Court File No. A-102-20

FEDERAL COURT OF APPEAL

BETWEEN:

AIR PASSENGER RIGHTS

Applicant

– and –

CANADIAN TRANSPORTATION AGENCY

Respondent

REPLY OF THE RESPONDENT,
CANADIAN TRANSPORTATION AGENCY
(Motion to Strike)

Volume 1

Allan Matte
Senior Counsel
Legal Services Directorate
Canadian Transportation Agency
15 Eddy Street, 19th Floor
Gatineau, Quebec
K1A 0N9

Tel: 819-953-0611
Fax: 819-953-9269
Allan.Matte@otc-cta.gc.ca

Servicesjuridiques/LegalServicesOTC/CTA@otc-cta.gc.ca

TO: Registrar
Federal Court of Appeal

AND TO: **SIMON LIN**
Evolink Law Group
4388 Still Creek Drive, Suite 237
Burnaby, B.C.
V5C 6C6
Email: simonlin@evolinklaw.com

Counsel for the Applicant

Table of Contents

Court File No. A-102-20

FEDERAL COURT OF APPEAL

BETWEEN:

AIR PASSENGER RIGHTS

Applicant

– and –

CANADIAN TRANSPORTATION AGENCY

Respondent

REPLY OF THE RESPONDENT,
CANADIAN TRANSPORTATION AGENCY
(Motion to Strike)

A. Overview

1. The Applicant is a frequent litigator before the Courts. In this latest proceeding, the Applicant challenges a statement on the website of the Canadian Transportation Agency (Agency) suggesting that a reasonable approach may be for airlines to provide passengers with vouchers when flights are cancelled as a result of the COVID-19 pandemic. The Agency, the Applicant and the Court agree that this statement does not affect the rights of the Applicant or the travelling public.

2. Judicial review is not available when administrative action does not affect legal rights, impose legal obligations or cause prejudicial effects. There is no dispute that the statement in issue does not affect rights. The application for judicial review therefore should be struck.

3. In response to this motion to strike, the Applicant asks this Court to weigh the arguments he proposes to make in support of the application for judicial review, and deflects from the main question of whether judicial review is available at all. While these arguments are without merit, this is not the question. The Applicant has provided no arguments to support

the assertion that the statements on the Agency's website affect the rights of airline passengers. Judicial review is therefore not available.

4. The Applicant wishes to argue that there is some controversy regarding the test to be applied when determining whether judicial review is available. There is not. The Courts apply multiple considerations when assessing whether judicial review is available, including whether the issue raises a question of public law and whether the administrative action affects the rights of one of the parties. If the application raises no issue of public law or does not affect the rights of one of the parties, judicial review is not available.

5. Given that the rights of airline passengers are not engaged in this proceeding, it is unclear what interest the Applicant has in pursuing it. This appears to be litigation for the purposes of litigation. It is an abuse of process, and the application should be struck.

B. The Agency's statements are not amenable to judicial review

6. The Applicant misstates the issues in this motion. It attempts to frame the issues as being whether judicial review is available on the "reasonable apprehension of bias" ground and the "misinformation" ground.[1] These are not the issues. The sole issue on this preliminary motion is whether the statements on the Agency's website can be made the subject of an application for judicial review. They cannot.

7. The Notice of Application in this matter states clearly that it is an application for judicial review of two statements posted on the Agency's website.

> This is an application for judicial review pursuant to section 28 of the *Federal Courts Act* in respect of two public statements issued on or about March 25, 2020 by the Canadian Transportation Agency (Agency), entitled "Statement on Vouchers" [Statement] and the "Important Information for Travellers During COVID-19" page [COVID-19 Agency Page] that cites the Statement.[2]

8. The arguments that the Applicant intends to make in support of the application for judicial review are irrelevant. The only question is whether the statements on the Agency's website

---

[1] Applicant's Memorandum of Fact and Law, para. 30
Applicant's Responding Motion Record, Tab 8, p. 103.
[2] Notice of Application issued the 9th day of April, 2020
Applicant's Responding Motion Record, Tab 2

can be made the subject of an application for judicial review. The Agency argues that they cannot since they do not affect rights, impose legal obligations, or cause prejudicial effects.[3]

9. Mactavish, J.A. agreed with the Agency's position in this regard and concluded that the statements are not amenable to judicial review.[4] While the panel hearing this motion is not strictly bound by this decision when considering whether to strike the application, it is the obvious conclusion. This is especially so given that the Applicant does not contest anywhere in its submissions the fact that the Agency's statements have no legal effect. In fact, the Applicant wants the Court to declare that the Agency's statements do not constitute a decision, order, determination, or other ruling and have no force or effect of law.[5] It is unclear why the Applicant is drawing on the Court's limited resources to address this case while conceding that the statements have no legal effect.

10. By attempting to frame the issues as it has, the Applicant wants the Court to assess the merits of the arguments made in support of the application. While these arguments have no merit, this is not the issue. The question is whether judicial review is available at all in respect of the Agency's statements.

11. Despite the fact that the Applicant's proposed grounds for review are not relevant, a closer look at them further supports the Agency's argument that the application should be struck.

12. For example, the Applicant wants to argue that the statements demonstrate that Members of the Agency will be biased with respect to passenger complaints, and wants them disqualified from hearing complaints to which it is not even a party. The Applicant relies on the Ontario Superior Court decision of *E.A. Manning Ltd. v. Ontario (Sec. Comm.)*[6] to support the argument that there is authority to grant an injunction to prohibit members of an administrative tribunal from adjudicating a particular case.[7] However, in *E.A. Manning*, the

---

[3] *Air Passenger Rights v. Canada (Transportation Agency)*, 2020 FCA 92 at para. 22 (*APR v. CTA).*
[4] *Ibid*, at para. 20.
[5] Notice of Application issued the 9th day of April, 2020
Applicant's Responding Motion Record, Tab 2
[6] 1994 CanLII 10560 (ON SC) (*E.A. Manning*); Applicant's Memorandum of Fact and Law, para. 43
Applicant's Responding Motion Record, Tab 8, p. 107.
[7] Applicant's Memorandum of Fact and Law, para. 43
Applicant's Responding motion Record, Tab 8, p. 107.

applicants sought a prohibition to stop the Ontario Securities Commission (OSC) from proceeding with two hearings on the basis of allegations of bias. These allegations were based on a policy statement issued by the OSC. This was not an application for judicial review of the policy statement however. In that case, the bias was alleged in the context of actual proceedings brought against security dealers and salespersons.

13. The Applicant wants this Court to review facts which the Applicant says create a reasonable apprehension of bias in future cases. There is no precedent for this. The proper course is to raise the issue in those cases where the decision of the Agency would affect the legal rights of the parties.

14. The decision of Mactavish J.A. on the motion for an interlocutory injunction brings home this very point. Mactavish J.A. pointed out that allegations of bias could be raised in actual proceedings affecting the rights of individuals, as was done in *E.A. Manning;*

> "Even if it subsequently turns out that CTA members were in fact involved in the formulation of the statements, APR's argument could be advanced in the context of an actual passenger complaint and any bias concerns could be addressed in that context. Relief could then be sought in this Court if the complainant is not persuaded that they have received a fair hearing."[8]

15. In other words, the Applicant wants to challenge conduct which it alleges demonstrates bias. In *E.A. Manning*, the applicants did not challenge the policy issued by the OSC, rather, they challenged action taken by the OSC which they argued was tainted by bias as a result of the policy.

16. Put yet another way, if a decision maker has dinner with one of the parties the day before a hearing involving that party, there is no jurisdiction to conduct a judicial review of that dinner. The proper recourse is to raise the issue during the hearing in which the rights of the litigants are at stake.

---

[8] *APR v. CTA, supra* note 3 at para. 36.

17. The "misinformation" ground raised by the Applicant also demonstrates why the application should be struck. Mactavish J.A. concluded that if passengers are being misled by the travel industry as to the import of the Agency's statements, recourse is available against those third parties.[9] This further demonstrates why judicial review is not available. Judicial review is reserved for circumstances when the rights of parties are at stake. None are at stake in this case since it is not the statements which are affecting the rights of air passengers, rather, it is the conduct of third parties which is alleged to cause prejudice.

18. The Applicant has framed this proceeding as an application for judicial review of statements on the Agency's website which it alleges have no legal effect. The Agency agrees with this assertion. The Court has agreed that the statements do not affect rights, impose legal obligations, or cause prejudicial effects on either the Applicant or airline passengers. Judicial review is not available.

C. There is no Controversy About the Test for When Judicial Review is Available

19. The Applicant, in its response to the motion to strike, attempts to argue that there is a disagreement in the jurisprudence about the proper test to apply when considering whether judicial review is available. There is no disagreement. The cases cited by the Applicant simply address different questions.

20. The Courts have considered whether the matter at issue is justiciable, that is, whether it involves public law or private interests. The other question addressed in the caselaw, the question which is raised in this motion, is whether there is a "matter" at all, that is, whether the administrative action being challenged affects rights, imposes legal obligations, or causes prejudicial effects.

21. The Applicant cites the case of *Highwood Congregation of Jehovah's Witnesses (Judicial Committee) v. Wall*[10] in which the Supreme Court of Canada considered whether the Court had jurisdiction to review a decision by a voluntary religious association to "disfellowship"

---

[9] *APR v. CTA, supra* note 3 at para. 37

[10] 2018 SCC 26 (*Highwood Congregation)*; Applicant's Memorandum of Fact and Law, para. 49 Applicant's Responding Motion Record, Tab 8, p. 109.

a member of its congregation. The Court allowed the appeal and concluded that the decision was not subject to judicial review because judicial review is reserved for state action, and not as a means for private parties to resolve disputes that may arise between them based on contract, tort or restitution.[11]

22. The Applicant also cites *Oceanex Inc. v. Canada (Transport)*[12] which involved a challenge of the approval of a federal crown corporation's commercial freight rates on what is known as a "constitutional route" - the route between North Sydney, Nova Scotia and Port aux Basques, Newfoundland and Labrador. The Applicant is a competitor of the crown corporation, and challenged by way of judicial review the crown corporation's decision to set the rates on this route. The Court concluded that the decision was of a public character, and could not be said to have been of a private and commercial nature.[13]

23. In both of these cases, the rights of one of the parties was affected. In *Highwood Congregation* it was the right to membership in a religious organization. In *Oceanex* it was the right to charge a specific freight rate. The question in these cases was whether the decision at issue invoked public law, rather than private law, and did not address the separate issue of whether the administrative action at issue affected the rights of the parties.

24. The Applicant also cites *Wenham v. Canada (Attorney General)*[14] which involved an application for judicial review seeking to quash a compensation program established by the government of Canada for victims of the drug Thalidomide. This decision concludes that whether or not an application is authorized by the *Federal Courts Act* and whether it raises a question of public law are separate issues.

> An application not authorized under the *Federal Courts Act*, R.S.C. 1985, c. F-7 **or** not aimed at public law matters may be quashed at the outset: *JP Morgan* at para. 68; *Highwood Congregation of Jehovah's Witnesses (Judicial Committee v. Wall,* 2018 SCC 26; *Air Canada v. Toronto Port Authority,* 2011 FCA 347…."[15] [emphasis added]

---

[11] *Ibid,* at para. 13.
[12] 2019 FCA 250 (*Oceanex*); Applicant's Memorandum of Fact and Law, para. 50
Applicant's Responding Motion Record, Tab 8, p. 109.
[13] *Ibid,* at para. 54.
[14] 2018 FCA 199 (CanLII); Applicant's Memorandum of Fact and Law, para. 51, Applicant's Motion Record, Tab 8 p. 110.
[15] *Ibid,* para. 36.

25. The *Wenham* decision cited by the Applicant makes it clear that whether the application is a "matter" under subsection 18.1(1) of the *Federal Courts Act* and whether it raises an issue of public law at all are separate matters. An application may be struck if it is not justiciable (i.e. does not raise a question of public law) or if the administrative action taken does not have a binding effect (i.e. is not a "matter" pursuant to the *Federal Courts Act*).

26. The fact that these are separate questions is clearly demonstrated by the analysis of the Federal Court in the 2019 decision of *Democracy Watch v. Canada (Attorney General)*[16]. This was an application for judicial review of a conclusion by the Commissioner of Lobbying that an investigation to ensure compliance with the Lobbyists' Code or the *Lobbying Act* was not necessary since the Code did not apply in the circumstances. The Federal Court considered separately whether the alleged breach of the *Conflict of Interest Act* was justiciable citing the *Highwood Congregation* case of the Supreme Court, and whether the decision was reviewable pursuant to subsection 18.1(3) of the *Federal Courts Act*, relying on the caselaw submitted by the Agency in this motion which addresses where the administrative action affects legal rights, imposes legal obligations, or causes prejudicial effects.

27. In *Democracy Watch 2019* the Federal Court asks the specific question of whether the alleged breach of the *Conflict of Interest Act* in that case was justiciable.

> Justiciability essentially asks whether it is appropriate for the courts to decide a particular issue (*Highwood Congregation of Jehovah's Witnesses (Judicial Committee) v Wall*, 2018 SCC 26 at para 32 [*Wall*]). Questions of justiciability involve "a normative inquiry into the appropriateness as a matter of constitutional judicial policy of the courts deciding a given issue or, instead, deferring to other decision-making institutions of the polity" (*Canada (Auditor General) v Canada (Minister of Energy, Mines and Resources)*, 1989 CanLII 73 (SCC), [1989] 2 SCR 49 at 90–91 [*Auditor General*]).[17]

28. The Federal Court concluded that in the absence of prior consideration of the matter and a decision of the Ethics Commissioner, the alleged breach of the *Conflict of Interests Act* was

[16] *Democracy Watch v. Canada (Attorney General)*, 2019 FC 388
[17] *Ibid,* para. 68

not justiciable.[18]

29. Immediately after concluding that the matter was not justiciable, the Court then addressed whether the decision was reviewable under subsection 18.1(3) of the *Federal Courts Act.* The Court referenced a 2009 case relied upon by the Agency in this motion and which involved the same applicant.

> [95] *Democracy Watch 2009* concerned a decision of the Ethics Commissioner not to investigate actions by Prime Minister Stephen Harper, the Attorney General, and other Cabinet ministers in relation to the Mulroney-Schreiber Airbus affair. In brief reasons, the Court of Appeal held the decision was not judicially reviewable as it was not a decision or order within the meaning of section 66 of the *COI Act* (which refers to a "decision or order" of the Commissioner) or of subsection 18.1(3) of the *Federal Courts Act* (*Democracy Watch 2009* at para 9). The Supreme Court refused leave to appeal (*Democracy Watch v Canada (Conflict of Interest and Ethics Commissioner)*, [2009] SCCA No 139).[19]

30. The Federal Court then refers to this Court's decision in *Air Canada v. Toronto Port Authority*,[20] also relied upon by the Agency in this motion, applies it, and concludes that while subsection 18.1(3) does not require a "decision" or "order", the administrative action at issue must affect a party's rights.

> [100] The Court held that the issue to be addressed was not whether the bulletins in issue were reflective of a "decision" or "order," but rather whether the Toronto Port Authority had done something to trigger Air Canada's right to bring a judicial review. Citing *Democracy Watch 2009*, the Court noted that the jurisprudence recognized many situations where an administrative body's conduct will not trigger the right to judicial review, including where the impugned conduct "fails to affect legal rights, impose legal obligations, or cause prejudicial effects" (*Air Canada* at paras 26–29). The Court found that neither bulletin had affected Air Canada's legal rights, imposed legal obligations, or caused it prejudicial effects (*Air Canada* at paras 37, 39).
>
> [101] I am satisfied that the absence of a "decision or order" cannot be taken as the test for determining if a matter is reviewable. Rather, the factors to consider include whether an administrative body's conduct or actions affected an applicant's legal rights, imposed legal obligations, or caused prejudicial effects.

---

[18] *Ibid*, para. 93.
[19] *Ibid*, para. 95.
[20] 2011 FCA 347

[102] The Federal Court of Appeal's recent decision in *Democracy Watch 2018* does not alter this conclusion. In that case, the Court considered whether two compliance measures under section 29 of the *COI Act* were reviewable, noting factors that pointed both to reviewability and non-reviewability (*Democracy Watch 2018* at paras 25–36). It confirmed that *Democracy Watch 2009* has "been used in support of the idea that 'an application for judicial review cannot be brought where the conduct attacked in the application for judicial review fails to affect legal rights, impose legal obligations, or cause prejudicial effects'" (*Democracy Watch 2018* at para 29). The Court did not find it necessary to finally decide whether the measures were reviewable, finding that even if they were, the Commissioner's interpretation and application of the Act were reasonable (*Democracy Watch 2018* at para 37).

[103] Considering the *Air Canada* factors in the context of the *Lobbying Act* and Lobbyists' Code, I am satisfied that the Commissioner's decision not to investigate the alleged breach is reviewable.

[104] The Lobbyists' Code acknowledges and encourages "anyone" suspecting non-compliance to forward information to the Commissioner (Lobbyists' Code, Introduction). Where a member of the public provides information to the Commissioner relating to compliance, the Commissioner is required to consider that information and determine whether an investigation is necessary (*Lobbying Act*, s 10.4(1)).

[105] The *Lobbying Act* and Lobbyists' Code impose a broader obligation upon the Commissioner to receive and consider information from members of the public than is imposed on the Ethics Commissioner, who need only receive information from or through members of Parliament (*COI Act*, s 44(4); see also *Democracy Watch 2018* at para 22, where the Federal Court of Appeal noted that "[n]o direct mechanism exists for a member of the public to request an investigation into such issues"). This broader obligation to receive and consider information is consistent with the purposes of the Act and the Code, which include "assuring the Canadian public that when lobbying of public office holders takes place, it is done ethically and with the highest standards with a view to enhancing public confidence and trust in the integrity of government decision making" (Lobbyists' Code, Introduction). It also reflects the wider breadth of application; the *Lobbying Act* and Lobbyists' Code impose obligations on Canadians who engage in lobbying whereas the application of the *COI Act* is limited to public office holders.

[106] The ability to provide information or initiate a complaint coupled with the Commissioner's duty to review, consider, and render a decision on that information leads me to conclude that legal rights are affected by a decision under subsection 10.4(1) of the Act. If that decision is reached in a manner contrary to the principles of fairness or if it fails to reflect the elements of reasonableness articulated by the Supreme Court

in *Dunsmuir v New Brunswick*, 2008 SCC 9 [*Dunsmuir*], the decision can also be presumed to have a prejudicial effect.

> [107] In finding the decision of the Ethics Commissioner was not reviewable in *Democracy Watch 2009*, the Federal Court of Appeal examined the question within the context of a different statutory regime. As noted, the *COI Act* expressly excludes the possibility that a member of the public can directly transmit information to the Ethics Commissioner in circumstances that obligate the Ethics Commissioner to either consider the information or render a decision in respect of that information (*COI Act*, ss 44 and 45; also see *Democracy Watch 2018* at para 22). The circumstances in this case are clearly distinguishable. I am satisfied that the Commissioner's decision not to investigate the complaint is reviewable.[21]

31. The Federal Court's decision in *Democracy Watch 2019* demonstrates that whether an application is justiciable, and whether it is reviewable under subsection 18.1(3) of the *Federal Courts Act*, are separate questions. The matter must involve both a question of public law and must be one which affects the rights of one of the parties.

32. On the appeal of the decision of the Federal Court in *Democracy Watch 2019*, this Court affirmed that the two questions are separate. This Court confirmed that not all administrative action gives rise to a right of review. This Court also confirmed that there are many circumstances where an administrative body's conduct will not trigger a right of review. Some decisions are not justiciable, while others may be justiciable but do not affect rights, impose legal obligations or cause prejudicial effects.[22]

33. This Court noted that it was this latter criterion which was the subject of the appeal. It was determined that it was not met, the appeal was allowed, and the decision not to investigate was restored.[23]

34. In the decision on the appeal of *Democracy Watch 2019*, this Court very clearly and succinctly explained when judicial review might not be available.

> [19] As in all judicial review applications, the Court must first decide whether the

---

[21] *Ibid*, paras. 100-107.
[22] *Canada (Attorney General) v. Democracy Watch*, 2020 FCA 69 at para. 19.
[23] *Ibid*, at paras. 20 and 41.

> decision sought to be set aside is subject to judicial review. Not all administrative action gives rise to a right of review. There are many circumstances where an administrative body's conduct will not trigger a right to judicial review. Some decisions are simply not justiciable, crossing the boundary from the legal to the political. Others may be justiciable but there may be an adequate alternative remedy. No right of review arises where the conduct attacked fails to affect rights, impose legal obligations, or cause prejudicial effects (*Sganos v. Canada (Attorney General)*, 2018 FCA 84 at para. 6; *Air Canada v. Toronto Port Authority Et Al*, 2011 FCA 347, [2013] 3 F.C.R. 605 at para. 29; *Irving Shipbuilding Inc. v. Canada (Attorney General)*, 2009 FCA 116, [2010] 2 F.C.R. 488; and *Democracy Watch 2009*, referred to above).[24]

35. The Applicant is attempting to convince the Court that there is some controversy where there is not. There are "many circumstances" where judicial review is not available. It could be that the matter does not invoke public law and is therefore not justiciable. It could also be that the administrative action at issue does not affect rights. In either case, judicial review is not available.

36. The fact that the Applicant has sought leave to appeal the decision of Mactavish J.A. changes nothing. This does not establish that there is a live controversy. Mr. Lukacs, the directing mind of the Applicant, is a frequent litigator before the Courts. Many of the proceedings he has brought have been dismissed summarily.[25] The fact that an application for leave to appeal has been filed with the Supreme Court does not in any way establish that Mr. Lukacs' arguments in this case have merit.

D. An Oral Hearing is not Required

37. The Applicant argues that section 16 of the *Federal Courts Act* provides for a right to an oral hearing for a final disposition of an application for judicial review.[26] In this motion, the Agency is asking this Court to strike the application for judicial review, and not hear it. Section 16 of the *Federal Courts Act* does not apply.

38. The Applicant further relies on this Court's decision in *Bernard v. Canada (Attorney General)*[27] to support the argument that it is entitled to an oral hearing before the application

---

[24] *Ibid*, para. 19.
[25] Agency's Memorandum of Fact and Law, para. 8
Moving Party's Motion Record, Tab 3, p. 182
[26] Applicant's Memorandum of Fact and Law, para. 82
Applicant's Responding Motion Record, Tab 8, p. 117
[27] 2019 FCA 144; Applicant's Memorandum of Fact and Law, para. 82

can be struck. This is not what this decision says. This decision says quite clearly that applications for judicial review are to be heard by way of oral hearing, but that there is no right to an oral hearing of a motion, including a motion for an order that an applicant is a vexatious litigant. This current motion is not a request that the application for judicial review be heard in writing, it is a request that it be struck and not heard at all.

39. This Court has previously struck applications brought by Mr. Lukacs without an oral hearing.[28] There is no reason why an oral hearing would be required in this case.

E. Costs

40. The Agency reserves the right to make submissions on the issue of costs following the disposition of the current motion.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated at Ottawa, in the Province of Ontario, this 31st day of August, 2020.

Allan Matte
Senior Counsel
Canadian Transportation Agency
Legal Services Directorate
15 Eddy Street, 19th Floor
Gatineau, Quebec K1A 0N9
Tel: (819) 953-0611 **NEW
Fax: (819) 953-9269
Email: Allan.Matte@otc-cta.gc.ca
Email: Servicesjuridiques/LegalServicesOTC/CTA@otc-cta.gc.ca

Counsel for the Respondent, Canadian Transportation Agency

Applicant's Responding Motion Record, Tab 8, p. 117

[28] *Lukacs v. Canada (Transportation Agency)*, 2016 FCA 227; *Lukacs v. Natural Sciences and Engineering Research Council of Canada*, 2015 FC 267.

PART V – LIST OF AUTHORITIES

Appendix A - Case Law

1. *Democracy Watch v. Canada (Attorney General)*, 2019 FC 388
2. *Canada (Attorney General) v. Democracy Watch*, 2020 FCA 69