

**VIA EMAIL**

April 30, 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. We write in response to the Respondent's letter dated April 30, 2020 seeking directions. The Agency's request mirrors, in part, the request of the proposed intervener, National Airlines Council of Canada (NACC). The Agency seeks to disrupt and overturn the expedited timetable that was set out in the Court's order on April 16, 2020.

In the interests of time, the Applicant will focus only on the main points raised by the Respondent.

Firstly, at this time, the Applicant confirms that it does not anticipate filing further evidence in reply. Thus, the Respondent's primary basis for seeking directions to vary a court-ordered timetable, under the guise of seeking directions, is moot.

Furthermore, the Respondent's request that the Applicant be deprived of its right to cross-examine is contrary to Rule 83 of the *Federal Courts Rules*. The Courts have recognized that the right to cross-examine an affiant is a fundamental right. Although the Respondent raised the issue of cross-examinations to Locke J.A., the Court did not order any derogation from the right to cross-examine under Rule 83.

The Agency's proposal of a myriad of endless procedural motions, after having been served with the Applicant's interlocutory injunction motion for three weeks, and seeking directions close to the last-minute, is contrary to the letter and spirit of this Court's order and also unnecessary:<sup>1</sup>

*[8] In the second place, and in the same interests of a sensible modern procedure, I think parties should be discouraged from bringing motions with respect to other motions. Motions should be opposed on their merits and should not be made the subject matter of further procedural motions. We risk building endless pyramids of motion materials if we do not enforce such a rule.*

Of note, the Agency has already previously sought to prolong the disposition of the Applicant's motion on the basis of "unavailability" and closure of the Gatineau Bridge,<sup>2</sup> which the Court has rejected:

...

**AND WHEREAS** the respondent opposes the request that the applicant's motion be dealt with on an expedited basis; the respondent notes that its operations have been significantly affected by

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<sup>1</sup> [Greens At Tam O'Shanter Inc. \(The\) v. Canada](#), 1999 CanLII 7512 (FC) at para. 8; see also [Global Television v. Canadian Energy and Paperworkers Union](#), 2002 FCA 376 where this Court confirmed that a motion to strike a Direction to Attend was not appropriate, and it should be dealt with by the judge hearing the underlying motion that gave rise to the responding affidavit.

<sup>2</sup> Letter from the agency to the court dated April 14, 2020; and Letter from the agency to the court dated April 15, 2020

various measures put in place in the context of COVID-19, though it does acknowledge on its website that it “continues to maintain its normal operations” other than dispute resolution activities involving air carriers and their passengers; the respondent also notes that the Statement on Vouchers has already been widely publicized, and that little benefit would therefore be achieved by dealing with the applicant’s motion on an expedited basis; the respondent further alleges that it will suffer significant prejudice if required to respond to the applicant’s motion in the normal course;

...

**AND WHEREAS** the Court is also satisfied that, though the respondent’s resources are limited at present, it is not unable to deal with the applicant’s motion during the suspension period, especially if the usual timelines are relaxed somewhat; the Court is not convinced that the respondent will suffer significant prejudice under these circumstances;

**AND WHEREAS** the Court is also not convinced that the wide dissemination of the Statement on Vouchers is a reason not to expedite the applicant’s motion; the apparently urgent basis on which the Statement on Vouchers was prepared and published suggests that the question of its removal should likewise be considered on an expedited basis;

**AND WHEREAS** the Court is therefore satisfied that it is in the interest of justice that the applicant’s motion be dealt with during the suspension period despite the March 19 and April 2, 2020 Notices;

**THIS COURT ORDERS** that:...

[emphasis added]

Although Locke J.A.’s order did not order a specific timetable for cross-examinations, both parties had an opportunity, and did make, submissions on the issue of cross-examinations before Locke J.A. issued the order. As is standard practice, the Court would expect the parties make reasonable arrangements that conforms to the court-ordered timetable.

**Most importantly**, the Respondent has carefully omitted the most pertinent correspondence from the Applicant dated April, 17, 2020 (and the related e-mail chain),<sup>3</sup> clearly demonstrating that it was the Applicant who immediately sought cooperation to arrange a timetable for the cross-examination on affidavits of both the Applicant’s and the Agency’s affiants, which would reasonably conform to this Court’s order of April 16.

The Agency’s new idea of “further submissions after the cross-examinations” was never raised to the Court, and was only mentioned to the Applicant for the first time on April 22, 2020,<sup>4</sup> long after the Court issued its Order. The Applicant respectfully submits that this is a clear demonstrating that the Respondent is *again* seeking to prolong the Applicant’s motion, a motion which the Agency’s own responding motion record suggests is somewhat straight forward.

The Agency’s assertion that the Applicant failed to cooperate is completely devoid of any merit.

It also bears noting that, bottoming the Agency’s request for directions, the Agency seems to have admitted that they knowingly introduced an affiant that completely lacks personal knowledge of the facts relevant to the motion. This may call for an adverse inference under Rule 81(2) from the judge hearing the Applicant’s motion. However, at this time, the Agency’s assertion of a “lack of personal knowledge” cannot deprive the Applicant of its right under the Rules for a cross-

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<sup>3</sup> Applicant’s letter to the agency dated April 17, 2020; Agency’s letter to the Applicant dated April 21, 2020

<sup>4</sup> Respondent’s Letter Seeking Directions, Appendix B, bottom of page 3

examination.<sup>5</sup> Whether an affiant has access to relevant documents, or has the requisite knowledge, is to be established under oath on a cross-examination.

The usual manner, under the Rules, for addressing any concerns over document production is to attend the cross-examination and make the objections on the record, on the pain of the potential consequences provided under the Rules. The Agency is seeking to circumvent the Rules and this Court's order through an informal letter that is not supported by any legal authorities.

Most importantly, the Agency's request rests largely on the erroneous proposition that a cross-examination must relate solely to the documents attached to that affiant's affidavit. That is incorrect, cross-examination on a judicial review can relate to all the affidavits filed in the proceeding (including the Applicant's affidavit), and also the issues in question on the motion itself.

Finally, the Applicant notes that the Agency's purported personal attacks on the Applicant's affiant is inappropriate and unnecessary, especially when Dr. Lukacs' professionalism has been repeatedly recognized by this Court. To the extent the Court requires a specific response to the Agency's broad allegations, we would be pleased to provide further submissions. Relatedly, the Agency asserted that the Applicant was "newly incorporated", but failed to recognize that the Applicant was, in fact, formed in May 2019 (the incorporation certificate is in the Applicant's motion record served on April 9, 2020).

The Applicant respectfully submits that the Respondent's request ought to be rejected. The Respondent's procedural motion on top of procedural motion approach clearly defeats this Court's specific order to expedite the Applicant's motion for an interlocutory injunction on a pressing matter.

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

Yours truly,

**EVOLINK LAW GROUP**



SIMON LIN

**Encls:** (1) Letter from the agency to the court dated April 14, 2020;  
(2) Letter from the agency to the court dated April 15, 2020;  
(3) Applicant's letter to the agency dated April 17, 2020;  
(4) Agency's letter to the Applicant dated April 21, 2020

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<sup>5</sup> Rule 83 of the *Federal Courts Rules*



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By Email: [Information@fca-caf.gc.ca](mailto:Information@fca-caf.gc.ca)

April 14, 2020

The Judicial Administrator  
Federal Court of Appeal  
90 Sparks Street, 5<sup>th</sup> Floor  
Ottawa, Ontario  
K1A 0H9

Dear Sir/Madam:

**Re: *Air Passenger Rights v Canadian Transportation Agency***  
**Court File No.: A-102-20**

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We acknowledge receipt of the Notice of Application and the Motion Record dated April 7, 2020, seeking interim and interlocutory injunctions. We also acknowledge the Court's Decision and Direction dated April 9, 2020.

As the Court is aware, the COVID-19 pandemic has had a significant impact on the operations of private business and government across the country, including those of the Canadian Transportation Agency ("Agency"). Agency employees, including Counsel, have been directed to work remotely where feasible, and request leave where it is not feasible. The bridges between Ottawa, Ontario, where many Agency employees reside, and Gatineau, Québec, where the Agency's offices are located, have been closed to all non-essential travel. The Agency's offices are essentially closed. While normal operations are being maintained as much as possible, the Agency has ordered the suspension of all dispute adjudication activities involving air carriers until June 30, 2020.

While the Applicant has asked the Court to issue an Order validating service, in the circumstances, we hereby accept service of the Notice of Application and the Motion Record pursuant to Rule 134 of the *Federal Courts Rules*, SOR/98-106 ("*Federal Courts Rules*").

Pursuant to the Court's Notices to the Profession dated March 19, 2020 and April 2, 2020, the calculation of time pursuant to the *Federal Courts Rules* does not run during the period from March 16, 2020 to May 15, 2020 ("Suspension Period"). These Directions recognize the seriousness of the COVID-19 pandemic and its effect on the ability of parties to prepare filings and meet deadlines. This is true for Counsel for the Agency who are working remotely without access to the resources of a formal office.

As a result of the Court's Directions, the calculation of time for the Agency's response does not include the Suspension Period.

This is not a case of urgency such that it should be exempted from the application of the Suspension Period. Assuming that judicial review of a statement on the Agency's website, which the Applicant

contents is not a decision, is available, it has already been widely publicized. It is unclear what benefit would be achieved by proceeding with the motion during the Suspension Period, instead of delaying it temporarily as contemplated by the Court's Directions. The Applicant seeks interlocutory relief which would have the same effect if granted a few weeks later than if the Suspension Period did not apply.

In the Agency's submission, the Court's Order and Direction dated April 9, 2020, demonstrates that the Applicant's motion lacks the necessary urgency.

In short, the Court's Directions recognize that the current health crisis severely limits the ability of parties to comply with the deadlines set out in the *Federal Courts Rules*. This case is a clear example of this. The Agency would suffer significant prejudice if required to file a response in the normal course. An exception should not be made in this case, and the Court's resources should be focused instead on cases of "genuine urgency".

Yours truly,

A handwritten signature in black ink, appearing to read "AMT", followed by a period.

Allan Matte  
Senior Counsel  
Legal Services Directorate  
Canadian Transportation Agency  
15 Eddy Street, 19<sup>th</sup> Floor  
Gatineau, Quebec  
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By Email: [Information@fca-caf.gc.ca](mailto:Information@fca-caf.gc.ca)

April 15, 2020

The Judicial Administrator  
Federal Court of Appeal  
90 Sparks Street, 5<sup>th</sup> Floor  
Ottawa, Ontario  
K1A 0H9

Dear Sir/Madam:

**Re: *Air Passenger Rights v Canadian Transportation Agency***  
**Court File No.: A-102-20**

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We write in reply to the Applicant's letter dated April 14, 2020.

It is surprising that Counsel for the Applicant would question the current situation and its impact on government employees, and demand affidavit evidence to support our submission that operations have been affected. It is well known that government employees have been directed to work remotely if they are able to do so. This includes Agency and Court staff. If the Court wishes affidavit evidence in support of these facts we could endeavour to provide one. In our view it is not necessary.

It was conceded in our submission yesterday that "normal operations are being maintained as much as possible". This includes services to the public as indicated in the March 25, 2020, statement on the Agency's website to which Counsel for the Applicant refers.<sup>1</sup> The Applicant quotes only the first half of the Agency's statement regarding operations during the pandemic. The second paragraph emphasizes the impact of the COVID-19 pandemic on operations.

Please note, however, that the CTA has temporarily paused all dispute resolution activities involving air carriers until June 30, 2020, to permit them to focus on immediate and urgent operational demands. While you can continue to file air passenger complaints with us and all complaints will be processed in due course, we may not be able to respond quickly. On or before June 30, 2020, the Agency will determine if the pause should end on that date or be extended to a later date.

While the Agency is maintaining operations, they have clearly been affected by the closing of the Agency's offices, the restrictions on travel and the need for social distancing.

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<sup>1</sup> Canadian Transportation Agency, "COVID-19 and CTA Services" (25 March, 2020), online: *Canadian Transportation Agency* <<https://otc-cta.gc.ca/eng/covid-19-and-cta-services>>.

There is no evidence that a short delay in proceeding with the motion will result in a denial of justice. The interlocutory relief the Applicant seeks will have the same effect even if delayed for a few weeks for reasons of health and safety.

The Applicant makes reference to the Updated Practice Direction and Order (COVID-19)<sup>2</sup> of the Federal Court which has also imposed a Suspension Period until May 15, 2020, and asserts that motions that would have substantial financial consequences should proceed. Again, the Applicant fails to make reference to important aspects of the Federal Court's Direction. The Applicant does not make reference to the examples of the types of cases that would be considered "urgent" or "exceptional" such that they should be exempted from the Suspension period.

By way of guidance only, applications for a stay of release from detention or for a stay of removal from Canada will be considered to be "urgent" if the release or removal is scheduled to occur during the Suspension Period, or within seven (7) days following its termination. Likewise, an application in respect of the seizure of a ship, an aircraft, or other property, will also be considered to be urgent. Similarly, matters where hardship or substantial financial consequences are likely to result from delay may be considered to be "urgent" or "exceptional." Such matters will be heard by telephone or video conference.

The Applicant's motion does not meet the test for urgency when considering the Federal Court's Direction as a reference. Nobody's liberty or property is at stake. There is no evidence that the legal rights of passengers are being affected. In fact, the Applicant repeatedly concedes and relies on his assertion that the Agency's statement is not legally binding.<sup>3</sup>

It is also noteworthy that the Federal Court's Direction states that adjudication of motions in writing pursuant to Rule 369 would continue on condition that all parties consent.<sup>4</sup>

The Ontario Court of Appeal decision of *Carleton Condominium Corporation No. 476 v Wong*<sup>5</sup> is a request for an adjournment of a hearing. The Court determined that the matter could be heard in writing. This is not a "similar adjournment request". This Court has imposed the Suspension Period and the Applicant has failed to show that an exception should be made in his case. The Court determined that questions from the panel could be addressed by teleconference, they were not discussing cross-examinations on affidavits.

The merits of the Application should be considered in the circumstances. Subsection 18.1(1) of the *Federal Courts Act* provides for judicial review by the Attorney General of Canada or by anyone directly affected by the matter in respect of which relief is sought. The Applicant is not directly affected. Moreover, the Applicant concedes that the Agency's statement, which is the

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<sup>2</sup> Federal Court, "Updated Practice Direction and Order (COVID-19)" (4 April 2020), online: *Federal Court* <<https://www.fct-cf.gc.ca/content/assets/pdf/base/FINAL%20-%20EN%20Covid-19%20Amended%20Practice%20Direction%20Order.pdf>> [*Updated Practice Direction and Order (COVID-19)*].

<sup>3</sup> See, for example, the Memorandum of Fact and Law of the Applicant dated April 7, 2020 at paras 61-63, Applicant's Motion Record dated April 7, 2020 at 204-205.

<sup>4</sup> *Updated Practice Direction and Order (COVID-19)*, *supra* note 2 at 4.

<sup>5</sup> [2020 ONCA 244](#).



subject of the Application, is not legally binding. We are contemplating a motion to strike the Application once the Suspension Period has expired on the basis that the Applicant is not affected by the statement and if it is non-binding and does not affect legal rights, judicial review is not available.

In our submission the Suspension Period should continue to apply.

Yours truly,

A handwritten signature in black ink, appearing to read "AM2.", positioned below the text "Yours truly,".

Allan Matte  
Senior Counsel  
Legal Services Directorate  
Canadian Transportation Agency  
15 Eddy Street, 19<sup>th</sup> Floor  
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**VIA FAX < 1-819-953-9269 >**

**VIA EMAIL <ALLAN.MATTE@OTC-CTA.GC.CA >**

April 17, 2020

Canadian Transportation Agency  
**ATTN: Mr. Allan Matte, Senior Counsel**  
15 Eddy Street, 19<sup>th</sup> Floor  
Gatineau, Québec  
K1A 0N9

Dear Mr. Matte,

**RE: Air Passenger Rights v. Canadian Transportation Agency (Federal Court of Appeal File No : A-102-20)**

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We trust you had an opportunity to review the Court's order dated April 16, 2020. We recognize that the Agency may experience difficulties with physical deliveries in light of the COVID-19 situation. As such, we enclose for service our Notice of Consent to Electronic Service. We trust that you will extend the same courtesy in consenting to electronic service.

Considering the expedited timelines for the motion, and that the Agency has previously alluded to cross-examination on affidavits, please kindly advise at your earliest convenience if the Agency intends to cross-examine the Applicant's affiant, Dr. Lukács. We will endeavor to secure a mutually convenient time for that cross-examination, within the deadlines fixed by the Court. We trust that the Agency will not object to conducting the cross-examination over video-conference considering the current social distancing requirements.

Furthermore, while it is not mandated under the *Rules* or the Court's order, we kindly request that you consider serving us with the Agency's affidavit a couple of days in advance of the April 29 deadline, followed by its memorandum of fact and law by April 29. Considering the restrictions under Rule 84, there will be greater selection of dates for Dr. Lukács' cross-examination if the Agency serves their affidavit earlier, assuming the Agency intends to cross-examine Dr. Lukács.

At this time, we cannot determine if it will be necessary to cross-examine the Agency's affiant as we have not yet seen the Agency's affidavit. In light of the expedited schedule, we suggest that it will be prudent to fix a date for the cross-examination at this time. In the event that we do not wish to proceed with a cross-examination, we will promptly notify you and the court reporter appointment can also be cancelled accordingly. Please kindly advise who the Agency's affiant(s) will be and their availability between April 30 to May 6.

Finally, we note that our Notice of Motion (page 1-2 of the Motion Record) refers to seeking orders under subparagraph 1(a)-(c) on an interim basis and “continuation” of these interim orders on an interlocutory basis as part of subparagraph 2(a)-(c). For greater certainty, please be advised that we will continue to seek the order under subparagraph 1(a) on an interlocutory basis as an alternative to subparagraph 2(a), if the Court does not grant the “complete removal” in subparagraph 2(a). We will continue to seek the orders under subparagraphs 1(b)-(c) on an interlocutory basis, as suggested in subparagraphs 2(b)-(c).

We look forward to hearing from you at your earliest convenience to set suitable dates for the cross-examination(s). We are available to discuss at your convenience.

Yours truly,

**EVOLINK LAW GROUP**



SIMON LIN

Barrister & Solicitor (Ontario/BC)

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Encls: Applicant's Notice of Consent to Electronic Service

**FEDERAL COURT OF APPEAL**

BETWEEN:

**AIR PASSENGER RIGHTS**

Applicant

– and –

**CANADIAN TRANSPORTATION AGENCY**

Respondent

**NOTICE OF CONSENT TO ELECTRONIC SERVICE**

The **Applicant**, Air Passenger Rights, consents to the electronic service of all documents in this application that are not required to be served personally. Electronic service of the documents may be made to the following electronic address:

**simonlin@evolinklaw.com**

with copy to

**lukacs@airpassengerrights.ca**

April 17, 2020



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**SIMON LIN**

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**A-102-20 -- Air Passenger Rights v CTA**

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**Allan Matte** <Allan.Matte@otc-cta.gc.ca>  
To: Simon Lin <simonlin@evolinklaw.com>

Tue, Apr 21, 2020 at 4:37 AM

Hi Mr. Lin,

Thank you for your letter. Our intention is to comply with the Court's Order regarding the filing of our responding record. We have not yet determined whether we will be cross-examining you client, nor have we selected an affiant. We will provide you with our Consent to electronic service with our record.

Regards,

Allan

Allan Matte

Senior Counsel/Avocat principal

Direction générale des services juridiques, de Secrétariat et de registraire/Legal, Secretariat and Registrar Services Branch

Direction des services juridiques/Legal Services Directorate

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