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VIA EMAIL

May 1, 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 Agency's letter of May 1, 2020.

It appears that the Agency continues to misquote case law and mischaracterize the Applicant's case in order to invite further procedural debate on a motion that this Court ordered to be expedited. If the Respondent's proposed courses of action were to be permitted, motions could never be expedited because a Respondent can always veto by raising a procedural objection and file motions against the underlying expedited motion to infinitely prolong the expedited hearing.

Firstly, the Agency cited *CBS Canada Holding Co. v Canada*, 2017 FCA 65, but they failed to bring to the Court's attention that that decision was involving an appeal from the Tax Court, where the rules differ from the *Federal Courts Rules*. The authority that clearly applies here is below:[1]

> *An affiant is required to answer questions on matters which have been set out in the affidavit as well as any collateral questions arising from his or her initial answers. In Bally-Midway Mfg. Co. v. M.J.Z. Electronics Ltd. (1984), 75 C.P.R. (2d) 160, Mr. Justice Dubé stated that cross-examinations on affidavits are confined to "the issues relevant to the interlocutory injunction and/or all allegations contained in the affidavit". In [Weight Watchers International Inc. v. Weight Watchers of Ontario Ltd. (No. 2) (1972), 6 C.P.R. (2d) 169 (F.C.T.D.)], Mr. Justice Heald relied upon jurisprudence which held that a person cross-examining on an affidavit was not confined to the area within the four corners of the affidavit* ***but could cover any matter relevant to the determination of the issue in respect of which the affidavit was filed****. In addition to being relevant, the question of course must not be of such a general nature that it cannot be intelligently answered, and the Court will exercise its discretion and disallow any question which it considers in the nature of a "fishing expedition".*
>
> [emphasis added]

Secondly, the Agency continues to mischaracterize the Applicant's case by *repeatedly* asserting that the Statement "has no legal effect",[2] and therefore judicial review is not available, suggesting there being no utility to expedite the motion despite the Court already ordered the motion be expedited. The Respondent's position is untenable, and judicial review is clearly available for the course of conduct the Agency has engaged in.[3]

The Applicant has already stated in its April 30, 2020 letter that the Application is not solely about whether the Statement was a "binding decision" or not, but rather: "*whether the Agency acted outside of its statutory mandate in issuing the Statement on Vouchers (and related publications) and, as a quasi-judicial body opining on a live legal controversy that may be before the tribunal*

[1] *Sawridge Band v. Canada*, 2005 FC 865
[2] Of note, the Applicant's in-chief submission was that the Statement was not a "binding decision". The Agency mischaracterized that as if the Applicant agrees that the Statement has "no legal effect". A document can still have legal effect, or create prejudice, even if it is not a "binding decision".
[3] *Moresby Explorers Ltd. v. Canada (Attorney General)*, 2007 FCA 273 at paras. 23-4; see also *David Suzuki Foundation v. Canada (Health)*, 2018 FC 380 at paras. 156-7

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later on, and whether that conduct exhibits a reasonable apprehension of bias." The essence of the judicial review was succinctly summarized in para. 1 of this Court's order of April 16, 2020.

Despite having exchanged multiple correspondences with the Applicant, and also numerous correspondences to the Court, the Agency still cannot identify a single reason **why** the Agency cannot follow the Rules and attend the cross-examination as required, and put their objections on the official record in the normal course. Indeed, the Agency's series of correspondence seeks to avoid that very issue and invites the Court to leap to the conclusion that the Agency should somehow be relieved from presenting their witness, or that the Court direct a new timetable to allow the myriad of motions that the Agency has suggested they wish to file.

In essence, the Agency is simply seeking, directly or indirectly, to appeal this Court's order of April 16, 2020, all with arguments that were raised or could have been raised before Locke J.A.

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

Yours truly,

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Simon Lin

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