Federal Court of Appeal | Cour d'appel fédérale

Date: 20230104

Docket: A-102-20

Citation: 2023 FCA 2

Present: **GLEASON J.A.**

BETWEEN:

AIR PASSENGER RIGHTS

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

and

THE CANADIAN TRANSPORTATION AGENCY

Intervener

Dealt with in writing without appearance of parties.

Order delivered at Ottawa, Ontario, on January 4, 2023

REASONS FOR ORDER BY: GLEASON J.A.

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REASONS FOR ORDER

GLEASON J.A.

[1] I have before me three motions related to disclosure in this application.

[2] The first motion is brought by the applicant and seeks an order requiring:

- the Canadian Transportation Agency (the CTA) to conduct further searches for documents responsive to earlier disclosure Orders issued in this matter;
- the CTA to produce the documents located via the above searches, the respondent to bring any motions with respect to privilege claims regarding any such documents, and the CTA to report back to the Court and the parties as to its search efforts, the whole in accordance with the time frames and details provided by the applicant in its Notice of Motion;
- the CTA to produce the documents that the applicant has identified as the "Withheld C-5 Urgent Debrief Call Documents" and the "Jones-Cuber Email"; and
- Transport Canada to take all necessary steps to preserve documents relevant to this application.

[3] The second motion is brought by the respondent and seeks a ruling that, in the event the "Withheld C-5 Urgent Debrief Call Documents" and the "Jones-Cuber Email" are found to be relevant, they be determined to be exempt from disclosure by reason of privilege. In accordance with previous Orders in this matter, the respondent has served and filed a public version of this motion as well as a confidential version that includes un-redacted copies of the two documents in question.

[4] The third motion is brought by the applicant and seeks to file an additional affidavit from Dr. Lukács that appends information from Entrust about unlocking encrypted documents. This motion was filed after the CTA filed its materials in response to the applicant's first motion. The

applicant alleges that this additional affidavit is responsive to materials contained in the CTA's responding record.

I. Background

[5] Some background is necessary to put these motions into context.

[6] The underlying application for judicial review in this matter challenges a statement on vouchers published on the CTA's website on March 25, 2020, shortly after the onset of the COVID-19 pandemic. The CTA opined in the statement that airlines could issue vouchers to passengers for cancellations caused by the pandemic as opposed to providing reimbursement for cancelled flights.

[7] The applicant alleges, among other things, that the issuance of the statement on vouchers gives rise to a reasonable apprehension of bias for two reasons: first, because it demonstrates pre-judgment of complaints in which passengers might have sought reimbursement for cancelled flights; and, second, because there was third party influence in the development of the statement.

[8] In its Notice of Application, filed on April 9, 2020, the applicant requested disclosure from the CTA of various categories of documents under rule 317 of the *Federal Courts Rules,* S.O.R./98-106 regarding the statement on vouchers. At that time, the requested documents did not include communications between CTA staff and all third parties. Instead, insofar as concerns communications to or from CTA staff (as opposed to its Chairperson, Vice Chairperson or

Members), the requested disclosure included only communications regarding the statement between CTA staff and passengers or CTA staff and the travel industry.

[9] The applicant thereafter made a motion on January 3, 2021, in which the scope of disclosure requested was in some aspects broadened and in other aspects narrowed. In the motion, the applicant sought disclosure of all records in possession of the CTA with respect to the statement on vouchers from March 9 to April 28, 2020.

[10] Following the disposition of other issues that are not germane to these motions, this Court issued an Order on October 15, 2021, under rule 318 of the *Federal Courts Rules*, requiring the CTA to disclose to the applicant:

(a) all non-privileged documents sent to or by a member of the CTA (including its Chairperson or Vice Chairperson) between March 9 and March 25, 2020 concerning the statement on vouchers posted on the CTA's website on March 25, 2020;

(b) all non-privileged documents sent to a third party by the CTA or received from a third party by the CTA between March 9 and March 25, 2020 concerning the statement on vouchers posted on the CTA's website on March 25, 2020; and

(c) all non-privileged documents related to any meeting attended by a CTA Member (including its Chairperson or Vice-Chairperson) between March 9 and March 25, 2020, where the statement on vouchers was discussed.

[11] Disagreements arose as to the scope of the foregoing Order, and the applicant made a further motion requesting, among other things, a more detailed disclosure order.

[12] On April 11, 2022, this Court granted the motion in part and ordered the CTA to disclose, among other things, non-privileged documents related to calls that the CTA Members, Chairperson or Vice Chairperson participated in during which the statement on vouchers was discussed over the time period covered by the October 15, 2021 disclosure Order. These calls included one that was listed by the applicant in its motion materials as C5. That call was held on March 22, 2020.

[13] The documents that the applicant has termed the "Withheld C-5 Urgent Debrief Call Documents" were issued shortly following the March 20, 2020 call and, unless privileged, would fall within the scope of the April 11, 2022 Order as being "correspondence of the meeting's decisions and deliverables", as detailed in item C5(e) in the Appendix to the April 11, 2022 Order.

[14] The April 11, 2022 Order also required the person at the CTA responsible for ensuring compliance with the October 15, 2021 Order to serve and file an affidavit detailing what the CTA did to ensure that the required disclosure was made because, among other things, the CTA had indicated that it was no longer in possession of certain encrypted emails about the statement on vouchers exchanged between Transport Canada and the CTA over the period covered by the October 15, 2021 Order.

[15] The Reasons for the April 11, 2022 Order stated that such affidavit should address:

(a) how the CTA narrowed down the several thousands of pages of documents to less than two hundred pages it had disclosed;

(b) what steps were taken, if any, to gather and/or preserve documents upon being served with the Notice of Application on April 9, 2020;

(c) who at the CTA conducted the searches for documents;

(d) whether the CTA reviewed its encrypted emails or documents;

(e) what record-keeping systems the CTA has, and whether all of them were searched for responsive documents;

(f) whether the CTA has any backups or archives of their emails and other electronic documents, and whether those backups or archives were searched;

(g) whether the CTA conducted any investigation after learning that some documents no longer exist, and any steps taken to recover those documents; and

(h) whether the CTA's audio or video conferencing system has a recording feature and whether the conferences between March 9 and 25, 2020 were recorded.

[16] There followed further disagreements between the applicant and the CTA regarding the scope of the required disclosure and arrangements for the cross-examination of Ms. Cuber, the affiant of the foregoing affidavit. These led to the issuance of a further Order on July 19, 2022, following the filing of further motions in which, among other things, the applicant sought to enforce a disclosure request contained in a Direction to Attend that the applicant served on Ms. Cuber, requesting she bring numerous additional documents to her cross-examination.

[17] That request was largely refused as I determined that there was no foundation for the requested disclosure of any documents the CTA resisted producing, other than documents showing the electronic search terms used in the document search (items 9 and 13 in the Direction to Attend) and documents that may shed light on when and how original encrypted emails between the CTA and Transport Canada about the statement on vouchers came to be deleted (item 12 in the Direction to Attend). Ms. Jones, who at the relevant time was the CTA's Chief Strategy Officer, was the recipient of one of these deleted encrypted email exchanges, and the other was sent to one of her subordinates.

[18] The cross-examination of Ms. Cuber was conducted on September 16, 2022, and spanned the course of nearly an entire day. During her cross-examination, Ms. Cuber testified that she had an email exchange with Ms. Jones relevant to the Court's disclosure Orders, upon which she relied in her search for documents. This email exchange is what the applicant has termed the "Jones-Cuber Email".

[19] More specifically, Ms. Cuber indicated at Question 48 (page 304 of the applicant's Motion Record filed on November 14, 2022) that Ms. Jones "[…] told [her] during [such] exchange where to find her responsive documents and what she had no knowledge of." She elaborated as follows at Questions 146 and 147 (pages 331 and 332 of the applicant's Motion Record filed on November 14, 2022):

> 146. Q. Between October 15, 2021, and the present, did you attempt to contact Ms. Marcia Jones to request documents or request her assistance in providing or locating documents for the October Order, April Order, or July Order?
>
> A. No because we had already had an exchange in January 2021 and I knew where to find responsive documents that she didn't have knowledge of.
>
> 147. Q. What do you mean documents she didn't have knowledge of?
>
> A. She indicated that she had no knowledge of anything like meeting minutes or memos on the subject of the Statement on Vouchers and that responsive documents had been collected in the context of Access to Information searches.

[20] The evidence from Ms. Cuber establishes that, to conduct her search for documents responsive to the disclosure Order, Ms. Cuber took several steps. She first reviewed the search results from two earlier disclosure requests made under the *Access to Information Act*, R.S.C. 1985, c. A-1 (the ATIP requests).

[21] The first ATIP request was received by the CTA on or about May 5, 2020, and requested documents described as unpublished background meetings, notes and exchanges, over the timeframe of June 1, 2019, to March 25, 2020, that led the CTA to suspend certain provisions in the Passenger Bill of Rights on March 13, 2020 and to issue the statement on vouchers on March 25, 2020.

[22] The second ATIP request was received by the CTA on or about August 25, 2020 and was made by the President of the applicant, Dr. Gabor Lukács. It requested "[a]ll documents, including e-mails, notes, meeting minutes, internal correspondences, and any other written record, relating to the drafting, review, approval, and/or publication of the Statement on Vouchers[…]" over the time period between March 11, 2020, to April 9, 2020.

[23] Ms. Cuber further deposed in her affidavit that she also consulted a collection of documents in the CTA's electronic records management information system (RDMIS) that were preserved in April 2021 in response to a request in March 2021 from the House of Commons' Standing Committee on Transport, Infrastructure and Communities for the disclosure of communication between the CTA and Transport Canada, including the Minister of Transport's office, concerning cancelled plane tickets.

[24] Ms. Cuber testified that she also caused a new electronic search to be done of all the Outlook accounts of all CTA personnel in November 2021, as well as manual searches in certain Outlook accounts and RDMIS, and had various discussions with CTA staff, including in the Information Management and Information Technology departments. Included in the search terms for some of these additional searches was a search for emails with the subject line "From MinO", which other documents that had been disclosed indicated was the subject line of at least one encrypted email that has not been recovered.

[25] During the course of Ms. Cuber's cross-examination, it became apparent that one of the electronic searches the CTA conducted contained a typographical error.

[26] The applicant requested a number of undertakings during the cross-examination, including a request that certain additional electronic searches be conducted. The CTA took these requests under advisement and thereafter did electronic searches in the Outlook accounts of all CTA personnel and in RDMIS for the period of March 9 to March 25, 2020, with the search terms “refund* OR voucher* OR rembourse* OR crédit”. Several thousand documents were returned and reviewed. Only one additional document, responsive to the disclosure Orders that had not been previously disclosed, was discovered. The CTA provided this document as well as details of these searches to the applicant.

[27] None of these various searches, conducted both before and after the cross-examination of Ms. Cuber, turned up the encrypted emails between the CTA and Transport Canada, which the CTA admits existed but can no longer locate.

[28] Ms. Jones and the Chairperson of the CTA, Mr. Streiner, left the CTA in June 2021. At this time, their Outlook accounts were permanently closed.

[29] In his affidavit, Mr. Guindon, the CTA’s Manager of Information Technology Operations, explained that it is impossible to search Outlook accounts of departed employees and that back up tapes are only kept for a short period of time. Such tapes were no longer in existence for the March 9 to March 25, 2020 time period by the time the first disclosure Order was issued in this matter.

[30] Mr. Guindon also explained that an electronic search of email accounts would not be able to read the body of encrypted emails, unless they were unencrypted by the recipient. However, the subject line of such emails could be searched. As noted, a search was conducted for the subject line of at least one of the encrypted emails that the CTA has not been able to locate.

II. Withheld C-5 Urgent Debrief Call Documents and the Jones-Cuber Email

[31] With this background in mind, I move to consider the various motions before me. It is convenient to deal first with the request for disclosure of the "Withheld C-5 Urgent Debrief Call Documents" and the "Jones-Cuber Email".

[32] Having reviewed both documents, which were filed on a confidential basis, I have determined that a portion of the "Jones-Cuber Email" must be disclosed to the applicant but that the "Withheld C-5 Urgent Debrief Call Documents" need not be disclosed.

[33] The "Jones-Cuber Email" is an email chain between Ms. Jones and Ms. Cuber, who is senior counsel at the CTA. During Ms. Cuber's cross-examination, the applicant requested an undertaking from the CTA to produce the "Jones-Cuber Email". The CTA took the request under advisement and later declined to disclose the email, taking the position that it is not relevant and is protected from disclosure by reason of privilege. The respondent, in accordance with previous rulings in this matter, filed representations on the issue of privilege.

[34] Insofar as concerns relevance, as the above-cited passages from the cross-examination of Ms. Cuber indicate, she relied on the "Jones-Cuber Email" with respect to the search for

documents from Ms. Jones. And, as also already noted, Ms. Jones was the recipient of one of the encrypted emails that the CTA has not been able to locate and that were sent between the CTA and Transport Canada on the issue of vouchers during the time period covered by the disclosure Orders, and the other thread containing the lost encrypted message was sent to one of her subordinates.

[35] A sufficient foundation has therefore been laid for disclosure of the portions of this email chain to which Ms. Cuber referred in her cross-examination. By virtue of earlier Orders issued in this matter, the CTA was required to file an affidavit to detail its document search, and the applicant was allowed to cross-examine the affiant of that affidavit with reference to the adequacy of the search. Such rulings rendered the portions of the email chain upon which Ms. Cuber relied relevant as they relate to the document search that was put in issue by previous Orders. Thus, the portions of the "Jones-Cuber Email" to which Ms. Cuber referred are amenable to disclosure unless protected by privilege.

[36] The respondent asserts that the "Jones-Cuber Email" is exempt from disclosure by reason of both solicitor-client and litigation privilege. I agree that solicitor-client privilege applies to the portion of the email exchange in which legal advice is sought and offered, but I find that the applicant has waived its claim for privilege in respect of the part of this portion of the email exchange to which Ms. Cuber referred during her cross-examination. I also find that the balance of the "Jones-Cuber Email" is not protected by litigation privilege.

[37] More specifically, as concerns the issue of the solicitor-client privilege, the passage from paragraph 70 in the Federal Court decision in *Right to Life Association of Toronto and Area v. Canada (Employment, Workforce and Labour)*, [2019] F.C.J. No. 1636, 2019 CanLII 9189 (F.C.), cited by the respondent, provides a useful summary of the bounds of this privilege. It states:

> The criteria for determining whether a communication qualifies for legal advice privilege are that: (1) it must have been between a client and solicitor; (2) it must be one in which legal advice is sought or offered; (3) it must have been intended to be confidential; and (4) it must not have had the purpose of furthering unlawful conduct: see *R v Solosky*, 1979 CanLII 9 (SCC), [1980] 1 SCR 821 at 835; *Pritchard v Ontario (Human Rights Commission)*, [2004] 1 SCR 809, 2004 SCC 31 at para 15 [*Pritchard*]; *Slansky* at para 74. Legal advice has been held to include not only telling clients the law, but also giving advice "as to what should prudently and sensibly be done in the relevant legal context": *Slansky* at para 77.

[38] The "Jones-Cuber Email" contains two exchanges in which Ms. Jones sought legal advice and Ms. Cuber offered it. I agree with the respondent that, given the context, one can conclude that these communications were intended to be confidential in the sense that they were not meant to be shared outside the CTA, and there is no suggestion that there was any contemplation of unlawful conduct. Thus, unless waived, solicitor-client privilege would prevent disclosure of these passages in the "Jones-Cuber Email".

[39] As concerns litigation privilege, such privilege was originally developed to permit lawyers to prepare their files in confidence. It extends to documents and communications whose dominant purpose is preparation for litigation (*Lizotte v. Aviva Insurance Company of Canada*, 2016 SCC 52 at paras. 19–25, 404 D.L.R. (4th) 389; *Blank v. Canada (Minister of Justice)*, 2006 SCC 39 at para. 60, 270 D.L.R. (4th) 257; *Webasto Product North America Inc. v. Shasta Equities Ltd.*, 2014 FCA 135 at para. 25, 374 D.L.R. (4th) 757).

[40] A review of the "Jones-Cuber Email" indicates that it was not prepared with the dominant purpose of preparing for this litigation or any other litigation. It is entirely unlike the sorts of documents over which litigation privilege is typically asserted, which include documents like a lawyer's file, communications with third party experts and witnesses, case assessments, strategy discussions and things of that ilk. The "Jones-Cuber Email" instead stemmed from an inquiry as to the nature of a step in this litigation and requested a copy of a publically-filed motion record that had been served on the CTA. The document was not created to advance the litigation. I accordingly conclude that the two emails first sent in the "Jones-Cuber Email" exchange are not protected by litigation privilege.

[41] I turn next to the issue of waiver. A client may waive privilege either intentionally or by implication, which will occur if it puts an otherwise privileged communication in issue in support of its position in litigation (see, *e.g.*, *Simcoff v. Simcoff*, 2009 MBCA 80 at paras. 25–30, 179 A.C.W.S. (3d) 218; *Verney v. Great-West Life Assurance Co.*, 38 O.R. (3d) 474, 77 A.C.W.S. (3d) 1154 (O.N.S.C.); *R. v. Smithen-Davis*, 2021 ONCA 731, 175 W.C.B. (2d) 142; *R. v. Campbell*, [1999] 1 S.C.R. 565 at paras. 46–48, 171 D.L.R. (4th) 193; and Sidney N. Lederman, Michelle K. Fuerst & Hamish C. Stewart, *Sopinka, Lederman & Bryant: The Law of Evidence in Canada*, 6th ed. (Toronto: LexisNexis Canada, 2022) at § 14.163).

[42] Here, the CTA, through the witness it produced in response to the earlier Court Order, put in issue those parts of the "Jones-Cuber Email" chain that Ms. Cuber relied on in testifying as to the adequacy of her document search. Ms. Cuber mentioned the email chain several times during her cross-examination in answer to questions about the adequacy of her search for the encrypted emails. She offered the information conveyed to her in the "Jones-Cuber Email" chain as a

reason why she understood what documents existed and why no further inquiries were required. She accordingly put in issue the contents of those otherwise privileged messages in the chain where the documents in Ms. Jones' possession were discussed. Thus, the waiver covers Ms. Jones' email in which she makes the request for advice and discusses the documents she had but not Ms. Cuber's reply, giving the advice, which does not touch on the documents.

[43] Therefore, to summarize, all portions of the "Jones-Cuber Email" chain must be disclosed to the applicant with the exception of the final email to Ms. Jones from Ms. Cuber, dated January 5, 2021, sent at 5:39 p.m., which is privileged and does not discuss the documents that were in Ms. Jones' possession. The earlier emails in the chain are either not privileged or privilege has been waived in respect of them.

[44] The CTA must make the forgoing disclosure to the applicant within ten days of the date of these Reasons.

[45] Moving on to the documents that the applicant has characterized as the "Withheld C-5 Urgent Debrief Call Documents", the redacted portions in this document are subject to both solicitor-client and deliberative privilege as, in them, legal advice was sought and offered on an issue that was subject to later determination by the CTA. Moreover, as the CTA notes in its submissions, although the issue of the vouchers is mentioned in these documents, the "Withheld C-5 Urgent Debrief Call Documents" relate almost exclusively to section 64 of the *Canada Transportation Act*, S.C. 1996, c. 10, which is not at issue in this application. Thus, these

documents are of marginal, if any, relevance to the underlying judicial review application in this matter. Accordingly, the "Withheld C-5 Urgent Debrief Call Documents" need not be disclosed.

III. The Applicant's Other Requests in the First Motion and the Third Motion

[46] I turn next to the remaining issues and have determined that the balance of the requests made by the applicant should be dismissed because the applicant has failed to establish that they would be likely to produce anything beyond the documents already disclosed, which the CTA has devoted considerable time and effort to produce.

[47] In this regard, the applicant has failed to establish that the additional steps it suggests of attempting to locate and search the phones or computers of Ms. Jones or Mr. Streiner would disclose anything further, or if it indeed would even be now possible to locate these devices. Nor has the applicant established how any different search terms for an electronic search would be likely to produce anything further. I also note that the applicant did not set out the additional search terms it now seeks in its Notice of Motion, Motion Record or request them during the cross-examination of Ms. Cuber. Instead, it has proposed additional search terms in its Reply, which has deprived the CTA of the opportunity to file evidence in respect of them.

[48] Given the breadth of the searches already conducted by the CTA and the inability to search the mailboxes of departed CTA personnel, there is no evidence to support the utility of the additional steps the applicant wishes the CTA be ordered to undertake. The requested steps are therefore nothing more than a fishing expedition.

[49] As for the request that an order be issued to Transport Canada for document preservation, as the respondent notes, there is no basis whatsoever for any such order. Disclosure has been ordered to date in this application under rule 318 of the *Federal Courts Rules* and requires the CTA to produce certain categories of documents in its possession, control or power. There is no basis under rule 318 to make an order for document preservation with respect to documents in the hands of a third party. This request will therefore also be dismissed.

[50] Finally, there is likewise no basis to admit the additional affidavit that the applicant seeks to file. Simply put, in light of my determination that there is no need for the CTA to conduct any further document searches, the issue of how encrypted documents might be unlocked is irrelevant.

[51] Thus, the applicant's first motion and the respondent's motion are granted in part on the terms outlined above, and the applicant's motion to admit additional evidence is dismissed. As in previous matters of this nature, costs of these motions are in the cause.

"Mary J.L. Gleason"
J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-102-20
STYLE OF CAUSE:	AIR PASSENGER RIGHTS v. THE ATTORNEY GENERAL OF CANADA AND THE CANADIAN TRANSPORTATION AGENCY

MOTIONS DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES

REASONS FOR ORDER BY:	GLEASON J.A.
DATED:	JANUARY 4, 2023

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