May 3, 2013

VIA EMAIL

The Secretary
Canadian Transportation Agency
Ottawa, Ontario, K1A 0N9

Attention: Ms. Sylvie Giroux, Analyst

Dear Madam Secretary:

Re: The Nawrots v. Sunwing Airlines
File No.: M 4120-3/13-01696 / Our reference: 0575-Nawrot
Complaint concerning denied boarding and/or failure to provide transportation and/or delay on or around August 10, 2012
Motion to contest confidentiality

Please accept the following motion in relation to the above-noted complaint pursuant to ss. 23(7) and 32 of the *Canadian Transportation Agency General Rules*, S.O.R./2005-35, to contest the claim of confidentiality made by Sunwing Airlines on April 29, 2013 with respect to Exhibits "H", "I", "K", and "L" to the affidavit of Ms. Joanne Dhue (sworn April 17, 2013).

BACKGROUND

On March 21, 2013 the Nawrots filed a complaint against Sunwing Airlines concerning denied boarding and/or refused transportation and/or delay on or around August 10, 2012. They also challenged the reasonableness of certain tariff provisions of Sunwing Airlines.

On April 17, 2013, Sunwing Airlines filed its answer pursuant to Rule 42 to the portion of the complaint that concerns the Nawrots' claim with respect to out-of-pocket expenses. The affidavit of Ms. Joanne Dhue, sworn on April 17, 2013, was tendered by Sunwing Airlines as evidence in support of its answer. Exhibits "H", "I", "K", and "L" to the said affidavit are partially redacted documents.

On April 29, 2013, following Agency's directions in Decision No. LET-C-A-67-2013, Sunwing Airlines made a claim of confidentiality with respect to the redacted portions of Exhibits "H", "I", "K", and "L" to the affidavit of Ms. Dhue.

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In the present motion, the Nawrots contest Sunwing Airlines' claim of confidentiality, and seek disclosure of unredacted copies of Exhibits "H", "I", "K", and "L" to the affidavit of Ms. Dhue.

ISSUES

I. Does Sunwing Airlines have standing to make a claim of confidentiality with respect to information of third parties?

Before addressing the merits of Sunwing Airlines' claim of confidentiality, an important preliminary question must be answered, namely, whether Sunwing Airlines has standing to make such a claim with respect to names of the individuals in question.

The notion of standing has been explained by Justice Cromwell, writing for a unanimous court in *Canada (Attorney General) v. Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45, [2012] 2 SCR 524, as follows (at para. 1):

> The law of standing answers the question of who is entitled to bring a case to court for a decision. Of course it would be intolerable if everyone had standing to sue for everything, no matter how limited a personal stake they had in the matter. Limitations on standing are necessary in order to ensure that courts do not become hopelessly overburdened with marginal or redundant cases, to screen out the mere "busybody" litigant, to ensure that courts have the benefit of contending points of view of those most directly affected and to ensure that courts play their proper role within our democratic system of government: *Finlay v. Canada (Minister of Finance)*, 1986 CanLII 6 (SCC), [1986] 2 S.C.R. 607, at p. 631. The traditional approach was to limit standing to persons whose private rights were at stake or who were specially affected by the issue. In public law cases, however, Canadian courts have relaxed these limitations on standing and have taken a flexible, discretionary approach to public interest standing, guided by the purposes which underlie the traditional limitations.
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> [Emphasis added.]

Rule 23(5) of the Agency's *General Rules*, which governs claims of confidentiality, clearly requires the moving party to demonstrate direct harm "to the person making the claim for confidentiality," which is Sunwing Airlines in the present case.

Although Sunwing Airlines' private rights are not affected by the disclosure of the information in question, Sunwing Airlines is nevertheless making a claim of confidentiality with respect to information of third parties: the names of the crew of Flight WG 201, the Ramp Lead, and the passengers listed as no-shows, go-shows, and elite plus, as well as certain email addresses.

Sunwing Airlines has failed to establish that it has authority to act on behalf of these individuals and/or that any of these individuals have any concerns about the disclosure of their names and/or email addresses.

Therefore, the Nawrots submit that Sunwing Airlines has no standing to make a claim of confidentiality with respect to the names and/or email addresses of these third parties, and for this reason alone, Sunwing Airlines' claim of confidentiality must fail.

II. Applicable law

(i) It is impermissible for a party to redact portions of a relevant document

In *Fairview Donut Inc. v. The TDL Group Corp.*, 2010 ONSC 789, a party was seeking a confidentiality (sealing) order with respect to irrelevant portions of exhibits of affidavits. As Justice Strathy observed in the reasons for dismissing the motion, the open court principle generally prevails over concerns of embarrassment to parties or witnesses:

> [62] As Spence J. observed in *Publow v. Wilson*, above, at para. 18, court proceedings frequently require parties and even witnesses who have no stake in the outcome, to disclose information that they would much rather keep to themselves. The information can be embarrassing and sometimes prejudicial, both personally and financially. Yet the principle of open courts has generally prevailed except in the limited circumstances now permitted by the *Sierra Club* test. [...]
>
> [Emphasis added.]

The question of whether a party is permitted to redact portions of a relevant document on the basis that those portions are not relevant has received further judicial attention in *McGee v. London Life Insurance Company Limited*, 2010 ONSC 1408, and more recently in *Dupont v. Bailey et al.*, 2013 ONSC 1336. In *McGee*, Justice Strathy held that:

> [8] It is impermissible for a party to redact portions of a relevant document simply on the basis of its assertion that those portions are not relevant. I respectfully agree with the observations of Corbett J. in *Albrecht v. Northwest Protections Services Ltd.*, [2005] O.J. No 2149, 139 A.C.W.S. (3d) 644 (S.C.J.) at para. 11 and *Guelph (City) v. Super Blue Box Recycling Corp.* (2004), 2 C.P.C. (6th) 276, [2004] O.J. No. 4468. [...]
>
> [9] The whole of a relevant document must be produced except to the extent it contains information that would cause significant harm to the producing party or would infringe public interests deserving of protection. I respectfully adopt as applicable in Ontario the statement of Lowry J., as he then was, in *North American Trust Co. v. Mercer International Inc.* (1999), 36 C.P.C. (4th) 395, [1999] B.C.J. No. 2107 (S.C.) at para. 13:
>
> > Under the rules of this court, a litigant cannot avoid producing a document in its entirety simply because some parts of it may not be relevant. The whole of a document is producible if a part of it relates to a matter in question. But where what is clearly not relevant is *by its nature such that there is good reason why it should not be disclosed*, a litigant may be excused from having to make a disclosure that will in no way serve to resolve the issues. *In controlling its process, the court will not permit one party to take unfair advantage*

> *or to create undue embarrassment by requiring another to disclose part of a document that could cause considerable harm but serve no legitimate purpose in resolving the issues*. [emphasis added]

Justice Strathy went on to explain the few exceptions to the rule that the whole of a relevant document must be produced:

> [13] Irrelevance alone is not a sufficient ground on which to redact portions of a document. The party seeking to do so bears the onus of establishing that redaction is necessary to protect an important interest. Some of the cases referred to by the parties include:
>
> > (a) patents or trade secrets: *Kimberly-Clark Corp v. Procter & Gamble Inc.*, (1990), 31 C.P.R. (3d) 207, [1990] F.C.J. No. 451 (F.C.T.D.); *United States Surgical Corp. v. Downs Surgical Canada Ltd.*, [1982] 1 F.C. 733, [1981] F.C.J. No. 164 (F.C.T.D.);
> >
> > (b) personal income tax information: *Janhevich v. Thomas* (1977), 15 O.R. (2d) 765, [1977] O.J. No. 2227 (H.C.); *Collins v. Beach* (1988), 24 C.P.C. (2d) 228, [1988] O.J. No. 43 (H.C.);
> >
> > (c) commercially sensitive financial information: *Manufacturers Life Insurance Co. v. Dofasco Inc.* (1989), 38 C.P.C. (2d) 47, [1989] O.J. No. 1456 (H.C.); *John Labatt Ltd. v. Molson Breweries* (1993), 1993 CanLII 3022 (FC), [1994] 1 F.C. 801, [1993] F.C.J. No. 1343 (F.C.T.D.); *North American Trust Co. v. Mercer International Inc.*, above, at paras. 11, 13-16 (S.C.); *Bouchard Paradis Inc. v. Markel Insurance Co. of Canada*, above;
>
> [14] The additional cases referred to by Lowry J. give rise to another possible category:
>
> > (d) records of a purely private and personal nature and not relevant to the issues, such as notes between parties: *Jervis Court Development Ltd. v. Ricci*, [1992] B.C.J. No. 2932 (S.C.) and personal diaries: *Lazin v. Ciba-Geigy Canada Ltd.*, 1976 ALTASCAD 58 (CanLII), [1976] 3 W.W.R. 460, 66 D.L.R. (3d) 380 (Alta. C.A.); *K.V.L. v. D.G.R.*, [1993] B.C.J. No. 1662, 39 A.C.W.S. (3d) 424 (S.C.) or irrelevant and sensitive medical information.

These legal principles were summarized in *Dupont v. Bailey et al.*, 2013 ONSC 1336 as follows:

> [15] The general rule is that relevant documents must be produced in their entirety: a party may not redact portions of a relevant document only because it says those portions are not relevant. [Footnote: *McGee*, at para. 8.]

> [16] However, that is not the end of the analysis and the general rule is subject to exceptions:
>
> - If portions of a relevant document are clearly not relevant and there is good reason why they should not be disclosed (such as, for example, if the information would cause significant harm to the producing party and in no way serve to resolve the issues at hand in the action) then such portions may be redacted. The party resisting full disclosure has the onus of establishing that the redacted portions contain irrelevant information and that redaction is necessary.
>
> - If the portions redacted from a relevant document are relevant, such portions may be redacted if they are protected by privilege. Privilege would of course include, as applicable to the circumstances of each case, solicitor and client privilege, litigation privilege or common law privilege if disclosure "would infringe public interests deserving of protection", as indicated in McGee, sufficient to establish a common law privilege meeting the *Wigmore* criteria).
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> [Emphasis in the original.]

The Nawrots submit that these legal principles are equally applicable in the present case, and Sunwing Airlines' claim of confidentiality ought to be decided in accordance with these principles. In particular, Sunwing Airlines has the onus of establishing that the redacted portions contain irrelevant information and that redaction is necessary.

(ii) The Agency's Rules on claims of confidentiality

Rule 23(5) of the Agency governs the evidence that a party seeking confidentiality must put forward:

> A person making a claim for confidentiality shall indicate
>
> (a) the reasons for the claim, including, if any specific direct harm is asserted, the nature and extent of the harm that would likely result to the person making the claim for confidentiality if the document were disclosed; and
>
> (b) whether the person objects to having a version of the document from which the confidential information has been removed placed on the public record and, if so, shall state the reasons for objecting.
>
> [Emphasis added.]

The wording of Rule 23(5) underscores that the direct harm asserted must be to the person making the claim for confidentiality, and not to a third party. In other words, a person can make a claim of confidentiality only to prevent harm to himself/herself, and no such claim can be advanced to protect the interests of a third party.

Rule 23(7) of the Agency governs motions such as the present one, seeking to contest a claim for confidentiality:

> A person contesting a claim for confidentiality shall file with the Agency
>
> (a) a request for the disclosure of the document, setting out the relevance of the document, the public interest in its disclosure and any other reason in support of the request; and
>
> (b) any material that may be useful in explaining or supporting those reasons.

As the Agency explained in *Azar v. Air Canada*, LET-C-A-180-2012, claims for confidentiality are determined using a two-stage test, where the Agency first determines whether the document is relevant, and if the document is relevant, then the Agency determines the extent to which its disclosure is appropriate:

> Pursuant to subsection 24(2) of the General Rules, the Agency must first determine whether the document in respect of which a claim of confidentiality is made is relevant to the proceeding. If it is determined that the document is not relevant, then pursuant to subsection 24(3) of the General Rules, the Agency may order that the document be withdrawn and will not order its disclosure. However, if the Agency determines that the document is relevant, then pursuant to subsection 24(2) of the General Rules, it must assess whether any specific direct harm would likely result from its disclosure or whether any demonstrated specific direct harm is sufficient to outweigh the public interest in having it disclosed.
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> [Emphasis added.]

It is worth observing that both the General Rules of the Agency and the decisions of the Agency concerning confidentiality speak of the relevance of "the document" and not parts of the document. The reason for this is the aforementioned principle that it is impermissible for a party to redact portions of a relevant document.

In *Azar v. Air Canada*, LET-C-A-180-2012, the Agency went on and explained that:

> Should it determine that the document is relevant and that the specific direct harm likely to result from disclosure justifies a claim for confidentiality, then pursuant to subsection 24(4) of the General 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 partial disclosure or disclosure to specific parties or their representatives, and ordering full public disclosure.

Thus, once the relevance of a document has been established, the burden of proof shifts to the party making a claim for confidentiality, and that party must demonstrate that "specific direct harm" would likely result from the disclosure of the document.

(iii) The open court principle and confidentiality: the *Sierra Club* test

The Supreme Court of Canada has emphasized the close relationship between the open court principle and freedom of expression guaranteed by s. 2(b) of the *Charter*. One of these frequently cited landmark decisions is *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, [1996] 3 S.C.R. 480, where La Forest, J. held (at para. 23) that:

> The principle of open courts is inextricably tied to the rights guaranteed by s. 2(b). Openness permits public access to information about the courts, which in turn permits the public to discuss and put forward opinions and criticisms of court practices and proceedings. While the freedom to express ideas and opinions about the operation of the courts is clearly within the ambit of the freedom guaranteed by s. 2(b), so too is the right of members of the public to obtain information about the courts in the first place.

A confidentiality order is chiefly a tool to control the access of the public to sensitive documents, and thus to infringe upon the public's freedom of expression guaranteed by s. 2(b) of the *Charter*. As such, claims of confidentiality are not to be taken lightly, and the onus is on the party making the claim to displace the strong constitutional presumption of public access and open court.

In *Sierra Club of Canada v. Canada (Minister of Finance)*, [2002] 2 S.C.R. 522, the Supreme Court of Canada formulated a two-branch test for granting a confidentiality order:

(a) such an order is necessary to prevent a serious risk to an important interest, including a commercial interest, in the context of litigation because reasonable alternative measures will not prevent the risk;

(b) the salutary effects of the confidentiality order, including the effects on the right of civil litigants to a fair trial, outweigh its deleterious effects, including the effects on the right to free expression.

The first branch of the test is explained in detail as follows (at paras. 54-55):

> As in *Mentuck*, I would add that three important elements are subsumed under the first branch of this test. First, the risk in question must be real and substantial, in that the risk is well grounded in the evidence, and poses a serious threat to the commercial interest in question.
>
> In addition, the phrase "important commercial interest" is in need of some clarification. In order to qualify as an "important commercial interest", the interest in question cannot merely be specific to the party requesting the order; the interest must be one which can be expressed in terms of a public interest in confidentiality. For example, a private company could not argue simply that the existence of a particular contract should not be made public because to do so would cause the company to lose business, thus harming its commercial interests. However, if, as in

> this case, exposure of information would cause a breach of a confidentiality agreement, then the commercial interest affected can be characterized more broadly as the general commercial interest of preserving confidential information. Simply put, if there is no general principle at stake, there can be no "important commercial interest" for the purposes of this test. Or, in the words of Binnie J. in F.N. (Re), [2000] 1 S.C.R. 880, 2000 SCC 35, at para. 10, the open court rule only yields "where the **public** interest in confidentiality outweighs the public interest in openness" (emphasis added).
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> [Emphasis (underlining) added.]

Thus, it is submitted that the test to be applied for determining Sunwing Airlines' claim for confidentiality is the one articulated by the Supreme Court of Canada in *Sierra Club*.

(iv) Caselaw: harm must be real and substantial, and not speculative

A guiding principle in deciding claims for confidentiality is that the party making such a claim must demonstrate a real and substantial risk of harm if the information or document is publicly disclosed. As the Agency's decision in *Tenenbaum v. Air Canada*, 219-A-2009 demonstrates, mere speculation or subjective fear of harm is not sufficient to derogation from the principle of open and accessible court proceedings.

The decision of the Agency in *Tenenbaum v. Air Canada*, 219-A-2009 is particularly relevant and helpful in the present matter, because the Agency also considered the interaction between the open court principle and privacy concerns in great detail, and concluded that:

> [59] The applicant's interpretation of this scheme of the *Privacy Act* cannot stand as is. In deciding a case and explaining the reasons for the decision, the Agency is using personal information in a way that is consistent with the purpose for which it was obtained. More importantly, the Agency associates names with personal identifiers only when it is necessary for a proper and complete understanding of the issues at stake. The Agency concludes that the right to privacy alleged by the applicant is not found in the *Privacy Act*.

One of the best surveys of the caselaw on confidentiality is the Agency's decision in *Jackson v. Jazz Aviation LP*, LET-P-A-67-2011:

> Pursuant to subsection 24(2) of the General Rules, the Agency must weigh the facts in order to determine whether Air Canada has established specific harm that would likely result from the disclosure. The evidence of harm must not be speculative. The Federal Court of Appeal came to this conclusion in *Canada Packers Inc. v. Canada (Minister of Agriculture)*, [1989] 1 F.C. 47 (Fed. C.A.). In *SNC Lavalin Inc. v. Canada (Minister for International Co-operation)*, [2003] F.C.J. No. 870 (QL),

> the Federal Court stated that it is not sufficient for an applicant to establish that harm might result from disclosure. It stated that speculation, no matter how well informed, did not meet the standard of reasonable expectation of material financial loss or prejudice to competitive position.
>
> ⋮
>
> The Federal Court and Federal Court of Appeal have been requiring specific evidence; general statements of the nature presented by Air Canada do not suffice. In *Brookfield LePage Johnson Controls Facility Management Services v. Canada (Minister of Public Works & Government Services)*, 2003 FCT 254 (Fed. T.D.), affirmed 2004 FCA 214 (F.C.A.)(leave to appeal refused 2005 SCC), the Federal Court reviewed the evidence, including the supplementary affidavit, and concluded that, aside from general statements of possible harm, the applicant had failed to provide insight as to how the competitors might use the record so that the applicant would sustain a reasonable expectation of probable harm if the records in question were released. [...]
>
> In contrast, the Federal Court found that the Canada Post Corporation (CPC) had a reasonable expectation of probable harm if some information was disclosed to Canada Customs Revenue Agency (CCRA). In *Dussault v. Canada (Customs & Revenue Agency)*, 2003 FC 973 (F.C.), the Federal Court reached that conclusion for the following reasons. First, the Director's evidence established that the information not now disclosed would provide an astute analyst with a fairly accurate picture of the structure and the nature of the compensation that CPC negotiated under an agreement. This information could be used by competitors of CPC to bid against CPC for the provision to the CCRA of the services covered by the agreement. Second, the Director swore that if the information was disclosed it was highly probable that this information would be used by competitors of CPC to bid against CPC for the provision to the CCRA of the service covered by the agreement. Third, the applicant was employed by a public relations and media firm representing UPS, a CPC competitor.
>
> [Emphasis added.]

The Nawrots adopt the Agency's reasons in *Tenenbaum, supra* and *Jackson, supra* as their own position, and submit that Sunwing Airlines' current claim for confidentially ought to be decided in accordance with these principles.

(v) The legal test for relevance

As noted earlier, the first stage of determining a claim of confidentiality requires deciding whether the document in question is relevant to the proceeding. In *R. v. Arp*, [1998] 3 SCR 339, the Supreme Court of Canada defined relevance as follows (at para. 38):

> To be logically relevant, an item of evidence does not have to firmly establish, on any standard, the truth or falsity of a fact in issue. The evidence must simply tend to "increase or diminish the probability of the existence of a fact in issue". [...] As a consequence, there is no minimum probative value required for evidence to be relevant.

In *The Law of Evidence*[1], relevance of evidence is explained as follows:

> Evidence is relevant where it has some tendency as a matter of logic and human experience to make the proposition for which it is advanced more likely than that proposition would appear to be in the absence of that evidence. To identify logically irrelevant evidence, ask, "Does the evidence assist in proving the fact that my opponent is trying to prove?"

In *Lukács v. Air Canada*, LET-C-A-154-2012, the Agency considered the issue of relevance of questions directed by one party to another, and cited with approval *Commission de la Santé & de la Sécurité du Travail c. La Reine*, 2000 CanLII 16617 (FC). The Nawrots agree with the definition of relevance provided in this authority at paragraph 34, where Blais, J. cites *The Law of Evidence in Canada* by J. Sopinka, S.N. Lederman, and A.W. Bryant:

> [34] At page 24 in The *Law of Evidence in Canada*, the authors wrote:
>
> > A fact will be relevant not only where it relates directly to the fact in issue, but also where it proves or renders probable the past, present or future existence (or non-existence) of any fact in issue.

The Nawrots submit that the relevance of the documents in question ought to be determined using this legal test.

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[1] D. Paciocco and L. Stuesser. *The Law of Evidence* (Toronto: Irwin Law, 1996), p. 19.

III. Application of the law to the case at bar

A. Relevance of the documents

As explained in *Fairview Donut Inc. v. The TDL Group Corp.*, 2010 ONSC 789 and *Dupont v. Bailey et al.*, 2013 ONSC 1336, the question to be decided for the purpose of a claim of confidentiality is *not* whether each and every word of a document is relevant, but rather whether a document as a whole is relevant to the proceeding. The same principle is reflected in Rule 24(2) of the Agency's *General Rules*, which also speaks of "the document" and not portions of the document.

(i) Facts in issue

In order to examine whether Exhibits "H", "I", "K", and "L" to the affidavit of Ms. Dhue are relevant, it is necessary to identify the facts in issue.

The Nawrots' evidence is that they presented themselves for check-in at approximately 1:10 am on August 11, 2013, and found the check-in counters closed.

Affidavit of Mr. Nawrot (February 28, 2013), paras. 8-9
Declaration of Kristina Marie Nawrot (March 4, 2013), paras. 5-6
Declaration of Karolyn Theresa Nawrot (March 4, 2013), paras. 6-7

Sunwing Airlines tendered the affidavits of Mr. Mark Williams, Ms. Joanne Dhue and Mr. Vic Tydeman to contradict the evidence of the Nawrots. Sunwing Airlines also challenges the credibility of the Nawrots. Mr. Tydeman's evidence is that three passengers of Flight WG 201 approached him at the check-in counter at 01:45 on August 11, 2012, and a fourth passenger arrived 5 minutes later, that he spoke to the passengers, and he contacted th dispatcher to ask if the passengers would be accepted, but the dispatcher declined the request "for the reason that all but 10 passengers had boarded the flight." Although Mr. Tydeman did not identify the three passengers by name, Sunwing Airlines suggests that the three passengers in question were the Nawrots.

Affidavit of Mr. Tydeman (April 26, 2013), paras. 5-7

The Nawrots vehemently dispute the substance, reliability, and credibility of Mr. Tydeman's evidence, and they have both the right and the obligation to respond to Sunwing Airlines' evidence and to rebut it in their Reply pursuant to Rule 44 (see *Spence v. Perimeter Aviation*, 349-C-A-2012, para. 23). The Nawrots are in full agreement with Sunwing Airlines' submission that:

> A determination of the Nawrots' Complaint is solely dependent on whether, on a balance of probabilities, the Nawrots can prove they arrived for check-in prior to 01:25 local time August 11, 2012 *and* that the check-in counter was closed by Sunwing Airlines prior to the cut-off time of 01:25 local time August 11, 2012.

Sunwing Airlines' answer of April 17, 2013, p. 2

(ii) Documents referred to in the pleadings are relevant

It is trite law that relevance of documents is established based on the contents of the pleadings of parties. Exhibits "H", "I", and "K" to the affidavit of Ms. Dhue are explicitly referenced on page 3 of Sunwing Airlines' April 17, 2013 answer, and they were tendered by Sunwing Airlines as evidence.

Thus, the Nawrots submit that the fact that Sunwing Airlines referred to these documents in its pleadings (answer pursuant to Rule 42) and tendered the documents as evidence is *prima facie* proof of their relevance to the present proceeding.

(iii) Relevance of Exhibit "H"

Exhibit "H" to the affidavit of Ms. Dhue is a "DESTINATIONS QCM," which shows (in UTC time) the times when the boarding of Flight WG 201 started and ended, the number of passengers on the flight, and it also contains the names of no-show and go-show passengers.

Start and end of boarding, and the number of passengers

These times when the boarding of Flight WG 201 started and ended are relevant to the present proceeding, because they contradicts Mr. Tydeman's evidence, and put the reliability and credibility of his evidence into serious question.

Indeed, according to Exhibit "H", there were at least 289 passengers on board, the boarding started at 01:40 local time (00:40 UTC), and ended at 02:05 local time (01:05 UTC). This gives a boarding rate of about 12 passengers per minute.

In sharp contrast, Mr. Tydeman, who claims that he distinctly remembers the incident (para. 3), claims that three passengers arrived at the check-in counter at 01:45 am (para. 5), at which time:

> 7. [...] I contacted the dispatcher and asked if she would accept 4 late running passengers. The dispatcher declined my request for the reason that all but 10 passengers had boarded the flight.
>
> [Emphasis added.]
>
> **Affidavit of Mr. Tydeman (April 26, 2013), paras. 3, 5-7**

The Nawrots intend to rely in their Reply (pursuant to Rule 44) on Exhibit "H" and the times when the boarding started and ended to demonstrate that Mr. Tydeman's recollection of the events is neither reliable nor credible.

Thus, the Nawrots submit that Exhibit "H" is relevant to the proceeding, because the information contained in it tends to diminish the probability of Sunwing Airlines' version of the events, and tends to increase the probability of the Nawrots' account of the events.

Names of no-show and go-show passengers

The second page of Exhibit "I" lists the names of no-show and go-show passengers. This information is relevant to the proceeding for two reasons.

First, paragraph 14 of the affidavit of Ms. Dhue states that:

> The QCM reports that there were nine (9) passengers who were "no-shows" for Flight WG201 in addition to the Nawrots. I investigated into whether any of these nine passengers that did not present themselves for check-in for Flight WG 201 could possibly be the passenger(s) referred to by Mr. Nawrot or in the Swissport Shift Report as also being denied boarding of Flight WG201. The results of my investigation are as follows: [...]

Affidavit of Ms. Dhue (April 17, 2013), para. 14

Currently, the Nawrots do not know the identity of these passengers, and they are faced with anonymous hearsay about the alleged reasons for the alleged failure of 9 anonymous passengers to check in on time.

The Nawrots are entitled to test Sunwing Airlines' evidence on this point, which may also speak to the credibility of Sunwing Airlines' evidence. However, it is impossible to test Sunwing Airlines' evidence without the names of the passengers in question, which may enable the Nawrots to attempt to contact the passengers themselves.

Furthermore, both the no-show and the go-show passengers may provide valuable evidence on what happened at the Gatwick Airport on August 11, 2012, and at what time the check-in counters closed.

Therefore, the Nawrots submit that the names of no-show and go-show passengers are portions of Exhibit "I" that are relevant to the present proceeding.

(iv) Relevance of Exhibit "I"

Exhibit "I" is entitled "Passenger Services Supervisor Shift Report – North Terminal," and it was signed by "Vic," who is presumably Mr. Vic Tydeman. It states, among other things, that:

> Sunwing flight ok most pax checked in by 0030 closed flight at 0125. 4 pax turned up 15 mins after closure time checked with dispatched who advised most pax boarded so denied them travel. [...]
>
> [Emphasis added.]

Affidavit of Ms. Dhue (April 17, 2013), Exhibit "I"

According to Exhibit "I", the 4 passengers showed up at 15 minutes after 01:25, that is, at 01:40 am. (We note that Mr. Tydeman claims in his affidavit that the passengers showed up at 01:45 am.) Thus, Exhibit "I" purports to represent that by 01:40 am most passengers had boarded Flight WG 201. However, we know from other documents that the boarding had only *just started* at 01:40 am.

Thus, Exhibit "I" strongly suggests that Mr. Tydeman provided incorrect information in his shift report. This, in turn, raises serious doubts about the credibility of Mr. Tydeman's version of the events, and the credibility of his evidence.

Exhibit "I" also appears to speak about staff members who failed to show up or were late for the shift, resulting in shortage of staff, which in turn may explain why Sunwing Airlines' counter was closed before 01:25 am.

Therefore, Exhibit "I" is a document tending to diminish the probability of Sunwing Airlines' version of the events (namely, that the Nawrots were late), and tending to increase the probability of the Nawrots' account of the events (namely, that Sunwing Airlines' counters were closed early). As such, the Nawrots intend to rely on Exhibit "I" in their Reply (pursuant to Rule 44).

(v) Relevance of Exhibit "K"

Exhibit "K" to the affidavit of Ms. Dhue consists of reports completed by the cabin crew of Flight WG 201. It contains a wealth of information that calls into question the credibility of Mr. Tydeman's evidence and the shift report completed by Mr. Tydeman (Exhibit "I").

First, the "on time performance" section of Exhibit "K" clearly shows that the "Call for Boarding" was made at 01:40, at the time Mr. Tydeman claims in his shift report that "most pax boarded" (see Exhibit "I" and paragraph 7 of Mr. Tydeman's affidavit).

Second, according to the "comments" section of Exhibit "K", the boarding of Flight WG 201 was completed only at 02:15, and not at 02:05 (01:05 UTC) as stated in the QCM report (Exhibit "H"). This further underscores the absurdity of Mr. Tydeman's claim that by 01:40 (Exhibit "I") or by 01:45 "all but 10 passengers had boarded the flight" (see paragraph 7 of Mr. Tydeman's affidavit).

Thus, Exhibit "K" is relevant to the present proceeding, because it tends to demonstrate that Sunwing Airlines' evidence is neither credible nor reliable, which in turn tends to increase the probability of the Nawrots' account of the events.

The names of the crew members listed in Exhibit "K" are relevant because the reports in Exhibit "K" were authored by the crew. It is trite law that documents admitted into evidence ought not be anonymous, and when the identity of their authors is known, it must be disclosed. Moreover, the recollection of the crew members with respect to Flight WG 201 is capable of confirming or refuting the contents of these reports and/or Sunwing Airlines' version of the events.

(vi) Relevance of Exhibit "L"

Exhibit "L" is email correspondence between an employee of Sunwing and other individuals whose role and/or affiliation and/or contact information has been redacted.

As it stands, Exhibit "L" is an exchange by unidentifiable people whom the Nawrots are unable to contact to verify their authorship and/or seek further information about their knowledge of what happened on August 11, 2012 in relation to the Nawrots having been denied boarding.

This state of affairs is grossly unfair and highly prejudicial to the Nawrots, because it deprives them of any opportunity to test or rebut Exhibit "L".

Exhibit "L" has been tendered as evidence by Sunwing Airlines, and therefore it is presumed to be relevant. In the alternative, if Sunwing Airlines believes that Exhibit "L" is not relevant, then it ought to be withdrawn.

B. The *Sierra Club* test

Once the relevance of a document has been established, the party resisting full disclosure has the onus of establishing that the redacted portions contain irrelevant information *and* that the redaction is necessary (see *Dupont v. Bailey et al.*, 2013 ONSC 1336, at para. 16).

The Nawrots submit that Sunwing Airlines has entirely failed to meet its burden of proof in this respect. First, Sunwing Airlines failed to demonstrate that the redacted information is irrelevant; second, it failed to lead evidence to demonstrate the information in issue is treated confidentially; and third, it failed to demonstrate the real risk of *any* harm to Sunwing Airlines caused by disclosure of the information in issue.

Although Sunwing Airlines refers to privacy considerations, it has failed to identify any legislation or authority that would justify withholding the names of individuals that appear on a document tendered as evidence in a legal proceeding solely based on privacy concerns, and in the absence of other important considerations, such as confidentiality of financial or medical information.

Sunwing Airlines' arguments concerning privacy have been fully addressed by the Agency in *Tenenbaum v. Air Canada*, 219-A-2009:

> [59] The applicant's interpretation of this scheme of the *Privacy Act* cannot stand as is. In deciding a case and explaining the reasons for the decision, the Agency is using personal information in a way that is consistent with the purpose for which it was obtained. More importantly, the Agency associates names with personal identifiers only when it is necessary for a proper and complete understanding of the issues at stake. The Agency concludes that the right to privacy alleged by the applicant is not found in the *Privacy Act*.

It is worth noting that Justice Strathy reached similar conclusions in *Fairview Donut Inc. v. The TDL Group Corp.*, 2010 ONSC 789:

> [62] As Spence J. observed in *Publow v. Wilson*, above, at para. 18, court proceedings frequently require parties and even witnesses who have no stake in the outcome, to disclose information that they would much rather keep to themselves. The information can be embarrassing and sometimes prejudicial, both personally and financially. Yet the principle of open courts has generally prevailed except in the limited circumstances now permitted by the *Sierra Club* test. [...]
>
> [Emphasis added.]

The case *M. (A.) v. Ryan*, [1997] 1 SCR 157 cited by Sunwing Airlines in support of its position, is concerned with extremely sensitive information related to psychiatrist-patient records. In spite of the sensitive nature of the documents, the Supreme Court of Canada upheld the order of the British Columbia Court of Appeal that the documents be disclosed, but subject to certain confidentiality undertakings. Thus, this authority fully supports the Nawrots' request that the unredacted documents be disclosed to them.

Having said that, the present case can easily be distinguished from *M. (A.) v. Ryan*, because in the present case no sensitive medical information is involved. The Nawrots are seeking only the disclosure of the names and email addresses of certain individuals that appear on documents that are relevant to the proceeding. There is nothing embarrassing or sensitive in these documents that would in any way be comparable to psychiatrist-patent records.

Therefore, it is submitted that Sunwing Airlines has failed to meet its burden of proof that parts of the exhibits in question ought to be treated confidentially and ought to be redacted. In particular, Sunwing Airlines has failed to demonstrate why the information in question ought not be disclosed to the Nawrots and/or their counsel.

Need for public disclosure

Once the sought names are disclosed, the Nawrots intend to attempt to contact the individuals in question through various means, including social media. This, in turn, will naturally entail publicly disclosure of the names of these individuals.

Thus, the Nawrots submit that restricting the use they may make of the names in question would likely significantly limit their ability to contact these individuals, and to rebut Sunwing Airlines' evidence with respect to these individuals (see paragraph 14 of the affidavit of Ms. Dhue).

Therefore, the Nawrots submit that the exhibits in issue ought to be placed on public record.

IV. Relief sought

For the aforementioned reasons, the Nawrots are asking the Agency to order that unredacted copies of Exhibits “H”, “I”, “K”, and “L” to the affidavit of Ms. Dhue be placed on public record.

In the alternative, if the Agency finds that these exhibits are relevant and the specific direct harm likely to result from their disclosure justifies a claim for confidentiality, the Nawrots ask that the documents be disclosed to them and their counsel, subject to a confidentiality undertaking.

In the alternative, if the Agency finds that any of these documents are not relevant, the Nawrots are asking that the Agency order that the irrelevant exhibits be withdrawn.

All of which is most respectfully submitted.

Louis Béliveau

Cc: Mr. Ray Nawrot
Mr. Clay Hunter, counsel for Sunwing Airlines

LIST OF AUTHORITIES

Legislation

1. *Canadian Transportation Agency General Rules*, S.O.R./2005-35.

Case law

2. *Azar v. Air Canada*, Canadian Transportation Agency, LET-C-A-180-2012.
3. *Canada (Attorney General) v. Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45, [2012] 2 SCR 524.
4. *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, [1996] 3 S.C.R. 480.
5. *Commission de la Santé & de la Sécurité du Travail c. La Reine*, 2000 CanLII 16617 (FC).
6. *Dupont v. Bailey et al.*, 2013 ONSC 1336.
7. *Fairview Donut Inc. v. The TDL Group Corp.*, 2010 ONSC 789.
8. *Jackson v. Jazz Aviation LP*, Canadian Transportation Agency, LET-P-A-67-2011.
9. *Lukács v. Air Canada*, Canadian Transportation Agency, LET-C-A-154-2012.
10. *M. (A.) v. Ryan*, [1997] 1 SCR 157.
11. *McGee v. London Life Insurance Company Limited*, 2010 ONSC 1408.
12. *R. v. Arp*, [1998] 3 SCR 339.
13. *Sierra Club of Canada v. Canada (Minister of Finance)*, [2002] 2 S.C.R. 522.
14. *Spence v. Perimeter Aviation*, Canadian Transportation Agency, 349-C-A-2012.
15. *Tenenbaum v. Air Canada*, Canadian Transportation Agency, 219-A-2009.

Secondary sources

16. D. Paciocco and L. Stuesser. *The Law of Evidence* (Toronto: Irwin Law, 1996).