

Halifax, NS

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January 4, 2022

VIA EMAIL and FAX

Ms. France Pégeot, Chair and CEO
Canadian Transportation Agency
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Ms. Elizabeth C. Barker, Vice-Chair
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Ms. Valérie Lagacé, Senior General Counsel and Secretary
Canadian Transportation Agency
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Dear Ms. Pégeot, Ms. Barker, and Me. Lagacé:

Re: Non-Compliance with the October 15, 2021 Order of Gleason, J.A. (A-102-20)

We are writing to you in your capacity as executive officers of the Canadian Transportation Agency [**Agency**] who supervise and control the Agency's members and staff and records pursuant to ss. 13-14 and 21-22 of the *Canada Transportation Act*, S.C. 1996, c. 10.

The Agency failed to comply and continues to fail to comply with paragraph 3 the Order of the Federal Court of Appeal rendered on October 15, 2021 by Gleason, J.A. in File No. A-102-20 [**Order**], a copy of which is attached for your review.

We request that you direct Agency members and staff under your supervision and control to fully cooperate and comply with paragraph 3 of the Order and have all documents produced forthwith and by no later than **Friday, January 7, 2022 at 17:00 Eastern Time**.

Please be advised that in the absence of full compliance by said deadline, we may be instructing counsel to bring contempt proceedings not only against the Agency but also against you personally pursuant to Rules 466-472 of the *Federal Courts Rules* and the principles laid out in *Canadian Standards Association v. P.S. Knight Co. Ltd.*, [2021 FC 770 at para. 37](#).

A finding of contempt of court carries serious personal consequences. Your personal interests may not fully align with those of the Agency and/or the Government of Canada. We urge you to seek legal advice from counsel who is independent from the Agency and/or the Government of Canada.

I. Paragraph 3 of the Order Is Clear and Unambiguous

Paragraph 3 of the Order clearly and unambiguously directed the Agency to disclose to us, the applicant, Air Passenger Rights, within 60 days of the Order:

- 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.

II. The Agency's Continued Failure to Comply with the Order

On December 14, 2021, the Agency produced certain documents [**Dec. 14 Package**] responding to paragraph 3 of the Order.

On December 17, 2021, our counsel advised the Agency that the production was incomplete and did not fully comply with the Order, and provided the Agency with a list of outstanding items.

On December 24, 2021, the Agency acknowledged that the original production was incomplete and produced further documents that were inadvertently omitted, but continues to disobey the Order.

At the time of writing this letter, the production of the following documents remain outstanding:

(b) Third-Party Correspondences

1. Based on pages 130, 152, and 157 of the Dec. 14 Package, Ms. Marcia Jones (former chief strategy officer) sent an email on March 25, 2020 at 2:34 p.m. with the subject "Update: CTA measures/Mise à jour: mesures prises par l'OTC." That email dealt with the Statement on Vouchers. The content of the email makes it clear that it was intended for consumption by third-parties outside of the Agency; however, the versions of this email that were disclosed only revealed the "To:" and "Cc: fields for the email, which only had names of the Agency employees.

The Order required the Agency to provide the **original** email sent by Ms. Jones, which will contain the recipients list in the "Bcc:" field,¹ yet it was not produced.

¹ We note that Tab 9 of the Dec. 14 Package contains documents from Ms. Jones, but the original copy of this March 25, 2020 email was not included.

2. The letter from Air Transat dated March 22, 2020 (pages 163-165 of the Dec. 14 Package) was sent to Mr. Streiner (the former chairperson of the CTA) and copied to Ms. Jones.

The Order required the Agency to produce **all** of the email responses and/or discussions flowing from this Air Transat letter, yet none were produced.

3. At page 150 of the Dec. 14 Package, there was an email dated March 22, 2020 sent by ACTA to the Agency. The email was labelled as “High” importance and marked for “Follow-up.”

The Order required the Agency to produce the follow-ups and/or responses sent by the Agency to ACTA regarding this March 22, 2020 email, yet none were produced.

4. The discussion between Mr. Streiner, the Deputy Minister of Transport, and an unidentified individual on or before March 23, 2020. This discussion was mentioned in Exhibit B to Vincent Millette’s December 14, 2021 Affidavit.

The Order required the Agency to produce all such discussions, yet none were produced.

5. The discussion(s) and correspondences between Ms. Jones and the Assistant Deputy Minister of Transport during the weekend of March 21-22, 2020. This discussion was also mentioned in Exhibit B of Vincent Millette’s December 14, 2021 Affidavit.

The Order required the Agency to produce all such discussions, yet none were produced.

6. At page 136 of the Dec. 14 Package, there was reference to at least three inquiries from the media, and also to numerous inquires at the Agency’s Info inbox and on Twitter on this issue.

The Order required the Agency to produce **all** these inquires and responses to same, yet none were produced.

(c) Meeting Documents

1. At page 34 of the Dec. 14 Package, Mr. Streiner confirmed that Air Transat’s request to issue a statement regarding vouchers would be discussed at the EC call on March 19, 2020 [**March 19 EC Call**].
2. At page 50 of the Dec. 14 Package, Mr. Streiner refers to a “Members’ call tomorrow [March 24, 2020]” to discuss the draft Statement on Vouchers [**March 24 Members’ Call**].

3. At page 67 of the Dec. 14 Package, Mr. Streiner refers to a meeting he had the morning of March 25, 2020 with Ms. Liz Barker, the Agency's Vice-Chair [**March 25 Discussion**].
4. At pages 69-70 of the Dec. 14 Package, Mr. Streiner confirmed that there were daily EC calls that he (and likely Ms. Barker) would participate in [**Daily EC Calls**].
5. At page 38 of the Dec. 14 Package, Mr. Streiner refers to having had discussions with "other federal players" before March 22, 2020 on the topic of issuing the Statement on Vouchers [**Other Federal Players Discussions**].

The Order required the Agency to produce all documents related to the March 19 EC Call, the March 24 Members' Call, the March 25 Discussion, the Daily EC Calls, and the Other Federal Players Discussions, yet none were produced nor was any claim of privilege put forward, and the time to do so has expired.

III. The Contumacious Conduct is Unacceptable and Must Stop

While omission of documents in the Dec. 14 Package may have initially been inadvertent, this is clearly no longer the case. The Agency's continued refusal to comply with the Order amounts to contumacious conduct toward the Court's authority, which is unacceptable and must stop.

We request that as the Agency's top executive officers, you bring the Agency into compliance with the Order, and direct Agency members and staff under your supervision and/or control to fully cooperate and comply with paragraph 3 of the Order and have all documents produced forthwith by no later than **Friday, January 7, 2022 at 17:00 Eastern Time**.

Yours very truly,

Dr. Gábor Lukács
President

Enclosed: Order of Gleason, J.A., dated October 15, 2021

Cc: Mr. Sandy Graham, counsel for the Respondent, Attorney General of Canada
(Sandy.Graham@justice.gc.ca)

Mr. Lorne Ptack, counsel for the Respondent, Attorney General of Canada
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Ms. Barbara Cuber, counsel for the Intervener, Canadian Transportation Agency
(Barbara.Cuber@otc-cta.gc.ca)

Mr. Simon Lin, counsel for the Applicant, Air Passenger Rights
(simonlin@evolinklaw.com)

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;

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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

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- 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*;

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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.