

FEDERAL COURT OF APPEAL

BETWEEN:

AIR PASSENGER RIGHTS

Appellant

-and-

ATTORNEY GENERAL OF CANADA

Respondent

-and-

CANADIAN TRANSPORTATION AGENCY

Intervener

MOTION RECORD OF THE ATTORNEY GENERAL OF CANADA

Informal motion to claim privilege over portions of two documents

ATTORNEY GENERAL OF CANADA

Department of Justice Canada
Civil Litigation Section
50 O'Connor Street
Ottawa, ON K1A 0H8
Fax: 613-954-1920

Per: Lorne Ptack

Tel: (613) 601-4805

Email: Lorne.Ptack@Justice.gc.ca

Per: J. Sanderson Graham

Tel: (613) 670-6274

Email: Sandy.Graham@justice.gc.ca
for the Attorney General of Canada

Index

Tab	Document	Page
1	Affidavit of Elizabeth Schmidt, Affirmed December 14, 2021	1
2	Written Representations of the Respondent	36

Court File No.: A-102-20,

FEDERAL COURT OF APPEAL

BETWEEN:

AIR PASSENGER RIGHTS

Appellant

and

THE ATTORNEY GENERAL OF CANADA

Respondent


AFFIDAVIT OF ELIZABETH SCHMIDT

I, **ELIZABETH SCHMIDT**, of the City of Ottawa, in the Province of Ontario, legal assistant at the Department of Justice **AFFIRM AS FOLLOWS:**

1. I am a legal assistant working with Lorne Ptack, counsel for the Respondent, the Attorney General of Canada. As such, I have personal knowledge of the matters that I hereinafter depose. Where facts are not from my direct knowledge, I have stated the source of the information and I believe it to be true.
2. I am aware from reviewing the file that the Applicant Air Passenger Rights seeks access to documents in the possession of the Canadian Transportation Agency (the "CTA").

- 3. I am further aware that the Respondent Attorney General of Canada seeks to withhold from disclosure text contained in two documents.
- 4. This matter was the subject of October 15, 2021 Order and Reasons by the Honourable Justice Gleason. Copies of the Order and Reasons are attached as Exhibits "A1" and "A2" to this affidavit.
- 5. In respect of the first document at issue, an email dated March 20, 2020, I have been advised by counsel and do believe that the individual Valérie Lagacé, named on that document, was at the time, and remains, Senior General Counsel at the CTA. I have confirmed that information through a search of 'GEDS', the Government online directory service. I have further been advised by counsel and do believe that the other individuals named on the email were employed by or were otherwise part of the CTA at the time of the email. A copy of the first document is attached as Exhibit "B".
- 6. In respect of the second document, an attachment to an email dated March 23, 2020, I have reviewed the attachment and am aware that it relates to Order No. [REDACTED] of the CTA. A copy of the document is attached as Exhibit "C".

Affirmed before me)
 at the City of Ottawa in the Province)
 of Ontario before me on the 14th of)
 December, 2021)


 _____)
 A Commissioner for Taking Affidavits)

LSO# 82792 P



Elizabeth Schmidt

THIS IS EXHIBIT "A1" REFERRED TO IN
THE AFFIDAVIT OF Elizabeth Schmidt,
Affirmed this 14th day of December, 2021

A handwritten signature in cursive script, appearing to read "A. Seduce".

A Commissioner, etc.

Federal Court of Appeal



Cour d'appel fédérale

Date: 20211015

Docket: A-102-20

Ottawa, Ontario, October 15, 2021

Present: GLEASON J.A.

BETWEEN:

AIR PASSENGER RIGHTS

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

and

THE CANADIAN TRANSPORTATION AGENCY

Intervener

ORDER

UPON informal motion of the applicant to file an additional affidavit in respect of its disclosure motion;

AND UPON motion of the applicant for an order under Rules 317 and 318 of the *Federal Courts Rules*, SOR 98/106, requiring the Canadian Transportation Agency (the CTA) to disclose the documents described in the applicant's Notice of Motion;

AND UPON motion of the CTA for leave to intervene in this application and other consequential orders;

AND UPON reading the materials filed;

THIS COURT ORDERS that:

1. The motions are granted on the terms set out below;
2. The additional affidavit from Dr. Gábor Lukács, sworn May 12, 2021, may be filed, effective the date it was received by the Court;
3. Within 60 days of the date of this Order, the CTA shall disclose to the applicant:
 - a. all non-privileged documents sent to or by a member of the CTA (including its Chairperson or Vice-Chairperson) between March 9 and March 25, 2020 concerning the statement on vouchers posted on the CTA's website on March 25, 2020;
 - b. all non-privileged documents sent to a third party by the CTA or received from a third party by the CTA between March 9 and March 25, 2020 concerning the statement on vouchers posted on the CTA's website on March 25, 2020; and

- c. all non-privileged documents related to any meeting attended by a CTA member (including its Chairperson or Vice-Chairperson) between March 9 and March 25, 2020 where the statement on vouchers posted on the CTA's website on March 25, 2020 was discussed;
4. The foregoing disclosure shall be made electronically;
5. Within 60 days of the date of this Order, the AGC shall submit to the Court for a ruling on privilege all documents over which privilege is asserted that would otherwise fall within paragraph 3 of this Order, the whole in accordance with the Reasons for this Order;
6. Within the same timeframe, the AGC shall serve and file a redacted version of its submissions, from which details of the contents of the documents are deleted;
7. The applicant shall have 30 days from receipt of the forgoing submissions to make responding submissions, if it wishes;
8. The materials related to claims for privilege shall then be submitted to the undersigned for a ruling on privilege;
9. Within 30 days of receipt of a ruling on the privilege claims, the applicant shall file any additional affidavit(s) it intends to rely on in support of its application;
10. The time for completion of all subsequent steps for perfection of this application shall be governed by the *Federal Courts Rules*;

11. The CTA is granted leave to intervene and to file an affidavit and a memorandum of fact and law of no more than 10 pages, the whole in accordance with the Reasons for this Order;
12. The style of cause is amended to add the CTA as an intervener and it shall be served with all materials the parties intend to file;
13. The issues of whether the CTA will be permitted to make oral submissions and of costs in respect of its intervention are remitted to the panel of this Court seized with hearing this application on its merits; and
14. No costs are awarded in respect of these motions.

"Mary J.L. Gleason"

J.A.

THIS IS EXHIBIT "A2" REFERRED TO IN
THE AFFIDAVIT OF Elizabeth Schmidt,
Affirmed this 14th day of December, 2021



A Commissioner, etc.

Federal Court of Appeal



Cour d'appel fédérale

Date: 20211015

Docket: A-102-20

Citation: 2021 FCA 201

Present: GLEASON J.A.

BETWEEN:

AIR PASSENGER RIGHTS

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

and

THE CANADIAN TRANSPORTATION AGENCY

Intervener

Dealt with in writing without appearance of parties.

Order delivered at Ottawa, Ontario, on October 15, 2021.

REASONS FOR ORDER BY:

GLEASON J.A.

Federal Court of Appeal



Cour d'appel fédérale

Date: 20211015

Docket: A-102-20

Citation: 2021 FCA 201

Present: GLEASON J.A.

BETWEEN:

AIR PASSENGER RIGHTS

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

and

THE CANADIAN TRANSPORTATION AGENCY

Intervener

REASONS FOR ORDER

GLEASON J.A.

[1] I have before me three motions: a motion from the applicant seeking disclosure of documents from the Canadian Transportation Agency (the CTA) under Rules 317 and 318 of the

Federal Courts Rules, SOR/98-106, or alternatively, that a subpoena be issued for their disclosure; an informal motion from the applicant made by way of letter seeking to put additional materials before the Court on the disclosure motion; and a motion from the CTA seeking leave to intervene in this application.

[2] Before turning to each of the motions, a little background is useful.

[3] The underlying judicial review application in this file challenges a statement on vouchers posted on the CTA's website on March 25, 2020, shortly after the onset of the COVID-19 pandemic. The CTA opined in the statement that airlines could issue vouchers to passengers for cancellations caused by the pandemic as opposed to reimbursements for cancelled flights. The statement provided:

The COVID-19 pandemic has caused major disruptions in domestic and international air travel.

For flight disruptions that are outside an airline's control, the Canada Transportation Act and Air Passenger Protection Regulations only require that the airline ensure passengers can complete their itineraries. Some airlines' tariffs provide for refunds in certain cases, but may have clauses that airlines believe relieve them of such obligations in force majeure situations.

The legislation, regulations, and tariffs were developed in anticipation of relatively localized and short-term disruptions. None contemplated the sorts of worldwide mass flight cancellations that have taken place over recent weeks as a result of the pandemic. It's important to consider how to strike a fair and sensible balance between passenger protection and airlines' operational realities in these extraordinary and unprecedented circumstances.

On the one hand, passengers who have no prospect of completing their planned itineraries with an airline's assistance should not simply be out-of-pocket for the cost of cancelled flights. On the other hand, airlines facing huge drops in passenger volumes and revenues should not be expected to take steps that could threaten their economic viability.

While any specific situation brought before the CTA will be examined on its merits, the CTA believes that, generally speaking, an appropriate approach in the current context could be for airlines to provide affected passengers with vouchers or credits for future travel, as long as these vouchers or credits do not expire in an unreasonably short period of time (24 months would be considered reasonable in most cases).

The CTA will continue to provide information, guidance, and services to passengers and airlines as we make our way through this challenging period.

[4] In its judicial review application, the applicant seeks the following declarations: (1) that the foregoing statement does not constitute a decision of the CTA and has no force or effect at law; (2) that the issuance of the statement violates the CTA's Code of Conduct and gives rise to a reasonable apprehension of bias, either for the CTA, as a whole, or for any member who supported the statement; and (3) that the CTA as a whole or any member who supported the statement exceeded or lost its or their jurisdiction to rule on passenger complaints seeking reimbursements for cancelled flights. The applicant also seeks injunctive relief requiring, among other things, removal of the statement from the CTA's website and an order enjoining the CTA as a whole or, alternatively, any member who supported the statement, from hearing passenger complaints requesting reimbursement for flights cancelled because of the pandemic.

[5] The applicant sought an interlocutory injunction for much the same relief on an interim basis. Justice Mactavish dismissed the request for interim relief, but in so doing accepted, without specifically ruling on the point, that the applicant's judicial review application raised a serious issue (*Air Passenger Rights v. Canada (Transportation Agency)*, 2020 FCA 92, [2020] F.C.J. No. 630 at para. 17).

[6] The CTA then brought a motion to strike the application, which was dismissed by Justice Webb (*Air Passenger Rights v. Canada (Transportation Agency)*, 2020 FCA 155). In so ruling, Justice Webb held that the bias issues raised by the applicant were ones that merit a hearing before a full panel of this Court (at para. 33).

[7] After being seized with the applicant's disclosure motion, I issued a direction requesting submissions on the proper respondent in this matter because the applicant had named the CTA and not the Attorney General of Canada (the AGC). After receipt of submissions from the parties and the AGC, I ruled that the AGC was the proper respondent in light of the nature of the application, the requirements of the *Federal Courts Rules* and the nature of the allegations made in the application. However, I left open the possibility of the CTA's bringing a motion to intervene (*Air Passenger Rights v. The Attorney General of Canada*, 2021 FCA 112).

[8] The AGC subsequently advised that he relied on the CTA's submissions in response to the applicant's motion for disclosure and made brief submissions opposing the applicant's informal motion to file additional materials on the disclosure motion.

[9] Thereafter, the CTA made a motion to intervene in the application, seeking the ability to make submissions related to its jurisdiction and mandate. The applicant opposes the intervention motion, and the AGC takes no position in respect of it.

I. The Motion for Disclosure and the Informal Motion to add an Affidavit on the Disclosure Motion

[10] In its motion for disclosure, the applicant seeks an order requiring disclosure of unredacted copies of all CTA records from March 9 to April 8, 2020 in respect of the impugned statement, including, without restriction, emails, meeting agendas, meeting minutes, notes, draft documents, and memos.

[11] In support of its disclosure motion, the applicant filed an affidavit from its President, Dr. Gábor Lukács, in which he attached excerpts from the transcript of the evidence given by the CTA's Chairperson before the House of Commons Standing Committee on Transport, Infrastructure and Communities on December 1, 2020. Dr. Lukács also appended an email exchange between an official at the Transport Canada and a Member of Parliament and documents obtained from the CTA through an access to information request that sought documents similar to those sought by the applicant in the present motion for disclosure. Several of the documents disclosed by the CTA in response to the access request were heavily redacted. In addition, the documents disclosed are but a few of the several thousand pages that the CTA indicated were responsive to the access request.

[12] The materials appended to Dr. Lukács' affidavit indicate that there were email communications between representatives from two airlines and the CTA regarding the subject matter of the impugned statement before it was issued and that there were likewise similar communications between representatives of the CTA and Transport Canada about the statement

before the statement was issued. Given the redactions to these documents, it is difficult to discern the nature of what was said about the statement in them. Other documents attached as exhibits to Dr. Lukács' affidavit indicate that the Chairperson and Vice-Chairperson of the CTA received drafts of the impugned statement before it was posted on the CTA's website. The fact that the Chairperson of the CTA was involved in approving the statement was confirmed in his testimony to the House of Commons Standing Committee on Transport, Infrastructure and Communities on December 1, 2020 and the email exchange between officials at the Transport Canada and a Member of Parliament. The latter email exchange also suggests that other CTA members endorsed the impugned statement.

[13] In the informal motion, the applicant seeks to add an additional affidavit from Dr. Lukács that appends three additional documents he obtained after he swore his first affidavit in support of the disclosure motion. These documents indicate that there are additional documents concerning the impugned statement that were exchanged between the CTA and Transport Canada prior to the issuance of the statement. One of the appended documents is a less redacted version of one of the emails appended to Dr. Lukács' original affidavit.

[14] I will deal with the informal motion first.

[15] The AGC objects to the filing of Dr. Lukács' additional affidavit because he says that the applicant did not follow the *Federal Courts Rules* in proceeding by way of informal motion and because the additional documents the applicant seeks to add to the record in respect of the disclosure motion are not relevant.

[16] With respect, I disagree. Given the current circumstances associated with the COVID-19 pandemic, as well as the fact that the informal motion contained an affidavit that appended the additional documents that the applicant seeks to put before the Court, there was no need for the applicant to have proceeded via way of formal motion. The AGC has suffered no prejudice due to the way the motion was brought and the Court has before it all that is necessary for disposition of the motion, including the arguments of the parties.

[17] As for relevance, the additional documents are of the same nature as those appended to Dr. Lukács' original affidavit and are relevant to the applicant's bias arguments, which are two-fold in nature. On one hand, the applicant asserts that the posting of the statement, itself, gives rise to a reasonable apprehension of bias because it indicates that the CTA pre-judged the merits of any complaint that might be filed in which a passenger seeks compensation for a cancelled flight. On the other hand, the applicant asserts that there was inappropriate third party interference in the CTA's adoption of the policy reflected in the impugned statement, which the applicant says provides an additional basis for a reasonable apprehension of bias. The documents the applicant wishes to add are relevant to the second prong of its bias argument.

[18] The second affidavit of Dr. Lukács is therefore relevant and I will consider it in support of the applicant's disclosure request.

[19] Turning to that request, adopting the submissions that were previously filed by the CTA, the AGC opposes the requested disclosure for several reasons. First, he says that Rule 317 of the *Federal Courts Rules* does not permit or require the requested disclosure because the Rule only

applies to material in the possession of a tribunal whose order is the subject of an application for judicial review. According to the AGC, there is no basis for disclosure under Rule 317 or 318 because the applicant contends that the impugned statements do not have the force of an order and no order has been made. In the alternative, the AGC submits that the request for disclosure should be denied because it is overly-broad, constitutes a fishing expedition and the materials sought are irrelevant to the issues raised in the application, which the AGC says have been impermissibly expanded by the applicant to include alleged third-party interference in the adoption of the impugned statement.

[20] I disagree in large part with each of these assertions.

[21] Turning to the first of the foregoing assertions, as the applicant rightly notes, the breadth of materials that are subject to disclosure under Rules 317 and 318 of the *Federal Courts Rules* is broader where bias or breach of procedural fairness is alleged, particularly where, as here, relief in the nature of prohibition is sought. In such circumstances, disclosure is not limited to the materials that were before the tribunal when an order was made. Rather, where such arguments are raised, documents in the possession, control or power of a tribunal that are relevant to the allegations of bias or breach of procedural fairness are subject to disclosure. Indeed, were it otherwise, this Court would be deprived of evidence necessary for the disposition of an applicant's claims of bias or breach of procedural fairness and the availability of relief in the nature of prohibition would be largely illusory: see, e.g., *Humane Society of Canada Foundation v. Canada (National Revenue)*, 2018 FCA 66, 289 A.C.W.S. (3d) 875 at paras. 5-6; *Gagliano v. Canada (Commission of Inquiry into the Sponsorship Program & Advertising Activities)*, 2006

FC 720, 293 F.T.R. 108 at para. 50, aff'd 2007 FCA 131; *Majeed v. Canada (Minister of Employment & Immigration)*, 1997 CarswellNat 1693, [1993] F.C.J. No. 908 (F.C.T.D.) at para. 3, aff'd [1994] F.C.J. No. 1401 (F.C.A.). Thus, the first assertion advanced by the AGC as to the scope of permitted disclosure under Rules 317 and 318 is without merit.

[22] As concerns the subsidiary arguments advanced by the AGC to resist disclosure, I do not agree that all the documents sought by the applicant are irrelevant or fall outside the scope of the claims made in the applicant's Notice of Application. However, the requested disclosure is broader than necessary and goes beyond that which is relevant to the bias issues raised by the applicant. Disclosure should instead be limited to documents sent to or from a member of the CTA (including its Chairperson and Vice-Chairperson), related to a meeting attended by CTA members or sent to or from a third party concerning the impugned statement between March 9 and March 25, 2020, the date the statement was posted on the CTA website. In addition, privileged documents should be exempt from disclosure.

[23] For clarity, meetings include telephone conversations, video conferences and internet meetings as well as in-person meetings and third parties include anyone other than a member or employee of the CTA.

[24] As noted, the applicant's allegations related to bias are two-fold and concern, first, the alleged pre-judgment by the CTA as an institution or, in the alternative, by its constituent members of passengers' entitlement to reimbursement for flights cancelled due to the COVID-19 pandemic and, second, alleged third-party influence in the development of the impugned

statement on vouchers. The Notice of Application and affidavits of Dr. Lukács are broad enough to encompass both aspects of the bias argument. I therefore do not accept that the bias argument has been impermissibly widened by the applicant.

[25] Documents received by and sent from CTA members or sent to or by anyone at the CTA from third parties about the subject matter of the statement that were sent or received prior to the date the statement was posted are relevant to the applicant's bias allegations because they are relevant to the involvement of decision-makers and third parties in the adoption of the impugned statement. Such involvement is central to the applicant's bias allegations. Likewise, documents related to meetings attended by CTA members during which the impugned statement was discussed before its adoption are similarly relevant.

[26] The evidence filed to date by Dr. Lukács shows that there were communications between third parties and the CTA about the subject matter of the impugned statement, prior to its adoption. Such evidence also suggests that the CTA's Chair, and possibly other CTA members, were involved in the decision to adopt and post the impugned statement. There is therefore a factual grounding for the requested disclosure, which cannot be said to constitute an impermissible fishing expedition.

[27] However, the applicant has provided no evidence to substantiate disclosure of documents post-dating the date the impugned statement was posted. Similarly, the applicant has failed to establish that documents that were purely internal to the CTA and which were not shared with its members are relevant. In short, there is no basis to suggest that such documents would contain

information about whether CTA members or third parties were involved in making the decision to post the impugned statement, which is the essence of the applicant's bias allegations. Thus, these additional documents need not be disclosed.

[28] The AGC, in adopting the submissions of the CTA, has requested that if disclosure is ordered, privileged documents be exempt from disclosure and that a process be established for ruling on privilege claims. I agree that this is necessary, and believe that the most expeditious process for advancing any claims of privilege would be for the CTA to submit any documents over which it claims privilege to the Court on a confidential basis for a ruling.

[29] I would accordingly order that, within 60 days from the date of the Order in these matters, all non-privileged documents sent to or by a member of the CTA (including its Chairperson or Vice-Chairperson) between March 9 and March 25, 2020 or sent to a third party by the CTA or received from a third party by the CTA between the same dates concerning the impugned statement or related to a meeting attended by a CTA member (including its Chairperson or Vice-Chairperson) between March 9 and March 25, 2020 where the impugned statement was discussed shall be provided electronically to the applicant. I would also order that, within the same period, the AGC shall provide the Court, on a confidential basis, copies of any document over which the CTA claims privilege, that would otherwise be subject to disclosure, along with submissions outlining the basis for the privilege claim. Such filing may be made via way of informal motion and should be supported by an affidavit attaching copies of the documents over which privilege is claimed. A redacted version of the AGC's submissions, from which all details regarding the contents of the documents are deleted, shall be served and filed.

The applicant shall have 30 days from receipt to make responding submissions, if it wishes.

These materials shall then be forwarded to the undersigned for a ruling on privilege.

[30] Should a 60-day period be too short to accomplish the foregoing, the AGC may apply for an extension, via way of informal motion supported by affidavit evidence, if the time provided is inadequate by reason of complexities flowing from the COVID-19 pandemic or the number of documents involved.

[31] The applicant will have 30 days from receipt of this Court's ruling on the privilege claims to serve any additional affidavits it intends to rely on in support of its application. Subsequent time limits for completion of the remaining steps to perfect the application will thereafter be governed by the *Federal Courts Rules*.

II. The Motion for Intervention

[32] I turn now to the CTA's motion for intervention. It seeks leave to intervene to provide a brief affidavit, a memorandum of fact and law and oral submissions on its jurisdiction and, more specifically, on the scope of its regulatory and adjudicative functions. The CTA proposes that such affidavit would be limited to attaching a sample of six resource, informational and guidance tools it says it has issued and posted on its website and the submissions limited to explaining the scope of the CTA's jurisdiction and practice of publishing guidance materials on its website.

[33] The applicant objects to the intervention, arguing that it is an impermissible attempt by the CTA to indirectly argue the merits of the bias issue. The applicant further submits that the AGC is the only party who should be heard and says that the AGC is able to adequately defend against the bias claims. The applicant in the alternative submits that, if it is allowed to intervene, the CTA should not be allowed to file additional evidence as an intervener is bound by the record the parties put before the Court and may not file new evidence or raise new arguments. The applicant also says that two of the six examples the CTA wishes to submit are bootstrapping as they were issued by the CTA after this application was commenced.

[34] The test for intervention applied by this Court involves the consideration of several factors such as whether: (1) the intervener is directly affected by the outcome; (2) there is a justiciable issue and a public interest raised by the intervention; (3) there is another efficient means to put the issue before the Court; (4) the position of the proposed intervener is adequately defended by one of the parties; (5) the interests of justice are better served by the intervention; and (6) the Court can effectively decide the case without the participation of the intervener: *Rothmans Benson & Hedges Inc. v. Canada (Attorney General)*, [1989] F.C.J. No. 446, 1989 CarswellNat 594, at para. 12; *Sport Maska v. Bauer Hockey Corp.*, 2016 FCA 44, [2016] 4 F.C.R. 3 at para. 37-39[*Sport Maska*]. However, as noted at paragraph 42 of *Sport Maska*, the test is a flexible one as each case is different and, ultimately, the most important question for the Court is whether the interests of justice are best served by granting the intervention.

[35] Here, I believe the interests of justice would be best served by granting the CTA the right to intervene as the Court may well benefit from some of the background information the CTA

seeks to put before the Court, which will set out the relevant context. The CTA is uniquely placed to provide such information to the Court, and such information might be important for the Court to understand in order to appreciate the relevant backdrop and scope of the CTA's jurisdiction in regulatory and adjudicative matters. Administrative tribunals have often been granted leave to intervene to explain their jurisdiction as was noted by the Supreme Court of Canada in *Ontario (Energy Board) v. Ontario Power Generation*, 2015 SCC 44, [2015] 3 S.C.R. 147 at paras. 42 and 48.

[36] That said, it is vital that the CTA's intervention not impair its ability to function as an independent administrative tribunal. Its submissions must therefore be factual and go no further than explaining its role and setting out the examples the CTA wishes to put before the Court that pre-date March 25, 2020. I do not believe it appropriate that the CTA refer to more recent examples because they are not directly relevant to what transpired in this application and may be perceived as an attempt to bootstrap the approach taken by the CTA in issuing the impugned statement. It is not the role of the CTA in intervening to act as an advocate or in any way defend the propriety of issuing the impugned statement. The CTA should rather behave as an *amicus*, who is allowed to intervene solely to ensure the Court possesses relevant background information.

[37] The examples the CTA will be allowed to put before the Court are not the sort of evidence that it is impermissible for an intervener to add to the record, if they indeed even constitute evidence as opposed to something more akin to a decision that may simply be filed or referred to in submissions. They do not expand the factual record or points in issue.

[38] I would accordingly allow the CTA to submit an affidavit that attaches the four examples appended as exhibits to the affidavit of Meredith Desnoyers, sworn July 14, 2021, which pre-date March 25, 2020. The applicant may submit such affidavit at the same time as the AGC submits its affidavits in response to those of the applicant. I would also allow the CTA to file a memorandum of fact and law of no more than 10 pages, explaining its jurisdiction and practice of publishing guidance materials on its website, as exemplified by the examples attached to the affidavit it will file. I would further grant the CTA's request that the style of cause be amended to add it as an intervener and that the other parties be ordered to serve the CTA with all further materials filed in this application.

[39] I would leave the issue of whether the CTA will be allowed to make oral submissions during the hearing to the panel seized with the application on the merits and would remit to such panel the issue of whether costs should be awarded in respect of the intervention.

[40] These three motions will therefore be granted on the foregoing terms. I make no order as to costs as none were sought in respect of the motion for intervention and success was divided on the motion for disclosure.

"Mary J.L. Gleason"

J.A.

FEDERAL COURT OF APPEAL**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

DOCKET: A-102-20

STYLE OF CAUSE: AIR PASSENGER RIGHTS v. THE
ATTORNEY GENERAL OF
CANADA and THE CANADIAN
TRANSPORTATION AGENCY

MOTION DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES

REASONS FOR ORDER BY: GLEASON J.A.

DATED: OCTOBER 15, 2021

WRITTEN REPRESENTATIONS BY:

Simon Lin FOR THE APPLICANT

J. Sanderson Graham FOR THE RESPONDENT

Barbara Cuber COUNSEL FOR THE CANADIAN
TRANSPORTATION AGENCY

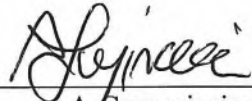
SOLICITORS OF RECORD:

Evolink Law Group FOR THE APPLICANT
Burnaby, British Columbia

A. François Daigle FOR THE RESPONDENT
Deputy Attorney General of Canada

Legal Services Directorate FOR THE CANADIAN
Canadian Transportation Agency
Gatineau, Quebec TRANSPORTATION AGENCY

THIS IS EXHIBIT "B" REFERRED TO IN
THE AFFIDAVIT OF Elizabeth Schmidt,
Affirmed this 14th day of December, 2021

A handwritten signature in cursive script, appearing to read "A. Synce".

A Commissioner, etc.

From: Scott Streiner
Sent: March 20, 2020 5:00 PM
To: Sébastien Bergeron
Subject: RE: EC March 20 - Decisions and Follow-ups

Great work, Alysia. Just a few additions below. Also, let's remove the "refunds and vouchers" item, since we're not quite sure yet what will be done on this front or how.

Let's make sure the cover message when you send these out invites EC members to let you know if they believe any items are missing or should be edited.

Thanks,

S

From: Sébastien Bergeron
Sent: Friday, March 20, 2020 4:49 PM
To: Scott Streiner
Subject: TR: EC March 20 - Decisions and Follow-ups

Scott,

See below. Anything's missing in your opinion? Kudos to Alysia for being able to work so fast! For me, it's good to go. It's for your consideration.

EC Member(s) Tasked	EC Decision(s)	Deliverable(s)	Expected Deadline
All Branch Heads	-	<ul style="list-style-type: none"> Prepare list of potential projects to assign to staff during teleworking period. 	March 23/24
	-	<ul style="list-style-type: none"> Identify annual publications and reports that the Agency should continue to monitor and work on. Marcia – includes Annual Report Chair's Office to compile a list → Please send your items to Alysia in advance if possible. 	March 25
Chair's Office	-	<ul style="list-style-type: none"> Work with Mireille and Comms to create internal "teleworking haiku" competition for staff on The Hub. 	Next week
Marcia	-	<ul style="list-style-type: none"> Comms will work with ATC and other groups to post public messaging on website to communicate delivery of Agency services during COVID-19: 	As soon as feasible

		<ul style="list-style-type: none"> o The Agency is continuing to deliver its services to the extent possible. o Complaints can continue to be filed with the Agency; however, there may be a longer response time. o Dispute proceedings involving airlines have been temporarily suspended. 	
	-	<ul style="list-style-type: none"> • Comms will update the Agency's helplines and other public-facing platforms to reflect the above messaging. 	
	-	<ul style="list-style-type: none"> • Prepare and circulate draft statement with respect to air passenger refunds and vouchers during COVID-19. 	Next week
Mireille	-	<ul style="list-style-type: none"> • Daily staff update – Include acknowledgment of challenges staff facing working from home e.g. child care 	March 20
		<ul style="list-style-type: none"> • The Agency is not invoking the BCP at this time, but should prepare itself for the possibility. • The BCP will be invoked in extraordinary circumstances (e.g. direction from Central Agencies, unavailability of staff due to sickness). • If the BCP is invoked, the Agency will continue to receive complaints. • If the BCP is invoked, non-critical services will continue to be provided to the extent possible. These will be managed on a day-to-day basis. 	March 20
	-	<ul style="list-style-type: none"> • Daily staff update – Inform staff that the Agency has not invoked the BCP and will continue to provide as many of its regular services as possible in the circumstances, but is making preparations should the possibility arise. The BCP would only be invoked in extraordinary circumstances. 	March 20
	-	<ul style="list-style-type: none"> • Update Committee on call with TBS with respect to fiscal year-end contracts. 	March 23/24
Valérie	-	<ul style="list-style-type: none"> • [REDACTED] 	March 23
	-	<ul style="list-style-type: none"> • Prepare options regarding approaches to VRCPI in context of COVID-19 and possible BCP situation. 	Next week

THIS IS EXHIBIT "C" REFERRED TO IN
THE AFFIDAVIT OF Elizabeth Schmidt,
Affirmed this 14th day of December, 2021

A handwritten signature in cursive script, appearing to read "A. Supniece", written over a horizontal line.

A Commissioner, etc.

Nadine Landry

From: Simon Fecteau Labbé
Sent: Monday, March 23, 2020 9:33 AM
To: Cynthia Jolly
Subject: FW: Current drafts
Attachments: RDIM-#2123111-v3-AC_discontinuance_-_draft_order.docx; Statement.docx

Importance: High

Do you want me to post the statement on the website once it's done ?
 I can coordinate with Maxime for Cision and Canada.ca

From: Cynthia Jolly <Cynthia.Jolly@otc-cta.gc.ca>
Sent: March-23-20 8:38 AM
To: Michael Parsons <Michael.Parsons@otc-cta.gc.ca>; Catherine Pirie <Catherine.Pirie@otc-cta.gc.ca>; Karen Jacob <Karen.Jacob@otc-cta.gc.ca>; Matilde Perrusclet <Matilde.Perrusclet@otc-cta.gc.ca>; Simon Fecteau Labbé <Simon.FecteauLabbe@otc-cta.gc.ca>
Subject: FW: Current drafts
Importance: High

From: Marcia Jones <Marcia.Jones@otc-cta.gc.ca>
Sent: Sunday, March 22, 2020 3:31 PM
To: Tim Hillier <Tim.Hillier@otc-cta.gc.ca>
Cc: Cynthia Jolly <Cynthia.Jolly@otc-cta.gc.ca>; Vincent Turgeon <Vincent.Turgeon@otc-cta.gc.ca>
Subject: Fwd: Current drafts
Importance: High

Hi, just a heads up you will be asked to post on Monday, a statement and a decision.

The statement deals with passenger refunds via vouchers.

The decision exempts carriers from 120 day notice requirements to stop operating certain domestic routes.

We can discuss Monday. The draft versions are attached and will change.

Marcia

Sent from my Bell Samsung device over Canada's largest network.

----- Original message -----
From: Scott Streiner <Scott.Streiner@otc-cta.gc.ca>
Date: 2020-03-22 12:42 PM (GMT-05:00)
To: Marcia Jones <Marcia.Jones@otc-cta.gc.ca>

Subject: Current drafts

As background for your call.

S

Scott Streiner

Président et premier dirigeant, Office des transports du Canada

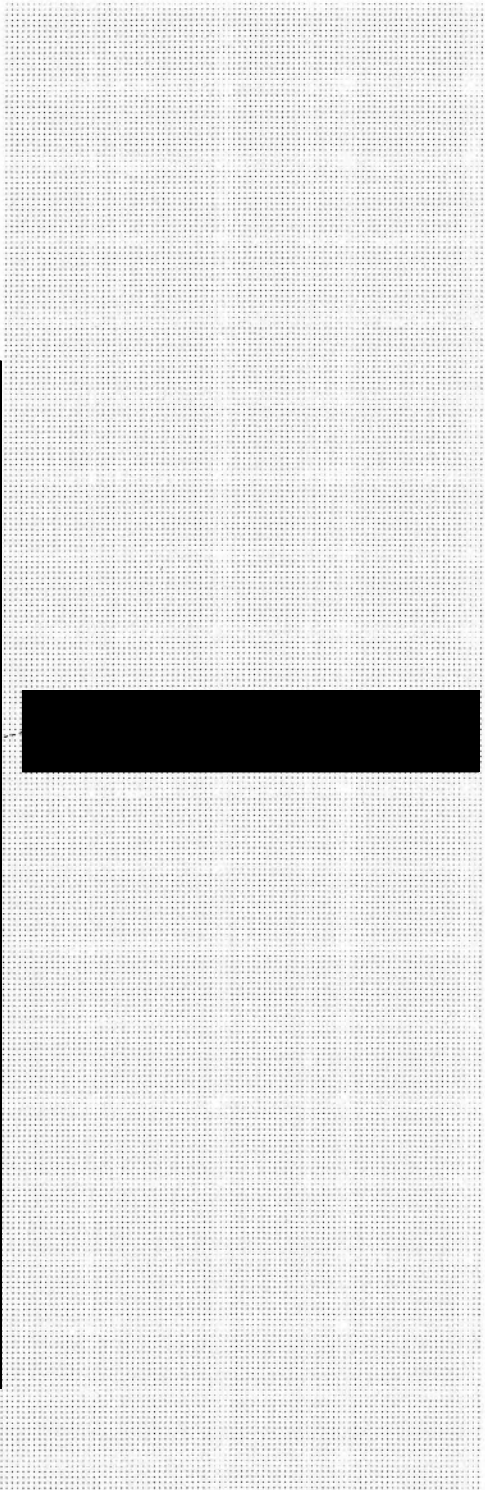
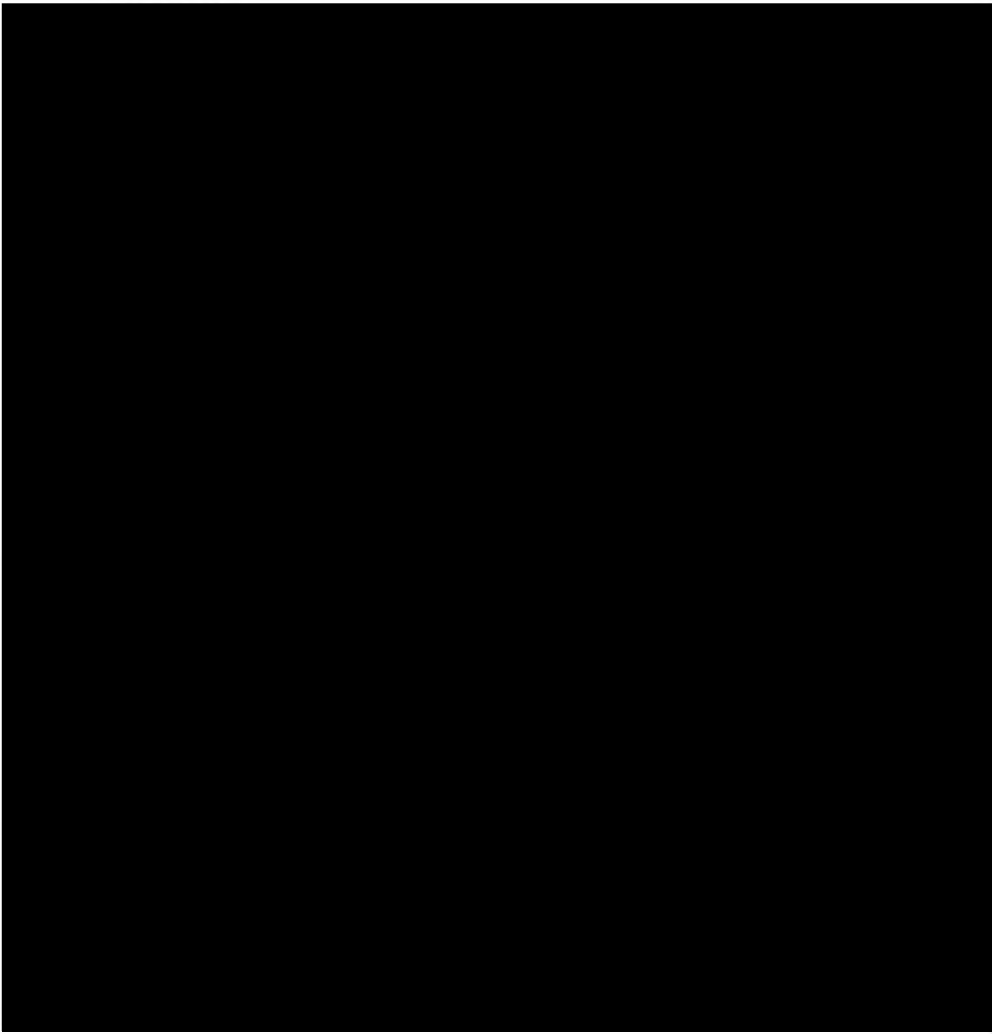
Chair and Chief Executive Officer, Canadian Transportation Agency

scott.streiner@otc-cta.gc.ca - Tél. : 819-997-9233 - ATS/TTY: 1-800-669-5575

132

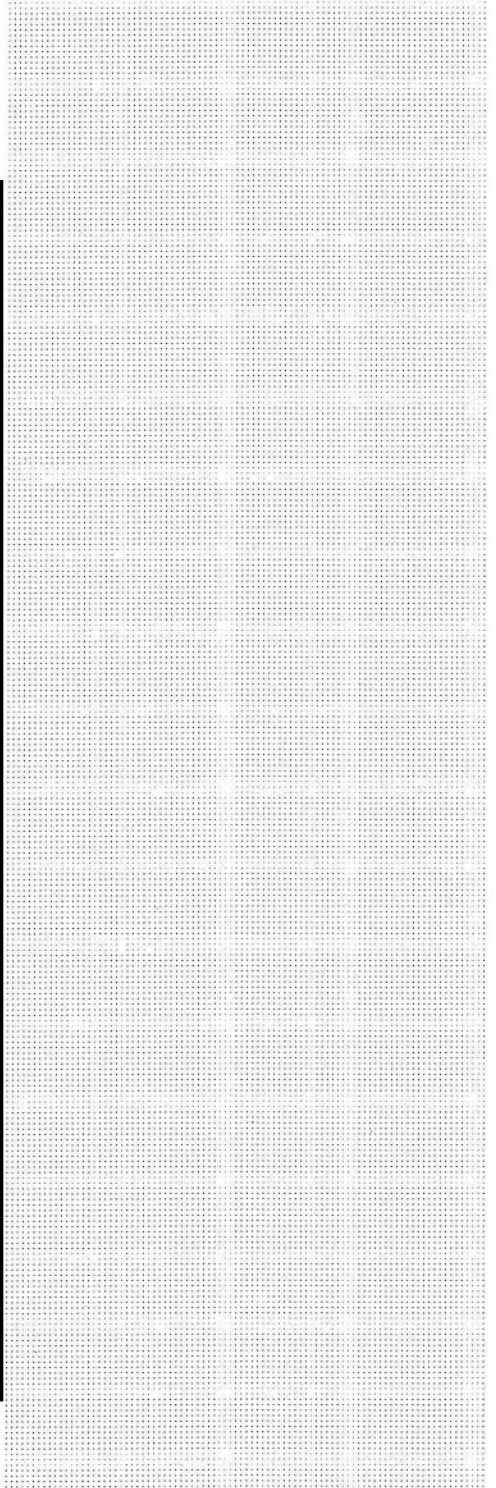
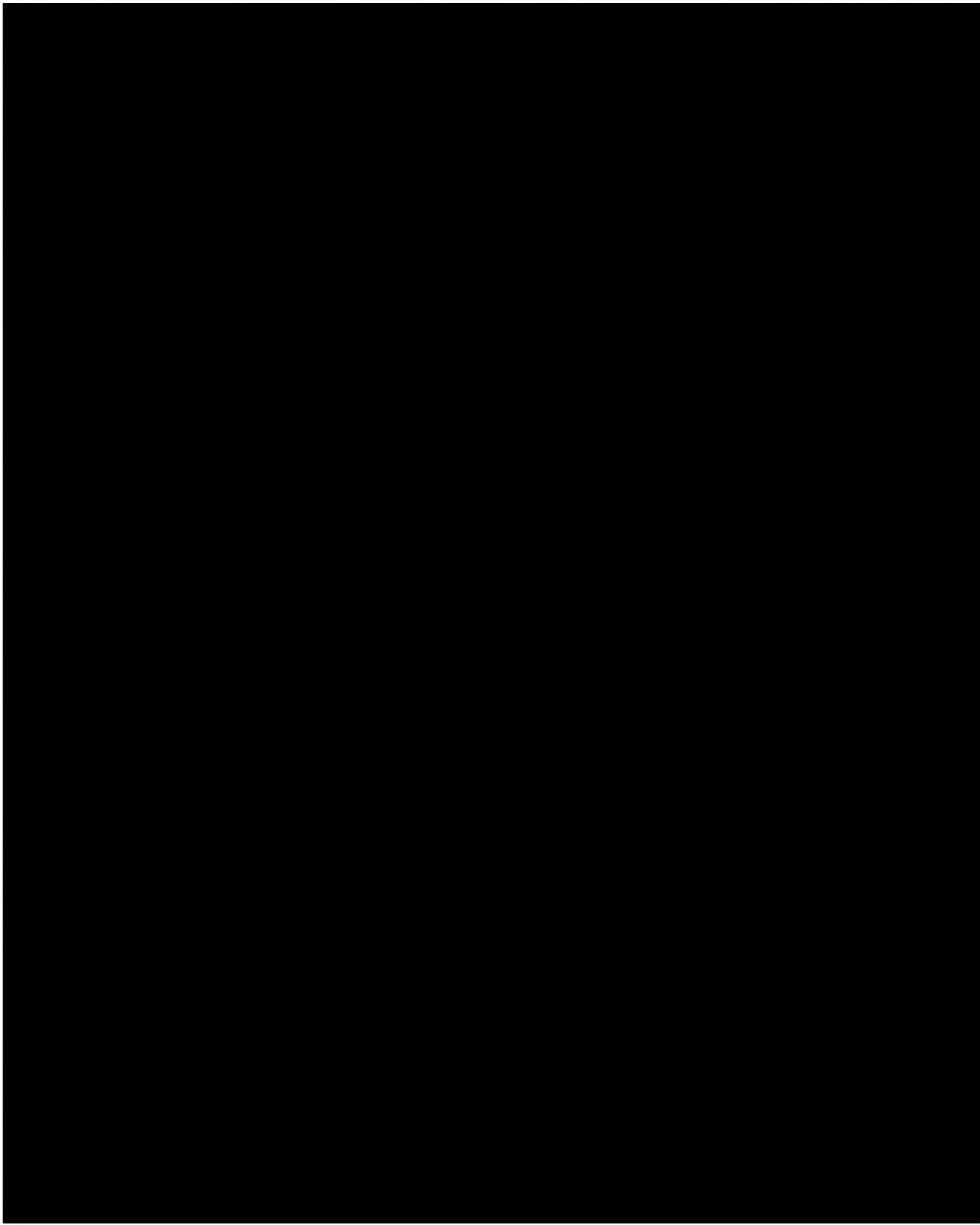
ORDER NO.

March 19, 2020



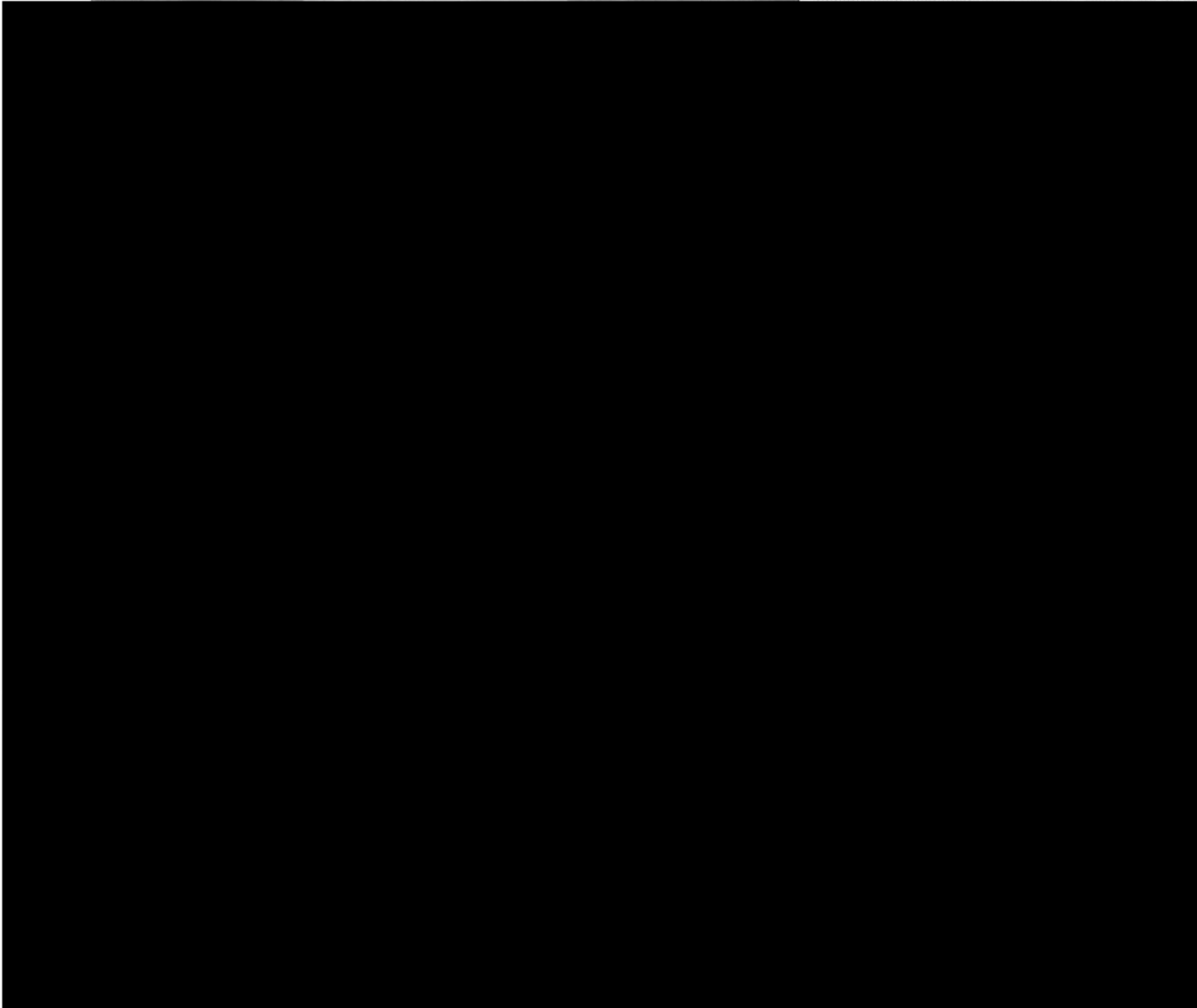
- 2 -

ORDER NO.



- 3 -

ORDER NO.



For flight disruptions that are outside an airline's control, the *Canada Transportation Act* and *Air Passenger Protection Regulations* only require that the airline ensure passengers can complete their itineraries. In addition, some airlines' tariffs provide for refunds in certain cases, but have clauses that relieve the airline of such obligations in *force majeure* situations.

All these documents were developed in anticipation of relatively localized and short-term disruptions. None contemplated the sorts of mass cancellations that have taken place over recent weeks as a result of the COVID-19 pandemic. It's important to consider how to strike a fair and sensible balance between passenger concerns and airlines' operational realities in these extraordinary and unprecedented circumstances.

On the one hand, passengers who have no prospect of completing their planned itineraries with an airline's assistance and have to find other ways of getting home should not simply be out-of-pocket for the cost of cancelled flights. On the other hand, airlines facing huge drops in passenger volumes and revenues should not be expected to take steps that could put their very survival at risk.

While any specific situations brought before the CTA will be examined on their merits, the CTA believes that, generally speaking, an appropriate solution could be for airlines to provide affected passengers with vouchers or credits for future travel, as long as these vouchers or credits do not expire in an unreasonably short period of time.

FEDERAL COURT OF APPEAL

BETWEEN:

AIR PASSENGER RIGHTS

Appellant

-and-

ATTORNEY GENERAL OF CANADA

Respondent

-and-

CANADIAN TRANSPORTATION AGENCY

Intervener

WRITTEN SUBMISSIONS OF THE ATTORNEY GENERAL OF CANADA

Informal motion to claim privilege over portions of two documents

Overview

1. This motion addresses two documents: one contains text clearly subject to solicitor client privilege, and the other includes an irrelevant document subject to legislative privilege.
2. Upon review it will be made clear that the privilege claims are valid and should be upheld by the Court of Appeal.

Background

3. The background to the present motion is set out in detail in the October 15, 2021 Order and Reasons of the Honourable Justice Gleason.¹
4. At paragraph 29 of the Reasons, Justice Gleason states:

[29] I would accordingly order that, within 60 days from the date of the Order in these matters, all non-privileged documents sent to or by a member of the CTA (including its Chairperson or Vice-Chairperson) between March 9 and March 25, 2020 or sent to a third party by the CTA or received from a third party by the CTA between the same dates concerning the impugned statement or related to a meeting attended by a CTA member (including its Chairperson or Vice-Chairperson) between March 9 and March 25, 2020 where the impugned statement was discussed shall be provided electronically to the applicant. I would also order that, within the same period, the AGC shall provide the Court, on a confidential basis, copies of any document over which the CTA claims privilege, that would otherwise be subject to disclosure, along with submissions outlining the basis for the privilege claim. Such filing may be made via way of informal motion and should be supported by an affidavit attaching copies of the documents over which privilege is claimed. A redacted version of the AGC's submissions, from which all details regarding the contents of the documents are deleted, shall be served and filed. The applicant shall have 30 days from receipt to make responding submissions, if it wishes.

These materials shall then be forwarded to the undersigned for a ruling on privilege.

[underlining added]

¹ Exhibits A1 and A2 to the Affidavit of Elizabeth Schmidt, sworn December 14, 2021.

5. These submissions with the attached Affidavit of Elizabeth Schmidt are being provided in compliance with paragraph 29. By separate motion, the Respondent is requesting an extension of time to provide submissions in respect of four additional documents.

The First Document in Issue

6. The first document in issue is a two-page email chain, dated March 20, 2020. The email contains meeting items for a CTA Executive Committee meeting.²
7. The second to last segment of the list on the second page includes a deliverable tasked to "Valérie". "Valérie" is Valérie Lagacé, who was at the time, and remains, Senior General Counsel to the Canadian Transportation Agency.³
8. The deliverable reads: [REDACTED]
9. [REDACTED] It does not relate to the Statement on Vouchers which is the subject of the underlying application.
10. The deliverable constitutes a request for legal advice [REDACTED]
11. The test for solicitor client privilege is summarized by the Federal Court as follows:
- [70] The criteria for determining whether a communication qualifies for legal advice privilege are that: (1) it must have been between a client and solicitor; (2) it must be one in which legal advice is sought or offered; (3) it must have been intended to be confidential; and (4) it must not have had the purpose of furthering unlawful conduct: see *R v Solosky*, 1979 CanLII 9 (SCC), [1980] 1 SCR 821 at 835; *Pritchard v Ontario (Human Rights Commission)*, [2004] 1 SCR 809, 2004 SCC 31 at para 15 [Pritchard];

² Schmidt Affidavit, Exhibit "B".

³ Schmidt Affidavit at para. 5.

Slansky at para 74. Legal advice has been held to include not only telling clients the law, but also giving advice “as to what should prudently and sensibly be done in the relevant legal context”: *Slansky* at para 77.⁴

12. In the present matter, the evidence establishes that the email was exchanged between the CTA and its counsel; and, that it is an internal document circulated only within the CTA.⁵ It is clear on the face of the text in issue that legal advice is being sought; and, there is no basis for any suggestion that unlawful conduct was engaged in any way.
13. Accordingly, solicitor-client privilege reasonably applies over the redacted text of this first document, which in any event is irrelevant to the underlying application.

⁴ [*Right to Life Association of Toronto and Area v. Canada \(Employment, Workforce and Labour\)*](#), 2019 CanLII 9189 (FC) at para [70](#).

⁵ Schmidt Affidavit at para. 5.

The Second Document in Issue

14. The second document consists of a string of emails titled "FW: Current drafts". The string begins with an email sent from the CTA's Chairperson, Scott Streiner, to a CTA employee, Marcia Jones, on March 22, 2020. The Chairperson's email contains two attachments.⁶
15. The three-page attachment with the header "ORDER NO." is a draft CTA order that concerns [REDACTED]
[REDACTED]
[REDACTED]. [REDACTED] [REDACTED], nor the order, are at issue in the underlying judicial review application and they are not captured by the Court's October 12, 2021 Order.
16. The document is also subject to deliberative privilege. It is a draft of an order that contains comments and edits from Agency Members. The order was ultimately issued and published by the Agency as Order No. [REDACTED]
17. The Supreme Court of Canada has recognized that while administrative tribunals cannot rely on deliberative secrecy to the same extent as judicial tribunals, secrecy remains the rule. It can be lifted when the litigant can present valid reasons for believing that the process followed did not comply with the rules of natural justice.⁸
18. In this case, the underlying Notice of Application does not challenge Agency Order No. [REDACTED] nor does that Order arise in the pleadings or Record before the Court to date. Accordingly, there is simply no challenge to whether the rules of natural justice

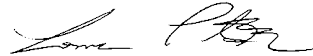
⁶ Schmidt Affidavit, Exhibit "C".

⁷ Canadian Transport Agency [REDACTED]

⁸ [*Tremblay v. Quebec \(Commission des affaires sociales\)*](#), [1992] 1 SCR 952 at p. 954; [*Commission scolaire de Laval v. Syndicat de l'enseignement de la région de Laval*](#), [2016] 1 SCR 29 at para. 58.

were met, as there is no challenge to the Order. The rule of secrecy applies and the attachment should not be subject to disclosure.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 14th DAY OF DECEMBER
2021



ATTORNEY GENERAL OF CANADA

Department of Justice Canada
Civil Litigation Section
50 O'Connor Street
Ottawa, ON K1A 0H8
Fax: 613-954-1920

Per: Lorne Ptack

Tel: (613) 601-4805

Email: Lorne.Ptack@Justice.gc.ca

Per: J. Sanderson Graham

Tel: (613) 670-6274

Email: Sandy.Graham@justice.gc.ca
for the Attorney General of Canada

LIST OF AUTHORITIES

Case Law

[*Commission scolaire de Laval v. Syndicat de l'enseignement de la région de Laval*](#), [2016] 1 SCR 29

[*Right to Life Association of Toronto and Area v. Canada \(Employment, Workforce and Labour\)*](#), 2019 CanLII 9189 (FC)

[*Tremblay v. Quebec \(Commission des affaires sociales\)*](#), [1992] 1 SCR 952

Other Sources

Canadian Transport Agency 