

FEDERAL COURT OF APPEAL

BETWEEN:

AIR PASSENGER RIGHTS

Applicant
(Moving Party)

- and -

ATTORNEY GENERAL OF CANADA

Respondent

- and -

CANADIAN TRANSPORTATION AGENCY

Intervener
(Responding Party)

**MOTION RECORD OF THE INTERVENER AND RESPONDING PARTY,
CANADIAN TRANSPORTATION AGENCY**
(Motion regarding CTA's Affiant's Failure to Attend Cross-Examination
Motion to Enforce, Vary and Correct the Court Orders Issued by Justice Gleason, J.A.)

(Pursuant to Rules 366 and 369 of the *Federal Courts Rules*)

Volume 1

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Counsel for the Applicant, Air Passenger Rights

c.c.: lukacs@AirPassengerRights.ca, Applicant

AND TO: **ATTORNEY GENERAL OF CANADA**
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Lorne Ptack
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Counsel for the Respondent, Attorney General of Canada

FEDERAL COURT OF APPEAL

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(Responding Party)

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FEDERAL COURT OF APPEAL

BETWEEN:

AIR PASSENGER RIGHTS

Applicant

- and -

ATTORNEY GENERAL OF CANADA

Respondent

- and -

CANADIAN TRANSPORTATION AGENCY

Intervener

**AFFIDAVIT OF MEREDITH DESNOYERS
AFFIRMED ON THE 26TH DAY OF MAY, 2022**

(Agency's Response to the Applicant's Motion regarding CTA's Affiant's Failure to Attend Cross-Examination Motion to Enforce, Vary and Correct the Court Orders Issued by Justice Gleason, J.A.)

I, Meredith Desnoyers, of the City of Ottawa, in the Province of Ontario, AFFIRM THAT:

1. I am a paralegal officer with the Canadian Transportation Agency ("Agency"), located at 15 Rue Eddy, Gatineau, Quebec, J8X 4B3. As such, I have personal knowledge of the matters set out herein except where stated to be based on information and belief, in which case I believe such information to be true.
2. Attached and marked as Exhibit "A" is a copy of the letter from the Attorney General of Canada (AGC) to the Court dated May 2, 2022.

3. Attached and marked as Exhibit "B" is a copy of the email from Lorne Ptack (AGC, Department of Justice) to Kevin Shaar (Agency Counsel) and Simon Lin (APR Counsel) dated May 2, 2022.
4. Attached and marked as Exhibit "C" is a copy of the letter from the Attorney General of Canada (AGC) to the Court dated May 17, 2022.
5. I swear this affidavit in support of the Agency's Response to the Applicant's *Motion regarding CTA's Affiant's Failure to Attend Cross-Examination; Motion to Enforce, Vary and Correct the Court Orders Issued by Justice Gleason, J.A.*, and for no other improper purpose.

AFFIRMED BEFORE me)
 at the City of Ottawa,)
 in the Province of Ontario)
 this 26th of May, 2022)


 _____)
 A Commissioner for Taking Oaths



 MEREDITH DESNOYERS

Exhibit A of the Affidavit of Meredith Desnoyers
affirmed on May 26, 2022

A handwritten signature in black ink, appearing to read "OUIZ.", positioned above a horizontal line.

A Commissioner for Taking Oaths



Department of Justice
Canada

Ministère de la Justice
Canada

National Litigation Sector
Civil Litigation Section
50 O'Connor Street, Suite 500
Ottawa, Ontario K1A 0H8

Telephone: (613) 601-4805
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BY EMAIL WITH COPY TO THE APPLICANT'S COUNSEL

May 2, 2022

Our File Number: LEX-500074803

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

Dear Administrator:

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

I write further to Counsel for the Intervener's April 28, 2022 letter, requesting a Case Management Conference towards resolving issues related to the Applicant's April 22, 2022 Direction to Attend and the document demands contained therein.

The Respondent is in agreement with the Intervener that this matter would benefit from a Case Management teleconference with the Court.

Yours truly,

Lorne Ptack
Counsel

c.c. Simon Lin, Counsel for the Applicant
Allan Matte, Counsel for the Intervener

Exhibit B of the Affidavit of Meredith Desnoyers
affirmed on May 26, 2022

A handwritten signature in black ink, appearing to read "C.M.Z.", positioned above a horizontal line.

A Commissioner for Taking Oaths

Meredith Desnoyers

From: Kevin Shaar
Sent: Tuesday, May 24, 2022 9:52 AM
To: Meredith Desnoyers
Subject: FW: A-102-20: Direction from the Court

From: Ptack, Lorne <Lorne.Ptack@justice.gc.ca>
Sent: Tuesday, May 3, 2022 11:49 AM
To: Kevin Shaar <Kevin.Shaar@otc-cta.gc.ca>; Simon Lin <simonlin@evolinklaw.com>
Cc: Graham, Sandy <Sandy.Graham@justice.gc.ca>; Services Juridiques / Legal Services (OTC/CTA) <Servicesjuridiques/LegalServicesOTC/CTA@otc-cta.gc.ca>
Subject: RE: A-102-20: Direction from the Court

The Respondent is in agreement with this way forward. Having regard for the Court of Appeal's May 2 2022 Direction, a Rule 94 motion is the appropriate next step. The examination should then proceed once a decision has been rendered by the Court, and the parties agree upon a mutually workable date and time.

*Lorne Ptack, Counsel / Avocat
Civil Litigation Section / Section du contentieux des affaires civiles
Department of Justice / Ministère de la Justice Gouvernement du Canada / Government of Canada
50 O'Connor Street, Suite 500, Room 526 Ottawa, ON K1A 0H8
Tel: / Cel: 613-601-4805 / Fax: 613-954-1920
E: Lorne.Ptack@Justice.gc.ca*

From: Kevin Shaar <Kevin.Shaar@otc-cta.gc.ca>
Sent: May 3, 2022 11:42 AM
To: Simon Lin <simonlin@evolinklaw.com>
Cc: Ptack, Lorne <Lorne.Ptack@justice.gc.ca>; Graham, Sandy <Sandy.Graham@justice.gc.ca>; Services Juridiques / Legal Services (OTC/CTA) <Servicesjuridiques/LegalServicesOTC/CTA@otc-cta.gc.ca>
Subject: RE: A-102-20: Direction from the Court

Hello Mr. Lin,

To be clear, the Agency and its affiant will not attend the cross-examination at noon today. As previously mentioned, the Agency is preparing a motion under Rule 94 of the Federal Courts Rules, which will be promptly filed with the Court.

We will happy to reschedule the cross-examination once the Court has ruled on the motion.

Regards,

Kevin Shaar
Avocat/Counsel
Office des Transports du Canada/Canadian Transportation Agency
15 Eddy, Gatineau (QC) K1A 0N9
Tél./Tel: 613-894-4260
Kevin.Shaar@otc-cta.gc.ca

From: Simon Lin <simonlin@evolinklaw.com>
Sent: Monday, May 2, 2022 4:36 PM
To: Kevin Shaar <Kevin.Shaar@otc-cta.gc.ca>
Cc: Lorne.Ptack@justice.gc.ca; sandy.graham@justice.gc.ca; Services Juridiques / Legal Services (OTC/CTA) <Servicesjuridiques/LegalServicesOTC/CTA@otc-cta.gc.ca>
Subject: Re: A-102-20: Direction from the Court

Good afternoon,

Please see the enclosed letter.

Thank you.

Kind Regards,

Simon Lin
Barrister & Solicitor

evolink LAW

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237-4388 Still Creek Drive, Burnaby, B.C. V5C 6C6
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On Mon, May 2, 2022 at 1:09 PM Kevin Shaar <Kevin.Shaar@otc-cta.gc.ca> wrote:

Good afternoon,

Pursuant to today's Direction from the Court, the Agency will be bringing a motion under Rule 94 of the Federal Courts Rules. Accordingly, we trust that you will agree that the examination will not proceed tomorrow.

We look forward to working with counsel to find an alternative date once the Court has ruled on the matter.

Sincerely,

Kevin Shaar

Avocat/Counsel

Office des Transports du Canada/Canadian Transportation Agency

15 Eddy, Gatineau (QC) K1A 0N9

Tél./Tel: 613-894-4260

Kevin.Shaar@otc-cta.gc.ca

Exhibit C of the Affidavit of Meredith Desnoyers
affirmed on May 26, 2022

A handwritten signature in black ink, appearing to read "C. W. Z.", positioned above a horizontal line.

A Commissioner for Taking Oaths



Department of Justice
Canada

Ministère de la Justice
Canada

National Litigation Sector
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Email: Lorne.Ptack@justice.gc.ca

BY EMAIL WITH COPY TO COUNSEL

May 17, 2022

Our File Number: LEX-500074803

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

Re: Air Passenger Rights v The Attorney General of Canada
Court File No.: A-102-20
Request for Directions and/or Special Management

Dear Administrator:

I would be grateful if this letter were brought to the attention of the Honourable Justice Gleason at your earliest convenience.

I write, with due regard for Rules 53, 54, 55, 380, and 383 of the *Federal Court Rules*, to request the Court's Direction in how to proceed with the conduct of cfn. A-102-20. If the Court of Appeal sees fit, I propose that this letter stand as an informal motion by the Respondent to request special management of this application per Rule 383. In the alternative should the Court of Appeal direct, the AGC will bring a formal motion.

At present, following on the December 2021 and April 2022 Orders and Reasons of the Court of Appeal, a number of matters are now outstanding between the parties, who appear to be at an impasse as to how best to move forward in compliance with the Court of Appeal's Orders to date.

The Intervener has in compliance with the Court's Orders produced additional documents and an affidavit. In turn, the Applicant has issued a Direction to Attend Examination upon the Intervener's affiant, which included additional document production demands which the Intervener disputes. Further to a May 2 2022 Direction from the Court, the Intervener has on May 12 2022 brought a Motion pursuant to Rule 94 to resolve that dispute.

Canada

On May 16 2022, the Applicant brought their own motion, some 650 pages, seeking relief on a number of fronts, including their contempt proceeding which was previously adjourned by the Court of Appeal pending the outcome of the Intervener's additional document production, now the subject of the Intervener's Rule 94 motion.

Further, it appears that points raised by the Applicant's May 16 motion would be addressed by the Intervener's May 12 motion and might therefore be redundant and unnecessary.

As well, the Applicant has taken the position that the respondent AGC is required to argue privilege claims on behalf of the Intervener. While this was the process followed in compliance with the December 2021 Order and Reasons, the April 2022 Order and Reasons do not address this point, and it is not clear that this is the appropriate step in respect of the additional document productions. In any event, such argument, whether by the Intervener or the Respondent, might reasonably follow the resolution of the Intervener's Rule 94 motion, as additional documents subject to privilege claims may be in issue. The Court of Appeal's guidance on this procedural point would be of assistance.

This matter has been ongoing for some time and is at risk of being further delayed in moving to resolution by potentially redundant and/or unnecessary motions. Accordingly, the Court's guidance is requested, by case management conference, special management, and/or such Directions as the Court of Appeal deems appropriate.

Yours truly,

A handwritten signature in blue ink, appearing to read "Lorne Ptack". The signature is fluid and cursive, with a long horizontal stroke at the end.

Lorne Ptack
Counsel for the Respondent

c.c. Simon Lin, Counsel for the Applicant
Kevin Shaar, Counsel for the Intervener

FEDERAL COURT OF APPEAL

BETWEEN:

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ATTORNEY GENERAL OF CANADA

Respondent

- and -

CANADIAN TRANSPORTATION AGENCY

Intervener
(Responding Party)

**WRITTEN REPRESENTATIONS OF THE INTERVENER AND RESPONDING PARTY,
CANADIAN TRANSPORTATION AGENCY**

(Motion regarding CTA's Affiant's Failure to Attend Cross-Examination
Motion to Enforce, Vary and Correct the Court Orders Issued by Justice Gleason, J.A.)

(Pursuant to Rules 366 and 369 of the *Federal Courts Rules*)

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Counsel for the Respondent, Attorney General of Canada

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WRITTEN REPRESENTATIONS OF THE INTERVENER AND RESPONDING PARTY,

CANADIAN TRANSPORTATION AGENCY

(Motion regarding CTA's Affiant's Failure to Attend Cross-Examination
Motion to Enforce, Vary and Correct the Court Orders Issued by Justice Gleason, J.A.)

(Pursuant to Rules 366 and 369 of *Federal Courts Rules*)

PART I – OVERVIEW & STATEMENT OF FACTS

A. Overview

1. These are the written representations of the Respondent (Intervener), Canadian Transportation Agency ("Agency") in response to the Motion Record of the Moving Party (Applicant), Air Passenger Rights, dated May 16, 2022. In its Motion, Air Passenger Rights alleges, among other things, that the Agency's affiant has failed to attend a cross-examination and that the Agency has again withheld documents.
2. This motion arises in the context of Air Passenger Rights' application for judicial review

of a statement ("Statement on Vouchers") published on the Agency's website at the onset of the COVID-19 pandemic, suggesting that it could be appropriate for air carriers to provide vouchers to passengers for flights which were cancelled as a result of the worldwide health situation.

3. In October 2021, the Agency was ordered to produce documents in relation to the Application for Judicial Review. In April 2022, the Agency was ordered to produce further documents and to file an affidavit detailing its search for documents in response to the October Disclosure Order. The Agency has, in good faith, complied with both production Orders and filed the affidavit required by the Court.
4. The order that the Applicant now seeks, to compel the attendance of the Agency's affiant, is not necessary, nor is it opportune. The Agency's affiant has not refused to attend cross-examination. The Agency has legitimate concerns regarding the extent of the demand for documents included in the Applicant's Direction to Attend, and has filed a motion seeking relief from production, as directed by this Court. The Agency's concerns and the need to resolve this dispute prior to the cross-examination were communicated to the Applicant in advance of the date chosen by the Applicant for cross-examination. The Applicant has inexplicably refused to postpone the cross-examination, and is solely responsible for the costs it has incurred.
5. Similarly, the order sought by the Applicant compelling the Agency to rectify five (5) alleged deficiencies in relation to its compliance with the October Disclosure Order or Additional Production Order is unnecessary. The Agency has complied with the these Orders. The Agency has also signaled its willingness to reschedule the cross-examination of its affiant once the dispute regarding the demand for documents included in the Direction to Attend has been resolved by the Court. Until the cross-examination has occurred, the order sought is premature.

B. Statement of Facts

6. This Application for Judicial Review is in relation to a Statement on Vouchers, published on the Agency's website on March 25, 2020, shortly after the onset of the COVID-19 pandemic. The Application alleges, among other things, that the issuance of the Statement

on Vouchers gives rise to a reasonable apprehension of bias on the part of the Agency.¹

7. The Notice of Application, which initially named the Agency as the Respondent and was issued on April 9, 2020, included a request for production of the Agency's record pursuant to Rule 317 of the *Federal Courts Rules*,² and sought the following documents;

1. Complete and unredacted copies of all correspondences, meetings, notes, and/or documents involving the appointed members of the Agency relating to the Statement [on Vouchers] and/or the issuance of vouchers or credits in relation to the COVID-19 incident, including both before and after publication of the Statement [on Vouchers];

2. The number of times the URLs for the Statements [on Vouchers] were accessed...

3. Complete and unredacted copies of all correspondences, meetings, notes, and/or documents between the Canadian Transportation Agency and the travel industry ...from February 15, 2020 to the present in respect of issuing of credits, coupons, or vouchers to passengers in lieu of a refund for travel affected by COVID-19; and

4. Complete and unredacted copies of all correspondences, emails, and/or complaints that the Agency received from passengers between February 15, 2020 to the present in respect of the issuing of credits, coupons, or vouchers to passengers in lieu of a refund for travel affected by COVID-19.³

8. The Applicant sought an interlocutory order that, among other things, would require that the statements on the Agency's website be removed, and would enjoin Members of the Agency from dealing with passenger complaints with respect to refunds on the basis that a reasonable apprehension of bias exists as a result of the statements on the Agency's website. This motion was dismissed. In so doing, the Court concluded that the Applicant had not established that the statements on the Agency's website were amenable to judicial review:

[27] It thus cannot be said that the impugned statements affect rights, impose legal obligations, or cause prejudicial effects on either APR or airline passengers. While this finding is sufficient to dispose of APR's motion for mandatory relief,

¹ *Air Passenger Rights v Attorney General of Canada*, 2022 FCA 64 at paras 3-4 [*Additional Production Order*] in the Motion Record of the Applicant Air Passenger Rights dated May 16, 2022, Tab 8, p. 493.

² [SOR/98-106](#) [*Federal Courts Rules*].

³ Notice of Application dated April 9, 2020, in the Motion Record of the Applicant Air Passenger Rights dated May 16, 2022, Tab 3, p. 451.

as will be explained below, I am also not persuaded that it has satisfied the irreparable harm component of the test.⁴

9. In its response to the Applicant's motion for an interlocutory injunction, the Agency asked that the application for judicial review be dismissed. The Court declined to dismiss the application on the basis that no motion was before the Court and that such a motion would have to be heard by a panel of judges, rather than a single judge.⁵
10. By decision dated October 2, 2020, the Court addressed the Agency's formal motion to strike the application for judicial review on the basis that the Statement on Vouchers on the Agency's website is not a "decision" within the meaning of the *Federal Courts Act*. The motion to strike was dismissed. The Court concluded that the Applicant's arguments that the Statement on Vouchers gives rise to a reasonable apprehension of bias should proceed to the hearing of the judicial review application.⁶
11. The Applicant brought a motion dated January 3, 2021 seeking production of documents from the Agency pursuant to subsection 318(4) of the *Federal Courts Rules*.⁷ The documents sought in this request were as follows:

An Order, pursuant to Rule 318(4), that within ten days the Agency transmit in electronic format to the Registry and to the Applicant complete and unredacted copies of all records from March 9 - April 8, 2020 in respect of the Publications (defined further below), including but not limited to emails, meeting agendas, meeting minutes, notes, draft documents, and memos.⁸

12. By decision dated October 15, 2021 ("October Disclosure Order"), the Court ordered that the Agency produce documents regarding the Statement on Vouchers:

[29] I would accordingly order that, within 60 days from the date of the Order in these matters, all non-privileged documents sent to or by a member of the CTA

⁴ *Air Passenger Rights v Canada (Transportation Agency)*, [2020 FCA 92](#) at para. 27.

⁵ *Ibid* at para 39.

⁶ *Air Passenger Rights v Canada (Transportation Agency)*, [2020 FCA 155](#) at para. 33.

⁷ *Federal Courts Rules*, *supra* note 2; *Air Passenger Rights v Attorney General of Canada*, [2021 FCA 112](#) at para 1.

⁸ Notice of Motion dated January 3, 2021, Federal Court of Appeal Recorded Entries, Court File No. A-102-20, Doc. #52, Affidavit of Meredith Desnoyers, affirmed the 12th day of May, 2022, Exhibit "C" (or *Desnoyers Affidavit*, Exhibit "C"), in the Motion Record of the Intervener, Canadian Transportation Agency, Motion for Relief from Production, dated May 12, 2022.

(including its Chairperson or Vice-Chairperson) between March 9 and March 25, 2020 or sent to a third party by the CTA or received from a third party by the CTA between the same dates concerning the impugned statement or related to a meeting attended by a CTA member (including its Chairperson or Vice-Chairperson) between March 9 and March 25, 2020 where the impugned statement was discussed shall be provided electronically to the applicant. I would also order that, within the same period, the AGC shall provide the Court, on a confidential basis, copies of any document over which the CTA claims privilege, that would otherwise be subject to disclosure, along with submissions outlining the basis for the privilege claim. Such filing may be made via way of informal motion and should be supported by an affidavit attaching copies of the documents over which privilege is claimed. A redacted version of the AGC's submissions, from which all details regarding the contents of the documents are deleted, shall be served and filed. The applicant shall have 30 days from receipt to make responding submissions, if it wishes. These materials shall then be forwarded to the undersigned for a ruling on privilege.⁹

13. By motion dated January 16, 2022, the Applicant claimed that the Agency had failed to comply with the October Disclosure Order, and sought various forms of relief, including the additional production of documents. Attached to the Notice of Motion is a schedule of documents that the Applicant described as "Withheld Materials". This schedule lists twenty-one (21) categories of documents that the Applicant alleged were being withheld by the Agency, identified as items A1-A6, B1-B5, and items C1 to C10.¹⁰
14. In the Additional Production Order dated April 11, 2022 ("Additional Production Order"), the Court addressed whether the Agency had complied with the October Disclosure Order. The Agency was ordered to produce documents that had previously been produced in .pdf format, but this time required that they be produced in Microsoft Word format. Of the 21 categories of documents listed in the Applicant's motion for additional disclosure, the Court ordered the Agency to produce the documents identified by the Applicant as items A1, A5, B4, and C2. The Court also ordered that if the Statement on Vouchers was discussed during meetings on March 19, 22 and 23, documents identified as items C1, C5 and C6 of the Reasons for Order be disclosed. The Court did not order that the remaining categories of

⁹ *Air Passenger Rights v Canada (Attorney General)*, [2021 FCA 201](#), in the Motion Record of the Applicant Air Passenger Rights dated May 16, 2022, Tab 5, p. 481.

¹⁰ Notice of Motion dated January 16, 2022, Affidavit of Meredith Desnoyers, affirmed the 12th day of May, 2022, Exhibit "D" (or *Desnoyers Affidavit*, Exhibit "D"), in the Motion Record of the Intervener, Canadian Transportation Agency, Motion for Relief from Production, dated May 12, 2022.

documents sought by the Applicant be produced.¹¹

15. In the Additional Production Order, the Court also ordered that the Agency serve and file an affidavit from the person responsible for complying with the October Disclosure Order detailing what had been done to ensure the required disclosure was made.¹²

16. On April 20, 2022, the production required of the Agency as a result of the Additional Production Order has been provided to the parties. An updated Certificate, attesting to the authenticity of the additional documents was filed with the Court.¹³

17. On April 21, 2022, the affidavit of Barbara Cuber was filed with the Court. As counsel for the Agency at the time, she was the person who took responsibility for complying with the October Disclosure Order. The affidavit is 12 pages long and describes in great detail the Agency's search for documents in response to the October Disclosure Order.¹⁴

18. On April 22, 2022, the Applicant sent a Direction to Attend in relation to Ms. Cuber's affidavit. The Direction to Attend requests that Ms. Cuber attend the examination and bring with her an additional twenty-five (25) categories of documents.¹⁵

19. On April 28, 2022, the Agency sent a letter seeking direction from the Court in the form of a case management conference prior to the proposed cross-examination of Ms. Cuber to resolve the issues raised in the latest request for documents included in the Applicant's Direction to Attend. The basis of the request was that the Direction to Attend sought not only documents that are irrelevant to the issues raised in the Application, but that it also

¹¹ Additional Production Order, *supra* note 1.

¹² *Ibid.* at para 47.

¹³ Certificate pursuant to the order dated April 11, 2022, Affidavit of Meredith Desnoyers, affirmed the 12th day of May, 2022, Exhibit "E" (or *Desnoyers Affidavit*, Exhibit "E"), in the Motion Record of the Intervener, Canadian Transportation Agency, Motion for Relief from Production, dated May 12, 2022.

¹⁴ Affidavit of Barbara Cuber sworn the 21st day of April, 2022, Affidavit of Meredith Desnoyers, affirmed the 12th day of May, 2022, Exhibit "F" (or *Desnoyers Affidavit*, Exhibit "F"), in the Motion Record of the Intervener, Canadian Transportation Agency, Motion for Relief from Production, dated May 12, 2022.

¹⁵ Direction to Attend a cross-examination on behalf of the Applicant to Barbara Cuber on May 3, 2022, Affidavit of Gábor Lukács, affirmed on May 15, 2022, Exhibit "AI", [*Direction to Attend*], in the Motion Record of the Applicant Air Passenger Rights dated May 16, 2022.

sought documents protected by Solicitor-Client Privilege.¹⁶

20. On May 2, 2022, Mactavish J.A. denied the Agency's request for a Case Management Conference and issued the following direction:

The Federal Courts Rules, S.O.R./98-106, and, in particular, Rule 94 thereof, provides a mechanism for resolving disputes of this nature. Given the history of this litigation and the nature of the dispute between the parties, the Court is of the view that the issues currently in dispute are best resolved through a formal motion supported by a proper evidentiary record.¹⁷

21. The Agency filed such a motion on May 12, 2022.

22. On May 16, 2022, the Applicant's *Motion Regarding the CTA's Affiant's Failure to Attend Cross-Examination and Motion to Enforce, Vary, and Correct the Court Orders Issued by Gleason, J.A.* (pursuant to Rules 8(2), 97, 397(2), and 369.2 of the *Federal Courts Rules*), was filed with the Court, seeking amongst other things, costs for the failure to attend, costs for the rescheduled cross-examination, and costs for the motion, payable forthwith.

23. On May 17, 2022, the Respondent sent a letter to the Court requesting directions and/or special management.¹⁸

PART II - STATEMENT OF THE POINTS IN ISSUE

24. The Agency proposes to address the following issues:

- A. Whether Ms. Cuber should be compelled to attend cross-examination;
- B. Whether the Applicant should bear the costs incurred for their scheduled examination;
- C. Whether an Order should be issued for the Agency to rectify their five (5) alleged deficiencies in relation to its compliance with the October Disclosure Order or Additional Production Order.

¹⁶ Mr Shaar's Letter to the Court, April 28, 2022, Affidavit of Gábor Lukács, affirmed on May 15, 2022, Exhibit "AN", [*Shaar Letter April 28*], in the Motion Record of the Applicant Air Passenger Rights dated May 16, 2022.

¹⁷ Court Direction dated May 2, 2022, in the Motion Record of the Applicant Air Passenger Rights dated May 16, 2022, Tab 9, p. 518.

¹⁸ Email from AGC to the Court, May 17, 2022, Affidavit of Meredith Desnoyers, affirmed the 26th day of May, 2022, Exhibit "C".

PART III - STATEMENT OF SUBMISSIONS

A. Rule 97: The Order Sought by the Applicant is Not Necessary, Nor is it Opportune

25. The Agency's affiant has not refused to attend cross-examination. The Agency has legitimate concerns regarding the extent of the request for documents included in the Direction to Attend, which goes well beyond what the Court has already ordered, and is seeking relief from production. This could not have been known by the Agency prior to having received the Direction to Attend, and must necessarily be resolved prior to the cross-examination.

26. Within days of the issuance of the Additional Production Order, the Applicant began making unnecessary demands and imposing arbitrary deadlines on the parties.¹⁹ Despite this, counsel for the Respondent and the Agency continued to signal their willingness to work collaboratively at arriving at a date for the cross-examination of the Agency's affiant.²⁰ Ultimately, the Direction to Attend was sent on April 22, 2022, before the Agency could respond with its availabilities.²¹

27. Once the Agency was able to assess the 25 categories of documents required in the Direction to Attend, its concerns regarding the scope of the production and the need to resolve this dispute prior to the cross-examination were communicated to the Applicant as early as April 28, 2022:

¹⁹ Mr. Lin's Letter to Ms. Cuber, Affidavit of Gábor Lukács, affirmed on May 15, 2022, Exhibit "AB", Motion Record of the Applicant Air Passenger Rights dated May 16, 2022; Mr. Lin's Letter to Mr. Matte, April 14, 2022, Affidavit of Gábor Lukács, affirmed on May 15, 2022, Exhibit "AD", Motion Record of the Applicant Air Passenger Rights dated May 16, 2022; Mr. Lin's Email to Mr. Matte, April 21, 2022, Affidavit of Gábor Lukács, affirmed on May 15, 2022, Exhibit "AE", Motion Record of the Applicant Air Passenger Rights dated May 16, 2022.

²⁰ Mr. Matte's email to Mr. Lin, April 14, 2022, Affidavit of Gábor Lukács, affirmed on May 15, 2022, Exhibit "AC", Motion Record of the Applicant Air Passenger Rights dated May 16, 2022; AGC's email to Mr. Lin, April 21, 2022, Affidavit of Gábor Lukács, affirmed on May 15, 2022, Exhibit "AF", Motion Record of the Applicant Air Passenger Rights dated May 16, 2022. AGC's email to Mr. Lin, April 22, 2022, Affidavit of Gábor Lukács, affirmed on May 15, 2022, Exhibit "AH", Motion Record of the Applicant Air Passenger Rights dated May 16, 2022.

²¹ *Direction to Attend*, supra note. 15.

Cross-Examination of Ms. Cuber

We acknowledge receipt of your Direction to Attend dated April 22, 2022. In this Direction, you are now seeking production of an additional twenty-five (25) categories of documents. This list of documents goes far beyond what a witness must provide when being cross-examined on an affidavit.

We intend to seek the Court's direction on the scope of any cross-examination which may take place and will be writing to the Court accordingly. We trust you will agree that the examination will not proceed until the Court provides its direction.²² [Emphasis added]

28. In its response, the Applicant insisted that the Agency present its affiant on May 3, 2022.²³

29. The Direction to Attend seeks not only documents that are irrelevant to the issues raised in the Application, but it also seeks documents that do not exist or are protected by Solicitor-Client Privilege. As such, and in order to ensure the orderly conduct of the cross-examination, the Agency sent a letter to the Court on April 28, 2022, requesting direction from the Court in the form of a case management conference.²⁴

30. The Respondent agreed with the Agency's approach.²⁵ However, the Applicant objected to the Agency's request, arguing in part, that "[i]f the CTA objects to the production of documents in the Direction to Attend, it may bring a motion under Rule 94 of the Federal Courts Rules".²⁶

31. On May 2, 2022, Mactavish J.A. agreed with the Applicant on this point and issued the following direction:

²² Mr. Shaar's letter to Mr. Lin, April 28, 2022, Affidavit of Gábor Lukács, affirmed on May 15, 2022, Exhibit "AK", Motion Record of the Applicant Air Passenger Rights dated May 16, 2022.

²³ Mr. Lin's letter to Mr. Shaar, April 28, 22, Affidavit of Gábor Lukács, affirmed on May 15, 2022, Exhibit "AL", Motion Record of the Applicant Air Passenger Rights dated May 16, 2022.

²⁴ *Shaar Letter April 28*, supra note 16.

²⁵ Letter from the Attorney General of Canada (AGC) to the Court dated May 2, 2022, Affidavit of Meredith Desnoyers, affirmed the 26th day of May, 2022, Exhibit "A".

²⁶ Mr. Lin's letter to the Court, April 28, 2022, Affidavit of Gábor Lukács, affirmed on May 15, 2022, Exhibit "AO", Motion Record of the Applicant Air Passenger Rights dated May 16, 2022.

The Federal Courts Rules, S.O.R./98-106, and, in particular, Rule 94 thereof, provides a mechanism for resolving disputes of this nature. Given the history of this litigation and the nature of the dispute between the parties, the Court is of the view that the issues currently in dispute are best resolved through a formal motion supported by a proper evidentiary record.²⁷ [Emphasis added]

32. Following the Court's direction, the Agency immediately wrote the Applicant, again indicating that the cross-examination should be postponed :

Pursuant to today's Direction from the Court, the Agency will be bringing a motion under Rule 94 of the Federal Courts Rules. Accordingly, we trust that you will agree that the examination will not proceed tomorrow.

We look forward to working with counsel to find an alternative date once the Court has ruled on the matter.²⁸ [Emphasis added]

33. Despite the Agency's attempts to communicate to the Applicant that the cross-examination of the Agency's affiant would not proceed until the dispute regarding the demand for documents was resolved by the Court, and despite the Court's direction that the issues were best resolved through a formal motion supported by a proper evidentiary record, as the Applicant had proposed, the Applicant continued to insist that the cross-examination of the Agency's affiant "**will proceed** as scheduled".²⁹ [Emphasis in original]

34. Given the Applicant's continued insistence, the Agency sent a third communication to the Applicant on May 3, 2022:

To be clear, the Agency and its affiant will not attend the cross-examination at noon today. As previously mentioned, the Agency is preparing a motion under Rule 94 of the Federal Courts Rules, which will be promptly filed with the Court.

We will happy to reschedule the cross-examination once the Court has ruled on the motion.³⁰ [Emphasis added]

²⁷ Mr. Shaar's email to Mr. Lin, May 2, 2022, Affidavit of Gábor Lukács, affirmed on May 15, 2022, Exhibit "AP", Motion Record of the Applicant Air Passenger Rights dated May 16, 2022. Exhibit "AP" to the Affidavit of Dr. Gábor Lukács.

²⁸ *Ibid.*

²⁹ Mr. Lin's letter to Mr. Shaar, May 2, 2022, Affidavit of Gábor Lukács, affirmed on May 15, 2022, Exhibit "AQ", Motion Record of the Applicant Air Passenger Rights dated May 16, 2022.

³⁰ Mr. Shaar's email to Mr. Lin, May 3, 2022, Affidavit of Gábor Lukács, affirmed on May 15, 2022, Exhibit "AR", Motion Record of the Applicant Air Passenger Rights dated May 16, 2022.

35. The Respondent again agreed with this approach.³¹ However, the Applicant responded that a certificate of non-attendance would be obtained, and that they would be seeking an order to compel attendance and costs.³²
36. It is clear from the Applicant's responses that, once the Direction to Attend had been served, there was nothing that could have been said or done to persuade the Applicant to postpone the cross-examination until after the dispute related to the documents requested was resolved by the Court.
37. To accept the Applicant's position that the cross-examination should have proceeded regardless, simply because the Direction to Attend had been served, would render any relief from production that this Court could order meaningless.
38. The Applicant's strategy seems to have been to force the cross-examination before the dispute related to the request for documents could be resolved. This has put the Agency in the difficult position of having to choose between not attending the cross-examination scheduled by the Applicant, or attending the cross-examination without the requested documents. Both scenarios would result in the Applicant bringing a motion under Rule 97 of the *Federal Courts Rules*. Having been unnecessarily put in this difficult situation, the Agency chose the option that was the least burdensome for all parties, avoiding the scenario where a second examination would have to be attended.
39. As expressed in its correspondence with the Applicant, the Agency remains committed to working with the Applicant to find an alternate date to cross-examine the Agency's affiant once the Court has ruled on the Agency's motion under Rule 94(2) of the *Federal Court Rules*. The Order to Attend sought by the Applicant is therefore not necessary, and until the Agency's motion is decided, it is not opportune.

B. The Applicant is Solely Responsible for the Costs Incurred

40. The costs incurred by the Applicant are the result of its misguided strategy and insistence

³¹ Email from Lorne Ptack to Kevin Shaar and Simon Lin, May 2, 2022, Affidavit of Meredith Desnoyers, affirmed the 26th day of May, 2022, Exhibit "B".

³² Mr. Lin's email to Mr. Shaar, May 3, 2022, Affidavit of Gábor Lukács, affirmed on May 15, 2022, Exhibit "AS", Motion Record of the Applicant Air Passenger Rights dated May 16, 2022.

that the cross-examination of the Agency's affiant proceed despite the Agency's clear communications that it be postponed until the dispute related to the request for documents included in the Direction to Attend is resolved. The Agency has acted diligently and in good faith. The costs incurred were unnecessary and could have been avoided by the Applicant. In such circumstances, the Applicant should bear its costs.

C. The Alleged Deficiencies with the Agency's Production

41. The Applicant alleges five deficiencies with the Agency's production in connection with the Additional Production Order.

Solicitor-Client Privilege

42. The Additional Production Order provided only for disclosure of non-privileged information. The Applicant submits that a new order should be issued mirroring the procedure set out in the October Disclosure Order, where the Respondent AGC is required to bring a motion arguing privilege claims on behalf of the Agency related to the Additional Production Order.³³ The same issue is raised in the second to last paragraph of the Respondent's May 17, 2022 letter to the Court requesting directions and/or special management.³⁴ Considering that the Additional Production Order did not address this point and that the two Orders have very different timeframes, the Agency agrees with the Respondent that a direction from the Court would be appropriate to establish the proper way to address any outstanding privilege claims.

43. In this regard, the Agency would not be adverse to a simplified procedure where it may assert its own claims of privilege.

The Agency's Private Twitter Messages and Info Account Emails

44. The Agency does not deny the existence of private Twitter messages or Info Account emails, nor that they may be captured by the Additional Production Order. The Agency has produced those that were responsive to that Order. What the Applicant is now seeking is

³³ Applicant's Written Representations, Motion Record of the Applicant Air Passenger Rights dated May 16, 2022, paragraph 93, p. 542.

³⁴ Email from AGC to the Court, May 17, 2022, Affidavit of Meredith Desnoyers, affirmed the 26th day of May, 2022, Exhibit "C".

something different.

45. The disclosure of the private Twitter messages was dealt with by the Court at paragraph 30 and 31 of the Reasons of the Additional Production Order. The Court found that private Twitter messages were captured by the October Disclosure Order because they were "non-privileged documents sent to a third party by the CTA or received from a third party by the CTA between March 9 and March 25, 2020 concerning the statement on vouchers posted on the CTA's website on March 25, 2020".³⁵ [Emphasis added] The Court therefore required the Agency to disclose all materials listed in item B4 in the Appendix.³⁶

46. Item B4 in the Appendix, for its part, lists the following materials:

CTA's Info Email and Twitter Messages. All non-privileged documents sent to or from the CTA in respect of the Statement on Vouchers between March 9, 2020 and March 25, 2020 using:

(a) the CTA's Info email account (info@otc-cta.gc.ca); and

(b) the CTA's Twitter accounts in English (CTA_gc) and French (OTC_gc), including but not limited to Private Messages.³⁷ [Emphasis added]

47. The Additional Production Order, or the October Disclosure Order for that matter, only required the disclosure of messages related to the Statement of Vouchers. Because the Statement of Vouchers was posted on the Agency's website on March 25, 2020, it is only natural that there would be few messages regarding it during the relevant period.

48. The Applicant cites the Agency's Written Representations (Feb. 1, 2022) and letter, dated December 24, 2021, to demonstrate that there was a high volume of messages and inquiries from individuals for this category.³⁸ This is misleading.

49. For example, the Agency's December 24 letter states that "there was a high volume of messages and inquiries from individuals concerning their personal air travel situations

³⁵ Additional Production Order, supra note 1 at paragraph 30.

³⁶ Ibid. at paragraph 31.

³⁷ Ibid. at Appendix A, Item B4.

³⁸ Applicant's Written Representations, Motion Record of the Applicant Air Passenger Rights dated May 16, 2022, at paragraph 96, p. 543.

between March 9 and March 25 on these accounts".³⁹ [Emphasis added] These messages do not relate to the Statement on Vouchers. The Additional Production Order did not require that the Agency disclose all messages from individuals related to flight delays and cancellations, which is what was being referred to in the Agency's Written Representations and letter.

50. The Applicant is now arguing that all messages on these accounts be produced, rather than all messages related to the Statement on Vouchers.

51. The Agency submits that it has complied with the Additional Production Order. However, should the Court now find that all private Twitter messages or Info Account emails about passenger issues at large during the stated time period are relevant to the issues raised on the Application for judicial of the Statement on Vouchers, the Agency will comply with such a new order.

March 24, 2020 Members' Meeting Documents

52. It is apparent from the Applicant's submissions that he now seeks to re-litigate the Additional Production Order in relation to the March 24, 2020 Member's meeting documents. In the January 16, 2022 motion, the Applicant requested all documents for the March 24, 2020 Members' meeting. The Additional Production Order was however, limited to "any notes taken by CTA Members, its Chairperson and Vice- Chairperson during the March 24, 2020 call, the whole in accordance with paragraph 43 of the Reasons for this Order."⁴⁰ [Emphasis added] This is contrary to what was ordered for the documents related to the March 19, 22 and 23, 2020 calls.⁴¹

53. As set out in in the Respondent's April 21, 2022 letter to the Court, a single document containing Members' notes had been identified by the Agency and was subsequently disclosed. No privilege has been claimed in regards to that document.⁴² Given that no

³⁹ Ms. Cuber's letter to Mr. Lin, December 24, 2021, Affidavit of Gábor Lukács, affirmed on May 15, 2022, Exhibit "K", Motion Record of the Applicant Air Passenger Rights dated May 16, 2022.

⁴⁰ Additional Production Order, supra note 1 at para. 6.

⁴¹ Additional Production Order, supra note 1 at para. 5.

⁴² AGC's Letter to Court, April 21, 2022, Affidavit of Gábor Lukács, affirmed on May 15, 2022, Exhibit "T", Motion Record of the Applicant Air Passenger Rights dated May 16, 2022.

privilege has been claimed, the direction set out in the Additional Production Order, to provide submissions on whether the CTA's Members were performing an adjudicative role in adopting the Statement on Vouchers, was not necessary.

54. In regards to **the "scheduler" file** referred to by the Applicant in paragraphs 104 and 107 of their Written Representations, the Agency has been transparent with the Court about its existence and has indicated that the document "contains no indication of the content of the meeting's discussion."⁴³ Disclosure of the document was not subsequently ordered in the Additional Production Order, contrary to what was ordered for the documents related to the March 19, 22 and 23, 2020 calls.⁴⁴ The Agency does not, however, object to its production.

55. At paragraphs 108 and 109 of the Applicant's Written Representations, the Applicant cites a collage of different documents to demonstrate the existence of a **"Members' Committee Agenda"**, and **meeting minutes and notes**, for the March 24, 2020 call, one of which is approximately 11 years old.⁴⁵

56. The different documents cited by the Applicant do not demonstrate the existence of the two documents in question. The Applicant's approach ignores the differences between regular Members' Meetings, *in camera* Meetings and Executive Committee Meetings, the different formalities for each, whether meeting minutes/notes are taken by non-members at the different meetings, and who is in attendance of these different meetings.

57. The Court has already provided for the appropriate approach to resolve these issues in the Additional Production Order. The Agency was ordered to produce an affidavit describing all the steps that had been taken to retrieve any potentially existing agendas, minutes or notes in relation to the October Disclosure Order. It has done so. Any questions regarding the Agency's search for documents in relation to the March 24, 2020 call, are best put to and answered by the Agency's affiant once the cross-examination has been rescheduled.

⁴³ See paragraph 83 of the CTA's written representations, February 1, 2022, Affidavit of Gábor Lukács, affirmed on May 15, 2022, Exhibit "AV", Motion Record of the Applicant Air Passenger Rights dated May 16, 2022, p. 416.

⁴⁴ Additional Production Order, *supra* note 1 at para. 5.

⁴⁵ CTA Further Disclosures, Appendix C1, April 20, 2022, Affidavit of Gábor Lukács, affirmed on May 15, 2022, Exhibit "O", Motion Record of the Applicant Air Passenger Rights dated May 16, 2022.

As such, the Order sought by the Applicant is premature.

Unredacted Copies of Some of the April 20, 2022 Documents

58. The only redacted documents in the April 20, 2022 disclosure package are in relation to Records of Decision. These documents record the decisions made at the Agency's Executive Committee meetings and cover a period of several months. The entries that are not for the dates for which production was ordered have been redacted because they do not fall within the scope of October Disclosure Order or Additional Production Order. Again, any relevant questions regarding those documents can be put to the Agency's affiant. As such, the Order sought by the Applicant is premature.

Certificate for the Authenticity of the April 20, 2022 Documents

59. The updated certificate, attesting to the authenticity of the additional documents, was signed by the person in the Agency's IM Department assigned to assist with the document search responsive to the Additional Production Order. The Agency will re-file a certificate if the Court finds it necessary.

D. Costs

60. Generally, an administrative body like the Agency will neither be entitled to nor be ordered to pay costs, at least when there has been no misconduct on its part. Where the body has acted in good faith and conscientiously throughout, albeit resulting in error, the tribunal will not ordinarily impose costs.⁴⁶

61. It is submitted that the Agency has acted in good faith. The Agency does not seek costs and submits that in the circumstances it should not be ordered to pay costs.

PART IV - ORDER / RELIEF SOUGHT

62. For the foregoing reasons, the Agency respectfully requests that this Honorable Court grant the following:

(a) Dismisses the request for an order that Ms. Cuber attend a cross-examination;

⁴⁶ *Lang v British Columbia (Superintendent of Motor Vehicles)*, 2005 BCCA 244 at para 47 citing Brown and Evans, *Judicial Review of Administrative Action in Canada* (Toronto: Canvasback, 1998).

- (b) Dismiss the request for an order to produce any further documents; and
- (c) such further and other relief as this Court may deem just.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated at Ottawa / Gatineau, in the Province of Ontario / Quebec, this 26th day of May, 2022.



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PART V - LIST OF AUTHORITIES

A. Appendix A - Statutes and Regulations

1. *Federal Courts Rules*, [SOR/98-106](#), ss [317](#), [318](#).

B. Appendix B - Case Law

1. *Air Passenger Rights v Canada (Transportation Agency)*, [2020 FCA 92](#) at para [27](#), [39](#).
2. *Air Passenger Rights v Canada (Transportation Agency)*, [2020 FCA 155](#) at para. [33](#).
3. *Air Passenger Rights v Attorney General of Canada*, [2021 FCA 112](#) at para [1](#).
4. *Lang v British Columbia (Superintendent of Motor Vehicles)*, [2005 BCCA 244](#) at para [47](#).