October 13, 2020 VIA EMAIL, ORIGINAL TO FOLLOW

Deputy Registrar
Supreme Court of Canada
301 Wellington Street
Ottawa, Ontario
K1A 0J1

Dear Sir,

Re: ***Air Passenger Rights v Canadian Transportation Agency***
Supreme Court of Canada File No.: 39266

The is the Response of the Respondent Canadian Transportation Agency ("Agency") to the Application for Leave to Appeal in the above noted matter.[1]

In the decision under appeal, the Federal Court of Appeal ("FCA") denied the Applicant's request for an interlocutory injunction in the context of an application for judicial review of two non-binding statements posted on the Agency's website.[2] The Applicant sought a mandatory order to remove the website statements and a prohibitive order enjoining Agency Members from adjudicating complaints respecting matters addressed in the statements due to an alleged reasonable apprehension of bias. The Court applied the three-step test in *RJR-MacDonald*[3] and the modified first step in accordance with *R v CBC*.[4]

With respect to the request to remove the statements, the Court examined whether the Applicant established a strong *prima facie* case at the first part of the test as required by *R v CBC*. As the Applicant conceded that the statements were not decisions, determinations, orders or legally-binding rulings, the FCA concluded that the matter was not even amenable to judicial review and as such, the Applicant had not met its burden. The FCA also concluded that the second part of the test concerning irreparable harm was not met. The Applicant did not allege harm for itself as required under the second part of the *RJR-MacDonald* test and, to the extent that it claimed harm to Canadian passengers, it had not sought or been granted public interest standing, nor had it established any actual or potential irreparable harm to Canadian passengers.

The FCA also refused to issue a prohibitive order to enjoin Agency Members from hearing complaints. The FCA was not satisfied that the second part of the test was met for this matter either, for the same reasons set out above, but also because the Applicant had not established that passengers will suffer irreparable harm given that any bias concerns can be raised with the Agency for decision in the context of a complaint, with recourse to the FCA if necessary.

[1] *Rules of the Supreme Court of Canada*, SOR/2002-156, s 27.
[2] *Air Passengers Rights v Canadian Transportation Agency*, 2020 FCA 92 at paras 3, 21 [*APR v CTA*].
[3] *RJR-MacDonald Inc. v Canada (Attorney General)*, 1994 CanLII 117 (SCC), [1994] 1 SCR 311.
[4] *APR v CTA*, *supra* note 2 at para 19, citing *R v Canadian Broadcasting Corp.*, 2018 SCC 5 [*R v CBC*].

Before this Court, the Applicant raises academic questions that, even on a relaxed and contextual reading of the applicable test, cannot compensate for the fact that the Agency statements are not amenable to judicial review and for the fact that that it failed to demonstrate irreparable harm.

The Applicant has attempted to create a jurisprudential conflict on the availability of judicial review where there is none. There are not two lines of cases but rather distinct cases about distinct issues. This Court's decision in *Highwood Congregation of Jehovah's Witnesses (Judicial Committee) v Wall*[5] determined that judicial review is reserved for state action, and not as a means for private parties to resolve disputes.[6] This is distinct from whether a decision is reviewable under section 18.1 of the *Federal Courts Act*, which requires that the decision affect legal rights, impose legal obligations or cause prejudicial effects.[7] In a decision that denied the Agency's motion to dismiss the Applicant's judicial review application on other grounds, the FCA rejected the Applicant's claim that *Wall* expanded the availability of judicial review.[8]

The Applicant also seeks this Court's intervention to correct what it calls the FCA's overly mechanistic, cumulative, tick-box approach to the *RJR-MacDonald* test. In particular, it argues that demonstrating irreparable harm at Step 2 of the test is more onerous at the FCA than in other Canadian courts. However, the FCA considered every angle advantageous to the Applicant's case. The Court found that the Applicant did not, and could not, claim irreparable harm to itself. But it also found no evidence of irreparable harm, including potential harm,[9] to the passengers for whom the Applicant claims to speak, notwithstanding its lack of public interest standing.

Interlocutory injunctive relief is a discretionary remedy attracting a high degree of deference.[10] The Agency respectfully submits that there is no reason to intervene where, as here, the FCA applied the correct test and found the arguments and evidence to be lacking. The Agency respectfully submits that the Application for Leave to Appeal should be dismissed.

Sincerely,

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Cc. Simon Lin, Counsel for the Applicant, via email (simonlin@evolinklaw.com)

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[5] 2018 SCC 26.
[6] *Ibid* at para 13.
[7] *Air Canada v Toronto Port Authority*, 2011 FCA 347 at paras 26-29.
[8] The Court concluded that the claim of a reasonable apprehension of bias could not be struck because it met the "serious issue" component of the *RJR-MacDonald* test. *Air Passenger Rights v Canadian Transportation Agency*, 2020 FCA 155 at paras 18-27.
[9] *APR v CTA*, *supra* note 2 at para 31.
[10] *Google Inc. v Equustek Solutions Inc.*, 2017 SCC 34 at para 22.