

Court File No. 16-A-17

FEDERAL COURT OF APPEAL

BETWEEN:

GABOR LUKACS

Moving Party

and

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

Respondents

**MEMORANDUM OF FACT AND LAW OF
NEWLEAF TRAVEL COMPANY INC.**

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**PART I
INTRODUCTION**

1. This Memorandum of Facts and Law is filed in accordance with Rule 354 of the Federal Court Rules, S.O.R./98-106 (“Rules”).
2. The Respondent, NewLeaf Travel Company Inc. (“NLTC”), submits that the Moving Party is not entitled to bring this Motion.
3. NLTC further submits that any and all material sought by the Moving Party that relates to NLTC’s proposed business model/plan is not relevant and is the subject of a confidentiality agreement between NLTC and the Respondent Canadian Transportation Agency (the “Agency”) and cannot be produced; alternatively, if leave to appeal is granted, a separate Motion ought to be brought by the Moving Party to seek said production.

PART II
STATEMENT OF FACTS

4. For the purposes of this Memorandum, NLTC states that the facts are fairly set out in paragraphs 9 – 24 of the Agency’s Decision (**Motion Record, Volume 1, Tab 1, pp. 3 – 6**).
5. NLTC was federally incorporated with the purpose of offering scheduled airlines services to the Canadian public as a reseller in partnership with Flair Airlines Inc. (“Flair”).
6. Generally speaking, NLTC’s business model involved the purchasing and re-sale of tickets on large aircraft operated by Flair, which holds a license issued by the Agency.
7. On or about August 21, 2015, the Agency initiated an inquiry, pursuant to section 81 of the Canada Transportation Act, S.C. 1996 c.10, as amended (the “Act”) into whether NLTC was required to hold a license pursuant to section 57 of the Act.
8. On or about December 21, 2015, the Agency began a consultation process with stakeholders for the purpose of reconsidering the approach taken of requiring resellers to be licensed. The approach under consideration was that of allowing resellers to operate without a license for the sale of air services directly to the public, as long as the affiliated airline offering the flight services held a valid license issued by the Agency.
9. Ultimately, in Decision No. 100-A-2016, which followed the call for consultations, the Agency determined that it would be varying the interpretation of the Agency found in the 1996 Greyhound Decision (Decision No. 232-A-1996) in a manner that was more consistent as it applied to resellers.
10. Decision No. 100-A-2016 provided that resellers, such as NLTC, “do not operate air services and are not required to hold an air license, as long as they do not

hold themselves out to the public as an air carrier operating an air service” (**Motion Record, Volume I, Tab 1, p. 12 at para. 56**).

11. The Agency stated with respect to NLTC that, “NewLeaf should it proceed with its proposed business model, would not operate an air service and would not be required to hold an air license” (**Motion Record, Volume I, Tab 1, p. 12 at paras. 52 and 56**).
12. The Moving Party (“Lukacs”) now brings a motion seeking Leave to Appeal Decision No. 100-A-2016.

STANDING TO BRING THIS MOTION

13. There are two findings in Decision 100-A-2016 (“Decision”):
 1. That resellers generally do not require a license from the Agency;
 2. That NLTC, operating as a reseller, does not require a license from the Agency.

Motion Record of Moving Party, Volume I, Tab 1, page 1 at para. 2

14. In his Notice of Motion, Lukacs seeks to challenge both findings.
15. Lukacs is not a “party” to the Decision; the only parties are the Agency and NLTC. Lukacs is therefore not a party within the meaning of the Act in respect of the findings contained in the Decision.
16. Section 41 of the Act has been interpreted by the Supreme Court of Canada as being a much more circumscribed process, and has stated that section 40, as compared to section 41(1), provides a much more inclusive set of review capabilities, including at least some availability of public interest standing. Section 41(1) provides for no such standing.

***Canadian National Railway Co. v. Canada (Attorney General)*,
[2014] 2 SCR 135, 2014 SCC 40 at para 33 [TAB 1]**

17. The Application for Leave to Appeal under section 41 of the CTA contemplates a true Appeal, and it does not contemplate other parties or persons whatsoever.

18. It follows, then, that the only parties to a true Appeal must only be those parties who were party to the Decision at first instance. Presumably, had NLTC been required by the Agency to hold a licence, it could seek leave to appeal under section 41 of the Act.
19. As NLTC is the only party who may appeal under this section, any other person bringing the motion contemplated in section 41, including Lukacs, does not have the requisite standing under section 41, and the motion must necessarily fail.
20. Lukacs points to several decisions in his memorandum of fact and law and book of authorities which grant Lukacs leave to appeal. Respectfully, all of those decisions are ones where Lukacs is a party at first instance to an application or complaint, or where he has intervened or otherwise attempted to gain standing in a non-contested motion.

LUKACS' PROPER PROCEDURE AND ALTERNATIVE REMEDY

21. Although Lukacs cannot avail himself of leave under s. 41 of the Act, he may have a remedy available to him in section 40 of the Act.
22. Lukacs may be an "interested person" entitled to seek an Order of the Governor in Council ("GIC") to vary the Decision of the Agency as an "interested person" pursuant to section 40.

***Canadian National Railway Co. v. Canada (Attorney General),
supra at para 33 [TAB 1]***

23. However, Lukacs has not availed himself of petitioning the GIC pursuant to section 40 where an "interested person" is contemplated in the Act to pursue the remedy he seeks, which is an order to quash the Decision.
24. Lukacs arguably may be able then to seek leave to appeal an unfavorable GIC section 40 decision under section 41(1).

25. NLTC submits that the Motion has not properly accounted for the proper process. The Motion as Lukacs has set it out cannot be permitted to proceed as advanced.

TEST FOR LEAVE TO APPEAL

26. If NLTC is incorrect in its submission in respect of Lukacs' Motion on the issue of Standing, then in the alternative NLTC submits that Lukacs must demonstrate an arguable case on a question of law or a question of jurisdiction in respect of section 41 (1) of the Act.

QUESTION OF LAW

27. Lukacs submits that the Agency made an error in law by departing from jurisprudence without a reasonable explanation and that its findings in the Decision render sections of the Act "futile" or in "express contradiction" to other sections of the Act.
28. A tribunal is not generally bound by its own findings. Tribunals do not adhere to the doctrine of *stare decisis* in the same manner as Courts do. On that basis, the Agency may very readily depart from its previous line of decisions, and the decision to do so is not a legal error and does not violate the doctrines of *stare decisis* or precedent as may be the case with a Court departing from similar authority without reasons.

***Domtar Inc. v. Quebec (Commission d'appel en matière de lésions professionnelles)*, [1993] 2 SCR 756 [TAB 2]**

29. Lukacs has failed to demonstrate an arguable case in respect of a question of law.

QUESTION OF JURISDICTION

30. The Supreme Court of Canada in the case of *Dunsmuir* and a considerable body of jurisprudence forward has indicated that questions of jurisdiction are limited to questions of true *vires* and what, prior to *Dunsmuir*, were referred to as "first

instance” questions, or rather, whether a tribunal possessed the statutory grant of authority to commence an inquiry.

31. Questions of jurisdiction as properly considered today only apply to whether or not the Agency had the ability to “commence its hearing or inquiry”; issues beyond that are required to be considered in the context of the standard of review analysis, and are generally reviewable on a standard of reasonableness.

***Dunsmuir v. New Brunswick*, [2008] 1 SCR 190,
2008 SCC 9 at para 59 [TAB 3]**

32. The Agency was within its jurisdiction when it commenced its inquiry, as such Lukacs has failed to demonstrate an arguable case in respect of a question of jurisdiction.

CONFIDENTIALITY AND RELEVANCY OF REQUESTED MATERIAL

33. NLTC objects to Lukacs’ request to be provided with the entirety of the record relied upon by the Act (the “Requested Material”) (specifically as it relates to NLTC’s business model/plan and all material related thereto, including any material created by the Agency referencing such material) pursuant to Rule 318(2) of the *Rules*. The basis for NLTC’s position is that the Requested Material contains confidential and proprietary information which would severely damage or destroy the commercial viability of NLTC, especially in its infancy. Further, NLTC submits that if leave is granted, the Requested Material is not relevant to an appeal given that it is an appeal under section 40 and is allowed only on questions of law and jurisdiction.
34. In the present case, a great deal of the record before the Agency related to direct questions and responses from the Agency to NLTC pertaining the specifics of its business plan both now and into the future phases of the business. This information was provided to the Agency with a request that said material was to be treated as confidential and is not available publically through any other source. The Agency has treated said material as confidential. This confidential

material contains propriety information which, if disclosed, would lose its value entirely. The material should not be disclosed to Lukacs on that basis alone.

35. Further, as a pure question of law, the record is of no reliance in establishing that an error of law occurred.
36. However, the very request for this material suggests that Lukacs' focus is not on a question of law or jurisdiction, but is rather on a question of mixed law and fact, which is not reviewable by this Court. Thus, either Lukacs has raised a question of mixed law and fact and the matter is not reviewable; or, he has raised a question of law or jurisdiction and the materials are not relevant or required for this Court to make a determination of his appeal.
37. NLTC submits that, if this Court has any question whatsoever regarding the relevance or confidentiality of the Requested Materials, a separate motion should be brought by Lukacs seeking disclosure and further submissions and supporting affidavits should be allowed to ensure that the interests of all parties are protected.
38. Further, *Rule* 151 allows for a party to a proceeding to bring a motion seeking an order to have certain materials in the court file treated as confidential. As the Court noted in *Lukacs v. Canadian Transportation Agency*, the obligations seen in *Rule* 318 and 151 must be considered as part of a global scheme to deal with confidential information.

***Lukacs v. Canadian Transportation Agency*,
2016 FCA 103 at para. 14 [Motion Record, Volume II, Tab 9]**

39. It is important to note that *Lukacs v. CTA, supra*, involved a judicial review where the record is paramount to ensuring the parties are able to make proper submissions and protect their respective positions. The present matter is merely an appeal on a question of law or jurisdiction. Further, the information sought in *Lukacs v. CTA* was primarily with respect to being provided an unredacted version of a 1996 CTA decision known as the 1996 Greyhound Decision.

40. The release of the unredacted 1996 Greyhound Decision is distinguishable from the Requested Material sought by the Applicant in the present case. The release of the unredacted 1996 Greyhound Decision in 2016 would have had no impact on the viability of the now defunct Greyhound Air; whereas most obviously, the release of the Requested Material would stand to negatively impact a business that is in its nascent stage, when it is most susceptible to being irreparably harmed by any such release of confidential materials. Secondly, this case is not one where many of the safeguards that found their way into the Confidentiality Order in File No. A-39-16 would protect NLTC's concerns. The ability to hold the Moving Party in contempt of court or to levy a fine would be shallow victories if their confidential information was spread to their competitors.

**PART III
CONCLUSION**

41. NLTC submits that Lukacs does not have a right to the Requested Materials under *Rule* 318(2) as they contain confidential and proprietary information regarding NLTC and are not relevant to the issue to be determined before the Court. In the alternative, if this Court finds that the Moving Party does have a right to the Requested Materials, NLTC submits that substantial and effective safeguards need to be put in place by way of a confidentiality order should the Applicant violate said order.
42. As a consequence, before any final determination is made on the issue of the Requested Materials further written submissions ought to be allowed by this Court.
43. For the reasons outlined above, NLTC respectfully requests that this Motion be dismissed with costs to NLTC under the appropriate Tariff.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 16TH DAY OF MAY 2016

D'ARCY & DEACON LLP
Per:



**BRIAN J. MERONEK, Q.C /
IAN S. MCIVOR**

**Counsel for the Respondent
NewLeaf Travel Company Inc.**

**PART IV
LIST OF AUTHORITIES**

	<u>TAB</u>
<i>Canadian National Railway Co. v. Canada (Attorney General)</i> , [2014] 2 SCR 135, 2014 SCC 40 at para 33	1
<i>Domtar Inc. v. Quebec (Commission d'appel en matière de lésions professionnelles)</i> , [1993] 2 SCR 756	2
<i>Dunsmuir v. New Brunswick</i> , [2008] 1 SCR 190, 2008 SCC 9 at para 59	3