

Our Safety Board: An Outline of the Background and Powers of the Canadian Transportation Safety Board

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Introduction

Given the common international context and the nature of the interests at stake it is not surprising to find that the issues which have occupied the attention of Canadian law-makers, judges, interested persons and safety advocates are similar to those which have been addressed in the United States. The pace of developments in Canada has been slower than in the United States but the current arrangements in Canada will be well recognized by persons who are familiar with transportation accident investigations in the United States.

Since 1989 the investigation of transportation related accidents in Canada has been within the mandate of an independent board. The formal name of that board is the Canadian Transportation Accident Investigation and Safety Board but it is more commonly known as the Transportation Safety Board of Canada, TSBC or, simply, the TSB. The TSB's jurisdiction is multi-modal and it reports to Parliament independently of Transport Canada, the government department charged with responsibility for regulating safety in the transportation network. The Act which created the TSB is the Canadian Transportation Accident and Safety Board Act, which we refer to throughout as "the Act".

Before undertaking a review of the practices, procedures and powers of the TSB it may be useful to pause briefly to say a few words about its immediate predecessor on the aviation side.

Brief Historical Background

In the early 1980's concerns about independence and conflicts of interest led to the creation of the Canadian Aviation Safety Board. Although the creation of CASB reflected an advance over the practice of allowing the safety regulator, Transport Canada, to investigate accidents in which it might well have a particular interest, there was much to be desired in the Canadian Aviation Safety Board Act. CASB continued to report to Parliament through Transport Canada and was dependent upon Transport Canada for funding.

Concern about the effectiveness of the Board came to a head in the months following the Arrow Air disaster of December 12, 1985. Following the crash of a DC-8 during take-off at Gander, Newfoundland (a crash which claimed 256 lives) the Board undertook an investigation which lasted 34 months. In the process internal disputes erupted and the Board was not able to reach agreement on a final report. Four members dissented from the majority view. The Minister of Transport formally accepted the majority findings, but it was subsequently learned that members of the department seriously doubted the findings. A judicial review of the work of the Board concluded that the findings of the majority (ice contamination) could not be supported, but did not recommend any further investigation.

The credibility of the CASB was completely destroyed by the Arrow Air investigation. The government's response was the creation, in 1989, of the present TSB. The Act which created the TSB required that the work of the TSB be comprehensively reviewed four years after its creation. That review took place in 1993 and the Commissioners who undertook the review reported in January, 1994. As a result of the review some fairly comprehensive amendments were enacted. These came in force in June of 1998.

The Composition, Powers and Objectives of the TSB

The TSB has statutory authority to investigate marine, land and aviation occurrences. Our comments are confined to aviation occurrences although, in general, the practices and procedures of the Board are common in the various modes.

Given the importance of the word "occurrence" as used in the Act we should pause to say that an occurrence includes any "accident or incident" associated with the operation of an aircraft and any situation or condition that could, in the opinion of the TSB, induce an "accident or incident" if left unattended. The word "incident" is not defined in the Act and is practically incapable of definition. Regulations passed under the Act do define "reportable aviation incident" but this definition is not terribly helpful. All circumstances which would involve a regulatory infraction are "incidents". Among the many circumstances thus included are, for example, improper documentation of spares, overweight landings and improper maintenance deferral practices." Engine failures, the occurrence of smoke or fire, depressurisation followed by emergency descent and loss of separation are, to name a few, all "reportable incidents". In the case of reportable incidents, Regulations passed under the Act require the owner and operator of the aircraft to preserve and protect evidence.

The TSB's statutory powers include, of course, investigation of aviation occurrences in Canada. They also extend to certain other cases, notably to any occurrence which involves an aircraft that, in its manufacture or operation, is subject to the regulatory overview of Transport Canada.

The Board itself is composed of up to five full-time members. The current composition of the Board, including some basic biographical information (and photographs) can be obtained from the Board's web-site. At the time of writing, that site is .

The object of the Board is defined as the advancement of transportation safety. It is not the function of the Board to assign fault or determine legal responsibility. The most recent statutory amendments (those which came into effect in June of this year) seem designed to pay more than lip-service to that objective and those limitations. We will comment in greater detail when dealing with particular amendments.

The Classification of Occurrences

Of the approximately 4,000 transportation occurrences which are reported to the TSB each year a relatively small number are selected for investigation. The Board has now adopted classification criteria for identifying occurrences which warrant investigation and the extent of the investigation. The Board considers the probability of adverse consequences, the nature of the adverse consequences and potential for improving the safety of products or operations.

Class 1 Occurrences are those which are thought to merit Public Inquiry. Only occurrences which involve quite significant risks to persons, property or the environment are likely to be chosen for this most intensive form of inquiry. No time limits are placed on the investigation and a formal report issues. Class 2 Occurrences are those which are judged to involve a high probability of advancing transportation safety. They are investigated individually but without the formality of a public inquiry. The investigation is normally complete in approximately six months and a formal report issues. Class 3 Occurrences do not meet the selection criteria of Class 2, but are though to merit individual investigation because of public expectations or the potential for better understanding latent unsafe conditions. The resulting report is less detailed. A Safety Issue Investigation may be ordered where the Board believes that multiple occurrences may be indicative of significant unsafe situations or conditions. These are referred to as Class 4 Occurrences. The least intensive investigations are Class 5 Occurrences. Here the investigators are involved in collecting basic data for possible safety analysis, statistical reporting or archival purposes. Data may be gathered by phone or mail. No report issues.

Identity and Powers of Investigators

The senior employee of the Board, in the aviation sector, is the Director of Investigations (Air). Working under him are a number of investigators. Once the Board decides to investigate, its investigators may enter and search any place and seize anything they find which they believe to be relevant to the investigation. They cannot do so without consent or a warrant unless the circumstances are such that taking the time to obtain a warrant may result in loss of important information.

The powers of investigators are extremely broad and manufacturers or operators who are investigated normally have many reasons for co-operating with investigators. First, of course, is a genuine concern for advancement of safety. Beyond that, establishing a good working relationship with the investigators, and in particular with the Investigator in Charge, or IIC, can be crucial in assuring that essential issues are considered in the right context. While it would be quite improper to attempt to mislead investigators it is

altogether proper and important to urge investigators to consider all the relevant data to come to a balanced conclusion. A manufacturer or operator will normally want to be involved at the earliest stages. Therefore, in general, it is not desirable to insist on unnecessary formalities. A manufacturer should be careful to ensure he knows the person he is dealing with. Often this will be clear on the basis of past acquaintance. Otherwise it is reasonable to ask to see a certificate of appointment. Normally it is not desirable to insist upon production of a warrant however. Co-operation is key.

Where aircraft or aircraft parts are seized by an investigator he may carry out tests of the parts, including tests to destruction. Although the owner does not have an absolute right to be present for such tests the legislation does recognize the interests of owners and others with a right of possession. These persons are almost always give the right to be present at the tests and to comment on the process before the relevant parts are destroyed. They are then entitled to be represented by a person with technical expertise and to take notes.

Besides seizing documents, aircraft and parts, an investigator may require any person whom he believes to have relevant information to attend and give a statement under oath. The powers of an investigator are quite remarkable and extend to requiring persons involved in the operation of an aircraft to submit to medical examination, requiring doctors to provide information and requiring delivery of human remains to permit the performance of an autopsy.

A new section of the Act, added in June of this year, gives the investigator another weapon to compel the production of documents or statements or the attendance of a person for medical examination. If resistance is met the investigator may apply before a Judge and obtain an order that the resisting person is in contempt. A Judge may order the apprehension and imprisonment of the resisting person.

Independence of the TSB and Observer Status

Among the amendments introduced this summer are a number which are designed to give further assurances of independence. A good example is the requirement of notification. Previously, the TSB was required to notify the Minister of Transport whenever it received notification of a transportation occurrence. The old wording required notice to: "the Minister of Transport and to any Minister responsible for a department having a direct interest in the occurrence". The words "the Minister of Transport" have been deleted. However, the Department of Transport will often have an interest in occurrences. It remains to be seen whether the TSB will continue to notify the Minister of Transport automatically on the theory that the Department has a "direct interest" in every aviation occurrence.

When the TSB decides to investigate an occurrence one of the questions of great interest to persons with an interest in the outcome is that of observer status. In keeping with the objective of increased independence the absolute right of the Minister of Transport to designate an observer has been removed in the most recent amendments. However, the Minister of a department with a direct interest still has a right of designation and our earlier comments apply. The status of operators, manufacturers, repair facilities and others with an interest in the investigation is discretionary. In practice the Investigator in Charge makes the determination. In the past investigators have often shown reluctance to grant observer status and have referred to the need to

maintain independence. It is interesting to note that the Commissioners appointed to review the first four years of operation of the TSB considered the independence argument and rejected it in the following words:

The self-imposed need to maintain separateness has undermined the TSBC's effectiveness, particularly in two areas. The TSBC has been reluctant to use industry resources and expertise that are potentially available in investigations. This reduces the depth of inquiry. Independence should be taken to mean that while the TSBC alone must eventually determine, decide on and be responsible for its final product, it should not conduct all that it does, especially its investigations, in isolation.

Second, because of the TSBC's preoccupation with its concept of independence, the tools of consultation, participation, co-operation and sharing of information with users and industry play a very limited roll in its day-to-day activities.

Advancing Safety, Report of the Canadian Transportation Accident Investigation and Safety Board Act Review Commission, 1995, at page 128. See also pages 148 to 150 for the views of the Commissioners on observer participation.

Obtaining observer status can be very important. As an observer one can come to know the investigators, understand their abilities and limitations and come to have an early appreciation of the matters of interest to them. With this insider's view of the investigation one is much more likely to succeed in early intervention by suggesting other routes of enquiry or other interpretations of the evidence. Once the investigation has reached the stage of an advanced draft report it may be difficult or impossible to interest investigators in considering matters which might be relevant to the final report. Having in mind the potential importance of a grant of observer status, interested parties should have the following facts in mind:

“ The grant of observer status is discretionary. The IIC's exercise of discretion is almost impossible to challenge and it may be influenced by subjective factors. Convincing the IIC that you will co-operate and will not seek to impede the investigation is crucial.

“ When seeking to persuade an IIC to grant observer status the most important points to make will concern your particular knowledge and experience which will allow a more thorough investigation.

“ If you are granted observer status you are not thereby invited to participate fully in all aspects of the investigation. You should expect to be excluded from meetings at which persons give statements in many cases and you will not have the right to be privy to all discussions of the investigators. The more useful you are to the investigation, the broader your role will be.

Draft Reports and Representations and the Question of Confidentiality

The ultimate product of an investigation is an investigation report. Before a final report is prepared the Board is required to send a copy of the draft to any person who has a “direct interest” in the findings. Who has a direct interest is for the Board to determine. The draft report is distributed on a confidential basis and all persons receiving it are bound to maintain confidentiality. The report production process has been the subject of fairly intense discussion and controversy.

The predecessor of the TSB, CASB, had a policy of producing a report of every accident notified to it. It developed a large backlog and when the TSB was created it inherited over 500 reports in process. After some soul searching it developed a classification criteria. At the same time the TSB has considered the nature of the involvement of interested parties (IPs). At one point in the early 1990's all IPs who had, on invitation, commented on draft reports, were being provided with written responses. This process became overly cumbersome and at present an IP cannot expect such individual attention. However, if an IP has been an active observer during the investigation it is likely that the IIC or another investigator will discuss the IP's comments on the draft report. Better still, active observers have an opportunity to put their views on the table while the investigation is ongoing and before the draft report stage has been reached. Investigators are very sensitive to the fact that the whole process of discussion with IPs can become very time intensive and it is generally desirable, when asked to comment on a draft report, to concentrate on the points of greatest importance and avoid unnecessary or insubstantial objections.

One of the amendments which came into force this June is, in our view, quite a welcome improvement over the previous position. Section 24 (4.1) of the amended Act states that the representations made by IPs who are invited to comment are privileged and, except for a coroner, no person shall use them in "legal, disciplinary or other proceedings". This amendment represents an attempt to deal more adequately with an old and central problem: the conflict between the need to get at the truth and the difficulty of persuading persons to come forth with the truth if the result may be civil or criminal liability or disciplinary proceedings. Investigators routinely tell persons they are interviewing that their comments will remain confidential. This is unfair and unrealistic. Material information will be made public eventually and even if the source of the information is not specifically identified that person's identity will often be an open secret.

While true confidentiality cannot generally be offered a degree of protection from the consequences which would otherwise attend the release of information can be given. Specifically, a statute can make it difficult or impossible for adverse parties to use certain information against the provider of the information. This is what the new Act has done in the case of representations made by IPs on draft reports. The clear wording of section 24(4.1) would appear to exclude such representations from use in legal proceedings.

It is still necessary to use such qualified as "would appear to exclude" as the courts in Canada have shown a strong bias towards allowing almost anything into evidence if an opposite party can show that exclusion might lead to a possible injustice. Furthermore, if representations made by an IP fall into the hands of an adversary they may provide an outline for damaging examination. In summary, when invited to make representations on a draft report an IP should generally comment on matters of greatest importance and may do so with reasonable confidence that the representations will not be used directly in a case against him. However, he should also have in mind that the representations may fall into the hands of an adversary and may be used indirectly to build a case against him.

Another of the recent amendments designed to protect IPs from the consequences of disclosure of information is the deletion of the term "peace officer" from a number of

sections. The earlier Act required the TSB to produce certain information (including interim reports) to peace officers and coroners investigating the occurrence. The requirement to inform coroners remains, but peace officers no longer have the right to receive this information.

Cock-pit Voice Recorders, Tower Tapes and Statements

The Act deals specifically with cock-pit voice recordings, tower tapes and statements made to investigators and in each case the recent amendments give some increased protection to persons who provide information or documents in the course of an investigation.

Cock-pit voice recordings are said to be “privileged”. The intention of classifying them as such is to promote confidentiality and to limit the use which can be made of these recordings in court proceedings. The history of this controversial question is the same here as in other jurisdictions. The extraordinary nature of the intrusion into the workplace and the consequent loss of any expectation of privacy has led to some protection being given as a quid pro quo. There is an absolute statutory prohibition against using the contents of these recordings against air traffic controllers, aircraft crew members, airport vehicle operators, or flight service station specialists in legal or disciplinary proceedings. Until June of this year it was possible, in exceptional circumstances, to use these recordings against crew members and others listed above in civil proceedings. That possibility has apparently been removed by the June amendments. As to civil proceedings against persons other than the crew members and controllers, there is a presumption that the recordings are not to be used. However, this presumption may be reversed if the court, after an in camera hearing, decides that the proper administration of justice requires that the recording be used in the proceeding. What little jurisprudence exists suggests that the courts will not order the recordings to be used unless there are truly exceptional circumstances. The party seeking to use the recordings will probably have to show that there is important information on the tapes which cannot be obtained in any other way.

Statements taken during the course of an investigation are treated in much the same manner as cock-pit voice recordings. Tower tapes, on the other hand, are treated rather differently. They are not said to be privileged and there are no requirements that they be kept in confidence. However, there is a statutory provision which gives air traffic controllers and aircraft crew members protection. Communications recorded on tower tapes may not be used against them in legal or disciplinary proceedings, subject, in the case of disciplinary proceedings, to the terms of any applicable collective agreement.

Investigators as Witnesses

The Act deals with the issue of when investigators may be called as witnesses in legal proceedings. The June 1998 amendments simplify the previous procedures and should be welcome to the aviation community. The statutory presumption is that investigators may not testify in legal proceedings, except a coroner’s inquest. The court may order that they testify “for special cause”. As in the case of statements and cock-pit voice recordings, it will generally be necessary to show that the investigators have important information which cannot be put before the court in any other fashion before they are called.

If investigators are called the question arises whether they may give opinion evidence. The Act before June stated that an investigator's opinion "as to any person's fault or civil or criminal liability is not admissible". Such a provision invites abuse. Only certain defined opinions are excluded and a competent cross-examiner can pay lip service to the rule while eliciting opinions which ought, in keeping with the policy of the Act, to be inadmissible. The new Act is quite simple and definite: The opinion of a member of the Board or of an investigator is not admissible in any legal or disciplinary proceeding. This section has not yet been considered, as far as we can determine, by any court. However, even given the inventiveness of some courts in finding ways around restrictive statutory provisions, it is difficult to see how the clear wording of this provisions can be finessed. All opinions of investigators should be strictly excluded.

Final Reports

Whereas the Act directly addresses questions concerning the admissibility of recordings and statements and the status of investigators in legal proceedings it does not directly address the ultimate question: What use may be made of the final report. The entire tenor of the Act is clearly against admissibility. Both public policy considerations (the objective of the TSB is advancement of transportation safety and the use of reports in litigation will thwart that objective) and the hearsay rule can be cited against admission. These arguments are usually sufficient. We know of only a very few cases in which reports have been admitted into evidence and we regard these cases as aberrations. The Commissioners who reviewed the operation of the TSB in 1993 disapproved of the practice in the following words:

We do not believe that this is appropriate. The Board should not confine its discussion to only those findings that meet legal standards of proof. The Board and the courts have different responsibilities. If observers and IPs think that a TSBC report may be used against them in future legal proceedings, they might be tempted to abuse participative processes in an effort to avoid providing facts or deflect blame. This would be contrary to a desirable approach to the investigation and report process where they would seek co-operatively to discover and state all the causes and contributing factors. We strongly endorse section 33 of the Act which guarantees that TSBC staff will not be used as experts for the benefit of private litigants.

Advancing Safety, Report of the Canadian Transportation Accident Investigation and Safety Board Act Review Commission, 1995, at page 156.

The Supreme Court of Canada did relax the hearsay exclusion rule in 1992 in the case of *R. v. Smith* [1992], 2 S.C.R. 915 and that case could possibly be argued in favour of admissibility. However, the public policy reasons for inadmissibility remain. Furthermore, an analysis of the Act lends strong support to the view that TSB Reports should not be admitted into evidence in any circumstances. In the passage cited immediately above the Commissioners approve section 33 of the Act. This is one of the sections we commented on above. It was amended this summer to make it clearer than ever that all opinions of investigators and members are to be excluded. A Report will necessarily include opinions of investigators and members and it appears unquestionable that, at least as to opinions, Reports must be excluded.

We are aware, although only in a general way, that similar enactments in the United States have been read down by courts which have shown impatience with any statutory

restrictions on what they may consider as evidence. Similar forces are at work in Canada, but we believe the clear statement of public policy in the Act, the restrictions placed on the use of recordings and statements and the statutory attempt to isolate investigators from litigation should prevail and Reports of the TSB should be absolutely excluded from evidence. It should be understood that this is an opinion and by no means a foregone conclusion.

Summary and Conclusions

Canada has evolved a multi-modal transportation accident investigation system along lines which will be familiar to the aviation community in the United States. Investigators are given very broad powers to search, seize and take statements. Interested Parties have recognized interests and, although they have few absolute rights, diplomacy, patience and a co-operative attitude will usually result in a grant of observer status.

Interested Parties should use observer status to encourage investigators to see the whole picture before the investigators have gone too far towards the production of a Report. Participation in an investigation is never without its perils. There can be no guarantee of confidentiality. An IP who is told by an investigator that he may speak with confidence that his words will remain confidential should most definitely not accept that guarantee at face value. Material information will be made public.

Notwithstanding the perils there is no real alternative to co-operation. Failure to co-operate is much more dangerous in many ways. It may actually lead to the continuation of an unsafe condition or practice, it is likely to expose a person or company to disastrous public criticism and it carries the potential of criminal prosecution or punitive damages in civil proceedings. The Act gives a measure of protection to those who do co-operate. The measure is fairly generous, but not perfect. A number of questions arise out of the most recent amendments to the Act. For example, as of June 1998 it appears clear that a statement given by an individual to an investigator may not be used against that individual in civil proceedings. Can that statement be used to establish the vicarious liability of the individual's employer in civil proceedings? Technically one might say it can so long as the individual is not a party to the proceedings. It is a virtual certainty that some lawyer will argue this position in some future case. As a matter of statutory intent, such use of a protected statement would appear to us unreasonable. However, it is a clear fact of judicial history that views of reason differ remarkably.

While there will always be points of legal uncertainty we believe the best advice that can be given to a manufacturer or operator is to develop in advance principles and procedures to guide its involvement in any accident investigation to which it may become an interested party. Improvising while the investigation is in process may be necessary as to some details but a person who finds himself in the middle of an investigation without a clear idea of the procedures involved and his ultimate objectives is likely to be a very unhappy person and the results of his involvement unhappier still. We hope that these comments may be of some little assistance in developing guiding principles and procedures.