

**FEDERAL COURT OF APPEAL**

BETWEEN:

**AIR PASSENGER RIGHTS**

Applicant

– and –

**ATTORNEY GENERAL OF CANADA**

Respondent

– and –

**CANADIAN TRANSPORTATION AGENCY**

Intervener

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**MOTION RECORD OF THE RESPONDING PARTY,  
AIR PASSENGER RIGHTS**

**Agency's Motion for Relief from Production**

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## Table of Contents

<b>1. Affidavit of Dr. Gábor Lukács, affirmed on May 15, 2022</b>	<b>1</b>
A. The Applicant: Air Passenger Rights. . . . .	1
B. Background . . . . .	3
C. Document Produced in Response to Gleason, J.A.’s October 15, 2021 Order . . . . .	4
D. Document Produced in Response to Gleason, J.A.’s April 11, 2022 Order	6
E. The CTA’s Continued Failure to Comply with the October Order and April Order. . . . .	11
F. Chronology of Documents for the Statement on Vouchers for this Motion	15
G. Waiver of Privilege for One of the Privilege Motion Documents . . . . .	20
H. Miscellaneous . . . . .	21
Exhibit “A”: Air Passenger Rights’s Articles of Incorporation . . . . .	24
Exhibit “B”: “Statement on Vouchers” (Mar. 25, 2020). . . . .	31
Exhibit “C”: CTA’s “Organization and mandate” (Mar. 30, 2020). . . . .	33
Exhibit “D”: Code of Conduct for Members of the Agency . . . . .	42
Exhibit “E”: Minutes of Members’ Meeting (Sep. 20, 2011). . . . .	49
Exhibit “F”: March 26, 2020 Members’ Committee Meeting Agenda . . . . .	53
Exhibit “G”: Transat Letter to the CTA Chairperson (Mar. 22, 2020) . . . . .	55
Exhibit “H”: CTA Chairperson’s Email (Mar. 18, 2020 at 22:14) . . . . .	59
Exhibit “I”: Transport Canada Encrypted Email (Mar. 18, 2020). . . . .	62
Exhibit “J”: Transport Canada and CTA Correspondence (Mar. 22-24, 2020) . . . . .	64
Exhibit “K”: Ms. Cuber’s Letter to Mr. Lin (Dec. 24, 2021) . . . . .	68
Exhibit “L”: CTA Cover Email for Documents (Apr. 20, 2022) . . . . .	72
Exhibit “M”: Mr. Allan Matte’s Letter (Apr. 20, 2022) . . . . .	75
Exhibit “N”: CTA Further Disclosures: Appendix B4 (Apr. 20, 2022) . . . . .	78
Exhibit “O”: CTA Further Disclosures: Appendix C1 (Apr. 20, 2022) . . . . .	89
Exhibit “P”: CTA Further Disclosures: Appendix C2 (Apr. 20, 2022) . . . . .	143
Exhibit “Q”: CTA Further Disclosures: Appendix C5 (Apr. 20, 2022) . . . . .	205
Exhibit “R”: CTA Further Disclosures: Appendix C6 (Apr. 20, 2022) . . . . .	220
Exhibit “S”: CTA production: “Carrier Asks 24 March 2020” . . . . .	277
Exhibit “T”: AGC’s Letter to the Court (Apr. 21, 2022) . . . . .	279
Exhibit “U”: Alysia Lau MS One Note – EC Meeting (Mar. 19, 2020). . . . .	282
Exhibit “V”: Alysia Lau MS One Note – EC Meeting (Mar. 20, 2020). . . . .	284
Exhibit “W”: Alysia Lau MS One Note – EC Meeting (Mar. 23, 2020). . . . .	286
Exhibit “X”: “Carrier Asks” (Mar. 24, 2020) . . . . .	288
Exhibit “Y”: Chairperson’s Email to EC (Mar. 23 at 14:19) . . . . .	290
Exhibit “Z”: Transat’s Letter to CTA Screenshot (Mar. 22, 2020). . . . .	293

Exhibit “AA”:	Air Canada’s Letter to CTA Screenshot (Mar. 23, 2020)	295
Exhibit “AB”:	Mr. Lin’s Letter to Ms. Cuber (Apr. 13, 2022)	297
Exhibit “AC”:	Mr. Matte’s Email to Mr. Lin (Apr. 14, 2022)	300
Exhibit “AD”:	Mr. Lin’s Letter to Mr. Matte (Apr. 14, 2022)	306
Exhibit “AE”:	Mr. Lin’s Email to Mr. Matte (Apr. 21, 2022)	309
Exhibit “AF”:	AGC’s Email to Mr. Lin (Apr. 21, 2022)	316
Exhibit “AG”:	Mr. Lin’s Email to AGC and CTA Counsels (Apr. 21, 2022)	323
Exhibit “AH”:	AGC’s Email to Mr. Lin (Apr. 22, 2022)	330
Exhibit “AI”:	Direction to Attend for Ms. Cuber (Apr. 22, 2022)	339
Exhibit “AJ”:	Mr. Lin’s Letter to Mr. Matte (Apr. 22, 2022)	345
Exhibit “AK”:	Mr. Shaar’s Letter to Mr. Lin (Apr. 28, 2022)	349
Exhibit “AL”:	Mr. Lin’s Letter to Mr. Shaar (Apr. 28, 2022)	353
Exhibit “AM”:	Mr. Lin’s Letter to Mr. Matte (Apr. 28, 2022)	356
Exhibit “AN”:	Mr. Shaar’s Letter to the Court (Apr. 28, 2022)	358
Exhibit “AO”:	Mr. Lin’s Letter to the Court (Apr. 28, 2022)	366
Exhibit “AP”:	Mr. Shaar’s Email to Mr. Lin (May 2, 2022)	369
Exhibit “AQ”:	Mr. Lin’s Letter to Mr. Shaar (May 2, 2022)	371
Exhibit “AR”:	Mr. Shaar’s Email to Mr. Lin (May 3, 2022)	373
Exhibit “AS”:	Mr. Lin’s Email to Mr. Shaar (May 3, 2022)	377
Exhibit “AT”:	Certificate of Non-Attendance (May 3, 2022)	381
Exhibit “AU”:	Court Reporter’s Invoice (May 3, 2022)	383
Exhibit “AV”:	CTA’s Written Representations (Feb. 1, 2022)	385
Exhibit “AW”:	Chairperson’s Email to Members (Mar. 22, 2020 at 08:54)	409
Exhibit “AX”:	Chairperson’s Calendar Invite (Mar. 22, 2020)	412
Exhibit “AY”:	Chairperson’s Email to Members (Mar. 22, 2020 at 11:24)	414
Exhibit “AZ”:	Ms. Oates’s Email (Mar. 22, 2020 at 12:55)	417
Exhibit “BA”:	Mr. MacKeigan’s Email (Mar. 22, 2020 at 13:11)	420
Exhibit “BB”:	Ms. Duff’s Email (Mar. 22, 2020 at 13:12)	424
Exhibit “BC”:	Ms. Smith’s and Mr. Dickie’s Emails (Mar. 22, 2020)	427
Exhibit “BD”:	CTA Email Chain (Mar. 22-23, 2022)	430
Exhibit “BE”:	Mr. Lin’s Letter to CTA and AGC (Apr. 21, 2022)	433
Exhibit “BF”:	GEDS Printout (May 13, 2022)	435
<b>2.</b>	<b>Notice of Application (April 9, 2020)</b>	<b>438</b>
<b>3.</b>	<b>Disclosure Order of Gleason, J.A. (October 15, 2021)</b>	<b>453</b>
<b>4.</b>	<b>Reasons of Disclosure Order of Gleason, J.A. (October 15, 2021)</b>	<b>457</b>
<b>5.</b>	<b>Bifurcation Order of Gleason, J.A. (January 26, 2022)</b>	<b>474</b>
<b>6.</b>	<b>Specific Documents Order of Gleason, J.A. (April 11, 2022)</b>	<b>477</b>

<b>7.</b>	<b>Reasons of Specific Documents Order of Gleason, J.A. (April 11, 2022)</b>	480
<b>8.</b>	<b>Direction of Mactavish, J.A. (May 2, 2022)</b>	505
<b>9.</b>	<b>Written Representations of the Responding Party</b>	506
Part I	Overview and Statement of Facts . . . . .	506
	A. CTA’s Failure to Comply with the October 15, 2021 Order of Gleason, J.A. . . . .	510
	B. Gleason, J.A.’s Order for Specific Documents (April 11, 2022)	512
	C. The CTA’s Affiant’s Failure to Attend the Scheduled Cross-Examination. . . . .	514
	D. The CTA’s Rule 94 Motion for the Direction to Attend . . .	516
Part II	Statement of the Points in Issue. . . . .	517
Part III	Statement of Submissions . . . . .	517
	A. Relevance of the Cross-Examination Materials. . . . .	519
	B. The CTA’s Bald Assertions of Privilege and “Non-Existence”	525
	C. The CTA Does Not Come to Court with Clean Hands . . . .	528
	D. Directions on Delivery of the Cross-Examination Materials.	528
	E. Costs Against the CTA, Payable Forthwith . . . . .	529
Part IV	Order Sought . . . . .	530
Part V	List of Authorities . . . . .	531
<b>10.</b>	<b>Objections Chart</b>	532

**Statutes and Regulations**

<b>11.</b>	<b><i>Federal Courts Rules, SOR/98-106</i></b>	539
	— Rule 83	540
	— Rule 94	541
	— Rule 97	543
	— Rule 363	544
	— Rule 369.2	545
	— Rule 397	546
	— Rule 400	548
	— Rule 401	550

**Case Law**

<b>12.</b>	<b><i>Alaktsang v. Canada (Minister of Citizenship &amp; Immigration), 2006 FC 1168</i></b>	551
	— paragraphs 18-19	554

13.	<i>Bristol-Myers Squibb Co. v. Canada (Attorney General)</i> , 2002 FCT 208	558
	— paragraph 5	559
	— paragraphs 16-17	563
14.	<i>Canadian Coalition for Firearm Rights v. Canada (Attorney General)</i> , 2022 FC 332	565
	— paragraph 19	568
15.	<i>Ermineskin First Nation v. Canada</i> , 2011 FC 1091	571
	— paragraph 45	580
	— paragraphs 46-47	581
	— paragraphs 48-51	582
16.	<i>Farmobile, LLC v. Farmers Edge Inc.</i> , 2021 FC 1427	584
	— paragraphs 31-32	592
17.	<i>Frame v. Riddle</i> , 2018 FCA 204	599
	— paragraph 30	605
18.	<i>GCT Canada Limited Partnership v. Vancouver Fraser Port Authority</i> , Cross-Examination Order (August 25, 2021), No. T-538-19 [ <i>GCT Canada</i> ]	607
	— paragraphs 3-4	608
	— paragraph 6	609
	— paragraphs 10-11	610
	— paragraph 17	611
	— paragraph 20	612
	— paragraphs 22-23	613
	— paragraphs 24 and 26-27	614
	— paragraph 29	615
19.	<i>Granados v. Canada (Citizenship and Immigration)</i> , 2018 FC 400	617
	— paragraph 9	619
20.	<i>Lukács v. Canada Transportation Agency</i> , 2014 FCA 239	623
	— paragraph 8	627
	— paragraphs 9 and 11	628
	— paragraph 13	629
21.	<i>Mohammed v. Canada (Immigration, Refugees and Citizenship)</i> , 2019 FC 193	632
	— paragraph 40	642

22.	<i>Northcott v. Canada (Attorney General)</i> , 2021 FC 289	644
	— paragraphs 51-53	653
23.	<i>Ottawa Athletic Club Inc. v. Athletic Club Group Inc.</i> , 2014 FC 672	655
	— paragraph 138	703
	— paragraph 141	704
24.	<i>Pelletier v. Canada (Privy Council)</i> , 2004 FCA 277	754
	— paragraph 13	756
25.	<i>Right to Life Association of Toronto and Area v. Canada (Employment, Workforce and Labour)</i> , 2019 CanLII 9189 (FC)	758
	— paragraphs 72-73	779
26.	<i>Roby v. Canada (Attorney General)</i> , 2013 FCA 251	786
	— paragraph 23	790
	— paragraphs 24-26	791
	— paragraphs 27-29	792
27.	<i>Simpson Strong-Tie Co. v. Peak Innovations Inc.</i> , 2009 FC 392	793
	— paragraph 9	794
28.	<i>ViiV Healthcare Company v. Gilead Sciences Canada, Inc.</i> , 2021 FCA 122	800
	— paragraphs 16-19	803
	— paragraphs 20-23	804

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**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](http://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 “**T**”.
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

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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

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Signature



[Home](#)

## Statement on Vouchers

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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.

[Share this page](#)

**Date modified:**

2020-03-25

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

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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.

**Date modified:**

2019-05-02

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

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Signature



[Home](#)

# Code of Conduct for Members of the Agency

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## 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<sup>1</sup>. 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.

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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.

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

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**Date modified:**  
2014-01-22

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

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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*

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**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]

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Geoffrey C. Hare  
Chair and CEO

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

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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

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>

- 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

Heather Smith

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

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Signature



March 22, 2020

Transmission by e-mail  
[scott.streiner@otc-cta.gc.ca](mailto: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

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Signature

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**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](mailto:George.Petsikas@transat.com)>  
**Date:** 2020-03-18 8:16 PM (GMT-05:00)  
**To:** Marcia Jones <[Marcia.Jones@otc-cta.gc.ca](mailto: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

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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

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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](mailto: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](mailto: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](mailto: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](mailto: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

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Signature



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VIA E-mail: [simonlin@evolinklaw.com](mailto: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**

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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](mailto: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.<sup>i</sup>

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](mailto:barbara.cuber@otc-cta.gc.ca)  
Email: [Servicesjuridiques.LegalServices@otc-cta.gc.ca](mailto:Servicesjuridiques.LegalServices@otc-cta.gc.ca)

c.c.: Air Passenger Rights, Applicant, via email: [lukacs@airpassengerrights.ca](mailto:lukacs@airpassengerrights.ca)

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

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<sup>i</sup> 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](mailto: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](mailto:simonlin@evolinklaw.com)>

## Transfert protégé de l'OTC

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Les fichiers suivants vous ont été envoyés par [Kizzy.Barrett@otc-cta.gc.ca](mailto: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

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

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## CTA Secure Delivery

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[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  
1.28 MB  
2.93 MB  
3.43 MB  
6.91 MB  
3.14 MB

74

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

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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.

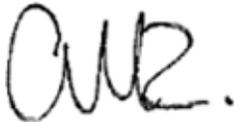
**Additional Production Order – Paragraph 5**

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](mailto:Allan.Matte@otc-cta.gc.ca)

Email: [Servicesjuridiques/LegalServicesOTC/CTA@otc-cta.gc.ca](mailto: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-...](https://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-...](https://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-...](https://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](#)

3



2



**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

6





**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**   
@freckletox0



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 @freckletox0 @FerrisCatWheel et 5 autres personnes

Good afternoon, please refer to this link that will answer your question: [otc-cta.gc.ca/eng/statement-...](https://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...](https://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-...](https://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](mailto:distcb@hotmail.com)  
  
[www.leproducb.com](http://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
<b>All Branch Heads</b>	<ul style="list-style-type: none"> <li>• Branch Heads seeking approval for staffing actions from EC should:               <ul style="list-style-type: none"> <li>○ Consult Mireille and Nadine B. first, and</li> <li>○ Circulate short e-mail including rationale to EC in advance of meeting.</li> </ul> </li> </ul>	-	-

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

**Sébastien Bergeron**

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**De :** Sébastien Bergeron  
**Envoyé :** 18 mars 2020 16:31  
**À :** +\_EC <[EC@otc-cta.gc.ca](mailto: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
<b>Marcia</b>	March 19	<ul style="list-style-type: none"> <li>Call major air carriers (top 5) and air transport associations (NACC, ATAC) to explain Agency's order to suspend air-related proceedings.</li> </ul>
<b>Mireille</b>	March 18	<ul style="list-style-type: none"> <li>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"> <li>Their manager must be present.</li> <li>Staff must maintain 2 metres of distance between themselves and other staff.</li> </ul> </li> </ul>
	March 19	<ul style="list-style-type: none"> <li>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).</li> </ul>
	March 19 (if possible)	<ul style="list-style-type: none"> <li>Prepare list of EC decision points on various aspects of the BCP.</li> </ul>
	March 20	<ul style="list-style-type: none"> <li>Provide list of all staff phone numbers to EC members.</li> </ul>
<b>Tom and Valérie</b>	March 19	<ul style="list-style-type: none"> <li>Provide options to constrain Air Canada exemption from/reduction of notice period related to discontinuance of service.</li> </ul>

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---

**De :** Scott Streiner <[Scott.Streiner@otc-cta.gc.ca](mailto:Scott.Streiner@otc-cta.gc.ca)>

**Envoyé :** 18 mars 2020 15:48

**À :** +\_EC <[EC@otc-cta.gc.ca](mailto: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](mailto: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

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### Sébastien Bergeron

Chef de cabinet | Bureau du président et premier dirigeant  
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**Envoyé :** 18 mars 2020 15:48

**À :** +\_EC <[\\_EC@otc-cta.gc.ca](mailto:_EC@otc-cta.gc.ca)>

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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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<b>Tom and Valérie</b>	-	<ul style="list-style-type: none"> <li><b>Request for exemption from notification period for discontinuance of service – Prepare template draft s. 80 decision incorporating the proposed conditions. No</b></li> </ul>	As soon as feasible

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

**Sébastien Bergeron**

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Canadian Transportation Agency | Government of Canada  
[Sebastien.bergeron@otc-cta.gc.ca](mailto:Sebastien.bergeron@otc-cta.gc.ca) | Tél. 819-712-0827

**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.

EC Member(s) Tasked	EC Decision(s)	Deliverable(s)	Expected Deadline
<b>All Branch Heads</b>	<ul style="list-style-type: none"> <li>Branch Heads seeking approval for staffing actions from EC should:               <ul style="list-style-type: none"> <li>Consult Mireille and Nadine B. first, and</li> </ul> </li> </ul>	-	-

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

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**De :** Sébastien Bergeron  
**Envoyé :** 18 mars 2020 16:31  
**À :** +\_EC <[EC@otc-cta.gc.ca](mailto: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
<b>Marcia</b>	March 19	<ul style="list-style-type: none"> <li>Call major air carriers (top 5) and air transport associations (NACC, ATAC) to explain Agency's order to suspend air-related proceedings.</li> </ul>
<b>Mireille</b>	March 18	<ul style="list-style-type: none"> <li>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"> <li>Their manager must be present.</li> <li>Staff must maintain 2 metres of distance between themselves and other staff.</li> </ul> </li> </ul>
	March 19	<ul style="list-style-type: none"> <li>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).</li> </ul>
	March 19 (if possible)	<ul style="list-style-type: none"> <li>Prepare list of EC decision points on various aspects of the BCP.</li> </ul>
	March 20	<ul style="list-style-type: none"> <li>Provide list of all staff phone numbers to EC members.</li> </ul>

**Tom and Valérie**

March 19

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

**Sébastien Bergeron**

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---

**De :** Scott Streiner <[Scott.Streiner@otc-cta.gc.ca](mailto:Scott.Streiner@otc-cta.gc.ca)>**Envoyé :** 18 mars 2020 15:48**À :** +\_EC <[\\_EC@otc-cta.gc.ca](mailto:_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

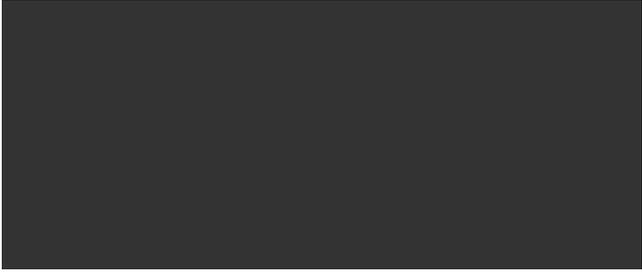
Amanda Hamelin

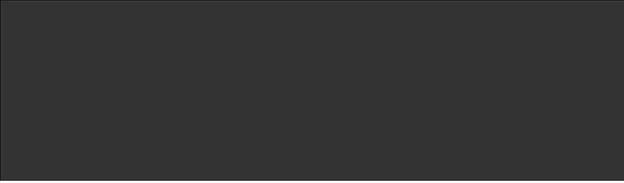
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Subject: FW: EC June 18- Decisions and Follow-ups

[Redacted]

[Redacted]



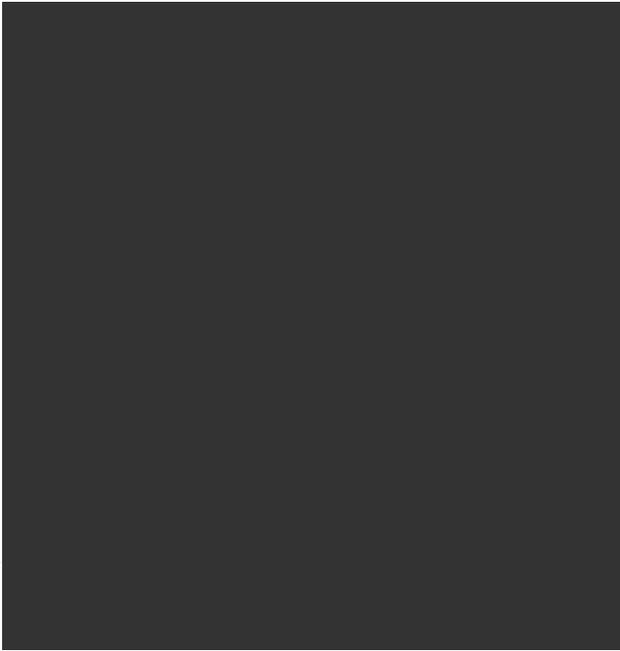


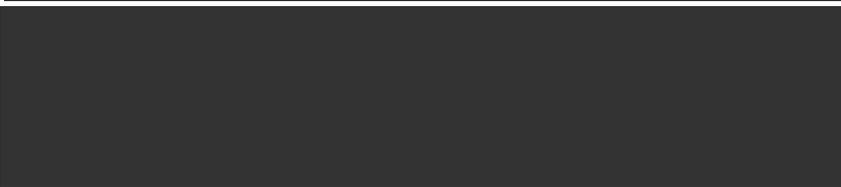






































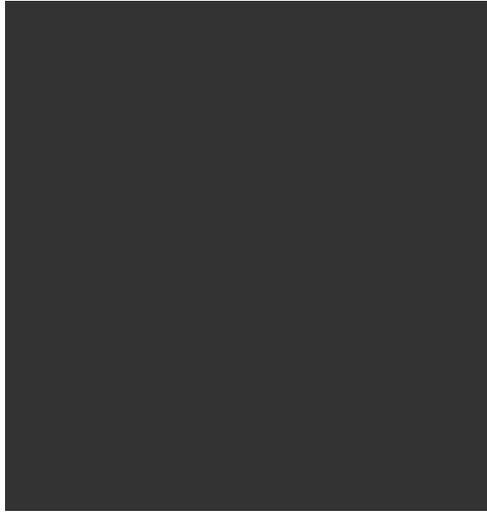
















De : Sébastien Bergeron  
 Envoyé : 23 mars 2020 20:59  
 À : +\_EC <[EC@01c-cla.gc.ca](mailto:EC@01c-cla.gc.ca)>  
 Objet : EC March 23 - Decisions and Follow-ups

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

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](mailto: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
<b>All Branch Heads</b>	-	<ul style="list-style-type: none"> <li>Prepare list of potential projects to assign to staff during teleworking period.</li> </ul>	March 23/24
	-	<ul style="list-style-type: none"> <li>Identify annual publications and reports that the Agency should continue to monitor and work on.</li> <li><b>Marcia</b> – includes Annual Report</li> <li><b>Chair's Office</b> to compile a list → <b>Please send your items to Alysia in advance if possible.</b></li> </ul>	March 25
<b>Chair's Office</b>	-	<ul style="list-style-type: none"> <li>Work with Mireille and Comms to create internal "teleworking haiku" competition for staff on The Hub.</li> </ul>	Next week
<b>Marcia</b>	-	<ul style="list-style-type: none"> <li>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"> <li>The Agency is continuing to deliver its services to the extent possible.</li> <li>Complaints can continue to be filed with the Agency; however, there may be a longer response time.</li> </ul> </li> </ul>	As soon as feasible

		<ul style="list-style-type: none"> <li>o Dispute proceedings involving airlines have been temporarily suspended.</li> <li>• Comms will update the Agency's helplines and other public-facing platforms to reflect the above messaging.</li> </ul>	
<b>Mirreille</b>	-	<ul style="list-style-type: none"> <li>• Daily staff update – include acknowledgment of challenges staff facing working from home e.g. child care</li> </ul>	March 20
	<ul style="list-style-type: none"> <li>• The Agency is not invoking the BCP at this time, but should prepare itself for the possibility.</li> <li>• The BCP will be invoked in extraordinary circumstances (e.g. direction from Central Agencies, unavailability of staff due to sickness).</li> <li>• If the BCP is invoked, the Agency will continue to receive complaints.</li> <li>• 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.</li> </ul>	<ul style="list-style-type: none"> <li>• 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.</li> </ul>	March 20
	-	<ul style="list-style-type: none"> <li>• Update Committee on call with TBS with respect to fiscal year-end contracts.</li> </ul>	March 23/24
<b>Valérie</b>	-	<ul style="list-style-type: none"> <li>• Section 64 of CTA – Examine whether a temporary order can be issued under this provision.</li> </ul>	March 23
	-	<ul style="list-style-type: none"> <li>• Prepare options regarding approaches to VRCPI in context of COVID-19 and possible BCP situation.</li> </ul>	Next week

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De : Sébastien Bergeron  
 Envoyé : 20 mars 2020 12:45  
 A : « EC <[EC@otc-cta.gc.ca](mailto: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"> <li>Branch Heads seeking approval for staffing actions from EC should:                             <ul style="list-style-type: none"> <li>Consult Mireille and Nadine B. first, and</li> <li>Circulate short e-mail including rationale to EC in advance of meeting.</li> </ul> </li> </ul>	-	-
Mireille	-	<ul style="list-style-type: none"> <li>BCP - Present comms strategy and proposal with respect to non-critical services.</li> </ul>	March 20
	<ul style="list-style-type: none"> <li>Staff should continue teleworking until further notice.</li> </ul>	<ul style="list-style-type: none"> <li>Include direction in the daily update that all staff should continue teleworking until further notice.</li> </ul>	March 19
	-	<ul style="list-style-type: none"> <li>Reach out to TBS on specific concerns requiring flexibility from TBS policies.</li> </ul>	As soon as feasible
Tom and Valérie	-	<ul style="list-style-type: none"> <li>Request for exemption from notification period for discontinuance of services – 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.</li> </ul>	As soon as feasible
Valérie	-	<ul style="list-style-type: none"> <li>Prepare options for Scott, Liz and Doug with respect to filings received for stayed cases.</li> </ul>	As soon as feasible
	-	<ul style="list-style-type: none"> <li>BCP - Examine whether the Act already allows vessels to operate without coastal trade licences during emergency situations.</li> </ul>	March 20

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De : Sébastien Bergeron  
 Envoyé : 19 mars 2020 15:37  
 À : « EC <[EC@otc-cta.gc.ca](mailto:EC@otc-cta.gc.ca)> »  
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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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Mireille	-	<ul style="list-style-type: none"> <li>BCP - Present comms strategy and proposal with respect to non-critical services.</li> </ul>	March 20
	<ul style="list-style-type: none"> <li>Staff should continue teleworking until further notice.</li> </ul>	<ul style="list-style-type: none"> <li>Include direction in the daily update that all staff should continue teleworking until further notice.</li> </ul>	March 19
	-	<ul style="list-style-type: none"> <li>Reach out to TBS on specific concerns requiring flexibility from TBS policies.</li> </ul>	As soon as feasible
Tom and Valérie	<ul style="list-style-type: none"> <li>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"> <li>Air carrier must identify routes that will be discontinued.</li> <li>Notification period of 2 weeks.</li> <li>Exemption will only apply during "crisis" period related to COVID-19 pandemic.</li> <li>Discontinuance of service is not permitted in remote communities where no other transportation service is available.</li> </ul> </li> </ul>	<ul style="list-style-type: none"> <li>Prepare draft s. 80 decision with the proposed conditions.</li> </ul>	As soon as feasible
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**De :** Sébastien Bergeron  
**Envoyé :** 18 mars 2020 16:31  
**A :** « EC » <[EC@otc-cta.gc.ca](mailto: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
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<b>Mireille</b>	March 18	<ul style="list-style-type: none"> <li>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"> <li>Their manager must be present.</li> <li>Staff must maintain 2 metres of distance between themselves and other staff.</li> </ul> </li> </ul>
	March 19	<ul style="list-style-type: none"> <li>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).</li> </ul>
	March 19 (if possible)	<ul style="list-style-type: none"> <li>Prepare list of EC decision points on various aspects of the BCP.</li> </ul>
	March 20	<ul style="list-style-type: none"> <li>Provide list of all staff phone numbers to EC members.</li> </ul>
<b>Tom and Valérie</b>	March 19	<ul style="list-style-type: none"> <li>Provide options to constrain Air Canada exemption from/reduction of notice period related to discontinuance of service.</li> </ul>

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**De :** Scott Streiner <[Scott.Streiner@otc-cta.gc.ca](mailto: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](mailto: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](mailto:scottstreiner@otc-cta.gc.ca) - Tél. : 819-997-9233 - ATS/TTY: 1-800-669-5575

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

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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**

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**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"> <li>Identify annual publications and reports that the Agency should continue to monitor and work on.</li> </ul>	
	-	<ul style="list-style-type: none"> <li><b>Marcia</b> – includes Annual Report</li> </ul>	March 25
		<ul style="list-style-type: none"> <li><b>Chair's Office</b> to compile a list → <i>Please send your items to Alysia in advance if possible.</i></li> </ul>	
<b>Chair's Office</b>	-	<ul style="list-style-type: none"> <li>Work with Mireille and Comms to create internal "teleworking haiku" competition for staff on The Hub.</li> </ul>	Next week
<b>Marcia</b>		<ul style="list-style-type: none"> <li>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"> <li>The Agency is continuing to deliver its services to the extent possible.</li> <li>Complaints can continue to be filed with the Agency; however, there may be a longer response time.</li> <li>Dispute proceedings involving airlines have been temporarily suspended.</li> </ul> </li> <li>Comms will update the Agency's helplines and other public-facing platforms to reflect the above messaging.</li> </ul>	As soon as feasible
<b>Mireille</b>	-	<ul style="list-style-type: none"> <li>Daily staff update – Include acknowledgment of challenges staff facing working from home e.g. child care</li> </ul>	March 20
		<ul style="list-style-type: none"> <li>The Agency is not invoking the BCP at this time, but should prepare itself for the possibility.</li> <li>The BCP will be invoked in extraordinary circumstances (e.g. direction from Central Agencies, unavailability of staff due to sickness).</li> <li>If the BCP is invoked, the Agency will continue to receive complaints.</li> <li>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.</li> </ul>	March 20

	.	• Update Committee on call with TBS with respect to fiscal year-end contracts.	March 23/24
<b>Valérie</b>	-	• 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](mailto: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](mailto: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](mailto: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
<b>All Branch Heads</b>	<ul style="list-style-type: none"> <li>• Branch Heads seeking approval for staffing actions from EC should:               <ul style="list-style-type: none"> <li>o Consult Mireille and Nadine B. first, and</li> <li>o Circulate short e-mail including rationale to EC in advance of meeting.</li> </ul> </li> </ul>		
<b>Mireille</b>		• 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
<b>Tom and Valérie</b>	-	• 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
<b>Valérie</b>	-	• 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**

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**De :** Sébastien Bergeron  
**Envoyé :** 19 mars 2020 15:37  
**À :** +\_EC <[EC@otc-cta.gc.ca](mailto: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
<b>All Branch Heads</b>	• 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.

<b>Mireille</b>	-	• 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
<b>Tom and Valérie</b>	• 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
<b>Valérie</b>	-	• Prepare options for Scott, Liz and Doug with respect to filings received for stayed cases.	As soon as feasible
<b>Valérie</b>	-	• 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](mailto: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
<b>Marcia</b>	March 19	<ul style="list-style-type: none"> <li>• Call major air carriers (top 5) and air transport associations (NACC, ATAC) to explain Agency's order to suspend air-related proceedings.</li> </ul>
<b>Mireille</b>	March 18	<ul style="list-style-type: none"> <li>• 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"> <li>o Their manager must be present.</li> <li>o Staff must maintain 2 metres of distance between themselves and other staff.</li> </ul> </li> </ul>
	March 19	<ul style="list-style-type: none"> <li>• 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).</li> </ul>
	March 19 (if possible)	<ul style="list-style-type: none"> <li>• Prepare list of EC decision points on various aspects of the BCP.</li> </ul>
	March 20	<ul style="list-style-type: none"> <li>• Provide list of all staff phone numbers to EC members.</li> </ul>
<b>Tom and Valérie</b>	March 19	<ul style="list-style-type: none"> <li>• Provide options to constrain Air Canada exemption from/reduction of notice period related to discontinuance of service.</li> </ul>

**Sébastien Bergeron**

Chef de cabinet | Bureau du président et premier dirigeant

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**De :** Scott Streiner <[Scott.Streiner@otc-cta.gc.ca](mailto:Scott.Streiner@otc-cta.gc.ca)>  
**Envoyé :** 18 mars 2020 15:48  
**À :** +\_EC <[EC@otc-cta.gc.ca](mailto: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 31<sup>st</sup> 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
<b>All Branch Heads</b>	-	<ul style="list-style-type: none"> <li>Prepare list of potential projects to assign to staff during teleworking period.</li> </ul>	March 23/24
	-	<ul style="list-style-type: none"> <li>Identify annual publications and reports that the Agency should continue to monitor and work on.</li> <li><b>Marcia</b> – includes Annual Report</li> <li><b>Chair's Office</b> to compile a list → <b>Please send your items to Alysia in advance if possible.</b></li> </ul>	March 25
<b>Chair's Office</b>	-	<ul style="list-style-type: none"> <li>Work with Mireille and Comms to create internal "teleworking haiku" competition for staff on The Hub.</li> </ul>	Next week
<b>Marcia</b>	-	<ul style="list-style-type: none"> <li>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"> <li>The Agency is continuing to deliver its services to the extent possible.</li> <li>Complaints can continue to be filed with the Agency; however, there may be a longer response time.</li> </ul> </li> </ul>	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"> <li>○ Dispute proceedings involving airlines have been temporarily suspended.</li> <li>● Comms will update the Agency's helplines and other public-facing platforms to reflect the above messaging.</li> </ul>	
<b>Mireille</b>	-	<ul style="list-style-type: none"> <li>● Daily staff update – Include acknowledgment of challenges staff facing working from home e.g. child care</li> </ul>	March 20
	<ul style="list-style-type: none"> <li>● The Agency is not invoking the BCP at this time, but should prepare itself for the possibility.</li> <li>● The BCP will be invoked in extraordinary circumstances (e.g. direction from Central Agencies, unavailability of staff due to sickness).</li> <li>● If the BCP is invoked, the Agency will continue to receive complaints.</li> <li>● 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.</li> </ul>	<ul style="list-style-type: none"> <li>● 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.</li> </ul>	March 20
	-	<ul style="list-style-type: none"> <li>● Update Committee on call with TBS with respect to fiscal year-end contracts.</li> </ul>	March 23/24
<b>Valérie</b>	-	<ul style="list-style-type: none"> <li>● Section 64 of CTA – Examine whether a temporary order can be issued under this provision.</li> </ul>	March 23
	-	<ul style="list-style-type: none"> <li>● Prepare options regarding approaches to VRCPI in context of COVID-19 and possible BCP situation.</li> </ul>	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](mailto: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](mailto: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
<b>All Branch Heads</b>	<ul style="list-style-type: none"> <li>Branch Heads seeking approval for staffing actions from EC should: <ul style="list-style-type: none"> <li>Consult Mireille and Nadine B. first, and</li> <li>Circulate short e-mail including rationale to EC in advance of meeting.</li> </ul> </li> </ul>	-	-
<b>Mireille</b>	-	<ul style="list-style-type: none"> <li>BCP - Present comms strategy and proposal with respect to non-critical services.</li> </ul>	March 20
	<ul style="list-style-type: none"> <li>Staff should continue teleworking until further notice.</li> </ul>	<ul style="list-style-type: none"> <li>Include direction in the daily update that all staff should continue teleworking until further notice.</li> </ul>	March 19
	-	<ul style="list-style-type: none"> <li>Reach out to TBS on specific concerns requiring flexibility from TBS policies.</li> </ul>	As soon as feasible
<b>Tom and Valérie</b>	-	<ul style="list-style-type: none"> <li><b>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.</b></li> </ul>	As soon as feasible

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

3/7

4/15/22, 11:05 AM

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

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

**Sébastien Bergeron**

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 Office des transports du Canada | Gouvernement du Canada  
[sebastien.bergeron@otc-cta.gc.ca](mailto: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](mailto: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](mailto: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
<b>All Branch Heads</b>	<ul style="list-style-type: none"> <li>Branch Heads seeking approval for staffing actions from EC should:               <ul style="list-style-type: none"> <li>Consult Mireille and Nadine B. first, and</li> <li>Circulate short e-mail including rationale to EC in advance of meeting.</li> </ul> </li> </ul>	-	-
<b>Mireille</b>	-	<ul style="list-style-type: none"> <li>BCP - Present comms strategy and</li> </ul>	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"> <li>Staff should continue teleworking until further notice.</li> </ul>	<ul style="list-style-type: none"> <li>Include direction in the daily update that all staff should continue teleworking until further notice.</li> </ul>	March 19
	-	<ul style="list-style-type: none"> <li>Reach out to TBS on specific concerns requiring flexibility from TBS policies.</li> </ul>	As soon as feasible
<b>Tom and Valérie</b>	<ul style="list-style-type: none"> <li>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"> <li>Air carrier must identify routes that will be discontinued.</li> <li>Notification period of 2 weeks.</li> <li>Exemption will only apply during "crisis" period related to COVID-19 pandemic.</li> <li>Discontinuance of service is not permitted in remote communities where no other transportation service is available.</li> </ul> </li> </ul>	<ul style="list-style-type: none"> <li>Prepare draft s. 80 decision with the proposed conditions.</li> </ul>	As soon as feasible
<b>Valérie</b>	-	<ul style="list-style-type: none"> <li>Prepare options for Scott, Liz and Doug with respect to filings received for stayed cases.</li> </ul>	As soon as feasible
<b>Valérie</b>	-	<ul style="list-style-type: none"> <li>BCP - Examine whether the Act already allows vessels to operate without coastal trade licences during emergency situations.</li> </ul>	March 20

**Sébastien Bergeron**

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4/15/22, 11:05 AM

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

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**De :** Sébastien Bergeron  
**Envoyé :** 18 mars 2020 16:31  
**À :** +\_EC <[\\_EC@otc-cta.gc.ca](mailto:_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
<b>Marcia</b>	March 19	<ul style="list-style-type: none"> <li>Call major air carriers (top 5) and air transport associations (NACC, ATAC) to explain Agency's order to suspend air-related proceedings.</li> </ul>
<b>Mireille</b>	March 18	<ul style="list-style-type: none"> <li>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"> <li>Their manager must be present.</li> <li>Staff must maintain 2 metres of distance between themselves and other staff.</li> </ul> </li> </ul>
	March 19	<ul style="list-style-type: none"> <li>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).</li> </ul>
	March 19 (if possible)	<ul style="list-style-type: none"> <li>Prepare list of EC decision points on various aspects of the BCP.</li> </ul>
	March 20	<ul style="list-style-type: none"> <li>Provide list of all staff phone numbers to EC members.</li> </ul>
<b>Tom and Valérie</b>	March 19	<ul style="list-style-type: none"> <li>Provide options to constrain Air Canada exemption from/reduction of notice period related to discontinuance of service.</li> </ul>

**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

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---

**De :** Scott Streiner <[Scott.Streiner@otc-cta.gc.ca](mailto:Scott.Streiner@otc-cta.gc.ca)>

**Envoyé :** 18 mars 2020 15:48

**À :** +\_EC <[EC@otc-cta.gc.ca](mailto: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](mailto: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]

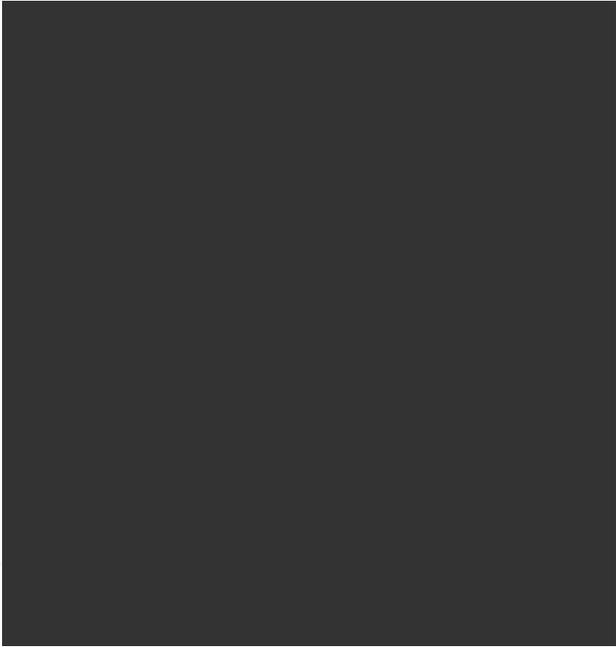
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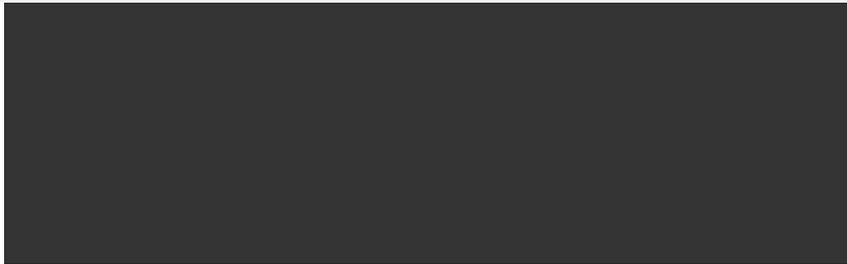


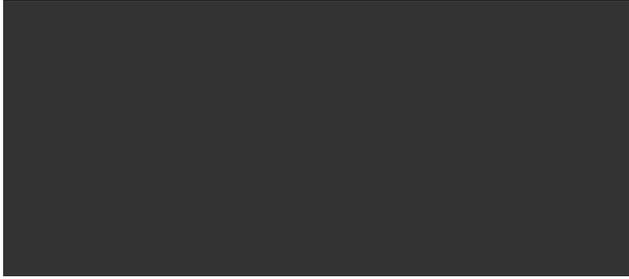


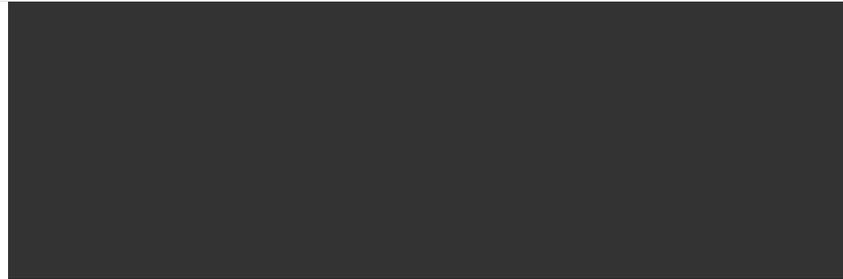




















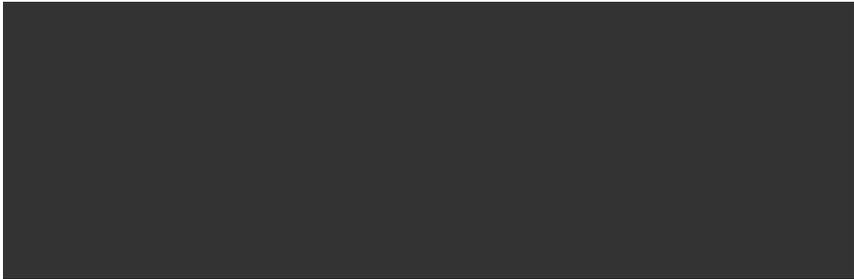












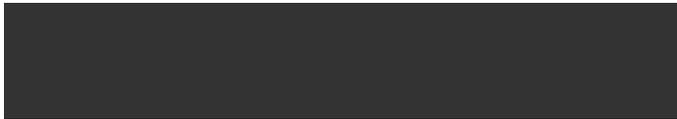
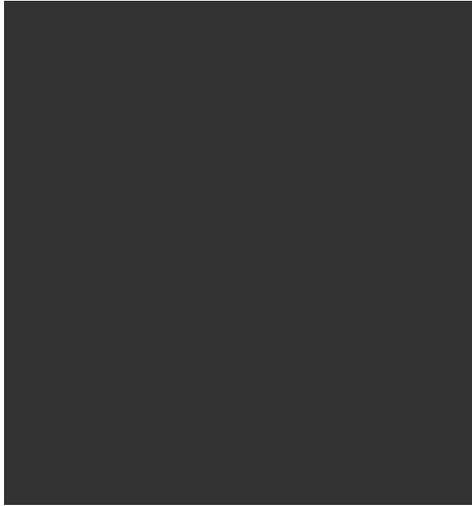
















De : Sébastien Bergeron  
 Envoyé : 23 mars 2020 20:59  
 À : +\_EC <EC@01c-cla.gc.ca>  
 Objet : EC March 23 - Decisions and Follow-ups

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

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](mailto: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
<b>All Branch Heads</b>	-	<ul style="list-style-type: none"> <li>Prepare list of potential projects to assign to staff during teleworking period.</li> </ul>	March 23/24
	-	<ul style="list-style-type: none"> <li>Identify annual publications and reports that the Agency should continue to monitor and work on.</li> <li><b>Marcia</b> – includes Annual Report</li> <li><b>Chair's Office</b> to compile a list → <b>Please send your items to Alysia in advance if possible.</b></li> </ul>	March 25
<b>Chair's Office</b>	-	<ul style="list-style-type: none"> <li>Work with Mireille and Comms to create internal "teleworking haiku" competition for staff on The Hub.</li> </ul>	Next week
<b>Marcia</b>	-	<ul style="list-style-type: none"> <li>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"> <li>The Agency is continuing to deliver its services to the extent possible.</li> <li>Complaints can continue to be filed with the Agency; however, there may be a longer response time.</li> </ul> </li> </ul>	As soon as feasible

		<ul style="list-style-type: none"> <li>o Dispute proceedings involving airlines have been temporarily suspended.</li> <li>• Comms will update the Agency's helplines and other public-facing platforms to reflect the above messaging.</li> </ul>	
<b>Mirreille</b>	-	<ul style="list-style-type: none"> <li>• Daily staff update – include acknowledgment of challenges staff facing working from home e.g. child care</li> </ul>	March 20
	<ul style="list-style-type: none"> <li>• The Agency is not invoking the BCP at this time, but should prepare itself for the possibility.</li> <li>• The BCP will be invoked in extraordinary circumstances (e.g. direction from Central Agencies, unavailability of staff due to sickness).</li> <li>• If the BCP is invoked, the Agency will continue to receive complaints.</li> <li>• 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.</li> </ul>	<ul style="list-style-type: none"> <li>• 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.</li> </ul>	March 20
	-	<ul style="list-style-type: none"> <li>• Update Committee on call with TBS with respect to fiscal year-end contracts.</li> </ul>	March 23/24
<b>Valérie</b>	-	<ul style="list-style-type: none"> <li>• Section 64 of CTA – Examine whether a temporary order can be issued under this provision.</li> </ul>	March 23
	-	<ul style="list-style-type: none"> <li>• Prepare options regarding approaches to VRCPI in context of COVID-19 and possible BCP situation.</li> </ul>	Next week

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De : Sébastien Bergeron  
 Envoyé : 20 mars 2020 12:45  
 À : « EC » <[EC@otc-cta.gc.ca](mailto: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"> <li>Branch Heads seeking approval for staffing actions from EC should:                             <ul style="list-style-type: none"> <li>Consult Mireille and Nadine B. first, and</li> <li>Circulate short e-mail including rationale to EC in advance of meeting.</li> </ul> </li> </ul>	-	-
Mireille	-	<ul style="list-style-type: none"> <li>BCP - Present comms strategy and proposal with respect to non-critical services.</li> </ul>	March 20
	<ul style="list-style-type: none"> <li>Staff should continue teleworking until further notice.</li> </ul>	<ul style="list-style-type: none"> <li>Include direction in the daily update that all staff should continue teleworking until further notice.</li> </ul>	March 19
	-	<ul style="list-style-type: none"> <li>Reach out to TBS on specific concerns requiring flexibility from TBS policies.</li> </ul>	As soon as feasible
Tom and Valérie	-	<ul style="list-style-type: none"> <li>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.</li> </ul>	As soon as feasible
Valérie	-	<ul style="list-style-type: none"> <li>Prepare options for Scott, Liz and Doug with respect to filings received for stayed cases.</li> </ul>	As soon as feasible
	-	<ul style="list-style-type: none"> <li>BCP - Examine whether the Act already allows vessels to operate without coastal trade licences during emergency situations.</li> </ul>	March 20

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

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Mireille	-	<ul style="list-style-type: none"> <li>BCP - Present comms strategy and proposal with respect to non-critical services.</li> </ul>	March 20
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	-	<ul style="list-style-type: none"> <li>Reach out to TBS on specific concerns requiring flexibility from TBS policies.</li> </ul>	As soon as feasible
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Valérie	-	<ul style="list-style-type: none"> <li>Prepare options for Scott, Liz and Doug with respect to filings received for stayed cases.</li> </ul>	As soon as feasible
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**De :** Sébastien Bergeron  
**Envoyé :** 18 mars 2020 16:31  
**A :** « EC » <[EC@otc-cta.gc.ca](mailto:EC@otc-cta.gc.ca)>  
**Objet :** EC - March 18 - follow-up actions

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**De :** Scott Streiner <[Scott.Streiner@otc-cta.gc.ca](mailto:Scott.Streiner@otc-cta.gc.ca)>  
**Envoyé :** 18 mars 2020 15:48

À : \* \_EC < [EC@otc-cta.gc.ca](mailto: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,

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](mailto: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  
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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](mailto: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**

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**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

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Signature

**Amanda Hamelin**

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**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](mailto: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](mailto: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 19<sup>th</sup>, 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 initiative<sup>1</sup> 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.

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<sup>1</sup> 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*<sup>2</sup> 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 days<sup>3</sup>.

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 APPR<sup>4</sup>. 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 days<sup>5</sup>;
- 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.

<sup>2</sup> 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.

<sup>3</sup> As required under section 19(4) APPR.

<sup>4</sup> 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.

<sup>5</sup> 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 initiatives<sup>6</sup> 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 crisis<sup>7</sup>, 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,<sup>8</sup> training,<sup>9</sup> accommodating manual folding*

<sup>6</sup> 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*.

<sup>7</sup> 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

<sup>8</sup> S. 7-8 ATPDR.

<sup>9</sup> S. 15-23 ATPDR.

wheelchairs on board,<sup>10</sup> accessible IFE,<sup>11</sup> written confirmation of services<sup>12</sup>, and retention of medical information or documents.<sup>13</sup>

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.<sup>14</sup>

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

---

<sup>10</sup> S. 43 ATPDR.

<sup>11</sup> S. 39 and 81 ATPDR.

<sup>12</sup> S. 58 ATPDR.

<sup>13</sup> S. 59 ATPDR.

<sup>14</sup> 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
<b>Chair's Office</b>	-	<ul style="list-style-type: none"> <li>Compile list of additional research projects that can be allocated staff during telework period.</li> <li><b><i>*Branch Heads should inform and begin canvassing managers for staff that could work on these projects.</i></b></li> </ul>	March 24
	-	<ul style="list-style-type: none"> <li>Circulate updated Members Committee agenda.</li> </ul>	March 24
	-	<ul style="list-style-type: none"> <li>Coordinate with Social Committee and Comms to set up internal haiku contest.</li> </ul>	This week
<b>Marcia</b>	-	<ul style="list-style-type: none"> <li>Comms to revise public messaging on Agency service delivery during COVID-19 pandemic.</li> </ul>	March 24
	<ul style="list-style-type: none"> <li>ATPDR guidance consultation process will be reviewed after the Agency addresses requests from air carriers regarding regulatory obligations.</li> </ul>	-	-
<b>Mireille</b>	-	<ul style="list-style-type: none"> <li>Examine options to support VPN capacity (e.g. rotating VPN access) during telework period.</li> </ul>	This week

Sébastien Bergeron

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**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"> <li>Prepare list of potential projects to assign to staff during teleworking period.</li> <li>Identify annual publications and reports that the Agency should continue to monitor and work on.</li> </ul>	March 23/24
	-	<ul style="list-style-type: none"> <li><b>Marcia</b> – includes Annual Report</li> <li><b>Chair's Office</b> to compile a list → <b>Please send your items to Alysia in advance if possible.</b></li> </ul>	March 25
Chair's Office	-	<ul style="list-style-type: none"> <li>Work with Mireille and Comms to create internal "teleworking haiku" competition for staff on The Hub.</li> </ul>	Next week
Marcia	-	<ul style="list-style-type: none"> <li>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"> <li>The Agency is continuing to deliver its services to the extent possible.</li> </ul> </li> </ul>	As soon as feasible

		<ul style="list-style-type: none"> <li>o Complaints can continue to be filed with the Agency; however, there may be a longer response time.</li> <li>o Dispute proceedings involving airlines have been temporarily suspended.</li> </ul>	
		<ul style="list-style-type: none"> <li>• Comms will update the Agency's helplines and other public-facing platforms to reflect the above messaging.</li> </ul>	
<b>Mireille</b>	-	<ul style="list-style-type: none"> <li>• Daily staff update – Include acknowledgment of challenges staff facing working from home e.g. child care</li> </ul>	March 20
	<ul style="list-style-type: none"> <li>• The Agency is not invoking the BCP at this time, but should prepare itself for the possibility.</li> <li>• The BCP will be invoked in extraordinary circumstances (e.g. direction from Central Agencies, unavailability of staff due to sickness).</li> <li>• If the BCP is invoked, the Agency will continue to receive complaints.</li> <li>• 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.</li> </ul>	<ul style="list-style-type: none"> <li>• 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.</li> </ul>	March 20
	-	<ul style="list-style-type: none"> <li>• Update Committee on call with TBS with respect to fiscal year-end contracts.</li> </ul>	March 23/24
<b>Valérie</b>	-	<ul style="list-style-type: none"> <li>• Section 64 of CTA – Examine whether a temporary order can be issued under this provision.</li> </ul>	March 23
	-	<ul style="list-style-type: none"> <li>• Prepare options regarding approaches to VRCPi in context of COVID-19 and possible BCP situation.</li> </ul>	Next week

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**De :** Sébastien Bergeron  
**Envoyé :** 20 mars 2020 12:45  
**À :** + EC <[EC@otc-cta.gc.ca](mailto: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"> <li>Branch Heads seeking approval for staffing actions from EC should:                             <ul style="list-style-type: none"> <li>Consult Mireille and Nadine B. first, and</li> <li>Circulate short e-mail including rationale to EC in advance of meeting.</li> </ul> </li> </ul>	-	-
Mireille	-	<ul style="list-style-type: none"> <li>BCP - Present comms strategy and proposal with respect to non-critical services.</li> </ul>	March 20
	<ul style="list-style-type: none"> <li>Staff should continue teleworking until further notice.</li> </ul>	<ul style="list-style-type: none"> <li>Include direction in the daily update that all staff should continue teleworking until further notice.</li> </ul>	March 19
	-	<ul style="list-style-type: none"> <li>Reach out to TBS on specific concerns requiring flexibility from TBS policies.</li> </ul>	As soon as feasible

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

**Sébastien Bergeron**  
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**De :** Sébastien Bergeron  
**Envoyé :** 19 mars 2020 15:37  
**À :** +.EC <[EC@otc-cta.gc.ca](mailto: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
<b>All Branch Heads</b>	<ul style="list-style-type: none"> <li>Branch Heads seeking approval for staffing actions from EC should:</li> </ul>	-	-

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

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**De :** Sébastien Bergeron  
**Envoyé :** 18 mars 2020 16:31  
**À :** \*[EC](mailto:EC@otc-cta.gc.ca) <[EC@otc-cta.gc.ca](mailto: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
<b>Marcia</b>	March 19	<ul style="list-style-type: none"> <li>Call major air carriers (top 5) and air transport associations (NACC, ATAC) to explain Agency's order to suspend air-related proceedings.</li> </ul>
<b>Mireille</b>	March 18	<ul style="list-style-type: none"> <li>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"> <li>Their manager must be present.</li> <li>Staff must maintain 2 metres of distance between themselves and other staff.</li> </ul> </li> </ul>
	March 19	<ul style="list-style-type: none"> <li>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).</li> </ul>
	March 19 (if possible)	<ul style="list-style-type: none"> <li>Prepare list of EC decision points on various aspects of the BCP.</li> </ul>
	March 20	<ul style="list-style-type: none"> <li>Provide list of all staff phone numbers to EC members.</li> </ul>

**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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**Sébastien Bergeron**

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**De :** Scott Streiner <[Scott.Streiner@otc-cta.gc.ca](mailto:Scott.Streiner@otc-cta.gc.ca)>

**Envoyé :** 18 mars 2020 15:48

**À :** +\_EC <[EC@otc-cta.gc.ca](mailto: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](mailto:scott.streiner@otc-cta.gc.ca) - Tél. : 819-997-9233 - ATS/TTY: 1-800-669-5575

Amanda Hamelin

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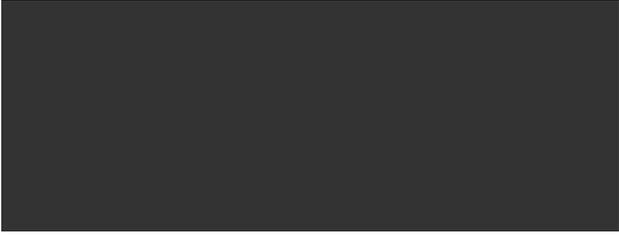
Subject: FW: EC June 18- Decisions and Follow-ups

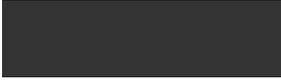
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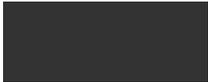




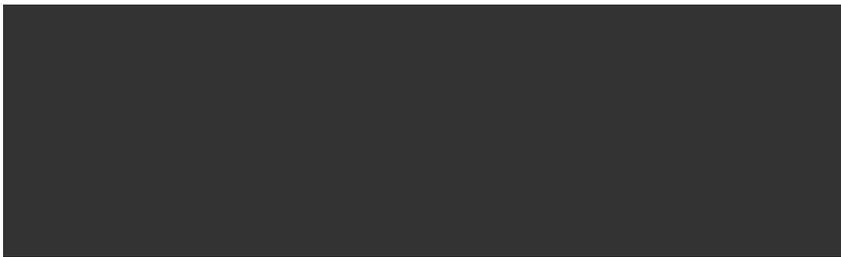


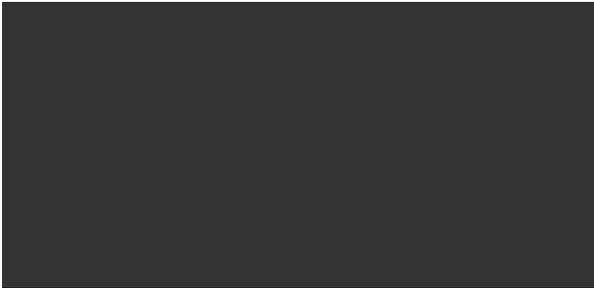




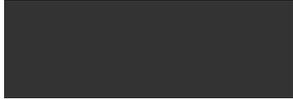
















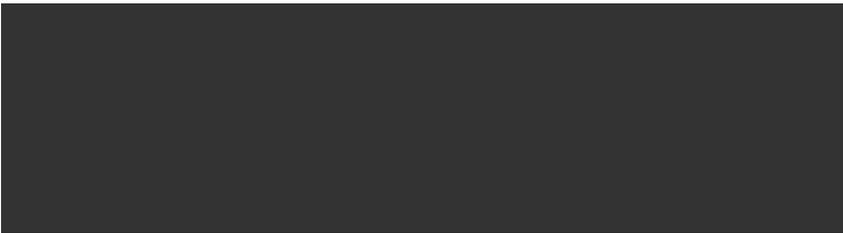














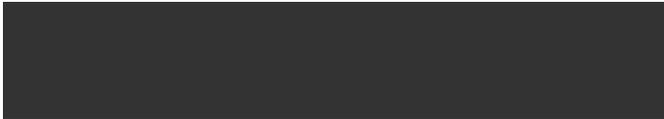
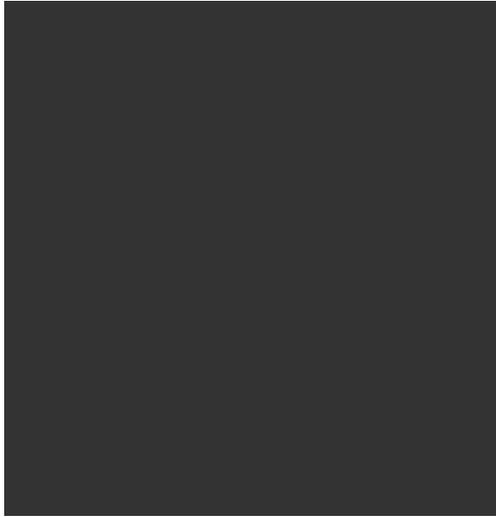


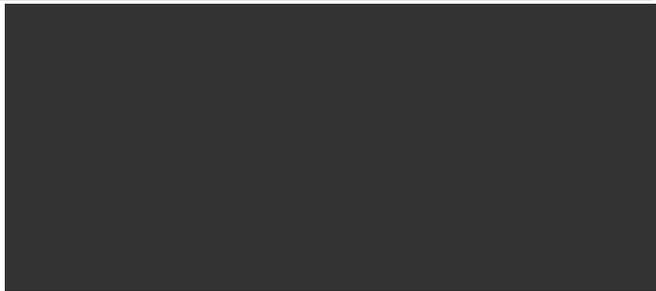














De : Sébastien Bergeron  
 Envoyé : 23 mars 2020 20:59  
 À : +\_EC <[EC@01c-cla.gc.ca](mailto:EC@01c-cla.gc.ca)>  
 Objet : EC March 23 - Decisions and Follow-ups

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

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**  
 Chef de cabinet | Bureau du président et premier dirigeant  
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**De :** Sébastien Bergeron  
**Envoyé :** 20 mars 2020 19:28  
**À :** + EC <[EC@otc-cta.gc.ca](mailto: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
<b>All Branch Heads</b>	-	<ul style="list-style-type: none"> <li>Prepare list of potential projects to assign to staff during teleworking period.</li> </ul>	March 23/24
	-	<ul style="list-style-type: none"> <li>Identify annual publications and reports that the Agency should continue to monitor and work on.</li> <li><b>Marcia</b> – includes Annual Report</li> <li><b>Chair's Office</b> to compile a list → <b>Please send your items to Alysia in advance if possible.</b></li> </ul>	March 25
<b>Chair's Office</b>	-	<ul style="list-style-type: none"> <li>Work with Mireille and Comms to create internal "teleworking haiku" competition for staff on The Hub.</li> </ul>	Next week
<b>Marcia</b>	-	<ul style="list-style-type: none"> <li>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"> <li>The Agency is continuing to deliver its services to the extent possible.</li> <li>Complaints can continue to be filed with the Agency; however, there may be a longer response time.</li> </ul> </li> </ul>	As soon as feasible

		<ul style="list-style-type: none"> <li>o Dispute proceedings involving airlines have been temporarily suspended.</li> <li>• Comms will update the Agency's helplines and other public-facing platforms to reflect the above messaging.</li> </ul>	
<b>Mirreille</b>	-	<ul style="list-style-type: none"> <li>• Daily staff update – include acknowledgment of challenges staff facing working from home e.g. child care</li> </ul>	March 20
	<ul style="list-style-type: none"> <li>• The Agency is not invoking the BCP at this time, but should prepare itself for the possibility.</li> <li>• The BCP will be invoked in extraordinary circumstances (e.g. direction from Central Agencies, unavailability of staff due to sickness).</li> <li>• If the BCP is invoked, the Agency will continue to receive complaints.</li> <li>• 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.</li> </ul>	<ul style="list-style-type: none"> <li>• 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.</li> </ul>	March 20
	-	<ul style="list-style-type: none"> <li>• Update Committee on call with TBS with respect to fiscal year-end contracts.</li> </ul>	March 23/24
<b>Valérie</b>	-	<ul style="list-style-type: none"> <li>• Section 64 of CTA – Examine whether a temporary order can be issued under this provision.</li> </ul>	March 23
	-	<ul style="list-style-type: none"> <li>• Prepare options regarding approaches to VRCPI in context of COVID-19 and possible BCP situation.</li> </ul>	Next week

Sébastien Bergeron  
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De : Sébastien Bergeron  
 Envoyé : 20 mars 2020 12:45  
 À : « EC » <[EC@otc-cta.gc.ca](mailto: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"> <li>Branch Heads seeking approval for staffing actions from EC should:                             <ul style="list-style-type: none"> <li>Consult Mireille and Nadine B. first, and</li> <li>Circulate short e-mail including rationale to EC in advance of meeting.</li> </ul> </li> </ul>	-	-
Mireille	-	<ul style="list-style-type: none"> <li>BCP - Present comms strategy and proposal with respect to non-critical services.</li> </ul>	March 20
	<ul style="list-style-type: none"> <li>Staff should continue teleworking until further notice.</li> </ul>	<ul style="list-style-type: none"> <li>Include direction in the daily update that all staff should continue teleworking until further notice.</li> </ul>	March 19
	-	<ul style="list-style-type: none"> <li>Reach out to TBS on specific concerns requiring flexibility from TBS policies.</li> </ul>	As soon as feasible
Tom and Valérie	-	<ul style="list-style-type: none"> <li>Request for exemption from notification period for discontinuance of services – 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.</li> </ul>	As soon as feasible
Valérie	-	<ul style="list-style-type: none"> <li>Prepare options for Scott, Liz and Doug with respect to filings received for stayed cases.</li> </ul>	As soon as feasible
	-	<ul style="list-style-type: none"> <li>BCP - Examine whether the Act already allows vessels to operate without coastal trade licences during emergency situations.</li> </ul>	March 20

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De : Sébastien Bergeron  
 Envoyé : 19 mars 2020 15:37  
 À : « EC <[EC@otc-cta.gc.ca](mailto: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"> <li>Branch Heads seeking approval for staffing actions from EC should:                             <ul style="list-style-type: none"> <li>Consult Mireille and Nadine B. first, and</li> <li>Circulate short e-mail including rationale to EC in advance of meeting.</li> </ul> </li> </ul>	-	-
Mireille	-	<ul style="list-style-type: none"> <li>BCP - Present comms strategy and proposal with respect to non-critical services.</li> </ul>	March 20
	<ul style="list-style-type: none"> <li>Staff should continue teleworking until further notice.</li> </ul>	<ul style="list-style-type: none"> <li>Include direction in the daily update that all staff should continue teleworking until further notice.</li> </ul>	March 19
	-	<ul style="list-style-type: none"> <li>Reach out to TBS on specific concerns requiring flexibility from TBS policies.</li> </ul>	As soon as feasible
Tom and Valérie	<ul style="list-style-type: none"> <li>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"> <li>Air carrier must identify routes that will be discontinued.</li> <li>Notification period of 2 weeks.</li> <li>Exemption will only apply during "crisis" period related to COVID-19 pandemic.</li> <li>Discontinuance of service is not permitted in remote communities where no other transportation service is available.</li> </ul> </li> </ul>	<ul style="list-style-type: none"> <li>Prepare draft s. 80 decision with the proposed conditions.</li> </ul>	As soon as feasible
Valérie	-	<ul style="list-style-type: none"> <li>Prepare options for Scott, Liz and Doug with respect to filings received for stayed cases.</li> </ul>	As soon as feasible
Valérie	-	<ul style="list-style-type: none"> <li>BCP - Examine whether the Act already allows vessels to operate without coastal trade licences during emergency situations.</li> </ul>	March 20

Sébastien Bergeron  
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**De :** Sébastien Bergeron  
**Envoyé :** 18 mars 2020 16:31  
**A :** « EC » <[EC@otc-cta.gc.ca](mailto: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
<b>Marcia</b>	March 19	<ul style="list-style-type: none"> <li>Call major air carriers (top 5) and air transport associations (NACC, ATAC) to explain Agency's order to suspend air-related proceedings.</li> </ul>
<b>Mireille</b>	March 18	<ul style="list-style-type: none"> <li>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"> <li>Their manager must be present.</li> <li>Staff must maintain 2 metres of distance between themselves and other staff.</li> </ul> </li> </ul>
	March 19	<ul style="list-style-type: none"> <li>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).</li> </ul>
	March 19 (if possible)	<ul style="list-style-type: none"> <li>Prepare list of EC decision points on various aspects of the BCP.</li> </ul>
	March 20	<ul style="list-style-type: none"> <li>Provide list of all staff phone numbers to EC members.</li> </ul>
<b>Tom and Valérie</b>	March 19	<ul style="list-style-type: none"> <li>Provide options to constrain Air Canada exemption from/reduction of notice period related to discontinuance of service.</li> </ul>

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**De :** Scott Streiner <[Scott.Streiner@otc-cta.gc.ca](mailto:Scott.Streiner@otc-cta.gc.ca)>  
**Envoyé :** 18 mars 2020 15:48

À : \* \_EC < [EC@otc-cta.gc.ca](mailto: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](mailto:scottstreiner@otc-cta.gc.ca) - Tél. : 819-997-9233 - ATS/TTY: 1-800-669-5575

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](mailto: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 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.

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](mailto: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 Léo-Pariseau, bureau 600  
Montréal, Québec, Canada H2X 4C2

Téléphone : 514 987-1660  
[www.transat.com](http://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](mailto: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 19<sup>th</sup>, 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 initiative<sup>1</sup> 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.

<sup>1</sup> 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.*

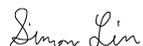
...

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](mailto: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](mailto:simonlin@evolinklaw.com)>  
Cc: Graham, Sandy <[Sandy.Graham@justice.gc.ca](mailto:Sandy.Graham@justice.gc.ca)>, Ptack, Lorne <[Lorne.Ptack@justice.gc.ca](mailto:Lorne.Ptack@justice.gc.ca)>, Services Juridiques / Legal Services (OTC/CTA) <[Servicesjuridiques/LegalServicesOTC/CTA@otc-cta.gc.ca](mailto: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](mailto:allan.matte@otc-cta.gc.ca)

**From:** Simon Lin <[simonlin@evolinklaw.com](mailto:simonlin@evolinklaw.com)>  
**Sent:** Wednesday, April 13, 2022 12:17 PM  
**To:** Barbara Cuber <[Barbara.Cuber@otc-cta.gc.ca](mailto:Barbara.Cuber@otc-cta.gc.ca)>; Services Juridiques / Legal Services (OTC/CTA) <[Servicesjuridiques/LegalServicesOTC/CTA@otc-cta.gc.ca](mailto:Servicesjuridiques/LegalServicesOTC/CTA@otc-cta.gc.ca)>  
**Cc:** Graham, Sandy <[Sandy.Graham@justice.gc.ca](mailto:Sandy.Graham@justice.gc.ca)>; Ptack, Lorne <[Lorne.Ptack@justice.gc.ca](mailto: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](http://www.evolinklaw.com)

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On Mon, Feb 7, 2022 at 12:57 PM Simon Lin <[simonlin@evolinklaw.com](mailto: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

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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](mailto: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](mailto: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](mailto: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](mailto: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;*

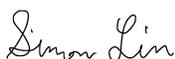
[emphasis added]

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 Group**

237-4388 Still Creek Drive, Burnaby, B.C. V5C 6C6

T: 604-620-2666

F: 888-509-8168

[www.evolinklaw.com](http://www.evolinklaw.com)

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On Thu, Apr 14, 2022 at 3:29 PM Simon Lin <[simonlin@evolinklaw.com](mailto: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](mailto: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](mailto:allan.matte@otc-cta.gc.ca)

**From:** Simon Lin <[simonlin@evolinklaw.com](mailto:simonlin@evolinklaw.com)>

**Sent:** Wednesday, April 13, 2022 12:17 PM

**To:** Barbara Cuber <[Barbara.Cuber@otc-cta.gc.ca](mailto:Barbara.Cuber@otc-cta.gc.ca)>; Services Juridiques / Legal Services (OTC/CTA) <[Servicesjuridiques/LegalServicesOTC/CTA@otc-cta.gc.ca](mailto:Servicesjuridiques/LegalServicesOTC/CTA@otc-cta.gc.ca)>

**Cc:** Graham, Sandy <[Sandy.Graham@justice.gc.ca](mailto:Sandy.Graham@justice.gc.ca)>; Ptack, Lorne <[Lorne.Ptack@justice.gc.ca](mailto: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](mailto: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](mailto: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](mailto: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](mailto: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](mailto: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](mailto: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](mailto:simonlin@evolinklaw.com)>, Allan Matte <[Allan.Matte@otc-cta.gc.ca](mailto:Allan.Matte@otc-cta.gc.ca)>  
Cc: Graham, Sandy <[Sandy.Graham@justice.gc.ca](mailto:Sandy.Graham@justice.gc.ca)>, Services Juridiques / Legal Services (OTC/CTA) <[Servicesjuridiques/LegalServicesOTC/CTA@otc-cta.gc.ca](mailto: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.

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

From: Simon Lin <[simonlin@evolinklaw.com](mailto:simonlin@evolinklaw.com)>  
Date: 2022-04-21 4:57 p.m. (GMT-05:00)  
To: Allan Matte <[Allan.Matte@otc-cta.gc.ca](mailto:Allan.Matte@otc-cta.gc.ca)>  
Cc: "Graham, Sandy" <[Sandy.Graham@justice.gc.ca](mailto:Sandy.Graham@justice.gc.ca)>, "Ptack, Lorne" <[Lorne.Ptack@justice.gc.ca](mailto:Lorne.Ptack@justice.gc.ca)>, "Services Juridiques / Legal Services (OTC/CTA)" <[Servicesjuridiques/LegalServicesOTC/CTA@otc-cta.gc.ca](mailto:Servicesjuridiques/LegalServicesOTC/CTA@otc-cta.gc.ca)>  
Subject: Re: A-102-20 -- Air Passenger Rights v Attorney General of Canada

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](http://www.evolinklaw.com)

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On Thu, Apr 14, 2022 at 3:29 PM Simon Lin <[simonlin@evolinklaw.com](mailto:simonlin@evolinklaw.com)> wrote:

Hello Mr Matte,

Please see enclosed. Thank you.

Kind Regards,

**Simon Lin**  
Barrister & Solicitor

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**318**

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On Thu, Apr 14, 2022 at 12:45 PM Allan Matte <[Allan.Matte@otc-cta.gc.ca](mailto: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

**From:** Simon Lin <[simonlin@evolinklaw.com](mailto:simonlin@evolinklaw.com)>  
**Sent:** Wednesday, April 13, 2022 12:17 PM  
**To:** Barbara Cuber <[Barbara.Cuber@otc-cta.gc.ca](mailto:Barbara.Cuber@otc-cta.gc.ca)>; Services Juridiques / Legal Services (OTC/CTA) <[Servicesjuridiques/LegalServicesOTC/CTA@otc-cta.gc.ca](mailto:Servicesjuridiques/LegalServicesOTC/CTA@otc-cta.gc.ca)>  
**Cc:** Graham, Sandy <[Sandy.Graham@justice.gc.ca](mailto:Sandy.Graham@justice.gc.ca)>; Ptack, Lorne <[Lorne.Ptack@justice.gc.ca](mailto: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

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On Mon, Feb 7, 2022 at 12:57 PM Simon Lin <[simonlin@evolinklaw.com](mailto:simonlin@evolinklaw.com)> wrote:

320

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

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On Tue, Feb 1, 2022 at 2:41 PM Graham, Sandy <[Sandy.Graham@justice.gc.ca](mailto: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](mailto:sgraham@justice.gc.ca)

Telephone | Téléphone: (613) 670-6274  
Facsimile | Télécopieur: (613) 954-1920

---

**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](mailto: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](mailto: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](mailto:kizzy.barrett@otc-cta.gc.ca) / Tél.: 819-431-1615

**322**

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

---

Signature

From: **Simon Lin** <[simonlin@evolinklaw.com](mailto: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](mailto:Lorne.Ptack@justice.gc.ca)>  
 Cc: Allan Matte <[Allan.Matte@otc-cta.gc.ca](mailto:Allan.Matte@otc-cta.gc.ca)>, Graham, Sandy <[Sandy.Graham@justice.gc.ca](mailto:Sandy.Graham@justice.gc.ca)>, Services Juridiques / Legal Services (OTC/CTA) <[Servicesjuridiques/LegalServicesOTC/CTA@otc-cta.gc.ca](mailto:Servicesjuridiques/LegalServicesOTC/CTA@otc-cta.gc.ca)>

Dear Mr. Ptack,

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The AGC cannot "veto" the Applicant's right to cross-examine by refusing (or delaying) to provide availability. If counsel for the AGC is unable to attend on May 4 or 5, 2022, we will consider the alternative dates you propose, bearing in mind that the Court intended that this cross-examination be completed before the Applicant files its affidavit. If we are not able to accommodate the dates you provide, we trust you will make alternative arrangements to attend on May 4 or 5, 2022. **Please provide the availabilities by 12:00PM EDT tomorrow (Friday April 22).**

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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 Cc: "Graham, Sandy" <[Sandy.Graham@justice.gc.ca](mailto:Sandy.Graham@justice.gc.ca)>, "Ptack, Lorne" <[Lorne.Ptack@justice.gc.ca](mailto:Lorne.Ptack@justice.gc.ca)>, "Services Juridiques / Legal Services (OTC/CTA)" <[Servicesjuridiques/LegalServicesOTC/CTA@otc-cta.gc.ca](mailto:Servicesjuridiques/LegalServicesOTC/CTA@otc-cta.gc.ca)>  
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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](mailto:allan.matte@otc-cta.gc.ca)

**From:** Simon Lin <[simonlin@evolinklaw.com](mailto:simonlin@evolinklaw.com)>

**Sent:** Wednesday, April 13, 2022 12:17 PM

**To:** Barbara Cuber <[Barbara.Cuber@otc-cta.gc.ca](mailto:Barbara.Cuber@otc-cta.gc.ca)>; Services Juridiques / Legal Services (OTC/CTA) <[Servicesjuridiques/LegalServicesOTC/CTA@otc-cta.gc.ca](mailto:Servicesjuridiques/LegalServicesOTC/CTA@otc-cta.gc.ca)>

**Cc:** Graham, Sandy <[Sandy.Graham@justice.gc.ca](mailto:Sandy.Graham@justice.gc.ca)>; Ptack, Lorne <[Lorne.Ptack@justice.gc.ca](mailto:Lorne.Ptack@justice.gc.ca)>

Counsel,

Please see the enclosed letter.

Thank you.

Kind Regards,

**Simon Lin**  
Barrister & Solicitor

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Barrister & Solicitor

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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](mailto: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](mailto:Servicesjuridiques/LegalServicesOTC/CTA@otc-cta.gc.ca)>  
**Sent:** February 1, 2022 4:03 PM  
**To:** Simon Lin <[simonlin@evolinklaw.com](mailto:simonlin@evolinklaw.com)>; Gabor Lukacs <[lukacs@AirPassengerRights.ca](mailto:lukacs@AirPassengerRights.ca)>; Graham, Sandy <[Sandy.Graham@justice.gc.ca](mailto:Sandy.Graham@justice.gc.ca)>; Ptack, Lorne <[Lorne.Ptack@justice.gc.ca](mailto:Lorne.Ptack@justice.gc.ca)>  
**Cc:** Barbara Cuber <[Barbara.Cuber@otc-cta.gc.ca](mailto: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.

329

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](mailto: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](mailto: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](mailto:kizzy.barrett@otc-cta.gc.ca) / Tél.: 819-431-1615

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

---

Signature

From: **Ptack, Lorne** <[Lorne.Ptack@justice.gc.ca](mailto: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](mailto:simonlin@evolinklaw.com)>  
CC: Allan Matte <[Allan.Matte@otc-cta.gc.ca](mailto:Allan.Matte@otc-cta.gc.ca)>, Kevin Shaar <[Kevin.Shaar@otc-cta.gc.ca](mailto:Kevin.Shaar@otc-cta.gc.ca)>, Graham, Sandy <[Sandy.Graham@justice.gc.ca](mailto:Sandy.Graham@justice.gc.ca)>, Schmidt, Elizabeth <[Elizabeth.Schmidt@justice.gc.ca](mailto: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](mailto:Lorne.Ptack@Justice.gc.ca)*

**From:** Simon Lin <[simonlin@evolinklaw.com](mailto:simonlin@evolinklaw.com)>

**Sent:** April 21, 2022 5:45 PM

**To:** Ptack, Lorne <[Lorne.Ptack@justice.gc.ca](mailto:Lorne.Ptack@justice.gc.ca)>

**Cc:** Allan Matte <[Allan.Matte@otc-cta.gc.ca](mailto:Allan.Matte@otc-cta.gc.ca)>; Graham, Sandy <[Sandy.Graham@justice.gc.ca](mailto:Sandy.Graham@justice.gc.ca)>; Services Juridiques / Legal Services (OTC/CTA) <[Servicesjuridiques/LegalServicesOTC/CTA@otc-cta.gc.ca](mailto:Servicesjuridiques/LegalServicesOTC/CTA@otc-cta.gc.ca)>

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Date: 2022-04-21 4:57 p.m. (GMT-05:00)

To: Allan Matte <[Allan.Matte@otc-cta.gc.ca](mailto:Allan.Matte@otc-cta.gc.ca)>

Cc: "Graham, Sandy" <[Sandy.Graham@justice.gc.ca](mailto:Sandy.Graham@justice.gc.ca)>, "Ptack, Lorne" <[Lorne.Ptack@justice.gc.ca](mailto:Lorne.Ptack@justice.gc.ca)>, "Services Juridiques / Legal Services (OTC/CTA)" <[Servicesjuridiques/LegalServicesOTC/CTA@otc-cta.gc.ca](mailto:Servicesjuridiques/LegalServicesOTC/CTA@otc-cta.gc.ca)>

Subject: Re: A-102-20 -- Air Passenger Rights v Attorney General of Canada

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](http://www.evolinklaw.com)

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On Thu, Apr 14, 2022 at 3:29 PM Simon Lin <[simonlin@evolinklaw.com](mailto:simonlin@evolinklaw.com)> wrote:

Hello Mr Matte,

Please see enclosed. Thank you.

Kind Regards,

**Simon Lin**  
Barrister & Solicitor

**evolink** LAW

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On Thu, Apr 14, 2022 at 12:45 PM Allan Matte <[Allan.Matte@otc-cta.gc.ca](mailto: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](mailto:allan.matte@otc-cta.gc.ca)

**From:** Simon Lin <[simonlin@evolinklaw.com](mailto:simonlin@evolinklaw.com)>  
**Sent:** Wednesday, April 13, 2022 12:17 PM  
**To:** Barbara Cuber <[Barbara.Cuber@otc-cta.gc.ca](mailto:Barbara.Cuber@otc-cta.gc.ca)>; Services Juridiques / Legal Services (OTC/CTA) <[Servicesjuridiques/LegalServicesOTC/CTA@otc-cta.gc.ca](mailto:Servicesjuridiques/LegalServicesOTC/CTA@otc-cta.gc.ca)>  
**Cc:** Graham, Sandy <[Sandy.Graham@justice.gc.ca](mailto:Sandy.Graham@justice.gc.ca)>; Ptack, Lorne <[Lorne.Ptack@justice.gc.ca](mailto: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

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T: 604-620-2666  
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On Mon, Feb 7, 2022 at 12:57 PM Simon Lin <[simonlin@evolinklaw.com](mailto:simonlin@evolinklaw.com)> wrote:

Counsel,

336

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](mailto: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](mailto: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](mailto: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](mailto: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."<sup>1</sup> 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.

---

<sup>1</sup> [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.<sup>2</sup>

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

---

<sup>2</sup> *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, 19<sup>th</sup> Floor / 15 rue Eddy, 19<sup>ème</sup> étage  
Gatineau, Quebec K1A 0N9  
Tel: 613-894-4260  
Fax: 819-953-9269  
Email: [Kevin.Shaar@otc-cta.gc.ca](mailto:Kevin.Shaar@otc-cta.gc.ca)  
Email: [Servicesjuridiques.LegalServices@otc-cta.gc.ca](mailto: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](mailto:sandy.graham@justice.gc.ca), [Lorne.Ptack@justice.gc.ca](mailto: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](mailto:FCARegistry-CAFGreffe@cas-satj.gc.ca)

April 28, 2022

The Judicial Administrator  
Federal Court of Appeal  
90 Sparks Street, 1<sup>st</sup> 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 made<sup>1</sup> and the affidavit has been filed.<sup>2</sup>

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,

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<sup>1</sup> Original material consisting of documents, exhibits and certificate filed April 21, 2022, Court File No. A-102-20, Recorded Entries.

<sup>2</sup> 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.<sup>3</sup>

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.<sup>4</sup>

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.<sup>5</sup>

Mr. Lukacs received documents in response to his Access to Information request on October 16, 2020, and on December 23, 2020.<sup>6</sup> He submitted a complaint to the Office of the Information Commissioner of Canada on November 23, 2020 with respect to this request.<sup>7</sup>

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<sup>3</sup> *Air Passenger Rights v Attorney General of Canada*, 2022 FCA 64 at paras 3-4.

<sup>4</sup> Notice of Application dated April 9, 2020, Federal Court of Appeal Recorded Entries, Court File No. A-102-20, Doc. #1.

<sup>5</sup> 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.

<sup>6</sup> 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.

<sup>7</sup> 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*.<sup>8</sup> 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.<sup>9</sup>

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.<sup>10</sup>

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

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<sup>8</sup> [SOR/98-106](#); *Air Passenger Rights v Attorney General of Canada*, [2021 FCA 112](#) at para 1.

<sup>9</sup> Notice of Motion dated January 3, 2021, Federal Court of Appeal Recorded Entries, Court File No. A-102-20, Doc. #52.

<sup>10</sup> 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.<sup>11</sup>

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.<sup>12</sup>

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.<sup>13</sup> The affidavit of Barbara Cuber dated the 21<sup>st</sup> 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.

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<sup>11</sup> *Air Passenger Rights v. Attorney General of Canada*, 2022 FCA 64.

<sup>12</sup> *Ibid.*

<sup>13</sup> 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.<sup>14</sup> 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)."<sup>15</sup>

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

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<sup>14</sup> *Stanfield v Canada (Minister of National Revenue)*, [2004 FC 584](#) at para 18.

<sup>15</sup> *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, 19<sup>th</sup> Floor / 15 rue Eddy, 19<sup>ème</sup> étage  
Gatineau, Quebec K1A 0N9  
Tel: 613-894-4260  
Fax: 819-953-9269  
Email: [Kevin.Shaar@otc-cta.gc.ca](mailto:Kevin.Shaar@otc-cta.gc.ca)  
Email: [Servicesjuridiques.LegalServices@otc-cta.gc.ca](mailto:Servicesjuridiques.LegalServices@otc-cta.gc.ca)

c.c.: Simon Lin, Counsel for the Applicant via email: [simonlin@evolinklaw.com](mailto:simonlin@evolinklaw.com)

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

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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,<sup>1</sup> 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.<sup>2</sup> 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,

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<sup>1</sup> *Air Passenger Rights v. A.G.C.*, 2022 FCA 64 at para. 50 (CanLII link not available)

<sup>2</sup> [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](mailto: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](mailto:simonlin@evolinklaw.com) <[simonlin@evolinklaw.com](mailto:simonlin@evolinklaw.com)>, [Lorne.Ptack@justice.gc.ca](mailto:Lorne.Ptack@justice.gc.ca) <[Lorne.Ptack@justice.gc.ca](mailto:Lorne.Ptack@justice.gc.ca)>, [sandy.graham@justice.gc.ca](mailto:sandy.graham@justice.gc.ca) <[sandy.graham@justice.gc.ca](mailto:sandy.graham@justice.gc.ca)>

Cc: Services Juridiques / Legal Services (OTC/CTA) <[Servicesjuridiques/LegalServicesOTC/CTA@otc-cta.gc.ca](mailto:Servicesjuridiques/LegalServicesOTC/CTA@otc-cta.gc.ca)>

**370**

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](mailto: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 &amp; 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](mailto: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](mailto:simonlin@evolinklaw.com)>  
Cc: [Lorne.Ptack@justice.gc.ca](mailto:Lorne.Ptack@justice.gc.ca) <[Lorne.Ptack@justice.gc.ca](mailto:Lorne.Ptack@justice.gc.ca)>, [sandy.graham@justice.gc.ca](mailto:sandy.graham@justice.gc.ca) <[sandy.graham@justice.gc.ca](mailto:sandy.graham@justice.gc.ca)>, Services Juridiques / Legal Services (OTC/CTA) <[Servicesjuridiques/LegalServicesOTC/CTA@otc-cta.gc.ca](mailto: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](mailto:Kevin.Shaar@otc-cta.gc.ca)

**From:** Simon Lin <[simonlin@evolinklaw.com](mailto:simonlin@evolinklaw.com)>  
**Sent:** Monday, May 2, 2022 4:36 PM  
**To:** Kevin Shaar <[Kevin.Shaar@otc-cta.gc.ca](mailto:Kevin.Shaar@otc-cta.gc.ca)>  
**Cc:** [Lorne.Ptack@justice.gc.ca](mailto:Lorne.Ptack@justice.gc.ca); [sandy.graham@justice.gc.ca](mailto:sandy.graham@justice.gc.ca); Services Juridiques / Legal Services (OTC/CTA) <[Servicesjuridiques/LegalServicesOTC/CTA@otc-cta.gc.ca](mailto: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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On Mon, May 2, 2022 at 1:09 PM Kevin Shaar <[Kevin.Shaar@otc-cta.gc.ca](mailto:Kevin.Shaar@otc-cta.gc.ca)> wrote:

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](mailto:Kevin.Shaar@otc-cta.gc.ca)

**376**

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

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Signature

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**Re: A-102-20: Direction from the Court**

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**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](http://www.evolinklaw.com)

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On Tue, May 3, 2022 at 8:41 AM Kevin Shaar <Kevin.Shaar@otc-cta.gc.ca> wrote:

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](mailto:Kevin.Shaar@otc-cta.gc.ca)

**From:** Simon Lin <[simonlin@evolinklaw.com](mailto:simonlin@evolinklaw.com)>

**Sent:** Monday, May 2, 2022 4:36 PM

**To:** Kevin Shaar <[Kevin.Shaar@otc-cta.gc.ca](mailto:Kevin.Shaar@otc-cta.gc.ca)>

**Cc:** [Lorne.Ptack@justice.gc.ca](mailto:Lorne.Ptack@justice.gc.ca); [sandy.graham@justice.gc.ca](mailto:sandy.graham@justice.gc.ca); Services Juridiques / Legal Services (OTC/CTA) <[Servicesjuridiques/LegalServicesOTC/CTA@otc-cta.gc.ca](mailto: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**

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On Mon, May 2, 2022 at 1:09 PM Kevin Shaar <[Kevin.Shaar@otc-cta.gc.ca](mailto:Kevin.Shaar@otc-cta.gc.ca)> wrote:

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](mailto:Kevin.Shaar@otc-cta.gc.ca)

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

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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

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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
<b>Examination for Discovery of Barbara Cuber</b>			
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

<b>Balance Due:</b>	<b>\$ 735.00</b>
<b>Payment Due:</b>	<b>06/02/2022</b>

If paid after 06/02/2022 pay this amount: \$ 749.70

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Thank You for Choosing Mainland Reporting

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

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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").<sup>1</sup> 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

<sup>1</sup> *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*")<sup>2</sup> 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.<sup>3</sup> Second, in considering a motion to dismiss, Justice Webb ruled that the reasonable apprehension of bias claim would be heard on its merits.<sup>4</sup> 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.

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<sup>2</sup> *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*].

<sup>3</sup> *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 \(SCC\)](#)).

<sup>4</sup> *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.<sup>5</sup> 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.<sup>6</sup> 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.<sup>7</sup>

## **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

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<sup>5</sup> 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.

<sup>6</sup> 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.

<sup>7</sup> 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.<sup>8</sup> 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."<sup>9</sup>
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

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<sup>8</sup> *Access Information Agency Inc. v Canada (Attorney General)*, [2007 FCA 224](#) at para 20 [*AIA v Canada*].

<sup>9</sup> *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.<sup>10</sup>

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

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<sup>10</sup> *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."<sup>11</sup>

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.

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<sup>11</sup> *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)<sup>12</sup>**

**A5: Original Microsoft Word file(s) for a draft response to media<sup>13</sup>**

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".<sup>14</sup> The Court may order that a certified copy, or the original, of all or part of the material requested be forwarded to the Registry.<sup>15</sup> 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,

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<sup>12</sup> 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*].

<sup>13</sup> *Ibid* at 308 at paras 50-51.

<sup>14</sup> See s [318\(1\)](#) of the *Federal Courts Rules*.

<sup>15</sup> 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, 2020<sup>16</sup> and**

**A3. Documents regarding the Statement on Vouchers on March 24, 2020.<sup>17</sup>**

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 23<sup>rd</sup> and then 24<sup>th</sup>.
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

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<sup>16</sup> *Applicant's Written Reps*, *supra* note 12 at 305-306 at paras 41-43.

<sup>17</sup> *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)<sup>18</sup>**

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

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<sup>18</sup> *Applicant's Written Repts*, *supra* note 12 at 306-307 at paras 45-46.

the decision-maker.<sup>19</sup> 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, 2020<sup>20</sup>**

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.<sup>21</sup>**

**B2. Original Email from Transport Canada on March 18, 2020 from Mr. Colin Stacey at Transport Canada to Ms. Marcia Jones on March 25, 2020<sup>22</sup>**

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.

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<sup>19</sup> *Canadian Copyright Licensing Agency (Access Copyright) v Alberta*, [2015 FCA 268](#) at para 18.

<sup>20</sup> *Applicant's Written Repts*, *supra* note 12 at 309-310 at paras 58-59.

<sup>21</sup> *Ibid* at 310 at para 60.

<sup>22</sup> *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, 2020<sup>23</sup>**

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 Messages<sup>24</sup>**

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

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<sup>23</sup> Applicant's Written Reps, *supra* note 12 at 302-303 at paras 29-32.

<sup>24</sup> *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.<sup>25</sup>

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

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<sup>25</sup> 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".<sup>26</sup> 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 PIAC<sup>27</sup>**

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

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<sup>26</sup> *October 2021 Court Order*, *supra* note 1 at para 22.

<sup>27</sup> *Applicant's Written Reps*, *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;<sup>28</sup> and**

**C5. Documents for the March 22, 2020 CTA Key Personnel Call;<sup>29</sup> and**

**C6. Documents for the March 23, 2020 EC Call.<sup>30</sup>**

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

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<sup>28</sup> *Applicant's Written Reqs, supra* note 12 at 301 at paras 24-25.

<sup>29</sup> *Ibid* at 303-304 at paras 33-35.

<sup>30</sup> *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 Call<sup>31</sup>**

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

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<sup>31</sup> *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)**<sup>32</sup>

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-Chairperson**<sup>33</sup>

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

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<sup>32</sup> *Applicant's Written Reps, supra* note 12 at 302-303 at paras 29-32.

<sup>33</sup> *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' Call<sup>34</sup>**

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."<sup>35</sup>
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

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<sup>34</sup> *Applicant's Written Reps, supra* note 12 at 307 at para 47.

<sup>35</sup> *October 2021 Court Order, supra* note 1 at para [21](#).

contained in any record-keeping system over which the tribunal has control.<sup>36</sup>

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 others<sup>37</sup>**

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

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<sup>36</sup> *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.

<sup>37</sup> *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 Call<sup>38</sup>**

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"<sup>39</sup>**

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

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<sup>38</sup> *Applicant's Written Reps, supra* note 12 at 309 at para 57.

<sup>39</sup> *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.<sup>40</sup>
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.

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<sup>40</sup> *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.<sup>41</sup>

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.<sup>42</sup>

#### **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 1<sup>st</sup> day of February, 2022.




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**Barbara Cuber**  
Senior Counsel

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Canadian Transportation Agency  
15 Eddy Street, 19<sup>th</sup> Floor  
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Email: [Servicesjuridiques.LegalServices@otc-cta.gc.ca](mailto:Servicesjuridiques.LegalServices@otc-cta.gc.ca)

**Counsel for the Respondent, Canadian Transportation Agency**

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<sup>41</sup> *Apotex Inc. v Merck & Co. Inc.*, [2003 FCA 234](#) at paras 93-94 [*Apotex*].

<sup>42</sup> *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

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Signature

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**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

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Signature

**Amanda Hamelin**

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**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

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Signature

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**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

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Signature

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**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

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**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

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Signature

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**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](mailto:Mark.MacKeigan@otc-cta.gc.ca)>; Heather Smith <[Heather.Smith@otc-cta.gc.ca](mailto:Heather.Smith@otc-cta.gc.ca)>; Mary Tobin Oates <[Mary.TobinOates@otc-cta.gc.ca](mailto:Mary.TobinOates@otc-cta.gc.ca)>; Lenore Duff <[Lenore.Duff@otc-cta.gc.ca](mailto:Lenore.Duff@otc-cta.gc.ca)>; Gerald Dickie <[Gerald.Dickie@otc-cta.gc.ca](mailto:Gerald.Dickie@otc-cta.gc.ca)>  
**Cc:** Liz Barker <[Liz.Barker@otc-cta.gc.ca](mailto: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**

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*.

**Formatted:** Font: Italic

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

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**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

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Signature

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**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](mailto: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](mailto:Mark.MacKeigan@otc-cta.gc.ca)>, Heather Smith <[Heather.Smith@otc-cta.gc.ca](mailto:Heather.Smith@otc-cta.gc.ca)>, Mary Tobin Oates <[Mary.TobinOates@otc-cta.gc.ca](mailto:Mary.TobinOates@otc-cta.gc.ca)>, Lenore Duff <[Lenore.Duff@otc-cta.gc.ca](mailto:Lenore.Duff@otc-cta.gc.ca)>, Gerald Dickie <[Gerald.Dickie@otc-cta.gc.ca](mailto:Gerald.Dickie@otc-cta.gc.ca)>  
**Cc:** Liz Barker <[Liz.Barker@otc-cta.gc.ca](mailto: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**

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 “BD”** to the Affidavit of Dr. Gábor Lukács  
affirmed before me on May 15, 2022

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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 Perruslet <Matilde.Perruslet@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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## **i** Examples

(1) Smith (2) Smith, John (3) John Smith (4) 613-999-0101 (5) "Da Vinci" (6) minister

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## Organizations

[Canada](#)

[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** [

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”

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**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

*JF*  
 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"

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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"

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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  
Burnaby, British Columbia

A. François Daigle FOR THE RESPONDENT  
Deputy Attorney General of Canada

Legal Services Directorate FOR THE CANADIAN  
Canadian Transportation Agency TRANSPORTATION AGENCY  
Gatineau, Quebec

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"

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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"

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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”

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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

**SOLICITORS OF RECORD:**

Evolink Law Group FOR THE APPLICANT  
Burnaby, British Columbia

A. François Daigle FOR THE RESPONDENT  
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.*

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**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.

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“Anne L. Mactavish”

J.A.

**FEDERAL COURT OF APPEAL**

BETWEEN:

**AIR PASSENGER RIGHTS**

Applicant

– and –

**ATTORNEY GENERAL OF CANADA**

Respondent

– and –

**CANADIAN TRANSPORTATION AGENCY**

Intervener

**WRITTEN REPRESENTATIONS OF THE RESPONDING PARTY****PART I – OVERVIEW AND STATEMENT OF FACTS**

1. This Rule 94 motion by the Canadian Transportation Agency [CTA] is a disguised attempt to shield evidence of the CTA's non-compliance with two Court Orders. Gleason, J.A. issued two Orders for the CTA to produce documents relevant to the Application: On October 15, 2021 an Order for the CTA to produce three broad 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 scope of, and subsumed in, the three broad categories of the October Order.

2. In light of deficiencies in the CTA's production of documents, in the April Order, Gleason, J.A. ordered the responsible individual to detail in an affidavit all the document search efforts, with eight prescribed topics [**CTA Document Search Affidavit**]. Gleason, J.A. contemplated that the evidence would be tested at a cross-examination.<sup>1</sup>

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<sup>1</sup> Reasons of Gleason, J.A. (Apr. 11, 2022), para. 50 [Tab 7, p. 497].

3. Despite a duly served Direction to Attend, the CTA refused to attend or to present any record of its document search efforts [**Cross-Examination Materials**].

4. The CTA's motion hinges on the premise that the scope of the cross-examination on the CTA Document Search Affidavit is confined to the merits of the underlying reasonable apprehension of bias issues for this Application, and thus the CTA's document search efforts are irrelevant and off-limits to the Court. It is on this premise that the CTA says that the Cross-Examination Materials are irrelevant and need not be produced.

5. The CTA's premise is flawed, because it defeats Gleason, J.A.'s ruling for cross-examination on the CTA Document Search Affidavit, and withholds from the Court the evidence necessary to ascertain whether the CTA complied with the Court Orders to produce all documents as ordered. The CTA seeks to confine the cross-examination to the basic formalities (i.e., affiant's name/title and signature), and nothing more.

6. The same flawed argument was considered and rejected by the Federal Court in a recent decision in *GCT Canada*.<sup>2</sup> The CTA has offered no basis at all to depart from the Federal Court's sound conclusions, and instead, the CTA omitted that decision.

7. Besides relevancy, the CTA baldly asserted "non-existence" or solicitor-client privilege for some of the Cross-Examination Materials, without any supporting proof.

8. The Court should also deny the CTA's motion because of the CTA's lack of clean hands. The CTA failed to attend the cross-examination on the CTA Document Search Affidavit, and there is evidence that the CTA is still not complying with Gleason, J.A.'s orders. On May 16, 2022, the Applicant already filed a motion in that regard.

9. The Applicant seeks costs for this motion, payable forthwith, for the CTA's dilatory conduct and Directions on the CTA's delivery of the Cross-Examination Materials.

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<sup>2</sup> *GCT Canada Limited Partnership v. Vancouver Fraser Port Authority*, Cross-Examination Order (August 25, 2021), No. T-538-19 [*GCT Canada*] [Tab 18, p. 607].

### The Underlying Application for Judicial Review

10. 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.

11. 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** raises a reasonable apprehension of bias for the CTA, or its constituent Members that endorsed the Statement on Vouchers; and
- (b) **Misinformation Ground** — misinforming passengers on their rights.

12. The RAB Ground of review is two-fold: (1) the pre-judgement by the CTA or its Members, about passengers’ entitlement to reimbursement for flights affected by the pandemic; and (2) external third-party influence in the inception of the Statement on Vouchers.<sup>3</sup> Articles 39-40 of the CTA’s *Code of Conduct* specifically state 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.<sup>4</sup>

13. 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.<sup>5</sup>

<sup>3</sup> Reasons for Order of Gleason, J.A. (Oct. 15, 2021) at para. 17 [Tab 4, p. 464].

<sup>4</sup> *Code of Conduct for Members of the Agency*, paras. 39 and 40 [Tab 1D, p. 47].

<sup>5</sup> Reasons for Order of Gleason, J.A. (Oct. 15, 2021) at paras. 5-6 [Tab 4, pp. 460-461].

### Missing Documents on the CTA's Inception of the Statement on Vouchers

14. On March 18, 2020, Transport Canada forwarded to the CTA an encrypted email stating it was Transat AT's request that the CTA endorse vouchers in lieu of refunds [**Transport Canada Encrypted Email**].<sup>6</sup> The CTA has not produced the original Transport Canada Encrypted Email and its contents and attachment(s) remain unknown.

15. In response to the October Order, the CTA initially revealed some other behind-the-scenes correspondences the CTA received directly from Transat AT, requesting a Statement on Vouchers be issued to frustrate passengers' credit card chargebacks.<sup>7</sup> Thereafter, after the April Order, the CTA produced a similar request from Air Canada marked "Private and Confidential."<sup>8</sup> Documents continue to trickle out.

16. The CTA asserted that the original Transport Canada Encrypted Email "no longer existed."<sup>9</sup> Although CTA personnel were informed near the outset of this case, on April 14, 2020, to preserve documents, the CTA is unwilling to investigate how key documents could still go missing.<sup>10</sup> On March 20, 2020, two days after the Transport Canada Encrypted Email, Mr. Streiner also specifically advised at the EC meeting that "[e]mails sent during this period subject to ATIP [Access to Information & Privacy]."<sup>11</sup>

17. Besides the missing Transport Canada Encrypted Email, two CTA personnel (i.e., the former Chair Scott Streiner and former Chief Strategy Officer Marcia Jones) had attended undisclosed meeting(s) around the weekend of March 21-22, 2020 with Transport Canada on the Statement on Vouchers [**TC/CTA Undisclosed Meeting Email**].<sup>12</sup>

<sup>6</sup> Transport Canada Encrypted Email – Lukács Affidavit, Exhibit "I" [Tab 1I, p. 62].

<sup>7</sup> Lukács Affidavit, para. 15(a) and Exhibits "G" and "H" [Tabs 1G and 1H, pp. 55 and 59].

<sup>8</sup> Lukács Affidavit, para. 19(d)v and Exhibit "R" [Tabs 1 and 1R, pp. 8 and 222-225].

<sup>9</sup> CTA Written Representations (Feb. 1, 2022), paras. 49-50 [Tab 1AV, pp. 396-397]; and Reasons of Gleason, J.A. (Apr. 11, 2022), para. 45 [Tab 7, p. 495].

<sup>10</sup> Affidavit of Ms. Barbara Cuber (Apr. 21, 2022) [**Cuber Affidavit**], paras. 8 and 55 and Exhibit "B", page 6, line above "2. SORT your information".

<sup>11</sup> Lukács Affidavit, Exhibit "V" [Tab 1V, p. 284].

<sup>12</sup> TC/CTA Undisclosed Meeting Email – Lukács Affidavit, Exhibit "J" [Tab 1J, p. 64].

18. On Sunday, March 22, 2020, Mr. Streiner scheduled an “Urgent Debrief” with a select group of five senior personnel on the Executive Committee [EC], while unveiling the first draft of the Statement on Vouchers.<sup>13</sup> Thereafter, at the EC meeting on March 23, 2020, Mr. Streiner provided another debrief of the meeting(s) with Transport Canada, noting that “TC indicated Agency moved faster than they expected. [...]”.<sup>14</sup>

19. Although the CTA vehemently denies the existence of *any* paper-trail of such meetings or correspondences with Transport Canada on the Statement on Vouchers around the weekend of March 21-22, 2020, it is abundantly clear that such meeting(s) or correspondence(s) did in fact occur.<sup>15</sup> Indeed, mere hours after Mr. Streiner circulated within the CTA the initial draft of the Statement on Vouchers on March 22, 2020, Transport Canada personnel already caught wind of the Statement on Vouchers.<sup>16</sup>

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

20. The Notice of Application on April 9, 2020 included a request that the CTA transmit four sets of relevant materials.<sup>17</sup> As the CTA objected to this request, on January 3, 2021, the Applicant brought a motion for production of a narrower scope of documents.<sup>18</sup> The Applicant’s January 3, 2021 motion and numerous other procedural matters and motions that arose since then were heard and decided by Gleason, J.A.

21. On October 15, 2021, Gleason, J.A. issued the October Order and compelled the CTA to produce three broadly 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

<sup>13</sup> Lukács Affidavit, Exhibits “AW” and “AX” [Tabs 1AW and 1AX, pp. 409 and 412].

<sup>14</sup> Lukács Affidavit, Exhibit “W” [Tab 1W, p. 286].

<sup>15</sup> *Ibid*, and see footnotes 12 and 14, *supra*.

<sup>16</sup> TC/CTA Undisclosed Meeting Email – Lukács Affidavit, Exhibit “J” [Tab 1J, p. 64].

<sup>17</sup> Notice of Application (Apr. 9, 2020), request to transmit [Tab 2, p. 451].

<sup>18</sup> Reasons for Order of Gleason, J.A. (Oct. 15, 2021) at para. 10 [Tab 4, p. 462].

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**].<sup>19</sup>

22. The reasons for the October Order stated that for the Meeting Documents “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.”<sup>20</sup> This understanding was confirmed again in the April Order.

23. 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.<sup>21</sup> This procedure required the AGC, and not the CTA, to submit an informal motion for Her Ladyship to rule on.

24. On December 14, 2021, the CTA produced a small number of documents [**Dec. 14, 2021 Documents**]. The Applicant identified 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 within the scope of the October Order, but was not produced. Each of categories A, B, and C corresponded to, and are within the scope of, the three categories of the October Order.

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<sup>19</sup> Order of Gleason, J.A. (Oct. 15, 2021), para. 3 [Tab 3, pp. 454-455].

<sup>20</sup> Reasons for Order of Gleason, J.A. (Oct. 15, 2021) at para. 23 [Tab 4, p. 466].

<sup>21</sup> Order of Gleason, J.A. (Oct. 15, 2021), paras. 5-8 [Tab 3, p. 455].

**B. Gleason, J.A.'s Order for Specific Documents (April 11, 2022)**

25. The Applicant made best efforts to cause the CTA to comply with the October Order, and to produce the missing items.<sup>22</sup> The CTA refused to do so, citing technicalities and baldly asserting that the documents did not exist or “no longer existed”.<sup>23</sup>

26. 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 21 specifically identified items that were covered in the October Order, coupled with a motion for a *show cause* order for contempt of court. On January 26, 2022, Gleason, J.A. bifurcated the portion of the motion for a *show cause* order for contempt to be heard at a later date, if necessary.<sup>24</sup>

27. On April 11, 2022, Gleason, J.A. issued an order and reasons for order [**April Order and Reasons for April Order**], including four main aspects below.<sup>25</sup>

28. **Existent Documents.** The existence of four sets of documents (i.e., A1, A5, B4, and C2) amongst the 21 sets of missing items was not disputed, and the Court found that they were all *within the scope of* the October Order, and must be produced:<sup>26</sup> A1 and A5 (MS Word files containing metadata), B4 (the CTA's Info Email and Twitter Messages), and C2 (March 20 CTA Executive Committee [**EC**] Meeting Documents). The Court ordered the CTA to produce these documents within 5 days.<sup>27</sup>

29. **Statement on Voucher Meeting Documents.** For categories C1, C5, and C6 (March 19, 22, and 23, 2020 meetings, respectively) where the CTA admitted the occurrence of those meetings, but did not confirm if the Statement on Vouchers was discussed

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<sup>22</sup> Notice of Motion and affidavit (Jan. 16, 2022) - Court Docket Doc. 100-101.

<sup>23</sup> CTA Written Representations (Feb. 1, 2022), paras. 49-50 [Tab [1AV](#), pp. [396-397](#)]; and Reasons of Gleason, J.A. (Apr. 11, 2022), paras. 44-45 [Tab [7](#), p. [495](#)].

<sup>24</sup> Order of Gleason, J.A. (Jan. 26, 2022) [Tab [5](#), p. [474](#)].

<sup>25</sup> Order of Gleason, J.A. (Apr. 11, 2022) [Tab [6](#), p. [477](#)].

<sup>26</sup> Reasons of Gleason, J.A. (Apr. 11, 2022), paras. 16-17, 25, 36 [Tab [7](#), pp. [486](#), [489](#), [492](#)].

<sup>27</sup> Order of Gleason, J.A. (Apr. 11, 2022), para. 4 [Tab [6](#), p. [478](#)].

at those meetings, the CTA was ordered to determine if the Statement on Vouchers was discussed at those meetings and, if so, to produce them within 5 days.<sup>28</sup> The Court similarly ruled that these documents were within the scope of the October Order.<sup>29</sup>

30. **CTA Document Search Affidavit.** For the remaining 14 categories of documents (i.e., A2-A4, A6, B1-B3, B5, C3-C4, and C7-10), the CTA did not dispute that they would be within the scope of the October Order, but the CTA claimed that they do not exist or “no longer existed.”<sup>30</sup> In order to address the dispute on their existence, the Court ordered the individual at the CTA responsible for compliance with the October Order to serve and file an affidavit within 10 days “detailing what has been done to ensure the required disclosure was made,” including eight specified topics:<sup>31</sup>

- (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;

<sup>28</sup> Order of Gleason, J.A. (Apr. 11, 2022), para. 5 [Tab 6, p. 478].

<sup>29</sup> Reasons of Gleason, J.A. (Apr. 11, 2022), paras. 32-35 [Tab 7, pp. 491-492]; Order of Gleason, J.A. (Apr. 11, 2022), para. 5 [Tab 6, p. 478].

<sup>30</sup> Reasons of Gleason, J.A. (Apr. 11, 2022), paras. 44-46 [Tab 7, pp. 495-496].

<sup>31</sup> Reasons of Gleason, J.A. (Apr. 11, 2022), para. 47 [Tab 7, p. 496] and Order of Gleason, J.A. (Apr. 11, 2022), para. 7 [Tab 6, p. 478].

- (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.

31. **Cross-Examination on the CTA Document Search Affidavit.** The Court also permitted cross-examination on this affidavit and provided the Applicant sufficient time for doing so.<sup>32</sup> The Court did not limit the scope of the cross-examination in any way.<sup>33</sup>

**C. The CTA's Affiant's Failure to Attend the Scheduled Cross-Examination**

32. The CTA served a barebones CTA Document Search Affidavit that only included four exhibits with no direct explanation on the 14 sets of missing documents.

33. Between April 13-21, 2022, the Applicant made numerous attempts to canvass availability for the cross-examination on the week of May 2, 2022.<sup>34</sup> Ultimately, as the CTA did not respond with any availability, and in order to accommodate the AGC's schedule, the Applicant served a Direction to Attend for May 3, 2022 at 9:00 PST / 12:00 EST and Ms. Cuber was asked to bring 25 materials that were [**Cross-Examination Materials**].<sup>35</sup>

- (a) referred to, or relied on, in the CTA Document Search Affidavit; and/or
- (b) relate to the CTA's document search efforts, or assist the Court in addressing the existence of the remaining 14 categories of missing items.<sup>36</sup>

<sup>32</sup> Reasons of Gleason, J.A. (Apr. 11, 2022), para. 50 [Tab 7, p. 497].

<sup>33</sup> *GCT Canada* [Tab 18, p. 607]; and *Federal Courts Rules*, Rule 83 [Tab 11, p. 540].

<sup>34</sup> Lukács Affidavit, paras. 31-40 and exhibits cited there [Tab 1, pp. 11-13].

<sup>35</sup> Lukács Affidavit, Exhibits "AH" and "AI" [Tabs 1AH and 1AI, pp. 330 and 339].

<sup>36</sup> Reasons of Gleason, J.A. (Apr. 11, 2022), paras. 44-47 [Tab 7, pp. 495-496].

34. On April 28, 2022, the CTA sent a lengthy letter to the Court requesting intervention and a case management conference,<sup>37</sup> *before* the cross-examination.<sup>38</sup> 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) requesting the Applicant's agreement/consent to postpone the cross-examination.<sup>39</sup>

35. 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).<sup>40</sup> The Applicant also wrote to the CTA advising that there was no basis to postpone the scheduled cross-examination.<sup>41</sup>

36. 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*.<sup>42</sup> The Court did **not** direct that the cross-examination on May 3, 2022 be cancelled or postponed.

37. 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,<sup>43</sup> 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.<sup>44</sup>

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<sup>37</sup> Lukács Affidavit, Exhibit "AN" [Tab 1AN, p. 358].

<sup>38</sup> Reasons of Gleason, J.A. (Apr. 11, 2022), para. 50 [Tab 7, p. 497].

<sup>39</sup> Lukács Affidavit, Exhibit "AK" [Tab 1AK, p. 349].

<sup>40</sup> Lukács Affidavit, Exhibit "AO" [Tab 1AO, p. 366].

<sup>41</sup> Lukács Affidavit, Exhibit "AL" [Tab 1AL, p. 353].

<sup>42</sup> Direction of Mactavish, J.A. (May 2, 2022) [Tab 8, p. 505].

<sup>43</sup> Lukács Affidavit, Exhibit "AP" [Tab 1AP, p. 369].

<sup>44</sup> Lukács Affidavit, Exhibit "AQ" [Tab 1AQ, p. 371].

38. 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.”<sup>45</sup> 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.<sup>46</sup> The CTA did not respond.<sup>47</sup>

39. The court reporter issued a certificate confirming Ms. Cuber’s non-attendance.<sup>48</sup>

**D. The CTA’s Rule 94 Motion for the Direction to Attend**

40. On May 12, 2022, the CTA filed a Rule 94 motion seeking to be relieved from bringing any of the Cross-Examination Materials, on the grounds that:

- (a) The materials “are irrelevant to the issues raised in the Application.”<sup>49</sup>
- (b) Some of the materials are subject to solicitor-client privilege,<sup>50</sup> although there was no affidavit evidence supporting those assertions of privilege.
- (c) Some of the materials “do not exist”,<sup>51</sup> and like in past instances, the CTA has provided no affidavit evidence in support of this bald assertion.

41. The CTA has again baldly asserted the non-existence of documents without any evidence. To the extent the Cross-Examination Materials exist, the CTA did **not** dispute they are in Ms. Cuber’s possession or control and not unduly onerous to produce.

42. The CTA also omitted to mention in its motion that its affiant had failed to attend the cross-examination on the CTA Document Search Affidavit, nor gave any excuse.

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<sup>45</sup> Lukács Affidavit, Exhibit “AR” [Tab 1AR, p. 373].

<sup>46</sup> Lukács Affidavit, Exhibit “AS” [Tab 1AS, p. 377].

<sup>47</sup> Lukács Affidavit, para. 51 [Tab 1, p. 15].

<sup>48</sup> Lukács Affidavit, Exhibit “AT” [Tab 1AT, p. 381].

<sup>49</sup> CTA’s Written Representations (May 12, 2022) at paras. 47-57.

<sup>50</sup> CTA’s Written Representations (May 12, 2022) at paras. 58-60.

<sup>51</sup> CTA’s Written Representations (May 12, 2022) at paras. 61-62.

**PART II – STATEMENT OF THE POINTS IN ISSUE**

43. The three (3) narrow issues to be decided on this motion are:
- (a) Whether the discretionary relief under Rule 94(2) should be refused.
  - (b) Whether the Court should issues direction(s) on when and how the CTA is to present the Cross-Examination Materials.
  - (c) Whether costs should be ordered against the CTA, payable forthwith.

**PART III – STATEMENT OF SUBMISSIONS**

44. Rule 94 mandates that a person being examined is to produce at the examination all non-privileged materials specified in a direction to attend that are in the person's possession and control. Rule 94(1) provides an exception for materials where privilege is asserted, and the procedure for the Court to rule on such assertions is addressed further below. Under Rule 94(2), the Court *may* also grant relief from production when:

- (a) the materials are irrelevant; or
- (b) by reason of the nature, number, or amount of materials, it would be unduly onerous to require the person to produce them.

45. The CTA does not claim that bringing the Cross-Examination Materials would be unduly onerous. The CTA also did not dispute that the Cross-Examination Materials, to the extent they exist, are in Ms. Cuber's possession or control. Indeed, Ms. Cuber is the individual responsible for complying with the Court's October Order,<sup>52</sup> and by necessity should have a broad scope of authority within the CTA.<sup>53</sup>

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<sup>52</sup> Cuber Affidavit at paras. 2-3.

<sup>53</sup> *Ottawa Athletic Club Inc. v. Athletic Club Group Inc.*, 2014 FC 672 at para. 138 [Tab 23, p. 703].

46. The CTA seeks blanket relief from bringing *any* of the Cross-Examination Materials for the cross-examination on the CTA Document Search Affidavit. The CTA’s primary basis for relief is relevancy, or alternatively assertions of solicitor-client privilege or “non-existence” of some of the Cross-Examination Materials. As the objecting party, the CTA bears the burden for establishing each of the three ground(s) for relief:

- (a) **Irrelevance.** The CTA is seeking relief under Rule 94 and bears the burden to establish that the Cross-Examination Materials are irrelevant.<sup>54</sup>
- (b) **Solicitor-Client Privilege.** The burden of establishing solicitor-client privilege lies with the person seeking to invoke the privilege, and mere say-so does **not** discharge that burden. When a privilege assertion is challenged, the Court *must* examine the actual materials in order to draw a conclusion as to whether privilege arises or if it has been waived.<sup>55</sup>
- (c) **“Non-Existence”.** The CTA is the holder of the materials, and should be required to provide proof of “non-existence.”<sup>56</sup> The party seeking production should not be placed on an unfair burden to prove existence of materials that they have never seen, and could not access.<sup>57</sup>

47. Respectfully, as detailed further below, relief should be denied because:

- (a) The CTA’s “relevance” objection is fundamentally flawed and based on trivializing Gleason, J.A.’s ruling, defeating the purpose for ordering the CTA Document Search Affidavit, and impermissibly curtailing the basic right to cross-examine under the *Federal Courts Rules*.

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<sup>54</sup> *Mohammed v. Canada (IRC)*, 2019 FC 193 (CanLII) at para. 40 [Tab 21, p. 642].

<sup>55</sup> *Right to Life Association of Toronto and Area v. Canada (EWL)*, 2019 CanLII 9189 (FC) [*Right to Life Association*] at paras. 72-73 [Tab 25, p. 779].

<sup>56</sup> Reasons of Gleason, J.A. (Apr. 11, 2022), paras. 15 and 47-50 [Tab 7, pp. 485-486 and 496-497].

<sup>57</sup> *Mohammed v. Canada (IRC)*, 2019 FC 193 (CanLII) at para. 40 [Tab 21, p. 642].

- (b) The CTA has provided no evidence for its assertions of solicitor-client privilege and non-existence of the Cross-Examination Materials.
- (c) The CTA does not come to Court with clean hands, and discretionary relief should be denied when a person does not have clean hands.

**A. Relevance of the Cross-Examination Materials**

48. The CTA's basic premise is that the permissible scope for the cross-examination on the CTA Document Search Affidavit must be confined only to the two grounds of judicial review: RAB Ground (i.e., the issue of reasonable apprehension of bias in the inception of the Statement on Vouchers) and/or Misinformation Ground.<sup>58</sup> The scope of the cross-examination then determines: (1) the questions that may be asked; and (2) the materials that the examined party must bring, if requested in the Direction to Attend.

49. The CTA's narrow formulation on the scope of cross-examination overlooks the breadth of case law on this issue. The scope of cross-examination broadly includes:<sup>59</sup>

- (a) the issues on the application or motion, even if those issues are not addressed in the affidavit;
- (b) the matters raised by the affiant in the affidavit, even if those matters are not relevant to the application or motion; or
- (c) the credibility and reliability of the deponent's evidence.

50. The CTA's Rule 94 motion before the cross-examination is also unusual. Typically, objections to document productions for a cross-examination and the questions that are objected to at the cross-examination are dealt with concurrently. Since the CTA failed to attend, there will inevitably be another motion for objections on the questions.

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<sup>58</sup> CTA's Written Representations (May 12, 2022) at paras. 23-25 and 47.

<sup>59</sup> *Farmobile, LLC v. Farmers Edge Inc.*, 2021 FC 1427 at paras. 31-32 [Tab 16, p. 592].

51. Most importantly, the CTA's manner of proceeding deprives the Court of the benefit of reviewing the cross-examination transcript, which serves as a further tool for assessing relevance of the Cross-Examination Materials.<sup>60</sup>

**i. Purpose for the Court to Order the CTA Document Search Affidavit**

52. *GCT Canada* is a complete answer to the CTA's objections on relevancy. Gleason, J.A. had cited another decision within the *GCT Canada* file as an example for ordering the CTA Document Search Affidavit, in the face of document production concerns.<sup>61</sup> On this motion, the CTA cited the *GCT Canada* file overall, but omitted the decision where the Federal Court addressed relevancy for the cross-examination on the court-ordered affidavit that is nearly identical to the CTA Document Search Affidavit.<sup>62</sup>

53. The context and factual background of the affidavit, and the issues in dispute, are pertinent to assessing relevance for the cross-examination.<sup>63</sup> As in *GCT Canada*, the context and background here is that there are serious issues about the CTA's compliance with the October Order. There are still 14 categories of materials that the Applicant has requested, but for which the CTA provided no evidence for its assertions of "non-existence" or "no longer in existence".<sup>64</sup> The Court ordered the CTA Document Search Affidavit to assist the Court in deciding if the CTA complied with the October Order, and to rule on the existence of the remaining 14 categories of missing materials.

54. Rule 83 provides a right to cross-examine on an affidavit from an adverse party, which arises by operation of the *Federal Courts Rules*. Contrary to what the CTA suggests, the court need not specifically order the cross-examination to take place.<sup>65</sup>

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<sup>60</sup> *Simpson Strong-Tie Company v. Peak Innovations Inc.*, 2009 FC 392 at para. 9 [Tab 27, p 794]; appeal dismissed: 2009 FCA 266.

<sup>61</sup> Reasons of Gleason, J.A. (Apr. 11, 2022), para. 48 [Tab 7, p. 497].

<sup>62</sup> *GCT Canada* [Tab 18, p. 607].

<sup>63</sup> *GCT Canada* at paras. 3, 4, 6, 10-11, and 17 [Tab 18, pp. 608-611]

<sup>64</sup> Reasons of Gleason, J.A. (Apr. 11, 2022), paras. 15 and 44-47 [Tab 7, pp. 485-486 and 495-496].

<sup>65</sup> *GCT Canada* at para. 20 [Tab 18, p. 612].

55. The right to cross-examine is subject to restriction only in limited circumstances.<sup>66</sup> The CTA has not raised any circumstance that would warrant a departure from this norm, especially when Gleason, J.A. clearly contemplated that there would be cross-examination on the CTA Document Search Affidavit.<sup>67</sup>

56. As in *GCT Canada*, Ms. Cuber is not put forward to address the merits of the underlying bias issues, and the CTA nominated her to speak to the CTA's document search efforts for complying with the Court's production orders.<sup>68</sup> The CTA is asking the Court to do the opposite as in *GCT Canada*, shielding the CTA's document search efforts from cross-examination, and constraining it only to topics that Ms. Cuber was not put forward to address (i.e., the underlying bias issues). This leads to an absurd result where the cross-examination on the CTA Document Search Affidavit will be a formal exercise of asking Ms. Cuber her name, title, and signature on the affidavit.

57. The underlying Application mainly deals with the CTA responding to behind-the-scenes interference from air carriers and political actors in issuing the Statement on Vouchers.<sup>69</sup> The panel hearing the merits of this judicial review would be greatly assisted by having a complete record about the (*in*)adequacy of the CTA's Rule 317 document production, including the "missing" paper-trail of the behind-the-scenes dealings.<sup>70</sup> Cross-examination on the CTA's document search efforts would enable the panel to determine the reason(s), if any, for the disappearance of relevant documents.

58. The CTA actually seeks to defeat Gleason, J.A.'s April Order and deprive the Court of the necessary evidence for all issues in dispute, including issues of the CTA's inadequate disclosure of relevant documents and possible spoliation of evidence.

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<sup>66</sup> *GCT Canada* at paras. 20 and 22 [Tab 18, pp. 612-613].

<sup>67</sup> Reasons of Gleason, J.A. (Apr. 11, 2022), para. 50 [Tab 7, p. 497].

<sup>68</sup> *GCT Canada* at paras. 26 and 29 [Tab 18, pp. 614-615]; Cuber Affidavit at paras. 2-3.

<sup>69</sup> See paragraph 12, *supra*.

<sup>70</sup> *GCT Canada* at paras. 23-27 [Tab 18, pp. 613-614].

ii. **The CTA's Document Search Efforts Is in the Scope of Cross-Examination**

59. The CTA also submitted that this Court's determination on October 15, 2021 on the relevant materials under the Rule 317 certified tribunal record would somehow constrain the scope of relevance for cross-examination on the CTA Document Search Affidavit that was not even contemplated by the Court at the time.<sup>71</sup> Respectfully, the Federal Court has rejected the same argument on a similar Rule 94 motion.<sup>72</sup>

19. I agree with the Applicants that the request for the Underlying Records [i.e., materials requested for the cross-examination] was specific and limited, not unduly broad and that they are producible and relevant. While the Underlying Records were previously subject to a Rule 317 decision, that decision (*Parker v Canada (Attorney General)*, 2021 FC 496) did not consider or render a decision regarding the relevance of the Underlying Records to the proceedings at large and was limited to the application of Rule 317 of the Rules.

60. For the Court's ease of reference, the Responding Party has prepared a comprehensive "objections chart", which is attached as [Tab 10]. As detailed in the objections chart, each of the Cross-Examination Materials are relevant and within the scope of cross-examination, and in particular the topic of the CTA's document search efforts.<sup>73</sup>

61. Firstly, the Cross-Examination Materials relate to whether the CTA complied with the Court's orders (i.e., the general October Order and the specific April Order) and the existence of the remaining 14 categories of materials, which are both live issues remaining from the January 16, 2022 motion that the Court will need to decide after Ms. Cuber's cross-examination. The Cross-Examination Materials will provide a glimpse of why there are "missing" documents for the behind-the-scenes dealings on the Statement on Vouchers. This evidence will assist the panel in deciding the weight to be ascribed to evidence that the CTA may later submit, or whether to draw an adverse inference.

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<sup>71</sup> CTA's Written Representations (May 12, 2022) at paras. 44-53.

<sup>72</sup> *Canadian Coalition for Firearm Rights v. Canada (AG)*, 2022 FC 332 at para. 19 [Tab 14, p. 568].

<sup>73</sup> See paragraph 49, *supra*.

62. Ms. Cuber’s barebones affidavit is silent on, and provided no direct explanation for, why and how the 14 categories of documents are “missing”, particularly the original Transport Canada Encrypted Email, and the Meeting Documents for the undisclosed CTA and Transport Canada meetings around the weekend of March 21-22, 2020.

63. Secondly, nearly all of the Cross-Examination Materials are documents directly referred to in Ms. Cuber’s affidavit, or otherwise relied upon in arriving at the statements in her affidavit. The CTA cannot shield the materials based on irrelevancy. Ms. Cuber also seems to have “outsourced” the actual document searches to other personnel, and some of which were not identified by name.<sup>74</sup> For example, Ms. Cuber did not speak to what search criteria, if any, were provided to Mr. Guindon to perform the Outlook search(es), or what criteria were actually used.<sup>75</sup> The CTA cannot claim its search was adequate if the CTA cannot articulate the criteria that were employed.

64. Thirdly, the Cross-Examination Materials allows Ms. Cuber’s credibility and reliability to be tested. The circumstances here are very concerning. As stated in the May 16, 2022 Written Representation at paragraphs 122-125, although Ms. Cuber owed a duty of candour to the Court, she had made inaccurate submissions to the Court about the documents in the CTA’s possession. In light of this history, there is good reason for having the Cross-Examination Materials to verify the statements made in her affidavit.

65. At paragraph 51 of its Written Submissions, the CTA misapplied the *Bristol-Myers* Federal Court decision to suggest that documents regarding the CTA’s document search need not be produced at all. *Bristol-Myers* was in the context of a cross-examination on an affidavit filed under Rule 307 for the merits hearing.<sup>76</sup> It is in that context that the Federal Court stated that an applicant cannot attempt an end run of Rule

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<sup>74</sup> *GCT Canada* at para. 4 [Tab 18, p. 608]; Cuber Affidavit at para. 15.

<sup>75</sup> Cuber Affidavit at paras. 37-38

<sup>76</sup> *Bristol-Myers Squibb Co. v. Canada (AG)*, 2002 FCT 208 paras. 5 and 16-17 [Tab 13, pp. 559 and 563].

317 by requesting further documents about the merits (or documents that were already rejected under Rule 317) by serving a separate direction to attend.

66. The CTA Document Search Affidavit was not filed pursuant to Rule 307, and in any event the CTA overlooked *GCT Canada*, which is a complete answer here.

67. At paragraph 52 of its Written Submissions, the CTA misrepresented the Direction to Attend in claiming that the Applicant was seeking a copy of all the irrelevant documents which were identified during the document search. A closer reading of the Direction to Attend confirms that the twenty-five items, except for #7, 24 and 25, are all materials strictly on the (in)adequacies of the CTA's search(es), and not the "irrelevant documents which were identified."<sup>77</sup> Items 24 and 25 of the Direction to Attend seeks the "index, table of contents, summary, and/or listings" for three of the "outsourced" searches Ms. Cuber relied on, and not the actual documents from the searches.

68. Only item 7 in the Direction to Attend asks Ms. Cuber to bring the five documents she received from Ms. Robertson, the Chair's Executive Coordinator, and referred to in paragraph 34 of the Cuber Affidavit. These documents will enable the Applicant to inquire how Ms. Cuber assessed a document as responsive to the Courts' orders. Ms. Cuber must have provided search criteria for Ms. Robertson's specific search that returned five responsive documents. However, Ms. Cuber excluded four of them, despite Ms. Robertson presenting them as responsive.<sup>78</sup> It begs the question why.

### iii. The CTA Document Search Affidavit Captures the April Order Searches

69. In paragraphs 54-57 of its Written Representations, the CTA claims that the CTA Document Search Affidavit only captures the document search(es) *before* December 14, 2021 (i.e., the 60-day deadline when the CTA produced documents for the

<sup>77</sup> Lukács Affidavit, Exhibit "AI" [Tab 1AI p. 339].

<sup>78</sup> Cuber Affidavit at paras. 34-35

October Order), and categorically excludes any search(es) conducted thereafter, such as the search(es) for the April Order. The CTA relies on the text of the April Order stating “an affidavit detailing the CTA’s efforts to comply with the October 15, 2021 Order.”

70. In other words, the CTA is saying that the October Order no longer applies after the April Order was issued for specific items. The CTA overlooked that the October Order required disclosure of three broad categories of documents, and did not excuse the CTA from productions after the 60-days passes. The April Order specified particular items that *are already within* the scope of, and subsumed into, the October Order.<sup>79</sup>

71. Any document search after December 14, 2021, including any search for the specific items in the April Order, is part and parcel of “the CTA’s efforts to comply with the October Order” in providing documents responsive to the three broad categories of relevant documents in the October Order. Based on the CTA’s theory, if the CTA comes across a document after December 14, 2021 that is covered by the October Order but not specified in the April Order, then that document can simply be withheld. That cannot be correct under any interpretation. The CTA’s hairsplitting technicality must be rejected.

#### **B. The CTA’s Bald Assertions of Privilege and “Non-Existence”**

72. In its Written Representations, like in the previous motions, the CTA relies on bald assertions to claim privilege and “non-existence” of some Cross-Examination Materials in paragraph 62 of its Written Representations.<sup>80</sup> The CTA enjoys no special status as a litigant in regards to proof and is bound by the same rules as other litigants.<sup>81</sup> The law of evidence and Rule 363 require that a party on a motion must file an affidavit for any facts not already in the court file.<sup>82</sup> Rule 363 is not a mere technicality.<sup>83</sup>

<sup>79</sup> Reasons of Gleason, J.A. (Apr. 11, 2022), paras. 16-17, 25, 32-36 [Tab 7, pp. 486, 489, 491, 492].

<sup>80</sup> Reasons of Gleason, J.A. (Apr. 11, 2022), paras. 15 and 47 [Tab 7, pp. 485-486 and 496].

<sup>81</sup> *Alaktsang v. Canada (CI)*, 2006 FC 1168 at para. 19 [Tab 12, p. 554].

<sup>82</sup> *Lukács v. CTA*, 2014 FCA 239 at paras. 8-9, 11, and 13 [Tab 20, pp. 627-629].

<sup>83</sup> *Frame v. Riddle*, 2018 FCA 204 para. 30 [Tab 17, p. 605].

73. Previously, this Court already reminded the CTA that “facts are to be introduced by a witness, not as part of the written representations of counsel” and “it does not seem to me that it is appropriate for counsel to refer to facts that have not been introduced by any witness, unless a Judge could take judicial notice of such facts.”<sup>84</sup>

74. This Court cannot take judicial notice of the CTA’s assertions of privilege and “non-existence” of some Cross-Examination Materials,<sup>85</sup> which are contested facts. Unfortunately, the CTA has chosen again to not adhere to this Court’s clear guidance.

**i. The CTA’s Bald Assertions of Privilege Are Unsubstantiated**

75. The CTA bears the burden of establishing any solicitor-client privilege, and cannot be based on mere say-so.<sup>86</sup> In this case, the CTA has not even submitted an affidavit describing what documents the CTA is asserting privilege for, and the number of such documents. The CTA is placing this Court in a position of having to address the CTA’s assertions in a factual vacuum. In light of the history of this case, and Gleason, J.A.’s ruling that privilege claims in other contexts are to be decided by the Court, the Applicant submits that the CTA should not be policing itself.

76. Indeed, the usual practice when an assertion of privilege is challenged is for the claiming party to submit the documents to the Court for examination.<sup>87</sup> The Applicant submits that the CTA should submit to the Court any of the Cross-Examination Materials for which it asserts privilege, for a ruling on whether any privilege applies.

77. Furthermore, the Court should closely scrutinize if any privilege was explicitly or implicitly waived when the CTA referring to the communications in the CTA Document Search Affidavit, with fairness as a guiding principle in determining whether

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<sup>84</sup> *Lukács v. Canada Transportation Agency*, 2014 FCA 239 at para. 9 [Tab 20, p. 628].

<sup>85</sup> CTA’s Written Representations (May 12, 2022) at paras. 58-62.

<sup>86</sup> *Alaktsang v. Canada (CI)*, 2006 FC 1168 at paras. 18-19 [Tab 12, p. 554]; and *Right to Life Association* at paras. 72-73 [Tab 25, p. 779].

<sup>87</sup> *Right to Life Association* at paras. 72-73 [Tab 25, p. 779].

there is a deemed waiver.<sup>88</sup> It would not be fair to the Applicant if the CTA is allowed to cite its communications to justify the adequacy of its document searches, but at the same time withhold the contents or substance of those specific communications.

78. Furthermore, the CTA is making a *blanket* privilege claim, which would also capture clearly non-privileged information. For example, in the Direction to Attend item #1 (April 14, 2020 notification to preserve documents, including the names of recipients), item #6 (correspondences with CTA Chair’s executive coordinator on the document search), and item #8 (correspondences with IT Manager regarding Outlook searches) clearly contain information that could **not** be covered by solicitor-client privilege.

79. For item #1, the names of the recipients of the document preservation notification is clearly not privileged, and it would be crucial for the Court to know if the recipients included Ms. Jones (who received the original Transport Canada Encrypted Email and the undisclosed weekend meeting(s) with Transport Canada). For items #6 and 8, the search criteria or terms are clearly not privileged. The criteria/terms employed for the search directly implicate the adequacy of the CTA’s document search(es). Presumably Ms. Cuber did not telepathically send the search criteria/terms to these individuals.

## ii. The CTA’s “Non-existence” Assertions Must Be Rejected

80. The CTA has again presented the Court with bald assertions of “non-existence” of documents without any evidence.<sup>89</sup> In the last instance, Gleason, J.A. ordered the CTA to file the CTA Document Search Affidavit to address the gaps created by the CTA’s bald assertions.<sup>90</sup> Unfortunately the CTA has not heeded this Court’s guidance.

81. Most importantly, some of the CTA’s bald assertions are clearly **false**. The CTA

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<sup>88</sup> *Ermineskin First Nation v. Canada*, 2011 FC 1091 at paras. 45-51 [Tab 15, pp. 580-582].

<sup>89</sup> CTA’s Written Representations (May 12, 2022) at paras. 61-62.

<sup>90</sup> Reasons of Gleason, J.A. (Apr. 11, 2022), paras. 15 and 47 [Tab 7, pp. 485-486 and 496].

claims non-existence of item #14 in the Direction to Attend (i.e., printout of the Outlook scheduled events between March 18-25, 2020 for Mr. Streiner and Ms. Jones, who participated in the undisclosed meetings with Transport Canada). In response to the April Order, the CTA presented some Outlook calendar entries involving Mr. Streiner,<sup>91</sup> which serves as a complete answer to the “non-existence” assertion.

82. The Court should dismiss the CTA’s bald assertions of non-existence, in the absence of any sworn evidence confirming the non-existence assertions.

### **C. The CTA Does Not Come to Court with Clean Hands**

83. Finally, the relief under Rule 94(2) is discretionary in nature as it is qualified by the word *may*. The federal courts have repeatedly confirmed that discretionary relief may be refused for a party that does not come to the court with clean hands.<sup>92</sup>

84. The CTA does not come to the Court with clean hands when it has failed to attend the cross-examination on the CTA Document Search Affidavit (and also withheld this fact from the Court) and continues to flout the October Order and April Order.<sup>93</sup> The CTA’s conduct is directly related to the Rule 94(2) discretionary relief it is seeking. The CTA should not be permitted to avoid its obligations under the *Federal Courts Rules* and various court orders, while at the same time asking this court for relief.

### **D. Directions on Delivery of the Cross-Examination Materials**

85. Considering the history of this Application, there is a great risk that further court intervention may be triggered if the CTA’s obligation to provide the Cross-Examination Materials is not made crystal clear in an Order or Direction.

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<sup>91</sup> Lukács Affidavit, Exhibits ‘P’-‘R’ [Tabs 1P-1R, pp. 157, 208, and 228].

<sup>92</sup> *Pelletier v. Canada (Privy Council)*, 2004 FCA 277 at para. 13 [Tab 24, p. 756]; and *Granados v. Canada (CI)*, 2018 FC 400 at para. 9 [Tab 19, p. 619].

<sup>93</sup> See paragraphs 32-39, *supra*; see also May 15, 2022 Motion Record: Applicant’s Written Representations, paras. 87-120.

86. In the context where examinations are now conducted remotely, the Applicant submits that it would be appropriate for the Court to issue a direction that the CTA is to provide the Cross-Examination Materials in electronic format two days in advance, and organized based on the list in the Direction to Attend. This ensures that the materials would be before all the parties and the court reporter, without unnecessary interruptions.

87. The Applicant appreciates that the Federal Court previously stated that there is no express mechanism in the *Federal Courts Rules* for producing the Cross-Examination Materials in advance.<sup>94</sup> However, this reasoning may have been superseded by a later decision of this Court confirming that the *Federal Courts Rules* is not the only source to regulate the practice and procedure. The federal courts can draw on their plenary powers to prevent, eliminate, or minimize conduct that causes delay and cost.<sup>95</sup>

#### **E. Costs Against the CTA, Payable Forthwith**

88. Rule 401(1) empowers the Court to award fixed costs for a motion, and payable forthwith if the motion should not have been brought, or if there was improper conduct. This is the third time that Court intervention arose from the CTA's attempt to circumvent Gleason, J.A's October Order. The CTA's motion should never have been brought. The CTA has already flouted the *Federal Courts Rules* in failing to attend a cross-examination. The documents disclosed on April 20, 2022 further reveal that the CTA has not complied with the October Order and April Order and has withheld documents.

89. 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 \$2,500 all-inclusive, payable forthwith. The Applicant and its counsel

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<sup>94</sup> *Ottawa Athletic Club Inc. v. Athletic Club Group Inc.*, 2014 FC 672 at para. 141 [Tab 23, p. 704].

<sup>95</sup> *ViiV Healthcare v. Gilead Sciences Canada*, 2021 FCA 122 at paras. 16-23 [Tab 28, pp. 803-804].

have an agreement for costs,<sup>96</sup> and any cost awards should be paid to counsel in trust.<sup>97</sup>

#### **PART IV – ORDER SOUGHT**

90. The Responding Party, Air Passenger Rights, is seeking:

- (a) an Order dismissing the Canadian Transportation Agency’s Rule 94 motion for discretionary relief;
- (b) a direction that the Canadian Transportation Agency provide the Cross-Examination Materials to the parties and the court reporter, two days in advance of the cross-examination that is to be scheduled;
- (c) costs on a solicitor-client basis, or alternatively a lump-sum of \$2,500, payable forthwith by the Canadian Transportation Agency; and
- (d) such further and other relief or directions as the counsel may request and this Honourable Court deems just.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

May 20, 2022

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**SIMON LIN**  
**Counsel for the Applicant,**  
**Air Passenger Rights**

<sup>96</sup> Lukács Affidavit, para. 7 [Tab 1, p. 2].

<sup>97</sup> *Roby v. Canada*, 2013 FCA 251 at paras. 23-29 [Tab 26, pp. 790-792]; and *Northcott v. Canada*, 2021 FC 289 at paras. 51-53 [Tab 22, p. 653].

## PART V – LIST OF AUTHORITIES

### Statutes and Regulations

*Federal Courts Rules*, S.O.R./98-106,  
Rules 83, 94, 97, 363, 369.2, and 400-401.

### Case Law

*Alaktsang v. Canada (Minister of Citizenship & Immigration)*, 2006 FC 1168

*Bristol-Myers Squibb Co. v. Canada (Attorney General)*, 2002 FCT 208

*Canadian Coalition for Firearm Rights v. Canada (Attorney General)*, 2022 FC 332

*Ermineskin First Nation v. Canada*, 2011 FC 1091

*Farmobile, LLC v. Farmers Edge Inc.*, 2021 FC 1427

*Frame v. Riddle*, 2018 FCA 204

*GCT Canada Limited Partnership v. Vancouver Fraser Port Authority*,  
Cross-Examination Order (August 25, 2021), No. T-538-19 [*GCT Canada*]

*Granados v. Canada (Citizenship and Immigration)*, 2018 FC 400

*Lukács v. Canada Transportation Agency*, 2014 FCA 239

*Mohammed v. Canada (Immigration, Refugees and Citizenship)*, 2019 FC 193

*Northcott v. Canada (Attorney General)*, 2021 FC 289

*Ottawa Athletic Club Inc. v. Athletic Club Group Inc.*, 2014 FC 672

*Pelletier v. Canada (Privy Council)*, 2004 FCA 277

*Right to Life Association of Toronto and Area v. Canada (Employment, Workforce and Labour)*, 2019 CanLII 9189 (FC)

*Roby v. Canada (Attorney General)*, 2013 FCA 251

*Simpson Strong-Tie Co. v. Peak Innovations Inc.*, 2009 FC 392

*ViiV Healthcare Company v. Gilead Sciences Canada, Inc.*, 2021 FCA 122

Item	Description of the Materials	CTA's Objection	Responding Party's Response to the Objections
<b>A. Notification of Agency Personnel on April 14, 2020 Regarding Application</b>			
1.	The notification sent on April 14, 2020 to preserve documents, referred to in paragraph 8 of the CTA Document Search Affidavit, including the name of the recipient	<ul style="list-style-type: none"> <li>a. Irrelevant</li> <li>b. Solicitor-client privilege</li> </ul>	<p><b>Relevance.</b> This document was raised by the affiant, and will be relied on by the CTA to justify the (in)adequacy of their search. See APR's submissions on "<i>Purpose for the Court to Order the CTA Document Search Affidavit</i>."</p> <p><b>Solicitor-Client Privilege.</b> The CTA is using this document to defend the CTA's document search efforts. There is a strong argument that any privilege is waived, explicitly or implicitly. The CTA also did not address whether it is possible to redact only portions of the notification that may contain privileged information. Names of the personnel receiving the notification are not shielded by privilege. See APR's submissions on "<i>The CTA's Bald Assertions of Privilege Are Unsubstantiated</i>."</p>
2.	Any responses to the document preservation notification on April 14, 2020.	<ul style="list-style-type: none"> <li>a. Irrelevant</li> <li>b. Solicitor-client privilege</li> </ul>	Same as #1 above.
<b>B. Inquiries for Documents with Former Agency Personnel</b>			
3.	Written correspondences between Ms. Cuber and the former Chair Mr. Streiner and the former Chief Strategy Officer, in regards to compliance with the Court's Orders, for the time period of October 15, 2021 to April 22, 2022.	<ul style="list-style-type: none"> <li>a. Irrelevant</li> <li>b. The CTA Document Search Affidavit need not cover the April 2022 searches</li> <li>c. Non-existent</li> </ul>	<p><b>Relevance.</b> The scope of the cross-examination includes the CTA's document search efforts. The key missing documents (e.g., the Transport Canada Encrypted Email, and the Meeting Documents for the undisclosed meetings between Transport Canada and the CTA around the weekend of March 21-22, 2020) involved these two former CTA personnel. A diligent search should involve, at the minimum, making some inquiries with those individuals. See APR's submissions under the heading "<i>Purpose for the Court to Order the CTA Document Search Affidavit</i>."</p> <p><b>Nexus to April Order.</b> The CTA's submission is absurd. The April Order deals with specific items subsumed into the October Order. See APR's submissions on "<i>The CTA Document Search Affidavit Captures the April Order Searches</i>."</p> <p><b>Existence.</b> Ms. Cuber <u>never</u> stated in her affidavit that she did not make inquiries with Mr. Streiner or Ms. Jones. This remains to be dealt with at the cross-examination. The CTA is inviting the Court to leapfrog into an unsupported conclusion. See APR's submissions on "<i>The CTA's 'Non-existence' Assertions Must be Rejected</i>."</p>

4.	Written correspondences between any CTA personnel and the former Chair Mr. Streiner and the former Chief Strategy Officer Ms. Jones, in regards to compliance with the Court's Orders, for the time period of October 15, 2021 to April 22, 2022.	<p>a. Irrelevant</p> <p>b. The CTA Document Search Affidavit need not cover the April 2022 searches</p> <p>c. Non-existent</p>	<p>Same as #3 above. This #4 deals with correspondence(s) by CTA personnel other than Ms. Cuber. This is a fair line of inquiry since Ms. Cuber suggested in the CTA Document Search Affidavit that she relied on a number of individuals for the document search (including Ms. Robertson, the Chair's Executive Coordinator).</p> <p>Ms. Cuber did not do any of the searches personally herself, but simply reviewed the search results that were given to her.</p>
5.	CTA's policy on data retention for the computer and mobile devices of departing personnel.	<p>a. Irrelevant</p> <p>b. Non-existent</p>	<p><b>Relevance.</b> The scope of the cross-examination is the CTA's document search efforts. The CTA Document Search Affidavit (at paras. 10-12) suggests that only certain documents are saved in the CTA's corporate repository. Considering there are numerous missing documents involving these individuals (e.g., see #3 above), a diligent search would involve at least searching these individual's local devices, or copies thereof. See APR's submissions on "<i>Purpose for the Court to Order the CTA Document Search Affidavit.</i>"</p> <p><b>Existence.</b> Ms. Cuber never claimed in her affidavit that this policy does not exist. To the contrary, she attached other documents on data retention, suggesting the CTA has a rather sophisticated system or policy for data management. See APR's submissions under the heading "<i>The CTA's 'Non-existence' Assertions Must be Rejected.</i>"</p>
<b>C. Inquiry with Ms. Lesley Robertson, Office of the Chairperson</b>			
6.	Written correspondences between Ms. Cuber and Ms. Lesley Robertson regarding search for documents responsive to the Court's Orders, referred to in paragraph 33 of the CTA Document Search Affidavit.	<p>a. Irrelevant</p> <p>b. The CTA Document Search Affidavit need not cover the April 2022 searches</p> <p>c. Solicitor-client privilege</p>	<p><b>Relevance.</b> These correspondences were raised by the affiant herself. See APR's submissions on "<i>Purpose for the Court to Order the CTA Document Search Affidavit.</i>"</p> <p><b>Nexus to April Order.</b> See APR's submissions on "<i>The CTA Document Search Affidavit Captures the April Order Searches.</i>"</p> <p><b>Solicitor-Client Privilege.</b> The CTA is relying on these undisclosed documents to defend its search efforts. There is a strong argument that any privilege is waived. The CTA failed to address if it is possible to redact any portions that may contain privileged information. See APR's submissions on "<i>The CTA's Bald Assertions of Privilege Are Unsubstantiated.</i>"</p>
7.	Copies of the five documents Ms. Cuber received from Ms. Robertson, referred to in paragraph 34 of the CTA Document Search Affidavit.	<p>a. Irrelevant</p> <p>b. The CTA Document Search Affidavit need not cover the April 2022 searches</p>	<p>Same as #6 above.</p>

**D. Inquiry with Mr. Guindon and Other Information Technology Personnel**

8.	Written correspondences between Ms. Cuber and Mr. Jonathan Guindon (the IT Operations Manager) regarding search for documents responsive to the Court's Orders, referred to in paragraphs 37-38 of the CTA Document Search Affidavit.	<p>a. Irrelevant</p> <p>b. The CTA Document Search Affidavit need not cover the April 2022 searches</p> <p>c. Solicitor-client privilege</p>	<p><b>Relevance.</b> The affiant herself raised the topic of making inquiries with Mr. Guindon. What Ms. Cuber told Mr. Guindon to search is squarely relevant to the CTA's document search efforts. It is unconceivable that Ms. Cuber simply told Mr. Guindon to "go search" without providing any criteria. See APR's submissions on "<i>Purpose for the Court to Order the CTA Document Search Affidavit.</i>"</p> <p><b>Nexus to April Order.</b> See APR's submissions on "<i>The CTA Document Search Affidavit Captures the April Order Searches.</i>"</p> <p><b>Solicitor-Client Privilege.</b> The CTA is relying on its dealings with Mr. Guindon to defend the CTA's document search efforts. There is a strong argument that any privilege is waived. The CTA also failed to address whether it is possible to redact any portions that may contain privileged information, if any. The search criteria provided to Mr. Guindon could not be privileged. See APR's submissions on "<i>The CTA's Bald Assertions of Privilege Are Unsubstantiated.</i>"</p>
9.	Documents showing the search terms employed for the electronic search referred to in paragraph 38 of the CTA Document Search Affidavit.	Irrelevant	<p><b>Relevance.</b> The affiant raised the issue of having conducted an electronic search. Computers do not have self-awareness, and must be provided search terms. The search terms that were provided would inform the Court on whether the CTA's document search was adequate. See APR's submissions on "<i>Purpose for the Court to Order the CTA Document Search Affidavit.</i>"</p>
10.	List of the CTA staff whose Microsoft Outlook accounts were captured in the search results referred to in paragraphs 38-39 of the CTA Document Search Affidavit.	Irrelevant	<p><b>Relevance.</b> The affiant referred to the search results in paragraph 39 of the CTA Document Search Affidavit. However, Mr. Streiner and Ms. Jones were no longer CTA personnel at the time Mr. Guindon conducted the search. Consequently, based on para. 38 of the affidavit, Mr. Streiner and Ms. Jones' Outlook accounts may not have been searched. This document will assist in verifying if a diligent search was conducted on the key personnel's Outlook accounts. See APR's submissions on "<i>Purpose for the Court to Order the CTA Document Search Affidavit.</i>"</p>
11.	Documents showing if searches were made in the MS Outlook accounts of the former Chair Mr. Streiner and the former Chief Strategy Officer Ms. Jones.	Irrelevant	Same as #10 above

12.	Microsoft Outlook logs showing when two emails were deleted from Ms. Jones' account (i.e., the original Transport Canada Encrypted Email and a March 25, 2020 announcement email for the Statement on Vouchers)	<p>a. Irrelevant</p> <p>b. Non-existent</p>	<p><b>Relevance.</b> Ms. Cuber claims that “relevant Agency personnel” were notified to preserve responsive documents on April 14, 2020 (para. 8 of CTA Document Search Affidavit). In addition, on March 20, 2020, Mr. Streiner had specifically advised at the Executive Committee meeting that “Emails sent during this period subject to ATIP [Access to Information &amp; Privacy]” (Lukács Affidavit, Exhibit “V” [Tab 1V, p. 284]), and consequently the emails should not have gone missing. The Microsoft Outlook logs would reveal <b>when</b> Ms. Jones (or whomever pressed the delete key) deleted these key emails. If the emails were deleted after the CTA had notice, there may be a case of spoliation, and the panel hearing the Application may draw an adverse inference. See APR’s submissions on “<i>Purpose for the Court to Order the CTA Document Search Affidavit.</i>”</p> <p><b>Non-Existence.</b> See APR’s submissions on “<i>The CTA’s “Non-existence” Assertions Must be Rejected</i>”.</p>
<b>E. Searching the Canadian Transportation Agency’s Corporate Repository</b>			
13.	Documents showing the search terms employed for searching responsive documents on the CTA’s corporate documents repository.	<p>a. Irrelevant</p> <p>b. The CTA Document Search Affidavit need not cover the April 2022 searches</p>	<p><b>Relevance.</b> The affiant herself raised the topic of making searches on the CTA’s corporate repository. The search terms employed are directly relevant to whether the CTA conducted an adequate search. See APR’s submissions on “<i>Purpose for the Court to Order the CTA Document Search Affidavit.</i>”</p> <p><b>Nexus to April Order.</b> See APR’s submissions on “<i>The CTA Document Search Affidavit Captures the April Order Searches.</i>”</p>
<b>F. Records of or Recordings of the March 9-25, 2020 Meetings</b>			
14.	With reference to the Outlook search referenced in paragraph 38 of the CTA Document Search Affidavit, a printout of Mr. Streiner and Ms. Jones’ Outlook calendar of scheduled events between March 9-25, 2020, including the weekend of March 21-22, 2020.	<p>a. Irrelevant</p> <p>b. Non-existent</p>	<p><b>Relevance.</b> Ms. Cuber’s affidavit did not refer to whether she searched the calendars of Mr. Streiner and/or Ms. Jones for the undisclosed weekend meetings with Transport Canada about the Statement on Vouchers on the weekend of March 21-22, 2020. The “Meeting Documents” was a specific category of documents ordered in the October Order, and confirmed again in the April Order. It would be a blatant oversight not to review the key personnel’s calendar in these circumstances. See APR’s submissions on “<i>Purpose for the Court to Order the CTA Document Search Affidavit.</i>”</p> <p><b>Existence.</b> The CTA’s assertion of “non-existence” must be <b>false</b>. The CTA had produced select Outlook calendar events from this time period (Lukács Affidavit, Exhibit “V” [Tab 1V, p. 284]), such as the daily EC Meetings. In other words, there would be Outlook events during those time periods that would form the list therein. See APR’s submissions on “<i>The CTA’s “Non-existence” Assertions Must be Rejected.</i>”</p>

15.	Printout of the meetings that took place using Mr. Streiner’s dial-in conference code between March 9-25, 2020, including the weekend of March 21-22, 2020.	<p>a. Irrelevant</p> <p>b. The CTA Document Search Affidavit need not cover the April 2022 searches</p>	<p><b>Relevance.</b> Same as #14 above. At para. 58 of the CTA Document Search Affidavit, Ms. Cuber is claiming that the meetings were not recorded. In other words, assuming Ms. Cuber’s statement is accurate, she must have reviewed the history information associated with Mr. Streiners dial-in code (and any other dial-in codes) in order to arrive at the statement that “[n]o. These meetings were not recorded.” The history for Mr. Streiner’s dial-in code would show when he met with Transport Canada during the weekend of March 21-22, 2020, and how many times, and whether Mr. Streiner’s dial-in code was used for those meetings, etc.. See APR’s submissions on “<i>Purpose for the Court to Order the CTA Document Search Affidavit.</i>”</p> <p><b>Nexus to April Order.</b> See APR’s submissions on “<i>The CTA Document Search Affidavit Captures the April Order Searches.</i>”</p>
16.	A printout listing the meetings between March 9-25, 2020 that were recorded.	<p>a. Irrelevant</p> <p>b. Non-existent</p>	<p><b>Relevance.</b> See APR’s submissions on “<i>Purpose for the Court to Order the CTA Document Search Affidavit.</i>”</p> <p><b>Existence.</b> The CTA’s bald assertion cannot be accurate. Ms. Cuber claimed at para. 58 of her affidavit that the meetings were not recorded. She must have reviewed some documents to base that conclusion. In other words, there must be a list of meetings showing whether there was a recording, or a repository of meetings that were recorded. See APR’s submissions on “<i>The CTA’s ‘Non-existence’ Assertions Must be Rejected.</i>”</p>

**G. Inquiries after Producing the Initial Documents on December 14, 2021**

17.	Documents showing what “the existing search results” in paragraph 42 of the CTA Document Search Affidavit refers to.	<p>a. Irrelevant</p> <p>b. Non-existent</p>	<p><b>Relevance.</b> Ms. Cuber mentioned the “existing search results” herself in para. 42 of the affidavit. See APR’s submissions on “<i>Purpose for the Court to Order the CTA Document Search Affidavit.</i>”</p> <p><b>Existence.</b> The CTA’s assertion must be false. Ms. Cuber said she “repeatedly verified the existing search results to ensure...”. The “existing search results” must be on some document, and not wholly within Ms. Cuber’s memory. See APR’s submissions on “<i>The CTA’s ‘Non-existence’ Assertions Must be Rejected.</i>”</p> <p><b>Relevance.</b> This is directly relevant to the CTA’s document search efforts and whether the CTA complied with the court orders. See APR’s submissions on “<i>Purpose for the Court to Order the CTA Document Search Affidavit.</i>”</p> <p><b>Nexus to April Order.</b> See APR’s submissions on “<i>Purpose for the Court to Order the CTA Document Search Affidavit.</i>”</p>
18.	Printout of the Microsoft Outlook search results relied upon to produce the documents on April 20, 2022.	<p>a. Irrelevant</p> <p>b. The CTA Document Search Affidavit need not cover the April 2022 searches</p>	<p><b>Relevance.</b> This is directly relevant to the CTA’s document search efforts and whether the CTA complied with the court orders. See APR’s submissions on “<i>Purpose for the Court to Order the CTA Document Search Affidavit.</i>”</p> <p><b>Nexus to April Order.</b> See APR’s submissions on “<i>Purpose for the Court to Order the CTA Document Search Affidavit.</i>”</p>

**H. Document Referred to in the April 20, 2022 Documents Package**

19.	The March 24, 2020 Members' Meeting agenda, referred to in the documents produced on April 20, 2022	<p>a. Irrelevant</p> <p>b. The CTA Document Search Affidavit need not cover the April 2022 searches</p>	<p><b>Relevance.</b> An agenda was directly referred to in the documents disclosed by the CTA on April 20, 2022 (Lukács Affidavit, Exhibit "O" (page 47 within this Exhibit) [Tab 10, p. 136]). See APR's submissions on "Purpose for the Court to Order the CTA Document Search Affidavit."</p> <p><b>Nexus to April Order.</b> See APR's submissions on "The CTA Document Search Affidavit Captures the April Order Searches."</p>
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**I. Microsoft Outlook Backups**

20.	The CTA's written policy on retaining the Microsoft Outlook backup tapes referred to in paragraph 53 of the CTA Document Search Affidavit.	<p>a. Irrelevant</p> <p>b. Non-existent</p>	Same as #5 above. Furthermore, regarding "non-existence", it is difficult to imagine that the CTA has no written policy on retention of the Outlook back up tapes, but somehow Ms. Cuber was able to articulate fairly precise time periods for retention in her affidavit.
21.	Written correspondences between Ms. Cuber and a staff/member of the CTA regarding retrieving the Microsoft Outlook backups referenced in paragraph 54 of the CTA Document Search Affidavit.	<p>a. Irrelevant</p> <p>b. Non-existent</p>	<p><b>Relevance.</b> See APR's submissions on "Purpose for the Court to Order the CTA Document Search Affidavit."</p> <p><b>Existence.</b> There is no sworn evidence from Ms. Cuber indicating that she did not correspond regarding these Outlook backup tapes. It appears Ms. Cuber may not have even done the minimal level of diligence to review the backup copies to locate the key missing documents (e.g., the Transport Canada Encrypted Email, the Meeting Documents for the March 21-22, 2020 weekend meetings with Transport Canada, and the announcement email sent by Ms. Jones on March 25, 2020). See APR's submissions on "The CTA Document Search Affidavit Captures the April Order Searches."</p>
22.	List of all the Outlook backup tapes that are still retained (referenced in paragraphs 53-54 of the CTA Document Search Affidavit), in particular the dates covered.	<p>a. Irrelevant</p>	<p><b>Relevance.</b> This document will prove/disprove whether the Outlook backup tapes contain the missing documents referred to in #21 above. Ms. Cuber did not say in her affidavit that the Outlook backup tapes did not cover the time period of March 9-25, 2020. To the contrary, her evidence suggests that when there is pending litigation, there may be some policy to put responsive documents on hold (Cuber Affidavit at para. 8 and Exhibit "B", page 6, line above "2. SORT your information"). See APR's submissions on "Purpose for the Court to Order the CTA Document Search Affidavit."</p>
23.	The CTA's written policy on retaining backups in formats other than backup tapes.	<p>a. Irrelevant</p> <p>b. Non-existent</p>	Same as #5 above.

**J. Inquiry Relating to ATI Requests A-2020-00002 and A-2020-00029**

24.	An index, table of contents, summary, and/or listing of the two Access to Information searches referred to and relied upon in Ms. Cuber's search, as referenced in paragraphs 17-20 and 21-25 of the CTA Document Search Affidavit.	a. Irrelevant	<b>Relevance.</b> The CTA appears to be admitting that index, table of contents, summary, and/or listings do exist. The listings are relevant to the criteria/basis for the CTA in labelling a document as "responsive" to the Court orders. There is no prejudice for the CTA in producing these materials since these are merely listings and not the actual documents themselves. It would permit the Court to verify whether the CTA applied the proper criteria in classifying a document as responsive. See APR's submissions on " <i>Purpose for the Court to Order the CTA Document Search Affidavit.</i> "
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**K. Inquiry Relating to TRAN Committee Motion Documents**

25.	An index, table of contents, summary, and/or listing of the document search for response to a Parliamentary Committee, referred to and relied upon in Ms. Cuber's search, as referenced in paragraph 29 of the CTA Document Search Affidavit.	a. Irrelevant	Same as #24 above.
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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

### Use of solicitor's affidavit

**82** Except with leave of the Court, a solicitor shall not both depose to an affidavit and present argument to the Court based on that affidavit.

### Cross-examination on affidavits

**83** A party to a motion or application may cross-examine the deponent of an affidavit served by an adverse party to the motion or application.

### When cross-examination may be made

**84 (1)** A party seeking to cross-examine the deponent of an affidavit filed in a motion or application shall not do so until the party has served on all other parties every affidavit on which the party intends to rely in the motion or application, except with the consent of all other parties or with leave of the Court.

### Filing of affidavit after cross-examination

**(2)** A party who has cross-examined the deponent of an affidavit filed in a motion or application may not subsequently file an affidavit in that motion or application, except with the consent of all other parties or with leave of the Court.

### Due diligence

**85** A party who intends to cross-examine the deponent of an affidavit shall do so with due diligence.

### Transcript of cross-examination on affidavit

**86** Unless the Court orders otherwise, a party who conducts a cross-examination on an affidavit shall order and pay for a transcript thereof and send a copy to each other party.

## Examinations out of Court

### General

### Definition of *examination*

**87** In rules 88 to 100, *examination* means

- (a) an examination for discovery;
- (b) the taking of evidence out of court for use at trial;
- (c) a cross-examination on an affidavit; or
- (d) an examination in aid of execution.

### Utilisation de l'affidavit d'un avocat

**82** Sauf avec l'autorisation de la Cour, un avocat ne peut à la fois être l'auteur d'un affidavit et présenter à la Cour des arguments fondés sur cet affidavit.

### Droit au contre-interrogatoire

**83** Une partie peut contre-interroger l'auteur d'un affidavit qui a été signifié par une partie adverse dans le cadre d'une requête ou d'une demande.

### Contre-interrogatoire de l'auteur d'un affidavit

**84 (1)** Une partie ne peut contre-interroger l'auteur d'un affidavit déposé dans le cadre d'une requête ou d'une demande à moins d'avoir signifié aux autres parties chaque affidavit qu'elle entend invoquer dans le cadre de celle-ci, sauf avec le consentement des autres parties ou l'autorisation de la Cour.

### Dépôt d'un affidavit après le contre-interrogatoire

**(2)** La partie qui a contre-interrogé l'auteur d'un affidavit déposé dans le cadre d'une requête ou d'une demande ne peut par la suite déposer un affidavit dans le cadre de celle-ci, sauf avec le consentement des autres parties ou l'autorisation de la Cour.

### Diligence raisonnable

**85** Le contre-interrogatoire de l'auteur d'un affidavit est effectué avec diligence raisonnable.

### Transcription d'un contre-interrogatoire

**86** Sauf ordonnance contraire de la Cour, la partie qui effectue un contre-interrogatoire concernant un affidavit doit en demander la transcription, en payer les frais et en transmettre une copie aux autres parties.

## Interrogatoires hors cour

### Dispositions générales

### Définition de *interrogatoire*

**87** Dans les règles 88 à 100, *interrogatoire* s'entend, selon le cas :

- a) d'un interrogatoire préalable;
- b) des dépositions recueillies hors cour pour être utilisées à l'instruction;
- c) du contre-interrogatoire concernant un affidavit;
- d) de l'interrogatoire à l'appui d'une exécution forcée.

### Service of direction to attend

**(3)** A direction to attend an oral examination shall be served

**(a)** where the person to be examined is an adverse party, at least six days before the day of the proposed examination;

**(b)** where the person to be examined is not a party to the proceeding, at least 10 days before the day of the proposed examination; or

**(c)** where the person is to be cross-examined on an affidavit filed in support of a motion, at least 24 hours before the hearing of the motion.

### Swearing

**92** A person to be examined on an oral examination shall be sworn before being examined.

### Examining party to provide interpreter

**93 (1)** Where a person to be examined on an oral examination understands neither French nor English or is deaf or mute, the examining party shall arrange for the attendance and pay the fees and disbursements of an independent and competent person to accurately interpret everything said during the examination, other than statements that the attending parties agree to exclude from the record.

### Administrator to provide interpreter

**(2)** Where an interpreter is required because the examining party wishes to conduct an oral examination in one official language and the person to be examined wishes to be examined in the other official language, on the request of the examining party made at least six days before the examination, the Administrator shall arrange for the attendance and pay the fees and disbursements of an independent and competent interpreter.

### Oath of interpreter

**(3)** Before aiding in the examination of a witness, an interpreter shall take an oath, in Form 93, as to the performance of his or her duties.

SOR/2007-301, s. 3(E).

### Production of documents on examination

**94 (1)** Subject to subsection (2), a person who is to be examined on an oral examination or the party on whose behalf that person is being examined shall produce for inspection at the examination all documents and other material requested in the direction to attend that are within that person's or party's possession and control, other than any documents for which privilege has been

### Signification de l'assignation

**(3)** L'assignation à comparaître est signifiée :

**a)** si elle s'adresse à une partie adverse, au moins six jours avant la date de l'interrogatoire;

**b)** si elle ne s'adresse pas à une partie à l'instance, au moins 10 jours avant la date de l'interrogatoire;

**c)** si elle vise le contre-interrogatoire de l'auteur d'un affidavit déposé au soutien d'une requête, au moins 24 heures avant l'audition de celle-ci.

### Serment

**92** La personne soumise à un interrogatoire oral prête serment avant d'être interrogée.

### Interprète fourni par la partie qui interroge

**93 (1)** Si la personne soumise à un interrogatoire oral ne comprend ni le français ni l'anglais ou si elle est sourde ou muette, la partie qui interroge s'assure de la présence et paie les honoraires et débours d'un interprète indépendant et compétent chargé d'interpréter fidèlement les parties de l'interrogatoire oral qui sont enregistrées selon le paragraphe 89(4).

### Interprète fourni par l'administrateur

**(2)** Lorsqu'une partie désire procéder à l'interrogatoire oral d'une personne dans une langue officielle et que cette dernière désire subir l'interrogatoire dans l'autre langue officielle, la partie peut demander à l'administrateur, au moins six jours avant l'interrogatoire, d'assurer la présence d'un interprète indépendant et compétent. Dans ce cas, l'administrateur paie les honoraires et les débours de l'interprète.

### Serment de l'interprète

**(3)** Avant de fournir des services d'interprétation, l'interprète prête le serment, selon la formule 93, de bien exercer ses fonctions.

DORS/2007-301, art. 3(A).

### Production de documents

**94 (1)** Sous réserve du paragraphe (2), la personne soumise à un interrogatoire oral ou la partie pour le compte de laquelle la personne est interrogée produisent pour examen à l'interrogatoire les documents et les éléments matériels demandés dans l'assignation à comparaître qui sont en leur possession, sous leur autorité ou sous leur

claimed or for which relief from production has been granted under rule 230.

### Relief from production

**(2)** On motion, the Court may order that a person to be examined or the party on whose behalf that person is being examined be relieved from the requirement to produce for inspection any document or other material requested in a direction to attend, if the Court is of the opinion that the document or other material requested is irrelevant or, by reason of its nature or the number of documents or amount of material requested, it would be unduly onerous to require the person or party to produce it.

### Objections

**95 (1)** A person who objects to a question that is asked in an oral examination shall briefly state the grounds for the objection for the record.

### Preliminary answer

**(2)** A person may answer a question that was objected to in an oral examination subject to the right to have the propriety of the question determined, on motion, before the answer is used at trial.

### Improper conduct

**96 (1)** A person being examined may adjourn an oral examination and bring a motion for directions if the person believes that he or she is being subjected to an excessive number of questions or to improper questions, or that the examination is being conducted in bad faith or in an abusive manner.

### Adjournment to seek directions

**(2)** A person conducting an oral examination may adjourn the examination and bring a motion for directions if the person believes answers to questions being provided are evasive or if the person being examined fails to produce a document or other material requested under rule 94.

### Sanctions

**(3)** On a motion under subsection (1) or (2), the Court may sanction, through costs, a person whose conduct necessitated the motion or a person who unnecessarily adjourned the examination.

garde, sauf ceux pour lesquels un privilège de non-divulgation a été revendiqué ou pour lesquels une dispense de production a été accordée par la Cour en vertu de la règle 230.

### Partie non tenue de produire des documents

**(2)** La Cour peut, sur requête, ordonner que la personne ou la partie pour le compte de laquelle la personne est interrogée soient dispensées de l'obligation de produire pour examen certains des documents ou éléments matériels demandés dans l'assignation à comparaître, si elle estime que ces documents ou éléments ne sont pas pertinents ou qu'il serait trop onéreux de les produire du fait de leur nombre ou de leur nature.

### Objection

**95 (1)** La personne qui soulève une objection au sujet d'une question posée au cours d'un interrogatoire oral énonce brièvement les motifs de son objection pour qu'ils soient inscrits au dossier.

### Réponse préliminaire

**(2)** Une personne peut répondre à une question au sujet de laquelle une objection a été formulée à l'interrogatoire oral, sous réserve de son droit de faire déterminer, sur requête, le bien-fondé de la question avant que la réponse soit utilisée à l'instruction.

### Questions injustifiées

**96 (1)** La personne qui est interrogée peut ajourner l'interrogatoire oral et demander des directives par voie de requête, si elle croit qu'elle est soumise à un nombre excessif de questions ou à des questions inopportunes, ou que l'interrogatoire est effectué de mauvaise foi ou de façon abusive.

### Ajournement

**(2)** La personne qui interroge peut ajourner l'interrogatoire oral et demander des directives par voie de requête, si elle croit que les réponses données aux questions sont évatives ou qu'un document ou un élément matériel demandé en application de la règle 94 n'a pas été produit.

### Sanctions

**(3)** À la suite de la requête visée aux paragraphes (1) ou (2), la Cour peut condamner aux dépens la personne dont la conduite a rendu nécessaire la présentation de la requête ou la personne qui a ajourné l'interrogatoire sans raison valable.

### 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.

(a) where the motion is made on notice, if all parties consent; or

(b) in any case, if the moving party satisfies the Court of the urgency of the motion.

SOR/2013-18, s. 11.

#### Evidence on motion

**363** A party to a motion shall set out in an affidavit any facts to be relied on by that party in the motion that do not appear on the Court file.

SOR/2002-417, s. 21(F); SOR/2021-244, s. 14(F).

#### Motion record

**364 (1)** Unless the Court orders otherwise, a person bringing a motion shall serve a motion record and file an electronic copy of or, subject to rule 72.4, three paper copies of that record.

#### Contents of motion record

(2) A moving party's motion record shall contain, on consecutively numbered pages arranged in the following order,

- (a) a table of contents;
- (b) the notice of motion;
- (c) all affidavits and other material served by the moving party for use on the motion;
- (d) subject to rule 368, the portions of any transcripts on which the moving party intends to rely;
- (e) subject to rule 366, written representations; and
- (f) any other filed material that is necessary for the purposes of the motion.

#### Service and filing of motion record

(3) Subject to subsections 51(2), 163(2) and 213(3), on a motion other than a motion under rule 369, the motion record shall be served and filed at least three days before the day set out in the notice of motion for the hearing of the motion.

SOR/2009-331, s. 5; SOR/2013-18, s. 12; SOR/2015-21, s. 27; SOR/2021-151, s. 20; SOR/2021-244, s. 15.

#### Respondent's motion record

**365 (1)** A respondent to a motion shall serve a respondent's motion record and file one electronic copy or, subject to Rule 72.4, three paper copies of the record no later than

a) lorsqu'il ne s'agit pas d'une requête *ex parte*, si toutes les parties y consentent;

b) dans tous les cas, si le requérant la convainc qu'il s'agit d'un cas d'urgence.

DORS/2013-18, art. 11.

#### Preuve

**363** Une partie présente sa preuve par affidavit, relatant tous les faits sur lesquels elle se fonde dans le cadre de la requête et qui ne figurent pas au dossier de la Cour.

DORS/2002-417, art. 21(F); DORS/2021-244, art. 14(F).

#### Dossier de requête

**364 (1)** Sauf ordonnance contraire de la Cour, le requérant signifie un dossier de requête et en dépose une copie électronique ou, sous réserve de la règle 72.4, trois copies papier.

#### Contenu du dossier de requête

(2) Le dossier de requête contient, sur des pages numérotées consécutivement, les éléments suivants dans l'ordre indiqué ci-après :

- a) une table des matières;
- b) l'avis de requête;
- c) les affidavits et autres documents et éléments matériels signifiés par le requérant à l'appui de la requête;
- d) sous réserve de la règle 368, les extraits de toute transcription dont le requérant entend se servir;
- e) sous réserve de la règle 366, les prétentions écrites du requérant;
- f) les autres documents ou éléments matériels déposés qui sont nécessaires dans le cadre de la requête.

#### Signification et dépôt du dossier de requête

(3) Sous réserve des paragraphes 51(2), 163(2) et 213(3), le dossier de requête, sauf s'il s'agit d'une requête présentée selon la règle 369, est signifié et déposé au moins trois jours avant la date de l'audition de la requête indiquée dans l'avis de requête.

DORS/2009-331, art. 5; DORS/2013-18, art. 12; DORS/2015-21, art. 27; DORS/2021-151, art. 20; DORS/2021-244, art. 15.

#### Dossier de l'intimé

**365 (1)** L'intimé signifie un dossier de réponse et en dépose une copie électronique ou, sous réserve de la règle 72.4, trois copies papier au plus tard :

### Motions in writing

**369 (1)** A party may, in a notice of motion, request that the motion be decided on the basis of written representations.

### Request for oral hearing

**(2)** A respondent to a motion brought in accordance with subsection (1) shall serve and file a respondent's record within 10 days after being served under rule 364 and, if the respondent objects to disposition of the motion in writing, indicate in its written representations or memorandum of fact and law the reasons why the motion should not be disposed of in writing.

### Reply

**(3)** A moving party may serve and file written representations in reply within four days after being served with a respondent's record under subsection (2).

### Disposition of motion

**(4)** On the filing of a reply under subsection (3) or on the expiration of the period allowed for a reply, the Court may dispose of a motion in writing or fix a time and place for an oral hearing of the motion.

### Motions in the Federal Court of Appeal

**369.1** Rule 362, subsection 364(3) and rules 366 to 369 do not apply to a motion that is brought in the Federal Court of Appeal.

SOR/2021-244, s. 17.

### Written representations only — Federal Court of Appeal

**369.2 (1)** Unless otherwise ordered by the Court and subject to subsection (2), all motions brought in the Federal Court of Appeal shall be decided on the basis of written representations.

### Request for oral hearing

**(2)** A party to a motion may make a written request that the motion be heard orally. The request, together with the reasons why the motion should be heard orally, shall be attached as a separate page at the end of the party's motion record.

### Reply by moving party

**(3)** Unless the motion is to be heard orally, the moving party may serve and file written representations in reply within four days after the day on which they are served with the respondent's motion record.

SOR/2021-244, s. 17.

### Procédure de requête écrite

**369 (1)** Le requérant peut, dans l'avis de requête, demander que la décision à l'égard de la requête soit prise uniquement sur la base de ses prétentions écrites.

### Demande d'audience

**(2)** L'intimé signifie et dépose son dossier de réponse dans les 10 jours suivant la signification visée à la règle 364 et, s'il demande l'audition de la requête, inclut une mention à cet effet, accompagnée des raisons justifiant l'audition, dans ses prétentions écrites ou son mémoire des faits et du droit.

### Réponse du requérant

**(3)** Le requérant peut signifier et déposer des prétentions écrites en réponse au dossier de réponse dans les quatre jours après en avoir reçu signification.

### Décision

**(4)** Dès le dépôt de la réponse visée au paragraphe (3) ou dès l'expiration du délai prévu à cette fin, la Cour peut statuer sur la requête par écrit ou fixer les date, heure et lieu de l'audition de la requête.

### Requêtes à la Cour d'appel fédérale

**369.1** La règle 362, le paragraphe 364(3) et les règles 366 à 369 ne s'appliquent pas aux requêtes présentées à la Cour d'appel fédérale.

DORS/2021-244, art. 17.

### Prétentions écrites uniquement — Cour d'appel fédérale

**369.2 (1)** Sauf ordonnance contraire de la Cour et sous réserve du paragraphe (2), la décision à l'égard d'une requête présentée à la Cour d'appel fédérale est prise sur la base de prétentions écrites.

### Demande d'audience

**(2)** Une partie peut présenter une demande écrite d'audition de la requête. La demande, accompagnée des raisons justifiant l'audition, est jointe sous forme de page séparée à la fin du dossier de requête de la partie.

### Réponse du requérant

**(3)** Sauf si une audition est tenue, le requérant peut signifier et déposer des prétentions écrites en réponse au dossier de réponse de l'intimé dans les quatre jours suivant la date à laquelle il en a reçu signification.

DORS/2021-244, art. 17.

(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 :

2006 FC 1168, 2006 CF 1168  
Federal Court

Alaktsang v. Canada (Minister of Citizenship & Immigration)

2006 CarswellNat 3016, 2006 CarswellNat 4636, 2006 FC 1168,  
2006 CF 1168, 151 A.C.W.S. (3d) 916, 300 F.T.R. 175 (Eng.)

**Tashi Dolma Alaktsang, Applicant and The Minister  
of Citizenship and Immigration, Respondent**

M.L. Phelan J.

Heard: September 27, 2006

Judgment: October 2, 2006

Docket: IMM-1728-06

Counsel: Ms Geraldine MacDonald, for Applicant  
Ms Leena Jaakkimainen, for Respondent

***M.L. Phelan J.:***

**I. Background**

1 The Applicant, a Convention refugee and Tibetan citizen of China, had her application for permanent residence denied by an Immigration Officer (Officer) on the grounds that she was an Indian citizen. The Applicant was held to be a member of a prescribed class listed in [s. 177 of the \*Immigration and Refugee Protection Regulations \(Regulations\)\*](#). This is the judicial review of that decision.

2 In the course of this matter, the Applicant brought a motion to require the Respondent to produce those parts of the certified tribunal record which had been excluded on the grounds of solicitor-client privilege. That motion was dismissed for reasons set forth herein.

**II. Facts**

3 The Applicant claims that she is a Tibetan citizen of China. She was found to be a Convention refugee on July 23, 1999. The Respondent, who could have participated in the immigration hearing, chose not to do so and did not object to the refugee application. That refugee application was based on the Applicant's assertion that she is a Tibetan citizen and feared persecution in Tibet.

4 On November 4, 1999, the Applicant applied for permanent residence. By letter dated March 3, 2006 - 6 <sup>1</sup>/<sub>2</sub> years after her application was filed — the Officer refused to grant the application for permanent residence on the basis that she was a citizen of India, a country other than the one where she feared persecution. The provision at issue, [s. 177 of the Regulations](#), reads:

177. For the purposes of subsection 21(2) of the Act, the following are prescribed as classes of persons who cannot become permanent residents:

- (a) the class of persons who have been the subject of a decision under section 108 or 109 or subsection 114(3) of the Act resulting in the loss of refugee protection or nullification of the determination that led to conferral of refugee protection;
- (b) the class of persons who are permanent residents at the time of their application to remain in Canada as a permanent resident;
- (c) the class of persons who have been recognized by any country, other than Canada, as Convention refugees and who, if removed from Canada, would be allowed to return to that country;
- (d) the class of nationals or citizens of a country, other than the country that the person left, or outside of which the person remains, by reason of fear of persecution; and
- (e) the class of persons who have permanently resided in a country, other than the country that the person left, or outside of which the person remains, by reason of fear of persecution, and who, if removed from Canada, would be allowed to return to that country.

177. Pour l'application du paragraphe 21(2) de la Loi, les catégories réglementaires de personnes qui ne peuvent devenir résidents permanents sont les suivantes:

- a) la catégorie des personnes qui ont fait l'objet d'une décision aux termes des articles 108 ou 109 ou du paragraphe 114(3) de la Loi rejetant la demande d'asile ou annulant la décision qui avait eu pour effet de conférer l'asile;
- b) la catégorie des personnes qui sont des résidents permanents au moment de présenter leur demande de séjour au Canada à titre de résident permanent;
- c) la catégorie des personnes qui se sont vu reconnaître la qualité de réfugié au sens de la Convention par tout pays autre que le Canada et qui seraient, en cas de renvoi du Canada, autorisées à retourner dans ce pays;

d) la catégorie des personnes qui ont la nationalité ou la citoyenneté d'un pays autre que le pays qu'elles ont quitté ou hors duquel elles sont demeurées par crainte d'être persécutées;

e) la catégorie des personnes qui ont résidé en permanence dans un pays autre que celui qu'elles ont quitté ou hors duquel elles sont demeurées par crainte d'être persécutées et qui seraient, en cas de renvoi du Canada, autorisées à retourner dans ce pays.

5 The Applicant had entered Canada using an Indian passport which she admitted was false having been secured by bribery. As proof of her Tibetan citizenship, she produced a "green book", a recognized document establishing Tibetan identity.

6 In 2003 another immigration official who was handing the Applicant's permanent residence application became suspicious that the Indian passport was genuine. It would appear that this officer, who had experience in India, embarked on this inquiry more by instinct than evidence. He did so at a time when third parties, including the local MP, were entreating the department to get on with issuing the permanent residence card after a four-year delay.

7 This official forwarded "tombstone" information to the Canadian Visa Office in New Delhi who then inquired of the Indian authorities as to the genuineness of the passport.

8 The Government of Indian Regional Passport Office in July or August 2005 stated that the passport was issued after a CID clearance (presumably a police clearance). The advice from the Indian Passport Office contained a caveat that the verification was performed without a photograph.

9 On November 25, 2005, the Officer advised the Applicant that she was satisfied that the passport was legitimately issued and that the Indian government considered her a citizen of India. The Officer then invited the Applicant to make submissions on the matter.

10 Prior to receipt of the submissions the Officer went back to the Appeals and Hearings section of the Canadian Border Services Agency (CBSA), the organization responsible for bringing motions to vacate a Board finding that a person was a refugee. The CBSA had earlier advised that there was insufficient evidence to seek to vacate the Board decision because "the genuineness of a passport is not determinative of citizenship".

11 Armed with the new information from the Indian Passport Office, the Officer again raised the issue of vacating the refugee finding. The CBSA advised that it would take another look at the file — that was 10 months ago and no follow-up action has been taken.

12 In response to the Officer's invitation to make submissions, the Applicant's then counsel outlined the proper steps to be taken to confirm whether the Applicant is truly a citizen of India

including the use of forensic study of the passport and/or submitting the passport itself to Indian authorities for verification. The submissions as to the proper method of verification were supported by affidavit evidence.

13 Without further inquiry, including affording the Applicant an interview, the Officer confirmed the finding that the Applicant was a citizen of India and refused the application for permanent residence.

### III. Analysis

14 There are three matters which must be addressed in this judicial review:

- the claim of solicitor-client privilege over, principally, e-mails contained in the certified tribunal record;
- the finding that the Applicant is an Indian citizen and is precluded from permanent resident status; and
- the fairness of the process by which the Respondent reached its decision.

#### *A. Solicitor-Client Privilege*

15 The certified tribunal record contained documents for which all or a portion of the information was blacked out on the grounds of solicitor-client privilege. The Applicant brought a motion challenging this claim of privilege.

16 The motion was filed late but in order to avoid potential adjournment of this judicial review, the Court directed that the matter be heard at regular motions some 10 days in advance of the scheduled judicial review hearing.

17 The Respondent's counsel objected to the matter being heard then citing a busy schedule, inability to secure assistance in her office and other personal matters which prejudiced the ability to fully respond to the motion. Therefore, this motion was heard immediately preceding the judicial review.

18 At the motion hearing the Respondent tendered to the Court and served on the Applicant a letter of the Officer explaining her reasons for claiming privilege including an assertion of litigation privilege as well as solicitor-client privilege. No affidavit evidence was filed. It was curious that there was sufficient time to prepare a letter but insufficient time or unwillingness to file an affidavit.

19 This procedure of filing a letter from the client unsupported by an affidavit on the day of the hearing is unacceptable practice. The government enjoys no special status as a litigant as regards proof and is bound by the same rules as are private litigants in this Court.

20 As I advised counsel, the excuse for the postponement of the motion was tenuous and the failure to file an affidavit would be taken as the failure to file any evidence. The Court was left with only the review of the records upon which to base its decision, the Applicant having waived the right to cross-examination so that this matter could proceed as scheduled. Fortunately for the Respondent, the contents of the records over which privilege was claimed was so clearly solicitor-client advice that the Applicant's motion had to be dismissed.

### ***B. Indian Citizenship***

21 As a general rule, the findings as to citizenship in another country are a factual inquiry for which the standard of review is patent unreasonableness (*Adar v. Canada (Minister of Citizenship & Immigration)*, [1997] F.C.J. No. 695 (Fed. T.D.)). This was the standard accepted by the parties and the one which the Court will use for its purposes because nothing turns on the standard of review on this issue.

22 However, in this case, the conclusion that the Applicant was an Indian citizen was based on the conclusion that the passport was genuine and that it was determinative of citizenship under a foreign law. This analysis is clearly a matter of mixed law and fact which should attract a standard of reasonableness *simpliciter* (*Canada (Minister of Citizenship & Immigration) v. Choubak*, 2006 FC 521, [2006] F.C.J. No. 661 (F.C.)).

23 In reaching her conclusion, the Officer relied on the verification of the Indian passport which came with a caveat from the Indian Passport Office as to the absence of a photograph; clearly an important point if the very subject is raised by the verifying authority. It must have been taken as a warning that any such verification was tentative.

24 The reliance on this verification is undermined by the affidavit evidence of the Applicant as to the proper procedure for verification as related by an official of the Indian government. The Respondent neither challenged the evidence in cross-examination nor did it file rebuttal evidence.

25 The Officer's conclusion is directly contrary to a finding by the Board that the Applicant is a Tibetan refugee and which the CBSA has so far refused to challenge by way of an application to vacate the Board decision. The CBSA specifically concluded that the genuineness of a passport is not determinative of citizenship; a conclusion which is directly at odds with the Officer's own conclusion.

26 The Officer's decision does not address the evidence which contradicts her findings. There is no mention of the Tibetan identity document nor of the conclusions of the Board nor of the CBSA or even the veracity of the Applicant's story of bribery.

27 The Respondent filed an affidavit in which the Officer tries to elaborate on what issues she considered. However, the notes in the file and the e-mail traffic being contemporaneous with the events are a more reliable source of evidence and generally lack the *ex post facto* justification nature of the affidavit. That affidavit is of questionable weight.

28 In the face of all the other evidence contrary to the Officer's conclusion and absent better evidence against the Applicant, this decision is patently unreasonable. This patently unreasonable finding is compounded by the manner in which the decision was made.

### ***C. Fairness***

29 The decision is essentially a finding that the Applicant falsely secured refugee status and that her explanation of how she secured an Indian passport is a lie.

30 At no time was the Applicant confronted with the challenge to her story of how she secured the Indian passport. At the time the Applicant's counsel was invited to make submissions, the issue raised was the genuineness of the Indian passport - only one aspect of the issue of the Applicant's citizenship.

31 It is unfair to now say, as was argued and referred to in the Officer's affidavit, that counsel should have reiterated the story of the bribery and given further and better details of the event. At no time was the Applicant alerted to a challenge to this facet of the case and nothing in the invitation to make submissions would have reasonably alerted counsel that the matter of the bribery was being challenged.

32 While an applicant is not entitled to an interview as of right, where the circumstances of fairness dictate that an interview should have been accorded, the failure to do so is a fatal flaw of natural justice and fairness (*Baker v. Canada (Minister of Citizenship & Immigration)*, [1999] 2 S.C.R. 817 (S.C.C.)).

33 In this instance the Respondent was directly challenging the Applicant's credibility and notice of that challenge and an opportunity to be heard was denied. An interview would have eliminated this breach of natural justice if the Respondent still had an open mind.

34 However, the record confirms that in this instance, the Officer's conclusions about the Applicant had been reached prior to any submission, not just in some preliminary fashion. The invitation to make submissions was form over substance. Not only was the Applicant misled as to the issue being challenged, there is little likelihood that any submissions would have altered the ultimate result.

35 The Applicant asks that the Respondent be ordered to approve the application for permanent residence. That application is almost seven years old and by now the Respondent must have (or

should have) considered all the steps for approval. Further, the Respondent has not indicated that there are any other issues which would hold up or prevent the issuance of the necessary authorization. The Court expects that the approval will follow shortly after this decision unless there is some legal impediment to approval.

#### **IV. Conclusion**

36 The application for judicial review will be granted, the decision of the Board must be quashed and the matter remitted to the Respondent for approval within thirty (30) days by a different decision maker without the involvement of the Officer or the other immigration official mentioned in this decision. The Court will remain seized of this matter if either party has difficulty with implementation of this Court's decision.

#### **Judgment**

*IT IS ORDERED THAT* the application for judicial review is granted, the decision of the Board quashed and the matter remitted to the Respondent for approval within thirty (30) days by a different decision maker without the involvement of the Officer or the other immigration official mentioned in this decision. The Court remains seized of this matter to address any difficulties with implementation of this Judgment.

2002 FCT 208, 2002 CFPI 208  
Federal Court of Canada — Trial Division

Bristol-Myers Squibb Co. v. Canada (Attorney General)

2002 CarswellNat 444, 2002 CarswellNat 4519, 2002 FCT 208, 2002 CFPI  
208, [2002] F.C.J. No. 271, 112 A.C.W.S. (3d) 346, 18 C.P.R. (4th) 353

**BRISTOL-MYERS SQUIBB COMPANY and BRISTOL-MYERS  
SQUIBB CANADA INC. (Applicants) and THE ATTORNEY GENERAL  
OF CANADA and BIOLYSE PHARMA CORPORATION (Respondents)**

Pelletier J.

Heard: February 19, 2002  
Judgment: February 26, 2002  
Docket: T-1898-01

Counsel: *Mr. A. Creber, Mr. J. Zakaib*, for Applicants  
*Mr. R. Woyiwada*, for Respondent, Attorney General of Canada  
*Mr. Gordon S. Jepson*, for Respondent, Biolyse Pharma Corporation

***Pelletier J.:***

**REASONS FOR ORDER AND ORDER**

1 This motion raises a novel point as to the conduct of a judicial review of a decision of the Minister under the *Patented Medicines (Notice of Compliance) Regulations*, SOR/98-166, (NOC regs.). In response to a Direction to Attend which required the deponent to produce various documents, the Minister issued a certificate under [s. 37 of the \*Canada Evidence Act\*, R.S.C. 1985, c. C-5](#) as amended by Statutes Canada 2001 c. 41. The purpose of this motion is to test that certificate.

2 The applicant Bristol Myers Squibb is the holder of patent with respect to a medicine known as paclitaxel and had filed a patent list with respect to the product pursuant to the NOC regs. The respondent Biolyse Pharma Corporation ("Biolyse") filed a New Drug Submission for its medicine paclitaxel. The Minister determined that [sections 5\(1\) and 5\(1.1\)](#) of the NOC regs. did not apply to Biolyse's submission and therefore issued a Notice of Compliance without requiring Biolyse to prepare and serve a Notice of Allegation with respect to the applicant's patent.

3 Upon becoming aware of the issuance Biolyse's NOC, the applicant commenced an application for judicial review of the Minister's decision. In its Notice of Application it sought production

of "Biolyse Pharma Corporation's New Drug Submission for paclitaxel solution for injection at a strength of 6 mg/ml" (the New Drug Submission). Subsequently, the applicant issued a Direction to Attend to the Minister's representative in which she was directed to have the New Drug Submission and certain other documents in her possession when she attended for cross-examination on her affidavit. In response to the Direction to Attend, the Minister's representative issued a certificate under *s. 37 of the Canada Evidence Act* claiming the right to withhold production of the records on the basis of a specified public interest. The certificate states that production is objected to, in part, because of the absence of a protective order as to the documents in question and because Biolyse had not consented to the release of the information. The applicant then brought this motion seeking an order for production of the documents in question notwithstanding the issuance of the certificate.

4 It is a matter of some significance that the application before the court is a judicial review of a decision to issue a Notice of Compliance. The issue is whether the Minister's determination that Biolyse's submission was not within *subsections 5(1) or 5(1.1)* of the NOC regs. can withstand judicial scrutiny. This is not, as is so often the case, an application for an order of prohibition as provided for in the NOC regs.

5 Production of documents in the tribunal's possession in the course of applications for judicial review is governed by Rule 317 which provides 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.

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 don't 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.

Since there is no provision for the filing of a tribunal record by the tribunal itself, (as there is in the case of the *Federal Court Immigration Rules* at Rule 17), Rule 317 is intended to put the applicant in the position where it can put the tribunal record before the Court by combining the records in its possession with those which it obtains from the tribunal. Document production precedes cross-examination on affidavits. Rule 308 provides that the time for completing the cross-examinations on the affidavits begins to run from the filing of the respondent's affidavits, or the expiry of the time limited for doing so.

6 The types of documents required to be produced in response to a request under Rule 317 was considered by the Court of Appeal in *1185740 Ontario Ltd. v. Minister of National Revenue*, [1999] F.C.J. No. 1432 (Fed. C.A.), where the following appears:

[5] In *Canada (Human Right Commission) v. Pathak*, [1995] 2 F.C. 455 (C.A.) this Court held that only documents which were actually before the Human Rights Commission in making its decision had to be produced. Other documents relied upon by the investigator did not have to be produced in the absence of evidence that the investigator had inaccurately summarized them. To much the same effect is the decision of this Court in *Quebec Ports Terminals v. Canada (Labour Relations Board)*, 17 Admin. L.R. (2d) 16. I accept and follow these decisions.

[6] The appellant has raised for the first time in this Court the point that both memoranda show on the final page the word "attachments" and the appellant seeks production of them. If there were attachments, these also would have been before the Minister. To the extent that there were any attachments, they should be produced.

7 The cases relating to a wider duty of disclosure, such as *Friends of the West Country Assn. v. Canada (Minister of Fisheries & Oceans)*, [1997] F.C.J. No. 557 (Fed. T.D.) must be read in the light of the Court of Appeal's decision in *1185740 Ontario Ltd.*, *supra*. In the former case, the judge decided that documents in the possession of the Minister and relevant to the issue must be produced whether or not they were before the decision maker. An appeal from that decision was dismissed for mootness with the qualification that the court took no position on the correctness of the decision appealed from. See [1997] F.C.J. No. 1362 (Fed. C.A.). In this case, it is clear that the respondent's New Drug Submission was before the Minister as it is the document which calls for a decision to be made.

8 Were the decision to be made solely on the basis of Rule 317, I would have little difficulty in finding that the document requested must be produced, subject to an appropriate protective order being made to protect the Respondent's commercial confidential information.

9 The Minister has asserted his right to exempt the material in his possession from production by issuing a certificate under [section 37 of the \*Canada Evidence Act\*](#), the material parts of which are as follows:

37. (1) Subject to sections 38 to 38.16, a Minister of the Crown in right of Canada or other official may object to the disclosure of information before a court, person or body with jurisdiction to compel the production of information by certifying orally or in writing to the court, person or body that the information should not be disclosed on the grounds

. (1) Sous réserve des articles 38 à 38.16, tout ministre fédéral ou tout fonctionnaire peut s'opposer à la divulgation de renseignements auprès d'un tribunal, d'un organisme ou d'une personne ayant le pouvoir de contraindre à la production de renseignements, en attestant verbalement ou par écrit devant eux que, pour des raisons d'intérêt public déterminées, ces

of a specified public interest. —(4.1) Unless the court having jurisdiction to hear the application concludes that the disclosure of the information to which the objection was made under subsection (1) would encroach upon a specified public interest, the court may authorize by order the disclosure of the information.—(5) If the court having jurisdiction to hear the application concludes that the disclosure of the information to which the objection was made under subsection (1) would encroach upon a specified public interest, but that the public interest in disclosure outweighs in importance the specified public interest, the court may, by order, after considering both the public interest in disclosure and the form of and conditions to disclosure that are most likely to limit any encroachment upon the specified public interest resulting from disclosure, authorize the disclosure, subject to any conditions that the court considers appropriate, of all of the information, a part summary of the information, or a written admission of facts relating to the information.

renseignements ne devraient pas être divulgués. —(4.1) Le tribunal saisi peut rendre une ordonnance autorisant la divulgation des renseignements qui ont fait l'objet d'une opposition au titre du paragraphe (1), sauf s'il conclut que leur divulgation est préjudiciable au regard des raisons d'intérêt public déterminées. —(5) Si le tribunal saisi conclut que la divulgation des renseignements qui ont fait l'objet d'une opposition au titre du paragraphe (1) est préjudiciable au regard des raisons d'intérêt public déterminées, mais que les raisons d'intérêt public qui justifient la divulgation l'emportent sur les raisons d'intérêt public déterminées, il peut par ordonnance, compte tenu des raisons d'intérêt public qui justifient la divulgation ainsi que de la forme et des conditions de divulgation les plus susceptibles de limiter le préjudice au regard des raisons d'intérêt public déterminées, autoriser, sous réserve des conditions qu'il estime indiquées, la divulgation de tout ou partie des renseignements, d'un résumé de ceux-ci ou d'un aveu écrit des faits qui y sont liés.

10 The specific public interest invoked by the Minister can be found in the Certificate of Anne Elizabeth Bowes in which Ms. Bowes makes the following comments:

6. All of these documents, to which I have access, were prepared by or in relation to Biolyse Pharma Corporation ... I am not aware of any protective order having been issued by the Court in these proceedings. Nor am I aware that Biolyse Pharma Corporation has consented to the disclosure of these documents ...

7. ...To that end, no manufacturer may market a new drug in Canada without first satisfying the minister, by providing specified information that the drug is safe effective and of high quality.

8. This determination cannot be made unless the Minister is confident that the information being provided by the manufacturer is absolutely complete and accurate. To encourage completeness and accuracy, and as is made known to the drug manufacturing industry, the Minister treats as entirely confidential all information received from, or prepared internally in relation to a manufacturer in furtherance of its application for drug approval. Otherwise there is a danger that a manufacturer who fears disclosure of its trade secrets to a competitor may be less than fully forthcoming or may choose not to seek to market its drug in Canada at all.

9. Like the Minister, this court has recognized that the perceived confidentiality of information is a cornerstone of the regulatory scheme, and that for this system to function effectively, the confidential nature of the relationship ought to be honoured and maintained to the extent possible. To ensure that such confidentiality is maintained, this court has also endorsed the use protective orders in related litigation.

10. In light of the above, pursuant to [section 37 of the Canada Evidence Act](#), I object to the disclosure of these documents and of the information contained in them. It should not be disclosed on the ground that its disclosure would be contrary to the public interest as described above.

11 The specified public interest claimed by the Minister's representative is the confidence of drug manufacturers that their proprietary commercially confidential information will not be made public to their detriment. On the specific facts of this case, this includes the interest of Biolyse in seeing that its confidential information is protected. [Section 37\(4.1\)](#) requires the Court to consider whether disclosure of the information would encroach upon the specified public interest.

12 The public interest advanced by disclosure is the public interest in the lawful administration of the NOC regs. which is tested by an application for judicial review. The disclosure required by the judicial review application is not public disclosure, notwithstanding the public interest in open justice, but sufficient disclosure to ensure the proper administration of justice.

13 There are two aspects to disclosure. The first is the Court's interest in having the full record before it when hearing the application for judicial review. Courts are deeply inimical to the notion of making decisions on an inadequate factual record. In theory, this interest would be satisfied by disclosing the New Drug Submission to the Court only. The second is the applicant's interest in having access to the record to assist it in demonstrating that the Minister's decision was in error. This is a partisan interest, but in an adversarial system a partisan interest is not only legitimate but necessary. The challenge is to provide sufficient disclosure to allow the adversarial system to function without thereby prejudicing Biolyse's legitimate commercial interests in confidentiality. In the past, the courts have managed this through protective orders which allow disclosure to counsel and selected experts who are bound by the order to refrain from disclosing to the applicant the content of the disclosed document.

14 And so, it is my view, the lawful administration of the NOC regs. and the requirements of the administration of justice justify an encroachment upon the specified interests identified in the certificate.

15 The next issue is the extent of any limitation on disclosure required by [subsection 37\(5\)](#). It is clear that a protective order is required. The parties have had discussions about a protective order but have been unable to agree in the face of the [section 37](#) certificate. Given that I have

found that disclosure is required, it is likely that agreement can be reached between reasonable and experienced counsel. But before leaving the matter to counsel, I wish to raise a point which was touched upon during argument.

16 The applicant is proceeding on the basis that the documents in issue are those described in the Direction to Attend served upon the Minister's delegate. Rule 317 provides that disclosure is obtained by making a demand upon the tribunal. If an objection is to be taken, it is to be made within the parameters of Rule 318. While Rule 91, which deals with the content of a Direction to Attend, is in Part 3 of the Rules and is said to apply to all proceedings, Rule 317 is specific to Applications. While it can be said that these Rules are not *in pari materia* in that one deals with production of documents by the tribunal, and the other deals with production of documents by a witness to be cross-examined, they can be made to overlap as they did here. A perceived defect in production pursuant to Rule 317 was sought to be corrected by invoking Rule 91. Each Rule must be read so as to leave room for the application of the other.

17 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] F.C.J. No. 910 (Fed. T.D.), (Prothonotary Hargrave).

18 The result is that the only document whose production would be properly before the Court is the document whose production was demanded in the Notice of Application. I will adjourn this motion for the parties to attempt to negotiate a protective order acceptable to all with respect to that document on the understanding that if agreement cannot be reached the matter is to be brought back before me.

## **ORDER**

### **THIS COURT ORDERS that:**

1. The applicant is entitled to production of Biolyse Pharma Corporation's New Drug Submission once a suitable protective order is in place; and

2. This matter is adjourned with leave to have the matter brought back before me if the parties are unable to agree on the terms of a protective order within 15 days of the date of this order.

2022 FC 332, 2022 CF 332  
Federal Court

Canadian Coalition for Firearm Rights v. Canada (Attorney General)

2022 CarswellNat 663, 2022 CarswellNat 664, 2022 FC 332, 2022 CF 332

**CANADIAN COALITION FOR FIREARM RIGHTS, RODNEY  
GILTACA, RYAN STEACY, MACCABEE DEFENSE  
INC. and WOLVERINE SUPPLIES LTD. (Applicants)  
and ATTORNEY GENERAL OF CANADA (Respondent)**

Jocelyne Gagné A.C.J.

Judgment: March 11, 2022

Docket: T-577-20

Counsel: Laura Warner (written), Michael A. Loberg (written), for Applicant  
Robert B. MacKinnon (written), for Respondents

*Jocelyne Gagné A.C.J.:*

## **I. Overview**

1 The Applicants claim that two expert witnesses for the Respondent, experts Murray Smith and Ralph Blake Brown, failed to produce, upon request, certain documents relevant to this application for judicial review. The Applicants are therefore filing a motion to compel (an 1800-page motion record) the production of these documents under [Rule 91\(2\)\(c\)](#) and [94\(1\) of the Federal Courts Rules \(SOR/98-106\) \[Rules\]](#).

2 Both parties failed to comply with the rules in this request. The Applicants' directions to attend were served on Mr. Smith and Dr. Brown less than 10 days before the scheduled cross-examination and they did not ask for an extension of time on motion. In addition to arguing that the Applicants' request is invalid, the Respondent argues that the documents are not "relevant" or in the "possession, power or control" of Mr. Smith and Dr. Brown. However, the Respondent did not apply for relief from production.

3 The Applicants also seek an order under [Rules 52.2, 91](#), and [94 of the Rules](#) for the production of the remaining letters of instruction given to three of the Respondent's six expert witnesses.

4 The Applicants do not seek to strike any evidence, but may ask for further questioning or the right to make succinct supplemental written submissions, should they be successful with their motion.

## II. Background

5 Mr. Smith's and Dr. Brown's affidavits were served and filed on December 10, 2021, per the Court's directed timetable for procedural steps. The parties scheduled the cross-examination of Mr. Smith for January 19 and 21, 2022 and of Dr. Brown for January 25 and February 4, 2022.

6 Mr. Smith's Affidavit at Exhibit C included a document called "Inspection Protocol: Business." This document referred to two underlying documents called the "SFSS [Specialized Firearms Support Services] Standard Operating Procedures" and the "FRT Standards and Editing Procedures" (the Applicants refer to these two documents collectively as the "SOPs"). Counsel for the Applicants requested the SOPs from the Respondent on January 4, 2022, and received them on January 11, 2022. On January 13, 2022, counsel for the Applicants noted that the SOPs state that for each inspected firearm, the associated file must contain the work notes, research, correspondence, and written notes (the "Underlying Records") that the SFSS employee created during inspection. The Applicants requested these documents, and the Respondent declined to provide them.

7 On January 17, 2022, the Applicants served directions to attend for Mr. Smith and Dr. Brown. According to [Rule 91\(3\)\(b\) of the Rules](#), a direction to attend must be served, "where the person to be examined is not a party to the proceeding, at least 10 days before the day of the proposed examination."

8 The direction to attend asked Dr. Brown to produce any social media posts he had made or commented on that relate to firearm regulation, or lobbying efforts by gun control or firearm advocacy organizations; and any correspondence he had sent to any gun control or firearm advocacy organization (the Applicants refer to this as the "Lobby Correspondence"). Dr. Brown did not produce the Lobby Correspondence.

9 Mr. Smith's direction to attend repeated the Applicants' request for the Underlying Records, which he did not produce.

10 On the request of the Respondent, the Applicants provided an instruction letter for one of their own expert witnesses to the Respondent on December 30, 2021. The Applicants also requested records of instruction for each of the Respondent's expert witnesses. On January 14, 2022, the Respondent provided the Applicants with letters of instruction for its expert witnesses Drs. Simon Chapman and Louis Klarevas, but did not provide the letters of instruction for the remaining four expert witnesses, Dr. Ahmed, Dr. Brown, Mr. Smith and Mr. Baldwin. The Respondent later sent

the Applicants its instruction email to Dr. Brown. The Respondents say that Dr. Ahmed, Mr. Smith, and Mr. Baldwin did not receive instructions.

### III. Issues

11 This motion raises the following issues:

A. *Were the Applicants' requests for documents from Mr. Smith and Dr. Brown served respecting the relevant timelines, according to the [Federal Courts Rules](#) and/or the [Protocol for Virtual Cross-Examinations of the present file](#)?*

B. *Are the "Underlying Records" and "Lobby Correspondence" relevant and accessible enough for the witnesses to be required to produce them per [Rule 91\(2\)\(c\) of the Rules](#)?*

C. *Should the Respondent be required to produce the letters of instruction for Dr. Ahmed, Mr. Smith, and Mr. Baldwin?*

### IV. Analysis

***A. Were the Applicants' requests for documents from Mr. Smith and Dr. Brown served respecting the relevant timelines, according to the [Federal Courts Rules](#) and/or the [Protocol for Virtual Cross-Examinations of the present file](#)?***

12 The Applicants argue that the first informal request for the Underlying Records was sufficiently timely, citing *Preventous Collaborative Health v Canada (Health)* [*Preventous*], an order from Prothonotary Ring in file T-189-19 (2020 CanLii 32965 (FC)) at para 20.

13 With respect to the Lobby Correspondence, the Applicants argue that although the direction to attend was only served eight days prior to Dr. Brown's first cross-examination date, the timeline was reasonable given the tight deadlines in the Protocol. They note that the Respondent did not refuse service of the direction to attend.

14 The Respondent, on the other hand, argues that it had no obligation to produce the Underlying Documents or the Lobby Correspondence because the directions to attend were filed late. The Respondent argues that, according to [Rule 91\(3\)\(b\) of the Rules](#), it must be served at least 10 days before the day of the proposed examination. The Respondent submits that Mr. Smith's direction to attend was only filed two days before the scheduled cross-examination, and that even the first informal request for the Underlying Records was not sent within the 10-day notice period. With respect to Dr. Brown, the Respondent notes that the direction to attend was only filed eight days before the scheduled cross-examination.

15 The Respondent argues that the Applicants are retroactively seeking an abridgement of time under [Rule 8 of the Rules](#) to serve the directions to attend to Mr. Smith and Dr. Brown. Citing [Alani](#)

v Canada (Prime Minister), 2015 FC 859 at para 15, the Respondent submits that the Applicants bear the burden of justifying the abridgment of time, which they have not met.

16 While nothing that the *Preventous* order cited by the Applicants suggests an exception to the 10 day deadline to serve and file the direction to attend, it does recognize that "less formal communications between counsel in advance of the examination could have the same effect as a formal demand for production of documents through the direction to attend". It is true that the informal request for the Underlying Documents was sent to Mr. Smith less than 10 days before the cross-examination, but it was triggered by the SOPs that were received by the Applicants on January 11, 2022, also less than 10 days before the first day of cross-examination on January 19, 2022. Under these circumstances, I am of the view that the Applicants must be relieved of their default to request for production of documents by Mr. Smith in accordance with [the Rules](#).

17 However, the same can not be said about the direction to attend that was sent to Dr. Brown. I will therefore only look at the relevance of the Underlying Records.

***B. Are the "Underlying Records" and "Lobby Correspondence" relevant and accessible enough for the witnesses to be required to produce them per Rule 91(2)(c) of the Rules?***

18 Just as I am relieving the Applicants from their default to serve their request for production of documents in time, I am also relieving the Respondent from its default to file a motion for relief from production under [Rule 94\(2\) of the Rules](#).

19 I agree with the Applicants that the request for the Underlying Records was specific and limited, not unduly broad and that they are producible and relevant. While the Underlying Records were previously subject to a Rule 317 decision, that decision ([Parker v Canada \(Attorney General\), 2021 FC 496](#)) did not consider or render a decision regarding the relevance of the Underlying Records to the proceedings at large and was limited to the application of [Rule 317 of the Rules](#).

20 I also agree with the Applicants that the Underlying Records are relevant to the issues of whether the words "variant" and "modified version" from the Regulations led the Governor in Council (GIC) to impermissibly sub-delegate its authority to the RCMP and are vague and contrary to [s. 7 of the Canadian Charter of Rights and Freedoms, Part 1 of the Constitution Act, 1982](#), being Schedule B to the *Canada Act 1982 (UK), 1982, c 11*. Collateral questions arising out of answers and documents exhibited to affidavits, or otherwise produced, do fall within the scope of cross-examination ([Royal Bank of Scotland plc v Golden Trinity \(The\), \[2000\] 4 FC 211 at paras 19-22](#)).

21 Finally, I believe Mr. Smith does have access to the Underlying Records, as a current employee of the RCMP and a previous manager of the Specialized Firearms Support Services of the RCMP; he likely had access to these records for the purpose of preparing his affidavit. Under [Rule 91\(2\)\(c\) of the Rules](#), this Court has held that "the 'possession, power or control

requirement' will be 'quite' broad in the case of 'an affiant with a broad scope of authority within an organization'" ([Ottawa Athletic Club Inc v Athletic Club Group Inc](#), 2014 FC 672 at para 138).

22 I will therefore order the production of the Underlying Records.

***C. Should the Respondent be required to produce the letters of instruction for Dr. Ahmed, Mr. Smith, and Mr. Baldwin?***

23 Section 3(d) of the Code of Conduct for Expert Witnesses (Schedule to [Rule 52.2](#) of the [Rules](#) does not require that letters of instruction exist or be produced. It states that "An expert's report submitted as an affidavit or statement referred to in [Rule 52.2 of the Federal Courts Rules](#) shall include [...] the facts and assumptions on which the opinions in the report are based; in that regard, a letter of instructions, if any, may be attached to the report as a schedule." The Respondent states that instruction letters do not exist for Mr. Smith, Mr. Baldwin, and Dr. Ahmed. That, in and of itself, should put the Applicants request to rest. But in addition, I agree with the Respondent that even if they did, the Code of Conduct does not require that they be produced, especially considering the fact that they were not listed in the formal or informal directions to attend.

**V. Conclusion**

24 For these reasons, I am partially granting the Applicants' motion to compel the production of documents and ordering the Respondent to file the Underlying Records before the end of business day on March 20, 2022. Considering the mitigated result, no costs will be granted.

**ORDER in T-577-20**

*THIS COURT ORDERS that:*

1. The Applicants Motion to compel the production of documents is granted in part;
2. The Respondent has until the end of business day on March 20, 2022, to serve on the Applicants and file the following documents:

The associated file containing the work notes, research, correspondence, and written notes created as per section 3 and Appendix 3-1-4 of the Specialized Firearms Support Services Standard Operating Procedures and the Firearm Reference Table Standards and Editing Procedures, while inspecting or re-inspecting the following firearms:

Maccabee Defence SLR-MULTI (FRN 181822);

Derya Arms Carina CR-100 (FRN 179522);

Derya Arms MKIO (FRN 141381);

Derya Arms MK12 (FRN 141379);

Derya VR90 (FRN 164268);

Mossberg 702 Plinkster (FRN 122010);

Mossberg 715T Tactical 22 (FRN 136698);

CZ 550 Safari Classic Magnum (FRN 123420);

Alphard Model 15SA (FRN 147046);

Alberta Tactical Rifle Modern Series (FRN 149826, 162446, 194622);

Adler B210 (FRN 166822); Ranger XT3 (FRN 179122);

Ranger XT3 Tactical (FRN 179042); and

Typhoon Defence F12 Typhoon (FRN 176624).

3. No costs are granted.

2011 FC 1091, 2011 CF 1091  
Federal Court

Ermineskin Indian Band & Nation v. Canada

2011 CarswellNat 4014, 2011 CarswellNat 4894, 2011 FC 1091, 2011 CF  
1091, [2011] A.C.F. No. 1406, [2011] F.C.J. No. 1406, 209 A.C.W.S. (3d) 50

**Chief John Ermineskin, Lawrence Wildcat, Gordon Lee, Art Littlechild, Maurice Wolfe, Curtis Ermineskin, Gerry Ermineskin, Earl Ermineskin, Rick Wolfe, Ken Cutarm, Brian Lee, Lester Fraynn, the Elected Chief and Councillors of the Ermineskin Indian Band and Nation Suing on Their Own Behalf and on Behalf of All the Other Members of the Ermineskin Indian Band and Nation, Plaintiffs (Respondents) and Her Majesty the Queen in Right of Canada, the Minister of Indian Affairs and Northern Development, and the Minister of Finance, Defendants (Applicants)**

Michel Beaudry J.

Heard: September 21, 2011

Judgment: September 23, 2011

Docket: T-1254-92

Counsel: Joseph C. McArthur, Jeff Langlois, for Plaintiffs / Respondents  
Mary E. Comeau, J. Raymond Chartier, for Defendants / Applicants

***Michel Beaudry J.:***

1 This is a motion by the Crown Defendant (the Crown) made pursuant to [Rule 51 of the Federal Courts Rules, SOR/98-106 \(Rules\)](#), for an order allowing the appeal and setting aside the Order of Prothonotary Lafrenière (Order) dated May 17, 2011, in which he found that the Crown has waived solicitor-client privilege through the filing of an affidavit in support of a motion for leave to amend its statement of defence.

2 For the reasons that follow, the appeal shall be dismissed.

**Brief Statement of Factual Background**

3 Action T-1254-92 has been split into phases. The first two phases of the action were tried before Mr. Justice Max Teitelbaum between 2000 and 2004. On December 22, 2004, during the closing arguments of the trial of the two first phases, the respondent (Ermineskin) submitted that

the Crown's pleadings of a limitation defence were inadequate. The Crown brought a motion to amend its pleadings to include express reference to certain limitations provisions (the 2004 amendment application). Ermineskin opposed the 2004 amendment application on the basis that the Crown offered no explanation for the delay in raising these limitations defences.

4 On January 20 and 21, 2005, the 2004 amendment application was heard by Mr. Justice Teitelbaum, who was critical of the Crown's delay in requesting leave to amend and its failure to adduce affidavit evidence to explain the delay. While he permitted the amendments to refer specifically to sections of the *Alberta Limitation of Actions*, RSA 1980, c L-15 (*Alberta Limitation of Actions*), the amendments in relation to the *Federal Court Act*, RSC 1985, c F-7 (*Federal Court Act*) and the *Ontario Limitations Act*, RSO 1980, c 240 (*Ontario Limitations Act*) were denied. He further stated that he was not determining the issue of whether the Crown's pleadings, as they existed without the amendments, were sufficient to make all of its limitations arguments.

5 By judgment dated November 30, 2005, Mr. Justice Teitelbaum [2005 CarswellNat 3953 (F.C.)] dismissed the claims in the first two phases of the proceedings. Subsequent appeals were dismissed by the Federal Court of Appeal and by the Supreme Court of Canada. The proceedings were reactivated in June 2010 once all appeals were exhausted. The remaining phases required further document production and discoveries, which are set to continue until the end of 2011. No trial dates are set for these phases.

6 On December 23, 2010, the Crown delivered a notice of motion seeking an order allowing it to amend its statement of defence to include an express reference to various sections of the *Alberta Limitation of Actions*, the *Federal Courts Act*, and the *Ontario Limitations Act*, (the 2010 amendment application).

7 In support of the 2010 amendment application, the Crown's Motion Record includes an affidavit sworn by Ms. Lynda Sturney (the affidavit), a team leader in the Calgary office of the Litigation Management and Resolution Branch of the Department of Indian and Northern Affairs, which provides the contextual background leading to the Crown's decision to seek leave to amend its statement of defence in December 2004. Particularly, paragraph 12 reads as follows:

I am advised by my counsel that the Crown believed that its existing pleadings were adequate and it was entitled to rely upon s. 39(2) of the *FCA* and the other specific sections of the Alberta and Ontario limitations legislation. However, out of an abundance of caution, on December 22, 2004, the Crown brought a motion to amend its Statement of Defence in order to refer specifically to certain legislative provisions relating to its six-year limitation defence.

8 During cross-examination, Ms. Sturney acknowledged that she had no involvement in this litigation from 2000 to 2007 and, more specifically, that she was not assigned to argue the case during the time of the amendment application referred to in her affidavit. Ms. Sturney objected to a number of questions relating to paragraph 12 of her affidavit on the basis that the information was

not relevant and was privileged. In reference to her statement in paragraph 12 of her affidavit that she was "advised by my counsel that the Crown believed their existing pleadings were adequate", Ms. Sturney confirmed that counsel who advised her of that belief consisted of lawyers with Macleod Dixon LLP, who acted as counsel to the Crown as the agents of the Department of Justice.

9 On April 19, 2011, Ermineskin brought a motion requesting, *inter alia*, a declaration that the Crown had waived solicitor-client privilege by tendering paragraph 12 of the affidavit as evidence in support of the Crown's 2010 amendment application.

10 Prothonotary Lafrenière issued the Order on May 17, 2011.

### **Impugned Decision**

11 In the Order, Prothonotary Lafrenière stated that although solicitor-client privilege is fundamental to our justice system in Canada and must be jealously protected, it may be waived expressly or implicitly in situations where one of the parties makes the communications with counsel an issue in the proceeding.

12 The Prothonotary's key finding of fact was that the hearsay statements in paragraph 12 of the affidavit are intended to rationalize the Crown's delay in amending its statement of defence. Based on this finding, the Prothonotary adopted and made them his, paragraphs 58 and 59 of Ermineskin's written submissions which read as follows:

Based on these principles, by tendering the affidavit of Ms. Sturney the Crown has waived solicitor-client privilege. Paragraph 12 clearly puts into issue the fact of the Crown having received legal advice, as well as the content of that advice, in regards to both the adequacy of the limitation defence portion of the pleadings and the reason for pursuing an amendment of its pleadings in 2005. Through this affidavit, the Crown seeks to rely on its "belief" in the adequacy of its pleadings, a belief that necessarily arises from the legal advice received from the Crown's legal counsel, to explain its extraordinary delay in seeking to amend its Statement of Defence.

Despite this reliance, the Crown has objected to the disclosure of the communications that would indicate the context of the legal advice received by the Crown in respect to the assessment of its pleadings, when that advice was received, as well as what, if anything occurred to cause the Crown to change its assessment that its pleadings were adequate. By these objections, the Crown seeks to waive privilege only insofar as it is beneficial to its position, without revealing information. This approach is incompatible with the principles of fairness and inconsistency.

13 The Prothonotary concluded that the Crown waived solicitor-client privilege in relation to communications between the Crown and its legal advisors which bear upon paragraph 12 the

affidavit and the Crown's belief when it brought its 2004 amendment application with respect to whether its existing pleadings were adequate. He ordered Ms. Sturney to produce all documents in her power, possession or control in relation to communications over which privilege had been waived and finally, ordered Ms. Sturney to re-attend for the purpose of cross examination on her affidavit sworn December 22, 2010.

### Issues

14 The issues here are:

- a. What is the proper standard of review to be applied in this appeal?
- b. Was the order waiving solicitor-client privilege vital to the final issue in the case?
- c. Was the Prothonotary's decision to waive the solicitor-client privilege clearly wrong as being based upon a misapprehension of the facts or upon a wrong principle of law?

### Relevant Legislation

15 The guiding principles of appeals of prothonotaries' orders are found at [Rule 51](#):

**51. (1)** An order of a prothonotary may be appealed by a motion to a judge of the Federal Court.

**(2)** Notice of the motion shall be served and filed within 10 days after the day on which the order under appeal was made and at least four days before the day fixed for the hearing of the motion.

**51. (1)** L'ordonnance du protonotaire peut être portée en appel par voie de requête présentée à un juge de la Cour fédérale.

**(2)** L'avis de la requête est signifié et déposé dans les 10 jours suivant la date de l'ordonnance frappée d'appel et au moins quatre jours avant la date prévue pour l'audition de la requête.

***a. What is the proper standard of review to be applied in this appeal?***

#### *Crown's Arguments*

16 The Crown submits that the Order is reviewable *de novo* as a nondiscretionary matter, and relies on paragraph 11 of *Environmental Defence Canada v. Canada (Minister of Fisheries & Oceans)*, [2009] F.C.J. No. 182 (F.C.) [*Environmental Defence Canada*], where the Court proceeded based on the parties' agreement that the "determination as to whether the redacted passage is subject to solicitor-client privilege is hardly a discretionary matter".

17 Nevertheless, if discretionary, the Crown contends that the Order meets the test for a *de novo* review of a discretionary decision of a prothonotary as it is based upon either a wrong principle or a misapprehension of facts (*R. v. Aqua-Gem Investments Ltd.*, [1993] 2 F.C. 425 (Fed. C.A.) at para 95).

#### *Ermineskin's Arguments*

18 Ermineskin's position is that the Order is discretionary, as solicitor-client privilege can be waived expressly or by implication. Even if this is not a discretion that should be exercised lightly, or without proper apprehension of legal principles affording protection for privileged communications, it is nonetheless a discretionary matter. It argues that the Crown failed to provide case law which demonstrates that the Order is "non discretionary" and erroneously relied on *Environmental Defence Canada*. Ermineskin further cites *Universal Sales Ltd. v. Edinburgh Assurance Co.*, [2009] F.C.J. No. 195 (F.C.) [*Universal Sales Ltd.*], where Mr. Justice Russell dismissed the submission that a prothonotary's decision as to whether privilege had been waived should be reviewed on a correctness standard rather than on the "clearly wrong" standard and held that he was required to follow the later standard set forth in *Merck & Co. v. Apotex Inc.*, [2003] F.C.J. No. 1925 (F.C.A.) [*Merck 2003*]. The respondents conclude that a *de novo* review can only be justified if the Crown can demonstrate that the Order was "clearly wrong" in a sense that the exercise of discretion by the Prothonotary was based either upon a misapprehension of the facts or upon a wrong principle, including an error of law.

#### *Analysis*

19 The Court is of the view that the Crown failed to provide a clear explanation as to why the Order waiving solicitor-client privilege is non-discretionary. The Supreme Court of Canada canvassed the solicitor-client privilege in *R. v. McClure*, [2001] S.C.J. No. 13, 2001 SCC 14 (S.C.C.) at para 34 [*McClure*], and articulated that "[d]espite its importance, solicitor-client privilege is not absolute. It is subject to exceptions in certain circumstances." Therefore, it is left to the discretion of the Prothonotary to decide whether solicitor-client privilege falls within such circumstances and thus, is a discretionary matter.

20 The standard of review of decisions of a prothonotary is set forth in *Merck 2003* at para 19. A discretionary order of prothonotaries ought not to be disturbed on appeal to a judge of this Court unless: (a) the question raised in the motion is vital to the final issue of the case, or (b) the order is clearly wrong, in the sense that the exercise of discretion by the Prothonotary was based upon a wrong principle or upon a misapprehensions of the facts. The appeal is to be heard by this Court *de novo* if either prong of the test is met.

21 The Federal Court of Appeal recently discussed the standard of review in *Bristol-Myers Squibb Co. v. Apotex Inc.*, [2011] F.C.J. No. 147 (F.C.A.), and articulated that the ordinary standard of review should apply to appeals from decisions of prothonotaries.

22 As a result, the Court shall not intervene unless the parties can show that the question raised is vital to the final issue of the case or that the Prothonotary was clearly wrong or based his decision on a wrong principle or on a misapprehension of the facts.

***b. Was the Order waiving solicitor-client privilege vital to the final issue in the case?***

*Crown's Arguments*

23 The Crown in its oral submissions agrees that the Order is not vital to the final issue.

*Ermineskin's Arguments*

24 The question of whether a party has waived solicitor-client privilege, according to Ermineskin, is "not vital to the final issue of the case" (*Apotex Inc. v. Merck & Co.*, 2008 FC 1121, 2008 CarswellNat 4387 (F.C.) at para 10 [*Merck 2008*]; *Universal Sales Ltd.* at para 17). The respondents submit that while the ultimate determination of whether to allow the Crown to amend its pleadings may or may not be "vital", the determination of which documents Ermineskin may access in concluding a cross examination of Ms. Sturney is clearly not "vital".

*Analysis*

25 The Court agrees with the parties that an order waiving the solicitor-client privilege is not vital to the final issue of a case. An order of this nature stands in contrast to an order striking a cause of action. The Court notes that in *Merck 2008*, Mr. Justice O'Keefe also concluded that an order waiving privilege did not raise a question of vital importance to the final issue of the case.

26 Therefore, the only way this appeal can succeed is if this Court finds that the Prothonotary was clearly wrong in the exercise of his discretion or clearly misapprehended the facts.

***c. Was the Prothonotary's decision to waive the solicitor-client privilege clearly wrong as being based upon a misapprehension of the facts or upon a wrong principle of law?***

*Crown's Arguments*

27 The Crown argues that the Prothonotary misapprehended the facts in accepting Ermineskin's submissions that paragraph 12 of the affidavit "was intended to rationalize" the Crown's delay in seeking to amend its statement of defence. The Crown underscores that paragraph 12 of the affidavit provides only background information to describe the context of the 2004 amendment

application, and it has no intention of relying on it to explain its delay in seeking to amend its statement of defence.

28 The Crown submits that its belief in 2004 regarding the adequacy of its existing pleadings is irrelevant. The fundamental premise of its position on the 2010 amendment application is that it is entitled to the amendments because it will serve to determine the real question in controversy and because there is no serious prejudice to the respondents (*Canderel Ltd. v. R.* (1993), [1994] 1 F.C. 3 (Fed. C.A.) at para 10 [*Canderel*]; *Dene Tha' First Nation v. Canada (Attorney General)*, [2008] F.C.J. No. 847 (F.C.) at paras 8, 13, 15 [*Dené Tha'*]).

29 The Crown contends that the Prothonotary's waiver of solicitor-client privilege constitutes an error of law. It argues that the Court will not lightly penetrate the shield of solicitor-client privilege relying upon a unilateral assertion of an issue by an adverse party (*Talisman Energy Inc. v. Petro-Canada Inc.*, [2000] A.J. No. 274 (Alta. Q.B.) at para 34 [*Talisman*]; *Ed Miller Sales & Rentals Ltd. v. Caterpillar Tractor Co.*, [1992] 5 W.W.R. 531 (Alta. Q.B.) at para 22 [*Ed Miller Sales*]). The Crown submits that the Prothonotary based his finding on the issue of delay, which has unilaterally been raised by Ermineskin, and will only become a relevant consideration for the Court to the extent that the delay results in prejudice of a kind that cannot be compensated by costs (*Canderel Ltd.* at para 10; *Dené Tha'* at paras 8, 13, 15.)

30 The Crown further states that solicitor-client privilege will only be waived where the client makes a positive assertion which puts his or her state of mind "in issue", for instance, where one party seeks to rely on legal advice it has received in order to justify a course of conduct (*Stuart Olson Construction Inc. v. Sawridge Plaza Corp.*, [1995] A.J. No. 953 (Alta. Q.B.) at para 24; *Fraser v. Houston*, [2002] B.C.J. No. 2204 (B.C. Master) at paras 22-24 [*Fraser*]; *Talisman* at paras 27, 33, 35).

31 Moreover, the Crown urges that where legal advice is referred to for context and is not relied upon by a party, solicitor-client privilege has not been waived. It is of the view that an affidavit containing an express reference to receiving the advice of legal counsel does not constitute a waiver of solicitor-client privilege. The Alberta Court of Queen's Bench found at paragraph 23 of *Talisman*, that a direct reference to legal advice in a pleading or evidence to the fact legal advice was obtained does not necessarily constitute a waiver of solicitor-client privilege.

32 Finally, the Crown contends that Ermineskin's reliance on *Cheung v. 518402 B.C. Ltd.*, [1999] B.C.J. No. 2415 (B.C. S.C. [In Chambers]), was misplaced, arguing that in the present case the affidavit does not attest to the substance of any communications exchanged between the Crown and its counsel. More fundamentally, the Crown rejects the argument that it provided paragraph 12 for the purpose of relying on evidence of communications between the Crown and its counsel, and then subsequently retracted its reliance. As such, it submits that it is not relying and has not

previously relied on evidence relating to the adequacy of its pleadings as the basis for its 2010 amendment application.

### *Ermineskin's Arguments*

33 Ermineskin's position is that, on the basis of the record and applicable legal authority, it was open to the Prothonotary to find that paragraph 12 was intended to rationalize the Crown's delay in seeking to amend its pleadings. While the Crown has asserted that it does not have the intention of relying on paragraph 12 to explain its delay in seeking to amend its pleadings, the fact remains that it chose to tender the affidavit. Eventually, the Prothonotary will hear and decide upon the 2010 amendment application and he should be granted deference in ordering further document production and cross-examination on affidavits. As such, an explanation for the Crown's delay in seeking to amend its statement of defence may be relevant to the determination of whether an amendment should be permitted (*Merck & Co. v. Apotex Inc.* (2003), [2004] 2 F.C.R. 459 (F.C.A.) at paras 29-34 [*Merck 2004*]; *Canderel Ltd.* at paras 12-13). Ermineskin submits that it is in these circumstances that the Prothonotary made a finding that paragraph 12 of the affidavit was intended to rationalize the Crown's delay.

34 Ermineskin contends that fairness and consistency require full disclosure of otherwise privileged communications to allow them to fully exercise its rights of cross-examination in light of the Crown's reliance on the state of its legal advice up to 2004 (*Genencor International Inc. v. Canada (Commissioner of Patents)*, [2007] F.C.J. No. 385 (F.C.) at para 26. As such, Ermineskin relies on *Castlemore Marketing Inc. v. Intercontinental Trade & Finance Corp.*, [1996] F.C.J. No. 201 (Fed. T.D.) at para 1, where it was held that an affiant is required to answer questions on "any matter relevant to the determination of the issue in respect of which the affidavit was filed."

35 Moreover, Ermineskin is of the view that the Crown did not identify a specific error of law, but rather allege that the Prothonotary was "clearly wrong" in determining that solicitor-client privilege could be waived in the absence of a positive assertion that would put the Crown's state of mind "in issue." However, they submit that the Crown voluntarily injected its state of mind into this application by adducing the affidavit into evidence.

36 Ermineskin adds that a party may be taken to have waived its right to solicitor-client privilege in relation to certain communication normally afforded that privilege where that party either expressly or impliedly waives such privilege. They rely on the British Columbia Supreme Court decision *Fraser*, for their argument. In that case, the Court held at paragraph 22:

1. Solicitor-client privilege should be interfered with only to the extent necessary to achieve a just result: *Descôteaux c. Mierzewski* [1982] 1 S.C.R. 860.
2. Waiver of solicitor-client privilege may occur in the absence of an intention to waive, where fairness and consistency so require. Waiver of privilege as to part of a communication

will be held to be waiver as to the entire communication. Similarly, where a litigant relies on legal advice as an element of his claim or defence, the privilege which would otherwise attach to that advice is lost: *S. & K. Processors Ltd. v. Campbell Avenue Herring Producers Ltd.* [1983] B.C.J. No. 1499.

3. A party will waive the protection of solicitor-client privilege when it voluntarily injects into the proceeding the question of its state of mind, and, in doing so, uses as a reason for its conduct the legal advice that it has received: *Morrison (supra)*.

4. To displace solicitor-client privilege there must be an affirmative allegation which puts the party's state of mind in issue: *Pax Management Ltd. v. A.R. Ristau Trucking Ltd.* 14 B.C.L.R. (2d) 257.

37 Ermineskin further relies on Madam Justice McLachlin's (as she then was) characterization of the waiver of solicitor-client privilege in *S. & K. Processors Ltd. v. Campbell Avenue Herring Producers Ltd.*, [1983] B.C.J. No. 1499 (B.C. S.C.) [*S. & K.*], stating that "the cases where fairness has been held to require implied waiver, there is always some manifestation of a voluntary intention to waive the privilege at least to a limited extent. The law then says that in fairness and consistency, it must be entirely waived."

38 They contend that *Merck 2004*, at paras 16 and 45, makes clear that the Crown cannot "pick and choose" what evidence it will waive privilege over. Instead, "privilege is lost over any communication that has a relevant and material connection to the issue brought forward" (*Iozzo v. Weir*, [2004] A.J. No. 395 (Alta. Q.B.) at para 26. In hearing the 2010 amendment application, the Prothonotary is entitled to consider all evidence before the Court, including the Crown's statement that it believed its "existing pleadings were adequate", which may be held to explain its delay.

39 Finally, Ermineskin underscores that the Crown's reliance on *Talisman* is misplaced, arguing that it is not binding on the Federal Court and that, in any event, it stands for the proposition that in exercising its discretion to order discovery of privileged documents, the Court must determine whether the legal advice offered by the waiving party is relevant to such a degree that privilege is waived over the entirety of the communications. Ermineskin argues that the Crown's delay in seeking to amend its pleadings is relevant to the application before the Court and thus, the evidence relating to the Crown's assertion, through the affidavit, that this delay was based on its belief in the adequacy of its pleadings up until 2004, is also relevant.

### *Analysis*

40 The main issue before the Court is whether Prothonotary Lafrenière's Order regarding the waiver of solicitor-client privilege was clearly wrong as being based upon a misapprehension of facts or upon a wrong principle of law.

## Finding of Facts

41 The Court cannot find that the Prothonotary misapprehended the facts, based on Ermineskin's submissions that paragraphed 12 of the affidavit "intended to rationalize" the Crown's delay in seeking to amend its statement of defence. The Court reiterates that the Crown delivered a notice of motion on December 23, 2010, seeking an order allowing amendments to its statement of defence to include an express reference to various statutes. The affidavit was submitted in the Crown's Motion Record in support of its 2010 application amendment.

42 The Court is of the view that, on the basis of the record and the parties' submissions, the Prothonotary did not err in finding that paragraph 12 of the affidavit was intended to rationalize the Crown's delay in seeking to amend its statement of defence in 2004. The Court accepts Ermineskin's position that there is an explicit reference to legal advice to be found in paragraph 12 of the affidavit and, to a lesser extent, in Ms. Sturney's cross-examination. Accordingly, the Court is unable to agree with the Crown that paragraph 12 of the affidavit solely provides only background information to describe the context of the 2004 amendment application.

43 Moreover, the Crown's submissions that paragraph 12 of the affidavit is irrelevant to its 2010 amendment application is without foundation. The affidavit was submitted in the Crown's Motion Record in support of the 2010 amendment application. The Prothonotary will hear the 2010 amendment application and, as such, the explanation for the Crown's delay in seeking to amend its statement of defence is a relevant factor to the determination of whether an amendment should be permitted or not. The Federal Court of Appeal in *Merck 2004*, cited *Continental Bank Leasing Corp. v. R.*, [1993] 1 C.T.C. 2306 (T.C.C.) with respect to the factors that the Court must consider to permit or deny amendments of pleadings, including "[...] the timeliness of the motion to amend or withdraw [...]".

44 In such circumstances, the Court must agree that the Prothonotary did not misapprehend the facts in finding that paragraph 12 of the affidavit was intended to rationalize the Crown's delay in seeking to amend its statement of defence.

## Waiver of Solicitor-client Privilege

45 The basic principles underlying the concept of solicitor-client privilege are not in dispute. It is common knowledge that the Supreme Court has repeatedly said that it recognized solicitor-client privilege as fundamental to the Canadian legal system (*McChure*). As stated in a recent decision by the Federal Court of Appeal, the protection of the confidentiality of legal advice communicated by lawyers to their clients is of fundamental importance to the administration of justice. Incursions must be kept to an absolute minimum (*Quadrini v. Canada (Revenue Agency)*, [2011] F.C.J. No. 475 (F.C.A.) at para 29).

46 In paragraph 26 of *Environmental Defence Canada*, the Federal Court stated that a waiver of solicitor-client privilege is established when it is demonstrated that the possessor of the privilege knows of the existence of the privilege and voluntarily evinces an intention to waive it (*K.F. Evans Ltd. v. Canada (Minister of Foreign Affairs)*, [1996] F.C.J. No. 30 (Fed. T.D.) at para 16). There may also be waiver by implication. The concept of implied waiver is addressed in Sopinka, Lederman & Bryant, *The Law of Evidence in Canada*, 3d ed (Toronto: LexisNexis Canada Inc, 2009) at 959:

As to what constitutes waiver by implication, Wigmore said:

Judicial decision gives no clear answer to this question. In deciding it, regard must be had to the double elements that are predicated in every waiver, i.e. not only the element of implied intention, but also the element of fairness and consistency. A privileged person would seldom be found to waive, if his intention not to abandon could alone control the situation. There is always also the objective consideration that when his conduct touches a certain point of disclosure, fairness requires that his privilege shall cease whether he intended that result or not. He cannot be allowed, after disclosing as much as he pleases, to withhold the remainder. He may elect to withhold or to disclose, but after a certain point his election must remain final

[emphasis added].

47 As recently confirmed by this Court in *Mahjoub, Re*, [2011] F.C.J. No. 1125 (F.C.) at para 10, the jurisprudence supports the following propositions relating to implied waiver of the privilege:

(a) waiver of privilege as to part of a communication will be held to be waiver as to the entire communication. *S. & K. Processors Ltd. v. Campbell Avenue Herring Producers Ltd.* [1983] B.C.J. No. 1499, *S & K*;

(b) where a litigant relies on legal advice as an element of his claim or defence, the privilege which would otherwise attach to that advice is lost. (*S & K*);

(c) in cases where fairness has been held to require implied waiver, there is always *some manifestation of a voluntary intention to waive the privilege at least to a limited extent*. The law then says that in fairness and consistency, it must be entirely waived. (*S & K*)

[My emphasis];

(d) the privilege will be deemed to have been waived where the interests of fairness and consistency so dictate or when a communication between a solicitor and client is legitimately brought into issue in an action. *Bank Leu AG v. Gaming Lottery Corp.* [1999] O.J. No. 3949, 43 C.P.C. (4th) 73 at paragraph 5;

(e) the onus of establishing the waiver rests on the party asserting waiver of the privilege. (*S & K* at paragraph 10).

48 In *Apotex Inc. v. Canada (Minister of Health)* (2003), [2004] 2 F.C.R. 137 (F.C.), Mr. Justice Lemieux concluded that fairness to a party is a guiding principle when determining whether solicitor-client privilege is deemed to have been waived. Balancing that element of fairness against the values underlying the privilege depends on the circumstances.

49 Guided by these principles, the Court must turn to the circumstances in this matter. In the Court's view, paragraph 12 of the affidavit is about injecting in the process the Crown's legal advice as an element to explain its delay in seeking amendments to its statement of defence. Following Sopinka, Lederman & Bryant's unequivocal statement that "[t]here is always also the objective consideration that when his conduct touches a certain point of disclosure, fairness requires that his privilege shall cease whether he intended that result or not," the Crown cannot be allowed, after disclosing relying on legal advice to determine the adequacy of its pleadings, to withhold communications between the Crown and its legal advisors which bear upon paragraph 12 of the affidavit.

50 The Crown's position is that the affidavit refers only to the fact of receiving legal advice and not the content of that advice, based on *Talisman* and *Ed Miller Sales*. The Court cannot agree that this is the situation in the present case. *Talisman* further holds, at para 27, that waiver is triggered by demonstrating reliance on legal advice for the resolution of an issue, not by the mere reference to having received it. As such, paragraph 12 of the affidavit asserts that the Crown relied on legal advice in regards to the adequacy of the limitation defence portion of the pleadings and the reason for pursuing an amendment of its pleadings. Accordingly, based on the sound principle in *S & K*, as the Crown relied on legal advice as an element of its claim, the privilege which would otherwise attach to that advice is lost.

51 It is not open to the Crown to assert that there was no implied waiver because its pleadings do not rely on the legal advice contained in the affidavit. The Court rejects that argument, as it was also dismissed by this Court in paragraph 32 of *Environmental Defence Canada*, and held that "reliance is not, in or itself, determinative of the issue of implied waiver." Therefore, there is nothing clearly wrong about Prothonotary Lafrenière's conclusion that "based on these principles, by tendering the affidavit of Ms. Sturney the Crown has waived solicitor-client privilege."

52 In closing, the Court must note that, as held by Prothonotary Lafrenière, the communication at issue in paragraph 12 of the affidavit relates to the applicants' belief in 2004 and not to any subsequent communication or legal advice. As such, there was only partial waiver by the Crown, limited to the considerations back in 2004.

53 In answering the second question, the Court agrees with the parties that Prothonotary Lafrenière's Order fails to raise an issue vital to the final outcome of the case. Answering the third question, the Court also finds that the Prothonotary did not commit any error in the exercise of his discretion or base his discretion on any misapprehension of facts.

54 The parties agreed that no costs should be awarded.

### **Judgment**

*THIS COURT ORDERS that:*

1. The appeal be dismissed.
2. No costs are awarded.

*Appeal dismissed.*

2021 FC 1427, 2021 CF 1427  
Federal Court

Farmobile, LLC v. Farmers Edge Inc.

2021 CarswellNat 7685, 2021 CarswellNat 7686, 2021 FC 1427, 2021 CF 1427

**FARMOBILE, LLC (Plaintiff / Defendant by Counterclaim) and  
FARMERS EDGE INC. (Defendant / Plaintiff by Counterclaim)**

Nicholas McHaffie J.

Heard: December 9, 2021  
Judgment: December 15, 2021  
Docket: T-449-17

Counsel: Scott Foster, Mathew Brechtel, Joan Archer, for Plaintiff / Defendant by Counterclaim  
Kendra Levasseur, James S. S. Holton, for Defendant, Plaintiff by Counterclaim

*Nicholas McHaffie J.:*

**I. Overview**

1 Farmobile appeals the November 3, 2021 order of Case Management Judge (CMJ) Ring dismissing its motion to require Ronald Osborne, Chief Technical Officer of Farmers Edge, to answer questions on cross-examination. The cross-examination was conducted in the context of a motion about the propriety of redactions applied to 13 emails produced by Farmers Edge. Farmers Edge had first produced the emails with a set of redactions. After Farmobile protested, Farmers Edge produced the emails with a second set of redactions, revealing somewhat more of what was in them. The cross-examination questions at issue on this appeal relate to the first set of redactions.

2 For the reasons below, I agree with Farmers Edge that Farmobile has not identified a palpable and overriding error in the CMJ's conclusion that the questions were improper. Farmobile failed to satisfy the CMJ that questions about the first set of redactions were relevant to the issues on the motion, which is about the second set of redactions, and they have failed to satisfy me that the CMJ made a palpable and overriding error in this regard. While cross-examination questions that go to an affiant's sworn evidence or to their credibility may go beyond what is legally relevant to the motion on which their affidavit was filed, Farmobile has not shown that the impugned questions arise from Mr. Osborne's affidavit or that they are fair and *bona fide* questions relevant to the credibility and reliability of his evidence.

3 Nor do I see an error in the CMJ's consequent conclusion that Mr. Osborne should not be ordered to re-attend for cross-examination. Farmobile argues Mr. Osborne should have been required to attend to answer relevant questions even if it is unsuccessful on the first aspect of its motion. I disagree. Farmobile made a tactical decision to purport to adjourn the cross-examination and seek directions when its questions about the first redactions were refused, rather than asking any further questions it may have had. They do not now have the opportunity to undo the consequences of that decision by seeking to continue their cross-examination as if it had not been adjourned.

4 The appeal motion is therefore dismissed.

## II. Issues and Standard of Review

5 Although framed somewhat differently by Farmobile, this appeal motion ultimately raises the following issues:

A. Did Case Management Judge Ring err in concluding that Farmobile's cross-examination questions about the first set of redactions were improper?

B. Did Case Management Judge Ring err by refusing to order any further cross-examination?

6 The parties agree that on an appeal motion from a decision of a Prothonotary of this Court, the appellate standards of review apply: [Housen v Nikolaisen, 2002 SCC 33](#); [Hospira Healthcare Corporation v Kennedy Institute of Rheumatology, 2016 FCA 215 at paras 2, 28, 63-65, 79](#). On factual findings and questions of mixed fact and law, including exercises of discretion, the applicable standard is that of palpable and overriding error; on questions of law, including those extricable from a question of mixed fact and law, the applicable standard is correctness: [Housen](#) at paras 19-37; [Hospira](#) at paras 66, 79; [Mahjoub v Canada \(Citizenship and Immigration\), 2017 FCA 157 at paras 57, 72-74](#).

7 Farmobile does not claim the CMJ made an extricable legal error. The parties therefore agree that the applicable standard is that of palpable and overriding error. As Farmers Edge points out, the nature of the "palpable and overriding error" standard, including the importance of both the "palpable" and "overriding" terms, was discussed by the Court of Appeal in [Mahjoub](#). In essence, the error or errors must be obvious and they must, alone or in combination, affect the outcome of the case: [Mahjoub](#) at paras 61-65.

## III. Analysis

***A. Case Management Judge Ring did not err in concluding that the questions at issue are improper***

*(1) Context: The action, the productions, and the underlying redactions motion*

8 Farmobile owns a patent on a farming data collection and exchange system. It believes Farmers Edge has infringed and is still infringing this patent through the latter's "FarmCommand" system, including a device called "CanPlug." Farmers Edge denies it has ever infringed the patent. Nonetheless, in April 2021, Farmers Edge implemented a software change. It claims the change results in it not infringing the patent even on Farmobile's theory of infringement. Farmers Edge seeks to rely on this software change both in defence to the claim of infringement and in respect of damages if the pre-April 2021 system is found to infringe. Farmers Edge therefore terms the change a "non-infringing alternative" or NIA.

9 Farmers Edge told Farmobile about the April 2021 NIA about a week before the trial was scheduled to begin, resulting in an adjournment of the trial. The trial is now scheduled to begin in August 2022. I note parenthetically that I am currently assigned to be the trial judge, but my hearing of this motion is serendipitous, as it was coincidentally set down for general sittings in Saskatoon on a date I was assigned to those sittings.

10 Farmobile asked Farmers Edge to produce documents relating to the April 2021 NIA. By order dated June 17, 2021, CMJ Ring set a timeline for production of those documents. Farmers Edge produced a number of documents, including 13 emails or email exchanges from which portions had been redacted. All of these emails have Mr. Osborne as a sender or recipient.

11 Farmobile complained of the redactions and sought unredacted copies of the emails. Farmers Edge refused. After an exchange between counsel and a case management conference (CMC), Farmers Edge provided further copies of emails with fewer redactions, without agreeing that the emails were relevant or that the original redactions were improper. Still unsatisfied, Farmobile served a notice of motion on August 9, 2021 seeking production of unredacted copies of the emails. In response, on August 23, Farmers Edge proposed to provide Farmobile's outside counsel with an opportunity to review the unredacted emails, with or without the assistance of Farmobile's outside expert. Farmobile responded the same day seeking a "brief high level summary of what the redacted information relates to."

12 On August 27, Farmers Edge served an affidavit from Mr. Osborne in response to the redactions motion. In his affidavit, Mr. Osborne states he identified the redactions applied to the emails. He says that the emails relate to Farmers Edge's operations and ongoing projects, which included but were not limited to the April 2021 NIA. He states that the redactions contain information irrelevant to the April 2021 NIA. Attached as an exhibit to the affidavit is a table setting out the general nature of the redacted information in each email and Mr. Osborne's assessment that, in each case, the information is irrelevant and would not assist in understanding the unredacted portions of the email.

13 The following Monday, August 30, Farmers Edge repeated its offer to give outside counsel an opportunity to inspect the unredacted documents on a "strict outside-counsel's-eyes-only basis this week," noting that Mr. Osborne's affidavit contained a summary of the nature of the redacted information as Farmobile had requested. This offer was not accepted.

*(2) The cross-examination questions at issue*

14 Farmobile cross-examined Mr. Osborne on September 24 by videoconference. The examination was brief. After preliminary confirmations, counsel asked Mr. Osborne whether he performed the redactions on "both sets of emails" (Q. 8). Counsel agreed before me that since the emails were the same, it would be more precise to refer to "both sets of redactions" rather than "both sets of emails." Regardless, the meaning of the question was clear. That question was refused on the basis that the first set of redactions was irrelevant to the issues on the motion.

15 Mr. Osborne was asked twice more whether he performed the first set of redactions (QQ. 13, 14). Again, these questions were refused. He was also asked whether Farmobile had put both sets of emails in the record (Q. 15), and whether the emails are the same but with different redactions (Q. 16). These questions were again refused on grounds of relevance. A thirteen-minute break followed. On return, Mr. Osborne confirmed that he identified the second set of redactions, but the next two questions about comparisons between the two sets of redactions (QQ. 18, 19) were refused as irrelevant, as was a further question asking whether Mr. Osborne could recall the first set of redactions without looking at them (Q. 20).

16 At that stage, counsel for Farmobile stated that they were going to adjourn the cross-examination to seek directions of the Court pursuant to [Rule 96\(2\) of the Federal Courts Rules, SOR/98-106](#). Counsel for Farmers Edge objected to this approach, suggesting that arguments about refused questions could be made at the hearing, and took the position that Farmobile was ending the cross-examination.

17 The same day, Farmobile requested a CMC to address a number of matters including its intention to bring a motion for directions in respect of the cross-examination. That CMC was held on October 5, 2021 before CMJ Ring and resulted in an October 6 order requiring Farmobile to file its motion by October 13. Farmers Edge's proposal of a review of the redactions by outside counsel was apparently discussed at the CMC.

18 On October 13, Farmobile served its notice of motion regarding the cross-examination questions. The following Monday, October 18, Farmobile responded to the August 30 proposal from Farmers Edge saying, "[g]iven the suggestion by Prothonotary Ring on the last CMC, we are prepared to review the redacted portions of the emails on an outside-counsel's-eyes-only basis." Farmers Edge responded on the Thursday, stating that counsel was unavailable that week to facilitate the review. The next day, October 22, Farmers Edge filed its responding record on the

cross-examination motion in accordance with the CMJ's October 6 order, in which it took the position that having been put to the task of preparing the responding materials, it was "now too late" for Farmobile to inspect the unredacted emails.

(3) *The CMJ's decision*

19 The CMJ stated that the legal principles governing the scope of cross-examination on an affidavit were not in dispute. She referred to the principle that "[a]n affiant who swears to certain matters should not be protected from fair cross-examination on the very information he volunteers in his affidavit": [CBS Canada Holdings Co v Canada](#), 2017 FCA 65 at para 29 citing [Ottawa Athletic Club Inc \(Ottawa Athletic Club\) v Athletic Club Group Inc](#), 2014 FC 672 at paras 130-133 and [Merck Frosst Canada Inc v Canada \(Minister of National Health and Welfare\)](#), [1996] FCJ No 1038 at para 9 [*Merck (1996)*]; see also [Thibodeau v Edmonton Regional Airport Authority](#), 2021 FC 146 at paras 12-13. The CMJ noted that the central issue in the motion before her was whether the impugned questions asked during the cross-examination were relevant.

20 To assess the question of relevance, the CMJ referred to Justice Hugessen's decision in [Merck Frosst Canada Inc v Canada \(Minister of Health\)](#), 1997 CarswellNat 2661, [1997] FCJ No 1847 (TD), aff'd [1999] FCJ No 1536 (CA) [*Merck (1997)*]. At paragraphs 6 to 8 of *Merck (1997)*, Justice Hugessen said the following:

For present purposes, I think it is useful to look at relevance as being of two sorts: formal relevance and legal relevance.

Formal relevance is determined by reference to the issues of fact which separate the parties. In an action those issues are defined by the pleadings, but in an application for judicial review, where there are no pleadings (the notice of motion itself being required to set out only the legal as opposed to the factual grounds for seeking review), the issues are defined by the affidavits which are filed by the parties. Thus, cross-examination of the deponents of an affidavit is limited to those facts sworn to by the deponent and the deponent of any other affidavits filed in the proceeding.

Over and above formal relevance, however, questions on cross-examination must also meet the requirement of legal relevance. Even when a fact has been sworn to in the proceeding, it does not have legal relevance unless its existence or non-existence can assist in determining whether or not the remedy sought can be granted. (I leave aside questions aimed at attacking the witness's personal credibility which are in a class by themselves). Thus, to take a simple example, where a deponent sets out his or her name and address, as many do, it would be a very rare case where questions on those matters would have legal relevance, that is to say, have any possible bearing on the outcome of the litigation.

[Emphasis added.]

21 The CMJ concluded the cross-examination questions about the first set of redactions were not relevant. She found that even if she accepted that the first set of redactions was formally relevant as having been referred to in Mr. Osborne's affidavit, Farmobile had not shown that they were legally relevant. She noted that the underlying redactions motion sought production of unredacted copies of the emails "at Exhibits S to EE" of the paralegal's affidavit sworn in support of the redactions motion. Those exhibits showed the second set of redactions. The CMJ concluded that it was the propriety of the second set of redactions, and not the first set, that was at issue on the motion and that Farmobile had not satisfactorily explained how a comparison between the two sets of redactions "can or will assist" in determining that issue. She noted that if Farmobile genuinely sought further information about the redacted content, counsel could have accepted the offer to inspect the unredacted documents "in a timely manner."

22 The CMJ went on to address Farmobile's argument that Mr. Osborne's evidence "cannot be trusted," since Farmers Edge had resiled from its initial position. She concluded that Farmers Edge had not resiled from its first position, given its statement at the time the second set of redactions were produced that it did not concede any impropriety in the first set of redactions. Further, even if Farmers Edge had resiled from its initial position, the CMJ reasoned that "it does not inevitably follow" that the second set of redactions contains relevant information, noting that "[t]he propriety of the redactions applied in the Second Set of Redacted Emails is assessed by examining the nature and scope of those redactions."

*(4) There is no palpable and overriding error*

**(a) The scope of permissible cross-examination on an affidavit**

23 The CMJ noted that there was no dispute before her as to the applicable principles regarding the scope of cross-examination on an affidavit in support of a motion. Before me, neither party directly challenged the CMJ's statement of those principles. Nevertheless, the parties' submissions emphasized different aspects of the case law and drew different conclusions regarding the applicable principles. It is therefore worth reviewing those principles at the outset.

24 I begin with the Federal Court of Appeal's 2017 decision in *CBS*, cited by the CMJ. In that case, while not purporting to discuss all of the relevant principles, the Court of Appeal said the following at paragraph 29:

The scope of cross-examination on an affidavit has been the subject of a number of decisions in which the relevant principles are set out: see *Ontario v. Rothmans Inc.*, 2011 ONSC 2504 at para. 143 and [*Ottawa Athletic Club*] at paras. 130-33. For the purposes of this motion, I am prepared to accept as correct the following statement taken from paragraph 132 of *Ottawa Athletic Club*:

However, there seems to be a consensus that "[a]n affiant who swears to certain matters should not be protected from fair cross-examination on the very information he volunteers in his affidavit," and "should submit to cross-examination not only on matters set forth in his affidavit, but also to those collateral questions which arise from his answers": [Merck (1996)] at para 9, quoting *Wyeth-Ayerst Canada Inc v Canada (Minister of National Health and Welfare)* (1995), 60 CPR (3d) 225, [[1995] FCJ No 240] (FCTD).

[Emphasis added; some citations omitted or varied.]

25 The *Rothmans* decision cited with approval in the above passage is a frequently cited decision of Justice Perell of the Ontario Superior Court of Justice. While *Rothmans* was decided under Ontario's Rules of Civil Procedure, the Federal Court of Appeal in *CBS* referred to paragraph 143 of *Rothmans* in particular as setting out "the relevant principles" for a cross-examination in this Court. In *Rothmans*, Justice Perell undertook a thorough review of the law on the permissible scope of examinations. At paragraph 143, he set out a series of principles applicable to cross-examinations on an affidavit filed in support of an application or motion, including the following:

- The examining party may not ask questions on issues that go beyond the scope of the cross-examination for the application or motion.
- The questions must be relevant to: (a) the issues on the particular application or motion; (b) the matters raised in the affidavit by the deponent, even if those issues are irrelevant to the application or motion; or (c) the credibility and reliability of the deponent's evidence.
- If a matter is raised in, or put in issue by the deponent in his or her affidavit, the opposite party is entitled to cross-examine on the matter even if it is irrelevant and immaterial to the motion before the court.
- The proper scope of the cross-examination of a deponent for an application or motion will vary depending upon the nature of the application or motion.
- A question asked on a cross-examination for an application or motion must be a fair question.
- The test for relevancy is whether the question has a semblance of relevancy.

[Emphasis added; citations omitted.]

26 Justice Perell's statement that the matters raised in a deponent's affidavit may be the subject of examination even if irrelevant to the motion are consistent with the Court of Appeal's express confirmation that an affiant cannot be protected from fair cross-examination on the information

they volunteer in an affidavit: *CBS* at paras 29-30 citing *Ottawa Athletic Club* at para 132 and *Merck (1996)* at para 9.

27 At the same time, the CMJ also referred to Justice Hugessen's "formal and legal relevance" analysis in *Merck (1997)*. As both the CMJ and Farmers Edge note, the Federal Court of Appeal confirmed in *Fink* that Justice Hugessen's analysis was correct and the "proper governing authority": *Canada (Attorney General) v Fink, 2017 FCA 87 at para 7*. In *Merck (1997)*, Justice Hugessen concluded that "[e]ven when a fact has been sworn to in the proceeding, it does not have legal relevance unless its existence or non-existence can assist in determining whether or not the remedy sought can be granted."

28 There seems to be an inconsistency between this statement and the principle recognized in *CBS* that a party may be cross-examined on information in their affidavit. This is particularly so given the citation with approval in *CBS* of *Rothmans*, which states clearly that an affiant may be cross-examined on matters in their affidavit "even if it is irrelevant and immaterial to the motion": *Rothmans* at para 143; *CBS* at para 29.

29 In my view, neither *Merck (1997)* nor *Fink* can be read as detracting from the general principle recognized in *Merck (1996)* and confirmed in *CBS* that an affiant can be cross-examined on the subject matter of their affidavit. Indeed, *CBS* expressly adopts *Ottawa Athletic Club*, in which Justice Russell confirmed the principle in *Merck (1996)* after considering *Merck (1997)*: *Ottawa Athletic Club* at paras 130-132. Notably, *Merck (1997)* does not appear to have considered the principle in *Merck (1996)*, although the latter was in turn based on jurisprudence of this Court and the Court of Appeal: *Merck & Frosst Canada Inc v Canada (Minister of National Health and Welfare), [1994] FCJ No 662 (CA) at para 26*, leave to appeal refused [1994] SCCA No 330; *Wyeth-Ayerst* at para 11. Similarly, the Court of Appeal decided *Fink* about a month after its decision in *CBS* without purporting to correct or disapprove of *CBS*, and did not directly deal with the issue of whether an affiant may be cross-examined on the contents of their affidavit even if they are not relevant to the issues on a motion or application.

30 In any event, neither party argued the CMJ was wrong in quoting the principle from *CBS* that an affiant should not be protected from cross-examination on the very information they put forward in their affidavit. Fairness certainly suggests that a party should not, as a general matter, be permitted to put evidence before the Court through an affidavit and then purport to limit cross-examination on that evidence on the basis that the very evidence it put forward was irrelevant. This is not to say that parties will be permitted to "waste their own and the Court's time and effort (to say nothing of money) in interminable questioning on matters that can have no conceivable impact on the outcome": *Merck (1997)* at para 9. However, in my view the CMJ made no error in citing the general principle in *CBS*.

31 I therefore understand the principles applicable to cross-examination on an affidavit filed in support of an application or motion in the Federal Court to be that a question on cross-examination must be a fair and *bona fide* question relevant to: (a) the issues on the application or motion; (b) the matters raised by the deponent in the affidavit, even if those matters are not relevant to the application or motion; or (c) the credibility and reliability of the deponent's evidence.

32 The first of these categories confirms that an affiant may be asked questions about matters relevant to the issues in the motion, even if those matters are not addressed in the affidavit. This is often expressed in the principle that cross-examination is not restricted to the "four corners" of the affidavit: *Ottawa Athletic Club* at para 132 citing *Almrei (Re)*, 2009 FC 3. As a corollary to the principle that an affiant cannot avoid fair questions on matters raised in their affidavit, they also cannot avoid fair questions on relevant matters about which they have knowledge simply by leaving those matters out of their affidavit.

33 I note that whether the second category above is formulated as being "matters raised by the deponent in the affidavit, *even if those matters are not relevant to the issues*" (the formulation of *Rothmans*, referred to with approval in *CBS*), or the narrower "matters raised by the deponent in the affidavit, *if those matters are relevant to the issues*" (effectively the formulation of *Merck (1997)*, referred to with approval in *Fink*), the result in this case does not change, as I find the CMJ did not err in finding Farmobile's questions about the first set of redactions irrelevant even on the more expansive formulation.

34 With respect to the third category, Farmers Edge argues that questions going to credibility must also meet the requirement of being formally and legally relevant as set out in *Merck (1997)*. I disagree. In *Merck (1997)*, Justice Hugessen expressly left aside questions aimed at attacking the witness' credibility, which he described as being "in a class by themselves": *Merck (1997)* at para 8. In *Almrei*, Justice Mosley noted that cross-examination was permitted if it was "relevant, fair and directed to an issue in the proceeding *or* to the credibility of the applicant" [emphasis added]: *Almrei* at para 71; *Ottawa Athletic Club* at para 132. A question may therefore be relevant and proper if it fairly goes to the credibility of the witness's evidence and thus to the Court's ability to rely on that evidence in deciding the motion.

35 Of course, a question cannot be justified simply by asserting that it goes to credibility. There are limits on questions going to credibility as well. They cannot, for example, be questions designed simply to impeach the character of the deponent: *Rothmans* at para 143. Questions going to credibility are also subject to the general rule against "fishing expeditions": *Castlemore Marketing Inc v Intercontinental Trade and Finance Corp*, [1996] FCJ No 201 at para 1; *Sawridge Band v Canada*, 2005 FC 865 at paras 4, 9.

36 Against this background, I turn to Farmobile's arguments that the CMJ made a palpable and overriding error in finding its questions about the first set of redactions irrelevant. I will

address these arguments in the context of each of the three categories of proper cross-examination questions.

**(b) Were the questions relevant to the issues in the motion?**

37 The relief sought in Farmobile's redactions motion is the production of unredacted copies of the 13 emails. Since the only redactions currently in place are those in the second set of redactions, the CMJ concluded that the issue on the motion was the propriety of these redactions. She found that Farmobile had not explained how questions about the first set of redactions "can or will assist" the Court in deciding that issue. She therefore held that the questions were not legally relevant to the issues on the motion.

38 Farmobile argues the CMJ erred in this finding. It first argues the CMJ conflated the principal issue in the proceeding with the relief being sought on the motion. In particular, it tries to distinguish between the issue raised by Mr. Osborne's affidavit, which it defines as "whether the redactions made by Mr. Osborne were proper," and the issue on the motion, which it defines as whether the Court will "permit the redactions to remain in the Second Version of Redacted Emails." I am unable to understand the distinction Farmobile is trying to make. As discussed in the next section, the redactions made by Mr. Osborne are the second set of redactions. The Court will permit the redactions to remain if they are "proper" in the sense of being in accordance with the relevant law. The two issues as stated by Farmobile therefore appear identical to me. I can see no error, let alone a palpable and overriding one, in the CMJ's statement of what is at issue in the redactions motion.

39 Nor can I see a palpable and overriding error in the CMJ's finding that questions about the propriety of the first set of redactions are not relevant to the issue of the propriety of the second set of redactions. The CMJ was not satisfied that questions about the first set of redactions could assist in assessing whether the second set of redactions are properly made. Farmobile has similarly not satisfied me that this is in error. On the redactions motion, the Court will have to decide whether the redacted information is "clearly irrelevant" to the issues in the litigation and whether it would "clearly not assist" in understanding unredacted portions of the emails, among other factors: [Janssen Inc v Apotex Inc, 2018 FC 407 at para 9](#) citing [Eli Lilly Canada Inc v Sandoz Canada Incorporated, 2009 FC 345 at para 14](#). Farmobile has not explained how questions about the first set of redactions, whether related to the process followed or the substance of the redactions, would help decide those issues.

40 Farmobile argued before the CMJ that the change in the redactions is relevant to the issues in the redactions motion because it shows that Mr. Osborne's evidence "cannot be trusted." Farmobile did not use the term "credibility" in its written submissions to the CMJ. However, it was effectively arguing, as it argued more expressly before me on appeal, that its questions on the first set of

redactions go to Mr. Osborne's credibility. I address this argument below, which relates to the third proper area of cross-examination questions.

**(c) Did Mr. Osborne's affidavit speak to the first set of redactions?**

41 Farmobile argues Mr. Osborne's affidavit refers to the first set of redactions and that it is therefore "only fair" that it be allowed to ask questions about those redactions. Farmers Edge counters that the CMJ found that Mr. Osborne did *not* refer to the first set of redactions and that, in any event, questions on those redactions did not meet the test for legal relevance based on the *Merck (1997)* approach. For the foregoing reasons, I will approach the question on the understanding that cross-examination may be directed to matters raised in the affidavit even if they are not relevant.

42 The question becomes whether Mr. Osborne's affidavit speaks to the first set of redactions, as Farmobile contends. To begin, I cannot agree with Farmers Edge's assertion that the CMJ found that the affidavit did not refer to the first set of redactions. The CMJ did not directly assess this question, stating simply that "even if" she accepted that the affidavit deals with the first set of redactions, they did not meet the test for legal relevance.

43 At the same time, I see no foundation for Farmobile's claim that Mr. Osborne spoke of the first set of redactions in his affidavit. Farmobile points to the second paragraph of the affidavit, where Mr. Osborne says the following:

Counsel for Farmers Edge has informed me that [Farmobile] seeks to remove some redactions from some emails that were produced in July 2021. The redactions were applied to those emails were identified by me.

44 A plain reading of this passage is that Mr. Osborne is referring to the redactions that Farmobile is seeking to remove. That is the second set of redactions. This reading is confirmed by the fact that the affidavit goes on to refer to the nature of the redactions, including by attaching the table of explanations as an Exhibit, as described above. These all again refer to the second set of redactions. Farmobile argues that the reference to "some emails produced in July 2021" includes both the first and second sets of redacted emails, each of which were produced in July 2021. I am not persuaded in the least that this is a reasonable or fair reading of Mr. Osborne's affidavit. There is only one set of emails. Mr. Osborne is discussing the redactions to the emails, and specifically to the redactions Farmobile is seeking to remove. I cannot read this as a reference to anything but the second set of redactions. As the CMJ underscored, it is these redactions that are at issue on the motion.

45 Farmobile says that it was precluded by Farmers Edge's objections during the cross-examination from even confirming whether Mr. Osborne was referring in his affidavit to the first set of redactions, and thereby establishing the basis for its questions about the first set of redactions. The difficulty with this argument is that Farmobile never asked Mr. Osborne such a question on cross-examination. If it had done so, it might have been a relevant question to confirm the scope of

the affidavit and thereby the scope of cross-examination. It did not, despite Farmobile's attempts to suggest that the question was implicit in its other questions. The Court is therefore left with the reading of the affidavit on its face. It does not refer to the first set of redactions. Farmobile's questions about the first set of redactions therefore do not fall into the second category of proper cross-examination questions.

**(d) Were the questions fair questions going to credibility?**

46 Farmobile argues that the questions about the first set of redactions go to Mr. Osborne's credibility. Mr. Osborne's affidavit, and in particular his statements regarding the contents of the redacted portions of the emails, is the primary evidence Farmers Edge relies on to support its assertion that the second set of redactions is appropriate. As noted above, I agree with Farmobile that fair questions going to Mr. Osborne's credibility can be asked. However, in my view, Farmobile has failed to show that the CMJ made a palpable and overriding error in addressing Farmobile's arguments on this ground.

47 The CMJ rejected Farmobile's arguments that the questions went to Mr. Osborne's credibility (or whether he could be "trusted") for two reasons. First, the CMJ noted that Farmobile could not rely on Farmers Edge having resiled from its initial position since they did not formally resile. Second, she found that even if Farmers Edge had resiled from its earlier position, the fact that the first set of redactions covered relevant information did not mean that the second set of redactions also covered relevant information.

48 Farmobile effectively argues that the first set of redactions covered clearly relevant information such that, on the assumption that Mr. Osborne also did those redactions, his approach to the redactions generally was unsound and his evidence on the second set of redactions is less credible as a result. I cannot accept that these arguments show an error on the part of the CMJ.

49 Farmobile relies on two emails to show the claimed importance of the previously redacted information: one from January 23, 2021 and one from March 29, 2021. However, the importance of the information that became unredacted, even if relevant, is far from clear on its face. Farmobile filed no evidence as to that importance and counsel was unable to explain it to the Court in any way that suggests that a change in their redaction status would reflect on Mr. Osborne's credibility. Indeed, Farmobile's arguments about one of the redactions seemed to change during the course of submissions. Farmobile first suggested that the appearance of a "PGN" component in the second redaction of the January 23, 2021 email showed the component was "being discussed much much earlier" than was known from the first set of redactions. However, when counsel was pointed to the same "PGN" component being seen in the first set of redactions in an email dating from November 2020, the argument morphed into an unpersuasive one about the amount of time, effort, and the people involved.

50 Farmobile has not persuaded me that the CMJ erred in concluding that questions about the first set of redactions were not proper questions going to credibility. To the contrary, it appears that the questions are in the nature of a fishing expedition, hoping to discover some impropriety in Mr. Osborne's handling of the redactions that could then be used to challenge his evidence.

51 In this regard, I see no error in the CMJ's conclusion that if Farmobile genuinely sought information regarding what was redacted, even in the second set of redactions, it could have accepted "in a timely manner" Farmers Edge's offer to inspect the unredacted documents. While Farmobile raised a number of arguments as to why it did not and could not have accepted the offer earlier, such as the status of second counsel (see *Farmobile, LLC v Farmers Edge Inc*, 2021 FC 1200), none of these were raised with Farmers Edge and none of them appear persuasive. I note in this regard that the CMJ, being involved in ongoing case management of the matter and having presided at the October 5, 2021 CMC, was singularly well placed to assess whether Farmobile could have accepted Farmers Edge's offer in a timely manner. As Farmers Edge argues, this Court has recognized that it is appropriate to have a mechanism to provide outside counsel with an opportunity to view unredacted documents: *Janssen* at para 9 citing *Eli Lilly* at para 14. It is in my view unpersuasive for Farmobile to effectively decline such an offer for well over a month while pursuing cross-examinations, only to argue that it ought to be allowed to cross-examine on an earlier set of redactions to demonstrate that Mr. Osborne's evidence about the current redactions is not credible.

52 I therefore conclude that Farmobile has not shown a palpable and overriding error with respect to the CMJ's conclusion that the questions about the first set of redactions were improper, based on any of the permissible categories of cross-examination. This aspect of Farmobile's appeal is dismissed.

***B. Case Management Judge Ring did not err in not ordering further cross-examination***

53 The penultimate paragraph of the CMJ's reasons reads as follows:

For these reasons, I conclude that Farmobile's motion for an order that questions regarding the First Set of Redacted Emails are relevant questions shall be dismissed. Consequently, Farmobile's request for an order requiring Mr. Osborne to re-attend for cross-examination shall also be dismissed.

[Emphasis added.]

54 Farmobile argues that the CMJ erred in not requiring Mr. Osborne to re-attend for further cross-examination. It argues the CMJ recognized that there were relevant areas of cross-examination with respect to the second set of redactions, noting in particular the CMJ's earlier statement that "Farmobile is entitled to ask questions relating to the [second set of redactions]."

Farmobile argues it was inconsistent and a palpable and overriding error for the CMJ to nonetheless decline to allow Farmobile to continue its cross-examination to ask those questions, particularly without giving a substantive rationale for doing so.

55 I disagree, for two reasons.

56 First, the CMJ's order must be considered in the context of the arguments Farmobile made before her. As is clear from Farmobile's written representations to the CMJ, its request that Mr. Osborne re-attend for further cross-examination was entirely premised on its argument that Farmers Edge had improperly refused its questions about the first set of redactions. As counsel conceded, Farmobile did not submit in the alternative that re-attendance should be ordered even if it was incorrect in its position with respect to the propriety of the refused questions. In this context, it is understandable that the CMJ limited herself to the brief conclusion that "consequently," the request for a re-attendance order would also be dismissed.

57 Second, even if Farmobile had made a request for re-attendance or continuation of the cross-examination regardless of its success on the merits of the refusals, it has not persuaded me that such a request ought to have been granted. To the contrary, Farmobile undertook what is a fairly aggressive litigation tactic in purporting to adjourn a cross-examination in the face of refusals rather than completing its examination and arguing about refusals at a later date. Having done so over the objections of Farmers Edge's, who made its position clear, Farmobile cannot now expect to simply return and continue its cross-examination as if it had not adjourned.

58 On this point, I agree with Farmers Edge that Farmobile purported to engage [Rule 96\(2\)](#) in inappropriate circumstances. The Rule permits a person conducting an examination to adjourn and bring a motion for directions "if the person believes answers to questions being provided are evasive or if the person being examined fails to produce a document or other material requested under rule 94." Neither of these situations apply. There was no failure to produce a document at issue. There was also no question of Mr. Osborne providing evasive answers. Rather, there was a disagreement between counsel over the relevance of questions on cross-examination. This is a reasonably common occurrence. It is not one that generally allows frustrated counsel to adjourn an examination. Farmobile has not given any reason it was unable to continue its cross-examination with other areas of questioning in the face of refusals with respect to the first set of redactions. In these circumstances, Farmobile effectively elected to terminate its cross-examination when it purported to adjourn: [Direct Source Special Products Inc v Sony Music Canada Inc, 2003 FC 1227 at paras 2-4, 20-21](#).

59 I therefore also dismiss Farmobile's appeal on the second issue.

***C. Farmers Edge is entitled to its costs***

60 Farmers Edge seeks its costs of this motion in the amount of \$10,000, payable forthwith and in any event of the cause. It argues this appeal on a "motion-within-a-motion" is a waste of the parties' and Court's resources and should be sanctioned with such an order. Farmobile argues that costs in any event of the cause are appropriate, and suggests costs should be in the range of \$2,500 to \$3,000, commensurate with the amount payable on similar motions.

61 I agree with Farmers Edge. In my view, Farmobile need not have asked questions about the first set of redactions, particularly when other avenues, including an outside-counsel's-eyes-only review of the documents, had been made available. Having obtained a refusal on those questions, it should not have adjourned its examination. Having adjourned, it need not have brought an interlocutory motion within an interlocutory motion, but could have argued about the refusals at the hearing of the redactions motion. Having brought its motion unsuccessfully, it then chose to prolong matters and further increase costs through this unnecessary appeal, despite the deferential standard to the CMJ's decision it acknowledged was applicable. I am satisfied that this appeal motion should not have been brought and that Rule 401(2) applies. I am satisfied that in all of the circumstances, Farmers Edge's request for \$10,000 is reasonable and that it should be payable forthwith and in any event of the cause.

#### **IV. Conclusion**

62 For the foregoing reasons, Farmobile's motion for appeal is dismissed with costs payable forthwith in the amount of \$10,000, inclusive of all taxes and disbursements.

#### **ORDER IN T-449-17**

*THIS COURT ORDERS that*

1. The motion for appeal is dismissed.
2. Costs are payable by the plaintiff/defendant by counterclaim to the defendant/plaintiff by counterclaim in the amount of \$10,000, inclusive of all taxes and disbursements, forthwith and in any event of the cause.

2018 CAF 204, 2018 FCA 204  
Federal Court of Appeal

Frame v. Riddle

2018 CarswellNat 6310, 2018 CarswellNat 8969, 2018 CAF 204,  
2018 FCA 204, 298 A.C.W.S. (3d) 451, 430 D.L.R. (4th) 138

**JOAN FRAME, PETER CHRISTOPHER VAN NAME,  
PRISCILLA MEECHES, NOELINE VILLEBRUN, ROSE  
SICCAMA, GUNARGIE O'SULLIVAN, COLLEEN RIJOTT,  
MARK HANDLEY, SARAH RAIN, VIOLET CHRISTINE DAVID,  
MELANIE MORRISSEAU, JOSEPHINE DENIS (Applicants)  
and JESSICA RIDDLE, WENDY LEE WHITE, CATRIONA  
CHARLIE and HER MAJESTY THE QUEEN (Respondents)**

J.B. Laskin J.A.

Judgment: November 9, 2018  
Docket: 18-A-40

Counsel: Jai Singh Sheikhpura (written), for Applicants  
Celeste Poltak (written), Kirk Baert (written), Garth Myers (written), David A. Klein (written),  
Douglas Lennox (written), Angela Bessflug (written), E.F. Anthony Merchant, Q.C. (written),  
Evatt Merchant, Q.C. (written), for Respondents, Jessica Riddle, Wendy Lee White and Catriona  
Charlie

***J.B. Laskin J.A.:***

1 This motion arises out of the settlement of the "Sixties Scoop" class proceedings — litigation seeking redress for the practice by Canadian child welfare authorities for many years of taking Indigenous children into care and placing them with non-Indigenous parents, where they were not raised in accordance with their cultural traditions or taught their traditional languages.

2 Some background is necessary to put the motion in context.

3 In total, 23 proposed class proceedings were commenced in relation to the Sixties Scoop. The first of these was commenced in Ontario in 2009. Other proposed class actions followed in four other provinces. The first Federal Court proceeding was commenced in 2016. Two further proceedings were commenced in 2017. The proposed class was said to comprise approximately 22,000 individuals.

4 In February 2017, the federal Minister of Indigenous and Northern Affairs publicly announced the federal government's interest in settling the Sixties Scoop litigation. Following this announcement, further proposed class proceedings were commenced in two provinces and the Federal Court.

5 In November 2017, after lengthy negotiations and a dispute resolution process overseen by the Federal Court, counsel in the first Ontario proceeding and the first Federal Court proceedings concluded a final settlement agreement covering all of the pending actions. The settlement agreement was conditional on the approval of both the Ontario Superior Court of Justice and the Federal Court. It provided for, among other things, the establishment and initial funding by the federal government of a foundation for the purpose of continuing efforts towards change and reconciliation, and a claims-based compensation scheme. The agreement included a right to opt out. It called for the payment of legal fees to class counsel of \$75 million. It specified an implementation date for the settlement, ending with the date of final determination of any appeal in relation to the approval orders.

6 Notice of the settlement approval hearings was given to class members in January 2018. They were provided with an opportunity to object to the terms of settlement, the proposed counsel fees, or both. The approval hearing in the Federal Court was held before Justice Shore over two days in May 2018. Some 373 objections were received and filed with the Court. Oral submissions by objectors were also heard. The objectors included four of the 12 applicants in this motion. Many objectors expressed concerns about the amount of class counsel fees.

7 At the conclusion of the hearing, Justice Shore announced his approval of the settlement. The formal approval order was issued a few days later, followed in turn by lengthy reasons. The order stated that the settlement agreement was fair, reasonable and in the best interests of the class. It set fees payable to class counsel in the Federal Court of \$37.5 million, and allocated \$12.5 million to each of three law firms. It stated that the order would be null and void if the settlement agreement was not approved by the Ontario court in substantially the same terms.

8 Later in May 2018, the Ontario settlement approval hearing proceeded before Justice Belobaba. He released his reasons in June. He stated that he would approve the settlement, with the exception of the legal fees, which he regarded as excessive and unreasonable. He advised that counsel in the Ontario proceeding had agreed to de-link the legal fees provision from the other settlement provisions, and in effect asked Federal Court class counsel to do the same.

9 After further negotiations, an agreement was reached to provide separately for fees for Ontario class counsel and for Federal Court class counsel, in an amount not to exceed \$37.5 million each, on the basis that each court would approve only payment of the fees of counsel before it. The settlement agreement was amended accordingly. Justice Belobaba approved the amended settlement agreement in July 2018. His order has not been appealed.

10 In the meantime Justice Phelan had been assigned as case management judge in the Federal Court proceeding. Federal Court class counsel made him aware of the amendment and provided a draft approval order, which was in substance the same as the order of Justice Shore, with the exception of provisions reflecting the amendment. Justice Phelan granted the order on August 2, 2018. Like Justice Shore's approval order, it approved fees payable to class counsel in the Federal Court of \$37.5 million, and allocated \$12.5 million each to the three law firms.

11 On August 8, 2018, Justice Phelan issued a direction requesting submissions on what he described as "the current motion for the payment of fees." He asked in particular, "[i]n light of Justice Shore's decision approving fees, what jurisdiction does the Court have to reconsider the issue and specifically is the matter *res judicata* or otherwise subject to any estoppel principles?" In response, class counsel submitted that both Justice Shore and Justice Phelan had approved the fees, and there was no motion for fee approval outstanding.

12 On September 10, 2018, after a case conference and further submissions, Justice Phelan issued reasons in which he concluded that, "in accordance with the principles of issue estoppel, [the] Court does not have jurisdiction to review, let alone reverse, Justice Shore's decision." He stated that "[i]n hindsight, it might have been preferable to title the August 2 Order '1st Amended Order of Justice Shore's Order of May 11, 2018'." He ordered that Justice Shore's May 2018 order and June 2018 order (accompanying his reasons and reproducing the May 2018 order), and his own August 2, 2018 order, "remain in full force and effect and Federal class counsel fees are to be paid accordingly."

13 The applicants now wish to appeal both Justice Phelan's August 2, 2018 order and his order of September 10, 2018. They move for an order under rule 334.31(2) of the *Federal Courts Rules*, SOR/98-106, by which a class member may seek leave to exercise the right of appeal of a representative plaintiff. It reads as follows:

(2) If a representative plaintiff or applicant does not appeal an order, or does appeal and later files a notice of discontinuance of the appeal, any member of the class for which the representative plaintiff or applicant had been appointed may apply for leave to exercise the right of appeal of that representative within 30 days after

(a) the expiry of the appeal period available to the representative, if the representative does not appeal; or

(b) the day on which the notice of discontinuance is filed, if the representative appeals and later files a notice of discontinuance of the appeal.

(2) Si le représentant demandeur n'a pas interjeté appel ou s'en est désisté, un membre du groupe peut demander l'autorisation d'exercer le droit d'appel du représentant demandeur dans les trente jours suivant:

- a) l'expiration du délai d'appel ouvert au représentant demandeur, si celui-ci n'a pas interjeté appel;
- b) le dépôt de l'avis de désistement, si le représentant demandeur s'est désisté de l'appel.

14 In their notice of motion, the applicants assert that they are all members of the class. They allege, among other things, that

- they were not given notice of the amendment to the settlement agreement;
- court files relating to it were improperly sealed, depriving them of access, without a confidentiality motion or order;
- they became aware of the amendment and its approval only through a newspaper article;
- approval required a new notice and a new fairness hearing;
- Justice Phelan's August 2, 2018 order rendered Justice Shore's approval order null and void;
- Justice Phelan's September 10, 2018 order was made without jurisdiction;
- some of the applicants wrote to Justice Phelan seeking permission to participate in the case conference that led to his September 10, 2018 order, but this request was denied;
- this denial was despite their direct interest in the issue of payment of legal fees, since if fees were reduced the amount of the reduction could be used to the benefit of the class;
- Justice Phelan erred by reviving Justice Shore's order without due process;
- Federal Court class counsel breached procedural fairness rules in amending the settlement agreement to remove Justice Belobaba's oversight of their fees;
- alternatively, Justice Phelan was not *functus officio* because what Justice Shore ruled on was significantly different from what Justice Phelan ruled on in his August 2, 2018 order;
- the amendment to the settlement agreement, and the provision for separate approval of fees, makes it impossible now to determine that the counsel fees payable to Federal Court class counsel are fair and reasonable; and
- the actions of Federal Court class counsel have been motivated by their interest in maximizing their fees, and their actions have brought the administration of justice into disrepute.

15 The evidence filed by the applicants in support of their motion consists only of Justice Phelan's August 2 and September 10, 2018 orders and the affidavit of a legal assistant. Her affidavit merely exhibits five documents. There is no affidavit of any of the applicants.

16 Despite the want of evidence, both the applicants' memorandum and their reply memorandum purport to recount in detail the relevant facts, including facts said to substantiate the allegations referred to above. They elaborate on their allegations against class counsel, stating, among other things, that class counsel "deceived" Justice Belobaba, acted without instructions, breached court rules, circumvented due process, and sought deliberately to work an injustice.

17 The applicants also rely on the test applied by this Court in motions for leave to appeal under rule 352. That test requires that the applicant for leave to appeal establish some arguable ground upon which the proposed appeal might succeed: see, for example, *Kurniewicz v. Canada (Minister of Manpower & Immigration)* (1974), 6 N.R. 225 (Fed. C.A.) at para. 9, [1974] F.C.J. No. 922 (Fed. C.A.).

18 The respondents have filed an extensive evidentiary record supported by affidavit. They too rely on the leave to appeal test under rule 352. They also submit, among other things, that the motion was brought out of time, that the applicants have no standing to bring it, and that there is no right to appeal a consent settlement approval order. They also point to the absence of evidence to support the proposition that, if leave were granted, the applicants would fairly or adequately represent the interests of the class.

19 Since the material on the motion was filed, counsel for the applicant Colleen Rijotte (whose last name is apparently misspelled in the style of cause) have filed a motion to be removed from the record based on a breakdown in the solicitor-client relationship, and advised that they have withdrawn from the motion. Counsel for the applicant Priscilla Meeches have advised the Court that they have been instructed to withdraw from participation in the motion, because their client does not wish there to be any delay in implementing the settlement.

20 This appears to be the first motion brought under rule 334.31(2). Only a very few motions have been brought under the similar provisions in the class proceedings statutes of other Canadian jurisdictions: see *Class Proceedings Act*, S.A. 2003, c. C-16.5, s. 36(3); *Class Proceedings Act*, R.S.B.C. 1996, c. 50, s. 36(2); *The Class Proceedings Act*, S.M. 2002, c. 14, s. 36(5); *Class Actions Act*, S.N. 2001, c. C-18.1, s. 36(4); *Class Proceedings Act*, R.S.N.B. 2011, c. 125, s. 38(4); *Class Proceedings Act*, S.N.S. 2007, c. 28, s. 39(4); *Class Proceedings Act*, 1992, S.O. 1992, c. 6, s. 30(5); *Code of Civil Procedure*, C.Q.L.R. c. C-25.01, art. 602; *The Class Actions Act*, S.S. 2001, c. C-12.01, s. 39(4).

21 However, though the language of the Ontario provision differs somewhat from that of rule 334.31(2), the decisions of the Ontario Court of Appeal in *Dabbs v. Sun Life Assurance Co. of Canada* (1998), 41 O.R. (3d) 97, 165 D.L.R. (4th) 482 (Ont. C.A.) , and *Sino-Forest Corp., Re*, 2013 ONCA 456 (Ont. C.A.) , leave to appeal refused, [2013] S.C.C.A. No. 395 (S.C.C.), are helpful in considering how the discretion granted by the rule should be exercised.

22 In *Dabbs* , a class member sought leave to act as a representative party for purposes of appealing a judgment that certified a class proceeding and approved its settlement. In refusing leave, the Court stated (at 103) that "[its] discretion to grant leave under [the Ontario provision] is guided by the best interests of the class and in particular by a consideration whether the class member applying would fairly and adequately represent the interests of the class." It noted that there was "nothing in the record which indicates that [the class member] would adequately represent the interests of this class by bringing an appeal which seeks to set aside the settlement agreement." It added that courts in three jurisdictions had approved the agreement, and that the class member was the only one, in a class of some 400,000, who was seeking to set it aside. "The wishes of one class member," it stated, "ought not to govern the interests of the entire class." If he was dissatisfied with the settlement, his recourse was to opt out and pursue his individual claim.

23 In the same vein, in *Sino-Forest* the Court dismissed a motion for leave to represent prospective class members in appealing an approved settlement where there was no basis on which to interfere with the approval order (at paras. 14-15).

24 In my view, similar considerations should govern the exercise of discretion under rule 334.31(2). To obtain leave to exercise the appeal right of a representative plaintiff, a class member must show that he or she will fairly and adequately represent the class on appeal, and that the appeal is itself in the best interests of the class. A focus on the best interests of the class is entirely consistent with the nature of the courts' supervisory role in class proceedings, particularly in relation to settlements: see *Bancroft-Snell v. Visa Canada Corp.*, 2016 ONCA 896 (Ont. C.A.) at para. 40, (2016), 133 O.R. (3d) 241 (Ont. C.A.) .

25 The parties have described a rule 334.31(2) motion as a motion for leave to appeal. That is not quite correct. Rather, as the text of the rule makes clear, it is a motion "for leave to exercise the right of appeal" of the representative plaintiff. The availability of an order under the rule therefore depends on whether the representative plaintiff (or applicant) has a right of appeal: see The Rules Committee, *Class Proceedings in the Federal Court of Canada: a discussion paper* (Ottawa: Federal Court of Canada, 2000) at 91-92.

26 The respondents submit that a representative plaintiff has no right to appeal an order approving a settlement of a class proceeding. They argue that an order of that kind is a consent order, and a party has no right to appeal an order to which it consented.

27 It is true that in other Canadian jurisdictions, appealing a consent order requires leave of the court: see, for example, *Alberta Rules of Court*, Alta. Reg. 124/2010, rule 14.5(1)(d); *Courts of Justice Act*, R.S.O. 1990, c. C.43, s. 133(a); *Ruffudeen-Coutts v. Coutts*, 2012 ONCA 65 (Ont. C.A.) at paras. 59-66, (2012), 348 D.L.R. (4th) 64 (Ont. C.A.) . Whether this is so for an order of the Federal Court may be questionable in light of subsection 27(1) of the *Federal Courts Act*,

R.S.C. 1985, c. F-7, which provides for appeals to this Court as of right from final and interlocutory judgments of the Federal Court (though it does not address who has standing to appeal).

28 In any event it is not at all clear that an order approving the settlement of a class proceeding is a consent order. The basis for a consent order is the parties' agreement, not a judge's determination of the merits or what is fair and reasonable in the circumstances. It therefore seems wrong to characterize a settlement approval order, which requires a judicial determination that the settlement is fair and reasonable and in the best interests of the class, as an order made on consent: *Bodnar v. Cash Store Inc.*, 2011 BCCA 384 (B.C. C.A.) at paras. 37-38, (2011), 23 B.C.L.R. (5th) 93 (B.C. C.A.). That characterization could also foreclose a class member's ability to seek leave to challenge an approval order on appeal, even when an appeal might be in the best interests of the class.

29 However, I need not decide this issue. Nor need I consider whether the motion has been brought out of time, as the respondents submit. That is because the motion fails in any event for another, basic reason: the applicants have not adduced sufficient evidence on which an order granting leave could justifiably be made.

30 It is fundamental that, with very limited exceptions, a motion must be supported by evidence. Rule 363 requires that "[a] party to a motion [...] set out in an affidavit any facts to be relied on by that party that do not appear on the Court file." This is no mere technicality: see *Kurniewicz* at paras. 9-10.

31 Here the evidence filed by the applicants is inadequate in the extreme. First, in circumstances in which the applicants are seeking to step into the shoes of the representative plaintiffs, the Court would expect to see evidence of the kind typically submitted on a certification motion, going to, among other things, the applicants' interest, their understanding of the position they seek to advance, their role in the proceeding, and their competence to instruct counsel: see *R. v. Horseman*, 2016 FCA 238 (F.C.A.), affirming 2015 FC 1149 (F.C.) and citing *Sullivan v. Golden Intercapital (GIC) Investments Corp.*, 2014 ABQB 212 (Alta. Q.B.) at paras. 54-57. Otherwise, as stated in *Sullivan*, the applicants "cannot be anything more than an empty vessel controlled by the litigation lawyer." And otherwise, there is no basis for exercising the discretion whether to grant leave in a manner that takes into account the first set of factors identified in *Dabbs*.

32 But here there is, as in *Dabbs* "nothing in the record which indicates that [the class member] would adequately represent the interests of this class by bringing an appeal which seeks to set aside the settlement agreement." There is, indeed, nothing to establish that the applicants are even members of the class (though this is conceded in relation to one of the applicants). In the absence of evidence going to the applicants' ability to adequately represent the class on appeal, their motion must fail.

33 Nor have the applicants adduced evidence to show that an appeal of Justice Phelan's orders would be in the best interests of the class, on the bases that they assert. There is a virtual absence of

evidence to substantiate the various allegations made by the applicants against class counsel and in relation to the events that preceded Justice Phelan's orders. Although the applicants need not necessarily prove their allegations at this stage in order to be granted leave, it is not sufficient, for example, to make assertions about the applicants' state of knowledge, or to impugn class counsel's conduct, without any evidence in support.

34 For these reasons, the motion is dismissed.

35 On the basis that the appellants' memorandum contains serious and unsupported allegations of misconduct against class counsel and the representative plaintiffs, the respondents ask the Court to order costs against the applicants' counsel personally. The applicants did not respond to this request in their reply memorandum.

36 Rule 404(2) requires that no costs order may be made against a solicitor unless the solicitor has been given an opportunity to be heard. To ensure compliance with rule 404, I will give applicants' solicitors until November 19, 2018 to file submissions in response to this request. If they do so, the respondents will have until November 26, 2018 to file brief submissions in reply. Both submissions should address the applicability of rule 334.39. Costs of the motion are reserved pending receipt and consideration of these submissions.

*Motion dismissed.*

Federal Court



Cour fédérale

Date: 20210825

Docket: T-538-19

Vancouver, British Columbia, August 25, 2021

**PRESENT:** Mr. Justice Pentney**BETWEEN:****GCT CANADA LIMITED PARTNERSHIP****Applicant**

and

**VANCOUVER FRASER PORT AUTHORITY and  
THE ATTORNEY GENERAL OF CANADA****Respondents****ORDER**

**UPON** the request of the Applicant, GCT Canada Limited Partnership [GCT], brought August 11, 2021, for an Order to permit it to cross-examine Mark Gustafson of the Vancouver Fraser Port Authority [VFPA], on his affidavit sworn July 30, 2021. The Court directed the parties to file written submissions, and agreed that this would be treated as a motion in writing, pursuant to Rule 369 of the *Federal Courts Rules*, SOR/98-106 [*Rules*];

**CONSIDERING** the following elements:

[1] This motion flows from an Order I issued, as Case Management Judge, on June 17, 2021, directing, *inter alia*, that “VFPA ... identify a senior official to supervise a review of its document holdings...” to fulfil the Court’s previous Order for further disclosure of documents.

[2] VFPA has produced an affidavit sworn July 30, 2021 by Mark Gustafson, its General Counsel, describing the nature and scope of the document search that VFPA undertook. GCT wants to cross-examine Mr. Gustafson on that affidavit, because it says that the search was deficient and did not comply with the terms of my Order. GCT notes that it has repeatedly sought disclosure of an adequate tribunal record from VFPA, and that this is just the latest chapter in that ongoing saga.

[3] GCT submits that certain statements by Mr. Gustafson that some documents do not exist appear to be contradicted by other documents already in the record. They seek to cross-examine him on these statements. GCT also argues that the affidavit does not explain why VFPA did not produce some documents that it located. GCT states “(t)here is no explanation in the affidavit as to what was actually produced as a result of the review process such that the Court has no insight into the product of the entire process.”

[4] GCT also contends that the search did not comply with the terms of the Order, because Mr. Gustafson directed others to conduct the search and is simply reporting on what they have advised him, rather than conducting the search himself.

[5] VFPA resists this, arguing that the affidavit it produced was pursuant to my Order, which itself did not provide for a right to cross-examine the senior official. It submits further that GCT does not have a right to conduct any cross-examination pursuant to Rule 83 of the *Rules*. In addition, VFPA argues that I am now *functus officio* in this matter, and therefore without jurisdiction to issue any further order.

[6] In considering the GCT motion, two over-arching considerations guide my analysis: the legal grounding for my jurisdiction and role as Case Management Judge in this matter, and the factual background and context for GCT's motion, and in particular its concerns with the adequacy of VFPA's disclosure.

[7] I will first describe the law regarding my role as one of the Case Management Judges in this matter. In examining my authority under Rule 385(1), I am guided by the following principles that animate the rules regarding judicial review and case management. To begin, applications for judicial review are to be heard and determined "without delay and in a summary way" (s. 18.4(1), *Federal Courts Act*). Pursuant to Rule 385(1) a Case Management Judge "shall deal with all matters that arise prior to the trial or hearing." A Case Management Judge is afforded discretion to give directions and make orders necessary for the "just, most expeditious and least expensive determination of the proceeding on its merits" (see Rules 3 and 385(1)(a), and case-law such as *1395804 Ontario Ltd. (Blacklock's Reporter) v. Canada (Attorney General)*, 2016 FC 719 at para 19).

[8] One limit on the discretion afforded to a Case Management Judge, however, is that in exercising their power under Rule 385(1), a Case Management Judge must remain cognizant of Rule 55. That Rule provides that it is only in special circumstances that compliance with the Rules can only be dispensed with. It has been interpreted to mean that justice must not be subordinated to expedition (*Apotex Inc. v. Bayer Inc.*, 2020 FCA 86 at para 42, citing *Merck & Co v Apotex Inc.*, 2003 FCA 438 at para 13). I should note here that in my view, it is not necessary to invoke Rule 55 in order to resolve this matter, but if I am wrong in that I am satisfied that this is the type of exceptional case which merits a departure from the Rules.

[9] A final relevant guiding principle is the proportionality of the request. A Case Management Judge is required to consider whether the nature and importance of the issue in dispute to the overall determination of the case, as well as the delay and expense associated with it, are proportional (see, for example *Hospira Healthcare Corporation v. Kennedy Trust for Rheumatology Research*, 2020 FCA 177 at para 9; *Pharmascience Inc. v. Pfizer Canada ULC*, 2020 FC 1175 at para 19).

[10] This is the framework within which the prior orders and directions issued have been issued in this matter, including the June 17, 2021 Order requiring VFPA to make further disclosure and to provide an affidavit from a senior official about the nature of the search that was done.

[11] Having discussed my role as Case Management Judge in this case, I now turn to the second of the two over-arching considerations that guide my analysis – the context and background for GCT’s motion. In a nutshell, the Order to VFPA to provide an affidavit from a senior official who could outline the nature of the search conducted arose out of concerns about the nature and extent of disclosure VFPA had already provided, concerns which have been repeatedly expressed by GCT.

[12] As noted earlier, I found that further disclosure was required and so ordered on June 17, 2021. Part of the context for this is the rather unusual situation presented in this case: VFPA is both the decision-maker and a full party to the proceeding. More commonly, the decision-maker is not a party to the judicial review proceeding, and they provide their Rule 317 disclosure as a matter of course. That disclosure is typically based on a clear “record” that is essentially the evidence that was presented by the parties before it. In this case, however, VFPA is not a

separate and independent decision-maker; that is the heart of the GCT concern in the underlying dispute.

[13] In mentioning this, I make no pronouncement on any legal consequence that may flow from the various roles played by VFPA. It has stated its position, that it played these several roles by virtue of its mandate as expressed in legislation and its letters patent. I refer to this only to provide background context to the Order that VFPA provide an affidavit from a senior official about its document search pursuant to the Order for further disclosure.

[14] One further contextual element that should be noted is that in the earlier proceeding, GCT expressed a concern that prior affidavits from VFPA had been provided by clerks or others who were not familiar with the substance of the matters, and it argued that any cross-examination of these individuals would have been worthless.

[15] With this background established, I turn to the submissions of the parties.

[16] In light of my ongoing obligations as Case Management Judge, I am not persuaded by VFPA's argument that I am now *functus officio*.

[17] First, the Order issued on June 17, 2021 arose from GCT's Motion seeking further production from VFPA. The substance of both parties' submissions was on whether VFPA had to make further production; they did not address the question of how it was to do so, and in that context there was no specific request that VFPA produce a senior official to address the nature or scope of the production. I was never asked to pronounce on the question of whether GCT should be able to cross-examine the VFPA deponent on the document search. I am not *functus* because I have never ruled on the point.

[18] As noted above, in light of the circumstances of this case and the nature of the record, and given the concerns about the identity and knowledge of prior affiants, I decided that VFPA should produce an affidavit from a senior official. I did not address the specific question of whether that official would be subject to cross-examination at that time. I am doing so now, on the motion of GCT and having heard from VFPA, in the context of my ongoing case management responsibilities.

[19] In doing so, there is no unfairness to any party. VFPA insisted that this matter be dealt with as a motion in writing, rather than through an informal discussion at the Case Management Conference. Both sides have had the opportunity to make submissions, and so both have been treated fairly. This is a procedural matter that does not affect VFPA's substantive rights or interests in any meaningful way, although I acknowledge that granting the Order will impose a further burden on Mr. Gustafson and counsel for VFPA.

[20] Second, VFPA argues that GCT does not have a "right" to cross-examine on the Gustafson affidavit pursuant to Rule 83, because it produced the affidavit pursuant to the Court Order. A literal reading of Rule 83 might suggest otherwise, insofar as: (a) GCT is a party that seeks to cross-examine on an affidavit; (b) the affidavit was filed in the context of a motion seeking further disclosure from VFPA further to its obligation to disclose the record on an application for judicial review; and (c) VFPA is an "adverse party" to GCT on both the motion and the underlying application. I note that Rule 83 does not limit cross-examination to certain types of affidavits filed by either party. That is to say, it does not say anything about why a party has filed an affidavit, it simply refers to affidavits filed on motions or applications and served on the other party. The question arises here as to whether the Gustafson affidavit was "served" on

GCT, or simply provided to it by virtue of the Order of the Court (on this point, see *Lukács v. Canada (Transportation Agency)*, 2019 FC 1646).

[21] It is not necessary to pronounce on this point, however, since pursuant to Rule 385(1)(a), the question remains whether cross-examination should be permitted because it is necessary for the just, most expeditious and least expensive determination of this case. Rule 83 neither expressly permits nor specifically forbids such cross-examination, and in my view this is not a situation that triggers the question of whether to dispense with compliance with the Rules under Rule 55. Indeed, VFPA concedes that had I mentioned this expressly in my previous Order there would be no basis to dispute it.

[22] In this regard, it should be recalled that the right to cross-examination on an affidavit is well-established in the case-law, and it is subject to restriction by the Court only in limited circumstances (*Genecor International Inc. v Commissioner of Patents*, 2007 FC 173 at para 26). One example of where cross-examination was not permitted was where a party had waived its right to do so for tactical reasons (*Imperial Oil Ltd. v Lubrizol Corp.* (1998), 82 C.P.R.. (3d) 440 (Fed. T.D.) at para 22). Another was where a party filed third party information pursuant to an order of the Court (*Rubin v Canada (Minister of Foreign Affairs and International Trade)* (2000), 196 F.T.R. 156 at para 9).

[23] In balancing the considerations relevant to Rule 385(1)(a), the starting point is that the adequacy of VFPA's disclosure pursuant to Rule 317, in the context of the GCT claim of actual bias, has been and remains a live issue in these proceedings. The issue is whether allowing the requested cross-examination will ensure that the judge hearing the merits of the claim will have a sufficient record on all of the relevant issues, while respecting the need to seek the most expeditious and least expensive determination of the proceeding on its merits.

[24] Having considered the submissions of the parties, and in exercise of my jurisdiction as Case Management Judge pursuant to Rule 385(1), I am persuaded that cross-examination on the affidavit of Mr. Gustafson (within the limits outlined below) will assist the hearing judge in having a complete record regarding the adequacy of VFPA's disclosure.

[25] I am also satisfied that the requested Order is proportional, considering its importance and connection to the underlying dispute, measured in relation to its impact on delay and expense.

[26] As described above, the record's adequacy is tightly connected to GCT's underlying complaint in this case: VFPA's concurrent roles as both the decision-maker and a party to the dispute. It is likely that the record's adequacy will continue to be a live issue between the parties, and the hearing judge may be asked to either make a ruling or take this into account in reaching a decision on the merits. Either way, the hearing judge will benefit from a full understanding of the disclosure made, and Mr. Gustafson's answers to questions about this in cross-examination may provide useful and relevant clarification.

[27] Permitting cross-examination will add a further step to the proceeding, but it will not unduly delay it or add great expense. Conversely, the absence of such an Order might result in an incomplete record for the hearing judge, thus impeding the Court's ability to determine the matter in a just manner.

[28] The cross-examination will be limited in scope, and should not therefore impose an undue burden on VFPA or its counsel. The questions raised by GCT about alleged inconsistencies or gaps in the disclosure, as revealed by the affidavit of Mr. Gustafson, should be answered so that the hearing judge will have a full understanding of the nature of the record.

[29] It bears repeating, however, that the scope of the cross-examination that I am ordering is limited. In particular, Mr. Gustafson's affidavit relates to the nature and scope of the document search undertaken by VFPA pursuant to my Order of June 17, 2021. He was not put forward to address the merits of the VFPA decision or decision-making process – there is another VFPA official (Mr. Xotta) who has addressed those subjects and who has been (or will be) subject to cross-examination on his affidavit.

[30] As discussed above, I find that this can be dealt with in exercise of my jurisdiction as Case Management Judge under Rule 385(1). If I am wrong in this, for the reasons set out above I find that it is in the interests of justice to permit GCT to conduct the limited cross-examination of Mr. Gustafson set out in the prior paragraphs, and therefore I find that this is a “special circumstance” that warrants a departure from the Rules under Rule 55. The hearing judge should have access to the best evidence on the adequacy of VFPA's disclosure, including answers to cross-examination by Mr. Gustafson. Ordering this will not add significant delay or expense to the proceeding, and will not interfere with the previously-scheduled hearing date.

[31] Therefore, I will order that GCT is permitted to cross-examine Mr. Gustafson, at a time and place to be agreed between the parties, only in relation to his evidence about the nature and scope of the search undertaken pursuant to my Order of June 17, 2021, and the documents that were found but not produced. No questions shall be asked of him relating to the merits of either the VFPA decisions being challenged or the VFPA decision-making process.

[32] I recognize that this Order may have an impact on the ability of the parties to meet their filing deadlines. To the extent this arises, either party will be permitted a short extension to make brief supplementary submissions relating to the evidence which emerges during the cross-examination of Mr. Gustafson. If this need arises, the parties shall advise the Court and

propose a schedule for the filing of these short, further submissions. The parties must otherwise comply with the deadlines already established for the filing of their records.

**THIS COURT ORDERS that:**

1. GCT is permitted to cross-examine Mr. Mark Gustafson on his affidavit sworn on July 30, 2021. The parties will agree on the time and manner of the cross-examination, but it shall be undertaken without delay.
2. The scope of this cross-examination is limited to questions about the document search that was undertaken pursuant to the Court Order of June 17, 2021, including questions about documents that were identified but not produced. No questions will be permitted that relate to the merits of the VFPA decision or decision-making process.
3. If the scheduling of this cross-examination affects the ability of the parties to meet their filing deadlines, they may advise the Court and the parties shall propose a schedule for the filing of short further submissions relating to the evidence which emerged during the cross-examination of Mr. Gustafson. The parties must otherwise comply with the deadlines already established for the filing of their records.
4. The parties will each bear their own costs on this motion.

“William F. Pentney”  
\_\_\_\_\_  
Judge

2018 FC 400, 2018 CF 400  
Federal Court

Granados c. Canada (Citoyenneté et Immigration)

2018 CarswellNat 2220, 2018 CarswellNat 2221,  
2018 FC 400, 2018 CF 400, 293 A.C.W.S. (3d) 371

**LUCY FRANCINETH GRANADOS (Applicant) and THE MINISTER  
OF CITIZENSHIP AND IMMIGRATION AND THE MINISTER OF  
PUBLIC SAFETY AND EMERGENCY PREPAREDNESS (Respondent)**

Luc Martineau J.

Heard: April 12, 2018  
Judgment: April 12, 2018  
Docket: IMM-1608-18

Counsel: Stewart Istvanffy, for the Applicant  
Lisa Maziade, for the Defendants

***Luc Martineau J.:***

[ENGLISH TRANSLATION]

1 Today, in urgent fashion, I heard by teleconference the motion for a stay from the applicant, Ms. Lucy Francineth Granados, who wants to prevent the enforcement of her imminent removal to Guatemala, which is scheduled for April 13, 2018 — tomorrow morning at 9:00 a.m.

2 The applicant, who is 41 years old, is a citizen of Guatemala. She is the mother of three children, who are 13, 17 and 20 years old. They reside in Guatemala and live with their grandmother and the applicant's brother in San Agustín Acasaguastlán, a rural area where they feel safer and where the cost of living is lower than in the country's capital. The applicant, who is single, is the only one who supports them financially, using her income from housekeeping work. It must be remembered that the applicant arrived in Canada in April 2009 and claimed refugee protection following the threats and extortion that she allegedly faced in 2008 from the Maras, a criminal gang, when her family was living in the capital. Her claim for refugee protection and pre-removal risk assessment [PRRA] application were rejected on February 21, 2011 and May 14, 2012 respectively - her account was not deemed to be plausible, since there were no substantial grounds for believing that she would be subject to personal risks, torture, a risk to her life or a risk of cruel and unusual treatment or punishment, to which the population of Guatemala generally appears not be exposed. Since no

application for leave and judicial review was filed for those two final decisions, the removal order that was issued against the applicant became fully enforceable in May 2012.

3 On August 15, 2012, the applicant had to be removed to Guatemala. However, after all arrangements had been made for her voluntary departure, the applicant failed to appear at the airport on the day of her departure, claiming it was because she had not heard the alarm on her clock. On August 22, 2012, an arrest warrant was issued for the applicant. Afterwards, Canada Border Services Agency [the Agency] lost all contact with the applicant.

4 In September 2017, the applicant decided to apply for permanent residence on humanitarian and compassionate considerations [H&C application]. However, the applicant's personal address on the H&C application was not her own, while the only point of contact was her counsel. In short, the applicant wanted to stay in hiding while her H&C application was being reviewed. In fact, she worked on the black market with no permit for all those years — none of her employers wanted to provide letters confirming her work in support of her H&C application. That said, since 2014, the applicant has been actively involved as a volunteer in various non-governmental organizations and made a vast network of acquaintances in the Latin American community. Numerous community and rights protection organizations decided to support her in her efforts to gain permanent residence in Canada.

5 In January 2018, the Agency was made aware of her H&C application. After intensive searches to track down the applicant, on March 20, 2018, Agency officers arrested her in an apartment in Montréal; she was overcome by a panic attack and tried to flee, such that the officers had to call for backup to bring her under control. That appeared to worsen the applicant's psychological state — especially since she stated that she had been molested during the arrest. The applicant is still being detained — her flight risk was rated as being high during detention reviews. The applicant was to be deported on March 27, 2018, but the removal could not be enforced; on March 26 and 27, 2018, she was in emergency at the Centre hospitalier de l'université de Montréal [CHUM], supposedly following a cardiorespiratory arrest. The applicant's removal was therefore postponed to April 13, 2018. In the meantime, on March 29, 2018, an application for an administrative stay was filed by her counsel, who referred to her medical condition, her role as the financial support for her children, and the existence of a pending H&C application. The application for a stay was dismissed by the enforcement officer on April 9, 2018.

6 On April 9, 2018, *mandamus* proceedings were instituted on behalf of the applicant to force the respondent, the Minister of Citizenship and Immigration, to make a decision on her H&C application before any deportation. The applicant incidentally challenges the reasonableness of the decision made by the enforcement officer to not postpone the removal — her counsel informed the Court during this morning's hearing of the applicant's intention to imminently serve and submit an application for leave and judicial review, if necessary. The Minister of Public Safety

and Emergency Preparedness is therefore also party to the proceedings. This motion for a stay was served on April 10, 2018.

7 To obtain a stay from the Court, the applicant must first display that there is a serious issue to be tried; second, that she would suffer irreparable harm if no order was granted; and third, that the balance of convenience considering the total situation of both parties, favours the order (*Toth v Canada (Minister of Employment and Immigration)* (1988), 6 Imm LR (2d) 123, 86 NR 302 (FCA); the serious issue test is particularly demanding following a refusal by an enforcement officer to postpone a removal and grant an administrative stay (*Baron v Canada (Minister of Public Safety and Emergency Preparedness)*, 2009 FCA 81 at para 67 [Baron]; *Wang v Canada (Minister of Citizenship and Immigration)*, [2001] 3 FC 682 at para 11).

8 Additionally, the respondents submit that the applicant does not meet any of the abovementioned three criteria, which are conjunctive, while the Court should alternatively dismiss the motion for a stay because the applicant does not have "clean hands". Despite the fact that the applicant lived in hiding for more than five years, her counsel argues that it is in the public interest to consider the merits of the applicant's arguments, along with her personal situation in light of the alleged irreparable harm, while considering the fact that the balance of convenience weighs in her favour.

9 The principle whereby the judge may summarily dismiss an application that requires the exercise of a discretionary power or jurisdiction in equity by the Court is well known (*Canada (Minister of Citizenship and Immigration v Thanabalasingham*, 2006 FCA 14 [Thanabalasingham]; *Moore v Canada (Citizenship and Immigration)*, 2009 FC 803), and was even invoked to refuse to hear a motion for a stay because the moving party did not have clean hands (*D'Souza v Canada (Public Safety and Emergency Preparedness)*, 2007 FC 1304; *Cox v Canada (Public Safety and Emergency Preparedness)*, 2016 FC 1268). As the Federal Court of Appeal explained in *Thanabalasingham* at paragraph 10, the Court should attempt to strike a balance between, on the one hand, maintaining the integrity of and preventing the abuse of judicial and administrative processes, and, on the other, the public interest in ensuring the lawful conduct of government and the protection of fundamental human rights.

10 However, under subsection 48(2) of the *Immigration and Refugee Protection Act*, SC 2001, c. 27 [Act], if a removal order is enforceable, the foreign national against whom it was made must leave Canada immediately and it falls to the Minister of Public Safety and Emergency Preparedness to ensure that it is enforced as soon as possible. The applicant is out of status and has been living in Canada illegally since May 2012. She explained that she did not want to regularize her situation with the immigration authorities during those years because she was afraid, depressed, and did not know that she could file an H&C application. However, what we clearly understand is that the applicant, who always acted according to her conscience, did not want and still does not want to leave Canada; it is only in Canada that she feels safe and can see to the financial needs of her

family, which is still in Guatemala. If she receives permanent residence, she will then be able to sponsor her loved ones and ensure that they have a better future than in Guatemala, which is recognized as being one of the most dangerous countries to live in Latin America.

11 Nevertheless, the simple fact of having a pending H&C application does not entitle a person to a stay, particularly when it was filed recently. However, the applicant's removal does not stop the processing of her H&C application and, in the event of a favourable decision, the applicant will be allowed to return to Canada, even though her counsel says that her chances are slim. By waiting more than five years after the dismissal of her PRRA application to file her H&C application, the applicant appears to have made a voluntary calculation so that she could demonstrate establishment in Canada. This was a tactical decision and she must now live with the consequences (*Palka v Canada (Public Security and Emergency Preparedness)*, 2008 FCA 165 at paras 13 and 14). Can she now at the same time force the Minister of Citizenship and Immigration to make a decision on her H&C application as soon as is reasonably possible on the pretext that more than six months have passed since she filed it in September 2017?

12 Counsel for the applicant submits that foreign nationals who live in hiding in Canada will not be encouraged for submitting an H&C application if they risk being deported to their country before the Minister of Citizenship and Immigration has ruled on the merits of such an application. At the same time, on the merits of the case, the Court should not only issue a writ of *mandamus*, since the applicant has been waiting for a favourable decision for more than six months, but in addition, it should declare that any H&C application filed less than six months before a deportation date must be reviewed before deportation is enforced.

13 Without ruling on the merits of the applicant's claims, I note that the Federal Court of Appeal appears to have adopted a much more nuanced view of the rights that a foreign national may have for staying in Canada once he or she has exhausted all remedies and a removal order becomes enforceable. In addition, in 2009, it was noted in *Baron* at paragraphs 64 and 65:

Events of this type, i.e. where persons fail to comply with the requirements of [the Act](#) or act in a way so as to prevent the enforcement thereof, should always be high on the list of relevant factors considered by an enforcement officer. It is worth repeating what this Court said at paragraph 19 of its Reasons in *Legault*, [*Legault v MCI*, 2002 FCA 125], above. Although the issue before the Court in *Legault*, above, pertained to the exercise of discretion in the context of an H&C application, the words of Décaré J.A. are entirely apposite to the exercise of discretion by an enforcement officer:

[19] In short, the *Immigration Act* and the Canadian immigration policy are founded on the idea that whoever comes to Canada with the intention of settling must be of good faith and comply to the letter with the requirements both in form and substance of [the Act](#). Whoever enters Canada illegally contributes to falsifying the immigration plan and policy and gives himself priority over those who do respect the requirements of the

Act. The Minister, who is responsible for the application of the policy and the Act, is definitely authorised to refuse the exception requested by a person who has established the existence of humanitarian and compassionate grounds, if he believes, for example, that the circumstances surrounding his entry and stay in Canada discredit him or create a precedent susceptible of encouraging illegal entry in Canada. In this sense, the Minister is at liberty to take into consideration the fact that the humanitarian and compassionate grounds that a person claims are the result of his own actions.

[Emphasis added.]

[65] Thus, if the conduct of the person seeking a deferral of his or her removal either discredits him or creates a precedent which encourages others to act in a similar way, it is entirely open to the enforcement officer to take those facts into consideration in determining whether deferral ought to be granted. Neither enforcement officers nor the courts, for that matter, should encourage or reward persons who do not have "clean hands".

14 Additionally, to qualify as irreparable, the cited harm must not simply be a typical and inherent consequence of removal (*Singh Atwal v Canada (Citizenship and Immigration)*, 2004 FCA 427 at para 16 with cited case law). In this case, the applicant did not demonstrate that her removal to Guatemala would expose her to a personal risk. In the circumstances, her harm remains highly speculative because she is no more at risk than the whole of Guatemala's population. In addition, the general documentary evidence on the situation in a given country is generally not sufficient to establish irreparable harm, while it falls to the applicant to demonstrate that she would be personally exposed to a risk.

15 The applicant is a vulnerable woman who is experiencing an enormous amount of stress and whose psychological balance is very delicate. With respect to medical problems cited by the applicant, including her undiagnosed heart condition despite the episode on March 26, 2018, nothing indicates that they cannot be treated in Guatemala. Furthermore, it appears clear from the reading of the grounds provided by the enforcement officer that her medical condition was taken into consideration. Thus, the medical documents submitted by the applicant in her application to postpone the removal were duly assessed by a physician. In his assessment, Dr. Louvish found the following:

**To sum up:** In the absence of any current objective medical evidence indicating any clinically significant ongoing sequelae due to Ms. Granados' medical history of syncope, it is reasonable to conclude that it would not preclude her from air travel at this time. As such, based on the medical documentation available for review and within all reasonable medical certainty, Ms. Granados is deemed medically fit for air travel to be repatriated to her country or origin (Guatemala) via commercial airliner.

Notwithstanding the above, it would be advisable that Ms. Granados is accompanied by a nurse escort on the flight to Guatemala to help with the potential exacerbation of her situational anxiety.

16 Lastly, in this file, the balance of convenience favours the respondents. The applicant received two unfavourable administrative decisions, neither of which were challenged before the Federal Court. It has already been six years that she has been out of status in Canada. In my view, the balance of convenience does not favour delaying further the discharge of her duty, as a person subject to an enforceable removal order, to leave Canada immediately, or the Minister of Public Safety and Emergency Preparedness's duty to remove her as soon as reasonably practicable; see [subsection 48\(2\) of the Act](#). This is not simply a question of administrative convenience, but implicates the integrity and fairness of, and public confidence in, Canada's system of immigration control (*Selliah v Canada (Minister of Citizenship and Immigration)*, 2004 FCA 261 at para 22).

17 For those reasons, the motion for a stay is dismissed.

**ORDER in IMM-1608-16**

*THE COURT ORDERS that the motion for a stay be dismissed.*

*Application dismissed.*

Federal Court of Appeal



Cour d'appel fédérale

Date: 20141023

Docket: A-357-14

Citation: 2014 FCA 239

Present: WEBB J.A.

BETWEEN:

DR. GÁBOR LUKÁCS

Appellant

And

CANADA TRANSPORTATION AGENCY

Respondent

**REASONS FOR ORDER**

**WEBB J.A.**

[1] The respondent has brought a motion to determine the content of the appeal book in this matter because the respondent wants to include a document and the appellant objects to the inclusion of this document. The document in question is the “Annotated Dispute Adjudication Rules” (Annotation) and the version that the respondent is seeking to include in the appeal book, based on the submissions of counsel for the respondent, is the version that was amended and

published on the respondent's website on or around August 22, 2014 (paragraph 17 of the respondent's written representations).

[2] The appellant has, with leave, appealed to this Court from the *Canadian Transportation Dispute Adjudication Rules (Dispute Proceedings and Certain Rules Applicable to All Proceedings)* (Dispute Adjudication Rules) made by the respondent. In particular, the appellant is asking that paragraphs 41(2)(b), 41(2)(c), and 41(2)(d) of these Dispute Adjudication Rules be quashed as being *ultra vires* the powers of the respondent or "invalid because they are unreasonable and establish inherently unfair procedures that are inconsistent with the intent of Parliament in establishing the Agency" (appellant's notice of appeal, paragraphs (i) and (ii)). Although couched in different terms, it appears that essentially the appellant is questioning the authority of the respondent to make the Dispute Adjudication Rules in question.

[3] The right of appeal to this Court is granted by section 41 of the *Canada Transportation Act*, S.C. 1996, c. 10:

41. (1) An appeal lies from the Agency to the Federal Court of Appeal on a question of law or a question of jurisdiction on leave to appeal being obtained from that Court on application made within one month after the date of the decision, order, rule or regulation being appealed from, or within any further time that a judge of that Court under special circumstances allows, and on notice to the parties and the Agency, and on hearing those of them that appear and desire to be heard.

41. (1) Tout acte — décision, arrêté, règle ou règlement — de l'Office est susceptible d'appel devant la Cour d'appel fédérale sur une question de droit ou de compétence, avec l'autorisation de la cour sur demande présentée dans le mois suivant la date de l'acte ou dans le délai supérieur accordé par un juge de la cour en des circonstances spéciales, après notification aux parties et à l'Office et audition de ceux d'entre eux qui comparaissent et désirent être entendus.

[4] Therefore, appeals only lie on questions of law or jurisdiction. In this case the legal issue is essentially related to the authority of the respondent to make the Dispute Adjudication Rules in question. As a preliminary matter, it is difficult to discern how a document (the Annotation):

- (a) purportedly created by the respondent to explain or clarify the Dispute Adjudication Rules;
- (b) amended and published on its website over two months after the Dispute Adjudication Rules were adopted; and
- (c) which, as part of the disclaimer at the beginning thereof, includes the statement that:  
  
“This document is a reference tool only. It is not a substitute for legal advice and ***has no official sanction***” (emphasis added)

would assist in determining whether as a matter of law the respondent had the authority to adopt the Dispute Adjudication Rules in question.

[5] As noted by the respondent there was no prior hearing in this matter and therefore there were no documents that had been previously introduced before a tribunal or a court. The respondent is requesting that either this Court determine under Rule 343 of the *Federal Courts Rules* that the Annotation should be included as part of the appeal book, or that this Court grant leave under Rule 351 of the *Federal Courts Rules* to include the Annotation as new evidence.

[6] Since there was no prior hearing, the only facts submitted to any tribunal or court related to the Annotation will be those as submitted as part of this motion. In its motion record the respondent submitted an affidavit of Alexei Baturin. However, there is no mention of the Annotation in this affidavit.

[7] The written submissions of counsel for the respondent include the following:

12. The Dispute Adjudication Rules that are the subject of this appeal came into force on June 4, 2014. On that date, the Agency published the Annotation on its website.
13. The Annotation was designed, as its introduction states, as a companion document to the Dispute Adjudication Rules, with the intention of providing explanations and clarifications of the Rules for those unfamiliar with the Agency and its processes.
14. The Annotation was prepared by Agency staff and was approved for publication by the Agency's Chair and Chief Executive Officer. The document is intended as a soft law instrument to provide guidance on the Agency's procedures but is not intended to fetter the Agency's discretion in the adjudicative decision-making process.
15. The Annotation is also intended to be an evergreen document, to be updated as needed.
16. Having received comments from the appellant respecting concerns about the Agency's procedures under the new Dispute Adjudication Rules, the Agency amended its Annotation on or around August 22, 2014, to address the following issues:
  - a. The Agency's continued commitment to providing reasons for its decisions;

- b. The possibility of requesting an opportunity to respond to a request to intervene in dispute proceedings before the Agency;
- c. The possibility of requesting an opportunity to conduct a cross-examination on affidavit; and
- d. The possibility of proceeding by way of oral hearing.

[8] There are a number of facts related to the creation and amendment of the Annotation in these written submissions. In dissenting reasons in *R. v. Schwartz*, [1988] 2 S.C.R. 443, Dickson C.J. (as he then was) stated certain general principles. There is no indication that the majority of the Justices of the Supreme Court of Canada disagreed with the general principles as expressed by Dickson C.J. In his reasons, Dickson C.J. stated that:

59 One of the hallmarks of the common law of evidence is that it relies on witnesses as the means by which evidence is produced in court. As a general rule, nothing can be admitted as evidence before the court unless it is vouched for viva voce by a witness. Even real evidence, which exists independently of any statement by any witness, cannot be considered by the court unless a witness identifies it and establishes its connection to the events under consideration. Unlike other legal systems, the common law does not usually provide for self-authenticating documentary evidence.

60 Parliament has provided several statutory exceptions to the hearsay rule for documents, but it less frequently makes exception to the requirement that a witness vouch for a document. For example, the *Canada Evidence Act* provides for the admission of financial and business records as evidence of the statements they contain, but it is still necessary for a witness to explain to the court how the records were made before the court can conclude that the documents can be admitted under the statutory provisions (see ss. 29(2) and 30(6)). Those explanations can be made by the witness by affidavit, but it is still necessary to have a witness....

[9] Facts are to be introduced by a witness, not as part of the written representations of counsel. Once introduced, counsel can refer to the facts. However, it does not seem to me that it is appropriate for counsel to refer to facts that have not been introduced by any witness, unless a Judge could take judicial notice of such facts. There was no suggestion by counsel in the written submissions submitted as part of the respondent's motion record that a Judge could (or should) take judicial notice of the alleged facts as set out in the paragraphs referred to above.

[10] In response to the written submission of the appellant, the respondent submitted a reply and included an affidavit of Mary Catharine Murphy. Rule 369(3) of the *Federal Courts Rules* provides that:

(3) A moving party may serve and file written representations in reply within four days after being served with a respondent's record under subsection (2).

(3) Le requérant peut signifier et déposer des prétentions écrites en réponse au dossier de réponse dans les quatre jours après en avoir reçu signification.

[11] The reply is to contain written representations only – not another affidavit. The appropriate manner in which the facts should have been introduced by the respondent was in the affidavit that was submitted as part of the respondent's record – not in the written submissions of counsel for the respondent or in an affidavit included with the reply.

[12] In the reply submissions, counsel for the respondent indicated that “since the Annotation is an Agency document that is prominently displayed on the home page of its Government website and is available to any member of the public, evidence of its existence by way of

affidavit is unnecessary”. No authority for this proposition was provided. The reference to the document being available to any member of the public could suggest that perhaps the respondent is arguing that a Judge could take judicial notice of the existence of the Annotation. However, since this argument was not raised by counsel, I will not address it. In any event, it appears that the respondent is attempting to introduce the Annotation for what it says about the Rules in question, not simply to show that it exists.

[13] Therefore, none of the facts that the respondent has attempted to introduce in the written representations of counsel or in the affidavit included in the reply will be considered in this motion.

[14] As a result, the only facts submitted by the respondent that are properly part of this motion are the facts as set out in the affidavit of Alexei Baturin. Since there is no reference to the Annotation in this affidavit, there is no witness to introduce this document and the result is that the respondent is attempting to include in the appeal book a document without any facts related to the document.

[15] As a result the Annotation is not to be included in the appeal book, whether it is considered as existing evidence or new evidence under Rule 351 of the *Federal Courts Rules*.

[16] The respondent's motion to include the Annotation in the appeal book is dismissed. Since the appellant did not ask for costs, no costs are awarded.

“Wyman W. Webb”

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J.A.

**FEDERAL COURT OF APPEAL**

**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

**DOCKET:** A-357-14

**STYLE OF CAUSE:** DR. GÁBOR LUKÁCS v.  
CANADA TRANSPORTATION  
AGENCY

**MOTION DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES**

**REASONS FOR ORDER BY:** WEBB J.A.

**DATED:** OCTOBER 23, 2014

**WRITTEN REPRESENTATIONS BY:**

Self-represented FOR THE APPELLANT

Barbara Cuber FOR THE RESPONDENT

**SOLICITORS OF RECORD:**

Legal Services Branch FOR THE RESPONDENT  
Canadian Transportation Agency  
Gatineau, Quebec

2019 FC 193, 2019 CF 193  
Federal Court

Mohammed v. Canada (Immigration, Refugees and Citizenship)

2019 CarswellNat 890, 2019 CarswellNat 921,  
2019 FC 193, 2019 CF 193, 303 A.C.W.S. (3d) 826

**AYOOB HAJI MOHAMMED AND AIERKEN MAILIKAIMU  
(Applicants) and THE MINISTER OF IMMIGRATION,  
REFUGEES AND CITIZENSHIP (Respondent)**

John Norris J.

Heard: February 5, 2019  
Judgment: February 15, 2019  
Docket: IMM-4072-16

Counsel: Prasanna Balasundaram, for Applicants  
Gregory George, Bradley Bechard, for Respondent

*John Norris J.:*

**I. OVERVIEW**

1 The applicants, Ayooob Haji Mohammed and Aierken Mailikaimu, are husband and wife. Mr. Mohammed is a citizen of China of Uighur ethnicity. He has resided in Albania as a refugee since 2006. Ms. Mailikaimu is a Canadian citizen. The two were married in March 2010 and have a child together.

2 In April 2014, the applicants submitted an application for permanent residence in Canada for Mr. Mohammed under Ms. Mailikaimu's sponsorship. The sponsorship application was approved in July 2014 and the application for permanent residence was forwarded to the visa office in Rome, Italy, for further processing.

3 As part of the processing of his application for permanent residence, Mr. Mohammed attended two interviews at the Canadian Consulate in Tirana, Albania. The first, held on January 15, 2015 has been described in the present proceeding as having been conducted by "partners." The second, held on March 10, 2016 was conducted by Jennifer Woo, an immigration officer with the visa section at the Canadian Embassy in Rome.

4 By letter dated July 11, 2016 Ms. Woo informed Mr. Mohammed that he did not qualify for the issuance of a permanent resident visa to Canada because he was inadmissible on security grounds. Specifically, she had determined that he was inadmissible under paragraphs 34(1)(c) and (f) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA] because she had reasonable grounds to believe that he was a member of an organization - the East Turkistan Islamic Movement [ETIM] - that engaged in terrorism.

5 In September 2016 the applicants commenced an application for leave and judicial review of this decision. The history of the proceeding from then until relatively recently is summarized comprehensively by Justice LeBlanc in *Malikaimu v. Canada (Immigration, Refugees and Citizenship)*, 2017 FC 1026 (F.C.), and *Mohammed v. Canada (Immigration, Refugees and Citizenship)*, 2018 FC 973 (F.C.).

6 On November 6, 2018 the hearing of the judicial review application was scheduled for February 25, 2019.

7 Over the course of this matter, the respondent has filed two affidavits from Ms. Woo. Counsel for the applicants requested to cross-examine Ms. Woo on these affidavits. The cross-examination was scheduled for January 10, 2019 via videoconference. In connection with the cross-examination, counsel for the applicants provided Ms. Woo with a Direction to Attend [DTA] dated January 2, 2019. Among other things, the DTA directed Ms. Woo to bring with her and produce at the cross-examination "all documents and other material in your possession, power or control that are relevant to the application." The DTA then set out a non-exhaustive list of particular items sought by the applicants.

8 The cross-examination proceeded as scheduled. Certain additional items were produced to the applicants in response to the DTA. The applicants maintain, however, that the DTA was not complied with fully. Accordingly, by motion filed on January 25, 2019 they sought an order directing the respondent to comply with their request to produce all documents and other material falling within the terms of the DTA. The applicants also sought amendments to the filing deadlines for material on the judicial review application as well as an adjournment of the February 25, 2019 hearing date.

9 This motion came before me at the General Sittings in Toronto on February 5, 2019. At the conclusion of oral argument, I informed the parties that, apart from adjusting the deadlines for the filing of the memoranda of fact and law on the judicial review application (which was done subsequently on the basis of a joint proposal from the parties), I was dismissing the motion for reasons which would be provided in due course. These are those reasons.

## II. BACKGROUND

10 Mr. Mohammed was born in China in 1984. He was accepted as a refugee in Albania after he was released from U.S. custody in Guantanamo Bay, Cuba, in May 2006. He had been detained by the U.S. military in Afghanistan shortly after they began operations there in October 2001. Mr. Mohammed explained in his application for permanent residence that he and 17 other Uighurs had been kidnapped by bounty hunters and turned over to the U.S. military. After being held at an American prison in Kandahar, Afghanistan, for six months, they were eventually transferred to the U.S. detention facility at Guantanamo Bay.

11 As part of his application for permanent residence, Mr. Mohammed provided documentation relating to his detention at Guantanamo Bay which stated that U.S. authorities believed that he had received training at an ETIM camp in Afghanistan and was a probable member of this group. (The ETIM has been listed by the United Nations and the United States as a terrorist group. It has been described as a Uighur separatist organization dedicated to the creation of a Uighur Islamic homeland in China through armed insurrection and terrorism.) Eventually U.S. authorities determined that Mr. Mohammed was not an enemy combatant and he was cleared for release to a third country. The application for permanent residence was also supported by documentation relating to the circumstances of Uighur detainees who had been held at Guantanamo Bay.

12 At the interview on March 10, 2016 Ms. Woo explored with Mr. Mohammed many aspects of his experiences in Afghanistan and Pakistan prior to his detention by U.S. forces.

13 As noted above, Mr. Mohammed was found to be inadmissible to Canada because Ms. Woo found there were reasonable grounds to believe he was a member of the ETIM, an organization that engaged in terrorism. Ms. Woo stated in her letter of July 11, 2016 that her conclusions were based on the information contained in Mr. Mohammed's application, his statements at the interview conducted on March 10, 2016 and open-source information.

14 The applicants have not filed their written submissions on the merits of the application for judicial review yet. As I understand their position from various filings in this matter (including their written submissions at the leave stage), they intend to challenge the visa officer's decision on at least the following grounds:

- Procedural fairness was breached because the visa officer failed to ensure proper interpretation for Mr. Mohammed during the March 10, 2016 interview;
- Procedural fairness was breached because the visa officer failed to provide Mr. Mohammed with an opportunity to address her concerns with respect to his alleged membership in the ETIM;
- Procedural fairness was breached as a result of the failure to provide Mr. Mohammed with notice of the true purpose of the January 15, 2015 interview;

- Mr. Mohammed was detained arbitrarily during the January 15, 2015 interview, thereby infringing his rights guaranteed by section 9 of the *Charter*;
- The failure to inform Mr. Mohammed of the true purpose of the January 15, 2015 interview infringed his rights guaranteed by section 10(a) of the *Charter*;
- The failure to inform Mr. Mohammed of his right to retain and instruct counsel at the January 15, 2015 interview infringed his rights guaranteed by section 10(b) of the *Charter*;
- The failure to inform Mr. Mohammed of the true purpose of the January 15, 2015 interview denied him meaningful access to counsel;
- The visa officer approached Mr. Mohammed's case with a pre-determined outcome in mind; and
- The decision finding Mr. Mohammed to be inadmissible on security grounds is unreasonable.

15 Many of the preliminary proceedings in this matter have concerned the production and disclosure of information to the applicants. I will not reiterate the history of those proceedings here. For present purposes, it suffices to note that by the time Ms. Woo was to be cross-examined, the Certified Tribunal Record [CTR] had been provided to the applicants. The record available to them thus included Mr. Mohammed's original application for permanent residence; the Global Case Management System [GCMS] notes pertaining to the application, including those from the March 10, 2016 interview with Mr. Mohammed as well as Ms. Woo's notes of her analysis of the information she considered; the open-source information Ms. Woo considered in making her decision; and redacted versions of security assessments prepared in connection with Mr. Mohammed's application for permanent residence by CSIS and the CBSA. (On October 12, 2018 Justice LeBlanc made an order under [section 87 of the IRPA](#) for the non-disclosure of information redacted from the CTR filed by the respondent on June 8, 2018. Previously, on December 4, 2017 Justice LeBlanc made another order under [section 87 of the IRPA](#) for the non-disclosure of the notes of the January 15, 2015 interview with Mr. Mohammed after they were ordered produced as a result of a motion brought by the applicants.)

16 As noted above, Ms. Woo provided two affidavits in connection with the present proceeding. The first, affirmed on January 18, 2017, was filed by the respondent in response to the motion brought by the applicants under [Rule 14\(2\) of the Federal Courts Citizenship, Immigration and Refugee Protection Rules, SOR/93-22 \[FCCIRP Rules\]](#) for production of notes of the January 15, 2015 interview. ([Rule 14\(2\)](#) provides that where a judge "considers that documents in possession or control of the tribunal are required for the proper disposition of the application for leave, the judge may, by order, specify the documents to be produced and filed and give such other directions as the judge considers necessary to dispose of the application for leave.") In this affidavit, Ms. Woo

confirmed that she was the officer who assessed Mr. Mohammed's application and determined that he did not qualify for issuance of a permanent resident visa to Canada. She provided the designation by which her GCMS notes pertaining to Mr. Mohammed's application could be identified. She also stated the following:

It has been brought to my attention that the Applicants brought a motion requesting disclosure of the interview notes from the interview held on January 15, 2015. I confirm that the interview held on January 15, 2015 was conducted by partners and that I did not have access to these notes and hence did not consider them before making my decision.

17 Ms. Woo's second affidavit was sworn on December 19, 2018. In it she described steps she took to confirm that Mr. Mohammed was comfortable with the interview being conducted in English. She also described the results of some internet research she conducted prior to interviewing Mr. Mohammed by searching his name in Google. She described two documents which she retrieved in this fashion and which she discussed with Mr. Mohammed in the interview. One of the articles is included in the CTR (see pages 27-28). The other was missing from both the CTR and Mr. Mohammed's file in Rome so a copy was attached as an exhibit to Ms. Woo's affidavit. (The other open source information Ms. Woo consulted in making her decision is included in the CTR (see pages 244-69).)

18 As noted above, counsel for the applicants provided Ms. Woo with a Direction to Attend for cross-examination on her affidavits. As well as confirming the date and time of the cross-examination, the DTA stated the following:

You are also required to bring with you and produce at the examination all documents and other material in your possession, power or control that are relevant to the application including but not limited to the following documents and things:

1. All emails, correspondence, notes, memorandums and/or documents concerning the convoking of the January 8, 2015 examination subsequently conducted on January 15, 2015 with Mr. Ayoob Haji Mohammed.
2. All emails, correspondence, notes, memorandums and/or documents you initiated, authored, received and/or reviewed concerning the report and inadmissibility assessment prepared by the Security Screening Branch, Canada [*sic*] Security Intelligence Service and the Canada Border Service Agency National Security Division respectively.
3. All emails, correspondence, notes, memorandums and/or documents you initiated, authored, received and/or reviewed in convoking the March 10, 2016 examination of Mr. Ayoob Haji Mohammed.
4. All documents and/or URLs of websites that you reviewed prior to the March 10, 2016 interview that you did not discuss with Mr. Ayoob Haji Mohammed.

5. All material that was before you at the time you made your decision, including all emails, correspondence, notes, memorandums and/or documents that you examined, consulted or reviewed that is not contained in the Certified Tribunal Record regardless of whether relied upon in the decision.

19 On the day of the cross-examination, counsel for the respondent produced some additional documents pursuant to the DTA. Counsel explained that a further search had been conducted after receiving the DTA and some additional emails involving Ms. Woo had been found.

20 The emails (which were marked as Exhibit A on the cross-examination) relate primarily to an exchange between Ms. Woo and Immigration, Refugees and Citizenship Canada National Headquarters - Case Management, in May 2016. They consist of the following:

a) An email dated May 5, 2016 from Ms. Woo to NHQ Case Management with the subject line "Potential High Profile Inadmissibility Refusal." Ms. Woo stated the following in the body of the email:

Please see the attached refusal letter. I sought advice from Case Review when drafting it, however as it is a A34 refusal for a family class case, I thought I would send it to your desk for review as per OB 344. Please advise if any changes should be made or anything else taken into account.

The draft refusal letter attached to this email has been redacted by the respondent. As discussed below, the applicants challenge this redaction.

b) An email dated May 5, 2016 from Yerusalem Ogbazgi of NHQ Case Management replying to Ms. Woo's email from earlier that day and asking her to forward the guidance that had previously been provided to her.

c) An email dated May 6, 2016 from Ms. Woo to Yerusalem Ogbazgi forwarding an email she had received from Simon Ouellet, a Litigation Analyst with NHQ Case Management. Ms. Woo described the guidance there as "very helpful." The respondent has redacted the email from Mr. Ouellet. It is evident from the context that this is the advice Ms. Woo referred to above which she had sought from Case Review when drafting the refusal letter. As discussed below, the applicants challenge this redaction.

d) Another email dated May 6, 2016 from Ms. Woo to Yerusalem Ogbazgi forwarding an email dated November 18, 2015 from Mr. Ouellet. In this email, which has been disclosed, Mr. Ouellet provides Ms. Woo with detailed advice about how to conduct her interview with Mr. Mohammed. At the cross-examination on her affidavits, Ms. Woo stated that she could not recall whether this email came about as a result of a phone call with Mr. Ouellet or a previous

email. She did recall that somehow she had communicated to Mr. Ouellet her concerns about how to provide procedural fairness in this case and this resulted in his email to her.

e) An email dated May 9, 2016 from Yerusalem Ogbazgi to Ms. Woo confirming receipt of the preceding email and stating that they would look into the matter and get back to her as soon as possible.

f) An email dated May 20, 2016 from Ms. Woo to Yerusalem Ogbazgi following up on their previous exchange of emails and stating that she would be on leave and then on training for the next few weeks.

21 In cross-examination, Ms. Woo described the steps she had taken to collect documents and other material in response to the DTA. She explained that after receiving the DTA she reviewed the CTR and realized that, to the best of her recollection, there may have been correspondence related to the case that had not been included. She found some emails in her Outlook account but she thought there could be more. She was no longer posted to the Canadian Embassy in Rome so her access to her old emails was limited. Upon making inquiries, she learned that her emails may not have been archived properly when she was transferred from Rome to a new posting. She contacted IT at the embassy in Rome to see if they could retrieve anything but had not heard back from them. She also attempted to contact Mr. Ouellet to see whether he could retrieve any of their email correspondence. She did not hear back from him (she understood that he was no longer in the Litigation Branch and may not have access to his old emails in any event). She also made inquiries about whether there might be a central server where her emails could have been archived. She did not meet with any success on this front, either. As a result, the only emails she could provide were the ones described above.

22 The respondent filed an affidavit on the present motion stating that further efforts were made in Rome to retrieve any additional emails but it was determined that Ms. Woo's mailbox and backups of her emails no longer existed.

### **III. ISSUES**

23 The Direction to Attend covered a wide range of items but the dispute over whether it has been complied with has crystalized around the following three issues:

- a) Was Ms. Woo required to produce additional emails?
- b) Was Ms. Woo required to produce Operational Bulletin 344 [OB 344]?
- c) Was Ms. Woo required to produce her draft refusal letter and any advice she received in relation to it?

### **IV. ANALYSIS**

24 Before addressing the specific points in dispute, it may be helpful to begin with a few general observations.

25 The evidentiary record on an application for judicial review of an administrative decision generally is restricted to the record that was before the decision-maker (*Assn. of Universities & Colleges of Canada v. Canadian Copyright Licensing Agency*, 2012 FCA 22 (F.C.A.) at para 19 [*Access Copyright*]; *Bernard v. Canada Revenue Agency*, 2015 FCA 263 (F.C.A.) at para 13 [*Bernard*]). The rationale for this rule is grounded in the respective roles of the administrative decision-maker and the reviewing court (*Access Copyright* at paras 17-18; *Bernard* at paras 17-18). The decision-maker decides the case on its merits. The reviewing court can only review the overall legality of what the decision-maker has done.

26 Compliance with this general rule in the context of the judicial review of decisions made under the *IRPA* is facilitated by the *FCCIRP Rules*. Rule 15(1)(b) provides that an order granting leave to proceed with judicial review shall specify the time limit within which the tribunal is to provide copies of its record required under Rule 17. Rule 17 in turn provides as follows:

**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 therefor,
- (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.

**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.

27 The general rule admits of exceptions. Sometimes less information than was before the original decision-maker will be considered by the reviewing court (as when a non-disclosure order is made under [section 87 of the IRPA](#)). Sometimes more information will be before the reviewing court, as when the exceptions discussed in *Access Copyright* (at para 20) and *Bernard* (at paras 19-28) are engaged. Thus, for example, it may be open to the parties to file additional evidence to address alleged breaches of procedural fairness or to establish or rectify gaps in the record. Ms. Woo's affidavits arguably fall within such recognized exceptions to the general rule. So too might the affidavits filed on behalf of the applicants (e.g. Mr. Mohammed's affidavit sworn November 15, 2018, in which he describes, among other things, his understanding of the purpose of the January 15, 2015, interview and the difficulties he had because the March 10, 2016, interview was conducted in English). I mention these affidavits simply as illustrations of how the record on judicial review can be expanded. I offer no opinion as to their ultimate admissibility. Should this issue be raised, it will be for the judge hearing the judicial review on its merits to determine.

28 Rule 15(1) also provides that the order granting leave shall specify the time limits within which further materials, if any, including affidavits and transcripts of cross-examinations on such affidavits, shall be served and filed. Such deadlines can be extended by the Court when warranted. Needless to say, this is something that has happened several times in the present application.

29 When a party intends to conduct an oral examination, [Rule 91\(1\) of the Federal Courts Rules, SOR/98-106](#), requires that a Direction to Attend in [Form 91](#) be served on the person to be examined. When the examination is a cross-examination on an affidavit, [Rule 91\(2\)\(c\)](#) provides that the DTA 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" (emphasis added). This is to be contrasted with an examination for discovery, with respect to which [Rule 91\(2\)\(a\)](#) provides that the person to be examined may be directed to produce for inspection at the examination "all documents and other material in the possession, power or control *of the party on behalf of whom the person is being examined* that are relevant to the matters in issue in the action" (emphasis added). Thus, the scope of the respective obligations to produce documents and other material is different in this important respect. In this connection, see *Merck Frosst Canada Inc. v. Canada (Minister of Health)*, [1997] F.C.J. No. 1847 (Fed. T.D.) at paras 4-8 (aff'd [1999] F.C.J. No. 1536 (Fed. C.A.)); *Simpson Strong-Tie Co. v. Peak Innovations Inc.*, 2009 FC 392 (F.C.) at para 24 (aff'd 2009 FCA 266 (F.C.A.)); and *Ottawa Athletic Club Inc. v. Athletic Club Group Inc.*, 2014 FC 672 (F.C.) at para 138.

30 Rule 94(1) of the *Federal Courts Rules* obliges a person who is to be examined or the party on whose behalf that person is being examined to "produce for inspection at the examination all documents and other material requested in the direction to attend that are within that person's or party's possession and control, other than any documents for which privilege has been claimed or for which relief from production has been granted under rule 230."

31 The DTA served on Ms. Woo followed the language of Rule 91(2)(c). It also provided a non-exhaustive list of specific items which, in the applicants' view, could fall within the general class of documents and other material that are relevant to the judicial review application. Since the examination was a cross-examination on her affidavits, the DTA properly limited Ms. Woo's duty to produce relevant documents and other material to those which were in *her* possession, power or control. Her duty to produce documents and other materials under Rule 94(1) was similarly limited to that which was in her possession and control.

32 The respondent submits that the DTA served on Ms. Woo is vague and unduly broad. I disagree. It was drafted with a commendable degree of precision which would have assisted Ms. Woo in responding to it. While it did not bear the fruit which the applicants doubtless hoped it would, this was not due to any flaws in how the DTA was drafted.

33 The duty to produce relevant, non-privileged documents and other materials established in Rule 94(1) is subject to Rule 94(2). The latter rule provides that, on motion, the Court may relieve a person to be examined or the party on whose behalf a person is being examined from the requirement to produce documents and other material requested in the direction to attend "if the Court is of the opinion that the document or other material requested is irrelevant or, by reason of its nature or the number of documents or amount of material requested, it would be unduly onerous to require the person or the party to produce it."

34 With this backdrop in mind, I will now turn to the specific areas of dispute concerning Ms. Woo's compliance with the DTA.

***A. Was Ms. Woo required to produce additional emails?***

35 This issue can be dealt with easily. I am satisfied on the evidence before me on this motion that any additional emails besides the ones Ms. Woo produced, if such there are, are not within her possession, power or control and, as a result, she is not required to produce them. Ms. Woo produced all the emails she herself had access to. Believing that there could be more emails that she could not find, she sought the assistance of others in an effort to gain access to her old emails. Those steps did not yield any additional results. Since Ms. Woo actually took these additional steps, it is not necessary for me to decide whether she was legally required to do so. Between her own efforts and those of others, I am satisfied that Ms. Woo has met her obligation to produce relevant documents and other materials that are in her possession or control. This being a cross-

examination on her affidavits (as opposed to an examination for discovery), this is sufficient to satisfy [Rule 94\(1\)](#).

36 I hasten to add that there is little reason to think on the record before me that there is much (if anything) that is missing. The only email Ms. Woo had any degree of confidence could be missing was one to Mr. Ouellet which initiated their exchange in November 2015. Even then, however, Ms. Woo was not sure whether this exchange began with an email or a phone call. (In this connection, it is worth noting that the subject line of Mr. Ouellet's November 18, 2015 email is "RE: follow-up on our conversation.") The DTA listed emails, correspondence, etc. touching upon a number of subjects (e.g. concerning the CSIS and CBSA Security Assessments) but no questions were asked of Ms. Woo on cross-examination to lay a foundation for the submission that she was party to or aware of any such emails. Finally, while we know that Ms. Woo was party to an exchange of emails in May 2016 with National Headquarters, no questions were asked of her to lay a foundation for the submission that there are emails following from that exchange that are missing.

***B. Was Ms. Woo required to produce Operational Bulletin 344?***

37 As set out above, on May 5, 2016 Ms. Woo forwarded a draft of her refusal letter to National Headquarters by email under the subject line "Potential High Profile Inadmissibility Refusal." She explained in the body of the email that she was doing so "as per OB 344" because it was a refusal for a family class case under [section 34 of the IRPA](#) (i.e. a refusal on security grounds). Ms. Woo asked NHQ to "advise if any changes should be made or anything else taken into account."

38 In cross-examination, Ms. Woo stated that she could not remember what exactly OB 344 is but she believed that it stated that "if something is an A34 refusal for a family class case, it - we should give them [i.e. NHQ] a head's up."

39 The applicants contend that OB 344 "is legally relevant because it relates to the procedure Ms. Woo followed in drafting her decision to find Mr. Mohammed inadmissible." As such, it should have been produced in response to the DTA. The respondent contends that OB 344 is irrelevant because it post-dates Ms. Woo's determination that Mr. Mohammed is inadmissible and, as such, Ms. Woo was not required to produce it.

40 I pause to note that neither Ms. Woo nor counsel for the respondent acting on her behalf brought a motion under [Rule 94\(2\)](#) to be relieved of the requirement to produce OB 344 on the grounds that it is irrelevant. This, however, is not fatal to the respondent's position here. Upon the initiative of the applicants, the question of whether OB 344 must be produced has been brought before the Court for determination. In making that determination, I am guided by the fact that, had counsel for the respondent brought a motion under [Rule 94\(2\)](#), the respondent would have borne the burden of establishing that the document is irrelevant. Separate and apart from [Rule 94\(2\)](#), this is only fair. OB 344 has a clear nexus to the underlying application for judicial review because Ms. Woo took a step in the preparation of her final reasons for refusal pursuant to it. This

nexus having been demonstrated, the legal burden should fall upon the respondent to establish irrelevance rather than upon the applicants (who, of course, have never seen OB 344) to establish relevance. As the Supreme Court of Canada has observed in an analogous context, it is essential not to place an unfair burden on the party seeking production of information they have never seen (cf. *R. v. Mills*, [1999] 3 S.C.R. 668 (S.C.C.) at para 71; *R. v. McNeil*, 2009 SCC 3 (S.C.C.) at para 33). That being said, it would still be prudent for the party seeking production to make their best efforts to establish relevance if they can.

41 I am satisfied that the respondent has established that OB 344 is irrelevant to the issues engaged in the underlying application for judicial review. I base this conclusion on the following considerations.

42 First, there is nothing to suggest that OB 344 deals with anything other than what Ms. Woo suggested in her cross-examination (and as reflected in her email of May 5, 2016) — namely, the need to give NHQ a heads-up before a potentially high-profile decision is released. There is nothing to suggest that OB 344 deals with the substance of a potentially high-profile decision as opposed to the procedure to follow before releasing it. Counsel for the applicants did not challenge Ms. Woo's understanding of OB 344 or explore it further in cross-examination.

43 Second, Ms. Woo had already decided to refuse the visa on security grounds and had drafted a refusal letter when she sent the email to NHQ pursuant to OB 344 on May 5, 2016. Clearly, nothing that Ms. Woo did pursuant to OB 344 changed the decision she had already made when she sent the email because that remained her decision. While she did invite suggestions from NHQ concerning her refusal letter, there is no evidence that this invitation was pursuant to OB 344 as opposed to her own initiative. Counsel for the applicants did not explore this area in cross-examination and, in any event, there is no evidence that NHQ took Ms. Woo up on her invitation.

44 Third, I cannot see any potential link between OB 344 and the grounds upon which the applicants are challenging Ms. Woo's decision. Counsel for the applicants suggested in submissions that OB 344 is indicative of an institutional bias against Mr. Mohammed. With respect, this is sheer speculation with no grounding in the evidence.

45 I am therefore satisfied that OB 344 is irrelevant and was not required to be produced in response to the DTA.

***C. Was Ms. Woo required to produce her draft refusal letter and any advice she received in relation to it?***

46 As set out above, the respondent has redacted the draft refusal letter Ms. Woo forwarded to NHQ on May 5, 2016, as well as input she received from Mr. Ouellet previously, when she was drafting the letter. The applicants maintain that these documents are relevant and should have been produced in response to the DTA. The respondent submits that such documents cannot be part of

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.*

2014 FC 672, 2014 CF 672  
Federal Court

Ottawa Athletic Club Inc. v. Athletic Club Group Inc.

2014 CarswellNat 2636, 2014 CarswellNat 4167, 2014 FC 672, 2014 CF 672,  
[2014] F.C.J. No. 743, 128 C.P.R. (4th) 1, 242 A.C.W.S. (3d) 937, 459 F.T.R. 39

**Ottawa Athletic Club Inc d.b.a. the Ottawa Athletic  
Club, Applicant and The Athletic Club Group Inc.  
and The Registrar of Trade-marks, Respondents**

James Russell J.

Heard: January 13, 2014

Judgment: July 9, 2014

Docket: T-1396-11

Counsel: Scott Miller, Jahangir Valiani, for Applicant  
Michael Adams, Thomas McConnell, for Respondents

Subject: Civil Practice and Procedure; Evidence; Intellectual Property; Property

APPLICATION to strike out trade-mark and for permanent injunction prohibiting respondent's use of trade-mark.

***James Russell J.:***

**Introduction**

1 This is an application under s. 57 of the *Trade-marks Act*, RSC, 1985, c T-13 [Act] to strike a trade-mark from the register kept under s. 26 of the Act [Register], or in the alternative to amend the Register to narrow the scope of the registration. The Applicant also requests a prohibition on any future use of the allegedly invalid trade-mark or its common law equivalent on the grounds that it offends ss. 10 and 11 of the Act. The trade-mark in question bears the registration number TMA633,422 and was registered on February 22, 2005 [Registration]. The Respondent, the Athletic Club Group Inc. [Athletic Club, or Respondent] is the registered owner.

**Background**

2 The Applicant, the Ottawa Athletic Club [OAC, or Applicant], has been operating a fitness facility in Ottawa since at least 1976 offering a range of athletic and fitness services. It claims to have used the trade name and trade-mark "Ottawa Athletic Club" continuously since that time.

3 The Respondent, the Athletic Club (or its predecessors in title), established its first fitness facility in London, Ontario in 1997, and has since opened facilities in Amherstburg (1999), Brantford (2001), Guelph (2006), Kingsville (2001), Thunder Bay (2004), Waterloo (2011) and Ottawa, as well as a second facility in London (2000). The Respondent opened its "Ottawa-Orleans" facility in November 2010, and its "Ottawa-Trainyards" facility in February 2011.

4 In July 2003, one of the Respondent's current directors and shareholders, Alan Quesnel, applied to register the trade-mark in question, THE ATHLETIC CLUB & DESIGN [Athletic Club Trade-mark, or the Trade-mark], which appears as follows:



**Graphic 1**

5 The registration was completed on February 22, 2005, with Mr. Quesnel as the initial Registrant. Title to the Trade-mark was later transferred to a partnership between Mr. Quesnel and Mr. David Wu, another current director and shareholder of the Respondent, and was eventually transferred to the Respondent corporation, The Athletic Club Group Inc, on September 21, 2009, after being briefly held by related numbered companies.

6 The Respondent claims that it (and its predecessors in title) has used the Trade-mark in association with its services continuously since 1997. The Trade-mark was registered in connection with the following services:

Restaurant services; snack bar services; operation of a facility for fitness training and/or weight training; operation of a facility for aerobics; personal training services; conducting dance classes; operation of a retail store selling sporting goods, men's and women's clothing, health foods and health supplements; fitness assessment services; conducting exercise, fitness and aerobics classes; operation of a tanning facility.

7 The Registration includes the following disclaimer: "The right to the exclusive use of the words ATHLETIC CLUB is disclaimed apart from the trade-mark."

8 The Applicant seeks to have the Trade-mark expunged on a number of grounds, including that it is confusing with the Applicant's own trade name and trade-mark, which had been in use for 21 years when the Respondent began using the Athletic Club Trade-mark.

9 The Applicant has filed its own trade-mark application, for "OAC & design" [OAC Trade-mark], which the Respondent is opposing. It bears application number 1,421,086 and appears as follows:



**Graphic 2**

10 The Applicant claims that the OAC Trade-mark has been used in relation to:

- The operation of a fitness club; conducting fitness classes; operation of a racquet club, namely tennis, squash and racquetball; and operation of an aquatics facility since at least as early as 1983;
- Personal training services since at least as early as 1989;
- Operation of an indoor golf facility since at least as early as 1995;
- Operation of summer sports camps since at least as early as 1993.

11 Under s. 57 of the Act, the Federal Court has exclusive original jurisdiction to consider applications to strike or amend entries in the Register. Only a "person interested" can bring such an application, but this is a broad category that includes anyone who is or reasonably apprehends that they may be affected by the registration, and a *de minimus* threshold applies (see *Omega Engineering Inc. v. Omega S.A.*, 2006 FC 1472 (F.C.) at para 11 [*Omega Engineering*]). There is no dispute here that the Applicant is a "person interested" as defined in the Act.

12 The Applicant seeks a declaration that the Athletic Club Trade-mark is invalid, an order under s. 57(1) of the Act striking (or in the alternative amending) the registration for the Athletic Club Trade-mark on the grounds that it does not accurately express or define the existing rights of the registered owner, and an order pursuant to ss. 53.2, 10 and 11 of the Act that the Respondent be permanently prohibited from using, directly or via licence, the Athletic Club Trade-mark and its common law equivalent.

13 While framed as an application, an expungement proceeding under s. 57 of the Act is neither a judicial review nor an appeal, but rather an exercise of the Court's original jurisdiction. There is therefore no standard of review to be applied. The Court is to approach the issues with a fresh mind: see Roger T. Hughes, Toni Polson Ashton & Neal Armstrong, *Hughes on Trade Marks*, 2nd

ed (looseleaf, rel 35-8/2013) (Markham, LexisNexis Canada, 2005) at 817-18 [*Hughes on Trade Marks*]; *CIBC World Markets Inc. v. Stenner Financial Services Ltd.*, 2010 FC 397 (F.C.) at para 18; *General Motors of Canada v. Décarie Motors Inc. / Les Moteurs Décarie Inc.* (2000), [2001] 1 F.C. 665 (Fed. C.A.) at para 31; *Emall.ca Inc. v. Cheap Tickets & Travel Inc.*, 2007 FC 243 (F.C.) at para 11, aff'd 2008 FCA 50 (F.C.A.) [*Cheaptickets*].

## Issues

14 The Applicant raises the following issues in this application:

(a) Is the Athletic Club Trade-mark invalid under s. 18(1)(a) of the Act on the basis that:

(i) On the date of registration (February 22, 2005) the Trade-mark was clearly descriptive or deceptively misdescriptive in the English language of the character or quality of the services in association with which the trade-mark was used, contrary to s. 12(1)(b) of the Act;

(ii) On the date of registration the Trade-mark was not distinctive as defined in s. 2 of the Act;

(iii) On the date of registration the Trade-mark was the name in any language of any of the services in connection with which it was used, contrary to s. 12(1)(c) of the Act; or

(iv) On the alleged date of first use and adoption (December 31, 1997) the Trade-mark designated the kind of services associated with it, contrary to s. 12(1)(e) and ss. 10 and 11 of the Act?

(b) Is the Athletic Club Trade-mark invalid under s. 18(1)(b) of the Act on the basis that:

(i) On the date of the Notice of Application in this matter (August 29, 2011) the Trade-mark was not distinctive, contrary to s. 2 of the Act?

(c) Is the Athletic Club Trade-mark invalid under s. 18(1) of the Act on the basis that:

(i) On the alleged date of first use (December 31, 1997), the Trade-mark was confusing with a previously used trade name / trade-mark (namely, the Ottawa Athletic Club), contrary to s. 16(1)(a) and 16(1)(c) of the Act?

(d) In the alternative, should the registration for the Athletic Club Trade-mark be amended by striking out some of the services listed; and

(e) Should the Respondent be permanently prohibited from using, directly or via licence, the Athletic Club Trade-mark and its common law equivalent, pursuant to ss. 53.2, 10 and 11 of the Act?

## Statutory Provisions

15 The following provisions of the Act are applicable in these proceedings:

### Definitions

2. In this Act,

[...]

"confusing"

"confusing", when applied as an adjective to a trade-mark or trade-name, means a trade-mark or trade-name the use of which would cause confusion in the manner and circumstances described in section 6;

[...]

"distinctive"

"distinctive", in relation to a trade-mark, means a trade-mark that actually distinguishes the wares or services in association with which it is used by its owner from the wares or services of others or is adapted so to distinguish them;

[...]

"person interested"

"person interested" includes any person who is affected or reasonably apprehends that he may be affected by any entry in the register, or by any act or omission or contemplated act or omission under or contrary to this Act, and includes the Attorney General of Canada;

[...]

"trade-mark"

"trade-mark" means

- (a) a mark that is used by a person for the purpose of distinguishing or so as to distinguish wares or services manufactured, sold, leased, hired or performed by him from those manufactured, sold, leased, hired or performed by others,
- (b) a certification mark,
- (c) a distinguishing guise, or
- (d) a proposed trade-mark;

[...]

"trade-name"

"trade-name" means the name under which any business is carried on, whether or not it is the name of a corporation, a partnership or an individual;

[...]

### **When deemed to be adopted**

3. A trade-mark is deemed to have been adopted by a person when that person or his predecessor in title commenced to use it in Canada or to make it known in Canada or, if that person or his predecessor had not previously so used it or made it known, when that person or his predecessor filed an application for its registration in Canada.

[...]

### **When mark or name confusing**

6. (1) For the purposes of this Act, a trade-mark or trade-name is confusing with another trade-mark or trade-name if the use of the first mentioned trade-mark or trade-name would cause confusion with the last mentioned trade-mark or trade-name in the manner and circumstances described in this section.

#### **Idem**

(2) The use of a trade-mark causes confusion with another trade-mark if the use of both trade-marks in the same area would be likely to lead to the inference that the wares or services associated with those trade-marks are manufactured, sold, leased, hired or performed by the same person, whether or not the wares or services are of the same general class.

#### **Idem**

(3) The use of a trade-mark causes confusion with a trade-name if the use of both the trade-mark and trade-name in the same area would be likely to lead to the inference that the wares or services associated with the trade-mark and those associated with the business carried on under the trade-name are manufactured, sold, leased, hired or performed by the same person, whether or not the wares or services are of the same general class.

#### **Idem**

(4) The use of a trade-name causes confusion with a trade-mark if the use of both the trade-name and trade-mark in the same area would be likely to lead to the inference that the wares or services associated with the business carried on under the trade-name and those associated

with the trade-mark are manufactured, sold, leased, hired or performed by the same person, whether or not the wares or services are of the same general class.

### **What to be considered**

(5) In determining whether trade-marks or trade-names are confusing, the court or the Registrar, as the case may be, shall have regard to all the surrounding circumstances including

- (a) the inherent distinctiveness of the trade-marks or trade-names and the extent to which they have become known;
- (b) the length of time the trade-marks or trade-names have been in use;
- (c) the nature of the wares, services or business;
- (d) the nature of the trade; and
- (e) the degree of resemblance between the trade-marks or trade-names in appearance or sound or in the ideas suggested by them.

[...]

### **Further prohibitions**

10. Where any mark has by ordinary and *bona fide* commercial usage become recognized in Canada as designating the kind, quality, quantity, destination, value, place of origin or date of production of any wares or services, no person shall adopt it as a trade-mark in association with such wares or services or others of the same general class or use it in a way likely to mislead, nor shall any person so adopt or so use any mark so nearly resembling that mark as to be likely to be mistaken therefor.

[...]

### **Further prohibitions**

11. No person shall use in connection with a business, as a trade-mark or otherwise, any mark adopted contrary to section 9 or 10 of this Act or section 13 or 14 of the Unfair Competition Act, chapter 274 of the Revised Statutes of Canada, 1952.

[...]

### **When trade-mark registrable**

12. (1) Subject to section 13, a trade-mark is registrable if it is not

[...]

(b) whether depicted, written or sounded, either clearly descriptive or deceptively misdescriptive in the English or French language of the character or quality of the wares or services in association with which it is used or proposed to be used or of the conditions of or the persons employed in their production or of their place of origin;

(c) the name in any language of any of the wares or services in connection with which it is used or proposed to be used;

[...]

(e) a mark of which the adoption is prohibited by section 9 or 10;

[...]

### **Idem**

(2) A trade-mark that is not registrable by reason of paragraph (1)(a) or (b) is registrable if it has been so used in Canada by the applicant or his predecessor in title as to have become distinctive at the date of filing an application for its registration.

[...]

### **Registration of marks used or made known in Canada**

16. (1) Any applicant who has filed an application in accordance with section 30 for registration of a trade-mark that is registrable and that he or his predecessor in title has used in Canada or made known in Canada in association with wares or services is entitled, subject to section 38, to secure its registration in respect of those wares or services, unless at the date on which he or his predecessor in title first so used it or made it known it was confusing with

(a) a trade-mark that had been previously used in Canada or made known in Canada by any other person;

(b) a trade-mark in respect of which an application for registration had been previously filed in Canada by any other person; or

(c) a trade-name that had been previously used in Canada by any other person.

[...]

### **Effect of registration in relation to previous use, etc.**

17. (1) No application for registration of a trade-mark that has been advertised in accordance with section 37 shall be refused and no registration of a trade-mark shall be expunged or amended or held invalid on the ground of any previous use or making known of a confusing trade-mark or trade-name by a person other than the applicant for that registration or his

predecessor in title, except at the instance of that other person or his successor in title, and the burden lies on that other person or his successor to establish that he had not abandoned the confusing trade-mark or trade-name at the date of advertisement of the applicant's application.

### **When registration incontestable**

(2) In proceedings commenced after the expiration of five years from the date of registration of a trade-mark or from July 1, 1954, whichever is the later, no registration shall be expunged or amended or held invalid on the ground of the previous use or making known referred to in subsection (1), unless it is established that the person who adopted the registered trade-mark in Canada did so with knowledge of that previous use or making known.

### **When registration invalid**

18. (1) The registration of a trade-mark is invalid if

- (a) the trade-mark was not registrable at the date of registration,
- (b) the trade-mark is not distinctive at the time proceedings bringing the validity of the registration into question are commenced, or
- (c) the trade-mark has been abandoned,

and subject to section 17, it is invalid if the applicant for registration was not the person entitled to secure the registration.

### **Exception**

(2) No registration of a trade-mark that had been so used in Canada by the registrant or his predecessor in title as to have become distinctive at the date of registration shall be held invalid merely on the ground that evidence of the distinctiveness was not submitted to the competent authority or tribunal before the grant of the registration.

[...]

### **Disclaimer**

35. The Registrar may require an applicant for registration of a trade-mark to disclaim the right to the exclusive use apart from the trade-mark of such portion of the trade-mark as is not independently registrable, but the disclaimer does not prejudice or affect the applicant's rights then existing or thereafter arising in the disclaimed matter, nor does the disclaimer prejudice or affect the applicant's right to registration on a subsequent application if the disclaimed matter has then become distinctive of the applicant's wares or services.

[...]

### **Power of court to grant relief**

53.2 Where a court is satisfied, on application of any interested person, that any act has been done contrary to this Act, the court may make any order that it considers appropriate in the circumstances, including an order providing for relief by way of injunction and the recovery of damages or profits and for the destruction, exportation or other disposition of any offending wares, packages, labels and advertising material and of any dies used in connection therewith.

[...]

### **Jurisdiction of Federal Court**

55. The Federal Court has jurisdiction to entertain any action or proceeding for the enforcement of any of the provisions of this Act or of any right or remedy conferred or defined thereby.

[...]

### **Exclusive jurisdiction of Federal Court**

57. (1) The Federal Court has exclusive original jurisdiction, on the application of the Registrar or of any person interested, to order that any entry in the register be struck out or amended on the ground that at the date of the application the entry as it appears on the register does not accurately express or define the existing rights of the person appearing to be the registered owner of the mark.

[...]

### **Définitions**

2. Les définitions qui suivent s'appliquent à la présente loi.

[...]

« créant de la confusion »

« créant de la confusion » Relativement à une marque de commerce ou un nom commercial, s'entend au sens de l'article 6.

[...]

« distinctive »

« distinctive » Relativement à une marque de commerce, celle qui distingue véritablement les marchandises ou services en liaison avec lesquels elle est employée par son propriétaire, des marchandises ou services d'autres propriétaires, ou qui est adaptée à les distinguer ainsi.

[...]

« personne intéressée »

« personne intéressée » Sont assimilés à une personne intéressée le procureur général du Canada et quiconque est atteint ou a des motifs valables d'appréhender qu'il sera atteint par une inscription dans le registre, ou par tout acte ou omission, ou tout acte ou omission projeté, sous le régime ou à l'encontre de la présente loi.

[...]

« marque de commerce »

Selon le cas:

- a) marque employée par une personne pour distinguer, ou de façon à distinguer, les marchandises fabriquées, vendues, données à bail ou louées ou les services loués ou exécutés, par elle, des marchandises fabriquées, vendues, données à bail ou louées ou des services loués ou exécutés, par d'autres;
- b) marque de certification;
- c) signe distinctif;
- d) marque de commerce projetée.

[...]

« nom commercial »

« nom commercial » Nom sous lequel une entreprise est exercée, qu'il s'agisse ou non d'une personne morale, d'une société de personnes ou d'un particulier.

[...]

### **Quand une marque de commerce est réputée adoptée**

3. Une marque de commerce est réputée avoir été adoptée par une personne, lorsque cette personne ou son prédécesseur en titre a commencé à l'employer au Canada ou à l'y faire connaître, ou, si la personne ou le prédécesseur en question ne l'avait pas antérieurement ainsi employée ou fait connaître, lorsque l'un d'eux a produit une demande d'enregistrement de cette marque au Canada.

[...]

### **Quand une marque ou un nom crée de la confusion**

6. (1) Pour l'application de la présente loi, une marque de commerce ou un nom commercial crée de la confusion avec une autre marque de commerce ou un autre nom commercial si l'emploi de la marque de commerce ou du nom commercial en premier lieu mentionnés cause de la confusion avec la marque de commerce ou le nom commercial en dernier lieu mentionnés, de la manière et dans les circonstances décrites au présent article.

**Idem**

(2) L'emploi d'une marque de commerce crée de la confusion avec une autre marque de commerce lorsque l'emploi des deux marques de commerce dans la même région serait susceptible de faire conclure que les marchandises liées à ces marques de commerce sont fabriquées, vendues, données à bail ou louées, ou que les services liés à ces marques sont loués ou exécutés, par la même personne, que ces marchandises ou ces services soient ou non de la même catégorie générale.

**Idem**

(3) L'emploi d'une marque de commerce crée de la confusion avec un nom commercial, lorsque l'emploi des deux dans la même région serait susceptible de faire conclure que les marchandises liées à cette marque et les marchandises liées à l'entreprise poursuivie sous ce nom sont fabriquées, vendues, données à bail ou louées, ou que les services liés à cette marque et les services liés à l'entreprise poursuivie sous ce nom sont loués ou exécutés, par la même personne, que ces marchandises ou services soient ou non de la même catégorie générale.

**Idem**

(4) L'emploi d'un nom commercial crée de la confusion avec une marque de commerce, lorsque l'emploi des deux dans la même région serait susceptible de faire conclure que les marchandises liées à l'entreprise poursuivie sous ce nom et les marchandises liées à cette marque sont fabriquées, vendues, données à bail ou louées, ou que les services liés à l'entreprise poursuivie sous ce nom et les services liés à cette marque sont loués ou exécutés, par la même personne, que ces marchandises ou services soient ou non de la même catégorie générale.

**Éléments d'appréciation**

(5) En décidant si des marques de commerce ou des noms commerciaux créent de la confusion, le tribunal ou le registraire, selon le cas, tient compte de toutes les circonstances de l'espèce, y compris:

- a) le caractère distinctif inhérent des marques de commerce ou noms commerciaux, et la mesure dans laquelle ils sont devenus connus;

- b) la période pendant laquelle les marques de commerce ou noms commerciaux ont été en usage;
- c) le genre de marchandises, services ou entreprises;
- d) la nature du commerce;
- e) le degré de ressemblance entre les marques de commerce ou les noms commerciaux dans la présentation ou le son, ou dans les idées qu'ils suggèrent.

[...]

### **Autres interdictions**

10. Si une marque, en raison d'une pratique commerciale ordinaire et authentique, devient reconnue au Canada comme désignant le genre, la qualité, la quantité, la destination, la valeur, le lieu d'origine ou la date de production de marchandises ou services, nul ne peut l'adopter comme marque de commerce en liaison avec ces marchandises ou services ou autres de la même catégorie générale, ou l'employer d'une manière susceptible d'induire en erreur, et nul ne peut ainsi adopter ou employer une marque dont la ressemblance avec la marque en question est telle qu'on pourrait vraisemblablement les confondre.

[...]

### **Autres interdictions**

11. Nul ne peut employer relativement à une entreprise, comme marque de commerce ou autrement, une marque adoptée contrairement à l'article 9 ou 10 de la présente loi ou contrairement à l'article 13 ou 14 de la Loi sur la concurrence déloyale, chapitre 274 des Statuts révisés du Canada de 1952.

[...]

### **Marque de commerce enregistrable**

12. (1) Sous réserve de l'article 13, une marque de commerce est enregistrable sauf dans l'un ou l'autre des cas suivants:

[...]

- b) qu'elle soit sous forme graphique, écrite ou sonore, elle donne une description claire ou donne une description fautive et trompeuse, en langue française ou anglaise, de la nature ou de la qualité des marchandises ou services en liaison avec lesquels elle est employée, ou à l'égard desquels on projette de l'employer, ou des conditions de leur production, ou des personnes qui les produisent, ou du lieu d'origine de ces marchandises ou services;

c) elle est constituée du nom, dans une langue, de l'une des marchandises ou de l'un des services à l'égard desquels elle est employée, ou à l'égard desquels on projette de l'employer;

[...]

e) elle est une marque dont l'article 9 ou 10 interdit l'adoption;

[...]

### **Idem**

(2) Une marque de commerce qui n'est pas enregistrable en raison de l'alinéa (1)a) ou b) peut être enregistrée si elle a été employée au Canada par le requérant ou son prédécesseur en titre de façon à être devenue distinctive à la date de la production d'une demande d'enregistrement la concernant.

[...]

### **Enregistrement des marques employées ou révélées au Canada**

16. (1) Tout requérant qui a produit une demande selon l'article 30 en vue de l'enregistrement d'une marque de commerce qui est enregistrable et que le requérant ou son prédécesseur en titre a employée ou fait connaître au Canada en liaison avec des marchandises ou services, a droit, sous réserve de l'article 38, d'en obtenir l'enregistrement à l'égard de ces marchandises ou services, à moins que, à la date où le requérant ou son prédécesseur en titre l'a en premier lieu ainsi employée ou révélée, elle n'ait créé de la confusion:

a) soit avec une marque de commerce antérieurement employée ou révélée au Canada par une autre personne;

b) soit avec une marque de commerce à l'égard de laquelle une demande d'enregistrement avait été antérieurement produite au Canada par une autre personne;

c) soit avec un nom commercial qui avait été antérieurement employé au Canada par une autre personne.

[...]

### **Effet de l'enregistrement relativement à l'emploi antérieur, etc.**

17. (1) Aucune demande d'enregistrement d'une marque de commerce qui a été annoncée selon l'article 37 ne peut être refusée, et aucun enregistrement d'une marque de commerce ne peut être radié, modifié ou tenu pour invalide, du fait qu'une personne autre que l'auteur de la demande d'enregistrement ou son prédécesseur en titre a antérieurement employé ou révélé

une marque de commerce ou un nom commercial créant de la confusion, sauf à la demande de cette autre personne ou de son successeur en titre, et il incombe à cette autre personne ou à son successeur d'établir qu'il n'avait pas abandonné cette marque de commerce ou ce nom commercial créant de la confusion, à la date de l'annonce de la demande du requérant.

### **Quand l'enregistrement est incontestable**

(2) Dans des procédures ouvertes après l'expiration de cinq ans à compter de la date d'enregistrement d'une marque de commerce ou à compter du 1er juillet 1954, en prenant la date qui est postérieure à l'autre, aucun enregistrement ne peut être radié, modifié ou jugé invalide du fait de l'utilisation ou révélation antérieure mentionnée au paragraphe (1), à moins qu'il ne soit établi que la personne qui a adopté au Canada la marque de commerce déposée l'a fait alors qu'elle était au courant de cette utilisation ou révélation antérieure.

### **Quand l'enregistrement est invalide**

18. (1) L'enregistrement d'une marque de commerce est invalide dans les cas suivants:

- a) la marque de commerce n'était pas enregistrable à la date de l'enregistrement;
- b) la marque de commerce n'est pas distinctive à l'époque où sont entamées les procédures contestant la validité de l'enregistrement;
- c) la marque de commerce a été abandonnée.

Sous réserve de l'article 17, l'enregistrement est invalide si l'auteur de la demande n'était pas la personne ayant droit de l'obtenir.

### **Exception**

(2) Nul enregistrement d'une marque de commerce qui était employée au Canada par l'inscrivant ou son prédécesseur en titre, au point d'être devenue distinctive à la date d'enregistrement, ne peut être considéré comme invalide pour la seule raison que la preuve de ce caractère distinctif n'a pas été soumise à l'autorité ou au tribunal compétent avant l'octroi de cet enregistrement.

[...]

### **Désistement**

35. Le registraire peut requérir celui qui demande l'enregistrement d'une marque de commerce de se désister du droit à l'usage exclusif, en dehors de la marque de commerce, de telle partie de la marque qui n'est pas indépendamment enregistrable. Ce désistement ne porte pas préjudice ou atteinte aux droits du requérant, existant alors ou prenant naissance par la suite, dans la matière qui fait l'objet du désistement, ni ne porte préjudice ou atteinte au droit que

possède le requérant à l'enregistrement lors d'une demande subséquente si la matière faisant l'objet du désistement est alors devenue distinctive des marchandises ou services du requérant.

[...]

### **Pouvoir du tribunal d'accorder une réparation**

53.2 Lorsqu'il est convaincu, sur demande de toute personne intéressée, qu'un acte a été accompli contrairement à la présente loi, le tribunal peut rendre les ordonnances qu'il juge indiquées, notamment pour réparation par voie d'injonction ou par recouvrement de dommages-intérêts ou de profits, pour l'imposition de dommages punitifs, ou encore pour la disposition par destruction, exportation ou autrement des marchandises, colis, étiquettes et matériel publicitaire contrevenant à la présente loi et de toutes matrices employées à leur égard.

[...]

### **Juridiction de la Cour fédérale**

55. La Cour fédérale peut connaître de toute action ou procédure en vue de l'application de la présente loi ou d'un droit ou recours conféré ou défini par celle-ci.

[...]

### **Juridiction exclusive de la Cour fédérale**

57. (1) La Cour fédérale a une compétence initiale exclusive, sur demande du registraire ou de toute personne intéressée, pour ordonner qu'une inscription dans le registre soit biffée ou modifiée, parce que, à la date de cette demande, l'inscription figurant au registre n'exprime ou ne définit pas exactement les droits existants de la personne paraissant être le propriétaire inscrit de la marque.

[...]

## **Argument**

### ***Applicant***

16 The Applicant argues that the Athletic Club Trade-mark is invalid for essentially three reasons: it was not registrable on the date of registration, based on several alleged grounds (s.18(1)(a)); it was not distinctive at the time the present proceeding was commenced (s.18(1)(b)); and, at the time it was first used, it was confusing with a previously used trade-mark or trade name, such that the Respondent was not "the person entitled to secure the registration" (ss. 6, 16(1) and 18(1)).

### ***Trade-mark confusing with a previously used trade-mark or trade name***

17 The Applicant argues that the Athletic Club Trade-mark is, and was at the time of its first use, confusing with the OAC's long-established trade name and Trade-mark, and is therefore invalid pursuant to s. 18(1) of the Act.

18 Subsection 18(1) states that a trade-mark is invalid "if the applicant for registration was not the person entitled to secure the registration." The Applicant says a trade-mark applicant is not entitled to register a trade-mark (or to retain their registration when subsequently challenged) if, on the date they first used it, the trade-mark was confusing with either a trade-mark (s.16(1)(a)) or a trade name (s. 16(1)(c)) previously used in Canada by any other person.

19 The Applicant argues that the OAC has made continuous and widespread use of the trade name / trade-mark "Ottawa Athletic Club" to advertise its services since 1976, including through signage, community sponsorships, program guides, promotional items, radio advertisements, yellow pages, trades shows, websites and more. This precedes the Respondent's use of the Athletic Club Trade-mark by 21 years. The OAC is a landmark in the sports and fitness industry and enjoys an excellent reputation.

20 The Applicant says there is ample evidence that the Athletic Club Trade-mark is confusing with the OAC trade name and trade-mark, and argues the following with respect to the criteria for confusion set out in s. 6(5) of the Act:

(a) inherent distinctiveness of the trade-marks or trade-names and the extent to which they have become known: the Athletic Club Trade-mark is clearly descriptive and therefore not distinctive, while the OAC operated and used its trade-mark / trade name for 21 years before the Respondent began using its Trade-mark;

(b) the length of time the trade-marks or trade-names have been in use: see above;

(c) the nature of the wares, services or business: the parties' respective trade-marks are used in association with the same services;

(d) the nature of the trade: the trade-marks are used in the same trade; and

(e) the degree of resemblance between the trade-marks or trade-names in appearance or sound or in the ideas suggested by them: the words used in the parties' trade-marks are almost identical — they sound alike and the ideas suggested by them are the same.

21 The Applicant sites a number of examples of actual confusion, including:

- Members of the public calling the OAC believing that it and the Respondent are one and the same, or expressing surprise that they are two different companies;

- Members of the public calling the OAC or tweeting on their Twitter accounts with respect to promotions or activities of the Respondent;
- Members of the public mistakenly sending job applications to the OAC for positions advertised by the Respondent;
- Mistaken delivery of fitness equipment intended for the Respondent to the OAC;
- A call from a college professor to the OAC to complain of the treatment received by two of his students in interviews, when in fact these interviews were conducted by the Respondent;
- A technician arriving at OAC to perform work on athletic machinery that was in fact located at the Athletic Club;
- The United Way sending a marketing proposal to the OAC intended for the Respondent, with the latter's Trade-mark located on the cover page; and
- Google search results for "Ottawa Athletic Club" demonstrating that the second organic result is for The Athletic Club.

22 In addition, the Applicant says the Respondent has promoted its services using a billboard with the same stock photograph used on the OAC's website for approximately two years, and launched a Facebook page titled "The Athletic Club in Ottawa" a year after the OAC launched its own page, titled "Ottawa Athletic Club." The Applicant says the OAC did not receive inquiries from persons trying to reach other athletic clubs, or applying for jobs at other athletic clubs, prior to the Respondent advertising in Ottawa.

23 The Applicant acknowledges that, pursuant to s. 17(2) of the Act, it can only seek to invalidate the Respondent's Trade-mark based on confusion with its own trade-mark or trade name if the Respondent had actual knowledge of the Applicant's previous use of the allegedly confusing trade-mark or trade name prior to its own adoption of the Trade-mark. This is because the Applicant brought this proceeding to expunge the Respondent's Trade-mark more than five years after the latter was registered. However, the Applicant says that actual knowledge is established by: 1) the presence of a NUANS corporate name search in the incorporating documents of the Respondent's predecessor company (and now subsidiary), signed by Alan Quesnel and David Wu and dated June 25, 1997, which lists the Ottawa Athletic Club; and 2) the failure of the Respondent's affiant, Mr. Chuck Kelly, to provide satisfactory responses regarding whether Mr. Quesnel and Mr. Wu knew of this search at the time they signed those incorporating documents.

24 The Applicant says this Court made an interlocutory order confirming that solicitor-client privilege was waived with respect to the communication of the NUANS search to the Athletic Club, its principles or shareholders by the lawyer who handled the incorporation. Despite this, the Applicant alleges, and despite questions being put and undertakings made during further cross-

examination, Mr. Kelly refused to provide files or solicitor reporting letters that would clarify the point, to make appropriate inquiries of Mr. Quesnel, Mr. Wu or the incorporating lawyer, or to conduct appropriate searches of corporate records. The Respondent also refused to make Mr. Quesnel or Mr. Wu available for cross-examination, despite the fact that these two founders of the Athletic Club have the most knowledge of the origins of the Athletic Club Trade-mark and trade name.

25 As a result of these alleged failures of the Respondent to properly respond to relevant inquiries on cross-examination, the Applicant argues that the Court should draw an adverse inference and find that the Respondent had actual knowledge of the Applicant's use of its trade name and trade-mark at least as early as June 1997. It is well established, the Applicant argues, that an adverse inference can be drawn if, without reasonable explanation, a party fails to adduce evidence available to it that could have resolved the issue: *Milliken & Co. v. Interface Flooring Systems (Canada) Inc.*, [1998] 3 F.C. 103 (Fed. T.D.) at para 26 [*Milliken*]. In the present case, the OAC has no ability to obtain the reporting letter or invoices relating to the incorporation of the London Athletic Club Inc. except from the Respondent. The documents or information are exclusively within the knowledge of the Respondent, and in such circumstances, where the Respondent refuses to produce such evidence, the Court will infer that the facts are adverse to the Respondent's interest: *Hoffmann-La Roche Ltd. v. Apotex Inc.* (1983), 145 D.L.R. (3d) 270 (Ont. H.C.) at para 25 [*Hoffman*].

#### *Trade-mark not registrable at the date of registration*

26 The Applicant asserts on a number of grounds that the Athletic Club Trade-mark was not registrable at the date of its registration, which is February 22, 2005, and is therefore invalid pursuant to s. 18(1)(a) of the Act.

#### *Trade-mark clearly descriptive of services*

27 First, the Applicant notes that under s. 12(1)(b) of the Act, a trade-mark is not registrable if it is "whether depicted, written or sounded, either clearly descriptive or deceptively misdescriptive in the English or French language of the character or quality of the wares or services in association with which it is used or proposed to be used..." The Applicant says this provision aims to prevent traders from obtaining a monopoly over words that belong "in the public stock of commonplace words that should remain available to all traders in describing their wares or services": *Ontario Teachers' Pension Plan Board v. Canada (Attorney General)*, 2012 FCA 60 (F.C.A.) at para 37 [*Ontario Teachers*].

28 The Applicant submits that whether a trade-mark is clearly descriptive is a question of first impression from the point of view of the average purchaser of those wares or services: *Wool Bureau of Canada Ltd. v. Canada (Registrar of Trade Marks)* (1978), 40 C.P.R. (2d) 25, [1978] F.C.J. No. 307 (Fed. T.D.) at paras 7, 11 [*Wool Bureau*]; *Mitel Corp. v. Canada (Registrar of Trade*

Marks) (1984), 79 C.P.R. (2d) 202 (Fed. T.D.) at para 7 [*Mitel*]. It is not appropriate to carefully and critically analyze the words to determine if they have alternative implications; rather, the proper approach is "to ascertain what those words in the context in which they are used would represent to the public": *Riverside Paper Corp. v. First Base Inc.*, [1999] F.C.J. No. 1291 (Fed. T.D.) at para 10 [*Riverside Paper*], quoting *John Labatt Ltd. v. Carling Breweries Ltd.* (1974), 18 C.P.R. (2d) 15 (Fed. T.D.). The word "clearly" in the phrase "clearly descriptive" is to be interpreted as "easy to understand, sufficient or plain" rather than "accurately" (*Drackett Co. of Canada v. American Home Products Corp.*, [1968] 2 Ex. C.R. 89 (Can. Ex. Ct.) at para 21; *Evert-Fresh Corp. v. Green Bag Pty. Ltd.*, 2011 TMOB 236 (T.M. Opp. Bd.) at para 18 [*Green Bag*]) and descriptiveness is considered in the context of the wares and services with which the trade-mark is used or proposed to be used: *Mitel*, above, at para 18.

29 Moreover, the Applicant argues that clearly descriptive words are to be interpreted as such notwithstanding any disclaimers or any special fonts used to display the words: *Atlantic Promotions Inc. v. Canada (Registrar of Trade Marks)* (1984), 2 C.P.R. (3d) 183 (Fed. T.D.), at 194; *Agropur Cooperative v. Parmalat S.p.A.*, 2011 TMOB 30 (T.M. Opp. Bd.) at para 40 [*Parmalat*]. Where the trade-mark in question is a composite mark (one containing words and alleged design features), the mark will not be registrable pursuant to s. 12(1)(b) of the Act where the mark, when sounded, contains word elements that are clearly descriptive and are also the dominant feature of the mark: *Best Western International Inc. v. Best Canadian Motor Inns Ltd.*, 2004 FC 135 (F.C.) [*Best Western*]; *Green Bag*, above, at paras 21-22; *674802 B.C. Ltd. v. Encorp Pacific (Canada)*, 2011 TMOB 180 (T.M. Opp. Bd.) at paras 15-26 [*Encorp Pacific*]; *Ogopogo Media Inc. v. B.C. Jobs Online Inc.*, 2011 TMOB 127 (T.M. Opp. Bd.) at paras 12-20 [*Ogopogo*]; *Parmalat*, above, at paras 35-43; *Fast Fence Inc. v. Yellow Fence Rentals Inc.*, 2010 TMOB 96 (T.M. Opp. Bd.); *Central City U-Lock Ltd. v. JCM Professional Mini-Storage Management Ltd.* (2009), 80 C.P.R. (4th) 467 (T.M. Opp. Bd.) at paras 18-24; *Canadian Jewellers Assn. v. Worldwide Diamond Trademarks Ltd.*, 2010 FC 309 (F.C.) at paras 17-21 [*Canadian Jewellers*]; *Canadian Tire Corp. v. Exxon Mobil Corp.* (2009), 80 C.P.R. (4th) 407 (T.M. Opp. Bd.) at paras 6-10; *Canadian Council of Professional Engineers v. Canadian Society for Professional Engineers* (1996), 66 C.P.R. (3d) 563 (T.M. Opp. Bd.) at para 11 [*Professional Engineers*]; *Burns Foods (1985) Ltd. v. Superior Livestock of Canada Inc.* (1996), 67 C.P.R. (3d) 413 (T.M. Opp. Bd.); *Arthur v. Auto Mart Magazine Ltd.* (1995), 66 C.P.R. (3d) 117 (T.M. Opp. Bd.).

30 In this case, the Respondent disclaimed the words "athletic club" in the Athletic Club Trade-mark, and in doing so, the Applicant argues, has acknowledged that these words are clearly descriptive of the character or quality of the Respondent's services, are the name of the services themselves, or are otherwise common to the trade: *Insurance Co. of Prince Edward Island v. Prince Edward Island Mutual Insurance Co.* (1999), 2 C.P.R. (4th) 103 (T.M. Opp. Bd.) at paras 6, 10 [*PEI Mutual*]; *Ogopogo*, above, at para 13; *Professional Engineers*, above, at para 11.

31 The Applicant argues that the clearly descriptive term "The Athletic Club" is the dominant feature of the mark. As evidence of this, the Applicant notes that both Athletic Club affiants quickly and without hesitation replied "The Athletic Club" when asked to sound the Trade-mark in cross-examination. There is nothing distinctive about the design element of the mark — a black oval with a black lined oval surrounding the perimeter. There is also nothing memorable about the script in which the text is written, and consumers would not identify the mark by such script: *Parmalat*, above, at para 40. Oval shapes are frequently used to enclose words, the Applicant says, and the British Columbia Court of Appeal has affirmed that it would be untenable to suggest that merely enclosing words in a border conferred the right to prevent anyone else from doing so forever: see *Westfair Foods Ltd. v. Jim Pattison Industries Ltd.*, 1989 CarswellBC 689 (B.C. S.C.) at para 20, (1989), 59 D.L.R. (4th) 46 (B.C. S.C.) [*Westfair Foods*], aff'd (1990), 68 D.L.R. (4th) 481 (B.C. C.A.).

32 The Applicant says the current case is similar to the *Encorp Pacific* case, cited above, where the Trade-marks Opposition Board found that given the relative size and simplicity of the design element of the mark — shown below — it did not stimulate visual interest.



**Graphic 3**

The dominant feature of the mark was therefore the words "Bottle Depot," which were clearly descriptive of recycling services. Applying the clearly descriptive test set out in *Best Western*, above, the Board found that the trade-mark as a whole and as a matter of immediate impression was clearly descriptive, when sounded, of the associated services.

33 Referring to *Riverside Paper*, above, the Applicant argues that the words "the athletic club," considered in context, are clearly descriptive of the service in association with which the Athletic Club Trade-mark is and has been used. An ordinary consumer, when viewing the Athletic Club Trade-mark as a whole, would readily attribute to it a common meaning that relates to the services listed in connection with the Trade-mark. The Applicant supports this view with reference to dictionary definitions of "athletic" and "club." The Applicant also points to statements

by the Respondent's affiants during cross-examination which show, in the Applicant's view, that the principle idea being conveyed by the Trade-mark is "a place of fitness," and that the term "athletic club" is used generically to refer to "a place to exercise" or a facility offering the types of services offered by the Respondent and the Applicant. These include fitness training, weight training, aerobics, fitness assessments, personal training, conducting exercise, dance classes, etc. The Applicant says an affiant for the Respondent acknowledged that the use of these descriptive words helps to generate online traffic to the Respondent's website.

*Trade-mark is the name of the services*

34 In addition to being descriptive of the services offered by the Respondent, the Applicant argues that the Athletic Club Trade-mark is the name in English of the services (or some of the services) in connection with which it is used. Section 12(1)(c) of the Act states that such a mark is not registrable, and it is therefore invalid pursuant to s. 18(1)(a).

35 The Applicant notes that the record before the Court contains examples of numerous parties using the words "athletic club" to describe the services offered by the Respondent. In the Applicant's view, this shows that at least in respect of certain services offered by the Respondent (namely, operation of a facility for fitness training and/or weight training, operation of a facility for aerobics, personal training services, fitness assessment services, and conducting exercise, fitness and aerobics classes), the term "athletic club" is the name of the services.

36 Where the word portion of a composite mark is the dominant feature, the mark may be capable of contravening section 12(1)(c) of the Act: *Canadian Bankers Assn. v. Northwest Bancorporation* (1979), 50 C.P.R. (2d) 113 (T.M. Opp. Bd.) at paras 12, 15 [*Banco*]; *Brûlerie des Monts Inc. v. 3002462 Canada Inc.* (1997), 132 F.T.R. 150, 75 C.P.R. (3d) 445 (Fed. T.D.). Furthermore, to contravene s. 12(1)(c), a trade-mark is not required to be primarily the name in any language of any of the services, but simply the name in any language of any of the services: *Banco*, above; *Saputo Produits Laitiers Canada s.e.n.c. / Saputo Dairy Products Canada G.P. v. Grande Cheese Co.*, 2011 TMOB 177 (T.M. Opp. Bd.) at para 30. The evidentiary burden under this section can be met by adducing copies of referenced works in which the mark can be shown to have a definition: *David Oppenheimer Co. LLC v. Imagine IP LLC*, 2011 TMOB 84 (T.M. Opp. Bd.).

*Trade-mark is a prohibited mark under s. 10*

37 The Applicant also argues that the Respondent adopted the Athletic Club Trade-mark in contravention of s. 10 of the Act. This means that it was unregistrable according to s. 12(1)(e) and the registration is invalid under s. 18(1)(a).

38 The Applicant says that on December 31, 1997, when the Respondent adopted the Athletic Club Trade-mark, that mark had "by ordinary and bona fide commercial usage become recognized as designating" a kind of services. As such, s. 10 prohibits any person from adopting it (or a mark

closely resembling it) as a trade mark in association with such services or others of the same general class, or using it in a way likely to mislead. The Applicant argues that a word that is already in ordinary commercial use in association with services should be open for use by any party, and is not available for adoption as a trade-mark. If it can be established that a trade-mark is or resembles such a word, it follows that it not registrable, invalid and not distinctive: *United Artists Records Inc. v. Sountrack Ltd.* (1977), 36 C.P.R. (2d) 278 (T.M. Opp. Bd.) [*United Artists*]; *Benson & Hedges (Canada) Ltd. v. Empresa Cubana Del Tabaco* (1975), 23 C.P.R. (2d) 274 (Reg. T.M.) [*Empresa Cubana*]; *Bank of Montreal v. Merrill Lynch & Co.* (1997), 84 C.P.R. (3d) 262 (T.M. Opp. Bd.) [*Merrill Lynch*].

39 The Applicant points to numerous newspaper articles, yellow page directories, judicial decisions in Canada, descriptions by fitness facilities of their activities, and the testimony of the Respondent's affiants on cross-examination as demonstrating that, by 1997, the use of the words "athletic club" had by ordinary and bona fide commercial usage come to designate the kind of services offered by the Respondent. As such, the adoption of these words as a trade-mark was prohibited by s. 10. This evidence, the Applicant says, also reinforces the arguments above that the trade-mark is clearly descriptive of the services contrary to s. 12(1)(b) and is the name of the services contrary to s. 12(1)(c).

#### *Trade-mark not distinctive*

40 The Applicant further argues that the Athletic Club Trade-mark is not distinctive (and was not distinctive on the date it was registered), and is thus invalid under both s. 18(1)(b) and the combination of ss. 18(1)(a) and 18(2) of the Act.

41 The Applicant notes that according to the definition of "distinctive" set out in s. 2 of the Act, a distinctive trade-mark is one that actually distinguishes the wares or services in association with which it is used by its owner from the wares or services of others, or is adapted so as to distinguish them. This requires that three conditions be met: 1) that a mark and a product or service be associated; 2) that the "owner" of the mark uses this association in selling his product or service; and 3) that this association enables the owner of the mark to distinguish his product or service from that of others: *Nature's Path Foods Inc. v. Quaker Oats Co. of Canada* (2001), 204 F.T.R. 102, 2001 CarswellNat 784 (Fed. T.D.) at para 46; *Bodum USA Inc. v. Meyer Housewares Canada Inc.*, 2012 FC 1450 (F.C.) at para 117 [*Bodum USA*].

42 Here, the Applicant says, there are two relevant dates to consider with respect to the distinctiveness of the Athletic Club Trade-mark. If the trade-mark was not distinctive on either date, it is invalid. First, through the combination of ss. 18(1)(a) and 18(2) of the Act, the trade-mark is invalid if it was not distinctive at the date of its registration. Second, under s. 18(1)(b), the trade-mark is invalid if it was not distinctive as of the filing date of the Notice of Application

in the present proceeding (August 29, 2011). The Applicant submits that the trade-mark was not distinctive on either of these dates.

43 The Applicant argues that where a trade-mark is clearly descriptive of the character or quality of the wares or services in association with which it is used, it is *prima facie* not distinctive. It is significantly more difficult to claim distinctiveness for descriptive words than coined words: *Riverside Paper*, above, at para 13; *Bodum USA*, above, at para 136. The distinctiveness of a composite mark can be tested by "sounding" the words if the design element is not dominant: *Canadian Jewellers Assn. v. Worldwide Diamond Trademarks Ltd.*, 2010 FCA 326 (F.C.A.) at para 2. As noted above, the Applicant argues that the dominant feature of the Athletic Club Trade-mark is the words "Athletic Club" and not the design elements.

44 A trade-mark that is commonly used by other third parties cannot be distinctive of a single source, the Applicant says, and a trade-mark that is used as a common name of goods or services loses its distinctiveness. The burden of proving secondary meaning (or acquired distinctiveness) increases in direct ratio to the commonality of usage as a description of a service, and the onus of proving such secondary meaning is a heavy one. Where the words are purely descriptive and in common use it is difficult to conceive a case where they could acquire a secondary meaning: *Canada (Registrar of Trade Marks) v. G.A. Hardie & Co.*, [1949] S.C.R. 483, 1949 CarswellNat 8 (S.C.C.) at para 42.

45 The Applicant says the evidence reveals that well before 1997, and continuing today, the words "athletic club" were and are used extensively in Canada. They are in fact so commonly used that all potential arguments by the Respondent regarding secondary meaning must fail.

46 The evidence with respect to the alleged use or advertising of the Athletic Club Trade-mark before the registration date is extremely scarce, and that evidence of use or advertising after that date is irrelevant to the application of ss. 18(1)(a) and 18(2) of the Act, the Applicant argues. In other words, if the Athletic Club Trade-mark was not distinctive as of the registration date, it is invalid regardless of any evidence about subsequently acquired secondary meaning. The Applicant also argues that any evidence regarding use or advertising of the Trade-mark after February 22, 2005 is irrelevant with respect to whether the Trade-mark was clearly descriptive of the services (s. 12(1)(b)) or the name of the services (s. 12(1)(c)), and that therefore "the vast majority of the evidence filed by the Respondent is not relevant."

47 Furthermore, the Respondent did not file any survey evidence or consumer affidavits to support a finding that the Trade-mark had acquired any secondary meaning or distinctiveness as of the registration date, or as of the date of the commencement of the current application.

48 The Applicant also argues that the Respondent does not consistently use the words "the athletic club" enclosed in a black oval on the interior and exterior signage at its facilities or on its website, which undermines the Respondent's claim to acquired distinctiveness.

## *Respondent*

49 The Respondent argues that the Applicant has not met its burden on any ground, and that the registration of the Athletic Club Trade-mark should be maintained.

50 The Applicant bears the onus in expungement proceedings to prove that the Respondent's Trade-mark is invalid, and if the Applicant does not meet this onus the registration should be maintained: *Boston Pizza International Inc. v. Boston Chicken Inc.* (2001), 211 F.T.R. 106, 15 C.P.R. (4th) 345 (Fed. T.D.) at para 64 [*Boston Pizza TD*], var'd on other grounds by 2003 FCA 120 (Fed. C.A.) [*Boston Pizza FCA*].

### *Distinctiveness of the Trade-mark*

51 The Respondent argues that a lack of distinctiveness as of the date of registration is not a proper ground for invalidating the Trade-mark, contrary to the Applicant's argument based on ss.18(1)(a) and 18(2) of the Act. The Court has previously considered a similar argument and did not agree that lack of distinctiveness at the time of registration was a proper ground for invalidating a trade-mark under s. 18(1)(a). Rather, the Court is confined to considering, under s.18(1)(b), whether the mark was distinctive when the expungement proceedings were commenced: *Fibergrid Inc. v. Precisioneering Ltd.* (1991), 35 C.P.R. (3d) 221 (Fed. T.D.), at 229 -230. Accordingly, the relevant date for assessing distinctiveness in this proceeding is August 29, 2011, and all evidence filed by the Respondent regarding the period before this date is relevant.

52 The Respondent notes that under the definition of "distinctive" in s. 2, distinctiveness can be either acquired or inherent: *McCallum Industries Ltd. v. HJ Heinz Co. Australia Ltd.*, 2011 FC 1216 (F.C.) at para 34. If the Athletic Club Trade-mark actually distinguishes (acquired distinctiveness) or is adapted to distinguish (inherent distinctiveness), the Trade-mark is distinctive and must be maintained: *Boston Pizza FCA*, above, at paras 5-6. A registered trade-mark is presumed valid until the contrary is proven: *Boston Pizza FCA*, above, at para 16. Furthermore, the mark "must be considered in its entirety and as a matter of first impression" and should not be separated into component parts: *Molson Breweries, A Partnership v. John Labatt Ltd.*, [2000] 3 F.C. 145 (Fed. C.A.) at para 83.

53 The Respondent notes that a trade-mark is "adapted to distinguish" when it is inherently distinctive: *Boston Pizza FCA*, above, at para 6. The Athletic Club Trade-mark is a design mark that includes original design elements, the Respondent says, and a trade-mark that incorporates an original design element is inherently distinctive: *Fairmont Resort Properties Ltd. v. Fairmont Hotel Management, L.P.*, 2008 FC 876 (F.C.) at para 85.

54 The Athletic Club Trade-mark is made up of two ellipses, one inside the other, which give the effect of creating a light ellipse in between that further emphasizes the Trade-mark. Inside

the smaller dark ellipse are the words "The Athletic Club" in a light colour, written in specific script and unique lettering that further distinguish the Trade-mark. It is the Applicant's onus to demonstrate that the Respondent's Trade-mark is not inherently distinctive, and the Applicant has not done so. The only example provided by the Applicant of another trade-mark using an oval shape in association with services similar to the Respondent's is another mark owned by the Respondent (the Total Fitness mark). This supports the position that oval shapes in association with the Respondent's services are distinctive of the Respondent.

55 In addition to being inherently distinctive (which is sufficient to maintain the registration), the Respondent argues that the Trade-mark has also acquired distinctiveness through use in Canada: *Boston Pizza FCA*, above, at paras 3, 13. The distinctiveness of a trade-mark can be enhanced by promotion: *In-Touch Network Systems Inc. v. 01 Communique Laboratory Inc.* (2007), 63 C.P.R. (4th) 224 (T.M. Opp. Bd.), at 229, [2007] T.M.O.B. No. 111 (T.M. Opp. Bd.) at para 26 [*In-Touch*]. The Respondent argues that it has conducted extensive promotion of the Athletic Club Trade-mark such that it has acquired distinctiveness, including prominent displays inside and outside its facilities and millions of dollars in advertising, direct mail to homes, door hangers, and promotional materials. The Respondent attests that it spent over \$1.7 million advertising its services in association with the Trade-mark from August 1, 2010 to July 31, 2011 alone.

56 The Respondent reiterates that it does not bear the onus in expungement proceedings, and argues that the Applicant has not provided any argument that the Athletic Club Trade-mark has not acquired distinctiveness as of the relevant date, which is the date of commencement of the present proceedings. Even if considered at the date of registration, the Respondent argues, the Applicant has not demonstrated that the Respondent's Trade-mark had not acquired distinctiveness.

#### *Effect of disclaimer*

57 The Respondent argues that the Applicant's position — that the disclaimer of the words "athletic club" should have no effect on the expungement proceedings because the mark is clearly descriptive — would render s. 35 of the Act inoperative, and this cannot be the intention of Parliament. Section 35 permits the owner to disclaim the right to the exclusive use of the portion of a trade-mark that may not be independently registrable. The Respondent's disclaimer of the words "athletic club" indicates that it was filing to register the distinctive shape of the ovals and the distinctive lettering, not necessarily the words inside. The registered mark would then prevent others from using similar ovals with the distinctive lettering inside, irrespective of the words. This, the Respondent says, is the purpose of its disclaimer.

58 The *Best Western* case cited above relied upon by the Applicant involved a disclaimer of individual words, not the entire phrase, and can therefore be distinguished, the Respondent argues. Here, it is the phrase "athletic club" that has been disclaimed, and the Applicant has not shown that the design elements of the Trade-mark are not distinctive. The disclaimer should therefore be

considered when assessing the Trade-mark in terms of descriptiveness as well as other grounds of invalidity alleged by the Applicant under ss. 10, 11 and 12 of the Act.

### ***Trade-mark registrable***

#### *Trade-mark not clearly descriptive*

59 The Respondent argues that the Trade-mark is not clearly descriptive of the character or quality of the wares or services associated with it and was therefore not unregistrable pursuant to s. 12(1)(b).

60 The test for whether a trade-mark is clearly descriptive is one of first impression in the mind of a normal or reasonable person. The word "character" in the phrase "character or quality of the wares or services" has been defined by case law to mean a feature, trait or characteristic belonging to the wares or services. Thus, to be clearly descriptive, the mark must describe an intrinsic characteristic or quality of the wares or services: *Ontario Teachers*, above.

61 First, the Respondent disclaimed the words "athletic club." Such a disclaimer allows the registration of a trade-mark provided that, apart from the unregistrable words, there remains a distinctive feature that would make the mark as a whole distinctive: *Lake Ontario Cement Ltd. v. Canada (Registrar of Trade Marks)* (1976), 31 C.P.R. (2d) 103 (Fed. T.D.), at 109 -110, [1976] F.C.J. No. 1104 (Fed. T.D.) at para 17. The design portions of the Respondent's Athletic Club Trade-mark are distinctive, and the Trade-mark should be assessed without considering the disclaimed portion. Taking this approach, the non-disclaimed portion of the Trade-mark is not clearly descriptive of the character or quality of the Respondent's services.

62 However, even if the words of the Trade-mark are assessed themselves, the Trade-mark is still not descriptive of the character or quality of the services, the Respondent argues. Character and quality are not just another name for the services. They refer to words that are descriptive of wares or services (such as blue wares, tasty wares, fresh-made wares), not all words that may be associated with a service. If Parliament had intended a more expansive interpretation it would not have included the words "character or quality."

63 If the Court takes a more liberal interpretation of s. 12(1)(b), then at the very least certain of the Respondent's services (such as restaurant and snack bar services and retail operations) are not clearly described by the words "the athletic club," and the Court is empowered under s. 57 to amend the registration: *Omega Engineering*, above, at paras 16 and 30-32. Furthermore, while the words "the athletic club" may suggest a relationship between other services offered by the Respondent, the types of services being offered are not clear or obvious from these words. Such words could connote any number of services such as tennis, squash or racquet ball, or groups such as a running or rowing club. If the Trade-mark is suggestive of a meaning other than one describing the services, then the words are not clearly descriptive.

64 The Respondent says that the intention of s. 12(1)(b) cannot be to prevent parties from using the words "athletic club" in trade-marks. If the Court were to find that these words are "clearly descriptive," then the effect would be that other marks using such words, such as the Applicant's, would be descriptive and unregistrable as well. This, they argue, cannot be the intended result of s. 12(1)(b).

*Trade-mark is distinctive*

65 Should the Court take the position that the words "athletic club" are clearly descriptive of the character or quality of the Respondent's services, then the Respondent argues that the Trade-mark had become distinctive through use by the Respondent by the time the application for the trade-mark registration was filed (July 29, 2003), and that this saves the registration by virtue of s. 12(2) of the Act. The Respondent says that the Athletic Club Trade-mark was prominently displayed inside and outside its facilities that operated prior to that date (Brantford, London-North and London-South), and that advertising was conducted in the areas of these facilities on a "full coverage" basis starting in 1997, in advance of the opening of each of the above-named facilities. This means that the Respondent attempted to reach every house in Brantford and London with advertising that used the Trade-mark in association with its services. The Respondent says the evidence it has presented on this point is the "tip of the iceberg" and more could have been presented if it had more time to prepare.

*Trade-mark is not the name of the wares or services*

66 The Respondent argues that the Trade-mark is not the name in any language of the wares or services in connection with which it is used, and was therefore not unregistrable pursuant to s.12(1)(c). The test under s. 12(1)(c) is narrower than the test for descriptive terms under s.12(1)(b). The mark as a whole must clearly be the name of the services, based on the immediate and first impression of the everyday user of those services: *ITV Technologies Inc. v. WIC Television Ltd.*, 2003 FC 1056 (F.C.) at paras 81-87 [*ITV Technologies*]. Unlike under s. 12(1)(b), there is no sound requirement under s. 12(1)(c), which means that the mark as a whole needs to be considered, including the design elements: *Jordan & Ste-Michelle Cellars Ltd. v. Alwar S.p.A.*, [1980] T.M.O.B. No. 81 (T.M. Opp. Bd.) at paras 14-17, (1980), 63 C.P.R. (2d) 235 (T.M. Opp. Bd.), at 239 [*Alwar*].

67 The Respondent argues that the mark is a design, and the design elements are clearly not the name in any language of any of the Respondent's services. Furthermore, the word portion of the Trade-mark on its own is not clearly the name of any of its services: the services being provided are not "the athletic club." They are restaurant services, snack bar services, the operation of a facility for fitness training and so on, as identified above: *ITV Technologies*, above, at para 86. The words "athletic club" are capable of representing various things, including groups of athletes

such as a running or rowing club, and it follows that the mark cannot be the name of the services: *ITV Technologies*, above, at para 85.

68 Furthermore, the words "athletic club" have been disclaimed by the Respondent, which renders inoperative the Applicant's objections based on s. 12(1)(c): *Calona Wines Ltd. v. Canada (Registrar of Trade Marks) (1977)*, [1978] 1 F.C. 591 (Fed. T.D.) at para 3. Otherwise, there would be no rationale for the disclaimer provision.

*Trade-mark is not a prohibited mark*

69 The Respondent also rejects the Applicant's argument that the Trade-mark is a prohibited mark under s. 10 of the Act.

70 To succeed with this argument, the Applicant must show that by 1997 the Athletic Club Trade-mark had, by ordinary and *bona fide* commercial usage, become recognized in Canada as designating the kind, quality, quantity, destination, value, place or origin or date or production of any wares or services. The Respondent argues that the Applicant must also show that it is the entire mark, including the design elements, that is so prohibited. A segment of a mark is not a "mark" under s. 10, as trade-marks are not to be dissected into their component parts: *Scotch Whisky Assn. v. Glenora Distillers International Ltd.*, 2009 FCA 16 (F.C.A.) at paras 23-24 [*Glenora Distillers*].

71 The Respondent says that the only argument really advanced by the Applicant under s. 10 is that the Trade-mark had become recognized as a "kind" of service, which is synonymous with "type" (*Producteurs Laitiers du Canada v. Republic of Cyprus (Ministry of Commerce, Industry & Tourism)*, 2011 FCA 201 (F.C.A.) at para 29 [*Cyprus*]). The Respondent argues that neither the words "The Athletic Club" on their own nor the mark as a whole designates a kind or type of service.

72 Furthermore, the Respondent reiterates its argument that the words "athletic" and "club" have been disclaimed, and that the disclaimed portion of the mark should not be considered in the s. 10 context or else there would be no rationale for s. 35 of the Act: *Jordan & Ste-Michelle Cellars Ltd./Caves Jordan & Ste-Michelle Ltée v. Andres Wines Ltd.*, 1985 CarswellNat 562, 6 C.I.P.R. 49 (Fed. T.D.) at para 9 [*Jordan & Ste-Michelle (FC)*]. The Respondent argues that s. 35 provides some relief from the provisions of s. 10, and therefore permits "Athletic Club" to be part of the Respondent's Trade-mark. As shown by the disclaimer, the Respondent has not sought to prevent other traders from using marks that include the words "athletic club"; rather, it is the Applicant who seeks to enforce a monopoly on the words "athletic club."

73 The Respondent says that it cannot be the intention of s. 10 to prohibit marks that contain the words "athletic club." The provision states that "no person" shall adopt a prohibited mark as a trade-mark, which means that the Applicant's success in the current application would jeopardize the trade-marks of many other traders using the words "athletic club," including the Applicant itself.

The Respondent argues that the *United Artists* decision by the Trade Mark Opposition Board, cited by the Applicant, has not been followed and imports wording such as "should be open for use by any party" that are not found in the Act itself. Furthermore, as noted above, the Respondent's Trade-mark does not prevent others from using the words "athletic club" in relation to their services.

*The ground of confusion with a previously used trade-mark or trade name is not available*

74 The Respondent says the allegation that the Athletic Club Trade-mark is confusing with the Applicant's previously used trade-mark or trade name is not applicable here by virtue of s. 17 of the Act. The relevant portion of s. 18(1) expressly states that it is "subject to section 17." Subsection 17(2) states that a trade-mark registration cannot be expunged or amended based on an application alleging previous use of a confusing trade-mark or trade name that is brought more than five years after the registration, "unless it is established that the person who adopted the registered trade-mark in Canada did so with knowledge of that previous use or making known." The Respondent says the Applicant has not established that the Respondent's predecessors in title adopted the Trade-mark with knowledge of the Applicant's previous use of its trade-mark or trade name, and the Applicant is therefore unable to rely on the ground of confusion as a basis for invalidating the Trade-mark under s. 18(1).

75 The Respondent argues that none of the Applicant's affidavits or documentary exhibits contains any evidence that Alan Quesnel adopted the Respondent's Trade-mark with knowledge of the Applicant's trade-mark or trade name. Moreover, the Applicant's argument that the Court should draw a negative inference on this point should be rejected, since the Respondent has responded appropriately to all relevant questions posed by the Applicant in cross-examination.

76 The Respondent says it has clearly stated, through a sworn affidavit of Chuck Kelly dated January 21, 2012, that Mr. Quesnel was not aware of the Applicant's trade-marks or trade name before he adopted the Respondent's Trade-mark. The NUANS search referred to by the Applicant was produced for the first time in the cross-examination of Chuck Kelly. It has not been properly filed as evidence and was entered for identification purposes only. After giving an "under advisement" to verify whether the NUANS search was the original, Chuck Kelly responded that "[n]one of Alan Quesnel, David Wu, Chuck Kelly or any officers or directors of the Respondent... received a copy of or reviewed the NUANS search at the time of incorporation or before they or their companies began using the trade-mark THE ATHLETIC CLUB AND DESIGN," and that the Respondent was unable to verify if the NUANS search shown for identification during the cross-examination was the original. Mr. Kelly further stated in this response that "Alan Quesnel and David Wu signed the Articles of Incorporation on the advice from their lawyer at the time when signing a variety of other documents. The NUANS Search was never brought to their attention."

77 The Respondent says this should have concluded the matter but the Applicant then brought a motion requesting, *inter alia*, a variety of declarations, leave to issue a subpoena (to the

incorporating lawyer), an order authorizing cross-examination of a non-party (the incorporating lawyer), and further answers from Chuck Kelly. The Court denied the majority of these requests but confirmed there had been a limited waiver of privilege resulting from the Respondent's previous answers. The waiver extended "only to the issue of whether or not the NUANS search was communicated to the corporation or its principles or shareholders," and the Court permitted the cross-examination of Mr. Kelly to continue. The Respondent says that in the subsequent cross-examination of Mr. Kelly the Applicant engaged in a fishing expedition in an attempt to find evidence establishing that Mr. Quesnel adopted the Trade-mark with knowledge of the Applicant, its trade-marks or trade name, but no such evidence was located. In response to questions taken under advisement Mr. Kelly stated that "[t]he NUANS Search referred to in the Order of August 10, 2012, was not communicated to the corporation or its principles or shareholders." On this basis, the Respondent argues that it has responded to all relevant questions posed by the Applicant, and therefore no negative inference can or should be drawn. There is sworn evidence that is directly contrary to the requested negative inference, and no evidence to support that inference. The Respondent argues that it is not required to conduct research for the Applicant as requested in the remainder of the questions taken under advisement during the second cross-examination of Chuck Kelly.

78 Should the Court conclude that the Applicant has established that Mr. Quesnel was aware of the Applicant's trade-mark or trade name before adopting the Athletic Club Trade-mark, the Respondent requests leave to file additional evidence on point.

*The Trade-mark is not in any case confusing with the Applicant's trade-mark or trade name*

79 The Respondent argues that, even if prior knowledge of the Applicant's trade-mark or trade name were established, the Respondent's Athletic Club Trade-mark is not confusing based on the criteria set out in s. 6(5) of the Act.

80 The Respondent says the Applicant must establish a likelihood of confusion rather than a mere possibility: *Remo Imports Ltd. v. Jaguar Cars Ltd.*, 2007 FCA 258 (F.C.A.) at para 38. The most important factor among those listed in s. 6(5) is, the Respondent argues, the degree of resemblance between the marks: *Masterpiece Inc. v. Alavida Lifestyles Inc.*, 2011 SCC 27 (S.C.C.) at para 49. The Respondent's Trade-mark is made up of distinctive design elements that are in no way similar to the Applicant's trade name or trade-mark.

81 Moreover, even if the words in the Trade-mark are sounded, the Respondent argues, there is no likelihood of confusion. The first word or first syllable in the trade-mark is by far the most important for the purpose of distinction (*Simmons Ltd. v. A to Z Comfort Beddings Ltd.* (1991), 37 C.P.R. (3d) 413 (Fed. C.A.) [*Park Avenue*] (FCA), and the first word of the Applicant's trade-mark / trade name is "Ottawa," which does not appear in the Respondent's Trade-mark.

82 Furthermore, when a number of traders are using identical words such as "athletic club," minor differences can permit the parties to distinguish the trade-marks between each other: *Maximum Nutrition Ltd. v. Kellogg Salada Canada Inc.*, [1992] 3 F.C. 442 (Fed. C.A.) at para 14, (1992), 43 C.P.R. (3d) 349 (Fed. C.A.). Here, the evidence indicates that many traders are using marks that include the words "athletic club," so individuals have become accustomed to making fine distinctions between marks based on minor differences. The nature of the trade also lessens the likelihood of confusion, the Respondent says, because customers must attend at either facility to use the services.

83 With respect to the examples of actual confusion cited by the Applicant, the Respondent says that none of the individuals allegedly confused were made available for cross-examination, and there are a variety of possible reasons for the confusion that may not relate to confusion of trade-marks. Furthermore, even if the examples submitted are accepted as evidence of confusion, they are so few in number compared to the size of the Ottawa population as to be insignificant.

84 Finally, the Respondent argues that it is well established that marks that contain descriptive words are not inherently distinctive and are therefore afforded only a minimal degree of protection by the Court. Where a party adopts a descriptive name, it must accept that a certain amount of confusion may arise: *PEI Mutual*, above. While the Applicant appears to be seeking a monopoly over the words "athletic club," the Court must balance the rights of the Applicant and the public with those of the Respondent to compete freely in the marketplace. Were it to find confusion in this case, the Court would in effect be granting the Applicant a trade-mark monopoly with respect to the words "athletic club" in association with its services, and the breadth of such a monopoly is unreasonable: *PEI Mutual*, above, at para 47; *Molson Canada 2005 v. San Miguel Brewing International Ltd.*, 2013 FC 156 (F.C.) at para 40.

## Analysis

### *Introduction*

85 The Applicant seeks to have the Athletic Club Trade-mark struck from the Register and to prohibit the Respondent from ever using the Athletic Club Trade-mark or its common law equivalent. This application has been motivated by what the Applicant characterizes as the "tremendous confusion" that has occurred, to the detriment of the Applicant's business, as a result of the Respondent entering the athletic and fitness services market in Ottawa using the Athletic Club Trade-mark.

86 The Applicant says it has no problem with the Athletic Club using a trade-mark that contains the words "athletic club," but contends that the Athletic Club must distinguish itself in some way that does not result in confusion with, and disruption to, the Applicant's business. For example, there is apparently an entity doing business in Ottawa as the Ottawa Aboriginal Athletic Club,

and this name, says the Applicant, is sufficiently distinctive not to cause problems for the OAC. The Applicant says the problem with the Athletic Club Trade-mark is that it is dominated by the common and generic words "The Athletic Club" and lacks sufficient distinctiveness to avoid the confusion that has occurred, and that will continue to occur, if the Respondent is allowed to continue doing business in Ottawa using the Trade-mark.

87 The Respondent says that it does not claim the words "The Athletic Club" as a trade-mark, and the Trade-mark design it uses is sufficiently distinctive to avoid confusion. It claims that any confusion that has occurred is not significant and is only to be expected in a market where businesses need to indicate to the public that they are offering athletic and fitness services.

88 The Applicant's objections to the Athletic Club Trade-mark are based upon a number of grounds and the parties agree that success on any single ground will suffice to justify striking the Trade-mark from the Register, or at least narrowing the registration by striking out some of the services listed for the Athletic Club Trade-mark. By contrast, the permanent injunction the Applicant seeks on the Respondent's continued use of the Trade-mark will only be appropriate if the Applicant succeeds in demonstrating that that Trade-mark is a prohibited mark under ss. 10 and 11 of the Act. I will address each of the grounds in turn.

### ***Confusion — Previous Use***

89 It is not disputed that the Respondent only began using the Athletic Club Trade-mark 21 years after the continuous use by the Applicant of the Ottawa Athletic Club trade name and trade-mark began. Hence, the Applicant says that, in accordance with s. 16(1)(a) and s. 16(1)(c) of the Act, the Respondent was not entitled to register the Trade-mark on February 22, 2005 because it was confusing with the Applicant's Ottawa Athletic Club trade name and trade-mark.

90 One of the problems with relying on this ground of invalidity is the 5-year limitation period contained in s. 17 of the Act:

#### **Effect of registration in relation to previous use, etc.**

17. (1) No application for registration of a trade-mark that has been advertised in accordance with section 37 shall be refused and no registration of a trade-mark shall be expunged or amended or held invalid on the ground of any previous use or making known of a confusing trade-mark or trade-name by a person other than the applicant for that registration or his predecessor in title, except at the instance of that other person or his successor in title, and the burden lies on that other person or his successor to establish that he had not abandoned the confusing trade-mark or trade-name at the date of advertisement of the applicant's application.

#### **When registration incontestable**

(2) In proceedings commenced after the expiration of five years from the date of registration of a trade-mark or from July 1, 1954, whichever is the later, no registration shall be expunged or amended or held invalid on the ground of the previous use or making known referred to in subsection (1), unless it is established that the person who adopted the registered trade-mark in Canada did so with knowledge of that previous use or making known.

### **Effet de l'enregistrement relativement à l'emploi antérieur, etc.**

17. (1) Aucune demande d'enregistrement d'une marque de commerce qui a été annoncée selon l'article 37 ne peut être refusée, et aucun enregistrement d'une marque de commerce ne peut être radié, modifié ou tenu pour invalide, du fait qu'une personne autre que l'auteur de la demande d'enregistrement ou son prédécesseur en titre a antérieurement employé ou révélé une marque de commerce ou un nom commercial créant de la confusion, sauf à la demande de cette autre personne ou de son successeur en titre, et il incombe à cette autre personne ou à son successeur d'établir qu'il n'avait pas abandonné cette marque de commerce ou ce nom commercial créant de la confusion, à la date de l'annonce de la demande du requérant.

### **Quand l'enregistrement est incontestable**

(2) Dans des procédures ouvertes après l'expiration de cinq ans à compter de la date d'enregistrement d'une marque de commerce ou à compter du 1er juillet 1954, en prenant la date qui est postérieure à l'autre, aucun enregistrement ne peut être radié, modifié ou jugé invalide du fait de l'utilisation ou révélation antérieure mentionnée au paragraphe (1), à moins qu'il ne soit établi que la personne qui a adopté au Canada la marque de commerce déposée l'a fait alors qu'elle était au courant de cette utilisation ou révélation antérieure.

91 The Applicant says that this limitation does not arise in the present case because, in accordance with s. 17(2), "the person who adopted the registered trade-mark in Canada did so with the knowledge of [the Applicant's] previous use or making known... ."

92 It is common ground that the persons who adopted the Athletic Club Trade-mark in this case were Mr. Alan Quesnel and Mr. David Wu, both of whom continue to be directors and shareholders of the Athletic Club. The Applicant says that Mr. Quesnel and/or Mr. Wu knew about the Applicant's previous use because they were the founders of the London Athletic Club Inc. and signed the incorporating documents for that entity which were attached to the obligatory NUANS search, and the NUANS search lists the "Ottawa Athletic Club."

93 So the first issue for the Court is whether the Applicant has established that Mr. Quesnel and/or Mr. Wu had knowledge of the OAC's trade name and trade-mark when they applied for the Athletic Club Trade-mark. The evidence on this issue and what it tells us is hotly disputed by the parties. Neither Mr. Quesnel nor Mr. Wu provided affidavits and Mr. Kelly, who did provide

affidavits for the Respondent and was cross-examined, has no direct knowledge of what was known at the material time.

94 It is not disputed that the person who first adopted the Trade-mark was Mr. Quesnel, who is the Respondent's predecessor in title. The Applicant has not produced evidence (it filed 9 affidavits) to show that Mr. Quesnel adopted the Athletic Club Trade-mark with knowledge of the Applicant's trade-mark or trade name. However, it is not likely that the Applicant would have any direct knowledge of what Mr. Quesnel knew at the material time. Because Mr. Quesnel did not swear an affidavit, the Applicant could not ask him what he knew. The Respondent produced an affidavit sworn by Mr. Chuck Kelly, who is in charge of operations for the Respondent but who has no direct knowledge about the adoption of the Trade-mark by the Respondent and, in particular, what Mr. Quesnel might have known. The Applicant has attempted to find out what Mr. Quesnel knew about the Applicant's trade mark / trade name through cross-examination of Mr. Kelly.

95 Mr. Kelly has been fairly consistent on this issue. In his affidavit of January 21, 2012 at paragraph 19, he explains as follows:

When Alan Quesnel began using and licensing the use of the trade-mark THE ATHLETIC CLUB & Design in 1997, he was not aware of the Applicant or any of the Applicant's trade-marks or trade-names. I am aware of this fact not only because Alan Quesnel has personally advised me but also because I was with Alain Quesnel the first time the Applicant and the Applicant's trade-marks and trade-names came to his attention.

96 When cross-examining Mr. Kelly on his affidavit, the Applicant produced the NUANS search, which Mr. Kelly had never seen. It was entered for identification purposes only. In response to an "under advisement" dealing with whether the NUANS search was the original, Mr. Kelly said that:

None of Alan Quesnel, David Wu, Chuck Kelly or any officers or directors of the Respondent, its predecessors-in-title or subsidiaries received a copy of or reviewed the NUANS search at the time of incorporation or before they or their companies began using the trade-mark THE ATHLETIC CLUB & DESIGN. Accordingly, whether or not the NUANS search shown for identification is the original cannot be verified by the Respondent, Alan Quesnel, David Wu, Chuck Kelly or any of the predecessors-in-title or subsidiaries. Furthermore, the minute books of the Athletic Club Group do not have any copies or originals of the NUANS search, so it could not be verified if the NUANS search submitted for identification is the same as the original.

Alan Quesnel and David Wu signed the Articles of Incorporation on the advice from their lawyer at the time when signing a variety of other documents. The NUANS Search was never brought to their attention.

The Articles of Incorporation appear to be a copy of the originals and there is no reason to believe it is not a copy of the original.

97 The Applicant continued to pursue this matter and obtained an order from Prothonotary Tabib allowing limited further cross-examination of Mr. Kelly based upon a limited waiver of solicitor-client privilege. Prothonotary Tabib provided clarification on the limited scope of her Order:

I hasten to add that this waiver only extends to the issue of whether or not the NUANS search was communicated to the corporation or its principals or shareholders. It does not extend to the legal advice that may have been sought or proffered by Mr. Corrent.

98 As a consequence of this order, Mr. Kelly was cross examined a second time. Several questions were taken under advisement to which Mr. Kelly provided the following response:

No. Alan Quesnel and David Wu were not generally aware of the requirements of the NUANS search before incorporating. The NUANS search referred to in the Order of August 10, 2012 was not communicated to the corporation or its principals or shareholders.

99 Against what appears to be fairly conclusive evidence from Mr. Kelly that Mr. Quesnel did not know of the Applicant's trade-mark or trade name at the material time, the Applicant asks the Court to consider the following:

(a) OAC is a landmark institution and has been known in Ottawa since 1976. As people interested in providing the same service and competing in the same market, the principals of the Athletic Club had to know about the OAC;

(b) Neither Mr. Quesnel nor Mr. Wu, who had direct knowledge on this point, provided affidavits. Rather, they left it to Mr. Kelly to provide indirect hearsay evidence on point;

(c) The reasons given by Mr. Kelly as to why Mr. Quesnel and Mr. Wu had not provided affidavits are unconvincing;

(d) Mr. Kelly's original affidavit was due to be filed with the Respondent's materials on October 28, 2011, but a two-month extension was granted until January 22, 2012. The Respondent filed on the last day of the extension. The Applicant suggests that this was a deliberate tactic aimed at ensuring the Applicant would have little time to deal with Mr. Kelly's evidence that he had nothing to do with choosing the Respondent's name and trade mark.

(e) Mr. Quesnel and Mr. Wu both signed the articles of incorporation for the London Athletic Club to which the NUANS search was attached. It listed "Ottawa Athletic Club," so Mr. Quesnel must have known about the Applicant;

- (f) If neither Mr. Quesnel nor Mr. Wu saw the NUANS search, then Mr. Corrent, their agent for the incorporation of The London Athletic Club Inc., certainly did because he submitted the documents for incorporation;
- (g) In the continued cross-examination of Mr. Kelly, he admitted that the only place he looked for the NUANS search was the minute book of the company, while admitting that there might have been a file with corporate search records, which he had not looked for;
- (h) Mr. Kelly did not ask the incorporating lawyer for the NUANS search, invoices and/or reporting letters from the lawyer's file, and refused to do so;
- (i) Mr. Kelly did not ask the incorporating lawyer if Mr. Quesnel and Mr. Wu discussed the NUANS search when signing the articles of incorporation for The London Athletic Club Inc.;
- (j) Mr. Kelly refused to search for and produce documentation on the incorporation of the company on the grounds that he was not obliged to conduct research for the Applicant;
- (k) Mr. Kelly was asked whether, before the incorporation of London Athletic Club, a common law trade mark search was done. As expected, he had no knowledge of this and said he was unsure as to whether such a search was conducted. However, Mr. Kelly was also asked who had drafted the answers to undertakings he had given on April 27, 2012, and he said that the drafting was done by someone at the law firm after he provided information verbally and by email. The Applicant points out that the same law firm filed the Respondent's trade-mark application, so they must have known whether a common law search was done.

100 As *Bodum USA*, above, teaches, knowledge under s. 17(2) of the Act may be imputed (at para 153):

Bodum contends that by reason of s 17(2) of the Act, its registration cannot be expunged or amended or held invalid on the ground of the previous use by a person other than Bodum, unless it's established that Bodum adopted the trade-mark in Canada with knowledge of that previous use. Bodum thus argues that the use, for example, of "French press" by Hario in 1985 and the use of the term by BonJour in the early 1990s, cannot go to invalidating the registration. I infer from the evidence that Bodum corporate management, specifically Jørgen Bodum and Carsten Jorgensen, knew of the previous use of the term when they adopted it as a trade-mark because of their knowledge of the marketplace and concerns expressed to Koen de Winter about the BonJour competition. For that reason, I impute the necessary knowledge to Bodum and will order that the trade-mark be expunged.

101 The Applicant further asks the court to draw a negative inference on the basis that the Respondent, without reasonable explanation, has failed to adduce evidence available to the Respondent that could have resolved the issue. See *Milliken*, above, at para 26. The Applicant

alleges that the Respondent could have introduced evidence that would have resolved the question of whether the Respondent had knowledge of the Applicant's prior use of a trade-mark or trade name that would be confusing with the Athletic Club Trade-mark before adopting that mark. On this basis, the Applicant argues that the Court should draw an adverse inference, and find as a fact that the Respondent knew of the OAC since at least as early its incorporation (or more accurately, the incorporation of its predecessor company), and therefore had knowledge of the prior use of a trade-mark / trade name that would be confusing with the Athletic Club Trade-mark.

102 The Applicant's allegation focuses on whether the Respondent's principals at the time — Alan Quesnel and David Wu — knew about a NUANS search performed for the Respondent by its solicitors in June 1997 in preparation for the incorporation of The London Athletic Club Inc., the Respondent's predecessor in title with respect to the Athletic Club Trade-mark. The name Ottawa Athletic Club was listed in that NUANS search, along with a number of other business names that include the words "athletic club" (see Exhibit 2 to Kelly Cross-Examination, Applicant's Record, Vol. 10 at p. 3411). The Respondent replied to questions taken under advisement during the cross-examination of Chuck Kelly by stating that neither Mr. Wu nor Mr. Quesnel had knowledge of this NUANS search. However, neither of these individuals provided an affidavit (which would have allowed them to be cross-examined), and the Respondent did not seek out information from the incorporating solicitor's file that might have clarified whether the NUANS search was brought to their attention. The Applicant sought leave of the Court to subpoena evidence from the solicitor, but this was refused. For their part, the Applicants failed to introduce the NUANS search into evidence through their affidavits, and only presented it "for identification purposes" at the cross-examination of Chuck Kelly.

103 There seems little doubt that the Respondent chose not to introduce the best evidence on this question. There is no way of knowing what the solicitor's file or recollection would have revealed about the NUANS search and whether it was drawn to the Respondent's principals' attention, but at minimum, no convincing explanation has been provided for introducing hearsay evidence regarding Mr. Quesnel's and Mr. Wu's knowledge rather than providing first-hand affidavits from these individuals, who continue to be Directors of the Respondent and actively involved in its business (see discussion of Rule 81(2) below).

104 The question before me is whether, at law, this failure of the Respondent to introduce the best evidence on this point justifies drawing the negative inference proposed by the Applicant. In my view, based on a review of the case law and the relevant facts, such an inference should not be drawn here.

### ***Proposed basis for the inference***

105 The Applicant refers to *Milliken* and *Hoffman*, both above, in support of its position that an adverse inference should be drawn.

106 *Milliken* was a decision in a copyright infringement trial, where one party (the Plaintiff) owned the rights to a particular design, and the other party (the Defendant) installed carpet in an airport based on that design. The decisive question was whether the design was entitled to copyright protection, and this turned on when the design was created. If it was created after legislative changes were made on June 8, 1988, copyright would apply. The Plaintiff argued that under s. 34(3)(a) of the Copyright Act, copyright is presumed to exist in an infringement action and the Defendant (which had introduced no evidence on point) bore the onus of rebutting the presumption (para 17). By contrast, the Defendant argued that the date of the design's creation was a fact material to the Plaintiffs' case and the Plaintiff had an obligation to adduce evidence proving it, which had not been led (para 19). The Defendant asked the Court to draw an adverse inference based on the Plaintiff's failure to introduce such evidence. The Court provided the following analysis:

[25] Thus, the question remains: When was the Mangrove design created? The plaintiffs allege that it was created in September 1988. However, they lead no evidence to support their contention....The evidence at trial only indicates that the design was created before January 11, 1989, that is the day when Richard Stoyles acquired the design from Ms. Iles at a trade show in Frankfurt, Germany.

[26] In my opinion, the failure to adduce evidence on such a material fact leaves it open to me to draw an adverse inference and come to the conclusion that the design was created prior to June 1988. It is a well established rule that an adverse inference may be drawn if, without reasonable explanation, a party fails to adduce evidence available to him which could have resolved the issue. The principle is enunciated in the following passage from Wigmore on Evidence:

The failure to bring before the tribunal some circumstance, document or witness, when either the party himself or his opponent claims that the facts would thereby be elucidated, serves to indicate, as the most natural inference, that the party fears to do so, and this fear is some evidence that the circumstance or document or witness, if brought, would have exposed facts unfavourable to the party. These inferences, to be sure, cannot fairly be made except upon certain conditions; and they are also open always to explanation by circumstances which make some other hypothesis a more natural one than the party's fear of exposure. But the propriety of such an inference in general is not doubted.

[Citations omitted]

107 The Court found that the Plaintiff could have called the designer as a witness, or introduced her evidence by way of commission or Letters Rogatory, and that it was also reasonable to expect the Plaintiff to have obtained information about the date of the design's creation when it obtained the rights. Therefore, the Court drew a negative inference as requested by the Defendant.

108 In a footnote at paragraph 26 of *Milliken*, above, Justice Tremblay-Lamer cited the following authorities for the "well established rule that an adverse inference may be drawn if, without reasonable explanation, a party fails to adduce evidence available to him which could have resolved the issue": *Murray v. Saskatoon (City) (No. 2) (1951)*, 4 W.W.R. (N.S.) 234 (Sask. C.A.); *Levesque v. Comeau*, [1970] S.C.R. 1010 (S.C.C.); Adrian Keane, *The Modern Law of Evidence*, 3d ed. (London: Butterworths, 1995) at 13; Colin Tapper, *Cross on Evidence*, 8th ed. (London: Butterworths, 1995) at 38-40 (cited to the 12th edition hereinafter); John Sopinka & Sidney N. Lederman, *The Law of Evidence in Civil Cases* (Toronto: Butterworths, 1974) at 535-537; Stanley Schiff, *Evidence in the Litigation Process*, vol. 1, 4th ed. (Toronto: Carswell, 1993) at 452.

109 These authorities suggest to me that context is important in determining whether a negative inference can be drawn from the failure of a party to present evidence uniquely within its possession, or to put forward a witness whose testimony could be expected to help its cause. As Tapper explains the concept, its main import in civil cases is that the failure to answer evidence put forward by the other party without a good explanation, when the means of answering that evidence seem to be within the party's control, can turn inconclusive evidence (or a *prima facie* case) into strong evidence:

Very soon after the parties were enabled to testify in most civil cases by the Evidence Act 1851, Alderson B recognized that the failure of one of them to deny a fact that it is in his power to deny 'gives colour to the evidence against him'... [I]n *Halford v Brookes* [[1991] 3 All ER 59, [1991] WLR 428, CA], it was argued that the effect was... to make it clear that a party to civil proceedings enjoyed no right of silence, and that inferences could be drawn even more readily in civil proceedings. The strength of such inference was examined by the House of Lords in *R v IRC, ex p TC Coombs & Co* [[1991] 2 AC 283, [1991] 3 All ER 623]:

In our legal system generally, the silence of one party in face of the other party's evidence may convert that evidence into proof in relation to matters which are, or are likely to be, within the knowledge of the client party and about which that party could be expected to give evidence. Thus, depending on the circumstances, a *prima facie* case may become a strong or even an overwhelming case. But, if the silent party's failure to give evidence (or to give the necessary evidence) can be credibly explained, even if not entirely justified, the effect of his silence in favour of the other party may be either reduced or nullified.

This makes it clear, first, that a *prima facie* case must be established; second, that it applies to partial as well as total failure to testify; and third, that the inference may be rebutted by a plausible explanation for silence. The effect can be to convert a *prima facie* case into proof of even the most serious matter, such as murder or equitable fraud, or one having very serious consequences, such as a child being taken into care...

[Colin Tapper, *Cross & Tapper on Evidence*, 12th ed (Oxford: Oxford University Press, 2010) at 40-41.]

110 Keane also emphasizes that this type of inference can strengthen the evidence introduced by the other party (even weak evidence), but cannot make up for the absence of evidence on a point:

In civil cases, one party's failure to give evidence or call witnesses may justify the court in drawing all reasonable inferences from the evidence which has been given by his opponent as to what the facts are which the first party chose to withhold. Thus adverse inferences have been drawn from the unexplained absence of witnesses who were apparently available and whose evidence was crucial to the case. In *Wisniewski v Central Manchester Health Authority* [[1992] Lloyd's Rep Med 223] Brooke LJ derived the following principles from the authorities on the point.

1. In certain circumstances a court may be entitled to draw adverse inferences from the absence or silence of a witness who might be expected to have material evidence to give on an issue in the action.
2. If a court is willing to draw such inferences they may go to strengthen the evidence adduced on that issue by the other party or to weaken the evidence, if any, adduced by the party who might reasonably have been expected to call the witness.
3. There must, however, have been some evidence, however weak, adduced by the former on the matter in question before the court is entitled to draw the desired inference: in other words, there must be a case to answer on that issue.
4. If the reason for the witness's absence or silence satisfies the court then no such adverse inference may be drawn. If, on the other hand, there is some credible explanation given, even if it is not wholly satisfactory, the potentially detrimental effect of his/her absence or silence may be reduced or nullified.

[Adrian Keane, James Griffiths & Paul McKeown, *The Modern Law of Evidence*, 8th ed (Oxford: Oxford University Press, 2010) at 14-15, emphasis added]

111 The other case cited by the Applicant, *Hoffman*, above, seems less helpful to their cause. In that case, the defendant, a generic drug distributor, had an obligation to pay royalties to the plaintiff until the Plaintiff's four patents relating to the manufacture of the drug Diazepam expired, unless they were no longer in use. The Defendant paid royalties until the third patent expired, but then stopped, claiming that the process protected by the fourth patent was not used by its manufacturer (a third company located in Italy).

112 A string of letters between the parties followed. The Defendant claimed its manufacturer had assured it the process protected by the fourth patent was not in use. The Plaintiff demanded

disclosure of the Defendant's manufacturer's process. The Defendant's manufacturer declined to disclose their process, but gave further assurances. The Plaintiff somehow got hold of what it claimed was the Defendant's manufacturer's process, and expressed the view that it infringed their patent. The Defendant asked the Plaintiff to disclose the purported information about its manufacturer's process, so that it could verify it and determine if the patent was indeed infringed. The Plaintiff responded that this would inappropriately shift the burden of proof: it was for the Defendant to demonstrate that it was not infringing the patent. The Defendant asked its distributor to disclose its process directly to (and only to) the Defendant's solicitor (and not to the Defendant or the Plaintiff or its solicitor). It appears that no further evidence was introduced on the question.

113 The Court found that the issue was "clearly upon whom falls the burden of proof" (at para 15). In the circumstances, the Defendant had to rebut an evidentiary presumption set out in the *Patent Act* stating that any substance with the same chemical composition would, in the absence of proof to the contrary, be deemed to have been produced through the patented process. Since the Defendant provided proof to the contrary, the Court found "as a fact that the diazepam imported by the defendant... and sold by it... was produced by the plaintiff's patented process and is therefore subject to the royalty payments..." (at para 22). The Court then provided the following additional analysis, which pointed to the same conclusion:

[23] Relying upon the authority of *Pleet v. Canadian Northern Quebec R. W. Co.* (1921), 50 O.L.R. 223, 64 D.L.R. 316, 26 C.R.C. 227 (Ont. C.A.); affirmed [1923] 4 D.L.R. 1112, 26 C.R.C. 238 (S.C.C.), and *Toronto Auer Light Co., Ltd. et al. v. Colling* (1898), 31 O.R. 18 (Div. Ct.), the plaintiff contends that quite apart from s. 41(2) of the Patent Act, at common law the rule has always been that when the subject-matter of an allegation lies particularly within the knowledge of one of the parties that party must prove it, whether it be of an affirmative or negative character.

[24] Therefore, in a case such as this where the plaintiff holds a process patent and the defendant is granted a compulsory licence, the onus shifts to the defendant to show that the supplier he selects abroad does not use the plaintiff's patented process. The defendant of the two parties involved is the only one having any real opportunity of determining the actual foreign process being employed. This is particularly so as the defendant and its solicitor instructed the foreign supplier not to divulge any information on its manufacturing process to the plaintiff's solicitor.

[emphasis added]

114 Despite the somewhat confusing phrase "the onus shifts to the defendant" in para 24, the common law rule cited was not employed to alter the statutory presumption (or burden of proof) in *Hoffman*. On the contrary, that presumption was the decisive factor in the case.

115 In view of the authorities described above, it is clear that the actual evidence introduced by the parties, as well as their respective burdens of proof in the matter at hand, are key considerations for the Court in determining whether the adverse inference proposed by the Applicant in the present case should be drawn. In addition, on the particular facts of this case, the Court must consider what information the Respondent was bound to provide by operation of the rules governing cross-examination on an affidavit and disclosure in an application more generally.

### *Adverse inference provided for in Rule 81(2)*

116 In addition to the common law rule cited by the Applicant, on the facts of this case, it is also appropriate to consider the effect of Rule 81(2) of the *Federal Court Rules*, SOR/98-106. Rule 81 provides as follows:

#### **Content of affidavits**

81. (1) Affidavits shall be confined to facts within the deponent's personal knowledge except on motions, other than motions for summary judgment or summary trial, in which statements as to the deponent's belief, with the grounds for it, may be included.

#### **Affidavits on belief**

(2) Where an affidavit is made on belief, an adverse inference may be drawn from the failure of a party to provide evidence of persons having personal knowledge of material facts.

[emphasis added]

117 Saunders, Rennie and Garton suggest that this Rule does not necessarily preclude the admission of hearsay evidence through an affidavit, which may be permissible according to the principled approach to the admission of hearsay evidence (see *Ethier v. Royal Canadian Mounted Police Commissioner*, [1993] 2 F.C. 659, 151 N.R. 374 (Fed. C.A.)). However, an adverse inference can be drawn where hearsay evidence is introduced instead of first-hand evidence and no adequate explanation is provided for why the best evidence is not available: Brian J. Saunders, Donald J Rennie & Graham Garton, *Federal Courts Practice 2014* (Toronto: Thomson Reuters, 2013) at 417.

118 The rationale for the Rule is "that the evidence contained in an affidavit must be able to be tested during a cross-examination of the affiant": *Bressette v. Kettle & Stony Point First Nations Band Council*, [1997] F.C.J. No. 1130 (Fed. T.D.) at para 3, (1997), 137 F.T.R. 189 (Fed. T.D.). The introduction of hearsay evidence through affidavits presents an obvious problem for the opposing party, because the value of any cross-examination on that evidence will be severely limited. The affiant knows only what they have been told, and as discussed below, a witness being cross-

examined on an affidavit has no obligation to seek further information in response to questions (i.e. to "inform" him or herself).

119 Where better evidence is available, it will be difficult to claim that the evidence meets the requirement of "necessity" for the admission of hearsay evidence based on the principled approach, which requires reliability and necessity: see *Polo Ralph Lauren Corp. v. United States Polo Assn.*, [2000] F.C.J. No. 1472 (Fed. C.A.) at para 10, (2000), 286 N.R. 282 (Fed. C.A.) [*United States Polo*]. Where such evidence is admissible, the "adverse inference" referred to in Rule 81(2) may affect the weight to be accorded to the affidavit: see *Lumonics Research Ltd. v. Gould*, [1983] 2 F.C. 360 (Fed. C.A.); *Tataskweyak Cree Nation v. Sinclair*, 2007 FC 1107 (F.C.) at paras 26-28.

### ***What was the Applicant's onus?***

120 Hughes states that in the context of expungement proceedings:

Throughout the proceedings, the onus lies on the party attacking the registration to show that it should be expunged; the mark is presumed to be valid; that presumption is not a strong one and simply means that some evidence must be lead which the Court must weigh.

[*Hughes on Trade Marks*, above, at p. 818, footnotes omitted]

See also Kelly Gill, *Fox on Canadian Law of Trade-Marks and Unfair Competition*, 4th ed (looseleaf) (Toronto: Carswell, 2002, updated January 2014) at 11-37-11-39 [*Fox on Trade-Marks*].

121 In *Bodum USA*, above, Justice Mosley expressed this burden as follows:

[20] A presumption of validity applies to the registration with the burden of proving the contrary resting on the opposing party based on the right to exclusive use set out in s 19 of the Act: *General Motors of Canada v Décarie Motors Inc*, [2001] 1 FC 665, 9 C.P.R. (4th) 368 (CA) at para 31. But the presumption is "weakly worded". It means simply that an application for expungement will succeed only if an examination of all of the evidence establishes that the trade-mark was not registrable at the relevant time: *Cheaptickets and Travel Inc v Emall.ca Inc et al*, 2008 FCA 50 at para. 12.

122 The *Cheaptickets* case referred to by Justice Mosley makes it clear that the presumption is a weak one indeed, adding little to the usual requirement for the attacking party to substantiate their case (*Cheaptickets*, above, at paras 10-12. See also *Apotex Inc. v. Canada (Registrar of Trade Marks)*, 2010 FCA 313 (F.C.A.) at para 5 [*Apotex (2010)*].

123 In the present matter, because of s. 17(2) of the Act, the Applicant's onus to establish its case includes the requirement to show that the Respondent had knowledge of the Applicant's use of a confusing mark when they adopted the Athletic Club Trade-mark: see *Bousquet v. Barmish*

*Inc.*, [1991] F.C.J. No. 813, 48 F.T.R. 122 (Fed. T.D.), aff'd [1993] F.C.J. No. 34, 150 N.R. 234 (Fed. C.A.). Hughes expresses this as follows:

Where it is alleged that a person applied to register a trade-mark used by another, proceedings to expunge on this basis must be brought within five years of registration, failing which, the party moving to expunge bears a burden of proving both use and knowledge of that use by the registrant at the time of application...

[*Hughes on Trade Marks*, above, at p. 606, footnotes omitted]

124 In some cases, the Court may be willing to infer such knowledge based on the facts established on the record, such as the Respondent's knowledge of the market and/or the prominence of the Applicant's trademark or trade name in that market: see *Bodum USA*, above, at para 153.

***Respondent's obligations to disclose information or documents and respond to questions posed during cross-examination on affidavits***

125 While the Applicant bears the onus to prove knowledge on the part of the Respondent of the prior use of a confusing mark, it is also necessary to consider what obligation, if any, the Respondent had to disclose information on this point during the course of the application.

126 Expungement proceedings can be pursued as an application or, if further relief beyond striking or amending the registration is sought, as an application or an action: Act, s. 58. Since the Applicant in this case seeks a prohibition on all future use by the Respondent of the Athletic Club Trademark, it would appear that both options were available.

127 The Applicant filed a notice of application rather than a statement of claim, which provides the benefit of a more expeditious proceeding, but it also means more limited opportunities to compel the opposing party to disclose evidence (*see Sierra Club of Canada v. Canada (Minister of Finance)*, [1999] F.C.J. No. 306 (Fed. T.D.) at para 14, (1999), 163 F.T.R. 109 (Fed. T.D.) [*Sierra Club*]). Thus, the Applicant "cannot expect to be able to make his case out of the mouth of the respondent": *Merck Frosst Canada Inc. v. Canada (Minister of National Health & Welfare)*, [1994] F.C.J. No. 662 (Fed. C.A.) at para 26, (1994), 169 N.R. 342 (Fed. C.A.) [*Merck (1994)*]; *Eli Lilly Canada Inc. v. Apotex Inc.*, 2007 FC 455 (F.C.).

128 Neither, however, is an applicant completely deprived of an opportunity to compel the opposing party to disclose documents or answer questions relevant to the issues and the evidence. It is true that a party cannot compel another party to file an affidavit: *Nourhaghghi v. Canada (Minister of Citizenship & Immigration)*, 2003 FC 1350 (F.C.) at para 20. However, should the responding party choose to introduce evidence by way of affidavits (which it may need to do in order to effectively respond to the application), the Rules provide an opportunity to cross-examine

on those affidavits (Rules 83 to 86), and to require affiants to produce certain relevant documents at those examinations (Rules 91 and 94).

129 Thus the Court must look at what answers the Respondent was required to give, on what basis, and what documents if any it was required to disclose.

*Obligation to answer fair and legally relevant questions within the scope of the cross-examination*

130 The scope of cross-examination on an affidavit has long been contentious, and the Court's answer to the question has varied over time (see *Maheu v. IMS Health Canada*, [2003] F.C.J. No. 902 (Fed. T.D.) at para 5, (2003), 234 F.T.R. 277 (Fed. T.D.) [*Maheu*]). Most often cited is Justice Hugessen's analysis in *Merck Frosst Canada Inc. v. Canada (Minister of Health)*, [1997] F.C.J. No. 1847 (Fed. T.D.) at paras 4-8, (1997), 146 F.T.R. 249 (Fed. T.D.) [*Merck (1997)*]:

[4] It is well to start with some elementary principles. Cross-examination is not examination for discovery and differs from examination for discovery in several important respects. In particular:

- a) the person examined is a witness not a party;
- b) answers given are evidence not admissions;
- c) absence of knowledge is an acceptable answer; the witness cannot be required to inform him or herself;
- d) production of documents can only be required on the same basis as for any other witness i.e. if the witness has the custody or control of the document;
- e) the rules of relevance are more limited.

[5] Since the objections which have given rise to the motions before me are virtually all based upon relevance, I turn, at once, to that subject.

[6] For present purposes, I think it is useful to look at relevance as being of two sorts: formal relevance and legal relevance.

[7] Formal relevance is determined by reference to the issues of fact which separate the parties. In an action those issues are defined by the pleadings, but in an application for judicial review, where there are no pleadings (the notice of motion itself being required to set out only the legal as opposed to the factual grounds for seeking review), the issues are defined by the affidavits which are filed by the parties. Thus, cross-examination of the deponents of an affidavit is limited to those facts sworn to by the deponent and the deponent of any other affidavits filed in the proceeding.

[8] Over and above formal relevance, however, questions on cross-examination must also meet the requirement of legal relevance. Even when a fact has been sworn to in the proceeding, it does not have legal relevance unless its existence or non-existence can assist in determining whether or not the remedy sought can be granted. (I leave aside questions aimed at attacking the witness's personal credibility which are in a class by themselves). Thus, to take a simple example, where a deponent sets out his or her name and address, as many do, it would be a very rare case where questions on those matters would have legal relevance, that is to say, have any possible bearing on the outcome of the litigation.

[emphasis added]

131 The Federal Court of Appeal has affirmed this decision without commenting on the proper scope of cross-examination on an affidavit (*Merck Frosst Canada Inc. v. Canada (Minister of Health)*, [1999] F.C.J. No. 1536, 249 N.R. 15 (Fed. C.A.)), and has cited these principles with approval on other occasions (see *Assoc. des Crabiers Acadiens Inc. c. Canada (Procureur général)*, 2009 FCA 357 (F.C.A.) at para 38; *Simpson Strong-Tie Co. v. Peak Innovations Inc.*, 2009 FCA 266 (F.C.A.) at para 8 [*Simpson Strong-Tie*]).

132 Justice Hugessen's description of "factual" relevance as "facts sworn to by the deponent and the deponent of any other affidavits filed in the proceeding" is broader than some earlier articulations (see *Goodwin v. Canada (Attorney General)* (October 6, 2004), Doc. T-486-04 (F.C.) [*Goodwin*] and *Merck (1994)*, above: matters arising from the affidavit itself as well as questions going to the credibility of the affiant), and narrower than others (see *Almrei, Re*, 2009 FC 3 (F.C.) at para 71: "cross-examination is not restricted to the "four corners" of the affidavit so long as it is relevant, fair and directed to an issue in the proceeding or to the credibility of the applicant"). However, there seems to be a consensus that "[a]n affiant who swears to certain matters should not be protected from fair cross-examination on the very information he volunteers in his affidavit," and "should submit to cross-examination not only on matters set forth in his affidavit, but also to those collateral questions which arise from his answers": *Merck Frosst Canada Inc. v. Canada (Minister of National Health & Welfare)*, [1996] F.C.J. No. 1038 (Fed. T.D.) at para 9, (1996), 69 C.P.R. (3d) 49 (Fed. T.D.) [*Merck (1996)*], quoting *Wyeth-Ayerst Canada Inc. v. Canada (Minister of National Health & Welfare)* (1995), 60 C.P.R. (3d) 225 (Fed. T.D.).

133 However the proper scope of cross-examination on an affidavit is defined, the affiant is required to answer fair and legally relevant questions that come within that scope (*Merck (1996)*, above).

*Obligation to fulfill undertakings, but no obligation to make them*

134 There is also an obligation to answer questions a party undertakes to answer during the course of the cross-examination (*Maheu*, above, at para 11; *Bruno v. Canada (Attorney General)*,

2003 FC 1281 (F.C.) at para 5 [*Bruno*]). However, the witness is under no obligation to make such undertakings, or to answer questions that were merely taken under advisement, as stated in *Bruno*, above, at para 5:

[5] As to the "undertakings" refused or taken under advisement at the cross-examination, it does not matter in my view whether a partial answer was later given or what reasons were given by the Respondents for refusing to provide answers. I subscribe fully to that part of the reasons for order given by Justice Hugessen in *Merck Frosst Canada Inc. v. Canada (Minister of Health)*, [1997] F.C.J. No. 1847, where he states as one of the distinguishing features between cross-examinations and examinations for discovery that "absence of knowledge is an acceptable answer: the witness cannot be required to inform him or herself". Undertakings are no more than an agreement by a party that it will inform itself in order to provide an answer to a question to which the witness does not know the answer. There is no obligation in the context of cross-examinations for a party to give any undertakings whatsoever. The person cross-examined on an affidavit is a witness, not a party. If, upon being cross-examined, his or her knowledge is found to be lacking, this may go to credibility, to the probative value of the evidence, etc., but it will not justify an obligation to give an undertaking. Of course, when a party, being under no obligation to give an undertaking, freely undertakes to provide further answers or documents, the undertaking must be honoured. But that is not the case for the specific "undertakings" under consideration.

[emphasis added]

135 Undertakings to disclose documents must also be honoured, and a response to a question taken under advisement can constitute an implied undertaking: *Autodata Ltd. v. Autodata Solutions Co.*, 2004 FC 1361 (F.C.) [*Autodata*].

#### *No obligation to seek out information*

136 As the above passage from *Bruno* also notes, an affiant "cannot be required to inform him or herself," in contrast to a deponent in an examination for discovery, who is obligated to seek out answers to relevant questions to which they do not know the answer. While there was some earlier jurisprudence to the opposite effect (see *Merck & Co. v. Apotex Inc.*, [1996] F.C.J. No. 405, 110 F.T.R. 155 (Fed. T.D.); *Bland v. Canada (National Capital Commission)*, [1989] F.C.J. No. 542, 29 F.T.R. 232 (Fed. T.D.); *Leesona Corp. v. Reliable Hosiery Mills Ltd.* (1974), 14 C.P.R. (2d) 168 (Fed. T.D.)), this now appears to be the established view: see *Bruno*, above, at para 5; *Maheu*, above, at para 8. The limitations of the affiant's knowledge may affect the credibility of their evidence or the weight given to it, but the witness cannot be compelled to find answers that are not within their knowledge: *Ward v. Samson Cree Nation No. 444*, [2001] F.C.J. No. 1383, 2001 FCT 990 (Fed. T.D.) at para 3; *Trevor Nicholas Construction Co. v. Canada (Minister of Public Works)*, [2008] F.C.J. No. 377, 2008 FC 306 (F.C.) at paras 33-34. "I don't know" is an acceptable response.

137 There has been some suggestion that an affiant who is an "agent" for a corporate party, rather than merely a "witness," might be required to seek additional knowledge: see *Royal Bank of Scotland plc v. "Golden Trinity" (The)*, [2000] 4 F.C. 211 (Fed. T.D.). However, this precedent has been described as specific to its context and has not been followed: see *Unitor ASA v. "Seabreeze I" (The)*, [2001] F.C.J. No. 681, 2001 FCT 416 (Fed. T.D.); *Fabi c. Ministre du Revenu national*, 2004 FC 439 (F.C.).

*Obligation to disclose documents in connection with a cross-examination*

138 Rule 91(2)(a) permits a party who intends to conduct a cross-examination on an affidavit to require the affiant, as part of the "direction to attend," 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" (emphasis added). The "possession, power or control" requirement relates to the individual affiant, not the party, though in the case of an affiant with a broad scope of authority within an organization, the scope of such a requirement may still be quite broad.

139 This disclosure obligation is subject to a motion for relief under Rule 94(2) "if the Court is of the opinion that the document or other material requested is irrelevant or, by reason of its nature or the number of documents or amount of material requested, it would be unduly onerous to require the person or party to produce it." The disclosure requirement has been interpreted fairly restrictively, including through a narrower interpretation of relevance (see *Apotex Inc. v. Eli Lilly & Co.*, 2005 FCA 134 (F.C.A.)), such that parties "cannot expect, nor demand, that the summary process mandated for applications will permit them to test every detail of every statement made in affidavits or in cross-examinations against any and all documents that may be in the opposing party's possession": *Simpson Strong-Tie*, above, at para 24.

140 While the Court has recognized that less formal communications between counsel in advance of the examination could have the same effect as a formal demand through the direction to attend, it has been consistent in insisting that the demand must be made in advance of the hearing. There is no mechanism for the Court to order disclosure of documents based on requests that are made at, or after, the cross-examination (see *Goodwin*, above; *Bruno*, above, at para 6), except perhaps where the questioning at the cross-examination lays a foundation for a claim that the documents should have been produced in response to the direction to attend (see *Simpson Strong-Tie*, above, at para 9). As Prothonotary Tabib explained in *Bruno*, above, at para 6:

[6] ... A party who fails to request production of documents prior to conducting a cross-examination must take the witness as he or she is and may not send the witness back to secure or produce documents which were not requested in a direction to attend or which the witness does not happen to have in his or her possession at the time of the cross-examination.

141 Nor is there any mechanism to require disclosure in advance of the cross-examination (rather than at the cross-examination), though cost considerations could arise where a party is "ambushed" with an excessive volume of documents at the cross-examination: *Sierra Club*, above, at paras 10, 14-16, 20.

*Summary of Respondent's disclosure obligations*

142 Based on the above analysis, it is my view that the Respondent's disclosure obligations, including the obligations of Chuck Kelly to respond to questions posed during cross-examination on his affidavit, can be summarized as follows:

1. Mr. Kelly was required to answer, at minimum, legally relevant questions arising from his affidavit or bearing on his credibility, and possibly questions arising from other affidavits filed in the matter or relevant to one of the legal issues;
2. Mr. Kelly was required to answer only based on personal knowledge, and had no obligation to "inform himself" by making inquiries of others connected to the Respondent's business;
3. The Respondent was required to disclose any relevant documents within Mr. Kelly's "possession, power or control" that were requested in advance through the direction to attend or equivalent communications between counsel; and
4. Mr. Kelly was required to fulfill any undertakings made at the cross-examination to answer relevant questions or disclose relevant documents, but had no obligation to make such undertakings or to answer questions merely taken under advisement.

*Cross examinations regarding the NUANS search and Prothonotary's order on Applicant's motion seeking further answers and disclosure*

143 At the first cross-examination of Mr. Kelly, on March 30, 2012, the Applicant's counsel presented "for identification purposes" a copy of the Articles of Incorporation of the Respondent's predecessor-in-title, The London Athletic Club Inc., along with an attached NUANS search listing similar business names. A NUANS search is a requirement prior to incorporation, to verify that the requested business name is available. After determining that Mr. Kelly had no recollection of having previously seen this document, the Applicant's counsel asked Mr. Kelly to undertake to verify whether the NUANS search and the Articles of Incorporation were the originals (i.e. true copies) of those documents. The response of the Respondent's counsel was somewhat ambiguous with respect to whether an undertaking was being made or the matter was being taken under advisement, but it is marked as advisement No. 7 in the transcript of the Cross-Examination and the Respondent's responses to undertakings: see Applicant's Record, Vol. 10, Tab 14, p. 3195 and Vol. 11, Tab 15, p. 3470. The relevant exchange was as follows:

**By Mr. Miller:**

Q. I am showing the Witness the original Articles of Incorporation and NUANS search for the London Athletic Club Inc. dated June 25th, 1997. I obtained it to try to expedite matters because otherwise I would have asked for an undertaking for its production, give the Witness the opportunity to review it. He has indicated to me that he has access to the records for the various clubs. "This" being the first. I would like to mark it as the second Exhibit.

Mr. Adams: Chuck, have you seen this before? Have you seen this Exhibit? Have you seen a document like this before go into the records?

The Witness: You know what, I am not saying I did not. It does not ring a bell looking at this.

Mr. Miller: That's fair. If you want to mark it for identification purposes today...

Mr. Adams: Yes.

Mr. Miller: ... that is fine. However, I am then going to ask for an undertaking that that in fact is the original NUANS search and Articles of Incorporation.

Mr. Adams: Yes. We will do that. We will take it under advisement and verify this.

144 The Respondent replied in its responses to undertakings that "whether or not the NUANS search shown for identification is the original cannot be verified by the Respondent..." and provided further information explaining this response. The full response was as follows (see Applicant's Record, pp. 3470-71):

- None of Alan Quesnel, David Wu, Chuck Kelly or any officers or directors of the Respondent, its predecessors in title or subsidiaries received a copy of or reviewed the NUANS search at the time of incorporation or before they or their companies began using the trademark THE ATHLETIC CLUB & DESIGN. Accordingly, whether or not the NUANS search shown for identification is the original cannot be verified by the Respondent, Alan Quesnel, David Wu, Chuck Kelly or any of the predecessors-in-title or subsidiaries. Furthermore, the minute books of The Athletic Club do not have any copies or originals of the NUANS search, so it could not be verified if the NUANS search submitted for identification is the original.
- Alan Quesnel and David Wu signed the Articles of Incorporation on the advice from their lawyer at the time when signing a variety of documents. The NUANS search was never brought to their attention.

- The Articles of Incorporation appear to be a copy of the originals and there is no reason to believe it is not a copy of the original.

145 The Applicant was dissatisfied with this response, and brought a motion seeking further answers and disclosure from the Respondent. The Applicant also sought authorization for the solicitor who filed the Articles of Incorporation to file an affidavit and to testify in court, and an order granting leave to serve a subpoena on that solicitor. Prothonotary Tabib dealt with this motion in an order dated August 10, 2012.

146 As to whether the Respondent had provided a proper response to the advisement/undertaking, and whether the Court should compel a further response from the Respondent or testimony or documents from the incorporating solicitor, Prothonotary Tabib provided the following analysis:

The Applicant does not like the inconclusive answer it got as to the conformity of the NUANS search. It likes the justification provided even less. It says the undertaking has not been fulfilled, and that Mr. Kelly should go back and seek other avenues of verification, namely, by asking Mr. Corrent or by obtaining his own copy from ONCORP or Service Ontario. It says that the justification should be struck, because it goes beyond what was asked and is self-serving.

I cannot agree. The request for an undertaking did not specify the means Mr. Kelly should use to effect his verification. To the extent the answer as provided is indicative of what Mr. Kelly has done, it would show that he has asked Mr. Quesnel, Mr. Wu and all other officers and directors of the relevant companies whether they recognized the NUANS search, and was advised that they had not seen it at the relevant time, were not made aware of it and did not get a copy of it. It would also show that Mr. Kelly reviewed the minute books of The Athletic Club and did not find the NUANS search. These two obvious modes of verification cannot be faulted. Nor can the answer, providing the result of these modes of verification, be faulted.

The first issue to be determined here, therefore, is whether the answer provided is sufficient, or whether Mr. Kelly should be required to make the further enquiries suggested by the Applicant in an attempt to verify the authenticity of the NUANS search.

Although a witness being cross-examined on an affidavit has no obligation to undertake to make enquiries to provide answers to which he or she does not know the answer, undertakings freely given must be honoured (see *Merck Frosst Canada Inc. v Canada (Minister of Health)*, [1997] FCJ No 1847, and *Autodata Ltd. v Autodata Solutions Co.*, 2004 FC 1361). That said, an undertaking, when given, does not bind the witness to provide an answer at all costs, but to take reasonable means to provide an answer. Where, as here, the parties do not stipulate or agree as to the steps the witness is to take in his or her efforts to provide an answer, what is reasonable in the circumstances must be ascertained on a case by case basis.

In the circumstances, I do not consider it reasonable to require the witness to make enquiries of third parties in order to ascertain the authenticity of the NUANS search. The NUANS search is not a document authored by the Respondent, or introduced by it as a basis for its defense. It is not even a document regularly introduced by the Applicant, the authenticity of which is spuriously contested by the Respondent. It was presented by the Applicant's counsel to the witness in the course of cross-examinations without prior notice, in an attempt to repair a perceived gap in its evidence. Even pursuant to an undertaking freely given, there are limits to a party's obligation to make enquiries and obtain information from sources outside its own organization to allow its opponent to verify or introduce evidence which it could have done independently.

[emphasis added]

147 Prothonotary Tabib appears to have been concerned not to impose obligations regarding responses to undertakings that were too disconnected from the principles that guide cross-examination on an affidavit to begin with. This seems a legitimate concern to me: if a party cannot compel an affiant to inform herself or disclose documents in response to questions asked at the cross-examination itself, does an undertaking (or an implied undertaking through a response) suddenly transform the process into full-blown discovery? At the same time, the jurisprudence outlined above is clear that parties must honour their undertakings to respond to questions or disclose documents. The *Autodata* case referred to (also decided by Prothonotary Tabib) provides the following analysis regarding how these competing considerations are to be balanced:

[17] The Applicant goes on to argue that it is not required to accept the Respondent's "bald" assertions in response to the undertaking that there has been no transfer of goodwill or intellectual properties, that it is entitled to test those assertions and that in so doing, disclosure of the entire share purchase agreement would provide clarification or lead to further areas of inquiry.

[18] The language of the Applicant's argument is the language of discovery. Certainly, if this proceeding were an action and the question had been posed in discovery, I would agree that the entire share purchase agreement is relevant, as it may lead to a train of further inquiry on relevant issues, and that a request for its disclosure is a proper follow-up request.

[19] However, a cross-examination on affidavit is not a discovery, and an application is not an action. An application is meant to proceed expeditiously, in summary fashion. For that reason, discoveries are not contemplated in applications. Parties cannot expect, nor demand, that the summary process mandated for applications will permit them to test every detail of every statement made in affidavits or in cross-examinations against any and all documents that may be in the opposing party's possession. If a party is not required to "accept" a witness' bald assertion in cross-examination, it is however limited in its endeavours to test that assertion

to the questions it may put to the witness and the witness' answers in the course of the cross-examination. To the extent documents exist that can buttress or contradict the witness' assertion, production may only be enforced if they have been listed, or sufficiently identified, in a direction to attend duly served pursuant to Rule 91(2)(c) (see *Bruno v. Canada (Attorney General)*, [2003] F.C.J. 1604). I reiterate: a cross-examination on an affidavit is the direct testimonial evidence of the witness, not a discovery of the party. Accordingly, counsel would be well-advised to approach a cross-examination on affidavit with the same circumspection as they would approach any cross-examination, lest they invite the same kind of "bald assertion" as the Respondent now bemoans, and be left having to attack the witness' credibility or the weight to be given to the testimony as the sole means of countering the assertion.

[emphasis added]

148 While rejecting the Applicant's assertion that the Respondent was obligated to make inquiries of its former solicitor to determine if the NUANS search presented for identification was a copy of the original, Prothonotary Tabib agreed with the Applicant that the Respondent's response put at issue whether the NUANS search was communicated to the Respondent's principals by that solicitor. She thus confirmed that privilege had been waived on this narrow point (though not with respect to any legal advice provided), and that further cross-examination could be conducted.

149 Regarding whether the Applicant should be permitted to file further evidence or compel the solicitor who handled the Respondent's incorporation to testify, Prothonotary Tabib found as follows:

Finally, that part of the Applicant's motion seeking to serve or file an additional affidavit from Mr. Corrent or adducing his evidence orally at the hearing must fail. A party may not split its case by adducing, after the start of cross-examinations, evidence which it could and should have adduced earlier (see *Atlantic Engraving Ltd. v. LaPointe Rosenstein*, 2001 FCT 1279, [2001] F.C.J. No. 1757 (Fed. T.D.)).

150 A further cross-examination of Mr. Kelly occurred on August 24, 2012. Mr. Kelly stated that he had asked Alan Quesnel and David Wu whether they had seen the NUANS search, and both indicated that they had not (Applicant's Record, p. 3513, question 966). He stated that he had verified that the NUANS search was not in the Respondent's minute books, but did not otherwise attempt to obtain a copy of the original search (*ibid*, questions 980-983). He did not contact the former solicitor (*ibid*, question 999), and did not attempt to obtain a copy from the Ontario Government Archives (*ibid*, question 1004).

151 The Applicant's counsel requested a number of undertakings, including whether Mr. Quesnel or Mr. Wu was generally aware at the time of the incorporation that a NUANS search was a requirement and whether they had previously incorporated any other companies. The Applicant also sought undertakings for the disclosure of a broad range of documents, including those signed

at the time of the incorporation of The London Athletic Club and each of the Respondent's other subsidiaries and the file of the solicitors who conducted the registration of the Trade-mark (who are also counsel in this matter), redacted to remove any legal advice provided.

152 The Respondent refused most of these undertakings, asserting that they were out of scope or not relevant, pertained in some cases to privileged information, and that there was no need for Mr. Kelly to conduct research for the Applicant. The Respondent did, however, provide a response to the question of whether Mr. Quesnel and Mr. Wu were generally aware of the requirement to conduct a NUANS search before incorporating:

No. Alan Quesnel and David Wu were not generally aware of the requirements of the NUANS Searches before incorporating. The NUANS Search referred to in the Order of August 10, 2012 was not communicated to the corporation or its principals or shareholders.

*Other evidence regarding the Respondent's prior knowledge of the Applicant or its trade-marks / trade name*

153 The disputed fact in question is whether the Respondent had prior knowledge of the Applicant and its trade-marks or trade name before adopting The Athletic Club Trade-mark. In this regard, Mr. Kelly stated the following in his second affidavit, sworn January 21, 2012:

19. When Alan Quesnel began using and licensing the use of the trade-mark THE ATHLETIC CLUB & DESIGN in 1997, he was not aware of the Applicant or any of the Applicant's trade-marks or trade-names. I am aware of this fact not only because Alan Quesnel has personally advised me but also because I was with Alan Quesnel the first time the Applicant and the Applicant's trade-marks and trade-names came to his attention.

154 Arguably, the only portion of this evidence that is admissible and could potentially be relied upon by the Court is Mr. Kelly's statement that he was "with" Mr. Quesnel when he learned about the OAC trade-marks and trade names. The admissibility of even this statement is questionable, and even if admissible its probative value is, in my view, almost zero.

155 The Court of Appeal in *United States Polo*, above, at paras 10-11 found that that trial judge erred in referring to and relying upon affidavit evidence based on information and belief where the necessity of using hearsay evidence rather than first-hand evidence was not established. While Mr. Kelly asserted in cross-examination that Mr. Quesnel was often out of the country, this is not a persuasive reason for why he did not file an affidavit. Based on the record, it seems clear that both Mr. Quesnel and Mr. Wu could have provided affidavits. As such, there was no necessity for Mr. Kelly to provide hearsay evidence about their knowledge or lack of knowledge of the Applicant and its trade-mark / trade name when they incorporated The London Athletic Club Inc. and began using the Athletic Club Trade-mark. The Respondent could have introduced first-hand evidence on this point had it chosen to do so.

156 Mr. Kelly attests that he was with Mr. Quesnel when the latter first learned of the Applicant's existence, but he does not tell us what facts led him to the conclusion that Mr. Quesnel was not previously aware of the Applicant. If it was a statement by Mr. Quesnel to this effect, this too would be hearsay and inadmissible. The fact remains that it is Mr. Quesnel's state of mind (whether he was learning of the Applicant for the first time) that is of interest in this scenario, and nothing Mr. Kelly says in his affidavit sheds any real light on that.

***Should an adverse inference be drawn?***

157 There is no question in my view that the Respondent declined to introduce the best available evidence regarding its principals' knowledge of the Applicant and its trade-mark / trade name at the relevant time (first-hand evidence from those principals themselves). It chose to rely instead on hearsay evidence from Mr. Kelly, who was not involved with the Respondent company at the time. This puts the Applicant at a disadvantage in terms of testing the Respondent's evidence. As became very clear during Mr. Kelly's cross-examinations, he had no personal knowledge on this point and could only relay the answers to the very narrow questions he had posed to Mr. Quesnel and Mr. Wu.

158 On the issue of the NUANS search specifically, the Respondent properly notes that this was not raised by the Applicant until the cross-examination of Mr. Kelly, when all of the evidence had already been submitted. As such, the Applicant cannot now complain that the Respondent did not enter first-hand evidence by Mr. Quesnel or Mr. Wu on that point.

159 The bigger problem for the Applicant, however, is that the Applicant bore the burden of proving that the Respondent had knowledge of the prior use of a confusing trade-mark or trade name. The Applicant has not provided any evidence — even weak evidence — that the Respondent knew of the Applicant's use of a confusing trade-mark or trade name when it adopted the Athletic Club Trade-mark in 1997. It did not introduce the NUANS search into evidence through its own affidavits, and did not request disclosure of the documents related to the 1997 incorporation through a Direction to Attend in advance of Mr. Kelly's cross-examination. In addition, it failed to present evidence that would allow the Court to infer from the context that the Respondent — which at the relevant time was opening a single facility in London, Ontario — must have been aware of the Applicant and its trade-mark or trade name (see *Bodum USA*, above, at para 153).

160 The authorities are clear in my view that while an adverse inference can strengthen weak evidence or turn a *prima facie* case into a conclusive one, it cannot enable the party bearing the burden of proof to overcome a complete lack of evidence on the point at issue. There must be a case to answer before the Respondent is required to introduce the best evidence or risk an inference that it does not favour their position: Tapper, above, at pp. 40-41; Keane, above, at pp. 14-15. The Applicant presented no case for the Respondent to answer on this point, and thus the Court is not entitled to draw an adverse inference. Having not presented any evidence of its own, the Applicant

should not be surprised that the Respondent chose not to put forward evidence by Mr. Quesnel and Mr. Wu on this question and subject them to the resulting cross-examination. It had nothing to gain by doing so.

161 The conclusion might be different if the Respondent had failed to comply with some disclosure obligation. However, the Applicant has not demonstrated that the Respondent failed to answer any question it was obligated to answer, or failed to disclose any document it was required to disclose. As a witness and not a party, Mr. Kelly was not required to inform himself for the purposes of answering questions on cross-examination. While the Respondent was required to fulfill undertakings made, it was under no obligation to make such undertakings. Prothonotary Tabib has already concluded that the Respondent reasonably fulfilled its undertaking to verify whether the NUANS search presented for identification was a true copy of the original, and I see no error in that conclusion. Even if this had been verified (for example, through the solicitor or from government archives), this would not add anything of substance to the evidence. The request for verification was an entry-point for the Applicant to ask follow-up questions about the Respondent's knowledge of the NUANS search. It has now asked those questions and come up empty.

162 Perhaps most crucially, the Applicant failed to follow the proper procedure to require the Respondent to disclose relevant documents in its possession in connection with Mr. Kelly's cross-examination. Mr. Kelly's affidavit put at issue the Respondent's prior knowledge of the Applicant and its trade name. Thus, it appears the Applicant would have been within its rights to demand, through the Direction to Attend, that the Respondent search its records for relevant documents, including any NUANS searches associated with its various incorporations. Having failed to do so, there was no mechanism for the Court to require such disclosures based on requests made at or after the cross-examination: see *Goodwin*, above; *Bruno*, above, at para 6.

163 I do not think, therefore, that the Court can draw a negative inference on the facts of this case. This leaves the Court to assess and balance the evidence available on point to decide whether knowledge should be imputed. This is no easy task. In *Bodum USA*, above, Justice Mosley could find imputed knowledge based upon an inference "from the evidence that Bodum corporate management, specifically Jørgen Bodum and Carsten Jorgensen knew of the previous use of the term when they adopted it as a trade-mark because of their knowledge of the marketplace and concerns expressed to Koen de Winter about the BonJour competition." In the present case, we can only speculate about what Mr. Quesnel and Mr. Wu knew about the Applicant and the marketplace, and there is no evidence about what someone said regarding competition. We also have Mr. Kelly's evidence that neither he, Mr. Quesnel, Mr. Wu, nor any officers or directors of the Respondent, its predecessors-in-title or subsidiaries "received a copy of or reviewed the NUANS search at the time of incorporation or before they or their companies began using the trade mark THE ATHLETIC CLUB & DESIGN," and that when "Alan Quesnel began using and licensing the use of the trade mark The ATHLETIC CLUB & DESIGN in 1997, he was not aware of the Applicant or the Applicant's trade marks or trade names." I agree with the Applicant that this kind of hearsay

response can carry little weight, but apart from the general assertion by the Applicant that someone in Mr. Quensel's position must have known about the Applicant, there is really nothing to support an imputed knowledge finding.

### ***Imputed Knowledge Through Lawyer/Agent***

*Can the solicitor's knowledge of the NUANS search be imputed to the Respondent's principals?*

164 In *Mah v. Wawanesa Mutual Insurance Co.*, 2013 ABCA 363 (Alta. C.A.) [*Mah*], the Alberta Court of Appeal observed that an agent's knowledge "is imputed to a principal by courts in two situations: when notice is given to its agent, or when the agent gained the knowledge in the course of his duties." The rationale for this rule was discussed by the Ontario Court of Appeal in *Durbin v. Monserat Investments Ltd.* (1978), 20 O.R. (2d) 181 (Ont. C.A.), at 183, (1978), 87 D.L.R. (3d) 593 (Ont. C.A.), at 595. The Court observed that the knowledge of an agent is normally imputed to his principal "based on the presumption that an agent will communicate his knowledge to his principal, because it is his duty to do so."

165 A second explanation for the rule is stated by Reynolds; namely, the identity of principal and agent, and the notion that "[a] principal should not be able by using an agent to put himself in a better position than that in which he would have been if he had dealt personally": F.M.B. Reynolds, *Bowstead and Reynolds on Agency*, 18th ed (London: Sweet & Maxwell, 2006) at 481-82.

166 As Reynolds points out, which principle is seen as the justification for the rule will affect its scope and the exceptions to it, and the cases can be difficult to reconcile (Reynolds, above, at 480-82).

167 Nevertheless, Fridman outlines the basic rule and its major exceptions as follows:

It may be crucial to the relations between a principal and a third party whether the principal was aware of particular information. In this respect it has been held that the knowledge of such information possessed by the principal's agent, whether as a result of notice to, or notification of the agent, or acquired by the agent by other means, may be attributed to the principal. In two situations, however, such knowledge will not be attributed to the principal. One is when the agent has been guilty of fraud or misfeasance *vis-à-vis* the principal. The other is when the third party with whom the agent dealt has notice that the agent will not in fact pass on such knowledge...

G.H.L. Fridman, *Canadian Agency Law*, 2d ed (Markham: LexisNexis Canada, 2012) at 216.

He later qualifies the scope of the rule somewhat as follows:

For the knowledge of an agent to be attributable to the principal, the knowledge must be relevant to the transaction in respect of which the agent is employed and there must be a duty on the agent to communicate the notice to his principal...

Fridman, above, at 218-19.

168 In this regard, it would appear that it makes no difference whether the agent received formal notification from another party or otherwise acquired the relevant knowledge in the course of completing the transaction for which they were engaged: Fridman, above, at 218, citing *Wilson v. Clarica Life Insurance Co.*, [2001] B.C.J. No. 2668, 36 C.C.L.I. (3d) 185 (B.C. S.C.), at 201, aff'd [2002] 11 W.W.R. 17 (B.C. C.A.); see also *Mah*, above, at para 13.

169 It is well established that this principle can apply to solicitor-client relationships: *Bank of Montreal v. Dresler*, 2002 NBCA 69 (N.B. C.A.) at para 66; *John M.M. Troup Ltd. v. Royal Bank*, [1962] S.C.R. 487 (S.C.C.); *Vescio v. Peterman* (1999), 45 O.R. (3d) 613, [1999] O.J. No. 4039 (Ont. C.A.); *Purdom v. Northern Life Assurance Co.*, [1928] O.J. No. 91 (Ont. C.A.) at paras 53-55, (1928), 63 O.L.R. 12 (Ont. C.A.), aff'd (1929), [1930] S.C.R. 119 (S.C.C.).

170 Neither the "fraud or misfeasance" exception nor the exception arising where the third party has notice that the agent will not pass the information on to the principal has any application here. However, questions arise from the qualifications that "the knowledge must be relevant to the transaction in respect of which the agent is employed and there must be a duty on the agent to communicate the notice to his principal."

171 With respect to the first proposition, Fridman cites *Krumm v. Shepard (Municipal District) No.220*, [1928] S.C.R. 487 (S.C.C.) [*Krumm*]. In *Krumm*, the Court imputed knowledge to a father that was acquired by his son in the course of carrying out the father's instructions to pay taxes on a parcel of land. The son paid the taxes on his father's instructions, but the municipality inferred that the land had been transferred to the son, and issued the receipt and subsequent assessments in the son's name. The son was aware of this, and the son's knowledge was imputed to the father. As such, the father's acquiescence to the assessment of the land in the son's name (and the sending of future notices to the son only) was inferred. After the father died, the son neglected to pay the taxes, and the municipality sold the land for back taxes, the father's estate sued the municipality, arguing that it had never received an assessment. The Court held that the son's knowledge of the change was a sufficient defence to the claim. Duff and Smith JJ expressed the matter as follows:

... Either the father assured himself personally in the usual way, by inspection of the notices, of the accuracy of the assessor's calculation... or... he left that business to the son. The son in either case would know, while, in the first case, both would have actual knowledge that the son was the person assessed. The son's knowledge being knowledge acquired in the course of the execution of his duty in this particular transaction, and being material to the transaction,

it must, for the purpose of considering the legal effect of the transaction itself, be imputed to the father...

[emphasis added]

172 By contrast, Reynolds cites the case of *Wyllie v. Pollen* (1863), 32 L.J. Ch. 782, 3 De G.J. & S. 596, 11 W.R. 1081 (Eng. Ch.) [*Wyllie*] for the proposition that a principal will not be deemed to have constructive knowledge of a fact known by the agent unless it is material to the transaction for which the agent was engaged, such that the agent had a duty to communicate it. Thus, where a solicitor acted for a transferee of a mortgage, that solicitor's knowledge that there were charges on title subsequent to that mortgage was not imputed to the principal, because it was not relevant to the transfer (see Reynolds, above, at p. 491).

173 The case of *Halifax Mortgage Services Ltd. v. Stepsky*, [1995] 4 All E.R. 656 (Eng. Ch. Div.) [*Stepsky*] illustrates the second proposition — that there must be a duty on the agent to communicate the notice to his principal. In *Stepsky*, a law firm represented both the borrowers (a husband and wife) and the lender in a second mortgage transaction. Much of the loan was used to pay the husband's business debts rather than for the stated purpose (to buy family shares in a business). The wife argued that her repayment obligations should be set aside because the solicitors knew this was the intended use of the funds and this knowledge should be imputed to the bank. The Court found that the solicitors' duty to withdraw from representation because a conflict had arisen between the interests of their joint clients superseded and prevented any duty to convey that information to the lender. As such, the knowledge could not be imputed to the lender.

174 *Magrath v. Collins*, [1917] A.J. No. 74 (Alta. S.C.) at para 5, (1917), 37 D.L.R. 611 (Alta. S.C.) states the positive form of this proposition: "that notice to an agent is notice to his principal whenever the agent is bound by his duty to his principal to communicate the notice to him." See also *Whitney v. Great Northern Insurance Co.*, [1917] A.J. No. 76, 32 D.L.R. 756 (Alta. C.A.), at 760; and *Wyllie*, above.

175 It seems to me that, in the present case, the Court must ask and decide whether the listing of the Applicant company's name in the NUANS search was material to the transaction for which the solicitor was engaged, and whether he had a duty to convey the information to the Respondent's principals or directors.

176 In my view, there is not sufficient evidence on the record to say that the information was material to the Respondent's incorporation or that such a duty arose, and therefore the Applicant has not established constructive knowledge. The solicitor was engaged to incorporate a company — The London Athletic Club Inc. — which at that time was to operate a single facility in London, Ontario. There is no suggestion that the existence of a company called the "Ottawa Athletic Club" posed any barrier to the incorporation of the Respondent's predecessor in title, The London Athletic Club Inc. The NUANS search the Applicants refer to listed a number of companies using a city

name or other descriptor along with the words "athletic club" in their name (see Exhibit 2 to Kelly Cross-Examination, Applicant's Record, Vol. 10 at pp. 3411-3415). Nor is there any information that the solicitor was asked to identify or anticipate any future problems that could arise with respect to trade-marks or trade names, either in London or with respect to any plans for future locations. In the absence of some evidence to the contrary, I conclude that the existence of a company with the name "Ottawa Athletic Club" was not material to the incorporation for which the solicitor was retained. This being the case, it is hard to see how the solicitor had a duty to specifically draw the Respondent's principals' attention to this information.

177 However, even if knowledge of the NUANS search can be imputed to the Respondent's principals or directors, concerns arise regarding whether this could be equated with knowledge of the previous use or making known of a confusing trade-mark or trade-name by another party, within the meaning of s. 17(2) of the Act. Simply put, even if knowledge of the NUANS search can be established or imputed, the search provides weak evidence regarding the Respondent's knowledge of the prior use of a confusing trademark or trade name. Companies exist that conduct no business. Businesses are carried out under names other than those on the corporate register. It may be that a NUANS search would reveal very little about the prior and current use of the names or trade-marks listed on it.

178 Perhaps the NUANS search would have indicated that further inquiries were warranted before adopting the Athletic Club Trademark. The Court's willingness in some cases to infer knowledge from the surrounding circumstances (see *Bodum USA*, above, at para 153) suggests that constructive knowledge may be enough to meet the knowledge requirement in s. 17(2) — i.e. that knowledge will be established where a party knew or ought to have known of the prior use of a confusing trademark or trade name — though there appears to be an absence of clear jurisprudence on the point. Thus, it is possible that constructive knowledge of the NUANS search (knowledge of the agent imputed to the principal) could constitute constructive knowledge of the prior use of a confusing trade-mark or trade name (in that the Respondent ought to have known or made inquiries).

179 There is little evidence or argument before the Court regarding what inferences can be drawn about knowledge of prior use of a confusing trade name based on knowledge of the NUANS search. Had the NUANS search been properly placed into evidence, it may be that the Court would have further evidence before it regarding the significance of that search and what it indicated or should have indicated to the Respondent. However, given my conclusion above it is not necessary to decide this question.

180 As the Applicant has not, in my view, established knowledge of previous use under s.17(2) of the Act, the five year limitation period in s. 17(1) prevails so that the Applicant cannot now allege invalidity under ss. 16(1)(a) and 16(1)(c).

***Clearly Descriptive or Deceptively Misdescriptive — s. 12(1)(b)***

181 The Applicant says that, in accordance with s. 18(1)(a) of the Act, the Athletic Club Trade-mark was not registrable at the date of registration because, contrary to s. 12(1)(b) of the Act, the Trade-mark was either clearly descriptive or deceptively misdescriptive in the English language of the character or quality of the wares and services in association with which it was used or proposed to be used. The Applicant also says that this ground of invalidity is not cured by the Trade-mark having become distinctive in accordance with s. 12(2) of the Act.

182 Section 12(1)(b) of the Act makes it clear that description or deceptive misdescription can occur as a result of the way a trade mark is "depicted, written or sounded." In the present case, we are dealing with a composite mark consisting of an oval design containing the words "The Athletic Club" in stylized form for which the words have been disclaimed. The Respondent does not wish to assert rights in the written words but does wish to protect the overall design, which it feels is distinctive.

183 As the Applicant points out, the *Best Western* case, above, established that where a composite mark, when sounded, contains word elements (even if disclaimed) that are clearly descriptive or deceptively misdescriptive, that mark will be unregistrable by virtue of s. 12(1)(b) if the words are the dominant feature of the mark. In fact, the Trade-Marks Office amended its Examination Manual to reflect this position as a result of the *Best Western* case. Justice Kelen affirmed and followed *Best Western* in *Canadian Jewellers*, both above.

184 The Respondent takes the position that the Athletic Club Trade-mark cannot be invalidated under s. 12(1)(b) because the word portion of the Trade-mark was disclaimed, the words are not the dominant feature, and the words are not, in any event, clearly descriptive or deceptively misdescriptive of the character or quality of the wares or services in association with which the Trade-mark is used. I don't think that any of these arguments can be sustained to save the Trade-mark.

185 Both of the Respondent's affiants confirmed in cross-examination that the sound of the Trade-mark was "the athletic club."

186 The Respondent argues that the word portion of the Trade-mark is not dominant and that it is the design as a whole that is distinctive. In my view, however, the Applicant is correct that the dominant and influential feature on first impression is the disclaimed words "The Athletic Club." There is nothing distinctive about the oval backer portion of the Trade-mark or the script to suggest that consumers would identify the Trade-mark by those design aspects rather than the words. The Respondent has disclaimed the words, but the words remain the dominant and influential feature of the Trade-mark. The oval and script do not stimulate visual interest in a way that removes visual

dominance from the words, and simply enclosing the words in a simple border cannot create a right to prevent others from doing so: see *Westfair Foods*, above, at para 20.

187 It is also my view that the words "athletic" and "club," based on dictionary definitions and the evidence of the Respondent's own affiants given in cross-examination, as well as the evidence of third-party usage adduced by the Applicant, are clearly descriptive of most of the services in association with which the Athletic Club Trade-mark is and has been used. The Federal Court of Appeal has provided recent guidance on the governing principles to be applied to this issue in *Ontario Teachers*, above, at para. 29.

[29] It is trite law that the proper test for a determination of whether a trade-mark is clearly descriptive is one of first impression in the mind of a normal or reasonable person. If such a person is unclear or uncertain as to the significance of the trade-mark in relation to the wares or services or if the trade-mark is suggestive of a meaning other than one describing the wares or services, then the word is not clearly descriptive. One should not arrive at a determination of the issue by critically analyzing the words of the trade-mark, but rather by attempting to ascertain the immediate impression created by the trade-mark in association with the wares or services with which it is used or proposed to be used. In other words, the trade-mark must not be considered in isolation, but rather in its full context in conjunction with the wares and services. In determining whether a trade-mark is clearly descriptive, one must also remember that the word "clearly" found in paragraph 12(1)(b) of the Act is there to convey the idea that it must be self-evident, plain or manifest, that the trade-mark is descriptive of the wares or services (see: *Hughes on Trade-marks*, 2d ed, loose-leaf (consulted on February 7, 2012), (Markham: LexisNexis, 2005), pp. 629-631 at para. 30; Milan Chromecek and Stuart C. McCormack, *World Intellectual Property Guidebook Canada*, (New York: Matthew Bender & Co. Inc.1991) at pp. 6-61 to 6-68; see also *Drackett Co. of Canada Ltd. v. American Home Products Corp.* (1968), 55 C.P.R. 29 at pp. 33-34 (Ex.Ct.) ("*Drackett*"); and *Molson* (FCA) at para. 30). Finally, the word "character" found at paragraph 12(1)(b) has been defined by the case law to mean a feature, trait or characteristic belonging to the wares or services (see *Drackett* at 34; *G.W.G. Ltd. v. Registrar of Trade-marks* (1981), 55 C.P.R. 2d 1 at 6; *Assoc'n of Professional Engineers of Ontario v. Registrar of Trade-marks* (1959), 31 C.P.R. 79 at 88).

In applying these principles to the present case, it is my view that the Athletic Club Trade-mark, when sounded, is clearly descriptive of the wares and services in association with which it is used.

188 The fact that some of the listed wares and services (eg restaurant and tanning services) are not necessarily connected to the athletic and physical fitness meaning of the words does not prevent invalidation under s. 12(1)(b). As discussed below in relation to s. 10 of the Act, these services, offered in the context of a facility such as those operated by the Respondent and the Applicant, fall within the commonly understood meaning of the term "athletic club." The case law is clear that the s. 12(1)(b) analysis is not an abstract exercise of determining whether the services

offered in connection with a trade-mark match the dictionary definitions of the component terms encompassed within the mark, but a contextual inquiry based on the immediate impression of the potential users of the service: see *Wool Bureau*, above, at paras 7, 11; *Mitel*, above, at paras 7, 18; *Riverside Paper*, above, at para 10; *Ontario Teachers*, above, at para 29.

189 In order to avoid the consequences of s. 12(1)(b), the Respondent alleges acquired distinctiveness as at the date of filing in accordance with s. 12(2) of the Act. The filing date is July 29, 2003.

***Relevant point in time for assessing acquired distinctiveness in relation to s. 12(1)(b) and 12(2)***

190 *Fox on Trade-Marks*, above, provides the following helpful description of the relevant dates for determining whether a trade-mark should be expunged, including the various sections of the Act to which these dates are relevant in the expungement context (at p. 11-34):

There are thus four primary dates that are relevant for expungement under the Trade-Marks Act, namely (1) the date of first use or making known in Canada of the registered trade-mark (s. 16(1)); (2) the date of filing the underlying application for the registration (s. 16(2) and (3)); the date of registration of the trade-mark (s. 18(1)(a)); and (4) the date on which proceedings bringing the validity of the registration into question are commenced (s. 18(1)(b) and (c)). In essence, however, it is the fourth date that is controlling, for the first three dates really refer to matters showing that, at the fourth date mentioned above, that is, the date of the application for expungement, the mark is wrongly on the register. But when expungement is sought on the ground that the trade-mark was not registrable at the date of registration, that date is critical and evidence that the mark has subsequently acquired distinctiveness sufficient to make it registrable under s. 12(2) is irrelevant. Evidence of registrability is relevant only as of the date of registration and the saving provision of s. 18(2) has no reference to distinctiveness acquired after that date.

[emphasis added]

191 The cases cited in support of the latter proposition — that the relevant date is the registration date — were decided under previous legislation: see *General Motors Corp. v. Bellows*, [1949] S.C.R. 678 (S.C.C.) [*General Motors*]; *Somerlite Ltd v Brown* (1934), 51 RPC 205, and *Shredded Wheat Co Ltd v Kellogg Co of Great Britain Ltd* (1940), 57 RPC 148. Thus, the language of the current statute and the cases interpreting it need to be taken into account.

192 The Court is empowered to expunge an entry in the Registry under s. 57 of the Act where the entry "does not accurately express or define the existing rights of the person appearing to be the registered owner of the mark."

193 The Applicant alleges that the entry does not accurately express the rights of the Respondent because the registration is invalid under s. 18(1)(a):

18. (1) The registration of a trade-mark is invalid if

(a) the trade-mark was not registrable at the date of registration,

[...]

[emphasis added]

194 The alleged reason the trade-mark was not registrable at the date of registration is set out in s. 12(1)(b):

12. (1) Subject to section 13, a trade-mark is registrable if it is not

[...]

(b) whether depicted, written or sounded, either clearly descriptive or deceptively misdescriptive in the English or French language of the character or quality of the wares or services in association with which it is used or proposed to be used or of the conditions of or the persons employed in their production or of their place of origin;

[...]

[emphasis added]

195 The so-called "saving provision," s. 12(2), reads as follows:

(2) A trade-mark that is not registrable by reason of paragraph (1)(a) or (b) is registrable if it has been so used in Canada by the applicant or his predecessor in title as to have become distinctive at the date of filing an application for its registration.

[emphasis added]

196 It is immediately apparent that the "saving provision" refers to only one date: the date of the application for registration of the trade-mark, in this case July 29, 2003. At the same time, reading s. 12(1)(b) in conjunction with s. 18(1)(a), it is clear that the relevant point in time for applying s. 12(1)(b) is "the date of registration."

197 Thus, it would appear that in an expungement proceeding under the current Act, there are two potentially relevant dates when non-compliance with s. 12(1)(b) is alleged:

1. The relevant date for determining whether a trade-mark was invalidly registered because it was "clearly descriptive or deceptively misdescriptive" of the products or services in

association with which it is used (i.e. the s. 12(1)(b) test) is the date of registration — here, February 22, 2005; or

2. To the extent that the "saving provision" is being invoked to argue that the trade-mark was registrable despite non-compliance with s. 12(1)(b) on the basis that it had been "so used in Canada by the applicant or his predecessor in title as to have become distinctive," the relevant date is the date of the application for registration — here, July 29, 2003: see *Bodum USA*, above, at para 18; *Cheaptickets*, above, at paras 20-21; *Candrug Health Solutions Inc. v. Thorkelson*, 2007 FC 411 (F.C.) at paras 24-25, reversed on other grounds by 2008 FCA 100 (F.C.A.) [*Candrug*].

198 It seems to me that the basic principle from *General Motors*, above, remains valid: use after the date of registration so as to make the mark distinctive is of no avail where the basis for the expungement is descriptiveness. However, under the current Act, "acquired distinctiveness" through use is to be assessed as at the date of the application for registration, not the date of registration itself.

199 This differs from the relevant point in time for assessing an alleged lack of distinctiveness under s. 18(1)(b), which is judged as of the date the expungement proceeding was initiated. However, s. 18(1)(a) provides a separate and distinct ground for expungement: see *Bodum USA*, above, at paras 147-148 and 150-151; *Cheaptickets*, above, at para 22; *Candrug*, above.

### ***Who has the onus in an expungement application?***

200 As pointed out elsewhere in this judgment, the party seeking expungement of a trade-mark generally bears the onus of demonstrating that the entry should be expunged from the Register. In relation to expungement on the basis that the mark was not registrable on the date of registration (that is, based on s. 18(1)(a)), *Fox on Trade-Marks*, above, states the following regarding the Applicant's onus (at pp. 11-39 - 11-40):

On an application to expunge on this ground, s. 54(3) states that registration of a trade-mark affords *prima facie* proof of the facts set out in a certified copy of the record of its registration. Therefore, a party seeking expungement of a registered trade-mark must adduce evidence that the trade-mark ought not to have been registered because, for example, it is not a trade-mark or that it falls within the exceptions of s. 12(1)(a) or (b)....

201 Does this mean that in addition to proving that the mark was "clearly descriptive or deceptively misdescriptive" within the meaning of s. 12(1)(b), the Applicant bears the onus of showing that there was no acquired distinctiveness through use in Canada as of the date of the application for registration, such that the saving provision in s. 12(2) does not apply? The language used by the Court of Appeal in dealing with this subsection of the Act in *Cheaptickets*, above —

an expungement case that dealt specifically with s. 12(1)(b) and 12(2) — suggests this may not be the case.

202 The Court in *Cheaptickets* spoke of s. 18(2) as providing a "defence" available to the trade-mark holder in an expungement proceeding, and seemed to portray s. 12(2) in similar terms. *Cheaptickets* was the trade-mark holder in that case, and Emall was the party seeking expungement. The Court responded to their arguments regarding s. 12(2) as follows:

[18] Emall argues that subsection 12(2) may be invoked during the process of trade-mark registration, but not during expungement proceedings. Emall submits that in expungement proceedings the relevant provision is subsection 18(2), which reads as follows (my emphasis):

18. (2) No registration of a trade-mark that had been so used in Canada by the registrant or his predecessor in title as to have become distinctive at the date of registration shall be held invalid merely on the ground that evidence of the distinctiveness was not submitted to the competent authority or tribunal before the grant of the registration.

...

18. (2) Nul enregistrement d'une marque de commerce qui était employée au Canada par l'inscrivant ou son prédécesseur en titre, au point d'être devenue distinctive à la date d'enregistrement, ne peut être considéré comme invalide pour la seule raison que la preuve de ce caractère distinctif n'a pas été soumise à l'autorité ou au tribunal compétent avant l'octroi de cet enregistrement.

19. Subsection 18(2) makes available to the holder of a registered trade-mark a specific defence in expungement proceedings which may come into play if the trade-mark has acquired distinctiveness by the time the registration process was complete, even if the Registrar of Trade-Marks was not given evidence of that fact.

20. The consequence of Emall's argument is that if *Cheaptickets* is unable to establish distinctiveness as of the completion of the registration process as contemplated by subsection 18(2), *Cheaptickets* would be barred from even attempting to establish distinctiveness as of the commencement of that process. Emall referred to no authority that would compel subsection 12(2) to be construed in such a limited fashion, and I see no reason to accept that interpretation. In my view, the existence of subsection 18(2) does not preclude *Cheaptickets* from invoking subsection 12(2) during expungement proceedings.

21. *Cheaptickets* is correct to say that Justice Strayer does not mention subsection 12(2). That may have been an error or oversight on his part, or it may indicate that he found subsection 12(2) not to be worthy of mention. In either case, the omission is inconsequential. The record discloses no evidence that is reasonably capable of supporting *Cheaptickets*' submission that

the trade-marks had acquired distinctiveness as of the date on which the applications for registration were filed.

[emphasis added]

203 It seems clear from this that the Court of Appeal did not find it appropriate to impose an onus on the party seeking expungement, *E-mail.ca*, to prove the negative — i.e. that distinctiveness had not been acquired through use as of the date of the application for registration. Rather, it found that it was open to the party opposing expungement to "invoke" s. 12(2) and to "[attempt] to establish distinctiveness as of the commencement of [the registration] process." It then found, in ruling against *Cheaptickets*, that there was no evidence on the record capable of establishing that such distinctiveness had been acquired. This seems more consistent with the view that should the Respondent want to "invoke" s. 12(2), it bears the onus of presenting evidence to show that distinctiveness within the meaning of that section had been acquired by the relevant date.

204 It could be argued that, where there is evidence both for and against such distinctiveness, ambiguity should still be resolved based on the presumed validity of the trade-mark. That is, while the Respondent would bear an "evidential" burden to show that there is some evidence reasonably capable of supporting acquired distinctiveness as described in the s. 12(2) saving provision, the overall burden of proof remains on the party seeking expungement, and ambiguity is to be resolved against them: see, in the trade-marks opposition context, *John Labatt Ltd. v. Molson Cos.*, [1990] F.C.J. No. 533, 36 F.T.R. 70 (Fed. T.D.), aff'd (1992), 42 C.P.R. (3d) 495, 144 N.R. 318 (Fed. C.A.), and *Cyprus*, above, at paras 26-28.

205 Be that as it may, the Federal Court of Appeal made it clear in *Cheaptickets*, above, that the presumption of the validity of a trade-mark was a weak one, and that whether the mark was to be expunged was a matter to be determined based on all of the evidence before the Court:

[12] The presumption of validity established by section 19 of the Trade-Mark Act is analogous to the presumption of validity of a patent in section 45 of the Patent Act, R.S.C. 1985, c. P-4. In *Apotex Inc v Wellcome Foundation Ltd*, [2002] 4 S.C.R. 153, Justice Binnie characterized that presumption as weakly worded, and he explained (at paragraph 43) that the presumption adds little to the onus already resting, in the usual way, on the attacking party. What that means, in my view, is that an application for expungement will succeed only if an examination of all of the evidence presented to the Federal Court establishes that the trade-mark was not registrable at the relevant time. There is nothing more to be made of the presumption of validity.

[emphasis added]

206 This was reiterated in *Apotex (2010)*, above, at para 5.

[5] Moreover, in *Emall.ca Inc. (c.o.b. Cheaptickets.ca) v. Cheap Tickets and Travel Inc.*, [2009] 2 F.C.R. 43, 68 C.P.R. (4th) 381 at para. 12 (C.A.), this Court held that the presumption of validity simply means that an application for expungement will succeed only if an examination of all of the evidence presented establishes that the trade-mark was not registrable at the relevant time. Glaxo does not suggest that the judge did not examine all of the evidence before arriving at his determination. Consequently, its argument cannot succeed.

[emphasis added]

207 In the present case, the Respondent offers the following evidence of distinctiveness as of the relevant date:

- (a) Displays of the Trade-mark both inside and outside of the Respondents' facilities at Brantford since November 2001, at London-North since 1997 and at London South since 2000;
- (b) Full coverage advertising since 1997 and before each facility above was opened; and
- (c) Newspaper advertisements in the *London Free Press* before July 24, 2003, and in *The Expositor* (Brantford) between July and December 2003.

208 As Justice Kelen pointed out in *Canadian Jewellers*, above, at para 75:

There has to be very strong evidence to show that the proposed trade-marks were distinctive at the time of the application. Subsection 12(2) of the Act is an exceptional provision which places a "heavy onus" on the applicant to demonstrate the proposed trade-marks' acquired distinctiveness: *Molson Breweries*, *supra*, at paragraph 53.

209 I have carefully reviewed the evidence for acquired distinctiveness under s. 12(2) offered by the Respondent and I do not think it meets the required standard. For example, the examples of advertising which appears at Exhibit 51 to Mr. Kelly's affidavit are highly problematic. The dates are handwritten and it is not clear whose handwriting this is or what the distribution was. Mr. Kelly could not provide clarification on these important matters. Further, the use of the Trade-mark on the advertisements for the London Community Health & Wellness Program is, essentially, use of the Trade-mark in association with the University of Western Ontario and the London Health Science Centre for a lecture series as part of a Free Access Community Program; it is not use of the Trade-mark in association with the wares or services for which it is registered.

210 In addition, the evidence of advertising expenditure during the relevant period appears to show approximately \$150,000, which is not significant in this context.

211 As regards the use of the Trade-mark inside and outside the Respondent's facilities, there is evidence that the Respondent has not consistently used "The Athletic Club" inside a black oval, or even inside an oval.

212 There are also significant omissions in the evidence that are normally used to demonstrate distinctiveness. For example, there is no survey evidence or consumer affidavits to support distinctiveness in the eyes of the consumer, and there is no evidence that the Respondent has ever attempted to police the rights to the Trade-mark.

213 There is also significant evidence of the use of "the athletic club" by third parties which makes it a generic term in the fitness industry. This was confirmed by the Respondent's witnesses in cross-examination. For example, when Mr. Kelly was presented with an article from the Montreal Gazette from 1991 which contained the words "I joined an athletic club with two thoughts in mind. The first was to get back in shape. The second was to lose weight," Mr. Kelly confirmed that this was not a reference to the Athletic Club and that "athletic club" merely meant a place of exercise. This means that the dominant aspect of the Athletic Club Trade-mark contains words from the common language, and this makes it even more important to provide strong evidence of distinctiveness for the relevant period.

214 The Respondent notes that the distinctiveness of a mark can be enhanced by promotion (*In-Touch*, above, at para 26), and points to a number of forms of promotion it has undertaken since the Trade-mark was first used in December 1997. These include display at its facilities, advertising in newspapers, magazines and on TV, its website, Facebook pages associated with each of its facilities, promotions at hockey games, merchandise, distribution of promotional materials through newspaper inserts, door hangers and direct mail, and advertisements shown in movie theatres. However, most of the evidence relating to these promotional activities relates to the period after the application for registration on July 29, 2003, and indeed after the registration itself on February 22, 2005.

215 For example, the Respondent lists advertising expenses associated with all facilities of approximately \$4.1 million over the period 2005 - 2010, and \$1.7 million over the one-year period from August 1, 2010 - July 31, 2011. This suggests the Respondent's level of advertising expenditure has grown as the number of facilities has grown, as one would expect. However, all of the above-noted expenditure occurred after the relevant period for the purposes of s. 12(2) of the Act. The Respondent says it spent \$9,600 advertising in the Guelph Expositor between July and December 2003, but this is a small figure and most of it would presumably have been spent after July 29, 2003.

216 It is clear that the Respondent did carry out some advertising in the *London Free Press* during the relevant period, despite the problems with the evidence in relation to that advertising that have already been observed. For example, a number of the "tear sheets" from those advertisements

include the full page upon which the ad appeared, including the date printed at the top of the page (see for example July 12, 19, and 26 and September 1, 13, 20, and 27 of 1999, February 12, 19 and 28, March 31, April 3, 17, and 27, May 1, 15, 23 and 29, June 1, 5, and 12, September 27 and November 6 of 2000, all in Respondent's Record, Vol. 5 at Tab 52). Thus, it appears that the Respondent did advertise with some regularity in the *London Free Press* during the relevant period. However, this in itself seems insufficient to establish distinctiveness either in London or the broader Canadian market, at least in the absence of evidence as to the effect of that advertising on awareness of the Respondent and its trade-mark, which has not been provided.

217 The examples provided of advertisements in *The Expositor* (Brantford) are relatively few in number and undated (see Respondent's Record, Vol. 4 at Tab 43). It is not clear that any of them relates to the relevant period.

218 The Respondent says it conducted "full coverage advertising" in each market prior to the opening of its facilities, both through newspaper advertisements and through means such as newspaper inserts, door hangers and direct mail. It says it has distributed "hundreds of thousands" of newspaper inserts, door hangers and direct mail advertisements. However, the examples provided of such materials are undated and the Respondent has not provided any evidence that they relate to the relevant period: Respondent's Record, Vols. 1-3, Tabs 23-36. The Applicant requested mailing lists, receipts, invoices etc. to verify whether any of these promotional efforts occurred in the relevant period, but the Respondent replied with only general statements in its responses to undertakings stating that it has "always" used such methods extensively and continues to do so (see Applicant's Record, Vol. 11, Tab 15, advisement #18 at p. 3477).

219 Mr. Kelly's affidavit says that the domain name for the Respondent's website was first registered on May 11, 2005, and Facebook did not exist prior to July 29, 2003, so it is clear that these promotional tools are not relevant to the s. 12 (2) analysis.

220 On the whole, then, it is my view that the Respondent has not established that the trade-mark had acquired distinctiveness for the purposes of s. 12 (2) by July 29, 2003.

221 As Justice Mosley pointed out in *Bodum USA*, above, at para 147, ultimately, "in assessing distinctiveness, the court must apply its own common sense to the evidence: *Candrug Health Solutions Inc. v. Thorkelson*, 2008 FCA 100 (F.C.A.) at paragraph 15." In my view, there is insufficient evidence in the present case to support the Respondent's claims for acquired distinctiveness under s. 12(2) of the Act.

222 The Respondent says that s. 12(1)(b) cannot be used to prevent parties from using the words "athletic club" in their trade marks because this would make all such marks unregistrable. I don't follow the logic of this argument. No one is prevented from using such words in their trade-mark provided they are disclaimed and the trade-mark is otherwise distinctive and is not prohibited by

any other section of the Act. The problem occurs, as here, when the words, although disclaimed, remain the dominant feature of a trade-mark that has no distinctiveness.

223 This means that I find the Applicant has established invalidity under s. 12(1)(b) and that the Athletic Club Trade-mark should be expunged.

***The Name of Services — s. 12(1)(c)***

224 The Respondent points out that, unlike s. 12(1)(b), s. 12(1)(c) does not include a sound requirement, which means that it is the trade-mark as a whole that must be considered, including all of the design elements. See *Alwar*, above, at paras 14-17. The Respondent says that the Athletic Club Trade-mark as a whole is not "clearly" the name of any of the Respondent's services because the Trade-mark is a design and the design elements are clearly not the name in any language of those services.

225 In the present case, there is a significant body of evidence to show that, for many years, including at the time of registration, numerous third parties have been using the words "athletic club" to describe the very services offered by the Respondent.

226 I have already found that the words "athletic club" are the dominant aspect of the Trade-mark and that the design elements do not have any distinctiveness. This means that the Respondent is, essentially, trading off the words "athletic club," even though those words were disclaimed in its trade-mark application.

227 As the Applicant points out, the Trade Marks Opposition Board decision in *Banco*, above, teaches that where the word portion of a composite trade-mark is the dominant feature, the composite trade-mark may be capable of contravening s. 12(1)(c), and did in that case:

[12] The word "bank" in the verbal sense is defined as follows:

3bank "vb-ED/-ING/-S vi 1 a: to keep a bank b: to carry out the business of banking  
2 a: to deposit money in a bank <a trip into town to shop and > b: to have an account  
with a bank or banker <the company s at the First National > vt 1; to deposit in a bank  
< your salary >

[..]

[14] It might be argued that it would be stretching a point to hold that the word "bank" and the expression "banking services" are synonymous but in consideration of the definitions in Webster's Dictionary, it would be an affront to credibility to conclude otherwise. Just as words such as "bakery" and "laundry" are wholly inseparable from the services performed in such establishments, so it is with "bank" and "banking", and while I realize that the English meanings given for the Spanish word "banco" in Cassell's Dictionary do not approach

in elaborateness the definitions appearing in Webster's Dictionary, nevertheless the word "banco" in for example the Spanish language is the equivalent of the word "bank" in the English language, and, as far as I am concerned, it is also the equivalent of the expression "banking services" in the English language.

[15] The applicant has argued that the allegation under the provisions of s. 12(1)(c) cannot succeed because the opponent has not presented the Registrar with evidence establishing that the word "banco" is primarily the name in the Spanish language for the English word "bank", and that nothing in the opponent's evidence qualifies affiant Hunt as an expert on the Spanish language or as a person knowledgeable in that language, but it does not seem to me that either of those arguments carries any weight whatever. In the first place, the applicant is not entitled to read into s. 12(1)(c) words that are not there and is certainly not entitled to transpose the provisions of s. 12(1)(b) into the provisions of s. 12(1)(c). Section 12(1)(c) does not require that the trade mark be primarily the name in any language of any of the services in association with which the mark is used or proposed to be used. The provisions of s. 12(1)(c) apply if the mark to be registered is simply the name in any language of the services in connection with which it is used or proposed to be used. As it happens, the word "banco" in Spanish like the word "bank" in English has several meanings, many of them entirely unrelated, but nevertheless the word "banco" in Spanish and the word "bank" in English are used to identify the sort of establishment known as a commercial bank or a savings bank as well as the services offered in such establishments, so that the allegation based on the provisions of s. 12(1) (c) is a very formidable one and the applicant has not succeeded in overcoming or disposing of it with respect to either of the trade marks that he has applied to register.

228 In the present case, it is my view that the words "athletic club" are entirely inseparable from the services being offered at the Respondent's establishments and at other athletic clubs, and that the design features are not sufficient to render the Trade-mark distinctive in a way that takes it outside the prohibition contained in s. 12(1)(c). While not all of the services offered by the Respondent would be called "athletic" if considered in isolation, they are the services of an "athletic club." Furthermore, s. 12(1)(c) prohibits the registration of a trade-mark where it is "the name in any language of any of the wares or services in connection with which it is used or proposed to be used" (emphasis added). "Athletic club" is the name of the Respondent's services considered in their context.

229 The effect of accepting the Respondent's arguments would be that a trader could obtain a monopoly in a generic description of services merely by disclaiming the words in question and then using them as the dominant feature in a design mark where the design is not distinctive. In my view, that would defeat the whole purpose of disclaimers.

230 In my view, then, the Applicant has shown that the Athletic Club Trade-mark, as of February 22, 2005, contravened s. 12(1)(c) and was, therefore, not registrable.

***Prohibited by s. 10***

231 The Applicant says that the Athletic Club Trade-mark is also invalid because, pursuant to ss. 18(1)(a) and 12(1)(e) of the Act, it contravenes s. 10 of the Act.

232 For ease of reference, s. 10 reads as follows:

10. Where any mark has by ordinary and *bona fide* commercial usage become recognized in Canada as designating the kind, quality, quantity, destination, value, place of origin or date of production of any wares or services, no person shall adopt it as a trade-mark in association with such wares or services or others of the same general class or use it in a way likely to mislead, nor shall any person so adopt or so use any mark so nearly resembling that mark as to be likely to be mistaken therefor.

10. Si une marque, en raison d'une pratique commerciale ordinaire et authentique, devient reconnue au Canada comme désignant le genre, la qualité, la quantité, la destination, la valeur, le lieu d'origine ou la date de production de marchandises ou services, nul ne peut l'adopter comme marque de commerce en liaison avec ces marchandises ou services ou autres de la même catégorie générale, ou l'employer d'une manière susceptible d'induire en erreur, et nul ne peut ainsi adopter ou employer une marque dont la ressemblance avec la marque en question est telle qu'on pourrait vraisemblablement les confondre.

233 The parties agree that the relevant date here is the date of adoption by the Athletic Club which is December 31, 1997.

234 The Respondent says that the Athletic Club Trade-mark cannot be invalidated under s. 10 because:

1. The Applicant has to show that it is the entire mark, including the design element, that is prohibited. A segment of a trade-mark is not a mark under s. 10 as trade marks are not to be dissected into their component parts. *Glenora Distillers*, above, at paras 23 and 24;
2. The Applicant has not provided any evidence to show that the "entire mark," including the design elements, would be prohibited by s. 10;
3. No evidence has been filed to show that even the word portion would designate the quality, quantity, destination, value, place of origin or date of production of any of the wares or services;
4. The words "athletic" and "club" have been disclaimed;
5. Section 35 of the Act provides some relief and permits "Athletic Club" to be part of the Respondents' Trade-mark; and

6. It cannot be the intention of section 10 to prohibit marks that contain the words "athletic club." This is contrary to the plain wording of the provision which states that "no person" shall adopt a prohibited mark as a trade-mark.

235 The Court must decide whether "athletic club" had at the relevant time become a mark that would trigger the s. 10 prohibition, and whether, in fact, the Respondent's adoption of its trade-mark was in violation of that prohibition. This is a crucial issue in the case since, in my view, the permanent injunction the Applicant is seeking would only be appropriate if the Trade-mark offends the s. 10 prohibition.

236 As discussed below, there are some problems with the Applicant's evidence of *bona fide* commercial usage establishing a prohibited mark under s. 10. However, based on the evidence as a whole, I find that this is established.

### ***Effect on disclaimer in relation to s. 10 of the Act***

237 Section 10 of the Act reads:

10. Where any mark has by ordinary and bona fide commercial usage become recognized in Canada as designating the kind, quality, quantity, destination, value, place of origin or date of production of any wares or services, no person shall adopt it as a trade-mark in association with such wares or services or others of the same general class or use it in a way likely to mislead, nor shall any person so adopt or so use any mark so nearly resembling that mark as to be likely to be mistaken therefor.

238 The Respondent says that s. 35 provides some relief against this provision, permitting the adoption of a mark that would otherwise offend it if the offending portion (here, the words) is disclaimed. Section 35 reads as follows:

35. The Registrar may require an applicant for registration of a trade-mark to disclaim the right to the exclusive use apart from the trade-mark of such portion of the trade-mark as is not independently registrable, but the disclaimer does not prejudice or affect the applicant's rights then existing or thereafter arising in the disclaimed matter, nor does the disclaimer prejudice or affect the applicant's right to registration on a subsequent application if the disclaimed matter has then become distinctive of the applicant's wares or services.

239 The Respondent says that the disclaimed portion is not to be considered when assessing the prohibition under s. 10, because otherwise s. 35 would serve no useful purpose. The Respondent cites *Jordan & Ste-Michelle (FC)*, above.

240 I have examined this case (discussed below), and while it does suggest that s. 35 (then s.34) disclaimers do have some relevance to the s. 10 analysis (a position with which I do not agree for

the reasons I have stated), I do not read the case as saying that the disclaimed portion of the mark must be disregarded for the purposes of the s. 10 analysis.

241 Section 10 itself says nothing about registration. It prohibits the adoption or use of certain trade-marks in the circumstances it describes. Disclaimers upon registration have no relevance to this. As Hughes points out, registration does not create rights to adopt or use a trade-mark so much as it serves as presumptive evidence that such rights exist:

It is not registration that makes a party proprietor of a trade-mark; he or she must be a proprietor *before* he or she can register... Registration creates a rebuttable presumption as to rights which can be displaced by other evidence, such as that of contractual obligation.

*Hughes on Trade Marks*, above, at p. 601.

242 Thus, it seems to me that whether one disclaims certain words when registering a trade-mark has no bearing on whether one had a legal right to adopt it in the first place.

243 The relevance of s. 10 in an expungement proceeding is that s. 12(1)(e) precludes the registration of a trade-mark the adoption of which is prohibited by s. 10. So, s. 10 in combination with s. 18(1)(a) and s. 12(1)(e) can serve as a basis for expungement.

244 At first glance, this may appear to make disclaimers relevant to the analysis, because they are relevant to the registration process. However, s. 12(1)(e) precludes the registration of a mark the *adoption* of which is prohibited by s. 10, and disclaimers on registration can have no bearing on whether adoption of the mark in the first place was prohibited by s. 10. To repeat, "[i]t is not registration that makes a party proprietor of a trade-mark; he or she must be a proprietor before he or she can register": *Hughes on Trade Marks*, above, at 601.

245 While it follows a different line of analysis than outlined above, I do not think *Jordan & Ste-Michelle (FC)*, above, supports the Respondent's position. The proposed mark in question in that case was BABY DUCK CANADIAN CHAMPAGNE, and the applicant for registration had disclaimed the words "Canadian champagne." The decision under review, which was upheld, was from the Trade Marks Opposition Board (see *Jordan & Ste-Michelle Cellars Ltd./Caves Jordan & Ste-Michelle Ltée v. Andres Wines Ltd.*, [1983] T.M.O.B. No. 97, 81 C.P.R. (2d) 230 (T.M. Opp. Bd.) [*Jordan & Ste-Michelle (TMOB)*]) and states at paras 9-10:

[9] ... [A]s s. 10 of the Act refers to the status of the mark prior to its adoption by the applicant and not to its status subsequent to its adoption, the evidence must establish that the mark CANADIAN CHAMPAGNE had become recognized in Canada as designating the kind, quality or place of origin of Canadian champagne as of the applicant's date of adoption, that is, the filing date of the applicant's proposed use application. In this regard, I am satisfied that the opponent has met this burden in the Browning affidavit and, in particular, para. 3

thereof, establishes that various companies have for many years utilized the words "Canadian champagne" to identify a particular type of wine which they have sold in Canada. Further, the Browning affidavit, which was not challenged or contradicted by the applicant, establishes that the words "Canadian champagne" have been generally accepted as identifying a sparkling wine of over 10% alcohol by volume and made primarily from Canadian-grown grapes and having an effervescence derived solely from the secondary fermentation of the wine in closed vessels. Thus, this description constitutes "in ordinary commercial terms" the type of wine which the applicant must be taken as intending to sell in Canada in association with its trade mark BABY DUCK CANADIAN CHAMPAGNE. In any event, the applicant has effectively conceded that Canadian champagne designates the kind of wares in association with which it intends to use its trade mark, having disclaimed the words "Canadian champagne" apart from the trade mark and having amended the statement of wares in its application to cover "Canadian champagne" which, having regard to s. 29(a) of the Trade Marks Act, constitutes a statement in ordinary commercial terms adopted by the applicant (effective as of the filing date of its application) of the specific wares in association with which it proposes to use its trade mark BABY DUCK CANADIAN CHAMPAGNE.

[10] With respect to the prohibition to the adoption of a trade mark under s. 10 of the Trade Marks Act, the trade mark sought to be registered must be either identical to the mark which designates the kind or quality of wares or must resemble that mark to such an extent as to be likely to be mistaken therefor. So far as the question of adoption of the trade mark is concerned, therefore, I do not consider that s. 10 could be relied upon to refuse a trade mark which, while confusing with a mark which designates the kind or quality of the wares, is neither identical to nor likely to be mistaken for such mark. Accordingly, s. 10 would not prohibit the adoption of a trade mark where the trade mark includes a word which either designates (or is likely to be mistaken for a mark which designates) the kind of wares, but where the trade mark as a whole would not be mistaken for such mark. In the present instance, I certainly do not consider that the applicant's trade mark BABY DUCK CANADIAN CHAMPAGNE would be likely to be mistaken for the mark CANADIAN CHAMPAGNE. Rather, the adoption by various Canadian wine producers of the words "Canadian champagne" in association with Canadian champagne would certainly alert the average consumer of the fact that there are various vintners who are producing Canadian champagne for distribution in Canada, such that the addition of the words "baby duck" to the words "Canadian champagne" by the applicant would, if anything, serve to distinguish the applicant's Canadian champagne from those of others, thereby avoiding any likelihood of the average consumer mistaking the applicant's Baby Duck Canadian Champagne in applied to Canadian champagne with the mark CANADIAN CHAMPAGNE in association with Canadian champagne.

246 It is clear that the TMOB did not disregard the disclaimed portion of the mark in assessing it for compliance with s. 10. Rather, the Board considered whether there was a "mark" that had "by

ordinary and bona fide commercial usage become recognized in Canada as designating the kind, quality... place of origin... [etc] of any wares or services," and found that the words "Canadian champagne" met these criteria. It then assessed whether the trade-mark proposed for registration was identical to that mark, or "so nearly [resembled] that mark as to be likely to be mistaken therefor." In making this assessment, the Board looked at the proposed trade-mark "as a whole," including the disclaimed portion. It compared "BABY DUCK CANADIAN CHAMPAGNE" to "Canadian champagne," and found that when considered as a whole, the former would not be mistaken for the latter.

247 Furthermore, the Board did not say that the disclaimer must be taken into account in the s. 10 analysis. Rather, it merely cited the disclaimer as evidence that the applicant for registration in that case had itself acknowledged that the words in question had come to designate, through ordinary commercial usage, the kind of wares in association with which it intended to use the proposed mark.

248 Upon review in this Court, Justice Cullen contrasted the prohibition set in s. 10 with that outlined in s. 9 of the Act, and took the view that disclaimers were relevant to the former but not the latter (*Jordan & Ste-Michelle (FC)*, above, at paras 7-13):

[7] ... Section 9 prohibits the adoption "... in connection with a business, as a trade mark or otherwise, any mark consisting of, or so nearly resembling as to be likely to be mistaken for ..." and then follow in subss. (a) to (o) the prohibited items. A mere sampling here will suffice to show the particular emphasis of s. 9, namely, The Royal Arms, Crest, or Standard; the arms or crest of any member of the Royal Family; the arms, crest, or flag adopted and used at any time in Canada or by any province; the heraldic emblem of the Red Cross, the Red Crescent or the Red Lion; any scandalous, obscene or immoral word or device; "United Nations"; R.C.M.P.

[8] This is a strong prohibitive section and in my view anyone endeavouring to use such a mark as part of an overall trade mark would not be successful nor permitted to use the disclaiming s. 34. I cannot imagine any examiner/Registrar telling an applicant, "The trade mark is acceptable but you must disclaim the right to the exclusive use of the words "United Nations", or "R.C.M.P."

[9] That is not the case, however, with s. 10 and if it were there would be no rationale for s. 34. Clearly, there are words that can be disclaimed and CANADIAN CHAMPAGNE is almost a text book case. Prior to the passage of s. 34 I am satisfied the respondent (applicant) could not have secured the trade mark BABY DUCK CANADIAN CHAMPAGNE. With s. 34 it is conceded by counsel for the respondent in the course of his argument that there is a whole series of trade marks possible using the words Canadian champagne. As examples, I believe he mentioned the following possibilities: Calonna Premium Vintage Canadian Champagne,

Andres Richelieu Canadian Champagne, Chateau-Gai Canadian Champagne, Jordan Gold Seal Canadian Champagne, and others.

[10] The arguments that s. 10 prohibits the adoption of the mark BABY DUCK CANADIAN CHAMPAGNE would certainly be applicable to CANADIAN CHAMPAGNE but not to the whole mark. The disclaimer section makes it possible to use a word or words that might otherwise be prohibited by s. 12(1)(b). This mark, BABY DUCK CANADIAN CHAMPAGNE, was adopted by the respondent (applicant) pursuant to s. 3 of the Trade Marks Act when it "filed an application for its registration in Canada".

[...]

[12] Certainly I can agree with the appellant that when considering the Trade Mark Register, there is a public interest in maintaining the purity of the Register. What is detrimental to the public interest here? If anything, the public is better informed because it knows which Canadian champagne it purchased.

[13] Also, certain marks should not enter the Register and I am referring for example to the prohibitions under s. 9. But s. 34 provides some relief from the provisions of s. 10 and therefore permits "Canadian Champagne" to be part of the mark.

[emphasis added]

249 As with the TMOB, the Court did not disregard the disclaimed portion of the mark in assessing it for compliance with s. 10. This is clear from the language of para 10:

The arguments that s. 10 prohibits the adoption of the mark BABY DUCK CANADIAN CHAMPAGNE would certainly be applicable to CANADIAN CHAMPAGNE but not to the whole mark.

250 Like the TMOB, then, the Court found that "Canadian Champagne" was a prohibited mark (and that the applicant for registration had conceded this through its disclaimer), but that the trade-mark applied for — BABY DUCK CANADIAN CHAMPAGNE — was not sufficiently similar to that mark to be mistaken for it. This was the basis of the Court's decision.

251 The Court also observed that without the disclaimer provision, a trade-mark would not be able to include the term "Canadian Champagne" even if the mark as a whole would not be mistaken that mark. The Court suggested that this would be a consequence both of s. 12(1)(b) (see para 10) and s. 10 (see para 13). In my view then, for the reasons outlined above, disclaimers are not relevant to the s. 10 analysis. The question is simply whether there is a prohibited mark that is so similar to the proposed mark that the latter would be mistaken for the former.

252 The discussion of disclaimers and their effect in *Fox on Trade-Marks* also seems at odds with the Respondent's position. It reads in relevant part (at pp. 6-11 - 6-12):

... [I]f an applicant disclaims all of the individual elements of a trade-mark, the trademark as a whole may still be registrable if the combination of elements is itself distinctive. In contrast, an applicant cannot avoid a determination that the subject trade-mark is deceptively misdescriptive by disclaiming that portion of the mark if it is the dominant feature.

[...]

...When determining if two marks are confusing, disclaimed matter must be taken into account, because the marks in question must be considered in their totalities. However, if the only similarity between the two marks is the disclaimed matter, the opposition will not succeed, since the purpose of the disclaimer is to otherwise permit other persons to use such independently non-registrable matter.

[emphasis added, footnotes omitted]

253 While these observations relate to distinctiveness and confusion, and not to s. 10 specifically, they underscore the point that the purpose of disclaimers is not to allow parties to adopt, use or register trade-marks that have no distinctiveness other than the disclaimed matter. Rather, the purpose is to permit the registration of distinctive trademarks (considered as a whole) that include some content over which the applicant cannot claim a monopoly of use: see *Café Suprême F. & P. Ltée c. Canada (Sous-procureur général)*, [1984] F.C.J. No. 42, 3 C.I.P.R. 201 (Fed. T.D.); *A. Lassonde Inc. c. Canada (Registraire des marques de commerce)*, [2000] F.C.J. No. 128 (Fed. T.D.) at paras 43-44, (2000), 180 F.T.R. 177 (Fed. T.D.); *Canadian Parking Equipment v. Canada (Registrar of Trade Marks)* (1990), 34 C.P.R. (3d) 154 (Fed. T.D.), at 161; *R.J. Reynolds Tobacco Co. v. Rothmans, Benson & Hedges Inc.* (1993), 47 C.P.R. (3d) 439 (Fed. T.D.).

254 Thus, in my view, the disclaimer of the words "athletic club" cannot help the Respondent to avoid the s. 10 prohibition if those words have "by ordinary and bona fide commercial usage" become a mark that designates a kind of wares or services in Canada within the meaning of s. 10, and if the Athletic Club trade-mark considered as a whole (including the disclaimed words) so closely resembles that mark as to be mistaken for it.

### ***Is the Athletic Club Trademark prohibited by s. 10***

255 In the present case, the "mark" that is alleged to have, by ordinary and *bona fide* commercial usage, become recognized in Canada as designating a kind of services is "athletic club." The trade-mark that must be compared to that "mark" is the words "The Athletic Club," along with the associated design features.

256 Thus, the Court must first determine whether the words "athletic club" meet the criteria to trigger the s. 10 prohibition. The parties seem to agree that of the list set out in s. 10 (kind, quality, quantity, destination, value, place of origin or date of production), only "kind" is relevant here. The Court must therefore determine whether the words "athletic club" have become a "mark" that designates a kind of wares or services within the meaning of s. 10 (a "designator mark"). If so, the Court must determine whether



**Graphic 4**

so closely resembles the mark "athletic club" that it is likely to be mistaken for it.

*Is "athletic club" a "mark" within the meaning of s. 10?*

257 Section 10 speaks of a "mark" that has come to designate a kind, quality etc. of wares or services, and prohibits the use of a trade-mark that so closely resembles that "mark" that it is likely to be mistaken for it. Assessing whether the words "athletic club" have become such a "mark" is complicated by the fact that the Act does not define the term "mark." In seeking to understand what is meant by the term "mark" in s. 10, it makes sense to look to the purpose of the provision and its place in the statutory scheme. However, there is some ambiguity in this regard as well.

258 *Fox on Trade-Marks* provides the following analysis regarding the purpose and scope of s. 10 (at p. 5-66.6):

This section replaces s. 13 of the *Unfair Competition Act* which was in similar terms but did not go quite so far. The prohibition against adoption in the *Unfair Competition Act* related to the symbols themselves. In the *Trade-marks Act*, the prohibition is extended to embrace any mark so nearly resembling such a prohibited mark as to be likely to be mistaken therefor. This section is obviously designed, as was its predecessor, to prohibit the adoption of such marks as the hall mark for silver and such other well-known marks indicative of quality or origin...

259 However, it is clear that the provision goes beyond marks "indicative of quality or origin," as the section by its terms also contemplates marks indicating the "kind,... quantity, destination, [or] value" of wares or services. Thus, the word "HALLOUMI," being indicative of a "kind" of cheese as a result of its common commercial usage in Canada, could not be the property (as a certification mark) of The Ministry of Commerce and Industry of the Republic of Cyprus: *Cyprus*, above. Section 10 functioned not to protect a hallmark or mark of quality or origin from commercial exploitation as a trade-mark, as suggested in *Fox on Trade-Marks*, but rather to protect existing commercial uses of the term "halloumi" from an attempted assertion of a monopoly on the rights to

use the term through the registration of a certification mark (see also *Unitel Communications Inc. v. Bell Canada*, [1995] F.C.J. No. 613 (Fed. T.D.) at paras 139, 178, (1995), 92 F.T.R. 161 (Fed. T.D.) [*Unitel*]: s.10 prohibits the adoption of a mark which has become generic "in the collective minds of the appropriate relevant universe").

260 The Court of Appeal in *Glenora Distillers*, above considered but did not conclusively decide what constitutes a "mark" protected under s. 10. The question there was whether the word "glen" was such a mark, such that the appellant's trade-mark "GLEN BRETON" would be prohibited (if likely to be mistaken for "glen") by s. 10. The Scotch Whiskey Association argued that the common use of the prefix "glen" in the names of scotch whiskeys, such as Glenfiddich, Glenmorangie and Glenlivet, meant that this word had come to designate a kind of whiskey (scotch), and the appellant's proposed trade-mark thus violated s. 10 of the Act. Incongruously, the Association had argued that their members were entitled to use the word "glen" in their trade-marks because they were distillers of genuine scotch whiskey. Sexton JA provided the following analysis for the Court:

[21] "Mark," as it appears in section 10, is not defined by the Act. A "trade-mark" is defined in section 2, in part, as "a mark that is used by a person for the purpose of distinguishing or so as to distinguish wares or services manufactured, sold, lease, hired or performed by him from those manufactured, sold, leased, hired or performed by others." The respondent argues that the term "mark" is clearly broader the term "trade-mark," and suggests that the word "glen," which forms part of many registered trademarks, can be considered on its own as a "mark" for the purposes of section 10.

[22] I agree with the first part of this argument, that a mark is not necessarily a trademark. *Fox on Trademarks* makes clear that a mark that is used for purely decorative or warehouse purposes will not be considered a trademark unless it has actually come to distinguish the trader of the goods (4th ed., looseleaf (Toronto: Thomson Carswell, 2002) at 3-14 to 3-16). For instance, a sticker affixed to a ware to indicate to warehouse employees the date of manufacture would most likely not fall within the definition of a "trade-mark." Likewise, a certification mark (a mark used to indicate that goods meet a defined standard, such as being "organic"), which may be used by many different traders, is a "mark" but not a "trade-mark," as it is not unique to any particular trader.

[23] However, this court has not been referred to any authority for the proposition that a segment of a trademark can stand alone as a mark. In my view, this would run counter to numerous authorities, albeit outside the context of section 10, stating that trademarks should generally not be dissected and analyzed syllable by syllable.

[emphasis added]

261 The term that is alleged to be a prohibited mark in the present case is "athletic club." The Applicant alleges that this term has been used as part of a number of trade-marks or trade names

in Canada, but it does not allege that "athletic club" was the entire trade-mark of these entities. It was a segment of their trade-marks or trade names. The Applicant also alleges that generic (or descriptive) uses of the term "athletic club" have helped to establish it as a "designator mark" (and thus prohibited mark) under s. 10. The above analysis seems to call into question whether either of these forms of commercial usage could establish a prohibited mark under s. 10.

262 The Court of Appeal's suggestion in *Glenora Distillers*, above, that segments of existing trade-marks cannot be stand-alone marks for the purposes of s. 10 is more than a passing reference, and could have important implications here. Thus, it requires careful consideration. In *Glenora Distillers*, the appellant, Glenora Distillers International Ltd [*Glenora*], was using the prefix "glen" in its trade-mark to evoke a similarity to scotch whiskeys, even though it was not permitted by the *Food and Drug Regulations* to label its product as "Scotch" because it was distilled in Canada. The Court of Appeal found that "it is fair to say that Glenora has marketed its product as being like a single-malt Scotch in everything but name" (para 6). The respondent Scotch Whiskey Association objected, claiming that "the use of 'glen'-prefixed marks in association with several well-known single malt Scotches... has resulted in an association between the word 'glen' and whiskies distilled in Scotland" (para 7).

263 The TMOB found that the word "glen" had not become a prohibited mark under s. 10 through ordinary and bona fide commercial usage, but Justice Harrington of this Court came to the opposite conclusion. He noted that glen-prefixed scotches made up 59% of the Canadian market for single-malt scotches, that there was confusion in the market whereby Glen Breton was perceived to be a Scotch whiskey, and that this confusion was due to the use of the word "glen" in Glenora's trade-mark.

264 The Court of Appeal overturned this decision, finding at paras 17-19:

[17] I am of the view that Justice Harrington made an error of law by failing to consider whether the word "glen," having only previously been used as part of various registered trademarks, is in fact a "mark" within the meaning of section 10 of the Trade-marks Act...

[18] In its memorandum of fact and law, the Association suggests that Justice Harrington held, at paragraph 16 of his reasons, that "Glen, as a mark, has become recognized as designating Scotch whisky in Canada." However, he did not address specifically the argument that "glen," being only a segment of the mark GLEN BRETON, and only a segment of any registered trademark (e.g. GLENFIDDICH) was not in itself a mark. He stated only that:

I am, therefore, satisfied that Glen Breton is not registrable under section 12(1)(e) of the Act because its adoption is prohibited by section 10 as no person shall adopt a mark as a trade-mark if it has by "ordinary and bona fide commercial usage become recognized in Canada as designating the...place of origin...of any wares...of the same general class."

[19] There was no express finding that "glen" was a mark, and no evidence has been shown to us that would justify such a finding.

[emphasis added]

265 The Court of Appeal later concluded that "the word 'glen' has not been shown to constitute a mark within the meaning of section 10 of the Trade-marks Act, and therefore cannot be prohibited" (para 28).

266 In reaching this result, the Court of Appeal considered the meaning of the term "mark" as quoted above, concluding that the proposition that a segment of a trade-mark can stand alone as a "mark" was "counter to numerous authorities, albeit outside the context of section 10, stating that trademarks should generally not be dissected and analyzed syllable by syllable" (para 23). After discussing two such authorities (*Thomas J. Lipton Ltd. v. Salada Foods Ltd. (No. 3) (1979)*, 45 C.P.R. (2d) 157 (Fed. T.D.) and *Park Avenue*, above, the Court concluded that:

[26] While neither of these cases deal directly with section 10 of the Act, in my view, the same essential logic applies, and it would be improper for this court to segment the previously registered marks, or the appellant's mark GLEN BRETON, as the respondent suggests. First, these authorities disclose a broader pattern of the courts refusing to dissect trademarks as part of a registrability analysis, which is itself persuasive. Further, the reasoning of *Park Avenue* is compelling. The word "glen," being a common word and forming part of numerous registered trademarks, is at best a weakly distinctive component of those trademarks. However, by segmenting those trademarks to consider "glen" as a mark on its own, this court would be affording stronger trade protection to that word than is due.

[emphasis added]

267 The Court then provides an alternate basis — albeit still connected to the principles that trade-marks should be considered in their totality and not dissected — for its conclusion that the Glen Breton trade-mark was not prohibited. Namely, it agreed with the TMOB that even if "glen" *was* a prohibited mark, it did not so dominate the trade-mark Glen Breton that the latter would be unregistrable (see paras 27-28). This issue will be dealt with below. Presently, I am concerned with a different question: is "athletic club" a "mark" such that it can be prohibited by s. 10 to begin with.

268 Read broadly, *Glenora Distillers* could be taken as authority for the proposition that the ordinary and bona fide commercial usage that leads to a mark being a prohibited mark under s.10 must be use *as a trade-mark* (not generic or descriptive use) and in fact must be use *as the entire trade-mark*. Commercial use of a term as a portion or segment of a trade-mark could not invest that term with the necessary "designating" force to become a prohibited mark under s. 10. If accepted, such a proposition would have important implications here, since the term "athletic club" has been used commercially both in a generic (or descriptive) sense and as part of the trade-marks of other

fitness facilities, but has not (at least until its adoption by the Respondent) been used as the entire trade-mark of any of those facilities.

269 Upon closer analysis, however, it is my view that this cannot be the intended result of *Glenora Distillers*, as it would lead to a logical inconsistency in the Court of Appeal's reasoning.

270 As the Court of Appeal observed, the case before it was somewhat unusual. All of the cases to which it had been referred for authority concerned the prohibition of particular words or phrases that were "inherently descriptive of the character or quality of the products being sold" (para 30). The Court discussed a couple of examples:

[30] ... For instance, in *Bank of Montreal v. Merrill Lynch & Co. (1997)*, 84 C.P.R. (3d) 262, the Trade-marks Opposition Board held that CASH MANAGEMENT ACCOUNT was prohibited in association with financial services, as it was commonly understood as "designating a type of financial service through which one can consolidate and manage cash investments and credit through one account." (at page 275)

[31] Similarly, the Board held that HABANOS was a prohibited mark for tobacco products, as it resembled the marks HABANA and HAVANA commonly used by traders and understood, among other uses, as designating Cuban tobacco by reference to Cuba's capital (*Benson & Hedges (Canada) Ltd. v. Empresa Cubana Del Tabaco (1975)*, 23 C.P.R. (2d) 274)...

271 The Court also observed that:

[32] Naturally, it would be possible for a mark that is not inherently descriptive of any quality of a product, through ordinary and bona fide commercial usage, to become a designator mark...

272 The Court observed a difference between these cases and the one before it. In cases such as *Merrill Lynch* and *Empresa Cubana*, both above, it found that "section 10 prevents a single trader from having a monopoly over a mark that is common to the trade and well-understood as designating a particular quality of wares or services" (para 31). By contrast, in the case before it, the Scotch Whiskey Association was (at para 32):

... essentially seeking to establish a monopoly over a word, which is not inherently descriptive, for a group of traders (namely, its members), when it is not clear that any of the Association's members incorporated the word into their trademarks for the purpose of designating their whiskies as being from Scotland.

273 The Court of Appeal rejected the Association's argument that if glen-prefixed marks were prohibited by s. 10, the Association's members could continue to use their own glen-prefixed trade-marks because they were genuine Scotch whiskey distillers. The Court found that this was

"completely contrary to the plain wording of the provision, which states that 'no person' shall adopt a prohibited mark as a trademark" (para 33). It was in this context that the Court observed:

[34] In short, [the Respondent's] success in this appeal would jeopardize the trademarks of many of the Association's members. In my view, this cannot be the correct result, and is not true to the spirit and purpose of section 10 of the Act. Accordingly, I would allow the appeal, and direct the Registrar to allow Glenora's application for the registration of GLEN BRETON.

274 In other words, as the Court of Appeal recognized, accepting that "glen" was a prohibited mark, did not necessarily mean that "glen-prefixed" marks would be prohibited (see paras 27-28) — the result which the Court of Appeal found could not be correct because it was contrary to "the spirit and purpose of section 10 of the Act." The same can be said in the present case. Even if "athletic club" is a prohibited mark, it may not dominate any of the trade-marks of the Respondent's competitors such that further use of those marks would be prohibited.

275 By contrast, the broad reading of *Glenora Distillers* identified above — that only use *as a trade-mark* and in fact only *use as the entire trade-mark* can lead to a mark becoming a prohibited mark under s. 10 — would lead inexorably to this result wherever a prohibited mark is found to exist. Designator marks could only be established through the commercial use of trade-marks whose further use would be prohibited as soon as such a designator mark is found to exist, because they would be identical to the prohibited mark. This would be an absurd result in my view, and cannot be right, as the Court of Appeal recognized.

276 As the Court of Appeal observed, *Glenora Distillers* was an unusual case, and the principle that the trade-mark segment "glen" could not be a stand-alone "mark" for the purposes of s. 10 must be read in that context. It had no inherent descriptive meaning, and while strongly associated with scotch whiskeys, had not been adopted by the Association's members for the purpose of designating that origin. It simply did not have a sufficiently strong or distinctive meaning standing on its own to be a designator mark for the purposes of s. 10. Segmenting the trade-marks that had led to its association with scotch in order to consider "glen" to be a mark on its own "would be affording stronger trade protection to that word than is due" (para 26).

277 By contrast, as the Court of Appeal noted, most of the s. 10 cases have dealt with terms that were inherently descriptive of the character or quality of the products or services being sold (para 30), and courts have been more willing to recognize such terms as designator marks. In my view, if "Canadian champagne" can designate a kind of wine for s. 10 purposes (*Jordan & Ste-Michelle (FC)*, above, at para 10), "HALLOUMI" can designate a kind of cheese (*Cyprus*, above), and "CASH MANAGEMENT ACCOUNT" can designate a kind of financial service (*Merrill Lynch*, above) within the meaning of s. 10, there seems no *prima facie* reason why "athletic club" could not come to designate a kind of fitness services if, on the facts, it has through *bona fide* commercial usage come to designate those services.

278 Furthermore, in my view these cases show that generic (or descriptive) uses of a term or its use as *part of* a trade-mark can contribute to its establishment as a designator mark through ordinary and *bona fide* commercial usage. I have no doubt that "cheddar" and "Scotch" would be prohibited marks for the purposes of s. 10, despite the fact that no one uses those terms in and of themselves as a trade-mark in relation to the products commonly understood to be described by those words. Indeed, the very meaning and import of s. 10 is that no one can. It "prevents a single trader from having a monopoly over a mark that is common to the trade and well-understood as designating a particular quality [or I would add kind] of wares or services" (para 31).

*Does the evidence establish that "athletic club" is a "mark" that designates a kind of services under s. 10?*

279 The evidence required to show that a term has become a designator mark under s. 10 has been described in various ways. In *ITV Technologies*, above, Justice Tremblay-Lamer found at para 88 that:

*ITV Technologies'* third ground with respect to registrability is based on paragraph 12(1)(e) and section 10 of the Act. Pursuant to section 10, a mark may become a prohibited mark if as a result of ordinary and bona fide commercial usage, it has become recognized in Canada as designating the kind, quality, quantity, destination, value, place or origin or date of production of any wares or services. The statutory prohibition requires that the use of the mark in question be in Canada and that the mark must have been commonly used in Canada at the relevant time as designating an aspect of the wares or services which are the subject of the mark (*Unitel Communications Inc.*, supra).

280 The statutory prohibition requires that the use of the mark in question be in Canada and that the mark must have been commonly used in Canada at the relevant time as designating an aspect of the wares or services which are the subject of the mark (*Unitel*, above).

281 In *Unitel*, above, Justice Gibson saw the question as whether "the trade marks at issue had become generic at the date of its registration in the collective minds of the appropriate relevant universe" (para 178), meaning "a generic term in respect of the goods or services to which the use has related." Justice Gibson relied upon *Ciba-Geigy Canada Ltd. v. Apotex Inc.*, [1992] 3 S.C.R. 120 (S.C.C.) in finding that the relevant "universe" of persons for determining this question was made up of the end users of the product or service in question (see para 105).

282 In *Cyprus*, above, both this Court and the Federal Court of Appeal found no error in the TMOB's formulation that the evidence showed that "there has been bona fide commercial usage of the Mark or similar terms such that it is recognized in Canada as designating a kind of cheese": see *International Cheese Council of Canada v. Republic of Cyprus (Ministry of Commerce, Industry & Tourism)*, [2008] T.M.O.B. No. 99 (T.M. Opp. Bd.) at para 30, *International Cheese Council*

*of Canada v. Republic of Cyprus (Ministry of Commerce, Industry & Tourism)* (2008), 70 C.P.R. (4th) 430 (T.M. Opp. Bd.), app'd 2010 FC 719 (F.C.) at paras 51-58, 2011 FCA 201 (F.C.A.) at para 24 (emphasis added). In this Court [*Cyprus (FC)*] Justice de Montigny stated at paragraph 54 that the opponents to registration had to:

... demonstrate that the Mark (or any other mark "so nearly resembling that mark as to be likely to be mistaken therefor", to use the language of section 10) was used extensively in Canada by others prior to the relevant date to designate a type of cheese, and that the Mark had an accepted definition or meaning in the industry: see *Sealy Canada Ltd. v. Simmons I.P. Inc.* (2005), 47 C.P.R. (4th) 296, at paragraphs 35 to 37 (T.M.O.B.).

At paragraph 57 he framed the burden as:

... establishing that the term "halloumi" or terms so nearly resembling it as to be likely to be mistaken therefor, was used extensively in Canada by others to designate a type of cheese.

Justice de Montigny elaborated at paragraph 58:

... [T]he applicable criterion is not quantitative but qualitative. What the opponents had to establish was that the term "halloumi" had by ordinary and bona fide commercial usage become extensively recognized in the industry.

283 I adopt Justice de Montigny's framing of what must be established. The term "athletic club" will be a prohibited mark under s. 10 of the Act if, at the relevant time that term, or terms so nearly resembling it as to be likely to be mistaken therefor, had been used extensively in Canada by others to designate a type of physical fitness services or facilities, and if the term has an accepted definition or meaning in the industry.

284 In the trade-mark opposition context that arose in *Cyprus*, the opponent had only an initial burden to establish a *prima facie* case on this point, whereupon the burden shifted to the applicant for registration to show that the proposed trade-mark was not a prohibited mark under s. 10: *Cyprus (FC)*, above, at para 53. That is not the case here, where the party seeking expungement bears the burden of proof throughout. However, Justice de Montigny's framing of what is ultimately to be determined (irrespective of who bears the onus) applies equally in this context.

285 The Applicant has put forward several forms of evidence in an effort to establish that, by December 1997 when the Respondent first adopted the Athletic Club Trade-mark, the words "athletic club" had by ordinary and bona fide commercial usage, become recognized in Canada as designating a kind of services.

#### *Evidence from Cross-Examinations*

286 First, the Applicant points to responses to questions by the Respondent's witnesses — Chuck Kelly and Alex Hunt — during cross-examination on their affidavits, which appear to acknowledge that the term "athletic club," in addition to forming a part of the Respondent's corporate name and Trade-mark, is also a descriptive term used to refer to facilities similar to those operated by the Respondent.

287 Alex Hunt, a private investigator who filed an affidavit on the Respondent's behalf, acknowledged that: "an athletic club" or "athletic clubs" would typically offer fitness training, weight training, aerobics, personal training and would typically conduct exercise, fitness, aerobic and dance classes; the sale of power bars, power drinks and other health foods to supplement workouts is "something you see" in such facilities; the "bigger ones" often sell sporting goods and clothing and have snacks for sale; and fitness assessments are offered for a fee at such facilities: see Cross-Examination of Alex Hunt, Applicant's Record, Vol. 10, Tab 12, questions 32, 37-40, 93.

288 Chuck Kelly acknowledged that: "some of" the services offered by the Respondent in its facilities fit with the dictionary definitions of "athletic" and "club"; one of the dictionary definitions of "club" referred to by the Applicant specifically mentions "athletic clubs"; a reference to an "athletic club" in a 1991 Montreal *Gazette* article presented by the Applicant was referring to "a place to exercise"; there are other "athletic clubs" in Canada that offer services such as fitness assessments, restaurant services, a snack bar, dance classes, and selling of sporting goods, health foods and supplements; in 1996, there were athletic clubs that offered dance classes; members of The Athletic Club use those facilities primarily for exercise and socializing; one of the things the Respondent is trying to project with its Trade-mark is fitness; and there are a lot of companies in Canada other than the Respondent that use the words "athletic club" in their name: see Cross-Examination of Chuck Kelly, Applicant's Record, Vol. 10, Tab 14, questions 313-319, 343-345, 378, 384-385, 410, 509. Elsewhere in the same cross-examination, Mr. Kelly claimed that the terms "fitness club" or "health club" would be more commonly used as descriptive terms by third parties to refer to facilities offering the types of services offered by the Respondent, and he identified massage and retail services (beyond "minor" retail) as two services offered by the Respondent that would not fit with the dictionary definitions of "athletic" and "club": see *ibid*, questions 316-319, 499.

289 While not irrelevant to the question of whether the words "athletic club" had by December 1997 become a mark that designated a kind of services, these responses are not strong evidence for that proposition either. They do seem to constitute an acknowledgement by these two witnesses that the term "athletic club" has at least to some degree become generic, and would be understood to encompass many of the services offered by the Respondent. However, the relevant "universe" whose opinion matters for present purposes are the end users (or potential users) of the services in question (*Unitel*, above, at para 105), and acknowledgements by these two witnesses of generic uses of the term do not provide strong evidence of how this broader public understands it.

290 In Mr. Hunt's case, counsel specifically stipulated, following a series of objections to questions posed, that he was speaking only based on personal knowledge or experience and was "not being put forward as an expert in any way of how an athletic club works or the services provided by athletic clubs generally" (see Cross-Examination of Alex Hunt, Applicant's Record at pp. 3132-3133).

291 In the case of Mr. Kelly, the case law is clear that his status on cross-examination is that of a witness and not a party, and thus his answers cannot be treated as admissions. Like Mr. Hunt, his testimony amounts to a survey of one. Counsel for the Applicant repeatedly asked him to place himself in 1996-97, before the Respondent's adoption of the Trade-mark, in responding to questions. However, he consistently testified that at the time he had little knowledge of "athletic clubs." He said he would have associated the term with "a gymnasium," that he was a member of a "gym" that offered weights, cardio and a vending machine, and the only "athletic club" he would have been aware of was the Detroit Athletic Club which on his understanding bore little resemblance to the Respondent's facilities: see Cross-Examination of Chuck Kelly, questions 350-378, 499-506. While some elements of the Respondent's services would be encompassed within this understanding (for example, weights, cardio equipment, vending machines, and in some cases dance classes), others (for example personal training, fitness assessments and retail operations) would not.

#### *Evidence from newspaper archives*

292 The Applicant has also presented numerous examples of newspaper articles that contain the term "athletic club." Most relevant for present purposes are the examples of articles published between the late 1980s and 1997, obtained by the Applicant from the Canadian Newsstand database available through the Ottawa Public Library. A number of these articles use the term "athletic club" in a descriptive sense in apparent reference to facilities devoted to sports and/or fitness, while others refer to the names of organizations or facilities that contained the words "athletic club." While one can infer from the context that some of these references are to facilities that bear some resemblance to those of the Respondent, it is in most cases not possible to tell precisely what range of activities and services are offered by the facilities in question. Some refer to the sites of squash, tennis, or running events or the home facilities of the participants, without a clear indication of whether these are activity-specific or more general athletic and fitness facilities, while others more clearly refer to multi-purpose fitness facilities (see Applicant's Record at pp. 2549, 2585, 2593, 2630, 2643, 2645, 2646). At least one article refers to a fitness facility that has a retail operation selling sports apparel (see Applicant's Record at p. 2567). Other facilities or organizations mentioned in the articles are (again judging from context) apparently dissimilar from the parties' facilities, such as rugby or hockey teams, a boxing club and sports or singles bars (see Applicant's Record at pages 2472, 2475, 2540).

293 What can be said on the basis of this evidence is that the term "athletic club" was, at least on some occasions prior to 1997, used in newspaper articles as a descriptive term to refer to athletic and fitness facilities that would offer at least some of the services currently offered by the Respondent. The precise degree of overlap or resemblance cannot be determined from the articles themselves. This evidence offers some support to the Applicant's position, but is far from conclusive on its own. It suggests that the term did have some descriptive meaning with the relevant audience at the relevant time, but it does not establish that there was truly an accepted definition or meaning of the term in the industry and what that meaning was. The fact that dissimilar organizations or facilities may have used the term "athletic club" in their names is not fatal to the Applicant's argument under s. 10 if the term still had a readily understood meaning in the relevant context.

*Evidence from Yellow Pages directories*

294 The Applicant has also submitted evidence based on Yellow Pages listings from various cities across Canada for various years between 1985 and 2011. These show that facilities using the term "athletic club" in their names were listed under headings such as "Fitness Centres & Programs," "Health Clubs," "Gymnasiums," "Gyms," "Fitness & Health Clubs," "Athletic Organizations," "Health Studios," "Fitness Centres," "Health, Fitness & Exercise Services," "Physical Fitness." Some directories also included a heading entitled "Sports/Athletic Clubs and Organizations," though the facilities employing term "athletic club" in their names did not appear to be listed under this heading.

295 This evidence shows that in several cities across Canada, facilities listed under headings that would imply some overlap with the Respondent's services were using the term "athletic club" in their names before 1997. These include Vancouver / Burnaby and the Lower Mainland of B.C., Victoria, Calgary, Edmonton, Winnipeg, Toronto East, Hamilton-Wentworth / Burlington, Ottawa-Hull, and Halifax-Dartmouth. In some of these markets (for example Vancouver/Burnaby and the Lower Mainland), a marked increase in the use of the term by such facilities is apparent in more recent years, though there were several relevant listings before 1997.

296 As with the newspaper evidence above, it is not possible to determine from this evidence the range of services offered by each listed facility or organization, but several of the categories (for example "Fitness Centres & Programs," "Health Clubs," and "Fitness Centres") do suggest a degree of similarity with the Respondent's services.

*Evidence from corporate and trade name / trade-mark searches and follow-up inquiries*

297 The Applicant conducted a number of searches for corporate names, business (or trade) names, and trade-marks using the term "athletic club." They used CDNameSearch (which searches the Canadian Intellectual Property Office (CIPO) database), OnCorp (which searches Ontario

corporate and business names), NUANS, the Quebec Registraire des entreprises. These searches revealed numerous examples of businesses and organizations using the term "athletic club" in their corporate names, trade names and trade-marks. NUANS alone contains more than 100 active listings of names that include this term. On their own, these listings tell us little about the services offered or activities carried out by these organizations. However, other forms of further evidence submitted by the Applicant give these listings greater relevance.

298 The first is a series of registrations under the Ontario *Business Names Act*, RSO 1990, c B.17. On December 17, 2007, the Respondent filed registrations under that Act to enable three of its subsidiaries — The Guelph Athletic Club Inc., The Thunder Bay Athletic Club Inc., Total Fitness Athletic Club (Brantford) Ltd. — to carry on business under the name The Athletic Club. On each of those registrations, the "Activity being carried out" is listed as "ATHLETIC CLUB." Similarly, the Respondent presented a renewal of a registration under the *Business Names Act* by the Cambridge Group Inc. to operate under the name Toronto Athletic Club, also listing ATHLETIC CLUB as the activity being carried out.

299 The Applicant says that the Toronto Athletic Club has been defining its activities in this manner since 1987. While there is no verification of this in the registration renewal provided, the Applicant's evidence, uncontested by the Respondent, was that the Toronto Athletic Club has been in operation for over 25 years (see Antonniou Affidavit of August 26, 2011, Exhibit H, Applicant's Record, Vol. 6 at p. 2069). The Applicant provided little evidence of that club's activities. The exhibit just mentioned indicates only that it is a "private club," and a print-out of a Google search indicates that it is "Where Toronto's business elite mixes health and networking with Stratus executive dining, and a spectacular view of Toronto Islands while you exercise!" (Applicant's Record at p. 2874).

300 The Applicant also called a number of the businesses listed in the above-noted corporate and business name searches to verify their activities. A summary of their responses compiled by the Applicant (and not contested by the Respondent) indicates under the header "what they do" that of the 19 facilities reached, most have "fitness facilities," eight have a swimming pool or "aquatics," and two offer squash facilities. Two facilities (including the Toronto Athletic Club mentioned above) are simply listed as "private club," while one is listed as having "hockey facilities." Most of these facilities have operated for 10 years or more, and 10 of the 19 began operating before the Respondent's adoption of the Trade-mark in 1997 (7 of which were listed as operating "fitness facilities," two of which were listed as "private clubs," and one of which operated "hockey facilities"): see Antonniou Affidavit of August 26, 2011, exhibit H, Applicant's Record at p. 2069. Another series of calls made by the Applicant's counsel confirmed that another 5 facilities using "athletic club" in their name had been operating for 120, 35, 35, 1 and 30 years respectively, but the Applicant has not indicated the services offered by these organizations: Oliver Affidavit of September 14, 2011, Applicant's Record, Vol. 7, Tab 11 at paras 137-141.

301 Finally, an Extended Preview Report from the CDNameSearch results, which are derived from CIPO's trade-marks database, provides information on the wares and services in connection with which trade-marks matching the search criteria "ATHLETIC & CLUB" have been registered: see Oliver Affidavit of September 14, 2011, Exhibit K, Applicant's Record at pp. 2200-2205.

302 A trade-mark entitled FIT CITY ATHLETIC CLUB & DESIGN, registered in March 1999 and owned by FITCITY for Women Inc. Richmond, B.C., is registered in connection with the following wares and services:

WARES:

(1) Clothing, namely, sweat pants, sweat shirts, t-shirts, hats, shorts; weight lifting gloves and mugs.

SERVICES:

(1) Operation of a retail business providing athletic club services, namely, a fitness and exercise club, hair salon services, massage services, tanning salon services, esthetician services.

303 The trade-mark MANSFIELD CLUB ATHLÉTIQUE, registered in February 2008 and owned by The Atwater Badminton & Squash Club of Montreal Quebec, is registered in connection with the following wares and services:

WARES:

(1) Apparel namely men's, women's and children's jogging and gym shorts, pull-on pants, sweat and warm-up suits, tank tops, T-shirts, long-sleeved T-shirts, jackets, socks; women's leotards and tights; headwear namely, hats and caps; gym bags, coffee mugs and key chains.

SERVICES:

(1) Operation of a fitness, athletic and health centre offering a complete program for physical conditioning and tests to evaluate the physical condition of individuals.

304 Other listed trade-marks relate to wares and services that are not similar to those offered by the Respondent. The trade-mark "Maple Leaf Athletic Club in a circle with maple leaf & design," owned by The Maple Leaf Athletic Club of Edmonton, is registered in connection with the services "(1) Sports club that promotes the participation in athletic games namely soccer, hockey and lacrosse." The trade-mark MARLBORO ATHLETIC CLUB, owned by Maple Leaf Sports & Entertainment Ltd. of Toronto, is registered in connection with the services "(1) Providing amusement and entertainment through the medium of hockey games and promotion of an interest in hockey." The trade-mark SHANKS ATHLETIC CLUB, owned by Schanks International Inc.

of Calgary, is registered in connection with the services "(1) Operation of a sports bar, including the sale and service of prepared foods and beverages, and the sale of sporting memorabilia and related sporting paraphernalia," as well as various wares.

### *Other evidence*

305 In my view, the Applicant accurately points out that the term "athletic club" has been used in a generic sense in various court judgments (see *National Council of Jewish Women of Canada, Toronto Section v. North York (Township)*, 1961 CarswellOnt 157 (Ont. C.A.) at para 7, (1961), 30 D.L.R. (2d) 402 (Ont. C.A.); *Kehoe v. Thorold (Town)*, 1973 CarswellOnt 465 (Ont. Dist. Ct.) at para 7, (1973), 35 D.L.R. (3d) 512 (Ont. Dist. Ct.); *Mayfair Tennis Courts Ltd. v. Nautilus Fitness & Racquet Centre Inc.*, 1999 CarswellOnt 601 (Ont. Gen. Div.) at paras 32-33, (1999), 23 R.P.R. (3d) 271 (Ont. Gen. Div.); *Rodgers v. Calvert*, 2004 CarswellOnt 3602 (Ont. S.C.J.) at para 42, (2004), 244 D.L.R. (4th) 479 (Ont. S.C.J.); *Rachfalowski v. R.*, 2008 TCC 258 (T.C.C. [Informal Procedure]) at para 21; *Ninpo Martial Arts Inc. v. Lepa*, 2009 ABPC 251 (Alta. Prov. Ct.) at para 6; *R. v. Tejada-Rosario*, 2009 CarswellOnt 9057 (Ont. S.C.J.) at para 5; *Eltom v. Canada (Minister of Citizenship & Immigration)*, 2005 FC 1555 (F.C.) at para 25), and in certain pieces of legislation (see *Health Insurance Act*, RRO 1990, Reg 552 (General), s. 24(1) 8.2; *Independent Health Facilities Act*, RRO 1990, Reg 650 (Facility Fees), s. 1(1) 8.2).

306 The Applicant also points to dictionary definitions of "athletic" and "club," but none of these defines "athletic club" and they are therefore of limited relevance to the present discussion. One of the dictionaries referenced lists "athletic club" as an example of "club," which shows a generic or descriptive (though not specifically defined) use of the term (see Shorter Oxford English Dictionary, Applicant's Record at p. 2872), but this does not tell us how the term was understood in 1997 by the consumers (or potential consumers) of the Respondent's services.

### *Conclusion*

307 Each piece of evidence outlined above presents, in itself, an incomplete picture. However, taken together, this evidence is sufficient to persuade me that by December 1997, on a balance of probabilities, the term "athletic club" had been used extensively in Canada by others within the industry of which the parties form a part and had a well-understood meaning in that industry and among the users and potential users of the parties' services. In particular, the evidence shows that prior to 1997, several facilities surveyed by the Applicant were operating fitness facilities under business names that included the term "athletic club," a number of such facilities were listed under relevant headings in the Yellow Pages, and the term was used descriptively (or generically) in newspapers to refer to such facilities.

308 It may be that there were individual differences among these facilities. Some may have had swimming pools and squash courts, and some not. Some may have had associated retail or food and beverage operations, and some not. We do not know how many offered personal training,

massage services, or various other amenities. Some may have been more posh or more exclusive than others.

309 However, it seems clear that the relevant public would have understood that these were places for exercise, and no doubt for congregating and socializing with others also interested in fitness or particular athletic activities. In other words, the term "athletic club" had by 1997 become a generic term designating facilities similar to those operated by the parties in this matter, though the specific services and amenities offered at each may have varied. The term "athletic club" had therefore become, in my view, through ordinary and bona fide commercial usage, a mark designating a kind of services. As a consequence, no person was entitled to adopt that mark (or one likely to be mistaken for it) "as a trade-mark in association with such... services or others of the same general class or use it in a way likely to mislead."

310 The underlined portion of the preceding quotation is significant. It means that s. 10 does not require an exact correlation with the services the mark has come to designate in order for the prohibition to apply. Where the services sought to be offered are "of the same general class," the use of the designator mark in connection with them will be prohibited. While the services currently offered by the Respondent may differ in some respects from those that had come to be designated by the mark "athletic club" by 1997, the evidence shows that they are of the same general class. Thus, if the Respondent's Trade-mark is so similar that it is likely to be mistaken for the mark "athletic club" (which remains to be considered below), its use in connection with those services will be prohibited.

***Is the Athletic Club Trademark so similar that it is likely to be mistaken for the mark "athletic club" in contravention of s. 10?***

311 As noted above, the question for the Court in this regard is whether



**Graphic 5**

so closely resembles the alleged "designator" mark "athletic club" that it is likely to be mistaken for that mark.

312 One factor the Court must consider is whether the design elements, even if not "distinctive" so as to avoid a finding (for example) of descriptiveness under s. 12(1)(b) (through the s. 12(2) saving provision) or confusion under s. 16, could nevertheless be sufficient to avoid a finding that the mark is prohibited under s. 10. That is, by prohibiting only marks that are identical to or *likely to be mistaken for* a designator mark, s. 10 seems to apply a higher threshold than mere confusion or lack of distinctiveness: see *Jordan & Ste-Michelle (TMOB)*, above, at para 10.

313 *Fox on Trade-Marks* says the following with respect to when the prohibition will or will not apply (at pp. 5-66.6 - 5-66.8):

Section 10 was held not to prohibit the adoption of a mark comprising a prohibited term proceeded [sic] by an adjective descriptive of the applied for wares [citing *McCain Foods Ltd. v 1009222 Ontario Inc. (2001)*, 15 CPR (4th) 110 at 124 (TMOB)]....

It is to be noted that s. 10 of the Act does not use the word "confusion", but instead uses the words "so nearly resembling... as to be likely to be mistaken therefore". This is one of the circumstances referred to in s. 6(5) of the Act and is one of the more important factors used to determine whether there is a risk of confusion between trade-marks or trade-names. The Trade-marks Opposition Board has observed that the language of s. 10 is similar to that of s. 9 of the Act and has therefore used the test devised in *Canada v Kruger [(1978), 44 CPR (2d) 135 at 139 (TMOB)]* and asked the following question by way of analogy: "Could a person familiar with any or all of the opponent's allegations of origin and having an imperfect recollection thereof confuse the mark with those appellations of origin?"

The totality of a trade-mark must be considered in the s. 10 analysis. Even where a particular word is prohibited, if the word is used in combination with a distinctive element such that the prohibited word does not dominate, the trade-mark will still be registrable [citing *Glenora Distillers*, above, at para 27]....

314 I adopt this analysis, and I think it implies that "likely to be mistaken for" under s. 10 is a narrower category (and thus sets a higher threshold) than "confusion" under s. 16, which casts a broader net.

315 However, the jurisprudence under s. 10 still employs the concept of "dominance" to determine whether any "distinguishing features" of a trade-mark are sufficient that it will not be mistaken for a "designator" mark. To repeat a portion of the analysis in *Glenora Distillers*, above:

[28] ... even if "glen" could be considered a mark and is prohibited, I find that it does not dominate GLEN BRETON as contemplated in *Molson*, when that trademark is considered as a whole.

"Export" did not dominate "Molson Export" so as to bring it within the s. 10 prohibition, and "Glen" did not dominate "Glen Breton" so as to trigger this prohibition. Does "athletic club" so dominate



Graphic 6

that the prohibition should apply?

316 I have been unable to locate any closely analogous cases under s. 10, where the combination of design and text was at issue. Thus, there has been little or no judicial treatment of the question of whether design elements that do not meet the "distinctiveness" threshold for s.12(1)(b) or s. 16 purposes might nevertheless prevent the s. 10 prohibition from applying due to the higher threshold implied by the words "likely to be mistaken therefor."

317 The Trade-mark Opposition Board considered a composite mark under s. 10 in *Principauté de Monaco v. Monte Carlo Holdings Corp.*, [2013] T.M.O.B. No. 5058, 2013 TMOB 58 (T.M. Opp. Bd.) [*Monte Carlo*]. It found that the proposed "DIAMOND REWARDS CLUB MONTE CARLO INN & Design" had a number of distinguishing features such that even if "Monte Carlo" was a mark designating the origin of services (which the Board did not decide), it did not dominate the proposed mark such that the latter was likely to be mistaken for the former. The trade-mark in question appears as follows:



**Graphic 7**

318 In my view, the distinguishing features of the mark in question in *Monte Carlo* were much greater than those at issue here, and the designator mark was much less prominent in the trade-mark as a whole.

319 Despite my view that s. 10 sets a higher threshold than "confusion" or lack of "distinctiveness" under other portions of the Act, I find that the mark "athletic club" so dominates the Athletic Club Trademark that the latter is likely to be mistaken for the former. As such, it is my view that the s. 10 prohibition applies.

320 In my view, then, the Applicant has established that the Trade-mark is prohibited under s. 10.

### ***Sections 11 and 12(1)(e)***

321 For the reasons given above, it seems to me that the Trade-mark is also prohibited under ss. 11 and 12(1)(e).

### ***Remedies***

322 The Applicant claims a permanent prohibition on use on the basis of ss. 53.2, 10 and 11 of the Act, which read as follows:

### **Further prohibitions**

10. Where any mark has by ordinary and bona fide commercial usage become recognized in Canada as designating the kind, quality, quantity, destination, value, place of origin or date of production of any wares or services, no person shall adopt it as a trade-mark in association with such wares or services or others of the same general class or use it in a way likely to mislead, nor shall any person so adopt or so use any mark so nearly resembling that mark as to be likely to be mistaken therefor.

[...]

### **Further prohibitions**

11. No person shall use in connection with a business, as a trade-mark or otherwise, any mark adopted contrary to section 9 or 10 of this Act or section 13 or 14 of the Unfair Competition Act, chapter 274 of the Revised Statutes of Canada, 1952.

[...]

### **Power of court to grant relief**

53.2 Where a court is satisfied, on application of any interested person, that any act has been done contrary to this Act, the court may make any order that it considers appropriate in the circumstances, including an order providing for relief by way of injunction and the recovery of damages or profits and for the destruction, exportation or other disposition of any offending wares, packages, labels and advertising material and of any dies used in connection therewith.

323 As the language of s. 53.2 makes clear, the power to grant an injunction is a discretionary power. However, by definition, a mark that offends s. 10 is one that "no person shall adopt" (s. 10) and "[n]o person shall use in connection with a business" (s. 11).

324 In *College of Traditional Chinese Medicine Practitioners & Acupuncturists (British Columbia) v. Council of Natural Medicine College (Canada)*, 2009 FC 1110 (F.C.) where Justice O'Keefe found that several of the marks in question violated s. 10 (and all were used in a manner that violated s. 7(d)), the Court found it appropriate in granting summary judgment to the plaintiffs in an expungement action to grant a permanent injunction preventing the defendant's further use of the marks.

## **Judgment**

1. *THIS COURT DECLARES that* Canadian Trade-mark Registration No. TMA633422 for the trade-mark the Athletic Club & Design (the Athletic Club Trade-mark) is invalid;

2. *THIS COURT ORDERS that:*

(a) Pursuant to s. 57(1) of the Trade-Marks Act (Act), the entry in the Canadian Trade-mark Register for the Athletic Club Trade-mark shall be struck out on the ground that it does not accurately express or define the existing rights of the person appearing to be the registered owner of the Mark;

(b) Pursuant to ss. 53.2, 10 and 11 of the Act, the Respondent is hereby permanently prohibited from using, directly or via licence, the Athletic Club Trade-mark and its common law equivalent; and

(c) The Applicant shall have its costs of these proceedings.

*Application granted.*

2004 CAF 277, 2004 FCA 277  
Federal Court of Appeal

Pelletier c. Canada (Procureur général)

2004 CarswellNat 2930, 2004 CarswellNat 5918, 2004 CAF  
277, 2004 FCA 277, 141 A.C.W.S. (3d) 380, 337 N.R. 319

**Clerk of the Privy Council, Appellant and Jean  
Pelletier and Attorney General of Canada, Respondents**

Clerk of the Privy Council, Appellant and Michel  
Vennat and Attorney General of Canada, Respondents

Nadon J.A.

Heard: August 20, 2004

Judgment: August 24, 2004

Docket: A-417-04, A-418-04

Counsel: Me Rosemary Millar, pour appellant

Me Brian Saunders, Me Patrick Girard, for intimés, Jean Pelletier, Michel Vennat

Me Geneviève Magnan, Me Alberto Martinez, pour intimé, PGC

***Nadon J.A.:***

1 Last August 4, Hugessen J. of the Federal Court dismissed an objection by the appellant under section 39 of the *Evidence Act*, R.S. 1995, c. C-5, against a request for material filed by the respondents, Jean Pelletier and Michel Vennat, pursuant to [rule 317 of the \*Federal Court Rules, 1998\*](#).

2 Accordingly, Hugessen J. ordered that the materials be produced within 10 days of his decision.

3 The very day of the decision by Hugessen J., the appellant filed his notices of appeal before this Court. In his motion, the appellant asked the Court to stay the order by Hugessen J. pending our decision on his appeal. For the following reasons, the application for a stay will be allowed.

4 To succeed, the appellant must meet the three criteria identified by the Supreme Court of Canada in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 (S.C.C.), i.e. that there is a serious issue to be tried, that irreparable harm will result if the stay is not granted and, finally, that the balance of convenience favours him.

5 First, I am persuaded that the appellant will suffer irreparable harm if the stay is not granted, since the production of material would result in the loss of their confidentiality. The appeal will then be illusory and moot.

6 With regard to the balance of convenience, it clearly leans toward the appellant since there will be no harm to the respondents, except that they will have to wait several months before obtaining the material in the event that the appeal is dismissed.

7 I now turn to the serious issue. According to the appellant, that involves determining the sufficiency of the description of the confidential information of the Cabinet mentioned in the certifications of the Clerk of the Privy Council, Alex Himmelfarb, dated May 26, 2004.

8 Hugessen J., relying on the decision of the Supreme Court of Canada in *Babcock v. Canada (Attorney General)*, [2002] 3 S.C.R. 3 (S.C.C.), determined at paragraph 5 of his reasons that:

[5] ... it is clear beyond the shadow of a doubt that the two documents described by the Clerk in his schedule in the Vennat case, above, and the first document described in his schedule in the Pelletier case, have formal and fatal defects ...

9 According to the respondents, here there is no prima facie case or even a serious issue. They add that there is no doubt that the certifications of the Clerk of the Privy Council do not meet the minimum criteria advanced by the Supreme Court in *Babcock, supra*, namely the author, title and date of the documents with regard to which confidentiality has been raised. Specifically, the respondents rely on the following passage in *Babcock*, found at paragraph 28, where the Supreme Court states the following:

It may be useful to comment on the formal aspects of certification. As noted, the Clerk must determine two things: (1) that the information is a Cabinet confidence within s. 39; and (2) that it is desirable that confidentiality be retained taking [page20] into account the competing interests in disclosure and retaining confidentiality. What formal certification requirements flow from this? The second, discretionary element may be taken as satisfied by the act of certification. However, the first element of the Clerk's decision requires that her certificate bring the information within the ambit of the Act. This means that the Clerk or minister must provide a description of the information sufficient to establish on its face that the information is a Cabinet confidence and that it falls within the categories of s. 39(2) or an analogous category; the possibility of analogous categories flows from the general language of the introductory portion of s. 39(2). This follows from the principle that the Clerk or minister must exercise her statutory power properly in accordance with the statute. The kind of description required for claims of solicitor-client privilege under the civil rules of court will generally suffice. The date, title, author and recipient of the document containing the information should normally be disclosed. If confidentiality concerns prevent disclosure of

any of these preliminary indicia of identification, then the onus falls on the government to establish this, should a challenge ensue. On the other hand, if the documents containing the information are properly identified, a person seeking production and the court must accept the Clerk's determination. The only argument that can be made is that, on the description, they do not fall within s. 39, or that the Clerk has otherwise exceeded the powers conferred upon her.

10 If today I had to decide the issue of the merits, I would be inclined to decide in favour of the respondents. Furthermore, after a careful review of *Babcock, supra*, I cannot find — as the respondents are asking me to find — that the appellant's arguments are devoid of any merit and that he could never be successful on appeal.

11 In my opinion, therefore, the appellant has satisfied the three criteria identified by the Supreme Court in *RJR MacDonald, supra*.

12 There is only one point raised by the respondents left to be addressed: whether I should not exercise my discretion in the appellant's favour, since the appellant failed to produce the documents in the time limit prescribed by Hugessen J. in his order dated August 4, 2004, i.e. within 10 days of the date of the decision.

13 In support of their arguments, the respondents refer me to a decision by Hugessen J. in *Warner Music Group Inc., Re[1997 CarswellNat 2050 (Fed. T.D.)]*, docket number T-1959-97, dated October 29, 2004, and specifically, to the words of Hugessen J. at paragraph 8 of his reasons:

[8] Before leaving this case, there is one comment that I wish to make on a matter which I explored with counsel but which, because of the findings I have made on the three part test, is not strictly relevant to my decision today. The point is this; the order being appealed required the production of the information and documents by 5h00 p.m. on October 21st, this year. That is just one week ago. That order has not been complied with. The appellant does not come before the Court in the classic expression with "clean hands". In my view, when a party seeks a discretionary exercise by a Court, that party is well advised not to be in default of the performance of any obligations it may have under Court orders. I appreciate, and counsel argued, that time was short. Mr. Justice Lutfy's revised order was issued on October 15, 1997, and compliance therewith was required only six days later. However, given that the appellant was conscious and aware of the requirement to comply on the 21st of October, at 5h00 p.m., it was the appellant's duty to move this Court prior to that time to be relieved, even temporarily, of the duty of compliance. This Court is always available. An application of that sort might even be accepted ex parte. It could certainly be made on short notice and, indeed, I would hazard a guess at saying that it might even be the subject of a consent extension for a short period of time pending the hearing of an application to stay such as this one. As I say, the point is not critical to my decision today, but I think it is something that counsel should bear in mind, because parties who are in non-compliance with Court orders will find considerable

difficulty in persuading the Court that they should be the subject of a discretionary order in their favour.

14 Even if I were to agree entirely with the statements of Hugessen J., I am prepared under the circumstances of this case to exercise my discretion in the appellant's favour. Accordingly, the motion will be granted and Hugessen J.'s decision dated August 4, 2004, will be stayed pending this Court's decision on the appeals filed against that judgment.

15 Furthermore, given that the appellant should have filed this motion within the 10-day limitation period to file those documents and that no reasonable explanation was offered to justify that omission, the respondents shall be entitled to their costs.

Federal Court



Cour fédérale

Date: 20190131

Docket: T-8-18

Vancouver, British Columbia, January 31, 2019

PRESENT: Case Management Judge Kathleen M. Ring

BETWEEN:

**RIGHT TO LIFE ASSOCIATION OF  
TORONTO AND AREA, BLAISE ALLEYNE  
AND MATTHEW BATTISTA**

**Applicants**

and

**CANADA (MINISTER OF EMPLOYMENT,  
WORKFORCE, AND LABOUR)**

**Respondent**

and

**ACTION CANADA FOR SEXUAL  
HEALTH AND RIGHTS  
AND BRITISH COLUMBIA CIVIL  
LIBERTIES ASSOCIATION**

**Interveners**

**ORDER**

**I. Overview**

[1] On this motion, the Applicants seek an order pursuant to Rules 317 and 318 of the *Federal Courts Rules* [Rules] compelling the Respondent to produce further documents relating to the Applicants’ Rule 317 request in their Notice of Application, as well as

additional categories of documents subsequently requested by the Applicants in correspondence to the Court and on this motion.

[2] Specifically, the Applicants seek the following Orders from the Court:

- (a) a declaration that the Minister has breached Rule 317 by failing to produce relevant, non-privileged documents falling within the Applicants' 317 request;
- (b) an order that the Respondent produce all of the classes of documents within the scope of the 317 request in the original Application, as further particularized in the April 17, 2018 letter, or such portions of them as found to be relevant and producible by the Court;
- (c) an order that the Respondent produce the following further classes of documents as sought on this motion:
  - (i) all documents reviewed or considered by the Minister in reaching the 2018 CSJ attestation decision;
  - (ii) all the complaints from Canadians received and consulted by the Minister or the Department in making the Attestation Decision and the responses to those complaints from any government official;
  - (iii) briefing notes from the Department to the Minister relating to the Attestation Decision; and

(iv) all communications amongst the Minister or her staff, on the one hand, and other federal Ministers or their staffs or any other person (including members of the public which made complaints against the Applicants or other pro-life groups receiving CSJ funds) regarding the 2018 CSJ attestation requirement, including the reasons for it being adopted, written either before or after the Attestation Decision; and

(d) costs of the motion.

[3] For the reasons below, the Applicants' motion is granted in part. The Respondent shall transmit to the Court and the Applicants, in accordance with these reasons, a copy of "all the complaints from Canadians received and consulted by the Minister or EDSC in making the decision", and a redacted version of the Memorandum to the Minister dated December 1, 2017. The balance of the Applicants' motion is dismissed. The Respondent's objection to disclosure of the legal advice dated October 5, 2017 on the grounds of solicitor-client privilege is upheld.

## **II. Background**

[4] In the underlying judicial review application, the Applicants challenge the decision of the Minister of Employment, Workforce, and Labour [Minister] to add a requirement to the application for funding under the Canada Summer Jobs [CSJ] program that applicants attest that: "Both the job and the organization's core mandate respect individual human rights in Canada, including the values underlying the Canadian Charter of Rights and Freedoms as well as other rights. These include reproductive rights, and ..." [attestation clause].

[5] The Applicants included a request in their originating Notice of Application filed on January 4, 2018 that, pursuant to Rule 317, the Respondent produce:

- (a) all documents relating directly or indirectly to [the] Minister's Decision to require the attestation, including directives, memoranda, emails, handwritten notes, and policies, authored by, or sent to or from or within the possession or control, of the respondent; and
- (b) all documents consulted or considered by the Respondent relating to the Decision to impose the attestation.

[6] On January 17, 2018, the Respondent transmitted the Certified Tribunal Record to the Registry and to the Applicants pursuant to Rule 318 of the Rules. It consists of the CSJ 2018 Applicant Guide, the CSJ 2018 Program Policy Rationale, the Applicant's CSJ funding application, the CSJ acknowledgement of receipt of application, and the CSJ 2018 Proposed Key Dates document.

[7] The Certified Tribunal Record was accompanied by a "Certification" form signed by Alan Bully, Director General, Program and Services Oversight, Service Canada, Employment and Social Development Canada [ESDC], on behalf of Her Majesty, certifying that "attached as pages 1-52 are true copies of all the documents relevant to the application and the decision to require the attestation which the respondent does not object to producing."

[8] In its transmittal letter to the Court, the Respondent objected to portions of the Applicant's request, stating that:

Pursuant to Rule 318(2), the Crown objects to portions of the applicant's request for the reasons that the request for materials is overly broad, is in the nature of discovery of documents, and seeks material irrelevant to the application. Furthermore, some records are objected to on the grounds that solicitor-client privilege prevents production of the documents. They were created for the purposes of legal advice and it was contemplated at the time they were created that they would remain confidential.

[9] On March 30, 2018, the Respondent served the Applicants with the Affidavit of Rachel Wernick pursuant to Rule 307 of the Rules. The Wernick Affidavit is slightly over 1900 pages in length and contains 101 exhibits.

[10] On April 10, 2018, the Applicants conducted a cross-examination of Ms. Wernick on her affidavit. Ms. Wernick testified that the Minister had briefing notes before her when she made the decision to require the attestation clause. When asked if Ms. Wernick could produce the briefing notes, counsel for the Respondent advised that there was one briefing note for the approval of the attestation clause and the Respondent claimed solicitor-client privilege over that briefing note.

[11] On April 17, 2018, three months after receiving the Certified Tribunal Record, counsel for the Applicants wrote to the Court advising that the Applicants did not have an adequate record of the decision under review, and requesting the Court to make an order for production of the following materials:

1. Any Memorandum to Cabinet on the subject of the Policy or decision;
2. Any legal opinion on the subject of the Policy or decision;

3. Any memorandum to the Minister from departmental staff on the subject of the Policy or decision;
4. Any response of the Minister to any of the complainants referenced in the affidavit;
5. Any internal memorandum prepared by staff for the purposes of advising the Minister prior to the decision regarding the Policy or decision;
6. Any memorandum related to the Policy or decision from the Minister to other MPs created prior to the decision;
7. Any memorandum related to the Policy or decision to the Minister from other MPs created prior to the decision;
8. The results of any investigation or research conducted by the Minister or the department against any Canadian on the subject of the Canada Summer Jobs program or Policy prior to the decision.

[12] By directions dated April 18, 2018, the Court directed the Applicants to bring a formal motion seeking relief under Rule 318.

[13] By Order dated May 18, 2018, the Court granted leave to the Applicants to amend their Notice of Application to allege, as additional grounds for the application, that the decision was made in bad faith, with bias, for an improper purpose, and on irrelevant considerations.

[14] On August 20, 2018, three months after filing their Amended Notice of Application, the Applicants filed this motion seeking production of documents under Rules 317 and 318. The Applicants submit that the Minister has refused to file the complete record on which she made her decision in accordance with Rule 317, and that other available evidence demonstrates that clearly relevant documents have been withheld by the Minister in responding to their Rule 317 request.

[15] The Respondent opposes the motion on the basis that the Applicants seek production beyond what is permitted under Rule 317, and that some of the documents sought are protected by solicitor-client privilege.

### **III. Issues**

[16] There are two primary issues on this motion:

- (a) Are additional documents producible under Rule 317?
- (b) Are some of the documents protected from disclosure by solicitor-client privilege?

### **IV. Analysis**

#### **A. Are Additional Documents Producible under Rule 317?**

##### **(i) Applicable Legal Principles**

[17] The only material that is accessible under Rule 317 is that which is “relevant to an application” and is “in the possession” of the administrative decision-maker. Both criteria must be met to trigger the obligation to transmit the material: *Habitations Îlot St-jacques Inc v Canada (Attorney General)*, 2017 FC 147 at para 4.

[18] Turning to the first requirement, the material accessible pursuant to Rule 317 must be actually relevant. Material that “could be relevant in the hopes of later establishing relevance” does not fall within Rule 317: *Access Information Agency Inc v Canada (Attorney General)*, 2007 FCA 224, 66 Admin LR (4th) 83 at para 21 [*Access Information Agency*].

[19] Documents are “relevant” for the purposes of Rule 317 if they may have affected the decision of the administrative decision-maker, or if it may affect the decision that this Court will make on the application for judicial review: *Maax Bath Inc v Almag Aluminum Inc*, 2009 FCA 204 at para 9 [*Maax Bath*].

[20] The relevance of the documents requested is to be determined in relation to the grounds of review set forth in the notice of application and the affidavits filed: *Canada (Human Rights Commission) v Pathak*, [1995] 2 FC 455 at page 460 (CA); *Tsleil-Waututh* at para 109.

[21] The general rule is that only materials that were available to the decision-maker at the time of rendering a decision are considered relevant for the purposes of Rule 317. However, there are exceptions to this rule. Documents in addition to those that were before the decision-maker may be considered relevant and subject to disclosure where there is an allegation of a breach of procedural fairness or an allegation of a reasonable apprehension of bias: *Gagliano v Canada (Commission of Inquiry into the Sponsorship Program and Advertising Activities)*, 2006 FC 720 at para 50 [*Gagliano #1*], appeal dismissed at 2007 FCA 131; *Humane Society of Canada Foundation v Canada (National Revenue)*, 2018 FCA 66 at paras 5 and 6 [*Humane Society*].

[22] To succeed in obtaining disclosure of material that was not before the decision-maker when he made the decision, the applicant must satisfy a two-part test laid out in *Canada (Public Sector Integrity Commissioner) v Canada (Attorney General)*, 2014 FCA 270 at para 4 [*Public Sector*].

[23] First, the applicant must raise a ground of review in his request that would allow the Court to consider evidence that was not before the decision-maker. Second, the ground of review must have a factual basis supported by appropriate evidence, as required. A bald assertion of bias is not sufficient and cannot support an order for production of documents to allow the moving party to go on a fishing expedition to see if something can be found to support the allegation of bias. The party demanding more complete disclosure has the burden of advancing the evidence justifying the request. The second criterion prevents an applicant raising a breach of procedural fairness simply to gain access to material that the applicant could not otherwise access: *Access Information Agency* at paras 17 to 21; *Public Sector* at para 4; *Humane Society* at paras 8 and 12.

[24] Rule 317 is also restricted to material “in the possession” of the administrative decision-maker. Rule 317 cannot be used to obtain material that is in the possession of others: *Tsleil-Waututh* at paras 111.

[25] Rule 317 does not in any way “serve the same purpose as documentary discovery in an action”: *Access Information Agency* at para 17.

**(ii) Positions of the Parties**

[26] The Applicants argue in their written representations that since their challenge to the Minister’s decision includes allegations of bad faith, bias, improper purpose, and infringement of *Charter* rights, the Respondent is obliged to produce a certified tribunal record that includes more than simply the documents that were before the Minister when she made her decision. They say that the Respondent must produce “literally all documents considered by the Minister in coming to her decision to impose the attestation”, including any document requested by the

Applicants that was viewed or considered by the Minister prior to and after reaching her decision, which shed light on her considerations and motivations in deciding to include the attestation clause in the CSJ application form.

[27] The Applicants say that the Minister's conduct in filing an affidavit that includes documents that were excluded from the certified record, and the disclosure of some 200 pages of documents by the Respondent to the Canadian Press under the *Access to Information Act*, demonstrates that clearly relevant documents are being withheld by the Minister in producing the certified record in accordance with Rule 317 of the Rules.

[28] As the Applicants' written representations did not squarely address each category of requested documents and explain its relevance for the purposes of Rule 317, the Court asked the Applicants to do so during the hearing of the motion. The Applicants' submissions were similar for each category of documents. The Applicants argue that the Minister should be compelled to produce the additional documents because they may indicate what motivated the Minister's decision, and whether the Minister's decision was made for a proper statutory purpose or for another purpose.

[29] The Respondent says that the Rule 318 motion should be dismissed because the multiple requests for documents all lack the required specificity, and the Applicants have not met the burden of advancing sufficient evidence and cogent explanation that other documents, beyond those which were before the Minister when she decided on the attestation requirement, are relevant to the specific grounds pled in their Amended Notice of Application.

**(iii) Admissibility of Evidence vs. Requirements of Rule 317**

[30] The mere fact that the documents produced in the Minister's certified tribunal record in response to the Rule 317 request are not co-extensive with the documents included in the Respondent's supporting affidavit served under 307 does not, in itself, establish that the Minister failed to produce a complete record under Rule 318. In *Canadian Copyright Licensing Agency (Access Copyright) v Alberta*, [2016] 3 FCR 19, 2015 FCA 268 at para 21, the Court observed that "material that was *not* before the administrative decision-maker can *potentially* be placed before the reviewing court by way of affidavit".

[31] The Federal Court of Appeal has cautioned that the concept of admissibility of evidence on judicial review must be kept analytically separate from the substantive requirements of Rule 317. As the Court stated in *Tsleil-Waututh*, "Not everything that is admissible can be obtained under Rule 317": *Tsleil-Waututh Nation v Canada (Attorney General)*, 2017 FCA 128 at paras 63 and 117 [*Tsleil-Waututh*].

**(iv) "Rolling" Requests for Documents from the Minister**

[32] The Respondent takes the position that the Applicants have made only one Rule 317 request and it is that broad request which the Court must review. The Respondent says that the Rules do not contemplate "rolling Rule 317 requests" as occurred in this case.

[33] Conversely, the Applicants say that Rule 318 is a court procedure which serves the purpose of allowing an applicant to make a new request based on the awareness of material missing from the record.

[34] I disagree with the Applicants' interpretation of Rule 318. Rule 318 provides that a decision-maker is to transmit the material requested pursuant to Rule 317 unless the decision-maker objects under Rule 318(2). The Applicants have not drawn any authority to the Court's attention to support the proposition that the purpose of Rule 318 is to allow new requests for documents.

[35] At the same time, while the Rules do not expressly contemplate subsequent requests, the Applicant correctly observes that this Court previously considered a motion for further disclosure under Rule 318 in circumstances where the applicant submitted a second request for production: *Detorakis v Canada (Attorney General)* 2009 FC 144.

[36] In my view, while multiple requests for material from the decision-maker are not to be encouraged, I am prepared to consider the Applicants' initial Rule 317 request and their further requests for records in the particular circumstances of this case. The apparent purpose of the second request was, at least in part, to address the Respondent's objection to the vagueness of the initial Rule 317 request. The third request was made after the Applicants filed an Amended Notice of Application which added new grounds of review alleging bias, breach of procedural fairness and improper purpose. The Respondent is not prejudiced by the Court's disposition of these further requests as it was afforded the opportunity to present written and oral submissions setting out its objections to these requests.

[37] In the next part of my analysis, I examine the categories of documents requested by the Applicants. In addition to carefully considering the written and oral submissions of both parties, as well as their written supplemental submissions, I have also reviewed the grounds of review and allegations in the Amended Notice of Application, as well as the affidavit evidence adduced

on this motion to assess whether the requested documents are properly producible in accordance with the jurisprudence governing Rules 317 and 318.

**(v) Complaints Received by the Minister and Responses to those Complaints**

[38] Two of the categories of documents sought by the Applicants on this motion relate specifically to the complaints received by the Minister or EDSC, namely:

- (a) All the complaints from Canadians received and consulted by the Minister or the Department in making the Attestation Decision and the responses to those complaints from any government official; and
- (b) Any response of the Minister to any of the complainants referenced in the affidavit.

[39] As a starting point, I considered the Applicants' request for these documents by reference to the Amended Notice of Application to ascertain the factual basis for the Applicants' allegations of bad faith, bias, improper purpose, and irrelevant considerations. The Applicants allege the Minister's decision was made to satisfy the lobbying demands of a group called 'Abortion Rights Coalition of Canada' [ARCC], and in furtherance of the federal government's "ideological commitment to there being absolutely no legal restrictions on abortion in Canada".

[40] The Amended Notice of Application alleges that: (a) as early as February, 2017, the Minister started receiving complaints from ARCC about groups it described as "anti-choice," saying that these groups should not receive Canada Summer Jobs funding because they held beliefs and opinions opposed to those of ARCC; (b) the Minister inspected the social media postings of the groups listed by ARCC, but did not contact the groups under scrutiny to examine

whether the complaints ARCC forwarded were accurate; and (c) in an April 12, 2017 iPolitics article, the Minister's press secretary stated that "any funding provided to an organization that works to limit women's reproductive rights last summer was an oversight. That's why this year we fixed the issue and no such organization will receive funding from any constituencies represented by Liberal MP's."

[41] The Amended Notice of Application indicates that the factual basis for the Applicants' allegations of bad faith, bias, improper purpose, and irrelevant considerations is, at least in part, that the Minister received complaints from ARCC that "anti-choice" groups should not receive CSJ funding, and that the Minister's decision was motivated by those complaints.

[42] I have also reviewed the Affidavit of Rachel Wernick, Senior Assistant Deputy Minister, Skills Development Branch, ESDC, which the Respondent served on the Applicant under Rule 307 of the Rules, and on which the Applicants rely in support of this motion. The Wernick Affidavit states that "during 2017, the Minister received complaints from Canadians about the nature of work placements for students being funded by the CSJ program and that organizations were distributing very graphic pictures of aborted fetuses or would not hire LGBTQ2 youth" (para 22) and that "the Minister and ESDC received complaints that CSJ funding was being used to undermine the rights of Canadians" (para 23).

[43] Examples of such complaints are attached as exhibits to the Wernick Affidavit, with personal information redacted to protect privacy. Paragraph 37 of the affidavit states that "as a result of the public complaints to the Minister outlined above, it came to the attention of the Minister that organizations which had received CSJ funding in the past, or applied for funding in 2017, active work to limit a women's reproductive rights".

[44] The Respondent opposes the request for “all the complaints from Canadians received and consulted by the Minister or the Department in making the Attestation Decision” on the basis that specific documents referenced in the Amended Notice of Application were already disclosed as exhibits to the Wernick Affidavit. I agree with the Applicants that there is no merit in this argument. The affidavit only attaches “examples” of such complaints. The affidavit does not purport to make full disclosure of the complaints received. It is no answer to say that because the Respondent provided with *some* documents relating to complaints received, the Applicants are not entitled to have the rest.

[45] When read in conjunction with the Wernick Affidavit, I find that the Applicants’ request for “all the complaints from Canadians received and consulted by the Minister or the Department in making the Attestation Decision” is described with sufficient specificity to identify the requested documents. The Wernick Affidavit states that “the Minister received complaints from Canadians about the nature of work placements for students being funded by the CSJ program”.

[46] I am also satisfied, on the material before me, that the complaints received by the Minister or the EDSC are relevant to the application. They relate to the allegations in the Amended Notice of Application described above, and may assist the Court in coming to a conclusion regarding the allegations of bad faith, bias, improper purpose, and irrelevant considerations.

[47] The Wernick Affidavit further establishes that the Minister was aware of the existence and tenor of the complaints: *Chrétien v Canada (Commission of Inquiry Into the Sponsorship Program and Advertising Activities)*, 2007 FCA 131 at para 7.

[48] Accordingly, I conclude that, excluding complaints already in their possession as exhibits to the Wernick Affidavit, the Applicants are entitled to receive copies of any other complaints from Canadians received and consulted by the Minister or EDSC in making the decision, with personal information redacted to protect privacy.

[49] The Applicants also seek disclosure of the responses to the complaints received. I decline to make such an order in the absence of any evidence that such responses exist, and without an adequate explanation by the Applicants as to the relevance of such responses to the allegations made in the Amended Notice of Application.

[50] In *Beno v Létourneau J et al* (1997), 1997 CanLII 5116 (FC), 130 FTR 183 at page 188, Mr. Justice Mackay held that the Court ought not to intervene to order production of documents of which there is no clear evidence of existence. The Applicants have adduced no evidence from their cross-examination of Ms. Wernick on her affidavit, or otherwise, to demonstrate that the Minister or ESDC provided any responses to the complaints received, or the content of such responses and their relevance to the allegations made in the Amended Notice of Application.

**(vi) Briefing Notes / Memoranda to the Minister**

[51] The Applicants request “briefing notes from the Department to the Minister relating to the Attestation Decision” and “any memorandum to the Minister from departmental staff on the subject of the Policy or decision”.

[52] The material before me indicates that there were three briefing notes before the Minister at the time of her decision. First, there was the Memorandum to the Minister dated

December 1, 2017 which sought a decision from the Minister on whether to proceed with the attestation for the 2018 CSJ program. Second, there were two other memoranda presented to the Minister in early December 2017 at or around the same time as the first memorandum.

[53] As explained later in these reasons, I have determined that the Respondent's objection to disclosure of the Memorandum to the Minister dated December 1, 2017 on the grounds of solicitor-client privilege is partially upheld. The Applicants are entitled to a redacted version of the Memorandum to the Minister which deletes the portions that are subject to solicitor-client privilege.

[54] Based on the material before me, I find that the Applicants failed to establish the relevance of the other two briefing notes to this application and therefore their request for disclosure of these documents is denied. The Bully Affidavit states neither of the other two memoranda sought a decision on the attestation clause. One of the memoranda sought approval of the information kit for Members of Parliament, and the other memorandum sought approval of the national priorities and launch dates for the 2018 CSJ program.

[55] Apart from the three memoranda herein described, the Applicants failed to establish the existence of any other briefing notes or memoranda to the Minister to support any order for disclosure of such documents.

**(vii) Other Categories of Documents**

[56] As for the remaining categories of requested documents, I decline to make an order for production of such documents because the Applicants failed to persuade me that the described

categories provide the requisite level of specificity, or that the requested documents exist and are relevant for the purposes of Rule 317.

[57] Rule 317 (1) requires a party to make a written request “identifying the material requested”. In *Maax Bath Inc v Almag Aluminum Inc*, 2009 FCA 204 [*Maax Bath*], the Federal Court of Appeal found that the applicant’s Rule 317 request for “... a copy of the material in the possession of the CITT prepared by the CITT’s non-legal staff for use by the CITT members in making their determinations”, without reference to any specific documents, lacked proper specificity and this defect was in itself sufficient to dismiss the applicant’s motion for production of documents pursuant to Rule 318.

[58] In this case, I find that the remaining categories of documents are vague and overly broad. For example, the Applicants’ initial 317 request seeks “all documents relating directly or indirectly to the Minister’s decision to require attestation ...” and “all documents consulted or considered by the Respondent relating to the Decision to impose the attestation”.

[59] As earlier noted, the Applicants submitted correspondence dated April 17, 2018 to the Court which they describe as “setting out a more detailed list of the classes of documents believed to fall within the original 317 request”. I find this further listing of documents, as well the additional categories of requested documents sought in this motion, remain overly broad and fail to provide the level of specificity required by the Federal Court of Appeal. For example, the Applicants’ request for “any internal memorandum prepared by staff for the purposes of advising the Minister prior to the decision regarding the Policy or decision” is analogous to the Rule 317 request which the Court found to lack proper specificity in *Maax Bath*.

[60] The Applicants' request for "the results of any investigation or research conducted by the Minister or the department against any Canadian on the subject of the Canada Summer Jobs program or Policy prior to the decision" is similarly vague and overly broad. The request for the results of "any" investigation or research against "any Canadian" on the subject of "the Canada Summer Jobs program" could, as the Respondent noted, include for example the results of any investigation relating to complaints by students on how they were treated in a job funded by the CSJ program. The lack of proper specificity is alone sufficient to dismiss the Applicants' motion for production of these documents.

[61] Secondly, and in any event, the Applicants have requested these remaining categories of documents without providing any evidence that the requested documents even exist. For example, the Applicants request "any memorandum to Cabinet on the subject of the Policy or decision", but they have not adduced any evidence to indicate that any relevant memoranda to Cabinet may be in existence, or even that Cabinet or other Ministers were engaged in the decision. To the contrary, counsel for the Applicants candidly acknowledged during the hearing that the Applicants have no evidence that there was a memorandum to Cabinet relating to the decision on the attestation clause. As the Respondent observed, any such documents would, in any event, be subject to claims of Cabinet Confidence.

[62] In the same vein, the Applicants acknowledged during the hearing that they do not know if any documents actually exist that would fall within their request for "any memoranda related to the Policy or decision" from the Minister to other Members of Parliament, or from other MP's to the Minister created prior to the decision.

[63] Thirdly, the Court has not received an adequate explanation of the relevancy of the materials requested in the remaining categories of documents. There is no dispute that the Applicants have raised grounds of review in their Amended Notice of Application that *permit* the transmission of materials beyond those that were before the decision-maker. However, the Court is not *required* to provide the Applicants with the requested materials merely because they raise these grounds of review. The Applicants must also advance evidence and an adequate explanation as to how the requested information is relevant, by reference to the Amended Notice of Application, the grounds of review invoked by the Applicants, and affidavit evidence: *Public Sector* at para 4; *Gagliano #1* at paras 51 to 54.

[64] To take an example, the Applicants have not satisfied me as to the relevance of their request for any internal staff memoranda, if they even exist. The Applicants rely on *Telus Communications Inc v Canada (Attorney General)*, 2004 FCA 317 where the Federal Court of Appeal ordered the disclosure of staff memoranda prepared for the tribunal on the basis that it may have affected the decision. However, as the appellate court subsequently explained in *Access Information Agency* at para 18, there was a factual basis for the disclosure request in *Telus*, as there were reasons to believe that a government policy had been implemented before it had been made public. In contrast, I find that the Applicants in this case have not established a factual basis for their request for internal staff memoranda.

[65] Overall, the assertion by the Applicants that these other categories of requested documents may be relevant appears to be based on pure speculation. The Applicants wish to view these documents, if they exist, to determine whether they may provide further support for their grounds of review. However, documents requested under Rule 317 are not transmitted first

so that a party may then determine whether they are relevant. Relevancy must be established by the Applicants to demonstrate that they are entitled to them in the first instance. As the Court observed in *Gagliano #1* at para 53, Rule 317 was specifically crafted in this manner to “avoid rewarding applicants for engaging in improper fishing expeditions”.

[66] In the absence of an adequate explanation or evidence regarding relevance of the remaining categories of requested documents, or that they even exist, it is not necessary to consider the requirement of possession under Rule 317, and the Applicants’ reliance on *Friends of The West Country Association v Canada (Minister of Fisheries and Oceans)*, 1997 CanLII 5107 (FC), 130 FTR 223; 46 Admin LR (2d) 144.

[67] For these reasons, the Court is not prepared to order that the Minister transmit the remaining categories of documents to the Applicants.

**B. Are Some of the Documents Protected by Solicitor-Client Privilege?**

[68] The Respondent objects to the disclosure of some documents on the grounds of solicitor-client privilege. The Respondent states in its transmittal letter to the Court that these documents were created for the purposes of legal advice and it was contemplated at the time they were created that they would remain confidential.

[69] Solicitor-client privilege is a legitimate ground of objection under Rule 318. Rules 317 and 318 are not a statutory abrogation of solicitor-client privilege: *Slansky v Canada (Attorney General)*, 2013 FCA 199 at paras 72 and 277 [*Slansky*].

[70] The criteria for determining whether a communication qualifies for legal advice privilege are that: (1) it must have been between a client and solicitor; (2) it must be one in which legal advice is sought or offered; (3) it must have been intended to be confidential; and (4) it must not have had the purpose of furthering unlawful conduct: see *R v Solosky*, [1980] 1 SCR 821 at 835; *Pritchard v Ontario (Human Rights Commission)*, [2004] 1 SCR 809, 2004 SCC 31 at para 15 [*Pritchard*]; *Slansky* at para 74. Legal advice has been held to include not only telling clients the law, but also giving advice “as to what should prudently and sensibly be done in the relevant legal context”: *Slansky* at para 77.

[71] Solicitor-client privilege has been held to arise when in-house government lawyers provide legal advice to a client department. However, where government lawyers give policy advice outside the realm of their legal responsibilities, such advice is not protected by the privilege. Owing to the nature of the work of in-house counsel, each situation must be assessed on a case-by-case basis to determine if the circumstances were such that the privilege arose: *Pritchard* at paras 19 and 20.

[72] The burden of establishing solicitor-client privilege lies with the person who seeks to invoke the privilege. The say-so of the decision-maker asserting solicitor-client privilege does not discharge that burden: *Canada (Attorney General) v Williamson*, 2003 FCA 361 at para 11; *Bernard v Public Service Alliance of Canada*, 2017 FCA 35 at para 13.

[73] Where a decision-maker claims solicitor-client privilege in respect of documents and the claim is challenged, the Court must examine the actual statements said to be privileged in order to draw a conclusion as to whether privilege arises or whether it

has been waived: *1185740 Ontario Ltd v Canada (Minister of National Revenue)*, (1999) 169 FTR 266, 1999 CanLII 8774 (FCA) at para 7.

[74] The Respondent filed two public affidavits, the Affidavit of Alan Bulley sworn September 11, 2018 and the Affidavit of March McCombs sworn September 10, 2018, to establish its objection based on solicitor-client privilege claim. The public affidavits indicate that the Respondent objects to the disclosure of two documents in the certified tribunal record on the grounds that they are solicitor-client privileged. The first document is legal advice with respect to a matter involving the CSJ program which ESDC requested from the Legal Services Unit that serves ESDC, and which the Legal Services Unit delivered to ESDC on October 5, 2017 [the “legal advice”].

[75] The second document that the Respondent objects to produce on the basis of solicitor-client privilege is a Memorandum to the Minister dated December 1, 2017, which sought a decision from the Minister on whether to proceed with new eligibility requirements and an attestation for the 2018 CSJ program. The Bulley Affidavit states that the Memorandum to the Minister was included with and appended the legal advice.

[76] The Respondent also filed a confidential affidavit, pursuant to an Order dated May 18, 2018, containing the two documents which it objected to produce on the grounds of solicitor-client privilege [Confidential Affidavit].

[77] Having reviewed these affidavits, I am satisfied on the evidence before me that the first document – the legal advice - meets the test for establishing solicitor-client privilege. The public affidavits establishes that in 2017, officials in the office of the Assistant Deputy Minister of the

Program Operations Branch at ESDC requested legal advice from the Legal Services Unit, and on October 5, 2017, a lawyer with the Legal Services Unit provided the legal advice to the ESDC in response to the request. Having reviewed the legal advice contained in the Confidential Affidavit, I am satisfied that it entails the giving of legal advice, and not policy advice.

[78] I am also satisfied on the evidence before me that the legal advice was intended to be confidential. Mr. Alan Bulley, the ESDU official to whom the LSU Legal Opinion was provided, states in his affidavit that he expected the communications between himself and the LSU regarding the LSU Advice to remain confidential.

[79] As regards the last criteria for solicitor-client privilege, there is no evidence before me that the legal advice had the purpose of furthering unlawful conduct.

[80] On my review of the first document, I conclude that the legal opinion is protected by solicitor-client privilege in its entirety. It is not a situation where parts of the document are privileged and parts are not.

[81] I have also reviewed the second document, the Memorandum to the Minister, which is contained in the Confidential Affidavit. Every page of the Memorandum is marked “SOLICITOR CLIENT PRIVILEGE”. The Memorandum encloses a copy of the first document, the legal advice. The Memorandum also contains passages within the Memorandum itself which summarize or refer to the legal advice. As I have already concluded that the legal advice meets the test for establishing solicitor-client privilege, the Memorandum is likewise subject to privilege to the extent that it includes or appends the legal advice.

[82] The Applicants argue that the Minister waived any privilege over the legal advice when she released certain materials to the media. I reject this argument. The Applicants rely solely on a media article which contains vague references to legal advice. The article does not describe the date of the legal advice or the subject matter of the legal advice. It is pure speculation by the Applicants that the legal advice referred to in the article is the same legal advice to which the Respondent claims solicitor-client privilege on this motion.

[83] During the hearing, counsel for the Respondent advised that the Respondent would be amenable to producing a redacted version of the Memorandum if the Court made an order that disclosure of the redacted Memorandum does not constitute waiver over the redacted portions of the Memorandum. Counsel indicated that the Respondent had refrained from producing a redacted version of the Memorandum because of case law holding that, by redacting portions of a document, a party waived privilege over the entire document.

[84] The Respondent did not draw the Court's attention to any jurisprudence of this Court that stands for the proposition that disclosure of a redacted document constitutes waiver of privilege over the privileged portions of the document. To the contrary, in *Slansky* at para 266, Justice Stratas of the Federal Court of Appeal stated, albeit in a dissenting judgment, that privileged statements can be severed from non-privileged statements. He observed that the redaction of isolated, privileged material plays a regular and important role in Canadian litigation, citing the following passage from *Guelph (City) v Super Blue Box Recycling Corp*, 2004 CanLII 34954 (ON SC) at para 119:

The practice of “redacting” documents has been in wide use in commercial litigation in Ontario for at least two decades. It follows a practice developed in American jurisdictions to balance the goals of full disclosure and protection of privilege. It is very common for documents that are otherwise producible to contain a portion that deals with receipt of legal advice on the topic at hand. For example, the minutes of a board meeting might contain twelve business items, one of which concerned receipt of legal advice pertaining to litigation. An “all or nothing” approach to disclosure would see the document entirely produced (thus breaching solicitor client privilege in respect to the advice given concerning the litigation), or entirely suppressed (depriving the opposing party with the record of the balance of the document). The proper solution is to produce the portion of the document that is not privileged, delete the portion that is privileged, and show the deletion on the face of the document to alert the opposing party that privileged material has been removed. [footnote omitted]

[85] Several decisions of this Court indicate that the Court may, in appropriate circumstances, order the disclosure of a redacted document, and that such disclosure does not constitute a waiver of privilege over the redacted portions of the document. *Ross v Canada (Justice)*, 2013 FC 757 at para 20, Mr. Justice Mosley held that the respondents did not waive their claim to solicitor-client privilege with respect to any information in the Final Investigative Report by disclosing a redacted version of the Report when directed to do so by the Court under Rule 318.

[86] In *Bank of Montreal v Sasso*, 2013 FC 584 at para 27, Mr. Justice Hughes observed that although redaction may be difficult in some cases, it is commonplace in many cases that come before this Court. He did not find any objection to the Adjudicator’s Order simply on the basis that it afforded a party the opportunity to redact privileged material from certain documents that it may produce.

[87] In the particular circumstances, I am of the view that disclosure of a redacted Memorandum is practically possible in this case, based on the position taken by the Respondent and my own review of the Memorandum. Such an approach accords with the remedial flexibility

of the Court when determining the validity of a Rule 318 objection. It furthers and reconciles objectives of the protection of privilege and the meaningful review of administrative decisions: *Lukács v Canada (Transportation Agency)*, 2016 FCA 103 at paras 13 to 15.

[88] For these reasons, I conclude that the Respondent's objection to disclosing the first document – the legal advice - on the basis of solicitor-client privilege is upheld. The Respondent's objection to disclosure of the Memorandum to the Minister dated December 1, 2017 on the grounds of solicitor-client privilege is partially upheld. The Respondent is directed to deliver a redacted version of the Memorandum to the Applicants, which redacts the portions that are subject to solicitor-client privilege. For clarity, the disclosure of a redacted version of the Memorandum to the Applicants shall not constitute a waiver of solicitor-client privilege by the Respondent over the whole Memorandum.

[89] As success was divided, I would award neither party its costs in respect of this motion.

**THIS COURT ORDERS that:**

1. Excluding complaints already in the Applicants' possession, the Respondent shall transmit to the Court and the Applicants, within thirty (30) days of the date of this Order, copies of all other complaints from Canadians received and consulted by the Minister or EDSC in making the decision, with personal information redacted to protect privacy.
2. The Respondent's objection to disclosure of the legal advice dated October 5, 2017 on the grounds of solicitor-client privilege is upheld.

3. The Respondent's objection to disclosure of the Memorandum to the Minister dated December 1, 2017 on the grounds of solicitor-client privilege is partially upheld. The Respondent shall, within thirty (30) days of the date of this Order, transmit a redacted version of the Memorandum to the Court and the Applicants, which redacts the portions that are subject to solicitor-client privilege.
4. The balance of the Applicants' motion is dismissed.
5. There shall be no order as to costs of this motion.

"Kathleen M. Ring"  
\_\_\_\_\_  
Case Management Judge

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.*

2009 FC 392  
Federal Court

Simpson Strong-Tie Co. v. Peak Innovations Inc.

2009 CarswellNat 1166, 2009 FC 392, 344 F.T.R. 217 (Eng.)

**Simpson Strong-Tie Company Inc., Applicant  
and Peak Innovations Inc., Respondent**

L.S. Mandamin J.

Heard: February 23, 2009

Judgment: April 21, 2009

Docket: T-1570-07, T-1571-07

Proceedings: affirmed *Simpson Strong-Tie Co. v. Peak Innovations Inc.* (2009), 2009 CarswellNat 2753, 2009 FCA 266 (F.C.A.)

Counsel: Kenneth D. McKay, for Applicant  
Paul Smith, for Respondent

***L.S. Mandamin J.:***

1 The Applicant, Simpson Strong-Tie Company Inc., appealed a decision of the Registrar of Trade-marks. In the course of the appeal proceedings, the Respondent, Peak Innovations Inc., filed certain affidavits. The Applicant served Directions to Attend on the affiants for cross-examination on their affidavits. The Directions sought extensive document production by the affiants. Neither the affiants nor the Respondent provided documents they considered beyond the scope of the affidavits. At the cross-examination, the affiants refused to answer Simpson Strong-Tie's questions about the documents requested in the Notice to Attend.

2 Simpson Strong-Tie then brought a motion before the case management Prothonotary for production of documents and re-attendance of the affiants to answer refused questions. The Respondent opposed the motion.

3 The case management Prothonotary dismissed the Applicant's motion. Simpson Strong-Tie now appeals the Prothonotary's Order dismissing its application for production of documents sought in the Direction to Attend and for answers to the questions refused in the cross-examination on affidavit.

## Decision Under Appeal

4 The Prothonotary observed the Directions to Attend and required the affiants to produce an extensive list of documents. He considered the majority of the Applicant's questions, for which answers were refused, to be about documents which Simpson Strong-Tie sought in its Directions to Attend. The Prothonotary considered the Applicant's remaining questions on cross-examination to be equally wide in scope. They were, in the Prothonotary's view, beyond the reach of the specific knowledge of the two affiants.

5 The Prothonotary noted that the Applicant's questions arose during cross-examination on affidavits rather than on examination for discovery.

6 The Prothonotary acknowledged the Applicant's submissions that witnesses are required to produce documents referred to in the Directions to Attend and that the *Federal Courts Rules, SOR 98-106*, contemplated that a witness in a proceeding may be compelled to produce documents reaching beyond the scope of the affidavit upon which they were cross-examined. However, he agreed with the Respondent's submission that the questions were not focussed on the affidavits and matters deposed therein, rather to efforts to obtain production of documents not within the possession, power or control of the affiants.

7 The Prothonotary considered [Rule 91](#), and more particularly 91(2)(c), directly applicable to the issue in the motion. That Rule provides that a party intending to conduct an oral examination shall serve a Direction to Attend on the person to be examined. [Rule 91\(2\)\(c\)](#) is specific to cross-examination on affidavit and requires the documents to be produced are those documents "in *that* person's possession, power or control" (emphasis in Prothonotary's reasons) that are relevant to the application. He contrasted this wording with [Rule 91\(2\)\(a\)](#) which deals with examinations for discovery and refers to documents "in the possession, power or control *of the party* on behalf of whom the person is being examined" (emphasis added). The Prothonotary held that on a plain reading of [Rule 91\(2\)\(c\)](#) the documents to be produced are only those in the affiant's possession, power or control.

8 The Prothonotary concluded that a Direction to Attend which seeks "all documents" in the Respondent corporation's files are documents not necessarily in the possession, power or control of the affiants. He decided that in its Directions to Attend, the Applicant had overreached what the affiants were required to produce.

9 The Prothonotary acknowledged that where a proper foundation was laid in cross-examination, a party could be required to obtain the production of additional documents. He found that the thrust of questions refused in the Applicant's cross-examinations on affidavit did not seek to lay a foundation to demonstrate the documents were in the possession of the affiants.

10 The Prothonotary ruled the questions arising from the Directions to Attend were not proper and need not be answered. Finally, he decided the remaining questions refused by Peak Innovations were questions to which argument was not directed or dealt with matters that were not relevant, were privileged, or exceeded the scope of the affidavits. On these, the Prothonotary decided that Simpson Strong-Tie was free to argue in the course of the proceeding that an adverse inference could be drawn against Peak Innovations for failing to produce those documents.

11 In result, the Prothonotary dismissed the Applicant's Motion for production of documents sought in the Direction to Attend and for answers to the questions refused in the cross-examination on affidavit.

### **Issue**

12 The issue in this appeal is whether the Prothonotary erred in holding that on cross-examination on an affidavit the production of documents and answers to questions thereto was governed by [Rule 91\(2\)\(c\)](#) and that the Rule limited document production in cross-examination on affidavit to documents in the possession, power or control of the affiants.

### **Standard of Review**

13 Discretionary orders of Prothonotaries ought not to be disturbed on appeal unless they are clearly wrong in the sense that the exercise of discretion was based on a wrong principle or misapprehension of the facts or that they raise questions vital to the final issue of the case. *R. v. Aqua-Gem Investments Ltd.*, [1993] F.C.J. No. 103 (Fed. C.A.)

14 In *Merck & Co. v. Apotex Inc.*, 2003 FCA 488 (F.C.A.), Justice Décarý decided that a judge should first determine whether the question is vital to the final issue. Secondly, whether "the orders are clearly wrong, in the sense that the exercise of discretion by the prothonotary was based upon a wrong principle or upon a misapprehension of the facts." *Merck* at para. 19.

### **Legislation**

15 Rule 91 of the *Federal Rules of Court* provides:

#### **Direction to attend**

91. (1) A party who intends to conduct an oral examination shall serve a direction to attend, in Form 91, on the person to be examined and a copy thereof on every other party.

#### **Production for inspection at examination**

(2) A direction to attend may direct the person to be examined to produce for inspection at the examination

(a) in respect of an examination for discovery, all documents and other material in the possession, power or control of the party on behalf of whom the person is being examined that are relevant to the matters in issue in the action;

(b) in respect of the taking of evidence for use at trial, all documents and other material in that person's possession, power or control that are relevant to the matters in issue in the action;

(c) in respect of a cross-examination on an affidavit, all documents and other material in that person's possession, power or control that are relevant to the application or motion;  
and

(d) in respect of an examination in aid of execution, all documents and other material in that person's possession, power or control that are relevant to the person's ability to satisfy the judgment.

16 Rule 94(1) provides:

**Production of documents on examination**

94. (1) Subject to subsection (2), a person who is to be examined on an oral examination or the party on whose behalf that person is being examined shall produce for inspection at the examination all documents and other material requested in the direction to attend that are within that person's or party's possession and control, other than any documents for which privilege has been claimed or for which relief from production has been granted under rule 230.

**Relief from production**

(2) On motion, the Court may order that a person to be examined or the party on whose behalf that person is being examined be relieved from the requirement to produce for inspection any document or other material requested in a direction to attend, if the Court is of the opinion that the document or other material requested is irrelevant or, by reason of its nature or the number of documents or amount of material requested, it would be unduly onerous to require the person or party to produce it.

**Analysis**

17 The underlying proceeding is an appeal by the Applicant, Simpson Strong-Tie, of the decision of the Registrar of Trade-marks (Opposition Board) of the Trade-marks Office. Simpson Strong-Tie had opposed the Respondent's application for registration of the trade-mark at issue: No. 1,205,529. This opposition was refused by the Opposition Board and the trademark has been registered. Simpson Strong-Tie appealed the decision pursuant to [section 56 of the \*Trade-marks\*](#)

*Act, R.S.C. 1985, c. T-13*, by filing a Notice of Application in Federal Court seeking an order granting its appeal, an order setting aside the decision of the Registrar of Trade-marks, and an order directing the Registrar of Trade-marks to refuse the registration of the trademark.

18 I begin by noting that the Prothonotary's decision refusing Simpson Strong-Tie's motion relates to an interlocutory matter and not to an issue vital to the final outcome. As such the Prothonotary's order ought not to be disturbed on appeal unless it is clearly wrong in the sense that the exercise of discretion was based on a wrong principle or misapprehension of the facts. *Merck, supra*.

19 The Applicant submits that Rule 94(1) requires that the person or party to produce the documents required and that the onus was on the recipient to apply under Rule 94(2) to seek relief from the Court from the production of documents. Further the Applicant submits that Rule 91(2)(c) allows the person issuing the Direction to Attend to ask for production of "all documents and other material ... relevant to the application or motion." Simpson Strong-Tie submits the Prothonotary did not deal with its submission and instead put the onus on the Applicant contrary to Rule 94(2).

20 The Applicant also submits the Federal Court Rules on the Direction to Attend provide for the production of all documents relevant to the application. It cited the decision of Justice Snider in *Sawridge Band v. R.*, 2005 FC 865 (F.C.), specifically:

In my view, the most succinct statement of the current state of the law on the scope of cross-examination on an affidavit, in the context of an interlocutory motion such as this, is set out by Reed J. in *Castlemore Marketing Inc. v. Intercontinental Trade and Finance Corp.*, [1996] F.C.J. No. 201, at para. 1:

An affiant is required to answer questions on matters which have been set out in the affidavit as well as any collateral questions arising from his or her initial answers. In *Bally-Midway Mfg. Co. v. M.J.Z. Electronics Ltd.* (1984), 75 C.P.R. (2d) 160, Mr. Justice Dubé stated that cross-examinations on affidavits are confined to "the issues relevant to the interlocutory injunction and/or all allegations contained in the affidavit". In [*Weight Watchers International Inc. v. Weight Watchers of Ontario Ltd.* (No. 2) (1972), 6 C.P.R. (2d) 169 (F.C.T.D.)], Mr. Justice Heald relied upon jurisprudence which held that a person cross-examining on an affidavit was not confined to the area within the four corners of the affidavit but could cover any matter relevant to the determination of the issue in respect of which the affidavit was filed. In addition to being relevant, the question of course must not be of such a general nature that it cannot be intelligently answered, and the Court will exercise its discretion and disallow any question which it considers in the nature of a "fishing expedition".

21 I note that in *Sawridge*, Justice Snider was dealing with an interlocutory motion by which the plaintiffs sought an order that the defendant produce an alternative witness who was a more informed affiant than the paralegal who prepared the affidavit that listed certain documents. Justice

Snider declined to grant the requested relief because, in addition to not specifying questions they wished to ask, the plaintiffs appeared to propose to cross-examine on the contents of the documents beyond the limited purpose for which they were put forward. Justice Snider held that such cross-examination would extend beyond the matters in respect of which the affidavit was filed.

22 The Applicant also refers to decisions in *Bruno v. Canada (Attorney General)*, 2003 FC 1281 (F.C.), and *Autodata Ltd. v. Autodata Solutions Co.*, 2004 FC 1361 (F.C.). *Bruno* dealt with a situation where the examining party failed to specify the production of documents in a Direction to Attend before examining a witness.

23 In *Autodata*, Prothonotary Tabib was considering an application made in the course of an appeal under section 56 of the *Trade Marks Act* which is the same type of proceeding as the instant case. She was considering whether production and answers were required in a situation where an undertaking to produce documents had been given. She echoed the Federal Court of Appeal decision in *Merck Frosst Canada Inc. v. Canada (Minister of Health)*, [1997] F.C.J. No. 1847 (Fed. T.D.), where it was stated that cross-examination is not examination for discovery in that the deponent is not a party and the deponent can be required to produce only documents within his or her custody or control, and the rules of relevance are more limited.

24 In my view, the three aforementioned decisions do not compel an interpretation of Rule 91(2)(c) different than the interpretation settled on by the Prothonotary. Rather, the decisions tend to support the Prothonotary's decision, especially *Autodata*. Prothonotary Tabib made the distinction between proceedings in an action and an application, the later involving a more restricted and summary procedure.

However, a cross-examination on affidavit is not a discovery, and an application is not an action. An application is meant to proceed expeditiously, in summary fashion. For that reason, discoveries are not contemplated in applications. Parties cannot expect, nor demand, that the summary process mandated for applications will permit them to test every detail of every statement made in affidavits or in cross-examinations against any and all documents that may be in the opposing party's possession. If a party is not required to "accept" a witness' bald assertion in cross-examination, it is however limited in its endeavours to test that assertion to the questions it may put to the witness and the witness' answers in the course of the cross-examination. To the extent documents exist that can buttress or contradict the witness' assertion, production may only be enforced if they have been listed, or sufficiently identified, in a direction to attend duly served pursuant to Rule 91(2)(c) (see *Bruno v. Canada (Attorney General)* [2003] F.C.J. 1604). I reiterate: a cross-examination on an affidavit is the direct testimonial evidence of the witness, not a discovery of the party. (underlining added)

25 The Applicant, Simpson Strong-Tie, proceeded in its appeal of the Registrar of Trade-marks decision by way of a Notice of Application. In choosing to proceed by application, it must observe the limitations that are attendant on application proceedings.

26 I agree with the Prothonotary that Rule 91(2)(c) is directly applicable. The language of Rule 91(2)(c) is precise with respect to production of documents for cross-examination on affidavits and is to be preferred over more generally worded provision of Rule 94 dealing with oral examinations.

27 The remaining matters the Applicant raises assume success in this application and deal with case management questions. Given the Applicant does not succeed in the central issue and given that case management is in the hands of the Prothonotary, I decline to address those issues. The Applicant should return to the case management Prothonotary for direction in respect of those matters.

### **Conclusion**

28 I conclude that the Prothonotary's Order ought not to be disturbed since it is not clearly wrong in the sense that the exercise of discretion was based on a wrong principle or misapprehension of the facts.

29 Costs are awarded to the Respondent, Peak Innovations Inc.

### **Judgment**

*THIS COURT ORDERS AND ADJUDGES that:*

1. The application is dismissed.
2. Costs are awarded to the Respondent.

*Appeal dismissed.*

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* (*per* Manson 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.*