A REVIEW OF PROBLEMS AND EVIDENTIARY ISSUES ARISING IN MARINE CASUALTY INVESTIGATIONS

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MAY 23, 2014

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A REVIEW OF PROBLEMS AND EVIDENTIARY ISSUES ARISING FROM MARINE CASUALTY INVESTIGATIONS

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I. MARINE CASUALTY INVESTIGATIONS

(i) Marine Occurences

(a) *"Queen of New Westminster"* – "the Nanaimo Incident" – August 13, 1992

- Vehicle fell off apron of loading ramp;
- 6 people in water, three dead;
- Public Inquiry (the "Nemetz Inquiry) under provincial *Inquiry Act* (B.C.) due to fact that B.C. Ferry Corporation was at that time a Provincial Crown Corporation;
- Investigations by Transportation Safety Board ("TSB"), Transport Canada-Marine Safety ("TCMS")
- Litigation in Supreme Court of British Columbia – three actions commenced and settled after mediation; *Askew v. B.C. Ferry Corporation*, S.C.B.C., Nanaimo Registry, *Brown v. B.C. Ferry Corporation*, S.C.B.C., Nanaimo Registry and *Reigner v. B.C. Ferry Corporation*, S.C.B.C., Nanaimo Registry;
- Two employees of BCFC terminated, one reinstated after grievance procedure;
- TSB Safety Recommendations – Changes to Loading Procedures, increased crew training, video camera surveillance of loading decks, warning strobe lights, fast rescue boat;

(b) *"Arctic Taglu"/"Bona Vista"* – July 21, 1993

- Collision of barge/tug combination with fishing vessel;
- 6 people dead;
- Investigations by the TSB, TCMS, R.C.M.P., and Coroner;
- Litigation in Federal Court, *Kajat v. The "Arctic Taglu"*, [1997] F.C.J. No. 1100; [1997] F,C.J. No. 1673; *Kajat* v. *The "Arctic* Taglu, [2000] F.C.J. NO. 203 (C.A.);
- TSB Safety Recommendations – navigation lights on tug/barge combination be standardized, fishing vessel crew require certificates, CCG review rescue diving capability, navigation lighting on fishing vessels be enforced.

(c) *"Sunboy"/"Jose Narvaez"/"Texada B.C."* – August 7, 1999

- collision between pleasure boat and barge when pleasure boat passed between tug and tow;
- 15 people in water – five dead;
- investigations by TSB, TCMS, R.C.M.P., and the Coroner;
- litigation – Supreme Court of British Columbia, Vancouver Registry No. C996585, *Chen v. The Owners and all Others Interested in the Ships "Jose Narvaez", "Texada B.C." and "Sunboy"* settled before trial;
- TSB Safety Recommendations – DOT and marine industry to ensure that tug and tow navigation lights meet safety range visibility; operators of pleasure vessels be required to possess certificate of competency;

(d) *"Queen of The North"* – November 22, 2006

- Passenger ferry allided with Gil Island on B.C. Inside Passage, remained afloat for approximately 90 minutes and sank;
- 99 of 101 passengers and crew were rescued – 2 passengers missing and presumed dead;

- Investigations by TSB, TCMS, RCMP and BC Ferry Services (BCF);
- Civil Litigation:
  - S.C.B.C. Vancouver Registry No. S062025, *Kotai v. the Ship Queen of the North et al* – passengers' class action proceeding - Issue of punitive damages, Joyce J., settled before trial;
  - S.C.B.C. Vancouver Registry S063067 – *Foisey v. B.C. Ferry Services* – settled before trial;
  - S.C.B.C. Vancouver Registry S073579 - *Papineau v. - B.C. Ferry Services Inc.* – settled before trial;
  - S.C.B.C. Vancouver Registry S074494, *Rosette v. B.C. Ferry Services Inc. et al* – settled before trial;
- Criminal Proceedings:
  - S.C.B.C. Vancouver Registry 25634 *R. v. Lilgert* – 5 month jury trial with fourth officer being convicted of two counts of criminal negligence causing death and sentenced to 4 years on each count to be served concurrently; - this matter is under appeal;
- TSB Safety Recommendations:
  - Guidelines for passenger manifests;
  - Crew familiarization with onboard equipment;
  - Passenger safety management training and realistic emergency exercise for crews;
  - Review and implement effective employee wellness and substance abuse policy;
  - Review of minimum bridge watch composition by Transport Canada
  - All large passenger vessels to adhere to same safety standards regardless of whether domestic or international operation;
  - Voyage Data Recorders be required in all large passenger vessels over 5000 gross tons;

(ii) Media Interest

- Media on scene within hours of major marine casualty;
- Media attempts to satisfy public desire to know cause of incident and assign fault, preferably by the 6:00 o'clock news, and in any event by the time the National is aired at 10:00 p.m.
- Media aggressively seeks interviews of those involved in the incident and any witnesses to incident;
- Media usually has a limited understanding of the investigating authorities and the protocol and procedures being followed in investigations.

(iii) Practical Considerations

- Participants are often in a state of shock, sometimes injured, and may be facing civil, criminal, and disciplinary proceedings and the loss of employment;
- There is often general confusion following an incident, with the need to stabilize the situation;
- Counsel representing participants (master, mate, crew, vessel owners, insurers etc.) conduct interviews to learn facts, advise witness of investigative procedures, rights, and potential problems;
- There may be a need for separate representation of participants or witnesses if potential for conflict of interest;
- Interviews with counsel for owners/employers – usually covered by solicitor/client or litigation privilege;
- Interviews with investigating authorities – Transportation Safety Board, sometimes within hours, usually within days of the incident;
- RCMP and TCMS will request interviews;
- Internal investigations by owners/employers;
- Disciplinary hearings and grievances under Collective Agreements;
- Civil proceedings generally follow;
- Sometimes criminal proceedings as well;

(iv) Investigations

(a) Transportation Safety Board

The principal legislation granting authority to investigate marine casualties is the *Canadian Transportation Accident Investigation and Safety Board Act*, (*"CTAISBA"*) pursuant to which the Transportation Safety Board ("TSB") is established with a mandate to investigate and report on the causes and contributing factors leading to marine occurrences.

- Usually the lead agency and has exclusive jurisdiction for the purposes of making findings as to causes and contributing factors;
- Investigators attend at scene, conduct examination of vessel and physical evidence and engage in expert analysis if necessary;
- Investigators interview participants in occurrence and any witnesses to incident, usually within days, sometimes within hours after the incident;
- A report is prepared by the Board, identifying safety deficiencies, making findings as to causes and contributing factors, and making recommendations designed to eliminate or reduce safety deficiencies;
- The report by the Board may take up to 2 years to be made public;

(b) *Canada Shipping Act*, 2001 (*CSA* 2001)

S. 219 (1) of *CSA* 2001 provides that the Minister of Transport may appoint a person to investigate a shipping casualty or an alleged contravention of a relevant provision of *CSA 2001*. S. 219 (2) provides that the person appointed may not make findings as to the causes and contributing factors of a shipping casualty that has been or is being investigated by the TSB.

(c) *Canada Labour Code* (*CLC*)

Parliament has made provision under the *Canada Labour Code*, R.S.C. 1996 c. L-1 (s. 141) for Health Safety Officers (often TCMS Officers so designated) to investigate a death in the workplace where that workplace comes under federal jurisdiction, such as matters relating to shipping and navigation. Restrictions are placed on the use that can be made of the information gained at such investigations (s. 144).

(d) Coroner

Where there has been a death in a marine casualty and a body has been recovered, a provincial Coroner may have jurisdiction and may conduct an inquest for the purpose of determining the identity of the deceased, and how, when, where and by what means the death occurred. Witnesses to Coroner's Inquests are usually provided with the right to counsel (s. 40 of the *B.C. Coroner Act*, R.S.B.C. 1996, c. 72) and witnesses may be provided with protection against the use of their evidence in other proceedings and against self-incrimination (s. 39, B.C. *Coroner Act*).

(e) Police

The police force having jurisdiction will often investigate marine casualties to determine if there is any basis for criminal charges. Following the sinking of the *Queen of the North*, the RCMP investigated jointly with TCMS and charges of criminal negligence causing death were laid with respect to the 2 missing persons. The RCMP obtained a warrant pursuant to s. 487.012 of the *Criminal Code*, obtaining a production order with respect to the TSB investigation file, duly edited by TSB concerning any statements or material protected by privilege. The RCMP approached many witnesses who had appeared before the TSB to obtain a consent to release the TSB witness statement and those statements to which a consent was obtained were used by the Crown in the criminal prosecution.

(f) Transport Canada – Marine Safety

TCMS will investigate concerning any regulatory infractions and has the power to suspend certificates and to lay charges, called

Administrative Monetary Penalties (AMPs), which consist of significant fines for infractions of *CSA 2001* by mariners and vessel owners/operators. There is provision for the AMPs to double with each subsequent offence. AMPs can be disputed by the mariner/vessel owner/operator by requesting a review before the Transportation Appeal Tribunal of Canada (TATC).

(g) Vessel Owner/Operator

It is usual for vessel owners/operators to have procedures and protocols for internal investigations following significant marine casualties. These investigations have no ability to grant employees who appear before them as witnesses any protection against incrimination with respect to statements made by the witness at the investigation.

(h) Minister of National Defence

The *National Defence Act* (s. 45) provides that the Minister may convene a board of inquiry for the purpose of investigating any matter connected with the functions of the Canadian Forces. Following the fire at sea aboard the Canadian submarine "*Chicoutimi*", the Minister established a Board of Inquiry. The media applied to be present when the Board of Inquiry was to take evidence from the crew when the vessel arrived in Halifax. In *Gordon* v. *Canada (Minister of National Defence)* 2004 FC 1566, Mr. Justice Harrington of the Federal Court Trial Division dismissed the application. The TSB is prohibited from investigating marine occurrences concerning a military conveyance (ship) except in limited circumstances, and in such circumstances, TSB shall take all reasonable measures to ensure that the investigations are coordinated. (*CTAISBA, s.* 18)

(i) Public Inquiries

There is provision in both federal and provincial legislation for Public Inquiries, usually dealing with crown corporations or some aspect of government business. These are rare with respect to marine casualties, however, the Nemetz Inquiry into the "Nanaimo Incident" was conducted under the B.C. *Inquiry Act*. The TSB has provision in its legislation (*CTAISBA* s. 21(1)) and TSB *Regs.* (s. 15) for public

inquiries. To date, TSB has not held a public inquiry into a marine casualty.

II BALANCING OF INTERESTS – PUBLIC AND INDIVIDUAL

(i) The Competing Interests

There are three competing interests at play in the *CTAISBA*. They are:

(i) the public interest in safety;
(ii) the rights of individuals; and
(iii) the public interest in the proper administration of justice.

The *CTAISBA* compels witnesses to attend before an investigator and provide evidence concerning a marine occurrence, while at that same time providing a privilege with respect to witness statements. The statements are to remain confidential and while information obtained can be used in the preparation of a TSB report, the statements are not to be communicated to anyone without either the written consent of the witness or a court order. The statements cannot be used against the witness in any legal, disciplinary or other proceeding.

There is provision in the *CTAISBA* for a court or coroner to examine a witness statement *in camera* and decide whether the proper administration of justice outweighs the importance of the privilege attaching to the statement. This paper examines the competing interests, the privilege granted to witnesses, and the manner in which the courts have adjudicated the balance between the public interest in safety, the rights of individuals, and the proper administration of justice.

(a) Public Interest

(i) Safety

The merits of investigating marine casualties with a view to determining the causes and contributing factors and making recommendations with respect to safety deficiencies to prevent future occurrences is beyond question. It appears to be the intention of the legislation to encourage witnesses to be open and frank in discussing marine casualties and for that purpose

a comfort level has been created for witnesses such that statements they make should not have repercussions against them either in civil, criminal or disciplinary proceedings, nor with respect to the relationship with employers and co-workers, nor concerning their ability to seek employment. That is, their reputation should not be adversely affected due to the fact that they have been candid and forthright in assisting on the safety aspects of the investigation.

(ii) **Proper Administration of Justice**

We live in a society with a sophisticated system of civil and criminal codes administered by the courts, administrative and quasi-judicial tribunals, for the purpose of enforcing legislation enacted by democratically elected governments and adjudicating disputes between both private and public interests.

The public has an interest in seeing that the laws enacted are properly enforced and complex rules of evidence have been developed which are applicable in judicial and quasi-judicial proceedings to allow the adjudicative body the access to factual evidence which will assist it in determining the basis for making decisions when applying the law. The public has an interest in seeing that responsibility for conduct is fairly assessed, and where appropriate, that it be sanctioned by way of damages, penalties, censure or incarceration.

(b) Individual Rights

At common law, no witness, whether a party to a proceeding or otherwise, was compellable to answer any question, the tendency of which was to expose the witness to any criminal charge, penalty, forfeiture of property or censure. (Sopinka, Lederman and Brant, *The Law of Evidence* (2d ed.) 1999, Butterworth's at p 713).

In 1893 the *Canada Evidence Act* provided protection against self-incrimination in criminal proceedings and shortly thereafter provincial *Evidence Acts* provided similar protections in civil proceedings. The protection granted to

witnesses is now contained in s. 5 of the *Canada Evidence Act* and in provincial *Evidence Acts* (i.e. *Evidence Act*, R.S.B.C 1996, c.124 s. 4)

In 1982 the *Canadian Charter of Rights and Freedoms* (The "Charter") became part of the *Canadian Constitution* and provides an individual with protection against self-incrimination (Section 13) and guarantees a right to a fair trial (Section 7). The protections guaranteed by these sections extend to evidence that could not have been obtained, or the significance of which could not have been appreciated, but for the testimony of the witness, such that derivative evidence is generally excluded as its admission would tend to affect the fairness of the trial. (*R. v. S. (R. J).*, [1995] 1 S.C.R. 451).

(ii) Watertight Compartments

Mariners know well the value of watertight compartments. They are designed to maintain and protect the integrity of a vessel in the event that water enters the hull. The effect of water being unrestricted inside a hull can be disastrous for a vessel, resulting in capsizing or sinking.

The concept of watertight compartments is also a hallmark of the investigation process and the judicial system. Investigating authorities are mandated by legislation to investigate for certain purposes and are granted powers to enable investigators to accomplish their goals. Legislation places restraints on the authority of investigators and provides protection for individuals who are required to appear as witnesses before investigators and provide statements concerning marine occurrences.

The courts are called on from time to time to adjudicate on the powers provided to investigators, the protections granted to witnesses, and to filter the use of witness statements and investigation reports when they are proffered as evidence in criminal or civil proceedings.

The integrity of the investigation processes and the judicial system is maintained by rules of evidence, similar to watertight compartments

which, with certain exceptions, limit the evidence gathered to the forum in which it was gathered.

(iii) Variations on a Theme – Canada, U.K. and U.S.

Canada, the U.K. and the U.S. have all established Boards to investigate transportation occurrences. Canada has the Transportation Safety Board ("TSB"), the U.K. has the Marine Accident Investigation Board ("MAIB") and the U.S. has the National Transportation Safety Board (the "NTSB").

All three Boards have a mandate to investigate marine transportation casualties with a view to identifying causes of marine casualties and to making recommendations with a view to preventing a similar marine casualty in the future.

All three Boards are mandated to conduct independent investigations and report publicly thereon making recommendations in the interests of safety. They have no regulatory or enforcement powers.

There are differences in the approach taken to the manner in which evidence is gathered by the respective boards and the manner in which it can be subsequently used.

In Canada, the legislation creating the Board compels witnesses to testify but grants a privilege to witnesses with respect to statements given which prohibits the disclosure and the use of those statements in other proceedings, subject to an exception where the proper administration of justice requires the same.

In the U.K, there does not appear to be a statutory privilege granted to a witness by the legislation creating the MAIB, however, the final report of the MAIB is prohibited by regulation from being published while prosecutions are outstanding against those involved in a marine casualty. (*Merchant Shipping (Accident Investigation) Act*, at, Reg. 1989, S.I. 1989 No. 1172, s. 9(2)). Witnesses would be entitled to protection in subsequent proceedings based on Statutes and rules of evidence. In Formal Investigations in the U.K., the Attorney General can give assurances with respect to future prosecutions to encourage witnesses to be forthcoming. *"Marchioness/Bowbelle" Formal Investigation Report HMSO 2001, Vol. 2 Annex B.*

In the U.S. although witnesses can be compelled to attend before the NTSB, they can take the protection of the Fifth Amendment of the *U.S. Constitution* and refuse to answer any questions beyond name and age on the grounds that the responses may incriminate the witness. There is no statutory privilege given in the NTSB legislation, and unless immunity is granted in subsequent proceedings, statements and reports may be admissible for certain purposes. In the recent Staten Island Ferry incident on October 15, 2003, in which 11 people died, the Captain, when ordered by a U.S. District Court to appear before the NTSB, appeared and took the protection of the Fifth Amendment, giving only his name and age before claiming the protection.

Canada, the U.K. and the U.S. are all signatories to the *International Convention for the Safety of Life at Sea 1974 (SOLAS, 1974)*, as amended by accession. The International Maritime Organization (IMO) has adopted a *Code of International Standards and Recommended Practices for a Safety Investigation into a Marine Casualty or Marine Incident (IMO Code)* which came into force and became binding on signatories to *SOLAS 1974* as of January 1, 2010.

The purpose of the *IMO Code* is to standardize the methodology and protocol for marine casualty investigations. The *CTAISBA* and the *IMO Code* are generally compatible, however, in the event of a conflict between the two, Canadian Courts, in interpreting domestic statutes, endeavour to construe domestic statutes, to the extent possible, to comply with Canada's international obligations. A clear provision is needed in a domestic statute to negate an interpretation consistent with an international treaty or convention to which Canada is a party. (*R. v. Hape*, [2007] 2 S.C.R. 292, 2007 SCC 26 at para 53)

(iv) The Canadian Dilemma

A problem which has arisen under the *CTAISBA* is that a statement given by a witness to investigating authorities in the interests of improving safety on the understanding that it would be privileged may end up being produced and discovered in subsequent proceedings if a Court so orders or if the witness waives the privilege.

The problem is that the privilege is not absolute.

The essential concern is that statements made on the basis that they would remain in confidence with an investigator, which statements may reflect adversely on the character or activities of employers, employees or co-workers, run the risk that a court at some later date in another proceeding may determine that the public interest in the administration of justice should override the privilege and confidentiality, thus causing damage to ongoing relationships and exposing witnesses to potentially serious consequences in terms of his reputation and livelihood.

The concern here is not with the incrimination of the witness as there are adequate protections in the *CTAISBA*, the *Charter* and *Evidence Acts* to prevent the use of the statement made by a witness against that witness in any other proceeding.

The concern is that the use of privileged and confidential statements in other proceedings, and even the fact that a witness has made a statement and refused to waive the privilege, may adversely affect the witness by calling into question the credibility of the witness and thereby bringing the administration of justice into disrepute.

It should be noted that there is no privilege or protection with respect to a prosecution for perjury or for giving contradictory evidence or when an offence has been committed under the *CTAISBA*, such as knowingly giving false or misleading information or obstructing an investigator. This is consistent with the provisions of s. 13 of the *Charter* and s. 5 of the *Canada Evidence Act* and relevant sections of provincial *Evidence Acts* and is an important tool in the proper administration of justice.

III TRANSPORTATION SAFETY BOARD INVESTIGATIONS

The *CTAISBA* constitutes the Transportation Safety Board ("TSB") and empowers it to conduct investigations into "marine occurrences" which are defined in the *Act* (s. 2) as:

> "(a) any accident or incident associated with the operation of a ship, and
>
> (b) any situation or condition that the Board has reasonable grounds to believe could, if left unattended, induce an accident or incident described in paragraph (a)".

The marine occurrences which are reportable to the TSB are set out in the *TSB Regulations* SOR/2014-37, s. 3.

The *CTAISBA* (s. 3(2)) applies in respect of marine occurrences in Canada and in any other place if Canada is requested to investigate by an appropriate authority (foreign state), a Canadian registered ship is involved, or a competent witness arrives or is found in Canada.

(i) Object of the Board - Section 7. (1)

The TSB is an independent Board reporting to Parliament through the President of the Queen's Privy Council for Canada. The object of the Board is stated as follows:

> "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 or 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.
>
> (4) The findings of the Board are not binding on the parties to any legal, disciplinary or other proceedings.

(ii) Exclusive Jurisdiction – Section 14.(3), (4), (5)

The TSB has exclusive jurisdiction, except for matters involving the Department of National Defence, with respect to investigations into

transportation occurrences for the purposes of making findings as to causes and contributing factors.

14.(3) Notwithstanding any other Act of Parliament,

(a) no department, other than the Department of National Defence, may commence an investigation into a transportation occurrence for the purpose of making findings as to its causes and contributing factors if

(i) that transportation occurrence is being or has been investigated by the Board under this Act, or

(ii) the department has been informed that that transportation occurrence is proposed to be investigated by the Board of this Act; and

(b) where an investigation into a transportation occurrence is commenced by the Board under this Act after an investigation into that transportation occurrence has been commenced by a department, other that the Department of National Defence, the department shall forthwith discontinue its investigation, to the extent that it is an investigation for the purpose of making findings as to the causes and contributing factors of the transportation occurrence.

(4) Nothing in subsection (3)

(a) prevents a department from commencing an investigation into or continuing to investigate a transportation occurrence for any purpose other than that of making findings as to its causes and contributing factors, or from investigating any matter that is related to the transportation occurrence and that is not being investigated by the Board; or

(b) prevents the Royal Canadian Mounted Police from investigating the transportation occurrence for any purpose for which it is empowered to conduct investigations.

(5) For greater certainty, where the Board does not investigate a transportation occurrence, no department is prevented from investigating any aspect of the transportation occurrence that it is empowered to investigate.

(iii) Power to Compel Witnesses – Section 19.(9) and (10)

TSB investigators are given powers of search and seizure as well as the power to compel witnesses to attend and give evidence.

Additional powers of investigator

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

(a) where the 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 or any 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.

Persons to comply with requirements imposed under paragraph (9)(a), (c) or (d)

(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).

(iv) The Privileges

(a) Statements - Sections 30.(1) and (2)

In return for compelling individuals to give evidence, protections are granted.

Interpretation

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.

Statement privileged

(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.

(b) On-board recordings - Sections 28(1) and (2)

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.

(v) The Exceptions

(a) Statements - Sections 30. (3), (4),(5), and (7)

Use by the Board

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

Access by peace officers, coroners and other investigators

(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.

Power of court or coroner

(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.

Use prohibited

(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.

(b) On-board recordings - Sections 28.(4),(5), (6) and (7)

Use by the Board

28(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.

Access by peace officers, coroners and other investigators

(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.

Power of court or coroner

(6) Notwithstanding anything in this section, where, in any proceedings before a court or coroner, a request for the production and discovery of an on-board recording is made, the court or coroner shall

(*a*) cause notice of the request to be given to the Board, if the Board is not a party to the proceedings;

(*b*) *in camera*, examine the on-board recording and give the Board a reasonable opportunity to make representations with respect thereto; and

(*c*) if the court or coroner concludes in the circumstances of the case that the public interest in the proper administration of justice outweighs in importance the privilege attached to the on-board recording by virtue of this section, order the production and discovery of the on-board recording, subject to such restrictions or conditions as the court or coroner deems appropriate, and may require any person to give evidence that relates to the on-board recording.

Use prohibited

(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, persons 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.

(vi) Evidence of Investigators – Sections 32 and 33

There are restrictions placed on the use of the evidence created by investigators.

Appearance of investigator

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.

Opinions inadmissible

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

(vii) Offences – Sections 35 and 36

There is an exception to the use that can be made of the investigators' evidence where an offence has been committed under the *CTAISBA* and the evidence of the investigator is needed for the prosecution thereof.

Offences

35.(1) Every person who

(a) contravenes subsection 19(8), (10) or (11),

(b) without lawful excuse, wilfully resists or otherwise obstructs a member or an investigator in the execution of powers or duties under this Act or the regulations,

(c) knowingly gives false or misleading information at any investigation or public inquiry under this Act, or

(d) makes a report pursuant to section 31 that the person knows to be false or misleading,

is guilty of an indictable offence and liable on conviction to a term or imprisonment not exceeding two years, or is guilty of an offence punishable on summary conviction.

(2) Every person who contravenes a provision of this Act or the regulations for which no punishment is specified is guilty of an offence punishable on summary conviction.

Evidence

36.(1) Subject to subsections (2) and (3),

(a) a report purporting to have been signed by an investigator stating that the investigator has exercised any power pursuant to section 19 and stating the results of the exercise of the power, or

(b) a document purporting to have been certified by an investigator as a true copy of or extract from a document produced to the investigator pursuant to subsection 19(9)

is admissible in evidence in any prosecution for an offence under this Act without proof of the signature or official character of the person appearing to have signed the report or certified the document and is, in the absence of evidence to the contrary, proof of the statements contained in the report or proof of the contents of the document.

Notice

(2) No report or document shall be received in evidence under subsection (1) unless the party intending to produce it has, at least seven days before producing it, served on the party against whom it is intended to be produced a notice of that intention, together with a copy of the report or document.

Cross-examination

(3) The party against whom a report or document is produced under subsection (1) may require the attendance, for the purposes of cross-examination, of the person who appears to have signed the report or certified the document as a true copy or extract.

IV INTERVIEWS, RIGHT TO COUNSEL, SOLICITOR-CLIENT AND LITIGATION PRIVILEGES

(i) Interviews

Witnesses can be compelled by subpoena to attend before a TSB investigator (s. 19(9)(a)(i)). As a practical matter, in order to accommodate TSB investigators, witnesses usually attend within hours or days of a marine occurrence following a verbal or written request of a TSB investigator to attend. In *Webber v. Canadian Aviation Insurance Managers Ltd.* 2002 BCSC 1415 per Sinclair Prowse J. at paragraph 34, the statutory privilege protection granted to a witness arises from the fact that the witness is compelled by the *CTAISBA* to produce information or give a statement to TSB investigators regardless of whether the witness has been provided with written notice of the requirement to attend (i.e. a Form 2 Statutory Summons – *TSB Regs.*)

The interview of a witness must be held *in camera* (*TSB Regs.* s. 9(1)). The witness is entitled to have one person chosen by the witness to attend with him (*TSB Regs.* s. 9(2)) provided however that that person cannot be another witness required to attend before the investigator (*TSB Regs.* s. 9(3)).

Any statement of a witness attending before a TSB investigator must be taken in a manner so that a complete and usable record of the statement is obtained. This is usually done by TSB investigators operating tape recorders during the interview and in investigators of serious marine occurrences, TSB may have the tape recordings transcribed or, in exceptional circumstances, a court reporter may be in attendance to records and transcribe the interview of the witness (*TSB Regs.* s. 9(5)). On written request, a person making a statement must be provided with a copy of that statement (*TSB Regs.* s. 9(6))

The *TSB Regs.(s. 15)* also make provision for public hearings, however, to date there have been no TSB public inquiries with respect to marine occurrences. A public inquiry would seem to undermine the very foundation of TSB investigations, being the confidence of the witness that the statement provided to a TSB investigator will be privileged and remain confidential.

(ii) Right to Counsel and Conflicts of Interest

On March 12, 1992 a collision occurred between the B.C. Ferry "*Queen of Alberni*" and the Japanese freighter "*Shinwa Maru*" off the Tsawwassen Ferry Terminal. The TSB conducted an investigation of the incident and proceeded to interview crew members aboard the Japanese freighter with legal counsel present. The Board sought to conduct interviews of the crew members aboard the "*Queen of Alberni*" and more particularly, the captain, without affording him the right to legal counsel.

The matter came before the Federal Court by way of judicial review in *Re Parrish* [1993] 2 F.C. 60, pursuant to s. 18.3 of the *Federal Court Act*. The question posed was whether a TSB investigator could require the captain to attend before him and give evidence under oath concerning a marine occurrence without the right to have counsel present.

Mr. Justice Rouleau answered the question in the negative and in his reasons stated at paragraphs 65 and 67:

> "¶65...My review of the jurisprudence reveals that the duty to act fairly implies the presence of counsel when a combination of some or all of the following elements are either found within the enabling legislation or implied from the practical application of the statute governing the tribunal: Where an individual or a witness is subpoenaed, required to attend and testify under oath with the threat of penalty; where absolute privacy is not assured and the attendance of others is not prohibited; where reports are made public; where an individual can be deprived of his rights or his livelihood; or where some other irreparable harm can ensue. I do not intend this list to be exhaustive but I wish to highlight those factual situations in the jurisprudence giving rise to the need for adequate protection by way of counsel or some other advisor.
>
> "¶67 The Canadian Transportation Accident Investigation and Safety Board offers to the Court but one valid argument or explanation as to why it wishes to deprive a witness of the right to counsel: that their presence would cause unwarranted delay and perhaps frustrate the immediate gathering of facts. This Court is asked to deprive an individual of his right to silence. In the event of a tragic and catastrophic incident, a witness is subpoenaed within hours and at best days to attend and give testimony under oath with the threat of penalty over his head while perhaps still in a traumatic state. He may not have the presence of mind to invoke the protection of the Canada Evidence Act and the British Columbia Evidence Act. The witness would be testifying before an investigator who is usually not legally trained, asking double-barrelled questions that in some cases may even be beyond the scope of the Board's mandate; perhaps in the presence of the coroner, police authorities or some regulatory body that has the power to deprive him not only of his reputation but his professional certification and his livelihood. The witness is then faced with interim reports that are sometimes prematurely leaked to the press before having had an opportunity to comment. In such circumstances, I cannot accept the Board's argument that the need for administrative expediency in the proceedings outweighs the necessity for the protection of a witness through the presence of counsel."

In practice, the presence of counsel can provide comfort to the witness by making him aware of the investigation process and his rights. Counsel can also assist in ensuring that there is clarity in both the questions asked and the responses given.

There are often conflicting interests which become apparent following a marine occurrence. The interests of vessel owners, cargo

owners, insurers, charterers, employers and employees, and even the interests of individual crew members may differ significantly.

Recently TSB investigators have taken the position when conducting interviews following marine occurrences that certain counsel and/or individuals may be excluded from interviews where TSB perceives there may be a conflict of interest, such as a situation where counsel present may be representing more than one interest, such as a vessel owner, employer, and employee.

Practically the Board is concerned about the lack of candour of a witness when the representative of another and potentially conflicting interest may be present at the interview. For example, a crew member may be reluctant to speak frankly on certain matters which may negatively impact his employer when counsel for the employer is also present.

On the other hand, there may be occasions when co-counsel are appropriate, provided the witness is aware of potential conflicts and consents, such as when there are potential criminal and civil proceedings, either contemplated or ongoing, concerning the incident under investigation. It is usual for the employer's insurance to cover an employee who is acting within the scope of his employment for civil liability purposes.

R. v. Neil, [2002] S.C.J. 72 involved criminal charges against a paralegal for fabricating court documents and fraud. The accused paralegal argued that his lawyers, who had also acted for another accused in related matters, were in conflict of interest and that his right to effective representation guaranteed under s. 7 and s. 11(d) of the *Charter* had been infringed. The Supreme Court of Canada did not agree however, and stated that the duty of loyalty a lawyer owes to a client includes not only an obligation of confidentiality but also a duty to avoid conflicting interests, a duty of commitment to the client's cause, and a duty of candour with the client on matters relevant to the retainer.

Mr. Justice Binnie, in rendering reasons for the Court, held that the solicitor/client relationship imposes a fiduciary duty on the solicitor. At paragraphs 18 and 26 of his reasons he stated:.

> "¶18 In Drabinsky *v. KPMG* (1998), 41 O.R. (3d) 565 (Gen. Div.), where the plaintiff sought an injunction restraining the accounting firm KPMG (of which the plaintiff was a client) from further investigating the financial records of a company of which the plaintiff was a senior officer, Ground J., grouping together lawyers and accountants, said, at p. 567:
>
> > "I am of the view that the fiduciary relationship between the client and the professional advisor, either a lawyer or an accountant, imposes duties on the fiduciary beyond the duty not to disclose confidential information. It includes a duty of loyalty and good faith and a duty not to act against the interests of the client." [Emphasis added]
>
> ¶26 "The duty of loyalty was similarly expressed by Wilson J.A. (as she then was) in Davey v. Wooley, Hames, Dale and Dingwall (1982) 35 O.R. (2d) 599, at p. 602:
>
> > "The underlying premise...is that, human nature being what it is, the solicitor cannot give his exclusive, undivided attention to the interests of his client if he is torn between his client's interests and his own or his client's interests and those of another client to whom he owes the self-same duty of loyalty, dedication and good faith."

A practical problem often arises where TSB investigates a marine occurrence involving a foreign flagged vessel. The master and crew may be from a third-world country and have limited skills in the language of the interview and may have no ability to retain separate representation. In such circumstances, the vessel owners, charterers, or the insurer may retain counsel to also represent the crew members at the TSB investigation interviews. Counsel will be present at interviews of crew members and also vessel owners/charterers.

The choice of counsel for representation before the TSB investigator is the right of the witness who is to be interviewed. The witness has the right to be fully informed of potential conflicts and it will be up to the witness and counsel to determine the appropriateness of the representation.

In certain circumstances, and in particular where there has been loss of life and/or serious property damage, where the witness or the interest the witness represents may face serious consequences as a result of the incident under investigation, the retention of independent counsel at an early stage for witnesses with potentially conflicting interests is advisable.

It should be noted that the privilege granted to a witness for a statement made in a TSB interview by s. 30(2) of the *CTAISBA* prohibits any person, (including counsel who represents more than one interest) from disclosing the contents of a witness statement to anyone (another witness or interest) except as provided by the *Act* or as authorized in writing by the witness making the statement.

The *Neil* decision heightens the level of caution for counsel in dealing with such matters. In the absence of written authorization required by s. 30(2) to divulge or share information given at a TSB interview, counsel will be in a difficult position, unable to disclose information which may be adverse or beneficial to the interests of one party that counsel represents at the expense of another party represented by the same counsel. The duty of loyalty referred to in the *Neil* case mandates that counsel should make no use of information obtained at the TSB interview of one client to the detriment or benefit of any other client counsel is representing without appropriate authorization.

Part 2 of the *TSB Regulations* governing interviews came into force on March 11, 2014. A witness is limited to having only one person (i.e. counsel) accompany him at a TSB investigation (*TSB Regs* s. 9(2)). TSB has indicated it will strictly enforce the new provisions limiting to one the number of counsel who will be permitted to attend with a witness.

(iii) Solicitor-Client and Litigation Privileges

R. v. Lilgert [2012] BCSC 1716

Maintaining that it had an obligation to attempt to obtain any information relevant to the prosecution, the Crown applied for production of any notes, summaries, reports, documents, records or recordings pertaining to interviews of certain B.C. Ferries ("BCF")

employees by counsel for BCF. The Crown issued a subpoena in the criminal proceedings to counsel for BCFas a third party record holder to appear at the trial and to produce records relating to the interviews of the 2 employees on the bridge at the time of the occurrence.

The application was opposed by counsel for BCF and counsel for one of the witnesses on the basis that solicitor-client and litigation privileges attached to the material requested.

Counsel for BCF told the employees that he was conducting the interview in his role as counsel for BCF and assured the employees, who had their own counsel present during the interviews, that the information provided in the interview would not be used for any purpose other than providing legal advice to BCF regarding processing of insurance claims and potential litigation. The interviews were not recorded and counsel made handwritten notes and dictated a summary for the purposes of providing a legal opinion to BCF. The material collected was not disclosed to anyone except BCF and its insurer.

Madam Justice Stromberg-Stein discussed the leading cases concerning solicitor-client privilege. The record holder (solicitor) must prove on a balance of probabilities the existence of a claim for solicitor-client privilege, and the onus is discharged by providing a sufficient description of the documents, the circumstances of their creation and the dominant purpose therefor. Once the onus is met, the onus shifts to the party seeking production to justify that production (*Kennedy* v. *McKenzie* [2005] Carswell ONT 2109 at paragraph 23).

Stromberg-Stein J. referred to *Solosky* v. *The Queen* [1980] 1 S.C.R. 821 at 839 for the proposition that the protection of confidential communications between a lawyer and client is a fundamental civil and legal right founded upon the unique relationship of solicitor and client. She quoted *Blank v. Canada (Minister of Justice)*[2006] SCC 39 per Fish J. at paragraph 26 concerning the importance of guarding solicitor-client privilege:

> "26 Much has been said in these cases, and others, regarding the origin and rationale of the solicitor-client privilege. The solicitor-client privilege has been firmly entrenched for centuries. It recognizes that the justice system depends for its vitality on full, free and frank

> communication between those who need legal advice and those who are best able to provide it. Society has entrusted to lawyers the task of advancing their clients' cases with the skill and expertise available only to those who are trained in the law. They alone can discharge these duties effectively, but only if those who depend on them for counsel may consult with them in confidence. The resulting confidential relationship between solicitor and client is a necessary and essential condition of the effective administration of justice."

Litigation privilege was raised in argument and reference was made to the comments of Mr. Justice Fish at paragraphs 26 to 28 of *Blank* v. *Canada supra*. However, Madam Justice Stromberg-Stein found it was unnecessary to examine litigation privilege in the circumstances of the case as she found that the communications between the employees of BCF and counsel for BCF were protected by solicitor-client privilege as the only means by which BCF could obtain information necessary with respect to potential litigation from civil claims and insurance claims. Counsel for BCF interviewed the witnesses for the dominant purpose of providing legal advice to BCF and at the time of communicating, the employees shared the same interest and were not adverse in interest to BCF. None of the work product of counsel for BCF was shared with counsel for the BCF employees. The Crown's application for third party records was dismissed and the subpoena to counsel was quashed.

***R. v. A.B.*, 2014 NLCA 8**

The Crown obtained two production orders directing two telecommunications companies to produce cellular phone records and residential landline telephone records during the course of a murder investigation. One of the production orders was issued under s. 487.012(1) of the *Criminal Code*. The respondent was a lawyer who was acting for a suspect in the murder investigations and who also apparently had a personal relationship with the suspect.

The Trial Division judge granted orders of *certiorari* quashing the production order on the basis that the Crown failed to ensure that the necessary steps were taken to protect solicitor-client privilege and failed to provide timely notice to the respondent before execution of the order.

The Newfoundland Court of Appeal dismissed the appeal and affirmed the Trial Division judge's decision quashing the order. The Court of Appeal cited *Lavallee v. Canada (Attorney General)* 2002 SCC 61 concerning the common law principles to be considered by a judge or justice when issuing search warrants applicable to law offices when a production order involving potentially privileged information is executed.

Harrington, J.A. stated at paragraph 55:

> "[55] The missteps that occurred here were contrary to the spirit and intent of the provisions of the *Criminal Code* and the *Lavallee* principles affirmed in the jurisprudence. The absence of a proper process in the execution of the orders with Law Society oversight provided sufficient grounds for the Trial Division judge to grant *certiorari* regarding the orders in this case."

It is interesting to note that while the statutory privilege under the *CTAISBA* belongs to the witness, there is no provision in the *Act* for the witness to be notified or provided standing at the stage where the production order is obtained or where the Court is determining whether the public interest in the proper administration of justice outweighs in importance the privilege attached to a statement. It is noted that production orders under s. 487 of the *CCC* are made on *ex parte* applications, and usually contain conditions preventing the record holder ordered to produce documents from informing suspects that the production order even exists. The materials supporting the application for the production order and all materials produced by the production order are usually ordered to be sealed in the court records.

V THE PRIVILEGE AND THE PROPER ADMINISTRATION OF JUSTICE

The following is a review of cases where a request was made for the production and discovery of witness statements, on-board recordings (data recorders), documents produced to investigators, and the TSB investigative file.

(i) Statements – s. 30 *CTAISBA*

***Braun v. Zenair*, [1993] O.J. 917,**

A passenger in an ultra-light aircraft was killed when it crashed. The family of the passenger brought a motion for production of statements

given by witnesses to a TSB investigator. It was held that the proper administration of justice did not require that an order for production of the statements be made. There was nothing in the statements that could not be ascertained by a routine investigation of the crash and the plaintiffs would not be unnecessarily inhibited in the preparation and presentation of their case by the suppression of the statements.

***Air Canada v. McDonnell Douglas Corporation et al.* (1995), O.J. No. 195**

Following the crash of one of its planes, the plaintiff brought three actions, one for compensation for payments to its crew, one for contribution or indemnity for payments made to passengers, and one for damages for the loss of the aircraft. The actions were heard together and there were common discoveries.

The Defendants brought a motion for an order that the plaintiff answer a large number of questions it refused to answer on the Examination for Discovery. Some of the questions objected to at the Examination for Discovery related to the Department of Transport investigation into the matter. Master Peppiatt stated at page 5:

> "It was the position of Air Canada that communications between the Department of Transport and persons involved in the investigation were privileged, not by reason of any legislation in force at the time, but under the common law as expressed by the Supreme Court of Canada in *Slavutych v. Baker*, [1976] 1 S.C.R. 254...In that case, which has been followed on many occasions, the court adopted at p. 260...the doctrine of qualified privilege contained in 8 Wigmore on Evidence 3rd ed. (McNaughton revision, 1961), para. 2285, to the effect that a communication would be privileged if it satisfied the four following tests:
>
> (1) The communications must originate in a confidence that they will not be disclosed.
>
> (2) This element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties.
>
> (3) The relation must be one which in the opinion of the community ought to be sedulously fostered.
>
> (4) The injury that would inure to the relation by the disclosure of the communications, must be greater than the benefit thereby gained for the correct disposal of litigation."

The Court found that even though the evidence placed before the Court supported the argument that there was a general belief that such communications were confidential, there was an absence in the pilot's affidavit of any specific reliance on the confidentiality of the communication, and the Wigmore test was not met.

In the absence of the establishment of any appreciable injury caused by disclosing the information, the Court ordered questions relating to the Department of Transport Investigation and communications in regard thereto were the proper subject of questioning on Examination for Discovery. This was affirmed on appeal before Potts J. of Ontario Court of Justice. *Air Canada v. McDonnell Douglas Corp.* (1995), O.J. No. 4881.

***Desrochers Estate v. Simpson Air* (1981) Ltd., [1995] N.W.T.J. No. 46**

Application was made under the *Canadian Aviation Safety Board Act* for production of certain witness statements, notwithstanding that privilege attached to them under that Act. The application arose out of a fatal aircraft crash. Mr. Justice Richard of the Northwest Territories Supreme Court stated at para. 4 of his reasons:

> "¶4 The Canadian Aviation Safety Board Act was repealed in 1990; however, its successor statute, Canadian Transportation Accident Investigation and Safety Board Act, S.C. 1989, ch. – 3 maintains an identical privilege attaching to witness statements. Counsel are agreed that the earlier statute is applicable to the witness statements made in 1988 and 1989 in connection with the investigation of the crash of the Simpson aircraft."

Richard J. further stated at paras. 13 and 14:

> "¶13 There is nothing in the statements that I have examined that could not have been obtained by the plaintiffs in the ordinary prosecution of litigation arising out of a fatal crash of an aircraft. There is nothing in the affidavit material to indicate otherwise.
>
> ¶14 In my respectful view, and keeping in mind the intention of Parliament, the statutory privilege would become meaningless if a litigant was routinely permitted to piggy-back on the investigative work of the Board. There must be some compelling reason to set aside the statutory privilege. In the context of the tests set forth by Parliament in s.39, the within litigation is "routine", and there is no compelling reason before me to set aside the statutory privilege."

***R. v C.W.W.*, [2002] NSFC 6,**

This case in the Nova Scotia Youth Court involved application by both Crown and Defence Counsel for the disclosure of statements taken by the TSB investigator concerning the derailment of the VIA Rail train the "Ocean". Charges were pending against a young person within the meaning of the *Young Offenders Act* alleging that that person did commit mischief by willfully damaging and removing without legal justification or excuse and without colour of right a lock on a switch, the property of a Canadian National Railway and did thereby endanger the life of persons on the VIA train contrary to the provisions of the *Criminal Code*.

Defence Counsel sought the statements indirectly through Crown disclosure. Crown Counsel indicated that the statements are not required for their criminal prosecution, but rather the Crown sought the statements in order to ensure that the accused was guaranteed his right to a full answer and defence in compliance with s. 7 of the *Canadian Charter of Rights and Freedoms*.

Defence Counsel submitted that the TSB statements, by their very nature, are relevant and discloseable (*R. v. Stinchcombe*, [1991] 68 C.C.C. (3d) 1.). Defence Counsel also submitted that the privilege in the C*TASIBA* is in conflict with the *Charter* as it prevents the accused from a full answer in defence.

The TSB resisted the application and made submissions to protect the privilege granted under s. 30(2) of the C*TASIBA*. It submitted that if the privilege in the Act is not upheld, it will have a chilling effect on candour in future safety investigations.

The statements were submitted to the court in a sealed envelope. The TSB pointed out that each deponent was asked if they would waive the privilege for this criminal prosecution, but each of the deponents declined to authorize the release of their statements.

At paragraph 7 of the reasons for judgment, Sparks J. stated:

> "¶7 In any event, the Act creates a privilege regarding these statements. Privilege is often claimed on the basis of a well known common law privilege, or on the basis of certain principles. In Sopinka, Lederman and Bryant, the Law of Evidence, (2nd Ed.), 1999 Butterworths, at p. 713, the following comments are helpful:

> ...The exclusionary rule of privilege, however, rests upon a different foundation. It is based upon social values, external to the trial process. Although such evidence is relevant, probative and trustworthy, and would thus advance the just resolution of disputes, it is excluded because of overriding social interests.
>
> In any discussion about privileges, one must keep in mind the constant conflict between two countervailing policies. On the one hand, there is the policy which promotes the administration of justice requiring that all relevant probative evidence relating to the issues be before the court so that it can properly decide the issues on the merits. On the other hand, there may be a social interest in preserving and encouraging particular relationships that exist in the community at large, the viability of which are based upon confidential communications...".
>
> In this case, however, the privilege is not predicated upon the common law, but rather upon the federal legislation."

In para. 18 of the reasons Sparks J. quoted Master Donkin in *Moore v. Reddy*, [1990] O.J. No. 308,

> "It seems to me that Parliament having decreed that there is a privilege subject to it being removed if there is a supervening public interest 'in the circumstances of the case', Parliament meant the privilege to remain unless some feature of the case required revelation of the statement. That is, in general in most cases the statements would remain privileged but in exceptional cases they might be disclosed. One can imagine several cases which might require the statements. Some instances would be (a) the death of the declarant; (b) the inability of the declarant on discovery to remember anything; (c) the fact that the declarant was not subject to being summoned into our courts to give evidence."

The Court held that only in the rarest of circumstances should the privilege of the TSB statements be abrogated and referred to a New Zealand case, *R. v. New Zealand Rail Limited*, [1995] T. No. 5/95, where a similar privilege in New Zealand was considered and it was indicated that greater weight would likely be given to abrogating the privilege in circumstances where it would assist an accused, other than the witness, in his defence.

Sparks J. found that this was not one of those rare circumstances, as the deponents had been interviewed by other sources available to Crown Counsel and could be called at the trial by Crown or Defence Counsel. Accordingly the statements were resealed and redelivered to the TSB.

***Wright v. the Ship "Sealnes"*, 2002 BCSC 473,**

An application was made by the plaintiff estate that the TSB produce 10 statements it had obtained during an investigation of a death on a vessel. The Court refused to abrogate the privilege. Harvey J. found that with one exception, the names and the functions of the persons who made these statements were in other material provided to the applicant. In addition, the materials were not statements in the conventional sense, but rather, were notes made by an investigator. This is not unusual in TSB investigations. Investigators usually have tape recorders and take notes. In major incidents a court reporter is sometimes engaged by agreement of TSB and counsel to ensure an accurate transcript of the interview.

***Webber v. Canadian Aviation Insurance Managers Ltd.*, 2002 BCSC 1414,**

This was an action by a plaintiff who owned and piloted a plane involved in a mid-air collision against the insurers of the plane. At issue in the proceeding was whether the aircraft was insured by the defendant at the time of the collision. Another person was also in the aircraft at the time of the collision and sitting in the seat most commonly occupied by the pilot. There was coverage only if the plaintiff was actually the pilot at the time of the collision.

The defendant insurer applied to obtain an order that (a) the notes of TSB investigators and a summary of the Regional Manager of TSB be produced; (b) that the plaintiffs produce a summary provided to them by the TSB; and (c) that two TSB investigators be required to attend in court to testify re the interviews.

The plaintiff had been interviewed the day after the mid-air collision and the defendant insurer wanted to see if the plaintiff's statement to TSB indicated who was the actual pilot at the time of the collision. Sinclair Prowse J. stated at paragraphs 14 and 15 of her reasons:

> "¶14 CAIM submits that Mr. Webber probably disclosed to the Board investigators who was piloting the aircraft and that he probably disclosed that it was Ms. Pawluski because he had not yet had time to consider the adverse repercussions of such a disclosure. (In this action, the Plaintiffs took the position that Mr. Webber was piloting the aircraft.)

> ¶15 There is no dispute that the Notes and Summary and the testimony of the Board investigators are relevant to the issue of who was piloting the aircraft. Rather, the dispute is whether those documents are producible and whether the testimony of the Board investigators is admissible."

The defendant insurer argued that no formal subpoena or written notification had been given to the plaintiff prior to the interview the day after the collision and that therefore the statement could not be considered a statement given under the Act and lacked statutory privilege. Sinclair Prowse J. found that this submission was not supported by the provisions of the *CTAISBA*, nor by the purpose of that protection. The fact that the statements were made in compliance with the statutory duty under the *CTAISBA* to do so gave rise to the statutory privilege protection, not the issuing of a subpoena or written notice to attend.

Sinclair Prowse J. stated at paragraphs 34, 35, 36, 37 and 38:

> "¶34 Similarly, in the present case the statutory privilege protection arose because of the fact that Mr. Webber was compelled by the Act to respond to the questions posed by the Board investigators. Whether he was given written notification of the interview beforehand was immaterial.
>
> ¶35 This conclusion is in keeping not only with the provisions of the Act but also with the probable purpose of the statutory privilege protection. That protection is necessary to enable the Board to achieve its objectives. As was mentioned earlier in these Reasons, those objectives include conducting independent investigations; identifying safety deficiencies as evidenced by transportation occurrences; making recommendations designed to eliminate or reduce any such safety deficiencies; and reporting publicly on its investigations and on the findings in relation thereto.
>
> ¶36 To achieve these ends, the Board must be provided with full and accurate information.
>
> ¶37 Although statutory compulsion will ensure that those interviewed respond to the questions of the Board investigators, it is the statutory privilege protection that ensures that the information given is accurate and complete.
>
> ¶38 That written notification be required before such protection arose would inevitably frustrate this purpose."

The court further found that the written consent by the plaintiff that his statement be provided to his counsel did not act as a waiver of the statutory privilege but was merely a written authorization to extend the privilege to his counsel. His counsel was prohibited from knowingly communicating the statement or permitting it to be communicated unless Mr. Webber authorized such further communication in writing.

The summary which had been provided by TSB to counsel for the plaintiff was also protected by solicitor/client privilege. The Court relied on s. 30(7) of the *CTAISBA* and found that the action was not a prosecution for perjury, not a prosecution for giving contradictory evidence, nor a prosecution under s. 35 of the *CTAISBA* and therefore refused to abrogate the privilege.

Sinclair Prowse J. concluded at para. 60

> "¶60 Given these circumstances, the evidence falls short of proving that a miscarriage of justice would probably result if the Notes and Summary documents were not produced. To the contrary, it shows that a miscarriage of justice would probably occur if they were produced as there would be no purpose to their production as they could not be used in this trial in any event."

***CNR v. Canada et al*, 2002 BCSC 1562,**

The defendant Queen in Right of the Province of British Columbia sought production of "privilege asserted documents" which TSB had by agreement already disclosed to the plaintiff CNR and one the defendants, CPR.

It is noteworthy that the TSB took the position that the privilege belonged not to the individual authors of the statements (the train crew members) but to the corporate entities who employed them. Henderson J. stated at para. 8 of his reasons:

> "¶8 The privilege is not absolute. It may be waived by the person who made the statement, provided the waiver is in writing. That is found in s. 30(2). In my view, that section answers the question "to whom does the privilege belong?" In those few decisions which have been reported on the construction of this section, the view has been taken that the privilege belongs to the author of the statement. I concur with that. It is not the Board's privilege."

As the privilege belongs to the author of the statement, the Board can not, by its own unilateral action, waive the privilege. Henderson J. stated at paras. 12 and 13 of his reasons:

> ¶12 As I have indicated, the purpose of s. 30 is to enhance the willingness of people to speak fully and freely to the Board. This is accomplished by preventing disclosure of statements to those who might have the ability to affect adversely the interests of the person giving the statement.
>
> ¶13 In particular, it seems to me the section is aimed at preventing disclosure of the statement to the employers of the people interviewed, where the employees could be subject to disciplinary action or termination because of their involvement in an accident. This section must also be aimed at preventing disclosure to police investigators who might be tempted to initiate criminal proceedings, and to civil litigants who might be minded to sue for damages. Finally, I would add the media. It is likely that this section is aimed at preventing disclosure of the statements in a public forum, given that such disclosure would probably have a chilling effect on the willingness of a witness to tell what he knows."

Henderson J. also stated at paras. 15 and 17:

> "¶15 The Board seems to have recognized that there was a need for a degree of disclosure, because it participated in a formal agreement, which has been reduced to writing, between the parties to this litigation. That agreement identifies two fundamentally different types of documents."
>
> "¶17 The other type of documents to which the agreement refers are described as "privilege asserted documents". The agreement says that counsel for the Board will assess which party is entitled to assert privilege over each of the privilege asserted documents. Apparently, it was the view of the Board that the privilege belonged, not to the individual authors of the statements, but to those corporate entities who employed them. As I have attempted to make clear in my discussion of the purpose of s. 30, according privilege to the CNR or the CPR would do little, if anything, to enhance the investigative effectiveness of the Board."

The Court went on to find that counsel to the Board did, in fact, produce to the CNR and to the CPR a quantity of documents over which privilege had not been waived. The Queen in Right of the Province of British Columbia, as one of the defendants, sought full disclosure of everything that had been

given to the CNR and the CPR, and of the statements in the possession of the Board over which privilege was still asserted.

Henderson J. further stated at paras. 22 - 25:

> "¶22 As will be clear from the brief narrative I have provided, what is arguably the most important aspect of this privilege has already been breached. The employers of the authors of the statements have read their statements.
>
> ¶23 It seems to me that has two effects.
>
> ¶24 First of all, it unbalances the playing field, in the sense that it gives the CNR and the CPR a tactical advantage in this litigation that has not been accorded to the other parties. I do not believe an order that requires the CNR and the CPR to return all of the documents to the Board would be an effective way of re-balancing the field. They will still have seen the contents of the documents, and could follow any chain of inquiry suggested by them.
>
> ¶25 The second effect is that it eliminates from my balancing of the statutory factors the most important aspect of the confidentiality requirement. Because the employers already have the documents, I need not give any consideration in this case to the important goal of maintaining confidentiality against those employers."

The Court found that the statements could be used for the purpose of refreshing the memory of a witness, to impeach the credibility of a witness in cross-examination, or to set a party upon a chain of inquiry which leads that party to other relevant evidence and causes it to take a fresh or more mature view of either the litigation or the prospects of settlement.

Henderson J. continued at paras. 37 and 38:

> "¶37 I have already found that failure to disclose these statements could have adverse consequences to a party and affect the fairness of the trial. That is enough for me to conclude that failure to disclose them might or could result in a miscarriage of justice. Madam Justice Sinclair Prowse's statement that it must be shown that the failure to disclose 'would' result in a miscarriage of justice, must, in my view, be read as an assertion that the failure to disclose 'might' or 'could' result in a miscarriage of justice. Otherwise, the test is impossibly high.
>
> ¶38 It is also my view that the statements contain relevant information that is 'not otherwise available'. 'Available' in this context, means available with reasonable effort and diligence."

Henderson J. abrogated the privilege and ordered disclosure, however, placed restrictions on the use of the documents.:

> ¶42 The parties to the litigation may not disclose the contents of any of these statements, or any part of their contents, to anyone other than officers or employees of their clients who are involved in this litigation; or to experts retained by the party for the purpose of this litigation; or to investigators retained by the party for the purpose of this litigation...
>
> ¶43 No party was at liberty to use any statement, or a portion thereof, in any other proceeding either in Canada or elsewhere.
>
> ¶44 Whenever a statement which was the subject of this ruling is marked as an exhibit at trial, any party is at liberty to ask the Court that the exhibit be placed in a sealed portion of the file and thus be unavailable to the public.

Chernetz v. *Eagle Copters Ltd.* 2003 ABQB 331

An application was made in civil litigation for the production of documents reflecting communications between certain defendants and TSB in regard to a helicopter crash in the Republic of Maldives. TSB was the investigating authority at the request of the Republic of Maldives due to the inability of the Maldives to undertake an appropriate investigation. The aircraft had been manufactured and certified in Canada, the pilot was Canadian and pursuant to the provisions of the *Convention on International Civil Aviation*, to which Canada and the Maldives were signatories, Canada had jurisdiction and agreed to conduct an investigation through the TSB, essentially as the flag state.

Mr. Justice McMahon of the Alberta Queen's Bench found that representations made by the parties to the TSB concerning the draft report were privileged pursuant to s. 24(4.1) and that statements, which were construed broadly to include information supplied by parties to the TSB at the request of TSB, were privileged pursuant to s. 30(2).

With respect to s. 24, McMahon J. stated at paragraph 48:

> "[48] The conclusion that s. 24 applies to the representations made in regard to the Blacklined Report is consistent with the purpose of the ***TSB Act*** - to advance public transportation safety. I agree with Edwards J.'s statements in ***Canada (Canadian Transportation Accident Investigation and Safety Board)*** v.

Canadian Press [2000] N.S.J.N.O. 139, at para. 55 and find them suitable to this case:

> The evidence is that the process of preparing a confidential draft report and inviting privileged representations on that report ensures accuracy and fairness to those persons who have a direct interest in the Board's findings. The restrictions in s. 24(3) ensure a level of candour that cannot be achieved if the draft report and any representations arising therefrom become the object of public scrutiny. Persons who are given a copy of the draft report are entitled, under s. 24(2) to a reasonable opportunity to respond. If the consultative process occurs publicly, persons with relevant information but limited or conflicting interest may be less willing to assist if they cannot expect confidentiality. The sources of information become easily identified if subject to media inquiry and may ultimately evaporate. ***In the end there is a substantial risk that the Board's ability to investigate transportation occurrences will suffer*** (emphasis added).

With respect to the broad definition of statements and information requested by the TSB pursuant to s. 19(9), McMahon J. had the following comments at paragraphs 74 and 75:

> "[74] I acknowledge that s. 19(9) appears to distinguish "statements" from the production of information. The opening phrase of s. 19(9) defines the breadth of the TSB investigator's power to compel as encompassing "information relevant" to the investigation. As noted, information regarding transportation occurrences can come in many forms, and from many persons. Under subsection (a), an investigator can simply ask that the information (which is defined as including records) be produced, or ask for it in the form of a statement under s. 30.
>
> [75] Although the drafting of s. 19(9) may suggest that there is a distinction between the production of information and a s. 30 statement, such that only information in the form of a "statement" attracts privilege, I do not take this narrow approach. Compliance with such requirements is not optional, pursuant to s.19(10). It would be unreasonable and unfair to only protect information in the form of statements. It would fly in the face of the aim and purpose of the TSB and the ***TSB Act*** to make a distinction in this regard. Further, it would be a triumph of form over substance."

In summary, McMahon J. found that all information provided by the parties to TSB was protected either under the representation privilege of s. 24 or the statement privilege under s. 30, with the exception that the privilege cannot extend to protect communications with Transport Canada or the NTSB, nor to notes or reports that do not on their face or for which there is no evidence to suggest that they were made for the purposes of making representations or statements to the TSB.

(ii) Data Recorders – s. 28 *CTAISBA*

***Air Inuit (1985) Ltd. v. Canada*, [1995] A.Q. No. 1873,**

On application by the Defendant, Mr. Justice Lesyk of the Quebec Superior Court ordered that a flight data recorder from the plane that crashed be made available to the defendant for the sole purpose of preparing the defence. It was noted that Air Inuit and the TSB had already listened to the magnetic tape and knew the contents. The Court found that the defendant would suffer a considerable prejudice by not having access to the flight data recorder in the circumstances and that the proper administration of justice required its disclosure.

***Propair Inc. v. Goodrich Corp.* [2003] J.Q. No. 243**

Following the crash of a plane at Mirabel in 1998 in which 11 people died, application was made in 6 civil actions for an order that TSB provide the attorneys for all parties with complete copies of the CVR recordings taken from the aircraft and any transcripts made therefrom. Mr. Justice Viau considered s. 28 of the *CTAISBA* and found that the CVR contained important, reliable and accurate evidence that the parties could not get from any other source. The Court found that the proper administration of justice outweighed the privilege and ordered the production of full copies of the CVR and transcripts made therefrom on condition that they remain confidential and not to be disclosed by the parties to anyone other than their attorneys and litigation consultants, and that they not be filed in the court record.

***Wappen–Reederri GmbH & Co. KG v. The "Hyde Park"*, 2006 FC 150**

Following the collision of the "*Cast Prosperity*" and the "*Hyde Park*" in the St. Lawrence River, the TSB seized the original and all existing copies of what it considered the "on-board recordings", being essentially the voyage

data recorder ("VDR"). The VDR on the "*Cast Prosperity*" included voice communications via microphones on the bridge of the ship ("bridge recordings"). It also recorded radio communications with other vessels and shore stations and with vessel traffic services (VTS) on a separate band (VHF recordings).

The owners of the "*Cast Prosperity*" made an application for the return to them of the VHF recordings because they did not fall under s. 28 of the *CTAISBA*. The owners of the "*Hyde Park*" supported the application of the owners of the "*Cast Prosperity*". The TSB took the position that s. 28 of *CTAISBA* applies to all of the recordings seized and that the public interest in the proper administration of justice did not outweigh in importance the privilege attached to the on-board recordings.

Madam Justice Gauthier of the Federal Court Trial Division (as she then was) listened to the recordings *in camera* and considered whether the bridge recordings should be disclosed to the parties pursuant to s. 28(6).

Madam Justice Gauthier held that the bridge recordings of the officers' voice communications on the bridge of the ship should not be released to the parties, but that copies of the VHF recordings which recorded VHF radio communications with other ships in the possession of TSB were to be returned to the owners of the "*Cast Prosperity*", with the TSB being entitled to retain the original as long as required for its investigation purposes. Madam Justice Gauthier stated as follows:

> "[74] As it is the case in respect of other statutory privileges which are subject to a similar balancing exercise, the Court must give 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-matter 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.
>
> [75] The assertion made by the parties that the information contained in the bridge recordings may be crucial and may not be available from another source that is as reliable are simply not supported by the evidence before the Court. There is also no indication of a possible miscarriage of justice.

> [76] Because of the poor quality of the bridge recordings and of the fact that many of the conversations on the bridge were carried out in German, the Court requested the TSB to provide it with a transcript and a translation. This has now been received and the Court is satisfied that the bridge recordings and the transcript are of little evidentiary value in this case.
>
> [77] In view of the foregoing, I have concluded that the bridge recordings and the transcript thereof should not be disclosed to the parties."

***British Columbia Ferry Services Inc. v. Canadian Transportation Accident Investigation Safety Board*, 2007 BCSC 1434, affirmed 2008 BCCA 40**

Following the sinking of the *Queen of the North*, the TSB recovered the hard drive for the electronic charting system (ECS) and used the data obtained therefrom in its analysis of the incident. TSB then retained a third party expert to interpret the data and provided the interpretation to BCF pursuant to an agreement which stated that:

> "The ECS data will be kept in confidence by BC Ferries and is to be used only for the purposes of responding to the draft report [of the respondent] subject to the parties' agreement to permitted uses prior to the release of the TSB's final report or order of the court."

BCF applied to court to be relieved of the terms on which the ECS data had been provided to it. TSB refused to consent to the release of the information which BC Ferries wished to include in its internal investigation report as TSB had not yet finalized its report.

Mr. Justice Hinkson dismissed the BCF application and determined that TSB was entitled to retain any information or documents in its possession until it completed its investigation. BC Ferries did not make an application pursuant to s. 20 of *CTAISBA* for return of seized property.

TSB raised a jurisdictional argument and stated that the Federal Court of Canada is the only Court that has jurisdiction to make orders with respect to TSB's private law duties and that the BC Supreme Court lacked jurisdiction to make the requested order. Mr. Justice Hinkson stated at paragraph 33:

> "[33] I need not resolve the question of this court's jurisdiction to make the order sought by the petitioner, as I am satisfied that

> even if this court has the necessary jurisdiction to make the order sought, that the order should not be made."

It should be noted that the parties agreed that the BC Supreme Court had jurisdiction to make an order for the return of the seized hard drive and any data obtained therefrom pursuant to s. 20 of the *CTAISBA*.

The BC Court of Appeal per Lowry J.A. confirmed the decision of the lower court, dismissing the application of BCF to be relieved of an obligation of confidentiality assumed under an agreement it made with the TSB. The agreement was made to resolve the impasse over the return of the hard drive, and more particularly the data it contained, to permit BCF to comment on the TSB's draft report in a meaningful way. BCF had argued it was not open to TSB to withhold its consent to release of the data except on grounds that are objectively reasonable. Lowry J. stated at paragraph 12:

> "[12] I question the applicability of the principle for which the case is cited, but even if it could be said a standard of reasonableness with respect to agreeing to the disclosure of the data was imposed on the Board, I am unable to accept that a sound basis has been established upon which the judge would necessarily have had to conclude the Board has acted unreasonably in insisting the obligation of confidence B.C. Ferries chose to assume when it obtained the data be fulfilled. In my view, it was open to the judge to conclude that the fact the data was given in confidence was of itself sufficient reason for the Board's refusal: the terms of the agreement do not oblige the Board to justify B.C. Ferries' obligation which, as I have said, was the whole basis upon which the vessel's owner was given the data."

In concurring, Hall, J.A., stated at paragraph 15:

> "[15] In this area, where there exist strong public policy reasons for affording confidentiality to activities of the respondent in order to facilitate effective investigation of transport accidents, I consider an applicant in the position of this appellant bears a heavy onus in seeking to persuade a court to relieve it of an agreement of the type here under consideration. While the judge might have more expansively set forth his reasons for declining to exercise his discretion, I am in no doubt that he reached the correct result in refusing to relieve the appellant from its agreed obligation of time limited confidentiality.

***HMTQ v. Canadian National Railway Company*, 2008 BCSC 1677**

A collision occurred between two of the respondent's trains in the respondent's rail yard in Prince George, British Columbia. The collision involved a "dangerous goods" container car and explosions and flames ensued. Locomotives and other rail cars were destroyed and significant environmental damage was done including contamination by hydrocarbons. CNR claimed litigation privilege over certain documentation, including e-mails, diagrams and photographs, prepared in contemplation of litigation.

CNR also claimed a statutory privilege pursuant to s. 28 of *CTAISBA* with respect to the CD which recorded by a video camera the activities in the rail yard prior to and at the time of the incident.

The BCSC per Wilson J. found that the dominant purpose for creating the documents over which litigation privilege was claimed was to promptly marshal the available evidence to defend anticipated litigation initiated by one or more regulatory agency, and upheld the litigation privilege.

With respect to the video recording of the activity in the rail yard, the Court found that s. 28 did not apply as the video camera was mounted on a pole in the rail yard and not in the cab of the locomotive. As such, there was no statutory privilege attached and the CD was ordered released to Transport Canada.

***Société Air France v. GTAA*, [2009] O.J. No. 5337 (S.C.J.), affirmed *Société Air France v. NAV Canada*, 2010 ONCA 598**

A motion was brought in civil proceedings in the Ontario Superior Court of Justice before Mr. Justice Strathy (as he then was) for an order that the cockpit voice recorder ("CVR") be produced to a party to the litigation resulting from the crash of an aircraft.

Mr. Justice Strathy reviewed the *CTAISBA* statutory privileges from their genesis with the *Dubin Commission* report in 1981 and provided a thorough review of Canadian jurisprudence with respect to the *CTAISBA* privileges. Strathy J. considered the factors referred to by Madam Justice Gauthier in *The Hyde Park* and found certain additional factors from which he concluded that, in the circumstances of this case, the public interest in the administration of justice outweighed the importance attached to the

statutory privilege. The additional important factors in this case included, *inter alia*:

- One of the pilots consented to the release of the CVR, with the other pilot and Air France taking no position;
- The CVR had already been used to refresh the pilot's recollections of events, which were sketchy;
- No personal communications or communications of a sensational or disturbing nature were contained on the CVR;
- There were no pending disciplinary or criminal proceedings against the pilots;

Strathy J. stated at paragraphs 139 and 140 as follows:

> "[139] For these reasons, the TSB shall be required to produce a copy of the CVR and transcript to counsel for NAV for use in this litigation. Subject to any further order of the trial judge, these records shall remain confidential and shall be used for the purposes of these proceedings only. They shall not be disclosed by the parties to anyone other than their experts, consultants, insurers and lawyers without further order of the court. The provisions of s. 28(7) of the *TSB Act* will, of course, apply...
>
> [140] Counsel for NAV has also requested production of an animation, which was prepared by the TSB from the FDR data. The TSB report indicates that the animation was used in the TSB's interviews of the flight crew and that it "stimulated the crew to recall specific events." Although I would not normally order production of the TSB's work product, particularly as it is said to be publicly available on the web site, it is clear that the pilots' memories of the events have been assisted by the animation. Fairness requires that it be produced to the parties in the litigation who may wish to contest its accuracy or to use it to probe, stimulate or challenge the pilots' recollection on discovery or at trial."

In ***Société Air France v. NAV Canada*, 2010 ONCA 598,** Goudge J.A. affirmed the thoughtful and comprehensive set of reasons of Mr. Justice Strathy in finding the test for the production of an on-board recording set forth in s. 28(6) of the *CTAISBA* to have been satisfied and confirmed the ordered production of the CVR on the terms set forth by the motion judge.

The Appeal Court found, however, that the flight animation created by TSB from the flight data recorder information should not be produced as there had been an agreement between counsel prior to the hearing that that issue would not be properly before the motions judge.

(iii) Evidence of Investigators – *Special Cause – s. 32* of *CTAISBA*

***R. v. Tayfel*, Manitoba Queen's Bench, per MacInnes, J, unreported, at CR 06-01-26621, March 28, 2007**

The Provincial Crown applied for an order under s. 32 of the *CTAISBA* that the TSB investigators and the TSB report be found both competent and compellable in a criminal trial. The accused was facing one charge of criminal negligence causing death, four charges of criminal negligence causing bodily injury and one charge of dangerous operation of an aircraft.

The Court held in oral reasons rendered by MacInnes J. that TSB investigators and their documents cannot be compelled nor are they competent to testify in a Court where the purpose and ultimate outcome will be to determine civil or criminal liability, unless there has been shown to be *special cause*. The Court found no *special cause* in this circumstance, and that the Winnipeg Police Service were entitled to conduct their own investigation, could have obtained all evidence necessary to prosecute the criminal proceeding, and that it was not appropriate that the police service piggyback itself on the Board's investigation.

***White Estate v. E&B Helicopters Ltd.*, 2008 BCSC 12**

In civil litigation resulting from a fatal helicopter accident, the Plaintiffs applied for an order that a TSB investigator be declared a competent and compellable witness at the trial pursuant to s. 32 of *CTAISBA*. The basis for the claim was that evidence material to the determination of the cause of the crash could only be obtained from the investigator. Parts of the helicopter, including electrical components in respect of which the investigator made his observations and performed tests, were dismantled in the course of the investigation. The components could not be restored to their condition at the time the TSB recovered the helicopter.

Mr. Justice Pitfield found that the circumstances of the case amounted to "*special cause*" within the meaning of s. 32. The Court (at para 20) set out certain questions to be asked to determine whether there was an exceptional

or extraordinary reason to declare an investigator competent and compellable. The Court found that there was no exhaustive list and that many factors may be relevant depending on the circumstances of a particular case. The Court held that the restrictions set forth in s. 32 should not be lightly set aside.

While the Court found that the investigator was competent and compellable in respect of observations made, photographs taken, tests performed and results obtained in relation to the helicopter involved in the accident, the conclusions and opinions of the investigator resulting from his observations and tests are not admissible in evidence by virtue of s. 33 of *CTAISBA*. Any opinions in that regard would require proof by expert witnesses who are not TSB investigators.

(iv) Production Orders - *Section 487.012 Canadian Criminal Code*

***HMTQ* v. *Canadian National Railway Company NR* 2008 BCSC 1677 at paragraphs 20 to 25**

A railway safety inspector appointed by the Minister of Transport under s. 27(1) of the *Railway Safety Act* and a Health and Safety Officer appointed by the Minister of Labour under s. 140(1) of the *Canada Labour Code*, Part II, completed an information to obtain a search warrant pursuant to s. 487 of the *Criminal Code of Canada* to obtain a warrant to search CN offices and ancillary buildings to obtain evidence with respect to violations under the *Railway Safety Act* and the *Canada Labour Code*, Part II. A warrant was issued and counsel for CNR, who was present when the warrant was executed, identified the material over which the Respondent was asserting a claim of solicitor-client privilege. The Court held that at the time that certain documents were prepared, litigation was contemplated and the dominant purpose for creating the documents was to promptly marshal the available evidence to defend anticipated litigation initiated by one or more regulatory agency. In the circumstances, the Court found that litigation privilege was established over those documents and they were protected from production.

In the Matter of an Affidavit to Obtain a Production Order and In the Matter of an Affidavit for an Order to Seal the Material, Provincial Court of British Columbia, Surrey registry, Police File Number 06-1172

Following the sinking of the "*Queen of the North*", the RCMP and TCMS conducted a joint investigation into the incident. The RCMP applied pursuant to s. 487.012 for a production order for data and/or documents in the Transportation Safety Board investigative file into the sinking of the "*Queen of the North*", save and except any interviews or statements or documents which may be deemed privileged. The Order was granted subject to certain terms and conditions: that nothing in the Order was to be construed as to require production of any data and/or documents which are subject to solicitor-client privilege and the Order was not to be construed as to require the production of any statement, report or document for which the TSB asserted privilege, or where the TSB offered privilege to acquire the statement, report or document.

The Court further ordered that the material in support of and resulting from the production order would be sealed pursuant to s. 487.3 of the *Criminal Code*.

During the investigation, the RCMP approached witnesses who had provided statements to the TSB and obtained from some TSB witnesses a consent for the release to the RCMP of any and all statements or documents provided by the witness to TSB for the purposes of their investigation into the sinking of the "*Queen of the North*". Statements to which witnesses had consented to the release were used by the Crown in the prosecution in the criminal trial. The last questions asked of a key Crown witness in the criminal trial concerned whether the witness had provided a statement concerning the events on the night of the sinking to the TSB, and upon the witness confirming the same, whether the witness had refused to consent to the release of a copy of that statement to the Crown and the police, to which the witness replied in the affirmative. The impression left with the jury by those final questions was an implication that the witness was trying to hide something.

The question that arises is whether the privileged statements obtained by TSB for the purposes of their investigation should or should not be made available provided a witness consents to their release for use as evidence in a civil or criminal proceeding.

The reason for the privilege is to provide a comfort level to witnesses so that they can be frank and open with TSB investigators. The privilege is given as protection for the witness such that the statement can never be used against the witness in any proceeding (s. 30(7) which provides that 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 s. 35.)

The prosecutions following sinking of the "*Queen of the North*" appeared to be the first instance in which the RCMP have endeavoured to obtain consents to release witness statements to the TSB and to utilize the same in criminal proceedings.

VI REFLECTIONS

(i) Public Policy Reasons for the Privilege and Confidentiality

The importance of the privilege granted to witness statements by s. 30(2) is that it provides a comfort level to the witness so he/she can be confident, open, and frank in giving evidence to the investigator concerning a marine casualty, expecting the statement given will remain confidential.

Any abrogation of the privilege and confidentiality attached to witness statements, for whatever reason, will have a chilling effect on the frankness with which witnesses participate in future investigations. The effectiveness of investigations into marine casualties to determine the causes and contributing factors with a view to safety and preventing future occurrences will be directly proportional to the vigor with which the privilege and confidentiality thereof are protected.

The rights of an individual not to have those statements used against him/her in other proceedings are protected by s. 30(7) of *CTAISBA*, s. 13 of the *Charter* and by the *Canada Evidence Act* (s. 5) and provincial *Evidence Acts* (i.e. B.C. *Evidence Act*, s. 4).

The real concern is that the production and discovery of statements could reveal comments and information the witness had intended to remain confidential and with the Board. The disclosure could have profound effects upon the continued or future employability of a witness, for once the genie is out of the bottle, you can not put it back. Restrictions or conditions will be of limited use.

The Courts have generally been diligent in protecting the privilege. The circumstances leading to the abrogation of the privilege should be rare and exceptional. Possible circumstances include the death of the declarant, the absence of a declarant from the jurisdiction of the Court, or a circumstance where a person other than the witness faces a severe penalty or significant liability in other proceedings and the witness, who could provide exculpatory evidence for that other person, is dead or otherwise unavailable. Even in such circumstances, restrictions or conditions should be placed on the disclosure of the statement that will protect the disclosure of anything not germane or relevant to the specific issue for which the production and discovery was ordered.

Put another way, the abrogation of the privilege should be used to prevent a miscarriage of justice. It should not be used as an additional tool in the panoply already available to counsel in civil, criminal and disciplinary proceedings.

(ii) Waiver of the Privilege and use of Statements in Other Proceedings

The privilege belongs to the witness. It is submitted that Courts should consider the importance of the privilege to the witness, the safety interests of marine casualty investigations, and abrogate the privilege only in exceptional circumstances when the proper administration of justice cannot be accomplished without abrogating the privilege.

It is further submitted that the public interest in the proper administration of justice should not, except in special circumstances, permit a litigant to piggy-back on the investigative work of the TSB.

The 1995 Review Commission on the *CTAISBA* stated at page 156:

> "The purpose of the investigation and inquiry system is to enhance safety. It is not to subsidize the collection of information by litigants at public expense. Nor should the cost of enforcement efforts of police and transport regulators be subsidized from the TSB budget"

The object and purpose of the TSB is to further the public interest in safety in marine transportation. It is left to the Courts to establish the delicate balance between the public interest in the administration of justice and the public and private interest in protecting rights of individuals as set forth in the *CTAISBA*, the *Charter*, and the *Evidence Acts*. If TSB reports and files

are to be used as the basis for or in civil and criminal proceedings, there will be a reluctance on the part of mariners involved in marine occurrences to co-operate with TSB investigators, let alone to be frank with them.

The obtaining by the RCMP of consents to release witness statements given to the TSB and the use of those statements in criminal proceedings is a cause for concern. The use by the Crown of the refusal to waive the statutory privilege to call into question the credibility of a key witness in a jury trial is also disconcerting. Was it the intent of the *CTAISBA* that the TSB investigations should be the farm system for civil and criminal proceedings?

It is interesting to note that in the UK, the *Merchant Shipping Act (Accident Reporting and Investigation), Regulations 2005* provide as follows:

> "The sole objective of a safety investigation into an accident under these Regulations shall be the prevention of future accidents through the ascertainment of its causes and circumstances. It shall not be the purpose of such an investigation to determine liability nor, except so far as is necessary to achieve its objective, to apportion blame."

The above is essentially a succinct statement of the objective and purpose of the TSB. The MAIB, however, does not release its report until the possibility of all other claims has been resolved. This protection is missing from the *CTAISBA* and in Canada a discretion is left with the Courts to balance the interest of the public in safety, individuals in their protected rights, and the proper administration of justice. In the US, immunity from prosecution is usually obtained before a witness makes any statement to the NTSB.

(iii) Concerns

How can TSB investigations be conducted without unduly influencing the civil and criminal judicial process, and without infringing on the rights of individuals and organizations involved in marine occurrences?

Perhaps legislative change to the *CTAISBA* is needed to make the TSB file absolutely privileged, or so nearly absolute as possible, (i.e. unavailable to other investigating bodies except in special circumstances), and to make the witness privilege absolute, or so nearly absolute as possible, by preventing its dissemination or use except for the purpose of defending the witness who made the statement or as permitted by court order.

Perhaps the information obtained by the TSB and its public report could be delayed until all civil and criminal proceedings have been completed, similar to the procedure of the MAIB in the U.K. Safety recommendations or directives could be made in the interim pending conclusion of civil and criminal proceedings.

The object of TSB investigations and reports is to incrementally identify safety deficiencies and make recommendations so that identified causal factors of marine incidents are eliminated or limited.

This is done primarily by looking at the systems the marine industry has put in place, whether by public policy, government regulations, company policies, training programs, or otherwise.

There will always be human error. It is important for TSB to comment on human frailties as contributing factors to marine incidents. But this should be done in a manner which does not expose individuals. The Canadian legal system has established civil courts to determine fault and provide remedies for civil liability, and criminal courts to adjudicate issues of moral culpability and impose appropriate penalties or sanctions, including incarceration.

Similarly when dealing with organizations, deficiencies in policies, standards or practices need to be noted in a manner that does not expose organizations or their members to civil or criminal liability.

The comments of Tim Hall, the Chairman of the US National Transportation Safety Board in September 1996 in a speech delivered in Vancouver are worth noting:

> "Individual human errors do not occur in a vacuum. They take place within a cultural, social and organizational context. That is, there are underlying causes and conditions that shape, facilitate or even nurture the behavior and actions of an accident-causing individual. These causes and conditions arise from government, industry, or individual company policies, procedures and programs that either do not exist or do not properly address the issues at hand.
>
> ... It is clear that accidents have broad implications. They can have a catastrophic impact on lives and the environment, and affect public policy, regulators, ship users and ship owners. We must work diligently to prevent them. We must educate ourselves about human capabilities and frailties, design our ships and their systems to accommodate those human abilities, effectively equip and train personnel to operate ships, and progressively refine the process until we get it right."

The Courts will continue to have an important role to play in determining the delicate balance required between the public interest in the safety of marine transportation and the administration of justice, and the public and individual interest in the protection of individual rights.