

Court File No.: A-242-16

**FEDERAL COURT OF APPEAL**

BETWEEN:

**DR. GÁBOR LUKÁCS**

Appellant

– and –

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

Respondents

**NOTICE OF MOTION**

**TAKE NOTICE THAT THE APPELLANT** will make a motion in writing to the Court under Rule 369 of the *Federal Courts Rules*, S.O.R./98-106.

**THE MOTION IS FOR:**

1. An Order pursuant to Rule 8, abridging the timelines for the filing of the responding motion record and the reply in the present motion;
2. An Order pursuant to ss. 44 and 50 of the *Federal Courts Act*, R.S.C. 1985, c. F-7, and Rule 373:
  - (a) staying the decision of the Canadian Transportation Agency dated March 29, 2016 and bearing Decision No. 100-A-2016 pending disposition of the appeal; and
  - (b) enjoining NewLeaf Travel Company Inc. from operating as an Indirect Air Service Provider [IASP or reseller], unless it posts a performance bond and/or security and/or guarantee in the amount of \$3,744,000 for the claims of stranded passengers;

3. Costs and/or reasonable out-of-pocket expenses of this motion in any event of the cause; and
4. Such further and other relief or directions as the Appellant may request and this Honourable Court deems just.

**THE GROUNDS FOR THE MOTION ARE:**

1. On June 23, 2016, NewLeaf Travel Company Inc. [NewLeaf] began (again) selling tickets to the public for flights within Canada.
2. On July 25, 2016, NewLeaf will begin to transport passengers on 60 non-stop flight segments per week, for a total of up to 9,360 passengers per week.
3. NewLeaf has no license to operate any air service under the *Canada Transportation Act* [the CTA].
4. NewLeaf is a shell company, without significant assets. It rents aircraft and crew from Flair Airlines Ltd. [Flair], a licensed airline, to transport passengers by air, but NewLeaf bears the full financial risk and liability to passengers, because Flair has no contractual relationship with NewLeaf's passengers. Thus, Flair assumes no risk.
5. NewLeaf is a fledgling, financially unstable company that is unlikely to be able to deliver the services that it has sold or pay compensation to passengers whom it may strand as a result of non-performance.

6. The present motion, brought in the public interest, seeks to offer passengers who purchased tickets from NewLeaf a somewhat similar protection that was contemplated by Parliament in enacting s. 61(1)(iv) of the *CTA*.
7. The purpose of the motion is not to shut down NewLeaf, but to ensure that it is NewLeaf and its investors that bear the financial risk rather than the travelling public. In other words, the purpose of the motion is to ensure that NewLeaf puts its money where its mouth is.
8. The amount of financial guarantee of \$3,744,000 sought from NewLeaf will allow compensating one week's load of stranded passengers carried by NewLeaf from their homes to another destination, and is based on the following conservative calculation:
  - (a) NewLeaf carrying 7,488 passengers per week (80% load factor);
  - (b) one half (3,744) of these passengers are travelling from their homes to another destination; and
  - (c) an average repatriation cost of \$1,000 per stranded passenger in excess of the amounts paid to NewLeaf.

This figure is less than 14% of the amount of capital a start-up airline is required to have before being granted a licence and allowed to sell tickets.

## THE DECISION UNDER APPEAL

9. Paragraph 57(a) of the *Canada Transportation Act*, S.C. 1996, c. 10 [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.
10. 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.
11. For twenty years, 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.
12. On March 29, 2016, the Agency issued Decision No. 100-A-2016 [Decision Under Appeal], in which it determined 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, being an IASP, is not required to hold a licence.
13. On June 9, 2016, this Honourable Court granted Dr. Gábor Lukács, the Appellant, leave to appeal the Decision Under Appeal, and recognized Lukács as having private and public interest standing.

**NEWLEAF'S FINANCES AND STRATEGY**

14. Under s. 61(1)(iv) of the *CTA* and s. 8.1 of the *Air Transportation Regulations*, 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. The entire capital must be available, and one half of it must be non-redeemable for a period of one year in order to meet the requirement.
15. For reference, on May 12, 2016, in Decision No. CONF-6-2016, the Agency found that Canada Jetlines Ltd. would need to have over \$27 million in order to meet this financial requirement.
16. NewLeaf never met these financial requirements, and has had only a small fraction of the capital that would meet the requirement.
17. In January 2016, when NewLeaf began selling tickets to the public for the first time, it was planning to have a capital of \$500,000 (less than 2% of what is reasonably required), and it was hoping to raise a total of \$2,000,000 (less than 7.5% of what is reasonably required) by the date of its first flight on February 12, 2016.
18. In practice, NewLeaf began selling tickets to the public on January 6, 2016 with only \$250,000 available (less than 1% of what is reasonably required). It was hoping to raise the rest on the go. After a mere twelve (12) days, on January 18, 2016, NewLeaf suspended sales, and cancelled all tickets sold.

19. As of July 19, 2016, NewLeaf and/or its affiliate owe approximately \$135,000 in unpaid bills to vendors. NewLeaf, its affiliate, and Mr. Jim Young, NewLeaf's CEO, have been named by an unpaid vendor as defendants in a legal action in the Ontario Superior Court of Justice, seeking damages of approximately \$96,000.
20. As of July 20, 2016, NewLeaf has not met its legal and financial obligations to the Kelowna Airport, did not sign the airport user agreement, nor did it provide the required deposit or insurance certificate.

#### **THE LEGAL TEST FOR A STAY OR INTERLOCUTORY INJUNCTION**

21. The legal test on a motion for stay pending appeal and interlocutory injunction are the same, and call for considering:
  - (a) whether there is a serious issue to be tried;
  - (b) irreparable harm; and
  - (c) the balance of convenience.

#### **Serious Issue**

22. Since this Honourable Court granted Lukács leave to appeal, the appeal is neither vexatious nor frivolous.

#### **Irreparable Harm**

23. Due to its inadequate capitalization, NewLeaf is unlikely to be able to deliver and sustain the services that it sold to the public, nor does it have the financial ability to compensate passengers who are stranded as a result of its non-performance.

24. Flair, the actual airline that is behind NewLeaf, is licensed, has met the financial fitness requirements, and has assets, but is shielded from liability for the performance of the services sold by NewLeaf, as explained by Mr. Jim Rogers, the president of Flair (Exhibit “X” on p. 226):

Flair is supplying aircraft and operating under a ACMI agreement with New Leaf. The contract with the passenger is with New Leaf and they have a passenger protection plan in place [...]

[Emphasis added.]

Thus, Flair will not compensate or otherwise protect passengers stranded by NewLeaf.

25. Therefore, if the Order sought is not granted, the travelling public will suffer irreparable harm, because their out-of-pocket expenses will go uncompensated: NewLeaf is unable to compensate them, and Flair is not required to do so.

### **Balance of Convenience**

26. The balance of convenience favours granting the Order sought, because:
- (a) staying of the Decision Under Appeal would maintain and/or restore the *status quo*, namely, that IASPs are required to hold a domestic licence;
  - (b) it shifts the financial risk from the travelling public to NewLeaf in a manner that is consistent with the intent of Parliament; and
  - (c) it leaves the door open for NewLeaf to maintain its business pending disposition of the appeal.

**URGENCY OF THE MOTION**

27. Due to the unavailabilities of counsels for the Respondents, the within appeal is not likely to be heard before late September 2016.
28. The present motion is urgent, because NewLeaf intends to begin transporting passengers on July 25, 2016.
29. Lukács is seeking abridgment of the delays set out in Rule 369 to ensure that some protection is in place for passengers as early as July 25, 2016.

**Statutes and regulations relied on**

30. Sections 2, 7, 8.1, 8.2, 8.5, and 107 of the *Air Transportation Regulations*, S.O.R./88-58.
31. Sections 41, 53, 55, 57-67.2, 80, 86, and 174 of the *Canada Transportation Act*, S.C. 1996, c. 10.
32. Sections 44 and 50 of the *Federal Courts Act*, R.S.C. 1985, c. F-7.
33. Rules 8, 369, and 373 of the *Federal Courts Rules*, S.O.R./98-106.
34. Such further and other grounds as the Appellant may advise and this Honourable Court may permit.

**THE FOLLOWING DOCUMENTARY EVIDENCE** will be used for the motion:

1. Affidavit of Dr. Gábor Lukács, affirmed on July 21, 2016.



2. Such further and additional materials as the Appellant may advise and this Honourable Court may allow.

July 21, 2016

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**Appellant**

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