

The defendants in a proceeding reported on in the February 2013 edition of these pages have had to return before the case management Master once more to obtain production of documents prior to trial. The case centres around the November 2007 crash-landing of a Bombardier Global 5000 aircraft owned by Jetport Inc. (“Jetport”) at Fox Harbour, Nova Scotia, which resulted in its total loss. The aircraft was insured for \$40 million by a pool of aviation insurers of which Global Aerospace Underwriting Managers (Canada) Ltd. (“Global”) is the manager. Global denied coverage and Jetport sued it and the insurers in the consortium. In addition, there are related actions involving Jetport’s insurance broker.

In February 2013, we reported on a decision of Justice Goldstein upholding the case management Master’s order directing that certain documents Jetport claimed were subject to litigation privilege should be disclosed to Global Aerospace.

On November 26, 2014, Master Graham issued his reasons for decision on a motion by the defendants under Rule 30.10 of the Ontario *Rules of Civil Procedure* and sections 28(6) and 30(5) of the *Canadian Transportation Accident Investigation and Safety Board Act*, SC 1989, c. 3 (the “Act”). Rule 30.10 allows parties to litigation to seek production of documents from a non-party. To succeed, the party seeking production must convince the court that the document sought is not privileged, is relevant to a material issue in the action, and that “it would be unfair to require the moving party to proceed to trial without having discovery of the document.”

The defendants sought production of several documents as well as the audio data from the aircraft’s Cockpit Voice Recorder (“CVR”) and the data from the Flight Data Recorder (“FDR”) from the Transportation Safety Board (the “TSB” or the “Board”). The TSB had conducted an investigation into the crash-landing of the aircraft and issued its report to the public in September 2009. The documents sought were those in the possession of the TSB as a result of the investigation it conducted. Master Graham grouped the documents requested into four categories:

- (1) The CVR recording and transcript;
- (2) Statements given to the TSB in its investigation;
- (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 FDR.

Before ruling on specific documents within each category, Master Graham reviewed the applicable law. Citing *Ontario (Attorney General) v Stavro*, a 1995 decision of the Ontario Court of Appeal, he set out the following factors to be considered on a motion under Rule 30.10:

- 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 moving party;
- whether the discovery of the opposing party in the litigation with respect to the issues to which the documents are relevant is adequate and, if not, whether responsibility for that inadequacy rests with that party;
- the position of the non-party with respect to production;
- the availability of the documents or their informational equivalent from some other source which is accessible to the moving party;
- the relationship of the non-party from whom production is sought to the litigation and the parties to the litigation. A non-party who has 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.

Next, Master Graham set out the several provisions of the Act that make certain kinds of communications, statements and recordings privileged in some circumstances. Specifically, sections 24, 28 and 30 were relevant to the motion, given the types of documents being sought.

Section 24 relates to the obligation of the TSB to prepare a public report on completion of an investigation. However, it also addresses the circulation of a confidential draft report to anyone having a direct interest in the findings of the Board and the privileged nature of “representations” made by such interested persons

with respect to the draft report. Specifically, subsection 24(4.1) provides that a representation made to the TSB with respect to the draft report is privileged, “except for one made by a minister responsible for a department having a direct interest in the findings of the Board.” Subsection 24(4.4) provides that, except for use by a coroner for the purpose of an investigation, “no person shall use representations in any legal, disciplinary or other proceedings.”

Section 28 addresses “on-board recordings” and provides that such recordings are privileged and that, in particular, no person shall “be required to produce an on-board recording or give evidence relating to it in any legal, disciplinary or other proceedings”. However, subsection 28(6) allows for production in a court proceeding if the court, having examined the on-board recording and heard from the TSB on the request for production, concludes that the public interest in the proper administration of justice outweighs in importance the privilege attached to the recording.

Section 30 governs “statements”, which include any oral, written or recorded statement relating to an incident under investigation by the TSB so long as it is given to the Board or an investigator or anyone working in their behalf. Any such statement is privileged, but the Board can make such use of it as it considers necessary. In addition, as under section 28, a court may determine that a statement can be disclosed if the public interest in the proper administration of justice outweighs the privileged and order it produced pursuant to subsection 30(5).

Preliminarily, Master Graham referenced the decision of Justice Greer of the Superior Court of Justice in another appeal brought from an earlier production order of the Master. The defendants argued that Justice Greer’s decision upholding Master Graham’s order had already determined any question of whether statutory privilege attached to the documents being sought under sections 24, 28 and 30. That decision related to certain refusals on an examination for discovery, including those relating to the TSB’s draft report. Master Graham rejected this argument, holding that Justice Greer’s decision related only to the issue of the production of the TSB draft report itself; questions related to that report, which had been provided to Jetport, had to be answered. This decision did not decide the questions of privilege relating to the various documents sought from the TSB on the current motion.

Master Graham then turned to the task of ruling on each of the several documents being sought from the TSB. With respect to the first category, the CVR recording and transcript, to which section 28 applies, Master Graham weighed several factors before ordering that the recording and transcript be produced, subject to a confidentiality order. In part, Master Graham noted that the recording for the 30 minutes prior to the accident was clearly relevant to the issue of how the accident occurred, especially given that memories will have faded in the more than seven years between the accident and the trial, which is scheduled to proceed in May 2015.

As well, having reviewed the recording, Master Graham was of the view that it did not contain any embarrassing banter between the pilots. While accepting that the Act seeks to protect those participating in a TSB investigation from any fear that their communications might be used against them in related litigation, Master Graham accepted the comments of Justice Strathy (since appointed the Chief Justice of Ontario) in *Société Air France v Greater Toronto Airports Authority*, 2009 CanLII 69321, to the effect that he could not imagine that “highly trained, responsible and professional pilots” might curtail their “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.”

Master Graham moved on to the consideration of statements made to the TSB in its investigation of the accident, noting that the test under section 30 is very similar to that under section 28: does the public interest in the proper administration of justice outweigh in importance the privilege attached to the statements. The TSB provided packages of documents containing information obtained from the pilot and first officer of the aircraft, some of the passengers, the president of Jetport (who had also been a passenger), Jetport’s director of maintenance, and Jetport’s former operations manager.

The case management Master assessed each document and determined that some were simply not relevant to the litigation and should therefore not be produced. For others, it was determined that they were relevant

to material issues in the action and that their release would not compromise aviation safety; these were ordered produced to the defendants. However, in the case of several statements, Master Graham was of the view that the privilege should be upheld. A distinction was drawn between certain statements given to the TSB and the communications recorded in the cockpit of the aircraft. For example, commenting on the statement given to the TSB by the pilot, Roger Adair, the Master stated:

There is a significant difference between the CVR...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. ...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 would be compromised.

Interestingly, Master Graham decided that in the case of statements given by Jetport's former operations manager, because he was no longer employed by Jetport, "[t]here 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" and ordered disclosure.

Master Graham also inspected several documents that had inadvertently been provided to counsel to the defendants by the TSB, which subsequently claimed were subject to the privilege over "representations" made on a draft report under section 24. The Master provided an analysis of that section, determining that, unlike sections 28 and 30, it did not include a provision allowing for the court "to nullify the privilege" in specified circumstances: a "representation" in relation to a TSB draft report by anyone other than a Minister can only be used by the TSB for the purpose of transportation safety or by a coroner.

That said, on review of the documents, Master Graham found that most were not actually "representations" governed by section 24. Some were "statements" and Master Graham employed the section 30 analysis to those; some were ordered produced, while others were determined to be privileged or not relevant.

Finally, Master Graham held that there is nothing in the Act that privileges the Flight Data Recorder (the data it contains do not come within the definition of an "on-board recording") and ordered it produced.

*Jetport Inc. v Global Aerospace Underwriting Managers*,  
2014 ONSC 6860