



By Email: FCARegistry-CAFGrefe@cas-satj.gc.ca

August 27, 2020

The Judicial Administrator, Federal Court of Appeal
90 Sparks Street, 5th Floor,
Ottawa, Ontario K1A 0H9

Dear Sir/Madam:

Re: *Air Passenger Rights v Canadian Transportation Agency*
Court File No.: A-102-20

We are writing in response to the Applicant's letter to the Court dated August 25, 2020.

In this letter, the Applicant makes submissions regarding the Canadian Transportation Agency's objection to the request for documents purportedly filed pursuant to Rule 317 of the *Federal Courts Rules*. We will not address the submissions made in this letter regarding the request for documents on the merits. Our arguments in response to these submissions are more properly reserved for the procedure that the Court directs pursuant to Rule 318(3), if deemed necessary.

Having said this, it is noteworthy that the Applicant now maintains that there *is* an "order" at stake in this case, to support its request pursuant to Rule 317. This is a complete reversal of its previous position taken on the motion for an interlocutory injunction where the Applicant conceded that the statements on the Agency's website "do not reflect decisions, determinations, **orders** or legally binding rulings on the part of the Agency"¹ (emphasis added).

This change in position brings into question the basis for the application for judicial review itself. The Applicant is asking the Court to issue a Declaration that the Agency's statement **is not** a decision, order, determination, or any other ruling of the Agency.² If the Applicant wants the Court to declare that the statement is not an order, then one wonders why the Applicant now says that it *is* an order.

There is no indication that the Applicant intends to amend the Notice of Application in this regard. If the Applicant now maintains that the statement is an order of the Agency, then presumably the proper procedure would have been to proceed by way of an appeal, for which leave is required.³

Put simply, the main premise of the application for judicial review is that the Agency's statement is not an order, and the Applicant asks that the Court declare that it is not an order. However, the Applicant

¹ *Air Passenger Rights v. Canada (Transportation Agency)*, [2020 FCA 92](#) at para. 21.

² Notice of Application issued the 8th day of April, 2020.

³ *Canada Transportation Act*, [S.C. 1986, c. 10](#), subs 41(1).



is now telling the Court that it is an order. It would be useful for the Applicant to explain these inconsistent positions.

Subsection 18.1(1) of the *Federal Courts Act*⁴ provides for judicial review in respect of a "matter". This Court has determined that judicial review is not available in this case⁵, that there is no "matter" which can be made subject to judicial review. Rule 317 refers more narrowly to an "order". It is difficult to understand how the Applicant intends to argue that while there is no "matter" at stake in this case, there is an "order" upon which it can base a Rule 317 request for documents.

In light of this development, the Agency submits that submissions with respect to the Rule 317 request proceed by way of motion. We submit that the Applicant should be required to file a motion in writing justifying the request for documents, including relevance, and addressing how it proposes to reconcile its positions taken on whether the statement at issue is an "order". We would then propose that the Agency submit a responding motion record outlining its objection to the request within ten (10) days.

In its letter to the Court, the Applicant attempts to characterize the Agency's objection to the request to produce documents as raising only the single issue of whether there is an "order" pursuant to Rule 317. If the Applicant intends now to argue that the Agency's statement is an "order", then the Agency will argue in the alternative that the documents requested are not relevant, may be subject to privilege, and that the Applicant is on a fishing expedition which the Court should not permit.

Rule 42 has no relevance to the current controversy of whether the Court should issue directions pursuant to Rule 318(3) of the *Federal Court Rules*.

Currently pending before the Court is the Agency's motion to strike the application for judicial review, precisely for the reason outlined above – the Agency's statement is not amenable to judicial review. We would therefore submit that it would be appropriate that the Court await a determination of the motion to strike before issuing directions pursuant to Rule 318(3) of the *Federal Courts Rules*, since if the motion is granted any order under Rule 318(3) would be rendered moot.

We trust the foregoing is satisfactory.

Yours truly,

Allan Matte
Senior Counsel
Canadian Transportation Agency

⁴ R.S.C. 1985, c. F-7

⁵ *Air Passenger Rights v. Canada (Transportation Agency)*, *supra*, note 1, at para. 20.

Office
des transports
du Canada



Canadian
Transportation
Agency

15 Eddy Street, 19th Floor
Gatineau, Quebec K1A 0N9

Tel: (819) 953-0611

Fax: (819) 953-9269

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

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

c.c.: Simon Lin

Counsel for the Applicant

simonlin@evolinklaw.com

Ottawa (Ontario) K1A 0N9
www.otc.gc.ca

Ottawa Ontario K1A 0N9
www.cta.gc.ca

Canada