

FEDERAL COURT OF APPEAL

BETWEEN:

AIR PASSENGER RIGHTS

Applicant

– and –

ATTORNEY GENERAL OF CANADA

Respondent

– and –

CANADIAN TRANSPORTATION AGENCY

Intervener

**MOTION RECORD OF THE APPLICANT,
AIR PASSENGER RIGHTS**

VOLUME 1 of 2

**Motion Regarding the CTA's Affiant's Failure to Attend Cross-Examination
Motion to Enforce, Vary, and Correct the Court Orders Issued by Gleason, J.A.
(pursuant to Rules 8(2), 97, 397(2), and 369.2 of the *Federal Courts Rules*)**

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Court File No.: A-102-20

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NOTICE OF MOTION

**(Motion Regarding the CTA's Affiant's Failure to Attend a Cross-Examination)
(Motion to Enforce, Vary, and Correct the Court Orders Issued by Gleason, J.A.)**

TAKE NOTICE THAT THE MOVING PARTY will make a motion in writing to the Court under Rule 369.2 of the *Federal Courts Rules*, S.O.R./98-106.

THE MOTION IS FOR:

1. An Order under Rule 97 that the affiant for the Canadian Transportation Agency [CTA], Ms. Barbara Cuber, who provided an affidavit on the CTA's document searches as mandated in the April 11, 2022 Order of the Court (Gleason, J.A.) [**April Order**], attend the cross-examination provided for in the Reasons for the April Order, within two weeks of the Order, at the CTA's cost, and all costs for Ms. Cuber's failure to attend the cross-examination on May 3, 2022;
2. An Order pursuant to Rule 8(2) that the deadline in the April Order for filing the Applicant's additional affidavit(s) be extended to thirty days after completion of the cross-examination of Ms. Cuber regarding the CTA's search(es) for relevant documents, including any refusals or objections motions and re-attendance;

3. An Order pursuant to Rule 397(2) that a clerical error in the April Order be corrected to reflect that in the Appendix to the Reasons for Order, Item B2 should state “March 18, 2020” instead of “March 25, 2020”;
4. An Order that the CTA produce, within one (1) day, the following withheld documents that the CTA was already ordered to produce pursuant to Gleason, J.A.’s April Order and/or Gleason, J.A.’s October 15, 2021 Order [**October Order**]:
 - (a) CTA’s Twitter private messages and Info account emails, as provided in paragraph 4 of the April Order and paragraph 3(b) of the October Order;
 - (b) All Meeting Documents (per paragraph 3(c) of the October Order) for the March 24, 2020 Members’ Meeting, including but not limited to:
 - i. The “scheduler” referred to in paragraph 83 of the CTA’s Written Representations made to the Court on February 1, 2022;
 - ii. The “Members Committee Agenda,” whose existence was discovered as a result of the April Order; and
 - iii. Meeting minutes, including those for any *in camera* portion of the March 24, 2020 Members’ Meeting; and
 - (c) Unredacted copies of appendices C1 (pp. 18-47), C2 (pp. 26-55), and C6 (pp. 21-50), produced on April 20, 2022, and covered by paragraphs 4-6 of the April Order and paragraph 3(c) of the October Order;
5. An Order that the Attorney General of Canada [**AGC**] forthwith bring an informal motion to assert privilege for any document(s) from the CTA’s document search(es) after Gleason, J.A.’s October Order, as per paragraph 5 of that Order;
6. An Order striking the April 21, 2022 certificate attesting to various documents, and that the CTA forthwith file a revised certificate that complies with s. 24 of the *Canada Evidence Act* and s. 23 of the *Canada Transportation Act*;

7. The CTA to pay costs forthwith, if the motion is opposed; and
8. Such further and other relief that this Honourable Court may permit.

THE GROUNDS FOR THE MOTION ARE:

Overview of this Motion

1. This is the third instance in this proceeding that the Court's assistance is needed because the CTA refuses to comply with the *Federal Courts Rules* to produce documents relevant to the Application, despite the Court (Gleason, J.A.) having issued two clear orders to that effect: the October Order and the April Order.
2. The CTA is engaging in dilatory tactics to flout the Orders, and its affiant failed to attend a cross-examination, despite being served with a Direction to Attend.

Background of the Underlying Judicial Review Application

3. At the outset of the COVID-19 pandemic, on March 25, 2020, the CTA widely disseminated a statement entitled "Statement on Vouchers" [**Statement on Vouchers**], purporting to influence the passengers' perception of their rights to refunds of unused airfares for flights affected during the COVID-19 pandemic.
4. The Statement on Vouchers was issued with approval of the CTA's Members, after air carriers' behind-the-scenes requests that the CTA to assist in derailing passengers' refund requests, and undisclosed meetings with Transport Canada.
5. The Applicant is a non-profit group that advocates for the rights of the travelling public, seeking judicial review on behalf and for the benefit of the travelling public in respect of the Statement on Vouchers on two distinct grounds:
 - (a) **Reasonable Apprehension of Bias Ground [RAB Ground]** — the issuing of the Statement on Vouchers was contrary to the CTA's *Code of Conduct*, **and** gives rise to a reasonable apprehension of bias for the CTA as a whole, or the CTA's members that endorsed the statement; and

- (b) **Misinformation Ground** — the statement misinforms and confuses passengers’ about their rights vis-à-vis the airlines.
6. The RAB Ground of review is two-fold. Firstly, the pre-judgement by the CTA as an institution, or by its constituent Members, regarding passengers’ entitlement to reimbursement for flights affected by the pandemic. Secondly, external third-party influence for the inception of the impugned Statement on Vouchers.
 7. On October 2, 2020, Webb, J.A. dismissed the CTA’s motion to strike, and ruled that the application for judicial review should be heard on the merits, and reaffirmed that the RAB Ground raises a *serious issue to be tried*.

CTA’s Failure to Comply with the October 15, 2021 Order of Gleason, J.A.

8. On October 15, 2021, Gleason, J.A. ordered, *inter alia*, that within 60 days the CTA shall produce to the Court and the Applicant [**October Order**]:
 - (a) all non-privileged documents sent to or by a member of the CTA (including its Chairperson or Vice-Chairperson) between March 9-25, 2020 concerning the Statement on Vouchers [**CTA Member Correspondences**];
 - (b) all non-privileged documents sent to a third party by the CTA or received from a third party by the CTA between March 9-25, 2020 concerning the Statement on Vouchers [**Third-Party Correspondences**]; and
 - (c) all non-privileged documents for any meeting attended by a CTA Member, including its Chair or Vice-Chair, between March 9-25, 2020 where the Statement on Vouchers was discussed [**Meeting Documents**].
9. The October Order also required the AGC to submit to Gleason, J.A. an informal motion to rule on any assertions of privilege for all documents that are otherwise within the scope of the three aforementioned categories of documents.
10. On December 14, 2021, the CTA produced only a small number of documents,

but withheld at least twenty-one (21) sets of documents relevant to the Application within the scope of the October Order, while the CTA claimed that most of those documents did not exist or “no longer existed” (i.e., were already deleted).

Gleason, J.A. Issues an Order for Specific Documents on April 11, 2022

11. On January 16, 2022, the Applicant brought a motion for a specific Order that the CTA produce all of the twenty-one (21) sets of withheld documents, and also a *show cause* order for contempt of the Court’s October Order.
12. On January 26, 2022, Gleason, J.A. bifurcated the portion of the motion for a specific Order to produce the withheld documents to be heard first. The remainder of the Applicant’s motion for an order to *show cause* for contempt of court would be heard thereafter, if necessary.
13. Concurrently with the filing of the present motion, the Applicant is requesting the Court to fix a timeline for the *show cause* portion of that motion to be heard.
14. On April 11, 2022, Gleason, J.A. issued an order and reasons for order on the AGC’s informal motion on privilege assertions for two documents and the Applicant’s request for a specific Order to produce the withheld documents, providing, *inter alia*, that [**April Order**]:
 - (a) **Ruling on Privilege:** The two documents submitted by the AGC are privileged and shall not be produced;
 - (b) **Existent Documents:** For four sets of documents (i.e., A1, A5, B4, and C2) amongst the twenty-one (21) sets of withheld documents, those documents’ existence were not in dispute, and the CTA was ordered to produce those documents within five (5) days of the April Order;
 - (c) **Statement on Voucher Meeting Documents:** For categories C1, C5, and C6 (March 19, 22, and 23, 2020 meetings, respectively) where the CTA acknowledged the occurrence of those meetings, but did not con-

firm if the Statement on Vouchers was discussed at those meetings, the CTA was ordered to determine if the Statement on Vouchers was discussed at those meetings and if so, to produce those documents within (5) days of the April Order;

- (d) **CTA Document Search Affidavit:** For the remaining fourteen of the twenty-one categories of documents (i.e., A2-A4, A6, B1-B3, B5, C3-C4, and C7-10) where the current, or previous, existence or possession of these documents were in dispute, the individual at the CTA responsible for compliance with the October Order was ordered to serve and file an affidavit within (10) days detailing the CTA's efforts to comply with the October Order, including at least the following specific topics:
- i. how the CTA narrowed down the several thousands of pages of documents to less than two hundred pages it has disclosed;
 - ii. what steps were taken, if any, to gather and/or preserve documents upon being served with the Notice of Application on April 9, 2020;
 - iii. who at the CTA conducted the searches for documents;
 - iv. whether the CTA reviewed its encrypted emails or documents;
 - v. what record-keeping systems the CTA has, and whether all of them were searched for responsive documents;
 - vi. whether the CTA has any backups or archives of their emails and other electronic documents, and whether those backups or archives were searched;
 - vii. whether the CTA conducted any investigation after learning that some documents no longer exist, and any steps taken to recover those documents; and

viii. whether the CTA's audio or video conferencing system has a recording feature and whether the conferences between March 9 and 25, 2020 were recorded.

15. Gleason, J.A. specified in the reasons for the April Order [**Reasons for April Order**] that the Applicant may cross-examine the affiant on the CTA Document Search Affidavit. The Court also fixed a deadline of 40 days for the Applicant's further affidavit(s) on the Application, to allow sufficient time for the cross-examination on the CTA Document Search Affidavit to occur *beforehand*.

16. Pending the filing of the CTA Document Search Affidavit, and cross-examination on that affidavit, the Court has not ruled on the remaining fourteen of the twenty-one sets of documents that the CTA has claimed not to exist or "no longer exist."

The CTA's Affiant's Failure to Attend a Scheduled Cross-Examination

17. On each of April 13, 14, and 21, 2022, the Applicant made good-faith attempts to canvass availabilities for the CTA's affiant, counsel for the CTA, and counsel for the AGC, for a cross-examination on the CTA Document Search Affidavit. The CTA refused to provide any availability for its counsel and its affiant.

18. Ultimately, the CTA refused to provide any availability, and in order to accommodate the AGC's schedule, on April 22, 2022 a Direction to Attend was served for May 3, 2022 to cross-examine the CTA's affiant, Ms. Barbara Cuber, on the CTA Document Search Affidavit.

19. The Direction to Attend required Ms. Cuber to bring twenty-five specific items that were referred to in the CTA Document Search Affidavit, or otherwise relevant to the CTA's document search efforts or the determination of the existence of the remaining fourteen sets of documents that the Court had not yet ruled upon as part of the April Order.

20. On April 28, 2022, the CTA wrote to the Court requesting intervention and a

case management conference, prior to the cross-examination that was specified in the reasons for April Order. Immediately thereafter, the Applicant advised that there was no basis for a CMC or postponement of the cross-examination.

21. On May 2, 2022, the Court refused the CTA's request for Court intervention and a case management conference before the cross-examination on May 3, 2022.
22. On May 3, 2022, less than twenty (20) minutes before the commencement of the cross-examination, counsel for the CTA advised that the CTA and its affiant would not be attending. A certificate of non-attendance has been provided by the court reporter after the court reporter waited for more than half an hour.

CTA's Continued Flouting of Both the October Order and April Order

23. Pursuant to the April Order, the CTA produced some documents on April 20, 2022 [**April 20, 2022 Documents**]. The Applicant then discovered that the latest disclosure still did not comply with the letter and spirit of the October Order and/or the April Order in at least five material respects. The Applicant made numerous requests to the CTA to rectify most of these deficiencies to no avail.
24. ***Withholding Documents Based on Unsubstantiated Privilege Assertions.*** Paragraph 5 of the October Order provides that the AGC is to file an informal motion for Gleason, J.A. to rule on any assertions of privilege for documents that were otherwise covered by the October Order. The CTA and the AGC failed to follow this process for the subsequent document search(es), and failed to inform the Court and the Applicant that documents were withheld based on privilege.
25. ***CTA's Twitter Private Messages and Info Account Emails.*** Contrary to paragraph 4 of the April Order and paragraph 3(b) of the October Order, the CTA **did not** produce any Twitter private messages, but produced a few public Twitter tweets instead. For the Info Account emails, the CTA produced a single email chain despite previously claiming that there were numerous relevant messages.

26. ***March 24, 2020 Members' Meeting Documents.*** On April 21, 2022, in response to paragraph 6 of the April Order that the AGC provide submissions, the AGC simply advised the Court that a single document was identified by the CTA and privilege is not asserted for **that** document, while refraining from providing any submissions and remained mum about the existence of any other documents for that March 24, 2020 Members' Meeting.
27. The remainder of the Applicant's request for March 24, 2020 Members' Meeting Documents (i.e., category C7) including, without limitation, the specific items below should be returned to Gleason, J.A. for a ruling:
- (a) *The "scheduler" File For the March 24, 2020 Members' Meeting.* In the February 1, 2022 written representations at paragraph 83, the CTA admitted it was in possession of a "scheduler" for this March 24, 2020 meeting. The Court determined that such documents are captured by paragraph 3(c) of the October Order. The CTA did not produce this document, despite admitting its existence.
 - (b) *The "Members Committee Agenda" for the March 24, 2020 Members' Meeting.* The existence of this document was referenced in the April 20, 2022 Documents produced by the CTA. This document is covered by paragraph 3(c) of the October Order and the CTA has failed to produce this document.
 - (c) *All meeting minutes, and notes, for the March 24, 2020 Members' Meeting.* Their existence can be gleaned from documents produced by the CTA pursuant to the April Order. This is covered by paragraph 3(c) of the October Order and the CTA has failed to produce these documents.
28. ***Unredacted copies of some of the April 20, 2022 Documents.*** Neither the October Order nor the April Order permitted the CTA to unilaterally apply redactions to the documents. The CTA applied redactions to the majority of appendices

C1, C2, and C6 in the April 20, 2022 Documents, totalling 90 pages. Despite the Applicant's follow-ups, the CTA did not provide any explanation.

29. ***Certifying the authenticity of the April 20, 2022 Documents.*** The April Order, paragraph 8, required the CTA to file an updated certificate attesting to the authenticity of the additional documents. The certificate was filed with the Court, but the CTA did not provide a copy to the Applicant. The certificate is not compliant with the *Canada Evidence Act*, and misrepresented the signatory's title.

CTA to Forthwith Pay the Costs for the Cross-Examination and the Motion

30. In light of the Court's May 2, 2022 direction, the CTA had no reason to refuse to present its affiant at the cross-examination scheduled for May 3, 2022. The CTA should be ordered to pay costs to attend the cross-examination at a later date, and the costs for the cross-examination that the affiant had failed to attend.
31. This motion is the third time in this matter where the CTA's failure to comply with its obligation to produce documents to the Court and the parties, pursuant to the *Federal Courts Rules*, necessitated this Court's intervention again.
32. The CTA's repeated failures to fully and completely abide by the October Order and April Order have caused judicial resources to be unnecessarily expended. The CTA's conduct has also delayed the matter and seriously undermined the Court's ability to meaningfully discharge its judicial review function, and is particularly egregious considering this case has a public interest dimension.

Statutes and Regulations Relied Upon

33. *Canada Transportation Act*, S.C. 1996, c. 10, and in particular, ss. 21-23;
34. *Canada Evidence Act*, R.S.C. 1985, c. C-5, including ss. 2 and 24;
35. *Federal Courts Rules*, S.O.R./98-106, including Rules 8(2), 97, 397(2), 369.2, and 400-401;

36. *Federal Courts Act*, R.S.C. 1985, c. F-7, including ss. 3, 18.1, 28, and 44; and
37. Such further and other grounds as counsel may advise and this Honourable Court may permit.

THE FOLLOWING DOCUMENTARY EVIDENCE will be used for the motion:

1. Affidavit of Barbara Cuber, affirmed on April 21, 2022.
2. Affidavit of Dr. Gábor Lukács, affirmed on May 15, 2022.
3. Such further and additional materials as counsel may advise and this Honourable Court may allow.

May 15, 2022

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FEDERAL COURT OF APPEAL

BETWEEN:

AIR PASSENGER RIGHTS

Applicant

– and –

ATTORNEY GENERAL OF CANADA

Respondent

– and –

CANADIAN TRANSPORTATION AGENCY

Intervener

AFFIDAVIT OF DR. GÁBOR LUKÁCS
(Affirmed: May 15, 2022)

I, **DR. GÁBOR LUKÁCS**, of the City of Halifax in the Province of Nova Scotia, AFFIRM THAT:

1. I am the President and a Director of the Applicant, Air Passenger Rights. As such, I have personal knowledge of the matters to which I depose, except as to those matters stated to be on information and belief, which I believe to be true.

A. The Applicant: Air Passenger Rights
2. Air Passenger Rights [**APR**] is a non-profit organization, formed in May 2019 under the *Canada Not-for-profit Corporations Act*, SC 2009, c. 23, to expand and continue the air passenger advocacy work that I have initiated in my personal capacity for over a decade. A copy of APR's articles of incorporation are attached and marked as **Exhibit "A"**.
3. I am the president and a director of APR. I actively lead all the work of APR. Mr. Simon Lin, counsel representing APR on this judicial review, is also one

of the directors of APR. APR operates on a non-profit basis and its board of directors, including myself, are not paid any remuneration.

4. APR's mandate is to engage in public interest advocacy for air passengers, continuing the same work that I have been engaging in personally for the past decade, including advocating on behalf of the travelling public before Parliament, administrative agencies and tribunals, and the courts, when necessary.
5. APR is funded solely by small donations from passengers. Those donations only cover some out-of-pocket expenses incurred in undertaking APR's public interest advocacy work.
6. APR promotes passenger rights by referring passengers to information and resources through the press, social media, and the AirPassengerRights.ca website.
7. Since the commencement of this application for judicial review, Mr. Lin's legal services in this matter have been provided on a *pro bono* basis. APR's board of directors has agreed that any costs awarded in this judicial review would be assigned to Mr. Lin's law office, less any disbursements that APR incurred. Mr. Lin did not take part in this board decision. For greater clarity, I am providing this information only for the purpose of supporting APR's request for costs on this motion, and it should not be construed as a waiver of any applicable privilege, including solicitor-client privilege and/or litigation privilege.
8. The fact that Mr. Lin has been acting on a *pro bono* basis for APR on this judicial review was previously disclosed in paragraph 78 of my affidavit affirmed on April 7, 2020 in this proceeding. Said affidavit was served on the Canadian Transportation Agency [CTA] on or about April 9, 2020.

B. Background

9. On March 25, 2020, the CTA posted a “Statement on Vouchers” [**Statement on Vouchers**] on its website, a copy of which is attached and marked as **Exhibit “B”**. The CTA widely disseminated the Statement on Vouchers to passengers and the travel industry through various channels, including its website, Twitter, an email announcement to carriers, in template responses to passengers’ inquiries, and a *pro forma* auto-response email for formal complaints received.
10. Since publishing the Statement on Vouchers, the CTA has been entirely unresponsive as to what occurred behind the scenes leading up to the CTA drafting and issuing the unattributed Statement on Vouchers, or who drafted or approved that Statement on Vouchers, until the CTA produced some documents in response to the court’s Orders.
11. A copy of the CTA’s “Organization and mandate” page as it was archived on March 30, 2020, retrieved from the Internet Archive repository, is attached and marked as **Exhibit “C”**.
12. The *Code of Conduct of Members of the Agency* [**Code of Conduct**] provides under the heading “Interactions with non-Agency individuals and organizations,” in part, that:

(39) Members shall not communicate with political actors or officials of other federal departments and agencies, provincial or foreign governments, or international organizations regarding a matter that is, was, or could be before the Agency.

(40) Members shall not publicly express an opinion about any past, current, or potential cases or any other issue related to the work of the Agency, and shall refrain from comments or discussions in public or otherwise that may create a reasonable apprehension of bias.

A copy of the CTA’s *Code of Conduct* is attached and marked as **Exhibit “D”**.

13. For greater clarity, I am attaching Exhibits “C” and “D” only for the purpose of placing before the Court the list of the CTA’s appointed members from March 30, 2020 and the *Code of Conduct*, respectively. I do not agree with, nor accept, any other content within those documents as correctly reflecting the CTA’s mandate under the *Canada Transportation Act*.

14. Based on my past experience and previous dealings with the CTA and also one of the Microsoft OneNote files that the CTA produced on May 5, 2022 in this Application, I believe that meetings of the CTA’s Members are recorded with formal meeting minutes.
 - (a) A redacted copy of the September 20, 2011 meeting of CTA’s Members, which the CTA served on me in File No. A-460-12, is attached and marked as **Exhibit “E”**.

 - (b) A PDF printout of a Microsoft OneNote file containing notes for a March 26, 2020 Members’ Meeting is attached and marked as **Exhibit “F”**. The annotations made by Ms. Heather Smith (a CTA Member) in the Microsoft OneNote file on the right hand side made some references to “Alysia”, who I believe to be Ms. Alysia Lau. Ms. Lau was the CTA employee that prepared minutes and/or notes for numerous relevant meetings including the Executive Committee [EC] meetings on March 19, 20, and 23, 2020, as detailed further below in Exhibits “U”-“W”.

- C. Document Produced in Response to Gleason, J.A.’s October 15, 2021 Order**
15. In response to the October 15, 2021 Order of Gleason J.A. [**October Order**], APR received materials from the CTA and the Attorney General of Canada [AGC] in four (4) separate packages as follows:
 - (a) On December 14, 2021, the CTA disclosed a 165-page PDF file entitled “Material in Possession of the Canadian Transportation Agency” [**Dec.**

14 Docs], which was ultimately filed in court on December 24, 2021. Within the Dec. 14 Docs, there were two correspondences from Transat A.T.:

- i. On pages 163-165 of the Dec. 14 Docs is a letter dated March 22, 2020 from Transat's Chairman, President, and CEO to Mr. Scott Streiner, which is attached and marked as **Exhibit "G"**.
 - ii. On pages 34-35 of the Dec. 14 Docs is an email forwarded from Ms. Marcia Jones to Mr. Scott Streiner on March 18, 2020, containing a lengthy email from George Petsikas of Transat, which is attached and marked as **Exhibit "H"**.
- (b) On December 14, 2021, the AGC served and filed a 16-page PDF file containing an informal motion to request extension of time to claim privilege over portions of two documents, which is in the Court docket as Doc. Nos. 92-94. Thereafter, on January 31, 2022, the CTA produced unredacted copies of these two documents:
- i. a March 18, 2020 email chain from Transport Canada containing encrypted content [**Transport Canada Encrypted Email**], which is attached and marked as **Exhibit "I"**; and
 - ii. a March 22-24, 2020 Transport Canada email chain referring to meetings with the CTA over the weekend [**TC/CTA Undisclosed Meeting Email**], which is attached and marked as **Exhibit "J"**.
- (c) On December 14, 2021, the AGC served and filed a 44-page PDF file containing an informal motion to claim privilege over two documents, which is in the Court docket as Doc. Nos. 96-98 [**Privilege Motion**].

- (d) On December 24, 2021, the CTA provided a 3-page letter and 13 pages of materials relating to the Statement on Vouchers [**Dec. 24 Docs**]. A copy of the CTA's letter is attached and marked as **Exhibit "K"**.

(i) CTA's Certificate of Attestation for the October Order Documents

16. For the Dec. 14 Docs and a rectification thereof, the CTA has served and filed with the Court two certificates attesting to the authenticity of such documents:

- (a) a certificate signed by Ms. Valerie Lagacé, Secretary of the CTA, under the CTA's seal, dated December 13, 2021.
- (b) a certificate signed by Ms. Patrice Bellerose, on behalf of the Secretary of the CTA, under the CTA's seal, dated February 1, 2022.

17. The CTA has not filed a certificate attesting to the authenticity of the Transport Canada Encrypted Email, the TC/CTA Undisclosed Meeting Email, and the Dec. 24 Docs.

D. Document Produced in Response to Gleason, J.A.'s April 11, 2022 Order

18. In response to the April 11, 2022 Order of Gleason J.A. [**April Order**], APR received materials from the CTA and AGC in four (4) separate packages, as summarized under the four headings below:

- (i) The April 20, 2022 Documents from the CTA;
- (ii) One CTA March 24, 2020 Members Meeting Notes in PDF Format;
- (iii) Two Microsoft OneNote Files from the CTA on May 5, 2022; and
- (iv) The CTA Document Search Affidavit in Response to April Order.

- (i) **The April 20, 2022 Documents from the CTA**
19. On April 20, 2022, the CTA disclosed sixteen (16) electronic files [**April 20, 2022 Documents**]. A copy of the email from the CTA listing the April 20, 2022 Documents is attached and marked as **Exhibit “L”**. The following is a synopsis of the sixteen (16) electronic files for the April 20, 2022 Documents.
- (a) A letter from counsel for the CTA dated April 20, 2022, which is attached and marked as **Exhibit “M”**.
 - (b) Nine (9) .msg email files from the CTA in response to category A1 (*The Microsoft Word Files for the Statement on Vouchers*) in the Appendix of the Reasons for April Order.
 - (c) One (1) .msg email file from the CTA in response to category A5 (*Chairperson’s Template Response to Media in MS Word Format*) in the Appendix of the Reasons for April Order.
 - (d) Five (5) PDF files from the CTA in response to each of the following categories in the Appendix of the Reasons for April Order:
 - i. **Category B4** (*CTA’s Info Email and Twitter Messages*) consisting of ten (10) pages. A copy of this Category B4 file is attached and marked as **Exhibit “N”**.
 - ii. **Category C1** (*Documents for the March 19, 2020 EC Call*) consisting of fifty-three (53) pages, with pages 18-47 almost fully redacted. A copy of this Category C1 file is attached and marked as **Exhibit “O”**.
 - iii. **Category C2** (*Documents for the March 20, 2020 EC Call*) con-

sisting of sixty-one (61) pages, with pages 26-55 almost fully redacted. A copy of this Category C2 file is attached and marked as **Exhibit “P”**.

- iv. **Category C5** (*Documents for the March 22, 2020 CTA Key Personnel Call*) consisting of fourteen (14) pages. A copy of this Category C5 file is attached and marked as **Exhibit “Q”**.
- v. **Category C6** (*Documents for the March 23, 2020 EC Call*) consisting of fifty-six (56) pages, with pages 21-50 almost fully redacted. A copy of this Category C6 file is attached and marked as **Exhibit “R”**. Within pages 2-5 of this Category C6 file, there is a letter dated March 23, 2020 from Air Canada to Mr. Scott Streiner that was marked “Private and Confidential.”

(ii) **One CTA March 24, 2020 Members Meeting Notes in PDF Format**

- 20. On April 21, 2022, the AGC provided a PDF printout of the “Carrier Asks 24 March 2020” from the Heather Smith Microsoft OneNote File below (paragraph 24), which is attached and marked as **Exhibit “S”**. This file did not identify Ms. Smith as the individual that made the annotations on the right side, but the original Microsoft OneNote file the CTA produced later on May 5, 2022 (paras. 24(b) below) revealed Ms. Smith as the author of those annotations.
- 21. Alongside this PDF document from the CTA, the AGC sent a letter to the Court on the same day stating the following in relation to this document:

In respect of paragraph 6 of the Order and paragraph 43 of the Reasons, a single document containing notes has been identified by the Intervener, and will be disclosed following this letter. No privilege is being claimed in respect of this specific document. The disclosure is not a waiver of any privilege which may apply to any similar document in this proceeding or otherwise.

With that, I believe that the Respondent has complied with the requirements of the April 11, 2022 Order.

A copy of the AGC's letter is attached and marked as **Exhibit "T"**.

(iii) **Two Microsoft OneNote Files from the CTA on May 5, 2022**

22. On May 5, 2022, the CTA disclosed two separate Microsoft OneNote files.

23. In one of the two Microsoft OneNote files, there were three documents with the titles "**Meeting - Mar. 19**", "**Meeting - Mar. 20**", and "**Meeting - Mar. 23**", which is attached and marked as **Exhibit "U"**, **Exhibit "V"**, and **Exhibit "W"**, respectively. In each of these three documents, on the right side, there was the name "Alysia Lau" that appeared as the author of the content therein [**Alysia Lau MS OneNote File**].

24. In the other Microsoft OneNote file, there were four separate documents as follows [**Heather Smith MS OneNote File**]:

(a) The document titled "**March 26**" contains a formal meeting agenda for the CTA Members' Meeting on March 26, 2020 with annotations made by Heather Smith, a CTA Member. A PDF printout of this document, with Ms. Smith's annotations, is attached and marked above as Exhibit "**F**".

(b) The document titled "**Carrier Asks 24 March 2020**" contains a side-by-side comparison chart of requests from Air Transat and Air Canada, with annotations made by Ms. Smith. A PDF printout of this document, with Ms. Smith's annotations, is attached and marked as **Exhibit "X"**. This side-by-side comparison chart was initially circulated by Mr. Streiner on March 23, 2020, found in pages 11-12 of Appendix C6 from the April 20, 2022 Documents, and a copy of that email and

attachment are attached and marked as **Exhibit “Y”**.

- (c) The document titled “**Air Transat**” contains a March 22, 2020 letter from Transat AT’s Chairman, President, and CEO to Mr. Scott Streiner. A screenshot of the first page is attached and marked as **Exhibit “Z”**. In the screenshot it shows that this file was imported into Microsoft OneNote from the Windows Desktop folder of the user “hsmith”.
- (d) The document titled “**Air Canada Letter**” contains a March 23, 2020 letter from Air Canada’s Executive Vice President and Chief Legal Officer to Mr. Scott Streiner, and marked as “*Private and Confidential.*” A screenshot of the first page of said letter is attached and marked as **Exhibit “AA”**. In the screenshot it shows that this file was imported into Microsoft OneNote from the Windows Desktop folder of the user “hsmith” The full letter can be found within pages 2-5 of the Category C6 PDF file (Exhibit “R”).

(iv) The CTA Document Search Affidavit in Response to April Order

25. In the April Order, the Court ordered the CTA to file an affidavit to detail its search for relevant documents [**CTA Document Search Affidavit**]. On April 21, 2022 the CTA served and filed the CTA Document Search Affidavit, and the affiant for this affidavit was Ms. Barbara Cuber.

26. In paragraph 50 of the reasons for the April Order, the Court permitted the Applicant to cross-examine on the CTA Document Search Affidavit. The Applicant’s efforts at scheduling this cross-examination are detailed further below.

(v) CTA’s Certificate of Attestation for the April Order Documents

27. On April 21, 2022 the CTA filed at the court registry a certificate dated April 20, 2022, attesting to the authenticity of the April 20, 2022 Documents, signed by a

Ms. Amanda Hamelin as an “Information Technology Manager of the Canadian Transportation Agency” but it did **not** contain the CTA’s seal.

28. The CTA did **not** provide APR with the certificate that Ms. Hamelin signed until May 12, 2022.

29. The CTA has not filed any certificate attesting to the authenticity of the Alysia Lau MS OneNote File and the Heather Smith MS OneNote File.

E. The CTA’s Continued Failure to Comply with the October Order and April Order

30. After the Court issued the April Order on April 11, 2022, APR has written to the AGC and/or CTA in relation to compliance with the Court’s October Order and/or April Order, which are detailed under separate subheadings below:

- (i) APR canvassing availability for the cross-examination;
- (ii) Documents that Continue to be Withheld by the CTA; and
- (iii) Ms. Cuber’s Failure to Attend the Cross-Examination on May 3, 2022.

(i) APR canvassing availability for the cross-examination

31. Shortly after receiving the April Order, Simon Lin, APR’s counsel, contacted counsel for the CTA and counsel for the AGC to canvass availability for the cross-examination on the CTA Document Search Affidavit.

32. A copy of the letter of Mr. Lin to Ms. Barbara Cuber, counsel for the CTA, with a copy to Mr. Lorne Ptack and Mr. Sandy Graham, counsel for the AGC, dated April 13, 2022, is attached and marked as **Exhibit “AB”**. In the letter, Mr. Lin was canvassing availability for a cross-examination on the week of May 2, 2022.

33. A copy of an email of Mr. Allan Matte, counsel for the CTA, dated April 14,

2022, is attached and marked as **Exhibit “AC”**. In the email, Mr. Matte responded to Mr. Lin’s request for availability as follows: “In terms of scheduling any cross-examinations, we should consult with Counsel for the AG to ensure that all are available. I will be in touch shortly.”

34. A copy of a letter of Mr. Lin, in response to the email from Mr. Matte, dated April 14, 2022, is attached and marked as **Exhibit “AD”**. In the letter, Mr. Lin noted that the AGC was already copied in the April 13, 2022 letter and requested the CTA to provide availability forthwith.
35. A copy of an email of Mr. Lin, to counsel for the AGC and counsel for the CTA, dated April 21, 2022, is attached and marked as **Exhibit “AE”**. In the email, Mr. Lin advised that since the CTA and AGC has not responded to APR’s request for availabilities, the cross-examination will be scheduled for May 4 or 5, 2022.
36. A copy of an email of Mr. Ptack dated April 21, 2022 is attached and marked as **Exhibit “AF”**. In the email, Mr. Ptack advised that “Counsel for the Respondent are not available on those dates. If you cannot wait for our availability Mr Lin, we can request that the Court convene a CMC to address timing and avoid further and unnecessary unilateral demands.”
37. A copy of an email of Mr. Lin to counsel for the AGC and counsel for the CTA, dated April 21, 2022, is attached and marked as **Exhibit “AG”**. In the email, Mr. Lin requested that the availabilities be provided by noon on April 22, 2022.
38. A copy of an email of Mr. Ptack, dated April 22, 2022, is attached and marked as **Exhibit “AH”**. In the email, Mr. Ptack advised that counsel for the AGC were not available on May 4-6, 2022, amongst other dates.
39. A copy of a Direction to Attend dated April 22, 2022 is attached and marked

as **Exhibit “AI”**. This Direction to Attend was served on counsel for the AGC via email and also served on counsel for the CTA via both email and fax. The Direction to Attend was for May 3, 2022 at 9:00AM PST / 12:00PM EST.

40. At no time did the CTA provided their availability for a cross-examination on the CTA Document Search Affidavit.

(ii) Documents that Continue to be Withheld by the CTA

41. A copy of the letter of Mr. Lin to Mr. Matte, dated April 22, 2022, is attached and marked as **Exhibit “AJ”**. In the letter, Mr. Lin brought to the CTA’s attention four (4) deficiencies in the CTA’s compliance with the October Order and/or April Order: (1) Redactions; (2) Claims for Privilege; (3) Twitter Private Messages and Info Account Emails; and (4) Original Microsoft One Note Format for Four Documents. Mr. Lin also requested that the CTA correct the deficiencies by April 29, 2022.

42. A copy of the letter of Mr. Kevin Shaar, counsel for the CTA, to Mr. Lin, dated April 28, 2022, is attached and marked as **Exhibit “AK”**. In the letter, Mr. Shaar addressed the following topics: (1) Solicitor-Client Privilege (in response to the reference of “Privilege” in Mr. Lin’s April 22, 2022 letter); (2) Twitter and @info messages; (3) Original Microsoft One Note versions of documents; and (4) Cross-Examination of Ms. Cuber.

43. A copy of the letter of Mr. Lin to Mr. Shaar, dated April 28, 2022, is attached and marked as **Exhibit “AL”**. In the letter, Mr. Lin addressed each of the four items from Mr. Shaar’s letter of the same date. The CTA has not responded to Mr. Lin’s letter.

(iii) **Ms. Cuber’s Failure to Attend the Cross-Examination on May 3, 2022**

44. A copy of a letter of Mr. Lin to Mr. Matte, dated April 28, 2022, is attached and marked as **Exhibit “AM”**. In the letter, Mr. Lin requested the CTA to provide, a day in advance, the documents listed in the April 22, 2022 Direction to Attend.
45. A copy of a seven (7) page letter of Mr. Shaar to the Court, dated April 28, 2022, is attached and marked as **Exhibit “AN”**. The CTA’s letter was sent to the Court shortly after Mr. Lin’s letter to Mr. Matte on April 28, 2022 (above).
46. A copy of a letter of Mr. Lin to the Court, dated April 28, 2022, is attached and marked as **Exhibit “AO”**. In this letter, Mr. Lin responded to Mr. Shaar’s letter to the Court.
47. On May, 2, 2022, the Court (Mactavish, J.A.) issued a direction in response to the CTA’s letter on April 28, 2022.
48. A copy of an email of Mr. Shaar, dated May 2, 2022, after the Court’s direction, is attached and marked as **Exhibit “AP”**. In the email, Mr. Shaar stated, “Pursuant to today’s Direction from the Court, the Agency will be bringing a motion under Rule 94 of the Federal Courts Rules. Accordingly, we trust that you will agree that the examination will not proceed tomorrow.”
49. A copy of a letter of Mr. Lin to Mr. Shaar, dated May 2, 2022, is attached and marked as **Exhibit “AQ”**. In the letter, Mr. Lin responded to Mr. Shaar’s email of the same date and stated that there was no basis to postpone the cross-examination scheduled for May 3, 2022.
50. A copy of an email of Mr. Shaar, dated May 3, 2022, at 8:41AM PST / 11:41AM EST, is attached and marked as **Exhibit “AR”**. In the email, Mr. Shaar stated, “To be clear, the Agency and its affiant will not attend the cross-examination at

noon today. As previously mentioned, the Agency is preparing a motion under Rule 94 of the Federal Courts Rules, which will be promptly filed with the Court.”

51. A copy of an email of Mr. Lin, dated May 3, 2022, at 8:49AM PST / 11:49AM EST, is attached and marked as **Exhibit “AS”**. In the email, Mr. Lin informed the CTA that the CTA’s affiant had no right of veto, and remedies under Rule 97 would be sought if the affiant did not attend the cross-examination. The CTA did not respond to Mr. Lin’s email.
52. A copy of the endorsed Direction to Attend of Ms. Cuber’s non-attendance on May 3, 2022 is attached and marked as **Exhibit “AT”**. In the endorsement, it states that the court reporter and Mr. Lin waited until 9:32AM PST on May 3, 2022.
53. A copy of the invoice from Mainland Reporting is attached and marked as **Exhibit “AU”**. The court reporter charged \$749.70 for the cross-examination on May 3, 2022.
54. I was informed by an email from Mainland Reporting that was sent to Mr. Lin that Mainland Reporting’s cancellation policy is that “[w]e need to know by 2 p.m. the day before the discovery is scheduled. By 2 p.m. we need to be confirming reporters for the next day, which is why we charge the cancellation rate at the 1/2 or full day rate we’ve booked them for.” I verily believe this statement from Mainland Reporting about its cancellation policy is true and correct.

F. Chronology of Documents for the Statement on Vouchers for this Motion

55. In this section, I have chronologically ordered and separately labelled some of the key documents that are pertinent for purposes of APR’s present motion.

(i) **Wednesday, March 18, 2020 Encrypted Email from Transport Canada**

56. A copy of the email correspondence between Mr. Colin Stacey, the Director General of Air Policy at Transport Canada, and Ms. Marcia Jones, the former Chief Strategy Officer at the CTA, dated March 18, 2020 (i.e., the Transport Canada Encrypted Email above), can be found in Exhibit “I”.
57. The Transport Canada Encrypted Email began with the following on March 18, 2020 at 2:57 PM, and appears to have been a forwarded email (i.e., “FW”) and was sent by Transport Canada in an encrypted form:

Subject: FW: From MinO: Air Transat

Hi Marcia,

Air Transat are telling us that they are getting pressure from creditors who are pushing on the airlines for cash. They will request that we officially let them to provide vouchers to passengers instead of providing them cash because they literally do not have enough cash to give refunds.

Have you heard anything about this? Are you available to discuss?

Thanks,

cs

58. A copy of the CTA’s Written Representations, dated February 1, 2022, is attached and marked as **Exhibit “AV”**. In paragraphs 49-50 of these Written Representations (excerpted below), the CTA claims that the original Transport Canada Encrypted Email from Mr. Stacey to Ms. Jones above “no longer exist[s].”

49. The Applicant rightly claims that there must have been original e-mails from Agency staff person Marcia Jones and from a third party, Colin Stacey, on March 25, 2020. There is direct evidence of this because their messages appear within e-mail chains that were disclosed by the Agency.

50. However, the Applicant speculates that e-mails that were created are retained permanently and are being withheld. This is not the case. Having thoroughly searched its records, the Agency was unable to locate the original e-mails sought by the Applicant, and the Agency has concluded that they no longer exist. The Agency cannot therefore produce these items.

[Emphasis added.]

59. The original Transport Canada Encrypted Email would have contained the original encrypted attachments, if any.
60. For greater certainty, I am including and excerpting the CTA's Written Representations from February 1, 2022 only to demonstrate the CTA's position in respect of the Transport Canada Encrypted Email. I do not agree with the CTA's argument that this email "no longer exist[s]."
- (ii) **Sunday, March 22, 2020 - Circulation of the Draft Statement on Vouchers within the CTA**
61. A copy of Mr. Streiner's email to some senior CTA personnel with one attachment entitled "Statement.docx", dated March 22, 2020 at 08:54, found on pages 36-37 of the Dec. 14 Docs, is attached and marked as **Exhibit "AW"**. In this email, Mr. Streiner indicated that "The attached [Statement on Vouchers] will be one item for discussion on our 10:30 call."
62. A copy of Mr. Streiner's Microsoft Outlook calendar invite to the above senior CTA personnel with the subject line "Urgent Debrief - Please confirm attendance ASAP," for a meeting on Sunday, March 22, 2020 at 10:30AM, found on page 3 of the Category C5 PDF file from the April 20, 2022 Documents, is attached and marked as **Exhibit "AX"**.
63. A copy of Mr. Streiner's email to all the CTA Members, with one attachment entitled "Statement.docx", dated March 22, 2020 at 11:24, found on pages 38-

39 of the Dec. 14 Docs, is attached and marked as **Exhibit “AY”**.

64. The CTA’s constituent Members replies to Mr. Streiner’s 11:24 email (Exhibit “AY”):

- (a) A copy of the email of Ms. Mary Tobin Oates, CTA Member, to Mr. Streiner and other CTA Members with one attachment entitled “Statement mto.docx”, dated March 22, 2020 at 12:55, found on pages 101-102 of the Dec. 14 Docs, is attached and marked as **Exhibit “AZ”**.
- (b) A copy of the email of Mr. Mark MacKeigan, CTA Member, to Mr. Streiner and other CTA Members, with one attachment entitled “Statement mto_mm.docx”, dated March 22, 2020 at 13:11, found on pages 96-98 of the Dec. 14 Docs, is attached and marked as **Exhibit “BA”**.
- (c) A copy of the email of Ms. Lenore Duff, CTA Member, to Mr. Streiner and other CTA Members, with one attachment entitled “Statement.docx”, dated March 22, 2020 at 13:12, found on pages 103-104 of the Dec. 14 Docs, is attached and marked as **Exhibit “BB”**.
- (d) A copy of a chain of emails sent by CTA Members Ms. Heather Smith and Mr. Gerald Dickie, to Mr. Streiner and other CTA Members, found on pages 99-100 of the Dec. 14 Docs, is attached and marked as **Exhibit “BC”**.

65. A copy of Mr. Streiner’s email to Ms. Marcia Jones, dated March 22, 2020 at 12:42 p.m., attaching two documents: a draft Statement on Vouchers and a draft decision involving Air Canada. This email is found at the bottom of pages 32-33 of the Privilege Motion that the AGC submitted on December 14, 2021 (paragraph 15(c) above), is attached and marked as **Exhibit “BD”**. The email from Mr. Streiner stated the following:

Subject: Current drafts

As background for your call.

S

(iii) Sunday, March 22, 2020 - Transport Canada References to the Statement on Vouchers

66. A copy of an email chain between Transport Canada and CTA personnel, during the dates of March 22-24, 2020 (i.e., the TC/CTA Undisclosed Meeting Email above), is attached above as Exhibit “J”.
67. The TC/CTA Undisclosed Meeting Email was started by a Transport Canada employee with the following on the afternoon of Sunday, March 22, 2020 at 2:22 p.m.:

Subject: CTA announcement tomorrow

Hi Cait - I was just on a conference call with Lawrence, our ADM, where he briefed us on an announcement the Agency would do tomorrow regarding the refund and voucher issue.

He understood, based on a conversation with Marcia, that the measure you would announce may have an adverse impact on larger carriers like AC or WestJet.

We are not entirely sure we understand this. Can you explain?

Feel free to call me if easier 343-996-9858

Thanks!

[Emphasis added.]

68. The TC/CTA Undisclosed Meeting Email then contains a response from a CTA employee on March 23, 2020 at 10:15 a.m. with the following:

Subject: RE: CTA announcement tomorrow

Hi Vincent,

I understand there is a plan to release a statement indicating that, generally speaking, for cancelled flights, an appropriate approach in the current context could be for airlines to provide affected passengers with vouchers or credits for future travel. This was discussed between the Chair, the DM and the Minister's Chief of Staff and Marcia spoke with your ADM over the weekend as well.

It has been noted, though, that some airlines may not wish to provide vouchers, if their tariffs do not have any reimbursement requirement for force majeure situations.

Let me know if you'd like to discuss further.

Cait

[Emphasis added.]

G. Waiver of Privilege for One of the Privilege Motion Documents

69. As described in paragraph 15(c) of this affidavit, the AGC filed a Privilege Motion on December 14, 2021. On April 20, 2022 and as part of the April 20, 2022 Documents, the CTA produced in unredacted form one of the documents from the Privilege Motion.
70. A copy of a letter of Mr. Lin to counsel for the CTA and counsel for the AGC, dated April 21, 2022, is attached and marked as **Exhibit "BE"**. In this letter, Mr. Lin brought the unredacted document to the attention of the CTA and AGC:

[...]

As a professional courtesy, we draw your attention to page 52 of the PDF file for Appendix C6. We note that this contains an email with the unredacted list of the two to-do items for Ms. Valérie Lagacé on March 23, 2020. This appears to be covered by para. 12 of the Court's Reasons on April 11, 2022, and para. 3 of the Order on April 11, 2022. The same email appears in some of the other PDF files in the Materials (e.g., C2 and C1).

Considering the Respondent, and the CTA, have had more ample opportunity to closely review the Materials prior to its release, we understand that the CTA is no longer asserting solicitor-client

privilege for the item identified above. **Please advise by close of business today (5:00PM EST April 21, 2022) if our understanding is incorrect.**

[...]

71. Neither the CTA nor the AGC responded to Mr. Lin's letter by the requested time, or shortly thereafter.

H. Miscellaneous

72. With reference to the CTA's Written Representations (Exhibit "AV"), the CTA acknowledged the existence of a "scheduler" for the Members' Meeting on March 24, 2020 at paragraph 83. I have reviewed the April 20, 2022 Documents, and the CTA has not produced this "scheduler" document.

73. A printout of the Government Electronic Directory Services [GEDS], dated May 14, 2022, is attached and marked as **Exhibit "BF"**. This printout shows the job titles of two CTA personnel as follows:

- (a) Amanda Hamelin - Business Analyst & Process Architect; and
- (b) Jonathan Guindon - Manager, IT Operations.

AFFIRMED remotely by Dr. Gábor Lukács
at the City of Budapest, Hungary before me
at the City of Coquitlam, British Columbia
on May 15, 2022, in accordance with O. Reg.
431/20, *Administering Oath or
Declaration Remotely*.

Commissioner for Taking Affidavits

Simon (Pak Hei) Lin, *Barrister & Solicitor*
LSO #: 76433W
4388 Still Creek Drive, Suite 237
Burnaby, BC V5C 6C6

Dr. Gábor Lukács

Halifax, NS

Tel:

lukacs@AirPassengerRights.ca

CERTIFICATE OF COMMISSIONER FOR TAKING AFFIDAVITS

I, Simon Lin, a Commissioner for taking Affidavits in Ontario, certify that:

1. This certificate is provided in accordance with the *COVID-19 Notice No. 2* of the Supreme Court of British Columbia.
2. On May 15, 2022, I commissioned the Affidavit of Dr. Gábor Lukács [**Deponent**] in this matter [**Affidavit**]. The Affidavit was commissioned remotely using video technology and a secure electronic signature platform, as permitted by the Law Society of Ontario and O. Reg. 431/20, *Administering Oath or Declaration Remotely*.
3. I was satisfied that the process was necessary because it was medically unsafe, for reasons associated with COVID-19, for the Deponent and a commissioner to be physically present together.
4. The Affidavit was loaded in PDF format by the commissioner onto a secure electronic signature platform, which:
 - a. does not permit the Deponent to add or remove any of the pages;
 - b. required both the commissioner and Deponent to apply their initials on each page of the Affidavit; and
 - c. required both the commissioner and Deponent to apply their electronic signatures where a signature is required.
5. The Deponent was emailed a link to the platform to securely sign the Affidavit. Thereafter, the following process was followed while the commissioner and Deponent was connected via video technology:
 - a. The Deponent showed me the front and back of the Deponent's current government-issued photo identification [**ID**], which I have retained screenshots of.
 - b. I compared the video image of the Deponent and the information on the ID and was satisfied that it was the same person.
 - c. The copy of the Affidavit before the commissioner and Deponent were on the same electronic platform and are identical.
 - d. I administered the oath to the Deponent who affirmed/swore to the truth of the facts in the Affidavit and the Deponent applied their electronic signature.

May 15, 2022

Signature of Simon Lin
Commissioner for Taking Affidavits

This is **Exhibit “A”** to the Affidavit of Dr. Gábor Lukács
affirmed before me on May 15, 2022

Signature



Form 4001
Articles of Incorporation
Canada Not-for-profit Corporations
Act (NFP Act)

Formulaire 4001
Statuts constitutifs
Loi canadienne sur les
organisations à but non lucratif
(Loi BNL)

- 1 Corporate name
Dénomination de l'organisation
Air Passenger Rights
- 2 The province or territory in Canada where the registered office is situated
La province ou le territoire au Canada où est maintenu le siège
NS
- 3 Minimum and maximum number of directors
Nombres minimal et maximal d'administrateurs
Min. 3 Max. 9
- 4 Statement of the purpose of the corporation
Déclaration d'intention de l'organisation
See attached schedule / Voir l'annexe ci-jointe
- 5 Restrictions on the activities that the corporation may carry on, if any
Limites imposées aux activités de l'organisation, le cas échéant
See attached schedule / Voir l'annexe ci-jointe
- 6 The classes, or regional or other groups, of members that the corporation is authorized to establish
Les catégories, groupes régionaux ou autres groupes de membres que l'organisation est autorisée à établir
See attached schedule / Voir l'annexe ci-jointe
- 7 Statement regarding the distribution of property remaining on liquidation
Déclaration relative à la répartition du reliquat des biens lors de la liquidation
See attached schedule / Voir l'annexe ci-jointe
- 8 Additional provisions, if any
Dispositions supplémentaires, le cas échéant
See attached schedule / Voir l'annexe ci-jointe
- 9 **Declaration:** I hereby certify that I am an incorporator of the corporation.
Déclaration : J'atteste que je suis un fondateur de l'organisation.

Name(s) - Nom(s)

Signature

Gabor Lukacs

Gabor Lukacs

A person who makes, or assists in making, a false or misleading statement is guilty of an offence and liable on summary conviction to a fine of not more than \$5,000 or to imprisonment for a term of not more than six months or to both (subsection 262(2) of the NFP Act).

La personne qui fait une déclaration fautive ou trompeuse, ou qui aide une personne à faire une telle déclaration, commet une infraction et encourt, sur déclaration de culpabilité par procédure sommaire, une amende maximale de 5 000 \$ et un emprisonnement maximal de six mois ou l'une de ces peines (paragraphe 262(2) de la Loi BNL).

You are providing information required by the NFP Act. Note that both the NFP Act and the *Privacy Act* allow this information to be disclosed to the public. It will be stored in personal information bank number IC/PPU-049.

Vous fournissez des renseignements exigés par la Loi BNL. Il est à noter que la Loi BNL et la *Loi sur les renseignements personnels* permettent que de tels renseignements soient divulgués au public. Ils seront stockés dans la banque de renseignements personnels numéro IC/PPU-049.

Schedule / Annexe**Purpose Of Corporation / Déclaration d'intention de l'organisation**

1. To educate air passengers and the public at large as to their rights and the means for the enforcement of these rights, by researching and making available the results of such research on the matter of the law relating to air passenger rights on domestic and international flights.
2. To act as a liaison between other public interest or citizens' groups engaged in public interest advocacy.
3. To assist in and promote the activity of public interest group representation throughout Canada and elsewhere.
4. To make representations to governing authorities on behalf of the public at large and on behalf of public interest groups with respect to matters of public concern and interest with respect to air passenger rights, and to teach public interest advocacy skills and techniques.

Schedule / Annexe**Restrictions On Activities / Limites imposées aux activités de l'organisation**

The Corporation shall have all the powers permissible by the Canada Not-for-profit Corporations Act, save as limited by the by-laws of the Corporation.

Nothing in the above purposes, however, shall be construed or interpreted as in any way empowering the Corporation to undertake functions normally carried out by barristers and solicitors.

Schedule / Annexe
Classes of Members / Catégories de membres

There shall be two classes of members: Ordinary Members and voting General Members. The criteria for admission to both classes shall be governed by the by-laws of the Corporation.

Distribution of Property on Liquidation / Répartition du reliquat des biens lors de la liquidation

Upon liquidation, the property of the Corporation shall be disposed of by being donated to an eligible donee, as defined in the Income Tax Act (Canada).

Schedule / Annexe
Additional Provisions / Dispositions supplémentaires

- a) Any amendment or repeal of the Corporation's By-Laws shall require confirmation by a Special Resolution of two-thirds of the General Membership prior to taking effect.

- b) The Corporation shall be carried on without the purpose of gain for its Members, and any profits or other accretions shall be used in furtherance of its purposes.

- c) Directors shall serve without remuneration, and no Director shall directly or indirectly receive any profit from his or her position as such, provided that Directors may be reimbursed for reasonable expenses incurred in the performance of their duties.

This is **Exhibit “B”** to the Affidavit of Dr. Gábor Lukács
affirmed before me on May 15, 2022

Signature



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Statement on Vouchers

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.

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Date modified:

2020-03-25

This is **Exhibit “C”** to the Affidavit of Dr. Gábor Lukács
affirmed before me on May 15, 2022

Signature

[Home](#)

Organization and mandate

Our organization and mandate

[Members](#)

[Organizational chart](#)

[Partner organizations](#)

[At the Heart of Transportation:
A Moving History](#)

The Canadian Transportation Agency (CTA) is an independent, quasi-judicial tribunal and regulator that has, with respect to all matters necessary for the exercise of its jurisdiction, all the powers of a superior court.

The CTA is made up of five full-time [Members](#); up to three temporary Members may also be named. The Members, who are all based in the National Capital Region, are supported in their decision-making process by some 240 employees and administrative staff.

The CTA has three core mandates

- We help ensure that the national transportation system runs efficiently and smoothly in the interests of all Canadians: those who work and invest in it; the producers, shippers, travellers and businesses who rely on it; and the communities where it operates.
- We protect the human right of persons with disabilities to an accessible transportation network.
- We provide consumer protection for air passengers.

Our tools

To help advance these mandates, we have three tools at our disposal:

- **Rule-making:** We develop and enforce ground rules that establish the rights and responsibilities of transportation service providers and users and that level the playing field among competitors. These rules can take the form of binding regulations or less formal guidelines, codes of practice or interpretation notes.
- **Dispute resolution:** We resolve disputes that arise between transportation providers on the

one hand, and their clients and neighbours on the other, using a range of tools from facilitation and mediation to arbitration and adjudication.

- **Information provision:** We provide information on the transportation system, the rights and responsibilities of transportation providers and users, and the Agency's legislation and services.

Our values

Our Code of Values and Ethics outlines the core values and expected behaviours that guide us in all activities related to our professional duties. Our guiding values are:

Respect for democracy - We uphold Canadian parliamentary democracy and promote constructive and timely exchange of views and information.

Respect for people - We treat people with dignity and fairness and foster a cooperative, rewarding working environment. **Integrity** - We act with honesty, fairness, impartiality and transparency.

Stewardship - We use and manage our resources wisely and take full responsibility for our obligations and commitments.

Excellence - We provide the highest quality service through innovation, professionalism and responsiveness.

Members

- [Scott Streiner, Chair and CEO](#)
- [Elizabeth C. Barker, Vice-Chair](#)
- [William G. McMurray, Member](#)
- [Mark MacKeigan, Member](#)
- [Mary Tobin Oates, Member](#)
- [Heather Smith, Member](#)
- [Gerald Dickie, temporary Member](#)
- [Lenore Duff, temporary Member](#)

Scott Streiner, Chair and CEO



Scott Streiner began a five-year term as Chair and CEO of the Canadian Transportation Agency (CTA) on July 20, 2015. Since that time, he has taken a series of steps to enhance the CTA's ability to respond to the needs of a rapidly evolving national transportation system, its customers, and the communities in which the system operates. These steps include: realigning the CTA's internal structure and recruiting top-notch talent to serve on the executive team; putting in place an action plan to foster a healthy, high-performing

organization; increasing public awareness of the CTA's roles and services through speeches, media

interviews, and social media; introducing innovative approaches to delivering the CTA's regulatory and adjudicative mandates; and launching a broad review of the full suite of regulations, codes, and guidelines administered by the CTA.

Scott also led the revitalization of the Council of Federal Tribunal Chairs in 2016 and 2017, and is currently a member of the Board of Directors of the Council of Canadian Administrative Tribunals.

Prior to joining the CTA, Scott had a 25-year career in the federal public service. As Assistant Secretary to the Cabinet, Economic and Regional Development Policy, he served as Secretary to the Cabinet Committee on Economic Prosperity and played a key role in preparing advice to the Prime Minister on economic, environmental and trade matters, including in the areas of transportation and infrastructure. As Assistant Deputy Minister, Policy with Transport Canada, he led the development of policy options and advice on issues touching all modes of the national transportation system, and ran the Department's international, intergovernmental and data analysis functions.

Earlier positions included Executive Director of the Aerospace Review; Assistant Deputy Minister with the Labour Program; Vice President, Program Delivery with the Canadian Environmental Assessment Agency; Director General, Human Resources with the Department of Fisheries and Oceans; Director of Operations for the Reference Group of Ministers on Aboriginal Policy; Machinery of Government Officer at the Privy Council Office; and Director of Pay Equity with the Canadian Human Rights Commission.

Scott has led Canadian delegations abroad, including to India, China, and the International Labour Organization. He has also served as the Government Member with NAV Canada, Canada's Ministerial Designee under the North American Agreement on Labour Cooperation, Chair of the Council of Governors of the Canadian Centre for Occupational Health and Safety, and a Director on the Board of the Soloway Jewish Community Centre.

Scott received a bachelor's degree in East Asian Studies from the Hebrew University, a master's degree in International Relations from the Norman Paterson School of International Affairs, and a PhD in Political Science from Carleton University. He spent a year at Carleton University as a Public Servant in Residence and has taught courses, published articles, and made conference presentations on human rights, Middle Eastern history and politics, and public policy.

Elizabeth C. Barker, Vice-Chair

Liz Barker began a five-year term as Vice-Chair and Member of the Canadian Transportation Agency (CTA) on April 3, 2018.

Liz joined the CTA's predecessor, the National Transportation Agency, in 1991 as counsel. She has held several positions at the CTA, including, most recently, Chief Corporate Officer, Senior General Counsel and Secretary. She has worked in all areas of the Agency's mandate over the years, but has specialized in advising the tribunal in complex dispute adjudications and oral hearings on controversial subjects including rail level of service complaints, a wide range of complex accessible transportation disputes, and ministerial inquiries into marine pilotage and the accessibility of inter-city



motor coach services. She has also worked extensively in the development of the Agency's approach to its human rights mandate, administrative monetary penalties regime, alternative dispute resolution, final offer arbitration, and rail level of service arbitration. She has appeared as counsel before all levels of court, including the Federal Court, the Federal Court of Appeal, and the Supreme Court of Canada, as co-counsel in *Council of Canadians with Disabilities v. VIA Rail Canada Inc.*, [2007] 1 S.C.R. 650.

Liz was a recipient of the Queen's Diamond Jubilee Medal in 2016 for her work at the Agency, in particular in accessible transportation, the administrative monetary penalties program, and for her leadership of the Legal Services Branch.

Liz received her law degree from Osgoode Hall Law School in 1987 and her B.A. (Honours in Law) from Carleton University in 1984. She has been a member of the Law Society of Ontario since 1989.

William G. McMurray, Member



William G. McMurray became a Member of the Canadian Transportation Agency on July 28, 2014.

Prior to his appointment to the Agency, he served as Vice-Chairperson of the Canada Industrial Relations Board.

A lawyer, Mr. McMurray practised administrative law and litigation in the private sector for over 23 years. He acted as counsel for some of Canada's largest employers in the federal transportation industry. He

successfully pleaded complex cases before a number of federal administrative tribunals, including the Agency and its predecessors. He has argued cases, in both official languages, before the Federal Court, the Federal Court of Appeal and has appeared in all levels of the civil courts. While practising law, he also taught "transportation law and regulation" at McGill University in Montréal for over ten years.

He studied common law and civil law at the University of Ottawa and studied political economy at Université Laval in Québec City and at the University of Toronto. Mr. McMurray completed his articles of clerkship while working in the Law Department of the former Canadian Transport Commission.

He has been a member of the Law Society of Upper Canada since 1986.

Mark MacKeigan, Member



Mark MacKeigan began a four-year term as a Member of the Canadian Transportation Agency on May 28, 2018.

He comes to the Agency from The St. Lawrence Seaway Management Corporation, the not-for-profit operator of the federal government's Seaway assets, where he was Chief Legal Officer and Corporate Secretary from 2014.

Mark is not entirely new to the Agency, having served previously as a Member from 2007 to 2014 and as legal counsel on specific files in a contract position during 1996.

His transportation law experience includes six years as senior legal counsel with the International Air Transport Association in Montréal from 2001 to 2007, focusing on competition law, cargo services, aviation regulatory and public international law matters. From 1996

to 2000, he was legal counsel with NAV CANADA, the country's provider of civil air navigation services.

Mark began his legal career in private practice in Toronto. After earning a Bachelor of Arts with highest honours in Political Science from Carleton University, Mark obtained his law degree from the University of Toronto and a Master of Laws from the Institute of Air and Space Law at McGill University. He also holds a postgraduate diploma in European Union Competition Law from King's College London.

He is a member of the Bars of Ontario and the State of New York and is admitted as a solicitor in England and Wales.

Mary Tobin Oates, Member



After 25 years of public service, Mary Tobin Oates joined the Canadian Transportation Agency on 9 July 2018. As a lawyer, Mary practised in different areas of law, largely in public and administrative law. She appeared before the Pension Appeals Board and the Federal Court of Appeal regarding disability benefits under the Canada Pension Plan and the Old Age Security Act. Mary served as a Board member of the Veterans Review and Appeal Board where she determined eligibility for disability benefits for members of the Canadian Forces and the Royal Canadian Mounted Police. Mary provided legal and policy advice on indigenous issues to the Department of Justice and to Indian and Northern Affairs Canada. She also served as Board member to Tungasuvvingat Inuit, a not-for-profit, charitable organization that provides services to and advocates on behalf of Inuit who live

in southern Canada.

Before becoming a lawyer, Mary worked as a technical editor for the Canadian Transportation Accident and Safety Board (now Transportation Safety Board).

Mary received her Bachelor of Arts from Memorial University of Newfoundland and graduated from Osgoode Hall Law School. She has been a member of the Law Society of Ontario (formerly the Law Society of Upper Canada) since February 1997.

Heather Smith, Member



Heather Smith became a full-time Member of the Canadian Transportation Agency on August 27, 2018. Heather was most recently Vice-President, Operations at the Canadian Environmental Assessment Agency. In previous positions, Heather was Executive Director in the Government Operations Sector of Treasury Board Secretariat, and Director General in the Strategic Policy Branch at Agriculture and Agri-Food Canada (AAFC). Heather held several management positions within Justice Canada, as General Counsel and Head of AAFC Legal Services, General Counsel and Head of Legal Services at the Canadian Environmental Assessment Agency, and General Counsel in the Legal Services Unit of Social

Development Canada.

Heather also served as legal counsel at Environment Canada Legal Services and Manager of the Canadian Environmental Protection Act Office at Environment Canada. Heather holds a B.A.(Hons.) from the University of King's College and an L.L.B. from the University of Toronto. She has also earned the Chartered Director (C.Dir.) designation from the McMaster/DeGroote Directors College.

Gerald Dickie, temporary Member



Gerald Dickie comes to the Canadian Transportation Agency after having worked for 36 years in the grain industry at different port locations. He spent the first 6 years in Thunder Bay at the Cargill Terminal. The next 30 years, he worked at the Port of Metro Vancouver. He initially worked on the rehabilitation of the Alberta Wheat Pool Terminal (now Cascadia Terminal) and was part of the team that automated the facility and introduced unit train unloading capabilities. In July of 2007, as a result of the ownership change of Agricore United, he moved to the North Vancouver Cargill Facility (formerly SWP) as the General Manager. He is an experienced manager of people, capital projects, business

operations, labour negotiations, supply chains and strategy.

The 30 years he spent working at the Port of Vancouver included being part of several external groups. He has held every position within the Vancouver Terminal Elevator Association, from President to Secretary. He was a member of the Senior Port Executive Committee Group, the Port Competitiveness Committee, BC Terminals Association and North Shore Waterfront Industry Association. This included leadership roles and active work in everything from port education for the community to Low Level Road Initiative and social licence activities. This experience included a good exposure to the issues that all port tenants, railway companies, vessel companies and customers faced.

He has worked with Transport Canada on the Winter Rail Contingency Meeting programs and on supply chain issues with a number of groups. He is familiar with marine and rail supply chains and with the producers, shippers and customers that rely on these chains.

Gerald has an MBA from Royal Roads University and a BScF from Lakehead University.

Lenore Duff, temporary Member



Lenore Duff is a former public service executive with 28 years of service with the Government of Canada whose positions included Director General, Strategic Initiatives at the Labour Program; Director General, Surface Transportation Policy at Transport Canada; and Senior Privy Council Officer supporting the Social Affairs Committee of Cabinet. Her primary focus throughout her career has been on the development of policy and legislation across a broad range of economic and social policy areas.

As Director General, Surface Transportation Policy at Transport Canada, Lenore was responsible for developing policy options and providing advice on strengthening the freight rail liability and compensation regime, as well as on reforming freight rail provisions as part of the recent modernization of the Canada Transportation Act. At the Labour Program, her work included leading the development of a series of legislative initiatives designed to enhance protections for federally regulated employees. Prior to that, Lenore was responsible for the development of policy initiatives related to income, employment and disability.

In the course of her career, Lenore has also had the opportunity to conduct consultations with a broad range of industry, civil society and government stakeholders to inform the development of policy and legislation.

Lenore earned both a Bachelor of Arts (Honours Sociology) and Master of Arts in Sociology from Carleton University.

This is **Exhibit “D”** to the Affidavit of Dr. Gábor Lukács
affirmed before me on May 15, 2022

Signature



[Home](#)

Code of Conduct for Members of the Agency

A. CONTEXT

Mandate of the Agency

(1) The Canadian Transportation Agency (Agency) is an independent, quasi-judicial, expert tribunal and regulator which has, with respect to all matters necessary for the exercise of its jurisdiction, all the powers of a superior court.

(2) The Agency and has three core mandates:

- a. Helping ensure that the national transportation system runs efficiently and smoothly in the interests of all Canadians: those who work and invest in it; the producers, shippers, travellers and businesses who rely on it; and the communities where it operates.
- b. Protecting the fundamental human right of persons with disabilities to an accessible transportation network.
- c. Providing consumer protection for air passengers.

Roles of the Agency's Chair, Vice-Chair, Members, and staff

(3) The Agency is comprised of up to five regular Members appointed by the Governor in Council (GIC), including the Agency's Chair and Vice-Chair, and up to three temporary Members appointed by the Minister of Transport from a roster approved by the GIC.

(4) Members make adjudicative decisions and regulatory determinations ¹.. Their responsibilities in these regards cannot be delegated.

(5) The Chair, who is the also Chief Executive Officer (CEO) and a Member, is responsible for overall leadership of the Agency. He or she sets the Agency's strategic priorities, serves as its public voice, reports on its plans and results to Parliament through the Minister of Transport, and handles relations with Ministers, Parliamentarians, Deputy Ministers, and analogous bodies in other jurisdictions. He or she assigns cases to Members, supervises and directs their work, and chairs regular Members meetings. And as CEO, he or she is the most senior manager of the public servants working in the organization, serves as Deputy Head and Accounting Officer with a broad range of related responsibilities under the Financial Administration Act and other statutes, and chairs the Executive Committee.

(6) The Vice-Chair, who is also a Member, sits on the Executive Committee and assumes the responsibilities of the Chair if the Chair is absent or incapacitated.

(7) Members other than the Chair and Vice-Chair do not have any managerial functions within the Agency.

(8) All Members are supported in the discharge of their decision-making duties by the Agency's public servants, who are responsible for giving Members frank, impartial, evidence-based advice; fully implementing Members' direction; and other tasks assigned to them by the Chair, their managers, or legislation.

B. GENERAL PROVISIONS

Purpose, guiding principles, and application of the Code

(9) This Code establishes the standards for the conduct of Members and applies to all regular and temporary Members. It supplements, and should be read in conjunction with, any applicable requirements and standards set out in the Canada Transportation Act; other legislation administered by the Agency; other legislation establishing ethical and conduct obligations, such as the Conflict of Interest Act; relevant regulations, policies, and guidelines; other relevant codes; and letters of appointment.

(10) The Code reflects:

- a. the Agency's commitment to independent, impartial, fair, transparent, credible, and efficient decision making; and
- b. the Agency's organizational values of respect for democracy, respect for people, integrity, stewardship, and excellence.

(11) Members shall:

- a. adhere to all elements of the Code and other applicable instruments;
- b. uphold the highest ethical standards at all times;
- c. arrange their private affairs in a manner that ensures they have no conflicts of interest;
- d. conduct themselves with integrity, avoid impropriety or the appearance of impropriety, and eschew any action that could cast doubt on their ability to perform their duties with impartiality;
- e. not accept gifts, hospitality, or other advantages or benefits from any party that has an interest in matters handled by the Agency;
- f. recuse themselves from any proceeding where they know or reasonably should know that, in the making of the decision, they would be in a conflict of interest, or where their participation might create a reasonable apprehension of bias. In such case, they shall immediately inform the Chair and provide reason for their recusal. Members are encouraged to seek the advice of the Chair and the General Counsel when dealing with any situation where recusal is contemplated; and
- g. immediately inform to the Chair if they become aware of a situation that may adversely affect the integrity or the credibility of the Agency, including possible non-compliance with the Code.

(12) The Chair is responsible for the administration of the Code, including any matters regarding its interpretation. Members are accountable to the Chair for their compliance with the Code.

Members' expertise and work arrangements

(13) Members have a responsibility to maintain the highest levels of professional competence and expertise required to fulfil their duties. Members are expected to pursue the development of knowledge and skills related to their work, including participation in training provided by the Agency.

(14) Regular, full-time Members must devote at least 37.5 hours per week to the performance of their duties during their term of appointment. If a regular Member is authorized by the Chair to continue to hear

one or more matters before them upon expiry of their term, they shall only request remuneration for actual time worked during the period of continuation.

(15) When temporary Members are appointed on a full-time basis, they must devote at least 37.5 hours per week to the performance of their duties. When temporary Members are appointed on a part-time basis, they shall only request remuneration for actual time worked.

(16) Members' designated workplace is at the Agency's head office. They shall only work from home or other off-site locations with the prior written approval of the Chair.

C. DECISION MAKING

Impartiality

(17) Members must approach each case with an open mind and must be, and be seen to be, impartial and objective at all times.

Natural justice and fairness

(18) Members must respect the rules of natural justice and procedural fairness.

(19) Members must ensure that proceedings are conducted in a manner that is transparent, fair, and seen to be fair.

(20) Members shall render each decision on the merits of the case, based on the application of the relevant legislation and jurisprudence to the evidence presented during the proceeding.

(21) Members shall not be influenced by extraneous or improper considerations in their decision making. Members shall make their decisions free from the improper influence of any other person, institution, stakeholder or interest group, or political actor.

Preparation

(22) Members shall carefully review and consider relevant material – including applications, pleadings, briefing notes, and draft decisions – before attending case-related briefing sessions, meetings, or oral hearings.

Timeliness

(23) Members shall take all reasonable steps to ensure that proceedings progress in a timely fashion, avoiding unnecessary delays but always complying with the rules of natural justice and procedural fairness. Members shall render decisions as soon as possible after pleadings have closed and ensure, to the greatest extent possible, that statutory timelines and internal service standards for the issuance of decisions are met.

Quality

(24) Members shall ensure that their decisions are written in a manner that is clear, logical, complete without being unnecessarily repetitive or lengthy, and consistent with any guidelines or standards established by the Agency regarding the quality and format of decisions.

Consistency

(25) Members shall be cognizant of the importance of consistency in Agency decisions, notwithstanding the fact that prior decisions on similar matters do not constitute binding precedents. Members should not depart from the principles established in previous decisions unless they have a reasonable basis, and provide well-articulated reasons, for doing so.

Respect for parties and participants

(26) Members shall conduct proceedings, including oral hearings, in a courteous and respectful manner, while ensuring that proceedings are orderly and efficient.

(27) Members shall conduct proceedings such that those who have cases before the Agency understand its procedures and practices and can participate meaningfully, whether or not they are represented by counsel.

(28) Members must be responsive to accessibility-related needs and implement reasonable accommodation measures to facilitate meaningful participation of parties and other participants with disabilities in Agency hearings.

(29) Members shall be responsive to diversity, gender, and other human rights considerations when conducting proceedings; for example, in the affirmation/swearing in of witnesses and the scheduling of oral hearings. Members shall avoid words, phrases, and actions that could be understood to manifest bias or prejudice based on factors such as disability, race, age, national origin, gender, religion, sexual orientation, or socio-economic status, and shall never draw inferences on a person's credibility on the basis of such factors.

Case-related communications

(30) Members shall not communicate directly or indirectly with any party, counsel, witness, or other non-Agency participants appearing before them in a proceeding with respect to that proceeding, except in the presence of all parties or their counsel.

(31) Members shall not disclose information about a case or discuss any matter that has been or is in the process of being decided by them or the Agency, except as required in the performance of, and in the circumstances appropriate to, the formal conduct of their duties. Members shall refrain from discussing any case or Agency-related matter in public places.

D. WORKING RELATIONS AND INTERACTIONS

Relations with other Members

(32) Members shall foster civil, collegial relations with other Members.

(33) Members should have frank discussions and openly debate issues, while showing respect for one another's expertise, opinions, and roles. Members shall not comment on another Member's views, decisions, or conduct, except directly and privately to that Member himself or herself, or to the Chair pursuant to subsection 11.g of this Code.

(34) Members assigned together to a Panel should strive to reach consensus decisions whenever

possible, but respectfully agree to disagree and prepare a majority opinion and a dissenting opinion where consensus cannot be achieved within a reasonable time period.

(35) Members should share their knowledge and expertise with other Members as requested and appropriate, without attempting to influence decisions in cases to which they are not assigned.

Relation with Agency staff

(36) Members shall at all times treat Agency staff with courtesy and be respectful of their views and recommendations, recognizing that staff are professional public servants who are required to offer their best advice to Members, who make the final decisions.

(37) Any concerns about staff performance should not be communicated directly to working-level employees but rather should be shared with the relevant Branch Head if the concerns are relatively minor and with the Chair if they are significant or systemic.

Interactions with non-Agency individuals and organizations

(38) Members shall not communicate with the news media. Enquiries from the media or members of the public shall be referred to the Chair's Office.

(39) Members shall not communicate with political actors or officials of other federal departments and agencies, provincial or foreign governments, or international organizations regarding a matter that is, was, or could be before the Agency.

(40) Members shall not publicly express an opinion about any past, current, or potential cases or any other issue related to the work of the Agency, and shall refrain from comments or discussions in public or otherwise that may create a reasonable apprehension of bias.

(41) Members shall not disclose or make known, either publicly or privately, any information of a confidential nature that was obtained in their capacity as a Member.

(42) Members shall not use their position or the Agency's resources (e.g., an Agency email account or letterhead) for personal gain.

(43) Members should exercise caution when using social media for personal purposes, and should not identify themselves as Members of the Agency on social media sites, except professional sites such as LinkedIn.

E. OUTSIDE ACTIVITIES

(44) Members shall not accept invitations to attend social events such as receptions or dinners with stakeholder representatives or with persons who are, or may become, a party, counsel, witness, or other non-Agency participants in an Agency proceeding, except in rare instances where there is a compelling justification and the Chair provides prior written approval.

(45) Members may take part in other outside activities that are not incompatible with their official duties and responsibilities and do not call into question their ability to perform their duties objectively, with the prior written approval of the Chair. Such activities may include participation in conferences and training seminars, speeches, teaching assignments, and volunteering.

(46) Requests for the Chair's approval of participation in social events or other outside activities must be

made in writing at least two weeks before those events or activities begin, and must fully disclose all relevant details. Members are also responsible for obtaining any other approval required by applicable legislation, guidelines, codes, or other instruments.


(47) Notwithstanding the foregoing, the Chair may, from time to time, confer with stakeholder representatives, counsel, or other parties in his role as the Agency's public voice, to discuss matters unrelated to any specific proceeding.

F. AFFIRMATION

(48) Members shall review and affirm their commitment to and compliance with the Code upon initial appointment and every year thereafter on or near the anniversary of their appointment.

1
.... In this Code, "decisions" shall be understood to refer to both adjudicative decisions, which deal with disputes between parties, and regulatory determinations, which deal typically involve a single party.

- Code of Conduct for Members of the Agency last update: March 26, 2018

 Share this page

Date modified:
2014-01-22

This is **Exhibit “E”** to the Affidavit of Dr. Gábor Lukács
affirmed before me on May 15, 2022

Signature

**CANADIAN TRANSPORTATION AGENCY
Minutes of the Members' Meeting**

September 20, 2011, 14:00, Room 1960

Members Present:

Geoffrey C. Hare, Chair
John Scott, Vice-Chair
Raymon J. Kaduck
Mark J. MacKeigan
Jean-Denis Pelletier

Staff Present:

Liz Barker, Inge Green, Annick Koster, *Legal Services Branch*
Ghislain Blanchard, *Industry Regulation and Determinations Branch*
Nina Frid, *Dispute Resolution Branch*
Jacqueline Bannister, *Communications Directorate*
Cathy Murphy, *Agency Secretary and Secretariat Directorate*
Julie Cauvier, *Secretary*

Item 1 – Proposed Agency Rules of Procedures for Adjudicating Disputes (Approval Item)

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

4. [REDACTED]

[REDACTED]

[REDACTED]:

1) [REDACTED]?

2) [REDACTED]

3) Should the Agency expand the role and responsibilities of the Panel Chair to incorporate one-Member quorum responsibilities and, if so, to what extent?

- Yes. The Panel Chair would deal with administrative / procedural rulings to advance a file as far as possible (until either the end of pleadings or until a substantive matter arises which requires the addition of the other Panel Member(s); where substantive issues arise within a procedural matter, the Panel Chair can recommend to the Agency Chair that a panel be struck and, based on the nature of the case, provide guidance and advice on the number of Members to be assigned.

4) [REDACTED]?

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Geoffrey C. Hare
Chair and CEO

This is **Exhibit “F”** to the Affidavit of Dr. Gábor Lukács
affirmed before me on May 15, 2022

Signature



RDJM-

#2053871-



r toutes les réunions se déroulent dans les deux langues officielles. / Les participants sont libres d'utiliser la langue de leur choix. / All meetings are bilingual. / Participants are invited to speak in the language of their choice.

RÉUNION DE COMITÉ DES MEMBRES / MEMBERS' COMMITTEE MEETING

Le 26 mars 2020 / March 26, 2020
10h00 - 12h00 / 10:00 a.m. - 12:00 p.m.

Salle / Room: 1960

ORDRE DU JOUR / AGENDA

Durée / Duration	Présentateur(s) / Presenter(s)	Points / Items		Pour / For	Documenté en / Documented on
		Français / French Anglais / English			
10:00 – 10:50	M. Jones / A Burnside / C Hurcomb	1. Mise à jour des documents d'orientation supplémentaires pour la RPPA / Update on supplemental guidance material for APPR  RDJM-2050922-Brief Ing_Material_L_Sup		Decision	Oui / Yes
10:50 – 11:30	M. Jones / S Gangopadhyay / S Askani	2. Présentation : Paquet de modifications réglementaires à faible impact RTAPH / Presentation: Low impact regulatory amendment package ATPDR  RDJM-2048566-DEC K_Amending_the_L		Decision	Oui / Yes
11:30 – 11:45	S Streiner	3. Communication du transporteur aérien aux passagers concernant les documents de voyage requis / Air carrier communication with passengers regarding required travel documentation		Discussion	Non / No

Slight change of plan.

Members: in camera will be done at the end if, as necessary. We will start the meeting with the APPR item. EC, presenters and observers for that item can log in for 10 am.

Heather Smith

Alysa will signal those who are participating in the other 2 items when it is time to log-in.

Many thanks everyone for your patience as we navigate through this teleconference life for best ways to be efficient!

Lesley

Air carriers communication to passengers re visa, travel documentation requirements

- Reliance on Timitec IATA Guide where incorrect information is relied upon - should the carrier be required to disclose what info is in their system
- Agency needs to be consistent re self-exoneration language in their tariffs, placing all onus on the passengers to know the requirements, but they have the ultimate decision to decide whether to let passengers board

Heather Smith

Messaging

- Timitec is a good tool and should be supported, but it is not infallible
- Passengers need to know what air carriers are going to apply (Timitec), require carriers to state that they rely upon it
- Require carriers to tell passengers what they know

Result of Discussion:

Ask Marcia and Valerie to review recent Agency caselaw to glean policy threads, come back with policy proposals, then we can discuss what we put out as public communications

In Camera

- Bag delay case - covering expenses and losses for bag delays.
- Was there a member discussion resulting in guidance re how to deal with cases? Similar cases Scorder () and Marder (get compensated for only the things they claimed while they were away) cases currently under appeal - the outcome was not the same in the two cases
- Expect cases to peter out because APPR provides clarity

Présentateurs, veuillez prendre note: / Presenters, please take note:

<http://intranet/tra/bpost/consils-pour-le-personnel-sur-les-presentations-au-comite-executif-et-au-comite-des-membres>

<http://intranet/eng/bpost/guidance-staff-presenting-executive-committee-and-members-committee>

This is **Exhibit “G”** to the Affidavit of Dr. Gábor Lukács
affirmed before me on May 15, 2022

Signature



March 22, 2020

Transmission by e-mail
scott.streiner@otc-cta.gc.ca

Mr. Scott Streiner
Chairman and Chief Executive Officer
Canadian Transportation Agency
15 Eddy Street, 17th Floor
Gatineau, Quebec J8X 4B3

RE: Request for further public clarification of air carrier obligations per the *Air Passenger Protection Regulations* ("APPR") in the context of the current extraordinary circumstances

Dear Mr. Streiner:

As you are aware, the global air transport and tourism industries are dealing with a wholly-unprecedented collapse in world travel demand, as well as with the resulting operational and financial calamity in terms of drastically cutting capacity and preserving liquidity in an attempt to prevent our businesses from failing and putting tens of thousands of Canadians out of work. Obviously, Transat A.T. and our subsidiary travel units, including Air Transat and Transat Holidays, have not been spared the brunt of this disaster.

Indeed, we have recently announced, as a result of borders closing, the suspension of all outbound travel sales on our flights and the imminent grounding of almost all of our fleet until April 30, 2020, except for the small remainder of our flights that are conducting emergency repatriation operations of Canadians abroad in coordination with the federal government. Furthermore, we are confronted to making extremely difficult decisions where an important number of employees will be put on leave until the situation stabilizes and until we can hopefully and eventually contemplate a return to some sense of normalcy in the future.

In the meantime, while our industry fights to survive, we urgently need the federal government and our oversight authorities such as the CTA to provide assistance, both in the form of financial support and relief in terms of the substantial easing of existing regulatory costs and burdens. I have already written to Ministers Garneau and Morneau with regards to the first objective, and I am now hereby addressing myself to you with respect to the second.

Please be assured that I appreciated the Agency's efforts on March 13, 2020 to provide much-needed clarification to both industry and consumers concerning the application and enforcement of certain provisions of the APPR in the context of the current extraordinary circumstances.



...page 2

However, we need more to be done on an urgent basis in order to establish proper certainty and support the industry's impact mitigation efforts to date.

Specifically, I hereby request that the Agency publicly and unequivocally recognize the uncontrollable nature of the crisis and that all changes to schedules and capacity reductions are measures needed to manage the devastating losses this crisis is causing. Quite simply, these changes are not within the control of air carriers and our regulator should be clear to this end, as well as for the purposes of the application of the APPR.

Furthermore, the limited scope of the exemption on March 13, 2020 is problematic as our personnel have almost no ability to provide alternative travel arrangements at this time given the above-mentioned folding of flight schedules. Consequently, and as additional support and relief, I hereby request the following:

- Clearly recognize that all delays, cancellations, and denied boarding occurring at this time of crisis are outside of Air Transat's control;
- Clarify that the uncontrollable nature of the crisis means that no refunds to passengers are required under the APPR. This is essential to avoid unnecessary confusion among consumers and to pre-empt a spike in the increase of complaints and lawsuits;
- Recognize the offering of travel voucher options in lieu of cash refunds as an acceptable means to address consumer requests for refunds which, in turn, would allow credit card companies and their processors to deny customer chargeback claims and thereafter cease otherwise resulting and destructive financial guarantee demands on air carrier merchants;
- Exempt airlines from the obligation to respond to compensation claims within 30 days;
- Exempt airlines from all obligations to provide alternate travel arrangements; and
- Ensure that all exemptions ordered by the Agency, including those found in Determination No. A-2020-42, are in effect until such time as the industry has fully recovered, which is expected to take longer than April 30, 2020, and at the very least, 90 days.

I would also like to take this opportunity to request a minimum one-year suspension of enforcement action and the levying of fines for non-compliance per the APPR and ATPDR. Again, we are not trying to conveniently avoid our obligations *in normal circumstances*, but rather to ensure that our reduced levels of human resources going forward are able to focus on actively



...page 3

managing the crisis and minimizing as much as possible disruptions to the system and our eventual efforts at recovery.

I wish to thank you in advance for your understanding and expeditious consideration of the present request. Also, please accept my best wishes for the continued health and well-being of yourself, your loved ones and your staff in these unimaginably difficult times.

Sincerely,

Jean-Marc Eustache
Chairman, President and
Chief Executive Officer

c.c. Hon. Marc Garneau, PC, MP – Minister of Transport
Marcia Jones, Chief Strategy Officer - CTA
Miled Hill, Office of the Hon. Marc Garneau, PC, MP
Lawrence Hanson, Assistant Deputy Minister of Transport (Policy)
Colin Stacey, Director General of Air Policy – Transport Canada
George Petsikas, Senior Director, Government and Industry Affairs – Transat A.T. Inc.

This is **Exhibit “H”** to the Affidavit of Dr. Gábor Lukács
affirmed before me on May 15, 2022

Signature

From: Scott Streiner
Sent: March 18, 2020 10:14 PM
To: Marcia Jones
Cc: Sébastien Bergeron
Subject: RE: Request for recognition and acceptance of travel voucher solutions

Thanks, Marcia. I'm not sure we have a clear role here, as this seems to boil down to a commercial dispute between the carrier and the credit card companies. That said, these are extraordinary times, and if there's something we can do to ease threats to industry viability while protecting passengers, we should at least consider it. Let's discuss during EC tomorrow.

S

From: Marcia Jones
Sent: Wednesday, March 18, 2020 10:05 PM
To: Scott Streiner
Cc: Sébastien Bergeron
Subject: Fwd: Request for recognition and acceptance of travel voucher solutions

Scott, I had a long call this evening and have a better understanding of the concern, now outlined in this email.

Perhaps we can discuss tomorrow or at the special EC.

Marcia

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

----- Original message -----

From: George Petsikas <George.Petsikas@transat.com>
Date: 2020-03-18 8:16 PM (GMT-05:00)
To: Marcia Jones <Marcia.Jones@otc-cta.gc.ca>
Subject: Request for recognition and acceptance of travel voucher solutions

Marcia

Many thanks for taking time to speak with me this evening.

As discussed, we are currently under enormous pressure from Canada's bank-owned credit card processors as a result of their charge back guarantees to their customers where the merchant is unable to provide the service nor refund the money paid to this end with the card. This is a pretty standard commitment per the credit card agreements offered by the big players such as Mastercard and Visa.

Consequently, one of the conditions imposed by these companies when doing business with large merchants such as Transat is to demand financial guarantees to cover their exposure per their voluntary commitments to their customers in the event we can't deliver or refund regardless of circumstances, including beyond our control and/or force majeure.

The net result is with the avalanche of recent COVID cancellations, consumers are invoking their charge back guarantees directly with the cards / banks, who in turn are demanding that the merchant makes them whole through the guarantees in question. This is putting enormous strain on our desperate attempts to manage the collapse in our revenues and stabilize our business and avoid ultimate failure and job losses.

As explained, this matter was actively addressed in France and Italy recently, two countries enormously dependant on the stability of their important travel and tourism and tourism sectors that have been severely impacted by the crisis. In brief, the relevant travel industry oversight authorities in these countries publicly recognized and accepted the offering of travel vouchers valid for up to 24 months as a satisfactory resolution of the consumer's claim for a cash refund in the current extraordinary circumstances.

This recognition of this option by state authorities in turn allowed the banks / card processors in those countries to invoke this voucher in lieu of a cash refund approach as evidence the merchant had fulfilled its obligations per the sale and thus allowed them to deny the charge back claim. The result was subsequently the suspension or significant alleviation of cash guarantee demands on the travel industry merchant by the banks.

Consequently, Transat respectfully requests that the Agency give active and urgent consideration to publishing a similar statement with respect to the existing travel voucher programs now being offered by Canadian air carriers including ourselves and Air Canada, among others. Again, the purpose is not to create any form of obligation in this sense but simply to recognize them as a satisfactory resolution of any cash refund claims against airlines. This of course would be temporary while we ride out the worst of the storm over the next few months.

Thank you in advance for your assistance and expeditious consideration of the present and please don't hesitate if you have any questions or require further information.

Kind regards - GP

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Avertissement de confidentialité:

Ce message, ainsi que son contenu et ses pièces jointes, sont exclusivement destinés au(x) destinataire(s) indiqué(s), sont confidentiels et peuvent contenir des renseignements privilégiés. Si vous n'êtes pas un destinataire indiqué, soyez avisé que tout examen, divulgation, copie, impression, reproduction, distribution, ou autre utilisation de ce message et de ses pièces jointes est strictement interdit. Si vous avez reçu ce message alors que vous n'êtes pas un destinataire désigné, veuillez en aviser immédiatement l'émetteur et détruire ce message et les pièces jointes.

Confidentiality Warning:

This message, its content and any attachments are intended only for the use of the intended recipient(s), are confidential, and may be privileged. If you are not the intended recipient, you are hereby notified that any review, retransmission, conversion to hard copy, copying, circulation or other use of this message and any attachments is strictly prohibited. If you are not the intended recipient, please notify the sender immediately by return e-mail, and delete this message and any attachments from your system.

This is **Exhibit ‘I’** to the Affidavit of Dr. Gábor Lukács
affirmed before me on May 15, 2022

Signature

Salmasi, Aysa

From: Marcia Jones <Marcia.Jones@otc-cta.gc.ca>
Sent: Wednesday, March 18, 2020 5:28 PM
To: Stacey, Colin
Cc: Caitlin Hurcomb; Allan Burnside; Davis, Mark; Millette, Vincent
Subject: RE: From MinO: Air Transat

Categories: ATIP Retrieval Notice A-2020-00167BB, ATIP Retrieval Notice / A-2020-00091

Hi Colin,

I am sending this unencrypted as our remote network access is patchy and we are not able to open encrypted emails on our Samsungs at the Agency.

I would note that for situations outside of the carrier's control, no refunds are required under the APPR. As you know, the Agency issued a determination on Friday to clarify some situations flowing from COVID-19 that are considered to be in that category.

I would assume that writ large this situation is outside of the carrier's control.

If a flight cancellation is within the carrier's control, or within the carrier's control but required for safety, a refund is required and a voucher would not be compliant. Again, this does not seem to be relevant here.

Looping in Cait in case she has anything to add.

I hope this is helpful.

Thanks,
Marcia

From: Stacey, Colin <colin.stacey@tc.gc.ca>
Sent: Wednesday, March 18, 2020 2:57 PM
To: Marcia Jones <Marcia.Jones@otc-cta.gc.ca>
Cc: Davis, Mark <mark.davis@tc.gc.ca>; Millette, Vincent <vincent.millette@tc.gc.ca>
Subject: FW: From MinO: Air Transat

Hi Marcia,

Air Transat are telling us that they are getting pressure from creditors who are pushing on the airlines for cash. They will request that we officially let them to provide vouchers to passengers instead of providing them cash because they literally do not have enough cash to give refunds.

Have you heard anything about this? Are you available to discuss?

Thanks,

cs

This is **Exhibit “J”** to the Affidavit of Dr. Gábor Lukács
affirmed before me on May 15, 2022

Signature

Nadine Landry

From: Millette, Vincent <vincent.millette@tc.gc.ca>
Sent: Tuesday, March 24, 2020 12:40 PM
To: Caitlin Hurcomb
Subject: RE: CTA announcement tomorrow

thanks

From: Caitlin Hurcomb [mailto:Caitlin.Hurcomb@otc-cta.gc.ca]
Sent: Tuesday, March 24, 2020 12:31 PM
To: Millette, Vincent <vincent.millette@tc.gc.ca>
Subject: RE: CTA announcement tomorrow

At this point, I've not received confirmation of what the timing will be.

From: Millette, Vincent [mailto:vincent.millette@tc.gc.ca]
Sent: Tuesday, March 24, 2020 12:28 PM
To: Caitlin Hurcomb <Caitlin.Hurcomb@otc-cta.gc.ca>
Subject: RE: CTA announcement tomorrow

Just out of my personal curiosity, do you know why it is delayed?

From: Caitlin Hurcomb [mailto:Caitlin.Hurcomb@otc-cta.gc.ca]
Sent: Tuesday, March 24, 2020 12:25 PM
To: Millette, Vincent <vincent.millette@tc.gc.ca>
Subject: RE: CTA announcement tomorrow

Hi Vincent,
I anticipate it will be in the next day or two, but I've not received confirmation.

From: Millette, Vincent [mailto:vincent.millette@tc.gc.ca]
Sent: Tuesday, March 24, 2020 12:07 PM
To: Caitlin Hurcomb <Caitlin.Hurcomb@otc-cta.gc.ca>
Subject: RE: CTA announcement tomorrow

Hi Cait – do you know when the Agency will be issuing this statement?

Thanks

From: Caitlin Hurcomb [mailto:Caitlin.Hurcomb@otc-cta.gc.ca]
Sent: Monday, March 23, 2020 11:04 AM
To: Millette, Vincent <vincent.millette@tc.gc.ca>
Subject: RE: CTA announcement tomorrow

Hi Vincent,
This statement indicates what the CTA views as appropriate given this situation – an approach that would ensure passengers aren't totally out of pocket while taking into account concerns from airlines.

The statement indicates that the CTA would consider vouchers acceptable "refunds" for those airlines that do require reimbursement in their tariff.

The statement does not force other airlines – whose tariffs do not require reimbursement in force majeure situations – to provide passengers with vouchers or credits. It indicates what we view as a good practice that would help make passengers whole. It's not our intention to take enforcement actions against one of these airlines if this practice is not followed, in alignment with their tariff.

If a complaint were brought forward to the CTA, it would be assessed on its own merits, of course.

Happy to discuss further,
Cait

From: Millette, Vincent [<mailto:vincent.millette@tc.gc.ca>]
Sent: Monday, March 23, 2020 10:20 AM
To: Caitlin Hurcomb <Caitlin.Hurcomb@otc-cta.gc.ca>
Subject: RE: CTA announcement tomorrow

Would your approach force in any way carriers that do not have refunds specified in their tariff to start refunding or their current tariff still apply?

From: Caitlin Hurcomb [<mailto:Caitlin.Hurcomb@otc-cta.gc.ca>]
Sent: Monday, March 23, 2020 10:15 AM
To: Millette, Vincent <vincent.millette@tc.gc.ca>
Subject: RE: CTA announcement tomorrow

Hi Vincent,

I understand there is a plan to release a statement indicating that, generally speaking, for cancelled flights, an appropriate approach in the current context could be for airlines to provide affected passengers with vouchers or credits for future travel. This was discussed between the Chair, the DM and the Minister's Chief of Staff and Marcia spoke with your ADM over the weekend as well.

It has been noted, though, that some airlines may not wish to provide vouchers, if their tariffs do not have any reimbursement requirement for force majeure situations.

Let me know if you'd like to discuss further.

Cait

From: Millette, Vincent [<mailto:vincent.millette@tc.gc.ca>]
Sent: Monday, March 23, 2020 10:02 AM
To: Caitlin Hurcomb <Caitlin.Hurcomb@otc-cta.gc.ca>
Subject: RE: CTA announcement tomorrow

Hi Cait – I am on a Min/DM call and I'm sure the question will come up. Any insight you can provide quickly?

Thanks

From: Millette, Vincent
Sent: Sunday, March 22, 2020 2:22 PM
To: 'Caitlin Hurcomb' <Caitlin.Hurcomb@otc-cta.gc.ca>
Subject: CTA announcement tomorrow

Hi Cait - I was just on a conference call with Lawrence, our ADM, where he briefed us on an announcement the Agency would do tomorrow regarding the refund and voucher issue.

He understood, based on a conversation with Marcia, that the measure you would announce may have an adverse impact on the larger carriers like AC or WestJet.

We are not entirely sure we understand this. Can you explain?

Feel free to call me if easier 343-996-9858

Thanks!

Sent from my BlackBerry 10 smartphone on the Rogers network.

This is **Exhibit “K”** to the Affidavit of Dr. Gábor Lukács
affirmed before me on May 15, 2022

Signature



VIA E-mail: simonlin@evolinklaw.com

December 24, 2021

Simon Lin
Evolink Law Group
4388 Still Creek Drive, Suite 237
Burnaby, B.C.
V5C 6C6

Re: *Air Passenger Rights v Attorney General of Canada and Canadian Transportation Agency*
Federal Court of Appeal Court File No.: A-102-20

Dear Mr. Lin,

This is in response to your letter of December 17, 2021 in the above-referenced matter. In that letter, you requested the disclosure of additional documents beyond those provided in the Agency's December 14, 2021 disclosure package. That package was sent in fulfillment of the Federal Court of Appeal's order dated October 15, 2021 ([2021 FCA 201](#)).

The Agency is providing the following responses and attachments. Where the Agency has not specifically addressed a document requested in your letter, it is because the Agency has not found such documents.

The Agency has taken all reasonable steps to comply with the Court's order. The disclosed material is the result of several searches, consultations with several persons within the Agency, and a review of thousands of pages of material.

CTA MEMBER CORRESPONDENCE

The Agency is providing the following attachments, noting that these are versions of documents already disclosed by the Agency in its December 14 disclosure package:

1. Regarding p. 15 of the package:

Two versions more fully showing the changes made to the document are attached. There are no comments in this document.

2. Regarding p. 17 of the package:

The attachment is on p. 66 of the December 14 package. Two versions more fully showing the changes made to the document are attached. There are no comments in this document.

3. Regarding p. 31 of the package:

The document that was disclosed on December 14 is complete. There are no "Track Changes" or comments in the document. We are nevertheless providing the document to you anew.

THIRD PARTY CORRESPONDENCE

The Agency has provided the documents in its possession relating to third party correspondence, with the exception of the following:

Regarding p. 163-165 of the package:

On December 14, the Agency disclosed a letter from Air Transat to Scott Streiner dated March 22, 2020. However, the Agency has possession of an email string in connection with this letter that was not previously disclosed. This email string consists of a covering email from Air Transat, and a message dated March 22, 2020 showing that Scott Streiner forwarded this letter to the Executive Committee of the Agency. This document should have been included in the disclosure package, it was overlooked and is being provided now. The Agency requests that the parties treat this document as forming part of the disclosure package.

In relation to p. 136 of the package:

You have requested that the Agency disclose inquiries to the CTA's "info@" account and on Twitter, and responses to these inquiries.

The Agency did not include all messages between March 9 and 25, 2020 from its Twitter account or inquiries to or responses from its general email account, info@otc-cta.gc.ca, in the disclosure package.

There was a high volume of messages and inquiries from individuals concerning their personal air travel situations between March 9 and March 25 on these accounts. The Agency did not consider that such messages, inquiries or responses fell within the scope of the order insofar as that order targets documents relevant to the Applicant's bias claims concerning the Statement on Vouchers.

The Agency notes that in this proceeding, the President of Air Passenger Rights has filed an affidavit attaching excerpts of the Agency's Twitter feed, indicating that access to this material is already available. The Applicant's affiant has also provided messages from the "info@" account to support its claim that the Statement on Vouchers became widely disseminated after it was published.ⁱ

Please note that the absence of these documents from the disclosure package is not the result of a decision to hide these documents but is rather a question of interpretation as to the scope of the Court's order.

Please also note that in its December 14 package, the Agency provided responsive messages found in its searches involving journalists.

MEETING DOCUMENTS

The Agency has possession of the following meeting minutes, meeting and discussion notes, meeting agendas or voice recordings for relevant meetings held during this time period:

A redacted document associated with a March 20 EC meeting, which can be found in the Motion Record of the Attorney General of Canada: Informal motion to claim privilege over portions of two documents, at Exhibit B, which was served and filed with the Court on December 14.

I trust the foregoing is satisfactory.

Sincerely,



Barbara Cuber
Senior Counsel
Canadian Transportation Agency
Legal Services Directorate
15 Rue Eddy, 19th Floor
Gatineau, Québec J8X 4B3
Tel: 613-301-8322
Email: barbara.cuber@otc-cta.gc.ca
Email: Servicesjuridiques.LegalServices@otc-cta.gc.ca

c.c.: Air Passenger Rights, Applicant, via email: lukacs@airpassengerrights.ca

c.c.: Sandy Graham and Lorne Ptack, Counsel for the Attorney General of Canada,
via email: sandy.graham@justice.gc.ca, Lorne.Ptack@justice.gc.ca

ⁱ Motion Record of the Moving Party, Air Passenger Rights, Motion under Rules 41 and 318 of the *Federal Courts Rules*, vol. 1, Affidavit of Gabor Lukacs, affirmed on January 3, 2021, Exhibits N and O at pages 89-110 and Written Representations of the Moving Party at p. 396, para. 19.

This is **Exhibit “L”** to the Affidavit of Dr. Gábor Lukács
affirmed before me on May 15, 2022

Signature

From: **Kizzy Barrett** <Kizzy.Barrett@otc-cta.gc.ca>
 Date: Wed, Apr 20, 2022 at 12:07 PM
 Subject: A-102-20 -- Air Passenger Rights v Attorney General of Canada et al.
 To: <simonlin@evolinklaw.com>

Transfert protégé de l'OTC

Les fichiers suivants vous ont été envoyés par Kizzy.Barrett@otc-cta.gc.ca. Pour les télécharger, veuillez copier le mot de passe et cliquer sur le lien suivant.

[Télécharger les documents](#)

A-102-20--Agency letter to Parties re disclosure in compliance with April 11 Production Order.pdf	194.07 KB
Appendix A1_Draft statement.msg	90.50 KB
Appendix A1_Draft.msg	81.00 KB
Appendix A1_RDIM-#2124145-v2-Web_FAQs__COVID-19.docx.msg	81.00 KB
Appendix A1_RE Draft statement (1).msg	94.50 KB
Appendix A1_RE Draft statement.msg	97.50 KB
Appendix A1_Revised statement.msg	62.50 KB
Appendix A1_Statement (2).msg	74.00 KB
Appendix A1_Statement (3).msg	73.00 KB
Appendix A1_Statement.msg	90.00 KB
Appendix A5.msg	63.50 KB
Appendix B4.pdf	1.28 MB
Appendix C1.pdf	2.93 MB
Appendix C2.pdf	3.43 MB
Appendix C5.pdf	6.91 MB
Appendix C6.pdf	3.14 MB

Si le lien ci-dessus ne s'ouvre pas, veuillez copier-coller le URL suivant dans votre navigateur Web :
<https://tfs-sft.otc-cta.gc.ca/pkg?token=b9caa164-322b-4c0e-add2-d2d6aa35bd90>

Si vous n'êtes pas le destinataire prévu de ce courriel, veuillez détruire toute copie du message initial.

Cet avis vous a été envoyé par l'[Office des transports du Canada](#).

CTA Secure Delivery

The following file(s) have been sent to you from Kizzy.Barrett@otc-cta.gc.ca. To download, please copy the password and click on the following link.

[Click here to download the file\(s\) listed below](#)

A-102-20--Agency letter to Parties re disclosure in compliance with April 11 Production Order.pdf	194.07 KB
Appendix A1_Draft statement.msg	90.50 KB
Appendix A1_Draft.msg	81.00 KB
Appendix A1_RDIM-#2124145-v2-Web_FAQs__COVID-19.docx.msg	81.00 KB
Appendix A1_RE Draft statement (1).msg	94.50 KB
Appendix A1_RE Draft statement.msg	97.50 KB
Appendix A1_Revised statement.msg	62.50 KB
Appendix A1_Statement (2).msg	74.00 KB
Appendix A1_Statement (3).msg	73.00 KB
Appendix A1_Statement.msg	90.00 KB

Appendix A5.msg
Appendix B4.pdf
Appendix C1.pdf
Appendix C2.pdf
Appendix C5.pdf
Appendix C6.pdf

63.50 KB
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6.91 MB
3.14 MB

87

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<https://tfs-sft.otc-cta.gc.ca/pkg?token=b9caa164-322b-4c0e-add2-d2d6aa35bd90>

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This is **Exhibit “M”** to the Affidavit of Dr. Gábor Lukács
affirmed before me on May 15, 2022

Signature



By Email

April 20, 2022

Evolink Law
4388 Still Creek Drive, Suite 237
Burnaby, BC
V5C 6C6

Attention: Simon Lin

Department of Justice Canada
Civil Litigation Section
50 O'Connor Street, Suite 500
Ottawa, ON
K1A 0H8

Attention Lorne Ptack
J. Sanderson (Sandy) Graham

Dear Sirs:

Re: *Air Passenger Rights v AGC*
Court File No.: A-102-20

We are writing further to the Court's Order dated April 11, 2022 ("Additional Production Order").

Additional Production Order – Paragraph 4

Pursuant to paragraph four (4) of the Additional Production Order, the Agency has been ordered to produce the documents identified as items A1, A5, C2 and B4 in the Appendix to the Reasons for the Order.

Item A1 - Included in the email accompanying this letter are links to the original Microsoft Word files for the Statement on Vouchers, and drafts of the Statement on Vouchers, attached to emails that were sent to/from a CTA Member (including the Chairperson and Vice-Chairperson) between March 9, 2020 and March 25, 2020.

Item A5 - Included in the email accompanying this letter is a link to the original Microsoft Word file(s) for the template media response in the March 24, 2020 at 7:34PM email sent by the Chairperson with subject line "Answer," which were sent to/from a CTA Member (including the Chairperson and Vice-Chairperson) between March 24, 2020 and March 25, 2020.

Item B4 – Included in the email attached to this letter is a link to copies of all non-privileged documents sent to or from the CTA in respect of the Statement on Vouchers between March 9, 2020 and March 25, 2020 using:

- (a) the CTA's Info email account (info@otc-cta.gc.ca); and
- (b) the CTA's Twitter accounts in English (CTA_gc) and French (OTC_gc), including but not limited to Private Messages.

Item C2 – attached in Appendix C2 are all non-privileged documents in respect of the CTA’s EC call on March 20, 2020.

Additional Production Order – Paragraph 5

Pursuant to paragraph five (5) of the Additional Production Order, the Agency is required to determine if the Statement on Vouchers was discussed during the March 19, 22 and 23 calls. If it was then documents relating to these calls as listed as items C1, C5 and C6 in the Appendix to the Reasons for the Additional Production Order are required to be produced.

Based on the materials that we have gathered, it appears that the Statement of Vouchers was discussed during the March 19, 22 and 23 calls.

Included with the email attached to this letter are links to the documents listed in Appendices C1, C5 and C6 of the Additional Production Order for the March 19, 22 and 23 calls respectively.

Yours truly,



Allan Matte
Senior Counsel
Legal Services Directorate
Canadian Transportation Agency
60 Rue Laval
Gatineau, Quebec
J8X 3G9

Tel: (819) 953-0611

Fax: (819) 953-9269

Email: Allan.Matte@otc-cta.gc.ca

Email: Servicesjuridiques/LegalServicesOTC/CTA@otc-cta.gc.ca

This is **Exhibit “N”** to the Affidavit of Dr. Gábor Lukács
affirmed before me on May 15, 2022

Signature



Nicole Beart

@Memory_Catcher



@OTC_gc - What recourse do people have to get their money back from #airlines? #Coronavirus has flights cancelled, borders closing, and yet the airlines are keeping the money of everyone who had #springbreak travel plans. @TravelGoC @Transport_gc

2:34 PM · Mar 21, 2020 · Twitter Web App



Tweet your reply

Reply



OTC.gc.ca  @OTC_gc · Mar 25, 2020



Replying to @Memory_Catcher

Good afternoon, please refer to this link that will answer your question: otc-cta.gc.ca/eng/statement-... Thank you. CTA social media





J.P. Cavalier
@johnpeterc88



En réponse à [@CTA_gc](#) [@TV_SteveWilks](#) et [@AirCanada](#)

AC cancelled my flight (it was them, not me) and they still refuse to refund. You guys need to get your act together and actually protect consumers, not the airlines. This is ridiculous.

[Traduire le Tweet](#)

3:56 PM · 24 mars 2020 · Twitter Web App

2 J'aime



Tweetez votre réponse.

Répondre



CTA.gc.ca @CTA_gc · 25 mars 2020



En réponse à [@johnpeterc88](#) [@TV_SteveWilks](#) et [@AirCanada](#)

Good afternoon, please refer to this link that will answer your question: otc-cta.gc.ca/eng/statement-... Thank you. CTA social media



Sleepyhead Sam 
@freckletoxo



En réponse à @ @NachoGreg et 4 autres personnes

no, we purchased in January for April 11th and refused a cash refund. Even though the border is closed.

[Traduire le Tweet](#)

1:57 PM · 23 mars 2020 · Twitter for iPhone

1 J'aime



Tweetez votre réponse.

Répondre



CTA.gc.ca  @CTA_gc · 25 mars 2020



En réponse à @freckletoxo @FerrisCatWheel et 5 autres personnes

Good afternoon, please refer to this link that will answer your question: otc-cta.gc.ca/eng/statement-... Thank you. CTA social media





Canadian Dad @JBully17 · 25 mars 2020



@CP24 I know you recently shared a great article about @SunwingVacay flying back stranded Canadians but those who should be praised should be the Canadians at home that Sunwing won't refund their money. Get a reporter to look into it!

[#covid19Canada](#)



CTA.gc.ca @CTA_gc · 25 mars 2020



En réponse à @JBully17

Good afternoon, please refer to this link that will answer your question: [otc-cta.gc.ca/eng/statement-...](#) Thank you. CTA social media





J.P. Cavalier
@johnpeterc88



En réponse à [@CTA_gc](#) [@TV_SteveWilks](#) et [@AirCanada](#)

AC cancelled my flight (it was them, not me) and they still refuse to refund. You guys need to get your act together and actually protect consumers, not the airlines. This is ridiculous.

[Traduire le Tweet](#)

3:56 PM · 24 mars 2020 · Twitter Web App

2 J'aime



Tweetez votre réponse.

Répondre



CTA.gc.ca @CTA_gc · 25 mars 2020



En réponse à [@johnpeterc88](#) [@TV_SteveWilks](#) et [@AirCanada](#)

Good afternoon, please refer to this link that will answer your question: [otc-cta.gc.ca/eng/statement-...](#) Thank you. CTA social media





Sleepyhead Sam 
@freckletoxoxo



En réponse à @ @NachoGreg et 4 autres personnes

no, we purchased in January for April 11th and refused a cash refund. Even though the border is closed.

[Traduire le Tweet](#)

1:57 PM · 23 mars 2020 · Twitter for iPhone

1 J'aime



Tweetez votre réponse.

Répondre



CTA.gc.ca  @CTA_gc · 25 mars 2020



En réponse à @freckletoxoxo @FerrisCatWheel et 5 autres personnes

Good afternoon, please refer to this link that will answer your question: otc-cta.gc.ca/eng/statement-... Thank you. CTA social media



@CTA_gc

Please assist us seeing a full refund from Air Canada regarding upcoming flights in April.

A voucher/credit is not what we need, a full refund is the only option during COVID19.

[Traduire le Tweet](#)

 **East Yorker** @eastyorker_ · 17 mars 2020

@AirCanada @HarveyCashore

We have a state of emergency in Ontario, Air Canada won't issue a refund to families booked on flights in April.

So not Canadian, unjust and outside what one would expect in these times.
twitter.com/TorontoStar/st...

8:06 AM · 23 mars 2020 · Twitter for Android



Tweetez votre réponse.

Répondre



CTA.gc.ca  @CTA_gc · 25 mars 2020



En réponse à @eastyorker_

Good afternoon, please refer to this link that will answer your question: otc-cta.gc.ca/eng/statement-... Thank you. CTA social media



1





Mimi Nguyen
@ungraceful_mi



En réponse à [@ungraceful_mi](#) et [@airtransat](#)

The PASSENGER chooses how they get refunded. I believe this is a [#lawsuit](#) waiting to happen if you willfully make passengers take a credit that will expire in 12 months. [@CTA_gc](#) you may want to look into this company.

[Traduire le Tweet](#)

1:34 PM · 22 mars 2020 · Twitter for Android

1 J'aime



Tweetez votre réponse.

Répondre



CTA.gc.ca @CTA_gc · 25 mars 2020



En réponse à [@ungraceful_mi](#) et [@airtransat](#)

Good afternoon, please refer to this link that will answer your question: [otc-cta.gc.ca/eng/statement-...](#) Thank you. CTA social media



1



Amanda Hamelin

From: Info
Sent: Wednesday, March 25, 2020 11:42 AM
To: Guylaine Carrier
Subject: RE: Objet : Accusé de réception de l'Office des transports du Canada / Acknowledgement of receipt from the Canadian Transportation Agency

Bonjour Guylaine,

Merci. Nous avons bien reçu votre plainte. Votre numéro de cas est le [20-81020](#).

Vous pouvez [vérifier l'état de votre plainte](#) en ligne.

A la lumière de la situation exceptionnelle découlant de la pandémie de la COVID-19, l'OTC [suspend les instances de règlement des différends concernant les compagnies aériennes](#) jusqu'au 30 avril 2020, afin de permettre à celles-ci de se concentrer sur leurs exigences opérationnelles immédiates et urgentes. Toute plainte aérienne reçue sera traitée en temps opportun. L'OTC déterminera, au plus tard le 30 avril 2020, si la suspension doit se terminer à cette date ou si elle doit être prolongée jusqu'à une date ultérieure.

Cordialement,

Office des transports du Canada / Gouvernement du Canada
info@otc-cta.gc.ca / Tél: 1-888-222-2592 / ATS: 1-800-669-5575
Suivez-nous : Twitter / YouTube

Canadian Transportation Agency / Government of Canada
info@otc-cta.gc.ca / Telephone 1-888-222-2592
Follow us: Twitter / YouTube

From: Guylaine Carrier
Sent: Wednesday, March 25, 2020 11:23 AM
To: Info
Subject: Objet : Accusé de réception de l'Office des transports du Canada / Acknowledgement of receipt from the Canadian Transportation Agency

Est-ce normal que je n'ai pas encore eu de nouvelles

Guyline Carrier
Le Pro du CB Inc.
418-338-3440
distcb@hotmail.com

www.leproducb.com

De : [Info](#)

Envoyé le : 6 mars 2020 15:04

À : [Guyline Carrier](#)

Objet : Accusé de réception de l'Office des transports du Canada / Acknowledgement of receipt from the Canadian Transportation Agency

English follows French

Nous vous remercions d'avoir communiqué avec l'Office des transports du Canada. Votre demande est importante pour nous. Nous vous répondrons dans les plus brefs délais. Suite à votre demande, une réponse additionnelle suivra.

Thank you for contacting the Canadian Transportation Agency. Your inquiry is important to us. We will get back to you as soon as possible. An additional response to your inquiry will follow accordingly.

This is **Exhibit “O”** to the Affidavit of Dr. Gábor Lukács
affirmed before me on May 15, 2022

Signature

Amanda Hamelin

Subject: Special EC - COVID19 - Daily updates
Location: (514) 938-6569,935311571# (then press #)
Start: Mon 3/16/2020 2:00 PM
End: Mon 3/16/2020 2:30 PM
Recurrence: Daily
Recurrence Pattern: every day from 2:00 PM to 2:30 PM
Meeting Status: Accepted
Organizer: Scott Streiner
Required Attendees: Alysia Lau; Douglas Smith; Lesley Robertson; Liz Barker; Marcia Jones; Mireille Drouin; Sébastien Bergeron; Tom Oommen; Valérie Lagacé
Optional Attendees: Allan Burnside; Simon-Pierre Lessard
Importance: High

Chair's Boardroom & by CBCI teleconference: dial 1 514 938 6569 call ID: 935311571# then # again

Alysia will HOST.

Attendance

- Scott Streiner
- Liz Barker
- Mireille Drouin
- Doug Smith
- Marcia Jones
- Tom Oommen
- Valérie Lagacé

- Sébastien Bergeron
- Alysia Lau

Debriefs - External

- MJ: Debriefed on suspension order and APPR determination. Air carrier tone is nothing within their control. Want Agency to clarify that they are not required to refund carriers. Air carriers don't have resources to turn to implementing ATPDR.
- SS: ATPDR largely reflect previous codes, so not reasonable to delay coming-into-force wholesale.

- SS: Other issue is air carriers refusing to provide refund or voucher to passengers.
- SS: Considering issuing statement - current context very different from regulations, Agency view is it would be reasonable that air carriers provide refunds or vouchers to passengers affected by mass cancellations.
- DS: Prefer vouchers given cash flow issues.
- LB: Vouchers would need to include reasonable conditions.
- VL: Could offer suspension of compensation requirements altogether. SS: Could imply that these types of situations are outside air carrier control.
- SS and SB: What if government provides bailout?

- MD: Have already communicated with employees who need to come in, other staff have come in to take equipment home.

- MD: BCP - must inform PCO of additional critical service.
- LB: Thought the Act already allowed for coasting trade to take place without permits for emergency operations. ***VL to examine this provision.**
- SS: Why would this be included in the first place? TO: Some urgency to processing applications even if for several months down the road.

- MD: BCP - what happens to non-critical services and comms plan. ***MD Will provide this tomorrow.**
- SS: Reached out to Ian Stewart from HFA.

- TO: Discontinuance of service. Sent potential conditions to Chair:
 - Shortening notification period to 2 weeks
 - Exemption will only apply during "crisis" pandemic period
 - Denial of discontinuance of service in remote communities with no other viable transportation service
 - APPR continue to apply
- TO: Rather than grant blanket exemption, seek specific routes from air carriers.
- SS: No need to specify APPR as condition.
- LB: Agree with proposed conditions.
- ***Decision: TO and VL to draft s. 80 decision applicable to all air carriers with conditions proposed (and requiring air carriers to identify routes).**

Internal Approach

- MD: Would like today's message to express maintaining telework until further notice. ***Approved**
- DS: Should we continue with compressed work weeks? SS: Should give employees flexibility in line with Central Agencies.
- MD: As of tomorrow, doors at 15 Eddy will be locked. Staff can enter with passes. MD to inform staff.
- MD: NB will accompany cleaners so they can empty trash cans in all closed offices.
- MD: There's been confirmed COVID-19 case in INAC in Vancouver.

- SS: Messages from Centre regarding flexibility, even in budget uncertainty. At some point, may need to seek signal from TBS/PCO regarding budget so we know what commitments we can make to employees. DRB terms extended until September.
- SS: Draft letter from TBS Secretary. MD: Main concern. ***MD to reach out to TBS regarding needed flexibility with respect to deliveries.**
- SS: Encourage Branch Heads and managers to be in regular contact with staff.

Varia

- VL: Secretariat still receiving filings for stayed cases. ***VL will share options for action with DS, SS and LB.**
- VL: Have a casual to take on administrative tasks for staff going on mat leave. Will present appointment to EC tomorrow.
- DS: Also have casuals that will come up over next few weeks. ****SS: No need for full-blown submission, instead Branch Heads should consult MD and NB first, then draft short email for EC in advance of meeting.**
-

Amanda Hamelin

From: Scott Streiner
Sent: Thursday, March 19, 2020 3:42 PM
To: Sébastien Bergeron; +_EC
Subject: RE: March 19 EC - Decisions and Follow-ups

Thanks, Seb. Just to be clear: no decision has been made on the AC exemption request. But drafting should get started so that we're ready to move quickly if and when Members make such a decision.

Thanks,

S

From: Sébastien Bergeron
Sent: Thursday, March 19, 2020 3:37 PM
To: +_EC
Subject: March 19 EC - Decisions and Follow-ups

Dear Colleagues,

Please find below the list of follow-up actions following today EC. If you notice something missing from the list or have a different recollection of a deliverable, please let us know.

EC Member(s) Tasked	EC Decision(s)	Deliverable(s)	Expected Deadline
All Branch Heads	<ul style="list-style-type: none"> • Branch Heads seeking approval for staffing actions from EC should: <ul style="list-style-type: none"> ○ Consult Mireille and Nadine B. first, and ○ Circulate short e-mail including rationale to EC in advance of meeting. 	-	-

Mireille	-	<ul style="list-style-type: none"> BCP - Present comms strategy and proposal with respect to non-critical services. 	March 20
	<ul style="list-style-type: none"> Staff should continue teleworking until further notice. 	<ul style="list-style-type: none"> Include direction in the daily update that all staff should continue teleworking until further notice. 	March 19
	-	<ul style="list-style-type: none"> Reach out to TBS on specific concerns requiring flexibility from TBS policies. 	As soon as feasible
Tom and Valérie	<ul style="list-style-type: none"> Request from Air Canada for exemption from notice period for discontinuance of service - Conditions that will be included in exemption are: <ul style="list-style-type: none"> Air carrier must identify routes that will be discontinued. Notification period of 2 weeks. Exemption will only apply during "crisis" period related to COVID-19 pandemic. Discontinuance of service is not permitted in remote communities where no other transportation service is available. 	<ul style="list-style-type: none"> Prepare draft s. 80 decision with the proposed conditions. 	As soon as feasible
Valérie	-	<ul style="list-style-type: none"> Prepare options for Scott, Liz and Doug with respect to filings received for stayed cases. 	As soon as feasible
Valérie	-	<ul style="list-style-type: none"> BCP - Examine whether the Act already allows vessels to operate without coastal trade licences during emergency situations. 	March 20

Sébastien Bergeron

Chef de cabinet | Bureau du président et premier dirigeant
Office des transports du Canada | Gouvernement du Canada
sebastien.bergeron@otc-cta.gc.ca | Tél. 819-712-0827

Chief of Staff | Office of the Chair and Chief Executive Officer
 Canadian Transportation Agency | Government of Canada
Sebastien.bergeron@otc-cta.gc.ca | Tél. 819-712-0827

De : Sébastien Bergeron
Envoyé : 18 mars 2020 16:31
À : +_EC <EC@otc-cta.gc.ca>
Objet : EC - March 18 : follow-up actions

Dear Colleagues,

Please find below the list of follow-up actions following today EC. If you notice something missing from the list or have a different recollection of a deliverable, please let us know.

EC Member(s) Tasked	Expected Deadline	Deliverable
Marcia	March 19	<ul style="list-style-type: none"> Call major air carriers (top 5) and air transport associations (NACC, ATAC) to explain Agency's order to suspend air-related proceedings.
Mireille	March 18	<ul style="list-style-type: none"> Send message to affected staff and managers - permitting staff who need VPN access to enter the Agency offices if they wish by COB March 20. <ul style="list-style-type: none"> Their manager must be present. Staff must maintain 2 metres of distance between themselves and other staff.
	March 19	<ul style="list-style-type: none"> Ensure daily COVID-19 updates are <i>e-mailed</i> to all staff. Mention that VPN should be used for work purposes only (no streaming of anything, except if it is absolutely necessary).
	March 19 (if possible)	<ul style="list-style-type: none"> Prepare list of EC decision points on various aspects of the BCP.
	March 20	<ul style="list-style-type: none"> Provide list of all staff phone numbers to EC members.
Tom and Valérie	March 19	<ul style="list-style-type: none"> Provide options to constrain Air Canada exemption from/reduction of notice period related to discontinuance of service.

Sébastien Bergeron

Chef de cabinet | Bureau du président et premier dirigeant
Office des transports du Canada | Gouvernement du Canada
sebastien.bergeron@otc-cta.gc.ca | Tél. 819-712-0827

Chief of Staff | Office of the Chair and Chief Executive Officer
Canadian Transportation Agency | Government of Canada
Sebastien.bergeron@otc-cta.gc.ca | Tél. 819-712-0827

De : Scott Streiner <Scott.Streiner@otc-cta.gc.ca>

Envoyé : 18 mars 2020 15:48

À : +_EC <EC@otc-cta.gc.ca>

Objet : For tomorrow

Hi, all. One more thing occurred to me after we hung up. Liz mentioned identifying activities for those unable to do much "normal" work, and we then focused on staff in Paul's area who don't have MyKey. I wonder if this is something we should consider more generally. Are there, for example, research projects we could ask some employees to undertake while they're at home? Please reflect on this and we can discuss tomorrow, along with the other items we identified today.

FYI, I've asked Seb and Alysia to email a short list of follow-up actions after each of our daily teleconferences, since it can be a little harder to keep track during a call than a face-to-face meeting. Of course, if you notice something missing from the list or have a different recollection of a deliverable, you should let them know.

My draft blog (still just in my head!) will come later today.

Thanks,

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

Amanda Hamelin

From: Sébastien Bergeron
Sent: Thursday, March 19, 2020 4:17 PM
To: Marcia Jones
Cc: Tim Hillier; Alysia Lau
Subject: RE: March 19 EC - Decisions and Follow-ups

Marcia,

Got it.

Alysia: can you make that happen tomorrow ?

Thanks,

Seb

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

----- Original message -----

From: Marcia Jones <Marcia.Jones@otc-cta.gc.ca>
Date: 2020-03-19 4:15 PM (GMT-05:00)
To: Sébastien Bergeron <Sebastien.Bergeron@otc-cta.gc.ca>
Cc: Tim Hillier <Tim.Hillier@otc-cta.gc.ca>, Alysia Lau <Alysia.Lau@otc-cta.gc.ca>
Subject: RE: March 19 EC - Decisions and Follow-ups

Hi SEb, just a reminder that Tim should be invited to the EC discussion tomorrow – part where we discuss BCP. I have asked him if anyone else should be invited, in case that is a possibility, who is holding the pen on it.

Thank you,
Marcia

From: Sébastien Bergeron <Sebastien.Bergeron@otc-cta.gc.ca>
Sent: Thursday, March 19, 2020 3:37 PM
To: +_EC <_EC@otc-cta.gc.ca>
Subject: March 19 EC - Decisions and Follow-ups

Dear Colleagues,

Please find below the list of follow-up actions following today EC. If you notice something missing from the list or have a different recollection of a deliverable, please let us know.

EC Member(s) Tasked	EC Decision(s)	Deliverable(s)	Expected Deadline
All Branch Heads	<ul style="list-style-type: none"> • Branch Heads seeking approval for staffing actions from EC should: <ul style="list-style-type: none"> ○ Consult Mireille and Nadine B. first, and ○ Circulate short e-mail including rationale to EC in advance of meeting. 	-	-
Mireille	-	<ul style="list-style-type: none"> • BCP - Present comms strategy and proposal with respect to non-critical services. 	March 20
	<ul style="list-style-type: none"> • Staff should continue teleworking until further notice. 	<ul style="list-style-type: none"> • Include direction in the daily update that all staff should continue teleworking until further notice. 	March 19
	-	<ul style="list-style-type: none"> • Reach out to TBS on specific concerns requiring flexibility from TBS policies. 	As soon as feasible
Tom and Valérie	<ul style="list-style-type: none"> • Request from Air Canada for exemption from notice period for discontinuance of service - Conditions that will be included in exemption are: <ul style="list-style-type: none"> ○ Air carrier must identify routes that will be discontinued. ○ Notification period of 2 weeks. 	<ul style="list-style-type: none"> • Prepare draft s. 80 decision with the proposed conditions. 	As soon as feasible

- o Exemption will only apply during "crisis" period related to COVID-19 pandemic.
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Valérie	-	<ul style="list-style-type: none"> • Prepare options for Scott, Liz and Doug with respect to filings received for stayed cases. 	As soon as feasible
Valérie	-	<ul style="list-style-type: none"> • BCP - Examine whether the Act already allows vessels to operate without coastal trade licences during emergency situations. 	March 20

Sébastien Bergeron

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De : Sébastien Bergeron
Envoyé : 18 mars 2020 16:31
À : +_EC <EC@otc-cta.gc.ca>
Objet : EC - March 18 : follow-up actions

Dear Colleagues,

Please find below the list of follow-up actions following today EC. If you notice something missing from the list or have a different recollection of a deliverable, please let us know.

EC Member(s) Tasked	Expected Deadline	Deliverable
Marcia	March 19	<ul style="list-style-type: none"> Call major air carriers (top 5) and air transport associations (NACC, ATAC) to explain Agency's order to suspend air-related proceedings.
Mireille	March 18	<ul style="list-style-type: none"> Send message to affected staff and managers - permitting staff who need VPN access to enter the Agency offices if they wish by COB March 20. <ul style="list-style-type: none"> Their manager must be present. Staff must maintain 2 metres of distance between themselves and other staff.
	March 19	<ul style="list-style-type: none"> Ensure daily COVID-19 updates are <i>e-mailed</i> to all staff. Mention that VPN should be used for work purposes only (no streaming of anything, except if it is absolutely necessary).
	March 19 (if possible)	<ul style="list-style-type: none"> Prepare list of EC decision points on various aspects of the BCP.
	March 20	<ul style="list-style-type: none"> Provide list of all staff phone numbers to EC members.
Tom and Valérie	March 19	<ul style="list-style-type: none"> Provide options to constrain Air Canada exemption from/reduction of notice period related to discontinuance of service.

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De : Scott Streiner <Scott.Streiner@otc-cta.gc.ca>

Envoyé : 18 mars 2020 15:48

À : +_EC <_EC@otc-cta.gc.ca>

Objet : For tomorrow

Hi, all. One more thing occurred to me after we hung up. Liz mentioned identifying activities for those unable to do much "normal" work, and we then focused on staff in Paul's area who don't have MyKey. I wonder if this is something we should consider more generally. Are there, for example, research projects we could ask some employees to undertake while they're at home? Please reflect on this and we can discuss tomorrow, along with the other items we identified today.

FYI, I've asked Seb and Alysia to email a short list of follow-up actions after each of our daily teleconferences, since it can be a little harder to keep track during a call than a face-to-face meeting. Of course, if you notice something missing from the list or have a different recollection of a deliverable, you should let them know.

My draft blog (still just in my head!) will come later today.

Thanks,

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

Amanda Hamelin

From: Sébastien Bergeron
Sent: Friday, March 20, 2020 12:45 PM
To: +_EC
Subject: *Correction* March 19 EC - Decisions and Follow-ups

Dear colleagues,

Please note below the correction (in red) we've made to the summary of yesterday EC.

Seb

EC Member(s) Tasked	EC Decision(s)	Deliverable(s)	Expected Deadline
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Mireille	-	<ul style="list-style-type: none"> BCP - Present comms strategy and proposal with respect to non-critical services. 	March 20
	<ul style="list-style-type: none"> Staff should continue teleworking until further notice. 	<ul style="list-style-type: none"> Include direction in the daily update that all staff should continue teleworking until further notice. 	March 19
	-	<ul style="list-style-type: none"> Reach out to TBS on specific concerns requiring flexibility from TBS policies. 	As soon as feasible
Tom and Valérie	-	<ul style="list-style-type: none"> Request for exemption from notification period for discontinuance of service – Prepare template draft s. 80 decision incorporating the proposed conditions. No 	As soon as feasible

Valérie	-	<p>decision has been made on this request. Only Members can make such a decision.</p> <ul style="list-style-type: none"> Prepare options for Scott, Liz and Doug with respect to filings received for stayed cases. 	As soon as feasible
	-	<ul style="list-style-type: none"> BCP - Examine whether the Act already allows vessels to operate without coastal trade licences during emergency situations. 	March 20

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De : Sébastien Bergeron

Envoyé : 19 mars 2020 15:37

À : +_EC

Objet : March 19 EC - Decisions and Follow-ups

Dear Colleagues,

Please find below the list of follow-up actions following today EC. If you notice something missing from the list or have a different recollection of a deliverable, please let us know.

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De : Sébastien Bergeron
Envoyé : 18 mars 2020 16:31
À : +_EC <EC@otc-cta.gc.ca>
Objet : EC - March 18 : follow-up actions

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Please find below the list of follow-up actions following today EC. If you notice something missing from the list or have a different recollection of a deliverable, please let us know.

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Tom and Valérie

March 19

- Provide options to constrain Air Canada exemption from/reduction of notice period related to discontinuance of service.
-

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De : Scott Streiner <Scott.Streiner@otc-cta.gc.ca>**Envoyé :** 18 mars 2020 15:48**À :** +_EC <_EC@otc-cta.gc.ca>**Objet :** For tomorrow

Hi, all. One more thing occurred to me after we hung up. Liz mentioned identifying activities for those unable to do much "normal" work, and we then focused on staff in Paul's area who don't have MyKey. I wonder if this is something we should consider more generally. Are there, for example, research projects we could ask some employees to undertake while they're at home? Please reflect on this and we can discuss tomorrow, along with the other items we identified today.

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My draft blog (still just in my head!) will come later today.

Thanks,

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

Amanda Hamelin

Subject: FW: EC June 18- Decisions and Follow-ups

[Redacted]

[Redacted]



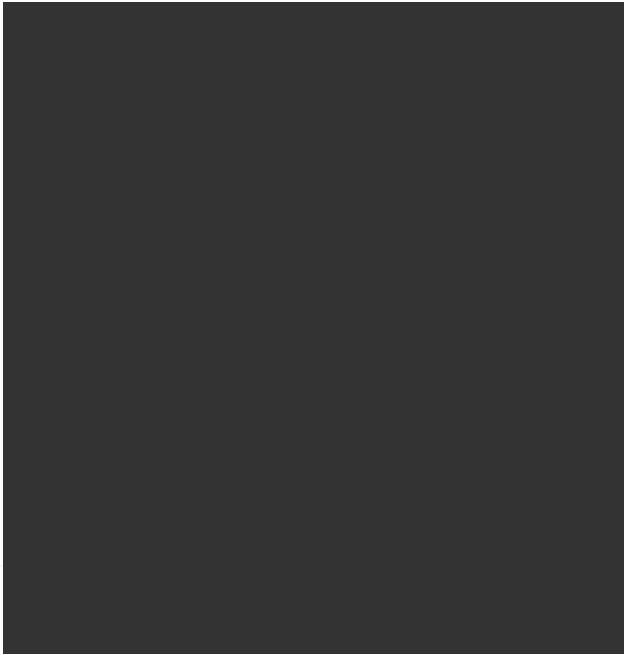








































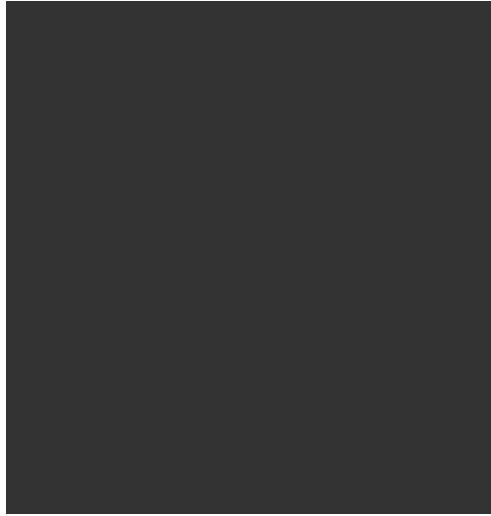
















De : Sébastien Bergeron
 Envoyé : 23 mars 2020 20:59
 À : +_EC <EC@01c-cla.gc.ca>
 Objet : EC March 23 - Decisions and Follow-ups

Dear colleagues,

Please find below the list of decisions and follow-up actions for today EC. If you notice something missing from the list or have a different recollection of a deliverable or decision, please let us know.

EC Member(s) Tasked	EC Decision(s)	Deliverable(s)	Expected Deadline
Chair's Office	-	<ul style="list-style-type: none"> Compile list of additional research projects that can be allocated staff during telework period. Branch Heads should inform and begin canvassing managers for staff that could work on these projects. 	March 24
	-	<ul style="list-style-type: none"> Circulate updated Members Committee agenda. 	March 24
	-	<ul style="list-style-type: none"> Coordinate with Social Committee and Comms to set up internal haiku contest. 	This week
Marcia	-	<ul style="list-style-type: none"> Comms to revise public messaging on Agency service delivery during COVID-19 pandemic. 	March 24
	<ul style="list-style-type: none"> ATPDR guidance consultation process will be reviewed after the Agency 	-	-

addresses requests from air carriers regarding regulatory obligations.

Mireille	-	• Examine options to support VPN capacity (e.g. rotating VPN access) during telework period.	This week
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De : Sébastien Bergeron
 Envoyé : 20 mars 2020 19:28
 À : + EC <EC@otc-cta.gc.ca>
 Objet : EC March 20 - Decisions and Follow-ups

Dear colleagues,

Please find below the list of decisions and follow-up actions for today EC. If you notice something missing from the list or have a different recollection of a deliverable or decision, please let us know.

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: <ul style="list-style-type: none"> The Agency is continuing to deliver its services to the extent possible. Complaints can continue to be filed with the Agency; however, there may be a longer response time. 	As soon as feasible

		<ul style="list-style-type: none"> o Dispute proceedings involving airlines have been temporarily suspended. • Comms will update the Agency's helplines and other public-facing platforms to reflect the above messaging. 	
Mirreille	-	<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. 	<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"> • Section 64 of CTA – Examine whether a temporary order can be issued under this provision. 	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

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De : Sébastien Bergeron
 Envoyé : 20 mars 2020 12:45
 A : « EC <EC@otc-cta.gc.ca>
 Objet : "Correction" March 19 EC - Decisions and Follow-ups

Dear colleagues,

Please note below the correction (in red) we've made to the summary of yesterday EC.

Seb

EC Member(s) Tasked	EC Decision(s)	Deliverable(s)	Expected Deadline
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De : Sébastien Bergeron
 Envoyé : 19 mars 2020 15:37
 À : « EC <EC@otc-cta.gc.ca> »
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De : Sébastien Bergeron
Envoyé : 18 mars 2020 16:31
A : « EC » <EC@otc-cta.gc.ca>
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De : Scott Streiner <Scott.Streiner@otc-cta.gc.ca>
Envoyé : 18 mars 2020 15:48

À : * _EC < EC@otc-cta.gc.ca >
Objet : For tomorrow

Hi, all. One more thing occurred to me after we hung up. Liz mentioned identifying activities for those unable to do much "normal" work, and we then focused on staff in Paul's area who don't have MyKey. I wonder if this is something we should consider more generally. Are there, for example, research projects we could ask some employees to undertake while they're at home? Please reflect on this and we can discuss tomorrow, along with the other items we identified today.

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Thanks,

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This is **Exhibit “P”** to the Affidavit of Dr. Gábor Lukács
affirmed before me on May 15, 2022

Signature

Amanda Hamelin

From: Scott Streiner
Sent: Friday, March 20, 2020 12:47 PM
To: Marcia Jones; Liz Barker; Mireille Drouin; Douglas Smith; Tom Oommen
Cc: Sébastien Bergeron; Alysia Lau; Tim Hillier; Valérie Lagacé
Subject: RE: BCP

Let me add some further reflections for everyone to mull prior to our call: a BCP is typically invoked when some external factor (like an infrastructure problem) make it impossible for most employees to work, even though they're healthy and ready and willing to do so. The BCP's purpose is to identify which critical services must nevertheless continue to be delivered, and how that will be done (e.g., having staff who deliver those critical services gather at an off-site location).

The current situation is different. The infrastructure is fine, and our goal is to maintain normal operations to the greatest extent possible with everyone working from home.

That said, over time, challenges may emerge as a result of a serious and unpredictable decline in the number of employees able to work due to infection. My thinking is that unless this reaches a very severe stage, it isn't really a BCP-type situation where we focus only on the delivery of critical services. In this scenario -- which requires some thinking, because it really is without precedent -- the issues will be how we:

- continue to deliver a reasonable level of a wider range of regular services with a reduced workforce,
- provide those services identified as critical if the staff who normally deliver them are among those who are ill and unable to work, and
- communicate these adjustments internally and externally.

We'll discuss further at 2.

Thanks,

S

-----Original Message-----

From: Scott Streiner

Sent: Friday, March 20, 2020 11:55 AM

To: Marcia Jones <Marcia.Jones@otc-cta.gc.ca>; Liz Barker <Liz.Barker@otc-cta.gc.ca>; Mireille Drouin <Mireille.Drouin@otc-cta.gc.ca>; Douglas Smith <Douglas.Smith@otc-cta.gc.ca>; Tom Oommen <Tom.Oommen@otc-cta.gc.ca>

Cc: Sébastien Bergeron <Sebastien.Bergeron@otc-cta.gc.ca>; Alysia Lau <Alysia.Lau@otc-cta.gc.ca>; Tim Hillier <Tim.Hillier@otc-cta.gc.ca>; Valérie Lagacé <Valerie.Lagace@otc-cta.gc.ca>

Subject: RE: BCP

Hi, Marcia. By way of clarification, there's no intention to activate the BCP now; we just need to have one ready in case events eventually evolve in that direction.

As for the addition of new activities, only one is in play (as it's been before): coasting trade applications. The email exchange on this yesterday afternoon provides further context.

Tim's welcome to join the call, though we're still far from any scenario where the BCP would be triggered.

Thanks, and talk soon.

S

-----Original Message-----

From: Marcia Jones <Marcia.Jones@otc-cta.gc.ca>

Sent: Friday, March 20, 2020 11:39 AM

To: Scott Streiner <Scott.Streiner@otc-cta.gc.ca>; Liz Barker <Liz.Barker@otc-cta.gc.ca>; Mireille Drouin <Mireille.Drouin@otc-cta.gc.ca>; Douglas Smith <Douglas.Smith@otc-cta.gc.ca>; Tom Oommen <Tom.Oommen@otc-cta.gc.ca>

Cc: Sébastien Bergeron <Sebastien.Bergeron@otc-cta.gc.ca>; Alysia Lau <Alysia.Lau@otc-cta.gc.ca>; Tim Hillier <Tim.Hillier@otc-cta.gc.ca>

Subject: BCP

Hi all,

I just wanted to send a quick note in advance of our call today to request that we discuss the BCP. I understand that there is some discussion happening about adding other services to it or winding down services for some but not all activities - sort of a different type of BCP than what we previously discussed.

I would like to clarify what is happening right now and make sure we are on the same page (as far as I understand, we are not in BCP mode, but work from home mode with a stay of proceedings for air. We are still accepting complaints and processing what we can, but no outreach to industry or complainants on them).

I would like to confirm if we are envisaging triggering the plan and if so, if there is appetite to change it for some reason.

Finally, I would like to discuss the comms messaging on our course of action, both internally and externally. I have asked if Tim can join for our discussion of BCP.

Thanks,
Marcia

Amanda Hamelin

From: Sébastien Bergeron
Sent: Sunday, March 22, 2020 1:06 PM
To: Scott Streiner; Liz Barker
Cc: Tim Hillier, Cynthia Jolly
Subject: RE: TR: EC March 20 - Decisions and Follow-ups

Scott, Liz:

See Marcia's response below.

Seb

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

----- Original message -----

From: Marcia Jones
Date: 2020-03-22 12:59 PM (GMT-05:00)
To: Sébastien Bergeron
Cc: Tim Hillier, Cynthia Jolly
Subject: Re: TR: EC March 20 - Decisions and Follow-ups

Hi Seb, I told the team that Monday was fine to get this up. As you know, there is already some messaging signalling cases are on hold now, so it is a matter of beefing it up.

Hope that works.

Thanks,
Marcia

De : Sébastien Bergeron
Envoyé : 20 mars 2020 19:28
À : +_EC
Objet : EC March 20 - Decisions and Follow-ups

Dear colleagues,

Please find below the list of decisions and follow-up actions for today EC. If you notice something missing from the list or have a different recollection of a deliverable or decision, please let us know.

EC Member(s) Tasked	EC Decision(s)	Deliverable(s)	Expected Deadline
All Branch Heads	-	• 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. 	
	-	<ul style="list-style-type: none"> Marcia – includes Annual Report 	March 25
		<ul style="list-style-type: none"> Chair's Office to compile a list → <i>Please send your items to Alysia in advance if possible.</i> 	
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: <ul style="list-style-type: none"> The Agency is continuing to deliver its services to the extent possible. Complaints can continue to be filed with the Agency; however, there may be a longer response time. Dispute proceedings involving airlines have been temporarily suspended. Comms will update the Agency's helplines and other public-facing platforms to reflect the above messaging. 	As soon as feasible
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

	.	• Update Committee on call with TBS with respect to fiscal year-end contracts.	March 23/24
Valérie	-	• Section 64 of CTA – Examine whether a temporary order can be issued under this provision.	March 23
	-	• Prepare options regarding approaches to VRCPI in context of COVID-19 and possible BCP situation.	Next week

Sébastien Bergeron

Chef de cabinet | Bureau du président et premier dirigeant
 Office des transports du Canada | Gouvernement du Canada
sebastien.bergeron@otc-cta.gc.ca | Tél. 819-712-0827
 Chief of Staff | Office of the Chair and Chief Executive Officer
 Canadian Transportation Agency | Government of Canada
Sebastien.bergeron@otc-cta.gc.ca | Tél. 819-712-0827

De : Sébastien Bergeron
 Envoyé : 20 mars 2020 12:45
 À : + EC <EC@otc-cta.gc.ca>
 Objet : *Correction* March 19 EC - Decisions and Follow-ups

Dear colleagues,

Please note below the correction (in red) we've made to the summary of yesterday EC.

Seb

EC Member(s) Tasked	EC Decision(s)	Deliverable(s)	Expected Deadline
All Branch Heads	<ul style="list-style-type: none"> • Branch Heads seeking approval for staffing actions from EC should: <ul style="list-style-type: none"> o Consult Mireille and Nadine B. first, and o Circulate short e-mail including rationale to EC in advance of meeting. 		
Mireille		• BCP - Present comms strategy and proposal with respect to non-critical services.	March 20

	• Staff should continue teleworking until further notice.	• Include direction in the daily update that all staff should continue teleworking until further notice.	March 19
	-	• Reach out to TBS on specific concerns requiring flexibility from TBS policies.	As soon as feasible
Tom and Valérie	-	• Request for exemption from notification period for discontinuance of service – Prepare template draft s. 80 decision incorporating the proposed conditions. No decision has been made on this request. Only Members can make such a decision.	As soon as feasible
Valérie	-	• Prepare options for Scott, Liz and Doug with respect to filings received for stayed cases.	As soon as feasible
	-	• BCP - Examine whether the Act already allows vessels to operate without coastal trade licences during emergency situations.	March 20

Sébastien Bergeron

Chef de cabinet | Bureau du président et premier dirigeant

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Canadian Transportation Agency | Government of Canada

Sebastien.bergeron@otc-cta.gc.ca | Tél. 819-712-0827

De : Sébastien Bergeron
Envoyé : 19 mars 2020 15:37
À : +_EC <EC@otc-cta.gc.ca>
Objet : March 19 EC - Decisions and Follow-ups

Dear Colleagues,

Please find below the list of follow-up actions following today EC. If you notice something missing from the list or have a different recollection of a deliverable, please let us know.

EC Member(s) Tasked	EC Decision(s)	Deliverable(s)	Expected Deadline
All Branch Heads	• Branch Heads seeking approval for staffing actions from EC should:	-	-

o Consult Mireille and Nadine B. first, and

o Circulate short e-mail including rationale to EC in advance of meeting.

Mireille	-	• BCP - Present comms strategy and proposal with respect to non-critical services.	March 20
	• Staff should continue teleworking until further notice.	• Include direction in the daily update that all staff should continue teleworking until further notice.	March 19
	-	• Reach out to TBS on specific concerns requiring flexibility from TBS policies.	As soon as feasible
Tom and Valérie	• Request from Air Canada for exemption from notice period for discontinuance of service - Conditions that will be included in exemption are: o Air carrier must identify routes that will be discontinued. o Notification period of 2 weeks. o Exemption will only apply during "crisis" period related to COVID-19 pandemic. o Discontinuance of service is not permitted in remote communities where no other transportation service is available.	• Prepare draft s. 80 decision with the proposed conditions.	As soon as feasible
Valérie	-	• Prepare options for Scott, Liz and Doug with respect to filings received for stayed cases.	As soon as feasible
Valérie	-	• BCP - Examine whether the Act already allows vessels to operate without coastal trade licences during emergency situations.	March 20

Sébastien Bergeron

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Canadian Transportation Agency | Government of Canada

Sebastien.bergeron@otc-cta.gc.ca | Tél. 819-712-0827

De : Sébastien Bergeron
Envoyé : 18 mars 2020 16:31
À : +_EC <EC@otc-cta.gc.ca>
Objet : EC - March 18 : follow-up actions

Dear Colleagues,

Please find below the list of follow-up actions following today EC. If you notice something missing from the list or have a different recollection of a deliverable, please let us know.

EC Member(s) Tasked	Expected Deadline	Deliverable
Marcia	March 19	<ul style="list-style-type: none"> • Call major air carriers (top 5) and air transport associations (NACC, ATAC) to explain Agency's order to suspend air-related proceedings.
Mireille	March 18	<ul style="list-style-type: none"> • Send message to affected staff and managers - permitting staff who need VPN access to enter the Agency offices if they wish by COB March 20. <ul style="list-style-type: none"> o Their manager must be present. o Staff must maintain 2 metres of distance between themselves and other staff.
	March 19	<ul style="list-style-type: none"> • Ensure daily COVID-19 updates are <i>e-mailed</i> to all staff. Mention that VPN should be used for work purposes only (no streaming of anything, except if it is absolutely necessary).
	March 19 (if possible)	<ul style="list-style-type: none"> • Prepare list of EC decision points on various aspects of the BCP.
	March 20	<ul style="list-style-type: none"> • Provide list of all staff phone numbers to EC members.
Tom and Valérie	March 19	<ul style="list-style-type: none"> • Provide options to constrain Air Canada exemption from/reduction of notice period related to discontinuance of service.

Sébastien Bergeron

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sebastien.bergeron@otc-cta.gc.ca | Tél. 819-712-0827

Chief of Staff | Office of the Chair and Chief Executive Officer

Canadian Transportation Agency | Government of Canada

Sebastien.bergeron@otc-cta.gc.ca | Tél. 819-712-0827

De : Scott Streiner <Scott.Streiner@otc-cta.gc.ca>
Envoyé : 18 mars 2020 15:48
À : +_EC <EC@otc-cta.gc.ca>
Objet : For tomorrow

Hi, all. One more thing occurred to me after we hung up. Liz mentioned identifying activities for those unable to do much "normal" work, and we then focused on staff in Paul's area who don't have MyKey. I wonder if this is something we should consider more generally. Are there, for example, research projects we could ask some employees to undertake while they're at home? Please reflect on this and we can discuss tomorrow, along with the other items we identified today.

FYI, I've asked Seb and Alysia to email a short list of follow-up actions after each of our daily teleconferences, since it can be a little harder to keep track during a call than a face-to-face meeting. Of course, if you notice something missing from the list or have a different recollection of a deliverable, you should let them know.

My draft blog (still just in my head!) will come later today.

Thanks,

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

Amanda Hamelin

From: Scott Streiner
Sent: Friday, March 20, 2020 1:41 PM
To: +_EC
Subject: Some items for today's EC call

External

- S.64 exemptions
- Refunds/vouchers issue

Internal

- BCP/managing widespread staff sick leave
- Keeping staff well-occupied
- Regular EC and Members meetings
- DH call with TBS next week
- ATIP considerations

Other

- CCAT conference

Amanda Hamelin

From: Marcia Jones
Sent: Friday, March 20, 2020 1:44 PM
To: Scott Streiner; +_EC
Subject: RE: Some items for today's EC call

Hi, I have one suggested item, below in blue.

From: Scott Streiner
Sent: Friday, March 20, 2020 1:41 PM
To: +_EC
Subject: Some items for today's EC call

External

- S.64 exemptions
- Refunds/vouchers issue

Internal

- BCP/managing widespread staff sick leave
- Keeping staff well-occupied
- Regular EC and Members meetings
- DH call with TBS next week
- ATIP considerations
- Contracts for services – March 31st fiscal year end (e.g. sign language)

Other

- CCAT conference

Amanda Hamelin

Subject: Special EC - COVID19 - Daily updates
Location: (514) 938-6569,935311571# (then press #)

Start: Mon 3/16/2020 2:00 PM
End: Mon 3/16/2020 2:30 PM

Recurrence: Daily
Recurrence Pattern: every day from 2:00 PM to 2:30 PM

Meeting Status: Accepted

Organizer: Scott Streiner
Required Attendees: Alysia Lau; Douglas Smith; Lesley Robertson; Liz Barker; Marcia Jones; Mireille Drouin; Sébastien Bergeron; Tom Oommen; Valérie Lagacé
Optional Attendees: Allan Burnside; Simon-Pierre Lessard

Importance: High

Chair's Boardroom & by CBCI teleconference: dial 1 514 938 6569 call ID: 935311571# then # again

Alysia will HOST.

Attendance

- Scott Streiner
- Liz Barker
- Mireille Drouin
- Doug Smith
- Marcia Jones
- Tom Oommen
- Valérie Lagacé

- Sébastien Bergeron
- Alysia Lau

Guests

- Tim Hillier
- Cynthia Jolly
- Karen Jacob

External Approach

- Section 64 draft decision: SS and LB leaning towards using s. 64 instead of s. 80 to either grant request or shorten notification period, unless s. 64 means discontinuance of service could be permanent. ***VL to examine whether Agency could make s. 64 order temporary.**

- Refunds and vouchers: MJ - can "encourage" airlines to refund/voucher as best practice.
- SS: ***SS to develop draft statement related to refunds and vouchers.**

Internal Approach

- BCP: MD - we have not yet invoked BCP. INAC has, PCH is operating critical services only.
- MD: Main concern is putting pressure on government services which should be reserved for critical services.
- SS: There will be call between deputy heads and TBS on Wednesday.
- ***Decision: MD to include acknowledgment of staff facing challenges (with kids etc.) while teleworking in daily staff update.**
- VL: BCP can be triggered when we work until we can't. VL and MJ: We need to be ready to trigger BCP.
- VL: Potential concern with VRCPI. ***VL and Steve Aubut to develop options to prepare for VRCPI for EC discussion.**
- SS: ***Will continue to deliver as many Agency services as possible at this time. Not invoking BCP at this time, but Agency should be prepared (clearly communicate this to staff). BCP could be triggered by: 1) central direction, or 2) unavailability of staff having impact on service delivery.**

- MD: BCP - external communications? ***Passengers who should wish to file complaint are still able to do so.**
- SS: Non-critical services --> manage on day-to-day basis, not 100% but the Agency will do its best.
- LB: Should consider posting message on website that Agency services continue. SS: Yes, but may take longer.
- ***Comms to work with ATC to post message on website ASAP: "CTA services during COVID-19 pandemic": CTA continues to maintain operations to the extent possible. Complaints can continue to be filed, make take longer for Agency to get back to you. Dispute proceedings involving air carriers temporarily paused. Agency helplines to be updated as well.**

- SS: Giving staff work during this time.
- LB: Projects such as annotation of **Part V of the CTA.**
- DS: **Headnotes for decisions**, will assign someone to assist VL with ATIP files, **accelerate web modernization, updating Hub.**
- CJ: Developing accessible materials in Word.
- SS: Need to develop inventory of projects and assign accordingly to staff who are: available, capable (skills), and would assist in developing relevant expertise.
- ***Monday or Tuesday: have inventory of possible projects and discuss allocating projects to staff.**

- SS: No need for regular weekly EC meetings. Members meeting items should proceed.
- ***Regular Members Committee meetings to proceed.** SS will still ask EC members to call in. **LR will recirculate draft agenda** and EC members to signal to Lesley whether comfortable proceedings.

- Deputy heads call with TBS Wednesday.
- SS: Emails sent during this period subject to ATIP.

- MJ: Contracts for services ending March 31. ***MD to share information with Committee next week.**

- SS: Board of Directors meeting on Monday - likely to cancel CCAT conference. To be held in Gatineau in 2021.

Varia

- MD: Have not received new floor plans yet, expect next Friday. Looking at other options to consult with staff. SS: Should maintain momentum on preparations for the move.
- MD: Also monitoring potential shutdown of construction sites. SS: If there is, staff should be made aware in one of the staff updates. TO: Don't forget consultation with disability network.
- DS: 20 people came into office to take equipment. Update on closure of building? MD: Building not closed. DS: Would like advanced notice.
- SB: Annual Report? MJ: ***Will look into deadline for Annual Report.**
- ***Chair's Office to make list of annual deliverables/products that Agency should continue to work on. --> Should develop list at EC meeting next week.**
- SS: Haiku competition ***Chair's Office - Share your haiku from working from home next week. MD to look at technology.**

Amanda Hamelin

From: Marcia Jones
Sent: Friday, March 20, 2020 3:17 PM
To: Scott Streiner; Liz Barker; Valérie Lagacé; Douglas Smith; Tom Oommen; Mireille Drouin
Cc: Sébastien Bergeron; Alysia Lau; Caitlin Hurcomb; Allan Burnside; Tim Hillier
Subject: Messages for website

Hi all,

Please find below some proposed messaging for our website, as per EC today, balancing carriers' concerns that we be more clear refunds are not required, while also acknowledging it would be a good practice to do so.

In addition, Cait has suggested it may be worth noting that passengers may have entitlements under the EU regime – given that they do cover refunds – and has proposed the following text below.

Please let us know if there are any concerns before we move to translation/posting.

Thank you,

Marcia

Situations outside the airline's control**Existing text:**

In these situations, airlines must:

- [Rebook passengers](#) on the next available flight operated by them or a partner airline.
 - *For disruptions between March 13, 2020 and April 30, 2020, airlines do not have to follow APPR requirements to rebook passengers using an airline with which they have no commercial agreement.*

Proposed addition:

- *While there is no obligation to refund passengers who do not wish to be rebooked, it is considered a good practice to do so, or to provide vouchers/credits that are valid for a reasonable time period.*

EU Regime

Proposed addition in off-set text box:

If you are flying to or from the European Union (EU), EU passenger rights may also apply. For more information, visit the EU's [Air Passenger Rights webpage](#).

Please note: A passenger can only receive compensation for inconvenience under the APPR if they have not already received compensation for the event under other air passenger protection rules.

4/15/22, 11:05 AM

Mail - Douglas.Smith@otc-cta.gc.ca

EC March 20 - Decisions and Follow-ups

Sébastien Bergeron

Fri 3/20/2020 7:28 PM

To: +_EC <_EC@otc-cta.gc.ca>;

Dear colleagues,

Please find below the list of decisions and follow-up actions for today EC. If you notice something missing from the list or have a different recollection of a deliverable or decision, please let us know.

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: <ul style="list-style-type: none"> The Agency is continuing to deliver its services to the extent possible. Complaints can continue to be filed with the Agency; however, there may be a longer response time. 	As soon as feasible

<https://outlook.otc-cta.gc.ca/owa/#path=/mail/search>

1/7

4/15/22, 11:05 AM

Mail - Douglas.Smith@otc-cta.gc.ca

		<ul style="list-style-type: none"> o Dispute proceedings involving airlines have been temporarily suspended. • Comms will update the Agency's helplines and other public-facing platforms to reflect the above messaging. 	
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. 	<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"> • Section 64 of CTA – Examine whether a temporary order can be issued under this provision. 	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

Sébastien Bergeron

Chef de cabinet | Bureau du président et premier dirigeant
 Office des transports du Canada | Gouvernement du Canada
sebastien.bergeron@otc-cta.gc.ca | Tél. 819-712-0827

Chief of Staff | Office of the Chair and Chief Executive Officer

<https://outlook.otc-cta.gc.ca/owa/#path=/mail/search>

4/15/22, 11:05 AM

Mail - Douglas.Smith@otc-cta.gc.ca

Canadian Transportation Agency | Government of Canada
Sebastien.bergeron@otc-cta.gc.ca | Tél. 819-712-0827

De : Sébastien Bergeron
Envoyé : 20 mars 2020 12:45
À : +_EC <_EC@otc-cta.gc.ca>
Objet : *Correction* March 19 EC - Decisions and Follow-ups

Dear colleagues,

Please note below the correction (in red) we've made to the summary of yesterday EC.

Seb

EC Member(s) Tasked	EC Decision(s)	Deliverable(s)	Expected Deadline
All Branch Heads	<ul style="list-style-type: none"> Branch Heads seeking approval for staffing actions from EC should: <ul style="list-style-type: none"> Consult Mireille and Nadine B. first, and Circulate short e-mail including rationale to EC in advance of meeting. 	-	-
Mireille	-	<ul style="list-style-type: none"> BCP - Present comms strategy and proposal with respect to non-critical services. 	March 20
	<ul style="list-style-type: none"> Staff should continue teleworking until further notice. 	<ul style="list-style-type: none"> Include direction in the daily update that all staff should continue teleworking until further notice. 	March 19
	-	<ul style="list-style-type: none"> Reach out to TBS on specific concerns requiring flexibility from TBS policies. 	As soon as feasible
Tom and Valérie	-	<ul style="list-style-type: none"> Request for exemption from notification period for discontinuance of service – Prepare template draft s. 80 decision incorporating the proposed conditions. No decision has been made on this request. Only Members can make such a decision. 	As soon as feasible

4/15/22, 11:05 AM

Mail - Douglas.Smith@otc-cta.gc.ca

Valérie	-	<ul style="list-style-type: none"> Prepare options for Scott, Liz and Doug with respect to filings received for stayed cases. 	As soon as feasible
	-	<ul style="list-style-type: none"> BCP - Examine whether the Act already allows vessels to operate without coastal trade licences during emergency situations. 	March 20

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De : Sébastien Bergeron
Envoyé : 19 mars 2020 15:37
À : +_EC <EC@otc-cta.gc.ca>
Objet : March 19 EC - Decisions and Follow-ups

Dear Colleagues,

Please find below the list of follow-up actions following today EC. If you notice something missing from the list or have a different recollection of a deliverable, please let us know.

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Mireille	-	<ul style="list-style-type: none"> BCP - Present comms strategy and 	March 20

4/15/22, 11:05 AM

Mail - Douglas.Smith@otc-cta.gc.ca

		proposal with respect to non-critical services.	
	<ul style="list-style-type: none"> Staff should continue teleworking until further notice. 	<ul style="list-style-type: none"> Include direction in the daily update that all staff should continue teleworking until further notice. 	March 19
	-	<ul style="list-style-type: none"> Reach out to TBS on specific concerns requiring flexibility from TBS policies. 	As soon as feasible
Tom and Valérie	<ul style="list-style-type: none"> Request from Air Canada for exemption from notice period for discontinuance of service - Conditions that will be included in exemption are: <ul style="list-style-type: none"> Air carrier must identify routes that will be discontinued. Notification period of 2 weeks. Exemption will only apply during "crisis" period related to COVID-19 pandemic. Discontinuance of service is not permitted in remote communities where no other transportation service is available. 	<ul style="list-style-type: none"> Prepare draft s. 80 decision with the proposed conditions. 	As soon as feasible
Valérie	-	<ul style="list-style-type: none"> Prepare options for Scott, Liz and Doug with respect to filings received for stayed cases. 	As soon as feasible
Valérie	-	<ul style="list-style-type: none"> BCP - Examine whether the Act already allows vessels to operate without coastal trade licences during emergency situations. 	March 20

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 Office des transports du Canada | Gouvernement du Canada
sebastien.bergeron@otc-cta.gc.ca | Tél. 819-712-0827

4/15/22, 11:05 AM

Mail - Douglas.Smith@otc-cta.gc.ca

Chief of Staff | Office of the Chair and Chief Executive Officer
 Canadian Transportation Agency | Government of Canada
Sebastien.bergeron@otc-cta.gc.ca | Tél. 819-712-0827

De : Sébastien Bergeron
Envoyé : 18 mars 2020 16:31
À : +_EC <_EC@otc-cta.gc.ca>
Objet : EC - March 18 : follow-up actions

Dear Colleagues,

Please find below the list of follow-up actions following today EC. If you notice something missing from the list or have a different recollection of a deliverable, please let us know.

EC Member(s) Tasked	Expected Deadline	Deliverable
Marcia	March 19	<ul style="list-style-type: none"> Call major air carriers (top 5) and air transport associations (NACC, ATAC) to explain Agency's order to suspend air-related proceedings.
Mireille	March 18	<ul style="list-style-type: none"> Send message to affected staff and managers - permitting staff who need VPN access to enter the Agency offices if they wish by COB March 20. <ul style="list-style-type: none"> Their manager must be present. Staff must maintain 2 metres of distance between themselves and other staff.
	March 19	<ul style="list-style-type: none"> Ensure daily COVID-19 updates are <i>e-mailed</i> to all staff. Mention that VPN should be used for work purposes only (no streaming of anything, except if it is absolutely necessary).
	March 19 (if possible)	<ul style="list-style-type: none"> Prepare list of EC decision points on various aspects of the BCP.
	March 20	<ul style="list-style-type: none"> Provide list of all staff phone numbers to EC members.
Tom and Valérie	March 19	<ul style="list-style-type: none"> Provide options to constrain Air Canada exemption from/reduction of notice period related to discontinuance of service.

Sébastien Bergeron

<https://outlook.otc-cta.gc.ca/owa/#path=/mail/search>

6/7

4/15/22, 11:05 AM

Mail - Douglas.Smith@otc-cta.gc.ca

Chef de cabinet | Bureau du président et premier dirigeant
Office des transports du Canada | Gouvernement du Canada
sebastien.bergeron@otc-cta.gc.ca | Tél. 819-712-0827

Chief of Staff | Office of the Chair and Chief Executive Officer
Canadian Transportation Agency | Government of Canada
Sebastien.bergeron@otc-cta.gc.ca | Tél. 819-712-0827

De : Scott Streiner <Scott.Streiner@otc-cta.gc.ca>

Envoyé : 18 mars 2020 15:48

À : +_EC <EC@otc-cta.gc.ca>

Objet : For tomorrow

Hi, all. One more thing occurred to me after we hung up. Liz mentioned identifying activities for those unable to do much "normal" work, and we then focused on staff in Paul's area who don't have MyKey. I wonder if this is something we should consider more generally. Are there, for example, research projects we could ask some employees to undertake while they're at home? Please reflect on this and we can discuss tomorrow, along with the other items we identified today.

FYI, I've asked Seb and Alysia to email a short list of follow-up actions after each of our daily teleconferences, since it can be a little harder to keep track during a call than a face-to-face meeting. Of course, if you notice something missing from the list or have a different recollection of a deliverable, you should let them know.

My draft blog (still just in my head!) will come later today.

Thanks,

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

Amanda Hamelin

Subject: FW: EC June 18- Decisions and Follow-ups

[Redacted]

[Redacted]



[Redacted]

[Redacted]

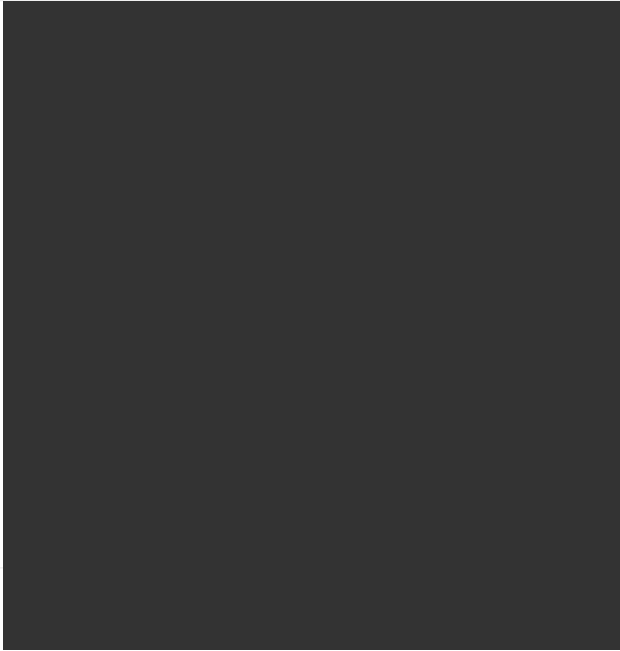
[Redacted]







































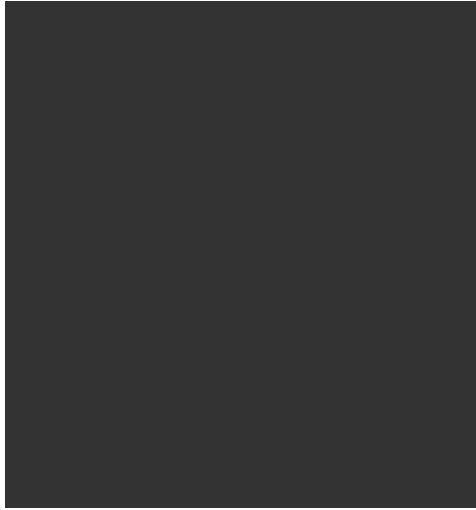
















De : Sébastien Bergeron
 Envoyé : 23 mars 2020 20:59
 À : +_EC <EC@01c-cla.gc.ca>
 Objet : EC March 23 - Decisions and Follow-ups

Dear colleagues,

Please find below the list of decisions and follow-up actions for today EC. If you notice something missing from the list or have a different recollection of a deliverable or decision, please let us know.

EC Member(s) Tasked	EC Decision(s)	Deliverable(s)	Expected Deadline
Chair's Office	-	<ul style="list-style-type: none"> Compile list of additional research projects that can be allocated staff during telework period. Branch Heads should inform and begin canvassing managers for staff that could work on these projects. 	March 24
	-	<ul style="list-style-type: none"> Circulate updated Members Committee agenda. 	March 24
	-	<ul style="list-style-type: none"> Coordinate with Social Committee and Comms to set up internal haiku contest. 	This week
Marcia	-	<ul style="list-style-type: none"> Comms to revise public messaging on Agency service delivery during COVID-19 pandemic. 	March 24
	<ul style="list-style-type: none"> ATPDR guidance consultation process will be reviewed after the Agency 	-	-

addresses requests from air carriers regarding regulatory obligations.

Mireille	-	• Examine options to support VPN capacity (e.g. rotating VPN access) during telework period.	This week
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Sébastien Bergeron
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Chief of Staff | Office of the Chair and Chief Executive Officer
 Canadian Transportation Agency | Government of Canada
Sebastien.bergeron@otc-cta.gc.ca | Tél. 819-712-0827

De : Sébastien Bergeron
Envoyé : 20 mars 2020 19:28
À : + EC <EC@otc-cta.gc.ca>
Objet : EC March 20 - Decisions and Follow-ups

Dear colleagues,

Please find below the list of decisions and follow-up actions for today EC. If you notice something missing from the list or have a different recollection of a deliverable or decision, please let us know.

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: <ul style="list-style-type: none"> The Agency is continuing to deliver its services to the extent possible. Complaints can continue to be filed with the Agency; however, there may be a longer response time. 	As soon as feasible

		<ul style="list-style-type: none"> o Dispute proceedings involving airlines have been temporarily suspended. • Comms will update the Agency's helplines and other public-facing platforms to reflect the above messaging. 	
Mirreille	-	<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. 	<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"> • Section 64 of CTA – Examine whether a temporary order can be issued under this provision. 	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

Sébastien Bergeron
 Chef de cabinet | Bureau du président et premier dirigeant
 Office des transports du Canada | Gouvernement du Canada
sebastien.bergeron@otc-cta.gc.ca | Tél. 819-712-0827

Chief of Staff | Office of the Chair and Chief Executive Officer
 Canadian Transportation Agency | Government of Canada
Sebastien.bergeron@otc-cta.gc.ca | Tél. 819-712-0827

De : Sébastien Bergeron
 Envoyé : 20 mars 2020 12:45
 À : « EC » <EC@otc-cta.gc.ca>
 Objet : "Correction" March 19 EC - Decisions and Follow-ups

Dear colleagues,

Please note below the correction (in red) we've made to the summary of yesterday EC.

Seb

EC Member(s) Tasked	EC Decision(s)	Deliverable(s)	Expected Deadline
All Branch Heads	<ul style="list-style-type: none"> Branch Heads seeking approval for staffing actions from EC should: <ul style="list-style-type: none"> Consult Mireille and Nadine B. first, and Circulate short e-mail including rationale to EC in advance of meeting. 	-	-
Mireille	-	<ul style="list-style-type: none"> BCP - Present comms strategy and proposal with respect to non-critical services. 	March 20
	<ul style="list-style-type: none"> Staff should continue teleworking until further notice. 	<ul style="list-style-type: none"> Include direction in the daily update that all staff should continue teleworking until further notice. 	March 19
	-	<ul style="list-style-type: none"> Reach out to TBS on specific concerns requiring flexibility from TBS policies. 	As soon as feasible
Tom and Valérie	-	<ul style="list-style-type: none"> Request for exemption from notification period for discontinuance of service – Prepare template draft s. 80 decision incorporating the proposed conditions. No decision has been made on this request. Only Members can make such a decision. 	As soon as feasible
Valérie	-	<ul style="list-style-type: none"> Prepare options for Scott, Liz and Doug with respect to filings received for stayed cases. 	As soon as feasible
	-	<ul style="list-style-type: none"> BCP - Examine whether the Act already allows vessels to operate without coastal trade licences during emergency situations. 	March 20

Sébastien Bergeron
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De : Sébastien Bergeron
 Envoyé : 19 mars 2020 15:37
 À : « EC <EC@otc-cta.gc.ca> »
 Objet : March 19 EC - Decisions and Follow-ups

Dear Colleagues,

Please find below the list of follow-up actions following today EC. If you notice something missing from the list or have a different recollection of a deliverable, please let us know.

EC Member(s) Tasked	EC Decision(s)	Deliverable(s)	Expected Deadline
All Branch Heads	<ul style="list-style-type: none"> Branch Heads seeking approval for staffing actions from EC should: <ul style="list-style-type: none"> Consult Mireille and Nadine B. first, and Circulate short e-mail including rationale to EC in advance of meeting. 	-	-
Mireille	-	<ul style="list-style-type: none"> BCP - Present comms strategy and proposal with respect to non-critical services. 	March 20
	<ul style="list-style-type: none"> Staff should continue teleworking until further notice. 	<ul style="list-style-type: none"> Include direction in the daily update that all staff should continue teleworking until further notice. 	March 19
	-	<ul style="list-style-type: none"> Reach out to TBS on specific concerns requiring flexibility from TBS policies. 	As soon as feasible
Tom and Valérie	<ul style="list-style-type: none"> Request from Air Canada for exemption from notice period for discontinuance of service - Conditions that will be included in exemption are: <ul style="list-style-type: none"> Air carrier must identify routes that will be discontinued. Notification period of 2 weeks. Exemption will only apply during "crisis" period related to COVID-19 pandemic. Discontinuance of service is not permitted in remote communities where no other transportation service is available. 	<ul style="list-style-type: none"> Prepare draft s. 80 decision with the proposed conditions. 	As soon as feasible
Valérie	-	<ul style="list-style-type: none"> Prepare options for Scott, Liz and Doug with respect to filings received for stayed cases. 	As soon as feasible
Valérie	-	<ul style="list-style-type: none"> BCP - Examine whether the Act already allows vessels to operate without coastal trade licences during emergency situations. 	March 20

Sébastien Bergeron
 Chef de cabinet | Bureau du président et premier dirigeant
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sebastien.bergeron@otc-cta.gc.ca | Tél. 819-712-0827

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 Canadian Transportation Agency | Government of Canada
Sebastien.bergeron@otc-cta.gc.ca | Tél. 819-712-0827

De : Sébastien Bergeron
Envoyé : 18 mars 2020 16:31
A : « EC » <EC@otc-cta.gc.ca>
Objet : EC - March 18 - follow-up actions

Dear Colleagues,

Please find below the list of follow-up actions following today EC. If you notice something missing from the list or have a different recollection of a deliverable, please let us know.

EC Member(s) Tasked	Expected Deadline	Deliverable
Marcia	March 19	<ul style="list-style-type: none"> Call major air carriers (top 5) and air transport associations (NACC, ATAC) to explain Agency's order to suspend air-related proceedings.
Mireille	March 18	<ul style="list-style-type: none"> Send message to affected staff and managers - permitting staff who need VPN access to enter the Agency offices if they wish by COB March 20. <ul style="list-style-type: none"> Their manager must be present. Staff must maintain 2 metres of distance between themselves and other staff.
	March 19	<ul style="list-style-type: none"> Ensure daily COVID-19 updates are <i>e-mailed</i> to all staff. Mention that VPN should be used for work purposes only (no streaming of anything, except if it is absolutely necessary).
	March 19 (if possible)	<ul style="list-style-type: none"> Prepare list of EC decision points on various aspects of the BCP.
	March 20	<ul style="list-style-type: none"> Provide list of all staff phone numbers to EC members.
Tom and Valérie	March 19	<ul style="list-style-type: none"> Provide options to constrain Air Canada exemption from/reduction of notice period related to discontinuance of service.

Sébastien Bergeron
 Chef de cabinet | Bureau du président et premier dirigeant
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Chief of Staff | Office of the Chair and Chief Executive Officer
 Canadian Transportation Agency | Government of Canada
Sebastien.bergeron@otc-cta.gc.ca | Tél. 819-712-0827

De : Scott Streiner <Scott.Streiner@otc-cta.gc.ca>
Envoyé : 18 mars 2020 15:48

À : * _EC < EC@otc-cta.gc.ca >

Objet : For tomorrow

Hi, all. One more thing occurred to me after we hung up. Liz mentioned identifying activities for those unable to do much "normal" work, and we then focused on staff in Paul's area who don't have MyKey. I wonder if this is something we should consider more generally. Are there, for example, research projects we could ask some employees to undertake while they're at home? Please reflect on this and we can discuss tomorrow, along with the other items we identified today.

FYI, I've asked Seb and Alysia to email a short list of follow-up actions after each of our daily teleconferences, since it can be a little harder to keep track during a call than a face-to-face meeting. Of course, if you notice something missing from the list or have a different recollection of a deliverable, you should let them know.

My draft blog (still just in my head!) will come later today.

Thanks,

S

Scott Streiner

Président et premier dirigeant, Office des transports du Canada
Chair and Chief Executive Officer, Canadian Transportation Agency
scottstreiner@otc-cta.gc.ca - Tél. : 819-997-9233 - ATS/TTY: 1-800-669-5575

This is **Exhibit “Q”** to the Affidavit of Dr. Gábor Lukács
affirmed before me on May 15, 2022

Signature

Amanda Hamelin

From: Scott Streiner
Sent: Sunday, March 22, 2020 8:54 AM
To: Liz Barker; Marcia Jones; Valérie Lagacé; Tom Oommen; Sébastien Bergeron
Subject: Draft
Attachments: Statement.docx

Good morning, folks. The attached will be one item for discussion on our 10:30 call. Talk soon.

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

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. They should be "kept whole" in some manner. 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.

Amanda Hamelin

Subject: Urgent Debrief - Please confirm attendance ASAP
Location: CBCI teleconference: dial 1 514 938 6569 call ID: 935311571# then # again

Start: Sun 3/22/2020 10:30 AM
End: Sun 3/22/2020 11:00 AM

Recurrence: (none)

Meeting Status: Accepted

Organizer: Scott Streiner
Required Attendees: sebastien bergeron (Sebastien.Bergeron@otc-cta.gc.ca); Marcia Jones; Tom Oommen; Valérie Lagacé; Liz Barker

Importance: High

Seb will host

Amanda Hamelin

From: Lenore Duff
Sent: Sunday, March 22, 2020 1:12 PM
To: Scott Streiner; Liz Barker; Mark MacKeigan; Heather Smith; Mary Tobin Oates; Gerald Dickie
Subject: Statement
Attachments: Statement.docx

Hi Scott & Liz (and colleagues):

Thank you for the opportunity to comment. I have taken a look at this and have a few comments. A couple are for clarity, and one is a “communications” concern, but I have tried to respect the content and format that you and Liz have taken. Please feel free to ignore any or all of my comments – afterall, I will not be around to deal with the fall out from the current crisis when we finally turn the corner. And by not be around, I mean at the Agency rather than on the earth, I hope!

Beyond that, I was wondering about two things:

- What happened in the past with respect to large scale disruptions of air travel, as in 9/11 and the Iceland volcano in Europe. I have noted that in my comments, but was wondering if what we are saying now is consistent with that. I realize it does not have to be consistent and the current crisis is worse, but it might prove useful.
- I am wondering about the timing of this statement. Are we responding to questions from the airlines or the public – if so will be saying something like “in response to concerns/questions raised by the industry and the public... .” I just would want to be careful to not be looking to set a policy standard, which may appear more favourable to industry, without some context. You mention in your email that you have been discussing with other federal colleagues, so this may be a more coordinated federal response, so that may address that concern.

Hope this is helpful, no need to answer my questions, they are largely rhetorical.

Lenore

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, because of circumstances largely beyond their control 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 its their merits, the CTA believes that, generally speaking, an appropriate response solution could be for airlines to provide affected passengers with vouchers or credits for future travel, as long as these vouchers or credits take the current situation fully into account, and do not expire in an unreasonably short period of time.

Commented [LD1]: Not sure what we mean by **documents** here; is it tariffs, or legislation referred to above, or both? I would probably broaden this to instead say: "The legislative framework that governs air travel is primarily designed to address relatively localized and short-term disruptions."

That said, I don't know what happened after 9/11(or, grant it, to a lesser extent), the Iceland volcano, but perhaps there is some experience on which to draw in terms of a broad scale disruption of air traffic. I think what will set this one apart will be the duration.

Commented [LD2]: Definitely would nix this language, as I can see individuals coming back to say that this is putting their personal survival at risk – not good optics. Maybe you could replace with:
... take steps that threaten their overall economic viability;
or
... take steps that threaten their continued operations.

Amanda Hamelin

From: Scott Streiner
Sent: Sunday, March 22, 2020 1:59 PM
To: +_EC
Subject: FW: Letter from Jean-Marc Eustache
Attachments: 20-03-22 Scott Streiner.pdf

Importance: High

Hi, all. Some of these items were covered in our discussion on Friday or the call I have with several of you this morning. Others weren't. We'll talk about all of them tomorrow.

S

From: Jean-Marc Eustache
Sent: Sunday, March 22, 2020 1:52 PM
To: Scott Streiner
Cc: mintc@tc.gc.ca; Marcia Jones ; miled.hill@tc.gc.ca; lawrence.hanson@tc.gc.ca; colin.stacey@tc.gc.ca; George Petsikas ; Jean-Marc Eustache
Subject: Letter from Jean-Marc Eustache
Importance: High

Dear Mr. Streiner,

Please find enclosed a letter from Mr. Jean-Marc Eustache.

Best Regards,

Francine Giroux

Adjointe au président
Assistant to the President
T 514-987-1660, 4055





Transat A.T. inc.
300, rue Léo-Pariseau, bureau 600
Montréal (Québec) H2X 4C2

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March 22, 2020

Transmission by e-mail
scott.streiner@otc-cta.gc.ca

Mr. Scott Streiner
Chairman and Chief Executive Officer
Canadian Transportation Agency
15 Eddy Street, 17th Floor
Gatineau, Quebec J8X 4B3

RE: Request for further public clarification of air carrier obligations per the *Air Passenger Protection Regulations* ("APPR") in the context of the current extraordinary circumstances

Dear Mr. Streiner:

As you are aware, the global air transport and tourism industries are dealing with a wholly-unprecedented collapse in world travel demand, as well as with the resulting operational and financial calamity in terms of drastically cutting capacity and preserving liquidity in an attempt to prevent our businesses from failing and putting tens of thousands of Canadians out of work. Obviously, Transat A.T. and our subsidiary travel units, including Air Transat and Transat Holidays, have not been spared the brunt of this disaster.

Indeed, we have recently announced, as a result of borders closing, the suspension of all outbound travel sales on our flights and the imminent grounding of almost all of our fleet until April 30, 2020, except for the small remainder of our flights that are conducting emergency repatriation operations of Canadians abroad in coordination with the federal government. Furthermore, we are confronted to making extremely difficult decisions where an important number of employees will be put on leave until the situation stabilizes and until we can hopefully and eventually contemplate a return to some sense of normalcy in the future.

In the meantime, while our industry fights to survive, we urgently need the federal government and our oversight authorities such as the CTA to provide assistance, both in the form of financial support and relief in terms of the substantial easing of existing regulatory costs and burdens. I have already written to Ministers Garneau and Morneau with regards to the first objective, and I am now hereby addressing myself to you with respect to the second.

Please be assured that I appreciated the Agency's efforts on March 13, 2020 to provide much-needed clarification to both industry and consumers concerning the application and enforcement of certain provisions of the APPR in the context of the current extraordinary circumstances.



...page 2

However, we need more to be done on an urgent basis in order to establish proper certainty and support the industry's impact mitigation efforts to date.

Specifically, I hereby request that the Agency publicly and unequivocally recognize the uncontrollable nature of the crisis and that all changes to schedules and capacity reductions are measures needed to manage the devastating losses this crisis is causing. Quite simply, these changes are not within the control of air carriers and our regulator should be clear to this end, as well as for the purposes of the application of the APPR.

Furthermore, the limited scope of the exemption on March 13, 2020 is problematic as our personnel have almost no ability to provide alternative travel arrangements at this time given the above-mentioned folding of flight schedules. Consequently, and as additional support and relief, I hereby request the following:

- Clearly recognize that all delays, cancellations, and denied boarding occurring at this time of crisis are outside of Air Transat's control;
- Clarify that the uncontrollable nature of the crisis means that no refunds to passengers are required under the APPR. This is essential to avoid unnecessary confusion among consumers and to pre-empt a spike in the increase of complaints and lawsuits;
- Recognize the offering of travel voucher options in lieu of cash refunds as an acceptable means to address consumer requests for refunds which, in turn, would allow credit card companies and their processors to deny customer chargeback claims and thereafter cease otherwise resulting and destructive financial guarantee demands on air carrier merchants;
- Exempt airlines from the obligation to respond to compensation claims within 30 days;
- Exempt airlines from all obligations to provide alternate travel arrangements; and
- Ensure that all exemptions ordered by the Agency, including those found in Determination No. A-2020-42, are in effect until such time as the industry has fully recovered, which is expected to take longer than April 30, 2020, and at the very least, 90 days.

I would also like to take this opportunity to request a minimum one-year suspension of enforcement action and the levying of fines for non-compliance per the APPR and ATPDR. Again, we are not trying to conveniently avoid our obligations *in normal circumstances*, but rather to ensure that our reduced levels of human resources going forward are able to focus on actively



...page 3

managing the crisis and minimizing as much as possible disruptions to the system and our eventual efforts at recovery.

I wish to thank you in advance for your understanding and expeditious consideration of the present request. Also, please accept my best wishes for the continued health and well-being of yourself, your loved ones and your staff in these unimaginably difficult times.

Sincerely,

Jean-Marc Eustache
Chairman, President and
Chief Executive Officer

c.c. Hon. Marc Garneau, PC, MP – Minister of Transport
Marcia Jones, Chief Strategy Officer - CTA
Miled Hill, Office of the Hon. Marc Garneau, PC, MP
Lawrence Hanson, Assistant Deputy Minister of Transport (Policy)
Colin Stacey, Director General of Air Policy – Transport Canada
George Petsikas, Senior Director, Government and Industry Affairs – Transat A.T. Inc.

Amanda Hamelin

From: Scott Streiner
Sent: Sunday, March 22, 2020 2:57 PM
To: +_EC
Subject: Revised statement
Attachments: Statement.docx

Hi, all. The attached version reflects feedback from Members. Please let me know this afternoon if you have any additional comments.

Valérie, let's have the secretariat ready to translate the statement and a s.64 decision tomorrow morning.

Thanks,

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

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 typically have clauses that relieve the airline 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 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 must 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 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.

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

Amanda Hamelin

From: Scott Streiner
Sent: Sunday, March 22, 2020 4:42 PM
To: Lenore Duff; Liz Barker; Mark MacKeigan; Heather Smith; Mary Tobin Oates; Gerald Dickie
Subject: RE: Statement

Thanks for the quick replies. Most of the suggestions have been incorporated. I'll explain more during our call on Tuesday.

S

----- Original message -----

From: Lenore Duff
Date: 2020-03-22 1:11 p.m. (GMT-05:00)
To: Scott Streiner , Liz Barker , Mark MacKeigan , Heather Smith , Mary Tobin Oates , Gerald Dickie
Subject: Statement

Hi Scott & Liz (and colleagues):

Thank you for the opportunity to comment. I have taken a look at this and have a few comments. A couple are for clarity, and one is a "communications" concern, but I have tried to respect the content and format that you and Liz have taken. Please feel free to ignore any or all of my comments – afterall, I will not be around to deal with the fall out from the current crisis when we finally turn the corner. And by not be around, I mean at the Agency rather than on the earth, I hope!

Beyond that, I was wondering about two things:

- What happened in the past with respect to large scale disruptions of air travel, as in 9/11 and the Iceland volcano in Europe. I have noted that in my comments, but was wondering if what we are saying now is consistent with that. I realize it does not have to be consistent and the current crisis is worse, but it might prove useful.
- I am wondering about the timing of this statement. Are we responding to questions from the airlines or the public – if so will be saying something like "in response to concerns/questions raised by the industry and the public... ." I just would want to be careful to not be looking to set a policy standard, which may appear more favourable to industry, without some context. You mention in your email that you have been discussing with other federal colleagues, so this may be a more coordinated federal response, so that may address that concern.

Hope this is helpful, no need to answer my questions, they are largely rhetorical.

Lenore

Amanda Hamelin

From: Liz Barker
Sent: Sunday, March 22, 2020 6:42 PM
To: Scott Streiner; +_EC
Subject: RE: Revised statement

This looks good Scott.
Liz

From: Scott Streiner
Sent: March-22-20 2:57 PM
To: +_EC
Subject: Revised statement

Hi, all. The attached version reflects feedback from Members. Please let me know this afternoon if you have any additional comments.

Valérie, let's have the secretariat ready to translate the statement and a s.64 decision tomorrow morning.

Thanks,

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

This is **Exhibit “R”** to the Affidavit of Dr. Gábor Lukács
affirmed before me on May 15, 2022

Signature

Amanda Hamelin

From: Scott Streiner
Sent: Monday, March 23, 2020 1:26 PM
To: +_EC
Subject: FW: Letter from Air Canada
Attachments: L_Suspension of APPR and ATPDR.pdf

For discussion during our 2:30 call.

S

From: Nathalie Ozumit
Sent: Monday, March 23, 2020 1:24 PM
To: Scott Streiner
Cc: Minister Marc Garneau (mintc@tc.gc.ca) ; Ferio Pugliese ; David Shapiro
Subject: Letter from Air Canada

SENT ON BEHALF OF DAVID J. SHAPIRO, EXECUTIVE VICE PRESIDENT, INTERNATIONAL & REGULATORY AFFAIRS & CHIEF LEGAL OFFICER

Dear Mr. Streiner,

Please see attached letter.

Kind regards,

**Nathalie Ozumit**

Adjointe de direction – Bureau du vice-président général – Affaires internationales et réglementaires et chef des Affaires juridiques
Executive Assistant – Office of the Executive Vice President, International and Regulatory Affairs and Chief Legal Officer

T 514 422-6104 | F 514 422-4147
nathalie.ozumit@aircanada.ca



David J. Shapiro

Executive Vice President, International & Regulatory Affairs & Chief Legal Officer

Vice-président général, Affaires internationales et réglementaires et chef des affaires juridiques

Centre Air Canada 1270
P.O. Box 7000, YUL 1276
Dorval, Québec, Canada H4Y 1J2

Direct Line: 514 422 5834
Facsimile: 514 422 0285
Email: david.shapiro@aircanada.ca

March 23, 2020

**Private and Confidential
By E-mail**

Mr. Scott Streiner

Office of the CEO
Canadian Transportation Agency
15 Eddy Street, 17th Floor
Gatineau, Quebec J8X 4B3

RE: Request for Exemption from the *Air Passenger Protection Regulations* ("APPR"), and from the Entry into Force of Certain Provisions of the *Accessible Transportation for Persons with Disabilities Regulations* ("ATPDR")

Dear Mr. Streiner,

I regret that I have to be writing with the degree of urgency that I am to request immediate relief from the ongoing application of APPR, and the imminent entry into force of ATPDR on June 25, 2020, as a result of the devastating impact that the COVID-19 crisis is having on airlines. These concerns were raised during the Agency's technical briefing on March 19th, 2020, and we were invited to put them in writing.

1- UNPRECEDENTED IMPACT ON AIRLINES

As you are well aware, with the world's borders being progressively shut down and a growing proportion of the world's population self-isolating, working from home and practising social distancing, the global airline industry is on the front line and has by and large come to a standstill. The COVID-19 crisis has already had a devastating impact on airline revenues, yet it seems that we may be only in the early stages of the deterioration. Like all airlines, Air Canada has had to implement drastic and unprecedented cost cutting measures, rapidly suspending the majority of its flights, internationally and transborder, and significantly reducing its domestic network as a direct result of the crisis.

2- APPR

Inadequacy of Determination No. A-2020-42

While the Agency's initiative¹ to exempt carriers from certain, specified provisions of APPR is appreciated, it stops well short of what is required to address the magnitude of the crisis we are confronting or to contribute to providing the real and tangible relief that airlines desperately need.

¹ Determination No. A-2020-42 of March 13, 2020.

First, by not clearly and unequivocally recognising that the scope and magnitude of the crisis is deeply affecting virtually *everything*² and that *no* airline operational decision is being made in isolation of it, without regard and responding to it, or without a heavy impact from it, the Agency fails to adequately account for the reality that *all* changes to schedules are measures needed to manage the devastating and overriding impact of the crisis and are a *direct result* of the crisis, as are *all* operational decisions impacting customers. In this environment, which has never been witnessed before and could not have been anticipated, and still cannot be planned for, virtually every operational occurrence addressed by APPR is driven by the crisis and therefore not within carriers' control.

It follows, therefore, that the narrow scope of the exemption (limited as it is to providing relief for situations *within* carriers' control) is equally problematic. Our staff has almost *no* ability to provide alternative travel arrangements, and our Customer Relations team *do not* have the capacity to respond to compensation requests within 30 days³.

In these circumstances, compliance with APPR is not only impractical and unrealistic, but is, for the most part, impossible.

Request

Therefore, pursuant to s. 80 of the Canada Transportation Act ("Act"), we request that the Agency declare a complete suspension of the application of all obligations under APPR until further notice.

If this most sensible measure in these unprecedented circumstances is, for whatever reason, deemed not feasible, we request that the Agency at a minimum:

- Clearly recognize that all delays, cancellations, and denied boarding occurring at this time of crisis are **outside of airlines' control**, with no exceptions;
- Clarify that the uncontrollable nature of the crisis means that no refunds to passengers are required under APPR⁴. While this may be clear to the Agency and in Air Canada's tariffs, it is increasingly evident that it is not clear to the general public. Failure to clarify this will inevitably lead to a sharp and unnecessary increase in complaints and meritless lawsuits;
- Exempt airlines from the obligation to respond to compensation claims within 30 days⁵;
- Exempt airlines from *all* obligations to provide alternate travel arrangements; and
- Ensure that all exemptions ordered by the Agency, including those found in Determination No. A-2020-42, are in effect until such time as the industry has fully recovered, which is, by all accounts, expected to take significantly longer than April 30, 2020, and at the very least, 90 days.

² Surprisingly, the Agency stated that whether "decisions that are influenced by the pandemic, including decisions to cancel and consolidate flights due to dropping passenger volumes (...) are within or outside carrier control would have to be assessed on a case-by-case basis". Given the extent of the pandemic and its impact on the industry, this could potentially result in literally millions of cases for the CTA and small claims courts to assess.

³ As required under section 19(4) APPR.

⁴ While para. 7 of Determination No. A-2020-42 does read that only rebooking obligations apply to situations outside carrier's control, a clear statement that no refunds apply would be extremely helpful in light of the current state of confusion in the public sphere.

⁵ Section 19(4) APPR.

3- ATPDR

Air Canada has deployed its best efforts and made very significant progress over the intervening months to ensure compliance with ATPDR by June 25, 2020 while also managing many other competing regulatory initiatives⁶ and operational urgencies such as the unforeseen and abrupt grounding of the Boeing 737 MAX (which as real and intense as it was, now pales as a crisis in comparison). Air Canada's resources, which have been stretched by these challenges for some time, are now stretched beyond any imaginable limits in managing the present crisis⁷, so that work on necessary ATPDR changes is now, inevitably and definitively severely delayed through no fault of ours. Therefore, we request that the compliance deadlines be suspended (or, otherwise, at least, extended significantly).

Air Canada estimates that it is 95% compliant with the June 25, 2020 requirements. However, the cost and effort needed to comply with the remaining 5% is significant: it includes in-flight entertainment upgrades for systems that are already being phased out in the next few years, as well as training requirements that have such broad impact on front-line staff that costly external consultant support is required.

An essential precursor to adjusting and delivering our training material is the review of a number of policies, procedures and processes throughout many departments. To say that devoting time and resources now to this endeavor is wholly unrealistic is an understatement: in no realm of reality are any of our key resources responsible for these changes available to do so at this time of crisis. That would entail taking them away from managing the current crisis, which simply is not an option. So, irrespective of the cost of training, the initial design of training material is now inevitably significantly delayed.

Even if training were designed and ready to be delivered, the current environment is not one conducive to learning and absorbing new regulations and complex requirements. The purpose of ATPDR is to accomplish a culture change and commitment to accessibility. True change management requires a mindset shift and takes time, energy, focus and investment to achieve. All of these are, understandably, now in short supply.

Request

We therefore request, pursuant to s. 170(3) or 170(4) of the Act, that the Agency extend the deadline for compliance with ATPDR until further notice, or at the very least by 90 days.

Air Canada remains committed to fully meeting the obligations of ATPDR once the industry has firmly recovered from the COVID-19 crisis. Even during the crisis, Air Canada will attempt to continue its implementation efforts to the extent practicable in the circumstances. In compliance with the test set out in s. 170(4), we *will* take the necessary measures to comply as soon as we are able.

If for any reason a full suspension is deemed not feasible, even appreciating that we may not fully be in a position to comply, we request that the Agency indefinitely suspend all initiatives that require IT development, sizable investment, new and complex procedures, and significant change management. These are: allowing reservations to be made by email,⁸ training,⁹ accommodating manual folding

⁶ Such initiatives include the *Regulations Amending the Transportation Information Regulations (Air Travel Performance Data Collection)*, the *Regulations Amending the Canadian Aviation Regulations (Parts I, VI and VII — Flight Crew Member Hours of Work and Rest Periods)*, and *Air Passenger Protection Regulations*.

⁷ Including personnel from the MEDA Desk, AC Medical, Airports, Call Centres, eCommerce, In-Flight Services, System Operations Control, Customer Relations, Operations Excellence, Passenger Movement, Customer Journey Management and Legal

⁸ S. 7-8 ATPDR.

⁹ S. 15-23 ATPDR.

wheelchairs on board,¹⁰ accessible IFE,¹¹ written confirmation of services¹², and retention of medical information or documents.¹³

For the many of the same reasons cited above, **we also request an equivalent extension of the deadline to provide comments on the draft guidance materials on ATPDR, and that all work on Phase II of ATPDR be halted** until the industry has fully recovered from the devastating effects of COVID-19. Any cost-benefit analysis for Phase II will have to recognise airlines' newly constrained capacity to take on additional costs in the current landscape.

4- Enforcement Leniency

Finally, in addition to the above, **Air Canada requests the implementation of an explicit one-year period of leniency from enforcement action and fines for non-compliance on APPR and ATPDR**, so that our workforce is free to focus on managing the overwhelming crisis at hand without being burdened or slowed by having to balance complex regulatory requirements. The Government of Canada has already established a solid precedent for the type of regulatory relief we are seeking.¹⁴

We have contacted Transport Canada and the Government of Canada with these requests and hope that all branches of government will work together to protect the sustainability of our industry.

We trust that you are sensitive to the importance and urgency of these matters and look forward to the Agency's full support during these exceedingly difficult times. Please do not hesitate to call to discuss if that might be useful.

Sincerely,



David J. Shapiro

cc: The Honorable Minister Marc Garneau, P.C., M.P.
Ferio Pugliese, Senior Vice President, Air Canada Express and Government Relations

¹⁰ S. 43 ATPDR.

¹¹ S. 39 and 81 ATPDR.

¹² S. 58 ATPDR.

¹³ S. 59 ATPDR.

¹⁴ On March 13, 2020 the Department of Finance issued a statement of measures to support the economy and the financial sector. In that document, it said "In the face of current global developments, financial institutions should focus on managing this uncertainty rather than devoting resources to previously announced regulatory changes." It also granted other relief from current regulatory requirements, including lowering the Domestic Stability Buffer requirement for domestic systemically important banks OSFI also announced it will suspend all consultations on regulatory matters. <https://www.canada.ca/en/department-finance/news/2020/03/canada-outlines-measures-to-support-the-economy-and-the-financial-sector.html>

Amanda Hamelin

From: Marcia Jones
Sent: Monday, March 23, 2020 1:55 PM
To: Scott Streiner; +_EC
Subject: RE: Items for discussion

Hi, one item below.
Thanks,
Marcia

From: Scott Streiner
Sent: Monday, March 23, 2020 12:25 PM
To: +_EC
Subject: Items for discussion

Hi, all. The final texts of the s.64 decision and statement (unchanged from yesterday) have been approved. Both should issue this afternoon.

Please note that our call today will take place at 2:30 instead of 2, as I have a CCAT Board meeting that's scheduled to end at 2:30. Here are some items for our discussion:

External

- Public messages on service levels
- AT letter: request for additional measures; reply
- Official languages considerations
- [Consultation on ATPDR guidance– signals check](#)

Internal

- Extra projects for staff
- Thursday Members meeting
- Haikus

Feel free to add any other items by "replying all" to this email or in the course of the call.

Thanks,

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

Amanda Hamelin

Subject: Special EC - COVID19 - Daily updates
Location: (514) 938-6569,935311571# (then press #)

Start: Mon 3/16/2020 2:00 PM
End: Mon 3/16/2020 2:30 PM
Show Time As: Tentative

Recurrence: Daily
Recurrence Pattern: every day from 2:00 PM to 2:30 PM

Meeting Status: Not yet responded

Organizer: Scott Streiner
Required Attendees: Alysia Lau; Douglas Smith; Lesley Robertson; Liz Barker; Marcia Jones; Mireille Drouin; Sébastien Bergeron; Tom Oommen; Valérie Lagacé
Optional Attendees: Allan Burnside; Simon-Pierre Lessard

Importance: High

Chair's Boardroom & by CBCI teleconference: dial 1 514 938 6569 call ID: 935311571# then # again

Alysia will HOST.

Attendance

- Scott Streiner
- Liz Barker
- Mireille Drouin
- Doug Smith
- Marcia Jones
- Tom Oommen
- Valérie Lagacé & Simon-Pierre Lessard

- Sébastien Bergeron
- Alysia Lau

Guests

- Tim Hillier

Debriefs

- SS: TC indicated Agency moved faster than they expected. Other travel restrictions expected. Agreement between SS and MK that agencies/departments should not issue piecemeal decisions. Call this evening between TC and Agency officials.

Messaging on CTA services

- SS: Where message says CTA pausing air disputes, should specify that Agency still receiving complaints.
- LB: Maintaining Agency services "to the extent possible" too vague and signaling slowdown of services when not true. Need to be more specific.
- ***TH to revise messaging - continuing normal activity, with exception of... passengers can file complaints, but response times may be different. Do not want to solicit air travel complaints.**

Air carrier requests for additional measures

- SS prepared table comparing AC and AT asks.
- ***Statement that all situations in COVID context = Category 3 should be discussed at Members meeting.**

Official languages considerations

- Official Language Commissioner wrote to all departments/agencies noting some information coming from departments only in one language. Reminder for Agency to be aware.

ATPDR Guidance Consultations

- MJ: Signal check on continuing consultations on ATPDR guidance.
- LB: ***Should not address this until AC request on all APPR/ATPDR is resolved.**

Additional projects for staff

- MD: **Training opportunities**
- TO: DCB staff will focus on catching up on tasks.
- DS: **Gathering information from staff nearing retirement or other long-time Agency employees.**
- LB: **Annotations of other pieces of legislation or regulations.** SS: Challenge is having Legal participate/supervise.
- ***Chair's Office to develop list of projects. Tomorrow: start develop list of staff that would be suitable for each project. Branch Heads should inform managers this is coming.**

Members Committee

- APPR supplementary guidance - MJ: yes, proposed approach to reflect comments SS and LB.
- Low impact amendments package - MJ: Yes, prepared to make presentation.
- **SS to reflect on item 4. Leave on agenda.**
- **LB would like to postpone item 5. Would like more time to re-examine legal opinion.**
- **Stylist options - SPL asking to postpone this item**
- SS: May not need a lot of in camera time - 15 min. + MJ's two items.

Haiku Contest

- SS: How to proceed? ***Should solicit, put it in staff update, Chair's Office to coordinate with Cynthia's team.**
- DS: Suggest managers should share haiku contest, not Chair's Office. SS: Or Social Committee involvement? ***DS to ask Tammy Chrusch if she would like to partner with AL and Comms to develop this.**

Other internal matters

- MD: School closures in Quebec until May 1. Should include this in daily staff update.
- Construction sites will be closed for 3 weeks.
- Year-end contracts: Current situation should not have impact on year-end. Should be normal year-end. Will issue communique to Branch Heads.
- 15 Eddy - will perform preventative bed bug inspections tomorrow.
- DS: Annual report. Directors still working on it but delayed. MJ: Intention is to keep regular sections of AR with additional section on response to COVID-19. Team is on track, looking to move draft along, but checking with TC to discuss delaying of timelines. SS: Should keep AR moving.

Varia

- TO: We received two requests for tariffs information. SS: Summary of what tariffs say about refunds/vouchers. MJ: Asked that tariffs team prioritize WJ, AC and AT tariffs.
- DS: VPN seemed spotty today. We have discussed rotating access to VPN. ***SB to reach out to MD to discuss VPN options.**

Amanda Hamelin

From: Scott Streiner
Sent: Monday, March 23, 2020 2:19 PM
To: +_EC
Subject: Summary of asks
Attachments: Asks.docx

Hi, all. Please have a look at the attached table and let me know during our 2:30 call if you think any key points from either letter have been missed. Thanks.

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

Item	AT	AC
APPR		Issue a blanket exemption from all APPR, or take the steps below
Classification of flight disruptions	State that all current disruptions are category 3	Same
Refunds	State that no refunds are owed	Same
Vouchers	Signal that vouchers are acceptable in lieu of cash refunds	
Response time	Exempt airlines from the 30 day timeline	Same
Alternative travel arrangements	Exempt airlines from any obligation to provide alternative travel arrangements	Same
April 30	Extend the current exemptions for at least 90 days	Same
Enforcement	Suspend for 1 year	Same
ATPDR		A 90-day or longer delay to the "deadline for compliance" or, at least, to certain provisions

Amanda Hamelin

From: Sébastien Bergeron
Sent: Monday, March 23, 2020 8:59 PM
To: +_EC
Subject: EC March 23 - Decisions and Follow-ups

Dear colleagues,

Please find below the list of decisions and follow-up actions for today EC. If you notice something missing from the list or have a different recollection of a deliverable or decision, please let us know.

EC Member(s) Tasked	EC Decision(s)	Deliverable(s)	Expected Deadline
Chair's Office	-	<ul style="list-style-type: none"> Compile list of additional research projects that can be allocated staff during telework period. <i>*Branch Heads should inform and begin canvassing managers for staff that could work on these projects.</i> 	March 24
	-	<ul style="list-style-type: none"> Circulate updated Members Committee agenda. 	March 24
	-	<ul style="list-style-type: none"> Coordinate with Social Committee and Comms to set up internal haiku contest. 	This week
Marcia	-	<ul style="list-style-type: none"> Comms to revise public messaging on Agency service delivery during COVID-19 pandemic. 	March 24
	<ul style="list-style-type: none"> ATPDR guidance consultation process will be reviewed after the Agency addresses requests from air carriers regarding regulatory obligations. 	-	-
Mireille	-	<ul style="list-style-type: none"> Examine options to support VPN capacity (e.g. rotating VPN access) during telework period. 	This week

Sébastien Bergeron

Chef de cabinet | Bureau du président et premier dirigeant
Office des transports du Canada | Gouvernement du Canada
sebastien.bergeron@otc-cta.gc.ca | Tél. 819-712-0827

Chief of Staff | Office of the Chair and Chief Executive Officer
Canadian Transportation Agency | Government of Canada
Sebastien.bergeron@otc-cta.gc.ca | Tél. 819-712-0827

De : Sébastien Bergeron
Envoyé : 20 mars 2020 19:28
À : + EC
Objet : EC March 20 - Decisions and Follow-ups

Dear colleagues,

Please find below the list of decisions and follow-up actions for today EC. If you notice something missing from the list or have a different recollection of a deliverable or decision, please let us know.

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. Identify annual publications and reports that the Agency should continue to monitor and work on. 	March 23/24
	-	<ul style="list-style-type: none"> 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: <ul style="list-style-type: none"> The Agency is continuing to deliver its services to the extent possible. 	As soon as feasible

		<ul style="list-style-type: none"> 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. • Comms will update the Agency's helplines and other public-facing platforms to reflect the above messaging. 	
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. 	<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"> • Section 64 of CTA – Examine whether a temporary order can be issued under this provision. 	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

Office des transports du Canada | Gouvernement du Canada
sebastien.bergeron@otc-cta.gc.ca | Tél. 819-712-0827

Chief of Staff | Office of the Chair and Chief Executive Officer
 Canadian Transportation Agency | Government of Canada
Sebastien.bergeron@otc-cta.gc.ca | Tél. 819-712-0827

De : Sébastien Bergeron
Envoyé : 20 mars 2020 12:45
À : + EC <EC@otc-cta.gc.ca>
Objet : *Correction* March 19 EC - Decisions and Follow-ups

Dear colleagues,

Please note below the correction (in red) we've made to the summary of yesterday EC.

Seb

EC Member(s) Tasked	EC Decision(s)	Deliverable(s)	Expected Deadline
All Branch Heads	<ul style="list-style-type: none"> Branch Heads seeking approval for staffing actions from EC should: <ul style="list-style-type: none"> Consult Mireille and Nadine B. first, and Circulate short e-mail including rationale to EC in advance of meeting. 	-	-
Mireille	-	<ul style="list-style-type: none"> BCP - Present comms strategy and proposal with respect to non-critical services. 	March 20
	<ul style="list-style-type: none"> Staff should continue teleworking until further notice. 	<ul style="list-style-type: none"> Include direction in the daily update that all staff should continue teleworking until further notice. 	March 19
	-	<ul style="list-style-type: none"> Reach out to TBS on specific concerns requiring flexibility from TBS policies. 	As soon as feasible

Tom and Valérie	-	<ul style="list-style-type: none"> Request for exemption from notification period for discontinuance of service – Prepare template draft s. 80 decision incorporating the proposed conditions. No decision has been made on this request. Only Members can make such a decision. 	As soon as feasible
Valérie	-	<ul style="list-style-type: none"> Prepare options for Scott, Liz and Doug with respect to filings received for stayed cases. 	As soon as feasible
	-	<ul style="list-style-type: none"> BCP - Examine whether the Act already allows vessels to operate without coastal trade licences during emergency situations. 	March 20

Sébastien Bergeron
 Chef de cabinet | Bureau du président et premier dirigeant
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De : Sébastien Bergeron
 Envoyé : 19 mars 2020 15:37
 À : +_EC <_EC@otc-cta.gc.ca>
 Objet : March 19 EC - Decisions and Follow-ups

Dear Colleagues,

Please find below the list of follow-up actions following today EC. If you notice something missing from the list or have a different recollection of a deliverable, please let us know.

EC Member(s) Tasked	EC Decision(s)	Deliverable(s)	Expected Deadline
All Branch Heads	<ul style="list-style-type: none"> Branch Heads seeking approval for staffing actions from EC should: 	-	-

- o Consult Mireille and Nadine B. first, and
- o Circulate short e-mail including rationale to EC in advance of meeting.

Mireille	-	<ul style="list-style-type: none"> • BCP - Present comms strategy and proposal with respect to non-critical services. 	March 20
	<ul style="list-style-type: none"> • Staff should continue teleworking until further notice. 	<ul style="list-style-type: none"> • Include direction in the daily update that all staff should continue teleworking until further notice. 	March 19
	-	<ul style="list-style-type: none"> • Reach out to TBS on specific concerns requiring flexibility from TBS policies. 	As soon as feasible
Tom and Valérie	<ul style="list-style-type: none"> • Request from Air Canada for exemption from notice period for discontinuance of service - Conditions that will be included in exemption are: <ul style="list-style-type: none"> o Air carrier must identify routes that will be discontinued. o Notification period of 2 weeks. o Exemption will only apply during "crisis" period related to COVID-19 pandemic. o Discontinuance of service is not permitted in remote communities where no other transportation service is available. 	<ul style="list-style-type: none"> • Prepare draft s. 80 decision with the proposed conditions. 	As soon as feasible
Valérie	-	<ul style="list-style-type: none"> • Prepare options for Scott, Liz and Doug with respect to filings received for stayed cases. 	As soon as feasible
Valérie	-	<ul style="list-style-type: none"> • BCP - Examine whether the Act already allows vessels to operate without coastal trade licences during emergency situations. 	March 20

Sébastien Bergeron

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Sebastien.bergeron@otc-cta.gc.ca | Tél. 819-712-0827

De : Sébastien Bergeron
Envoyé : 18 mars 2020 16:31
À : * EC <EC@otc-cta.gc.ca>
Objet : EC - March 18 : follow-up actions

Dear Colleagues,

Please find below the list of follow-up actions following today EC. If you notice something missing from the list or have a different recollection of a deliverable, please let us know.

EC Member(s) Tasked	Expected Deadline	Deliverable
Marcia	March 19	<ul style="list-style-type: none"> Call major air carriers (top 5) and air transport associations (NACC, ATAC) to explain Agency's order to suspend air-related proceedings.
Mireille	March 18	<ul style="list-style-type: none"> Send message to affected staff and managers - permitting staff who need VPN access to enter the Agency offices if they wish by COB March 20. <ul style="list-style-type: none"> Their manager must be present. Staff must maintain 2 metres of distance between themselves and other staff.
	March 19	<ul style="list-style-type: none"> Ensure daily COVID-19 updates are <i>e-mailed</i> to all staff. Mention that VPN should be used for work purposes only (no streaming of anything, except if it is absolutely necessary).
	March 19 (if possible)	<ul style="list-style-type: none"> Prepare list of EC decision points on various aspects of the BCP.
	March 20	<ul style="list-style-type: none"> Provide list of all staff phone numbers to EC members.

Tom and Valérie March 19 • Provide options to constrain Air Canada exemption from/reduction of notice period related to discontinuance of service.

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Sebastien.bergeron@otc-cta.gc.ca | Tél. 819-712-0827

De : Scott Streiner <Scott.Streiner@otc-cta.gc.ca>

Envoyé : 18 mars 2020 15:48

À : +_EC <EC@otc-cta.gc.ca>

Objet : For tomorrow

Hi, all. One more thing occurred to me after we hung up. Liz mentioned identifying activities for those unable to do much "normal" work, and we then focused on staff in Paul's area who don't have MyKey. I wonder if this is something we should consider more generally. Are there, for example, research projects we could ask some employees to undertake while they're at home? Please reflect on this and we can discuss tomorrow, along with the other items we identified today.

FYI, I've asked Seb and Alysia to email a short list of follow-up actions after each of our daily teleconferences, since it can be a little harder to keep track during a call than a face-to-face meeting. Of course, if you notice something missing from the list or have a different recollection of a deliverable, you should let them know.

My draft blog (still just in my head!) will come later today.

Thanks,

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

Amanda Hamelin

Subject: FW: EC June 18- Decisions and Follow-ups

[Redacted]

[Redacted]











































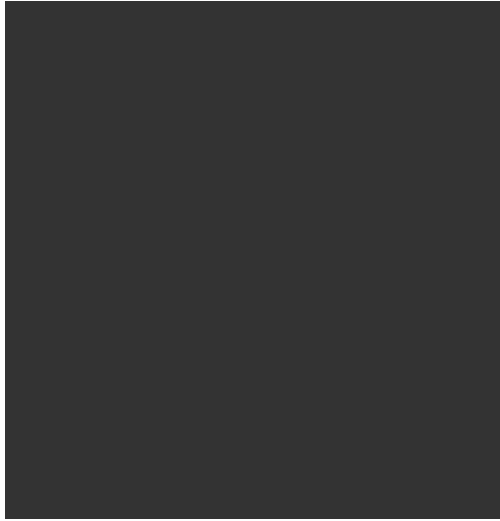
















De : Sébastien Bergeron
 Envoyé : 23 mars 2020 20:59
 À : +_EC < EC@01c-cla.gc.ca >
 Objet : EC March 23 - Decisions and Follow-ups

Dear colleagues,

Please find below the list of decisions and follow-up actions for today EC. If you notice something missing from the list or have a different recollection of a deliverable or decision, please let us know.

EC Member(s) Tasked	EC Decision(s)	Deliverable(s)	Expected Deadline
Chair's Office	-	<ul style="list-style-type: none"> Compile list of additional research projects that can be allocated staff during telework period. Branch Heads should inform and begin canvassing managers for staff that could work on these projects. 	March 24
	-	<ul style="list-style-type: none"> Circulate updated Members Committee agenda. 	March 24
	-	<ul style="list-style-type: none"> Coordinate with Social Committee and Comms to set up internal haiku contest. 	This week
Marcia	-	<ul style="list-style-type: none"> Comms to revise public messaging on Agency service delivery during COVID-19 pandemic. 	March 24
	<ul style="list-style-type: none"> ATPDR guidance consultation process will be reviewed after the Agency 	-	-

addresses requests from air carriers regarding regulatory obligations.

Mireille	-	• Examine options to support VPN capacity (e.g. rotating VPN access) during telework period.	This week
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De : Sébastien Bergeron
Envoyé : 20 mars 2020 19:28
À : + EC <EC@otc-cta.gc.ca>
Objet : EC March 20 - Decisions and Follow-ups

Dear colleagues,

Please find below the list of decisions and follow-up actions for today EC. If you notice something missing from the list or have a different recollection of a deliverable or decision, please let us know.

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: <ul style="list-style-type: none"> The Agency is continuing to deliver its services to the extent possible. Complaints can continue to be filed with the Agency; however, there may be a longer response time. 	As soon as feasible

		<ul style="list-style-type: none"> o Dispute proceedings involving airlines have been temporarily suspended. • Comms will update the Agency's helplines and other public-facing platforms to reflect the above messaging. 	
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. 	<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"> • Section 64 of CTA – Examine whether a temporary order can be issued under this provision. 	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

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De : Sébastien Bergeron
 Envoyé : 20 mars 2020 12:45
 A : « EC <EC@otc-cta.gc.ca> »
 Objet : "Correction" March 19 EC - Decisions and Follow-ups

Dear colleagues,

Please note below the correction (in red) we've made to the summary of yesterday EC.

Seb

EC Member(s) Tasked	EC Decision(s)	Deliverable(s)	Expected Deadline
All Branch Heads	<ul style="list-style-type: none"> Branch Heads seeking approval for staffing actions from EC should: <ul style="list-style-type: none"> Consult Mireille and Nadine B. first, and Circulate short e-mail including rationale to EC in advance of meeting. 	-	-
Mireille	-	<ul style="list-style-type: none"> BCP - Present comms strategy and proposal with respect to non-critical services. 	March 20
	<ul style="list-style-type: none"> Staff should continue teleworking until further notice. 	<ul style="list-style-type: none"> Include direction in the daily update that all staff should continue teleworking until further notice. 	March 19
	-	<ul style="list-style-type: none"> Reach out to TBS on specific concerns requiring flexibility from TBS policies. 	As soon as feasible
Tom and Valérie	-	<ul style="list-style-type: none"> Request for exemption from notification period for discontinuance of service – Prepare template draft s. 80 decision incorporating the proposed conditions. No decision has been made on this request. Only Members can make such a decision. 	As soon as feasible
Valérie	-	<ul style="list-style-type: none"> Prepare options for Scott, Liz and Doug with respect to filings received for stayed cases. 	As soon as feasible
	-	<ul style="list-style-type: none"> BCP - Examine whether the Act already allows vessels to operate without coastal trade licences during emergency situations. 	March 20

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De : Sébastien Bergeron
 Envoyé : 19 mars 2020 15:37
 À : « EC <EC@otc-cta.gc.ca> »
 Objet : March 19 EC - Decisions and Follow-ups

Dear Colleagues,

Please find below the list of follow-up actions following today EC. If you notice something missing from the list or have a different recollection of a deliverable, please let us know.

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All Branch Heads	<ul style="list-style-type: none"> Branch Heads seeking approval for staffing actions from EC should: <ul style="list-style-type: none"> Consult Mireille and Nadine B. first, and Circulate short e-mail including rationale to EC in advance of meeting. 	-	-
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Valérie	-	<ul style="list-style-type: none"> Prepare options for Scott, Liz and Doug with respect to filings received for stayed cases. 	As soon as feasible
Valérie	-	<ul style="list-style-type: none"> BCP - Examine whether the Act already allows vessels to operate without coastal trade licences during emergency situations. 	March 20

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De : Sébastien Bergeron
Envoyé : 18 mars 2020 16:31
A : « EC » <EC@otc-cta.gc.ca>
Objet : EC - March 18 - follow-up actions

Dear Colleagues,

Please find below the list of follow-up actions following today EC. If you notice something missing from the list or have a different recollection of a deliverable, please let us know.

EC Member(s) Tasked	Expected Deadline	Deliverable
Marcia	March 19	<ul style="list-style-type: none"> Call major air carriers (top 5) and air transport associations (NACC, ATAC) to explain Agency's order to suspend air-related proceedings.
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	March 19 (if possible)	<ul style="list-style-type: none"> Prepare list of EC decision points on various aspects of the BCP.
	March 20	<ul style="list-style-type: none"> Provide list of all staff phone numbers to EC members.
Tom and Valérie	March 19	<ul style="list-style-type: none"> Provide options to constrain Air Canada exemption from/reduction of notice period related to discontinuance of service.

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De : Scott Streiner <Scott.Streiner@otc-cta.gc.ca>
Envoyé : 18 mars 2020 15:48

À : *[EC](mailto:EC@otc-cta.gc.ca) <EC@otc-cta.gc.ca>

Objet : For tomorrow

Hi, all. One more thing occurred to me after we hung up. Liz mentioned identifying activities for those unable to do much "normal" work, and we then focused on staff in Paul's area who don't have MyKey. I wonder if this is something we should consider more generally. Are there, for example, research projects we could ask some employees to undertake while they're at home? Please reflect on this and we can discuss tomorrow, along with the other items we identified today.

FYI, I've asked Seb and Alysia to email a short list of follow-up actions after each of our daily teleconferences, since it can be a little harder to keep track during a call than a face-to-face meeting. Of course, if you notice something missing from the list or have a different recollection of a deliverable, you should let them know.

My draft blog (still just in my head!) will come later today.

Thanks,

S

Scott Streiner

Président et premier dirigeant, Office des transports du Canada
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This is **Exhibit “S”** to the Affidavit of Dr. Gábor Lukács
affirmed before me on May 15, 2022

Signature



Carrier Asks

Item	AT	AC
APPR		Issue a blanket exemption from all APPR, or take the steps below
Classification of flight disruptions	State that all current disruptions are category 3	Same
Refunds	State that no refunds are owed	Same
Vouchers	Signal that vouchers are acceptable in lieu of cash refunds	
Response time	Exempt airlines from the 30 day timeline	Same
Alternative travel arrangements	Exempt airlines from any obligation to provide alternative travel arrangements	Same
April 30	Extend the current exemptions for at least 90 days	Same
ATPDR		Provide a 90-day or longer delay to the "deadline for compliance" for, at least, certain provisions
Enforcement of APPR and ATPDR	Suspend for 1 year	Same
Advance notice for service changes on domestic routes		Exempt AC from the 120-day notice requirement

Not a reasonable request

Already addressed through the Agency's statement

Agree to suspend until end of June

Agree to extend until the end of June

Not a reasonable ask

OK for temporary suspensions, but not going to agree to permanent changes

This is **Exhibit “T”** to the Affidavit of Dr. Gábor Lukács
affirmed before me on May 15, 2022

Signature



National Litigation Sector
Civil Litigation Section
50 O'Connor Street, Suite 500
Ottawa, Ontario K1A 0H8

Telephone: (613) 601-4805
Fax: (613) 954-1920
Email: Lorne.Ptack@justice.gc.ca

BY EMAIL WITH COPY TO COUNSEL

April 21, 2022

Our File Number: LEX-500074803

Judicial Administrator
Federal Court of Appeal
90 Sparks Street
Ottawa, Ontario K1A 0H9

Re: Air Passenger Rights v The Attorney General of Canada - CFN: A-102-20

Dear Administrator:

I write in respect of cfn. A-102-20, *Air Passenger Rights v. Attorney General of Canada and the Canadian Transport Agency*, and specifically in respect of the April 11, 2022 Order and Reasons of the Honourable Justice Gleason.

At paragraph 3 of the Order, and paragraphs 11-13 of the Reasons, the Respondent's claims of privilege are upheld and the two relevant documents are ordered disclosed in redacted form.


I therefore write to advise the Court that the redacted documents were provided to counsel for the Applicant as pages 27-28 and 30-35 of the Respondent's Motion Record (Informal motion to claim privilege over portions of two documents), served and filed on December 14, 2021. At the Court's request, the same redacted Motion Record was provided to the Court on March 28, 2022, for inclusion in the Court's public record of this matter.

In respect of paragraph 6 of the Order and paragraph 43 of the Reasons, a single document containing notes has been identified by the Intervener, and will be disclosed following this letter. No privilege is being claimed in respect of this specific document. The disclosure is not a waiver of any privilege which may apply to any similar document in this proceeding or otherwise.

With that, I believe that the Respondent has complied with the requirements of the April 11, 2022 Order.

Should the Court require any further information or steps taken, we would be pleased to make ourselves available.

Yours truly,

A handwritten signature in cursive script that reads "Lorne Ptack".

Lorne Ptack
J. Sanderson (Sandy) Graham
Counsel for the Attorney General of Canada

c.c. Simon Lin, Counsel for the Applicant
Allan Matte and Kevin Shaar, Counsel for the Intervener

This is **Exhibit “U”** to the Affidavit of Dr. Gábor Lukács
affirmed before me on May 15, 2022

Signature

Meeting - Mar. 19

Thursday, March 19, 2020 9:03 AM

Attendance

- Scott Streiner
- Liz Barker
- Mireille Drouin
- Doug Smith
- Marcia Jones
- Tom Oommen
- Valérie Lagacé

- Sébastien Bergeron
- Alysia Lau

Debriefs - External

- MJ: Debriefed on suspension order and APPR determination. Air carrier tone is nothing within their control. Want Agency to clarify that they are not required to refund carriers. Air carriers don't have resources to turn to implementing ATPDR.
- SS: ATPDR largely reflect previous codes, so not reasonable to delay coming-into-force wholesale.

- SS: Other issue is air carriers refusing to provide refund or voucher to passengers.
- SS: Considering issuing statement - current context very different from regulations, Agency view is it would be reasonable that air carriers provide refunds or vouchers to passengers affected by mass cancellations.
- DS: Prefer vouchers given cash flow issues.
- LB: Vouchers would need to include reasonable conditions.
- VL: Could offer suspension of compensation requirements altogether. SS: Could imply that these types of situations are outside air carrier control.
- SS and SB: What if government provides bailout?

- MD: Have already communicated with employees who need to come in, other staff have come in to take equipment home.

- MD: BCP - must inform PCO of additional critical service.
- LB: Thought the Act already allowed for coasting trade to take place without permits for emergency operations. ***VL to examine this provision.**
- SS: Why would this be included in the first place? TO: Some urgency to processing applications even if for several months down the road.

- MD: BCP - what happens to non-critical services and comms plan. ***MD Will provide this tomorrow.**
- SS: Reached out to Ian Stewart from HFA.

- TO: Discontinuance of service. Sent potential conditions to Chair:
 - Shortening notification period to 2 weeks
 - Exemption will only apply during "crisis" pandemic period
 - Denial of discontinuance of service in remote communities with no other viable transportation service
 - APPR continue to apply
- TO: Rather than grant blanket exemption, seek specific routes from air carriers.
- SS: No need to specify APPR as condition.
- LB: Agree with proposed conditions.
- ***Decision: TO and VL to draft s. 80 decision applicable to all air carriers with conditions proposed (and requiring air carriers to identify routes).**

Alysia Lau

Internal Approach

- MD: Would like today's message to express maintaining telework until further notice. ***Approved**
- DS: Should we continue with compressed work weeks? SS: Should give employees flexibility in line with Central Agencies.
- MD: As of tomorrow, doors at 15 Eddy will be locked. Staff can enter with passes. MD to inform staff.
- MD: NB will accompany cleaners so they can empty trash cans in all closed offices.
- MD: There's been confirmed COVID-19 case in INAC in Vancouver.

- SS: Messages from Centre regarding flexibility, even in budget uncertainty. At some point, may need to seek signal from TBS/PCO regarding budget so we know what commitments we can make to employees. DRB terms extended until September.
- SS: Draft letter from TBS Secretary. MD: Main concern. ***MD to reach out to TBS regarding needed flexibility with respect to deliveries.**
- SS: Encourage Branch Heads and managers to be in regular contact with staff.

Varia

- VL: Secretariat still receiving filings for stayed cases. ***VL will share options for action with DS, SS and LB.**
- VL: Have a casual to take on administrative tasks for staff going on mat leave. Will present appointment to EC tomorrow.
- DS: Also have casuals that will come up over next few weeks. ****SS: No need for full-blown submission, instead Branch Heads should consult MD and NB first, then draft short email for EC in advance of meeting.**

This is **Exhibit “V”** to the Affidavit of Dr. Gábor Lukács
affirmed before me on May 15, 2022

Signature

Meeting - Mar. 20

Thursday, March 19, 2020 4:19 PM

Attendance

- Scott Streiner
- Liz Barker
- Mireille Drouin
- Doug Smith
- Marcia Jones
- Tom Oommen
- Valérie Lagacé

- Sébastien Bergeron
- Alysia Lau

Guests

- Tim Hillier
- Cynthia Jolly
- Karen Jacob

External Approach

- Section 64 draft decision: SS and LB leaning towards using s. 64 instead of s. 80 to either grant request or shorten notification period, unless s. 64 means discontinuance of service could be permanent. ***VL to examine whether Agency could make s. 64 order temporary.**

- Refunds and vouchers: MJ - can "encourage" airlines to refund/voucher as best practice.
- SS: ***SS to develop draft statement related to refunds and vouchers.**

Internal Approach

- BCP: MD - we have not yet invoked BCP. INAC has, PCH is operating critical services only.
- MD: Main concern is putting pressure on government services which should be reserved for critical services.
- SS: There will be call between deputy heads and TBS on Wednesday.
- ***Decision: MD to include acknowledgment of staff facing challenges (with kids etc.) while teleworking in daily staff update.**
- VL: BCP can be triggered when we work until we can't. VL and MJ: We need to be ready to trigger BCP.
- VL: Potential concern with VRCPI. ***VL and Steve Aubut to develop options to prepare for VRCPI for EC discussion.**
- SS: ***Will continue to deliver as many Agency services as possible at this time. Not invoking BCP at this time, but Agency should be prepared (clearly communicate this to staff). BCP could be triggered by: 1) central direction, or 2) unavailability of staff having impact on service delivery.**

- MD: BCP - external communications? ***Passengers who should wish to file complaint are still able to do so.**
- SS: Non-critical services --> manage on day-to-day basis, not 100% but the Agency will do its best.
- LB: Should consider posting message on website that Agency services continue. SS: Yes, but may take longer.
- ***Comms to work with ATC to post message on website ASAP: "CTA services during COVID-19 pandemic": CTA continues to maintain operations to the extent possible. Complaints can continue to be filed, make take longer for Agency to get back to you. Dispute proceedings involving air carriers temporarily paused. Agency helpines to be updated as well.**

- SS: Giving staff work during this time.
- LB: Projects such as annotation of **Part V of the CTA.**
- DS: **Headnotes for decisions**, will assign someone to assist VL with ATIP files, **accelerate web modernization, updating Hub.**
- CJ: Developing accessible materials in Word.
- SS: Need to develop inventory of projects and assign accordingly to staff who are: available, capable (skills), and would assist in developing relevant expertise.
- ***Monday or Tuesday: have inventory of possible projects and discuss allocating projects to staff.**

- SS: No need for regular weekly EC meetings. Members meeting items should proceed.
- ***Regular Members Committee meetings to proceed.** SS will still ask EC members to call in. **LR will recirculate draft agenda** and EC members to signal to Lesley whether comfortable proceedings.

- Deputy heads call with TBS Wednesday.
- SS: Emails sent during this period subject to ATIP.

- MJ: Contracts for services ending March 31. ***MD to share information with Committee next week.**

- SS: Board of Directors meeting on Monday - likely to cancel CCAT conference. To be held in Gatineau in 2021.

Alysia Lau

Varia

- MD: Have not received new floor plans yet, expect next Friday. Looking at other options to consult with staff. SS: Should maintain momentum on preparations for the move.
- MD: Also monitoring potential shutdown of construction sites. SS: If there is, staff should be made aware in one of the staff updates. TO: Don't forget consultation with disability network.
- DS: 20 people came into office to take equipment. Update on closure of building? MD: Building not closed. DS: Would like advanced notice.
- SB: Annual Report? MJ: ***Will look into deadline for Annual Report.**
- ***Chair's Office to make list of annual deliverables/products that Agency should continue to work on. --> Should develop list at EC meeting next week.**
- SS: Haiku competition ***Chair's Office - Share your haiku from working from home next week. MD to look at technology.**

This is **Exhibit “W”** to the Affidavit of Dr. Gábor Lukács
affirmed before me on May 15, 2022

Signature

Friday, March 20, 2020 3:40 PM

Attendance

- Scott Streiner
- Liz Barker
- Mireille Drouin
- Doug Smith
- Marcia Jones
- Tom Oommen
- Valérie Lagacé & Simon-Pierre Lessard
- Sébastien Bergeron
- Alysia Lau

Guests

- Tim Hillier

Debriefs

- SS: TC indicated Agency moved faster than they expected. Other travel restrictions expected. Agreement between SS and MK that agencies/departments should not issue piecemeal decisions. Call this evening between TC and Agency officials.

Messaging on CTA services

- SS: Where message says CTA pausing air disputes, should specify that Agency still receiving complaints.
- LB: Maintaining Agency services "to the extent possible" too vague and signaling slowdown of services when not true. Need to be more specific.
- ***TH to revise messaging - continuing normal activity, with exception of... passengers can file complaints, but response times may be different. Do not want to solicit air travel complaints.**

Air carrier requests for additional measures

- SS prepared table comparing AC and AT asks.
- ***Statement that all situations in COVID context = Category 3 should be discussed at Members meeting.**

Official languages considerations

- Official Language Commissioner wrote to all departments/agencies noting some information coming from departments only in one language. Reminder for Agency to be aware.

ATPDR Guidance Consultations

- MJ: Signal check on continuing consultations on ATPDR guidance.
- LB: ***Should not address this until AC request on all APPR/ATPDR is resolved.**

Additional projects for staff

- MD: **Training opportunities**
- TO: DCB staff will focus on catching up on tasks.
- DS: **Gathering information from staff nearing retirement or other long-time Agency employees.**
- LB: **Annotations of other pieces of legislation or regulations.** SS: Challenge is having Legal participate/supervise.
- ***Chair's Office to develop list of projects. Tomorrow: start develop list of staff that would be suitable for each project. Branch Heads should inform managers this is coming.**

Members Committee

- APPR supplementary guidance - MJ: yes, proposed approach to reflect comments SS and LB.
- Low impact amendments package - MJ: Yes, prepared to make presentation.
- **SS to reflect on item 4. Leave on agenda.**
- **LB would like to postpone item 5. Would like more time to re-examine legal opinion.**
- **Stylist options - SPL asking to postpone this item**
- SS: May not need a lot of in camera time - 15 min. + MJ's two items.

Haiku Contest

- SS: How to proceed? ***Should solicit, put it in staff update, Chair's Office to coordinate with Cynthia's team.**
- DS: Suggest managers should share haiku contest, not Chair's Office. SS: Or Social Committee involvement? ***DS to ask Tammy Chrusch if she would like to partner with AL and Comms to develop this.**

Other internal matters

- MD: School closures in Quebec until May 1. Should include this in daily staff update.
- Construction sites will be closed for 3 weeks.
- Year-end contracts: Current situation should not have impact on year-end. Should be normal year-end. Will issue communique to Branch Heads.
- 15 Eddy - will perform preventative bed bug inspections tomorrow.
- DS: Annual report. Directors still working on it but delayed. MJ: Intention is to keep regular sections of AR with additional section on response to COVID-19. Team is on track, looking to move draft along, but checking with TC to discuss delaying of timelines. SS: Should keep AR moving.

Varia

- TO: We received two requests for tariffs information. SS: Summary of what tariffs say about refunds/vouchers. MJ: Asked that tariffs team prioritize WJ, AC and AT tariffs.
- DS: VPN seemed spotty today. We have discussed rotating access to VPN. ***SB to reach out to MD to discuss VPN options.**

Alysia Lau

This is **Exhibit “X”** to the Affidavit of Dr. Gábor Lukács
affirmed before me on May 15, 2022

Signature

Carrier Asks 24 March 2020

Tuesday, March 24, 2020 11:26 AM



Carrier Asks

Item	AT	AC
APPR		Issue a blanket exemption from all APPR, or take the steps below
Classification of flight disruptions	State that all current disruptions are category 3	Same
Refunds	State that no refunds are owed	Same
Vouchers	Signal that vouchers are acceptable in lieu of cash refunds	
Response time	Exempt airlines from the 30 day timeline	Same
Alternative travel arrangements	Exempt airlines from any obligation to provide alternative travel arrangements	Same
April 30	Extend the current exemptions for at least 90 days	Same
ATPDR		Provide a 90-day or longer delay to the "deadline for compliance" for, at least, certain provisions
Enforcement of APPR and ATPDR	Suspend for 1 year	Same
Advance notice for service changes on domestic routes		Exempt AC from the 120-day notice requirement

Not a reasonable request] Heather Smith

Already addressed through the Agency's statement] Heather Smith

Agree to suspend until end of June] Heather Smith

Agree to extend until the end of June] Heather Smith

Not a reasonable ask] Heather Smith

OK for temporary suspensions, but not going to agree to permanent changes] Heather Smith

This is **Exhibit “Y”** to the Affidavit of Dr. Gábor Lukács
affirmed before me on May 15, 2022

Signature

Amanda Hamelin

From: Scott Streiner
Sent: Monday, March 23, 2020 2:19 PM
To: +_EC
Subject: Summary of asks
Attachments: Asks.docx

Hi, all. Please have a look at the attached table and let me know during our 2:30 call if you think any key points from either letter have been missed. Thanks.

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

Item	AT	AC
APPR		Issue a blanket exemption from all APPR, or take the steps below
Classification of flight disruptions	State that all current disruptions are category 3	Same
Refunds	State that no refunds are owed	Same
Vouchers	Signal that vouchers are acceptable in lieu of cash refunds	
Response time	Exempt airlines from the 30 day timeline	Same
Alternative travel arrangements	Exempt airlines from any obligation to provide alternative travel arrangements	Same
April 30	Extend the current exemptions for at least 90 days	Same
Enforcement	Suspend for 1 year	Same
ATPDR		A 90-day or longer delay to the "deadline for compliance" or, at least, to certain provisions

This is **Exhibit “Z”** to the Affidavit of Dr. Gábor Lukács
affirmed before me on May 15, 2022

Signature



Air Transat

File: Air Transat.pdf
Inserted from: C:\Users\hsmith\Desktop\Air Transat.pdf
Size: 1.7 MB



March 22, 2020

Transmission by e-mail
scott.streiner@otc-cta.gc.ca

Mr. Scott Streiner
Chairman and Chief Executive Officer
Canadian Transportation Agency
15 Eddy Street, 17th Floor
Gatineau, Quebec J8X 4B3

RE: Request for further public clarification of air carrier obligations per the *Air Passenger Protection Regulations ("APPR")* in the context of the current extraordinary circumstances

Dear Mr. Streiner:

As you are aware, the global air transport and tourism industries are dealing with a wholly-unprecedented collapse in world travel demand, as well as with the resulting operational and financial calamity in terms of drastically cutting capacity and preserving liquidity in an attempt to prevent our businesses from failing and putting tens of thousands of Canadians out of work. Obviously, Transat A.T. and our subsidiary travel units, including Air Transat and Transat Holidays, have not been spared the brunt of this disaster.

Indeed, we have recently announced, as a result of borders closing, the suspension of all outbound travel sales on our flights and the imminent grounding of almost all of our fleet until April 30, 2020, except for the small remainder of our flights that are conducting emergency repatriation operations of Canadians abroad in coordination with the federal government. Furthermore, we are confronted to making extremely difficult decisions where an important number of employees will be put on leave until the situation stabilizes and until we can hopefully and eventually contemplate a return to some sense of normalcy in the future.

In the meantime, while our industry fights to survive, we urgently need the federal government and our oversight authorities such as the CTA to provide assistance, both in the form of financial support and relief in terms of the substantial easing of existing regulatory costs and burdens. I have already written to Ministers Garneau and Morneau with regards to the first objective, and I am now hereby addressing myself to you with respect to the second.

Please be assured that I appreciated the Agency's efforts on March 13, 2020 to provide much-needed clarification to both industry and consumers concerning the application and enforcement of certain provisions of the APPR in the context of the current extraordinary circumstances.

Transat A.T. inc.
Place du Parc
300, rue Leo-Pariseau, bureau 600
Montréal, Québec, Canada H2X 4C2

Téléphone : 514 987-1660
www.transat.com

This is **Exhibit “AA”** to the Affidavit of Dr. Gábor Lukács
affirmed before me on May 15, 2022

Signature



AC Suspension of APPR and ATPDR

File: AC Suspension of APPR and ATPDR.pdf
Inserted from: C:\Users\hsmith\Desktop\AC Suspension of APPR and ATPDR.pdf
Size: 228 KB



David J. Shapiro
Executive Vice President, International & Regulatory Affairs & Chief Legal Officer
Vice-président général, Affaires internationales et réglementaires et chef des affaires juridiques

Centre Air Canada 1270
P.O. Box 7000, YUL 1276
Dorval, Québec, Canada H4Y 1J2

Direct Line: 514 422 5834
Facsimile: 514 422 0285
Email: david.shapiro@aircanada.ca

March 23, 2020

**Private and Confidential
By E-mail**

Mr. Scott Streiner
Office of the CEO
Canadian Transportation Agency
15 Eddy Street, 17th Floor
Gatineau, Quebec J8X 4B3

RE: Request for Exemption from the *Air Passenger Protection Regulations* ("APPR"), and from the Entry into Force of Certain Provisions of the *Accessible Transportation for Persons with Disabilities Regulations* ("ATPDR")

Dear Mr. Streiner,

I regret that I have to be writing with the degree of urgency that I am to request immediate relief from the ongoing application of APPR, and the imminent entry into force of ATPDR on June 25, 2020, as a result of the devastating impact that the COVID-19 crisis is having on airlines. These concerns were raised during the Agency's technical briefing on March 19th, 2020, and we were invited to put them in writing.

1- UNPRECEDENTED IMPACT ON AIRLINES

As you are well aware, with the world's borders being progressively shut down and a growing proportion of the world's population self-isolating, working from home and practising social distancing, the global airline industry is on the front line and has by and large come to a standstill. The COVID-19 crisis has already had a devastating impact on airline revenues, yet it seems that we may be only in the early stages of the deterioration. Like all airlines, Air Canada has had to implement drastic and unprecedented cost cutting measures, rapidly suspending the majority of its flights, internationally and transborder, and significantly reducing its domestic network as a direct result of the crisis.

2- APPR

Inadequacy of Determination No. A-2020-42

While the Agency's initiative¹ to exempt carriers from certain, specified provisions of APPR is appreciated, it stops well short of what is required to address the magnitude of the crisis we are confronting or to contribute to providing the real and tangible relief that airlines desperately need.

¹ Determination No. A-2020-42 of March 13, 2020.

This is **Exhibit “AB”** to the Affidavit of Dr. Gábor Lukács
affirmed before me on May 15, 2022

Signature

April 13, 2022

VIA EMAIL

Canadian Transportation Agency
ATTN : Ms. Barbara Cuber
15 Rue Eddy
Gatineau, Québec J8X 4B3

Dear Ms. Cuber,

RE: Air Passenger Rights v. AGC and CTA (A-102-20)

We are writing to coordinate regarding the logistics for the delivery of documents and affidavit that was ordered by the Court on April 11, 2022 (the “**April 11 Order**”), including cross-examination of the CTA’s affiant in accordance with para. 50 of the reasons for the April 11 Order, and delivery of the documents identified under B4 and the MS Word files identified under A1 and A5 of the appendix to the reasons for the April 11 Order.

Cross-Examination of the CTA’s Affiant

Due to the short period between the service of the CTA’s affidavit and of the Applicant’s affidavit, we are writing to canvass availability for a cross-examination of the CTA’s affiant on the week of May 2, 2022. Considering that the affidavit relates, in large part, to steps that were previously taken to comply with the October 15, 2021 Order, the affiant should be readily identifiable.

Please advise by no later than close of business on April 14, 2022 regarding availabilities.

Furthermore, since the CTA’s affidavit may not be served until April 21, 2022, we trust you will agree to a reasonable abridgment of the time for serving the Direction to Attend under Rule 91(3)(b) of the *Federal Courts Rules*.

The MS Word Documents in A1 and A5 of the Appendix

We note that A1 and A5 relate to the Word documents that were attached to emails sent to/from a CTA Member. In order to facilitate and expedite the delivery, we propose that the CTA simply provide those emails in the original .EML format. The EML files would already contain the original MS Word attachments (with all metadata intact), and avoid the need for any manual copying/pasting of the Word files and manually associating each Word file with a corresponding email.

The Info Account Emails and Twitter Messages in B4 of the Appendix

We understand that the CTA claimed in the December 24, 2021 letter that the Info email account and/or Twitter messages may be voluminous.

...

The Agency did not include all messages between March 9 and 25, 2020 from its Twitter account or inquiries to or responses from its general email account, info@otc-cta.gc.ca, in the disclosure package.

There was a high volume of messages and inquiries from individuals concerning their personal air travel situations between March 9 and March 25 on these accounts.

...

We recognize the potential time constraints that may arise if the CTA needs to apply its manual PDF conversion process for each Info Account email. As such, we can advise that the Applicant is agreeable to receiving the Info Account emails in their original .EML format to facilitate timely delivery of the materials, and to avoid potential errors that may arise from the manual PDF conversion process that had previously occurred.

For the Twitter private messages, we trust that the CTA is aware that Twitter has a [feature](#) that allows bulk export of the data, including private messages. There are also [commercial tools](#) that allow bulk conversion of Twitter private messages into PDF. We trust that these readily-available tools should be able to facilitate timely delivery of these documents, and the CTA's manual PDF conversion process may not be unnecessary.

Yours truly,

EVOLINK LAW GROUP



SIMON LIN
Barrister & Solicitor

Cc: Mr. Lorne Ptack and Sandy Graham, counsel for the Attorney General of Canada

This is **Exhibit “AC”** to the Affidavit of Dr. Gábor Lukács
affirmed before me on May 15, 2022

Signature

From: **Allan Matte** <Allan.Matte@otc-cta.gc.ca>
Date: Thu, Apr 14, 2022 at 12:45 PM
Subject: RE: A-102-20 -- Air Passenger Rights v Attorney General of Canada
To: Simon Lin <simonlin@evolinklaw.com>
Cc: Graham, Sandy <Sandy.Graham@justice.gc.ca>, Ptack, Lorne <Lorne.Ptack@justice.gc.ca>, Services Juridiques / Legal Services (OTC/CTA) <Servicesjuridiques/LegalServicesOTC/CTA@otc-cta.gc.ca>

Hi Mr. Lin,

Your email below and attached letter have been forwarded to me for a reply. Please be advised that I have taken over carriage of this matter from my colleague, Ms. Cuber. I am currently reviewing the matter and anticipate being able to respond to the Court's Order in due course.

Your suggestions regarding how the Agency might provide the production contemplated by the Court's Order will certainly be taken under consideration.

In terms of scheduling any cross-examinations, we should consult with Counsel for the AG to ensure that all are available. I will be in touch shortly.

In the meantime, please be advised that our office (such as it is) is closed for the holiday weekend.

Regards,

Allan Matte

Senior Counsel/Avocat principal

Office des transports du Canada/Canadian Transportation Agency

60 rue Laval
Gatineau, Québec J8X 3G9

allan.matte@otc-cta.gc.ca

From: Simon Lin <simonlin@evolinklaw.com>
Sent: Wednesday, April 13, 2022 12:17 PM
To: Barbara Cuber <Barbara.Cuber@otc-cta.gc.ca>; Services Juridiques / Legal Services (OTC/CTA) <Servicesjuridiques/LegalServicesOTC/CTA@otc-cta.gc.ca>
Cc: Graham, Sandy <Sandy.Graham@justice.gc.ca>; Ptack, Lorne <Lorne.Ptack@justice.gc.ca>
Subject: Re: A-102-20 -- Air Passenger Rights v Attorney General of Canada

Counsel,

Please see the enclosed letter.

Thank you.

Kind Regards,

Simon Lin
Barrister & Solicitor

evolink LAW

Evolink Law Group
237-4388 Still Creek Drive, Burnaby, B.C. V5C 6C6
T: 604-620-2666
F: 888-509-8168

www.evolinklaw.com

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On Mon, Feb 7, 2022 at 12:57 PM Simon Lin <simonlin@evolinklaw.com> wrote:

Counsel,

Enclosed for service please find the Applicant's Reply submissions and a supplementary affidavit. We also enclose a letter that we will be filing.

Thank you.

Kind Regards,

Simon Lin
Barrister & Solicitor

evolink LAW

Evolink Law Group
237-4388 Still Creek Drive, Burnaby, B.C. V5C 6C6
T: 604-620-2666
F: 888-509-8168

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On Tue, Feb 1, 2022 at 2:41 PM Graham, Sandy <Sandy.Graham@justice.gc.ca> wrote:

I confirm receipt on behalf of the AGC.

Thank you,

J. Sanderson (Sandy) Graham
Senior General Counsel / Avocat général principal

Civil Litigation Section / Section du contentieux des affaires civiles
50 O'Connor Street | 50, rue O'Connor
Room 544 | Pièce 544
Ottawa, Canada K1A 0H8

National Litigation Sector / Secteur national du contentieux

Department of Justice Canada / Ministère de la Justice Canada
sgraham@justice.gc.ca

Telephone | Téléphone: (613) 670-6274
Facsimile | Télécopieur: (613) 954-1920
Government of Canada | Gouvernement du Canada

From: Services Juridiques / Legal Services (OTC/CTA) <Servicesjuridiques/LegalServicesOTC/CTA@otc-cta.gc.ca>
Sent: February 1, 2022 4:03 PM
To: Simon Lin <simonlin@evolinklaw.com>; Gabor Lukacs <lukacs@AirPassengerRights.ca>; Graham, Sandy <Sandy.Graham@justice.gc.ca>; Ptack, Lorne <Lorne.Ptack@justice.gc.ca>
Cc: Barbara Cuber <Barbara.Cuber@otc-cta.gc.ca>
Subject: A-102-20 -- Air Passenger Rights v Attorney General of Canada

Good Afternoon,

Please find enclosed for service:

1. Written Representations of the Intervener, Canadian Transportation Agency; and
2. Certification of email exchange dated March 24, 2020.

If you experience any difficulties with the transmission of this email or its attachments, please reply to the Legal Services Directorate general mailbox (Servicesjuridiques.LegalServices@otc-cta.gc.ca) or contact counsel of record in this matter, Ms. Barbara Cuber.

Please confirm receipt of this email and its attachments.

Thank you,

Kizzy Barrett

Paralegal Team Leader, Legal Services Directorate
Canadian Transportation Agency / Government of Canada
kizzy.barrett@otc-cta.gc.ca / Tel: 819-431-1615

Chef d'équipe de parajuriste, Direction des services juridiques
Office des transports du Canada / Gouvernement du Canada

This is **Exhibit “AD”** to the Affidavit of Dr. Gábor Lukács
affirmed before me on May 15, 2022

Signature

April 14, 2022

VIA EMAIL

Canadian Transportation Agency
ATTN : Mr. Alan Matte
60 Rue Laval
Gatineau, Québec J8X 3G9

Dear Mr. Matte,

RE: Air Passenger Rights v. AGC and CTA (A-102-20)

We acknowledge receipt of your email of today's date.

Cross-Examination of the CTA's Affiant

We note that your email only responds to our letter of April 13, 2022 in form, but not in substance. Our April 13 letter canvassing availability for cross-examination of the CTA's affiant was already copied to counsel for the Attorney General of Canada. As such, your assertion that "*we should consult with Counsel for the AG to ensure that all are available*" is without merit because the April 13, 2022 letter already accomplished that.

Moreover, we note that the Attorney General of Canada and the CTA are not parties adverse in interest. Hence, the Attorney General of Canada has no right to cross-examine the CTA's affiant, although the Attorney General of Canada is welcome to attend if they prefer.

Please provide the availability of the affiant **forthwith**.

CTA's Compliance with the Court's Order

Thank you for confirming that the CTA will consider our suggestion for the logistics of the document production. However, we are concerned that in the email today the CTA stated that it would "respond to the Court's Order in due course."

We draw to you attention that the Court has ordered a specific timeline for various steps, 5-days or 10-days, respectively. Taking into account the public holidays, the deadlines would fall on April 20, 2022, and April 21, 2022. **We trust that the CTA will comply with the Court's Order, within the timelines stated therein.**

If the CTA is suggesting it would be seeking an extension of time, we trust that the CTA will bring forward any extraordinary circumstances, with admissible evidence, on a proper motion.

CTA's Recent Change of Counsel

We bring to your attention paragraph 47(b) of the Court's reasons for judgment on April 11, 2022 which states that:

[47] Given the number of issues that have arisen with disclosure and compliance with this Court's October 15, 2021 Order as well as the number of outstanding documents that the applicant is seeking, I agree with the applicant that the individual at the CTA who was responsible for complying with this Court's October 15, 2021 Order should be required to serve and file an affidavit detailing what has been done to ensure the required disclosure was made. I would expect that the affidavit would address the following issues set out in paragraph 43 of the applicant's reply submissions, namely:

...

(b) what steps were taken, if any, to gather and/or preserve documents upon being served with the Notice of Application on April 9, 2020;

[emphasis added]

The Applicant respects a litigant's right to choose their own counsel. However, we note that it is unusual for a lawyer to act as counsel for a matter if they may be a fact witness, or if the lawyer is otherwise bound up in the facts.

It is apparent that the steps that the CTA took to preserve documents, if any steps were taken, is a material and disputed fact in this case. We note that you had conduct of the matter in April 2020 when the Notice of Application was served, and you were also directly involved in the various objections to the Rule 317 document production in August 2020, prior to your appointment as a Temporary Member of the CTA.

The Applicant may bring a motion, as necessary, after reviewing the CTA's affidavit, and cross-examining the CTA's affiant.

Yours truly,
EVOLINK LAW GROUP



SIMON LIN
Barrister & Solicitor

Cc: Mr. Lorne Ptack and Sandy Graham, counsel for the Attorney General of Canada

This is **Exhibit “AE”** to the Affidavit of Dr. Gábor Lukács
affirmed before me on May 15, 2022

Signature

Re: A-102-20 -- Air Passenger Rights v Attorney General of Canada

Simon Lin <simonlin@evolinklaw.com>

Thu, Apr 21, 2022 at 5:56 PM

To: Allan Matte <Allan.Matte@otc-cta.gc.ca>

Cc: "Graham, Sandy" <Sandy.Graham@justice.gc.ca>, "Ptack, Lorne" <Lorne.Ptack@justice.gc.ca>, "Services Juridiques / Legal Services (OTC/CTA)" <Servicesjuridiques/LegalServicesOTC/CTA@otc-cta.gc.ca>

Counsel,

Further to our letters on April 13-14, 2022, we had not received the availability from counsel for the CTA and AGC, nor the availability of the CTA's affiant (which has been identified today as Ms. Barbara Cuber).

Accordingly, and to avoid delays to the case, we will be setting down the cross-examination for Ms. Cuber's affidavit unilaterally for May 4 or 5, 2022. We will be serving our Direction to Attend shortly.

Thank you.

Kind Regards,

Simon Lin
Barrister & Solicitor

evolink LAW

Evolink Law Group

237-4388 Still Creek Drive, Burnaby, B.C. V5C 6C6

T: 604-620-2666

F: 888-509-8168

www.evolinklaw.com

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On Thu, Apr 14, 2022 at 3:29 PM Simon Lin <simonlin@evolinklaw.com> wrote:

Hello Mr Matte,

Please see enclosed. Thank you.

Kind Regards,

Simon Lin
Barrister & Solicitor

evolink LAW

Evolink Law Group

237-4388 Still Creek Drive, Burnaby, B.C. V5C 6C6

T: 604-620-2666

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On Thu, Apr 14, 2022 at 12:45 PM Allan Matte <Allan.Matte@otc-cta.gc.ca> wrote:

Hi Mr. Lin,

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Your suggestions regarding how the Agency might provide the production contemplated by the Court's Order will certainly be taken under consideration.

In terms of scheduling any cross-examinations, we should consult with Counsel for the AG to ensure that all are available. I will be in touch shortly.

In the meantime, please be advised that our office (such as it is) is closed for the holiday weekend.

Regards,

Allan Matte

Senior Counsel/Avocat principal

Office des transports du Canada/Canadian Transportation Agency

60 rue Laval

Gatineau, Québec J8X 3G9

allan.matte@otc-cta.gc.ca

From: Simon Lin <simonlin@evolinklaw.com>

Sent: Wednesday, April 13, 2022 12:17 PM

To: Barbara Cuber <Barbara.Cuber@otc-cta.gc.ca>; Services Juridiques / Legal Services (OTC/CTA) <Servicesjuridiques/LegalServicesOTC/CTA@otc-cta.gc.ca>

Cc: Graham, Sandy <Sandy.Graham@justice.gc.ca>; Ptack, Lorne <Lorne.Ptack@justice.gc.ca>

Subject: Re: A-102-20 -- Air Passenger Rights v Attorney General of Canada

Counsel,

Please see the enclosed letter.

Thank you.

Kind Regards,

Simon Lin
Barrister & Solicitor

evolink LAW

Evolink Law Group
237-4388 Still Creek Drive, Burnaby, B.C. V5C 6C6
T: 604-620-2666

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On Mon, Feb 7, 2022 at 12:57 PM Simon Lin <simonlin@evolinklaw.com> wrote:

Counsel,

Enclosed for service please find the Applicant's Reply submissions and a supplementary affidavit. We also enclose a letter that we will be filing.

Thank you.

Kind Regards,

Simon Lin
Barrister & Solicitor

evolink LAW

Evolink Law Group
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On Tue, Feb 1, 2022 at 2:41 PM Graham, Sandy <Sandy.Graham@justice.gc.ca> wrote:

I confirm receipt on behalf of the AGC.

Thank you,

J. Sanderson (Sandy) Graham

Senior General Counsel / Avocat général principal

Civil Litigation Section / Section du contentieux des affaires civiles
50 O'Connor Street | 50, rue O'Connor
Room 544 | Pièce 544
Ottawa, Canada K1A 0H8

National Litigation Sector / Secteur national du contentieux

Department of Justice Canada / Ministère de la Justice Canada
sgraham@justice.gc.ca

Telephone | Téléphone: (613) 670-6274
Facsimile | Télécopieur: (613) 954-1920
Government of Canada | Gouvernement du Canada

From: Services Juridiques / Legal Services (OTC/CTA) <Servicesjuridiques/LegalServicesOTC/CTA@otc-cta.gc.ca>
Sent: February 1, 2022 4:03 PM
To: Simon Lin <simonlin@evolinklaw.com>; Gabor Lukacs <lukacs@AirPassengerRights.ca>; Graham, Sandy <Sandy.Graham@justice.gc.ca>; Ptack, Lorne <Lorne.Ptack@justice.gc.ca>
Cc: Barbara Cuber <Barbara.Cuber@otc-cta.gc.ca>
Subject: A-102-20 -- Air Passenger Rights v Attorney General of Canada

Good Afternoon,

Please find enclosed for service:

1. Written Representations of the Intervener, Canadian Transportation Agency; and
2. Certification of email exchange dated March 24, 2020.

If you experience any difficulties with the transmission of this email or its attachments, please reply to the Legal Services Directorate general mailbox (Servicesjuridiques.LegalServices@otc-cta.gc.ca) or contact counsel of record in this matter, Ms. Barbara Cuber.

Please confirm receipt of this email and its attachments.

Thank you,

Kizzy Barrett

Paralegal Team Leader, Legal Services Directorate
Canadian Transportation Agency / Government of Canada
kizzy.barrett@otc-cta.gc.ca / Tel: 819-431-1615

Chef d'équipe de parajuriste, Direction des services juridiques
Office des transports du Canada / Gouvernement du Canada
kizzy.barrett@otc-cta.gc.ca / Tél.: 819-431-1615

This is **Exhibit “AF”** to the Affidavit of Dr. Gábor Lukács
affirmed before me on May 15, 2022

Signature

From: **Ptack, Lorne** <Lorne.Ptack@justice.gc.ca>
Date: Thu, Apr 21, 2022 at 2:27 PM
Subject: RE: A-102-20 -- Air Passenger Rights v Attorney General of Canada
To: Simon Lin <simonlin@evolinklaw.com>, Allan Matte <Allan.Matte@otc-cta.gc.ca>
Cc: Graham, Sandy <Sandy.Graham@justice.gc.ca>, Services Juridiques / Legal Services (OTC/CTA) <Servicesjuridiques/LegalServicesOTC/CTA@otc-cta.gc.ca>

Counsel for the Respondent are not available on those dates. If you cannot wait for our availability Mr Lin, we can request that the Court convene a CMC to address timing and avoid further and unnecessary unilateral demands.

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To: Allan Matte <Allan.Matte@otc-cta.gc.ca>
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Office des transports du Canada/Canadian Transportation Agency

60 rue Laval

Gatineau, Québec J8X 3G9

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Sent: Wednesday, April 13, 2022 12:17 PM
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affirmed before me on May 15, 2022

Signature

From: **Simon Lin** <simonlin@evolinklaw.com>
 Date: Thu, Apr 21, 2022 at 2:44 PM
 Subject: Re: A-102-20 -- Air Passenger Rights v Attorney General of Canada
 To: Ptack, Lorne <Lorne.Ptack@justice.gc.ca>
 Cc: Allan Matte <Allan.Matte@otc-cta.gc.ca>, Graham, Sandy <Sandy.Graham@justice.gc.ca>, Services Juridiques / Legal Services (OTC/CTA) <Servicesjuridiques/LegalServicesOTC/CTA@otc-cta.gc.ca>

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Thank you.

Kind Regards,

Simon Lin
 Barrister & Solicitor

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Office des transports du Canada/Canadian Transportation Agency

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Sent: Wednesday, April 13, 2022 12:17 PM

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Signature

From: **Ptack, Lorne** <Lorne.Ptack@justice.gc.ca>
Date: Fri, Apr 22, 2022 at 07:46
Subject: RE: A-102-20 -- Air Passenger Rights v Attorney General of Canada
To: Simon Lin <simonlin@evolinklaw.com>
CC: Allan Matte <Allan.Matte@otc-cta.gc.ca>, Kevin Shaar <Kevin.Shaar@otc-cta.gc.ca>, Graham, Sandy <Sandy.Graham@justice.gc.ca>, Schmidt, Elizabeth <Elizabeth.Schmidt@justice.gc.ca>

Mr. Lin,

No one has refused to provide you with dates and certainly no one has veto'd anything. Rather than coordinating between counsel, you have made baseless demands and set unilateral deadlines. You may wish to consider a more cooperative approach towards moving this matter forward in the future.

Counsel for the respondent are NOT available on the following dates:

April 25, 26, 28

May 4, 5, 6, 9, 16, 17, 19

June 27-30

Lorne Ptack, Counsel / Avocat

Civil Litigation Section / Section du contentieux des affaires civiles

Department of Justice / Ministère de la Justice Gouvernement du Canada / Government of Canada

50 O'Connor Street, Suite 500, Room 526 Ottawa, ON K1A 0H8

Tel: / Cel: 613-601-4805 / Fax: 613-954-1920

E: Lorne.Ptack@Justice.gc.ca

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Sent: April 21, 2022 5:45 PM

To: Ptack, Lorne <Lorne.Ptack@justice.gc.ca>

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On Thu, Apr 14, 2022 at 12:45 PM Allan Matte <Allan.Matte@otc-cta.gc.ca> wrote:

Hi Mr. Lin,

Your email below and attached letter have been forwarded to me for a reply. Please be advised that I have taken over carriage of this matter from my colleague, Ms. Cuber. I am currently reviewing the matter and anticipate being able to respond to the Court's Order in due course.

Your suggestions regarding how the Agency might provide the production contemplated by the Court's Order will certainly be taken under consideration.

In terms of scheduling any cross-examinations, we should consult with Counsel for the AG to ensure that all are available. I will be in touch shortly.

In the meantime, please be advised that our office (such as it is) is closed for the holiday weekend.

Regards,

Allan Matte

Senior Counsel/Avocat principal

Office des transports du Canada/Canadian Transportation Agency

60 rue Laval
Gatineau, Québec J8X 3G9

allan.matte@otc-cta.gc.ca

From: Simon Lin <simonlin@evolinklaw.com>
Sent: Wednesday, April 13, 2022 12:17 PM
To: Barbara Cuber <Barbara.Cuber@otc-cta.gc.ca>; Services Juridiques / Legal Services (OTC/CTA) <Servicesjuridiques/LegalServicesOTC/CTA@otc-cta.gc.ca>
Cc: Graham, Sandy <Sandy.Graham@justice.gc.ca>; Ptack, Lorne <Lorne.Ptack@justice.gc.ca>
Subject: Re: A-102-20 -- Air Passenger Rights v Attorney General of Canada

Counsel,

Please see the enclosed letter.

Thank you.

Kind Regards,

Simon Lin
Barrister & Solicitor

evolink LAW

Evolink Law Group
237-4388 Still Creek Drive, Burnaby, B.C. V5C 6C6
T: 604-620-2666
F: 888-509-8168

www.evolinklaw.com

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On Mon, Feb 7, 2022 at 12:57 PM Simon Lin <simonlin@evolinklaw.com> wrote:

Counsel,

349

Enclosed for service please find the Applicant's Reply submissions and a supplementary affidavit. We also enclose a letter that we will be filing.

Thank you.

Kind Regards,

Simon Lin
Barrister & Solicitor

evolink LAW

Evolink Law Group
237-4388 Still Creek Drive, Burnaby, B.C. V5C 6C6
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On Tue, Feb 1, 2022 at 2:41 PM Graham, Sandy <Sandy.Graham@justice.gc.ca> wrote:

I confirm receipt on behalf of the AGC.

Thank you,

J. Sanderson (Sandy) Graham
Senior General Counsel / Avocat général principal

Civil Litigation Section / Section du contentieux des affaires civiles
50 O'Connor Street | 50, rue O'Connor
Room 544 | Pièce 544
Ottawa, Canada K1A 0H8

National Litigation Sector / Secteur national du contentieux

Department of Justice Canada / Ministère de la Justice Canada
sgraham@justice.gc.ca

Telephone | Téléphone: (613) 670-6274
Facsimile | Télécopieur: (613) 954-1920
Government of Canada | Gouvernement du Canada

From: Services Juridiques / Legal Services (OTC/CTA) <Servicesjuridiques/LegalServicesOTC/CTA@otc-cta.gc.ca>
Sent: February 1, 2022 4:03 PM
To: Simon Lin <simonlin@evolinklaw.com>; Gabor Lukacs <lukacs@AirPassengerRights.ca>; Graham, Sandy <Sandy.Graham@justice.gc.ca>; Ptack, Lorne <Lorne.Ptack@justice.gc.ca>
Cc: Barbara Cuber <Barbara.Cuber@otc-cta.gc.ca>
Subject: A-102-20 -- Air Passenger Rights v Attorney General of Canada

Good Afternoon,

Please find enclosed for service:

1. Written Representations of the Intervener, Canadian Transportation Agency; and
2. Certification of email exchange dated March 24, 2020.

If you experience any difficulties with the transmission of this email or its attachments, please reply to the Legal Services Directorate general mailbox (Servicesjuridiques.LegalServices@otc-cta.gc.ca) or contact counsel of record in this matter, Ms. Barbara Cuber.

Please confirm receipt of this email and its attachments.

Thank you,

Kizzy Barrett

Paralegal Team Leader, Legal Services Directorate
Canadian Transportation Agency / Government of Canada
kizzy.barrett@otc-cta.gc.ca / Tel: 819-431-1615

Chef d'équipe de parajuriste, Direction des services juridiques
Office des transports du Canada / Gouvernement du Canada



This is **Exhibit “AI”** to the Affidavit of Dr. Gábor Lukács
affirmed before me on May 15, 2022

Signature

FEDERAL COURT OF APPEAL

BETWEEN:

AIR PASSENGER RIGHTS

Applicant

– and –

ATTORNEY GENERAL OF CANADA

Respondent

– and –

CANADIAN TRANSPORTATION AGENCY

Intervener

DIRECTION TO ATTEND

TO: Barbara Cuber

YOU ARE REQUIRED TO ATTEND A CROSS-EXAMINATION for your affidavit affirmed on April 21, 2022 on behalf the Canadian Transportation Agency [**Affidavit**], on **Tuesday, May 3, 2022 at 12:00 pm (Eastern Time)** via Zoom:

Meeting ID: 853 1187 7451 Passcode: 536989

YOU ARE ALSO REQUIRED TO BRING WITH YOU and produce at the examination the following documents and things:

- A. Notification of Agency Personnel on April 14, 2020 Regarding Application**
 - 1. With reference to the Affidavit at paragraph 8, the original notification that was sent on April 14, 2020, including the names of the recipients.
 - 2. With reference to the Affidavit at paragraph 8, all the responses from the recipients in respect of the notification mentioned therein.

- B. Inquiries for Documents with Former Agency Personnel**
 - 3. All written correspondences, between October 15, 2021 to April 22, 2022, between Ms. Cuber, and Ms. Marcia Jones (former Chief Strategy Officer) or Mr. Scott Streiner (former Chairperson), in respect of compliance with the October Order (as defined in the Affidavit) and/or April Order (as defined in the Affidavit), including any requests to Ms. Jones and/or Mr. Streiner to assist in providing and/or locating documents.

4. All written correspondences, between October 15, 2021 to April 22, 2022, between a member or staff of the Canadian Transportation Agency (other than Ms. Cuber), and Ms. Jones or Mr. Streiner, in respect of compliance with the October Order and/or April Order, including any requests to for assistance in providing and/or locating documents.
5. The Canadian Transportation Agency's policy on retaining of data on computer hard drives and mobile devices of departing personnel.

C. Inquiry with Ms. Lesley Robertson, Office of the Chairperson

6. With reference to the Affidavit at paragraph 33, all written correspondences with Ms. Lesley Robertson in respect of the inquiry and/or search for documents responsive to the October Order and/or the April Order.
7. With reference to the Affidavit at paragraph 34, copies of the five documents.

D. Inquiry with Mr. Guindon and Other Information Technology Personnel

8. With reference to the Affidavit at paragraphs 37-38, all written correspondences with Mr. Jonathan Guindon or personnel in the Information Technology Services Division [collectively, **Information Technology Personnel**] regarding the search for documents responsive to the October Order and/or the April Order.
9. With reference to the Affidavit at paragraph 38, all documents showing the search terms employed for the electronic search referred to therein.
10. With reference to the Affidavit at paragraphs 38-39, the list of Agency staff whose Outlook accounts returned documents in the 799 item search results.
11. With reference to the Affidavit at paragraph 38, documents showing if searches were made on the Outlook accounts of the former Chief Strategy Officer (Marcia Jones) and the former Chairperson (Scott Streiner).
12. The Outlook system logs showing when the following emails were deleted from Ms. Marcia Jones' Outlook account:
 - (a) Email received by Ms. Marcia Jones on March 18, 2020 from Mr. Colin Stacey with the subject line "FW: From MinO: Air Transat."
 - (b) Email sent by Ms. Marcia Jones on March 25, 2020 with the subject line "Update: CTA measures/Mise à jour: mesures prises par l'OTC."

E. Searching the Canadian Transportation Agency's Corporate Repository

13. With reference to paragraph 13 of the Affidavit, all documents showing the search terms that were employed for the search(es) made on RDIMS (the Canadian Transportation Agency's corporate repository) for documents responsive to the October Order and/or the April Order.

F. Records of or Recordings of the March 9-25, 2020 Meetings

14. With reference to paragraph 38 of the Affidavit, printouts from the Outlook calendars for Mr. Scott Streiner and Ms. Marcia Jones of the scheduled events between March 18-25, 2020, including the weekend of March 21-22, 2020.
15. With reference to the April 20, 2022 Documents, the first page of Appendix C1.pdf shows the meeting invite from Mr. Streiner with his dial-in code of 935311571, a printout from the teleconferencing platform showing all conferences that were hosted using this dial-in code between March 9 and 25, 2020, including the weekend of March 21-22, 2020.
16. With reference to paragraph 58 of the Affidavit, a printout from the teleconferencing platform listing all the meetings between March 9 and 25, 2020 that were recorded.

G. Inquiries after Producing the Initial Documents on December 14, 2021

17. With reference to paragraph 42 of the Affidavit, the written documents showing what "the existing search results" were.
18. With reference to the documents disclosed by the Canadian Transportation Agency on April 20, 2022 [**April 20, 2022 Documents**], a printout of the Outlook search results relied upon by Ms. Amanda Hamelin or other Information Technology Personnel to identify the April 20, 2022 Documents.

H. Document Referred to in the April 20, 2022 Documents Package

19. With reference to the April 20, 2022 Documents, page 47 of Appendix C1.pdf refers to a "Circulate updated Members Committee Agenda" for March 24, 2020. Please provide the Members Committee Agenda referred to therein.

I. Microsoft Outlook Backups

20. With reference to paragraph 53 of the Affidavit, the Canadian Transportation Agency's policy document on Outlook retention standards referred to in paragraph 53 of the Affidavit (i.e., periods of 10 days and 12 weeks).
21. With reference to paragraph 54 of the Affidavit, all written correspondences between Ms. Cuber and a member or staff of the Canadian Transportation Agency, regarding retrieving the Outlook backup tapes for searching.
22. With reference to paragraphs 53-54 of the Affidavit, a list of all the backup tapes for Outlook that are still being kept, including the dates covered by those backup tapes.
23. The Canadian Transportation Agency's policy on retaining backup of Outlook documents other than on backup tapes, such as backups on Amazon Cloud, Microsoft 365, or other cloud platforms.

J. Inquiry Relating to ATI Requests A-2020-00002 and A-2020-00029

24. With reference to the Affidavit at paragraphs 17-20 and 21-25, any index, table of contents, summary, and/or listings for:
 - (a) the 683 items for A-2020-00002; and/or
 - (b) the 1417 Outlook items, the 25 electronic documents, and/or the 5099-page working copy of the search results for A-2020-00029.

K. Inquiry Relating to TRAN Committee Motion Documents

25. With reference to the Affidavit at paragraph 29, any index, table of contents, summary, and/or listings of the collection of documents stemming from the motion from the Standing Committee on Transportation, Infrastructure and Communities on March 25, 2021 [**TRAN Committee Motion**].

TRAVEL EXPENSES for 1 day of attendance is served with this direction, calculated in accordance with Tariff A of the Federal Courts Rules, as follows:

Transportation allowance \$0
 Overnight accommodations and meal allowance \$0
 TOTAL \$0

If further attendance is required, you will be entitled to additional money.

THE EXAMINATION WILL BE CONDUCTED IN ENGLISH. If you prefer to be examined in the other official language, an interpreter may be required and you must immediately advise the solicitor for the party conducting the examination.

IF YOU FAIL TO ATTEND OR REMAIN UNTIL THE END OF THIS EXAMINATION, YOU MAY BE COMPELLED TO ATTEND AT YOUR OWN EXPENSE AND YOU MAY BE FOUND IN CONTEMPT OF COURT.

INQUIRIES CONCERNING THIS DIRECTION may be directed to Simon Lin (simonlin@evolinklaw.com).

April 22, 2022



SIMON LIN

Evolink Law Group
4388 Still Creek Drive, Suite 237
Burnaby, British Columbia, V5C 6C6

Tel: 604-620-2666

Fax: 888-509-8168

simonlin@evolinklaw.com

**Counsel for the Applicant,
Air Passenger Rights**

This is **Exhibit “AJ”** to the Affidavit of Dr. Gábor Lukács
affirmed before me on May 15, 2022

Signature

April 22, 2022

VIA EMAIL

Canadian Transportation Agency
ATTN : Mr. Alan Matte
60 Rue Laval
Gatineau, Québec J8X 3G9

Dear Mr. Matte,

RE: Air Passenger Rights v. AGC and CTA (A-102-20)

We are writing regarding the CTA's documents that were sent on April 20, 2022 (the "**Materials**"). We noted numerous deficiencies that we are bringing to your attention below.

Redactions

We noticed that there were a significant number of pages that were redacted in the Materials (i.e., Appendix C1, pages 18-47; Appendix C2, pages 26-55; Appendix C6, pages 21-50). The CTA's letter accompanying the Materials (the "**Letter**") did not mention these redactions, nor provided any explanation for why there were such redactions.

We draw your attention to numerous decisions from the Federal Court confirming that "[i]t is for the Court and not the tribunal to decide what information can be withheld from the applicant."¹ Accordingly, it is not for the CTA to unilaterally redact materials.

Claims for Privilege

In the Letter, the CTA did not state if it has withheld any documents for which it claims privilege for. Rather, the CTA simply represented that it had produced the "non-privileged documents". We draw your attention to [Air Passenger Rights v. Canada \(Attorney General\)](#), 2021 FCA 201 at paras. 27-31. Accordingly, please confirm if the CTA has identified any documents for which it claims privilege from its latest document search. If there are such documents, please advise how the CTA intends to comply with the Court's guidance on claims for privilege on this application.

¹ [Mekonen v. Canada \(Citizenship and Immigration\)](#), 2007 FC 1133 at para. 10 (per Dawson J., as she then was); [Singh v. Canada \(CIC\)](#), 2010 FC 757 (per de Montigny J., as he then was) at para. 27-28; [Mohammed v. Canada \(CIC\)](#), 2006 FC 1310 at para. 19.

Twitter Private Messages and Info Account Emails

In Appendix B4 of the Materials, the CTA had only provided eight (8) screenshots of public Twitter tweets, and one e-mail thread from its Info email account.

We draw your attention to the CTA's letter dated December 24, 2021, where the CTA stated the following in respect of Twitter messages and emails on its Info email account:

...There was a high volume of messages and inquiries from individuals concerning their personal air travel situations between March 9 and March 25 on these accounts...

[emphasis added]

We also draw your attention to an email from Vincent Turgeon dated March 24, 2020 at 5:13PM (Exhibit AB to the Affidavit of Dr. Gabor Lukacs on January 16, 2022), where Mr. Turgeon stated:

Also, our Twitter account has received dozens of questions on that same topic. Can I use that strategy for direct responses on email (@Info inbox) and on Twitter?

The CTA's Appendix B4 raises the following two concerns.

Firstly, the Court specifically ordered that the private messages on Twitter be produced. However, instead, the CTA produced screenshots of the public tweets only, contrary to the Court's Order.

Secondly, the number of emails on the CTA's Info inbox that was produced (i.e., one email chain) is inconsistent with the CTA's previous representations that there were a high volume of messages. Furthermore, on the December 24, 2021 letter, the CTA also represented that:

The Agency did not include all messages between March 9 and 25, 2020 from its Twitter account or inquiries to or responses from its general email account, info@otc-cta.gc.ca, in the disclosure package.

This representation implies that the CTA had reviewed its Twitter account and Info inbox, but just did not include those materials in the disclosure. In other words, the CTA is acknowledging that there were Twitter messages relating to the Statement on Vouchers.

Original Microsoft One Note Format for Four Documents

On April 11, 2022, the Court ruled that original electronic documents are covered by the order that was made on October 15, 2021.²

For various “meeting documents” covered by the Court’s April 11, 2022 Order, the CTA has only provided the PDF versions of those documents, but not the original Microsoft One Note file:

1. Page 2 of Appendix C1 (for meeting on March 19, 2020)
2. Pages 15-16 of Appendix C2 (for meeting on March 20, 2020)
3. Pages 9-10 of Appendix C6 (for meeting on March 23, 2020)
4. The document for March 24, 2020 sent by the Attorney General of Canada titled “Carrier Asks 24 March 2020”.

Similar to MS Word files, MS One Note files contain metadata and history of edits to those files, or any “tracked changes” on those files. Although the CTA previously represented to the Court that there was no evidence of the Statement on Vouchers being discussed at those meetings, the Materials that have now been produced suggests otherwise.

The documents above are the meeting notes that relate directly to the Statement on Vouchers. The CTA is obligated to produce the original MS One Note file, which would contain the draft versions of these notes, and records of any changes made.

Conclusion

We trust that the CTA will address the above deficiencies **by April 29, 2022**. For greater certainty, the aforementioned deficiencies are those that we were able to identify at this time. If further deficiencies are identified, we will promptly bring them to your attention.

Yours truly,
EVOLINK LAW GROUP



SIMON LIN
Barrister & Solicitor

² *Air Passenger Rights v. Attorney General of Canada*, 2022 FCA 64 at paras. 17-24

This is **Exhibit “AK”** to the Affidavit of Dr. Gábor Lukács
affirmed before me on May 15, 2022

Signature



By Email

April 28, 2022

Evolink Law
4388 Still Creek Drive, Suite 237
Burnaby, BC
V5C 6C6

Attention: Simon Lin

Dear Mr. Lin:

Re: *Air Passenger Rights v AGC*
Court File No.: A-102-20

We are writing further to your emails dated April 21 and 22, and the attached letters.

Solicitor-Client Privilege

We can confirm that nothing which we have produced should be construed as a waiver of any privilege, nor would it affect any previous decisions of the Court ruling on the applicability of privilege to these documents.

You have asked about whether the Canadian Transportation Agency ("Agency") has withheld any documents over which privilege has been claimed in response to the Court's April 11 Order ("Additional Production Order").

We would refer you to the wording of the Additional Production Order. The Additional Production Order required that the Agency produce certain documents listed in the Appendix of the Reasons for this Order. For example, the Agency was ordered to produce all non-privileged documents in respect of the Agency's EC call on March 20, 2020. For ease of reference, the full wording of Appendix C2 of the Reasons of the Additional Production Order is as follows;

- C2. Documents for the March 20 EC Call.** All non-privileged documents in respect of the CTA's EC call on March 20, 2020, including but not limited to:
- (a) the meeting agenda;
 - (b) correspondences to schedule and/or set up the meeting;
 - (c) video or audio recordings of the meeting;
 - (d) meeting minutes;
 - (e) notes taken by or on behalf of any of the participants; and
 - (f) correspondences of the meeting's decisions and deliverables. [emphasis added]

We have not filed an objection on the basis of privilege. The Additional Production Order required that the Agency produce only non-privileged documents.

Section 318 of the *Federal Courts Rules* requires that a Tribunal transmit the documents requested and where the Tribunal objects to producing documents, it must inform the parties and the Administrator of the reasons for the objection. With respect to the Additional Production Order, the Agency has not objected to producing any responsive documents.

Twitter and @info messages

We would also refer you to the Additional Production Order regarding the Twitter and @info messages. For ease of reference, reproduced below is the wording of Appendix B4 of the Reasons for the Additional Production Order which references these messages;

B4. CTA's Info Email and Twitter Messages. All non-privileged documents sent to or from the CTA in respect of the Statement on Vouchers between March 9, 2020 and March 25, 2020 using:
(a) the CTA's Info email account (info@otc-cta.gc.ca); and
(b) the CTA's Twitter accounts in English (CTA_gc) and French (OTC_gc), including but not limited to Private Messages.

You have referenced Ms. Cuber's letter dated December 24, 2020, which states that the Agency received a "high volume of messages and inquiries from individuals concerning their personal air travel situations between March 9 and March 25...." . You also reference Mr. Turgeon's email dated March 24, 2020, which references "dozens of questions on the same topic".

The Court did not order that all of the messages to which you refer be produced. The Court ordered that non-privileged documents sent to or from the Agency in respect of the Statement on Vouchers, within the specified time period, be produced. These documents have been produced.

Original Microsoft One Note versions of documents

Despite the fact that original Microsoft version of the "meeting documents" referenced in on page 3 of your April 22, 2022 letter were not requested by the Applicant nor ordered to be produced by the Court, we are producing under separate cover these files.

Cross-Examination of Ms. Cuber

We acknowledge receipt of your Direction to Attend dated April 22, 2022. In this Direction, you are now seeking production of an additional twenty-five (25) categories of documents. This list of documents goes far beyond what a witness must provide when being cross-examined on an affidavit.

We intend to seek the Court's direction on the scope of any cross-examination which may take place and will be writing to the Court accordingly. We trust you will agree that the examination will not proceed until the Court provides its direction.

Yours truly,



Kevin Shaar
Counsel / Avocat
Canadian Transportation Agency / Office des transports du Canada
Legal Services Directorate / Services Juridiques, Direction générale des services soutien
15 Eddy Street, 19th Floor / 15 rue Eddy, 19^{ème} étage
Gatineau, Quebec K1A 0N9
Tel: 613-894-4260
Fax: 819-953-9269
Email: Kevin.Shaar@otc-cta.gc.ca
Email: Servicesjuridiques.LegalServices@otc-cta.gc.ca

c.c.: Sandy Graham and Lorne Ptack, Counsel for the Attorney General of Canada,
via email: sandy.graham@justice.gc.ca, Lorne.Ptack@justice.gc.ca

This is **Exhibit “AL”** to the Affidavit of Dr. Gábor Lukács
affirmed before me on May 15, 2022

Signature

April 28, 2022

VIA EMAIL

Canadian Transportation Agency
ATTN : Mr. Kevin Shaar
15 Eddy Street
Gatineau, Québec K1A 0N9

Dear Mr. Shaar,

RE: Air Passenger Rights v. AGC and CTA (A-102-20)

We write in response to your letter of today (“**Letter**”), responding to our letters on April 21 and 22, 2022. We use the same headings in the Letter for convenience.

Solicitor-Client Privilege

We note that our letter of April 21, 2022 simply requests the CTA and AGC to confirm if they are waiving privilege for a specific document that was disclosed, although the Court has allowed the privilege claim. Based on the Letter and lack of response from the AGC, we understand that the disclosure was not inadvertent and privilege has been waived.

With respect to our April 22, 2022 letter, we requested the CTA to confirm whether any documents have been withheld on the basis of privilege. Since the CTA’s Letter specifically identifies “solicitor-client privilege”, we understand that: (1) there were documents from the April 11, 2022 Order that the CTA claims to be subject to solicitor-client privilege, and (2) that those documents were withheld without the AGC having brought any motion to claim privilege, or even informing the Applicant of such.

The April 11, 2022 Order cannot to be read in isolation from the October 15, 2021 Order. It is clear that any claims to privilege for document production be decided by the Court, not the CTA itself. The CTA’s interpretation relying on the “non-privileged” terminology is unfounded. The same terminology appeared in the October 15, 2021 Order, where the Court ordered privilege claims be made by informal motion, supported by an affidavit.

Accordingly, please forthwith confirm if there will be a motion to claim privilege for documents that would have been covered by the April 11, 2022 Order but for the claim of privilege. If not, those documents must be produced immediately.

Twitter and @Info Messages

The CTA has failed to address why no Twitter private messages were produced, but instead a series of public Twitter tweets were provided. We refer you to the Reasons for Order on April 11, 2022 at para. 25. It is clear that the CTA acknowledged the existence of Twitter messages. Unfortunately, the CTA is continuing to refuse to produce the documents, despite a specific Court Order to that effect.

Ms. Cuber's letter on December 24, 2021 and Mr. Turgeon's email on March 24, 2020 was relied upon by the Applicant and the Court for the motion for the April 11, 2022 Order. The CTA did not dispute the Applicant's assertions that a high volume of messages (i.e., Twitter private messages and/or Info emails) regarding this subject-matter existed. It is not open for the CTA to "reinterpret" the evidence to now claim non-existence.

Original Microsoft One Note versions of documents


We refer you to the Court's Reasons for Order on April 11, 2022 at para. 23 where the same argument was rejected. We look forward to receiving the documents in short order.

Cross-Examination of Ms. Cuber

We have received your letter to the Court, which was copied to our office. We have responded accordingly, outlining our position in that regard. With respect to the CTA's assertion that it is not required to produce those documents at the cross-examination, we refer you to the letter that we sent to the Court today.

Considering the CTA has acknowledged service of the Direction to Attend, the CTA is legally bound to present its affiant on May 3, 2022. The CTA's request for directions does not serve as a stay of the Direction to Attend.

Yours truly,
EVOLINK LAW GROUP



SIMON LIN, Barrister & Solicitor

Cc: Mr. Sandy Graham and Mr. Lorne Ptack, counsel for the Respondent

This is **Exhibit “AM”** to the Affidavit of Dr. Gábor Lukács
affirmed before me on May 15, 2022

Signature

April 28, 2022

VIA EMAIL

Canadian Transportation Agency
ATTN : Mr. Alan Matte
60 Rue Laval
Gatineau, Québec J8X 3G9

Dear Mr. Matte,

RE: Air Passenger Rights v. AGC and CTA (A-102-20)

We are writing regarding the cross-examination of the CTA's affiant on May 3, 2022.

As you are aware, prior to the COVID-19 pandemic, there was technically no obligation to provide, in advance of the cross-examination, the documents requested in the Direction to Attend. However, the practice appears to have changed since March 2020, and the courts expect the parties to reasonable coordinate/cooperate when the court reporter is attending remotely.

We trust that the CTA would consider providing the requested documents in advance so it would not create unnecessary difficulties for the court reporter when documents are provided only last minute. Moreover, some courts have previously noted that if an affiant presents voluminous documents only on the day of the cross-examination, there may be cost consequences.

We respectfully request that the CTA provide the requested documents, in advance, on May 2, 2022.

Yours truly,
EVOLINK LAW GROUP

Simon Lin

SIMON LIN
Barrister & Solicitor

Cc: Mr. Sandy Graham and Mr. Lorne Ptack, counsel for the Respondent

This is **Exhibit “AN”** to the Affidavit of Dr. Gábor Lukács
affirmed before me on May 15, 2022

Signature



VIA EMAIL: FCARegistry-CAFGreffe@cas-satj.gc.ca

April 28, 2022

The Judicial Administrator
Federal Court of Appeal
90 Sparks Street, 1st Floor
Ottawa, Ontario
K1A 0H9

Dear Sir/Madam:

Re: *Air Passenger Rights v Attorney General of Canada*
Court File No.: A-102-20

We are writing to request a Case Management Teleconference to address the Applicant's latest request for production of documents.

Pursuant to the Court's Order dated April 11, 2022 ("Additional Production Order"), the Canadian Transportation Agency ("Agency") was ordered to produce additional documents to the parties and was also ordered to file an affidavit from the individual responsible for producing documents further to the Court's previous October 15, 2021 Order ("October Order").

The additional production has been made¹ and the affidavit has been filed.²

The Applicant has sent a Direction to Attend proposing to cross-examine the Agency's affiant on May 3, 2022. and is now seeking the production of an additional twenty-five (25) categories of documents.

In the Agency's submission, the Court's intervention is required to avoid any unnecessary steps in this proceeding, limit the number of objections during cross-examination, and to move the matter forward in an efficient and orderly manner towards a hearing on the merits.

Background

The Application for Judicial Review is in relation to a Statement on Vouchers, published on the Agency's website on March 25, 2020, shortly after the onset of the COVID-19 pandemic. The Application seeks judicial review of the Statement on Vouchers and alleges, among other things,

¹ Original material consisting of documents, exhibits and certificate filed April 21, 2022, Court File No. A-102-20, Recorded Entries.

² Affidavit of Barbara Cuber dated April 21, 2022, Court File No. A-102-20, Doc. #122.

that the issuance of the Statement on Vouchers gives rise to a reasonable apprehension of bias on the part of the Agency.³

The Notice of Application issued on April 9, 2020, included a request for production of the Agency's record pursuant to Rule 317 of the *Federal Courts Rules*, and sought the following documents;

1. Complete and unredacted copies of all correspondences, meetings, notes, and/or documents involving the appointed members of the Agency relating to the Statement [on Vouchers] and/or the issuance of vouchers or credits in relation to the COVID-19 incident, including both before and after publication of the Statement [on Vouchers];
2. The number of times the URLs for the Statements [on Vouchers] were accessed...
3. Complete and unredacted copies of all correspondences, meetings, notes, and/or documents between the Canadian Transportation Agency and the travel industry ...from February 15, 2020 to the present in respect of issuing of credits, coupons, or vouchers to passengers in lieu of a refund for travel affected by COVID-19; and
4. Complete and unredacted copies of all correspondences, emails, and/or complaints that the Agency received from passengers between February 15, 2020 to the present in respect of the issuing of credits, coupons, or vouchers to passengers in lieu of a refund for travel affected by COVID-19.⁴

On August 25, 2020, Mr. Lukacs, President (Founder and Coordinator) of the Applicant, submitted a formal request to the Agency under the *Access to Information Act* for the following documents;

All documents, including e-mails, notes, meeting minutes, internal correspondences, and any other written record, relating to the drafting, review, approval, and/or publication of the Statement on Vouchers (<https://otc-cta.gc.ca/eng/statement-vouchers>). The time period we request is March 11, 2020 to April 9, 2020.⁵

Mr. Lukacs received documents in response to his Access to Information request on October 16, 2020, and on December 23, 2020.⁶ He submitted a complaint to the Office of the Information Commissioner of Canada on November 23, 2020 with respect to this request.⁷

³ *Air Passenger Rights v Attorney General of Canada*, 2022 FCA 64 at paras 3-4.

⁴ Notice of Application dated April 9, 2020, Federal Court of Appeal Recorded Entries, Court File No. A-102-20, Doc. #1.

⁵ Affidavit of Gabor Lukacs dated January 3, 2021 at para 61, Federal Court of Appeal Recorded Entries, Court File No. A-102-20, Doc. #45.

⁶ Affidavit of Gabor Lukacs dated January 3, 2021 at paras 64 and 69, Federal Court of Appeal Recorded Entries, Court File No. A-102-20, Doc. #45.

⁷ Affidavit of Gabor Lukacs dated January 3, 2021 at para. 68, Federal Court of Appeal Recorded Entries, Court File No. A-102-20, Doc. #45.

The Applicant brought a motion dated January 3, 2021 seeking production of documents from the Agency pursuant to subsection 318(4) of the *Federal Courts Rules*.⁸ The documents sought in this request were as follows;

An Order, pursuant to Rule 318(4), that within ten days the Agency transmit in electronic format to the Registry and to the Applicant complete and unredacted copies of all records from March 9 - April 8, 2020 in respect of the Publications (defined further below), including but not limited to emails, meeting agendas, meeting minutes, notes, draft documents, and memos.⁹

By decision dated October 15, 2021 ("October Disclosure Order"), the Court ordered that the Agency produce documents regarding the Statement on Vouchers.

[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.

By motion dated January 16, 2022, the Applicant claimed that the Agency had failed to comply with the October Disclosure Order, and sought various forms of relief, including additional production of documents. Attached to the Notice of Motion is a schedule of documents that the Applicant described as "Withheld Materials". This schedule lists twenty-one (21) categories of documents that the Applicant alleged were being withheld by the Agency, identified as items A1-A6, B1-B5, and items C1 to C10.¹⁰

In the Additional Production Order dated April 11, 2022, the Court addressed whether the Agency had complied with the October Disclosure Order. The Agency was ordered to produce documents

⁸ [SOR/98-106](#); *Air Passenger Rights v Attorney General of Canada*, [2021 FCA 112](#) at para 1.

⁹ Notice of Motion dated January 3, 2021, Federal Court of Appeal Recorded Entries, Court File No. A-102-20, Doc. #52.

¹⁰ Notice of Motion dated January 16, 2022, Federal Court of Appeal Recorded Entries, Court File No. A-102-20, Doc. #52.

that had previously been produced but this time required that they be produced in Microsoft Word format. Of the 21 categories of documents listed in the Applicant's motion for additional disclosure, the Court Ordered the Agency to produce the documents identified by the Applicant as items A1, A5, B4, C2. The Court also ordered that if the Statement on Vouchers was discussed during meetings on March 19, 22 and 23, it must disclose documents identified as items C1, C5 and C6 of the Reasons for Order. The Court did not Order that the remaining categories of documents sought by the Applicant be produced.¹¹

In the Additional Production Order, the Court also ordered that the Agency serve and file an affidavit from the person responsible for complying with the October Order detailing what has been done to ensure the required disclosure was made.¹²

The production required of the Agency as a result of the Additional Production Order has been provided to the parties. An updated Certificate, attesting to the authenticity of the additional documents has been filed with the Court.¹³ The affidavit of Barbara Cuber dated the 21st day of April, was filed with the Court that same day. It is 12 pages long and describes in great detail the Agency's search for documents in response to the October Order.

On April 22, 2022, the Agency was sent the Direction to Attend in relation to Ms. Cuber's affidavit. The Direction to Attend requests that Ms. Cuber attend the examination and bring with her an additional 25 categories of documents.

The Agency's Affidavit

The Additional Production Order required the filing of an affidavit from the person responsible for ensuring the Agency's compliance with the October Order. Ms. Barbara Cuber, Counsel at the Agency, swore the affidavit which provided the information outlined in the Additional Production Order, including the steps taken to gather and preserve documents, who conducted searches for documents, and what record-keeping systems are maintained at the Agency.

It can be inferred from the Court's reasons that the purpose of the affidavit is to establish that the Agency has complied with the October Order. In the Agency's submission, the affidavit is detailed and provides this assurance.

The Additional Production Order contemplates that there would be cross-examination of the Agency's affiant. However, the Applicant's Direction to Attend goes far beyond the four corners of the affidavit, treats the cross-examination as discovery, and is an attempt at conducting another round of document production from the Agency.

¹¹ *Air Passenger Rights v. Attorney General of Canada*, 2022 FCA 64.

¹² *Ibid.*

¹³ Original material consisting of documents, exhibits, and certificate pursuant to the order dated April 11, 2022, Federal Court of Appeal Record Entries, Court File No. A-102-20.

The Applicant is Exceeding the Scope of Cross-Examination on Affidavit

The proposed cross-examination of the Agency's affiant is governed by Rule 91 of the *Federal Courts Rules*. In respect of a cross-examination on an affidavit, the direction to attend may direct the person to be examined to produce for inspection at the examination all documents and other material in that person's possession, power or control that are relevant to the application or motion.

What is relevant to the Application, in this case, has already been determined by the Court in the October Disclosure Order and the Additional Production Order.

The Federal Court has stated that Rule 91 may not be used in an application for judicial review to expand production of documents so that the process becomes similar to discovery of documents in an action. Production is limited to what is required by relevancy.¹⁴ A direction to attend is not about expanding production of documents beyond what is allowed pursuant to Rule 317 of the *Federal Courts Rules*. Rule 317 governs production of documents by a tribunal.

"In my view, Rule 317, which is the rule of narrower application, governs production of documents by a tribunal. A demand is made of the tribunal and if the tribunal objects, it can do so following the procedure in Rule 318. A Direction to Attend issued under Rule 91 can be used to compel the deponent of an affidavit on the part of the tribunal to produce at the cross examination those documents referred to in the demand under Rule 317 for which an objection to production has not been upheld. But, in the case of a deponent on behalf of the tribunal, it is not appropriate to use Rule 91 to expand the scope of the demand for production beyond what has been demanded under Rule 317. It is clear that production under Rule 317 is circumscribed in a way that a demand under Rule 91 is not. For example, Rule 94 limits objections to production to claims of privilege which is a narrower ground that is available under Rule 318. See *Canadian Arctic Resources Committee Inc. v. Diavik Diamond Mines Inc.*, [2000 CanLII 15536 \(FC\)](#), [2000] F.C.J. No. 910 (Prothonotary Hargrave)."¹⁵

As further detailed below, the additional 25 categories of documents listed by the Applicant in the Direction to Attend are irrelevant to the Application. In the Agency's submission, the Applicant is seeking discovery rather than documents relevant to the Application. As such, the documents listed in the Direction to Attend should not be produced.

In addition to being irrelevant, many of the documents now being sought are clearly covered by solicitor-client privilege.

The Direction to Attend Seeks Irrelevant documents

The Direction to Attend lists 25 categories of documents. None of the documents listed are relevant to the Application or any pending motion. Put simply, the Agency has provided an affidavit setting out the steps taken to produce relevant documents. The Applicant is now asking that the Agency

¹⁴ *Stanfield v Canada (Minister of National Revenue)*, [2004 FC 584](#) at para 18.

¹⁵ *Bristol-Myers Squibb Co. v Canada (Attorney General)*, [2002 FCT 208](#) at para 17.

produce all documents that may be related to the affidavit, regardless of the fact that they are irrelevant to the Application.

For example, the Applicant seeks documents in relation to statements made by the Agency's affiant in which she describes steps she took to comply with the October Order. The Applicant seeks;

- (a) copies of the notification sent on April 14, 2020, to relevant personnel including Members of the Applicant's request for documents pursuant to Rule 317.
- (b) Copies of any responses to the notification referred to in paragraph (a);
- (c) Copies of the documents produced by Ms. Lesley Robertson which were determined to be irrelevant; and
- (d) A printout from the teleconferencing platform listing all meetings between March 9 and March 25 that were recorded;

Clearly, the Applicant is treating the cross-examination of the Agency's affiant as discovery, something which the Federal Court has explicitly stated should not be permitted.

The Direction to Attend Seeks Documents Protected by Solicitor-Client Privileged

The Direction to Attend also seeks documents that are clearly subject to solicitor-client privilege. Paragraphs 1, 2, 3, 6, 8 and 21, seeks copies of communications between Counsel and staff or Members of the Agency. The Agency submits that communications subject to solicitor-client privilege need not be produced.

Conclusion

The Agency is seeking the Court's intervention prior to the cross-examination so as to avoid any unnecessary steps in this proceeding. Without the Court's intervention, the Agency will have no choice but to object to the production of the documents during the cross-examination, which will inevitably have to be determined by the Court and may require the Agency's affiant to be reexamined. Furthermore, given the existence of the October Disclosure Order and the Additional Production Order, and considering the extent of the new request for documents, the Direction to Attend raises serious concerns regarding the principle of proportionality set out in Rule 3(b) of the *Federal Courts Rules*.

Yours truly,



Kevin Shaar
Counsel / Avocat
Canadian Transportation Agency / Office des transports du Canada
Legal Services Directorate / Services Juridiques, Direction générale des services soutien
15 Eddy Street, 19th Floor / 15 rue Eddy, 19^{ème} étage
Gatineau, Quebec K1A 0N9
Tel: 613-894-4260
Fax: 819-953-9269
Email: Kevin.Shaar@otc-cta.gc.ca
Email: Servicesjuridiques.LegalServices@otc-cta.gc.ca

c.c.: Simon Lin, Counsel for the Applicant via email: simonlin@evolinklaw.com

c.c.: Sandy Graham and Lorne Ptack, Counsel for the Attorney General of Canada,
via email: sandy.graham@justice.gc.ca, Lorne.Ptack@justice.gc.ca

This is **Exhibit “AO”** to the Affidavit of Dr. Gábor Lukács
affirmed before me on May 15, 2022

Signature

April 28, 2022

VIA EMAIL

Judicial 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)

We are counsel for the Applicant. Please bring this letter to Gleason J.A.'s attention. This letter relates to Her Ladyship's Order on April 11, 2022, particularly the cross-examination permitted in that Order,¹ and also responding to the CTA's letter of today (the "**Letter**").

The CTA's Letter is an improper attempt to bring a motion under the guise of a correspondence without any evidence, and to re-litigate the Gleason J.A.'s October 15, 2021 and April 11, 2022 orders. If the CTA objects to the production of documents in the Direction to Attend, it may bring a motion under Rule 94 of the *Federal Courts Rules* ("**FCR**").

Of note the two Federal Court cases in page 5 of the Letter deals with cross-examinations of a respondent's affidavit under Rule 307, **not** an affidavit specifically ordered by the Court to address issues arising from a respondent's retention and search of relevant documents. Based on the CTA's theory, the Applicant would be deprived of its court-ordered right to test whether the CTA properly retained and searched for documents it was ordered to disclose.

Similarly, the CTA's bald assertions of solicitor-client privilege should not be entertained in an informal letter, without the Court being provided with unredacted copies of the documents that may be at issue. Gleason J.A. has already provided a clear procedure for addressing claims of privilege.² It is for the Respondent (AGC) to make privilege claims, not the CTA.

Considering that Rule 94 and Gleason J.A.'s reasons for judgment on October 15, 2021 at paras. 28-31 already contain clearly defined processes for addressing the CTA's concerns, the Applicant submits that a case conference is unnecessary. However, should the Court find that a case conference be necessary, the Applicant proposes that Gleason J.A. preside over that conference because the Applicant also wishes to briefly address the Court to correct a clerical error in the April 11 Order. Moreover, Her Ladyship is intimately familiar with this case,

¹ *Air Passenger Rights v. A.G.C.*, 2022 FCA 64 at para. 50 (CanLII link not available)

² [Air Passenger Rights v. Canada \(Attorney General\)](#), 2021 FCA 201 at paras. 28-31.


having rendered numerous decisions in this case in the past year, and presided over the last case conference.

Although the CTA has made lengthy submissions regarding the Applicant's Direction to Attend, it appears that the CTA may have overlooked that their Letter did not contain a copy of that document. A copy of the Direction to Attend is enclosed for the Court's convenience.

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

Yours truly,

EVOLINK LAW GROUP



SIMON LIN
Barrister & Solicitor

ENCLS: Direction to Attend for May 3, 2022.

Cc: Mr. Sandy Graham and Mr. Lorne Ptack, counsel for the Attorney General of Canada, and Mr. Allan Matte and Kevin Shaar, counsel for the Canadian Transportation Agency.

This is **Exhibit “AP”** to the Affidavit of Dr. Gábor Lukács
affirmed before me on May 15, 2022

Signature

From: **Kevin Shaar** <Kevin.Shaar@otc-cta.gc.ca>

Date: Mon, May 2, 2022 at 1:09 PM

Subject: A-102-20: Direction from the Court

To: simonlin@evolinklaw.com <simonlin@evolinklaw.com>, Lorne.Ptack@justice.gc.ca <Lorne.Ptack@justice.gc.ca>, sandy.graham@justice.gc.ca <sandy.graham@justice.gc.ca>

Cc: Services Juridiques / Legal Services (OTC/CTA) <Servicesjuridiques/LegalServicesOTC/CTA@otc-cta.gc.ca>

383

Good afternoon,

Pursuant to today's Direction from the Court, the Agency will be bringing a motion under Rule 94 of the Federal Courts Rules. Accordingly, we trust that you will agree that the examination will not proceed tomorrow.

We look forward to working with counsel to find an alternative date once the Court has ruled on the matter.

Sincerely,

Kevin Shaar

Avocat/Counsel

Office des Transports du Canada/Canadian Transportation Agency

15 Eddy, Gatineau (QC) K1A 0N9

Tél./Tel: 613-894-4260

Kevin.Shaar@otc-cta.gc.ca

This is **Exhibit “AQ”** to the Affidavit of Dr. Gábor Lukács
affirmed before me on May 15, 2022

Signature

May 2, 2022

VIA EMAIL

Canadian Transportation Agency
ATTN : Mr. Kevin Shaar
15 Eddy Street
Gatineau, Québec K1A 0N9

Dear Mr. Shaar,

RE: Air Passenger Rights v. AGC and CTA (A-102-20)

We acknowledge receipt of your email this afternoon, requesting that the cross-examination on May 3, 2022 be postponed.

We draw to your attention that the Applicant had informed the CTA that the Applicant intended to cross-examine the CTA's affiant, and also made numerous good-faith attempts to canvass availabilities, on April 13, 14, and 21, 2022. The CTA's failure to provide any substantive response left the Applicant with no choice but to serve the Direction to Attend on April 22, 2022, in compliance with the timelines under the *Federal Courts Rules*.

The CTA had ample opportunity to prepare and file a Rule 94 motion had it genuinely intended to do so. Indeed, the CTA acknowledged that it was served with the Direction to Attend on April 22, 2022. Unfortunately, the CTA has ignored the *Federal Courts Rules* and the strict timelines under Gleason J.A.'s April 11, 2022 order, and unilaterally attempted to call a case management conference late on April 28, 2022. The Applicant has immediately brought to the CTA's attention that any objections regarding documents should be addressed under Rule 94. Unfortunately, the CTA continued to ignore the *Federal Courts Rules*.

The Court's direction clearly refused the CTA's attempt to derail the cross-examination, and does not serve as a basis to postpone the cross-examination. The cross-examination on Ms. Cuber's affidavit **will proceed** as scheduled on May 3, 2022 at 12:00PM Eastern Time.

Yours truly,
EVOLINK LAW GROUP



SIMON LIN, Barrister & Solicitor

Cc: Mr. Sandy Graham and Mr. Lorne Ptack, counsel for the Respondent

This is **Exhibit “AR”** to the Affidavit of Dr. Gábor Lukács
affirmed before me on May 15, 2022

Signature

From: **Kevin Shaar** <Kevin.Shaar@otc-cta.gc.ca>
Date: Tue, May 3, 2022 at 8:41 AM
Subject: RE: A-102-20: Direction from the Court
To: Simon Lin <simonlin@evolinklaw.com>
Cc: Lorne.Ptack@justice.gc.ca <Lorne.Ptack@justice.gc.ca>, sandy.graham@justice.gc.ca <sandy.graham@justice.gc.ca>, Services Juridiques / Legal Services (OTC/CTA) <Servicesjuridiques/LegalServicesOTC/CTA@otc-cta.gc.ca>

Hello Mr. Lin,

To be clear, the Agency and its affiant will not attend the cross-examination at noon today. As previously mentioned, the Agency is preparing a motion under Rule 94 of the Federal Courts Rules, which will be promptly filed with the Court.

We will happy to reschedule the cross-examination once the Court has ruled on the motion.

Regards,

Kevin Shaar

Avocat/Counsel

Office des Transports du Canada/Canadian Transportation Agency

15 Eddy, Gatineau (QC) K1A 0N9

Tél./Tel: 613-894-4260

Kevin.Shaar@otc-cta.gc.ca

From: Simon Lin <simonlin@evolinklaw.com>
Sent: Monday, May 2, 2022 4:36 PM
To: Kevin Shaar <Kevin.Shaar@otc-cta.gc.ca>
Cc: Lorne.Ptack@justice.gc.ca; sandy.graham@justice.gc.ca; Services Juridiques / Legal Services (OTC/CTA) <Servicesjuridiques/LegalServicesOTC/CTA@otc-cta.gc.ca>
Subject: Re: A-102-20: Direction from the Court

Good afternoon,

Please see the enclosed letter.

Thank you.

Kind Regards,

Simon Lin
Barrister & Solicitor

evolink LAW

Evolink Law Group
237-4388 Still Creek Drive, Burnaby, B.C. V5C 6C6
T: 604-620-2666
F: 888-509-8168

www.evolinklaw.com

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We look forward to working with counsel to find an alternative date once the Court has ruled on the matter.

Sincerely,

Kevin Shaar

Avocat/Counsel

Office des Transports du Canada/Canadian Transportation Agency

15 Eddy, Gatineau (QC) K1A 0N9

Tél./Tel: 613-894-4260

Kevin.Shaar@otc-cta.gc.ca

This is **Exhibit “AS”** to the Affidavit of Dr. Gábor Lukács
affirmed before me on May 15, 2022

Signature

Re: A-102-20: Direction from the Court

Simon Lin <simonlin@evolinklaw.com>

Tue, May 3, 2022 at 5:49 PM

To: Kevin Shaar <Kevin.Shaar@otc-cta.gc.ca>

Cc: "Lorne.Ptack@justice.gc.ca" <Lorne.Ptack@justice.gc.ca>, "sandy.graham@justice.gc.ca" <sandy.graham@justice.gc.ca>, "Services Juridiques / Legal Services (OTC/CTA)" <Servicesjuridiques/LegalServicesOTC/CTA@otc-cta.gc.ca>

Good morning Mr. Shaar,

A proper Direction to Attend had been served. The CTA and the affiant have no right of veto. An intention to bring a motion does not override the obligation to attend a cross-examination.

If the CTA's affiant does not attend, a certificate of non-attendance will be obtained. Furthermore, the Applicant will be seeking remedies under Rule 97, including an order to compel attendance and costs.

Thank you.

Kind Regards,

Simon Lin
Barrister & Solicitor



Evolink Law Group

237-4388 Still Creek Drive, Burnaby, B.C. V5C 6C6

T: 604-620-2666

F: 888-509-8168

www.evolinklaw.com

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We will happy to reschedule the cross-examination once the Court has ruled on the motion.

Regards,

Kevin Shaar

Avocat/Counsel

Office des Transports du Canada/Canadian Transportation Agency

15 Eddy, Gatineau (QC) K1A 0N9

Tél./Tel: 613-894-4260

Kevin.Shaar@otc-cta.gc.ca

From: Simon Lin <simonlin@evolinklaw.com>

Sent: Monday, May 2, 2022 4:36 PM

To: Kevin Shaar <Kevin.Shaar@otc-cta.gc.ca>

Cc: Lorne.Ptack@justice.gc.ca; sandy.graham@justice.gc.ca; Services Juridiques / Legal Services (OTC/CTA) <Servicesjuridiques/LegalServicesOTC/CTA@otc-cta.gc.ca>

Subject: Re: A-102-20: Direction from the Court

Good afternoon,

Please see the enclosed letter.

Thank you.

Kind Regards,

Simon Lin

Barrister & Solicitor

evolink LAW

Evolink Law Group

237-4388 Still Creek Drive, Burnaby, B.C. V5C 6C6

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We look forward to working with counsel to find an alternative date once the Court has ruled on the matter.

Sincerely,

Kevin Shaar

Avocat/Counsel

Office des Transports du Canada/Canadian Transportation Agency

15 Eddy, Gatineau (QC) K1A 0N9

Tél./Tel: 613-894-4260

Kevin.Shaar@otc-cta.gc.ca

This is **Exhibit “AT”** to the Affidavit of Dr. Gábor Lukács
affirmed before me on May 15, 2022

Signature

Simon Hin appeared by videoconference with a court reporter from Mainland Reporting Services on the date and the time set forth on the appointment. By the hour of 9:32 (a.m.) (p.m.) on the same day *Pacific Standard Time* Barbara Cuber did not log in to appear via videoconference as requested.
per Bob Preston

Official Reporter

FEDERAL COURT OF APPEAL

BETWEEN:

AIR PASSENGER RIGHTS

Applicant

– and –

ATTORNEY GENERAL OF CANADA

Respondent

– and –

CANADIAN TRANSPORTATION AGENCY

Intervener

DIRECTION TO ATTEND

TO: Barbara Cuber

YOU ARE REQUIRED TO ATTEND A CROSS-EXAMINATION for your affidavit affirmed on April 21, 2022 on behalf the Canadian Transportation Agency [**Affidavit**], on **Tuesday, May 3, 2022 at 12:00 pm (Eastern Time)** via Zoom:
Meeting ID: 853 1187 7451 Passcode: 536989

YOU ARE ALSO REQUIRED TO BRING WITH YOU and produce at the examination the following documents and things:

- A. Notification of Agency Personnel on April 14, 2020 Regarding Application**
 - 1. With reference to the Affidavit at paragraph 8, the original notification that was sent on April 14, 2020, including the names of the recipients.
 - 2. With reference to the Affidavit at paragraph 8, all the responses from the recipients in respect of the notification mentioned therein.
- B. Inquiries for Documents with Former Agency Personnel**
 - 3. All written correspondences, between October 15, 2021 to April 22, 2022, between Ms. Cuber, and Ms. Marcia Jones (former Chief Strategy Officer) or Mr. Scott Streiner (former Chairperson), in respect of compliance with the October Order (as defined in the Affidavit) and/or April Order (as defined in the Affidavit), including any requests to Ms. Jones and/or Mr. Streiner to assist in providing and/or locating documents.

This is **Exhibit “AU”** to the Affidavit of Dr. Gábor Lukács
affirmed before me on May 15, 2022

Signature

Mainland Reporting Services (2002) Inc.

Suite 410, 601 6th St
 New Westminster, BC V3L 3C1
 Phone: 604.520.3838
 Fax: 604.522.2426

Simon Lin
 Simon Lin Law Corporation
 237-4388 Still Creek Drive
 Burnaby, BC V5C 6C6

Invoice #6117

Date	Terms
05/03/2022	2% 10 Net 30

Job #4189 on 05/03/2022 at 9:00 AM PT

Case: Air Passenger Rights v. Attorney General of Canada
Reporter: Robert Preston
Icbc File#:
Location: Conference Room

Description	Price	Qty	Amount
Examination for Discovery of Barbara Cuber			
Full Day Attendance (non-attendance stamp provided)	\$ 625.00	1.00	\$ 625.00
Zoom Hook-Up Fee	\$ 75.00	1.00	\$ 75.00
			<u>\$ 700.00</u>

Subtotal: \$ 700.00

Sales Tax: \$ 35.00

Amount Due: \$ 735.00

Paid: \$ 0.00

Balance Due:	\$ 735.00
Payment Due:	06/02/2022

If paid after 06/02/2022 pay this amount: \$ 749.70

VENDOR 5006075
 ADR VENDOR 5001614
 GST# 85395 5938 RT0001

Thank You for Choosing Mainland Reporting

This is **Exhibit “AV”** to the Affidavit of Dr. Gábor Lukács
affirmed before me on May 15, 2022

Signature

FEDERAL COURT OF APPEAL

BETWEEN:

AIR PASSENGER RIGHTS

Applicant

- and -

ATTORNEY GENERAL OF CANADA

Respondent

- and -

CANADIAN TRANSPORTATION AGENCY

Intervener

**WRITTEN REPRESENTATIONS OF THE INTERVENER,
CANADIAN TRANSPORTATION AGENCY****(Pursuant to January 26, 2022 Direction of Justice Gleason)**

PART I – OVERVIEW & STATEMENT OF FACTS**Overview**

1. In this judicial review proceeding, the Canadian Transportation Agency ("Agency") has disclosed material in its possession to the Applicant, as required by an order of this Court dated October 15, 2021 ("Order").¹ That Order was made pursuant to Rule 318 of the *Federal Courts Rules*.
2. In the month following this disclosure, the Applicant and its counsel have sent five letters seeking more documents. The Agency has communicated that, having searched extensively, it has not found such documents or that some documents are beyond the Order's scope. The Applicant has now filed a motion seeking the production of 21 documents or categories of documents. It erroneously claims that these documents should have been disclosed and that

¹ *Air Passenger Rights v Canada (Attorney General)*, [2021 FCA 201](#) [October 2021 Court Order].

the Agency has withheld them.

3. The Applicant does not specify the rule under which it seeks an order for production and accordingly, the Agency submits that the motion should be considered under Rule 318 of the *Federal Courts Rules* and the principles applicable thereto.
4. In making its claims, the Applicant ignores three considerations applicable to the Order and to tribunal disclosure under Rule 318.
5. First, the Agency was only required to produce the documents that come within the Order's scope. In doing so, the Agency was required to search for and disclose responsive documents falling into the categories described in the Order.
6. Second, the Agency cannot produce documents that are not in its possession. The Agency cannot disclose documents that never existed, no longer exist or are not otherwise within its possession.
7. And third, Rule 318 does not serve the same purpose as document discovery. Tribunal disclosure does not entitle the Applicant to conduct a fishing expedition or to require the Agency to perform endless searches.
8. The Agency herein provides its response to each item the Applicant seeks to obtain. The Agency is providing a fresh version of one document that was previously disclosed (Item A4 in Schedule "A" of the Applicant's motion). The Agency submits that it cannot be required to produce non-responsive documents or documents it does not possess. Accordingly, the Agency submits that the motion for production should be dismissed. That said, the Agency remains committed to ensuring compliance with the Order or any future order for production this Court may make.

Background and Facts

9. On March 25, 2020, the Agency posted a statement on its website entitled the "Statement on Vouchers" ("Statement"). The Applicant has sought judicial review of the Statement and claims that the issuance, distribution and subsequent referencing of the website statement and information page (collectively referred to as "the publications") raise a reasonable

apprehension of bias and/or are contrary to the Agency's *Code of Conduct for Members of the Agency* ("*Code of Conduct*")² for the Agency or the members who supported the publications. The Application also claims that the members have exceeded or lost jurisdiction to hear any future complaints of passengers about refunds from air carriers related to the COVID-19 pandemic.

10. Several interlocutory rulings have been made in this proceeding. For present purposes, two are significant. First, in rejecting the Applicant's motion for an interlocutory injunction, Justice MacTavish found that the Statement does not affect rights, impose legal obligations or cause prejudicial effects.³ Second, in considering a motion to dismiss, Justice Webb ruled that the reasonable apprehension of bias claim would be heard on its merits.⁴ The proceeding continues on this basis.

11. On January 4, 2021, the Applicant filed a motion seeking the disclosure of the following documents pursuant to Rule 318 or Rule 41 of the *Federal Courts Rules*:

Complete and unredacted copies of all records from March 9 – April 8, 2020 in respect of the Publications, including but not limited to emails, meeting agendas, meeting minutes, notes, draft documents, and memos.

12. In the Order, Justice Gleason granted this motion in part and required the Agency to disclose documents sent to or from a member of the CTA, 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. Documents post-dating the Statement's publication, purely internal documents not shared with Agency members, and privileged documents were not subject to disclosure.

13. After the Order issued, it rested with the Agency to search for and identify responsive documents and to disclose only these.

² *Code of Conduct for Members of the Agency*, Exhibit D of the affidavit of Gábor Lukács, affirmed January 16, 2022, Motion Record of the Applicant dated January 17, 2022, Volume 1, Tab 2D at 50 [*Code of Conduct*].

³ *Air Passengers Rights v Canada (Transportation Agency)*, [2020 FCA 92](#) at paras [20](#), [27](#) (Leave to Appeal to the Supreme Court of Canada refused: *Air Passenger Rights v Canadian Transportation Agency*, [2020 CanLII 102983 \(SCC\)](#)).

⁴ *Air Passenger Rights v Canada (Transportation Agency)*, [2020 FCA 155](#) at paras [32-34](#).

14. The Agency disclosed approximately 160 pages of responsive correspondence, drafts and meeting documents in its possession on December 14, 2021 and one further document on December 24, 2021. By December 17, the Applicant had produced a list of alleged deficiencies in the disclosure package and by December 20, it was employing the language of contempt of court against the Agency and its personnel. The Agency responded to these and other communications and in doing so, it provided a new document as well as different versions of disclosed documents to show the author of changes made to drafts; it explained that it had searched for but not found documents sought; and it indicated that certain documents were outside the Order's scope.⁵ By January 17, 2022, the Applicant filed a contempt motion against the Agency and its personnel in connection with this disclosure. The Court has now ordered that the Applicant's motion be bifurcated and that only the portion seeking document production be pursued at this time.
15. The Agency has informed the Applicant that the disclosure package was the result of several searches; consultations with several persons within the Agency; and a review of thousands of pages of material.⁶ The Applicant does not dispute the adequacy of the search but instead makes unsupported claims, based on speculation, that the Agency possesses and is withholding further documents.

PART II – STATEMENT OF THE POINTS IN ISSUE

16. The issue to be decided is whether this Court should order the Agency to produce the items identified in Schedule "A" of the Notice of Motion.⁷

PART III – STATEMENT OF SUBMISSIONS

17. The Agency submits that it has disclosed the responsive documents in its possession, as required by the Order. Accordingly, the Agency submits that it should not be required to

⁵ Exhibits AO to AV of the affidavit of Gabor Lukacs, affirmed on January 16, 2022, Motion Record of the Applicant dated January 17, 2022, Volume 1, Tab 2AO to 2AV at 186 to 243.

⁶ Exhibit AQ of the affidavit of Gabor Lukacs, affirmed on January 16, 2022, Motion Record of the Applicant dated January 17, 2022, Volume 1, Tab 2AQ at 204.

⁷ Schedule "A" of the Notice of Motion, Motion Record of the Applicant dated January 17, 2022, Volume 1, Tab 1 at 9-13 [*Withheld Materials*].

produce further documents.

18. In these submissions, the Agency outlines the documents it does and does not have in its possession and the reasons why certain documents were determined to be outside the scope of the Order.
19. The Agency submits that this motion should be considered in light of the principles applicable to disclosure under Rules 317 and 318 of the *Federal Courts Rules*. Specifically, disclosure of material in the possession of a tribunal does not serve the same purpose as document discovery; it forms part of judicial review proceedings, which are meant to be summary in nature.⁸ Courts have held that the rules around disclosure of a tribunal's record "do not permit a party to ask the tribunal to prepare new documents or to do research in existing documents, any more than they permit a party to obtain existing documents from the tribunal which are in no way related to the impugned decision."⁹
20. In considering whether further document production is warranted in this case, the Agency submits that three considerations apply. First, the Agency is not required to disclose documents that are beyond the Order's scope. Second, the Agency cannot be required to produce documents that are not in its possession. And third, the Agency's obligation to disclose its record should not be conflated with the process of document discovery.

The Agency is not required to disclose documents that are beyond the Order's scope

21. The Order identified three categories of documents for disclosure, as opposed to a specific list of identifiable documents to produce. As a result, the obligation rested with the Agency to search its records, and to identify and disclose responsive documents based on its reading of the Order's scope.
22. The Applicant now speculates that there must be additional responsive documents that have been withheld. This is not the case. The Agency was required by the terms of the Order to produce documents that are responsive. The Order did not require the Agency to provide

⁸ *Access Information Agency Inc. v Canada (Attorney General)*, [2007 FCA 224](#) at para 20 [*AIA v Canada*].

⁹ *Hiebert v Canada (Acting/assistant Commissioner, Corporate Development, Correctional Service)*, [1999 CanLII 9184 \(FC\)](#) at para 11, citing *Quebec Port Terminals Inc. v Canada (Labour Relations Board)* (1993), 164 NR 60.

explanations for documents that were not produced. It did not require the Agency to produce documents to prove that they are not responsive.

23. The Applicant now also claims an entitlement to certain documents that it did not seek in its disclosure motion and that do not fall within the Order's scope. The Agency submits that to the extent that a debate exists as to the scope of the Order, it cannot be said that the Agency has wrongly withheld documents from disclosure.

24. The Agency submits that it should not be required to produce further documents not required by the Order, nor should it be required to produce documents to prove that they do not come within the Order's scope.

The Agency cannot be required to produce documents that are not in its possession

25. Rules 317 and 318 apply to material that is "in the possession of a tribunal." The Agency cannot produce documents that never existed, no longer exist or are not in its possession.

26. By its nature, the Order did not determine the existence or non-existence of any specific document. The Agency submits that a party claiming the existence of a document that has not been disclosed under Rule 318 must provide persuasive evidence of its existence. It cannot rely on speculation or guesswork. The burden does not lie on the responding party to provide evidence to counter the moving party's claims. The Federal Court's findings in the context of document discovery are apposite here:

[33] With respect to the requirement on the moving party to demonstrate that further documents likely exist, the moving party must have some persuasive evidence that documents are available and have not been produced, rather than mere speculation, intuition or guesswork: *Havana House Cigar & Tobacco Merchants Ltd et al v Naeini* (1998), [1998 CanLII 7605](#) (FC), 80 CPR (3d) 132 at para 19. The Defendants were under no obligation to provide their own evidence to be considered by the Court in contrast to that of the Plaintiff. The burden was on him to make his case.¹⁰

27. In this case, the Applicant has combed through the disclosure package and now speculates that certain documents must exist and that the Agency has withheld them. The Applicant

¹⁰ *Paid Search Engine Tools, LLC v Google Canada Corporation*, [2021 FC 515](#) at para 14, citing *Hutton v Sayat*, [2020 FC 1183](#) at para 33.

leaves no room for the possibility that documents may not have been produced, that documents may have been deleted, or that documents may not be in the Agency's possession.

28. The Agency cannot disclose any documents that it does not possess. Moreover, the Agency submits that where, as here, the existence of documents is speculative, the Agency should not be required to provide evidence to prove their non-existence.

The Agency's disclosure obligation should not be conflated with document discovery

29. The Applicant has crossed the line from disclosure under Rule 318 into an attempt at document discovery. Tribunal disclosure does not produce the same results as discovery and "does not require a tribunal (by contrast to a respondent in an action) to engage in an extended and exhaustive search for material whose relevance may at best be marginal and whose selection will necessarily involve an exercise of judgment."¹¹

30. Since receiving the disclosure package, the Applicant has made rolling demands for documents and now raises the specter of contempt of court. In many instances, the Applicant demands new categories of documents or has particularized its document request to a point that extends beyond what it originally sought. In doing so, the Applicant has effectively required the Agency to continuously scour its records for an expanding list of documents whose existence and relevance cannot be assumed. The Agency submits that this cannot be the intent of Rule 318 or the Order.

31. In light of the above, the Agency respectfully submits that it should not be required to produce the documents outlined below on the basis that they are not responsive to the Order or they do not exist. For ease of reference, the Agency has organized its submissions, as much as possible, along the lines of the items outlined in Schedule A to the Applicant's motion.

¹¹ *AIA v Canada*, *supra* note 8 at para 17, citing *Atlantic Prudence Fund Corp. v Canada (Minister of Citizenship and Immigration)*, [2000] FCJ No. 1156 at para 11.

Agency responses to items listed in Schedule A of Applicant's motion

CATEGORY A: CTA Member correspondences

A1: Original Microsoft Word files for the Statement (original version of Statement and drafts thereof between March 9 and March 25, 2020)¹²

A5: Original Microsoft Word file(s) for a draft response to media¹³

32. Having received the disclosure package, the Applicant has now requested the original Microsoft Word files for various draft documents that the Agency disclosed in pdf format. The Applicant's stated purpose is to verify the metadata to, among other things, establish authorship.
33. The Agency submits that it was not required by the terms of the Order to provide original Microsoft Word files for any of the documents now requested by the Applicant. The Order simply required the Agency to disclose "documents" and to do so "electronically". The Agency submits that the Order must be read in light of Rule 318 and the Applicant's own motion for disclosure under that Rule.
34. Rule 318 contemplates the disclosure of certified copies of materials. It alternatively calls for the transmission of original material "where the material cannot be reproduced".¹⁴ The Court may order that a certified copy, or the original, of all or part of the material requested be forwarded to the Registry.¹⁵ In this case, the Court did not specify that original material was required to be transmitted. Because the transmission of original material is treated as an alternative when it is not possible to provide copies, the Agency submits that it was not required to provide original Microsoft Word files in order to comply with the Order.
35. What is more, up until now, the Applicant has sought copies of documents in its disclosure requests. In its Notice of Application for judicial review, the Applicant sought "a certified copy" of Agency material. In its Notice of Motion under Rules 318 or 41 of the *Federal Courts Rules*, the Applicant requested "complete and unredacted copies" of documents,

¹² Written representations of the Moving Party, Motion Record of Applicant dated January 17, 2022, Volume 1, Tab 6 at 304 at para 34 [*Applicant's Written Reps*].

¹³ *Ibid* at 308 at paras 50-51.

¹⁴ See s [318\(1\)](#) of the *Federal Courts Rules*.

¹⁵ See s [318\(4\)](#) of the *Federal Courts Rules*.

including "draft documents." In light of this, it cannot be assumed that the Applicant was seeking a Court order for the production of original versions of documents.

36. The Agency submits that the Applicant has not established that obtaining original versions of documents to determine authorship is relevant to its grounds of judicial review. The Applicant could have argued that disclosure of the original versions of drafts was relevant when it made its motion for disclosure. The relevance of original versions would have been debated in that context. The Agency submits that the Applicant cannot now demand these documents under the guise that the Order required their disclosure.

37. Moreover, the demand for original versions to conduct metadata analysis is inconsistent with the purpose of judicial review proceedings, which are intended to be summary in nature. In light of this, it cannot be assumed that the Order required the disclosure of original documents in order to allow for a debate on metadata. This line of inquiry would entail additional evidentiary and procedural steps that are not contemplated in these types of proceedings.

38. Accordingly, the Agency submits that it is not required to produce original Microsoft Word versions of documents.

A2. Documents regarding the Statement on Vouchers on March 23, 2020¹⁶ and

A3. Documents regarding the Statement on Vouchers on March 24, 2020.¹⁷

39. The Applicant seeks to recreate the chain of events to explain why the Statement was published on March 25, 2020 when the then-Chairperson wanted to publish it on the 23rd and then 24th.

40. Relying on a perceived absence of updates to the then-Chairperson on the status of the Statement on March 23 and 24, the Applicant wrongly infers that documents related to this have been created, retained and withheld. The Applicant reasons that the disclosed documents show that the then-Chairperson wanted the Statement to be published on March 23, that it was not published on that date, and that the then-Chairperson knew that it had not

¹⁶ *Applicant's Written Reps*, *supra* note 12 at 305-306 at paras 41-43.

¹⁷ *Ibid* at 308 at paras 52-53.

been published. A similar situation transpired on March 24. The Applicant insists that written updates must exist which would have informed the then-Chairperson of the status of the Statement, given that Agency personnel were working from home at the time.

41. The Agency submits that the Applicant has provided no persuasive evidence that the documents sought exist. The claim that updates to any person are necessarily made in writing is plainly speculative.
42. The Agency further submits that the Applicant has not shown how recreating status updates to the then-Chairperson is relevant to its grounds of review. The Applicant appears to be searching for these documents in hopes of establishing their relevance, and requiring the Agency to conduct an exhaustive search more consistent with document discovery than tribunal disclosure.
43. That said, having thoroughly searched its records, the Agency has concluded that it does not possess any additional documents in relation these items beyond what has already been disclosed. The Agency cannot therefore produce further documents.

A4 Documents regarding the announcement of the Statement to third-parties (draft message to stakeholders)¹⁸

44. The Applicant claims that the Agency has tampered with a copy of an e-mail that it disclosed by removing the sender and recipient information. There is no basis at all for this claim. The document appears as it does because of the process of converting the e-mail to pdf format for the purposes of disclosure.
45. The Agency is providing a fresh version of the document with these materials. The Agency acknowledges that the document that was certified as a true copy was imperfect but submits that this was inadvertent and should not be regarded as improper. Under Rule 318, tribunals are only required to transmit certified copies to the Registry; they are not required to file certified copies with the Court. Certification in this context is designed to allow the Registry to authenticate that materials in the parties' records are in fact those that were supplied by

¹⁸ *Applicant's Written Repts, supra* note 12 at 306-307 at paras 45-46.

the decision-maker.¹⁹ The Agency submits that the certification of this imperfect version was not intentional or done for an improper purpose, and asks that the Court accept the fresh version so that it may be treated as part of the tribunal record.

A6. Ms. Jones' Draft FAQs about the Statement on Vouchers of March 24, 2020²⁰

46. The Applicant seeks to recreate the chain of events to explain how a draft document containing responses to frequently asked questions ended up in an Agency member's hands on March 24, 2020. The Applicant speculates that the Agency possesses, has retained, and is withholding further responsive documents that would answer this question.
47. The Agency notes that the Applicant has not shown how recreating the circumstances in which an Agency member obtained this draft is relevant to its grounds of review. The Applicant appears to be searching for these documents in hopes of establishing their relevance, and requiring the Agency to conduct an exhaustive search more consistent with document discovery than tribunal disclosure.
48. That said, having thoroughly searched its records, the Agency has produced all responsive documents in its possession in relation to this item. The Agency therefore cannot be required to produce further documents.

CATEGORY B: Third Party Correspondence

B1. Original Email Announcing the Statement on Vouchers sent by Ms. Marcia Jones on March 25, 2020.²¹

B2. Original Email from Transport Canada on March 18, 2020 from Mr. Colin Stacey at Transport Canada to Ms. Marcia Jones on March 25, 2020²²

49. The Applicant rightly claims that there must have been original e-mails from Agency staff person Marcia Jones and from a third party, Colin Stacey, on March 25, 2020. There is direct evidence of this because their messages appear within e-mail chains that were disclosed by the Agency.

¹⁹ *Canadian Copyright Licensing Agency (Access Copyright) v Alberta*, [2015 FCA 268](#) at para 18.

²⁰ *Applicant's Written Repts*, *supra* note 12 at 309-310 at paras 58-59.

²¹ *Ibid* at 310 at para 60.

²² *Ibid* at 300 at paras 22-23.

50. However, the Applicant speculates that e-mails that were created are retained permanently and are being withheld. This is not the case. Having thoroughly searched its records, the Agency was unable to locate the original e-mails sought by the Applicant, and the Agency has concluded that they no longer exist. The Agency cannot therefore produce these items.

B3. Correspondence in respect of Ms. Jones' and the Assistant Deputy Minister's Meetings on or about March 21-22, 2020²³

51. The Applicant speculates that there must be documents in respect of discussions that are said to have taken place around March 21 and 22, 2020 between Agency staff person Marcia Jones and the Assistant Deputy Minister at Transport Canada.

52. The Applicant relies on an e-mail from an Agency staff person who does not appear to have taken part in these discussions and who states that Ms. Jones "spoke" with this third party concerning the Statement. There is no indication in that email that there are any documents associated with this discussion. The Applicant also points to an e-mail from the then-Chairperson to Ms. Jones providing attachments "as background for your call". The nature or details of that call are not specified and there is no indication that other documents for that call exist, have been retained and are being withheld.

53. Having thoroughly searched its records, the Agency has concluded that it does not possess any documents in relation this item. The Agency cannot therefore produce further documents.

B4: CTA's Info Email and Twitter Messages²⁴

54. The Applicant sought disclosure of these documents on December 17 and 20, 2021, after receiving the Agency's disclosure package. On December 24, 2021, the Agency responded that a category of such documents exists and explained why they were not disclosed. These documents consist of messages and inquiries from individuals to the Agency concerning their personal air travel situations.

55. The Agency noted in its December 24 letter that since the Applicant has previously filed

²³ *Applicant's Written Reps, supra* note 12 at 302-303 at paras 29-32.

²⁴ *Ibid* at 307 at paras 48-49.

documents from the Agency's Twitter feed on the record of this proceeding, it stands to reason that this category of documents is available to the Applicant. The Agency submits that tribunal disclosure does not require the Agency to disclose documents already in the possession of the Applicant.

56. The Agency further submits that any private messages on Twitter or e-mails to the Agency's general e-mail account need not be produced for two reasons: first, the Applicant explicitly abandoned this category of documents in its Notice of Motion under Rules 318 or 41 of the *Federal Courts Rules*; and second, the documents are not within the scope of the Order.

57. In its Notice of Application, the Applicant requested, among other documents, the following:

Complete and unredacted copies of all correspondences, e-mails, and/or complaints that the Agency received from passengers between February 15, 2020 to the present in respect to issuing of credits, coupons, or vouchers to passengers in lieu of a refund for travel affected by COVID-19.²⁵

58. Subsequently, in its Notice of Motion under Rule 318, the Applicant abandoned its request to obtain this and other categories of documents. The Applicant stated: "In the interest of swift resolution of this motion and the application, only a small portion of the transmittal request is being pursued." The Applicant then indicated that it was seeking "complete and unredacted copies of all records from March 9 – April 8, 2020 in respect of the Publications, including but not limited to emails, meeting agendas, meeting minutes, notes, draft documents, and memos."

59. The Applicant framed the purpose of seeking the requested documents as follows:

The Materials will demonstrate:

- i. The names of the specific appointed members of the Agency who participated in the issuance of the Publications by approving, supporting, or otherwise endorsing the Publications, and the nature of their respective involvement; and

²⁵ Notice of Application dated April 6, 2020, Motion Record of Applicant dated January 17, 2022, Volume 1, Tab 3 at 274.

- ii. The Agency's objective in issuing the Publications, including the nature and extent of external influences on the Agency from the airline industry and/or Transport Canada.

60. It is difficult to see how individual passenger correspondence to general Agency accounts handled by Agency staff would advance the claims made by the Applicant.

61. The Agency also submits that this category of documents falls outside the scope of the Order. The Order was crafted to capture only documents that are "relevant to the bias issues raised by the applicant".²⁶ The Court summarized the bias allegations as follows:

[24] As noted, the applicant's allegations related to bias are two-fold and concern, first, the alleged pre-judgement 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.

62. While the Agency will comply with any order to produce this category of documents, the Agency submits that these documents fall outside the Order's scope and that they are not relevant to the claims advanced in the underlying judicial review proceeding.

B5. Correspondence to/from PIAC²⁷

63. The Applicant claims that the Agency has withheld correspondence with the Public Interest Advocacy Centre ("PIAC") that should have been produced. The Applicant relies on a draft message to stakeholders, authored by an Agency staff person, informing them that the Statement and other Agency decisions had been published. In the draft message, the staff person references the fact that there had been "outreach from PIAC/CAA."

64. The Applicant makes three assumptions in relation to its claim. First, it assumes that the outreach from PIAC came in the form of written correspondence. Second, it assumes that if there was written correspondence, it was retained and is being withheld. And third, it assumes that this outreach concerned the Statement. The Agency notes that the draft message announced not only the publication of the Statement but also two other Agency

²⁶ *October 2021 Court Order*, *supra* note 1 at para 22.

²⁷ *Applicant's Written Repts*, *supra* note 12 at 310 at paras 60-61.

decisions: an exemption allowing for the suspension of domestic air services; and a decision exempting carriers from certain requirements of the *Air Passenger Protection Regulations*, SOR/2019-150. The Agency submits that the Applicant relies on speculation to conclude that a responsive document exists, has been retained, and has been withheld.

65. Having thoroughly searched its records, the Agency has concluded that it does not possess any responsive documents in relation this item. The Agency cannot therefore produce further documents.

CATEGORY C: Meeting Documents

C1. Documents for the March 19, 2020 EC Call;²⁸ and

C5. Documents for the March 22, 2020 CTA Key Personnel Call;²⁹ and

C6. Documents for the March 23, 2020 EC Call.³⁰

66. The Applicant speculates that the Statement was discussed at meetings of the Executive Committee and of key Agency personnel. The Applicant relies on e-mails from the then-Chairperson that preceded these meetings. In these e-mails, the then-Chairperson writes of his intention to discuss the topic of vouchers at an upcoming meeting.

67. The Agency submits that e-mails stating that a topic will be discussed at a future meeting do not prove that the discussions indeed happened, that documents were created to support the discussions or that minutes noting these discussions were prepared. Accordingly, these e-mails simply provide evidence that the then-Chairperson intended to discuss the topic prior to the time a meeting took place.

68. Pursuant to the Order, the Agency was required to disclose documents related to meetings attended by members where the Statement was discussed. The Agency submits that if meeting documents in its possession contain no record that the matter was discussed, then the documents must be considered non-responsive.

69. This is the case with the meetings that were held on March 19, 22 and 23, 2020. The Agency

²⁸ *Applicant's Written Repts, supra* note 12 at 301 at paras 24-25.

²⁹ *Ibid* at 303-304 at paras 33-35.

³⁰ *Ibid* at 305 at paras 38-40.

has in its possession documents related to these three meetings, namely in the form of schedulers and/or meeting minutes. However, these documents contain no record that the Statement or the subject matter of vouchers were in fact discussed.

70. The Agency submits that it is not required to produce documents that are not responsive to the Order. The Agency has disclosed responsive meeting documents to the Applicant. The Applicant is relying on speculation to claim that other documents must exist, must be responsive and that the Agency has withheld these.
71. The Agency further submits that the Order did not require it to disclose documents for the purpose of proving that they are not responsive. To require this now would allow the Applicant to use this motion to obtain more than that to which it is entitled under the Order and Rules 317 and 318 of the *Federal Courts Rules*. This would be tantamount to document discovery.

C2. Documents for the March 20 EC Call³¹

72. The Agency has disclosed draft minutes for an Executive Committee meeting that took place on March 20, 2020 and has made a privilege claim on a small portion of that document. The e-mails disclosed concerning the draft minutes show that the Statement was discussed on March 20 but no deliverable resulted, such that a request was made to remove mention of the Statement from the final version of the minutes.
73. The Applicant speculates that more documents must exist for this meeting and that the Agency must have withheld them.
74. There are additional documents in the Agency's possession but they contain no mention of the Statement or the subject of the Statement. The Agency has a meeting scheduler and the final version of the minutes. The scheduler contains no information about the content of the meeting. The final minutes do not mention the Statement as that item was removed. The Agency submits that it should not be required to disclose these documents as they do not mention the Statement and provide no information not already disclosed in relation to this

³¹ *Applicant's Written Repts, supra* note 12 at 302 at paras 27-28.

meeting.

C3. CTA Chairperson's March 21-22, 2020 Weekend Meeting(s)³²

75. The Applicant speculates that there must be documents in respect of discussions that are said to have taken place between the Agency's then-Chairperson, the Deputy Minister of Transport and the Minister of Transport's Chief of Staff.
76. The Applicant relies on an e-mail from an Agency staff person who does not appear to have taken part in these discussions and who states that the subject matter of the Statement "was discussed" between the then-Chair and these third parties.
77. There is no indication in that email that any documents are associated with such discussions, that any such documents have been retained and that they are being withheld. That said, having thoroughly searched its records, the Agency has concluded that it does not possess any documents in relation this item. The Agency cannot therefore produce further documents.

C4. CTA Chairperson' March 21 and/or March 22, 2020 Discussions with the Vice-Chairperson³³

78. The Applicant claims that documents related to discussions between the then-Chairperson and Vice-Chairperson on March 21 or 22, 2020 exist and have been withheld. The Applicant relies on an e-mail authored by the then-Chairperson stating that he and the Vice-Chairperson wanted to share a draft of the Statement with the Agency's members.
79. The Applicant speculates that since the then-Chairperson and Vice-Chairperson wanted to share the draft, they must have communicated and there must be meeting documents associated with that communication. The existence of such documentation is plainly speculative. There is no reason to conclude from this e-mail that documents in relation to any discussions that may have taken place exist.
80. That said, having thoroughly searched its records, the Agency has concluded that it does not

³² *Applicant's Written Reps, supra* note 12 at 302-303 at paras 29-32.

³³ *Ibid* at 304 at paras 36-37.

possess any additional documents in relation this item beyond what has already been disclosed. The Agency cannot therefore produce further documents.

C7: Documents for the March 24 Agency Members' Call³⁴

81. A meeting of Agency members was scheduled for March 24, 2020. The Applicant points to an e-mail pre-dating that meeting in which the then-Chairperson wrote of his intention to discuss the Statement at the meeting.
82. The Agency submits that the existence of this e-mail does not prove that the discussions indeed happened, that documents were created to support the discussion or that minutes noting these discussions were prepared.
83. The Agency has in its possession a single document in relation to this meeting, namely a scheduler. That document contains no indication of the content of the meeting's discussions nor does it confirm that the meeting took place. Accordingly, the Agency submits that the document is not responsive to the Order.
84. In relation to this item, the Applicant has requested the production of notes taken by or on behalf of participants at the meeting. The Agency submits that if personal notes were taken and kept by members, they are not in the Agency's possession.
85. Rule 317 allows a party to receive material that is "in the possession of a tribunal." The Order stated that "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."³⁵
86. This Court in *Canada (Privacy Commissioner) v Canada (Labour Board)* has held that personal notes taken by Governor-in-Council appointees are not "under the control" of a tribunal. These notes do not form part of the official record of the tribunal and are not

³⁴ *Applicant's Written Reps, supra* note 12 at 307 at para 47.

³⁵ *October 2021 Court Order, supra* note 1 at para [21](#).

contained in any record-keeping system over which the tribunal has control.³⁶

87. While the Court decided this matter in a quasi-judicial context, the Agency submits that there is a reasonable question as to whether the same principles apply in this case. The applicability of Rules 317 and 318 of the *Federal Courts Rules* has been debated by the parties on the grounds that the Statement does not constitute an order to which a tribunal record attaches. This Court has determined that the rules do, in fact, apply. Accordingly, the Agency submits that the principles applicable to decision-making, records and judicial independence that informed the Court's decision in *Canada (Privacy Commissioner)* have some application to this case.

88. To be clear, the Agency has no knowledge of the existence of members' personal notes in relation to this meeting. However, the Agency respectfully submits that, having found no such notes in its record-keeping systems, if any such notes exist they are not "in the possession" of the tribunal within the meaning of Rules 317 and 318.

C8: Documents for the March 25 Discussion involving the Chair and/or Vice-Chair and others³⁷

89. To claim that documents exist and have been withheld, the Applicant relies on an e-mail from March 25, 2020 between the then-Chairperson and Vice-Chairperson that states "After a lot of back-and-forth this morning, Liz and I have decided on a few additional tweaks to the statement." That document evidences the "tweaks" that were made.

90. The Applicant has focused on the mention of "back-and-forth" and speculates that there must be associated meeting documents, that these have been retained, and that they have not been disclosed. There is no indication in these documents that any back and forth entailed any associated documentation.

91. The Applicant similarly points to the fact that the Statement was attached to an e-mail from the then-Chairperson to the Vice-Chair and Agency staff on March 25, 2020. The Applicant

³⁶ *Canada (Privacy Commissioner v Canada (Labour Relations Board)* (2000), 257 N.R. 66 (F.C.A.), [2000] F.C.J. No. 617 (C.A.) (QL)) at para 5.

³⁷ *Applicant's Written Reps*, *supra* note 12 at 309 at paras 55-56.

plainly speculates that since the Chair's covering e-mail is blank, a meeting must have taken place, there must be associated documentation, this documentation has been retained, and it is not being disclosed.

92. Having thoroughly searched its records, the Agency has concluded that it does not possess any additional documents in relation these items beyond what has already been disclosed. The Agency cannot therefore produce further documents.

C9: Documents for the Cancelled March 25, 2020 Call³⁸

93. The Applicant seeks to obtain information in relation to a meeting between the then-Chairperson and Agency personnel that was cancelled before it took place on March 25, 2020. The Applicant requests access to documents pertaining to when and how the meeting was initially scheduled.

94. The Applicant provides no reason to suggest that providing such documents would be responsive to the Order. It is difficult to see how details of when and how a meeting was scheduled are relevant to the grounds of judicial review when it is clear that the meeting was cancelled. The Applicant appears to be searching for these documents in hopes of establishing their relevance, and requiring the Agency to conduct an exhaustive search more consistent with document discovery than tribunal disclosure.

95. That said, having thoroughly searched its records, the Agency has concluded that it does not possess any additional documents in relation this item beyond what has already been disclosed. The Agency cannot therefore produce further documents.

C10: The then-CTA Chairperson's Discussion(s) with "Other Federal Players"³⁹

96. The Applicant speculates that there must be documents in connection with alleged discussions between the then-Chairperson and "other federal players." The Applicant bases its assertion on an e-mail from the then-Chairperson to Agency members on March 22, 2020 that states: " After some analysis, reflection, and discussion with other federal players, we're

³⁸ *Applicant's Written Reps, supra* note 12 at 309 at para 57.

³⁹ *Ibid* at 302-303 at paras 29-32.

considering issuing a statement [...]"

97. The Applicant assumes that these discussions have associated documentation that is being withheld. This is speculative. In fact, the wording of the e-mail references "discussion", which regularly take place verbally rather than in writing.
98. That said, having thoroughly searched its records, the Agency has concluded that it does not possess any additional documents in relation this item beyond what has already been disclosed. The Agency cannot therefore produce further documents.

Conclusion with respect to production order

99. The Agency respectfully submits that it has complied with the Order and that there is no basis for a further order under Rule 318. The Applicant has not provided persuasive evidence that the documents sought are in the Agency's possession or within the Order's scope. The Agency has thoroughly searched its records before concluding that documents sought are not in its possession. Accordingly, the Agency asks that the Applicant's motion be dismissed.
100. The Agency's submissions relate only to the issue of motion for a production order. The Agency reserves the right to produce further submissions or evidence should the Court hear the motion for contempt.

The Agency should not be required to pay, nor does it seek, costs

101. Generally, an administrative body like the Agency will neither be entitled to nor be ordered to pay costs, at least when there has been no misconduct on its part. Where the body has acted in good faith and conscientiously throughout, albeit resulting in error, the reviewing tribunal will not ordinarily impose costs.⁴⁰
102. The Agency submits that it has acted in good faith. The Agency has complied with the terms of the Order, and will comply with any further production order that might be made in response to the Applicant's motion.

⁴⁰ *Lang v British Columbia (Superintendent of Motor Vehicles)*, 2005 BCCA 244 at para 47.

103. The Applicant is requesting costs as if it had successfully prosecuted contempt proceedings. However, this Court has found that resorting to contempt powers is premature at this stage, as there is no reason to assume non-compliance. The Applicant cannot rely on the customary practice that applies in contempt proceedings. It is well established that this practice is reserved for successful contempt applications.⁴¹

104. The Agency does not seek costs and submits that in the circumstances it should not be ordered to pay costs. However, should this Court find that an award of costs is appropriate, the Agency submits that it must reflect any division of success.⁴²

PART IV – ORDER SOUGHT

105. The Agency seeks an Order dismissing the Applicant's motion.

106. The Agency does not seek costs and asks that costs not be awarded against it.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated at Gatineau, in the Province of Quebec, this 1st day of February, 2022.



Barbara Cuber
Senior Counsel

Legal Services Directorate
Canadian Transportation Agency
15 Eddy Street, 19th Floor
Gatineau, QC K1A 0N9
Telephone: 613-301-8322

Email: Barbara.Cuber@otc-cta.gc.ca

Email: Servicesjuridiques.LegalServices@otc-cta.gc.ca

Counsel for the Respondent, Canadian Transportation Agency

⁴¹ *Apotex Inc. v Merck & Co. Inc.*, [2003 FCA 234](#) at paras 93-94 [*Apotex*].

⁴² *Ibid* at para 94.

PART V – LIST OF AUTHORITIES

Appendix A – Statutes and Regulations

Federal Courts Rules, [SOR/98-106](#), r [41](#), [318](#).

Appendix B – Case Law

Access Information Agency Inc. v Canada (Attorney General), [2007 FCA 224](#)

Air Passengers Rights v Canada (Transportation Agency), [2020 FCA 92](#)

Air Passenger Rights v Canada (Transportation Agency), [2020 FCA 155](#)

Air Passenger Rights v Canadian Transportation Agency, [2020 CanLII 102983 \(SCC\)](#)

Air Passenger Rights v Canada (Attorney General), [2021 FCA 201](#)

Apotex Inc. v Merck & Co. Inc., [2003 FCA 234](#)

Canada (Privacy Commissioner v Canada (Labour Relations Board) (2000), 257 NR 66 (FCA), [2000] FCJ No. 617 (CA) (QL))

Canadian Copyright Licensing Agency (Access Copyright) v Alberta, [2015 FCA 268](#)

Hiebert v Canada (Acting/assistant Commissioner, Corporate Development, Correctional Service), [1999 CanLII 9184 \(FC\)](#)

Lang v British Columbia (Superintendent of Motor Vehicles), [2005 BCCA 244](#)

Paid Search Engine Tools, LLC v Google Canada Corporation, [2021 FC 515](#)

This is **Exhibit “AW”** to the Affidavit of Dr. Gábor Lukács
affirmed before me on May 15, 2022

Signature

From: Scott Streiner
Sent: March 22, 2020 8:54 AM
To: Liz Barker; Marcia Jones; Valérie Lagacé; Tom Oommen; Sébastien Bergeron
Subject: Draft
Attachments: Statement.docx

Good morning, folks. The attached will be one item for discussion on our 10:30 call. Talk soon.

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

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. They should be "kept whole" in some manner. 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.

This is **Exhibit “AX”** to the Affidavit of Dr. Gábor Lukács
affirmed before me on May 15, 2022

Signature

Amanda Hamelin

Subject: Urgent Debrief - Please confirm attendance ASAP
Location: CBCI teleconference: dial 1 514 938 6569 call ID: 935311571# then # again
Start: Sun 3/22/2020 10:30 AM
End: Sun 3/22/2020 11:00 AM
Recurrence: (none)
Meeting Status: Accepted
Organizer: Scott Streiner
Required Attendees: sebastien bergeron (Sebastien.Bergeron@otc-cta.gc.ca); Marcia Jones; Tom Oommen; Valérie Lagacé; Liz Barker
Importance: High

Seb will host

This is **Exhibit “AY”** to the Affidavit of Dr. Gábor Lukács
affirmed before me on May 15, 2022

Signature

From: Scott Streiner
Sent: March 22, 2020 11:24 AM
To: Mark MacKeigan; Heather Smith; Mary Tobin Oates; Lenore Duff; Gerald Dickie
Cc: Liz Barker
Subject: Draft statement
Attachments: Statement.docx

Hi, Colleagues. I hope all of you and your family and friends remain healthy and are doing OK despite our current isolation in our homes.

As you know, there have been many questions about what (if any) entitlements passengers have, and what (if any) obligations carriers have, when flights are disrupted as a result of the COVID-19-related mass cancellations.

After some analysis, reflection, and discussion with other federal players, we're considering issuing a statement (draft attached) that acknowledges the current rule-set never really contemplated the present circumstances and indicates that vouchers/credits would be an appropriate way of protecting passengers from a total loss without pushing carriers closer towards insolvency.

Because this statement is a policy signal of sorts and could inform -- though of course, not fetter -- future Agency decisions, Liz and I wanted to share it with all Members. We're looking at releasing it as early as tomorrow, so could you please let us know by 2 pm if you concur with it, and whether you have any questions or comments?

Many thanks,

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

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.

This is **Exhibit “AZ”** to the Affidavit of Dr. Gábor Lukács
affirmed before me on May 15, 2022

Signature

From: Mary Tobin Oates
Sent: March 22, 2020 12:55 PM
To: Scott Streiner; Mark MacKeigan; Heather Smith; Lenore Duff; Gerald Dickie
Cc: Liz Barker
Subject: RE: Draft statement
Attachments: Statement mto.docx

Hey there!

Thank you for the opportunity to review this document. I think that there should be a short introductory sentence that states that cause of the issuance of a statement. That it's the pandemic is buried. I also wonder which situations are captured by our recommendation: flights returning to Canada or future flights. Thanks, MTO

From: Scott Streiner
Sent: Sunday, March 22, 2020 11:24 AM
To: Mark MacKeigan ; Heather Smith ; Mary Tobin Oates ; Lenore Duff ; Gerald Dickie
Cc: Liz Barker
Subject: Draft statement

Hi, Colleagues. I hope all of you and your family and friends remain healthy and are doing OK despite our current isolation in our homes.

As you know, there have been many questions about what (if any) entitlements passengers have, and what (if any) obligations carriers have, when flights are disrupted as a result of the COVID-19-related mass cancellations.

After some analysis, reflection, and discussion with other federal players, we're considering issuing a statement (draft attached) that acknowledges the current rule-set never really contemplated the present circumstances and indicates that vouchers/credits would be an appropriate way of protecting passengers from a total loss without pushing carriers closer towards insolvency.

Because this statement is a policy signal of sorts and could inform -- though of course, not fetter -- future Agency decisions, Liz and I wanted to share it with all Members. We're looking at releasing it as early as tomorrow, so could you please let us know by 2 pm if you concur with it, and whether you have any questions or comments?

Many thanks,

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

The COVID-19 pandemic has caused disruptions in daily lives around the world. 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. The COVID-19 pandemic would be considered a *force majeure*.

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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.

Commented [MT01]: Are only repatriation flights being considered? The next sentence seems to contemplate ongoing disruptions.

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.

This is **Exhibit “BA”** to the Affidavit of Dr. Gábor Lukács
affirmed before me on May 15, 2022

Signature

From: Mark MacKeigan
Sent: March 22, 2020 1:11 PM
To: Mary Tobin Oates; Scott Streiner; Heather Smith; Lenore Duff; Gerald Dickie
Cc: Liz Barker
Subject: RE: Draft statement
Attachments: Statement mto_mm.docx

Scott, Mary, and all,

I think Mary's changes improve the document. I agree with the policy statement being necessary and I agree with its contents. I have made a few further changes in the attached for colouring and limitation of this policy re: perception of fettering.

Mark

From: Mary Tobin Oates
Sent: Sunday, March 22, 2020 12:55 PM
To: Scott Streiner ; Mark MacKeigan ; Heather Smith ; Lenore Duff ; Gerald Dickie
Cc: Liz Barker
Subject: RE: Draft statement

Hey there!

Thank you for the opportunity to review this document. I think that there should be a short introductory sentence that states that cause of the issuance of a statement. That it's the pandemic is buried. I also wonder which situations are captured by our recommendation: flights returning to Canada or future flights. Thanks, MTO

From: Scott Streiner
Sent: Sunday, March 22, 2020 11:24 AM
To: Mark MacKeigan <Mark.MacKeigan@otc-cta.gc.ca>; Heather Smith <Heather.Smith@otc-cta.gc.ca>; Mary Tobin Oates <Mary.TobinOates@otc-cta.gc.ca>; Lenore Duff <Lenore.Duff@otc-cta.gc.ca>; Gerald Dickie <Gerald.Dickie@otc-cta.gc.ca>
Cc: Liz Barker <Liz.Barker@otc-cta.gc.ca>
Subject: Draft statement

Hi, Colleagues. I hope all of you and your family and friends remain healthy and are doing OK despite our current isolation in our homes.

As you know, there have been many questions about what (if any) entitlements passengers have, and what (if any) obligations carriers have, when flights are disrupted as a result of the COVID-19-related mass cancellations.

After some analysis, reflection, and discussion with other federal players, we're considering issuing a statement (draft attached) that acknowledges the current rule-set never really contemplated the present circumstances and indicates that vouchers/credits would be an appropriate way of protecting passengers from a total loss without pushing carriers closer towards insolvency.

Because this statement is a policy signal of sorts and could inform -- though of course, not fetter -- future Agency decisions, Liz and I wanted to share it with all Members. We're looking at releasing it as early as tomorrow, so could you please let us know by 2 pm if you concur with it, and whether you have any questions or comments?

Many thanks,

S

Scott Streiner

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

The COVID-19 pandemic has caused disruptions in daily lives around the world. 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. The COVID-19 pandemic would be considered a *force majeure*.

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All these documents 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 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.

Commented [MM1]: While this document may have been drafted in the context of our Canadian carriers, international licensees are also covered. This text might add a bit of useful colouring.

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.

Commented [MT02]: Are only repatriation flights being considered? The next sentence seems to contemplate ongoing disruptions.

Commented [MM3R2]: Mary raises a good point.

While any specific situations brought before the CTA will be examined on their merits, the CTA believes that, in the context of the current pandemic, 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.

Commented [MM4]: Again, emphasizing the specific nature of the circumstances. Might help on the fettering issue.

This is **Exhibit “BB”** to the Affidavit of Dr. Gábor Lukács
affirmed before me on May 15, 2022

Signature

From: Lenore Duff
Sent: March 22, 2020 1:12 PM
To: Scott Streiner; Liz Barker; Mark MacKeigan; Heather Smith; Mary Tobin Oates; Gerald Dickie
Subject: Statement
Attachments: Statement.docx

Hi Scott & Liz (and colleagues):

Thank you for the opportunity to comment. I have taken a look at this and have a few comments. A couple are for clarity, and one is a “communications” concern, but I have tried to respect the content and format that you and Liz have taken. Please feel free to ignore any or all of my comments – afterall, I will not be around to deal with the fall out from the current crisis when we finally turn the corner. And by not be around, I mean at the Agency rather than on the earth, I hope!

Beyond that, I was wondering about two things:

- What happened in the past with respect to large scale disruptions of air travel, as in 9/11 and the Iceland volcano in Europe. I have noted that in my comments, but was wondering if what we are saying now is consistent with that. I realize it does not have to be consistent and the current crisis is worse, but it might prove useful.
- I am wondering about the timing of this statement. Are we responding to questions from the airlines or the public – if so will be saying something like “in response to concerns/questions raised by the industry and the public... .” I just would want to be careful to not be looking to set a policy standard, which may appear more favourable to industry, without some context. You mention in your email that you have been discussing with other federal colleagues, so this may be a more coordinated federal response, so that may address that concern.

Hope this is helpful, no need to answer my questions, they are largely rhetorical.

Lenore

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, because of circumstances largely beyond their control 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 its their merits, the CTA believes that, generally speaking, an appropriate response solution could be for airlines to provide affected passengers with vouchers or credits for future travel, as long as these vouchers or credits take the current situation fully into account, and do not expire in an unreasonably short period of time.

Commented [LD1]: Not sure what we mean by documents here; is it tariffs, or legislation referred to above, or both? I would probably broaden this to instead say: "The legislative framework that governs air travel is primarily designed to address relatively localized and short-term disruptions."

That said, I don't know what happened after 9/11 (or, grant it, to a lesser extent), the Iceland volcano, but perhaps there is some experience on which to draw in terms of a broad scale disruption of air traffic. I think what will set this one apart will be the duration.

Commented [LD2]: Definitely would nix this language, as I can see individuals coming back to say that this is putting their personal survival at risk – not good optics. Maybe you could replace with:
... take steps that threaten their overall economic viability;
or
... take steps that threaten their continued operations.

This is **Exhibit “BC”** to the Affidavit of Dr. Gábor Lukács
affirmed before me on May 15, 2022

Signature

From: Heather Smith
Sent: March 22, 2020 10:32 PM
To: Gerald Dickie; Scott Streiner; Mark MacKeigan; Mary Tobin Oates; Lenore Duff
Cc: Liz Barker
Subject: RE: Draft statement

Hi all!

I agree with the comments that Mary, Mark and Lenore have already made on the draft text. I would also encourage you to look again at the last phrase of the statement "as long as these vouchers or credits do not expire in an unreasonably short period of time". It is ambiguous about what "an unreasonably short period of time" would be, and in many provinces, consumer protection legislation does not allow vouchers and credits to have expiry dates. It seems to be injecting unnecessary questions or potential for media controversy where the Agency is trying to provide guidance and reassurance. I would delete that last thought altogether, or - if you have incorporated Lenore's suggested changes to that sentence re "taking the current circumstances fully into account", I suggest that you end the sentence there.

Cheers!

Heather

From: Gerald Dickie
Sent: Sunday, March 22, 2020 10:04 PM
To: Scott Streiner ; Mark MacKeigan ; Heather Smith ; Mary Tobin Oates ; Lenore Duff
Cc: Liz Barker
Subject: Re: Draft statement

No comments from me other than the letter is well timed and valuable to the reader. Its the right thing to do in terms of Crisis Management.

Gerry

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 11:24 AM (GMT-05:00)
To: Mark MacKeigan <Mark.MacKeigan@otc-cta.gc.ca>, Heather Smith <Heather.Smith@otc-cta.gc.ca>, Mary Tobin Oates <Mary.TobinOates@otc-cta.gc.ca>, Lenore Duff <Lenore.Duff@otc-cta.gc.ca>, Gerald Dickie <Gerald.Dickie@otc-cta.gc.ca>
Cc: Liz Barker <Liz.Barker@otc-cta.gc.ca>
Subject: Draft statement

Hi, Colleagues. I hope all of you and your family and friends remain healthy and are doing OK despite our current isolation in our homes. 442

As you know, there have been many questions about what (if any) entitlements passengers have, and what (if any) obligations carriers have, when flights are disrupted as a result of the COVID-19-related mass cancellations.

After some analysis, reflection, and discussion with other federal players, we're considering issuing a statement (draft attached) that acknowledges the current rule-set never really contemplated the present circumstances and indicates that vouchers/credits would be an appropriate way of protecting passengers from a total loss without pushing carriers closer towards insolvency.

Because this statement is a policy signal of sorts and could inform -- though of course, not fetter -- future Agency decisions, Liz and I wanted to share it with all Members. We're looking at releasing it as early as tomorrow, so could you please let us know by 2 pm if you concur with it, and whether you have any questions or comments?

Many thanks,

S

Scott Streiner

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Chair and Chief Executive Officer, Canadian Transportation Agency
scott.streiner@otc-cta.gc.ca - Tél. : 819-997-9233 - ATS/TTY: 1-800-669-5575

This is **Exhibit “BD”** to the Affidavit of Dr. Gábor Lukács
affirmed before me on May 15, 2022

Signature

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 Perruscllet <Matilde.Perruscllet@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

This is **Exhibit “BE”** to the Affidavit of Dr. Gábor Lukács
affirmed before me on May 15, 2022

Signature

April 21, 2022

VIA EMAIL

Canadian Transportation Agency
ATTN : Mr. Alan Matte
60 Rue Laval
Gatineau, Québec J8X 3G9

Attorney General of Canada
**ATTN : Mr. Lorne Ptack and Sandy
Graham**
Civil Litigation Section
Department of Justice Canada
50 O'Connor Street, Suite 500, Room 526
Ottawa, ON K1A 0H8

Dear Counsel,

RE: Air Passenger Rights v. AGC and CTA (A-102-20)

We acknowledge receipt of the CTA's documents that were sent yesterday via a filesharing link (the "**Materials**"). We are in the process of reviewing the Materials.

As a professional courtesy, we draw your attention to page 52 of the PDF file for Appendix C6. We note that this contains an email with the unredacted list of the two to-do items for Ms. Valérie Lagacé on March 23, 2020. This appears to be covered by para. 12 of the Court's Reasons on April 11, 2022, and para. 3 of the Order on April 11, 2022. The same email appears in some of the other PDF files in the Materials (e.g., C2 and C1).

Considering the Respondent, and the CTA, have had more ample opportunity to closely review the Materials prior to its release, we understand that the CTA is no longer asserting solicitor-client privilege for the item identified above. **Please advise by close of business today (5:00PM EST April 21, 2022) if our understanding is incorrect.**

For greater certainty, we are still in the process of reviewing the Materials, and this letter shall not be construed as any acknowledgment from the Applicant that the CTA has complied with the Court's Orders.

Yours truly,
EVOLINK LAW GROUP

Simon Lin

SIMON LIN
Barrister & Solicitor

This is **Exhibit “BF”** to the Affidavit of Dr. Gábor Lukács
affirmed before me on May 15, 2022

Signature



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Search in : Information Technology Services Division

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i Examples

(1) Smith (2) Smith, John (3) John Smith (4) 613-999-0101 (5) "Da Vinci" (6) minister

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Organizations

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[Canadian Transportation Agency](#)

[Enabling Services Branch](#)

[Internal Services Group](#)

[Information Technology Services Division](#)

Information Technology Services Division

People

14

1. Akbaristerabadi, Majid; 819-661-1193; Programmer Analyst;
2. Béland, Cédric; 819-790-8631; Information Support Specialist;
3. Bergeron, Vincent; 819-665-0986; Programmer Analyst, Application Development;
4. Caruso, Michael; 613-290-8698; Information Support Specialist;
5. Chevrette, Antoine; 613-867-6057; Director, Information Technology Services;
6. Dickey, Sylvain; 873-353-3257; Technical Advisor;
7. Estabrooks, Gordon; 613-853-6187; IT Security Coordinator;
8. Gariépy, Samuel; 873-355-5745; Support Analyst, Infrastructure / Operations;
9. Guindon, Jonathan; 819-712-2971; Manager, IT Operations;
10. Guthrie, Ryan; 819-962-1885; Senior Technical Architect;
11. Hamelin, Amanda; 819-635-6311; Business Analyst & Process Architect;
12. Hashmi, Adeel; 873-455-0458; Technical Advisor;
13. Wilson, Sandra; 819-271-7067; Administrative Services Coordinator;
14. Zielinski, Barbara; 613-614-7959; Technical Advisor, Application Development and Database Administration;

Date modified:

2020-10-10

Court File No.: A-102-20

FEDERAL COURT OF APPEAL

BETWEEN:

AIR PASSENGER RIGHTS

Applicant

- and -

CANADIAN TRANSPORTATION AGENCY

Respondent

NOTICE OF APPLICATION

TO THE RESPONDENT:

A PROCEEDING HAS BEEN COMMENCED by the Applicant. The relief claimed by the Applicant appears on the following page.

THIS APPLICATION will be heard by the Court at a time and place to be fixed by the Judicial Administrator. Unless the Court orders otherwise, the place of hearing will be as requested by the Applicant. The Applicant requests that this application be heard at the Federal Court of Appeal in **Vancouver, British Columbia**.

IF YOU WISH TO OPPOSE THIS APPLICATION, to receive notice of any step in the application or to be served with any documents in the application, you or a solicitor acting for you must prepare a notice of appearance in Form 305 prescribed by the *Federal Courts Rules* and serve it on the Applicant's solicitor, or where the applicant is self-represented, on the Applicant, WITHIN 10 DAYS after being served with this notice of application.

Copies of the *Federal Courts Rules*, information concerning the local offices of the Court and other necessary information may be obtained on request to the Administrator of this Court at Ottawa (telephone 613-992-4238) or at any local office.

**IF YOU FAIL TO OPPOSE THIS APPLICATION, JUDGMENT MAY BE GIVEN
IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU.**

Date: April 8, 2020

Issued by:  **JEAN-FRANÇOIS DUPORT
REGISTRY OFFICER
AGENT DU GREFFE**

Address of
local office: Federal Court of Appeal
90 Sparks Street, 5th floor
Ottawa, Ontario, K1A 0H9

TO: CANADIAN TRANSPORTATION AGENCY

APPLICATION

This is an application for judicial review pursuant to section 28 of the *Federal Courts Act* in respect of two public statements issued on or about March 25, 2020 by the Canadian Transportation Agency [Agency], entitled “Statement on Vouchers” [Statement] and the “Important Information for Travellers During COVID-19” page [COVID-19 Agency Page] that cites the Statement.

These public statements, individually or collectively, purport to provide an unsolicited advance ruling on how the Agency will treat and rule upon complaints of passengers about refunds from air carriers relating to the COVID-19 pandemic.

The Statement was issued without hearing the perspective of passengers whatsoever.

The Applicant makes application for:

1. a declaration that:
 - (a) the Agency’s Statement is **not** a decision, order, determination, or any other ruling of the Agency and has no force or effect of law;
 - (b) the issuance of the Statement on or about March 25, 2020, referencing of the Statement within the COVID-19 Agency Page, and the subsequent distribution of those publications is contrary to the Agency’s own *Code of Conduct* and/or gives rise to a reasonable apprehension of bias for:
 - i. the Agency as a whole, or
 - ii. alternatively, the appointed members of the Agency who supported the Statement;
 - (c) further, the Agency, or alternatively the appointed members of the Agency who supported the Statement, exceeded and/or lost its (their) jurisdiction under the *Canada Transportation Act*, S.C. 1996, c. 10 to rule upon any complaints of passengers about refunds from carriers relating to the COVID-19 pandemic;

2. an interim order (*ex-parte*) that:
 - (a) upon service of this Court's interim order, the Agency shall prominently post the interim clarification (below) at the top portion of both the French and English versions of the "Statement on Vouchers" [**Statement**] and the "Important Information for Travellers During COVID-19" page [**COVID-19 Agency Page**] (both defined in paragraphs 11-12 of the Notice of Application):

The Canadian Transportation Agency's "Statement on Vouchers" is not a decision, order, determination, or any legal ruling of the Canadian Transportation Agency. It does **not** have the force of law. The "Statement on Vouchers" is currently pending judicial review by the Federal Court of Appeal. This notice is posted by Order [insert URL link to PDF of order] of the Federal Court of Appeal.;
 - (b) starting from the date of service of this Court's interim order, the Agency shall bring the above interim clarification to the attention of anyone that contacts the Agency with a formal complaint and/or informal inquiry regarding air carriers' refusal to refund arising from the COVID-19 pandemic;
 - (c) the Agency shall not issue any decision, order, determination, or any other ruling with respect to refunds from air carriers in relation to the COVID-19 pandemic; and
 - (d) this interim order is valid for fourteen days from the date of service of this Court's interim order on the Agency, and may be renewed by the Applicant under Rule 374(2);
3. an interlocutory order that:
 - (a) the Agency shall forthwith completely remove the Statement from the Agency's website including any references to the Statement within the COVID-19 Agency Page and substitute it with this Court's interlocutory order, or alternatively the order renewing the interim clarification (subparagraph 2(a) above), until final disposition of the Application;

- (b) the interim orders in subparagraphs 1(b)-(c) above are maintained until final disposition of the Application;
 - (c) the Agency shall forthwith communicate with persons that the Agency has previously communicated with regarding the Statement and bring those persons' attention to this Court's interlocutory order and the removal or clarification of the Statement; and
 - (d) the Agency shall forthwith communicate with air carriers under the Agency's jurisdiction, the Association of Canadian Travel Agencies, and Travel Pulse and bring those persons' attention to this Court's interlocutory order and the removal or clarification of the Statement;
4. a permanent order that:
- (a) the Agency prominently post at the top portion of the COVID-19 Agency Page that the Agency's Statement has been ordered to be removed by this Court;
 - (b) the Agency remove the Statement, and references to the Statement within the COVID-19 Agency Page, from its website and replace the Statement with a copy of this Court's judgment;
 - (c) in the event the Agency receives any formal complaint or informal inquiry regarding air carriers' refusal to refund in respect of the COVID-19 pandemic, promptly and prominently inform the complainant of this Court's judgment; and
 - (d) the Agency, or alternatively the appointed members of the Agency who supported the Statement, be enjoined from dealing with any complaints involving air carriers' refusal to refund passengers in respect of the COVID-19 pandemic, and enjoined from issuing any decision, order, determination or any other ruling with respect to refunds from air carriers for the COVID-19 pandemic;
5. costs and/or reasonable out-of-pocket expenses of this Application; and

6. such further and other relief or directions as the Applicant may request and this Honourable Court deems just.

The grounds for the application are as follows:

A. Overview

1. The present Application challenges the illegality of the Canadian Transportation Agency's Statement, which purports to provide an unsolicited advance ruling in favour of air carriers without having heard the perspective of passengers beforehand.
2. The Statement and the COVID-19 Agency Page preemptively suggest that the Agency is leaning heavily towards permitting the issuance of vouchers in lieu of refunds. They further suggest that the Agency will very likely dismiss passengers' complaints to the Agency for air carriers' failure to refund during the COVID-19 pandemic, irrespective of the reason for flight cancellation.
3. Despite the Agency having already determined in a number of binding legal decisions throughout the years that passengers have a fundamental right to a refund in cases where the passengers could not travel for events outside of their control, the Agency now purports to grant air carriers a blanket immunity from the law via the Statement, without even first hearing passengers' submissions or perspective as to why a refund is **mandated** by law. This is inappropriate.
4. The Agency, as a quasi-judicial tribunal, must at all times act with impartiality. That impartiality, unfortunately, has clearly been lost, as demonstrated by the Agency's issuance of the unsolicited Statement and usage thereof.
5. The fundamental precept of our justice system is that "*justice should not only be done, but should manifestly and undoubtedly be seen to be done*" (*R. v. Yumnu*, 2012 SCC 73 at para. 39). This fundamental precept leaves no room for any exception, even during difficult times like the COVID-19 pandemic.
6. Impartiality is further emphasized in the Agency's own *Code of Conduct* stipulating that the appointed members of the Agency shall not express an opinion on potential cases.

B. The COVID-19 Pandemic

7. The coronavirus [COVID-19] is a highly contagious virus that originated from the province of Hubei in the Peoples Republic of China, and began spreading outside of the Peoples Republic of China on or around January 2020.
8. On or about March 11, 2020, the World Health Organization declared COVID-19 a global pandemic.
9. On or about March 13, 2020, the Government of Canada issued a blanket travel advisory against non-essential travel outside of Canada until further notice and restricting entry of foreign nationals into Canada, akin to a “declaration of war” against COVID-19, and that those in Canada should remain at home unless absolutely necessary to be outside of their homes [Declaration].
10. COVID-19 has disrupted air travel to, from, and within Canada. The disruption was brought about by the COVID-19 pandemic and/or the Declaration, such as:
 - (a) closure of borders by a number of countries, resulting in cancellation of flights by air carriers;
 - (b) passengers adhering strictly to government travel advisories (such as the Declaration) and refraining from air travel (and other forms of travel) unless absolutely necessary; and
 - (c) air carriers cancelling flights on their own initiative to save costs, in anticipation of a decrease in demand for air travel.

C. The Agency’s Actions in Relation to COVID-19, Including the “Statement on Vouchers”

11. Since March 13, 2020 and up to the date of filing this Application, the Agency has taken a number of steps in relation to COVID-19. Those listed in the four sub-paragraphs below are **not** the subject of review in this Application.
 - (a) **On March 13, 2020**, the Agency issued Determination No. A-2020-42 providing, *inter alia*, that various obligations under the *Air Passen-*

ger Protection Regulations, SOR/2019-150 [APPR] are suspended until April 30, 2020:

- i. Compensation for Delays and Inconvenience for those that travel: compensation to passengers for inconvenience has been reduced and/or relaxed (an air carrier's obligation imposed under paragraphs 19(1)(a) and 19(1)(b) of the *APPR*);
 - ii. Compensation for Inconvenience to those that do not travel: the air carrier's obligation, under subsection 19(2) of the *APPR* to pay compensation for inconvenience to passengers who opted to obtain a refund instead of alternative travel arrangement, if the flight delay or the flight cancellation is communicated to passengers more than 72 hours before the departure time indicated on the passengers' original ticket; and
 - iii. Obligation to Rebook Passengers on Other Carriers: the air carrier's obligation, under paragraphs 17(1)(a)(ii), 17(1)(a)(iii), and 18(1)(a)(ii) of the *APPR*.
- (b) **On or about March 25, 2020**, the Agency issued Determination No. A-2020-47 extending the exemptions under Decision No. A-2020-42 (above) to June 30, 2020. This Determination further exempted air carriers from responding to compensation requests within 30 days (s. 19(4) of *APPR*). Instead, air carriers would be permitted to respond to compensation requests 120 days *after* June 30, 2020 (e.g. October 28, 2020).
 - (c) **On or about March 18, 2020**, the Agency issued Order No. 2020-A-32, suspending **all** dispute proceedings until April 30, 2020.
 - (d) **On or about March 25, 2020**, the Agency issued Order No. 2020-A-37, extending the suspension (above) to June 30, 2020.
12. On or about March 25, 2020, almost concurrently with the Order and Determination on the same date (above), the Agency publicly posted the Statement on its website (**French:** <https://otc-cta.gc.ca/fra/message-concernant-credits>; **En-**

glish: <https://otc-cta.gc.ca/eng/statement-vouchers>) providing that:

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.

13. On or about March 25, 2020, concurrently with the Statement, the Agency posted an amendment to the COVID-19 Agency Page on its website, adding four references to the Statement (French: **Information importante pour les voyageurs pour la période de la COVID-19** [<https://otc-cta.gc.ca/fra/information->

importante-pour-voyageurs-pour-periode-covid-19]; English: **Important Information for Travellers During COVID-19** [<https://otc-cta.gc.ca/eng/important-information-travellers-during-covid-19>]).

14. The COVID-19 Agency Page cites and purports to apply the Statement in the context of an air carrier's legal obligation in three circumstances: (1) situations outside airline control (including COVID-19 situations); (2) situations within airline control; and (3) situations within airline control, but required for safety.
15. In effect, the COVID-19 Agency Page purports to have relieved air carriers from providing passengers with refunds in practically **every** imaginable scenario for cancellation of flight(s), contrary to the Agency's own jurisprudence and the minimum passenger protections under the *APPR*.

D. Jurisprudence on Refunds for Passengers

16. Since 2004, in a number of decisions, the Agency confirmed passengers' fundamental right to a refund when, for whatever reason, an air carrier is unable to provide the air transportation, including those outside of the air carrier's control:
 - (a) *Re: Air Transat*, Decision No. 28-A-2004;
 - (b) *Lukács v. Porter*, Decision No. 344-C-A-2013, para. 88;
 - (c) *Lukács v. Sunwing*, Decision No. 313-C-A-2013, para. 15; and
 - (d) *Lukács v. Porter*, Decision No. 31-C-A-2014, paras. 33 and 137.
17. The Agency's jurisprudence was entirely consistent with the common law doctrine of frustration, the civil law doctrine of *force majeure*, and, most importantly, common sense.
18. The *APPR*, which has been in force since 2019, merely provides **minimum** protection to passengers. The *APPR* does not negate or overrule the passengers' fundamental right to a refund for cancellations in situations outside of a carrier's control.
19. Furthermore, the COVID-19 Agency Page also suggests that the Statement *would* apply to cancellations that are within airline control, or within airline control but required for safety purposes, squarely contradicting the provisions

of subsection 17(7) of the *APPR*. Subsection 17(7) clearly mandates that any refund be in the original form of payment, leaving no room for the novel idea of issuing a voucher or credit.

20. Finally, whether an air carrier's flight cancellation could be characterized as outside their control, or within their control, remains to be seen. For example, if a cancellation was to save costs in light of shrinking demand, it may be considered a situation within an air carrier's control. However, the Statement and the COVID-19 Agency Page presuppose that **any and all** cancellations at this time should be considered outside an air carrier's control.
21. The combined effect of the Statement and the COVID-19 Agency Page purports to ignore decade old and firmly established jurisprudence of the Agency. This all occurred without any formal hearing, adjudication, determination, or otherwise, or even a single legal submission or input from the passengers.
22. As described further below, the Agency does not even outline its legal basis or provide any support for those public statements.
23. The Agency's public statements are tantamount to endorsing air carriers in illegally withholding the passengers' monies, all without having to provide the services that were contracted for. The air carriers all seek to then issue vouchers with varying expiry dates and usage conditions to every passenger, effectively depriving all the passengers of their fundamental right to a refund, which is a right the Agency itself firmly recognized.

E. The Agency's Conduct Gives Rise to a Reasonable Apprehension of Bias

24. The Agency is a quasi-judicial tribunal that is subject to the same rules of impartiality that apply to courts and judges of the courts.
25. Tribunals, like courts, speak through their legal judgments and not media postings or "statements."
26. The Statement and/or the COVID-19 Agency Page is not a legal judgment. They give an informed member of the public the perception that it would be more

likely than not that the Agency, or the members that supported the Statement, will not be able to fairly decide the issue of refunds relating to COVID-19.

27. The Agency has already stipulated a general rule, outside the context of a legal judgment, that refunds need not be provided. No support was provided for this radical departure from the fundamental rights of passengers. The Agency merely provided a bald assertion or conclusion that passengers are not entitled to any refund.
28. The Agency's own Code of Conduct expressly prohibits members of the Agency from expressing an opinion about potential cases or any other issue related to the Agency's work, or comments that may create a reasonable apprehension of bias:

(40) Members **shall not publicly express an opinion about any past, current, or potential cases or any other issue related to the work of the Agency**, and shall refrain from comments or discussions in public or otherwise that may create a reasonable apprehension of bias.

[Emphasis added.]

29. Although neither the Statement, nor the COVID-19 Agency Page, contain the signature or names of any specific member of the Agency, given the circumstances and considering the Agency's own Code of Conduct providing that the professional civilian staff's role are to **fully** implement the appointed member(s)' directions, the Statement and the COVID-19 Agency Page ought to be attributed to the member(s) who supported the Statement either before or after its posting on the internet.
30. In these circumstances, the Court must proactively step in to protect the passengers, to ensure that "justice should not only be done, but should manifestly and undoubtedly be seen to be done," and to ensure that the administration of justice is not put to disrepute.
31. The Court ought to issue an interim, interlocutory, and/or permanent order restricting the Agency's involvement with passengers' COVID-19 related refunds against air carriers.

F. The Applicant

32. The Applicant is a non-profit corporation under the *Canada Not-for-profit Corporations Act*, SC 2009 that is an advocacy group representing the rights of air passengers.
33. Air Passenger Rights is led by a Canadian air passenger rights advocate, Dr. Gábor Lukács, whose work and public interest litigation has been recognized by this Honourable Court in a number of judgments:
- (a) *International Air Transport Assn et al. v. AGC et al.* (Federal Court of Appeal File No. A-311-19, Order of Near J.A., dated March 3, 2020) that:
- [...] the Court is of the view that the case engages the public interest, that the proposed intervener [Dr. Gábor Lukács] would defend the interests of airline passengers in a way that the parties [the Agency, the Attorney General of Canada, and an airlines trade association] cannot, that the interests of justice favour allowing the proposed intervention in the appeal, and that the proposed intervention would be of assistance to the Court in deciding the appeal [...]
- (b) *Lukács v. Canada (Transportation Agency)* 2016 FCA 174 at para. 6;
- (c) *Lukács v. Canada (Transport, Infrastructure and Communities)*, 2015 FCA 269 at para. 43;
- (d) *Lukács v. Canada (Transport, Infrastructure and Communities)*, 2015 FCA 140 at para. 1; and
- (e) *Lukács v. Canada (Transportation Agency)*, 2014 FCA 76 at para. 62.

G. Statutory provisions

34. The Applicant will also rely on the following statutory provisions:
- (a) *Canada Transportation Act*, S.C. 1996, c. 10 and, in particular, sections

25, 37, and 85.1;

(b) *Federal Courts Act*, R.S.C. 1985, c. F-7, and in particular, sections 18.1, 18.2, 28, and 44; and

(c) *Federal Courts Rules*, S.O.R./98-106, and in particular, Rules 300, 369, and 372-374; and

35. Such further and other grounds as counsel may advise and this Honourable Court permits.

This application will be supported by the following material:

1. Affidavit of Dr. Gábor Lukács, to be served.
2. Such further and additional materials as the Applicant may advise and this Honourable Court may allow.

The Applicant requests the Canadian Transportation Agency to send a certified copy of the following material that is not in the possession of the Applicant but is in the possession of the Canadian Transportation Agency to the Registry and to the Applicant:

1. Complete and unredacted copies of all correspondences, meetings, notes, and/or documents involving the appointed members of the Agency relating to the Statement and/or issuance of vouchers or credits in relation to the COVID-19 incident, including both before and after publication of the Statement;
2. The number of times the URLs for the Statements were accessed (**French:** <https://otc-cta.gc.ca/fra/message-concernant-credits>; **English:** <https://otc-cta.gc.ca/eng/statement-vouchers>) from March 24, 2020 onward;
3. Complete and unredacted copies of all correspondences, meetings, notes, and/or documents between the Canadian Transportation Agency and the travel industry (including but not limited to any travel agencies, commercial airlines, industry groups, etc.) from February 15, 2020 to the present in respect to issuing of credits, coupons, or vouchers to passengers in lieu of a refund for travel affected

by COVID-19; and

- 4. Complete and unredacted copies of all correspondences, e-mails, and/or complaints that the Agency received from passengers between February 15, 2020 to the present in respect to issuing of credits, coupons, or vouchers to passengers in lieu of a refund for travel affected by COVID-19.

April 6, 2020

“Simon Lin”

SIMON LIN
 Evolink Law Group
 4388 Still Creek Drive, Suite 237
 Burnaby, British Columbia, V5C 6C6

Tel: 604-620-2666
 Fax: 888-509-8168

simonlin@evolinklaw.com

**Counsel for the Applicant,
 Air Passenger Rights**

I HEREBY CERTIFY that the above document is a true copy of the original files in the Court.

JE CERTIFIE que le document ci-dessus est une copie conforme à l'original déposé au dossier de la Cour fédérale.

Filing date April 9, 2020
 Date de dépôt

April 9, 2020
 Dated
 Fait le

JEAN-FRANÇOIS DUPORE
 REGISTRY OFFICER
 AGENT DU GREFFE

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.

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

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

Federal Court of Appeal



Cour d'appel fédérale

Date: 20220126

Docket: A-102-20

Ottawa, Ontario, January 26, 2022

Present: GLEASON J.A.

BETWEEN:

AIR PASSENGER RIGHTS

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

and

THE CANADIAN TRANSPORTATION AGENCY

Intervener

ORDER

FURTHER to the Case Conference held on January 25, 2022, scheduled to discuss the process for dealing with various motions pending before the Court;

AND UPON reading the materials filed in respect of the said motions, including the applicant's record in support of its January 17, 2022 motion;

AND UPON considering that the applicant seeks in its January 17, 2022 Notice of Motion what it terms an order of progressive enforcement, whereby this Court would issue various orders requiring, *inter alia*: (1) production of certain documents; (2) service of the production order upon the Chairperson, Vice-Chairperson and the Secretary and Senior Counsel for the intervener; and (3) issuance of a show cause order for contempt against the aforementioned individuals upon the filing by the applicant of affidavit evidence of failure to comply with this Court's Order of October 15, 2021 or the further production order sought by the applicant in its January 17, 2022 Notice of Motion;

AND UPON considering that the authority relied upon by the applicant in support of its request for progressive enforcement, namely *Hyundai Motor America v. Cross Canada Auto Body Supply (West) Limited*, 2007 FC 120 (*Hyundai*) is not binding upon this Court and is distinguishable as in that case, unlike the present, there was no claimed uncertainty surrounding which documents had previously been ordered to be disclosed;

AND UPON considering that in *Hyundai* Justice Dawson held at paragraph 15 that a court's contempt powers "... should not be ... invoked when they are premature or not required";

AND UPON considering that resort to this Court's contempt powers in respect of disclosure issues is premature at this stage as there is no reason to assume that there would be non-compliance with any further production order that might be made in response to the applicant's January 17, 2022 Notice of Motion;

AND UPON determining that the most expeditious and appropriate method for dealing with the various orders requested by the applicant in its January 17, 2022 Notice of Motion is to bifurcate the said motion and deal in the first instance only with the order requested in paragraph 1 of the Notice of Motion, which will clarify which of the documents in dispute are to be produced in accordance with this Court's Order of October 15, 2021;

THIS COURT ORDERS that:

1. The Court shall hear the applicant's January 17, 2022 motion in an bifurcated manner and address in the first instance only the order requested in paragraph 1 of the Notice of Motion as well as the request for costs in respect of this portion of the motion;
2. Any materials the respondent or the intervener wish to file that are responsive to the request for relief made in paragraph 1 of the Notice of Motion and the request for costs shall be served and filed by no later than February 1, 2022; and
3. In the event the applicant requires an extension of time to file its reply representations in respect of this portion of its motion, the applicant may seek an order approving the extension via way of email addressed to the Registry.

"Mary J.L. Gleason"

J.A.

Federal Court of Appeal



Cour d'appel fédérale

Date: 20220411

Docket: A-102-20

Ottawa, Ontario, April 11, 2022

Present: GLEASON J.A.

BETWEEN:

AIR PASSENGER RIGHTS

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

and

THE CANADIAN TRANSPORTATION AGENCY

Intervener

ORDER

UPON motions of the applicant and respondent related to documentary disclosure and privilege, the whole as more particularly described in the Reasons for this Order;

AND UPON reading the materials filed;

THIS COURT ORDERS that:

1. The motion of the applicant is granted in part;
2. The motion of the respondent is granted;
3. The portions of the two documents in respect of which the respondent asserts claims of privilege are privileged and shall not be produced. Redacted copies of them shall be produced in accordance with the Reasons for this Order;
4. Within five (5) days of the date of this Order, the Canadian Transportation Agency (the CTA) shall disclose to the parties the materials listed in the Appendix to the Reasons for this Order as items A1, A5 and C2 and B4 (except those that are publicly available on the CTA's Twitter feeds);
5. Within five (5) days of the date of this Order, the CTA shall determine if the statement on vouchers was discussed during the March 19, 22 and 23, 2020 calls. If so, it shall disclose to the parties the documents relating to these calls as listed as items C1, C5 and C6 in the Appendix to the Reasons for this Order. Such disclosure shall be made within five (5) days of the date of this Order;
6. Within 10 days of the date of this Order, the respondent shall serve and file submissions regarding any notes taken by CTA Members, its Chairperson and Vice-Chairperson during the March 24, 2020 call, the whole in accordance with paragraph 43 of the Reasons for this Order;
7. Within 10 days of the date of this Order, the individual at the CTA responsible for compliance with this Court's October 15, 2021 Order shall serve and file an affidavit

- detailing the CTA's efforts to comply with the October 15, 2021 Order, the whole in accordance with the directions provided in the Reasons for this Order at paragraph 47;
8. Within 10 days of the date of this Order, the CTA shall file an updated certificate, attesting to the authenticity of the additional documents it is required to disclose as well as copies of the said documents;
 9. Within 40 days of the date of Order, the applicant shall file any additional affidavit(s) it intends to rely on in support of its application;
 10. All subsequent steps required to perfect this application shall be governed by the *Federal Courts Rules*, S.O.R./98-106.

"Mary J.L. Gleason"

J.A.

Federal Court of Appeal



Cour d'appel fédérale

Date: 20220411

Docket: A-102-20

Citation: 2022 FCA 64

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 April 11, 2022.

REASONS FOR ORDER BY:

GLEASON J.A.

Federal Court of Appeal



Cour d'appel fédérale

Date: 20220411

Docket: A-102-20

Citation: 2022 FCA 64

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 two motions regarding disclosure of documents by the Canadian Transportation Agency (CTA). The first relates to a claim of privilege over portions of two

documents and the second relates to a disagreement over whether the CTA has complied with the disclosure order issued by this Court on October 15, 2021.

I. Background

[2] A little background is necessary to place the two motions into context.

[3] The underlying application for judicial review in these matters challenges a statement on vouchers published 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 providing reimbursements for cancelled flights.

[4] In its application for judicial review, the applicant alleges, among other things, that the issuance of the statement gives rise to a reasonable apprehension of bias for two reasons: first, because it demonstrated pre-judgment of complaints in which passengers might seek reimbursement for cancelled flights; and second, because there was third party influence in the development of the statement.

[5] The applicant brought a motion seeking disclosure from the CTA, and on October 15, 2021, this Court granted the motion in part and ordered the CTA to disclose:

- 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.

[6] Further to the October 15, 2021 Order, the CTA disclosed a number of documents to the applicant, but the applicant believes the disclosure is incomplete based on the contents of the documents that have been disclosed to date. On January 17, 2022, the applicant brought a motion in which it sought an order for disclosure of the additional documents listed in the schedule to its Notice of Motion plus the issuance of a show cause order for contempt and related ancillary relief.

[7] On December 15, 2021, the respondent brought a motion seeking to have portions of two documents found to be privileged and protected from disclosure. On the same date, it also brought another motion, seeking an extension of time to obtain instructions on whether it would seek to claim privilege over two additional documents.

[8] A case conference was convened on January 25, 2022 during which the parties made submissions on the procedure for dealing with the various motions before the Court. Following that case conference, the Court issued two Orders on January 26, 2022.

[9] The first of the January 26, 2022 Orders granted the respondent additional time to bring a motion if it wished to request a ruling on privilege in respect of the two additional documents. The respondent subsequently advised that it was not seeking such a ruling and has disclosed the two additional documents to the applicant.

[10] The second of the January 26, 2022 Orders provided that the applicant's January 17, 2022 motion would be bifurcated such that the request for an order for disclosure of additional documents would be decided first because it could well render the request for a show cause order for contempt unnecessary. The CTA and the applicant subsequently filed written submissions in respect of the outstanding disclosure issues.

II. The Motion for a Ruling on Privilege

[11] I turn now to the respondent's motion seeking a determination that portions of two documents are privileged. I have carefully reviewed the two documents, along with the parties' submissions in respect of them, and am satisfied that the requested order should be granted as portions of the two documents that the respondent wishes to protect from disclosure are privileged.

[12] The first of these documents is an email chain, in which a to-do list appears for various members of the CTA. The list was issued by the former Chairperson of the CTA. Three of the tasks that appear on the second page of the list are directed to Valérie Lagacé, the Senior General Counsel of the CTA. They request legal advice and a legal opinion and therefore are subject to solicitor-client privilege and are protected from disclosure. The CTA shall accordingly redact the portions of this document directed to Ms. Lagacé and disclose only the redacted version of it.

[13] The second document is an email chain between various individuals at the CTA, emanating from the former Chairperson of the CTA, which attaches a draft of the statement on vouchers as well as a draft of a decision in an unrelated matter. The respondent asserts that the draft decision is subject to deliberative privilege and, moreover, is irrelevant to the applicant's application for judicial review. Having carefully reviewed the document, I agree that the draft decision is subject to deliberative privilege and therefore determine that the CTA shall disclose this second document with the draft decision redacted from it.

III. The Motion of Further Disclosure

[14] Turning to the applicant's motion for further disclosure, the additional documents that the applicant seeks an order to disclose are listed in the Appendix to these Reasons.

[15] The applicant filed an affidavit from Dr. Gábor Lukács in support of its motion for a more detailed order for disclosure in which Dr. Lukács sets out in some detail the reasons why he believes that the documents listed in the schedule likely exist. In response, the CTA declined to

file an affidavit and, with a few exceptions, instead simply asserts that most of the requested documents in the Appendix do not exist or, in two cases, says it no longer possesses them.

[16] I will deal first with the documents the CTA admits exist but has declined to produce.

A. *Microsoft Word files for the statement on vouchers and for the template media response attached to the Chairperson's March 24, 2020 email*

[17] The first set of documents that the CTA admits exists but declined to disclose are the original Microsoft Word files for the statement on vouchers and for the CTA's media response (items A1 and A5 in the Appendix). The CTA chose to send the applicant PDF versions of these documents from which the metadata had been removed.

[18] The CTA submits that it is not required to produce the original Microsoft Word files because: (1) the applicant did not specify in its notice of motion, seeking disclosure, that they were sought, (2) this Court's October 15, 2021 Order did not specifically require their production, and (3) Rules 317 and 318 of the *Federal Courts Rules*, S.O.R./98-106 (the Rules) do not contemplate or require production of original electronic version of documents. On the final point, the CTA submits that these Rules contemplate as the default position only the disclosure of certified copies of documents and that original materials need only be disclosed where such copies cannot be produced. Because it reproduced these two documents in PDF form, the CTA says that it need not produce the original Microsoft Word files. In essence, it claims that original electronic versions of documents are not subject to disclosure under Rules 317 and 318.

[19] I disagree with the CTA.

[20] As concerns the requirements of the Rules, there is nothing in Rule 317 or 318 that shields the electronic version of documents from disclosure. Indeed, contrary to what the CTA alleges, rule 318(1)(b) contemplates such disclosure where the original electronic version is relevant. Rule 318 provides:

318 (1) Within 20 days after service of a request under rule 317, the tribunal shall transmit

(a) a certified copy of the requested material to the Registry and to the party making the request; or

(b) where the material cannot be reproduced, the original material to the Registry.

Objection by tribunal

(2) Where a tribunal or party objects to a request under rule 317, the tribunal or the party shall inform all parties and the Administrator, in writing, of the reasons for the objection.

Directions as to procedure

(3) The Court may give directions to the parties and to a tribunal as to the procedure for making submissions with respect to an objection under subsection (2).

Order

(4) The Court may, after hearing submissions with respect to an

318 (1) Dans les 20 jours suivant la signification de la demande de transmission visée à la règle 317, l'office fédéral transmet :

a) au greffe et à la partie qui en a fait la demande une copie certifiée conforme des documents en cause;

b) au greffe les documents qui ne se prêtent pas à la reproduction et les éléments matériels en cause.

Opposition de l'office fédéral

(2) Si l'office fédéral ou une partie s'opposent à la demande de transmission, ils informent par écrit toutes les parties et l'administrateur des motifs de leur opposition.

Directives de la Cour

(3) La Cour peut donner aux parties et à l'office fédéral des directives sur la façon de procéder pour présenter des observations au sujet d'une opposition à la demande de transmission.

Ordonnance

(4) La Cour peut, après avoir entendu les observations sur l'opposition,

objection under subsection (2), order that a certified copy, or the original, of all or part of the material requested be forwarded to the Registry.

ordonner qu'une copie certifiée conforme ou l'original des documents ou que les éléments matériels soient transmis, en totalité ou en partie, au greffe.

[21] Where the authorship of documents or their revision history is relevant (as it is here and will often be where allegations of bias are raised), the metadata contained in the documents are relevant. Metadata were not disclosed in the type of PDF the CTA produced but will be disclosed if the original Microsoft Word file version of the documents is disclosed.

[22] Disclosure of the metadata is contemplated in rule 318(1)(b) precisely because it cannot be reproduced in a photocopy of the document or in a PDF copy of the sort produced by the CTA. The Federal Court reached the same conclusion in *GCT Canada Limited Partnership v. Vancouver Fraser Port Authority*, 2021 FC 624 [*Vancouver Fraser Port Authority*], where it required production of original Microsoft Excel files that contained embedded data of relevance to bias allegations raised by the applicant (see paras. 41-48 and 132). Thus, contrary to what the CTA says, the Microsoft Word files in question are not immune from disclosure under Rules 317 and 318.

[23] As for the fact that this Court did not specifically state that Microsoft Word file versions of documents were to be disclosed (as opposed to PDF versions) or that the applicant did not specifically request them, such assertions are without merit. Given the prevalence of computer use and electronic documents, it cannot seriously be contested in 2022 that documents include electronic documents. This Court's October 15, 2021 Order required the production of "all non-privileged documents" coming within the scope of the Order. The Order was not limited to

production of the paper version of documents. Nor was the applicant's disclosure request so limited.

[24] The CTA shall therefore disclose the documents listed as items A1 and A5 in the Appendix.

B. *Twitter messages and messages sent via the CTA's Info email*

[25] The next group of documents that the CTA acknowledges exist but declined to disclose are messages from and to third parties received via its Twitter accounts or through its Info email account concerning the statements on vouchers over the period in respect of which disclosure was ordered (item B4 in the Appendix).

[26] The CTA offers three reasons for its position. First it says that, at least as concerns its Twitter accounts, materials from them should be available to the applicant because the applicant has filed these sorts of materials in this case. Second, the CTA says that the applicant abandoned this request in its original motion seeking disclosure. Third, the CTA says that these documents do not fall within the scope of this Court's October 15, 2021 Order because they are unlikely to support the applicant's bias allegations as most would be from individuals. It therefore asserts that the documents fall outside the scope of this Court's October 15, 2021 Order.

[27] Turning first to the CTA's Twitter accounts, to the extent that Tweets on the accounts are publicly available (and thus accessible to the applicant), they need not be produced. A party may

only obtain disclosure through Rules 317 and 318 of materials that are not already in its possession. Rule 317(1) provides in relevant part that a party may request disclosure of material “that is in the possession of the tribunal ... and not in the possession of the party”.

[28] As concerns the CTA’s second and third points in respect of these materials, I disagree that the applicant has abandoned a request for their disclosure or that they are not covered by the October 15, 2021 Order.

[29] In its original motion materials, the applicant principally modified its disclosure request to shorten the period in respect of which it sought disclosure. Over the shortened period, it still maintained its request for “complete and unredacted copies of all records from March 9 – April 8, 2020 in respect of [the statement on vouchers and a related posting on the CTA website] but not limited to emails, meeting agendas, meeting minutes, notes, draft documents, and memos”. This request is clearly broad enough to cover the category of documents that the CTA has declined to disclose.

[30] Likewise, they fall within the scope of this Court’s October 15, 2021 Order. In paragraph 3(b) of that Order, this Court ordered disclosure of “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”. In the Reasons for that Order, the Court specified that third parties “include anyone other than a member or employee of the CTA.” (at para. 23).

[31] With respect, it is not for the CTA to opine whether these documents are likely to further the applicant's case. They are third party communication over the relevant period concerning the impugned statement on vouchers and thus fall within the scope of documents that the Court determined were relevant and subject to disclosure in its October 15, 2021 Order. The CTA shall therefore disclose to the applicant all materials listed in item B4 in the Appendix except those that are publicly available on its Twitter feeds. For clarity, private Twitter messages sent or received on the CTA's accounts must be disclosed.

C. *Documents for the March 19, 22 and 23, 2020 Executive Committee and Key Personnel Calls*

[32] Although the CTA acknowledges that there are documents that pertain to the calls between CTA's Executive Committee and Key Personnel on the above dates (items C1, C5 and C6 in the Appendix), it says that none of them relates to the statement on vouchers and therefore need not be disclosed. It is unclear from the CTA's representations whether the statement on vouchers was discussed during the calls on March 19, 22 and 23, 2020, although the CTA states that the applicant has not been able to establish that it was discussed. (I note that the documents disclosed to date appear to show that it was the intent to discuss the statement on vouchers during these calls.)

[33] In order to comply with the Order, the CTA was required to inquire whether the subject was discussed during these calls. If the subject matter was not discussed, then none of these documents needed to be disclosed. Conversely, if the statement on vouchers was discussed during the calls, the terms of the October 15, 2021 Order requires disclosure of these documents.

[34] The Order requires disclosure of two different sorts of documents in paragraphs 3(a) and 3(c). By virtue of paragraph 3(a) of the Order, the CTA was required to disclose all non-privileged documents sent to or by a CTA Member (including its Chairperson and Vice-Chairperson) between March 9 and 25, 2020 concerning the statement on vouchers. Paragraph 3(c) of the Order, on the other hand, requires disclosure of all non-privileged documents related to any meeting attended by a CTA member (including its Chairperson and Vice-Chairperson) between March 9 and March 25, 2020 where the statement on vouchers was discussed. In paragraph 23 of the Reasons, the Court specified that a meeting includes telephone conversations, video conferences and internet meetings as well as in person meetings.

[35] Thus, the CTA shall determine if the statement on vouchers was discussed during these calls. If so, then it must disclose all the documents relating to these calls.

D. *Documents for the March 20, 2020 Executive Committee call*

[36] The CTA admits that the statement on vouchers was discussed during this call and that it has in its possession additional documents that pertain to the call (item C2 in the Appendix). It takes the position that it need not disclose these documents because the documents contain no mention of the statement on vouchers. This is incorrect. As noted, pursuant to the clear wording of paragraph 3(c) of the October 15, 2021 Order, the CTA has been ordered to produce these documents. It accordingly must do so.

[37] All the disclosures required by these Reasons shall be made within 5 days of the date of the Order that accompanies these Reasons.

E. *Documents for the March 24, 2020 CTA Members' call*

[38] The applicant has requested production of the notes taken by CTA Members during this call. The CTA states that it has no knowledge of whether its Members, Chairperson and Vice-Chairperson kept notes of the March 24, 2020 call during which the statement on vouchers was discussed (item C7 in the Appendix). It further submits that, to the extent there might be any such notes, they are not in the possession of the CTA but are rather the personal property of the Members and are immune from disclosure.

[39] In support of its position, the CTA relies on the decision of this Court in *Canada (Privacy Commissioner) v. Canada (Labour Relations Board)* (2000), 180 F.T.R. 313, 257 N.R. 66 (A.D.) [*Canada (Privacy Commissioner)*] in which this Court declined to order production under the *Privacy Act*, R.S.C. 1985, c. P-21 of notes taken by members of the Canada Labour Relations Board during a hearing. At paragraphs 5-6, Justice Desjardins, who wrote for the Court, stated:

[5] While the notes taken by the Board members may or may not amount to "personal information", a matter we need not decide, it is obvious to us that these notes are not "under the control" of the Board as provided in paragraph 12(1)(b) of the *Privacy Act*. These notes are being taken during the course of quasi-judicial proceedings, not by employees of the Board, but by Governor in Council's appointees endowed with adjudicative functions which they must perform, not as agent of the Board, but independently of other members of the Board including the chairperson of the Board or a government institution. Board members are under no obligation to take notes although they may. Their notes are not part of the official records of the Board and are not contained in any other record keeping system over which the Board has control.

[6] The trial judge made the following statement with which we agree:

... It is clear that there is no requirement either in the *Canada Labour Code*, or in the CLRB policy or procedure touching upon the notes. The notes are viewed by their authors as their own. The CLRB members are free to take notes as and when they see fit, and indeed may simply choose not to do so. The notes are intended for the eyes of the author only. No other person is allowed to see read or use the notes, and there is a clear expectation on the part of the author that no other person will see the notes. The members maintain responsibility for the care and safe keeping of the notes and can destroy them at any time. Finally, the notes are not part of the official records of the CLRB and are not contained in any other record keeping system over which the CLRB has administrative control.

In my view, it is apparent from the foregoing that however broadly one construes the word control, the notes in issue were not "under the control" of the CLRB within any of the meanings that can be attributed to that term. Not only are the notes outside the control or custody of the CLRB but they are also considered by the CLRB to fall outside the ambit of its functions.

[40] The underpinning for the foregoing determination that the notes were not producible was the fact that they were subject to adjudicative privilege. Indeed, in the subsequent case of *Wyndowe v. Rousseau*, 2008 FCA 39, 373 N.R. 301 [*Wyndowe*], Justice Decary, who wrote for the Court stated that the thrust of the decision in *Canada (Privacy Commissioner)*:

... is that the disclosure of the notes would offend the adjudicative privilege, also termed judicial immunity, that could be claimed by administrative tribunals and would compromise the operation of the Board and be injurious to the conduct of lawful investigations within the meaning of the exemption found in paragraph 22(1)(b) of the *Privacy Act*.

[41] In *Wyndowe*, disclosure was ordered because the note-taker in that case was not engaged in an adjudicative function.

[42] In the present case, it appears that there may well be a debate between the parties as to the nature of the function that was being carried out by the CTA Members, Chairperson and Vice-chairperson in the adoption of the statement on vouchers. If the function is an adjudicative one, then the notes taken by the Members are protected from disclosure under the principles set out above.

[43] In light of this uncertainty, the respondent is directed to confirm within ten days of the date of the Order that accompanies these Reasons whether it takes the position that these notes are immune from disclosure by reason of adjudicative privilege and, if not, on what other basis they cannot be ordered to be disclosed.

F. *The Remaining Documents*

[44] With three exceptions, the CTA states that none of the remaining documents that the applicant seeks exists.

[45] Two of these exceptions relate to the documents listed as items B1 and B2 in the Appendix, the original emails between a CTA staff member and an official at Transport Canada. The CTA concedes that it must have been in possession of these emails at some point because they are found within other email chains, but states that they cannot be located.

[46] The other exception is one of the documents listed as item A4 in the Appendix, the draft email to carriers that Ms. Jones of the CTA sent to the CTA Chairperson the day before the

statement on vouchers was posted. As originally produced, this email had the sender and recipient information removed from it. The CTA subsequently provided a revised version of the email, showing this information. It disclosed the revised version of this email with its written submissions.

[47] Given the number of issues that have arisen with disclosure and compliance with this Court's October 15, 2021 Order as well as the number of outstanding documents that the applicant is seeking, I agree with the applicant that the individual at the CTA who was responsible for complying with this Court's October 15, 2021 Order should be required to serve and file an affidavit detailing what has been done to ensure the required disclosure was made. I would expect that the affidavit would address the following issues set out in paragraph 43 of the applicant's reply submissions, namely:

- (a) how the CTA narrowed down the several thousands of pages of documents to less than two hundred pages it has disclosed;
- (b) what steps were taken, if any, to gather and/or preserve documents upon being served with the Notice of Application on April 9, 2020;
- (c) who at the CTA conducted the searches for documents;
- (d) whether the CTA reviewed its encrypted emails or documents;
- (e) what record-keeping systems the CTA has, and whether all of them were searched for responsive documents;
- (f) whether the CTA has any backups or archives of their emails and other electronic documents, and whether those backups or archives were searched;
- (g) whether the CTA conducted any investigation after learning that some documents no longer exist, and any steps taken to recover those documents; and

- (h) whether the CTA's audio or video conferencing system has a recording feature and whether the conferences between March 9 and 25, 2020 were recorded.

[48] Somewhat similar orders requiring an affidavit were made by the Federal Court in *Vancouver Fraser Port Authority* and in *Constantinescu c. Canada (Correctional Service)*, 2021 FC 229 where problems with disclosure by a tribunal arose.

[49] Such affidavit shall be served and filed within 10 days of the date of the Order that accompanies these Reasons. The CTA shall also serve and file an updated certificate, attesting to the authenticity of the additional documents it is required to disclose in accordance with these Reasons as well as copies of the aforementioned documents within 10 days of the date of the Order that accompanies these Reasons.

[50] To allow for any necessary cross-examinations of the CTA's affiant, within 40 days of the date of the Order that accompanies these Reasons, the applicant shall file any additional affidavit(s) it intends to rely on in support of this application. All further steps for the perfection of this application shall be governed by the Rules.

[51] Costs of these motions are in the cause.

“Mary J.L. Gleason”

J.A.

Appendix A

SCHEDULE “A” (the “Withheld Materials”)

A. CTA Member Correspondences

- A1. **The Microsoft Word Files for the Statement on Vouchers.** The original Microsoft Word files for the Statement on Vouchers, and drafts of the Statement on Vouchers, attached to emails that were sent to/from a CTA Member (including the Chairperson and Vice-Chairperson) between March 9, 2020 and March 25, 2020.
- A2. **Documents Regarding the Statement on Vouchers on March 23, 2020.** All documents regarding the Statement on Vouchers that were sent to/from a CTA Member (including the Chairperson and Vice-Chairperson) on or about March 23, 2020.
- A3. **Documents Regarding the Statement on Vouchers on March 24, 2020.** All documents regarding the Statement on Vouchers that were sent to/from a CTA Member (including the Chairperson and Vice-Chairperson) on or about March 24, 2020 between 8:30AM and 7:00PM.
- A4. **Documents Regarding the Announcement of the Statement on Vouchers to Third-Parties.** All documents regarding Ms. Jones’s email on March 24, 2020 with the subject line “message to carriers – signals check” that was sent to/from a CTA Member (including the Chairperson and Vice-Chairperson) between March 24, 2020 and March 25, 2020.
- A5. **Chairperson’s Template Response to Media in MS Word Format.** The original Microsoft Word file(s) for the template media response in the March 24, 2020 at 7:34PM email sent by the Chairperson with subject line “Answer,” which were sent to/from a CTA Member (including the Chairperson and Vice-Chairperson) between March 24, 2020 and March 25, 2020.
- A6. **Ms. Jones’s Draft FAQs about the Statement on Vouchers.** All documents in respect of Ms. Jones’s draft FAQs first circulated on

March 24, 2020 in response in the email with subject line “RE: Answer,” which was sent to/from a CTA Member (including the Chairperson and Vice-Chairperson) between March 24, 2020 and March 25, 2020.

B. Third-Party Correspondences

- B1. Original Email Announcing the Statement on Vouchers.** Original version of the e-mail sent by Ms. Marcia Jones on March 25, 2020 with the subject line “Update: CTA measures/Mise à jour: mesures prises par l’OTC.”
- B2. Original Email from Transport Canada on March 18, 2020.** Original version of the e-mail sent by Mr. Colin Stacey at Transport Canada to Ms. Marcia Jones on March 25, 2020 with the subject line “FW: From MinO:[Redacted],” including all attachments to that email.
- B3. Correspondences in respect of Ms. Jones’s and the Assistant Deputy Minister’s Meeting(s).** All non-privileged correspondences in respect of the meeting(s) between Ms. Marcia Jones and the Assistant Deputy Minister of Transport on or about March 21-22, 2020.
- B4. CTA’s Info Email and Twitter Messages.** All non-privileged documents sent to or from the CTA in respect of the Statement on Vouchers between March 9, 2020 and March 25, 2020 using:
- (a) the CTA’s Info email account (info@otc-cta.gc.ca); and
 - (b) the CTA’s Twitter accounts in English (CTA_gc) and French (OTC_gc), including but not limited to Private Messages.
- B5. Correspondences to/from PIAC.** All non-privileged correspondences to/from PIAC between March 9, 2020 and March 25, 2020 regarding the Statement on Vouchers.

C. Meeting Documents

- C1. **Documents for the March 19 EC Call.** All non-privileged documents in respect of the CTA's EC call on March 19, 2020, including but not limited to:
- (a) the meeting agenda;
 - (b) correspondences to schedule and/or set up the meeting;
 - (c) video or audio recordings of the meeting;
 - (d) meeting minutes;
 - (e) notes taken by or on behalf of any of the participants; and
 - (f) correspondences of the meeting's decisions and deliverables.
- C2. **Documents for the March 20 EC Call.** All non-privileged documents in respect of the CTA's EC call on March 20, 2020, including but not limited to:
- (a) the meeting agenda;
 - (b) correspondences to schedule and/or set up the meeting;
 - (c) video or audio recordings of the meeting;
 - (d) meeting minutes;
 - (e) notes taken by or on behalf of any of the participants; and
 - (f) correspondences of the meeting's decisions and deliverables.
- C3. **CTA Chairperson's March 21-22, 2020 Weekend Meeting(s).** All non-privileged documents in respect of the meeting(s) between the CTA's Chairperson, the Deputy Minister of Transport, an unidentified individual, and/or some of them over the course of the weekend of March 21-22, 2020 about the Statement on Vouchers, including but not limited to:
- (a) documents sent to/from those third-parties before or after the meeting(s), including draft(s) of the Statement on Vouchers;

- (b) the meeting agenda;
- (c) correspondences to schedule and/or set up the meeting;
- (d) video or audio recordings of the meeting;
- (e) meeting minutes;
- (f) notes taken by or on behalf of any of the participants; and
- (g) correspondences of the meeting's decisions and deliverables.

C4. **CTA Chairperson's March 21 and/or 22, 2020 Discussions with Vice- Chairperson.** All non-privileged documents in respect of the meeting(s) between the CTA's Chairperson and Vice-Chairperson over the course of the weekend of March 21-22, 2020 about the Statement on Vouchers, including but not limited to:

- (a) documents circulated between them before or after their meeting(s), including draft(s) of the Statement on Vouchers;
- (b) the meeting agenda;
- (c) correspondences to schedule and/or set up the meeting;
- (d) meeting minutes;
- (e) notes taken by or on behalf of any of the participants; and
- (f) correspondences regarding the meeting(s).

C5. **Documents for the March 22 CTA Key Personnel Call.** All non-privileged documents in respect of the call on March 22, 2020 at or about 10:30AM, including but not limited to:

- (a) the meeting agenda;
- (b) correspondences to schedule and/or set up the meeting;
- (c) video or audio recordings of the meeting;
- (d) meeting minutes;
- (e) notes taken by or on behalf of any of the participants; and

- (f) correspondences of the meeting's decisions and deliverables.
- C6. **Documents for the March 23 EC Call.** All non-privileged documents in respect of the CTA's EC call on March 23, 2020, including but not limited to:
- (a) the meeting agenda;
 - (b) correspondences to schedule and/or set up the meeting;
 - (c) video or audio recordings of the meeting;
 - (d) meeting minutes;
 - (e) notes taken by or on behalf of any of the participants; and
 - (f) correspondences of the meeting's decisions and deliverables.
- C7. **Documents for the March 24 CTA Members' Call.** All non-privileged documents in respect of the CTA Members' Call on March 24, 2020, including but not limited to:
- (a) the meeting agenda;
 - (b) correspondences to schedule and/or set up the meeting;
 - (c) video or audio recordings of the meeting;
 - (d) meeting minutes;
 - (e) notes taken by or on behalf of any of the participants; and
 - (f) correspondences of the meeting's decisions and deliverables.
- C8. **Documents for the March 25 Discussions Involving Chair and/or Vice-Chair.** All non-privileged documents in respect of the discussions involving the Chairperson or Vice-Chairperson, and/or other persons on March 25, 2020 regarding the Statement on Vouchers, including but not limited to:
- (a) the meeting agenda;
 - (b) correspondences to schedule and/or set up the meeting;

- (c) video or audio recordings of the meeting;
- (d) meeting minutes;
- (e) notes taken by or on behalf of any of the participants; and
- (f) correspondences of the meetings' decisions and deliverables.

C9. **Documents for the Cancelled March 25 Call.** All non-privileged documents for the March 25, 2020 meeting originally scheduled for 10:00AM, including but not limited to:

- (a) the meeting agenda;
- (b) correspondences to schedule and/or set up the meeting; and
- (c) draft documents circulated prior to the scheduled meeting.

C10. **The CTA Chairperson's Discussion(s) with "Other Federal Players"**. All non-privileged documents in respect of the discussion(s) between the Chairperson and "other federal players" on or before March 23, 2020 regarding the Statement on Vouchers, including but not limited to:

- (a) the meeting agenda;
- (b) correspondences to schedule and/or set up the meeting;
- (c) video or audio recordings of the meeting;
- (d) meeting minutes;
- (e) notes taken by or on behalf of any of the participants; and
- (f) correspondences of the meeting's decisions and deliverables.

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: APRIL 11, 2022

WRITTEN REPRESENTATIONS BY:

Simon Lin COUNSEL FOR THE APPLICANT

J. Sanderson Graham COUNSEL FOR THE RESPONDENT

Barbara Cuber COUNSEL FOR THE INTERVENER

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Deputy Attorney General of Canada

Legal Services Directorate FOR THE INTERVENER
Canadian Transportation Agency
Gatineau, Quebec

Federal Court of Appeal



Cour d'appel fédérale

TO : APPEAL REGISTRY**FROM :** MACTAVISH J.A.**DATE :** May 2, 2022**RE :** *A-102-20: Air Passenger Rights v. The Attorney General of Canada et al.*

DIRECTION

The Canadian Transportation Agency seeks a case management conference to be held in advance of a cross-examination set for tomorrow. It is apparent from the correspondence from the parties that they disagree with respect to the documents to which the applicant is entitled.

The *Federal Courts Rules*, S.O.R./98-106, and, in particular, Rule 94 thereof, provides a mechanism for resolving disputes of this nature. Given the history of this litigation and the nature of the dispute between the parties, the Court is of the view that the issues currently in dispute are best resolved through a formal motion supported by a proper evidentiary record.

Consequently, the Court will not be scheduling a case management conference at this time.

“Anne L. Mactavish”

J.A.

Court File No.: A-102-20

FEDERAL COURT OF APPEAL

BETWEEN:

AIR PASSENGER RIGHTS

Applicant

– and –

ATTORNEY GENERAL OF CANADA

Respondent

– and –

CANADIAN TRANSPORTATION AGENCY

Intervener

WRITTEN REPRESENTATIONS OF THE MOVING PARTY

PART I – OVERVIEW AND STATEMENT OF FACTS

1. This is the third time the Applicant is seeking assistance to bring the Intervener, the Canadian Transportation Agency [CTA], into compliance with its obligations to produce relevant documents to the Court. The Court issued two Orders to that effect, including an order for the CTA to file an affidavit about its document search efforts.

2. Gleason, J.A. issued two Orders: On October 15, 2021 an Order that the CTA to produce three categories of documents that were determined as relevant for this Application [**October Order**], and another Order on April 11, 2022 [**April Order**] for specific items that are already within the three categories of the October Order. Despite two clear Orders, the CTA engaged in a pattern of obfuscation to avoid compliance.

3. To address the CTA's bald assertions of non-existence or "no longer in existence" of many key documents, in the April Order, the Court ordered that the responsible individual at the CTA detail the CTA's document search efforts in an affidavit.

4. The Court also permitted the Applicant to cross-examine the CTA's affiant on the document search. Unfortunately, the CTA refused to present its affiant at the scheduled cross-examination, despite a duly served Direction to Attend. The Applicant is seeking assistance to compel the affiant's attendance, with costs payable by the CTA.

5. Although the CTA produced some documents on April 20, 2022 [**April 20, 2022 Documents**], the CTA continues to defy the two Court Orders. The CTA's document production, including the April 20, 2022 Documents, continues to be incomplete and missing many documents covered by the October Order. The CTA's certificate on April 21, 2022 is also not in compliance with the Court's April Order and the applicable laws.

6. Most seriously, the CTA ignored the terms of the October Order that privilege assertions must be decided by the Court on an informal motion from the AGC, and

not by the CTA itself. The CTA concealed, from the Court and the Applicant, that an unspecified number of documents were excluded from the April 20, 2022 Documents.

7. The Applicant is also asking the Court to impose cost consequences to deter the CTA's dilatory conduct, and its repeated failure to comply with the letter and spirit of the October Order and the April Order. A matter cannot proceed efficiently when a non-party withholds relevant evidence, and merely pays lip service to court orders.

The Underlying Application for Judicial Review

8. The underlying Application relates to the widely disseminated "Statement on Vouchers" that the CTA published on its website on March 25, 2020 [**Statement on Vouchers**], purporting to guide the public on their right to refunds of unused airfares.

9. The Applicant is a non-profit organization seeking judicial review on behalf of and for the benefit of the travelling public based on two distinct grounds of review:

- (a) **Reasonable Apprehension of Bias Ground [RAB Ground]** — the issuing of the Statement on Vouchers was contrary to the CTA's *Code of Conduct*, **and** gives rise to a reasonable apprehension of bias for the CTA as a whole, or the CTA's constituent Members that endorsed the Statement on Vouchers; and
- (b) **Misinformation Ground** — the Statement on Vouchers misinforms and confuses passengers' about their rights vis-à-vis the airlines.

10. The RAB Ground of review is two-fold. Firstly, the pre-judgement by the CTA as an institution, or by its constituent Members, regarding passengers' entitlement to reimbursement for flights affected by the pandemic. Secondly, external third-party influence for the inception of the impugned Statement on Vouchers.¹ In that regard, articles 39-40 of the CTA's *Code of Conduct* specifically state that:

¹ Reasons for Order of Gleason, J.A. (Oct. 15, 2021) at para. 17 [Tab 5, p. 477].

(39) Members shall not communicate with political actors or officials of other federal departments and agencies, provincial or foreign governments, or international organizations regarding a matter that is, was, or could be before the Agency.

(40) Members shall not publicly express an opinion about any past, current, or potential cases or any other issue related to the work of the Agency, and shall refrain from comments or discussions in public or otherwise that may create a reasonable apprehension of bias.²

11. Before Gleason, J.A.’s October Order and April Order, two justices of this Court had confirmed that this RAB Ground raises a *serious issue to be tried* on its merits.³

The CTA’s Inception of the Statement on Vouchers

12. On March 18, 2020, Transport Canada forwarded an encrypted email to the CTA with Transat AT’s request that the CTA endorse vouchers in lieu of cash refund.⁴ In addition to the encrypted email, two key CTA personnel (i.e., the former Chair Scott Streiner and former Chief Strategy Officer Marcia Jones) attended undisclosed meetings around the weekend of March 21-22, 2020 with Transport Canada on this topic.⁵

13. On the morning of Sunday, March 22, 2020, Mr. Streiner scheduled an “Urgent Debrief” with a select group of five senior personnel in the CTA’s Executive Committee, and at about the same time unveiled Mr. Streiner’s initial draft Statement on Vouchers.⁶

14. The exact contents within Transport Canada’s forwarded and encrypted request from Transat AT remains a mystery. The CTA asserted that this Transport Canada email “no longer existed.”⁷ It remains to be seen why material evidence for the RAB Ground of judicial review could go missing, when the relevant CTA personnel were told to

² *Code of Conduct for Members of the Agency*, paras. 39 and 40 [Tab 2D, p. 60].

³ Reasons for Order of Gleason, J.A. (Oct. 15, 2021) at paras. 5-6 [Tab 5, pp. 473-474].

⁴ Transport Canada Encrypted Email – Lukács Affidavit, Exhibit “I” [Tab 2I, p. 75].

⁵ TC/CTA Undisclosed Meeting Email – Lukács Affidavit, Exhibit “J” [Tab 2J, p. 77].

⁶ Lukács Affidavit, Exhibits “AW” and “AX” [Tabs 2AW and 2AX, pp. 422 and 425].

⁷ CTA Written Representations (Feb. 1, 2022), paras. 49-50 [Tab 2AV, pp. 409-410]; and Reasons of Gleason, J.A. (Apr. 11, 2022), para. 45 [Tab 8, p. 508].

retain documents less than a month after receiving the Transport Canada encrypted email.⁸ The CTA appears to be unwilling to investigate why documents are missing.⁹

15. In response to Gleason, J.A.’s October Order, the CTA initially revealed some behind-the-scenes correspondences it received from Transat AT, requesting a Statement on Vouchers be issued to frustrate passengers’ pursuit of credit card chargebacks.¹⁰ Thereafter, after Gleason, J.A.’s April Order, on April 20, 2022 the CTA produced a similar request from Air Canada marked “Private and Confidential.”¹¹ The CTA never explained why the Air Canada letter was withheld until the April Order was issued.

16. It is abundantly clear that some meeting(s) or correspondence(s) between the CTA and Transport Canada regarding the Statement on Vouchers did in fact occur around the weekend of March 22-23, 2020. Indeed, mere hours after Mr. Streiner circulated within the CTA his initial draft of the Statement on Vouchers, Transport Canada personnel already had knowledge of the CTA’s plans for the Statement on Vouchers.¹² Nevertheless, the CTA vehemently and baldly denies the existence of any paper-trail of such meetings or correspondences with Transport Canada about the Statement on Vouchers around the weekend of March 21-22, 2020.¹³

17. Between March 22-23, 2020, all of the CTA’s constituent Members had in-principle approved the Statement on Vouchers.¹⁴ Then, at the Members’ meeting on March 24, 2020, the Members considered the requests from Air Canada and Transat AT (i.e., that the CTA publicly “[s]tate that no refunds are owed” and for the CTA to “[s]ignal that vouchers are acceptable”) before publishing the Statement on Vouchers.

⁸ Affidavit of Ms. Barbara Cuber (Apr. 21, 2022) [**Cuber Affidavit**], para. 8 and Exhibit “B”, page 6, line above “2. SORT your information”.

⁹ Cuber Affidavit (Apr. 21, 2022), para. 55.

¹⁰ Lukács Affidavit, para. 15(a) and Exhibits “G” and “H” [Tabs 2G and 2H, pp. 68 and 72].

¹¹ Lukács Affidavit, para. 19(d)v and Exhibit “R” [Tabs 2 and 2R, pp. 21 and 235-238].

¹² TC/CTA Undisclosed Meeting Email – Lukács Affidavit, Exhibit “J” [Tab 2J, p. 77].

¹³ See footnote 7, *supra*.

¹⁴ Lukács Affidavit, paras. 64 and 24 [Tab 2, pp. 31 and 22(b)].

A. CTA’s Failure to Comply with the October 15, 2021 Order of Gleason, J.A.

18. The Notice of Application on April 9, 2020 included a request that the CTA transmit four sets of relevant materials.¹⁵ As the CTA objected to this request, on January 3, 2021, the Applicant brought a motion for production of all documents between March 9 to April 8, 2020 concerning the Statement on Vouchers.¹⁶

19. The Applicant’s January 3, 2021 motion as well as numerous other procedural matters and motions that arose since then were heard and decided by Gleason, J.A.

20. On October 15, 2021, Gleason, J.A. issued the October Order and compelled the CTA to produce three carefully defined categories of documents within sixty days:

- (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 [**CTA Member Correspondences**];
- (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 [**Third-Party Correspondences**]; 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 [**Meeting Documents**].¹⁷

21. The reasons for the October Order stated that for the Meeting Documents “meet-

¹⁵ Notice of Application (Apr. 9, 2020), request to transmit [Tab 3, p. 464].

¹⁶ Reasons for Order of Gleason, J.A. (Oct. 15, 2021) at para. 10 [Tab 5, p. 475].

¹⁷ Order of Gleason, J.A. (Oct. 15, 2021), para. 3 [Tab 4, pp. 467-468].

ings 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.”¹⁸ This understanding was confirmed again in the April Order.

22. Gleason, J.A. also defined a specific procedure for the Court, and not the CTA itself, to decide any assertions to privilege for documents that would otherwise fall within the three aforementioned categories of documents.¹⁹ This procedure required the AGC, and not the CTA, to submit an informal motion for Her Ladyship to rule on.

23. On December 14, 2021, the CTA produced a small number of documents [**Dec. 14, 2021 Documents**]. The Applicant identified twenty-one (21) sets of documents (i.e., A1-A6, B1-B5, and C1-C10, in the appendix to the reasons for the April Order) that were clearly within the scope of the October Order, but the CTA had failed to produce. Each of categories A, B, and C corresponded to, and within the scope of the three categories of the October Order above, namely, CTA Member Correspondences, Third-Party Correspondences, and Meeting Documents, respectively.

B. Gleason, J.A.’s Order for Specific Documents (April 11, 2022)

24. The Applicant exercised best efforts to cause the CTA to comply with the October Order, and to produce the twenty-one sets of missing items.²⁰ The CTA refused to do so, citing various technicalities and bald assertions that most of the documents did not exist or “no longer existed” (i.e., were already deleted).²¹ The Applicant was left with no option but to bring a second motion on January 16, 2022 for a specific order to compel production of the twenty-one specifically identified items that were covered in the October Order, coupled with a motion for a *show cause* order for contempt of court.

¹⁸ Reasons for Order of Gleason, J.A. (Oct. 15, 2021) at para. 23 [Tab 5, p. 479].

¹⁹ Order of Gleason, J.A. (Oct. 15, 2021), paras. 5-8 [Tab 4, p. 468].

²⁰ Notice of Motion and affidavit (Jan. 16, 2022) - Court Docket Doc. 100-101.

²¹ CTA Written Representations (Feb. 1, 2022), paras. 49-50 [Tab 2AV, pp. 409-410]; and Reasons of Gleason, J.A. (Apr. 11, 2022), paras. 44-45 [Tab 8, p. 508].

25. On January 26, 2022, Gleason, J.A. bifurcated the portion of the motion for a specific Order to produce the withheld documents to be heard first. The remainder of the motion for a *show cause* order for contempt would be heard thereafter, if necessary.²²

26. On April 11, 2022, Gleason, J.A. issued an order and reasons for order [**April Order and Reasons for April Order**]. The April Order included a ruling on the AGC's informal motion, filed on December 14, 2021, to assert privilege over portions of two documents, and a ruling on the Applicant's motion for specific documents.

27. For the AGC's informal motion of privilege on two documents, the Court allowed the documents to be partially redacted and ordered that only the redacted versions be produced.²³ However, for unknown reasons, on April 20, 2021 the CTA produced **unredacted** versions of one of those two documents,²⁴ contrary to paragraph 3 of the April Order. The Applicant immediately requested the CTA and AGC to clarify if the disclosure was inadvertent.²⁵ No response was forthcoming and it appears that privilege for that document was waived, immediately after the Court allowed the privilege claim.

28. On April 11, 2022, Gleason, J.A. made various Orders, including, *inter alia*:²⁶

- (a) **Existent Documents:** For four sets of documents (i.e., A1, A5, B4, and C2) amongst the 21 sets of withheld items, where existence was not in dispute, the CTA was ordered to produce them within 5 days of the April Order;²⁷
- (b) **Statement on Voucher Meeting Documents:** For categories C1, C5, and C6 (March 19, 22, and 23, 2020 meetings, respectively) where the CTA admitted

²² Order of Gleason, J.A. (Jan. 26, 2022) [Tab 6, p. 487].

²³ Order of Gleason, J.A. (Apr. 11, 2022), para. 3 [Tab 7, p. 491]; Reasons of Gleason, J.A. (Apr. 11, 2022), paras. 11-13 [Tab 8, pp. 497-498].

²⁴ Lukács Affidavit, Exhibit "O" (page 49 within this Exhibit) [Tab O, p. 151].

²⁵ Lukács Affidavit, Exhibit "BE" [Tab 2BE, p. 446].

²⁶ Order of Gleason, J.A. (Apr. 11, 2022) [Tab 7, p. 490]

²⁷ Order of Gleason, J.A. (Apr. 11, 2022), para. 4 [Tab 7, p. 491].

the occurrence of those meetings, but did not confirm if the Statement on Vouchers was discussed at those meetings, the CTA was ordered to determine if the Statement on Vouchers was discussed at those meetings and, if so, to produce those documents within 5 days of the April Order;²⁸

- (c) **CTA Document Search Affidavit:** For the 14 categories of documents (i.e., A2-A4, A6, B1-B3, B5, C3-C4, and C7-10) where the current, or previous, existence or possession were in dispute, the individual at the CTA responsible for compliance with the October Order was ordered to serve and file an affidavit within 10 days detailing the CTA's efforts to comply with the October Order, including eight specific topics.²⁹ The Court also permitted cross-examination on this affidavit and provided the Applicant sufficient time for doing so.³⁰

i. Ruling on the Existent Documents

29. The CTA acknowledged the existence of these four categories of documents: A1 and A5 (i.e., MS Word files containing metadata), B4 (the CTA's Info Email and Twitter Messages), and C2 (March 20 CTA Executive Committee [EC] Meeting Documents).³¹

30. For the MS Word files, the Court rejected the CTA's technical argument that the electronic files need not be produced under Rules 317-318.³² The Court held that electronic files are part of "all non-privileged documents" in the October Order and that "it cannot seriously be contested in 2022 that documents include electronic documents."³³

31. For the CTA Info Email and Twitter Messages, the Court rejected the CTA's technical objections, and found these materials are Third-Party Correspondences and

²⁸ Order of Gleason, J.A. (Apr. 11, 2022), para. 5 [Tab 7, p. 491].

²⁹ Order of Gleason, J.A. (Apr. 11, 2022), para. 7 [Tab 7, p. 491].

³⁰ Reasons of Gleason, J.A. (Apr. 11, 2022), para. 50 [Tab 8, p. 510].

³¹ Reasons of Gleason, J.A. (Apr. 11, 2022), paras. 16-17, 25, 36 [Tab 8, pp. 499, 502, 505].

³² Reasons of Gleason, J.A. (Apr. 11, 2022), paras. 20-22 [Tab 8, pp. 500-501].

³³ Reasons of Gleason, J.A. (Apr. 11, 2022), para. 23 [Tab 8, p. 501].

that: “[w]ith respect, it is not for the CTA to opine whether these documents are likely to further the applicant’s case. They are third party communication over the relevant period concerning the impugned statement on vouchers and thus fall within the scope of documents that the Court determined were relevant and subject to disclosure [...]”³⁴

32. For the March 20 EC Meeting Documents, the CTA argued that the documents for this meeting should be excluded unless the Statement on Vouchers was mentioned on the face of the particular document.³⁵ The Court rejected this technical interpretation and noted that the clear wording of the Meeting Documents term in the October Order required disclosure of all non-privileged documents related to any meeting attended by a CTA member where the Statement on Vouchers was discussed, and is **not** dependent on whether the Statement on Vouchers was mentioned on the face of the document.³⁶

ii. Ruling on the Statement on Voucher Meeting Documents

33. For the Statement on Voucher Meeting Documents, which are the EC meetings on March 19, 22, and 23, 2020 (i.e., categories C1, C5, and C6, respectively), the CTA acknowledged the occurrence of those meetings and existence of some documents.

34. The CTA similarly argued that a document need not be produced pursuant to the Meeting Documents term in the October Order, unless the face of that document mentioned the Statement on Vouchers.³⁷ The Court rejected this argument for the same reasons as the March 20 EC documents, and ordered the CTA to inquire if the topic was discussed at those meetings and, if so, to produce *all* the documents for that meeting.³⁸

³⁴ Reasons of Gleason, J.A. (Apr. 11, 2022), paras. 26-31 [Tab 8, pp. 502-504].

³⁵ Reasons of Gleason, J.A. (Apr. 11, 2022), para. 36 [Tab 8, p. 505].

³⁶ Reasons of Gleason, J.A. (Apr. 11, 2022), para. 34 [Tab 8, p. 505].

³⁷ Reasons of Gleason, J.A. (Apr. 11, 2022), para. 32 [Tab 8, p. 504].

³⁸ Reasons of Gleason, J.A. (Apr. 11, 2022), paras. 33-35 [Tab 8, pp. 504-505]; Order of Gleason, J.A. (Apr. 11, 2022), para. 5 [Tab 7, p. 491].

iii. Ruling on the CTA Document Search Affidavit

35. For the remaining 14 of the 21 categories of missing items (i.e., A2-A4, A6, B1-B3, B5, C3-C4, and C7-10), the CTA declined to file an affidavit on their existence.³⁹

36. Instead, the CTA claimed it was no longer in possession of the documents for three of those categories: B1 (the original announcement of the Statement on Vouchers showing the recipients thereof), A4 (documents regarding the announcement of the Statement on Vouchers), and B2 (the encrypted email from Transport Canada on March 18, 2020).⁴⁰ For the remaining eleven categories (i.e., A2, A3, A6, B3, B5, C3, C4, and C7-10), the CTA simply made bald assertions that those items do not exist.⁴¹

37. In light of the numerous issues arising from the CTA's disclosure and compliance with the October Order, and the number of outstanding documents sought by the Applicant (i.e., the remaining fourteen categories, A2-A4, A6, B1-B3, B5, C3-C4, and C7-10), Gleason, J.A. ordered that the individual at the CTA responsible for complying with the October Order shall file an affidavit "detailing what has been done to ensure the required disclosure was made," including in particular eight specific topics detailing the CTA's efforts at searching relevant documents [**CTA Document Search Affidavit**].⁴²

38. Gleason, J.A. also permitted the Applicant to cross-examine the CTA's affiant on the Document Search Affidavit.⁴³ To accommodate the time necessary for the cross-examination, Gleason, J.A. ordered that the Applicant's additional affidavits should be filed 40 days after the April Order, rather than the 30 days stated in the October Order.⁴⁴

³⁹ Reasons of Gleason, J.A. (Apr. 11, 2022), para. 15 and "Remaining Documents" under paras. 44-50 [Tab 8, pp. 498-499 and 508-510].

⁴⁰ Reasons of Gleason, J.A. (Apr. 11, 2022), paras. 15 and 45-46 [Tab 8, pp. 498-499 and 508-509].

⁴¹ Reasons of Gleason, J.A. (Apr. 11, 2022), para. 15 [Tab 8, pp. 498-499].

⁴² Reasons of Gleason, J.A. (Apr. 11, 2022), para. 47 [Tab 8, p. 509].

⁴³ Reasons of Gleason, J.A. (Apr. 11, 2022), para. 50 [Tab 8, p. 510].

⁴⁴ Reasons of Gleason, J.A. (Apr. 11, 2022), para. 50 [Tab 8, p. 510]; Order of Gleason, J.A. (Apr. 11, 2022), para. 9 [Tab 7, p. 492]; Order of Gleason, J.A. (Oct. 15, 2021), para. 9 [Tab 4, p. 468].

C. The CTA's Affiant's Failure to Attend a Scheduled Cross-Examination

39. Between April 13-21, 2022, the Applicant made numerous attempts to canvass availability with the CTA and AGC to schedule the cross-examination for the week of May 2, 2022.⁴⁵ Ultimately, as the CTA did not respond with any availability, and in order to accommodate the AGC's schedule, a Direction to Attend was served on April 22, 2022, fixing the cross-examination for May 3, 2022 at 9:00 PST / 12:00 EST.⁴⁶

40. In the Direction to Attend, Ms. Cuber was asked to bring 25 items that were:

- (a) expressly referred to in the CTA Document Search Affidavit; and/or
- (b) directly relate to the CTA's document search efforts, or assist the Court in addressing the existence of the remaining 14 categories of missing documents.⁴⁷

41. On April 28, 2022, the CTA sent a lengthy letter to the Court requesting intervention and a case management conference,⁴⁸ *before* the cross-examination.⁴⁹ At about the same time as the CTA's letter to the Court, the CTA also wrote to the Applicant indicating that: (1) the CTA acknowledged receipt of the Direction to Attend; (2) a letter would be sent to the Court to seek directions on the scope of the cross-examination; and (3) requested the Applicant's agreement/consent to postpone the cross-examination.⁵⁰

42. On April 28, 2022, in response to the CTA's letters, the Applicant also wrote to the Court submitting that there was no need for a CMC as there are procedures in the *Federal Courts Rules* to address the CTA's concern(s).⁵¹ The Applicant also wrote to the CTA advising that there was no basis to postpone the scheduled cross-examination.⁵²

⁴⁵ Lukács Affidavit, paras. 31-40 and exhibits cited there [Tab 2, pp. 24-26].

⁴⁶ Lukács Affidavit, Exhibits "AH" and "AI" [Tabs 2AH and 2AI, pp. 343 and 352].

⁴⁷ Reasons of Gleason, J.A. (Apr. 11, 2022), paras. 44-47 [Tab 8, pp. 508-509].

⁴⁸ Lukács Affidavit, Exhibit "AN" [Tab 2AN, p. 371].

⁴⁹ Reasons of Gleason, J.A. (Apr. 11, 2022), para. 50 [Tab 8, p. 510].

⁵⁰ Lukács Affidavit, Exhibit "AK" [Tab 2AK, p. 362].

⁵¹ Lukács Affidavit, Exhibit "AO" [Tab 2AO, p. 379].

⁵² Lukács Affidavit, Exhibit "AL" [Tab 2AL, p. 366].

43. On May 2, 2022, the Court (Mactavish, J.A.) issued a direction rejecting the CTA's request for court intervention and a CMC before the cross-examination set for May 3, 2022. The Court noted that the CTA's concern(s) could be addressed under the *Federal Courts Rules* by way of a motion with a proper evidentiary record.⁵³

44. On May 2, 2022, after the Court's direction, the CTA advised that it would be bringing a Rule 94 motion, and requested the cross-examination be adjourned indefinitely,⁵⁴ despite the timeline in the Reasons for April Order. The CTA did not indicate it would not present its affiant the next day. The Applicant immediately advised again that there was no basis to postpone the cross-examination.⁵⁵

45. On May 3, 2022 at 11:41 a.m. EST (less than 20 minutes before the cross-examination), the CTA advised that "the Agency and its affiant will not attend the cross-examination at noon today."⁵⁶ The Applicant immediately advised, for the third time, that there was no basis to postpone the cross-examination and that an order would be sought under Rule 97 if Ms. Cuber failed to attend.⁵⁷ The CTA did not respond.⁵⁸

46. The court reporter issued a certificate confirming Ms. Cuber's non-attendance.⁵⁹

D. CTA's Continued Flouting of Both the October Order and April Order

47. On April 20, 2022, the CTA produced some documents pursuant to the April Order [**April 20, 2022 Documents**]. Upon review, the Applicant discovered that the CTA may still not be compliant with the October Order and April Order in at least five material respects, and the CTA had continued to withhold documents covered by the

⁵³ Direction of Mactavish, J.A. (May 2, 2022) [Tab 9, p. 518].

⁵⁴ Lukács Affidavit, Exhibit "AP" [Tab 2AP, p. 382].

⁵⁵ Lukács Affidavit, Exhibit "AQ" [Tab 2AQ, p. 384].

⁵⁶ Lukács Affidavit, Exhibit "AR" [Tab 2AR, p. 386].

⁵⁷ Lukács Affidavit, Exhibit "AS" [Tab 2AS, p. 390].

⁵⁸ Lukács Affidavit, para. 51 [Tab 2, p. 28].

⁵⁹ Lukács Affidavit, Exhibit "AT" [Tab 2AT, p. 394].

Orders. The Applicant repeatedly wrote to the CTA regarding most of these deficiencies, and the CTA has failed to rectify them or simply remained silent about them.

i. Withheld Documents Based on Unsubstantiated Privilege Assertions

48. In the October Order, Gleason, J.A. carefully crafted a clear and specific process to deal with the CTA's or the AGC's assertions of privilege for the document search.⁶⁰

49. The CTA enclosed a letter alongside the April 20, 2022 Documents stating that the bundle included the non-privileged documents, but did not advise if any documents from the recent document search(es) were withheld based on assertions of privilege.⁶¹

50. On April 22, 2022, the Applicant reminded the CTA of the Court's specified procedure for asserting privilege in the October Order, and requested the CTA to confirm if the CTA was asserting privilege for documents from its latest document search.⁶²

51. On April 28, 2022, the CTA responded to the Applicant but **did not** address whether the CTA, after its recent document search, withheld any documents based on assertions of privilege.⁶³ Rather, the CTA raised a technical interpretation as follows:

(a) The CTA was ordered to produce non-privileged documents and, as such, "responsive documents" for the April Order are only those that are non-privileged.

(b) The *Federal Courts Rules* only required objections to be provided to the Court and the Applicant for "responsive documents," and not otherwise.

52. In other words, the CTA claims that it need not raise objections for privilege because, based on the CTA's reasoning of "responsive documents," if the CTA believes a document is privileged it is already excluded, and the Court and the Applicant need not

⁶⁰ Order of Gleason, J.A. (Oct. 15, 2021), paras. 5-8 [Tab 4, p. 468].

⁶¹ Lukács Affidavit, Exhibit "M" [Tab 2M, p. 88].

⁶² Lukács Affidavit, Exhibit "AJ" [Tab 2AJ, p. 358].

⁶³ Lukács Affidavit, Exhibit "AK" [Tab 2AK, p. 362].

be informed. Moreover, although the Applicant's inquiry was not based on any specific type of privilege, the CTA responded with the heading "Solicitor-Client Privilege."⁶⁴

53. On April 28, 2022, immediately upon receiving the CTA's letter, the Applicant requested that the CTA forthwith comply with the Court's October Order outlining the procedure for asserting privilege, and the CTA has failed to do so.⁶⁵

ii. CTA's Twitter Private Messages and Info Account Emails

54. In the Reasons for the April Order, the Court noted that the CTA acknowledged the existence of messages to/from third parties in its Twitter accounts or through its Info emails concerning the Statement on Vouchers during the time period covered by the October Order, and those documents must be produced.⁶⁶ The Court further noted that "[f]or clarity, private Twitter messages sent or received on the CTA's accounts must be disclosed," whereas publicly available Twitter tweets need not be produced.⁶⁷

55. In the April 20, 2022 Documents, the CTA produced eight publicly available Twitter tweets rather than the Twitter private messages that the Court ordered. For the emails on the CTA's Info account, the CTA only produced one email chain.⁶⁸

56. On April 22, 2022, the Applicant reminded the CTA that the Court specifically ordered production of the Twitter private messages, not the Twitter public tweets.⁶⁹ The Applicant also reminded the CTA that the existence of one (1) email chain only was contrary to the CTA's admissions to the Court of a high volume of messages on Twitter and the CTA's Info email account between the dates covered by the October Order.⁷⁰

⁶⁴ Lukács Affidavit, Exhibit "AK" [Tab 2AK, p. 362].

⁶⁵ Lukács Affidavit, para. 43 and Exhibit "AL" [Tabs 2 and 2AL, pp. 26 and 366].

⁶⁶ Reasons of Gleason, J.A. (Apr. 11, 2022), paras. 25 and 30 [Tab 8, pp. 502-503].

⁶⁷ Reasons of Gleason, J.A. (Apr. 11, 2022), paras. 27 and 31 [Tab 8, pp. 502 and 504].

⁶⁸ Lukács Affidavit, Exhibit "N" (pp. 9-10 within this Exhibit) [Tab 2N, pp. 100-101].

⁶⁹ Reasons of Gleason, J.A. (Apr. 11, 2022), paras. 27 and 31 [Tab 8, pp. 502 and 504].

⁷⁰ Lukács Affidavit, Exhibit "AJ" [Tab 2AJ, p. 358].

57. On April 28, 2022, the CTA backtracked on the existence of, or the volume of, the Twitter private messages and/or Info account emails, even though the Court had noted that the CTA previously acknowledged the existence of such messages regarding the Statement on Vouchers.⁷¹ For the Twitter private messages specifically, the CTA did not provide any explanation why the CTA produced the Twitter public tweets instead.

iii. March 24, 2020 Members' Meeting Documents

58. In the April Order, the Court ordered that within ten (10) days the AGC shall file submissions if it intended to assert privilege for Members' notes for the March 24, 2020 Members' meeting.⁷² On April 21, 2022, the AGC advised the Court that only one document containing Members' notes had been identified by the CTA, containing a side-by-side comparison of the requests from Air Canada and Transat, including those airlines' requests for a Statement on Vouchers, and some commentary of a CTA Member.⁷³ The AGC advised that no privilege is claimed for this specific document.⁷⁴

59. In the Reasons for April Order, the Court stated that the Meeting Documents term in the October Order required disclosure of **all** non-privileged documents for meetings attended by a CTA member where the Statement on Vouchers was discussed, and is **not** dependent on whether the Statement on Vouchers was mentioned on the face of a document.⁷⁵ This necessarily captures the March 24, 2020 Members' meeting.

60. However, in relation to the April Order, the AGC produced only one document for the March 24, 2020 Members' meeting. There are at least three documents for that meeting that do exist, and are covered by the October Order, but were not produced.

⁷¹ Reasons of Gleason, J.A. (Apr. 11, 2022), para. 25 [Tab 8, pp. 502]; Lukács Affidavit, para. 41 and Exhibit "AJ", under the heading "Twitter and @info messages" [Tab 2 and 2AJ, pp. 26 and 358].

⁷² Order of Gleason, J.A. (Apr. 11, 2022), para. 6 [Tab 7, p. 491].

⁷³ Lukács Affidavit, Exhibits "S" and "X" [Tabs 2S and 2X, pp. 290 and 301].

⁷⁴ Lukács Affidavit, Exhibit "T" [Tab 2T, p. 292].

⁷⁵ Reasons of Gleason, J.A. (Apr. 11, 2022), para. 34 [Tab 8, p. 505].

61. Firstly, in the CTA’s written representations to the Court on February 1, 2022, at paragraph 83, the CTA claimed that it was in possession of a “scheduler” for the March 24, 2020 meeting.⁷⁶ Although the Reasons for April Order confirmed such documents are within the scope of the October Order, the CTA has not produced this document.⁷⁷

62. Secondly, the April 20, 2022 Documents contained a specific reference to “Circulate updated Members Committee Agenda” for March 24, 2020.⁷⁸ On May 5, 2022, the CTA provided some MS OneNote files containing an example of a formal meeting agenda for a separate March 26, 2020 Members’ Meeting.⁷⁹ The missing March 24, 2020 Members’ Meeting agenda was specifically identified for the CTA’s attention, but the CTA has still not produced the agenda for this March 24, 2020 meeting.⁸⁰

63. Thirdly, the MS OneNote containing a March 26, 2020 Members Meeting agenda revealed that Ms. Alysia Lau likely attended Members’ meetings and that some minutes were taken for such meetings.⁸¹ Ms. Lau was the CTA employee that prepared the formal meeting minutes for the March 19, 20, and 23 EC meetings.⁸² The CTA has not produced any meeting minutes or notes from non-Members, such as Ms. Lau.⁸³

iv. Unredacted Copies of Some of the April 20, 2022 Documents

64. In the April 20, 2022 Documents, the CTA almost fully redacted the appendices C1 (pp. 18-47), C2 (pp. 26-55), and C6 (pp. 21-50).⁸⁴ In the letter accompanying the documents, the CTA did not mention the redactions, nor provide any explanation.⁸⁵

⁷⁶ Lukács Affidavit, Exhibit “AV” [Tab 2AV, p. 416].

⁷⁷ Reasons of Gleason, J.A. (Apr. 11, 2022), paras. 33-34 and 36 [Tab 8, pp. 504-505]; and Lukács Affidavit, paras. 18 and 72 [Tab 2, pp. 19 and 34].

⁷⁸ Lukács Affidavit, Exhibit “O” (page 47 within this Exhibit) [Tab 2O, p. 149].

⁷⁹ Lukács Affidavit, Exhibit “F” [Tab 2F, p. 66].

⁸⁰ Direction to Attend, para. 19 – Lukács Affidavit, Exhibit “AI” [Tab 2AI, p. 355].

⁸¹ Lukács Affidavit, para. 14 and the exhibits cited therein [Tab 2, p. 17].

⁸² Lukács Affidavit, para. 23 and the three exhibits cited therein [Tab 2, p. 22].

⁸³ Lukács Affidavit, para. 18 [Tab 2, p. 19].

⁸⁴ Lukács Affidavit, paras. 19(d)(ii), (iii), and (v) [Tab 2, p. 20].

⁸⁵ Lukács Affidavit, Exhibit “M” [Tab 2M, p. 88].

65. On April 22, 2022, the Applicant sought an explanation for those redactions, amongst other deficiencies.⁸⁶ On April 28, 2022, the CTA responded to other deficiencies, but remained silent on the redactions and has not provided any explanation.⁸⁷

v. Certificate for the Authenticity of the April 20, 2022 Documents

66. According to the Court file, the CTA filed a certificate on April 21, 2022, attesting to the authenticity of the April 20, 2022 Documents.⁸⁸ Unlike previous instances, the CTA did not provide the Applicant with a copy of the certificate until weeks later.⁸⁹

67. The certificate was signed by Ms. Amanda Hamelin as “Information Technology Manager of the [CTA],” and did not contain the CTA’s seal.⁹⁰ Ms. Hamelin’s official title on the Government Electronic Directory Services [GEDS] is “Business Analyst & Process Architect.”⁹¹ The individual with the title of “Manager, IT Operations” is Mr. Jonathan Guindon, who was referred to in Ms. Cuber’s affidavit on April 21, 2022.⁹²

PART II – STATEMENT OF THE POINTS IN ISSUE

68. The six (6) narrow issues to be decided on this motion are based largely on irrefutable facts, clearly documented in writing, as follows:

- (a) Whether Ms. Cuber should be compelled to attend the cross-examination specified in paragraph 50 of the Reasons for April Order, and at the CTA’s cost.
- (b) Whether the CTA should pay costs for the examination that Ms. Cuber had already failed to attend on May 3, 2022.

⁸⁶ Lukács Affidavit, Exhibit “AJ” [Tab 2AJ, p. 358].

⁸⁷ *Ibid* and Exhibit “AK” [Tabs 2AJ and 2AK, pp. 358 and 362].

⁸⁸ See Court Docket, Entry on April 21, 2022.

⁸⁹ *Ibid*, see also Court Docket, Entry on December 24, 2021.

⁹⁰ See Court Docket, Entry on April 21, 2022.

⁹¹ Lukács Affidavit, Exhibit “BF” [Tab 2BF, p. 448].

⁹² Cuber Affidavit at para. 37.

- (c) Whether time should be extended for the Applicant's affidavit(s), to allow for completion of the cross-examination on the CTA's Document Search Affidavit.
- (d) Whether the clerical error relating to the April Order should be corrected.
- (e) Whether an Order should issue for the CTA and/or AGC to immediately rectify their five (5) deficiencies in complying with the October Order or April Order.
- (f) Whether the CTA should pay costs for this motion, forthwith.

PART III – STATEMENT OF SUBMISSIONS

69. The law in respect of the six narrow issues above is relatively straightforward.

A. Rule 97: Order to Attend a Cross-Examination at the CTA's Costs

70. A Direction to Attend the May 3, 2022 cross-examination was served, and the court reporter confirmed that Ms. Cuber failed to attend.⁹³ Accordingly, it cannot be seriously contested that Ms. Cuber failed to attend a cross-examination that was fixed pursuant to the *Federal Courts Rules* and the Court's guidance in paragraph 50 of the April Reasons for Order. The Applicant is entitled to seek an Order under Rule 97.

71. The longstanding practice in the Federal Court is that "as a general rule, affidavits will be struck if the deponent does not appear for cross-examination."⁹⁴ However, striking the CTA Document Search Affidavit would directly defeat the purpose of the April Order. The Court had specifically ordered that affidavit be filed in order to assist the Court and the Applicant in addressing the CTA's bald assertions of non-existence or "no longer in existence" of documents relevant to the Application.⁹⁵

⁹³ Lukács Affidavit, Exhibits "AI" and "AT" [Tabs 2AI and 2AT, pp. 352 and 394].

⁹⁴ *Ngo Sen v. Canada (CI)*, 2020 FC 331 at para. 15 [Tab 17, p. 588] citing *Bayer Ag v. Apotex Inc*, 1998 CanLII 8327 (FC) at para. 11 (Rothstein J., as he then was).

⁹⁵ Reasons of Gleason, J.A. (Apr. 11, 2022), para. 15 and 47-50 [Tab 8, pp. 498-499 and 509-510].

72. The Applicant submits that a Rule 97(a) order compelling Ms. Cuber to attend the cross-examination within two weeks, at a mutually convenient time, and at the CTA's cost, is an appropriate remedy in the circumstances. This order would ensure that the cross-examination contemplated in the Reasons for April Order would proceed, and avoid further delays to this Application from the CTA's conduct. In the event of further non-attendance, the Court can resort to its contempt powers under Rule 98.

73. The circumstances for Ms. Cuber's non-attendance are particularly egregious for two further reasons. Firstly, the CTA waited until twenty minutes before the start time to notify the Applicant that the CTA and Ms. Cuber would not be attending.⁹⁶ Secondly, this was the second time for this Application that the CTA had a "no show" at a cross-examination. Back on May 1 2020, approximately two years ago, the CTA's affiant (Ms. Meredith Desnoyers) also did not attend a cross-examination for a different motion without any reason or notice, under closely analogous circumstances.⁹⁷

B. Costs for the Failure to Attend on May 3, 2022

74. The Applicant also seeks costs against the CTA under Rule 97(e) for the non-attendance on May 3, 2022. *Even if* the CTA provides an excuse for the non-attendance, the CTA was dilatory in waiting until long after any opportunity to cancel the court reporter's booking without penalties.⁹⁸ The court reporter fee associated with the non-attendance on May 3, 2022 is \$749.70.⁹⁹ The CTA should bear the costs of its tardiness.

C. Extension of Time for the Applicant's Affidavits

75. The determination turns on the facts of each case, based on the following four factors: (1) a continuing intention to pursue the application; (2) that the application

⁹⁶ Lukács Affidavit, Exhibit "AR" [Tab 2AR, p. 386].

⁹⁷ First of two letters from Applicant filed in Court on May 1, 2020.

⁹⁸ Lukács Affidavit, paras. 53-54 [Tab 2, p. 28].

⁹⁹ Lukács Affidavit, Exhibit "AU" [Tab 2AU, p. 396].

has some merit; (3) that no prejudice arises from the delay; and (4) that a reasonable explanation for the delay exists.¹⁰⁰ The test is clearly met in this case.

76. The time for the Applicant's further affidavit(s) should be extended to thirty (30) days after completing the cross-examination of the CTA's affiant, including any refusals/objections motion and re-attendance. The CTA's April 28, 2022 letter to the Court suggests that the CTA would be raising numerous objections to questions at the cross-examination,¹⁰¹ likely necessitating a refusals/objections motion and re-attendance.

77. It is self-evident that the Applicant has a continuing intent to pursue the Application. The Applicant's motions are to ensure the Court would have a complete evidentiary record to conduct a meaningful judicial review of the CTA's actions.

78. Similarly, there is clearly merit to this Application, as two justices of this Court have confirmed that the RAB Ground raises a *serious issue to be tried* on its merits.¹⁰²

79. There is no prejudice to the AGC. The October Order allowed the Applicant's further affidavit(s) to be filed *after* the CTA produces all the relevant documents and after ruling on all the privilege claims.¹⁰³ The CTA's failure to produce all relevant documents caused the issuance of the April Order, which was not an entirely new order, and specified particular items that were *already within the scope* of the October Order.¹⁰⁴

80. In the April Order, the time for the Applicant's further affidavit(s) was adjusted to forty days after the April Order,¹⁰⁵ allowing time for completion of the CTA's docu-

¹⁰⁰ *Canada (Attorney General) v. Hennelly*, 244 NR 399 at para. 3 [Tab 14, p. 565].

¹⁰¹ Lukács Affidavit, Exhibit "AN" [Tab 2AN, [p. 371].

¹⁰² Reasons for Order of Gleason, J.A. (Oct. 15, 2021) at paras. 5-6 [Tab 5, pp. 473-474].

¹⁰³ Order of Gleason, J.A. (Oct. 15, 2021), para. 9 [Tab 4, p. 468]; Reasons of Gleason, J.A. (Oct. 15, 2021), para. 31 [Tab 5, p. 482].

¹⁰⁴ Order of Gleason, J.A. (Apr. 11, 2022), paras. 4-5 [Tab 7, p. 491]; Reasons of Gleason, J.A. (Apr. 11, 2022), paras. 23, 30, 34, and 36 [Tab 8, pp. 501, 503, and 505].

¹⁰⁵ Order of Gleason, J.A. (Apr. 11, 2022), para. 9 [Tab 7, p. 492].

ment production and the cross-examination on the CTA Document Search Affidavit.¹⁰⁶ Extending the time now simply gives effect to the intent of the Court's previous Orders.

81. There are three strong explanations for the extension of time. Firstly, the earlier orders contemplated that the CTA completes document production before the Applicant files further affidavit(s), consistent with the relative timelines in Rules 306 and 318.

82. Secondly, the cross-examination of the CTA's affiant could not be completed within the forty (40) days contemplated in paragraph 50 of the Reasons for April Order, solely because of the CTA's failure to present its affiant on May 3, 2022.

83. Thirdly, the CTA did not produce some documents covered by the October Order or April Order. The CTA and AGC also did not follow the process to assert privilege for documents in the CTA's recent search(es), as contemplated in the October Order.

D. Correcting a Clerical Error in April Order and Reasons for April Order

84. Rule 397(2) empowers the Court to correct clerical errors at any time (i.e., the "slip rule."). Item B2 in the Appendix to the Reasons for April Order reads:

B2: Original Email from Transport Canada on March 18, 2020.
Original version of the e-mail sent by Mr. Colin Stacey at Transport Canada to Ms. Marcia Jones on March 25, 2020 with the subject line "FW: From MinO:[Redacted]," including all attachments to that email.¹⁰⁷

85. It was obvious that the correct date was March 18, 2020, as per the heading, and not March 25, 2020. The Applicant's affidavit (para. 18) and submissions (para. 22) for that motion clearly stated March 18, 2020, and the CTA responded without difficulty.¹⁰⁸

86. This typographical error was inadvertently introduced in the Schedule to the Notice of Motion that the Applicant's counsel had overlooked, then replicated in the

¹⁰⁶ Reasons of Gleason, J.A. (Apr. 11, 2022), para. 50 [Tab 8, p. 510].

¹⁰⁷ Reasons of Gleason, J.A. (Apr. 11, 2022), Appendix (emphasis added) [Tab 8, p. 512].

¹⁰⁸ CTA Written Representations (Feb. 1, 2022), paras. 49-50 [Tab 2AV, pp. 409-410].

CTA's written representations, and finally made its way into the Appendix to the Reasons for April Order.¹⁰⁹ The correction does not affect the substance of the April Order, nor prejudice any party, and avoids any potential dispute at the cross-examination.

E. Order that the AGC and CTA Rectify Five Non-Compliances with Orders

87. In the motion for the April Order, the Applicant was requesting an order that the CTA produce twenty-one specific sets of documents (i.e., A1-A6, B1-B5, and C1-C10), which were all subsumed in the three categories of the October Order (i.e., CTA Member Correspondences, Third-Party Correspondences, and Meeting Documents).

88. Similarly, in the present motion, the Applicant is not seeking an entirely new order for document production. Rather, the Applicant has discovered five material deficiencies, and seeks the Court's assistance to enforce the existing Orders, or to order that the CTA produce documents covered by the existing Orders. The Applicant is **not** seeking production of further documents beyond the scope of the October Order.

i. Withheld Documents Based on Unsubstantiated Privilege Assertions

89. In the October Order, Gleason, J.A. specified a process to deal with the CTA's or the AGC's assertions of privilege from the document search(es):

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 [i.e., the CTA Member Correspondences, the Third-Party Correspondences, and the Meeting Documents], the whole in accordance with the Reasons for this Order; [...]

8. The materials related to claims for privilege shall then be submitted to the undersigned [Gleason, J.A.] for a ruling on privilege;¹¹⁰

90. Paragraphs 5-8 of the October Order require that for all documents where privilege is being asserted, which would otherwise be captured in the categories of CTA

¹⁰⁹ Notice of Motion (Jan. 17, 2022) – Court Docket Doc. 100.

¹¹⁰ Order of Gleason, J.A. (Oct. 15, 2021), paras. 5 and 8 (emphasis added) [Tab 4, pp. 467-468].

Member Correspondences, Third-Party Correspondences, or Meeting Documents, must be submitted to Gleason, J.A. for a ruling. However, the CTA had failed to abide by this process for their document searches in respect of the April Order, while tacitly admitting that documents were withheld based on assertions of solicitor-client privilege.¹¹¹

91. The CTA is claiming that because the April Order did not specifically deal with assertions of privilege again, that the specific procedure in the October Order somehow ceased to apply. The CTA then withheld documents based on its own assertion of privilege, *without* even informing the Court and the Applicant. Respectfully, this is another attempt by the CTA to defy court orders under the guise of creative interpretation.

92. Paragraphs 5-8 of the October Order did not allow the CTA to excuse itself from complying with the process on subsequent document searches. Otherwise, paragraph 5 of the Court's October Order could be easily circumvented by claiming that the allegedly privileged documents were only found on day 61 day after the October Order.

93. The Applicant submits that an Order should be issued confirming that paragraphs 5-8 of the October Order continue to apply and that the AGC submit an informal motion forthwith to assert privilege for withheld documents in the CTA's recent search.

94. The Applicant further submits that the Court should carefully scrutinize any motion for privilege with a keen eye on whether the assertions are even genuine, or an efficient use of the Court's scarce judicial resources.¹¹² As noted in the Lukács Affidavit, privilege for one of the two documents was waived without explanation¹¹³ shortly after the Court upheld the privilege,¹¹⁴ suggesting there was no genuine intent to assert privilege to begin with.

¹¹¹ Lukács Affidavit, paras. 41-42 and Exhibits "AJ"- "AL" [Tabs 2 and 2AJ-2AL, pp. 26 and 358-366].

¹¹² *ViiV Healthcare v. Gilead Sciences Canada*, 2021 FCA 122 at paras. 18-23 [Tab 21, pp. 633-634].

¹¹³ Lukács Affidavit, paras. 69-71 [Tab 2, pp. 33-34].

¹¹⁴ Order of Gleason, J.A. (Apr. 11, 2022), para. 3 [Tab 7, p. 491].

ii. **CTA’s Twitter Private Messages and Info Account Emails**

95. The existence of Twitter private messages and Info Account emails captured by the October Order (i.e., Third-Party Correspondences concerning the Statement on Vouchers) is *res judicata*. In the Reasons for April Order, the Court said that:

25. The next group of documents that the CTA acknowledges exist but declined to disclose are messages from and to third parties received via its Twitter accounts or through its Info email account concerning the statements on vouchers over the period in respect of which disclosure was ordered (item B4 in the Appendix). ...

30. Likewise, they fall within the scope of this Court’s October 15, 2021 Order. [...]

31. [...] For clarity, private Twitter messages sent or received on the CTA’s accounts must be disclosed. [Emphasis added.]

96. The CTA now seeks to relitigate the issue and backtrack from their admissions in the CTA’s Written Representations (Feb. 1, 2022) at paragraphs 52-58 and letter stating that there was a high volume of “messages and inquiries from individuals” for this category.¹¹⁵ The CTA should not be permitted to change its position on-the-fly.

97. Although the April Order stated that the Twitter private messages must be disclosed, but not Twitter public tweets,¹¹⁶ the CTA did the *exact* opposite. The CTA has not stated why it did not follow the Court’s order to produce Twitter private messages, despite requests for clarification. Ms. Cuber’s April 21, 2022 affidavit is also silent on whether the CTA took steps to gather the Twitter private messages for the April Order, suggesting the CTA may have simply ignored the Court’s Orders.

98. In the same vein, the CTA produced **one** email chain from its Info account, which is a far cry from the high volume of messages and inquiries that the CTA admitted in the December 24, 2021 letter. Ms. Cuber’s April 21, 2022 affidavit also appears to be silent on what steps, if any, the CTA took to gather the Info Account emails.

¹¹⁵ Lukács Affidavit, Exhibits “K” and “AK” [Tabs 2K and 2AK, pp. 81 and 362].

¹¹⁶ Reasons of Gleason, J.A. (Apr. 11, 2022), paras. 27 and 30-31 [Tab 8, pp. 502-504].

99. The Applicant submits that an Order should be issued, giving a final opportunity for the CTA to produce the Twitter private messages and the Info account emails.

iii. March 24, 2020 Members' Meeting Documents

100. The Applicant's request, from the January 16, 2022 motion, that the CTA produce all documents for the March 24, 2020 Members' meeting (i.e., category C7) should now be returned to Gleason, J.A. for a final ruling, after the AGC was already provided an opportunity to make submissions on this issue on April 21, 2022.

101. This category C7 remains undecided due to uncertainty on whether the CTA Members were in an adjudicative role in adopting the Statement on Vouchers that may attract adjudicative privilege.¹¹⁷ The Court ordered the AGC to provide submissions:¹¹⁸

Within 10 days of the date of this Order, the respondent [AGC] shall serve and file submissions regarding any notes taken by CTA Members, its Chairperson and Vice- Chairperson during the March 24, 2020 call, the whole in accordance with paragraph 43 of the Reasons for this Order.

102. On April 21, 2022, the AGC sent a letter to the Court simply stating that:¹¹⁹

In respect of paragraph 6 of the Order and paragraph 43 of the Reasons, a single document containing notes has been identified by the Intervener, and will be disclosed following this letter. No privilege is being claimed in respect of this specific document. The disclosure is not a waiver of any privilege which may apply to any similar document in this proceeding [...]

103. The AGC sidestepped the Court's direction to provide submissions on whether the CTA's Members were performing an adjudicative role in adopting the Statement on Vouchers. In lieu of that, the AGC merely produced one document and waived any privilege for that document **only**. The AGC was silent on whether other documents existed for the March 24, 2020 meeting (e.g., the "scheduler," agenda, or meeting minutes, as detailed further below), or whether privilege is being asserted for any such documents.

¹¹⁷ Reasons of Gleason, J.A. (Apr. 11, 2022), paras. 42-43 [Tab 8, p. 508].

¹¹⁸ Order of Gleason, J.A. (Apr. 11, 2022), para. 6 (emphasis added) [Tab 7, p. 491].

¹¹⁹ Lukács Affidavit, Exhibit "T" [Tab 2T, p. 292].

104. Furthermore, the lone document that was disclosed around April 21, 2022 (i.e., a side-by-side comparison of Air Canada and Transat’s requests, with annotations)¹²⁰ is a **different** document than the one in the CTA’s earlier representations that “[t]he Agency has in its possession a single document in relation to this meeting, namely a scheduler.”¹²¹ The CTA’s treasure box of “single documents” is changing on-the-fly.

105. The Court confirmed that the Meeting Documents term in the October Order required disclosure of all non-privileged documents related to any meeting attended by a CTA member where the Statement on Vouchers was discussed, and is **not** dependent on whether the Statement on Vouchers was mentioned on the face of the document(s).¹²² The “single document” produced by the AGC (above) confirms that the Statement on Vouchers was, in fact, a topic of discussion at the March 24, 2020 Meeting.¹²³

106. Accordingly, there is a solid basis for the Court to grant the specific order for this category C7 relating to the March 24, 2020 Members’ Meeting. To avoid any uncertainty, the Applicant submits that the Court should specify, *without limitation*, that the following three documents for the March 24, 2020 Members’ Meeting be produced.

107. ***The “scheduler” file.*** In the CTA’s written representations on February 1, 2022 at paragraph 83, the CTA admitted that it possessed a “scheduler” file for this meeting.

108. ***The “Members’ Committee Agenda” for March 24, 2020.*** This “Members Committee Agenda” was referenced in a to-do list from the April 20, 2022 Documents.¹²⁴ The CTA provided an agenda for a different Members’ meeting on March 26, 2020,¹²⁵ showing the formalities and highly organized fashion of these meetings.

¹²⁰ Lukács Affidavit, Exhibit “S” [Tab 2S, p. 290].

¹²¹ Lukács Affidavit, Exhibit “AV” (paragraph 83 of this Exhibit) [Tab 2AV, p. 416].

¹²² Reasons of Gleason, J.A. (Apr. 11, 2022), para. 34 [Tab 8, p. 505].

¹²³ Lukács Affidavit, Exhibit “S” [Tab 2S, p. 290].

¹²⁴ Lukács Affidavit, Exhibit “O” (page 47 of this Exhibit) [Tab 2O, p. 149].

¹²⁵ Lukács Affidavit, Exhibit “F” [Tab 2F, p. 66].

109. *All meeting minutes, and notes, for the March 24 Meeting.* In the February 1, 2022 Written Representations, the CTA deflected the debate to the Members' notes only. The CTA had not addressed if there were meeting minutes/notes by a non-Member. The Applicant had provided evidence of meeting minutes taken at some Members' Meetings.¹²⁶ Furthermore, the annotations in the March 26, 2020 Members' meeting agenda suggest that "Alysia" (likely Ms. Alysia Lau) is in attendance at Members' meetings too.¹²⁷ Ms. Lau prepared meeting minutes for numerous EC meetings.¹²⁸

110. For greater clarity, the Applicant submits that the Court should specify that this category C7 includes any *in camera* portion of the March 24, 2020 Members' meeting. The annotations in the March 26, 2020 Members' meeting agenda suggest that the CTA sometimes hold portions of meetings *in camera*.¹²⁹ This would avoid the need for further Court intervention if the CTA misinterprets this Court's orders again.

iv. Unredacted Copies of Some of the April 20, 2022 Documents

111. In the April 20, 2022 Documents, the CTA almost fully redacted the appendices C1 (pp. 18-47), C2 (pp. 26-55), and C6 (pp. 21-50), totalling 90 pages. The CTA has not provided any explanation for these redactions, despite requests for clarification from the Applicant. It is unusual for documents to be redacted without any explanation.

112. Neither the October Order nor the April Order permitted the CTA to apply redactions to any of the documents to be produced. To the contrary, the fact that the Court specified a procedure for the Court to rule on privilege assertions serves as confirmation of the longstanding principle in the Federal Court that "[i]t is for the Court and not the tribunal to decide what information can be withheld from the applicant."¹³⁰

¹²⁶ Lukács Affidavit, Exhibit "E" [Tab 2E, p. 62].

¹²⁷ Lukács Affidavit, para. 14(b) and exhibits cited therein [Tab 2, p. 17].

¹²⁸ Lukács Affidavit, Exhibits "U"- "W" [Tabs 2U-2W, pp. 295-299].

¹²⁹ Lukács Affidavit, Exhibit "F" (last annotation in the Exhibit) [Tab 2F, p. 66].

¹³⁰ *Mekonen v. Canada (CI)*, 2007 FC 1133 at para. 10 [Tab 15, p. 569]; *Singh v. Canada*

113. The Applicant submits that an Order should be issued, for the CTA to provide unredacted copies of appendices C1 (pp. 18-47), C2 (pp. 26-55), and C6 (pp. 21-50).

v. Certificate for the authenticity of the April 20, 2022 Documents

114. In paragraph 8 of the April Order, the CTA was ordered to “file an updated certificate, attesting to the authenticity of the additional documents.” Rule 318(1)(a) simply refers to providing a “certified copy”, but does not elaborate on the legal requirements.

115. However, s. 24(b) of the *Canada Evidence Act [CEA]* provides that a “certified copy” of non-public documents, like the April 20, 2022 Documents, shall be by way of a seal and certified by the hand of the presiding officer, clerk, or secretary.

116. The CTA’s certificate on April 21, 2022 is defective in three material respects: (1) it was not under the CTA’s seal; (2) it was not signed by the CTA’s Secretary or an authorized delegate; and (3) the signatory, Ms. Amanda Hamelin, misstated her title.

117. The certification was not under the seal of the CTA, as required by section 24(b) of the *CEA* and section 23(1) of the *Canada Transportation Act [Act]*.¹³¹

118. Ms. Hamelin signed as “Information Technology Manager,” and not “the presiding officer, clerk, or secretary” under s. 24(b) of the *CEA*. Section 23 of the *Act* appointed the CTA’s Secretary as the officer for certifying documents. Of note, for this Application the CTA filed two other certificates signed by the Secretary or an authorized delegate. Ms. Hamelin did not indicate that she was an authorized delegate.

119. Furthermore, Ms. Hamelin misrepresented her title as “Information Technology Manager” when her official title was “Business Analyst & Process Architect.” The role of “Manager, IT Operations” at the CTA is currently held by Mr. Jonathan Guindon,

(*IC*), 2010 FC 757 at paras. 27-28 [Tab 20, p. 621]; and *Mohammed v. Canada (IC)*, 2006 FC 1310 at para. 19 [Tab 16, p. 582].

¹³¹ *Canada Evidence Act*, s. 24(b) [Tab 11, p. 553]; *Canada Transportation Act*, s. 23(1) [Tab 12, p. 556].

who was referenced in the CTA Document Search Affidavit affirmed the same day as Ms. Hamelin's certificate. That affidavit did not say that Mr. Guindon had left his role.

120. The Applicant submits that the CTA's certificate on April 21, 2022 should be struck, and the CTA should re-file a certificate with the CTA's seal and signed by an authorized officer, in accordance with s. 24(b) of the *CEA* and s. 23 of the *Act*.

F. Costs Against the CTA, Payable Forthwith

121. Rule 401(1) empowers the Court to award fixed costs for a motion, which may be paid forthwith if the motion should not have been opposed, or the non-moving party's improper conduct necessitated the motion. This is the third time that Court intervention arose from the CTA's failure to produce relevant documents. The CTA has continued their pattern of obfuscation, as discussed above, despite two Court Orders.

122. The April 20, 2022 Documents has now revealed that the CTA repeatedly misrepresented to the Court about the documents in order to evade compliance with the October Order. For example, the CTA initially revealed requests for the Statement on Vouchers from Transat AT only, without mention of Air Canada. In response to the April Order, the CTA now revealed that Air Canada made a similar request *and* that the airlines' requests were placed side-by-side at the March 24, 2020 Members' meeting.¹³²

123. In the same vein, the CTA advised the Court that the March 19, 22, and 23, 2020 EC meeting documents "contain no record that the matter was discussed,"¹³³ and are therefore not responsive to the October Order. However, the subsequently produced April 20, 2022 Documents (particularly the meeting minutes) show on their face the Statement on Vouchers, or that subject matter, being discussed at each of these meetings.¹³⁴ It is unclear why the CTA made these inaccurate submissions to the Court.

¹³² Lukács Affidavit, Exhibit "S" [Tab 2S, p. 290].

¹³³ CTA Written Representations (Feb. 1, 2022), paras. 68 and 70 [Tab 2AV, pp. 413-414].

¹³⁴ Lukács Affidavit, Exhibits "U"- "W" and also "O", "P", and "R" [Tabs 2U-2W, 2O,

124. Finally, the April 20, 2022 Documents show that the CTA misrepresented to the Court about the March 20, 2020 EC Meeting Documents in at least two respects. In paragraph 72 of its previous submissions, the CTA passed off Mr. Bergeron’s “to-do list” as the minutes when, in fact, Ms. Lau prepared the formal minutes that were produced in the April 20, 2022 Documents.¹³⁵ Ms. Lau’s minutes mentioned the Statement on Vouchers. Similarly, the CTA’s assertion that “[t]here are additional documents in the Agency’s possession but they contain no mention of the Statement or the subject of the Statement.”¹³⁶ is contradicted by Ms. Lau’s minutes, and other meeting documents.

125. Considering this Application raises a matter of public interest, the CTA’s pattern of obfuscation, and that the CTA had numerous opportunities to comply with the Court Orders, the Applicant seeks costs on a solicitor-and-client basis, or alternatively a lump sum award of \$3,500 all-inclusive, payable forthwith. The Applicant and its counsel have an agreement for costs,¹³⁷ and any cost awards should be paid to counsel in trust.¹³⁸

PART IV – ORDER SOUGHT

126. The Applicant is seeking orders in the Notice of Motion [**Tab 1, pp. 1-3**].

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

May 15, 2022

SIMON LIN
Counsel for the Applicant,
Air Passenger Rights

[2P](#), and [2R](#), pp. [295-299](#), [102](#), [156](#), and [233](#)].

¹³⁵ Lukács Affidavit, Exhibits “V” and “P” (page 19 within this Exhibit “P”) [[Tabs 2V](#) and [2P](#), pp. [297](#) and [175](#)].

¹³⁶ CTA Written Representations (Feb. 1, 2022), para. 74 [[Tab 2AV](#), p. [414](#)].

¹³⁷ Lukács Affidavit, para. 7 [[Tab 2](#), p. [15](#)].

¹³⁸ *Roby v. Canada*, [2013 FCA 251](#) at paras. [23-29](#) [[Tab 19](#), pp. [608-610](#)]; and *Northcott v. Canada*, [2021 FC 289](#) at paras. [51-53](#) [[Tab 18](#), p. [602](#)].

PART V – LIST OF AUTHORITIES

Statutes and Regulations

Canada Evidence Act, R.S.C. 1985, c. C-5,
ss. 2 and 24

Canada Transportation Act, S.C. 1996, c. 10,
ss. 21-23

Federal Courts Rules, S.O.R./98-106,
Rules 8(2), 97, 397(2), 369.2, and 400-401

Case Law

Canada (Attorney General) v. Hennelly, 244 N.R. 399

Mekonen v. Canada (Citizenship and Immigration), 2007 FC 1133

Mohammed v. Canada (Minister of Citizenship and Immigration), 2006 FC 1310

Ngo Sen v. Canada (Citizenship and Immigration), 2020 FC 331

Northcott v. Canada (Attorney General), 2021 FC 289

Roby v. Canada (Attorney General), 2013 FCA 251

Singh v. Canada (Citizenship and Immigration), 2010 FC 757

ViiV Healthcare Company v. Gilead Sciences Canada, Inc., 2021 FCA 122



CANADA

CONSOLIDATION

CODIFICATION

Canada Evidence Act

Loi sur la preuve au Canada

R.S.C., 1985, c. C-5

L.R.C. (1985), ch. C-5

Current to May 2, 2022

À jour au 2 mai 2022

Last amended on July 12, 2019

Dernière modification le 12 juillet 2019



R.S.C., 1985, c. C-5

L.R.C., 1985, ch. C-5

An Act respecting witnesses and evidence

Loi concernant les témoins et la preuve

Short Title

Titre abrégé

Short title

1 This Act may be cited as the *Canada Evidence Act*.

R.S., c. E-10, s. 1.

Titre abrégé

1 *Loi sur la preuve au Canada*.

S.R., ch. E-10, art. 1.

Part I

Partie I

Application

Application

Application

2 This Part applies to all criminal proceedings and to all civil proceedings and other matters whatever respecting which Parliament has jurisdiction.

R.S., c. E-10, s. 2.

Application

2 La présente partie s'applique à toutes les procédures pénales et civiles ainsi qu'à toutes les autres matières de compétence fédérale.

S.R., ch. E-10, art. 2.

Witnesses

Témoins

Interest or crime

3 A person is not incompetent to give evidence by reason of interest or crime.

R.S., c. E-10, s. 3.

Intérêt ou crime

3 Nul n'est inhabile à témoigner pour cause d'intérêt ou de crime.

S.R., ch. E-10, art. 3.

Accused and spouse

4 (1) Every person charged with an offence, and, except as otherwise provided in this section, the wife or husband, as the case may be, of the person so charged, is a competent witness for the defence, whether the person so charged is charged solely or jointly with any other person.

Accusé et conjoint

4 (1) Toute personne accusée d'infraction, ainsi que, sauf disposition contraire du présent article, le conjoint de la personne accusée, est habile à témoigner pour la défense, que la personne ainsi accusée le soit seule ou conjointement avec une autre personne.

Spouse of accused

(2) No person is incompetent, or uncompellable, to testify for the prosecution by reason only that they are married to the accused.

Conjoint de l'accusé

(2) Une personne n'est pas inhabile à témoigner ni non contraignable pour le poursuivant pour la seule raison qu'elle est mariée à l'accusé.

Certificate where court has no seal

(2) Where any court, justice or coroner or court stenographer referred to in subsection (1) has no seal, or so certifies, the evidence may be given by a copy purporting to be certified under the signature of a judge or presiding provincial court judge or of the justice or coroner or court stenographer, without any proof of the authenticity of the signature or other proof whatever.

R.S., 1985, c. C-5, s. 23; R.S., 1985, c. 27 (1st Supp.), s. 203; 1993, c. 34, s. 15; 1997, c. 18, s. 117; 2002, c. 8, s. 118.

Certified copies

24 In every case in which the original record could be admitted in evidence,

(a) a copy of any official or public document of Canada or of any province, purporting to be certified under the hand of the proper officer or person in whose custody the official or public document is placed, or

(b) a copy of a document, by-law, rule, regulation or proceeding, or a copy of any entry in any register or other book of any municipal or other corporation, created by charter or Act of Parliament or the legislature of any province, purporting to be certified under the seal of the corporation, and the hand of the presiding officer, clerk or secretary thereof,

is admissible in evidence without proof of the seal of the corporation, or of the signature or official character of the person or persons appearing to have signed it, and without further proof thereof.

R.S., c. E-10, s. 24.

Books and documents

25 Where a book or other document is of so public a nature as to be admissible in evidence on its mere production from the proper custody, and no other Act exists that renders its contents provable by means of a copy, a copy thereof or extract therefrom is admissible in evidence in any court of justice or before a person having, by law or by consent of parties, authority to hear, receive and examine evidence, if it is proved that it is a copy or extract purporting to be certified to be true by the officer to whose custody the original has been entrusted.

R.S., c. E-10, s. 25.

Certificat si le tribunal n'a pas de sceau

(2) Si un de ces tribunaux, ce juge de paix, ce coroner ou ce sténographe judiciaire n'a pas de sceau, ou certifie qu'il n'en a pas, la preuve peut se faire au moyen d'une copie donnée comme certifiée sous la signature d'un juge ou du juge de la cour provinciale président ce tribunal, ou de ce juge de paix, de ce coroner ou de ce sténographe judiciaire, sans aucune preuve de l'authenticité de cette signature, ni autre preuve.

L.R. (1985), ch. C-5, art. 23; L.R. (1985), ch. 27 (1^{er} suppl.), art. 203; 1993, ch. 34, art. 15; 1997, ch. 18, art. 117; 2002, ch. 8, art. 118.

Documents officiels

24 Sont admissibles en preuve, dans tous les cas où la pièce originale pourrait l'être sans qu'il soit nécessaire de prouver le sceau de la personne morale, non plus que la signature et le caractère officiel de la ou des personnes qui paraissent l'avoir signée, et sans autre preuve de ces actes :

a) la copie de tout document officiel ou public du Canada ou d'une province, donnée comme attestée sous la signature du fonctionnaire compétent ou de la personne qui a la garde de ce document officiel ou public;

b) la copie d'un document, règlement administratif, règle, règlement ou procédure, ou la copie d'une écriture dans un registre ou dans un autre livre d'une municipalité ou autre personne morale, créée par une charte ou par une loi fédérale ou provinciale, donnée comme attestée sous le sceau de cette municipalité ou autre personne morale et revêtue de la signature du fonctionnaire président, du greffier ou du secrétaire de celle-ci.

S.R., ch. E-10, art. 24.

Livres et documents

25 Quand un registre ou livre ou un autre document est d'une nature assez publique pour être admissible en preuve sur simple production par le fonctionnaire qui en a la garde, et s'il n'existe pas d'autre loi permettant d'en prouver le contenu au moyen de copie, une copie ou un extrait de ce livre ou document est admissible en preuve devant tout tribunal judiciaire, ou devant toute personne qui a, en vertu de la loi ou avec le consentement des parties, le pouvoir d'entendre, de recueillir ou d'examiner la preuve, s'il est prouvé que c'est une copie ou un extrait donné comme étant certifié conforme par le fonctionnaire à la garde de qui l'original a été confié.

S.R., ch. E-10, art. 25.



CANADA

CONSOLIDATION

CODIFICATION

Canada Transportation Act

Loi sur les transports au Canada

S.C. 1996, c. 10

L.C. 1996, ch. 10

Current to December 23, 2021

À jour au 23 décembre 2021

Last amended on June 10, 2020

Dernière modification le 10 juin 2020

(a) the sittings of the Agency and the carrying on of its work;

(b) the manner of and procedures for dealing with matters and business before the Agency, including the circumstances in which hearings may be held in private; and

(c) the number of members that are required to hear any matter or perform any of the functions of the Agency under this Act or any other Act of Parliament.

Head Office

Head office

18 (1) The head office of the Agency shall be in the National Capital Region described in the schedule to the *National Capital Act*.

Residence of members

(2) The members appointed under subsection 7(2) shall reside in the National Capital Region described in the schedule to the *National Capital Act* or within any distance of it that the Governor in Council determines.

1996, c. 10, s. 18; 2007, c. 19, s. 5; 2008, c. 21, s. 61.

Staff

Secretary, officers and employees

19 The Secretary of the Agency and the other officers and employees that are necessary for the proper conduct of the business of the Agency shall be appointed in accordance with the *Public Service Employment Act*.

Technical experts

20 The Agency may appoint and, subject to any applicable Treasury Board directive, fix the remuneration of experts or persons who have technical or special knowledge to assist the Agency in an advisory capacity in respect of any matter before the Agency.

Records

Duties of Secretary

21 (1) The Secretary of the Agency shall

(a) maintain a record in which shall be entered a true copy of every rule, order, decision and regulation of the Agency and any other documents that the Agency requires to be entered in it; and

a) ses séances et l'exécution de ses travaux;

b) la procédure relative aux questions dont il est saisi, notamment pour ce qui est des cas de huis clos;

c) le nombre de membres qui doivent entendre les questions ou remplir telles des fonctions de l'Office prévues par la présente loi ou une autre loi fédérale.

Siège de l'Office

Siège

18 (1) Le siège de l'Office est fixé dans la région de la capitale nationale délimitée à l'annexe de la *Loi sur la capitale nationale*.

Lieu de résidence des membres

(2) Les membres nommés au titre du paragraphe 7(2) résident dans la région de la capitale nationale délimitée à l'annexe de la *Loi sur la capitale nationale* ou dans la périphérie de cette région définie par le gouverneur en conseil.

1996, ch. 10, art. 18; 2007, ch. 19, art. 5; 2008, ch. 21, art. 61.

Personnel

Secrétaire et personnel

19 Le secrétaire de l'Office et le personnel nécessaire à l'exécution des travaux de celui-ci sont nommés conformément à la *Loi sur l'emploi dans la fonction publique*.

Experts

20 L'Office peut nommer des experts ou autres spécialistes compétents pour le conseiller sur des questions dont il est saisi, et, sous réserve des instructions du Conseil du Trésor, fixer leur rémunération.

Registre

Attributions du secrétaire

21 (1) Le secrétaire est chargé :

a) de la tenue du registre du texte authentique des règles, arrêtés, règlements et décisions de l'Office et des autres documents dont celui-ci exige l'enregistrement;

(b) keep at the Agency's office a copy of all rules, orders, decisions and regulations of the Agency and the records of proceedings of the Agency.

Entries in record

(2) The entry of a document in the record referred to in paragraph (1)(a) shall constitute the original record of the document.

Copies of documents obtainable

22 On the application of any person, and on payment of a fee fixed by the Agency, the Secretary of the Agency or, in the absence of the Secretary, the person assigned by the Chairperson to act in the absence shall issue under the seal of the Agency to the applicant a certified copy of any rule, order, regulation or any other document that has been issued by the Agency.

Judicial notice of documents

23 (1) Judicial notice shall be taken of a document issued by the Agency under its seal without proof of the signature or official character of the person appearing to have signed it.

Evidence of deposited documents

(2) A document purporting to be certified by the Secretary of the Agency as being a true copy of a document deposited or filed with or approved by the Agency, or any portion of such a document, is evidence that the document is so deposited, filed or approved and, if stated in the certificate, of the time when the document was deposited, filed or approved.

Powers of Agency

Policy governs Agency

24 The powers, duties and functions of the Agency respecting any matter that comes within its jurisdiction under an Act of Parliament shall be exercised and performed in conformity with any policy direction issued to the Agency under section 43.

Agency powers in general

25 The Agency has, with respect to all matters necessary or proper for the exercise of its jurisdiction, the attendance and examination of witnesses, the production and inspection of documents, the enforcement of its orders or regulations and the entry on and inspection of property, all the powers, rights and privileges that are vested in a superior court.

b) de la conservation, dans les bureaux de l'Office, d'un exemplaire des règles, arrêtés, règlements, décisions et procès-verbaux de celui-ci.

Original

(2) Le document enregistré en application de l'alinéa (1)a) en constitue l'original.

Copies conformes

22 Le secrétaire de l'Office, ou la personne chargée par le président d'assurer son intérim, délivre sous le sceau de l'Office, sur demande et contre paiement des droits fixés par celui-ci, des copies certifiées conformes des règles, arrêtés, règlements ou autres documents de l'Office.

Admission d'office

23 (1) Les documents délivrés par l'Office sous son sceau sont admis d'office en justice sans qu'il soit nécessaire de prouver l'authenticité de la signature qui y est apposée ou la qualité officielle du signataire.

Preuve

(2) Le document censé être en tout ou en partie la copie certifiée conforme, par le secrétaire de l'Office, d'un document déposé auprès de celui-ci, ou approuvé par celui-ci, fait foi du dépôt ou de l'approbation ainsi que de la date, si elle est indiquée sur la copie, de ce dépôt ou de cette approbation.

Attributions de l'Office

Directives

24 Les attributions de l'Office relatives à une affaire dont il est saisi en application d'une loi fédérale sont exercées en conformité avec les directives générales qui lui sont données en vertu de l'article 43.

Pouvoirs généraux

25 L'Office a, à toute fin liée à l'exercice de sa compétence, la comparution et l'interrogatoire des témoins, la production et l'examen des pièces, l'exécution de ses arrêtés ou règlements et la visite d'un lieu, les attributions d'une cour supérieure.



CANADA

CONSOLIDATION

CODIFICATION

Federal Courts Rules

Règles des Cours fédérales

SOR/98-106

DORS/98-106

Current to May 2, 2022

À jour au 2 mai 2022

Last amended on January 13, 2022

Dernière modification le 13 janvier 2022

Extension by consent

7 (1) Subject to subsections (2) and (3), a period provided by these Rules may be extended once by filing the consent in writing of all parties.

Limitation

(2) An extension of a period under subsection (1) shall not exceed one half of the period sought to be extended.

Exception

(3) No extension may be made on consent of the parties in respect of a period fixed by an order of the Court or under subsection 203(1), 304(1) or 339(1).

Extension or abridgement

8 (1) On motion, the Court may extend or abridge a period provided by these Rules or fixed by an order.

When motion may be brought

(2) A motion for an extension of time may be brought before or after the end of the period sought to be extended.

(3) [Repealed, SOR/2021-244, s. 4]

SOR/2004-283, s. 32; SOR/2021-244, s. 4.

PART 2**Administration of the Court****Officers of the Court**

9 to 11 [Repealed, SOR/2004-283, s. 4]

Court registrars

12 (1) The Administrator shall arrange that there be in attendance at every sitting of the Court a duly qualified person to act as court registrar for the sitting, who shall, subject to the direction of the Court,

(a) make all arrangements necessary to conduct the sitting in an orderly, efficient and dignified manner;

(b) keep a record of every material event that transpires during the sitting;

(c) keep and be responsible for all books and records of the Court used at the sitting; and

Délai prorogé par consentement écrit

7 (1) Sous réserve des paragraphes (2) et (3), tout délai prévu par les présentes règles peut être prorogé une seule fois par le dépôt du consentement écrit de toutes les parties.

Limite

(2) La prorogation selon le paragraphe (1) ne peut excéder la moitié du délai en cause.

Exception

(3) Les délais fixés par une ordonnance de la Cour et ceux prévus aux paragraphes 203(1), 304(1) et 339(1) ne peuvent être prorogés par le consentement des parties.

Délai prorogé ou abrégé

8 (1) La Cour peut, sur requête, proroger ou abréger tout délai prévu par les présentes règles ou fixé par ordonnance.

Moment de la présentation de la requête

(2) La requête visant la prorogation d'un délai peut être présentée avant ou après l'expiration du délai.

(3) [Abrogé, DORS/2021-244, art. 4]

DORS/2004-283, art. 32; DORS/2021-244, art. 4.

PARTIE 2**Administration de la cour****Fonctionnaires de la cour**

9 à 11 [Abrogés, DORS/2004-283, art. 4]

Greffiers

12 (1) Sous réserve des directives de la Cour, l'administrateur veille à ce qu'une personne qualifiée pour agir à titre de greffier de la Cour soit présente à chacune des séances de la Cour; cette personne :

a) prend les dispositions nécessaires pour assurer l'ordre, la bonne marche et la dignité de la séance;

b) enregistre les événements importants de la séance;

c) a la garde et la responsabilité de tous les livres et registres de la Cour utilisés au cours de la séance;

d) a la garde et la responsabilité de toutes les pièces déposées au cours de la séance, les marque, les enregistre et indique par qui elles ont été déposées.

Failure to attend or misconduct

97 Where a person fails to attend an oral examination or refuses to take an oath, answer a proper question, produce a document or other material required to be produced or comply with an order made under rule 96, the Court may

- (a) order the person to attend or re-attend, as the case may be, at his or her own expense;
- (b) order the person to answer a question that was improperly objected to and any proper question arising from the answer;
- (c) strike all or part of the person's evidence, including an affidavit made by the person;
- (d) dismiss the proceeding or give judgment by default, as the case may be; or
- (e) order the person or the party on whose behalf the person is being examined to pay the costs of the examination.

Contempt order

98 A person who does not comply with an order made under rule 96 or 97 may be found in contempt.

Written Examinations

Written examination

99 (1) A party who intends to examine a person by way of a written examination shall serve a list of concise, separately numbered questions in Form 99A for the person to answer.

Objections

(2) A person who objects to a question in a written examination may bring a motion to have the question struck out.

Answers to written examination

(3) A person examined by way of a written examination shall answer by way of an affidavit.

Service of answers

(4) An affidavit referred to in subsection (3) shall be in Form 99B and be served on every other party within 30

Défaut de comparaître ou inconduite

97 Si une personne ne se présente pas à un interrogatoire oral ou si elle refuse de prêter serment, de répondre à une question légitime, de produire un document ou un élément matériel demandés ou de se conformer à une ordonnance rendue en application de la règle 96, la Cour peut :

- a) ordonner à cette personne de subir l'interrogatoire ou un nouvel interrogatoire oral, selon le cas, à ses frais;
- b) ordonner à cette personne de répondre à toute question à l'égard de laquelle une objection a été jugée injustifiée ainsi qu'à toute question légitime découlant de sa réponse;
- c) ordonner la radiation de tout ou partie de la preuve de cette personne, y compris ses affidavits;
- d) ordonner que l'instance soit rejetée ou rendre jugement par défaut, selon le cas;
- e) ordonner que la personne ou la partie au nom de laquelle la personne est interrogée paie les frais de l'interrogatoire oral.

Ordonnance pour outrage au tribunal

98 Quiconque ne se conforme pas à une ordonnance rendue en application des règles 96 ou 97 peut être reconnu coupable d'outrage au tribunal.

Interrogatoire écrit

Interrogatoire par écrit

99 (1) La partie qui désire procéder par écrit à l'interrogatoire d'une personne dresse une liste, selon la formule 99A, de questions concises, numérotées séparément, auxquelles celle-ci devra répondre et lui signifie cette liste.

Objection

(2) La personne qui soulève une objection au sujet d'une question posée dans le cadre d'un interrogatoire écrit peut, par voie de requête, demander à la Cour de rejeter la question.

Réponses

(3) La personne interrogée par écrit est tenue de répondre par affidavit établi selon la formule 99B.

Signification des réponses

(4) L'affidavit visé au paragraphe (3) est signifié à toutes les parties dans les 30 jours suivant la signification de l'interrogatoire écrit.

(b) after having reserved judgment at the conclusion of a hearing, by depositing in the Registry written reasons, signed by the judge or prothonotary who delivered them.

Drafting of order

394 (1) When the Court gives reasons, it may direct one of the parties to prepare for endorsement a draft order to implement the Court's conclusion, approved as to form and content by the other parties or, if the parties cannot agree on the form and content of the order, to bring a motion for judgment in accordance with rule 369 or 369.2, as the case may be.

Pronouncement of judgment

(2) On the return of a motion under subsection (1), the Court shall settle the terms of and pronounce the judgment, which shall be endorsed in writing and signed by the presiding judge or prothonotary.

SOR/2021-244, s. 20.

Copies to be sent

395 (1) Subject to subsection 36(3), the Administrator shall send without delay a copy of every order made and of any reasons given other than in open court to all parties

- (a) by registered mail;
- (b) by electronic means, including facsimile and electronic mail; or
- (c) by any other means, as directed by the Chief Justice, likely to bring the order and any reasons to the attention of the party.

Proof of receipt

(2) If an order and any reasons are transmitted by electronic means, the Administrator shall confirm receipt by the party and place proof of that receipt on the Court file.

SOR/2010-177, s. 6.

Recording of orders

396 Every order shall be recorded by the Administrator forthwith after it is made.

Motion to reconsider

397 (1) Within 10 days after the making of an order, or within such other time as the Court may allow, a party may serve and file a notice of motion to request that the Court, as constituted at the time the order was made, reconsider its terms on the ground that

b) soit en les remettant au greffe, signés par le juge ou le protonotaire qui les a rendus, dans le cas où l'affaire avait été mise en délibéré à la fin de l'instruction.

Rédaction d'une ordonnance

394 (1) Lorsque la Cour donne des motifs, elle peut donner des directives à une partie pour qu'elle rédige un projet d'ordonnance à consigner donnant effet à la décision de la Cour, dont la forme et le fond ont été approuvés par les autres parties ou, si les parties ne peuvent s'entendre sur la forme et le fond, pour qu'elle présente une requête pour jugement selon la règle 369 ou 369.2, selon le cas.

Prononcé du jugement

(2) Sur réception de la requête pour jugement visée au paragraphe (1), la Cour fixe les termes du jugement et le prononce. Le jugement est consigné et signé par le juge ou le protonotaire président.

DORS/2021-244, art. 20.

Envoi de copies

395 (1) Sous réserve du paragraphe 36(3), l'administrateur transmet sans délai aux parties, de l'une des façons ci-après une copie de chaque ordonnance rendue et de tout motif donné, le cas échéant, autrement qu'en audience publique :

- a) par courrier recommandé;
- b) par voie électronique, notamment télécopieur ou courriel;
- c) par tout autre moyen, précisé par le juge en chef, à même de porter l'ordonnance et les motifs à leur connaissance.

Accusé de réception

(2) Si l'ordonnance et les motifs sont transmis par voie électronique, l'administrateur confirme que les parties les ont reçus et en verse la preuve au dossier de la Cour.

DORS/2010-177, art. 6.

Enregistrement

396 L'administrateur enregistre les ordonnances dès qu'elles ont été rendues.

Réexamen

397 (1) Dans les 10 jours après qu'une ordonnance a été rendue ou dans tout autre délai accordé par la Cour, une partie peut signifier et déposer un avis de requête demandant à la Cour qui a rendu l'ordonnance, telle qu'elle était constituée à ce moment, d'en examiner de nouveau

(a) the order does not accord with any reasons given for it; or

(b) a matter that should have been dealt with has been overlooked or accidentally omitted.

Mistakes

(2) Clerical mistakes, errors or omissions in an order may at any time be corrected by the Court.

Stay of order

398 (1) On the motion of a person against whom an order has been made,

(a) where the order has not been appealed, the court that made the order may order that it be stayed; or

(b) where a notice of appeal of the order has been issued, a judge of the court that is to hear the appeal may order that it be stayed.

Conditions

(2) As a condition to granting a stay under subsection (1), a judge may require that the appellant

(a) provide security for costs; and

(b) do anything required to ensure that the order will be complied with when the stay is lifted.

Setting aside of stay

(3) A judge of the court that is to hear an appeal of an order that has been stayed pending appeal may set aside the stay if the judge is satisfied that the party who sought the stay is not expeditiously proceeding with the appeal or that for any other reason the order should no longer be stayed.

SOR/2004-283, s. 40.

Setting aside or variance

399 (1) On motion, the Court may set aside or vary an order that was made

(a) *ex parte*; or

(b) in the absence of a party who failed to appear by accident or mistake or by reason of insufficient notice of the proceeding,

les termes, mais seulement pour l'une ou l'autre des raisons suivantes :

a) l'ordonnance ne concorde pas avec les motifs qui, le cas échéant, ont été donnés pour la justifier;

b) une question qui aurait dû être traitée a été oubliée ou omise involontairement.

Erreurs

(2) Les fautes de transcription, les erreurs et les omissions contenues dans les ordonnances peuvent être corrigées à tout moment par la Cour.

Sursis d'exécution

398 (1) Sur requête d'une personne contre laquelle une ordonnance a été rendue :

a) dans le cas où l'ordonnance n'a pas été portée en appel, la Cour qui a rendu l'ordonnance peut surseoir à l'ordonnance;

b) dans le cas où un avis d'appel a été délivré, seul un juge de la Cour saisie de l'appel peut surseoir à l'ordonnance.

Conditions

(2) Le juge qui sursoit à l'exécution d'une ordonnance aux termes du paragraphe (1) peut exiger que l'appelant :

a) fournisse un cautionnement pour les dépens;

b) accomplisse tout acte exigé pour garantir, en cas de confirmation de tout ou partie de l'ordonnance, le respect de l'ordonnance.

Annulation du sursis

(3) Un juge de la Cour saisie de l'appel d'une ordonnance qui fait l'objet d'un sursis peut annuler le sursis, s'il est convaincu qu'il n'y a pas lieu de le maintenir, notamment en raison de la lenteur à agir de la partie qui a demandé le sursis.

DORS/2004-283, art. 40.

Annulation sur preuve *prima facie*

399 (1) La Cour peut, sur requête, annuler ou modifier l'une des ordonnances suivantes, si la partie contre laquelle elle a été rendue présente une preuve *prima facie* démontrant pourquoi elle n'aurait pas dû être rendue :

a) toute ordonnance rendue sur requête *ex parte*;

b) toute ordonnance rendue en l'absence d'une partie qui n'a pas comparu par suite d'un événement fortuit

if the party against whom the order is made discloses a *prima facie* case why the order should not have been made.

Setting aside or variance

(2) On motion, the Court may set aside or vary an order

- (a) by reason of a matter that arose or was discovered subsequent to the making of the order; or
- (b) where the order was obtained by fraud.

Effect of order

(3) Unless the Court orders otherwise, the setting aside or variance of an order under subsection (1) or (2) does not affect the validity or character of anything done or not done before the order was set aside or varied.

PART 11

Costs

Awarding of Costs Between Parties

Discretionary powers of Court

400 (1) The Court shall have full discretionary power over the amount and allocation of costs and the determination of by whom they are to be paid.

Crown

(2) Costs may be awarded to or against the Crown.

Factors in awarding costs

(3) In exercising its discretion under subsection (1), the Court may consider

- (a) the result of the proceeding;
- (b) the amounts claimed and the amounts recovered;
- (c) the importance and complexity of the issues;
- (d) the apportionment of liability;
- (e) any written offer to settle;
- (f) any offer to contribute made under rule 421;
- (g) the amount of work;

ou d'une erreur ou à cause d'un avis insuffisant de l'instance.

Annulment

(2) La Cour peut, sur requête, annuler ou modifier une ordonnance dans l'un ou l'autre des cas suivants :

- a) des faits nouveaux sont survenus ou ont été découverts après que l'ordonnance a été rendue;
- b) l'ordonnance a été obtenue par fraude.

Effet de l'ordonnance

(3) Sauf ordonnance contraire de la Cour, l'annulation ou la modification d'une ordonnance en vertu des paragraphes (1) ou (2) ne porte pas atteinte à la validité ou à la nature des actes ou omissions antérieurs à cette annulation ou modification.

PARTIE 11

Dépens

Adjudication des dépens entre parties

Pouvoir discrétionnaire de la Cour

400 (1) La Cour a le pouvoir discrétionnaire de déterminer le montant des dépens, de les répartir et de désigner les personnes qui doivent les payer.

La Couronne

(2) Les dépens peuvent être adjugés à la Couronne ou contre elle.

Facteurs à prendre en compte

(3) Dans l'exercice de son pouvoir discrétionnaire en application du paragraphe (1), la Cour peut tenir compte de l'un ou l'autre des facteurs suivants :

- a) le résultat de l'instance;
- b) les sommes réclamées et les sommes recouvrées;
- c) l'importance et la complexité des questions en litige;
- d) le partage de la responsabilité;
- e) toute offre écrite de règlement;
- f) toute offre de contribution faite en vertu de la règle 421;

(h) whether the public interest in having the proceeding litigated justifies a particular award of costs;

(i) any conduct of a party that tended to shorten or unnecessarily lengthen the duration of the proceeding;

(j) the failure by a party to admit anything that should have been admitted or to serve a request to admit;

(k) whether any step in the proceeding was

(i) improper, vexatious or unnecessary, or

(ii) taken through negligence, mistake or excessive caution;

(l) whether more than one set of costs should be allowed, where two or more parties were represented by different solicitors or were represented by the same solicitor but separated their defence unnecessarily;

(m) whether two or more parties, represented by the same solicitor, initiated separate proceedings unnecessarily;

(n) whether a party who was successful in an action exaggerated a claim, including a counterclaim or third party claim, to avoid the operation of rules 292 to 299;

(n.1) whether the expense required to have an expert witness give evidence was justified given

(i) the nature of the litigation, its public significance and any need to clarify the law,

(ii) the number, complexity or technical nature of the issues in dispute, or

(iii) the amount in dispute in the proceeding; and

(o) any other matter that it considers relevant.

Tariff B

(4) The Court may fix all or part of any costs by reference to Tariff B and may award a lump sum in lieu of, or in addition to, any assessed costs.

g) la charge de travail;

h) le fait que l'intérêt public dans la résolution judiciaire de l'instance justifie une adjudication particulière des dépens;

i) la conduite d'une partie qui a eu pour effet d'abrèger ou de prolonger inutilement la durée de l'instance;

j) le défaut de la part d'une partie de signifier une demande visée à la règle 255 ou de reconnaître ce qui aurait dû être admis;

k) la question de savoir si une mesure prise au cours de l'instance, selon le cas :

(i) était inappropriée, vexatoire ou inutile,

(ii) a été entreprise de manière négligente, par erreur ou avec trop de circonspection;

l) la question de savoir si plus d'un mémoire de dépens devrait être accordé lorsque deux ou plusieurs parties sont représentées par différents avocats ou lorsque, étant représentées par le même avocat, elles ont scindé inutilement leur défense;

m) la question de savoir si deux ou plusieurs parties représentées par le même avocat ont engagé inutilement des instances distinctes;

n) la question de savoir si la partie qui a eu gain de cause dans une action a exagéré le montant de sa réclamation, notamment celle indiquée dans la demande reconventionnelle ou la mise en cause, pour éviter l'application des règles 292 à 299;

n.1) la question de savoir si les dépenses engagées pour la déposition d'un témoin expert étaient justifiées compte tenu de l'un ou l'autre des facteurs suivants :

(i) la nature du litige, son importance pour le public et la nécessité de clarifier le droit,

(ii) le nombre, la complexité ou la nature technique des questions en litige,

(iii) la somme en litige;

o) toute autre question qu'elle juge pertinente.

Tarif B

(4) La Cour peut fixer tout ou partie des dépens en se reportant au tarif B et adjuger une somme globale au lieu ou en sus des dépens taxés.

Directions re assessment

(5) Where the Court orders that costs be assessed in accordance with Tariff B, the Court may direct that the assessment be performed under a specific column or combination of columns of the table to that Tariff.

Further discretion of Court

(6) Notwithstanding any other provision of these Rules, the Court may

- (a)** award or refuse costs in respect of a particular issue or step in a proceeding;
- (b)** award assessed costs or a percentage of assessed costs up to and including a specified step in a proceeding;
- (c)** award all or part of costs on a solicitor-and-client basis; or
- (d)** award costs against a successful party.

Award and payment of costs

(7) Costs shall be awarded to the party who is entitled to receive the costs and not to the party's solicitor, but they may be paid to the party's solicitor in trust.

SOR/2002-417, s. 25(F); SOR/2010-176, s. 11.

Costs of motion

401 (1) The Court may award costs of a motion in an amount fixed by the Court.

Costs payable forthwith

(2) Where the Court is satisfied that a motion should not have been brought or opposed, the Court shall order that the costs of the motion be payable forthwith.

Costs of discontinuance or abandonment

402 Unless otherwise ordered by the Court or agreed by the parties, a party against whom an action, application or appeal has been discontinued or against whom a motion has been abandoned is entitled to costs forthwith, which may be assessed and the payment of which may be enforced as if judgment for the amount of the costs had been given in favour of that party.

Motion for directions

403 (1) A party may request that directions be given to the assessment officer respecting any matter referred to in rule 400,

Directives de la Cour

(5) Dans le cas où la Cour ordonne que les dépens soient taxés conformément au tarif B, elle peut donner des directives prescrivant que la taxation soit faite selon une colonne déterminée ou une combinaison de colonnes du tableau de ce tarif.

Autres pouvoirs discrétionnaires de la Cour

(6) Malgré toute autre disposition des présentes règles, la Cour peut :

- a)** adjuger ou refuser d'adjuger les dépens à l'égard d'une question litigieuse ou d'une procédure particulières;
- b)** adjuger l'ensemble ou un pourcentage des dépens taxés, jusqu'à une étape précise de l'instance;
- c)** adjuger tout ou partie des dépens sur une base avocat-client;
- d)** condamner aux dépens la partie qui obtient gain de cause.

Adjudication et paiement des dépens

(7) Les dépens sont adjugés à la partie qui y a droit et non à son avocat, mais ils peuvent être payés en fiducie à celui-ci.

DORS/2002-417, art. 25(F); DORS/2010-176, art. 11.

Dépens de la requête

401 (1) La Cour peut adjuger les dépens afférents à une requête selon le montant qu'elle fixe.

Paiement sans délai

(2) Si la Cour est convaincue qu'une requête n'aurait pas dû être présentée ou contestée, elle ordonne que les dépens afférents à la requête soient payés sans délai.

Dépens lors d'un désistement ou abandon

402 Sauf ordonnance contraire de la Cour ou entente entre les parties, lorsqu'une action, une demande ou un appel fait l'objet d'un désistement ou qu'une requête est abandonnée, la partie contre laquelle l'action, la demande ou l'appel a été engagé ou la requête présentée a droit aux dépens sans délai. Les dépens peuvent être taxés et le paiement peut en être poursuivi par exécution forcée comme s'ils avaient été adjugés par jugement rendu en faveur de la partie.

Requête pour directives

403 (1) Une partie peut demander que des directives soient données à l'officier taxateur au sujet des questions visées à la règle 400 :

FEDERAL COURT OF APPEAL

BETWEEN:

AIR PASSENGER RIGHTS

Applicant

– and –

ATTORNEY GENERAL OF CANADA

Respondent

– and –

CANADIAN TRANSPORTATION AGENCY

Intervener

**MOTION RECORD OF THE APPLICANT,
AIR PASSENGER RIGHTS**

VOLUME 2 of 2

**Motion Regarding the CTA's Affiant's Failure to Attend Cross-Examination
Motion to Enforce, Vary, and Correct the Court Orders Issued by Gleason, J.A.
(pursuant to Rules 8(2), 97, 397(2), and 369.2 of the *Federal Courts Rules*)**

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Federal Court of Canada — Appeal Division

Canada (Attorney General) v. Hennelly

1999 CarswellNat 5100, 1999 CarswellNat 967, [1999] F.C.J. No.
846, 167 F.T.R. 158 (note), 244 N.R. 399, 89 A.C.W.S. (3d) 376

**The Attorney General of Canada, Appellant (Applicant)
and Philip Hennelly, Respondent (Respondent)**

Linden J.A., McDonald J.A., Robertson J.A.

Heard: June 2, 1999
Oral reasons: June 2, 1999
Docket: A-617-95

Proceedings: Affirmed [91 F.T.R. 317](#), [1995 CarswellNat 1044](#) (Fed. T.D.)

Counsel: *Mr. Derek Edwards*, for Appellant/Applicant.
Mr. Philip Hennelly, in person for Respondent/Respondent.

McDonald J.A.:

1 We are all of the opinion that this appeal must be dismissed. We recognize that it is usually routine for parties to consent to extensions of time in circumstances such as these and equally routine for the Court to allow an extension on this basis.

2 Nonetheless, the presence or absence of consent for an extension of time is not determinative of the issue.

3 The proper test is whether the applicant has demonstrated

1. a continuing intention to pursue his or her application;
2. that the application has some merit;
3. that no prejudice to the respondent arises from the delay; and
4. that a reasonable explanation for the delay exists.

4 Any determination of whether or not the applicant's explanation justifies the granting of the necessary extension of time will turn on the facts of each particular case.

5 We do not understand the Motions Judge to be saying that one of the criteria for granting an extension is whether or not consent has been given.

6 In this case the Motions Judge found that inadvertence was an insufficient explanation for the appellant's delay.

7 We can find no compelling reason to interfere with the Motions Judge's exercise of discretion in finding that the appellant failed to provide an adequate explanation which would justify granting an extension of time.

8 The appeal will be dismissed with costs to the respondent fixed in the amount of \$100.00.

Appeal dismissed.

2007 FC 1133, 2007 CF 1133
Federal Court

Mekonen v. Canada (Minister of Citizenship & Immigration)

2007 CarswellNat 3655, 2007 CarswellNat 7044, 2007 FC 1133, 2007 CF
1133, [2007] F.C.J. No. 1469, 161 A.C.W.S. (3d) 621, 66 Imm. L.R. (3d) 222

**Teklemichael Weldetensai Mekonen, Berekti Okbay (Applicants)
and The Minister of Citizenship and Immigration (Respondent)**

E.R. Dawson J.

Heard: October 16, 2007
Judgment: November 2, 2007
Docket: IMM-6626-06

Counsel: David Matas, for Applicants
Rick Garvin, for Respondent

E.R. Dawson J.:

1 Teklemichael Weldetensai Mekonen and his wife Berekti Okbay are citizens of Eritrea. Ms. Okbay and their four daughters were landed in Canada in April of 2000 as Convention refugees. In July of 2001, Ms. Okbay applied to sponsor her husband as a member of the family class. In turn, in June of 2002, Mr. Mekonen, who resides outside of Canada, applied for permanent resident status. At all times, Mr. Mekonen has admitted that he was a member of the Eritrean Liberation Front (ELF), although he says that he was never personally involved in any armed struggle.

2 Mr. Mekonen and Ms. Okbay bring this application for judicial review of a decision of a visa officer that, as a member of ELF, Mr. Mekonen was captured by [paragraph 34\(1\)\(f\) of the *Immigration and Refugee Protection Act, S.C. 2001, c. 27 \(Act\)*](#), and therefore was inadmissible to Canada. Specifically, the officer found that:

AS MENTIONED ABOVE PI HELD A LEADERSHIP POSITION WITHIN THE ORGANIZATION. BEING A MEMBER (LEADER) OF THE ELF FOR 25 YEARS, IN ERITREA AND THE SUDAN DURING THE PERIOD 1975 TO 1989 HE WOULD HAVE BEEN AWARE OF THE ACTIVITIES OF THE ELF. I AM NOT SATISFIED THAT PI WAS SIMPLY AN INNOCENT MEMBER OF THE ELF. THERE ARE REASONABLE GROUNDS TO BELIEVE [S/C] THAT PI WAS INVOLVED AND AWARE OF E [S/C] THE ARMED STRUGGLE OF ERITREAN LIBERATION AND THE ARMED CLASHES

BETWEEN THE ELF AND THE EPLF-ERITREAN PEOPLE'S LIBERATION FRONT AND KNOWLEDGEABLE ABOUT THE GROUP'S TERROR-RELATED ACTIVITIES. APPLICATION REFUSED — A34(1)(F).

3 *Subsection 34(1) of the Act* provides that:

34(1) A permanent resident or a foreign national is inadmissible on security grounds for

- (a) engaging in an act of espionage or an act of subversion against a democratic government, institution or process as they are understood in Canada;
- (b) engaging in or instigating the subversion by force of any government;
- (c) engaging in terrorism;
- (d) being a danger to the security of Canada;
- (e) engaging in acts of violence that would or might endanger the lives or safety of persons in Canada; or
- (f) being a member of an organization that there are reasonable grounds to believe engages, has engaged or will engage in acts referred to in paragraph (a), (b) or (c).

34(1) Empoortent interdiction de territoire pour raison de sécurité les faits suivants :

- a) être l'auteur d'actes d'espionnage ou se livrer à la subversion contre toute institution démocratique, au sens où cette expression s'entend au Canada;
- b) être l'instigateur ou l'auteur d'actes visant au renversement d'un gouvernement par la force;
- c) se livrer au terrorisme;
- d) constituer un danger pour la sécurité du Canada;
- e) être l'auteur de tout acte de violence susceptible de mettre en danger la vie ou la sécurité d'autrui au Canada;
- f) être membre d'une organisation dont il y a des motifs raisonnables de croire qu'elle est, a été ou sera l'auteur d'un acte visé aux alinéas a), b) ou c).

4 While the applicants have raised a number of interesting arguments, in my view, one issue is determinative. I find that, on the facts and circumstances of this particular case, the officer breached the duty of fairness that he owed to Mr. Mekonen. The officer did so by failing to provide Mr. Mekonen with copies of documents that the officer had obtained and considered in making his decision, and by failing to afford Mr. Mekonen an opportunity to comment on the information

contained within those documents. Additionally, to the extent that the officer found that there were reasonable grounds to believe that the ELF is an organization that there are reasonable grounds to believe is, or was, engaged in terrorism, the officer erred by failing to indicate how he understood and applied the definition of "terrorism".

Standard of review

5 It is only in respect of the review of the officer's substantive decision that a pragmatic and functional analysis is required in order to determine the appropriate standard of review. Evaluating whether the requirements of procedural fairness have been met is a legal question to be answered by the Court. See: *C.U.P.E. v. Ontario (Minister of Labour)*, [2003] 1 S.C.R. 539 (S.C.C.) at paragraph 100.

6 With respect to the substantive decision concerning the status of the ELF as a terrorist group within the meaning of [subsection 34\(1\) of the Act](#), I accept and adopt the conclusions of my colleagues in cases such as *Kanendra v. Canada (Minister of Citizenship & Immigration)*, [2005] F.C.J. No. 1156 (F.C.), that a decision as to whether an organization is one described in [paragraphs 34\(1\)\(a\), \(b\), or \(c\) of the Act](#) is to be reviewed on the standard of reasonableness.

Procedural matter

7 Small portions of the tribunal record in this matter were redacted on grounds that disclosure of such information would be injurious to national security. The Minister brought, late in the proceeding, an application under [section 87 of the Act](#) for the non-disclosure of that information.

8 After receiving both public and confidential evidence filed on the Minister's behalf and after hearing the *ex parte* and *in camera* submissions of counsel for the Minister and the public submissions of counsel for the applicants, an order issued approving revised versions of the eight pages of the tribunal record where redactions were initially made. Some further information was disclosed and some information remained redacted on the ground that its disclosure would be injurious to national security or to the safety of any person.

9 Two comments are to be made about the [section 87](#) application.

10 First, as explained to counsel for the Minister, it is imperative that these applications be brought on a timely basis. It is for the Court and not the tribunal to decide what information can be withheld from an applicant, and such a decision should be made sufficiently far in advance of the hearing on the merits as to enable the applicant to know on a timely basis all of the information that can be disclosed.

11 Second, as explained to counsel, while certain information remained redacted in the present case, my decision on the merits of this application has been made without regard to the redacted

confidential information. The case was decided solely upon the public record. I now turn to the substantive issues.

Did the officer breach the duty of fairness?

12 The content of the duty of fairness is variable and contextual; it is not abstract or absolute. In two cases, *Haghighi v. Canada (Minister of Citizenship & Immigration)*, [2000] 4 F.C. 407 (Fed. C.A.), and *B. (S.) v. Canada (Minister of Citizenship & Immigration)*, [2001] 3 F.C. 3 (Fed. C.A.), the Federal Court of Appeal considered whether an officer was required by the duty of fairness to disclose for comment to the person affected by the officer's decision a report received by the officer. The issue arose in *Haghighi* in the context of an inland humanitarian and compassionate application and in *B. (S.)* in the context of a danger opinion. In both cases, the Court applied five factors in order to determine whether disclosure of the report in question was required in order to provide the person concerned with a reasonable opportunity to participate in a meaningful fashion in the decision-making process. The factors were:

- (1) the nature and effect of the decision within the statutory scheme;
- (2) whether, because of the expertise of the writer of the report or other circumstances, the report was likely to have such a degree of influence over the decision-maker that advance disclosure was required in order to "level the playing field";
- (3) the harm likely to arise from a decision based upon an incorrect or ill-considered understanding of the relevant circumstances;
- (4) the extent to which advance disclosure of the report was likely to avoid the risk of an erroneously-based decision; and
- (5) any costs likely to arise from advance disclosure, including delays in the decision-making process.

See: *B. (S.)*, at paragraphs 22 and 23.

13 I believe that those contextual factors are apposite in order to determine the content of the duty of fairness in the present case. Each factor is addressed in turn below.

1. The nature and effect of the decision within the statutory scheme.

14 In *Baker v. Canada (Minister of Citizenship & Immigration)*, [1999] 2 S.C.R. 817 (S.C.C.), Madam Justice L'Heureux-Dubé noted that greater procedural protections are required where no appeal procedure is provided within the statute or where the decision is determinative of the issue and further requests cannot be submitted.

15 Subsection 34(1) of the Act describes persons who may not be admitted to Canada for reasons of national security. There is no right of appeal from a finding of inadmissibility, although it may be judicially reviewed with the leave of this Court. However, the matters referred to in subsection 34(1) "do not constitute inadmissibility in respect of a permanent resident or a foreign national who satisfies the Minister that their presence in Canada would not be detrimental to the national interest". See: subsection 34(2) of the Act. The consideration of "national interest" does not involve a reconsideration of the finding of inadmissibility. Rather, it "involves the assessment and balancing of all factors pertaining to the applicant's entry into Canada against the stated objectives of the *Immigration and Refugee Protection Act* as well as Canada's domestic and international interests and obligations". See: Citizenship and Immigration Canada Enforcement Manual, Chapter 2, Section 13.6.

16 The decision with respect to inadmissibility is not an exercise of discretion. Officers are instructed to obtain evidence for subsection 34(1) decisions by collecting police or intelligence reports, statutory declarations supported by evidence of statements made to an officer, and other documentary evidence including media articles, scholarly journals, and expert reports.

17 The objective nature of the decision and the lack of any appeal procedure militate in favor of greater content to the duty of fairness.

2. The degree of influence the report is likely to have on the decision-maker.

18 The non-disclosed documents consist of a memorandum from the Canada Border Services Agency (CBSA) dated October 6, 2005, and some open source information about the ELF. The memorandum contained a recommendation that the information forwarded to the officer "provides evidence to support a determination of inadmissibility" under section 34 of the Act. The contents of the memorandum did not have to be protected for security reasons, as demonstrated by the fact that the memorandum was later disclosed to Mr. Mekonen in abortive proceedings before the Immigration Appeal Division.

19 The content and purpose of the CBSA memorandum lead me to conclude that it was an instrument of advocacy designed, in the words of the Federal Court of Appeal in *B. (S.)*, "to have such a degree of influence on the decision maker that advance disclosure is required 'to level the playing field'".

3. The harm likely to arise from a decision based upon an incorrect or ill-considered understanding of the relevant circumstances.

20 This is not a case where, as in *Haghighi*, a negative decision may result in the removal of an individual from Canada to a situation where they may risk torture. Generally, a person applying

from abroad for permanent resident status in Canada will not face any significant risk of harm if their application is rejected.

21 In the present case, however, Mr. Mekonen's wife and children are permanent residents of Canada and recognized to be Convention refugees in relation to Eritrea, their country of nationality. The risk the family faces from an ill-considered decision with respect to Mr. Mekonen's admissibility is that the family will, absent extraordinary ministerial relief, not be able to be reunited in Canada. In my view, this leads to the content of the duty of fairness being more extensive in this particular factual context.

4. The extent to which advance disclosure of the report was likely to avoid the risk of an erroneous decision.

22 In the present case, the following arises out of the documents not disclosed to Mr. Mekonen by the officer:

1. The CBSA memorandum contained no discussion of what, as a matter of law, constitutes terrorism.
2. Much of the open source country condition documentation spoke of armed clashes between ELF and the Eritrea People's Liberation Front (EPLF). Because the EPLF did not form the government at the time, this evidence would not be relevant to the issue of whether ELF was engaged in the subversion by force of a government. Similarly, the definition of "terrorism" applied by the Supreme Court of Canada in *Suresh v. Canada (Minister of Citizenship & Immigration)*, [2002] 1 S.C.R. 3 (S.C.C.), requires an act "intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act". The documentary evidence before the officer would require careful analysis in order to see whether the ELF's activities fell within the ambit of that definition or within the ambit of subversion by force of any government.
3. A publication from the United Nations High Commissioner for Refugees entitled "Sudan-Eritrea: Early Warning Note", contained in the open source information before the officer, noted that "[t]here is still today no serious balanced historical study of the Eritrean independence struggle, most of the literature being, at least to some degree, of a propagandistic nature."

23 In my view, had the CBSA and open source information been provided to Mr. Mekonen, he could have commented upon: (a) the analytical deficiency in that the CBSA memorandum did not discuss the definition of "terrorism" or how the ELF was engaged in either terrorism or

subversion; and (b) the nature of the country condition documentation, particularly the source of the information. In the circumstances of this case, such comment may very well avoid an erroneous decision with respect to admissibility.

5. Any costs arising from advance disclosure, including delay.

24 I can see no cost or delay that would arise from advance disclosure of the documents that were before the officer. This is because on June 15, 2006, the visa officer wrote to Mr. Mekonen advising that the officer had reasonable grounds to believe that Mr. Mekonen might be inadmissible under [paragraph 34\(1\)\(f\) of the Act](#). The officer stated that, in coming to his conclusion, he had considered the information Mr. Mekonen had provided in his application for permanent residence, at his interview, and after his interview. The officer did not mention the CBSA memorandum and the open-source information that had been provided to the officer. The officer gave Mr. Mekonen 45 days to respond to the officer's concerns.

25 No added cost or delay would have resulted if the officer had, at the same time, provided the CBSA memorandum and the open source documentation to Mr. Mekonen.

6. Conclusion on the content of the duty of fairness.

26 Weighing these factors, I find that the circumstances of this case required the officer to provide Mr. Mekonen with the CBSA memorandum and the open source documents and to allow Mr. Mekonen to make submissions that were responsive to that material. Such actions were necessary in order for Mr. Mekonen to have a meaningful opportunity to present relevant evidence and submissions and to have his evidence and submissions fully and fairly considered by the officer.

27 In reaching this conclusion, I have considered the Minister's arguments that general country condition documentation did not have to be provided and that Mr. Mekonen did not dispute the accuracy of any fact found in that documentation. However, as the Federal Court of Appeal noted in *B. (S.)* at paragraph 22, relying upon its earlier decision in *Haghighi*, "the question is not whether the report is or contains extrinsic evidence of facts unknown to the person affected by the decision, but whether the disclosure of the report is required to provide the person with a reasonable opportunity to participate in a meaningful manner in the decision-making process". In the present case, for the above reasons, meaningful participation included the right to highlight weaknesses in the material before the officer.

An organization that engages, has engaged, or will engage in terrorism.

28 In *Ali v. Canada (Minister of Citizenship & Immigration)* (2004), [2005] 1 F.C.R. 485 (F.C.), the Court held at paragraph 58 that, to arrive at a finding of inadmissibility under [paragraph 34\(1\)\(f\) of the Act](#), an officer would have to have regard to the definition of "terrorism" provided in *Suresh* as well as to the definitions of "terrorist activity" and "terrorist group" contained in [subsection](#)

83.01(1) of the *Criminal Code*, R.S.C. 1985, c. C-46. The failure of the officer to explain how the term "terrorist" was defined and applied was found to be a reviewable error. Similar conclusions were reached in *Jalil v. Canada (Minister of Citizenship & Immigration)*, [2006] 4 F.C.R. 471 (F.C.), and *Naeem v. Canada (Minister of Citizenship & Immigration)*, 2007 FC 123 (F.C.).

29 In the present case, the officer's reasons, found in the Computer Assisted Immigration Processing System notes, contain no definition of "terrorism". The officer simply wrote that there were reasonable grounds to believe that Mr. Mekonen was "knowledgeable about [the ELF's] terror-related activities". There is no indication of how the officer understood and applied the definition of "terrorism". This constitutes a reviewable error.

Conclusion and Certification

30 Because of the officer's breach of the duty of the procedural fairness, the application for judicial review is allowed.

31 While Mr. Mekonen posed a number of questions for certification, including one with respect to the duty of fairness, the Minister opposed certification of any question. No question will be certified.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

1. The application for judicial review is allowed, and the decision of the visa officer made on July 6, 2006, is hereby set aside.
2. The matter is remitted for redetermination by a different visa officer in accordance with these reasons.

Application granted.

2006 FC 1310, 2006 CF 1310
Federal Court

Mohammed v. Canada (Minister of Citizenship & Immigration)

2006 CarswellNat 3485, 2006 CarswellNat 5341, 2006 FC 1310, 2006 CF
1310, [2006] A.C.F. No. 1630, [2006] F.C.J. No. 1630, [2007] 4 F.C.R.
300, 153 A.C.W.S. (3d) 197, 302 F.T.R. 184 (Eng.), 57 Imm. L.R. (3d) 105

**Zaheer Mohiuddin Mohammed (Applicant) and The
Minister of Citizenship and Immigration (Respondent)**

K.W. von Finckenstein J.

Heard: October 25, 2006

Judgment: October 30, 2006

Docket: IMM-7498-05

Counsel: Mr. Lorne Waldman for Applicant

Mr. Lorne McClenaghan, Mr. Marcel Larouche for Respondent

K.W. von Finckenstein J.:

Background

1 Zaheer Mohiuddin Mohammed (the "Applicant") applied for permanent residence in Canada after being granted Convention refugee status. The application was denied on November 4, 2005, pursuant to [section 34\(1\) of the *Immigration and Refugee Protection Act, S.C. 2001, c. 27* \("IRPA"\)](#) based on his membership in the Mohajir Quami Movement (the "MQM"), an organization that was found to have engaged in acts of terrorism. The Applicant does not dispute that he was and is a member of the MQM, but disputes that he or the MQM engaged in acts of terrorism.

2 The Applicant was granted leave to seek judicial review in an Order dated July 27, 2006, by Justice Barnes. The July 27 order directed the tribunal to send copies of its record to the parties and to the Registry of the Court by August 17, 2006.

3 The tribunal, an Immigration Officer employed by Citizenship and Immigration Canada, prepared and certified the Tribunal Record and served the Certified Tribunal Record on the Court and the parties. The Certified Tribunal Record was accompanied by a cover letter under the signature of June Levato ("Levato Letter"). The Levato letter disclosed that the Tribunal was

withholding several pages of documents in its possession on the basis that disclosure of the documents 'would be injurious to national security or the safety of any person'.

4 The Applicant then made a motion dated September 6, 2006, to determine whether it was open to the Respondent to provide an incomplete disclosure of the Tribunal Record without first seeking the Court's directions on the matter contrary to [Rules 317 and 318 of the *Federal Courts Rules*, S.O.R./98-106 \("FCR"\)](#) or [section 38 of the *Canada Evidence Act*, R.S., 1985, c. C-5 \("CEA"\)](#).

5 Prothonotary Lafrenière ordered the Minister of Citizenship and Immigration (the "Respondent") to forward the withheld portions to the Court under seal. He also ordered the Respondent to bring a motion for non-disclosure of the portions of the Tribunal Record it seeks to withhold from the Applicant.

6 Consequently, the Respondent has brought this motion for non-disclosure requesting:

1. A declaration that the Respondent is not required to disclose the redacted portions of the Certified Tribunal Record for reasons of national security and public safety; and
2. A declaration that the Tribunal was permitted to object to disclosure by serving a written objection.

7 On October 11, 2006, Chief Justice Lutfy ordered:

- a. an *ex-parte* in-camera hearing to be heard the morning of October 25, 2006, in the absence of counsel for the Applicant; and
- b. a public hearing of the motion of the Respondent in the afternoon of October 25, 2006, with counsel for both sides being present.

Issue

8 At the public hearing both sides agreed that there is only one issue to be decided, namely:

- a. What is the appropriate procedure to be followed to determine whether part of the Tribunal Record may not be disclosed by reasons of national security?

Analysis

9 Applications for leave to commence judicial review proceedings in immigration matters are governed by sections 15, 16 and 17 of the *Federal Courts Immigration and Refugee Protection Rules* ("*Immigration Rules*") which provide as follows:

15. (1) An order granting an application for leave:

(a) shall specify the language and the date and place fixed under paragraphs 74(a) and (b) of the Act for the hearing of the application for judicial review;

(b) shall specify the time limit within which the tribunal is to send copies of its record required under Rule 17;

(c) shall specify the time limits within which further materials, if any, including affidavits, transcripts of cross-examinations, and memoranda of argument are to be served and filed;

(d) shall specify the time limits within which cross-examinations, if any, on affidavits are to be completed; and

(e) may specify any other matter that the judge considers necessary or expedient for the hearing of the application for judicial review.

(2) The Registry shall send to the tribunal a copy of an order granting leave forthwith after it is made.

(3) The tribunal shall be deemed to have received a copy of the order on the tenth day after it was sent by mail by the Registry.

16. Where leave is granted, all documents filed in connection with the application for leave shall be retained by the Registry for consideration by the judge hearing the application for judicial review.

17. Upon receipt of an order under Rule 15, a tribunal shall, without delay, prepare a record containing the following, on consecutively numbered pages and in the following order:

(a) the decision or order in respect of which the application for judicial review is made and the written reasons given therefore,

(b) all papers relevant to the matter that are in the possession or control of the tribunal,

(c) any affidavits, or other documents filed during any such hearing, and

(d) a transcript, if any, of any oral testimony given during the hearing, giving rise to the decision or order or other matter that is the subject of the application for judicial review,

and shall send a copy, duly certified by an appropriate officer to be correct, to each of the parties and two copies to the Registry.

15. (1) L'ordonnance faisant droit à la demande d'autorisation :

(a) spécifie la langue ainsi que la date et le lieu fixés en application des alinéas 74a) et b) de la Loi pour l'audition de la demande de contrôle judiciaire;

(b) spécifie le délai accordé au tribunal administratif pour envoyer des copies de son dossier, prévu à la règle 17;

(c) spécifie le délai de signification et de dépôt d'autres documents, le cas échéant, dont les affidavits, la transcription des contre-interrogatoires et les mémoires;

(d) spécifie le délai dans lequel les contre-interrogatoires sur les affidavits, le cas échéant, doivent être terminés;

(e) peut spécifier toute autre question que le juge estime nécessaire ou pratique pour l'audition de la demande de contrôle judiciaire.

(2) Le greffe envoie immédiatement au tribunal une copie de l'ordonnance faisant droit à la demande d'autorisation.

(3) Le tribunal administratif est réputé avoir reçu une copie de l'ordonnance le dixième jour après sa mise à la poste par le greffe.

16. Lorsque la demande d'autorisation est accueillie, le greffe garde les documents déposés à l'occasion de la demande, pour que le juge puisse en tenir compte à l'audition de la demande de contrôle judiciaire.

17. Dès réception de l'ordonnance visée à la règle 15, le tribunal administratif constitue un dossier composé des pièces suivantes, disposées dans l'ordre suivant sur des pages numérotées consécutivement :

(a) la décision, l'ordonnance ou la mesure visée par la demande de contrôle judiciaire, ainsi que les motifs écrits y afférents;

(b) tous les documents pertinents qui sont en la possession ou sous la garde du tribunal administratif,

(c) les affidavits et autres documents déposés lors de l'audition,

(d) la transcription, s'il y a lieu, de tout témoignage donné de vive voix à l'audition qui a abouti à la décision, à l'ordonnance, à la mesure ou à la question visée par la demande de contrôle judiciaire,

dont il envoie à chacune des parties une copie certifiée conforme par un fonctionnaire compétent et au greffe deux copies de ces documents.

10 It should be noted that there is no reference to withholding portions of the record for any reason including reasons of national security as argued in this case.

11 [Sections 86 and 87 of the IRPA](#) deal with non-disclosure of materials in immigration matters.

86. (1) The Minister may, during an admissibility hearing, a detention review or an appeal before the Immigration Appeal Division, make an application for non-disclosure of information.

(2) Section 78 applies to the determination of the application, with any modifications that the circumstances require, including that a reference to "judge" be read as a reference to the applicable Division of the Board.

87. (1) The Minister may, in the course of a judicial review, make an application to the judge for the non-disclosure of any information with respect to information protected under subsection 86(1) or information considered under section 11, 112 or 115.

(2) Section 78, except for the provisions relating to the obligation to provide a summary and the time limit referred to in paragraph 78(d), applies to the determination of the application, with any modifications that the circumstances require

86. (1) Le ministre peut, dans le cadre de l'appel devant la Section d'appel de l'immigration, du contrôle de la détention ou de l'enquête demander l'interdiction de la divulgation des renseignements.

(2) L'article 78 s'applique à l'examen de la demande, avec les adaptations nécessaires, la mention de juge valant mention de la section compétente de la Commission.

87. (1) Le ministre peut, dans le cadre d'un contrôle judiciaire, demander au juge d'interdire la divulgation de tout renseignement protégé au titre du paragraphe 86(1) ou pris en compte dans le cadre des articles 11, 112 ou 115.

(2) L'article 78 s'applique à l'examen de la demande, avec les adaptations nécessaires, sauf quant à l'obligation de fournir un résumé et au délai.

12 As this case concerns an application for judicial review, [section 87](#) ordinarily would be the applicable section. However, [section 87](#) is limited to information protected under section 86(1), or information arising under sections 11, 112 or 115. In this instance the Applicant was accepted as a Convention refugee and made an inland application for permanent residence. His application in no way involves [sections 86\(1\), 11, 112 or 115 of IRPA](#). Instead, he was considered inadmissible under [section 34\(1\)\(f\) of IRPA](#).

13 The *Immigration Rules* incorporate by reference, parts of the *Federal Courts Rules*. Section 4 of the *Immigration Rules* provide:

4. (1) Subject to subrule (2), except to the extent that they are inconsistent with the Act or these Rules, Parts 1 to 3, 6, 7, 10 and 11 and [rules 383 to 385 of the Federal Courts Rules](#) apply to applications for leave, applications for judicial review and appeals.

(2) [Rule 133 of the Federal Courts Rules](#) does not apply to the service of an application for leave or an application for judicial review.

4.(1) Sous réserve du paragraphe (2), la demande d'autorisation, la demande de contrôle judiciaire et l'appel sont régis par les parties 1, 2, 3, 6, 7, 10 et 11 et les règles 383 à 385 des Règles des Cours fédérales, sauf dans le cas où ces dispositions sont incompatibles avec la Loi ou les présentes règles.

(2) La règle 133 des Règles des Cours fédérales ne s'applique pas à la signification d'une demande d'autorisation ou d'une demande de contrôle judiciaire.

14 [Rules 317 and 318 of the Federal Courts Rules](#) provide for a procedure allowing a tribunal to object to the disclosure of certain materials. They provide as follows:

317. (1) A party may request material relevant to an application that is in the possession of a tribunal whose order is the subject of the application and not in the possession of the party by serving on the tribunal and filing a written request, identifying the material requested.

(2) An applicant may include a request under subsection (1) in its notice of application.

(3) If an applicant does not include a request under subsection (1) in its notice of application, the applicant shall serve the request on the other parties.

318. (1) Within 20 days after service of a request under rule 317, the tribunal shall transmit

(a) a certified copy of the requested material to the Registry and to the party making the request; or

(b) where the material cannot be reproduced, the original material to the Registry.

(2) Where a tribunal or party objects to a request under rule 317, the tribunal or the party shall inform all parties and the Administrator, in writing, of the reasons for the objection.

(3) The Court may give directions to the parties and to a tribunal as to the procedure for making submissions with respect to an objection under subsection (2).

(4) The Court may, after hearing submissions with respect to an objection under subsection (2), order that a certified copy, or the original, of all or part of the material requested be forwarded to the Registry.

317. (1) Une partie peut demander que des documents ou éléments matériels pertinents à la demande qui sont en la possession de l'office fédéral dont l'ordonnance fait l'objet de la demande lui soient transmis en signifiant à l'office fédéral et en déposant une demande

de transmission de documents qui indique de façon précise les documents ou éléments matériels demandés.

(2) Un demandeur peut inclure sa demande de transmission de documents dans son avis de demande.

(3) Si le demandeur n'inclut pas sa demande de transmission de documents dans son avis de demande, il est tenu de signifier cette demande aux autres parties.

318. (1) Dans les 20 jours suivant la signification de la demande de transmission visée à la règle 317, l'office fédéral transmet :

(a) au greffe et à la partie qui en a fait la demande une copie certifiée conforme des documents en cause;

(b) au greffe les documents qui ne se prêtent pas à la reproduction et les éléments matériels en cause.

(2) Si l'office fédéral ou une partie s'opposent à la demande de transmission, ils informent par écrit toutes les parties et l'administrateur des motifs de leur opposition.

(3) La Cour peut donner aux parties et à l'office fédéral des directives sur la façon de procéder pour présenter des observations au sujet d'une opposition à la demande de transmission.

(4) La Cour peut, après avoir entendu les observations sur l'opposition, ordonner qu'une copie certifiée conforme ou l'original des documents ou que les éléments matériels soient transmis, en totalité ou en partie, au greffe.

15 Unfortunately, [Rules 317 and 318](#) are found in [Part 5 of the *Federal Courts Rules*](#). Section 4 of the *Immigration Rules* does not incorporate Part 5 into said Rules.

16 Thus, there seems to be a lacuna in the rules for dealing with sensitive information that a tribunal does not want to disclose in cases concerning judicial review of immigration decisions.

17 To deal with such a lacuna, the [Federal Courts Rules](#) contain a so called 'gap rule' within [Rule 4](#), which provides:

4. On motion, the Court may provide for any procedural matter not provided for in these Rules or in an Act of Parliament by analogy to these Rules or by reference to the practice of the superior court of the province to which the subject-matter of the proceeding most closely relates.

4. En cas de silence des présentes règles ou des lois fédérales, la Cour peut, sur requête, déterminer la procédure applicable par analogie avec les présentes règles ou par renvoi à la pratique de la cour supérieure de la province qui est la plus pertinente en l'espèce.

18 It strikes me that Rule 4 is directly applicable to the situation at hand. Here we are dealing with a situation where the parties have brought a motion asking me to deal with an issue not covered either in the *Immigration Rules* or the *Federal Courts Rules*.

19 Parenthetically, I would like to note that no one appearing before me on this motion advanced the proposition that material injurious to national security or the safety of persons must be disclosed by reason of the lack of procedure for non-disclosure. Both parties before me only stressed that the decision as to whether something can be withheld or not should be made by the court and not by the Respondent alone. I certainly agree with that proposition.

20 The closest analogy can be found in [Rules 317 and 318 of the *Federal Courts Rules*](#). I shall therefore, deal with the subject matter of this motion by invoking [Rule 4](#) so as to allow me to use [Rules 317 and 318](#).

21 Rule 318(3) allows for directions as to the procedure to be followed. The question therefore arises as to what type of procedure should be invoked.

22 The parties are unanimous that three types of analogous procedures exist that could be invoked:

- (a) [s. 38 of the CEA](#); or
- (b) the procedure set out in [s. 86 of IRPA](#); or
- (c) the procedure set out in [s. 87 of IRPA](#).

23 The parties also agree that the procedure in [section 38 of the CEA](#) is unduly complicated, would require a separate application and would involve another party, the Attorney General of Canada. I agree and, in the spirit of dealing with applications for judicial review expeditiously, I discard the [CEA](#) option.

24 As between [section 86](#) and [section 87](#), the difference lies in the Applicant's entitlement to a summary under [section 86](#) as to the suppressed information, while the same is not available under [section 87](#).

25 The Respondent advocates following the procedure set out in [section 87](#), while the Applicant submits that [section 86](#) is more appropriate. The Applicant's rationale being that while the Applicant should not know the material that falls under the national security umbrella, he is entitled to a summary so that he knows at least the ambit of the information that works against him.

26 In this case the Applicant has been advised that he is not being granted permanent residency, as he is considered to be inadmissible by virtue of [section 34\(1\)\(f\) of IRPA](#), i.e. being a member of an organization in which there are reasonable grounds to believe engages or has engaged or will engage in acts of terrorism. The decision of the CIC officer T. Argyrides, dated November 4, 2005, in the underlying application for judicial review states:

I have considered the documentary evidence presented by counsel on record on behalf of Mr. Mohammad (*sic*), his admission of his membership with the MQM (Altaf faction) and his support of the parties' ideology and principals. It is this officer's opinion that there are reasonable grounds to believe that Mr. Mohammad (*sic*) is a member of the MQM Altaf group, an organization that there are reasonable grounds to believe is or was engaged in terrorist activity.

(Application Record at page 9)

27 The Applicant is thus aware that it is his membership in the MQM that caused the immigration officer to consider him inadmissible.

28 [Section 87](#) refers specifically to judicial review proceedings, while [section 86](#) is more geared to non-admissibility hearings based on ministerial certificates. It behoves the court when filling lacuna to stay as close as possible to the original legislative intent. In this case, Parliament evidently had [section 87](#) in mind when considering non-disclosure in the context of judicial reviews. Accordingly, it seems to me that [section 87](#) is the more appropriate procedure to be used under these circumstances.

29 In addition, I would note that summarizing some of the information normally sought to be withheld (i.e. relating to CSIS procedures, file numbers, contacts, working relationships and names of CSIS personnel) is extremely difficult, would be of no help to the Applicant yet imposes a considerable burden on the Respondent. Finally, I see that my colleague, Lemieux J., equally ordered a motion under [section 87](#) in the similar case of *Naeem v. Canada (Minister of Citizenship & Immigration)* (May 29, 2006), Doc. IMM-5395-05 (F.C.).

30 This morning I reviewed in-camera in the absence of Applicant's counsel, the materials the Respondent wishes to withhold. I am satisfied that the release of the information sought to be withheld would be injurious to national security or to the safety of persons. I, therefore, have authorized the release of the information subject to the redactions indicated thereon.

31 This application for judicial review shall now proceed on the basis of the Tribunal Record made of:

(a) the portion already furnished to the Applicant, and

(b) the remainder redacted as per my order of October 27, 2006.

32 Adapting [section 78](#) to the circumstances of an application for judicial review (as mandated by [section 87\(2\)](#)), I am of the view that:

1. the hearing on the merits should be conducted in two parts:

- a public hearing the morning of November 20, 2006, with counsel for both sides being present, and
- an *ex-parte* in-camera hearing to be heard in the afternoon of November 20, 2006, in the absence of counsel for the Applicant.

2. When making its decision on the merits in the judicial review application the court will consider both:

- the publicly available Tribunal Record; and
- the information in the redacted portions of the Tribunal Record, available at the in-camera hearing, to the extent, if any, that pertains to the Applicant.

33 Finally this matter should have come before the court by way of motion of the Respondent urging the court to adopt the procedure spelled out above. It is hoped that this will happen in future cases. Given that the Applicant had to bring this matter to the attention of this court, an order for costs of this motion in favour of the Applicant will issue.

ORDER

THIS COURT ORDERS that:

1. The motion for non-disclosure of part of the Tribunal Record is granted. The Respondent shall file with the court and serve the Applicant with the redacted version of the Tribunal Record as attached to my order of October 27, 2006.

2. The hearing of the application on the merits of this case on November 20, 2006, will take place in two parts:

- a public hearing the morning of November 20, 2006, with counsel for both sides being present, and
- an *ex-parte* in-camera hearing to be heard in the afternoon of November 20, 2006, in the absence of counsel for the Applicant.

3. The Applicant shall have his costs in this motion.

Motion granted.

2020 FC 331, 2020 CF 331
Federal Court

Ngo Sen c. Canada (Citoyenneté et Immigration)

2020 CarswellNat 1748, 2020 CarswellNat 659,
2020 FC 331, 2020 CF 331, 316 A.C.W.S. (3d) 709

**BERTHE GISÈLE NGO SEN (Applicant) and THE MINISTER
OF CITIZENSHIP AND IMMIGRATION (Respondent)**

Nicholas McHaffie J.

Heard: January 28, 2020

Judgment: March 3, 2020

Docket: IMM-2927-19

Counsel: Styliani Markaki, for the Applicant
Jocelyne Murphy, for the Respondent

Nicholas McHaffie J.:

[UNREVISED CERTIFIED ENGLISH TRANSLATION]

I. Overview

1 The applicant for judicial review seeks an extraordinary and discretionary remedy. This remedy will only be granted where the applicant has complied with the rules, processes and orders of the court, and comes forward with "clean hands". In this case, the applicant's conduct demonstrates a disregard of these requirements.

2 Berthe Gisèle Ngo Sen failed to appear for removal following the rejection of her application for protection in Canada. A warrant for her arrest was issued accordingly. While in hiding to avoid this warrant, she submitted a new application on humanitarian and compassionate (H&C) considerations, which was also rejected. She is now applying for judicial review of the rejected H&C application and has filed an affidavit in support of her application. Nevertheless, she refused to appear to allow the Minister to complete the cross-examination on her affidavit, claiming fear of being arrested during the cross-examination.

3 At the Minister's request and under the authority of [rule 97 of the *Federal Courts Rules*, SOR/98-106](#), I strike out Ms. Ngo Sen's affidavit. It is appropriate, under the circumstances, to

exercise this discretion: Ms. Ngo Sen's affidavit contains disputed facts about her allegation of a breach of procedural fairness, and she refused to appear for cross-examination. Ms. Ngo Sen's fear of arrest does not justify her refusal to appear in this circumstances.

4 Since Ms. Ngo Sen's affidavit has been struck out, there is no evidence to support her claim. Despite this fact, I have the discretion to consider the alleged errors that are evident in the record. Ms. Ngo Sen's circumstances do not justify the exercise of that discretion. I find that her conduct — including her refusal to appear for her removal, her decision to remain hidden from the authorities, and her refusal to appear for cross-examination — is such that she comes before this Court without "clean hands". Her misconduct speaks against the exercise of this discretion, and is an independent reason for dismissing the application for judicial review. I am aware that exercising this power could lead to consequences for Ms. Ngo Sen, but this is not sufficient to outweigh the seriousness of her misconduct, the need to deter others from similar conduct and the weakness of her case.

5 The application for judicial review is therefore dismissed.

II. Ms. Ngo Sen's application

6 Ms. Ngo Sen arrived in Canada in June 2015. She made a claim for refugee protection based on her fear of persecution in Cameroon. This claim was rejected by the Refugee Protection Division (RPD) and the Refugee Appeal Division (RAD) on the basis of her credibility, and this Court denied her application for leave to apply for judicial review of the RAD's decision. As a result, she was issued a removal order. However, despite purchasing an airline ticket and undertaking to leave Canada, Ms. Ngo Sen did not appear for her departure from Canada. As a result, the Border Services Agency issued an arrest warrant for Ms. Ngo Sen. She has been in hiding since these events, and her address remains unknown to this day.

7 In July 2017, Ms. Ngo Sen applied for permanent residence on humanitarian and compassionate considerations. Many of the documents filed with this application, which are found in the certified tribunal record, were redacted to hide the addresses and even the names of the witnesses who could lead to Ms. Ngo Sen's contact information.

8 After she filed her application, Ms. Ngo Sen's counsel closed his practice. She found a new representative in March 2019, who sent an email to Immigration, Refugees and Citizenship Canada (IRCC) explaining that Ms. Ngo Sen planned to send an addition to her record by May 1, 2019, and requesting that a decision not be made before that date. In April 2019, Ms. Ngo Sen changed representatives again, this time claiming the services of Annick Legault. Annick Legault contacted the IRCC again, stating that [TRANSLATION] "it will not be possible" to file the new evidence before May 1, and [TRANSLATION] "notifying" the IRCC that [TRANSLATION] "we will file an addition to the H&C application no later than June 1, 2019". On April 30, 2019, an immigration officer refused Ms. Ngo Sen's application.

9 Still in hiding, Ms. Ngo Sen filed an application for leave and for judicial review of the immigration officer's decision. The application was accompanied by an affidavit from Ms. Ngo Sen, stating that there was a breach of procedural fairness since the officer did not allow her to submit her addition before rendering a decision. Ms. Ngo Sen stated, among other things, that Ms. Legault said that she had never been denied a request for a delay, even though the time offered was sometimes shorter than that requested. The application for leave and for judicial review also alleged that the officer erred in the burden of proof imposed in the context of the H&C application.

10 Justice Roussel granted Ms. Ngo Sen's application for leave. Justice Roussel's order is typical of this type of order pursuant to [rule 15\(1\) of the *Federal Courts Citizenship, Immigration and Refugee Protection Rules*, SOR/93-22 \[Immigration Rules\]](#). This order provides for cross-examinations on affidavits, indicating that any affidavits must be completed on or before December 20, 2019.

11 Following Justice Roussel's order, the Minister asked Ms. Ngo Sen to appear for cross-examination on her affidavit. On December 6, 2019, Ms. Ngo Sen's counsel, who replaced Ms. Legault, sent a letter informing the Minister that Ms. Ngo Sen would not appear for cross-examination. The reasons for her refusal were as follows:

[TRANSLATION]

We have discussed this case with our client. Since she has no status in Canada, she is afraid that she will be arrested by Canadian authorities if she appears for examination on her affidavit. Therefore, she has decided not to comply with your request.

III. The applicable rules

12 Applications for judicial review are governed by the Immigration Rules, which incorporate some of the *Federal Courts Rules*. Rule 3 of the *Federal Courts Rules* states that the rules are intended to provide a solution to the dispute so as to secure the just, most expeditious and least expensive determination. Failure to comply with the rules may jeopardize the fairness and timeliness of the proceedings for the parties involved.

13 In particular, [rule 83 of the *Federal Courts Rules*](#) provides that a party "may cross-examine the deponent of an affidavit served by an adverse party to the motion or application". [Rule 97](#) sets out the order that the Court may make when a party to the dispute fails to appear for examination:

Failure to attend or misconduct

97 Where a person fails to attend an oral examination or refuses to take an oath, answer a proper question, produce a document or other material required to be produced or comply with an order made under [rule 96](#), the Court may

...

(c) strike all or part of the person's evidence, including an affidavit made by the person;

(d) dismiss the proceeding or give judgment by default, as the case may be;

...

Défaut de comparaître ou inconduite

97 Si une personne ne se présente pas à un interrogatoire oral ou si elle refuse de prêter serment, de répondre à une question légitime, de produire un document ou un élément matériel demandé ou de se conformer à une ordonnance rendue en application de la règle 96, la Cour peut:

[...]

c) ordonner la radiation de tout ou partie de la preuve de cette personne, y compris ses affidavits;

d) ordonner que l'instance soit rejetée ou rendre jugement par défaut, selon le cas;

[...]

14 The Minister relies on this rule to ask that the entire contents of Ms. Ngo Sen's affidavit be struck out and that the judicial review be dismissed.

15 Justice Rothstein, while a member of this Court, noted that "as a general rule, affidavits will be struck if the deponent does not appear for cross-examination": *Bayer Ag v Apotex Inc*, 1998 CanLII 8327 (FC) at para 11. I note that this Court's certified French translation of this passage does not provide the same exact meaning and reads "*en règle générale les affidavits ne sont radiés que si leur auteur omet de se présenter pour le contre-interrogatoire*". I would present Justice Rothstein's proposition as reading "*en règle générale les affidavits seront radiés si leur auteur omet de se présenter pour le contre-interrogatoire*" [emphasis added].

16 This general rule also applies in the context of immigration law. In *Kuzmich v Canada (Minister of Citizenship and Immigration)*, 1998 CanLII 8857 (FC), the applicant took the position that he would only appear for cross-examination if "the Minister and the Consulate undertake not to disclose the applicant's illegal presence in the United States": *Kuzmich* at paras 11, 12. According to Justice McGillis, the imposition of such a condition was "outrageous" and constituted a refusal to appear for cross-examination on his affidavit: *Kuzmich* at para 12. Consequently, she exercised her discretion under rule 97(c) and (d) to strike out the applicant's affidavit and dismiss the Notice of Motion.

17 Ms. Ngo Sen does not seek to impose conditions in order to participate in her cross-examination. Rather, she explicitly refused to appear for her cross-examination in order to avoid the authorities. I am of the view that the conclusion in *Kuzmich* applies equally, if not more, to this case.

18 As conceded by the Minister's representative at the hearing, the examination of affidavits is rarely claimed in applications for judicial review in immigration law. This is no doubt related to the principle that new evidence is generally inadmissible in judicial review proceedings: *Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22 at paras 19, 20; *Kabran v Canada (Immigration, Refugees and Citizenship)*, 2018 FC 115 at para 19. However, one of the exceptions to this rule is that the Court may admit evidence that addresses procedural fairness arguments: *Access Copyright*, at para 20(b). When facts of this nature are in dispute, as is apparently the case here, [rule 83](#) states that the opposing party may cross-examine the affiant to examine the value of the evidence presented.

19 Ms. Ngo Sen refused to appear despite a legitimate request by the Minister to appear for cross-examination. While the fear of arrest and the desire to avoid removal may seem [TRANSLATION] "reasonable" from Ms. Ngo Sen's perspective, this can in no way justify a refusal to appear in response to a valid request to cross-examine. For these reasons, I exercise my discretion under [rule 97\(c\)](#). Ms. Ngo Sen's affidavit is therefore struck out.

20 I note that a situation where a request for cross-examination has the sole underlying purpose of trapping a claimant who is in hiding to avoid removal may raise different considerations in the exercise of discretion under [rule 97](#). In this regard, I would like to recall that the *Federal Courts Rules* are put in place to govern, facilitate and resolve disputes before the Courts. They are not in themselves a tool for the authorities to use in their quest to deport foreigners in hiding. Seeking an order from this Court is one thing; attempting to use the rules for the sole and undisclosed purpose of forcing an applicant to appear in order to arrest him or her is another. This is not the case here, so the question remains open as to whether the Court could decline to exercise its discretion under [rule 97](#) where an examination is claimed in bad faith or where the facts suggest that the examination is clearly unnecessary.

21 Ms. Ngo Sen's affidavit was the only evidence filed in support of her application for judicial review. The Minister therefore asks that the judicial review be dismissed under [rule 97\(d\)](#).

22 Despite the absence of evidence, this Court may still consider an application for judicial review if the alleged errors "appear on the face of the record": *Turcinovica v Canada (Minister of Citizenship and Immigration)*, 2002 FCT 164 at paras 12-14. This principle does not apply to Ms. Ngo Sen's allegations of breach of procedural fairness, which depend on her affidavit, but could apply to her allegations that the officer did not apply the correct burden of proof.

23 In the circumstances, I am not prepared to exercise my discretion to consider the application in the absence of evidence and, at the same time, I am exercising my discretion to dismiss the application under [rule 97\(d\)](#). I do so because of Ms. Ngo Sen's misconduct, which influences the exercise of my discretion, and which in my view provides an independent basis for dismissing the application.

IV. Ms. Ngo Sen's misconduct

24 The doctrine of "clean hands" applies to all applications for judicial review, including those in immigration matters. That is, the applicant on judicial review is seeking a discretionary and extraordinary remedy from the Court, and must therefore have clean hands.

25 Failing to appear for removal and going into hiding to avoid removal after a claim for refugee protection and an application for judicial review have been rejected is not conduct beyond reproach. In fact, it is conduct that is "very serious and [that] undermined the valid removal process and shows disregard for a decision of this Court": *Debnath v Canada (Citizenship and Immigration)*, 2018 FC 332 at para 25. Subsection 48(2) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA] requires that a foreign national who is the subject of an enforceable removal order leave the territory of Canada immediately. If this would cause irreparable harm, an applicant may apply for a stay of removal in appropriate circumstances, which Ms. Ngo Sen did not do in this case. An applicant who does not meet the requirements of the legislation on which he or she is basing their H&C application and judicial review application does not have clean hands.

26 However, the absence of clean hands does not mean that an application for judicial review should be automatically dismissed. The Federal Court of Appeal confirmed in *Thanabalasingham* that the power to dismiss an application or refuse to grant a remedy is a discretionary power. In exercising this discretion, the balance between the integrity of the judicial process and the public interest in the legality of the administration's actions and the protection of fundamental human rights must be considered: *Canada (Minister of Citizenship and Immigration) v Thanabalasingham*, 2006 FCA 14 at paras 9, 10; see also *Gazlat v Canada (Citizenship and Immigration)*, 2008 FC 532 at paras 13-18; *Debnath* at paras 20-22. To this end, the Court of Appeal identified certain non-exhaustive factors relevant to the exercise of discretion, as follows:

- the seriousness of the applicants' misconduct and the extent to which it undermines the proceeding in question;
 - the need to deter others from similar conduct;
 - the nature of the alleged administrative unlawfulness and the apparent strength of the case;
- and

- the importance of the individual rights affected, and the likely impact upon the applicants if the administrative action impugned is allowed to stand.

27 The weighing of these factors supports the exercise of discretion to deny the application on the basis of Ms. Ngo Sen's misconduct. First, as noted, failure to report for removal despite a valid deportation order and hiding to avoid removal is serious misconduct with significant consequences for the removal process and the integrity of the immigration system: *Debnath* at paras 23-25; see also *Wu v Canada (Citizenship and Immigration)*, 2018 FC 779 at paras 13, 14.

28 Second, no one can dispute that there is an interest in deterring this type of conduct in order to ensure the proper functioning of the Canadian immigration system: *Wu* at para 15.

29 The strength of the case also works against Ms. Ngo Sen. Other than the potential breach of procedural fairness, which depends on her struck affidavit, Ms. Ngo Sen's only argument was that the officer applied the wrong burden of proof by using the phrase [TRANSLATION] "the applicant has the burden of proof to show that the hardship alleged in support of her application is such as to justify an exemption". She argues that the officer should not have limited his consideration to issues of "hardship", following the approach of the Supreme Court of Canada in *Kanthisamy v Canada (Citizenship and Immigration)*, 2015 SCC 61.

30 The phrase used by the officer can be found at the beginning of the decision under the heading [TRANSLATION] "Application Summary: Briefly describe the factors stated by the applicant". In this context, the reference to "hardship" should be considered in light of the submissions filed on behalf of Ms. Ngo Sen. Her submissions described the factors relevant to the H&C application as being only the hardship that would be caused by her return to Cameroon. It is clear from reading the decision as a whole that the officer followed the instructions of the Supreme Court of Canada in *Kanthisamy* and considered all of the factors presented by Ms. Ngo Sen. In this context, the mere reference to "hardship" is not an error that could overturn the reasonableness of the officer's decision.

31 Finally, I note that the return to Cameroon is an important consequence for Ms. Ngo Sen. However, taking into account the fact that the RPD and the RAD have already rejected her claim for refugee protection, this factor alone is not sufficient in this case to outweigh the other factors, including Ms. Ngo Sen's conduct and the lack of strength of her case, see *Debnath* at paras 27, 28; *Wu* at paras 14, 16-18.

V. Conclusion

32 In light of Ms. Ngo Sen's refusal to appear for cross-examination on her affidavit without satisfactory justification, I strike her affidavit under [rule 97\(c\)](#). Furthermore, I exercise my discretion to dismiss this application for judicial review without deciding it on its merits, on

the grounds of Ms. Ngo Sen's misconduct as a result of her failure to appear under [rule 97\(d\)](#) and independently by applying the clean hands doctrine.

33 No party has proposed or is proposing any issue for certification. Finally, for consistency and in accordance with [subsection 4\(1\) of the IRPA](#) and rule 5(2) of the Immigration Rules, the style of cause is amended to name the Minister of Citizenship and Immigration as the respondent.

JUDGMENT in IMM-2927-19

THIS COURT'S JUDGMENT is as follows:

1. The application for judicial review is dismissed.
2. The style of cause is amended to name the Minister of Citizenship and Immigration as the respondent.

2021 FC 289, 2021 CF 289
Federal Court

Northcott v. Canada (Attorney General)

2021 CarswellNat 1050, 2021 CarswellNat 1780,
2021 FC 289, 2021 CF 289, 332 A.C.W.S. (3d) 746

**TANYA NORTHCOTT (Applicant) and ATTORNEY
GENERAL OF CANADA (Respondent)**

Patrick Gleeson J.

Heard: February 1, 2021

Judgment: April 1, 2021

Docket: T-681-20

Counsel: Christopher Rootham, for Applicant
Helene Robertson, Elsa Michel, for Respondent

Patrick Gleeson J.:

I. Overview

1 In 2004, the Applicant, Ms. Tanya Northcott, sought recognition of her status under the [Indian Act, RSC 1985, c I-5 \[Indian Act\]](#) through Indigenous and Northern Affairs Canada [INAC].

2 INAC determined that Ms. Northcott was ineligible for Indian status based on the then applicable registration provisions under the [Indian Act](#), a decision that INAC maintained over a period of 15 years. In 2019, following the coming into force of certain amendments to the [Indian Act](#), INAC recognized Ms. Northcott's Indian status (*An Act to amend the Indian Act in response to the Superior Court of Québec decision in Descheneaux c Canada (Procureur général)*, [SC 2017, c 25, s 10.1 \[Bill S-3\]](#)).

3 In 2015, prior to her status being recognized, Ms. Northcott filed a complaint with the Canadian Human Rights Commission [CHRC or Commission] in which she alleged (1) discrimination arising out of the refusal to recognize her status and (2) that the manner in which she was treated by INAC in the processing of her request was discriminatory.

4 In a decision dated April 22, 2020, the CHRC advised Ms. Northcott that it had decided not to deal with her complaint. The CHRC determined the complaint was trivial, a decision it reached

on the basis that section 10.1 of Bill S-3 prevents individuals from seeking compensation from the Crown for a past denial of status. Ms. Northcott now seeks judicial review of the CHRC decision pursuant to [section 18 of the Federal Courts Act, RSC, 1985, c F-7](#).

5 INAC, the responsible department has used various names during the period relevant to this Application. I will refer to the department as INAC throughout these reasons.

6 After careful consideration of the written and oral submissions of the parties, I conclude that the Court's intervention is warranted. The CHRC's decision as it relates to the alleged discriminatory treatment of Ms. Northcott in the processing of her request for status is not reasonable. My reasons follow.

II. Background

A. *The Indian Act and Bill S-3*

7 Individuals are entitled to registration under the *Indian Act* based on their ancestry and the status, or entitlement to status, of their ancestors ([Indian Act, s 6](#)). Historically, status determinations for women who married a non-status man have disadvantageously differed from those applicable where a man married a non-status woman. Many of these provisions in the *Indian Act* have been removed or amended over the years.

8 In this regard, Bill S-3 addresses, in part, circumstances where women and their descendants have lost status due to marriage. The Bill also includes [section 10.1](#), which provides that a right to claim compensation, damages or indemnity does not arise where a person newly entitled to registration as a result of the Bill S-3 amendments had previously not been registered:

No liability

10.1 For greater certainty, no person or body has a right to claim or receive any compensation, damages or indemnity from Her Majesty in right of Canada, any employee or agent of Her Majesty in right of Canada, or a council of a band, for anything done or omitted to be done in good faith in the exercise of their powers or the performance of their duties, only because

- (a) a person was not registered, or did not have their name entered in a Band List, immediately before the day on which this section comes into force; and
- (b) that person or one of the person's parents, grandparents or other ancestors is entitled to be registered under [paragraph 6\(1\)\(a.1\), \(a.2\) or \(a.3\) of the *Indian Act*](#).

Absence de responsabilité

10.1 Il est entendu qu'aucune personne ni aucun organisme ne peut réclamer ou recevoir une compensation, des dommages-intérêts ou une indemnité de l'État, de ses préposés ou

mandataires ou d'un conseil de bande en ce qui concerne les faits — actes ou omissions — accomplis de bonne foi dans l'exercice de leurs attributions, du seul fait qu'une personne n'était pas inscrite — ou que le nom d'une personne n'était pas consigné dans une liste de bande — à la date d'entrée en vigueur du présent article et que la personne ou l'un de ses parents ou un autre de ses ascendants a le droit d'être inscrit en vertu de l'un des alinéas 6(1)a.1), a.2) ou a.3) de la *Loi sur les Indiens*.

9 It was the Bill S-3 amendments that addressed Ms. Northcott's ineligibility allowing her to become eligible for status upon their coming into force in 2019.

B. The CHRA Complaint Process

10 The CHRC administers the complaint process established in the [Canadian Human Rights Act, RSC 1985, c H-6 \[CHRA\]](#). Section 40 of the [CHRA](#) provides that any person who believes another party has engaged in a discriminatory practice may file a complaint with the CHRC. In administering the process, the CHRC acts as a screening body in relation to complaints based on the enumerated grounds of discrimination identified in the [CHRA \(s 3\)](#).

11 The [CHRA](#) defines discriminatory practices in [sections 5 to 14.1](#). In providing services customarily available to the public, the [CHRA](#) provides that it is a discriminatory practice to "differentiate adversely in relation to any individual" on a prohibited ground of discrimination ([s 5\(b\)](#)).

12 The CHRC may designate an investigator to investigate the complaint ([CHRA, s 43\(1\)](#)). Upon the conclusion of the investigation, the investigator must submit a report of the findings of the investigation to the CHRC ([CHRA, s 44\(1\)](#)). This investigation report is referred to as the section 40/41 report.

13 The CHRC may dismiss a complaint if it is satisfied that an inquiry into the complaint is not warranted, ([CHRA, s 44](#)). The grounds for dismissal include those circumstances where the Commission finds a complaint to be trivial, frivolous, vexatious or made in bad faith ([CHRA, s 41\(1\)\(d\)](#)).

14 In performing its screening function and determining whether in response to a complaint an inquiry is warranted, the Commission may rely on the section 40/41 report. Where the Commission follows an investigator's recommendations without providing its own supplementary reasons, the CHRC decision's reasonableness depends mainly upon the rationality of the report's reasoning and the conclusions ([Dupuis v Canada \(Attorney General\), 2010 FC 511 at para 15](#)).

C. Ms. Northcott's Request for Status

15 In April 2004, Ms. Northcott requested that INAC recognize her status under the *Indian Act*. In May 2007 the request was denied — INAC was unable to establish whether either of Ms. Northcott's birth parents were themselves entitled to status and registration under the *Indian Act*.

16 In October 2010, Ms. Northcott protested the initial denial. In September 2011, the protest was refused on two grounds. First, the protest was initiated after the expiry of the three-year protest period identified in the original decision letter and therefore could not be accepted as a valid protest. Second, although changes to the *Indian Act* that came into force in January 2011 might have made her birth mother eligible for registration (*Gender Equity in Indian Registration Act, SC 2010, c 18*) it was not established that her birth father was eligible. As only one birth parent was entitled to registration under the *Indian Act*, INAC was unable to establish that Ms. Northcott was entitled to registration.

17 In June 2014, Ms. Northcott asked that her file be reopened and INAC agreed to do so. In April 2015, she filed the human rights complaint that is the subject of this Application.

18 In June 2017, INAC informed Ms. Northcott that she remained ineligible for registration. Following the Bill S-3 amendments to the *Indian Act*, INAC advised Ms. Northcott to reapply for status. On September 20, 2019, INAC confirmed that Ms. Northcott had become registered under the *Indian Act*.

D. The CHRC Complaint

19 Ms. Northcott's complaint alleges discrimination based on race, sex, and family status. First, she alleges that denial of status under the *Indian Act* based on her parentage is discriminatory. Second, she alleges that the long wait times she experienced in the processing of her request are attributable to inadequate staffing which reflected INAC's view that these were not important services for Indigenous persons, and that this too amounted to discrimination under the CHRA:

...I feel that if this was a segment of the Government that catered to the general public that it would not take such an unacceptable extraordinary long time for responding to queries; because it's an Aboriginal issue the Aboriginal Affairs and Northern Development Canada do not hire enough people to handle the case load because it's not considered an important service for Aboriginal people which is discrimination upon a person's Race.

20 The CHRC initially advised Ms. Northcott that the complaint would be held in abeyance as it challenged discriminatory impacts flowing from the wording of federal legislation, an issue that was before the Supreme Court of Canada for final determination. The Supreme Court issued its decision in *Canada (Canadian Human Rights Commission) v Canada (Attorney General)*, 2018 SCC 31 in June 2018. Subsequently, an investigator was appointed and a section 40/41 report was completed.

21 Ms. Northcott suffers from Fetal Alcohol Spectrum Disorder. As a result, it often takes longer for her to comprehend what is being relayed to her, and she does not always understand information properly. Ms. Northcott did not identify this medical condition in her initial complaint, a matter that I address later in these reasons (see paragraph 36).

III. The CHRC Investigation

A. The Section 40/41 Report

22 The investigator found that the complaint raised an issue of whether, if the complaint was successful, a practical remedy was available. The investigator noted that allegations without a practical remedy may be "trivial" within the meaning of the [CHRA](#).

23 The investigator recognized that prior to Bill S-3, the *Indian Act* contained provisions that discriminated against and negatively affected Ms. Northcott. However, the investigator found section 10.1 of Bill S-3 applied to Ms. Northcott's complaint. The investigator also noted that although the complaint alleged undue hardship in the registration process, the underlying issue was INAC's determination that Ms. Northcott was ineligible for status under the *Indian Act*. As such, the investigator found section 10.1 also prevented the Tribunal from ordering any useful remedy in respect of this part of the complaint. Having concluded damages could not be awarded for either claim, the investigator found that "there does not appear to be any practical remedy that the Tribunal could order with respect to the issue of obtaining Indian Status." Without a practical remedy, the investigator concluded all the allegations were trivial as provided for at [paragraph 41\(1\)\(d\) of the CHRA](#) and recommended that the CHRC not deal with the complaint.

24 The section 40/41 report was provided to the parties for comment. Ms. Northcott provided submissions on the report and counsel for the Respondent provided a response to Ms. Northcott's submissions.

B. Ms. Northcott's Response to the 40/41/Report

25 In responding to the section 40/41 report, Ms. Northcott took the position that section 10.1 of Bill S-3 did not apply to her. She maintained her claim that her Indian Status was denied prior to Bill S-3 because of a discriminatory policy, not because of requirements under the *Indian Act*. She further submitted that Section 10.1 blocks claims for damages against the government related to past denials of Indian Status "for anything done or omitted to be done in good faith." and that the INAC policy requiring that she prove the identity of her birth father coupled with the lengthy processing delays amounted to bad faith conduct.

26 She further alleged that INAC's bad faith conduct continued after the submission of her complaint after her status was recognized in 2019, in the context of her attempts to obtain a Secure

Certificate of Indian Status [Status Card]. She alleged that INAC: (1) was not sensitive to her Fetal Alcohol Spectrum Disorder; (2) she again experienced lengthy process delays; (3) call back practices were unreasonable; and (4) an INAC employee hung up on her and she was left believing that her file would be closed if documents were not submitted by defined dates. She reports this caused her distress because she thought closing her file meant she would lose her status under the *Indian Act*.

C. The Respondent's Response to the 40/41 Report

27 The Respondent submitted the complaint was moot because Ms. Northcott's status had been recognized. The Respondent noted that Ms. Northcott's request for Indian Status was not denied because she could not prove her birth father; this information was known to the Respondent at the time. Instead, the issue was that her birth father was not entitled to registration. The Respondent notes that Ms. Northcott's status request was denied because she did not meet the requirements of [section 6 of the Indian Act](#) at the time.

28 In addressing the alleged bad faith, the Respondent submitted there was no evidence that Ms. Northcott's Indian Status registration was deliberately denied or delayed with the intent to harm her. The Respondent also argued that Ms. Northcott's treatment when obtaining a status card and any alleged failure to account for her Fetal Alcohol Spectrum Disorder were new issues not raised in her original complaint.

IV. Decision under Review

29 In dismissing Ms. Northcott's complaint the Commission issued no supplementary reasons, relying on the recommendation of the investigator and the section 40/41 report.

V. Issues and Standard of Review

30 Ms. Northcott argues that the CHRC erred in dismissing the whole of her complaint on the basis that section 10.1 of Bill S-3 prevented the tribunal from ordering any practical remedy because the decision unreasonably:

A. focuses exclusively on the first part of the complaint and thereby fails to address whether the second part the complaint was barred by section 10.1; and

B. interprets section 10.1 to be a bar to the second part of the complaint.

31 Decisions by the CHRC to dismiss complaints under [CHRA section 41\(1\)\(d\)](#) are reviewed on a reasonableness standard ([Stukanov v Canada \(Attorney General\), 2021 FC 49 at para 28](#)). A decision maker's interpretation of statute is also to be reviewed against a standard of reasonableness ([Canada \(Minister of Citizenship and Immigration\) v Vavilov, 2019 SCC 65 at para 115](#) []). In interpreting legislation "[a]dministrative decision makers are not required to

engage in a formalistic statutory interpretation exercise in every case," although the merits of their interpretation must still accord with the provision's text, context, and purpose (*Vavilov* at para 119-120). "Where the meaning of a statutory provision is disputed in administrative proceedings, the decision maker must demonstrate in its reasons that it was alive to these essential elements" (*Vavilov* at para 120).

32 A decision will be reasonable if it "is one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law" (*Vavilov* at paras 85).

VI. Analysis

33 In this Application, Ms. Northcott does not take issue with the conclusion that section 10.1 of Bill S-3 prevents her from claiming any compensation regarding the past denial of her status, the first part of her complaint. This aspect of the decision is reasonable

34 However, the CHRC's decision to dismiss the second part of Ms. Northcott's complaint is unreasonable. The decision, when read as a whole, does not disclose a chain of analysis supporting the conclusion that s 10.1 prevents the ordering of a practical remedy in respect of the second part of the complaint.

A. Failure to Address the Whole of the Complaint Renders the Decision Unreasonable

35 In responding to the section 40/41 report Ms. Northcott notes that section 10.1 of Bill S-3 is of application only if the government has acted in good faith. She takes issue with the conclusion that section 10.1 is of application because she alleges INAC had acted in bad faith in the processing of her request. She points to the lengthy delays, the lack of clear reasons for the refusals, the repeated requests that she supply documents, the difficulties in getting a response to her inquiries, the INAC call back process, and the failure to consider and accommodate her Fetal Alcohol Spectrum Disorder. She further highlights that the process issues were ongoing; she continued to experience them in the processing of her request for a status certificate.

36 The section 40/41 report details both aspects of the complaint. In summarizing the second part of the complaint, it is acknowledged that Ms. Northcott's allegations relating to process were ongoing in that she had experienced similar issues while seeking to obtain a status certificate. In this regard, I note that Ms. Northcott wrote to the Commission in December 2019 (Application Record at page 27) detailing her experience in obtaining a status certificate. She reported a conversation she had with an INAC official where she notified the official that she suffered from a brain injury and described its impact on her. She reported that the INAC official hung up on her and again complains of the INAC call back system. She specifically requests that the investigator include this letter as part of her complaint.

37 Despite Ms. Northcott's bad faith allegations, the section 40/41 report and the Commission's decision are silent on the issue. The report limits its consideration of the process complaint to a single paragraph finding that the underlying issue for this complaint was the ineligibility decision. It appears that the report takes the position that because the first complaint underlies the second, the second complaint should be addressed in the same manner as the first. Why this is so is not readily evident. There is no doubt that had the initial status decision been different Ms. Northcott would not have been exposed to the process issues she now alleges are discriminatory. However, this does not reasonably lead to the conclusion that the second aspect of the complaint cannot stand independently of the first.

38 Ms. Northcott's submissions in response to the section 40/41 report argue that section 10.1 could not apply to the second part of the complaint because INAC had not acted in good faith. The Respondent briefly addresses this submission in its reply to the section 40/41 report. However, neither the section 40/41 report nor the Commission's decision attempts to address or grapple with this issue. The failure to address a fundamental issue or argument may well render an administrative decision unreasonable ([Walker v Canada \(Attorney General\)](#), 2020 FCA 44 at para 9 citing [Vavilov](#) at paras 96-98, 127-128).

39 Ms. Northcott's bad faith submissions were central and fundamental to her reply to the section 40/41 report. They directly address the applicability of section 10.1 to the process aspect of her complaint.

40 The reasons contained in the section 40/41 report and Commission's decision itself must be considered and read "in light of the history and context of the proceedings" ([Vavilov](#) at para 94). In the context of the [CHRA](#) complaint process, it may be possible to view the submissions of a complainant and respondent in response to a section 40/41 report as informing the Commission's decision and adoption of the section 40/41 report as it reasons. Presuming, without deciding this could be so, I would decline to adopt such an approach in this circumstance. The issue not addressed is central or fundamental to the position advanced by the complaint.

41 The Respondent also takes the position that many of the facts Ms. Northcott cites in support of her bad faith submissions were not included in her original complaint and are not relevant to the issues raised in her complaint. While these issues, including Ms. Northcott's medical conditions, might well have been new to the Respondent, they were placed before the Commission in advance of the completion of the section 40/41 report. They were not new to the Commission and Ms. Northcott had expressly requested they form part of her complaint.

42 Administrative decision makers must grapple with the key issues or central arguments raised ([Vavilov](#) at para 128). Bad faith was Ms. Northcott's central submission in her reply to the section 40/41 report and it impacted directly upon the application of section 10.1 to her claim. The Commission's failure to address this issue renders the decision unreasonable.

B. The Interpretation of Section 10.1 of Bill S-3 was also unreasonable

43 My conclusion above is determinative of the Application so I will only briefly comment on the issue of the reasonableness of the Commission's interpretation of section 10.1.

44 As I have previously noted, administrative decision makers need not engage in a formal statutory interpretation analysis when considering the meaning of legislation. However, where an issue of interpretation arises the decision maker must demonstrate in its reasons that it was alive to the provision's text, context, and purpose (*Vavilov* at para 119-120). In this instance, an issue of interpretation unquestionably arises.

45 The purpose of section 10.1 of Bill S-3, which at the time was clause 8, was described as follows by the Minister's delegate before the Senate Standing Committee on Aboriginal Peoples:

...clause 8 of the bill has the effect of preventing claims by individuals newly entitled to registration under Bills-3 for compensation for benefits that they were not entitled to in the past. That is the policy behind clause 8...That kind or provision actually reflects a common law rule, and it was put in the bill for clarity (Senate, Standing Committee on Aboriginal Peoples, *Evidence*, 41-2, No 14 (30 November 2016)).

46 The Respondent, in its reply to the section 40/41 report, described the purpose of section 10.1 in similar terms:

This provision merely codifies the general public law that damages will not be awarded for harm suffered as a result of the application of a law subsequently declared invalid, absent bad faith (Certified Tribunal Record at page 26, also see *Mackin v New Brunswick (Minister of Justice)*, 2002 SCC 13 at para 78).

47 The section 40/41 report, adopted by the CHRC, found that section 10.1 applied to the second part of Ms. Northcott's complaint. This conclusion is, on its face, at odds with the text and purpose of the section. The section 40/41 report does not detail any analysis in support of the conclusion that section 10.1 applies to the second part of the complaint. Instead, the conclusion is explained on the basis that the second part of the complaint is subsumed in the first part of the complaint. I have already found that this determination was unreasonable.

48 I am not satisfied that in concluding section 10.1 was determinative of the second part of Ms. Northcott's complaint, that the investigator considered the meaning of the section in a manner reflective of the text, context, and purpose of section 10.1.

VII. Costs

49 The parties have agreed on costs, proposing the amount of \$2750 be ordered payable to the successful party. I am satisfied that the quantum proposed is appropriate.

50 The parties further advised the Court that in the event costs are payable to Ms. Northcott, the Order should provide costs be payable to Ms. Northcott's counsel in trust subject to the following directions:

A. the Applicant is to be reimbursed for all disbursements reasonably and necessarily incurred by her;

B. any amount that remains may be retained by her counsel; and

C. if any dispute arises as to the amount to which the Applicant is entitled a motion may be made to this Court for a resolution.

51 The parties note that where *pro bono* counsel is involved in a matter, the payment of costs to counsel, in trust, is consistent with the decision of the Federal Court of Appeal in [Roby v Canada \(Attorney General\)](#), 2013 FCA 251 [

52 In *Roby*, the Court of Appeal noted that *pro bono* representation is not a bar to a costs award (para 24). The Court further noted that although costs are normally payable to and by the parties in accordance with Rule 400(7) of the Federal Courts Rules, SOR/98-106, Rule 400(7) also provides that costs may be paid to a party's solicitor in trust (para 26). In turn the jurisprudence has recognized that *pro bono* counsel may enter into fee arrangements with their client allowing a costs award to be payable to counsel and assuring no windfall to a client benefitting from *pro bono* representation (para 25 citing *1465778 Ontario Inc v 1122077 Ontario Ltd*, 2006 CanLII 35819, 82 OR (3d) 757 (Ont CA)).

53 I am satisfied that the quantum of costs proposed, in addition to making costs payable to Applicant's counsel in trust subject to the directions set out above, is appropriate in the circumstances. Absent counsel's *pro bono* involvement, the matter may not have been pursued and the issues raised may have been less effectively defined.

VIII. Conclusion

54 The Application is granted and the CHRC's decision as it relates to Ms. Northcott's treatment is set aside and remitted to the Commission for redetermination in accordance with these Reasons.

JUDGMENT IN T-681-20

THIS COURT'S JUDGMENT is that:

1. The Application is granted.

2. The April 22, 2020 decision of the Canadian Human Rights Commission, is set aside in part and the matter is returned for reconsideration in accordance with these reasons
3. Costs to the Applicant in the amount of \$2750 inclusive of all disbursements and taxes payable to Nelligan O'Brien Payne LLP, subject to the following:
 - a) the Applicant is to be reimbursed for all disbursements reasonably and necessarily incurred by her;
 - b) any amount that remains may be retained by her counsel; and
 - c) if any dispute arises as to the amount to which the Applicant is entitled, a motion may be made to this Court for a resolution.

Application granted.

2013 CAF 251, 2013 FCA 251
Federal Court of Appeal

Roby v. Canada (Attorney General)

2013 CarswellNat 3835, 2013 CarswellNat 6982, 2013 CAF
251, 2013 FCA 251, 235 A.C.W.S. (3d) 568, 450 N.R. 159

**Jeffery Roby, Applicant and Attorney
General of Canada, Respondent**

K. Sharlow J.A., Robert M. Mainville J.A., D.G. Near J.A.

Heard: October 3, 2013
Judgment: October 24, 2013
Docket: A-8-13

Counsel: Mark Tonkovich, for Applicant
Jacqueline Wilson, for Respondent

K. Sharlow J.A.:

1 The Employment Insurance Commission concluded that the applicant Jeffery Roby received benefits under the *Employment Insurance Act, S.C. 1996, c. 23*, that exceeded his statutory entitlement by \$5,426, and that he must reimburse the Crown for the overpayment. Mr. Roby has consistently taken the opposite position, but he has been unable to persuade the Commission, a Board of Referees and an Umpire that he is correct. He now seeks relief from this Court by way of an application for judicial review of the Umpire's decision. For the reasons that follow, I have concluded that Mr. Roby's application should succeed.

2 In this Court, the Crown conceded that Mr. Roby is entitled to succeed with respect to \$701 of the claimed overpayment because the Commission failed to respect a statutory deadline. Therefore, Mr. Roby's application must succeed at least with respect to that \$701. The amount now in issue is \$4,725.

Statutory framework

3 The following provisions of the *Employment Insurance Act* are the foundation of the Crown's right to require a return or repayment of an amount paid to a claimant in excess of the claimant's entitlement:

43. A claimant is liable to repay an amount paid by the Commission to the claimant as benefits

(a) for any period for which the claimant is disqualified; or

(b) to which the claimant is not entitled.

44. A person who has received or obtained a benefit payment to which the person is disentitled, or a benefit payment in excess of the amount to which the person is entitled, shall without delay return the amount, the excess amount or the special warrant for payment of the amount, as the case may be.

43. La personne qui a touché des prestations en vertu de la présente loi au titre d'une période pour laquelle elle était exclue du bénéfice des prestations ou des prestations auxquelles elle n'est pas admissible est tenue de rembourser la somme versée par la Commission à cet égard.

44. La personne qui a reçu ou obtenu, au titre des prestations, un versement auquel elle n'est pas admissible ou un versement supérieur à celui auquel elle est admissible, doit immédiatement renvoyer le mandat spécial ou en restituer le montant ou la partie excédentaire, selon le cas.

Facts

4 The relevant facts are undisputed and are briefly summarized. Mr. Roby was a police officer in 2001 when he suffered a work related injury. He applied for sickness benefits under the *Employment Insurance Act*. At the same time, he submitted a "direct deposit application" which instructed the Commission to deposit his benefits to his bank account at the Canadian Imperial Bank of Commerce (CIBC).

5 Two important events occurred before the Commission formally advised Mr. Roby that he was entitled to benefits. First, in November of 2002, he made an assignment for the general benefit of his creditors under the *Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3*. The assignment in bankruptcy included an assignment of Mr. Roby's CIBC bank account, which came under the sole control of the trustee in bankruptcy. Second, in December of 2002, Mr. Roby instructed the Commission to disregard his direct deposit application because, in his words, "the CIBC account is no longer valid."

6 By letter dated February 10, 2003, Mr. Roby was informed that his application for sickness benefits had been approved for the maximum 15 week period from May 5, 2002 to August 17, 2002.

7 Unfortunately, in January of 2003, the Commission had already deposited sickness benefits totaling \$5,426 to Mr. Roby's CIBC account, contrary to his direction. On January 21, 2003, the Commission acknowledged to Mr. Roby that his benefits had been deposited in error to the CIBC

account and that the Commission would accept full responsibility for not forwarding the funds to him. At that time, the Commission assured Mr. Roby that they would "take care of it from their end", and apologized for the inconvenience. The next day, the Commission sent Mr. Roby a cheque payable to him in the amount of \$5,426. Mr. Roby accepted the cheque and cashed it.

8 The record discloses no evidence as to what steps, if any, the Commission took or tried to take to recover the unauthorized deposits from CIBC, either through CIBC or through the trustee in bankruptcy.

9 In April of 2003, CIBC applied the unauthorized deposits to a debt owed by Mr. Roby in respect of another account. The record does not disclose why or on what legal basis that was done, but neither party has suggested that there are grounds for finding any impropriety on the part of CIBC or the trustee in bankruptcy with respect to that transaction.

10 The Commission subsequently took the position that Mr. Roby had received his statutory entitlement twice, and sought to recover what they characterized as an overpayment. It appears that by the date of the hearing of Mr. Roby's application in this Court, the Crown had collected some or all of the purported overpayment.

11 As indicated above, Mr. Roby appealed to the Board, challenging the Commission's determination that there was an overpayment. A hearing was convened to consider the appeal and the appeal was dismissed. However, that decision was set aside by an Umpire because Mr. Roby was not given notice of the hearing (CUB 78195). A second hearing was convened at which Mr. Roby testified. In a decision dated January 17, 2012, the Board concluded that Mr. Roby had received an overpayment. Mr. Roby appealed that decision. His appeal was dismissed (CUB 80197). Mr. Roby now seeks judicial review of the Umpire's decision.

Discussion

12 The decision of the Umpire cannot stand. It is based on the Board's factual finding, confirmed by the Umpire, that the Commission had deposited Mr. Roby's benefits to his CIBC bank account in accordance with Mr. Roby's instructions. That factual finding was not reasonably open to the Board or the Umpire in the face of the uncontradicted evidence that:

- (a) Mr. Roby withdrew his direct deposit application before his entitlement was determined;
- (b) the Commission did not give effect to Mr. Roby's withdrawal of the direct deposit application;
- (c) before issuing the replacement cheque to Mr. Roby, the Commission acknowledged its error in failing to give effect to the withdrawal and informed Mr. Roby that they would "take care of things from their end".

13 In these circumstances, Mr. Roby acted reasonably in accepting the replacement payment offered by the Commission, based on the assurance of the Commission that they would take responsibility for correcting the erroneous misdirection of the previous payments.

14 Having determined that the Umpire's decision cannot stand, it is necessary for this Court to consider whether the issues raised by Mr. Roby should be resolved by this Court on the available record. As there are no facts in dispute, I have concluded that the record is sufficient to enable this Court to reach an appropriate disposition. Given that this matter has been unresolved for almost 10 years, it would be appropriate to do so.

15 It is argued for Mr. Roby that the only reasonable conclusion on the available evidence is that the misdirected payments were not amounts paid to Mr. Roby or from which he benefited, and therefore a fundamental condition for the application of [sections 43 and 44 of the *Employment Insurance Act*](#) was not met. The Crown argues the contrary, based on two cases, *Lanuzo v. Canada (Attorney General)*, [2005 FCA 324](#) (F.C.A.) and CUB 54925 (July 5, 2002). For the following reasons, I am not persuaded that those cases are dispositive.

16 In *Lanuzo*, a claimant for employment insurance benefits was held to be required to repay the amount he had received in excess of his statutory entitlement even though the overpayment was the result of an error on the part of the Commission. I do not doubt the correctness of that decision, but it is based on evidence that the claimant actually received the amounts that comprised the overpayment. In this case, Mr. Roby did not actually receive the amounts that the Commission misdirected to his CIBC bank account. That is sufficient to distinguish *Lanuzo*.

17 CUB 54925 is a decision that is closer on its facts to this one, but it is not identical. The claimant in CUB 54925 initially requested that his benefits be deposited to his bank account with Canada Trust, and subsequently requested that his benefits be deposited to his bank account with the Royal Bank. After the amended request, the Commission mistakenly deposited to the Canada Trust account a payment representing benefits for a certain two week period. When the claimant advised the Commission that he had not received a payment relating to that period, the Commission issued him a replacement payment, and warned him that he was responsible for advising the Commission if the original payment was discovered. The payment that was deposited in error to the Canada Trust bank account was seized by a creditor of the claimant pursuant to a garnishment order. The Board concluded, and the Umpire agreed, that the claimant benefitted from the misdirected payment when it was applied, albeit without the claimant's consent, to reduce a debt he owed to a third party. On that basis, the claimant was held to be liable to repay the amount claimed by the Commission as an overpayment.

18 The difference in this case is that at the time the Commission misdirected the payments in issue to Mr. Roby's CIBC bank account, Mr. Roby was in bankruptcy. Significantly, this was his first bankruptcy, with the result that he was presumptively entitled to an automatic and

absolute discharge from all of his unsecured debts pursuant to [section 168.1 of the *Bankruptcy and Insolvency Act*](#) (subject to certain exceptions that, on the available evidence, probably would not have applied to Mr. Roby).

19 The Board and the Umpire should have considered whether, given these circumstances, the misdirected payments actually benefitted Mr. Roby. If they had considered that question, they would have concluded that on a balance of probabilities, the debt reduced by the misdirected payments would have ceased to be a liability of Mr. Roby upon his discharge from bankruptcy. That is sufficient to distinguish the facts in this case from the facts in CUB 54925 and to support the position of Mr. Roby that the misdirected payments did not benefit him.

20 I acknowledge the possibility that Mr. Roby could in fact have benefitted from the misdirected payments. For example, the debt in issue might have been a secured debt which would have been unaffected by the bankruptcy. One may speculate about other possibilities but I am not prepared to do so, given the assurances the Commission gave to Mr. Roby in 2003 that they would "take care of [their mistake] from their end". In these circumstances, it was incumbent on the Commission to take at least the steps required to determine with reasonable certainty what became of the misdirected payments before simply assuming that they benefitted Mr. Roby.

21 The Crown argues that, by virtue of the definition of "total income" in the [Bankruptcy and Insolvency Act](#), the amounts deposited to Mr. Roby's CIBC account were income of Mr. Roby. That submission is coupled with a reference to the obligation of the trustee in bankruptcy to determine the amount of income the bankrupt is entitled to retain and the amount he must contribute to the estate. It is not entirely clear how this submission assists the Crown's position, but in any event it is not supported by any evidence as to what, if anything, the trustee in bankruptcy determined or did in relation to the payments in issue. That is not surprising, given that there is no evidence that the Commission made any attempt to investigate those matters.

Conclusion

22 The only reasonable conclusion on the evidence is that Mr. Roby did not benefit from the misdirected payments. Therefore, I would allow the application for judicial review and set aside the decision of the Umpire. I would refer this matter back to the office of the Chief Umpire with a direction that Mr. Roby's appeal to the Umpire is to be allowed, his appeal to the Board is to be allowed, and the Commission is to be directed to cease all attempts to collect the purported overpayment from Mr. Roby, and to reimburse him for any amounts that have already been collected on account of the purported overpayment.

Costs

23 Mr. Roby has also claimed costs in this Court. As the successful party, he would normally be entitled to costs. However, Mr. Roby represented himself until a very short time before the hearing

in this Court. Normally the costs awarded to a self-represented litigant are limited to disbursements. However, that limitation does not apply in this case because the law firm Baker & McKenzie LLP became Mr. Roby's solicitor of record shortly before the hearing. Mr. Tonkovich of that firm appeared at the hearing as counsel for Mr. Roby.

24 Baker & McKenzie LLP acted for Mr. Roby *pro bono*, but that is not a bar to a costs award in Mr. Roby's favour. That is well explained by Feldman J.A., writing for the Ontario Court of Appeal in *1465778 Ontario Inc. v. 1122077 Ontario Ltd.* (2006), 216 O.A.C. 339, 82 O.R. (3d) 757 (Ont. C.A.), at paragraphs 34 and 35:

[34] It is clear from the submissions of the *amici* representing the views of the profession, as well as from the developing case law in this area, and I agree, that in the current costs regime, there should be no prohibition on an award of costs in favour of *pro bono* counsel in appropriate cases. Although the original concept of acting on a *pro bono* basis meant that the lawyer was volunteering his or her time with no expectation of any reimbursement, the law now recognizes that costs awards may serve purposes other than indemnity. To be clear, it is neither inappropriate, nor does it derogate from the charitable purpose of volunteerism, for counsel who have agreed to act *pro bono* to receive some reimbursement for their services from the losing party in the litigation.

[35] To the contrary, allowing *pro bono* parties to be subject to the ordinary costs consequences that apply to other parties has two positive consequences: (1) it ensures that both the non-*pro bono* party and the *pro bono* party know that they are not free to abuse the system without fear of the sanction of an award of costs; and (2) it promotes access to justice by enabling and encouraging more lawyers to volunteer to work *pro bono* in deserving cases. Because the potential merit of the case will already factor into whether a lawyer agrees to act *pro bono*, there is no anticipation that the potential for costs awards will cause lawyers to agree to act only in cases where they anticipate a costs award.

25 Mr. Tonkovich also drew our attention to paragraph 36 of *1465778 Ontario*, which confirms the general principle that costs belong to the party to whom they are awarded (and, by necessary implication, not to that party's solicitor):

[36] Where costs are awarded in favour of a party, the costs belong to that party. See Mark M. Orkin, Q.C., *The Law of Costs*, looseleaf (Aurora: Canada Law Book, 2005) at §204 and *Rules of Civil Procedure*, rule 59.03(6). However, *pro bono* counsel may make fee arrangements with their clients that allow the costs to be paid to the lawyer. This ensures that there will be no windfall to the client who is not paying for legal services.

26 In the Federal Court and in this Court, costs are payable to and by the parties, and not their solicitors, because of Rule 400(7) of the *Federal Courts Rules*, SOR/98-106. However, Rule 400(7) also provides that costs may be paid to a party's solicitor in trust.

27 At the hearing of Mr. Roby's application in this Court, Mr. Tonkovich candidly advised the Court that there was no agreement between himself and Mr. Roby with respect to any sharing of a costs award. However, after the hearing and while this matter was under reserve, Mr. Tonkovich advised the Court by letter that he and Mr. Roby had agreed that the portion of any costs award expressly allocated to the *pro bono* services provided by Baker & McKenzie LLP could be retained by that firm.

28 In my view, this is an appropriate case to award costs for the benefit of *pro bono* counsel. In exemplary fashion, Mr. Tonkovich untangled a confusing body of evidence and argument, discerned the most important legal issues, and effectively presented submissions that were of significant assistance to the Court in the efficient resolution of this case. However, the amount of the award must be modest given the applicable tariff, and will necessarily represent only a fraction of the actual value of the time Mr. Tonkovich must have spent in preparing for the hearing and presenting argument.

29 I would award costs in the amount of \$2,500 inclusive of all disbursements and taxes, payable to Baker & McKenzie LLP in trust, subject to the following directions. (1) Mr. Roby is to be reimbursed for all disbursements reasonably and necessarily incurred by him in this matter before Mr. Tonkovich began to act for him, including court fees and the cost of preparing, serving and filing documents. (2) Any amount that remains may be retained by Baker & McKenzie LLP as compensation for their *pro bono* services. (3) If any dispute arises as to the amount to which Mr. Roby is entitled, a motion may be made to this Court for a resolution.

Robert M. Mainville J.A.:

I agree

D. G. Near J.A.:

I agree

Application allowed.

2010 FC 757, 2010 CF 757
Federal Court

Singh v. Canada (Minister of Citizenship & Immigration)

2010 CarswellNat 2397, 2010 CarswellNat 3690, 2010 FC 757, 2010 CF
757, 191 A.C.W.S. (3d) 597, 372 F.T.R. 40 (Eng.), 90 Imm. L.R. (3d) 239

**Yadwinder Singh, Applicant and The Minister
of Citizenship and Immigration and Canada
Border Services Agency, Respondents**

Yves de Montigny J.

Heard: May 17, 2010

Judgment: July 19, 2010

Docket: IMM-2234-09

Counsel: Jeremiah Eastman, for Applicant
Ian Hicks, for Respondents

Yves de Montigny J.:

1 This is an application for judicial review whereby the Applicant seeks declaratory relief against the unwillingness of Citizenship and Immigration Canada ("CIC") to confirm his status as a permanent resident. In the alternative, the Applicant seeks a *mandamus* order compelling CIC to grant him permanent residence or, in the further alternative, compelling CIC to complete the processing of his humanitarian and compassionate ("H&C") application for permanent residence class within a defined timeframe. The Applicant also seeks his costs on a solicitor-client basis.

I. Facts

2 The Applicant is an Indian citizen who has been married for over 14 years to a Canadian citizen with whom he has two Canadian-born children. He first arrived in Canada on January 21, 1994 and claimed refugee status. After the rejection of his refugee claim, he applied for permanent residence in Canada on H & C grounds. This application was received by CIC on December 28, 1995, and approved in principle on April 12, 1996. His application then proceeded to stage two in order to determine whether he met the statutory requirements for landing.

3 In the summer of 1997, the Applicant decided to apply for a student visa. Since the process was shorter if he applied from outside of Canada, and because he could not enter the United States,

he gave his application and his passport to a friend who was a Canadian citizen so that he could bring it to the Canadian visa office in Buffalo, New York. The visa officer serving his friend said the Canadian visa office in Buffalo could not process the application without the Applicant being present. His friend therefore returned to Canada with the application and the Applicant's passport. Upon entry into Canada, the friend was searched by a port of entry officer, who seized the Applicant's passport, telling him that he could not carry someone else's passport. The officer gave the Applicant's friend a receipt for the passport to be picked up by the Applicant.

4 Despite the Applicant's numerous attempts to obtain his passport, he never succeeded in doing so. The evidence in the record is not clear as to what happened to the Applicant's passport. It appears to have been lost between the port of entry office in Fort Erie and the Immigration office in Niagara Falls, although there is also an indication in the record that it may have been returned to someone believed to be the Applicant.

5 The Applicant was called in to pick up his landing documents on December 23, 1998. The officer apparently handed the Applicant his Record of Landing and welcomed him as a new Canadian permanent resident, and asked to see his passport. When the Applicant showed him a copy of his passport and explained that his original passport had been lost, he was told that a copy was not sufficient; as a result, the officer asked the Applicant to give him back his Record of Landing.

6 The Applicant immediately initiated an application to obtain a new passport from the Indian consulate. The passport not having been issued after several years, the Applicant inquired about the reason for the delay at the Indian consulate. He was told that the consulate could not process his application before CIC confirmed some technical information about his status in Canada. The Applicant finally obtained a new passport in January 2003, which he submitted to CIC in February 2003.

7 By the time the second processing stage resumed, however, the Applicant's medical, criminal and security clearances had expired. The Applicant therefore submitted updated medical and criminal examinations. In a somewhat Kafkaesque turn of events, however, the Applicant's new passport and his 2004 medical examination had expired at the time these documents were processed and CIC had finalized the security checks. Thus, CIC sent the Applicant two letters on August 31, 2005, requesting a valid passport and an updated medical examination.

8 Unfortunately for the Applicant, CIC received information from the Canadian Border Services Agency ("CBSA") in September 2005, before the Applicant's permanent residence application was finalized, indicating that the Applicant was the subject of criminal charges for drug trafficking in the United States and that his extradition was sought by the American authorities. On April 24, 2007, the Applicant was ordered to surrender to the American authorities to face prosecution.

Although he had initially filed an application for judicial review of that decision, he surrendered to the American authorities on August 14, 2009.

9 The Applicant's file has been on hold ever since CIC learned of the criminal charges laid against him in the United States. CIC sent him a letter on May 25, 2009, requesting new and updated medical and police certificates, passport and American police certificate in order to resume the assessment of his application for permanent residence.

10 The Applicant now seeks a declaration from this Court declaring that CIC's refusal to land him on December 23, 1998 and on February 3, 2003 was unlawful because he had allegedly met all the requirements for landing on those dates and had therefore become a permanent resident.

11 In the alternative, the Applicant seeks an order of *mandamus* compelling CIC to grant the Applicant's application for permanent residence within thirty days of the Court's order.

12 In the further alternative, the Applicant seeks an order of *mandamus* compelling the Respondents to complete the processing of the Applicant's application for permanent residence within thirty days of the Court's order.

13 The application was originally directed only against the Minister of Citizenship and Immigration. But in order to have a complete record before the Court, counsel for the Applicant brought a motion for an Order directing that the CBSA be added as a respondent. This motion was granted, on consent, on March 9, 2010, and both Respondents therefore filed a Certified Tribunal Record ("CTR"). Both Respondents also filed an application for non-disclosure pursuant to section 87 of the Immigration and Refugee Protection Act (2001, c. 27) ("*IRPA*"), thereby requesting that some information be blacked out from the record for national security reasons.

II. Issues

14 There are only two issues to be decided by this Court in the context of this application for judicial review. First, should an order for declaratory relief be issued by this Court to the effect that the Applicant met all the legal requirements for landing on December 23, 1998 and/or on June 28, 2002, and that the CIC acted illegally in refusing to land him as a permanent resident? Second, should the Court order the Respondents either to grant the Applicant's application for permanent residence, or to complete the processing of his application, within 30 days of this Court's order? These questions raise both jurisdictional and factual issues for which there are scant precedents. Moreover, the first question must be dealt with in the context of two different legal regimes, since prior to the coming into force of the *IRPA* and its Regulations, (*Immigration and Refugee Protection Regulations*, SOR/2002-227, hereafter "*IRPR*") on June 28, 2002, the *Immigration Act* (R.S.C., 1985, c. I-2) and the *Immigration Regulations* (SOR/78-172) ("*Regulations*") governed the Applicant's application for permanent residence.

15 Before addressing these issues, however, I shall deal briefly with the Respondents' motions for non-disclosure that were made pursuant to section 87 of the *IRPA*. After holding an *ex parte* and *in camera* hearing of that motion, and a further teleconference hearing with counsel for both parties, I granted the Respondents' motion on May 7, 2010 subject to my direction given at the *in camera* hearing that paragraph 4 of p. 2 of the supplementary record be unredacted except for two words. At the time, I gave only brief oral reasons for that decision, and indicated that I would provide fuller reasons as part of my decision on the merit of the judicial review application. Accordingly, the first part of my analysis will be devoted to this issue.

III. The legislative scheme

16 Pursuant to subsection 14(2) of the *Immigration Act* an officer shall grant landing to an immigrant, defined in section 2 of that *Immigration Act* as "a person seeking landing", when the officer is satisfied, following an examination, that it would not be contrary to the Act or Regulations to grant landing:

14. (2) Where an immigration officer is satisfied that it would not be contrary to this Act or the regulations to grant landing to an immigrant whom the officer has examined, the officer shall

- (a) grant landing to that immigrant; or
- (b) authorize that immigrant to come into Canada on condition that the immigrant be present for further examination by an immigration officer within such time and at such place as the immigration officer who examined the immigrant may direct.

14. (2) L'agent d'immigration qui convainc, après l'interrogatoire d'un immigrant, que l'octroi du droit d'établissement ne contreviendrait pas, dans son cas, à la présente loi ni à ses règlements est tenu:

- a) soit de lui accorder ce droit;
- b) soit de l'autoriser à entrer au Canada à condition qu'il se présente, pour interrogatoire complémentaire, devant un agent d'immigration dans le délai et au lieu fixés.

17 Pursuant to subsection 14(1) of the *Regulations*, an immigrant must be in possession of a valid and subsisting passport or travel document issued to him or her by their country of origin:

14. (1) Subject to subsection (2), every immigrant shall be in possession of

- (a) a valid and subsisting passport issued to that immigrant by the country of which he is a citizen or national, other than a diplomatic, official or other similar passport;

14. (1) Sous réserve du paragraphe (2), tout immigrant doit avoir

a) un passeport en cours de validité, autre qu'un passeport diplomatique, officiel ou autre passeport semblable, qui lui a été délivré par le pays dont il est citoyen ou ressortissant;

18 Since the coming into force of the *IRPA* and the *IRPR* on June 28, 2002, the following legislative provisions apply to the Applicant's application for permanent residence. First of all, a foreign national, which is defined in section 2 as "a person who is not a Canadian citizen or a permanent resident", becomes a permanent resident pursuant to subsection 21(1) of the *IRPA* if an officer is satisfied that the foreign national meets the requirements of the legislation:

21. (1) A foreign national becomes a permanent resident if an officer is satisfied that the foreign national has applied for that status, has met the obligations set out in paragraph 20(1)(a) and subsection 20(2) and is not inadmissible.

21. (1) Devient résident permanent l'étranger dont l'agent constate qu'il a demandé ce statut, s'est déchargé des obligations prévues à l'alinéa 20(1)a) et au paragraphe 20(2) et n'est pas interdit de territoire.

19 Pursuant to subsection 72(1) of the *IRPR*, a foreign national in Canada becomes a permanent resident if it is established through an examination that he or she meets the requirements of the legislation:

Obtaining status

72. (1) A foreign national in Canada becomes a permanent resident if, following an examination, it is established that

(a) they have applied to remain in Canada as a permanent resident as a member of a class referred to in subsection (2);

(b) they are in Canada to establish permanent residence;

(c) they are a member of that class;

(d) they meet the selection criteria and other requirements applicable to that class;

(e) except in the case of a foreign national who has submitted a document accepted under subsection 178(2) or of a member of the protected temporary residents class,

(i) they and their family members, whether accompanying or not, are not inadmissible,

(ii) they hold a document described in any of paragraphs 50(1)(a) to (h), and

(iii) they hold a medical certificate, based on the most recent medical examination to which they were required to submit under these Regulations within the previous

12 months, that indicates that their health condition is not likely to be a danger to public health or public safety and, unless subsection 38(2) of the Act applies, is not reasonably expected to cause excessive demand; and

(f) in the case of a member of the protected temporary residents class, they are not inadmissible.

Obtention du statut

72. (1) L'étranger au Canada devient résident permanent si, à l'issue d'un contrôle, les éléments suivants sont établis:

- a) il en a fait la demande au titre d'une des catégories prévues au paragraphe (2);
- b) il est au Canada pour s'y établir en permanence;
- c) il fait partie de la catégorie au titre de laquelle il a fait la demande;
- d) il satisfait aux critères de sélection et autres exigences applicables à cette catégorie;
- e) sauf dans le cas de l'étranger ayant fourni un document qui a été accepté aux termes du paragraphe 178(2) ou de l'étranger qui fait partie de la catégorie des résidents temporaires protégés:
 - (i) ni lui ni les membres de sa famille — qu'ils l'accompagnent ou non — ne sont interdits de territoire,
 - (ii) il est titulaire de l'un des documents visés aux alinéas 50(1)a) à h),
 - (iii) il est titulaire d'un certificat médical attestant, sur le fondement de la plus récente visite médicale à laquelle il a été requis de se soumettre aux termes du présent règlement dans les douze mois qui précèdent, que son état de santé ne constitue vraisemblablement pas un danger pour la santé ou la sécurité publiques et, sauf si le paragraphe 38(2) de la Loi s'applique, ne risque pas d'entraîner un fardeau excessif;
- f) dans le cas de l'étranger qui fait partie de la catégorie des résidents temporaires protégés, il n'est pas interdit de territoire.

20 In the case of a foreign national who, like the Applicant, has obtained an exemption under section 25 of the *IRPA* to apply for permanent residence from within Canada, section 68 of the *IRPR* provides that the foreign national becomes a permanent resident if it is established through an examination that he or she is not inadmissible and holds a passport or other document listed in section 50 of the *IRPR*:

Applicant in Canada

68. If an exemption from paragraphs 72(1)(a), (c) and (d) is granted under subsection 25(1) of the Act with respect to a foreign national in Canada who has made the applications referred to in section 66, the foreign national becomes a permanent resident if, following an examination, it is established that the foreign national meets the requirements set out in paragraphs 72(1)(b) and (e) and

(a) in the case of a foreign national who intends to reside in the Province of Quebec and is not a member of the family class or a person whom the Board has determined to be a Convention refugee, the competent authority of that Province is of the opinion that the foreign national meets the selection criteria of the Province;

(b) the foreign national is not otherwise inadmissible; and

(c) the family members of the foreign national, whether accompanying or not, are not inadmissible.

Demandeur au Canada

68. Dans le cas où l'application des alinéas 72(1)a), c) et d) est levée en vertu du paragraphe 25(1) de la Loi à l'égard de l'étranger qui se trouve au Canada et qui a fait les demandes visées à l'article 66, celui-ci devient résident permanent si, à l'issue d'un contrôle, les éléments ci-après, ainsi que ceux prévus aux alinéas 72(1)b) et e), sont établis:

a) dans le cas où l'étranger cherche à s'établir dans la province de Québec, n'appartient pas à la catégorie du regroupement familial et ne s'est pas vu reconnaître, par la Commission, la qualité de réfugié, les autorités compétentes de la province sont d'avis qu'il répond aux critères de sélection de celle-ci;

b) il n'est pas par ailleurs interdit de territoire;

c) les membres de sa famille, qu'ils l'accompagnent ou non, ne sont pas interdits de territoire.

21 Section 50 of the *IRPR* provides a list of acceptable documents of which a foreign national must be in possession to become a permanent resident:

Documents — permanent residents

50. (1) In addition to the permanent resident visa required of a foreign national who is a member of a class referred to in subsection 70(2), a foreign national seeking to become a permanent resident must hold

(a) a passport, other than a diplomatic, official or similar passport, that was issued by the country of which the foreign national is a citizen or national;

- (b) a travel document that was issued by the country of which the foreign national is a citizen or national;
- (c) an identity or travel document that was issued by a country to non-national residents, refugees or stateless persons who are unable to obtain a passport or other travel document from their country of citizenship or nationality or who have no country of citizenship or nationality;
- (d) a travel document that was issued by the International Committee of the Red Cross in Geneva, Switzerland, to enable and facilitate emigration;
- (e) a passport or travel document that was issued by the Palestinian Authority;
- (f) an exit visa that was issued by the Government of the Union of Soviet Socialist Republics to its citizens who were compelled to relinquish their Soviet nationality in order to emigrate from that country;
- (g) a British National (Overseas) passport that was issued by the Government of the United Kingdom to persons born, naturalized or registered in Hong Kong; or
- (h) a passport that was issued by the Government of Hong Kong Special Administrative Region of the People's Republic of China.

Documents: résidents permanents

50. (1) En plus du visa de résident permanent que doit détenir l'étranger membre d'une catégorie prévue au paragraphe 70(2), l'étranger qui entend devenir résident permanent doit détenir l'un des documents suivants:

- a) un passeport — autre qu'un passeport diplomatique, officiel ou de même nature — qui lui a été délivré par le pays dont il est citoyen ou ressortissant;
- b) un titre de voyage délivré par le pays dont il est citoyen ou ressortissant;
- c) un titre de voyage ou une pièce d'identité délivré par un pays aux résidents non-ressortissants, aux réfugiés au sens de la Convention ou aux apatrides qui sont dans l'impossibilité d'obtenir un passeport ou autre titre de voyage auprès de leur pays de citoyenneté ou de nationalité, ou qui n'ont pas de pays de citoyenneté ou de nationalité;
- d) un titre de voyage délivré par le Comité international de la Croix-Rouge à Genève (Suisse) pour permettre et faciliter l'émigration;
- e) un passeport ou un titre de voyage délivré par l'Autorité palestinienne;

- f) un visa de sortie délivré par le gouvernement de l'Union des républiques socialistes soviétiques à ses citoyens obligés de renoncer à leur nationalité afin d'émigrer de ce pays;
- g) un passeport intitulé « British National (Overseas) Passport », délivré par le gouvernement du Royaume-Uni aux personnes nées, naturalisées ou enregistrées à Hong Kong;
- h) un passeport délivré par les autorités de la zone administrative spéciale de Hong Kong de la République populaire de Chine.

22 Finally, it appears from section 13 of the *IRPR* that a passport or any other document may be produced only by producing the original document:

Production of documents

13. (1) Subject to subsection (2), a requirement of the Act or these Regulations to produce a document is met

- (a) by producing the original document;
- (b) by producing a certified copy of the original document; or
- (c) in the case of an application, if there is an application form on the Department's website, by completing and producing the form printed from the website or by completing and submitting the form on-line, if the website indicates that the form can be submitted on-line.

Exception

(2) Unless these Regulations provide otherwise, a passport, a permanent resident visa, a permanent resident card, a temporary resident visa, a temporary resident permit, a work permit or a study permit may be produced only by producing the original document.

Production de documents

13. (1) Sous réserve du paragraphe (2), la production de tout document requis par la Loi ou le présent règlement s'effectue selon l'une des méthodes suivantes:

- a) la production de l'original;
- b) la production d'un double certifié conforme;
- c) dans le cas d'une demande qui peut être produite sur un formulaire reproduit à partir du site Web du ministère, la production du formulaire rempli, ou l'envoi de celui-ci

directement sur le site Web du ministère s'il y est indiqué que le formulaire peut être rempli en ligne.

Exception

(2) Sauf disposition contraire du présent règlement, les passeports, visas de résident permanent, cartes de résident permanent, visas de résident temporaire, permis de séjour temporaire, permis de travail et permis d'études ne peuvent être produits autrement que par présentation de l'original.

23 When determining whether the declaratory relief sought by the Applicant should be granted, the applicable legal regime will vary depending on the date upon which CIC's refusal to land the Applicant is being considered. To the extent that the date upon which the Applicant argues he should have been landed is that of December 23, 1998, the requirements to be applied are those found in the *Immigration Act* and the *Regulations*. If, on the other hand, the Court examines whether the Applicant should have been landed on February 3, 2003, it is the *IRPA* and the *IRPR* that must be applied.

24 No such issue as to the relevant legislation arises when considering the application for an order of *mandamus*. Section 190 of the *IRPA* indicates clearly that Parliament intended the new Act to apply retrospectively, as it specifically provides that the *IRPA* shall apply to all pending applications:

Application of this Act

190. Every application, proceeding or matter under the former Act that is pending or in progress immediately before the coming into force of this section shall be governed by this Act on that coming into force.

Application de la nouvelle loi

190. La présente loi s'applique, dès l'entrée en vigueur du présent article, aux demandes et procédures présentées ou instruites, ainsi qu'aux autres questions soulevées, dans le cadre de l'ancienne loi avant son entrée en vigueur et pour lesquelles aucune décision n'a été prise.

25 Consequently, if a *mandamus* order requiring the Respondents to complete the processing of the Applicant's application were to be granted, the application would have to be made in accordance with the new legislative scheme: *Dragan v. Canada (Minister of Citizenship & Immigration)*, 2003 FCT 211, [2003] F.C.J. No. 260 (Fed. T.D.).

IV. Analysis

A. The Respondents' Motion for Non-Disclosure

26 Rule 17 of the *Federal Courts Immigration and Refugee Protection Rules* (SOR/93-22) ("*Rules*") requires the tribunal to include in the CTR "all papers relevant to the matter that are in the possession or control of the tribunal". Section 87 of *IRPA* allows for the non-disclosure of information if its disclosure would be injurious to national security or to the safety of any person.

27 In *Mohammed v. Canada (Minister of Citizenship & Immigration)*, 2006 FC 1310, [2006] F.C.J. No. 1630 (F.C.), this Court held that "the decision as to whether something can be withheld or not should be made by the Court and not by the Respondent alone" (at para. 19). Similarly, in *Mekonen v. Canada (Minister of Citizenship & Immigration)*, 2007 FC 1133, [2007] F.C.J. No. 1469 (F.C.), the Court held that "it is for the Court and not the tribunal to decide what information can be withheld from an applicant..." (at para. 10).

28 The combined effect of Rule 17 of the *Rules* and this Court's decisions in *Mohammed*, above, and *Mekonen*, above, is that a section 87 motion is required to be filed in all cases where information is redacted from the CTR for reasons of national security.

29 As provided for in paragraph 83(1)(c) of the *IRPA*, upon the request of the Minister, a judge shall hear information or other evidence, in the absence of the public, and the Applicant and his counsel if, in the judge's opinion, its disclosure could be injurious to national security or endanger the safety of any person. The evidence that is adduced in support of this application through the secret affidavit and the attachments thereto must be heard in the absence of the public, the Applicant and his counsel because disclosure of the evidence would be injurious to the national security or endanger the safety of any person.

30 Pursuant to sections 87 and 87.1, and paragraph 83(1)(b), the Court may appoint a special advocate to represent the interests of the permanent resident or foreign national if the Court is of the opinion that considerations of fairness and natural justice so require. In the case at bar, counsel for the Applicant made no such request.

31 After having held an *in camera* and *ex parte* hearing with counsel for the Respondents, during which the witness who filed the secret affidavit in support of the motion was questioned, counsel for the Applicant and for the Respondents were invited to make submissions by way of teleconference. As previously mentioned, it is at the end of this process that I granted the motion brought by the Respondents, with the caveat that one paragraph of the supplementary record be disclosed save for two words.

32 The state has a considerable interest in protecting national security and the security of its intelligence services. The disclosure of confidential information could have a detrimental effect on the ability of investigative agencies to fulfil their mandates in relation to Canada's national security. Although overturned by the Supreme Court on other grounds, the Federal Court found in *Almrei v. Canada (Minister of Citizenship & Immigration)*, 2004 FC 420, [2004] F.C.J. No. 509 (F.C.), that

the Court has a duty to ensure the confidentiality of information if, in the opinion of the judge, its disclosure would be injurious to national security or endanger the safety of any person. Quoting from paragraph 25 of the United Kingdom House of Lords decision in *R. v. Shayler*, [2002] UKHL 11 (U.K. H.L.), Justice Edmond Blanchard stated (at para. 58):

There is much domestic authority pointing to the need for a security or intelligence service to be secure. The commodity in which such a service deals is secret and confidential information. If the service is not secure those working against the interests of the state, whether terrorists, other criminals or foreign agents, will be alerted, and able to take evasive action; its own agents may be unmasked; members of the service will feel unable to rely on each other; those upon whom the service relies as sources of information will feel unable to rely on their identity remaining secret; and foreign countries will decline to entrust their own secrets to an insecure recipient...

In *Henrie v. Canada (Security Intelligence Review Committee)* (1988), [1989] 2 F.C. 229 (Fed. T.D.); aff'd in (1992), 5 Admin. L.R. (2d) 269 (Fed. C.A.), this Court recognized the rule that information related to national security ought not to be disclosed as an important exception to the principle that the court process should be open and public:

There are, however, very limited and well defined occasions where the principle of complete openness must play a secondary role and where, with regard to the admission of evidence, the public interest in not disclosing the evidence may outweigh the public interest in disclosure. This frequently occurs where national security is involved for the simple reason that the very existence of our free and democratic society as well as the continued protection of the rights of litigants ultimately depend on the security and continued existence of our nation and of its institutions and laws.

33 The notion of the sometimes competing interests of the public's right to an open system and the state's need to protect information and its sources was discussed by the Supreme Court of Canada in *Ruby v. Canada (Solicitor General)*, 2002 SCC 75, [2002] S.C.J. No. 73 (S.C.C.). In that case, the Supreme Court acknowledged that the state has a legitimate interest in preserving Canada's supply of intelligence information received from foreign sources and noted that the inadvertent release of such information would significantly injure national security.

34 Disclosure of confidential information related to national security or which would endanger the safety of any person could cause damage to the operations of investigative agencies. In the hands of an informed reader, seemingly unrelated pieces of information, which may not in themselves be particularly sensitive, can be used to develop a more comprehensive picture when compared with information already known by the recipient or available from another source. In *Henrie*, above, Justice David Addy also stated (at paras. 29-30):

By contrast, in security matters, there is a requirement to not only protect the identity of human sources of information but to recognize that the following types of information might require to be protected with due regard of course to the administration of justice and more particularly to the openness of its proceedings: information pertaining to the identity of targets of the surveillance whether they be individuals or groups, the technical means and sources of surveillance, the methods of operation of the Service, the identity of certain members of the Service itself, the telecommunications and cipher systems and, at times, the very fact that a surveillance is being or is not being carried out. This means for instance that evidence, which of itself might not be of any particular use in actually identifying the threat, might nevertheless require to be protected if the mere divulging of the fact that C.S.I.S. is in possession of it would alert the targeted organization to the fact that it is in fact subject to electronic surveillance or to a wiretap or to a leak from some human source within the organization.

It is of some importance to realize that an "informed reader", that is, a person who is both knowledgeable regarding security matters and is a member of or associated with a group which constitutes a threat or a potential threat to the security of Canada, will be quite familiar with the minute details of its organization and of the ramifications of its operations regarding which our security service might well be relatively uninformed. As a result, such an informed reader may at times, by fitting a piece of apparently innocuous information into the general picture which he has before him, be in a position to arrive at some damaging deductions regarding the investigation of a particular threat or of many other threats to national security.

35 Having reviewed the redacted information, and having duly considered the secret affidavit as well the explanations given by the deponent at the *in camera* and *ex parte* hearing, I have come to the conclusion that the redactions sought were necessary in order to protect national security as well as the security of persons mentioned in the secret material. Moreover, the redacted portions of the Certified Tribunal Record are minimal in content and do not seriously prejudice the Applicant's ability to know and comprehend the case he has to meet. In any event, the resolution of this application does not turn on the security clearances of the Applicant. It is for all of these reasons that the motion of the Respondents pursuant to s. 87 of the *IRPA* was granted.

B. The Application for Declaratory Relief

36 Counsel for the Applicant seeks a declaration from this Court that he was landed on December 23, 1998 (the date on which the Applicant attended CIC Etobicoke office for his landing examination), on June 28, 2002 (the date on which the *IRPR* came into force) or in February 2003 (the date on which he submitted a passport obtained from the Indian consulate in replacement of the lost one). On each of these dates, the Applicant submitted that he met all the legal requirements for landing and therefore became a permanent resident.

37 Counsel for the Respondents, for his part, argued that the Applicant could not be granted permanent residence on either of these dates because he could not satisfy an officer that he met all the requirements of the legislation. On December 23, 1998, he was not in possession of a valid and subsisting passport as required by subsection 14(1) of the former *Regulations*, while in February 2003, his medical, criminal and security clearances had expired.

38 There is no doubt that this Court has jurisdiction to grant declaratory relief. Section 18.1(3) of the *Federal Courts Act*, R.S.C. 1985, c. F-7, permits the Court to make whatever declaration is appropriate including both positive and negative declarations. The preconditions to be met before declaratory relief can be granted have been spelled out by the Supreme Court of Canada in the following terms:

Declaratory relief is a remedy neither constrained by form nor bounded by substantive content, which avails persons sharing a legal relationship, in respect of which a "real issue" concerning the relative interests of each has been raised and falls to be determined.

Solosky v. Canada (1979), [1980] 1 S.C.R. 821 (S.C.C.), at p. 830.

39 In the present case, these preconditions are clearly met. First of all, the parties obviously share a legal relationship ever since the Applicant made his application for permanent residence in 1995. When a person applies for permanent residence, a legal relationship is created as between that person and CIC. For instance, an applicant has a duty to truthfully answer all questions asked by the visa officer (*IRPA*, s. 16(1); *Immigration Act*, s. 12(4)), and to undergo a medical examination (*IRPA*, s. 16(2); *Immigration Act*, s. 11) and an examination by the visa officer (*IRPA*, s. 18; *Immigration Act*, s. 12(1)). CIC, on the other hand, as a duty to grant landing to immigrants who meet all legal requirements (*IRPA*, s. 21; *Immigration Act*, s. 5(2) and 14(2)).

40 Furthermore, the issue at stake is clearly a real one in that it affects the parties' interests and has not been resolved yet. Indeed, the issue is not academic or hypothetical; what is at stake is the Applicant's status in Canada and the possibility to re-enter Canada if he is ever found guilty of the charges that have been laid against him in the United States. This is not to say that the declaration sought by the Applicant would automatically provide any relief to the Applicant. Disregard of a declaratory judgment does not amount to contempt, as such a declaratory judgment merely states an existing legal situation: *L.C.U.C. v. Canada Post Corp.* (1986), 8 F.T.R. 93 (Fed. T.D.). For a declaratory order to have any practical and immediate effect, it would have to be accompanied by an order in the nature of a *mandamus*. I shall return to that question shortly. Suffice it to say that even if the Court were not prepared to compel the Respondents to perform any specific duty, there would still be merit in declaring the law. As the Supreme Court stated in another context, government officials and administrative boards are not above the law, and if an official acts contrary to statute, the courts are entitled to so declare: see *Kelso v. Canada*, [1981] 1 S.C.R. 199 (S.C.C.), at p. 210.

41 I have to agree with counsel for the Respondents that the Applicant could not be landed on February 23, 2003, or indeed at any point in time after the coming into force of *IRPA*, as an officer could not be satisfied that he was not inadmissible. Through no fault of his own, Mr. Singh's medical, criminal and security clearances had expired and needed to be reinitiated when he submitted a valid passport. That being said, this was a most unfortunate state of affairs. For all those years, the Applicant was on a kind of merry-go-round, as one clearance after another had to be redone since their validity periods never all coincided. This is clearly an example of the bureaucracy at its worst, and one can only sympathize with the Applicant's Kafkaesque experience. But from a strictly legal point of view, it is impossible to conclude that the various officials who dealt with Mr. Singh's application after he obtained a new passport erred in applying the requirements of the law.

42 The same cannot be said with respect to the refusal to land him on December 23, 1998. It is not in dispute that the only reason his Record of Landing was taken back from him on that date was his inability to present a valid and subsisting passport. At that point, Mr. Singh had met all the other requirements of the *Immigration Act* and its attendant *Regulations*.

43 The requirement to be in possession of a valid and subsisting passport is found in subsection 14(1) of the *Regulations*, reproduced above at paragraph 17 of these reasons. Being in possession of something generally refers to the control over an object. However, depending of the legal context, a person may be considered in possession of something if that person holds a legal right to assume immediate control over an object: see *Ready John Inc. v. Canada (Department of Public Works & Government Services)*, 2004 FCA 222, [2004] F.C.J. No. 1002 (F.C.A.) at paras. 42-45. In the specific context of the *Immigration Act*, interpreting the regulatory requirement found in subsection 14(1) as the physical control of the passport by the Applicant would make no sense. The purpose of that subsection is clearly to verify that an immigrant wishing to come to Canada is a citizen of another country and to ascertain the identity of the immigrant before landing him. This is confirmed by an amendment made to the legal regime governing refugees in 1992 (S.C. 1992, ch. 49). Pursuant to s. 38 of that statute, section 46.04 of the *Immigration Act* was modified. The modified paragraph 46.04(8) states:

(8) An immigration officer shall not grant landing either to an applicant under subsection (1) or to any dependant of the applicant until the applicant is in possession of a valid and subsisting passport or travel document or a satisfactory identity document.

44 Moreover, the French version of subsection 14(1) of the former *Immigration Regulations* stipulates that an immigrant "doit avoir" a valid passport. This expression is clearly much broader than "being in possession of" in the English version. To have a valid passport doesn't necessarily mean to physically hold on the passport, but rather to be the bearer of that document or to have the legal use of it. It should have been sufficient for the Applicant to demonstrate that he was the

legal bearer of a valid passport; this is obviously done in general by showing the passport itself, but there may be circumstances where the showing of the physical passport may not be necessary in order to meet this requirement.

45 In the specific context of this case, the interpretation of subsection 14(1) proposed by the Respondents would not only make no sense but would also bring about a terrible injustice on the Applicant. Mr. Singh would be made to suffer for the loss of his passport by officials of the Respondents. Besides, the Respondents had a copy of his passport in the file, which showed that it was valid until 2001. In those very exceptional circumstances, it would be absurd and not in keeping with the wording and the spirit of subsection 14(1) to find that the Applicant could only satisfy the requirement set out in that provision by having with him the passport itself that was issued to him by the Indian authorities.

46 Counsel for the Respondents cited section 13 of the *IRPR* to bolster his argument. Section 13 of the *IRPR* prescribes an evidentiary rule to the effect that, if the "production" of a document is required by the legislation, it is the original document that must be "produced". Quite apart from the fact that section 13 of the *IRPR* finds no equivalent in the *Immigration Act* or in the former *Regulations*, it must be borne in mind that section 14(1) of the former *Regulations* did not speak of a requirement to produce but to hold a valid passport. These are two different requirements. The requirement to hold (in French "être titulaire de") a document is more than an evidentiary rule; it goes to the substance of being entitled to a valid passport issued by one's country of citizenship.

47 For all of those reasons, I am therefore of the view that CIC erred in law in finding that the Applicant did not comply with the requirement enunciated in s. 14(1) of the former *Immigration Regulations*, and in refusing to land the Applicant on December 23, 1998.

C. The Application for Mandamus

48 The necessary conditions to be met for the issuance of a writ of *mandamus* have been set out by the Federal Court of Appeal in *Apotex Inc. v. Canada (Attorney General)* (1993), [1994] 1 F.C. 742 (Fed. C.A.), at para. 45; aff'd [1994] 3 S.C.R. 1100 (S.C.C.) and aptly summarized by my colleague Justice Danièle Tremblay-Lamer in the following terms:

- (1) there is a public legal duty to the applicant to act;
- (2) the duty must be owed to the applicant;
- (3) there is a clear right to the performance of that duty, in particular:
 - (a) the applicant has satisfied all conditions precedent giving rise to the duty;

(b) there was a prior demand for performance of the duty, a reasonable time to comply with the demand, and a subsequent refusal which can be either expressed or implied, e.g. unreasonable delay; and

(4) there is no other adequate remedy.

Conille v. Canada (Minister of Citizenship and Immigration), [1999] 2 F.C. 33, (T.D.) at para. 8

49 In the case at bar, the Applicant seeks two alternative *mandamus* orders. The first order sought is to direct CIC to grant the Applicant his permanent residence within 30 days of the Court's order. Alternatively, the Applicant seeks an order compelling CIC to complete the processing of the Applicant's application within 30 days of the Court's order.

50 There is no doubt in my mind that the Applicant has met all the requirements for the issuance of a *mandamus* order. It is clear that CIC has a public legal duty to process the Applicant's permanent residence application. Section 5(2) of the former *Immigration Act* imposed on CIC a clear obligation to grant landing to an applicant for permanent residence who meets the relevant statutory requirements, and the same is true by virtue of section 11(1) of *IRPA*: see, for example, *Dragan*, above, at para. 40; *Vaziri v. Canada (Minister of Citizenship & Immigration)*, 2006 FC 1159, [2006] F.C.J. No. 1458 (F.C.) at para. 41.

51 I also find that the Applicant had a right to the performance of that duty. He submitted a completed application accompanied by all required supporting documents and paid the required processing fees. The record also shows that the Applicant and his counsel repeatedly contacted the Respondents to request updates or a final decision to be made. Yet, more than 14 years after he filed his application, a decision has yet to be made. The Respondents are correct in pointing out that the Applicant, due to the outstanding criminal charges that have been laid against him in the fall of 2005, cannot now satisfy an officer that he is not inadmissible under section 36 of *IRPA*. The fact remains that, prior to those charges having been laid, he had waited almost ten years for his application to be processed. If such a long period of time does not amount to an unreasonable delay, I truly wonder what does.

52 In light of the foregoing, I am of the view that the Applicant is entitled to an order in the nature of a *mandamus*. There is, however, authority for the proposition that while *mandamus* will be issued to compel the performance of a duty, it cannot dictate the result to be reached: see, for example, *Schwarz Hospitality Group Ltd. v. Canada (Minister of Canadian Heritage)*, 2001 FCT 112 (Fed. T.D.), at para. 34. Indeed, the jurisprudence is to the effect that issuing specific directions may sometimes be warranted, but only in very limited and exceptional circumstances. As stated by the Federal Court of Appeal in *Rafuse v. Canada (Pension Appeals Board)*, 2002 FCA 31, [2002] F.C.J. No. 91 (Fed. C.A.) at par. 14:

While the directions that the Court may issue when setting aside a tribunal's decision include directions in the nature of a directed verdict, this is an exceptional power that should be exercised only in the clearest of circumstances: *Xie, supra*, at paragraph 18. Such will rarely be the case when the issue in dispute is essentially factual in nature (*Ali v. Canada (Minister of Employment and Immigration)*, [1994] 3 F.C. 73 (T.D.)), particularly when, as here, the tribunal has not made the relevant finding.

See also: *Johnson v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 1262, [2005] F.C.J. No. 1523, at paras. 20-22; *Xie v. Canada (Minister of Employment and Immigration)* (1994), 75 F.T.R. 125 (F.C.T.D.) at para. 18.

53 In the case at bar, the issue of the Applicant's inadmissibility was apparently resolved in his favour at the time of his interview on December 23, 1998. Had it not been for the error of the officer in determining that the Applicant did not hold a valid passport because it had been seized at the visa office in Buffalo and never returned to him, the Applicant would most probably have been landed on that date. The evidence in that respect, however, is not devoid of all ambiguity, and does not allow the Court to bypass the assessment of an immigration officer and to substitute its decision to that of the Minister and those who are entrusted with his delegated authority.

54 Accordingly, the decision not to land the Applicant on December 23, 1998 is quashed, and the Applicant's file is remitted back to the Respondents to be processed in accordance with the law as it stood on that date and on the basis of the Applicant's record at the time. The processing of the Applicant's file shall also be made in light of these reasons, and in particular in light of the declaratory order with respect to s. 14(1) of the *Immigration Act*. Because of the long delays through which the Applicant already had to go through, the redetermination shall be made within 90 days of the release of this Court's order.

55 Counsel proposed no question for certification, and none will be certified.

56 Counsel for the Applicant seeks his costs on a solicitor-client basis. I agree with the Respondents that there is no justification for such an award. That being said, I am prepared to grant costs on a party to party basis to the Applicant. I am of the view that the long delay in processing the Applicant's file amounts to "special circumstances" for the purpose of Rule 22 of the *Federal Courts Immigrations and Refugee Protection Rules*, SOR/93-22. Accordingly, the Respondents are jointly ordered to pay \$2,000 to the Applicant.

Order

THIS COURT ORDERS that this application for judicial review be granted. More specifically, the Court makes the following two orders:

- The Court declares that the requirement to hold a valid passport found in s. 14(1) of the *Regulations* adopted under the former *Immigration Act* did not require an Applicant to actually have in his or her possession a hard copy of his or her passport, when it can be established by other means that the Applicant holds a valid passport;
- The Court further orders CIC to process the application for landing of the Applicant within 90 days of the release of this Order, in accordance with the law as it stood on December 23, 1998 and as interpreted in the reasons for this Order, and on the basis of the Applicant's record on that date.
- The Respondents are ordered to pay the Applicant a lump sum of \$2,000.00.

Application granted.

2021 CAF 122, 2021 FCA 122
Federal Court of Appeal

ViiV Healthcare Company v. Gilead Sciences Canada, Inc.

2021 CarswellNat 2094, 2021 CarswellNat 7323, 2021 CAF 122,
2021 FCA 122, 332 A.C.W.S. (3d) 249, 460 D.L.R. (4th) 272

**VIIV HEALTHCARE COMPANY, SHIONOGI & CO.,
LTD. and VIIV HEALTHCARE ULC (Appellants) and
GILEAD SCIENCES CANADA, INC. (Respondent)**

David Stratas, J.B. Laskin, Anne L. Mactavish JJ.A.

Heard: April 19, 2021

Judgment: June 16, 2021

Docket: A-115-20, A-43-20, A-13-20, A-477-19

Proceedings: affirming *ViiV Healthcare Company v. Gilead Sciences Canada, Inc.* (2019), 2019 CarswellNat 10135, 2019 CarswellNat 10134, 2019 CF 1579, 2019 FC 1579, Michael D. Manson J. (F.C.); and affirming *ViiV Healthcare Company c. Gilead Sciences Canada, Inc.* (2020), 2020 CarswellNat 3757, 2020 CF 11, 2020 CarswellNat 1702, 2020 FC 11, Michael D. Manson J. (F.C.); and affirming *ViiV Healthcare Company v. Gilead Sciences Canada, Inc.* (2020), 173 C.P.R. (4th) 297, 2020 CarswellNat 2386, 2020 CF 486, 2020 CarswellNat 1166, 2020 FC 486, Michael D. Manson J. (F.C.)

Counsel: Donald M. Cameron, Scott MacKendrick, Melanie Szweras, Michael Fenwick, Anastassia Trifonova, for Appellants
Tim Gilbert, Nisha Anand, Andrew Moeser, Kevin P. Siu, Andrea Rico Wolf, Colin Carruthers, for Respondent

David Stratas J.A.:

1 The appellants (collectively "ViiV") appeal from three interlocutory orders of the Federal Court (all *per* Manson J.). ViiV also appeals a summary judgment dismissing its patent infringement action against the respondent, *Gilead (perManson J.): 2020 FC 486*.

2 For the reasons that follow, I would dismiss the appeals with costs.

A. Background and the appeals from the interlocutory orders

3 The patent in issue, Canadian Patent No. 2,606,282, owned by some of the ViiV companies, covers several classes of chemical compounds.

4 ViiV took the view that Gilead's compound, bicitegravir, a component of a drug for treating HIV, infringed its patent. So it brought an action against Gilead for patent infringement. Gilead counterclaimed on the basis that ViiV's patent was invalid.

5 In August 2019, roughly eighteen months into the action, Gilead brought a motion for summary trial under [Rule 216](#) on the issue of patent infringement. The Federal Court scheduled the motion to be heard in January 2020.

6 ViiV objected to the bringing of the motion and stated it would move to adjourn or quash it. However, ViiV did not complete its filings on the motion to quash until December 2019, just before the hearing of the summary trial. By that time, the parties had done significant preparations for the summary trial. For example, voluminous expert evidence had already been filed: [2020 FC 11](#).

7 The Federal Court dismissed the motion to adjourn or quash: [2020 FC 11](#). It held that the summary trial would go ahead. But whether it would grant summary judgment was a different matter. It said it would rule on the appropriateness of that at the summary trial itself: [2020 FC 11](#).

8 In file A-13-20, ViiV appeals the Federal Court's dismissal of the motion to quash. The Federal Court conducted a factually suffused, discretionary assessment of the circumstances relevant to whether the summary trial should go ahead as scheduled. As well, the Federal Court found that many of the materials in support of the motion to quash were improper and the motion to quash was brought very late: [2020 FC 11](#). In the course of its reasons, the Federal Court also offered some observations about the propriety of motions to quash. These observations will be addressed later in these reasons. Overall, ViiV has not established any reviewable error on the part of the Federal Court and so I would dismiss this appeal.

9 Along the way, the Federal Court dismissed two other interlocutory motions brought by ViiV:

- The Federal Court dismissed ViiV's motion to compel production of certain documents: [2019 FC 1579](#). ViiV appeals this in file A-477-19.
- The Federal Court dismissed ViiV's hearsay objection to the admission into evidence of the product monograph of bicitegravir: Order dated January 24, 2020. ViiV appeals this in file A-43-20.

Both of these appeals should be dismissed.

10 As for the appeal concerning the production of certain documents, there are two reasons why it should be dismissed. First, the documents are relevant only to a variant theory of infringement

and later in these reasons I reject that theory. Second, ViiV argues that the productions are relevant to Gilead's counterclaim on the basis that the patent is invalid. But Gilead undertakes that it will discontinue its invalidity counterclaim if it is successful on all appeals. Given that I propose that very result, Gilead will discontinue its invalidity counterclaim and so the productions sought by ViiV are irrelevant.

11 As for the appeal concerning the admissibility of the product monograph of bictegravir, I would also dismiss it. In the end, even if the Federal Court erred, its consideration of the monograph is of no moment. The record shows that the parties agreed on most of the structure of bictegravir, including, as we shall see, the most important part: it has a bridged bicyclic ring at the "Ring A" position. The parties only disagree about some stereochemistry which is irrelevant to the infringement issue: Excerpts from Plaintiffs' Fresh as Amended Written Representations, para. 54, A-43-20 Appeal Book Vol. 1, Tab 5 (Appendix 3), at 156-158. In response to questions at the hearing, ViiV could not say how this case would have been decided differently if the product monograph were excluded from evidence.

B. The summary trial issues

(1) Introduction: a review of the principles

12 When a motion for summary judgment or summary trial is brought, how should the Court proceed? What exactly is the methodology the Court should follow? These days, the answer is rather unclear.

13 Some suggest that the Court can consider first whether a motion for summary judgment or summary trial should be entertained at all and, if not, the Court, on its own initiative, can dismiss it right away: *e.g.*, [Wenzel Downhole Tools Ltd. v. National-Oilwell Canada Ltd.](#), 2010 FC 966, 87 C.P.R. (4th) 412 at paras. 5-7. Others suggest that a party can bring a motion to quash a motion for summary judgment or summary trial on the basis that it should not be entertained at all. Still others, such as the Federal Court here (2020 FC 11), suggest that motions to quash should not be brought. And others never consider the issue unless a party has raised it.

14 Lack of clarity also stems from the fact that judges and counsel often address whether a summary judgment motion or a summary trial is "appropriate" but a review of the case law shows that "appropriate" means different things to different judges. For some, "appropriate" is a shorthand for whether the summary proceedings should be entertained at all: [Bosa Estate v. Canada \(Attorney General\)](#), 2013 FC 793, 436 F.T.R. 288 at para. 22; [Premium Sports Broadcasting Inc. v. 9005-5906 Québec Inc. \(Resto-bar Mirabel\)](#), 2017 FC 590 at para. 5; [Collins v. Canada](#), 2014 FC 307, 2014 D.T.C. 5066. For others, "appropriate" is a shorthand for whether a judgment should be granted based on the facts and the law before them: [Cabral v. Canada \(Citizenship and Immigration\)](#), 2016 FC 1040, 46 Imm. L.R. (4th) 209; [Trevor Nicholas Construction Co. Limited v. Canada \(Minister of Public Works\)](#), 2011 FC 70, 328 D.L.R. (4th) 665. And others seem to mix and match by using

"appropriate" to embrace both of these issues: *Tremblay v. Orio Canada Inc.*, 2013 FC 109, [2014] 3 F.C.R. 404 at paras. 24-27; *Teva Canada Limited v. Wyeth and Pfizer Canada Inc.*, 2011 FC 1169, 99 C.P.R. (4th) 398; *0871768 B.C. Ltd. v. Aestival (Vessel)*, 2014 FC 1047, 467 F.T.R. 1 at paras. 58-63; *Burns Bog Conservation Society v. Canada*, 2012 FC 1024, 417 F.T.R. 98 at para. 65.

15 Better clarity on this would benefit judges and counsel alike. The quest for clarity begins with an understanding of three basic operative principles concerning the practice and procedure of the Federal Courts.

16 First, the practice and procedure of the Federal Courts draws upon two sources, one primary, one secondary. The primary source is the *Federal Courts Rules, S.O.R./98-106*. The Rules set out standards expressly and by necessary implication. They supply most of the substantive content of the practice and procedure of the Courts. The secondary source is the plenary powers of the Courts — the powers that the Courts possess by virtue of being courts under section 101 of the *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, Appendix II, No. 5. These allow the Courts, among other things, to run and govern their essential back-office operations, such as the Registry, and to regulate their proceedings and the litigants who prosecute and defend them. The plenary powers of the Courts are always live. They can be drawn upon by the Courts when just and appropriate as long as there is no legislative text in the way.

17 The second operative principle is that the *Federal Courts Rules* generally permit the parties to prosecute and defend their cases as they see fit. The general default position in the Federal Courts system is that litigation is party-run. Putting aside specific court orders or directions that might be issued in particular cases and putting aside the rules on case management, parties can file documents at any time within the deadlines set by the Rules and they can file motions whenever they wish. But this is only a default position.

18 The third operative principle is the centrality in our practice and procedure of Rule 3 of the Federal Courts Rules. Rule 3 provides that the *Federal Courts Rules* shall be interpreted and applied so that "every proceeding" is determined "on its merits" in "the just, most expeditious and least expensive" way. Inherent in Rule 3 is the concept of proportionality: *Canada (Board of Internal Economy) v. Canada (Attorney General)*, 2017 FCA 43, 412 D.L.R. (4th) 336 at para. 11. The words "every", "most" and "least" in Rule 3 deserve particular attention. They encourage interpretations and applications of the Rules that are proactive in preventing, eliminating or minimizing conduct that causes delay and cost.

19 The three operative principles guide us in answering practical questions of procedure and practice. Take this one for example. A party brings a motion. The motion appears to have little merit but it is quite harmful in terms of the time and the expense it will cause. Can the opposing party bring a motion to quash it or, alternatively, to adjourn it? This question squarely arises in

this case, as ViiV brought a motion in the Federal Court to quash or adjourn Gilead's summary trial motion.

20 The operative principles, above, suggest that in rare circumstances motions to quash or to adjourn a motion can be brought. When brought early and dealt with quickly before time is wasted and the resources of the Court and the parties are squandered, they can proactively advance the objectives of Rule 3 and stop harmful litigation conduct in its tracks. In this way, motions to quash or adjourn are analogous to motions under the Rules concerning scheduling, case-management and the restraining of abuses of process. Thus, although not expressly permitted by a specific rule, they fall under Rule 4.

21 A motion to quash is not the place to raise substantive defences to the motion, no matter how strong; the responding motion record under Rule 369(2) is the place to do that. As well, it should not be a time-wasting and resource-exhausting exercise in itself. No matter which side is doing it, filibustering proceedings by bringing useless, unnecessary motions has no place in the Federal Courts system.

22 In appropriate circumstances, can the Court act on its own initiative to refuse to entertain a problematic motion, *i.e.*, one where the time and the expense it will cause is disproportionate to its benefit?

23 Yes. The Court need not wait for a responding motion. The Court is not stuck in a purely passive role, standing idly by and watching helplessly as a problematic motion tips the proceeding into an abyss of delay, waste and chaos.

24 The Court is a scarce community resource that must be preserved and managed in the public interest: [Canada v. Olumide, 2017 FCA 42, \[2018\] 2 F.C.R. 328 at paras. 17-20](#). Using its plenary powers, the Court can act on its own initiative to invite submissions and then, when warranted, can issue orders, directions or both to advance the Rule 3 objectives. For example, this Court has relied on its plenary powers as a court to act proactively to deal with problematic litigation conduct: see [Dugré v. Canada \(Attorney General\), 2021 FCA 8 at para. 38](#) and cases cited therein; see also [Fabrikant v. Canada, 2018 FCA 171](#), [Fabrikant v. Canada, 2018 FCA 224](#), [Mazhero v. Fox, 2014 FCA 219](#), [Philipos v. Canada \(AttorneyGeneral\), 2016 FCA 79, \[2016\] 4 F.C.R. 268](#) and many others.

25 However, the Court should not be quick to act on its own initiative. The general principle that litigation in the Federal Courts system is party-run, not Court-run, deserves respect and must be given due weight. Put another way, the parties deserve deference and a good margin of appreciation in the litigation choices they make. But deference does not mean unquestioning acceptance and no margin of appreciation is limitless.

26 Quite aside from the foregoing, the Court always has a wide discretion guided by the objectives of Rule 3 to issue directions or orders concerning scheduling and the manner in which the motion is to be prosecuted, defended and argued.

27 The Court must always respect the principles of procedural fairness. Before making any ruling that may affect the interests of the parties, the Court must invite submissions and consider them.

28 How do these principles play out in summary judgment motions and summary trial motions under Rules 213-216?

29 Where a motion for summary judgment or summary trial or its timing seems problematic in the sense described above, a motion to quash or adjourn may be brought subject to the qualifications set out above. Absent such a motion, the Court — acting on its own initiative in accordance with the principles set out above — can invite submissions and then decide the issue whether a motion for summary judgment or summary trial should be entertained at all or should be adjourned. Quite aside from this, in dealing with any motion for summary judgment or summary trial, the Court has a wide discretion governed by the objectives of Rule 3 concerning scheduling and the manner in which the motion is to be prosecuted, defended and argued.

30 I turn now to the specific wording of Rules 213-216.

31 Rule 213 provides that "[a] party may bring a motion for summary judgment or summary trial on all or some of the issues raised in the pleadings" any time after "the defendant has filed a defence" but "before the time and place for trial have been fixed".

32 Rule 215 governs when the Court may grant summary judgment. It provides that if the Federal Court "is satisfied that there is no genuine issue for trial with respect to a claim or defence", the Court shall grant summary judgment. There is "no genuine issue for trial" where the judge has "the evidence required to fairly and justly adjudicate the dispute" on a summary basis, *i.e.*, where "the process (1) allows the judge to make the necessary findings of fact, (2) allows the judge to apply the law to the facts, and (3) is a proportionate, more expeditious and less expensive means to achieve a just result": [Hryniak v. Mauldin, 2014 SCC 7, \[2014\] 1 S.C.R. 87 at paras. 49 and 66](#); see also [Ethiopian Orthodox Tewahedo Church of Canada St. Mary Cathedral v. Aga, 2021 SCC 22 at para. 25](#) and [Manitoba v. Canada, 2015 FCA 57, 470 N.R. 187 at para. 11](#).

33 Put another way, "a case ought not to proceed to trial, with all the consequences that would follow for the parties and the costs involved for the administration of justice, unless there is a genuine issue that can only be resolved through the full apparatus of a trial": [Canmar Foods Ltd. v. TA Foods Ltd., 2021 FCA 7 at para. 24](#).

34 Even if there is a "genuine issue of fact or law for trial with respect to a claim or defence", the Court may "nevertheless determine that issue by way of summary trial": Rule 215(3). In such cases, judges have greater powers to decide disputed questions of fact: *Manitoba* at para. 16; *Milano Pizza Ltd. v. 6034799 Canada Inc.*, 2018 FC 1112, 159 C.P.R. (4th) 275 at para. 32.

35 Rule 216 governs the Court's discretion as to whether to hold a summary trial. The Court may decline to do so if "the issues raised are not suitable for summary trial" or "a summary trial would not assist in the efficient resolution of the action": Rule 216(5). The Rule also provides that even if the amounts involved are high, the issues are complex or the evidence is conflicting, "the Court may grant judgment either generally or on an issue" unless "the Court is of the opinion that it would be unjust to decide the issues on the motion": Rule 216(6).

36 What do the words "issues...not suitable for a summary trial" and "assist in the efficient resolution of the action" in Rule 216(5) mean? What is "unjust" within the meaning of Rule 216(6)?

37 These words "must be interpreted [and applied] broadly, favouring proportionality and fair access to the affordable, timely and just adjudication of claims": *Hryniak*, above at para. 5. In other words, they must be interpreted and applied consistently with the objectives in Rule 3.

38 Appropriately mindful of the wording of these Rules and Rule 3, the Federal Court has developed useful factors relevant to whether the prerequisites in the Rules for summary judgment or summary trial have been met: *Wenzel* at paras. 38; *Bosa Estate* at para. 22; *Tremblay* at para. 24.

39 Also highly useful is the concise, comprehensive and accurate summary of the law under Rules 215 and 216 — including the effect of the Supreme Court's decision in *Hryniak* — in *Milano Pizza* at paras. 24-40.

40 Some of the cases cited in *Milano Pizza* show that in some cases summary proceedings just add to the cost and duration of litigation. But other cases cited in *Milano Pizza* show that in some cases summary proceedings can improve access to speedy, cost-efficient justice.

41 It is hard enough for parties to drive all the way to the final destination of trial and final determination of the merits of the litigation; to have their journey interrupted along the way and put through summary proceedings is harder still. But a summary procedure can sometimes provide the parties with an express route to their final destination. It all depends. The wise exercise of judicial discretion is called for: taking the words of the Rules, viewing them in light of the objectives of Rule 3 and examples in the case law, and applying them to the particular circumstances of the case.

42 At the end of the day, the Court must be satisfied that the prerequisites in the Rules for summary judgment or summary trial, understood in light of Rule 3, are met and that it is able to grant summary judgment, fairly and justly, on the evidence adduced and the law.

(2) Applying these principles to this case

43 In file A-115-20, ViiV seeks to overturn the Federal Court's finding that a "summary judgment [trial] was an appropriate proceeding to advance the litigation and narrow the issues in dispute" given the "narrow and well-defined issues before the Court". The Federal Court found that given the facts and the law before the Court, it was in a position to grant judgment: [2020 FC 486 at paras. 1 and 11-18](#).

44 ViiV contends that the Federal Court ignored the issue of onus of proof. I disagree: see [2020 FC 486 at paras. 19-22](#).

45 ViiV also submits that the Federal Court erred in law or in fact in granting summary judgment in this case. But ViiV's submissions do not identify an extricable legal question on which the Federal Court erred. In substance, ViiV asks this Court to reweigh the matter and come to a different conclusion.

46 On appeal, that is not our task. If the Federal Court does not commit legal error and does not commit palpable and overriding error in applying the law to the circumstances of the litigation before it, this Court cannot interfere: [Housen v. Nikolaisen, 2002 SCC 33, \[2002\] 2 S.C.R. 235](#). We are especially loath to interfere where, as here, a particular judge of the Federal Court is either case-managing or is closely involved in regulating the course of the proceedings. ViiV has not demonstrated any reversible error on the part of the Federal Court.

47 In the course of its reasons on the motion to quash or adjourn, the Federal Court suggested it has no authority to consider preliminary motions to quash motions for summary judgment or motions for summary trial: [2020 FC 11 at paras. 25-26](#). Given the analysis above concerning the availability of motions to quash or adjourn, this is incorrect.

C. The Federal Court's finding that the patent, properly construed, did not cover bictegravir

48 The Federal Court found bictegravir did not infringe the patent. As a result it granted summary judgment in favour of Gilead. ViiV challenges this, alleging a number of legal grounds for reversal. These are described below. In my view, there are no grounds to set aside the Federal Court's grant of summary judgment in favour of Gilead.

49 The Federal Court's judgment turned on its construction of claims 1, 11 and 16 of the patent and the construction of "Ring A" described in those claims.

50 The parties agree that Gilead's drug, bictegravir, is substantially the same as the compounds described in claims 1, 11 and 16 except at the "Ring A" position.

51 Claim 1 describes "Ring A" as an "optionally substituted heterocycle". Claim 11 describes it as an "optionally substituted and optionally condensed 5- to 7- membered heterocycle containing 1 to 2 hetero atom(s)". And Claim 16 describes it as an "optionally substituted and optionally condensed 5-to 7- membered heterocycle...[where] two of the substituents taken together with the neighboring atom(s), may form an optionally substituted carbocycle or optionally substituted heterocycle". The question, one of construction, was whether these include bridged bicyclic rings — the type of structure at the "Ring A" position of bictegravir.

52 In the Federal Court, ViiV argued that "Ring A" covers bridged bicyclic rings and so bictegravir offends the patent. Gilead argued that "Ring A" does not include bridged bicyclic rings and so bictegravir is outside of the patent.

53 The Federal Court agreed with Gilead. It found that "Ring A" as defined in claims 1, 11 and 16 includes only spiro and fused bicyclic rings, not bridged bicyclic rings.

54 In the course of its reasons, the Federal Court found the claims themselves were unclear, such that a person ordinary skilled in the art ("POSITA") would not know what is covered and what is not. As a result, the POSITA would have to resort to the patent disclosure to determine the scope of "Ring A".

55 On appeal, ViiV submits that the Federal Court made many errors of law in construing the claims.

56 Construction of a patent is a question of law: [Whirlpool Corp. v. Camco Inc.](#), 2000 SCC 67, [2000] 2 S.C.R. 1067 at paras. 61 and 76. However, the Federal Court is entitled to deference in its appreciation of the evidence, particularly the expert evidence, which affects the construction: [Mylan Pharmaceuticals ULC v. AstraZeneca Canada Inc.](#), 2012 FCA 109, 432 N.R. 292 at para. 20; [Wenzel Downhole Tools Ltd. v. National-Oilwell Canada Ltd.](#), 2012 FCA 333 (F.C.A.), [2014] 2 F.C. 459 at para. 44; [Bell Helicopter Textron Canada Limitée v. Eurocopter](#), 2013 FCA 219, 449 N.R. 111 at paras. 73-74; [ABB Technology AG v. Hyundai Heavy Industries Co., Ltd.](#), 2015 FCA 181, 475 N.R. 341 at paras. 22-24. In particular, the appreciation of expert evidence as to how a POSITA would understand the claims and any specific wording as well as what common general knowledge was available to the POSITA at the date of publication is a question of fact reviewable under the palpable and overriding error standard: [Bombardier Recreational Products Inc. v. Arctic Cat, Inc.](#), 2018 FCA 172, 159 C.P.R. (4th) 319 at paras. 15- 16; [Apotex Inc. v. Astrazeneca Canada Inc.](#), 2017 FCA 9 at paras. 29-30; [Tearlab Corporation v. I-MED Pharma Inc.](#), 2019 FCA 179, 166 C.P.R. (4th) 367 at para. 29. For these things, the standard of review is the hard-to-meet standard of palpable and overriding error: [Cobalt Pharmaceuticals Company v. Bayer Inc.](#), 2015 FCA 116, 474 N.R. 311 at para. 15; [ABB Technology](#) at para. 24.

57 ViiV says the Federal Court erred in law by referring to the patent disclosure when construing the claims.

58 I disagree. It is trite law that a patent must be read contextually in light of the entire patent and all of the necessary expert evidence: [Jansen Inc. v. Teva Canada Limited](#), 2015 FC 184, 128 C.P.R. (4th) 129 at paras. 92-93; [Teva Canada Limited v. Janssen Inc.](#), 2018 FC 754, 157 C.P.R. (4th) 391 at para. 236. Part of the necessary context is the disclosure: [Consolboard Inc. v. MacMillan Bloedel \(Sask.\) Ltd.](#), [1981] 1 S.C.R. 504, 122 D.L.R. (3d) 203 at 520-521 S.C.R.

59 ViiV submits that the Federal Court erred in law by resorting to the disclosure even though it found the claims "clear and unambiguous".

60 Again, I disagree. ViiV plucks the phrase "clear and unambiguous" from the Federal Court's reasons and mischaracterizes it. A reading of the whole paragraph — not just one sentence in it — shows that the Federal Court found it necessary to go beyond the terms of the claim: [2020 FC 486 at para. 128](#).

61 The reasons of first-instance courts are to be read holistically, making due allowance for awkward expression and efforts to synthesize reams of information: [R. v. R.E.M.](#), 2008 SCC 51, [2008] 3 S.C.R. 3 at paras. 35 and 55; [Mahjoub v. Canada \(Citizenship and Immigration\)](#), 2017 FCA 157, [2018] 2 F.C.R. 344 at para. 68; [Canada v. South Yukon Forest Corporation](#), 2012 FCA 165, 431 N.R. 286 at paras. 49-51. This means, among other things, that isolated sentences in reasons must be read in the context of the reasons and the record before the Court. When this is done here, it is obvious that the Federal Court understood correctly the role of disclosure in construing patent claims.

62 ViiV says the Federal Court erred by construing the patent without biology/virology evidence from Gilead. ViiV does not say there was no biology/virology evidence at all before the Court; nor does it say such evidence is necessary to construe Ring A. It says, as a general matter, there should be a full POSITA team and there was not one here so the appeal must be allowed. It says this based on authorities that tell us that patents must always be construed contextually.

63 I disagree. It is true that patents should be construed contextually in light of the entire patent and all of the necessary expert evidence. Put negatively, this means that one cannot create a fiction by cherry-picking part of a patent or part of the POSITA team. But this does not mean that to understand a specific portion of a claim a court must always take into account every conceivable part of the context, whether or not it is useful to the construction. Where, as here, some piece of context does not assist with the construction, the Court need not consider it.

64 In this case, biology/virology evidence would not have assisted in the interpretation of "Ring A". ViiV's own expert on the subject said as much: [2020 FC 486](#). And if virology/biology evidence

were required, the Court had access to it: ViiV led an expert on biology/virology. Tellingly, ViiV does not refer to its biology/virology evidence at all on this appeal.

65 ViiV submits that the Federal Court improperly limited claims 1, 11 and 16 to the preferred embodiments and that in doing this, the Federal Court impermissibly read language into the claims.

66 Again, I disagree. As ViiV concedes, the Federal Court charged itself correctly on the law in this area: Appellant's memorandum of fact and law at para. 75. In reality, ViiV takes issue with how the Federal Court applied this law to the facts — a question of mixed fact and law with no extricable legal question for which the standard of review is palpable and overriding error.

67 ViiV quibbles about the force of some authorities and the meaning of the term "may" in claim 16 of the patent. But it does not argue — let alone demonstrate — that the Federal Court made any palpable and overriding error such as obviously illogical findings, findings that are not supported by the record, or a complete disregard of evidence: see, e.g., *Mahjoub* at para. 62. The Federal Court knew the law in this area, and clearly preferred Gilead's expert evidence to that of ViiV: 2020 FC 486 at paras. 130-136.

68 Next, ViiV submits that even if bictegravir does not fall within the scope of claims 1, 11 and 16, it infringes the patent because it is a mere variation of a non-essential element of the patent. However, during the summary trial, ViiV conceded that "Ring A" is essential. ViiV's concession means the variant argument is not open to it.

69 To try to limit the force of this concession, ViiV tries to chop the patent up into smaller and smaller pieces. It says it conceded only that Ring A, as a whole, is essential but it did not concede that certain forms of Ring A are essential. In saying this, ViiV is attempting to resile from the breadth of its concession in the Federal Court. This it cannot do. Its approach smacks of the "spirit of the invention" approach to patent infringement. Under this now-discredited approach, patent holders get two kicks at the can: first, they can try and show literal infringement and then, if unsuccessful, they can try to show infringement "in spirit". The Supreme Court has rejected this approach due to its uncertainty and unpredictability: *Free WorldTrust v. Électro Santé Inc.*, 2000 SCC 66, [2000] 2 S.C.R. 1024.

D. Proposed disposition

70 Therefore, I would dismiss the four appeals with costs.

J.B. Laskin J.A.:

I agree

Anne L. Mactavish J.A.:

I agree

Appeals dismissed.