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July 29, 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)

Please bring this letter to Gleason J.A.'s attention. Her Ladyship is seized of all pre-hearing issues for this Application. The Applicant is responding to the urgent letter of July 28, 2022 from the CTA about disclosure of Twitter messages and @Info emails [**Twitter and Email Materials**].

Despite three rulings that the Twitter and Email Materials must be disclosed,[1] for the first time the CTA raises a last-minute issue on redactions to the materials and confidentiality. It is noteworthy that the CTA's letter was the first time that the Applicant was informed of the concerns. Although the Applicant had initiated correspondences with the CTA this week on other topics for this case, the CTA chose to send an urgent letter to the Court. The CTA's approach disregards the Court's guidance for the parties, and the CTA, to approach the case with a "modicum of courtesy and common sense." The Applicant would have consented to reasonable extensions, for good reason.

The CTA's request should be denied for three reasons. Firstly, this is another disguised attempt to collaterally attack the three disclosure orders under a different label. Secondly, the CTA's letter is based on the flawed premise that the CTA is permitted to unilaterally redact the Twitter and Email Materials. Thirdly, the CTA overlooked a simple and practical solution outlined below.

The CTA's Approach is a Collateral Attack on the Disclosure Orders

The CTA's July 28, 2022 letter is a continuation of the same tactic of obfuscation and delay. The CTA's objection throughout was that the Twitter and Email Materials were outside the scope of the Court's October 15, 2021 Order. Despite the specific April 11, 2022 Order, the CTA continued to advance this flawed argument and provided the Court with only **ten pages** of materials.[2] After the July 19, 2022 Order, the CTA now admits that there are **1,100 pages** of responsive materials.

In the letter, the CTA now "self-declares" that it is permitted to apply unilateral redactions and decide what to withhold from the Court and the parties. The CTA then seeks a broad Rule 151 confidentiality order, without any evidence, and invites the Court to draw conclusions in a vacuum.

[1] October 15, 2021 Order, para. 3(b); April 11, 2022 Order, para. 4; and July 19, 2022 Order, para. 5.
[2] Affidavit of Dr. Gabor Lukacs affirmed on May 15, 2022 (filed with the Rule 97 motion) at para. 19(d).

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The CTA is Not Permitted to Redact the Twitter and Email Materials

In the CTA's letter, it incorrectly presupposes that it is permitted to unilaterally redact the Twitter and Email Materials (i.e., "Agency is redacting the confidential information contained therein in accordance with the requirements of the *Privacy Act* and the *Access to Information Act*.").

Respectfully, the CTA overlooked the Federal Court rejection of the very same *Privacy Act* basis for redactions to a Certified Tribunal Record.[3] In particular, the Federal Court stated that section 8(2) of the *Privacy Act* expressly permits personal information to be disclosed in order to comply with a court order.[4] This case is the complete answer here to any *Privacy Act* concerns. With respect to the *Access to Information Act*, it only applies to information requests made under that statute. It has no application to a court disclosure order, which is an entirely separate process.[5]

Furthermore, in the letter the CTA seeks a "blank cheque" to redact information that it deems to be harmful to the commercial interests of air carriers. Such redactions potentially defeat the judicial review since part of the Applicant's bias argument is that the CTA was influenced by third-parties (i.e., air carriers such as Air Canada and Air Transat) at the expense of the passengers.

In the context of bringing a motion to assert privilege, this Court noted the concerns if the CTA were to act unilaterally including: the CTA's objectivity and that the CTA is not the proper party to address issues of relevance of the materials.[6] The Court's concerns apply with even greater force to whether the CTA should be permitted to apply redactions, or to bring a Rule 151 confidentiality motion. The Federal Court recognized the potential unfairness, and that it impedes the court's ability to discharge its judicial review functions, if the tribunal can decide its own redactions.[7]

Applicant's Proposed Practical Solution

The CTA's proposed steps are impractical and causes further delays. It ignores the usual practice that parties should informally attempt to address concerns over potentially confidential information. For example, the undersigned is involved in a case with the AGC (different DOJ counsel) where similar confidentiality and redaction issues arose. The parties in that case reached a practical solution without court intervention, with appropriate redactions applied to sensitive personal information.[8] The Applicant submits the following practical solution to the CTA concerns.

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[3] *Jemmo v. Canada (Citizenship and Immigration)*, 2021 FC 965 [***Jemmo FC***]
[4] *Jemmo FC* at paras. 13-16.
[5] *Access to Information Act*, s. 2(3).
[6] *Air Passenger Rights. V. Attorney General of Canada*, 2022 FCA 132 at para. 38.
[7] *Al Mousawmaii v. Canada (MCI)*, 2018 FC 1256 at para. 37; *Jemmo FC* at paras. 4-6.
[8] See *Brink v. Her Majesty the Queen*, T-465-21 (Order of Zinn, J. in Doc. 26 from October 19, 2021, and also the AGC's Letter on October 18, 2021).

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The CTA's letter confirms that the Twitter and Email Materials are ready-to-go, except for the CTA's proposed redactions. Hence, per the July 19, 2022 order, the Applicant submits that the CTA be directed to disclose the materials in unredacted form to the parties (or counsel only) and the Court, without public access, pending the filing of a Rule 151 motion. The Applicant submits that the CTA be granted the time extension, in order to prepare a draft redacted version for the proposed Rule 151 motion. However, the Applicant submits that the motion should be brought by the AGC, not the CTA, considering the CTA's limited role in this case and concerns of objectivity.

In that regard, the Applicant acknowledges that highly sensitive personal information (i.e., passport numbers, credit card information, dates of birth, and home addresses) should be redacted from the publicly available file, which was a similar approach applied in the above case.[9]

Of note, even should a Rule 151 confidentiality order be ultimately granted, counsel for the parties would normally be allowed access to the confidential materials in any event, per Rule 152(2)(a). The CTA could not provide any reason why the Twitter and Email Materials cannot be provided by July 29, 2022 to the parties, or alternatively on a "counsel's eyes only basis".[10]

Providing the materials on a "counsel's eyes only basis" appears to be common practice, when litigants could not fully agree on the scope of redactions to the publicly available court file. Allowing the parties (or only counsel) to review the materials unredacted will enable the parties to prepare for the merits hearing and for counsel to advise their clients on whether to oppose any redactions.

A Rule 151 order is an extraordinary measure and the threshold is high.[11] Except for the highly sensitive personal information above, the CTA's bald assertions for seeking a confidentiality order could not meet the test. Allowing counsel unimpeded access to the Twitter and Email Materials would enable counsel to assist the Court in assessing the redactions, in the event of any dispute.

The Applicant submits that the above practical solution fully addresses the concerns raised by the CTA. 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 AGC, and (2) Mr. Kevin Shaar, counsel for the CTA

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[9] *Ibid*.
[10] *Lukács v. Canada (Transportation Agency)*, 2016 FCA 103 at paras. 16 and 25.
[11] *Pharmascience Inc. v. Meda AB*, 2021 FC 1216 at paras. 24-28 (per Zinn, J.)