

Federal Court of Appeal



Cour d'appel fédérale

Date: 20210604

Docket: A-102-20

Citation: 2021 FCA 112

Present: GLEASON J.A.

BETWEEN:

AIR PASSENGER RIGHTS

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

Dealt with in writing without appearance of parties.

Order delivered at Ottawa, Ontario, on June 4, 2021.

REASONS FOR ORDER BY:

GLEASON J.A.

Federal Court of Appeal



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REASONS FOR ORDER

GLEASON J.A.

[1] The Court has before it a motion made by the applicant under Rules 369, 318(4), and in the alternative, under Rule 41 of the *Federal Courts Rules*, SOR/98-106, seeking disclosure of documents in the possession, control or power of the Canadian Transportation Agency that relate to statements the Agency made on its website in March 2020. This motion for disclosure has been brought in the context of a pending application for judicial review in which the applicant seeks to challenge the Agency's statements, alleging they are non-binding, violate the Agency's

Code of Conduct and mislead passengers as to their rights. The applicant also claims that the statements give rise to a reasonable apprehension of bias, disqualifying Agency members from ruling on any complaint in which a passenger seeks reimbursement for flights cancelled in relation to the COVID-19 pandemic.

[2] In its response to the disclosure request, the Agency filed detailed submissions, resisting the requested disclosure and setting out its intended position on the various issues that arise in the application, including in respect of the applicant's bias allegations.

[3] On February 19, 2021, this Court issued a Direction, requesting submissions from the parties on whether the Attorney General of Canada should be substituted as the respondent. The Direction noted that this application is not an appeal under section 41 of the *Canada Transportation Act*, S.C. 1996, c. 10, but, rather, an application for judicial review under section 28 of the *Federal Courts Act*, R.S.C. 1985, c. F-7 and that, under paragraph 303(1)(a) and subsection 303(2) of the *Federal Courts Rules*, it would appear that the Attorney General ought to have been named as the respondent. A copy of the Direction was forwarded to the Attorney General, who, following receipt, filed a Notice of Appearance.

[4] The Court received submissions from the parties and from the Attorney General of Canada on the issue of the appropriate respondent in this application.

[5] The Attorney General takes the position that it should be substituted for the Agency as it would be inappropriate for the Agency to defend its decision or to take a position on the bias allegations and the Attorney General is the proper respondent under the *Federal Courts Rules*.

[6] The Agency takes the opposite position, asserting that, as it has a statutory right to be heard in respect of appeals brought under section 41 of the *Canada Transportation Act*, it should be afforded standing to participate as the respondent to this application. In the alternative, the Agency requests that it be afforded the opportunity to make a motion to intervene in this application if the Attorney General is substituted as the respondent.

[7] The applicant, for its part, takes the position that the Agency is the appropriate respondent, but submits that the Agency should be strictly circumscribed in the types of submissions it may make to avoid taking inappropriately adversarial positions.

[8] I am of the view that the Attorney General of Canada should be substituted for the Agency as the respondent in this application given the nature of the application and the Attorney General's willingness to appear and act as respondent.

[9] It is true that subsection 41(4) of the *Canada Transportation Act* affords the Agency the right to be heard in the context of an appeal from one of its decisions. However, as the parties acknowledge, the present application is not an appeal of an Agency decision, but, rather, is an application under section 28 of the *Federal Courts Act*.

[10] The proper parties to such applications are governed by the *Federal Courts Rules*, which are regulations passed under the *Federal Courts Act*. Rule 303 provides:

Respondents

303 (1) Subject to subsection (2), an applicant shall name as a respondent every person

(a) directly affected by the order sought in the application, other than a tribunal in respect of which the application is brought; or

(b) required to be named as a party under an Act of Parliament pursuant to which the application is brought.

Application for judicial review

(2) Where in an application for judicial review there are no persons that can be named under subsection (1), the applicant shall name the Attorney General of Canada as a respondent.

Substitution for Attorney General

(3) On a motion by the Attorney General of Canada, where the Court is satisfied that the Attorney General is unable or unwilling to act as a respondent after having been named under subsection (2), the Court may substitute another person or body, including the tribunal in respect of which the application is made, as a respondent in the place of the Attorney General of Canada.

Défendeurs

303 (1) Sous réserve du paragraphe (2), le demandeur désigne à titre de défendeur :

a) toute personne directement touchée par l'ordonnance recherchée, autre que l'office fédéral visé par la demande;

b) toute autre personne qui doit être désignée à titre de partie aux termes de la loi fédérale ou de ses textes d'application qui prévoient ou autorisent la présentation de la demande.

Défendeurs — demande de contrôle judiciaire

(2) Dans une demande de contrôle judiciaire, si aucun défendeur n'est désigné en application du paragraphe (1), le demandeur désigne le procureur général du Canada à ce titre.

Remplaçant du procureur général

(3) La Cour peut, sur requête du procureur général du Canada, si elle est convaincue que celui-ci est incapable d'agir à titre de défendeur ou n'est pas disposé à le faire après avoir été ainsi désigné conformément au paragraphe (2), désigner en remplacement une autre personne ou entité, y compris l'office fédéral visé par la demande.

[11] By virtue of paragraph 303(1)(a), it is clear that the Agency should not be named as the respondent. Moreover, as the Attorney General has indicated that he is willing to appear and act as the respondent, there is no basis to substitute any other party as the respondent.

[12] Contrary to what the applicant asserts, it is not necessary to name the Agency to ensure that any order is effective. Judicial review applications proceed regularly before this Court and the Federal Court, with the named respondent being the Attorney General, and the Courts' judgments are effective against the tribunals whose decisions are being reviewed: see for example *Adebogun v. Canada (Attorney General)*, 2017 FCA 242, 2017 CarswellNat 7140 at paras 9, 13-14, *Canada (Attorney General) v. Galderma Canada Inc.*, 2019 FCA 196, 2019 CarswellNat 3012 at paras 1-2, 8, 24, 75, *Bissessar v. Canada (Attorney General)*, 2019 FCA 305, 2019 CarswellNat 7639 at paras 20-24, 29-30.

[13] While the foregoing is sufficient to dispose of this issue, I also note that it is likely more appropriate that submissions on the merits of the issues that arise in this application – and most notably in respect of the bias issue – be made by the Attorney General and not the Agency. In this regard, a tribunal should refrain from embarking into the merits of a decision in such a way as to call into question its impartiality (see, for example, *Ontario (Energy Board) v. Ontario Power Generation Inc.*, 2015 SCC 44, [2015] 3 S.C.R. 147 at paras 50 and 71, *Canada (Attorney General) v. Quadrini*, 2010 FCA 246, [2012] 2 F.C.R. 3 at para 16, *Northwestern Utilities Ltd. and al. v. Edmonton*, [1979] 1 S.C.R. 684, 89 D.L.R. (3d) 161 at 709-710, *Canadian Pacific Railway Company v. Canada (Transportation Agency)*, 2021 FCA 69, 2021 CarswellNat 1402 at paras 102-103).

[14] Thus, the Attorney General will be substituted as the respondent in this application.

[15] If the Attorney General wishes to make additional submissions in response to those of the applicant on the disclosure issue, including in respect of the applicant's informal motion of May 12, 2021 to add additional materials in support of the disclosure motion, the Attorney General may do so within 30 days of the date of these Reasons. The applicant shall have 15 days to file responding submissions, if it wishes. The informal motion to add additional materials and the disclosure motion shall then be returned to the undersigned, for disposition.

[16] If it still wishes to do so, the Agency may bring a motion, seeking leave to intervene in this application. Should such motion be made, the Agency's materials should demonstrate how its proposed intervention will meet the test for intervention under Rule 109 of the *Federal Courts Rules* and should be mindful of the appropriate scope of tribunal submissions.

“Mary J.L. Gleason”

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-102-20

STYLE OF CAUSE: AIR PASSENGER RIGHTS v.
ATTORNEY GENERAL OF
CANADA

MOTION DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES

REASONS FOR ORDER BY: GLEASON J.A.

DATED: JUNE 4, 2021

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