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An examination of United States and Canadian government agencies' jurisdiction for investigating cross-border transportation accidents such as the tragic train derailment, crude oil explosion, and fire at Lac-Mégantic, Québec in July 2013

Kenneth R. Hoffman

Austin T. Dowling

CANADA-U.S. TRANSPORTATION ACCIDENT INVESTIGATIONS

JURISDICTIONAL ISSUES

By: Kenneth R. Hoffman, shareholder at Dysart Taylor Cotter McMonigle & Montemore, P.C. & Austin T. Dowling, associate at Dysart Taylor Cotter McMonigle & Montemore, P.C.

(Readers are cautioned that neither of the authors is licensed to practice law in any jurisdiction in Canada)

INTRODUCTION

In the aftermath of the tragic train derailment, crude oil explosion and fire at Lac-Mégantic, Québec in July 2013, the Transportation Safety Board of Canada (TSB) launched a massive investigation into the cause or causes of the incident. The crude oil cargo was produced from wells in North Dakota, it was transported in bulk in tank trailers from storage tanks at the well sites, and it was transloaded from those tank trailers into the involved railcars at a truck-rail transfer facility in North Dakota. Accordingly, the TSB understandably desired to include that process in its investigation.



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Principally, the TSB wanted to determine if the product actually in the railcars was what it was purported to be according to the shipping documents; how the product was stored at the well sites; how the product was transferred from that storage into the tank trailers and by whom; how the product was handled and transported from the well storage to the truck-rail transfer facility and by whom; how the transfer into the railcars was performed and by whom; and whether any additional substance or substances had been introduced into the storage facility, the transport vehicles, or the railcars, or during any transfer process. In order to carry out this part of its investigation, the TSB dispatched one of its investigators from Winnipeg to North Dakota to interview persons with knowledge of the facts and to gather related information and documents.

The TSB investigator was accompanied by an investigator from Washington, DC from the National Transportation Safety Board (NTSB) of the United States, although the NTSB had not instituted an investigation of its own. Inquiring legal minds naturally wanted to know: (1) what jurisdiction or authority does the TSB of Canada have to conduct an investigation in the United States regarding a rail accident that occurred in Canada; (2) what jurisdiction or authority does the NTSB of the United States have regarding a rail accident that occurred in Canada and with respect to which it has not instituted a

formal investigation; and (3) what jurisdiction or authority do the TSB and the NTSB have to jointly investigate a rail accident involving cross-border operations? This paper is intended to provide practitioners with a primer on these issues regardless of the mode of transportation involved, but with emphasis on rail and marine occurrences.

Regulatory Entities

- United States Department of Transportation (USDOT): The Department of Transportation was established by an act of Congress on October 15, 1966.
 - The USDOT is responsible for enacting policies and safety regulations in the United States as it relates to transportation. [49 USC § 101]
- Transport Canada: Develops and enforces safety regulations and standards, tests and promotes safety technologies, and introduces safety management systems to prevent and manage safety risks in all modes of transportation.
 - Develops safety standards and regulations, provides oversight and gives expert advice on dangerous goods accidents to promote public safety in the transportation of dangerous goods by all modes of transport in Canada.
- These entities are essentially equivalent and provide virtually the same function for their respective countries.

Investigative Entities-United States

- National Transportation Safety Board (NTSB): Originally created in 1926, the NTSB separated from the USDOT in 1975 by the Independent Safety Board Act of 1974, establishing the NTSB as a completely independent entity separate from the USDOT. [49 USC § 1111]
- Charged by Congress with investigating every civil aviation accident in the United States and significant accidents in other modes of transportation – railroad, highway, marine and pipeline. The NTSB investigates and establishes the facts, circumstances and cause or probable cause of the accident or incident and may issue safety recommendations aimed at preventing future accidents. [49 USC § 1131, et seq.]
 - Specifically as to rail accidents, the NTSB has authority over any “railroad accident in which there is a fatality or substantial property damage, or that involves a passenger train.” [49 USC § 1131(a)(1)(C)]
 - Specifically as to marine accidents, the NTSB has authority over “a major marine casualty (except a casualty involving only public vessels) occurring on or under the navigable waters, internal waters, or the territorial sea of the United States as described in Presidential Proclamation No. 5928 of December 27, 1988, or involving a vessel of the United States (as defined in section 2101(46) [now § 116] of title 46), under regulations prescribed jointly by the Board and the head of the department in which the Coast Guard is operating ...” [49 USC § 1131(a)(1)(E)]
- The NTSB also has general “catch-all” authority to investigate and establish the facts, circumstances and cause or probable cause of any other accident related to the transportation of individuals or property when the Board decides (i) the accident is catastrophic; (ii) the

accident involves problems of a recurring character; or (iii) the investigation of the accident would carry out the goals of NTSB. [49 USC § 1131(a)(1)(F)]

- With respect to aviation, railroad, highway, and pipeline accidents (plus those accidents in the “catch-all” category), the NTSB investigation “has priority over any investigation by another department, agency, or instrumentality of the United States Government.” [49 USC § 1131(a)(2)(A)]
- With respect to marine accidents involving public vessels, “The Board or the head of the department in which the Coast Guard is operating shall investigate and establish the facts, circumstances, and cause or probable cause of a marine accident involving a public vessel and any other vessel. The results of the investigation shall be made available to the public.” [49 USC § 1131(b)(1)]
- The NTSB makes safety recommendations to the USDOT after investigative findings, which may or may not be adopted in some form as regulations by the USDOT. [49 USC § 1135]
- USDOT: Also investigates transportation-related accidents, to determine (1) compliance with its regulations and standards; (2) what additions or improvements should be made to existing standards and regulations in order to improve safety; (3) what improvements can and should be made to the transportation systems to improve safety; and (4) what enforcement action may be appropriate.
- The [Reimbursable Memorandum of Agreement Between Department of Transportation and National Transportation Safety Board](#) (1975) set out a formal standard for the two agencies and how they are to interact.

Investigative Entities-Canada

- Transportation Safety Board of Canada (TSB): The TSB is an independent agency, created by an Act of Parliament in the *Canadian Transportation Accident Investigation and Safety Board Act*, S.C. 1989, c. 3 (Can.) (hereinafter CTAISBA) which came into force on March 29, 1990.
- The TSB is an independent agency from Transport Canada, and advances transportation safety by investigating marine, pipeline, rail, and aviation occurrences, and communicating risks in the transportation system.
- The CTAISBA outlines the jurisdiction of the TSB as follows:
 - “(2) This Act applies in respect of marine occurrences
 - (a) in Canada; and
 - (b) in any other place, including waters described in subsection (3), if
 - (i) Canada is requested to investigate the marine occurrence by an appropriate authority,
 - (ii) the marine occurrence involves a ship registered or licensed in Canada, or
 - (iii) a competent witness to, or person having information concerning a matter that may have contributed to, the marine occurrence arrives or is found at any place in Canada.
 - (3) This Act also applies in respect of marine occurrences or pipeline occurrences related to an activity concerning the exploration or exploitation of the continental shelf.
 - (4) This Act applies in respect of railway occurrences and pipeline occurrences

- (a) in Canada, if the railway or pipeline is within the legislative authority of Parliament; and
- (b) outside Canada, if Canada is requested to investigate the occurrence by an appropriate authority.”

[CTAISBA § 3(2-4, emphasis added)]

- A “railway occurrence” is defined as “any accident or incident associated with the operation of rolling stock on a railway.” [CTAISBA § 2] Disregarding any issue of sovereignty, this definition could be used to support the extension of TSB investigative authority to “incidents” in the United States (or elsewhere outside of Canada) that might be “associated” with an accident that occurred inside Canada.
- The TSB makes safety recommendations to Transport Canada after investigative findings, which may or may not be adopted and made regulations by Transport Canada.
- Again, the NTSB and TSB are essentially equivalent and provide virtually the same function for their respective countries, except that the TSB is not involved in highway accident investigations.
- Transport Canada: Transport Canada has investigative powers and duties similar to those of the USDOT relating to regulatory compliance and enforcement.

Cross-Border Interaction between Investigative Agencies

- The CTAISBA § 3(4) sets out that the Act “applies in respect of railway occurrences and pipeline occurrences (a) in Canada, if the railway or pipeline is within the legislative authority of Parliament; and (b) outside Canada, if Canada is requested to investigate the occurrence by an appropriate authority.”
 - However, there is no formal, continuing, general Memorandum of Understanding (MOU) or other agreement between Canada and the United States as it relates to investigations.
- With respect to aviation accidents, the Convention on International Civil Aviation (the “Chicago Convention”), Annex 13, governs how the member states interact regarding accident investigations. In particular, Section 5.1 of Annex 13 of the Chicago Convention allows delegation of an investigation from one country to another.
[*International Standards and Recommended Practices, Aircraft Accident and Incident Investigation; Annex 13 (9th Edition, 10th Amendment, November 1, 2001)*]
- Pursuant to the Chicago Convention, in May of 2012, the NTSB and TSB entered into a special MOU to enable the TSB to conduct an investigation on United States soil. That MOU was specific to a single investigation that the NTSB delegated to the TSB, involving a mid-air collision in Virginia.
 - One of the planes was piloted by [an FAA inspector](#), and the other plane was piloted by [an NTSB employee](#), which created a [potential conflict of interest for the NTSB](#) as the investigative agency.

- For accidents involving other modes, the NTSB and TSB do work together and share information as necessary.
 - For example, the NTSB and TSB recently issued a joint safety recommendation on January 21, 2014, following the Lac-Mégantic accident involving a train transporting crude oil.
 - According to the TSB, the joint recommendation of the two nations' safety boards was [unprecedented](#).

Confidentiality of Investigative Information

Transportation Safety Board of Canada

- “An investigator who is investigating a transportation occurrence may...require the person to produce the information to the investigator or to attend before the investigator and give a statement...under oath... and make copies of or take such extracts from the information as the investigator deems necessary for the purposes of the investigation.” [CTAISBA § 19(9)]
 - “No person shall refuse or fail to produce information to an investigator...and give a statement, in accordance with...paragraph (9)(a).” [CTAISBA § 19(10)]
 - If a person does fail to produce, the investigator may make an application to the Federal Court or superior court of a province, and that court can make an inquiry, and take steps for punishment if the person is guilty of contempt of the court. [CTAISBA § 19(15.1)]
- Any representations made by persons contributing to a draft report by the Board are considered privileged, and “no person shall use representations in any legal, disciplinary or other proceedings.” [See, CTAISBA § 24(4.1)]
- Additionally, CTAISBA §§ 28-30 define, and ascribe privileged status to, an “on-board recording” (§ 28), a “communication record” (§ 29), and a “statement.”
 - “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.” [See, CTAISBA § 28(2)(a) and (b)]
 - “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.” [CTAISBA § 28(7)]

- “A communication record obtained under this Act shall not be used against any person referred to in subsection (1) in any legal proceedings or, subject to any applicable collective agreement, in any disciplinary proceedings.” [See, CTAISBA § 29(6)]
- “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.” [See, CTAISBA § 30(7)]
- There are exceptions to these privileges which are addressed later in this paper.

National Transportation Safety Board (United States)

- The NTSB may conduct public investigative hearings and otherwise exercise its fact-finding authority to carry out its statutory mandate, and may require by subpoena or otherwise the production of evidence and witnesses that they need to conduct their investigation. [49 USC § 1113(a)]
- The NTSB’s governing statute also provides for confidentiality limitations on public disclosure and use of trade secrets, cockpit recordings and transcripts, surface vehicle recordings and transcripts, laboratory records pertaining to drug tests and medical information, and records or information relating to the NTSB’s participation in foreign aircraft investigations. [49 USC § 1114]
- Any person interviewed by the NTSB “has the right to be accompanied, represented, or advised by an attorney or non-attorney representative.” [49 CFR § 831.7]
- Parties may request the Board to keep confidential certain information that the submitter believes is a trade secret or confidential commercial information. [49 CFR § 831.6]
- When submitting proprietary information to the NTSB that the submitter believes qualifies as a trade secret or confidential commercial information subject to the Trade Secrets Act or FOIA exemptions, the information and documents must be appropriately marked on each and every page of such document. [49 CFR § 831.6(a)(2)]
 - This disclosure is generally subject to confidential status, although the Board may still disclose the information to other departments and agencies of the US government, Congress committees, judicial proceedings under court order (that preserves the confidentiality of the information), and to the public to protect health and safety. [See, 49 USC § 1114(b); 5 USC § 552(b)(4)]
- Subject to the trade secret and confidential commercial information exceptions, all factual information, proposed findings that parties have submitted, petitions for reconsideration and the Board’s rulings will be placed in the public docket, which will be made available to the public. [49 CFR § 845.50 and 49 CFR § 837.3(a)]
- Typically, parties to investigations will have an opportunity to correct any errors, omissions or potentially misleading language in field notes and factual reports at the discretion and judgment of the NTSB. [See, 49 CFR § 831.11 and § 831.14]

Use in Litigation Stemming from Accidents

Transport Safety Board of Canada

- CTAISBA § 7(2): “It is not the function of the Board to assign fault or determine civil or criminal liability, but the Board shall not refrain from fully reporting the causes and contributing factors merely because fault and liability might be inferred from the Board’s Findings.”
- CTAISBA § 7(3)-(4): “No finding of the Board shall be construed as assigning fault for determining civil or criminal liability; the findings of the Board are not binding on the parties to any legal, disciplinary or other proceedings.”
- CTAISBA § 32: “Except for proceedings before and investigations by a coroner, an investigator is not competent or compellable to appear as a witness in any proceedings unless the court or other person or body before whom the proceedings are conducted so orders for special cause.”
- CTAISBA § 33: “An opinion of a member or an investigator is not admissible in evidence in any legal, disciplinary or other proceedings.”
- Despite the privilege and confidentiality provisions in CTAISBA §§ 24, and 28-30, there are exceptions.
 - A report in which the investigator used his powers set forth in CTAISBA § 19 is admissible evidence in any prosecution for an offense under the CTAISBA. Documents and extracts of documents obtained by an investigator pursuant to his powers set forth in CTAISBA § 19 are also admissible evidence in any prosecution as well. [CTAISBA § 36(1)(b)] Because of this language in § 19, it may be more advantageous to voluntarily relinquish documents and work with the investigator, so as to avoid these unfavorable evidence and admissibility rules if the investigator forces a party to produce documents.
 - CTAISBA § 24(4.2): “The Board may use representations as it considers necessary in the interests of transportation safety.”
 - CTAISBA § 24(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.”
 - CTAISBA § 24(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.”
 - CTAISBA § 28(5-6):
 - “(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.”

○ CTAISBA § 30(3)-(6):

“(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.

(6) For the purposes of subsection (5), “court” includes a person or persons appointed or designated to conduct a public inquiry into a transportation occurrence pursuant to this Act or the *Inquiries Act*.”

- Claims of privilege must be timely and carefully made.

National Transportation Safety Board (United States)

- 49 U.S.C. § 1154(b) “preclude(s) the use or admission into evidence of Board accident reports in any suit or action for damages arising from accidents. These sections reflect Congress’ ‘strong...desire to keep the Board free of the entanglement of such suits’...and serve to ensure that the Board does not exert undue influence on litigation.” [See, 49 CFR § 835.3(a)]
- 49 C.F.R. Part 835 describes policies and procedures regarding the testimony of employees of the NTSB Board in suits or actions for damages and criminal proceedings arising out of accidents. [See, 49 CFR § 835.1]

- Board employees may only testify as to unique, firsthand information, (through depositions or written interrogatories, including factual evaluations embodied in their factual accident reports), that is not reasonably available elsewhere. [49 CFR § 835]
- It is important to note the distinction between *factual accident reports* and *Board accident reports*. Since factual accident reports are generally admissible as evidence, advising clients as to how and what to disclose to the Board's investigation, and revising the accident reports where possible, becomes very important. [49 CFR § 835.2 and § 835.4.]
- Board employees may *not* offer opinion testimony as experts. [49 CFR § 835.3(a)]
- "Board employees are authorized to testify only once in connection with any investigation they have made of an accident. Consequently, when more than one civil lawsuit arises as a result of an accident, it shall be the duty of counsel seeking the employee's deposition to ascertain the identity of all parties to the multiple lawsuits and their counsel, and to advise them of the fact that a deposition has been granted, so that all interested parties may be afforded the opportunity to participate therein." [49 CFR § 835.5]

Practice Considerations for Investigations

- **NTSB:** Once an NTSB major report is adopted at a Board Meeting, an abstract of that report, containing the Boards' conclusions, probable cause and safety recommendations, it is placed on the Boards' website under "Publications." The full report will be posted on the website shortly thereafter when completed.
- **TSB:** After the examination and analysis phase, a TSB investigation report is drafted. The Board reviews the draft report: it may approve it, ask for minor amendments, or return it for further work. Once the draft report is approved, it is sent to designated reviewers on a confidential basis for comment.
 - A designated reviewer may be any person—including a company, corporation, manufacturer or association—who, in the opinion of the Board, will contribute to the completeness and accuracy of the report.
 - The Board considers all of the designated reviewers' comments and amends the report as required.
- Because both the NTSB and TSB publish their reports and are eventually made public, it is important for counsel to carefully navigate the investigative process with that in mind.
- One of the most important roles of an attorney representing an entity involved in an investigation comes in their opportunity to review and make comments to the draft of the investigation report when working with the TSB, and the opportunity to make corrections to any field notes and factual reports when working with the NTSB.
 - However, CTAISBA § 24 gives the Board of the TSB broad discretion as to who they believe should have the opportunity to review and comment on the report, as the standard set forth is who "in the opinion of the Board, has a direct interest in the findings of the Board."

- Because there are no formal MOU's or agreements between the United States and Canada relating to the TSB and NTSB, counsel may potentially question the particular agency's jurisdiction for accidents involving cross-border operations.
 - However, it is important to keep in mind that the NTSB and TSB will very likely work together to obtain any information that they need anyway, so one is likely better off cooperating with the agencies so as to potentially afford favorable treatment in reviewing and amending reports.
- Also take note of NTSB rules regarding voluntarily-provided safety information.
[See, 49 CFR § 831.6(a)(3)]
- Because USDOT determinations can oftentimes be done in conjunction with an NTSB investigation, counsel representing a party to a joint investigation by the two agencies could potentially use Section II(G) of the *Reimbursable Memorandum of Agreement Between Department of Transportation and National Transportation Safety Board (1975)* to request that the USDOT investigator (from PHMSA, FMCSA, FRA, FAA, or CG) remove themselves from witness interviews. Doing so could potentially preserve important confidentiality and privilege considerations.

CONCLUSION

Even without any discussion of national sovereignty, which is beyond the scope of this paper, there is scant legal authority in either the United States or Canada for the conduct of cross-border accident investigations on foreign soil by the relevant governmental agencies of the two countries other than in the field of civil aviation. Nevertheless, the NTSB and the TSB have a history of working together cooperatively when necessary in the interest of public safety. The governing statutory and regulatory structures in each country do provide some confidentiality, privilege, and other due process protections for persons and entities who may be involved in an investigation. Although the reports and conclusions of the TSB and the NTSB in and of themselves may not be used as evidence, they can certainly provide roadmaps for potential plaintiffs. The authors are hopeful this paper will assist the attorneys who represent those persons and entities to navigate the "process," regardless of how you pronounce this word, in both countries.