

From Jean-Francois.Bisson-Ross@aircanada.ca Tue Mar 8 17:43:10 2016
Date: Tue, 8 Mar 2016 21:42:39 +0000
From: Jean-Francois Bisson-Ross <Jean-Francois.Bisson-Ross@aircanada.ca>
To: "secretariat@otc-cta.gc.ca" <secretariat@otc-cta.gc.ca>
Cc: Gabor Lukacs <lukacs@airpassengerrights.ca>, Shoghik Abrahamyan <Shoghik.Abrahamyan@aircanada.ca>, Kerianne Wilson <Kerianne.Wilson@aircanada.ca>
Subject: Air Canada NDU pursuant to February 24 decision [I]

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Classification: INTERNAL USE ONLY

Dear Mme Secretary,

Please find the response to Mr Lukacs's submission of Saturday March 4, 2016, in which the Applicants confirmed their refusal to sign and return Air Canada's Non-Disclosure Undertaking as submitted to them on Friday February 26th, relying on their Modified Non-Disclosure Agreement with the heading "under protest". Air Canada has submitted that the Non-Disclosure Agreement signed as such did not respect decision LET-C-A-6-2016.

Signature of Non-Disclosure Undertakings "under protest"

Air Canada submits that the confirmation of an intention or undertaking, such as for the signature of a Non-Disclosure Agreement, is qualified and ambiguous where it is signed "under protest".

The authorities submitted by the Applicants in support of their position refer to the performance of an act "under protest"; in said instances, making a payment. There are indeed many instances referred to in Canadian doctrine where the performance of a payment is realized "under protest"[1].

The key difference in the two previously described instances is that a payment made under protest is performed simultaneously at the time where the protest is indicated, as opposed to the confirmation of an intention for act(s) which have yet to be performed.

There are limited authorities in Canadian Law which defined the expression "under protest":

The Labour Law terms: A Dictionary of Canadian Labour Law[2], provide:

A) "protest" declaration of dissent or disapproval; compliance under protest is an express indication that submission does not signify consent;

B) "compliance under protest" submission to an order while indicating one's objection to it in order to preserve the legal right to challenge to order subsequently;

American Tribunals have otherwise also specified that " the naked assertion of "under protest" (...) is merely an assertion that what is being done is contrary to the desire or intent of the protesting party"[3].

Mr Lukacs's letter of March 4, 2016

Despite the parties' divergence of opinion on the meaning of the Applicants' signature "under protest" of Air Canada's Non-disclosure Undertaking, Mr Lukacs, as representative for Co-Applicant Johnson and as Co-Applicant, has confirmed in his letter dated March 4 2016, which was neither communicated "under protest" or on a "without prejudice" basis, at sub paragraph 4 of page 2, that the Applicants did not interpret their reservation "under protest" as altering the wording of the Undertaking presented by Air Canada, and that it remains a valid Undertaking, unless an Appeal of decision LET-C-A-2016 sets it aside.

Considering the Applicant's March 4 2016 additional statement which details the Applicants intent to comply with Air Canada's Undertaking as initially provided, Air Canada will provide the Applicants with a copy of document A-2, in respect of decision LET-C-A-6-2016.

Best regards,

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[1] Most notably and recently reviewed by the New-Brunswick Court of Appeal in *Nav Canada v. Greater Fredericton Airport Authority Inc.*, 2008 NBCA 28 (CanLII)

[2] J Sack, Q.C. and E. Poskanzer (Toronto: Lancaster House, 1984) at 41, 121, and 159, as reported in 2008 Canlii 88097 (AB GAA);

[3] *Castano v. Gabriel* 1969 60 misc. 2d 218

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