Court File No: A-102-20

FEDERAL COURT OF APPEAL

BETWEEN:

AIR PASSENGER RIGHTS

Applicant

- and -

CANADIAN TRANSPORTATION AGENCY

Respondent

APPLICANT'S WRITTEN REPRESENTATIONS PURSUANT TO THE DIRECTIONS OF GLEASON J.A. ON FEBRUARY 19, 2021

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TO : **CANADIAN TRANSPORTATION AGENCY**

AND TO : **THE ATTORNEY GENERAL OF CANADA**

PART I – OVERVIEW

1. On February 19, 2021, this Honourable Court directed that the parties to this judicial review application provide submissions in respect of Rule 303, particularly:

    a. whether the Attorney General of Canada (**AGC**) should be substituted for the Canadian Transportation Agency (**Agency**) as a Respondent, and

    b. propriety for the Agency appearing and taking positions on this judicial review, which seeks orders prohibiting the members of the Agency from hearing claims for refunds for flights cancelled during the COVID-19 pandemic.

    (the "**Directions**").

2. This Honourable Court also requested that the Registry send the Directions to the AGC and that the AGC shall forthwith serve and file a Notice of Appearance if the AGC wish to make submissions on the issues above.

3. As discussed further below, naming the Agency as the Respondent is compliant with the procedure in Rule 303, and the AGC should not be substituted for the Agency.

4. Naming the Agency as the Respondent is also consistent with the approach from other jurisdictions involving allegations of reasonable apprehension of bias against a tribunal, such as *E.A. Manning Ltd. v. Ontario Securities Commission*, 1995 CanLII 1706 (ONCA) [BOA Tab 1], which has been cited by both parties in two interlocutory motions.[1]

5. Historically, a tribunal may be barre from appearing at a judicial review as a party. However, in *Ontario (Energy Board) v Ontario Power Generation Inc.*, 2015 SCC 44 [BOA Tab 4], the Supreme Court adopted a more relaxed contextual approach. The tribunal's level of participation is at the Court's discretion.

6. Under the contextual approach, the Court considers a number of factors to determine whether the tribunal should be permitted to participate, and the scope of that participation with particular attention to whether the tribunal would be "bootstrapping".

7. The "bootstrap" concern is front and centre in this case because the Agency has been appending additional text or otherwise changing its Publications, all without specifically bring these material changes to the Court's attention. In fact, the Agency's submissions have avoided speaking to these changes and proceed as if the changes existed at the outset. This Court may need to consider limiting the scope of the Agency's participation.

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[1] The Applicant's Motion for Interlocutory Injunction (2020 FCA 92 at para. 33 [BOA Tab 2]) and the Agency's Motion to Strike (2020 FCA 155 at para. 31 [BOA Tab 3]).

PART II – NAMING A RESPONDENT UNDER RULE 303

8. Rule 303 sets out the *procedural* requirements for naming a respondent on judicial reviews. The Applicant takes note of this Honourable Court's recent guidance on Rule 303 in *Canada (Attorney General) v. Zalys*, 2020 FCA 81 (***Zalys***) at para. 22-26 [BOA Tab 5]. *Zalys* was released shortly after the Applicant filed its Notice of Application.

9. At the outset, the Applicant notes that when the AGC has already been served with the Notice of Application twice. The first time was on April 9, 2020, where the AGC acknowledged receipt on the same day. Then, the second time, in accordance with this Honourable Court's directions dated February 19, 2021. There is no explanation from the AGC for the extreme delay in filing a Notice of Appearance (filed March 17, 2021).

10. The Applicant submits that naming the Agency, and not the AGC, as the Respondent is consistent with the procedural requirements for two reasons, stated further below.

11. Firstly, the case law has recognized that if an injunction is being sought against the tribunal, then the tribunal should be named as a respondent on the judicial review:[2]

> [28] The applicants submitted that the application complies with paragraph 303(1)(a) of the *Federal Courts Rules*. The applicants submitted that it is appropriate to name the Appeal Board members as respondents, since this is a case were injunctive relief is sought to prevent these individuals from acting in their capacity as members of the tribunal, as in *Sunshine Village Corp. v. Canada (Minister of Canadian Heritage) (1995)*, 96 F.T.R. 14 at paragraph 6 (T.D.). In addition, the applicants submitted that the Appeal Board members have acted as respondents up to this point by filing affidavits, motions, and even applying for and receiving funding to act in the proceedings by order of Justice Mosley of November 17, 2004.
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> …
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> [43] There have been cases where injunctive relief has been sought against the tribunal and it has been named as a respondent. I would also note that in *Abbott v. Pelican Lake First Nation*, 2003 FCT 340, a case involving the same Pelican Lake Appeal Board, the Appeal Board was named as a respondent.
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> [emphasis added]

[2] *Bill v. Pelican Lake Band*, 2006 FC 679 [***Bill***] at paras. 28 and 43; affirmed in 2006 FCA 397 [BOA Tabs 6-7]; the *Sunshine Village Corp. v. Canada (Minister of Canadian Heritage) (1995),* 96 F.T.R. 14 decision referenced in paragraph 28 of *Bill* is still being cited for the same proposition in the 2021 version of the Federal Courts Practice book under Rule 303 (see page 729 – *"…It is appropriate to name tribunal members as respondents where injunctive relief is sought to prevent them from acting as such."*)

12. On this Application, the Applicant is seeking an injunction against the Agency, which is a complete answer in the event the Agency raises this procedural question.

13. Indeed, naming the tribunal is consistent with the principles of natural justice that those who may be affected by the Court's order be named and also be given the opportunity to make some submissions to the Court. If the Agency was not named, there would be a procedural fairness concern in the event the Court issues the injunctions.

14. Secondly, the Applicant acknowledges that a literal reading of Rule 303(1)(a) suggests that it may prohibit naming the tribunal as a respondent to the judicial review.[3] By operation of Rule 303(2)-(3), normally the AGC is named as a respondent, followed by a motion by the AGC to substitute another party in its place, likely the Agency.

15. However, to our knowledge, it has been the usual practice of the AGC that it will not represent the Agency in judicial review proceedings before this Court for the reason that the AGC has historically taken the position that the Agency is independent and at an arms-length from the government. We enclose a copy of this Court's Order in file A-386-12 noting that the AGC was unable or unwilling to act as a respondent in that case.[4]

16. Based on our review of reported decisions, we are not aware of any instance where the AGC was named as a sole respondent for judicial reviews arising from the Agency's work. On the other hand, we are aware of judicial reviews in this Court where the Agency was named as the respondent and no concerns were raised by the Agency or the Court.[5]

17. There would have been little utility for the Applicant to name the AGC, only to have the AGC bring a motion to substitute the Agency for itself, which would undermine the principle for the most expeditious determination of judicial reviews.

18. The Applicant acknowledges that the fact that the style of cause was not questioned in previous proceedings[6] does not automatically mean that the same style of cause is proper in this Application.[7]

19. The Applicant expects that the Agency may argue for some form of summary dismissal of this judicial review relying on a procedural question under Rule 303. After nearly a

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[3] *Zalys* at para. 22 [BOA Tab 5]

[4] Order in file A-386-12 [BOA Tab 8]

[5] *Lukacs v. Canada (Transportation Agency)*, 2016 FCA 202; and *Lukács v. Canada (Transport, Infrastructure and Communities)*, 2015 FCA 140 [BOA Tabs 9-10]

[6] *Ibid*

[7] *Zalys* at para. 25 [BOA Tab 5]

year of litigating this judicial review, the Agency should be estopped from raising any procedural question on the basis that they should not have been named as a respondent. A similar objection was raised in *Bill* and rejected:

> [44] In this case, the Appeal Board's decisions are being reviewed and thus, the Appeal Board is not a proper respondent to this application under subrule 303(1). The Appeal Board did not bring a motion that it be removed as respondent. The Appeal Board has conducted itself as a respondent, by filing affidavits and submissions, and, as the applicants have pointed out, it has even applied to this Court for funding to act in the proceedings. In such circumstances, the Appeal Board cannot now ask this Court to dismiss the application on the basis that it is not a proper respondent. Moreover, non-compliance with the Federal Courts Rules is treated as an irregularity that does not void the proceeding (rule 56).
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> [emphasis added]

20. In this case, the Agency never brought any motion that it be removed as a respondent. The Agency even filed an affidavit in response and a Memorandum in response to the Applicant's Motion for Interlocutory Injunctions, without raising such procedural concern.

21. Moreover, the Agency also participated as a respondent in the Applicant's Supreme Court of Canada leave to appeal application for the Motion for Interlocutory Injunctions. At the same time, the Agency also brought a motion to strike, which was subsequently dismissed. At present, the Agency also actively responded to the Applicant's motion under Rule 317 for transmitting relevant documents.

22. Throughout the three motions,[8] the Agency did not raise any procedural objection relating to Rule 303, and have been rigorously defending the merits of the two grounds of judicial review (i.e., Reasonable Apprehension of Bias Ground; and Misinformation Ground).[9] There is a strong argument that the Agency has already conceded that they are the proper respondent for this judicial review. The Agency should not be permitted to now ask this Court to summary dismiss the judicial review on the basis of Rule 303.

23. In the unlikely event that this Honourable Court finds it necessary to substitute (or add) the AGC as a respondent to this judicial review Application, the Court should specifically confirm that the steps in this proceeding up to the present are valid. As in *Bill* (excerpted above), any non-compliance with the *Federal Courts Rules* would merely be an irregularity, and cannot nullify the proceedings to date, as specifically stated in Rule 56.

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[8] The Applicant's Motion for Interlocutory Injunctions; the Agency's Motion to Strike; and the Applicant's Rule 317 Motion for Transmittal of Documents.

[9] Applicant's Notice of Motion for the Rule 317 motion at para. 4 (Motion Record page 2)

24. Notably, Rules 57-58 imposes strict requirements on any challenges to steps taken in a proceeding, which must be brought "as soon as practicable after the moving party obtains knowledge of the irregularity". It is plain and obvious that both the Agency and the AGC must have known of any such irregularity by April 9, 2020, when they were served with the Notice of Application. Rules 57-58 would be completely defeated if the AGC or the Agency were permitted to raise such objections nearly one year thereafter.

PART III – The Propriety of the Agency Appearing in this Court on Judicial Review

25. The Applicant will address two closely related issues under this section:[10] (1) whether it is proper for the Agency to act as a party in this judicial review; and (2) the scope of arguments the Agency may make, with particular concerns on potential "bootstrapping".

26. The Applicant's position is that, based on the Supreme Court of Canada's latest test in *Ontario Energy Board*, it is proper (and perhaps even necessary) for the Agency to be a party respondent in this judicial review. However, this Honourable Court should exercise special caution in relation to the Agency's submissions as there are some indications of potential "bootstrapping" and a complete lack of transparency when the Agency has failed to transmit to the Registry a single document in relation to the subject-matter after this proceeding has been ongoing for nearly one-year.

i. Whether the Agency May Properly Appear on this Judicial Review

27. In *Northwestern Utilities*,[11] the Supreme Court held as follows in relation to tribunal "standing" or participation on judicial review:

> This appeal involves an adjudication of the Board's decision on two grounds both of which involve the legality of administrative action. One of the two appellants is the Board itself, which through counsel presented detailed and elaborate arguments in support of its decision in favour of the Company. Such active and even aggressive participation can have no other effect than to discredit the impartiality of an administrative tribunal **either** in the case where the matter is referred back to it, or in future proceedings involving similar interests and issues or the same parties. The Board is given a clear opportunity to make its point in its reasons for its decision, and it abuses one's notion of propriety to countenance its participation as a full-fledged litigant in this Court, in complete adversarial confrontation with one of the principals in the contest before the Board itself in the first instance.
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> It has been the policy in this Court to limit the role of an administrative tribunal whose decision is at issue before the Court, even where the right to appear is given by statute, to an

[10] *Ontario Energy Board* at para. 64 [BOA Tab 4]
[11] *Northwestern Utilities Ltd. and al. v. Edmonton*, 1978 CanLII 17 (SCC) at p. 709-710 [BOA Tab 11]

explanatory role with reference to the record before the Board and to the making of representations relating to jurisdiction. (*Vide The Labour Relations Board of the Province of New Brunswick v. Eastern Bakeries Limited et al.*[11]; *The Labour Relations Board of Saskatchewan v. Dominion Fire Brick and Clay Products Limited et al.*[12]) Where the right to appear and present arguments is granted, an administrative tribunal would be well advised to adhere to the principles enunciated by Aylesworth J.A. in *International Association of Machinists v. Genaire Ltd. and Ontario Labour Relations Board*[13], at pp. 589, 590:

> Clearly upon an appeal from the Board, counsel may appear on behalf of the Board and may present argument to the appellate tribunal. We think in all propriety, however, such argument should be addressed not to the merits of the case as between the parties appearing before the Board, but rather to the jurisdiction or lack of jurisdiction of the Board, If argument by counsel for the Board is directed to such matters as we have indicated, the impartiality of the Board will be the better emphasized and its dignity and authority the better preserved, while at the same time the appellate tribunal will have the advantage of any submissions as to jurisdiction which counsel for the Board may see fit to advance.

[emphasis added]

28. In 2015, in the case of *Ontario Energy Board*, the Supreme Court of Canada adopted a contextual and discretionary approach in determining whether a tribunal may properly appear on an appeal or judicial review:[12]

> [59] In accordance with the foregoing discussion of tribunal standing, where the statute does not clearly resolve the issue, the reviewing court must rely on its discretion to define the tribunal's role on appeal. While not exhaustive, I would find the following factors, identified by the courts and academic commentators cited above, are relevant in informing the court's exercise of this discretion:
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> (1) If an appeal or review were to be otherwise unopposed, a reviewing court may benefit by exercising its discretion to grant tribunal standing.
>
> (2) If there are other parties available to oppose an appeal or review, and those parties have the necessary knowledge and expertise to fully make and respond to arguments on appeal or review, tribunal standing may be less important in ensuring just outcomes.
>
> (3) Whether the tribunal adjudicates individual conflicts between two adversarial parties, or whether it instead serves a policy-making, regulatory or investigative role, or acts on behalf of the public interest, bears on the degree to which impartiality concerns are raised. Such concerns may weigh more heavily where the tribunal served an adjudicatory function in the proceeding that is the subject of the appeal, while a proceeding in which the tribunal adopts a more regulatory role may not raise such concerns.

[emphasis added]

[12] *Ontario Energy Board* at para. 59 [BOA Tab 4]

29. Regarding the first factor, this review will be unopposed if the Agency is not a respondent. This supports finding that the Agency is a proper respondent for this case.

30. For the second factor, there are no other parties available to oppose the judicial review. As discussed above, the AGC considers the Agency to be at an arms-length from the government, and previously confirmed to this Court that the AGC is unable or unwilling to be a respondent in another judicial review involving the Agency. The fact that the AGC was aware of this judicial review, and have not sought to participate in the past year, further reinforces the proposition that there are no other parties available.

31. Relatedly, even should the AGC now volunteer to act as a respondent in place of the Agency, the AGC clearly lacks the necessary knowledge of the subject-matter to be a proper respondent for this judicial review. All of the necessary knowledge, records, and documents, are entirely within the possession and control of the Agency (as submitted in the Applicant's Rule 317 Motion). The Agency would singularly be the party that can provide those documents and records to this Honourable Court, and explain *why* they issued the Publications to interfere with the airlines' contractual dispute with passengers.

32. The Applicant notes that the third factor suggests that it may not be proper for the Agency to be a respondent. While the Agency has both a regulatory and adjudicative role, the subject-matter of this judicial review involves its exercise of an adjudicative role on a subject-matter that the Agency appears to have already taken a position on (i.e., whether the Agency's members may maintain a *perception* of fairness and impartiality when they had already approved, supported, or endorsed the Publications).

33. In this instance, the Applicant submits that this Honourable Court should also consider an additional factor in the exercise of its discretion. Namely that subsection 41(4) of the *Canada Transportation Act*, S.C. 1996, c. 10 provides that the Agency is "entitled to be heard by counsel or otherwise on the argument <u>of an appeal</u>." Although s. 41(4) is limited only to appeals, it strongly suggests that Parliament intended for the Agency to have some participatory role in court cases involving the Agency's work.

34. In summary, the factors above lean in favour of finding that it is proper for the Agency to be a respondent on this judicial review. The fact that the Agency would later be exercising an adjudicative role, rather than a mere regulatory role, may give rise to some concerns of impropriety in its participation. However, the Court could provide clear guidance on the *scope* of the Agency's participation (as discussed in the next section) to address such concerns.

ii. The Scope of the Agency's Participation on this Judicial Review

35. Notably, this Court has previously cautioned that the Agency's participation on a statutory appeal exceeded the bounds allowed by the law as stated by the Supreme Court of Canada in *Northwestern Utilities* above:[13]

> [93] From these excerpts, it appears that the Agency has entered into the fray and become an adversary in this matter. This is to be regretted. The statements of Estey J. in *North Western Utilities Ltd. et al. v. City of Edmonton*, 1978 CanLII 17 (SCC), [1979] 1 S.C.R. 684, at pages 709-710 are apposite.
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> (excerpt from *Northwestern Utilities* omitted)
>
> [94] The Agency cannot be an adversary in a matter on appeal wherein the decisions being appealed were rendered by the Agency itself. The Agency should take note of this for future proceedings.

36. Recently, the Supreme Court summarized the "bootstrapping" concern as follows:[14]

> [64] As the term has been understood by the courts who have considered it in the context of tribunal standing, a tribunal engages in bootstrapping where it seeks to supplement what would otherwise be a deficient decision with new arguments on appeal: see, e.g., *United Brotherhood of Carpenters and Joiners of America, Local 1386 v. Bransen Construction Ltd.*, 2002 NBCA 27, 249 N.B.R. (2d) 93. Put differently, it has been stated that a tribunal may not "defen[d] its decision on a ground that it did not rely on in the decision under review": *Goodis*, at para. 42.

37. In this case, there is some indication of "bootstrapping" when the Agency has already materially changed its Publications multiple times, all without informing the Court in the Agency's submissions of these crucial changes. The Agency then seeks to provide submissions in its memorandum to attempt to justify its motivation for releasing the Publications in March 2020, relying on the subsequent material modifications that the Agency made to the Publications [**Motivation for the Publications Topic**].[15]

38. The Agency's submissions on that very topic cannot assist the Court. It would be most helpful if the Agency simply transmitted the relevant records to enable the panel hearing the judicial review to conduct an independent and impartial assessment of what a reasonably informed individual will perceive of the Agency's conduct relating to the Publications, and whether that conduct contravened the Agency's own *Code of Conduct*.

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[13] *VIA Rail Canada Inc. v. Canadian Transportation Agency*, 2005 FCA 79 at paras. 92-94; reversed on other grounds 2007 SCC 15 [BOA Tabs 12-13]

[14] *Ontario Energy Board* at para. 64 [BOA Tab 4]

[15] Affidavit of Gabor Lukacs affirmed January 3, 2021 at paras. 50-53 (Motion Record for Rule 317 motion at pages 22-23; Applicant's Reply submissions for the Rule 317 motion at para. 6

39. Relatedly, as the Supreme Court noted in *Northwestern Utilities* that "argument should be addressed not to the merits of the case as between the parties appearing before the Board, but rather to the jurisdiction or lack of jurisdiction of the Board." As such, the Applicant submits that, in addition to the topic above, the Agency should also be precluded from making submissions on these two topics:

    a. In the context of flight delays or cancellations, whether the COVID-19 pandemic could be considered a circumstance beyond an airlines control. [**Airlines' Control Topic]**

    b. Whether airlines had a legal obligation to refund passengers in full when the airlines cannot deliver the services for reasons outside its control. [**Refund Obligation Topic]**

40. The Agency's submissions in all three motions thus far were based on the Agency's underlying presumption or premise that: (1) COVID-19 should always be considered a circumstance beyond an airlines control; and (2) the airlines do not have to provide any refund to passengers, necessitating the Agency to "intervene" with the Publications to cause airlines to offer vouchers to protect the economic viability of the airlines.

41. It is obvious that in any of the Agency's future adjudication for COVID-19 related flight disruptions these two issues above will be front and centre. Allowing the Agency to rigorously make submissions, or otherwise take a strong position, on these very topics would in and of itself affect the public's perception of whether the Agency could even act fairly and impartially in future proceedings.

42. For the Motivation for the Publications topic, in particular, the panel hearing the judicial review can glean from the Agency's documents and records what the Agency's motivations were when the Agency released the Publications. The Agency's *post-facto* explanations on what they purportedly did, or believed they were doing, do not assist.

43. To the extend the Court requires further assistance of submissions on these three topics, the Court could consider appointing an *amicus curiae* for submissions solely limited to these three topics. The AGC, assuming it is willing and able to participate, may be a suitable candidate for acting as an *amicus curiae*. Alternatively, the Court can consider appointing a law professor with expertise in aviation laws.

PART III – Conclusion

44. The Applicant submits that the style of cause in this judicial review complies with the procedural requirements under Rule 303. There is no need to substitute the AGC as a respondent, or to add the AGC as a respondent for this judicial review.

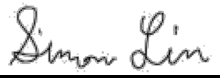
45. Substantively, the case law suggests it is proper for the Agency to be a respondent in this judicial review. However, the Agency's scope of participation should be restricted and exclude submissions on the Motivation for the Publications, the Airlines' Control Topic and the Refund Obligation Topic.

46. Restricting the Agency's submissions on these topics do not create fairness concerns, but rather maintain the public's confidence that the Agency's participation on this judicial review would not give rise to concerns of the Agency's ability to fairly and impartially.

47. In the event the Court requires submissions on those excluded topics, the Court can consider appointing an *amicus curiae* for those narrow topics.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Dated at the City of Vancouver, Province of British Columbia, March 22, 2021



Signature of counsel for the Applicant
Simon Lin