

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)

NOTICE OF APPLICATION FOR LEAVE TO APPEAL
(AIR PASSENGER RIGHTS, APPLICANT)

(Pursuant to Rule 25(1)(a) of the *Rules of the Supreme Court of Canada*, SOR/2002-156)

TAKE NOTICE that AIR PASSENGER RIGHTS hereby applies for Leave to Appeal to the Court, pursuant to section 40 of the *Supreme Court Act*, R.S.C. 1985, c. S-26, from the judgment of the Honourable Madam Justice Mactavish of the Federal Court of Appeal in File No. A-102-20 made on May 22, 2020, and for:

1. an order granting leave to appeal;
2. alternatively, pursuant to subsection 43(1.1) of the *Supreme Court Act*, R.S.C. 1985, c. S-26, remanding for re-hearing by a five-judge panel of the Federal Court of Appeal and an order to 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 injunctions;
3. an order for costs or, alternatively, disbursements only; and
4. any other order that this Court may deem appropriate.

AND TAKE FURTHER NOTICE that this Application for Leave is made on the following grounds:

1. The Federal Court of Appeal motions judge erred in law by resurrecting an outmoded and restrictive test for the availability of judicial review in the federal courts that is:
 - (a) inconsistent with the test applied by provincial appellate and superior courts;
 - (b) inconsistent with the statutory language, context, and legislative intent of the judicial review provisions of the *Federal Courts Act*; and
 - (c) incongruent with the test articulated by this Court in *Highwood Congregation of Jehovah's Witnesses (Judicial Committee) v. Wall*, [2018 SCC 26](#) and affirmed in *J.W. v. Canada (Attorney General)*, [2019 SCC 20](#).

2. The Federal Court of Appeal motions judge erred in applying her court's mechanistic formulation of the *RJR-MacDonald* framework that drastically differs from the contextual approach of the vast majority of Canadian courts, including this Court. The motion judge's reasons exemplify the frequently criticized flaws in the Federal Court of Appeal's approach. These flaws make obtaining interlocutory relief in the federal courts nearly impossible by:
 - (a) applying a tick-box checklist without properly weighing and balancing the *RJR-MacDonald* factors in an equitable and contextual fashion;
 - (b) imposing a comparatively onerous "irreparable harm" criterion that is impossible to meet by litigants seeking interlocutory relief in the public interest, and nearly impossible to meet in any other context;
 - (c) requiring proof with certainty that harm will be suffered, and that it cannot be repaired later via theoretical means, without consideration of its practicalities; and/or
 - (d) failing to consider the primacy of injunctive relief as a preventative and effective measure for protection of consumers and the public interest.

DATED at Vancouver, British Columbia, this 3rd day of August, 2020.

Simon Lin

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Canadian Transportation Agency**

NOTICE TO THE RESPONDENT OR INTERVENER: A respondent or intervener may serve and file a memorandum in response to this application for leave to appeal within 30 days after the day on which a file is opened by the Court following the filing of this application for leave to appeal or, if a file has already been opened, within 30 days after the service of this application for leave to appeal. If no response is filed within that time, the Registrar will submit this application for leave to appeal to the Court for consideration under section 43 of the Supreme Court Act.