

FEDERAL COURT OF APPEAL

BETWEEN:

DR. GÁBOR LUKÁCS

Applicant

– and –

CANADIAN TRANSPORTATION AGENCY

Respondent

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

**APPLICANT/RESPONDING PARTY
MOTION RECORD
(Agency's motion to strike the application for mootness)**

Dated: August 25, 2016

DR. GÁBOR LUKÁCS

Halifax, NS

lukacs@AirPassengerRights.ca

Applicant

TO: **CANADIAN TRANSPORTATION AGENCY**
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Gatineau, QC J8X 4B3

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**Solicitor for the Respondent,
Canadian Transportation Agency**

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Applicant

– and –

CANADIAN TRANSPORTATION AGENCY

Respondent

**AFFIDAVIT OF DR. GÁBOR LUKÁCS
(Affirmed: January 25, 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 a Canadian air passenger rights advocate. My work and public interest litigation has been recognized by the Federal Court of Appeal in a number of judgments:
 - (a) *Lukács v. Canada (Transport, Infrastructure and Communities)*, 2015 FCA 140, at para. 1;
 - (b) *Lukács v. Canada (Transportation Agency)*, 2014 FCA 76, at para. 62; and
 - (c) *Lukács v. Canada (Transport, Infrastructure and Communities)*, 2015 FCA 269, at para. 43.

2. My activities as an air passenger rights advocate also include:
 - (a) filing approximately two dozen successful regulatory complaints with the Canadian Transportation Agency (“**Agency**”), resulting in

airlines being ordered to implement policies that reflect the legal principles of the *Montreal Convention* or otherwise offer better protection to passengers;

- (b) promoting air passenger rights through the press and social media;
 - (c) referring passengers mistreated by airlines to legal information and resources.
3. On September 4, 2013, the Consumers' Association of Canada recognized my achievements in the area of air passenger rights by awarding me its Order of Merit for "singlehandedly initiating Legal Action resulting in revision of Air Canada unfair practices regarding Over Booking."
4. On December 23, 2015, just one day before Christmas Eve, the Agency announced that it would conduct a public consultation on the requirement for Indirect Air Service Providers to hold a license ("**Consultation**"). The Agency's announcement stated 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.]

A copy of of the announcement and the "Details of the consultation" referenced in it are attached and marked as **Exhibit "A"**.

5. I first learned about the the Consultation on January 8, 2016 from the email of Mr. Ghislain Blanchard, Director General, Industry Regulations and Determinations at the Agency, a copy of which is attached and marked as **Exhibit “B”**.
6. On January 8, 2016, I wrote to Mr. John Toulipoulos, the contact person for the Consultation at the Agency, and requested that he provide me with information about the legal basis for the consultation and the Agency’s jurisdiction to make generic, legislative-like determinations with respect to domestic service. A copy of my email to Mr. Toulipoulos is attached and marked as **Exhibit “C”**.
7. On January 15, 2016 the Secretary of the Agency wrote to me, among other things, that:

[...] while this review is underway, the Agency will not require persons to apply for a licence as long as the service offered to the public meets all of the following conditions:

- i. The person does not operate any aircraft;
- ii. The person charters the aircraft’s entire capacity, for the purpose of resale to the public; and
- iii. The air carrier holds the appropriate Agency licence to operate the air service.

A copy of the Secretary’s email is attached and mark as **Exhibit “D”**.

8. On January 15, 2016, I wrote to the Secretary of the Agency, and requested that my questions to Mr. Toulipoulos relating to the legality of the consultation and its outcome (Exhibit “C”) be addressed. A copy of my email to the Secretary is attached and marked as **Exhibit “E”**.

9. The Agency acknowledged the receipt of my email of January 15, 2016 (Exhibit “E”), but my questions about the legality of the consultation and its outcome have not been addressed to this date.
10. On January 19, 2016, the Secretary of the Agency wrote to me, among other things, that:

[...] the Agency Chair, acting in his capacity as CEO, also instructed staff to not seek a licence application from NewLeaf and other companies like it pending the completion of this consultation and the issuance of an Agency decision on the issue, provided they met three criteria. These criteria were detailed in my email to you of Friday, January 15, 2016.

A copy of the Secretary’s email is attached and marked as **Exhibit “F”**.

11. On January 20, 2016, the Secretary of the Agency wrote to me in reference to the Agency Chair’s aforementioned instructions that:

We are unable to provide you with a copy of these instructions as they were provided verbally to Agency staff.

A copy of the Secretary’s email is attached and mark as **Exhibit “G”**.

12. On January 21, 2016, the Secretary of the Agency wrote to me in reference to the Agency Chair’s aforementioned instructions that:

I can advise that the meeting at which these instructions were given took place on October 29, 2015, but that no minutes were produced for this meeting.

A copy of the Secretary’s email is attached and mark as **Exhibit “H”**.

13. On or around January 21, 2016, the Agency released an announcement entitled “Key facts on the Agency’s review of licensing requirements for certain air travel companies,” which reads as follows:

Business models in the airline industry are rapidly evolving. To ensure that users of transportation services are protected, while still allowing innovative approaches that can increase consumer choice in the market, the Agency is currently reviewing whether companies that bulk purchase all seats on planes and then resell those seats to the public, but do not operate any aircraft, should be required to hold a licence.

In December, the Agency advised these companies that while this review was ongoing, they would not be required to seek a license, so long as they met certain conditions. This approach has been consistent since the beginning.

Once consultations are complete, the Agency will review and carefully consider the submissions received and issue a determination on which companies are required to hold licences. This will be done as quickly as possible while ensuring that all relevant information is taken into account.

[Emphasis added.]

A copy of the announcement is attached and marked as **Exhibit “I”**.

AFFIRMED before me at the City of Halifax
in the Regional Municipality of Halifax
on January 25, 2016.

Dr. Gábor Lukács

Halifax, NS

Tel:

lukacs@AirPassengerRights.ca

This is **Exhibit “A”** to the Affidavit of Dr. Gábor Lukacs
affirmed before me on January 25, 2016

Signature



[Canadian Transportation Agency \(/eng\)](#)

[Home](#) / [News Room](#) / Consultation on the requirement to hold a licence

Consultation on the requirement to hold a licence

The Agency is asking the aviation industry and other interested stakeholders whether persons who have commercial control over an air service, but do not operate aircraft (indirect air service providers), should be required to hold a licence.

[Details of the consultation \(/eng/consultation/consultation-requirement-hold-a-licence\)](#)

Date modified:

2015-12-23



[Canadian Transportation Agency \(/eng\)](#)

[Home](#) / [Consultations](#) / Consultation on the requirement to hold a licence

Consultation on the requirement to hold a licence

The Canadian Transportation Agency (Agency) is requesting comments from the aviation industry and other interested stakeholders on whether persons who have commercial control over an air service, but do not operate aircraft (Indirect Air Service Providers), should be required to hold a licence.

Background

The Canadian Transportation Agency (Agency) regulates the licensing of air transportation pursuant to Part II of the [Canada Transportation Act](http://laws-lois.justice.gc.ca/eng/acts/C-10.4/index.html) (Act) and the [Air Transportation Regulations](http://laws-lois.justice.gc.ca/eng/regulations/SOR-88-58/index.html).

The Act requires that persons hold the appropriate licence before they can operate a publicly available air transportation service (air service), which subjects these persons to a number of economic, consumer and industry protection safeguards, including with respect to [tariffs](https://www.otc-cta.gc.ca/eng/tariffs) (<https://www.otc-cta.gc.ca/eng/tariffs>), [financial requirements](https://www.otc-cta.gc.ca/eng/publication/financial-requirements-guide-air-licence-applicants) (<https://www.otc-cta.gc.ca/eng/publication/financial-requirements-guide-air-licence-applicants>), and [Canadian ownership](https://www.otc-cta.gc.ca/eng/canadian-ownership) (<https://www.otc-cta.gc.ca/eng/canadian-ownership>). When more than one person is involved in the delivery of the air service, it is important to determine who is operating the air service and is required, as such, to comply with the licensing requirements.

When the *National Transportation Act, 1987* (subsequently consolidated and revised by the Act) was introduced in 1987, it ushered in the deregulation of the aviation industry. At this time, the distinction between chartered and scheduled air carriers was eliminated for domestic air services. Industry subsequently developed new and innovative approaches to the delivery of air services that did not always fit into the Act's licensing parameters. One such approach is the Indirect Air Service Provider model, where persons have commercial control over an air service and make decisions on matters such as on routes, scheduling, pricing, and aircraft to be used, while charter air carriers operate flights on their behalf.

The Agency's current approach to determining which person is operating a domestic air service originated from its [1996 Greyhound Decision](https://www.otc-cta.gc.ca/eng/ruling/232-a-1996) (<https://www.otc-cta.gc.ca/eng/ruling/232-a-1996>) and requires the person with commercial control to hold the licence, irrespective of whether the

person operates any aircraft. As of December 1, 2015, 16 persons that did not operate any aircraft held licences providing them the authority to operate domestic air services.

For international air services, the Regulations require the air carrier, not the charterer, to hold a licence. Consequently, under the current approach, a person who is in commercial control of an air service and does not operate aircraft must hold the licence for domestic, but not for international air services.

All licensed air carriers are required to hold a Canadian Aviation Document (CAD) (<http://www.tc.gc.ca/eng/civilaviation/publications/tp8880-chapter1-section3-5193.htm>) issued by the Minister of Transport. When a person does not operate any aircraft, they are neither required nor entitled to obtain a CAD. The Agency has issued domestic licences to Indirect Air Service Providers on the basis that the CAD requirement is met by the charter air carrier.

The Agency, after careful review and study, is considering a change in its approach to determining who is operating an air service in situations where a person has commercial control over an air service, but does not operate aircraft. It is important to note that a review of the Act (<http://www.tc.gc.ca/eng/ctareview2014/canada-transportation-act-review.html>) is underway and may recommend changes to the legislative framework. Regulatory reforms may also be contemplated.

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.

However, the Agency would preserve its discretion to apply legislative and regulatory requirements in a purposive manner to ensure that the objectives underpinning the air licensing regime continue to be met. Accordingly, should a person who does not operate aircraft hold themselves out to the public as an air carrier and not a charterer or structure their business model to circumvent the licensing requirements, the Agency could determine that they are operating the air service. Considerations in any such determination could include the manner in which they hold themselves out to the public, whether their involvement goes beyond a typical contractual charter arrangement, and the extent to which their operations are integrated into those of the air carrier.

When an air service is marketed and sold by an air carrier that has commercial control and the flights are operated by another air carrier, pursuant to a wet lease, code share, blocked space, capacity purchase agreement or other similar agreement, the Agency will continue to require the air carrier in commercial control to hold the licence for that air service, consistent with existing regulatory requirements.

Call for comments

The Agency invites interested stakeholders to submit their comments on the Agency's proposed approach, including with respect to the following questions:

- Whether Indirect Air Service Providers should be required to hold a licence to sell their services directly to the public, in their own right. Provide a clear explanation for your position;
- What criteria the Agency should consider in determining whether an Indirect Air Service Provider is holding itself out as an air carrier, and therefore, should be required to hold the licence; and
- What regulatory amendments, if any, should be contemplated to clarify who is operating an air service and is required, as such, to hold a licence.

Participants may submit **written** comments no later than the end of the business day on January 22, 2016.

All submissions made as part of this consultation process will be considered public documents and, as such, may be posted on the Agency's website.

How to Participate

Submit your comments to consultations@otc-cta.gc.ca (<mailto:consultations@otc-cta.gc.ca>).

Contact:

John Touliopoulos - Manager, Financial Evaluation Division (<http://geds20-sage20.ssc-spc.gc.ca/en/GEDS20/?pgid=015&dn=cn%3DTouliopoulos%5C%2C%20John%2C%20ou%3DRACD-DARC%2C%20ou%3DIRDB-DGRDI%2C%20ou%3DCTA-OTC%2C%20o%3DGC%2C%20c%3DCA>)

Telephone:

819-953-8960

Email:

john.touliopoulos@otc-cta.gc.ca

Latest Milestones

Title	Date
Deadline for submissions	January 22, 2016

Date modified:

2015-12-21

This is **Exhibit “B”** to the Affidavit of Dr. Gábor Lukacs
affirmed before me on January 25, 2016

Signature

RE: URGENT: Possible unlicensed operation / violation of s. 67(1) of the CTA

Ghislain Blanchard <Ghislain.Blanchard@otc-cta.gc.ca>

Fri, Jan 8, 2016 at 5:15 PM

To: Gabor Lukacs <lukacs@airpassengerrights.ca>, secretariat <Secretariat.Secretariat@otc-cta.gc.ca>

Dear Dr. Luckas,

As promised yesterday, I am following up on your request for information regarding the NewLeaf Travel Company, and specifically in regards to your questions below and subsequent ones raised during our discussion.

We confirm that NewLeaf Travel Company Inc. (NewLeaf) does not hold any Agency licences nor does it have an application for a licence before the Agency. We also confirm that the Agency is aware of NewLeaf's recently advertised business venture, wherein Newleaf promotes itself as an air travel company that will partner with Flair Airlines, a licenced air carrier, who will operate the aircraft on the air service.

The Agency is reviewing whether persons who have commercial control over an air service, but do not operate any aircraft (Indirect Air Service Providers), such as NewLeaf, should be required to hold a licence. The Agency is now consulting with Canadians on this matter. Information on the Agency's consultation and how to participate can be found at: <https://www.otc-cta.gc.ca/eng/consultation/consultation-requirement-hold-a-licence>. Interested persons may submit written comments no later than the end of the business day on January 22, 2016.

As NewLeaf does not have a licence, they do not have a tariff pursuant to the Air Transportation Regulations. Flair Airlines is a licenced air carrier and, as such, they are required pursuant to section 67(4) of the Canada Transportation Act, to make a copy of their tariff available upon request and on payment of a fee not exceeding the cost of making a copy.

Flair Airlines holds Licence No. 050100 and No. 050114 granting the authority to operate domestic and non-scheduled international air services using small, medium, large, and all cargo aircraft.

I trust the above will address the questions that you have raised.

Sincerely,

Ghislain Blanchard
Director General
Industry Regulation and Determinations

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

From: Gabor Lukacs [mailto:lukacs@AirPassengerRights.ca]

Sent: January-06-16 11:57 AM

To: secretariat

Subject: URGENT: Possible unlicensed operation / violation of s. 67(1) of the CTA

Dear Madam Secretary,

I am writing to you concerning NewLeaf Travel Company Inc., which announced today that it is offering domestic service between various cities in Canada.

1. I conducted a search among the Agency's decisions, but I was unable to locate any one relating to granting the company a license.
2. I visited the company's website used for selling tickets, and found that it does not display the tariff, contrary s. 67(1)(a.1) of the Canada Transportation Act.

3. I spoke to a reservation agent of New Leaf, and she not aware of the company having a tariff. Thus, the company may be in breach of s. 67(1)(a) of the Canada Transportation Act.

I am requesting that the Agency confirm whether this company has been licensed (and if so, provide me with a copy of the decision granting license), and whether the Agency is aware of the issues identified above.

Kindly please confirm the receipt of this message.

I look forward to hearing from you.

Best wishes,
Dr. Gabor Lukacs

This is **Exhibit “C”** to the Affidavit of Dr. Gábor Lukacs
affirmed before me on January 25, 2016

Signature

From lukacs@AirPassengerRights.ca Fri Jan 8 19:03:12 2016
Date: Fri, 8 Jan 2016 19:03:06 -0400 (AST)
From: Gabor Lukacs <lukacs@AirPassengerRights.ca>
To: john.touliopoulos@otc-cta.gc.ca
Subject: Question concerning "Consultation on the requirement to hold a licence"

Dear Mr. Touliopoulos,

I am writing to seek further information about the nature of the above-noted consultation.

1. Based on what provision of the Canada Transportation Act or the Air Transportation Regulations does the Agency engage in this consultation exercise?

2/a. At the end of the consultation, will the Agency issue a decision or order?

2/b. If so, what provision(s) of the Canada Transportation Act or the Air Transportation Regulations permits the Agency to make a generic (legislative-like) determination with respect to domestic service, without a complaint or application about a specific business?

I look forward to hearing from you.

Best wishes,
Dr. Gabor Lukacs

This is **Exhibit “D”** to the Affidavit of Dr. Gábor Lukacs
affirmed before me on January 25, 2016

Signature

From Secretariat.Secretariat@otc-cta.gc.ca Fri Jan 15 16:17:14 2016
Date: Fri, 15 Jan 2016 20:17:05 +0000
From: secretariat <Secretariat.Secretariat@otc-cta.gc.ca>
To: Gabor Lukacs <lukacs@airpassengerrights.ca>
Subject: Question concerning "Consultation on the requirement to hold a licence"

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Dr. Lukacs,

This is in response to your e-mail to Mr. Blanchard and separate e-mail to Mr. Touloupoulos, both dated January 8, 2016. Your two e-mails have been reproduced at the end of this response.

A panel has been assigned to review whether NewLeaf Travel Company Inc. (NewLeaf) is required, pursuant to section 57 of the Canada Transportation Act (CTA), to hold a licence to operate the proposed air transportation business venture between NewLeaf and Flair Airlines Inc. (Flair). The Agency is, pursuant to section 81 of the CTA, conducting an inquiry into this matter. Next steps, including whether to issue a formal decision, order, or any other action is to be taken is entirely at the discretion of the panel.

The Agency is also currently consulting with Canadians on whether persons who bulk purchase all seats on planes and then resell those seats to the public, such as NewLeaf, should be required to hold a licence. Consultations serve as a means to collect information from key and interested stakeholders. If you have views on whether persons who bulk purchase all seats on planes and then resell those seats to the public should be required to hold a licence, I encourage you to submit your comments, as part of the consultation process, by end of day January 22nd, which is the deadline.

NewLeaf, like other persons who bulk purchase all seats on planes and then resell those seats to the public, that hold an Agency licence or have a pending application, has been informed that while this review is underway, the Agency will not require persons to apply for a licence as long as the service offered to the public meets all of the following conditions:

- i. The person does not operate any aircraft;
- ii. The person charters the aircraft's entire capacity, for the purpose of resale to the public; and
- iii. The air carrier holds the appropriate Agency licence to operate the air service.

There is no enforcement action in place with NewLeaf with respect to sections 57 and 59 of the CTA. Should the Agency's review conclude that persons that market

and sell an air service to the public, but do not operate any aircraft, are required to hold a licence, they will be informed of such a decision and will be required to apply for a licence from the Agency.

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

From: Gabor Lukacs [mailto:lukacs@AirPassengerRights.ca]

Sent: January-08-16 6:03 PM

To: John Touliopoulos

Subject: Question concerning "Consultation on the requirement to hold a licence"

Dear Mr. Touliopoulos,

I am writing to seek further information about the nature of the above-noted consultation.

1. Based on what provision of the Canada Transportation Act or the Air Transportation Regulations does the Agency engage in this consultation exercise?

2/a. At the end of the consultation, will the Agency issue a decision or order?

2/b. If so, what provision(s) of the Canada Transportation Act or the Air Transportation Regulations permits the Agency to make a generic

(legislative-like) determination with respect to domestic service, without a complaint or application about a specific business?

I look forward to hearing from you.

Best wishes,

Dr. Gabor Lukacs

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

From: Gabor Lukacs [mailto:lukacs@AirPassengerRights.ca]

Sent: January-08-16 4:44 PM

To: Ghislain Blanchard

Cc: secretariat

Subject: RE: URGENT: Possible unlicensed operation / violation of s. 67(1) of the CTA

Dear Mr. Blanchard,

Thank you for your answer. According to the consultation website that you sent me:

The Agency's current approach [...] requires the person with commercial control to hold the licence, irrespective of whether the person operates any aircraft.

Thus, on its face, it appears that NewLeaf is required to hold a license, and its operation is contrary to ss. 57 and/or 59 of the Canada Transportation Act (the "CTA").

1. Is there any proceeding currently before the Agency to bring NewLeaf into compliance with ss. 57 and/or 59 of the CTA?

2/a. Has the Agency taken or contemplates to take any steps in terms of enforcement with respect to NewLeaf's non-compliance with ss. 57 and/or 59 of the CTA?

2/b. If not, why not?

As per our telephone call today, I would appreciate if you could confirm when you will be able to answer these questions.

I look forward to hearing from you.

Best wishes,

Dr. Gabor Lukacs

This is **Exhibit “E”** to the Affidavit of Dr. Gábor Lukacs
affirmed before me on January 25, 2016

Signature

From lukacs@AirPassengerRights.ca Fri Jan 15 16:34:28 2016
 Date: Fri, 15 Jan 2016 16:34:22 -0400 (AST)
 From: Gabor Lukacs <lukacs@AirPassengerRights.ca>
 To: secretariat <Secretariat.Secretariat@otc-cta.gc.ca>
 Subject: Re: Question concerning "Consultation on the requirement to hold a licence"

[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 Madam Secretary:

Unfortunately, your letter did not address my questions relating to the ongoing "Consultation," and focused only on the specific case of NewLeaf.

My questions with respect to the ongoing "Consultation" were and are:

1. Based on what provision of the Canada Transportation Act or the Air Transportation Regulations does the Agency engage in this consultation exercise?

2/a. At the end of the consultation, will the Agency issue a decision or order about its conclusions?

2/b. If so, what provision(s) of the Canada Transportation Act or the Air Transportation Regulations permits the Agency to make a generic (legislative-like) determination with respect to domestic service, without a complaint or application about a specific business?

I would be most grateful if you were so kind to answer these questions.

I look forward to hearing from you.

Best wishes,
 Dr. Gabor Lukacs

On Fri, 15 Jan 2016, secretariat wrote:

>
 > Dr. Lukacs,
 >
 >
 >
 > This is in response to your e-mail to Mr. Blanchard and separate e-mail to
 > Mr. Touliopoulos, both dated January 8, 2016. Your two e-mails have been
 > reproduced at the end of this response.
 >
 >
 >
 > A panel has been assigned to review whether NewLeaf Travel Company Inc.
 > (NewLeaf) is required, pursuant to section 57 of the Canada Transportation
 > Act (CTA), to hold a licence to operate the proposed air transportation
 > business venture between NewLeaf and Flair Airlines Inc. (Flair). The
 > Agency is, pursuant to section 81 of the CTA, conducting an inquiry into
 > this matter. Next steps, including whether to issue a formal decision,

> order, or any other action is to be taken is entirely at the discretion of
> the panel.
>
>
>
> The Agency is also currently consulting with Canadians on whether persons
> who bulk purchase all seats on planes and then resell those seats to the
> public, such as NewLeaf, should be required to hold a licence. Consultations
> serve as a means to collect information from key and interested
> stakeholders. If you have views on whether persons who bulk purchase all
> seats on planes and then resell those seats to the public should be required
> to hold a licence, I encourage you to submit your comments, as part of the
> consultation process, by end of day January 22nd, which is the deadline.
>
>
>
> NewLeaf, like other persons who bulk purchase all seats on planes and then
> resell those seats to the public, that hold an Agency licence or have a
> pending application, has been informed that while this review is underway,
> the Agency will not require persons to apply for a licence as long as the
> service offered to the public meets all of the following conditions:
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>
> i. The person does not operate any aircraft;
>
> ii. The person charters the aircraft's entire capacity, for the purpose
> of resale to the public; and
>
> iii. The air carrier holds the appropriate Agency licence to operate the
> air service.
>
>
>
> There is no enforcement action in place with NewLeaf with respect to
> sections 57 and 59 of the CTA. Should the Agency's review conclude that
> persons that market and sell an air service to the public, but do not
> operate any aircraft, are required to hold a licence, they will be informed
> of such a decision and will be required to apply for a licence from the
> Agency.
>
>
>
>
> -----Original Message-----
>
> From: Gabor Lukacs [mailto:lukacs@AirPassengerRights.ca]
>
> Sent: January-08-16 6:03 PM
>
> To: John Touliopoulos
>
> Subject: Question concerning "Consultation on the requirement to hold a
> licence"
>
>
>
> Dear Mr. Touliopoulos,
>
>
>

> I am writing to seek further information about the nature of the above-noted
> consultation.
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>
>
> 1. Based on what provision of the Canada Transportation Act or the Air
> Transportation Regulations does the Agency engage in this consultation
> exercise?
>
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> 2/a. At the end of the consultation, will the Agency issue a decision or
> order?
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>
>
> 2/b. If so, what provision(s) of the Canada Transportation Act or the Air
> Transportation Regulations permits the Agency to make a generic
>
> (legislative-like) determination with respect to domestic service, without a
> complaint or application about a specific business?
>
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>
> I look forward to hearing from you.
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>
> Best wishes,
>
> Dr. Gabor Lukacs
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>
> -----Original Message-----
>
> From: Gabor Lukacs [mailto:lukacs@AirPassengerRights.ca]
>
> Sent: January-08-16 4:44 PM
>
> To: Ghislain Blanchard
>
> Cc: secretariat
>
> Subject: RE: URGENT: Possible unlicensed operation / violation of s. 67(1)
> of the CTA
>
>
>
> Dear Mr. Blanchard,
>
>
>
> Thank you for your answer. According to the consultation website that you
> sent me:
>
>
>
> The Agency's current approach [...] requires the person with
>

> commercial control to hold the licence, irrespective of whether
>
> the person operates any aircraft.
>
>
>
> Thus, on its face, it appears that NewLeaf is required to hold a license,
> and its operation is contrary to ss. 57 and/or 59 of the Canada
> Transportation Act (the "CTA").
>
>
>
> 1. Is there any proceeding currently before the Agency to bring NewLeaf into
> compliance with ss. 57 and/or 59 of the CTA?
>
>
>
> 2/a. Has the Agency taken or contemplates to take any steps in terms of
> enforcement with respect to NewLeaf's non-compliance with ss. 57 and/or 59
> of the CTA?
>
>
>
> 2/b. If not, why not?
>
>
>
> As per our telephone call today, I would appreciate if you could confirm
> when you will be able to answer these questions.
>
>
>
> I look forward to hearing from you.
>
>
>
> Best wishes,
>
> Dr. Gabor Lukacs
>
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>

This is **Exhibit “F”** to the Affidavit of Dr. Gábor Lukacs
affirmed before me on January 25, 2016

Signature

From Secretariat.Secretariat@otc-cta.gc.ca Tue Jan 19 17:52:08 2016
Date: Tue, 19 Jan 2016 21:51:58 +0000
From: secretariat <Secretariat.Secretariat@otc-cta.gc.ca>
To: Gabor Lukacs <lukacs@airpassengerrights.ca>
Subject: Response to your telephone inquiry of January 18, 2016

[The following text is in the "iso-8859-1" character set.]
[Your display is set for the "ISO-8859-2" character set.]
[Some special characters may be displayed incorrectly.]

Dr. Lukacs,

Further to our telephone conversation yesterday morning and your request for a copy of the Agency's decision granting an exemption to NewLeaf Travel Company Inc. (NewLeaf) from the licensing requirements of the Canada Transportation Act, I can confirm that the Agency has not, in fact, issued an exemption or any other decision with respect to NewLeaf at this time. Rather, in the context of the emergence of this new business model and a discussion between the Panel assigned to the NewLeaf matter and Agency staff, the Panel instructed staff to conduct broad consultations with industry as expeditiously as possible to inform the Agency's consideration of this new model. At this same meeting, the Agency Chair, acting in his capacity as CEO, also instructed staff to not seek a licence application from NewLeaf and other companies like it pending the completion of this consultation and the issuance of an Agency decision on the issue, provided they met three criteria. These criteria were detailed in my email to you of Friday, January 15, 2016.

Elizabeth C. Barker

Secretary of the Canadian Transportation Agency

Office des transports du Canada | Canadian Transportation Agency

Gouvernement du Canada | Government of Canada

Ottawa, Canada K1A 0N9

Courriel | Email : secretariat@otc-cta.gc.ca

Site Web | Website : www.otc-cta.gc.ca

Téléphone | Telephone 819-997-0099

Télécopieur | Facsimile 819-953-5253

Téléimprimeur | Teletypewriter 1-800-669-5575

This is **Exhibit “G”** to the Affidavit of Dr. Gábor Lukacs
affirmed before me on January 25, 2016

Signature

From Secretariat.Secretariat@otc-cta.gc.ca Wed Jan 20 18:11:32 2016
Date: Wed, 20 Jan 2016 22:11:23 +0000
From: secretariat <Secretariat.Secretariat@otc-cta.gc.ca>
To: Gabor Lukacs <lukacs@airpassengerrights.ca>
Subject: RE: The "instructions" of the Agency Chair

[The following text is in the "iso-8859-1" character set.]
[Your display is set for the "ISO-8859-2" character set.]
[Some special characters may be displayed incorrectly.]

Dr. Lukacs,

We are unable to provide you with a copy of these instructions as they were provided verbally to Agency staff.

Elizabeth C. Barker

Secrétaire de l'Office des transports du Canada
Office des transports du Canada / Gouvernement du Canada
secretariat@otc-cta.gc.ca / Site Web www.otc-cta.gc.ca
Tél. : 819-997-0099 / Télécopieur 819-953-5253 / ATS : 1-800-669-5575

Secretary of the Canadian Transportation Agency
Canadian Transportation Agency / Government of Canada
secretariat@otc-cta.gc.ca / Web site www.otc-cta.gc.ca
Tel: 819-997-0099 / Facsimile 819-953-5253 / TTY: 1-800-669-5575

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

From: Gabor Lukacs [mailto:lukacs@AirPassengerRights.ca]
Sent: January-19-16 6:28 PM
To: secretariat
Subject: The "instructions" of the Agency Chair

Dear Madam Secretary,

Thank you for your message.

Due to the absence of a formal order or decision, I am requesting that you provide me with a copy of the "instructions" of the Agency Chair, acting in his capacity as CEO, referenced in your email below.

Best wishes,
Dr. Gabor Lukacs

On Tue, 19 Jan 2016, secretariat wrote:

>
> Dr. Lukacs,
>
>
>
> Further to our telephone conversation yesterday morning and your
> request for a copy of the Agency's decision granting an exemption to
> NewLeaf Travel Company Inc. (NewLeaf) from the licensing requirements
> of the Canada Transportation Act, I can confirm that the Agency has
> not, in fact, issued an exemption or any other decision with respect to NewLeaf at
> this time.
> Rather, in the context of the emergence of this new business model

> and a discussion between the Panel assigned to the NewLeaf matter and
> Agency staff, the Panel instructed staff to conduct broad
> consultations with industry as expeditiously as possible to inform the
> Agency's consideration of this new model. At this same meeting, the
> Agency Chair, acting in his capacity as CEO, also instructed staff to
> not seek a licence application from NewLeaf and other companies like
> it pending the completion of this consultation and the issuance of an
> Agency decision on the issue, provided they met three criteria. These
> criteria were detailed in my email to you of Friday, January 15, 2016.

>
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>
>
>

> Elizabeth C. Barker

>
> Secretary of the Canadian Transportation Agency
>
>
>

> Office des transports du Canada | Canadian Transportation Agency

>
> Gouvernement du Canada | Government of Canada
>
>

> Ottawa, Canada K1A 0N9

>
> Courriel | Email : secretariat@otc-cta.gc.ca
>
>

> Site Web | Website : www.otc-cta.gc.ca

>
> Téléphone | Telephone 819-997-0099
>
>

> Télécopieur | Facsimile 819-953-5253

>
> Téléimprimeur | Teletypewriter 1-800-669-5575
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>

This is **Exhibit “H”** to the Affidavit of Dr. Gábor Lukacs
affirmed before me on January 25, 2016

Signature

From Secretariat.Secretariat@otc-cta.gc.ca Thu Jan 21 17:30:45 2016
 Date: Thu, 21 Jan 2016 21:30:36 +0000
 From: secretariat <Secretariat.Secretariat@otc-cta.gc.ca>
 To: Gabor Lukacs <lukacs@airpassengerrights.ca>
 Subject: RE: The "verbal instructions" of the Agency Chair

[The following text is in the "iso-8859-1" character set.]
 [Your display is set for the "ISO-8859-2" character set.]
 [Some special characters may be displayed incorrectly.]

Dr. Lukacs,

I can advise that the meeting at which these instructions were given took place on October 29, 2015, but that no minutes were produced for this meeting.

Elizabeth C. Barker

Secrétaire de l'Office des transports du Canada
 Office des transports du Canada / Gouvernement du Canada
 secretariat@otc-cta.gc.ca / Site Web www.otc-cta.gc.ca
 Tél. : 819-997-0099 / Télécopieur 819-953-5253 / ATS : 1-800-669-5575

Secretary of the Canadian Transportation Agency
 Canadian Transportation Agency / Government of Canada
 secretariat@otc-cta.gc.ca / Web site www.otc-cta.gc.ca
 Tel: 819-997-0099 / Facsimile 819-953-5253 / TTY: 1-800-669-5575

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

From: Gabor Lukacs [mailto:lukacs@AirPassengerRights.ca]
 Sent: January-20-16 5:30 PM
 To: secretariat
 Subject: The "verbal instructions" of the Agency Chair

Dear Madam Secretary,

Thank you for your message below.

Kindly please clarify on what date these verbal instructions were made, whether they were recorded in the minutes of the meeting, and if so, kindly please provide me with a copy of the relevant portion of the minutes.

Best wishes,
 Dr. Gabor Lukacs

On Wed, 20 Jan 2016, secretariat wrote:

> Dr. Lukacs,
 >
 > We are unable to provide you with a copy of these instructions as they
 > were provided verbally to Agency staff.
 >
 >
 > Elizabeth C. Barker
 >
 > Secrétaire de l'Office des transports du Canada Office des transports
 > du Canada / Gouvernement du Canada secretariat@otc-cta.gc.ca / Site

> Web www.otc-cta.gc.ca Tél. : 819-997-0099 / Télécopieur 819-953-5253 /
> ATS : 1-800-669-5575
>
> Secretary of the Canadian Transportation Agency Canadian
> Transportation Agency / Government of Canada secretariat@otc-cta.gc.ca
> / Web site www.otc-cta.gc.ca
> Tel: 819-997-0099 / Facsimile 819-953-5253 / TTY: 1-800-669-5575
>
>
> -----Original Message-----
> From: Gabor Lukacs [<mailto:lukacs@AirPassengerRights.ca>]
> Sent: January-19-16 6:28 PM
> To: secretariat
> Subject: The "instructions" of the Agency Chair
>
> Dear Madam Secretary,
>
> Thank you for your message.
>
> Due to the absence of a formal order or decision, I am requesting that
> you provide me with a copy of the "instructions" of the Agency Chair,
> acting in his capacity as CEO, referenced in your email below.
>
> Best wishes,
> Dr. Gabor Lukacs
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>
>
> On Tue, 19 Jan 2016, secretariat wrote:
>
>>
>> Dr. Lukacs,
>>
>>
>>
>> Further to our telephone conversation yesterday morning and your
>> request for a copy of the Agency's decision granting an exemption to
>> NewLeaf Travel Company Inc. (NewLeaf) from the licensing requirements
>> of the Canada Transportation Act, I can confirm that the Agency has
>> not, in fact, issued an exemption or any other decision with respect to NewLeaf at
>> this time.
>> Rather, in the context of the emergence of this new business model
>> and a discussion between the Panel assigned to the NewLeaf matter and
>> Agency staff, the Panel instructed staff to conduct broad
>> consultations with industry as expeditiously as possible to inform
>> the Agency's consideration of this new model. At this same meeting,
>> the Agency Chair, acting in his capacity as CEO, also instructed
>> staff to not seek a licence application from NewLeaf and other
>> companies like it pending the completion of this consultation and the
>> issuance of an Agency decision on the issue, provided they met three
>> criteria. These criteria were detailed in my email to you of Friday, January 15,
>> 2016.
>>
>>
>>
>>
>> Elizabeth C. Barker
>>
>> Secretary of the Canadian Transportation Agency
>>
>>

This is **Exhibit "I"** to the Affidavit of Dr. Gábor Lukacs
affirmed before me on January 25, 2016

Signature



[Canadian Transportation Agency \(/eng\)](#)

[Home](#) / [News Room](#)

/ Key facts on the Agency's review of licensing requirements for certain air travel companies

Key facts on the Agency's review of licensing requirements for certain air travel companies

Business models in the airline industry are rapidly evolving. To ensure that users of transportation services are protected, while still allowing innovative approaches that can increase consumer choice in the market, the Agency is currently reviewing whether companies that bulk purchase all seats on planes and then resell those seats to the public, but do not operate any aircraft, should be required to hold a licence (/eng/consultation/consultation-requirement-hold-a-licence).

In December, the Agency advised these companies that while this review was ongoing, they would not be required to seek a license, so long as they met certain conditions (/eng/consultation/consultation-requirement-hold-a-licence). This approach has been consistent since the beginning.

Once consultations are complete, the Agency will review and carefully consider the submissions received and issue a determination on which companies are required to hold licences. This will be done as quickly as possible while ensuring that all relevant information is taken into account.

Date modified:

2016-01-21

FEDERAL COURT OF APPEAL

BETWEEN:

DR. GÁBOR LUKÁCS

Applicant

– and –

CANADIAN TRANSPORTATION AGENCY

Respondent

WRITTEN REPRESENTATIONS OF THE APPLICANT**OVERVIEW****(i) The application for judicial review and the appeal**

1. An IASP (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.

2. There are currently two proceedings before this Honourable Court, relating to whether IASPs are required to hold licenses under the *Canada Transportation Act*, S.C. 1996, c. 10 [the *CTA*]:

(a) the present application for judicial review, seeking a declaration that the Canadian Transportation Agency [the Agency] lacks jurisdiction to make decisions or orders having the effect of exempting and/or excluding IASPs from the statutory requirement of holding a licence; and

(b) the statutory appeal from Decision No. 100-A-2016 [Decision Under Appeal] of the Agency, in which the Agency determined that IASPs of domestic air service are no longer required to hold licences under the *CTA*, so long as they do not hold themselves out as an air carrier operating an air service, and that NewLeaf Travel Company Inc. [NewLeaf], being an IASP, is therefore not required to hold a licence.

3. While the legal arguments in the statutory appeal undoubtedly overlap with the ones in the present application, the remedies being sought substantially differ. The statutory appeal seeks to set aside a specific decision of the Agency, while the present application seeks to prohibit the Agency from making decisions and orders with a certain effect.

(ii) The Agency's motion to strike the application

4. Lukács opposes the Agency's motion to strike the application on the basis of mootness, because:

- (a) the remedies being sought in the present application substantially differ from the remedies sought in the statutory appeal; and
- (b) the remedies being sought in the present application do serve a practical purpose, since the Agency led no evidence nor undertaking that it will not make additional decisions or orders having the same effect as what is being challenged in the present application.

5. In the alternative, Lukács submits that the present application should not be struck, but held in abeyance pending disposition of the statutory appeal, as was done in the past in File No. A-386-12.

PART I – STATEMENT OF FACTS

A. BACKGROUND

6. Paragraph 57(a) of 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.

Canada Transportation Act, ss. 55(1) & 57(a)

Tab 3, pp. 52-56

7. An Indirect Air Service Provider [IASP] 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.

**Agency’s Written Representations, para. 12
Lukács Affidavit, Exhibit “A”**

**Agency’s Rec., p. 135
Tab 1A, p. 6**

8. An IASP enters into two separate and independent contracts:
- (a) a contract for the transportation of the passenger, between the passenger and the IASP; and
 - (b) a contract for the rental of aircraft with flight crew, between the IASP and the operator of the aircraft.

Due to the absence of a contractual relationship between passengers and the operator of the aircraft, the latter has no obligations toward the passengers.

9. IASP is not a new or innovative business model, but has been known for more than twenty years. Since 1996 and up until recently, 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. In doing so, the Agency had been following the so-called *1996 Greyhound Decision*:

The Agency's current approach to determining which person is operating a domestic air service originated from its 1996 Greyhound Decision and requires the person with commercial control to hold the licence, irrespective of whether the person operates any aircraft. As of December 1, 2015, 16 persons that did not operate any aircraft held licences providing them the authority to operate domestic air services.

Agency's Written Representations, para. 15
Lukács Affidavit, Exhibit "A"

Agency's Rec., p. 137
Tab 1A, p. 6

10. NewLeaf Travel Company Inc. [NewLeaf] is an IASP, whose business model consists of selling non-stop scheduled domestic air service to the Canadian public in its own name, while renting the aircraft and crew from Flair Airlines Ltd.

11. On August 21, 2015, the Agency commenced an inquiry into whether NewLeaf's business model requires a licence under the *CTA*.

Agency's Written Representations, para. 18

Agency's Rec., p. 137

12. On October 29, 2015, the Chair of the Agency unlawfully instructed the staff of the Agency to not require IASPs to hold a licence. The Secretary of the Agency, whose duties include record keeping for the Agency, confirmed that:

- (a) no order or decision was made to reflect the Chair's instructions;
- (b) the Chair's instructions were made orally; and
- (c) no minutes were taken for the meeting where the instructions were given.

Lukács Affidavit, Exhibits "F"-"H"

Tabs 1F-1H, pp. 26-31

13. 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.]

Lukács Affidavit, Exhibit “A”

Tab 1A, p. 6

14. The consultation was commenced for the sake of NewLeaf, although this true purpose was not disclosed to the public, and the inquiry about NewLeaf is never mentioned in the consultation announcement.

B. PROCEDURAL HISTORY OF THE APPLICATION

15. On January 22, 2016, the present application for judicial review with respect to the “Approach under consideration” was commenced. Lukács was seeking a declaration that the Agency lacks jurisdiction to make decisions or orders having the effect of exempting and/or excluding certain types of airlines from the statutory requirement of holding a licence, and that the implementation of the aforementioned new “approach” requires legislative amendments. He was also seeking a prohibition enjoining the Agency from making such orders and decisions.

Baturin Affidavit, Exhibit “A”

Agency’s Record, p. 9

16. The Agency unnecessarily and unreasonably delayed the application in more than one way:

- (a) On January 29, 2016, Lukács asked, by way of an informal motion, that the application be expedited. The Agency first objected to dealing with the matter by way of an informal motion, and retracted its objection only after the February 16, 2016 Direction of the Court (Stratas, J.A.). Finally, the Agency consented to expediting the application, but in the process wasted 20 days.

Baturin Affidavit, Exhibits “B”-“F” **Agency’s Record, pp. 21-33**

- (b) The Agency unreasonably objected to the request of Lukács to transmit the record pursuant to Rule 317, causing a delay of approximately three (3) months in the proceeding and wasting substantial judicial resources.

Baturin Affidavit, Exhibit “I” **Agency’s Record, p. 60**

C. THE STATUTORY APPEAL

17. Without waiting for the determination of the application, on March 29, 2016, the Agency issued Decision No. 100-A-2016, in which it determined that:

- (1) IASPs (resellers) of domestic air service are no longer required to hold licences under the *CTA*, so long as they do not hold themselves out as an air carrier operating an air service; and
- (2) NewLeaf, being an IASP (reseller), is therefore not required to hold a licence.

Baturin Affidavit, Exhibit “H” **Agency’s Record, p. 44**

18. While the consultation announcement referred to “Indirect Service Providers,” the Agency renamed them “resellers” in Decision No. 100-A-2016 [Decision Under Appeal]:

“reseller” means a person who does not operate aircraft and who purchases the seating capacity of an air carrier and subsequently resells those seats, in its own right, to the public.

[Emphasis added.]

**Decision Under Appeal, para. 5
being Exhibit “H” to the Baturin Affidavit**

Agency’s Record, p. 46

19. The Agency’s reasons leave no doubt that the terms “Indirect Air Service Provider” and “Reseller” mean the same business model:

[...] the reseller model, whereby the reseller has commercial control over an air service and makes decisions on matters such as routes, scheduling, pricing, and aircraft to be used, while air carriers operate the aircraft on the reseller’s behalf.

**Decision Under Appeal, para. 11
being Exhibit “H” to the Baturin Affidavit**

Agency’s Record, p. 47

20. 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 in its reasons for granting leave to appeal. The Court also ordered that the appeal be expedited if the Notice of Appeal is filed within thirty days and that it be heard together with the present applications

***Lukács v. Canada (CTA)*, 2016 FCA 174, paras. 4, 6, 9; being Exhibit “M” to the Baturin Affidavit**

21. On June 28, 2016, The Notice of Appeal was filed and served. Subsequently, the appeal book and all memoranda have been served and filed.

22. Since August 16, 2016, both the statutory appeal and the present application have been ready for hearing.

PART II – STATEMENT OF THE POINTS IN ISSUE

23. The questions to be decided on this motion are:
- (a) whether the application for judicial review is moot;
 - (b) whether the application should be held in abeyance, pending disposition of the statutory appeal; and
 - (c) costs of the motion and the application.

PART III – STATEMENT OF SUBMISSIONS

24. Lukács agrees with the Agency's submissions that:
- (a) the threshold on a motion to strike an application is very high, and the moving party must demonstrate that the application is "bereft of any chance of success"; and
 - (b) a case is moot if it fails to meet the "live controversy" test in the sense that there is no longer a tangible and concrete dispute between the parties.
25. Lukács submits that the application is not moot.
26. In the alternative, Lukács submits that the application should not be struck, but rather held in abeyance pending disposition of the statutory appeal in File No. A-242-16, as was done in File No. A-386-12.

***Lukács v. Canadian Transportation Agency,
Order of November 30, 2012 in File No. A-386-12***

Tab 5, p. 68

A. THE APPLICATION IS NOT MOOT

27. The present application is not a "pre-appeal" of the Decision Under Appeal, but rather it challenges the legality of the Agency's objective of exempting and/or excluding IASPs from the statutory requirement of holding a licence, regardless of how the Agency frames it or what format or mechanism the Agency attempts to use for implementing it. The thrust of the application is that what the Agency is seeking to do requires legislative amendments, and the Agency cannot do it on its own.

28. As the Agency correctly acknowledged at paragraph 47 of its written representations, the Order being sought on the present application seeks to prohibit the Agency from making a particular type of decision, and not only one specific decision.

29. While the Agency seeks to frame its current attempt to relieve IASPs from the requirement to hold a licence as a determination of who “operates an air service” within the meaning of the *CTA*, the pith and substance remains excluding and/or exempting of IASPs from the statutory requirement of holding a licence. Similarly, the Agency’s change of terminology from “Indirect Air Service Providers” to “resellers” is a mere cosmetic change that does not alter the substance of the model used by these businesses.

30. The Decision Under Appeal in the statutory appeal in File No. A-242-16 is not the first attempt of the Agency to do away with the licensing requirement for IASPs. On October 29, 2015, almost two months before the Consultation was announced, the Chair of the Agency unlawfully instructed the staff of the Agency to not require IASPs to hold a licence.

Lukács Affidavit, Exhibits “F”-“H”

Tabs 1F-1H, pp. 26-31

31. Thus, the record shows that the Agency was and remains determined to relieve IASPs, one way or another, from the requirement to hold a licence. The Agency led no evidence nor an undertaking that the Decision Under Appeal is its last attempt to do so, and on a balance of probabilities it is not.

32. Therefore, the Agency failed to demonstrate that it is plain and clear that the Order being sought on the present application will have no practical effect.

B. ALTERNATIVELY, THE APPLICATION SHOULD BE HELD IN ABEYANCE

33. It is common ground that the legal issues in the present application and the appeal in File No. A-242-16 overlap. Furthermore, while granting of the appeal would not necessarily render the remedies being sought on the present application moot, it is clear that if the appeal is dismissed, then the present application becomes moot.

34. In File No. A-386-12 in similar circumstances, this Honourable Court did not strike the application, and instead stayed it pending disposition of the statutory appeal.

Lukács v. Canadian Transportation Agency,
Order of November 30, 2012 in File No. A-386-12

Tab 5, p. 68

35. Therefore, Lukács submits that if this Honourable Court finds that this application may be moot, then the application should not be struck, but rather should be held in abeyance pending disposition of the statutory appeal in File No. A-242-16.

C. COSTS

36. The Agency's position with respect to costs on the present motion is inconsistent with the Agency's submissions at paragraph 42 of its memorandum of fact and law:

Generally, an administrative body like the Agency will neither be entitled nor be ordered to pay costs, at least when responding to a court proceeding to address its jurisdiction and where there has been no misconduct on its part.

Agency's Memorandum of Fact and Law, para. 42

Resp. Record, p. 64

37. Lukács submits that the Agency should be denied its costs on the motion, and if the application is struck, the Agency should be directed to pay Lukács his disbursements in the present application for the following reasons:

- (a) The present application is a proceeding in the nature of public interest litigation, and it was properly commenced, even if it has possibly been rendered moot by subsequent events.

***Dagg v. Canada (Industry)*, 2010 FCA 316, para. 15**

Tab 4, p. 61

- (b) The Agency has unnecessarily delayed the proceeding by initially objecting to expediting the application by way of an informal motion. Lukács requested the application to be expedited on January 29, 2016, and the Agency consented to it only on February 19, 2016, and only after this Honourable Court intervened.

Baturin Affidavit, Exhibits “B”-“F”

Agency’s Record, pp. 21-33

- (c) The Agency unnecessarily delayed the proceeding by unreasonably objecting to the request of Lukács to transmit the record under Rule 317.

Baturin Affidavit, Exhibit “I”

Agency’s Record, p. 60

PART IV – ORDER SOUGHT

38. The Applicant, Dr. Gábor Lukács, is seeking an Order:
- (a) dismissing the Agency's motion, with costs in any event of the cause;
 - (b) alternatively, directing that the present application be held in abeyance pending disposition of the appeal in File No. A-242-16;
 - (c) in the further alternative, if the present application is struck, denying the Agency its costs of the present motion and directing the Agency to pay Lukács his disbursements in the application; and
 - (d) granting such further relief as this Honourable Court may deem just.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

August 25, 2016

DR. GÁBOR LUKÁCS

Halifax, NS

lukacs@AirPassengerRights.ca

Applicant

PART V – LIST OF AUTHORITIES**STATUTES AND REGULATIONS**

Canada Transportation Act, S.C. 1996, c. 10,
ss. 55, 57

CASE LAW

Dagg v. Canada (Industry), 2010 FCA 316

Lukács v. Canadian Transportation Agency,
Order of November 30, 2012 in File No. A-386-12



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

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

cent des éléments d'actif de celle-ci au moment de sa dissolution.

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]

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.

Inaccessibilité

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-

Case Name:

Dagg v. Canada (Minister of Industry)

Between

**Michael Dagg, Appellant, and
Minister of Industry, Respondent**

[2010] F.C.J. No. 1463

[2010] A.C.F. no 1463

2010 FCA 316

2010 CAF 316

2010 CarswellNat 4388

196 A.C.W.S. (3d) 265

414 N.R. 182

Docket A-500-09

Federal Court of Appeal
Ottawa, Ontario

Dawson, Trudel and Mainville JJ.A.

Heard: September 15, 2010.

Judgment: November 22, 2010.

(19 paras.)

Government law -- Access to information and privacy -- Access to information -- Legislation -- Federal -- Access to Information Act -- Appeals and judicial review -- Practice and procedure -- Costs -- Considerations -- Appeal by applicant from decision declining to award costs allowed -- After applicant commenced application for judicial review of Industry Canada's refusal of his access request, Industry Canada provided requested documents -- Applicant then brought motion for dismissal of application and costs -- Judge erred in concluding application was premature and

in making no costs award -- But for error, judge would have considered applicant's claim for costs on basis that application had been properly commenced, but rendered moot -- Applicant was entitled to costs on a party-and-party basis.

Appeal by the applicant from a decision of a Federal Court judge declining to award costs. The applicant made a request to Industry Canada seeking access to certain records. Industry Canada responded and advised that an extension of up to 150 days beyond the 30-day limit contained in the Access to Information Act would be required to complete the processing of the request. However, it did not complete the request within the 150-day extension. The applicant filed a complaint with the Information Commissioner concerning the delay in responding to the access request. The Commissioner investigated the complaint and advised the applicant that Industry Canada's failure to respond to the request within the extended deadline was a deemed refusal, but it had provided the Commissioner with a work plan and committed to a date to respond to the request. Thereafter, the applicant commenced an application for judicial review of the decision refusing his access request. The application was made within the 45-day deadline for commencing such an application, but was made prior to the commitment date set out in the Commissioner's letter. On the commitment date, Industry Canada provided the applicant with the requested records. The applicant then brought a motion to dismiss the application for judicial review because it had been rendered moot. He also sought costs. The judge found that the application for judicial review was premature as the Commissioner cured Industry Canada's deemed refusal when it approved an extension and set a date for Industry Canada to respond to the request. He made no award of costs because of his conclusion that the Court had no jurisdiction to hear the underlying application and that the issue had not been determined by the Court of Appeal. The applicant appealed the costs award on the basis that the judge erred in failing to award costs to him.

HELD: Appeal allowed. The judge erred in concluding that the application for judicial review was premature. But for that error, the judge would have considered the applicant's claim for costs on the basis that his application had been properly commenced, but rendered moot. Consequently, the applicant was entitled to his costs. As Industry Canada's conduct was not scandalous or outrageous, the applicant was entitled to costs on a party-and-party basis.

Statutes, Regulations and Rules Cited:

Access to Information Act, R.S.C. 1985, c. A-1, s. 7, s. 9, s. 9(1), s. 10, s. 10(3), s. 41

Federal Courts Rules, Rule 407

Counsel:

Kris Klein and Shaun Brown, for the Appellant.

Robert MacKinnon and Brian Harvey, for the Respondent.

The judgment of the Court was delivered by

1 DAWSON J.A.:-- This is an appeal from an order of the Federal Court. The Court's reasons are cited as 2009 FC 1265. The sole issue to be determined on this appeal is whether the Judge made an error in principle when he dismissed a motion for costs brought by the appellant, Mr. Dagg. The issue arises out of the following facts.

The Facts

2 By letter dated January 15, 2008, Mr. Dagg made a request to Industry Canada under the *Access to Information Act*, R.S.C. 1985, c. A-1 (Act) seeking access to certain records. Industry Canada responded that, pursuant to subsection 9(1) of the Act, an extension of up to 150 days beyond the 30-day limit contained in section 7 of the Act would be required to complete the processing of Mr. Dagg's request. Thereafter, Industry Canada did not process the access request within the 150-day extension. Mr. Dagg filed a complaint with the Information Commissioner (Commissioner) concerning Industry Canada's delay in responding to the access request. The sections of the Act referred to in these reasons are set out in the appendix to the reasons.

3 The Commissioner investigated Mr. Dagg's complaint. By letter dated July 10, 2009, the then Commissioner advised Mr. Dagg of the results of his investigation. In material part, the letter advised Mr. Dagg that:

The investigation confirmed that extensions invoked under section 9 were necessary and that the durations were reasonable. Hence, the due date for a response was extended. As you know, the department failed to respond to your request by the extended due date, thereby placing itself in a deemed refusal situation pursuant to subsection 10(3) of the Act. In our view, there is no lawful justification for [Industry Canada]'s failure to meet the response deadline.

As a result of our intervention [Industry Canada] has provided our office with a work plan and commitment date for your request. [Industry Canada] is making every effort to respond to your request by September 28, 2009. Consequently, we will record your complaint as resolved. [Emphasis added.]

4 On August 21, 2009, Mr. Dagg commenced an application for judicial review of the decision refusing his access request. This date was within the 45-day deadline for commencing such applications set under section 41 of the Act, but was prior to the commitment date of September 28,

2009. On the commitment date, Industry Canada provided Mr. Dagg with the requested records. Certain exemptions were claimed under the Act, none of which were the subject of any further complaint.

5 Mr. Dagg then brought a motion seeking an order dismissing the application for judicial review because it had been rendered moot. He also sought costs.

The Decision of the Federal Court

6 The Judge began his decision by correctly noting that section 41 of the Act contains three prerequisites that must be met before an access requester may apply to the Federal Court. Only one of the prerequisites was in issue: had Mr. Dagg been refused access to the requested record?

7 The Judge then reviewed the recent decision of the Federal Court in *Statham v. Canadian Broadcasting Corp.*, 2009 FC 1028. The Judge discussed the *Statham* decision in the following terms:

In *Statham*, it is significant that the Court interprets the Act as granting the power to cure a deemed refusal to the Office of the Information Commissioner [Commissioner] upon conclusion of its investigation. This conclusion effectively precludes the applicant from applying to the Federal Court under section 41 of the Act if the [Commissioner] has approved a future commitment date from the government institution.

8 The Judge viewed the facts in *Statham* to be similar to the facts before him. He therefore concluded that:

27. [...] it is appropriate to defer to my colleague's interpretation of subsection 37(1) of the Act as set out in *Statham*, *supra* and apply it to the facts of this motion. Accordingly, the [Commissioner] cured the deemed refusal when it approved a new delay period, ending on September 28, 2009, for the respondent to comply with the request. The applicant's application for judicial review was premature as there was no refusal for the purpose of section 41.

9 On the issue of costs, the Judge wrote:

28. Because I have concluded, on the basis of *Statham*, *supra*, that this Court had no jurisdiction to hear the underlying application for judicial review pursuant to section 41 of the Act, but the law in this area has yet to be determined by the Court of Appeal, I do not award costs against either party.

Consideration of the Issue

10 Mr. Dagg argues that the Judge erred in law in failing to award costs to him. He states that he

believes he only received the requested documents because he commenced his application in the Federal Court. He seeks reimbursement of the legal fees he incurred in the amount of \$3,405.00.

11 This Court may only interfere with the Judge's order as to costs if the Judge made an error in principle, or if the costs award is plainly wrong. See: *Hamilton v. Open Window Bakery Ltd.*, [2004] 1 S.C.R. 303 at paragraph 27.

12 In reasons cited as *Statham v. Canadian Broadcasting Corp.*, 2010 FCA 315 this Court found that the Federal Court erred when it interpreted the Act to empower the Commissioner to "cure" deemed refusals by establishing a commitment date so as to in effect extend the time frames established in the Act. The Court also affirmed that no distinction exists between a deemed refusal of access and a refusal based upon exemptions or exclusions in the Act.

13 Applying those conclusions to the present case, when Mr. Dagg commenced his application for judicial review Industry Canada was deemed, under subsection 10(3) of the Act, to have refused access to him. This was because access was not provided within the extended time period set under subsection 9(1) of the Act. Subsequently, after the application for judicial review was commenced, access was provided. At that time, Mr. Dagg correctly took the position that his application had become moot.

14 By following the decision of the Federal Court in *Statham*, the Judge committed an error in principle. Mr. Dagg's application for judicial review was not premature when it was commenced. The three prerequisites under section 41 of the Act were all met. Throughout, the Federal Court had jurisdiction under section 41 of the Act. Later, when access was provided the application was rendered moot.

15 But for that error of principle, the Judge would have considered Mr. Dagg's claim for costs on the basis that his application had been properly commenced, but had been rendered moot. The Judge would also have considered that Mr. Dagg was provided with the requested records after the application for judicial review was commenced, some 20 months after the access request had been filed. In the specific circumstances now before the Court, considering the above factors, I conclude that the Court should have ordered that Mr. Dagg was entitled to have his costs in the Federal Court.

16 As to the quantum of such costs, Mr. Dagg is effectively seeking costs on a solicitor-and-client basis. The jurisprudence is well settled that solicitor-and-client costs are "generally awarded only where there has been reprehensible, scandalous or outrageous conduct on the part of one of the parties." See: *Young v. Young*, [1993] 4 S.C.R. 3 at page 134. The conduct of Industry Canada cannot be so characterized.

17 Rule 407 of the *Federal Courts Rules* provides that unless the Court otherwise orders, party-and-party costs shall be assessed in accordance with column III of the table to Tariff B of the *Federal Courts Rules*. I would order that Mr. Dagg be paid his costs in the Federal Court assessed on that basis.

18 In reaching this conclusion, I have considered the respondent's submission that to award costs in this case "may well encourage the practice by complainants of initiating applications for judicial review before the expiry of timelines for disclosure, knowing that they can pursue their costs in these kind[s] of moot applications." However, an award of party-and-party costs does not indemnify a litigant. It is a contribution to a party's solicitor-and-client costs. Because complainants will expend more money in legal fees than they receive as costs, I see little danger in the particular circumstances before me in awarding costs to Mr. Dagg. Further, the respondent's concerns are based on the incorrect premise that the Commissioner possesses the power to extend the time frames established in the Act.

19 For these reasons, I would allow the appeal and, pronouncing the order the Judge should have, I would order that the appellant receive his costs in the Federal Court, assessed on the basis of the midpoint of column III of the table to Tariff B of the *Federal Courts Rules*. As the appellant was successful on this appeal I would award him his costs of the appeal.

DAWSON J.A.

TRUDEL J.A.:-- I agree.

MAINVILLE J.A.:-- I concur.

* * * * *

APPENDIX

Sections 7, 9, 10 and 41 of the *Access to Information Act* are as follows:

Notice where access requested

7. Where access to a record is requested under this Act, the head of the government institution to which the request is made shall, subject to sections 8, 9 and 11, within thirty days after the request is received,

(a) give written notice to the person who made the request as to whether or not access to the record or a part thereof will be given; and

(b) if access is to be given, give the person who made the request access to the record or part thereof.

[...]

Extension of time limits

9. (1) The head of a government institution may extend the time limit set out in section 7 or subsection 8(1) in respect of a request under this Act for a reasonable period of time, having regard to the circumstances, if

(a) the request is for a large number of records or necessitates a search through a large number of records and meeting the original time limit would unreasonably interfere with the operations of the government institution,

(b) consultations are necessary to comply with the request that cannot reasonably be completed within the original time limit, or

(c) notice of the request is given pursuant to subsection 27(1)

by giving notice of the extension and, in the circumstances set out in paragraph (a) or (b), the length of the extension, to the person who made the request within thirty days after the request is received, which notice shall contain a statement that the person has a right to make a complaint to the Information Commissioner about the extension.

Notice of extension to Information Commissioner

- (2) Where the head of a government institution extends a time limit under subsection (1) for more than thirty days, the head of the institution shall give notice of the extension to the Information Commissioner at the same time as notice is given under subsection (1).

Where access is refused

10. (1) Where the head of a government institution refuses to give access to a record requested under this Act or a part thereof, the head of the institution shall state in the notice given under paragraph 7(a)

(a) that the record does not exist, or

(b) the specific provision of this Act on which the refusal was based or, where the head of the institution does not indicate whether a record exists, the provision on which a refusal could reasonably be expected to be based if the record existed, and shall state in the notice that the person who made the request has a right to make a complaint to the Information Commissioner about the refusal.

Existence of a record not required to be disclosed

- (2) The head of a government institution may but is not required to indicate under subsection (1) whether a record exists.

Deemed refusal to give access

- (3) Where the head of a government institution fails to give access to a record requested under this Act or a part thereof within the time limits set out in this Act, the head of the institution shall, for the purposes of this Act, be deemed to have refused to give access.

[...]

Review by Federal Court

41. Any person who has been refused access to a record requested under this Act or a part thereof may, if a complaint has been made to the Information Commissioner in respect of the refusal, apply to the Court for a review of the matter within forty-five days after the time the results of an investigation of the complaint by the Information Commissioner are reported to the complainant under subsection 37(2) or within such further time as the Court may, either before or after the expiration of those forty-five days, fix or allow.

* * * * *

Notification

7. Le responsable de l'institution fédérale à qui est faite une demande de communication de document est tenu, dans les trente jours suivant sa réception, sous réserve des articles 8, 9 et 11 :

a) d'aviser par écrit la personne qui a fait la demande de ce qu'il sera donné ou non communication totale ou partielle du document;

b) le cas échéant, de donner communication totale ou partielle du document.

...

Prorogation du délai

9. (1) Le responsable d'une institution fédérale peut proroger le délai mentionné à l'article 7 ou au paragraphe 8(1) d'une période que justifient les circonstances dans les cas où :

a) l'observation du délai entraverait de façon sérieuse le fonctionnement de l'institution en raison soit du grand nombre de documents demandés, soit de l'ampleur des recherches à effectuer pour donner suite à la demande;

b) les consultations nécessaires pour donner suite à la demande rendraient pratiquement impossible l'observation du délai;

c) avis de la demande a été donné en vertu du paragraphe 27(1).

Dans l'un ou l'autre des cas prévus aux alinéas *a)*, *b)* et *c)*, le responsable de l'institution fédérale envoie à la personne qui a fait la demande, dans les trente jours suivant sa réception, un avis de prorogation de délai, en lui faisant part de

son droit de déposer une plainte à ce propos auprès du Commissaire à l'information; dans les cas prévus aux alinéas *a*) et *b*), il lui fait aussi part du nouveau délai.

Avis au Commissaire à l'information

- (2) Dans les cas où la prorogation de délai visée au paragraphe (1) dépasse trente jours, le responsable de l'institution fédérale en avise en même temps le Commissaire à l'information et la personne qui a fait la demande.

Refus de communication

- 10. (1) En cas de refus de communication totale ou partielle d'un document demandé en vertu de la présente loi, l'avis prévu à l'alinéa *7a*) doit mentionner, d'une part, le droit de la personne qui a fait la demande de déposer une plainte auprès du Commissaire à l'information et, d'autre part :

- a*) soit le fait que le document n'existe pas;

- b*) soit la disposition précise de la présente loi sur laquelle se fonde le refus ou, s'il n'est pas fait état de l'existence du document, la disposition sur laquelle il pourrait vraisemblablement se fonder si le document existait.

Dispense de divulgation de l'existence d'un document

- (2) Le paragraphe (1) n'oblige pas le responsable de l'institution fédérale à faire état de l'existence du document demandé.

Présomption de refus

- (3) Le défaut de communication totale ou partielle d'un document dans les délais prévus par la présente loi vaut décision de refus de communication.

...

Révision par la Cour fédérale

41. La personne qui s'est vu refuser communication totale ou partielle d'un document demandé en vertu de la présente loi et qui a déposé ou fait déposer une plainte à ce sujet devant le Commissaire à l'information peut, dans un délai de quarante-cinq jours suivant le compte rendu du Commissaire prévu au paragraphe 37(2), exercer un recours en révision de la décision de refus devant la Cour. La Cour peut, avant ou après l'expiration du délai, le proroger ou en autoriser la prorogation.

Federal Court of Appeal



Cour d'appel fédérale

Date: 20121130

Docket: A-386-12

Ottawa, Ontario, November 30, 2012

Present: TRUDEL J.A.

BETWEEN:

GABOR LUKACS

Applicant

and

CANADIAN TRANSPORTATION AGENCY

Respondent

ORDER

The respondent Canadian Transportation Agency (the Agency) presents a motion seeking an Order quashing the applicant's Application for Judicial Review with respect to a Directive entitled "Internal Procedure on One Member being Assigned to Deal with Procedural Matters in Adjudicative Cases";

In his Application for Judicial Review, the applicant challenges:

- (a) the validity of the Internal Procedure;

- (b) the jurisdiction of the Chairperson of the Agency to issue directives which are contrary to the *Canada Transportation Act*, S.C. 1996, c. 10 (the Act);
- (c) the jurisdiction of the Agency to make and apply the Internal Procedure without the approval of the Governor-in-Council.

In a distinct file, the applicant was granted leave to appeal to our Court a decision of the Agency issued by a single member (Docket 12-A-38; A-460-12);

Obviously, the issues raised by the applicant in his application will be squarely addressed in the appeal. Indeed, the Order granting leave specifically states that the issue is:

... whether the Agency exceeded its jurisdiction and/or erred in law by making its decision without a quorum of at least two members, as required by subsection 16(1) of the *Canada Transportation Act*, S.C. 1996, c. 10”

By necessity, the impugned Directive will be examined;

As a result, it would be more efficient to proceed with the appeal while keeping the Application for Judicial Review in abeyance even if it is already doubtful, at this stage, that this procedure is open to the applicant;

CONSEQUENTLY, IT IS ORDERED AS FOLLOWS:

The Application for Judicial Review is stayed pending the disposition of the appeal in A-460-12;

The applicant shall report to the Court as to his intention to either pursue or desist from his application no later than 20 days after issuance of a final judgment from this Court in A-460-12.

"Johanne Trudel"

J.A.