Court File No: A-102-20

FEDERAL COURT OF APPEAL

BETWEEN:

AIR PASSENGER RIGHTS

Applicant

- and -

CANADIAN TRANSPORTATION AGENCY

Respondent

APPLICANT'S REPLY ON COSTS OF THE INTERLOCUTORY INJUNCTIONS MOTION

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TO : **CANADIAN TRANSPORTATION AGENCY**

1. The Agency attempts to subvert their response submissions to the Applicant's costs request to re-litigate issues that have already been decided in three separate Orders of this Court. The Agency also invites this Court to decide new substantive issues, and to upend decades of jurisprudence on costs, all based on the Agency's misstatement of the facts, and unexplained omissions of case law from all levels of the federal courts.[1]

The Agency is re-litigating the decided issue on whether the motion had merit

2. The Agency's assertion at paras. 5-6 that the Applicant's motion was completely devoid of merit is fully answered by three separate Orders of this Court. The Agency is now seeking to reopen the Court's rulings, contrary to the centuries old *functus* principle.

    a. On April 9, 2020, Pelletier J.A. held that "**WHEREAS** while the matters raised in the Notice of Application are important…" [emphasis added] and granted leave to refile the interlocutory motion upon filing proof of service.

    b. On April 16, 2020, Locke J.A. concluded that there was genuine urgency in hearing the motion and found that it was in the interest of justice to expedite it, despite the COVID-19 suspensions, which completely answers para. 11 of the Agency's re-argument about the motion not being an urgent matter.

    c. On May 22, 2020, at paras. 16-17 of the reasons, when addressing the merits for a prohibitory order, the Court proceeded on the basis that the claim that the Agency members demonstrating a reasonable apprehension of bias raised a serious issue (i.e., it was neither frivolous nor vexatious).

The Agency is (re)arguing substantive issues not before this Honourable Court

3. Firstly, at paras. 7-9, the Agency invites this Court to summarily conclude that "*the Applicant was not acting in the public interest*" because a preliminary motion was not filed. The Agency ignores the settled principle that "*a party may assert standing when an application is commenced, and need not seek it by preliminary motion.*"[2] Similar to the Agency's purported motion to strike, the standing test was not before the Court.[3]

4. Secondly, the Court's ruling on the strong *prima facie* merits focused on the narrow threshold legal question of whether the subject administrative action was amenable to judicial review (i.e., if the Agency Statement purported to affect rights, etc.).[4] In light of the threshold ruling, the Court did not rule on any (im)propriety of the Agency's conduct, including the veracity of the Agency's Statement and subsequent FAQ "clarification." However, at para. 8, the Agency now invites the Court to extend the legal ruling to include a finding that "*the motion therefore did not raise any issues of public interest*".

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[1] The Agency's omissions of case law were raised in paras. 35 and 57 of the Reply on the Motion.
[2] *Canadian Council for Refugees v. Canada (Immigration, Refugees and Citizenship)*, 2017 FC 1131 at paras. 19-21, citing *Finlay v Canada (Minister of Finance)*, 1986 CanLII 6 (SCC) **[BOA Tabs 1-2].**
[3] *Judgment* at para. 39 **[BOA Tab 3].**
[4] *Judgment* at paras. 20 and 22 **[BOA Tab 3].**

5. Notably, the Agency inexplicably omits the obvious *practical* effects on the passengers from the Agency's conduct, all documented in the very exhibit the Agency relies on "[Global News'] *Consumer Matters has heard from countless airline passengers who've been frustrated by airlines refusing to offer refunds based on the CTA's statement on vouchers*." Furthermore, the Agency's invitation also ignores this Court's comments that the serious passenger claims alleged by the Applicant may be raised by alternative means.[5] In other words, the passenger issues are important, but they may simply not be amendable to judicial review at this time under s. 18.1 of the *Federal Courts Act*.

6. Thirdly, at para. 6, the Agency invites the Court to make a new finding that the motion was a means to garner publicity. The Agency again misquotes Dr. Lukacs's unsolicited media interview.[6] The substance of Dr. Lukacs's comments on the Agency's subsequent FAQ "clarification" is seen from a proper reading of the article: "*In terms of the public, this is a positive development because I've seen the original statement on vouchers being used by airlines… It is a strategic move on their part to try and save face...The* [Agency] *now acknowledges that what they put out before was misleading.*"[7]

The Agency irrevocably waived any request for costs on the motion

7. It is settled law in the federal courts that a party is not entitled to costs unless they were requested:[8] (1) in the pleading (i.e., Notice of Application or Notice of Motion); (2) in the written submissions (i.e., memorandum or written representations); and/or (3) at the very latest and also at the presiding judge's discretion, in the oral hearing.

8. Under Rule 366, the Agency was required to file a responding memorandum and, under Rule 70(1)(d), to elect whether it seeks costs.[9] The Agency chose not to seek costs.

9. In its Reply, the Applicant requested leave to make separate submissions to address the Applicant's request for costs, to enable expeditious determination of the merits of the motion. Even then, the Agency did not ask to "re-elect" on its own waiver of costs. The Agency is now seeking to reopen a settled issue, amend their motion record, and also backtrack on their election. The "hearing" concluded on May 22, 2020. The Agency's purported "request" for costs is inconveniently raised two weeks *after* the hearing concluded, and also *after* the Applicant's cost submissions, when the Court was already *functus* on any possible requests for costs on the motion from the Agency.

10. At para. 16 of their submissions, the Agency cites *Chen v. Canada* for the proposition that "*the discretion of the Court to award costs is unfettered*." The Agency miscited this Court's ruling. This Court's *ratio* was that the Court's discretion to award costs is not

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[5] *Judgment* at paras. 36-37 **[BOA Tab 3]**; see also Order of Locke J.A. **[BOA Tab 4].**
[6] See para. 23 of the Applicant's Motion Reply where the Agency's misstatement was already raised.
[7] See the Global News article relied on by the Agency at footnote 5 of their responding cost submissions.
[8] *MacDonald v. Canada*, 2016 FC 186 at para. 74; *Pascal v. Canada*, 2005 FCA 31 at para. 2; *Pelletier v. Canada*, 2006 FCA 418 at paras. 9-10; *Rosenberry v. Canada*, 2012 FC 521 at para. 104 **[BOA Tabs 5-8].**
[9] *Sapru v. Canada*, 2011 FCA 35 at para. 65; *Wawatie v. Canada*, 2009 FC 558 at paras. 7-9; and *Tursunbayev v. Canada*, 2019 FC 457 at paras. 40, 42, and 43 **[BOA Tabs 9-11].**

fettered by the parties' agreement, which is not even the issue here. This Court did not rule that it had unfettered discretion to reopen any costs debate despite being *functus*.

The Agency is taking inconsistent and disingenuous positions

11. The Agency's new position that the motion was somehow frivolous is inconsistent. The Agency had full opportunity to raise all reasons why the motion should not be heard or expedited, but this was never raised before Locke J.A., nor at any other time.

12. At para. 12, the Agency claims that their unilateral declaration for not attending the agreed-upon cross-examination excuses their non-compliance with Rules 83 and 97 of the *Federal Courts Rules,* and therefore forecloses the obtaining of a non-attendance certificate. Beneath their position is a disingenuous argument that the Applicant could not proceed with a court-ordered expedited schedule and must accede to the Agency's last-minute request for directions seeking to indefinitely postpone the motion. The Agency's novel theory, to the Applicant's knowledge, was never recognized by any court, and would mean any party can "self-excuse" non-compliance with court rules.

13. The Agency also misrepresented to this Honourable Court that the Applicant "*advised the Court that it did not intend to cross-examine the Agency's affiant,*" by citing the assertions in their own letter as if it were a fact. Clearly, in the Applicant's April 30, 2020 and May 4, 2020 letters to the Court (which the Agency carefully omitted), the Applicant never abandoned, waived, or forewent its right to cross-examination under Rule 83.

The Agency argues new issues when they failed to examine the Applicant's affiant

14. At para. 6 and footnote 7, and in their letter of April 30, 2020, the Agency purports to make unsubstantiated personal or character attacks against a non-party witness. Firstly, and fundamentally, none of the Agency's assertions are in the affidavit.[10]

15. Secondly, and most importantly, there is no evidence that the Applicant was intending anything other than seeking to protect and advance the lay passengers' interests on an important issue. If the Agency seeks to advance any alternative theory or testimony, they must respect the most basic rule in *Browne v. Dunn,* which was not done here.[11]

16. The Agency's inability to focus on the actual and straightforward costs issues and their ineptitude to follow basic litigation procedure has unnecessarily consumed judicial resources. The Applicant submits that the Agency's conduct should be condemned.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Dated at the City of Vancouver, Province of British Columbia, June 7, 2020

Simon Lin

Signature of counsel for the Applicant, Simon Lin

[10] *Lukács v. Canadian Transportation Agency*, 2014 FCA 239 at para. 9 **[BOA Tab 12].**
[11] See para. 7 of the Applicant's costs submissions where the Agency waived their right to cross-examine.