Court File No. A-102-20

FEDERAL COURT OF APPEAL

BETWEEN:

AIR PASSENGER RIGHTS

Appellant

-and-

CANADIAN TRANSPORTATION AGENCY

Respondent

WRITTEN SUBMISSIONS OF THE ATTORNEY GENERAL OF CANADA

March 22, 2021

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Overview

1. By Direction issued February 19, 2021, this Court invited the Attorney General of Canada to make submissions on the issue whether the Canadian Transportation Agency is a proper respondent to this application and, if not, whether the Attorney General should be substituted as respondent.

2. The Agency is not a proper respondent. This application is brought in respect of public statements issued by the Agency. Rule 303(1)(a) of the *Federal Courts Rules* provides that applicants shall not name as a respondent the tribunal in respect of which the application is brought.

3. Even if the Agency could be named as a respondent, its role in this application would be limited by the principles laid down in *Northwestern Utilities*. As an impartial tribunal, it cannot defend the merits of the matter or address allegations of bias.

4. Rule 303(2) provides that where there are no persons that can be named as respondent under Rule 303(1), the applicant shall name the Attorney General of Canada as a respondent. In this capacity, the Attorney General may appear as defender of the rule of

law, to address the allegations that the Agency has not complied with the principles of fairness.

The Canadian Transportation Agency is not a Proper Respondent

5. The application for judicial review is brought pursuant to section 28 of the *Federal Courts Act* "in respect of two public statements issued on or about March 15, 2020 by the Canadian Transportation Agency" concerning refunds for passengers whose flights were cancelled due to the COVID-19 pandemic. The Applicant seeks declaratory and injunctive relief against the Agency. It alleges that the statements are illegal as being unsolicited advance rulings in favour of air carriers that give rise to a reasonable apprehension of bias.

6. Rule 303(1)(a) of the *Federal Courts Rules* provides that an applicant shall name as a respondent every person directly affected by the order sought in the application, "other than a tribunal in respect of which the applicant is brought."[1] Where the application is brought in respect of a tribunal, that tribunal cannot normally be a respondent, although it may request status as an intervener.[2]

7. Where a tribunal has been named as respondent, this Court has allowed motions to amend the style of cause to remove the tribunal as a party respondent.[3]

The Agency Cannot Defend Its Own Decision

8. The rationale behind Rule 303 is the legal policy that a tribunal does not have standing at law to defend its own decision.

9. Whether in judicial review or appeal proceedings, the federal agency that made a decision is not authorized to come to court to defend the decision it made, still less to justify itself.

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[1] Rule 303(1), *Federal Courts Rules*, SOR/98-106, as amended; *Drew v Canada (Attorney General)*, 2018 FC 553.
[2] *Genex Communications Inc. v Canada* (A.G.), 2005 FCA 283 at para 62.
[3] *Exeter v Canada (A.G.)*, 2013 FCA 134 at paras 4,5; *Adebogun v Canada (A.G.)*, 2017 FCA 242.

Its submissions must in principle be limited to an explanation of its jurisdiction, its procedures and the way in which the events unfolded in this case.[4]

10. In *Northwestern Utilities*, the Supreme Court of Canada explained that it has been the policy of the Court to limit the role of an administrative tribunal whose decision is at issue, even where the right to appear is given by statute, to an explanatory role with reference to the record before the tribunal and to the making of representations relating to jurisdiction. "Active and even aggressive participation" by a tribunal in the defence of the merits of its decision "can have no other effect than to discredit the impartiality of an administrative tribunal either in the case where the matter is referred back to it, or in future proceedings involving similar interests and issues or the same parties."[5]

11. Where the authorizing statute is silent as to the role or status of the tribunal, the Supreme Court has confined the tribunal strictly to the issue of its jurisdiction to make the order in question. This does not include authority to address allegations that the tribunal has failed to adhere to the rules of natural justice:

> To allow an administrative board the opportunity to justify its action and indeed to vindicate itself would produce a spectacle not ordinarily contemplated in our judicial traditions.[6]

12. These limits apply even where the tribunal is granted intervener status. In *Quadrini v Canada (AG)*[7], the Public Service Labour Relations Board sought leave to intervene in a judicial review of one of its decisions and file a memorandum of fact and law. This Court observed that whether a tribunal appears as a party or as an intervener, the Court must exercise "careful regulation" over its participation based on the principles of finality and impartiality.[8] It prohibited the Board from attempting "to vary, qualify or supplement the reasons for decision" and from "embarking into the merits of the Board's decision in such

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[4] *Genex Communications Inc., supra*, at para 66.
[5] *Northwestern Utilities Ltd. et al. v City of Edmonton*, [1979] 1 SCR 684 at p 709.
[6] *Northwestern Utilities Inc., supra*, at p 710.
[7] 2010 FCA 246.
[8] *Quadrini, supra*, at paras 16, 17.

a way as to call into question its ability to hear, impartially, any redetermination in the event that this matter is remitted back to it."[9]

13. Similarly, in *Chretien*[10], a Commissioner was granted intervener status on an application for judicial review of his decision not to recuse himself from an Inquiry. The Prothonotary granted leave to the Commissioner to address the mandate and scope of the Commission as well as its jurisdiction and procedural discretion.[11] However, noting that the Commissioner's apprehended bias and whether he might be precluded from proceeding with his inquiry were precisely the matters at issue in the application, the Prothonotary held that his impartiality "is best protected by precluding his participation in the very subject area of controversy…."[12]

14. In this case, the Applicant alleges that the Agency has made an unsolicited advance ruling in favour of air carriers[13], a ruling that suggests that the Agency will likely dismiss passengers' complaints[14]; that it has done so without first hearing submissions from passengers[15]; and that it has thereby lost the impartiality required of a quasi-judicial tribunal.[16] The Applicant specifically alleges that the Agency's conduct gives rise to a reasonable apprehension of bias.[17]

15. Under the limits established by the Supreme Court in *Northwestern Utilities*, the Agency cannot properly address the allegations of bias made by the Applicant.

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[9] *Quadrini, supra*, at para 31.
[10] *Chretien v Canada (AG)*, 2005 FC 591.
[11] *Chretien, supra*, at para 44.
[12] *Chretien, supra*, at para 36.
[13] Notice of Application, para 1.
[14] Notice of Application, para 2.
[15] Notice of Application, para 3.
[16] Notice of Application, paras 4 to 6.
[17] Notice of Application, paras 24 to 31.

The Attorney General May Be Named As Respondent

16. Rule 303(2) provides that where there are no persons that can be named as respondent under Rule 303(1), the applicant shall name the Attorney General of Canada as a respondent.[18]

17. The Attorney General's participation as default respondent in judicial review proceedings pursuant to Rule 303(2) ensures that there can be a party to present an opposite point of view to the applicant's and to defend the tribunal's decision. However, because the Attorney General is also the defender of the public interest and has a duty to uphold the rule of law there may be limits to his ability to defend the decision.[19]

18. Where the Attorney General appears as a respondent, he does so in the public interest, his role and mandate being to assist the Court to reach a decision that accords with law, notwithstanding that the Crown is often a party before the same board or commission whose decision is under review.[20]

19. The Attorney General's role as protector of the rule of law is to ensure that public bodies carry out their duties in accordance with law and that, when they do so, their decisions are respected. As such, the Attorney General has a public interest duty to consider whether and to what extent his participation in the judicial review process is necessary and appropriate to assist the Court in reaching a decision that accords with law.[21]

20. In this case, the Attorney General may assist the Court by reviewing the allegations of bias against the Agency, assessing whether or not those allegations have merit, addressing the evidence and making arguments in support of his assessment. In so doing, he will act as an independent defender of the rule of law, not as the legal defender of the Agency and the

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[18] Rule 303(2), *Federal Courts Rules*, *supra.*
[19] *Hoechst Marion Roussel Canada v Canada (AG)*, 2001 FCT 795; *Chretien*, *supra*, at paras 29 to 31.
[21] *Douglas v Canada (AG)*, 2013 FC 451 at para 86; *Kinghorne v Canada (AG)*, 2018 FC 1060 at para 33.

merits of its position. His arguments may or may not coincide with those that the Agency might have made.

21. Finally, for the purposes of Rule 303(3), the Attorney General is not unable or unwilling to act a respondent in this proceeding.

22. For these reasons, it is appropriate for this Court to substitute the Attorney General of Canada as respondent instead of the Agency.

23. The Agency may decide to seek intervener status. If granted, the Agency could address questions of jurisdiction and process that arise during the application.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 22ND DAY OF MARCH 2021

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LIST OF AUTHORITIES

Statutes and Regulations

1. *Federal Courts Rules*, SOR/98-106, as amended, Rules 303(1) and 303(2)

Caselaw

1. *Adebogun v Canada (A.G.)*, 2017 FCA 242
2. *Chretien v Canada (AG)*, 2005 FC 591
3. *Douglas v Canada (AG)*, 2013 FC 451
4. *Drew v Canada (Attorney General)*, 2018 FC 553
5. *Exeter v Canada (A.G.)*, 2013 FCA 134
6. *Genex Communications Inc. v Canada* (A.G.), 2005 FCA 283
7. *Hoechst Marion Roussel Canada v Canada (AG)*, 2001 FCT 795
8. *Kinghorne v Canada (AG)*, 2018 FC 1060
9. *Northwestern Utilities Ltd. et al. v City of Edmonton*, [1979] 1 SCR 684
10. *Quadrini v Canada (AG)*, 2010 FCA 246