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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,



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