Court File No. A-242-16

IN THE FEDERAL COURT OF APPEAL

BETWEEN:

Dr. GÁBOR LUKÁCS

Appellant

and

CANADIAN TRANSPORTATION AGENCY and NEWLEAF TRAVEL COMPANY INC.

Respondents

MEMORANDUM OF FACT AND LAW ON APPEAL OF RESPONDENT NEWLEAF TRAVEL COMPANY INC.

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PART I - STATEMENT OF FACTS

Overview

1. The Respondent, the Canadian Transportation Agency ("Agency") held public consultations into whether resellers, including the Respondent, NewLeaf Travel Company Inc. ("NewLeaf"), operate air services, and as such should be required to hold air licences pursuant to the applicable provisions of the Canada Transportation Act, S.C. 1996 (the "Act").

2. By way of a Decision No. 100-A-2016 ("Decision") rendered March 29, 2016, the Agency determined that:

a. Resellers do not operate air services and are not required to hold an air licence, as long as they do not hold themselves out to the public as an air carrier operating an air service.
b. NewLeaf, should it proceed with its proposed business model, would not operate an air service and would not be required to hold an air licence.

Agency Decision, Appeal Book Tab 2, page 10, para. 2

3. The Appellant obtained leave under s. 41(1) of the Act from the Court to appeal the Decision on the basis that no reasonable interpretation of the Act is capable of supporting the Agency's reasons for its Decision; and, that the Agency exceeded its jurisdiction in relieving resellers from the requirement of being Canadian and from holding prescribed liability insurance coverage contrary to the explicit language of s. 80(2) of the Act.

Appellant's Memorandum of Fact and Law, page 3, para. 8

4. Following a consultation process initiated by the Agency, involving various stakeholders, and after an analysis which considered the wording of the Act and the *Air Transportation Regulations*, SOR/88-58 ('ATR'); the Agency's underlined policy purposes, and the submissions received, the Agency determined that the most reasonable interpretation of what it means to "operate an air service", such as to require a licence, does not capture resellers

(including NewLeaf) as long as they do not hold themselves out to the public as an air carrier operating an air service.

Agency Decision, Appeal Book Tab 2, page 14, para. 26

5. NewLeaf asserts that the Agency's interpretation of the Act (the Agency's home statute), as it relates to whether resellers are required to hold a licence, is a sound and reasonable interpretation of the Act and in accordance with its role as an economic regulator of air transportation under the Act. Furthermore, the Agency did not exceed its jurisdiction contrary to s. 80(2) of the Act in that the Agency did not grant a exemption to otherwise applicable provisions of the Act; rather, the Agency held that resellers were not required to hold a licence and therefore are not regulated by the Agency and as such there was no exemption needed.

Historical Background

6. Beginning in 1987, Parliament passed amendments to the National Transportation Act, 1987, and subsequently through the present Act, which reduced economic regulation of Canada's domestic airlines in order to promote competition. The legislation provided that air carriers could operate within Canada pursuant to a specific licence and removed any distinction between non-scheduled and scheduled domestic air services; encouraged greater market entry; more routes and pricing flexibility. These changes allowed domestic air service carriers the freedom to allocate their seating capacity in whatever way they deemed appropriate.

Agency Decision, Appeal Book Tab 2, page 11, para. 11

7. S. 57 of the Act states that, in order to operate an air service, a person is required to obtain a licence under the Act, which provides certain economic consumer and industry protection safeguards as found in the Act and in the ATR. The Act further requires that a licence holder must comply with Canadian ownership requirements; hold a Canadian Aviation Document ('CAD') issued

by Transport Canada, have certain requisite insurance protection and meet prescribed financial requirements (s. 57 and s. 61).

8. In 1996, pursuant to its supervisory authority, the Agency dealt with a complaint filed by WestJet Airlines Ltd. against Greyhound Lines of Canada Ltd. ('Greyhound') and Kelowna Flight Craft Air Charter Ltd. ('Kelowna') ("Greyhound Decision") in which the National Transportation Agency (predecessor to the Agency) found Greyhound, on the facts of that case, to operate an air service for reasons cited in the decision and determined that Greyhound required a domestic air licence even though it was Kelowna which operated the aircraft.

Agency Decision, Appeal Book Tab 2, page 11, para. 12

Appeal Book Tab 4, page 34

9. As a result of this decision, Greyhound and Kelowna made certain changes to their business model and asked the Agency for a review of its decision. Although the Agency acknowledged that certain ameliorating amendments to the commercial arrangements by the parties had been made, it remained of the opinion that the fundamental relationships between Greyhound and Kelowna had not changed and therefore the Agency declined to rescind or vary its prior decision.

Appeal Book Tab 6, page 45

10. Pursuant to s. 64 of the National Transportation Act (1987), Greyhound and Kelowna petitioned the Governor in Council ('GIC') to rescind both decisions of the Agency. The GIC, in its legislative discretion, rescinded the Agency's decision and ruled that Greyhound would not be the operator of a domestic air service that requires a domestic licence if:

a. Greyhound continued to be Canadian;
b. complied with the provisions of its Air Charter Agreement with Kelowna; and,

c. informed all prospective purchasers of air services that Kelowna will be providing the air service.

Appeal Book Tab 7, page 48

11. In 2009, the GIC again reversed the Agency's determination that American Medical Responsive Canada Inc., as a reseller, would operate an air service.

Agency Decision, Appeal Book Tab 2, page 12, para. 14

12. In October 2013, in Decision No. 390-A-2013, the Agency informed the air transportation industry as to what constitutes "air service" and the criteria to be applied by the Agency. In that decision, the Agency stated as follows:

> [2] The Agency is mandated by Parliament to administer, interpret and enforce the CTA and associated regulations. The Agency is not bound by its past determinations and the interpretation of the CTA by the Agency can evolve in light of its own experience and the evolution of the air transportation industry.

Decision No. 390-A-2013, para. 2

13. The Agency further committed to provide more clarity in matters of importance to the air transportation sector and stated as follows:

> [6] Under its current 3-year Strategic Plan, the Agency has committed to modernize its regulatory framework, including by improving the transparency and clarity of the legislation and regulations that it administers pertaining to the air transportation sector. The Agency has also indicated that it will engage stakeholders in this process and take their views into account. This Determination is consistent with this commitment.

Decision No. 390-A-2013, para. 6

14. Having analyzed the requirements insofar as they went, the Agency determined that an "air service" is specifically publically available when:

(i) offered and made available to the public;

(ii) provided pursuant to a contract or arrangement for the transportation of passengers or goods;

(iii) is offered for consideration; and

(iv) is provided by means of an aircraft.

The Agency correctly noted that Decision No. 390-A-2013 did not specifically address resellers.

Appeal Book Tab 2, page 12, para. 15

15. There was a strong caveat attached by the Agency to its determination as to what constitutes an air service for the purposes of requiring an Agency licence. The Agency stated as follows:

> [53] Every case is unique and accordingly the Agency will make its determinations based on the merits of each case. The Agency will apply these approved criteria when determining whether a person operates an air service that requires that person to hold an Agency licence.

Decision No. 390-A-2013, para. 53

Consultation Process / Resellers

16. With the continued reshaping of the air transportation industry, the Agency determined that there was a lack of clarity among resellers as to whether they were required to hold a licence given that they did not operate the aircraft. Consequently, the Agency conducted an internal review into that issue in 2014, and subsequently in August 2015 included NewLeaf in the inquiry, when the Agency became aware of NewLeaf's plans to market and sell air services on aircraft owned and operated by Flair Airlines Ltd. ("Flair"), a licenced air carrier, through various contractual arrangements entered into with Flair.

Agency Decision, Appeal Book Tab 2, page 12, paras. 17 – 18

17. As part of the inquiry, the Agency published a consultation paper and invited interested parties to comment on, among other things, whether resellers should be required to hold a licence pursuant to s. 57 of the Act to sell their services directly to the public.

Agency Decision, Appeal Book Tab 2, page 13, para. 19

Appeal Book Tab 8, page 54

18. As a result, a wide range of submissions (26 in number) were received by the Agency and a summary of various positions taken by responding parties were included in the Decision.

Agency Decision, Appeal Book Tab 2, pages 13 – 14, paras. 19 - 24

Agency Decision

19. The Agency's ultimate determination is set out in paragraph 2 above. In the course of making its determination, the Agency recognized that a reseller is not defined in the Act. The Agency therefore defined a reseller to be "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".

Agency Decision, Appeal Book Tab 2, page 10, para. 5

20. The Agency ultimately found that "the most reasonable interpretation of what it means to operate an air service does not capture resellers, as long as they do not hold themselves out to the public as an air carrier operating an air service". The Agency came to this conclusion based in part upon review of the requirements of the Act and ATR and in specific reference to the phrase "operate an air service" (s. 57).

Agency Decision, Appeal Book Tab 2, page 14, paras. 25 – 26

21. As part of its ongoing supervision, and relying on its experience and expertise, the Agency pointed out that:

a. The movement towards deregulation in the industry resulted in a greater reliance on market forces to achieve more competitive prices and a wider range of services;
b. Industry developed new approaches to the provision of air services, some of which did not fit squarely into the Agency's licensing parameters; and,
c. The reseller model did not fit squarely into the licensing parameters of the Agency.

Agency Decision, Appeal Book Tab 2, page 11, para. 11

22. The Agency correctly assessed that Parliament did not intend the Agency to regulate commercial control over air service, in and of itself, without regard to the fact that ownership and operation of the aircraft (air carriers) was a fundamental requisite to regulation.

23. After taking into account the plain meaning, context and history of the statutory language; the National Transportation Policy; the Act's passenger protection and Canadian ownership goals; and the manner in which resellers hold themselves out to the public, the Agency stated as follows:

> [41] These provisions [of the Act] can still be given full effect in a context where resellers are not required to obtain a licence. Should a non-Canadian reseller enter into an arrangement whereby it owns or control (sic) in fact the licenced air carrier, that air carrier would cease to be Canadian and would no longer be eligible to hold a licence. It is also worth noting that non-Canadian charterers have legally operated in Canada for many decades, reselling licenced air carriers' aircraft capacity to the public without any government intervention.

Agency Decision, Appeal Book Tab 2, page 17, para. 41

24. As to whether NewLeaf would be operating an air service and therefore be required to hold an air licence, the Agency concluded that, as a reseller it would not be required to hold a licence, based on the determination it made pertaining to resellers, as long as NewLeaf followed the proposed business model presented to the Agency. The Agency stated as follows:

> [52] The Agency has reviewed all available information and finds that if the proposed business model is followed, NewLeaf would be a reseller that does not operate an air service and therefore does not need to obtain a licence. The Agency notes, however, that if NewLeaf were to hold itself out to the public as an air carrier operating an air service, it would be required to hold a licence.
>
> **Agency Decision, Appeal Book Tab 2, page 20, para. 52**

PART II - STATEMENT OF POINTS AT ISSUE

25. The issues to be determined in this appeal are:

(a) Did the Agency err in law by rendering an unreasonable Decision in determining that resellers are not required to hold licences under the Act?

This Respondent states that:

(i) the Agency did not err in law; and,

(ii) the Decision of the Agency that resellers do not require to hold a licence under the Act was reasonable.

(b) Did the Agency err in law by rendering an unreasonable Decision by determining that NewLeaf is not required to hold a licence?

This Respondent states that whether NewLeaf is required to hold a licence is a question of mixed fact and law and is not appealable under s. 41 of the Act; alternatively, the Decision of the Agency that NewLeaf is not required to hold a licence was reasonable.

(c) Did the Agency exceed its jurisdiction in rendering the Decision?

This Respondent states that the Decision was within the Agency's jurisdiction to make.

PART III – SUBMISSIONS / ARGUMENT

Standard of Review

(a) As to Error in Law

26. The parties appear to agree that the appropriate standard of review is reasonableness. Certainly NewLeaf submits that the appropriate standard of review is reasonableness, as the Agency, in rendering its Decision, was interpreting its home statute, which convenes and structures the Agency and sets out its objects, purposes and powers and is therefore "closely connected to its function".

***McLean v. British Columbia (Securities Commission)*, [2013] 3 SCR 895, 2013 SCC 67 at para 21**

27. The Supreme Court of Canada in *McLean* has most recently affirmed that an administrative decision-maker is entitled to significant deference when it is interpreting its home statute.

***McLean v. British Columbia (Securities Commission)*, [2013] 3 SCR 895, 2013 SCC 67 at paras 19-33**

28. More directly, this Court, in reviewing decisions of the Agency, has stated that the expertise of the Agency makes it well qualified to provide an interpretation of its home statute that makes sense in the broad policy context in which the Agency operates.

***Lukacs v. Canadian Transportation Agency*, 2014 FCA 76 at paras. 16 – 17**

29. This Court has further stated:

> [50] Thus, the benefit of prior judicial consideration of the applicable standard of review is available. In that regard, the

decision of the Supreme Court in *Council of Canadians with Disabilities v. VIA Rail Canada Inc.*, [2007] 1 S.C.R. 650, 2007 SCC 15 (CanLII), provides clear guidance with respect to the standard of review to be applied in circumstances in which the Agency is interpreting the CTA, its own statute. In particular, in paragraphs 98 to 100, Abella J. states:

> [98] The human rights issues the Agency is called upon to address arise in a particular – and particularly complex – context: the federal transportation system. The *Canada Transportation Act* is highly specialized regulatory legislation with a strong policy focus. The scheme and object of the Act are the oxygen the Agency breathes. When interpreting the Act, including its human rights components, the Agency is expected to bring its transportation policy knowledge and experience to bear on its interpretations of its assigned statutory mandate: *Pushpanathan*, at para. 26.
>
> [99] … The Agency, and not a reviewing court, is best placed to determine whether the Agency may exercise its discretion to make a regulation for the purpose of eliminating an undue obstacle to the mobility of persons with disabilities – a determination on which the Agency's jurisdiction to entertain applications depends.
>
> [100] The Agency is responsible for interpreting its own legislation, including what that statutory responsibility includes. The Agency made a decision with many component parts, each of which fell squarely and inextricably within its expertise and mandate. It was therefore entitled to a single, deferential standard of review.
>
> [Emphasis added.]

***Canadian National Railway Company v. Canadian Transportation Agency and The Attorney General of Canada*, 2008 FCA 363**

(b) As to Jurisdiction

30. When it comes to the question of an agency or tribunal exceeding jurisdiction, the determination must start with whether the question is a "true question of jurisdiction or *vires*." As noted by the Supreme Court of Canada in *ATCO*: "This Court's recent jurisprudence has emphasized that true questions

of jurisdiction, if they exist as a category at all, an issue yet unresolved by the Court, are rare and exceptional" [Emphasis Added].

***ATCO Gas and Pipelines Ltd. v. Alberta (Utilities Commission)*, [2015] 3 SCR 219, 2015 SCC 45 at para 27**

31. In NewLeaf's submission, a true question of jurisdiction is not engaged. It is plain and obvious that a grant of authority for the Agency to inquire into the activities of resellers (including NewLeaf) exists under the Act.

Broad and Purposive Approach to Statutory Interpretation

32. The broad and purposive approach for statutory interpretation set out in *Rizzo v. Rizzo Shoes Ltd. (Re), [1998] 1 SCR 27* has been most helpfully set out in *Bell ExpressVu* which provides as follows:

> 26 In Elmer Driedger's definitive formulation, found at p. 87 of his Construction of Statutes (2nd ed. 1983):
>
> **Today there is only one principle or approach, namely, 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.**
>
> Driedger's modern approach has been repeatedly cited by this Court as the preferred approach to statutory interpretation across a wide range of interpretive settings [.] I note as well that, in the federal legislative context, this Court's preferred approach is buttressed by s. 12 of the *Interpretation Act*, R.S.C. 1985, c. I-21, which provides that every enactment "is deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects".
>
> (…)

***Bell ExpressVu Ltd. Partnership v. Rex*, 2002 SCC 42, 2002 CarswellBC 851 at para 26**

Object and Purpose of the Act

33. A review of the object and purpose of the Act places prime importance on competition and market forces. It further indicates that regulation is only to be used to achieve outcomes that cannot be achieved by competition and market forces. S. 5 of the Act states in part:

> **Declaration**
>
> **5** It is declared that a competitive, economic and efficient national transportation system that meets the highest practicable safety and security standards and contributes to a sustainable environment and makes the best use of all modes of transportation at the lowest total cost is essential to serve the needs of its users, advance the well-being of Canadians and enable competitiveness and economic growth in both urban and rural areas throughout Canada. Those objectives are most likely to be achieved when:
>
> > **(a)** competition and market forces, both within and among the various modes of transportation, are the prime agents in providing viable and effective transportation services;
> >
> > **(b)** regulation and strategic public intervention are used to achieve economic, safety, security, environmental or social outcomes that cannot be achieved satisfactorily by competition and market forces and do not unduly favour, or reduce the inherent advantages of, any particular mode of transportation;
> >
> > **(c)** rates and conditions do not constitute an undue obstacle to the movement of traffic within Canada or to the export of goods from Canada; …
> >
> > [Emphasis Added]
>
> ***Canada Transportation Act*, S.C. 1996, c. 10, s. 5**

34. Under the Act, the intent is to promote competition by allowing a free market to operate. It is clearly contrary to the object and purpose of the Act to

use artificial constraints to stifle potential new markets entrants with undue regulatory burdens.

Reasonableness of Decision

35. As the standard of review is reasonableness, one needs to examine whether the decision of the Agency was reasonable in the sense of justification, transparency and intelligibility in the decision-making process and whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

***Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 at para. 47**

36. In that regard, the Agency was alive to its interpretative obligations in coming to a determination based on its interpretation of its home statute. It was alive to the requirements of reading the words of the statute in their grammatical and ordinary sense harmoniously with the scheme of the legislation, the object of the legislation and the intention of Parliament.

Agency Decision, Appeal Book Tab 2, page 14, para. 25

37. The Agency recognized that Parliament did not explicitly require entities that do not operate aircraft to hold a licence; whereas, a chartered air carrier is required to hold a licence for international services.

Agency Decision, Appeal Book Tab 2, page 15, para. 28

38. In turn, the Agency reasoned appropriately that the expression “operate an air service” should be consistent be it a domestic or an international air service.

Agency Decision, Appeal Book Tab 2, page 15, para. 29

39. The Agency examined s. 59 of the Act, which prohibits a person from selling an air service unless a person holds a licence in respect of that air service. That section does not require the person selling the air service to be

licensee; it only requires that a licence be held in respect of that air service. Selling an air service does not equate to operating an air service.

Agency Decision, Appeal Book Tab 2, page 15, para. 30

40. As long as the air carrier has a licence the requirements of the Act are fulfilled. It cannot be said that operating an air service excludes the operation of the aircraft. There can be no air service without aircraft. The triteness of the statement is demonstrated in the definition of "air services" which under s. 55(1) of the Act means "a service provided by means of an aircraft …".

41. Significantly, s. 57 of the Act requires that in order to obtain a licence, a person must be an air carrier, as one of that requisites is that the person hold a CAD issued under *The Aeronautics Act*. Only an air carrier that has custody and operational control of aircraft is eligible to hold a CAD, which is the technical safety and security document issued by Transport Canada. NewLeaf is <u>not</u> eligible to obtain a CAD, as it does not have custody and control of the aircraft.

42. The Agency properly noted that a licenced air carrier must hold a charter permit to operate charter flights on behalf of charterers who can resell that aircraft capacity directly to the public without the charterer having to hold a licence. The ATR requires certain conditions to apply in international non-scheduled charters, but the Agency quite properly pointed out that, if Parliament had wanted to differentiate between a reseller and a charterer, it would have done so. Consequently it was reasonable for the Agency to observe that charterers are not required to hold a licence. Likewise resellers of domestic services are not required to hold a licence, as there are no legislative provisions expressly requiring a reseller to be a licensee.

Agency Decision, Appeal Book Tab 2, page 15, paras. 31 - 32

43. Critically, the Agency took into account the National Transportation Policy as articulated in s. 5 of the Act as stated in paragraph 33 above. The Agency in its wisdom held the view that more competition and choice in the marketplace would be fostered by resellers not having to hold a licence as long as their partner air carriers did.

Agency Decision, Appeal Book Tab 2, page 16, para. 36

44. Again, from the prospective of consumer protection, the Agency was satisfied that the terms and conditions of the tariff issued by the air carrier, the requisite liability insurance, and, the financial requirements imposed upon the air carrier, were sufficient protection.

Agency Decision, Appeal Book Tab 2, page 17, para. 38

45. The Agency quite rightly pointed out that its role is not to insure absolute customer protection, but reasonable protection. The legislation in no respects provides guarantees; nor, should one be read into the Act with respect to resellers.

Agency Decision, Appeal Book Tab 2, page 17, para. 39

46. The Agency also considered the Canadian ownership requirement and the labelling requirements of identifying to the public the air carrier as the operator of the aircraft.

Agency Decision, Appeal Book Tab 2, pages 17 - 19, paras. 40 – 46

47. Insofar as NewLeaf was concerned, the Agency was satisfied that the air carrier (in this case Flair), as a licensee, has to comply with the licensing regime, including tariffs that respect legislative and regulatory requirements related to consumer protection.

Agency Decision, Appeal Book Tab 2, page 20, para. 55

48. Consequently, considering all of the above, including:

(a) the detailed and thorough analysis the Agency made in arriving at its interpretation as set out above;
(b) the fact that “operates an air service” and “reseller” are not defined in the Act; and,
(c) the wide discretion given to this Agency in interpreting its home statute;

the Decision was not only reasonable, but was the most reasonable interpretation the Agency could render, such that the Court ought not interfere in the Decision.

Appellant’s Interpretation

49. The Appellant advances a position based effectively on the premise that:

a. Parliament has not promulgated new legislative language to comport with the Agency’s reasoning;
b. the Agency ought to be bound by its prior decisions.

50. It is not the intent of NewLeaf to comment on each and every provision addressed by the Appellant. It should be noted at the outset however, that the Appellant’s premise is fundamentally flawed. At the heart of the Appellant’s argument is the false premise that a contractual relationship between the licensee and a passenger is required in order to ensure that passengers have recourse to the various protections accorded to them with respect to licensees.

51. The Appellant posits that because the reseller is contracting with the passengers directly, that the doctrine of privity of contract will leave passengers without recourse to the licensee. This premise is simply not true. The doctrine of privity of contract does not relieve a licensee from legislative or regulatory requirements set out under the Act. Once that premise is debunked the Appellant’s arguments with respect to the absurdity of the Agency’s interpretation fail *ipso facto*.

52. In fact, as will be set out in more detail, the Appellant's interpretation of the Act actually creates an absurd result which would require two licences for the operation of one domestic flight. NewLeaf submits that any interpretation that comes to such an absurd conclusion cannot possibly be reasonable.

(a) Legislative Language

53. The Appellant structures his argument by first considering the definition for what it means to "operate an air service" under the Act. The Appellant then focuses on numerous sections of the Act to attempt to suggest that the only reasonable conclusion of "operating an air service" must include resellers. Further, the Appellant suggests that failing to apply that interpretation throughout the Act creates various absurdities due to friction with the doctrine of privity of contract.

54. To best expose the fallacies in the Appellant's interpretation, it is helpful to go through his statutory examples of what he views as Parliament's intentions. The Appellant attempts to establish that the Agency was working with the wrong definition of "air carrier." Whatever differences may exist between the two definitions are not material and were not determinative of the Agency's Decision under Appeal **(Appellant's Memorandum at paras. 46 and 47)**.

55. The Appellant also postulates on the Agency's use of the term "operate". In the Decision, the Agency determined that resellers were not "operating an air service" and thus were not required to hold a licence under ss. 57 or 61. The Appellant lists the dictionary definition of "operation" and suggests that the plain and ordinary meaning of the word operate is to "manage" or "control" and as such the Agency has misused the word operate. However, a further review of the Appellant's dictionary definition also includes, "work," "put or keep in a function state," "be in action," and other words which imply that operate can also be determined in the sense of physically operating an air service. Consequently, the Appellant's truncated meaning of the word "operate" is not

determinative of legislative intent **(Appellant's Memorandum at paras. 42 to 45)**.

56. There are two other key considerations which establish that it is reasonable to interpret the term "operate an air service" in ss. 57 and 61 as not applying to resellers:

a. Both sections require that a licensee hold a CAD;
b. The prohibitions in ss. 59 and 60 clearly distinguish between the commercial control aspect and the purely operational aspect of "operating an air service."

57. The Appellant's suggestion that Parliament intended resellers to be required to hold a licence is inconsistent with Parliament's express requirement that licensees hold a CAD. As stated in paragraph 41 above, the Act requires any person applying for a licence to hold a CAD. A CAD is the document granted by the federal government which allows an individual or company to physically operate an aircraft. If a reseller is required to hold a licence, as the Appellant suggests, then it follows that a reseller must obtain a CAD. This restriction would necessitate that a party whose entire business model is premised on <u>not</u> operating aircrafts, would be required to hold documentation to allow them to operate aircrafts. Further, this interpretation would require two separate licences, and two separate CADs, for the same air service.

58. The Agency's position that "operating an air service" should not include resellers is also buoyed by s. 59 of the Act which states:

> **No person** shall sell, cause to be sold or publicly offer for sale in Canada an air service unless, if required under this Part, **a person** holds a licence issued under this Part in respect of that service and that licence is not suspended. [Emphasis Added]

"The person" selling the air service; need not be "the person" holding the licence.

59. The prohibition against the sale of an air service serves to distinguish between the commercial control of an air service and the operational of an air service. The wording of s. 59 separates the sale and marketing of an air service from the licensing components which are required to operate an air service; the consequence of which is that the term “to operate an air service” should be interpreted as only applying to the operational components of an air service and not the commercial control aspects.

60. The Appellant also misconstrues the language and purpose of s. 60 of the Act. S. 60 deals with a licensee contracting with another party for the provision of aircraft and crew, who will ultimately provide an air service under the licensee’s licence. This section plainly does not apply to the relationship between resellers and licensees.

61. The Appellant also points to numerous sections of the Act to suggest that allowing resellers to operate without a licence circumvents the intention of Parliament. There are three primary areas in the Act and ATR which the Appellant suggests support such an argument, namely:

(a) the sections which relate to route, pricing and scheduling regulations **(Appellant’s Memorandum at paras. 54 to 58)**;
(b) the tariff regulations **(Appellant’s Memorandum at paras. 91 to 94)**.; and,
(c) the requirements placed on licensees under the Act and the ATR **(Appellant’s Memorandum at paras. 79 to 87)**.

62. The Appellant suggests that the above problems, coupled with the issue of privity of contract between the passenger and the reseller, create financial risk to passengers which could not have been intended by Parliament.

63. The fundamental problem with this argument is twofold: the Act and the ATR create statutory obligations upon licensees, which exist notwithstanding

any contract; and, while the licensee is free to contract with the reseller, the licensee cannot offload its obligations under the Act and ATR.

64. In particular, the Appellant submits that, given the regulation on licensee's for matters revolving around scheduling and pricing, Parliament intended that a licensee must have commercial control over those matters. While it may well be in most cases that a licensee will have control over those matters, there is nothing in the language or context of the Act, which supports the proposition that a licensee must have control over those matters.

65. The licensee is regulated by the Act, when it provides an air service. Where an air service is being operated under a licensee's licence, that licensee bears the responsibility of ensuring it is compliant with the Act to the satisfaction of the Agency. The addition of a reseller to the equation does not alter the responsibility of the licensee to ensure that it does not run afoul of the Act and ATR.

66. The above argument applies with equal validity to the tariff requirements under the Act and ATR. The Act requires that, "the holder of a domestic licence shall" (s. 67) ensure that an approved tariff exists for flights it operates. The licensee is free to contract with the reseller to seek compensation where the tariff imposed an obligation outside of the parties' contractual terms, but it is an ancillary matter and does not relieve the licensee of its statutory obligations to the passengers and the Agency.

67. One of the Appellant's major issues with resellers being permitted to operate without a licence, is that they are not subject to the various licensing requirements found in ss. 57 and 61. The practical effect of these two sections requires a domestic licensee to meet the following requirements:

a. be Canadian, as defined in the Act;
b. hold a CAD document in respect of the service to be provided under the licence;

c. have prescribed liability insurance coverage in respect of the service to be provided under the licence;
d. meet prescribed financial requirements; and
e. satisfy the Agency that they have not contravened s. 59 in respect of a domestic service within the preceding twelve months.

68. The Appellant suggests that allowing a reseller to operate without a licence circumvents these requirements and leads to increased financial risk being placed on passengers. The Appellant is again applying a flawed premise, because the Decision does not modify those requirements; it simply establishes that where a reseller contracts with a licensee who meets, and continues to meet, those requirements that they will not also require the reseller to possess a licence. (viz. Air Canada Vacations (Air Canada); Nolitours (Air Transat); Sunwing Vacations (Sunwing Airlines).

69. Firstly, liability insurance is not something which requires a contract to take effect. A licensee is required to maintain liability insurance for the air services it operates. Given that the Decision has deemed that the licensee is the party operating the air service, it follows that passengers are covered by the licensee's liability insurance. In any event, the licensee would clearly owe a duty of care to the passengers it transports and as such passengers would have the further recourse by way of a claim in tort.

70. Secondly, the licensee remains obligated to meet ongoing financial requirements based on the air services it provides under the Act. Given that all of the protection under the Act is placed at the foot of the licensee, the financial fitness of the licensee is what should be important to passengers. The fact that a passenger also has recourse against the reseller for breach of contract provides the passenger with an additional level of protection that is not present in a normal air carriage contract.

71. Lastly, the Decision expressly confirms that where a reseller, who does not meet the Canadian requirement, and is deemed to own or control a

licensee, that licensee will fail to satisfy the requirements under ss. 57 and 61. Consequently, there is no inconsistency between the Decision and the Act on that point.

Agency Decision, Appeal Book Tab 2, page 17, para. 41

72. NewLeaf submits that a passenger who books a flight through a reseller has the same regulatory protection as a passenger who booked a flight through the licensee directly. In fact, as was suggested earlier, passengers are arguably in a better position booking through a reseller because it then has an additional party from whom they can seek compensation.

73. Further, the only evidence that the Appellant offers to show that passengers would not be protected by the licensee for various statutory protection is a quote from the Agency's consultation paper. The Appellant attributes legal import to the consultation paper, which it cannot bear (**Appellant's Memorandum, page 22, para. 80**). The approach presented by the Agency in the consultation paper was merely an approach under consideration. The Agency requested submissions from interested parties and was not bound by the proposed or any other approach. What is relevant to this appeal is the Decision itself.

74. The Decision expressly states that the passenger will maintain regulatory protection from the licensee and a further layer of protection against the reseller in the form of any applicable consumer protection legislation. Consequently, there is no basis upon which this Court can conclude that passengers are not protected by the licensee.

Agency Decision, Appeal Book Tab 2, page 17, para. 38

75. In sum, the Appellant appears to be presuming that privity of contract usurps statutory protections, which is simply not true. The interpretation of the Act favoured by the Decision clearly does not circumvent any portion of the Act, as the licensee remains responsible for those statutory obligations. As such,

the interpretation favoured by the Agency in its Decision is neither unreasonable nor did it create an absurd result. It is sound and unassailable reasoning which ought not to be overturned.

(b) Binding Precedence

76. The Appellant raises the doctrine of binding precedence of past decisions. NewLeaf submits that this doctrine has no applicability in the case of federally appointed boards, tribunals and other administrative decision-makers.

77. Administrative decision-makers, whether tribunals, boards or the Agency are not bound by their previous decisions, as evidenced in the following pronouncements:

> [40] Accordingly, decisions of the Council must be treated in the same manner as those of any federally constituted administrative board, commission or other tribunal, that is, its decisions do not create binding precedent, nor is it bound by the doctrine of stare decisis; see the decision in *Domtar Inc. v. Quebec (Commission d'appel en matière de lesion professionnelles)*, 1993 CanLII 106 (SCC), [1993] 2 S.C.R. 756.
>
> [41] Accordingly, in my opinion, the Council's decisions do not constitute "jurisprudence" within the ordinary meaning and usage of that word and have no precedential value, as per the decision in *Domtar*, *supra*. [Emphasis Added]
>
> ***Singh v. Canada (Attorney General)*, 2015 FC 93 (CanLII) at paras 40-41**

78. The following quote is also apt:

> [42] According to the decision of the Supreme Court of Canada in *Domtar Inc. v. Quebec (Commission d'appel en matière de lesion professionnelles)*, 1993 CanLII 106 (SCC), [1993] 2 S.C.R. 756, decisions of federally constituted boards, commissions or other tribunals do not create binding precedent.
>
> [43] As discussed in the recent decision of *Jones' Masonry Ltd. v. Labourers' International Union of North America, Local*

> *900* (2013), 408 N.B.R. (2d) 163 (N.B.C.A.), the doctrine of stare decisis does not apply in the context of administrative tribunals.
>
> …
>
> [45] In *Domtar*, supra at pages 784-801, the Supreme Court considered the issue of inconsistent decisions among administrative decision makers, and concluded that where decisions made within jurisdiction are not unreasonable, the principle of deference prevails; see page 795 of *Domtar*, supra.
>
> [46] The Court observed at page 786 of that decision, that if courts are required to review administrative decision-makers for inconsistency, it would risk transforming judicial review into an appellate jurisdiction, contrary to the legislative intent of Parliament. The Court concluded that the existence of a conflict in decisions as an independent basis for judicial review would undermine the principles of decision-making freedom and independence bestowed upon administrative decision-makers by Parliament; see the decision in *Domtar*, supra at pages 800-801.
>
> [47] This summary of the jurisprudence makes it clear that the resolution of conflicting tribunal decisions is not the role of courts in conducting judicial review; see the decision in *Jones' Masonry*, supra at paragraph 6.
>
> [Emphasis Added]

***Canada Post Corporation v. Canadian Union of Postal Workers*, 2015 FC 682 (CanLII) at paras 42-48**

79. The Agency is entitled to refine and change its interpretation of statutory terms, such as "operates an air service", based on the National Transportation Policy which favors competition and market forces and discourages conditions which create an undue obstacle to the movement of traffic.

***Canadian Pacific Railway Company v. Canada (Transport, Infrastructure and Communities)*, 2015 FCA 1 at para. 61**

80. In particular, the Agency is not bound by the 1996 Greyhound Decision. It is irrelevant to consider that this decision has been followed in the past. The Decision uses a method that is clear, cogent, and, in particular, it addresses

legislative changes and policy documents, and the evolution of regulatory thinking. These factors inoculate the Decision from review on this Appeal.

81. Therefore, the Agency did not commit a reviewable error in its decision to depart from the 1996 Greyhound decision, nor did it commit a reviewable error in its analysis or reasoning used in arriving at the Decision.

82. Moreover, in order for the Appellant's argument to be consistent, he would have to conclude that the GIC decision, which overturned the Greyhound decision, was itself based on a reversible error in law, something the Appellant cannot do.

83. The Appellant's proper course should have been to proceed with a petition to the GIC under s. 40 of the Act for 3 reasons:

a. The GIC is given supervisory authority over Agency decisions.
b. Parliament has granted the GIC wide authority and flexibility to structure the air transportation in any way it deems appropriate; provided it is not in contravention of the clear legislative provisions to the contrary.
c. The historical course of review of the role of resellers has been through the auspices of the GIC, and should continue to reside there.

Multiple Statutory Interpretations Can Be Reasonable

84. Furthermore, it is permissible and indeed expected that multiple reasonable statutory interpretations can be sustained by the same statutory provision. This was most recently affirmed by the Federal Court in *Jam Industries*:

> [20] The difficulty with that argument is that, even if the CITT has departed from its own prior jurisprudence that fact alone does not prove that the decision in issue here is unreasonable, and does not give rise to a distinct ground of judicial intervention. In *Domtar Inc. v Québec (Commission d'appel en matière de lésions professionnelles)*, 1993 CanLII 106 (SCC), [1993] 2 S.C.R. 756, the Supreme Court held that a

> conflict in the interpretation of a single provision by different tribunals, or differing interpretations of a single provision by different panels of the same tribunal, is not an independent ground of judicial review: see para. 83, 93. If the language of the statute is capable of supporting each interpretation, then both can stand.

***Jam Industries Ltd. v. Canada (Border Services Agency)*, 2007 FCA 210 at para 20**

85. The Agency has effectively stated that the most reasonable decision among reasonable alternatives, considering the object and purpose of the Act, the nature of the scheme and the intention of Parliament as it is known is that which is espoused in the Decision.

86. It is not for the Appellant to suggest that he has a more reasonable or another superlative alternative. He must either demonstrate that the Decision is unreasonable because there is only one reasonable interpretation of the subject matter of the Decision, or he must demonstrate within a range of possible outcomes the Decision fails to fall inside that range and is therefore unreasonable; a Sisyphean task.

***McLean v. British Columbia (Securities Commission)*, [2013] 3 SCR 895, 2013 SCC 67 at paras 37-41**

NewLeaf Decision

87. The Appellant cannot advance his request for a remedy in respect of NewLeaf. S. 41 of the Act permits an appeal to this Court on a question of law or a question of jurisdiction only.

88. S. 41 has been judicially interpreted by the Supreme Court of Canada as being expressly limited vis-à-vis its preceding section, section 40, which permits a near plenary right of review to the GIC:

> [41] By contrast, where Parliament intended to circumscribe an avenue of review, it did so expressly. Section 41, for example, places a number of

> restrictions on the right to appeal a decision of the Agency to the Federal Court of Appeal: appeals under s. 41 are limited to questions of law or jurisdiction, (…) The limitations contained in s. 41 provide strong indication that Parliament directed its attention to the issue of restrictions on the avenues of review and included intended limitations expressly.
>
> [Emphasis Added]

***Canadian National Railway Co. v. Canada (Attorney General)*, [2014] 2 SCR 135, 2014 SCC 40 at para 41**

89. The Appellant's challenge of NewLeaf necessarily requires a consideration of the factual matrix; including NewLeaf's history, its contractual agreements, its financial fitness, its directors and its ability to meet the "Canadian" test, among a multitude of other factual considerations, which necessarily renders the nature of that question at issue one of either mixed fact and law or of fact alone, which is not within the purview of the Court on an appeal under s. 41 of the Act.

PART IV – ORDER SOUGHT

90. The Respondent, NewLeaf Travel Company Inc., submits that this Appeal should be dismissed and should be awarded costs on an enhanced party-party basis, in respect of the Appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 8TH DAY OF AUGUST 2016

D'ARCY & DEACON LLP
Per:

_____
BRIAN J. MERONEK, Q.C /
IAN S. MCIVOR / BRIAN P. HENNINGS

Counsel for the Respondent
NewLeaf Travel Company Inc.

PART V – AUTHORITIES

Statutes and Regulations

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

Canada Transportation Act, S.C. 1996, c. 10

Legislative History

National Transportation Act, 1987 [Repealed], R.S.C. 1985, Chap. 28 (3rd Supp.)

Agency Decision

Decision No. 390-A-2013

Case Law

McLean v. British Columbia (Securities Commission) [2013] 3 SCR 895

Lukacs v. Canadian Transportation Agency, 2014 FCA 76

Canadian National Railway Company v. Canadian Transportation Agency and The Attorney General of Canada, 2008 FCA 363

ATCO Gas and Pipelines Ltd. v. Alberta (Utilities Commission), [2015] 3 SCR 219

Bell ExpressVu Ltd. Partnership v. Rex, 2002 SCC 42, 2002 CarswellBC 851

Dunsmuir v. New Brunswick, 2008 SCC 9

Canada Post Corporation v. Canadian Union of Postal Workers, 2015 FC 682

Singh v. Canada (Attorney General), 2015 FC 93

Canadian Pacific Railway Company v. Canada (Transport, Infrastructure and Communities), 2015 FCA 1

Jam Industries Ltd. v. Canada (Border Services Agency), 2007 FCA 210

Canadian National Railway Co. v. Canada (Attorney General), [2014] 2 SCR 135, 2014 SCC 40