

**FEDERAL COURT OF APPEAL**

BETWEEN:

**DR. GÁBOR LUKÁCS**

Applicant

– and –

**CANADIAN TRANSPORTATION AGENCY**

Respondent

(Application under section 28 of the *Federal Courts Act*, R.S.C. 1985, c. F-7)

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**REPLY OF THE APPLICANT / MOVING PARTY**

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Dated: October 29, 2014

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**REPLY OF THE APPLICANT / MOVING PARTY****A. REVERSAL OF THE AGENCY’S POSITION**

1. Up until now, the Agency has taken the position that:

- (a) Expedia’s website has become compliant (as of May 20, 2014);
- (b) the affidavit of Ms. Sasova establishes Expedia’s compliance; and
- (c) “Expedia’s current compliance” is relevant to the application.

This position was communicated to Lukács in writing by counsel for the Agency on June 6, 2014:

While the fact of Expedia’s current compliance with the Air Transportation Regulations, a fact that is established in Ms. Sasova’s affidavit, is relevant to your application, her communications during her investigation with Expedia are not.

[Emphasis added.]

**Lukács Affidavit, Exhibit “M”**

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2. In paragraphs 18, 20, 22, 25, and 27 of its Written Representations, the Agency reversed its position on all three of these points. While the Agency’s belated concessions are most welcome, the Agency should be required to reimburse Lukács in any event for the costs he incurred due to the Agency’s previous position and/or misleading communications of counsel for the Agency.

**B. PARAGRAPH 23 OF THE AGENCY'S WRITTEN REPRESENTATIONS**

3. With respect to the state of Expedia's website on May 20, 2014, the Agency incorrectly suggests at paragraph 23 of its Written Representations that Ms. Sasova stated on September 4, 2014 that "Expedia's advertisement is non-compliant, but that it is acceptable." Ms. Sasova did not acknowledge on September 4, 2014 that Expedia's advertisement was non-compliant on May 20, 2014, but only said that it was "acceptable" to her.

**C. COSTS OF THE SEPTEMBER 15, 2014 CONTINUED CROSS-EXAMINATION**

4. Mr. Dodsworth is also counsel for Ms. Sasova, and he was served with the present motion. No submissions were made as to why Ms. Sasova should not be required to pay personally for the costs of the September 15, 2014 continued cross-examination.

**Sasova Cont'd Cross-Examination, p. 117, l. 14**

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5. The Agency argues that it should not pay the costs of the September 15, 2014 continued cross-examination for two reasons:

- (a) Ms. Sasova allegedly produced all documents that were in existence before and up to the date of her affidavit (paragraph 52 of the Agency's Written Representations); and
- (b) Ms. Sasova was not required to produce documents created after the date of her affidavit (paragraphs 35-36 of the Agency's Written Representations).

The first of these is factually false, while the second misstates the law.

**(i) Ms. Sasova did not produce all emails dated May 20, 2014 or earlier**

6. On September 4, 2014, Ms. Sasova failed to produce a number of emails between Agency Staff and Expedia that were in existence prior to May 20, 2014, the date of her affidavit, including those dated: March 20, 2014, 5:20 p.m. (Ex. 8, p. 1, top); March 27, 2014, 10:29 a.m. (Ex. 8, p. 9, top); April 8, 2014, 8:44 a.m. (Ex. 8, p. 17); April 4, 2014, 3:20 p.m. (Ex. 8, p. 19, middle); April 16, 2014, 8:34 p.m. (Ex. 8, p. 19, top); April 28, 2014, 10:05 a.m. (Ex. 8, p. 29, top); May 1, 2014, 2:39 p.m. (Ex. 8, p. 49); May 2, 2014, 4:35 p.m. (Ex. 8, p. 51, top); and most importantly, May 14, 2014, 5:32 p.m. (Ex. 8, p. 53, top).

7. No explanation has been provided about Ms. Sasova's failure to produce these documents on September 4, 2014 as directed. The fact that Ms. Sasova produced the documents later demonstrates that the documents were within her possession, power or control. It is submitted that, absent another explanation, Ms. Sasova withheld some of these documents, including the May 14, 2014 email, because some of them were inconsistent with the statements she made in her affidavit.

**(ii) Failure to produce emails dated after May 20, 2014**

8. The Agency argues at paragraph 36 of its Written Representations that Ms. Sasova had no obligation to produce documents that were created after her affidavit was sworn, but provided no authority in support of this proposition.

9. Rule 94(1) of the *Federal Courts Rules* provides that:

**94.** (1) Subject to subsection (2), a person who is to be examined on an oral examination or the party on whose behalf that person is being examined shall produce for inspection at the examination all documents and other material requested in the direction to attend

that are within that person's or party's possession and control, other than any documents for which privilege has been claimed or for which relief from production has been granted under rule 230.

[Emphasis added.]

10. Rule 94(1) puts a positive duty upon a person being examined to bring documents to the examination, subject to relief pursuant to Rule 94(2), which was neither sought nor granted in the present case. This duty depends on whether the person has possession or control of the document, and does not depend on the date of the affidavit. This duty extinguishes upon the completion of the examination of the witness.

11. The Agency does not argue that Lukács failed to cross-examine with due diligence. Thus, the dates of Ms. Sasova's examination and her affidavit are irrelevant to her duty to produce documents that she was directed to produce and which were in her possession or control.

12. The emails between Agency Staff and Expedia, dated after May 20, 2014, which were produced only after September 4, 2014, were relevant to the question of whether Expedia's website was non-compliant when Ms. Sasova swore her affidavit. As noted earlier, this was a disputed fact up until now. Therefore, at the time of Ms. Sasova's examination, the emails in question were clearly relevant, and they were in Ms. Sasova's possession or control, because she was able to produce them shortly after September 4, 2014.

**D. RE-ATTENDANCE AND FURTHER PRODUCTION**

**(i) Failure to produce all emails sent by Mr. Lynch on July 28, 2014**

13. Paragraph 41 of the Agency's Written Representations, which is not supported by an affidavit, creates the impression of spoliation of evidence. However, in light of the sudden reversal of the Agency's position outlined above, production of these emails is no longer necessary, and the issue is moot.

**(ii) Questions 393-397 and the entire line of questioning**

14. The Agency did not dispute the relevance of these questions or the line of questioning, and its counsel objected on different grounds: in his view, Lukács could or should have asked them on September 4, 2014. Lukács is asking the Honourable Court to rule on the propriety of this objection.

15. The Agency made no submissions in support of the propriety of this objection. The Agency did not explain why these questions or the line of questioning would be repetitive in any way, nor did the Agency point to any part of the transcript where the same questions were already asked. Therefore, it is submitted that Ms. Sasova should re-attend at her own expense or the expense of the Agency, to answer these questions and the entire line of questioning, and follow-up questions.

**(iii) Objections to questions related to Exhibit No. A for Identification**

16. As noted in the Written Representations of Lukács (para. 74), this line of questioning aims to attack the personal credibility of Ms. Sasova. Questions of this nature have been held to form "a class by themselves."

*Merck Frosst Canada Inc. v. Canada (Minister of Health)*, [1997] F.C.J. No. 1847, para. 8 Agency's Record

17. Ms. Sasova, who is an employee and not a Member of the Agency, did not have to know about settlement discussions in order to take steps to enforce the law. Once the Agency shared with Ms. Sasova privileged settlement discussions, the Agency, being Ms. Sasova's employer and principal, is bound by her subsequent use of the privileged information, including her making reference to the content of such discussions in her examination.

**E. COSTS OF THE PRESENT MOTION**

18. The June 6, 2014 email of counsel for the Agency sent Lukács on a wild goose chase by representing to Lukács that the Agency intended to rely on the affidavit of Ms. Sasova to establish that Expedia's website became compliant by May 20, 2014. These representations, which caused Lukács to expend significant resources, were not retracted nor corrected until the Agency was required to respond to the present motion,

**Lukács Affidavit, Exhibit "M"**

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19. In these circumstances, it is submitted that the Agency should bear the costs of the present motion in any event of the cause.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

October 29, 2014

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