Court File No.:

FEDERAL COURT OF APPEAL

BETWEEN:

AIR PASSENGER RIGHTS

Applicant

– and –

CANADIAN TRANSPORTATION AGENCY

Respondent

MEMORANDUM OF FACT AND LAW OF THE APPLICANT

PART I – OVERVIEW AND STATEMENT OF FACTS

A. Overview

1. The underlying Application relates to the "Statement on Vouchers" [**Statement**] and the "Important Information for Travellers During COVID-19" page [**COVID-19 Agency Page**] the Agency published on March 25, 2020 [the **Agency Publications**].

2. The Statement endorses air carriers in withholding refunds of prepaid air fares from passengers whose travel plans are affected by COVID-19, and endorses issuing of vouchers to passengers without a legal basis. The Statement was also published contrary to the Agency's own *Code of Conduct*, raising a serious concern of a reasonable apprehension of bias and whether the Agency could be impartial when dealing with such disputes.

3. The travel industry has sought to use the Agency Publications to mislead passengers on their rights to a refund. The Statement is not a legally binding ruling or decision of the Agency, but some air carriers are passing it off as such.

4. The Agency was given notice that the Statement is misleading, but failed to take any corrective action. Absent this Court's urgent intervention and clarification of the Statement, the travel industry will continue to utilize the Agency Publications, with the Agency's silent blessing, to misinform and prejudice the passengers.

B. The Parties to this Application and Motion

i. The Respondent: Canadian Transportation Agency

5. The Canadian Transportation Agency [**Agency**] in an economic regulator of air carriers operating to, from, or within Canada. The Agency also acts as a quasi-judicial tribunal to adjudicate disputes between passengers and air carriers.

6. The Agency published a *Code of Conduct* for its appointed members that is in effect during the material times and specifically provides as follows:

> (40) Members **shall not publicly express an opinion about any past, current, or potential cases or any other issue related to the work of the Agency**, and shall refrain from comments or discussions in public or otherwise that may create a reasonable apprehension of bias.[1]

ii. The Applicant: Air Passenger Rights

7. The Applicant, Air Passenger Rights [**APR**], is a non-profit entity under the *Canada Not-for-profit Corporations Act*, SC 2009 that is an advocacy group representing and advocating for the rights of the travelling public, who travel by air.[2]

8. APR was founded in May 2019 by Dr. Gabor Lukács, who is the President of APR. APR expands upon and continues the decade long advocacy work in air passenger rights that Dr. Lukács has already commenced in his personal capacity.[3]

9. Dr. Lukács is a Canadian air passenger rights advocate, who has appeared before various quasi-judicial tribunals, including the Agency, and courts across Canada, including this Honourable Court and the Supreme Court of Canada, in respect of air passenger rights. Dr. Lukács's advocacy in the public interest and his expertise and experience in the area of passenger rights have been recognized by the transportation bar, the academic community, the judiciary, and the legislature.[4]

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1 *Code of Conduct* – Lukács Affidavit, Exhibit "T" (emphasis added) [Tab 2T, p. 110].
2 Lukács Affidavit, paras. 19-22 [Tab 2, p. 17].
3 *Ibid.*
4 Lukács Affidavit, paras. 2-18 [Tab 2, pp. 12-17].

10. This Honourable Court recently recognized Dr. Gábor Lukács, the President of APR, as representing the interest of air passengers in a way that the Agency cannot:

> [...] the Court is of the view that the case engages the public interest, that the proposed intervener [Dr. Gábor Lukács] would defend the interests of airline passengers in a way that the parties [the Agency, the Attorney General of Canada, and an airlines trade association] cannot, that the interests of justice favour allowing the proposed intervention in the appeal, and that the proposed intervention would be of assistance to the Court in deciding the appeal [...][5]

11. APR assists Canadian passengers through its Facebook Group [the **APR Facebook Group**] consisting of approximately 23,700 members currently. The APR Facebook Group serves as a platform for passengers to post and discuss their concerns about air travel and passenger rights. Volunteers of APR, in particular Dr. Gábor Lukács, also assist the passengers with the information they are seeking.[6]

C. COVID-19 Impacting Air Travel

12. The Court could take judicial notice that the coronavirus [**COVID-19**] is a highly contagious virus originating from the People's Republic of China, which began spreading to other countries on or around January 2020.

13. On March 11, 2020, the World Health Organization [**WHO**] declared COVID-19 a global pandemic.[7]

14. On March 13, 2020, the Government of Canada issued an advisory against non-essential travel abroad and restricting entry of foreign nationals, and strongly urged Canadians to stay home unless absolutely necessary [**Declaration**].[8]

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[5] *International Air Transport Association et al. v. AGC et al.*, Federal Court of Appeal File No. A-311-19, Order of Near J.A., dated March 3, 2020 – Lukács Affidavit, Exhibit "C" [Tab 2C, p. 47].
[6] Lukács Affidavit, paras. 25-27 [Tab 2, p. 18].
[7] WHO press release – Lukács Affidavit, Exhibit "E" [Tab 2E, p. 58].
[8] Government of Canada advisory – Lukács Affidavit, Exhibit "F" [Tab 2F, p. 63].

15. Air travel to, from, and within Canada became seriously disrupted after the WHO announcement and the Declaration on March 11 and 13, respectively, including:

(a) border closures or restrictions overseas, resulting in flight cancellations;

(b) passengers adhering to travel advisories or refraining from travelling; and

(c) air carriers cancelling flights in anticipation of decreasing demand.[9]

16. Around mid-March 2020, traffic in the APR Facebook Group increased substantially, despite air travel decreasing dramatically during that time period. Membership increased by 50%. The number of Facebook postings and comments increased by 189% and 195%, respectively. Most of this increased traffic related to passengers being denied full refunds for their unused air fares in light of the COVID-19 situation.[10]

17. Around that time, air carriers began to withhold refunds for unused air fares, and instead, offered to issue or purported to issue future travel vouchers to passengers. Those vouchers are subject to expiry dates and other conditions imposed by the air carriers themselves. It is likely that the traffic increase on the APR Facebook Group is directly correlated to the number of passengers being denied refunds by their air carriers for the COVID-19 situation.[11]

D. The Agency's Statement and the COVID-19 Agency Page

18. On March 25, 2020, the Agency published an anonymous and unsigned "Statement on Vouchers" [**Statement**] on its website, which reads as follows:

> The COVID-19 pandemic has caused major disruptions in domestic and international air travel.
>
> For flight disruptions that are outside an airline's control, the Canada Transportation Act and Air Passenger Protection Regulations only require that the airline ensure passengers can complete their itineraries. Some airlines' tariffs provide for refunds in certain cases, but may have clauses that airlines believe relieve them of such obligations in force majeure situations.

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[9] Lukács Affidavit, para. 36 [Tab 2, p. 20].
[10] Lukács Affidavit, paras. 32-35 [Tab 2, p. 19].
[11] Lukács Affidavit, paras. 60-66 and 71-73 [Tab 2, pp. 30-33 and 36-37].

> The legislation, regulations, and tariffs were developed in anticipation of relatively localized and short-term disruptions. None contemplated the sorts of worldwide mass flight cancellations that have taken place over recent weeks as a result of the pandemic. It's important to consider how to strike a fair and sensible balance between passenger protection and airlines' operational realities in these extraordinary and unprecedented circumstances.
>
> On the one hand, passengers who have no prospect of completing their planned itineraries with an airline's assistance should not simply be out-of-pocket for the cost of cancelled flights. On the other hand, airlines facing huge drops in passenger volumes and revenues should not be expected to take steps that could threaten their economic viability.
>
> While any specific situation brought before the CTA will be examined on its merits, the CTA believes that, generally speaking, an appropriate approach in the current context could be for airlines to provide affected passengers with vouchers or credits for future travel, as long as these vouchers or credits do not expire in an unreasonably short period of time (24 months would be considered reasonable in most cases).
>
> The CTA will continue to provide information, guidance, and services to passengers and airlines as we make our way through this challenging period.[12]

19. The Statement was published without input or submissions from the passengers. On the other hand, there is evidence that the Statement was prepared with input from air carriers as part of a "decision [...] reached in conjunction with the Canada Transportation Agency regarding the refund of itineraries immediately affected by the COVID-19 crisis period."[13]

20. At about the same time as publishing the Statement, the Agency amended the COVID-19 Agency Page on its website entitled "Information importante pour les voyageurs pour la periode de la COVID-19" (French) and "Important Information for Travellers During COVID-19" (English). The COVID-19 Agency Page states that "Airlines may make decisions to cancel or delay flights for other reasons. Whether these situations are within or outside the airline's control would have to be assessed on a

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[12] "Statement on Vouchers" – Lukács Affidavit, Exhibit "M" [Tab 2M, p. 84].
[13] Lukács Affidavit, paras. 44-45 and Exhibit "N" [Tabs 2 and 2N, pp. 23 and 86].

case-by-case basis."[14] The COVID-19 Agency Page then specifically references the Statement purporting to endorse the issuance of vouchers for **every** scenario of flight cancellations in the *Air Passenger Protection Regulations* [***APPR***], without regard to the reason for flight cancellation: (1) Situations outside airline control (s. 10 of *APPR*); (2) Situations within airline control (s. 12 of *APPR*); and (3) Situations within airline control, but required for safety (s. 11 of *APPR*).[15]

21. In stark contrast to the CTA's manner of presenting the Statement, the United States Department of Transportation, the regulator for air carriers operating to, from, or within the United States, issued a detailed enforcement notice on April 3, 2020 with proper and carefully considered legal authorities and signed by the individual issuing that notice [**USDOT Enforcement Notice**].[16]

22. Although the Agency stated that cancellations are assessed case-by-case (in the COVID-19 Agency Page above), the Agency responds to passenger inquiries on their rights to refund with boilerplate communications based largely on the Statement and/or the COVID-19 Agency Page, without even addressing the passenger's specific scenario, particularly the air carrier's reasons for cancelling a particular flight.[17]

23. Similarly, the COVID-19 Agency Page and Statement do not explain *how* the Statement's endorsement on the issuance of vouchers can be reconciled with the text of subsection 17(7) of the *APPR* mandating a refund, a minimum obligation for situations within airline control and situations within airline control, but required for safety.

Method used for refund

> **17** (7) Refunds under this section must be paid by the method used for the original payment and to the person who purchased the ticket or additional service.[18]

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[14] Lukács Affidavit, paras. 46-47 [Tab 2, pp. 24-25] and Exhibits "O" and "P" [Tabs 2O and 2P, pp. 89 and 94].
[15] *Air Passenger Protection Regulations*, ss. 10-12 [App. "A", pp. 219-221].
[16] USDOT Enforcement Notice – Lukács Affidavit, Exhibit "AE" [Tab 2AE, p. 158].
[17] Lukács Affidavit, paras. 48-58 [Tab 2, pp. 26-29] and Exhibits "Q","R", and "S" [Tabs 2Q-2S, pp. 99, 102, and 106].
[18] *Air Passenger Protection Regulations*, s. 17(7) (emphasis added) [App. "A", pp. 227].

E. The Agency's Formal Rulings on Passengers' Rights to Refund

24. The Agency's Statement and the COVID-19 Agency Page endorsing the issuance of vouchers in lieu of refunds do not explain the clear inconsistency with the Agency's own formal decisions described further below, which confirm a right to refund. The Statement also does not specify how the Statement arrived at the underlying proposition that passengers have no entitlement to a refund (i.e., "passengers who have no prospect of completing their planned itineraries with an airline's assistance should not simply be out-of-pocket for the cost of cancelled flights").

25. Since 2004, in the context of reviewing Air Transat's tariff in Decision No. 28-A-2004, the Agency opined as follows in regards to a passenger's right to a refund:

> In Decision No. LET-A-112-2003, the Agency noted that Rule 5.2 includes a provision that states that Air Transat will undertake to ensure that the passenger is routed or transported to his/her destination, as per the contract of carriage, within a reasonable period of time and at no extra cost. The Agency stated that this provision may not be just and reasonable as it does not provide the passenger with any recourse should such passenger find the anticipated time or the alternate travel arrangements provided by the carrier to reach the passenger's ticketed destination unacceptable. The Agency expressed the view that, in such circumstances, Air Transat should, at the request of the passenger, provide a refund.
>
> With respect to Rule 6.3, the Agency noted that this rule includes a provision which states that where passengers incur a schedule irregularity of not less than six hours involving a flight operated by Air Transat, and the flight is cancelled after the initial delay, Air Transat will provide a full refund. The Agency stated that this provision may not be just and reasonable in that it does not provide adequate options to passengers affected by a schedule irregularity, and does not protect passengers from events that are beyond the passengers' control. The Agency therefore advised Air Transat that it should include a provision that provides a refund, at the request of the passenger, should a flight be delayed for more than a certain period of time, e.g., 12 hours, whether or not a flight is cancelled.
>
> The Agency further noted that Air Transat has removed its liability to passengers who do not concur with the alternate travel arrangements in Rule 6.3 of the tariff. Such liability appeared in Air Transat's tariff previously on file with the Agency. The Agency stated that the current

> provision may not be just and reasonable, as it does not include a requirement that the passenger agree to the alternate travel arrangements. The Agency also advised Air Transat that it should include a provision that provides for a refund in the event a passenger finds the alternate travel arrangements unsatisfactory.[19]

26. The Agency then "read-in" or replaced a provision in Air Transat's tariff with the provision below underscoring passengers' right to a refund. The Agency mandated that in circumstances where the Carrier is unable to provide reasonable alternative transportation within a reasonable time, then the passengers must be provided a refund.

> 6.3(d) If the Carrier is unable to provide reasonable alternative transportation on its services or on the services of other carrier(s) within a reasonable period of time, then it will refund the unused ticket or portions thereof.[20]

27. In 2013, in Decision No. 313-C-A-2013 where the Agency was reviewing whether Sunwing's tariff was unreasonable, the Agency opined as follows with regards to passengers' rights to a refund, citing the 2004 decision above:

> [15] In terms of passengers' right to refunds, in Decision No. 28-A-2004, the Agency recognized the fundamental right of passengers to be refunded for the unused portions of their tickets if the carrier is unable to provide transportation on its services or on the services of other carrier(s) within a reasonable period of time.[21]

28. Also in 2013, in Decision No. 344-C-A-2013 in the context of reviewing whether Porter's tariff was unreasonable, the Agency referred to its 2004 decision (above) throughout and specifically opined that:

> [88] The Agency agrees with Mr. Lukács, and finds that it is unreasonable for Porter to refuse to refund the fare paid by a passenger because of its cancellation of a flight, even if the cause is an event beyond Porter's control.[22]

29. Then, in 2014, in Decision No. 31-C-A-201, the Agency was reviewing whether

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[19] *Re: Air Transat*, Decision No. 28-A-2004 (emphasis added) [App. "B", Tab 24, p. 521].
[20] *Ibid.* (emphasis added) [App. "B", Tab 24, p. 524].
[21] *Lukács v. Sunwing*, Decision No. 313-C-A-2013, para. 15 (emphasis added) [App. "B", Tab 19, p. 469].
[22] *Lukács v. Porter*, Decision No. 344-C-A-2013, para. 88 (emphasis added) [App. "B", Tab 17, p. 417].

Porter's international tariff was unreasonable and opined as follows with regards to passengers' right to a refund, citing the key decisions above:

> [137] As for reasonableness, Mr. Lukács correctly notes that passengers are entitled to reprotection or a refund, irrespective of the reason for their inability to travel, as long as the passengers are not responsible for it. In Decision No. 28-A-2004, the Agency recognized the right of passengers to be refunded for the unused portions of their tickets if the carrier is unable to provide transportation on its services or on the services of other carrier(s) within a reasonable period of time. [...] [23]

30. The Agency's rulings above are consistent with common sense and the right to a refund mentioned in the USDOT Enforcement Notice.

> Although the COVID-19 public health emergency has had an unprecedented impact on air travel, the airlines' obligation to refund passengers for cancelled or significantly delayed flights remains unchanged.[24]

F. Prejudice to Passengers from the Agency's Publication of the Statement

31. The Agency's publication of the Statement misinforms the public and the industry about passengers' right to refunds from air carriers. The Statement has introduced unnecessary confusion and complication into a passenger's simple refund request for a service that could not and was not even used. The Statement is being cited by the travel insurance industry as a basis for rejecting trip cancellation claims, because the Agency's Statement endorses vouchers as a near equivalent alternative to a refund.

i. The Travel Industry Denying Passengers' Their Right to a Refund

32. After the Agency's publication of the Statement, some air carriers misrepresented the Statement as if it was a conclusive and legally binding ruling, although the Statement contained no names of the decision maker, order number, or file numbers. Those air carriers used, or purported to use, the Statement as a form of legal shield to deny passengers their refunds for unused air fares.

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[23] *Lukács v. Porter*, Decision No. 31-C-A-2014, para. 137 (emphasis added) [App. "B", Tab 18, p. 449].

[24] USDOT Enforcement Notice – Lukács Affidavit, Exhibit "AE" (emphasis added) [Tab 2AE, p. 158].

(a) **Sunwing** issued a letter and an FAQ to travel agents, stating that the issuance of vouchers is the subject of a formal ruling of the Agency.

> Initially, we offered customers booked on our flights during this suspension the choice between a future travel credit valid for 12 months and a full cash refund. However, after the Government of Canada's non-essential travel advisory, we adjusted our policy to be aligned with all other Canadian airlines and tour operators. This decision is also consistent with the ruling made by the Canadian Transportation Agency on March 26, 2020.[25]

(b) **Air Canada** cited the Statement as a formal exemption granted by the Agency.

> [...] Hello / Bonjour Mr. Foulkes,
>
> I would like to attach two links from the Canadian Transportation Agency website as they may help clarify some of your questions. The CTA has issued temporary exemptions to the Air Passenger Protection Regulations regarding refund request and extension of ticket validity.
>
> https://www.otc-cta.gc.ca/eng/content/canadian-transportation-agency-issues -temporary-exemptions-certain-air-passenger-protection
>
> https://otc-cta.gc.ca/eng/statement-vouchers [...][26]

(c) **Westjet** asserted that the Statement was a decision that Westjet made "in conjunction with" the Agency and that Westjet is bound by that.

> We recognize that the cancellation of flights and the current economic uncertainty for amny of our guests has created a great deal of frustration. A viable and consistent decision was reached in conjunction with the Canada Transportation Agency regarding the refund of itineraries immediately affected by the COVID-19 crisis period.
>
> We appreciate that your view is that the Canadian Transportation Agency has issued two different initiatives however they act as the governing agency for all Canadian agencies and we operate within the policies that they set out.

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[25] Sunwing's letter and FAQ, dated March 27, 2020 – Lukács Affidavit, Exhibits "U" and "V" (emphasis added) [Tabs 2U and 2V, pp. 117 and 119].

[26] Air Canada's email to Mr. Foulkes, dated April 1, 2020 – Lukács Affidavit, Exhibit "X" (emphasis added) [Tab 2X, p. 128].

> We assure you that should future discussions result in an alternate policy adjustment that you will be contacted via email to advise you of such.[27]

33. In some instances, air carriers and the travel industry also cited the Statement suggesting the Agency supported, approved, or endorsed an air carrier's refusal to refund passengers, leaving passengers with no viable option other than to accept a voucher:

(a) **Westjet** asserted that the Agency approved Westjet issuing vouchers in place of a refund.

> We understand the challenges our guest have been faced with. However, the Canadian Transport Agency has approved us to issue refunds to the travel bank. [...][28]

(b) **Air Canada** suggested that the "maximum" the passenger could achieve is the voucher that the Agency has supported.

> As mention previously the maximum we can provide is to keep your ticket as a credit for 24 months (2 years) [...] The policy we follow at the moment is supported by the CTA (Canadian air transportation agency).[29]

(c) **Air Transat** stated that the Agency had issued an opinion that vouchers are acceptable when passengers' travel plans are cancelled.

> [...] We strongly believe that the 24-month credit offered to our customers to compensate for their cancelled travel plans is a flexible proposition in these exceptional circumstances [...] In this regard, the Canadian Transportation Agency recently issued an opinion on the subject, which supports our decision and emphasizes that the solution proposed by Transat, among others, is appropriate given the current situation.[30]

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[27] Email of WestJet to Mr. Chamberlain, dated Apirl 5, 2020 – Lukács Affidavit, Exhibit "N" (emphasis addd) [Tab 2N, p. 86].

[28] WestJet's Facebook message to Ms. Christopher, dated March 31, 2020 – Lukács Affidavit, Exhibit "N" (emphasis added) [Tab 2N, p. 86].

[29] Chain of emails between Air Canada and Mr. Belisle, dated March 20-27, 2020 – Lukács Affidavit, Exhibit "Y" (emphasis added) [Tab 2Y, p. 134].

[30] Email of Air Transat to Mr. Bacour, dated March 26, 2020 – Lukács Affidavt, Exhibit "Z" (emphasis added) [Tab 2Z, p. 139].

(d) **TravelOnly**, a travel agency, cited the Statement as a "direction" for the travel industry to issue vouchers instead of refunds.

> The Canadian Transportation Agency has provided a statement which provides direction for you and your travel advisor regarding the issuing of future travel vouchers. In summary, the CTA believes that providing affected passengers with vouchers or credits for future travel is appropriate and reasonable. We understand that you may have questions on your voucher and how to use it for future travel and we encourage you to reach out to your TravelOnly advisor or our offices for assistance at any time. Please note that most vouchers will be issued within the next 4-6 weeks depending on the airline and travel supplier.[31]

(e) **Travel Week**, a travel agents journal, encouraged travel agents to use the Statement to coerce passengers to withdraw credit card chargebacks and blame passengers for not purchasing travel insurance (see next section on how useful travel insurance could be).

> **"Tactful and tough, agents have effective strategies for dealing with refund demands"** [...]
>
> A letter that Vanderlubbe and his team have ready for any client making persistent refund requests or launching credit card chargebacks is strongly worded but fair, and explains the situation from the retailer's side. The letter cites the CTA statement and reads, in part: "We too are experiencing financial damage from the COVID19 pandemic, paying our staff for more than 5 weeks now with little or no revenue coming, in order to help our customers return home, process future travel credits, and we will be re-booking for months later."
>
> The letter also notes: "The Federal Government has issued a plain language statement which you can read from the link below [https://otc-cta.gc.ca/eng/statement-vouchers] that states that, as far as the air travellers protection regime goes, it was never intended to cover acts of God, or a force majeure situation. In short, they state that a future travel credit for 2 years is sufficient compensation under this circumstance.
>
> [...]

[31] TravelOnly Facebook post, dated March 25, 2020 – Lukács Affidavit, Exhibit "AB" (emphasis added) [Tab 2, p. 145].

> [*sic*] Your chargeback through your credit card is unreasonable given that you are being offered a travel credit good for two years, and that you had the opportunity to purchase cancellation insurance at the time of booking, and you declined to do so.
>
> [*sic*] We ask that you contact your credit card company and 'reverse the chargeback request'. We need evidence of this in order to process your future travel credit."[32]

(f) **Travel Industry Council of Ontario** issued a bulletin interpreting the Statement as the Agency allowing the issuance of vouchers in place of refunds.

> **If you sold only air transportation on an airline regulated by the Canadian Transportation Agency (CTA):**
>
> The CTA has indicated that to sustain the economic viability of the airline industry, the airlines under their jurisdiction may issue vouchers for future travel in lieu of refunds. Please click here for the CTA's statement. Please note that TICO does not have jurisdiction over airlines, which are federally regulated.[33]

34. Some air carriers and travel agencies also purported to automatically "issue" vouchers to the passengers, without reference to the passengers' right to a refund, also implying that the voucher is the best option available to the passenger.[34]

ii. The Agency repeated the Statement to brush off passengers

35. The Agency repeated the same boilerplate Statement and/or the COVID-19 Agency Page back to passenger who contacted the Agency for assistance, strongly indicating that a voucher would be the passengers' best outcome.

(a) The Agency answers passengers' Twitter inquiries by simply saying "please refer to this link that will answer your question."[35]

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[32] Travel Week article, dated April 3, 2020 – Lukács Affidavit, Exhibit "AD" (emphasis added) [Tab 2, p. 151].
[33] TICO Registrar Bulletin – Lukács Affidavit, Exhibit "AC" [Tab 2, p. 147].
[34] Lukács Affidavit, para. 18(a) [Tab 2, p. 36].
[35] Lukács Affidavit, paras. 48-49 [Tab 2, p. 26] and Exhibit "Q" [Tab 2Q, p. 99].

(b) The Agency responded to a passenger's email inquiries by copying and pasting portions of the Statement and the COVID-19 Agency Page. The Agency provides no real solution except to wait for a response from the airline by November 2020 at the earliest, and if unsuccessful, to complain to the same body that issued the endorsement of the vouchers (i.e., the Agency).[36]

iii. Passengers are likely to be denied their trip cancellation insurance claims

36. As a final resort, passengers that have purchased travel insurance would likely approach their travel insurance providers to claim their loss on the airfare that air carriers refuse to refund. However, the Statement is likely to be cited again to the passenger by the insurers to deny a travel insurance claim on the basis that the Agency endorsed the issuance of vouchers as appropriate.

> [...] On March 25, 2020, the Canadian Transportation Agency updated its endorsement of the use of vouchers or credits as an appropriate approach for Canada's airlines as long as these vouchers or credits do not expire in an unreasonably short period of time.
>
> Travel insurers are advising policyholders that if you have been offered this type of full credit, or voucher for future use by an airline, train or other travel provider, in many instances, under the terms of your insurance policy you will not be considered to have suffered an insurable loss.
>
> [...]
>
> Disputes over refunds and credits should be directed to your travel service provider, transportation carrier or the Canadian Transportation Agency. [...][37]

37. It is unclear under what circumstances trip cancellation insurance would protect a passenger when, in the COVID-19 Agency Page, the Agency endorsed the issuance of vouchers in place of refunds for flights cancelled for any reason.

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[36] Lukács Affidavit, paras. 51-58 [Tab 2, pp. 26-29] and Exhibits "R" and "S" [Tabs 2R-2S, pp. 102 and 106].

[37] Canadian Life and Health Insurance Association's press release, dated April 1, 2020 – Lukács Affidavit, Exhibit "AF" (emphasis added) [Tab 2AF, p. 161].

G. The Agency's Failure to Take Immediate Action to Rectify the Statement

38. On March 30, 2020, the Applicant Air Passenger Rights [**APR**] wrote to the Agency raising concerns regarding the Statement and requesting that it be removed by March 31, 2020. On the same day, the Agency acknowledged receipt of APR's letter. Until the filing of this Motion, the Agency has not responded to APR's letter, nor made any clarifications or changes to the Statement.[38]

PART II – STATEMENT OF THE POINTS IN ISSUE

39. Should this Court grant an interim mandatory and prohibitory injunction to protect the rights of passengers, pending the interlocutory injunction hearing?

40. Should this Court grant an interlocutory mandatory and prohibitory injunction to protect the rights of passengers, pending disposition of the Application?

41. Should this Court issue directions and/or orders to facilitate the prompt resolution of the underlying Application, including the fixing of a timetable and an order permitting electronic service of documents?

PART III – STATEMENT OF SUBMISSIONS

42. On this Motion, the Applicant is firstly seeking interim *ex parte* injunctions (both a prohibitory and mandatory injunction) to prevent further prejudice to the passengers until the interlocutory injunctions can be adjudicated. The interlocutory injunctions will be for further temporary relief, and/or continuing of the interim relief until the hearing of this judicial review application.

43. This Honourable Court has jurisdiction to grant the sought interim and interlocutory injunctions pursuant to ss. 18.2, 28(1)(k), and 44 of the *Federal Courts Act*.[39]

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[38] Lukács Affidavit, paras. 75-77 [Tab 2, p. 38] and Exhibits "AG" and "AH" [Tabs 2AG and 2AH, pp. 164 and 167].

[39] *Federal Courts Act*, ss. 18.2, 28(1)(k), and 44 [App. "A", pp. 234, 237, and 239].

A. The Legal Test for Interim or Interlocutory Injunctions

44. The Supreme Court of Canada confirmed the test for an injunction generally requires the consideration of three elements: (1) preliminary investigation of the merits; (2) irreparable harm; and (3) balance of convenience.[40] The Federal Court held that these three elements "are interrelated and that the three factors should not be assessed in total isolation from one another."[41]

i. Difference between interlocutory and interim injunctions: urgency

45. The test for the granting of an interim injunction is the same as the test for an interlocutory injunction, except that the applicant for an interim injunction must also demonstrate urgency.[42]

46. The urgency usually relates to the "irreparable harm" factor. As such, this Court should first determine if an applicant meets the three factors under the test for an injunction, and then assess the urgency of the matter.[43]

ii. The Preliminary Investigation of the Merits

47. For this first branch, the Court does not engage in an extensive review of the merits. Rather, the requirement is "a serious issue to be tried" in the sense that the underlying case is neither frivolous nor vexatious. The threshold is low. [44]

48. However, where an applicant seeks "mandatory" action from the other party, the underlying case supporting the *mandatory* injunction is tested against the standard of a

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[40] *R. v. CBC.*, 2018 SCC 5 at paras. 12-13 [App. "B", Tab 22, p. 491].

[41] *Unilin Beheer B.V. v. Triforest Inc.*, 2017 FC 76 at para. 102 [App. "B", Tab 29, p. 627].

[42] *Federal Courts Rules*, Rule 374(1) [App. "A", p. 243]; and *Laboratoires Servier v. Apotex Inc.*, 2006 FC 1443 at para. 17 [App. "B", Tab 16, p. 398].

[43] *Fournier Pharma Inc. v. Apotex Inc.*, [1999] F.C.J. No. 504 at para. 3 [App. "B", Tab 12, p. 361]; and *Canada (Public Safety and Emergency Preparedness) v. Sevic*, 2020 CanLII 20385 (FC) [App. "B", Tab 3, p. 257].

[44] *RJR – MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 [***RJR-MacDonald***] at paras. 54-55 [App. "B", Tab 25, p. 538].

strong *prima facie* case. This higher threshold does not require that the applicant show that they are sure to win, but merely a "strong likelihood on the law and the evidence presented that, at trial, the applicant will be ultimately successful."[45]

49. The essential difference between "a strong *prima facie* case" and "a serious issue to be tried" is that under the former "the court is required to undertake a closer analysis of the merits of the case before granting the interim relief," and in the latter case "the court is not required to examine the merits of the case as closely."[46]

iii. Irreparable Harm

50. The irreparable harm branch of the test is "closely tied to the remedy of damages." Irreparable refers to the nature of the harm suffered rather than its magnitude. It is harm which either cannot be quantified in monetary terms or which cannot be cured, usually because one party cannot collect damages from the other.[47]

51. The quality of the evidence required to establish irreparable harm is a function of the nature of the irreparable harm alleged. On the highest end of the spectrum, in cases where the alleged irreparable harm is financial in nature, clear and compelling evidence is required. The Court is also permitted to draw logical inferences of irreparable harm based on the evidence before the Court.[48]

52. Irreparable harm is "one of the factors that might be weighed when deciding whether to grant an interlocutory injunction." This element could be relaxed in cases such as: (1) when an applicant is not seeking, or may not be able to seek, damages in the

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[45] *R. v. CBC.*, 2018 SCC 5 at paras. 13 and 17 [App. "B", Tab 22, pp. 491 and 493].

[46] *Diversified Metal Engineering Ltd. v. Trivett*, 2006 PESCAD 16 at para. 25 [App. "B", Tab 10, p. 339].

[47] *Cheder Chabad v. Minister of National Revenue*, 2013 FCA 196 at para. 21 [App. "B", Tab 6, p. 303]; and *RJR-Macdonald* at para. 64 [App. "B", Tab 25, p. 541].

[48] *Administration de pilotage des Laurentides v. Corp. des pilotes du Saint-Laurent central inc.*, 2015 FCA 295 at para. 13 [App. "B", Tab 1, p. 247]; and *Newbould v. Canada (Attorney General)*, 2017 FCA 106 at paras. 28-29 [App. "B", Tab 21, p. 486].

underlying claim; or (2) the underlying dispute transcends the scope of a purely private dispute, and affects the rights of third parties, such as public interest litigation.[49]

53. Damage or inconvenience to third parties may also be considered in the determination of irreparable harm. Specifically, in the case of charitable organizations, this Court carved out an exception whereby harm to third parties may be considered when that third party depends upon the applicant that is before the Court.[50]

iv. Balance of Convenience

54. Under this third branch, the Court identifies the party which would suffer greater harm from the granting or refusal of the interlocutory injunction, pending a decision on the merits. The factors that must be considered under this branch are numerous and will vary from case to case. They could include public interest considerations, such as the concerns of society generally, and the particular interests of an identifiable group, such as air passengers in this instance, should be considered.[51]

55. Whether an applicant provides an undertaking for damages is a factor in the balance of convenience equation. The lack of an undertaking is not fatal. A respondent's absence of damages if the injunction were to issue may be an important consideration in whether an undertaking as to damages should be waived.[52]

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[49] *RJR-Macdonald* at para. 66 [App. "B", Tab 25, p. 541]; *David Hunt Farms Ltd. v. Canada (Minister of Agriculture)*, [1994] 2 F.C. 625 at para 24 [App. "B", Tab 8, p. 324]; *U.A.W. v. Pacific Western Airlines Ltd.*, 1986 ABCA 38 at para. 23 [App. "B", Tab 30, p. 649].

[50] *Edmonton Northlands v. Edmonton Oilers Hockey Club*, A.J. No. 1001, [1994] at para. 85 [App. "B", Tab 11, p. 356] (aff'd: 1994 ABCA 90); *Glooscap Heritage Society v. Canada (National Revenue)*, 2012 FCA 255 at para. 34 [App. "B", Tab 14, p. 384]; and *Holy Alpha & Omega Church of Toronto v. Canada (Attorney General)*, 2009 FCA 265 at para. 17 [App. "B", Tab 15, p. 392].

[51] *R. v. CBC.*, 2018 SCC 5 at paras. 12-13 [App. "B", Tab 22, p. 491]; and *RJR-Macdonald* at paras. 67-68 [App. "B", Tab 25, p. 541].

[52] *Federal Courts Rules*, Rule 373(2) [App. "A", p. 243]; *Soowahlie Indian Band v. Canada (Attorney General)*, 2001 FCA 387 at para. 13 [App. "B", Tab 26, p. 554]; and *Algonquin Wildlands League v. Northern Bruce Peninsula (Municipality)*, 2000 CarswellOnt 5326 at para. 4 [App. "B", Tab 2, p. 252].

56. In the context of public interest litigation, the court may waive the undertaking when there are serious public interests at stake and the balance of convenience, including the public interest, otherwise favours the applicant. Fairness concerns are also at play when an applicant is acting altruistically on behalf of and for the benefit of a group of affected persons. Courts also consider the relative economic strength of the parties, so that the financial wherewithal of an applicant would not be the sole reason to render interlocutory remedies ineffectual.[53]

B. Strong *Prima Facie* Case and a Serious Issue to be Tried in the Present Case

57. On the interim injunction, the Applicant seeks the following orders, pending hearing of the interlocutory injunction: (1) the Agency post some clarification regarding the Statement on their website; (2) the Agency bring this Court's order and the clarification to the attention of passengers inquiring about refunds from air carriers; and (3) the Agency refrain from issuing any decision, order, determination, or any other ruling with respect to refunds from air carriers for the COVID-19 pandemic.

58. On the interlocutory injunction, the Applicant seeks the following: (1) the Agency completely remove the Statement and references thereto, or alternatively continue interim injunction #1; (2) interim injunction #2 be continued; (3) interim injunction #3 be continued; (4) the Agency bring this Court's order, and the removal or clarification of the Statement, to the attention of passengers that **previously** contacted the Agency; and (5) the Agency bring this Court's order, and the removal or clarification of the Statement, to the attention of air carriers and a travel agency association.

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[53] *Taseko Mines Ltd. v. Phillips*, 2011 BCSC 1675 at paras. 68-70 [App. "B", Tab 27, p. 569]; *Friends of Stanley Park v. Vancouver (City) Board of Parks & Recreation*, 2000 BCSC 372 at paras, 44-46 [App. "B", Tab 13, pp. 377-378]; *Delta (Municipality) v. Nationwide Auctions Inc.*, [1979] 4 W.W.R. 49 at paras. 22-23 [App. "B", Tab 9, pp. 331-332]; *Comité de sauvegarde de l'École La Découverte de Saint-Sauveur c. Nouveau-Brunswick (Ministre de l'Éducation)*, [1997] N.B.J. No. 582 at paras. 13-14 [App. "B", Tab 7, pp. 316-317]; *Micaleff v. Gainers Inc.*, [1988] O.J. No. 80 at para. 41 [App. "B", Tab 20, p. 479]; and *Tracy v. Instaloans Financial Solution Centres (B.C.) Ltd.*, 2006 BCSC 1018 at para. 106 [App. "B", Tab 28, p. 604] (aff'd: 2017 BCCA 481 at para. 72).

59. Interim injunctions (1) and (2) and interlocutory injunctions (1), (2), (4), and (5) are "mandatory" in nature. Accordingly, the Applicant must demonstrate the higher threshold of a strong *prima facie* case for: (a) the Statement not being a legal ruling; or (b) the Statement and the COVID-19 Agency Page being misleading.

60. Interim injunction (3) and interlocutory injunction (3) are "prohibitory" in nature. As such, the Applicant need only meet the low threshold of "a serious issue to be tried" that the Agency's conduct gives rise to a reasonable apprehension of bias.

i. The Statement is not a legal ruling: strong *prima facie* case

61. The Agency, like other quasi-judicial tribunals and courts, speaks through its decisions, orders, determinations, and rulings.[54] This principle is reflected in section 41 of the Agency's enabling legislation, the *Canada Transportation Act* [***Act***], which provides a statutory right of appeal to this Honourable Court from decisions, orders, rules, and regulations made by the Agency.[55] Notably, the *Act* does not contemplate the Agency issuing public commentary on disputed matters, such as the Statement. On the contrary, the Agency's own *Code of Conduct* explicitly prohibits doing so.[56]

62. It is apparent on the face of the record that the Statement is not a legal ruling:

(a) Substantively, the Statement provides no legal reasoning or support for key assertions. For example, the Agency baldly asserted that in such circumstances the passengers will be out-of-pocket, with the underlying implication that passengers have *no right to a refund*. The Agency's formal decisions since 2004 specifically provide for a right to refund, which was omitted from the Statement.

(b) Procedurally, the Agency has already suspended the processing of all complaints initiated by passengers against air carriers, from March 18, 2020 to June

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[54] See, for example, Determination No. A-2020-42 – Lukács Affidavit, Exhibit "H" [Tab 2H, p. 69].
[55] *Canada Transportation Act*, s. 41(1) [App. "A", p. 230].
[56] *Code of Conduct*, para. 40 – Lukács Affidavit, Exhibit "T" [Tab 2T, p. 110].

30, 2020.[57] Consequently, the Statement could not have possibly resulted from a formal adjudication or *inter partes* proceeding.

(c) As to form, the Statement lacks the indicia of a legally binding ruling or decision from a court or tribunal, such as: (1) a file or docket number; (2) place and date the matter was heard and/or decided; (3) the parties that appeared in the matter; and (4) name of the decision maker(s).

63. The Applicant has therefore demonstrated a strong *prima facie* case that the Statement cannot be a decision, determination, order, or other legally binding ruling of the Agency. In light of clear evidence that the travel industry has passed off the Statement as if it is legally binding, or bearing some legal or government endorsement for the withholding of refunds, it is imperative that this Court direct the Agency to provide the necessary clarification(s) until the Application can be heard on its merits.

ii. That the Statement and/or the COVID-19 Agency Page are misleading: strong *prima facie* case

64. As a further or alternative basis for granting interim and interlocutory injunctions #1 and #2, there is also a strong *prima facie* case that the Statement and/or the COVID-19 Agency Page are misleading.

(a) The COVID-19 Agency Page and Statement give passengers the impression that the air carriers have a *carte blanche* to cancel flights and withhold refunds, all under the guise of COVID-19, irrespective of the actual reason for cancellation.

(b) The Statement is easily accessible from URL links in the COVID-19 Agency Page and gives lay passengers the general impression that this is an official legal ruling or endorsement.

(c) The travel industry has already misled passengers by citing the Statement as a legal ruling or decision, or passed off the Statement as a government endorsement or approval for withholding refunds from passengers.

[57] Order No. 2020-A-37 – Lukács Affidavit, Exhibit "K" [Tab 2K, p. 79].

65. On the interlocutory injunction, the Agency should be further directed to clarify any misconception for passengers who **previously** contacted the Agency regarding refunds arising from COVID-19, and key stakeholders of the travel industry.

iii. The Agency's conduct gives rise to a reasonable apprehension of bias: a serious issue to be tried

66. The fundamental precept of our justice system is that "justice should not only be done, but should manifestly and undoubtedly be seen to be done." Judicial and quasi-judicial officers speak to, and are accountable to, the public through their judgments and rulings. It is impermissible for quasi-judicial tribunals to jump into the fray extra-judicially by posting comments on the tribunal's website expressing support for the position of one side on a dispute that could come before that tribunal.[58] This is precisely the impression the Statement gives to reasonably informed members of the public.

67. The Agency's posting of the Statement in the face of the Agency's own *Code of Conduct* firmly establishes a "serious issue to be tried". The *Code of Conduct* expressly prohibits members of the Agency from expressing an opinion about potential cases or any other issue related to the Agency's work. The mere posting of the Statement runs afoul of that clear prohibition.

> (40) Members **shall not publicly express an opinion about any past, current, or potential cases or any other issue related to the work of the Agency**, and shall refrain from comments or discussions in public or otherwise that may create a reasonable apprehension of bias.[59]

68. Although the Statement does not disclose the name(s) of the appointed member(s) that supported its publication, the evidence before this Court supports the conclusion that the Statement was endorsed by the appointed members of the Agency.

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[58] *R. v. Yumnu*, 2012 SCC 73 at para. 39 [App. "B", Tab 23, p. 508]; *VIA Rail Canada Inc. v. Canadian Transportation Agency*, 2005 FCA 79 at para. 93 [App. "B", Tab 31, p. 687] (rev'd on other grounds: 2007 SCC 15); and *Wewaykum Indian Band v. Canada*, 2003 SCC 45 at paras. 57-67 [App. "B", Tab 32, pp. 710-713].

[59] *Code of Conduct* – Lukács Affidavit, Exhibit "T" (emphasis added) [Tab 2T, p. 110].

(a) The Statement clearly states that it is presenting the Agency's position. Subsection 7(2) of the *Act* states that the Agency consists of its appointed members.[60]

(b) The Agency continues to display the Statement even after APR brought to its attention the Statement's misleading nature, and requested its removal.

69. The Applicant submits that an informed, reasonable, and right-minded person, viewing the Statement and/or the COVID-19 Agency Page realistically and practically, and having thought the matter through,[61] would conclude that the Agency has not and will not act impartially because:

(a) the appointed member(s)' failure to take corrective actions gives rise to a reasonable inference that they all supported the Statement;

(b) the Statement's unexplained contradictions with the Agency's formal rulings suggest that its members are leaning towards the air carriers and seeking to protect them through extrajudicial techniques;

(c) the Agency's boilerplate repetition of the Statement and the COVID-19 Agency Page to passenger inquiries firmly supports that the Agency's predisposition is that passengers have no right to any refund, with no recourse but vouchers; and

(d) Westjet stated to a passenger that the Statement was the product of a decision reached in conjunction with the Agency.[62]

70. The Applicant therefore has established a serious issued to be tried on the issue of a reasonable apprehension of bias.

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[60] *Canada Transportation Act*, s. 7(2) [App. "A", p. 229].
[61] *Wewaykum Indian Band v. Canada*, 2003 SCC 45 at paras. 58-60 [App. "B", Tab 32, p. 711].
[62] Lukács Affidavit, paras. 44-45 and Exhibit "N" [Tabs 2 and 2N, pp. 23 and 86].

C. Irreparable Harm if an Injunction is not Granted

71. The underlying Application is a judicial review by a non-profit public interest litigant seeking to protect the rights of thousands of passengers who have been exposed to misinformation stemming from the Agency's publication of the Statement [**Affected Passengers**].[63] The Statement is an extrajudicial commentary for which the Agency cannot otherwise be held accountable.

72. The immediate harm to the Affected Passengers is two-fold.

(a) The air carriers and the travel industry are utilizing the Statement and the COVID-19 Agency Page to mislead passengers into believing that withholding full refunds is sanctioned by the law or the government, and that the Affected Passengers' only available options are accepting a voucher, paying substantial cancellations fees, or accepting a small refund.

(b) The Agency's "jump into the fray" of disputes between passengers and carriers gives Affected Passengers and the public the perception that justice will *not* be seen to be done, and thus threatens the integrity of, and public confidence in, the administration of justice.

73. The harm to the Affected Passengers is irreparable because they may have no remedy in damages against the Agency. Firstly, the Affected Passengers may not have a clear cause of action against the Agency for damages when the Statement is being passed off by a third-party, the air carriers. Secondly, with respect to the harm from the reasonable apprehension of bias, it is similarly unclear if there could even be a claim for damages against a decision maker that failed to act impartially. As the Supreme Court held in *RJR-MacDonald*:

> [...] it will in most cases be impossible for a judge on an interlocutory application to determine whether adequate compensation could ever be obtained at trial. Therefore, until the law in this area has developed further, it is appropriate to assume that the financial damage which will be suffered by an applicant following a refusal of relief, even though

[63] Lukács Affidavit, paras. 19-27 and 60-66 [Tab 2, pp. 17-18 and 30-33].

capable of quantification, constitutes irreparable harm.[64]

74. The present case is not a typical private dispute, where an applicant seeks an injunction to protect *their own* interest. APR concedes that it does not suffer direct harm in this instance; rather, the irreparable harm is suffered by the Affected Passengers. Consistent with its non-profit public interest mandate, APR brings this Motion seeking injunctive relief *for the benefit of* those passengers to preserve the *status quo*. This public interest initiative warrants special attention and consideration when the Court assesses the type of harm that the public interest litigant must demonstrate in seeking an injunction to prevent harm to persons for whom the entity speaks.[65]

75. Some of the Affected Passengers, specifically those that are members of the APR Facebook Group, rely on APR to voice their grievance over the withholding of refunds by air carriers, and to protect those passengers' interest whenever possible. It is consistent with APR's own articles of incorporation,[66] and Dr. Lukács's previous work before various courts and tribunals, to bring a public interest proceeding for the benefit of, and to protect, those vulnerable passengers.[67]

76. Affected Passengers that were subject to deception cannot be expected to bring their own motion for relief when they themselves are likely still caught in the web of deceit. The only other viable alternative is a public interest organization that may step forward to advance the Affected Passengers' interests when the Agency fails to do so.[68]

77. Absent swift intervention by this Court, the extrajudicial Statement will continue to mislead the Affected Passengers into prejudicing their rights to a refund. Moreover, the Agency's continued involvement in passengers' claims against air carriers for COVID-19 related refunds will put the administration of justice into disrepute.

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64 *RJR-Macdonald* at para. 66 (emphasis added) [App. "B", Tab 25, p. 541].
65 See para. 53, *supra*.
66 Lukács Affidavit, Exhibit "D" [Tab 2D, p. 51].
67 See para. 52, *supra*.
68 *International Air Transport Association et al. v. AGC et al.*, Federal Court of Appeal File No. A-311-19, Order of Near J.A., dated March 3, 2020 – Lukács Affidavit, Exhibit "C" [Tab 2C, p. 47].

D. The Balance of Convenience Favours Granting the Injunction

78. In this instance, there is no evidence that the Agency would suffer any monetary damages or great inconvenience if the narrowly tailored interim and interlocutory injunctions sought by the Applicant were to be granted.

(a) The Statement has no utility except to spur confusion for the passengers, and air carriers' unjustifiable reliance on it to deny rightful refunds to passengers.

(b) The Agency is not supposed to have any stake, financial or otherwise, in the disputes between passengers and air carriers. Consequently, the sought injunctions are financially neutral from the Agency's perspective.

(c) The Agency has already suspended all dispute proceedings until June 30, 2020.[69] Enjoining the Agency from addressing complaints relating to COVID-19 is simply maintaining that *status quo*, and there could be no inconvenience from that.

79. Temporarily enjoining the Agency from addressing COVID-19 refund related complaints is imperative because, absent the injunction, the Agency could, on its own motion, lift the suspension and then seek to retroactively "legitimize" their extrajudicial Statement, to the prejudice of the passengers. There is also risk for multiplicity of proceedings if the Agency were to take retroactive steps. The Agency has demonstrated that it is not shy to take steps that may have significant ramification or prejudice to the passengers, all without involvement of or notice to the passengers.

80. There is also the concern that should the Court find in the Applicant's favour on the merits that the Agency did not act impartially, the Agency would lose jurisdiction by operation of law.[70] Any COVID-19 refund complaints the Agency dealt with in the meantime could become a nullity, leading to a significant waste of resources for all.

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[69] Order No. 2020-A-37 – Lukács Affidavit, Exhibit "K" [Tab 2K, p. 79].

[70] *Canadian Cable Television Assn. - Assn canadienne de télévision par câble v. American College Sports Collective of Canada Inc.*, [1991] 3 F.C. 626 at para. 45 [App. "B", Tab 4, p. 279].

81. Compliance with the injunctions sought is not onerous for the Agency.

(a) The interim injunction merely directs the Agency, **going forward**, to bring the clarifications and this Court's order to the attention of whoever contacts them about COVID-19 refunds. This can be easily achieved with an email template.

(b) The interlocutory injunction that the Agency contact passengers who **previously** inquired with the Agency regarding COVID-19 refunds can easily be achieved with minimal time and resources. The Agency itself has records of the passengers that they corresponded with. The Agency could use a computer search using keywords such as "Statement on Vouchers" or other keywords to identify all passengers to send a template clarification email to.

(c) The interlocutory injunction that the Agency send air carriers and one travel agency association the clarifications and this Court's order is similarly not onerous. The Agency clearly has the contact information for the air carriers and it can be accomplished by sending a template email to the responsible individual for each of those air carriers.

82. Finally, the general public also has a substantial interest in ensuring that law and order are upheld and maintained, especially during a global pandemic. Members of the public will want to see that justice is seen to be done and any concerns over impartiality of a quasi-judicial tribunal be swiftly addressed without exception, with adequate protections to those who may be affected pending final determination of the issue.

Relief from undertaking for damages

83. The Applicant, as a non-profit organization engaging in public interest advocacy work, does not have the financial resources to provide an undertaking as to damages.[71]

[71] Lukács Affidavit, paras. 22-23 [Tab 2, p. 17].

84. Considering the strong merits in the Applicant's case, the serious public interest issues at stake, the balance of convenience favouring the Applicant, and the absence of any obvious monetary damages to the Agency that could arise from the injunction, this is the most appropriate case for excusing the Applicant from giving an undertaking.[72]

85. Public interest litigation and advocacy will be severely restricted if public interest litigants are required to provide an undertaking for damages.

86. Even should the Court have any residual concerns, the Court should err on the side of caution and direct the Agency to restore the *status quo* (i.e., the situation prior to the Agency's publication of the Statement on March 25, 2020).

E. Urgency in Hearing the Interim Injunction

87. As demonstrated by the evidence, misinformation relating to and/or emanating from the Statement has been disseminated and continues to be disseminated by the Agency, air carriers, travel agents, and their industry associations or publications.

(a) As recently as April 3, 2020, a publication for travel agents provided detailed instructions on how travel agents should utilize the Statement to mislead passengers and to deflect them from initiating credit card chargebacks or to coerce passengers into terminating such chargebacks.[73]

(b) The travel insurance industry is informing travel insurers how the Agency's Statement can be utilized to reject trip cancellation insurance claims.[74]

88. This conduct during a pandemic is despicable and cries out for immediate intervention by this Court to freeze any further dissemination of misinformation. The source of the misinformation is the Statement, and therefore it must be rectified promptly, without further delay, to avoid further harm to the public in general, and the Affected Passengers in particular.

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[72] See paras. 55-56, *supra*.
[73] Lukács Affidavit, Exhibit "AD" [Tab 2, p. 151].
[74] Lukács Affidavit, Exhibit "AF" (emphasis added) [Tab 2AF, p. 161].

PART IV – ORDER SOUGHT

89. The Moving Party, Air Passenger Rights, is seeking the following Orders:

(a) an interim order (*ex-parte*) that:

i. upon service of this Court's interim order, the Agency shall prominently post the interim clarification (below) at the top portion of both the French and English versions of the "Statement on Vouchers" [**Statement**] and the "Important Information for Travellers During COVID-19" page [**COVID-19 Agency Page**]:

> The Canadian Transportation Agency's "Statement on Vouchers" is not a decision, order, determination, or any legal ruling of the Canadian Transportation Agency. It **does not** have the force of law. The "Statement on Vouchers" is currently pending judicial review by the Federal Court of Appeal. This notice is posted by Order [URL link to order] of the Federal Court of Appeal.

ii. starting from the date of service of this Court's interim order, the Agency shall bring the above interim clarification to the attention of anyone that contacts the Agency with a formal complaint and/or informal inquiry regarding air carriers' refusal to refund arising from the COVID-19 pandemic;

iii. the Agency shall not issue any decision, order, determination, or any other ruling with respect to refunds from air carriers for the COVID-19 pandemic; and

iv. this interim order is valid for fourteen days from the date of service of this Court's interim order on the Agency, and may be renewed by the Applicant under Rule 374(2);

(b) an interlocutory order that:

i. the Agency shall forthwith completely remove the Statement from the Agency's website including any references to the Statement within the COVID-19 Agency Page and substitute it with this Court's interlocutory order, or alternatively the order renewing the interim clarification (subparagraph 1(a)(i) above), until final disposition of the Application;

ii. the interim order in subparagraph 89(b)(ii) above is maintained until final disposition of the Application;

iii. the interim order in subparagraph 89(b)(iii) above is maintained until final disposition of the Application;

iv. the Agency shall forthwith communicate with all persons that the Agency has communicated with regarding the Statement and bring those persons' attention to this Court's interlocutory order and the removal or clarification of the Statement; and

v. the Agency shall forthwith communicate with all air carriers under the Agency's jurisdiction, the Association of Canadian Travel Agencies, and Travel Pulse and bring those persons' attention to this Court's interlocutory order and the removal or clarification of the Statement;

(c) an order fixing an expedited timetable for the Applicant's motion for an interlocutory order (para. 89(b) above), and the hearing of the Application;

(d) an order directing that all documents in this Application shall be served electronically;

(e) costs and/or reasonable out-of-pocket expenses of this motion; and

(f) such further and other relief or directions as the counsel may request and this Honourable Court deems just.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

April 7, 2020

SIMON LIN
Counsel for the Applicant,
Air Passenger Rights

PART V – LIST OF AUTHORITIES

Statutes and Regulations

Air Passenger Protection Regulatins, SOR/2019-150,
ss. 10-12 and 17

Federal Courts Act, R.S.C., 1985, c. F-7,
ss. 18.2, 28, and 44

Canada Transportation Act, S.C. 1996, c. 10,
ss. 7 and 41

Federal Courts Rules, S.O.R./98-106,
Rules 369 and 373-374

Case Law

Administration de pilotage des Laurentides v. Corp. des pilotes du Saint-Laurent central inc., 2015 FCA 295

Algonquin Wildlands League v. Northern Bruce Peninsula (Municipality), 2000 CarswellOnt 5326

Canada (Public Safety and Emergency Preparedness) v. Sevic, 2020 CanLII 20385 (FC)

Canadian Cable Television Assn. - Assn canadienne de télévision par câble v. American College Sports Collective of Canada Inc., [1991] 3 F.C. 626

Canadian Council for Refugees v. R., 2008 FCA 40

Cheder Chabad v. Minister of National Revenue, 2013 FCA 196

Comité de sauvegarde de l'École La Découverte de Saint-Sauveur c. Nouveau-Brunswick (Ministre de l'Éducation), [1997] N.B.J. No. 582

David Hunt Farms Ltd. v. Canada (Minister of Agriculture), [1994] 2 F.C. 625

Delta (Municipality) v. Nationwide Auctions Inc., [1979] 4 W.W.R. 49

Diversified Metal Engineering Ltd. v. Trivett, 2006 PESCAD 16

Edmonton Northlands v. Edmonton Oilers Hockey Club, A.J. No. 1001, [1994]