

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Jetport Inc. v. Global Aerospace Underwriting Managers et al. (CV-08-357295)

BEFORE: MASTER GRAHAM

HEARD: October 23, 2014

COUNSEL: S. Svonkin and M. Bookman for the plaintiff

R. Bell, R. Fenn, R. Rohmer and S. Jones for the defendants (moving parties)

B. Dawe for the Transportation Safety Board (non-party)

REASONS FOR DECISION

(Motion by Global Aerospace under rule 30.10 for production of TSB documents)

[1] On November 11, 2007 a Bombardier Global 5000 aircraft owned by the plaintiff Jetport Inc. flew from Hamilton, Ontario to Fox Harbour, Nova Scotia where it crashed on landing, resulting in injuries to some of the occupants and the destruction of the aircraft. The plaintiff has sued Global Aerospace Underwriting Managers, which is the manager for a pool of aviation insurers, and the insurers themselves, following the denial by those insurers of Jetport's first party insurance claim arising from the crash. There are also related actions involving Jones Brown Inc. which was Jetport's insurance broker. The basis for the insurers' denial of the claim is that the pilot in command of the aircraft at the time of the loss did not meet the insurance policy's requirements for previous flying time on an aircraft of that make and model.

[2] The defendants move under rule 30.10 and sections 28(6) and 30(5) of the *Canadian Transportation Accident Investigation and Safety Board Act, S.C. 1989, c. 3* to compel production of documents from the Transportation Safety Board ("TSB").

[3] The documents for which the defendants seek the order are set out in the notice of motion. At the conclusion of the hearing the defendants' counsel initially informed the court that he was seeking production of the documents at items (a), (b), (c), (e), (f) and (g) in the notice of motion. However, as it is clear from the issues argued that the defendants are also seeking production of the audio data from the aircraft's Cockpit Voice Recorder ("CVR") and the data from the Flight Data Recorder ("FDR"), I will also rule on items (j) and (k) in the notice of motion. The notice of motion also includes at item (h) "representations" from the plaintiff and various employees to the TSB. For the reasons set out below, the court with one exception cannot order production of TSB documents that fall into the category of "representations".

[4] Rule 30.10 is as follows:

30.10(1) 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.

...

(3) Where privilege is claimed for a document referred to in subrule (1), or where the court is uncertain of the relevance of or necessity for discovery of the document, the court may inspect the document to determine the issue.

[5] In *Ontario (Attorney General) v. Stavro*, [1995] O.J. 3136 (C.A.) at paragraph 15, the court set the following guidelines for the granting of an order under rule 30.10:

15 In deciding whether to order production in the circumstances of this case, the factors to be considered by the motion judge should include:

- the importance of the documents in the litigation;
- whether production at the discovery stage of the process as opposed to production at trial is necessary to avoid unfairness to the appellant;
- whether the discovery of the defendants with respect to the issues to which the documents are relevant is adequate and if not, whether responsibility for that inadequacy rests with the defendants;
- the position of the non-parties with respect to production;
- the availability of the documents or their informational equivalent from some other source which is accessible to the moving parties;
- the relationship of the non-parties from whom production is sought, to the litigation and the parties to the litigation. Non-parties who have an interest in the subject-matter of the litigation and whose interests are allied with the party opposing production should be more susceptible to a production order than a true "stranger" to the litigation.

[6] Because the documents sought are in the possession of the TSB, the following sections of the *Canadian Transportation Accident Investigation and Safety Board Act*, S.C. 1989, c. 3 ("the *TSB Act*") are also applicable:

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

(2) Before making public a report under subsection (1), the Board shall, on a confidential basis, send a copy of the ***draft report*** on its findings and any safety deficiencies that it has identified to each Minister and any other person who, in the opinion of the Board, has a direct interest in the findings of the Board, and shall give that Minister or other person a reasonable opportunity to make ***representations to the Board with respect to the draft report*** before the final report is prepared.

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

(4) The Board shall

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

(b) keep a record of those representations;

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

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

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

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

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

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

...

28. (1) In this section, “*on-board recording*” means the whole or any part of

(a) a recording of voice communications originating from, or received on or in,

(i) the flight deck of an aircraft, . . . or

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

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

(2) *Every on-board recording is privileged and, except as provided by this section, no person, including any person to whom access is provided under this section, shall*

(a) knowingly communicate an on-board recording or permit it to be communicated to any person; or

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

(3) Any on-board recording that relates to a transportation occurrence being investigated under this Act shall be released to an investigator who requests it for the purposes of the investigation.

(4) The Board may make such use of any on-board recording obtained under this Act as it considers necessary in the interests of transportation safety, but, subject to subsection (5), shall not knowingly communicate or permit to be communicated to anyone any portion thereof that is unrelated to the causes or contributing factors of the transportation occurrence under investigation or to the identification of safety deficiencies.

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

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

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

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

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

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

(b) in camera, examine the on-board 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.

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

...

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

(a) "***statement***" means

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

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

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

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

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

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

(4) The Board shall make statements available to

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

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

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

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

(a) ***in camera, examine the statement;*** and

(b) ***if the court or coroner concludes in the circumstances of the case that the public interest in the proper administration of justice outweighs in importance the privilege attached to the statement by virtue of this section, order the production and discovery of the statement,*** subject to

such restrictions or conditions as the court or coroner deems appropriate, and may require any person to give evidence that relates to the statement.

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

[emphasis added throughout]

[7] The plaintiff, in opposing the motion, relies on *Morse Shoe (Canada) Ltd. v. Zellers Inc.*, [1997] O.J. No. 1524 (C.A.) at paragraph 18, where the court states as follows:

18 Even though delay is not specifically mentioned in rule 30.10, obviously it should be considered where relevant.

[8] The plaintiff submits that the defendants have unduly delayed bringing this motion and therefore should not be permitted to do so. Specifically, the defendants have been aware since a letter dated November 18, 2011 from the TSB to the defendants' counsel that the TSB was asserting privilege over the documents in question and failed to bring this motion until more than two years later. Plaintiff's counsel submits that the appropriate procedure at this point would be for the defendants to serve a summons to witness on the TSB to have the documents in question brought to trial and any issues of privilege can be addressed then.

[9] Although the defendants could have brought this motion earlier, the examination for discovery of Jetport was not completed until January, 2014. The defendants' record for this motion was served on March 7, 2014 when the action was still at the discovery stage. The subsequent delay in the motion being argued arises from various interlocutory motions within the rule 30.10 production motion, relating primarily to whether various cross-examinations should take place. Any delay in bringing the motion is not so egregious as to be a basis for precluding it. It is preferable to have the privilege issues addressed before trial so that the parties have the benefit of reviewing any privileged documents that may be ordered produced for the purpose of trial preparation. The motion may proceed.

[10] There are essentially four categories of documents sought on this motion, as follows:

- (1) The cockpit voice recording (CVR") and the transcript of the recording;
- (2) Statements given to the TSB in its investigation of the accident;

- (3) Representations made to the TSB in respect of its draft report as contained in the material provided to Global's counsel in error;
- (4) The data contained in the subject aircraft's Flight Data Recorder ("FDR").

[11] The main issue with respect to the bulk of these documents is whether they should be excluded from production on the basis of the privilege conferred by ss. 24(4.1), 28(2) and 30(2) of the *TSB Act*. Counsel for the defendants submit that the privilege issues have already been determined by Greer J. in her ruling on an appeal from one of my production orders, reported at [2013] O.J. No. 4883, as follows:

33 In the case at bar, the Master held that the Refusals, as earlier noted, must be answered *in relation to the TSB Draft Report*. The issue of privilege was not before him but even if it had been, in my view, he came to the proper conclusion in making the Orders he did. *The public interest in the administration of justice outweighs the importance attached to the statutory privilege now claimed*. The Draft Report is, in my view, a vital document in assisting the Court to know what position Jetport's witnesses took on all matters relating to the accident. See: paras. 20-23 and 29 of the Court of Appeal decision in *NAV Canada et al.*, supra. [emphasis added]

[12] Counsel for the defendants argues that Greer J.'s decision creates an issue estoppel that precludes the plaintiff from re-arguing the privilege issue with respect to any of the documents, including the CVR, statements and representations to the TSB and the FDR. As counsel should be aware, I already addressed this argument in my endorsement of June 20, 2014 in which I dismissed the defendants' motion to strike a notice served by Jetport to cross-examine the defendants' deponent Mr. Floyd on this motion.

[13] As I stated in my ruling, Greer J.'s decision related only to the issue of production of the TSB draft report. There has been no previous ruling on the issue of whether or not any of the documents currently under consideration should be produced notwithstanding the various statutory privileges. In addition, the TSB, which is the non-party from which production is sought on this motion, was not a party to the motion before me or the appeal before Greer J. so it cannot be bound by any previous ruling. The defendants' submission that the privilege issues cannot be argued on the basis of issue estoppel fails.

[14] My rulings with respect to the requested production of documents in each category are as follows:

Cockpit Voice Recording and transcript (TSB Act s. 28)

[15] The court has jurisdiction to rule on the production of the CVR and transcript under both rule 30.10 and s. 28 of the *TSB Act*. The appropriate considerations on this motion were reviewed in *Société Air France v. Greater Toronto Airports Authority et al.*, 2009 CanLII 69321 (“*Air France*”) in which the court heard a motion by NAV Canada for production of the CVR from an Air France aircraft that crashed at Toronto’s Pearson International Airport on August 2, 2005. At paragraphs 78 and 79 of the decision, Strathy J. (as he then was) stated:

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) [sic]. 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).***” ...

[The reference to rule 30.01 in these paragraphs is clearly a typographical error and the court’s intention must have been to refer to rule 30.10 throughout.]

[16] The TSB has informed Jetport in correspondence of October 14, 2009 that it will not provide it with the CVR. The TSB provided for the court’s review seven CDs including a transcript of the subject aircraft’s CVR for the 30 minutes prior to the accident, four different recordings from four different CVR channels for the 30 minutes prior to the accident and two recordings from two different CVR channels for the two hours prior to the accident. As required by s. 28(6)(b) of the *TSB Act*, I have examined the “on-board recordings” *in camera*. Counsel for the TSB made representations with respect to the production of the on-board recordings during submissions on the motion and did not ask for the opportunity to make any further representations following my examination of the recordings.

[17] The issue under s. 28(6)© of the *TSB Act* is 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”. The court’s decision as to whether to override the statutory privilege in an on-board recording turns on its balancing of the relative importance of these competing interests in the circumstances of the particular case (See *Air France*, paragraph 81). In addition, if the court determines that the CVR should be produced, it may impose such restrictions and conditions as deemed appropriate (See *Air France*, paragraph 110).

[18] The main issues to be decided at trial include the pre-accident flying time of the plaintiff's pilots on the make and model of aircraft involved in the accident and whether flying time in a flight simulator can properly be credited as flying time on the make and model of aircraft. On a previous motion for productions, I ruled that "the conditions that existed at the time of the accident, and the manner in which the accident occurred, could reasonably influence the trial judge's decision as to whether the required 100 hours [of flying experience on the make and model of aircraft] does or does not include 'simulator time'". This decision was upheld on appeal by Greer J. in the decision referred to at paragraph [11] above. Accordingly, evidence as to the manner in which the accident occurred is also relevant for the purpose of this motion.

[19] The CVR for the 30 minutes before the accident contains the pilots' communications with each other and occasionally with people on the ground about the aircraft itself, the weather conditions, their response to the weather conditions and their plan for landing the aircraft. All of these communications are relevant to the issue of how the accident occurred.

[20] In addition, addressing concerns raised by Strathy J. with respect to the pilots' privacy interests in the CVR, my review of the CVR reveals that, although some of the exchanges between the pilots consist of banter between colleagues, it does not contain any conversations of a personal nature that would be embarrassing to either of the pilots. Further, there are no "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" (See *Air France*, paragraph 112).

[21] I accept that a policy of the *TSB Act* is that those participating in the investigation of what that statute refers to as "transportation occurrences" should be able to function without fear that their communications might be used against them in related litigation. However, I also accept the comments of Strathy J. in *Air France* at paragraphs 72, 135 and 136:

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. . . .

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. . . .

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 curtail [sic] 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.

[22] The "public interest in the proper administration of justice", being the consideration that the court must balance against the importance of the privilege, is the public interest in the fairness of the trial process, which requires that the court have access to such relevant, probative and reliable evidence as is available. The action, which arises out of an accident that occurred in November, 2007, is scheduled to be tried in May, 2015, seven years and six months after the event. The recollection of the pilots as to what transpired in the period of time leading up to the accident will surely have faded and the inevitable deficiencies in human memory can easily be mitigated by the availability of the recording.

[23] If the privilege attaching to the CVR in this case is overridden on this motion, the only harm is that the pilots' communications will be disclosed to the parties to the lawsuit and to their counsel. However, the pilots' conduct has already been subject to the scrutiny of the TSB, which has prepared a report that has been released to the public so their privacy interests have already been infringed to some extent simply by the TSB investigation process. I adopt Strathy J.'s comments to the effect that it is highly unlikely that ordering production of the CVR in this case would inhibit communication between pilots or adversely affect aviation safety. However, to deny production of the CVR would compromise the integrity of the trial process by preventing access to a very relevant and reliable piece of evidence. Refusing production would cause the greater harm and accordingly, I hereby order that the CVR be produced, subject to a confidentiality order.

Statements given to the TSB in its investigation of the accident (TSB Act s. 30)

[24] The language of s. 30(5) of the *TSB Act*, relating to statements, is sufficiently similar to s. 28, relating to on-board recordings (i.e. the CVR), that if the moving party meets the requirements of s. 30, it will also meet the requirements of rule 30.10.

[25] As with the CVR, counsel for the TSB has given me various statements to review. The issue with respect to each statement provided is identical to the

issue with the CVR: whether the public interest in the proper administration of justice outweighs in importance the privilege attached to the statements.

[26] The TSB has provided six packages of documents containing information from Roger Adair (one of the pilots of the subject aircraft), Dwayne Johnston (described as the first officer), Peter Phillips (one of the passengers), Tim Armstrong (the president of Jetport and also a passenger), Mike Charters (Jetport's director of maintenance) and Dean Kent (Jetport's former operations manager). There is a seventh package containing "Passenger Seating Information" and interview information for four more passengers on the aircraft.

1. Roger Adair documents

The **statement from Roger Adair** was given to two TSB investigators on **November 19, 2007**. It consists primarily of his description of the flight, his information as to the weather and runway conditions at Fox Harbour and his actions while landing the aircraft.

A pilot's statement to the TSB about how an accident occurred, the purpose of which is to assist the TSB in improving aviation safety, requires complete candour from the pilot, which is why the privilege was created. There is a significant difference between the CVR, which I have ordered be produced, and Mr. Adair's statement. Mr. Adair's communications recorded on the CVR arose during the course of his duties as a pilot and the CVR is essentially in the nature of a business record. I accept, as did Strathy J. in *Air France*, that a pilot's communications as recorded on the CVR constitute a spontaneous, unfiltered and contemporaneous record of what transpired in the aircraft cockpit in the period immediately preceding the accident. When giving a statement to a TSB investigator, the pilot has had an opportunity to reflect on his or her actions and, with a view to the ultimate goal of safer aviation, should be able to provide the statement without fear of collateral repercussions. If the court were to override the privilege attached to Mr. Adair's statement, the privilege would be meaningless and aviation safety could be compromised. The privilege on this statement is upheld.

Roger Adair's email of December 4, 2007 attaches a list of six of the passengers on the subject flight and their telephone numbers. This constitutes information with respect to witnesses under rule 31.06(2) and shall be produced.

Yves Jolicoeur's email of December 10, 2007 relates to arranging for Adair and Armstrong to see the "animation". It is not relevant.

Roger Adair's letter of December 10, 2007 attaches a certification of his flying experience based on his pilot's log and other documents. Although the letter constitutes a statement, it relates to factual information about his flying experience. The letter and the attachments are highly relevant and their disclosure would not compromise aviation safety; they shall be produced.

The **Interview Summaries** of an **interview with Roger Adair conducted on December 12-13, 2007**, consist of a more detailed account from Adair of the circumstances of the accident and also contain some information with respect to proposed improvements to the landing area at Fox Harbour. The privilege is upheld for the same reason given regarding the November 19, 2007 statement.

The **Investigator notes from a phone conversation with Roger Adair on January 9, 2008** relate to actions that Jetport planned to take to increase the safety of flights into Fox Harbour. The privilege is upheld.

The **email dated January 18, 2008 from Roger Adair to Yves Jolicoeur** relates to Adair's "flight times and simulator times". The document is highly relevant to a critical issue in the action and its release would not compromise aviation safety. It shall be produced.

The **email dated March 14, 2008 from Roger Adair to Yves Jolicoeur** relates to which of Adair and Johnstone was the Pilot in Command on the flight in question. It shall be produced for the same reason as the January 18, 2008 email.

The **email dated April 7, 2008** from Roger Adair contains information about the number of employees at the Hamilton Jetport facility and various courses taken by staff in various positions. It is not relevant.

The **"Summary Report Roger Adair"** consists of a spreadsheet of his flight duty and flight time from June 1 to November 11, 2007. It does not constitute a statement which would be covered by privilege. However, it makes no reference to the make and model of aircraft flown on each occasion and is therefore not relevant to issues in the action.

Roger Adair's medical certificate and pilot's license are relevant to his qualification to fly on the day of the accident and shall be produced.

Roger Adair's pilot logbook identifies the aircraft flown on each occasion recorded and is relevant and not privileged. It shall be produced.

Jetport's planned flight duty times are not relevant.

Jetport's actual flight duty times show when Roger Adair and Wayne Johnston were on duty but do not indicate the aircraft flown. This is not relevant.

Roger Adair's certificate of medical status, license status and pilot proficiency check dated June 29, 2007 are all relevant to his qualifications to fly and shall be produced.

2. Dwayne Johnstone documents

Dwayne Johnstone's interview summary from his interview conducted on December 5, 2007 consists of his description of the accident including the weather conditions, the action taken by Adair in flying the aircraft and the aftermath of the accident. The privilege with respect to this statement is upheld for the same reasons as for the statements of Roger Adair.

The **interview summary of Dwayne Johnstone's statement given December 12, 2007** is based on Johnstone's review of the automation [sic; animation?] derived from the FDR data. It contains his comments with respect to the animation. The privilege with respect to this statement is upheld for the same reasons as given for the Adair statements and the previous Johnstone document.

Dwayne Johnstone's letter of December 10, 2007 is relevant to his flying experience. The privilege is overridden for the same reason given for the Adair letter of December 10, 2007. The attached copy of **Johnstone's pilot's log** is both relevant and not privileged and shall be produced.

The **"Summary Report Dwayne Johnstone"** consists of a spreadsheet of his flight duty and flight time from June 1 to November 11, 2007. As with the similar report for Adair, it does not constitute a statement which would be covered by privilege but as it makes no reference to the make and model of aircraft flown on each occasion it is also not relevant to issues in the action.

Johnstone's medical certificate and license are relevant to his qualifications as a pilot and shall be produced.

Johnstone's training record, pilot logbook, pilot proficiency check, license status and medical status are all non-privileged documents that are relevant to his qualifications as a pilot and shall be produced.

3. Peter Phillips documents

The **interview summary dated November 15, 2007** includes Phillips' description of the accident which is relevant to the issue of the manner in which the accident occurred. Although Phillips was a passenger and not a pilot, he is an employee of Jetport. For the purpose of the TSB's mandate to enhance aviation safety, a witness in his position should be able to give a candid statement regarding an accident without concern for any possible consequence to his employer. Accordingly, the privilege attaching to the statement is upheld.

The **email dated December 5, 2007 from the TSB investigator and Phillips' reply of December 13, 2007** are not relevant to the issues in the action and there is no reason to override the privilege.

4. Tim Armstrong documents

The **interview notes** from the investigator's interview with Armstrong include his description of how the accident occurred. As Armstrong was the president of Jetport at the time, for the purpose of the TSB's mandate to enhance aviation safety he should be able to give a candid statement without concern for any possible consequence to his company. The privilege in this statement is therefore upheld.

The **email communications between Yves Jolicoeur and Armstrong dated November 22 and 23, 2007** include no relevant information.

The **email communications between Roy Bears (TSB investigator) and Armstrong dated December 5 and 12, 2007** include no relevant information.

The **correspondence dated November 26, 2007 from the TSB to Transport Canada**, a copy of which was sent to Armstrong, includes a description of the accident and the runway and comments with respect to the correct approach path to the runway. It is relevant and not privileged and shall be produced.

The **correspondence dated April 1, 2008 from the TSB to Transport Canada**, a copy of which was sent to Armstrong, addresses the flight crew's familiarity with the Fox Harbour aerodrome and the aircraft in question and the suitability of the runway for the aircraft. It is relevant and not privileged and shall be produced.

The **second correspondence dated April 1, 2008 from the TSB to Transport Canada**, and **correspondence dated April 4, 2008 from the TSB to Transport Canada**, copies of which were sent to Armstrong,

addresses “eye-to-wheel height information” in relation to the approach path into Fox Harbour and the capabilities of the aircraft in question. These are relevant and not privileged and shall be produced.

The **email dated August 12, 2010 from Yves Jolicoeur** responding to a request from Armstrong to forward the manuals from the Global 5000 aircraft involved in the accident and the **letters from the TSB to Armstrong dated December 1 and 13, 2011 with respect to Access to Information requests** are not relevant and need not be produced.

5. Mike Charters documents

The package contains 26 documents most of which are copies of emails between the TSB investigators and Charters requesting records for the surveying of the airfield, the airfield’s approach path system and the manuals used by Jetport and advising of the status of the TSB investigation. None of them are relevant to the issues in the action. There is also a memorandum with respect to the return to Mr. Jolicoeur of two aircraft parts, an accelerometer and acceleration switch, which is also not relevant.

6. Dean Kent documents

Two of the documents are emails between Kent and Yves Jolicoeur, which are not relevant.

The **interview summary of an interview conducted on April 26, 2008** indicates that Kent, who was formerly Jetport’s operations manager, was currently working as a pilot flying for the Bank of Nova Scotia. He left Jetport after the accident at Fox Harbour and before the statement was given. The summary of his statement addresses Jetport’s acquisition of the Global 5000 aircraft and Jetport’s approach to aviation safety concerns and pilot training. It is clearly relevant to the issues in the action. The issue is whether overriding the privilege attached to this statement would compromise the TSB’s mandate to improve aviation safety.

The fact that Kent was no longer an employee of Jetport at the time that he gave the statement casts it in a different light than those of Phillips and Armstrong reviewed above. There is no concern that but for the privilege, he would have been less forthcoming in providing information owing to a fear that full disclosure might adversely affect his employer. Accordingly, the policy reason for the privilege, being the integrity of the TSB investigation for the purpose of improving aviation safety, would not be compromised by the statement’s disclosure. This document shall be produced.

The remaining document consists of **two pages of handwritten interview notes** which an accompanying document indicates are dated April 26, 2008. The first seven lines of the notes refer to questions for another witness "Jason", whose statement was not included in the material provided to the court by the TSB. The balance of the notes are with respect to the statement taken from Kent, as indicated both by the accompanying document and by the fact that their content corresponds with the summary of the interview reviewed above. These notes shall be produced for the same reason as the interview summary.

7. Passenger seating information and information from four passengers

The **passenger seating information** indicates the seating positions and the weights of the passengers in the aircraft and whether they were wearing lap belts or lap and shoulder belts. The information is not relevant to the issues in the action.

The documents from the passenger **Steven Joyce** consist of a handwritten statement taken November 11, 2007 and two emails between himself and TSB investigator Roy Bears. In his statement, he describes where he and the other passengers were sitting in the aircraft. He describes the approach to the runway and the movement of the aircraft and impact on landing. The description of the accident, while not detailed, is relevant to how the accident occurred. However, if the assumption that Steven Joyce is related to Ron Joyce is correct, then the privilege should not be overridden for the same reason that the privilege attaching to the statements of Phillips and Armstrong was not overridden.

The two emails relate only to where Steven Joyce was sitting, his weight, whether he was belted, whether he was wearing footwear and whether there were safety briefings before or during the flight. These matters are not relevant to the issues in the action.

The documents from the passenger **David Wagstaff** include notes taken during an audio tape interview on November 12, 2007 and emails between TSB investigator Bears and Wagstaff with respect to the same questions asked in Bears' emails with Steven Joyce. The emails are not relevant.

The notes of the interview with Wagstaff reflect the weather at the time of the landing, the landing itself and the steps taken after the landing. Accordingly, the content of the notes would be relevant, but would be privileged. Although the notes do not specifically identify Wagstaff's position it does appear from his knowledge of the pilots that he has some association with Jetport. On this basis, the privilege should not be

overridden for the same reason stated above in relation to other Jetport employees.

The balance of the documents consist of email communications between the TSB investigator Roy Bears and two other passengers with respect to the same information requested of Joyce and Wagstaff as to seating position, weight, use of seatbelts, footwear and safety briefings. As indicated above, this information is not relevant to the issues in the action.

Representations made to the TSB in respect of its draft report (*TSB Act* s. 24) and other documents provided by the TSB to Global's counsel

[27] The representations in question were produced by the TSB to the defendant Global's counsel on a CD accompanied by a letter dated September 16, 2011. Mr. Harding, senior legal counsel at the TSB, subsequently communicated with Global's counsel Mr. Fenn, first by telephone on November 4, 2011 and then by letter dated November 18, 2011. The gist of these communications from Mr. Harding was that the CD inadvertently contained "sensitive privileged information, e.g. witness statements and representations made by persons with a direct interest in the findings of the TSB in the TSB draft report #A07A0134". Mr. Harding provided an itemized list of the documents in question and requested that Mr. Fenn "treat this information in a confidential manner and as such refrain from disclosing it to anyone or making copies thereof".

[28] The *TSB Act*, s. 24(1) provides for the preparation by the TSB of a report to be made available to the public on completion of any investigation of a transportation occurrence. Before making the report public, the TSB shall, on a confidential basis, send copies of its draft report to each Minister and any other person with a direct interest in its findings and give all recipients the opportunity to make "representations" with respect to the draft report before the final report is prepared (s. 24(2)).

[29] The *Act* significantly limits the use of "representations" beyond the preparation of the TSB's final report. Representations are privileged, except for one made by a minister responsible for a department having a direct interest in the findings of the TSB (s. 24(4.1)). The TSB itself may use representations in the interests of transportation safety (s. 24(4.2)). Otherwise, representations can only be made available to a coroner (s. 24(4.3)) and except for use by a coroner, "no person shall use representations in any legal, disciplinary or other proceedings" (s. 24(4.4)).

[30] The language of the *TSB Act* clearly states that representations by anyone other than a Minister responsible for a department can only be used by the TSB

for the purpose of transportation safety and by a coroner. Otherwise representations are privileged and may not be used in any other legal proceedings. Unlike ss. 28(6) and 30(5) of the *Act*, which provide for the review by a court of privileged “on-board recordings” (e.g. CVRs) and “statements” to the TSB or an investigator to determine whether the public interest in the proper administration of justice outweighs the privilege, s. 24 does not allow for any such review.

[31] Parliament has jurisdiction to create a statutory privilege and the *TSB Act* s. 24(4.1) does so in regard to representations made to the TSB in response to its draft report. The *Act* contains no provision similar to ss. 28(6) and 30(5) authorizing the court to determine whether the privilege may be overridden. There is therefore no basis on which the court could nullify the privilege with respect to representations.

[32] Counsel for the Global defendants provided the court with a package containing those documents listed in Mr. Harding’s letter of November 18, 2011 referred to above. My rulings with respect to whether or not each of these documents is privileged are as follows:

1. Representations on behalf of Transport Canada.

These constitute a submission by a Minister responsible for a department having a direct interest in the findings of the Board, which is a specified exception to the privilege in s. 24(4.1) of the *TSB Act*. The privilege therefore does not apply. However, the representations reproduced include Transport Canada’s comments on the scope of the TSB’s regulatory function which are not relevant. There are also representations regarding clarification of the standards used by the TSB to determine LFL (landing field length). The comments with respect to LFL led to amendments in the final report but the representations themselves are not relevant.

2. Representations on behalf of Canadian Business Aviation Association, Jetport Inc., Dwayne Johnstone and Bombardier.

These consist of the TSB’s response to representations from these three entities and Mr. Johnstone. The responses, which summarize the representations, are also privileged. I note that the TSB’s response to the representation of Jetport was produced with a letter from Jetport’s counsel dated January 13, 2014.

3. Letter dated April 16, 2009 from Timothy Armstrong, President of Jetport Investments to Wendy Tadros, TSB Chair.

This letter consists of comments on the TSB draft report and in substance is a representation and therefore privileged. However, it was produced by Jetport with counsel's letter of January 13, 2014.

4. GEX 5000 9211 Cockpit Observations.

These are characterized as "representations from Bombardier" in the November 18, 2011 letter. It contains a note that the contents of the document consist of observations noted during the post accident inspection by Bombardier Air Safety. The position of the aircraft's controls at the time of the accident is relevant. There is nothing to indicate that the inspection was for the purpose of making representations regarding the TSB's draft report; accordingly, it is not a representation and therefore is not privileged.

5. Yves Jolicoeur, Investigator Field Notes dated January 17, 2008.

These notes are characterized as "representations from witness". Given that the notes pre-date the draft report, which was dated February 4, 2009, they cannot be representations that would be protected under s. 24(4.1). The document consists of notes of a telephone conversation with an individual whose name has been redacted and would constitute a privileged statement under s. 30 of the *TSB Act*. The identity of the individual, a Transport Canada employee could likely be determined from the description of his position.

The issue is whether the public interest in the proper administration of justice outweighs in importance the privilege attached to the statement under s. 30 of the *TSB Act*. The information in the document relates to various measurements taken to determine the approach path that a pilot should take when landing at Fox Harbour. It therefore does relate to the manner in which the accident occurred and is therefore relevant. The source of the information would have no concern about liability being found against him or his employer and disclosure of the document would not compromise aviation safety. The document is hereby ordered produced despite the privilege.

6. Notes of Yves Jolicoeur dated January 9, 2008.

These notes of a telephone conversation are characterized as a statement rather than a representation and given the date, they cannot be a representation with respect to the draft TSB report. The name of the individual interviewed is redacted but could be identified from the description of his position. The notes relate to Jetport's review of the accident. As some of the notes relate to the experience required by pilots flying for Jetport into Fox Harbour, they are relevant.

The issue is whether the public interest in the proper administration of justice outweighs in importance the privilege attached to the statement under s. 30 of the *TSB Act*. The statement contains information relating to the issue of pilot experience which would be of assistance to the trial judge in resolving the issues in the action. However, it also contains proposed changes to be made by Jetport in respect of future flights into Fox Harbour. The purpose of the privilege is to ensure that witnesses giving statements will not be inhibited by the prospect of legal liability when assisting with an investigation intended to improve transportation safety. To order production would be contrary to the intention of the *TSB Act* as a whole and could compromise aviation safety by discouraging aircraft operators from proposing changes that would make aviation safer. The privilege is upheld.

7. Eight handwritten pages of notes characterized as “witness statement”.

These consist partly of proposed questions to be asked during the course of the investigation and partly of notes of information obtained during the course of interviews. The individuals interviewed are not identified by name.

Page 12006 contains notes relating to the structure of some sort of transportation agency and has nothing to do with issues in the action. It need not be produced.

Pages 12007 and 12008 appear to be notes from an interview with someone whose name has been redacted but who was familiar with the internal operations of Jetport. These notes refer to Roger Adair’s pilot experience and the training that was and was not made available to him; accordingly they are relevant. The information contained in the notes relates to the state of affairs that existed before the accident, as opposed to steps taken at the time of or after the accident, and their disclosure would not compromise aviation safety. The importance of the notes to a fair trial outweighs the privilege. These notes shall be produced.

Page 12009 seems to consist of notes of the investigator’s travel plans, are not relevant and need not be produced.

Pages 12010 and 12011 include only a list of questions or lines of enquiry but do not appear to contain any information from any witness. They are not relevant.

Page 12012 contains what appears to be a list of topics for inquiry or discussion but no information from witnesses. It is not relevant.

Page 12013 contains notes of two questions and a series of answers but there is nothing to show who provided the answers. The first question relates to steps taken to manage risk on the day of the flight and one of the answers reflects the identity of “PF” (pilot flying), which is an issue in the action. This evidence alone is of sufficient importance to the fairness of the trial and by extension the proper administration of justice to outweigh the privilege. This page shall be produced.

8. Typed page titled “Safety Issues” also containing handwritten notes but characterized by TSB as “witness statement”.

This document appears to consist of a summary of the investigator’s findings rather than statements from any specified individual, although some of the contents would plausibly have come from statements taken by the investigator. The findings relate to crew experience, weather and other environmental conditions at the time of the accident and the information available to the flight crew regarding the accident location. The contents are directly relevant to the issue of pilot experience and whether pilot experience was a factor in how the accident occurred. Unlike the contents of the document at item 6 above, this document does not contain changes proposed by Jetport arising out of the accident. As the document consists of facts reflecting the state of affairs at the time of the accident which relate directly to the issues in the action, their disclosure would not compromise aviation safety. Accordingly, the public interest in the proper administration of justice outweighs the privilege. This document shall be produced.

9. Handwritten page of “employee names”.

This is neither a representation nor a statement but simply a handwritten list of names with some other partially illegible notes. It is not privileged. However, there is nothing in the document that is relevant. It need not be produced.

10. Technical diagram for Bombardier Global 5000.

Mr. Harding’s letter describes this as proprietary information. However, the document states that it is part of an aircraft maintenance manual so there is no basis for it being privileged. However it is not relevant to issues in the action and need not be produced.

Flight Data Recorder

[33] The court has already determined that the manner in which the accident occurred is relevant. Section 28 of the *TSB Act* relates to “on-board recordings” including voice communications (in this case the CVR) and video recordings.

This section does not apply to the Flight Data Recorder and there is nothing in the *Act* that makes the FDR privileged. The FDR would contain data relevant to the issue of how the accident occurred and as there is no applicable privilege, it shall be produced.

Timing of production

[34] The timing of the hearing of this motion, which was delayed by the interlocutory proceedings referred to in paragraph [37] below, combined with the significant number of documents provided for the court's review and the fact that the pre-trial conference is scheduled to proceed on February 13, 2015, has created some urgency in the matter. All documents ordered produced shall be produced by the TSB to the defendants and the plaintiff within 20 days of the release of these Reasons.

Sealing order

[35] The documents provided for my review and reviewed above, consisting of the envelope and contents marked "Patrick Floyd" provided by counsel for the defendants, and the envelopes and contents marked "CVR Transcript and Audio", "Roger Adair", "Dwayne Johnstone", "Peter Phillips", "Tim Armstrong", "Mike Charters", "Dean Kent" and "passengers" provided by counsel for the TSB are hereby ordered sealed.

Confidentiality order

[36] Although the notice of motion refers to a confidentiality order "in the form attached as Schedule "A" hereto", there was no order attached. If counsel still seek a confidentiality order, and can agree among themselves as to terms, they may submit an order to me, along with the consent of all parties, for my signature.

Costs

[37] If the parties cannot otherwise agree, the costs of this motion, which include the motions to strike the notice of examination served on Mr. Floyd, to strike portions of Mr. Laporte's affidavit and to compel rule 39 examinations of Mr. Harding and Mr. Fenn, are reserved to the trial judge, who will be in the best position to determine the importance of the productions obtained on the motion to the ultimate disposition of the action.

MASTER GRAHAM

November 26, 2014