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VIA EMAIL

April 15, 2020

Federal Court of Appeal
90 Sparks Street, 5th floor
Ottawa, Ontario K1A 0H9

Dear Registry Officer,

RE: Air Passenger Rights v. Canadian Transportation Agency (FCA : A-102-20)

We are counsel for the Applicant Air Passenger Rights. This letter is in reply to the second letter from the Canadian Transportation Agency (the "**Agency**") dated April 15, 2020, which was in further reply to the Applicant's letter on April 14, 2020.

Firstly, actions speak louder than words. It is apparent from the Agency's swift responses that there are no unavailability concerns. Indeed, the Agency has already closely studied the Applicant's motion record, as evidenced from their ability to thoroughly quote the motion record itself, such as footnote 3 of the Agency's recent letter, and to raise a substantive defense such as s. 18.1 of the *Federal Courts Act*.

Of note, the Applicant's motion is not a debate on the merits of the judicial review but simply the three factors under the interlocutory injunction test. The Agency's reference to "cross-examination on affidavits" in the second last paragraph on page 2 of their recent letter confirms the Agency has carefully considered the motion and is in a position to provide their response, if any. If the Agency does not intend to file affidavits, the whole "cross-examination on affidavits" concern does not even arise (Rule 84). If the Agency has decided to bring forward an affidavit, that again reinforces their readiness to respond.

Furthermore, court reporting agencies like Gillespie Reporting in Ottawa, continues to conduct cross-examinations remotely, even in the current situation.

Secondly, the Agency *repeatedly* stated that the Applicant conceded that the Statement is not legally binding, but the Agency failed to state *the Agency's* position in that regard (i.e. whether the Agency is also conceding that the Statement is not a legally binding). That issue is the crux of the Application and having the Agency's position as soon as possible will significantly streamline the procedural hurdles that are being raised herein.

Thirdly, the Agency raises subsection 18.1(1) of the *Federal Courts Act* as a reason to delay the Applicant's motion. The Agency appears to be resurrecting a debate that has been settled by this Court (excerpt below). In any event, the Applicant's position is that it is premature to consider

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defenses for purposes of scheduling, but rather should be dealt with after the interlocutory motion, or at the merits stage of the underlying Application.

> [56] Under subsection 18.1(1) of the FCA, "anyone directly affected by the matter in respect of which relief is sought" is authorized to bring an application for judicial review. Moreover, the subsection's wording is broad enough to encompass applicants who are not directly affected when they meet the test for public interest standing: see Kwicksutaineuk/Ah-kwa-mish Tribes v. Canada (Minister of Fisheries and Oceans) (2003), 2003 FCT 30 (CanLII), 227 F.T.R. 96 (F.C.T.D.); affirmed (2003), 2003 FCA 484 (CanLII), 313 N.R. 394 (F.C.A.) and leave to appeal to the Supreme Court of Canada refused, May 20, 2004, [2004] S.C.C.A. No. 55 (QL).
>
> [emphasis added]
>
> *Canada (RCMP) v. Canada (AG)*, 2005 FCA 213, per Décary, Létourneau and Pelletier JJ.A.

Finally, the Agency seems to be suggesting that judicial review is never available unless there is some "legally binding decision". That, with great respect, is not the law. Judicial review is available for any administrative act, as evidenced in section 18.1(3)(b).

> **Powers of Federal Court**
> **(3)** On an application for judicial review, the Federal Court may
>
> **(b)** declare invalid or unlawful, or quash, set aside or set aside and refer back for determination in accordance with such directions as it considers to be appropriate, prohibit or restrain, a decision, order, act or proceeding of a federal board, commission or other tribunal.
>
> [emphasis added]

As a further example, this Court has previously reviewed administrative acts with no underlying "legally binding decision" (*Krause v. Canada*, 1999 CanLII 9338 (FCA)).

> The design of prohibition, on the other hand, is preventative rather than corrective.[10] It affords a measure of judicial supervision not only of inferior tribunals but of administrative authorities generally. Specifically it is available "to prohibit administrative authorities from exceeding their powers or misusing them."[11] Indeed, prohibition has been granted to supervise the exercise of statutory power by such authorities including an act as distinct from a legal decision or determination, and a preliminary decision leading to a decision that affects rights even though the preliminary decision does not immediately do so.[12]
>
> [underlined in the Court's decision]

The Applicant submits that the Court should order that the Agency forthwith formalize their position in a responding motion record rather than never ending letter correspondences.

Should the Court have any directions, we would be pleased to comply.

Yours truly,
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