pmlaw

Paterson, MacDougall LLP
BARRISTERS, SOLICITORS

Box 100, Suite 900
1 Queen Street East
Toronto, Ontario
M5C 2W5

T: (416) 366-9607
F: (416) 366-3743
Website: pmlaw.com

Clay S. Hunter
Direct Tel: (416) 643 3324
E-Mail: chunter@pmlaw.com

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Via E-mail: sylvie.giroux@otc-cta.gc.ca

Canadian Transportation Agency
Air and Accessible Transportation Branch
Air & Marine Investigation Division
Ottawa, Ontario
K1A 0N9

Attention: Sylvie Giroux, Analyst

Dear Sirs/Mesdames:

RE: File No. M4120-3/13-01696
Complaint by the Nawrots Family against Sunwing Airlines
Our File No. 213062

Submissions by Sunwing Airlines Inc. in Reply to the Complainants' Motion to Contest Confidentiality dated May 3, 2013

We write with the following submissions with respect to the Complainants' motion to contest confidentiality.

The "Standing" of Sunwing

There is absolutely no merit to the Complainants' submissions with respect to the standing of Sunwing Airlines Inc. ("Sunwing") to claim confidentiality over the names of individuals contained in its documents.

Indeed, to accept the Complainants' submissions would eviscerate the law of privacy and existing privacy legislation.

The documents at issue are Sunwing documents that include private information with respect to the names of individuals contained therein. Pursuant to the *Personal Information Protection and Electronic Documents Act* (PIPEDA), (S.C. 2000, c.5) Sunwing is prohibited from disclosing this information without the consent of the individuals themselves or as set out in s. 7 of the Act.

S. 23 of the General Rules specifically provides for a party to a proceeding before the Canada Transportation Agency (the "Agency") to make a claim for confidentiality. Sunwing is a party.

S. 23 (5) stipulates that the party making the claim set out the reasons for their claim. As set out in its claim, relevance and the protection of the privacy of the individuals named is the basis for Sunwing's claim for confidentiality; to be weighed against disclosure serving no purpose in advancing the Complaint.

Redaction of portions of a document

Similarly, there is absolutely no merit to the Complainants' submissions that it is "impermissible" for a party to redact portions of a relevant document.

S. 23 of the General Rules specifically addresses and allows for a claim of confidentiality over a portion of a document:

> s. 23
>
> (3) A claim for confidentiality in respect of a document shall be made in accordance with subsections (4) to (9);
>
> (4) A person making a claim for confidentiality shall file
>
> a) one version of the document *from which the confidential information has been deleted,* whether or not an objection has been made under paragraph (5)(b); and
>
> b) one version of the document that contains the confidential information marked "contains confidential information" on the top of each page and *that identifies the portions that have been deleted* from the version of the document referred to in paragraph (a).
>
> (5) A person making a claim for confidentiality shall indicate:
>
> (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)

On this basis alone, the Complainants' submission on this issue should be dismissed.

With respect to the law, the Complainants are wrong in stating that it is "impermissible" for a party to redact portions of a relevant document.

We simply reproduce the citation *McGee v. London Life Insurance Company Limited*, 2010 ONSC 1408 from the Complainants' submissions with proper emphasis:

> [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 C. v. Mercer International Inc.* (1999), 36 C.P.C. (4th) 395, [1999] B.C.J. N. 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 the document is producible if a part of it relates to a matter in question.* ***But where what is clearly not relevant is by it 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)

The General Rules of the Agency simply codify this general rule at common law.

We refer the Agency to our original submissions and reiterate that the information over which confidentiality is claimed is not relevant, is private information deserving of protection; and, its disclosure serves no purpose in resolving the Complaint. Weighed against the harm to privacy interests, any such disclosure should not be allowed.

Unlike the cases and decisions cited by the Complainant, the information at issue is not financial information with possible commercial consequences arising from disclosure. Rather it is the identity of individuals with no relevant connection to the Complaint. The potential harm to privacy interests is real and substantial.

As stated in our original submissions, the documents proffered to date provide the information required to resolve the Complaint. The identity of individuals over which confidentiality is claimed is not required nor is it relevant.

As this proceeding is not being conducted by way of oral hearing and the Complainants have chosen not to pursue their claim by way of civil action, the parties do

not have the opportunity to orally examine or cross examine the witness or the affiants on their evidence. This does not allow the parties to chase any and all of whom they may deem to be potential witnesses.

The Complainants in their submissions state that they must "test" Sunwing's evidence by gaining access to and examining/investigating individuals and publicly disclosing their identities. This is not correct and not proper. The Complainants' opportunity to "test" the evidence within the process they have chosen is to provide their own and raise doubts with respect to Sunwing's evidence in their submissions. That can be done without any harm to privacy interests on the basis of the redacted documents.

It is the stated objective of the Complainants to publicly broadcast the names of the individuals in order for them to be chased down and examined. To allow the Complainants to engage in a never ending fishing expedition in support of their complaint is to allow an abuse of the Agency's process and the public interest.

At some point in this process, principles of proportionality must be considered by the Agency and whether the seemingly never ending litigiousness of these proceeding, the public interest, the nature and the value of the claim justify the measures and remedy sought by the Complainants. In our submission, this is such a point.

For the above reasons and those set out in its Claim for Confidentiality dated April 29, 2013 and its Answer to the Complainants' April 23, 2013 Notice of Motion dated April 26, 2013, Sunwing submits the Complainants' present motion should be denied in its entirety.

Yours truly,

Clay S. Hunter

CSH/
cc: Louis Béliveau