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February 1, 2016

The Secretary

CANADIAN TRANSPORTATION AGENCY
Secretary
15 Eddy Street
17th Floor Mailroom
Gatineau QC J8X 4B3

**SUBJECT: Mr. Christopher C. Johnson and Dr. Gábor Lukács
v. Air Canada
Case No.: 15-05627
Our File No.: LIT-2015-000544
Response to the Complainants' Opposition**

Dear Madam Secretary:

1. Please find Air Canada's Response to the Opposition to Air Canada's Request for confidentiality, amounting to a Request for Disclosure under s. 31 (3) of *the Canadian Transportation Agency Rules* (the "CTA Rules") (the "Opposition").
2. Air Canada further provides the comments below, given the Complainants' confirmation in the Opposition, served on January 27th, that documents A-1 and AQ-2, communicated by Air Canada during the discovery process, have been disclosed and swiftly placed on the docs.airpassengerrights.ca and the web.archive.org websites, in apparent breach of an implied confidentiality undertaking.

3. The documents A-1, A-2 and AQ2-1 (collectively referred to as the "Documents") are internal, proprietary to Air Canada and contain information that will place Air Canada at a commercial disadvantage vis-à-vis its competitors were they further distributed. The documents are not terms and conditions of carriage and are not subject to any publication obligation under the *Air Transportation Regulations* (the "ATR").
4. In adjudicating disputes, the Agency has to promote justice and favor the just determination of issues. In doing so, it has all the powers necessary to issue any Order to protect the Documents' confidentiality.

1. Documents A-1 and AQ2-1 were disseminated in breach of Implied Undertakings of Confidentiality

5. 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 (*Lac d'Amiante du Québec Ltée v. 2858-0702 Québec Inc.*, 2001 SCC 51; *Juman c. Doucette*, 2008 SCC 8; *Globe and Mail v. Canada (A.G.)*, 2010 SCC 41). The policy reasons for this consistent stand 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.
6. These same policy reasons apply to the communication of documents as part of proceedings before the Agency. In the present case, the complainant asked for certain information and documents. In the interest of responding to the best of its abilities, Air Canada communicated internal, commercially sensitive documents, with the expectation that they would be protected by an implicit undertaking of confidentiality. Air Canada does not seek to have those documents kept secret from the complainant, but rather, to restrict their use to the proceedings in question.

2. Documents A-1 and AQ2-1 were published following a communication by Air Canada within the discovery process:

7. The Complainants allege that the documents A-1 and AQ2-1 are already being part of the public domain, and as such Air Canada's Request for confidentiality affecting said documents is belated. As further explained below, the Agency has all necessary powers to issue the appropriate confidentiality order following Air Canada's Request during the discovery process.

8. The fact that the documents were swiftly communicated in public websites, including at Airpassengerrights.ca, should not bring umbrage to the commercial harm sustained by Air Canada would the Documents remain in the Agency's official record and be further distributed.

3. The Agency has the power to grant Air Canada's Request despite the distribution of some of the Documents on two websites.

9. The Agency has the power to make "any decision that it considers just and reasonable" under the *CTA Rules*¹ in the context of a Request for confidentiality, and should make all adaptations necessary for the optimal confidentiality of the Documents, starting with, at the very least, their withdrawal from the Agency's public record. The Agency, in interpreting its own rules, has to promote justice². Air Canada hereby requests the Agency to make any necessary adaptation to the *CTA Rules* to favor the just determination of the present issues³.
10. Article 25 of the *Canada Transportation Act* (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, which includes the signature of a confidentiality agreement, to order the Complainants to remove the document A-1 and AQ2-1 from the Air Passenger Rights website, with the understanding that they might remain available on the Internet generally as archived material.

4. Air Canada does not have to publish and disclose internal recommendations, as they are not terms and conditions of carriage.

11. Sections 116 and 122 of the *ATR* impose on a carrier to publish its terms and conditions of carriage, for clarity and certainty. The Complainants request disclosure of internal recommendations which apply and respect the published terms and conditions of carriage.

¹ *CTA Rules*, r. 31 (5) iv.

² *CTA Rules* r. 5 (1).

³ *CTA Rules*, r. 6.

12. The Legislator has struck a balance in limiting an air carrier's disclosure obligation under sections 116 and 122 of the *ATR* to conditions of carriage. 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 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.
13. It is self-evident that further disclosure of private internal recommendations, would hinder the proper and efficient conduct of airlines' operations in applying their Tariff.

5. Common Law Test for confidentiality

14. Air Canada disagrees with the Complainants' submission that it did not meet the legal test for confidentiality. It adds that that the test set forth under the Common Law has to be reviewed considering the *CTA Rules*⁴. Even if the Documents may be considered as relevant to the present matter, the harm resulting from their further disclosure militate for their confidentiality, trumping public interest.
15. The Agency must take into consideration the following in deciding on the confidential treatment to be conferred to the Documents:
 - a. **The Documents' relevance to the dispute at stake (CTA Rules r. 31 (5))**
16. The Complainants allege in their Complaint that Air Canada has a reimbursement policy contrary to the *Montreal Convention*, the *CTA* and its Regulations as well as Air Canada's own Tariff.
17. The Documents' relevance is disputed by Air Canada in its Answer, as it submits that the Documents are not conditions of carriage and solely constitute internal recommendations in implementing its Policy as outlined in its Tariff. Air Canada respects the *Montreal Convention* and the *CTA* and its Regulations in handling passenger refund requests. Air Canada further confirmed that it

⁴ See *CTA Rules*, r. 31

does not limit the reimbursement of passenger expenses in cases where it is liable to do so.

18. It may well be that the Agency, ruling on the Complaint's merits, will not find that the Documents infringe the *Montreal Convention*, the *CTA* and its Regulations and Air Canada's own Tariff.
19. The Documents are relevant to the Complaint as delineated by the Complainants, but it is Air Canada's position that they are not relevant as conditions of carriage, they remain commercially sensitive internal recommendations, which do not have to be published under the *ATR*.

b. The harm resulting from the disclosure versus the public interest in having the documents disclosed (CTA Rules r. 31 (5))

20. Air Canada reiterates in full its comments provided in its Request under s. 31 of the *CTA Rules*. The disclosure of commercially sensitive information will cause harm and place it at a commercial disadvantage vis-à-vis other carriers.
21. The public interest in this matter, considering the commercial sensitivity of these internal documents and the *ATR* is limited to the publication of conditions of carriage in an Air Carrier's Tariff.

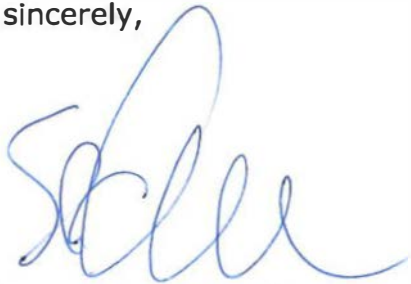
6. Ms. Twyla Robinson's Statement

22. Air Canada disagrees with the Complainants' position that the Statement filed by Ms. Twyla Robinson must be struck out as it does not provide all the elements required within the context of a verification of contents by the *CTA* under rule 15 of the *CTA Rules*.
23. Section 15 of the *CTA Rules* imposes requirements within the context of a verification of contents of a document under the Agency's initiative. The *CTA Rules* do not otherwise subject a statement to any specific requirement.
24. Ms. Robinson's clear and unequivocal Statement was provided in good faith by Air Canada in support of its request under s. 31 (1) of the *CTA Rules*. Consideration must be given to the Statement's content, as evidence filed in support of Air Canada's Request. In the situation at hand, Ms. Robinson's signed Statement confirmed her personal knowledge of Air Canada's confidential treatment of internal documents, and their commercial sensitivity.

25. Air Canada submits that the Statement's content do not require a supplementary verification by the Agency under the *CTA Rules*.
26. Although it is true that the *CTA Rules* allow the Agency, if it deems necessary, to require a verification of a witness' Statement, we respectfully submit that this is neither necessary nor justified in the case at hand. The Agency is not allowed to simply dismiss Ms. Robinson's Statement as such would be disproportionate and prevent the just determination of issues and promotion of justice.

The whole, respectfully submitted.

Yours sincerely,



Jean-François Bisson-Ross

Counsel – Litigation

JFBR/sa

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