SCC File No.: _____

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE FEDERAL COURT OF APPEAL)

BETWEEN:

AIR PASSENGER RIGHTS

APPLICANT
(Applicant)

– and –

CANADIAN TRANSPORTATION AGENCY

RESPONDENT
(Respondent)

APPLICATION FOR LEAVE TO APPEAL
(AIR PASSENGER RIGHTS, APPLICANT)
(Pursuant to s. 40 of the *Supreme Court Act*, R.S.C. 1985, c. S-26 and
Rule 25 of the *Rules of the Supreme Court of Canada*, SOR/2002-156)

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PART I – OVERVIEW AND STATEMENT OF FACTS

A. Overview

1. The proposed appeal seeks to restore doctrinal uniformity across Canada on both the availability of interlocutory relief and the constitutional right to access judicial review. The Federal Court of Appeal [**FCA**] has diverged from the approaches of this Court and provincial appellate and superior courts, and most importantly, its enabling statute, the *Federal Courts Act*.

2. The case arises from a motion for interlocutory relief to compel the Canadian Transportation Agency to remove and/or clarify misleading Publications it widely disseminated to the travelling public, and to enjoin the Agency's members from adjudicating on the subject matter expressed in the Publications. The FCA denied the motion on the basis that: (a) judicial review was not available in relation to the Publications; (b) a public interest advocacy group cannot rely on the "irreparable harm" to the vulnerable people it represents, but rather must show harm to the Applicant itself; (c) the Applicant must prove that "irreparable harm" **would** result, not simply that it **may** result. On each of these points, the FCA adopted tests that are at odds with the jurisprudence of provincial courts, with the objectives of judicial review and public interest litigation, and with common sense.

3. The *Federal Courts Act* confers on federal courts the same extensive and constitutionally guaranteed judicial review jurisdiction with respect to federal administrative bodies as provincial superior courts have with respect to provincial administrative bodies. Yet, over the past decade, the FCA has imposed an onerous non-statutory prerequisite for the availability of judicial review, which is not in the text of the *Federal Courts Act* and is also inconsistent with the test applied in the provincial courts.[1] By so doing, the FCA restricted Canadians' access to judicial review of federal administrative acts that affect citizens from coast to coast, and departed from Parliament's will.

4. The FCA has also diverged from other Canadian courts with respect to the *RJR-MacDonald* framework for interlocutory relief. In the past decades, the FCA imposed a mechanistic and onerous approach to "irreparable harm," diverging from the analysis adopted in this Court, the provincial appellate and superior courts, and even the Federal Court. The FCA's approach makes it nearly impossible for litigants to obtain interlocutory relief in the federal courts in all areas of law within the

[1] *Highwood Congregation of Jehovah's Witnesses (Jud. Comm.) v. Wall*, 2018 SCC 26 at para. 14.

subject-matter expertise of the federal courts, including immigration and refugee law, intellectual property law, admiralty law, and aboriginal claims involving the federal crown.

5. The combined effect of the FCA's diverging approaches effectively forecloses interlocutory relief in judicial reviews of federal administrative actions that have a broad public interest implication, contrary to Parliament's expressed intent in s. 18.2 of the *Federal Courts Act*. The proposed appeal offers the Court an opportunity to restore doctrinal uniformity across Canada and address the FCA's diverging approaches to both of the aforementioned, seemingly unrelated areas of law that touch upon the daily lives of those in Canada, in one form or another.

B. Facts

6. Air Passenger Rights [**APR**] is a non-profit advocacy group representing and advocating for the rights of the public who travel by air. Dr. Gábor Lukács is the founder and president of APR, and he has been a recognized advocate for the Canadian travelling public for more than a decade. Dr. Lukács's public interest advocacy work involved appearances as a stakeholder or public interest litigant before the Canadian Transportation Agency [**Agency**] and invitations to appear before Parliamentary committees to represent the interest of air passengers. Dr. Lukács has also appeared before all levels of Court in Canada, including this Court, as a public interest litigant or as a court-approved advocate for specific passengers on a *pro bono* and *pro hac vice* basis.[2]

7. The Agency is a statutory body that administers a regulatory scheme for transportation by air from, to, and within Canada. In respect of air travel, the Agency fulfills a dual role: (i) as a quasi-judicial tribunal, it adjudicates consumer disputes between passengers and carriers; (ii) as the economic regulator, it makes regulatory determinations and issues licenses or permits to air carriers.[3] The Agency is composed exclusively of its members appointed by the Governor in Council. Members of the Agency perform and are accountable for all of the Agency's work including its role to adjudicate passenger disputes.[4] Although the Agency's statutory functions are non-delegable unless authorized by statute, its members are assisted by a roster of civil service staff.[5]

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2 *Air Passenger Rights v. Canadian Transportation Agency*, 2020 FCA 92 [**FCA Reasons**] at para. 3 [Tab 2, p. 7]; Lukács Affidavit, paras. 2-27 [Tab 10, p. 93].

3 *Lukács v. Canada (Transportation Agency)*, 2014 FCA 76 at paras. 50-52.

4 *Canada Transportation Act*, ss. 7(2), 10, 13; and 85.1.

5 *Canada Transportation Act*, s. 19; *Code of Conduct for Members of the Agency* [***Code of Conduct***] paras. 4 and 36 – Lukács Affidavit, Exhibit "T" [Tab 10T, p. 186].

i. The Agency's *Code of Conduct* prohibits commentary on potential cases

8. As a quasi-judicial body, the Agency's Members are held to a high standard of professional and ethical conduct, akin to judicial members of a court. The Agency's *Code of Conduct* further reinforces the standard statutory and common law protections with a specific prohibition that:

> (40) Members shall not publicly express an opinion about any past, current, or potential cases or any other issue related to the work of the Agency, and shall refrain from comments or discussions in public or otherwise that may create a reasonable apprehension of bias.[6]

ii. The COVID-19 pandemic and the Agency's Publications

9. Air passengers and air carriers have been seriously affected by the COVID-19 pandemic that began with a World Health Organization declaration on March 11, 2020 and Canadian government advisory on non-essential travel on March 13, 2020.[7] The Agency issued two formal orders to suspend adjudication of passenger complaints until June 30, 2020, and two formal determinations to suspend or relax until June 30, 2020 some of the carriers' minimum compensation, rebooking, and complaint response time requirements under the *Air Passenger Protection Regulations*, SOR/2019-150 [***APPR***]. None of these four actions relieved the carriers from the fundamental obligation to refund passengers for unused airfares.[8] The legality of these actions are not in dispute in this case.

10. On March 25, 2020, the Agency published two commentaries on its website [**Publication(s)**]. The pertinent part of the first Publication, entitled "**Statement on Vouchers**," reads as follows:

> 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.

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6 *Code of Conduct*, para. 40 – Lukács Affidavit, Exhibit "T" [Tab 10T, p. 186].
7 FCA Reasons, at para. 1 [Tab 2, p. 6].
8 Lukács Affidavit, Exhibits "H"-"K" [Tabs 10H-10K, pp. 145-155].

> 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).[9]

11. The Agency has not revealed the author(s) of the Statement on Vouchers; however, its text indicates that it represents the Agency's position as a whole. The author(s) were fully aware that carriers' refusal to refund passengers would potentially come before members of the Agency, but still chose to encourage carriers in issuing vouchers to protect the air carriers' economic viability.

12. The second Publication is a webpage detailing a carrier's legal obligations under the *APPR* to passengers whose flights were disrupted during the pandemic, and describing three types of disruptions distinguished under the *APPR*: outside the carrier's control, within the carrier's control, or within the carrier's control but required for safety reasons [**COVID-19 Agency Page**].[10] That page gives the impression that **all** flight disruptions during the pandemic would be categorized as outside the carrier's control, and as such passengers are not entitled to refunds of unused airfare.

13. The COVID-19 Agency Page further endorsed the Statement on Vouchers in all three types of flight disruptions under the *APPR*, giving lay passengers the inescapable impression that accepting a voucher was their only viable option. The Agency did not state why it endorsed the Statement on Vouchers for disruptions within the carrier's control (whether or not required for safety reasons), despite the *APPR* codifying passengers' right to a refund in the case of such disruptions.[11]

14. Inexplicably, the Agency omitted from both Publications its own long-standing jurisprudence affirming that passengers have a fundamental right to a refund when a carrier is unable to provide the air transportation for any reason, including reasons outside the carrier's control.[12] That

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[9] **Statement on Vouchers** – Lukács Affidavit, Exhibit "M" (emphasis added) [Tab 10M, p. 160].
[10] **COVID-19 Agency Page** – Lukács Affidavit, Exhibit "P" [Tab 10P, p. 170].
[11] *Air Passenger Protection Regulations*, ss. 17(2) and 17(7).
[12] *Re: Air Transat*, CTA Decision No. 28-A-2004; *CTA Lukács v. Sunwing*, Decision No. 313-C-

jurisprudence is anchored in the legislative requirement that carriers must have just and reasonable terms and conditions[13] that address "refunds for services purchased but not used" for any reason.[14] The *APPR*'s codification of some existing rights did not extinguish this entrenched jurisprudence.

iii. Confusion to the public caused by the Agency's Conduct and Publications

15. If the Agency intended the Statement on Vouchers to clarify and assist passengers in ascertaining their rights to a refund, the Agency has failed. The Statement on Vouchers had the opposite effect, causing confusion and frustration for passengers.

16. The Agency widely disseminated the Statement on Vouchers to passengers via public and private platforms, including Twitter and email.[15] In response to specific passenger inquiries, the Agency indiscriminately regurgitated or directed passengers to the Statement on Vouchers and, in some instances, stated that the Agency will not be dealing with passenger complaints at this time. The incongruity of the Publications and the Agency's boilerplate replies to passengers' cries for assistance gave passengers an impression that they had no right to a refund for unused airfares.

17. Major Canadian air carriers used the Statement on Vouchers as an excuse to refuse refunds to passengers. Sunwing passed it off as the Agency's binding ruling. Westjet claimed the Agency had approved the issuance of vouchers. Air Canada represented it as a form of temporary exemption formally granted by the Agency, or that issuing vouchers is a policy mandated by the Agency. Air Transat characterized it as an opinion supporting the air carriers' decision to refuse refunds. Swoop represented it as a clarification of the Agency's position to endorse carriers in issuing vouchers.[16]

18. The Statement on Vouchers also inspired the travel industry to undermine rights under various provincial consumer protection legislation to a credit card chargeback for unperformed services, and offered insurers an excuse to deny policy coverage for actual travel disruptions.[17]

A-2013 at para. 15; *Lukács v. Porter*, CTA Decision No. 344-C-A-2013 at para. 88; and *Lukács v. Porter*, CTA Decision No. 31-C-A-2014 at para. 137.

[13] *Air Transportation Regulations*, s. 111(1); and *Canada Transportation Act*, s. 67.2.

[14] *Air Transportation Regulations*, ss. 107(1)(n)(xii) and 122(c)(xii).

[15] Order of Locke, J.A., dated April 16, 2020 [Tab 5, p. 27]; Lukács Affidavit, paras. 48-49, 54, and 56-58 [Tab 10, pp. 102-105].

[16] Lukács Affidavit, paras. 60-65 [Tab 10, pp. 106-108].

[17] Lukács Affidavit, paras. 68 and 74 [Tab 10, pp. 110 and 113].

19. The Agency had full knowledge of the carriers' systematic misrepresentation of the Statement on Vouchers.[18] Yet, the Agency took no remedial action to protect passengers from the deception, nor did the Agency distance itself from those misleading statements to the public. Most disturbingly, the Agency did not denounce Westjet's claim that the Statement on Vouchers was a "decision [that] was reached in conjunction with the [Agency] regarding the refund of itineraries."[19]

20. In short, the Agency abdicated its mandate to provide guidance to protect passengers, and instead its actions frustrated all practical remedies for lay passengers to recover funds for travel services they had paid for but never received and may never receive in the foreseeable future.

21. The confusion created by the Agency's actions is underscored by the Transport Minister referring to the impugned statements as expressing what the Agency had already "ruled" upon:

> Mr. Chair, as my hon. colleague knows, the Canadian Transportation Agency has ruled on this issue and has ruled that, in the present circumstances and in a non-binding way, it is acceptable for airlines to offer credits for up to two years. In the case of Air Canada, the credit has no expiry date.[20]

C. Proceedings before the Federal Court of Appeal

22. APR promptly brought a judicial review application upon learning of the potential harm to passengers arising from the Agency's Publications. The application was brought to the Federal Court of Appeal as the court of first instance pursuant to s. 28 of the *Federal Courts Act*. APR also brought a motion seeking firstly interim *ex parte* injunctions, followed by interlocutory injunctions to remove and/or clarify the Publications and to enjoin the Agency's members from dealing with passenger refund claims related to COVID-19 until further order of the court.[21]

23. On April 9, 2020, Pelletier, J.A. held that while the Applicant raised important matters, they were not sufficiently urgent to be heard *ex parte*, without hearing from the Agency. He granted leave to refile the interlocutory injunctions motion, which is the subject of this proposed appeal.[22]

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[18] The Agency was duly served with the Lukács Affidavit on April 9, 2020.
[19] Lukács Affidavit, para. 45 (emphasis added) [Tab 10, p. 99].
[20] COVI Committee, Evid., 43rd Parl., 1st Sess., No. 013, p. 14 (emphasis added) [Tab 11, p. 262].
[21] Notice of Motion, dated April 7, 2020 [Tab 9, p. 77]; and FCA Reasons at para. 3 [Tab 2, p. 7].
[22] Order of Pelletier, J.A., dated April 9, 2020 [Tab 6, p. 28].

24. On April 16, 2020, Locke, J.A. recognized that the Statement on Vouchers' timing suggested it was intended to immediately affect the relations between carriers and passengers, and that there was potential for confusion to non-parties that rely on that statement, whose rights might be irrevocably affected. He ordered the Applicant's motion to be expedited despite the Suspension Period.[23]

25. On May 22, 2020, Mactavish, J.A. [**Motions Judge**] issued reasons for her judgment dismissing both the interlocutory mandatory and prohibitory injunctions.

26. The Motions Judge acknowledged the Applicant's argument that the Agency's established jurisprudence confirms the passengers' right to a refund when carriers are unable to provide the service, including situations beyond a carrier's control, and its omissions from the Publications.[24]

27. The Motions Judge applied a mechanistic, tick-box approach to the *RJR-Macdonald* framework for interlocutory relief, and held that the Applicant must satisfy all three factors in order to be entitled to relief,[25] an approach that differs from that of most provincial courts.

28. The Motions Judge correctly held that mandatory interlocutory relief requires meeting a higher threshold of strong *prima facie* case, and correctly acknowledged the Applicant's submission that section 18.1 of the *Federal Courts Act* is not limited to formal decisions and orders but allows judicial review "by anyone directly affected by the matter in respect of which relief is sought."[26]

29. The Motions Judge did not consider this Court's guidance on availability for judicial review. Instead, she applied an outmoded test that restricted judicial review to administrative actions that "affect rights, impose legal obligations, or cause prejudicial effects," and concluded on that basis that judicial review was not available and this case did not meet the strong *prima facie* threshold.[27]

30. Departing further from the provincial courts' approach, the Motions Judge also held that the "irreparable harm" element required proof with clear and non-speculative evidence that the Applicant itself **would** suffer the harm. She noted a narrow exception where charities can rely on

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[23] Order of Locke, J.A., dated April 16, 2020 [Tab 5, p. 24].
[24] FCA Reasons at para. 10 [Tab 2, p. 9].
[25] FCA Reasons at para. 15 [Tab 2, p. 10].
[26] FCA Reasons at paras. 19 and 21 [Tab 2, pp. 11-12].
[27] FCA Reasons at paras. 22-23 and 26-27 [Tab 2, pp. 12-14].

the harm of those that rely on the charity, but did not explain why a similar reasoning could not equally apply to a public interest non-profit advocacy group[28] that speaks on behalf of passengers.[29]

31. The Motions Judge then concluded that there was no "irreparable harm," because rather than curtailing the misinformation at the main source, there is a theoretical possibility of passengers individually seeking legal recourse against air carriers for repeating or using that misinformation.[30]

32. For the prohibitory relief to temporarily enjoin the Agency's members from dealing with refund complaints arising from COVID-19, the Motions Judge assumed that the *serious issue to be tried* threshold was met in respect of the allegation that the Agency's members violated the *Code of Conduct*, or otherwise displayed a reasonable apprehension of bias.[31]

33. The Motions Judge denied the prohibitory relief under the "irreparable harm" heading, because she found that there was no evidence that members of the Agency were involved in formulating or endorsing the Publications. The Motions Judge opined that statements by Agency staff cannot "taint" the Agency's members.[32] However, there was equally no evidence that the Agency's civil service staff exclusively authored the Publications, or formulated a policy shift that undermines the *APPR* and the Agency's jurisprudence without any support from the Agency's members.

34. The Motions Judge then opined that if it subsequently turned out that the Agency's members formulated the Publications, the passengers could, in theory, individually raise the ground of bias and then seek leave to appeal to the Federal Court of Appeal if unsatisfied.[33] There was no evidence that the Agency would voluntarily divulge the authors of the Publication, even before the FCA. The Motions Judge did not explain how lay passengers would be expected to navigate the Agency's procedures, and then the *Federal Courts Rules*, to compel the Agency to disclose the Publications' author(s) and then advance a serious argument against an adjudicator. The Motions Judge's reasons are also silent about access to justice considerations and the harms to the administration of justice in allowing such a serious issue to go unchecked.

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[28] FCA Reasons at paras. 28 and 30. [Tab 2, p. 14].
[29] FCA Reasons at para. 3 [Tab 2, p. 7]; Purpose of Corporation for Air Passenger Rights – Lukács Affidavit, Exhibit "D" [Tab 10D, p. 127].
[30] FCA Reasons at para. 37 [Tab 2, p. 17].
[31] FCA Reasons at para. 17 [Tab 2, p. 11].
[32] FCA Reasons at para. 35 [Tab 2, p. 16].
[33] FCA Reasons at para. 36 [Tab 2, p. 16].

PART II – QUESTIONS IN ISSUE

35. This case raises the following questions of national, public, and constitutional importance:

Issue 1: What is the correct test for availability of judicial review in the federal courts?

Issue 2: What is the national and consistent approach to "irreparable harm" in the *RJR-MacDonald* framework for litigants seeking interim relief in the public interest?

PART III – STATEMENT OF ARGUMENT

Issue 1: What is the correct test for availability of judicial review in the federal courts?

36. Sections 96 to 101 of the *Constitution Act, 1867* guarantee all Canadians access to a superior court for judicial review of administrative actions.[34] Administrative bodies are vested with statutory powers for the public's benefit, such powers that do not accrue to private entities. Consequently, these administrative bodies are subject to judicial review when they purport to exercise their statutory powers or mandate.[35]

37. Judicial review is a public law remedy by which courts uphold the rule of law and ensure that administrative bodies act within the bounds of their statutory mandate provided by the law.[36] The function of judicial review therefore is not merely to aright individual injustices, but also to protect society as a whole from administrative overreach.[37]

38. In *Highwood Congregation of Jehovah's Witnesses (Judicial Committee) v. Wall*, 2018 SCC 26 at para. 14, this Court articulated the test for availability of judicial review as whether the administrative bodies' action is an exercise of state authority that is of a sufficiently public character [***Wall*-test**]. In *J.W. v. Canada (Attorney General)*, 2019 SCC 20 at para. 101, this Court reaffirmed the applicability of the *Wall*-test.

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[34] *Dunsmuir v. New Brunswick*, 2008 SCC 9 at para. 31; and *Highwood Congregation of Jehovah's Witnesses (Judicial Committee) v. Wall*, 2018 SCC 26 at para. 13.

[35] *Knox v. Conservative Party of Canada*, 2007 ABCA 295 at para. 20.

[36] *Highwood Congregation of Jehovah's Witnesses (Judicial Comm.) v. Wall*, 2018 SCC 26 at para. 13 citing with approval *Knox v. Conservative Party of Canada*, 2007 ABCA 295 at para. 14.

[37] *Martineau v. Matsqui Institution Disciplinary Board*, [1980] S.C.R. 602 at 619.

39. There is a divide among FCA judges as to the correct test for availability of judicial review. Since 2018, at least three different panels of the FCA have acknowledged or applied the *Wall*-test.[38] However, in 2020, the FCA reverted back to an outmoded and more restrictive test, which superimposes a non-statutory prerequisite that the challenged administrative act must "affect rights, impose legal obligations, or cause prejudicial effects."[39] This extra prerequisite is not in the text of s. 18.1(1) of the *Federal Courts Act*, and does not accord with Parliament's intent in the 1992 reform to guarantee broad unimpeded access to judicial reviews for supervising federal administrative actions.

40. In the case at bar, the Motions Judge failed to apply the *Wall*-test, and instead applied the aforementioned outmoded and restrictive test for determining whether judicial review was available.[40] By so doing, the Motions Judge overlooked not only the principle of *stare decisis*, but also Parliamentary supremacy in not giving effect to Parliament's clear guidance in the 1992 reform for the broad availability of judicial review in the federal courts.

A. The Plenary Scope of Judicial Review in the Federal Courts

41. Judicial review in the federal courts originated from the 1971 *Federal Court Act*, but reached its current plenary scope only after the 1992 legislative reform.

42. In 1971, Parliament first enacted section 18 of the 1971 *Federal Court Act* to fully transfer the constitutional role to judicially supervise every "federal board, commission or other tribunal," from the provincial superior courts to a unified court,[41] whose judicial review decisions would affect the daily lives of every Canadian from coast to coast. Section 28 of the 1971 *Federal Court Act* carved out an exception for the appeal division to exclusively review a "decision or order" of a "federal board, commission or other tribunal" that is of a non-administrative (i.e., judicial or quasi-judicial) nature, based on three specifically enumerated grounds under the then s. 28(a)-(c).

43. In 1992, the *Federal Court Act* was amended to clarify the dichotomy and confusion that previously surrounded the different remedial powers exercised by the trial and appeal divisions

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[38] *Wenham v. Canada (Attorney General)*, 2018 FCA 199 at para. 36; *Canada (Attorney General) v. Public Service Alliance of Canada*, 2019 FCA 41 at para. 30; and *Oceanex Inc. v. Canada (Transport)*, 2019 FCA 250 at para. 30.

[39] *Canada (Attorney General) v. Democracy Watch*, 2020 FCA 69 at paras. 15 and 19.

[40] FCA Reasons at paras. 22-23 [Tab 2, p. 12].

[41] *Canada (Human Rights Comm.) v. Canadian Liberty Net*, [1998] 1 SCR 626 at paras. 33-36.

under ss. 18 and 28 of the 1971 *Federal Court Act*, respectively.[42] In place of the former s. 28 that carved out the appeal division's jurisdiction based on the remedies being sought, the new s. 28 of the 1992 *Federal Court Act* now assigns exclusive judicial review jurisdiction to the Federal Court of Appeal with respect to enumerated federal administrative bodies, including the Agency.

44. In 1992, Parliament also enacted a unified s. 18.1, replacing the "decisions or orders" limitation in the former s. 28(1) with "matter" in the new s. 18.1(1).[43] Parliament also retired the exclusion of "decisions or orders" of an administrative nature from judicial review under the former s. 28(1). The three limited grounds for judicial review have been expanded to include an all-encompassing ground where the public body "acted in any other way that was contrary to law."[44]

45. Section 18.1 of the *Federal Courts Act* reaffirms the plenary scope of judicial review of federal administrative acts in the federal courts, which is coextensive with the constitutionally guaranteed common law right of judicial review before the provincial superior courts.[45] Today, the federal courts enjoy the same extensive and constitutionally guaranteed judicial review jurisdiction with respect to federal administrative bodies as provincial superior courts do with respect to provincial administrative bodies. Section 18.1 of the *Federal Courts Act* does not constrain the federal courts' constitutional role and jurisdiction, but rather breathes life into it.

B. The Motions Judge Erred by Failing to Apply the *Wall*-Test

46. The *Wall*-test, articulated by this Court for the availability of judicial review,[46] equally applies before the federal courts,[47] courts that carry out an identical constitutional role with respect to federal administrative bodies as provincial superior courts do for provincial administrative bodies.[48]

47. In this case, the Motions Judge overlooked the *Wall*-test, and resurrected the outmoded and

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[42] *Martineau v. Matsqui Institution Disciplinary Board*, [1980] S.C.R. 602 at 606 and 609.
[43] *Krause v. Canada*, [1999] 2 FC 476 at paras. 22-24; *Markevich v. Canada*, [1999] 3 FC 28 at paras. 9-13; *Larny Holdings Ltd. v. Canada (Minister of Health)*, 2002 FCT 750 at paras. 14-22; and *Morneault v. Canada*, [2001] 1 FC 30 at paras. 42-44.
[44] *Irving Shipbuilding Inc. v. Canada (Attorney General)*, 2009 FCA 116 at paras. 29-31; and *Federal Courts Act*, s. 18.1(4)(f) – see *Morneault v. Canada*, [2001] 1 FC 30 at para. 44.
[45] *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12 at paras. 33-34 and 48.
[46] *Highwood Congregation of Jehovah's Witnesses (Jud. Comm.) v. Wall*, 2018 SCC 26 at para. 14.
[47] *Oceanex Inc. v. Canada (Transport)*, 2019 FCA 250 at para. 30.
[48] *Canada (Human Rights Comm.) v. Canadian Liberty Net*, [1998] 1 SCR 626 at paras. 32-36.

restrictive test for assessing the availability of judicial review.[49] Had the Motions Judge applied the *Wall*-test, she would have reached the inevitable conclusion that judicial review must be available for the Agency's act of publishing non-binding guidance for consumption by the travelling public.

48. First, the Agency was purporting to exercise state authority. The Motions Judge found that the Agency's provision of non-binding guidance is part of their mandate and the Agency's impugned acts were in furtherance of that mandate.[50] Subsequently, the Transport Minister acknowledged that the impugned statements expressed what the Agency had already "ruled" upon.[51]

49. Second, the Agency's actions were of a sufficiently public character. The Agency is a statutory economic regulator of air carriers and a quasi-judicial adjudicator of air travel disputes.[52] Under the guise of a policy statement or guidance,[53] the Agency opined on the merits of a live controversy that would land on its adjudicative docket in short order. The Agency claims that the purpose of its commentary was to offer the public a "fair and sensible balance between passenger protection and airlines' operational realities" in order to protect the airlines' "economic viability."[54] In other words, the Agency claims it was its role to step in and settle the debate in some fashion, and as the Transport Minister acknowledged, the Agency has publicly sealed the debate.[55]

50. The recent April 2020 FCA panel's resurrection of the outmoded and restrictive test and the Motions Judge's application thereof undermines the predictability of and access to judicial reviews at the federal level. A close review of the jurisprudence demonstrates that the non-statutory prerequisite in that test has its origin rooted in jurisprudence before the 1992 Parliamentary reform, when federal judicial review focused on "decisions or orders" rather than "matters."[56]

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[49] FCA Reasons at paras. 22-23 [Tab 2, p. 12].
[50] FCA Reasons at para. 34 [Tab 2, p. 16].
[51] COVI Committee, Evidence, 43rd Parl., 1st Sess., No. 013, p. 14 [Tab 11, p. 262].
[52] FCA Reasons at para. 34 [Tab 2, p. 16].
[53] FCA Reasons at paras. 25-26 [Tab 2, p. 13].
[54] FCA Reasons at paras. 5-6 [Tab 2, pp. 7-8].
[55] COVI Committee, Evidence, 43rd Parl., 1st Sess., No. 013, p. 14 [Tab 11, p. 262].
[56] *Air Canada v. Toronto Port Authority et al*, 2011 FCA 347 at para. 29 [***Air Canada***] cites both *Irving Shipbuilding Inc. v. Canada (A.G.)*, 2009 FCA 116 (which does not support the *ratio* in *Air Canada*) and *Democracy Watch v. Conflict of Interest and Ethics Commission*, 2009 FCA 15 at para. 10 which relies on *Canadian Institute of Public and Private Real Estate Co. v. Bell Canada*, 2004 FCA 243 at paras. 5 and 7, which further relies on *Re Attorney-General of Canada and Cylien*, 1973 CanLII 1163 (FCA) that deals exclusively with "decisions" and not "matters."

51. This Court's swift correction and prompt settling of any division of opinion among FCA panels is essential to restore constitutional order, to enable full access to the constitutionally guaranteed federal judicial review, and to uphold the rule of law at the federal administrative agencies.

Issue 2: What is the national and consistent approach to "irreparable harm" in the *RJR-MacDonald* framework for litigants seeking interim relief in the public interest?

52. For over a decade, a spectrum of vastly different formulations of the "irreparable harm" criteria for interlocutory relief under the *RJR-MacDonald* framework have permeated among appellate and superior courts across Canada.[57] On one end of the spectrum, the New Brunswick Court of Appeal does not require demonstration of "irreparable harm" at all.[58] On the other end, the FCA requires clear, real and not speculative evidence that irreparable harm **will** result,[59] which is on its face contrary to this Court's guidance that this factor refers to harm that **may** result.[60]

53. In between those ends of the spectrum, various provincial appellate and superior courts have treated the three *RJR-MacDonald* criteria contextually, not as watertight compartments or a checklist, but rather as interrelated factors, where the strength of one may compensate for the weakness of another. Most importantly, these middle-of-the-road courts only require that "irreparable harm" **may** result absent the interim relief. Even the Federal Court has begun to join the middle-of-the-road approach in moving away from a box-ticking exercise in favour of a contextual analysis.[61] An additional point of diversion between these courts across Canada is whether a party seeking the interim relief on behalf of the public must itself suffer the "irreparable harm" directly or this criteria may also be satisfied through a flexible application of the relevant contextual factors. These inconsistencies undermine predictability for litigants and restrict access to justice in the federal courts, calling for this Court's intervention to establish a consistent national approach.

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[57] *The Commissioner of Competition v. HarperCollins Publishers LLC, et al.*, 2017 CACT 14 [***HarperCollins***] at para. 38 (*per* Justice D. Gascon); see *Mosaic Potash Esterhazy L.P. v. Potash Corp. of Saskatchewan Inc*, 2011 SKCA 120 [***Mosaic***] paras. 51-67 for a detailed review of the spectrum of formulations, and *Vancouver Aquarium Marine Science Centre v. Charbonneau*, 2017 BCCA 395 [***Vancouver Aquarium***] at paras. 58-60 rejecting the FCA approach.

[58] *Imperial Sheet Metal Ltd. v. Landry and Gray Metal Products*, 2007 NBCA 51 at paras. 25-30.

[59] *Janssen Inc. v. Abbvie Corporation*, 2014 FCA 112 at paras. 19, 21, and 24

[60] *Tabah v. Quebec (A.G.)*, [1994] 2 SCR 339 at 359 (*per* La Forest J, in dissent on other grounds).

[61] *Letnes v. Canada (A.G.)*, 2020 FC 636 at para. 36; *Okojie v. Canada (C.I.)*, 2019 FC 880 at para. 35; and *Ahousaht First Nation v. Canada (Fisheries)*, 2019 FC 1116 at para. 51.

54. In this case, the disparity is particularly striking as the Applicant would likely have succeeded under the middle-of-the-road approach adopted in various provincial superior and appellate courts, and even the Federal Court. However, the Motions Judge applied a distinctively stringent formulation of "irreparable harm" for the *RJR-MacDonald* framework and refused any relief.

C. A Contextual Application of the *RJR-MacDonald* Framework is the Correct Approach

55. Returning to first principles, equitable doctrines are inherently contextual, flexible, not easily framed by formulas, and are based on what is just in all the circumstances.[62] The *RJR-MacDonald* framework guides a court's exercise of its equitable jurisdiction to grant interim or interlocutory relief, often on an urgent basis, before a full evidentiary record could be developed.

56. In *Google Inc. v. Equustek Solutions Inc.* [***Google***], this Court reaffirmed the centuries old principle that a court's exercise of its equitable jurisdiction to grant interim equitable relief must be based on a contextual analysis of the fundamental question of whether it would be just and equitable in the circumstances of that particular case (i.e., in the interests of justice).[63] The purpose of the *RJR-MacDonald* framework and its three interrelated factors is to assist the courts in carrying out this contextual analysis, not to bind their discretion with a specific, closed tick-box formula.

57. The contextual application of the *RJR-MacDonald* framework has been adopted by provincial appellate and superior courts across Canada,[64] and more recently even the Federal Court has

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[62] *Uber Technologies Inc. v. Heller*, 2020 SCC 16 at paras. 58 and 78; and *Soulos v. Korkontzilas*, [1997] 2 SCR 217 at para. 34; see also *Federal Courts Act*, s. 44.

[63] *Google Inc. v. Equustek Solutions Inc.*, 2017 SCC 34 at para. 23-25.

[64] *Cambie Surgeries Corporation v. British Columbia (Attorney General)*, 2019 BCCA 29 at para. 19; *Vancouver Aquarium*, *supra*, at paras. 91 and 94-5; *Nova Scotia (Minister of Health) v. J. (J.)*, 2003 NSCA 71 at para. 30; *Northway Aviation Ltd. v. Southeast Resource Development Council Corp. Ltd. et al.*, 2008 MBCA 93 at para. 19; *Livent Inc. v. Deloitte & Touche*, 2016 ONCA 395 at para. 5; *Vidéotron ltée c. Industries Microlec produits électroniques inc.*, 1987 CanLII 658 (QC CA) at para. 29; *Entreprises Jacques Despars inc. c. Pelletier*, 1992 CanLII 3130 (QC CA) at para. 13; *Wildman v. Kulyk*, 2013 SKCA 55 at para. 28; *Zipper Transportation Services ltd. v. Korstrom*, 1998 CanLII 5440 (MB CA) at para. 11; *Royal Bank of Canada v. Saulnier*, 2006 NSCA 108 at para. 9; *Govt. P.E.I. v. Summerside Seafood*, 2006 PESCAD 11 at para. 61; *Henderson v. Quinn*, 2019 NSSC 190 at para. 44; *William v. British Columbia (A.G.)*, 2019 BCCA 112 at para. 30; *Mosaic*, *supra*, at paras. 26 and 51; and *M & M Homes Inc. v. 2088556 Ontario Inc.*, 2020 ONCA 134 at para. 42.

shifted towards the contextual application of *RJR-MacDonald*, in line with the provincial courts.[65]

58. Despite this Court's guidance in *Google*, the Federal Court of Appeal remains an outlier. For decades, the FCA has adopted a mechanistic and onerous approach to this Court's *RJR-MacDonald* framework in three respects: first, the factors have been treated as tick-box formulas;[66] second, the level of certainty and the quality of evidence to demonstrate "irreparable harm" is distinctly more onerous than what is required in the provincial courts;[67] and third, the "irreparable harm" must be suffered by the person seeking interim relief, with a narrow exception for registered charities.[68]

59. The FCA's approach of requiring litigants to prove "irreparable harm" at the outset with a high degree of certainty defeats the very objective of making interim equitable relief available to litigants, because fact finding at the interlocutory stage is necessarily speculative in nature.[69] Such an onerous approach creates a threshold that arguably can never be met, and undermines the role of equity in balancing which party may suffer greater harm if the relief were to be granted, tips the balance heavily against moving parties, and risks that interim relief could be denied even when the possible harm to the moving party outweighs any potential harm to the non-moving party.[70]

60. The wisdom of the contextual approach is apparent in cases affecting the public interest, where a mechanistic requirement that the moving party suffer the "irreparable harm" can practically

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[65] *Letnes v. Canada (Attorney General)*, 2020 FC 636 at para. 36; *Okojie v. Canada (Citizenship and Immigration)*, 2019 FC 880 at para. 35; *Ahousaht First Nation v. Canada (Fisheries, Oceans and Coast Guard)*, 2019 FC 1116 at para. 51; *Robinson v. Canada (Attorney General)*, 2019 FC 876 at para. 67; *Namgis First Nation v. Canada (Fisheries, Oceans and Coast Guard)*, 2018 FC 334 at para. 98; *Baciu v. Canada (Citizenship and Immigration)*, 2020 FC 7 at para. 10; *Awashish v. Conseil des Atikamekw d'Opitciwan*, 2019 FC 1131 at para. 11; and *British Columbia (Attorney General) v. Alberta (Attorney General)*, 2019 FC 1195 at paras. 96-97.

[66] *Ahlul-Bayt Centre, Ottawa v. Canada (N.R.)*, 2018 FCA 61 at para. 8; *Canada (A.G.) v. Oshkosh Defense Canada Inc.*, 2018 FCA 102 at para. 21; *Western Oilfield Equipment Rentals Ltd. v. M-I L.L.C.*, 2020 FCA 3 at paras. 6-7; and *Janssen Inc. v. Abbvie Corporation*, 2014 FCA 112 at paras. 13-14. See also *HarperCollins*, *supra* at paras. 35 and 56.

[67] Norman Siebrasse, Interlocutory Injunctions and Irreparable Harm in the Federal Courts, 2010 88-3 Canadian Bar Review 515, 2010 CanLIIDocs 93 [**Bar Review Article**], cited with approval in *Mosaic*, *supra*, at paras. 58-59; *HarperCollins*, *supra* at paras. 38 and 56.

[68] *Glooscap Heritage Society v. M.N.R.*, 2012 FCA 255 at paras. 33-34.

[69] *Mosaic*, *supra*, at para. 59; and Bar Review Article, *supra*, p. 523.

[70] Bar Review Article, *supra*, pp. 525 and 529.

never be met.[71] Under this approach, the fairly low threshold[72] for "irreparable harm" may be met by harm to the community at large instead of narrowly focusing on the moving party, or by showing impropriety of an administrative act, or otherwise relaxed when monetary damages are not sought.[73]

61. The FCA's approach has been impeding interlocutory relief for litigants in all matters within the federal courts' jurisdiction, such as intellectual property, immigration, and admiralty. This Court's guidance could restore access to such relief as intended in the *Federal Courts Act*.

D. The Motions Judge Erred by Failing to Follow the Contextual Approach

62. The Motions Judge's reasons manifested all of the indicia of the FCA's mechanistic and onerous approach in assessing the "irreparable harm" factor under the *RJR-MacDonald* framework.[74] The Motion Judge erred by failing to apply the contextual approach and overlooking the public interest nature of the proceedings and proposed relief, thereby creating a cascading effect.

63. Had the Motions Judge taken into account the *Wall*-test and the public interest nature of the relief sought, she would have granted the relief under a contextual analysis.

i. The *RJR-MacDonald* factors are not cumulative tick-boxes

64. The Motions Judge treated the *RJR-MacDonald* factors as cumulative tick-boxes, each of which must be met separately.[75] By so doing, the Motions Judge overlooked the public interest dimension of the case, which allows for the strong merits of the case and/or the obvious improprieties of the administrative acts to make up for perceived frailties to the "irreparable harm" aspect.[76]

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[71] *Vancouver Aquarium*, *supra*, at paras. 92-93.

[72] *Mosaic*, *supra*, at para. 61; and Bar Review Article, pp. 528 and 533.

[73] *Newlab Clinical Research Inc. v. N.A.P.E.*, 2003 NLSCTD 167 at paras. 42-44 and 49; *Island Telephone Company, Re*, 1987 CanLII 192 (PE SCAD); *N.A.P.E. v. Western Regional Integrated Health Authority*, 2008 NLTD 20 at para. 9; *Cambie Surgeries Corp. v. B.C. (A.G.)*, 2018 BCSC 2084 at paras. 123-124; leave to appeal ref'd: 2019 BCCA 29 at paras. 18-19; *PT v. Alberta*, 2019 ABCA 158 at para. 69; *Edmonton Northlands v. Edmonton Oilers Hockey Club*, 1993 CanLII 7234 (AB QB) at para. 85; affirmed: 1994 ABCA 90; and *M & M Homes Inc. v. 2088556 Ontario Inc.*, 2020 ONCA 134 at para. 42.

[74] See paragraph 58 on page 44.

[75] FCA Reasons at para. 15 [Tab 2, p. 10].

[76] See paragraph 60 on page 44.

65. The cascading error from the Motions Judge's approach is that she also fettered her discretion in failing to consider where the balance of convenience lied in this case.[77] The balance of convenience is key for assessing whether it is "just or convenient" in the circumstances,[78] a principle of equity that Parliament enshrined in ss. 18.2 and 44 of the *Federal Courts Act*.

66. Had the Motions Judge considered the balance of convenience, she would have reached the inevitable conclusion that this factor favoured granting the relief. There was no evidence before the Motions Judge of any inconvenience or harm to the Agency or any persons in granting the interim relief preserving the *status quo* that ensued before the Agency engaged in the impugned acts.

ii. "Irreparable harm" may be demonstrated by risk of harm to the public

67. The Motions Judge erred in law by holding that "**only** harm suffered **by the party** seeking the injunction will qualify" as irreparable harm under the *RJR-MacDonald* framework. There are two difficulties with this proposition. First, this Court held that "[h]arm is generally viewed from **the standpoint of the person seeking to benefit** from the interlocutory relief," which implies that the harm does not have to be suffered by the party seeking the relief before the court.[79]

68. Second, and more importantly, parties that seek relief for the public benefit or the benefit of others would not themselves be suffering the alleged harm. Frequently, those at risk of suffering the harm, and in turn, benefiting from the requested interlocutory relief, are the most vulnerable who would be unable, incapable, or inexperienced in advancing the grievance themselves.[80] The Motion Judge's narrow interpretation of "irreparable harm" therefore can arguably never be met in litigation that transcends the interest of the parties, foreclosing interlocutory relief for such litigation in the federal courts. As this Court confirmed in *Delta Air Lines v. Lukács*, the imposition of a legal test that can arguably never be met is unreasonable, and such a test should not be applied.[81]

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[77] FCA Reasons at para. 38 [Tab 2, p. 17].
[78] Bar Review Article, *supra*, pp. 520, 523, 528, 534, and 539.
[79] *PT v. Alberta*, 2019 ABCA 158 at para. 50, following *Tabah v. Quebec (A.G.)*, [1994] 2 SCR 339 at 359 (*per* La Forest J, in dissent on other grounds).
[80] *Richard v. Time Inc.*, 2012 SCC 8 at paras. 36-37, 72, and 74; *Canada (A. G.) v. Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45 at paras. 71 and 73-74.
[81] *Delta Air Lines v. Lukács*, 2018 SCC 2 at paras. 17-18.

69. The FCA's stringent approach is exhibited by its recognition of only one exception to the rule that "only harm suffered by the party seeking the injunction will qualify." The FCA narrowly permits registered charities to rely on risk of harm to persons that depend on that charity.[82] There is no reason why the same exception should not apply to a non-profit entity, such as the Applicant.

70. The correct and equitable approach to "irreparable harm" would be to assess the risk of harm to the beneficiaries, or group of beneficiaries, that the interlocutory relief seeks to protect or benefit.[83] For example, "irreparable harm" was previously assessed from the perspective of the beneficiaries, such as the risk of harm to children, when parents, grandparents, or a school board applied for relief.[84]

71. Had the Motions Judge turned her mind to the contextual approach and this Court's guidance, she would have found that when a non-profit advocacy organization, like the Applicant, seeks relief to benefit consumers, the risk of harm should be assessed from the consumers' perspective.

iii. "Irreparable harm" concerns assessment of risks, not absolute certainties

72. The Motions Judge required the Applicant to "demonstrate with clear and **non-speculative evidence** that it **will suffer** irreparable harm."[85] That approach to the evidentiary threshold and the level of certainty of the harm the evidence should demonstrate detracts from the equitable objective underlying interlocutory relief. The exercise of equitable jurisdiction on an interlocutory basis is comprised of balancing and minimizing risks of harm pending final adjudication, and is not about making conclusive findings based on certainties.[86] Irreparable harm concerns **risks** of what harms might occur in the future, which cannot be predicted with certainty.[87] A requirement for proof with certainty of the harm occurring is an impossible burden, which therefore should not be applied.[88]

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[82] *Glooscap Heritage Society v. M.N.R.*, 2012 FCA 255 at paras. 33-34.
[83] *Tabah v. Quebec (A.G.)*, [1994] 2 SCR 339 at 360 (*per* La Forest J, in dissent on other grounds).
[84] *C.D. v. A.B.*, 2004 CanLII 43691 (NB CA) at para. 28; and *Whitecourt Roman Catholic Separate School District No. 94 v. Alberta*, 1995 ABCA 260 at para. 29.
[85] FCA Reasons at para. 28 [Tab 2, p. 14].
[86] *Mosaic*, *supra*, at paras. 58-60; see also paragraph 59 on page 44 above.
[87] *Minister of Community Services v. B.F.*, 2003 NSCA 125 at para. 19; and *C.D. v. A.B.*, 2004 CanLII 43691 (NB CA) at para. 30.
[88] *Manto v. Canada (IRC)*, 2018 FC 335 at para. 22; *Wang v. Luo*, 2002 ABCA 224 at para. 17.

73. The Motions Judge erred by finding that the mere *theoretical* possibility of *individual* passengers bringing separate recourses rendered the alleged *aggregate* harm to every passenger reparable.[89] This Court has cautioned that consideration be given to *realistic* alternative recourses that are practically, not merely in theory, possible.[90] The Motions Judge did not heed that caution.

74. The Motions Judge did not appreciate that average passengers are not legally savvy and are unable to pierce through deceptions on their own.[91] Such passengers trust and rely on the Agency's Publications' accuracy, unaware that those Publications enabled air carriers to deceive passengers and to trample upon their rights. Even if a passenger were to break through the cloud of deceit, it would be unworkable for them to retain counsel for individual claims.[92] Furthermore, it is impractical for a self-represented passenger to advance complex bias arguments before the Agency or to individually challenge the Agency's conduct via a leave to appeal motion to the FCA.

iv. Injunction: Most effective consumer and public interest remedy

75. Courts have recognized the principle that "information is power" (*scientia potestas est*).[93] Conversely, disinformation is an abuse of that power, to the prejudice of its audiences, which can lead to serious ramifications and repercussions for the audiences and the public.[94] In the consumer context, misinformed consumers are at risk of their legal rights being trampled upon without their knowledge,[95] which is precisely what this interlocutory injunction seeks to protect against.

76. In this instance, the Motions Judge stated that any proliferation of misinformation from the Agency (i.e., the Publications) and the travel industry quoting or relying on the Agency's publications can be adequately "repaired" by passengers later seeking separate recourse against those third parties.[96] The Motions Judge's finding is unsupportable in law or logic in three respects.

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[89] FCA Reasons at paras. 36-37 [Tab 2, pp. 16-17].
[90] *Canada (A. G.) v. Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45 at para. 51.
[91] *Richard v. Time Inc.*, 2012 SCC 8 at paras. 36-37, 72, and 74.
[92] *AIC Limited v. Fischer*, 2013 SCC 69 at para. 27.
[93] *Cote v. Canada (Treasury Board)*, 1993 CanLII 9382 (FCA) at para. 15.
[94] Lee, Newton. "Misinformation and Disinformation," in Newton Lee, ed., *Facebook Nation: Total Information Awareness*, 2nd ed. Springer, 2014. [Tab 12, pp. 269, 279, and 280]; and *Stagg v. Condominium Plan No. 882-2999*, 2013 ABQB 684 at para. 50.
[95] *Richard v. Time Inc.*, 2012 SCC 8 at paras. 36-37, 72, and 74.
[96] FCA Reasons at para. 37 [Tab 2, p. 17].

77. Firstly, the Motions Judge overlooked the difficulty, if not impossibility, of tracking and tracing the effects of disinformation after the fact, especially considering the sheer number of passengers.[97] Secondly, the Motions Judge failed to adhere to this Court's guidance on the primacy of injunctions as the most efficient remedy in protection of vulnerable consumers and deterrence of wrongful conduct against them.[98] Thirdly, the Motions Judge's approach is tantamount to holding that disinformation should not be swiftly curtailed and corrected at its source (i.e., the Agency), but rather should be addressed through relief against the multitude of third persons that proliferate it.

PART IV – SUBMISSIONS CONCERNING COSTS

78. The Applicant seeks its costs, or alternatively, disbursements only. The Applicant also asks that considering the public interest nature of the issues raised, no costs be awarded against it.

PART V – ORDER SOUGHT

79. The Applicant seeks an order granting leave to appeal, or alternatively, an order remanding the case to a five-judge panel of the Federal Court of Appeal for re-hearing, pursuant to subsection 43(1.1) of the *Supreme Court Act*, with an order for a *de novo* review whether the subject administrative action could be amenable to judicial review and the Federal Court of Appeal's formulation of the *RJR-Macdonald* test for interlocutory relief.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 3rd day of August, 2020.

Simon Lin

SIMON LIN
Counsel for the Applicant,
Air Passenger Rights

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[97] *Bell Canada v. Cogeco Cable Canada*, 2016 ONSC 6044 at para. 37; and *B.C. Tel Mobility Cellular Inc. v. Rogers Cantel Inc.*, 1995 CanLII 1679 (BC SC) at para. 31.

[98] *Seidel v. TELUS Communications Inc.*, 2011 SCC 15 at para. 35.

PART VI – TABLE OF AUTHORITIES

PART VII

STATUTES AND REGULATIONS WITHOUT HYPERLINKS

CHAPTER 1†

An Act respecting the Federal Court of Canada

[*Assented to 3rd December, 1970*]

Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:

SHORT TITLE

Short title

1. This Act may be cited as the *Federal Court Act*.

INTERPRETATION

Definitions

2. In this Act,

"Associate Chief Justice"

(*a*) "Associate Chief Justice" means the Associate Chief Justice of the Court;

"Canadian maritime law"

(*b*) "Canadian maritime law" means the law that was administered by the Exchequer Court of Canada on its Admiralty side by virtue of the *Admiralty Act* or any other statute, or that would have been so administered if that Court had had, on its Admiralty side, unlimited jurisdiction in relation to maritime and admiralty matters, as that law has been altered by this or any other Act of the Parliament of Canada;

"Chief Justice"

(*c*) "Chief Justice" means the Chief Justice of the Court;

"Court" or "Federal Court"

(*d*) "Court" or "Federal Court" means the Federal Court of Canada;

"Court of Appeal" or "Federal Court of Appeal"

(*e*) "Court of Appeal" or "Federal Court of Appeal" means that division of the Court referred to as the Court of Appeal or Federal Court of Appeal by this Act;

† *See* R.S.C., 1970 (2nd Supp.), c. 10.

19 ELIZABETH II

CHAPITRE 1†

Loi concernant la Cour fédérale du Canada

[*Sanctionnée le 3 décembre 1970*]

Sa Majesté, sur l'avis et du consentement du Sénat et de la Chambre des communes du Canada, décrète:

TITRE ABRÉGÉ

Titre abrégé

1. La présente loi peut être citée sous le titre: *Loi sur la Cour fédérale.*

INTERPRÉTATION

Définitions

2. Dans la présente loi,

«juge en chef adjoint»

a) «juge en chef adjoint» désigne le juge en chef adjoint de la Cour;

«droit maritime canadien»

b) «droit maritime canadien» désigne le droit dont l'application relevait de la Cour de l'Échiquier du Canada, en sa juridiction d'amirauté, en vertu de la *Loi sur l'Amirauté* ou de quelque autre loi, ou qui en aurait relevé si cette Cour avait eu, en sa juridiction d'amirauté, compétence illimitée en matière maritime et d'amirauté, compte tenu des modifications apportées à ce droit par la présente loi ou par toute autre loi du Parlement du Canada;

«juge en chef»

c) «juge en chef» désigne le juge en chef de la Cour;

«Cour» ou «Cour fédérale»

d) «Cour» ou «Cour fédérale» désigne la Cour fédérale du Canada;

«Cour d'appel» ou «Cour d'appel fédérale»

e) «Cour d'appel» ou «Cour d'appel fédérale» désigne la division de la Cour appelée Cour d'appel ou Cour d'appel fédérale;

† *Voir* S.R.C. de 1970 (2e Supp.), c. 10.

"Crown" (*f*) "Crown" means Her Majesty in right of Canada;

"Federal board, commission or other tribunal" (*g*) "federal board, commission or other tribunal" means any body or any person or persons having, exercising or purporting to exercise jurisdiction or powers conferred by or under an Act of the Parliament of Canada, other than any such body constituted or established by or under a law of a province or any such person or persons appointed under or in accordance with a law of a province or under section 96 of *The British North America Act, 1867*;

"Final judgment" (*h*) "final judgment" means any judgment or other decision that determines in whole or in part any substantive right of any of the parties in controversy in any judicial proceeding;

"Judge" (*i*) "judge" means a judge of the Court and includes the Chief Justice and Associate Chief Justice;

"Laws of Canada" (*j*) "laws of Canada" has the same meaning as those words have in section 101 of *The British North America Act, 1867*;

"Practice and procedure" (*k*) "practice and procedure" includes evidence relating to matters of practice and procedure;

"Property" (*l*) "property" means property of any kind whether real or personal, movable or immovable or corporeal or incorporeal and, without restricting the generality of the foregoing, includes a right of any kind, a share or a chose in action;

"Relief" (*m*) "relief" includes every species of relief whether by way of damages, payment of money, injunction, declaration, restitution of an incorporeal right, return of land or chattels or otherwise;

"Rules" (*n*) "Rules" means provisions of law and rules and orders made under section 46 or continued in force by subsection (6) of section 62;

"Ship" (*o*) "ship" includes any description of vessel or boat used or designed for use in navigation without regard to method or lack of propulsion;

f) «Couronne» désigne Sa Majesté du chef du Canada; «Couronne»

g) «office, commission ou autre tribunal fédéral» désigne un organisme ou une ou plusieurs personnes ayant, exerçant ou prétendant exercer une compétence ou des pouvoirs conférés par une loi du Parlement du Canada ou sous le régime d'une telle loi, à l'exclusion des organismes de ce genre constitués ou établis par une loi d'une province ou sous le régime d'une telle loi ainsi que des personnes nommées en vertu ou en conformité du droit d'une province ou en vertu de l'article 96 de l'*Acte de l'Amérique du Nord britannique, 1867*; «office, commission ou autre tribunal fédéral»

h) «jugement final» désigne tout jugement ou toute autre décision qui statue en totalité ou en partie sur le fond au sujet d'un droit d'une ou plusieurs des parties à une procédure judiciaire; «jugement final»

i) «juge» désigne un juge de la Cour, y compris le juge en chef et le juge en chef adjoint; «juge»

j) «droit du Canada» a le sens donné, à l'article 101 de l'*Acte de l'Amérique du Nord britannique, 1867*, à l'expression «Laws of Canada» traduite par l'expression «lois du Canada» dans les versions françaises de cet Acte; «droit du Canada»

k) «pratique et procédure» s'entend également de la preuve relative aux questions de pratique et de procédure; «pratique et procédure»

l) «bien» désigne n'importe quelle sorte de bien, mobilier ou immobilier, corporel ou incorporel, et notamment, sans restreindre la portée générale de ce qui précède, un droit de n'importe quelle nature, une part ou un droit d'action; «bien»

m) «redressement» comprend toute espèce de redressement judiciaire, qu'il soit sous forme de dommages-intérêts, de paiement d'argent, d'injonction, de déclaration, de restitution d'un droit incorporel, de restitution d'un bien mobilier ou immobilier, ou sous une autre forme; «redressement»

n) «Règles» désigne les règles et ordonnances établies en vertu de l'article 46 ou qui demeurent en vigueur aux termes du paragraphe (6) de l'article 62, ainsi «Règles»

"Supreme Court"

(*p*) "Supreme Court" means the Supreme Court of Canada; and

"Trial Division"

(*q*) "Trial Division" means that division of the Court called the Federal Court—Trial Division.

que toute autre disposition du droit en la matière;

«navire»

o) «navire» comprend toute espèce de bâtiment ou bateau utilisé ou conçu pour la navigation, indépendamment de son mode de propulsion ou même s'il n'en a pas;

«Cour suprême»

p) «Cour suprême» désigne la Cour suprême du Canada; et

«Division de première instance»

q) «Division de première instance» désigne la division de la Cour appelée Division de première instance de la Cour fédérale.

THE COURT

LA COUR

Original Court continued

3. The court of law, equity and admiralty in and for Canada now existing under the name of the Exchequer Court of Canada is hereby continued under the name of the Federal Court of Canada as an additional court for the better administration of the laws of Canada and shall continue to be a superior court of record having civil and criminal jurisdiction.

Maintien du tribunal existant

3. Le tribunal de *common law*, d'*equity* et d'amirauté du Canada existant actuellement sous le nom de Cour de l'Échiquier du Canada est maintenu sous le nom de Cour fédérale du Canada, en tant que tribunal supplémentaire pour la bonne application du droit du Canada, et demeure une cour supérieure d'archives ayant compétence en matière civile et pénale.

Court to consist of two divisions

4. The Federal Court of Canada shall hereafter consist of two divisions, called the Federal Court—Appeal Division (which may be referred to as the Court of Appeal or Federal Court of Appeal) and the Federal Court—Trial Division.

La Cour est formée de deux divisions

4. La Cour fédérale du Canada est désormais formée de deux divisions appelées Division d'appel de la Cour fédérale qui peut être appelée Cour d'appel ou Cour d'appel fédérale et Division de première instance de la Cour fédérale.

THE JUDGES

LES JUGES

Constitution of Court

5. (1) The Federal Court of Canada shall consist of the following judges:

(*a*) a chief justice called the Chief Justice of the Federal Court of Canada, who shall be the president of the Court, shall be the president of and a member of the Court of Appeal and shall be *ex officio* a member of the Trial Division;

(*b*) an associate chief justice called the Associate Chief Justice of the Federal Court of Canada, who shall be the president of and a member of the Trial Division and shall be *ex officio* a member of the Court of Appeal; and

Composition de la Cour

5. (1) La Cour fédérale du Canada est composée des juges suivants:

a) un juge en chef, appelé juge en chef de la Cour fédérale du Canada, qui est président de la Cour, président et membre de la Cour d'appel et membre de droit de la Division de première instance;

b) un juge en chef adjoint, appelé juge en chef adjoint de la Cour fédérale du Canada, qui est président et membre de la Division de première instance et qui est membre de droit de la Cour d'appel; et

Extra-ordinary remedies

18. The Trial Division has exclusive original jurisdiction

(*a*) to issue an injunction, writ of *certiorari,* writ of prohibition, writ of *mandamus* or writ of *quo warranto,* or grant declaratory relief, against any federal board, commission or other tribunal; and

(*b*) to hear and determine any application or other proceeding for relief in the nature of relief contemplated by paragraph (*a*), including any proceeding brought against the Attorney General of Canada, to obtain relief against a federal board, commission or other tribunal.

Recours extraordinaires

18. La Division de première instance a compétence exclusive en première instance

a) pour émettre une injonction, un bref de *certiorari,* un bref de *mandamus,* un bref de prohibition ou un bref de *quo warranto,* ou pour rendre un jugement déclaratoire, contre tout office, toute commission ou tout autre tribunal fédéral; et

b) pour entendre et juger toute demande de redressement de la nature de celui qu'envisage l'alinéa *a*), et notamment toute procédure engagée contre le procureur général du Canada aux fins d'obtenir le redressement contre un office, une commission ou à un autre tribunal fédéral.

Inter-governmental disputes

19. Where the legislature of a province has passed an Act agreeing that the Court, whether referred to in that Act by its new name or by its former name, has jurisdiction in cases of controversies,

(*a*) between Canada and such province, or

(*b*) between such province and any other province or provinces that have passed a like Act,

the Court has jurisdiction to determine such controversies and the Trial Division shall deal with any such matter in the first instance.

Différends entre gouvernements

19. Lorsque l'assemblée législative d'une province a adopté une loi reconnaissant que la Cour, qu'elle y soit désignée sous son nouveau ou son ancien nom, a compétence dans les cas de litige

a) entre le Canada et cette province, ou

b) entre cette province et une ou plusieurs autres provinces ayant adopté une loi au même effet,

la Cour a compétence pour juger ces litiges et la Division de première instance connaît de ces questions en première instance.

Industrial property

20. The Trial Division has exclusive original jurisdiction as well between subject and subject as otherwise,

(*a*) in all cases of conflicting applications for any patent of invention, or for the registration of any copyright, trade mark or industrial design, and

(*b*) in all cases in which it is sought to impeach or annul any patent of invention, or to have any entry in any register of copyrights, trade marks or industrial designs made, expunged, varied or rectified,

and has concurrent jurisdiction in all other cases in which a remedy is sought under the authority of any Act of the Parliament of Canada or at law or in equity, respecting

Propriété industrielle

20. La Division de première instance a compétence exclusive en première instance, tant entre sujets qu'autrement,

a) dans tous les cas où des demandes de brevet d'invention ou d'enregistrement d'un droit d'auteur, d'une marque de commerce ou d'un dessin industriel sont incompatibles, et

b) dans tous les cas où l'on cherche à faire invalider ou annuler un brevet d'invention ou insérer, rayer, modifier ou rectifier une inscription dans un registre des droits d'auteur, des marques de commerce ou des dessins industriels,

et elle a compétence concurrente dans tous les autres cas où l'on cherche à obtenir un redressement en vertu d'une

(*b*) in the case of any other judgment within thirty days (in the calculation of which July and August shall be excluded),

from the pronouncement of the judgment appealed from or within such further time as the Trial Division may, either before or after the expiry of those ten or thirty days, as the case may be, fix or allow.

b) dans le cas de tout autre jugement, dans les trente jours (les mois de juillet et août devant être exclus pour le calcul de ce délai),

à compter du prononcé du jugement dont il est fait appel ou dans le délai supplémentaire que la Division de première instance peut, soit avant, soit après l'expiration de ces dix ou trente jours, selon le cas, fixer ou accorder.

Service

(3) All parties directly affected by the appeal shall be served forthwith with a true copy of the notice of appeal and evidence of service thereof shall be filed in the Registry of the Court.

Signification

(3) Une copie certifiée conforme de l'avis d'appel doit être immédiatement signifiée à toutes les parties directement intéressées dans l'appel et la preuve de cette signification doit être déposée au greffe de la Cour.

Final judgment

(4) For the purposes of this section a final judgment includes a judgment that determines a substantive right except as to some question to be determined by a referee pursuant to the judgment.

Jugement final

(4) Aux fins du présent article, un jugement final comprend notamment un jugement qui statue sur le fond au sujet d'un droit, à l'exception d'un point litigieux laissé à la décision ultérieure d'un arbitre qui doit statuer en conformité du jugement.

Review of decisions of federal board, commission or other tribunal

28. (1) Notwithstanding section 18 or the provisions of any other Act, the Court of Appeal has jurisdiction to hear and determine an application to review and set aside a decision or order, other than a decision or order of an administrative nature not required by law to be made on a judicial or quasi-judicial basis, made by or in the course of proceedings before a federal board, commission or other tribunal, upon the ground that the board, commission or tribunal

(*a*) failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction;

(*b*) erred in law in making its decision or order, whether or not the error appears on the face of the record; or

(*c*) based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it.

Examen des décisions d'un office, d'une commission ou d'un autre tribunal fédéral

28. (1) Nonobstant l'article 18 ou les dispositions de toute autre loi, la Cour d'appel a compétence pour entendre et juger une demande d'examen et d'annulation d'une décision ou ordonnance, autre qu'une décision ou ordonnance de nature administrative qui n'est pas légalement soumise à un processus judiciaire ou quasi judiciaire, rendue par un office, une commission ou un autre tribunal fédéral ou à l'occasion de procédures devant un office, une commission ou un autre tribunal fédéral, au motif que l'office, la commission ou le tribunal

a) n'a pas observé un principe de justice naturelle ou a autrement excédé ou refusé d'exercer sa compétence;

b) a rendu une décision ou une ordonnance entachée d'une erreur de droit, que l'erreur ressorte ou non à la lecture du dossier; ou

c) a fondé sa décision ou son ordonnance sur une conclusion de fait erronée, tirée de façon absurde ou arbitraire ou sans tenir compte des éléments portés à sa connaissance.

When application may be made

(2) Any such application may be made by the Attorney General of Canada or any party directly affected by the decision or order by filing a notice of the application in the Court within ten days of the time the decision or order was first communicated to the office of the Deputy Attorney General of Canada or to that party by the board, commission or other tribunal, or within such further time as the Court of Appeal or a judge thereof may, either before or after the expiry of those ten days, fix or allow.

Délai de présentation de la demande

(2) Une demande de ce genre peut être faite par le procureur général du Canada ou toute partie directement affectée par la décision ou l'ordonnance, par dépôt à la Cour d'un avis de la demande dans les dix jours qui suivent la première communication de cette décision ou ordonnance au bureau du sous-procureur général du Canada ou à cette partie par l'office, la commission ou autre tribunal, ou dans le délai supplémentaire que la Cour d'appel ou un de ses juges peut, soit avant soit après l'expiration de ces dix jours, fixer ou accorder.

Trial Division deprived of jurisdiction

(3) Where the Court of Appeal has jurisdiction under this section to hear and determine an application to review and set aside a decision or order, the Trial Division has no jurisdiction to entertain any proceeding in respect of that decision or order.

Cas où la Division de première instance n'a pas compétence

(3) Lorsque, en vertu du présent article, la Cour d'appel a compétence pour entendre et juger une demande d'examen et d'annulation d'une décision ou ordonnance, la Division de première instance est sans compétence pour connaître de toute procédure relative à cette décision ou ordonnance.

Reference to Court of Appeal

(4) A federal board, commission or other tribunal to which subsection (1) applies may at any stage of its proceedings refer any question or issue of law, of jurisdiction or of practice and procedure to the Court of Appeal for hearing and determination.

Renvoi à la Cour d'appel

(4) Un office, une commission ou un autre tribunal fédéral auxquels s'applique le paragraphe (1) peut, à tout stade de ses procédures, renvoyer devant la Cour d'appel pour audition et jugement, toute question de droit, de compétence ou de pratique et procédure.

Hearing in summary way

(5) An application or reference to the Court of Appeal made under this section shall be heard and determined without delay and in a summary way.

Procédure sommaire d'audition

(5) Les demandes ou renvois à la Cour d'appel faits en vertu du présent article doivent être entendus et jugés sans délai et d'une manière sommaire.

Limitation on proceedings against certain decisions or orders

(6) Notwithstanding subsection (1), no proceeding shall be taken thereunder in respect of a decision or order of the Governor in Council, the Treasury Board, a superior court or the Pension Appeals Board or in respect of a proceeding for a service offence under the *National Defence Act*.

Restriction relative aux procédures d'opposition à certaines décisions ou ordonnances

(6) Nonobstant le paragraphe (1), aucune procédure ne doit être instituée sous son régime relativement à une décision ou ordonnance du gouverneur en conseil, du conseil du Trésor, d'une cour supérieure ou de la Commission d'appel des pensions ou relativement à une procédure pour une infraction militaire en vertu de la *Loi sur la défense nationale*.

Where decision not to be restrained

29. Notwithstanding sections 18 and 28, where provision is expressly made by an Act of the Parliament of Canada for an appeal as such to the Court, to the Supreme Court, to the Governor in Council or to the Treasury Board from a decision or order

Cas où il ne doit pas être mis obstacle à la décision

29. Nonobstant les articles 18 et 28, lorsqu'une loi du Parlement du Canada prévoit expressément qu'il peut être interjeté appel, devant la Cour, la Cour suprême, le gouverneur en conseil ou le conseil du Trésor, d'une décision ou ordonnance d'un