

Court File No.:

FEDERAL COURT OF APPEAL

BETWEEN:

DR. GÁBOR LUKÁCS

Moving Party

– and –

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

Respondents

MEMORANDUM OF FACT AND LAW OF THE MOVING PARTY

PART I – STATEMENT OF FACTS

A. OVERVIEW

1. Dr. Gábor Lukács, the Moving Party, is seeking leave to appeal, pursuant to section 41 of the *Canada Transportation Act* (“CTA”), from Decision No. 100-A-2016 (“Impugned Decision”) of the Canadian Transportation Agency (“Agency”).

2. In the Impugned Decision, the Agency unreasonably and without lawful authority purports to exclude and/or exempt certain types of air service providers from the statutory requirement of holding a licence, set out in s. 57(a) of the *CTA*. With respect to the air services offered by these providers, the Impugned Decision effectively removes all economic regulation and consumer protection measures that were put in place by Parliament by enacting the *CTA*.

3. In practical terms, the Impugned Decision circumvents the will of the legislature, and exposes the public to significant risks from which Parliament intended to protect the public:

- (a) underfunded service providers, who are unable to deliver the air services that consumers have paid for in advance, leaving passengers stranded;
- (b) service providers with insufficient insurance, who are thus unable to meet their liabilities in the case of a disaster (as happened in the case of the Lac-Mégantic rail disaster);
- (c) unreasonable prices on routes served by only one provider; and
- (d) uncompensated losses in the case of overbooked, delayed, or cancelled flights, or in the case of damage to baggage.

4. The reasons for the Impugned Decision are particularly troublesome and fundamentally flawed with respect to the issue of passenger protection in that they overlook the absence of a contractual relationship between the consumer and the operator of the aircraft and the doctrine of privity of contract (see paras. 60-64 below).

5. The grounds for the proposed appeal and the application for judicial review in File No. A-39-16 somewhat overlap, but the remedies sought differ.

Lukács Affidavit, Exhibit “B”

Tab 5B, p. 38

6. Lukács submits that hearing the proposed appeal together with the application for judicial review would be in the interest of justice and save valuable judicial resources.

B. THE PARTIES

7. Lukács is a Canadian air passenger rights advocate, whose work and public interest advocacy have been widely recognized in Canada, including in a number of judgments of this Honourable Court.

Lukács Affidavit, paras. 2-4

Tab 5, p. 28

8. The Agency has a broad mandate in respect of all transportation matters under the legislative authority of Parliament. One of the Agency's key functions is to act as an economic regulator of transportation by air within Canada. The Agency carries out this function by issuing licences that permit operating an air service, and enforcing and reviewing the prices, terms, and conditions imposed by licence holders on the travelling public through its adjudicative proceedings.

9. NewLeaf Travel Company Inc. ("NewLeaf") is a company that in January 2016 began to advertise and sell tickets for scheduled flights within Canada without holding any licence to operate an air service. Subsequently, NewLeaf suspended operations due to concerns about its lack of a licence.

**Girard Affidavit, Exhibits "F" and "G",
being Exhibit "C" to the Lukács Affidavit**

Tab 5C, pp. 88, 91

C. THE LEGISLATIVE SCHEME

10. Paragraph 57(a) of the *CTA* prohibits operating an air service without a licence issued by the Agency under Part II of the *CTA*. Subsection 55(1) of the *CTA* defines "air service" as a service provided by means of an aircraft, that is publicly available for the transportation of passengers or goods, or both.

Canada Transportation Act, ss. 55(1) & 57(a)

App. A, pp. 157 & 161

11. Parliament imposed a number of economic and consumer protectionist conditions for obtaining a licence for operating an air service within Canada:

- (a) Canadian ownership of at least 75%, ensuring that the licence holder is substantially owned and controlled by Canadians;
- (b) prescribed liability insurance coverage; and
- (c) prescribed financial fitness requirements.

Canada Transportation Act, s. 61

App. A, p. 162

12. The *Air Transportation Regulations*, SOR/88-58 (“ATR”), promulgated pursuant to ss. 36 and 86 of the *CTA* with the approval of the Governor in Council, provides that:

- (a) an operator of an air service within Canada (“domestic service”) must carry an insurance that covers risks of injury to or death of passengers and public liability; and
- (b) an applicant for a licence to operate domestic service (“domestic licence”) must demonstrate having sufficient funds for the cost of operating the air service for 90 days, even without any revenue.

Air Transportation Regulations, ss. 7 & 8.1
Canada Transportation Act, s. 86

App. A, pp. 142 & 144
App. A, 177

13. Operators of domestic air service are subject to stringent regulation:

- (a) in some cases, a licensee must give a 120-day or 30-day notice before it can discontinue or reduce its service to a destination;
- (b) prices are regulated on routes served only by one provider.

Canada Transportation Act, ss. 64-66

App. A, pp. 163-164

14. As an additional consumer protection measure, Parliament chose to subject the relationship between the travelling public and domestic air service providers to regulatory oversight by the Agency:

- (a) each domestic licence holder is required to establish and publish a Tariff setting out its terms and conditions with respect to a prescribed list of core issues;
- (b) the Tariff is the contact of carriage between the consumers and the licence holder, and can be enforced by the Agency; and
- (c) upon complaint by any person, the Agency may suspend or disallow tariff provisions that are found to be unreasonable or unduly discriminatory.

Canada Transportation Act, ss. 67, 62.1, 67.2
Air Transportation Regulations, s. 107

App. A, pp. 167-168
App. A, p. 151

15. A licence to operate air service is not transferable.

Canada Transportation Act, s. 58

App. A, p. 161

16. Any contravention of a provision of the *CTA* or a regulation or order made under the *CTA*, including the operating of an air service without a licence, is an offence punishable on summary conviction.

Canada Transportation Act, s. 174

App. A, p. 180

D. INDIRECT AIR SERVICES PROVIDERS (“RESELLERS”)

(i) The “Consultation on the Requirement to hold a licence”

17. An “Indirect Air Service Provider” (“IASP” or “reseller”) is a person who has commercial control over an air service and makes decisions on matters such as routes, scheduling, and pricing, but performs the transportation of passengers with aircraft and flight crew rented from another person.

Decision No. 100-A-2016, para. 11

Tab 1, p. 3

Girard Affidavit, para. 3

Tab 5C, p. 50

being Exhibit “C” to the Lukács Affidavit

18. Unlike travel agents, IASPs enter into agreements to transport passengers by air in their own name, and not as agents for third parties. Consequently, consumers of IASPs have a contractual relationship only with the IASP, and they are not parties to the contract between the IASP and the third party who provides the aircraft and the crew.

19. IASP is not a new or innovative business model, but has been known for more than twenty years. Since 1996 and up until recently, the Agency had consistently held that a person with commercial control over a domestic air service “operates” it within the meaning of the *CTA*, and thus required them to hold a domestic licence. In doing so, the Agency had been following the so-called *1996 Greyhound Decision*.

Girard Affidavit, paras. 4-7

Tab 5C, p. 50

being Exhibit “C” to the Lukács Affidavit

20. On December 23, 2015, the Agency announced that it would conduct a public consultation on the requirement for IASPs to hold a licence, and that the Agency was considering implementing the following “Approach under consideration”:

Indirect Air Service Providers would not normally be required to hold a licence to sell air services directly to the public, as long as they charter licenced air carriers to operate the flights. This would apply to the operation of domestic and international air services. As these providers would not be subject to the licensing requirements, contracts they enter into with the public would not be subject to tariff protection, nor would they be subject to the financial and Canadian ownership requirements.

[Emphasis added.]

Lukács Affidavit, Exhibit “A”

Tab 5A, p. 32

(ii) NewLeaf

21. NewLeaf has never held and holds no licence to operate an air service in Canada. In spring 2015, the Agency became aware of NewLeaf’s intention to provide an air service to the public as an IASP, with Flair Airlines Ltd. (“Flair”) providing the aircraft with flight crew.

**Girard Affidavit, para. 8
being Exhibit “C” to the Lukács Affidavit**

Tab 5C, p. 50

22. On August 21, 2015, the Agency commenced an inquiry into whether NewLeaf was operating an air service within the meaning of the *CTA*. The Agency appointed Mr. Ghislain Blanchard to conduct the inquiry and report his findings to the Agency. Subsequently, the Agency announced the aforementioned “Consultation on the Requirement to Hold a License,” which was commenced for the sake of NewLeaf, although this true purpose was not disclosed to the public. In fact, the inquiry about NewLeaf is never mentioned in the consultation announcement.

Letter Decision No. LET-A-3-2016

Tab 4, p. 25

**Girard Affidavit, paras. 9-10
being Exhibit “C” to the Lukács Affidavit**

Tab 5C, p. 50

23. In January 2016, while the Agency's inquiry and consultation was ongoing, NewLeaf began to advertise and sell tickets to the public for scheduled flights within Canada.

NewLeaf's Winter 2016 Schedule **Tab 3, p. 23**
Girard Affidavit, Exhibit "F" **Tab 5C, p. 88**
being Exhibit "C" to the Lukács Affidavit

24. Later in January 2016, NewLeaf suspended its ticket sales and postponed the launch of its service, due to concerns about its lack of a licence.

Girard Affidavit, Exhibit "G" **Tab 5C, p. 91**
being Exhibit "C" to the Lukács Affidavit

E. APPLICATION FOR JUDICIAL REVIEW (FILE NO.: A-39-16)

25. On January 22, 2016, Lukács brought an application for judicial review pursuant to s. 28 of the *Federal Courts Act* in respect of the "Approach under consideration" of the Agency that purports to relieve IASPs from the statutory requirement of holding a licence. Lukács sought, among other things:

- (a) a declaration that the Agency has no jurisdiction to make a decision or order that has the effect of exempting and/or excluding IASPs from the statutory requirement of holding a licence; and
- (b) a prohibition enjoining the Agency from making such a decision or order.

Lukács Affidavit, Exhibit "B" **Tab 5B, p. 38**

26. Lukács and the Agency have agreed to expedite the application, and this Honourable Court agreed that expedition is warranted.

Lukács v. Canadian Transportation Agency, **Vol. II, Tab 9, p. 92**
2016 FCA 103, para. 24

F. THE IMPUGNED DECISION

27. On March 29, 2016, without waiting for a determination of the application for judicial review brought by Lukács, the Agency issued Decision No. 100-A-2016 (the “Impugned Decision”), in which it concluded that:

- (a) IASPs (resellers) are not required to hold a licence as long as they do not hold themselves out to the public as an air carrier operating an air service; and
- (b) NewLeaf is not required to hold a licence.

Decision No. 100-A-2016

Tab 1, p. 1

28. On March 29, 2016, NewLeaf announced that it was planning to re-launch with its first flight taking off by late spring or early summer 2016.

Lukács Affidavit, Exhibit “D”

Tab 5D, p. 100

PART II – STATEMENT OF THE POINTS IN ISSUE

29. The questions to be decided on the present motion are:

- (a) whether this Honourable Court should grant Lukács leave to appeal;
- (b) whether the present motion should be expedited;
- (c) whether the proposed appeal should be expedited; and
- (d) whether the proposed appeal should be heard together with the application for judicial review in File No. A-39-16.

PART III – STATEMENT OF SUBMISSIONS

30. The crux of the case at bar is that the Agency pretends that the requirement to hold a licence is a mere policy choice of itself as a regulator, and that it can change its mind about it. This is clearly not the case. It was Parliament, and not the Agency, that chose to impose a regulatory scheme on air transportation to establish commercial standards and consumer protection measures. The requirement that all air service providers hold a licence is an inherent part of the regulatory scheme, and it serves as an enforcement mechanism to protect the the travelling public.

31. For nearly twenty years, the Agency had consistently and correctly been interpreting s. 57(a) of the *CTA* as requiring all IASPs providing domestic service to hold a domestic licence. Although Parliament amended the *CTA* on a number of occasions in the past twenty years, the provisions relating to the requirement to hold a licence have not been amended. Moreover, the IASP business model is not new and has been around for as long as the *CTA* itself.

32. Lukács seeks leave to appeal the Impugned Decision on the grounds that the Agency erred in law and/or exceeded its jurisdiction, because:

- (a) no reasonable interpretation of the *CTA* is capable of supporting the conclusion that IASPs are not required to hold a domestic licence in order to provide domestic service; and
- (b) the Agency has no jurisdiction to make a decision or order to the effect that IASPs no longer require a domestic licence.

33. Every decision, order, rule or regulation of the Agency may be appealed to this Honourable Court on a question of law or a question of jurisdiction with the leave of the Court.

Canada Transportation Act, s. 41(1)

App. A, p. 155

A. REASONABLENESS OF THE IMPUGNED DECISION

34. Section 57 of the *CTA* provides that:

57 No person shall operate an air service unless, in respect of that service, the person

- (a) holds a licence issued under this Part;
- (b) holds a Canadian aviation document; and
- (c) has the prescribed liability insurance coverage.

Canada Transportation Act, s. 57

App. A, p. 161

35. Subsection 55(1) of the *CTA* defines “air service” as follows:

air service means a service, provided by means of an aircraft, that is publicly available for the transportation of passengers or goods, or both; (*service aérien*)

Canada Transportation Act, s. 55(1)

App. A, p. 157

36. The requirement to hold a licence was imposed by Parliament and not by the Agency. Consequently, the question of who “operates an air service” is not a mere question of policy that the Agency can change overnight; rather, it is a matter of statutory interpretation: identifying what Parliament intended to accomplish by imposing the requirement.

(i) **The considered and consistent view of the Agency (1996-2015)**

37. The considered and consistent view of a tribunal about the meaning of its home statute is entitled to some weight and is relevant to the determination of the reasonableness of a different interpretation.

***Canada (CHRC) v. Canada*, 2011 SCC 53, para. 53** Vol. II, Tab 1, p. 21
“The Canadian Law of Judicial Review: A Plea for Doctrinal Coherence and Consistency” Vol. II, Tab 11, p. 129

38. This principle is particularly relevant in the present case, because the *CTA* has a built-in mechanism for the review of the Act every eight years, and the *CTA* was amended by Parliament on a number of occasions. Nevertheless, in the past twenty years Parliament chose not to amend the provisions relating to the requirement to hold a licence.

***Canada Transportation Act*, s. 53** App. A, p. 156

39. Between 1996 and 2015, the Agency consistently interpreted the *CTA* as imposing a requirement to hold a licence on any person who enters into a contract to provide an air service. A person who does not hold a licence can participate in the agreement only as an agent, not as a principal. In a 2010 decision, the Agency summarized the state of the law as follows:

Duke Jets is reminded that only air carriers holding a valid Agency licence may enter into an agreement to provide an air service to, from or within Canada. [...] As such, the charter agreement with the air carrier must clearly indicate that Duke Jets has entered into the agreement on behalf of the named client failing which other regulatory requirements may apply and need to be met.

CTA Decision No. 222-A-2010, p. 2 Vol. II, Tab 2, p. 28
Girard Affidavit, paras. 4-7 Tab 5C, p. 50
being Exhibit “C” to the Lukács Affidavit

40. It is not uncommon for an air service to be delivered with the participation of multiple entities. The Agency established four factors for determining which of the participants is the one who operates an air service and thus is required to hold a licence in such situations:

1. Risks and benefits associated with the operation of the proposed air service;
2. Performance of key functions and decision-making authority with respect to the operation of the proposed air service;
3. Exclusivity and non-competition provisions; and
4. Use of firm name and style.

The “operator” of an air service is the participant who assumes the majority of the risks, is entitled to most of the benefits, and has decision-making authority.

Decision No. 42-A-2013, p. 2

Vol. II, Tab 3, p. 30

Decision No. 152-A-2014

Vol. II, Tab 5, p. 46

41. Items 1, 2, and 4 are precisely what characterize IASPs, and set them apart from a travel agent or businesses that rent out aircraft and flight crew, and thus the conclusion that IASPs are required to hold a licence directly follows from the Agency’s considered and consistent view of the licensing requirement set out in the *CTA*.

42. Given that the relevant provisions of the *CTA* have remained unchanged for the past twenty years, it was incumbent on the Agency to explain why it chose to depart from its well-established, longstanding, considered, and consistent view on who is require to hold a license, and in particular, what was wrong with that interpretation. It is submitted that the failure of the Agency to do so renders the Impugned Decision unreasonable.

(ii) **Reliance on false premises**

43. The Impugned Decision is based on four erroneous premises. First, the *Air Transportation Regulations* (the “*ATR*”) provides that:

air carrier means any person who operates a domestic or an international service; (*transporteur aérien*)

The Impugned Decision, however, adopted a terminology that, by way of circular reasoning, equates operating an aircraft with operating an air service:

"air carrier" means any person who operates aircraft on a domestic or international air service;

[Emphasis added.]

Air Transportation Regulations, s. 2

App. A, p. 136

Decision No. 100-A-2016, para. 5

Tab 1, p. 2

44. Second, the Impugned Decision is based on the misleading and incomplete statement that “In the non-scheduled international context, the air carrier, and not the charterer, is required to hold the licence.”

Decision No. 100-A-2016, para. 32

Tab 1, p. 7

45. The aforementioned statement flies in the face of the Agency’s decision issued only two weeks after the Impugned Decision, permitting Air Transat to rent aircraft with flight crew from Flair (the same company that NewLeaf was partnering with) subject to the following conditions:

1. Air Transat shall continue to hold the valid licence authority.
2. Commercial control of the flights shall be maintained by Air Transat. Flair shall maintain operational control of the flights and shall receive payment based on the rental of aircraft and crew and not on the basis of the volume of traffic carried or other revenue-sharing formula.

3. Air Transat and Flair shall continue to comply with the insurance requirements set out in subsections 8.2(4), 8.2(5) and 8.2(6) of the ATR.

[Emphasis added.]

CTA Decision No. 112-A-2016

Tab 6, p. 49

46. The arrangement between Air Transat and Flair appears to be identical to the one between NewLeaf and Flair. Yet, in the case of the former, Air Transat is required to hold a valid licence and both Air Transat and Flair are required to comply with the insurance requirements.

47. Third, the Agency drew conclusions from the false premise that the *CTA* makes no distinction between scheduled and non-scheduled domestic air service. As a matter of fact, section 64 of the *CTA* restricts the discontinuance and reduction of the frequency of scheduled domestic service, and subsection 64(4) provides that:

64(4) In this section, non-stop scheduled air service means an air service operated between two points without any stops in accordance with a published timetable or on a regular basis.

The correct statement of the law is that although holders of a domestic license can operate both scheduled and non-scheduled domestic service, scheduled domestic service is subject to a more stringent regulation.

Canada Transportation Act, s. 64(4)

App. A, p. 164

48. Finally, the Impugned Decision is based on the false premise of “deregulation of the aviation industry, eliminating restrictions on market entry, routes that could be operated, [and] pricing.”

Decision No. 100-A-2016, para. 11

Tab 1, p. 3

49. As a matter of fact, the Canadian domestic air service industry is far from being deregulated:

- (a) only Canadian-owned businesses that meet prescribed financial fitness requirements can enter the market (s. 61);
- (b) service cannot be abruptly discontinued or reduced, and is subject to a mandatory notice period (ss. 64-65); and
- (c) prices are regulated on routes served by only one provider (s. 66).

Canada Transportation Act, ss. 61, 64-66

App. A, pp. 162-164

50. Lukács submits that the Agency's reliance on these false premises creates a lack of transparency and clarity in the reasoning of the Agency that renders the Impugned Decision unreasonable.

(iii) Rendering sections 64-66 of the CTA futile

51. In enacting sections 64-66 of the *CTA*, Parliament chose to regulate specific aspects of domestic service: (a) schedule changes that substantially affect the frequency of the service; and (b) prices on routes served by only one provider.

Canada Transportation Act, ss. 64-66

App. A, pp. 163-164

52. As the Agency correctly noted in the Impugned Decision, in the IASP business model, it is the IASP that “has commercial control over an air service, and makes decisions on matters such as routes, scheduling, pricing, and aircraft to be used” (emphasis added). Thus, it is the IASP that has control over those aspects of the air service that Parliament intended to regulate.

Decision No. 100-A-2016, para. 11

Tab 1, p. 3

53. Sections 64-66 consistently speak about “licensee.” Therefore, Parliament intended the requirement of holding a licence to apply to the person who has control over scheduling and pricing, the regulation of which is the purpose of these provisions.

Canada Transportation Act, ss. 64-66

App. A, pp. 163-164

54. It is a well-established principle of statutory interpretation that Parliament does not intend to produce absurd consequences. An interpretation that defeats the purpose of a statute or renders some aspect of it futile is absurd.

Rizzo & Rizzo Shoes Ltd. (Re),
[1998] 1 SCR 27, para. 27

Vol. II, Tab 10, p. 107

55. Interpreting the *CTA* as not requiring IASPs to hold a domestic licence, as the Agency did in the Impugned Decision, is absurd and thus unreasonable, because it renders ss. 64-66 of the *CTA* futile.

(iv) Textual and contextual analysis

56. Subsection 57(a) requires a person who “operate[s] an air service” to hold a licence. The definition of “air service” in s. 55(1) unambiguously refers to providing transportation service to the public at large (i.e., consumers), and not renting out aircraft with flight crew to another person. Thus, it is not the operator of the aircraft but the IASP that is required to hold a domestic licence.

Canada Transportation Act, ss. 55(1) & 57(a)

App. A, pp. 157 & 161

57. Any ambiguity that might possibly exist as to who “operates” an air service is resolved by s. 60(1) of the *CTA*, which specifically addresses the business model of a person providing an air service using an aircraft, with a flight crew, provided by another person:

60 (1) No person shall provide all or part of an aircraft, with a flight crew, to a licensee for the purpose of providing an air service pursuant to the licensee's licence and no licensee shall provide an air service using all or part of an aircraft, with a flight crew, provided by another person except

- (a) in accordance with regulations made by the Agency respecting disclosure of the identity of the operator of the aircraft and other related matters; and
- (b) where prescribed, with the approval of the Agency.

[Emphasis added.]

Canada Transportation Act, s. 60(1)

App. A, p. 161

58. The wording of s. 60(1) underscores the distinction between the “operator of the aircraft” used to provide an air service, and the person who “provide[s] an air service” using the aircraft and crew of another person. Thus, the “operator of the aircraft” is not the same as the person who “operate[s] an air service,” and thus requires a licence. Parliament’s implicit assumption that the person who “provide[s] an air service” would be a “licensee” confirms that it is the provider of the air service (IASP) who is required to hold a licence. The Agency’s conclusion to the contrary is unreasonable, because it violates the presumption of consistent expression.

Lukács v. Canada (CTA), 2014 FCA 76, para. 41

Vol. II, Tab 7, p. 62

(v) Purposive analysis and privity of contract

59. Lukács adopts as his own position the Agency’s analysis of the purpose of the air licensing requirement set out in Decision No. 390-A-2013. Parliament requires air service providers to hold a licence as a way of establishing commercial standards and consumer protection measures. These requirements serve a number of purposes, including:

- (a) preventing underfunded service providers, who cannot deliver the services that consumers have paid for in advance, from entering the market;
- (b) restricting foreign control over domestic air service; and
- (c) ensuring that the terms and conditions of the service address prescribed core areas (such as bumping, delays, cancellations, refunds, etc.) and that the terms and conditions are reasonable and not unduly discriminatory.

Decision No. 390-A-2013, paras. 20-25

Vol. II, Tab 4, pp. 37-38

60. As the Agency acknowledged, the effect of interpreting the *CTA* as not requiring IASPs to hold a licence is that these commercial standards and consumer protection measures would not apply to IASPs and their consumers:

Indirect Air Service Providers would not normally be required to hold a licence to sell air services directly to the public, as long as they charter licenced air carriers to operate the flights. This would apply to the operation of domestic and international air services. As these providers would not be subject to the licensing requirements, contracts they enter into with the public would not be subject to tariff protection, nor would they be subject to the financial and Canadian ownership requirements.

[Emphasis added.]

Lukács Affidavit, Exhibit “A”

Tab 5A, p. 32

61. The Impugned Decision fails to address how the interpretation advanced by the Agency could be reconciled with the objective of preventing underfunded service providers from entering the market. Indeed, it is plain and obvious that by not requiring IASPs to hold a licence and thus meet the financial fitness requirements, this objective is defeated.

62. With respect to the protection offered by the terms and conditions of the tariff, the Agency's reasons are fundamentally flawed in that they overlook the absence of a contractual relationship between the consumer and the operator of the aircraft and the doctrine of privity of contract:

In weighing the relevance of the licensing provisions' consumer protection purposes to the question of whether those provisions should be interpreted as covering resellers, it is important to note that when passengers buy tickets through a reseller that is not required to hold an air licence, they will still be covered by the terms and conditions of the tariff issued by the chartered air carrier operating the aircraft on which those passengers travel.

[Emphasis added.]

Decision No. 100-A-2016, para. 38

Tab 1, p. 9

63. The very essence of the IASP ("reseller") business model is that there are two separate and independent contracts: (1) between the IASP and the operator of the aircraft, for the rental of the aircraft with flight crew; and (2) between the passenger and the IASP, for the transportation of the passenger. In particular, there is no contractual relationship between the passenger and the operator of the aircraft, and consequently the operator of the aircraft has no obligations toward the passengers.

64. Therefore, the tariff of the operator of the aircraft governs the contractual relationship between the IASP and the operator of the aircraft, but it cannot govern the nonexistent contractual relationship between the passenger and the operator of the aircraft. Hence, the passengers are left without protection.

65. Consequently, the Agency's interpretation of the licensing requirement in the Impugned Decision is unreasonable, because it circumvents and defeats the very purpose for which Parliament enacted the *CTA*.

(vi) **NewLeaf**

66. Regardless of the terminology used to describe the activities of NewLeaf, the Winter 2016 Schedule of NewLeaf leaves no doubt that it was intending to provide a “non-stop scheduled air service” within the meaning of subsection 64(4) of the *CTA*.

NewLeaf’s Winter 2016 Schedule
Canada Transportation Act, s. 64(4)

Tab 3, p. 23
App. A, p. 164

67. Section 64 of the *CTA* leaves no doubt that Parliament intended to require anyone who has control over the schedule of a domestic non-stop scheduled service to be a “licensee,” that is, to hold a licence.

Canada Transportation Act, s. 64

App. A, p. 163

68. Therefore, the Agency’s conclusion that NewLeaf is not required to hold a domestic licence is unreasonable in that it falls outside the range of possible acceptable outcomes defensible in respect of the facts and the law.

B. EXCESS OF JURISDICTION

69. While the *CTA* confers broad decision-making and regulation-making powers on the Agency with respect to transportation by air, Parliament chose to explicitly withhold certain powers from the Agency:

80(2) No exemption shall be granted under subsection (1) that has the effect of relieving a person from any provision of this Part that requires a person to be a Canadian and to have a Canadian aviation document and prescribed liability insurance coverage in respect of an air service.

Canada Transportation Act, s. 80

App. A, p. 175

86(2) No regulation shall be made under paragraph (1)(l) that has the effect of relieving a person from any provision of this Part

that requires a person to be a Canadian and to have a Canadian aviation document and prescribed liability insurance coverage in respect of an air service.

Canada Transportation Act, s. 86(2)

App. A, p. 179

70. Lukács submits that the Agency exceeded its jurisdiction in making the Impugned Decision, because the Agency has done indirectly, in the guise of statutory interpretation, what Parliament explicitly forbade it to do: relieving a person (in this case, IASPs) from the requirement of Canadian ownership and of maintaining a prescribed liability insurance coverage.

C. EXPEDITING AND CONSOLIDATING HEARINGS

71. The intention of NewLeaf to relaunch, with its first flight taking off by late spring or early summer 2016, creates an urgency for the determination of the present motion and the hearing of the proposed appeal, in order to prevent harm to the travelling public.

Lukács Affidavit, Exhibit “D”

Tab 5D, p. 100

72. Allowing IASPs, and NewLeaf in particular, to operate without a licence exposes the public to significant risk from which Parliament intended to protect the public:

- (a) Without the financial fitness requirements, there is a risk that the IASP lacks the financial means necessary to operate the flights on which it has sold tickets.
- (b) Without the insurance coverage requirements, there is a risk that the IASP is unable to meet its liabilities in the case of a disaster (as happened in the case of the Lac-Mégantic rail disaster).

- (c) Without the minimal protection that the terms of a tariff may offer, there is a risk that passengers, who have no contractual relationship with the third party operating the aircraft, are left with no effective remedy if their flight is overbooked, delayed, or cancelled, or if their baggage is damaged.

73. The arguments raised in the application for judicial review in File No. A-39-16 and the proposed appeal overlap, and the Agency heavily relies on the Impugned Decision in its opposition to the application for judicial review, although the remedies being sought differ:

- (a) in the proposed appeal, Lukács is seeking to set aside the Impugned Decision; and
- (b) in the application for judicial review, Lukács is seeking certain declarations and a prohibition against the Agency.

74. Lukács and the Agency have agreed to expedite the application for judicial review, and this Honourable Court agreed that expedition is warranted. It is submitted that the present motion and the proposed appeal should to be expedited for the same reasons that are rooted in the public interest.

Lukács v. Canadian Transportation Agency,
2016 FCA 103, para. 24

Vol. II, Tab 9, p. 92

75. Hearing the application for judicial review and the proposed appeal together will save valuable judicial resources.

D. COSTS

76. Lukács respectfully asks this Honourable Court that he be awarded his disbursements in any event of the cause, and if successful, also a modest allowance for his time, for the following reasons:

- (a) the motion raises novel questions of law that have not been addressed by this Honourable Court;
- (b) the motion and the proposed appeal are in the nature of public interest litigation; and
- (c) the issues raised in the motion are not frivolous.

***Lukács v. Canada (CTA)*, 2014 FCA 76, para. 62**

Vol. II, Tab 7, p. 66

***Lukács v. Canada (CTA)*, 2015 FCA 269, para. 43**

Vol. II, Tab 8, p. 79

PART IV – ORDER SOUGHT

77. The Moving Party, Dr. Gábor Lukács, is seeking an Order:
- (a) granting Lukács leave to appeal Decision No. 100-A-2016 of the Canadian Transportation Agency;
 - (b) expediting the hearing of the present motion;
 - (c) expediting the proposed appeal, and directing that it be heard together with the application for judicial review in Federal Court of Appeal File No. A-39-16;
 - (d) granting Lukács costs and/or reasonable out-of-pocket expenses of this motion forthwith and in any event of the cause; and
 - (e) granting such further relief as the Moving Party may request and this Honourable Court deems just.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

April 18, 2016

DR. GÁBOR LUKÁCS

Halifax, NS

lukacs@AirPassengerRights.ca

Moving Party

PART V – LIST OF AUTHORITIES

STATUTES AND REGULATIONS

Air Transportation Regulations, SOR/88-58,
ss. 7, 8.1, 8.2, 8.5, 107

Canada Transportation Act, S.C. 1996, c. 10,
ss. 41, 53, 55, 57-67.2, 80, 86, 174

CASE LAW

Canada (Canadian Human Rights Commission) v. Canada (Attorney General), 2011 SCC 53

Determination of whether Duke Jets Ltd. requires a licence pursuant to Part II of the Canada Transportation Act,
Canadian Transportation Agency, Decision No. 222-A-2010

Determination of whether WestJet Encore Ltd. requires a licence pursuant to Part II of the Canada Transportation Act,
Canadian Transportation Agency, Decision No. 42-A-2013

Determination of what constitutes an “air service” and the criteria to be applied by the CTA,
Canadian Transportation Agency, Decision No. 390-A-2013

Determination of whether Air Georgian Limited requires a licence pursuant to Part II of the Canada Transportation Act,
Canadian Transportation Agency, Decision No. 152-A-2014

Determination of application by Air Transat on behalf of itself and Flair, Canadian Transportation Agency, Decision No. 112-A-2016

Lukács v. Canada (Transportation Agency), 2014 FCA 76

Lukács v. Canada (Canadian Transportation Agency), 2015 FCA 269

Lukács v. Canadian Transportation Agency, 2016 FCA 103

CASE LAW (CONTINUED)

Rizzo & Rizzo Shoes Ltd. (Re), [1998] 1 SCR 27

OTHER AUTHORITIES

Justice David Stratas, “The Canadian Law of Judicial Review: A Plea for Doctrinal Coherence and Consistency” (February 17, 2016).

Available at SSRN: <http://ssrn.com/abstract=2733751> or
<http://dx.doi.org/10.2139/ssrn.2733751>