Court File No: A-102-20

FEDERAL COURT OF APPEAL

BETWEEN:

AIR PASSENGER RIGHTS

Applicant

- and -

CANADIAN TRANSPORTATION AGENCY

Respondent

APPLICANT'S RESPONSE TO THE RESPONDENT'S AND THE ATTORNEY GENERAL OF CANADA'S WRITTEN SUBMISSION ON MARCH 22, 2021

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TO: **CANADIAN TRANSPORTATION AGENCY**

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

1. This is a response to both the written submissions filed by the Canadian Transportation Agency [**Agency**] on March 22, 2021, and also the written submissions filed by the Attorney General of Canada [**AGC**] on March 22, 2021. The Applicant does not intend to repeat the submissions delivered on March 22, 2021. Critically, in both their submissions the AGC and the Agency failed to provide *any* explanation for the long delay for raising the Rule 303 concern that they are relying on.

2. The Agency's April 1 response demonstrates a lack of candour. The Agency is attempting to misinform the Court even on facts that are clearly indefensible on its face.

3. Para. 5 of the Agency's April 1 submissions is materially misleading and clearly lack tribunal impartiality. The Agency falsely claimed that "*The Agency has <u>not amended the Statement since its publication</u>….The Court was made aware of the publications of these FAQs in the Agency's Memorandum of Fact and Law on the mandatory interlocutory injunction dated April 22, 2020."* [emphasis added]

4. Firstly, the uncontradicted documentary evidence demonstrates that in November 2020 material modifications were made to the Statement by adding a new textbox at the top stating it is "non-binding", and appending the lengthy FAQ that was first published as a completely separate page on April 22, 2020.[1] All of these modifications were *after* this judicial review was commenced. The Agency presented no evidence to support its bald assertion that the Statement was never amended since publication on March 25, 2020.

5. The Agency sidestepped the obvious common-sense fact that the <u>context</u>, <u>length</u>, and <u>wording</u> of the Statement on Vouchers that was posted on March 25, 2020 (prior to this judicial review being commenced), is materially different than the one that the Agency bases its merits arguments upon. That is not acceptable conduct in any court of law.

6. The Agency's assertion that the Court was made aware of the new FAQs is similarly inaccurate. It appears the Agency is relying on para. 27 of its April 29, 2020 memoranda. The critical fact that the Agency fails to state is that the FAQ was added **after** the judicial review was commenced and just one week before their response record for the interlocutory injunctions motion. Reasonable apprehension of bias cannot be "rewinded" or "backtracked" by subsequent conduct.

7. The Agency's conduct begs the questions "Why were the Publications amended on April 22, 2020 and again around November 2020? And why did the Agency not inform the Court that their argument is based on Publications that mutated multiple times?" This can only be answered by the Agency disclosing the relevant records to the Court.

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[1] Affidavit of Dr. Gabor Lukacs at paras. 50-55 affirmed on January 3, 2021 (Doc. 53)

The AGC Should Not be Substituted in Place of the Agency

8. While the AGC acknowledged at para. 5 that "[t]he Applicant seeks declaratory and injunctive relief against the Agency," then at paras. 21-22 the AGC urges this Court to summarily remove the Agency from the Application based on Rule 303. Then the AGC seeks to substitute itself in place of the Agency. The AGC's position is unworkable at law and paras. 11-13 of the Applicant's submissions are a complete answer to the AGC.

9. Indeed, it is a well-accepted principle that a judgment or order can only bind a person who was a party to the proceeding in which the judgment or order was given.[2] Appellate courts across Canada consistently confirm this long-standing principle.[3]

10. The Agency's participation as a Respondent is critical here. Without the Agency's participation, the panel hearing the judicial review on its merits would be constrained from issuing the injunctive relief that the Applicant is seeking.

11. Indeed, the AGC's position would effectively foreclose injunctive relief against the Agency, who would be a non-party when the AGC is substituted. That would deprive the Applicant of its argument on the Reasonable Apprehension of Bias Ground of judicial review, and may amount to a collateral attack on this Court's earlier judgment.[4]

12. Paragraph 11 of the Agency's March 22 submissions is consistent with the Applicant's position that the Agency is to remain a respondent in this judicial review because the Applicant is seeking injunctive relief against the Agency.

13. On March 22, the Agency also submitted at para. 3 that an impetus for not naming tribunals as respondents on a judicial review is that a "department" does not have a legal personality separate from the Crown. Hence, the AGC would be required to be a respondent in those cases. Then, at para. 8, the Agency acknowledged that Parliament intended that the Agency have a legal personality that is separate from the AGC. This further supports that the Applicant had properly named the Agency as a respondent.

14. In response to para. 7 of the AGC's submissions, the Applicant concedes that this Court has allowed motions to amend the style of cause on other judicial reviews. However,

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[2] *Canadian Civil Procedure Law*, 2 ed. (Markham, Ont: LexisNexis, 2010) at §19.203, cited in *Norris v. Black and The Registrar General of Land Titles,* 2013 NBCA 62 [***Norris***] at para. 18 [BOA Tab 1]

[3] *Equustek Solutions Inc. v. Google Inc.,* 2015 BCCA 265, which was upheld in 2017 SCC 34; see also the principle that "a person has not yet had his day in court and should not be bound by an order made in an action to which he was not a party" referred to in *Township of Sandwich West v. Bubu Estates Ltd. et al.,* 1986 CanLII 2645 (ON CA), a case cited with approval in *MacMillan Bloedel Ltd. v. Simpson*, 1996 CanLII 165 (SCC) at para. 33 [BOA Tabs 2-5]

[4] *Air Passenger Rights v. Canada (Transportation Agency)*, 2020 FCA 155 at paras. 30-33 [BOA Tab 6]

the AGC has not cited a single case where any court in Canada allowed a respondent to be substituted whilst proceedings are underway for injunctive relief against that very respondent. Indeed, that would fly in the face of the long-standing principles above.

15. Moreover, procedurally, there is no motion before the Court. The operation of Rule 47(2) and 303(3) requires the AGC to bring a motion to be substituted out. There is no reason to exempt the AGC from bringing a motion when it seeks to be substituted in.

16. On a motion, the AGC would need to give clear evidence to explain its long delay.[5] The AGC should not be permitted to obtain relief indirectly, when such relief would likely be barred directly. Rule 58 mandates that motions for irregularities be brought "as soon as practicable", and the Federal Court previously noted that a period of two months was considered dilatory.[6] More recently, this Court confirmed this rule must be considered contextually and a two-month period is not to be considered a hard-and-fast deadline.[7]

17. In this case, the nearly one-year delay is not acceptable by any standard, in light of s. 18.4 of the *Federal Courts Act* that judicial reviews are to be determined without delay.[8] Indeed, reasonable apprehension of bias concerns must be addressed at the earliest opportunity.[9] In this case, it is expected that many passengers have already filed complaints with the Agency relating to refunds for COVID-19 affected flights. Those passengers deserve certainty on the Agency's impartiality as soon as practicable.

18. A delay to this judicial review from the AGC's dilatoriness could irrevocably affect the legal rights of passengers. If the panel of this Court were to find that the Agency's member(s) could not act impartially, the passengers may be deprived of their right to proceed in another forum if a limitation period for re-filing their claims have expired.

The Propriety of the Agency Defending its Own Conduct

19. The Agency's April 1 submissions further reinforces that this Court must intervene now to ensure that this review proceeds to the merits hearing promptly. In particular, the relevant Agency documents must be transmitted to the Court. The scope of the Agency's submissions on the underlying merits of the two review grounds (i.e., the Misinformation Ground and the Reasonable Apprehension of Bias Ground) must be limited in order to prevent an abuse of this Court's process.

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[5] See the docket entry on March 16, 2021 confirming that the AGC was served on April 9, 2020.

[6] *Scottish & York Insurance Co. v. York,* 2000 CanLII 14742 (FC) at paras. 94-96 [BOA Tab 7]

[7] *Canada (Board of Internal Economy) v. Canada (A.G.)*, 2017 FCA 43 at para. 35 [BOA Tab 8]

[8] [emphasis added] *Association des crabiers acadiens Inc. v. Canada (A.G.),* 2009 FCA 357 at paras. 30-31; see also *Canada (Attorney General) v. TeleZone Inc.,* 2010 SCC 62 at para. 26 [BOA Tabs 9-10]

[9] *Piikani Nation v McMullen*, 2020 ABCA 183 at paras. 24-25 [BOA Tab 11]

20. The Agency's conduct thus far demonstrates that it cannot act with self-restraint and has repeatedly presented misinformation, without any evidence, and advanced baseless arguments to invite this Court to pre-emptively rule on the merits of the case (see paras. 3-7 of these submissions above).

21. At paras. 8-15, the AGC relied on the Supreme Court's decision in *Northwestern Utilities* to argue for removal of the Agency as a respondent. The AGC completely overlooked the Supreme Court's later guidance that has overtaken *Northwestern Utilities*,[10] which the Applicant cited in paras 28-34 of its submissions.

22. That subsequent guidance from the Supreme Court of Canada (*Ontario Energy Board* cited at para. 28 of the Applicant's March 22, 2021 submissions) supports allowing the Agency remain as a respondent, but with a more limited scope of participation to protect the public's perception of tribunal impartiality down the road.

23. The Applicant's submissions at paras. 35-43 that the Agency should remain as a respondent, with a limit on its scope of participation, are consistent with the Agency's position (at paras. 14-18 of the Agency's March 22, 2021 submissions) in that regard. The Agency conceded that their participation as a party is not precluded or improper.

24. The AGC's approach in summarily removing the Agency as a respondent, and have the Agency participate as an intervener on the Agency's own volition, would have the unintended effect of shielding the Agency from judicial scrutiny.

25. As submitted in paras. 43 and 47 of the Applicant's submissions, the Court could consider appointing an *amicus curiae* if the panel requires submissions on the three topics that the Agency should be precluded from making submissions on.

26. The Applicant has no objection should the AGC volunteer to attend the merits hearing of this judicial review as an *amicus curiae*, and to be prepared to provide submissions on those three excluded topics at the direction of the panel.

The Agency is Again Inviting Preemptive Determination of the Judicial Review

27. At para. 4 of their March 22 submissions and para. 7 of their April 1 submissions, the Agency again is seeking to invite a pre-emptive ruling and re-argue the previous motions by claiming that the Misinformation Ground is not amenable to judicial review because it does not affect rights, impose legal obligations or cause prejudicial effects. That, again, is not an issue to be determined on a motion, but is for the panel to decide.

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[10] *FortisAlberta Inc v Alberta (Utilities Commission),* 2020 ABCA 271 at paras. 74-75 [BOA Tab 12]

28. It is trite law that the decision of a single judge of the Federal Court of Appeal is not binding on a panel of the court,[11] and that an application for judicial review can be dismissed only by a panel.[12] Furthermore, findings on an interlocutory motion are not conclusive, and do not bind the judges that hear the merits of an application.

29. Consequently, Mactavish, J.A.'s decision is neither a decision of "the Court" nor "conclusive." While the Agency may rely on Mactavish, J.A.'s interlocutory decision in an effort to persuade a panel of this court, it is not binding on a panel, and it is inappropriate for the Agency to represent to this Honourable Court otherwise.

30. Despite the fact that both parties have advanced detailed arguments on the Airlines' Control Topic and the Refund Obligation Topic (defined in para. 39 of the Applicant's March 22 submissions), the Agency now claims at paras. 8-9 of its April 1 submissions that this is somehow not disclosed in the Notice of Application. This technical objection is easily answered by paras. 14-23 of the Notice of Application.

31. The Agency's conduct demonstrates that they are not facilitating the matter towards the merits hearing, which is what a tribunal should be doing, but rather casting technical objections at each and every turn to attempt to disrupt the Court's process.

32. Finally, at para. 13 of the Agency's March 22 submissions, it is seeking to re-cast or otherwise re-interpret the submissions that were already made in the three motions that the Agency participated in. Then, the Agency appears to invite this Honourable Court to now summarily determine that the Agency's participation thus far would not affect tribunal impartiality. That is not the correct approach.

33. Whether the Agency's litigation conduct thus far in this judicial review could affect the perception of tribunal impartiality remains to be decided by the panel hearing the merits.

34. It would not be appropriate to accept the Agency's bald assertions at this juncture, in the absence of any evidence whatsoever, especially when the Agency has not produced a single document or record after nearly one-year.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Dated at the City of Vancouver, Province of British Columbia, April 1, 2021

Simon Lin

Signature of counsel for the Applicant, Simon Lin

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[11] *Federal Courts Act*, s. 16; *Franke Kindred Canada Limited v. Gacor Kitchenware (Ningbo) Co. Ltd.*, 2012 FCA 316 at para. 1; *Boudreau v. Canada (Minister of National Revenue)*, 2005 FCA 304 at para. 3; and *Air Passengers Rights v. Canada (Transportation Agency)*, 2020 FCA 92 at para. 39 [BOA Tab 13-15]

[12] *Assiniboine v. Meeches*, 2013 FCA 177 at paras. 38-39 and 41 [BOA Tab 16]