

COURT FILE NO.: 07-CV-337564PD3

DATE: 2010/01/14

SUPERIOR COURT OF JUSTICE - ONTARIO

**RE: SOCIÉTÉ AIR FRANCE v GREATER TORONTO AIRPORTS
AUTHORITY et al**

BEFORE: MASTER RONNA M. BROTT

**COUNSEL: ROBERT J. FENN, for the Defendants NAV CANADA et al, Moving Parties
TIMOTHY TREMBLEY, for the Defendants Air France et al, Responding
Parties
BARNEY BRUCKER AND ANNA CASEMORE, for the Defendant
Attorney General of Canada**

ENDORSEMENT

[1] This is a motion brought by the defendants NAV CANADA et al (“NAV”) for Orders that Air France produce:

- (1) the full and complete employee and training records of Captain Rosaye and First Officer Naud;
- (2) the full and complete medical records of Captain Rosaye and First Officer Naud;
- (3) the Air France internal investigation report into the accident of AFR 358, including all documents pertaining to or flowing from the Air France internal investigation; and
- (4) A better representative for examination for discovery.

[2] This action is one of four actions commenced in Ontario arising from an incident on August 2, 2005 involving the Airbus A340 (“A340”) aircraft operated as Air France flight 358 (“AFR 358”) from Charles deGaulle Airport in Paris, France to Lester B. Pearson International Airport in Toronto, Ontario.

[3] In this action Air France, as operator of AFR 358 and owner of the A340 aircraft, has claimed damages against NAV, named employees of NAV, the Greater Toronto Airports Authority (“GTAA”) and the Attorney General of Canada for the value of the aircraft hull and

for contribution and indemnity for any and all claims paid by Air France arising from the aircraft incident.

[4] In the related class action (“the class action”) the passengers of AFR 358 have claimed against Air France, NAV, Captain Rosaye, First Officer Naud and others for damages caused to the passengers and their families as a result of the AFR 358 incident. Air France cross-claimed against NAV in the class action. The parties in the class action recently moved for an Order to approve the settlement of the action on behalf of all parties, save and except NAV. The decision with respect to the approval of the settlement of the class action was under reserve at the time of the hearing of this motion. (It was released December 24, 2009).

[5] In the third action, GTAA has claimed against Air France, NAV, Captain Rosaye and First Officer Naud for damages relating to the environmental clean-up of the wreckage of the aircraft. Air France has cross-claimed against NAV in the GTAA action.

[6] In the fourth action, Mariana Strugarova, a passenger on the aircraft, has commenced an action against Air France, NAV, GTAA, Captain Rosaye, First Officer Naud and others for damages sustained by Ms. Strugarova and her family as a result of the incident of August 2, 2005.

[7] The requests for production arise from questions refused at the examinations for discovery of the Air France representative and the brief examination of Captain Rosaye. The test is whether the questions posed have some semblance of relevance to the matters in issue as delineated by the pleadings.

EMPLOYMENT AND TRAINING RECORDS

[8] The contents of the “professional” files of Captain Rosaye and First Officer Naud that have been produced include two-page computerized print-outs of their pilot proficiency charts. Air France has not produced any other records or reports in relation to the pilots’ training and proficiency.

[9] The evidence at the examination for discovery of Captain Gangloff is that all documents, forms and reports which are completed following a training session or check ride would be filed in the pilot’s professional personal file.

[10] The pleadings clearly put into issue the proficiency and training of the flight crew in landing the A340 aircraft in adverse weather conditions. The complete files of Captain Rosaye and First Officer Naud in relation to their training and certification, specifically in relation to line check reports, simulator reports, recurrent training reports, dangerous goods and LOFT reports are clearly relevant to the matters in issue. Administrative documentation, which is likely also contained with the employees’ personnel files, such as banking records, is not relevant and is therefore not producible.

MEDICAL RECORDS

[11] Canadian Aviation Regulations require that operators of foreign aircraft in Canada must comply with the conditions of a Canadian Foreign Air Operator certificate. Those regulations state that no flight crew member may operate an aircraft if there is reason to believe that the person is suffering from or is likely to suffer from fatigue.

[12] At his examination for discovery, First Officer Naud confirmed that medical records exist and that it is a requirement that Air France pilots submit to a medical examination at the Air France medical centre by a Department of Civil Aviation approved Air France doctor every six months.

[13] Air France takes the position that it does not have the medical information requested and that even if it could obtain the information from the hands of those who do possess it, it is precluded from producing it on the basis of strict privacy laws which govern such production in France.

[14] Further, counsel for Air France asserts that the medical certificates of both Captain Rosaye and First Officer Naud have been produced and therefore any possible issues relating to their medical conditions are covered by the production of the medical certificate. Counsel for NAV analogized the medical certificate to a driver's license in a motor vehicle accident case alleging that simply because operators of motor vehicles hold valid driver licenses does not remove the right of counsel to delve into the actions of the drivers at the time of the accident.

[15] There is no question that the French seek to preserve the confidentiality of its citizens' medical records and its privacy concerns are well understood. Canadian law is consistent with French law in relation to confidentiality issues. In these proceedings, a consent confidentiality order is already in place and further, all parties are subject to the deemed undertaking rule.

[16] Air France has chosen Ontario as the place to commence this action. The accident occurred in Ontario. The laws of Ontario prevail. Furthermore, in the related class proceeding many French residents have claimed damages for personal injuries arising from the incident and they have produced their medical documents in support of their claims. Medical records in France and Ontario belong to the patient. Therefore, with the consent of the patient the records may be produced by Air France.

[17] Both Captain Rosaye and First Officer Naud are named parties to these actions. They are represented by the same solicitors as Air France. There is evidence confirming that at the time of the incident, Captain Rosaye had been on a reduced work schedule due to fatigue and was

restricted by his French aviation medical certification to fly only in certain areas. The pleadings and the Canadian Aviation Regulations make the issue of fatigue relevant.

[18] In light of the evidence of Captain Rosaye's reduced work schedule as a result of fatigue, and the pleading that Air France operated or continued to operate AFR 358 when they knew or ought to have known that it was not safe to do so, I find that the medical records of Captain Rosaye bear some semblance of relevance to the matters in issue and shall be produced.

[19] With respect to First Officer Naud, I find that there is a paucity of evidence in relation to any medical issues which may have any relevance to the matters in issue. Further there is no specific pleading that puts his medical status in issue. Accordingly, the medical records of First Officer Naud are irrelevant to the litigation at this stage. To order their production would permit NAV to conduct a fishing expedition, which is inappropriate.

INTERNAL INVESTIGATIVE REPORT CONDUCTED BY AIR FRANCE

[20] Following the accident and in accordance with the Canadian Transportation Accident Investigation and Safety Board Act ("CTAISB"), the Transportation Safety Board ("TSB") conducted an investigation into the accident involving AF 358. Air France personnel participated in the investigation. Exchanges of information between the TSB and Air France passed through the Bureau d'Enquete et d'Analyses ("BEA") which is the national authority in France for such investigations. NAV also seeks production of Air France reports relating to the six other Air France accidents referred to in the TSB report.

[21] Air France has a flight safety department mandated to improve safety and among their stated goals, is to study accidents of all airlines to learn lessons from them.

[22] In its Notice of Motion, NAV seeks production of the internal Air France report. In oral argument, the request broadened significantly to include production of not only the Air France internal investigation but also all information and documentation provided by Air France through the BEA for use in the TSB report.

[23] CTAISB Act provides for a number of legal privileges in respect of the investigation of aviation occurrences. Generally the privileges protect statements and the authors of those statements, cockpit voice recorders and communications records respecting air traffic control. As with privileges generally, the purpose is to encourage the willingness of people to speak freely. This is particularly so in aviation circumstances as the media's involvement could well have a chilling effect on a witness's willingness to disclose information to the Board.

[24] Air France concedes that the internal investigation is relevant but takes the position that because its internal investigation relies to a significant degree on confidential and privileged communications with the TSB, the internal investigation report is privileged. Air France also resists disclosure of the AF358 investigation files on the basis of common law privilege. Air

France relies on the four-part Wigmore test to establish the common law privilege and submits it has been satisfied.

[25] The CTAISB Act provides that the TSB shall not knowingly communicate or permit a witness statement to be communicated. As well, the members of the Air France Commission are bound by a duty of confidentiality pursuant to the French Civil Aviation Code and Annex 13 of the Chicago Convention. There is no provision in the Act that prevents Air France from disclosing the Air France internal findings and conclusions from Air France's own internal investigation. Further, there is a provision in the Act which permits Air France to authorize the TSB to release actual statements made to the TSB during its investigation if Air France chooses to do so.

[26] NAV asserts that because Air France routinely conducts investigations into all accidents involving Air France aircraft and other accidents as part of its regular business practices, and then those reports are circulated to Air France employees to improve flight safety through education and analysis, they are not privileged and are producible. Air France denies that the report in its entirety has been shared.

[27] When Captain Gangloff was examined for discovery, he confirmed that Air France routinely conducts analyses of the operational risks of various accidents and the analyses are incorporated into the Air France training manuals. He also confirmed that changes were made to the manuals after the Air France Report on the accident of Air France 358. Even if the internal investigation report is only distributed to a few people, that in and of itself is indicative of a waiver of the privilege which attaches thereto. Air France alleges that only the lessons learned are disseminated to the pilots. If that is so, it still means that the internal investigation was given to some people who were charged with the task of preparing the lessons to be learned. That in my opinion, would suffice to waive the privilege.

[28] In *Braybrook Estate v Saskatchewan Power Corp.* [1988] S.J. No. 297, Justice Sirois held that a safety officer's accident report which was prepared to determine the cause of the accident must be produced. In that case, the report made recommendations to the company to avoid similar incidents occurring in the future.

[29] It is therefore ordered that the Air France internal investigation shall be produced.

[30] With respect to the six other Air France incidents referred to in the TSB report or other non-Air France accidents, it is ordered that the information or documentation that was communicated to pilot groups as a result of these accidents and which resulted in changes in the manuals shall be produced.

[31] As the request for production of the TSB internal investigation file was not included as part of the written materials, the request is dismissed with leave to request the information at a later date, on sufficient notice, if necessary.

FURTHER AND BETTER REPRESENTATIVE OF AIR FRANCE

[32] Air France is now prepared to produce Etienne Lichtenberger, Director of Safety in the Operations and Quality Executive Management at Air France, to be examined. NAV is prepared to examine Mr. Lichtenberg but 'has reserved its right to examine another representative', if necessary. If the parties cannot agree on this issue following the examination of Mr. Lichtenberg, the parties may bring the appropriate motion.

[33] A telephone case conference is convened on **February 17, 2010 at 10:30 a.m.** to discuss next steps, a timetable for the litigation and counsels' preferred method of dealing with costs of these motions, in the event that they have been unable to reach agreement on costs. The solicitors for Air France shall make the telephone arrangements. I can be reached at 416-326-6146.

RONNA M. BROTT

[34] **POSTSCRIPT:** Following the writing of these reasons but prior to their release, I received the following from counsel:

1. Correspondence dated December 4, 2009 from Mr. Fenn;
2. Supplementary Affidavit of Patrick H. Floyd sworn the 3rd day of December 2009;
3. Correspondence dated December 7, 2009 from Mr. Trembley;
4. Supplementary Responding Motion Record of the Plaintiffs including Affidavit of Etienne Lichtenberger sworn December 15, 2009 (together with English translation of the Affidavit);
5. Correspondence from Mr. Fenn dated December 22, 2009;
6. Correspondence from Mr. Trembley dated December 23, 2009.

[34] I completely agree with Mr. Trembley that the appropriate manner to deal with the additional information following the hearing would have been for Mr. Fenn to request a case conference to let the Court determine how to deal with the additional evidence. As Case Management Master I have been assigned to hear all Masters' motions with respect to all of the actions and to manage the actions. To simply send the Affidavit, without the consent of opposing counsel and without leave of the court was inappropriate. It is contrary to Rule 1.09.

[35] In terms of its substantive value, because my decision was reached prior to its receipt and perusal, the result of the motion is unchanged. Accordingly, the information is superfluous and unnecessary. Had a case conference been requested all counsel would have been so advised.

[36] It is therefore ordered that all costs associated with the post-hearing information and evidence are payable forthwith by NAV to Air France in an amount to be agreed upon by counsel. If quantum cannot be agreed upon, counsel may submit costs outlines and one page of written submissions within 30 days or alternatively, they may make oral submissions on these costs at the telephone case conference.

DATE HEARD: November 19, 2009