

**VIA EMAIL**

April 29, 2020

Federal Court of Appeal  
90 Sparks Street, 5th floor  
Ottawa, Ontario K1A 0H9

Dear Registry Officer,

**RE: Air Passenger Rights v. Canadian Transportation Agency (FCA : A-102-20)**

We are counsel for the Applicant. On April 28, 2020, the National Airlines Council of Canada (NACC) filed an *ex parte* motion for intervention and delivered a letter to the Court. The NACC seeks to vary the timelines in Locke J.A.'s order of April 16, 2020, which ordered that the Applicant's injunction motion be expedited. Please kindly bring this letter to Locke J.A.'s attention.

Since April 17, 2020, the NACC was fully aware of the expedited timelines ordered by Locke J.A.<sup>1</sup> However, the NACC waited more than one week with notifying the Court, even after they had already decided to seek leave to intervene.<sup>2</sup> NACC's dilatory conduct disrupts the Court's process and directly delays a pending motion that the Court has ordered to be dealt with on an expedited basis.<sup>3</sup> Of note, Locke J.A. recognized that passengers may rely on the Statement on Vouchers such that the passengers' rights could be irrevocably affected, warranting swift disposition.<sup>4</sup>

The NACC has not presented *any* genuine urgency warranting the extraordinary exception to decide their intervention motion *ex parte* prior to the Applicant's pending expedited motion. Notably, the Applicant's expedited interlocutory motion does not even determine the merits of the dispute between the Applicant and the Agency. The NACC will have a full opportunity to seek leave to intervene in the judicial review, on proper notice, after the Applicant's motion is heard.

The NACC also fails to explain why the air carriers whom NACC purportedly claims to be "directly affected" by the Statement on Vouchers are not seeking to intervene directly, but rather attempt to do so via a proxy. Indeed, Locke J.A.'s Order noted that part of the Applicant's concern was that air carriers are systematically utilizing the Statement on Vouchers to mislead passengers to their detriment. Considering the alleged importance of the Statement on Vouchers for the air carriers, it would have been imperative on them, not their proxy, to come before the Court to clearly explain *how* the continued posting of a potentially misleading Statement on Vouchers (and related publications) is critical for their well-being.<sup>5</sup> The air carriers have clearly failed to do so.

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<sup>1</sup> See page 14 of NACC's motion record at para. 16.

<sup>2</sup> [Canada \(Attorney General\) v. Siemens Enterprises Communications Inc.](#), 2011 FCA 250 at para. 5

<sup>3</sup> Order of Locke J.A. on April 16, 2020 page 4, second paragraph

<sup>4</sup> Order of Locke J.A. on April 16, 2020 page 3, last paragraph

<sup>5</sup> Rule 81(2)

Relatedly, the air carriers' approach in bringing their "proxy" *ex parte* motion also deprives the Applicant of its right to cross-examine the relevant individuals on the evidence they rely upon.

Practically, the air carriers are shielding themselves from scrutiny by this Court, but at the same time providing wholly irrelevant and non-justiciable materials to delay the Applicant's motion. Indeed, the rule is that interveners are not permitted to add to the evidentiary record, save in the most exceptional circumstances.<sup>6</sup> However, in this instance, NACC's affidavits are even lengthier than the Applicant's affidavit and there is no circumstance warranting such departure.

Furthermore, the bulk of NACC's evidence are self-serving materials,<sup>7</sup> that came into existence *after* the Applicant's motion was served (April 9), and do not bear on the justiciable legal issues in the case. Moreover, those materials clearly could not have been before the Agency at the time:<sup>8</sup>

*After service of a notice of motion, as a general rule, any act done by any party affected by the application which affects the rights of the parties on the pending motion will be ignored by the Court.*

...  
*The rights of an appellant [applicant?] cannot be prejudiced by anything done after the notice of motion has been served, but his rights are to be determined as they existed at the date of its service.*

[emphasis added]

It also bears noting that the NACC's primary argument on the interlocutory injunction simply repeats what the Agency has already stated that they will raise,<sup>9</sup> confirming that the NACC will bring no meaningful contribution to the debate on the interlocutory injunction. The NACC has failed to point to any argument that the Agency could not raise in the Agency's response.

Finally, in an attempt to bolster their claim for "urgency", the NACC misstated the Applicant's motion by asserting that "[t]he applicant's interlocutory motion was made in writing and without notice". The April 16 Order of Locke J.A. confirms that the Canadian Transportation Agency was given proper notice for the interlocutory motion and a generous timeline for responding.

The Applicant submits that NACC's *ex parte* intervention motion ought to be denied, owing to a lack of any urgency and non-compliance with the Court's practice directions relating to bringing of motions during the COVID-19 pandemic. However, the Applicant submits that the Court could consider granting NACC leave to refile their motion for intervention, upon filing proper proof of service, to be heard after the Applicant's motion has been determined.

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<sup>6</sup> ['Namgis First Nation v. Canada \(Fisheries and Oceans\)](#), 2019 FCA 149 at para. 18

<sup>7</sup> Mike McNaney Affidavit, Ex A and C; Nicola Colville Affidavit, all exhibits; Jiwan Son Affidavit, Ex D

<sup>8</sup> [Shipdock Amsterdam B.V. v. Cast Group Inc.](#), 1999 CanLII 9085 (FC) at paras. 7-8 per Lafrenière P. (as he then was), citing *Bruce v. John Northway & Son Ltd.*, 1962 O.W.N. 150

<sup>9</sup> See NACC's written representations at p. 321, paras. 53-54; see also Agency's letter to the Court dated April 15, 2020, last paragraph, where the same issue was raised, and Applicant's letter to the Court dated April 15, 2020 squarely addressing that issue.

Should the Court have any directions, we would be pleased to comply.

Yours truly,

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