Court File No.: A-102-20

FEDERAL COURT OF APPEAL

BETWEEN:

AIR PASSENGER RIGHTS

Applicant

- and -

CANADIAN TRANSPORTATION AGENCY

Respondent

RESPONDING MOTION RECORD OF THE RESPONDENT, CANADIAN TRANSPORTATION AGENCY

Re: Motion to compel production of documents

(Rules 41, 318 and 365 of the *Federal Courts Rules*)

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WRITTEN REPRESENTATIONS OF THE RESPONDENT, CANADIAN TRANSPORTATION AGENCY

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(Rules 41, 318 and 365 of the *Federal Courts Rules*)

PART I - OVERVIEW & STATEMENT OF FACTS

A. Overview

1. This motion to compel the production of documents arises in the context of an application for judicial review commenced by a Notice of Application dated April 9, 2020 (the "Application"). The Application challenges the publication on the Canadian Transportation Agency's ("Agency") website of a statement entitled "Statement on Vouchers" ("website statement") and an associated information page that concern flight disruptions caused by the COVID-19 pandemic.

2. The Application claims that the issuance, distribution and subsequent referencing of the website statement and information page (collectively referred to as "the publications") raise a reasonable apprehension of bias and/or are contrary to the Agency's *Code of Conduct for Members of the Agency* ("*Code of Conduct*")[1] for the Agency or the Members who

[1] *Code of Conduct for Members of the Agency*, Exhibit I of the affidavit of Gábor Lukács affirmed January 3, 2021, Motion Record of the Moving Party dated January 3, 2021 at Volume 1, Tab 2I at 66 [*Code of Conduct*].

supported the publications. The Application also claims that the Members have exceeded or lost jurisdiction to hear any future complaints of passengers about refunds from air carriers related to the COVID-19 pandemic.

3. In its Application, the Applicant included documentary requests which purport to have been made under Rule 317 of the *Federal Courts Rules*[2] (the "*Rules*"). In accordance with Rule 318(2), on August 20, 2020, the Agency filed an objection to the Applicant's request.

4. The Applicant has brought a motion to compel the production of documents in the Agency's possession pursuant to Rule 318 of the *Rules*. Alternatively, the Applicant seeks to subpoena the Chairperson of the Agency pursuant to Rule 41 of the *Rules* to obtain the documents.

5. The Applicant claims that the production of documents requested pursuant to Rule 317 remains outstanding. The Applicant sought production of certain categories of documents in its Application, but is now proposing to amend the request in order to obtain the following:

> Complete and unredacted copies of all records from March 9 – April 8, 2020 in respect of the Publications, including but not limited to emails, meeting agendas, meeting minutes, notes, draft documents, and memos [collectively referred hereinafter as "the Materials"].

6. The Agency maintains its objection to the Applicant's initial request and to the newly paraphrased documentary request in this motion for several reasons. First, Rule 317 does not apply in the present case as there is no "order" under review. Second, the request lacks specificity. Third, the documents are not relevant nor necessary to resolve the issues raised in the Application. Finally, the request constitutes an impermissible fishing expedition.

7. The Agency respectfully submits that no subpoena should be issued under Rule 41 as an alternative to obtaining the same material as that being sought pursuant to Rule 317. The Agency submits that the proposed use of Rule 41 is not appropriate, the documents are not necessary and the request constitutes a fishing expedition on the part of the Applicant.

[2] SOR/98-106 [*Rules*].

B. Statement of Facts

The Agency

8. The Agency is Canada's longest-standing independent, quasi-judicial tribunal and regulator. It has a broad mandate in respect of all transportation matters under the legislative authority of Parliament. The Agency performs two key functions. First, it is a quasi-judicial expert tribunal tasked with resolving commercial and consumer transportation-related disputes, as well as adjudicating accessibility issues for persons with disabilities. It operates like a Court when exercising this function. Second, it is a regulator and develops and applies ground rules that establish the rights and responsibilities of transportation service providers and users, and that level the playing field among competitors. As part of its regulatory function, the Agency also makes determinations relating to matters such as issuing licenses and permits or issuing exemptions, where appropriate, from the application of certain provisions of the *Canada Transportation Act*[3] ("CTA") or to regulations or orders made pursuant to the CTA. In both roles, the Agency may be called upon to deal with matters of significant complexity.[4]

9. The Agency's enabling statute is the CTA. It is highly specialized regulatory legislation with a strong policy focus.[5]

10. The Supreme Court of Canada has stated that "the Agency is expected to bring its transportation policy knowledge and experience to bear on its interpretations of its assigned statutory mandate."[6] This Court has also confirmed that the Agency legitimately draws upon its regulatory experience, its knowledge of the industry and its expertise in the transportation sector when interpreting legislation within its mandate.[7]

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[3] SC 1996, c 10.

[4] *Lukacs v Canada (Transportation Agency)*, 2014 FCA 76 at paras 50-52, Motion Record of the Moving Party dated January 3, 2021 at Volume 3, Tab 22 at 636.

[5] *Council of Canadians with Disabilities v VIA Rail Canada Inc.,* 2007 SCC 15 at para 98.

[6] *Ibid*.

[7] *Canadian National Railway Company v Emerson Milling Inc. et al.,* 2017 FCA 79 at para 73.

Background

11. On March 25, 2020, the Agency posted a statement on its website entitled the "Statement on Vouchers". The text of the website statement reads, in its entirety, as follows:

> The COVID-19 pandemic has caused major disruptions in domestic and international air travel.
>
> For flight disruptions that are outside an airline's control, the Canada Transportation Act and Air Passenger Protection Regulations only require that the airline ensure passengers can complete their itineraries. Some airlines' tariffs provide for refunds in certain cases, but may have clauses that airlines believe relieve them of such obligations in force majeure situations.
>
> The legislation, regulations, and tariffs were developed in anticipation of relatively localized and short-term disruptions. None contemplated the sorts of worldwide mass flight cancellations that have taken place over recent weeks as a result of the pandemic. It's important to consider how to strike a fair and sensible balance between passenger protection and airlines' operational realities in these extraordinary and unprecedented circumstances.
>
> On the one hand, passengers who have no prospect of completing their planned itineraries with an airline's assistance should not simply be out-of-pocket for the cost of cancelled flights. On the other hand, airlines facing huge drops in passenger volumes and revenues should not be expected to take steps that could threaten their economic viability.
>
> While any specific situation brought before the CTA will be examined on its merits, the CTA believes that, generally speaking, an appropriate approach in the current context could be for airlines to provide affected passengers with vouchers or credits for future travel, as long as these vouchers or credits do not expire in an unreasonably short period of time (24 months would be considered reasonable in most cases).
>
> The CTA will continue to provide information, guidance, and services to passengers and airlines as we make our way through this challenging period.[8]

12. On April 9, 2020, the Applicant commenced an Application to challenge the website statement and accompanying information page referencing the statement.

13. The Application seeks the following:

    1. a declaration that:

       (a) the Agency's Statement **is not** a decision, order, determination, or any other

[8] Agency's Publications: Statement on Vouchers and COVID-19 Agency Page, Exhibit L of the affidavit of Gábor Lukács affirmed January 3, 2021, Motion Record of the Moving Party dated January 3, 2021 at Volume 1, Tab 2L at 82.

ruling of the Agency and has no force or effect of law;

(b) the issuance of the Statement on about March 25, 2020, referencing of the Statement within the COVID-19 Agency Page, and the subsequent distribution of those publications is contrary to the Agency's own *Code of Conduct* and/or gives rise to a reasonable apprehension of bias for:

i. the Agency as a whole, or

ii. alternatively, the appointed members of the Agency who supported the Statement; and

(c) further, the Agency, or alternatively the appointed members of the Agency who supported the Statement, exceeded and/or lost its (their) jurisdiction under the *Canada Transportation Act*, SC 1996, c 10 to rule upon any complaints of passengers about refunds from carriers relating to the COVID-19 pandemic;

[…]

4. a permanent order that:

(a) the Agency prominently post at the top portion of the COVID-19 Agency Page that the Agency's Statement has been ordered to be removed by this Court;

(b) the Agency remove the Statement, and references to the Statement within the COVID-19 Agency Page, from its website and replace the Statement with a copy of this Court's judgment;

(c) in the event the Agency receives any formal complaint or informal inquiry regarding air carriers' refusal to refund in respect of the COVID-19 pandemic, promptly and prominently inform the complainant of this Court's judgement; and

(d) the Agency, or alternatively the appointed members of the Agency who supported the Statement, be enjoined from dealing with any complaints involving air carriers' refusal to refund passengers in respect of the COVID-19 pandemic, and enjoined from issuing any decision, order, determination or any other ruling with respect to refunds from air carriers for the COVID-19 pandemic.

14. The relevant grounds contained in the Application are as follows:

(26) The Statement and/or COVID-19 Agency Page is not a legal judgment. They give an informed member of the public the perception that it would be more likely than not that the Agency, or the members that supported the Statement, will not be able to fairly decide the issue of refunds relating to COVID-19.

[...]

(28) The Agency's own Code of Conduct expressly prohibits members of the Agency from expressing an opinion about potential cases or any other issue related to the Agency's work, or comments that may create a reasonable apprehension of bias:

> (40) Members **shall not publicly express an opinion about any past, current, or potential cases or any other issue related to the work of the Agency**, and shall refrain from comments or discussions in public or otherwise that may create a reasonable apprehension of bias.
>
> [Emphasis added.]

> (29) Although neither the Statement, nor the COVID-19 Agency Page, contain the signature or names of any specific member of the Agency, given the circumstances and considering the Agency's own Code of Conduct providing that the professional civilian staff's role are to **fully** implement the appointed member(s)' directions, the Statement and the COVID-19 Agency Page ought to be attributed to the member(s) who supported the Statement either before or after its posting on the internet.

15. On August 20, 2020, in response to the request for production of documents as it was originally framed, the Agency transmitted its objection to the production of the Material to the Applicant and the Administrator pursuant to subsection 318(2) of the *Rules* (the "Objection Letter").[9] In the Objection Letter, the Agency indicated its position that as the subject of the Application is not an "order" of the Agency, Rule 317 does not apply and the Agency would not be transmitting any documents.

16. After a series of letters sent by each party to the Judicial Administrator of this Court further outlining the parties' positions, on November 13, 2020, Justice Webb issued a Direction advising the Applicant to file a motion before this Court.

17. On this motion, the Applicant seeks transmission of the following documents:

> Complete and unredacted copies of all records from March 9 – April 8, 2020 in respect of the Publications, including but not limited to emails, meeting agendas, meeting minutes, notes, draft documents, and memos.

18. Thus far, this Court has dismissed two motions filed within the context of this proceeding. The first was filed by the Applicant, seeking an interlocutory injunction to require that the publications be removed and that Agency Members be enjoined from hearing any cases concerning passenger requests for refunds from air carriers in the context of the COVID-19 pandemic.

[9] Agency's objection letter to transmit material dated August 20, 2020, Exhibit AC of the affidavit of Gábor Lukács affirmed on January 3, 2021, Motion Record of the Moving Party dated January 3, 2021 at Volume 1, Tab 2AC at 187-189.

19. In its Decision on the interlocutory injunction issued on May 22, 2020, the Court found that the Applicant had not satisfied the test for injunctive relief. The Court noted the Applicant's concession that the publications are not Agency orders, and found that they were not binding and were not amenable to judicial review.[10] The Court did, however, state that it would assume that the Applicant had met the low threshold of a "serious issue to be tried" in relation to whether Members should be enjoined from hearing refund cases. The Applicant sought leave to appeal this Decision to the Supreme Court of Canada. The application for leave to appeal was dismissed without costs on December 23, 2020.[11]

20. The second motion filed in this proceeding was a motion to strike filed by the Agency, which this Court dismissed on October 2, 2020. The Court determined that there was no support for the Applicant's arguments for an expanded interpretation of the availability of judicial review, and agreed with the finding of the Decision on interlocutory relief. That said, applying the high bar for a decision to strike an application, the Court noted that the reasonable apprehension of bias ground met the low threshold of a serious issue to be tried in the Decision on interlocutory relief. The Court noted that the Agency addressed the reasonable apprehension of bias ground only in its reply submissions, and found that arguments on this ground should be made at the hearing of the Application, not in reply submissions on a motion to strike.[12]

PART II – STATEMENT OF THE POINTS IN ISSUE

21. The issues to be decided in this motion are as follows:

    A. Whether this Court should dismiss the Applicant's motion for an Order that the Agency transmit all of the Materials; and.

    B. Whether this Court should dismiss the Applicant's alternative request for a subpoena to the Agency's Chief Executive Officer to produce the same materials under Rule 41.

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[10] *Air Passenger Rights v Canadian Transportation Agency*, 2020 FCA 92 at para 20, Motion Record of the Moving Party dated January 3, 2021 at Volume 3, Tab 9 at 440 [*APR v CTA*].

[11] *Air Passenger Rights v Canadian Transportation Agency*, 2020 CanLII 102983 (SCC).

[12] *Air Passenger Rights v Canada (Transportation Agency),* 2020 FCA 155, Motion Record of the Moving Party dated January 2, 2021 at Volume 3, Tab 10 at 445.

PART III - STATEMENT OF SUBMISSIONS

A. Rule 317 Is Not Applicable as the Publications Are Not Agency "Orders"

22. Rule 317 of the *Rules* applies to material in the possession of a tribunal whose order is the subject of an application for judicial review:

> **Material from tribunal**
>
> **317** (1) A party may request material relevant to an application that is in the possession of a tribunal whose order is the subject of the application and not in the possession of the party by serving on the tribunal and filing a written request, identifying the material requested.

23. Rule 317 does not apply to all judicial review applications; Courts have held that "there can be no production under Rule 317 unless an order of the tribunal exists and is under review."[13] The Rule advances the purpose of judicial review of tribunal decisions, which is, generally, to allow the Court to review a decision based on the evidentiary record that was before the tribunal.[14] Rule 317 can be applied to matters other than orders only where these matters are assimilated to an "order" as contemplated by Rule 317.[15] The Agency submits that Rule 317 does not apply in this case because the publications are not an order; they cannot be assimilated to an order; and they are not "under review".

24. In this proceeding, there is no question that the website statement and information page are not Agency orders. One of the original heads of relief sought in the Application was a declaration confirming that the website statement is not a decision, order, determination or any other type of ruling. The Application asserts that the website statement and associated information page are not a legal judgment.[16] When dismissing the Applicant's motion for an interlocutory injunction, Justice Mactavish noted that the Applicant had conceded that "the statements on the CTA website do not reflect decisions, determinations, orders or

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[13] *Preventous Collaborative Health v Canada (Health),* 2020 CanLII 103848 at para 13 [*Preventous*]; *Patterson v Gascon*, 2004 FC 972 at para 11 [*Patterson*].

[14] *Preventous*, *supra* note 13 at para 13 and 21.

[15] *Patterson*, *supra* note 13 at para 11.

[16] Notice of Application issued April 9, 2020 at para 26, Motion Record of the Moving Party dated January 3, 2021 at Volume 1, Tab 3 at 386 [*Application*].

legally-binding rulings on the part of the Agency."[17] This Court, the Applicant and the Agency are all in agreement - what is at issue in this proceeding is not an order.

25. In fact, the very reason this Application has proceeded by way of judicial review is that the Applicant is not challenging an Agency order. Challenges to Agency orders must proceed by way of appeal to this Court, provided leave is granted, in accordance with section 41 of the CTA:

> **41(1)** An appeal lies from the Agency to the Federal Court of Appeal on a question of law or a question of jurisdiction on leave to appeal being obtained from that Court on application made within one month after the date of the decision, order, rule or regulation being appealed from, or within any further time that a judge of that Court under special circumstances allows, and on notice to the parties and the Agency, and on hearing those of them that appear and desire to be heard.

26. Judicial review is not available if an appeal mechanism exists.[18] In an effort to bring its request within the ambit of Rule 317, the Applicant cites certain decisions that have applied the rule to a "course of conduct" or "practice". However, these exceptional cases share certain commonalities that are absent here. Specifically, in each case, the conduct or practice directly impacted the rights of the applicant seeking judicial review.

27. In *Renova Holdings*, the applicants, who were "producers" within the meaning of the *Canadian Wheat Board Act*,[19] alleged that the Canadian Wheat Board violated the requirements of that Act by improperly using monies from pooled accounts that were earned from the sale of the applicants' goods.[20] In making an order for production under Rule 317, the Court restricted the material to financial statements and expense summaries for a year during which the applicants were directly affected by the impugned activities, and found that evidence from years in which the applicants were not directly affected would not form part of the record under Rule 317.[21]

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[17] *APR v CTA*, *supra* note 10 at para 21, Motion Record of the Moving Party dated January 3, 2021 at Volume 3, Tab 9 at 440.

[18] *Canadian National Railway Company v Scott,* 2018 FCA 148 at para 18.

[19] RSC 1985, c C-24.

[20] *Renova Holdings Ltd. v Canadian Wheat Board,* 2006 FC 1505, Motion Record of the Moving Party dated January 3, 2021 at Volume 3, Tab 29 at 759-765.

[21] *Ibid* at para 15.

28. *Airth v Canada*[22] concerned a challenge to the authority of the Minister of National Revenue to issue letters of requirement for information for income tax audit purposes. The 42 applicants, each connected to the Hell's Angels Motorcycle Club, were recipients of those letters. They challenged the Minister's authority to issue the letters and claimed that their underlying purpose was to establish penal liability. The proceeding involved matters between the Canada Revenue Agency and law enforcement. At issue were alleged breaches of the applicants' Charter rights flowing from the impugned course of conduct.[23]

29. As the practice or course of conduct in these cases had a direct, binding and immediate impact on the legal rights of the applicants, each was understandably considered to be assimilated to an order for the purpose of Rule 317.

30. The situation in these cases differs significantly from the present case. In rejecting the Applicant's request for interlocutory relief in this proceeding, Justice Mactavish found that the website statement is not binding on the Agency as a matter of law, and noted that the statement itself says so expressly:

> As a general principle, CTA policy documents are not binding on it as a matter of law: *Canadian Pacific Railway Company v. Cambridge (City)*, 2019 FCA 254, 311 A.C.W.S. (3d) 416 at para. 5. Moreover, in this case the Statement on Vouchers specifically states that "any specific situation brought before the Agency will be examined on its merits". It thus remains open to affected passengers to file complaints with the CTA (which will be dealt with once the current suspension of dispute resolution services has ended) if they are not satisfied with a travel voucher, and to pursue their remedies in this Court if they are not satisfied with the Agency's decisions.[24]

31. Justice Mactavish correctly stated in her reasons that in the exercise of its mandate, the Agency performs a range of adjudicative and regulatory functions and, in addition, "provides the transportation industry and the travelling public with non-binding guidance with respect to the rights and obligations of transportation service providers and

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[22] *Airth v Canada (National Revenue),* 2006 FC 1442 [*Airth*]. See also *Airth v Canada (National Revenue)*, 2007 FC 415, Motion Record of the Moving Party dated January 3, 2021 at Volume 3, Tab 11 at 453-455.

[23] *Airth*, *supra* note 22 at para 8.

[24] *APR v CTA*, *supra* note 10 at para 26, Motion Record of the Moving Party dated January 3, 2021 at Volume 3, Tab 9 at 441.

consumers."[25] The publications fall into this latter category.

32. By citing *Canadian Pacific Railway Company v Cambridge (City)*,[26] Justice Mactavish likened the publications in this proceeding to the Agency's *Apportionment of Costs of Grade Separations: A Resource Tool*, which is just one of many Agency policy documents. That particular policy document identified the party that would "normally" pay the costs of a grade-separated road crossing. The Court expressed the absence of any binding legal effect of that policy document as follows:

> As a matter of law, the policy document does not have the force of law nor does it bind. Even if the Agency did not follow it, it would not give rise to a legal error. On the very terms of the policy document, this factor is not mandatory; on the facts of a case, it may be departed from [...][27]

33. But there is more. Rule 317 applies only where there is an order that is "under review". In this proceeding, this Court has already ruled that "the administrative action being challenged in [the Applicant's] application for judicial review is not amenable to judicial review"[28] and that the publications do not affect legal rights, impose legal obligations or cause prejudicial effects on either APR or airline passengers.[29] The Applicant sought leave to appeal that Decision to the Supreme Court of Canada, in part to challenge this very finding on the applicable test for judicial review, and its application was dismissed.[30]

34. In addition, in determining whether the Application should be struck, this Court again reviewed the case law and arguments advanced by the Applicant on the availability of judicial review. Although the Court dismissed the motion to strike, it found that there was no support for the Applicant's proposition that judicial review is available even though no legal rights are affected, no legal obligations are imposed and there are no prejudicial

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[25] *APR v CTA*, *supra* note 10 at para 34, Motion Record of the Moving Party dated January 3, 2021 at Volume 3, Tab 9 at 442.

[26] 2019 FCA 254.

[27] *Ibid* at para 5.

[28] *APR v CTA*, *supra* note 10 at para 20, Motion Record of the Moving Party dated January 3, 2021 at Volume 3, Tab 9 at 440.

[29] *APR v CTA*, *supra* note 10 at para 27, Motion Record of the Moving Party dated January 3, 2021 at Volume 3, Tab 9 at 441.

[30] *Air Passenger Rights v Canadian Transportation Agency*, 2020 CanLII 102983 (SCC).

effects.[31] The decisions in this proceeding have been consistent and unequivocal. The Agency submits that there is a fundamental defect with the Application, and a very real question as to how the publications in this proceeding are in fact "under review". As a consequence, the Agency respectfully submits that the Applicant should not be rewarded with broad document production flowing from its fundamentally flawed Application.

35. In this motion, the Applicant attempts to re-frame the website statement as a policy or practice that comes within the meaning of an "order" under Rule 317. It provides no persuasive reason for doing so. The Agency respectfully submits that accepting this reformulation would lead to an absurd result. It would require this Court to conclude that, notwithstanding the concurrence of the parties that the statement is not an order, and the findings of this Court that it is not amenable to judicial review because it does not affect the Applicant's or air passengers' legal rights, impose legal obligations, or cause prejudicial effects, it should nevertheless be treated as an "order" for the purposes of Rule 317.

36. In the Agency's respectful submission, such a finding would permit the Applicant to re-frame its case to argue that the publications are orders or can be assimilated to orders, which is at odds with the concession it has already made to the contrary. The Agency respectfully submits that the Applicant should not be permitted to take one position in its Application and another for the purposes of obtaining the production of documents.

37. For these reasons alone, the Agency respectfully submits that the motion should be dismissed.

B. If Rule 317 Applies, The Criteria for the Production of The Material Requested Are Not Met

38. The Agency makes the following alternative submissions in the event that this Court holds that Rule 317 applies to this proceeding. While the Applicant claims that the Agency should be limited in its submissions to the ground raised in its Objection Letter, the Agency notes that the Applicant has reformulated its request for documents in the context of this motion, and has provided additional justifications and grounds not set out in its Application. The

[31] *Air Passenger Rights v Canada (Transportation Agency),* 2020 FCA 155 at para 27, Motion Record of the Moving Party dated January 3, 2021 at Volume 3, Tab 10 at 451.

Agency submits that it should be permitted to respond accordingly. Furthermore, the procedure related to motions as set out in the *Rules* permits Respondents a right to respond to the moving party's motion, and also provides the moving party with a right of reply.[32]

39. The Agency submits that the Applicant's motion should be dismissed because the request for material lacks specificity; the material is neither relevant nor necessary for the disposition of the Application; and the request constitutes a fishing expedition.

C. The Request for Material Lacks Specificity

40. The Request is overly broad insofar as the Applicant seeks complete and unredacted copies of all Agency records in respect of the publications within a specified date range. The Applicant has framed its request in the broadest possible terms to ensure that no material is excluded on the basis of its format or type. This is reflected in the inclusion of a non-exhaustive list extending to emails, meeting agendas, meeting minutes, notes, draft documents and memos. But this open-ended list does not make the request any more specific.

41. Rule 317 requests that are framed in general terms such as these, and specifically with language that extends to "all" documents in the tribunal's possession, have been found to be overbroad.[33] Courts may deny them on this basis alone.[34]

42. Such overbroad requests make it impossible to provide a targeted response. For instance, providing the materials requested would surely give rise to issues of privilege, but it is unreasonable to expect that the Agency would make these arguments given the overly generalized nature of the request. What is more, the Applicant has provided no justification for taking the exceptional measure of transmitting "complete and unredacted" copies of the Material, thus overriding the privilege that may apply. Should the Applicant refine its request, or should this Court determine that Material is to be produced pursuant to Rule 317, the Agency requests an opportunity to make any claims with respect to privilege that may

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[32] *Rules*, *supra* note 2, ss 369(2) and 369(3).

[33] *Access to Information Agency Inc. v Canada (Attorney General)*, 2007 FCA 224 at paras 1 and 20; *Maax Bath Inc. v Almag Aluminum et al.*, 2009 FCA 204 at paras 11 and 15 [*Maax Bath*].

[34] *Maax Bath*, *supra* note 33 at para 11.

apply.

43. The Agency respectfully submits that if this Court determines that Rule 317 applies to the publications, the motion should be dismissed for lack of specificity alone.

D. The Materials are Irrelevant and Unnecessary

44. Rule 317 refers to material in the possession of the tribunal that is "relevant to an application." Relevant documents are "those documents that may have affected the decision of the Tribunal or that may affect the decision that this Court will make on the application for judicial review."[35] This Court has rejected motions seeking the production of documents where the applicant has failed to convince the Court that the material is relevant and necessary to the proposed grounds of review.[36] For the reasons detailed below, the Agency submits that the Applicant has failed to establish the relevance and necessity of the Material requested in this proceeding.

There is no record before the decision-maker in this case

45. This Court has held that "[i]t is trite law that in general only materials that were available to the decision-maker at the time of rendering a decision are considered relevant for the purposes of Rule 317".[37] In this case, if the Court finds that the publications are "orders", or are assimilated to orders for the purposes of Rules 317 and 318, it remains that they are not, in fact, Agency decisions or regulatory determinations that engaged the Agency's statutory decision-making functions. They are instead non-binding and general publications.

46. Accordingly, it is not possible to speak of a "record before the decision-maker" as records are normally constituted when the Agency hears a complaint or an application for a regulatory determination.

47. The Agency's power to issue non-binding statements is not in issue. It is well-established that administrative tribunals can issue non-binding instruments like statements, policies or

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[35] *Maax Bath*, *supra* note 33 at paras 9-10.

[36] *Maax Bath*, *supra* note 33.

[37] *Gagliano v Canada (Commission of Inquiry into the Sponsorship Program and Advertising Activities)*, 2006 FC 720 at para 50 [*Gagliano*].

guidelines without the need for any statutory authority to do so. It has been found that "[p]olicy statements, rulings, speeches, communiqués, and Staff notes are all valuable parts of a mature and sophisticated regulatory system."[38]

48. The publications issued in this instance were not made pursuant to any particular statutory provision, manifestly did not generate a proceeding or record, and were not made through the exercise of the Agency's decision-making functions. Moreover, the publications did not determine anyone's rights or entitlements and were framed in general terms. The website statement suggested what an appropriate approach *could* be in the current context, while explicitly stating, as is the Agency's duty, that any specific situation brought before the CTA would be examined on its merits.

49. The Agency respectfully submits that if this Court finds that Rules 317 and 318 apply to the publications, the fact that there was no record of material before any decision-makers in this case should not allow the *Rules* to be applied to any and all documents created by the Agency or its staff in relation to the publications, including emails, meeting agendas, meeting minutes, notes, draft documents and memos. The fact that the Agency cannot produce the record of the proceeding, because none is created when the Agency publishes informational material, is no reason to allow the Applicant to obtain an exceptionally broad range of documents. The Agency submits that any order for production that this Court may contemplate in relation to non-binding publications should be as restrictive in scope as that which would be applicable to an actual decision or order.

50. The Agency acknowledges that where an allegation of reasonable apprehension of bias is advanced, documents in addition to those that were before the tribunal may be producible under Rule 317. That said, additional disclosure does not refer to disclosure of all documents where there is an absence of a tribunal record. The Court must still evaluate the relevance of the materials requested. An applicant is not permitted to make bald or merely speculative assertions in its application, in the hopes of finding relevant supporting documents later[39]:

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[38] *E.A. Manning Ltd. v Ontario (Securities Commission),* 1995 CanLII 1706 (ON CA).

[39] *Gagliano*, *supra* note 37 at para 65; *Humane Society of Canada Foundation v Canada (National Revenue)*, 2018 FCA 66 at para 10 [*Humane Society*].

> [8] Therefore, while additional disclosure is warranted when there are allegations of a reasonable apprehension of bias or a breach of procedural fairness, this does not allow a person to engage in a fishing expedition in the hopes of discovering some documents to establish the claim.[40]

51. Accordingly, while production of a record is not possible in this case because of the nature of the publications themselves, the Agency will nevertheless comment on the relevance and necessity of the Material requested in relation to the grounds of review.

The grounds of review contained in the Application do not justify the production of the requested Material

52. Relevance and necessity are evaluated in relation to the grounds raised in the Application as the Court's decision will be based on these grounds:

> A document is relevant to an application for judicial review if it may affect the decision that the Court will make on the application. As the decision of the Court will deal only with the grounds of review invoked by the respondent, the relevance of the documents requested must necessarily be determined in relation to the grounds of review set forth in the originating notice of motion and the affidavit filed by the respondent.[41]

53. The Agency notes that the grounds for review as summarized by the Applicant in this motion are different than what was originally advanced in its Application. In reading its motion, it seems the Applicant has now changed its original grounds from focusing on the Agency as a whole and/or Members who "supported" the Statement, to an exclusive focus on identifying Agency Members who "approved, supported and/or endorsed the Publications and the nature and extent of their involvement in the Publications". The Applicant now also seeks information on the Agency's objective in issuing the publications, including "the nature and extent of the external influences on the Agency from the airline industry and/or Transport Canada".[42] This latter line of inquiry was not present in its Application but arose following the receipt of documents pursuant to an Access to Information request.[43] Given

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[40] *Humane Society*, *supra* note 39 at para 8.

[41] *Canada (Human Rights Commission) v Pathak,* 1995 CanLII 3591 (FCA), [1995] 2 FC 455 at para 10.

[42] Written Representations of the Moving Party dated January 3, 2021 at para 59, Motion Record of the Moving Party dated January 3, 2021 at Volume 1, Tab 5 at 406 [*Applicant's Submissions*].

[43] Documents Disclosed Under the *Access to Information Act*, Exhibit AJ of the affidavit of Gábor Lukács affirmed on January 3, 2021, Motion Record of the Moving Party dated January 3, 2021 at Volume 1, Tab 2AJ at 235-372 [*ATIP disclosure*].

the evolution of the grounds raised, the Applicant asks that the Court read its Application "generously and holistically".

54. The Agency respectfully submits that the Applicant is crossing the line from a request under Rule 317 to document discovery. The Applicant's request seems to be aimed at finding material to support its changing theories of what lies behind the Agency's publications. The Courts have been very clear, however, that Rule 317 does not serve the same purpose as document discovery:

> [S]ection 317 does not serve the same purpose as documentary discovery in an action" (*Access to Information Agency Inc. v. Canada (Attorney General)*, 2007 FCA 224 (CanLII) at paragraph 17; *Atlantic Prudence Fund Corp.*, *supra* at paragraph 11). It should not be open to the applicant to engage in a fishing expedition.[44]

55. Despite this evolution in the focus and scope of its grounds, the Agency respectfully submits that the Applicant has not demonstrated that gaining access to "complete and unredacted copies of all records from March 9 – April 8, 2020 in respect of the Publications" is relevant and necessary in this proceeding.

56. The Application seeks a declaration that the issuance, referencing and distribution of the publications are contrary to the Agency's *Code of Conduct* and/or give rise to a reasonable apprehension of bias for the Agency or any members who supported the Statement. The Application further seeks a declaration that the Agency or any members who supported the Statement exceeded or lost jurisdiction to adjudicate passenger complaints about refunds from carriers related to the COVID-19 pandemic.[45] The Agency submits that the only facts necessary to decide these questions are contained in the publications themselves.

57. The Applicant also seeks to show that the publications misstate the law and past Agency decisions with respect to the availability of refunds. On this point, the Agency submits that no document production is required as this is a question of law. Accordingly, the Material requested is not relevant and necessary in order for the Court to decide this question.

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[44] *Maax Bath*, *supra* note 33 at para 15.

[45] *Application*, *supra* note 16 at paras 1(b) and (c), Motion Record of the Moving Party dated January 3, 2021 at Volume 1, Tab 3 at 378.

The publications speak for themselves

58. The Agency submits that in order to make a decision on this judicial review application, the necessary facts are contained in the publications themselves. To evaluate whether a reasonable apprehension of bias arises, the Court will have to determine "what … an informed person, viewing the matter realistically and practically—and having thought the matter through—[would] conclude."[46] The matter that must be viewed realistically and practically here is a statement that is general in nature and does not address any specific case; it is not attributed; it declares itself to be non-binding insofar as it states that any case brought before the Agency will be decided on its merits; and it has been found to be non-binding in law.

59. What the Applicant would have this Court conclude under this test is that the Agency or its Members cannot impartially decide future potential complaints in which a refund is sought because the Agency issued the publications. In order for the Court to make its finding, the facts required are within the publications.

60. As acknowledged in the Application, the website statement and information page do not contain the signature or names of any Agency Members. The reason for this, of course, is that non-binding statements are not Agency decisions and are therefore not attributed or attributable to any individuals, including Members. Nevertheless, to the extent that the Applicant alleges that a reasonable apprehension of bias has arisen from the issuance, referencing and distribution of these publications, the Applicant must rely on the website statement itself, which refers to "the CTA".

61. The Agency notes that the Applicant's focus in this proceeding has settled on identifying which and to what extent Members were involved in the publications. The Applicant states that "[s]uch identification is required because, according to Mactavish, J.A., reasonable apprehension of bias should normally be directed at the appointed members of the Agency."[47]

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[46] *Committee for Justice and Liberty v National Energy Board*, 1976 CanLII 2 (SCC), [1978] 1 SCR 369 at 394-395.

[47] *Applicant's Submissions*, *supra* note 42 at para 63 citing *APR v CTA*, *supra* note 10 at para 33, Motion Record of the Moving Party dated January 3, 2021 at Volume 1, Tab 5 at 407.

62. The Applicant seems to interpret this to mean it is required to obtain the names of any Agency Members that were involved in the publications and it seeks to do so through Rule 317. The Agency disagrees with this interpretation, and instead suggests that the Applicant is facing a challenge arising from its own choice in how to frame, and when to file, its Application: it is seeking a pre-emptive declaration of reasonable apprehension of bias on the part of Agency Members with respect to unattributed, non-binding general, as opposed to case specific publications, which it claims precludes them from hearing potential future complaints in which refunds may be sought.

63. Information about whether any specific Agency Member was involved with the publications is not relevant and necessary in order to evaluate the Applicant's grounds for review. In considering this Application, the Court will consider the publications in light of certain legal principles in determining whether a reasonable apprehension of bias exists or whether Members have lost jurisdiction to hear future potential complaints. For instance, the Court will be guided by the principle that tribunals are permitted to issue instruments like statements or guidelines without requiring statutory authority to do so, but that these general instruments are not binding and cannot fetter a tribunal's discretion when exercising decision-making functions.[48] Moreover, the Court will be guided by the jurisprudence that clearly holds that administrative decision-makers are not precluded from hearing future cases involving the same parties or similar facts as this does not, in itself, give rise to a reasonable apprehension of bias.[49]

64. The Applicant has chosen to cast its grounds for judicial review in a manner that lacks a solid basis in law or fact. The Agency respectfully submits that the Applicant should not be rewarded with the broad production of Agency documents to accommodate its questionable grounds for review.

65. The Agency also notes that the Application originally justified the need to identify individual Agency Members on the grounds that the *Code of Conduct* requires Agency staff

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[48] *Stemijon Investments Limited v Canada (Attorney General)*, 2011 FCA 299 at paras 24 and 60. See also *Maple Lodge Farms v Government of Canada*, 1982 CanLII 24 (SCC), [1982] 2 SCR 2 at 5-6.

[49] *Khodeir v Canada (Governor-in-Council),* 2010 FCA 308 at para 2; *Toligara Nazaire v Canada (Citizenship and Immigration),* 2006 FC 416 at para 15.

to fully implement Members' directions. However, the provision on which the Applicant relies for this assertion is not applicable in this case, as it applies only to Members' decision-making functions. The *Code of Conduct* states as follows:

> (8) All Members are supported in the discharge of their decision-making duties by the Agency's public servants, who are responsible for giving Members frank, impartial, evidence-based advice; fully implementing Members' direction; and other tasks assigned to them by the Chair, their managers, or legislation.[50]

66. The *Code of Conduct* indicates that, "[i]n this Code, 'decisions' shall be understood to refer to both adjudicative decisions, which deal with disputes between parties, and regulatory determinations, which typically involve a single party."[51] As amply established in this proceeding, the publications are not Agency decisions; they are non-binding statements that are general in nature and the fact that they have been issued does not preclude Members from being able to hear a case.

67. The Agency respectfully submits that the facts necessary for the Court to make its decision are contained within the publications. The Applicant has not demonstrated that access to all Agency records in relation to the publications is relevant and necessary to prove a reasonable apprehension of bias on the part of the Agency or its Members.

<u>The Agency's objective in issuing the Publications speaks for itself</u>

68. The Applicant also alleges that the Agency was subject to external influence from airlines and/or Transport Canada in relation to the publications. The Agency notes that it is not clear in what way external influences from a separate government body, if any, would be relevant to the Applicant's allegation of bias. In any event, the Applicant has identified no reason to allege that the Agency or its Members were subject to such influence. In addition, the evidence tendered by the Applicant in this motion does not suggest external influence from airlines giving rise to a reasonable apprehension of bias on the part of the Agency or its Members. In both these cases, what the Applicant has put forward are communications

[50] *Code of Conduct, supra* note 1.

[51] *Code of Conduct, supra* note 1.

between Agency staff and external parties.

69. Finally, the relevant ground, as set out in its Application, is that the publications may "give an informed member of the public the perception that it would be more likely than not that the Agency, or the members that supported the Statement, will not be able to fairly decide the issue of refunds relating to COVID-19."[52] In fact, what the Court will be required to determine is whether Members will be biased in deciding potential future complaints in which a passenger is seeking a refund.

70. The evidence and legal principles necessary for the Court to make this determination are available without recourse to document production. The Application alleges that the Agency is likely to dismiss passenger complaints concerning refunds based on the words contained in the publications. The Application also alleges that the publications purport to relieve air carriers from their refund obligations and that they run contrary to the Agency's past decisions confirming passengers' fundamental right to a refund when an air carrier is unable to provide flight services for any reason. The Applicant relies on his interpretation of the text of the publications and cites the Agency's past decisions in support of these claims.

71. The Agency respectfully submits that in order to determine the Agency's objective in issuing the publications and its significance, this Court must have reference to the text of the publications and consider the legal principles that apply not only to non-binding statements, but also to administrative tribunal decisions. More specifically, neither Agency statements nor Agency decisions are binding. At most, this Court has held that where the Agency intends to depart from past cases, it must provide a reasonable basis for doing so.[53]

72. With this in mind, information about exchanges that may have occurred with anyone external to the Agency are not relevant and necessary for the Court's determination of whether the publications give rise to a reasonable apprehension of bias. Moreover, the Agency submits that this narrow line of inquiry does not justify the production of all Agency

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[52] *Application*, *supra* note 16 at para 26, Motion Record of the Moving Party dated January 3, 2021 at Volume 1, Tab 3 at 387.

[53] *Canadian Pacific Railway Company v Canada (Transport, Infrastructure and Communities)*, 2015 FCA 1 at para 59.

records in relation to the publications, as requested.

73. For the above reasons, the Agency respectfully submits that the Applicant has failed to show that the Material requested is relevant and necessary in order for this Court to make a decision in respect of its Application.

The Applicant Is Engaged in an Impermissible Fishing Expedition

74. The rule against fishing expeditions in the context of Rule 317 is clear: "[a] bald assertion of bias is not sufficient and cannot support an order for production of documents to allow the moving party to go on a fishing expedition to see if something can be found to support the allegation of bias."[54]

75. The Applicant has requested access to complete and unredacted Agency documents for two purposes that are both unfounded and go beyond the scope of what was alleged in the Application: to identify whether and to what extent individual Members were involved with the publications; and to determine whether there were external influences from airlines and/or Transport Canada. The Applicant is suggesting that since the filing of its Application, it has acquired evidence of Member involvement and improper influence from airlines and Transport Canada in relation to the publications through documents received pursuant to an access to information request.[55] The Agency submits that this material does not support or advance the Applicant's grounds and that it is not appropriate to use Rule 317 to seek unredacted versions of any documents received through its access to information request.

76. With respect to the email from a Transport Canada Policy Advisor claiming that the website statement was approved by Agency Members,[56] the Agency simply notes that Transport Canada employees do not work or speak for the Agency and would not be in a position to provide information on the Agency's internal processes.

77. With respect to the Chairperson's response that the website statement was "reviewed by

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[54] *Right to Life Association of Toronto, Right to Life Association of Toronto and Area v Canada (Employment, Workforce and Labour)*, 2019 CanLII 9189 (FC) at para 23.

[55] *ATIP disclosure*, *supra* note 43.

[56] MP Erskine-Smith's exchange with Transport Canada at 116, Exhibit Q of the affidavit of Gábor Lukács affirmed on January 3, 2021, Motion Record of the Moving Party dated January 3, 2021 at Volume 1, Tab 2Q at 116.

senior members of the organization," and that "as head of the organization, I am always involved, of course,"[57] the Applicant assumes this justifies its request to obtain documents to establish endorsement, support or approval by appointed Agency Members. However, the Agency notes that the Chairperson also explained in his public testimony that "every statement like this is an expression of the organization's guidance." These responses indicate that the website statement is, as it states, institutionally attributed.

78. Finally, the Applicant advances no reason to allege that evidence of e-mail exchanges between staff members and external parties provides a credible basis on which to claim a reasonable apprehension of bias on the part of Agency Members.

79. The Agency respectfully submits that the exhibits tendered in this Motion Record do not provide grounds for requiring the production of the Materials as requested by the Applicant. The allegations remain speculative and overbroad and constitute a fishing expedition.

E. The Applicant's Request to Subpoena the Chief Executive Officer of the Agency for the Production of Documents

80. Section 41 of the *Federal Courts Rules* is a procedural mechanism to introduce evidence on an exceptional basis.

81. To the extent that the evidence sought must be necessary and must not arise from a fishing expedition but must be based on credible grounds, then the Agency advances the same arguments in relation to these factors as are set out at paragraphs 44-79 above.

82. The Agency submits that there are no exceptional reasons to permit the Applicant to subpoena the Chairperson and Chief Executive Officer of the Agency in this case. The Applicant relies on a descriptive overview of mechanisms that may be available to obtain evidence from witnesses in circumstances described as rare and extraordinary[58] to argue that the Chairperson of the Agency should provide the documents requested. The Applicant

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[57] Standing Committee on Transport, Infrastructure and Communities: Evidence (excerpt), Exhibit R of the affidavit of Gábor Lukács affirmed on January 3, 2021, Motion Record of the Moving Party dated January 3, 2021 at Volume 1, Tab 2R at 130.

[58] *See Applicant's Submissions*, *supra* note 42 at para 94 citing *Tsleil-Waututh Nation v Canada (A.G.),* 2017 FCA 128 at para 103, Motion Record of the Moving Party dated January 3, 2021 at Volume 2, Tab 5 at 415.

proposes an inappropriate and disproportionate use of this rule. The Applicant also aims this rule at an inappropriate person. In the event that this Court should determine that a subpoena is warranted, then the Agency requests that it be directed at a senior member of the Agency's staff that generally has knowledge of matters internal to the Agency, for instance the Agency's Secretary.

PART IV – ORDER SOUGHT

83. The Agency seeks an Order dismissing the Applicant's motion.

84. Generally, an administrative body like the Agency will neither be entitled to nor be ordered to pay costs, at least when there has been no misconduct on its part. Where the body has acted in good faith and conscientiously throughout, the reviewing tribunal will not ordinarily impose costs.[59]

85. It is submitted that the Agency has acted in good faith. The Agency does not seek costs and asks that costs not be awarded against it.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated at Gatineau, in the Province of Quebec, this 18th day of January, 2021.

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[59] *Lang v British Columbia (Superintendent of Motor Vehicles)*, 2005 BCCA 244 at para 47 citing Brown and Evans, *Judicial Review of Administrative Action in Canada* (Toronto: Canvasback, 1998).

PART V - LIST OF AUTHORITIES

A. Appendix A – Statues and Regulations

Canada Transportation Act, SC 1996, c 10, s 41

Federal Courts Rules, SOR/98-106, r 41, 317, 318, 365, 369

B. Appendix B – Case Law

Access to Information Agency Inc. v Canada (Attorney General), 2007 FCA 224

Air Passenger Rights v Canadian Transportation Agency, 2020 CanLII 102983 (SCC)

Airth v Canada (National Revenue), 2006 FC 1442

Canada (Human Rights Commission) v Pathak, 1995 CanLII 3591 (FCA), [1995] 2 FC 455

Canadian National Railway Company v Emerson Milling Inc. et al., 2017 FCA 79

Canadian National Railway Company v Scott, 2018 FCA 148

Canadian Pacific Railway Company v Cambridge (City), 2019 FCA 254

Canadian Pacific Railway Company v Canada (Transport, Infrastructure and Communities), 2015 FCA 1

Committee for Justice and Liberty v National Energy Board, 1976 CanLII 2 (SCC), [1978] 1 SCR 369

Council of Canadians with Disabilities v VIA Rail Canada Inc., 2007 SCC 15

E.A. Manning Ltd. v Ontario (Securities Commission), 1995 CanLII 1706 (ON CA)

Gagliano v Canada (Commission of Inquiry into the Sponsorship Program and Advertising Activities), 2006 FC 720

Humane Society of Canada Foundation v Canada (National Revenue), 2018 FCA 66

Khodeir v Canada (Governor-in-Council), 2010 FCA 308

Lang v British Columbia (Superintendent of Motor Vehicles), 2005 BCCA 244

Maax Bath Inc. v Almag Aluminum et al., 2009 FCA 204

Maple Lodge Farms v Government of Canada, 1982 CanLII 24 (SCC), [1982] 2 SCR 2

Preventous Collaborative Health v Canada (Health), 2020 CanLII 103848

Patterson v Gascon, 2004 FC 972

Right to Life Association of Toronto, Right to Life Association of Toronto and Area v Canada (Employment, Workforce and Labour), 2019 CanLII 9189 (FC)

Stemijon Investments Limited v Canada (Attorney General), 2011 FCA 299

Toligara Nazaire v Canada (Citizenship and Immigration), 2006 FC 416