February 24, 2016 Case No. 15-05627

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Dear Sirs:

Re: Application by Christopher Johnson and Gábor Lukács against Air Canada

BACKGROUND

On December 4, 2015, Gábor Lukács (on behalf of himself and Christopher Johnson) (the applicants) filed an application alleging that Air Canada is applying a policy that purports to limit its liability with respect to delay of passengers that is not set out in its International Tariff, contrary to section 122 of the *Air Transportation Regulations*, SOR/88-58, as amended (ATR) and is unreasonable within the meaning of section 111 of the ATR, because it purports to fix a lower limit of liability than what is set out in the Convention for the Unification of Certain Rules for International Carriage by Air Montreal Convention (*Montreal Convention*). The applicants also assert that Air Canada has failed to apply the terms and conditions set out in its tariff by applying the impugned policy and/or other unofficial policies instead of the provisions of the *Montreal Convention*, contrary to section 110(4) of the ATR.

The Canadian Transportation Agency (Agency) opened pleadings on December 29, 2015. On the same day, the applicants filed a notice of written questions and production of documents in regard to the impugned policy pursuant to subsection 24(1) of the *Canadian Transportation Agency Rules (Dispute Proceedings and Certain Rules Applicable to All Proceedings)* (SOR/2014-104) (Dispute Adjudication Rules). On January 11, 2016, Air Canada filed its response to the notice and attached a document, titled A-1, which according to Air Canada, contains internal recommendations pertaining to its policy for reimbursement of expenses.

On January 12, 2016, the applicants filed a second notice of written questions and production of documents regarding A-1. On January 19, 2016, Air Canada filed its response to the second notice and attached a document, titled AQ2-1, containing excerpts from what Air Canada refers to as its current internal recommendations pertaining to the reimbursement of expenses.

On January 20, 2016, Air Canada filed its answer to the application and attached another document, titled A-2, representing what Air Canada refers to as its current expense guidelines. On the same day, Air Canada filed a request for confidentiality relating to documents A-1, AQ2-1, and A-2 (documents) and argued that the documents are subject to an implicit undertaking of confidentiality. On January 27, 2016, the applicants filed their opposition to Air Canada's request for confidentiality by way of a request for disclosure, and on February 1, 2016, Air Canada filed its response to the applicants' request for disclosure.

On February 3, 2016, the applicants filed a request pursuant to subsection 34(1) of the Dispute Adjudication Rules to file documents not otherwise provided for in the Dispute Adjudication Rules in response to Air Canada's response to the applicants' request for disclosure. In the request, the applicants submit that they would like to respond to the new allegation being made by Air Canada, namely, that they breached the implied undertaking of confidentiality, and to the related relief being sought by Air Canada.

ISSUES

1) **Are the documents A-1 and AQ2-1 filed with the Agency subject to the implied undertaking rule?**
2) **Should the documents for which Air Canada requests confidentiality be found to be confidential?**

Issue 1: Are the documents A-1 and AQ2-1 filed with the Agency subject to the implied undertaking rule?

Position of the parties

Air Canada submits that the Supreme Court of Canada has repeatedly held that there is an implicit undertaking of confidentiality regarding documents exchanged during the discovery process. Air Canada has referred to two leading cases from the Supreme Court on this issue, *Lac d'Amiante du Québec Ltée v. 2858-0702 Québec Inc.*, 2001 SCC 51 and *Juman v. Doucette*, 2008 SCC 8. Air Canada also refers to a quote from the Supreme Court wherein the Court stated that "this undertaking is meant to allow the parties to obtain as full a picture of the case as possible, without the fear that disclosure of the information will be harmful to their interests, privacy-related or otherwise" (*Globe and Mail v. Canada (A.G.)*, 2010 SCC 41 at para. 77). Air Canada claims that this is precisely their concern and states that it is willing to share the documents with the applicants for the purposes of the present application provided that they sign a Confidentiality and Non-Disclosure Undertaking (NDU).

The applicants argue that written questions and production of documents in proceedings before the Agency are governed by section 24 of the Dispute Adjudication Rules and that section 24 differs from discovery proceedings in courts of law, where parties exchange documents and provide answers only among themselves. According to the applicants, pursuant to subsection 24(2) of the Dispute Adjudication Rules, answers and documents provided in response to questions and production requests must be filed with the Agency. The applicants assert that such filings are public pursuant to subsection 7(2) of the Dispute Adjudication Rules, and there can be no implied undertaking attached to the answers and documents obtained in this way. The applicants argue that any implied undertaking that might have existed is spent once the answers and documents are filed with the Agency and thus become part of the public record before the Agency.

Air Canada counters that the Supreme Court has ruled on three separate occasions in the last fifteen years on the issue of an implicit undertaking of confidentiality regarding documents exchanged during the discovery process and argues that the policy reasons for this consistent stance are evident: as the purpose of discovery is to encourage the most complete disclosure of information, parties providing such information must be able to trust that it will remain confidential. Air Canada argues that these same policy reasons apply to the communication of documents as part of current proceedings before the Agency.

Analysis

The implied undertaking (or "deemed undertaking") rule is well established in Canada and is intended to restrict a party who receives evidence during the discovery process from using that evidence for a collateral purpose. It is based on the principle that people should have a right to privacy but at the same time should make full disclosure in civil proceedings. The discovery process is compulsory, a litigant has little control over what evidence is compellable, and therefore should receive some assurance that the evidence that is disclosed will not be used for some other purpose. The general rule is that what is said in the discovery room stays in the discovery room until revealed in the courtroom or disclosed by judicial order (*Juman v. Doucette, supra,* at paras. 23-27).

The implied undertaking rule applies to evidence obtained on discovery and is not available to the public because it remains in the private sphere. At the discovery stage, as opposed to the trial stage, there is no imperative for transparency. The right to confidentiality will end if the adverse party decides to actually use the information in his or her own case. In the civil Courts, once the trial begins, the media will have access to the Court records, exhibits and documents filed by the parties. Information obtained on discovery therefore may become part of the court record. Information that is revealed when this happens is not subject to the obligation of confidentiality (*Lac D'Amiante Québec v. 2858-0702 Québec Inc. supra,* at paras. 63-66, 69-70, 72-73).

The Agency notes that the rule has been codified in many jurisdictions and incorporated into the rules of civil procedure governing the discovery process. In Ontario, for example, subrule 31.1.01(3) of the *Rules of Civil Procedure* RRO 1990, Reg. 194, provides that all parties and their lawyers are deemed to undertake not to use evidence or information obtained on discovery for any purposes other than those of the proceeding in which the evidence was obtained.

In some jurisdictions, however, the rules of civil procedure state that the implied undertaking rule does not apply to evidence that is filed with the Court (see, for example, subrule 30.1.01(5) (a) of the Ontario *Rules of Civil Procedure*).

Breach of the implied undertaking rule is a serious matter, and is treated as contempt of court [see for example, *N.M. Paterson & Sons v. St. Lawrence Seaway Management Corp*., 2002 FCT 1247].

The nature of the proceedings before the Agency is such that discoveries are completed on the record, as opposed to the process in civil proceedings where discoveries occur out of court. Before the Agency, answers to questions and documents which are produced are filed with the Agency. The Agency is subject to the open court principle and subsection 7(2) of the Dispute Adjudication Rules requires that documents which are filed with the Agency are placed on the public record and are publicly available, subject only to a request for confidentiality being made when the document is filed.

Subsection 31(1) of the Dispute Adjudication Rules describes the process through which a person may request confidentiality over a document. Subsection 7(2) indicates that such a request must be filed at the same time as the document over which confidentiality is sought, otherwise the document is placed on the public record. Therefore, by operation of these provisions, when documents A-1 and AQ2 were produced and filed with the Agency, they were placed on the Agency's public record. In doing so, the documents went from the private sphere and into the public sphere and based on the above case law, the Agency finds that the implied undertaking rule would not apply to these documents.

The remaining issue is whether the documents should be kept confidential.

Issue 2: Should the documents for which Air Canada requests confidentiality be found to be confidential?

Position of the parties

Are the documents relevant to the proceeding?

On the issue of relevance, Air Canada concedes that the documents are relevant to the application as asserted by the applicants, but it is its position that the documents are not relevant as conditions of carriage and remain commercially sensitive internal recommendations.

The applicants argue that the application challenges the policies of Air Canada set out in the documents and that each of these documents are vital to the proceeding.

If the documents are found to be relevant, would any specific direct harm likely result from their disclosure and, if so, whether any demonstrated specific harm is sufficient to outweigh the public interest in having the documents disclosed?

Air Canada submits that it is making the present request for confidentiality to protect its commercial interests and argues that should they not be kept confidential, Air Canada would be placed at a commercial disadvantage vis-à-vis its competitors regarding the treatment of expense requests. According to Air Canada, it consistently treats its expense procedures and policies as confidential documents, as confirmed by a statement submitted by its Manager of Customer Relations, and argues that the documents in question are internally developed procedures representing recommendations developed by Air Canada which are unique to Air Canada and are commercially sensitive. According to Air Canada, this is evidenced by the fact that the expense policy documents clearly indicate that they are for internal use only and are not to be distributed. Air Canada further submits that the excerpts are commercially sensitive and for internal use only as they are found only on Air Canada's internal portal (ACPedia) and are not downloadable, as they are intended only for internal consultation.

The applicants submit that proceedings before the Agency are subject to the constitutionally-protected open court principle, and that, as such, all documents filed with the Agency must be presumptively open to the public and the burden of proof lies upon the person seeking to limit this right (*Nova Scotia (Attorney General) v. MacIntyre*, [1982] 1 S.C.R. 175; *Lukács v. Canada (Transport, Infrastructure and Communities)*, 2015 FCA 140).

The applicants argue that the legal test for balancing the open court principle against other interests remains the Dagenais/Mentuck test. The applicants cite Chief Justice Beverly McLachlin from a paper entitled "Openness and the Rule of Law":

> Without denying the importance of protecting privacy and security, we must preserve the essential core of the open court principle, and the broader principle of freedom of expression.
>
> How do we do this? In Canada, we have established a common law test for balancing the open court principle against other interests. Judges may limit the open court principle if: 1) such an order is necessary to prevent a serious risk to the proper administration of justice because other reasonably alternative measures will not prevent the risk; and 2) the salutary effects of the limit on openness outweigh the deleterious effects on the rights and interests of the parties and the public.

The applicants argue that the risk under the test for confidentiality must be real, substantial, well-grounded in the evidence, and pose a serious threat to an interest that can be expressed in terms of public interest in confidentiality (*Sierra Club v. Canada (Minister of Finance),* 2002 SCC 41, paras. 54-55) and that that a mere preference for personal or financial privacy and/or to be free from embarrassment does not meet this onerous requirement (*Coltsfoot Publishing Ltd. v. Foster-Jacques*, 2012 NSCA 83, para. 97 and *Nova Scotia (Attorney General) v. MacIntyre, supra, at* pp. 8-9).

The applicants assert that, in the present case, Air Canada would simply prefer to keep the documents confidential, and presented no evidence capable of demonstrating that disclosure of the documents would cause it serious harm, or any harm for that matter, other than embarrassment. The applicants also argue that the evidence shows that Air Canada has not been treating the information in the documents as sensitive in that it provided the documents to the applicants without any indication of their sensitive nature, it filed documents setting out the policies in question with the Agency without seeking confidentiality at the same time and knowing that they would be placed on public record; and it had been communicating these policies to the public.

The applicants claim that since members of the public are subjected to the policies set out in the documents, there is a significant public interest in maintaining open access to them and allowing the public to inform itself about details of the present proceeding that affect not only the parties, but the public as a whole.

The applicants assert that Air Canada's competitors are equally subject to the obligations set out in the *Montreal Convention* and the public disclosure requirements set out in sections 116 and 122 of the ATR. Consequently, the applicants argue that requiring Air Canada to disclose policies that should match the *Montreal Convention* and should have anyway been disclosed in its tariff cannot possibly cause Air Canada any competitive disadvantage.

Air Canada disagrees with the applicants' submission that its request did not meet the legal test for confidentiality and adds that the test set forth under the common law has to be reviewed considering the Dispute Adjudication Rules. Air Canada argues that, even if the documents may be considered relevant to the present matter, the harm resulting from their further disclosure militates for their confidentiality, trumping public interest. Air Canada also argues the documents are internal proprietary documents and contain information that will place Air Canada at a commercial disadvantage.

Air Canada states that it does not seek to have those documents kept secret from the complainant, but rather, to restrict their use to the proceedings in question.

Air Canada asserts that the documents are not terms and conditions of carriage and are not subject to any publication obligation under ATRs. Air Canada submits that sections 116 and 122 of the ATR require a carrier to publish its terms and conditions of carriage for clarity and certainty and that, in the present case, the applicants request disclosure of internal recommendations which apply and respect the published terms and conditions of carriage.

Air Canada argues that the legislator has struck a balance in limiting an air carrier's disclosure obligation to conditions of carriage and that there is no obligation for an airline to publish how it organizes its resources, in handling passenger refund requests and while respecting the *Montreal Convention*, the CTA and its Regulations and its tariff. Air Canada claims that it has the right to privately organize the handling of its obligations as published in its tariff, and would otherwise be at a commercial disadvantage vis-à-vis its competitors regarding the treatment of expense requests. In addition, Air Canada submits that further disclosure of private internal recommendations, would hinder the proper and efficient conduct of airlines' operations in applying their tariff.

Air Canada submits that the Agency has the power to make "any decision that it considers just and reasonable" and should make all adaptations necessary for the optimal confidentiality of the documents, starting with their withdrawal from the Agency's public record.

In addition, Air Canada argues that section 25 of the CTA establishes that the Agency, in its role as a quasi-judicial body, has all the powers, rights and privileges that are vested in a superior court, with respect to several matters, including the Agency's jurisdiction, the attendance and examination of witnesses, and more particularly in the present circumstances, the production and inspection of documents. As such, Air Canada requests the Agency, in granting its request for confidentiality, and ordering the applicants to sign a confidentiality agreement, also order the applicants to remove the documents A-1 and AQ2-1 from the applicant's website, with the understanding that they might remain available on the internet generally as archived material. According to Air Canada, the fact that the documents were swiftly communicated in public websites should not take away from the commercial harm sustained by Air Canada should the documents remain in the Agency's official record and be further distributed.

Analysis

Pursuant to subsection 31(5) of the Dispute Adjudication Rules, the Agency must first determine whether the documents in respect of which a claim for confidentiality has been made are relevant to the proceedings. If the Agency determines that the documents are relevant, then it must assess whether any specific direct harm would likely result from their disclosure and whether any demonstrated specific direct harm is sufficient to outweigh the public interest in having it disclosed.

Should it determine that the documents are relevant and the specific direct harm likely to result from disclosure justifies a claim for confidentiality, then pursuant to paragraph 31(5)(c) of the Dispute Adjudication Rules, the Agency has a range of disclosure options, from ordering that the document not be placed on the public record to ordering that it be kept confidential, but allowing for partial disclosure or disclosure to specific parties or their representatives upon receipt of a signed undertaking of confidentiality.

Are the documents relevant to the proceeding?

The policies set out in the documents are being directly challenged in the present application. Air Canada did not object to their production, and concedes that they are relevant to the application. Accordingly, the Agency finds that the documents are relevant to this proceeding.

If the documents are found to be relevant, would any specific direct harm likely result from their disclosure and, if so, would any demonstrated specific harm be sufficient to outweigh the public interest in having the documents disclosed?

Specific direct harm must be clear, identifiable harm to a party's public reputation and/or commercial interests which results directly from disclosure to the public. As per the Supreme Court of Canada's decision in *Sierra Club of Canada v. Canada (Minister of Finance)*, *supra*, a confidentiality order requires the presence of a real and substantial risk which is well grounded in the evidence.

The Agency finds that, given the nature of the information at issue, the placing of document A-2 on the public record could affect Air Canada's competitive position relative to other carriers, and could represent an unfair disadvantage to Air Canada. While the applicants argue that this information is subject to public disclosure requirements set out in sections 116 and 122 of the ATR, the fact remains that these documents are not reproduced in Air Canada's tariff and the question of whether any aspect of these documents should be incorporated into Air Canada's tariff would be an issue for determination in the application, but at this stage Air Canada has established that it should be kept confidential. Accordingly, the Agency finds that the public interest in having A-2 disclosed is outweighed by the specific direct harm that Air Canada would suffer if it was made public.

With respect to documents A-1 and AQ2, when they were produced and filed with the Agency, no claim for confidentiality was made by Air Canada and, as a result, they were placed on the Agency's public record. Moreover, they were immediately posted on the internet. They are therefore not only on the Agency's public record but are now otherwise in the public domain. The Agency does not accept the applicants' argument that the manner in which A-1 and AQ2 were filed demonstrate that Air Canada did not consider them to be confidential. Parties filing documents in proceedings would not normally expect those documents to be immediately posted on the internet. However, the fact that they were filed without a simultaneous claim for confidentiality means that they were placed on the public record. Although an order from the Agency finding these documents confidential would have the effect of removing them from the Agency's public record, and arguably they could be removed by the applicants from any website within their control, they would likely remain in the public sphere as the applicants have confirmed that they have been posted to a website over which they have no control. Since the documents are now publicly available, the claim for confidentiality fails. Therefore, Air Canada has failed to establish any specific direct harm which would result from keeping these documents on the public record.

Based on the foregoing, the Agency will keep the confidential version of document A-2 on the confidential record. The confidential version of the document will be considered by the Agency in its decision-making process, but will not be part of the public record. The Agency notes that Air Canada is willing to provide a copy of document A-2 in confidence after receipt of a signed NDU signed by the applicants. The Agency finds this to be reasonable in the circumstances.

With respect to the applicants' request to make further submissions on whether they are in breach of the implied undertaking rule and whether the Agency should order that documents produced by Air Canada should be removed from the applicants' website, given the Agency's finding that the implied undertaking rule does not apply to these documents, the issue is moot and further submissions are not necessary.

ORDERS

Pursuant to subparagraph 31(5)(c)(iii) of the Dispute Adjudication Rules, the Agency orders that:

1. Air Canada will have until February 26, 2016 to provide the applicants with a NDU for signature.
2. The applicants must submit the signed NDU to Air Canada within 2 business days.
3. Air Canada must provide document A-2 to the applicants within 2 business days from the date of receipt of the signed NDU.
4. The applicants will have 5 business days from the receipt of document A-2 to file their reply to the application.
5. The applicants' request to file additional submissions pursuant to subsection 34(1) of the Dispute Adjudication Rules is denied.

All correspondence and pleadings should refer to Case No. 15-05627 and be filed through the Agency's Secretariat e-mail address: secretariat@otc-cta.gc.ca.

BY THE AGENCY:

(signed)

William G. McMurray
Member

(signed)

Sam Barone
Member

(signed)

P. Paul Fitzgerald
Member