

October 23, 2020

VIA EMAIL

Supreme Court of Canada
ATTN: Registrar of the Supreme Court
301 Wellington Street
Ottawa, Ontario K1A 0J1

Dear Madam or Sir:

RE: Air Passenger Rights v. Canadian Transportation Agency (SCC File No.: 39266)

Please kindly accept this letter as the reply in the above-noted leave application.

The issue to be decided on this leave application is whether the proposed appeal raises matters of national, public, and constitutional importance. The Agency failed to address this issue at all. The Agency presented no arguments to dispute that there is a stark jurisprudential split on interlocutory injunctions and availability of judicial review between the federal courts and the provincial courts.

Instead, the Agency argued that the proposed appeal raises merely academic questions, and then re-argued the merits from the court below. The Agency overlooked that this Court's role is not error-correction, but rather development of Canadian jurisprudence, and addressing issues of national significance that transcend the merits of the parties' dispute. This Court's focus on a leave application is not merely whether the court below erred, but rather whether there are nationally significant jurisprudential issues that require guidance from this Court.

The Agency's submissions confirm that the proposed appeal meet these criteria.

The Agency misstates the record in suggesting that the Motions Judge has denied the Applicant's public interest standing. That is not true.¹ The Applicant has asserted "*public interest standing by naming itself as an applicant in a notice of application*," and no preliminary motion was required.²

The Federal and Provincial Courts are Divided on the Requisite Irreparable Harm Standard³

The Agency seeks to sidestep this proposed question by arguing that decisions on interlocutory injunctions are entitled to deference. That is not the issue on this leave application, and also not an issue on the merits of the appeal. The issue is whether there is a jurisdictional split.

The Agency appears to have conceded that there is a jurisprudential split between the federal courts and most of the provincial courts, as summarized by Justice D. Gascon in [The Commissioner of Competition v. HarperCollins Publishers LLC, et al.](#), 2017 CACT 14 at para. 38.⁴

¹ See page 2, paragraph 3, of the [Order on Costs](#), per Mactavish, J.A., dated June 16, 2020.

² The approach to asserting public interest standing as summarized in [Canadian Council for Refugees v. Canada](#), 2017 FC 1131 at paras. 19-21, citing [Finlay v. Canada \(Minister of Finance\)](#), 1986 CanLII 6 (SCC).

³ Issue 2 in Applicant's Memorandum of Arguments for Leave to Appeal [**Memorandum**].

⁴ See footnote 57 of the Memorandum citing various appeal decisions, and footnote 67 confirming that this split in jurisprudence has already been observed over a decade ago in legal academia.

Indeed, if the Agency is correct in arguing that “the FCA applied the correct test,” then by necessity, the courts in almost every province must have applied the wrong test for decades.⁵ Irrespective of which test is correct, this Court should provide guidance to ensure uniformity of Canadian laws.

The Agency further claimed that the FCA “considered every angle advantageous to the Applicant,” which is also not the question on this leave application, or even the appeal. The FCA did not consider the tests adopted in the provincial courts, nor attempt to resolve the jurisdictional split.

A Recent FCA Decision⁶ Affirms that Guidance is Needed on Availability of Judicial Review

The FCA’s answer to the jurisdictional split on the availability of judicial review between this Court’s *Wall*-test (para. 39 of Memorandum) and the FCA’s outmoded test (para. 38 of Memorandum) is that this Court did not specifically overturn [Air Canada v. Toronto Port Authority](#), 2011 FCA 347 [*AC v. TPA*] when this Court referenced para. 52 of *AC v. TPA*.⁷ According to the FCA, judicial review is available only if both tests are met simultaneously.⁸

The Agency uses a different label to characterize *AC v. TPA* (which purports to interpret section 18.1 of the *Federal Courts Act*) and *Wall* to argue that they deal with “distinct” issues. The Agency overlooked that both *Wall* and *AC v. TPA* deal with one and the same threshold question: “is there state action that would make judicial review available?” Indeed, the BC Court of Appeal has interpreted both *AC v. TPA* and *Wall* as authorities for drawing a line between state action reviewable in court, and state action that is not subject of review.⁹ They are not authorities that deal with “distinct” issues, as the Agency claims.

The varying treatment, conflicting interpretations, and sporadic applications of *Wall* by different panels or judges of the FCA demonstrate that this jurisprudential conflict has no prospect of being resolved by the court below, absent specific guidance or intervention by this Court.¹⁰

For these reasons, the Applicant respectfully submits that leave to appeal ought to be granted to critically review these two jurisprudentially significant matters that affect access to justice for all Canadians.

Yours truly,



SIMON LIN
Barrister & Solicitor

Cc: Ms. Barbara Cuber, counsel for the Respondent, Canadian Transportation Agency

⁵ See footnote 64 of the Memorandum for numerous examples from the provincial courts across Canada.

⁶ See [Air Passenger Rights v. Canada \(Transportation Agency\)](#), 2020 FCA 155 dismissing the Agency’s Motion to Strike the judicial review application, which was filed the same day as this leave application.

⁷ [Air Passenger Rights v. Canada \(Transportation Agency\)](#), 2020 FCA 155 at paras. 18-19.

⁸ [Air Passenger Rights v. Canada \(Transportation Agency\)](#), 2020 FCA 155 at paras. 26-27.

⁹ [Independent Contractors and Businesses Association v B.C.](#), 2020 BCCA 243 at paras. 24-5.

¹⁰ See para. 39 of the Applicant’s Memorandum; see also [Air Passenger Rights v. Canada \(Transportation Agency\)](#), 2020 FCA 155 at paras. 18-19 and 26-27; and the [Judgment](#) subject of this leave application.