

Occupational Health
and Safety Tribunal Canada



Tribunal de santé et
sécurité au travail Canada

Ottawa, Canada K1A 0J2

Case No. 2004-14
Decision No. OHSTC-09-023

**CANADA LABOUR CODE
PART II
OCCUPATIONAL HEALTH AND SAFETY**

Air Canada
appellant

and

The Canadian Union of Public
Employees, Air Canada Component
Respondent

and

Transportation Safety Board
of Canada (TSBC)
Intervenor

June 18, 2009

This matter was decided by Appeals Officer Pierre Guénette.

For the appellant
Maryse Tremblay, Counsel

For the respondent
Beth Symes, Counsel

For the intervenor
Louise Béchamp, Counsel

Canada 

I. THE APPEAL

- [1] This appeal, dated March 9, 2004, was made by Air Canada pursuant to subsection 146(1) of the *Canada Labour Code*, Part II (*Code*) against a direction issued by health and safety officer (HSO) Marie-Anyk Côté on February 13, 2004.
- [2] On October 13, 2004, the appellant applied to the Tribunal for a stay of the direction pending disposition of the appeal. On November 5, 2004, by way of a teleconference, this application was heard by the undersigned Appeals Officer who granted the stay in a written decision on January 6, 2005.
- [3] The hearing of the appeal proceeded in Montreal, Quebec, on July 11-12, 2005, October 24-26, 2005, February 1, 13-14, 21-22, 2006, April 11-12, 2006, February 8-9, 2007, April 19-20, 23-24, 26-28, 2007, November 27-28, 2007 and December 11, 2007.
- [4] At some point during these proceedings, Maryse Tremblay (M. Tremblay), Counsel for Air Canada, requested that the scope of this appeal be clarified.
- [5] Both parties presented submissions on this issue. M. Tremblay argued that the appeal must be restricted to the two items noted in HSO Côté's direction to Air Canada. According to Counsel, the second item of this direction only referred to the Air Safety Report¹ ("ASR") filed by the pilot of flight AC 875. However, Beth Symes (B. Symes), Counsel for CUPE, pointed out that a letter sent by HSO Côté to the Montreal workplace health and safety committee (YUL workplace committee) on February 13, 2004, seemed to indicate that the direction referred to more than just the ASR, and that the scope of the appeal was broader than what was claimed by Air Canada.
- [6] Following careful consideration of the parties' submissions on the matter, on September 7, 2006, I issued a decision confirming that the appeal concerned solely the two items noted in HSO Côté's direction to Air Canada to wit, the employer duty to investigate and the YUL workplace committee access to employer documents.
- [7] As a result of this ruling, and at a telephone conference held on September 12, 2006, at the request of Counsel for Air Canada, I further clarified that the second item of HSO Côté's direction encompassed documents from the Transportation Safety Board of Canada ("TSBC"), namely the TSBC draft report on the events and the Air Canada representations on this report.
- [8] At that juncture, TSBC sought authorization to intervene in the proceedings and on February 8, 2007, I allowed TSBC limited intervenor status.
- [9] By way of additional submissions, in a letter dated February 17, 2009, Counsel for Air Canada brought to my attention a Federal Court of Canada case² in which Barnes J.

¹ Air Safety Report: It is used by Air Canada flight crews to report hazards and events with respect to safety deficiencies that have the potential for an accident or an incident.

² *CUPE, Air Canada Component v. Air Canada* [2009] FC 12

stated : “where an employee initiates a complaint under s. 127.1 of the Code, it is necessary to exhaust the internal complaint resolution process before the employee, or the union on the employee’s behalf, can request an investigation by a Health and Safety Officer”. Air Canada argued that this judgment applies in the present case to “all issues raised and remedies sought by CUPE that **do not concern** the two items addressed [in the HSO Côté direction] because these issues were not addressed through the internal complaint resolution process described in s. 127.1 [my emphasis]”.³

- [10] The respondent was afforded an opportunity to respond to appellant’s contentions, and it did in a letter dated March 20, 2009, following which the appellant responded in a letter dated April 14, 2009. Having considered the submissions of both parties with respect to the relevance of the case submitted by Counsel for Air Canada, I confirm, as stated previously, that my jurisdiction in this case is restricted to the two items noted in HSO Côté’s direction. Given that the Federal Court decision deals with issues not within the scope of this appeal, I will not need to address this matter in my reasons.

II. BACKGROUND

- [11] On June 14, 2002, the tail of an Air Canada Airbus 330-343⁴ struck the runway upon takeoff from Frankfurt Airport in Germany, causing the Pilot-in-Command⁵ to return to that airport. During descent, the aircraft pitched up to 26.7 degrees. The pilots managed to land the fully fuelled aircraft without incident.
- [12] There were no reported employee injuries following the events of flight AC 875⁶ and accordingly no “Injury Report” or “Flight Report – Injury/Illness/Incident” was completed by employees.
- [13] The pilots reported the events of flight AC 875 to an Air Canada representative at the Frankfurt Airport, and that person advised the Air Canada Chief Duty Dispatcher in Canada, who in turn informed the Air Canada Flight Safety department.
- [14] As a result, several parties at Air Canada were informed of the events of flight AC 875, including the Communications Centre where the message was distributed to employer and employee representatives of the YUL workplace committee.
- [15] Following the events of flight AC 875, the Pilot-in-Command completed an ASR and sent it to the Air Canada Flight Safety department in accordance with Air Canada Reporting Policy.

³ Letter from the appellant dated February 17, 2009.

⁴ A scheduled flight (AC 875) from Frankfurt, Germany to Montreal, Quebec with 253 passengers and 13 crew members on board.

⁵ According to the Aviation Occupational Safety and Health Regulations, the meaning of “pilot-in-command” is “... in respect of an aircraft, the pilot having responsibility and authority for the operation and safety of the aircraft.

⁶ Events of flight AC 875: On June 14, 2002, at the Frankfurt Airport, Germany, the tail of the aircraft struck the runway on take off and consequently the pilot returned to the airport. During landing operations the aircraft pitched up to 26.7 degrees.

- [16] During the take-off and landing of flight AC 875, Air Canada Flight Attendant Elizabeth Niles (E. Niles) occupied the Flight Deck Observer Seat⁷ at the request of the Pilot-in-Command.
- [17] Around the time of those events (March 2002), Air Canada had issued a security procedures update which modified the employer policy with respect to use of the flight deck observer seat by flight attendants. As of that update, the employer determined that pilots would no longer designate a flight attendant to occupy the flight deck observer seat.
- [18] E. Niles returned to her Montreal base on June 15, 2002. She felt somewhat anxious about resuming flying on account of the events she had been through on flight AC 875, but she did not report those events to her manager upon return from Frankfurt. In the ensuing weeks, she booked off sick as she was afraid to go back aboard an aircraft and felt depressed about the situation. She nonetheless resumed flying in July 2002 and completed all her scheduled flights. She also completed some flights in August. It is at that time that Ms Niles reported her health condition to a supervisor who, in turn, referred her to an Air Canada physician. As a result of that medical consultation, she was referred to a psychotherapist for post-traumatic stress care.
- [19] The first time she spoke to the Co-chair representative of the YUL workplace committee about her health condition resulting from the events of flight AC 875 was in August 2002.
- [20] On September 12, 2002, E. Niles filed an injury report with her supervisor.
- [21] Air Canada has developed a Corporate and Employee Safety Manual to deal with accidents or incidents involving employees. According to chapter 9 (Accident/Incident Investigation):

It is the Company's policy to report and investigate all accidents/incidents resulting in or (that) may result in, employee injury, damage to equipment, facilities and aircraft, including any unplanned contact with aircraft. (...)

The investigation of an accident or incident shall be completed using Accident Investigation Report Form ACF 32-6B within the time frames specified in Accident/Incident Investigation Procedures. An Employee Injury/Accident Report Form ACF32-5 must accompany the Accident Investigation Report. Both forms available on the Aeronet must be completed for all accident types (aircraft damage, equipment and facility damage and personal injuries). (...)

Management and employees must develop an understanding of what happened, how it happened, who was involved, what were the consequences and what must be done to avoid any recurrence.

To accomplish this, an accident/incident investigation must take place and be conducted by responsible persons qualified to do so. The objective of the investigation is to determine the root cause and factors contributing to the accident/incident using a systemic approach to learn the WHAT? WHY? WHO? WHEN? WHERE? And especially HOW ? an accident/incident occurred.(...)

Employees must report all accidents and incidents which caused or could have caused injury or

⁷ The flight deck observer seat is located inside the cockpit of the aircraft.

damage to their immediate supervisor.

Management must investigate, record and report all accidents, occupational diseases and other hazardous occurrences consistent with Company policy and applicable regulations.

Accident/incident investigation and reporting is a Line Management responsibility.

An employee member of the Work Place Health and Safety Committee will be involved in the investigation of all accidents/incidents (as dictated by the local Terms of Reference).

- [22] The workplace health and safety committee's role, as regards an occupational health and safety investigation, is specified in the Air Canada Corporate and Employee Safety Manual:

The Branch local Work Place Health and Safety Committee will:

Participate in all inquiries, investigations, studies and inspections pertaining to the health and safety of employees, including any consultations that may be necessary with persons who are technically qualified to advise the committee on such matters.

- [23] The same manual describes the investigation process to be followed at Air Canada, including the involvement of the workplace health and safety committee:

Decide who will conduct the investigation, what resources may be necessary, and who will review the team's findings.

The following points need to be considered in determining who will be involved in an investigation:

- Accident/incident investigation and reporting is a line management responsibility.
- An employee member of the Work Place Health and Safety Committee will be involved in the investigation of S1⁸ & S2⁹ accidents/incidents (as dictated by the local Terms of Reference).

(my underline)

- [24] The injury report filed by E. Niles was reviewed by the YUL workplace committee at their September 2002 monthly meeting. The YUL workplace committee decided to be part of the investigation to determine why E. Niles' injury had occurred and whether it was caused by the events of flight AC 875. As part of the YUL workplace committee investigation, Patrick Botter (P. Botter)¹⁰ requested from Captain Curtis (Director of Flight Safety at Air Canada), access to reports relating to the events of flight AC 875. In his reply, Captain Curtis informed P. Botter that there were two reports:

⁸ S1: means a fatality or disabling injury that results in loss of use of a body part totally or partially, damage to the aircraft that delays the scheduled use for more than 24 hours or that the total cost exceeds \$100,000, damage to equipment facilities that delays the scheduled use for more than one week or the total cost is over \$10,000.

⁹ S2: means a disabling injury resulting in loss time of 14 days or more to one person, damage to the aircraft that delays the scheduled use for up to 24 hours or the total cost not exceeding \$100,000, damage to equipment facilities that delays the scheduled use for up to one week or the total cost does not exceed \$10,000.

¹⁰ Patrick Botter: From September 2002 to May 2003 he was the employer Co-chair of the YUL workplace committee, as well as the Manager, Safety, Operations and Product Support – East within the In Flight Service branch.

- the draft investigation report by the TSBC,
and
- the ASR.

- [25] Captain Curtis informed P. Botter that a TSBC draft report is not a public document and that the ASR could not be released unless the employee involved agreed or the law so required. Consequently, Captain Curtis refused to give the YUL workplace committee access to those reports.
- [26] Following said refusal, P. Botter suggested that members of the YUL workplace committee present the employer with a list of questions in order to gain assistance in their investigation. However, employee members of the committee disagreed with P. Botter and decided to make a complaint to a Transport Canada health and safety officer on February 26, 2003.
- [27] HSO Côté was assigned to investigate the complaint submitted by the employee Co-chair of the YUL workplace committee.
- [28] HSO Côté was summoned to testify by the Tribunal in order to explain her complaint investigation and the reasons for the issuance of a direction to Air Canada. Both parties had the opportunity to cross-examine the witness at the hearing.
- [29] I retain the following from the testimony of HSO Côté at the hearing.
- [30] In the course of her investigation, she met members of the YUL workplace committee as well as managers. She found the employer's investigation approach with respect to the hazardous occurrence that resulted in a disabling injury to E. Niles to have been very restrictive. She therefore concluded that the employer had not conducted a proper investigation in accordance with the *Code* and the *Aviation Occupational Safety and Health Regulations (Aviation Regulations)*.
- [31] HSO Côté concluded the complaint investigation by finding that the employer had not conducted a health and safety investigation and that the YUL workplace committee had been denied by the employer access to health and safety information and reports related to events of flight AC 875. As a result, HSO Côté issued a direction to Air Canada on February 13, 2004:

DIRECTION TO THE EMPLOYER UNDER PARAGRAPH 145(1)

The undersigned health and safety officer conducted an investigation into a complaint about an incident which occurred in the work place operated by Air Canada, being an employer subject to the *Canada Labour code* (sic) – Part II, on board flight AC 875, June 14, 2002.

The said health and safety officer is of the opinion that the following provisions of the *Canada Labour Code* have been contravened:

Paragraph 125.(1) (c) of the *Canada Labour Code*, Part II

"...every employer shall...

(c) investigate, record and report in the manner and to the authorities as prescribed all accidents, occupational diseases and other hazardous occurrences known to the employer,"

Subsection 135.(9) of the *Canada Labour Code*, Part II;

"A work place committee, in respect of the work place for which it is established, shall have full access to all government and employer reports, studies and tests relating to the health and safety of employees, but shall not have access to the medical records of any person except with the person's consent"

In the course of the complaint investigation, the health and safety officer was able to determine that there was no health and safety investigations (sic) conducted by the employer and that the YUL Work Place Committee was denied access, for investigation purposes, to health and safety information and reports related to the incident that occurred on flight AC 875, June 14, 2002.

Therefore, you are HEREBY DIRECTED, pursuant to paragraph 145(1)(a) of the *Canada Labour Code*, Part II, to terminate the contravention immediately.

Further, you are HEREBY DIRECTED, pursuant to paragraph 145(1)(b) of the *Canada Labour Code*, Part II, to take steps no later than March 15, 2004, to ensure that the contravention does not reoccur.

Issued at Montreal, this 13th Day of February 2004.

Marie-Anyk Côté
Health and Safety Officer

[32] On February 13, 2004, HSO Côté wrote to Suzanne St-Jean (S. St-Jean), health and safety representative Co-chair on the YUL workplace committee, to inform the YUL workplace committee of the results of her investigation. In that letter she also states that:

... There is an urgent need for Air Canada to revise its Corporate Safety Reporting Policy to be in compliance with the *Canada Labour Code* – Part II, to ensure Work Place Committees have full access to information pertaining to the health and safety of employees contained in all reports, studies and tests.

She then reiterated the direction issued to the employer that same day:

... Based on the investigation conducted, including the review of documentation received, it is Transport Canada's position that Air Canada is in contravention of the *Canada Labour Code* – Part II, paragraph 125(1)(c) by not conducting a health and safety investigation of the subject incident, and subsection 135(9) by denying access to the Work Place Committee to specifically requested reports, or parts thereof related to the health and safety of Air Canada employees.

She concluded the letter by adding the following:

Transport Canada is hereby directing Air Canada, this date, to:

- (1) terminate forthwith the contraventions noted above and in the attached Direction;
- (2) put in place a health and safety structure which ensures compliance with the *Canada Labour*

Code – Part II, especially with regards to the necessity of the Work Place Committee to carry out investigations following an incident and/or accident; and
(3) forward to the undersigned Health & Safety Officer, documentation on how Air Canada's revised health and safety structure meets the second element listed above.

III. ISSUES

[33] The issues to be decided in this case are whether HSO Côté was well founded in finding Air Canada in contravention of:

- 1- Paragraph 125(1)(c) of the *Code* with respect to the employer obligation to investigate hazardous occurrences, and
- 2- Subsection 135(9) of the *Code* with respect to the employer obligation to give the workplace committee access to all or parts of government and employer reports, studies and tests that relate to the health and safety of employees.

IV. SUMMARY OF THE EVIDENCE

a) Appellant's evidence

[34] The appellant called five witnesses and submitted 84 documents.

Employer's obligation to investigate

[35] I retain the following from the appellant's witnesses, dealing with the first item of the direction.

[36] Joseph Donato (J. Donato) testified that on June 14, 2002, he was an Operations Duty Manager in the In-Flight Service department of Air Canada.

[37] He stated that after having been informed of the accident, he attempted unsuccessfully to contact the In-Charge flight attendant of flight AC 875. He managed to contact the most senior flight attendant, who reported that no cabin crew and passengers had been injured during the take off and landing.

[38] Further to Mr Donato's testimony, P. Botter testified that as the employer Co-chair of the YUL workplace committee, he was informed of the disabling injury to E. Niles during the committee's monthly meeting of January 2003. He added that once the employer had been informed of the injury suffered by E. Niles, they requested the flight report from the In-Charge flight attendant. That report was never completed by the In-Charge flight attendant. P. Botter testified that the YUL workplace committee approached all crew members to obtain written statements. Three were received.

[39] Mr Botter stated that as part of the YUL workplace committee investigation, he requested documents from the employer.

[40] P. Botter stated at the conclusion of his examination-in-chief that the role of the YUL workplace committee was to determine the reasons of E. Niles' injury subsequent to the events of flight AC 875.

[41] The second item of the direction concerned access by the YUL workplace committee to employer reports.

YUL workplace committee access to employer documents.

[42] Concerning the second item of the direction, I retained the following from the appellant's witnesses.

[43] P. Botter testified that it was as employer co-chair of the YUL workplace committee that he made a written request to Captain Curtis to obtain any information on flight AC 875. The purpose of the request was to gain for the YUL workplace committee access to reports concerning the events of flight AC 875 so that the YUL workplace committee could conduct its investigation and obtain the reasons of E. Niles' presence on the flight deck during take off and landing on June 14, 2002.

[44] P. Botter stated that Captain Curtis replied by making reference to an on-going internal investigation where no report had yet been completed. He also referred to a draft investigation report done by the TSBC, on which Air Canada had been asked to provide comments. He added that this draft report could not be used for other purposes. Captain Curtis also made reference to an ASR that had been completed by the pilot and he specified that for an ASR to be disclosed, at least one of the following conditions had to be met:

- the author's consent, or
- required by law.

[45] Captain Curtis informed Mr Botter of the protocol to follow for seeking the pilot's consent. He added that he was informed that since the accident, both pilots had retired.

[46] P. Botter added that considering responses obtained from management, he suggested to members of the YUL workplace committee to submit a list of questions to the employer, in order to get some information from the ASR. He added that the employee co-chair of the YUL workplace committee disagreed with that approach and a decision was made to file a complaint to Transport Canada, despite the fact that P. Botter had not consented to said approach.

[47] Mr Botter testified that in the days that followed the complaint to Transport Canada, he requested written reports from the flight crew concerning the events of flight AC 875. He received three reports from flight attendants.

[48] In cross-examination, P. Botter stated that members of the YUL workplace committee had not been involved in the internal investigation conducted by the employer. He added that management never provided the internal investigation report.

[49] He explained that as the employer co-chair of the YUL workplace committee, he was not in a position to file a complaint against the employer that he represents.

[50] In re-examination, Mr. Botter stated that the YUL workplace committee initiated its own investigation in September 2002, after having been informed of the injury to E. Niles. The YUL workplace committee was looking for the Incident Report, as well as written reports from the flight crew.

[51] During his examination-in-chief, Captain Curtis explained that following the events of flight AC 875, an internal investigation was conducted by the Flight Safety department. That information was provided to P. Botter. Captain Curtis added that the internal investigation related to flight safety.

[52] Captain Curtis stated that Air Canada had developed an Air Safety Reporting Policy in 2003 to replace the Air Canada Immunity Policy. He added that the purpose of the Safety Reporting Policy was to give employees an opportunity to uninhibitedly report hazards and occurrences that could compromise the health, safety and property of Air Canada, its employees and customers. The policy reads in part as follows:

- Confidentiality

The identity, or information revealing the identity, of any employee who reports a hazard or occurrence to a Safety Person, will not be disclosed unless agreed to by the employee, or required by law.

- No Discipline

No company disciplinary action, or reprisal, will be taken against any employee who reports a hazard or occurrence that affects safety.

This policy does not apply to unlawful acts, gross negligence or wilful infractions.

[53] In addition, Air Canada has developed the Air Safety Reports Immunity Policy that is part of the Flight Operations Manual:

Safe flights operations are Air Canada's most important commitment. To ensure that commitment, it is imperative that we have uninhibited reporting of all incidents and occurrences that compromise the safety of our operations.

We ask that each employee accept the responsibility to communicate any information that may affect the integrity of flight safety. Employees must be assured that this communication will never result in reprisal, thus allowing a timely, uninhibited flow of information to occur.

All employees are advised that Air Canada will not initiate disciplinary actions against an employee who discloses an incident or occurrence involving flight safety. This policy cannot apply to criminal,

international (sic) or regulatory infractions.

Air Canada has developed Air Safety Reports to be used by flight crews as well as other employees for reporting information concerning flight safety. They are designed to protect the identity of the employee who provides information. These forms are readily available in your work area.

We urge all employees to use this program to help Air Canada continue its leadership in providing our customers and employees with the highest level of flight safety.

- [54] Captain Curtis noted the two features of the Policy that is the confidentiality as to the identity of the employee who reports a hazard or incident as well as the absence of disciplinary action against the employee who actually does the reporting.
- [55] Captain Curtis testified that an ASR is a personal account of an incident that is completed by a flight crew. It will provide factual information about the flight, as well as a summary of the event with respect to what happened and why it happened:

Air Canada pilots report hazards or incidents in ASRs. Unless the author pilots consent or are required by law, only factual de-identified information in their ASRs will be used to advance flight safety.

The ASRs are the pilots' personal account of the flight safety incident or hazard and their actions in dealing with it.

- [56] According to Captain Curtis, the Flight Safety department receives an average of 3000 ASRs per year.
- [57] He said that the ASR is a personal account of an incident or hazard and that it is completed by a flight crew (mostly pilots) on a non-mandatory basis. The ASR contains:
- factual information concerning the flight;
 - a summary of the event;
 - a personal account of what happened and why it happened; and
 - their expertise suggestions to prevent the reoccurrence of the incident.
- [58] Captain Curtis specified that pilots can report all types of flight incidents through the ASR, while certain categories of flight incidents have to be reported by law either in writing or verbally.
- [59] Captain Curtis testified that once an ASR is completed, it is sent to the Flight Safety department for the following purposes:
- approximately 85% of the information goes to a database without a specific investigation;
 - to promote safety awareness to Air Canada pilots;
 - to be discussed with the appropriate manager (mainly maintenance, airport authorities and In-Flight division) with respect to safety issues;
 - to review safety issues with aviation manufacturers and aviation associations;
 - to use some of the information to improve Air Canada's flight training program; and

- to share information on safety issues with the Air Transport Association (ATA).

- [60] In Captain Curtis' opinion, providing ASRs to other organizations would bring about a significant reduction in the reporting of flight safety hazards and have a devastating impact on Air Canada's fragile reporting culture.
- [61] Captain Curtis mentioned that an ASR had been filed for the events of flight AC 875 and that he had reviewed its content. According to him, the ASR made no mention of the presence of a flight attendant on the flight deck and no reference to a health and safety issue with respect to the events that occurred during flight AC 875.
- [62] Captain Curtis testified that following the written request by P. Botter, he informed him that according to the Air Canada Corporate Safety Reporting Policy, he was not at liberty to release the ASR to the YUL workplace committee in the absence of the author's consent or unless it is required by law.
- [63] At cross-examination, Captain Curtis stated that there is no agreement or memorandum of understanding between Air Canada and the Air Canada Pilots Association (ACPA) with respect to filling out ASRs.
- [64] He added that it is mandatory to report flight incidents that come within some specific category; however the completion of an ASR is always optional because the program is voluntary.
- [65] Kent Wilson (K. Wilson), President of the Air Canada Pilots Association (ACPA) and a Captain on Airbus A340 at Air Canada testified at the hearing.
- [66] He specified that ACPA represents 3,000 pilots at Air Canada.
- [67] According to him, there are two fundamental aspects to ASRs:
- the immunity aspect; and
 - the confidentiality aspect.
- [68] K. Wilson went on to explain that the immunity aspect is important to protect pilots from retribution. As for the confidentiality aspect, K. Wilson said that it is important to protect the identity of the ASR author and that without this guarantee the reputation of a pilot could be unfairly damaged.
- [69] He explained that ASRs are often used when flight incidents happen. According to him, they are a good vehicle to make written statements.
- [70] K. Wilson added that the reporting culture is necessary to prevent further flight incidents. However if the confidentiality aspect is missing, the reporting culture will fail.
- [71] In K. Wilson's opinion, a breach in the confidentiality of ASRs would mean the end of the

reporting system. The quality and quantity of ASRs would be lessened and this would have a major impact on the safety management system at Air Canada.

- [72] K. Wilson expressed concern with the release of the ASR to the YUL workplace committee, as well as with the impact this could potentially have on flight safety at Air Canada in reducing the number and quality of ASRs.
- [73] He stated under cross-examination that he is not concerned that members of a workplace committee could provide to the media information found in an ASR.
- [74] He also specified that in case of access to ASRs by non-flight safety experts¹¹, some technical details provided by pilots could be misinterpreted.

YUL workplace committee access to TSB documents

- [75] Captain Curtis testified that the TSB conducted an investigation concerning the events of flight AC 875 and that Air Canada was designated as a reviewing party by TSB in the consultation process. Captain Curtis explained that the Flight Safety department is the point of contact with TSB and will assist them during a TSB investigation. In the course of an investigation, TSB will seek to obtain all operational manuals.
- [76] Captain Curtis explained the TSB consultation process followed in this case:
- TSB sent a draft investigation report to Air Canada (Flight Safety department) for representations;
 - Air Canada reviewed the draft investigation report by focussing on the following points:
 - a) any errors and/or omissions;
 - b) any issues related to Flight Safety; and
 - c) accuracy of content.
 - TSB received the Air Canada representations and, where in agreement, modifications were made to the investigation report;
 - The modified version of the investigation report was returned to Air Canada for additional representations and reply;
 - At the end of the consultation process, the TSB released the final version of the investigation report, which became public on April 29, 2003.

- [77] Captain Curtis specified that all correspondence between the parties remained confidential. Therefore, neither Air Canada nor TSB were allowed to release any part to other parties.

b) Respondent's evidence

- [78] The respondent called five witnesses and submitted 93 documents.

¹¹ Kent Wilson specified that a non-flight safety expert is a person that is not a pilot or somebody from Flight Safety Department.

Employer obligation to investigate

- [79] I retain the following from the respondent's witnesses dealing with the first item of the direction.
- [80] E. Niles confirmed that as a flight attendant, she was assigned to flight AC 875 from Frankfurt, Germany to Toronto, Canada on June 14, 2002.
- [81] The In-charge flight attendant asked her to occupy the observer seat on the flight deck for take-off, at the request of the Pilot-in-Command, despite an Air Canada Security Insert that specified that the Pilot would no longer designate a flight attendant to the flight deck observer seat. She added that she complied with the Pilot-in-Command's request because he is the authority on board the aircraft.
- [82] E. Niles explained that after take-off, the Pilot-in-Command was informed of the tail strike by the Traffic Controller, as well as by a flight attendant sitting at the back of the aircraft. She described the atmosphere inside the flight deck where she perceived the pilots as being very nervous. She felt very nervous and was not feeling secure. She left the flight deck very anxious, she was crying and she had difficulty speaking to employees on-board. E. Niles added that before landing the Pilot-in-Command requested her to come back to the flight deck. During descent, the aircraft was pitching up somewhat and she heard warning bells and horns. She thought that the aircraft would crash. Finally the aircraft landed safely and without incident.
- [83] E. Niles testified that when she left the flight deck, she informed the In-charge flight attendant that this was the worst incident she had experienced in her career as a flight attendant. She did not realize how seriously she would subsequently be affected.
- [84] E. Niles said that in the weeks that followed, she did not report to work on some shifts because she was anxious about flying. In August 2002, she informed a supervisor that she was too anxious to fly and she booked off for the month. She subsequently saw the employer's doctor at the request of a supervisor. The doctor concluded that she was suffering from post traumatic stress and referred her to a psychotherapist.
- [85] E. Niles testified that in late August 2002, she met employee members of the YUL workplace committee and on September 12, 2002, she completed the Air Canada Flight Attendant Injury/Accident Report. She added that the employer did not follow up with her after she reported her disabling injury.
- [86] She indicated in her "Will – Say" statement that the secretary of the Employer Co-Chair of the YUL workplace committee informed her that the YUL workplace committee was investigating events of flight AC 875 and she was asked to prepare a statement concerning what had happened. E. Niles testified that after she sent her statement to the YUL workplace committee, the employer, as well as the Flight Safety department never followed up with her with respect to events of flight AC 875.

- [87] At cross-examination, Ms Niles stated that she had not informed the employer about her injury despite the fact that she knew that she was required to report any incident to the employer. Furthermore, she explained that in June 2002, she had not completed the Air Canada Flight Attendant Injury/Accident Report because she thought that she would be fine.
- [88] John Bessett (J. Bessett), the In Charge Flight Attendant on flight AC 875, testified at the hearing.
- [89] J. Bessett said that he had intended to complete an incident report concerning the events but that the Pilot-in-Command had told him that he would complete all reports. He added that the only report he made was following a request by the employee Co-Chair of the YUL workplace committee.
- [90] J. Bessett testified that no employer representative sought feedback from him with respect to flight AC 875.
- [91] S. St-Jean, employee member of the YUL workplace committee in 2002, was also a witness at the hearing.
- [92] S. St-Jean stated that from an occupational health and safety point of view, events of flight AC 875 had to be investigated. However, the employer never discussed the events of flight AC 875 with members of the YUL workplace committee.
- [93] S. St-Jean testified that it was the responsibility of the YUL workplace committee to jointly investigate with the employer the events of flight AC 875.
- [94] S. St-Jean stated that in order to obtain the sequence of events that would make it possible to understand what had happened on June 14, 2002, a joint (managers/employees) complaint was made to Transport Canada for the purpose of getting all documents concerning events of flight AC 875. She added that without those documents, the YUL workplace committee was not in a position to pursue the investigation further.
- [95] S. St-Jean concluded her testimony by saying that the YUL workplace committee had not been contacted by the Flight Safety department or by any TSB representative.

YUL workplace committee access to employer documents

- [96] S. St-Jean testified that despite efforts by P. Botter, all requests made to Air Canada to obtain documents were to no avail.
- [97] At examination-in-chief, she testified that the YUL workplace committee was seeking the intervention of a Transport Canada health and safety officer for the purpose of obtaining from the employer all documents relating to events of flight AC 875. She added that all documents were necessary to establish a sequence of events and understand what had

happened on June 14, 2002.

- [98] According to S. St-Jean, the employer's refusal to release the documents to the YUL workplace committee had an impact on their investigation.
- [99] France Pelletier (F. Pelletier) testified at the hearing in her capacity as health and safety chairperson of the Air Canada Component of the Airline Service Division of the Canadian Union of Public Employees and the Employee Co-chair of the Air Canada In-Flight Service Policy Health and Safety Committee for the cabin personnel employed by Air Canada.
- [100] She stated that the Union has no authority to discipline pilots.
- [101] F. Pelletier explained that the YUL workplace committee is bound to confidentiality of some reports they receive and that could include ASRs. This means that any confidential report obtained by the YUL workplace committee cannot be disclosed to other parties.

YUL workplace committee access to TSBC documents

- [102] The respondent presented no testimony with respect to the YUL workplace committee access to TSBC documents.

V. SUMMARY OF ARGUMENTS

a) Appellant's arguments

Employer obligation to investigate

- [103] M. Tremblay, counsel for Air Canada, submitted that the employer was informed of the situation following the events of flight AC 875, on June 14, 2002, by J. Donato, Operations Duty Manager on duty for the In-Flight Service department¹². As part of his duties following an aircraft accident, J. Donato contacted D. Bergeron, a flight attendant that was part of the flight crew. J. Donato was then informed of the events and got a confirmation that the flight crew was not injured. Following that conversation, J. Donato informed several Air Canada representatives, as well as the employer co-chair of the policy health and safety committee.
- [104] She pointed out that reporting all incidents or accidents involving the aircraft, passengers and crew members to the Pilot-in-Command and to management is part of a flight attendant duties. This duty is set out in the Safety and Emergency Procedures Manual for flight attendants. In addition, the employer requires that a flight attendant injury has to be reported through a Flight Attendant Injury/Accident Report within 24 hours of the end of the work cycle. Also, the In-Charge flight attendant has to report an

¹² In-Flight Service is the Air Canada department responsible for Flight Attendants.

incident verbally to the employer within 24 hours of the work cycle, and a Flight Report – Injury/Illness/Incident (injury report) has to be submitted to the employer.

- [105] It is submitted that the YUL workplace committee members reviewed the events of flight AC 875 at their June 2002 monthly meeting. She adds that the YUL workplace committee did not pursue the case any further because no injury report had been submitted concerning the events of flight AC 875.
- [106] The In-Charge flight attendant of flight AC 875 never reported the accident to management, as required by the employer.
- [107] E. Niles did not inform the flight crew of her anxiety and did not report events of flight AC 875 to her manager at the end of her work shift, as required by the employer.
- [108] Counsel argued that E. Niles failed to inform a supervisor of the reason for her booking off on some occasions between mid-June and mid-August 2002. Furthermore, counsel maintained that the sole report submitted by E. Niles was the Injury Report submitted on September 12, 2002, a few weeks after consulting an Air Canada physician and a psychotherapist.
- [109] The disabling injury to E. Niles was not reported to management until September 12, 2002. Therefore, there was no obligation to conduct a hazardous occurrence investigation during that time.
- [110] The employer started a health and safety investigation as soon as it was informed by the employee of her disabling injury resulting from events of flight AC 875. The employer then nominated P. Botter as the qualified person to carry out the investigation. However, it has been admitted that the employer did not clearly identify P. Botter as the qualified person.
- [111] P. Botter did request documents from management. At the time however, the investigation had not been completed.
- [112] Consequently, it was Counsel's position that HSO Côté had wrongly concluded that the employer had not investigated the disabling injury to E. Niles and accordingly she erred in her direction to Air Canada.
- [113] Counsel argued that the employer became aware of E. Niles' injury solely when she submitted the Injury Report on September 12, 2002. Hence, the employer did not breach its obligation to investigate the hazardous occurrence that affected E. Niles in the course of her work on flight AC 875, on June 14, 2002.
- [114] With regards to participation of the workplace health and safety committee in an accident investigation, Counsel argued that it is clear from both paragraph 125.1 (c) of the *Code* and paragraph 9.3 (b) of the *Aviation Occupational Safety and Health Regulations (Aviation Regulations)*, that the responsibility to conduct a hazardous

occurrence investigation and appoint a qualified person to carry out the investigation Is that of the employer. As for the workplace health and safety committee, its responsibility is to participate in the employer's hazardous occurrence investigation.

[115] Counsel maintained that the employer never denied the YUL workplace committee the opportunity to participate in the employer investigation of the hazardous occurrence of E. Niles. She added that the workplace health and safety committee investigates mostly all hazardous occurrences.

[116] M. Tremblay concluded her submission on the first item of the direction as follows:

In conclusion, Air Canada admits the following in respect of the investigation regarding Flight 875:

- It did not clearly identify Mr. Patrick Botter as the qualified person appointed to carry out the investigation of the hazardous occurrence related to Flight 875; and
- It did not complete its investigation of the hazardous occurrence related to Flight 875. Once the Committee suspended further participation until the decision on Mr. Roy's complaint, Air Canada acknowledges that its qualified appointee should have continued and concluded the investigation in accordance with the employer's obligation under s.125.(1) (c) of the *Code*.

YUL workplace committee access to documents

[117] Counsel submitted that the ASR is part of Air Canada's Safety Reporting Policy (SRP) and she stressed the following elements:

- The objective is "to enhance flight safety through the uninhibited reporting of hazards and occurrences that may compromise the health, safety and property of Air Canada, its employees and customers."
- The ASR "enhances safety through the voluntary reporting of incidents or occurrences related to safety in order to avoid accidents."
- Employees who report incidents or occurrences compromising the safety of Air Canada's operations will not be subjected to disciplinary action, except in cases of unlawful acts, gross negligence or wilful infractions.
- The confidentiality of the employee who reports a hazard or occurrence will be preserved unless disclosure is agreed to by the employee, or it is required by law.
- The ASR is a tool used by employees to report incidents or occurrences.

[118] The ASRs are prepared by pilots on a voluntary basis. The employer encourages pilots to use that report for the purpose of improving flight safety.

[119] As to the ASR disclosure policy, Counsel Tremblay submits:

Pursuant to the Safety Reporting Policy, the ASRs are not disclosed to anyone other than the Flight Safety Department of Air Canada to which the ASR is addressed, unless agreed by the employee or required by law.”

[120] Air Canada pilots feel confident to report human factors that may have contributed to an incident or occurrence because of the established confidentiality protection safeguard.

[121] It was submitted that:

“Air Canada pilots would view the forced disclosure of an ASR as gravely violating their privacy and breaching Air Canada’s commitment to confidentiality. Indeed, it has been established that if pilots who submit ASRs fear that the information they contain could expose them to the judgement of their peers, embarrass them and/or affect their professional reputation, they will cease reporting essential safety-related information through ASRs.”

[122] It was submitted that:

“... ASRs assist the airline industry in identifying the cause of an aviation accident or a potential accident, in some cases a pilot error, as well as finding methods to avoid similar incidents in the future.”

[123] Counsel maintained that HSO Côté erred in her direction by misinterpreting the access requirements found in subsection 135(9) of the Code.

[124] She argued that the ASR is not an employer report since. “... ASRs are prepared by pilots on an entirely voluntary basis. It is not a report required to be produced by or prepared on behalf of Air Canada.”

[125] She added that under subsection 135(9) of the Code, an ASR has no application therefore the employer has no obligation to give access to the workplace committee.

[126] The ASR is not a government report because there is no legislative requirement to submit that type of report and the government has no access to it.

[127] Should I find that ASRs are covered by subsection 135(9) of the Code, M. Tremblay maintained that this report “... will be subject to circulation outside of the confidentiality safeguards of the Safety Reporting Policy and without any protection against disclosure.” As a result, pilots would not report incidents or errors to the employer, except for those categories of incidents for which reporting is mandated by the employer or the *Transportation Safety Board Act*. Therefore, Air Canada would lose valuable information.

[128] Contrary to the position advocated by the respondent, Counsel Tremblay expressed the opinion that the YUL workplace committee had other options available to it to obtain the relevant information with respect to events of flight AC 875:

- through the incident report that is normally completed by the In-charge flight attendant. However in this case it was not done.
- by submitting a list of questions with respect to the ASR content.
- by seeking to interview pilots involved in flight AC 875.

[129] She submitted that even if I find the ASR to be an employer report, the ASR filed by the pilots concerning the events does not relate, in this case, to the occupational health and safety of the flight attendants on flight AC 875.

[130] In summary, she argued that :

“Air Canada submits that the forced disclosure of ASRs would greatly hinder the reporting culture at Air Canada, thereby reducing the quantity and quality of valuable flight safety information received from Air Canada pilots. If pilots lose confidence in Air Canada’s ability to guarantee confidentiality, Air Canada will lose access to an invaluable source of information. Accidents may occur simply because pilots who could have prevented them by sharing information will decline to do so out of fear of reprisal or humiliation.”

[131] M. Tremblay concluded by stating that an ASR is not an employer report within the meaning of subsection 135 (9) of the *Code*. She added that in the alternative, the information found in the ASR dealing with the events of flight AC 875 does not relate to occupational safety and health and that its release to the YUL workplace committee:

... would gravely undermine the confidentiality necessary to maintain and enhance a reporting culture that is essential to further flight safety, which ultimately also ensures passenger and employee safety.

YUL workplace committee access to TSBC’s documents

[132] Counsel argued that the following documents that were requested by the respondent are confidential and/or privileged and Air Canada is not required to disclose them to the YUL workplace committee:

- 1- the TSBC draft report concerning the Frankfurt incident of June 14, 2002,
- 2- the written representations made by Air Canada on the TSBC draft report, and
- 3- the written comments by TSBC concerning the Air Canada representations.

[133] Air Canada did object to the release of those TSBC documents on the basis of confidentiality under the *Canadian Transportation Accident Investigation and Safety Board Act (CTAISB Act)*.

[134] Counsel submitted that Air Canada received the TSBC draft report and a covering letter that specified: “Not for release – Contents of this report is not to be made public without written permission of the Canadian Transportation Accident Investigation and Safety Board”.

[135] Subsection 24. (3) of the *CTAISB Act* specifies the confidential status of a draft report:

24. (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.

- [136] In addition, it was argued that subsection 135. (9) of the *Code* does not allow the YUL workplace committee to obtain those documents as they are confidential communications between Air Canada and the TSBC. As for the TSBC draft report, it was submitted that it represents a preliminary step in the process of preparing a final public report on its investigation findings and that it could not be considered as a government report to be released under the *Code*.
- [137] It was further submitted that all TSBC final reports are public documents and obviously available to the workplace committee. In the present case, the TSBC final report on the Frankfurt incident was available to the YUL workplace committee.
- [138] It was further argued that Air Canada's representations on the TSBC draft report are privileged and that this is supported by subsection 24. (4.1) and following of the *CTA/ISB Act*:

(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.

- [139] In this case, counsel argued that the privileged representations made by Air Canada on the TSBC draft report could not be communicated to any person.
- [140] Counsel further submitted that where conflict between legislation is alleged and one is to prevail over the provisions of another legislation, such specification would be explicit in the legislation itself, which it is not the case with the *Code*, as relates to the privileged nature of the TSBC draft report. Had Parliament intended that subsection 135(9) of the *Code* could override the privilege conferred by the TSB Act, it would have said so. Accordingly, the substantive provisions of Part II of the *Code*, which serve to determine the extent of application of the legislation, do not make those paramount over all other federal legislation.
- [141] With respect to the TSBC comments on Air Canada's representations, it was submitted that despite the fact that there is no provision to that effect in the *CTA/ISB Act*, those communications are also privileged and confidential and should not be disclosed to other parties. A reference was made to a ruling of the Alberta Court of Queen's Bench

in *Chernetz v. Eagle Copters Ltd.*¹³, in which it was stated that the privilege extends also to communications between TSBC and the designated reviewer on its representations.

[142] Counsel submitted that the respondent did not present case law supporting their position because no such case law exists.

[143] In conclusion, M. Tremblay asked that the Appeals Officer dismiss the respondent's request for disclosure of the three documents listed at paragraph 132.

b) Respondent's arguments

Employer's obligation to investigate

[144] B. Symes, counsel for CUPE maintained that the employer never informed the YUL workplace committee with respect to the identity of the qualified person appointed to investigate the disabling injury suffered by E. Niles, contrary to section 9.3 of the *Aviation Occupational Safety and Health Regulations* (Aviation Regulations).

[145] She argued that P. Botter did not conduct a proper legally required employer investigation, that he was conducting his investigation on behalf of the YUL workplace committee, not on behalf of the employer. Support for this conclusion can be found in the emails between P. Botter and some Air Canada managers.

[146] She further argued that P. Botter was not a qualified person to investigate the accident, as defined in the *Aviation Regulations*.

[147] With respect to investigations, it was submitted that P. Botter could not be concurrently the employer representative as well as the YUL workplace committee representative, despite being the employer co-chair of the YUL workplace committee.

[148] With respect to what would constitute an effective investigation, B. Symes referred to a decision of Regional Safety Officer¹⁴ Cadieux in *Halterm Ltd and Halifax International Longshoring Assn.*¹⁵ where he held that an effective accident investigation should include the following actions: seeking, searching, researching, examining systematically, asking questions and interrogating.

[149] Accordingly, she argued that the employer failed to conduct a proper investigation because the facts demonstrate that only part of the actions listed in the previous paragraph were performed.

¹³ *Chernetz v. Eagle Copters Ltd.*, [2003] A.J. No. 521.

¹⁴ Following amendments to the Canada Labour Code, Part II, in 2000, the function of Regional Safety Officer was repealed and replaced by the function of Appeals Officer.

¹⁵ *Halterm Ltd. and Halifax International Longshoring Assn.*, [1992], Decision no. 92-001.

- [150] The employer failed to initiate the investigation after the events of flight AC 875 and did not verify properly with employees to determine whether any had been injured through those events.
- [151] B. Symes also raised the matter of the participation of the YUL workplace committee in the employer hazardous occurrence investigation.
- [152] She argued that a workplace health and safety committee plays an essential role in the effective functioning of the employer internal responsibility system and that this role is based on the fundamental employees right to participate in health and safety matter issues in the workplace. As support for the respondent position on this issue, B. Symes referred to the decision in *Bunge du Canada*¹⁶ where Appeals Officer Serge Cadieux stated that:

a... joint Committee meeting held to address a serious hazardous situation in the work place “constitutes the very foundation of the internal responsibility framework advocated in the legislation, which provides for, among other things, the right of employees to take part in identifying and resolving problems relating to their work place.”

- [153] According to counsel, a workplace health and safety committee must play an active role in an investigation and take part in the fact findings of the accident by interviewing witnesses and other persons and taking part in all other aspects of the investigation, thus doing more than simply reviewing the results of an investigation conducted by the employer.
- [154] Counsel submitted that the YUL workplace committee was unable to complete their investigation of the hazardous occurrence because of refusal by the employer to disclose all documents related to the events of flight AC 875.

YUL workplace committee access to documents

- [155] According to counsel, the employer did not provide the documents that had been requested by P. Botter.
- [156] She submitted that the *Code*, more particularly paragraph 125(1)(z.18) and subsections 135 (8) and 135(9) , provides the workplace committee with a broad right of access to health and safety information from the employer, including access to ASRs.
- [157] More specifically, with respect to the ASR, it was argued that:
- it is mandatory at Air Canada,
 - it is part of the employer Reporting Policy,
 - it is the official vehicle to report incidents according to the Air Canada Flight Operations Manual which specifies that it is an “employer report”, and
 - it is a fact that an ASR may contain related health and safety information and the

¹⁶ *Bunge du Canada* [1998] C.L.C.R.S.O.D. No. 2, Decision 98-002

employer does not have the discretion to make such determination.

[158] Counsel argued that the ASR in this case relates to the health and safety of employees because it concerns several incidents that had an impact on the health and safety of the entire flight crew and is related to a disabling injury suffered by a flight attendant.

[159] According to counsel, the Air Canada proposal to give the YUL workplace committee access to only some parts of the ASR requested by the YUL workplace committee is contrary to the *Code*.

[160] For the purposes of subsection 135(9) of the *Code*, an ASR is an employer report having to do with the health and safety of employees, since the employer directs its pilots to use the ASR to report the following incidents:

- an aircraft unfit to fly
- a fire or explosion on board
- a declared emergency
- an aircraft evacuation
- seriously ill, injured or incapacitated crew or passengers
- violent or armed passengers.

[161] Counsel put forth the respondent position that even if a report is completed by an employee, it still is an employer report. In support of that position, reference was made to the decision by Regional Safety Officer D. Malanka in *St. Lawrence and Hudson Railway and Canadian Auto Workers Union*¹⁷ where he stated that any submitted information by an employee that is collected by the employer is to be considered an employer report.

[162] Under the *Code*, employees are required to report certain situations to the employer and these reports are not considered employee reports.

[163] According to B. Symes, ASRs contain health and safety information:

... Once the Committee determines that an ASR is necessary to identify a hazard, the employer must provide the ASR to the Committee, and the Code does not give the employer the discretion to refuse this request based on its own view of the report's relevance to health and safety and a hazardous occurrence investigation.

[164] She maintained that the ASR completed by the Pilot following the events of flight AC 875 clearly relates to the health and safety of employees as there was an injury to an Air Canada flight attendant and an impact on the entire flight crew. That ASR contains key information about what happened and why those events happened on June 14, 2002.

[165] As for the confidential nature of an ASR, she submitted that a workplace health and

¹⁷ *St. Lawrence and Hudson Railway, CP RailSystem – Agincourt Yard and Canadian Auto Workers Union*, [1997], C.L.C.R.S.O.D. NO. 17

safety committee is part of the limited number of organisations that should have access to the content of an ASR, because of their need and right to know. Members of a workplace health and safety committee are trained not to disclose confidential information outside of the Committee. It was argued that the disclosure of the ASR to a workplace health and safety committee would not compromise the confidentiality aspect of the employer's reporting system because the document would only be used for health and safety purposes and its confidentiality would be maintained.

- [166] It was submitted that the YUL workplace committee should have access to the entire ASR to fully accomplish its investigation mandate.
- [167] On the question of access to other employer information, it was submitted that it was relevant in this particular case because the information gathered by some Air Canada departments was necessary for the investigation conducted by the YUL workplace committee. The refusal by Air Canada to share that information with the YUL workplace committee was therefore in violation of the *Code*.

YUL workplace committee access to TSBC's documents

- [168] According to counsel, under subsections 135(8) and (9) of the *Code*, the YUL workplace committee has the right to access the three TSBC documents listed at paragraph 132.
- [169] The YUL workplace committee was entitled to review the TSBC draft report in order to comply with their duties under the *Code*, which is to prevent accidents and incidents to employees, in a timely manner. Therefore, the YUL workplace committee should not be made to wait almost four months before getting access to the TSBC investigation report.
- [170] She argued that the TSBC draft investigation report is a «government report». In support of this point, reference was made to subsection 11(1) of the *CTA/ISB Act* which states that the TSBC:

...is for all purposes an agent of Her Majesty, and the duties and powers of the Board under this Act may be exercised only as an agent of Her Majesty.

Consequently, according to counsel, one can draw the conclusion that a report written by TSBC is a report of Her Majesty which constitutes a «government report».

- [171] B. Symes argued that the *CTA/ISB Act* does not prohibit Air Canada, as a reviewer, from disclosing the TSBC documents¹⁸ to the YUL workplace committee for the purpose of taking remedial measures. Subsection 24. (3) of that Act provides that:

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.

¹⁸ TSBC draft investigation report, the Air Canada representations on the TSB draft report, as well as the TSB's response to Air Canada

[172] In support of this argument, Ms Symes referred to the decision of Appeals Officer Malanka in *Canadian Pacific Railway Co v. Woollard*¹⁹, as standing for the proposition that:

The purpose of Part II of the Code is remedial. Policy and Workplace Committees are essential vehicles for achieving the Code's remedial purpose. By definition, the work of Policy and Workplace Committees is both preventive and remedial.

[173] She maintained that in case of conflict between the disclosure obligations of Air Canada under the *Code* and under the *CTA/ISB Act*, the *Code* should prevail.

[174] In addition, access to the TSBC draft report would help the YUL workplace committee conduct their investigation sooner and make the relevant recommendations to the employer.

[175] Counsel Symes concluded her submissions by stating that the case law cited by Air Canada and TSBC is not relevant to the case before me.

c) Intervenor's arguments

[176] Louise Béchamp, counsel for TSBC, presented written submissions on behalf of the TSBC.

[177] In accordance with subsection 24(1) of the *CTA/ISB Act*, TSBC prepared a confidential draft report (draft report) following its investigation of the Frankfurt incident. The draft report was sent to Air Canada as a designated reviewer. The purpose of the draft report is to ensure that fairness, accuracy, confidentiality, international commitments, and legal obligations are duly respected and taken into account by the TSBC. Air Canada had the opportunity to dispute, correct or contradict information that it believed was incorrect or unfairly prejudicial to their interests. Air Canada made representations to TSBC in that respect. TSBC published its final report on April 29, 2003.

[178] Counsel submitted that under the *TSB Act*, such documents are confidential and privileged. Therefore, TSBC is opposed to their production and disclosure.

[179] Counsel went on to reiterate "that the privilege attached to representations under the *Act* is of critical importance in ensuring its ability to fulfill its role and advance transportation safety".

[180] Counsel concluded by stating that I will exceed my jurisdiction if I order the disclosure of those TSBC documents to the YUL workplace committee.

¹⁹ *Canadian Pacific Railway Co v. Woollard*, supra

VI. ANALYSIS

[181] What is to be decided in this case is whether Air Canada is in contravention of:

- Paragraph 125(1)(c) of the *Code* with respect to the employer obligation to investigate hazardous occurrences, and
- Subsection 135(9) of the *Code* with respect to the workplace committee right of access to all or parts of government and employer reports, studies and tests that relate to the health and safety of employees.

Employer obligation to investigate

[182] The purpose of paragraph 125(1)(c) of the *Code*, when read in conjunction with the statement of purpose at section 122.1 of the legislation, is to prevent the occurrence or the reoccurrence of an accident or incident that could injure an employee. Section 122.1 reads as follows:

122.1 The purpose of this Part is to prevent accidents and injury to health arising out of, linked with or occurring in the course of employment to which this Part applies.

[183] More specifically, the *Code* specifies at paragraph 125. (1)(c) that:

125. (1) Without restricting the generality of section 124, every employer shall, in respect of every work place controlled by the employer and, in respect of every work activity carried out by an employee in a work place that is not controlled by the employer, to the extent that the employer controls the activity,

(c) investigate, record and report in the manner and to the authorities as prescribed all accidents, occupational diseases and other hazardous occurrences known to the employer.

[184] Paragraph 125. (1)(c) of the *Code* refers to the “prescribed manner”. Subsection 122. (1) of the *Code* defines the term “prescribe”:

“prescribe” means prescribe by regulation of the Governor in Council or determine in accordance with rules prescribed by regulation of the Governor in Council.

[185] The applicable regulations in this matter are the *Aviation Regulations*:

1.3 These regulations apply in respect of employees employed on aircraft while in operation and in respect of persons granted access to such aircraft by the employer.

[186] In this case, E. Niles was an employee employed on an Air Canada aircraft while in operation in Frankfurt, Germany.

[187] The employer duties with respect to investigations are laid out in sections 9.3 and 9.6 of the *Aviation Regulations*:

9.3 Where an employer is aware of an accident, occupational disease or other hazardous occurrence

affecting any of the employees in the course of employment on an aircraft, the employer shall, as soon as possible,

- (a) take necessary measures to prevent a recurrence of the hazardous occurrence;
- (b) appoint a qualified person to carry out an investigation of the hazardous occurrence; and
- (c) notify the safety and health committee or the safety and health representative, if either exists, of the hazardous occurrence and of the name of the qualified person appointed to investigate it.

9.6 (1) The employer shall, without delay, send a report in writing to the safety and health committee or the safety and health representative, if either exists, where an investigation referred to in section 9.3 discloses that the hazardous occurrence resulted in

- (a) a disabling injury to an employee;
- (b) the loss of consciousness of an employee;
- (c) the implementation of rescue, revival or other similar emergency procedures; or
- (d) a fire or an explosion.

(2) A copy of the report made in accordance with subsection (1) shall be submitted by the employer to the regional safety officer at the regional office within 14 days after the employer becomes aware of the hazardous occurrence.

(3) The report referred to in subsection (1) shall be in the form set out in Schedule I to this Part and contain the information required by the form.

[188] The fundamental obligation of the employer under this provision is to investigate without delay accidents, occupational diseases or other occupational hazards affecting any of its employees. In addition, the employer is required to follow an extensive internal procedure in order to conduct a complete investigation.

[189] The occurrence of an accident affecting an employee is an unquestioned element in this case, as well as the repercussions that the events had on E. Niles' health.

[190] The employer was immediately made aware of the accident at the Frankfurt Airport on June 14, 2002. However, it is paramount to determine when the employer became aware of the effects of this occurrence on E. Niles.

[191] I have been presented with much evidence on this issue and my conclusion, based on the above, is that the employer became aware of the disabling injury to E. Niles on September 12, 2002, after she had completed the "Air Canada Flight Attendant Injury/Accident Report".

[192] Consequently, it is the actions taken by the employer after that date that will be analyzed:

- Did Air Canada appoint a qualified person to carry out the investigation?
- Did Air Canada conduct a complete investigation?

- [193] Neither the *Code* nor the *Aviation Regulations* describe what an investigation is. However, the *Aviation Regulations* prescribe a format for the report and it is required of the employer to send a copy to the workplace health and safety committee or health and safety representative, without delay. In addition the employer shall submit a copy of the investigation report to a health and safety officer²⁰ within 14 days.
- [194] According to the evidence before me, the obligations set out in section 9.6 of the *Aviation Regulations* were not met as no report presented in the prescribed manner was sent to a HSO or the YUL workplace committee. Furthermore, the employer did not even follow its own internal procedures with respect to accident/incident investigation.
- [195] Regardless of the employer compliance with section 9.3 of the *Aviation Regulations*, there was an obligation to send the report within 14 days to a health and safety officer and without delay to the YUL workplace committee. This obligation was clearly not fulfilled. Therefore, the employer is in violation of the *Aviation Regulations* and consequently of paragraph 125 (1)(c) of the *Code*.
- [196] The Air Canada Corporate and Employee Safety Manual includes a complete chapter with respect to accident/incident investigation. This chapter describes the different steps to follow with respect to the investigation of an accident/incident.

- [197] The introduction to this chapter reads as follows:

Every accident/incident disrupts operations and may result in employees being injured.

Management and employees must develop an understanding of what happened, how it happened, who was involved, what were the consequences and what must be done to avoid any recurrence.

To accomplish this, an accident/incident investigation must take place and be conducted by responsible persons qualified to do so. (...)

- [198] On the same chapter, "investigation" has been defined as:

A systematic research, using a defined process, based on observation, inquiries, statements and analysis to gather information and verify facts related to an event before taking action to prevent any re-occurrence.

- [199] According to Air Canada Accident/Incident process, it is the front line manager who is responsible for the investigation and the involvement of the workplace health and safety committee is essential.
- [200] Counsel for Air Canada submitted that the employer did undertake an investigation, but for reasons not specified by the appellant, the investigation was never completed.

²⁰ Section 9.6 of the *Aviation Regulations* mirrors paragraph 15.8(2)(b) of the *Canada Occupational Health and Safety Regulations*. The latter has been amended subsequently to the 2000 revision of the *Code*, Part II and reference to the regional safety officer has been replaced by reference to health and safety officer.

[201] The appellant did not offer evidence that the employer followed the investigation process described in the Air Canada Corporate and Employee Safety Manual.

[202] Contrary to appellant's submissions, the evidence before me did not demonstrate that the employer appointed P. Botter as the qualified person to carry out the hazardous occurrence investigation. The evidence establishes that P. Botter requested any information on that specific flight in order for the YUL workplace committee to conduct its investigation. It was in his capacity as the employer co-chair of the YUL workplace committee that he made that request to the Director of Air Canada Flight Safety.

[203] It is my understanding from the evidence before me, and contrary to appellant's submissions, that the only health and safety investigation was initiated by the YUL workplace committee with respect to incidents of flight AC875, on June 14, 2002. Unfortunately, the investigation stopped when the employee co-chair of the YUL workplace committee filed a complaint to Transport Canada. In its submissions, the appellant admitted that:

- It did not identify Mr. Patrick Botter as the qualified person appointed to carry out the investigation of the hazardous occurrence related to Flight 875; and

- It did not complete its investigation of the hazardous occurrence related to Flight 875. Once the Committee suspended further participation until the decision on Mr. Roy's complaint, Air Canada acknowledges that its qualified appointee should have continued and concluded the investigation in accordance with the employer's obligation under s.125(1)(c) of the *Code*.

[204] This appellant submission recognizes that Air Canada did not assign P. Botter as the qualified person to investigate the hazardous occurrence that impacted on E. Niles' health. It is on its own initiative that the YUL workplace committee initiated an investigation on the hazardous occurrence and that P. Botter was involved in the investigation.

[205] For all the reasons cited above, I conclude that Air Canada did not investigate the hazardous occurrence that led to E. Niles' injury. Therefore, the employer was in violation of the *Code*. This conclusion confirms HSO Côté's findings.

[206] Therefore, based on my authority pursuant to paragraph 146.1(1)(a) of the *Code*, I will vary the first item of the direction issued by HSO Côté on February 13, 2004, to refer specifically to the *Aviation Regulations*.

[207] Having reached a conclusion on the employer's duty to investigate hazardous occurrences, I would like to clarify the role of the workplace committee with respect to a hazardous occurrence investigation.

[208] The main duty of the workplace committee is to offer advice and make recommendations to the employer on occupational health and safety issues. As far as investigations are concerned, the workplace committee may participate actively in the employer investigation. However, in a situation where the employer does not conduct an investigation, I opine that the workplace committee should not take over the lead

investigative role.

- [209] The respondent made several references to the fact that the YUL workplace committee was investigating the hazardous occurrence to E. Niles, which is not provided for in the *Code* and the *Aviation Regulations*. It is the sole responsibility of the employer to carry out a complete hazardous occurrence investigation, with the active participation of the workplace committee.
- [210] Consequently, I strongly recommend that the employer and the YUL workplace committee clarify this issue immediately to make sure they follow the prescription of the *Code* as well as the Air Canada Corporate and Employee Safety Manual with respect to Accident/Incident Investigation.

YUL workplace committee access to documents

- [211] I will now turn to the examination of the second element of the HSO Côté direction, namely Air Canada's contravention to subsection 135(9) of the *Code*.
- [212] Under the *Code*, the workplace committee has the right to access all government and employer reports. More specifically subsection 135(9) reads as follows:

135. (9) A work place committee, in respect of the work place for which it is established, shall have full access to all of the government and employer reports, studies and test relating to the health and safety of the employees, or to the parts of those reports, studies and tests that relate to the health and safety of employees, but shall not have access to the medical records of any person except with the person's consent.

- [213] In the course of her complaint investigation, HSO Côté found that "the YUL Work Place Committee was denied access, for investigation purposes, to health and safety information and reports related to the incident that occurred on flight AC 875". She therefore directed Air Canada to terminate the contravention and take steps to ensure that the contravention does not reoccur. Air Canada appeals from this direction.
- [214] From the evidence produced at the hearing, my understanding is that the information and reports referred to in HSO Côté's instruction are the pilots' ASR as well as other related employer documents and the TSB related material. I shall deal with these two items separately, starting with the ASR and the other related employer documents.

YUL workplace committee access to ASRs

- [215] One of the rights that the *Code* provides to an employee is the right to know. Through several provisions of the *Code*, employees have the right to get information of known or foreseeable hazards in the workplace, as well as be provided with information, instruction, training and supervision that is necessary to protect their health and safety. It is through the workplace committee or the health and safety representative that employees have the right to have access to government or employer reports relating to the health and safety of employees.

- [216] Occupational health and safety is rooted in the prevention of work hazards and one of its main focus is procedures and practices. In the case at hand, it is important for the YUL workplace committee to have access to the ASR to understand, among other things, why E. Niles was requested to occupy the flight deck observer seat during the aircraft take off and landing as this practice could have had an impact on her health and safety during the events of flight AC875. The ASR was the only report written by an employee, which in that case was the Pilot-in-Command. From an occupational health and safety perspective, the information found in the ASR could prove to be very useful for the YUL workplace committee.
- [217] ASRs are part of the Air Canada Safety Reporting Policy (the Policy). They have been described as personal reports voluntarily submitted by employees, in this case the pilots of flight AC 875, following a safety related incident or occurrence. As per the policy, the confidentiality of the author is preserved and the content is not disclosed unless agreed to by the employee or required by law.
- [218] The Policy also provides that the filing of an ASR will not result in reprisal or discipline unless the incident was caused by an unlawful act, gross negligence or a willful infraction. Air Canada's goal in maintaining this policy is to ensure the report of a maximum of incidents and ultimately further flight safety.
- [219] Although not mandatory, the practice of filing ASRs in cases of safety incidents or occurrences had been widely adopted by Air Canada's employees. Indeed, ASRs represent a large portion of all safety reports received annually by Air Canada. For instance, from January 2003 to June 2005, on a total of almost 8 000 reports of safety incidents, 6 500 of them were filed in the form of an ASR.
- [220] On February 21, 2003, P. Botter asked, on behalf of the YUL workplace committee, to be provided with any documents relevant to the events of flight AC 875. On the same day, Air Canada replied that access to the ASR filed by the pilots would be granted only if the conditions set out in Air Canada's policy were met, i.e. if the pilots consented or if it was required by law.
- [221] Air Canada further argued in its submission that even if I was to find that this specific clause in the policy did not prevent the disclosure of the ASR, Air Canada had no obligation to disclose it as an ASR is not an "employer report" for the purposes of subsection 135. (9) of the *Code*. I shall deal with this point first.
- [222] In my opinion, ASRs are, as an integral part of Air Canada's reporting policy, employer reports. The form itself is provided by Air Canada and bears its logo. The elements that it must contain are entirely predetermined by Air Canada. Moreover, even if they are filed on a voluntary basis, as argued by the appellant, ASRs exist primarily for the benefit of Air Canada. The evidence demonstrates that it is Air Canada that developed the Air Safety Reports Immunity Policy, which includes ASRs.
- [223] Going back to the first point, the YUL workplace committee argues that Air Canada's decision to deny access to the pilots' ASRs runs contrary to Air Canada's obligations

under paragraph 125. (1) (z.18) and subsection 135. (9) of the *Code*:

125. (1) Without restricting the generality of section 124, every employer shall, in respect of every work place controlled by the employer and, in respect of every work activity carried out by an employee in a work place that is not controlled by the employer, to the extent that the employer controls the activity

(z.18) provide, within thirty days after receiving a request, or as soon as possible after that, the information requested from the employer by a policy committee under subsection 134.1 (5) or (6), by a work place committee under subsection 135. (8) or (9) or by a health and safety representative under subsection 136. (6) or (7);

135. (9) A work place committee, in respect of the work place for which it is established, shall have full access to all of the government and employer reports, studies and tests relating to the health and safety of the employees, or to the parts of those reports, studies and tests that relate to the health and safety of employees, but shall not have access to the medical records of any person except with the person's consent.

- [224] The purpose of a joint workplace health and safety committee is to improve health and safety conditions in the workplace by identifying potential health and safety problems and recommend to the employer corrective actions to avoid a reoccurrence of an incident or an accident. It is through a workplace health and safety committee that employees are given the right to be informed of known or foreseeable hazards and to participate in identifying and correcting occupational health and safety concerns.
- [225] Paragraph 125. (1) (z.18) and subsection 135. (9) of the *Code* clearly establish the duty of an employer to provide a workplace committee, in the exercise of its mandate, with all relevant documents relating to the health and safety of its employees. These provisions do not mention specific circumstances in which these documents should be provided. In the case at hand, the issue is whether the employer's policies or practices may defeat the workplace committee's statutory right to access certain documents that may be relevant to their mandate.
- [226] In *Canada (Information Commissioner) v. Canada (Canadian Transportation Accident Investigation and Safety Board)*,²¹ a 2006 decision, the Federal Court of Appeal dealt with a similar issue.
- [227] In that case, NAV CANADA was asked to disclose records pursuant to the *Access to Information Act* [the "*Access Act*"], which it refused to do. The records contained communications relating to four air occurrences which were investigated by the TSBC.
- [228] Among other things, NAV CANADA submitted that the exception found at paragraph 20(1)(b) of the *Access Act* applied. This exception provides a right to refuse to disclose any record that contains "financial, commercial, scientific or technical information that is **confidential information** supplied to a government institution by a third party and is treated consistently in a confidential manner by the third party" [my emphasis].

²¹ [2006] F.C.J. No. 704.

[229] To establish the confidentiality of its communications, NAV CANADA relied upon its own policies and consistent past practice. To Desjardins J., however, the fact that information has been kept confidential in the past [...] is at most only a factor to be considered in determining whether the information is confidential for the purposes of paragraph 20(1)(b) [of the Access Act].²²

[230] NAV CANADA also invoked the confidentiality provisions of the collective agreements with its unions to suggest that there was a reasonable expectation of privacy in the communications on the part of the pilots and the controllers. On this point, Desjardins J. held that:

“This consideration cannot, however, be determinative of the status of this information under the Access Act: private parties cannot through such agreements alone contract out of the express statutory provisions of the Access Act [...]. At most, such agreements may be taken into account in the final analysis, to support other objective evidence of confidentiality.”²³

In my opinion, Justice Desjardins’ reasoning may find application in the present case.

[231] The paramount objective of Part II of the *Code* is to ensure the health and safety of all employees. As such, its provisions must take precedence over any policies and practices of private parties that would compromise the fulfillment of that goal. Air Canada’s policies and past practice, along with its commitment towards employees to keep ASRs confidential, are not by themselves sufficient to bring relevant documents outside the scope of the *Code*’s express provisions.

[232] I looked closely at Air Canada’s considerations to keep ASRs confidential. While I agree that the concerns it expresses about a possible decrease in the reporting rate are legitimate, I am of the opinion, for the above-mentioned reasons, that the employees’ health and safety safeguards enshrined in the *Code* cannot be contracted out. I am of the opinion that keeping strictly confidential all of these reports is not the only way to fulfill Air Canada’s goal of improving flight safety. A restricted right of access to certain members of the workplace health and safety committee, for example, could be granted for investigation purposes only. This could potentially minimize the impact on the employees’ reporting rate while ensuring that ASRs are used for the very purpose they were created in the first place, i.e. improve safety for everyone onboard Air Canada flights.

[233] As to other employer documents that could be related to the events of flight AC 875, the appellant did not convince me, based on relevant evidence, that the employer collected written and electronic documents for the Flight Safety Division’s investigation.

[234] In the absence of evidence showing that the employer has in its possession other documents than the ASR and TSBC documents, I cannot direct Air Canada to grant access to the YUL workplace committee to “other” documents. On the other hand, if Air Canada has other documents in relation to the events of flight AC 875, documents that

²² *Ibid* at 75.

²³ *Ibid* at 76.

were not identified during the hearing, the employer would have to comply immediately with HSO Côté's direction and make them accessible to the YUL workplace committee.

[235] For these reasons, I am of the opinion that Air Canada contravened subsection 135(9) of the *Code*. Therefore, the YUL workplace committee is entitled to be provided with the ASR filed by the pilots of flight AC 875 and any other existing employer documents that are related to the events of flight AC 875, subjected to the above-mentioned proviso of restricting this access to only one or two members of the YUL workplace committee jointly identified by the parties.

YUL workplace committee access to TSBC's documents

- [236] Both parties and the intervenor TSBC presented arguments relating to the disclosure of the TSBC related material.
- [237] More specifically, respondent CUPE is asking me to recognize that Air Canada should have provided the YUL workplace committee with the draft report prepared by the TSBC pursuant to subsection 24(2) of the *CTA/ISB Act*²⁴, Air Canada's representations on said draft report and the TSBC comments on these representations made pursuant to paragraph 24(4)(d) of the *CTA/ISB Act* [the "three documents"].
- [238] The TSBC argues that the three documents are confidential and privileged under the *CTA/ISB Act* and, as such, should not be disclosed to the YUL workplace committee. Moreover, the TSBC maintains that without the assurance of confidentiality, stakeholders involved in the transportation industry would be reluctant to provide the information and representations necessary to identify the causes of accidents.
- [239] The appellant's arguments are along the same line. In addition, Air Canada points out that the confidentiality of the TSBC related documents ensures that no one will use the information it provides to TSBC against its own interests.
- [240] The request of the YUL workplace committee for any documents relating to the events of flight AC 875 was presented by P. Botter on February 21, 2003. This request was denied by Air Canada.
- [241] At that time, Air Canada was already in possession of the draft of the TSBC report and had 30 days, until March 3, 2003, to comment on it. The final report by the TSBC was released on April 29, 2003.
- [242] The wording of section 24 of the *CTA/ISB Act* is clear: draft reports and representations made on them are privileged and confidential. Those who have access to these documents are prohibited from communicating them to anyone, except to those who are specifically mentioned in this section.

²⁴ S.C. 1989, c.3.

[243] The relevant text of section 24 is as follows:

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.** (my emphasis)

[244] As pointed out by the TSBC, "the purpose of the *CTAISB Act* is to foster safe and effective transportation for Canadian residents and visitors".²⁵ To further this goal, Parliament considers that TSBC draft reports and the representations that are associated to them must be kept confidential. This ensures that the stakeholders involved in the transportation industry confidently and uninhibitedly transmit information that might be valuable to the TSBC investigations.

[245] In the case at hand, the *CTAISB Act* is the specific law that governs access to TSBC documents pending the release of the final report. Consequently, its provisions must take precedence over the provisions of the *Code* pertaining to documents such as paragraph 125. (1) (z.18) and subsection 135. (9). They are rather general in nature and may run contrary to the requirements of the *CTAISB Act*.

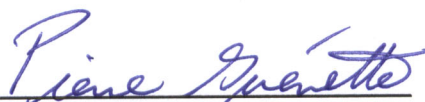
[246] I note that section 24 does not specifically refer to the confidentiality of the comments TSBC may make on the representations it receives. However, a close examination of the purpose of this section convinces me that these comments should be subjected to the same guarantee of confidentiality that is afforded to the draft reports and the representations made on them.

²⁵ TSB submissions, paragraph 26.

- [247] Section 24 aims to protect the confidentiality of documents that are used by the TSBC in the course of their investigations and report drafting. The communication of TSBC comments on the representations it receives pursues the same goal as the communication of the draft report and designated reviewers' representations, namely the achievement of recommendations on transportation safety that would be satisfactory to all the stakeholders involved.
- [248] The confidentiality of these documents, as I stated earlier, ensures that these stakeholders confidently share with the TSBC the information needed to carry out its mandate. Since comments by the TSBC are likely to include the same kind of sensitive information that is contained in the draft reports and the representations made on them, they should also be kept confidential.
- [249] In any event, I note that the final report is now public and accessible to the committee. Therefore, the question of the access by the committee to the draft report is now moot.
- [250] As for the representations by Air Canada on the draft and the comments by the TSBC on these representations, I received no evidence suggesting that their access would further assist the YUL workplace committee in the fulfillment of their mandate.
- [251] For these reasons, I am of the opinion that the appellant could not be compelled under paragraph 125. (1) (z.18) and subsection 135. (9) of the *Code* to give the YUL workplace committee access to the TSBC related documents.

VII. DECISION

- [252] For these reasons, I vary the direction issued to Air Canada by HSO Marie-Anik Côté as per the appendix to this decision, as follows:
- by adding the prescribed *Aviation Occupational Safety and Health Regulations* with respect to the duties of the employer to investigate the hazardous occurrence known to the employer and consequently to send a written report to the YUL workplace committee, in accordance with section 9.3 and 9.6, and
 - by specifying that the YUL workplace committee shall have access to the ASR related to the events of flight AC 875 and that the three TSBC documents shall be excluded.
- [253] The employer is required to report to a health and safety officer, within 10 days of receiving this decision, on the measures taken to comply with the direction.



Pierre Guénette
Appeals Officer

APPENDIX

Case No: 2004-14
Decision No: OHSTC09-023

IN THE MATTER OF THE CANADA LABOUR CODE, PART II – OCCUPATIONAL HEALTH AND SAFETY

DIRECTION TO THE EMPLOYER UNDER PARAGRAPH 145(1)

Following an appeal brought under section 146 of the *Canada Labour Code*, Part II, the undersigned Appeals Officer conducted an inquiry, pursuant to section 146.1, with respect to a direction issued by health and safety officer Marie-Anyk Côté, on February 13, 2004, following her investigation into a complaint about incidents which occurred in the workplace operated by Air Canada, being an employer subject to the *Canada Labour Code*, Part II, on board flight AC 875, on June 14, 2002.

As a result of the inquiry by the Appeals Officer, based on testimonies of witnesses, documents submitted by both parties and the intervenor, the undersigned Appeals Officer is of the opinion that the following provisions of the *Canada Labour Code*, Part II, have been contravened and the direction is varied accordingly:

1. Paragraph 125.(1) (c) of the *Canada Labour Code*, Part II, provides that:

“...every employer shall...(c) investigate, record and report in the manner and to the authorities as prescribed all accidents, occupational diseases and other hazardous occurrences known to the employer”.

Section 9.3 of the Aviation Occupational Safety and Health Regulations provides that:

“Where an employer is aware of an accident, occupational disease or other hazardous occurrence affecting any of the employees in the course of employment on an aircraft, the employer shall, as soon as possible,

- (a) take necessary measures to prevent a recurrence of the hazardous occurrence;
- (b) appoint a qualified person to carry out an investigation of the hazardous occurrence; and
- (c) notify the safety and health committee or the safety and health representative, if either exists, of the hazardous occurrence and of the name of the qualified person appointed to investigate it”.

Section 9.6 of the Aviation Occupational Safety and Health Regulations provides that:

“(1) The employer shall, without delay, send a report in writing to the safety and health committee or the safety and health representative, if either exists, where an investigation referred to in section 9.3 discloses that the hazardous occurrence resulted in

(a) a disabling injury to an employee; (...)

(2) A copy of the report made in accordance with subsection (1) shall be submitted by the employer to the regional safety officer at the regional office within 14 days after the employer becomes aware of the hazardous occurrence.

(3) The report referred to in subsection (1) shall be in the form set out in Schedule 1 to this Part and contain the information required by the form”.

In the course of the hearing, the Appeals Officer determined that Air Canada did not appoint a qualified person to carry out an investigation of the hazardous occurrence on-board flight AC 875 on June 14, 2002, at the Frankfurt Airport and consequently the employer did not notify the Montreal workplace health and safety committee of the hazardous occurrence and of the name of the qualified person appointed to investigate it. In addition the employer did not, without delay, send a report in writing to the workplace health and safety committee with respect to the hazardous occurrence that resulted in a disabling injury to Elizabeth Niles, an employee of Air Canada.

2. Subsection 135. (8) of the *Canada Labour Code*, Part II, provides that:

“A work place committee, in respect of the work place for which it is established, may request from an employer any information that the committee considers necessary to identify existing or potential hazards with respect to materials, processes, equipment or activities.

Subsection 135. (9) of the *Canada Labour Code*, Part II, provides that:

“A work place committee, in respect of the work place for which it is established, shall have full access to all of the government and employer reports, studies and tests relating to the health and safety of employees, or to the parts of those reports, studies and tests that relate to the health and safety of employees, but shall not have access to the medical records of any person except with the person’s consent”.

The Appeals Officer determines that the Montreal (YUL) Workplace health and safety committee was denied access to health and safety information and reports, including the Air Safety Report pertaining to the events of flight AC 875, on June 14, 2002.

This finding does not apply to the three documents pertaining to the Transportation Safety Board of Canada (TSBC) that is:

- The TSBC draft investigation report;
- The written representations by Air Canada on the TSBC draft investigation report; and
- The TSBC written comments on the Air Canada representations.

Therefore, you are **HEREBY DIRECTED**, pursuant to section 145. (1) of the *Canada Labour Code*, Part II, to terminate the contravention no later than 10 days from the issuance of the decision and to ensure that the contravention does not reoccur.

Varied in Ottawa, this 18th day of June 2009.



Pierre Guénette
Appeals Officer