Federal Court  Cour fédérale

Date: 20100420

Docket: T-143-09

Citation: 2010 FC 429

Ottawa, Ontario, April 20, 2010

PRESENT: The Honourable Mr. Justice Harrington

BETWEEN:

PRIVACY COMMISSIONER OF CANADA

Applicant

and

AIR CANADA

Respondent

REASONS FOR ORDER AND ORDER

[1] An incident occurred on an Air Canada Jazz flight which led to protracted correspondence between the passenger and Air Canada, and ultimately to his demand that Air Canada produce his personal information file. It refused on the grounds of privilege. The passenger complained to the Privacy Commissioner, but Air Canada maintained the same position with her. She has now applied to this Court for a hearing in accordance with Section 15 of the *Personal Information Protection*

and Electronic Documents Act, invariably referred to by its acronym PIPEDA. Apart from other remedies, she asks for a ruling on the validity of Air Canada's privilege assertion.

[2] The purpose of PIPEDA is to establish rules to govern the collection, use and disclosure of personal information. It applies to businesses subject to federal jurisdiction, such as airlines.

[3] An individual, without any need for justification, has the right to access his or her personal information held by such an organization and, if appropriate, call for the rectification of any errors contained therein.

[4] There are some exceptions, one being if "…the information is protected by solicitor-client privilege" as declared in Section 9(3)(a), or by "solicitor-client or litigation privilege", the words used in Section 4.9 of the Schedule of Principles.

AIR CANADA JAZZ FLIGHT AC8193

[5] During the Air Canada Jazz flight from Kamloops to Vancouver on 26 May 2005, Mr. Juergen Dankwort and another passenger were observed by the flight attendant, Mr. Rene Wong, to be consuming beer which had not been served to them by him. Consumption of alcohol on board that has not been served by the aircraft's operator is prohibited by the *Canadian Aviation Regulations*, SOR/96-433. Mr. Wong drew this fact to the attention of the two passengers. One surrendered his beer and that was the end of the matter. Although Mr. Dankwort also surrendered his beer, a discussion, or rather discussions, ensued. Both Mr. Dankwort and Mr. Wong agree that

extreme rudeness was displayed. Each, however, claims that he was excessively polite, and blames the other. Each threatened to file a complaint, and indeed each did.

[6] Mr. Wong informed the pilot and, as a result, on arrival in Vancouver Mr. Dankwort was not only met by an Air Canada representative, but also by several RCMP officers. After some discussion, he was sent on his way. He was not detained and no charges were ever laid. Air Canada did not put him on a "no-fly" list and has not shared or made use of the information contained in its file.

[7] The very next day Mr. Dankwort wrote to the president of Air Canada to complain about Mr. Wong's "unwarranted and aggressive behaviour." Upon landing he was questioned by RCMP officers "in a most unpleasant manner in full view of all deplaning passengers." Mr. Wong's "conduct was unprofessional and hostile. He abused his authority. I was subjected to verbal intimidation by him and falsely accused of causing a disturbance." The letter ended with this ominous remark:

> I am holding Air Canada responsible for the wrongful actions of your employee that caused me great personal distress, including embarrassment, police intervention and delay. I await your reply on how you propose to redress this matter…

[8] Over the next 22 months, Air Canada rebuffed Mr. Dankwort's complaint including his threat of a lawsuit. It supported Mr. Wong's version of events, which it said were backed up by an independent witness, another passenger.

[9] While all this was going on, Mr. Dankwort also complained to the Canadian Transportation Agency that Mr. Wong, who to his surprise was supported by Air Canada, had made a false allegation against him. The CTA declined jurisdiction on the basis that the complaint described was a level of service issue which fell within the purview of airline management.

THE PRIVACY COMMISSIONER

[10] The Privacy Commissioner became involved once Mr. Dankwort drew to her attention that Air Canada was refusing to make its file on him available for his inspection. When faced with the same refusal based on privilege, she called upon Air Canada to file an affidavit which would identify in considerable detail the documents over which privilege was claimed and which would clearly set out why privilege was being asserted. Air Canada refused and added that it had already provided her with adequate particulars in their exchange of correspondence.

[11] The Privacy Commissioner prepared a preliminary report bemoaning Air Canada's position. These preliminary reports sometime have the effect of breaking an impasse. However, that did not work in this case. In her final report, she mentioned that she had recommended in her preliminary report that Air Canada disclose the documents Mr. Dankwort requested and concluded: "I am disappointed with the actions of Air Canada in addressing the issue of the requested documents. Accordingly, the complaint is well-founded. We will be pursuing the matter in accordance with our authorities under the Act."

[12] In her Notice of Application to this Court, the Privacy Commissioner seeks:

a. A declaration that she was entitled to require Air Canada to provide affidavit evidence in support of its claim of privilege;
b. An order confirming or denying Air Canada's claim that the documents are subject to privilege;
c. An order requiring Air Canada to provide Mr. Dankwort with access to any and all documents unlawfully withheld from him; and
d. An award of damages in Mr. Dankwort's favour.

THE REQUISITE AFFIDAVIT

[13] In response to the Privacy Commissioner's application to this Court, Air Canada has filed affidavit evidence, on which its representatives were cross-examined, and has delivered the documents over which it asserts privilege to the Court, under seal.

[14] Although it was held by the Supreme Court in *Canada (Privacy Commissioner) v. Blood Tribe Department of Health*, 2008 SCC 44, [2008] 2 S.C.R. 574, that the Privacy Commissioner has no jurisdiction in her administration of PIPEDA to rule on an assertion of privilege and therefore is not entitled to inspect documents over which privilege is claimed, Section 12 gives her broad powers and in the conduct of an investigation she may compel persons to appear and give oral or written evidence on oath. It follows, she submits, that she was entitled to require Air Canada to justify its assertion of privilege by way of a detailed affidavit.

[15] I do not agree. Although the burden rests with Air Canada to justify its allegation of privilege, it is this Court, and not the Privacy Commissioner, who is the decision maker. Air Canada could have refused without giving any particulars whatsoever. The Privacy Commissioner would then have had to seek one of the many avenues of redress to this Court which are available to her. In such a case, even if it turned out that Air Canada's refusal was not capricious, and that the documents were privileged, Air Canada might face serious cost consequences for unnecessarily taking up the Court's time.

[16] In this case, Air Canada, in my opinion, provided sufficient particulars. Consider the decision of Madam Justice Sharlow, speaking for the Federal Court of Appeal in *Blank v. Canada (Minister of the Environment)*, 2001 FCA 374, 281 N.R. 388 at paragraph 17:

> Claims of solicitor-client privilege are typically dealt with as they have been in this case, with the party challenging the privilege being given particulars about the documents rather than access to the documents themselves. The result is that the documents are reviewed in detail only by the Court. In the first instance, the challenging party is compelled as a matter of necessity to rely on the judge or, as in this case, commence an appeal without being able to specify what errors might have been committed. The appellate court is then forced to look over the shoulder of the judge at first instance and reach its own conclusion as to whether the privilege applies. No other procedure has been devised that can ensure a reasonable review of the solicitor-client privilege claim without destroying it. There is no reason to depart from that practice in this case.

[17] Of course, the Privacy Commissioner had the right to inform Air Canada that if it did not persuade her that its assertion was well founded, she would come to this Court, as indeed she has. However, since she could not make a decision, it follows that she could not stipulate the steps Air Canada had to take to satisfy her that the documents were truly privileged. If she were the decision

maker, she may well have been entitled to stipulate what Air Canada had to do. Rule 223 of the *Federal Courts Rules* calls for an affidavit of documents, including a statement of the grounds for which each claim of privilege is claimed in respect of a document. However, in that case it is the Tribunal itself, *i.e.* the Federal Court, which determines whether the assertion of privilege is justified.

THE PRIVILEGED DOCUMENTS

[18] Air Canada asserts privilege over five documents:

a. The initial report and a follow-up report by the flight attendant, Mr. Wong;

b. A report from the customer service representative who met the plane on arrival at Vancouver;

c. A report from the captain of the aircraft; and, finally,

d. A statement from a passenger who witnessed the incident.

[19] There are two underlying themes. One is that an airline must be extremely attentive to safety issues. This theme is emphasized in the many instruction manuals which covered the flight in question. Having characterized Mr. Dankwort's behaviour as disruptive, Mr. Wong was obliged to prepare a report. The other theme is that any large organization which serves the public is bound to receive complaints. The merits of the complaint are not before me. The fact remains that an incident which arises during a flight could result in either the airline instituting various proceedings against the passenger, or vice versa.

[20] Mr. Wong prepared his first report on the "Air Canada Jazz Incident Report" form. This form identifies 24 potential types of incidents including turbulence, equipment malfunction and hijacking. One of the 24 is "disruptive or impaired passenger." That is the type of incident Mr. Wong circled.

[21] The form calls for a brief description of what happened, and of the action taken. It only provides a few lines for this purpose. Mr. Wong set out his version of events and significantly, also gave the name of a passenger who witnessed the incident. These "disruptive or impaired passenger" reports are not sent directly to Air Canada's legal department, but are passed on to it as a matter of course.

[22] The second report was prepared by the Air Canada Customer Service Manager who met Mr. Dankwort at the gate upon the plane's arrival in Vancouver. There has been some confusion with respect to this document. At a later stage, Air Canada's legal department requested a report from him, but all he did was retransmit an earlier email which was prepared on the day of the incident. It is titled "Shift Overview." Within the context of email exchanges it could well be a privileged document, but it was first created as a stand-alone document before the legal department became involved. These two reports were prepared before Mr. Dankwort's letter of May 27, 2005, addressed to Montey Brewer, CEO of Air Canada, at its headquarters in Montréal, with copy to Air Canada Customer Solutions in Calgary.

[23] There are a number of departments within Air Canada which use the word “Customer” as part of their title. Air Canada’s summary of events is set out in an affidavit of Kim Swan, a paralegal. She refers to certain individuals as being a customer relations manager, the Customer Solutions Department and Consumer Advocacy Department. The only distinction I consider relevant is between the various “Customer” departments on the one hand and the “Legal Department” on the other.

[24] On receipt of the letter at Air Canada’s head office, the customer relations manager in Montréal involved Me Louise-Hélène Sénécal, assistant general counsel, litigation. The copy of Mr. Dankwort’s letter addressed to Air Canada Customer Relations was received in Calgary on June 3, 2005.

[25] Over the next several days, Ms. Swan, a paralegal in Calgary, became involved with the Customer Advocacy Department, the whole under Me Sénécal’s supervision.

[26] Mr. Dankwort’s letter was acknowledged and an investigation was promised.

[27] The day-to-day investigation was overseen by Ms. Swan. The internal correspondence attached to her confidential affidavit shows that Air Canada Jazz was treating the matter as a threatened lawsuit. Customer Advocacy requested a report from the captain of the flight, as well as a more detailed report from Mr. Wong, for furtherance to Ms. Swan. Mr. Wong’s more detailed report was prepared on June 14 and the captain’s Aeronautical Event Report was prepared on June

16. On July 5, Customer Advocacy wrote to Mr. Dankwort and stated that Mr. Wong had, in their opinion, acted appropriately. That letter had been approved by Me Sénécal prior to its issuance.

[28] Mr. Dankwort wrote back to take issue with Air Canada's position. He said:

> You have apparently decided to accept your employee's story of these events, diverting from the complaint I made about Mr. Wong's conduct and his false report –a most serious act, given the imperatives of air safety and the responsibilities of an airline attendant.

[29] The passenger who witnessed the incident was then contacted and voluntarily gave a statement which entirely supported Mr. Wong's version.

WHAT IS LEGAL PRIVILEGE?

[30] One may always keep one's thoughts to oneself. However, if they are put to writing, even in a note to file, which one considers personal, or if one corresponds with another verbally or in writing, with all of its modern electronic applications, the information, and if contained in a document, the document itself, may be required to be produced.

[31] The law recognizes that certain communications and documents ought to remain confidential. Sections 37 through 39 of the *Canada Evidence Act* deal with public interest, national interest, and confidences of the Queen's Privy Council. One need only look at the index of Hubbard, Magotiaux and Duncan, *The Law of Privilege in Canada*, (Aurora: Canada Law Book, 2006), to get an idea of the scope of what the law considers should remain confidential, such as Parliamentary privilege, spousal privilege, religious communications, doctor/patient

communications and, in the criminal law context, the privilege against self-incrimination. The case before me deals with solicitor/client and litigation privilege.

[32] In *Blank v. Canada (Minister of Justice)*, 2006 SCC 39, [2006] 2 S.C.R. 319, the Court distinguished solicitor/client privilege from litigation privilege, within the context of the *Access to Information Act*. A prime distinction between solicitor/client privilege, sometimes called legal advice privilege, and litigation privilege is that the latter, to use the words of Mr. Justice Fish, "…expires with the litigation of which it was born" (para. 8). Solicitor/client privilege, which has been part of our law for centuries, "…recognizes that the justice system depends for its vitality on full, free and frank communication within those who need legal advice and those who are best able to provide it… The resulting confidential relation between solicitor and client is a necessary and essential condition of the effective administration of justice." (para. 26). This privilege does not lose its status with the passage of time.

[33] However, litigation privilege, which comes to an end with the passage of time, is somewhat broader in scope in that it may cover communications between a solicitor and third parties. "Its object is to ensure the efficacy of the adversarial process and not to promote the solicitor-client relationship…" (para. 27).

[34] *Blank* dealt with litigation privilege which came to an end, absent closely related proceedings, upon the termination of the litigation that gave rise to the privilege. In the case before

me, the witness statement from another passenger on the flight would only be covered by litigation privilege. The other four documents at issue may be covered by both forms of privilege.

[35] Legal privilege existed long before the modern concept of supposed transparency as set out in PIPEDA, the *Access to Information Act* and the *Privacy Act*. Solicitor/client privilege and litigation privilege form a cornerstone of our daily life under the Rule of Law. The necessity to safeguard privilege has been emphasized time and time again by the Supreme Court. In addition to *Blank*, above, recent instances include *Smith v. Jones*, [1999] 1 S.C.R. 455; *Pritchard v. Ontario (Human Rights Commission)*, 2004 SCC 31, [2004] 1 S.C.R. 809; *Foster Wheeler Power Co. v. Société intermunicipale de gestion et d'élimination des déchets (SIGED) Inc.*, 2004 SCC 18, [2004] 1 S.C.R. 456; *Maranda v. Richer*, 2003 SCC 67, [2003] 3 S.C.R. 193; and *Lavallée, Rackel & Heintz v. Canada (Attorney General)*, 2002 SCC 61, [2002] 3 S.C.R. 209.

[36] There is also a fundamental distinction to be drawn between "information" and "documentation". Although PIPEDA speaks of "information", it is clear that the information possessed by an organization concerning an individual must be in a retrievable format. Thus, we are speaking of a "record".

[37] The distinction in my mind between a "privileged document" and "privileged information" was formed, at least as it applies in this Court, by President Jackett in *Susan Hosiery Ltd. v. Canada (Minister of National Revenue – MNR)*, [1969] 2 Ex.C.R. 27. He addressed the solicitor/client privilege and what he called the "lawyer's brief" rule. He said at paragraph 11:

> What is privileged is the communications or working papers that came into existence by reason of the desire to, obtain a legal opinion or legal assistance in the one case and the materials created for the lawyer's brief in the other case. The facts or documents that happen to be reflected in such communications or materials are not privileged from discovery if, otherwise, the party would be bound to give discovery of them.

ARE THE DOCUMENTS PRIVILEGED?

[38] Turning now to the first document, the "Air Canada Jazz Incident Report" prepared by Mr. Wong the day of the flight, the Privacy Commissioner, who has not seen the documents, submits from context that it cannot be privileged as it was prepared in the ordinary course of business. To be privileged, the communication must have been produced with litigation in mind, produced for the dominant purpose of receiving legal advice or as an aid to the conduct of litigation and the prospect of litigation must be reasonable (*Commercial Union Assurance Co. PLC v. M.T. Fishing Co.* (1999), 162 F.T.R. 74, aff'd (1999), 244 N.R. 397 (F.C.A.)).

[39] When Mr. Wong prepared his report, he had some reason to believe that Mr. Dankwort had transgressed the *Canadian Aviation Regulations.* Sections 602.04(1) and (2) thereof provide :

602.04 (1) In this section, "intoxicating liquor" means a beverage that contains more than 2.5 per cent proof spirits.	602.04 (1) Pour l'application du présent article, « boissons enivrantes » s'entend des boissons ayant une teneur en alcool de plus de 2,5 pour cent.
(2) No person shall consume on board an aircraft an intoxicating liquor unless the intoxicating liquor	(2) Il est interdit à toute personne de consommer des boissons enivrantes à bord d'un aéronef à moins :

(a) has been served to that person by the operator of the aircraft; or	*a)* qu'elles ne lui aient été servies par l'utilisateur de l'aéronef;
(b) where no flight attendant is on board, has been provided by the operator of the aircraft.	*b)* qu'elles ne lui aient été fournies par l'utilisateur de l'aéronef lorsqu'il n'y a pas d'agent de bord à bord.

[40] Sections 7.3(3) and (4) of the *Aeronautics Act* stipulate that a person who has contravened any regulation under the Act is guilty of an offence punishable on summary conviction and, in the case of an individual, subject to a fine not exceeding $5,000.

[41] It is significant that he gave the name of a witness, as the manuals make it perfectly clear that if Air Canada were minded to encourage the authorities to lay a charge, it would want to know if a non-employee witnessed the incident.

[42] Mr. Wong also reasonably anticipated that a complaint would be filed against him. The Air Canada Jazz Initial Training Manual provides that the law branch is available to provide advice and support to employees who are called as witnesses. If a civil suit or criminal charges are laid against an employee, Air Canada Jazz fully assumes the employee's defence. "In the event you are involved in a disruptive passenger incident, remember you are not on your own. There is support available."

[43] I am satisfied that the dominant purpose of Mr. Wong's initial report was to set out facts which would allow Air Canada's legal department to advise the company as to whether it should

pursue Mr. Dankwort, and to allow the legal department, on the other hand, to assess potential liability on the part of Mr. Wong and his employer. This report is subject to both solicitor/client and litigation privileges.

[44] The second report, that of the Air Canada representative who met the flight in Vancouver, Mark Shankland, is somewhat different. His was a routine end of shift synopsis prepared after both he and the RCMP officers had spoken with Mr. Dankwort. It was clear that no charges were going to be laid against Mr. Dankwort who exhibited no animosity toward Mr. Shankland. Although a report was requested some time later on behalf of the legal department, that does not change the characterization of his report, the dominant purpose of which was not solicitor/client or litigation privilege. It should be disclosed. I appreciate, however, that had it only been created at the time it had been requested on behalf of the legal department, it would have been privileged. I find no bad faith on Air Canada's part.

[45] Mr. Wong's second report and the captain's report were clearly generated in response to Mr. Dankwort's claim. Air Canada's response was coordinated by its legal department. The two documents are covered by both solicitor/client and litigation privilege.

[46] The last document, the statement from a passenger who witnessed the exchanges between Mr. Dankwort and Mr. Wong, is only subject to litigation privilege. The Privacy Commissioner argues that the two-year statute of limitations in British Columbia has come and gone and so that in

accordance with *Blank*, such privilege as there may have been has expired. She also points out, however, that some balance must be exercised in order to protect the witness' privacy rights.

[47] Given that Mr. Dankwort's position was that he was defamed by Mr. Wong, and given that Mr. Wong's version of events is fully supported by this witness, perhaps he would be inclined to sue her. It is too simplistic to state that there is a two-year limitation. Another issue is when that two-year period began to run. As regards the passenger, what she said has not yet been "discovered" by Mr. Dankwort. Consequently, I am satisfied that the statement is still covered by litigation privilege.

THE PRIVACY COMMISSIONER'S SUBMISSIONS

[48] The cases cited by the Commissioner circumscribe the limits of privilege. Apart from the dominant purpose test, a document which otherwise would not be privileged does not gain the patina of privilege by routing it through a lawyer. Likewise, not all communications with in-house counsel, be it within a private organization or the government, are necessarily privileged.

[49] The Commissioner emphasizes that Ms. Swan, Air Canada's paralegal who did much of the day-to-day work in this matter, was not licensed. The fact remains that she was working under the overall supervision of Me Sénécal. As stated by the Supreme Court in *Descôteaux v. Mierzwinski*¸ [1982] 1 S.C.R. 860 at 873:

> Seeking advice from a legal adviser includes consulting those who assist him professionally (for example, his secretary or articling student) and who have as such had access to the communications made by the client for the purpose of obtaining legal advice.

[50] The Commissioner made two other submissions which require mention. One was that for a document to be privileged, there must have been be a reasonable prospect when it was created which would allow a reasonable person possessed of all pertinent information to conclude that it was unlikely that the claim would be resolved without litigation. Thus, an investigation report may not be privileged. The other is that by referring to its investigation in its correspondence with Mr. Dankwort, Air Canada waived privilege.

[51] *Hamalainen (Committee of) v. Sippola*, [1992] 2 W.W.R. 132, 62 B.C.L.R. (2d) 254, a decision of the British Columbia Court of Appeal, is cited as authority for the first. This was an insurance case. The Court held that in determining a claim of privilege with respect to a document, there were two factual determinations to be made. One was whether litigation was a reasonable prospect at the time it was prepared. If so, what was the dominant purpose for its creation? The documents in question satisfy that test.

[52] In support of the second proposition, reference was made to the decision of this Court in *Mid-West Quilting Co. v. Canada*, 2007 FC 735. However that case is but one of many which have held that solicitor/client privilege has been impliedly waived if considerations of fairness and consistency so require. The issue before Mr. Justice O'Reilly was whether an extension of time to bring an action should be granted under Manitoba's *Limitation of Actions Act*. To succeed, Mid-West was required to establish that not more than one year had elapsed between "'the date on which it first knew, or, in all the circumstances of the case, ought to have known, of all material facts of a

decisive character upon which the action is based', and 'the date on which the application is made to the Court for leave.'"

[53] In its supporting affidavit, the affiant said that he had sought and obtained legal advice. Thus, Mid-West put in issue the legal advice it received. It could not very well take the position that it had received legal advice which did not put it on notice of a possible time bar and at the same time refuse to produce that advice. In this case, Air Canada made no mention whatsoever of its legal advice. It simply gave its understanding of facts which had been obtained as a result of an investigation, an investigation which was carried out in reasonable contemplation of litigation.

[54] Had Mr. Dankwort sued Air Canada, he would not have been entitled to the production of the documents in issue. Nevertheless, he would have been entitled on an examination to discovery to obtain all of Air Canada's knowledge, information and belief as to the facts in issue, as per *Susan Hosiery*, above. However he could not have made use of that information other than in those court proceedings, as otherwise he would have run the risk of being found in contempt of court *(NM Paterson & Sons Ltd. v. St. Lawrence Seaway Management Corp.*, 2004 FCA 210, 322 N.R. 83).

[55] I see nothing in PIPEDA which would require Air Canada to disclose discoverable facts which are contained in a privileged document, other than in court proceedings. These facts were put at the disposal of its solicitors for legal advice. Indeed, *Blank*, above, is instructive. The *Access to Information Act* also denies production of privileged documents. That being said, section 49 provides that the Court may, nevertheless, order the production of the record or part thereof. The

Motions Judge, in a judgment reported at [2000] F.C.J. No. 1147 (QL), ordered that some facts be severed from privileged documents and be made available to the applicant. The Crown did not appeal. In Mr. Blank's appeal, Madam Justice Sharlow went out of her way to state at paragraph 22:

> The instances in which partial disclosure was ordered fall into two categories. In one category, disclosure was ordered of certain statements in the communication that were purely factual. It is arguable that those factual statements should not have been ordered disclosed because in each case they are inextricably linked to the legal issue under discussion that they ought to be treated as part of the privileged communication. To that extent, there may have been over-disclosure of some privileged documents. However, as the Minister has not cross-appealed, the order of the Judge will not be varied on that account.

DAMAGES

[56] The Privacy Commissioner submitted that if Air Canada wrongfully withheld documents from Mr. Dankwort, then the Court, in its discretion, should award damages. She suggested a sum of $5,000 to $10,000.

[57] Mr. Dankwort, in his affidavit in support of the application, states he wants to "correct Air Canada's records." In other words, he wants Air Canada to acknowledge that his version is correct and Mr. Wong's and the witness' versions are wrong. I asked counsel how this issue has been resolved in other cases in which there are dramatically opposed versions of an event. Counsel informed me the Commissioner often suggests that the competing version be inserted in the file. Mr. Dankwort has already succeeded in that respect. This is consistent with Principle 4.9.6. When a challenge is not resolved to the satisfaction of the individual, the substance of the unresolved

challenge shall be recorded by the organization. No doubt Air Canada will add these reasons for order and order to its file.

[58] Mr. Dankwort expresses concern that airlines, such as Air Canada, have extraordinary power in that they may decide who may or may not fly with them, and he fears that at any time he might be detained.

[59] In this regard, Carmen Baggaley, a senior policy and research analysis with the Office of the Privacy Commissioner, filed an affidavit setting out particulars of various programs implemented by the Canadian Border Service Agency and Transport Canada which deal with “no-fly” programs. Air Canada moved prior to the hearing to have this affidavit struck. Prothonotary Morneau rightly decided that this motion was best left to the judge hearing the application on the merits.

[60] While I do not think that the affidavit adds much, and while some of it is argumentative and speculative, it does indicate that there could have been a basis for Mr. Dankwort’s concerns. I see no need to strike it.

[61] Apart from one document, which was withheld with no evidence of bad faith, Mr. Dankwort is not entitled to see the documents in question. Furthermore, Air Canada has preferred to let the matter be, notwithstanding that Mr. Dankwort was possibly in breach of s. 602.04(2) of the *Canadian Aviation Regulations*. Mr. Dankwort says that he was not aware of the regulation. That does not matter. As stated by Lord Atkin in *Evans v. Bartlam*, [1937] A.C. 473 at 479 (H.L.):

> The fact is that there is not and never has been a presumption that every one knows the law. There is the rule that ignorance of the law does not excuse, a maxim of very different scope and application.

[62] Given Air Canada's inaction, all we are left with is a disagreement as to what was said, by whom, to whom and in what tone of voice. I see no reason to award any damages.

COSTS

[63] As Air Canada has been successful for the most part, and given that costs usually follow the event, I see no reason why it should not be awarded its costs.

ORDER

FOR REASONS GIVEN;

THIS COURT ORDERS that:

1. It is declared that the Privacy Commissioner was not entitled to require Air Canada to provide her with affidavit evidence in support of its claim of privilege.
2. The documents over which Air Canada asserts privilege are privileged except the report of Mark Shankland prepared May 26, 2005.
3. Air Canada is to provide Mr. Dankwort with copy of that report, as a stand-alone document, with the name and identification features of the other passenger mentioned therein deleted.
4. Mr. Dankwort is awarded no damages.
5. The motion to strike the affidavit of Carmen Baggaley in whole or in part is dismissed.
6. The whole with costs in Air Canada's favour.

"Sean Harrington"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-143-09
STYLE OF CAUSE:	Privacy Commissioner of Canada v. Air Canada
PLACE OF HEARING:	Ottawa, Ontario
DATE OF HEARING:	March 23, 2010
REASONS FOR ORDER AND ORDER:	HARRINGTON J.
DATED:	April 20, 2010

APPEARANCES:

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