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January 27, 2016

VIA EMAIL

The Secretary
Canadian Transportation Agency
Ottawa, ON K1A 0N9

Dear Madam Secretary:

Re: Mr. Christopher C. Johnson and Dr. Gábor Lukács v. Air Canada
Application concerning failure to apply the tariff and application of terms and conditions not set out in the tariff and with respect to delayed passengers
Case No.: 15-05627
Opposition to Air Canada's request for confidentiality dated January 20, 2016

Pursuant to Rule 31(3) of the *Canadian Transportation Agency Rules (Dispute Proceedings and Certain Rules Applicable to All Proceedings)*, SOR/2014-104 ("*Dispute Rules*"), the Applicants oppose Air Canada's request for confidentiality dated January 20, 2016, and request that the documents be placed on public record pursuant to Rule 31(5)(b).

The Applicants rely on the documents that were attached to the Application and the answers provided by Air Canada on January 11, 2016 and January 19, 2016, which have already been provided to the Agency and Air Canada.

OVERVIEW

Air Canada is seeking to seal and prevent public access to three documents that were filed with the Agency and marked as A-1, AQ2-1, and A-2. The documents pertain to Air Canada's policy with respect to passengers affected by failure to operate and/or failure to operate on schedule.

The Applicants submit that Air Canada's request is lacking any merits and is frivolous for the following reasons:

- Documents A-1 and AQ2-1 are already public and publicly available on the Internet, and thus Air Canada's request is belated.
- No implied undertaking attaches to answers and documents received under Rule 24.
- Pursuant to ss. 122(c) and 116 of the *Air Transportation Regulations* Air Canada is required to publish the policies set out in Documents A-1, AQ2-1, and A-2.
- Air Canada presented no evidence capable of demonstrating that disclosure of the documents would cause serious harm.

I. THE FACTS

(a) Document A-1, entitled "Expense Policy"

1. On January 11, 2016, Air Canada served Document A-1 on the Applicants, and filed it with the Agency. Air Canada did not make a request for confidentiality at the time of the filing.
2. The substance of the policy set out in Document A-1 has been communicated to the public on a number of occasions in 2013 and 2014.

Mr. Johnson's Statement, Exhibits "E" and "K"
Email of Air Canada (February 6, 2014), Document No. 2
Email of Air Canada (November 12, 2014), Document No. 3

3. Document A-1 is publicly available on the Internet at the following URLs:
 - http://docs.airpassengerrights.ca/Canadian_Transportation_Agency/Air_Canada/Compensation_for_Expenses_of_Delayed_Passengers/2016-01-11-AC-expense_policy.pdf
 - http://web.archive.org/web/20160120220236/http://docs.airpassengerrights.ca/Canadian_Transportation_Agency/Air_Canada/Compensation_for_Expenses_of_Delayed_Passengers/2016-01-11-AC-expense_policy.pdf

(b) Document AQ2-1, entitled “Policy and Conditions”

4. On January 19, 2016, Air Canada served Document AQ2-1 on the Applicants, and filed it with the Agency. Air Canada did not make a request for confidentiality at the time of the filing.
5. Document AQ2-1 is publicly available on the Internet at the following URLs:
 - http://docs.airpassengerrights.ca/Canadian_Transportation_Agency/Air_Canada/Compensation_for_Expenses_of_Delayed_Passengers/2016-01-19-AC-more_answers_to_questions-current_expense_policy-OCR.pdf
 - http://web.archive.org/web/20160120233749/http://docs.airpassengerrights.ca/Canadian_Transportation_Agency/Air_Canada/Compensation_for_Expenses_of_Delayed_Passengers/2016-01-19-AC-more_answers_to_questions-current_expense_policy-OCR.pdf

(c) The Internet Archive (web.archive.org)

6. The Applicants have no control over the public information that has been collected and stored by the Internet Archive:

The Internet Archive is a 501(c)(3) non-profit that was founded to build an Internet library. Its purposes include offering permanent access for researchers, historians, scholars, people with disabilities, and the general public to historical collections that exist in digital format.

Founded in 1996 and located in San Francisco, the Archive has been receiving data donations from Alexa Internet and others. In late 1999, the organization started to grow to include more well-rounded collections. Now the Internet Archive includes: texts, audio, moving images, and software as well as archived web pages in our collections, and provides specialized services for adaptive reading and information access for the blind and other persons with disabilities.

<http://archive.org/about/>

II. ISSUES

7. The sole question to be decided is whether the Agency should grant Air Canada’s request for confidentiality with respect to Documents A-1, AQ2-1, and A-2.

III. SUBMISSIONS

Preliminary matter: The “Statement” of Ms. Twyla Robinson

8. The Agency’s *Dispute Rules* permit verifying facts by way of an affidavit or witnessed statement. The requirements for an affidavit or a witnessed statement are set out in Schedules 2 and 3, respectively. A common requirement, set out under paragraph 3(c), is that the affidavit or witnessed statement must include:

an attestation that the person has personal knowledge of the information and that the information is, to their knowledge, true, accurate and complete or, if the person does not have personal knowledge of the information, a statement indicating the source of the information and an attestation that the information is, to their knowledge, true, accurate and complete;

[Emphasis added.]

Dispute Rules, Schedules 2 and 3, para. 3(c)

9. The “Statement” of Ms. Robinson, submitted in support of Air Canada’s request for confidentiality, is not an affidavit nor was it made before a witness. Furthermore, it does not include the attestation as to the truth, accuracy and completeness of its contents.
10. Thus, the Applicants submit that the Agency should disregard the “Statement” of Ms. Robinson, and give it no weight.

(a) Documents A-1 and AQ2-1 are already public and Air Canada’s request is belated

11. Air Canada is attempting to shut the stable door after the horse has bolted. Rule 7(2) of the Agency’s *Dispute Rules* provides that:

7(2) All filed documents are placed on the Agency’s public record unless the person filing the document files, at the same time, a request for confidentiality under section 31 in respect of the document.

[Emphasis added.]

12. Air Canada is familiar with the Agency’s procedures relating to confidentiality, and has made such requests in the past. It was fully aware of the requirement that the issue of confidentiality must be raised “at the same time” as the document is filed.
13. Nevertheless, Air Canada filed Documents A-1 and AQ2-1 with the Agency on January 11 and 19, 2016, respectively, and it did not file “at the same time” a request for confidentiality.

Instead, Air Canada served the Documents on the Applicants without any indication of their sensitive or confidential nature.

14. As a result of Air Canada's conduct, Documents A-1 and AQ2-1 have already been "placed on the Agency's public record" in accordance with Rule 7(2), and are now publicly available on the Internet, including on the Internet Archive.
15. Thus, Air Canada's request with respect to Documents A-1 and AQ2-1 is belated, and even if the Agency granted the request, it would have no practical effect or benefit. Therefore, based on this consideration alone, the request should be denied.

***Takeda Canada Inc. v. Canada (Health)*, 2014 FC 1076, para. 28**

(b) No implied undertaking attaches to answers and documents received under Rule 24

16. Written questions and productions of documents in proceedings before the Agency are governed by Rule 24 of the *Dispute Rules*. Rule 24(2) provides that:

24(2) The party to which a notice has been given must, within five business days after the day on which they receive a copy of the notice, file a complete response to each question or the requested documents, as the case may be, accompanied by the information referred to in Schedule 12.

[Emphasis added.]

17. Rule 24 differs from discovery proceedings in courts of law, where parties exchange documents and provide answers only among themselves. Under Rule 24(2), in proceedings before the Agency, answers and documents provided in response to questions and production requests must be filed with the Agency.
18. Since Rule 24(2) requires filing answers and documents with the Agency, and all such filings are public pursuant to Rule 7(2), there can be no implied undertaking attached to the answers and documents obtained in this way.
19. Furthermore, 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 record before the Agency.

***Goodyear Canada Inc. v. Meloche*, 1996 CanLII 8261 (ON SC), para. 29
Lac d'Amiante du Québec Ltée v. 2858-0702 Québec Inc., 2001 SCC 51, para. 70
Juman v. Doucette, 2008 SCC 8, para. 51**

(c) **Air Canada's legal obligation to publish policy**

20. Paragraph 112(c)(v) of the *Air Transportation Regulations*, S.O.R./88-58 (“*ATR*”) states that:

122. Every tariff shall contain

(c) the terms and conditions of carriage, clearly stating the air carrier's policy in respect of at least the following matters, namely,

⋮

(v) failure to operate the service or failure to operate on schedule,

⋮

(x) limits of liability respecting passengers and goods,

[Emphasis added.]

21. Section 116 of the *ATR* provides that:

116. (1) Every air carrier shall keep available for public inspection at each of its business offices a copy of every tariff in which the air carrier participates that applies to its international service.

(2) Every air carrier shall display in a prominent place at each of its business offices a sign indicating that the tariffs for the international service it offers, including the terms and conditions of carriage, are available for public inspection at its business offices.

(3) Every air carrier shall, for a period of three years after the date of any cancellation of a tariff participated in by the carrier, keep a copy of that tariff at the principal place of business in Canada of the carrier or at the place of business in Canada of the carrier's agent.

22. Documents A-1 (“Expense Policy”), AQ2-1 (“Policy and Conditions”), and A-2 set out Air Canada's policy in respect to stranded passengers, that is, “failure to operate service or failure to operate on schedule.” These documents also purport to impose monetary limits on the reimbursement of expenses to stranded passengers, that is, “limits of liability.”

23. Thus, Air Canada is seeking confidentiality with respect to policies that it is required, as a matter of law, to make available for public inspection. Therefore, Air Canada's request is a frivolous attempt to circumvent its obligations under the *ATR*, and should be denied accordingly.

(d) **Air Canada does not meet the legal test for confidentiality**

24. Proceedings before the Agency are subject to the constitutionally protected open court principle, and as such all documents filed with the Agency must be presumptively open to the public. 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

25. The legal test for balancing the open court principle against other interests remains the *Dagenais/Mentuck* test (or its adaptation, as in *Sierra Club*):

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.

[Emphasis added.]

Chief Justice Beverley McLachlin: “Openness and the Rule of Law”

(i) **No evidence of serious harm**

26. The risk under the test for confidentiality must be real and substantial, well grounded in the evidence, and posing 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

27. It is settled law 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
Nova Scotia (Attorney General) v. MacIntyre, [1982] 1 SCR 175, pp. 8-9

28. In the case at bar, Air Canada would simply prefer to keep the Documents confidential, but it 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.

29. On the contrary, the evidence before the Agency shows that Air Canada has not been treating the information in the Documents as sensitive:
- (a) Air Canada provided documents setting out the policies in question to the Applicants without any indication of their sensitive nature;
 - (b) Air Canada 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
 - (c) Air Canada has been communicating these policies to the public, and by applying the policies it cannot avoid communicating them to the public in the future.

**Mr. Johnson’s Statement, Exhibits “E” and “K”
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30. Air Canada’s competitors are equally subject to the obligations set out in the *Montreal Convention* and the public disclosure requirements set out in ss. 116 and 122 of the *ATR* as Air Canada is. Consequently, requiring Air Canada to disclose policies that should anyway match the *Montreal Convention* and should have anyway been disclosed in its tariff cannot possibly cause Air Canada any competitive disadvantage.

(ii) Relevance and public interest in disclosure

31. The present Applications challenges the policies of Air Canada set out in the Documents. Each of these documents are vital to the proceeding before the Agency:
- (a) Document A-1 sets out the Impugned Policy since April 4, 2013;
 - (b) Document AQ2-1 sets out Air Canada’s policy effective December 7, 2015, and directly contradicts the position taken by Air Canada with respect to whether mechanical problems constitute “controllable” or “uncontrollable” IROPs within the meaning of Air Canada’s policies; and
 - (c) Document A-2 sets out what Air Canada claims to be its current policy, which was established at an unknown time, likely as a result of the present Application.
32. 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 the Documents 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.

33. Therefore, it is submitted that even if there were any evidence of serious harm to Air Canada (which is not the case here), the public interest in the disclosure of the Documents outweighs Air Canada's private interest in keeping the Documents confidential.

All of which is most respectfully submitted.

Dr. Gábor Lukács
Co-applicant and
representative for Mr. Johnson

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