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January 19, 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 at the Registry's earliest convenience. This is a response to the letter from the Respondent, the Attorney General of Canada, on the evening of January 18, 2022 (the "**Letter**").

The Letter is an attempt to summarily disrupt the Applicant's motion filed on January 17, 2022 seeking to enforce this Court's Order dated October 15, 2021 ("**Order**"). For the past month, the Applicant has been requesting the Canadian Transportation Agency (**CTA**) to comply with the Order to no avail, as indicated in the motion. The Applicant had no other option but to file the motion as a last resort to ensure that the Order is respected and all the documents disclosed.

As noted in our January 17, 2022 motion, the situation has now become serious. The evidence shows that twenty one (21) sets of documents covered by the Order were intentionally not disclosed. At least one document appears to have been tampered with (see para. 46 of the written representations). Despite numerous requests, the CTA proffered no viable explanation.

Defiance of a court order is a serious substantive matter that must be dealt with openly and formally, and not a mere procedural issue as the Respondent suggests. The Court's orders must be respected by everyone, including the CTA, and the rule of law must be upheld. The Applicant's motion already proposes a path for the CTA to swiftly comply with the Order, without the need to face a contempt of court trial (paras. 87-94 of the written representations).

The Letter also omitted the mention that the Order and the accompanying Reasons for Order already set out the procedures with respect to items 1 and 2, and that the Applicant has already addressed items 3 and 4 in our December 30, 2021 and January 6, 2022 letters to the Court, which are enclosed herein for the Court's ease of reference.

1. The Respondent's December 14, 2021 informal motion for extension of time is governed by paragraph 30 of the Reasons for Order, and has been perfected. The Applicant responded to that motion on December 16, 2021 (enclosed), and the Respondent had not filed any reply. The motion to extend time is **ready to be decided**.

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2. The Respond's December 14, 2021 informal motion to assert privilege (mislabelled in the Letter) is **governed by paragraphs 5-8 of the Order**. Pursuant to paragraph 7 of the Order, the Applicant will be filing its response by January 31, 2022, as also indicated in our January 17, 2022 letter.

3. The CTA's December 24, 2021 letter has been addressed in the Applicant's December 30, 2021 letter, and **requires no further steps**.

4. The Respondent's January 6, 2022 letter, requesting case management, has been addressed in the Applicant's January 6, 2022 letter. It would defeat common sense to **hold a CMC on whether to hold a CMC**.

5. The Applicant's January 17, 2022 motion is governed by the *Federal Courts Rules*, and in particular Rules 365 and 369.2 (as recently amended) and 466-467. There are **no outstanding procedural matters** with respect to this motion either.

In short, case management is not a forum to relitigate orders that have not been appealed, and would not be appropriate in the present case. If the Respondent or the CTA were to seek an extension to respond to the motion, the Applicant is prepared to extend the courtesy of an extension pursuant to Rule 7. However, the January 17, 2022 motion must continue its ordinary course and be decided on the merits.

Lastly, the Letter mislabels the Respondent's December 14, 2021 motion as a "motion to maintain redactions on irrelevant or privileged portions of documents". The Order only permitted the Respondent to bring an informal motion for documents it seeks to claim privilege, not relevance. The Respondent's motion itself makes only claims for privilege, and did not mention redacting "irrelevant" documents whatsoever. It is unclear why the Respondent has now introduced "relevance" into the picture. The issue of relevance has already been decided in the Order and the Reasons for Order on October 15, 2021, and the doctrine of *res judicata* precludes the Respondent from relitigating the issue.

Should the Court have any directions, we would be pleased to comply.

Yours truly,
EVOLINK LAW GROUP
Simon Lin
SIMON LIN, Barrister & Solicitor

Encls: (1) Applicant's Letter on December 16, 2021 in response to the Respondent's time extension motion; **(2)** December 30, 2021 letter to the Court; and **(3)** January 6, 2022 letter to the Court.

Cc: Mr. Sandy Graham and Mr. Lorne Ptack, counsel for the Attorney General of Canada, and Ms. Barbara Cuber, counsel for the Canadian Transportation Agency.

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December 16, 2021 **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. The Attorney General of Canada (A-102-20)

We are counsel for the Applicant. Please bring this letter to Gleason J.A.'s attention as soon as practicable so the parties' submissions on the requested extension of time will not be rendered moot. On October 15, 2021, Gleason J.A. granted the Applicant's Rule 318 motion [**Rule 318 Ruling**].[1] Her Ladyship is seized with the motion(s) for ruling on privilege for documents that were ordered to be produced.

On December 14, 2021, the Respondent served two motions: (1) a motion for a 45-day extension to consult further on two emails, consisting of three pages only [**Extension Motion**]; and (2) a motion for ruling on privilege for two documents [**Privilege Motion**]. The Applicant intends to meet-and-confer for the Privilege Motion and, if necessary, will file its response to the Privilege Motion within the 30-day deadline set by the Court, taking into account the Christmas Recess.

This letter is in response to the Extension Motion. Prior to the Respondent serving the Extension Motion, the Applicant already advised the Respondent that the Applicant will consent to an extension of five days, to December 20, 2021. However, the Respondent has not responded.

The Three Pages of Emails in the Extension Motion

The Respondent's Extension Motion seeks an additional 45 days to conduct unspecified consultations on two emails: (1) a one-page email dated March 18, 2020 [**Exhibit A**]; and (2) a two-page email dated March 23, 2020 [**Exhibit B**]. Both Exhibit A and Exhibit B are not recently sourced documents gathered during the sixty-day period after the Rule 18 Ruling. Rather, both the Canadian Transportation Agency [**Agency**] and Transport Canada were fully aware of the existence of Exhibit A and Exhibit B, and that their disclosure was requested in various forums.

Mr. Millette's affidavit attempts to give the (mis)impression that those emails recently surfaced on December 9, 2021. However, in reality, in 2020 both Exhibit A and Exhibit B were earmarked for

[1] *Air Passenger Rights v. Canada (Attorney General)*, 2021 FCA 201 at para. 29.

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release under the *Access to Information Act*.[2] Exhibit B was explicitly raised in this judicial review on May 14, 2021.[3] Any consultation could have, and should have, been done before these exhibits were released under the *Access to Information Act* in 2020, or to a Parliamentary Committee in May 2021. Mr. Millette's affidavit is totally silent on what the Agency and/or Transport Canada have done with these emails since 2020.

The Four Criteria for Extension of Time Are Not Met

In the Rule 318 Ruling at para. 30, at the time the Court fixed the 60-day time limit, the Court granted leave for the AGC to seek an extension of time on two possible grounds: (1) if the time provided is inadequate by reason of complexities flowing from the COVID-19 pandemic; or (2) the number of documents involved. It appears the Extension Motion is not based on either of these grounds. In any event, the Agency's disclosure package on December 14, 2021 consisted of 161 pages, suggesting that there is no issue arising from the volume of documents they had to prepare.

Firstly, the Respondent cannot point to any previous submission where they expressed any intent, let alone a continued intent, to seek consultation on any documents before production. Indeed, when a redacted version of Exhibit B was brought before the Court,[4] the Agency and the AGC had not indicated that any consultations were required, or that any privilege would be asserted.

Secondly, regarding the underlying merits, the Respondent has not identified any grounds that it can reasonably rely upon to resist production of those emails. The Respondent merely requests more time to conduct consultations, without providing any factual or legal basis for asserting privilege. On the face of those emails, there is no privilege that could be reasonably asserted.

Thirdly, the Respondent's assertion that there is no prejudice from their delay is unfounded. Judicial reviews are to be heard expeditiously without delay.[5] The Applicant has been proceeding with due dispatch. This judicial review was commenced on April 9, 2020, and the Agency has been resisting disclosure of all documents since August 2020.[6] The Applicant promptly served its Rule 318 motion on January 4, 2021, immediately after the Supreme Court of Canada refused leave to appeal for the Applicant's interlocutory injunctions motion.[7]

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[2] Affidavit of Vincent Millette at Exhibits A and B, "**Categories:**" heading near the top of the emails; Affidavit of Dr. Gabor Lukacs sworn on May 14, 2021 (Doc. 91) [**Lukacs Affidavit**] at paras. 2-3 and Exhibit A.
[3] Lukacs Affidavit at Exhibit B.
[4] Letter from Agency to the Court on May 14, 2021; Letter from AGC to the Court on July 5, 2021.
[5] *Federal Courts Act*, s. 18.4(1); *Association des crabiers acadiens Inc. v. Canada (A.G.)*, 2009 FCA 357 at paras. 30-31; see also *Canada (Attorney General) v. TeleZone Inc.*, 2010 SCC 62 at para. 26.
[6] Letter from Agency to the Court on August 20, 2020.
[7] *Air Passengers Rights v. Canada (Transportation Agency)*, 2020 FCA 92, leave to appeal refused (2020 CanLii 102983).

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Finally, there is no evidence explaining why the AGC and the Agency failed to complete their consultation on three pages within the 60-day time limit. The only evidence is Mr. Millette claiming that he was contacted by the Agency on December 9, 2021, but that affidavit omits the important fact that those emails were already on the radar long beforehand and earmarked for disclosure in 2020 under the *Access to Information Act* and to a Parliamentary committee in May 2021.

Conclusion

The Applicant submits that there is no basis to permit an extension of time when the Respondent, and the Agency, had already been provided a generous amount of time to prepare the documents for production, which consisted of 161 pages only. The extension of time requested herein is not within the two narrow grounds identified by the Court in the Rule 318 Ruling. The Respondent has also not indicated what grounds of privilege, if any, could be reasonably asserted for the emails in question. There is simply no air of reality that privilege could be asserted for those emails.

The Applicant respectfully requests that the Respondent's motion for an extension of time be dismissed, and that the Agency be ordered to produce unredacted copies of Exhibit A and Exhibit B forthwith.

Alternatively, the Applicant submits that a 45-day extension is excessive and an extension to December 20, 2021 is more than sufficient. The Applicant further submits that any extension of time should be preemptory on the Respondent.

Should the Court have any directions, we would be pleased to comply.

Yours truly,
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December 30, 2021 **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. The Attorney General of Canada (A-102-20)

We are counsel for the Applicant. We are writing to object to the December 24, 2021 letter of the Canadian Transportation Agency [**CTA**] seeking informal directions from the Court on a matter that must be dealt with by way of a formal motion on the basis of evidence. Kindly please bring this letter to the attention of Gleason J.A., who is seized with this file.

Gleason J.A. issued an Order on October 15, 2021 requiring the CTA to produce certain documents within 60 days [**Order**]. Regrettably, the CTA has not fully complied with the Order, and continues to refuse to produce certain documents even after the Applicant pointed out the obvious deficiencies on December 17, 2021.

The sole outstanding question is the CTA's non-compliance with this Court's clear and unambiguous Order, which has become final since it was not appealed to the Supreme Court of Canada and the time to do so has expired. Non-compliance with a Court Order has to be dealt with formally by way of a motion and on the basis of evidence. The CTA should not be permitted to circumvent the *Federal Courts Rules* by seeking informal directions by way of a letter.

The CTA's letter is also an improper attempt to relitigate the merits of a final order and to seek legal advice from the Court, which is not the Court's role (*Olumide v. Canada*, 2016 FCA 287 at paras. 14-17). The CTA misinformed the Court that the Applicant requested production of additional documents beyond the Court's Order. That is incorrect. The Applicant is only seeking the CTA's full compliance with the Order and production of documents prescribed in the Order.

The Applicant will continue to secure the CTA's compliance with the Order. However, should the Court's assistance be necessary, the Applicant will, as a last resort, bring a formal motion for contempt of court and/or other available remedies.

Yours truly,
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January 6, 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. Attorney General of Canada and the Canadian Transportation Agency (A-102-20)

We write to object to the Respondent's letter from today and their request for case management. The Respondent was fully aware that the Applicant has not consented to case management. Case management requests should not be made by way of a letter when it is not by consent. Rather, the Respondent should have brought their request by way of a motion, with evidence.

The Applicant notes that the Respondent's request for case management at this juncture is extremely peculiar. By Order dated October 15, 2021, Gleason JA is already seized with the next procedural steps of this Application.[1] Gleason JA has also stipulated the timing for the steps after the procedural steps are concluded.[2] In light of Gleason JA's order, there is evidently no need for case management. The Respondent's request appears to be a form of judge shopping or, to echo the letter from the Canadian Transportation Agency (**CTA**) on December 24, 2021, to open a forum to indirectly relitigate Gleason JA's order on October 15, 2021.

On December 30, 2021, the Applicant responded to the CTA's letter of December 24, 2021 and continues to take steps to seek the CTA's compliance with the Court's Order. Justice and the rule of law demand that any defiance of a court order should be dealt with openly and formally by way of a motion, not informally as the CTA and the Respondent propose.

Should the Court see fit to designate this Application for case management, the Applicant submits that Gleason JA should be formally designated as the case management judge. Her Ladyship has presided over numerous motions for this Application, issued numerous directions for this case, and has been *de facto* case managing this matter for the past year.

Yours truly,
EVOLINK LAW GROUP
Simon Lin
SIMON LIN, Barrister & Solicitor

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[1] *Air Passenger Rights v. Canada (AG)*, 2021 FCA 201 at paras. 29-31; Order at paras. 8-10.
[2] *Ibid.*