

June 5, 2013

File No. M 4120-3/13-01696

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Dear Sirs:

Re: Complaint by the Nawrot family against Sunwing Airlines Inc.

- [1] This refers to the above-noted complaint filed with the Canadian Transportation Agency (Agency) on March 21, 2013.

PRELIMINARY MATTER

- [2] In Decision No. LET-C-A-71-2013, regarding the claims for confidentiality filed by the Nawrot family and by Sunwing Airlines Inc. (Sunwing), the Agency ordered the parties to file a request for disclosure of the documents by not later than May 3, 2013, should they wish to contest each other's claims for confidentiality. In that Decision, the Agency also ordered that any reply the parties may wish to make must be filed no later than May 7, 2013. The pleadings respecting this specific issue therefore closed on May 7, 2013.
- [3] Both parties filed additional submissions after May 7, 2013. Under certain circumstances, the Agency allows additional pleadings, however, in this case, the Agency concludes that the additional submissions are unwarranted. Therefore, the Agency does not accept the Nawrot family's submissions dated May 15, 16 and 17, 2013. The Agency also does not accept Sunwing's submission dated May 16, 2013. These submissions will therefore not form part of the record.
- [4] In addition, the Agency directs the parties as it previously did, in its Decision No. LET-C-A-67-2013, to adhere to the directions given and to desist from overly litigious conduct. It is imperative to keep in mind that the Agency has the ultimate authority to control its own procedure.

BACKGROUND

- [5] Pleadings respecting this complaint were opened on March 27, 2013. Sunwing was provided until April 17, 2013 to file its answer to the complaint and the Nawrot family was provided seven days, upon receipt of Sunwing's answer, to file their reply. On April 17, 2013, Sunwing filed an answer respecting the issue of compensation for alleged denied boarding and, on the same day, requested additional time to file an answer respecting the matter of the reasonableness of Sunwing's denied boarding policy. On April 19, 2013, in Decision No. LET-C-A-66-2013, the Agency, among other things, granted an extension of time to Sunwing to file its answer and to the Nawrot family to file a reply.
- [6] On April 22, 2013, Sunwing filed an answer with respect to the reasonableness of Sunwing's denied boarding policy.
- [7] On April 23, 2013, the Nawrot family filed a motion pursuant to section 32 of the *Canadian Transportation Agency General Rules*, SOR/2005-35 (General Rules) requesting the following:
- 1) Directions from the Agency respecting the following statement of Sunwing in its April 17, 2013 submission: "We can see that there are purchases on the credit card payment summary between the time of the purchase of a railway ticket and the hotel at Gatwick which have been redacted. These are relevant and should be revealed and disclosed as well as any supporting invoices/receipts.;"
 - 2) The production by Sunwing of an unredacted version of some exhibits appended to Johanne Dhue's affidavit, as well as a sworn affidavit by Vic Tydeman;
 - 3) An extension of seven days from receipt of the requested documents and/or the determination of its motion, whichever is later, to file a reply in the main proceeding.
- [8] In Decision No. LET-C-A-67-2013, the Agency advised the parties to either produce the unredacted copy of each other's documents or to submit a claim for confidentiality in accordance with the General Rules. On April 26, 2013, Sunwing filed an application for a review of Decision No. LET-C-A-67-2013. On April 28, 2013, the Nawrot family filed a claim for confidentiality and responded to Sunwing's application for a review of Decision No. LET-C-A-67-2013. On April 29, 2013, Sunwing also filed a claim for confidentiality. On May 3, 2013, the Nawrot family filed a motion contesting Sunwing's claim for confidentiality and on May 7, 2013, Sunwing filed a reply to the Nawrot family's submission.

ISSUES

1. Should the Agency review Decision No. LET-C-A-67-2013?
2. If the Agency decides that it will review Decision No. LET-C-A-67-2013, should the Nawrot family be provided with an opportunity to respond?
3. Should the Agency grant the Nawrot family's claim for confidentiality?
4. Should the Agency grant Sunwing's claim for confidentiality?

5. Should the Agency grant the Nawrot family's request for seven days to reply in the main proceeding?

Issue 1: Should the Agency review Decision No. LET-C-A-67-2013?

[9] Section 16 of the General Rules provides that:

16. (1) A party may give a notice in writing to any other party to produce, within 10 days after receipt of the notice, a document that relates to any matter in dispute that is in the possession or control of the other party and shall specify the document to be produced.

(2) Subject to a determination by the Agency under section 24 or 25, if a party fails to respond to the notice to produce a document, within the period prescribed in subsection (1), the Agency may

(a) order production of the document; or

(b) permit the party who gave the notice to submit secondary evidence of the contents of the document.

[10] In its letter of April 23, 2013, the Nawrot family filed, in accordance with section 16 of the General Rules, a Notice to Sunwing to Produce Documents. As Sunwing had also asked for the production of a document, the Nawrot family asked the Agency to decide within what period those documents, from both parties, had to be filed.

Submissions

[11] In its application dated April 26, 2013, Sunwing submits that it has the right to answer the Nawrot family's motion of April 23, 2013 and Sunwing states that as it was not given an opportunity to answer, it requests the Agency to review Decision No. LET-C-A-67-2013. In its response dated April 28, 2013 to Sunwing's application for a review, the Nawrot family submits that Sunwing's answer was not filed in accordance with the General Rules. It also submits that the Agency does not have to wait to hear from Sunwing before issuing directions about the proper procedures that parties must follow and to set timelines for complying with these procedures.

Analysis and findings

[12] Although it is true that as per subsection 32(4) of the General Rules, a party may provide an answer to a motion within 10 days of it being served, this subsection applies to a situation where the Agency must analyze the respective submissions of the parties and then decide on the motion. However, section 16 of the General Rules refers to a Notice to Produce Documents and the Nawrot family asks, as mentioned before, that the Agency decide within what period the documents at issue had to be filed. The Agency is of the opinion that under such a scenario, it is when one party wants to object to the production of documents, for confidentiality reasons, for example, that a party can file a claim to that effect, after which the party that asked for the production of documents will be able to file a reply contesting such claim. The Agency notes that it is exactly what Sunwing did in its submission of April 29, 2013.

- [13] In light of the above, the Agency finds that the application has no merit and denies that application.

Issue 2: If the Agency decides that it will review Decision No. LET-C-A-67-2013, should the Nawrot family be provided with an opportunity to file a response?

- [14] As the Agency has decided that it will not review Decision No. LET-C-A-67-2013, there is no need to address this issue.

Issue 3: Should the Agency grant the Nawrot family's claim for confidentiality?

Submissions

- [15] The Nawrot family advises that they will produce the documents requested by the Agency in Decision No. LET-C-A-67-2013. However, they make a claim for confidentiality with respect to the first 12 digits of the credit card number. The Nawrot family submits that public disclosure of the credit card number will enable anyone to make fraudulent purchases using the credit card number and the expiry date, which appear on the documents at issue. The Nawrot family maintains that public disclosure of these documents would expose Mr. Nawrot to specific direct harm, namely, identity theft and fraudulent transactions in his name. The Nawrot family also argues that credit card numbers are generally considered to be highly sensitive and confidential information.
- [16] Sunwing did not contest the Nawrot family's claim for confidentiality.

Analysis

- [17] Pursuant to subsection 24(2) of the General Rules, the Agency must first determine whether the document in respect of which a claim for confidentiality is made is relevant to the proceeding.
- [18] 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.
- [19] Should it determine that the document is relevant and 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 for partial disclosure or disclosure to specific parties or their representatives, to ordering full public disclosure.

[20] The factors to be considered are:

- (i) Whether the confidential information for which the Nawrot family requests confidentiality is relevant to the proceeding; and
- (ii) If so, if any specific direct harm would likely result from the disclosure of the confidential information; and
- (iii) If so, whether the specific direct harm is sufficient to outweigh the interest in disclosing the said information.

Factor (i): Relevancy

[21] To determine if the document to be produced is relevant, the Agency must examine the nature of what is claimed and then look at whether the evidence to be produced will show or at least tend to show or increases or diminishes the probability of the existence of the fact related to what is claimed. It should not be a fishing expedition. Therefore, a demand for production should not be speculative, fanciful, disruptive, unmeritorious, obstructive and time-consuming.

[22] The claim for confidentiality by the Nawrot family is relevant to how much compensation for out-of-pocket expenses they should receive. The out-of-pocket expenses are supported by a credit card statement. Although it is only in a case where the Agency finds that the carrier failed to apply its terms and conditions set out in its tariff that it can direct a carrier to pay compensation for any expenses incurred by a person adversely affected by said failure, the Agency finds the documents relevant.

[23] Given this finding, the Agency will now consider if any specific direct harm would likely result from the disclosure of the confidential information and, if so, whether any demonstrated specific harm is sufficient to outweigh the public interest in having it disclosed.

Factors (ii) and (iii): Specific direct harm

[24] Specific direct harm is clear, identifiable harm to a party's public reputation and/or commercial interests which results directly from disclosure to the public. As per the test for confidentiality established by the Supreme Court of Canada in *Sierra Club of Canada v. Canada (Minister of Finance)*, [2002] 2 SCR 522 (*Sierra Club*), requires the presence of a real and substantial risk which is well grounded in the evidence.

[25] The Nawrot family submits that disclosure of Mr. Nawrot's credit card number will enable anyone to make fraudulent purchases using the credit card number and the expiry date, which appear on the requested documents.

[26] The Agency finds that placing of this specific information on the public record could cause harm to Mr. Nawrot and does not serve any public interest purpose.

- [27] Therefore, the Agency grants the Nawrot family's claim for confidentiality, and will allow the redacted document to be included on the public record.

Issue 4: Should the Agency grant Sunwing's claim for confidentiality?

Submissions

- [28] Sunwing relies on its submissions contained in its April 26, 2013 answer to the Nawrot family's notice of motion of April 23, 2013, in which Sunwing submits that the disclosure of the redacted portions of Exhibits "H", "K" and "L" to the Affidavit of Joanne Dhue is irrelevant to the issue to be determined and is not in public interest given that they serve only to infringe upon the privacy of the individuals whose identity the Nawrot family seeks to reveal. Sunwing submits that the complainant's request for disclosure is nothing more than a fishing expedition and should be rejected. Sunwing also submits that whether in the process of a complaint to the Agency or by way of a civil action, any and all productions must be relevant to the issue to be decided and therefore the Nawrot family is not entitled to the identity of any potential witnesses. In addition, Sunwing submits that the law with respect to privacy considerations limiting the discovery obligations of a party is settled law and is codified by subsections 24(2) and (3) of the General Rules. Sunwing relies on *McGee v. London Life Insurance Company Limited*, 2010 ONSC 1408 (*McGee*) which the Nawrot family also relied upon in their submission. Finally, Sunwing argues that the complainants have consciously chosen to pursue this aspect of the complaint through the Agency's process. If they wish full discovery and cross-examination on the evidence, the proper forum is a court of law.
- [29] The Nawrot family submits that Sunwing has failed to establish that it has authority to act on behalf of the individuals whose names are in the redacted documents and that any of these individuals have any concerns about the disclosure of their names and/or e-mail addresses. The Nawrot family therefore claims that Sunwing has no standing to make a claim of confidentiality with respect to the names and e-mail addresses of these third parties. The Nawrot family maintains that Sunwing has the onus of establishing that the redacted portions contain irrelevant information and that the redaction is necessary. The Nawrot family submits that the test to be applied for determining Sunwing's claim for confidentiality is the one articulated by the Supreme Court in *Sierra Club*. The Nawrot family argues that 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.
- [30] The Nawrot family relies on Decision No. 219-A-2009 (*Tenenbaum v. Air Canada*) and argues that it is relevant and helpful in the present matter.
- [31] The Nawrot family submits that the fact that Sunwing referred to these documents in its pleadings and tendered the documents as evidence is *prima facie* proof of their relevance to the present proceeding. The Nawrot family argues that Exhibit "H" is relevant as it goes to show that there is a contradiction between what it says and what the witness, Mr. Tydeman, says in relation to the time of the boarding and the time it took to board. The Nawrot family argues that Exhibit "I" is relevant because it contains names of no-show passengers and go-show passengers. In their view, those passengers may provide valuable evidence on what happened. In regards to

Exhibit “J”, the Nawrot family submits that the document is relevant as it tends to diminish the probability of Sunwing’s version of events and to increase the probability of the Nawrot family’s account of events. The Nawrot family argues that Exhibit “K” is relevant because it tends to demonstrate that Sunwing’s evidence is neither credible nor reliable. Also, the recollection of the crew members with respect to the flight in question is capable of confirming or refuting the contents of these reports or Sunwing’s version of the events. Finally, the Nawrot family argues that Exhibit “L” is relevant and should not be redacted because the Nawrot family is unable to identify the author of the e-mail correspondence.

Analysis

- [32] Pursuant to subsection 24(2) of the General Rules, the Agency must first determine whether the document in respect of which a claim for confidentiality is made is relevant to the proceeding.
- [33] 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.
- [34] Should it determine that the document is relevant and 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 for partial disclosure or disclosure to specific parties or their representatives, to ordering full public disclosure
- [35] The factors to be considered are:
- (i) Whether the confidential information for which Sunwing requests confidentiality is relevant to the proceeding; and
 - (ii) If so, if any specific direct harm would likely result from the disclosure of the confidential information; and
 - (iii) If so, whether the specific direct harm is sufficient to outweigh the interest in disclosing the said information.
- [36] The Agency will not entertain the Nawrot family’s argument that Sunwing has no standing to make a claim of confidentiality with respect to information of third parties. Sunwing’s submits that a party to a proceeding can make a claim for confidentiality and that Sunwing is a party. The Agency agrees that Sunwing is a party and can file such claims.

Factor (i): Relevancy

- [37] As indicated before, to determine if the document to be produced is relevant, the Agency must examine the nature of what is claimed. It then assesses at whether the evidence to be produced will show or at least tend to show or increases or diminishes the probability of the existence of the fact related to what is claimed. It should not be a fishing expedition. Therefore, demand for production should not be speculative, fanciful, disruptive, unmeritorious, obstructive and time-consuming.
- [38] The Nawrot family submits that the fact that Sunwing referred to these documents in its pleadings and tendered the documents as evidence is *prima facie* proof of their relevance to the present proceeding. There is no such thing as “prima facie” proof of relevancy. The Agency rejects that argument.

Exhibit “H”

- [39] The Agency notes that the redacted information in Exhibit “H” to the affidavit of Johanne Dhue only involves the identity of the Ramp Lead for the Sunwing flight and the names of some passengers who are private citizens not known to be witnesses for the case at issue. The public interest in those persons’ privacy outweighs the private interest in the disclosure. Also, the Nawrot family indicates that Exhibit “H” goes to show that there is a contradiction between what it says and what the witness, Mr. Tydeman, says in relation to the time of the boarding and the time it took to board. The timings are not redacted in the document submitted by Sunwing. Further, the issue is not at what time boarding took place or how long it took, but rather whether the Nawrots presented themselves for check in on time. Therefore, the Agency finds that the information that has been redacted from Exhibit “H” is not relevant. The redacted version shall be included in the record.

Exhibits “I”, “K” and “L”

- [40] The issue is whether the Nawrot family presented themselves prior to the cut-off time for check-in and not whether the aircraft departed at the scheduled time.
- [41] The Agency notes that the redacted information in Exhibit “I” (the Passenger Services Supervisor Shift Report), Exhibit “K” (the Captain’s Trip Report, euroAtlantic Airways Cabin Crew Report and Sunwing Transatlantic Cabin Crew Flight Report), and Exhibit “L” (the Swissport Passenger Services Supervisor Shift Report), contain the names of the individuals involved with the Sunwing flight in question. More particularly, Exhibit I has names redacted relating to individuals who were not present at the time of the incident and arrived late for shifts that began after the check-in time. Exhibit K is a set of standard trip reports and the redacted portions relate only to the names of cabin and flight crew who operated the flight. Nothing suggests that they have evidence as to when the Nawrots arrived at the check-in counter. Exhibit L is an e-mail that suggests only that there was no recollection on the part of the captain about denied boarding. The Agency finds that the disclosure of the identities of the individuals listed in the aforementioned Exhibits is not relevant to the case at hand. The Agency is of the opinion that divulging the identities of the individuals will not show or at least tend to show or increase or

diminish the probability of the existence of the facts related to what is claimed, i.e., that the Nawrot family presented themselves at a certain time at the check-in counter. However, the rest of what is in the documents relates to events surrounding the boarding of the Sunwing flight and the Agency finds that they are relevant.

[42] It is important to note that the Agency is now dealing with a claim of confidentiality, not a request for a publication ban. The Agency's decision in *Tenenbaum v. Air Canada* is therefore not applicable to the issue.

[43] Sunwing argues that if the complainants wished full discovery and cross-examination on the evidence, the proper forum is a court of law. The Agency's General Rules were created for dealing with matters and business before the Agency. Those General Rules are detailed however, they do not contain any provisions regarding discovery nor regarding cross-examination. "Administrative tribunals and agencies do not have any inherent powers; only those that are conferred on them by statute either expressly or by necessary implication. Thus they will require express authority to make an order for discovery, it being unlikely that such authority will arise by necessary implication for the mere fact of an entitlement to conduct hearings...."¹ Therefore the Agency can, in any of its proceedings, refuse to allow a request for discovery and cross-examination. The Agency can also refuse to allow a request for disclosure which will, by the Nawrot family's own admission, turn into one of discovery and cross-examination, such as this one. The Agency agrees with Sunwing's view on that point.

[44] Further, the Nawrots explain that the names of individuals are necessary because, if they are revealed, it is the family's intention to track down and contact these individuals through social media and that it is necessary therefore that the names be on the public record. Since the Nawrot family has stated that there were no persons at the check-in counter when they arrived, there is no reason why names of the flight crew should be made public or that the individuals involved should be subjected to possible harassment relating to an incident they did not witness. This is a fishing expedition and the public interest in the privacy of these persons outweighs the value of any evidence that could result.

[45] In addition to personal information not relevant to the case, Sunwing has redacted information in Exhibit "I" relating to operations of other carriers that took place after the incident in question and the Agency finds that these statements are not relevant to the matter at hand.

[46] The Agency therefore grants Sunwing's claim for confidentiality and will allow the redacted documents to be included in the public record.

Issue 5: Should the Agency grant the Nawrot's family motion to extend the time to file its final reply?

[47] The Nawrot family will have June 12, 2013 to file with the Agency, with a copy to Sunwing, a reply to Sunwing's answers dated respectively April 17 and April 22, 2013. Pleadings will then be closed.

¹ Mullan, David J., *Administrative Law*, Irwin Law, 2001, at page 242

[48] Should you have any questions regarding the foregoing, you may contact Sylvie Giroux at telephone number 819-997-6410, facsimile number 819-953-7910 or by e-mail at sylvie.giroux@otc-cta.gc.ca.

Sincerely,

(signed)

Cathy Murphy
Secretary

BY THE AGENCY:

(signed)

Raymon J. Kaduck
Member

(signed)

Sam Barone
Member