

Court File No.:

FEDERAL COURT OF APPEAL

BETWEEN:

AIR PASSENGER RIGHTS

Applicant

– and –

CANADIAN TRANSPORTATION AGENCY

Respondent

NOTICE OF MOTION

TAKE NOTICE THAT THE MOVING PARTY will make an urgent motion in writing to the Court under Rule 369 of the *Federal Courts Rules*, S.O.R./98-106, **without notice**.

THE MOTION IS FOR:

1. an interim order (*ex-parte*) that:
 - (a) upon service of this Court’s interim order, the Agency shall prominently post the interim clarification (below) at the top portion of both the French and English versions of the “Statement on Vouchers” [**Statement**] and the “Important Information for Travellers During COVID-19” page [**COVID-19 Agency Page**] (both defined in paragraphs 11-12 of the Notice of Application):

The Canadian Transportation Agency’s “Statement on Vouchers” is not a decision, order, determination, or any legal ruling of the Canadian Transportation Agency. It **does not** have the force of law. The “Statement on Vouchers” is currently pending judicial review by the Federal Court of Appeal. This notice is posted by Order of the Federal Court of Appeal.

- (b) starting from the date of service of this Court's interim order, the Agency shall bring the above interim clarification to the attention of anyone that contacts the Agency with a formal complaint and/or informal inquiry regarding air carriers' refusal to refund arising from the COVID-19 pandemic;
- (c) the Agency shall not issue any decision, order, determination or any other ruling with respect to refunds from air carriers for the COVID-19 pandemic; and
- (d) this interim order is valid for fourteen days from the date of service of this Court's interim order on the Agency, and may be renewed by the Applicant under Rule 374(2);

2. an interlocutory order that:

- (a) the Agency shall completely remove the Statement from the Agency's website including any references to the Statement within the COVID-19 Agency Page, or alternatively renewing the order for interim clarification (subparagraph 1(a) above), until final disposition of the Application;
- (b) the interim order in subparagraph 1(b) above is maintained until final disposition of the Application;
- (c) the interim order in subparagraph 1(c) above is maintained until final disposition of the Application;
- (d) the Agency shall forthwith communicate with all persons that the Agency has communicated with regarding the Statement and bring those persons' attention to this Court's interlocutory order and the removal or clarification of the Statement; and

- (e) the Agency shall forthwith communicate with all air carriers under the Agency's jurisdiction and the Association of Canadian Travel Agencies and bring those persons' attention to this Court's interlocutory order and the removal or clarification of the Statement;
3. an order fixing an expedited timetable for the Applicant's motion for an interlocutory order (para. 2 above), and the hearing of the Application;
4. an order directing that all documents in this Application shall be served electronically;
5. costs and/or reasonable out-of-pocket expenses of this motion; and
6. such further and other relief or directions as the counsel may request and this Honourable Court deems just.

THE GROUNDS FOR THE MOTION ARE:

1. This is a motion seeking an interim order, on an *ex-parte* basis, and an interlocutory order pending final disposition of the Application, including the fixing of a timeline for the matter.
2. There is urgency in addressing the interim order at the earliest opportunity because the Agency's conduct, that is the subject of the underlying Application, has a clear tendency to mislead, and likely has already misled, tens of thousands of passengers. Many more passengers will continue to be misled regarding their rights unless a prompt clarification is issued.

Background

3. The underlying Application challenges the legality of the Canadian Transportation Agency's Statement on refunds for air tickets relating to COVID-19. The Agency's Statement purports to provide an unsolicited advance ruling favouring air carriers without submissions from passengers at all. The Statement specifi-

cally endorses the air carriers in withholding refunds from passengers, and instead issuing expiring “credits” that are subject to other various conditions that air carriers seeks to impose, such as one-time use only or any excess credit is to be forfeited.

4. Since as early as 2004, the Agency has determined that passengers have a fundamental right to a refund in cases where the passengers could not travel due to events outside of their control, even when it arises from a situation outside the air carriers’ control. The Agency now seeks to upend that settled principle via the Statement and grants air carriers a blanket immunity from the law without hearing the submissions from a single passenger.
5. The Agency is a quasi-judicial tribunal that must act independently and impartially at all times. The Statement, and the COVID-19 Agency Page, stray far from the required independence and impartiality. This motion seeks to bring interim measures, followed by interlocutory measures, to protect the passengers’ interest in the face of the anonymous Statement, which has since been widely distributed and relied upon as “support” by air carriers and travel agencies in denying refunds rightfully owed to passengers.
6. This Application is brought by the Applicant, Air Passenger Rights [APR], a non-profit public interest advocacy group that represents the right of air passengers. The public interest advocacy work of Dr. Gábor Lukács, the President of APR, has been recognized by this Court.

The Impugned Statement and the COVID-19 Agency Page

7. On or about March 25, 2020, the Agency publicly posted the Statement on its website (**French:** <https://otc-cta.gc.ca/fra/message-concernant-credits>; **English:** <https://otc-cta.gc.ca/eng/statement-vouchers>) which reads 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. Concurrently with the Statement, the Agency posted an amendment to the COVID-19 Agency Page on its website, adding four references to the Statement (French: **Information importante pour les voyageurs pour la période de la COVID-19** [<https://otc-cta.gc.ca/fra/information-importante-pour-voyageurs-pour-periode-covid-19>]; English: **Important Information for Travellers During COVID-19** [<https://otc-cta.gc.ca/eng/important-information-travellers-during-covid-19>]).
9. The COVID-19 Agency Page purports to endorse a blanket immunity for air

carriers to withhold refunds from passengers in **all** circumstances, and instead issue a “credit,” contrary to the explicit provisions of the *Air Passenger Protection Regulations*, SOR/2019-150 [APPR] and settled jurisprudence of the Agency:

- (a) **Cancellations within an air carriers’ control:** The COVID-19 Agency Page specifically endorsed the Statement, *despite* s. 17(7) of the APPR specifically providing for a refund to the original form of payment.
- (b) **Cancellations within an air carriers’ control, but required for safety:** The COVID-19 Agency Page specifically endorsed the Statement, *despite* s. 17(7) of the APPR specifically providing for a refund to the original form of payment.
- (c) **Cancellations outside an air carriers’ control:** The COVID-19 Agency Page specifically endorsed the Statement. The APPR sets the minimum standards of treatment in this situation, mandating that an air carrier provide alternative transportation on the next available flight (s. 18 of APPR). Section 18 is silent on what is required of the air carrier if transportation cannot be offered on the next available flight, which would then fall to be determined by previous decisions of the Agency (i.e., the fundamental right to a refund when the air carrier cannot offer the service, as briefly mentioned above).

The Orders Sought on this Motion

The Interim Order Preserving and Clarifying the Rights of Passengers

10. The test for issuing the interim mandatory order that the Agency providing a clarification relating to their website (interim order subparagraphs (1)(a)-(b)) is met:
 - (a) There is a strong *prima facie* case that the Statement is not a legally binding decision, order, determination or any other ruling of the Agency.
 - (b) There is also a strong *prima facie* case that the Statement and COVID-19 Agency Page, individually or collectively, have the capability, tendency or effect of deceiving or misleading passengers regarding their legal right to a refund of their airfares from the air carriers.
 - (c) Public interest will be severely undermined if misinformation is not promptly remedied. In particular, the passengers will suffer irreparable harm if the Statement and the COVID-19 Agency Page are not immediately clarified. Many passengers have already been contacting airlines to seek refunds. Many passengers may, or already have, incorrectly relied on the Statement and the COVID-19 Agency Page, potentially prejudicing their legal rights to a refund.
 - (d) The balance of convenience favours the issuing of the interim order, pending the hearing of the interlocutory order. The Applicant has written to the Agency indicating that the Statement is misleading and must be removed. The Agency has failed to take any action or respond. The Agency suffers no prejudice whatsoever in having its public message properly qualified and clarified until this Court makes its determination.
 - (e) The Applicant is a non-profit advocacy group and does not have the means to provide an undertaking as to damages. In any case, the Agency clearly will not suffer any damages from the interim order. And, most

importantly, the lack of an undertaking is merely a factor in considering the balance of convenience and is not fatal to a motion for an injunction.

11. The test for issuing the interim injunction enjoining the Agency's conduct (interim order subparagraph (1)(c)) is also met:
 - (a) There is a *serious issue to be tried* as to whether the Statement and/or the COVID-19 Agency Page gives rise to a reasonable apprehension of bias for the Agency as a whole, or for the appointed members of the Agency that supported the Statement.
 - (b) There will be irreparable harm to the passengers, and also to the administration of justice, if a decision-maker that is not impartial and not independent embarks on an inquiry of the passengers' complaints.
 - (c) The balance of convenience favours the issuing of the interim injunction, pending the hearing of the interlocutory injunction. There will be no inconvenience or prejudice to the Agency in simply maintaining the same *status quo* and not hearing any complaints in relation to refunds from air carriers for COVID-19. The Agency, on its own motion, already suspended all dispute resolutions until June 30, 2020, but that suspension could be rescinded with little to no notice. The Agency's own motion supports the view that there is no urgency in having the passengers' complaints determined before this Court rules on the Application.

Interlocutory Order Preserving the Rights of Passengers

12. The test for issuing the interlocutory mandatory order that the Agency remove the Statement and references to the Statement in the COVID-19 Agency Page (interlocutory order subparagraph (2)(a)) is met:
 - (a) There is a strong *prima facie* case, and very clear, that the Statement cannot be a legally binding decision, order, determination, or any other ruling of the Agency;

- (b) There is also a strong *prima facie* case that the Statement and the COVID-19 Agency Page, individually or collectively, have the capability, tendency, or effect of deceiving or misleading passengers regarding their legal right to a refund of their airfares from the air carriers;
 - (c) Public interest will be severely undermined if the misinformation is not promptly corrected. In particular, the passengers will suffer irreparable harm if the Statement and the COVID-19 Agency Page are not removed. Many passengers have already been contacting airlines to seek refunds. Airlines have already relied on the Statement and the COVID-19 Agency Page to mislead passengers regarding their rights, to the prejudice of the passengers.
 - (d) The balance of convenience favours the issuing of the interlocutory order. Alternatively, the Court should continue the interim orders in subparagraphs 1(a)-(b).
 - (e) The Applicant is a non-profit advocacy group and does not have the means to provide an undertaking as to damages. In any case, the Agency clearly will not suffer any damages from the interim order. And, most importantly, the lack of an undertaking is merely a factor in considering the balance of convenience and is not fatal to a motion for an injunction.
13. The interim orders in subparagraphs 1(b)-(c) ought to be maintained until final disposition of the Application.
14. The test for issuing the mandatory interlocutory order for the Agency to inform the air carriers, the travel industry, and passengers that the Agency previously communicated with regarding the Statement, regarding this Court's interlocutory order (interlocutory order subparagraph 2(c)-(d)), is also met:
- (a) There is a strong *prima facie* case that the Statement was used as "legal support" by air carriers and the travel industry in refusing refunds to

passengers. Those persons ought to be promptly informed of this Court's order so that they can take the appropriate steps to correct information they previously provided to passengers.

- (b) Public interest will be severely undermined if the misinformation is not promptly remedied. In particular, the passengers will suffer irreparable harm if the Statement and the COVID-19 Agency Page are not immediately removed or clarified. Many passengers have already been contacting airlines to seek refunds. Many passengers may, or already have, incorrectly relied on the Statement and the COVID-19 Agency Page, prejudicing their legal rights to a refund.
- (c) The balance of convenience favours the issuing of the mandatory interlocutory order. There will be no inconvenience or prejudice to the Agency in simply informing those persons of this Court's interlocutory order.

An Order Fixing an Expedited Timetable

15. There is urgency in hearing **both** the interlocutory orders, and the underlying Application, on an expedited basis. While there is no direct evidence from passengers, the Court can take judicial notice of the COVID-19 situation that has affected virtually every individual and entity. The air carriers and the tens of thousands (or likely hundred of thousands) of passengers require some certainty of their legal rights, so as to allow them to assess their financial positions in these difficult times.

An Order for Electronic Service of Documents

16. In light of the COVID-19 situation, it would be most expedient for documents in this Application to be dealt with electronically as much as possible.

Statutes and regulations relied on

17. *Canada Transportation Act*, S.C. 1996, c. 10 and, in particular, sections 7 and 41;
18. *Federal Courts Act*, R.S.C. 1985, c. F-7, and in particular, sections 18.1, 18.2, 28, and 44; and
19. *Federal Courts Rules*, S.O.R./98-106, and in particular, Rules 300, 369, and 372-374;
20. Such further and other grounds as counsel may advise and this Honourable Court may permit.

THE FOLLOWING DOCUMENTARY EVIDENCE will be used for the motion:

1. Affidavit of Dr. Gábor Lukács, affirmed on April 7, 2020.
2. Such further and additional materials as counsel may advise and this Honourable Court may allow.

April 7, 2020

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TO: **CANADIAN TRANSPORTATION AGENCY**