will contribute to achieving the Board's object.

(3) The Board may remove an observer from an investigation if the observer contravenes a condition imposed by the Board on the observer's presence or if, in the Board's opinion, the observer has a conflict of interest that impedes the conduct of the investigation.

24. (1) On completion of any investigation, the Board shall prepare and make available to the public a report on its findings, including any safety deficiencies that it has identified and any recommendations that it considers appropriate in the interests of transportation safety.

(2) Before making public a report under subsection (1), the Board shall, on a confidential basis, send a copy of the draft report on its findings and any safety deficiencies that it has identified to each Minister and any other person who, in the opinion of the Board, has a

direct interest in the findings of the Board, and shall give that Minister or other person a reasonable opportunity to make representations to the Board with respect to the draft report before the final report is prepared.

(3) No person shall communicate or use the draft report, or permit its communication or use, for any purpose, other than the taking of remedial measures, not strictly necessary to the study of, and preparation of representations concerning, the draft report.

(4) The Board shall

(*a*) receive representations made pursuant to subsection (2) in any manner the Board considers appropriate;

(*b*) keep a record of those representations;

(*c*) consider those representations before preparing its final report; and

(*d*) notify in writing each of the persons who made those representations, indicating how the Board has disposed of that person's representations.

(4.1) A representation is privileged, except for one made by a minister responsible for a department having a direct interest in the findings of the Board. Subject to other provisions of this Act or to a written authorization from the author of a representation, no person, including any person to whom access is provided under this section, shall knowingly communicate it or permit it to be communicated to any person.

(4.2) The Board may use representations as it considers necessary in the interests of transportation safety.

(4.3) If requested to do so by a coroner conducting an investigation into any circumstances in respect of which representations were made to the Board, the Board shall make them available to the coroner.

(4.4) Except for use by a coroner for the purpose of an investigation, no person shall use representations in any legal, disciplinary or other proceedings.

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,

(ii) the bridge or a control room of a ship,

(iii) the cab of a locomotive, or

(iv) the control room or pumping station of a pipeline, or

(*b*) a video recording of the activities of the operating personnel of an aircraft, ship, locomotive or pipeline

that is made, using recording equipment that is intended to not be controlled by the operating personnel, on the flight deck of the aircraft, on the bridge or in a control room of the ship, in the cab of the locomotive or in a place where pipeline operations are carried out, as the case may be, and includes a transcript or substantial summary of such a recording.

(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.

(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.

(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.

(5) The Board shall make available any on-board recording obtained under this Act to

(*a*) [Repealed, 1998, c. 20, s. 17]

(*b*) a coroner who requests access thereto for the purpose of an investigation that the coroner is conducting; or

(*c*) any person carrying out a coordinated investigation under section 18.

(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 recordings 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.

(7) An on-board recording may not be used against any of the following persons in disciplinary proceedings, proceedings relating to the capacity or competence of an officer or employee to perform the officer's or employee's functions, or in legal or other proceedings, namely air or rail traffic controllers, marine traffic regulators, aircraft, train or ship crew members (including, in the case of ships, masters, officers, pilots and ice advisers), airport vehicle operators, flight service station specialists, person who relay messages respecting air or rail traffic control, marine traffic regulation or related matters and persons who are directly or indirectly involved in the operation of a pipeline.

29(1) In this section, "communication record" means the whole or any part of any record, recording, copy, transcript or substantial summary of

(c) any type of communications respecting marine traffic regulation or related matters that take place between any of the following person, namely, marine traffic regulators, person designated under subsection 58(1) or section 76, 99, or 106 of the Canada Marine Act, ship crew members (including masters, officers, pilots and ice advisers), and staff of Coast Guard radio stations, rescue coordination centers and subentries and harbour master offices; or

(d) any type of communications respecting maritime distress, maritime safety or related matters

(i) that take place between any of the following persons, namely Coast Guard radio station operators, ship crew

members (including masters, officers, pilots and ice advisers), and staff of vessel traffic services centers, person designated under subsection 58(1) or 76, 99, or 106 of the Canada Marine At, rescue coordination centers and subentries, harbour master offices and ship agents' offices, or

(ii) that take place between any person on shore and a ship via a Coast Guard radio station.

30. (1) For the purposes of this section and section 19,

(*a*) "statement" means

(i) the whole or any part of an oral, written or recorded statement relating to a transportation occurrence and given, by the author of the statement, to the Board, an investigator or any person acting for the Board or for an investigator,

(ii) a transcription or substantial summary of a statement referred to in subparagraph (i), or

(iii) conduct that could reasonably be taken to be intended as such a statement; and

(*b*) where a statement is privileged, the identity of its author is privileged to the same extent.

(2) A Statement is privileged, and no person, including any person to whom access is provided under this section, shall knowingly communicate it or permit it to be communicated to any person except as provided by this Act or as authorized in writing by the person who made the statement

(3) The Board may make such use of any statement as it considers necessary in the interests of transportation safety.

(4) The Board shall make statements available to

(*a*) [Repealed, 1998, c. 20, s. 19]

(*b*) a coroner who requests access thereto for the purpose of an investigation that the coroner is conducting; or

(*c*) any person carrying out a coordinated investigation under section 18.

(5) Notwithstanding anything in this section, where, in any proceedings before a Court or coroner, a request for the production and discovery of a statement is contested on the ground that it is privileged, the Court or coroner shall

(a) in camera, examine the statement; and

(b) 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 statement by virtue of this section, order the production and discovery of the statement, 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 statement.

(7) A statement shall not be used against the person who made it in any legal or other proceedings except in a prosecution for perjury or for giving contradictory evidence or a prosecution under section 35.

32. Except for proceedings before and investigations by a coroner, an investigator is not competent or compellable to appear as a witness in any proceedings unless the Court or other person or body before whom the proceedings are conducted so orders for special cause.

33. An opinion of a member or an investigator is not admissible in evidence in any legal, disciplinary or other proceedings.

Confidentiality – Representations to the TSB

Section 24 of the TSB says that the Board shall prepare and make public a report on its findings. The Report is intended to highlight any safety deficiencies and make recommendations with regard to improving transportation safety. Due to the limitation placed upon the Board at s. 7(2), the Board is not to assign fault. They may report on causes and factors even though fault or liability may be inferred from the findings.

Pursuant to s. 24(2), the Board shall send a copy of the draft report of its findings, highlighting any safety deficiencies it may have discovered, to the persons considered by the Board to have a direct interest in the findings. Those persons contacted then have an opportunity to make representations to the Board, which will be considered before the Board makes its final report. The representations are protected by statutory privilege. Representations are not to be used in legal, disciplinary, or other proceedings.

In the *Canadian Accident Investigation and Transportation Safety Board v. Canadian Press*, [2000] N.S.J. No. 139, the Nova Scotia Court was presented with an interesting case. There, a member of the Canadian Press had managed to obtain a copy of the draft report. The reporter called the Board to make inquiries with respect to it. The TSB brought an application for injunctive relief asking that the Canadian Press be enjoined from ever publishing or using the draft report, and second, returning all copies and information contained within the report. Not surprisingly, the position of the Canadian Press was that such an injunction would inhibit the

freedom of the press. The Court was not impressed with the argument that s. 24(3) infringed on the freedom of the press since the reporter was unlawfully in possession of the document. In speaking to the purposes of the confidentiality granted by the CTAISBA and protected by the TSB:

> 18 Moreover, persons with an interest in the Board's investigations and the public generally would be prejudiced if the injunctive relief upholding the Act's legislative scheme is not honoured. The seeking of representations from various interested persons ensures that the ultimate report prepared by the Board is factually accurate and addresses all necessary issues arising in the subject matter of the investigation report.
>
> 19 Further, the receipt of representations from interested parties ensures that those persons who are the subject of comment in the draft report are provided with every opportunity to put their full position before the Board. These persons are properly entitled to rely upon the statutory protection created by the Act. They expect to be treated in a fair and confidential fashion. Their interests and those of the Board are entirely undermined if, in the midst of the consultative process, the media assumes the authority to publish the draft report. As noted in Mr. Harris' affidavit, the facts and conclusions contained in draft reports have been subjected to revision as a result of representations received from interested parties. It is therefore entirely possible that a final report issued by the Board pursuant to Section 24(1) of the Act could vary significantly from the draft report issued by the Board pursuant to Section 24(2) of the Act. Ultimately, the integrity of the consultative process (and the candour and fairness it embodies) would be irreparably damaged if the draft report of the Board were subject to wide circulation prior to all representations being received by the Board and the resulting final report issued.

Ultimately, the Court was not moved by the argument put forth by the Canadian Press and granted the injunctive relief requested by the TSB.

In *Hayes Heli-Log Services Ltd. v. Acro Aerospace Inc.,* 2006 BCCA 419, the British Columbia Court of Appeal dealt with a case where a Sikorsky helicopter lost power to both rotors. The TSB conducted an investigation, and prepared a draft report, a copy of which they provided to Sikorsky in order that the company might make representations according to the Act. Senior Sikorsky employees sent copies of their presentations to the Board to the United States Federal Aviation Administration (FAA) and the United States Transportation Safety Board (USNTSB). A copy of the representation made its way into an un-related proceeding in California. Despite Sikorsky's attempts to have the document sealed, the California Court refused.

Back in British Columbia a chambers judge decided that the representations were protected by a statutory privilege. This decision was overturned by the British Columbia Court of Appeal. In coming to the conclusion that they were not privileged documents, the Court found that the actions of Sikorsky took the representations outside the ambit of statutory privilege. Donald J. took a purposive interpretation of the s. 24(4). He acknowledged that the purpose of the confidentiality is to encourage full and candid reporting by interested persons in order that the

TSB can fulfill its mandate. Therefore, within the 'channel of communication between the TSB and a party making a representation to it, there can be no intrusion. With regard to the communications between Sikorsky and the American agencies, Donald J., at paragraph 19 said:

> "I am in respectful agreement with the view expressed by McMahon J. In the present case, I am unable to see that the communications to the FAA and the NTSB advanced any purpose of the Act. They did nothing to assist the CTSB in it work. Nor do I think that pre-trial discovery would compromise the goal of open communication with the CTSB because here the representor voluntarily sent PSL-347-01 to the other agencies."

It would appear that communication outside of the specific ambit of the channels of communication protected by the CTAISBA will not be afforded the strict statutory privilege granted by parliament. In *Chernetz v. Eagle Copters ltd.*, 28 ABQB 331, the TSB was asked to investigate the crash of a Bell 212 helicopter that crashed in Rangali, in the Republic of the Maldives. All of the occupants of the helicopter were killed, including Harry Chernetz a resident of Calgary, whose widow made an application for the materials. The Court held that the representations made by Pratt & Whitney, the manufacturer of the faulty engines, to the TSB were still protected by the statutory privilege, as this communication was contemplated by the Act. Further, since this type of helicopter, on these types of engines were relatively common in Canada, there was a benefit to Canada for the representations to be made within the cloak of confidentiality that has been found to provide honest and candid statements to the TSB. However, the court found that statements made to Transport Canada, or the NTSB, were not privileged as they were not made for the purpose of representations to the TSB. For privilege under s. 24 to apply, it is essential for submissions to be channeled through the TSB.

Use of TSB Statements

Statements made to a TSB investigator, in the course of his investigation, are privileged under s.19(9) of the TSB states that an investigator may compel a person to attend and give a statement, if the investigator is of the opinion the person has information that may be relevant to the investigation. The investigator may also require that the statement is given under oath or affirmation. In the case of *Parrish (Re)*, [1993] 2 F.C. 60, an investigation into a marine collision between the B.C. Ferry, "Queen of Alberni", and the Japanese freighter, "Shinwa Maru", the Board refused to accept the testimony of Captain Parrish in the presence of his Counsel. A question was directed to the Federal Court asking whether there was a right to Counsel when compelled to testify under oath to an investigator. Counsel for Captain Parrish pointed out that a person giving a statement should not be deprived of their right to Counsel in a situation where the Act has taken away their right to silence. The case was decided on aspects of procedural fairness. It was found that there was a right to Counsel when being compelled to testify under oath. Factors to be considered are: where a person is being compelled under threat of penalty, where the confidentiality of the statement is not assured and the presence of others is not prohibited, where reports are made public, where an individual may be deprived of his rights or livelihood, or where some other irreparable harm may ensue. The Court pointed out that the investigators are compelling witnesses to testify to, at times, tragic events, within hours of their occurrence and with the threat of penal sanctions looming over him/her if he doesn't. Further,

investigators are not legally trained, may be asking questions that would be inappropriate in a Court of law, and even beyond the mandate of the Board. Ultimately, the Court was not swayed that the need for administrative expediency outweighed Captain Parrish's protection through presence of Counsel.

It is s. 30 of the CTAISBA that provides statutory privilege and protection to the statements made to TSB investigators. It is not to be provided to anyone, other than a coroner or someone carrying out a coordinated investigation as found under s. 18. S. 30 provides for a method by which the Court shall determine if statements will be released. First, they shall examine the documents in camera. If the public interest in the administration of justice outweighs the statutory privilege provided by s. 30, then the Court shall order the production of the statements. However, Courts have been loathe to overcome the statutory privileges found within the CTAISBA. As the privilege relates to statements, the decision of Sparks J. in the Nova Scotia Youth Court case, *R. v. W. (C.W.)*, 204 N.S.R. (2d) 144 is instructive of how the privilege afforded statements is being interpreted. That case involved a train derailment. A youth was charged with offences relating to the cause of the derailment. The accused, with the support of the Crown, made an application to the Court to order the production of statements made to TSB investigators. There were 18 statements made to the investigators, four of which the Court determined to be relevant to the criminal trial. However, the court refused to grant access to the statements. Sparks J., at para. 23 said:

> If these statements are not disclosed I must consider whether the public interest in the proper administration of justice will be compromised. For example, will there be a wrongful conviction if the information is not disclosed in the circumstances of this case. In other words, will there be a miscarriage of justice? After reviewing these statements I cannot reach such a conclusion. But the statutory test goes beyond relevancy and includes whether this information can be obtained from other sources as noted in *R. v. New Zealand Rail Limited, supra*. In the circumstances of this case each of the deponents have been interviewed by the RCMP and two of the five deponents have also been interviewed by CN Rail. Only in the rarest of circumstances should the privilege of the TSB statement be abrogated. This is not one of those rare circumstances as the same deponents were interviewed by other sources available to Crown counsel. Thus, the question becomes whether, in these circumstances, the proper administration of justice does not outweigh the privilege attached to these statements as defence counsel can obtain these statements from either the RCMP or CN rail through Crown counsel.

It is interesting that the Court focused so much on the information being potentially available to other people who had interviewed the same people and so little to the content of the statements. It is easy to look at a situation like this case and envision that the statements that are being given to the police are very different from those given to the investigators; not necessarily due to the nature of the privilege afforded one statement over the other, but more as it relates to the types of questions that the different investigators might ask. Experience with the field, ie. the cause of a train accident, could easily lead TSB investigators to a line of questioning more honed in on the question of causation. Your average RCMP officer, it could easily be supposed, has little knowledge of train derailments and no knowledge or experience to determine what might truly be determinative as to cause.

In *Desrochers Estate v. Simpson Air (1981) Ltd.*, 36 C.P.C. (3d) 150, production of documents from a fatal air crash was sought. In particular the parties wanted the identity of the individuals who had made statements to investigators, and the contents of those statements. The Court refused to set aside the statutory privilege. In coming to the conclusion that the production of the documents in the interest of the proper administration of justice did not outweigh the statutory privilege, Richard J. stated that there was nothing in the statements that could not have been obtained by the plaintiffs in the ordinary prosecution of litigation out of a fatal crash of an aircraft. Because the litigation was 'routine' there were no unusual circumstances to allow the setting aside of statutory privilege.

One last case dealing with the statements to the TSB is *Canadian National Railway v. Canada*, 2002 BCCA 689. That case dealt with a train derailment causing two fatalities. The Order being appealed was that of the B.C. Supreme Court, which had ordered the TSB to disclose pertinent statements to the parties involved in the litigation. The facts leading to this Application were interesting, since the TSB had looked at the documents in its possession and split them into different categories: those that could be disclosed to C.N., those that could be disclosed the Canadian Pacific Railway, those that neither party could see, and those that could readily be disclosed to everyone. No documents that were deemed discloseable to C.N. or the Canadian

Pacific Railway were provided to Her Majesty in right of B.C. The court looked at the power inherent in s. 30(5)(b) and in particular, the authority placed on the court to order an individual to testify to the statement that has been ordered released. In light of this section of the CTAISBA, and the selective disclosure of the TSB, both the Supreme Court and the Appeal Court of B.C. determined that it was in the best interests of the administration of justice that the statements should be disclosed to all of the parties involved in the litigation:

> I am satisfied that Mr. Justice Henderson's reasons and my reasons must make it clear that there has been no intention of in any way diminishing the importance to be attached to the privilege in all other cases, nor in any way of undermining the circumstances for its exercise set out in the cases of *Webber v. Canadian Aviation Insurance Managers Ltd*, [2002] B.C.J. No. 2270 (B.C. S.C.) or *Braun Estate v. Zenair Ltd.* (1993), 13 O.R. (3d) 319 (Ont. Gen. Div.). It is only because of the special circumstance that there has been some distribution of privileged documents to some of the parties that requires the orderly administration of justice to ensure that all of the privileged documents find their way into the hands of all of the parties.

Evidence gathered by TSB Investigators

In *White Estate v. E&B helicopters*, 2008 BCSC 12, the Plaintiff was trying to compel the evidence of a TSB investigator. The Plaintiff sought to have the Defendant helicopter maintenance company admit to the facts contained in a notice to admit facts relating to the observations, examinations, and test results of the investigator. Presumably, knowledge of these facts were ascertained from the TSB report. The Defendant refused to admit to any of the facts. Evidence before the Court was that in proceeding with his investigation, the Investigator had done some destructive testing, and those components were no longer available. Section 32 of the CTAISBA states that an investigator is not competent or compellable unless the Court orders for special cause. In determining that special cause was constituted by the lack of any other appropriate means to get the information of the TSB investigator, the Court referenced the TSB report. Evidence was not used to adduce fault or liability, but it was used to make a determination on the condition of the helicopter parts at the time of the decision, relative to the time when the investigator did his testing. Given the reluctance of the Defendant to admit to any facts, and the lack of any other means by which the Plaintiff could obtain the information sought, the Court ordered that the Investigator was compellable. Therefore, the Investigator was compellable to testify to his observations and tests. However, he cannot testify as to his opinion on his observations as s. 33 of the CTAISBA provides an absolute bar to the opinion evidence of investigators:

> 23. He cannot be required to testify regarding the question of whether what he observed corresponded to what he would expect to have observed, whether the components he identified were those that should have been found in the helicopter, or whether the manner of installation corresponded to acceptable standards. Those are matters of opinion in respect of which he is neither competent nor compellable. Opinions in respect of such matters will likely be based upon the Investigator's observations, photographs and test results, but must be provided by expert witnesses who are not TSB investigators.

Voice Data Recordings (VDR)/Black Boxes

In *Wappen-Reederie GmbH & Co. K.G., a body politic and corporate of Hamburg, Germany, and Reederei MS Eilbek GmbH & Co. K.G.a body politic and corporate of Hamburg, Germany v. M.V. "Hyde Park", the Owners and all others interested in the Vessel M.V. "Hyde Park*, 2006 F.C. 150 ("*Hyde Park"*), the incident in question involved a collision between the "Cast Prosperity" and the "Hyde Park". The "Cast Prosperity" was equipped with a voyage data recorder (VDR), otherwise known as a black box, which records and stores ships data such position speed, heading, etc. The VDR also records radio communications with other ships and with shore stations. In the course of their investigation, the TSB seized the VDR recordings. The owners of the "Cast Prosperity", supported by the owners of the "Hyde Park" applied for an order of the Court requiring the return of the original recordings. The TSB refused to release a copy of the recordings on the basis that they are privileged. Gauthier J. considered the meaning of the restrictive measures found within the TSB at paragraph 68:

> [68] Also, these records could not be used to establish the facts even if all those involved in a casualty were unavailable because of death or other good reasons. Did Parliament really believe that a miscarriage of justice was a reasonable price to pay to protect those communications which are not even expected to be private when made over the VHF radio system? Unfortunately, these anomalies can only be dealt with by amendments to the legislation.

Gauthier J. went on to instruct herself to the appropriate considerations when determining whether the information should be released:

> [74] As it is the case in respect of other statutory privileges which are subject to a similar balancing exercise, the Court must give the appropriate weight to the privilege and avoid routinely allowing disclosure simply because of the probative value normally attached to audio recordings of events. In all cases, the Court must consider among other things:
>
> (i) the nature and subject of the litigation
>
> (ii) the nature and probative value of the evidence in the particular case and how necessary this evidence is for the proper determination of a core issue before the Court
>
> (iii) whether there are other ways of getting this information before the Court;
>
> (iv) the possibility of a miscarriage of justice.

In *Hyde Park*, the Court requested a transcript and translation of the German bridge recordings. After examining them in camera, it was determined that the bridge recordings were of little evidentiary value and need not be disclosed.

In order to investigate and make their findings, it was determined at the genesis of the TSB, that privilege was required in order to ensure honest statements. At page 234 of the Dubin Commission, the purpose for the qualified privilege was justified in this way:

> If the cockpit voice recorder were absolutely privileged as contended for by CALPA [Canadian Airline Pilots Association], an injured passenger or the estate of a deceased passenger might be deprived of the only evidence available with respect to the cause of the accident. This would decide, once and for all, against the public interest in the administration of justice. On the other hand, if the tapes were only producible on an order of a judge in civil proceedings, he would be in a position to weigh the public interest in the administration of justice against the public interest in maintaining confidentiality. In weighing these interests, the judge would be able to take into account the damage to the relationship of the pilots and their employers, the availability of the evidence from other sources, the effect of the production of the document on aviation safety and any other submissions which might support a ruling in favour of the privilege if objection is taken to production, as well as to the cogency of the material. In order to make that determination, the court might require production of the tape and have an opportunity of reviewing it in its entirety. If production is ordered, only so much of the transcript that is relevant to the issue at trial would form part of the public record, and thus the portions of the tape which are not relevant, but the publication of which might prove embarrassing, would not be disclosed.
>
> It cannot be assumed that the information provided by a cockpit voice recorder would cease to be available if portions of it are held to be necessary in civil proceedings as a result of a ruling by a judge that the interests of justice require it. It would be undesirable to create a privilege on the ground that those seeking it would otherwise not obey the law.

In *British Columbia Ferry Services Inc. v Canadian Transportation Accident Investigation Safety Board*, 2007 BCSC 1434, [upheld at 2008 BCCA 40], B.C. Ferries sought to gain greater use of information obtained from a hard drive that had been recovered from the "M/V Queen of the North". The "Queen of the North" had sunk near Gil Island after striking ground on March 22, 2006. The TSB retrieved the hard drive from the "Queen of the North" using a submersible it had obtained for the purpose. However, rather than seek to have the hard drive returned to them through an application under s. 20(3) of the CTA, B.C. Ferries had entered into an agreement with the TSB for disclosure of the evidence on the hard drive. That agreement limited the use to which B.C. Ferries could put the information. B.C. Ferries made an application for permission to use the information in an addendum to its previous report on the accident. The TSB resisted the expanded use of the information, regardless of the fact that it may have been allowed under a s. 20(3) application. The Court refused permission to B.C. Ferries to use the information for purposes greater than those agreed to between the parties.

A more recent case is *Société Air France et al. v. Greater Toronto Airports Authority*, 2010 ONSC 432, in which production was sought for the black box of an Airbus A340 that crashed after landing in Toronto. In that case the plane overshot the runway, pitched into a ravine

whereupon it burst into flame. No lives were lost but several people, including the captain were severely injured. The TSB resisted production stating that the black box was privileged under section 28 and the witness statements that were taken were privileged under section 30. In reference to the necessary determination whether production of the recording is 'in the public interest in the proper administration of justice', the TSB argued that "there is an onus on the moving party to show, with applicable expert evidence, that the available evidence is insufficient to make out its case and that the evidence contained in the CVR is not otherwise available." (Paragraph 123). In considering this argument, Strathy J. stated

> [124] In my view the "insufficient available evidence" test proposed by counsel for the TSB is difficult to apply because the test is almost impossible for a party to meet without access to the CVR itself. How can a party possibly know whether the CVR contains relevant, reliable and necessary evidence when access to it is prohibited? Moreover, the "insufficient available evidence" test overlooks the important question of the reliability and admissibility of evidence. There may be a wealth of evidence, but it may be unreliable for some of the reasons discussed above.

After considering all the circumstances, the Court ordered that the TSB was required to produce a copy of the CVT and transcript for use in the litigation. This decision was appealed but upheld (2010) ONCA 598). *Société Air France*, is one of the few cases where the Court has ordered production of the recordings that have been seized by the TSB in its investigations.

It is difficult to extract predictive principles from the case law which would assist counsel in ascertaining the availability of TSB related evidence. On a happier note, the somewhat amorphous concepts of "public interest" and the "interests of justice" may well occupy the hands of admiralty counsel where the volume of collision cases is wanting.