

**FEDERAL COURT OF APPEAL**

BETWEEN:

**AIR PASSENGER RIGHTS**

**Appellant**

**-and-**

**ATTORNEY GENERAL OF CANADA**

**Respondent**

**-and-**

**CANADIAN TRANSPORTATION AGENCY**

**Intervener**

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**WRITTEN SUBMISSIONS OF THE ATTORNEY GENERAL OF CANADA**

**November 21 2022 informal motion for an extension of time  
and to claim privilege over portions of two documents**

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**Overview**

1. This motion addresses two documents, both containing text clearly subject to solicitor client privilege. Further, one of the documents is reasonably subject to litigation privilege, while the other includes text reasonably subject to deliberative privilege.
2. Upon review it will be made clear that the privilege claims are valid and should be upheld by the Court of Appeal.
3. The respondent further requests an extension of time to serve and file the present motion.

## Background

4. The basis for the present motion is set out in detail in the September 2, 2022 Order of the Honourable Justice Gleason.<sup>1</sup>
5. Therein at paragraph 1 subparagraph c the Court of Appeal directs that any motions regarding privilege are to be brought by the Respondent by no later than November 14, 2022.
6. Communications were exchanged between the Applicant's counsel and Intervener's counsel. The Respondent's counsel was cc'd on these exchanges. The Respondent was not aware of which documents might ultimately be raised before the Court of Appeal, nor whether any privilege claims might attach to such documents.
7. On November 14, 2022, counsel for the Respondent wrote to the Court to advise that the Respondent was not aware of whether any privilege claims would be necessary, but would be prepared to bring a motion if appropriate.<sup>2</sup>
8. Thereafter on November 14, 2022, counsel for the Applicant wrote to the Court of Appeal and served and filed their motion record seeking, among other things, to compel further disclosure of documents from the Intervener.
9. It is the Respondent's position that two of the documents that are the subject of the Applicant's motion are properly subject to solicitor-client privilege, litigation privilege, and/or deliberative privilege. Accordingly, the present informal motion has been made to maintain those privilege claims.
10. Further, given the facts above, this motion record will also serve as an informal request for an extension of time to serve and file the present motion to uphold the privilege claims.

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<sup>1</sup> Exhibit A to the Affidavit of Elizabeth Schmidt, sworn November 21, 2022 [“Schmidt Affidavit”].

<sup>2</sup> Schmidt Affidavit, Exhibit B.

## **Extension of time**

11. The Court of Appeal is well familiar with the test for an extension of time. It is the Respondent's position that all branches of the test are met in this instance: the Respondent's counsel's letter of November 14, 2022 demonstrates the continuing intention to raise any privilege claims before the Court of Appeal; as demonstrated below, the two documents in issue engage communications between client and counsel which clearly speak to the merit of this motion; this motion is being brought within a week of the original November 14, 2022 deadline set by the Court, and the same documents will be considered by the Court with the Intervener's response to the Applicant's motion to compel production, thus no prejudice to the Applicant may reasonably be said to result; and, the facts set out above provide a reasonable explanation for the delay.

## **The First Document in Issue**

12. The first document in issue is an email chain, dated January 5, 2021. The email is an exchange between Marcia Jones, Chief Strategy Officer with the Canadian Transportation Agency (the "CTA"), and Barbara Cuber, Senior Counsel to the CTA.<sup>3</sup>
13. The subject header reads "incoming litigation".
14. The contents of the email chain are, upon review, reasonably an exchange between lawyer and client regarding a litigation matter.
15. On that basis, it is reasonable to conclude that the contents of the email exchange, in its entirety, is properly subject to solicitor client privilege, as well as litigation privilege.

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<sup>3</sup> Schmidt Affidavit, page 2, para. 6, and Exhibit "C".

## The Second Document in Issue

16. The second document in issue is an email chain, dated March 22, 2020, entitled "Debrief from Sunday EC". The email is an exchange between CTA employees and John Dodsworth, Senior Counsel with CTA Legal Services. The other recipients of the email exchange are also from the CTA, as well as Valérie Lagacé, who was at the time, and remains, Senior General Counsel to the Canadian Transportation Agency.<sup>4</sup>
17. The top and bottom-most emails in the chain includes references to work being done by Valérie Lagacé in her capacity as counsel.

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<sup>4</sup> Schmidt Affidavit, pages 2-3, para. 7, and Exhibit "D".

## Applicable Test for Solicitor Client Privilege

22. The test for solicitor client privilege is summarized by the Federal Court as follows:

[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*, 1979 CanLII 9 (SCC), [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.<sup>5</sup>

23. In the present matter, the evidence establishes that both documents are email exchanged between the CTA and its counsel; that the counsel involved are providing legal advice in respect of litigation and [REDACTED]; and, that these are internal documents circulated only within the CTA.<sup>6</sup> It is clear on the face of the text in issue that legal advice is being sought; and, there is no basis for any suggestion that unlawful conduct was engaged in any way.

24. Accordingly, solicitor-client privilege reasonably applies over the redacted text of both documents, which in any event are irrelevant to the underlying application.

25. In addition, the subject and content of the first document are plainly raised in the context of a client seeking advice on a litigation matter, and accordingly, engage litigation privilege.

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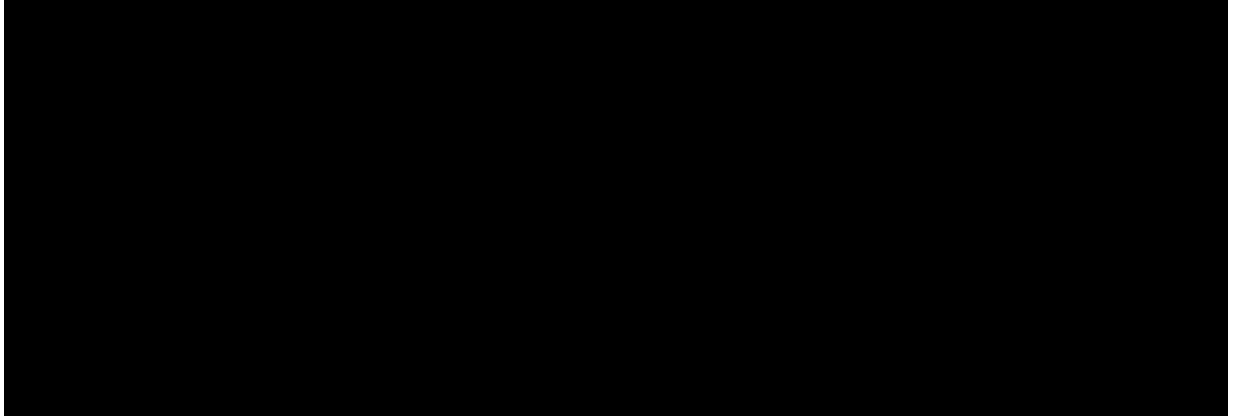
<sup>5</sup> [\*Right to Life Association of Toronto and Area v. Canada \(Employment, Workforce and Labour\)\*](#), 2019 CanLII 9189 (FC) at [para 70](#).

<sup>6</sup> Schmidt Affidavit at para. X.

## Applicable Test for Deliberative Privilege

26. The Supreme Court of Canada has recognized that while administrative tribunals cannot rely on deliberative secrecy to the same extent as judicial tribunals, secrecy remains the rule. It can be lifted when the litigant can present valid reasons for believing that the process followed did not comply with the rules of natural justice.<sup>7</sup>

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ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 21st DAY OF NOVEMBER 2022

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<sup>7</sup> [\*Tremblay v. Quebec \(Commission des affaires sociales\)\*](#), [1992] 1 SCR 952 at p. 954; [\*Commission scolaire de Laval v. Syndicat de l'enseignement de la région de Laval\*](#), [2016] 1 SCR 29 at [para 58](#).

## LIST OF AUTHORITIES

### Legislation

1. [Canada Transportation Act, SC 1996, c 10](#)

### Jurisprudence

2. [Commission scolaire de Laval v. Syndicat de l'enseignement de la région de Laval, \[2016\] 1 SCR 29](#)
3. [Right to Life Association of Toronto and Area v. Canada \(Employment, Workforce and Labour\), 2019 CanLII 9189 \(FC\)](#)
4. [Tremblay v. Quebec \(Commission des affaires sociales\), \[1992\] 1 SCR 952](#)