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October 5, 2014

VIA FAX

Judicial Administrator
Federal Court of Appeal
Ottawa, ON K1A 0H9

Dear Madam or Sir:

**Re: Dr. Gábor Lukács v. Canadian Transportation Agency
Federal Court of Appeal File No.: A-357-14
Affidavit filed by the Agency contrary to Rule 369(3)**

I am the appellant in the above-noted matter. I am writing to alert the Honourable Court to the numerous improprieties related to the affidavit included in the respondent's reply, dated October 3, 2014, in relation to a motion in writing. Since these improprieties are highly prejudicial, and interfere with my procedural rights related to opposing the motion, I respectfully ask that the Court reject the affidavit, and direct the Agency to remove any reference to it from its reply.

I. Background: the Agency's motion to include a document in the appeal book or adduce it as fresh evidence

On September 15, 2014, the Agency brought a motion in writing, pursuant to Rule 369 of the *Federal Courts Rules*, to have a disputed document included in the appeal book, or alternatively, adduce the document as fresh evidence. (The motion to determine the contents of the appeal book was brought by the respondent, and not the appellant, in accordance with the directions of Nadon, J.A., dated September 5, 2014.)

The authenticity, reliability, and credibility of the document in question are contested for a number of reasons, including (but not limited to): the document appears to exist in several substantially different versions; the document contains a disclaimer stating that it is not official; and it appears that the version of the document that the Agency intends to rely on was created for an improper purpose, namely, to influence the outcome of the present appeal.

It was pointed out in my submissions in opposition to the motion, dated September 29, 2014, that the motion suffers from a fatal flaw: the supporting affidavit is silent about the document that the Agency wishes to adduce. The document was not attached as an exhibit to the affidavit, and none of the allegations with respect to the purpose, authorship, and approval of the document were supported by any evidence. This state of affairs made it impractical to conduct a cross-examination.

II. Improprieties related to the Agency's reply and the prejudice caused

The Agency's reply, dated October 3, 2014, included an affidavit sworn by Ms. Cathy Murphy, which purports to remedy the aforementioned flaw; however, both the inclusion of the affidavit and the affidavit itself are improper, do not comply with the *Federal Courts Rules*, and deprive me of my procedural rights.

(a) Rule 369 does not permit an affidavit to be submitted in a reply

Rule 369(3) of the *Federal Courts Rules* allows the moving party only to file written representations in reply, but does not permit the filing of additional affidavits (*Maple Leaf Foods Inc. v. Consorzio del Prosciutto di Parma*, 2010 FCA 67, para. 12). This restriction serves as a safeguard to protect the procedural rights of the responding party to the motion, who is entitled to know the entirety of the case he needs to meet, and is entitled to present evidence, cross-examine, and make submissions about the entirety of the moving party's evidence.

In the present case, the Agency deliberately ignored Rule 369(3), and included the affidavit of Ms. Murphy in its reply in order to test the reaction and patience of this Honourable Court (see the email of Ms. Barbara Cuber, counsel for the Agency, dated October 3, 2014, attached).

The Agency's conduct undermines my ability to provide a full and complete answer to the Agency's motion, because at this stage of the motion, the rules do not allow me to file additional evidence, to cross-examine Ms. Murphy on her affidavit, or to make additional submissions.

Thus, the Agency's conduct frustrates my right to test and contest the Agency's evidence in support of this motion, and has the effect of improperly shielding Ms. Murphy from being cross-examined, effectively circumventing Rule 83 of the *Federal Courts Rules*.

(b) Failure to comply with Rule 80(3)

Rule 80(3) of the *Federal Courts Rules* requires that when reference is made to an exhibit, the exhibit be identified by an endorsement on the exhibit or on a certificate attached to it, signed by the person before whom the affidavit is sworn.

Paragraph 6 of the affidavit of Ms. Murphy purports to refer to "Tab 11" of the Agency's Motion Record, but the document has not been attached nor identified by an endorsement or a certificate.

Tab 11 of the Agency's Motion Record consists of 90 pages, and purports to reflect a constantly changing document that exists in multiple versions, and which is only available electronically. Consequently, a proper identification of the document by the affiant is not a mere technicality, but rather a step necessary (albeit not sufficient) to establish authenticity on the one hand, and to allow accurate cross-examination on the other hand.

(c) Filing an additional affidavit without leave

Although Rule 369 does not allow the filing of additional affidavits with the reply on a motion, Rule 312(a), which governs the conduct of applications, provides that a party may seek leave to file an additional affidavit; the exercise of such a discretion is governed by a four-part conjunctive test (*Pfizer Canada Inc. v. Canada (Health)*, 2007 FC 506, para. 7 and *Abbott Laboratories Limited v. Canada (Health)*, 2007 FC 817, para. 16). The Agency could, perhaps, have sought leave to file an additional affidavit on the present motion in accordance with these principles.

The filing of an additional affidavit by the Agency without first seeking leave to do so, however, deprived me of the ability to test and contest the Agency's explanation about its failure to include the affidavit of Ms. Murphy in its motion record, and to lead evidence to demonstrate that the Agency's explanation is not credible.

Indeed, the present appeal is not the first time that the Agency is attempting to rely on a document that exists in multiple versions. At the hearing of the appeal in File No. A-279-13, this Court expressed concern about the reliability of a document that existed in multiple versions, and indicated to counsel for the Agency that the reliability of such documents cannot be established without evidence, prompting the Agency to withdraw the document in question (*Lukács v. Canada (Transportation Agency)*, 2014 FCA 76, para. 49).

Therefore, in the present case, the Agency has been (or should have been) aware of the requirements to establish the reliability of a contested document that it intends to rely on before this Honourable Court.

Sincerely yours,

Dr. Gábor Lukács

Enclosed: Email of Ms. Barbara Cuber, counsel for the Agency, dated October 3, 2014

Cc: Ms. Barbara Cuber, counsel for the Canadian Transportation Agency

From Barbara.Cuber@otc-cta.gc.ca Fri Oct 3 13:41:05 2014
Date: Fri, 3 Oct 2014 16:40:55 +0000
From: Barbara Cuber <Barbara.Cuber@otc-cta.gc.ca>
To: Gabor Lukacs <lukacs@airpassengerrights.ca>
Cc: Alexei Baturin <Alexei.Baturin@otc-cta.gc.ca>,
Wendy Liston <Wendy.Liston@otc-cta.gc.ca>
Subject: RE: URGENT: Affidavit improperly included in the Reply [Re: Court
File No. A-357-14 - Reply of the Agency]

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Hello,

The reply addresses the context in which the affidavit has been included. In particular, the Agency is offering an affidavit in the event that the Court finds that its absence constituted a defect in relation to the motion.

The Court may, of course, determine that the affidavit has been improperly filed. However, the Agency will not be removing the affidavit or any reference to it from its reply.

Barbara

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

From: Gabor Lukacs [mailto:dr.gabor.lukacs@gmail.com] On Behalf Of Gabor Lukacs
Sent: October-03-14 11:38 AM
To: Barbara Cuber
Cc: Alexei Baturin; Wendy Liston
Subject: URGENT: Affidavit improperly included in the Reply [Re: Court
File No. A-357-14 - Reply of the Agency]

Hi Barbara,

An affidavit has been improperly included in the Agency's reply. Rule 369 does not permit affidavits on a reply.

Please remove the affidavit and any reference to it from your reply, and serve me with a compliant reply.

Best wishes,
Gabi

On Fri, 3 Oct 2014, Alexei Baturin wrote:

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> Dear Mr. Lukacs,
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>
> Attached please find the Reply Submissions of the Respondent, Canadian
> Transportation Agency in respect to the Agency's Motion to determine
> the contents of the appeal book in this matter.
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> Regards,
>
> Alexei Baturin

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