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December 2, 2022 **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. AGC and CTA (A-102-20) – Response to AGC's Informal Motion Asserting Privilege for Two Documents

We are counsel for the Applicant. Please bring this letter to Gleason J.A.'s attention. Her Ladyship is seized of all pre-hearing issues, pursuant to the Order of July 19, 2022. Please accept this letter as the Applicant's response to the AGC's motion on privilege claims for two documents.

The Applicant's submissions below are predicated on the two sets of documents (i.e., the Jones-Cuber Email and the Withheld C5 Urgent Debrief Call Documents) being found to be relevant to the motion or Application. If the Court determines that these documents are not relevant, it is not necessary to determine the AGC's motion on privilege. Should the Court find that these two sets of documents are relevant, the Applicant submits that the privilege assertions should be denied.

The Jones-Cuber Email(s) are Not Privileged

Assuming the single email chain attached as Exhibit C to Ms. Schmidt's affidavit represents the totality of the written communications between Ms. Jones and Ms. Cuber on the subject during that time period, the Applicant submits that the privilege assertions be denied on three bases:

1. No privilege is attached to the communications for steps taken for document gathering.
2. The CTA waived any privilege by relying on the email correspondence to bolster its claims that it had performed the court-ordered search diligently.
3. Even if privilege had attached, the Court should not enforce the privilege, in the interests of justice, due to the CTA's failure to preserve all relevant documents at the outset.

The act of giving legal advice, or performing work for the dominant purpose of litigation, is distinct from a party's discharge of its obligations to disclose records. A party cannot hide behind privilege to withhold documents on whether it complied with the court-ordered disclosure of documents:[1]

[1] *Manson Insulation Products Ltd v Crossroads C&I Distributors*, 2014 ABQB 442 [***Manson Insulation ABKB***] at paras. 31-32 (emphasis added)

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> *[31] However, the existence of solicitor-client privilege over a solicitor's advice and instructions to a client regarding preservation and disclosure of records does not mean the privilege extends to work done by solicitors or their employees in the clerical tasks of collecting and organizing a party's records. As submitted by New Crossroads, the parties must disclose what they have done regarding their records – regardless of whether things were done by lay people or lawyers.*
>
> *[32] Many steps involved in preparing productions of records in complex, document- intensive lawsuits are primarily clerical in nature and tend to be performed at law firms – often by assistants or paralegals, but sometimes by lawyers. That does not, by itself, make these steps privileged. What a party does to discharge its obligations to disclose records is not privileged, and its status will not be altered by the fact that some steps may be taken at a law firm.*

This Court's October 2021 Order required the CTA to disclose three categories of relevant documents. Subsequently, "[g]iven the number of issues that have arisen with disclosure and compliance with [the October 2021 Order] as well as the number of outstanding documents that the applicant is seeking", the Court ordered that "the individual at the CTA who was responsible for complying with [the October 2021 Order] should be required to serve and file an affidavit detailing what has been done to ensure the required disclosure was made."[2]

The CTA tasked Ms. Cuber with "gathering documents responsive to the October Order, and with producing these to the parties" and was the affiant for the above affidavit.[3] The fact that Ms. Cuber is a solicitor does not distract from the fact that **both** the initial document disclosure and the subsequent filing of the affidavit were pursuant to court orders. Moreover, the CTA is still required to "disclose what they have done regarding their records – regardless of whether things were done by lay people or lawyers."[4]

Furthermore, Ms. Cuber's affidavit, and the cross-examination on that affidavit, were compelled by way of a Court Order, or the *Federal Courts Rules*. The AGC cited no authority suggesting that a party can rely on privilege to refuse to disclose documents relating to whether it had fully complied with an earlier Court Order (i.e., the October 2021 Order), when the Court has already made a specific order that the CTA "[detail] what has been done to ensure the required disclosure was made" (i.e., the April 2022 Order).

In this case, at the cross-examination, Ms. Cuber had repeatedly relied on her written communications with Ms. Jones to substantiate her document search efforts.[5] Although the issue of waiver was already raised before the AGC brought its motion on November 21, 2022, the AGC failed to address waiver in its in-chief submissions, and should not be permitted to raise it in reply.

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[2] *Air Passenger Rights v. Canada (Attorney General)*, 2022 FCA 64 at para. 47.
[3] Affidavit of Barbara Cuber [**Cuber Affidavit**] affirmed on April 21, 2022 at paras. 2-3 (Court Docket #122).
[4] *Manson Insulation ABKB* at para. 31.
[5] Applicant's Motion on November 14, 2022, Written Representations at para. 65 and footnote 88.

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In any event, even if privilege attach, the Court has a discretion to waive the privilege when it is in the interests of justice.[6] In *Brown BCSC*, the court found that it was in the interest of justice to waive the privilege when a party failed to preserve evidence after notice was given to preserve it. As detailed in the Applicant's November 14, 2022 motion and reply, this reasoning applies with even greater force, since the CTA consciously wiped Ms. Jones's Outlook account upon her departure. Ms. Jones's representations to Ms. Cuber would have a direct bearing on the steps the CTA took to preserve relevant documents, including preserving the Outlook account in full.

The April 9, 2020 Notice of Application and accompanying Rule 317 request clearly put the CTA on notice that documents must be preserved.[7] Despite being on notice, the CTA proceeded to wipe the MS Outlook accounts of key departing personnel, and left the matter in the hands of those persons to decide for themselves if documents with no "business value" could be destroyed.

The Withheld C5 Urgent Debrief Call Documents are Not Privileged

Assuming the Court finds that the redacted portions of the Withheld C5 Urgent Debrief Call Documents are relevant (i.e., they touch upon the subject of refunds or vouchers), the AGC's claim of solicitor-client privilege and/or deliberative secrecy should still fail for the reasons below.

At para. 23, the AGC made a bald assertion that "these are internal documents circulated only within the CTA.[footnote 6]" Footnote 6 cites a non-existent passage "Schmidt Affidavit at para. X." There is also nothing in the Schmidt affidavit remotely supporting the assertion that the subject documents were circulated only within the CTA. The AGC's assertion should be struck.

With respect to solicitor-client privilege, although the Applicant had already raised the issue, the AGC failed to address the fact that the CTA had represented to the Information Commissioner of Canada that "[t]he CTA is no longer relying on section 23 [*ATIA* section for solicitor-client privilege and litigation privilege] to withhold any information within the scope of this complaint."[8]

The CTA's representations to the Information Commissioner amount to an explicit waiver, and the AGC put forward no basis to set aside that waiver. A party should not be permitted to selectively assert privilege in a different forum when it had already been explicitly waived.

Regarding deliberative secrecy, the CTA represented to the Court that its Statement on Vouchers was not an "order".[9] In other words, the CTA has acknowledged that the CTA's members were

[6] *Brown v. Wilkinson*, 2012 BCSC 398 [*Brown BCSC*] at paras. 36-42.
[7] *Brown BCSC* at para. 36.
[8] Affidavit of Dr. Gabor Lukács, para. 40 [Applicant's November 14, 2022 Motion Record, Tab 2, p. 21].
[9] CTA's Written Representations on January 18, 2021 at paras. 6, 15, and 23 (Docket 57).

not undertaking an "adjudicative function" when it issued the Statement on Vouchers. Accordingly, since that act was not an adjudicative function, deliberative secrecy cannot attach:

> [60] I disagree. *Tremblay* does not apply to every administrative organization required to perform [translation] "decision-making functions", to borrow the expression the appellants use to characterize a type of administrative act that is not limited to adjudicative functions (A.F., at para. 108). Once again, Tremblay is clear and does not have the scope the appellants seek to attribute to it. That case concerns the deliberative secrecy that applies to administrative tribunals, that is, to bodies that perform adjudicative functions. Moreover, the cases the appellants cite to illustrate the application of deliberative secrecy support this view. In *Duke of Buccleuch, O'Rourke, Ward* and *Knight Lumber*, the arbitrators and administrative tribunal members the parties wished to call to testify had exercised powers of an adjudicative nature. The same is true of *Noble China Inc. v. Lei (1998)*, 1998 CanLII 14708 (ON SC), 42 O.R. (3d) 69, in which the Ontario Court (General Division) held that the deliberations of an arbitrator in a commercial arbitration process were protected by deliberative secrecy as a result of *Tremblay*. Deliberative secrecy was also found to apply to deliberations of administrative tribunals performing adjudicative functions in *Comité de révision de l'aide juridique v. Denis*, 2007 QCCA 126, and *Cherubini Metal Works Ltd. v. Nova Scotia (Attorney General)*, 2007 NSCA 37, 253 N.S.R. (2d) 134.[10]

Conclusion

The Applicant submits that the AGC's informal motion for privilege should be dismissed.

While the *Federal Courts Rules* allow a moving party a right of reply, this right does not extend to issues that should have been raised in chief. In the November 14, 2022 motion, the Applicant specifically raised the issues of: (1) Ms. Cuber's reliance on the Jones-Cuber Email as a ground for waiver of privilege; and (2) claims of solicitor-client privilege for the Withheld C5 Urgent Debrief Call Documents were explicitly waived.[11] It was incumbent on the AGC to address these issues, in chief, when it filed its motion for privilege on November 21, 2022. The AGC failed to do so.

Should the AGC attempt to argue the aforementioned issues in reply, those submissions should be struck for the reason of case-splitting.

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

Yours truly,
EVOLINK LAW GROUP
Simon Lin
SIMON LIN, Barrister & Solicitor

Cc: (1) Mr. Sandy Graham and Mr. Lorne Ptack, counsel for the Attorney General of Canada, and (2) Mr. Kevin Shaar, counsel for the Canadian Transportation Agency

[10] *Commission scolaire de Laval v. Syndicat de l'enseignement de la région de Laval*, 2016 SCC 8, para 60
[11] Applicant's Written Representations (November 14, 2022) at paras. 51 and 65).