

FEDERAL COURT OF APPEAL

BETWEEN:

AIR PASSENGER RIGHTS

Applicant

- and -

THE ATTORNEY GENERAL OF CANADA

Respondent

**REPLY REPRESENTATIONS OF THE MOVING PARTY,
CANADIAN TRANSPORTATION AGENCY
(MOTION FOR LEAVE TO INTERVENE)**

Pursuant to Rules 109 and 369 of the *Federal Courts Rules*

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PART I – STATEMENT OF FACTS

1. These are the reply submissions of the Canadian Transportation Agency ("Agency") with respect to its motion for leave to intervene in this proceeding, pursuant to Rule 109 of the *Federal Courts Rules*.¹
2. The Agency relies on the facts and submissions set out in its written representations in support of its motion dated July 15, 2021. However, the Agency wishes to reply to specific points raised in Air Passenger Rights' ["APR"] submissions which oppose the Agency's motion. In relation to these points, the Agency respectfully submits that (1) its proposed intervention is appropriate; (2) its proposed submissions are relevant and it is in the interests

¹ [SOR/98-106](#) [Rules], Motion Record of the Canadian Transportation Agency (Motion to Intervene) dated July 15, 2021 (Volume 2), Appendix A, Tab A2.

of justice to consider them; and (3) the material the Agency seeks to introduce in evidence is permissible as general background intended to assist this Court in its understanding of the issues raised in the judicial review application.

PART II – STATEMENT OF THE POINTS IN ISSUE

3. At issue is whether the Agency should be granted status as an intervener in this matter and if so, under what terms.

PART III – STATEMENT OF SUBMISSIONS

A. The Agency's proposed intervention is appropriate

4. APR claims that, having been removed as respondent in this proceeding, the Agency is attempting to indirectly return to defend the merits of the application by "repackaging" its arguments as a submission on its jurisdiction and mandate.² The Agency submits that this characterization is unfounded.
5. This Court must consider the appropriateness of the Agency's participation in this proceeding given the allegations of bias raised by APR. However, APR's suggestion that the Agency will mount a clandestine defense by describing its jurisdiction and website publication practices is not justified in light of the contents of the Agency's motion, and Supreme Court of Canada jurisprudence on the scope of acceptable tribunal participation in review proceedings.

² Written representations of the Responding Party/Applicant dated July 30, 2021 at 23 at para. 20 and at 24 at para. 22 [*APR responding submissions*].

6. The Agency has not been foreclosed from applying to intervene in this proceeding. In fact, in replacing the Agency with the Attorney General of Canada ["Attorney General"] as respondent, Justice Gleason indicated that the Agency can apply for leave to intervene, provided that it is mindful of the test for intervention and the appropriate scope of tribunal submissions.³

7. The Agency respectfully points out that it identified the jurisprudential basis establishing the appropriateness of its proposed intervention at paragraph 21 of its written representations on the motion. As set out in that paragraph, the Supreme Court of Canada has found it acceptable for a tribunal to participate in a review proceeding to explain its jurisdiction, and has stated that a tribunal may assist the Court because of its familiarity with the relevant administrative scheme, and the factual and legal realities of the specialized field in which it operates.⁴ As set out in its motion, this is precisely what the Agency proposes to do: (1) explain the scope of its jurisdiction in respect of air transportation, and particularly air travel complaints; and (2) provide a sample of website material reflecting its well-established practice of publishing information, resource and guidance material for the public and industry in relation to the air travel matters that come within its jurisdiction.

8. APR does not suggest that the Agency would inaccurately explain its statutory mandate, nor does it deny that the Agency has published a variety of documents on its website with

³ *Air Passenger Rights v. Canada (Attorney General)*, [2021 FCA 112](#) at para. [16](#) Motion Record of the Canadian Transportation Agency (Motion to Intervene) dated July 15, 2021 (Volume 2), Appendix B, Tab B1.

⁴ The Agency cited the Supreme Court of Canada in *Ontario (Energy Board) v Ontario Power Generation Inc.*, [2015 SCC 44](#) at para. [42](#) and [53](#). See Motion Record of the Canadian Transportation Agency (Motion to Intervene) dated July 15, 2021 (Volume 2), Appendix B, Tab B8.

statements that these publications are non-binding. In providing submissions on these topics, the Agency proposes to rely on legislation and regulations, as well as a closed list of documents that have been provided with its motion, and that APR acknowledges are publicly available on the Agency's website and can be filed in this proceeding, albeit by the Attorney General.⁵ The Agency submits that describing its mandate and practices using material that is easily accessible and verifiable is not inappropriate and is an accepted form of participation that does not undermine tribunal impartiality.

9. The Agency respectfully submits that addressing its practice of publishing material on its website for the public and stakeholders is appropriate in the circumstances of this case. This judicial review does not arise from an adjudicative or regulatory proceeding in which relevant background can be gleaned from evidence and submissions that were filed by parties. Rather, this proceeding relates to the publication of material on the Agency's website. Providing a description and sample of Agency website material published over the course of many years constitutes useful background and the Agency is well-placed to provide it.
10. For this same reason, the Agency disagrees with APR's submission that introducing website material published after the impugned Publications amounts to bootstrapping. First, the Agency's proposed list of publications shows a consistency in approach over many years, not an attempt to justify the specific actions under scrutiny in this judicial review. Second, since this application for judicial review does not concern an Agency adjudicative or regulatory proceeding, APR's concerns about bootstrapping simply do not arise.

⁵ APR responding submissions at 26 at para. 34.

11. Finally, the Agency submits that the Court cannot retain APR's argument that the Attorney General is opposing the judicial review application and presenting a full defense, and that it is therefore unnecessary for the Agency to participate in this proceeding. The Attorney General's position on the merits has not yet been formulated and, as pointed out in the Agency's motion at paragraph 37, the Attorney General has told this Court that in this proceeding, it will act as "an independent defender of the rule of law." In any event, the Agency submits that it is well-positioned to provide an impartial, concise submission on its specialized jurisdiction in respect of air travel complaints and its practice of publishing material on its website.

B. The Agency's jurisdiction and mandate are relevant to the legal issues raised in the proceeding and it is in the interests of justice to consider this context

12. The Agency respectfully submits that APR takes too narrow a view in claiming that the Agency's jurisdiction and mandate are not relevant because they are not specifically in dispute in this proceeding. The Agency's motion clearly indicates that its purpose is to provide relevant context for the Court's consideration.

13. In its responding submissions, APR indicates that on the merits, it will ask the Court to consider two issues: (1) whether the Agency's issuance of the impugned Publications is contrary to its *Code of Conduct* and raises a reasonable apprehension of bias; and (2) whether the content of the impugned Publications contains misinformation and omissions and creates confusion for the traveling public.⁶

⁶ APR's responding submissions at 19 at para. 4.

14. The Agency respectfully submits that in considering these issues, and potentially the issue of whether the impugned Publications amount to Agency orders, the topics the Agency proposes to address would provide the Court with directly relevant context.
15. In particular, the Agency believes that it will be relevant for the Court to consider the scope of the Agency's authority to hear air travel complaints and the remedies the Agency may order under the CTA, the *Air Transportation Regulations*, SOR 88/58, and the *Air Passenger Protection Regulations*, SOR 2019-150. It will also be relevant for the Court to consider that the Agency's jurisdiction is centered on air carrier tariffs, and on determining whether air carriers have applied the terms and conditions of carriage set out in those tariffs, or determining whether those provisions are clear, just and reasonable.
16. In respect of air travel complaints, the Agency does not have the open-ended authority of a court of inherent jurisdiction, and has clearly defined remedial powers. The Agency submits that, in determining whether Agency members should be prevented from hearing air travel complaints and whether the impugned Publications are misleading, it is important for the Court to consider the regulatory scheme and precisely what powers the Agency has in respect of air travel complaints.
17. The Agency also submits that it will be relevant for the Court to take into consideration the Agency's well-developed practice, both before and after the impugned Publications were posted on the Agency's website, of issuing informational, resource and guidance material to the public and industry with the consistent caveat that this material is not binding or does not supplant regulatory requirements or Agency decision-making. As mentioned above, this

proceeding impugns website publications and the Agency submits that relevant background can be obtained from an understanding of the Agency's general website publication practices.

18. The Agency would add a point of clarification: contrary to APR's assertion, the Agency is not contradicting itself in its motion by claiming that it issues non-binding informational material pursuant to a statutory authority; rather, the Agency is claiming that it has a longstanding practice of issuing such material for the public and stakeholders.

19. The Agency respectfully submits that its proposed intervention is relevant and that, to the extent that the Agency may assist the Court in placing the legal issues in context by describing its jurisdiction and mandate, it is in the interests of justice that the Agency be permitted to intervene on these topics.

C. The Agency's proposed evidence is permitted because it provides general background to assist in understanding the issues raised in the proceeding

20. APR's claim that the Agency is impermissibly proposing to add new issues and evidence is, in the Agency's view, unfounded.

21. APR relies on jurisprudence in which proposed interveners have provided ill-defined reasons for intervening or have attempted to broaden the issues under review with questionable social science evidence, or broad political, policy or legal considerations where the legal issues in the proceeding were narrow and clearly identified.⁷

22. The Agency's intent in providing an affidavit with a sample of website material is distinguishable from these cases. The Agency has explained that its proposed affidavit would

⁷ See jurisprudence cited in APR's responding submissions at 25 at para. 28-30.

be limited to providing an illustrative sample of material from its website, and would focus exclusively on demonstrating the range of topics covered and the consistent statements about the material's non-binding nature. The Agency's stated intent in filing this material is to provide context for the Court in its consideration of the legal issues. The Agency respectfully submits that this comes within the exception that allows a Court to receive an affidavit where it provides general background in circumstances where that information might assist the Court in understanding the issues relevant to the judicial review.⁸ The Agency respectfully submits that its proposed affidavit is permissible under this exception, and relies on its submissions already made at paragraphs 41 and 42 of its written representations on the motion to support its position that the addition of this information is not prejudicial under the circumstances.

D. Costs

23. In addition to the submissions already made in its motion, the Agency agrees with APR that the Agency shall not seek costs if permitted to intervene.⁹

PART IV – ORDER SOUGHT

24. In its order sought in the alternative, APR seeks to limit the Agency's memorandum of fact and law to 10 pages and its oral submissions to 10 minutes.¹⁰ The Agency agrees with these

⁸ *Association of Universities and Colleges of Canada v. Canadian Copyright Licensing Agency (Access Copyright)*, [2012 FCA 22](#) at para. [20](#). The Federal Court considered the "general background" exception in relation to an intervener, but did not find that the proposed evidence came within that exception, in *Canadian Association of Refugee Lawyers v. Canada (Citizenship and Immigration)*, [2018 FC 1092](#) at paras. [13-14](#).

⁹ APR's responding submissions at 30 at para. 48(b)(viii).

¹⁰ APR responding submissions at 30 at para 48(b)(v) and (vii).

terms. The Agency also agrees that APR should have a period of 10 days in which to file a supplementary memorandum of fact and law after the Agency's filing.¹¹

25. The Agency agrees that it should not repeat arguments already raised by the Attorney General.¹² The Agency maintains that the affidavit it seeks to file is permissible and that its proposed submissions meet the test for intervention and do not undermine its impartiality or independence. The Agency therefore maintains its request to intervene with its proposed submissions and material.

26. The Agency has underlined amendments to the Order originally sought in its motion to reflect proposals advanced by APR with which the Agency agrees:

(a) an Order granting the Agency leave to intervene pursuant to Rule 109 of the *Federal Courts Rules*, and amending the style of cause to reflect the same;

(b) an Order permitting the Agency to file a Memorandum of Fact and Law of no more than 10 pages that does not repeat arguments already raised and affidavit at any time the Court considers appropriate, such as: the filing of an affidavit within 10 days after the Respondent's affidavit(s) and exhibit(s) are filed; and the filing of a Memorandum of Fact and Law within 10 days after the Respondent's Record is filed;

¹¹ APR responding submissions at 30-31 at para. 48(b)(vi).

¹² APR responding submissions at 30 at para. 48(b)(iv).

- (c) an Order that APR be permitted to file a supplementary Memorandum of Fact and Law that is of no more than 10 pages within 10 days of filing of the Agency's Memorandum of Fact and Law;
- (d) an Order that the Agency be served with all materials filed by the parties;
- (e) an Order that the Agency be consulted on hearing dates and be provided the right to make oral submissions for no more than 10 minutes before the Court; and
- (f) such further and other relief as this Court may deem just.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated at Gatineau, in the Province of Quebec, this 4th day of August, 2021.



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PART V – LIST OF AUTHORITIES

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| <p>1. <i>Association of Universities and Colleges of Canada v. Canadian Copyright Licensing Agency (Access Copyright)</i>, <u>2012 FCA 22</u></p> |
| <p>2. <i>Canadian Association of Refugee Lawyers v. Canada (Citizenship and Immigration)</i>, <u>2018 FC 1092</u></p> |

