

May 28, 2016

VIA EMAIL

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

Dear Madam or Sir:

**Re: Dr. Gábor Lukács v. Canadian Transportation Agency and NewLeaf
Federal Court of Appeal File No.: 16-A-17
Request for directions pursuant to Rule 318(3)
Reply to the letters of the Respondents**

I am writing to reply to the May 26, 2016 and May 27, 2016 letters of the Respondents.

- (1) *The request is not premature.* Deciding a motion for leave to appeal without first determining the record before the Court (at least on a preliminary basis) would be prejudicial to the moving party, and would render the explicit language of Rule 350 futile:

350 Rules 317 to 319 apply to appeals and motions for leave to appeal, with such modifications as are necessary.

[Emphasis added.]

Thus, it is submitted that the procedures for the transmission of the tribunal's record are available to the moving party and are applicable already on a motion for leave to appeal.

- (2) *The Respondents misstate the grounds objection in File No. A-39-16.* In File No. A-39-16, the Agency objected to the transmission of documents not only based on confidentiality, but also on the ground of irrelevance (see enclosed objection letter).

Nevertheless, because confidentiality was raised as a ground for objection, and there is a heavy evidentiary burden on the maker of an objection of this nature, this Honourable Court directed that the Agency, and not me, bring a motion to litigate the objections.

The Respondents presented no compelling reasons for departing from this practice.

- (3) ***Questions of law should not be decided without a record, in the abstract.*** Subsection 41(3) of the *CTA* is a clear indication of Parliament’s intent that this Honourable Court consider the record based on which the impugned decision was made:

41(3) An appeal shall be heard as quickly as is practicable and, on the hearing of the appeal, the Court may draw any inferences that are not inconsistent with the facts expressly found by the Agency and that are necessary for determining the question of law or jurisdiction, as the case may be.

[Emphasis added.]

- (4) ***Relevance of the record before the tribunal is not a genuine issue.*** In *Access Information Agency Inc. v. Canada (Attorney General)*, 2007 FCA 224, this Honourable Court held that:

[7] It has been consistently held in the case law that the requesting party is entitled to be sent everything that was before the decision-maker (and that the applicant does not have in its possession) at the time the decision at issue was made: *1185740 Ontario Ltd. v. Canada (Minister of National Revenue)*, [1999] F.C.J. No. 1432 (F.C.A.).

In the present case, the only documents that are being sought are those that were before the Agency at the time of making the Impugned Decision. Given the numerous references to these documents that are apparent on the face of the Impugned Decision, it is submitted that relevance is not a genuine issue.

- (5) ***The Respondents should present their evidence first.*** Since the main ground for objection (confidentiality) requires the Respondents to tender evidence to make out the objection, it would be both impractical and procedurally unfair to require me to bring a motion for production “blindly,” without knowing the evidentiary basis for the Respondents’ objection.

Sincerely yours,

Dr. Gábor Lukács
Moving Party

Enclosed: Letter of counsel for the Canadian Transportation Agency to the Federal Court of Appeal, dated February 11, 2016

Cc: Mr. Allan Matte, counsel for the Canadian Transportation Agency
Mr. Brian J. Meronek, Q.C., counsel for NewLeaf Travel Company Inc.
Mr. Ian S. McIvor, counsel for NewLeaf Travel Company Inc.



By Fax

February 11, 2016

The Administrator
Federal Court of Appeal
1st Floor
90 Sparks Street
Ottawa, Ontario

Dear Sir/Madam:

**Re: Dr. Gabor Lukacs v. Canadian Transportation Agency
– Court File No.: A-39-16**

This is in response to the request by the Applicant in the Notice of Application filed in the above-referenced matter that the Canadian Transportation Agency (Agency) "send a certified copy of the following materials that is not in the possession of the Applicant but is in the possession of the Canadian Transportation Agency to the Applicant and to the Registry:

The complete, unredacted version of the "detailed reasons for the Agency decision" in the case of WestJet Airlines Ltd. against Greyhound Lines of Canada Ltd. and Kelowna Flightcraft Air Charter Ltd. (Docket No. 960315, File M4205/K14/6052), which were provided in confidence to Greyhound and Kelowna on or around April 16, 1996."

The Agency objects to the request by the Applicant.

At issue in the judicial review is the Applicant's objection to the Agency's ongoing re-examination of an issue within its jurisdiction under Part II of the Canada Transportation Act to license persons who provide air services. The Agency has conducted public consultations 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 license.

The Agency's consultation document can be found at <https://www.otc-cta.gc.ca/eng/consultation/consultation-requirement-hold-a-licence>. In that document, the Agency identified that its current approach to determining whether a person is operating a domestic air service originated from its 1996 Greyhound Decision and requires the person with commercial control to hold the license, irrespective of whether the person operates any aircraft. The Agency has

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identified a different interpretation of the licensing provision and is currently considering and evaluating numerous submissions provided by stakeholders during the public consultations on the issue. No decision has been made.

In his application for judicial review, the Applicant seeks:

A declaration that the Canadian Transportation Agency has no jurisdiction to make a decision or order that has the effect of exempting and/or excluding Indirect Air Service Providers from the statutory requirement of holding a license; and

An interim and permanent prohibition, enjoining the Canadian Transportation Agency from making a decision or order that purports to exempt and/or exclude Indirect Air Service Providers from the statutory requirement of holding a license;

In this context, there are two grounds for the Agency's objection to disclosure of the requested document:

First, as stated by the Applicant in his request, the Agency's reasons for decision in question, dated April 16, 1996, were provided to Greyhound and Kelowna in confidence. The Agency issued a public version of the requested decision on April 18, 1996, in which the Agency stated:

Due to the confidentiality of the documents filed by Kelowna and Greyhound, as determined by the Agency in its letter decision dated April 12, 1996, detailed reasons for the Agency decision were to be provided, in confidence, to Greyhound and Kelowna which was done on April 16, 1996.

The requested decision, dated April 16, 1996, is marked "Confidential" and remains confidential vis a vis the public, including the Applicant. As such, the Agency objects to its release to the Applicant.

While the Agency's April 18, 1996 public decision, and erratum to that decision dated April 19, 1996 are available on the Agency's public website, I am providing certified copies in response to the Applicant's request as well as a certified copy of the April 12, 1996 letter referred to above.

The second ground for objection is that the content of the Agency's confidential 1996 Greyhound decision is irrelevant to the application as framed. The Applicant argues that the Agency has no jurisdiction to make a decision or order exempting Indirect Air Service Providers from holding a licence because such action can only be taken through regulation-making or a legislative change to the CTA. Accordingly, the confidential reasons why the Agency decided in 1996 to require Greyhound to obtain a licence are not germane to the jurisdictional issue raised by the Applicant.

If this Court should disagree, and be of the view that the 1996 confidential Greyhound decision is relevant to the application, the Agency would be pleased to provide it to the court under seal.

Yours sincerely



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