



VIA EMAIL: FCARegistry-CAFGrefe@cas-satj.gc.ca

December 2, 2022

The Judicial Administrator
Federal Court of Appeal
90 Sparks Street, Main floor
Ottawa, Ontario
K1A 0H9

Dear Sir/Madam:

Re: *Air Passenger Rights v Attorney General of Canada*
Court File No.:A-102-20

Please bring this letter to the attention of Gleason, J.A. at your earliest convenience.

On November 30, 2022, the Applicant submitted its Reply submissions, as well as an informal motion to file evidence on reply. This letter is the Canadian Transportation Agency's (Agency) response to that motion.

The Agency also requests that the Court accept this letter as an informal motion to address a serious misrepresentation of the facts, raised for the first time by the Applicant in its Reply submissions.

Applicant's Motion to File Evidence on Reply

The Agency submits that the Applicant has not demonstrated the "unusual circumstances" necessary to permit the filing of reply evidence.¹

The evidence that the Applicant seeks to introduce by way of affidavit, which consists of excerpts from a company website, is of little relevance or probative value. The barrier identified in Mr. Guindon's affidavit was that the relevant mailboxes were not recoverable. Even if the encryption keys could reasonably be recovered and could be used in these circumstances, which is not clear from the excerpts provided by the Applicant, it does not change the substance of Mr. Guindon's testimony.

Furthermore, it is the Applicant that argued, without evidence, that the Agency's multiple searches for documents did not include encrypted emails, and contrary to the evidence, that inquiries were not made regarding the Outlook accounts of former employees. That the Agency would dispute these assumptions should come as no surprise to the Applicant. The reply evidence was available at the time and was not included in the Applicant's original affidavit.

The Applicant's motion should therefore be dismissed.

¹ Amgen Canada Inc. V. Apotex Inc., 2016 CarswellNat 1363, [2016 FCA 121](#).

In the alternative, should the Court grant the Applicant's motion, the Agency requests the opportunity to submit sur-reply evidence on whether what is now being suggested by the Applicant is feasible or reasonable.

Misrepresentation of the Facts

The Applicant's 17 page Reply raises several new issues for the first time, amongst them, a serious misrepresentation of the facts that need be addressed.

The Applicant claims that Ms. Jones' and the Analysis and Outreach Branch (AOB) was excluded or omitted from any “tasking” for the manual Access to Information (ATI) Search.² This is false. Contrary to the Applicant's assertions, both the notification and tasking emails were sent to Ms. Jones and the AOB. In the notification email sent on Tuesday May 5, 2020, Marcia Jones, as branch head, is included in the list of recipients.³ In the tasking email sent May 29, 2020, the recipients are the subject experts of the program concerned with the request (OPI – Office of the Primary Interest). This is standard practice. In this case, Karina Bouthillette, whose name appears in the list of recipients, is the person assigned by the AOB to search the records and make recommendations on their disclosure. Marcia Jones is also included in CC.⁴

The documents cited by the Applicant clearly show that Ms. Jones's and the AOB were included in the tasking for the manual ATI search. In order for the Court to have the necessary information to dispose of the Applicant's motion, the Agency requests that this important correction to the facts be considered.

Sincerely,



Kevin Shaar
Counsel
Legal Services Directorate
Canadian Transportation Agency
15 Eddy Street, 19th Floor
Gatineau, Quebec K1A 0N9
Tel: 613-894-4260
Fax: 819-953-9269
Email: Kevin.Shaar@otc-cta.gc.ca
Email: Servicesjuridiques.LegalServices@otc-cta.gc.ca

c.c.: Simon Lin, Counsel for the Applicant, via email: simonlin@evolinklaw.com

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

² Applicant's Reply Submission, at paras. 34-35 and 62, pp. 9 and 16

³ Lukács Affidavit (Nov. 14, 2022), Exhibit “U” [MR, Tab 2U, p. 109 - Notification].

⁴ Lukács Affidavit (Nov. 14, 2022), Exhibit “U” [MR, Tab 2U, p. 104 - Tasking].