Court File No.: A-218-14

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)

REPLY OF THE APPLICANT / MOVING PARTY

(motion pursuant to Rules 91, 94, 96, and 97 of the *Federal Courts Rules*)

Dated: November 27, 2014

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REPLY OF THE APPLICANT / MOVING PARTY

A. QUESTIONS 53-54, 56, 60-61, 67: THE INTENDED SUBMISSIONS OF THE COMMISSIONER

1. It is in the interest of justice that duplication of arguments be avoided. Contrary to the Commissioner's written representations at paragraph 46, neither the affidavit nor the answers of Ms. Kosseim provide any information about the intended submissions of the Commissioner. This information is vital to assess whether the proposed intervention will add to the debate an element which is absent from what the parties before the Court will bring:

> 11 This overriding consideration requires, in every case, that the proposed intervener demonstrate that its intervention will assist the determination of an issue. This cannot be achieved without demonstrating that the proposed intervention will add to the debate an element which is absent from what the parties before the Court will bring (see Canada Union of Public Employees (Airline Division v. Canadian Airlines International Inc. (supra). In turn, I find it difficult to conceive how such a demonstration can be made without giving an indication of the facts and arguments the Commission intends to present, and contrasting those with the positions taken by the parties.
>
> [Emphasis added.]

***Canada (Attorney General) v. Sasvari*, 2004 FC 1650, para. 11** **MR Tab 7: 164**

2. A motion for leave to intervene is not a game of poker nor a guessing game. A proposed intervener must be transparent to the Court about its intentions, which must be set out in a "detailed and well-particularized supporting affidavit to satisfy the Court that intervention is warranted."

> ***Pictou Landing Band Council v. Canada (Attorney General)*, 2014 FCA 21, paras. 10-11** **MR Tab 13: 200**

3. The explanation offered at paragraph 48 of the Commissioner's written representation is unsupported by the transcript. Ms. Kosseim never said that she had insufficient information to answer the questions. If Ms. Kosseim was uncertain about the Commissioner's intended submissions or that these submissions would be different from those of the Agency, she could have said so.

4. Ms. Kosseim never addressed the substance of these crucial questions posed to her, and instead provided evasive answers. This was compounded by improper objections of counsel for the Commissioner to Lukács's attempts to rephrase the questions in order to elicit answers.

5. The drastic remedies of dismissing the Commissioner's motion or the striking out of Ms. Kosseim's affidavit are warranted in the present case for a number of reasons. First, as Justice Stratas, J.A. noted in *Pictou*, failure of a proposed intervener to address these crucial questions is in and on its own a basis for refusing leave to intervene. Second, there is no practical difference between providing evasive answers to crucial questions and failing to attend an examination at all—they both deprive the examining party of an important right, and delay the proceeding. Third, a non-party seeking a discretionary order should conduct itself in a manner that does not require further interlocutory motions, and should be allowed less leeway than a party to a proceeding.

6. In the alternative, Ms. Kosseim should re-attend for cross-examination to answer these questions and follow-up questions that may arise.

B. SCOPE OF CROSS-EXAMINATION ON AFFIDAVITS

7. Cross-examination on an affidavit can cover any material relevant to the determination of the issue in respect of which the affidavit was filed.

***Sawridge Band v. Canada*. 2005 FC 865, para. 4** **Respondent Record, Tab 4-G, p. 113**

C. QUESTIONS 50 AND 52: COLLATERAL ATTACK

8. Although the Commissioner eventually answered these questions, the issue is not moot, because Lukács had no opportunity to ask follow-up questions; indeed, these questions were objected to at the examination. Contrary to the Commissioner's submission at paragraph 43 of its written representations, a "collateral attack" can also be made against statutory provisions or regulations.

***Alberta v. AUPE*, 2014 ABCA 197, para. 60**

***R. v. Bryan*, 1999 CanLII 4805 (MB CA), para. 1**

9. Whether the Commissioner disputes the validity of the provisions of the General Rules or the Dispute Rules of the Agency that incorporate the open court principle is relevant to whether leave to intervene should be granted, because s. 18.5 of of the *Federal Courts Act* does not permit such a challenge on judicial review given that s. 41 of the *Canada Transportation Act* provides for a statutory appeal from rules made by the Agency.

10. If the Commissioner will confirm that it will not challenge in any way, directly or indirectly, the General Rules and the Dispute Rules of the Agency in its intervention, then an answer in writing will suffice; otherwise, Lukács is seeking to ask follow-up questions at a re-attendance for cross-examination.

D. TIMING OF THE COMMISSIONER'S MOTION: QUESTIONS 16-19 AND PRODUCTIONS

11. The question on the present motion is not whether the Court should refuse leave to intervene based on the failure of the Commissioner to bring his motion at the "earliest possible opportunity," but rather whether this may be a factor for refusing leave. The answer to that question is affirmative: this Court held that a proposed intervener has a duty to seek leave to intervene at the "earliest possible opportunity."

> ***Mugesera v. Canada (Minister of Citizenship and Immigration)*, 2003 FCA 84, para. 4** — **MR Tab 12: 193**
>
> ***Canada (Attorney General) v. Siemens Enterprises Communications*, 2011 FCA 250, para. 5** — **Tab 8: 169**

12. Communications with third parties, such as the CTA, about the present application demonstrate that at the time of those communications, the Commissioner already had knowledge of the present application, and thus they will assist the Court in assessing whether the Commissioner's delay is acceptable.

E. PROCEDURE FOR OBJECTING TO A DIRECTION TO ATTEND

13. Paragraph 32 of the Commissioner's written representations misstate *Simpson Strong-Tie Company*, which was about the scope of productions and not about the proper procedure for objecting to productions:

> [12] The issue in this appeal is whether the Prothonotary erred in holding that on cross-examination on an affidavit the production of documents and answers to questions thereto was governed by Rule 91(2)(c) and that the Rule limited document production in cross-examination on affidavit to documents in the possession, power or control of the affiants.

> ***Simpson Strong-Tie Company v. Peak Innovations Inc.*, 2009 FC 392, para. 12** — **Responding Record, Tab 4-E, p. 79**

14. The Commissioner's position is tantamount to arguing that Rule 94(2) is redundant and serves no purpose. Indeed, if a party opposing the production can simply state its reasons at or before the cross-examination, then what is the purpose of Rule 94(2)? If Rule 94(2) is obsolete, as the Commissioner seems to suggest, then why is it still in the *Federal Courts Rules*?

15. Lukács respectfully disagrees with the Commissioner, and submits that Rule 94(2) serves a purpose analogous to Rule 95(1): it provide the proper procedure for objecting to production. Thus, in the absence of an agreement to the contrary between the parties, failing to invoke Rule 94(2) before the examination extinguishes the party's right to object to the production.

F. COSTS

16. The legal basis for Lukács seeking costs against Ms. Kosseim personally is Rule 96(3), while the factual basis is that she provided evasive answers to questions related to the intended submissions of the Commissioner. Following the advice of counsel is not recognized by the case law as an excuse for providing evasive answers to proper questions, and does not relieve Ms. Kosseim from the financial consequences of her conduct as a witness.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

November 27, 2014

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