

December 16, 2021

VIA EMAIL

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

Dear Madam or Sir,

**RE: Air Passenger Rights v. The Attorney General of Canada (A-102-20)**

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We are counsel for the Applicant. Please bring this letter to Gleason J.A.'s attention as soon as practicable so the parties' submissions on the requested extension of time will not be rendered moot. On October 15, 2021, Gleason J.A. granted the Applicant's Rule 318 motion [**Rule 318 Ruling**].<sup>1</sup> Her Ladyship is seized with the motion(s) for ruling on privilege for documents that were ordered to be produced.

On December 14, 2021, the Respondent served two motions: (1) a motion for a 45-day extension to consult further on two emails, consisting of three pages only [**Extension Motion**]; and (2) a motion for ruling on privilege for two documents [**Privilege Motion**]. The Applicant intends to meet-and-confer for the Privilege Motion and, if necessary, will file its response to the Privilege Motion within the 30-day deadline set by the Court, taking into account the Christmas Recess.

This letter is in response to the Extension Motion. Prior to the Respondent serving the Extension Motion, the Applicant already advised the Respondent that the Applicant will consent to an extension of five days, to December 20, 2021. However, the Respondent has not responded.

**The Three Pages of Emails in the Extension Motion**

The Respondent's Extension Motion seeks an additional 45 days to conduct unspecified consultations on two emails: (1) a one-page email dated March 18, 2020 [**Exhibit A**]; and (2) a two-page email dated March 23, 2020 [**Exhibit B**]. Both Exhibit A and Exhibit B are not recently sourced documents gathered during the sixty-day period after the Rule 18 Ruling. Rather, both the Canadian Transportation Agency [**Agency**] and Transport Canada were fully aware of the existence of Exhibit A and Exhibit B, and that their disclosure was requested in various forums.

Mr. Millette's affidavit attempts to give the (mis)impression that those emails recently surfaced on December 9, 2021. However, in reality, in 2020 both Exhibit A and Exhibit B were earmarked for

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<sup>1</sup> [Air Passenger Rights v. Canada \(Attorney General\)](#), 2021 FCA 201 at para. 29.

release under the *Access to Information Act*.<sup>2</sup> Exhibit B was explicitly raised in this judicial review on May 14, 2021.<sup>3</sup> Any consultation could have, and should have, been done before these exhibits were released under the *Access to Information Act* in 2020, or to a Parliamentary Committee in May 2021. Mr. Millette's affidavit is totally silent on what the Agency and/or Transport Canada have done with these emails since 2020.

### **The Four Criteria for Extension of Time Are Not Met**

In the Rule 318 Ruling at para. 30, at the time the Court fixed the 60-day time limit, the Court granted leave for the AGC to seek an extension of time on two possible grounds: (1) if the time provided is inadequate by reason of complexities flowing from the COVID-19 pandemic; or (2) the number of documents involved. It appears the Extension Motion is not based on either of these grounds. In any event, the Agency's disclosure package on December 14, 2021 consisted of 161 pages, suggesting that there is no issue arising from the volume of documents they had to prepare.

Firstly, the Respondent cannot point to any previous submission where they expressed any intent, let alone a continued intent, to seek consultation on any documents before production. Indeed, when a redacted version of Exhibit B was brought before the Court,<sup>4</sup> the Agency and the AGC had not indicated that any consultations were required, or that any privilege would be asserted.

Secondly, regarding the underlying merits, the Respondent has not identified any grounds that it can reasonably rely upon to resist production of those emails. The Respondent merely requests more time to conduct consultations, without providing any factual or legal basis for asserting privilege. On the face of those emails, there is no privilege that could be reasonably asserted.

Thirdly, the Respondent's assertion that there is no prejudice from their delay is unfounded. Judicial reviews are to be heard expeditiously without delay.<sup>5</sup> The Applicant has been proceeding with due dispatch. This judicial review was commenced on April 9, 2020, and the Agency has been resisting disclosure of all documents since August 2020.<sup>6</sup> The Applicant promptly served its Rule 318 motion on January 4, 2021, immediately after the Supreme Court of Canada refused leave to appeal for the Applicant's interlocutory injunctions motion.<sup>7</sup>

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<sup>2</sup> Affidavit of Vincent Millette at Exhibits A and B, "**Categories:**" heading near the top of the emails; Affidavit of Dr. Gabor Lukacs sworn on May 14, 2021 (Doc. 91) [**Lukacs Affidavit**] at paras. 2-3 and Exhibit A.

<sup>3</sup> Lukacs Affidavit at Exhibit B.

<sup>4</sup> Letter from Agency to the Court on May 14, 2021; Letter from AGC to the Court on July 5, 2021.

<sup>5</sup> *Federal Courts Act*, s. 18.4(1); [Association des crabiers acadiens Inc. v. Canada \(A.G.\)](#), 2009 FCA 357 at paras. 30-31; see also [Canada \(Attorney General\) v. TeleZone Inc.](#), 2010 SCC 62 at para. 26.

<sup>6</sup> Letter from Agency to the Court on August 20, 2020.

<sup>7</sup> [Air Passengers Rights v. Canada \(Transportation Agency\)](#), 2020 FCA 92, leave to appeal refused ([2020 CanLii 102983](#)).

Finally, there is no evidence explaining why the AGC and the Agency failed to complete their consultation on three pages within the 60-day time limit. The only evidence is Mr. Millette claiming that he was contacted by the Agency on December 9, 2021, but that affidavit omits the important fact that those emails were already on the radar long beforehand and earmarked for disclosure in 2020 under the *Access to Information Act* and to a Parliamentary committee in May 2021.

### **Conclusion**

The Applicant submits that there is no basis to permit an extension of time when the Respondent, and the Agency, had already been provided a generous amount of time to prepare the documents for production, which consisted of 161 pages only. The extension of time requested herein is not within the two narrow grounds identified by the Court in the Rule 318 Ruling. The Respondent has also not indicated what grounds of privilege, if any, could be reasonably asserted for the emails in question. There is simply no air of reality that privilege could be asserted for those emails.

The Applicant respectfully requests that the Respondent's motion for an extension of time be dismissed, and that the Agency be ordered to produce unredacted copies of Exhibit A and Exhibit B forthwith.

Alternatively, the Applicant submits that a 45-day extension is excessive and an extension to December 20, 2021 is more than sufficient. The Applicant further submits that any extension of time should be preemptory on the Respondent.

Should the Court have any directions, we would be pleased to comply.

Yours truly,

**EVOLINK LAW GROUP**



SIMON LIN

Barrister & Solicitor