

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

THE ESTATE OF SANDRA LEE DESROCHERS, deceased, by its administrator, GERALD JOSEPH MAURISSE DESROCHERS; GERALD JOSEPH MAURISSE DESROCHERS; MICHAEL DAVID JONES by his next friend THE PUBLIC TRUSTEE OF THE NORTHWEST TERRITORIES; and JASON PATRICK JONES by his next friend THE PUBLIC TRUSTEE OF THE NORTHWEST TERRITORIES

MAY 24 1995  
Plaintiffs  
YELLOWKNIFE

- and -

SIMPSON AIR (1981) LTD.; THE ESTATE OF BRENT CROSBY by his administratrix JULIETTE CROSBY and THE ESTATE OF GEORGE JOLY by its administratrix MARGARET ANNE JOLY

Defendants

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Application by plaintiffs for an order over-riding the privilege accorded by Parliament to certain witness statements made to the Canadian Aviation Safety Board. Application denied.

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REASONS FOR JUDGMENT OF THE HONOURABLE MR. JUSTICE J.E. RICHARD

Heard at Yellowknife, Northwest Territories  
on April 18, 1995

Reasons filed: April 26, 1995

Counsel for Plaintiffs: Adrian Wright

Counsel for Defendants: Scott Duke

The Canadian Aviation Safety Board did not appear but filed written submissions by its counsel Franz Reinhardt

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**REASONS FOR JUDGMENT**

1       The plaintiffs apply pursuant to the provisions of the *Canadian Aviation Safety Board Act*, R.S.C. 1985, C-12 for an order for the production of certain witness statements notwithstanding the privilege attached to those statements by the Act.

2       The within litigation arises out of the fatal crash of an aircraft owned by the defendant Simpson Air (1981) Ltd. in October 1988. The crash of the aircraft was

investigated by the Canadian Aviation Safety Board in executing its statutory mandate to advance aviation safety.

Parliament provided that any statements made by witnesses to the Board or its investigators were to be privileged, presumably to encourage cooperation and candour in the giving of the statements. This statutory privilege is only subject to any overriding "public interest", as determined by the court:

**37. For the purposes of this section and sections 38 to 40,**

**(a) "statement" means the whole or any part of any oral, written or recorded assertion, or transcript or substantial summary thereof, relating to an aviation occurrence and includes conduct that could reasonably be taken to be intended as an assertion; and**

**(b) where a statement is privileged, the identity of its author is privileged to the same extent.**

**38. (1) Where a statement is obtained by the Board or an investigator under this Act, it is privileged and no person who receives it, including any person to whom access is provided under this section or section 39, shall knowingly release it or permit it to be released to any person except as provided by this Act, required by law or authorized in writing by the declarant.**

**(2) The Board may make such use of any statement obtained under this Act as it considers necessary in the interests of aviation safety.**

**(3) The Board shall release any statement obtained under this Act to**

**(a) a peace officer authorized by law to gain access thereto;**

**(b) a coroner who requires access thereto for the purpose of an investigation he is conducting; or**

(c) any person carrying out a coordinated investigation under section 17 or appointed by the Minister of Transport pursuant to subsection 26(2) who requires access thereto in order to carry out his duties and functions.

39. (1) Notwithstanding anything in section 38, where in any proceedings before a court or coroner a request for the production or discovery of a statement obtained under this Act is contested on grounds that it is privileged under this Act, the court or coroner shall, *in camera*, examine the statement and if the court or coroner concludes in the circumstances of the case that the public interest in the proper administration of justice outweighs in importance the privilege attached to the statement by virtue of section 38, the court or coroner shall order its production and discovery, subject to such restrictions or conditions as the court or coroner deems appropriate, and may require any person to give evidence that relates to the statement.

(2) For the purposes of subsection (1), "court" includes a person or persons appointed or designated to conduct a public inquiry into an aviation occurrence pursuant to this Act or the *Inquiries Act*.

(emphasis added)

4 The *Canadian Aviation Safety Board Act* was repealed in 1990; however its successor statute, *Canadian Transportation Accident Investigation and Safety Board Act*, S.C. 1989, ch. C-3 maintains an identical privilege attaching to witness statements. Counsel are agreed that the earlier statute is applicable to the witness statements made in 1988 and 1989 in connection with the investigation of the crash of the Simpson Air aircraft.

5 Notice of the plaintiffs' application was given to the Board and through the Board, to the fifteen declarants who provided statements to the Board. Some of the declarants have waived the statutory privilege. Most have not.

6 The Board, in accordance with its policy, objects to the production of the witness statements. The Board submits that witnesses would refuse to provide information to assist the Board's investigators if it was perceived that the statements would be made freely available for use in civil litigation.

7 The defendants put forward a preliminary objection to my jurisdiction as chambers judge in hearing this application under s.39 of the Act. It is submitted that it is only the trial judge presiding at the trial of the litigation that is given jurisdiction by the wording of s.39(1). I find there is no merit in this submission. The ordinary meaning of the words of the subsection does not lend itself to such a restrictive interpretation but rather a contrary interpretation. The use of the words "production" and "discovery" imply an interlocutory stage of the proceedings. No case authority was cited in support of a restrictive interpretation of s.39. I note that the only cases dealing with this statutory privilege to which the court was referred — Moore v. Reddy (1990) 44 C.P.C. (2d) 61 (Ont. S.C.)

and Braun v. Zenair Ltd., March 30, 1993, Ont. Ct of Justice, unreported -- both involve an application at the interlocutory stage of litigation.

8 Accordingly, I have examined the statements *in camera* in accordance with the statute. I have also examined, with the concurrence of counsel, a copy of the Board's Aviation Occurrence Report dated June 15, 1992. I understand that both parties to this litigation are in possession of a copy of this report which sets forth the results of the Board's investigations regarding the crash of the defendants' aircraft.

Having examined these documents, and the two affidavits filed in support of this application, I am unable to find anything in the circumstances of this case that would cause me to conclude that the public interest in the proper administration of justice outweighs in importance the statutory privilege enacted by Parliament in s.38 of the Act.

10 There is nothing in the statements which I have read that is at variance with the contents of the Aviation Occurrence Report which is in the possession of the plaintiffs.

11 From the submissions of plaintiffs' counsel one readily concludes that the plaintiffs simply wish to utilize the fruit of the Board's investigation in their prosecution of the within litigation. It is clear that the plaintiffs seek (a) the identity of the persons who gave the Board's investigators any statements which might tend to support the plaintiffs' contention in this litigation that the crash of the aircraft was attributable to pilot error and/or (b) the contents of any such statements.

12 The affidavit material filed in support of the within application indicates that the plaintiffs are unable to locate two witnesses in particular yet no detailed information is provided as to the date(s) or extent of any inquiries in this regard. If the Board's investigators were able to locate these witnesses after the accident, why could not the plaintiffs and their investigators?

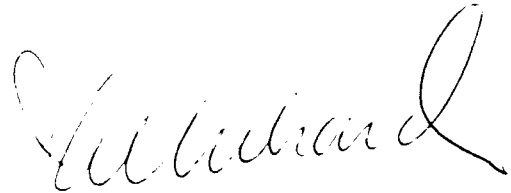
13 There is nothing in the statements that I have examined that could not have been obtained by the plaintiffs in the ordinary prosecution of litigation arising out of a fatal crash of an aircraft. There is nothing in the affidavit material to indicate otherwise.

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In my respectful view, and keeping in mind the intention of Parliament, the statutory privilege would become meaningless if a litigant was routinely permitted to piggy-back on the investigative work of the Board. There must be some compelling reason to set aside the statutory privilege. In the context of the test set forth by Parliament in s.39, the within litigation is "routine", and there is no compelling reason before me to set aside the statutory privilege.

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The plaintiffs' application is accordingly dismissed. This ruling does not, of course, foreclose any new application made to the trial judge in the context of the evidence before him or her at trial.



J. E. Richard  
J.S.C.

Dated at Yellowknife, Northwest Territories  
this 26th day of April, 1995

Counsel for Plaintiffs: Adrian Wright

Counsel for Defendants: Scott Duke

The Canadian Aviation Safety Board did not appear but filed written submissions by its counsel Franz Reinhardt



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**Reasons for Judgment of the  
Honourable Mr. Justice J.E. Richard**

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