

VIA EMAIL

April 30, 2020

Federal Court of Appeal
90 Sparks Street, 5th floor
Ottawa, Ontario K1A 0H9

Dear Registry Officer,

RE: Air Passenger Rights v. Canadian Transportation Agency (FCA : A-102-20)

We are counsel for the Applicant. On April 28, the National Airlines Council of Canada (NACC) addressed the Court, seeking to vary the timelines in Locke J.A.'s order of April 16, which ordered that the Applicant's injunction motion be expedited. Prior to receiving the Court's direction on April 29, the Applicant has delivered a letter to the Court regarding the NACC's lack of urgency, amongst other concerns. This letter is pursuant to the Court's amended directions on April 30. It is not in the interest of justice to permit the NACC's intervention for the following three reasons.

Firstly, the NACC is seeking to **significantly expand** on the evidentiary record, contrary to the rule that interveners are not permitted to introduce evidence, save in the most exceptional circumstances.¹ There is no such circumstance here warranting departure. The NACC also seeks to place an unfair burden on the Court and the parties, for a relatively straightforward judicial review that should be dealt with summarily without delay.² Indeed, the NACC's proposed evidence is even lengthier than each of the Applicant's and Respondent's own evidence.

Secondly, since April 17, the NACC was fully aware of the court-ordered expedited timelines.³ However, the NACC waited more than one week with even notifying the Court, long after having already decided to seek leave to intervene.⁴ NACC's dilatory conduct directly disrupts the Court's process and abruptly delays a pending motion that was ordered to be expedited.⁵ Of note, Locke J.A. recognized that passengers may rely on the Agency's Statement such that the passengers' rights could be irrevocably affected, warranting swift disposition of the Applicant's motion.⁶

Most importantly, the NACC failed to explain why the air carriers whom NACC purportedly claims to be "directly affected" by the Statement on Vouchers are not seeking to intervene directly, but rather attempt to do so via a proxy.⁷ The air carriers clearly have the capability and resources to intervene, unlike the lay passengers whom the Applicant represents. Indeed, Locke J.A.'s Order noted that one of the Applicant's primary concern was that each air carrier is systematically utilizing the Statement on Vouchers in varying manners to mislead passengers to their detriment. It would have been imperative on each of those airlines, not their proxy, to come to Court to clearly

¹ *Namgis First Nation v. Canada (Fisheries and Oceans)*, 2019 FCA 149 at para. 18; see also *Canada (Citizenship and Immigration) v. Ishaq*, 2015 FCA 151 [*Ishaq*] at paras. 28(3) and 32.

² Federal Courts Act s. 18.4 "Hearings in a summary way"; see also Order of Locke J.A. on April 16, 2020

³ See page 14 of NACC's motion record at para. 16.

⁴ *Canada (Attorney General) v. Siemens Enterprises Communications Inc.*, 2011 FCA 250 at para. 5

⁵ Order of Locke J.A. on April 16, 2020 page 4, second paragraph

⁶ Order of Locke J.A. on April 16, 2020 page 3, last paragraph

⁷ *Rothmans, Benson and Hedges Inc v Canada (AG)*, [1990] 1 FC 74, 1989 CarswellNat 594 [*Rothmans*] at para. 12, points #1 and 3

explain *how* the continued posting of a potentially misleading Statement on Vouchers (and related publications) is critical for their well-being.⁸ The air carriers have clearly failed to do so.

The air carriers have effectively shielded themselves from this Court's scrutiny, but at the same time seeks to introduce *post facto* anecdotal evidence to delay the Applicant's motion.⁹ Indeed, the Agency's own motion record suggests that the NACC's proposed evidence was not even before the Agency at the time of publishing the March 25 Statement on Vouchers, casting serious doubt on any utility of NACC's materials and their involvement in this proceeding.¹⁰ It bears emphasizing that *post facto* evidence, such as the NACC's, is also not to be considered.¹¹

Finally, the NACC seeks to repeat the Agency's position that the Agency is already defending.¹² The Agency's motion record suggests the Agency is advancing the position that it is within its mandate to ensure "economic viability" (i.e. the cash-flow) of air carriers, and in fulfilling that supposed mandate the Agency claims they can formulate policy that permits air carriers to issue flight vouchers in response to passengers' demands for refund. The NACC seeks to regurgitate that position, and *further* seeks to hijack this judicial review with an unnecessary policy debate on whether flight vouchers is good and sound policy because of the COVID-19 pandemic.¹³

Of note, this judicial review is not about the wisdom of a policy to allow flight vouchers in lieu of a refund. Rather, the core legal question that the Applicant is asking this Court to review is whether the Agency acted outside of its statutory mandate in issuing the Statement on Vouchers (and related publications) and, as a quasi-judicial body opining on a live legal controversy that may be before the tribunal later on, and whether that conduct exhibits a reasonable apprehension of bias.

Although it is concerning that almost every business (including the NACC air carriers) are experiencing revenue decreases during the pandemic, assessing whether a business requires financial assistance, and whether any policies be adopted to protect a business's cash position is within the exclusive purview of government or Parliament. Indeed, to the extent there is any threat to the very existence of the NACC member air carriers, section 47 of the *Canada Transportation Act* specifically empowers the Cabinet, not the Agency, to step in to ensure the economic viability of the air carriers.¹⁴ Of note, the powers under section 47 was previously exercised in the early 2000s in relation to the Air Canada restructuring, for example.

The Applicant submits that NACC's intervention motion ought to be denied for the above reasons.

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

Yours truly,

EVOLINK LAW GROUP



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⁸ Rule 81(2)

⁹ Mike McNaney Affidavit, Ex A and C; Nicola Colville Affidavit, all exhibits; Jiwan Son Affidavit, Ex D

¹⁰ [Stemijon Investments Ltd. v. Canada \(Attorney General\)](#), 2011 FCA 299 at para. 41

¹¹ [Shipdock Amsterdam B.V. v. Cast Group Inc.](#), 1999 CanLII 9085 at paras. 7-8 per Lafrenière P. (as he then was); [Odyssey Television Network Inc. v. Ellas TV Broadcasting Inc.](#), 2018 FC 337 at para. 42

¹² [Rothmans](#) at para. 12, points # 4 and 6

¹³ [Ishaq](#) at paras. 25-27

¹⁴ Para. 12 of the Mike McNaney Affidavit (NACC's motion record p. 13) confirming they are already doing so