

**Federal Court of Appeal**



**Cour d'appel fédérale**

**Date: 20220719**

**Docket: A-102-20**

**Citation: 2022 FCA 132**

**Present: GLEASON J.A.**

**BETWEEN:**

**AIR PASSENGER RIGHTS**

**Applicant**

**and**

**THE ATTORNEY GENERAL OF CANADA**

**Respondent**

**and**

**THE CANADIAN TRANSPORTATION AGENCY**

**Intervener**

Dealt with in writing without appearance of parties.

Order delivered at Ottawa, Ontario, on July 19, 2022.

**REASONS FOR ORDER BY:**

**GLEASON J.A.**

**Federal Court of Appeal**



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**REASONS FOR ORDER**

**GLEASON J.A.**

[1] I have before me two motions concerning pre-hearing disclosure in this application. The first is brought by the intervener, the Canadian Transportation Agency (the CTA). In its motion,

the CTA seeks relief from being required to produce for inspection the materials requested in a Direction to Attend that the applicant served on senior counsel for the CTA, who is the deponent of an affidavit filed pursuant to an earlier Order of this Court. The second motion is brought by the applicant and seeks an order for the affiant to attend for cross-examination, at the CTA's expense, and to produce the materials requested in a Direction to Attend as well as other ancillary relief the applicant asserts is required to give effect to this Court's previous disclosure Orders.

[2] I also have before me correspondence from counsel for the applicant, requesting that a timetable be set for the hearing of the portion of its motion, dated January 16, 2022 and filed the next day (the January 17, 2022 Motion), seeking a show cause order for contempt. Counsel for the respondent and the CTA have also written to the Court, asking that this application be specially managed in light of the delays incurred to date in perfecting the application and future issues that might arise.

[3] For the reasons that follow, the two motions are granted in part on the terms outlined below.

[4] As for the various requests made via way of correspondence, as was the case in January 2022, it is premature to schedule a hearing in respect of the applicant's request for a show cause order. As for the request for case management, I will remain seized of all issues that require adjudication in this application that arise prior to the filing of a requisition for hearing. I have

also issued some additional orders and provided some general guidance in the hope of ensuring a more expeditious and cooperative completion of the steps required to perfect this application.

I. Background

[5] Some background is necessary to explain the two motions and the requests made in the recent correspondence received from the parties and the CTA.

[6] The underlying application for judicial review in this file challenges a statement on vouchers published on the CTA's website on March 25, 2020, shortly after the onset of the COVID-19 pandemic. The CTA opined in the statement that airlines could issue vouchers to passengers for cancellations caused by the pandemic as opposed to providing reimbursements for cancelled flights.

[7] In its application for judicial review, the applicant alleges, among other things, that the issuance of the statement gives rise to a reasonable apprehension of bias for two reasons: first, because it demonstrates pre-judgment of complaints in which passengers might seek reimbursement for cancelled flights; and second, because there was third party influence in the development of the statement.

[8] Following various interlocutory motions on other issues, the applicant brought a motion seeking disclosure from the CTA. On October 15, 2021, I issued an Order and Reasons for Order (2021 FCA 201) granting the applicant's motion in part and ordered the CTA to disclose:

- all non-privileged documents sent to or by a member of the CTA (including its Chairperson or Vice-Chairperson) between March 9 and March 25, 2020, concerning the statement on vouchers posted on the CTA’s website on March 25, 2020;
- all 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; and
- all non-privileged documents related to any meeting attended by a CTA member (including its Chairperson or Vice-Chairperson) between March 9 and March 25, 2020, where the statement on vouchers posted on the CTA’s website on March 25, 2020, was discussed.

[9] The Reasons for Order clarified that meetings included telephone conversations, video conferences, internet meetings and in-person meetings and that third parties included anyone other than a Member or employee of the CTA (*Air Passenger Rights v. Canada (Attorney General)*, 2021 FCA 201 at para. 23).

[10] The October 15, 2021 Order also established an informal process for obtaining a ruling on assertions of privilege. Paragraphs 5 to 8 of that Order provided:

5. Within 60 days of the date of this Order, the AGC shall submit to the Court for a ruling on privilege all documents over which privilege is asserted that would otherwise fall within paragraph 3 of this Order, the whole in accordance with the Reasons for this Order;

6. Within the same timeframe, the AGC shall serve and file a redacted version of its submissions, from which details of the contents of the documents are deleted;
7. The applicant shall have 30 days from receipt of the forgoing submissions to make responding submissions, if it wishes;
8. The materials related to claims for privilege shall then be submitted to the undersigned for a ruling on privilege;

[11] Further to the October 15, 2021 Order, the CTA disclosed a number of documents to the applicant. Included among them was a March 22, 2020 letter from the President of Air Transat to the former Chairperson of the CTA in which Air Transat requested that the CTA recognize that it was acceptable for it to provide passengers with vouchers in lieu of refunds to reimburse them for flights cancelled due to the COVID-19 pandemic.

[12] The applicant believed the disclosure made by the CTA further to the Court's October 15, 2021 Order was incomplete. On January 17, 2022, the applicant brought another motion in which it sought orders requiring disclosure of the documents it believed were encompassed within the scope of the October 15, 2021 Order, but had not been disclosed. In its January 17, 2022 Motion, the applicant also sought the issuance of a show cause order for contempt and related ancillary relief.

[13] On December 15, 2021, the respondent brought an informal motion seeking to have portions of two documents found to be privileged and protected from disclosure. On the same date, it also brought another motion, seeking an extension of time to obtain instructions on whether it would seek to claim privilege over two additional documents.

[14] A case conference was convened on January 25, 2022, during which the parties made submissions on the procedure for dealing with the various motions before the Court. Following that case conference, I issued two further Orders on January 26, 2022.

[15] The first of the January 26, 2022 Orders granted the respondent additional time to bring a motion if it wished to request a ruling on privilege in respect of the two additional documents. The respondent subsequently advised that it was not seeking such a ruling and disclosed the two additional documents to the applicant. The documents subsequently disclosed included a March 22-24, 2020 encrypted email chain between the CTA and Transport Canada that indicates that there were discussions between the Chairperson of the CTA and officials at Transport Canada and between Marcia Jones, the CTA's former Senior Strategy Officer, and officials at Transport Canada about the statement on vouchers before it was issued.

[16] A copy of another encrypted email chain dated March 18, 2020, between Ms. Jones and an official at Transport Canada was previously disclosed.

[17] The CTA has indicated that it has not been able to locate the original electronic version of at least some of these email chains, which it says no longer exist.

[18] The second of the January 26, 2022 Orders provided that the applicant's January 17, 2022 Motion would be bifurcated such that the request for an order for disclosure of additional documents would be decided first because it could well render the request for a show cause order for contempt unnecessary.

[19] Following receipt of submissions in respect of the first portion of the applicant's January 17, 2022 Motion seeking additional orders in respect of disclosure, on April 11, 2022, I issued a further Order and Reasons for Order (2022 FCA 64) in respect of the applicant's disclosure requests. Among other things, the April 11, 2022 Order required that:

- the CTA disclose four sets of documents whose existence was not in dispute (listed as categories A1, A5, B4 and C2 in the applicant's Notice of Motion). These comprised the original electronic versions of certain documents previously disclosed in PDF format, non-publicly available documents sent to or from the CTA's Info email and Twitter accounts over the relevant period in respect of the statement on vouchers and non-privileged documents in respect of the CTA's March 20, 2020 Executive Committee call;
- the CTA determine if the statement on vouchers was discussed during the calls held on March 19, 22 and 23, 2020, and, if so, that the CTA disclose the documents related to those calls. These documents were described as categories C1, C5 and C6 in the applicant's January 17, 2022 Notice of Motion;
- the respondent advise if it was claiming deliberative privilege in respect of any notes taken by CTA Members, its Chairperson or Vice Chairperson during their March 24, 2020 call as the CTA had cited case law in support of its submission that the notes need not be disclosed in which the exemption from disclosure was premised on deliberative privilege; and



- the individual at the CTA responsible for compliance with the Court’s October 15, 2021 Order serve and file an affidavit detailing the efforts of the CTA to comply with the Court’s October 15, 2021 Order.

[20] On the issue of a possible claim for privilege over the notes taken during the March 24, 2020 call, paragraphs 42-43 of the Reasons for the April 11, 2022 Order provided:

[42] In the present case, it appears that there may well be a debate between the parties as to the nature of the function that was being carried out by the CTA Members, Chairperson and Vice-Chairperson in the adoption of the statement on vouchers. If the function is an adjudicative one, then the notes taken by the Members are protected from disclosure under the principles set out above.

[43] In light of this uncertainty, the respondent is directed to confirm within ten days of the date of the Order that accompanies these Reasons whether it takes the position that these notes are immune from disclosure by reason of adjudicative privilege and, if not, on what other basis they cannot be ordered to be disclosed.

[21] With respect to the requirement that an affidavit be filed to detail the CTA’s efforts to comply with the Court’s October 15, 2021 Order, paragraph 47 of the Reasons for the April 11, 2022 Order noted that the affidavit was required by reason of the “number of issues that have arisen with disclosure and compliance with this Court’s October 15, 2021 Order as well as the number of outstanding documents that the applicant is seeking”. The paragraph continued, by stating:

... I would expect that the affidavit would address the following issues set out in paragraph 43 of the applicant’s reply submissions, namely:

- (a) how the CTA narrowed down the several thousands of pages of documents to less than two hundred pages it has disclosed;
- (b) what steps were taken, if any, to gather and/or preserve documents upon being served with the Notice of Application on April 9, 2020;
- (c) who at the CTA conducted the searches for documents;
- (d) whether the CTA reviewed its encrypted emails or documents;
- (e) what record-keeping systems the CTA has, and whether all of them were searched for responsive documents;
- (f) whether the CTA has any backups or archives of their emails and other electronic documents, and whether those backups or archives were searched;
- (g) whether the CTA conducted any investigation after learning that some documents no longer exist, and any steps taken to recover those documents; and
- (h) whether the CTA's audio or video conferencing system has a recording feature and whether the conferences between March 9 and 25, 2020 were recorded.

[22] The April 11, 2022 Order and Reasons for Order contemplated that it might be necessary for the applicant to cross-examine the deponent of the affidavit the CTA was ordered to produce as the time table that was set allowed time for any necessary cross-examination.

[23] Further to the April 11, 2022 Order, the CTA disclosed a number of additional documents. Among them was a previously undisclosed letter from the President of Air Canada to the former Chairperson of the CTA, dated March 23, 2020, in which Air Canada requested that the CTA recognize that Air Canada had no obligation to issue refunds to passengers whose flights were cancelled as a result of the pandemic.

[24] The CTA also disclosed a number of documents related to the March 19, 20, 22 and 23, 2020 calls, described above. Some of these documents were heavily redacted. Counsel for the applicant wrote to counsel for the CTA to request an explanation for the redactions, but none was provided by counsel for the CTA in his correspondence in reply. Counsel for the CTA instead stated that the CTA had complied with the Court's April 11, 2022 Order by producing all the non-privileged documents it was required to produce.

[25] As for the affidavit the CTA was ordered to produce, on April 21, 2022, senior counsel at the CTA responsible for compliance with the production orders provided an affidavit that describes the steps she undertook to locate and produce the documents the CTA was ordered to disclose.

[26] On the privilege issue, the CTA disclosed notes taken by only one of the CTA Members in respect of the March 24, 2020 call between the Members, Chairperson and Vice-Chairperson of the CTA. On April 21, 2022, counsel for the Attorney General wrote to the Court and advised that the CTA had provided a single document containing notes taken by a CTA member during that call and that no claim of privilege was being asserted with respect to that document. The CTA has not clarified whether there remain any notes taken during that call that have not been disclosed.

[27] Following receipt of the documents produced by the CTA subsequent to the April 11, 2022 Order, in addition to seeking clarifications, counsel for the applicant also sought dates for the cross-examination of the affiant. Counsel for the applicant relatedly wrote to counsel for the

respondent and CTA, commencing on April 13, 2022, to request dates. While counsel for the respondent provided his unavailable dates on April 22, 2022, counsel for the CTA did not respond to the request for dates.

[28] The applicant served a Direction to Attend on the deponent of the affidavit on April 22, 2022, in which the applicant sought:

**A. Notification of Agency Personnel on April 14, 2020 Regarding Application**

1. With reference to the Affidavit at paragraph 8, the original notification that was sent on April 14, 2020, including the names of the recipients.
2. With reference to the Affidavit at paragraph 8, all the responses from the recipients in respect of the notification mentioned therein.

**B. Inquiries for Documents with Former Agency Personnel**

3. All written correspondences, between October 15, 2021 to April 22, 2022, between Ms. Cuber, and Ms. Marcia Jones (former Chief Strategy Officer) or Mr. Scott Streiner (former Chairperson), in respect of compliance with the October Order (as defined in the Affidavit) and/or April Order (as defined in the Affidavit), including any requests to Ms. Jones and/or Mr. Streiner to assist in providing and/or locating documents.
4. All written correspondences, between October 15, 2021 to April 22, 2022, between a member or staff of the Canadian Transportation Agency (other than Ms. Cuber), and Ms. Jones or Mr. Streiner, in respect of compliance with the October Order and/or April Order, including any requests to for assistance in providing and/or locating documents.
5. The Canadian Transportation Agency's policy on retaining of data on computer hard drives and mobile devices of departing personnel.

**C. Inquiry with Ms. Lesley Robertson, Office of the Chairperson**

6. With reference to the Affidavit at paragraph 33, all written correspondences with Ms. Lesley Robertson in respect of the inquiry and/or search for documents responsive to the October Order and/or the April Order.
7. With reference to the Affidavit at paragraph 34, copies of the five documents.

**D. Inquiry with Mr. Guindon and Other Information Technology Personnel**

8. With reference to the Affidavit at paragraphs 37-38, all written correspondences with Mr. Jonathan Guindon or personnel in the Information Technology Services Division [collectively, Information Technology Personnel] regarding the search for documents responsive to the October Order and/or the April Order.
9. With reference to the Affidavit at paragraph 38, all documents showing the search terms employed for the electronic search referred to therein.
10. With reference to the Affidavit at paragraphs 38-39, the list of Agency staff whose Outlook accounts returned documents in the 799 item search results.
11. With reference to the Affidavit at paragraph 38, documents showing if searches were made on the Outlook accounts of the former Chief Strategy Officer (Marcia Jones) and the former Chairperson (Scott Streiner).
12. The Outlook system logs showing when the following emails were deleted from Ms. Marcia Jones' Outlook account:
  - (a) Email received by Ms. Marcia Jones on March 18, 2020 from Mr. Colin Stacey with the subject line "FW: From MinO: Air Transat."
  - (b) Email sent by Ms. Marcia Jones on March 25, 2020 with the subject line "Update: CTA measures/Mise à jour: mesures prises par l'OTC."

**E. Searching the Canadian Transportation Agency's Corporate Repository**

13. With reference to paragraph 13 of the Affidavit, all documents showing the search terms that were employed for the search(es) made on RDIMS (the Canadian Transportation Agency's corporate repository) for documents responsive to the October Order and/or the April Order.

**F. Records of or Recordings of the March 9-25, 2020 Meetings**

14. With reference to paragraph 38 of the Affidavit, printouts from the Outlook calendars for Mr. Scott Streiner and Ms. Marcia Jones of the scheduled events between March 18-25, 2020, including the weekend of March 21-22, 2020.
15. With reference to the April 20, 2022 Documents, the first page of Appendix C1.pdf shows the meeting invite from Mr. Streiner with his dial-in code of 935311571, a printout from the teleconferencing platform showing all conferences that were hosted using this dial-in code between March 9 and 25, 2020, including the weekend of March 21-22, 2020.
16. With reference to paragraph 58 of the Affidavit, a printout from the teleconferencing platform listing all the meetings between March 9 and 25, 2020 that were recorded.

**G. Inquiries after Producing the Initial Documents on December 14, 2021**

17. With reference to paragraph 42 of the Affidavit, the written documents showing what "the existing search results" were.
18. With reference to the documents disclosed by the Canadian Transportation Agency on April 20, 2022 [April 20, 2022 Documents], a printout of the Outlook search results relied upon by Ms. Amanda Hamelin or other Information Technology Personnel to identify the April 20, 2022 Documents.

**H. Document Referred to in the April 20, 2022 Documents Package**

19. With reference to the April 20, 2022 Documents, page 47 of Appendix C1.pdf refers to a "Circulate updated Members Committee Agenda" for March 24, 2020. Please provide the Members Committee Agenda referred to therein.

**I. Microsoft Outlook Backups**

20. With reference to paragraph 53 of the Affidavit, the Canadian Transportation Agency's policy document on Outlook retention standards referred to in paragraph 53 of the Affidavit (i.e., periods of 10 days and 12 weeks).
21. With reference to paragraph 54 of the Affidavit, all written correspondences between Ms. Cuber and a member or staff of the Canadian Transportation Agency, regarding retrieving the Outlook backup tapes for searching.
22. With reference to paragraphs 53-54 of the Affidavit, a list of all the backup tapes for Outlook that are still being kept, including the dates covered by those backup tapes.
23. The Canadian Transportation Agency's policy on retaining backup of Outlook documents other than on backup tapes, such as backups on Amazon Cloud, Microsoft 365, or other cloud platforms.

**J. Inquiry Relating to ATI Requests A-2020-00002 and A-2020-00029**

24. With reference to the Affidavit at paragraphs 17-20 and 21-25, any index, table of contents, summary, and/or listings for:
  - (a) the 683 items for A-2020-00002; and/or
  - (b) the 1417 Outlook items, the 25 electronic documents, and/or the 5099 page working copy of the search results for A-2020-00029.

**K. Inquiry Relating to TRAN Committee Motion Documents**

25. With reference to the Affidavit at paragraph 29, any index, table of contents, summary, and/or listings of the collection of documents stemming from the motion from the Standing Committee on Transportation, Infrastructure and Communities on March 25, 2021 [TRAN Committee Motion].

(Motion Record of the Applicant Air Passenger Rights Regarding the CTA's Affiant's Failure to Attend Cross-Examination Motion to Enforce, Vary, and

Correct the Court Orders Issued by Gleason, J.A., Vol I, Exhibit AI to the Affidavit of Dr. Gábor Lukács, p. 352 to 356)

[29] The CTA replied by letter stating that it would seek the direction of the Court to be relieved from the requirement to produce the requested documents. The CTA wrote to the Court requesting such relief, and on May 2, 2022, my colleague, Justice Mactavish, issued a Direction requiring the CTA to bring a motion to be relieved from production. That motion (along with the motion of the applicant) are the ones now before me.

[30] Despite being aware of the CTA's intent to bring a motion regarding production and the Direction of this Court that such a motion be brought, the applicant did not cancel the cross-examination scheduled for May 3, 2022, and, when the affiant did not attend, obtained a certificate of non-attendance.

## II. The Issues

[31] The parties have filed substantial materials – totaling over 2000 pages – in respect of the two pending motions. The issues raised in the two motions now before me and in the correspondence from counsel can be distilled as follows:

1. Should the deponent of the document search affidavit be ordered to attend for cross-examination and, if so, should she be ordered to bring any of the documents listed in the Direction to Attend or be required to produce them in advance of the cross-examination?



2. Should the CTA be required to bear the costs of the aborted cross-examination and any future attendance?
3. Should this case be informally case managed to help alleviate any further pre-hearing issues?

### III. Attendance at Cross-Examination and Production

[32] In terms of the first of the foregoing issues, the CTA's submissions on its motion contain the suggestion that the deponent of the affidavit should not be subject to cross-examination at all and that it was thus incorrect for a cross-examination to have been contemplated. The CTA cites in support of this assertion the decision in *Constantinescu v. Canada (Correctional Services)*, 2021 FC 229 [*Constantinescu*], where the Federal Court refused to order cross-examination of the affiant of an affidavit of documents that it had ordered a tribunal to produce. There, the Court found that the applicant had failed to establish that the affidavit of documents was insufficient or inaccurate (*Constantinescu*, at para. 125).

[33] However, as the applicant notes, the Federal Court ordered cross-examination of an affiant in *GCT Canada Limited Partnership v. Vancouver Fraser Port Authority*, 2021 FC 624 [*GCT Canada*], (see unreported order made in *GCT Canada Limited Partnership v. Vancouver Fraser Port Authority*, August 25, 2021, in file T-538-19). There, like here, the Court had previously required the individual responsible for responding to a production request under Rule 317 of the *Federal Courts Rules*, S.O.R./98-106 to file an affidavit detailing what the individual had done to disclose the requested documents. In that case, questions remained as to the

sufficiency of the search, and the Federal Court allowed for the cross-examination of the affiant on issues related to the nature and scope of the document search but not on issues directed to the merits of the application.

[34] In the present case, as in *GCT Canada*, legitimate questions also remain about the scope and nature of the document search undertaken by the CTA and about the adequacy of its disclosure. These questions include:

- the need to explain on what basis the CTA unilaterally redacted large portions of documents it was ordered to produce, although an explanation was eventually given by the CTA in its materials filed in response to the applicant's motion;
- why the letter from Air Canada to the CTA was not disclosed earlier;
- why so few documents were disclosed when the CTA indicated in earlier Court filings that there might well be a much greater number of documents responsive to the disclosure requests, including numerous private Twitter messages and documents received over the CTA's Info email account;
- whether there were additional notes taken during the March 24, 2020 call by CTA Members, Vice-Chairperson or Chairperson; and

- when and how the original electronic versions of the encrypted emails between the CTA and Transport Canada, referred to above, were deleted.

[35] For clarity, these are only some of the more obvious unanswered questions. Therefore, the foregoing list is not intended to be a comprehensive listing of the subjects that may be explored during the cross-examination of the affiant.

[36] As for the documents that must be produced at the cross-examination, the CTA has indicated in its submissions in response to the applicant's motion that it does not object to producing certain additional documents to the applicant or to the Court (for documents over which privilege is claimed). There are also a few points that need to be clarified arising from the previous disclosure Orders.

[37] As concerns privilege claims, it is not entirely clear which documents are currently subject to such a claim. That said, the CTA indicates in its response to the applicant's motion that it "would not be adverse to a simplified procedure where it may assert its own claims for privilege".

[38] Such a procedure was established in the October 15, 2021 Order. It continues to apply to this application on a go-forward basis. Under the October 15, 2021 Order, the Attorney General was required to advance the privilege claims. This requirement was imposed for two reasons: first, to bring a degree of objectivity that is required by the nature of this application; and, second, because certain types of privilege claims may well intersect with the eventual defences

on the merits of the application that the respondent may wish to advance. This would be the case, notably, with an assertion of deliberative privilege.

[39] Accordingly, if there are additional documents or portions of documents that the CTA has been ordered to disclose, that are subject to disclosure under the Order that accompanies these Reasons or that are sought during the cross-examination in respect of which a claim for privilege is advanced, the respondent shall make an informal motion for a ruling on privilege, by way of letter to the Court. The respondent shall serve and file a public version of any such motion, from which information alleged to be privileged is redacted. The respondent shall also make a confidential filing, enclosing the documents in respect of which a privilege ruling is sought. Any such motion should be made expeditiously once the need for a ruling become apparent.

[40] The next category of documents are private Twitter messages and messages received over the CTA's Info email account from passengers about cancelled flights over the period in respect of which disclosure was ordered. The CTA indicates it is prepared to disclose these documents, even though it believes they do not come within the scope of the previous Orders. Given this willingness, the CTA should disclose these messages to the applicant as soon as possible and in any event by no later than 10 days from the date of the Order that accompanies these Reasons.

[41] With respect to documents related to the March 24, 2020 call, the April 11, 2022 Order and Reasons did not deal comprehensively with the applicant's request for production in respect of that call. They rather asked initially for clarification regarding whether the respondent was

claiming deliberative privilege over notes that might have been taken by CTA Members, its former Chairperson or Vice-Chairperson during that call.

[42] From the response received from the CTA, it is unclear whether there were additional notes taken by CTA Members, its Chairperson or Vice-Chairperson during that call beyond those that have been disclosed. Within 5 days of the date of the Order that accompanies these Reasons, the CTA shall advise the parties and the Court whether it has been able to determine if any such additional notes were taken. If the respondent asserts a claim of privilege over any such documents, within 10 days of the date of the Order that accompanies these Reasons, it shall make a motion for a ruling on its privilege claim, following the procedure detailed above.

[43] Following resolution of the issues with respect to the notes taken during this call, I will rule on the balance of the applicant's disclosure request made in respect of the March 24, 2020 call if the CTA does not voluntarily disclose the additional documents sought by the applicant in respect of that call. The applicant shall forthwith advise the Court if a ruling on the remainder of its disclosure request in respect of the March 24, 2020 call is required following resolution of the issues with respect to the notes taken during this call.

[44] I turn next to the issue of whether an order should be issued under Rule 97 to require that the affiant attend for cross-examination. I do not believe it appropriate to issue such an order, at least not at this stage, as it was ill-advised for the applicant to have attempted to proceed with the cross-examination on May 3, 2022.

[45] The previous attempts to schedule the cross-examination show an unfortunate lack of cooperation between counsel. In particular, counsel for the CTA did not provide dates for the examination in a timely fashion in circumstances where there were Court-imposed deadlines that the applicant was required to meet. On the other hand, the applicant proceeded with the unilaterally scheduled cross-examination after it knew that the Court was to be seized with a motion on production issues.

[46] I would hope that, with a modicum of courtesy and common sense, the parties should now be able to arrange for the cross-examination of the affiant. If I am incorrect in this hope, the applicant can renew its request for such an order via way of informal motion made by way of letter.

[47] I turn next to the scope of that cross-examination. As in *GCT Canada*, the scope of the cross-examination of the affiant should be limited to exploring what the affiant did to comply with the Court's disclosure Orders. The initial Order issued on October 15, 2021 outlined the categories of documents required to be disclosed. Subsequent Orders (including this one) have served to bring precision to issues that have arisen regarding the scope of the October 15, 2021 Order. Thus, in examining what was done to comply with the October 15, 2021 Order, it is open to the applicant to ask relevant questions regarding steps taken to comply with all the disclosure Orders.

[48] I turn next to consider the applicant's production request made in the Direction to Attend. I agree with the CTA that the cross-examination of the affiant cannot be used as a fishing

expedition and that such cross-examination is not akin to a discovery. Rather, the cross-examination has been allowed to ensure that all documents relevant to the applicant's bias allegations have been disclosed.

[49] At this point, the applicant has not laid the necessary evidentiary foundation for the broad disclosure of many of the requested documents, which include a multitude of documents determined by the CTA to fall outside the scope of the disclosure Orders. That said, in my view, a sufficient foundation has been laid for disclosure of a few of the categories of documents sought in the Direction to Attend. These are the documents showing the electronic search terms used (items 9 and 13 in the Direction to Attend) and documents that may shed light on when and how the original encrypted emails between the CTA and Transport Canada came to be deleted (item 12 in the Direction to Attend). Both items are directly relevant to the affiant's search and to what happened to the original version of certain documents that are germane to the applicant's bias allegations.

[50] At this point, I am not convinced that any further items sought by the applicant in the Direction to Attend are necessary to ensure that all documents relevant to the application have been disclosed. However, this determination is without prejudice to the right of the applicant to request further disclosure if answers given during the cross-examination establish that further disclosure must be ordered to ensure that all relevant documents are produced.

[51] The applicant has requested that production be made in advance of the cross-examination, even though Rule 94 does not specifically contemplate an order being made for

such advance disclosure. Given the reduction in the number of documents that the affiant must now produce, I would hope that the CTA would agree to disclose them prior to the cross-examination to facilitate the examination and the work of the reporter in the event the examination is conducted virtually. If the parties are not able to agree on such pre-hearing disclosure and if the applicant believes it essential, it may seek the Court's intervention via way of informal motion made by letter.

IV. Costs for the Cross-Examination and these Motions

[52] In light of the shared responsibility for the aborted cross-examination, no costs will be awarded in respect of it. Costs on these motions shall be in the cause.

V. Case Management

[53] I agree that a process for ongoing management of the pre-hearing issues in this application is warranted. I will remain seized of all such issues that arise before the filing of a requisition for hearing. The parties or the CTA may request the Court's further intervention in respect of pre-hearing issues, should it be required, via way of informal motion made by letter, addressed to the Judicial Administrator, with a request that the motion be placed before me.

[54] Given the delays and difficulties that have arisen in perfecting this application, the parties and the CTA are requested to confer and agree upon a timetable for the completion of the required steps to perfect this application. Within 30 days of the Order that accompanies these



Reasons, they shall file a timetable for completion of the remaining steps, or failing agreement, file their respective proposals for the timetable.

[55] As noted earlier, a hearing for the portion of the applicant's motion seeking a show cause order for contempt will not be scheduled at this point as this request is premature and the order may well prove unnecessary if all disclosure issues are resolved. If, following the cross-examination of the affiant, the applicant believes that it is necessary for a hearing to be scheduled in respect of the pending portion of its January 17, 2022 Motion, it may renew the request for a hearing date, by letter addressed to the Court, setting out its reasons in support of the request.

[56] Finally, the typographical error in the Appendix to the April 11, 2022 Reasons for Order will be corrected, as requested by the applicant.

"Mary J.L. Gleason"

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J.A.

**FEDERAL COURT OF APPEAL**

**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

**DOCKET:** A-102-20  
**STYLE OF CAUSE:** AIR PASSENGER RIGHTS v. THE  
ATTORNEY GENERAL OF  
CANADA AND THE CANADIAN  
TRANSPORTATION AGENCY

**MOTION DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES**

**REASONS FOR ORDER BY:** GLEASON J.A.

**DATED:** JULY 19, 2022

**WRITTEN REPRESENTATIONS BY:**

Simon Lin COUNSEL FOR THE APPLICANT  
Lorne Ptack COUNSEL FOR THE  
RESPONDENT  
Kevin Shaar COUNSEL FOR THE  
INTERVENER

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