

August 25, 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 (A-102-20)

We are counsel for the Applicant, Air Passenger Rights. Please kindly bring this letter to the attention of Boivin, J.A. By Order dated August 18, 2020, Boivin, J.A. is seized of this file.

This letter relates to the letter dated August 20, 2020 from the Respondent, the Canada Transportation Agency (“**Agency**”), delivered in accordance with Rule 318(2), raising a single objection to the Applicant’s request for records pursuant to Rule 317. The Agency has not raised any other objections. By way of this letter, the Applicant provides its response to the Agency’s sole objection and further seeks directions from the Court under Rule 318(3) on the procedure for making submissions to address the Agency’s single objection.¹

The Agency’s sole objection under Rule 318(2) is, the Agency claims, that there was no “order” of a tribunal. The Agency has overlooked that “order” (*ordonnance*) is broadly defined under Rule 2 of the *Federal Courts Rules* using the word “includes” rather than “means”. Moreover, “ordonnance” specifically includes “*autre mesure prise par un office federal*,” (emphasis added), clearly confirming that Rule 317 captures more than simply “decisions or orders”.

The Agency has failed to substantiate how the impugned Publications is not a “mesure” of the Agency. Indeed, in the previous motions,² the Agency has taken the position that the impugned Publications were “policies” or “guidance” that were part of the Agency’s actions or responses in respect to the COVID-19 pandemic.

Notably, the Federal Court has previously ruled that Rule 317-8 is sufficiently flexible to permit the court to order that relevant materials for judicial review of an administrative agency’s “policies, practices, or actions” be disclosed as part of the procedure in Rule 318.³ Those Federal Court rulings are consistent with Stratas, J.A.’s more recent guidance on the flexible interpretation of Rule 318⁴ and that orders under Rule 318 comes in “any shape and size, limited only by the

¹ [Lukács v. Canada \(Transportation Agency\)](#), 2016 FCA 103 at paras. 3-4

² Including the Applicant’s motion for interlocutory injunctions and the Agency’s motion to strike

³ [Renova Holdings Ltd. v. Canadian Wheat Board](#), 2006 FC 1505 at paras. 13 and 17-19; [Airth v. Canada \(National Revenue\)](#), 2007 FC 415 at paras. 5-8

⁴ [Lukács v. Canada \(Transportation Agency\)](#), 2016 FCA 103 at para. 14

creativity and imagination of counsel and courts” with the goal of furthering and reconciling as much as possible the objectives of:⁵

- (1) meaningful review of administrative decisions in accordance with Rule 3 of the *Federal Courts Rules* and s. 18.4 of the *Federal Courts Act* and the principles discussed at paras. 6-7 of *Lukács v. Canada (Transportation Agency)*, 2016 FCA 103;
- (2) procedural fairness; and
- (3) the protection of any legitimate confidentiality interests while permitting as much openness as possible in accordance with the Supreme Court’s principles in *Sierra Club*.

In this instance, the Applicant submits that the Court could consider directing the Agency to provide short written submissions on why their narrow technical objection (i.e., their objection that there being no “order”) should not be dismissed, assuming the Agency still intends to pursue that technical objection. The Applicant further submits that this Honourable Court could also direct the parties to provide, as part of their Rule 318 submissions, short written submissions on the issuance of a subpoena under Rule 41 against the chief executive officer of the Agency⁶ to produce the materials the Applicant has requested⁷ in its Notice of Application.

The Applicant submits that a streamlined procedure would be the most suitable for this judicial review considering the materials that the Applicant requests clearly relates to the RAB Ground and/or Misinformation Ground for judicial review.

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

Yours truly,

EVOLINK LAW GROUP



SIMON LIN

Cc: Mr. Allan Matte, counsel for the Respondent, Canada Transportation Agency

⁵ *Lukács v. Canada (Transportation Agency)*, 2016 FCA 103 at paras. 15 and 18; see also *Tsleil-Waututh Nation v. Canada (Attorney General)*, 2017 FCA 128 at paras. 78-9 and 83

⁶ Under section 13 of the *Canada Transportation Act*, the Chairperson has supervision over the work of all staff and members.

⁷ See *Tsleil-Waututh Nation v. Canada (Attorney General)*, 2017 FCA 128 at para. 103 where Stratas, J.A. provided some guidance on Rule 41 as a possible option for an applicant to obtain records.