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Via email: Allen.Harding@tsb.gc.ca

Allen C. Harding,
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Place du Centre
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Dear Mr. Harding,

Re: *Transportation Safety Board Regulations Amendments, Canada Gazette, Part I: Notices and Proposed Regulations, September 3, 2011*

We write on behalf of the Canadian Bar Association's National Air and Space Law Section, Maritime Law Section and Administrative Law Section (CBA Sections) in response to *Transportation Safety Board (TSB) Regulations* tabled in September 2011. The Air and Space Law Section represents lawyers across Canada who practice in the fields of aviation and space law. The Maritime Law Section represents lawyers who practice in the field of maritime law. The Administrative Law Section consists of lawyers specializing in various aspects of administrative law. The CBA Sections have jointly reviewed the proposed changes to the TSB regulations and offer the following comments.

Background

The CBA Sections' members who deal with the TSB with respect to ongoing transportation accident investigations report significant difficulty with the process, and especially the inability to access key factual information required for various legal purposes, including civil litigation. Problems arise in particular from:

1. a lack of clarity in the definition and role of observers;
2. inconsistency across the TSB organization (individually and regionally) in providing access to basic facts regarding an accident;
3. lack of access to critical evidence prior to disassembly and/or destructive testing and analysis by TSB personnel; and
4. the exclusion of victims and their families from the investigation process.

In addition, CBA Sections' members report a general perception that the TSB, as an organization, is resistant to lawyers' involvement in the process. While we recognize that the paramount role of the

TSB is to investigate accidents to advance transportation safety, the reality is that aviation and marine accidents often have widespread legal ramifications, such as insurance claims, regulatory enforcement actions, coroners' inquests and litigation, all mandating the involvement of counsel. In many cases, the TSB has exclusive control over the factual information lawyers require to effectively advise their clients.

In our view, the proposed regulations will not resolve these problems.

Parties with Direct Interest (PDI) and Observers

Section 23(2) of the *Transportation Safety Board Act* permits the TSB to invite a person to attend a TSB investigation as an observer if, "in the opinion of the Board, the person has a direct interest in the subject-matter of the investigation and will contribute to achieving the Board's objective". Historically, this has been interpreted to exclude representatives of victims of an aviation or marine accident and their families from observer status, as they are not considered to be parties with direct interest (PDIs).

The effect of this interpretation is that accident victims and their families are treated like any other members of the general public in terms of obtaining access to information from an ongoing TSB investigation. This ignores the legitimate needs of victims for access to timely disclosure of information regarding an accident, or that family members of the crew often have crucial insight into many human factors involved in an accident. It is also out of step with the investigation procedures of other nations.

For instance, the EU recently passed regulation 996/2010 regarding the "Investigation and Prevention of Accidents". Article 15 of the regulation specifically empowers investigators to brief victims and their families on factual observations and preliminary reports. Article 15(5) requires the investigating authority to brief victims and their relatives before any information from the investigation is made public. In our view, Canadian victims and their families should be entitled to the same level of disclosure. We recommend that a similar provision be incorporated into the TSB regulations to authorize the TSB to brief victims on the results of their investigation. We also recommend that the term "victim" be specifically defined to include "any passengers onboard an aircraft or vessel involved in an occurrence, and any other person who suffered significant injury or damage as a direct result of the occurrence."

Historically, there has been considerable controversy over whether an organization deemed to be a PDI can appoint an outside technical adviser as its observer. For example, on occasion, TSB investigators have refused to permit outside technical advisors appointed by an air carrier or an operator's insurers to participate as an observer. The rationale has been that an individual retained by an insurer or law firm could not represent a PDI. In our submission, once it has been determined that an organization or individual is a PDI, that party should be entitled to appoint whomever it sees fit to act on its behalf. The proposed regulations do not reveal any legitimate TSB interest in controlling who a PDI appoints as its own observer. We suggest that the proposed regulations include a specific provision that allows a PDI to appoint a representative as an observer, along with counsel.

Another significant problem relates to the right of PDIs to have representatives attend during component teardowns and laboratory analysis. At present, section 19 of the *TSB Act* provides that the TSB may test any component seized during an investigation (including testing it to destruction) and that the TSB must take all reasonable measures to invite the owner of the component to be in attendance. However, the term "test" is not defined. The problem is that there are many investigative steps that result in destruction of evidence, but those steps are not necessarily "tests". For instance, it is common practice to cut or "section" components for metallurgical analysis at the

TSB laboratory, which can result in destroying the evidence. In addition, evidence can be lost during the disassembly of sensitive components, such as fuel control units or electrical systems.

Unless PDIs are present during these phases of the investigation, the only individuals with knowledge of the steps taken and the condition of the evidence will be the TSB investigators. TSB investigators cannot be subpoenaed to testify in a court proceeding, absent a showing of special cause. The net result is that parties to a civil case will be required to compel the attendance of the TSB investigators or else run the risk that the civil courts are deprived of vital evidence. This is a significant problem not addressed by the proposed regulations.

The TSB also often uses personnel from the manufacturer of a component under investigation as experts in the process. While it may make sense from a technical perspective to involve those with the most technical familiarity, it creates an uneven playing field for families and others affected by the process. The involvement of, for example, an expert appointed by the family in the process would provide a natural counterbalance to involvement by the manufacturer.

The proposed regulations pertaining to observers raise other difficulties. Regulation 11(2) states that an observer “shall not knowingly communicate or use ...any information that the observer has obtained during the investigation without the express authorization of the Board”. However, no temporal restriction on this prohibition is specified. As presently worded, the prohibition appears to apply even after the TSB has issued its final report. In our view, there is no justification for a prohibition on communication after the TSB report has been made public.

Further, the prohibition does not distinguish between facts obtained or witnessed during a TSB investigation and analysis. We recognize the TSB has a legitimate interest in ensuring that its preliminary analysis is not leaked or discussed outside of the investigation until it has been approved and adopted in a final report, but fail to see any legitimate reason for prohibiting an observer from communicating facts pertaining to an accident, for example, on a privileged basis with counsel, or after the final report is issued. Observers will have numerous legitimate reasons for communicating facts such as:

- internal safety reporting or Safety Management System purposes
- reporting obligations to insurers
- briefing legal counsel
- media relations

In our view, observers should not be restricted in communicating basic facts pertaining to an accident. We recommend that observers and PDIs be required to sign a non-disclosure form that provides that they are free to communicate facts regarding an accident, but cannot disclose any analysis by the TSB until the TSB has published its report.

A further problem with the proposal is that it fails to distinguish between observers who are attending a TSB investigation on behalf of a PDI and those who were specifically invited to attend by the TSB because of their technical expertise. The latter would more properly be categorized as technical advisers to the TSB, rather than observers. We recognize that the TSB has a legitimate interest in imposing communication limits on technical advisers who form part of the TSB investigation team. We suggest the regulations should differentiate between observers and invited technical advisers accordingly.

One significant issue regarding reporting of aviation occurrences is that the reportable occurrences under these regulations and reportable occurrences under the *Civil Aviation Regulations Part VIII* are

not the same. This difference can be easily rectified by incorporating the CADORS manual in this regulation.

In summary, we recommend that the proposed regulations be amended to:

- a) incorporate an express provision requiring the TSB to keep victims informed of the progress of an investigation, including factual updates;
- b) clarify that a PDI has the right to nominate a representative/adviser to act as its observer;
- c) require the TSB to take all reasonable steps to ensure that PDIs are invited to attend any phase of the investigation, including disassembly and laboratory analysis, that could result in the loss or destruction of evidence;
- d) limit the prohibition on communications by observers to matters relating to analysis by the TSB, and only until such time as a final report has been published;
- e) differentiate between observers and appointed technical advisers; and
- f) incorporate the CADORS Manual regarding reportable aviation occurrences.

Right to Counsel

The changes to the regulations relating to the right to have a person attend at an interview along with the person being interviewed will impact the right to counsel, and so is of significant concern to the CBA Sections. The proposed regulations would limit a witness from being effectively represented by counsel during a TSB interview. The rationale for such limitation is stated to be:

The proposed Regulations would allow the person being interviewed to have one representative of their choice present at the interview. Some transportation employers request legal counsel to be present during an interview. It is important that witnesses are not intimidated by the number of people in attendance and speak openly without having numerous representatives who interrupt the interview which currently takes place. This practice is not part of the Regulations and is being added for the protection of the witness.

In our experience, there are no significant problems because of counsel interrupting or interfering with interviews, or improperly impeding the process in any way by their presence. Additional training of TSB investigators in witness interviewing techniques would minimize objections by counsel. We expect any concern in this regard to be based primarily on anecdotes, rather than real data or research to support restrictions on the presence of counsel.

Further, we do not believe that witnesses are intimidated by having counsel of their own choice present at an interview. Individuals being interviewed are often extremely worried, even when they have absolutely no legal vulnerability. It is understandable to want legal counsel present to be free to do more than simply accompany a witness to the interview. It is often more intimidating for a transportation industry worker, possibly unaware of his/her legal rights and obligations and perhaps still shaken from the effects of a recent incident, to be alone with an investigator for a compelled interview. Despite any assurances from the investigator about the role of the TSB and issues of privilege, the worker is still faced with a recorded interview by a government official and would be under pain of government sanction for refusing to speak. The results of the investigation will and often does have significant consequences for that person's reputation and job security, and may have potential civil or criminal ramifications. Although statutory provisions prohibit the subsequent use of those interviews, the substance of the interviews will become public in the report. We suggest it is far more intimidating to a witness to be compelled to talk to an investigator, knowing that they are unable to access meaningful assistance, than to be accompanied by counsel during the interview.

Proposed regulation 9(3) goes too far in prohibiting any individual accompanying a witness to a TSB interview from speaking during the interview except with the permission of the TSB investigator. We recognize the need for the TSB to obtain factual information from witnesses to investigate aviation and marine accidents. However, the law has established over nearly 20 years that a witness has the right to counsel. *In the Matter of an Investigation by the Canadian Transportation Accident Investigation and Safety Board into a Marine Occurrence and Captain Roger Parrish*¹, the Federal Court of Canada held that the TSB could not deny a witness the right to counsel during a TSB interview. The court ruled:

There is no doubt that boards or tribunals are masters of their own procedure and when witnesses appear, as did Captain Parrish, with two or three counsel, it is within the Board's domain to limit not only the number of counsel but also the scope of their participation. But the Board cannot, for the sake of administrative expediency, deprive a witness of the right to counsel. A witness is subpoenaed very shortly after the accident, perhaps still shaken, to attend and give testimony under oath with the threat of penalty over his head. He may not have the knowledge or the presence of mind to best protect his rights or object to inappropriate questions. He runs the risk of being deprived not only of his reputation but of his professional certification and his livelihood. Interim reports are sometimes leaked to the press before the witness has an opportunity to comment.

The court concluded, "I am satisfied that in these circumstances the procedural fairness requires that the witness be permitted to be accompanied by counsel when at the inquiry".

We view proposed regulation 9(3) as an unwarranted attempt to limit the role of counsel during a TSB interview. The regulation may well be subject to challenges based on procedural fairness², denial of natural justice and the *Charter*. A witness is best protected by allowing counsel to be present and to participate in a meaningful way. We recommend that proposed regulation 9(3) be deleted so the TSB is not entitled to deny the attendance of counsel, limit the role of counsel in advising a client during the interview, or limit counsel's ability to object to inappropriate lines of questioning.

The CBA Sections thank you for considering our views.

Yours truly,

(original signed by Gaylene Schellenberg for Indra Heed Hornsby)

Indra Heed Hornsby
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¹ *Parrish(Re)*, [1993] 2 FC 90 (TD).

² See, for example, *Parrish*, *ibid*.