

August 31, 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 (A-102-20)

We are counsel for the Applicant, Air Passenger Rights. Please kindly bring this letter to the attention of Boivin, J.A. By Order dated August 18, 2020, Boivin, J.A. is seized of this file.

This letter is in response to the Agency’s letter dated August 27, 2020. At the eleventh hour to resurrect its motion to strike, the Agency is seeking to infuse further confusion by making an unfounded allegation that the Applicant has taken an “inconsistent position”. The Agency further alleges that the Applicant should, instead of a judicial review, seek leave to appeal an “order” under s. 41 of the *Canada Transportation Act*. The Agency’s allegations are grossly misleading.

An “Order” under the Federal Courts Rules

The Agency’s faulty allegations resolve around the word “order” and is easily answered with a basic principle of statutory interpretation – **defined terms**. The word “order” is not a defined term under the *Canada Transportation Act* [CTA], nor the *Federal Courts Act* [FCA]. Hence, “order” under the *FCA* and *CTA* would be guided by the ordinary meaning of that term.

On the other hand, the *Federal Courts Rules* [FCR] defines “order” in a non-exhaustive manner in Rule 2 using the expression “includes”, which extends the ordinary meaning of the term “order”.¹

<p>Definitions</p> <p>2 The following definitions apply <u>in these Rules</u>.</p>	<p>Définitions</p> <p>2 Les définitions qui suivent s’appliquent <u>aux présentes règles</u>.</p>
<p>order <u>includes</u></p> <p>(a) a judgment;</p> <p>(b) a decision or <u>other disposition</u> of a tribunal; and</p> <p>(c) a determination of a reference under section 18.3 of the Act.</p>	<p>ordonnance <u>Sont assimilés à une ordonnance</u> :</p> <p>a) un jugement;</p> <p>b) une décision ou <u>autre mesure prise par un office fédéral</u>;</p> <p>c) une décision rendue dans le cadre d’un renvoi visé à l’article 18.3 de la Loi.</p>

¹ Statutory Interpretation 3/e, Ruth Sullivan at page 79-81 (**enclosed**)

In essence, “order” (as used under the *FCR* only) is broader than the ordinary term “order” (as used in the *FCA* or *CTA*), as evidenced by the fact that the Rules Committee specifically included “autre mesure” in the defined term. Accordingly, the Applicant submits that the broadly defined term “order” in the *FCR* would extend to the underlying Publications (the “policy” and “guidance” that is the subject of this judicial review).

The Applicant has not changed its position, nor adopted any inconsistent position. The Applicant’s Rule 317 request was already included in its April 9, 2020 Notice of Application. It is the Agency that has failed to appreciate the statutory frameworks and the above basic principle of statutory interpretation. The Applicant’s position has always been that the impugned Publications could not be an “order” (in the ordinary sense). However, the Publications could fall within the extended meaning of an “order” (as that term is broadly defined in the *FCR*), which would trigger the application of Rule 317. Hence, the Applicant has made its request for materials under Rule 317.

The Agency’s Rule 318(2) Objection

In its letter, the Agency purports to change the reasons for objection that they already provided under Rule 318(2) on August 20, 2020, or otherwise bootstrap every other imaginable reason for objection (i.e., relevance, privilege, and/or fishing).

It was imperative for the Agency to bring their “best foot forward” when they stated their reasons for objection under Rule 318(2) on the deadline of August 20, 2020. Indeed, the Agency has had nearly four months to carefully consider any reason it wishes to rely upon, as opposed to the standard 20-days. The Agency’s belated attempt to assert every imaginable reason for objection, and without any further explanation or elaboration, is odd and not supported by the *Rules*.

Furthermore, the Applicant submits that it would be inappropriate to indefinitely defer the Rule 318(3) determination and/or the Rule 41 subpoena request until the Agency’s motion to strike is finally determined, which may be many months later when a hearing could be scheduled before a three or five judge panel. Judicial reviews should be decided with due dispatch (*FCA* s. 18.4).

It is also in the Agency’s interest for this Court to render a prompt determination of the judicial review *on the merits* to “clear the air”. Part of the Applicant’s judicial review is an allegation that the Agency’s members exhibited a reasonable apprehension of bias by participating in the impugned actions. A prompt disclosure of the relevant records, assuming the Agency’s members were not involved in the impugned actions, would be a substantial step in “clearing the air” and significantly advancing this judicial review to the merits stage. It is inexplicable why the Agency is seeking to raise a myriad of objections that would inevitably delay the merits hearing and, potentially, a vindication of the allegations that they are contesting against.

In these circumstances, the Applicant submits that the most appropriate course would be for the Court to summarily dismiss the Agency's objection(s) for lack of any specificity. Alternatively, the Court could consider directing the Agency substantiate their objection on a proper evidentiary basis by bringing a motion under Rule 369, followed by the Applicant's response.

[8] Now to objections under Rule 318(2). Where the relevant administrative decision-maker, here the Agency, objects under Rule 318(2) to disclosing some or all of the material requested under Rule 317 and the applicant does not dispute the objection, then the material is not transmitted. However, if, as here, the applicant disputes the objection, either the applicant or the administrative decision-maker may ask the Court for directions as to how the objection should be litigated: see Rule 318(3).

[9] In response to a request for directions, the Court may determine that the objection cannot succeed solely on the basis of the reasons given by the administrative decision-maker under Rule 318(2). In that case, it may summarily dismiss the objection and require the administrative decision-maker to transmit the material under Rule 318(1) within a particular period of time.

[10] In cases where the Rule 318(2) objection might have some merit, the Court can ask for submissions from the parties on a set schedule. But sometimes the Court will need more than submissions: in some cases, there will be real doubt and complexity and sometimes evidence will have to be filed by the parties to support or contest the objection. In cases like these, the Court may require the administrative decision-maker to proceed by way of a written motion under Rule 369. That Rule provides for motion records, responding motion records and replies, and also the deadlines for filing those documents. The motion records require supporting affidavits and written representations.²

[emphasis added]

An Applicant should not be the moving party in such a motion and be placed in a position to have to address every imaginable objection that may, or could, be raised in a Rule 317 request, which is precisely what the Agency is seeking to advance in this instance.

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

Yours truly,
EVOLINK LAW GROUP


SIMON LIN

Cc: Mr. Allan Matte, counsel for the Respondent, Canada Transportation Agency

² *Lukács v. Canada (Transportation Agency)*, 2016 FCA 103 at paras. 8-10; *Bernard v. Public Service Alliance of Canada*, 2017 FCA 35 at para. 12; see also the directions of de Montigny, J.A., that also involved the Agency and a similar circumstance relating to Rule 317-8 (*A-431-17 Dr. Gábor Lukács v. Canadian Transportation Agency and Air Transat A.T. Inc.*) (**enclosed**)

ESSENTIALS OF
CANADIAN LAW

STATUTORY
INTERPRETATION
THIRD EDITION

RUTH SULLIVAN



1) Statutory Definitions

Many statutes and regulations begin with a section or subsection, sometimes quite a long one, setting out definitions of words or expressions that are used in the Act. Definitions may also be found at the beginning of divisions, parts, or individual sections.²¹ Because the legislature is sovereign, it may assign meanings to words that bear little or no relation to their ordinary meaning. It can deem “red” to mean blue or “land” to include sky and ocean. But legislatures generally have little interest in major departures from conventional usage, and most definitions incorporate, clarify, or only slightly modify the ordinary meaning, or in some cases the technical meaning, of the defined words.

The federal *Interpretation Act*²² sets out a number of rules applicable to statutory definitions:

15 (1) Definitions or rules of interpretation in an enactment apply to all the provisions of the enactment, including the provisions that contain those definitions or rules of interpretation.

(2) Where an enactment contains an interpretation section or provision, it shall be read and construed

(a) as being applicable only if a contrary intention does not appear; and

(b) as being applicable to all other enactments relating to the same subject-matter unless a contrary intention appears.

16. Where an enactment confers power to make regulations, expressions used in the regulations have the same respective meanings as in the enactment conferring the power.

Similar rules apply to provincial and territorial legislation as well.

a) Exhaustive versus Non-exhaustive Definitions

It is important to distinguish between statutory definitions that are exhaustive and those that are non-exhaustive.

Exhaustive definitions are usually introduced by the word “means” followed by a definition that comprises the sole meaning the word may bear throughout the statute and throughout any regulations made under it, for example:

21 Section 8 of the Uniform Law Conference Drafting Conventions says, “Definitions should be set out in the first section of the Act, unless they apply only to a particular Part, section or group of sections. In that case, they should be placed at the beginning of the passage in question.” In older Acts and in some jurisdictions, definitions are set out at the end of Acts, parts, or sections.

22 RSC 1985, c I-21.

In this section,

“fishing gear” means any tackle, netting, or other device designed or adapted to catch fish or marine mammals.

Unless a drafting error has occurred, the meaning assigned to “fishing gear” by this definition may not be varied or supplemented by ordinary usage or by other convention.

Non-exhaustive definitions are usually introduced by the expression “includes,” or “does not include,” followed by a directive which adds to or subtracts from the ordinary (or technical) meaning of the defined term, for example:

In this Part,

“nets” includes crab pots and lobster traps but does not include gill nets.

This definition presupposes that the interpreter knows or will be able to determine the ordinary meaning of “nets” in this context. The point of the definition is not to fix the meaning of “nets” but to ensure that the provisions governing the use of nets apply equally to crab pots and lobster traps, which are functional equivalents, and do not apply to gill nets, which are meant to be governed by different rules.

Note that definitions in legislation sometimes use the word to be defined as part of the definition. This generally is done to limit the scope of the defined term and does not indicate a lack of skill on the part of the drafter; it simply reflects the fact that statutory definitions have a different function than dictionary definitions.

b) Uses of Statutory Definitions

Statutory definitions are used for a variety of purposes. One important use is to create a short form of reference for lengthy or awkward expressions, for example:

In this Act,

“investigation” means an investigation carried out by the Competition Commissioner pursuant to s. 19 of the *Competition Act*;

“Minister” means the Minister of Employment and Immigration.

When readers come across the term “investigation” or “Minister” in the Act, they are expected to fill in the details identifying the relevant investigation or minister. This avoids having to repeat these details each time a reference is made.

Statutory definitions are also used to narrow the usual scope of a word or expression, for example:

In this Part,

“grain” does not include rice or wild rice;

“employee” means an employee who is not a member of a union;

“will” means a will made before 1 January 1957.

These definitions rely on the ordinary (or technical) meanings of the defined terms, which are then narrowed by excluding things that might normally fall within the meaning (the first example above) or by adding qualifying words or expressions that describe a subclass within the meaning (the next two examples).

Statutory definitions are also used to expand the usual scope of a word or expression, for example:

In this section,

“fish” includes shell fish, crustaceans, and marine mammals;

“sale” includes a promise to sell;

“will” means any writing signed by a person, whether witnessed or not, that contains a direction respecting the disposition of their property to take effect after their death.

In these examples, **the statutory definition enlarges the ordinary (or technical) meaning of the defined terms by including things that might normally be thought to fall outside their denotation.** The first two examples are non-exhaustive; the verb “includes” is used to extend the defined term to the things singled out for special mention—shell fish and some mammals, mere promises to sell—so that they are subject to the same rules as the things within the ordinary scope of the terms—standard types of fish, enforceable contracts of sale. In the third example, an exhaustive definition is used to expand the defined term to writings that are not ordinarily considered wills—an insurance contract naming the beneficiary of life insurance, for example.

Finally, **statutory definitions are used to resolve possible doubt or ambiguity:**

In this Act,

“mammal” includes whales and other marine mammals;

“fruit” does not include tomatoes;

“counsel” means a member of the Law Society of Upper Canada;

“vehicle” means any car, cart, truck, motorcycle, tractor, or other conveyance capable of travelling on roadways at a speed of 30 k.p.h. or more.

These definitions are meant to clarify rather than qualify the ordinary (or technical) meaning of the defined terms—to create precise meanings and sharp distinctions, to resolve doubt. They are often included by drafters in an effort to anticipate and resolve the interpretation issues that are likely to arise in the application of the legislation. Sometimes they are added to legislation by way of amendment in response to complaints or unsatisfactory judicial interpretations.

As these examples indicate, statutory definitions do not necessarily lighten the interpreter's load. Many simply add to the ordinary or technical meaning of the defined term, which must still be determined in the usual way. And since all consist of words, all require interpretation, like any other legislative text. In the definition of "vehicle" set out above, for example, although the interpreter is given help in determining the scope of the defined term, he or she must now tackle "conveyance," "roadway," and "capable."

2) Interpretation Acts

Each Canadian jurisdiction has an Act that applies to all the legislation enacted by that jurisdiction. Most are called "Interpretation Act," but Ontario's is called the *Legislation Act* because it applies to other legislative matters as well.

Although there are some significant variations in the Acts of the different jurisdictions, in many respects they are similar or identical. All include provisions about enactment, the coming into force of legislation, and its temporal and territorial application; all have a smattering of interpretation rules. In addition, some have rules for making appointments, conferring powers, tabling reports, taking oaths, computing time, and other miscellaneous matters. And finally, there are numerous definitions of particular words—words like "Act," "bank," "contravene," "standard time," "writing," and the auxiliary verbs "may" and "shall" or "must"—that might occur in legislation dealing with any subject.

In the federal Act, for example, "person" is defined to include corporations while "corporation" is defined to exclude partnerships, even partnerships that are considered separate legal entities under provincial law. This means that each time the word "person" is used in a federal enactment, it is presumed to refer to individuals and corporations but not to partnerships.

Interpretation Acts apply generally unless a "contrary intention" is either expressed or implied in the legislation being interpreted. For example, section 3 of the federal *Interpretation Act* says:



TO : Appeal Registry

FROM : de Montigny J.A.

DATE : March 13, 2018

RE : A-431-17

Dr. Gábor Lukács v. Canadian Transportation Agency and Air Transat A.T. Inc.

DIRECTION

The applicant has sought directions, pursuant to Rule 318(3) of the *Federal Courts Rules*, S.O.R. 98/106, with respect to the procedure to be followed for making submissions in relation to the Canadian Transportation Agency's failure and/or objection to transmit records. Having reviewed the record, and more particularly the exchange of letters dated February 6, 8 and 12, 2018 between the parties, I have come to the conclusion that the issue ought to be decided on the basis of a written motion under Rule 369. The Canadian Transportation Agency shall therefore file a Motion Record under that Rule, complete with evidence and written representations, to assert its objections to the requested material in the Notice of Application. Such motion shall be filed within 10 days of this Direction, and the time limits set out in Rule 369 shall apply for the Canadian Transportation Agency's record and for the reply. If the Agency wishes part of its Motion Record to be sealed pursuant to Rules 151-152, it shall make such a request in its Notice of Motion and provide evidence to support the request.

"YdM"