IN THE DISTRICT COURT
AT WELLINGTON

CRI-2009-085-

IN THE MATTER OF	THE TRANSPORT ACCIDENT INVESTIGATION COMMISSION ACT 1990
BETWEEN	TRANSPORT ACCIDENT INVESTIGATION COMMISSION Informant
AND	FAIRFAX NEW ZEALAND LTD Defendant

Hearing: 3 November 2009

Appearances: D Lahood and M Ferrier for Informant
R Stewart for Defendant

Judgment: 30 November 2009.

RESERVED JUDGMENT OF JUDGE JOHN WALKER
(SENTENCE)

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[1] Fairfax New Zealand Ltd, the publisher of the *Dominion Post* newspaper, has pleaded guilty to a charge under s 14 of the Transport Accident Investigation Commission Act 1990 that:

> It did disclose a record specified in s 14B(2) of the Transport Accident Investigation Commission Act 1990 in breach of s 14B of that Act, by publishing in the *Dominion Post* newspaper information relating to an investigation that had been provided in confidence by the Transport Accident Investigation Commission to another person.

[2] The maximum penalty for this offence by a body corporate is a fine of $25,000.

[3] There is no dispute about the summary of facts and I attach the summary as an appendix to this judgment.

[4] In essence the defendant has had access to a draft report of the Commission which had been supplied in confidence to a number of affected parties for comment before the report was finalised. The defendant published information which was contained in that draft report.

[5] The Commission, on becoming aware of the possibility of such publication, had warned the Editor that such publication might be an offence, explained the provisions of the Act, the natural justice considerations which underpinned the confidential draft procedure, and that the Commission had an obligation to protect its processes under the Act.

[6] The defendant took legal advice and the advice it received was that publication would not constitute an offence. That advice did not come from Mr Stewart or his firm.

[7] The defendant does not seek to excuse its breach by blaming its lawyers. What the defendant says is that this is not a case where it simply ignored the warnings delivered by the Commission and acted recklessly in its publication, but that it took steps to ascertain whether it would be in jeopardy if it published the information.

[8] This is the first prosecution brought under this section and I requested counsel to find out if there have been prosecutions under similar legislation in other jurisdictions which might provide some guidance in this case. Counsel for the informant has carried out extensive research and inquiry and I am very grateful for that assistance.

[9] It appears that while other jurisdictions including Canada, Australia and the United Kingdom have similar confidentiality regimes, no disclosure offence has

been created. However, a judgment of the Nova Scotia Supreme Court[1] provided to me by Mr Ferrier is of assistance. Although that case involved an application for an injunction to restrain a newspaper from publishing a draft accident report, it is nevertheless instructive on the underlying reasons for confidentiality of draft reports. In particular I refer to the following paragraphs of that judgment:

> 19 Further, the receipt of representations from interested parties ensures that those persons who are the subject of comment in the draft report are provided with every opportunity to put their full position before the Board. These persons are properly entitled to rely upon the statutory protection created by the Act. They expect to be treated in a fair and confidential fashion. Their interests and those of the Board are entirely undermined if, in the midst of the consultative process, the media assumes the authority to publish the draft report. As noted in Mr. Harris' affidavit, the facts and conclusions contained in draft reports have been subjected to revision as a result of representations received from interested parties. It is therefore entirely possible that a final report issued by the Board pursuant to Section 24(1) of the Act could vary significantly from the draft report issued by the Board pursuant to Section 24(2) of the At. Ultimately, the integrity of the consultative process (and the candour and fairness it embodies) would be irreparably damaged if the draft report of the Board were subject to wide circulation prior to all representations being received by the Board and the resulting final report issued.
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> 55 The evidence is that the process of preparing a confidential draft report and inviting privileged representations on that report ensures accuracy and fairness to those persons who have a direct interest in the Board's findings. The restrictions in s. 24(3) ensure a level of candour that cannot be achieved if the draft report and any representations arising therefrom become the object of public scrutiny. Persons who are given a copy of the draft report are entitled, under s. 24(2) to a reasonable opportunity to respond. If the consultative process occurs publicly, persons with relevant information but limited or conflicting interest may be less willing to assist if they cannot expect confidentiality. The sources of information become easily identified if subject to media inquiry and may ultimately evaporate. In the end there is a substantial risk that the Board's ability to investigate transportation occurrences will suffer.
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> 57 Equally, transportation safety is well served if those persons with a vested interest in the process are treated fairly. This necessarily requires conducting the consultative process before potentially inaccurate facts or conclusions are made public. To do otherwise leaves innocent persons in the unenviable and unnecessary position of having to defend their rightful position in the media as opposed to simply correcting an inaccuracy in advance of the public announcement.

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[1] Canadian Transportation Accident Investigation and Safety Board v Canadian Press [200]N.S.J. No 139 (S.C.) Edwards J

> 60 While the consultative process created under the Act clearly does not involve a breach of trust, the overriding interests of transportation safety are worthy of similar protection and requires that similar accommodation be given to innocent persons with relevant information to assist the Board in confirming the accuracy of its findings. It is not, in the words of the British Columbia Court of Appeal "too high a price to pay" - particularly where in this case, the final report is being made public in any event. Ultimately, transportation safety benefits more from a thorough and accurate and public report than by transforming every investigation into a public inquiry.

[10] The offence of disclosing information supplied in confidence relates to information supplied to the Commission as well as information supplied by the Commission to others.

[11] There is clearly a need for those who can supply information relating to a transportation accident to be able to do so freely and candidly without fear of that information being used against them in criminal or other proceedings. The interests of the public in the cause of such accidents being ascertained and the learning of lessons from such accidents in order to minimise the chance of such accidents being repeated is obvious. The Act provides confidentiality in respect of the disclosure of witness statements and cockpit voice recorders. The underlying principles of the "no blame approach" and the "predominance of safety considerations" were referred to by Greig J in *R v New Zealand Rail Ltd* (High Court Blenheim, 21 December 1995).

[12] In my view ascertaining the cause of the transportation accident is of greater importance than affording affected parties a fair opportunity of commenting on a draft report. I would regard a disclosure offence which undermined the principle of free and candid disclosure as having a greater impact on the work of the Commission than a disclosure offence which related only to the consultation process relating to a draft report.

[13] That is not to say that a disclosure offence relating to a draft report is of little consequence. The principles set out in the *Canadian Press* case explain how important the confidentiality of a draft report can be.

[14] I do not therefore accept the Informant's submission that this disclosure should be regarded as at the most serious level of offending under the Act.

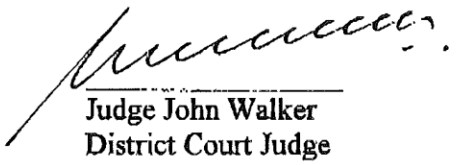
[15] Mr Lahood for the Informant submitted that any breach of the confidentiality regime , no matter how small , could seriously undermine the Commission's ability to obtain important evidence about an accident and determine the causes of an accident. I do not accept that all disclosures can seriously undermine the Commission's ability to obtain important evidence about an accident. Certainly the disclosure of protected statements, cockpit voice recorders, and other information supplied in the course of an investigation, undermining the expectation of confidentiality in respect of that information, would seriously undermine the Commission's ability to obtain information. The same cannot be said, in my view, in respect of disclosure of a draft report.

[16] Mr Lahood has submitted that a very substantial penalty has to be imposed in this case because unless that happens, the Informant will have difficulty emphasising the importance of confidentiality being maintained if the Court has not adequately reflected the importance of such confidentiality. I accept that the penalty imposed needs to be such as to send a clear message that the confidentiality requirements will be treated seriously by the Court. However, it would not be right to set the level of fine in this case at the high level suggested by the Informant simply because it was the first prosecution. The starting point needs to be assessed in relation to this offence and the circumstances of it.

[17] I assess the starting point as a fine of $15,000. I have assessed that starting point on the basis that an offence which strikes at the ability of the Commission to obtain witness statements and other information in the course of the investigation would justify a greater starting point in the region of $20,000 which would also allow for recognition of any aggravating factors relating to the offender such as previous convictions or recklessness. I am not intending to set out any general sentencing principles for this offence, that is not my function, I am simply explaining how I arrive at my starting point.

[18] The only mitigating factor is the guilty plea which has been entered at the first reasonable opportunity. The taking of legal advice and acting upon it is not a mitigating factor and is not advanced as such. It is simply the absence of what would be an aggravating factor; that is proceeding recklessly in the face of a warning from the Commission.

[19] Allowing therefore for the plea of guilty, the fine is reduced to of $10,000 and the defendant is convicted and fined $10,000 together with Court costs of $130 and a solicitor's fee of $250.



Judge John Walker
District Court Judge

Solicitors: