

Federal Court of Appeal



Cour d'appel fédérale

Date: 20160503

Docket: A-39-16

Ottawa, Ontario, May 3, 2016

Present: STRATAS J.A.

BETWEEN:

DR. GÁBOR LUKÁCS

Applicant

and

CANADIAN TRANSPORTATION AGENCY

Respondent

**ORDER**

**WHEREAS** the applicant has brought an application for judicial review in respect of an Agency inquiry into whether Indirect Air Service Providers should be exempted or excluded from the statutory requirement of holding a licence;

**AND WHEREAS** the Agency, among other things, has been assessing whether it should continue to follow a 1996 case relevant to this point, known as the 1996 Greyhound Decision;

**AND WHEREAS** the applicant has requested under Rule 318 that the Agency produce an unredacted copy of the 1996 Greyhound Decision for the purposes of the application, a decision that the Agency has kept confidential owing to the description in the decision of purportedly confidential commercial arrangements among those parties;

**AND WHEREAS** the respondent objects to disclosure of the 1996 Greyhound Decision under Rule 318(2) but is prepared to disclose to the appellant a redacted version of the decision in order to respect confidentiality;

**AND WHEREAS** this Court has considerable flexibility in giving directions under Rule 318(3) and in making a confidentiality order under Rule 152; in particular, it has flexibility in determining whether documents are to be kept confidential as against just the public or as against both the public and the applicant; it can also uphold the objection to disclosure in its entirety: see *Lukács v. Canadian Transportation Agency*, 2016 FCA 130;

**AND WHEREAS**, overall, as against the need for confidentiality versus the public's interest in the openness of court proceedings, the Court is to be guided by *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41, [2002] 2 S.C.R. 522;

**AND WHEREAS** the Agency has failed to offer strong proof of the need for confidentiality as against the public; merely asserting "commercial reasons" on the basis of an email from someone speaking for a party involved in the 1996 Greyhound Decision, a twenty-year decision, is not sufficient;

**AND WHEREAS** the Agency did order the reasons sealed at the time it made the 1996 Greyhound Decision, so there is at least some evidence of some need for confidentiality and a danger that some commercial arrangements may still be confidential; therefore, this Court will err on the side of sealing the 1996 Greyhound Decision from the public but will leave it for the panel to re-evaluate the matter if it wishes or if urged to do so;

**AND WHEREAS** the redacted version of the 1996 Greyhound Decision does not disclose commercial arrangements that, on the evidence filed before the Court, need to be kept confidential; in this regard, the interest in open court proceedings is paramount;

**AND WHEREAS** the Agency has shown no reason and has offered no evidence supporting why the unredacted 1996 Greyhound Decision cannot be given to the applicant as long as he gives an undertaking of confidentiality;

**AND WHEREAS** the applicant requires the unredacted 1996 Greyhound Decision in order to make informed submissions on the application;

**AND WHEREAS**, in the opinion of the Court, the applicant, an experienced litigator in this Court, albeit not a lawyer, can be trusted on his undertaking, particularly in light of the addition of a further acknowledgement to the undertaking that he must give, which acknowledgement is set out in paragraph 2 of this Order;

**AND WHEREAS** if the applicant fails to abide by his undertaking, this Order, or both in any way, he may be liable for breach of confidence and may be found in contempt of this Court;

**AND WHEREAS** the panel hearing this application may make whatever further order it wishes to make concerning the continued confidentiality of the 1996 Greyhound Decision or any other materials in the court file;

**AND WHEREAS** the Court expects that the confidential supplementary memoranda will be so interspersed with details found in the 1996 Greyhound Decision that it is neither practical nor useful to require the parties to file a public redacted version of their confidential supplementary memoranda;

**THIS COURT ORDERS** that:

1. The 1996 Greyhound Decision, any confidential records filed in respect of it, and any confidential supplementary memoranda concerning it shall be treated confidentially in accordance with Rule 152(1);

2. Within five days of this Order, the applicant shall file a signed written undertaking to the Court in accordance with Rule 152(2)(b); in the undertaking, the applicant shall also acknowledge that any breach of this Order and the undertaking may constitute a contempt of Court;

3. Within five days of the filing of the undertaking, the respondent shall file the unredacted 1996 Greyhound Decision in a confidential supplementary record; a public supplementary record containing the redacted 1996 Greyhound Decision (found at pages 15-26 of the respondent's motion record) shall also be filed at that time;
4. Within five days of the filing of the respondent's confidential supplementary record, the applicant may file a six-page confidential supplementary applicant's memorandum making submissions on the 1996 Greyhound Decision as it affects this application;
5. Within five days of the filing of the applicant's confidential supplementary memorandum, the respondent may file a six-page confidential supplementary respondent's memorandum concerning the same subject-matter;
6. Within ten days of the filing of the confidential respondent's supplementary memorandum, the applicant shall file a requisition for hearing;
7. The panel hearing this application may make whatever further Order is necessary or appropriate regarding the confidentiality of the materials described in this Order or other materials in the court file.

"David Stratas"

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J.A.