



VIA ELECTRONIC FILING

August 3, 2023

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

Dear Administrator:

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.

The Canadian Transportation Agency (Intervener) has read the Air Passenger Rights' (Applicant) letter dated July 11, 2023, seeking to re-litigate its Rule 41 motion, the Attorney General of Canada's (Respondent) response and the Applicant's reply.

The Intervener has serious concerns regarding the Applicant's request to examine Mr. Scott Streiner, Chair and CEO of the Canadian Transportation Agency during the relevant time period, and wishes to respond. As stated by the Respondent at paragraph 3 of its letter response, "(t)he AGC does not represent either of the individuals that the Applicant now seeks to subpoena, nor their employers, in this Application."

Please accept this letter as an informal motion for the Intervener to respond, should it be required.

The Applicant has failed to demonstrate the exceptional circumstances required for the requested order, or that the current state of the evidentiary record, "even if bolstered by permissible inferences and any evidentiary presumptions,"¹ would be inadequate to the point of preventing the Court from conducting a meaningful review of the impugned decision (if such a decision exists here).

The Applicant's multiple requests under Rules 317 and 318, the multiple access to information requests, the cross-examination of the Intervener's affiant, have been extremely broad and sought "every last crumb of information, even information that has absolutely no realistic bearing on this matter."² Despite the exhaustive searches for records conducted by the Agency and the extensive disclosure that has been provided, including by a third party, the Applicant still claims

¹ *Tsleil-Waututh Nation v. Canada (Attorney General)*, 2017 FCA 128, at para. 79.

² 2017 FCA 128, at para. 156; see also paras. 61 and 165.

there are missing crumbs and seeks to examine the former Chair. However, the Applicant is not entitled to every crumb.³

In *Tsleil-Waututh Nation v. Canada (Attorney General)*, the Court makes it clear that simple gaps in the evidence are not sufficient justification for the exceptional order now being sought by the Applicant.⁴ If there are in fact evidentiary gaps in the present case, gaps that are not pure conjecture, they can be properly assessed and evaluated by the Court.⁵ As stated by Justice Stratas J.A. at paragraph 158, "at some point, materiality and proportionality—not just bare relevance—must come to bear on the matter".

Section 18.4(1) of the *Federal Courts Act* provides that an application "shall be heard and determined without delay in a summary way." Rule 3 provides that the *Federal Court Rules* "shall be interpreted and applied so as to secure the just, most expeditious and least expensive determination of every proceeding on its merits."

Like in *Tsleil-Waututh Nation*, these are significant concerns in the present case and there is no danger of immunization from meaningful review. That crumbs may still be out there or that gaps may exist in the evidence, is not sufficient justification for the exceptional order being sought by the Applicant. What the Applicant is seeking is without precedent, and would constitute a dangerous one.

Regards,



Kevin Shaar
Counsel for the Intervener
Legal Services Directorate
Canadian Transportation Agency
60 Laval, Unit 01
Gatineau, Québec J8X 3G9
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
Sandy Graham and Lorne Ptack, Counsel for the Attorney General of Canada,
via email: sandy.graham@justice.gc.ca; Lorne.Ptack@justice.gc.ca

³ See for example, in *Kiss v. Canada (Citizenship and Immigration)*, 2022 FC 133, at para. 25, where the Applicant's request for leave to issue a subpoena under Rule 41, based on very similar arguments as the present case, was refused by the Federal Court. The Court found that Applicant's evidence was "pure conjecture" and permitting the examination on missing documents "would amount to a fishing expedition, and would be beyond the proper scope of judicial review." In *Piatka-Wasty v. Canada (Attorney General)*, 2022 FC 1185, at paras. 32-33, the Applicant's request for an order under Rule 41, based on "missing proof", was similarly refused.

⁴ 2017 FCA 128, at paras. 81, 153, 154.

⁵ 2017 FCA 128, at para. 167.