COURT FILE NO.: 07-CV-337564
05-CV-294746
07-CV-337545
07-CV-336943
DATE: 20091209

ONTARIO SUPERIOR COURT OF JUSTICE

RE: **Société Air France et al.,** Plaintiffs

Greater Toronto Airports Authority et al., Defendants

BEFORE: G.R. Strathy J.

COUNSEL: *Robert Fenn, Richard Rohmer Q.C. & Patrick Floyd*, for the Moving Party, NAV Canada

Peter Pliszka & Richard Butler, for Respondent, Transportation Safety Board

T. Tremblay, for Société Air France

Doug Wray & Gail Misra, for Airline Pilots Association and Air Canada Pilots Association, Proposed Intervenors

Ann Christian-Brown, for Plaintiff Strugarova et al.

DATE HEARD: October 1 & 2, 2009

REASONS FOR DECISION

[1] This motion is about whether the cockpit voice recorder ("CVR") – part of an aircraft's "black box" – should be produced to a party to litigation resulting from the crash of that aircraft.

[2] On August 2, 2005, flight AFR 358, an Air France Airbus A340 with 297 passengers and 12 crew members aboard, overshot the runway while landing at Toronto's Pearson International Airport in a severe thunderstorm. The plane was travelling at a speed of about 80 knots when it ran out of runway, pitched into a ravine and burst into flames. Fortunately, all passengers and crew escaped with their lives, although several people, including the captain, suffered serious injuries. The aircraft was a total loss. A class action has been launched on behalf of the passengers on the aircraft and a multi-million dollar lawsuit has been brought by Air France and its insurers against the Greater Toronto Airports Authority ("GTAA"), NAV Canada ("NAV")

(the entity responsible for air traffic control), and the Attorney General of Canada, (representing Environment Canada and the Ministry of Transportation).

[3] NAV moves for production of the CVR under s. 28 of the *Canadian Transportation Accident Investigation and Safety Board Act*, S.C. 1989, c. 3 (the "*TSB Act").* NAV claims that the CVR contains vital information and that the parties and the court should have the benefit of this information to ensure fair trials. The request for production is opposed by the Transportation Safety Board (the "TSB") as well as two pilots' unions, who have requested *amicus curiae* status for the purposes of this motion. They say that the contents of the CVR should be suppressed in the interests of aviation safety and the personal privacy of the pilots.

[4] Section 28 of the *TSB Act*, which I shall discuss in more detail shortly, provides that a CVR recording is privileged, is to be used by the TSB for the purposes of its investigation, and is not to be released for use in litigation unless a court, having examined the recording *in camera*, and having heard submissions of the TSB, has concluded that "the public interest in the proper administration of justice outweighs in importance the privilege attached to the on-board recording …".

[5] To put this issue in context, I will provide some additional information concerning the events surrounding the crash and the litigation that has resulted. I will then explain the evolution of the statutory privilege for the CVR and the reasons for it. I will then set out the evidence adduced by the parties and their arguments about why the CVR should or should not be produced in this particular case. In assessing their arguments, I will examine the Canadian cases that have considered the statutory privileges under the *TSB Act*. Following this, I will set out my conclusions on the factors that should be considered by the court in the application of the statutory test and how those factors are engaged in this particular case. For the reasons that follow, I have concluded that the CVR should be produced. Its production will be restricted to the parties to these proceedings and it will not be made publicly available.

I. Background – the crash – the TSB investigation – the litigation

The accident and TSB investigation

[6] Prior to departure from Paris, the pilots of AFR 358 had been aware of the potential for thunderstorms in Toronto and had taken on extra fuel in case additional holding time was required or in case they had to divert to another airport if conditions at Toronto prevented a landing. As they approached Toronto, they obtained updated information on the deteriorating weather and discussed alternative airports. Ultimately, they decided to proceed with the landing.

[7] As they began their descent, Air France's "sterile cockpit" rule came into effect. Personal conversation was prohibited and only operational communications between the pilots were permitted. During the descent until the final seconds of the flight, there were a number of communications between the pilots and air traffic control and also between the captain and the first officer. The first officer was the "pilot flying" the aircraft for the descent and landing.

[8] The approach and landing took place in fearful conditions of dark clouds, turbulence, lightning and heavy rain. Approaching the runway, the aircraft entered an intense downpour that severely limited the pilots' visibility. At times, only part of the runway was visible and it was covered with water, producing a shiny glass-like surface. The wind, initially a crosswind, shifted to a tailwind shortly before landing, increasing the aircraft's speed. This, coupled with increased engine thrust applied by the first officer, had the effect of increasing the aircraft's speed and lifting it above its intended trajectory to the runway. As the aircraft crossed the "threshold" of the runway, the rain intensified and there were numerous lightning strikes. The first officer wrestled with the controls to keep the massive Airbus on course. It ultimately touched down almost half way down the 9,000 foot runway. In spite of the application of full reverse thrust to the engines, it was unable to stop and hurtled past the end of the runway and into the ravine.

[9] For two hours before to the crash, the CVR was like an electronic fly on the cockpit wall. It heard and recorded every sound and every word that was spoken by the two pilots during this critical period. As well, the aircraft's Flight Data Recorder ("FDR") recorded a myriad of data about the flight from a variety of sources, including airspeed, groundspeed, heading, track, angle of attack, activation of equipment such as landing gear, flaps and brakes and other key information.

[10] While the aircraft's gutted hull was still smouldering, investigators from the TSB arrived on the scene and secured the "black box", which included the CVR and the FDR. In spite of significant heat exposure, it was ultimately possible to retrieve the voice and data records. With the information downloaded from the FDR, the TSB was able to prepare an animation illustrating the approach, landing, and crash. By overlaying the CVR on the animation, the entire sequence of the accident, complete with the pilots' cockpit conversations and communications with air traffic control, could be recreated. The TSB investigators conducted lengthy interviews of the two pilots and were able to use the CVR to assist the pilots in reconstructing the final two hours of the flight. The TSB used these interviews, the CVR and the FDR to reconstruct the events leading up to the accident and analyzed these events in an exhaustive report.

[11] The TSB released its report on December 12, 2007. It is available on the TSB's website. It runs 142 pages and is highly detailed. Section 7(2) of the *TSB Act* provides that it is not the function of the TSB to assign fault or to determine civil or criminal liability, but the TSB "shall not refrain from fully reporting on the causes and contributing factors [of an accident] merely because fault or liability might be inferred from the Board's findings." A fair reading of the TSB's report suggests that certain acts or omissions of the pilots during the last two hours of AFR 358, particularly during the last 30 minutes of the flight, may have contributed to the accident.

[12] The CVR performed an important role in the investigation of the accident and in the TSB's interviews of the captain and first officer. Under the heading "Useful or Effective Investigation Techniques", the TSB report states:

Use of Flight Data Recorder and Cockpit Voice Recorder Animation as an Interview Tool

During the investigation, the flight crew members were interviewed by TSB investigators on several occasions. The final interview was conducted approximately six weeks after the accident, which has the potential for some loss in the ability to remember specific events.

The FDR animation was successfully used to structure the final interview, which was conducted in three stages. In the first stage, the flight crew members, who in this instance were interviewed together, were provided an opportunity to ask questions and to discuss any thoughts they had had about the accident since their last discussion with TSB investigators. In the second stage, the FDR animation with no CVR overlay was played for the crew. During the playback, they were encouraged to talk through what was happening during the various stages of the approach. The animation was stopped and backed up as required to facilitate the discussion. In the third stage, the FDR animation was played for the flight crew with the CVR overlay added, and the above process was repeated.

This interview framework was noteworthy in that the use of the animation stimulated the crew to recall specific events. The use of the animation also provided a common frame of reference for aircraft position and location. For example, in discussing the weather during the approach, the crew members were able to position the aircraft where the weather began to deteriorate and point out what areas of the airport they could see.

The use of this technique provided a corollary benefit for the crew. Having been through the trauma of an accident, both crew members had spent significant time and energy considering what had happened and questioning what had gone wrong. The use of the animation provided them an opportunity to review the accident sequence and answer many of these questions for themselves. Both crew members appreciated this opportunity.

Litigation arising out of the accident

[13] At least four lawsuits have been commenced as a result of the accident.

[14] In *Société Air France et al. v. GTAA et al.* (Court File No. 07-337564 PD3) Air France and its insurers claim damages of over $200 million against NAV, various NAV employees, the GTAA and the Attorney General of Canada, claiming damages for the loss of the Airbus and indemnity for all claims paid by Air France as a result of the accident.

[15] In *Hussein Abdulrahim et al. v. Air France et al.* (Court File No. 05-CV-294746 CP), a class action, the passengers on AFR 358 claim damages against Air France, NAV, the pilot and first officer, and others, for damages sustained by the passengers and their families as a result of the accident. Air France has cross-claimed against NAV.

[16] In *Greater Toronto Airport Authority v. Air France et al.* (Court File No. 07-CV-337545 PD2) the GTAA claims against Air France, NAV, the captain and the first officer for damages relating to the environmental clean up of the aircraft wreckage and the related fuel and fire extinguisher chemicals. Air France cross-claims against NAV in this action.

[17] In *Strugarova et al. v. Air France et al.* (Court File No. 07-CV-336943 PD2) Mariana Strugarova, an opt-out passenger in the class action, claims against Air France, NAV, the GTAA, the captain and first officer and others, for damages caused to her and her family as a result of the accident.

[18] The parties in these actions make serious allegations against the pilot and first officer. For example, NAV's pleading alleges that the pilots were negligent in the manner in which the aircraft approached the runway and landed and that they:

> (a) failed to perform necessary landing distance calculations;
>
> (b) failed to make the necessary communications;
>
> (c) failed to conduct mandatory "challenge and response" protocols and checklists during the approach and landing;
>
> (d) failed to execute appropriate navigational maneouvres, including a "missed approach" when they should have aborted the approach to Toronto due to the weather and diverted to Ottawa; and
>
> (e) failed to carry out proper standard operating procedures and engaged in unsafe operations.

[19] It is obvious that the actions of the captain and the first officer during the entire flight, but particularly in the last two hours of the flight and most likely in the last 15 to 30 minutes of the flight, will be put under the microscope at trial. There is every reason to believe that days of trial time, and expert testimony, will be consumed by a minute-by-minute slow motion and microscopic examination of their actions.

[20] On December 7, 2006, Winkler J., as he then was, made a confidentiality order in the class action providing that documentary productions of the defendants that were confidential could be designated as such and filed with the court under a protective order, subject to review by the court if the designation was disputed,. This would limit the disclosure of such documents to the immediate parties and their advisors. A similar order was made by Stewart J. on January 16, 2009 in the *Strugarova* action.

II. The statutory privilege for CVRs – its evolution and purpose

[21] The statutory privilege attaching to CVRs, contained in the *TSB Act*, has its genesis in the recommendations of a federally-appointed commission chaired by the Honourable Charles Dubin, in 1981. It reflects an international recognition of the need for effective investigation of aviation accidents.

[22] In this section, I will begin by setting out the statutory privilege and will then comment on its evolution in Canada and internationally.

The Statutory Privilege

[23] The objects of the TSB, set out in s. 7 of the *TSB Act*, are to advance transportation safety by conducting independent investigations into transportation accidents, reporting publicly on their causes and making recommendations concerning safety. As noted earlier, it is not the responsibility of the TSB to assign fault and s. 7(3) provides that "[N]o finding of the Board shall be construed as assigning fault or determining civil or criminal liability." Subsection7(4) provides that "[t]he findings of the Board are not binding on the parties to any legal, disciplinary or other proceedings."

[24] Section 28, dealing with "on-board recordings", which includes CVRs, is one of a several sections that confer privilege on certain information obtained by the TSB in the course of its investigation. As we will see, s. 28 is, broadly speaking, consistent with an international regime established to promote navigation safety by giving aviation accident investigators access to reliable information. Section 28 provides that every "on board recording" is privileged and, except as provided by that section, no person shall be required to produce the recording or give evidence concerning it in any legal, disciplinary or other proceeding. It provides that the recording is to be produced to any TSB investigator who requests it for the purpose of the investigation.

[25] Subsection 28 (6) provide that the recording may be produced to a court or coroner under certain circumstances, where the court or coroner concludes that the public interest in the administration of justice outweighs the importance of the privilege:

> 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.

[26] Subsection 28(7) provides that the on-board recording may not be "used against", aircraft crew members, among others, in disciplinary, legal or other proceedings.

> 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.

[27] Section 29 provides that various "communication records", including tapes of communications between air traffic controllers and aircraft crew members, may not be "used against" such persons in legal or disciplinary proceedings. There is not, however, a bar on production of such information. In these cases the recordings of the communications between Pearson air traffic control and the flight crew have been produced in the litigation.

[28] An additional privilege is created by s. 30 of the *TSB Act*, relating to written or recorded statements take by TSB investigators from pilots and crew members (among others) following a transportation accident. Subsection 30(2) provides that such statements are privileged and s. 30(5) provides for a procedure almost identical to s. 28(6) for the court to order production of the statement. The court is required to examine the statement *in camera* and make a determination whether the public interest in the proper administration of justice outweighs in importance the privilege attached to the statement and may order production of the statement "subject to such restrictions or conditions as the court or coroner deems appropriate."

Genesis of the privilege – the Dubin Commission

[29] These privilege provisions of the *TSB Act* and the statutory process for disclosure of communication records and witness statements were the product of a Commission of Inquiry on Aviation Safety, appointed by the federal government in 1979 and chaired by The Honourable Mr. Justice Charles Dubin (the "Dubin Commission"). The appointment of the commission was triggered by an accident in 1978 at Cranbrook, B.C., involving a Boeing 737 jet, which resulted in numerous fatalities and serious injuries. As the investigation into the accident progressed, investigators were accused of incompetence and destruction of evidence. There was a real concern about the potential for conflicts of interest in the investigation of aviation incidents by

government investigators and proposals were made for an independent investigative body. The Dubin Commission was given a broad mandate "touching upon every matter which affects aviation safety from a legislative and procedural point of view."

[30] The Dubin Commission released its report in 1981. It made recommendations designed to promote aviation safety in Canada and proposed a new legislative framework for accident investigation. Those recommendations included the development of an independent federal agency called the "Canadian Aviation Safety Board", with a duty to investigate and report on aviation accidents and to make recommendations concerning safety. In 1984, as a result of the recommendations of the Dubin Commission, Parliament enacted the *Canadian Safety Board Act*, S.C. 1980-81-82-83, c. 165. This statute ultimately evolved into the *TSB Act*, which expanded the scope of the agency's responsibility to rail, marine and pipeline transportation.

[31] The Dubin Commission's Report addressed the question of the confidentiality of CVRs, air traffic control tapes and witness statements. The commission concluded that CVRs were an invaluable tool for the accident investigator; however, because CVRs also record conversations of a personal or private nature, "…which cast no light on the cause of the accident or incident," their publication could prove unnecessarily embarrassing for pilots. The commission recommended that CVR data should be privileged and should not be disclosed unless aviation safety and the administration of justice required disclosure. It recommended that to override the CVR privilege, the court should be convinced that "the public interest in the proper administration of justice outweighs the importance of any reasons advanced for maintaining confidentiality."

[32] In particular, the Dubin Commission made the following comments, at pages 224-225 of the report:

> A cockpit voice recorder records everything that may be overheard in the cockpit of an aircraft. It was made mandatory for commercial aircraft having a maximum certificated take-off weight of more than 12,500 pounds by ANO Series II, No. 14, which requires that the cockpit voice recorder 'be operated continuously from the start of the use of the checklist before starting the engines of the aeroplane for the purpose of a flight to completion of the final checklist at the termination of the flight.' It is the property of the carrier.
>
> It has a 30 minute loop so that only the last 30 minutes are recorded and what is transcribed earlier is erased.
>
> In the investigation of an accident or incident the recording becomes an invaluable tool for the investigator. However, it records not only conversations which may be relevant in the determination of the cause of an accident or incident, but also records conversations of a personal or private nature, which cast no light on the cause of the accident or incident. A publication of the conversations of the latter nature could

> prove embarrassing. The pilots complain that the cockpit voice recorder is an unprecedented invasion of privacy, and that no other employees are subjected to electronic eavesdropping in their work place. Although they recognize the necessity of such a recording device, their claim is that it should be used only by accident investigators, and for the sole purpose of assisting them in the determination of the cause of the accident in aid of preventing future accidents as a result of the information obtained. In order to ensure such exclusive use of the cockpit voice recorded, they seek legislation which would permit only the accident investigators to have access to the cockpit voice recording, and a ban on the publication of its contents."

[33] Later, after discussing the law of privilege, the Commission set out its reasons for recommending that the use of CVRs in civil proceedings be subject to a qualified privilege. It stated at page 234:

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

[34] The Dubin Commission recommended that the enabling statute should provide that CVR recordings be privileged and that they should only be produced after a judge had concluded that the public interest in the proper administration of justice outweighed the importance of "any reasons advanced for maintaining confidentiality" (at page 259). This was substantially the provision that was ultimately incorporated into the *TSB Act.*

International Standards - ICAO

[35] Canada is a signatory to the *Chicago Convention on Civil Aviation*. The United Nations International Civil Aviation Organization ("ICAO"), recommends standards and practices for aircraft accident and incident investigations in countries that are signatories to that convention. These are contained in Annex 13 to the convention, entitled "Aircraft Accident and Incident Investigation".

[36] Section 3.1 of Annex 13 states:

> 3.1 The sole objective of the investigation of an accident or incident shall be the prevention of accidents and incidents. It is not the purpose of this activity to apportion blame or liability.

[37] Section 5.12 – "Non-disclosure of records" – of Annex 13 informs the international standards for the use, control and disclosure of Flight Recorder Data (including CVR data): under Annex 13:

> The State conducting the investigation of an accident or incident shall not make the following records available for purposes other than accident or incident investigation, unless the appropriate authority for the administration of justice in that State determines that their disclosure outweighs the adverse domestic and international impact such action may have on that or any future investigations:
>
> …
>
> d) cockpit voice recordings and transcripts from such recordings; …
>
> [emphasis added]

[38] A note to s. 5.12 states:

> Note – Information contained in the records listed above, which includes information given voluntarily by persons interviewed during the investigation of an accident or incident, could be utilized inappropriately for subsequent disciplinary, civil, administrative and criminal proceedings. If such information is distributed, it may, in the future, no

> longer be openly disclosed to investigators. Lack of access to such information would impede the investigation process and seriously affect flight safety.

[39] The note appears to refer to witness statements and reflects the concern that their use in subsequent legal proceedings might have a chilling effect on the cooperation of witnesses with TSB investigators.

[40] It appears that Canadian law, as set out in s. 28 of the *TSB Act*, is generally consistent with Annex 13. Other jurisdictions, including the United States, have filed exceptions or differences to Annex 13 and have enacted domestic law that does not precisely follow Annex 13. In the United States, disclosure of the CVR is regulated by the *United States Code*, Title 49, "Transportation", Ch. 11, National Transportation Safety Board, sections 1114 and 1154. Section 1114 provides that the recording itself and the transcript of the recording are not to be produced in their entirety, but that the National Transportation Safety Board *shall* make public any *part* of a transcript of a CVR recording that the board decides is *relevan*t to the accident or incident. Further, section 1154 provides that a court may allow discovery by a party of a CVR recording if, after an *in camera* review of the recording, the court decides that the parts of the transcript previously made public under section 114 do not provide the party with sufficient information to receive a fair trial. In this situation, discovery of the CVR is necessary to provide the party with sufficient information to receive a fair trial.

[41] The test to be applied in the United States by the board and the court in determining whether to release the transcript does not take into account the potential adverse domestic or international effects on investigations that might result from such access. It appears that the National Transportation Safety Board in the United States regularly discloses extracts from CVR transcripts in its reports.

[42] France is a party to the *Chicago Convention*. The Airbus in this case was registered under French law. It appears that in France it is common to append CVR transcripts to the report of the investigating authority (the Bureau d'Enquètes et d'Analyses).

[43] This suggests that the international practice regarding the publication of transcripts of CVR recordings is not entirely uniform.

The Report of the TSB Act Review Commission

[44] Section 63 (now repealed) of the *TSB Act* provided that a commission would be appointed to review the first three years of operation of the Act. The commissioners released their report in 1994: *Advancing Safety*, Report of the Canadian Transportations Accident Investigation and Safety Board Act Review Commission, (Ottawa: Minister of Supply and Services, 1994). Among other things, it recommended that the rules of confidentiality be rewritten to emphasize privilege as opposed to confidentiality – in particular, statements given to investigators would remain privileged and could not be used for litigation or disciplinary purposes.

[45] On the subject of CVRs, the commission recommended that the TSB be permitted to publish transcripts containing excerpts from CVRs, but that the production of these records to litigants should remain subject to court authorization. The commission stated, at p. 156:

> We have heard a considerable number of submissions on the issue of confidentiality for on-board recordings. Although we understand that the introduction of cockpit voice recorders was based on what was in effect a social contract between flight crew and their employers and regulators, granting this right was an extraordinary concession which should not go any further. Conferring special rights on distinct groups is now subject to review under section 7 and 15 of the *Charter*. If crews press for complete protection, they risk losing protection altogether.
>
> In our view, the United States *Independent Safety Board Act* of 1974 contains a more appropriate and workable model for the use of on-board recordings than the present section 28 of the [*TSB*] *Act.* The U.S. statute requires the NTSB to publish cockpit voice recorder transcripts with irrelevant sections removed.
>
> Under this model, for example, carrier flight instructors or the TSBC could use excerpts from on-board recordings to emphasize safety lessons. These recordings still could not be used for litigation or regulatory purposes, unless a court or coroner ordered otherwise. We appreciate that an on-board recording may be the only source of some relevant evidence for litigants, so a controlled exception to the general prohibition on 'collateral' use of TSBC information is justified.

[46] The recommendation that transcripts of CVR recordings be made public suggests that the review commission was not concerned that this would have an effect on aviation safety or that it would somehow restrict communication in the cockpit.

III. The evidence and the submissions of the parties

The evidence and submissions of moving party NAV

[47] NAV's evidence is contained in an affidavit of W. Fred McCague, one of NAV's lawyers. He describes the various legal proceedings arising from the accident, the TSB investigation, the request made by counsel on behalf of NAV for the production of the CVR from the TSB and the TSB's refusal to produce the recording. Mr. McCague submits that, on discovery, the captain and first officer had difficulty remembering specifics of the approach and landing and that the CVR and its transcript are absolutely essential to a fair trial and to permit NAV to make full answer and defence.

The evidence and submissions of the TSB

[48] The evidence on behalf of the TSB is set out in an affidavit of Gerard MacDonald, Executive Director of the TSB. The affidavit describes the work of the TSB, its enabling legislation, and its genesis, including the recommendations of the Dubin Commission. He also explains the role of ICAO and the provisions of Annex 13, discussed above.

[49] Mr. MacDonald gives an overview of the TSB's investigation of the AFR 358 accident investigation and explains the TSB's position that the CVR data should not be disclosed in this litigation. He says that access to information is improved, and the TSB's accident investigation and reporting is enhanced, when the information gathered by the TSB remains privileged. He also explains the TSB's position that sustaining the privilege in this case does not pose any risk of prejudice to the proper administration of justice.

[50] Mr. MacDonald makes it clear that the CVR data was used in the production of the TSB's report and that a number of sections of the report contain relevant information that was gleaned from the CVR; however, there are no direct quotations from the recording in the TSB report.

[51] The nub of Mr. MacDonald's position is contained in paras 77 to 82 of his affidavit, which I will reproduce below, in their entirety:

> The policy underlying this statutory privilege for CVR's is the public interest in ensuring that accident investigators can obtain full, frank and timely disclosure from any persons with knowledge or facts about a transportation incident.
>
> Within the context of the statutory framework described above, the various stakeholders involved in the transportation industry (manufacturers, traffic controllers, regulators, brokers, transporters, operators, crew members, etc. – hereinafter "Stakeholders") are usually willing to provide TSB investigators with information following an accident. Relevant information can be obtained by interviewing the flight crew to establish what occurred, how they reacted and what they understand to be the consequences of their actions. The cooperation of the pilots, as well as other relevant stakeholders, is essential to the success of TSB investigations.
>
> TSB makes every effort to obtain accurate and reliable information from the Stakeholder and other relevant witnesses. Although TSB has statutory powers to compel the production of evidence and information, pursuant to s. 19 of the Act, it has been my experience that <u>cooperation</u> during an accident investigation bears far greater results than does

compelling the disclosure of evidence. The statutory privilege that attaches to statements given to TSB by witnesses facilities that cooperative process; the presence of the statutory privilege provides those who come forward with information do so [sic] with the security of knowing that their comments will not later be used against them.

TSB believes that, without that assurance of confidentiality, these Stakeholders would be reluctant to communicate freely and provide the information and representations necessary to investigate accidents. This is because of concerns about exposing themselves to potential civil liability and, in some cases, even criminal charges in connection with accidents. Based on its experience interviewing hundreds, if not thousands, of witnesses over the past many years, TSB understands that some Stakeholders and potential witnesses are also concerned about loss of employment, adverse effects upon relations with their co-workers, their unions, their employers, and their families. TSB believes that if people fear their disclosure of information relevant to the investigation might eventually expose them to adverse repercussions, they might decline to provide their statements in a timely manner, or in a complete and detailed way, if at all.

The recording of conversations between crewmembers, traffic controllers and other protagonists is a necessary part of the investigation's information base. As noted by the Dubin Commission report, individuals involved in the provision of transportation services agreed to CVR technology in their place of work on the understanding that the information would be used in analyses designed to reduce the incidence of aviation accidents, and would not be used against them. … This philosophy is illustrated in the various privilege protections set out in the Act and can also be found in the enabling legislation of investigative bodies of several other nations.

It is TBS's opinion that the release of information collected by TSB investigators (including CVR data), even on completion of an investigation, would chill the relationship between investigators and these Stakeholders and reduce the amount of safety information available to the TSB. TSB believes that the privilege related to CVR data is necessary to encourage full, accurate objective communication between air traffic regulators and pilots, and between crew members, in times of crisis. Those involved in the transportation industry ought not to conduct their work under the cloud of fear or anxiety that their words will come back to embarrass them or found accusations of liability. If professionals in the transportation industry are guarded in their communications, this could, in turn, diminish the likelihood of identifying, reducing or eliminating safety deficiencies.

[52] Mr. MacDonald acknowledges that the CVR is absolutely essential to the investigation of aircraft accidents by the TSB. He says, however, that there is no risk of prejudice to the parties to these actions if the CVR is not produced because all relevant information, including information taken from the CVR, is available in the TSB report.

[53] The essence of the TSB's position on this motion is summed up by para 53 of its factum:

> TSB firmly believes that the privilege related to CVR data is necessary to encourage full, accurate and objective communication between air traffic regulators and pilots, and between crew members, in times of crisis. Within the context of the accident investigation framework described above, TSB believes that the release of CVR data, as with other privileged materials under the Act, would 'chill' the relationship between investigators and parties involved in accident investigation (e.g. pilots, manufacturers, traffic controllers, regulators, brokers, transporters, operators, crew members …). The adverse effect of disclosure contrary to the privilege remains the same whether the Air France 358 Investigation Report has or has not already been released.

[54] The TSB's position is also that there is a wealth of information, including the TSB report itself, that is available to the parties to these legal actions and that there is no prejudice to any party in proceeding to trial without the CVR recording or transcript.

The Evidence – ALPA and ACPA

[55] At the hearing of the motion for production of the CVR, a motion was made on behalf of the Air Canada Pilots Association ("ACPA") and the Air Line Pilots Association, International ("ALPA"), who requested leave to intervene or, alternatively, to make submissions as friends of the court. The request to make submissions as *amicus* was not opposed. For the reasons contained in this section, I granted leave to intervene as friends of the court.

[56] ACPA represents more than 3,500 Air Canada pilots in collective bargaining. It is the successor to the former Canadian Air Line Pilots Association ("CALPA"), of which Air Canada was a founding member. ACPA has been frequently recognized as an authoritative voice on behalf of Canadian airline pilots and has appeared before legislative committees addressing issues of aviation safety, including the regulation of the use of CVRs in aircraft.

[57] ALPA is a trade union that represents more than 54,000 airline pilots at 36 airlines throughout North America. It is also a successor to CALPA, with which it merged in 1997. It is presently certified to represent approximately 2,400 airline pilots in Canada and is the exclusive bargaining agent for pilots at a number of Canadian airlines, other than Air Canada. Like ACPA, it is frequently recognized as an important spokesperson for the interests of airline pilots in North America. It too has appeared before legislative committees, in Canada and the United States on issues of aviation safety. It has obtained intervenor status in litigation in the United States in which the use of cockpit voice recorder information has been an issue.

[58] Although neither of the two pilots on AFR 358 were members of the two unions, counsel for NAV did not oppose the unions being given an opportunity to make submissions, but opposed intervenor status. Counsel for the TSB submitted that it would be appropriate to hear submissions on behalf of the pilots as they have a legitimate interest and a unique perspective on the issue.

[59] The motion of ACPA and ALPA was brought under rule 13 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194. Rule 13.01 permits a person who is not a party to move for leave to intervene as an added party under certain circumstances. Rule 13.02 permits a person, with leave of the judge or at the invitation of the presiding judge or master, "and without becoming a party to the proceeding, [to] intervene as a friend of the court for the purpose of rendering assistance to the court by way of argument." In *Finlayson et al. v GMAC Leaseco Ltd.* (2007), 84 O.R. (3d) 680, [2007] O.J. No. 597 (Sup. Ct.), Quinn J. suggested that, quite apart from rule 13, the court's inherent jurisdiction to control its own process includes determining whether a person may intervene as an "added party" to a motion. He suggested, however, that in doing so the court should apply the tests set out in rule 13.01.

[60] In *Trempe et al. v. Reybroek et al.* (2002), 57 O.R. (3d) 786, [2002] O.J. No. 369 (Sup. Ct.) at para 11, Molloy J. suggested that Rule 13.02 applies to persons who do not have a direct or personal stake in the *lis* between the parties "but who, because of special interest or different perspective or expertise, may be of assistance to the court in understanding the issues in the case."

[61] In *Authorson (Litigation guardian of) v. Canada (Attorney General)* (2001), 147 O.A.C. 355, [2001] O.J. No. 2768 (C.A.), McMurtry C.J.O. stated at para 6:

> I am guided in the exercise of my discretion on this motion by the reasons of Dubin C.J.O. in *Peel (Regional Municipality) v. Great Atlantic & Pacific Co. of Canada Ltd.* (1990), 74 O.R. (2d) 164 (C.A.) ("Peel") who stated the test to be applied on motions such as this, as follows, at p. 167:
>
> > Although much has been written as to the proper matters to be considered in determining whether an application for intervention should be granted, in the end, in my opinion, the matters to be considered are the nature of the case, the issues which arise and the likelihood of the applicant being able to make a useful contribution to the resolution of the appeal without causing injustice to the immediate parties.

[62] In that case, Chief Justice McMurtry refused to permit the National Council of Veteran Associations in Canada to intervene in an appeal as a friend of the Court. The appeal was from an order granting summary judgment to a class of disabled veterans in an action claiming interest on surplus statutory benefits being administered by Veterans Affairs Canada. The Chief Justice

refused leave to intervene because he was satisfied that the public interest and the interests of the veterans would be fully and adequately represented by counsel for the Attorney General.

[63] In a later case, *1162994 Ontario Inc. v. Bakker* (2004), 184 O.A.C. 157, [2004] O.J. No. 816 (C.A.), McMurtry C.J.O. granted leave to a tenants' advocacy group to intervene in an appeal as a friend of the court in a landlord-tenant dispute concerning the liability of tenants, not in possession, to pay rent. In granting leave, McMurtry C.J.O. stated, at para 7 – 8:

> **…** I am satisfied that although this litigation is substantially private in nature it could well have a broader impact than merely deciding the case between the two parties. The appeal may well determine the nature of the relationship between co-tenants, between co-tenants and landlords and the effect of the departure of a co-tenant with respect to these relationships. From its expertise in dealing with difficulties arising out of the wide variety of factual situations giving rise to disputes between co-tenants and between tenants and landlords, ACTO will be able to bring to bear an analysis of the issues in this appeal from a perspective that is different from that of the individual tenant/appellant in this case. ACTO could assist the court in understanding the dimensions of the legal issues that arise in this case.
>
> I also recognize the private nature of this litigation and the need to avoid unnecessarily complicating issues before the court, or unduly adding to the costs to the respondent. The proposed intervenor will therefore not be permitted to add to the record and will be potentially subject to an adverse costs award should the court hearing the appeal determine such is appropriate.

[64] It is to be noted that McMurtry C.J.O. did not permit the proposed *amicus* to add to the record. Interestingly, rule 13.02, the *amicus* rule, does not appear to contemplate that the amicus will introduce evidence, since it speaks of "rendering assistance to the court by way of argument." In this case, the intervenor proposed to file affidavit evidence as well as to make argument, file a factum and submit a brief of authorities.

[65] Having heard the submissions of Mr. Wray on behalf of ACPA and ALPA, I was satisfied that the pilots had an interest in the outcome of the motion and that their perspective on the issues might not necessarily be reflected in the submissions of the other parties. In particular, the TSB, which is the main opponent to the motion, approaches the issue from the viewpoint of transportation safety and investigative efficacy, whereas the pilots approach the issue in terms of both safety and privacy. I was satisfied that the two organizations had a unique and direct interest in this issue, that the court would benefit from submissions on behalf of pilots and that those submissions could be made without unnecessary delay, costs or inconvenience to any party. The two organizations undertook to be bound by the confidentiality order and undertook that their submissions would not result in repetition or re-argument.

[66] The motion of ALPA and ACPA is supported by two affidavits, one by Captain Bryon Mask, a retired Air Canada Pilot and Director of Flight Safety for ACPA and the other by Captain Raymond Gelinas, a pilot with Air Canada Jazz, a member of ALPA International and Chairman of that organization's Accident Analysis and Prevention Committee. While there are some differences in the background given by the two deponents, their evidence is substantially the same and in many cases the language used in their affidavits is identical.

[67] Both pilots express the opinion that the information from CVRs is invaluable in determining the causes of airline accidents and in allowing investigative bodies such as the TSB to make safety recommendations in the public interest. They express the opinion, however, that the release of the CVR information beyond those purposes is detrimental to aviation safety.

[68] They give several reasons for this opinion. First, they say that the airline cockpit is the pilots' place of employment, like an office, and that the introduction of a recording device into that location is a substantial infringement of the pilots' privacy and dignity. They say that this is particularly true because the CVR will record not only very private conversations between the pilots but also the pilots' final utterances and occasionally terrified screams in catastrophic accidents. They say that pilots accept the use of CVRs for the purpose of enhancing safety based on two fundamental understandings. The first is that the recording devices will be used in the carefully controlled and expert environments of investigative bodies, such as the TSB, for the investigation of the causes of accidents in the interest of aviation safety. Second, they say that pilots operate under the assurance that the invasion of their privacy is minimized by the design of the equipment (because it runs in two hour loops) and by statutory provisions that restrict disclosure of the information to the public.

[69] The deponents express the belief that the release of CVR information "*particularly in a 'raw' unedited, unparaphrased or otherwise unredacted form,* inhibits the CVR's acceptance by the pilots … This acceptance of the legitimacy of the CVR in the cockpit is the bulwark of the entire CVR program. Without the assurance that their conversations will be kept confidential to the highest extent possible, pilots will resist the imposition of such recording devices." [emphasis in original]

[70] Finally, the pilots express the opinion that the level of candour of discussion in the cockpit environment would be markedly decreased were pilots no longer able to assume that their cockpit conversations would be confidential and secure from broader dissemination and scrutiny by third parties. It is axiomatic that an open and uninhibited exchange of information and views between pilots in an airplane cockpit is essential to securing a basic level of safety. Critical, and often highly complex, decisions must be made by professional airline pilots in the course of fractions of a second, based on information supplied by the other pilot in the cockpit. They express the opinion that the speed and quality of pilots' decisions could be impaired if they were aware that their conversations might be disclosed to third party litigants.

[71] I make several observations about the evidence the pilots. First, I accept without reservation that ALPA and ACPA have an important interest in matters of aviation safety and that the views of their spokespersons are entitled to attention and respect. Second, I cannot see

any purpose in the disclosure of purely personal conversations between pilots except in the exceptional case where there is a concern that those conversations have interfered with the performance of their duties. Third, it goes without saying that no purpose would be served by the disclosure of utterances of pilots in the agony of impending impact except to the very rare and unusual extent where the utterances are directly relevant to an issue. Fourth, I do not necessarily accept that the potential for release of CVR data to parties other than the TSB and like agencies would impair the free exchange of information between pilots, any more than the potential for release to the TSB would do. There is no evidence that the introduction of CVRs since the 1960s has impaired communication between pilots, in spite of the fact that third parties have had access to those recordings and, in some cases, the recordings have actually been made public through government investigative bodies or otherwise.

[72] It is difficult for me to accept that highly trained, responsible and professional pilots would somehow curtail their important and necessary communications because there is a recording device in the cockpit that will only be accessed in the event of an accident, and potentially an accident with very serious and even fatal consequences. The extract I have quoted earlier,[1] from page 234 of the report of the Dubin Committee, suggests that the committee did not consider this argument to be particularly compelling.

[73] Finally, the evidence of the two pilots supports the conclusion, which can hardly be doubted, that the CVR is an invaluable investigative tool. This is particularly so in view of the likelihood that the pilots will be unable to accurately reconstruct from memory the precise sequence and content of a series of communications and "split second" decisions made in the crucial minutes before an accident.

IV. The applicable test

[74] In this section, I will set out the test applicable to motions of this kind. It is worth reminding myself that the statute requires that I examine the CVR (i.e., listen to the recording), hear submissions of the parties, and determine whether, in the circumstances of the case, the public interest in the proper administration of justice outweighs in importance the privilege attached to the on-board recording by virtue of s. 28 of the *TSB Act.* If I order production of the CVR, I may impose such restrictions or conditions as are deemed appropriate.

[75] In order to determine the factors that should be considered in the application of this test, I will examine the case law surrounding the statutory privileges set out in the *TSB Act.* Some of the cases deal with the production of witness statements under section 30 of the statute and I will examine these as well due to the limited authority available under section 28.

[76] As a preliminary matter, counsel for the TSB submits that this motion, although not currently styled as such, is effectively a motion for production from a non-party, pursuant to rule 30.10(1) of the *Rules of Civil Procedure,* R.R.O. 1990, Reg. 194:

[1] See para 33 above.

> The court may, on motion by a party, order production for inspection of a document that is in the possession, control or power of a person not a party and is not privileged where the court is satisfied that,
>
> (a) the document is relevant to a material issue in the action; and
>
> (b) it would be unfair to require the moving party to proceed to trial without having discovery of the document.

[77] Counsel for the TSB states that although the jurisdictional basis for the motion is not set out in the amended notice of motion, the original notice of motion referred to rule 30.10 and that the case law under that rule is applicable. In particular, he submits that orders for production from non-parties are not the norm and should only be made in exceptional circumstances: *Attorney General of Ontario et al. v. Stavro et al.* (1995), 26 O.R. (3d) 39, [1995] O.J. No. 3136 (C.A.) at p. 48; *Morse Shoe (Canada) Ltd. v. Zellers Inc.* (1997), 10 C.P.C. (4th) 390, [1997] O.J. No. 1524 (C.A.) at para 19. In addition, he submits that the information sought from the non-party must first be sought from the parties to the action in the normal course of discovery: *Attorney General of Ontario et al. v. Stavro et al.* at pp. 48 – 49. In summary, counsel for the TSB says that the party moving for production must establish:

> (a) that the document sought is not privileged;
>
> (b) that the information in the document is relevant to a material issue and cannot be obtained from another source; and
>
> (c) it would be unfair to require the moving party to proceed to trial without having discovery of the document.

[78] While the procedure for requiring production of the CVR from the TSB may be governed by Rule 30.10, s. 28 of the *TSB Act* also establishes a test for production that may partially overlap with the "unfairness" test in Rule 30.01(1)(b). However, the test under the *TSB Act* arguably goes beyond the test under Rule 30.01(1)(b) by establishing a "public interest" requirement.

[79] In the circumstances of this case, I am satisfied that if NAV meets the requirements of s. 28, it will also meet the requirements of rule 30.01(1)(b). As the TSB is not prepared to release the CVR to Air France (which arguably owns it) it would be pointless to require NAV to attempt to obtain the CVR from Air France.

[80] I now turn to a review of the authorities that have considered requests for production of documents that are privileged under the *TSB Act.* As a preliminary matter, it should be observed that cases of this kind, dealing with privilege, involve a conflict between two important policies. On the one hand, there is the public interest in the administration of justice. On the other hand, there is a public interest in aviation safety. As the learned authors of Sopinka, Lederman and Bryant note, in *The Law of Evidence*, 2nd ed., (Toronto: Butterworths, 1999), the law of privilege is concerned with the resolution of such conflicts – at p. 713:

> 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. ...

[81] Unlike “class” privileges, where communications between certain classes of people are protected by common law or statute, the provisions of the *TSB Act* do not confer an absolute privilege – rather, the privilege depends upon the court’s assessment of the relative importance of competing interests in the circumstances of the particular case. As a prelude to the application of the test in this case, I will review the most pertinent cases in which the courts have wrestled with this question.

[82] In *Moore v. Reddy* (1990), 44 C.P.C. (2d) 61, [1990] O.J. No. 308, a case to which reference is frequently made, Master Donkin considered a request for production by the defendant of a statement made by a pilot to the Canadian Aviation Safety Board (the predecessor to the TSB) following an accident in which his airplane had crashed into the plaintiffs’ home. The statements were taken in two separate interviews, conducted 2 days and 3 weeks after the accident. The relevant provisions were sections 38 to 40 of the *Canadian Aviation Safety Board Act*, R.S.C. 1985, c. C-12, which was repealed in 1990, the provisions of which were the same as the comparable provisions of the *TSB Act*.

[83] Master Donkin noted that “Parliament appears to have enacted the privilege in order to promote frankness in the giving of statements.” He declined to order production of the statement, but did not rule out the possibility of its production at a later date, in the event the pilot’s recollection was impaired on discovery. Master Donkin concluded that Parliament intended that statements would remain privileged except in “exceptional cases” and articulated a test that would only order production when the evidence could not be otherwise obtained. The Master stated at pp. 63-64:

> 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 revealing 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. Counsel supporting this motion suggests that the circumstances of this case are sufficient because the statement is given by the pilot and the case alleges pilot error. Obviously any case against the pilot must allege pilot error, and it seems to me that this is not an unusual feature. There is no evidence at this point that the defendant Reddy is not available or cannot remember. It may be that on discovery he does not remember and therefore it may become appropriate to remove the privilege in this case. There is no such evidence before me now.
>
> As instructed by the statute I have read the statement. In my view, there are no circumstances of this case which indicate that the interest of justice require that the privilege be removed.

[84] The test applied by Master Donkin focused, therefore, on whether production of the statement was necessary because the information could not be obtained for one reason or another.

[85] *Braun v. Zenair Ltd*. (1993), 13 O.R. (3d) 319, [1993] O.J. No. 917 (Gen. Div.) also dealt with statements made to TSB investigators, but it was brought pursuant to s. 30(2) of the *TSB Act* which was by then in force. A motion was brought to compel production of statements taken by a TSB investigator following a crash of an ultralight aircraft resulting in two fatalities. The statutory provision, discussed above, provided that the statements were privileged unless the declarant authorized their release or the court determined that the public interest in the proper administration of justice outweighed the privilege attached to the documents. The witnesses did not consent to the release of the statements and Jenkins J. therefore considered whether the public interest in the proper administration of justice required their production. He reviewed the statements to determine their importance and concluded that production should not be ordered because there was nothing in the statements that could not be acquired through a routine investigation. Jenkins J. stated, at para 7:

> I find that privilege attaches to each of the statements unless and until it is waived by the party who gave the statement or is abrogated by order of the court. On reviewing the affidavit of David MacKenzie filed in support of the motion and the statements of the four witnesses I am unable to find that the proper administration of justice requires that I order production of the statements. There is nothing in the statements that could not be ascertained by a routine investigation of this crash and I don't believe the plaintiffs will be unnecessarily inhibited in the preparation or presentation of their case by suppression of the statements. Indeed the information contained in the statements is readily available to

> the plaintiffs from the information already provided to them by the board and from other sources.

[86] After referring to the circumstances set out by Master Donkin in *Moore v. Reddy*, above, Jenkins J. continued, at para 9:

> I would add to this list circumstances where relevant information is not otherwise available to the parties and failure to disclose the information might result in a miscarriage of justice. In this case none of the circumstances which would justify abrogation of the privilege exists. As a result the motion is dismissed.

[87] Like Master Donkin, Jenkins J. appears to have contemplated an exception to the statutory privilege based on the necessity for production of the statement. The necessity for production is determined with reference to the sufficiency of the existing body of evidence.

[88] In *Webber v. Canadian Aviation Insurance Managers. Ltd*., 2002 BCSC 1414, [2002] B.C.J. No. 2270 (B.C.S.C.), the plaintiff's aircraft had been involved in a mid-air collision and the issue was whether the plaintiff, or his friend Ms. Pawluski, had been piloting the aircraft at the time of the collision. If she was, then the aircraft would not be covered by the defendant's insurance policy. The defendant moved for an order requiring the TSB to produce a statement taken from the plaintiff. The insurance company obviously wanted the plaintiff's statement to the TSB investigator because the statement was taken the day after the accident and before the plaintiff had had an opportunity to consider the possible implications of his friend piloting the craft, if that was indeed the case. The defendant also sought to have the TSB investigators attend court to testify concerning their interview of the plaintiff. Sinclair Prowse J. refused to order production of the statement, noting the privilege under s. 30(2) of the *TSB Act*. She stated, at paras 35-37:

> … That protection [the statutory privilege] 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.
>
> To achieve these ends, the Board must be provided with full and accurate information.
>
> 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.

[89] Sinclair Prowse J. then considered whether there was a discretion under the statute to order production and, if so, whether it was appropriate to exercise that discretion. She held, following *Braun v. Zenair Ltd*., above, that there was a discretion but that it should only be exercised where the statement contains relevant information that is not otherwise available *and* that the failure to disclose the information would result in a miscarriage of justice. She noted as well that s. 30(7) of the *TSB Act* provides that a statement cannot be used against a person who made it "except in a prosecution for perjury or for giving contradictory evidence or a prosecution under s. 35 [which sets out various offences arising under the statute, including obstructing an investigation or misleading investigators]." She held that even if the statement and the investigator's notes were produced, they could not be used against the maker in any event. She concluded, at para 60:

> Given these circumstances, the evidence falls short of proving that a miscarriage of justice would probably result if the Notes and the 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.

[90] In *Desrochers Estate v. Simpson Air* (1981) Ltd. (1995), 36 C.P.C. (3d) 150, [1995] N.W.T. J. No. 46 (N.W.T. S.C.), the plaintiffs applied under the *Canadian Aviation Safety Board Act* for production of witness statements following the fatal crash of an airplane owned by the defendant. The accident occurred in 1988 and Board investigators had taken statements in 1988 and 1989. Counsel agreed that the earlier statute, rather than the *TSB Act*, was applicable. The Board opposed the release of the statements, copies of which were given to the motions judge for review. Justice Richard dismissed the application, concluding that the public interest in the administration of justice in the case did not outweigh the importance of the privilege, stating, at paras 9 - 15:

> **…** I am unable to find anything in the circumstances of this case that would cause me to conclude that the public interest in the proper administration of justice outweighs in importance the statutory privilege enacted by Parliament in s. 38 of the Act.
>
> There is nothing in the statements which I have read that is at variance with the contents of the Aviation Occurrence Report which is in the possession of the plaintiffs.
>
> **…**
>
> 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.

> 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 test 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.

[91] Justice Richard appears to have applied a test similar to that applied by Jenkins J. in *Braun v. Zenair Ltd*. above: there was nothing in the statements that could not have been obtained in the ordinary course of the litigation.

[92] In *R. v. C.W.W.* (2002), 204 N.S.R. (2d) 144, [2002] N.S.J. No. 191 (N.S. Youth Ct.), the Crown and the accused, a young person charged with mischief endangering life and criminal negligence in connection with a train derailment, applied for an order that the TSB disclose 18 witness statements that had been made to the board's investigators. The Crown argued that the statements were required to ensure that the accused was able to make full answer and defence. The TSB argued that if the privilege was not upheld, it would have a "chilling effect" on the cooperation and candour of witnesses in the investigation process. After reviewing the case law, including *Moore v. Reddy , Braun v. Zenair Ltd*. and *Desrochers Estate v. Simpson Air*, Sparks Youth Ct. J. concluded that the privilege should only be set aside in "rare cases" – at para 20:

> In reading these cases, I am satisfied that the carte blanc privilege attached to the TSB's statements should only be abrogated in rare circumstances. While the cases use the language of a miscarriage of justice as the test, this articulated tests is consistent with the language used in the Act and with the case law including *Stinchcombe*. Therefore, I approach the examination of the Act, keeping in mind that the statements should only be disclosed if it is concluded that, in the circumstances of this case, the public interest in the proper administration of justice outweighs in importance the privilege attached to these statements.

[93] The judge then examined the statements and concluded that most were irrelevant but that four were in fact relevant. The judge then turned to the public interest, and appears to have applied a "miscarriage of justice" test – at para 21:

> If these statements are not disclosed I must consider whether the public interest in the proper administration of justice will be compromised. For example, will there be a wrongful conviction if the information is not disclosed in the circumstances of this case. In other words, will there be a miscarriage of justice? After reviewing these statements I cannot reach such a conclusion. But the statutory test goes beyond relevancy and includes whether this information can be obtained from other sources ….

> In the circumstances of this case, each of the deponents have been interviewed by the R.C.M.P. and two of the five deponents have also been interviewed by CN Rail. Only in the rarest of circumstances should the privilege of the TSB statements be abrogated. This is not one of those rare circumstances as the same deponents were interviewed by other sources available to Crown counsel. Thus, the question becomes whether, in these circumstances, the proper administration of justice outweighs the privilege attached to these statements. In my opinion, the proper administration of justice does not outweigh the privilege attached to these statements as defence counsel can obtain these statements from either the R.C.M.P. or CN rail through Crown counsel.

[94] Since there had been statements taken by both the R.C.M.P. and in some cases by CN Rail, the accused would have access to these statements and would have an opportunity to make full answer and defence under the *Charter of Rights and Freedoms,* Part I of the Constitution Act, 1982, being Schedule B to the *Canada Act, 1982* (U.K.) 1982, c. 11.

[95] In *Canadian National Railway Co. v. Canada* (2002), 8 B.C.L.R. (4th) 316, [2002] B.C.J. No. 2519, (S.C.) app. for leave to appeal ref'd (2002), 9 B.C.L.R. (4th) 247, [2002] B.C.J. No. 2859 (C.A.), the TSB had investigated a fatal derailment on the CN rail line in the Fraser Canyon. In that case, it appeared that the TSB had produced to the two railways copies of statements that had been given by their respective employees, but the TSB would not produce the documents to the Province nor would it produce to each railway the statements taken from employees of the other railway. Henderson J., at paras 12 and 13, found that this was in error, since the privilege belonged to the employee who made the statement, not to his or her employer:

> 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.
>
> 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. The 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 the 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.

[96] Henderson J. found that the privilege had already been breached by the TSB and that giving the statements to one party but not to the others created an uneven playing field.

Henderson J. followed *Webber v. Canadian Aviation Insurance Managers. Ltd.* and held that the test was whether the statement contains relevant information that is not otherwise available and that the failure to disclose the document might or could result in a miscarriage of justice. He held that to show that the failure to disclose *would* result in a miscarriage of justice would be an impossibly high hurdle. He imposed confidentiality provisions on the parties.

[97] An application for leave to appeal was brought to the Court of Appeal. Lambert J.A. dismissed the application. In so doing, he noted that the effectiveness of the TSB depends on the ability of the Board's investigators to obtain information from witnesses, at para 4:

> It is very important to understand that the effectiveness of the Safety Board depends on the fact that statements made to the Board are privileged. People are assured, or are entitled to be assured, of that privilege when they make their statements and they do so in reliance on the privilege sections of the Canadian Transportation Accident Investigation and Safety Board Act. The integrity of the whole investigation process is at stake in the privilege that is associated with the statements that are made. The privilege is dealt with in s. 30….

[98] And at para 10:

> The disclosure to the Canadian Pacific and the Canadian National Railway Companies of some of the privileged documents in this case goes a long way to diminish the retention of the privilege in the remaining documents and goes even further to make it unfair to have some of the privileged documents disclosed to some of the parties and not the remainder of the privileged documents disclosed to all of the parties. I am satisfied that Mr. Justice Henderson's reasons and my reasons must make it clear that there has been no intention of in any way diminishing the importance to be attached to the privilege in all other cases, nor in any way of undermining the circumstances for its exercise set out in the cases of *Webber v. Canadian Aviation Insurance Managers Ltd.* [2002] B.C.J. No. 2270 or *Braun v. Zenair Ltd.* (1993), 13 O.R. (3d) 319. It is only because of the special circumstance that there has been some distribution of privileged documents to some of the parties that requires the orderly administration of justice to ensure that all of the privileged documents find their way into the hands of all of the parties.

[99] In *Chernetz v. Eagle Copters Ltd.*, [2004] 9 W.W.R. 325, [2003] A.J. No. 521, (Q.B.) the plaintiff had sued the defendant as a result of the death of her husband in a helicopter crash that occurred in the Maldives. The TSB, although not statutorily responsible for investigating an accident outside Canada, was asked by the government of Maldives to conduct the investigation. At the request of the TSB, Eagle Copters supplied the TSB with information concerning the helicopter and made formal representations concerning the board's draft report. The plaintiff moved for production of these documents. McMahon J., noting the importance of confidentiality

to the integrity of the TSB's investigative process, refused to compel the production of the documents.

[100] In *Propair Inc. et a. v. Goodrich Corporation*, [2003] J.Q. No. 243, J.E. 2003-67 (S.C.) an application was brought to compel production of the CVR following a crash in June 1998 at Mirabel Airport, resulting in the deaths of nine passengers and two crew members. The application was opposed by the TSB as well as ALPA and ACPA. The Court found, having listened to the CVR, that the recording should be produced because it was important evidence that could not otherwise be obtained from a reliable and accurate source. The judge, Viau J., found that the public interest in the administration of justice required that this important piece of evidence be provided to the parties.

[101] The judge rejected the submissions of ALPA and ACPA and what he described as their assertion of a "vague right of privacy" – at para. 13:

> Les deux pilotes décédés dans l'écrasement n'étaient membres ni d'ALPA ni D'ACPA. Et, à l'examen, force est de constater que le seul intérêt de ces associations est de bloquer tout accès à l'enregistrement. Invoquant un vague droit à la vie privée, elles s'objectent partout où elles peuvent le faire, tentant de transformer en une sorte de débat public des causes d'intérêt privé. Elles n'ont aucun autre intérêt dans les présentes affaires et les éléments de preuve qu'elles présentent sont loin d'être convaincants. Elles renforcent plutôt cette attitude d'opposition radicale et systématique qui n'a été, semble-t-il, retenue nulle part ailleurs, en Amérique du Nord du moins.

[102] An application for leave to appeal was dismissed: [2003] J.Q. No. 2523, J.E. 2003-576 (C.A.). The court noted that the decision was within the scope of the judge's discretion.

[103] In *Wappen-Reederei GmbH & Co. K.G. v Hyde Park (The)*, [2006] 4 F.C.R. 272, [2006] F.C.J. No. 193 ("*The Hyde Park*"), Justice Gauthier of the Federal Court dealt with an application by a shipowner to require the TSB to release copies of "bridge recordings", referred to as the ship's "voyage data recorder." This recorded ship data, including position, speed and heading, voice communications on the ship's bridge, and radio communications with other ships and shore stations. The application was supported by the owners of the other vessel involved in the collision.

[104] Justice Gauthier noted that prior to June of 1989, when the *TSB Act* was enacted, there was no coordinated independent multimodal accident investigation agency in Canada; each mode of transportation had its own regime. The statutory regime in place for the investigation of aviation accidents became the model for the investigation of other kinds of accidents. The original *TSB Act* provided that after three years of operation, it would be reviewed by an independent commission to assess its effect. Justice Gauthier, then a practicing maritime lawyer, was a member of that commission. The report of the commission, referred to earlier in these

reasons, was completed in January, 1994. In her judgment, Justice Gauthier quoted from the report:

> Although the need to identify safety deficiencies as efficiently as possible was the prime public interest motivating the introduction of all such provisions, it appears from pages 156 and 157 of the Commission's report that "(...) the introduction of cockpit voice recorders was based on what was in effect a social contract between flight crew and their employers and regulators, granting this right was an extraordinary concession which should not go any further". According to the evidence put before the Commission, "flight crews considered the introduction of technology to record cockpit conversations an extraordinary invasion of workplace privacy, originally they tolerated the introduction of this technology on the understanding that it would be used only to promote safety".

[105] In considering whether the bridge recordings should be disclosed pursuant to ss. 28(6), Gauthier J. stated, at paras 74 to 77:

> As it is the case in respect of other statutory privileges which are subject to a similar balancing exercise, the Court must give appropriate weigh 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.
>
> 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.
>
> 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.
>
> In view of the foregoing, I have concluded that the bridge recordings and the transcript thereof should not be disclosed to the parties. [emphasis added]

[106] It is particularly significant that, having listened to the recording and read the transcript, Gauthier J. was satisfied that the bridge recording had little evidentiary value in the case. As well, she rejected the moving party's assertion that the evidence was crucial and not otherwise obtainable.

[107] Finally, in *White Estate v. E & B Helicopters Ltd.* (2008), 78 B.C.L.R. (4th) 131, [2008] B.C.J. No. 31 (Sup. Ct.) the estate of a victim of a fatal helicopter crash sought to compel a TSB investigator to give evidence in the proceedings. Section 32 of the *TSB Act* provides that an investigator is not a competent or compellable witness in any proceedings unless the court "so orders for special cause." In that case, the investigator had dismantled certain parts of the helicopter in the course of his investigation and performed tests on them. The court concluded that as a result of those actions, it was no longer possible to replicate the observations or tests conducted by the investigator. Justice Pitfield noted that the test under section 32, which refers to "special cause," is different from the tests under s. 28(6) and s. 30(5) referred to above and concluded, at paras 20 – 21:

> In assessing whether there is an exceptional or extraordinary reason to declare an investigator competent and compellable, the following questions are relevant:
>
> - How relevant and probative is the evidence which the investigator could provide?
> - Is the evidence available from any other source?
> - Has the party seeking the declaration done all that could reasonably be done in an attempt to obtain the evidence from other sources?
> - Has the party seeking the declaration done, or refrained from doing, something that prevented the evidence sought to be adduced from being available by some other means?
> - Will the integrity of the TSB investigative process be compromised by the declaration?
> - Does the interest in the proper administration of justice outweigh the interest of administrative convenience afforded investigators by rendering them neither competent nor compellable?
> - Is there a serious likelihood of injustice if the evidence is not adduced?
>
> The list is not exhaustive. Other factors may be relevant depending upon the circumstances. In particular circumstances, the answer to any one of

> the questions may be more important than the answer to another. What should be kept in mind, however, is that the privilege accorded the Investigator should not lightly be set aside.

[108] Pitfield J. found that the information that the TSB investigator was able to provide could not be obtained from any other source because there had been a material alternation of the evidence and only the investigator could provide evidence concerning its original state and the tests that had been performed. The plaintiffs had done everything they could to obtain the evidence from other sources. There was no reason to believe that ordering the investigator to testify would compromise the investigative process in the future. Pitfield J. concluded at paras 36 and 37:

> The interest in the proper administration of justice cannot be overlooked. A statutory limitation from which relief is permitted must not be construed in a manner which may adversely affect the search for the truth, wherever and to whatever conclusion the search may lead. Were the Investigator's evidence not admitted, there is a serious likelihood of injustice as the court would be constrained in its ability to determine whether the components to which the observations and tests related played any part in causing the accident, and if so, to whom, if anyone, deficiencies that might be found to have existed should be attributed in the determination of liability. Administrative convenience should not be a consideration where the proper administration of justice is at stake.
>
> Investigative integrity and administrative convenience are laudable objectives but cannot be preserved to the point where the likely result is injustice, whether to plaintiff or defendant. However, in my opinion, preservation of the integrity of the investigative process is assured by applying the principles I have identified.

[109] Against the background of this jurisprudence, I now return to the issues in the case before me.

V. Application of the Test

[110] In order to apply the statutory test in s. 28 of the *TSB Act*, I must first consider the content of the CVR and the circumstances of this case. I must then determine whether, in the circumstances of the case, the public interest in the proper administration of justice outweighs in importance the privilege attached to the on-board recording by virtue of that section. This in turn requires that I consider the meaning and content of the “public interest in the proper administration of justice” and the “importance of the privilege attached to the CVR”. This necessarily involves a balancing of the two interests. If, having engaged in this balancing

process, I determine that production is desirable, I may impose such restrictions and conditions as I deem appropriate.

[111] I begin with the CVR. The statutory requirement that I do so presumably requires that I ensure that its contents are relevant and that there are no irrelevant private communications or disturbing utterances. I have listened to the recording of the CVR, which covers the two hour period prior to the termination of the flight. I have also read and considered the transcript of the recording. The recording, although enhanced for the last 30 minutes of the flight, is not particularly easy for a lay person to follow. However, the transcript provides a useful tool for understanding the recording. The recording and the transcript would be readily comprehensible to an experienced aviation expert or pilot.

[112] The CVR contains no communications of an irrelevant personal nature that would be embarrassing to either of the pilots. Nor are there any utterances made in the agony of impending impact, the publication of which would be unseemly, sensational or an unreasonable infringement on the privacy of the pilots. There are predictable remarks as it becomes apparent to the pilots that the runway is running out, but these are neither surprising nor embarrassing.

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

[114] To this extent, my conclusions about the CVR are very different from those of Gauthier J. in *The Hyde Park*. In that case she observed, as I noted above, that "the bridge recordings and the transcript are of little evidentiary value in this case".

[115] I turn then to the circumstances of this case. First, broadly speaking, the litigation before the court is important and substantial in personal and monetary terms. The inquiry concerns a very serious aviation accident. It has given rise to a class action involving a class of almost 300 people, some of whom suffered serious injuries. There are several other lawsuits that involve claims for hundreds of millions of dollars.

[116] Second, looking at the relative importance of the CVR in the circumstances of the case, some of the fundamental issues before the Court in these actions relate to the crucial period of about 30 minutes from the time that AFR 358 began its descent until it came to a crushing stop in the ravine. The communications between the two pilots during that period will be central to liability and those conversations have been captured "live" on the CVR.

[117] Third, as counsel for the TSB observes, there is a wealth of information from other sources, including the TSB's own report, which will be available to the court and to the parties. The FDR is available as an accurate record of many of the important manoeuvres of the Airbus

during the crucial period. The records of communications with Air Traffic Control will be available. Assuming that they are both able to testify at trial, the two pilots will be able to give evidence about the communications between them. As some of the cases discussed above indicate, the lack of other available evidence will be an important consideration in determining whether the public interest in the administration of justice requires production of the CVR.

[118] The utility of the TSB report lies primarily in its informational value. It is not admissible in evidence as proof of the pilots' conversations or as proof of the content of the CVR. While one might say that it gives all parties knowledge of the facts of the accident, it is simply the TSB's version of the facts, based on the investigation it carried out.

[119] Mr. Pliszka notes that barristers, and perhaps judges, suffer from an obsessive need to get as much evidence as possible. I would qualify this by saying that there is an obsessive need to get as much *reliable* evidence as possible. In this case, there is some concern about the reliability of the pilots' evidence for several reasons. The first officer, who has been examined for discovery, has an imperfect recollection on some of the key events. While there is some debate as to the extent of his recollection, it would hardly be surprising that, more than four years after the event, his memory of those tense thirty minutes would have faded. Lawyers and judges know that people who have been involved in traumatic events frequently have difficulty recalling precisely what transpired before the event and often substitute a recollection of what they routinely do as opposed to what they actually did. Quite apart from that, it is not at all unusual for such witnesses to give a narrative filtered by hindsight, selective memory and wishful thinking. The trial of these matters is clearly a considerable time away. No estimate has been given but I would suspect that a trial is at least two to three years away. Memories will not improve during that time. In contrast to these testimonial shortcomings, the CVR is, quite obviously, highly reliable evidence.

[120] I would note that there is some uncertainty about the availability of the captain to testify, given health issues that appear to be a consequence of the accident. Air France has taken the position that he was not well enough to attend discovery. The Master has recently determined that there is insufficient medical evidence to support his inability to attend discovery and has ordered that his examination proceed. This order has been appealed. While this leaves the capacity of the pilot to give evidence in some doubt, I would not place much weight on this factor.

[121] Finally, and perhaps most significant, it is clear that the CVR has already been used by the TSB to refresh the recollection of the two pilots. This is a perfectly acceptable and obviously successful investigative technique. But it raises questions about the ability of a party to the litigation, and the trier of fact, to rely on the recollection of the pilot without the assistance of the CVR and, equally important, to test the current veracity of the witnesses "refreshed" recollection, without access to the underlying evidence.

[122] This brings me to the next branch of the test: what do we mean by the "public interest in the proper administration of justice?" What is the content of that public interest? How do we

balance the public interest in the proper administration of justice against interests of a different kind and with a different subject matter?

[123] It seems to me that, in this context, the "public interest in the proper administration of justice" refers primarily to the public interest in the fairness of the trial process – a trial in which the party can fairly make out its case and can fairly meet the case of the other party. Counsel for the TSB submits that this means that there is an onus on the moving party to show, with applicable expert evidence, that the available evidence is insufficient to make out its case and that the evidence contained in the CVR is not otherwise available. In the *Hyde Park*, Gauthier J. stated that the court should consider "the possibility of a miscarriage of justice" if the CVR is not released. The same expression has been used in other cases, including by Jenkins J. in *Braun v. Zenair Ltd*., by Sinclair Prowse J. in *Webber v. Canadian Aviation Insurance Managers, Ltd*. and by Sparks, Youth Ct. J. in *R. v. C.W.W.* On the other hand, in *White Estate v. E & B Helicopters Ltd.,* Pitfield J. asked whether there was a "serious likelihood of injustice".

[124] In my view the "insufficient available evidence" test proposed by counsel for the TSB is difficult to apply because the test is almost impossible for a party to meet without access to the CVR itself. How can a party possibly know whether the CVR contains relevant, reliable and necessary evidence when access to it is prohibited? Moreover, the "insufficient available evidence" test overlooks the important question of the reliability and admissibility of evidence. There may be a wealth of evidence, but it may be unreliable for some of the reasons discussed above. The TSB report itself may contain valuable information, but it is of limited evidentiary value because the findings are not binding in civil proceedings by virtue of s. 7(4) of the *TSB Act.*

[125] As well, in my view, the "miscarriage of justice" test is a more stringent test than required by s. 28 and it is a test that is virtually impossible to apply on a prospective basis.

[126] In considering the public interest in the administration of justice, it is worth keeping in mind that it is an interest that extends beyond the immediate interests of the parties. The public interest in the administration of justice includes an interest in the integrity of the judicial fact-finding process and the reliability of the evidence before the court.

[127] There is another aspect of the public interest in the administration of justice that is particularly applicable to class proceedings litigation such as this. Behaviour modification is an important goal of class actions. Just as the TSB serves an important function in exposing shortcomings in the transportation system and making recommendations to correct them, so too the class action identifies the causes of a mass wrong and encourages those responsible to modify their behaviour. It seems to me that there is a public interest in ensuring that the information available to the court, in the performance of this important responsibility, is as complete and reliable as possible.

[128] The last branch of the test is to examine the importance of the privilege attached to an on-board recording by virtue of section 28 of the *TSB Act.*

[129] As a starting point, it seems to me that the section 28 privilege for on-board recordings is slightly different from the section 30 privilege attaching to statements. While both are motivated by an overall desire to promote aviation safety through effective accident investigation, the purpose of the privilege attached to statements under s. 30 is to encourage witnesses to be co-operative and forthcoming with TSB investigators, secure in the confidentiality of their evidence. As the Review Commission of which Justice Gauthier was a member pointed out: the "confidentiality" assurance is largely illusory and the information provided by witnesses invariably finds its way into TSB reports.

[130] In contrast, the section 28 privilege has two purposes. The first, as pointed out by the report of the Dubin Commission, is to protect the pilots' privacy, which has been infringed by the intrusion of the CVR into their workplace – an intrusion they have accepted in the interests of aviation safety. The second is to encourage free and uninhibited communications between the pilots.

[131] On the subject of privacy, and to deal with an obvious concern, it is difficult to imagine that anyone would demand, still less order, production of purely personal communications, made outside critical time periods that are irrelevant to the issues in the case. This is presumably one of the reasons the Dubin Commission recommended, and the statute provides, a judicial vetting of the CVR. As I have pointed out earlier, Air France' sterile cockpit policy would prohibit non-operational communications during the descent in any event.

[132] For the same reason, the judicial examination process would screen out any irrelevant exclamations in the agony of impending impact. I repeat that there are no such communications in this case.

[133] The more substantial concern is the pilots' general interest in privacy. In my view, the concern is largely illusory for the reasons identified in the report of the *TSB Act* Review Commission. Much of the content of the communications between the pilots has already been disclosed in the report of the TSB which, although not quoting the conversations verbatim, has given its own summary of them. The pilots' privacy has already been infringed by the disclosure in the TSB report of the substance of their communications and conversations. This report has been publicly released and posted on the TSB web site. I fail to see how the disclosure of the actual conversations, to the parties to this litigation, for use only in this litigation and subject to a confidentiality order, could be a more serious invasion of the pilots' privacy than the public disclosure of the report itself. As well, the privacy concern is generally illusory because, in at least some jurisdictions, the CVR transcript is included in the report of the investigating authority and in others it is routinely published. Thus, in both the particular sense and the general sense, the pilots' privacy has already been infringed.

[134] The second reason for the privilege attached to on-board recordings is the desire to encourage open and timely communications between aircraft flight crew – counsel for the TSB suggests that the disclosure of CVRs would have a chilling effect on communication that would ultimately impair safety because pilots would limit their communications due to the electronic "fly on the wall".

[135] As I stated above, I have great difficulty in accepting that the disclosure of the CVR in this case would have a "chilling" effect on communications between pilots. This argument carried no weight with the Dubin Commission, which concluded that the CVR could be released by the court, in appropriate cases, without impairing aviation safety. As I have noted, the transcripts are released as a matter of course in some countries. The Review Panel has recommended that the TSB be permitted to disclose the CVR record in its reports. The suggestion of a chilling effect has no evidentiary basis and is nothing more than speculation.

[136] The public places a great deal of trust in pilots. I am certain that pilots take this responsibility very seriously indeed and that they deserve the public's trust. I cannot imagine that pilots would curtain critical communications, endangering their own safety and the safety of their passengers, simply because those communications might be disclosed in some future legal proceedings in the event of an accident.

[137] Nor do I accept that in the circumstances of this case the release of the CVR would damage the relationship between the pilots and their employer. There are no disciplinary proceedings pending and the CVR could not be used in such proceedings in any event.

[138] I have concluded that this is a case in which the public interest in the administration of justice outweighs the importance attached to the statutory privilege. Simply by way of summary, and without being exhaustive, the factors that I have considered in this case, which to some extent expands those considered by Gauthier J. in *The "Hyde Park,"* are as follows:

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

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

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

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

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

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

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

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

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

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

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

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

[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. If the parties can agree on a draft order, it shall be submitted to me for approval. If the parties are unable to agree, submissions may be made in writing or a hearing may be convened.

[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.

[141] If the parties are unable to agree on the costs of the motion, written submissions may be addressed to me in care of Judges' Administration.

G.R. Strathy J.

DATE: December 9, 2009