

Court File No.: A-242-16

**FEDERAL COURT OF APPEAL**

BETWEEN:

**DR. GÁBOR LUKÁCS**

Appellant

– and –

**CANADIAN TRANSPORTATION AGENCY and  
NEWLEAF TRAVEL COMPANY INC.**

Respondents

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**MOTION RECORD OF THE MOVING PARTY**

**(Motion to compel answers and productions and for other relief)**

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Dated: September 30, 2016

**DR. GÁBOR LUKÁCS**

Halifax, NS

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**Appellant**

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## TABLE OF CONTENTS

1	Notice of Motion	1
2	Affidavit of Dr. Gábor Lukács, affirmed on September 30, 2016	11
A	Order of the Federal Court of Appeal granting Leave to Appeal, dated June 9, 2016	17
B	Reasons for Order of the Federal Court of Appeal, dated June 9, 2016	20
C	Notice of Appeal, filed on June 28, 2016	27
D	Notice of Motion, dated July 21, 2016	36
E	Affidavit of Mr. William F. Clark, sworn on July 23, 2016	47
F	Order of the Court (Scott, J.A.), dated July 24, 2016	53
G	Affidavit of Mr. Donald James Young, sworn on July 23, 2016 (redacted), with Exhibit "A"	56
H	Direction of the Court (Scott, J.A.), dated July 29, 2016	69
I	Written Examination directed to Mr. Clark, dated August 25, 2016	71
J	Written Examination directed to Mr. Young, dated August 25, 2016	76
K	Answers to Written Examination of Mr. Clark, dated September 9, 2016	137
L	Answers to Written Examination of Mr. Young, dated September 9, 2016	144

M	Letter of Dr. Lukács to Mr. Brian J. Meronek, counsel for NewLeaf, dated September 16, 2016	170
N	Transcript of recording of telephone conversation with Mr. Chris Lapointe, Vice-President Commercial Operations for Flair Airlines Ltd., taken on July 8, 2016	175
3	Written Representations of the Appellant	195
	OVERVIEW	195
<b>PART I</b>	<b>STATEMENT OF FACTS</b>	196
A.	The present appeal (main proceeding)	196
B.	The pending motion for interim relief	197
(i)	Transcript of cross-examination was not pro- vided	199
(ii)	Refusals on the cross-examination of Mr. Clark and Mr. Young	199
(iii)	The July 8, 2016 telephone call with Mr. Chris Lapointe	200
<b>PART II</b>	<b>STATEMENT OF THE POINTS IN ISSUE</b>	202
<b>PART III</b>	<b>STATEMENT OF SUBMISSIONS</b>	203
A.	Transcript of the cross-examination	203
B.	The Affidavit of Mr. Clark	203
C.	Leave to file a supplementary affidavit	205
D.	Refusals of Mr. Young	207
(i)	Arrangements for repatriation of stranded pas- sengers	207

(ii) NewLeaf's capitalization and financial stability	209
(iii) Damages to NewLeaf if the sought order is granted	211
(iv) Mr. Young's credibility and expertise	213
E. Schedule for remaining steps in the July 21, 2016 motion	216
F. Costs	217
<b>PART IV ORDER SOUGHT</b>	<b>218</b>
<b>PART V LIST OF AUTHORITIES</b>	<b>220</b>

**Statutes and Regulations:**

4 <i>Air Transportation Regulations</i> , SOR/88-58	224
— section 2 (interpretation)	225
— section 8.1 (financial requirements)	231
5 <i>Canada Business Corporations Act</i> , R.S.C., 1985, c. C-44	233
— section 113	234
6 <i>Canada Transportation Act</i> , S.C. 1996, c. 10	235
— section 41 (leave to appeal)	236
— section 53 (review of Act)	237
— section 55 (definitions)	238
— sections 57-60 (prohibitions)	242
— section 61 (license for domestic service)	243
7 <i>Criminal Code</i> , R.S.C. 1985, c. C-46	244
— section 183.1	245
— paragraph 184(2)(a)	246
8 <i>Federal Courts Rules</i> , S.O.R./98-106	248
— Rule 81	249
— Rules 82-87	250

— Rule 94	252
— Rule 97	253
— Rule 100	254
— Rule 369	255

**Case Law:**

9 <i>Canadian Tire Corporation v. Canadian Bicycle Manufacturers Association</i> , 2006 FCA 56	257
— paragraph 9	261
— paragraph 10	262
10 <i>Lukács v. Canadian Transportation Agency</i> , 2016 FCA 103	264
— paragraph 16	271
11 <i>R. v. Goldman</i> , [1980] 1 S.C.R. 976	276
— page 18	293

Court File No.: A-242-16

**FEDERAL COURT OF APPEAL**

BETWEEN:

**DR. GÁBOR LUKÁCS**

Appellant

– and –

**CANADIAN TRANSPORTATION AGENCY and  
NEWLEAF TRAVEL COMPANY INC.**

Respondents

**NOTICE OF MOTION**

**TAKE NOTICE THAT THE APPELLANT** will make a motion in writing to the Court under Rule 369 of the *Federal Courts Rules*, S.O.R./98-106.

**THE MOTION IS FOR:**

1. An Order directing NewLeaf Travel Company Inc. to send Dr. Lukács a copy of the transcript of the August 25, 2016 cross-examination, as required by Rule 86 of the *Federal Courts Rules*.
2. An Order pursuant to Rules 81, 100, 94, and 97 of the *Federal Courts Rules*:
  - (i) striking out paragraph 9 of the affidavit of Mr. William F. Clark and the answers of Mr. Clark to questions 8-9 on the written examination; or alternatively
  - (ii) directing Mr. William F. Clark to respond to question 9(a) by stating the file numbers in question, and to produce documents as directed in question 9(d) in the written examination.

3. An Order pursuant to Rule 84(2), granting Dr. Lukács leave to file a supplementary affidavit for the July 21, 2016 motion for the purpose of adducing as evidence the transcript of the July 8, 2016 telephone conversation shown at **Tab 2N**.
4. An Order pursuant to Rules 100, 94, and 97 of the *Federal Courts Rules*, directing Mr. Donald James Young to produce documents and properly answer:
  - (i) questions 45 and 61;
  - (ii) questions 3-4, 54-58, and 65-66;
  - (iii) questions 1, 46-48, 50-52, 64, and 123; and
  - (iv) questions 6-7, 10-15, 69-92, and 93-122.
5. An Order setting a schedule for the remaining steps in the July 21, 2016 motion, and permitting Dr. Lukács 15 days from the receipt of NewLeaf's memorandum to serve and file his reply in respect of that motion.
6. Costs and/or reasonable out-of-pocket expenses of this motion in any event of the cause; and
7. Such further and other relief or directions as the Appellant may request and this Honourable Court deems just.

**THE GROUNDS FOR THE MOTION ARE:**

1. On June 9, 2016, this Honourable Court granted Lukács leave to appeal a decision made by the Canadian Transportation Agency [the Agency] dated March 29, 2016 and bearing Decision No. 100-A-2016 [Decision Under Appeal].
2. In the Decision Under Appeal, the Agency purported to decide among other things that NewLeaf Travel Company Inc. [NewLeaf] is not required to hold a licence under the *Canada Transportation Act*, S.C. 1996., c. 10.
3. A Notice of Appeal has been filed on June 28, 2016, and subsequently the appeal has been perfected. A requisition for hearing has been filed on August 16, 2016, and the appeal is now awaiting hearing.

**PENDING MOTION FOR INTERIM RELIEF**

4. On July 21, 2016, Lukács brought a motion for an interlocutory relief, pending disposition of the appeal, for an order:
  - (a) staying the decision of the Canadian Transportation Agency dated March 29, 2016 and bearing Decision No. 100-A-2016 pending disposition of the appeal; and
  - (b) enjoining NewLeaf Travel Company Inc. from operating as an Indirect Air Service Provider [IASP or reseller], unless it posts a performance bond and/or security and/or guarantee in the amount of \$3,744,000 for the claims of stranded passengers.

5. NewLeaf tendered the affidavits of Mr. William F. Clark and Mr. Donald James Young, sworn on July 23, 2016, in opposition to the motion for interim relief.
6. On July 29, 2016, this Honourable Court directed that Dr. Lukács be cross-examined in Halifax between August 24 and 26, 2016, and that Mr. Young and Mr. Clark be cross-examined in writing.
7. On August 25, 2016, NewLeaf cross-examined Dr. Lukács on his July 21, 2016 affidavit. NewLeaf did not provide Lukács with a copy of the transcript of the cross-examination.
8. On or around August 25, 2016, Dr. Lukács cross-examined Mr. Clark and Mr. Young on their July 23, 2016 affidavits by directing written questions to them (including requests to produce documents), as per the Direction of this Court.
9. On September 9, 2016, Mr. Clark and Mr. Young provided answers to certain questions, but they failed to produce any documents as requested, and Mr. Young outright refused to answer the vast majority of the questions and/or to produce documents.
10. On or around September 16, 2016, Dr. Lukács wrote to counsels for NewLeaf, and requested answers to the outstanding questions and productions by September 23, 2016. Neither NewLeaf nor its affiants provided additional answers or productions.

11. The core areas of factual dispute between the parties are:
- (i) the existence and/or sufficiency of arrangements to repatriate stranded passengers in the event that NewLeaf ceases operations;
  - (ii) the capitalization and/or financial stability of NewLeaf;
  - (iii) the existence and quantum of damages, including lost profits, in the event that the sought order is granted; and
  - (iv) the credibility of the evidence of Mr. Clark and Mr. Young.

**THE AFFIDAVIT OF MR. CLARK**

12. Paragraph 9 of Mr. Clark's affidavit, as clarified in his answers to questions 8-9, concerns Mr. Clark's belief as to the state of the law, and as such it is not confined to facts, contrary to Rule 81(1).
13. In the alternative, if paragraph 9 of Mr. Clark's affidavit is not struck, then Mr. Clark should not be permitted to make bald allegations that the Canadian Transportation Agency "threatened" air carriers, but rather should be required to:
- (a) identify the file numbers in which such "threats" were allegedly made, as requested in question 9(a); and
  - (b) produce copies of correspondence in which the Canadian Transportation Agency allegedly "threatened" air carriers, as requested in question 9(d).

**THE JULY 8, 2016 TELEPHONE CALL WITH MR. CHRIS LAPONTE**

14. There has been a substantial change in the evidence with respect to arrangements relating to the repatriation of stranded passengers:
- (a) Paragraph 11 of the Clark Affidavit and paragraph 24 of the Young Affidavit created the impression of NewLeaf having a contractual arrangement requiring Flair Airlines Ltd. to repatriate passengers if NewLeaf ceases operations, and that funds were held in escrow for that purpose.
  - (b) Mr. Young refused to produce the agreement(s) between NewLeaf and Flair that he referenced in paragraph 24 of his affidavit (question 45).
  - (c) Mr. Clark's answer to question 11 shied away from the notion of "contractual arrangement" and stated that "Flair again accepted the repatriation obligation for NewLeaf passengers [...]" in reference to some kind of statutory obligation Mr. Clark believes the Agency to impose.
15. In the July 8, 2016 telephone conversation, Mr. Chris Lapointe, the Vice-President Commercial Operations for Flair Airlines Ltd., stated with respect to Flair's willingness to assume the financial risk for repatriating passengers that:

No, we're not. We're not. I'm not - no, no, we're not. We don't - it's not built into our financial model, Gabor.

He explained that Flair spent a quarter-million dollars to repatriate some

passengers in 2009, but that with NewLeaf it would be different:

Now, in this case here, I'm not saying - this is a much different situation. It'll be millions of dollars to repatriate these people or whatever the word is to get them back home again. So I'm not saying that - we don't have it in our financial model with NewLeaf to fund it.

16. Dr. Lukács seeks leave to file a supplementary affidavit in support of his July 21, 2016 motion for an injunction for the purpose of adducing as evidence the transcript of the July 8, 2016 telephone conversation, shown at **Tab 2N**, for the following reasons:
  - (a) The supplementary affidavit is relevant, because it demonstrates that Flair neither accepted nor was financially able to accept the "repatriation obligation for NewLeaf passengers" referenced in Mr. Clark's answer to question 11.
  - (b) Dr. Lukács became aware of the significance of the telephone conversation with Mr. Lapointe only after the cross-examination of Mr. Young and Mr. Clark.
  - (c) The supplementary affidavit is necessary to respond to a substantial and unexpected shift in the evidence of Mr. Clark.
  - (d) The recording is admissible as evidence (*R. v. Goldman*, [1980] 1 S.C.R. 976).
  - (e) NewLeaf is not prejudiced by the filing of the proposed supplementary affidavit; and
  - (f) It is in the interest of justice to grant such leave.

**THE AFFIDAVIT OF MR. YOUNG**

17. The questions and productions refused by Mr. Young are relevant to the core areas of factual dispute between the parties, identified in paragraph 11 above.
18. Confidentiality is not a proper basis for refusing to answer questions or to produce documents. The proper avenue to address confidentiality is by bringing a motion pursuant to Rules 151-152.

**STATUTES AND REGULATIONS**

19. Sections 2 and 8.1 of the *Air Transportation Regulations*, S.O.R./88-58.
20. Section 113 of the *Canada Business Corporations Act*, R.S.C., 1985, c. C-44.
21. Sections 41, 53, 55, and 57-61 of the *Canada Transportation Act*, S.C. 1996, c. 10.
22. Sections 183.1 and 184(2)(a) of the *Criminal Code*, R.S.C. 1985, c. C-46.
23. Rules 81, 84, 86, 94, 97, 100, and 369 of the *Federal Courts Rules*, S.O.R./98-106.
24. Such further and other grounds as the Appellant may advise and this Honourable Court may permit.

**THE FOLLOWING DOCUMENTARY EVIDENCE** will be used for the motion:

1. Affidavit of Dr. Gábor Lukács, affirmed on September 30, 2016.
2. Such further and additional materials as the Appellant may advise and this Honourable Court may allow.

September 30, 2016

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**DR. GÁBOR LUKÁCS**

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**Appellant**

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**Solicitors for the Respondent,  
Newleaf Travel Company Inc.**

Court File No.: A-242-16

**FEDERAL COURT OF APPEAL**

BETWEEN:

**DR. GÁBOR LUKÁCS**

Appellant

– and –

**CANADIAN TRANSPORTATION AGENCY and  
NEWLEAF TRAVEL COMPANY INC.**

Respondents

**AFFIDAVIT OF DR. GÁBOR LUKÁCS  
(Affirmed: September 30, 2016)**

I, **DR. GÁBOR LUKÁCS**, of the City of Halifax in the Regional Municipality of Halifax, in the Province of Nova Scotia, AFFIRM THAT:

1. I am the Appellant in the present proceeding. As such, I have personal knowledge of the matters to which I depose, except as to those matters stated to be on information and belief, which I believe to be true.

**THE PRESENT APPEAL (MAIN PROCEEDING)**

2. On June 9, 2016, the Federal Court of Appeal granted me leave to appeal a decision made by the Canadian Transportation Agency [the Agency] dated March 29, 2016 and bearing Decision No. 100-A-2016 [Decision Under Appeal]. A copy of the Court's order is attached and marked as **Exhibit “A”**.

3. In the reasons for granting leave to appeal, a copy of which is attached and marked as **Exhibit “B”**, the Federal Court of Appeal recognized me as having both private and public interest standing.

4. On June 28, 2016, I filed the Notice of Appeal, a copy of which is attached and marked as **Exhibit “C”**.
5. The appeal has been perfected, a requisition for hearing has been filed on August 16, 2016, and the appeal is now awaiting hearing.

#### **PENDING MOTION FOR INTERIM RELIEF**

6. On July 21, 2016, I brought a motion for an interlocutory relief, pending disposition of the appeal, for an order:
  - (a) staying the decision of the Canadian Transportation Agency dated March 29, 2016 and bearing Decision No. 100-A-2016 pending disposition of the appeal; and
  - (b) enjoining NewLeaf Travel Company Inc. from operating as an Indirect Air Service Provider [IASP or reseller], unless it posts a performance bond and/or security and/or guarantee in the amount of \$3,744,000 for the claims of stranded passengers.

A copy of the July 21, 2016 Notice of Motion is attached and marked as **Exhibit “D”**.

7. In opposition to the motion for interim relief, NewLeaf Travel Company Inc. tendered the following evidence:
  - (a) the affidavit of Mr. William F. Clark, sworn on July 23, 2016, a copy of which is attached and marked as **Exhibit “E”**; and
  - (b) the affidavit of Mr. Donald James Young, sworn on July 23, 2016.

8. A copy of the July 24, 2016 Order of the Court (Scott, J.A.), directing that certain portions of the affidavit of Mr. Young be treated confidentially, is attached and marked as **Exhibit “F”**.
9. A redacted copy of the affidavit of Mr. Young, with the financial and commercial information redacted, is attached and marked as **Exhibit “G”**.
10. A copy of the July 29, 2016 Direction of the Court (Scott, J.A.), directing that I be cross-examined between August 24 and 26, 2016 and that the cross-examination of Mr. Young and Mr. Clark would be conducted in writing, is attached and marked as **Exhibit “H”**.

#### **CROSS-EXAMINATION TRANSCRIPT WAS NOT PROVIDED**

11. On August 25, 2016, I was cross-examined on my July 21, 2016 affidavit by counsels for NewLeaf.
12. To this date, NewLeaf has not provided me with a transcript of my cross-examination.

#### **REFUSALS ON CROSS-EXAMINATION**

13. A copy of the Written Examination directed to Mr. Clark, dated August 25, 2016, is attached and marked as **Exhibit “I”**.
14. A copy of the Written Examination directed to Mr. Young, dated August 25, 2016, is attached and marked as **Exhibit “J”**.
15. A copy of the Answers to Written Examination of Mr. Clark, dated September 9, 2016, is attached and marked as **Exhibit “K”**.

16. A copy of the Answers to Written Examination of Mr. Young, dated September 9, 2016, is attached and marked as **Exhibit "L"**.
17. A copy of my September 16, 2016 letter to Mr. Brian J. Meronek, counsel for NewLeaf Travel Company Inc., requesting that the affiants provide full and complete answers and productions in response to the written examination by September 23, 2016, is attached and marked as **Exhibit "M"**.
18. I have received no response to my September 16, 2016 letter (Exhibit "M").

#### **JULY 8, 2016 TELEPHONE CALL WITH MR. CHRIS LAPOINTE**

19. On July 8, 2016, I spoke on the telephone with Mr. Chris Lapointe, the Vice-President Commercial Operations for Flair Airlines Ltd., about my concerns relating to the protection of stranded passengers. In response to my question regarding whether Flair would be willing to assume the financial risk for people being stranded, Mr. Lapointe stated:

No, we're not. We're not. I'm not - no, no, we're not. We don't - it's not built into our financial model, Gabor.

Mr. Lapointe then explained to me that Flair spent a quarter-million dollars to repatriate some passengers in 2009, but that with NewLeaf it would be different:

Now, in this case here, I'm not saying - this is a much different situation. It'll be millions of dollars to repatriate these people or whatever the word is to get them back home again. So I'm not saying that - we don't have it in our financial model with NewLeaf to fund it.

A copy of the transcript of the recording of my July 8, 2016 telephone conversation with Mr. Lapointe, the Vice-President Commercial Operations for Flair Airlines Ltd., is attached and marked as **Exhibit “N”**.

20. At the time of filing my July 21, 2016 motion, I did not realize the significance of my conversation with Mr. Lapointe, which struck me as merely confirming the lack of obligation on the part of Flair to passengers, stated in the July 6, 2016 email of Mr. Jim Rogers, the President of Flair Airlines Ltd., which I did include as Exhibit “X” to my July 21, 2016 affidavit.
21. Paragraph 11 of the affidavit of Mr. Clark (Exhibit “E”) and paragraph 24 of the affidavit of Mr. Young (Exhibit “G”) created the impression that NewLeaf might have some kind of contractual arrangement requiring Flair to repatriate stranded passengers if NewLeaf ceases operations. On cross-examination in writing, I requested Mr. Clark and Mr. Young to produce these documents (questions 11 and 45, respectively).
22. The significance of the telephone conversation with Mr. Lapointe for my July 21, 2016 motion dawned on me only when I read the answer of Mr. Clark to question 11 of the written examination (Exhibit “K”), and the refusal of Mr. Young to answer question 45 and produce the agreement(s) referenced in paragraphs 13 and 24 of his affidavit (Exhibit “L”).
23. Based on the July 8, 2016 telephone conversation with Mr. Lapointe (Exhibit “N”), and in particular the statements starting on line 5 on page 8 of the transcript, I believe that:

- (a) Flair Airlines Ltd. is not only unwilling but also financially incapable of repatriating stranded passengers should NewLeaf cease operations; and
- (b) the statement of Mr. Clark in response to question 11 of the written examination that “Flair again accepted the repatriation obligation for NewLeaf passengers” is untrue.

**AFFIRMED** before me at the City of Halifax  
in the Regional Municipality of Halifax  
on September 30, 2016.

---

Dr. Gábor Lukács

Halifax, NS  
Tel:  
*lukacs@AirPassengerRights.ca*

This is **Exhibit “A”** to the Affidavit of Dr. Gábor Lukács  
affirmed before me on September 30, 2016

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Signature

**Federal Court of Appeal****Cour d'appel fédérale****Date: 20160609****Docket: 16-A-17****Ottawa, Ontario, June 9, 2016**

**CORAM:**   **GAUTHIER J.A.**  
             **WEBB J.A.**  
             **GLEASON J.A.**

**BETWEEN:****GÁBOR LUKÁCS****Appellant****and****CANADIAN TRANSPORTATION AGENCY  
AND NEWLEAF TRAVEL COMPANY INC.****Respondents****ORDER**

The appellant is granted leave under section 41 of the *Canadian Transportation Act*, S.C. 1996, c. 10 to appeal the decision made by the Canadian Transportation Agency, dated March 29, 2016 and bearing Decision No. 100-A-2016 [the Decision].

This appeal shall be expedited provided the appellant files his Notice of Appeal within thirty (30) days of the date of this Order. If the application for judicial review in Federal Court of Appeal File No. A-39-16 is not rendered moot by this Order and if this appeal is expedited, then

this appeal shall be heard immediately following the judicial review application in Federal Court of Appeal File No. A-39-16.

Costs of this motion for leave shall be in the cause.

"Johanne Gauthier"

---

J.A.

This is **Exhibit “B”** to the Affidavit of Dr. Gábor Lukács  
affirmed before me on September 30, 2016

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Signature

**Federal Court of Appeal****Cour d'appel fédérale****Date: 20160609****Docket: 16-A-17****Citation: 2016 FCA 174**

**CORAM:**   **GAUTHIER J.A.**  
             **WEBB J.A.**  
             **GLEASON J.A.**

**BETWEEN:****GÁBOR LUKÁCS****Appellant****and****CANADIAN TRANSPORTATION AGENCY  
AND NEWLEAF TRAVEL COMPANY INC.****Respondents**

Dealt with in writing without appearance of parties.

Order delivered at Ottawa, Ontario, on June 9, 2016.

**REASONS FOR ORDER BY:****GLEASON J.A.****CONCURRED IN BY:****GAUTHIER J.A.  
WEBB J.A.**

Federal Court of Appeal



Cour d'appel fédérale

Date: 20160609

Docket: 16-A-17

Citation: 2016 FCA 174

**CORAM:**    **GAUTHIER J.A.**  
             **WEBB J.A.**  
             **GLEASON J.A.**

**BETWEEN:**

**GÁBOR LUKÁCS**

**Appellant**

**and**

**CANADIAN TRANSPORTATION AGENCY  
AND NEWLEAF TRAVEL COMPANY INC.**

**Respondents**

**REASONS FOR ORDER**

**GLEASON J.A.**

[1] The appellant, Dr. Gábor Lukács, is seeking leave to appeal Decision 100-A-2016 of the Canadian Transportation Agency, issued on March 29, 2016 [the Decision]. In the Decision, the Agency made two determinations. First, it decided that resellers of domestic air service are no longer required to hold licences under the *Canada Transportation Act*, S.C. 1996, c. 10 [the CTA], so long as they do not hold themselves out as an air carrier operating an air service.

Second, in application of the foregoing, the Agency held that the respondent, Newleaf Travel Company Inc., was such a reseller and therefore not required to hold a licence. In so deciding, the Agency modified its previous interpretation of subsection 55(1) and paragraph 57(a) of the CTA that it had applied to several other domestic resellers of air services.

[2] Dr. Lukács submits the Agency made an error of law as its changed interpretation of subsection 55(1) and paragraph 57(a) of the CTA is unreasonable. He also alleges that the Agency lacked jurisdiction to undertake the inquiry which led to the new interpretation of the licencing requirements applicable to resellers of domestic air services. The issues in the proposed appeal therefore raise questions that fall within the scope of section 41 of the CTA.

[3] Newleaf does not contest this but rather says that Dr. Lukács lacks standing to commence this appeal as he was not a party to the proceeding before the Agency. It also asserts that Dr. Lukács has failed to raise an arguable case in respect of the issues that he has raised.

[4] Contrary to what Newleaf asserts, the materials filed do raise an arguable case and Dr. Lukács does have standing to commence this appeal, either as a private or public interest applicant.

[5] Dr. Lukács participated in the consultation before the Agency undertaken with respect to the change in the interpretation of the licencing requirements applicable to domestic resellers of air service, which is sufficient to afford him standing to launch this appeal.

[6] Even if this were not the case, he would possess standing as a public interest litigant. The test for public interest standing involves consideration of three inter-related factors: first, whether there is a justiciable issue, second, whether the individual seeking standing has a genuine interest in the issue, and, third, whether the proposed proceeding is a reasonable and effective way to bring the matter before the courts: *Canada (Attorney General) v. Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45, [2012] 2 S.C.R. 524 at paras. 36-37. As leave is being granted, this appeal raises a justiciable issue. It is undisputed that Dr. Lukács is an air passenger rights advocate, who has frequently brought applications to this Court in respect of Agency decisions, and therefore does have a genuine interest in the issues raised in this appeal. Finally, an appeal by someone like Dr. Lukács is an effective way for the issues raised in this appeal to be brought before the Court as Newleaf would not challenge the Decision rendered in its favour.

[7] Thus, leave should be granted to Dr. Lukács to commence this appeal.

[8] Dr. Lukács requests that this appeal be expedited and joined for hearing with an earlier judicial review application he commenced, challenging the jurisdiction of the Agency to embark upon the inquiry that led to the Decision (Federal Court of Appeal File A-39-16). The judicial review application in File A-39-16 is being conducted on an expedited basis. If the judicial review application is not rendered moot by this appeal, it makes sense that this appeal and the judicial review application be heard one immediately after the other by the same panel of this Court as there is considerable overlap between the files. It also is appropriate to expedite this

appeal due both to the fact that the judicial review application is being expedited and to the nature of the issues raised in the appeal.

[9] I would therefore order that the appeal be conducted on an expedited basis if Dr. Lukács files his Notice of Appeal within thirty days of the date of this Order. I would also order that if this matter is expedited, this appeal be heard immediately following the judicial review application in File A-39-16 if that application proceeds to hearing. The other issues raised by the parties regarding production of materials should be dealt with in a separate procedural Order issued concurrently with this Order.

[10] While Dr. Lukács seeks his costs in respect of this motion for leave, it is more appropriate that they be in the cause.

---

"Mary J.L. Gleason"  
J.A.

"I agree  
Johanne Gauthier J.A."

"I agree  
Wyman W. Webb J.A."

**FEDERAL COURT OF APPEAL****NAMES OF COUNSEL AND SOLICITORS OF RECORD**

**DOCKET:** 16-A-17

**STYLE OF CAUSE:** GÁBOR LUKÁCS v. CANADIAN TRANSPORTATION AGENCY AND NEWLEAF TRAVEL COMPANY INC.

**MOTION DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES**

**REASONS FOR ORDER BY:** GLEASON J.A.

**CONCURRED IN BY:** GAUTHIER J.A.  
WEBB J.A.

**WRITTEN REPRESENTATIONS BY:**

Dr. Gábor Lukács FOR THE APPELLANT  
(ON HIS OWN BEHALF)

Allan Matte FOR THE RESPONDENT  
CANADIAN TRANSPORTATION AGENCY

Brian J. Meronek FOR THE RESPONDENT  
Ian S. McIvor NEWLEAF TRAVEL COMPANY INC.

**SOLICITORS OF RECORD:**

Legal Services Branch FOR THE RESPONDENT  
Canadian Transportation Agency  
Gatineau, Quebec CANADIAN TRANSPORTATION AGENCY

D'Arcy & Deacon LLP FOR THE RESPONDENT  
Barristers and Solicitors  
Winnipeg, Manitoba NEWLEAF TRAVEL COMPANY INC.

This is **Exhibit “C”** to the Affidavit of Dr. Gábor Lukács  
affirmed before me on September 30, 2016

---

Signature

Court File No.:

**FEDERAL COURT OF APPEAL**

BETWEEN:

**DR. GÁBOR LUKÁCS**

Appellant

– and –

**CANADIAN TRANSPORTATION AGENCY and  
NEWLEAF TRAVEL COMPANY INC.**

Respondents

**NOTICE OF APPEAL**

TO THE RESPONDENT:

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the appellant. The relief claimed by the appellant appears on the following page.

THIS APPEAL will be heard by the Federal Court of Appeal at a time and place to be fixed by the Judicial Administrator. Unless the court directs otherwise, the place of hearing will be as requested by the appellant. The appellant requests that this appeal be heard in **Halifax, Nova Scotia**.

IF YOU WISH TO OPPOSE THIS APPEAL, to receive notice of any step in the appeal or to be served with any documents in the appeal, you or a solicitor acting for you must prepare a notice of appearance in Form 341A prescribed by the *Federal Courts Rules* and serve it on the appellant's solicitor, or where the appellant is self-represented, on the appellant, WITHIN 10 DAYS of being served with this notice of appeal.

IF YOU INTEND TO SEEK A DIFFERENT DISPOSITION of the judgment appealed from, you must serve and file a notice of cross-appeal in Form 341B prescribed by the *Federal Courts Rules* instead of serving and filing a notice of appearance.

Copies of the *Federal Courts Rules*, information concerning the local offices of the court and other necessary information may be obtained on request to the Administrator of this court at Ottawa (telephone 613-996-6795) or at any local office.

IF YOU FAIL TO OPPOSE THIS APPEAL, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU.

Date: June 28, 2016

Issued by: \_\_\_\_\_

Address of  
local office: Federal Court of Appeal  
1801 Hollis Street, Suite 1720  
Halifax, Nova Scotia, B3J 3N4

TO: **CANADIAN TRANSPORTATION AGENCY**  
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**Allan Matte**  
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**Solicitor for the Respondent,  
Canadian Transportation Agency**

AND TO: **D'ARCY & DEACON LLP**  
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**Solicitors for the Respondent,  
Newleaf Travel Company Inc.**

## APPEAL

**THE APPELLANT APPEALS** to the Federal Court of Appeal from a decision made by the Canadian Transportation Agency [the Agency] dated March 29, 2016 and bearing Decision No. 100-A-2016 [Decision Under Appeal], in which the Agency determined that:

1. Indirect Air Service Providers [IASPs or resellers] of domestic air service are no longer required to hold licences under the *Canada Transportation Act*, S.C. 1996, c. 10 [the CTA], so long as they do not hold themselves out as an air carrier operating an air service; and
2. NewLeaf Travel Company Inc. [NewLeaf], being an IASP, is therefore not required to hold a licence.

**THE APPELLANT ASKS** that:

1. the Decision Under Appeal be set aside;
2. this Honourable Court make the order that should have been made by the Agency, declaring that:
  - (a) Indirect Air Service Providers (also known as “resellers”) of domestic air service are required to hold licences; and
  - (b) NewLeaf Travel Company Inc. is required to hold a licence;
3. the Appellant be awarded a moderate allowance for the time and effort he devoted to preparing and presenting his case, and reasonable out-of-pocket expenses incurred in relation to the appeal; and

4. this Honourable Court grant such further and other relief as is just.

**THE GROUNDS OF APPEAL** are as follows:

1. Paragraph 57(a) of the *Canada Transportation Act*, S.C. 1996, c. 10 [the *CTA*] prohibits operating an air service without a licence issued by the Agency under Part II of the *CTA*. Subsection 55(1) of the *CTA* defines “air service” as a service provided by means of an aircraft, that is publicly available for the transportation of passengers or goods, or both.
2. Through the licensing process and conditions set out in the *CTA*, Parliament imposed numerous economic and consumer protectionist conditions on operators of air service within Canada:
  - (a) Canadian ownership, prescribed liability insurance coverage, and prescribed financial fitness (s. 61);
  - (b) notice period for discontinuance or reduction of certain services (ss. 64-65);
  - (c) prohibition against unreasonable fares or rates on routes served by only one provider (s. 66); and
  - (d) regulatory oversight of the contractual relationship between the travelling public and the service provider (ss. 67, 67.1, and 67.2).
3. Section 58 of the *CTA* provides that a licence to operate an air service is not transferable.

4. An Indirect Air Service Provider [IASP or reseller] is a person who has commercial control over an air service and makes decisions on matters such as routes, scheduling, and pricing, but performs the transportation of passengers with aircraft and flight crew rented from another person.

**Decision Under Appeal, para. 11**

5. IASPs (resellers) differ from travel agents: IASPs enter into agreements to transport passengers by air in their own name, while travel agents act merely as agents for third parties.

**Decision Under Appeal, para. 5**

6. Since 1996 and up until recently, the Agency had consistently and reasonably held that a person with commercial control over a domestic air service “operates” it within the meaning of the *CTA*, and thus required them to hold a domestic licence. In doing so, the Agency had been following the so-called *1996 Greyhound Decision*.
7. NewLeaf is a federally incorporated company whose purpose is to offer scheduled domestic air service to the Canadian public as an IASP.
8. In August 2015, the Agency launched an inquiry into whether NewLeaf required a licence.
9. On December 23, 2015, the Agency announced that it would conduct a public consultation on the requirement for IASPs to hold a licence, and that the Agency was considering implementing the following “Approach under consideration”:

Indirect Air Service Providers would not normally be required to hold a licence to sell air services directly to the public, as long as they charter licenced air carriers to operate the flights. This would apply to the operation of domestic and international air services. As these providers would not be subject to the licensing requirements, contracts they enter into with the public would not be subject to tariff protection, nor would they be subject to the financial and Canadian ownership requirements.

[Emphasis added.]

10. On March 29, 2016, the Agency issued the Decision Under Appeal, in which it adopted the “Approach under consideration” and determined that:
  - (a) IASPs (resellers) are not required to hold a licence as long as they do not hold themselves out to the public as an air carrier operating an air service; and
  - (b) NewLeaf, being an IASP, is not required to hold a licence.
11. In practical terms, the Decision Under Appeal circumvents the will of the legislature, and exposes the public to significant risks from which Parliament intended to protect the public, including:
  - (a) underfunded service providers, who are unable to deliver the air services that consumers have paid for in advance, leaving passengers stranded;
  - (b) service providers with insufficient insurance, who are thus unable to meet their liabilities in the case of a disaster (as happened in the case of the Lac-Mégantic rail disaster); and

- (c) uncompensated losses in the case of overbooked, delayed, or cancelled flights.
12. The Agency erred in law and rendered an unreasonable decision by:
- (a) departing from its considered and consistent view on the requirement to hold a licence, without explaining why;
  - (b) basing the decision on the following false premises, which are inconsistent with ss. 64-66 of the *CTA* and s. 2 of the *Air Transportation Regulations*:
    - i. “air carrier” is synonymous with the operator of the aircraft;
    - ii. “in the non-scheduled international context, the air carrier, and not the charterer, is required to hold the licence”;
    - iii. “deregulation of the aviation industry” has taken place with respect to domestic air services; and
    - iv. the distinction between scheduled and non-scheduled domestic air services has been eliminated.
  - (c) interpreting the requirement to hold a licence in a manner that:
    - i. renders ss. 64, 65, and 66 of the *CTA* futile;
    - ii. ignores s. 60(1) of the *CTA*; and
    - iii. defeats the economic and consumer protectionist purposes for which the *CTA* was enacted.

13. The Agency exceeded its jurisdiction by making the Decision Under Appeal, which has the effect of relieving IASPs from the requirement of being Canadian and from holding prescribed liability insurance coverage, contrary to the explicit language of s. 80(2) of the *CTA*.

**Statutes and regulations relied on**

14. Sections 2, 7, 8.1, 8.2, 8.5, and 107 of the *Air Transportation Regulations*, S.O.R./88-58.
15. Sections 41, 53, 55, 57-67.2, 80, 86, and 174 of the *Canada Transportation Act*, S.C. 1996, c. 10.
16. Such further and other grounds as the Appellant may advise and the Honourable Court permits.

June 28, 2016

---

**DR. GÁBOR LUKÁCS**

Halifax, Nova Scotia

*lukacs@AirPassengerRights.ca*

Appellant

This is **Exhibit “D”** to the Affidavit of Dr. Gábor Lukács  
affirmed before me on September 30, 2016

---

Signature

Court File No.: A-242-16

**FEDERAL COURT OF APPEAL**

BETWEEN:

**DR. GÁBOR LUKÁCS**

Appellant

– and –

**CANADIAN TRANSPORTATION AGENCY and  
NEWLEAF TRAVEL COMPANY INC.**

Respondents

**NOTICE OF MOTION**

**TAKE NOTICE THAT THE APPELLANT** will make a motion in writing to the Court under Rule 369 of the *Federal Courts Rules*, S.O.R./98-106.

**THE MOTION IS FOR:**

1. An Order pursuant to Rule 8, abridging the timelines for the filing of the responding motion record and the reply in the present motion;
2. An Order pursuant to ss. 44 and 50 of the *Federal Courts Act*, R.S.C. 1985, c. F-7, and Rule 373:
  - (a) staying the decision of the Canadian Transportation Agency dated March 29, 2016 and bearing Decision No. 100-A-2016 pending disposition of the appeal; and
  - (b) enjoining NewLeaf Travel Company Inc. from operating as an Indirect Air Service Provider [IASP or reseller], unless it posts a performance bond and/or security and/or guarantee in the amount of \$3,744,000 for the claims of stranded passengers;

3. Costs and/or reasonable out-of-pocket expenses of this motion in any event of the cause; and
4. Such further and other relief or directions as the Appellant may request and this Honourable Court deems just.

**THE GROUNDS FOR THE MOTION ARE:**

1. On June 23, 2016, NewLeaf Travel Company Inc. [NewLeaf] began (again) selling tickets to the public for flights within Canada.
2. On July 25, 2016, NewLeaf will begin to transport passengers on 60 non-stop flight segments per week, for a total of up to 9,360 passengers per week.
3. NewLeaf has no license to operate any air service under the *Canada Transportation Act* [the *CTA*].
4. NewLeaf is a shell company, without significant assets. It rents aircraft and crew from Flair Airlines Ltd. [Flair], a licensed airline, to transport passengers by air, but NewLeaf bears the full financial risk and liability to passengers, because Flair has no contractual relationship with NewLeaf's passengers. Thus, Flair assumes no risk.
5. NewLeaf is a fledgling, financially unstable company that is unlikely to be able to deliver the services that it has sold or pay compensation to passengers whom it may strand as a result of non-performance.

6. The present motion, brought in the public interest, seeks to offer passengers who purchased tickets from NewLeaf a somewhat similar protection that was contemplated by Parliament in enacting s. 61(1)(iv) of the *CTA*.
7. The purpose of the motion is not to shut down NewLeaf, but to ensure that it is NewLeaf and its investors that bear the financial risk rather than the travelling public. In other words, the purpose of the motion is to ensure that NewLeaf puts its money where its mouth is.
8. The amount of financial guarantee of \$3,744,000 sought from NewLeaf will allow compensating one week's load of stranded passengers carried by NewLeaf from their homes to another destination, and is based on the following conservative calculation:
  - (a) NewLeaf carrying 7,488 passengers per week (80% load factor);
  - (b) one half (3,744) of these passengers are travelling from their homes to another destination; and
  - (c) an average repatriation cost of \$1,000 per stranded passenger in excess of the amounts paid to NewLeaf.

This figure is less than 14% of the amount of capital a start-up airline is required to have before being granted a licence and allowed to sell tickets.

**THE DECISION UNDER APPEAL**

9. Paragraph 57(a) of the *Canada Transportation Act*, S.C. 1996, c. 10 [the *CTA*] prohibits operating an air service without a licence issued by the Agency under Part II of the *CTA*. Subsection 55(1) of the *CTA* defines “air service” as a service provided by means of an aircraft, that is publicly available for the transportation of passengers or goods, or both.
10. An Indirect Air Service Provider [IASP or reseller] is a person who has commercial control over an air service and makes decisions on matters such as routes, scheduling, and pricing, but performs the transportation of passengers with aircraft and flight crew rented from another person.
11. For twenty years, the Agency had consistently held that a person with commercial control over a domestic air service “operates” it within the meaning of the *CTA*, and thus required them to hold a domestic licence.
12. On March 29, 2016, the Agency issued Decision No. 100-A-2016 [Decision Under Appeal], in which it determined that:
  - (a) IASPs (resellers) are not required to hold a licence as long as they do not hold themselves out to the public as an air carrier operating an air service; and
  - (b) NewLeaf, being an IASP, is not required to hold a licence.
13. On June 9, 2016, this Honourable Court granted Dr. Gábor Lukács, the Appellant, leave to appeal the Decision Under Appeal, and recognized Lukács as having private and public interest standing.

**NEWLEAF'S FINANCES AND STRATEGY**

14. Under s. 61(1)(iv) of the *CTA* and s. 8.1 of the *Air Transportation Regulations*, an applicant for a domestic licence must demonstrate that it has sufficient funding in place, without taking into account any revenue from operations, to meet the costs associated with starting up and operating the air service for a 90-day period. The entire capital must be available, and one half of it must be non-redeemable for a period of one year in order to meet the requirement.
15. For reference, on May 12, 2016, in Decision No. CONF-6-2016, the Agency found that Canada Jetlines Ltd. would need to have over \$27 million in order to meet this financial requirement.
16. NewLeaf never met these financial requirements, and has had only a small fraction of the capital that would meet the requirement.
17. In January 2016, when NewLeaf began selling tickets to the public for the first time, it was planning to have a capital of \$500,000 (less than 2% of what is reasonably required), and it was hoping to raise a total of \$2,000,000 (less than 7.5% of what is reasonably required) by the date of its first flight on February 12, 2016.
18. In practice, NewLeaf began selling tickets to the public on January 6, 2016 with only \$250,000 available (less than 1% of what is reasonably required). It was hoping to raise the rest on the go. After a mere twelve (12) days, on January 18, 2016, NewLeaf suspended sales, and cancelled all tickets sold.

19. As of July 19, 2016, NewLeaf and/or its affiliate owe approximately \$135,000 in unpaid bills to vendors. NewLeaf, its affiliate, and Mr. Jim Young, NewLeaf's CEO, have been named by an unpaid vendor as defendants in a legal action in the Ontario Superior Court of Justice, seeking damages of approximately \$96,000.
20. As of July 20, 2016, NewLeaf has not met its legal and financial obligations to the Kelowna Airport, did not sign the airport user agreement, nor did it provide the required deposit or insurance certificate.

#### **THE LEGAL TEST FOR A STAY OR INTERLOCUTORY INJUNCTION**

21. The legal test on a motion for stay pending appeal and interlocutory injunction are the same, and call for considering:
  - (a) whether there is a serious issue to be tried;
  - (b) irreparable harm; and
  - (c) the balance of convenience.

#### **Serious Issue**

22. Since this Honourable Court granted Lukács leave to appeal, the appeal is neither vexatious nor frivolous.

#### **Irreparable Harm**

23. Due to its inadequate capitalization, NewLeaf is unlikely to be able to deliver and sustain the services that it sold to the public, nor does it have the financial ability to compensate passengers who are stranded as a result of its non-performance.

24. Flair, the actual airline that is behind NewLeaf, is licensed, has met the financial fitness requirements, and has assets, but is shielded from liability for the performance of the services sold by NewLeaf, as explained by Mr. Jim Rogers, the president of Flair (Exhibit "X" on p. 226):

Flair is supplying aircraft and operating under a ACMI agreement with New Leaf. The contract with the passenger is with New Leaf and they have a passenger protection plan in place [...]

[Emphasis added.]

Thus, Flair will not compensate or otherwise protect passengers stranded by NewLeaf.

25. Therefore, if the Order sought is not granted, the travelling public will suffer irreparable harm, because their out-of-pocket expenses will go uncompensated: NewLeaf is unable to compensate them, and Flair is not required to do so.

### **Balance of Convenience**

26. The balance of convenience favours granting the Order sought, because:
- (a) staying of the Decision Under Appeal would maintain and/or restore the *status quo*, namely, that IASPs are required to hold a domestic licence;
  - (b) it shifts the financial risk from the travelling public to NewLeaf in a manner that is consistent with the intent of Parliament; and
  - (c) it leaves the door open for NewLeaf to maintain its business pending disposition of the appeal.

**URGENCY OF THE MOTION**

27. Due to the unavailabilities of counsels for the Respondents, the within appeal is not likely to be heard before late September 2016.
28. The present motion is urgent, because NewLeaf intends to begin transporting passengers on July 25, 2016.
29. Lukács is seeking abridgment of the delays set out in Rule 369 to ensure that some protection is in place for passengers as early as July 25, 2016.

**Statutes and regulations relied on**

30. Sections 2, 7, 8.1, 8.2, 8.5, and 107 of the *Air Transportation Regulations*, S.O.R./88-58.
31. Sections 41, 53, 55, 57-67.2, 80, 86, and 174 of the *Canada Transportation Act*, S.C. 1996, c. 10.
32. Sections 44 and 50 of the *Federal Courts Act*, R.S.C. 1985, c. F-7.
33. Rules 8, 369, and 373 of the *Federal Courts Rules*, S.O.R./98-106.
34. Such further and other grounds as the Appellant may advise and this Honourable Court may permit.

**THE FOLLOWING DOCUMENTARY EVIDENCE will be used for the motion:**

1. Affidavit of Dr. Gábor Lukács, affirmed on July 21, 2016.

2. Such further and additional materials as the Appellant may advise and this Honourable Court may allow.

July 21, 2016

---

**DR. GÁBOR LUKÁCS**

Halifax, NS

*lukacs@AirPassengerRights.ca*

**Appellant**

10

TO: **CANADIAN TRANSPORTATION AGENCY**  
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**Solicitor for the Respondent,  
Canadian Transportation Agency**

AND TO: **D'ARCY & DEACON LLP**  
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**Ian S. McIvor**  
Tel: (403) 541-5290  
Email: *imcivor@DarcyDeacon.com*

**Solicitors for the Respondent,  
Newleaf Travel Company Inc.**

This is **Exhibit “E”** to the Affidavit of Dr. Gábor Lukács  
affirmed before me on September 30, 2016

---

Signature

Court File No. A-242-16

**IN THE FEDERAL COURT OF APPEAL**

BETWEEN:

**Dr. GÁBOR LUKÁCS**

Appellant

and

**CANADIAN TRANSPORTATION AGENCY and  
NEWLEAF TRAVEL COMPANY INC.**

Respondents

**AFFIDAVIT OF WILLIAM F. CLARK**

I, WILLIAM F. CLARK, Lawyer, of the City of Toronto, in the Province of Ontario, affirm that:

1. I am the principal of Clark and Company, a law firm whose practice is restricted to providing advice to the aviation and travel industries, and as such have knowledge of the fact to which I hereinafter depose, except where they are stated to be based on information and belief, in which case I believe them to be true.
  
2. I have acted as regulatory counsel for both NewLeaf Travel Company Inc. ("NewLeaf") and Flair Airlines Ltd. ("Flair") since the start of 2016 on matters relating to the regulatory and contractual matters for NewLeaf and Flair to provide the ultra low cost service to the public.
  
3. Attached and marked as Exhibit "A" is a copy of my Curriculum Vitae.
  
4. Three provinces have enacted travel industry legislation being British Columbia, Ontario & Quebec. All three provinces have compensation funds to protect transactions for the purchase of travel through registered travel agents in their respective province.

5. The funds in BC and Ontario are financed by travel agents paying into the fund based on sales volume. For example, in Ontario, the assessment is \$0.25 per \$1000 of sales.

6. NewLeaf is selling its product directly to consumers and is processing all transaction by way of credit cards. NewLeaf has not made its product available for sales through travel agents. Airline sales through travel agents have decreased drastically with the advent of the internet, and is now below 50% of airline bookings, and decreasing rapidly.

7. There are very few claims against the respective travel industry funds due to the protection afforded to consumers through their credit cards. Provincial consumer protection legislation has passed the risk off to the credit card issuer industry, by imposing liability on the issuing financial entity for any transactions processed, where the consumer does not receive the purchased goods or services.

8. It is the practice of the administrator of these travel industry funds to require any claimants against their fund to first make a claim against their personal credit card issuer, before the respective funds will process a claim, which has resulted in very few claims now being made against the respective compensation funds. The majority of claims are in regard to cash transactions (which NewLeaf will not process) and for fraudulent activities of the travel agent.

9. It has been the policy of the Canadian Transportation Agency ("CTA") to force air carriers to repatriate passengers at destination should the tour wholesaler, or purchaser of the aircraft capacity not complete its commercial arrangements with the air carrier. By repatriation is meant the return of a passenger from his/her destination to the point of origin. The CTA has in the past threatened to issue a show cause against the licenses of air carriers in order to force them to repatriate consumers at destination, on the principle that the air carrier has been paid for the return flight of that passenger, and the air carrier has a contractual obligation to complete the rotation. This enforcement has always resulted in surviving air carriers to complete the repatriation obligation.

3

10. The contractual arrangement between NewLeaf and Flair for the repatriation of passengers at destination upon a financial failure by New Leaf, places the obligation on Flair.

11. I make this affidavit in good faith and in response to the notice of motion for an injunction/stay of the CTA decision.

Sworn before me at the Township of Muskoka in the Province of Ontario on  
23 July 2016 No 100

Deirdre Anne MacLeod  
Commissioner for Taking Affidavits Deirdre Anne MacLeod  
(or as the case may be) LSUC 51309D  
  
(Signature of Deponent)

Bill Clark | Clark &amp; Company

Page 1 of 2

51

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## BILL CLARK

### Legal Counsel



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[Connect on LinkedIn](#)

[Download vCard](#)

One of the few Canadian lawyers devoting their total time to the commercial and regulatory legal requirements of aviation and travel companies. Bill's practice is primarily a corporate and regulatory law practice with an emphasis on those business entities operating in those industries in Canada.

Bill is consulted by many foreign air carriers and their countries regarding bilateral negotiations with Canada. Numerous airlines have utilized his legal services from commencement of operations to Canada by either charter services or offline services, through the bilateral negotiations with the Government of Canada to allow

scheduled services

Bill also provides regulatory advice to domestic airlines as well as companies in associated aviation industries such as ground handlers, parts suppliers, engine overhaulers, flight training schools, helicopter operators and fixed-based operators. Commercial and transactional advice is also provided to aircraft lessors and lessees, as well as third party financial institutions in regard to leasing, financing and the interchange of aircraft.

A significant portion of Bill's practice is dedicated to the executive aircraft segment of the aviation industry. He has served as a Director of the Canadian Business Aviation Association (CBA) for over a decade and is presently a member of several National Business Aviation Association (NBAA) committees. Bill has been the designated legal counsel to the Canadian Association of Tour Operators (CATO) since its inception in 1984.

Renowned for his expertise in the field, Bill is often asked to participate in and deliver specialized papers at aviation conferences in Canada and the United States. Past topics have focused on the Canadian aviation industry regulatory framework, aircraft and components security in Canada and travel industry regulatory matters.

Bill was called to the Ontario Bar in 1971 after graduating from the University of Western Ontario (Honours Business Administration, 1964) which he attended on a full scholarship and the University of Toronto's Faculty of Law (1969).

Previous to creating Clark & Company in 1999, Bill conducted his practice at Nobbs, Woods & Clark which was a successor firm to Hamilton Torrance, which originated in 1949, and which commenced the dedicated aviation practice in the mid 1950s.

#### PARTICIPATION IN AVIATION INDUSTRY RELATED GROUPS & ASSOCIATIONS

Canadian Business Aviation Association (CBA): Director, 1999-2010

Canadian Association of Tour Operators (CATO): Legal Counsel, 1984-Present

National Business Aviation Association (NBAA): Regulatory Issues Advisory Group, Member 2007 - Present

American Bar Association, Forum on Air & Space Law Member of Governing Council Canadian Liaison 2008 - Present

National Business Aviation Association (NBAA): Tax & Risk Management Committee Member, 2002-2007

#### NEWS ARCHIVE

[June 2015](#) (1)

[April 2015](#) (1)

[October 2014](#) (1)

[October 2013](#) (1)

[August 2012](#) (2)

[June 2012](#) (2)

This is Exhibit "A" referred to in the affidavit of William F. Clark sworn before me this

23rd day of July 2016  
 Duly Anne MacLeod  
 Delyne Anne MacLeod  
 LSUC 51309D

A Notary Public in and for the  
 Province of Ontario

Aircraft Owners & Pilots Association (AOPA): Legal Counsel (Canada), 1996-2012  
Air Transport Association of Canada (ATAC): Member, Legal Affairs Committee, 1973-Present  
Seneca College of Applied Arts & Technology: Aviation & Flight Technology Program, Chair,  
Industry Advisory Committee, 1982-2005  
Canadian Owners & Pilots Association (COPA): Director, 1976-1983  
Canadian Flight Magazine: Columnist , "The Law and You", 1975-1989  
Canadian Bar Association: Chair, Air Law Section, 1976/1977 and 1981/1982  
American Bar Association: Sections on Business Law/Aircraft Financing, Forum on Air & Space  
Law,Aircraft Finance and Contracts Division  
Lawyer Pilots Bar Association

Clark & Company Barristers & Solicitors, 100 Richmond Street West, Suite 330, Toronto ON M5H 3K6

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This is **Exhibit “F”** to the Affidavit of Dr. Gábor Lukács  
affirmed before me on September 30, 2016

---

Signature

**Federal Court of Appeal****Cour d'appel fédérale****Date: 20160724****Docket: A-242-16****Ottawa, Ontario, July 24, 2016****Present:** SCOTT J.A.**BETWEEN:****DR GÀBOR LUKÀCS****Appellant****and****CANADIAN TRANSPORTATION AGENCY AND****NEWLEAF TRAVEL COMPANY INC****Respondents****ORDER**

**UPON** motion filed on July 23, 2016 by the respondent NewLeaf Travel Company Inc. for an order pursuant to Rules 151 and 152 of the *Federal Court Rules SOR/98-106*(the Rules);

**AND UPON** reviewing the motion record and reply of the moving party;

**AND UPON** it appearing that the respondent the Canadian Transportation Agency has not responded to the motion;

**AND UPON** considering the partial opposition of the appellant Dr. Gàbor Lukàcs;

**AND UPON** it appearing that some of the material in issue should be treated as confidential notwithstanding the public interest in open and accessible court proceedings;

**THIS COURT ORDERS** that the financial and commercial information as set out in paragraphs 18, 19, 20, 21, 22, 24, 25, 26, 27, 28, 41 and 42 of the affidavit of Donald James sworn July 23, 2016, be treated as confidential under Rules 151 and be filed and maintained as confidential in accordance with Rule 152 of the *Federal Courts Rules*.

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"A.F. Scott"

J.A.

This is **Exhibit “G”** to the Affidavit of Dr. Gábor Lukács  
affirmed before me on September 30, 2016

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Signature

Court File No. A-242-16

**IN THE FEDERAL COURT OF APPEAL**

BETWEEN:

**Dr. GÁBOR LUKÁCS**

Appellant

and

**CANADIAN TRANSPORTATION AGENCY and  
NEWLEAF TRAVEL COMPANY INC.**

Respondents

**AFFIDAVIT OF DONALD JAMES YOUNG**

I, DONALD JAMES YOUNG, Executive, of the City of Winnipeg, in the Province of Manitoba, affirm that:

1. I am the Chief Executive Officer of NewLeaf Travel Company Inc. ("NewLeaf"), and as such have knowledge of the fact to which I hereinafter depose, except where they are stated to be based on information and belief, in which case I believe them to be true.
2. I have been in the airline industry for over 20 years. A current resume of my experience can be found in Exhibit "E" at page 69 to the affidavit affirmed by Gabor Lukacs in this motion.
3. The current model utilized by NewLeaf is that of a reseller contracting with Flair Airlines Ltd. ("Flair"), which is a licensed air carrier to provide Ultra Low Cost Carrier service to the Canadian market.
4. I am aware of the Appellant's concerns with respect to the operation of NewLeaf.

### Passenger Protection

5. In specific response to the direction of the Court dated July 22, 2016, three provinces have enacted travel industry legislation - BC, Ontario and Quebec. All three have travel compensation funds to provide refunds to passengers (from any jurisdiction) who book their travel through a registered retail travel agent in that jurisdiction. NewLeaf does not travel to Quebec.

6. The compensation funds in the BC and Ontario models are funded on the basis of the travel agent making contributions. In Ontario, it is at a semi-annual rate of \$0.25 on each thousand dollars of sales. I am advised by Brian Reddy, the Chief Financial Officer of NewLeaf, that the Travel Industry Council of Ontario ("TICO) considers NewLeaf to be a travel agent for the purpose of contributing to its compensation fund. I expect that its counterpart in BC will likewise follow suit and require NewLeaf to contribute to its compensation fund. NewLeaf will abide by whatever the requirements are.

7. Credit card issuers are liable to the consumer for processed transactions, where goods and services are not received. Therefore, the protection for the consumer lies within NewLeaf's credit card processor PSiGate. Attached and marked as **Exhibit "A"** to my affidavit is a copy of the relevant portions of the credit card agreement.

8. Due to the exposure to the risk, PSiGate retains 100% of the transaction fee for up to one week past when the passenger has completed his/her full travel to ensure the services have been provided.

9. PSiGate's responsibilities include holding all funds for any repatriation on any return flight booked by the passenger. Repatriation in this context means the return from the passenger's destination to the point of origin on any return flight booked. The consumer is therefore protected until the entire flight has been completed.

10. PSiGate is required to return to consumers any charges to their credit card where the services have not been performed. As stated above, 100% of the cost is held by PSiGate until after the flights have been completed.

11. In addition, once any passenger has entered the jetway to the aircraft, he/she is protected by the published airline tariff of Flair.

12. In addition to the tariff, NewLeaf's Booking and Reservation Terms and Conditions will take care of all other concerns that a passenger might have with respect to inconvenience as to travel and baggage. Attached hereto and marked as **Exhibit "B"** to my affidavit is a copy of said Terms and Conditions.

13. NewLeaf also has an Aircraft, Crew, Maintenance and Insurance (ACMI) agreement with Flair, which requires Flair to provide airplane capacity to NewLeaf.

14. NewLeaf is required to provide to Flair in advance 100% of the costs of the air travel every week to ensure that all cost relating to passengers flying in that period are fully paid.

15. NewLeaf's sales are entirely through its website or call centre based in Winnipeg, Manitoba. The only form of payment accepted at this time is protected by NewLeaf through a valid credit card.

16. As such, the process for consumers is equal to that offered in the case of travel agencies and airlines.

#### **Revenue/Expenses**

17. I have reviewed the allegations made by the Appellant in his notice of motion and supporting affidavit, which, in our view, are wrong and based on inaccurate information as more fully set out below.

18. As of 0600 CT July 23, 2016, NewLeaf has sold over [REDACTED] segments for travel from July 25, 2016 to October 2, 2016.

19. The gross receipts collected from the above sales totals [REDACTED] and is on deposit with NewLeaf's Credit Card Processor- PSiGate and held by it in trust as set out above.

20. As of this date, NewLeaf has paid over [REDACTED] to its third party vendors, airport authorities, ground handling companies and Flair in the form of prepayments and deposits to secure services not yet delivered.

### Capitalization

21. As of this date, NewLeaf has investors who have committed [REDACTED] of immediate cash, which is held in trust, and an additional [REDACTED] for the next four or five months as needed and upon approval of the board of directors for expenditures.

22. I was told by the investors who have provided the primary funding that they have funds of up to [REDACTED] of additional capital available to NewLeaf if required to protect their investment.

23. These investors are well experienced in ULCC model funding, led by Ben Baldanza as Chairman of the board of NewLeaf. Mr Baldanza was formerly the CEO of the very successful Spirit Airlines in the US.

24. NewLeaf has [REDACTED] in an escrow account with Flair to confirm that NewLeaf will pay any of its payments under the ACMI and MOU agreements with Flair, to be utilized by Flair, if it is called upon to repatriate passengers.

25. NewLeaf has placed deposits totaling approximately [REDACTED] with airport authorities, ground handling companies and other related vendors to ensure payment for all services rendered and remittance of all fees collected from the consumer on their behalf.

26. As of today Newleaf has prepaid approximately [REDACTED] for services related to operating the aircraft and hiring additional crew members to support the schedule over the next 6 months.

27. Additionally, NewLeaf will pay [REDACTED] to Flair for operations commencing August 1.

28. As stated in paragraph 19 above, as of today's date, NewLeaf has on deposit with the Credit Card merchant [REDACTED] in total gross receipts which funds are not accessible to NewLeaf until the passenger has completed his/her flight segment. Settlement of these funds occurs weekly on a Friday based on completed flights up to the previous Wednesday, creating a further protection to the consumer in as much NewLeaf cannot be paid until well after the consumer has completed that part of their trip. Any return flight payments will remain with the credit card company for reimbursement to the consumer if that flight segment does not take place.

29. NewLeaf does not and cannot at this point rely on credit card revenues to fund current operations. Contrary to the Appellant's assertions, NewLeaf does not cover its present costs with future sales revenues.

30. Accordingly, the allegation that NewLeaf is under capitalized and financially unstable is baseless.

31. More importantly, the facts contained in paragraph 22 to 29 above are bound up in confidentiality agreements with investors and Flair, and those agreements are in jeopardy of being breached if the contents are not protected by an order of the Court.

32. In addition, this information is of high competitive value to NewLeaf's competitors and would simply erode NewLeaf's ability to carry on its operations if this material were made available to the public.

#### **Kelowna Airport Contract**

33. NewLeaf has executed the airport agreement with Kelowna Municipal Airport Authority and expects a fully executed copy from that Authority imminently.

34. The required deposit has been paid to the Authority.

#### **Disputed Accounts**

35. The accounts referred to by the Appellant are accounts incurred by 1919183 Ontario Ltd. 1919183 Ontario Ltd. tried to work with both Ms. Hessie Jones and Mr. Norm LeCavilier while doing a separate business of Ski Charter flights specific to recreational travelers.

36. The 1919183 Ontario Ltd. accounts have been discussed with each of the individuals claiming failed payment. In both cases, the amount of the accounts, the specific alleged work performed and quality of work performed are disputed. The failure to provide adequate services in a timely and adequate manner cost significant business losses to 1919183 Ontario Ltd. A claim by Ms. Jones has been filed in the Ontario Courts and a defence and a counterclaim will be filed as part of that process.

#### **Irreparable Harm**

37. NewLeaf would suffer extreme prejudice and harm to its business interests and the customers who have purchased tickets if an injunction is granted which prematurely decides the issues.

38. To NewLeaf - A delay in the commencement of operations would have significant impact to NewLeaf's financial position as the company would be expending additional capital with no return in income in the form of additional salaries rents, minimum payments to Flair, and other related fees in order to wait out the proceedings of the court.

39. To Airports - When NewLeaf recommenced sales on June 23, it announced sub daily service on 19 routes, with 60 flights per week. Of these routes, 18 were unserved on a non stop basis by current airlines. Since the company's announcement, additional non stop services were added by other airlines on a temporary basis with competitive prices. If NewLeaf were not allowed to operate, competitors could potentially raise fares as the impetus for low fare transportation has been removed, or in the case of route

competition remove the service entirely as the competitive threat no longer exists, which is what happened when NewLeaf suspended operations in January 2016. Airport revenues would be harmed as a result of lower total collected fees and increased airport unit costs due to fewer passengers transiting their facility, particularly during the peak summer season.

40. First Nation Investors - A group of Manitoba First Nations has taken as significant equity investment position in NewLeaf. The First Nations' investment represents, for them, an opportunity to lift their community's financial returns through stimulated economic development.

41. Consumers - To date over [REDACTED] tickets have been sold to consumers across the country. Should NewLeaf not be allowed to commence operations, the impact to their travel plans would have the same effect that the Appellant is trying to prevent; that being, passengers would be faced with an immediate financial hurdle imposed on them by the other airlines charging higher airfares resulting from the elimination of low fare competition and reduced seat capacity and the inconvenience and expense of making alternate arrangements.

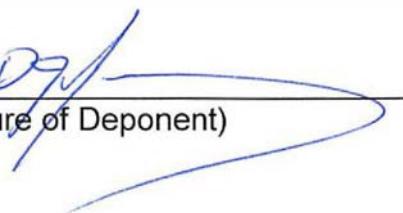
42. Employees - Currently NewLeaf employees over [REDACTED] direct employees and approximately [REDACTED] indirect employees in the employment of NewLeaf's vendors and partners. These people were hired to specifically work on the NewLeaf project. If NewLeaf were not allowed to operate, it is apparent that these employees would need to be laid off or terminated as there would no longer be employment for them. NewLeaf would also suffer financially from cancellation fees, severance payments and other penalties for early contract termination.

43. I make this affidavit in good faith and in response to the notice of motion for an injunction/stay of the CTA decision.

Sworn before me at the City of Winnipeg in the Province of Manitoba on 23 July 2016



\_\_\_\_\_  
Notary Public in and for the  
Province of Manitoba

  
\_\_\_\_\_  
(Signature of Deponent)

This is Exhibit "A" referred to in  
the affidavit of Donald James Young  
sworn before me this 23<sup>rd</sup> day of  
July, 2016

  
A Notary Public in and  
for the Province of Manitoba

### 8. Application Terms

**FOR MERCHANTS AND GUARANTORS:** As the person signing below on behalf of the business Merchant, you certify that you are an owner, partner, director or officer of the Merchant and have been duly authorized to sign this Card Acceptance and Gateway Application on behalf of the Merchant. Merchant and each guarantor signing below (each a "Guarantor") hereby acknowledge that at the time of application they have each received and read, and hereby agree, to be bound by, all of the terms of (1) this Card Acceptance and Gateway Application including the Personal Guarantee, the Pre-Authorized Debit Agreements for Card Fees and Other Service Fees and Schedule "A" (the Fee Schedule) and (2) the Merchant Agreement. The terms set out in this Application take effect when this Application is signed by or on behalf of Merchant. The terms of the Merchant Agreement take effect on the Effective Date set out in the Merchant Agreement. IF MERCHANT DOES NOT WISH TO ACCEPT ALL OF THE TERMS OF THIS APPLICATION AND THE MERCHANT AGREEMENT, IT MUST NOTIFY US WITHIN TEN (10) DAYS OF THE DATE OF THIS APPLICATION, IMMEDIATELY RETURN ALL MATERIALS PROVIDED TO MERCHANT AND NOT ACCEPT PAYMENT INSTRUMENTS OR SUBMIT TRANSACTION DATA TO US OR USE THE MERCHANT NUMBER ASSIGNED TO IT. UPON RECEIPT OF SUCH MERCHANT NOTIFICATION WITHIN TEN (10) DAYS OF THE DATE OF THIS APPLICATION, THIS APPLICATION AND THE MERCHANT AGREEMENT SHALL BE NULL AND VOID AND WE SHALL HAVE NO OBLIGATION TO MERCHANT WHATSOEVER WITH RESPECT TO ANY TRANSACTION DATA OR OTHERWISE.

Merchant, each Owner of the Merchant identified above and each Guarantor ("you" or "your") consent to Home Trust and PSIGate or their designees investigating and verifying your credit and financial information, and obtaining credit reports from credit reporting agencies or credit bureaus on each of you (and this is prior written notice for so doing). If this Application is approved, subsequent credit reports may be obtained and used in connection with the maintenance or renewal of the Agreement. PSIGate will provide the name of the credit reporting agency or credit bureau upon request.

You agree that all business references, including banks, may release any and all credit and financial information to Home Trust or PSIGate for the purpose of evaluating the suitability of Merchant for the services you have requested in this Application. You expressly consent to Home Trust's and PSIGate's collection, use and disclosure of this and other personal information Home Trust or PSIGate may collect in connection with our relationship with you to administer, service and enforce your Agreement, and otherwise in accordance with our Privacy Code (Home Trust's Privacy Code is available at [hometrust.ca/privacycode.aspx](http://hometrust.ca/privacycode.aspx) and PSIGate's Privacy Code is available at [psigate.com/privacy](http://psigate.com/privacy)) and specifically, as part of our credit investigation, and acknowledge that your social insurance number (if provided), date of birth and driver's license number will be used for credit matching and identity verification throughout the term hereof. Home Trust and PSIGate may exchange your personal information with financial institutions (including without limitation the parties to this Agreement) and Card Associations for the purpose of providing you with the requested products and services and for security measures in relation to your account. Home Trust and PSIGate may use your personal information to determine your eligibility for, and to offer you, additional products and services unless you ask us not to by calling us at 1-877-903-2133 ext. 5075. A file containing your personal information will be maintained at our offices and will be accessible by our authorized employees and agents. Home Trust and PSIGate use service providers located outside of Canada to provide merchant processing and other services and such personal information may be processed outside of Canada and be subject to applicable foreign legal requirements including legal requirements to disclose personal information to governmental authorities in certain circumstances. For more information, or to request access to or correction of personal information, contact our Chief Privacy Officer at [privacy@hometrust.ca](mailto:privacy@hometrust.ca).

You represent that you are entering into this Agreement in your capacity as a business and not as an individual consumer.

The individual(s) signing below represent and warrant that all information on this Application, and the related information submitted in conjunction with the Application, is true, complete and not misleading. The Application now belongs to the Servicers. Merchant understands that the application fee is non-refundable.

ANY UNILATERAL ALTERATION, STRIKEOVER OR MODIFICATION TO THE PREPRINTED TEXT OR LINE ENTRIES OF THIS CARD ACCEPTANCE AND GATEWAY APPLICATION AND MERCHANT AGREEMENT SHALL BE OF NO EFFECT WHATSOEVER, AND IN THE SERVICERS' DISCRETION, MAY RENDER THIS APPLICATION INVALID.

By signing below, you declare that you are not acting on behalf of a third party and that the account referred to herein does not have any beneficial owners.

Faximile and electronic versions of executed copies of this Agreement shall be binding and enforceable against the parties and have the same force and effect as if they were original signatures.

**APPLICABLE TO THE PROVINCE OF QUEBEC ONLY:** It is the express wish of the parties that this Application and any related documents be drawn up and executed in English. Les parties conviennent que la présente autorisation et tous les documents s'y rattachant soient rédigés et signés en anglais.

### 9. Personal Guarantee

In exchange for the Servicers' acceptance of the Agreement, the undersigned Guarantor(s) unconditionally and irrevocably guarantee, jointly and severally, (and for Quebec purposes, solidarily), performance of the Merchant's obligations under the Agreement and prompt payment of all sums due from Merchant under this Agreement. In the event of default by Merchant hereunder the Guarantor(s) waive all rights to notice of default, to the benefit of division and discussion and agrees to indemnify and save the Servicers harmless from and against any and all amounts due from Merchant under the Agreement. Guarantor confirms that this is a guarantee of payment and not of collection and that the Servicers are relying upon this guarantee in entering into the Agreement. The Guarantor's obligations under this guarantee are continuing, unconditional and absolute and without limiting the generality of the foregoing shall not be released, discharged, limited or otherwise affected by and the Guarantor hereby waives to the greatest extent permitted by law, any act or omission of any person or any other circumstance whatsoever which might constitute a legal or equitable discharge, limitation or reduction of the Guarantor's obligations hereunder. The Servicers may proceed against Guarantor(s) without pursuing Merchant.

### 10. Acceptance

<b>MERCHANT SIGNATURE</b>		<b>MERCHANT SIGNATURE</b>
<b>PRINT NAME, TITLE, DATE (DD/MM/YY)</b>		<b>PRINT NAME, TITLE, DATE (DD/MM/YY)</b>
<i>READY CFO 02/06/16</i>		
<b>GUARANTOR SIGNATURE</b>		<b>GUARANTOR SIGNATURE</b>
<b>PRINT NAME, TITLE, DATE (DD/MM/YY)</b>		<b>PRINT NAME, TITLE, DATE (DD/MM/YY)</b>
<b>HOME TRUST COMPANY (Officer Use) SIGNATURE</b>		<b>ATTENT: SERVICES INTER ACTIVE GATEWAY MGR (Officer Use) SIGNATURE</b>
<b>PRINT NAME, TITLE, DATE (DD/MM/YY)</b>		<b>PRINT NAME, TITLE, DATE (DD/MM/YY)</b>



- which a Card is used that involves a sale, refund or adjustment in the amount of a sale or refund.
- JJ. "Transaction Records" include sales slips and credit slips, which may be paper-based or electronic records that you give the Cardholder showing the amount of the Transaction and whether the Transaction was approved or declined by the Card issuer;
- KK. "User Documentation" means the welcome letter you received regarding the set-up of your Merchant account with additional details regarding the provision of the Services, including instructions on Integration with the Software, and any other information Services may provide you regarding your Merchant account.

#### **Article B – Card Acceptance Services**

The following provisions apply to both Card Present Transactions and Card Not Present Transactions, unless otherwise specified.

2. Authorization.
  - a. Merchant shall comply with any authorization procedures, including pre- and post-authorization procedures, set out in this Agreement, in the User Documentation and the Card Association Rules, and as the Servicers may otherwise direct from time to time;
  - b. Merchant acknowledges that Authorization: (i) indicates only the availability of credit at the time of Authorization; (ii) does not warrant that the person presenting the Card is the rightful Cardholder; and (iii) is not an unconditional promise or guarantee by Servicers that any Transaction will not be subject to Chargeback.
  - c. Servicers shall have no obligation to process any Transactions initiated with a Card type not selected by Merchant in the Application and Servicers shall be entitled to decline such Transactions without first attempting to obtain an Authorization. In the event any such Transaction is inadvertently not declined by Servicers and is authorized by a Card Issuer or Card Association, Merchant shall be fully liable for such Transaction, as if the Card type was selected by Merchant in the Application.
  - d. Merchant agrees to accept all valid and unexpired Cards presented by Merchant's customers for payment, and to honour any Card presented regardless of type of Card or Card Association.
  - e. Merchant shall process all of its Transactions exclusively through the Servicers network and shall not, directly or indirectly, process any Transactions through any third party.
  - f. Merchant is permitted to provide discounts to Cardholders for paying by different payment methods (credit or debit) and is permitted to provide differential discounts among different Card Associations.
  - g. If in your Application you have elected to accept credit Cards from a particular Card Association, you are not required to accept debit Cards from that same Card Association, and vice-versa. For Card Present Transactions this applies to mobile-based payments as well as card-based payments.
  - h. In respect of Card Present Transactions, if in your Application you consented to accept Contactless Transactions (whether card-based or mobile-based), you may cancel that acceptance at any time without penalty by giving us written notice. Cancellation will take effect once we confirm receipt of that notice. If Fees in respect of mobile-based Contactless Transactions increase relative to Fees in respect of card-based Contactless Transactions, you may cancel your acceptance of mobile-based Contactless Transactions without penalty by giving the Servicers 30 days' written notice while maintaining all other terms of this Agreement, including without disabling your acceptance of card-based Contactless Transactions. Cancellation of your mobile-based Contactless Transactions will take effect once we confirm receipt of your cancellation notice.
  - i. Merchant is not permitted to do any of the following:
    - a. charge Cardholders a fee or surcharge for accepting Cards;
    - b. require a Transaction minimum value for accepting Cards;
    - c. mislead any Cardholder into believing that his or her Transaction is being processed on one Card when it is actually being processed on another Card;
    - d. use the Services for illegal purposes, or to interfere with or disrupt other users of the Services; or
    - e. use any Card other than for the sole purpose of completing a bona fide Transaction.
9. Merchant shall submit Transaction Records to Servicers no later than the next business day immediately following the day that Transactions are originated, in the manner indicated in the User Documentation or as otherwise directed by Servicers.
10. Merchant is not permitted to submit a Transaction:
  - a. prior to the term or following termination of this Agreement;
  - b. while Merchant is in breach of this Agreement;
  - c. while the Merchant or any of its affiliates or directors, officers, employees, agents or representatives are listed on the Member Alert To Control High-Risk merchants list of MasterCard (the Match List) in Canada or the United States;
  - d. if Merchant has previously sent the same Transaction to another acquiring bank and that acquiring bank has declined to process the Transaction;
  - e. that has failed address verification;
  - f. that is already subject to a partial refund under this Agreement or otherwise;
  - g. that is known or suspected to be fraudulent or unacceptable by the Servicers regardless of whether Merchant has been given notice of such Transactions by the Servicers;
  - h. for the purchase of products or services that are illegal in Canada or the United States;
  - i. for a customer who is a shareholder, director, officer, employee, agent or representative of Merchant or any of its affiliates;
  - j. that was made in connection with an e-wallet, virtual cash or other payment aggregation service;
  - k. for a good or service that is being sold for a price other than the posted price; or
  - l. for a good or service that has been returned to Merchant.
11. In respect of each Transaction, Merchant represents and warrants to the Servicers that:
  - a. it represents a legitimate sale of goods or services by Merchant to a Cardholder in the ordinary course of Merchant's business;
  - b. it was not previously submitted under this Agreement;
  - c. it represents an obligation of the cardholder for the amount of the Transaction;
  - d. the amount of the Transaction is only for the goods or services sold including applicable taxes;
  - e. the amount charged for the Transaction is not subject to any dispute, setoff or counterclaim;
  - f. Merchant has no reason to believe that the Transaction is fraudulent or not authorized by the Cardholder, or that the enforceability or collectability of the Cardholder's obligation is or could be impaired in any way; and
  - g. it was made in accordance with, and complies with the terms of, this Agreement, the User Documentation, the Rules and applicable law.
12. Settlement.
  - a. The Servicers will settle with you by crediting your Settlement Account with an amount equal to the total of your sales Transactions less your refund Transactions. The Servicers' standard funding schedule is weekly, one week in arrears, following settlement batch close of the Merchant's terminal. An alternative funding schedule may be imposed at Servicers' discretion, based on a number of credit and risk considerations. Servicers will give Merchant reasonable advanced notice of any such change in funding schedule. All credits to the Settlement Account or other payments to Merchant are subject to final audit by the Servicers and the Servicers have a right to debit or credit the Settlement Account to correct any errors.
  - b. The transfer of settlement funds is normally conducted by electronic funds transfer (EFT) to your Settlement Account. Due to the nature of EFT, the electronic networks utilized for the movement of funds, and the fact that not all financial institutions belong to the EFT network, payment to Merchant may be delayed. Servicers will not be liable for any delays in transfer of settlement funds or errors in debit and credit entries caused by third parties.
  - c. Servicers reserve the right to divert and hold all settlement funds when Servicers are investigating any breach of this Agreement by Merchant or have reasonable cause to believe that Merchant may have violated a provision of this Agreement, the User Documentation or the Rules, or is engaged in illegal or fraudulent activity.

For ease of reference – copy to be compared to Agreement

## **12. Settlement**

- a. The Services will settle with you by crediting your Settlement Account with an amount equal to the total of your sales Transactions less your refund Transactions. The Services standard funding schedule is weekly, one week in arrears, following settlement batch close for the Merchant's terminal. An alternative funding schedule may be imposed at Servicers' discretion, based on a number of credit and risk considerations. Servicers will give Merchant reasonable advanced notice of any such change in funding schedule. All credits to the Settlement Account or other payments to the Merchant are subject to final audit by the Servicers and the Servicers have a right to debit or credit the Settlement Account.

(...)

This is **Exhibit “H”** to the Affidavit of Dr. Gábor Lukács  
affirmed before me on September 30, 2016

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Signature

# Federal Court of Appeal



# Cour d'appel fédérale

**TO :** Appeal Registry

**FROM :** Scott J.A.

**DATE :** July 29, 2016

**RE :** **A-242-16**

**Dr. Gábor Lukács and Canadian Transportation Agency and NewLeaf Travel Company Inc.**

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## DIRECTION

Kindly inform the parties that the cross-examination of Dr. Lukács should take place in Halifax at any point in time between August 24 and 26, 2016. The cross-examination of Mr. Young and Mr. Clark will be conducted in writing and questions should be served on these affiants no later than August 26, 2016 and answers be provided 15 days later.

“AFS”

This is **Exhibit “I”** to the Affidavit of Dr. Gábor Lukács  
affirmed before me on September 30, 2016

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Signature

Court File No.: A-242-16

**FEDERAL COURT OF APPEAL**

BETWEEN:

**DR. GÁBOR LUKÁCS**

Appellant

– and –

**CANADIAN TRANSPORTATION AGENCY and  
NEWLEAF TRAVEL COMPANY INC.**

Respondents

**WRITTEN EXAMINATION**

TO: William F. Clark

The Appellant, Dr. Gábor Lukács, has chosen to cross-examine Mr. William F. Clark on his affidavit sworn on July 23, 2016.

You are required to answer the questions in the schedule by affidavit in Form 99B prescribed by the *Federal Courts Rules*.

Pursuant to the July 29, 2016 Direction of the Court (Scott, J.A), the affidavit containing the answers is to be served on all other parties within 15 days from the date on which these questions are served on you.

August 25, 2016

“Dr. Gábor Lukács”  
**DR. GÁBOR LUKÁCS**

Halifax, Nova Scotia

*lukacs@AirPassengerRights.ca*

Appellant

## SCHEDULE

1. In paragraph 6 of your affidavit, you have made certain statements about the decrease of sales through travel agents. What is the source of your information or belief?
2. In paragraph 7 of your affidavit, you are referring to "very few claims."
  - (a) What do you mean by "very few"?
  - (b) Few relative to what?
  - (c) What is the source of your information or belief?
3. In paragraph 7 of your affidavit, you are referring to provincial consumer protection legislation that imposes liability on credit card issuers for goods or services not received by the customer.

With respect to each of the following provinces, please state the legislation and the section(s) and/or subsection(s) that you were referring to.

  - (a) New Brunswick;
  - (b) Nova Scotia;
  - (c) Ontario;
  - (d) Manitoba;
  - (e) Saskatchewan;
  - (f) Alberta; and
  - (g) British Columbia.
4. In reference to paragraph 7 of your affidavit, are you aware of any provincial consumer protection legislation that imposes liability on credit card issuers above and beyond the amount of the transaction involved?

If so, please identify the legislation and the section(s) and/or subsection(s).

5. In reference to paragraph 7 of your affidavit, are you aware of any provincial consumer protection legislation that requires credit card issuers to compensate customers for all of their out-of-pocket expenses arising from the non-delivery of goods or the non-performance of services?  
If so, please identify the legislation and the section(s) and/or subsection(s).
6. In the event that NewLeaf Travel Company Inc. fails to provide the services paid for, are you aware of any provincial consumer protection legislation that would require credit card issuers to pay for the full repatriation expenses of passengers, including accommodation, meals, and transportation on another airline?  
If so, please identify the legislation and the section(s) and/or subsection(s).
7. In practical terms, if a passenger purchased a Hamilton-Saskatoon flight from NewLeaf Travel Company Inc. for \$99.00 and then NewLeaf Travel Company Inc. fails to provide the services paid for, are you aware of any provincial consumer protection legislation that would require the credit card issuer to pay the passenger more than \$99.00?  
If so, please identify the legislation and the section(s) and/or subsection(s).
8. Pursuant to Rules 94(1) and 100, you are requested to produce a copy of the policy of the Canadian Transportation Agency referenced in paragraph 9 of your affidavit.
9. With respect to the cases referenced in paragraph 9 of your affidavit, where you stated that the Canadian Transportation Agency “threatened to issue a show cause against the licenses of air carriers in order to force to repatriate consumers at destination”:
  - (a) please identify the cases (including file numbers);
  - (b) please state the source of your information or belief;
  - (c) did any of these cases involve domestic licences?
  - (d) pursuant to Rules 94(1) and 100, you are requested to produce copies of correspondence in which the Canadian Transportation Agency “threatened to issue a show cause against the licenses of air carriers.”

10. Are you aware of any case where the Canadian Transportation Agency “threatened to issue a show cause against the licenses of air carriers” to compel the operating carrier to repatriate passengers at its own expense, even if the operating carrier has not been fully paid?  
If so, please elaborate and identify the cases (including file numbers).
11. Pursuant to Rules 94(1) and 100, you are requested to produce copies of the contract(s) and/or agreements(s) referenced in paragraph 10 of your affidavit.

This is **Exhibit “J”** to the Affidavit of Dr. Gábor Lukács  
affirmed before me on September 30, 2016

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Signature

Court File No.: A-242-16

**FEDERAL COURT OF APPEAL**

BETWEEN:

**DR. GÁBOR LUKÁCS**

Appellant

– and –

**CANADIAN TRANSPORTATION AGENCY and  
NEWLEAF TRAVEL COMPANY INC.**

Respondents

**WRITTEN EXAMINATION**

TO: Donald James Young

The Appellant, Dr. Gábor Lukács, has chosen to cross-examine Mr. Donald James Young on his affidavit sworn on July 23, 2016.

You are required to answer the questions in the schedule by affidavit in Form 99B prescribed by the *Federal Courts Rules*.

Pursuant to the July 29, 2016 Direction of the Court (Scott, J.A), the affidavit containing the answers is to be served on all other parties within 15 days from the date on which these questions are served on you.

August 25, 2016

“Dr. Gábor Lukács”  
**DR. GÁBOR LUKÁCS**

Halifax, Nova Scotia

*lukacs@AirPassengerRights.ca*

Appellant

## SCHEDULE

### **Performance bond and/or security and/or guarantee**

1. Is NewLeaf Travel Company Inc. financially able to post a performance bond and/or security and/or guarantee in the amount of \$3,744,000?  
If not, what is the largest amount of performance bond and/or security and/or guarantee that NewLeaf Travel Company Inc. is capable of posting?
2. In reference to paragraph 37 of your affidavit, how would the granting of an order, requiring NewLeaf Travel Company Inc. to post a performance bond and/or security and/or guarantee as a condition of its operation pending determination of the appeal, decide the issues on appeal?
3. Did you discuss with the investors of NewLeaf Travel Company Inc., referenced at paragraph 22 of your affidavit, the interlocutory injunction that is being sought?
4. Did you ask the investors of NewLeaf Travel Company Inc., referenced at paragraph 22 of your affidavit, whether they would be able and willing to post the performance bond and/or security and/or guarantee being sought on the present motion?
  - (a) If not, why not?
  - (b) If yes, what did the investors answer?

### **Residence**

5. Is the information contained in the Federal Corporate Information for NewLeaf Travel Company Inc., being Exhibit "C" to the Lukács Affidavit on page 33 of the motion record, accurate? If not, please elaborate.
6. What is your address in Winnipeg, Manitoba and since what date have you been living at that address?
7. Did you update your address on the corporation registration of NewLeaf Travel Company Inc., and if so, on what date?

**Past involvement with Canada Jetlines Ltd.**

8. I understand from paragraph 2 of your affidavit and Exhibit "E" to the Lukács Affidavit referenced therein that prior to your involvement with NewLeaf, you were the president of "Canada Jetliners, Ltd. a start-up ULCC headquartered in Vancouver BC." Is this correct?
9. Can you confirm that "Canada Jetliners, Ltd." is a typographical error, and it should read "Canada Jetlines Ltd."?
10. In the chain of emails from July 2014 between Canada Jetlines Ltd. and Mr. Robert Jones, being Exhibit "1" on page 19 of the present examination, on July 16, 2014, Mr. Dix Lawson wrote to Mr. Robert Jones:

In fact, when we learned of your first invoice Jim Young was e-mailed on May 5, 2014:

*"Good day Jim, As you are aware, I have an Invoice from Bob Jones (Creative Spin) acting in the capacity of Strategic Advisor for the period of March. Our process for contracting is to establish written requirements and statement of work (SOW) then find a provider to do the work. Any contract that develops from this needs exec approval, indeed this process was approved by the Board of Directors. The problem I am facing with Bob's invoice is that we have no SOW and approved contract, which I need in order to insert him into our program. So for now I cannot take action on this invoice from Bob. We need an approved SOW and contract to move forward."*

This e-mail is clear that you cannot be a paid consultant without a contract, and your first invoiced was dismissed. This ended any idea of a verbal deal with Jim Young as a paid consultant.

Is it true that on May 5, 2014, you received an email with the aforementioned content (quoted in italics)?

11. In the chain of emails from July 2014 between Canada Jetlines Ltd. and Mr. Robert Jones, being Exhibit "1" on page 19 of the present examination, on July 16, 2014, Mr. Dix Lawson wrote to Mr. Robert Jones:

We are also very much aware of your relationship and history with Jim Young. For example, we know of the arrangements made to ensure Jim Young maintained on paper an Ontario residence at 16 Shea Court, Toronto, with a

\$600.00 per month lease document dated May 1, 2014; thus, helping to ensure Jim Young could move back and forth across the border when he had no actual Canadian residence.

- (a) Is it true that in 2014, you maintained on paper an Ontario residence at 16 Shea Court, Toronto?
  - (b) Was there a lease document dated May 1, 2014?
  - (c) Is it true that in May 2014, you had no real and actual Canadian residence?
  - (d) What was the purpose of this arrangement?
  - (e) Were you a Canadian citizen in May 2014? If not, what was your legal (immigration and tax) status in Canada?
12. In the chain of emails from July 2014 between Canada Jetlines Ltd. and Mr. Robert Jones, being Exhibit "1" on page 19 of the present examination, on July 16, 2014, Mr. Dix Lawson wrote to Mr. Robert Jones:

In addition, it appears that Jim Young was feeding you confidential Jetlines information so that you could later use this information to advance your own company's (ArCompany) interests. On April 3, 2014 you e-mailed Jim Young and other members of the ArCompany team the following:

*"I did not invite Dave Solloway (and I assume no one else has ... let me know if otherwise), as I want to talk about the ArCompany CJL proposal and my current understanding of the available CJL budget for the Go To Market / Marketing functions, and then how this needs to line up with the proposal."*

Again a relationship between you and Jim Young is exposed that intentionally excludes CJL's Chief Commercial Officer, other CJL management team members and the Board of Directors in the process, and indicates that it was the Jetlines internal budget numbers that was being sought after. Within Jetlines Jim Young fought hard to single source any marketing efforts to ArCompany, which was not his role as an officer of Jetlines. With a MBA you should be aware of the ethical issues associated with using a personal relationship to gain an unfair advantage in bidding

for company business. This is hardly consulting work for Jetlines.

- (a) Is it true that on April 3, 2014, Mr. Robert Jones sent you an email with the aforementioned content (quoted in italics)?
  - (b) Around April 3, 2014, what was Mr. Solloway's role in Canada Jetlines Ltd.?
13. Would it be fair to say that the aforementioned concerns, described in the email of Mr. Dix Lawson to Mr. Robert Jones, played a role in your departure from Canada Jetlines Ltd.?
14. What were the circumstances and events leading to your departure from Canada Jetlines Ltd.?
15. On what date did you cease to be the president of Canada Jetlines Ltd.?

#### **NewLeaf Airways and NewLeaf Travel Company**

- 16. Is the information in the Corporation Profile Report for 1919183 Ontario Ltd., being Exhibit "D" to the affidavit of Dr. Lukács on page 38 of the motion record, accurate as of February 2016? If not, please elaborate.
- 17. Was 1919183 Ontario Ltd. incorporated on July 14, 2014 and were you appointed a director of the company on the same date?
- 18. Was 1919183 Ontario Ltd. doing business as "NewLeaf" and/or "NewLeaf Airways"?
- 19. Was NewLeaf Travel Company Inc. incorporated on April 15, 2015?
- 20. Have NewLeaf Travel Company Inc. and NewLeaf Airways (1919183 Ontario Ltd.) had the same directors, namely, yourself, Mr. Robert Jones, and Mr. Brian Reddy?
- 21. Until sometime in January 2016, did NewLeaf Travel Company Inc. and NewLeaf Airways (1919183 Ontario Ltd.) have the same registered office at 130 King Street West, Suite 2120, Toronto, Ontario, M5X 1K6?

22. The business models of both NewLeaf Travel Company Inc. and NewLeaf Airways (1919183 Ontario Ltd.) claim to use the Ultra Low Cost Carrier (ULCC) model, correct?
23. The business models of both NewLeaf Travel Company Inc. and NewLeaf Airways (1919183 Ontario Ltd.) call for using so-called “secondary airports,” correct?
24. The business plan of both NewLeaf Travel Company Inc. and NewLeaf Airways (1919183 Ontario Ltd.) call for utilizing three (3) aircraft in the initial period of operation, correct?
25. The business models of both NewLeaf Travel Company Inc. and NewLeaf Airways (1919183 Ontario Ltd.) call for renting aircraft on a “block hour basis” under an ACMI (aircraft, crew, maintenance, and insurance) contract, correct?
26. Would it be fair to say that, in practical terms, the business models of NewLeaf Travel Company Inc. and of NewLeaf Airways (1919183 Ontario Ltd.), outlined in Exhibit “E” to the Lukács Affidavit, are virtually identical? If not, please explain the differences.
27. What assets, including intellectual property and Internet domains, did NewLeaf Airways (1919183 Ontario Ltd.) transfer to NewLeaf Travel Company Inc.?
28. Do you agree that the logo shown on the September 16, 2015 news release of NewLeaf Travel Company Inc., being Exhibit “2” on page 26 of the present examination, is identical to the logo of NewLeaf Airways (1919183 Ontario Ltd.) shown on Exhibit “E” to the Lukács Affidavit?
29. Did NewLeaf Travel Company Inc. seek and obtain the consent of NewLeaf Airways (1919183 Ontario Ltd.) to use the “NewLeaf” trademark and the aforementioned logo?  
If not, why not?
30. What business activities, if any, has NewLeaf Airways (1919183 Ontario Ltd.) had since NewLeaf Travel Company Inc. was incorporated?

### **Passenger protection**

31. On June 23, 2016, NewLeaf Travel Company Inc. began selling tickets to the public for flights between July 25, 2016 and October 2, 2016, correct?
32. Is it fair to say that on the day that NewLeaf Travel Company Inc. began selling tickets to the public, NewLeaf Travel Company Inc. had not paid Flair Airlines for the full costs of the service for the entire period from July 25, 2016 to October 2, 2016?
33. Does the email of Ms. Dorian Werda, being Exhibit "3" on page 28 to the present examination, describe the communications between the Travel Industry Council of Ontario (TICO) and NewLeaf Travel Company Inc. accurately?
34. Is it fair to say that the Ontario compensation fund administered by TICO offers no protection to passengers who purchase tickets from NewLeaf Travel Company Inc. on the Internet or through its Winnipeg-based call centre?
35. Has NewLeaf Travel Company Inc. completed its registration with TICO? If not, please explain why.  
If yes, pursuant to Rules 94(1) and 100, you are requested to produce a copy of the confirmation of NewLeaf Travel Company Inc.'s registration with TICO.
36. Has NewLeaf Travel Company Inc. registered with the British Columbia counterpart of TICO?  
If not, please explain why not.  
If yes, pursuant to Rules 94(1) and 100, you are requested to produce a copy of the confirmation of NewLeaf Travel Company Inc.'s registration.
37. Is it fair to say that British Columbia's Travel Assurance Fund offers no protection to passengers who purchase tickets from NewLeaf Travel Company Inc. on the Internet or through its Winnipeg-based call centre?
38. You stated at paragraph 7 of your affidavit that "Credit card issuers are liable to the consumer for processed transactions, where goods and services are not received."

What kind of liability (contractual, statutory, common law, etc.) are you referring to, and what is the source of your knowledge?

39. Would it be fair to say that a passenger cannot get back from their “credit card issuer” and/or PSiGate more than the amount they paid NewLeaf Travel Company Inc. for services that were not provided?
40. Would it be fair to say that the airfares offered to the public by NewLeaf Travel Company Inc. are significantly lower than those offered by Air Canada and WestJet? If so, please quantify it.
41. In the event that NewLeaf Travel Company Inc. fails to provide the services paid for, do you believe that “credit card issuers” and/or PSiGate are required to pay for the full repatriation expenses of passengers, including accommodation, meals, and transportation on another airline?  
If yes, please state the source of your belief.
42. Section 12(a) of the credit card agreement, being Exhibit “A” to your affidavit, permits PSiGate to impose on NewLeaf Travel Company Inc. an “alternative funding schedule,” correct?
43. Pursuant to Rules 94(1) and 100, you are requested to produce copies of the “alternative funding schedule” that were in place on June 23, 2016 and July 23, 2016.
44. In reference to paragraph 8 of your affidavit, how does PSiGate know when a passenger completed their full travel?
45. Pursuant to Rules 94(1) and 100, you are requested to produce copies of:
  - (a) the Aircraft, Crew, Maintenance and Insurance (ACMI) agreement(s);
  - (b) the MOU agreement(s); and
  - (c) the escrow agreement(s);referenced in paragraphs 13 and 24 of your affidavit.

### **Revenue/Expenses**

46. With respect to the screenshot shown as Exhibit “6” on page 37 of the present examination:
  - (a) Do you recognize it as taken from the booking website of NewLeaf Travel Company Inc.?
  - (b) What does the item “O” (\$16.78) stand for?
  - (c) What does the item “Air Transport Charge” (\$18.00) stand for?
  - (d) Is it fair to say that the following items are collected on behalf of third parties: YXE Arpt Improvement Fee (\$20.00); Security Charge ATSC (\$7.12); and GST/HST Tax (\$3.10)?
  - (e) What amount (portion) of the total price of \$65.00 is a net revenue for NewLeaf Travel Company Inc.?
47. Of the total gross receipts collected, referenced in paragraph 19 of your affidavit, which amount (portion) is taxes, fees, and third party charges, and which amount (portion) is NewLeaf Travel Company Inc.’s net revenue?
48. Pursuant to Rules 94(1) and 100, you are requested to produce copies of:
  - (a) the trust agreement governing the “trust” referenced in paragraph 19 of your affidavit;
  - (b) an account statement from PSiGate, as of July 23, 2016, showing the total amount of “gross receipts collected from the above sales” referenced in paragraph 19 of your affidavit; and
  - (c) a breakdown of the gross sales in a form that distinguishes the net revenue of NewLeaf Travel Company Inc. from taxes, fees and third party charges that are collected as part of the total fare as of July 23, 2016.
49. With respect to each entity that you had in mind in paragraph 20 of your affidavit, please state the name of the entity, the amount that NewLeaf Travel Company Inc. payed to the entity, the purpose of the payment, and the date of the payment.

50. With respect to each week starting July 25, 2016, please state in Canadian dollars how much NewLeaf Travel Company Inc. has paid Flair for operating the flights.
51. Do the above-noted amounts include fuel and de-icing (if necessary)?  
If not, with respect to each of the aforementioned weeks, please state how much NewLeaf Travel Company Inc. paid for fuel and de-icing.
52. With respect to each week starting July 25, 2016, please state NewLeaf Travel Company Inc.'s total costs relating to the operation of the flights.
53. If the revenue from seats sold on a given flight does not cover the operating expenses of the flight, does NewLeaf Travel Company Inc. cancel the flight or operate it at a loss?  
If the former, what kind of alternative transportation are passengers with confirmed bookings offered and who pays for its costs?  
If the latter, who covers the shortfall?

### **Capitalization**

54. Who are the investors of NewLeaf Travel Company Inc., how much has each of them invested in NewLeaf Travel Company Inc., and on what date were the investment funds paid?
55. What amount (portion) of the amount stated in paragraph 21 of your affidavit as being held in trust is unencumbered?
56. Pursuant to Rules 94(1) and 100, you are requested to produce copies of:
  - (a) confirmation that the amount stated in paragraph 21 of your affidavit is being held in trust;
  - (b) the trust agreement(s) governing the "trust" referenced in paragraph 21 of your affidavit;
  - (c) the agreement(s) signed by the investors referenced in paragraph 21 of your affidavit;

- (d) the agreement(s) relating to the “additional” amount “for the next four or five months as needed” referenced in paragraph 21 of your affidavit;
  - (e) bank statement(s) of NewLeaf Travel Company Inc., showing unencumbered paid-in capital as of: (i) June 23, 2016; (ii) July 20, 2016, and (iii) July 23, 2016.
  - (f) audited (or, if unavailable, unaudited) financial statements of NewLeaf Travel Company Inc. for June and July 2016; and
  - (g) any agreement(s) relating to the funding referenced in paragraph 22 of your affidavit.
57. Who are the investors who “have provided the primary funding” referenced in paragraph 22 of your affidavit?
58. Can investors withdraw their investments in NewLeaf Travel Company Inc. at any time, or is a portion of the investment “locked in” for a certain period of time?  
What portion of the investment is “locked in” and for how long?
59. Was Mr. Baldanza the CEO of Spirit Airlines in December 2015?
60. Please review the Air Travel Consumer Report of the US Department of Transportation issued in February 2016, being Exhibit “4” on page 30 to the present examination.  
Do you consider Spirit Airlines’ result of 10.97 consumer complaints per 100,000 enplanements in December 2015 “very successful”?
61. How many passengers can be “repatriated” from the amount held in an “escrow account” referenced in paragraph 24 of your affidavit?  
Please explain the calculations that were used to establish the sufficiency of the amount in question.
62. Does Flair have a legal obligation to repatriate passengers at its own expense should the amount held in escrow, referenced in paragraph 24 of your affidavit, turns out to be insufficient?  
If so, please specify the source of this obligation.

63. How many weeks of airport fees, ground handling and other related services does the amount referenced in paragraph 25 of your affidavit cover?
64. How many days of operations does the amount referenced in paragraph 27 of your affidavit cover?
65. What was the purpose of the “4 Months Operational Reserve” and the figure of \$9,413,000 shown in “Appendix C – Use of Proceeds” to Exhibit “E” to the Lukács Affidavit, shown on page 73 of the motion record?
66. Does NewLeaf Travel Company Inc. have such a reserve?  
If so, please state the amount held in reserve.

### **Kelowna Airport Contract**

67. On what date did NewLeaf Travel Company Inc. execute the airport agreement with the Kelowna Municipal Airport Authority?
68. Pursuant to Rules 94(1) and 100, you are requested to produce a copy of the transaction slip or bank statement confirming the payment stated in paragraph 34 of your affidavit.

### **Unpaid bills – Mr. Norm LeCavalier**

69. When did the “Ski Charter flights,” referenced in paragraph 35 of your affidavit, take place or were supposed to take place?
70. What services was Mr. LeCavalier expected to deliver to NewLeaf Airways (1919183 Ontario Ltd.) and by what date?
71. Please describe in detail the nature of the alleged dispute, referenced in paragraph 36 of your affidavit, about the work performed by Mr. LeCavalier.
72. Did Mr. LeCavalier provide services to NewLeaf Travel Company Inc.?
73. In light of the alleged dispute about the work of Mr. LeCavalier, why did NewLeaf Travel Company Inc. use his services?

74. What was the purpose of your December 19, 2015 email sent to Mr. LeCavalier, being Exhibit "Q" to the Lukács Affidavit, on page 171 of the motion record?
75. Is it true that in an email dated January 24, 2016, being Exhibit "R" to the Lukács Affidavit, on page 173 of the motion record, you wrote to Mr. Norman LeCavalier that:

[...] you has always been and continue to be a valuable member of this venture. I know I disclose more information to the two of you than I do to any other stakeholder group (including YWG!) But I trust you both implicitly and value your counsel, the support, time and effort you have both put into this from the start.

76. In light of the alleged dispute about the work of Mr. LeCavalier, why did you continue trusting him and sharing information with him?
77. Do you recognize the chain of emails, being Exhibit "5" on page 32 to the present examination?
78. Is it true that on January 30, 2016, Mr. Sam Samaddar wrote to you, with a copy to Mr. Norman LeCavalier, the following?

You made financial commitments to Norm and you have ignored him when he has reached out to you?

79. Which "financial commitments to Norm" was Mr. Samaddar referring to?
80. Is it true that on February 5, 2016, you wrote to Mr. LeCavalier, with a copy to Mr. Samaddar, that:

My intention is to pay you once we have closed on the capital.

81. What "capital" were you referring to in your February 5, 2016 email to Mr. LeCavalier?
82. What payment were you referring to in your February 5, 2016 email to Mr. LeCavalier?
83. What services did Mr. LeCavalier provide for which you were communicating intent to pay him in your February 5, 2016 email?

84. Do you recognize the “Audit Summary – New Leaf / Flair Airlines Operation (SOR 88-58),” being Exhibit “7” on page 39 of the present examination?
85. At whose request was the “Audit Summary – New Leaf / Flair Airlines Operation (SOR 88-58)” prepared and who paid for it?
86. Did you send the email dated February 17, 2016, shown as Exhibit “8” on page 47 to the present examination?  
If so, for what purpose did you send this email to Mr. LeCavalier?
87. In the March 16, 2016 letter of Mr. LeCavalier (Exhibit “S” to the Lukács Affidavit, page 178 of the motion record), does “Brian” refer to Mr. Brian Reddy, the Chief Financial Officer of NewLeaf Travel Company Inc.?
88. Is it true that sometime between February 22, 2016 and March 16, 2016 you spoke to Mr. LeCavalier, and stated that Mr. Brian Reddy had “asked Lisa to complete the transfer”?  
If so, what was the amount and the purpose of the promised transfer?
89. Did Mr. LeCavalier receive any payment from NewLeaf Travel Company Inc. and/or from NewLeaf Airways (1919183 Ontario Ltd.) in 2016?  
If so, on what date(s), what amount(s), and for what purpose(s)?
90. Pursuant to Rules 94(1) and 100, you are requested to produce all correspondence with Mr. LeCavalier relating to disputing the work performed by him and/or the timeliness of the work and/or the quality of his work, including but not limited to:
  - (a) response(s), if any, to the March 16, 2016 letter of Mr. LeCavalier (Exhibit “S” to the Lukács Affidavit, p. 178 of the motion record); and
  - (b) response(s), if any, to the June 23, 2016 letter of Mr. LeCavalier (Exhibit “S” to the Lukács Affidavit, p. 177 of the motion record).
91. Since the day you swore your affidavit, have the outstanding bills of Mr. LeCavalier (Exhibit “S” to the Lukács Affidavit, pages 182-183) been paid by NewLeaf Travel Company Inc. and/or NewLeaf Airways (1919183 Ontario Ltd.) and/or a third party?

92. Since the day you swore your affidavit, has NewLeaf Travel Company Inc. and/or NewLeaf Airways (1919183 Ontario Ltd.) reached a settlement with Mr. LeCavalier?

If so, pursuant to Rules 94(1) and 100, you are requested to produce a copy of the settlement agreement.

### **Unpaid bills – ArCompany**

93. What services was ArCompany expected to deliver with respect to all three of the items shown on the May 20, 2015 invoice (Exhibit “T” to the Lukács Affidavit, page 187 of the motion record), and what was the deadline for these services?

94. In paragraphs 35-36 of your affidavit, did you intend to convey that all items in ArCompany’s invoice are disputed, or only portions of it?

95. Have the undisputed portions of ArCompany’s invoice been paid?

If not, why not?

If yes, please state the amount, date, and the source of the payment.

96. Do you recognize the September 1, 2014 email, being Exhibit “9” on page 49 to the present examination?

97. On or around September 1, 2014, did you write the following?

Thank the whole team at CSIS, sorry I mean ArCompany and remind me never to have a love child hiding in a convent in Switzerland.... They would find it.

98. Would it be fair to say that as of September 1, 2014, you were satisfied with the quality and timeliness of the work performed by ArCompany?

99. Do you recognize the October 10, 2014 email, being Exhibit “10” in page 50 of the present examination?

100. On or around October 10, 2014, did you write to Ms. Hessie Jones and Ms. Amy Tobin of ArCompany the following?

I wanted to add my heartfelt thanks for the work we accomplished this week.

101. Was the work referenced in the October 10, 2014 email the “NewLeaf MyAir Branding Program”?
102. Would it be fair to say that as of October 10, 2014, you were satisfied with the quality and timeliness of the work performed by ArCompany?
103. Please describe in detail the nature of the alleged dispute, referenced in paragraph 36 of your affidavit, about the work performed by ArCompany.
104. Do you recognize the April 6, 2016 email from “bob.jones” to yourself, shown in Exhibit “T” to the Lukács Affidavit, on the lower portion of page 185 of the motion record?
105. Does “bob.jones” refer to Mr. Robert Jones, one of the directors of NewLeaf Travel Company Inc.?
106. What was the role of Mr. Robert Jones in NewLeaf Travel Company Inc. in April 2016? Was he the Chief Commercial Officer of the company?
107. What “investments funds” was Mr. Robert Jones referring to in his April 6, 2016 email to you?
108. Is it fair to say that Mr. Robert Jones was referring in his April 6, 2016 email to investment funds that NewLeaf Travel Company Inc. was expecting to receive?
109. Which entity is “NewLeaf Corp” shown on the invoice of ArCompany (Exhibit “T” to the Lukács Affidavit, page 187 of the motion record)?
110. Can you confirm that as of April 2016, the domain *newleafcorp.ca*, used by Mr. Robert Jones for his April 6, 2016 email, was owned by NewLeaf Travel Company Inc.?
111. What was your reaction to the April 6, 2016 email of Mr. Robert Jones?
112. Pursuant to Rules 94(1) and 100, you are requested to produce all correspondence between yourself and others, dated between April 6, 2016 and June 28, 2016, concerning the invoice of ArCompany (Exhibit “T” to the Lukács Affidavit, page 187 of the motion record).

113. Are you familiar with the chain of emails from June 25-28, 2016 between Mr. Robert Jones from NewLeaf Travel Company Inc. and Ms. Hessie Jones from ArCompany, being Exhibit "11" on page 52 of the present examination?
114. Is Ms. Amie Seier (referenced in the June 25, 2016 email of Mr. Robert Jones) the market manager of NewLeaf Travel Company Inc.?
115. What is the reason for the absence of denial and/or dispute of the monies owed in the June 25, 2016 email of Mr. Robert Jones?
116. On June 28, 2016, Mr. Robert Jones wrote to Ms. Hessie Jones:

As I have told you repeatedly, Brian is managing the payment activity and he fully intends to complete the payment, but money has to flow in first, before it can flow out. And I frequently remind him and he acknowledges the intent to finish the transaction when able.

Which "payment" was Mr. Robert Jones referring to, and what does "money has to flow in first, before it can flow out" mean?

117. Is it fair to say that as of June 28, 2016, no dispute has been communicated to ArCompany concerning the invoice shown as Exhibit "T" to the Lukács Affidavit, page 187 of the motion record?
118. Are you aware of the June 30, 2016 email of Ms. Hessie Jones to Mr. Brian Meronek, counsel for NewLeaf Travel Company Inc., being Exhibit "12" on page 55 of the present examination?
119. Is it fair to say that the June 30, 2016 email of Ms. Hessie Jones was left unanswered?  
If not, please elaborate. If yes, please explain why it was left unanswered.
120. Pursuant to Rules 94(1) and 100, you are requested to produce all correspondence with ArCompany dated July 23, 2016 or earlier, disputing the work performed by the company and/or the timeliness of the work and/or the quality of the work.

121. Since the day you swore your affidavit, has the outstanding invoice of ArCompany (Exhibit "T" to the Lukács Affidavit, page 187 of the motion record) been paid by NewLeaf Travel Company Inc. and/or NewLeaf Airways (1919183 Ontario Ltd.) and/or a third party?
122. Since the day you swore your affidavit, has NewLeaf Travel Company Inc. and/or NewLeaf Airways (1919183 Ontario Ltd.) reached a settlement with ArCompany?  
If so, pursuant to Rules 94(1) and 100, you are requested to produce a copy of the settlement agreement.

### **Public statements**

123. In reference to Exhibit "AB" to the Lukács Affidavit on page 238 of the motion record, is it true that NewLeaf Travel Company Inc. "has a backup plan" in the event that it is required to hold a licence to operate?  
If so, what is the "backup plan"?
124. According to a report published by CBC News, being Exhibit "13" on page 56 to the present examination:

NewLeaf president Jim Young says the company's first month of operation in Winnipeg has been a success and it is eyeing new routes for the fall. As a sign of commitment to the city, Young says, it has decided to base an aircraft here, which means crews and maintenance work feeding the local economy.

Does the report adequately reflect what you said?  
If not, please elaborate.
125. Does NewLeaf Travel Company Inc. have operational control of any aircraft and/or crew?  
If not, how could NewLeaf Travel Company Inc. have "decided" to base an aircraft in Winnipeg?
126. On or around August 24, 2016, NewLeaf Travel Company Inc. released to the public its schedule for October 3-31, 2016, correct?
127. In the October 3-31, 2016 period, how many routes and how many flights per week will NewLeaf Travel Company Inc. offer?

## **Settlement with Bob Jones:**

**From:** Bob Jones [mailto:[bob.jones@sympatico.ca](mailto:bob.jones@sympatico.ca)]  
**Sent:** July 24, 2014 1:51 PM  
**To:** Dix Lawson <[dix.lawson@jetlines.ca](mailto:dix.lawson@jetlines.ca)>  
**Cc:** [jim.scott@jetlines.ca](mailto:jim.scott@jetlines.ca); [amelia.mui@jetlines.ca](mailto:amelia.mui@jetlines.ca); Bob Jones <[bob.jones@sympatico.ca](mailto:bob.jones@sympatico.ca)>  
**Subject:** RE: Final Suggested Proposal

Dix,

Thanks for your email and the clarification of the funds transfer and the stock processing. I look forward to Amelia's email confirmation tomorrow.

Regarding conversations with prospective investors, I want to be sure I am clear. Let me know if the following is correct or please correct as appropriate:

*Any funds invested now will be in the private company at \$0.30 per share. CJL is on track for the RTO as stated in the July 2 News Release, and expects the RTO to be completed by the end of August 2014, at which time the company will be listed on the TSX.V. At that time, the current expectation is that there will be a one for one share exchange (private co to pub co) and the new pub co is expected to open at \$0.30 per share (e.g. no rollback or initial price change is expected with moving to the pub co).*

Regards,

Bob

=====

**R. G. (Bob) Jones**  
Office: 416-281-6292  
Mobile: 647-519-6292  
[bob.jones@sympatico.ca](mailto:bob.jones@sympatico.ca)

=====

---

From: [dix.lawson@jetlines.ca](mailto:dix.lawson@jetlines.ca)  
To: [bob.jones@sympatico.ca](mailto:bob.jones@sympatico.ca)  
CC: [jim.scott@jetlines.ca](mailto:jim.scott@jetlines.ca); [amelia.mui@jetlines.ca](mailto:amelia.mui@jetlines.ca)  
Subject: RE: Final Suggested Proposal  
Date: Thu, 24 Jul 2014 11:47:25 -0700

Good day Bob,

We have exceeded our Bridge financing target (mentioned in my email of 2 Jul) as a part of our agreement with InoVent and we are now in the due diligence period with them that ends 29 Aug. The planned outcome is an amalgamation that when complete will see the surviving company - Canada Jetlines Ltd listed on the TSX.V. The shares to be issued to you are in Canada Jetlines.

Bob, there is still scope for your Toronto region investors to get involved in this project. Please pursue them; it would be magnificent if you could add to the book in the next few days! I have attached our 9 July Investor presentation for your use, and you already have the term sheet and sub agreement. Please advise if there is any other support needed from us.

We won't wait for your expense claim to complete our agreement. You should see the payment for the five invoices in your bank account tomorrow. Amelia will drop you a note to let you know when the funds transfer is completed. We are also completing the shares issue process, which we expect to be completed next week.

Sincerely,

Dix

**From:** Bob Jones [<mailto:bob.jones@sympatico.ca>]  
**Sent:** July-24-14 10:55 AM  
**To:** Dix Lawson; [jim.scott@jetlines.ca](mailto:jim.scott@jetlines.ca)  
**Cc:** Bob Jones  
**Subject:** RE: Final Suggested Proposal

Jim / Dix,

Per my last note to you on Monday June 21 (below), I am still putting together the last invoice on miscellaneous expenses (estimated at \$700.00) along with the related receipts. Unfortunately, I have had a number of other activities going on that have made the process a little slower than I had wanted.

In any event, I suggest that you proceed to process the other components / invoices of our arrangement and I will get the misc expenses to you as soon as possible (most likely now Monday July 28). Please let me know what the processing timeframe is for our arrangement, and if anything else is required.

Regarding the shares, I assume these will be shares in the new CJL / Inovent PubCo? Is the Inovent deal proceeding as scheduled and are the related money raising activities on track? Per the revised investment agent agreement (good until July 31), I have yet to reconnect with my original investor associates on this opportunity, so an update from your end would be appreciated.

Thanks & regards,

Bob

=====

**R. G. (Bob) Jones**  
Office: 416-281-6292  
Mobile: 647-519-6292  
[bob.jones@sympatico.ca](mailto:bob.jones@sympatico.ca)

---

From: [bob.jones@sympatico.ca](mailto:bob.jones@sympatico.ca)  
To: [dix.lawson@jetlines.ca](mailto:dix.lawson@jetlines.ca)  
CC: [jim.scott@jetlines.ca](mailto:jim.scott@jetlines.ca); [bob.jones@sympatico.ca](mailto:bob.jones@sympatico.ca)  
Subject: RE: Final Suggested Proposal  
Date: Mon, 21 Jul 2014 00:45:05 -0400  
Dix / Jim,

Per your note below, please find attached the following items:

1. An executed Subscription Agreement for 30,000 shares
2. An Invoice for \$9,000.00 to cover the payment for the shares

I will complete the miscellaneous expenses invoice in the next two days, along with the appropriate scanned receipts.

Let me know if there are any changes required and also when you expect to process the various items.

Thanks & regards,

Bob

=====

**R. G. (Bob) Jones**  
Office: 416-281-6292  
Mobile: 647-519-6292  
[bob.jones@sympatico.ca](mailto:bob.jones@sympatico.ca)

=====

From: [dix.lawson@jetlines.ca](mailto:dix.lawson@jetlines.ca)  
To: [bob.jones@sympatico.ca](mailto:bob.jones@sympatico.ca)  
CC: [jim.scott@jetlines.ca](mailto:jim.scott@jetlines.ca)  
Subject: RE: Final Suggested Proposal  
Date: Fri, 18 Jul 2014 13:09:06 -0700

Good day Bob,

With respect to your clarification points 1- 4:

1. Agreed that we have these invoices and will process.
2. Please provide the invoice with receipts.
3. Agreed, we will use the one invoice we have from Feb.
4. As noted earlier, please complete the first five pages of the sub agreement (attached) for 30,000 shares, scan and return to me along with a separate invoice for \$9,000 of work that supports the shares as a payment.

We will action everything as quickly as possible once we receive the documents for points 2 and 4.

Sincerely,

**Dix Lawson**  
Chief Administrative Officer and Program Manager  
Canada Jetlines Ltd.

(w) 604-273-5387 (JETS)  
(c) 604-754-8255  
(f) 604-273-5399



*Room C4408 YVR International Terminal Bldg, 3211 Grant McConachie Way, Richmond BC V7B 0A4*

**Mail:**  
**P.O. Box 32382**  
**Vancouver Airport Domestic Terminal R.P.O.**  
**Richmond, BC, Canada, V7B 1W2**

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---

**From:** Bob Jones [<mailto:bob.jones@sympatico.ca>]  
**Sent:** July-18-14 10:15 AM  
**To:** [jim.scott@jetlines.ca](mailto:jim.scott@jetlines.ca); [dix.lawson@jetlines.ca](mailto:dix.lawson@jetlines.ca); [bob.jones@sympatico.ca](mailto:bob.jones@sympatico.ca)  
**Subject:** RE: Final Suggested Proposal

Jim,

Thanks for your response.

First, just a side comment on the Toronto money raising efforts:

- raising funds is always a tenuous exercise -- evidence CJL's previous efforts
- it is difficult to predict the future business activities of private companies and when we began our journey with Byron, they were in good shape ... we could not have predicted that multiple large deals would fail to close, and they decided to de-certify their IROC standing.
- we shouldn't forget that some excellent collateral was created and over 100 investors were approached and a number of RTO candidates were analyzed, among other items, etc. ... no excuses, but significant good work was done.

So, just to clarify your offer:

1. Pay \$2,000.00 in car allowance (4 months as one month was already paid) ... invoices already provided.

2. Misc expenses (parking, printing of collateral, etc.) Totalling approx \$700.00 ... invoice still owing.
3. Payment of one months fees totalling \$7,910.00 (\$7,000.00 fees plus \$910.00 HST) ... invoice already provided.
4. 30,000 shares of Canada Jetlines stock ... assuming an invoice is required ... please specify the required details.

It is unfortunate that we have come to this point, as I believe I have provided a significant amount of time to this project. However, I too prefer to resolve this matter. So, assuming my summary above is correct, I will accept this offer and consider this matter closed.

Regards,

Bob

416-281-6292

From: [dix.lawson@jetlines.ca](mailto:dix.lawson@jetlines.ca)

To: [bob.jones@sympatico.ca](mailto:bob.jones@sympatico.ca)

CC: [jim.scott@jetlines.ca](mailto:jim.scott@jetlines.ca)

Subject: RE: Jetlines move to a public listing - Opportunity and the Effects on existing Finder's Fee Agreement

Date: Wed, 16 Jul 2014 08:05:47 -0700

Good day Bob,

I have removed Jim Young from this email chain. I have also removed Amelia. The intent is to have this discussion between you, me and Jim Scott. Please read this response, after which you may send it to Jim Young if you wish.

There is no senior advisor contract signed between you and Jetlines thru Jim Young or anyone else in the company. Jetlines has a defined process for engaging consultants with monthly fees in the range you are talking about that involves approval of the CEO, the Board of Directors' Audit Committee, and a review by Jetlines' law firm. None of these measures were taken, because Jetlines would simply not approve such a contract in that stage of our progress. In fact, when we learned of your first invoice Jim Young was e-mailed on May 5, 2014:

*"Good day Jim,*

*As you are aware, I have an Invoice from Bob Jones (Creative Spin) acting in the capacity of Strategic Advisor for the period of March. Our process for contracting is to establish written requirements and statement of work (SOW) then find a provider to do the work. Any contract that develops from this needs*

*exec approval, indeed this process was approved by the Board of Directors. The problem I am facing with Bob's invoice is that we have no SOW and approved contract, which I need in order to insert him into our program. So for now I cannot take action on this invoice from Bob. We need an approved SOW and contract to move forward."*

This e-mail is clear that you cannot be a paid consultant without a contract, and your first invoiced was dismissed. This ended any idea of a verbal deal with Jim Young as a paid consultant.

We are also very much aware of your relationship and history with Jim Young. For example, we know of the arrangements made to ensure Jim Young maintained on paper an Ontario residence at 16 Shea Court, Toronto, with a \$600.00 per month lease document dated May 1, 2014; thus, helping to ensure Jim Young could move back and forth across the border when he had no actual Canadian residence. While this is, for all intents and purposes, a private arrangement it causes us great concern, and leads us to consider whether there are self-serving deals between you and Jim Young. It also bring Jetlines into a cross border ethical/legal issue with one of our employees that we may still be responsible for. So in July 2014 when you self-initiated an invoice to Jetlines for \$40,000.00 saying Jim Young told you Jetlines would pay you \$7,000.00 per months, and no one bothers to have any form of a contract or inform the CEO when you see him, red flags go up. In other words and to be very blunt, a non-itemized invoice for \$40,000 of un-contracted work, based on your story of a verbal promise from a person you are creating other questionable documents with (who has been told in writing that there is no contract) is a real concern for us. Again there are possible ethic/legal issues at play. You may consider these strong words; however, to ethically, morally and legally protect Jetlines we need to consider our next steps with these transactions between you and Jim Young and your representation of a \$40,000.00 invoice.

In addition, it appears that Jim Young was feeding you confidential Jetlines information so that you could later use this information to advance your own company's ( ArCompany) interests. On April 3, 2014 you e-mailed Jim Young and other members of the ArCompany team the following:

*"I did not invite Dave Solloway (and I assume no one else has ... let me know if otherwise), as I want to talk about the ArCompany CJL proposal and my current understanding of the available CJL budget for the Go To Market / Marketing functions, and then how this needs to line up with the proposal."*

Again a relationship between you and Jim Young is exposed that intentionally excludes CJL's Chief Commercial Officer, other CJL management team members and the Board of Directors in the process, and indicates that it was the Jetlines internal budget numbers that was being sought after. Within Jetlines Jim Young fought hard to single source any marketing efforts to ArCompany, which was not his role as an officer of Jetlines. With a MBA you should be aware of the ethical issues associated with using a personal relationship to gain an unfair advantage in bidding for company business. This is hardly consulting work for Jetlines.

From an initial review of the "Summary of Work Activities for Canada Jetlines":

- You signed a finder's fee contract that defined terms with no monthly fee;
- As an experienced and educated businessman you know that a large scale change in terms (monthly fees) requires a chance to your existing contract – which was not done;
- The notion that you were an advisor because you were included in presentation material as such is not supported by a contract, the fact you were presented this way was at the insistence of Jim Young who stated you wanted the added exposure to attract investors.

- If your terms with Jim Young were verbal then when Jim Scott met you in Toronto we question why this matter wasn't raised at that opportunity. Also Jim Young was told in writing that no advisory contract was in place or would be honoured. You spoke with Jim Young numerous times a week. Thereby, it is highly questionable that you could presume there was a verbal contract given these facts.
- The work you are claiming as completed does not in any way equal the approximate 350 hours of time that you are attempting to claim. A skilled and professional consultant would know this. This claim is therefore considered unsubstantiated and touches on being unethical; and
- The idea seems a little out of line that you should be paid while under a Finder's Fee Agreement for the negotiation with an "IB" that saw Jetlines end up with Byron that was in the final stages of going out of business, and taking Jetlines' cash with them.

Nevertheless, Bob, as I indicated in my email of 4 Jul, we do believe that you did do work for Jetlines above the finders agreement, but certainly not \$40,000.00. We also have a basic belief that you did this work in good faith. Even without a written contract for non-finder items we have offered you 25,000 shares at \$.30 as compensation. I can bump that to 30,000 shares. We will also honour the commitment to four months at \$500 per month as noted earlier.

We are under real time constraints as we can't issue shares past this week's closing. Assuming that you wish to move ahead with the offer I have again attached the sub agreement. Please fill out the first five pages, scan and send them to me along with an invoice for \$9,000 (30,000 shares). I'll counter-sign the document and send it back to you. As our original deadline was noon Pacific time Wed, we feel it is only proper to modify that to 4:00 PM Pacific Wed July 16, 2014. This will allow you time to consider this offer after which time the offer will have to lapse.

Sincerely,

**Dix Lawson**  
**Chief Administrative Officer and Program Manager**  
**Canada Jetlines Ltd.**

(w) 604-273-5387 (JETS)  
(c) 604-754-8255  
(f) 604-273-5399

=====

<image001.jpg>

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**Mail:**  
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**Vancouver Airport Domestic Terminal R.P.O.**  
**Richmond, BC, Canada, V7B 1W2**

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## **NEWS RELEASE**

### **NewLeaf's Latest Team Members Have Landed**

WINNIPEG, Manitoba – September 16, 2015 – NewLeaf Travel Company Inc. is pleased to announce the addition of two new members to the leadership team supporting the rapid growth of the Winnipeg based travel company.

Dean Dacko having recently returned from three years as the Senior Vice President, Head of Marketing and Product for Malaysia Airlines, brings years of national and international experience and expertise to the company. During his time in Asia, Dacko was recognized and awarded as one of the 50 Most Talented CMO's in Asia, 2013 Asia's Leading Airline, and Asia's Best Brand Award. He joins the team as Chief Commercial Officer and will be responsible for all marketing, sales, distribution, and revenue generation responsibilities.

Amie Seier also joins and brings her social media and community engagement skills in both tourism and retail sectors as a Marketing Manager. Both new executives are Winnipeg born and are excited to see the company's head office in their hometown.

"We're thrilled to have both Dean and Amie on board," said Jim Young, NewLeaf's President and CEO. "Dean's wealth of experience in the tourism and travel industry combined with Amie's focus on connecting with prospective customers through social media, fuels our plan to communicate with travellers and be Canada's first ultra-low cost focused travel company, offering service to un-served and underserved destinations across Canada and to leisure destinations throughout North America."

The ultra low-cost modeled travel company doesn't plan on slowing down, but is planning on ramping up the hiring here in Winnipeg. "This is only the beginning of the first wave of employees to begin at NewLeaf. Our long term goal is to create an excess of 750 new jobs here in the city and significantly stimulate the economy," said Young.

NewLeaf is partnering with Kelowna-based Flair Airlines, Ltd, which owns and operates a fleet of Boeing 737-400s. As the operator partner, Flair Airlines will provide the aircraft, maintenance and crews to help this venture takeoff. NewLeaf will be also operating bases out of Hamilton and Kelowna, but Winnipeg will be where they intend to call home.

NewLeaf's initial route map will be announced in the near future in Winnipeg, Manitoba, Kelowna, British Columbia and Hamilton, Ontario.

#### **About NewLeaf**

NewLeaf Travel Company Inc. is a new, privately held, Canadian company headquartered in Winnipeg MB, whose purpose is to provide leisure travellers with an alternative travel experience at a lower cost. In partnership with Flair Airlines, NewLeaf will offer scheduled



## NEWS RELEASE

nonstop flights from the company's bases in Kelowna, Winnipeg and Hamilton to multiple domestic and international destinations. NewLeaf customers save money through low fares that are unbundled and transparent, only paying for what they want and use with no surprises. See more at [www.NewLeafTravel.ca](http://www.NewLeafTravel.ca)

### About Flair Airlines

Flair Airlines, Ltd is a Canadian airline with operations based in Kelowna, Calgary and Hamilton. The company provides private group air charter service and is certified to operate worldwide with five comfortable and quiet Boeing 737-400 passenger jets. Flair has been in business since 2003 and has a strong track record of safety and service. See more about Flair Airlines at [www.Flairair.ca](http://www.Flairair.ca)

For more information contact:

**Amie Seier, Marketing Manager**  
**NewLeaf Travel Company Inc.**  
**Email: [Media@NewLeafCorp.ca](mailto:Media@NewLeafCorp.ca)**  
**Website: [www.NewLeafTravel.ca](http://www.NewLeafTravel.ca)**  
**Phone: 204-390-1201**

From TICO@tico.ca Mon Jul 25 18:04:00 2016  
Date: Mon, 25 Jul 2016 16:03:51 +0000  
From: TICO Information <TICO@tico.ca>  
To: Gabor Lukacs <lukacs@airpassengerrights.ca>  
Subject: RE: Request for a teleconference re: NewLeaf

Hello Mr. Lukacs

Further to our telephone conversation of today, I confirm that TICO has met with a representative of NewLeaf Travel last week. As I explained, TICO's position is that any transactions (travel sales) conducted by NewLeaf Travel at the Hamilton Airport location ONLY would be captured under the Ontario Travel Industry Act, 2002. This would not include transactions made on the NewLeaf website as the company/website is domiciled outside of Ontario.

Accordingly, NewLeaf Travel does require TICO registration and has been advised of same. TICO is currently working with NewLeaf Travel to get their TICO registration in place.

Should you require any further assistance, please feel free to contact me.

Best regards,  
Dorian

Dorian Werda  
Vice President, Operations

Travel Industry Council of Ontario  
2700 Matheson Blvd. East  
Suite 402, West Tower  
Mississauga, Ontario  
L4W 4V9

Tel: 905-624-6241 ext 224  
Toll free: 1-888-451-8426  
Fax: 905-624-8631  
Web: www.tico.ca

This message, including any attachments may contain confidential information intended only for the person(s) named above. If you are not the intended recipient or have received this message in error, please notify me immediately by reply e-mail and permanently delete the original transmission from me, including any attachments, without disseminating, distributing or making a copy. Thank you.

-----Original Message-----

From: Gabor Lukacs [mailto:lukacs@AirPassengerRights.ca]  
Sent: July 25, 2016 8:02 AM  
To: TICO Information  
Subject: Request for a teleconference re: NewLeaf

Dear Ms. Werda and Mr. Smith,

We have spoken before. I am a Canadian air passenger rights advocate. I am involved in a public interest litigation before the Federal Court of Appeal relating NewLeaf:

[http://docs.airpassengerrights.ca/Federal\\_Court\\_of\\_Appeal/A-242-16/](http://docs.airpassengerrights.ca/Federal_Court_of_Appeal/A-242-16/)

Mr. Jim Young, CEO of NewLeaf, stated in his affidavit that TICO would require NewLeaf to contribute to the indemnity fund of TICO (see paragraph 6):

[http://docs.airpassengerrights.ca/Federal\\_Court\\_of\\_Appeal/A-242-16/2016-07-23--NewLeaf--affidavit--Donald\\_James\\_Young--PAGES\\_WITHOUT\\_CONFIDENTIAL\\_INFO.pdf](http://docs.airpassengerrights.ca/Federal_Court_of_Appeal/A-242-16/2016-07-23--NewLeaf--affidavit--Donald_James_Young--PAGES_WITHOUT_CONFIDENTIAL_INFO.pdf)

Subsequently, NewLeaf stated to the Court that it has met with you or one of your colleagues, and that it is in the process of being registered with TICO:

[http://docs.airpassengerrights.ca/Federal\\_Court\\_of\\_Appeal/A-242-16/2016-07-24--NewLeaf-to-DutyOfficer--re\\_cross\\_examination--TICO\\_registration.pdf](http://docs.airpassengerrights.ca/Federal_Court_of_Appeal/A-242-16/2016-07-24--NewLeaf-to-DutyOfficer--re_cross_examination--TICO_registration.pdf)

I would like to speak to you about the following:

- (a) whether the statements made by NewLeaf to the Court are accurate;
- (b) given the unique situation and the interest of the travelling public in being protected by a reputable scheme, such as TICO's, how long do you expect it will take for NewLeaf to become registered; and
- (c) TICO's position with respect to the sales made by NewLeaf so far, and NewLeaf continuing to sell travel services in Ontario pending its legislation.

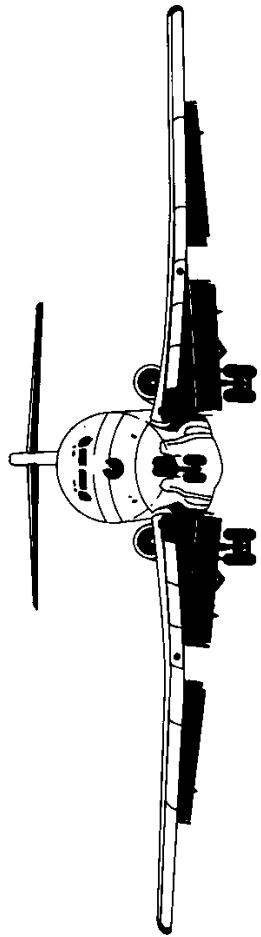
I look forward to hearing from you.

Best wishes,  
Dr. Gabor Lukacs

--  
Dr. Gabor Lukacs  
Air Passenger Rights  
Tel : (647) 724 1727  
Twitter : @AirPassRightsCA  
Facebook: <https://www.facebook.com/AirPassengerRights/>



U.S. Department  
of Transportation

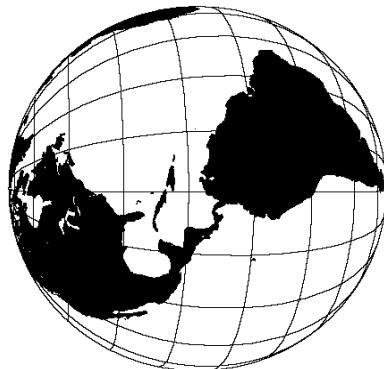


# Air Travel Consumer Report

A Product Of The  
**OFFICE OF AVIATION ENFORCEMENT AND PROCEEDINGS**  
Aviation Consumer Protection Division

Issued: February 2016

Flight Delays <sup>1</sup>	December 2015 12 Months ending December 2015
Mishandled Baggage <sup>1</sup>	December 2015 January – December 2015
Oversales <sup>1</sup>	4 <sup>th</sup> Quarter 2015 January – December 2015
Consumer Complaints <sup>2</sup> (Includes Disability and Discrimination Complaints)	December 2015 January – December 2015
Customer Service Reports to the Dept. of Homeland Security <sup>3</sup>	December 2015
Airline Animal Incident Reports <sup>4</sup>	December 2015 January – December 2015



<sup>1</sup> Data collected by the Bureau of Transportation Statistics. Website: <http://www.bts.gov>

<sup>2</sup> Data compiled by the Aviation Consumer Protection Division. Website: <http://www.transportation.gov/airconsumer>

<sup>3</sup> Data provided by the Department of Homeland Security. Transportation Security Administration

<sup>4</sup> Data collected by the Aviation Consumer Protection Division

**Exhibit "4"**  
**to the written examination**

- 31 -

**107**

TABLE 6

CONSUMER COMPLAINTS: RANKINGS  
U.S. AIRLINES\*

RANK	AIRLINE	DECEMBER 2015		DECEMBER 2014	
		COMPLAINTS	SYSTEMWIDE ENPLANEMENTS	COMPLAINTS	SYSTEMWIDE ENPLANEMENTS
1	HAWAIIAN AIRLINES	3	887,606	0.34	11
2	SOUTHWEST AIRLINES**	64	12,378,845	0.52	41
3	EXPRESSJET AIRLINES	11	1,982,782	0.55	8
4	ALASKA AIRLINES	11	1,965,045	0.56	7
5	SKYWEST AIRLINES	14	2,460,470	0.57	19
6	JETBLUE AIRWAYS	22	3,157,832	0.70	11
7	DELTA AIR LINES	82	10,981,637	0.75	64
8	ENVOY AIR	10	859,797	1.16	5
9	VIRGIN AMERICA	12	626,009	1.92	5
10	UNITED AIRLINES	217	8,028,650	2.70	153
11	AMERICAN AIRLINES**	386	12,120,007	3.18	149
12	FRONTIER AIRLINES	63	1,237,802	5.09	45
13	SPIRIT AIRLINES****	175	1,595,224	10.97	****
	<b>TOTAL</b>	<b>1,070</b>	<b>58,281,706</b>	<b>1.84</b>	<b>518</b>
					<b>49,919,562</b>
					<b>1.04</b>

Note: For simplicity, statistics are displayed to two decimal places. Actual ranking order is based on our computer carrying out the number of decimal places to nine.

\* All U.S. airlines with at least one percent of total domestic scheduled-service passenger revenues, as determined by DOT's Bureau of Transportation Statistics, plus other carriers that report flight delay and mishandled baggage data voluntarily. The carriers that are ranked in this table are the same carriers that are ranked in the "Flight Delays," "Mishandled Baggage," and "Oversales" sections of this report.

\*\* Effective July 2015, data of the merged operations of American Airlines and US Airways are combined, and appear only as American Airlines in this table. Totals for December 2014 reflect the deletion of US Airways data for that month.

\*\*\* Effective January 2015, complaints of the merged operations of Southwest Airlines and AirTran Airways are combined, and appear only as Southwest Airlines in this table. Totals for December 2014 reflect the deletion of AirTran's complaints for that month.

\*\*\*\* Per BTS Technical Directive #24 issued October 10, 2014, Spirit Airlines became a reporting carrier effective January 2015.

---

**From:** Jim Young [mailto:[jim.young@newleafcorp.ca](mailto:jim.young@newleafcorp.ca)]  
**Sent:** Friday, February 05, 2016 7:05 PM  
**To:** 'NORMAN LECAVALIER'  
**Cc:** 'Sam Samaddar'  
**Subject:** RE: New Leaf Update

Norm

I have just walked in from a very long day and a 450 km drive in bad weather.

I'm happy to give you a more detailed update if you would like. My intention is to pay you once we have closed on the capital. At this moment we have been unable to complete \$500K in transactions from the FN communities discussed. We are negotiating with TWCC through the weekend and have put a hard deadline on BRFN/Hemisphere Group of Sunday night.

It is my wife's birthday Monday and I am supposed to be home for that. Unfortunately, I am here in Winnipeg getting this deal done.

Please be patient, we will get this done.

Jim

---

**From:** NORMAN LECAVALIER [mailto:[nlecavalier@shaw.ca](mailto:nlecavalier@shaw.ca)]  
**Sent:** Friday, February 05, 2016 8:34 PM  
**To:** Jim Young <[jim.young@newleafcorp.ca](mailto:jim.young@newleafcorp.ca)>  
**Cc:** Sam Samaddar <[ssamaddar@kelowna.ca](mailto:ssamaddar@kelowna.ca)>  
**Subject:** Re: New Leaf Update  
**Importance:** High

Jim,

I think it is best that I pull back at this time. Clearly you are not able to follow through on your commitments.

It is becoming embarrassing for me within the folks that I am working with and at this point volunteer time.

If have a firm plan to address the concerns, then by all means I am willing to listen.

Norm

Norm LeCavalier, Silver Fox Business Strategies

---

**From:** Jim Young

**Sent:** Wednesday, February 3, 2016 3:44 PM

**To:** 'Norm LeCavalier'

**Reply To:** Jim Young

**Subject:** RE: New Leaf Update

I will give him a call. PS- Still no luck on getting funds in today. Going up to the Reservation first thing in the morning to meet with Chief and Council. It's a 2 hour drive each way.

Jim

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**From:** Norm LeCavalier [mailto:[NLeCavalier@shaw.ca](mailto:NLeCavalier@shaw.ca)]

**Sent:** Wednesday, February 03, 2016 5:22 PM

**To:** 'Sam Samaddar' <[ssamaddar@kelowna.ca](mailto:ssamaddar@kelowna.ca)>; 'Jim Young' <[jim.young@newleafcorp.ca](mailto:jim.young@newleafcorp.ca)>

**Cc:** 'Norm LeCavalier' <[NLeCavalier@shaw.ca](mailto:NLeCavalier@shaw.ca)>

**Subject:** RE: New Leaf Update

**Importance:** High

Jim;

In reviewing Sam's email, I'm not sure if you have responded to Sam in this regard. My guess, it would be prudent on your part to give him a call so that the two of you can clarify this matter.

Talk to you soon.

**Sincerely,**

## **Norm LeCavalier**

Mobile: 250-575-0344



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**From:** Sam Samaddar [mailto:[ssamaddar@kelowna.ca](mailto:ssamaddar@kelowna.ca)]  
**Sent:** Saturday, January 30, 2016 4:38 PM  
**To:** Jim Young  
**Cc:** NORMAN LECAVALIER  
**Subject:** Re: NewLeaf Update

Jim

Despite your lack of leadership and poor communication skills both Norm and I have continued to do meaningful work on your behalf.

We have both stuck our reputations way out there.

All the commitments made by you have not come to fruition. Furthermore you have failed to communicate with us when things have not gone as expected and it's only when we put intense pressure on you that you finally decide to communicate.

You made financial commitments to Norm and you have ignored him when he has reached out to you? Do you not think you owe him an explanation? Furthermore you continue to put him in a difficult situation with his wife, that is not right.

I have asked Norm to hold off on any financial or legal action against New Leaf but that is hanging on a thread.

Get past your ego and give him a call, he deserves far better.

You are very close to this coming down around you like a house of cards, for once listen and stop pandering.

Please respond.

Sam

On Jan 24, 2016, at 3:11 PM, Jim Young <[jim.young@newleafcorp.ca](mailto:jim.young@newleafcorp.ca)> wrote:

Sam and Norm

My apologies for not being reachable for the last week. I have had a minute to type up a note and give you a post mortem on the last couple of weeks.

When we announced on Jan 6, we had firm commitments from three investors totaling \$750K, more than enough to launch in the agreed to model, and their agreement that announcing our schedule and commencing sales was a prudent next step,. We took in Rogers 250K prior to the announcement and used some of that money to pay employees, get the website turned on and fund our advertising. Closings from the remaining 500K were to follow in succession. We needed to complete closings in that order due to a settlement agreement we have with Flair on past debt from the Rutherford debacle.

When Flair put the ultimatum to us last weekend, we had to immediately return 50K to Flair in order for them to give us time to develop an orderly return of funds and manage communication with our customers (thank you CL for throwing me under the bus). Additionally, JR communicated with our other 250K investor, who was to close that Friday morning, his concerns and wanting us to suspend sales. That investor walked away from the table.

Further, an additional 750K in investment from Toronto which was also to close this past week was put on hold as we had to disclose our plans to suspend sales on Monday. It's been a tough week.

So, to sum it up. NewLeaf had solved its financial problems and was on a path to have all the cash necessary to launch Feb 12- in a responsible manner. Flair managers (not necessarily the owner) had lost their nerve and exerted enough pressure to force the suspension. Had they not done so, NewLeaf would have over \$1MM in sales to date, \$1.5MM in the bank and be well down the road to a successful Feb 12 launch- and all with three weeks still to go before first flight.

Where are we now?

- We have the consumer firmly on our side and I believe our relaunch will be well received
- We have the attention of the federal government at the ministerial level and will get the

clarity we seek before we start selling again (projected mid March)

- Our First Nations investor has just doubled their investment to 500K (closing all funds by end of the week)
- Additionally FN lawyers are working with our lawyers to build a syndicate of other FN investors as well as banking relationships to access a line of credit for CC backstop.
- We now have significant interest from the Toronto investment community that we plan to aggressively pursue and close before our relaunch.

Sam and Norm, you has always been and continue to be a valuable member of this venture. I know I disclose more information to the two of you than I do to any other stakeholder group (including YWG!) But I trust you both implicitly and value your counsel, the support, time and effort you have both put into this from the start.

I have been unreachable in the last couple of days for a lot of the reasons stated above, but most importantly being that my wife has been in and out of hospital since Wednesday with dangerously high blood pressure due to the stress of this venture on our family's finances and my absence from home while I focus 24/7 to bring funds to the table, pay our obligations, and all the other things we need to do to get launched.... I am going home tomorrow to spend some time with her but will work to make sure we have cash from closings by the end of the week.

Call me if you have any questions.

Jim



DATES FLIGHTS PASSENGERS ADD ONS PAYMENT CONFIRMATION FINISH

Low fare. Here to there.

FLIGHTS MY TRIP

### Flight Requirements

Round Trip

From

Saskatoon - YXE \*

To

Kelowna - YLW \*

Departure Date

10 September 2016

Return Date

10 September 2016

Adults *	Children	Infants
1	0	0

Promo Code:

[Find Flights](#)

[Group Booking](#)

### Travel Information

All Prices in Canadian Dollar

Departure Flight

From: Saskatoon - YXE To: Kelowna - YLW

Departure: 07 Sep 2016 11:40

Arrival: 07 Sep 2016 12:28

Fare: \$16.78

GST/HST Tax: \$0.84

Total: \$65.00

Number of Passengers

Adults: 1 Children: 0 Infants: 0

### Contact Information

All prices are in Canadian Dollar

DESCRIPTION	AMOUNT
<b>Air Transportation Charges</b>	
O	\$16.78
Reservation Fee	\$0.00
Air Transport Charge	\$18.00
<b>Taxes, Fees and Other Charges</b>	
YXE Arpt Improve Fee	\$20.00
Security Charge ATSC	\$7.12
GST/HST Tax	\$3.10
<b>Total to be applied to Credit Card:</b>	<b>\$65.00</b>

Please fill all the information in English

Fields Marked with \* are mandatory

If you require special services, such as a wheelchair, etc., please call NewLeaf Customer Service at 204-888-4357 to identify your special needs.

### Primary Reservation Contact Information

Title:

Ms./Mrs.

First Name:

\*

Last Name:

\*

Address Line 1:

\*

Address Line 2:

City:

\*

Country:

Canada \*

Province:

Postal Code:

Email:

\*

Date of Birth:

\*

Phone Number:

\*

Mobile Number:

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[Contact Us](#)

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Flights operated by Flair Airlines Ltd.

**Audit Summary – New Leaf / Flair Airlines Operation (SOR 88-58)**

**Date:** February 3, 2016

**Auditor:** Laura Mortensen, Curiosity Analysis and Consulting  
22 -1853 Parkview Cres, Kelowna BC V1X 8A3  
250-575-5542  
laura.j.mortensen@gmail.com

**Prepared for:** Norm LeCavalier, SilverFox Business Strategies Inc.(for NewLeaf)  
5395 Ptarmigan St, Kelowna BC, V1W 5A4  
250-764-5301  
nle cavalier@shaw.ca

**AUDIT SCOPE AND SUMMARY:**

An audit was conducted in accordance with the requirements of the Canadian Air Transportation Regulations (SOR 88-58) to ensure that the proposed joint operations of New Leaf and Flair Airlines comply with all requirements and/or to address any gaps or areas requiring additional investigation and/or action.

The audit was carried out under the assumption that the NewLeaf and Flair Airlines will operate under a domestic license only. Some notes are made regarding additional considerations that must be addressed should international operations be added.

The audit does not ensure Flair Airlines compliance with CAR 705 air operator requirements.

From review of the documents noted below, a number of areas requiring action and/or clarification were discovered. Recommendations on how these items should be addressed are also listed.

In summary, there is no reason that NewLeaf and Flair Airlines require any additional licensing to operate a domestic air service. The items to be addressed mainly require some additional policy and/or amendment to the Memorandum of Understanding so that both parties are adequately protected in this joint operation.

**REFERENCE DOCUMENTATION:**

- 1) Canadian Air Transportation Regulations SOR 88-58
- 2) Memorandum of Understanding between NewLeaf and Flair Airlines dated June 5, 2015
- 3) Flair Airlines CAR 705 Operator Certificate 14941
- 4) Flair Airlines Air Carrier License 050100
- 5) Flair Airlines Air Carrier License 050114
- 6) New Leaf Phased Start Up budget V3 April 27 2015

- 7) NewLeaf Business Plan - 22- March v8
- 8) Flair New Leaf ACMI pricing Grid2
- 9) Proforma Notes WITH ACMI 18March\_15 total aircraft

**ITEMS REQUIRING ACTION / CLARIFICATION:**

**Liability Insurance – 7(1), 7(2), 7(3), 7(4), 8(1), 8(2)**

The regulations are very prescriptive about the amounts of insurance required by air carriers and assurance that insurance covers all parties in joint ventures. It must be ensured that the proper required insurance is in place and adequately covers both Flair and New Leaf for the planned operations. See Recommendations.

Insurance requirements per the ATR are as follows:

“For every accident or incident related to the operation: liability insurance covering risks of injury to or death of passengers in an amount that is not less than the amount determined by multiplying \$300,000 by the number of passenger seats on board the aircraft engaged in the service”

For NewLeaf /Flair Airlines = approx. \$44,700,000 per aircraft (B737 – 149 passengers)

“Insurance covering risks of public liability in an amount that is not less than, where the MCTOW of the aircraft engaged in the service is greater than 18,000 pounds, \$2,000,000 plus an amount determined by multiplying \$150 by the number of pounds by which the MCTOW of the aircraft exceeds 18,000 pounds.”

B737 MTOW between 115,500 lb (52,400 kg) and 150,000 lb (62,800–68,000 kg)

For New Leaf / Flair Airlines = approx..\$16,625,000 - \$21,800,000 per aircraft

**Public Disclosure – 8.5(1), 8.5(2), 8.5(3), 8.5(4), 8.5(5)**

As NewLeaf is a licensee, it must be ensured that Flair Airlines is identified on all service schedules, timetables, electronic displays and any other public advertising as well as to travellers before reservation and on check-in, and that Flair Airlines and the aircraft type are identified for each segment of the journey appear on all travel documents issued. See Recommendations.

**Reduction or Discontinuance of Domestic Services – 14(1), 14(1.1), 14(2)**

New Leaf and Flair Airlines will need to be aware of the passenger carrying capacities in all cities which they are providing service within Canada to be able to provide proper notice if the passenger carrying capacity will be reduced to a level where notice is required. See Recommendations.

**Contents of Tariffs and Interest – 107(1), 107(2), 107(3), 107.1**

From review of the Memorandum of Understanding dated June 5, 2015, it is not clear how tariffs will be handled and applied for the New Leaf and Flair Airlines operation. These requirements

should be documented with clear lines of responsibility for the application and update of tariffs. See Recommendations. There are very strict rules governing how tariffs are documented and applied:

"Every tariff shall contain

- (a) the name of the issuing air carrier and the name, title and full address of the officer or agent issuing the tariff;
- (b) the tariff number, and the title that describes the tariff contents;
- (c) the dates of publication, coming into effect and expiration of the tariff, if it is to expire on a specific date;
- (d) a description of the points or areas from and to which or between which the tariff applies;
- (e) in the case of a joint tariff, a list of all participating air carriers;
- (f) a table of contents showing the exact location where information under general headings is to be found;
- (g) where applicable, an index of all goods for which commodity tolls are specified, with reference to each item or page of the tariff in which any of the goods are shown;
- (h) an index of points from, to or between which tolls apply, showing the province or territory in which the points are located;
- (i) a list of the airports, aerodromes or other facilities used with respect to each point shown in the tariff;
- (j) where applicable, information respecting prepayment requirements and restrictions and information respecting non-acceptance and non-delivery of goods, unless reference is given to another tariff number in which that information is contained;
- (k) a full explanation of all abbreviations, notes, reference marks, symbols and technical terms used in the tariff and, where a reference mark or symbol is used on a page, an explanation of it on that page or a reference thereon to the page on which the explanation is given;
- (l) the terms and conditions governing the tariff, generally, stated in such a way that it is clear as to how the terms and conditions apply to the tolls named in the tariff;
- (m) any special terms and conditions that apply to a particular toll and, where the toll appears on a page, a reference on that page to the page on which those terms and conditions appear;
- (n) the terms and conditions of carriage, clearly stating the air carrier's policy in respect of at least the following matters, namely,
  - (i) the carriage of persons with disabilities,
  - (ii) acceptance of children,
  - (iii) compensation for denial of boarding as a result of overbooking,
  - (iv) passenger re-routing,
  - (v) failure to operate the service or failure to operate on schedule,
  - (vi) refunds for services purchased but not used, whether in whole or in part, either as a result of the client's unwillingness or inability to continue or the air carrier's inability to provide the service for any reason,
  - (vii) ticket reservation, cancellation, confirmation, validity and loss,
  - (viii) refusal to transport passengers or goods,
  - (ix) method of calculation of charges not specifically set out in the tariff,
  - (x) limits of liability respecting passengers and goods,
  - (xi) exclusions from liability respecting passengers and goods, and
  - (xii) procedures to be followed, and time limitations, respecting claims;

- (o) the tolls, shown in Canadian currency, together with the names of the points from, to or between which the tolls apply, arranged in a simple and systematic manner with, in the case of commodity tolls, goods clearly identified;
- (p) the routings related to the tolls unless reference is made in the tariff to another tariff in which the routings appear; and
- (q) the official descriptive title of each type of passenger fare, together with any name or abbreviation thereof."

**Requirements and Prohibitions Relating to Advertising – 135.8(1), 135.8(2), 135.8(3),  
135.8(4), 135.8(5), 135.9, 135.91, 135.92**

It is not clear how compliance with advertising of pricing regulations will be handled and applied for the New Leaf and Flair Airlines operation. As it is likely that NewLeaf will be advertising and pricing flights on the website, the responsibility for complying with this part of the regulations may fall to NewLeaf. See Recommendations.

**Services, Administration, Damaged or Lost Aids– 147(1), 147(2), 147(3), 148(1), 148(2),  
148(3), 148(4), 148(5), 149(1), 149(2), 150, 151(1), 151(2), 151(3), 151(4), 152, 153(1), 153(2),  
154, 155(1), 155(2), 155(3), 155(4)**

As Flair Airlines is a licensed air carrier, there are policies regarding services that comply with the regulations. However, due to the increased volume of operations and public visibility, it must be ensured that all of the policies are sufficient and that there are adequate staff available to comply with service regulations. These regulations pertain to things such as provisions for dealing with disabled persons and other special service requests. There are in-depth requirements regarding the allowance of aids (including service animals) on flights and for replacement of lost/damaged aids. See Recommendations.

**Filing an Application for Inquiry – 156**

There is no clear policy for dealing with complaints and/or ensuring that complaints that cannot be handled are directed to the CTA. It is not clear who is responsible to address complaints and/or forward them on to the CTA, as required. See Recommendations.

**RECOMMENDATIONS:**

**Liability Insurance – 7(1), 7(2), 7(3), 7(4), 8(1), 8(2)**

It is recommended that the current Schedule I form submitted to the CTA by Flair Airlines be reviewed to ensure insurance amounts meet requirements (see Items Requiring Action / Clarification) and that the MOU be amended to clearly state who is responsible for liability insurance and ensuring it is updated to meet any changes to the NewLeaf and Flair Airlines operations.

It is also recommended that insurance be procured in compliance with Section 8.2(4) and 8.2(5) as this will be required if any international flights are added:

"The licensee shall maintain passenger and third party liability insurance coverage for a service for which another person provides an aircraft with flight crew, at least in the amounts set out in section 7,

- (a) by means of its own policy; or
- (b) subject to subsection (5), by being named as an additional insured under the policy of the other person."

"Where the licensee is named as an additional insured under the policy of the person referred to in subsection (4), there must be a written agreement between the licensee and the person to the effect that, for all flights for which the person provides aircraft with flight crew, the person will hold the licensee harmless from, and indemnify the licensee for, all passenger and third party liabilities while passengers or cargo transported under contract with the licensee are under the control of the person."

#### **Financial Requirements – 8.1(2)**

It is recommended that New Leaf prepare a statement of start-up costs to comply with this regulation.

A review of the start-up budget provided by New Leaf (New Leaf Phased Start Up budget V3 April 27 2015) does not adequately break down costs in accordance with the regulation. This is not technically required, but would likely help to expedite approval by the CTA.

The regulation states:

"...an applicant shall

- (a) in respect of the air service specified in the application, provide the Agency with a current written statement of the start-up costs that the applicant has incurred in the preceding 12 months, with written estimates of start-up costs that the applicant expects to incur and with written estimates of operating and overhead costs for a 90-day period of operation of the air service, and establish that
  - (i) in respect of the start-up costs, the statement is complete and accurate and the estimates are reasonable,
  - (ii) in respect of the operating and overhead costs, the estimates are reasonable and are based on utilization of the aircraft solely on the specified air service under conditions of optimum demand, which utilization shall be no less than that which is necessary for the air service to be profitable,
  - (iii) subject to subparagraph (b)(i), the applicant has acquired or can acquire funds in an amount at least equal to the total costs included in the statement and in the estimates,
  - (iv) the funds are not encumbered and are comprised of liquid assets that have been acquired or that can be acquired by way of a line of credit issued by a financial institution or by way of a similar financial instrument,
  - (v) the terms and conditions under which those funds have been acquired or can be acquired are such that the funds are available and will remain available to finance the air service,
  - (vi) subject to paragraph (b), where the applicant is a corporation, at least 50% of the funds required by subparagraph (iii) have been acquired by way of capital stock that has been issued

and paid for and that cannot be redeemed for a period of at least one year after the date of the issuance or reinstatement of the licence, and

(vii) subject to paragraph (b), where the applicant is a proprietorship or partnership, at least 50% of the funds required by subparagraph (iii) have been acquired by way of the proprietor's or partners' capital that has been injected into the proprietorship or partnership and that cannot be withdrawn for a period of at least one year after the date of the issuance or reinstatement of the licence;

(b) where the applicant is or has been in operation,

(i) increase the amount of funds required by subparagraph (a)(iii) by the amount of any shareholders', proprietor's or partners' deficit that is disclosed in the applicant's current audited financial statements which are prepared in accordance with generally accepted accounting principles in Canada, and those additional funds shall be acquired by way of capital stock that has been issued and paid for in the case of a corporation, or by way of the proprietor's or partners' invested capital in the case of a proprietorship or partnership, which capital stock or invested capital is to be subject to the condition prescribed in subparagraph (a)(vi) or (vii), and

(ii) decrease the amount of the capital stock that is required by subparagraph (a)(vi) to be issued and paid for in the case of a corporation, or the amount of the proprietor's or partners' capital that is required by subparagraph (a)(vii) to be invested in the case of a proprietorship or partnership, by the amount of any shareholders', proprietor's or partners' equity that is disclosed in the applicant's current audited financial statements which are prepared in accordance with generally accepted accounting principles in Canada."

#### **Public Disclosure – 8.5(1), 8.5(2), 8.5(3), 8.5(4), 8.5(5)**

It is recommended that a review of the booking system be carried out to ensure that Flair Airlines is mentioned on all travel documents as NewLeaf is a licensee by the regulations and must comply with 8.5(2) and 8.5(3).

#### **Domestic Licensing – 10(1), 10(2)**

It is recommended that the MOU be amended to state that Flair Airlines is responsible to maintain domestic licensing in accordance with SOR88-58 Section 10(1) and 10(2). Actions to taken if a domestic license is not maintained by Flair Airlines should be discussed and also addressed in the MOU.

#### **Reduction or Discontinuance of Domestic Services - 14(1), 14(1.1), 14(2)**

Complete an analysis of proposed current routes for weekly passenger carrying capacity and determine the capacity added by the NewLeaf schedule and whether reductions in service would need to be reported per this regulation:

"For the purposes of subsection 64(1.1) of the Act, a licensee proposing to discontinue a year-round non-stop scheduled air service between two points in Canada, where the proposed discontinuance would result in a reduction, as compared to the week before the proposal is to take effect, of at least 50% of the weekly passenger-carrying capacity of all licensees operating year-round nonstop scheduled air services between those two points, shall give notice of the proposal to the persons, and in the manner, referred to in paragraphs (1)(a) and (b)."

**Contents of Tariffs and Interest – 107(1), 107(2), 107(3), 107.1**

Decide if tariffs will be applied to the NewLeaf and Flair operations and who will be responsible to document and update tariffs as required. The MOU should likely be amended to reflect the responsibility, application and update of as well as how any tariffs collected will be distributed. It must be ensured that all of the regulatory requirements are addressed (see Items Requiring Action / Clarification)

**Requirements and Prohibitions Relating to Advertising – 135.8(1), 135.8(2), 135.8(3),  
135.8(4), 135.8(5), 135.9, 135.91, 135.92**

It is recommended that requirements for advertising of prices be clearly documented with defined lines of responsibility. Responsibility for compliance with these regulations should be documented in the MOU. If NewLeaf is responsible to comply with the advertising of prices regulations, all the regulations should be reviewed against the proposed policies to ensure that there are no issues.

**Services, Administration, Damaged or Lost Aids– 147(1), 147(2), 147(3), 148(1), 148(2),  
148(3), 148(4), 148(5), 149(1), 149(2), 150, 151(1), 151(2), 151(3), 151(4), 152, 153(1), 153(2),  
154, 155(1), 155(2), 155(3), 155(4)**

It is recommended that requirements for services be clearly documented with defined lines of responsibility. Responsibility for compliance with these regulations should be documented in the MOU. If NewLeaf is responsible to comply with some or all of the service regulations, all the regulations should be reviewed against the proposed policies to ensure that there are no issues. An analysis of staffing needs should also be carried out with consideration of the requirement to deal with additional service requests.

It is also recommended that relationships be developed at all airports out of which New Leaf and Flair airlines intend to operate to ensure that regulations around aids can be complied with (i.e. having a replacement aid available.)

**Filing an Application for Inquiry – 156**

It is recommended that the MOU be amended to address responsibility for responding to customer complaints and/or forwarding them to the CTA, as required. It is also recommended that a clear policy for dealing with complaints and/or ensuring that complaints that cannot be handled are directed to the CTA is documented and a method is provided to allow customers to make complaints, as necessary.

**AUDITOR NOTES:**

**Provision of Aircraft with Flight Crew – 8.2(1), 8.2(2), 8.2(3), 8.2(4), 8.2(5), 8.2(6)**

If International service is added to the NewLeaf and Flair Airlines operations, approval will need to be applied for under Section 8.2. Flair Airlines has previously done attained this approval with Cubana de Aviacion S.A.

**Reduction or Discontinuance of Domestic Services – 14(1)**

If any services are proposed to areas where there is currently no service, there are regulations regarding notification to the public if those services are going to be reduced or no longer offered. This may be a risk for future business development to underserved communities.

**International Licensing – 15 – 20**

If international service is added to the NewLeaf and Flair operations, a number of additional regulations for licensing must be complied with.

**International Charters (Non-U.S.) - Part III**

If international service is added to the NewLeaf and Flair operations, the international service must be classified and the applicable additional regulations must be complied with.

**Transborder Charters - Part IV**

If international service is added to the NewLeaf and Flair operations, the international service must be classified and the applicable additional regulations must be complied with.

**Service Schedules - Part VI**

If scheduled international service is added to the NewLeaf and Flair operations, an additional license will need to be obtained by Flair Airlines and the service schedule regulations will need to be complied with.

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**From:** Jim Young [mailto:[jim.young@newleafcorp.ca](mailto:jim.young@newleafcorp.ca)]  
**Sent:** Wednesday, February 17, 2016 3:07 PM  
**To:** 'Norm LeCavalier'; [laura.j.mortensen@gmail.com](mailto:laura.j.mortensen@gmail.com)  
**Subject:** FW: NewLeaf Travel Inquiry into whether NewLeaf Travel Company Inc. is proposing to operate an air service - Case No. 15-03590

FYI

Jim

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**From:** secretariat [mailto:[Secretariat.Secretariat@otc-cta.gc.ca](mailto:Secretariat.Secretariat@otc-cta.gc.ca)]  
**Sent:** Wednesday, February 17, 2016 4:45 PM  
**To:** [jim.young@newleafcorp.ca](mailto:jim.young@newleafcorp.ca)  
**Cc:** Daniel Cardozo <[Daniel.Cardozo@otc-cta.gc.ca](mailto:Daniel.Cardozo@otc-cta.gc.ca)>; John Touliopoulos <[John.Touliopoulos@otc-cta.gc.ca](mailto:John.Touliopoulos@otc-cta.gc.ca)>  
**Subject:** NewLeaf Travel Inquiry into whether NewLeaf Travel Company Inc. is proposing to operate an air service - Case No. 15-03590

On August 21, 2015, the Canadian Transportation Agency (Agency) initiated an inquiry, into whether NewLeaf Travel Company Inc. (NewLeaf) is proposing to operate an air service and, therefore, required to hold a licence (Inquiry). By Decision No. LET-A-3-2016 dated February 5, 2016 (Decision), the Agency granted NewLeaf until February 19, 2016 to provide any comments on submissions from Enerjet and Jetlines as well as any other information or documentation that it wishes the Agency to consider before making a determination on the Inquiry.

On February 15, 2016, NewLeaf requested an extension of the deadline to March 11, 2016 in order to allow it to provide an appropriate response to Jetlines'.

I have been instructed by the Panel assigned to this case to communicate the following direction:

The Agency has considered the request and grants the extension. NewLeaf has until March 11, 2016 to provide its final comments.

All correspondence should refer to Case No. 15-03590 and be filed through the Agency's Secretariat at [secretariat@otc-cta.gc.ca](mailto:secretariat@otc-cta.gc.ca).

Please confirm receipt to all.

Sincerely,

Inge Green

Secrétaire intérimaire de l'Office des transports du Canada

Office des transports du Canada / Gouvernement du Canada  
[secretariat@otc-cta.gc.ca](mailto:secretariat@otc-cta.gc.ca) / Site Web [www.otc-cta.gc.ca](http://www.otc-cta.gc.ca)

Tél. : [819-997-0099](tel:819-997-0099) / Télécopieur [819-953-5253](tel:819-953-5253) / ATS : [1-800-669-5575](tel:1-800-669-5575)

Acting Secretary of the Canadian Transportation Agency

Canadian Transportation Agency / Government of Canada  
[secretariat@otc-cta.gc.ca](mailto:secretariat@otc-cta.gc.ca) / Web site [www.otc-cta.gc.ca](http://www.otc-cta.gc.ca)

Tel: [819-997-0099](tel:819-997-0099) / Facsimile [819-953-5253](tel:819-953-5253) / TTY: [1-800-669-5575](tel:1-800-669-5575)

From: Jim Young <[djimyoung@gmail.com](mailto:djimyoung@gmail.com)>  
Date: Mon, Sep 1, 2014 at 6:16 PM  
Subject: Re: ArCompany Intel on Kelowna FC, Flair Air and Key People  
To: Bob Jones <[bob.jones@sympatico.ca](mailto:bob.jones@sympatico.ca)>  
Cc: Brian Reddy <[breddy@attglobal.net](mailto:breddy@attglobal.net)>, [h.jones@arcompany.co](mailto:h.jones@arcompany.co) <[h.jones@arcompany.co](mailto:h.jones@arcompany.co)>, [a.tobin@arcompany.co](mailto:a.tobin@arcompany.co) <[a.tobin@arcompany.co](mailto:a.tobin@arcompany.co)>, [a.jenkins@arcompany.co](mailto:a.jenkins@arcompany.co) <[a.jenkins@arcompany.co](mailto:a.jenkins@arcompany.co)>, [b.jones@arcompany.co](mailto:b.jones@arcompany.co) <[b.jones@arcompany.co](mailto:b.jones@arcompany.co)>

Bob. Great work

Thank the whole team at CSIS, sorry I mean ArCompany and remind me never to have a love child hiding in a convent in Switzerland.... They would find it.

Jim

On Sep 1, 2014, at 2:38 PM, Bob Jones <[bob.jones@sympatico.ca](mailto:bob.jones@sympatico.ca)> wrote:

Jim / Brian,

Hessie and the ArCompany Team have packaged up the Intel Research into a better organized Word Doc and have added some additional info on Tracy Medve and Vern Kakoschke. The new doc is attached.

There will will be several other social media specific docs sent later tonight with further intel.

Regards,

Bob

=====

**R. G. (Bob) Jones**

Office: [416-281-6292](tel:416-281-6292)

Mobile: [647-519-6292](tel:647-519-6292)

[bob.jones@sympatico.ca](mailto:bob.jones@sympatico.ca)

=====

<ArCompany Intel Research for NewLeaf - KFC & Flair V1- 01-Sep-2014.doc>

From: Jim Young <[djimyoung@gmail.com](mailto:djimyoung@gmail.com)>  
Date: Fri, Oct 10, 2014 at 2:43 PM  
Subject: Re: Branding and Biking  
To: H jones <[h.jones@arcompany.co](mailto:h.jones@arcompany.co)>, A tobin <[a.tobin@arcompany.co](mailto:a.tobin@arcompany.co)>, Hugh Oddie <[hugh@odditiel.com](mailto:hugh@odditiel.com)>  
Cc: Brian Reddy <[breddy@attglobal.net](mailto:breddy@attglobal.net)>, Bob jones <[bob.jones@sympatico.ca](mailto:bob.jones@sympatico.ca)>

Hello all

I wanted to add my heartfelt thanks for the work we accomplished this week. I think we nailed a couple of very important things:

1. The brand values really connect us with the airline we want to build and the airline we want to run.
2. The name is very promising. I will be keenly interested in how it tests with our target demographics.

Overall a very good day, my only regret was that I was unable to be with you there in person. Maybe that is why we finished on time both days...LOL.

I know we have been pushing everyone to add value wherever we can and the branding exercise is a big step and a big leap of faith on your part. Thank you for all your efforts and kicking this off. You guys are all very good partners and we will all go far in this venture.

Best,

Jim

On Oct 9, 2014, at 12:59 AM, Bob Jones <[b.jones@arcompany.co](mailto:b.jones@arcompany.co)> wrote:

Hi Guys,

Just wanted to let you know I made it home Tuesday night in the rain. It was actually quite a leisurely drive on the 401, where my rain suit got completely soaked on the outside, but inside I was dry as a bone. And in case you think I am insane, motorcycle tires are actually designed to aquaplane much less than cars. They really behave reasonably well in the rain. And I was listening to SADE most of the way home. So, it was all good.

I also wanted to acknowledge you guys for a job well done at the branding session. The new name of MyAir with values of Family, Festive, Authentic and Savvy is actually pretty different from the existing corporate world, very meaningful and well, Savvy, Baby (Austin Powers).

Amy ... it was great to see you again. Hessie ... thanks for picking up dinner on Monday. And Hugh ... what can I say, you are the penultimate, excuse me, I mean ultimate host and facilitator: good wine, good eats and good results (feel free to substitute "great" for "good", where appropriate). Brian and Jim ... great contributions as always.

Finally, I took the liberty to craft some "tongue in cheek" ads (see attached PPT), which helps

me to internalize the MyAir name, and to get the creative juices flowing on where we could go with our new identity. I am also trying to work on my poetry skills, and although it may not be perfect iambic pentameter, I think you will be entertained.

Till we speak next.

Regards,

Bob

=====

**R. G. (Bob) Jones**

Office: [416-281-6292](tel:416-281-6292)

Mobile: [647-519-6292](tel:647-519-6292)

[b.jones@arcompany.co](mailto:b.jones@arcompany.co)

=====

<MyAir Ads 2.ppt>

From: **Bob Jones <bob.jones@sympatico.ca>**  
Date: Tue, Jun 28, 2016 at 12:04 AM  
Subject: Re: Payment  
To: "**h.jones@arcompany.co" <h.jones@arcompany.co>**  
Cc: Bob Jones <bob.jones@sympatico.ca>

Hessie,

It's late in the day on Monday and I have been working almost 7 / 24 over the last several weeks to ensure that NewLeaf's website, booking engine, call centre, and airport infrastructure have been up and functioning properly. They all have to support a 7 / 24 high reliability environment.

I read your email (below) and at first I couldn't believe it, indicating that I am untrustworthy. My second reaction shifted to mad and insulted, and then my perspective changed to saddened that our friendship is not strong enough to withstand 4 or 5 days of non-callbacks because I'm really busy. As an aside, **I HAVEN'T CALLED ANYBODY BACK (not even family) UNLESS IT RELATES TO THOSE FOUR ITEMS (website, booking engine, call centre, airport infrastructure), BECAUSE I HAVE HAD NO TIME!!!!!!** So, I find it a big concern that you think I have been purposefully ignoring you.

Furthermore, I have not been personally monitoring anything on Social Media, I only found out about your online comments when Amie interrupted a conference call I was on (late on Friday) to bring them to my attention. And even then I couldn't spend much time on it.

Your reference to incessant calls and emails going unanswered amounts to two text messages on Jun 22 asking if I was available for an update call and one email on June 24 providing some NewLeaf feedback on Reddit (according to my records). There was no indication of urgency in your messages and yet you think I am purposefully ignoring you, when I am extremely busy trying get this thing off the ground to earn money for all. I would hardly say two text messages and one email without urgency are incessant. I wouldn't even say they were persistent! You didn't call me back on the weekend ... should I be offended ... no, I know you'll call me back when you can ... so much for mutual trust.

As I have told you repeatedly, Brian is managing the payment activity and he fully intends to complete the payment, but money has to flow in first, before it can flow out. And I frequently remind him and he acknowledges the intent to finish the transaction when able.

I certainly understand your frustration, but as I have told you before, the issue was being addressed and for you to encourage regular contact with Brian.

I suggest you re-read this email trail again from the bottom and it should be obvious why your email has driven the flavour of this email.

I am open to having a conversation, but don't treat me like I'm the problem!

I assume our conversations are between you and I and not for anyone else's consumption.

Regards,

Bob

Mobile: [647-519-6292](tel:647-519-6292)

On 2016-06-27 12:01, Hessie Jones wrote:

Bob,

I am so disappointed that my trust in you, my incessant emails and phone calls have gone unanswered, while the social media postings got your attention immediately. I have been very patient, believing that NewLeaf would do the right thing.

The truth is that a number of us got only promises but no payment for our work, and I am not going to assist NewLeaf in hiding the truth. You yourself have said you do not trust Jim and I can't afford to keep believing that NewLeaf has plans to pay me.

I can offer you a simple solution if NewLeaf is concerned about their reputation: pay the bill, and as a bonus I will even post a "thank you" note online.

Hessie

**Hessie Jones** | CEO | [ArCompany](#) | [h.jones@arcompany.co](mailto:h.jones@arcompany.co)

[647.999.2348](tel:647.999.2348) | @hessiejones | [ArCompany Blog](#)

Check out my new book on Amazon: [EVOLVE, Marketing \(^as we know it\) is Doomed!](#)

On Sat, Jun 25, 2016 at 1:19 PM, bob.jones wrote:

Hessie,

Amie Seier forwarded a number of posts you made connecting with Melanie Dodaro and Gabor Lukacs about NewLeaf non-payment.

I see you called me twice on Wed and I apologize I didn't get back to you more quickly. I have been up to my ying yang in start up issues.

I don't think this public posting on monies owed is going to help expedite things.

Call me anytime this weekend and we can discuss.

Regards ,

Bob

Mobile : [647-519-6292](tel:647-519-6292)

Sent from Samsung Mobile

From h.jones@arcompany.co Fri Jul 1 01:07:30 2016  
Date: Thu, 30 Jun 2016 19:07:14 -0400  
From: Hessie Jones <h.jones@arcompany.co>  
To: Brian J. Meronek' <bmeronek@darcydeacon.com>  
Cc: Gabor Lukacs <lukacs@airpassengerrights.ca>, Ian McIvor' <imcivor@darcydeacon.com>, Orvel L. Currie <ocurrie@darcydeacon.com>, gstefanson@darcydeacon.com, NORMAN LECA VALIER <nlecavalier@shaw.ca>  
Subject: NewLeaf's unpaid invoices

[ The following text is in the "UTF-8" character set. ]  
[ Your display is set for the "ISO-8859-2" character set. ]  
[ Some characters may be displayed incorrectly. ]

Dear Mr. Meronek,

I am writing on behalf of ArCompany, one of several vendors whose invoices NewLeaf has failed to pay for over a year. A copy of of Invoice no. 0000108 dated May 20, 2015 for the amount of \$76,485.12 is attached.

A copy of Mr. Bob Jones's email dated April 6, 2016, acknowledging the outstanding invoice for prior work, including the work summary, is also attached.

I reiterate my request, communicated by email to Mr. Young, Mr. Jones, and Mr. Reddy, that NewLeaf pay this outstanding invoice by JULY 4, 2016.

Sincerely yours,  
Hessie Jones

Hessie Jones | CEO | ArCompany | h.jones@arcompany.co

647.999.2348 | @hessiejones | ArCompany Blog

[ARC\_FINAL\_TRADEMARK.png]

Check out my new book on Amazon: EVOLVE, Marketing (^as we know it) is Doomed!

[ Part 2, Application/MSWORD (Name: "ArCompany Work Done for NewLeaf [ 14-Apr-2015.doc") 730 KB. ]  
[ Unable to print this part. ]

[ Part 3, Application/PDF (Name: "Invoice-0000108 NewLeaf May 20, 2015.pdf") 61 KB. ]  
[ Unable to print this part. ]

[ Part 4, Application/PDF (Name: "2016-04-06--Bob\_Jones-to-Hessie\_Jones--re\_outstanding\_invoic e.pdf") 42 KB. ]  
[ Unable to print this part. ]

## Discount airline eyes Winnipeg for hub but faces opposition from First Nations

Canada Jetlines wants transport minister to give B.C.-based company an exemption on foreign investment rules

By Sean Kavanagh, [CBC News](#) Posted: Aug 19, 2016 4:00 AM CT

Last Updated: Aug 19, 2016 7:40 AM CT

Travellers may clear Canada Jetlines for landing, but an investment group of seven Manitoba First Nations wants the discount airline startup grounded before takeoff.

- [Canada Jetlines gets local support for changes to foreign ownership rules](#)
- [Summer ends with no ultra-low-cost airline in Hamilton](#)
- [Jetlines CEO Dave Solloway pitches new low-cost airline](#)

Canada Jetlines wants Transport Minister Marc Garneau to give the B.C.-based company an exemption on foreign investment rules for airlines. The current limit is 25 per cent. The company says it has an investor lined up from Europe and wants the cap raised to 49 per cent.

Canada Jetlines president and CEO Jim Scott says the company will bring new ultra low fares to Winnipeg, and 250 direct jobs and 1,200 total jobs, as well as inject \$260 million into the local economy by the eighth year of operation.

The prairie city would become an east-west hub for the carrier, he said.

"Winnipeg is, by its geographical location, a place to have crews based and to have aircraft overnighting, and by overnighting creating the maintenance," Scott said.

But to find the capital (approximately \$27 million) to satisfy requirements for a federal airline licence, the company wants Ottawa to ease foreign investment restrictions.

The company solicited letters from politicians and stakeholders across the country, asking the federal government to grant Jetlines the exemption.

"They basically said the same thing; our communities are not being fully developed because they don't have the proper air service into them," Scott said.

But the South Beach Capital Partners are sending the minister a different letter.

## **First Nations investors want competition grounded**

The group of seven Manitoba First Nations recently made a sizable investment in NewLeaf Travel. The Winnipeg-based ticket seller has partnered with Flair Airlines to offer discount flights, operating 60 flights a week since starting in July.

- **Winnipeg-based NewLeaf finally takes flight**

Speaking on behalf of the South Beach Capital Partners, Brokenhead Chief Jim Bear says the letter being sent to the federal minister on a rule change asks for a definite no.

"As First Nations we are always being told, 'Why don't you guys get into business? Why don't you work towards self-sufficiency?' Then when we do, to have the audacity of foreign ownership come into play," Bear told

CBC News.

Bear says the partners are also writing to Indigenous and Northern Affairs Minister Carolyn Bennett to lobby on their behalf against the exemption.

The group hopes to leverage its investment in NewLeaf into training partnerships with schools such as Red River College.

Bear noted that the port of Churchill and the rail line to the community are in the hands of foreign investors, and now the port is being closed and rail service has been cut in half.

- [Trudeau government still mulling Port of Churchill options](#)

## Airports authority welcomes competition

Winnipeg Airports Authority president Barry Rempel wrote to the federal transport minister with his endorsement of the exemption for Canada Jetlines.

Rempel says Canada's foreign investment restrictions should reflect what's happening globally, and said that as they are, they are too strict. He points to Australia with what he says is a booming airline industry and few investment restrictions.

The airport executive says easing the restrictions could even benefit NewLeaf in the long run, but he sympathizes with the investment partners and the company.

"I do feel obviously for them in that they feel the rules are changing since they started that investment."

A recent transportation review for the federal government also recommended the exemption limit increase, but it may take years for those changes to happen.

- [Foreign investment limits 'overly restrictive' for Canadian airlines, says Laurier economist](#)

Rempel says more companies such as NewLeaf and additional routes out of Winnipeg are good news for consumers.

"There is more competition here now. New routes to new places, and the fares are the kind of fares that are encouraging people to travel, so it's a good summer for our community."

## NewLeaf wants time to grow

NewLeaf president Jim Young says the company's first month of operation in Winnipeg has been a success and it is eyeing new routes for the fall. As a sign of commitment to the city, Young says, it has decided to base an aircraft here, which means crews and maintenance work feeding the local economy.

But Young isn't pleased with the idea of investment restrictions being changed for Canada Jetlines just as NewLeaf is taking off.

"There is already an ultra low-cost carrier in the combination of NewLeaf and Flair in the market. As a result, let's see how that works... We don't necessarily need to see a ton of competition thrown into the market."

But he says they are ready to compete if necessary.

Young says he is proud of the investment South Beach Capital Partners has made, and the First Nations investment is about as Canadian as you can get.

"Getting First Nation investment was a big achievement as far as NewLeaf was concerned. It's good for Manitoba."

There no timeline on a decision from the federal government. A spokesperson for Transport Canada says the department "is currently reviewing the request by consulting stakeholders and evaluating the public interest."

This is **Exhibit “K”** to the Affidavit of Dr. Gábor Lukács  
affirmed before me on September 30, 2016

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Signature

Court File No. A-242-16

IN THE FEDERAL COURT OF APPEAL

BETWEEN:

Dr. GÁBOR LUKÁCS

Appellant

and

CANADIAN TRANSPORTATION AGENCY and  
NEWLEAF TRAVEL COMPANY INC.

Respondents

ANSWERS TO WRITTEN EXAMINATION  
AFFIDAVIT OF WILLIAM F. CLARK

I, WILLIAM F. CLARK, Lawyer, of the City of Toronto, in the Province of Ontario, AFFIRM THAT the answers set out in Exhibit A to this affidavit to the questions dated August 25, 2016 submitted by the Appellant Dr. Gábor Lukács are true, to the best of my information, knowledge and belief.

Sworn before me at the City of Toronto in the Province of Ontario on September 9,  
2016

Notary Public in and for the  
Province of Ontario

WALTER FOX  
L.S.U.C. 10784

(Signature of Deponent)

## EXHIBIT A

<u>Questions</u>	<u>Answers</u>
<p>1. In paragraph 6 of your affidavit, you have made certain statements about the decrease of sales through travel agents. What is the source of your information or belief?</p>	<p>The Affiant reviews numerous travel industry media publications which on a daily basis would include Open Jaw, Canadian Travel Courier, Travel Industry Today, PAX News and Travel Market Report. On a weekly basis, they would include Travel Week (CDN) and the major industry publication being Travel Weekly (US). From those sources, which constantly publish comparisons between internet bookings and bookings made with travel agents, the Affiant has made the statement regarding the significant decrease of bookings by consumers through travel agents.</p> <p>This week, many of those publications have reported a May survey by ASTA (American Society of Travel Agents) indicating that only 22% of the travel industry consumers participating in that survey had booked their travel through a retail travel agent.</p>
<p>2. In paragraph 7 of your affidavit, you are referring to "very few claims."</p> <ul style="list-style-type: none"> <li>(a) What do you mean by "very few"?</li> <li>(b) Few relative to what?</li> <li>(c) What is the source of your information or belief?</li> </ul>	<p>The Affiant reviews the reports of the Compensation Committee of the Travel Industry Council of Ontario ("TICO") after each quarterly meeting, and as well the annual report of TICO.</p> <p>The 2016 report, which is available online, underscores the substantial decline in the number of and the value of claims processed by TICO which was down to 31 claims for the fiscal year ending March 31, 2016, with a total value of \$101,139 compared to \$179,821 in the previous year, and nearly \$500,000 in the 2012 fiscal year end.</p>

	A review of the current TICO report would also indicate that during the last fiscal year only one repatriation claim was paid.
<p>3. In paragraph 7 of your affidavit, you are referring to provincial consumer protection legislation that imposes liability on credit card issuers for goods or services not received by the customer.</p> <p>With respect to each of the following provinces, please state the legislation and the section(s) and/or subsection(s) that you were referring to.</p> <ul style="list-style-type: none"> <li>(a) New Brunswick;</li> <li>(b) Nova Scotia;</li> <li>(c) Ontario;</li> <li>(d) Manitoba;</li> <li>(e) Saskatchewan;</li> <li>(f) Alberta; and</li> <li>(g) British Columbia.</li> </ul>	The Appellant is able to access the various Consumer Protection Legislation which is readily available. For example Section 99 of the <i>Consumer Protection Act</i> , SO 2002, c. 30, Sched. A or Section 52 of the <i>Business Practices and Consumer Protection Act</i> , SBC 2004, c. 2 govern the obligations of credit card issuers in respect of transactions where the promised services or goods are not delivered by the vendor. And as well, the <i>Financial Consumer Agency of Canada Act</i> , SC 2001, c. 9, which establishes the Financial Consumer Agency of Canada imposes additional obligations upon federally regulated credit card issuers.
<p>4. In reference to paragraph 7 of your affidavit, are you aware of any provincial consumer protection legislation that imposes liability on credit card issuers above and beyond the amount of the transaction involved?</p> <p>If so, please identify the legislation and the section(s) and/or subsection(s).</p>	<p>See the answer to question #3 above. In addition, the Ontario travel refund is restricted to the value paid by the consumer.</p> <p>However, similarly, any other legislated or contractual warranties only typically cover parts and labour for the repair of the product, and do not cover consequential damages or incidental costs suffered by the consumer in awaiting the repair of the warranted product. For example, a family travelling on vacation in their brand new car, that is the subject of such a warranty, would not be</p>

	reimbursed should their car malfunction, and this results in the family either having to extend their vacation or return by other modes.
5. In reference to paragraph 7 of your affidavit, are you aware of any provincial consumer protection legislation that requires credit card issuers to compensate customers for all of their out-of-pocket expenses arising from the non-delivery of goods or the non-performance of services?  If so, please identify the legislation and the section(s) and/or subsection(s).	See the answer to question #4 above.
6. In the event that NewLeaf Travel Company Inc. fails to provide the services paid for, are you aware of any provincial consumer protection legislation that would require credit card issuers to pay for the full repatriation expenses of passengers, including accommodation, meals, and transportation on another airline?  If so, please identify the legislation and the section(s) and/or subsection(s).	See the answer to question #4 above.
7. In practical terms, if a passenger purchased a Hamilton-Saskatoon flight from NewLeaf Travel Company Inc. for \$99.00 and then NewLeaf Travel Company Inc. fails to provide the services paid for, are you aware of any provincial consumer protection legislation that would require the credit card issuer to pay the passenger more than \$99.00?  If so, please identify the legislation and the section(s) and/or subsection(s).	The Affiant is not aware of any legislation which imposes an obligation on credit card issuers to offer additional compensation in such circumstances, whether related to travel or other products.
8. Pursuant to Rules 94(1) and 100, you are requested to produce a copy of the policy of the Canadian Transportation Agency referenced in paragraph 9 of your affidavit.	In over four decades of involvement with the travel industry legislation in Ontario, the Affiant's involvement as counsel to the Canadian Association of Tour Operators ("CATO") since 1983; his involvement in the creation

	<p>of the self-management entity known as TICO; and, his involvement on behalf of numerous forgone Canadian air carriers, the Affiant has been at the site along with the CATO emergency team at every financial failure of a Canadian travel wholesaler or air carrier for the last four decades.</p> <p>Despite the Affiant's reference to a "policy" of the CTA, which the Appellant appears to have taken to be a written document, perhaps the more apt description of this standard is the legal position held by the CTA. In all financial failure situations, the CTA and its predecessors have maintained the legal position that, if an air carrier survives one of these failures and had issued a contract for travel to a consumer who was at a destination at the time of failure, it was a compliance term of the air carrier's licence issued by the CTA that the carrier complete the contract of carriage and return the passenger to point of origin, whether or not the air carrier had received compensation. Numerous air carriers have abided by that policy including Flair Airlines Ltd. who in 2009, on the failure of the Ottawa-based travel wholesaler Go Travel, flew 6 trips to Mexico and the Dominican Republic and repatriated over 900 Canadian consumers.</p>
9. With respect to the cases referenced in paragraph 9 of your affidavit, where you stated that the Canadian Transportation Agency "threatened to issue a show cause against the licenses of air carriers in order to force to repatriate consumers at destination":  (a) please identify the cases (including file numbers);	See the answer to question #8 above. In addition, several of the failures involved repatriation of individuals on domestic operations including, but not limited to, Nationair, Worldways, Ontario World Air, JetsGo and Odyssey.

<p>(b) please state the source of your information or belief;</p> <p>(c) did any of these cases involve domestic licences?</p> <p>(d) pursuant to Rules 94(1) and 100, you are requested to produce copies of correspondence in which the Canadian Transportation Agency “threatened to issue a show cause against the licenses of air carriers.”</p>	
<p>10. Are you aware of any case where the Canadian Transportation Agency “threatened to issue a show cause against the licenses of air carriers” to compel the operating carrier to repatriate passengers at its own expense, even if the operating carrier has not been fully paid?</p> <p>If so, please elaborate and identify the cases (including file numbers).</p>	See the answers to question #'s 8 & 9 above.
11. Pursuant to Rules 94(1) and 100, you are requested to produce copies of the contract(s) and/or agreements(s) referenced in paragraph 10 of your affidavit.	The Affiant's statement incorrectly utilized the verbiage referring to a “contractual arrangement” in reference to the understanding of both NewLeaf and Flair Airlines Ltd. in respect of their obligations. Each party has been advised by the Affiant of the CTA “legal position” further detailed in the answer to question #8 above. Based on that advice, Flair again accepted the repatriation obligation for NewLeaf passengers that it had accepted previously in 2009.

This is **Exhibit “L”** to the Affidavit of Dr. Gábor Lukács  
affirmed before me on September 30, 2016

---

Signature

Court File No. A-242-16

IN THE FEDERAL COURT OF APPEAL

BETWEEN:

**Dr. GÁBOR LUKÁCS**

Appellant

and

**CANADIAN TRANSPORTATION AGENCY and  
NEWLEAF TRAVEL COMPANY INC.**

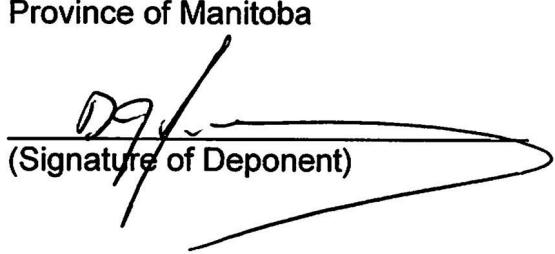
Respondents

**ANSWERS TO WRITTEN EXAMINATION  
AFFIDAVIT OF DONALD JAMES YOUNG**

I, DONALD JAMES YOUNG, Executive, of the City of Winnipeg, in the Province of Manitoba, AFFIRM THAT the answers set out in Exhibit A to this affidavit to the questions dated August 25, 2016 submitted by the Appellant Dr. Gábor Lukács are true, to the best of my information, knowledge and belief.

Sworn before me at the City of Winnipeg in the Province of Manitoba on September 9, 2016

  
\_\_\_\_\_  
Notary Public in and for the  
Province of Manitoba

  
\_\_\_\_\_  
(Signature of Deponent)

## EXHIBIT A

<u>Questions</u>	<u>Answers</u>
<b>Performance bond and/or security and/or guarantee</b>  1. Is NewLeaf Travel Company Inc. financially able to post a performance bond and/or security and/or guarantee in the amount of \$3,744,000?  If not, what is the largest amount of performance bond and/or security and/or guarantee that NewLeaf Travel Company Inc. is capable of posting?	A performance bond and/or security and/or guarantee is not necessary.
2. In reference to paragraph 37 of your affidavit, how would the granting of an order, requiring NewLeaf Travel Company Inc. to post a performance bond and/or security and/or guarantee as a condition of its operation pending determination of the appeal, decide the issues on appeal?	NewLeaf believes that a performance bond and/or guarantee is not necessary or required. Any funds available to NewLeaf are for the purposes of its continued operations. Any injunction granted would harm the very travelling public the Appellant seeks to protect by causing NewLeaf to shut down its operations.
3. Did you discuss with the investors of NewLeaf Travel Company Inc., referenced at paragraph 22 of your affidavit, the interlocutory injunction that is being sought?	The Affiant objects to the question. It is not relevant.
4. Did you ask the investors of NewLeaf Travel Company Inc., referenced at paragraph 22 of your affidavit, whether they would be able and willing to post the performance bond and/or security and/or guarantee being sought on the present motion?  (a) If not, why not?  (b) If yes, what did the investors answer?	The Affiant objects to the question. It is not relevant.

<b>Residence</b>	
5. Is the information contained in the Federal Corporate Information for NewLeaf Travel Company Inc., being Exhibit "C" to the Lukács Affidavit on page 33 of the motion record, accurate? If not, please elaborate.	Yes.
6. What is your address in Winnipeg, Manitoba and since what date have you been living at that address?	The Affiant objects to the question. It is not relevant.
7. Did you update your address on the corporation registration of NewLeaf Travel Company Inc., and if so, on what date?	The Affiant objects to the question. It is not relevant.
<b>Past involvement with Canada Jetlines Ltd.</b>	
8. I understand from paragraph 2 of your affidavit and Exhibit "E" to the Lukács Affidavit referenced therein that prior to your involvement with NewLeaf, you were the president of "Canada Jetliners, Ltd. a start-up ULCC headquartered in Vancouver BC." Is this correct?	Yes.
9. Can you confirm that "Canada Jetliners, Ltd." is a typographical error, and it should read "Canada Jetlines Ltd."?	Yes.
10. In the chain of emails from July 2014 between Canada Jetlines Ltd. and Mr. Robert Jones, being Exhibit "1" on page 19 of the present examination, on July 16, 2014, Mr. Dix Lawson wrote to Mr. Robert Jones:  In fact, when we learned of your first invoice Jim Young was e-mailed on May 5, 2014:  <i>"Good day Jim, As you are aware, I have an Invoice from Bob Jones (Creative Spin) acting in the capacity of Strategic Advisor for the period of March. Our process for contracting is to establish written requirements and statement of work (SOW) then find a provider to do</i>	The Affiant objects to the question. The question is not relevant. It would appear that it is being asked merely to embarrass the Affiant.  The Affiant also questions why and how the Appellant obtained confidential information from a competitor concerning the Affiant which has publicly advocated and campaigned against NewLeaf operating its air service. The Affiant intends to pursue this breach of privacy.

<p><i>the work. Any contract that develops from this needs exec approval, indeed this process was approved by the Board of Directors. The problem I am facing with Bob's invoice is that we have no SOW and approved contract, which I need in order to insert him into our program. So for now I cannot take action on this invoice from Bob. We need an approved SOW and contract to move forward."</i></p> <p>This e-mail is clear that you cannot be a paid consultant without a contract, and your first invoiced was dismissed. This ended any idea of a verbal deal with Jim Young as a paid consultant.</p> <p>Is it true that on May 5, 2014, you received an email with the aforementioned content (quoted in italics)?</p>	
<p>11. In the chain of emails from July 2014 between Canada Jetlines Ltd. and Mr. Robert Jones, being Exhibit "1" on page 19 of the present examination, on July 16, 2014, Mr. Dix Lawson wrote to Mr. Robert Jones:</p> <p>We are also very much aware of your relationship and history with Jim Young. For example, we know of the arrangements made to ensure Jim Young maintained on paper an Ontario residence at 16 Shea Court, Toronto, with a \$600.00 per month lease document dated May 1, 2014; thus, helping to ensure Jim Young could move back and forth across the border when he had no actual Canadian residence.</p> <p>(a) Is it true that in 2014, you maintained on paper an Ontario residence at 16 Shea Court, Toronto?</p>	<p>See the answer to question #10 above.</p>

<p>(b) Was there a lease document dated May 1, 2014?</p> <p>(c) Is it true that in May 2014, you had no real and actual Canadian residence?</p> <p>(d) What was the purpose of this arrangement?</p> <p>(e) Were you a Canadian citizen in May 2014? If not, what was your legal (immigration and tax) status in Canada?</p>	
<p>12. In the chain of emails from July 2014 between Canada Jetlines Ltd. and Mr. Robert Jones, being Exhibit "1" on page 19 of the present examination, on July 16, 2014, Mr. Dix Lawson wrote to Mr. Robert Jones:</p> <p>In addition, it appears that Jim Young was feeding you confidential Jetlines information so that you could later use this information to advance your own company's (ArCompany) interests. On April 3, 2014 you e-mailed Jim Young and other members of the ArCompany team the following:</p> <p><i>"I did not invite Dave Solloway (and I assume no one else has ... let me know if otherwise), as I want to talk about the ArCompany CJL proposal and my current understanding of the available CJL budget for the Go To Market / Marketing functions, and then how this needs to line up with the proposal."</i></p> <p>Again a relationship between you and Jim Young is exposed that intentionally excludes CJL's Chief Commercial Officer, other CJL management team members and the Board of Directors in the process, and indicates that it was the Jetlines internal budget numbers that was being sought after. Within Jetlines Jim Young</p>	<p>See the answer to question #10 above.</p>

<p>fought hard to single source any marketing efforts to ArCompany, which was not his role as an officer of Jetlines. With a MBA you should be aware of the ethical issues associated with using a personal relationship to gain an unfair advantage in bidding for company business. This is hardly consulting work for Jetlines.</p> <p>(a) Is it true that on April 3, 2014, Mr. Robert Jones sent you an email with the aforementioned content (quoted in italics)?</p> <p>(b) Around April 3, 2014, what was Mr. Solloway's role in Canada Jetlines Ltd.?</p>	
<p>13. Would it be fair to say that the aforementioned concerns, described in the email of Mr. Dix Lawson to Mr. Robert Jones, played a role in your departure from Canada Jetlines Ltd.?</p>	<p>See the answer to question #10 above.</p>
<p>14. What were the circumstances and events leading to your departure from Canada Jetlines Ltd.?</p>	<p>See the answer to question #10 above.</p>
<p>15. On what date did you cease to be the president of Canada Jetlines Ltd.?</p>	<p>See the answer to question #10 above.</p>
<p><b>NewLeaf Airways and NewLeaf Travel Company</b></p>	
<p>16. Is the information in the Corporation Profile Report for 1919183 Ontario Ltd., being Exhibit "D" to the affidavit of Dr. Lukács on page 38 of the motion record, accurate as of February 2016? If not, please elaborate.</p>	<p>Yes.</p>
<p>17. Was 1919183 Ontario Ltd. incorporated on July 14, 2014 and were you appointed a director of the company on the same date?</p>	<p>The Affiant objects to the question. It is not relevant.</p>

18. Was 1919183 Ontario Ltd. doing business as "NewLeaf" and/or "NewLeaf Airways"?	See the answer to question #17 above.
19. Was NewLeaf Travel Company Inc. incorporated on April 15, 2015?	Yes.
20. Have NewLeaf Travel Company Inc. and NewLeaf Airways (1919183 Ontario Ltd.) had the same directors, namely, yourself, Mr. Robert Jones, and Mr. Brian Reddy?	The Affiant objects to the question. It is not relevant.
21. Until sometime in January 2016, did NewLeaf Travel Company Inc. and NewLeaf Airways (1919183 Ontario Ltd.) have the same registered office at 130 King Street West, Suite 2120, Toronto, Ontario, M5X 1K6?	See the answer to question #20 above.
22. The business models of both NewLeaf Travel Company Inc. and NewLeaf Airways (1919183 Ontario Ltd.) claim to use the Ultra Low Cost Carrier (ULCC) model, correct?	See the answer to question #20 above.
23. The business models of both NewLeaf Travel Company Inc. and NewLeaf Airways (1919183 Ontario Ltd.) call for using so-called "secondary airports," correct?	See the answer to question #20 above.
24. The business plan of both NewLeaf Travel Company Inc. and NewLeaf Airways (1919183 Ontario Ltd.) call for utilizing three (3) aircraft in the initial period of operation, correct?	See the answer to question #20 above.
25. The business models of both NewLeaf Travel Company Inc. and NewLeaf Airways (1919183 Ontario Ltd.) call for renting aircraft on a "block hour basis" under an ACMI (aircraft, crew, maintenance, and insurance) contract, correct?	See the answer to question #20 above.

26. Would it be fair to say that, in practical terms, the business models of NewLeaf Travel Company Inc. and of NewLeaf Airways (1919183 Ontario Ltd.), outlined in Exhibit "E" to the Lukács Affidavit, are virtually identical? If not, please explain the differences.	See the answer to question #20 above.
27. What assets, including intellectual property and Internet domains, did NewLeaf Airways (1919183 Ontario Ltd.) transfer to NewLeaf Travel Company Inc.?	See the answer to question #20 above.
28. Do you agree that the logo shown on the September 16, 2015 news release of NewLeaf Travel Company Inc., being Exhibit "2" on page 26 of the present examination, is identical to the logo of NewLeaf Airways (1919183 Ontario Ltd.) shown on Exhibit "E" to the Lukács Affidavit?	See the answer to question #20 above.
29. Did NewLeaf Travel Company Inc. seek and obtain the consent of NewLeaf Airways (1919183 Ontario Ltd.) to use the "NewLeaf" trademark and the aforementioned logo?  If not, why not?	See the answer to question #20 above.
30. What business activities, if any, has NewLeaf Airways (1919183 Ontario Ltd.) had since NewLeaf Travel Company Inc. was incorporated?	See the answer to question #20 above.
<b>Passenger protection</b>	
31. On June 23, 2016, NewLeaf Travel Company Inc. began selling tickets to the public for flights between July 25, 2016 and October 2, 2016, correct?	Yes. NewLeaf has been in continuous operation since July 25, 2016 and over 25,000 passengers have completed travel on Flair.
32. Is it fair to say that on the day that NewLeaf Travel Company Inc. began selling tickets to the public, NewLeaf Travel Company Inc. had not paid Flair Airlines for the full costs	NewLeaf has met all its financial obligations to Flair and will continue to do so.

of the service for the entire period from July 25, 2016 to October 2, 2016?	
33. Does the email of Ms. Dorian Werda, being Exhibit "3" on page 28 to the present examination, describe the communications between the Travel Industry Council of Ontario (TICO) and NewLeaf Travel Company Inc. accurately?	The Affiant was not a party to the email and cannot identify it. However, I am aware of the position of TICO as stated.
34. Is it fair to say that the Ontario compensation fund administered by TICO offers no protection to passengers who purchase tickets from NewLeaf Travel Company Inc. on the Internet or through its Winnipeg-based call centre?	See the answer contained in paragraph 1 – 4 of the Affidavit of William F. Clark sworn September 9, 2016
35. Has NewLeaf Travel Company Inc. completed its registration with TICO? If not, please explain why.  If yes, pursuant to Rules 94(1) and 100, you are requested to produce a copy of the confirmation of NewLeaf Travel Company Inc.'s registration with TICO.	NewLeaf and TICO are in ongoing discussions as to the extent, if any, of the legal requirements to register.
36. Has NewLeaf Travel Company Inc. registered with the British Columbia counterpart of TICO?  If not, please explain why not.  If yes, pursuant to Rules 94(1) and 100, you are requested to produce a copy of the confirmation of NewLeaf Travel Company Inc.'s registration.	The BC counterpart has verbally indicated that NewLeaf does not need to register.
37. Is it fair to say that British Columbia's Travel Assurance Fund offers no protection to passengers who purchase tickets from NewLeaf Travel Company Inc. on the Internet or through its Winnipeg-based call centre?	Not known.
38. You stated at paragraph 7 of your affidavit that "Credit card issuers are liable to the consumer for processed transactions, where goods and services are not received."	If NewLeaf were to cease operations, the funds paid for unfulfilled services would be refunded by the credit card company.

What kind of liability (contractual, statutory, common law, etc.) are you referring to, and what is the source of your knowledge?	
39. Would it be fair to say that a passenger cannot get back from their “credit card issuer” and/or PSiGate more than the amount they paid NewLeaf Travel Company Inc. for services that were not provided?	See the answer to question #38 above.
40. Would it be fair to say that the airfares offered to the public by NewLeaf Travel Company Inc. are significantly lower than those offered by Air Canada and WestJet? If so, please quantify it.	The Affiant objects to the question. It is not relevant.  Even if it was relevant, the question is too vague.
41. In the event that NewLeaf Travel Company Inc. fails to provide the services paid for, do you believe that “credit card issuers” and/or PSiGate are required to pay for the full repatriation expenses of passengers, including accommodation, meals, and transportation on another airline?  If yes, please state the source of your belief.	See the answer to question #38 above.
42. Section 12(a) of the credit card agreement, being Exhibit “A” to your affidavit, permits PSiGate to impose on NewLeaf Travel Company Inc. an “alternative funding schedule,” correct?	Yes.
43. Pursuant to Rules 94(1) and 100, you are requested to produce copies of the “alternative funding schedule” that were in place on June 23, 2016 and July 23, 2016.	There are none.
44. In reference to paragraph 8 of your affidavit, how does PSiGate know when a passenger completed their full travel?	PSiGate refers to third party sources for confirmation of the completion of the passenger's travel.
45. Pursuant to Rules 94(1) and 100, you are requested to produce copies of:	The Affiant objects to the production of the requested copies on the basis that:

<p>(a) the Aircraft, Crew, Maintenance and Insurance (ACMI) agreement(s);</p> <p>(b) the MOU agreement(s); and</p> <p>(c) the escrow agreement(s);</p> <p>referenced in paragraphs 13 and 24 of your affidavit.</p>	<p>(a) They are not relevant.</p> <p>(b) They are confidential documents.</p> <p>(c) They are being requested as part of a fishing expedition.</p> <p>(d) Due to the reluctance of the Appellant to disclose who is supporting and/or assisting the Appellant financially or otherwise in this Appeal and Notice of Motion, NewLeaf has reason to believe that a competitor is an undisclosed party assisting the Appellant in these proceedings.</p>
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### Revenue/Expenses

<p>46. With respect to the screenshot shown as Exhibit "6" on page 37 of the present examination:</p> <p>(a) Do you recognize it as taken from the booking website of NewLeaf Travel Company Inc.?</p> <p>(b) What does the item "O" (\$16.78) stand for?</p> <p>(c) What does the item "Air Transport Charge" (\$18.00) stand for?</p> <p>(d) Is it fair to say that the following items are collected on behalf of third parties: YXE Arpt Improvement Fee (\$20.00); Security Charge ATSC (\$7.12); and GST/HST Tax (\$3.10)?</p>	<p>The Affiant objects to the questions posed about NewLeaf's revenues/expenses on the basis of:</p> <p>(a) The objections cited in paragraph 45 above.</p> <p>(b) The questions would be in the purview of the CTA should it have determined that NewLeaf required a license which it did not so determine.</p>
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(e) What amount (portion) of the total price of \$65.00 is a net revenue for NewLeaf Travel Company Inc.?	
47. Of the total gross receipts collected, referenced in paragraph 19 of your affidavit, which amount (portion) is taxes, fees, and third party charges, and which amount (portion) is NewLeaf Travel Company Inc.'s net revenue?	See the answer to question #46 above.
<p>48. Pursuant to Rules 94(1) and 100, you are requested to produce copies of:</p> <ul style="list-style-type: none"> <li>(a) the trust agreement governing the "trust" referenced in paragraph 19 of your affidavit;</li> <li>(b) an account statement from PSiGate, as of July 23, 2016, showing the total amount of "gross receipts collected from the above sales" referenced in paragraph 19 of your affidavit; and</li> <li>(c) a breakdown of the gross sales in a form that distinguishes the net revenue of NewLeaf Travel Company Inc. from taxes, fees and third party charges that are collected as part of the total fare as of July 23, 2016.</li> </ul>	See the answer to question #'s 45 & 46 above.
49. With respect to each entity that you had in mind in paragraph 20 of your affidavit, please state the name of the entity, the amount that NewLeaf Travel Company Inc. payed to the entity, the purpose of the payment, and the date of the payment.	See the answer to question #46 above.
50. With respect to each week starting July 25, 2016, please state in Canadian dollars how much NewLeaf Travel Company Inc. has paid Flair for operating the flights.	See the answer to question #46 above.

<p>51. Do the above-noted amounts include fuel and de-icing (if necessary)?</p> <p>If not, with respect to each of the aforementioned weeks, please state how much NewLeaf Travel Company Inc. paid for fuel and de-icing.</p>	<p>See the answer to question #46 above.</p>
<p>52. With respect to each week starting July 25, 2016, please state NewLeaf Travel Company Inc.'s total costs relating to the operation of the flights.</p>	<p>See the answer to question #46 above.</p>
<p>53. If the revenue from seats sold on a given flight does not cover the operating expenses of the flight, does NewLeaf Travel Company Inc. cancel the flight or operate it at a loss?</p> <p>If the former, what kind of alternative transportation are passengers with confirmed bookings offered and who pays for its costs?</p> <p>If the latter, who covers the shortfall?</p>	<p>The questions are based on a false premise, and are hypothetical. Since the start of operations on July 25, 2016, no flights have been cancelled; and no passengers have been required to seek alternate transportation arrangements.</p>
<p><b>Capitalization</b></p>	
<p>54. Who are the investors of NewLeaf Travel Company Inc., how much has each of them invested in NewLeaf Travel Company Inc., and on what date were the investment funds paid?</p>	<p>The Affiant objects to the questions concerning capitalization on the basis set out in the answer to question #46 above.</p>
<p>55. What amount (portion) of the amount stated in paragraph 21 of your affidavit as being held in trust is unencumbered?</p>	<p>See the answer to question #54 above.</p>
<p>56. Pursuant to Rules 94(1) and 100, you are requested to produce copies of:</p> <p>(a) confirmation that the amount stated in paragraph 21 of your affidavit is being held in trust;</p>	<p>See the answer to question #'s 45 &amp; 54 above.</p>

<ul style="list-style-type: none"> <li>(b) the trust agreement(s) governing the “trust” referenced in paragraph 21 of your affidavit;</li> <li>(c) the agreement(s) signed by the investors referenced in paragraph 21 of your affidavit;</li> <li>(d) the agreement(s) relating to the “additional” amount “for the next four or five months as needed” referenced in paragraph 21 of your affidavit;</li> <li>(e) bank statement(s) of NewLeaf Travel Company Inc., showing <u>unencumbered</u> paid-in capital as of: (i) June 23, 2016; (ii) July 20, 2016, and (iii) July 23, 2016.</li> <li>(f) audited (or, if unavailable, unaudited) financial statements of NewLeaf Travel Company Inc. for June and July 2016; and</li> <li>(g) any agreement(s) relating to the funding referenced in paragraph 22 of your affidavit.</li> </ul>	
<p>57. Who are the investors who “have provided the primary funding” referenced in paragraph 22 of your affidavit?</p>	<p>See the answer to question #54 above.</p>
<p>58. Can investors withdraw their investments in NewLeaf Travel Company Inc. at any time, or is a portion of the investment “locked in” for a certain period of time?</p> <p>What portion of the investment is “locked in” and for how long?</p>	<p>See the answer to question #54 above.</p>
<p>59. Was Mr. Baldanza the CEO of Spirit Airlines in December 2015?</p>	<p>See the answer to question #54 above.</p>

<p>60. Please review the Air Travel Consumer Report of the US Department of Transportation issued in February 2016, being Exhibit "4" on page 30 to the present examination.</p> <p>Do you consider Spirit Airlines' result of 10.97 consumer complaints per 100,000 enplanements in December 2015 "very successful"?</p>	<p>See the answer to question #54 above.</p>
<p>61. How many passengers can be "repatriated" from the amount held in an "escrow account" referenced in paragraph 24 of your affidavit?</p> <p>Please explain the calculations that were used to establish the sufficiency of the amount in question.</p>	<p>See the answer to question #54 above.</p>
<p>62. Does Flair have a legal obligation to repatriate passengers at its own expense should the amount held in escrow, referenced in paragraph 24 of your affidavit, turns out to be insufficient?</p> <p>If so, please specify the source of this obligation.</p>	<p>NewLeaf is of the view that Flair has a legal obligation to repatriate to the extent required by the Act, the Regulations and the CTA; in the unlikely and hypothetical event that NewLeaf is forced to cease operations.</p> <p>See the Affidavits of William F. Clark filed in this proceeding.</p>
<p>63. How many weeks of airport fees, ground handling and other related services does the amount referenced in paragraph 25 of your affidavit cover?</p>	<p>See the answer to question #54 above.</p>
<p>64. How many days of operations does the amount referenced in paragraph 27 of your affidavit cover?</p>	<p>See the answer to question #54 above.</p>
<p>65. What was the purpose of the "4 Months Operational Reserve" and the figure of \$9,413,000 shown in "Appendix C – Use of Proceeds" to Exhibit "E" to the Lukács Affidavit, shown on page 73 of the motion record?</p>	<p>See the answer to question #54 above.</p>

66. Does NewLeaf Travel Company Inc. have such a reserve? If so, please state the amount held in reserve.	See the answer to question #54 above.
<b>Kelowna Airport Contract</b>	
67. On what date did NewLeaf Travel Company Inc. execute the airport agreement with the Kelowna Municipal Airport Authority?	NewLeaf has been operating into and out of the Kelowna Airport 7 times/week since it began operations on July 25, 2016. NewLeaf signed the agreement on July 21, 2016. The terms of the agreement between NewLeaf and the Kelowna Airport Authority is irrelevant and confidential and the Affiant refuses to provide any particulars of the agreement.
68. Pursuant to Rules 94(1) and 100, you are requested to produce a copy of the transaction slip or bank statement confirming the payment stated in paragraph 34 of your affidavit.	See the answer to question #'s 45 & 67 above.
<b>Unpaid bills – Mr. Norm LeCavalier</b>	
69. When did the “Ski Charter flights,” referenced in paragraph 35 of your affidavit, take place or were supposed to take place?	As the Appellant is aware, there was a settlement of the dispute with Norm LeCavalier and a release signed which is confidential as between the parties. Any questions posed relating to the dispute are irrelevant; are made to embarrass NewLeaf and the Appellant is improperly advocating on behalf of a party to a dispute. The Affiant objects to the question.
70. What services was Mr. LeCavalier expected to deliver to NewLeaf Airways (1919183 Ontario Ltd.) and by what date?	See the answer to question #69 above.
71. Please describe in detail the nature of the alleged dispute, referenced in paragraph 36 of your affidavit, about the work performed by Mr. LeCavalier.	See the answer to question #69 above.

72. Did Mr. LeCavalier provide services to NewLeaf Travel Company Inc.?	See the answer to question #69 above.
73. In light of the alleged dispute about the work of Mr. LeCavalier, why did NewLeaf Travel Company Inc. use his services?	See the answer to question #69 above.
74. What was the purpose of your December 19, 2015 email sent to Mr. LeCavalier, being Exhibit "Q" to the Lukács Affidavit, on page 171 of the motion record?	See the answer to question #69 above.
75. Is it true that in an email dated January 24, 2016, being Exhibit "R" to the Lukács Affidavit, on page 173 of the motion record, you wrote to Mr. Norman LeCavalier that:  [...] you has always been and continue to be a valuable member of this venture. I know I disclose more information to the two of you than I do to any other stakeholder group (including YWG!) But I trust you both implicitly and value your counsel, the support, time and effort you have both put into this from the start.	See the answer to question #69 above.
76. In light of the alleged dispute about the work of Mr. LeCavalier, why did you continue trusting him and sharing information with him?	See the answer to question #69 above.
77. Do you recognize the chain of emails, being Exhibit "5" on page 32 to the present examination?	See the answer to question #69 above.
78. Is it true that on January 30, 2016, Mr. Sam Samaddar wrote to you, with a copy to Mr. Norman LeCavalier, the following:  You made financial commitments to Norm and you have ignored him when he has reached out to you?	See the answer to question #69 above.
79. Which "financial commitments to Norm" was Mr. Samaddar referring to?	See the answer to question #69 above.

<p>80. Is it true that on February 5, 2016, you wrote to Mr. LeCavalier, with a copy to Mr. Samaddar, that:</p> <p>My intention is to pay you once we have closed on the capital.</p>	<p>See the answer to question #69 above.</p>
<p>81. What “capital” were you referring to in your February 5, 2016 email to Mr. LeCavalier?</p>	<p>See the answer to question #69 above.</p>
<p>82. What payment were you referring to in your February 5, 2016 email to Mr. LeCavalier?</p>	<p>See the answer to question #69 above.</p>
<p>83. What services did Mr. LeCavalier provide for which you were communicating intent to pay him in your February 5, 2016 email?</p>	<p>See the answer to question #69 above.</p>
<p>84. Do you recognize the “Audit Summary – New Leaf / Flair Airlines Operation (SOR 88-58),” being Exhibit “7” on page 39 of the present examination?</p>	<p>See the answer to question #69 above.</p>
<p>85. At whose request was the “Audit Summary – New Leaf / Flair Airlines Operation (SOR 88-58)” prepared and who paid for it?</p>	<p>See the answer to question #69 above.</p>
<p>86. Did you send the email dated February 17, 2016, shown as Exhibit “8” on page 47 to the present examination?</p> <p>If so, for what purpose did you send this email to Mr. LeCavalier?</p>	<p>See the answer to question #69 above.</p>
<p>87. In the March 16, 2016 letter of Mr. LeCavalier (Exhibit “S” to the Lukács Affidavit, page 178 of the motion record), does “Brian” refer to Mr. Brian Reddy, the Chief Financial Officer of NewLeaf Travel Company Inc.?</p>	<p>See the answer to question #69 above.</p>
<p>88. Is it true that sometime between February 22, 2016 and March 16, 2016 you spoke to Mr. LeCavalier, and stated that Mr.</p>	<p>See the answer to question #69 above.</p>

<p>Brian Reddy had “asked Lisa to complete the transfer”?</p> <p>If so, what was the amount and the purpose of the promised transfer?</p>	
<p>89. Did Mr. LeCavalier receive any payment from NewLeaf Travel Company Inc. and/or from NewLeaf Airways (1919183 Ontario Ltd.) in 2016?</p> <p>If so, on what date(s), what amount(s), and for what purpose(s)?</p>	<p>See the answer to question #69 above.</p>
<p>90. Pursuant to Rules 94(1) and 100, you are requested to produce all correspondence with Mr. LeCavalier relating to disputing the work performed by him and/or the timeliness of the work and/or the quality of his work, including but not limited to:</p> <ul style="list-style-type: none"> <li>(a) response(s), if any, to the March 16, 2016 letter of Mr. LeCavalier (Exhibit “S” to the Lukács Affidavit, p. 178 of the motion record); and</li> <li>(b) response(s), if any, to the June 23, 2016 letter of Mr. LeCavalier (Exhibit “S” to the Lukács Affidavit, p. 177 of the motion record).</li> </ul>	<p>See the answer to question #69 above.</p>
<p>91. Since the day you swore your affidavit, have the outstanding bills of Mr. LeCavalier (Exhibit “S” to the Lukács Affidavit, pages 182-183) been paid by NewLeaf Travel Company Inc. and/or NewLeaf Airways (1919183 Ontario Ltd.) and/or a third party?</p>	<p>See the answer to question #69 above.</p>
<p>92. Since the day you swore your affidavit, has NewLeaf Travel Company Inc. and/or NewLeaf Airways (1919183 Ontario Ltd.) reached a settlement with Mr. LeCavalier?</p>	<p>See the answer to question #69 above.</p>

If so, pursuant to Rules 94(1) and 100, you are requested to produce a copy of the settlement agreement.	
<b>Unpaid bills – ArCompany</b>	
93. What services was ArCompany expected to deliver with respect to all three of the items shown on the May 20, 2015 invoice (Exhibit “T” to the Lukács Affidavit, page 187 of the motion record), and what was the deadline for these services?	The questions relating to ArCompany pertain to a dispute claim in which NewLeaf has filed a Statement of Defence and Counterclaim, which was filed as Exhibit “2” to the cross-examination of Gabor Lukacs on August 25, 2016. All questions pertaining to the ArCompany and NewLeaf dispute are irrelevant and motivated merely by a collaboration between the Appellant and Hessie Jones, the principal of ArCompany, to embarrass NewLeaf and coerce NewLeaf into paying ArCompany. In that respect, the Appellant is acting improperly as an advocate in a civil action. The Affiant objects to the question.
94. In paragraphs 35-36 of your affidavit, did you intend to convey that all items in ArCompany’s invoice are disputed, or only portions of it?	See the answer to question #93 above.
95. Have the undisputed portions of ArCompany’s invoice been paid?  If not, why not?  If yes, please state the amount, date, and the source of the payment.	See the answer to question #93 above.
96. Do you recognize the September 1, 2014 email, being Exhibit “9” on page 49 to the present examination?	See the answer to question #93 above.
97. On or around September 1, 2014, did you write the following?  Thank the whole team at CSIS, sorry I mean ArCompany and remind me never to have a	See the answer to question #93 above.

love child hiding in a convent in Switzerland.... They would find it.	
98. Would it be fair to say that as of September 1, 2014, you were satisfied with the quality and timeliness of the work performed by ArCompany?	See the answer to question #93 above.
99. Do you recognize the October 10, 2014 email, being Exhibit "10" in page 50 of the present examination?	See the answer to question #93 above.
100. On or around October 10, 2014, did you write to Ms. Hessie Jones and Ms. Amy Tobin of ArCompany the following?  I wanted to add my heartfelt thanks for the work we accomplished this week.	See the answer to question #93 above.
101. Was the work referenced in the October 10, 2014 email the "NewLeaf MyAir Branding Program"?	See the answer to question #93 above.
102. Would it be fair to say that as of October 10, 2014, you were satisfied with the quality and timeliness of the work performed by ArCompany?	See the answer to question #93 above.
103. Please describe in detail the nature of the alleged dispute, referenced in paragraph 36 of your affidavit, about the work performed by ArCompany.	See the answer to question #93 above.
104. Do you recognize the April 6, 2016 email from "bob.jones" to yourself, shown in Exhibit "T" to the Lukács Affidavit, on the lower portion of page 185 of the motion record?	See the answer to question #93 above.
105. Does "bob.jones" refer to Mr. Robert Jones, one of the directors of NewLeaf Travel Company Inc.?	See the answer to question #93 above.

106. What was the role of Mr. Robert Jones in NewLeaf Travel Company Inc. in April 2016? Was he the Chief Commercial Officer of the company?	See the answer to question #93 above.
107. What “investments funds” was Mr. Robert Jones referring to in his April 6, 2016 email to you?	See the answer to question #93 above.
108. Is it fair to say that Mr. Robert Jones was referring in his April 6, 2016 email to investment funds that NewLeaf Travel Company Inc. was expecting to receive?	See the answer to question #93 above.
109. Which entity is “NewLeaf Corp” shown on the invoice of ArCompany (Exhibit “T” to the Lukács Affidavit, page 187 of the motion record)?	See the answer to question #93 above.
110. Can you confirm that as of April 2016, the domain <a href="http://newleafcorp.ca">newleafcorp.ca</a> , used by Mr. Robert Jones for his April 6, 2016 email, was owned by NewLeaf Travel Company Inc.?	See the answer to question #93 above.
111. What was your reaction to the April 6, 2016 email of Mr. Robert Jones?	See the answer to question #93 above.
112. Pursuant to Rules 94(1) and 100, you are requested to produce all correspondence between yourself and others, dated between April 6, 2016 and June 28, 2016, concerning the invoice of ArCompany (Exhibit “T” to the Lukács Affidavit, page 187 of the motion record).	See the answer to question #93 above.
113. Are you familiar with the chain of emails from June 25-28, 2016 between Mr. Robert Jones from NewLeaf Travel Company Inc. and Ms. Hessie Jones from ArCompany, being Exhibit “11” on page 52 of the present examination?	See the answer to question #93 above.

114. Is Ms. Amie Seier (referenced in the June 25, 2016 email of Mr. Robert Jones) the market manager of NewLeaf Travel Company Inc.?	See the answer to question #93 above.
115. What is the reason for the absence of denial and/or dispute of the monies owed in the June 25, 2016 email of Mr. Robert Jones?	See the answer to question #93 above.
116. On June 28, 2016, Mr. Robert Jones wrote to Ms. Hessie Jones:  As I have told you repeatedly, Brian is managing the payment activity and he fully intends to complete the payment, but money has to flow in first, before it can flow out. And I frequently remind him and he acknowledges the intent to finish the transaction when able.	See the answer to question #93 above.
Which “payment” was Mr. Robert Jones referring to, and what does “money has to flow in first, before it can flow out” mean?	
117. Is it fair to say that as of June 28, 2016, no dispute has been communicated to ArCompany concerning the invoice shown as Exhibit “T” to the Lukács Affidavit, page 187 of the motion record?	See the answer to question #93 above.
118. Are you aware of the June 30, 2016 email of Ms. Hessie Jones to Mr. Brian Meronek, counsel for NewLeaf Travel Company Inc., being Exhibit “12” on page 55 of the present examination?	See the answer to question #93 above.
119. Is it fair to say that the June 30, 2016 email of Ms. Hessie Jones was left unanswered?  If not, please elaborate. If yes, please explain why it was left unanswered.	See the answer to question #93 above.
120. Pursuant to Rules 94(1) and 100, you are requested to produce all correspondence with ArCompany dated July 23, 2016 or earlier,	See the answer to question #93 above.

disputing the work performed by the company and/or the timeliness of the work and/or the quality of the work.	
121. Since the day you swore your affidavit, has the outstanding invoice of ArCompany (Exhibit "T" to the Lukács Affidavit, page 187 of the motion record) been paid by NewLeaf Travel Company Inc. and/or NewLeaf Airways (1919183 Ontario Ltd.) and/or a third party?	See the answer to question #93 above.
122. Since the day you swore your affidavit, has NewLeaf Travel Company Inc. and/or NewLeaf Airways (1919183 Ontario Ltd.) reached a settlement with ArCompany?  If so, pursuant to Rules 94(1) and 100, you are requested to produce a copy of the settlement agreement.	See the answer to question #93 above.
<b>Public statements</b>	
123. In reference to Exhibit "AB" to the Lukács Affidavit on page 238 of the motion record, is it true that NewLeaf Travel Company Inc. "has a backup plan" in the event that it is required to hold a licence to operate?  If so, what is the "backup plan"?	The Affiant objects to the question. It is not relevant and in any event is confidential.
124. According to a report published by CBC News, being Exhibit "13" on page 56 to the present examination:  NewLeaf president Jim Young says the company's first month of operation in Winnipeg has been a success and it is eyeing new routes for the fall. As a sign of commitment to the city, Young says, it has decided to base an aircraft here, which means crews and maintenance work feeding the local economy.  Does the report adequately reflect what you said?	See the answer to question #123 above.

If not, please elaborate.	
125. Does NewLeaf Travel Company Inc. have operational control of any aircraft and/or crew?  If not, how could NewLeaf Travel Company Inc. have "decided" to base an aircraft in Winnipeg?	See the answer to question #123 above.
126. On or around August 24, 2016, NewLeaf Travel Company Inc. released to the public its schedule for October 3-31, 2016, correct?	See the answer to question #123 above.
127. In the October 3-31, 2016 period, how many routes and how many flights per week will NewLeaf Travel Company Inc. offer?	See the answer to question #123 above.

This is **Exhibit “M”** to the Affidavit of Dr. Gábor Lukács  
affirmed before me on September 30, 2016

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Signature



Halifax, NS

[lukacs@AirPassengerRights.ca](mailto:lukacs@AirPassengerRights.ca)

September 16, 2016

**VIA EMAIL**

Brian J. Meronek, Q.C.  
D'Arcy & Deacon LLP

Dear Mr. Meronek:

**Re: *Lukács v. Canadian Transportation Agency and NewLeaf Travel Company Inc.*  
Federal Court of Appeal File No.: A-242-16  
Written examination – request for answers and productions**

On August 26, 2016, I served written examinations on NewLeaf's affiants, Mr. William F. Clark and Mr. Donald James Young; their answers were due within 15 days, as per the Direction of the Court (Scott, J.A.).

I am writing to request that NewLeaf and/or its affiants provide full and complete answers and productions in response to the aforementioned written examinations by **Friday, September 23, 2016**, failing which I will have no choice but to make a motion to the Federal Court of Appeal.

**I. Written Examination of Mr. Clark**

**(a) Unanswered questions and productions**

1. Mr. Clark failed to answer question **9(a)**, requiring him to identify cases, including file numbers, where the Canadian Transportation Agency allegedly “threatened to issue a show cause against the licenses of air carriers in order to force to repatriate consumers at destination.”
2. Mr. Clark failed to respond to production request **9(d)**, asking for copies of correspondence in which the Canadian Transportation Agency allegedly “threatened to issue a show cause against the licenses of air carriers in order to force to repatriate consumers at destination.”

**(b) Correcting potential mistake**

3. In response to production request 11, Mr. Clark stated, among other things, that:

[...] Flair again accepted the repatriation obligation for NewLeaf passengers that it had accepted previous in 2009.

I have grounds to believe that this statement is false. Since Mr. Clark is an honourable member in good standing of the Law Society of Upper Canada (LSUC), I presume that Mr. Clark made the aforementioned statement as a result of an inadvertent and innocent mistake.

Thus, before I would proceed to question Mr. Clark's credibility before the Court, I would like to offer him an opportunity to correct his unfortunate oversight.

**II. Written Examination of Mr. Young****(a) Evasive and/or non-responsive answers**

4. Mr. Young provided an evasive and/or non-responsive answer to question 1. The question was not asking about his opinion as to the necessity of a performance bond and/or security and/or guarantee, but rather about NewLeaf's financial capability to post one.
5. Mr. Young provided an evasive and/or non-responsive answer to question 32. The thrust of the question was relating to NewLeaf selling tickets to the public for services that NewLeaf did not fully pay for.
6. Mr. Young provided an evasive and/or non-responsive answer to question 41.
7. Mr. Young provided an evasive and/or non-responsive answer to question 53, which seeks information about who bears the financial risk in the event of insufficient number of seats sold on a given flight.

**(b) Questions and productions improperly refused**

8. Mr. Young improperly refused to answer questions 3-4 on the basis of irrelevance. These questions are relevant to: the lack of harm that NewLeaf would suffer if the sought order were granted; paragraph 22 of Mr. Young's Affidavit; and Mr. Young's credibility.
9. Mr. Young improperly refused to answer questions 6-7 on the basis of irrelevance. These questions are directed at the credibility of Mr. Young, who claims to be residing in Winnipeg while the Federal Corporate Information shows him as residing in Nanaimo, British Columbia.

10. Mr. Young improperly refused to answer questions **10-15** on the basis of irrelevance. These questions are relevant to: Mr. Young's purported experience in the airline industry (para. 2 of Mr. Young's affidavit); Mr. Young's close relationship with ArCompany; Mr. Young's past conduct of purporting to live at fictitious addresses; and Mr. Young's credibility.
11. Mr. Young improperly refused to answer questions **17-30** on the basis of irrelevance. These questions are relevant to: the amount of financial reserves that NewLeaf would reasonably need (see Exhibit "E" to the Lukács Affidavit); and the credibility of Mr. Young's statements in paragraphs 35-36 of his affidavit.
12. Mr. Young improperly refused to produce documents requested under **45(a), 45(b), and 45(c)**. These documents are clearly relevant, because they are referenced in Mr. Young's affidavit at paragraphs 13 and 24, and they directly speak to the arrangements that may or may not exist with respect to repatriation of stranded passengers.

Confidentiality is not recognized as proper grounds for refusing to answer questions. The proper avenue to address such concerns is by way of a motion pursuant to *Federal Courts Rules* 151-152. I will not oppose any reasonable motion for confidentiality along the lines of the July 24, 2016 Order of the Court (Scott, J.A.).

Please be advised that the vexatious and/or frivolous allegations relating to "who is supporting and/or assisting the Appellant financially or otherwise" will not be tolerated, and may be grounds for seeking costs against Mr. Young personally and/or against counsel advancing such a position.

13. Mr. Young improperly refused to answer questions **46-48 and 50-52**, and questioned their relevance. These questions are relevant to establishing NewLeaf's net revenue (as opposed to cash flow), which in turn is necessary for determining whether NewLeaf will have any lost profits if the sought order is granted.
14. Mr. Young improperly refused to answer questions **54-58**, seeking to test the bald allegations put forward in paragraphs 21 and 22 of Mr. Young's Affidavit. These facts are in dispute and directly relate to NewLeaf's financial fitness and ability to deliver and sustain the services that it sells to the public.
15. Mr. Young improperly refused to answer questions **59-60**. These questions are relevant to the credibility of the statement at paragraph 23 of Mr. Young's affidavit about Spirit Airlines having been "very successful" under Mr. Baldanza's leadership.
16. Mr. Young improperly refused to answer questions **61 and 63-66**. These questions are relevant to: the statements contained in paragraph 24 of Mr. Young's affidavit; and whether funds are available to repatriate stranded passengers should NewLeaf cease operations.

17. Mr. Young improperly refused to answer questions **69-92 and 93-122**. These questions are relevant, because they are capable of demonstrating that Mr. Young deliberately and knowingly made false statements in paragraphs 35 and 36 of his affidavit, and as such it speaks to his credibility as a witness.
18. Mr. Young improperly refused to answer question **123**. As stated previously, confidentiality is not a proper ground of objection. The question is relevant to whether NewLeaf will suffer irreparable harm if the order sought is granted (paragraph 37 of Mr. Young's affidavit).
19. Mr. Young improperly refused to answer questions **124-125**. These questions are relevant to the truth of paragraph 3 of Mr. Young's affidavit and his credibility.
20. Mr. Young improperly refused to answer questions **126-127**. The answer to the questions is clearly not confidential, as it is a matter of public knowledge. The questions are relevant to establish the number of passengers transported by NewLeaf, and thus to estimate the number of passengers who may be stranded in the event that NewLeaf suddenly ceases operations.

Please note that I reserve my rights to raise further and other grounds for seeking answers to these questions should a motion be necessary.

I look forward to hearing from you.

Yours very truly,  
Dr. Gábor Lukács

This is **Exhibit “N”** to the Affidavit of Dr. Gábor Lukács  
affirmed before me on September 30, 2016

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Signature

GRS FILE NO. 16-0765

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RECORDING OF TELEPHONE CONVERSATION taken by Dr. Gabor Lukacs,  
on July 8, 2016, at 18:38 Central European Time.

\*\*\*\*\*

This Telephone Recording was transcribed by Gillespie Reporting  
Services at Ottawa, Ontario, having been duly appointed for the  
purpose.

1 DR. LUKACS: Hello?

2 MR. LAPOINTE: Hello, is Mr. Lukacs there, please?

3 DR. LUKACS: Speaking.

4 MR. LAPOINTE: Hi, it's Chris Lapointe from Flair  
5 Airlines. I understand you were looking to speak to  
6 somebody at Flair.

7 DR. LUKACS: That's correct. Thank you very much  
8 for calling me back, Mr. Lapointe, I appreciate that. I  
9 believe at this moment there is actually a letter being  
10 faxed over to Flair. I will also be transmitting it by  
11 e-mail to ensure that everybody is copied. I don't -- I  
12 want to avoid the appearance of doing something behind the  
13 back of anybody else. So that momentarily --

14 MR. LAPOINTE: Sure.

15 DR. LUKACS: -- is going to be transmitted. You  
16 see, the place where I'm having concerns is, is, you know,  
17 Flair is a legitimate business, it's a well-established  
18 airline. I have no problems, perhaps with some minor  
19 tariff issues, but I have no general problem with Flair.  
20 But now NewLeaf is out there selling tickets and what I'm  
21 seeking is some kind of clarity as to whether Flair is  
22 going to honour those tickets if NewLeaf becomes insolvent,  
23 defaults on its obligations, what is going to happen with  
24 the passengers, that's what I wanted to speak to you about  
25 and really that's a concern I wanted also to convey to you,

1           that if there is a way to resolve that concern, I will be  
2           happy to make a public statement that that concern has been  
3           resolved and the matter is safe, but I need to be assured  
4           that passengers are not going to be stranded because I  
5           really have first-hand experience as to what it does to  
6           people.

7           MR. LAPOINTE: No, I like that, yeah. I get a  
8           feel, Gabor -- it is Gabor, right?

9           DR. LUKACS: Yes.

10          MR. LAPOINTE: I, you know, I kind of -- I guess I  
11          respect your, your -- the role you're trying to play in  
12          being some sort of a passenger rights advocate, but  
13          unfortunately, you know, I think there's certain tactics  
14          that you're taking that aren't necessarily serving the  
15          general public. So, you know, we have a regulatory  
16          relationship with Transport Canada. We have an established  
17          regulatory relationship with the CTA. Flair Airlines as an  
18          entity has no requirement or need to deal with individuals  
19          such as yourself on these areas which are governed by the  
20          various departments of the Government of Canada. So I  
21          don't know where, where you're adding value to the process.

22          DR. LUKACS: Well, the value is added by the fact that  
23          the Federal Court of Appeal recognized me as representing  
24          the public interest in this case. I'm sure you have read  
25          the ruling of the June 9th. And if not, I will be happy

1           to --

2           MR. LAPOINTE: Actually, I haven't, no.

3           DR. LUKACS: Okay.

4           MR. LAPOINTE: No, I haven't read it. I'm not --

5           DR. LUKACS: So do you have access to CanLII,  
6           Canadian Legal Institute website? Are you in front of your  
7           computer?

8           MR. LAPOINTE: I guess, yeah, I am in front of my  
9           computer. Yeah, I can --

10          DR. LUKACS: So can --

11          MR. LAPOINTE: I can look things up, but...

12          DR. LUKACS: So the number of the case is 2016 FCA,  
13          so foxtrot charlie alpha, 174. This is the preliminary  
14          ruling by the Canadian Transportation Agency and all those  
15          things that are you saying, you know, Gabor is just a  
16          private person, he has no business here, all those things  
17          have been already hashed out in court and the court said that  
18          NewLeaf's, that there are some serious questions about what  
19          NewLeaf is doing and that's why there's an expedited appeal  
20          ongoing about this and the court recognized that I have a  
21          public interest standing.

22          So the court feels, some of the best jurists of  
23          this country feel that I'm representing here the public  
24          interest in this matter. I mean, it's up to you how you  
25          want to handle it, but I really want to, you know, some of

1           the reasons that you feel that I am acting perhaps making  
2           steps that is bad for you is because unlike other entities,  
3           for example, if you could choose to give a call to CanJet  
4           and ask them how they were dealing with me. You never  
5           heard about it in the press because we were dealing with it,  
6           in a very informal and cordial way and I felt that  
7           passengers' interests were being served that way.

8           And I've no interest in, you know, in dragging  
9           anybody's reputation through the mud and certainly I always  
10          much prefer to deal with things informally and to be clear,  
11          this is not about me getting my picture out in the  
12          newspaper. I'm much happier not to do that and in a  
13          confidential and private way, reach some way of some kind  
14          of, you know, arrangement where passengers are safe, which  
15          is really my ultimate goal. I have no financial --

16           MR. LAPOINTE: Well, I have, you know, Gabor, I  
17          have exactly the same goal as you do. I'm not -- but I  
18          don't want to, you know, we'll have a -- we're a private  
19          company. We have morals and ethics. We've been in business  
20          for 10 years. We intend to be here for at least another 10  
21          before we sell the thing and retire or something.

22           So, I mean, I'm in exactly the same place you are  
23          within our organization. I have fought for the last 18  
24          months to ensure -- I'm talking about with our negotiations  
25          with NewLeaf and other potential ULCC partners that I am

1           the internal passenger rights advocate because I have been  
2         here before, we did a tour program in 2009 with Go Travel  
3         South. We ended up going down and repatriating 906  
4         passengers at our expense and that's the way we operate.

5           So we -- I'm in the same, exactly the same position  
6         you are. I am -- internally, I am fighting to ensure that  
7         the mechanisms are in place and the protection is in place  
8         because come the day when there's a 75 per cent chance or  
9         whatever, 25 per cent chance, 10 per cent chance that this  
10        thing has to stop, that the mechanisms in place to ensure  
11        that, a) everybody gets their money back that hasn't  
12        travelled and that mechanism is now in place; and b) if  
13        they're at destination and half-way through their trip,  
14        there is a mechanism in place to ensure those people can  
15        get home safely and not have -- not incur additional  
16        expense to do so.

17           So we're doing all of that internally, so I don't  
18        need -- my personal opinion is, is that there's not much  
19        that can be done external to that. We're working with the  
20        CTA on tariffs. We're working with our partners, NewLeaf,  
21        and we're pushing to make sure that all the agreements that  
22        are in place have the proper protections for the  
23        passengers.

24           DR. LUKACS: Well, you know, Chris, the problem is  
25        that I've read your tariff and your tariff actually says

1           that in respect to refunds you send people to -- just to  
2       NewLeaf. If people get stranded, you don't have those  
3       clauses that other airlines have about a possibility of you  
4       buying people tickets on other airlines' flights if it  
5       becomes necessary, so there are some issues there.

6           And most importantly, what I am seeking and really,  
7       I also would like to be clear that I am coming here with  
8       some, you know, it's -- I'm coming here with some, in a way  
9       to actually help you and remove some of the doubts. And  
10      that's why I also sent you the letter. I am sure -- my  
11      spouse is telling me that it has gone through the fax now.  
12      Which is that as soon as these issues, what I am very  
13      pleased to hear what you are saying and this is why I'm  
14      actually calling you because with NewLeaf it's not possible  
15      to properly communicate.

16           All those things that you tell me about, for  
17       example, the protection of people who are halfway with  
18       their travel, this is something that I would be feeling far  
19       more happier about this whole NewLeaf and it would reduce  
20       me to more legal concerns as opposed to an immediate  
21       emergency as, you know, as of right now to be solved if  
22       Flair stated this publicly, openly by way of a public  
23       commitment. Because at that point, it's no longer an  
24       emergency that I may be having to interrupt my vacation  
25       because a thousand people are stranded like it happened

1       with Skygreece. That's the kind of nightmare that I'm afraid  
2       of. And, you know, if Flair is willing to foot the bill  
3       and take the risk of people being stranded and look  
4       after --

5                    MR. LAPOINTE: No, we're not. We're not. I'm not  
6       -- no, no, we're not. We don't -- it's not built into our  
7       -- it's not built into our financial model, Gabor. We're  
8       not -- I'm not saying that we're going to -- we did that  
9       once before, it cost us a quarter-million dollars, and we  
10      did it and because we did it -- because we realized we had  
11      to do it, right. These people are now not -- they're not,  
12      you know, two hours away over in Regina and where there's  
13      all sorts of options to get home. These people are sitting  
14      in Punta Cana or in Cancun and it's, you know, peak, peak  
15      January/February season, whatever it was in 2009, and we  
16      looked at each other and said, hey, this has to happen,  
17      let's go do it. And we spent a quarter-million dollars and  
18      went and did it, right. And so that's the kind of people  
19      that we are.

20                  Now, in this case here, I'm not saying -- this is a  
21      much different situation. It'll be millions of dollars to  
22      repatriate these people or whatever the word is to get them  
23      back home again. So I'm not saying that -- we don't have  
24      it in our financial model with NewLeaf to fund it. What  
25      I'm saying is, making sure that our contract stipulated the

1 passenger protection plan and, and the funding is available  
2 to execute on that, whether that be we operate the system  
3 for two more weeks and we go pick everybody up and take  
4 them home, you know, Flair does it, some of the routes will  
5 be cancelled and we'll buy tickets or NewLeaf will buy  
6 tickets on WestJet and Air Canada.

7 Whatever it is, you know, we're not going to fly  
8 somewhere, we're not going to fly a 737 to go pick up nine  
9 people. If there's another way to get those people home,  
10 we'll buy the tickets on Air Canada or NewLeaf will. So that's  
11 the plan that we're putting in place now and we've insisted  
12 that it get done.

13 But I'm not going to, I don't want to put that out  
14 in the media yet until I know for a fact that it's black  
15 and white and we understand the mechanics of that. I don't  
16 want to engage the public in that discussion until it's in  
17 place and it's not the place, it's not the place for us to  
18 have a discussion. We're a private company. We have our  
19 ethics and morals.

20 We're dealing with it and I don't want to take that  
21 out into the public realm and make it because you have a  
22 habit of doing that and I guess I don't know what, whatever  
23 the motivation is, but I know from all the membership at  
24 ATAC, you're not considered a very positive addition to the  
25 aviation scene in Canada because of some of the tactics and

1       the approaches -- you obviously beg to differ in that you  
2       have that opinion and if the passengers, if the general  
3       public feel that you're doing them a service, fantastic,  
4       right.

5                  As a member of ATAC and as a member of the -- a  
6       pretty small group of people trying to provide service in a  
7       very hyper-competitive market in a very challenging  
8       industry, you know, we have to fight to make this work.  
9       This is not easy. This is not easy to bring lower fares.

10                 The big battle is actually with Air Canada and  
11       WestJet. Those are the ones that are going to screw it up  
12       for everybody because they do, you know, completely  
13       anti-competitive behaviour, right. That's where the  
14       problem lies. That's where we should be putting our  
15       energy, to say, listen, let's open these markets up. Let's  
16       not let WestJet come in one day later and put four flights  
17       right on top of us and just to keep us out of the market  
18       because we actually do have a model that will be allow  
19       people to travel cheaper in Canada.

20                 You know, that's where the energy should be put.  
21       That, you know, opening up the doors and making it public  
22       knowledge what's going on with Air Canada, the fact that  
23       they can pick up the phone to any, you know, Financial Post  
24       and they can create slag articles about a small operator  
25       trying to come into the market and create something that's

1           actually good for Canadians. You know, that's where the  
2         problem lies.

3           And if we focus our energy there and actually  
4         making it a truly competitive market where these people  
5         can't do these types, or these companies can't do these  
6         types of things, then we wouldn't have to worry about  
7         stranding passengers because the model will work. People  
8         don't have to pay what they're currently paying to travel  
9         within Canada domestically. It's a rip-off. Every time I  
10       go to -- I go to Calgary every week and it's just under \$500  
11       round-trip for a 44-minute flight each way. It doesn't  
12       have to cost that much. But these two companies have a  
13       lock on the market.

14           DR. LUKACS: And, Chris, do you think I have any  
15       love lost on this company? Like, have a look at my track  
16       record. Do you think in any way I like what is happening  
17       here? I think you are really completely missing the point.  
18       I will tell you what the point is. I'm going to tell you  
19       quite bluntly. I think that there is a Canadian  
20       Transportation Agency that over the past few years has not  
21       been doing its job and they are, they are, you know,  
22       NewLeaf can actually get by. By the same token, they are  
23       not doing their job properly, but that's of course why Air  
24       Canada and to some extent WestJet can behave the way they  
25       can behave. That's why hating Air Canada is such a

1 national passion, it was why people are all frustrated.

2 You know, doing things right and if you were doing  
3 things right, I would be happy. If there was a business  
4 model that I see that passengers are being protected at  
5 least as much as they're protected with WestJet or Air  
6 Canada if things go wrong, I would be happy to support it.

7 I'm, look, I have no desire as a person who travels  
8 myself, I've no desire to pay extra myself or to pay extra  
9 for my spouse or that my friends will pay extra and I agree  
10 with you that those prices are over-priced. That's really  
11 not the issue. The issue is that it seems that you and  
12 NewLeaf to a great extent, but even you are trying to fight  
13 with me instead of working with me and instead of understanding  
14 the concerns that passengers have and the rights of passengers  
15 that I have fought for a number of years successfully to get for  
16 passengers in Canada and what, and the problem is that the  
17 way, the way is a kind of byproduct of how you're putting  
18 -- it's your business model, it is actually taking back the  
19 significant achievements that I have already managed to put  
20 in place for passengers who travel with Air Canada and  
21 WestJet.

22 And this is why I'm also trying to talk to you,  
23 Chris. If you can find a reasonable way to ensure that  
24 passengers are as protected as with these airlines, I'm  
25 going to focus simply on the legal challenge because I

1 think there is an issue there, a purely legal question there.

2                 But at that point, it stops being the kind of  
3 immediate emergency that -- of the magnitude that currently  
4 I'm considering getting an injunction from a court to shut  
5 things down because I feel that currently passengers are at  
6 very grave risk and I've told it to counsel for NewLeaf.  
7 I'm being absolutely upfront about it.

8                 And I'm trying to, you know, plead with you to, to  
9 instead -- in many ways it would be terrible for all the  
10 people who got tickets and I really don't want to have to  
11 go there. All I'm trying to tell you is, that those things  
12 and what you have stated earlier as to how people who have  
13 already bought tickets are going to be repatriated, who is  
14 going to pay for their accommodation.

15                 Just think about the following scenario: Someone  
16 from Halifax, my home town, goes to Hamilton and they get  
17 stranded there. Who is, you know, because of the lack of  
18 competition which I think you are 100 per cent right about,  
19 do you know how much Air Canada is going to gouge them to  
20 take them home on a last-minute flight, business class  
21 flight possibly to Halifax? This is my concern. I've seen  
22 it happen. Do you know what happened in the Skygreece case?  
23 Eventually, after I think the Transport Canada was pushing  
24 very hard, Air Canada, they had to lower their fares. But  
25 initially, there were people who paid \$6,000 to get home

1 because they got stranded in God knows -- Europe isn't a  
2 really place where there no carriers there, but they knew  
3 what the situation was and they just charged astronomic  
4 prices and passengers were out of, you know, thousands and  
5 thousands of dollars.

6 And my, my question is here, you know, if this  
7 NewLeaf again went ahead and began to sell tickets based on  
8 what I understand, without having this kind of network of  
9 protection in place, these arrangements that you are  
10 describing there, as I understand, they are not in place.  
11 So you are still talking about discussing it, but the  
12 tickets have already been sold. That is extremely  
13 irresponsible with the public.

14 You know, if you had a kind of plan in place, you  
15 wouldn't have heard all this, you know, you wouldn't have  
16 heard me speaking out so harshly against this because then  
17 I would say, well, maybe it's not by the letter of the law  
18 which a court will have to decide, but it's not like we are  
19 putting people at risk then today. Currently, I'm seeing  
20 an immediate risk because when -- just put yourself in a  
21 place of the passengers. Someone average working class  
22 family, they have a couple of weeks vacation --

23 MR. LAPOINTE: No, Gabor, I get all that. I get  
24 all that. The discussion's really between, you know, us  
25 cooperating with you. I've seen you -- unfortunately, I've

1       a couple of things going on. One is I've seen some of your  
2       stuff in the media and it's, you know, it could be deemed  
3       to be inflammatory and I think you've got a lawsuit now  
4       pending or whatever. You know, that's not a great tactic.  
5       I understand you've --

6                  DR. LUKACS: A lawsuit pending --

7                  MR. LAPOINTE: -- done, you have been compensated  
8       by our competitor, Jetlines. Jetlines has paid you to do  
9       work for them. That's our competitor, right. So right  
10      away you've got a bias potentially, right. So now you're  
11      no longer a clean passenger rights advocate. You've  
12      actually worked for the competition, right, so --

13                 DR. LUKACS: Chris. Chris, I don't know --

14                 MR. LAPOINTE: So the problem is you're not --

15                 DR. LUKACS: Chris, I'm going to stop you there. I  
16      have never been paid a cent by Jetlines nor by anybody  
17      else. If you, you know, I would, I would love if you  
18      showed me a copy of anything of being paid. I volunteer.  
19      I never received a dime from any airline, ever, never.  
20      The, you know, it's just, it's just not something that -- I  
21      don't know where you take that thing from, but it is  
22      simply, you know, you're making it up or if someone told  
23      you that, but it's not the case.

24                 I don't know what lawsuit is pending. I'm not  
25      aware of such a lawsuit and I haven't been served with

1 anything. You know, I, I honestly don't know what, what  
2 you're referring to. And quite frankly, I don't know who  
3 would be suing me and for what. Can you elaborate on  
4 that?

5 MR. LAPOINTE: Well, the bottom line, Gabor, is I  
6 can't, I have no reason to trust you, right. So I have a  
7 relationship with the CTA and I have a relationship with  
8 the Transport Canada. We have our membership and  
9 relationships within ATAC. We have lawyers that advise us  
10 what we should do, just like I'm sure that you have lawyers  
11 that advise you in your passenger rights advocate  
12 activities.

13 And the advice that we're getting and the approach  
14 that we're taking is we're dealing with the recognized  
15 authorities within Canada. We're dealing on our own moral  
16 judgment to do the right thing and that's really the --  
17 that's the best I can do right now. I mean, I don't have,  
18 I don't have the capacity nor the interest at this point in  
19 time in engaging another party into this discussion until  
20 such time as we're ready to do so. It's our business. The  
21 CTA has approved, you know, the governing authority has  
22 approved and allowed us to do what we're doing. No, they  
23 haven't shut anybody down. So we're following the rules of  
24 the land and we're moving forward with our business plan.

25 DR. LUKACS: And the Federal Court of Appeal --

1                   MR. LAPOINTE: So I don't see any reason to  
2 deviate.

3                   DR. LUKACS: And the reason is that the Federal  
4 Court of Appeal says otherwise and whatever approval you  
5 may have from the CTA, that's now in the hands of the  
6 Federal Court of Appeal. You may not be up to speed on  
7 what actually happened. This is why I was referring you to  
8 the June 9th ruling of the Federal Court of Appeal. It's  
9 not the final ruling. It simply was granting leave to  
10 appeal and I was recognized as having a public interest  
11 standing. That's not something to be taken lightly, sir.  
12 So, you know, I --

13                  MR. LAPOINTE: And again, we have our legal  
14 counsel. We have our legal counsel that advise us what to  
15 do and that's what we're acting on, Gabor. It's nothing  
16 personal.

17                  DR. LUKACS: Oh, of course.

18                  MR. LAPOINTE: We are moving forward with our plan  
19 and we're...

20                  DR. LUKACS: I do --

21                  MR. LAPOINTE: I don't know what else there is to  
22 say. Until such time as we get advice to say otherwise and  
23 let's start dealing with any one of a number of passenger  
24 rights advocates, well, then that'll be the tactic that we  
25 take. But as a, you know, we're a private business and we

1 make our decisions accordingly and we seek the best advice  
2 possible and I know at the end of the day, we're moral and  
3 ethical people and we're not in here for a quick rip and to  
4 grab some cash from the general public. That's not what we  
5 want to do and we don't want to be in business with people  
6 that do that either, so we're doing everything we can to  
7 put the proper protections in place while at the same time  
8 maintaining a viable model that can move forward and be  
9 successful.

10 DR. LUKACS: Well, I'm -- the question is not about  
11 the intention, the question is about implementation. This  
12 is why I'm -- that's why I sent you a letter and that's why  
13 I will be sending letters to the others, to seek clear  
14 clarification as to whether Flair will honour the tickets  
15 being sold by NewLeaf if NewLeaf becomes insolvent or goes  
16 out of business otherwise or defaults on its obligations.

17 MR. LAPOINTE: Yeah. You know, I've got a ten  
18 o'clock conference call here in two minutes I've got to  
19 dial into, so I will take a look at the letter. I'll seek  
20 advisement from our legal counsel as to whether we want to  
21 comment on the letter and I'm sure we'll be talking to you  
22 again.

23 DR. LUKACS: All right. Thank you very much, sir.

24 MR. LAPOINTE: Okay, appreciate it. Have a great  
25 day. Thanks.

19

1 DR. LUKACS: You too, bye.

2

3 WE HEREBY CERTIFY THAT the foregoing was  
4 transcribed to the best of our skill and ability,  
5 from a recording provided to Gillespie Reporting  
6 Services.

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Court File No.: A-242-16

**FEDERAL COURT OF APPEAL**

BETWEEN:

**DR. GÁBOR LUKÁCS**

Appellant

– and –

**CANADIAN TRANSPORTATION AGENCY and  
NEWLEAF TRAVEL COMPANY INC.**

Respondents

**WRITTEN REPRESENTATIONS OF THE APPELLANT**

**OVERVIEW**

1. The present motion seeks to move along the July 21, 2016 motion for various interim reliefs pending determination of the underlying appeal. Broadly speaking, the present motion concerns:

- (a) the transcript of the August 25, 2016 cross-examination of Lukács, which NewLeaf has yet to provide;
- (b) the refusals of Mr. William F. Clark and Mr. Donald James Young, the affiants of NewLeaf, to answer questions and/or produce documents as directed;
- (c) leave for Lukács to file a supplementary affidavit in support of the July 21, 2016 motion; and
- (d) setting a schedule for the outstanding steps in the July 21, 2016 motion.

## PART I – STATEMENT OF FACTS

### A. THE PRESENT APPEAL (MAIN PROCEEDING)

2. An Indirect Air Service Provider [IASP or reseller] is a person who has commercial control over an air service and makes decisions on matters such as routes, scheduling, and pricing, but performs the transportation of passengers with aircraft and flight crew rented from another person.
3. On March 29, 2016, in Decision No. 100-A-2016 [Decision Under Appeal], the Canadian Transportation Agency [Agency] determined that:
  - (1) IASPs of domestic air service are no longer required to hold licences under the *Canada Transportation Act*, S.C. 1996, c. 10 [the *CTA*], so long as they do not hold themselves out as an air carrier operating an air service; and
  - (2) NewLeaf Travel Company Inc. [NewLeaf], being an IASP, is therefore not required to hold a licence.
4. On June 9, 2016, this Honourable Court granted Lukács leave to appeal the Decision Under Appeal, and recognized Lukács as having both private and public interest standing.

*Lukács v. Canada (CTA), 2016 FCA 174,  
paras. 4 and 6*
5. On June 28, 2016, a Notice of Appeal has been filed. Subsequently, the appeal has been perfected, a requisition for hearing has been filed on August 16, 2016, and the appeal is now awaiting hearing.

*Lukács Affidavit, para. 5*

**Tab 2B, p. 20**

**Tab 2, p. 12**

**B. THE PENDING MOTION FOR INTERIM RELIEF**

6. On July 21, 2016, Lukács brought a motion for an interlocutory relief, pending disposition of the appeal, for an order:

- (a) staying the decision of the Canadian Transportation Agency dated March 29, 2016 and bearing Decision No. 100-A-2016; and
- (b) enjoining NewLeaf Travel Company Inc. from operating as an Indirect Air Service Provider [IASP or reseller], unless it posts a performance bond and/or security and/or guarantee in the amount of \$3,744,000 for the claims of stranded passengers.

**Lukács Affidavit, Exhibit “D”**

**Tab 2D, p. 36**

7. The overarching concern in the motion for interim relief is that NewLeaf does not hold a domestic licence, is not properly capitalized, and does not have the financial fitness that holders of domestic licences are required to have by law. Consequently, NewLeaf will strand thousands of passengers if it becomes insolvent and/or otherwise defaults on its obligations.

8. The aforementioned financial fitness requirements are set out in subsection 8.1(2) of the *Air Transportation Regulations* [the *ATR*], promulgated pursuant to s. 61(a)(iv) of the *CTA*. It requires an applicant for a domestic licence to have sufficient funds for the cost of operating the air service for 90 days, even without any revenue. Moreover, s. 8.1(2)(vi) of the *ATR* provides that 50% of the required capital must be locked in for a period of at least one year.

***Air Transportation Regulations*, s. 8.1(2)**

**Tab 4, p. 231**

9. It is undisputed that in January 2016, NewLeaf began selling tickets to the public for travel by air within Canada, but had only \$250,000 in secured capital (less than 1% of what is reasonably required). It is also undisputed that 12 days later, NewLeaf suspended sales and cancelled tickets already sold.

**July 21, 2016 Affidavit of Lukács, paras. 23-24 & 33  
pp. 17 & 19 of the July 21, 2016 Motion Record**

10. The motion for interim relief relates to NewLeaf's second attempt to launch, in June 2016. In opposition to the motion of Lukács for interim relief, NewLeaf tendered the affidavits of Mr. William F. Clark and Mr. Donald James Young, sworn on July 23, 2016.

**Lukács Affidavit, Exhibits "E" and "G"**                   **Tabs 2E & 2G, pp. 47 & 56**

11. The core areas of factual dispute between the parties are:

- (i) the existence and/or sufficiency of arrangements to repatriate stranded passengers in the event that NewLeaf ceases operations;
- (ii) the capitalization and/or financial stability of NewLeaf;
- (iii) the existence and quantum of damages, including lost profits, in the event that the sought order is granted; and
- (iv) the credibility of the evidence of Mr. Clark and Mr. Young.

12. On July 24, 2016, this Honourable Court directed that certain portions of the affidavit of Mr. Young be treated confidentially. (Only a redacted copy of the affidavit has been included in the present motion record, and all references to actual figures are omitted throughout.)

**Lukács Affidavit, Exhibit "F"**

**Tab 2F, p. 53**

13. On July 29, 2016, this Honourable Court directed that Lukács be cross-examined in Halifax between August 24 and 26, 2016, and that Mr. Young and Mr. Clark be cross-examined in writing.

**Lukács Affidavit, Exhibit "H"**

**Tab 2H, p. 69**

**(i) Transcript of cross-examination was not provided**

14. On August 25, 2016, NewLeaf conducted a cross-examination of Lukács on his July 21, 2016 affidavit, but has not provided him with a copy of the transcript.

**Lukács Affidavit, paras. 11-12**

**Tab 2, p. 13**

**(ii) Refusals on the cross-examination of Mr. Clark and Mr. Young**

15. Lukács cross-examined Mr. Clark and Mr. Young in writing, as directed by the Court. Certain answers to the examination in writing were received on September 9, 2016, but Mr. Young refused to answer the vast majority of the questions and neither affiants produced any documents as directed.

**Lukács Affidavit, Exhibits "K" and "L"**

**Tabs 2K & 2L, pp. 137 & 144**

16. On September 16, 2016, Lukács wrote to counsel for NewLeaf and requested that the affiants provide full and complete answers and productions in response to the written examination by September 23, 2016, but Lukács received no response.

**Lukács Affidavit, Exhibit "M" and para. 18**

**Tab 2M, pp. 170 & 14**

(iii) The July 8, 2016 telephone call with Mr. Chris Lapointe

17. NewLeaf's business model involves renting aircraft and crew from Flair Airlines Ltd. [Flair] to transport passengers by air, but NewLeaf bears the full financial risk and liability to passengers, as Flair has no contractual relationship with NewLeaf's passengers. Thus, if NewLeaf becomes insolvent or defaults on its obligation to Flair, passengers have no enforceable rights against Flair.

18. In response to these concerns, Mr. Young stated at paragraph 24 of his affidavit that:

24. NewLeaf has [...] in an escrow account with Flair to confirm that NewLeaf will pay any of its payments under the ACMI and MOU agreements with Flair, to be utilized by Flair, if it is called upon to repatriate passengers.

Similarly, Mr. Clark stated at paragraph 10 of his affidavit that:

10. The contractual arrangement between NewLeaf and Flair for the repatriation of passengers at destination upon a financial failure by NewLeaf, places the obligation on Flair.

**Lukács Affidavit, Exhibits "G" and "E"                  Tabs 2G & 2E, pp. 56 & 47**

19. On cross-examination, however, Mr. Young refused to produce the contractual agreement(s) between NewLeaf and Flair (question 45), and Mr. Clark stated in response to question 11 that:

The Affiant's statement incorrectly utilized the verbiage referring to a "contractual arrangement" in reference to the understanding of both NewLeaf and Flair Airlines Ltd. in respect of their obligations. Each party has been advised by the Affiant of the CTA "legal position" further detailed in the answer to question #8 above. Based on that advice, Flair again accepted the repatriation obligation for NewLeaf passengers that it had accepted previously in 2009.

**Lukács Affidavit, Exhibits "L" and "K"                  Tabs 2L & 2K, pp. 144 & 137**

20. In light of this substantial change and/or contradiction in the evidence of NewLeaf as to the arrangements between itself and Flair, Lukács is seeking leave to adduce as evidence the transcript of the recording of his July 8, 2016 telephone conversation with Mr. Chris Lapointe, the Vice-President Commercial Operations for Flair Airlines Ltd. Mr. Lapointe stated with respect to Flair's willingness to assume the financial risk for repatriating passengers that:

No, we're not. We're not. I'm not - no, no, we're not.  
We don't - it's not built into our financial model,  
Gabor.

Mr. Lapointe explained that Flair spent a quarter-million dollars to repatriate some passengers in 2009, but that with NewLeaf it would be different:

Now, in this case here, I'm not saying - this is a much different situation. It'll be millions of dollars to repatriate these people or whatever the word is to get them back home again. So I'm not saying that - we don't have it in our financial model with NewLeaf to fund it.

**Lukács Affidavit, Exhibit "N"**

**Tab 2N, p. 175**

21. At the time of the filing of the July 21, 2016 motion, Lukács was not aware of the significance of his conversation with Mr. Lapointe, which appeared to merely confirm the lack of obligation on the part of Flair to passengers, stated in the July 6, 2016 email of Mr. Jim Rogers, the President of Flair Airlines Ltd. The latter was marked as Exhibit "X" to the July 21, 2016 affidavit of Lukács.

**Lukács Affidavit, para. 20**

**Tab 2, p. 15**

22. Lukács realized the significance of his conversation with Mr. Lapointe only after he read the answer of Mr. Clark to question 11 and the refusal of Mr. Young to produce the agreement(s) referenced at para. 24 of his affidavit.

**Lukács Affidavit, para. 22**

**Tab 2, p. 15**

**PART II – STATEMENT OF THE POINTS IN ISSUE**

23. The issues to be resolved on this motion are:
- (a) whether NewLeaf should be directed to send Dr. Lukács a copy of the transcript of the August 25, 2016 cross-examination;
  - (b) whether paragraph 9 of the affidavit of Mr. Clark and the answers of Mr. Clark to questions 8-9 to the written examination should be struck out, or alternatively, whether Mr. Clark should be directed to respond to question 9(a) and produce documents as directed in question 9(d);
  - (c) whether Dr. Lukács should be granted leave to file a supplementary affidavit for the July 21, 2016 motion for the purpose of adducing as evidence the transcript of the July 8, 2016 telephone conversation shown at **Tab 2N**;
  - (d) whether Mr. Donald James Young should be directed to produce documents and properly answer questions; and
  - (e) the schedule for the remaining steps in the July 21, 2016 motion.

### PART III – STATEMENT OF SUBMISSIONS

#### A. TRANSCRIPT OF THE AUGUST 25, 2016 CROSS-EXAMINATION

24. Rule 86 requires a party who conducts a cross-examination on an affidavit to order and pay for a transcript and to send a copy to each party.

*Federal Courts Rules, Rule 86*

Tab 8, p. 250

25. On August 25, 2016, NewLeaf conducted a cross-examination of Lukács on his July 21, 2016 affidavit, but did not provide him with a copy of the transcript.

*Lukács Affidavit, paras. 11-12*

Tab 2, p. 13

26. Lukács is therefore asking the Honourable Court to order NewLeaf to comply with Rule 86 and provide him with a copy of the transcript.

#### B. THE AFFIDAVIT OF MR. CLARK

27. Affidavits filed in relation to a motion must be confined to facts; argumentative materials or legal conclusions are not permitted. Tendentious, opinionated, or argumentative portions of affidavits may be struck.

*Federal Courts Rules, Rule 81(1)*

Tab 8, p. 249

*Canadian Tire Corporation v. Canadian Bicycle Manufacturers Association, 2006 FCA 56,*  
paras. 9-10

Tab 9, p. 261

28. While paragraph 9 of the affidavit of Mr. Clark creates the impression that it states facts, the answers of Mr. Clark on cross-examination to questions 8-9 confirm that these statements refer to the state of the law or the understanding of the law by the Canadian Transportation Agency.

*Answers to Written Examination (Clark),  
being Exhibit “K” to the Lukács Affidavit*

Tab 2K, p. 137

29. It is submitted that legal obligations of air carriers under the *Canada Transportation Act* or the *Air Transportation Regulations* are questions of law that the Federal Court of Appeal is competent to resolve. Thus, such questions are to be addressed in NewLeaf's arguments, and not in its evidence.

30. Therefore, the content of paragraph 9 of Mr. Clark's affidavit and his answers to questions 8-9 are inadmissible arguments, and as such ought to be struck.

31. In the alternative, if paragraph 9 of Mr. Clark's affidavit is not struck, then it is submitted that Mr. Clark should be required:

- (a) to answer question 9(a) in full, and provide the file numbers of the cases where the Canadian Transportation Agency allegedly "threatened" air carriers; and
- (b) to produce copies of correspondence in which the Canadian Transportation Agency allegedly "threatened" air carriers, as directed in question 9(d).

It is submitted that the answer and the productions are relevant and necessary for testing Mr. Clark's unsubstantiated and dubious statement that the Canadian Transportation Agency regularly "threatens" air carriers.

32. Mr. Clark failed to answer question 9(a) fully and ignored the request for production set out in question 9(d), but neither he nor NewLeaf objected to the question or the production.

**C. LEAVE TO FILE A SUPPLEMENTARY AFFIDAVIT**

33. Lukács is seeking leave, pursuant to Rule 84(2), to file a supplementary affidavit in support of his July 21, 2016 motion for the purpose of adducing as evidence the transcript of the July 8, 2016 telephone conversation with Mr. Lapointe, shown at **Tab 2N**, for the following reasons.

*Federal Courts Rules, Rule 84(2)*

**Tab 8, p. 250**

34. The supplementary affidavit is relevant, because it demonstrates that Flair neither accepted nor was financially able to accept the “repatriation obligation for NewLeaf passengers” referenced in Mr. Clark’s answer to question 11. Indeed, Mr. Lapointe stated with respect to Flair’s willingness to assume the financial risk for repatriating passengers that:

No, we’re not. We’re not. I’m not – no, no, we’re not.  
We don’t – it’s not built into our financial model,  
Gabor.

Mr. Lapointe explained that Flair spent a quarter-million dollars to repatriate some passengers in 2009, but that with NewLeaf it would be different:

Now, in this case here, I’m not saying – this is a much different situation. It’ll be millions of dollars to repatriate these people or whatever the word is to get them back home again. So I’m not saying that – we don’t have it in our financial model with NewLeaf to fund it.

**Lukács Affidavit, Exhibit “N”**

**Tab 2N, p. 175**

35. Lukács became aware of the significance of his telephone conversation with Mr. Lapointe only after the cross-examination of Mr. Young and Mr. Clark. Up until that time he was under the impression that the conversation merely confirmed what was stated in the July 6, 2016 email of Mr. Jim Rogers, the

President of Flair Airlines Ltd., which was adduced as Exhibit "X" to the July 21, 2016 affidavit of Lukács:

Flair is supplying aircraft and operating under a ACMI agreement with New Leaf. The contract with the passenger is with New Leaf and they have a passenger protection plan in place [...]

[Emphasis added.]

**July 21, 2016 Affidavit of Lukács, Exhibit "X"**  
**p. 227 of the July 21, 2016 Motion Record**

**Lukács Affidavit, paras. 20-22**

**Tab 2, p. 15**

36. The transcript of the telephone conversation between Dr. Lukács and Mr. Lapointe is admissible, because the recording was lawful: Lukács was recording a conversation to which he was a party, and as such he consented to the recording.

*Criminal Code, ss. 183.1 and 184(2)(a)*

**Tab 7, pp. 245-246**

*R. v. Goldman, p. 18*

**Tab 11, p. 293**

37. NewLeaf is not prejudiced by the proposed supplementary affidavit.

38. It is in the interest of justice to grant Lukács leave to file the supplementary affidavit with the transcript of the conversation with Mr. Lapointe, because it is capable of demonstrating that Mr. Clark's sworn statements with respect to the arrangements between NewLeaf and Flair are untrue.

**D. REFUSALS OF MR. YOUNG**

39. Broadly speaking, Mr. Young refused to answer questions and produce documents based on the following grounds:

(a) Confidentiality, which is not a proper ground for objection given that Mr. Young chose to include confidential information in his affidavit. It is submitted that the proper avenue for raising such concerns is under Rules 151-152, which allow this Honourable Court to exercise its remedial flexibility and decide who may have access to confidential information.

*Lukács v. Canadian Transportation Agency,*  
2016 FCA 103, para. 16

Tab 10, p. 271

(b) Some vexatious, frivolous, and scandalous allegations as to “a competitor is an undisclosed party assisting the Appellant in these proceedings.” These allegations are a reprehensible attempt to smear the reputation of Lukács. In light of the track record of Lukács for the past eight (8) years, both before this Honourable Court and before the Canadian Transportation Agency, it is submitted that such allegations should be given no weight, and should be taken into account in awarding costs against NewLeaf.

(c) Lack of relevance, which will be addressed below based on the four core area that have been identified in paragraph 11 on page 198.

**(i) Arrangements for repatriation of stranded passengers**

40. Mr. Young stated at paragraph 24 of his affidavit that:

24. NewLeaf has [...] in an escrow account with Flair to confirm that NewLeaf will pay any of its payments under the ACMI and

MOU agreements with Flair, to be utilized by Flair, if it is called upon to repatriate passengers.

**Lukács Affidavit, Exhibit "G"**

**Tab 2G, p. 56**

41. Mr. Young refused to disclose documents requested in question 45, which were: the ACMI agreement(s); the MOU agreement(s); and the escrow agreement(s) referenced in paragraphs 24 (and 13) of his affidavit.

**Lukács Affidavit, Exhibit "L"**

**Tab 2L, p. 144**

42. These documents are relevant and should be produced, because they are the only reliable method for verifying the truth of Mr. Young's statement at paragraph 24, which has been contradicted by the statement of Mr. Lapointe:

Now, in this case here, I'm not saying - this is a much different situation. It'll be millions of dollars to repatriate these people or whatever the word is to get them back home again. So I'm not saying that - we don't have it in our financial model with NewLeaf to fund it.

**Lukács Affidavit, Exhibit "N"**

**Tab 2N, p. 175**

43. Mr. Young also refused to answer question 61, which reads as follows:

61. How many passengers can be "repatriated" from the amount held in an "escrow account" referenced in paragraph 24 of your affidavit?

Please explain the calculations that were used to establish the sufficiency of the amount in question.

This question is relevant, because it is directed at the main and overarching concern on the July 21, 2016 motion, namely, the existence and sufficiency of arrangements for repatriation of passengers in the event of insolvency or default.

(ii) NewLeaf's capitalization and financial stability

44. Mr. Young stated at paragraph 22 of his affidavit that:

22. I was told by the investors who provided the primary funding that they have funds of up to [...] of additional capital available to NewLeaf if required to protect their investment.

**Lukács Affidavit, Exhibit "G"**

**Tab 2G, p. 56**

45. Mr. Young refused to answer question 57, which was asking about the identity of the investors referenced at paragraph 22 of his affidavit.

**Lukács Affidavit, Exhibit "L"**

**Tab 2L, p. 144**

46. Question 57 is relevant and should be answered, because Rule 81(1) requires a deponent to state the source of his belief. Anonymous or unidentified sources are not permitted under Rule 81(1).

**Federal Courts Rules, Rule 81(1)**

**Tab 8, p. 249**

47. Mr. Young also refused to answer questions 3-4, relating to whether the investors referenced at paragraph 22 of his affidavit would be able and willing to post the performance bond and/or security and/or guarantee being sought on the July 21, 2016 motion.

**Lukács Affidavit, Exhibit "L"**

**Tab 2L, p. 144**

48. Questions 3-4 are relevant and should be answered, because they speak to the credibility of paragraph 22 of Mr. Young's affidavit. Indeed, investors who are willing to provide additional capital in that amount and who genuinely believe in the success of NewLeaf would surely not hesitate to post a bond or security for a fraction of that amount.

49. Mr. Young stated at paragraph 21 of his affidavit that:

As of this date, NewLeaf has investors who have committed [...] of immediate cash, which is held in trust, and an additional [...] for the next four or five months as needed and upon approval of the board of directors for expenditures.

**Lukács Affidavit, Exhibit “G”**

**Tab 2G, p. 56**

50. Mr. Young refused to answer questions 54, about the identity of the investors and the amounts they have invested, and question 55, about the portion of the amount stated in paragraph 21 of his affidavit that is unencumbered. He also refused to produce documents as directed in question 56, relating to paragraph 21 of his affidavit.

**Lukács Affidavit, Exhibit “L”**

**Tab 2L, p. 144**

51. Questions and productions 54-56 are relevant and should be answered, because they speak directly to the truth of the statement of Mr. Young as to NewLeaf’s capitalization. It is submitted that given the magnitude of the amounts involved, the potential significant harm to the travelling public, and the undisputed fact that NewLeaf had only \$250,000 in secured capital at the time of its first launch, Mr. Young should not be permitted to make bald allegations about the capitalization of NewLeaf without providing some documents to support his statements.

**July 21, 2016 Affidavit of Lukács, para. 33  
p. 19 of the July 21, 2016 Motion Record**

52. Mr. Young also refused to answer question 58, relating to what portion of the investment in NewLeaf is “locked in” and for how long.

**Lukács Affidavit, Exhibit “L”**

**Tab 2L, p. 144**

53. Question 58 is relevant and should be answered, because it will allow this Honourable Court to compare the capitalization of NewLeaf with the financial fitness standards that are set out in s. 8.1(2)(vi) of the *ATR*.

*Air Transportation Regulations*, s. 8.1(2)(vi)

Tab 4, p. 231

54. Mr. Young also refused to answer questions 65 and 66, relating to the reserves of NewLeaf Travel Company Inc.

**Lukács Affidavit, Exhibit "L"**

Tab 2L, p. 144

55. Questions 65-66 are relevant and should be answered, because they are capable of showing that NewLeaf Travel does not have the reserves that would reasonably be necessary for conducting its business. NewLeaf Airways, a company affiliated with NewLeaf Travel, which was planning to use the same business model, budgeted \$9,413,000 as a "4 Months Operational Reserve."

**July 21, 2016 Affidavit of Lukács, Exhibit "E",  
page 73 of the July 21, 2016 Motion Record**

**(iii) Damages to NewLeaf if the sought order is granted**

56. The issue of what damages, if any, NewLeaf will suffer if the sought order is granted is undoubtedly a central consideration relating to the balance of convenience with respect to the July 21, 2016 motion.

57. On cross-examination Mr. Young was asked the following question:

1. Is NewLeaf Travel Company Inc. financially able to post a performance bond and/or security and/or guarantee in the amount of \$3,744,000?

If not, what is the largest amount of performance bond and/or security and/or guarantee that NewLeaf Travel Company Inc. is capable of posting?

Mr. Young provided the following answer:

A performance bond and/or security and/or guarantee is not necessary.

**Lukács Affidavit, Exhibit "L"**

**Tab 2L, p. 144**

58. It is submitted that the answer of Mr. Young is evasive and fails to answer the question asked. The question was not asking about the deponent's personal opinion as to how this Honourable Court should decide the July 21, 2016 motion, but rather about the financial capabilities of NewLeaf.

59. Question 1 is relevant and should be answered, because the relief being sought on the July 21, 2016 motion does not seek to shut down NewLeaf if it posts a performance bond and/or security and/or guarantee. Consequently, if the relief sought is granted, NewLeaf will not have any substantial damages that it claims; rather, it could post the security and could operate pending disposition of the appeal.

60. Even if NewLeaf were to cease operations as a result of the order being granted, it is far from clear that NewLeaf would lose any profits, because:

$$\text{profit} = \text{net revenue} - \text{costs}.$$

In order to estimate profits, it is necessary to examine both NewLeaf's net revenues and its costs.

61. Mr. Young refused to answer questions 46-48, seeking to distinguish NewLeaf's "gross receipts" (which includes taxes and third party charges, such as airport improvement fees) from NewLeaf's net revenue, that is, the portion of the gross receipts that is not collected on behalf of a third party. Mr. Young also

refused to answer questions 50-52 and 64, seeking to establish the operational costs of NewLeaf.

**Lukács Affidavit, Exhibit “L”**

**Tab 2L, p. 144**

62. Questions 46-48, 50-52, and 64 are relevant and should be answered, because they are necessary for determining whether NewLeaf would lose any profits if it were required to cease operations.

63. Mr. Young also refused to answer question 123, which reads as follows:

123. In reference to Exhibit “AB” to the Lukács Affidavit on page 238 of the motion record, is it true that NewLeaf Travel Company Inc. “has a backup plan” in the event that it is required to hold a licence to operate?

If so, what is the “backup plan”?

**Lukács Affidavit, Exhibit “L”**

**Tab 2L, p. 144**

64. Question 123 is relevant and should be answered, because it is capable of demonstrating that NewLeaf will not suffer damages or will not suffer as extensive damages as it claims, in the event that the order sought is granted.

**(iv) Mr. Young’s credibility and expertise**

65. Mr. Young refused to answer questions 6-7, relating to his address in Winnipeg and the time that this information was updated on the corporation registration of NewLeaf.

**Lukács Affidavit, Exhibit “L”**

**Tab 2L, p. 144**

66. Questions 6-7 are relevant and should be answered, because they seek to resolve the contradiction between Mr. Young’s sworn statement that he is

“of the City of Winnipeg, in the Province of Manitoba,” and the address in Nanaimo, British Columbia shown on the corporate registration of NewLeaf, which Mr. Young acknowledged to be accurate (answer to question 5). Since both NewLeaf and Mr. Young personally have a statutory obligation under s. 113 of the *Canada Business Corporations Act* to update Mr. Young’s address within 15 days, this contradiction speaks to the credibility of Mr. Young as a witness.

**Lukács Affidavit, Exhibit “L”**

**Tab 2L, p. 144**

***Canada Business Corporations Act, s. 113***

**Tab 5, p. 233**

67. Mr. Young also refused to answer questions 10-15, relating to his past experience at Canada Jetlines Ltd., including the circumstances leading to his sudden departure from the position of president for that company.

**Lukács Affidavit, Exhibit “L”**

**Tab 2L, p. 144**

68. Questions 10 and 12-15 are relevant and should be answered, because they speak to Mr. Young’s experience and expertise referenced at paragraph 2 of his affidavit, and in particular, his understanding of corporate management and finances, which is the subject matter of a substantial portion of his affidavit. As such, these answers speak to the reliability of Mr. Young’s evidence with respect to NewLeaf’s finances.

69. Question 11 is relevant and should be answered, because it relates to the same concern of Mr. Young not being forthright with respect to his address, as raised in questions 6-7.

70. Mr. Young stated in paragraphs 35-36 of his affidavit that:

35. The accounts referred to by the Appellant are accounts incurred by 1919183 Ontario Ltd. 1919183 Ontario Ltd. tried to

work with both Ms. Hessie Jones and Mr. Norm LeCavalier while doing a separate business of Ski Charter Flights specific to recreational travelers.

36. The 1919183 Ontario Ltd. accounts have been discussed with each of the individuals claiming failed payment. In both cases, the amount of the accounts, the specific alleged work performed and quality of work performed are disputed. The failure to provide adequate services in a timely manner and adequate manner cost significant business losses to 1919183 Ontario Ltd. A claim by Ms. Jones has been filed in the Ontario Courts and a defence and a counterclaim will be filed as part of that process.

**Lukács Affidavit, Exhibit “G”**

**Tab 2G, p. 56**

71. Mr. Young refused to answer questions 69-92 and 93-122 relating to these statements of his, which are difficult if not impossible to reconcile with the documentary evidence, as explained below.

**Lukács Affidavit, Exhibit “L”**

**Tab 2L, p. 144**

72. Although Mr. Young’s affidavit indicates deep dissatisfaction with the services of Mr. LeCavalier, he wrote to Mr. LeCavalier on January 24, 2016 that:

[...] you has always been and continue to be a valuable member of this venture. I know I disclose more information to the two of you than I do to any other stakeholder group (including YWG!) But I trust you both implicitly and value your counsel, the support, time and effort you have both put into this from the start.

**July 21, 2016 Affidavit of Lukács, Exhibit “R”**  
**p. 173 of the July 21, 2016 Motion Record**

73. Mr. Young’s affidavit indicates some kind of a dispute relating to amounts owed to Mr. LeCavalier, yet he wrote to Mr. LeCavalier on February 5, 2016 that:

My intention is to pay you once we have closed on the capital.

**Exhibit “5” to the Written Examination of Mr.  
Young being Exhibit “J” to the Lukács Affidavit**

**Tab 2J, p. 108**

74. Similarly, although Mr. Young's affidavit refers to disputes relating to amounts owed to ArCompany, the email exchange between Ms. Hessie Jones, the CEO of ArCompany, and Mr. Robert Jones, a director of both NewLeaf Travel and NewLeaf Airways, shows the contrary:

As I have told you repeatedly, Brian is managing the payment activity and he fully intends to complete the payment, but money has to flow in first, before it can flow out. And I frequently remind him and he acknowledges the intent to finish the transaction when able.

**Exhibit “11” to the Written Examination of Mr. Young being Exhibit “J” to the Lukács Affidavit**

**Tab 2J, p. 128**

75. Questions 69-92 and 93-122 are relevant to the credibility of Mr. Young and should be answered, because they are capable of demonstrating that he knowingly misstated the facts in paragraphs 35-36 of his affidavit. These questions will also provide Mr. Young with a fair opportunity to explain the apparent contradictions between his statements and the documentary evidence.

#### **E. SCHEDULE FOR REMAINING STEPS IN THE JULY 21, 2016 MOTION**

76. Lukács is asking the Honourable Court to set a schedule for the following steps that are outstanding in relation to the July 21, 2016 motion:

- (a) filing of cross-examination transcript and/or answers to examination in writing;
- (b) filing and service of NewLeaf's memorandum in response to the July 21, 2016 motion;
- (c) filing and service of the reply of Lukács in relation to the July 21, 2016 motion.

77. Due to the volume of the evidence, Lukács is asking to be allowed 15 days from the service of NewLeaf's responding memorandum to file his reply.

#### **F. Costs**

78. Lukács is asking that this Honourable Court award him costs and/or reasonable out-of-pocket expenses on this motion in any event of the cause, because of the conduct of NewLeaf, which has been substantially delaying the determination of the July 21, 2016 motion.

#### PART IV – ORDER SOUGHT

79. The Appellant, Dr. Gábor Lukács, is seeking an Order:
- (a) directing NewLeaf Travel Company Inc. to send Dr. Lukács a copy of the transcript of the August 25, 2016 cross-examination;
  - (b) striking out paragraph 9 of the affidavit of Mr. William F. Clark and the answers of Mr. Clark to questions 8-9 on the written examination, or alternatively directing Mr. William F. Clark to respond to question 9(a) by stating the file numbers in question, and to produce documents as directed in question 9(d) in the written examination;
  - (c) granting Dr. Lukács leave to file a supplementary affidavit for the July 21, 2016 motion for the purpose of adducing as evidence the transcript of the July 8, 2016 telephone conversation shown at **Tab 2N**;
  - (d) directing Mr. Donald James Young to produce documents and properly answer:
    - (i) questions 45 and 61;
    - (ii) questions 3-4, 54-58, and 65-66;
    - (iii) questions 1, 46-48, 50-52, 63, and 123; and
    - (iv) questions 6-7, 10-15, 69-92, and 93-122;
  - (e) setting a schedule for the remaining steps in the July 21, 2016 motion, and permitting Dr. Lukács 15 days from the receipt of NewLeaf's memorandum to serve and file his reply in respect of that motion;
  - (f) costs and/or reasonable out-of-pocket expenses of this motion in any event of the cause; and

(g) granting such further relief as this Honourable Court may deem just.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

September 30, 2016

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**DR. GÁBOR LUKÁCS**

Halifax, NS

*lukacs@AirPassengerRights.ca*

**Appellant**

## PART V – LIST OF AUTHORITIES

### STATUTES AND REGULATIONS

*Air Transportation Regulations*, S.O.R./88-58,  
ss. 2 and 8.1

*Canada Business Corporations Act*, R.S.C., 1985, c. C-44

*Canada Transportation Act*, S.C. 1996, c. 10,  
ss. 41, 53, 55, and 57-61

*Criminal Code*, R.S.C. 1985, c. C-46,  
ss. 183.1 and 184(2)(a)

*Federal Courts Rules*, S.O.R./98-106,  
Rules 81, 84, 86, 94, 97, 100, and 369

### CASE LAW

*Canadian Tire Corporation v. Canadian Bicycle Manufacturers Association*, 2006 FCA 56

*Lukács v. Canadian Transportation Agency*, 2016 FCA 103

*R. v. Goldman*, [1980] 1 S.C.R. 976

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CANADA

CONSOLIDATION

CODIFICATION

**Air Transportation Regulations****Règlement sur les transports  
aériens**

SOR/88-58

DORS/88-58

Current to February 15, 2016

À jour au 15 février 2016

Last amended on December 14, 2012

Dernière modification le 14 décembre 2012

## Regulations Respecting Air Transportation

### Short Title

**1** These Regulations may be cited as the *Air Transportation Regulations*.

### Interpretation

**2** In these Regulations and Part II of the Act,

**ABC/ITC** means a passenger charter flight on which both advance booking passengers and inclusive tour participants are carried and that is operated pursuant to Division IV of Part III; (*VARA/VAFO*)

**ABC/ITC (domestic)** [Repealed, SOR/96-335, s. 1]

**accommodation** means sleeping facilities provided on a commercial basis to the general public; (*logement*)

**Act** means the *Canada Transportation Act*; (*Loi*)

**advance booking charter** or **ABC** means a round-trip passenger flight originating in Canada that is operated according to the conditions of a contract entered into between one or two air carriers and one or more charterers that requires the charterer or charterers to charter the entire passenger seating capacity of an aircraft for resale by them to the public, at a price per seat, not later than a specified number of days prior to the date of departure of the flight from its origin in Canada; (*vol affréte avec réservation anticipée ou VARA*)

**advance booking charter (domestic)** or **ABC (domestic)** [Repealed, SOR/96-335, s. 1]

**air carrier** means any person who operates a domestic service or an international service; (*transporteur aérien*)

**air crew** means the flight crew and one or more persons who, under the authority of an air carrier, perform in-flight duties in the passenger cabin of an aircraft of the air carrier; (*personnel d'aéronef*)

**aircrew** [Repealed, SOR/96-335, s. 1]

**all-cargo aircraft** means an aircraft that is equipped for the carriage of goods only; (*aéronef tout-cargo*)

**back-to-back flights** [Repealed, SOR/96-335, s. 1]

## Règlement concernant les transports aériens

### Titre abrégé

**1** *Règlement sur les transports aériens.*

### Définitions

**2** Les définitions qui suivent s'appliquent au présent règlement et à la partie II de la Loi.

**aéronef moyen** Aéronef équipé pour le transport de passagers et ayant une capacité maximale certifiée de plus de 39 passagers sans dépasser 89 passagers. (*medium aircraft*)

**aéronef tout-cargo** Aéronef équipé exclusivement pour le transport de marchandises. (*all-cargo aircraft*)

**affréteur des États-Unis** Personne qui a pris des arrangements avec le transporteur aérien afin d'offrir des vols affrétés en provenance des États-Unis. (*United States charterer*)

**autorisation** [Abrogée, DORS/96-335, art. 1(F)]

**base** [Abrogée, DORS/96-335, art. 1]

**bureau** Est assimilé à un bureau du transporteur aérien tout endroit au Canada où celui-ci reçoit des marchandises en vue de leur transport ou met en vente des billets de passagers. La présente définition exclut les bureaux d'agents de voyages. (*business office*)

**capacité maximale certifiée** Selon le cas :

**a)** le nombre maximum de passagers précisé sur la fiche de données d'homologation de type ou la fiche de données de certificat de type délivrée ou acceptée pour les type et modèle d'aéronef par l'autorité compétente canadienne,

**b)** pour un aéronef ayant été modifié pour recevoir un plus grand nombre de passagers, le nombre maximum de passagers précisé sur l'homologation de type supplémentaire ou le certificat de type supplémentaire délivré ou accepté par l'autorité compétente canadienne. (*certified maximum carrying capacity*)

**cinquième liberté** Privilège d'un transporteur aérien non canadien qui effectue un vol affrété d'embarquer ou

**base** [Repealed, SOR/96-335, s. 1]

**business office**, with respect to an air carrier, includes any place in Canada where the air carrier receives goods for transportation or offers passenger tickets for sale, but does not include an office of a travel agent; (*bureau*)

**Canadian charter carrier licensee** means a person who is a Canadian and holds a non-scheduled international licence that is valid for charters; (*transporteur fréteur licencié du Canada*)

**certificated maximum carrying capacity** means

(a) the maximum number of passengers specified in the Type Approval Data Sheet or the Type Certificate Data Sheet issued or accepted by the competent Canadian authority for the aircraft type and model, or

(b) in respect of a particular aircraft that has been modified to allow a higher number of passengers, the maximum number of passengers specified in the Supplemental Type Approval or the Supplemental Type Certificate issued or accepted by the competent Canadian authority; (*capacité maximale certifiée*)

**common purpose charter** or **CPC** means a round-trip passenger flight originating in Canada that is operated according to the conditions of a contract entered into between one or two air carriers and one or more charterers that requires the charterer or charterers to charter the entire passenger seating capacity of an aircraft to provide transportation at a price per seat to passengers

(a) travelling to and from a CPC event, or

(b) participating in a CPC educational program; (*vol affréter à but commun ou VABC*)

**common purpose charter (domestic)** or **CPC (domestic)** [Repealed, SOR/96-335, s. 1]

**courier service** means an enterprise engaged in the door-to-door transportation of consignments for overnight or earlier delivery; (*service de messageries*)

**CPC educational program** means a program for educational purposes organized for the exclusive benefit of full-time elementary or secondary school students, or both; (*programme éducatif VABC*)

**CPC event** means a presentation, performance, exhibition, competition, gathering or activity that

(a) is of apparent significance unrelated to the general interest inherent in travel, and

de débarquer au Canada des passagers ou des marchandises en provenance ou à destination du territoire d'un pays autre que celui du transporteur aérien. (*fifth freedom*)

**équipage** Une ou plusieurs personnes qui, pendant le temps de vol, agissent à titre de commandant de bord, de commandant en second, de copilote, de navigateur ou de mécanicien navigant. (*flight crew*)

**événement VABC** Présentation, spectacle, exposition, concours, rassemblement ou activité :

a) qui est d'une importance manifeste, et qui est motivé par des raisons autres que l'agrément de voyager; et

b) qui n'est pas mis sur pied ni organisé dans le but premier d'engendrer du trafic aérien d'affrètement. (*CPC event*)

**gros aéronef** Aéronef équipé pour le transport de passagers et ayant une capacité maximale certifiée de plus de 89 passagers. (*large aircraft*)

**jour ouvrable** Dans le cas du dépôt d'un document auprès de l'Office, à son siège ou à un bureau régional, jour normal d'ouverture des bureaux de l'administration publique fédérale dans la province où est situé le siège ou le bureau. (*working day*)

**logement** Chambre mise à la disposition du public à des fins commerciales. (*accommodation*)

**Loi** La Loi sur les transports au Canada. (*Act*)

**marchandises** Objets pouvant être transportés par la voie aérienne. La présente définition comprend les animaux. (*goods*)

**mille** Mille terrestre, sauf s'il est précisé qu'il s'agit d'un mille marin. (*mile*)

**MMHD** Pour un aéronef, la masse maximale homologuée au décollage indiquée dans le manuel de vol de l'aéronef dont fait mention le certificat de navigabilité délivré par l'autorité canadienne ou étrangère compétente. (*MC-TOW*)

**particularités du voyage** Les marchandises, services, installations et avantages, autres que le logement et le transport, qui sont compris dans un programme VAFO au prix de voyage à forfait ou qui sont offerts aux participants à titre facultatif moyennant un supplément. (*tour features*)

**(b)** is not being created or organized for the primary purpose of generating charter air traffic; (*événement VABC*)

**door-to-door transportation** means the carriage of consignments between points of pick-up and points of delivery determined by the consignor, the consignee or both, including the surface transportation portion; (*transport de porte-à-porte*)

**entity charter** means a flight operated according to the conditions of a charter contract under which

**(a)** the cost of transportation of passengers or goods is paid by one person, corporation or organization without any contribution, direct or indirect, from any other person, and

**(b)** no charge or other financial obligation is imposed on a passenger as a condition of carriage or otherwise in connection with the transportation; (*vol affrété sans participation*)

**fifth freedom** means the privilege of a non-Canadian air carrier, where operating a charter flight, of embarking or disembarking in Canada passengers or goods destined for, or coming from, the territory of a country other than that of the non-Canadian air carrier; (*cinquième liberté*)

**flight crew** means one or more persons acting as pilot-in-command, second officer, co-pilot, flight navigator or flight engineer during flight time; (*équipage*)

**fourth freedom** means the privilege of a non-Canadian air carrier, where operating a charter flight, of embarking in Canada passengers or goods destined for the territory of the country of the non-Canadian air carrier and includes the privilege of disembarking such passengers in Canada on return from that territory; (*quatrième liberté*)

**goods** means anything that can be transported by air, including animals; (*marchandises*)

**inclusive tour** or **tour** means a round or circle trip performed in whole or in part by aircraft for an inclusive tour price for the period from the time of departure of the participants from the starting point of the journey to the time of their return to that point; (*voyage à forfait*)

**inclusive tour charter** or **ITC** means a passenger flight operated according to the conditions of a contract entered into between an air carrier and one or more tour operators that requires the tour operator or tour operators to charter the entire passenger seating capacity of an aircraft for resale by them to the public at an inclusive

**passager** Personne, autre qu'un membre du personnel d'aéronef, qui voyage à bord d'un aéronef du service intérieur ou du service international du transporteur aérien aux termes d'un contrat ou d'une entente valides. (*passenger*)

**permis** Document délivré ou réputé délivré par l'office qui autorise le transporteur aérien titulaire d'une licence internationale service à la demande, valable pour le vol ou la série de vols projetés, à effectuer un vol affrété ou une série de vols affrétés. (*permit*)

**personnel d'aéronef** L'équipage ainsi que les personnes qui, sous l'autorité du transporteur aérien, exercent des fonctions pendant le vol dans la cabine passagers d'un aéronef de ce transporteur. (*air crew*)

**petit aéronef** Aéronef équipé pour le transport de passagers et ayant une capacité maximale certifiée d'au plus 39 passagers. (*small aircraft*)

**point** [Abrogée, DORS/96-335, art. 1]

**prix de voyage à forfait** Sont assimilés au prix de voyage à forfait d'un participant les frais exigibles pour le transport, le logement et, s'il y a lieu, les particularités du voyage. (*inclusive tour price*)

**prix par place** Somme, exprimée en dollars canadiens, qui est payée à l'affréteur ou à son agent pour l'achat d'un billet de transport aller-retour d'un passager d'un VARA ou d'un VABC. (*price per seat*)

**programme éducatif VABC** Programme à but éducatif organisé dans l'intérêt exclusif des élèves à plein temps du primaire ou du secondaire ou des deux niveaux. (*CPC educational program*)

**quatrième liberté** Privilège d'un transporteur aérien non canadien qui effectue un vol affrété d'embarquer au Canada des passagers ou des marchandises à destination du territoire de son pays, y compris le privilège de débarquer ces passagers au Canada à leur retour de ce territoire. (*fourth freedom*)

**responsabilité civile** Responsabilité légale du transporteur aérien découlant de la propriété, de la possession ou de l'utilisation d'un aéronef, à l'égard :

**a)** des blessures ou du décès de personnes autres que ses passagers, son personnel d'aéronef et ses employés;

**b)** des dommages matériels autres que les dommages aux biens dont il a la charge. (*public liability*)

**tour price per seat; (vol affrété pour voyage à forfait ou VAFO)**

**inclusive tour charter (domestic) or ITC (domestic)** [Repealed, SOR/96-335, s. 1]

**inclusive tour price** includes, for a participant in an inclusive tour, charges for transportation, accommodation and, where applicable, tour features; (*prix de voyage à forfait*)

**large aircraft** means an aircraft equipped for the carriage of passengers and having a certificated maximum carrying capacity of more than 89 passengers; (*gros aéronef*)

**MCTOW** means the maximum certificated take-off weight for aircraft as shown in the aircraft flight manual referred to in the aircraft's Certificate of Airworthiness issued by the competent Canadian or foreign authority; (*MMHD*)

**medium aircraft** means an aircraft equipped for the carriage of passengers and having a certificated maximum carrying capacity of more than 39 but not more than 89 passengers; (*aéronef moyen*)

**mile** means a statute mile unless a nautical mile is specified; (*mille*)

**passenger** means a person, other than a member of the air crew, who uses an air carrier's domestic service or international service by boarding the air carrier's aircraft pursuant to a valid contract or arrangement; (*passager*)

**permit** means a document issued or deemed to be issued by the Agency authorizing an air carrier holding a non-scheduled international licence, valid for the proposed flight or series of flights, to operate a charter flight or series of charter flights; (*permis*)

**point** [Repealed, SOR/96-335, s. 1]

**price per seat** means the amount, expressed in Canadian dollars, by the payment of which round-trip air transportation may be purchased from a charterer or the charterer's agent for a passenger on an ABC or CPC; (*prix par place*)

**public liability** means legal liability of an air carrier, arising from the air carrier's operation, ownership or possession of an aircraft, for

**(a)** injury to or death of persons other than the air carrier's passengers, air crew or employees, and

**secrétaire** Le secrétaire de l'Office. (*Secretary*)

**série** [Abrogée, DORS/96-335, art. 1]

**service de messageries** Entreprise de transport de porte-à-porte d'envois pour livraison le lendemain au plus tard. (*courier service*)

**taxe** [Abrogée, DORS/2012-298, art. 1]

**territoire** S'entend des étendues de terre, y compris les eaux territoriales adjacentes, qui sont placées sous la souveraineté, la compétence ou la tutelle d'un État. Toute mention d'un État doit s'interpréter, le cas échéant, comme une mention du territoire de cet État, et toute mention d'une zone géographique qui comprend plusieurs États doit s'interpréter, le cas échéant, comme une mention de l'ensemble des territoires des États qui composent cette zone géographique. (*territory*)

**trafic** Les personnes ou les marchandises transportées par la voie aérienne. (*traffic*)

**transport** À l'égard d'un vol affréte pour voyage à forfait, le transport par air ou par tout autre mode :

**a)** entre tous les points de l'itinéraire du voyage;

**b)** entre les aéroports ou les terminaux terrestres et l'endroit où le logement est fourni aux points de l'itinéraire du voyage autres que le point d'origine. (*transportation*)

**transport de porte-à-porte** Transport d'envois entre les points de ramassage et de livraison déterminés par l'expéditeur, le destinataire ou les deux. La présente définition comprend la partie du transport de surface. (*door-to-door transportation*)

**transporteur aérien** Personne qui exploite un service intérieur ou un service international. (*air carrier*)

**transporteur fréteur licencié des États-Unis** Citoyen des États-Unis, au sens de la définition de **citizen of the United States** à la partie 204 du règlement intitulé *Federal Aviation Regulations*, publié par le gouvernement des États-Unis, qui détient une licence internationale service à la demande valable pour les vols affrétés entre le Canada et les États-Unis. (*United States charter carrier licensee*)

**transporteur fréteur licencié du Canada** Personne qui est un Canadien et qui détient une licence internationale service à la demande valable pour les vols affrétés. (*Canadian charter carrier licensee*)

**(b)** damage to property other than property in the air carrier's charge; (*responsabilité civile*)

**Secretary** means the Secretary of the Agency; (*secrétaire*)

**small aircraft** means an aircraft equipped for the carriage of passengers and having a certificated maximum carrying capacity of not more than 39 passengers; (*petit aéronef*)

**territory** means the land areas under the sovereignty, jurisdiction or trusteeship of a state, as well as territorial waters adjacent thereto, and any reference to a state shall be construed, where applicable, as a reference to the territory of that state and any reference to a geographical area comprising several states shall be construed, where applicable, as a reference to the aggregate of the territories of the states constituting that geographical area; (*territoire*)

**third freedom** means the privilege of a non-Canadian air carrier, where operating a charter flight, of disembarking in Canada passengers who, or goods that, originated in the territory of the country of the non-Canadian air carrier and includes the privilege of re-embarking such passengers in Canada for the purpose of returning them to that territory; (*troisième liberté*)

**toll** [Repealed, SOR/2012-298, s. 1]

**tour features** means all goods, services, facilities and benefits, other than accommodation and transportation, that are included in an ITC program at the inclusive tour price or made available to tour participants as optional extras at an additional charge; (*particularités du voyage*)

**tour operator** means a charterer with whom an air carrier has contracted to charter an aircraft in whole or in part for the purpose of operating an inclusive tour; (*voyagiste*)

**traffic** means any persons or goods that are transported by air; (*trafic*)

**transborder goods charter** or **TGC** means a one-way or return charter that originates in Canada and that is operated between Canada and the United States according to the conditions of a charter contract to carry goods, entered into between one or two air carriers and one or more charterers, under which the charterer or charterers charter the entire payload capacity of an aircraft; (*vol affrété transfrontalier de marchandises ou VAM*)

**troisième liberté** Privilège d'un transporteur aérien non canadien qui effectue un vol affrété de débarquer au Canada des passagers ou des marchandises provenant du territoire de son pays, y compris le privilège de rembarquer les passagers au Canada pour les retourner dans ce territoire. (*third freedom*)

**VARA/VAFO** Vol passagers affrété transportant des passagers avec réservation anticipée et des participants à un voyage à forfait, qui est effectué conformément à la section IV de la partie III. (*ABC/ITC*)

**VARA/VAFO (intérieur)** [Abrogée, DORS/96-335, art. 1]

**vol affrété à but commun** ou **VABC** Vol passagers aller-retour en provenance du Canada, effectué aux termes d'un contrat passé entre un ou deux transporteurs aériens et un ou plusieurs affréteurs, selon lequel l'affréteur ou les affréteurs s'engagent à retenir toutes les places de l'aéronef destinées aux passagers pour fournir le transport à un prix par place à des passagers qui :

- a)** soit se rendent à un événement VABC et en reviennent;
- b)** soit participant à un programme éducatif VABC. (*common purpose charter or CPC*)

**vol affrété à but commun (intérieur)** ou **VABC (intérieur)** [Abrogée, DORS/96-335, art. 1]

**vol affrété avec réservation anticipée** ou **VARA** Vol passagers aller-retour en provenance du Canada, effectué aux termes d'un contrat passé entre un ou deux transporteurs aériens et un ou plusieurs affréteurs, selon lequel l'affréteur ou les affréteurs s'engagent à retenir toutes les places de l'aéronef destinées aux passagers pour les revendre au public à un prix par place avant un certain nombre de jours précédant la date de départ du vol du point d'origine au Canada. (*advance booking charter or ABC*)

**vol affrété avec réservation anticipée (intérieur)** ou **VARA (intérieur)** [Abrogée, DORS/96-335, art. 1]

**vol affrété pour voyage à forfait** ou **VAFO** Vol passagers effectué aux termes d'un contrat passé entre un transporteur aérien et un ou plusieurs voyagistes, selon lequel le ou les voyagistes s'engagent à retenir toutes les places de l'aéronef destinées aux passagers pour les revendre au public à un prix de voyage à forfait par place. (*inclusive tour charter or ITC*)

**vol affrété pour voyage à forfait (intérieur)** ou **VAFO (intérieur)** [Abrogée, DORS/96-335, art. 1]

**transborder passenger charter** or **TPC** means a one-way or return charter that originates in Canada and that is operated between Canada and the United States according to the conditions of a charter contract to carry passengers, entered into between one or two air carriers and one or more charterers, under which the charterer or charterers charter the entire passenger seating capacity of an aircraft, for resale by the charterer or charterers; (*vol affréte transfrontalier de passagers or VAP*)

**transborder passenger non-resaleable charter** or **TP-NC** means a one-way or return charter that originates in Canada and that is operated between Canada and the United States according to the conditions of a charter contract to carry passengers, entered into between one or two air carriers and one or more charterers, under which the charterer or charterers charter the entire passenger seating capacity of an aircraft and do not resell that passenger seating capacity; (*vol affréte transfrontalier de passagers non revendable or VAPNOR*)

**transborder United States charter** or **TUSC** means a charter originating in the United States that is destined for Canada; (*vol affréte transfrontalier des États-Unis or VAEU*)

**transportation**, in respect of an inclusive tour charter, means transportation by air or any other mode

- (a) between all points in the tour itinerary, and
- (b) between airports or land terminals and the location where accommodation is provided at any point in the tour itinerary, other than the point of origin; (*transport*)

**United States charter carrier licensee** means a person who is a citizen of the United States, as defined in Part 204 of the *Federal Aviation Regulations*, published by the Government of the United States, and who holds a non-scheduled international licence that is valid for charters between Canada and the United States; (*transporteur fréteur licencié des États-Unis*)

**United States charterer** means a person who has entered into an arrangement with an air carrier to provide charter air transportation originating in the United States; (*affréteur des États-Unis*)

**working day**, in respect of the filing of a document with the Agency, at its head office or a regional office, means a day on which offices of the Public Service of Canada are generally open in the province where the head office or regional office is situated. (*jour ouvrable*)

SOR/90-740, s. 1; SOR/93-253, s. 2; SOR/94-379, s. 4; SOR/96-335, s. 1; SOR/2012-298, s. 1.

**vol affréte sans participation** Vol effectué aux termes d'un contrat d'affrètement selon lequel :

- a) le coût du transport des passagers ou des marchandises est payé par une seule personne, une seule société ou un seul organisme et n'est partagé, directement ou indirectement, par aucune autre personne;
- b) nuls frais ni autre obligation financière ne sont imposés aux passagers comme condition de transport ou autrement pour le voyage. (*entity charter*)

**vol affréte transfrontalier de marchandises** ou **VAM** Vol affréte aller ou aller-retour en provenance du Canada effectué entre le Canada et les États-Unis aux termes d'un contrat d'affrètement pour le transport de marchandises passé entre un ou deux transporteurs aériens et un ou plusieurs affréteurs, selon lequel l'affréteur ou les affréteurs s'engagent à retenir toute la capacité payante de l'aéronef. (*transborder goods charter or TGC*)

**vol affréte transfrontalier de passagers** ou **VAP** Vol affréte aller ou aller-retour en provenance du Canada effectué entre le Canada et les États-Unis aux termes d'un contrat d'affrètement pour le transport de passagers passé entre un ou deux transporteurs aériens et un ou plusieurs affréteurs, selon lequel l'affréteur ou les affréteurs s'engagent à retenir toutes les places de l'aéronef destinées aux passagers en vue de les revendre. (*transborder passenger charter or TPC*)

**vol affréte transfrontalier de passagers non revendable** ou **VAPNOR** Vol affréte aller ou aller-retour en provenance du Canada effectué entre le Canada et les États-Unis aux termes d'un contrat d'affrètement pour le transport de passagers passé entre un ou deux transporteurs aériens et un ou plusieurs affréteurs, selon lequel l'affréteur ou les affréteurs s'engagent à retenir toutes les places de l'aéronef destinées aux passagers et à ne pas les revendre. (*transborder passenger non-resaleable charter or TPNC*)

**vol affréte transfrontalier des États-Unis** ou **VAEU** Vol affréte en provenance des États-Unis dont la destination est le Canada. (*transborder United States charter or TUSC*)

**voyage à forfait** Voyage aller-retour ou voyage circulaire effectué en totalité ou en partie par aéronef, à un prix de voyage à forfait, pour la période comprise entre le départ des participants et leur retour au point de départ. (*inclusive tour or tour*)

**(4)** An air carrier may have a comprehensive single limit liability coverage where liability risks are covered by a single policy or a combination of primary and excess policies, but no single limit liability coverage of that air carrier shall be for an amount that is less than the applicable combined insurance minima determined pursuant to paragraphs (1)(a) and (b).

SOR/96-335, s. 3.

**8 (1)** Every applicant for a licence or for an amendment to or renewal of a licence, and every licensee, shall file with the Agency, in respect of the service to be provided or being provided, as the case may be, a valid certificate of insurance in the form set out in Schedule I.

**(2)** A person referred to in subsection (1) who files a certificate of insurance electronically shall, on the request of the Agency, file forthwith a certified true copy of the certificate.

SOR/96-335, s. 4.

## Financial Requirements

**8.1 (1)** In this section, “applicant” means a Canadian who applies for

**(a)** a domestic licence, non-scheduled international licence or scheduled international licence that authorizes the operation of an air service using medium aircraft, or for the reinstatement of such a licence that has been suspended for 60 days or longer; or

**(b)** a domestic licence, non-scheduled international licence or scheduled international licence that authorizes the operation of an air service using large aircraft, or for the reinstatement of such a licence that has been suspended for 60 days or longer.

**(2)** Subject to subsection (3), an applicant shall

**(a)** in respect of the air service specified in the application, provide the Agency with a current written statement of the start-up costs that the applicant has incurred in the preceding 12 months, with written estimates of start-up costs that the applicant expects to incur and with written estimates of operating and overhead costs for a 90-day period of operation of the air service, and establish that

ment à toute question se rapportant à l’assurance ou au sujet assuré, que ce soit avant ou après une perte.

**(4)** Le transporteur aérien peut souscrire une assurance tous risques à limite d’indemnité unique lorsque sa responsabilité est couverte par une seule police ou par un ensemble de polices primaires et complémentaires, auquel cas cette assurance doit prévoir une protection pour un montant au moins égal aux montants minimaux d’assurance combinés prévus aux alinéas (1)a) et b).

DORS/96-335, art. 3.

**8 (1)** Toute personne qui demande la délivrance, la modification ou le renouvellement d’une licence ainsi que tout licencié doivent déposer auprès de l’Office un certificat d’assurance valide, conforme à l’annexe I, à l’égard du service projeté ou fourni, selon le cas.

**(2)** En cas de dépôt par voie électronique, l’intéressé doit, à la demande de l’Office, déposer sans délai une copie certifiée conforme du certificat d’assurance.

DORS/96-335, art. 4.

## Exigences financières

**8.1 (1)** Dans le présent article, « demandeur » s’entend d’un Canadien qui demande :

**a)** soit une licence intérieure, une licence internationale service à la demande ou une licence internationale service régulier qui autorise l’exploitation d’un service aérien utilisant des aéronefs moyens, ou le rétablissement d’une telle licence suspendue depuis au moins 60 jours;

**b)** soit une licence intérieure, une licence internationale service à la demande ou une licence internationale service régulier qui autorise l’exploitation d’un service aérien utilisant des gros aéronefs, ou le rétablissement d’une telle licence suspendue depuis au moins 60 jours.

**(2)** Sous réserve du paragraphe (3), le demandeur doit :

**a)** quant au service aérien visé par la demande, remettre à l’Office, par écrit, un relevé à jour des frais de démarrage qu’il a engagés au cours des 12 mois précédents, une estimation des frais de démarrage qu’il prévoit d’engager ainsi qu’une estimation des frais d’exploitation et des frais généraux qu’il prévoit d’engager pendant une période de 90 jours d’exploitation du service aérien, et démontrer :

**(i)** que le relevé est complet et exact et que l’estimation est raisonnable quant aux frais de démarrage,

- (i) in respect of the start-up costs, the statement is complete and accurate and the estimates are reasonable,
- (ii) in respect of the operating and overhead costs, the estimates are reasonable and are based on utilization of the aircraft solely on the specified air service under conditions of optimum demand, which utilization shall be no less than that which is necessary for the air service to be profitable,
- (iii) subject to subparagraph (b)(i), the applicant has acquired or can acquire funds in an amount at least equal to the total costs included in the statement and in the estimates,
- (iv) the funds are not encumbered and are comprised of liquid assets that have been acquired or that can be acquired by way of a line of credit issued by a financial institution or by way of a similar financial instrument,
- (v) the terms and conditions under which those funds have been acquired or can be acquired are such that the funds are available and will remain available to finance the air service,
- (vi) subject to paragraph (b), where the applicant is a corporation, at least 50% of the funds required by subparagraph (iii) have been acquired by way of capital stock that has been issued and paid for and that cannot be redeemed for a period of at least one year after the date of the issuance or reinstatement of the licence, and
- (vii) subject to paragraph (b), where the applicant is a proprietorship or partnership, at least 50% of the funds required by subparagraph (iii) have been acquired by way of the proprietor's or partners' capital that has been injected into the proprietorship or partnership and that cannot be withdrawn for a period of at least one year after the date of the issuance or reinstatement of the licence;

(b) where the applicant is or has been in operation,

- (i) increase the amount of funds required by subparagraph (a)(iii) by the amount of any shareholders' proprietor's or partners' deficit that is disclosed in the applicant's current audited financial statements which are prepared in accordance with generally accepted accounting principles in Canada, and those additional funds shall be acquired by way of capital stock that has been issued and paid for in the case of a corporation, or by way of the proprietor's or partners' invested capital in the case of a proprietorship or partnership, which capital stock

- (ii) que l'estimation des frais d'exploitation et des frais généraux est raisonnable et fondée sur l'utilisation des aéronefs uniquement pour ce service aérien dans des conditions de demande optimale, laquelle utilisation représente au moins le minimum nécessaire pour assurer la rentabilité du service aérien,
- (iii) sous réserve du sous-alinéa b)(i), qu'il a acquis ou est en mesure d'acquérir des fonds au moins équivalents au total des frais inscrits dans le relevé et dans les estimations,
- (iv) que les fonds ne sont pas grevés et qu'ils sont constitués de liquidités acquises ou pouvant l'être au moyen d'une marge de crédit accordée par une institution financière ou au moyen de tout instrument financier semblable,
- (v) que les modalités selon lesquelles ces fonds ont été acquis ou peuvent l'être sont telles que les fonds sont disponibles et continueront de l'être pour financer le service aérien,
- (vi) sous réserve de l'alinéa b), s'il s'agit d'une société, qu'au moins 50 pour cent des fonds exigés par le sous-alinéa (iii) ont été acquis au moyen d'actions du capital-actions émises et libérées qui ne peuvent être rachetées pendant une période minimale d'un an après la date de délivrance ou de rétablissement de la licence,
- (vii) sous réserve de l'alinéa b), s'il s'agit d'une entreprise individuelle ou d'une société de personnes, qu'au moins 50 pour cent des fonds exigés par le sous-alinéa (iii) ont été acquis au moyen du capital investi par le propriétaire ou les associés dans l'entreprise ou la société qui ne peut en être retiré pendant une période minimale d'un an après la date de délivrance ou de rétablissement de la licence;

b) s'il est en exploitation ou l'a été :

- (i) augmenter le montant des fonds exigés par le sous-alinéa a)(iii) du montant du déficit des actionnaires, du propriétaire ou des associés figurant dans ses états financiers courants vérifiés, établis conformément aux principes comptables généralement reconnus au Canada; ces fonds additionnels doivent être acquis au moyen d'actions du capital-actions émises et libérées, dans le cas d'une société, ou au moyen du capital investi par le propriétaire ou les associés, dans le cas d'une entreprise individuelle ou d'une société de personnes, et ces actions ou ce capital investi sont assujettis à la condition prévue aux sous-alinéas a)(vi) ou (vii),



CANADA

CONSOLIDATION

CODIFICATION

**Canada Business Corporations  
Act****Loi canadienne sur les sociétés  
par actions**

R.S.C., 1985, c. C-44

L.R.C. (1985), ch. C-44

Current to September 18, 2016

À jour au 18 septembre 2016

Last amended on February 26, 2015

Dernière modification le 26 février 2015

### Notice of change of director or director's address

- 113 (1)** A corporation shall, within fifteen days after
- (a) a change is made among its directors, or
  - (b) it receives a notice of change of address of a director referred to in subsection (1.1),

send to the Director a notice, in the form that the Director fixes, setting out the change, and the Director shall file the notice.

### Director's change of address

- (1.1)** A director shall, within fifteen days after changing his or her address, send the corporation a notice of that change.

### Application to court

- (2)** Any interested person, or the Director, may apply to a court for an order to require a corporation to comply with subsection (1), and the court may so order and make any further order it thinks fit.

R.S., 1985, c. C-44, s. 113; 2001, c. 14, s. 42.

### Meeting of directors

- 114 (1)** Unless the articles or by-laws otherwise provide, the directors may meet at any place and on such notice as the by-laws require.

### Quorum

- (2)** Subject to the articles or by-laws, a majority of the number of directors or minimum number of directors required by the articles constitutes a quorum at any meeting of directors, and, notwithstanding any vacancy among the directors, a quorum of directors may exercise all the powers of the directors.

### Canadian directors present at meetings

- (3)** Directors, other than directors of a corporation referred to in subsection 105(4), shall not transact business at a meeting of directors unless,

- (a)** if the corporation is subject to subsection 105(3), at least twenty-five per cent of the directors present are resident Canadians or, if the corporation has less than four directors, at least one of the directors present is a resident Canadian; or

- (b)** if the corporation is subject to subsection 105(3.1), a majority of directors present are resident Canadians or if the corporation has only two directors, at least one of the directors present is a resident Canadian.

### Avis de changement

- 113 (1)** Dans les quinze jours suivant soit tout changement dans la composition du conseil d'administration, soit la réception de l'avis de changement d'adresse visé au paragraphe (1.1), la société doit aviser le directeur du changement, en la forme établie par lui, pour enregistrement.

### Avis de changement d'adresse

- (1.1)** S'il change d'adresse, l'administrateur en avise la société dans les quinze jours qui suivent.

### Demande au tribunal

- (2)** À la demande de tout intéressé ou du directeur, le tribunal peut, s'il le juge utile, obliger par ordonnance la société à se conformer au paragraphe (1), et prendre toute autre mesure pertinente.

L.R. (1985), ch. C-44, art. 113; 2001, ch. 14, art. 42.

### Réunion du conseil

- 114 (1)** Sauf disposition contraire des statuts ou des règlements administratifs, les administrateurs peuvent se réunir en tout lieu et après avoir donné l'avis qu'exigent les règlements administratifs.

### Quorum

- (2)** Sous réserve des statuts ou des règlements administratifs, la majorité du nombre fixe ou minimal d'administrateurs constitue le quorum; lorsque celui-ci est atteint, les administrateurs peuvent exercer leurs pouvoirs, nonobstant toute vacance en leur sein.

### Administrateurs résidents canadiens

- (3)** Les administrateurs des sociétés non visées au paragraphe 105(4) ne peuvent délibérer lors des réunions que si :

- a)** dans le cas des sociétés visées au paragraphe 105(3), au moins vingt-cinq pour cent des administrateurs présents sont résidents canadiens ou, lorsque celles-ci comptent moins de quatre administrateurs, au moins l'un des administrateurs présents est résident canadien;

- b)** dans le cas des sociétés visées au paragraphe 105(3.1), la majorité des administrateurs présents est constituée de résidents canadiens ou, lorsque celles-ci ne comptent que deux administrateurs, au moins l'un des administrateurs présents est résident canadien.



CANADA

CONSOLIDATION

CODIFICATION

**Canada Transportation Act****Loi sur les transports au Canada**

S.C. 1996, c. 10

L.C. 1996, ch. 10

Current to February 15, 2016

À jour au 15 février 2016

Last amended on July 30, 2015

Dernière modification le 30 juillet 2015

that is the property or under the control of any person the entry or inspection of which appears to the inquirer to be necessary; and

**(b)** exercise the same powers as are vested in a superior court to summon witnesses, enforce their attendance and compel them to give evidence and produce any materials, books, papers, plans, specifications, drawings and other documents that the inquirer thinks necessary.

## Review and Appeal

### Governor in Council may vary or rescind orders, etc.

**40** The Governor in Council may, at any time, in the discretion of the Governor in Council, either on petition of a party or an interested person or of the Governor in Council's own motion, vary or rescind any decision, order, rule or regulation of the Agency, whether the decision or order is made *inter partes* or otherwise, and whether the rule or regulation is general or limited in its scope and application, and any order that the Governor in Council may make to do so is binding on the Agency and on all parties.

### Appeal from Agency

**41 (1)** An appeal lies from the Agency to the Federal Court of Appeal on a question of law or a question of jurisdiction on leave to appeal being obtained from that Court on application made within one month after the date of the decision, order, rule or regulation being appealed from, or within any further time that a judge of that Court under special circumstances allows, and on notice to the parties and the Agency, and on hearing those of them that appear and desire to be heard.

### Time for making appeal

**(2)** No appeal, after leave to appeal has been obtained under subsection (1), lies unless it is entered in the Federal Court of Appeal within sixty days after the order granting leave to appeal is made.

### Powers of Court

**(3)** An appeal shall be heard as quickly as is practicable and, on the hearing of the appeal, the Court may draw any inferences that are not inconsistent with the facts expressly found by the Agency and that are necessary for determining the question of law or jurisdiction, as the case may be.

### Agency may be heard

**(4)** The Agency is entitled to be heard by counsel or otherwise on the argument of an appeal.

tériel roulant ou navire — , quel qu'en soit le propriétaire ou le responsable, si elle l'estime nécessaire à l'enquête;

**b)** exercer les attributions d'une cour supérieure pour faire comparaître des témoins et pour les contraindre à témoigner et à produire les pièces — objets, livres, plans, cahiers des charges, dessins ou autres documents — qu'elle estime nécessaires à l'enquête.

## Révision et appel

### Modification ou annulation

**40** Le gouverneur en conseil peut modifier ou annuler les décisions, arrêtés, règles ou règlements de l'Office soit à la requête d'une partie ou d'un intéressé, soit de sa propre initiative; il importe peu que ces décisions ou arrêtés aient été pris en présence des parties ou non et que les règles ou règlements soient d'application générale ou particulière. Les décrets du gouverneur en conseil en cette matière lient l'Office et toutes les parties.

### Appel

**41 (1)** Tout acte — décision, arrêté, règle ou règlement — de l'Office est susceptible d'appel devant la Cour d'appel fédérale sur une question de droit ou de compétence, avec l'autorisation de la cour sur demande présentée dans le mois suivant la date de l'acte ou dans le délai supérieur accordé par un juge de la cour en des circonstances spéciales, après notification aux parties et à l'Office et audition de ceux d'entre eux qui comparaissent et désirent être entendus.

### Délai

**(2)** Une fois l'autorisation obtenue en application du paragraphe (1), l'appel n'est admissible que s'il est interjeté dans les soixante jours suivant le prononcé de l'ordonnance l'autorisant.

### Pouvoirs de la cour

**(3)** L'appel est mené aussi rapidement que possible; la cour peut l'entendre en faisant toutes inférences non incompatibles avec les faits formellement établis par l'Office et nécessaires pour décider de la question de droit ou de compétence, selon le cas.

### Plaidoirie de l'Office

**(4)** L'Office peut plaider sa cause à l'appel par procureur ou autrement.

## Review of Act

### Statutory review

**53 (1)** The Minister shall, no later than eight years after the day this subsection comes into force, appoint one or more persons to carry out a comprehensive review of the operation of this Act and any other Act of Parliament for which the Minister is responsible that pertains to the economic regulation of a mode of transportation or to transportation activities under the legislative authority of Parliament.

### Objective of review

**(2)** The person or persons conducting the review shall assess whether the legislation referred to in subsection (1) provides Canadians with a transportation system that is consistent with the national transportation policy set out in section 5 and, if necessary or desirable, may recommend amendments to

- (a)** the national transportation policy; and
- (b)** the legislation referred to in subsection (1).

### Consultations

**(3)** The review shall be undertaken in consultation with purchasers and suppliers of transportation services and any other persons whom the Minister considers appropriate.

### Powers on review

**(4)** Every person appointed to carry out the review has, for the purposes of the review, the powers of a commissioner under Part I of the *Inquiries Act* and may engage the services of experts, professionals and other staff deemed necessary for making the review at the rates of remuneration that the Treasury Board approves.

### Report

**(5)** The review shall be completed and a report of the review submitted to the Minister within 18 months after the appointment referred to in subsection (1).

### Tabling of report

**(6)** The Minister shall have a copy of the report laid before each House of Parliament on any of the first thirty days on which that House is sitting after the Minister receives it.

1996, c. 10, s. 53; 2007, c. 19, s. 12.

## Examen de la loi

### Examen complet

**53 (1)** Le ministre nomme, dans les huit ans suivant la date d'entrée en vigueur du présent paragraphe, une ou plusieurs personnes chargées de procéder à un examen complet de l'application de la présente loi et de toute autre loi fédérale dont le ministre est responsable et qui porte sur la réglementation économique d'un mode de transport ou sur toute activité de transport assujettie à la compétence législative du Parlement.

### But de l'examen

**(2)** Les personnes qui effectuent l'examen vérifient si les lois visées au paragraphe (1) fournissent aux Canadiens un système de transport qui est conforme à la politique nationale des transports énoncée à l'article 5. Si elles l'estiment utile, elles peuvent recommander des modifications :

- a)** à cette politique;
- b)** aux lois visées au paragraphe (1).

### Consultations

**(3)** L'examen doit être effectué en consultation avec les acheteurs et les fournisseurs de services de transport et les autres personnes que le ministre estime indiquées.

### Pouvoirs

**(4)** Chaque personne nommée pour effectuer l'examen dispose à cette fin des pouvoirs d'un commissaire nommé aux termes de la partie I de la *Loi sur les enquêtes* et peut, conformément au barème de rémunération approuvé par le Conseil du Trésor, engager le personnel — experts, professionnels et autres — nécessaire pour effectuer l'examen.

### Rapport

**(5)** L'examen doit être terminé, et le rapport sur celui-ci présenté au ministre, dans les dix-huit mois suivant la date de la nomination prévue au paragraphe (1).

### Dépôt du rapport

**(6)** Le ministre fait déposer une copie du rapport devant chaque chambre du Parlement dans les trente premiers jours de séance de celle-ci suivant sa réception.

1996, ch. 10, art. 53; 2007, ch. 19, art. 12.

with the orders, regulations and directions made or issued under this Act, notwithstanding the fact that the receiver, manager, official or person has been appointed by or acts under the authority of a court.

#### **Adaptation orders**

**(2)** Wherever by reason of insolvency, sale under mortgage or any other cause, a transportation undertaking or a portion of a transportation undertaking is operated, managed or held otherwise than by the carrier, the Agency or the Minister may make any order it considers proper for adapting and applying the provisions of this Act.

### **PART II**

## **Air Transportation**

### **Interpretation and Application**

#### **Definitions**

**55 (1)** In this Part,

**aircraft** has the same meaning as in subsection 3(1) of the *Aeronautics Act*; (*aéronef*)

**air service** means a service, provided by means of an aircraft, that is publicly available for the transportation of passengers or goods, or both; (*service aérien*)

**basic fare** means

**(a)** the fare in the tariff of the holder of a domestic licence that has no restrictions and represents the lowest amount to be paid for one-way air transportation of an adult with reasonable baggage between two points in Canada, or

**(b)** where the licensee has more than one such fare between two points in Canada and the amount of any of those fares is dependent on the time of day or day of the week of travel, or both, the highest of those fares; (*prix de base*)

**Canadian** means a Canadian citizen or a permanent resident within the meaning of subsection 2(1) of the *Immigration and Refugee Protection Act*, a government in Canada or an agent of such a government or a corporation or other entity that is incorporated or formed under the laws of Canada or a province, that is controlled in fact by Canadians and of which at least seventy-five per cent, or such lesser percentage as the Governor in Council may by regulation specify, of the voting interests are owned and controlled by Canadians; (*Canadien*)

en vertu de la présente loi, en dépit du fait que sa nomination a été faite par le tribunal ou que ses attributions lui ont été confiées par celui-ci.

#### **Modification**

**(2)** L'Office ou le ministre peut, par arrêté, adapter les dispositions de la présente loi si, notamment pour insolvabilité ou vente hypothécaire, une entreprise de transport échappe, en tout ou en partie, à la gestion, à l'exploitation ou à la possession du transporteur en cause.

### **PARTIE II**

## **Transport aérien**

### **Définitions et champ d'application**

#### **Définitions**

**55 (1)** Les définitions qui suivent s'appliquent à la présente partie.

**aéronef** S'entend au sens du paragraphe 3(1) de la *Loi sur l'aéronautique*. (*aircraft*)

**Canadien** Citoyen canadien ou résident permanent au sens du paragraphe 2(1) de la *Loi sur l'immigration et la protection des réfugiés*; la notion englobe également les administrations publiques du Canada ou leurs mandataires et les personnes ou organismes, constitués au Canada sous le régime de lois fédérales ou provinciales et contrôlés de fait par des Canadiens, dont au moins soixante-quinze pour cent — ou tel pourcentage inférieur désigné par règlement du gouverneur en conseil — des actions assorties du droit de vote sont détenues et contrôlées par des Canadiens. (*Canadian*)

**document d'aviation canadien** S'entend au sens du paragraphe 3(1) de la *Loi sur l'aéronautique*. (*Canadian aviation document*)

**licencié** Titulaire d'une licence délivrée par l'Office en application de la présente partie. (*licensee*)

**prix de base**

**a)** Prix du tarif du titulaire d'une licence intérieure qui est sans restriction et qui constitue le montant le moins élevé à payer pour le transport aller, entre deux points situés au Canada, d'un adulte accompagné d'une quantité normale de bagages;

**Canadian aviation document** has the same meaning as in subsection 3(1) of the *Aeronautics Act*; (*document d'aviation canadien*)

**domestic licence** means a licence issued under section 61; (*Version anglaise seulement*)

**domestic service** means an air service between points in Canada, from and to the same point in Canada or between Canada and a point outside Canada that is not in the territory of another country; (*service intérieur*)

**international service** means an air service between Canada and a point in the territory of another country; (*service international*)

**licensee** means the holder of a licence issued by the Agency under this Part; (*licencié*)

**non-scheduled international licence** means a licence issued under subsection 73(1); (*Version anglaise seulement*)

**non-scheduled international service** means an international service other than a scheduled international service; (*service international à la demande*)

**prescribed** means prescribed by regulations made under section 86; (*règlement*)

**scheduled international licence** means a licence issued under subsection 69(1); (*Version anglaise seulement*)

**scheduled international service** means an international service that is a scheduled service pursuant to

(a) an agreement or arrangement for the provision of that service to which Canada is a party, or

(b) a determination made under section 70; (*service international régulier*)

**tariff** means a schedule of fares, rates, charges and terms and conditions of carriage applicable to the provision of an air service and other incidental services. (*tarif*)

## Affiliation

(2) For the purposes of this Part,

(a) one corporation is affiliated with another corporation if

(i) one of them is a subsidiary of the other,

(ii) both are subsidiaries of the same corporation,  
or

b) dans les cas où un tel prix peut varier selon le moment du jour ou de la semaine, ou des deux, auquel s'effectue le voyage, le montant le plus élevé de ce prix. (*basic fare*)

**règlement** Règlement pris au titre de l'article 86. (*prescribed*)

**service aérien** Service offert, par aéronef, au public pour le transport des passagers, des marchandises, ou des deux. (*air service*)

**service intérieur** Service aérien offert soit à l'intérieur du Canada, soit entre un point qui y est situé et un point qui lui est extérieur sans pour autant faire partie du territoire d'un autre pays. (*domestic service*)

**service international** Service aérien offert entre le Canada et l'étranger. (*international service*)

**service international à la demande** Service international autre qu'un service international régulier. (*non-scheduled international service*)

**service international régulier** Service international exploité à titre de service régulier aux termes d'un accord ou d'une entente à cet effet dont le Canada est signataire ou sous le régime d'une qualification faite en application de l'article 70. (*scheduled international service*)

**tarif** Barème des prix, taux, frais et autres conditions de transport applicables à la prestation d'un service aérien et des services connexes. (*tariff*)

**texte d'application** Arrêté ou règlement pris en application de la présente partie ou de telle de ses dispositions. (*French version only*)

## Groupe

(2) Pour l'application de la présente partie :

a) des personnes morales sont du même groupe si l'une est la filiale de l'autre, si toutes deux sont des filiales d'une même personne morale ou si chacune d'elles est contrôlée par la même personne;

- (iii)** both are controlled by the same person;
- (b)** if two corporations are affiliated with the same corporation at the same time, they are deemed to be affiliated with each other;
- (c)** a partnership or sole proprietorship is affiliated with another partnership or sole proprietorship if both are controlled by the same person;
- (d)** a corporation is affiliated with a partnership or a sole proprietorship if both are controlled by the same person;
- (e)** a corporation is a subsidiary of another corporation if it is controlled by that other corporation or by a subsidiary of that other corporation;
- (f)** a corporation is controlled by a person other than Her Majesty in right of Canada or a province if
  - (i)** securities of the corporation to which are attached more than 50% of the votes that may be cast to elect directors of the corporation are held, directly or indirectly, whether through one or more subsidiaries or otherwise, otherwise than by way of security only, by or for the benefit of that person, and
  - (ii)** the votes attached to those securities are sufficient, if exercised, to elect a majority of the directors of the corporation;
- (g)** a corporation is controlled by Her Majesty in right of Canada or a province if
  - (i)** the corporation is controlled by Her Majesty in the manner described in paragraph (f), or
  - (ii)** in the case of a corporation without share capital, a majority of the directors of the corporation, other than *ex officio* directors, are appointed by
    - (A)** the Governor in Council or the Lieutenant Governor in Council of the province, as the case may be, or
    - (B)** a Minister of the government of Canada or the province, as the case may be; and
- (h)** a partnership is controlled by a person if the person holds an interest in the partnership that entitles the person to receive more than 50% of the profits of the partnership or more than 50% of its assets on dissolution.

- b)** si deux personnes morales sont du groupe d'une même personne morale au même moment, elles sont réputées être du même groupe;
- c)** une société de personnes ou une entreprise individuelle est du groupe d'une autre société de personnes ou d'une autre entreprise individuelle si toutes deux sont contrôlées par la même personne;
- d)** une personne morale est du groupe d'une société de personnes ou d'une entreprise individuelle si toutes deux sont contrôlées par la même personne;
- e)** une personne morale est une filiale d'une autre personne morale si elle est contrôlée par cette autre personne morale ou par une filiale de celle-ci;
- f)** une personne morale est contrôlée par une personne autre que Sa Majesté du chef du Canada ou d'une province si :
  - (i)** des valeurs mobilières de la personne morale conférant plus de cinquante pour cent des votes qui peuvent être exercés lors de l'élection des administrateurs de la personne morale en question sont détenues, directement ou indirectement, notamment par l'intermédiaire d'une ou de plusieurs filiales, autrement qu'à titre de garantie uniquement, par cette personne ou pour son bénéfice,
  - (ii)** les votes que comportent ces valeurs mobilières sont suffisants, en supposant leur exercice, pour élire une majorité des administrateurs de la personne morale;
- g)** une personne morale est contrôlée par Sa Majesté du chef du Canada ou d'une province si :
  - (i)** la personne morale est contrôlée par Sa Majesté de la manière décrite à l'alinéa f),
  - (ii)** dans le cas d'une personne morale sans capital-actions, une majorité des administrateurs de la personne morale, autres que les administrateurs d'*office*, sont nommés par :
    - (A)** soit le gouverneur en conseil ou le lieutenant-gouverneur en conseil de la province, selon le cas,
    - (B)** soit un ministre du gouvernement du Canada ou de la province, selon le cas;
- h)** contrôle une société de personnes la personne qui détient dans cette société des titres de participation lui donnant droit de recevoir plus de cinquante pour cent des bénéfices de la société ou plus de cinquante pour

### **Definition of “person”**

**(3)** In subsection (2), *person* includes an individual, a partnership, an association, a corporation, a trustee, an executor, a liquidator of a succession, an administrator or a legal representative.

### **Control in fact**

**(4)** For greater certainty, nothing in subsection (2) shall be construed to affect the meaning of the expression “controlled in fact” in the definition “Canadian” in subsection (1).

1996, c. 10, s. 55; 2000, c. 15, s. 1; 2001, c. 27, s. 222.

### **Non-application of Part**

**56 (1)** This Part does not apply to a person that uses an aircraft on behalf of the Canadian Armed Forces or any other armed forces cooperating with the Canadian Armed Forces.

### **Specialty service exclusion**

**(2)** This Part does not apply to the operation of an air flight training service, aerial inspection service, aerial construction service, aerial photography service, aerial forest fire management service, aerial spraying service or any other prescribed air service.

### **Emergency service exclusion**

**(3)** This Part does not apply to the provision of an air service if the federal government or a provincial or a municipal government declares an emergency under federal or provincial law, and that government directly or indirectly requests that the air service be provided to respond to the emergency.

### **Public interest**

**(4)** The Minister may, by order, prohibit the provision of an air service under subsection (3) or require the discontinuance of that air service if, in the opinion of the Minister, it is in the public interest to do so.

### **Not a statutory instrument**

**(5)** The order is not a statutory instrument within the meaning of the *Statutory Instruments Act*.

1996, c. 10, s. 56; 2007, c. 19, s. 14.

**56.1** [Repealed, 2007, c. 19, s. 15]

**56.2** [Repealed, 2007, c. 19, s. 15]

cent des éléments d'actif de celle-ci au moment de sa dissolution.

### **Définition de « personne »**

**(3)** Au paragraphe (2), *personne* s'entend d'un particulier, d'une société de personnes, d'une association, d'une personne morale, d'un fiduciaire, d'un exécuteur testamentaire ou du liquidateur d'une succession, d'un tuteur, d'un curateur ou d'un mandataire.

### **Contrôle de fait**

**(4)** Il demeure entendu que le paragraphe (2) n'a pas pour effet de modifier le sens de l'expression « contrôle de fait » dans la définition de « Canadien » au paragraphe (1).

1996, ch. 10, art. 55; 2000, ch. 15, art. 1; 2001, ch. 27, art. 222.

### **Exclusions — forces armées**

**56 (1)** La présente partie ne s'applique pas aux personnes qui utilisent un aéronef pour le compte des Forces armées canadiennes ou des forces armées coopérant avec celles-ci.

### **Exclusion — services spécialisés**

**(2)** La présente partie ne s'applique pas à l'exploitation d'un service aérien de formation en vol, d'inspection, de travaux publics ou de construction, de photographie, d'épandage, de contrôle des incendies de forêt ou autre service prévu par règlement.

### **Exclusion — urgences**

**(3)** La présente partie ne s'applique pas à la fourniture d'un service aérien dans le cas où le gouvernement fédéral, le gouvernement d'une province ou une administration municipale déclare en vertu d'une loi fédérale ou provinciale qu'une situation de crise existe et présente directement ou indirectement une demande en vue d'obtenir ce service pour faire face à la situation de crise.

### **Intérêt public**

**(4)** Le ministre peut, par arrêté, interdire la fourniture d'un service aérien au titre du paragraphe (3) ou exiger qu'il y soit mis fin s'il estime qu'il est dans l'intérêt public de le faire.

### **Loi sur les textes réglementaires**

**(5)** Les arrêtés ne sont pas des textes réglementaires au sens de la *Loi sur les textes réglementaires*.

1996, ch. 10, art. 56; 2007, ch. 19, art. 14.

**56.1** [Abrogé, 2007, ch. 19, art. 15]

**56.2** [Abrogé, 2007, ch. 19, art. 15]

**56.3** [Repealed, 2007, c. 19, s. 15]

**56.4** [Repealed, 2007, c. 19, s. 15]

**56.5** [Repealed, 2007, c. 19, s. 15]

**56.6** [Repealed, 2007, c. 19, s. 15]

**56.7** [Repealed, 2007, c. 19, s. 15]

## Prohibitions

### Prohibition re operation

**57** No person shall operate an air service unless, in respect of that service, the person

- (a) holds a licence issued under this Part;
- (b) holds a Canadian aviation document; and
- (c) has the prescribed liability insurance coverage.

### Licence not transferable

**58** A licence issued under this Part for the operation of an air service is not transferable.

### Prohibition re sale

**59** No person shall sell, cause to be sold or publicly offer for sale in Canada an air service unless, if required under this Part, a person holds a licence issued under this Part in respect of that service and that licence is not suspended.

1996, c. 10, s. 59; 2007, c. 19, s. 16.

### Provision of aircraft with flight crew

**60 (1)** No person shall provide all or part of an aircraft, with a flight crew, to a licensee for the purpose of providing an air service pursuant to the licensee's licence and no licensee shall provide an air service using all or part of an aircraft, with a flight crew, provided by another person except

- (a) in accordance with regulations made by the Agency respecting disclosure of the identity of the operator of the aircraft and other related matters; and
- (b) where prescribed, with the approval of the Agency.

### Conditions and Ministerial directions

**(2)** Approval by the Agency under subsection (1) is subject to any directions to the Agency issued by the Minister and to any terms and conditions that the Agency may specify in the approval, including terms and conditions respecting routes to be followed, points or areas to be served, size and type of aircraft to be operated, schedules,

**56.3** [Abrogé, 2007, ch. 19, art. 15]

**56.4** [Abrogé, 2007, ch. 19, art. 15]

**56.5** [Abrogé, 2007, ch. 19, art. 15]

**56.6** [Abrogé, 2007, ch. 19, art. 15]

**56.7** [Abrogé, 2007, ch. 19, art. 15]

## Interdictions

### Conditions d'exploitation

**57** L'exploitation d'un service aérien est subordonnée à la détention, pour celui-ci, de la licence prévue par la présente partie, d'un document d'aviation canadien et de la police d'assurance responsabilité réglementaire.

### Incessibilité

**58** Les licences d'exploitation de services aériens sont inaccessibles.

### Opérations visant le service

**59** La vente, directe ou indirecte, et l'offre publique de vente, au Canada, d'un service aérien sont subordonnées à la détention, pour celui-ci, d'une licence en règle délivrée sous le régime de la présente partie.

1996, ch. 10, art. 59; 2007, ch. 19, art. 16.

### Fourniture d'aéronefs

**60 (1)** La fourniture de tout ou partie d'aéronefs, avec équipage, à un licencié en vue de la prestation, conformément à sa licence, d'un service aérien et celle, par un licencié, d'un service aérien utilisant tout ou partie d'aéronefs, avec équipage, appartenant à un tiers sont assujetties :

- a) au respect des règlements, notamment en matière de divulgation de l'identité des exploitants d'aéronefs;
- b) si les règlements l'exigent, à l'autorisation de l'Office.

### Directives ministérielles et conditions

**(2)** L'autorisation est assujettie aux directives que le ministre peut lui donner et peut comporter, lors de la délivrance ou par la suite en tant que de besoin, les conditions qu'il estime indiqué d'imposer, notamment en ce qui concerne les routes aériennes à suivre, les points ou régions à desservir, la dimension et la catégorie des aéro-

places of call, tariffs, fares, rates and charges, insurance, carriage of passengers and, subject to the *Canada Post Corporation Act*, carriage of goods.

## Licence for Domestic Service

### Issue of licence

**61** On application to the Agency and on payment of the specified fee, the Agency shall issue a licence to operate a domestic service to the applicant if

(a) the applicant establishes in the application to the satisfaction of the Agency that the applicant

(i) is a Canadian,

(ii) holds a Canadian aviation document in respect of the service to be provided under the licence,

(iii) has the prescribed liability insurance coverage in respect of the service to be provided under the licence, and

(iv) meets prescribed financial requirements; and

(b) the Agency is satisfied that the applicant has not contravened section 59 in respect of a domestic service within the preceding twelve months.

### Qualification exemption

**62 (1)** Where the Minister considers it necessary or advisable in the public interest that a domestic licence be issued to a person who is not a Canadian, the Minister may, by order, on such terms and conditions as may be specified in the order, exempt the person from the application of subparagraph 61(a)(i) for the duration of the order.

### Statutory Instruments Act

**(2)** The order is not a regulation for the purposes of the *Statutory Instruments Act*.

### Publication

**(3)** The Minister must, as soon as feasible, make the name of the person who is exempted and the exemption's duration accessible to the public through the Internet or by any other means that the Minister considers appropriate.

1996, c. 10, s. 62; 2013, c. 31, s. 5.

nefs à exploiter, les horaires, les escales, les tarifs, l'assurance, le transport des passagers et, sous réserve de la *Loi sur la Société canadienne des postes*, celui des marchandises.

## Service intérieur

### Délivrance de la licence

**61** L'Office, sur demande et paiement des droits indiqués, délivre une licence pour l'exploitation d'un service intérieur au demandeur :

a) qui, dans la demande, justifie du fait :

(i) qu'il est Canadien,

(ii) qu'à l'égard du service, il détient un document d'aviation canadien,

(iii) qu'à l'égard du service, il détient la police d'assurance responsabilité réglementaire,

(iv) qu'il remplit les exigences financières réglementaires;

b) dont il est convaincu qu'il n'a pas, dans les douze mois précédents, enfreint l'article 59 relativement à un service intérieur.

### Exemption

**62 (1)** Lorsqu'il estime souhaitable ou nécessaire dans l'intérêt public de délivrer une licence intérieure à une personne qui n'a pas la qualité de Canadien, le ministre peut, par arrêté assorti ou non de conditions, l'exempter de l'obligation de justifier de cette qualité, l'exemption restant valide tant que l'arrêté reste en vigueur.

### Loi sur les textes réglementaires

**(2)** L'arrêté n'est pas un règlement pour l'application de la *Loi sur les textes réglementaires*.

### Publication

**(3)** Dès que possible, le ministre rend le nom de la personne bénéficiant de l'exemption et la durée de celle-ci accessibles au public par Internet ou par tout autre moyen qu'il estime indiqué.

1996, ch. 10, art. 62; 2013, ch. 31, art. 5.



CANADA

CONSOLIDATION

**Criminal Code**

R.S.C., 1985, c. C-46

CODIFICATION

**Code criminel**

L.R.C. (1985), ch. C-46

Current to April 12, 2016

À jour au 12 avril 2016

Last amended on July 23, 2015

Dernière modification le 23 juillet 2015

**sell** includes offer for sale, expose for sale, have in possession for sale or distribute or advertise for sale; (*vendre*)

**solicitor** means, in the Province of Quebec, an advocate or a notary and, in any other province, a barrister or solicitor. (*avocat*)

R.S., 1985, c. C-46, s. 183; R.S., 1985, c. 27 (1<sup>st</sup> Supp.), ss. 7, 23, c. 1 (2<sup>nd</sup> Supp.), s. 213, c. 1 (4<sup>th</sup> Supp.), s. 13, c. 29 (4<sup>th</sup> Supp.), s. 17, c. 42 (4<sup>th</sup> Supp.), s. 1; 1991, c. 28, s. 12; 1992, c. 27, s. 90; 1993, c. 7, s. 5, c. 25, s. 94, c. 40, s. 1, c. 46, s. 4; 1995, c. 39, s. 140; 1996, c. 19, s. 66; 1997, c. 18, s. 7, c. 23, s. 3; 1998, c. 34, s. 8; 1999, c. 2, s. 47, c. 5, s. 4; 2000, c. 24, s. 43; 2001, c. 32, s. 4, c. 41, ss. 5, 31, 133; 2002, c. 22, s. 409; 2004, c. 15, s. 108; 2005, c. 32, s. 10, c. 43, s. 1; 2008, c. 6, s. 15; 2009, c. 2, s. 442, c. 22, s. 4, c. 28, s. 3; 2010, c. 3, s. 1, c. 14, s. 2; 2012, c. 1, s. 24; 2013, c. 8, s. 2, c. 9, s. 14, c. 13, s. 7; 2014, c. 17, s. 2, c. 25, s. 11, c. 31, s. 7, c. 32, s. 59; 2015, c. 20, s. 19.

(v) l'article 126 (fausses présentations),

(vi) l'article 129 (infractions relatives aux agents);

j) toute infraction visée à la *Loi sur la protection de l'information*;

k) l'article 51.01 (infractions relatives aux produits, services, étiquettes et emballages) de la *Loi sur les marques de commerce*.

Est également visée par la présente définition toute autre infraction dont il y a des motifs raisonnables de croire qu'elle est une infraction d'organisation criminelle, ou toute autre infraction dont il y a des motifs raisonnables de croire qu'elle est une infraction visée aux alinéas b) ou c) de la définition de **infraction de terrorisme** à l'article 2. (*offence*)

**intercepter** S'entend notamment du fait d'écouter, d'enregistrer ou de prendre volontairement connaissance d'une communication ou de sa substance, son sens ou son objet. (*intercept*)

**policier** S'entend d'un officier ou d'un agent de police ou de toute autre personne chargée du maintien de la paix publique. (*police officer*)

**réseau téléphonique public commuté** Installation de télécommunication qui vise principalement à fournir au public un service téléphonique par lignes terrestres moyennant contrepartie. (*public switched telephone network*)

**vendre** Sont assimilés à la vente l'offre de vente et le fait d'exposer pour la vente, d'avoir en sa possession pour la vente, de distribuer ou de faire de la publicité pour la vente. (*sell*)

L.R. (1985), ch. C-46, art. 183; L.R. (1985), ch. 27 (1<sup>er</sup> suppl.), art. 7 et 23, ch. 1 (2<sup>e</sup> suppl.), art. 213, ch. 1 (4<sup>e</sup> suppl.), art. 13, ch. 29 (4<sup>e</sup> suppl.), art. 17, ch. 42 (4<sup>e</sup> suppl.), art. 1; 1991, ch. 28, art. 12; 1992, ch. 27, art. 90; 1993, ch. 7, art. 5, ch. 25, art. 94, ch. 40, art. 1, ch. 46, art. 4; 1995, ch. 39, art. 140; 1996, ch. 19, art. 66; 1997, ch. 18, art. 7, ch. 23, art. 3; 1998, ch. 34, art. 8; 1999, ch. 2, art. 47, ch. 5, art. 4; 2000, ch. 24, art. 43; 2001, ch. 32, art. 4, ch. 41, art. 5, 31 et 133; 2002, ch. 22, art. 409; 2004, ch. 15, art. 108; 2005, ch. 32, art. 10, ch. 43, art. 1; 2008, ch. 6, art. 15; 2009, ch. 2, art. 442, ch. 22, art. 4, ch. 28, art. 3; 2010, ch. 3, art. 1, ch. 14, art. 2; 2012, ch. 1, art. 24; 2013, ch. 8, art. 2, ch. 9, art. 14, ch. 13, art. 7; 2014, ch. 17, art. 2, ch. 25, art. 11, ch. 31, art. 7, ch. 32, art. 59; 2015, ch. 20, art. 19.

## Consent to interception

**183.1** Where a private communication is originated by more than one person or is intended by the originator thereof to be received by more than one person, a consent to the interception thereof by any one of those persons is sufficient consent for the purposes of any provision of this Part.

1993, c. 40, s. 2.

## Consentement à l'interception

**183.1** Pour l'application de la présente partie, dans le cas d'une communication privée ayant plusieurs auteurs ou plusieurs destinataires, il suffit, afin qu'il y ait consentement à son interception, que l'un d'eux y consente.

1993, ch. 40, art. 2.

## Interception of Communications

### Interception

**184 (1)** Every one who, by means of any electro-magnetic, acoustic, mechanical or other device, wilfully intercepts a private communication is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years.

### Saving provision

**(2)** Subsection (1) does not apply to

**(a)** a person who has the consent to intercept, express or implied, of the originator of the private communication or of the person intended by the originator thereof to receive it;

**(b)** a person who intercepts a private communication in accordance with an authorization or pursuant to section 184.4 or any person who in good faith aids in any way another person who the aiding person believes on reasonable grounds is acting with an authorization or pursuant to section 184.4;

**(c)** a person engaged in providing a telephone, telegraph or other communication service to the public who intercepts a private communication,

**(i)** if the interception is necessary for the purpose of providing the service,

**(ii)** in the course of service observing or random monitoring necessary for the purpose of mechanical or service quality control checks, or

**(iii)** if the interception is necessary to protect the person's rights or property directly related to providing the service;

**(d)** an officer or servant of Her Majesty in right of Canada who engages in radio frequency spectrum management, in respect of a private communication intercepted by that officer or servant for the purpose of identifying, isolating or preventing an unauthorized or interfering use of a frequency or of a transmission; or

**(e)** a person, or any person acting on their behalf, in possession or control of a computer system, as defined in subsection 342.1(2), who intercepts a private communication originating from, directed to or transmitting through that computer system, if the interception is reasonably necessary for

**(i)** managing the quality of service of the computer system as it relates to performance factors such as

## Interception des communications

### Interception

**184 (1)** Est coupable d'un acte criminel et passible d'un emprisonnement maximal de cinq ans quiconque, au moyen d'un dispositif électromagnétique, acoustique, mécanique ou autre, intercepte volontairement une communication privée.

### Réserve

**(2)** Le paragraphe (1) ne s'applique pas aux personnes suivantes :

**a)** une personne qui a obtenu, de l'auteur de la communication privée ou de la personne à laquelle son auteur la destine, son consentement exprès ou tacite à l'interception;

**b)** une personne qui intercepte une communication privée en conformité avec une autorisation ou en vertu de l'article 184.4, ou une personne qui, de bonne foi, aide de quelque façon une autre personne qu'elle croit, en se fondant sur des motifs raisonnables, agir en conformité avec une telle autorisation ou en vertu de cet article;

**c)** une personne qui fournit au public un service de communications téléphoniques, télégraphiques ou autres et qui intercepte une communication privée dans l'un ou l'autre des cas suivants :

**(i)** cette interception est nécessaire pour la fourniture de ce service,

**(ii)** à l'occasion de la surveillance du service ou d'un contrôle au hasard nécessaire pour les vérifications mécaniques ou la vérification de la qualité du service,

**(iii)** cette interception est nécessaire pour protéger ses droits ou biens directement liés à la fourniture d'un service de communications téléphoniques, télégraphiques ou autres;

**d)** un fonctionnaire ou un préposé de Sa Majesté du chef du Canada chargé de la régulation du spectre des fréquences de radiocommunication, pour une communication privée qu'il a interceptée en vue d'identifier, d'isoler ou d'empêcher l'utilisation non autorisée ou importune d'une fréquence ou d'une transmission;

**e)** une personne - ou toute personne agissant pour son compte - qui, étant en possession ou responsable d'un ordinateur - au sens du paragraphe 342.1(2) -, intercepte des communications privées qui sont desti-

the responsiveness and capacity of the system as well as the integrity and availability of the system and data, or

(ii) protecting the computer system against any act that would be an offence under subsection 342.1(1) or 430(1.1).

### Use or retention

(3) A private communication intercepted by a person referred to in paragraph (2)(e) can be used or retained only if

- (a) it is essential to identify, isolate or prevent harm to the computer system; or
- (b) it is to be disclosed in circumstances referred to in subsection 193(2).

R.S., 1985, c. C-46, s. 184; 1993, c. 40, s. 3; 2004, c. 12, s. 4.

### Interception to prevent bodily harm

**184.1 (1)** An agent of the state may intercept, by means of any electro-magnetic, acoustic, mechanical or other device, a private communication if

- (a) either the originator of the private communication or the person intended by the originator to receive it has consented to the interception;
- (b) the agent of the state believes on reasonable grounds that there is a risk of bodily harm to the person who consented to the interception; and
- (c) the purpose of the interception is to prevent the bodily harm.

### Admissibility of intercepted communication

(2) The contents of a private communication that is obtained from an interception pursuant to subsection (1) are inadmissible as evidence except for the purposes of proceedings in which actual, attempted or threatened bodily harm is alleged, including proceedings in respect of an application for an authorization under this Part or in respect of a search warrant or a warrant for the arrest of any person.

### Destruction of recordings and transcripts

(3) The agent of the state who intercepts a private communication pursuant to subsection (1) shall, as soon as is

nées à celui-ci, en proviennent ou passent par lui, si l'interception est raisonnablement nécessaire :

(i) soit pour la gestion de la qualité du service de l'ordinateur en ce qui concerne les facteurs de qualité tels que la réactivité et la capacité de l'ordinateur ainsi que l'intégrité et la disponibilité de celui-ci et des données,

(ii) soit pour la protection de l'ordinateur contre tout acte qui constituerait une infraction aux paragraphes 342.1(1) ou 430(1.1).

### Utilisation ou conservation

(3) La communication privée interceptée par la personne visée à l'alinéa (2) e) ne peut être utilisée ou conservée que si, selon le cas :

- a) elle est essentielle pour détecter, isoler ou empêcher des activités dommageables pour l'ordinateur;
- b) elle sera divulguée dans un cas visé au paragraphe 193(2).

L.R. (1985), ch. C-46, art. 184; 1993, ch. 40, art. 3; 2004, ch. 12, art. 4.

### Interception préventive

**184.1 (1)** L'agent de l'État peut, au moyen d'un dispositif électromagnétique, acoustique, mécanique ou autre, intercepter une communication privée si les conditions suivantes sont réunies :

- a) l'auteur de la communication ou la personne à laquelle celui-ci la destine a consenti à l'interception;
- b) l'agent a des motifs raisonnables de croire qu'il existe un risque de lésions corporelles pour la personne qui a consenti à l'interception;
- c) l'interception vise à empêcher les lésions corporelles.

### Admissibilité en preuve des communications interceptées

(2) Le contenu de la communication privée obtenue au moyen de l'interception est inadmissible en preuve, sauf dans les procédures relatives à l'infliction de lésions corporelles ou à la tentative ou menace d'une telle infliction, notamment celles qui se rapportent à une demande d'autorisation visée par la présente partie, un mandat de perquisition ou un mandat d'arrestation.

### Destruction des enregistrements et des transcriptions

(3) L'agent de l'État qui intercepte la communication privée doit, dans les plus brefs délais possible, détruire



CANADA

CONSOLIDATION

CODIFICATION

## Federal Courts Rules

## Règles des Cours fédérales

SOR/98-106

DORS/98-106

Current to May 24, 2016

À jour au 24 mai 2016

Last amended on January 30, 2015

Dernière modification le 30 janvier 2015

## Citation of rule or order

**(2)** An amendment made under subsection (1) shall indicate the rule or Court order under which the amendment is made.

# Affidavit Evidence and Examinations

## Affidavits

### Form of affidavits

**80 (1)** Affidavits shall be drawn in the first person, in Form 80A.

### Affidavit by blind or illiterate person

**(2)** Where an affidavit is made by a deponent who is blind or illiterate, the person before whom the affidavit is sworn shall certify that the affidavit was read to the deponent and that the deponent appeared to understand it.

### Affidavit by deponent who does not understand an official language

**(2.1)** Where an affidavit is written in an official language for a deponent who does not understand that official language, the affidavit shall

**(a)** be translated orally for the deponent in the language of the deponent by a competent and independent interpreter who has taken an oath, in Form 80B, as to the performance of his or her duties; and

**(b)** contain a jurat in Form 80C.

## Exhibits

**(3)** Where an affidavit refers to an exhibit, the exhibit shall be accurately identified by an endorsement on the exhibit or on a certificate attached to it, signed by the person before whom the affidavit is sworn.

SOR/2002-417, s. 10.

## Content of affidavits

**81 (1)** Affidavits shall be confined to facts within the deponent's personal knowledge except on motions, other than motions for summary judgment or summary trial, in which statements as to the deponent's belief, with the grounds for it, may be included.

## Signification

**(2)** Le document modifié selon le paragraphe (1) doit indiquer la date de la modification et la règle ou l'ordonnance en vertu de laquelle la modification est apportée et doit être signifié à nouveau.

# Preuve par affidavit et interrogatoires

## Affidavits

### Forme

**80 (1)** Les affidavits sont rédigés à la première personne et sont établis selon la formule 80A.

### Affidavit d'un handicapé visuel ou d'un analphabète

**(2)** Lorsqu'un affidavit est fait par un handicapé visuel ou un analphabète, la personne qui reçoit le serment certifie que l'affidavit a été lu au déclarant et que ce dernier semblait en comprendre la teneur.

### Affidavit d'une personne ne comprenant pas une langue officielle

**(2.1)** Lorsqu'un affidavit est rédigé dans une des langues officielles pour un déclarant qui ne comprend pas cette langue, l'affidavit doit :

**a)** être traduit oralement pour le déclarant dans sa langue par un interprète indépendant et compétent qui a prêté le serment, selon la formule 80B, de bien exercer ses fonctions;

**b)** comporter la formule d'assermentation prévue à la formule 80C.

## Pièces à l'appui de l'affidavit

**(3)** Lorsqu'un affidavit fait mention d'une pièce, la désignation précise de celle-ci est inscrite sur la pièce même ou sur un certificat joint à celle-ci, suivie de la signature de la personne qui reçoit le serment.

DORS/2002-417, art. 10.

## Contenu

**81 (1)** Les affidavits se limitent aux faits dont le déclarant a une connaissance personnelle, sauf s'ils sont présentés à l'appui d'une requête – autre qu'une requête en jugement sommaire ou en procès sommaire – auquel cas ils peuvent contenir des déclarations fondées sur ce que le déclarant croit être les faits, avec motifs à l'appui.

## Affidavits on belief

**(2)** Where an affidavit is made on belief, an adverse inference may be drawn from the failure of a party to provide evidence of persons having personal knowledge of material facts.

SOR/2009-331, s. 2.

## Use of solicitor's affidavit

**82** Except with leave of the Court, a solicitor shall not both depose to an affidavit and present argument to the Court based on that affidavit.

## Cross-examination on affidavits

**83** A party to a motion or application may cross-examine the deponent of an affidavit served by an adverse party to the motion or application.

## When cross-examination may be made

**84 (1)** A party seeking to cross-examine the deponent of an affidavit filed in a motion or application shall not do so until the party has served on all other parties every affidavit on which the party intends to rely in the motion or application, except with the consent of all other parties or with leave of the Court.

## Filing of affidavit after cross-examination

**(2)** A party who has cross-examined the deponent of an affidavit filed in a motion or application may not subsequently file an affidavit in that motion or application, except with the consent of all other parties or with leave of the Court.

## Due diligence

**85** A party who intends to cross-examine the deponent of an affidavit shall do so with due diligence.

## Transcript of cross-examination on affidavit

**86** Unless the Court orders otherwise, a party who conducts a cross-examination on an affidavit shall order and pay for a transcript thereof and send a copy to each other party.

## Examinations out of Court

### General

#### Definition of examination

**87** In rules 88 to 100, *examination* means

- (a)** an examination for discovery;
- (b)** the taking of evidence out of court for use at trial;

## Poids de l'affidavit

**(2)** Lorsqu'un affidavit contient des déclarations fondées sur ce que croit le déclarant, le fait de ne pas offrir le témoignage de personnes ayant une connaissance personnelle des faits substantiels peut donner lieu à des conclusions défavorables.

DORS/2009-331, art. 2.

## Utilisation de l'affidavit d'un avocat

**82** Sauf avec l'autorisation de la Cour, un avocat ne peut à la fois être l'auteur d'un affidavit et présenter à la Cour des arguments fondés sur cet affidavit.

## Droit au contre-interrogatoire

**83** Une partie peut contre-interroger l'auteur d'un affidavit qui a été signifié par une partie adverse dans le cadre d'une requête ou d'une demande.

## Contre-interrogatoire de l'auteur d'un affidavit

**84 (1)** Une partie ne peut contre-interroger l'auteur d'un affidavit déposé dans le cadre d'une requête ou d'une demande à moins d'avoir signifié aux autres parties chaque affidavit qu'elle entend invoquer dans le cadre de celle-ci, sauf avec le consentement des autres parties ou l'autorisation de la Cour.

## Dépôt d'un affidavit après le contre-interrogatoire

**(2)** La partie qui a contre-interrogé l'auteur d'un affidavit déposé dans le cadre d'une requête ou d'une demande ne peut par la suite déposer un affidavit dans le cadre de celle-ci, sauf avec le consentement des autres parties ou l'autorisation de la Cour.

## Diligence raisonnable

**85** Le contre-interrogatoire de l'auteur d'un affidavit est effectué avec diligence raisonnable.

## Transcription d'un contre-interrogatoire

**86** Sauf ordonnance contraire de la Cour, la partie qui effectue un contre-interrogatoire concernant un affidavit doit en demander la transcription, en payer les frais et en transmettre une copie aux autres parties.

## Interrogatoires hors cour

### Dispositions générales

#### Définition de interrogatoire

**87** Dans les règles 88 à 100, *interrogatoire* s'entend, selon le cas :

- a)** d'un interrogatoire préalable;

- (c) a cross-examination on an affidavit; or
- (d) an examination in aid of execution.

- b) des dépositions recueillies hors cour pour être utilisées à l'instruction;
- c) du contre-interrogatoire concernant un affidavit;
- d) de l'interrogatoire à l'appui d'une exécution forcée.

### Manner of examination

**88 (1)** Subject to rules 234 and 296, an examination may be conducted orally or in writing.

### Electronic communications

**(2)** The Court may order that an examination out of court be recorded by video recording or conducted by video-conference or any other form of electronic communication.

### Oral Examinations

#### Oral examination

**89 (1)** A party requesting an oral examination shall pay the fees and disbursements related to recording the examination in accordance with Tariff A.

#### Examination in Canada

**(2)** An oral examination that takes place in Canada shall be recorded by a person authorized to record examinations for discovery under the practice and procedure of a superior court in Canada.

#### Examination outside Canada

**(3)** An oral examination that takes place in a jurisdiction outside Canada shall be recorded by a person authorized to record

- (a) court proceedings in that jurisdiction; or
- (b) examinations for discovery under the practice and procedure of a superior court in Canada, if the parties consent.

#### Examination to be recorded

**(4)** A person who records an oral examination shall record it word for word, including any comment made by a solicitor, other than statements that the attending parties agree to exclude from the record.

#### Place of oral examination

**90 (1)** Where a person to be examined on an oral examination resides in Canada and the person and the parties cannot agree on where to conduct the oral examination, it shall be conducted in the place closest to the person's residence where a superior court sits.

### Mode d'interrogatoire

**88 (1)** Sous réserve des règles 234 et 296, l'interrogatoire se fait soit de vive voix soit par écrit.

### Communication électronique

**(2)** La Cour peut ordonner que l'interrogatoire d'une personne hors cour soit enregistré sur cassette vidéo ou effectué par vidéo-conférence ou par tout autre moyen de communication électronique.

### Interrogatoire oral

#### Interrogatoire oral

**89 (1)** La partie qui demande un interrogatoire oral paie le montant relatif à l'enregistrement déterminé selon le tarif A.

#### Interrogatoire au Canada

**(2)** L'interrogatoire oral qui a lieu au Canada est enregistré par une personne autorisée à enregistrer des interrogatoires préalables selon la pratique et la procédure d'une cour supérieure au Canada.

#### Interrogatoire à l'étranger

**(3)** L'interrogatoire oral qui a lieu à l'étranger est enregistré par une personne autorisée :

- a) soit à y enregistrer des procédures judiciaires;
- b) soit à enregistrer des interrogatoires préalables selon la pratique et la procédure d'une cour supérieure au Canada, si les parties y consentent.

#### Enregistrement intégral

**(4)** La personne chargée d'enregistrer un interrogatoire oral l'enregistre intégralement, y compris les commentaires des avocats, en excluant toutefois les énoncés que les parties présentes consentent à exclure du dossier.

#### Endroit de l'interrogatoire

**90 (1)** Lorsque la personne devant subir un interrogatoire oral réside au Canada et n'arrive pas à s'entendre avec les parties sur l'endroit où se déroulera l'interrogatoire, celui-ci est tenu à l'endroit où siège une cour supérieure qui est le plus proche de la résidence de la personne.

**(b)** where the person to be examined is not a party to the proceeding, at least 10 days before the day of the proposed examination; or

**(c)** where the person is to be cross-examined on an affidavit filed in support of a motion, at least 24 hours before the hearing of the motion.

### **Swearing**

**92** A person to be examined on an oral examination shall be sworn before being examined.

### **Examining party to provide interpreter**

**93 (1)** Where a person to be examined on an oral examination understands neither French nor English or is deaf or mute, the examining party shall arrange for the attendance and pay the fees and disbursements of an independent and competent person to accurately interpret everything said during the examination, other than statements that the attending parties agree to exclude from the record.

### **Administrator to provide interpreter**

**(2)** Where an interpreter is required because the examining party wishes to conduct an oral examination in one official language and the person to be examined wishes to be examined in the other official language, on the request of the examining party made at least six days before the examination, the Administrator shall arrange for the attendance and pay the fees and disbursements of an independent and competent interpreter.

### **Oath of interpreter**

**(3)** Before aiding in the examination of a witness, an interpreter shall take an oath, in Form 93, as to the performance of his or her duties.

SOR/2007-301, s. 3(E).

### **Production of documents on examination**

**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.

### **Relief from production**

**(2)** On motion, the Court may order that a person to be examined or the party on whose behalf that person is being examined be relieved from the requirement to

**c)** si elle vise le contre-interrogatoire de l'auteur d'un affidavit déposé au soutien d'une requête, au moins 24 heures avant l'audition de celle-ci.

### **Serment**

**92** La personne soumise à un interrogatoire oral prête serment avant d'être interrogée.

### **Interprète fourni par la partie qui interroge**

**93 (1)** Si la personne soumise à un interrogatoire oral ne comprend ni le français ni l'anglais ou si elle est sourde ou muette, la partie qui interroge s'assure de la présence et paie les honoraires et débours d'un interprète indépendant et compétent chargé d'interpréter fidèlement les parties de l'interrogatoire oral qui sont enregistrées selon le paragraphe 89(4).

### **Interprète fourni par l'administrateur**

**(2)** Lorsqu'une partie désire procéder à l'interrogatoire oral d'une personne dans une langue officielle et que cette dernière désire subir l'interrogatoire dans l'autre langue officielle, la partie peut demander à l'administrateur, au moins six jours avant l'interrogatoire, d'assurer la présence d'un interprète indépendant et compétent. Dans ce cas, l'administrateur paie les honoraires et les débours de l'interprète.

### **Serment de l'interprète**

**(3)** Avant de fournir des services d'interprétation, l'interprète prête le serment, selon la formule 93, de bien exercer ses fonctions.

DORS/2007-301, art. 3(A).

### **Production de documents**

**94 (1)** Sous réserve du paragraphe (2), la personne soumise à un interrogatoire oral ou la partie pour le compte de laquelle la personne est interrogée produisent pour examen à l'interrogatoire les documents et les éléments matériels demandés dans l'assignation à comparaître qui sont en leur possession, sous leur autorité ou sous leur garde, sauf ceux pour lesquels un privilège de non-divulgation a été revendiqué ou pour lesquels une dispense de production a été accordée par la Cour en vertu de la règle 230.

### **Partie non tenue de produire des documents**

**(2)** La Cour peut, sur requête, ordonner que la personne ou la partie pour le compte de laquelle la personne est interrogée soient dispensées de l'obligation de produire

produce for inspection any document or other material requested in a direction to attend, if the Court is of the opinion that the document or other material requested is irrelevant or, by reason of its nature or the number of documents or amount of material requested, it would be unduly onerous to require the person or party to produce it.

### Objections

**95 (1)** A person who objects to a question that is asked in an oral examination shall briefly state the grounds for the objection for the record.

### Preliminary answer

**(2)** A person may answer a question that was objected to in an oral examination subject to the right to have the propriety of the question determined, on motion, before the answer is used at trial.

### Improper conduct

**96 (1)** A person being examined may adjourn an oral examination and bring a motion for directions if the person believes that he or she is being subjected to an excessive number of questions or to improper questions, or that the examination is being conducted in bad faith or in an abusive manner.

### Adjournment to seek directions

**(2)** A person conducting an oral examination may adjourn the examination and bring a motion for directions if the person believes answers to questions being provided are evasive or if the person being examined fails to produce a document or other material requested under rule 94.

### Sanctions

**(3)** On a motion under subsection (1) or (2), the Court may sanction, through costs, a person whose conduct necessitated the motion or a person who unnecessarily adjourned the examination.

### Failure to attend or misconduct

**97** Where a person fails to attend an oral examination or refuses to take an oath, answer a proper question, produce a document or other material required to be produced or comply with an order made under rule 96, the Court may

- (a)** order the person to attend or re-attend, as the case may be, at his or her own expense;

pour examen certains des documents ou éléments matériels demandés dans l'assignation à comparaître, si elle estime que ces documents ou éléments ne sont pas pertinents ou qu'il serait trop onéreux de les produire du fait de leur nombre ou de leur nature.

### Objection

**95 (1)** La personne qui soulève une objection au sujet d'une question posée au cours d'un interrogatoire oral énonce brièvement les motifs de son objection pour qu'ils soient inscrits au dossier.

### Réponse préliminaire

**(2)** Une personne peut répondre à une question au sujet de laquelle une objection a été formulée à l'interrogatoire oral, sous réserve de son droit de faire déterminer, sur requête, le bien-fondé de la question avant que la réponse soit utilisée à l'instruction.

### Questions injustifiées

**96 (1)** La personne qui est interrogée peut ajourner l'interrogatoire oral et demander des directives par voie de requête, si elle croit qu'elle est soumise à un nombre excessif de questions ou à des questions inopportunes, ou que l'interrogatoire est effectué de mauvaise foi ou de façon abusive.

### Ajournement

**(2)** La personne qui interroge peut ajourner l'interrogatoire oral et demander des directives par voie de requête, si elle croit que les réponses données aux questions sont évasives ou qu'un document ou un élément matériel demandé en application de la règle 94 n'a pas été produit.

### Sanctions

**(3)** À la suite de la requête visée aux paragraphes (1) ou (2), la Cour peut condamner aux dépens la personne dont la conduite a rendu nécessaire la présentation de la requête ou la personne qui a adjourné l'interrogatoire sans raison valable.

### Défaut de comparaître ou inconduite

**97** Si une personne ne se présente pas à un interrogatoire oral ou si elle refuse de prêter serment, de répondre à une question légitime, de produire un document ou un élément matériel demandés ou de se conformer à une ordonnance rendue en application de la règle 96, la Cour peut :

- (b)** order the person to answer a question that was improperly objected to and any proper question arising from the answer;
- (c)** strike all or part of the person's evidence, including an affidavit made by the person;
- (d)** dismiss the proceeding or give judgment by default, as the case may be; or
- (e)** order the person or the party on whose behalf the person is being examined to pay the costs of the examination.

- a)** ordonner à cette personne de subir l'interrogatoire ou un nouvel interrogatoire oral, selon le cas, à ses frais;
- b)** ordonner à cette personne de répondre à toute question à l'égard de laquelle une objection a été jugée injustifiée ainsi qu'à toute question légitime découlant de sa réponse;
- c)** ordonner la radiation de tout ou partie de la preuve de cette personne, y compris ses affidavits;
- d)** ordonner que l'instance soit rejetée ou rendre jugement par défaut, selon le cas;
- e)** ordonner que la personne ou la partie au nom de laquelle la personne est interrogée paie les frais de l'interrogatoire oral.

### Contempt order

**98** A person who does not comply with an order made under rule 96 or 97 may be found in contempt.

Written Examinations

### Written examination

**99 (1)** A party who intends to examine a person by way of a written examination shall serve a list of concise, separately numbered questions in Form 99A for the person to answer.

### Objections

**(2)** A person who objects to a question in a written examination may bring a motion to have the question struck out.

### Answers to written examination

**(3)** A person examined by way of a written examination shall answer by way of an affidavit.

### Service of answers

**(4)** An affidavit referred to in subsection (3) shall be in Form 99B and be served on every other party within 30 days after service of the written examination under subsection (1).

### Application of oral examination rules

**100** Rules 94, 95, 97 and 98 apply to written examinations, with such modifications as are necessary.

### Ordonnance pour outrage au tribunal

**98** Quiconque ne se conforme pas à une ordonnance rendue en application des règles 96 ou 97 peut être reconnu coupable d'outrage au tribunal.

Interrogatoire écrit

### Interrogatoire par écrit

**99 (1)** La partie qui désire procéder par écrit à l'interrogatoire d'une personne dresse une liste, selon la formule 99A, de questions concises, numérotées séparément, auxquelles celle-ci devra répondre et lui signifie cette liste.

### Objection

**(2)** La personne qui soulève une objection au sujet d'une question posée dans le cadre d'un interrogatoire écrit peut, par voie de requête, demander à la Cour de rejeter la question.

### Réponses

**(3)** La personne interrogée par écrit est tenue de répondre par affidavit établi selon la formule 99B.

### Signification des réponses

**(4)** L'affidavit visé au paragraphe (3) est signifié à toutes les parties dans les 30 jours suivant la signification de l'interrogatoire écrit.

### Application

**100** Les règles 94, 95, 97 et 98 s'appliquent à l'interrogatoire écrit, avec les adaptations nécessaires.

## Contents of motion record

**(2)** The motion record of a respondent to a motion shall contain, on consecutively numbered pages and in the following order,

- (a)** a table of contents;
- (b)** all affidavits and other material to be used by the respondent on the motion that is not included in the moving party's motion record;
- (c)** subject to rule 368, the portions of any transcripts on which the respondent intends to rely;
- (d)** subject to rule 366, written representations; and
- (e)** any other filed material not contained in the moving party's motion record that is necessary for the hearing of the motion.

SOR/2009-331, s. 6; SOR/2013-18, s. 13; SOR/2015-21, s. 28.

## Memorandum of fact and law required

**366** On a motion for summary judgment or summary trial, for an interlocutory injunction, for the determination of a question of law or for the certification of a proceeding as a class proceeding, or if the Court so orders, a motion record shall contain a memorandum of fact and law instead of written representations.

SOR/2002-417, s. 22; SOR/2007-301, s. 8; SOR/2009-331, s. 7.

## Documents filed as part of motion record

**367** A notice of motion or any affidavit required to be filed by a party to a motion may be served and filed as part of the party's motion record and need not be served and filed separately.

## Transcripts of cross-examinations

**368** Transcripts of all cross-examinations on affidavits on a motion shall be filed before the hearing of the motion.

## Motions in writing

**369 (1)** A party may, in a notice of motion, request that the motion be decided on the basis of written representations.

## Request for oral hearing

**(2)** A respondent to a motion brought in accordance with subsection (1) shall serve and file a respondent's record within 10 days after being served under rule 364 and, if

## Contenu du dossier de réponse

**(2)** Le dossier de réponse contient, sur des pages numérotées consécutivement, les éléments suivants dans l'ordre indiqué ci-après :

- a)** une table des matières;
- b)** les affidavits et autres documents et éléments matériels dont l'intimé entend se servir relativement à la requête et qui ne figurent pas dans le dossier de requête;
- c)** sous réserve de la règle 368, les extraits de toute transcription dont l'intimé entend se servir et qui ne figurent pas dans le dossier de requête;
- d)** sous réserve de la règle 366, les prétentions écrites de l'intimé;
- e)** les autres documents et éléments matériels déposés qui sont nécessaires à l'audition de la requête et qui ne figurent pas dans le dossier de requête.

DORS/2009-331, art. 6; DORS/2013-18, art. 13; DORS/2015-21, art. 28.

## Mémoire requis

**366** Dans le cas d'une requête en jugement sommaire ou en procès sommaire, d'une requête pour obtenir une injonction interlocutoire, d'une requête soulevant un point de droit ou d'une requête en autorisation d'une instance comme recours collectif, ou lorsque la Cour l'ordonne, le dossier de requête contient un mémoire des faits et du droit au lieu de prétentions écrites.

DORS/2002-417, art. 22; DORS/2007-301, art. 8; DORS/2009-331, art. 7.

## Dossier de requête

**367** L'avis de requête ou les affidavits qu'une partie doit déposer peuvent être signifiés et déposés à titre d'éléments de son dossier de requête ou de réponse, selon le cas. Ils n'ont pas à être signifiés et déposés séparément.

## Transcriptions des contre-interrogatoires

**368** Les transcriptions des contre-interrogatoires des auteurs des affidavits sont déposés avant l'audition de la requête.

## Procédure de requête écrite

**369 (1)** Le requérant peut, dans l'avis de requête, demander que la décision à l'égard de la requête soit prise uniquement sur la base de ses prétentions écrites.

## Demande d'audience

**(2)** L'intimé signifie et dépose son dossier de réponse dans les 10 jours suivant la signification visée à la règle 364 et, s'il demande l'audition de la requête, inclut une

the respondent objects to disposition of the motion in writing, indicate in its written representations or memorandum of fact and law the reasons why the motion should not be disposed of in writing.

### Reply

**(3)** A moving party may serve and file written representations in reply within four days after being served with a respondent's record under subsection (2).

### Disposition of motion

**(4)** On the filing of a reply under subsection (3) or on the expiration of the period allowed for a reply, the Court may dispose of a motion in writing or fix a time and place for an oral hearing of the motion.

### Abandonment of motion

**370 (1)** A party who brings a motion may abandon it by serving and filing a notice of abandonment in Form 370.

### Deemed abandonment

**(2)** Where a moving party fails to appear at the hearing of a motion without serving and filing a notice of abandonment, it is deemed to have abandoned the motion.

### Testimony regarding issue of fact

**371** On motion, the Court may, in special circumstances, authorize a witness to testify in court in relation to an issue of fact raised on a motion.

## PART 8

# Preservation of Rights in Proceedings

## General

### Motion before proceeding commenced

**372 (1)** A motion under this Part may not be brought before the commencement of a proceeding except in a case of urgency.

### Undertaking to commence proceeding

**(2)** A party bringing a motion before the commencement of a proceeding shall undertake to commence the proceeding within the time fixed by the Court.

mention à cet effet, accompagnée des raisons justifiant l'audition, dans ses préventions écrites ou son mémoire des faits et du droit.

### Réponse du requérant

**(3)** Le requérant peut signifier et déposer des préventions écrites en réponse au dossier de réponse dans les quatre jours après en avoir reçu signification.

### Décision

**(4)** Dès le dépôt de la réponse visée au paragraphe (3) ou dès l'expiration du délai prévu à cette fin, la Cour peut statuer sur la requête par écrit ou fixer les date, heure et lieu de l'audition de la requête.

### Désistement

**370 (1)** La partie qui a présenté une requête peut s'en désister en signifiant et en déposant un avis de désistement, établi selon la formule 370.

### Désistement présumé

**(2)** La partie qui ne se présente pas à l'audition de la requête et qui n'a ni signifié ni déposé un avis de désistement est réputée s'être désistée de sa requête.

### Témoignage sur des questions de fait

**371** Dans des circonstances particulières, la Cour peut, sur requête, autoriser un témoin à témoigner à l'audience quant à une question de fait soulevée dans une requête.

## PARTIE 8

# Sauvegarde des droits

## Dispositions générales

### Requête antérieure à l'instance

**372 (1)** Une requête ne peut être présentée en vertu de la présente partie avant l'introduction de l'instance, sauf en cas d'urgence.

### Engagement

**(2)** La personne qui présente une requête visée au paragraphe (1) s'engage à introduire l'instance dans le délai fixé par la Cour.

*Case Name:*  
**Canadian Tire Corp. v. Canadian Bicycle Manufacturers  
Assn.**

**Between**  
**Canadian Tire Corporation, Limited, applicant, and**  
**Canadian Bicycle Manufacturers Association, Raleigh**  
**Canada Limited, Groupe Procycle Inc., A. Mordo And Son**  
**Ltd., Yong Qi (Changzhou) Industrial Co., Ltd., Liyang**  
**(Shen Zhen) Machinery Co., Ltd., Liyang (Vietnam)**  
**Industries Co., Ltd., Specialized Bicycle Components**  
**Canada, Inc., Cervélo Cycles Inc., Giant Manufacturing**  
**Co., Ltd., Taiwan Bicycle Exporters' Association, Kenton**  
**Bicycle Co., Acebike Bicycle Co., Ltd., Pride**  
**International Inc., China Bicycle Association, China**  
**Chamber of Commerce For Import And Export of Machinery**  
**And Electronic Products, Bangkok Cycle Industrial**  
**Company Limited, Retail Council of Canada, Canadian**  
**Association of Specialty Bicycle Importers, Trek Bicycle**  
**Corporation, Cannondale Bicycle Corporation, Giant**  
**Bicycle Canada Inc., Astro Engineering Vietnam Co.,**  
**Ltd., Asama Yuh Jium International Vietnam Co. Ltd.,**  
**Always Co., Ltd., Vietnam Sheng Fa International Co.,**  
**Ltd., Dragon Bicycles Vietnam Co. Ltd., Syndicat De**  
**Métallos, Genesis Cycle Inc., Laidlaw Holdings Inc./To**  
**Wheels, Duke's Cycle, Norco Products Ltd., Ryder**  
**Distribution Inc., The Government of The Kingdom of**  
**Thailand, Bicicletas Mercurio, S.A. De C.V., Italcycle**  
**Inc., Bicycle Trade Association of Canada, The**  
**Government of The United Mexican States, Giant China Co.**  
**Ltd., The Government of Taiwan, .243 Racing Inc., The**  
**Government of The Republic of Turkey, The Government of**  
**The People's Republic of China, The Government of The**  
**Republic of Philippines, The Government of The Socialist**  
**Republic of Vietnam, Smooth Shifting Sports, Inc.,**  
**Brantford Cyclepath, Bayview Cycle Centre, Independent**  
**Bicycle Dealer Association, Primeau Vélo, Cycles Devinci**  
**Inc., Accessoires Pour Vélo O.G.D. Ltée and Bicycle**

**Sports Pacific, respondents**

[2006] F.C.J. No. 204

[2006] A.C.F. no 204

2006 FCA 56

2006 CAF 56

346 N.R. 186

146 A.C.W.S. (3d) 395

Docket A-439-05

Federal Court of Appeal  
Ottawa, Ontario

**Nadon J.A.**

Heard: February 2, 2006.

Judgment: February 10, 2006.

(16 paras.)

*Administrative law -- Judicial review and statutory appeal -- Affidavits filed in support of judicial review applications must be confined to the facts within the personal knowledge of the deponent, and the deponent must not interpret evidence previously considered by a tribunal or draw legal conclusions.*

*Civil Evidence -- Affidavits -- Striking out -- Affidavit in support of a judicial review application struck on the grounds that it constituted opinion evidence.*

Application to strike an affidavit. In September, 2005, the Canadian International Trade Tribunal issued a report after an inquiry into the importation of bicycles. It concluded that the increase in imported bicycles was the principal cause of the serious injuries suffered by domestic producers of like or directly competitive goods, and recommended to the Department of Finance that it impose a surtax. Canadian Tire Corporation commenced a judicial review application, and filed a forty-five paragraph affidavit from William Dovey in support. The Canadian Bicycle Manufacturers Association and the other respondents claimed that the affidavit was opinion evidence. Canadian Tire Corporation countered that some of the paragraphs were factual and not opinion.

HELD: Application allowed. Affidavits filed in support of judicial review applications must be confined to the facts within the personal knowledge of the deponent, and the deponent must not interpret evidence previously considered by a tribunal or draw legal conclusions. The purpose of the Dovey affidavit was to demonstrate that the conclusions reached by the Tribunal are not supported by, nor consistent with, the information contained within the Tribunal's report. While there were paragraphs that were factual statements and not opinion, they cannot be dissociated from the paragraphs which constitute opinion evidence. The affidavit is therefore struck in its entirety.

**Counsel:**

Riyaz Dattu, for the applicant.

Martin G. Masse and Keith Cameron, for the respondents.

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**REASONS FOR ORDER**

**1 NADON J.A.:**-- On February 10, 2005, the Canadian International Trade Tribunal (the "CITT") commenced a Global Safeguard Inquiry into the importation of bicycles and finished painted bicycle frames, following a complaint brought by the respondents herein who alleged that the said bicycles and painted bicycle frames were being imported into Canada in such increased quantities and under such conditions as to cause or threaten serious injury to domestic producers of like or competitive goods.

**2** Following its investigation into the matter, the CITT, on September 1, 2005, issued a Report containing its determinations and recommendations. More particularly, the CITT concluded that the increase in imported bicycles was the principal cause of the serious injuries suffered by the domestic producers of like or directly competitive goods. As a result, the CITT recommended to the Department of Finance that it impose a surtax set at 30% in the first year of application, 25% in the second year, and 20% in the third year.

**3** On September 29, 2005, the applicant, Canadian Tire Corporation ("Canadian Tire"), commenced a judicial review application in respect of the CITT's Report and on October 31, 2005, it filed the affidavit of William C. Dovey in support of its application.

**4** On November 18, 2005, the respondents filed a motion for an order striking out the said affidavit in its entirety.

**5** The Dovey affidavit is comprised of 45 paragraphs. After outlining his qualifications and experience (paragraphs 1 to 4), Mr. Dovey sets out the scope of the opinion which he intends to give (paragraphs 5 to 8), with a qualification of that opinion (paragraph 9). He then provides, at

paragraph 10, his summary comments and conclusions. He then sets out, at paragraphs 11 through 42, his approach and analysis. Finally, at paragraph 43, he sets out the specific findings which lead him to conclude as he does.

**6** For the present purposes, it will suffice for me to reproduce paragraphs 8, 9, 10 and 43 of the affidavit:

8. In the context of the above, I was asked to address and answer from a financial and accounting point of view the following questions:

Are the determinations and recommendations by the Tribunal concerning bicycles pursuant to the Global Safeguard Inquiry consistent with and supported by the financial evidence and information set out in the Tribunal Report?

9. My opinions and comments are qualified because the scope of my review was limited to the financial and other information set out in the Tribunal Report. I understand that the Tribunal had significant additional financial information available to it that is not now available to me.

I am not able to determine the extent to which such additional information, were it available to me, would have impacted on my observations and opinions set out herein.

10. Based on the scope of my review and subject to the assumptions, qualifications and restrictions noted herein, my conclusions are as follows:

- a) The financial evidence and information set out in the Tribunal Report is contradictory to and not supportive of certain of the Tribunal's determinations;
- b) There are alternative conclusions one can draw from the financial evidence and information set out in the Tribunal Report.

[...]

43. Set out below are my summary findings based on the scope of my review and subject to the assumptions and restrictions noted herein:

- i) The rate of growth in imports slowed over the five year period under review.
- ii) Based on certain measures, the financial condition of domestic producers improved over the period 2000 to 2004. The improvement in gross margin percentage and reduction in losses between 2000 and 2004 suggests improvement in the overall financial condition of domestic producers despite increases in imports.
- iii) The domestic producers may not have had the capacity to supply the domestic market if imports were substantially reduced.
- iv) There is no support in the Tribunal Report for an assumption that, had the imports not increased, the domestic producers are now capable of a substantial production increase while maintaining existing profitability.
- v) Factors other than the volume of and rate of increase in imports may be the drivers of domestic production, sales and profit.

7 For the reasons that follow, it is my view that there can be no doubt whatsoever that the affidavit must be struck in its entirety.

8 To begin with, it is clear that the Dovey affidavit constitutes opinion evidence, the purpose of which is to demonstrate to this Court that the conclusions reached by the CITT in its Report and, in particular, that the increase in the number of bicycles and finished painted bicycle frames into Canada is a principal cause of the serious injury caused to the domestic market, are not supported by, nor are they consistent with the financial evidence and information contained in the CITT Report.

9 Recently, in *Ly v. Canada (Minister of Citizenship and Immigration)*, [2003] F.C.J. No. 1496, 2003 FC 1184, dated October 10, 2003, Mr. Justice von Finkenstein, in the context of an application for judicial review of a decision of the Appeals Division of the Immigration and Refugee Board, correctly, in my view, dealt with the nature of affidavits that could be filed in support of a judicial review application. At paragraph 10 of his Reasons, the learned Judge expressed his view as follows:

[10] Except on motions, affidavits shall be confined to facts within the personal knowledge of the deponent: Rule 81(1), Federal Court Rules, 1998. The affidavit

must be free from argumentative materials and the deponent must not interpret evidence previously considered by a tribunal or draw legal conclusions (*Deigan v. Canada (A.G.)* (1996), 206 N.R. 195 (Fed. C.A.); *West Region Tribal Council v. Booth* (1992), 55 F.T.R. 28; *First Green Park Pty. Ltd. v. Canada (A.G.)*, [1997] 2 F.C. 845). If an affidavit does not meet these requirements, the application can only succeed if an error is apparent on the face of the record (*Turcinovica v. Canada (M.C.I.)*, [2002] F.C.J. No. 216, 2002 FCT 164).

**10** In *Deigan v. Canada*, *supra*, to which Mr. Justice von Finkenstein refers in support of his view, this Court agreed that the Motions Judge was correct in striking out certain paragraphs of the affidavit at issue on the grounds that these paragraphs were tendentious, opinionated and argumentative.

**11** Although I agree with counsel for the applicant that certain paragraphs of Mr. Dovey's affidavit are factual statements and not opinion, they cannot be dissociated from the paragraphs which, in effect, constitute Mr. Dovey's opinion. Further, some of the paragraphs, namely paragraphs 1 to 4, which set out Mr. Dovey's qualifications and experience, are of no use to this Court on their own. Indeed, the true purpose of the Dovey affidavit is not to present facts for consideration of the Court, but to present facts which are already within the existing record so as to argue that the conclusions reached by the CITT are not justified. Paragraph 8 of Mr. Dovey's affidavit, which I again reproduce, makes that perfectly clear:

8. In the context of the above, I was asked to address and answer from a financial and accounting point of view the following questions:

Are the determinations and recommendations by the Tribunal concerning bicycles pursuant to the Global Safeguard Inquiry consistent with and supported by the financial evidence and information set out in the Tribunal Report?

**12** In other words, the purpose of the affidavit is to provide to this Court an assessment of the evidence which differs from that made by the CITT. That evidence is, in my view, not admissible in this judicial review application.

**13** Another reason for striking the Dovey affidavit is that it constitutes evidence that was not before the CITT when it issued its Report. Allowing the introduction of the affidavit would have the effect of transforming the application before this Court into a *de novo* application. Were I to conclude that the affidavit is admissible, I would then have to grant, if they so wished, leave to the respondents to file their own "expert" affidavits in response to that of Mr. Dovey. The parties would most certainly proceed to discovery and file the transcripts of the evidence adduced thereat. In the end, this Court would be called upon to decide the issues raised by the judicial review application on evidence which the CITT had never considered.

**14** In any event, as Mr. Justice MacKay of the Federal Court stated in Vancouver Island Peace Society v. Canada, [1994] 1 F.C. 102, at paragraphs 56 and 57 of his Reasons, the issues which arise in judicial review proceedings are generally of a legal nature and not issues of a scientific or technical nature in respect of which the Court is in need of help from experts.

**15** For these reasons, I will allow, with costs, the respondents' motion to strike the Dovey affidavit in its entirety.

**16** There remains one issue to be dealt with. At the end of their arguments, the parties informed me that Canadian Tire had not yet filed its Application Record and that, as a result, the time to do so had elapsed. The respondents were in agreement with Canadian Tire that the delay to file the Application Record should be extended. However, the respondents were of the view that a delay of 20 days was sufficient, while Canadian Tire requested a delay of 45 days. In the circumstances, I am prepared to give Canadian Tire an additional 45 days to file its Application Record.

NADON J.A.

**Federal Court of Appeal**



**Cour d'appel fédérale**

**Date: 20160405**

**Docket: A-39-16**

**Citation: 2016 FCA 103**

**Present:** **STRATAS J.A.**

**BETWEEN:**

**DR. GÁBOR LUKÁCS**

**Applicant**

**and**

**CANADIAN TRANSPORTATION AGENCY**

**Respondent**

Dealt with in writing without appearance of parties.

Order delivered at Ottawa, Ontario, on April 5, 2016.

**REASONS FOR ORDER BY:**

**STRATAS J.A.**

Federal Court of Appeal



Cour d'appel fédérale

Date: 20160404

Docket: A-39-16

Citation: 2016 FCA 103

Present: STRATAS J.A.

BETWEEN:

DR. GÁBOR LUKÁCS

Applicant

and

CANADIAN TRANSPORTATION AGENCY

Respondent

**REASONS FOR ORDER**

**STRATAS J.A.**

[1] The parties are working to perfect this application for judicial review. The applicant has requested under Rule 317 that the respondent Agency transmit the record it relied upon when making its decisions that are the subject of the application. In response, the Agency has objected under Rule 318(2) to disclosure of some of the record and has informed the applicant and the Court of the reasons for the objection.

[2] Under Rule 318(3), the applicant now requests directions as to the procedure for making submissions on the objection.

[3] The Court has read the Agency's reasons for objection. Although unnecessary under Rule 318, the applicant has supplied his responses to the Agency's reasons.

[4] A reading of the parties' reasons and responses shows that they may not have a clear idea of the relationship between Rules 317 and 318 and the Court's remedial flexibility in this area. This affects the submissions on the objection that this Court will need. Before giving directions concerning the steps the parties need to take concerning the objection, it is necessary to clarify matters.

#### **A. Rules 317-318 and the Court's remedial flexibility**

[5] Rules 317-318 do not sit in isolation. Behind them is a common law backdrop and other Rules that describe how the record of the administrative decision-maker can be placed before a reviewing court. This was all explained in *Canadian Copyright Licensing Agency (Access Copyright) v. Alberta*, 2015 FCA 268 at paras. 7-18 and will not be repeated here. On admissibility of evidence before the reviewing court on judicial review, see, most recently, *Bernard v. Canada (Revenue Agency)*, 2015 FCA 263.

[6] Under Rule 317, a party can request from the administrative decision-maker material relevant to the application for judicial review. Under Rule 318, the requesting party is entitled to be

sent everything that it does not have in its possession and that was before the decision-maker at the time it made the decision under review, unless the decision-maker objects under Rule 318(2): *Access Information Agency Inc. v. Canada (Attorney General)*, 2007 FCA 224, 66 Admin. L.R. (4th) 83 at para. 7; *1185740 Ontario Ltd. v. Canada (Minister of National Revenue)* (1999), 247 N.R. 287 (F.C.A.). The Saskatchewan Court of Appeal set out the guiding principle on this entitlement rather well:

In order to effectively pursue their rights to challenge administrative decisions from a reasonableness perspective, the applicants in judicial review proceedings must be entitled to have the reviewing court consider the evidence presented to the tribunal in question [absent well-founded objection by the tribunal].

(*Hartwig v. Commission of Inquiry into matters relating to the death of Neil Stonechild*, 2007 SKCA 74, 284 D.L.R. (4th) 268 at para. 24.)

[7] This passage recognizes the relationship between the record before the reviewing court and the reviewing court's ability to review what the administrative decision-maker has done. If the reviewing court does not have evidence of what the tribunal has done or relied upon, the reviewing court may not be able to detect reversible error on the part of the administrative decision-maker. In other words, an inadequate evidentiary record before the reviewing court can immunize the administrative decision-maker from review on certain grounds. Our judge-made law in the area of administrative law develops in a way that furthers the accountability of public decision-makers in their decision-making and avoids immunization, absent the most compelling reasons: *Slansky v. Canada (Attorney General)*, 2013 FCA 199, 364 D.L.R. (4th) 112 at paras. 314-15 (dissenting reasons, but not opposed on this point).

[8] Now to objections under Rule 318(2). Where the relevant administrative decision-maker, here the Agency, objects under Rule 318(2) to disclosing some or all of the material requested under Rule 317 and the applicant does not dispute the objection, then the material is not transmitted. However, if, as here, the applicant disputes the objection, either the applicant or the administrative decision-maker may ask the Court for directions as to how the objection should be litigated: see Rule 318(3).

[9] In response to a request for directions, the Court may determine that the objection cannot succeed solely on the basis of the reasons given by the administrative decision-maker under Rule 318(2). In that case, it may summarily dismiss the objection and require the administrative decision-maker to transmit the material under Rule 318(1) within a particular period of time.

[10] In cases where the Rule 318(2) objection might have some merit, the Court can ask for submissions from the parties on a set schedule. But sometimes the Court will need more than submissions: in some cases, there will be real doubt and complexity and sometimes evidence will have to be filed by the parties to support or contest the objection. In cases like these, the Court may require the administrative decision-maker to proceed by way of a written motion under Rule 369. That Rule provides for motion records, responding motion records and replies, and also the deadlines for filing those documents. The motion records require supporting affidavits and written representations.

[11] Regardless of the manner in which the Court proceeds, when determining the validity of an objection under Rule 318(2) what standpoint should it adopt? Is the Court reviewing the administrative decision-maker's decision to object?

[12] No. When determining the validity of an objection, the Court is tasked with deciding the content of the evidentiary record in the proceeding—the application for judicial review—before it. Like all proceedings before the Court, it must consider what evidence is admissible before it. The Court, regulating its own proceedings, must apply its own standards and not defer to the administrative decision-maker's view. See *Slansky*, above at para. 274. (Much of the discussion that follows is based on *Slansky*.)

[13] What can the Court do when determining the validity of an objection? Quite a bit. There is much remedial flexibility. The Court can do more than just accept or reject the administrative decision-maker's objection to disclosure of material. It is not an all-or-nothing proposition.

[14] In this regard, Rule 318 should not been seen in isolation. Other rules and powers inform and assist the Court in determining an objection. For example:

- Rules 151 and 152 allow for material before the reviewing court to be sealed where confidentiality interests established on the evidence outweigh the substantial public interest in openness: *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41, [2002] 2 S.C.R. 522.

- Rule 53 allows terms to be attached to any order and Rule 55 allows the Court to vary a rule or dispense with compliance with a Rule. The exercise of these discretionary powers is informed by the objective in Rule 3 (recently given further impetus by the Supreme Court's decision in *Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87): to "secure the just, most expeditious and least expensive determination of every proceedings on its merits." It is also informed by s. 18.4 of the *Federal Courts Act*, R.S.C. 1985, c. F-7: "an application shall be heard and determined without delay and in a summary way."

- The Court can draw upon its plenary powers in the area of supervision of tribunals to craft procedures to achieve certain legitimate objectives in specific cases:

*Canada (Human Rights Commission) v. Canadian Liberty Net*, [1998] 1 S.C.R. 626, 157 D.L.R. (4th) 385 at paras. 35-38; *M.N.R. v. Derakhshani*, 2009 FCA 190, 400 N.R. 311 at paras. 10-11; *Canada (National Revenue) v. RBC Life Insurance Company*, 2013 FCA 50, 443 N.R. 378 at paras. 35-36.

[15] These Rules and powers allow the Court determining a Rule 318 objection to do more than just uphold or reject the administrative decision-maker's objection to disclosure of material. The Court may craft a remedy that furthers and reconciles, as much as possible, three objectives: (1) meaningful review of administrative decisions in accordance with Rule 3 and s. 18.4 of the *Federal Courts Act* and the principles discussed at paras. 6-7 above; (2) procedural fairness; and (3) the protection of any legitimate confidentiality interests while permitting as much openness as possible in accordance with the Supreme Court's principles in *Sierra Club*.

[16] Where there is a valid confidentiality interest that could sustain an objection against inclusion of a document into the record, the Court must ask itself, “Confidential from whom?” Perhaps the general public cannot access the confidential material, but the applicant and the Court can, perhaps with conditions attached. Perhaps the only party that can access the confidential material is the Court, but a benign summary of the material might have to be prepared and filed to further meaningful review, as much procedural fairness as possible, and openness. In other cases, the objection may be such that confidentiality must be upheld absolutely against all, including the Court. Legal professional privilege is an example of this.

[17] And the fact that part of a document may be confidential does not necessarily mean that the whole document must be excluded from the record. The Court must consider whether deleting or obscuring the confidential parts of a document is enough or whether the entire document should be excluded from the record.

[18] In short, the Court’s determination of the Rule 318(2) objection—a determination aimed at furthering and reconciling, as much as possible, the three objectives set out in para. 15, above—can result in an order of any shape and size, limited only by the creativity and imagination of counsel and courts: see, for example, the creative and detailed sealing order made in *Health Services and Support-Facilities Subsector Bargaining Association v. British Columbia*, 2002 BCSC 1509, 8 B.C.L.R. (4th) 281.

**B. The directions to be given in this case**

[19] In some cases, the Court might be able to determine an administrative decision-maker's Rule 318(2) objection solely on the basis of the reasons the decision-maker has provided under Rule 318(2). This case—a complex one requiring evidence to establish the objection—is not one of those cases. Thus, in the circumstances of this case, the Agency should file a motion record under Rule 369 seeking an order vindicating its objection.

[20] Without limiting whatever other relief the Agency might wish to seek, the Agency must address, both in its evidence and in written representations, the requirements for confidentiality and the test set out in *Sierra Club*.

[21] The Agency should be specific in its motion record concerning the type of order it wants. In doing so, it should have regard to the above discussion—in particular, the remedial flexibility the Court possesses and the Court's desire to craft a remedy that furthers and reconciles, as much as possible, the three objectives set out in para. 15, above.

[22] The Agency shall file its motion under Rule 369 within ten days of today's date and then the times set out under Rule 369 shall follow for the respondent's responding record and the reply. The Registry shall forward the motion to me for determination immediately after the reply has been filed or the time for reply has expired, whichever is first. An order shall go to this effect.

[23] To the extent the Agency wishes part of its motion record to be sealed under Rules 151-152, the Agency should request that in its notice of motion and support its request with evidence. Any confidential material may then be included in a confidential volume within a sealed envelope, filed only with the Court. At the time of determining the motion, the Court will review the material and assess whether further submissions on this point are needed from the applicant or whether the claim of confidentiality is made out.

[24] The parties have agreed to expedite this matter. The Court agrees that expedition is warranted and, following the motion, will schedule the remaining steps in this application. The parties should immediately discuss an expedited schedule on the footing that the motion will be determined by the end of April at the latest. The parties should also consider whether the application should be heard as soon as possible by videoconference rather than waiting for the Court's next sittings in Halifax after April. The parties shall make their submissions on these matters in their written representations in their motion records.

[25] The parties are also encouraged to engage in discussions to try to settle the record that should be placed before this Court in this application. Through their agreement to expedite this matter, the parties now recognize that there is a public interest in expedition. Quick agreement on this issue will speed this matter considerably. One possibility is to agree that the matter proceed with a public record and a sealed disputed record and the admissibility of the disputed record can be argued before the Court hearing the application, if necessary with affidavits filed in the parties'

respective records for the purpose of resolving the dispute. If the parties truly recognize there is a public interest in expedition, then this is probably the best way to proceed.

“David Stratas”

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J.A.

**FEDERAL COURT OF APPEAL****NAMES OF COUNSEL AND SOLICITORS OF RECORD**

**DOCKET:** A-39-16

**STYLE OF CAUSE:** DR. GÁBOR LUKÁCS v.  
CANADIAN TRANSPORTATION  
AGENCY

**MOTION DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES**

**REASONS FOR ORDER BY:** STRATAS J.A.

**DATED:** APRIL 5, 2016

**WRITTEN REPRESENTATIONS BY:**

Dr. Gábor Lukács ON HIS OWN BEHALF

John Dodsworth FOR THE RESPONDENT

**SOLICITORS OF RECORD:**

Canadian Transportation Agency FOR THE RESPONDENT  
Gatineau, Quebec

*Indexed as:*  
**R. v. Goldman**

**Gordon David Goldman, appellant; and  
Her Majesty The Queen, respondent.**

[1980] 1 S.C.R. 976

[1980] 1 R.C.S. 976

Supreme Court of Canada

1979: March 14 / 1979: December 21.

**Present: Laskin C.J. and Martland, Ritchie, Pigeon, Dickson,  
Beetz, Estey, Pratte and McIntyre JJ.**

**ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO**

*Criminal law -- Conspiracy to possess counterfeit money -- Evidence -- Admissibility --  
Conversations recorded by consent of one party -- Proof of consent -- Consenter not a witness --  
Criminal Code, ss. 178.1, 178.11(2)(a), 178.16(1) -- Protection of Privacy Act, 1973-74 (Can.), c.  
50.*

*Evidence -- Interception -- Conversations intercepted by consent -- Direct conversation --  
Telephone conversation -- Admissibility -- Voluntariness of consent -- Proof of consent -- Criminal  
Code, ss. 178.1, 178.11(2)(a), 178.16(1) -- Protection of Privacy Act, 1973-74 (Can.), c. 50.*

Appellant Goldman was acquitted on a charge of conspiracy with one Cremascoli (now deceased), one Dwyer, and others unknown, to possess counterfeit American money. The Crown case depended on the admission in evidence of recordings made by police of two conversations on May 20, 1976 between Dwyer and appellant. The first was a telephone conversation and the second a direct conversation during which Dwyer was fitted with a concealed device and from which transmissions were recorded by the police who were some distance away. Dwyer, arrested in the U.S., was found to be in possession of counterfeit U.S. money and to avoid serious punishment agreed to assist the police. He was brought to Canada and gave a consent in writing to the interception of his conversations with Goldman. After completing his part in the matter he returned

to the U.S. and has not since been seen by agents of the Crown. Dwyer was not called as a witness at the trial and after a lengthy voir dire the trial judge refused to admit the evidence. The judge concluded that Dwyer had given bona fide consent to the interception but also that the interceptions having been made without judicial authority were not lawfully made within s. 178.16(1)(a) of the Criminal Code and therefore, that since Dwyer's consent did not include a consent to the admission of evidence under s. 178.16(1)(b), the evidence was excluded. The Court of Appeal however accepted the trial judge's finding as to the nature of Dwyer's consent, but held that such consent made the interception lawful and that the evidence was admissible under s. 178.16(1)(a). A new trial was accordingly ordered.

Held (Laskin C.J. dissenting): The appeal should be dismissed.

Per Martland, Ritchie, Pigeon, Dickson, Beetz, Estey, Pratte and McIntyre JJ.: In addition to its submissions on the points raised by the appellant the Crown argued that the intercepted conversations were not private communications within the meaning of s. 178.1 of the Criminal Code because Dwyer, who originated them, had consented to and knew of the interception and that accordingly Part IV.1 of the Code did not apply and the conversations were admissible under the common law rules of evidence. The point was not argued at trial and not decided by the Court of Appeal which relied on other grounds for its decision. Once under the definition of "private communication", it is the originator's state of mind that is decisive. If Dwyer was the sole originator of the communications then they were not private within the terms of the Protection of Privacy Act and they would not be subject to the terms of Part IV.1 of the Criminal Code. There is however the distinction that the Code speaks of a "private communication" and not of a "private conversation". It would be an over simplification to say that, in the case of a telephone conversation, the "originator of the private communication" is the person who made the call; or that in the case of a direct conversation the originator was either the arranger of the meeting or the person who made the first remark. Conversation is the broader term and includes an interchange of a series of communications. It is consistent with the scheme of Part IV.1 to consider that the originator of a private communication (under s. 178.1) is the person who makes the remark or series of remarks which the Crown seeks to adduce in evidence. Such a person, speaking with a reasonable expectation of privacy, who makes statements in an electronically intercepted conversation, has, as the originator of them, the protection of the privacy provisions of the Criminal Code. The admissibility of the statements at any subsequent trial will depend on Part IV.1 of the Code. To the extent that the conversations in this appeal were originated by the appellant they were private under the Act.

While there had been no judicial authorization for the interceptions and the Crown relied solely on a consent to intercept under s. 178.11(2)(a), it is clear, first, that prior to the passing of the Protection of Privacy Act interceptions such as these were lawful and further that the only Criminal Code provision which could render them unlawful is s. 178.11(1). Subsection (2) of s. 178.11 excepts from the strictures of subs. (1) an interception by consent. A consent interception under s. 178.11(2) is thus unaffected by subs. (1) and remains lawful. The interceptions here, if made with a valid

consent, would be lawful under s. 178.16(1) and evidence thereof admissible.

The courts below did not err in their determination of what constituted consent. Consent must be voluntary (i.e. free from coercion) and made knowingly, with an awareness of the significance of the consent. On the evidence here the consent was valid and legally effective.

*Finally the admission of the signed consent of Dwyer did not contravene the hearsay rule -- Dwyer not having been called to give evidence at the trial. The consent in question [under s. 178.11 (2)(a)] may be express or implied and on the evidence the Crown properly discharged the onus upon it and raised a clear implication of consent.*

Per Laskin C.J., dissenting: In Rosen v. The Queen, [1980] 1 S.C.R. 961, the point was made in dissent that the ex post facto consent given in that case to make conversations with the accused admissible against him, being procured by the Crown by a promise of benefit, was not voluntary. If that dissent was right on this point, the present case is a fortiori. Once an improper inducement is established any confession that follows is tainted and inadmissible in evidence. Such a fundamental question as the voluntariness of a consent cannot be avoided by calling it a question of fact. The confession cases do not support the position that notwithstanding a threat or fear of prejudice, or promise of benefit or advantage, there may still be a finding of voluntariness as being one of fact. The proper construction of the definition of "private communication" and the meaning of "originator" should be left open.

### Cases Cited

[R. v. Miller & Thomas (No. 1) (1975), 28 C.C.C. (2d) 94 (B.C. Co. Ct.); R. v. LaSarge (1976), 26 C.C.C. (2d) 388; Ibrahim v. The Queen, [1914] A.C. 599; Rosen v. The Queen, [1980] 1 S.C.R. 961, referred to.]

APPEAL from a judgment of the Court of Appeal for Ontario [(1977), 1 C.R. (3d) 257, 38 C.C.C. (2d) 212 sub. nom. R. v. Cremascoli and Goldman] allowing an appeal against an acquittal on a charge of conspiracy, with others, to pass counterfeit money. Appeal dismissed, Laskin C.J. dissenting.

Earl J. Levy, Q.C., for the appellant.  
David Watt, for the respondent.

Solicitor for the appellant: Earl J. Levy, Toronto.  
Solicitors for the respondent: The Attorney General for Ontario, Toronto.

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The following are the reasons delivered by

**THE CHIEF JUSTICE** (dissenting):-- In my reasons in Rosen v. The Queen [[1980] 1 S.C.R. 961], which are being issued concurrently with the reasons that now follow in this case, I took the point, as a decisive ground for ordering a new trial, that the [sic] ex post facto consent given in the Rosen case to make conversations with the accused admissible against him, being procured by the Crown by a promise of benefit, was not voluntary. The conversations were, therefore, not admissible. If I was right on this point in the Rosen case then, in the present case, it is a fortiori.

Whereas in Rosen there was an illegally intercepted communication and the ex post facto consent was intended to make it admissible in evidence, here the promise of leniency to one Dwyer (who was found in possession of counterfeit bills) preceded the recording of any conversation with the appellant Goldman. In reliance on the promise of leniency, Dwyer proceeded to co-operate with the police who, having his written consent, intercepted a telephone conversation and also a face-to-face conversation during which Dwyer bore a concealed body pack. The distinction taken by my brother McIntyre (in refusing to adapt the confession rule to privacy cases) between an inculpatory statement induced by a promise of benefit held out by a person in authority and an already intercepted communication does not apply in the present case.

True, there may be a formal similarity in the two situations, but where the promise of benefit or fear of prejudice, as the case may be, induces a person in Dwyer's position to initiate a private communication with an accused which is going to be intercepted by the police, there is the likelihood of leading the accused into damaging statements in order to redeem the promise of benefit or avoid any likely prejudice. It must be remembered that in this case Dwyer, after completing his assignment for the police, went back to the United States and was not available to give evidence at Goldman's trial.

To repeat, if I was correct in Rosen, the present case is a fortiori. Moreover, I am unable to appreciate how such a fundamental question as the voluntariness of a consent can be avoided by calling it a question of fact. The confession cases do not, in my opinion, support the position that notwithstanding a threat or fear of prejudice, or promise of benefit of advantage, there may still be a finding of voluntariness as being one of fact. Once an improper inducement is established, any confession that follows is tainted and is inadmissible in evidence: see Kaufman, *Admissibility of Confessions* (2nd ed. 1973), c. 5, at pp. 70 et seq.

Although this is enough to dispose of the present case (in which I would set aside the order for a new trial by the Ontario Court of Appeal and restore the acquittal at trial), there are other important questions here which merit canvass. In Rosen, I was content to proceed on the assumption that the phrase "lawfully made" in s. 178.16(1)(a) covered both judicially authorized interceptions and interceptions made with prior consent, leaving s. 178.16(1)(b) as a provision envisaging ex post facto consent to admission in evidence of an interception that was originally illegal. I am not

prepared to rest on this assumption in this case. In my opinion, there is at least ambiguity in the words "lawfully made", and good ground for resolving it in favour of the policy of protection of privacy.

The present Criminal Code provisions with which we are concerned originated in the Protection of Privacy Act, 1973-1974 (Can.), c. 50, an Act which not only added a new Part IV.1 to the Criminal Code under the heading "Invasion of Privacy", but as well a new Part I.1 to the Crown Liability Act, also headed "Invasion of Privacy" and also amended the Official Secrets Act to authorize the Solicitor General to issue warrants for intercepting communications where evidence under oath satisfied him that the interception was necessary for the prevention or detection of subversive activity or necessary to safeguard the security of Canada. The amendment went on to specify the contents of a warrant so issued.

It is by no means clear to me that prior to the passing of the Protection of Privacy Act interceptions such as those made here were lawful. They were at least civil trespasses or invasions of privacy, although, in line with the common law, the fruits of the interceptions were, if relevant to an issue in a criminal trial, admissible in evidence. If the words "lawfully made" in s. 178.16(1)(a) mean simply not prohibited by law then, of course, they would cover interceptions made with prior consent as well as those made through judicial authorization.

I set out here the relevant provisions of the Criminal Code which give perspective to the view that I hold of the words "lawfully made". They are as follows:

178.1 In this Part,

"authorization" means an authorization to intercept a private communication given under section 178.13 or subsection 178.15(2);

. . . "private communication" means any oral communication or any telecommunication made under circumstances in which it is reasonable for the originator thereof to expect that it will not be intercepted by any person other than the person intended by the originator thereof to receive it;

. . .

178.11 (1) Every one who, by means of an electromagnetic, acoustic, mechanical or other device, wilfully intercepts a private communication is guilty of an indictable offence and liable to imprisonment for five years.

(2) Subsection (1) does not apply to

- (a) a person who has the consent to intercept, express or implied, of the originator of the private communication or of the person intended by the originator thereof to receive it;
- (b) a person who intercepts a private communication in accordance with an authorization or any person who in good faith aids in any way a person whom he has reasonable and probable grounds to believe is acting with any such authorization;
- (c) a person engaged in providing a telephone, telegraph or other communication service to the public who intercepts a private communication,
  - (i) if such interception is necessary for the purpose of providing such service,
  - (ii) in the course of service observing or random monitoring necessary for the purpose of mechanical or service quality control checks, or
  - (iii) if such interception is necessary to protect the person's rights or property directly related to providing such service; or
- (d) an officer or servant of Her Majesty in right of Canada in respect of a private communication intercepted by him in the course of random monitoring that is necessarily incidental to radio frequency spectrum management in Canada.

(3) Where a private communication is originated by more than one person or is intended by the originator thereof to be received by more than one person, a consent to the interception thereof by any one of such persons is sufficient for the purposes of paragraph (2)(a), subsection 178.16(1) and subsection 178.2(1).

178.12 An application for an authorization shall be made ex parte and in writing to a judge of a superior court of criminal jurisdiction, or a judge as defined in section 482 and shall be signed by the Attorney General of the province in which the application is made or the Solicitor General of Canada or an agent specially designated in writing for the purposes of this section by

- (a) the Solicitor General of Canada personally, if the offence under

- investigation is one in respect of which proceedings, if any, may be instituted at the instance of the Government of Canada and conducted by or on behalf of the Attorney General of Canada, or
- (b) the Attorney General of a province personally, in respect of any other offence in that province,

and shall be accompanied by an affidavit which may be sworn on the information and belief of a peace officer or public officer deposing to the following matters, namely:

- (c) the facts relied upon to justify the belief that an authorization should be given together with particulars of the offence;
- (d) the type of private communication proposed to be intercepted;
- (e) the names and addresses, if known, of all persons, the interception of whose private communications there are reasonable and probable grounds to believe may assist the investigation of the offence, and if not known, a general description of the place at which private communications are proposed to be intercepted or, if a general description of that place cannot be given, a general description of the manner of interception proposed to be used;
- (f) the period for which the authorization is requested; and
- (g) whether other investigative procedures have been tried and have failed or why it appears they are unlikely to succeed or that the urgency of the matter is such that it would be impractical to carry out the investigation of the offence using only other investigative procedures. 1973, c. 50, s.2.

178.13 (1) An authorization may be given if the judge to whom the application is made is satisfied that it would be in the best interests of the administration of justice to do so and that

- (a) other investigative procedures have been tried and have failed;
- (b) other investigative procedures are unlikely to succeed; and
- (c) the urgency of the matter is such that it would be impractical to carry out the investigation of the offence using only other investigative procedures.

(2) An authorization shall

- (a) state the offence in respect of which private communications may be intercepted;
- (b) state the type of private communication that may be intercepted;
- (c) state the identity of the persons, if known, whose private communications are to be intercepted and where the identity of such persons is not known, generally describe the place at which private communications may be intercepted or, if a general description of that place cannot be given, generally describe the manner of interception that may be used;
- (d) contain such terms and conditions as the judge considers advisable in the public interest; and
- (e) be valid for the period, not exceeding thirty days, set forth therein.

...

178.15 (1) Notwithstanding section 178.12, an application for an authorization may be made ex parte to a judge of a superior court of criminal jurisdiction, or a judge as defined in section 482, designated from time to time by the Chief Justice, by a peace officer specially designated in writing for the purposes of this section by

- (a) the Solicitor General of Canada, if the offence is one in respect of which proceedings, if any, may be instituted by the Government of Canada and conducted by or on behalf of the Attorney General of Canada, or
- (b) the Attorney General of a province, in respect of any other offence in the province,

if the urgency of the situation requires interception of private communications to commence before an authorization could, with reasonable diligence, be obtained under section 178.13.

(2) Where the judge to whom an application is made pursuant to subsection (1) is satisfied that the urgency of the situation requires that interception of private communications commence before an authorization could, with reasonable diligence, be obtained pursuant to section 178.13, he may, on such terms and conditions, if any, as he considers advisable, give an authorization in writing for a period of up to thirty-six hours.

(3) For the purposes of section 178.16 only, an interception of a private communication in accordance with an authorization given pursuant to this

section shall be deemed not to have been lawfully made unless the judge who gave the authorization or, if such judge is unable to act, a judge of the same jurisdiction, certifies that if the application for the authorization had been made to him pursuant to section 178.12 he would have given the authorization.

...

178.16 (1) A private communication that has been intercepted and evidence obtained directly or indirectly as a result of information acquired by interception of a private communication are both inadmissible as evidence against the originator thereof or the person intended by the originator thereof to receive it unless

- (a) the interception was lawfully made; or
- (b) the originator of the private communication or the person intended by the originator thereof to receive it has expressly consented to the admission thereof.

(2) Where in any proceedings the judge is of the opinion that any private communication or any other evidence that is inadmissible pursuant to subsection (1)

- (a) is relevant, and
- (b) is inadmissible by reason only of a defect of form or an irregularity in procedure, not being a substantive defect or irregularity, in the application for or the giving of the authorization under which such private communication was intercepted or by means of which such private communication was intercepted or by means of which such evidence was obtained, or
- (c) that, in the case of evidence, other than the private communication itself, to exclude it as evidence may result in justice not being done.

he may, notwithstanding subsection (1), admit such private communication or evidence as evidence in such proceedings.

...

(4) A private communication that has been lawfully intercepted shall not be received in evidence unless the party intending to adduce it has given to the

accused reasonable notice of his intention together with

- (a) a transcript of the private communication, where it will be adduced in the form of a recording, or a statement setting forth full particulars of the private communication, where evidence of the private communication will be given viva voce; and
  - (b) a statement respecting the time, place and date of the private communication and the parties thereto, if known.
- ...

I refer also to provisions of the Crown Liability Act as added by the Protection of Privacy Act, these being,

7.1 In this Part,

"authorization" means an authorization to intercept a private communication given under section 178.13 of the Criminal Code;

...

7.2 (1) Subject to subsection (2), where a servant of the Crown, by means of an electromagnetic, acoustic, mechanical or other device, intentionally intercepts a private communication, in the course of his employment, the Crown is liable for all loss or damage caused by or attributable to such interception, and for punitive damages in an amount not exceeding \$5,000, to each person who incurred such loss or damage.

(2) The Crown is not liable under subsection (1) for loss or damage or punitive damages referred to therein where the interception complained of

- (a) was lawfully made;
- (b) was made with the consent, express or implied, of the originator of the private communication or of the person intended by the originator thereof to receive it; or
- (c) was made by an officer or servant of the Crown in the course of random monitoring that is necessarily incidental to radio frequency spectrum management in Canada.

...

The tort liability imposed upon the Crown by s. 7.2(1) above parallels the criminal liability imposed by s. 178.11(1) of the Criminal Code, but in each case there are qualifying or saving provisions found in s. 7.2(2) and s. 178.11(2) respectively. The qualification of tort liability under s. 7.2(2)(a) where the interception was "lawfully made" necessarily excludes express or implied consent to an interception since this is provided for under s. 7.2(2)(b), being in the same wording as s. 178.11(1)(b) of the Criminal Code. So too, s. 7.2(2)(c) is a particular saving provision which again limits the meaning of "lawfully made" in s. 7.2(2)(a). It appears to me to follow that the words "lawfully made" refer to a judicial authorization, having regard to the fact that "authorization" is defined in s. 7.1 of the amended Crown Liability Act by reference to the definition of this word in s. 178.13 of the Criminal Code. The way in which the Criminal Code amendments and those in the Crown Liability Act are tied together strongly supports the conclusion that the same construction should be placed upon the words "lawfully made" in both statutes.

Even if reference is had to the Criminal Code amendments alone, their context under the Protection of Privacy Act points to a difference between interceptions that, because of judicial authorization, are "lawfully made" and those that are made with consent. This difference is reflected in s. 178.15(3) as well as in s. 178.16(2)(b). Thus, s. 178.15(3) opens with the words "For the purposes of s. 178.16 only, an interception of a private communication in accordance with an authorization given pursuant to this section shall be deemed not to have been lawfully made unless ...", and the provisions of s. 178.16(2)(b) referring to defects in form of an authorization, are consistent with the view that "lawfully made" refers to judicial authorization. They cannot have any application to interceptions under s. 178.11(2)(a) or to those permitted for the limited purposes of s. 178.11(2)(c) and (d). Again, the notice provisions of s. 178.16(4) bear a similarity to the information that must be included in an authorization under s. 178.13 and thus reinforce my view that s. 178.16(1)(a) applies only to judicial authorization of an interception.

In my opinion, s. 178.16, in the light of the elaborate controls set up under ss. 178.11 to 178.14 was designed to protect privacy of communication by altering the common law rule as to admission of illegally obtained evidence, so that even if collaboration with the police resulted under s. 178.11(2)(a), this did not ipso facto make the evidence obtained by a consensual interception admissible without a further consent under s. 178.16(1)(b). I do not agree that the legislation under examination is sufficiently clear to warrant the conclusion that a consent under s. 178.11(2)(a) dispenses with any further consent in relation to admissibility. Indeed, s. 178.16(2) reinforces this position.

In principle, I see a vast difference between a judicial authorization for an interception which, at the same time, would make its fruits admissible in evidence and a prior consent by a private person to an interception destroying another's expected privacy. Of course, Parliament could prescribe that for the purpose of admissibility in evidence both situations be treated the same way. It has not, however, done so with the clarity that should be present to enable A., by consenting to an

interception of private communications with B., to make those communications admissible without more against B. It is not only that one may distinguish the positive words "lawfully made" from the excepting terms of s. 178.11(2)(a) (framed in the negative), but there are the other indications of a difference running through the various sections that I have quoted, sufficient to establish an ambiguity in s. 178.16(1)(a) and to support subject-matter in a requirement of a further consent under s. 178.16(1)(b).

The two points I have taken are enough to dispose of this case and I leave for consideration on another occasion the admissibility in evidence of Dwyer's signed consent when he himself was not available as a witness. Again, I leave open the question of the proper constitution of the definition of "private communication", especially in respect of the meaning of "originator".

As I have previously indicated, I would allow the appeal, set aside the order of the Ontario Court of Appeal and restore the acquittal at trial.

The judgment of Martland, Ritchie, Pigeon, Dickson, Beetz, Estey, Pratte and McIntyre JJ. was delivered by

MCINTYRE J.:-- This is an appeal from the judgment of the Court of Appeal for Ontario which allowed a Crown appeal against the acquittal of the appellant, sometimes referred to hereafter as Goldman, on a charge of conspiracy with one Cremascoli (now deceased), one Dwyer, and others unknown, to possess counterfeit American money. The Crown's case depended upon the admission in evidence of recordings made by the police of two conversations between the appellant and Dwyer on May 20, 1976. The first was a telephone conversation, and the second a direct conversation between Dwyer and the appellant during which Dwyer was fitted with a concealed body pack, transmissions from which were recorded by the police who were some distance away.

Dwyer was arrested in the United States and found to be in possession of counterfeit United States money. To avoid serious punishment, he agreed to assist the police. He was brought to Canada and gave a consent in writing to the interception of his conversations with Goldman. After completing his part in the matter, he returned to the United States and has since not been seen by agents of the Crown. There is evidence, however, that he has been interviewed by representatives of the appellant.

The Crown tendered the evidence of intercepted conversations at Goldman's trial and a voir dire lasting some six days was held to determine the admissibility of such evidence. Dwyer was not called as a witness. The trial judge refused to admit the evidence. He considered that Dwyer had given a bona fide consent to the interception of the communications with Goldman free from any police coercion even though Dwyer was not present in court to give evidence before him. However, he also concluded that the interceptions, having been made without any judicial authorization, were not lawfully made within the meaning of s. 178.16(1)(a) of the Criminal Code. He therefore concluded that they could not be admitted in evidence and, since Dwyer's consent to the interception did not include a consent to the admission of the evidence under s. 178.16(1)(b), it was

excluded. The Crown adduced no other evidence except to prove the circumstances relating to the arrest of Dwyer and an acquittal resulted.

The Court of Appeal adopted a different view. It accepted the trial judge's finding as to the nature of the consent given by Dwyer, but it went further and held that the giving of such consent made the interception lawful. The evidence was therefore held to be admissible under s. 178.16(1)(a). The appeal was allowed and a new trial ordered.

The appellant raised several grounds of appeal in this Court. To summarize, it was contended that the Court of Appeal was wrong in holding that an interception of a private communication is lawfully made under s. 178.16(1)(a) when made by a consent under s. 178.11(2)(a) and without judicial authorization; that it was wrong in its determination of what constitutes a valid consent under s. 178.11(2)(a) of the Criminal Code; that it was wrong in holding that Dwyer did in fact consent to the interception; and that it was wrong in admitting in evidence a form of consent signed by Dwyer when he gave no evidence at trial. The Crown, in addition to its submissions on the points raised by the appellant, argued that the intercepted conversations were not private communications within the meaning of s. 178.1 of the Criminal Code because Dwyer, who originated them, had consented to and knew of the interception and consequently had no reasonable belief that the conversations would not be intercepted. Therefore, it was said, Part IV.1 of the Criminal Code did not apply and the conversations were admissible under common law rules of evidence. This point was not argued at trial. It was raised in the Court of Appeal but not decided because the court relied upon other grounds for its decision. Because of its importance in the case, I propose to deal with it at the outset.

Section 178.1 defines a "private communication" in these terms:

"private communication" means any oral communication or any telecommunication made under circumstances in which it is reasonable for the originator thereof to expect that it will not be intercepted by any person other than the person intended by the originator thereof to receive it;

Prior to the coming into effect of the Protection of Privacy Act in 1974 which amended the Criminal Code by the addition of Part IV.1, an intercepted communication of the kind described above was admissible in evidence, subject to established common law rules of evidence, without the statutory restrictions now found in Part IV.1 of the Criminal Code (ss. 178.1 and 178.11 to 178.22 inclusive). One effect of Part IV.1 was to break new ground and impose restrictions upon the admission of such evidence. Section 178.11 is reproduced hereunder:

178.11 (1) Every one who, by means of an electromagnetic, acoustic, mechanical or other device, wilfully intercepts a private communication is guilty of an indictable offence and liable to imprisonment for five years.

(2) Subsection (1) does not apply to

- (a) a person who has the consent to intercept, express or implied, of the originator of the private communication or of the person intended by the originator thereof to receive it;
- (b) a person who intercepts a private communication in accordance with an authorization or any person who in good faith aids in any way a person whom he has reasonable and probable grounds to believe is acting with any such authorization;
- (c) a person engaged in providing a telephone, telegraph or other communication service to the public who intercepts a private communication,
  - (i) if such interception is necessary for the purpose of providing such service,
  - (ii) in the course of service observing or random monitoring necessary for the purpose of mechanical or service quality control checks, or
  - (iii) if such interception is necessary to protect the person's rights or property directly related to providing such service; or
- (d) an officer or servant of Her Majesty in right of Canada in respect of a private communication intercepted by him in the course of random monitoring that is necessarily incidental to radio frequency spectrum management in Canada.

(3) Where a private communication is originated by more than one person or is intended by the originator thereof to be received by more than one person, a consent to the interception thereof by any one of such persons is sufficient for the purposes of paragraph (2)(a), subsection 178.16(1) and subsection 178.2(1).

The facts, so far as they relate to this point, may be shortly stated. On May 20, 1976, in Toronto, at about 8:00 a.m., Dwyer in the presence of police officers made a telephone call to Goldman. A device had been installed upon the telephone which enabled the recording of this conversation. This fact was, of course, known to Dwyer but unknown to Goldman. By this time Dwyer had agreed to co-operate with the police and to assist in the investigation. The same day, a body pack transmission device was concealed upon Dwyer's person by the police with Dwyer's consent. Dwyer then went to Goldman's office where he met and had a fifteen minute conversation with him. By means of the concealed body pack, the police, who were some distance away, were able to receive and record the

conversation. Prior to the phone call and the meeting with the appellant, Dwyer had signed a form of consent to the interception of his conversations with the appellant.

For the purpose of dealing with this branch of the case, it is not necessary to consider whether the consent on the part of Dwyer was a valid and effective consent or whether the written consent was properly admissible in evidence. These questions will be dealt with later. It is sufficient to observe that it was abundantly clear that, during both the telephone conversation and the personal conversation which followed, Dwyer was fully aware that the police were intercepting and recording the words spoken. Dwyer then had no reasonable expectation that the conversations would not be intercepted. It must be accepted as well that the appellant was unaware of any interception. There is no evidence to suggest that he was aware of Dwyer's involvement with the police. It is a reasonable assumption, which I make for the purpose of this argument, that Goldman did have a reasonable expectation that the conversation would not be intercepted, in other words, that it would be a private communication.

It will be observed at once that under the definition of "private communication" it is the originator's state of mind that is decisive. It follows, in my opinion, that if Dwyer was the sole originator of the communications they were not private communications within the meaning of the Act. They would not be subject to the terms of Part IV.1 of the Criminal Code. The appellant's state of mind on the question would seem to be of no significance. It should also be observed, however, that the definition in the Criminal Code speaks of a "private communication" and not of a "private conversation". It falls for the court to determine whether there is any difference in the two words, for if there is and if a conversation is made up of a series of communications given and received by each of the participants the problem is more difficult. The conversation would have to be broken down into its several component communications and those communications originated by Dwyer would not be subject to Part IV.1 of the Criminal Code and would be admissible at common law as if Part IV.1 had not been enacted. Those originated by Goldman, who was innocent of knowledge of the police role in the matter, would be subject to the provisions of Part IV.1 of the Criminal Code and their admissibility against him would be determinable under the provisions of that part of the Criminal Code. The extent of the applicability of Part IV.1 must therefore be determined.

Where one is considering a telephone conversation, it would be tempting to say that the originator of the private communication is the person who made the call. It would be equally possible to consider the originator to be the person who spoke first regardless of who made the call. When considering a direct conversation, one could consider as the originator of the entire conversation either the arranger of the meeting at which the conversation took place or the person who made the first remark. The adoption of such arbitrary tests, however, involves, in my view, an oversimplification. There has been little Canadian authority on this point and none which binds this Court. This is the first occasion when it has fallen for decision here. In *R. v. Miller & Thomas* (No. 1) [ (1975), 28 C.C.C. (2d) 94 (B.C. Co. Ct.), it seems to have been considered that the originator of a private telephone conversation was the person who made the call. In an unreported case in the Supreme Court of British Columbia, *R. v. Jasicek, McKay J.*, in making a ruling on the

admissibility of certain evidence during the course of the trial, rejected the argument that a conversation must be broken down into its separate communications. He considered it would involve a "strained and unrealistic interpretation of clear words in the statute". In *R. v. Zoell*, in the Saskatchewan Court of Appeal, April 4, 1977 (as yet unreported), a case dealing with a charge of possession of an electromagnetic device for scanning radio broadcasts contrary to s. 178.18(1) of the Criminal Code, the question arose whether police broadcasts made by police with the knowledge of a high probability of unauthorized interception were private communications. Some inferential support may be found for the separate communication argument in the words of Culliton C.J.S. where he said:

It is to be noted that the criterion to be applied in determining what constitutes a "private communication" is an objective one. That test relates only to what is in the mind of the sender. In the present case the test is simply this. In the circumstances, as shown by the evidence, under which oral radio communications are regularly made by the Regina City Police over the assigned radio frequency, can it be said, that the sender of such communications can reasonably expect that they will not be intercepted by any person other than the persons intended to receive them? (Emphasis added.)

The purpose, it has been frequently said, of Part IV.1 of the Code was to protect the right to privacy. It may be more realistic to say that the purpose or effect of Part IV.1 has been to regulate the method of breach of any such right. That the right may be subject to frequent lawful breach is clear from the scheme of Part IV.1 but the courts must be astute to limit breaches to the extent provided by the Code. With that thought in mind, it must be observed that Part IV.1 applies to the electronic interception of private communications not private conversations. In such judicial comment as I have been able to find, the courts have generally seemed to consider that communication in this context is synonymous with conversation. Accepting this view, they have simply said that he who starts the conversation is the originator. It is evident that the determination of the originator of any given communication must be made upon a construction of the words of the Code.

It is elementary to say that the courts must discern and apply the legislative intent when construing the statutes. The intent must be found upon an examination of the words employed in the enactment for it is the intent which the legislature expressed which must have effect. It is for this reason that the meaning of statutory language must be examined and on occasions fine distinctions must be made. In my view, the difference between the word conversation and the word communication is, in the context of this statutory provision, significant. A communication involves the passing of thoughts, ideas, words or information from one person to another. Conversation is a broader term and it would include, as all conversations do, an interchange of a series of separate communications. It is consistent with the scheme of Part IV.1, in my view, to consider that the originator of a private communication within the meaning of s. 178.1 is the person who makes the remark or series of remarks which the Crown seeks to adduce in evidence. If a person, with a

reasonable expectation of privacy, speaking in an electronically intercepted conversation makes statements which the Crown seeks to use against him, he has, in my view, as the originator of those statements, the protection of the privacy provisions of the Criminal Code because those statements constitute private communications upon his part and their admissibility at any subsequent trial will depend upon the provisions of Part IV.1 of the Criminal Code. I do not find this a strained or unrealistic interpretation of the words of the statute. In fact, where a police officer or police agent participates in a conversation with a suspect knowing that it is being intercepted electronically and hears the suspect make hoped for inculpatory statements of importance to the Crown's case, I am unable to consider the police officer to be the originator of the very statement or statements he was seeking to obtain.

It follows from what I have said that the Act applies here to those statements in the telephone conversation and personal conversation between Dwyer and the appellant which were originated by the appellant. To the extent that the conversations were so originated the communications were private communications under the Act and the Act applies to them.

I now turn to the other points taken in argument on behalf of the appellant. It was contended that the Court of Appeal was in error when it held that the interceptions were admissible in evidence under the provisions of s. 178.16(1)(a) as being lawfully made when there had been no judicial authorization for the making of the interceptions and the Crown relied solely on a consent to intercept under s. 178.11(2)(a).

Section 178.11 is reproduced above and the relevant parts of s. 178.16 as they then stood are reproduced hereunder:

178.16 (1) A private communication that has been intercepted and evidence obtained directly or indirectly as a result of information acquired by interception of a private communication are both inadmissible as evidence against the originator thereof or the person intended by the originator thereof to receive it unless

- (a) the interception was lawfully made; or
- (b) the originator of the private communication or the person intended by the originator thereof to receive it has expressly consented to the admission thereof.

In dealing with this point Brooke J.A. for the Court of Appeal said:

With the greatest deference I do not agree with the conclusion that the tape recordings were inadmissible in evidence as the interception was not lawfully made within the meaning of s. 178.16. Like some others, the learned trial judge interpreted the judgment of this Court in R. v. LaSarge (1976), 26 C.C.C. (2d)

388, as holding that to be lawfully made and admissible under s. 178.16 an interception must be made pursuant to an authorization provided for in Part IV of the Code. In my opinion, this is not the effect of that decision. In both the judgments of Houlden, J.A. and that of Martin, J.A., it is clear that consent was not in issue there but that in the circumstances of the case to be lawfully made the interception required an authorization.

Section 178.16 provides for the admissibility in evidence of an interception of a private communication in two circumstances. The evidence of the interception is admissible, first, if the interception was lawfully made and, second, evidence of all other interceptions is admissible with the consent specified in s. 178.16(1)(b). An interception of a private communication is lawfully made if one of the parties to it consented to the interception. Prior to the passing of Part IV there was no protection against the person to whom one chose to speak consenting to another listening in. Part IV proceeds on the same basis. This Court in *R. v. Douglas* (1977), 33 C.C.C. (2d) 395 affirmed the admissibility in evidence of an interception made with consent of a party to it who was an undercover agent when no authorization covered the interception (see *Zuber, J.A.*, pp. 400-401). In my opinion an interception is lawfully made if made under circumstances enumerated by s. 178.11(2).

I am in full agreement with Brooke J.A. in his comments above quoted and I agree with him that *R. v. LaSarge* [ (1976), 26 C.C.C. (2d) 388] is not authority for the proposition that the words "lawfully made" in s. 178.16(1)(a) mean only an interception made by judicial authorization. Section 178.11(1) makes it an indictable offence to intercept a private communication by means of the devices described and in subs. (2) provides that subs. (1) which created the offence will not apply to a person who has the consent, express or implied, of the originator of the private communication or of the person intended to receive it. This consent is a consent to interception and its effect is to preserve from illegality, in other words to render lawful, an interception of a private communication made with consent. It is important to note as well that the consent may be express or implied and may be given by either the originator of the private communication or the intended recipient. Section 178.16 is complementary to s. 178.11. It deals with admissibility of evidence which has been obtained by interceptions of private communications. It provides that an intercepted private communication is inadmissible as evidence against its originator or the person intended to receive it unless it was lawfully made or unless the originator or the person intended to receive it has expressly consented to the admission. The Crown does not allege that any such consent as that envisaged in s. 178.16(1)(b) was given in the case at bar. Therefore, that subsection is not relevant to the case. However, it is worthwhile to note that the 178.16(1)(b) consent differs from the consent in s. 178.11(2)(a) in that it is a consent to admit evidence not to intercept. The Crown's position here is simply this, by virtue of Dwyer's consent given under s. 178.11(2)(a), the interceptions were lawfully made within the meaning of s. 178.16(1)(a) and evidence thereof was admissible

notwithstanding the absence of any further consent under s. 178.16(1)(b).

The appellant contended that the words "lawfully made" in s. 178.16(1)(a) referred only to an interception made under a judicial authorization under s. 178.11(2)(a). To support this position, he referred to the amendments to the Crown Liability Act in s. 7.2 part of which is reproduced hereunder:

7.2 (1) Subject to subsection (2), where a servant of the Crown, by means of an electromagnetic, acoustic, mechanical or other device, intentionally intercepts a private communication, in the course of his employment, the Crown is liable for all loss or damage caused by or attributable to such interception, and for punitive damages in an amount not exceeding \$5,000 to each person who incurred such loss or damage.

(2) The Crown is not liable under subsection (1) for loss or damage or punitive damages referred to therein where the interception complained of

- (a) was lawfully made;
- (b) was made with the consent, express or implied, of the originator of the private communication or of the person intended by the originator thereof to receive it;

...

It will be seen that subs. 7.2(1) creates "tortious liability" upon the Crown for intentional interception of private communications and subs. (2) relieves against such liability where (a) the interception has been lawfully made, and (b) when it is made with consent. It was argued that this enactment established a difference between an interception lawfully made and one made by consent so that the words "lawfully made" would not include an interception made by consent. This distinction, it was said, should be preserved throughout the entire Protection of Privacy Act with the result that an interception "lawfully made" within the meaning of s. 178.16(1)(a) of the Criminal Code should not include an interception made by consent under s. 178.11(2)(a) of the Criminal Code.

I am not prepared to accept this argument by analogy. It was said that well established canons of construction dictated that words should receive a uniform meaning when used repeatedly in the same statute or in one in para materia. Following this principle, it was said, the separate parts of the Protection of Privacy Act which amended the Criminal Code, the Crown Liability Act and the Official Secrets Act, respectively, should be construed as a unified whole, providing one body of law applying to the separate situations covered by the separate Acts which were amended. I have no quarrel with the general proposition thus expressed but, in my view, it has no application here.

Canons of construction find their principal use where there is ambiguity. They must not be employed, however, to twist and torture the plain meaning of words. Furthermore, it is not every inconsistency or contradiction in a statute which will justify reliance on artificial rules of construction in order to find a meaning which would not otherwise be clearly apparent and which would be contradictory to a clear expression of intent. Whatever questions may arise in attempting to reconcile the alleged differences between the Criminal Code amendments made in the Protection of Privacy Act and the amendments there made to the Crown Liability Act, it is perfectly clear that prior to the passing of the Protection of Privacy Act interceptions such as those in question here were lawful. It is equally clear that the only provision in the Criminal Code which could render such interceptions unlawful is s. 178.11(1). It is also clear that subs. (2) of s. 178.11 excepts from the strictures of subs. (1) an interception by consent. It follows then unmistakably that a consent interception under s. 178.11(2) is unaffected by subs. (1) and remains lawful. Therefore the interception here, if made with a valid consent, would be lawfully made within the meaning of s. 178.16(1)(a) and evidence thereof would be admissible.

The second and third points argued by the appellant may be dealt with together and they will require some more detailed reference to the evidence. It was argued that the Court of Appeal and the trial judge were in error in their determination of what constituted a consent under s. 178.11(2)(a) and in the further finding that Dwyer in fact gave a valid consent.

Dwyer was arrested in Florida on May 17, 1976. He had been caught while trying to pass a counterfeit fifty dollar American bill in a retail store. A search made of his person on his arrest revealed that he was then carrying three more fifty dollar counterfeit bills and two counterfeit ten dollar bills, all American. He was questioned by the American authorities. He directed the police to a restaurant where a woman friend of his gave to the police a further quantity of American counterfeit notes to a face value of four thousand one hundred and ninety dollars. Dwyer was released the same day on his own recognizance in the amount of twenty-five thousand dollars with no deposit. He appeared as required the following day before a U.S. magistrate and was released on his own recognizance in the amount of five thousand dollars without deposit. Dwyer agreed to co-operate with the police in the matter and that day flew to Toronto with the American police officers. From the evidence of American police, it was clear that Dwyer had been questioned at length after his arrest as had his woman friend. They had been told of possible charges they would face which could involve maximum sentences of imprisonment for fifteen years. In the result, Dwyer pleaded guilty to a charge of attempted uttering of counterfeit money. His plea was taken in the magistrate's chambers and he was released on probation. No charges were preferred against his woman friend but the officer acknowledged that they were "held in abeyance". The officers denied that any threats or inducements were employed in the matter.

Dwyer was interrogated by the police on his arrival in Toronto. A police officer, one Constable Sayers of the Toronto police, described how the interceptions were made. He interviewed Dwyer about 8.00 p.m. on May 19, 1976. He said he explained the consent form which he presented to Dwyer and Dwyer signed it. This form is exhibit 11 and is in these words:

CON 044/76

CANADA            ) IN THE MATTER OF a consent  
                    ) to intercept the private  
PROVINCE OF     ) communications of Michael Dwyer,  
ONTARIO          ) by means of an electromagnetic,  
(TERRITORIAL    ) acoustic, mechanical or other  
DIVISION)        ) device pursuant to section  
                    ) 178.11(2)(a) of the  
                    ) Criminal Code.

#### CONSENT

I, Michael Dwyer, of the Municipality of Toronto, in the County of York, in the Province of Ontario, hereby expressly consent to the interception by means of an electromagnetic, acoustic, mechanical or other device of any private communications to which I am a party either as an originator or intended recipient by officers of Metropolitan Toronto Police and such other persons as may be necessary to assist them in the interception of the above mentioned private communications from this date until the investigation is concluded.

DATED at Toronto, this 19th day of May, 1976.

Laverne M. Sayers M. Dwyer

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WITNESS Consenting Originator (or, intended recipient).  
Laverne M. Sayers, P.C. 2999

He then installed a voice transmitter on Dwyer's back. It was concealed by Dwyer's clothing. The officer then posted himself at the rear of the location described as the Bermuda Tavern. There he recorded transmissions from Dwyer's body pack of a conversation of some three hours' duration from the interior of the tavern. The results of this adventure did not satisfy the police. There was some dissatisfaction expressed by them with Dwyer's performance and a second attempt was made on May 20, 1976.

On this occasion, and I am again relying largely on the evidence of Sayers, at 8:00 a.m. Sayers put an electronic device on the telephone of one of the senior police officers in the police

building. This device enabled the interception of conversation on this telephone. Dwyer, in the presence of various police officers, then made a call on the telephone so equipped to Goldman. At about 12:30 p.m. the same day, Sayers outfitted Dwyer again with a concealed body pack voice transmitter. He then went to the vicinity of 1240 Bay Street in Toronto where Goldman's office was situated and from the transmissions from Dwyer's body pack he recorded a conversation of about fifteen minutes' duration between Dwyer and Goldman. The tapes and transcripts made of the interceptions of the call by Dwyer on the telephone from the police office and the conversation between Dwyer and Goldman at 1240 Bay Street are those which the Crown adduced in evidence.

During this period, that is, from the time of the arrest of Dwyer to the conclusion of his activities in Toronto, he was subjected to detailed questioning by the police. The police said that he was co-operative, that he was not threatened or offered special inducements, but it is clear that in return for his co-operation he was leniently dealt with and his woman friend was not prosecuted. The police officers were closely cross-examined and certain conflicting evidence was brought out. However, the trial judge who heard the evidence and saw the witnesses over a period of some six days said:

Fundamental to this aspect of the Crown's argument is the issue of consent, one of the principal issues upon which counsel have joined. Did Dwyer consent to the interception and if so, was that consent real and valid? Considerable evidence was given from which Dwyer's attitude and his state of mind may be assessed during the course of preparatory steps taken for the interception as well as during and following the interception. Each officer who had any significant contact with Dwyer at these critical times appears to have given evidence. I have been satisfied by the Crown that there is no evidence to support Mr. Levy's suggestion that Dwyer's consent was the result of actual or threatened force, coercion, duress or any similar conduct on the part of the authorities.

Dwyer was a person of some recorded criminal reputation and was found in constructive possession of a substantial amount of counterfeit money. In the result, he was prosecuted upon a relatively minor offence, was released upon his personal bond without restriction. He was sentenced in Judges' Chambers, a procedure acknowledged as extraordinary by one of the American officers who testified. He received what might be interpreted as a sanction inappropriately lenient to both his conduct and his previous criminal record. The prosecution of his woman companion was held in abeyance. No charges were contemplated in Ontario. The evidence contains vague but unmistakeable reference to some form of agreement in which leniency was to be exchanged for Dwyer's cooperation.

The only reasonable inference on all of the evidence is that Dwyer was in fact

persuaded by promise of leniency to cooperate with the police in the interception.

And later:

I am accordingly prepared to find that the Crown has satisfied me that Dwyer in fact gave real and valid consent to the interception although undoubtedly [sic] persuaded to do so by promises of leniency given him by the police.

It is evident that the trial judge understood the importance of the issue before him. It is evident as well that he was not blind to the fact that Dwyer co-operated with the police out of selfish motives in exchange for leniency but he nevertheless considered that an effective and acceptable consent had been given. I am not prepared, on my reading of the evidence, to disturb that finding.

The Court of Appeal, while differing in the result because of its interpretation of s. 178.16 of the Criminal Code, was also of this view. Brooke J.A. said:

Turning first to Mr. Levy's submission that the trial judge erred in making his finding that Dwyer gave a real and valid consent. It is important to recognize, that in cases such as this one, where the person who would normally be the principal witness was not present, and gave no evidence, while the issue and degree of proof remain the same, extra caution is required by the Court in testing the evidence presented. After all, the only witnesses were police witnesses whose conduct was very much in issue and it remained unchallenged, save as tested by cross-examination. In this case Mr. Levy quite correctly refers to the finding by the learned trial judge, that Dwyer was undoubtedly persuaded to consent to the interception by promises of leniency by the police as a finding against the credibility of police witnesses who repeatedly stated that Dwyer had been promised nothing. Mr. Levy refers to the significant instance in Toronto where Dwyer had lied to the police and led them to a false meet which was quite the contrary to co-operation. He draws our attention to the fact that for some unstated reason Dwyer then became sincere in his cooperation after police accusations of deceit and an attempt to use them. Counsel submits that there must at least have been coercion or something more than mere promises of leniency. He contends that one finding against the credibility of police witnesses should cast doubt on the whole affair.

Considering all of the evidence and proceeding with the caution I have referred to, I find no reason to say the learned trial judge was wrong on the evidence before him in making the finding that he did. It is clear from the beginning that Dwyer set out to co-operate and achieve his freedom with the least punishment possible. His co-operation was the means through which he sought to minimize the seriousness of his position that he knew could attract a very heavy penalty.

The evidence of the events which took place in Florida is consistent only with this view.

He continued, after referring with approval to the words of Stark J. in *R. v. Rosen* [(1977), 30 C.C.C. (2d) 565], at p. 569, where that judge expressed the view that consents of this nature given upon the advice of counsel were not vitiated by motives of self-interest and said:

I think the passage quoted was apt and the view expressed correct. The consent anticipated by the statute is a real consent. It is not consent exhorted by coercion but rather free from coercion given by a party with knowledge of the circumstances and appreciation of his position. Only such a consent could have been contemplated by Parliament to exempt the wilful interception of private communications from the criminal offence created by s. 178. Only such a consent could have been contemplated by Parliament as a condition of admissibility in evidence of the interception of the private communication. The onus is on the Crown to prove consent beyond a reasonable doubt as a condition precedent to admissibility.

I see no reason on this evidence to doubt the judgment of the learned trial judge and to hold that what was co-operation as a result of promises of leniency became co-operation as a result of coercion following Dwyer's efforts to deceive the police in Toronto. His attempt failed. They told him so and no doubt were angered by his conduct but that is not coercion. Significantly, his purpose did not change and so he co-operated. He consented. He agreed to dupe his alleged confederate into a discussion so that the police could listen in and record what was said. That was enough.

He considered the consent valid and effective.

I am in agreement with this disposition of the issue of consent. The consent given under s. 178.11(2)(a) must be voluntary in the sense that it is free from coercion. It must be made knowingly in that the consentor must be aware of what he is doing and aware of the significance of his act and the use which the police may be able to make of the consent. The test to be applied in considering the admissibility of a statement or confession made by an accused person in custody to police officers or others in a position of authority is not applicable here. The word "voluntary" in the sense in which it applies to a consent to intercept or to admit evidence under Part IV.1 of the Criminal Code should not be considered in the restricted sense of the rule in the Ibrahim [[1914] A.C. 599] case. A consent under s. 178.11(2)(a) is a valid and effective consent if it is the conscious act of the consentor doing what he intends to do for reasons which he considers sufficient. If the consent he gives is the one he intended to give and if he gives it as a result of his own decision and not under external coercion the fact that his motives for so doing are selfish and even reprehensible by certain

standards will not vitiate it. In my opinion, on the evidence adduced in this case, the consent was a valid consent and was legally effective for its intended purpose, that is, the procuring of admissible evidence for use in Goldman's trial.

The word coercion requires some definition in this context. The consent must not be procured by intimidating conduct or by force or threats of force by the police, but coercion in the sense in which the word applies here does not arise merely because the consent is given because of promised or expected leniency or immunity from prosecution. Inducements of this nature or compulsion resulting from threats of prosecution would render inadmissible a confession or statement made by an accused person to those in authority because the confession or statement could be affected or influenced by the inducement or compulsion. Different considerations arise, however, where a consent of the kind under consideration here is involved. I refer to *Rosen v. The Queen* [[1980] 1 S.C.R. 961] where the question was considered and where I said for the Court:

In such a case, very different considerations apply. The consenter is consenting to the use in evidence of tapes or other recordings which have been previously recorded and which he cannot change. He is not agreeing to make a statement which he could invent nor to give evidence in futuro which he could colour in the hope of reward or benefit. The nature of the evidence which will be admitted as a result of his consent is already fixed and determined and cannot be affected by the circumstances of the consent.

The final point taken by the appellant was that the trial judge and the Court of Appeal erred in admitting the signed consent of Dwyer into evidence because it contravened the hearsay rule -- Dwyer not having been called at trial to give evidence. Brooke J.A. for the Court of Appeal saw no merit upon this point and disposed of it with these words:

But he also gave his consent in writing. His consent was an issue of fact in these proceedings and could be proved like any other fact in issue. I think the evidence of P.C. Sayers and others was admissible to prove the fact that Dwyer had consented and that he signed the consent above set out. That evidence was not hearsay as is contended by Mr. Levy.

While I am inclined to agree with that statement, I do not consider it necessary to deal with the point. It will be observed that the consent referred to in s. 178.11(2)(a) may be express or implied. As I understand the argument of Crown counsel, he did not place his case upon a specific consent under the section. His argument was that there was an implied consent which would suffice to render the intercepts admissible. On all the evidence, it seems clear to me that the Crown discharged the onus upon it and raised on the evidence a clear implication of consent.

In summary then, it is my opinion that while the provisions of Part IV.1 apply to the conversations between Dwyer and Goldman for the reasons given earlier, the effect of s. 178.16(1)(a) is to deprive the appellant of any protection in the circumstances of this case. I would

dismiss the appeal.

Appeal dismissed, LASKIN C.J. dissenting.