

December 2, 2022

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

Dear Madam or Sir,

RE: Air Passenger Rights v. AGC and CTA (A-102-20) – Response to CTA’s Letter of December 2, 2022

We are counsel for the Applicant. Please bring this letter to Gleason J.A.’s attention. Her Ladyship is seized of all pre-hearing issues, pursuant to the Order of July 19, 2022. Please accept this letter as the Applicant’s response to the CTA’s letter dated December 2, 2022 [**Letter**].

In the Letter, the CTA made submissions on the admissibility of the supplementary affidavit, which is of no merit. The Applicant further submits that, as detailed below, material portions of the Letter contain bald assertions and an impermissible sur-reply, and should be disregarded.

The CTA’s Submissions on Applicant’s Filing of Supplementary Affidavit

The CTA appears to now concede that the main technical barrier the CTA was advancing in its motion record “was that the relevant mailboxes were not recoverable.” The Applicant already fully addressed this technical barrier: (1) the Outlook accounts of current CTA personnel could be searched “in the event that there [are] copies of the e-mails of departed personnel in the accounts of remaining personnel”;¹ and (2) local devices of departed personnel must be reviewed.²

Based on the CTA’s concession, it may not be necessary for the Court to conclusively decide at this time whether the encrypted emails could be unlocked, and the Court should reserve the issue until *after* the encrypted emails are located. There is no reason to refuse to search for a treasure box just because the key is not yet readily available. The same logic applies to encrypted emails.

Should the Court order a search for the encrypted emails, and the CTA exercising its due diligence in attempting to open those emails, the CTA can report back to the Court and present its in(ability) to open the encrypted emails.³ The CTA will not be prejudiced with this approach. The Applicant is also open to working with the CTA to explore a technical solution in that event.

¹ Applicant’s Reply at para. 46, quoting the Affidavit of Jonathan Guindon at paras. 24 and 30.

² Applicant’s Reply at paras. 36, 39, and 48.

³ Applicant’s Reply at para. 49.

It bears noting that the CTA has not yet made any attempts to try to open a single encrypted relevant email, because the CTA claimed that those encrypted emails had not been located, or minimal efforts were undertaken to locate those emails. The CTA should not be permitted to argue the “impossibility” of opening encrypted emails at this time when no actual attempts were made.

The supplementary affidavit is simply to illustrate that recovery of an encryption key is not impossible. The CTA does not appear to suggest it is impossible and only seeks to argue whether it is “feasible or reasonable”, which can be dealt with after the encrypted emails are located.

Finally, the third paragraph under “*Applicant’s Motion to File Evidence on Reply*” is an impermissible sur-reply. Those submissions are wholly unrelated to the supplementary affidavit, which dealt only with recovery of encryption keys, not the (in)ability to search for encrypted emails.

CTA’s Assertions of Misrepresentation

The CTA made unfounded allegations against the Applicant for misrepresentation.

The CTA’s allegation rests exclusively on its bald assertions on the role of Ms. Karina Bouthillette (who appears to be a former CTA personnel) and what the CTA asserts is “standard practice” for ATI “tasking.” There is no evidence before the Court to support the CTA’s assertions.

Most importantly, and in any event, the CTA’s allegations are a transparent attempt to distract from the undisputed fact that only the Office of the Chair completed the Confirmation Form that the “tasking” was performed.⁴ Whether or not Ms. Jones and her Analysis and Outreach Branch received the “tasking,” they failed to perform any “tasking.” There is no evidence that they ever completed the “tasking” (i.e., a Confirmation Form, like the one signed by the Office of the Chair).

Conclusion

The Applicant submits that the CTA’s submissions should be rejected. Should the Court have any directions, we would be pleased to comply.

Yours truly,

EVOLINK LAW GROUP


SIMON LIN, Barrister & Solicitor

Cc: (1) Mr. Sandy Graham and Mr. Lorne Ptack, counsel for the Attorney General of Canada, and (2) Mr. Kevin Shaar, counsel for the Canadian Transportation Agency

⁴ Lukács Affidavit (Nov. 14, 2022), Exhibit “U” [MR, Tab 2U, p. 108 – Confirmation Form].