

FEDERAL COURT OF APPEAL

BETWEEN:

DR. GÁBOR LUKÁCS

Appellant

– and –

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

Respondents

**MEMORANDUM OF FACT AND LAW OF THE APPELLANT,
DR. GÁBOR LUKÁCS**

Dated: July 18, 2016

DR. GÁBOR LUKÁCS

Halifax, NS

lukacs@AirPassengerRights.ca

Appellant

TO: **CANADIAN TRANSPORTATION AGENCY**
15 Eddy Street
Gatineau, Quebec J8X 4B3

Allan Matte

Tel: (819) 994 2226

Fax: (819) 953 9269

Email: *Allan.Matte@otc-cta.gc.ca*

**Solicitor for the Respondent,
Canadian Transportation Agency**

AND TO: **D'ARCY & DEACON LLP**
1 Lombard Place, Suite 2200
Winnipeg, MB R3B 0X7

Brian J. Meronek, Q.C.

Tel: (204) 942-2271

Fax: (204) 943-4242

Email: *bmeronek@DarcyDeacon.com*

Ian S. McIvor

Tel: (403) 541-5290

Email: *imcivor@DarcyDeacon.com*

**Solicitors for the Respondent,
Newleaf Travel Company Inc.**

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**MEMORANDUM OF FACT AND LAW OF THE APPELLANT,
DR. GÁBOR LUKÁCS****PART I – STATEMENT OF FACTS****A. OVERVIEW**

1. The Appellant, Dr. Gábor Lukács, is appealing, with leave of the Court, a decision of the Canadian Transportation Agency [the Agency] dated March 29, 2016 and bearing Decision No. 100-A-2016 [Decision Under Appeal].
2. In the Decision Under Appeal, the Agency unreasonably and/or without lawful authority determined that:
 - (1) Indirect Air Service Providers [IASPs or resellers] of domestic air service are no longer required to hold licences under the *Canada Transportation Act*, S.C. 1996, c. 10 [the *CTA*], so long as they do not hold themselves out as an air carrier operating an air service; and
 - (2) NewLeaf Travel Company Inc. [NewLeaf], being an IASP, is therefore not required to hold a licence.

Decision Under Appeal, para. 2**Appeal Book, Tab 2, p. 9**

3. An IASP (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 Under Appeal, para. 11

Appeal Book, Tab 2, p. 11

4. IASPs (resellers) differ from travel agents: IASPs enter into agreements to transport passengers by air in their own name, while travel agents act merely as agents for third parties. Unlike travel agents, IASPs have two separate and independent contracts:

- (a) between the passenger and the IASP, for the transportation of the passenger; and
- (b) between the IASP and the operator of the aircraft, for the rental of the aircraft with flight crew.

Due to the absence of a contractual relationship between passengers and the operator of the aircraft, the latter has no obligations toward the passengers.

Decision Under Appeal, para. 5

Appeal Book, Tab 2, p. 10

5. 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.

6. The legal effect of the Decision Under Appeal is that IASPs are relieved from the statutory requirement of holding a licence, set out in s. 57(a) of the *CTA*, and are allowed to operate outside the regulatory scheme established by the *CTA*. Thus, with respect to contracts between IASPs and the public, the Decision Under Appeal removes all economic regulation and consumer protection measures that were put in place by Parliament.

7. In practical terms, the Decision Under Appeal circumvents the will of the legislature, and exposes the public to significant risks from which Parliament intended to protect the public, including:

- (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 caused by overbooking, delay, or cancellation.

8. Broadly speaking, Lukács submits that:

- (a) no reasonable interpretation of the *CTA* is capable of supporting the Agency's determinations in the Decision Under Appeal; and
- (b) the Agency exceeded its jurisdiction in making the Decision Under Appeal, which has the effect of relieving IASPs from the requirement of being Canadian and from holding prescribed liability insurance coverage, contrary to the explicit language of s. 80(2) of the *CTA*.

9. Lukács further submits that the only reasonable interpretation of the *CTA* is that only those who hold a valid licence under the *CTA* may lawfully enter into an agreement with the public to provide transportation by air. Hence, IASPs are required to hold licences.

B. THE PARTIES

10. 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.

11. This Court recognized Lukács as having both private and public interest standing in its reasons for granting leave to appeal.

***Lukács v. Canada (CTA)*, 2016 FCA 174, paras. 4 and 6**

12. 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.

13. NewLeaf is a federally incorporated company whose purpose is to offer non-stop scheduled domestic air service to the Canadian public as an IASP. NewLeaf holds no licence under the *CTA* for operating an air service in Canada.

NewLeaf's Winter 2016 Schedule

Appeal Book, Tab 9, p. 56

NewLeaf's memorandum in opposition of leave to appeal, para. 5

C. THE LEGISLATIVE SCHEME

14. 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)

15. 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

16. The *Air Transportation Regulations*, SOR/88-58 [the *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

17. 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

18. 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 contract of carriage between the consumers and the licence holder, and can be enforced by the Agency.
- (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

19. A licence to operate an air service is not transferable.

Canada Transportation Act, s. 58

20. 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

D. INDIRECT AIR SERVICES PROVIDERS (RESELLERS)

21. An Indirect Air Service Provider [IASP] 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. An IASP enters into two separate and independent contracts:

- (a) a contract for the transportation of the passenger, between the passenger and the IASP; and
- (b) a contract for the rental of aircraft with flight crew, between the IASP and the operator of the aircraft.

Due to the absence of a contractual relationship between passengers and the operator of the aircraft, the latter has no obligations toward the passengers.

22. A crucial difference between IASPs, travel agents, and tour operators lies in who has the obligation to perform the services contracted:

- (1) A travel agent acts merely as an agent for third parties, and has no obligation to perform the transportation services contracted by its principal.
- (2) A tour operator arranges for the performance of transportation services by a contractor and has a duty to exercise due care in the selection of a competent contractor; however, it has no obligation to perform the services on its own, because it is not party to the contract of carriage between the passenger and the carrier.
- (3) In sharp contrast, an IASP enters into agreements in its own name to transport passengers by air. Since passengers have no contractual relationship with the operator of the aircraft, the IASP has the obligation to perform the services contracted.

***Craven et al. v. Strand Holidays (Canada) Ltd. et al.*,
142 D.L.R. (3d) 31, 1982 CanLII 1859, para. 17**

(i) History

23. 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*:

The Agency’s current approach to determining which person is operating a domestic air service originated from its 1996 Greyhound Decision and requires the person with commercial control to hold the licence, irrespective of whether the person operates any aircraft. As of December 1, 2015, 16 persons that did not operate any aircraft held licences providing them the authority to operate domestic air services.

“**Consultation on the requirement to hold a licence**” **Appeal Book, Tab 8, p. 52**

(ii) NewLeaf

24. NewLeaf is an IASP, whose business model consists of selling non-stop scheduled domestic air service to the Canadian public in its own name, while renting the aircraft and crew from Flair Airlines Ltd. [Flair].

NewLeaf’s Winter 2016 Schedule **Appeal Book, Tab 9, p. 56**

Decision Under Appeal, para. 49 **Appeal Book, Tab 2, p. 19**

NewLeaf’s memorandum in opposition of leave to appeal, para. 5

25. Thus, only NewLeaf has an obligation toward the passengers to perform the air services contracted. Flair, which has a contract only with NewLeaf but not with the passengers, has no obligation to the passengers.

26. On August 21, 2015, the Agency commenced an inquiry into whether NewLeaf’s business model requires a licence under the *CTA*.

Decision Under Appeal, para. 48 **Appeal Book, Tab 2, p. 19**

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

27. 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.]

“Consultation on the requirement to hold a licence” **Appeal Book, Tab 8, p. 51**

28. The consultation was commenced for the sake of NewLeaf, although this true purpose was not disclosed to the public, and the inquiry about NewLeaf is never mentioned in the consultation announcement.

E. THE DECISION UNDER APPEAL: INDIRECT AIR SERVICE PROVIDERS RENAMED “RESELLERS”

29. On March 29, 2016, the Agency issued the Decision Under Appeal in which it determined that:

- (1) IASPs (resellers) of domestic air service are no longer required to hold licences under the *CTA*, so long as they do not hold themselves out as an air carrier operating an air service; and
- (2) NewLeaf, being an IASP (reseller), is therefore not required to hold a licence.

Decision Under Appeal, para. 2

Appeal Book, Tab 2, p. 9

30. While the consultation announcement referred to “Indirect Service Providers,” the Agency renamed them “resellers” in the Decision Under Appeal:

“reseller” means a person who does not operate aircraft and who purchases the seating capacity of an air carrier and subsequently resells those seats, in its own right, to the public.

[Emphasis added.]

Decision Under Appeal, para. 5

Appeal Book, Tab 2, p. 10

31. The Agency’s reasons leave no doubt that the terms “Indirect Air Service Provider” and “Reseller” mean the same business model:

[...] the reseller model, whereby the reseller has commercial control over an air service and makes decisions on matters such as routes, scheduling, pricing, and aircraft to be used, while air carriers operate the aircraft on the reseller’s behalf.

Decision Under Appeal, para. 11

Appeal Book, Tab 2, p. 11

PART II – STATEMENT OF THE POINTS IN ISSUE

32. The issues to be determined on this appeal are:

- (a) Did the Agency err in law and render an unreasonable decision by determining that:
 - (1) Indirect Air Service Providers (resellers) are no longer required to hold licences under the *CTA*; and
 - (2) NewLeaf is not required to hold a licence?
- (b) Did the Agency exceed its jurisdiction in making the Decision Under Appeal?

PART III – STATEMENT OF SUBMISSIONS

33. The crux of the present appeal is that the Agency cannot, in the guise of statutory interpretation, give effect to a policy decision different from the one made by Parliament.

***Canada (CHRC) v. Canada*, 2011 SCC 53, para. 62**

34. It was Parliament, and not the Agency, that imposed 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 serves as an enforcement mechanism to protect the travelling public.

35. The IASP model has been around for as long as the *CTA* itself. Although Parliament amended the *CTA* several times in the past twenty years, it left the requirement to hold a licence unchanged. During this time, the Agency had consistently and reasonably been interpreting the *CTA* as requiring IASPs providing domestic service to hold a domestic licence.

36. The question of who is required to hold a licence under the *CTA* is not a policy decision that the Agency can change overnight; rather, it is a matter of statutory interpretation: identifying which kind of businesses, activities, and transactions Parliament intended to regulate.

37. The modern approach to statutory interpretation is that:

[...] the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

***Lukács v. Canada (CTA)*, 2014 FCA 76, paras. 22-23**

***Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 SCR 27, para. 21**

38. Although the Agency identified these principles correctly, it failed to properly apply them, and relied on a wealth of erroneous premises in its reasons.

Decision Under Appeal, para. 25

Appeal Book, Tab 2, p. 14

39. Lukács submits that the only reasonable interpretation of the *CTA* is that Parliament intended to regulate businesses that:

- (a) enter into agreements to transport passengers by air in their own name; and/or
- (b) have commercial control over a domestic air service, including decision-making authority about routes, scheduling, and pricing.

In particular, such businesses, including IASPs, are required to hold licences.

A. TEXTUAL ANALYSIS

40. The *CTA* imposes a requirement to hold a licence on those who “operate an air service,” and not on those who operate an aircraft:

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.

[Emphasis added.]

Canada Transportation Act, s. 57

41. 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)

42. In the Decision Under Appeal, the Agency skipped the first step of statutory analysis by failing to consider the plain and ordinary meaning of the word “operate,” and conflated it with an (erroneous) contextual analysis.

Decision Under Appeal, para. 33

Appeal Book, Tab 2, p. 16

43. The Canadian Oxford Dictionary defines the verb “operate” as:

1. [*transitive*] manage, work, control; put or keep in a functional state.
2. [*intransitive*] be in action; function.
3. [*intransitive*] produce an effect; exercise influence: the tax operates to our disadvantage.
4. [*intransitive*] [often foll. by on] perform a surgical operation.
 - conduct a military or naval action.
 - be active in business etc., esp. dealing in stocks and shares.
5. [*intransitive*] [foll. by on] influence or affect (feelings etc.).
6. [*transitive*] bring about; accomplish.

[Emphasis added.]

The Canadian Oxford Dictionary (2 ed.), Oxford University Press, 2005

44. Thus, the plain and ordinary meaning of the word “operate” in s. 57(a) of the *CTA* is to “manage” or “control” an air service as a business activity, that is, commercial control, and the activity of on “air service” is defined unambiguously in s. 55(1) as providing transportation service to the public at large.

45. Therefore, Parliament intended to regulate and require to hold licences businesses that have commercial control over an air service. In particular, an IASP, having commercial control over an air service, is required to hold a licence under the *CTA*.

B. CONTEXTUAL ANALYSIS

(i) Definition of an “air carrier”

46. The *Air Transportation Regulations* (the “*ATR*”) provides that:

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

Air Transportation Regulations, s. 2

47. The Agency adopted a terminology in the Decision Under Appeal that erroneously equates operating an aircraft with operating an air service, and results in circular reasoning:

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

[Emphasis added.]

Decision Under Appeal, para. 5

Appeal Book, Tab 2, p. 10

(ii) Renting aircraft with crew (s. 60)

48. Parliament explicitly addressed the business model of providing an air service using an aircraft and flight crew rented from 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)

49. The wording of s. 60(1) distinguishes between: (1) the “operator of the aircraft” used to provide an air service; and (2) the person who “provide[s] an air service” using the aircraft and crew of another person.

50. The principle of consistent expression dictates that Parliament intended the phrase “operator of the aircraft” to have a different meaning than the person who “provide[s] an air service.”

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

51. Parliament’s implicit assumption that the person who “provide[s] an air service” would be a “licensee” confirms that the provider of the air service, such as an IASP, is required to hold a licence.

(iii) Stringent restrictions on domestic air services

52. The Agency’s analysis has been tainted by numerous false premises, including the fiction of “deregulation of the aviation industry, eliminating restrictions on market entry, routes that could be operated, [and] pricing.”

Decision Under Appeal, para. 11

Appeal Book, Tab 2, p. 11

53. 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**

(a) **Pricing**

54. Section 66 of the *CTA* confers powers on the Agency with respect to the pricing of air services on routes where a licence holder enjoys a monopoly. If the Agency finds that the fare or an increase to the fare is unreasonable, it may:

- (a) disallow the fare, rate or increase;
- (b) direct the licensee to amend its tariff by reducing the fare, rate or increase by the amounts and for the periods that the Agency considers reasonable in the circumstances; or
- (c) direct the licensee, if practicable, to refund amounts specified by the Agency, with interest calculated in the prescribed manner, to persons determined by the Agency to have been overcharged by the licensee.

[Emphasis added.]

Canada Transportation Act, s. 66(1)

55. The wording of the statute reflects Parliament's intent that the person with control over the fares of the air service be a licence holder.

(b) **Reduction or discontinuance of service**

56. Section 64 of the *CTA* imposes a 120-day or 30-day notice period on domestic licence holders who propose to discontinue or reduce the frequency of their service to a point to less than one flight per week that would result in only one or no licensee offering at least one flight per week to that point.

Canada Transportation Act, ss. 64(1) and 64(2)

57. Section 65 of the *CTA* provides broad remedial powers to the Agency in the event of a breach of the obligations under s. 64:

65 Where, on complaint in writing to the Agency by any person, the Agency finds that a licensee has failed to comply with

section 64 and that it is practicable in the circumstances for the licensee to comply with an order under this section, the Agency may, by order, direct the licensee to reinstate the service referred to in that section

- (a) for such a period, not exceeding 120 days after the date of the finding by the Agency, as the Agency deems appropriate; and
- (b) such a frequency as the Agency may specify.

[Emphasis added.]

Canada Transportation Act, s. 65

58. In this case too, the wording of the statute reflects the legislative intent that those who have control over the routes, schedules, and frequency of the service be licence holders and subject to the Agency's oversight.

(c) **Scheduled vs. non-scheduled domestic service**

59. The Agency's analysis in the Decision Under Appeal relies on the erroneous premise that the distinction between scheduled and non-scheduled domestic air service has been eliminated in the *CTA*.

Decision Under Appeal, para. 11

Appeal Book, Tab 2, p. 11

60. As a matter of fact, subsection 64(4) of the *CTA* 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.

[Emphasis added.]

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, ss. 64(4) and 64(1.1)

(iv) Selling does not equate to operating an air service

61. The Agency correctly noted in the Decision Under Appeal that selling an air service to the public does not equate to operating an air service.

Decision Under Appeal, para. 30

Appeal Book, Tab 2, p. 15

62. This argument, however, is a straw man, because the Decision Under Appeal does not concern travel agents, who sell tickets as mere agents without being parties to the contract and without having commercial control over the air services sold.

63. What brings IASPs within the scope of the *CTA* is that: (1) IASPs enter into contracts with the public as a principal; and (2) IASPs have commercial control over the air services they sell.

Decision Under Appeal, paras. 5 and 11

Appeal Book, Tab 2, pp. 10-11

(v) Comparison with international service

64. The Decision Under Appeal 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 Under Appeal, para. 32

Appeal Book, Tab 2, p. 15

65. The aforementioned statement flies in the face of the Agency’s decision, issued only two weeks after the Decision Under Appeal, permitting Air Transat to rent aircraft with flight crew from Flair, the same company that NewLeaf is 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

66. 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.

(vi) The Agency’s considered and consistent view

67. 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

“The Canadian Law of Judicial Review: A Plea for Doctrinal Coherence and Consistency”, p. 18

68. 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, but chose not to amend the provisions relating to the requirement to hold a licence for the past twenty years.

Canada Transportation Act, s. 53

69. In the *1996 Greyhound Decision*, the Agency identified economic regulation as the purpose of the *National Transportation Act* [the NTA], and articulated

and examined several factors for determining whether a person “operates” an air service within the meaning of the *NTA* and is thereby required to hold a licence, including the following three:

- (a) risks and benefits associated with operation of the air service;
- (b) performance of key functions and decision-making authority with respect to the operation of the air service; and
- (c) use of firm name and style, and the degree to which the business’s name is known to the traveling public.

Greyhound Decision, pp. 3, 5, 8

Appeal Book, Tab 3, pp. 24, 26, 29

70. These three factors characterize IASPs, and set them apart from travel agents or businesses that rent out aircraft and flight crew.

71. Since 1996 and until the Decision Under Appeal, the Agency had been consistently interpreting the phrase “operate an air service” using the analytic framework of the *1996 Greyhound decision*.

“Consultation on the requirement to hold a licence”

Appeal Book, Tab 8, p. 52

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

CTA Decision No. 152-A-2014

72. During this time, the Agency’s considered and consistent view had been that a person who does not hold a licence can participate in an agreement to provide air services only as an agent, not as a principal:

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

73. Therefore, from 1996 and until the Decision Under Appeal, the Agency had held the considered and consistent view that the *NTA*, and its successor, the *CTA*, require IASPs to hold a domestic licence (see para. 23 on p. 8). The absence of an explanation for the Agency's departure from this longstanding view lends further support to the conclusion that the Decision Under Appeal is unreasonable.

“Consultation on the requirement to hold a licence” **Appeal Book, Tab 8, p. 52**

(vii) Legislative history

74. The *NTA* defines “domestic service” and prohibits the operation of a (domestic) air service the same way as its successor, the *CTA*, which received royal assent in 1996. (The only difference is that “publicly available” has been relocated into the definition of an “air service” in the *CTA*.)

National Transportation Act, ss. 67 and 71
Canada Transportation Act, ss. 55 and 61

75. The requirements for obtaining a domestic licence became stricter under the *CTA* by the addition of financial fitness as a fourth requirement to the existing three in the *NTA*.

National Transportation Act, s. 72
Canada Transportation Act, s. 61(a)(iv)

76. The provisions on discontinuance and reduction of services used to be similar in the *NTA* and the *CTA*; however, in 2000, Parliament added the definition of “non-stop scheduled air service” and additional restrictions on such service to s. 64 of the *CTA*.

National Transportation Act, s. 76
Canada Transportation Act, s. 64(4)

77. These additions in 2000 give further indication of the legislative intent that such “non-stop scheduled air services” are subject to the regulatory scheme and the requirement to hold a licence.

C. PURPOSIVE ANALYSIS

78. 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**

79. 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:

- (i) restricting foreign control over domestic air service;
- (ii) excluding underfunded service providers, who cannot deliver the services that have been paid for, from the market;
- (iii) regulation of frequency of service and pricing; and
- (iv) ensuring that the terms and conditions of the service address core areas (such as bumping, delays, cancellations, refunds, etc.) and that they are reasonable and not unduly discriminatory.

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

80. The effect of not requiring IASPs to hold a licence is that these standards and measures would not apply to consumers of IASPs:

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.

“Consultation on the requirement to hold a licence”

Appeal Book, Tab 8, p. 52

81. Thus, interpreting the *CTA* as not requiring IASPs to hold a domestic licence, as the Agency did in the Decision Under Appeal, is absurd and unreasonable, because it defeats these objectives of the *CTA*.

(i) Restriction of foreign control

82. Parliament chose to limit foreign ownership in providers of domestic air services. The *CTA* requires a domestic licence holder to be and remain “Canadian,” which is defined as: (1) controlled in fact by Canadians; **and** (2) at least 75% voting interests are owned and controlled by Canadians.

Canada Transportation Act, ss. 55(1), 61(1)(i), and 63(1)

83. Interpreting the *CTA* as not requiring IASPs to hold domestic licences defeats the intent of Parliament, because it allows an IASP to be controlled by non-Canadians, while the IASP has commercial control over a domestic air service. Thus, the Decision Under Appeal enables an IASP to serve as a shell company to circumvent the Canadian ownership requirement.

(ii) Exclusion of underfunded service providers

84. In 1996, when the *CTA* replaced the *NTA*, Parliament imposed the additional requirement of meeting certain financial requirements: an applicant for a domestic licence must demonstrate that it has sufficient funding in place, without taking into account any revenue from operations, to meet the costs associated with starting up and operating the air service for a 90-day period.

Canada Transportation Act, ss. 55(1), 61(1)(iv), and 63(1)

Air Transportation Regulations, s. 8.1

85. This requirement protects consumers from underfunded service providers who may strand passengers by being unable to deliver the services that consumers have paid for in advance.

86. The Decision Under Appeal 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, and then stranding passengers. 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.

87. The licence and financial fitness of the operator of the aircraft rented by an IASP offers no protection to the travelling public, because passengers have no contractual relationship with the operator of the aircraft, but only with the IASP. The operator of the aircraft only has a contract with the IASP, and will transport passengers only as long as the IASP pays it. If the IASP becomes insolvent and stops paying, the operator of the aircraft has no obligation toward the passengers, who get stranded as a result.

(iii) Regulation of price and frequency of service

88. Parliament chose to regulate specific aspects of domestic service in the *CTA*: (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

89. An IASP “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 Under Appeal, para. 11

Appeal Book, Tab 2, p. 11

90. Interpreting the *CTA* as requiring the operator of the aircraft, and not the IASP, to hold a licence renders ss. 64-66 of the *CTA* futile, because the operator of the aircraft has no control over scheduling and pricing.

(iv) **Protection by the tariff**

91. 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 Under Appeal, para. 38

Appeal Book, Tab 2, p. 17

92. 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.

93. 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.

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

D. APPLICATION OF THE LAW TO NEWLEAF

95. NewLeaf’s business falls squarely within the type of activities and transactions that Parliament intended to regulate in the *CTA*, and which are inherent to operating an air service within the meaning of the *CTA*.

- (a) NewLeaf is in the business of entering into agreements to transport passengers by air in its own name (and not as an agent):

NewLeaf indicated that it would market and sell air services to the public, on its own behalf, and enter into a charter arrangement with Flair, a licensed air carrier, to operate the flights.

[Emphasis added.]

Decision Under Appeal, para. 49

Appeal Book, Tab 2, p. 19

- (b) NewLeaf has commercial control over a domestic air service, including decision-making authority about routes, scheduling, and pricing.
- (c) The air service controlled by NewLeaf is a “non-stop scheduled air service” within the meaning of subsection 64(4) of the *CTA*.

NewLeaf’s Winter 2016 Schedule

Appeal Book, Tab 9, p. 56

Canada Transportation Act, s. 64(4)

96. Licences are not transferable. Thus, NewLeaf cannot circumvent the statutory requirement to hold a domestic licence by renting aircraft and crew from a licensed air carrier. Allowing NewLeaf to operate without a licence defeats the purpose of Part II of the *CTA*.

Canada Transportation Act, s. 58

97. 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.

E. EXCESS OF JURISDICTION

98. 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

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)

99. The reason that Parliament chose to withhold these powers from the Agency is because some of these powers have been delegated to the Minister:

62 (1) Where the Minister considers it necessary or advisable in the public interest that a domestic licence be issued to a person who is not a Canadian, the Minister may, by order, on such terms and conditions as may be specified in the order, exempt the person from the application of subparagraph 61(a)(i) for the duration of the order.

Canada Transportation Act, s. 62(1)

100. Lukács submits that the Agency exceeded its jurisdiction in making the Decision Under Appeal, 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.

F. COSTS

101. 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 appeal raises novel questions of law that have not been addressed by this Honourable Court.
- (b) This Honourable Court found in its reasons for granting leave to appeal that the appeal raises an arguable case; in particular, the appeal is not frivolous.
- (c) The appeal is in the nature of public interest litigation, as this Honourable Court found in its reasons for granting leave to appeal that Lukács has public interest standing.

***Lukács v. Canada (CTA)*, 2016 FCA 174, paras. 4 and 6**

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

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

PART IV – ORDER SOUGHT

102. The Appellant, Dr. Gábor Lukács, is seeking an Order:
- (a) setting aside Decision No. 100-A-2016 of the Canadian Transportation Agency;
 - (b) substituting Decision No. 100-A-2016 with the determination that should have been made by the Agency, namely:
 - i. Indirect Air Service Providers (also known as “resellers”) of domestic air service are required to hold licences; and
 - ii. NewLeaf Travel Company Inc. is required to hold a licence;
 - (c) awarding the Appellant a moderate allowance for the time and effort he devoted to preparing and presenting his case, and reasonable out-of-pocket expenses incurred in relation to the appeal; and
 - (d) granting such further relief as this Honourable Court may deem just.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

July 18, 2016

DR. GÁBOR LUKÁCS

Halifax, NS

lukacs@AirPassengerRights.ca

Appellant

PART V – LIST OF AUTHORITIES

STATUTES AND REGULATIONS

Air Transportation Regulations, S.O.R./88-58,
ss. 2, 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

LEGISLATIVE HISTORY

National Transportation Act, 1987 [Repealed], R.S.C. 1985,
Chap. 28 (3rd Supp.), ss. 67, 71, 72, 76, 80, 83-84

CASE LAW

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

Craven et al. v. Strand Holidays (Canada) Ltd. et al.,
142 D.L.R. (3d) 31, 1982 CanLII 1859

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

CASE LAW (CONTINUED)

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. Canada (Canadian Transportation Agency), 2016 FCA 174

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>

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