

July 11, 2023

**VIA EMAIL**

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

Dear Madam or Sir,

**RE: APR v. AGC and CTA (A-102-20) – Request to Renew Portion of Rule 41 Motion**

We are counsel for the Applicant. Please bring this letter to Gleason J.A.'s attention. Her Ladyship is seized of all pre-hearing issues, pursuant to the Order of July 19, 2022. This letter is regarding the letter and filing dated June 14, 2023 from Transport Canada [**TC Response**], in response to this Court's subpoena issued on May 26, 2023 [**Subpoena**].

On April 26, 2023, the Court granted leave to issue the Subpoena to Transport Canada [**TC**] to produce three categories of documents namely:<sup>1</sup> (1) Stacey-Jones Email;<sup>2</sup> (2) Millette-Hurcomb Email Exchange;<sup>3</sup> and (3) TC-CTA Weekend Meeting Documents.<sup>4</sup> The response from TC on June 14, 2023 (per Mr. Colin Stacey) contained one document consisting of one page that is responsive to one of the three categories only, namely the "Millette-Hurcomb Email Exchange." Mr. Stacey confirmed in writing that TC did **not** have possession of the "Stacey-Jones Email" or the "TC-CTA Weekend Meeting Documents"

The Applicant requests that this letter stand as an informal motion to renew the request for portions of the relief that were not granted on April 26, 2023 because it was premature at that time [**Renewed Request**].<sup>5</sup> The necessary evidence for this Renewed Request is already before the Court, namely the Affidavit of Dr. Gábor Lukács (Doc. 188) [**Lukács Affidavit**] and the TC Response, which are already part of the court file under Rule 363.

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<sup>1</sup> Order of Gleason J.A., on April 26, 2023 (Doc. 197) [**April 2023 Order**].

<sup>2</sup> An email from Mr. Stacey (TC) to Ms. Jones (Canadian Transportation Agency [**CTA**]) on March 18, 2020 regarding Air Transat's request that vouchers be endorsed in lieu of a cash refund (Notice of Motion for Rule 41 subpoena – Doc. 187 [**NOM**], Orders Sought at para. 1(a)).

<sup>3</sup> Emails between Mr. Millette (TC) with Ms. Hurcomb (CTA) regarding Air Transat's request that vouchers be endorsed in lieu of a cash refund between March 18-25, 2020 (NOM, Orders Sought at para. 1(b)).

<sup>4</sup> All non-privileged documents for the meetings between CTA personnel and TC officials relating to the Statement on Vouchers around the weekend of March 20-22, 2020 (NOM, Orders Sought at para. 1(c)).

<sup>5</sup> April 2023 Order at page 2, last paragraph.

To avoid further delays, the Renewed Request will only be seeking out-of-court evidence from two (2) individuals identified in paragraph 4 of the original Rule 41 Notice of Motion, instead of the original request to examine five (5) individuals, as clearly annotated below:

*4. If TC is not in possession of the **TC-CTA Weekend Meeting Documents**, as an alternative to paragraphs 1-2 above and instead of a subpoena for those documents, an Order that a subpoena be issued for the attendees of those meetings to provide oral evidence out-of-court regarding the discussions that occurred at those meetings and the inception of the Statement on Vouchers:*

*i. Mr. Scott Streiner ~~and Ms. Marcia Jones~~, for a duration not exceeding ninety (90) minutes each; and*

*ii. ~~Mr. Michael Keenan, Mr. Lawrence Hanson, and Mr. Marc Roy~~ for a duration not exceeding one (1) hour each.*

In issuing the April 2023 Order, this Court necessarily ruled that the request for TC-CTA Weekend Meeting Documents met the Rule 41 test for a subpoena.<sup>6</sup> The respondent also consented to the production of the TC-CTA Weekend Meeting Documents.

TC has confirmed that it does not have possession of the TC-CTA Weekend Meeting Documents. Hence, at present there are **no other means** for this Court to ascertain the substance of the TC-CTA weekend discussions regarding the Statement on Vouchers before its publication. This Court has already determined that these TC-CTA weekend discussions occurred.<sup>7</sup> There is a material risk that the CTA would be immunized from judicial review if the substance of these discussions are not before the Court.

The factual circumstances gleaned from the documents disclosed **strongly** point to the TC-CTA discussions causing Mr. Streiner (then CTA Chair) to change his mind on the Statement on Vouchers. On the evening of Friday March 20, 2020, Mr. Streiner already parked the idea of a Statement on Vouchers stating “*since we’re not quite sure yet what will be done on this front or how.*”<sup>8</sup> Then in the early morning of Sunday March 22, 2020, Mr. Streiner unveiled a first draft of the Statement on Vouchers, stating it was “[a]fter some analysis, reflection, and discussion with other federal players...”<sup>9</sup> Finally, at the EC Meeting on Monday, Mr. Streiner referred to discussions and agreements with TC.<sup>10</sup>

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<sup>6</sup> April 2023 Order on page 2, first and second paragraphs.

<sup>7</sup> [Air Passenger Rights v. Canada \(Attorney General\)](#), 2022 FCA 132 at para. 15.

<sup>8</sup> Written Representations (Doc. 190, Feb 27, 2023) at paras. 82-84; Lukács Affidavit at Ex. C (MR p. 42).

<sup>9</sup> *Ibid*; Lukács Affidavit at Ex. E (MR p. 48).

<sup>10</sup> Lukács Affidavit at Ex. S (MR p. 91).

It is regrettable that TC and the CTA did not keep a paper trail of these weekend meetings where substantive issues were discussed. Upon further review of the documents disclosed, there remains a missing piece of the puzzle that is directly relevant to the Reasonable Apprehension of Bias [**RAB**] ground of judicial review and the evidence can only be obtained from the attendees of these TC-CTA weekend meetings including:

1. Who said what about the Statement on Vouchers at the TC-CTA weekend meetings?
2. What were the agreement(s) made at the TC-CTA weekend meetings?<sup>11</sup>
3. The purpose and reasoning of the CTA, particularly Mr. Streiner, acceding to Air Transat's request to recognize vouchers in lieu of refunds when he had already indicated that it "*boil[ed] down to a commercial dispute between the carrier and the credit card companies*"<sup>12</sup> and likely outside of the CTA's mandate.
4. If any influence was exerted by a senior political staff (Mr. Marc Roy, then Transport Minister's Chief of Staff<sup>13</sup>), considering the CTA's *Code of Conduct* specifically bars communications with political actors for matters that could come before the CTA?<sup>14</sup>
5. What caused Mr. Streiner to reverse course after he already parked the idea of the Statement on Vouchers on Friday evening?

The narrow issue now before the Court for this Renewed Request is whether to issue subpoena to receive the evidence of the TC-CTA weekend discussions in a different *format* than ordered on April 26, 2023. In other words, whether to compel the evidence of the TC-CTA weekend discussions in the form of a transcript from out-of-court testimony, in place of documents since the CTA or TC does not have possession of the documents.

As the Applicant argued at the motion for the Rule 41 subpoena,<sup>15</sup> it is within the Court's plenary powers to determine the format of the evidence to be received for the judicial review unless there is an express legislative text to the contrary.<sup>16</sup> There is no legislative text prohibiting receipt of a transcript as evidence. In fact, it is plain from the structure of

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<sup>11</sup> Lukács Affidavit at Ex. S (MR p. 91).

<sup>12</sup> Lukács Affidavit at Ex. F (MR p. 51).

<sup>13</sup> Lukács Affidavit at Ex. K (MR p. 66).

<sup>14</sup> Lukács Affidavit at Ex. A – *Code of Conduct for Members of the Agency*, clauses 21 and 39 (MR p. 33).

<sup>15</sup> Written Representations (Doc. 190, Feb 27, 2023) at paras. 75-80.

<sup>16</sup> [Viv Healthcare Company v. Gilead Sciences Canada, Inc.](#), 2021 FCA 122 at paras. 15-19.

the Federal Courts Rules that use of a transcript, specifically transcript from cross-examination on affidavits, is standard for a judicial review application.

It is expected that the respondent may claim that, for cross-examination on an affidavit, the individual voluntarily came forward with the affidavit and thus could be examined out of court, but there may not be precedent for compel an individual to give out of court evidence for a judicial review. Respectfully, there is no distinction to be made. In this case, the Court had exercised its plenary powers to order the CTA to present an affiant to give an affidavit, and attend cross-examination, regarding evidence gathering for this case.<sup>17</sup> The requested order herein is simply to compel evidence to be given, and analogous to what the Court had previously ordered.

Finally, per the scheduling order on June 2, 2023, the requested examinations would not delay the case since the Applicant's memorandum is not due until November 22, 2023.

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

Yours truly,

**EVOLINK LAW GROUP**

  
SIMON LIN

Barrister & Solicitor

**Cc:** (1) Mr. Sandy Graham and Mr. Lorne Ptack, counsel for the Attorney General of Canada, and (2) Mr. Kevin Shaar, counsel for the Canadian Transportation Agency

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<sup>17</sup> [Air Passenger Rights v. Canada \(Attorney General\)](#), 2022 FCA 64 at paras. 44-50.