

July 8, 2021

VIA EMAIL

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

Dear Registry Officer,

RE: Air Passenger Rights v. The Attorney General of Canada (A-102-20)

We are counsel for the Applicant, Air Passenger Rights. Please bring this letter to Gleason J.A.'s attention. Her Ladyship is seized with the Applicant's Rule 41 and 318 Motion to Compel Documents from the Canadian Transportation Agency [CTA] (Doc. 52). Please accept this letter as the Applicant's submissions in accordance with para. 3 of the Court's order on June 4, 2021.

Reply on the Relevance of the Less Redacted Emails

The Applicant seeks to include a less redacted version of some CTA and Transport Canada emails [**Less Redacted Emails**] by way of Dr. Lukacs's affidavit of May 12, 2021. The Applicant relies on its letters that were submitted to the Court on May 12, 2021 and May 14, 2021. The Applicant replies to the AGC's bald assertion doubting relevance as follows.

The identity of the unnamed individual in the email from the CTA on March 23, 2020 at 10:15AM (quoted below) is of paramount importance and directly relevant to the Applicant's claim that the CTA was not acting independently, but rather at the whim of the private sector and/or political actors. The Less Redacted Emails would confirm whether the CTA's Member(s) breached paras. 39-40 of the CTA's *Code of Conduct for Members of the Agency*.¹

This [referring to the CTA's Statement on Vouchers] was discussed between the Chair [of the CTA], the DM [a deputy minister of Transport Canada] and the [REDACTED] and Marcia [the Chief Strategy Officer of the CTA] spoke with your ADM [an assistant deputy minister of Transport Canada] over the weekend as well.²

The redaction above was based on s. 19(1) of the federal *Access to Information Act* [ATIA], which allows redactions if there is "personal information". The definition of "personal information" under the ATIA incorporates the same definition from the *Privacy Act*, which expressly excludes information about government officers or employees from the definition of "personal information".³

¹ Applicant's Written Representations from January 3, 2021 at para. 15

² Exhibit "B" of the May 12, 2021 Affidavit of Dr. Lukacs

³ ATIA, section 3 citing the *Privacy Act*, section 3 "personal information" under subparagraph (j) and (j.1)

but, for the purposes of sections 7, 8 and 26 and section 19 of the *Access to Information Act*, does not include

(j) information about an individual who is or was an officer or employee of a government institution that relates to the position or functions of the individual including,

- (i) the fact that the individual is or was an officer or employee of the government institution,
- (ii) the title, business address and telephone number of the individual,
- (iii) the classification, salary range and responsibilities of the position held by the individual,
- (iv) the name of the individual on a document prepared by the individual in the course of employment, and
- (v) the personal opinions or views of the individual given in the course of employment,

(j.1) the fact that an individual is or was a ministerial adviser or a member of a ministerial staff, as those terms are defined in subsection 2(1) of the *Conflict of Interest Act*, as well as the individual's name and title,

[emphasis added]

In other words, the redaction and reference to s. 19(1) of the *ATIA* mean that the unnamed individual was **not** from the public sector. The unnamed individual must be from the private sector, likely the travel industry, or another group with a direct or indirect interest in withholding refunds from passengers.

There is a strong argument that discussion between the Chair, DM, ADM, and the unnamed individual would give rise to a reasonable apprehension of bias, if the unnamed individual was working for or on behalf of the travel industry. This is clearly relevant to the Rule 318 disclosure motion and the Reasonable Apprehension of Bias ground of judicial review.

The Less Redacted Emails are already in the Applicant's motion record from January 3, 2021, but with significant redactions, as compared to the version provided in the May 12, 2021 affidavit. The CTA always had the fully unredacted emails and there could be no prejudice in that regard.

To the extent there is any residual doubt about the relevance of the Less Redacted Emails, the Court may order that a fully unredacted copy be provided for the Court's review.

Reply for the Procedural Aspect of the Informal Motion

On May 14, 2021, the CTA submitted as follows regarding the Less Redacted Emails affidavit:

If given the opportunity, the Agency would file a response to address the propriety of seeking to add to the record by way of informal letter rather than by way of motion. The Agency would also address the relevance and necessity of the information sought to be added. Accordingly, should this Court consider accepting the letter and further affidavit, the Agency requests direction with respect to whether it may have an opportunity to respond.

[emphasis added]

Thereafter, on June 4, 2021, this Court granted leave for the AGC to file submissions in response to the Less Redacted Emails, akin to a formal process for submissions on a motion.

However, the AGC failed to provide *any* substantive basis to object to inclusion of the Less Redacted Emails. The AGC merely relies on “the reasons set out in the submissions of the Agency [the May 14, 2021 letter].” The CTA’s submissions from May 14, 2021 (above) actually provide no substantive objection either. The AGC simply repeats the CTA’s May 14, 2021 bald assertion that the Less Redacted Emails “are neither necessary nor relevant.” Respectfully, the AGC has effectively waived their right to object to the Less Redacted Emails.

It is within the plenary power of this Honourable Court to control its own procedures. Rule 55 enables the Court to permit filing of reply evidence,⁴ which would include any further evidence that was subsequently discovered, such as the Less Redacted Emails affidavit. The AGC has not pointed to *any* prejudice if the Court considers the Less Redacted Emails for the Rule 318 motion.⁵

The Applicant has also demonstrated (above) that the Less Redacted Emails will assist the panel in deciding the merits of the judicial review, and that those emails were not available to the Applicant prior to May 11, 2021.⁶

Reply on the Rules 41 and 318 Disclosure Motion

For the disclosure issue, the Applicant does not intend to provide further reply to the AGC’s letter of July 5, 2021. The Applicant relies on the January 3, 2021 and January 22, 2021 submissions.

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

Yours truly,

EVOLINK LAW GROUP

Simon Lin

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⁴ *Amgen Canada Inc. v. Apotex Inc.*, 2016 FCA 121 at para. 8

⁵ *Tsleil-Waututh Nation v. Canada (Attorney General)*, 2017 FCA 128 at para. 11 (bullet point #2)

⁶ *Ibid*, bullet points #1 and #3