

Federal Court of Appeal



Cour d'appel fédérale

Date: 20230426

Docket: A-102-20

Ottawa, Ontario, April 26, 2023

Present: GLEASON J.A.

BETWEEN:

AIR PASSENGER RIGHTS

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

and

THE CANADIAN TRANSPORTATION AGENCY

Intervener

ORDER

UPON motion of the applicant for an order under Rule 41 of the *Federal Courts Rules*, SOR/98-106, granting leave to issue a subpoena to Transport Canada requiring it to transmit to the Court and the parties the documents mentioned in the applicant's Notice of Motion and for the other ancillary relief detailed in the Notice of Motion;

AND UPON reading the materials filed;

AND UPON noting the respondent's consent to production of a PDF version of the materials listed in paragraphs 1(a), (b) and (c) of the applicant's Notice of Motion that are not already in the possession of the applicant which are not privileged, if they are available;

AND UPON determining that the materials that the respondent agrees should be produced have already been determined to be relevant to this application and can no longer be located by the intervener and therefore that leave should be granted to issue a subpoena for the production of all parts of those documents that are not privileged;

AND UPON determining that it is sufficient if a PDF version of the said documents is produced, the applicant failing to show why an electronic version might be relevant as concerns these documents, which, if they exist, are in the possession of Transport Canada;

AND UPON determining that the materials listed in in paragraphs 1(d) of the applicant's Notice of Motion need not be produced as the request for them is equivalent to a fishing expedition. The applicant has failed to demonstrate that any such documents exist, beyond those that are duplicative of materials already produced by the intervener or that are covered by the documents in respect of which a subpoena will issue;

AND UPON determining that a similar process to that outlined in previous Orders in this application should be followed if the respondent intends to invoke privilege in respect of any portion of the documents in respect of which a subpoena is to issue;

AND UPON determining that there is presently no basis for granting the other relief sought by the applicant in its Notice of Motion, which, at best, is premature;

THIS COURT ORDERS that:

1. Within 10 days of the date of this Order, the respondent shall advise the Court and the parties of the name of the individual at Transport Canada to whom a subpoena seeking a PDF version of the documents listed in paragraphs 1(a), (b), or (c) of the Notice of Motion should be addressed;
2. If the respondent claims privilege over any portion of the documents to be produced via subpoena, within 20 days of the date of this Order, it shall make an informal motion to the Court for a ruling on privilege and shall file, on a confidential basis, an unredacted version of the documents over which privilege is claimed as well as a redacted version of its submissions, from which details of the information over which privilege is asserted are deleted;
3. The applicant shall have 10 days from receipt of the respondent's submissions to file a response to them;
4. The materials related to the claim for privilege shall then be returned to the undersigned for a ruling;
5. In the event no claim for privilege is made, leave is granted to serve a subpoena on the individual at Transport Canada named by the respondent, requiring production to the Court and the parties, within 30 days of receipt of the subpoena, of a PDF version of the materials listed in paragraphs 1(a), (b), and (c) of the applicant's Notice of Motion, from which all encryptions are removed, that are not already in the applicant's possession;

6. In the event a claim for privilege is made, this Court shall issue such further order(s) as required to effect production of the documents subject to subpoena; and
7. Costs of this motion are in the cause.

"Mary J.L. Gleason"

J.A.