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August 3, 2023 **VIA EMAIL**

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

Dear Madam or Sir,

RE: APR v. AGC and CTA (A-102-20) – Reply to AGC's Letter of August 1, 2023

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. This letter is in reply to the CTA's letter dated today [**Letter**].

The Applicant objects to the CTA's filing of the Letter for the primary reason that the CTA is attempting to delve into the merits of the Application, contrary to this Court's earlier caution on the permissible boundaries of the CTA's intervention.[1] In addition, the CTA failed to explain the long delay in filing its Letter, which is being submitted only *after* the Applicant filed its reply submissions. The CTA received the Applicant's July 11, 2023 informal motion and was copied on all emails between the Applicant and the AGC where a timeline was discussed. The CTA remained silent and did not raise any objections or concerns.

Should the Court accept the CTA's Letter, the Applicant respectfully submits as follows.

The true purpose of the CTA's belated objection is to shield Mr. Streiner from examination and to withhold critical evidence from the panel. Had the CTA been genuinely concerned about proportionality, it could have asked Mr. Streiner to provide an affidavit about his weekend discussions with Mr. Roy, and could have sought leave to file that affidavit, with or without cross-examination, as permitted under the new Rule 87.1. The CTA was willing to voluntarily provide evidence only when it may be favourable to them, as gleaned from their earlier motion to intervene.

Moreover, regrettably, *none* of the authorities cited in the Letter support the propositions that the CTA advanced. Rather, these authorities confirm the necessity of Mr. Streiner's evidence.

In footnote 1, the CTA cited *Tsleil-Waututh Nation v. Canada (A.G.)*, 2017 FCA 128 [***Tsleil-Waututh 2017***] at para. 79, which actually begins with:

> *In this Court, administrative decision-makers whose decisions cannot be fairly evaluated because of a complete lack of anything in the record on an essential element—situations where in effect the administrative decision-maker says on an essential element, "Trust us, we got it right"*

[1] *Air Passenger Rights v. Canada (Attorney General)*, 2021 FCA 201 at paras. 35-39.

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Mr. Streiner's evidence on why he decided to push a Statement on Vouchers after meeting with a political actor, despite initially rejecting that idea, is **precisely** an essential element stated in *Tsleil-Waututh 2017*. Furthermore, this Court refused to allow exceptional evidence in *Tsleil-Waututh 2017* because the requested evidence could be obtained by way of cross-examination.[2] In this case, there is no other way to obtain evidence on this essential element.

In footnote 3 of the Letter, the CTA cited *Kiss v. Canada (Citizenship and Immigration)*, 2022 FC 133 [***Kiss***] at para. 25 for the CTA's proposition that "*the Applicant is not entitled to every crumb*." Respectfully, the requested evidence is far from a "crumb." Furthermore, the paragraph the CTA cited from *Kiss* actually says that the requested evidence was already in the hands of the applicant in that case, which would eliminate any necessity of a Rule 41 subpoena. This closely tracks this Court's decision in *Tsleil-Waututh 2017* that there was an alternative means to obtain the requested evidence. The same cannot be said in this case.

In footnote 3 of the Letter, the CTA also relied on *Piatka-Wasty v. Canada (A.G.)*, 2022 FC 1185 [***Piatka***] at paras. 32-33, which is entirely different from the current Application. In *Piatka*, the applicant was seeking disclosure of the file for a Mr. MacInnis, a file that was not even before the decision-maker in rendering the decision. In the present case, the same cannot be said of Mr. Streiner's meeting with Mr. Roy. There is strong evidence that Mr. Streiner had his weekend discussion with Mr. Roy *prior to* deciding to push the Statement on Vouchers on a Sunday morning. Mr. Roy's "file" (i.e., the weekend discussions) was clearly before Mr. Streiner when he decided to draft and circulate the Statement on Vouchers.

Finally, the CTA is relitigating whether evidence about the weekend meeting(s) between CTA personnel and Transport Canada officials met two of the requisite elements of the Rule 41 test, namely that the evidence is necessary and the applicant has raised a credible ground for review. The Court had already decided these elements in the Order on April 26, 2023, and the CTA did not raise any objections or provided any submissions. The issue is *res judicata*.

The CTA does not appear to be disputing that the other two elements of the Rule 41 test are clearly met. That is, there is no other way of obtaining evidence about the weekend meetings, and that Mr. Streiner has relevant evidence on these weekend meetings that he attended.

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

[2] *Tsleil-Waututh Nation v. Canada (Attorney General)*, 2017 FCA 128 at para. 152.