

15 January 2017

Dr Gabor Lukacs  
Air Passenger Rights  
Email: [lukacs@AirPassengerRights.ca](mailto:lukacs@AirPassengerRights.ca)

Dear Dr Lukacs:

Having reviewed the documents that you provided (listed in Appendix “A”) and additional documents (listed in Appendix “B”) relating to the representations made by NewLeaf Travel Company Inc. (“NewLeaf”) and/or Flair Airlines Ltd. (“Flair”) to the public, I am of the option that:

- Mr. Jeremy Hogan (“Hogan”), or anyone else in a similar position, as purchaser of NewLeaf/Flair air tickets for flights between Canada and the United States, has an actionable case for breach of contract against NewLeaf and/or Flair.
- NewLeaf and/or Flair have simply refused to deliver the services contracted.
- Contractually, NewLeaf and/or Flair have no right to cancel a flight for any reason other than those set out in the Reservation Terms & Conditions (“T&C”). When they cancel a flight contrary to the T&C, they are liable to pay damages.
- Recoverable damages include all additional out-of-pocket expenses, including but not limited to:
  - difference between the fare paid and the cost of substitute transportation;
  - non-refundable prepaid fees (such as hotels, car rentals, etc.); and
  - any additional expenses reasonably incurred as a result of the cancellation.
- Affected passengers should name both from NewLeaf and Flair as defendants, and leave it the court to apportion liability.

Due to the large number of affected passengers and the commonality of the issues, I recommend that you also seek an opinion from a lawyer with expertise in class actions, which is outside my own expertise.

## BACKGROUND

In November 2016, NewLeaf and/or Flair began to publicly offer for sale and sell air tickets for flights between certain cities in Canada and the United States. The flights were to take place between January and April 2017.

NewLeaf's website states that "Flights operated by Flair Airlines Ltd."

On December 17, 2016, Mr. Hogan purchased two round-trip tickets on NewLeaf's website on flights F8250 and F2581, respectively (the "Reservation"). According to IATA's "Airline and Airport Code Search," the 2-letter code "F8" stands for "Flair Airlines Ltd."

On or around December 19, 2016, Mr. Jim Young, NewLeaf's CEO, represented to the public that: "We operate on behalf of Flair as the passenger reservation system."

On or around January 3, 2017, NewLeaf announced that it would cancel all flights between Canada and the United States, and would refund all fares paid in relation to these flights. NewLeaf also publicly stated that it would not provide any compensation to ticket holds.

Subsequently, Flair has taken the position that the cancellation and compensation of ticket holders "is a strictly contractual matter between NewLeaf" and the ticket holders.

Neither NewLeaf nor Flair ever held a charter permit for operating the flights between Canada and the United States on which tickets were sold. Flair holds a non-scheduled international licence and was in the process of applying for a charter permit for operating the flights. On January 4, 2017 discontinued the application at NewLeaf's request.

## ISSUES

In order to determine the rights of ticket holders, I must address the following issues:

- the nature of the relationship between ticket holders and NewLeaf and Flair;
- the contractual language governing cancellation of flights;
- breach and/or repudiation of contract by NewLeaf and/or Flair;
- liability of NewLeaf and/or Flair under the *Carriage by Air Act* (more specifically, the *Montreal Convention*); and
- liability of NewLeaf and/or Flair under other legal theories or statutes.

## ANALYSIS

### The nature of the relationship between ticket holders and NewLeaf and Flair

The Reservation and the T&C make no direct mention of Flair, although they have a link to “Flair Air Tariff” at the bottom (pointing to Flair’s Domestic Tariff), and the general framework of the web page from which the T&C are printed states “Flights operated by Flair Airlines Ltd.”

From this evidence I infer that that from the purchaser’s point of view, the question of fact is whether NewLeaf:

- is directly selling transportation; or
- is selling transportation as an agent for Flair, being an undisclosed principal; or
- is selling transportation as an agent for Flair, being a disclosed principal.

The lack of a definition section in the T&C, defining the capitalised terms “Carrier” and “Re-Seller,” leave one to guesswork as to their precise meaning, an exercise which would be unreasonable to ask of the average consumer. As such, the purchaser’s testimony as to their understanding at the time of purchase may be determinative as to whether Flair was a disclosed or undisclosed principal in the event that NewLeaf were found to be acting as an agent for Flair (see *In re Nigeria Charter Flights*, 520 F. Supp. 2D 447).

In the event of selling transportation directly or acting as agent for an undisclosed principal, I am of the opinion that the liabilities of NewLeaf would be quite similar and nothing turns on the distinction.

### Contractual language governing cancellation of flights

The T&C contain numerous provisions relating to cancellation of flights due to circumstances beyond the control of NewLeaf or the “Carrier”:

- Under the heading “Flight cancelation [sic] due to weather notice,” the T&C provide that in the event of a “flight cancelation [sic] due to a circumstance beyond the control of NewLeaf or the Carrier, neither NewLeaf or the Carrier shall have a liability to a passenger, provided that, in such case, the Carrier may, in its sole discretion [...]”
- Under the heading “Schedule Irregularities,” the T&C provide that “NewLeaf and the carrier will make all reasonable efforts to transport the passenger and his/her baggage at the times indicated in timetables.” This obligation is subjected to the caveat that “NewLeaf will not guarantee and will be held liable for cancellation or changes to flight times that appear on passengers’ tickets due to force majeure.”

At the same time, the T&C makes no mention of cancellation initiated by NewLeaf or the “Carrier” for reasons other than these two. (I note that passengers may cancel and “receive a full refund” within 24 hours of booking, but these provisions are not relevant to the issue at hand.)

The link to “Flair Air Tariff” at the bottom of the T&C brings the reader to Flair’s domestic tariff, applicable to domestic flights, which is not applicable to flights between Canada and the United States.

Flair’s International Charter Tariff was not publicly available and was not brought to the passengers’ attention at the time the tickets were offered for sale or sold, and in any event it contains no provisions affecting the rights of ticket holders in the event of a cancellation of the nature at hand.

I am therefore of the opinion that the Reservation and the T&C are the only relevant direct terms with respect to the liabilities of NewLeaf and Flair, as the case may be.

#### Breach and/or repudiation of contract by NewLeaf and/or Flair

I am of the opinion that contractually, NewLeaf and/or Flair have no right to cancel a flight for any reason other than those stipulated in the T&C (weather or “force majeure”).

According to the public statements made by NewLeaf, the flights between Canada and the United States were cancelled due to business considerations relating to competition and profitability, and not due to weather or “force majeure.”

I am thus of the opinion that NewLeaf and/or Flair have simply refused to deliver the services contracted for, and are liable to pay damages for doing so.

The guiding principle in damages for breach and/or repudiation of contract is restitution, which means restoring the non-breaching party to the position where they would be had the contract not been breached or repudiated. Recoverable damages include loss of the benefit of the contract as well as consequential damages. (The circumstances of this case may also warrant punitive or exemplary damages, but Canadian courts are reluctant to make such awards.)

The benefit of the contract may well exceed the amount of the refund provided by NewLeaf. It can be measured by the price, on or around the date of the cancellation, of an equivalent transportation service (same or similar dates and times, and number of stops). If ticket holders choose to purchase alternative transportation on another airline, then NewLeaf and/or Flair are liable not only provide a refund, but also for the difference in the fare paid to NewLeaf and the cost of the alternative transportation.

Consequential damages may include non-refundable fees prepaid to service providers at the destination (such as hotels, car rentals, and tour operations), and any additional expenses reasonably incurred as a result of the cancellation of the flights.

Hogan, and anyone else in a similar position, should keep their records and document their efforts to mitigate their damages, including by choosing reasonable alternative transportation and asking third parties to make an exception and refund the non-refundable fees.

### Liability of NewLeaf and/or Flair under the *Carriage by Air Act*

The *Montreal Convention* is an international treaty concerning the rights of passengers in international carriage by air. It is found in Schedule VI of the *Carriage by Air Act*. Both Canada and the United States are parties to the *Montreal Convention*.

Subsection 2(2.1) of the *Carriage by Air Act* provides that the *Montreal Convention* shall “have the force of law in Canada in relation to any carriage by air to which the provisions apply, irrespective of the nationality of the aircraft performing that carriage.”

Complete non-performance of the contract does not fall within the substantive scope of the *Montreal Convention* (see *In re Nigeria Charter Flights*, 520 F. Supp. 2D 447 and *Mullaney v. Delta Air Lines*, 2009 U.S. Dist. LEXIS 51039).

In my opinion, the actions of NewLeaf and/or Flair constitute a complete non-performance, and thus the *Montreal Convention* is unfortunately not applicable; however, out of abundance of caution, I will explore the possibility that it does apply.

If the events complained of fall within the temporal and substantive scope of the *Montreal Convention*, then by virtue of Article 29 it preempts all other domestic law, and the claim must be brought under the *Convention* (see *Thibodeau v. Air Canada*, 2014 SCC 67).

Liability under the *Montreal Convention* cannot be limited or excluded by a creative contractual language, because Article 26 renders such contractual provisions null and void.

Flight cancellation resulting in the passenger never leaving the airport of origin may still be considered a “delay” within the meaning of Article 19 the *Montreal Convention*, and passengers can recover out-of-pocket expenses paid for services that no longer serve any purpose for their travel (see *Lukacs v. United Airlines Inc., et al.*, 2009 MBQB 29, which I am sure you are familiar with).

In cases where passengers enter into a contract of carriage with one person (contracting carrier), while the transportation is performed by another person (actual carrier):

- both the contracting and the actual carriers are subject to the provisions of the *Montreal Convention* (Articles 39 and 40);
- the contracting carrier and the actual carrier are mutually liable for the actions and omission of each other (Article 41); and
- the contracting carrier and the actual carrier cannot exclude their liabilities by way of contractual provisions (Article 47).

I am thus of the opinion that, under the *Montreal Convention*, there only two possibilities:

- NewLeaf is the contracting carrier while Flair is the actual carrier, in which case they are both liable for the cancellation of the flights; or
- only Flair is the carrier, and then it bears full responsibility for the cancellation of the flights.

It will be up to the court seized with the matter to determine, based on the facts, which of these two is the case.

#### Liability of NewLeaf and/or Flair under other legal theories or statutes

NewLeaf and/or Flair may be liable to ticket holders under additional legal theories or statutes, other than those that I explored in detail in this opinion. I recommend further research as to whether the facts of this case may create additional causes of action:

- Tort law, for example, negligent misrepresentation. This could be pleaded as an alternative to breach and/or repudiation of contract, should the court find that there is no privity of contract between Flair and the ticket holders.
- False or misleading representations under the *Competition Act*. Section 36 creates a private cause of action for losses or damages suffered as a result of certain breaches of the Act. An action can be brought not only in provincial superior courts, but also in the Federal Court (s. 36(3)).
- Liabilities related to the tariff and charters even in the absence of contractual provisions.

In closing, I wish to draw your attention to the large (3,000) number of affected passengers that were reported by CBC News and the commonality of issues, both of which point in the direction of a class action.

Since class actions are outside my own expertise, I recommend that you seek an opinion from a lawyer with expertise in class actions.

Sincerely yours,

A handwritten signature in cursive script that reads "Louis Béliveau".

Louis Béliveau, LL.B.

## **Schedule “A”**

1. “Discount air service NewLeaf to offer flights to Phoenix from Calgary and Edmonton,” CBC News online (Nov 16, 2016 2:25 PM MT)
2. NewLeaf Gets Hot Hot Hot, YouTube channel of NewLeaf (Published on Nov 16, 2016).
3. Reservation of Mr. Jeremy Hogan and Caroline Turner-Hogan (December 17, 2016).
4. Flair’s International Charter Tariff (received by Dr. Gabor Lukacs from the Canadian Transplantation agency on December 21, 2016).
5. “NewLeaf cancels 'sun' service from Hamilton, refunds 3,000 tickets,” by Kelly Bennett, CBC News online (Jan 04, 2017 11:21 AM ET).
6. Email of the Canadian Transportation Agency to Dr. Gabor Lukacs (Wed, Jan 4, 2017 at 4:40 PM).
7. Radio interview: Dr. Gabor Lukacs, Air Passenger Advocate & Jim Young, President and CEO at NewLeaf Travel Company Inc., published by Kelly Cutrara (January 5, 2017).
8. NewLeaf’s Reservation Terms & Conditions (January 5, 2017).
9. “Discount company NewLeaf Travel says ‘sorry Alberta’ and cancels Arizona, Florida flights,” by Erica Tucker, Global News online (January 4, 2017 9:32 pm).
10. Email of Mr. Jeremy Hogan to Flair and NewLeaf (January 5, 2017 at 10:31 AM).
11. Email of Flair to Mr. Hogan (January 5, 2017 at 11:22 AM).
12. Email of NewLeaf to Mr. Hogan (January 5, 2017 at 12:13 PM).
13. Email of Mr. Hogan to NewLeaf (January 5, 2017 at 12:56 PM).
14. Email of NewLeaf to Mr. Hogan (January 5, 2017 at 12:57 PM).
15. Email of Mr. Hogan to NewLeaf (January 5, 2017 at 13:16 PM).

## **Schedule “B”**

16. “Flair Air liable for passenger rights, not ticket reseller NewLeaf, judge says,” by Laura Glowacki, CBC News online (Dec 19, 2016 6:35 PM CT).