



By Email: Information@fca-caf.gc.ca

May 1, 2020

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

Dear Sir/Madam:

Re: *Air Passenger Rights v Canadian Transportation Agency*
Court File No.: A-102-20

We write in reply to the Applicant's response dated April 30, 2020, to our request for Directions.

It now appears that after many exchanges, Applicant's Counsel now advises that he does *not* intend to rely on any additional evidence. The Applicant complains about the Agency's proposed "myriad of endless procedural motions". However, our request for Directions only became necessary as a result of the Applicant's conduct as outlined in our letter from yesterday, including its insistence that it was going to rely on this additional evidence.

The Applicant's change in position regarding additional evidence leaves only the issue of cross-examination of the Agency's affiant.

While we had previously been agreeable to cross-examination, in his letter to the Court, Applicant's Counsel has indicated a clear intention to cross-examine Ms. Desnoyers on matters unrelated to the contents of her affidavit. He even proposes to cross-examine her on his own client's affidavit. The Applicant has not identified any relevant issue that could be addressed during cross-examination. It is clearly improper.

The scope of cross-examination on an affidavit is limited to information set out in the affidavit or collateral issues arising from any answers given.¹ The Applicant should not be permitted to conduct the cross-examination which it now admits will be based on matters unrelated to the contents of the affidavit and outside Ms. Desnoyers' knowledge.

The Application for Judicial Review relates to a statement on the Agency's website which both parties agree has no legal effect, and which the Applicant has admitted does not affect the rights of air passengers or the obligations of airlines.² The Direction to Attend requests statistics

¹ *CBS Canada Holding Co. v Canada*, [2017 FCA 65](#) at paras 29 and 31.

² Memorandum of Fact and Law of the Respondent, Canadian Transportation Agency dated April 29, 2020 at paras 44-46, Respondent's Record dated April 29, 2020, Vol. 1, Tab 2 at 244-245.

regarding how many times the statement has been accessed, documents related to the drafting and publication of the statement, and any communications that the Agency had regarding the statement with the Minister of Transport, the Privy Council and even the Prime Minister.

This is a clear fishing expedition for documents that have no relevance to the motion and should not be permitted.

The current timetable does not allow for cross-examinations. In the normal course, a party should be entitled to test evidence filed by way of affidavit. However, in light of Counsel's letter dated April 30, 2020, it is clear that the Applicant's intent is to cross-examine Ms. Desnoyers on issues unrelated to her affidavit and outside of her knowledge. On this basis, it is open for the Court to decline to amend the current timetable to include cross-examination.

If the cross-examination is to proceed, and as suggested by the Applicant, we would attend and refuse to produce the documents requested for the reasons stated and object on the record to any improper question.

In the alternative, the Agency would request leave to file a motion to strike the Direction to Attend as currently drafted.

The final issue is the filing of submissions following receipt of the transcript of any cross-examination. The Applicant's only objection is that the current timetable does not provide for these submissions. However the same can be said for cross-examinations. If cross-examination does proceed fairness requires that both parties have the opportunity to address the transcript through submissions.

Yours truly,



Allan Matte
Senior Counsel
Legal Services Directorate
Canadian Transportation Agency
15 Eddy Street, 19th Floor
Gatineau, Quebec
K1A 0N9

Tel: (819) 953-0611

Fax: (819) 953-9269

Email: Allan.Matte@otc-cta.gc.ca

Email: Servicesjuridiques/LegalServicesOTC/CTA@otc-cta.gc.ca

c.c.: Simon Lin

Counsel for the Applicant, Air Passengers Rights

simonlin@evolinklaw.com