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TRANSPORTATION NOTES

Legal Decisions and Developments Affecting the Transportation Industry in Canada

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Resellers of "air services" are not required to obtain a CTA Licence

NewLeaf Travel Company Inc. ("NewLeaf") has been described as a Canadian "virtual airline" and "ticket seller". Its business model is to sell ultra low-cost air services, primarily to secondary airports in Canada, in conjunction with Flair Airlines Ltd. ("Flair"). As part of the arrangement, Flair provides the aircraft, crew and maintenance. It holds an AOC and a licence from the Canadian Transportation Agency (the "Agency"). NewLeaf has never held such designations.

Indeed, NewLeaf does not own or operate any aircraft at all. Rather, its role is to sell tickets on services operated by Flair.

On January 6, 2016, NewLeaf announced that it would begin flights on February 12, 2016. This date was subsequently postponed when the Agency announced that it would be reviewing the arrangement to determine whether this particular business model does, in fact, require a licence.

The Agency released its decision on March 30, 2016, concluding that a licence is not required. The analysis started with a review of s. 57(a) of the *Canada Transportation Act*, S.C. 1996 (the "*Act*") which states that:

> … no person shall operate an air service unless, in respect of that service, the person holds a licence issued under Part II of [the *Act*].

The term "air service" is defined under s. 55(1) of the *Act* as "a service, provided by means of an aircraft, that is publicly available for the transportation of passengers or goods, or both". The term "operate" is not defined in the legislation.

Put differently, if NewLeaf's business model is caught under s. 57(a) of the *Act*, NewLeaf is subject to the full panoply of regulatory oversight found in the *Act*, including tariff filing provisions, financial requirements and Canadian ownership regulations.

After considering the key statutory provisions, the Agency referenced to the changes made in Canada in the 1980s where the industry was significantly de-regulated, which resulted in operational efficiencies that allowed for new approaches to the sale of air services, including the "reseller model".

The Agency then reviewed a number of its past rulings on various incantations of the "reseller model", for example:

- a 1996 attempt by Greyhound Lines of Canada Ltd. ("Greyhound") (not licenced) to partner with Kelowna Flightcraft Air Charter Ltd. ("Kelowna") (licensed) wherein the Agency found that Greyhound would require a licence because it had commercial control over the sale of the air service even if it didn't operate the aircraft. (see CTA Decision Nos. 232-A-1996 and 292-A-1996);
- the Agency's decision in the Greyhound matter was reversed by the Governor in Council (through OIC No. P.C. 1996-849), wherein the GIC found that Greyhound was not operating an "air service" but required Greyhound to inform all prospective purchasers that Kelowna would be providing the air service; and
- in 2009, the Agency's confidential decision that a licence was required was again overturned by the GIC (by OIC No. P.C. 2010-1143) when it allowed American Medical Response of Canada Inc. to function without a licence.

In reviewing history of the Greyhound situation, the Agency noted that it only applied that approach to resellers of domestic air services because the *Air Transportation Regulations,* SOR-88-58, explicitly require that the air carrier, not the reseller, must have a licence for international air services.

The Agency also noted that there are 14 resellers that hold licences for domestic air services. As a result, to bring clarity to the situation, the Agency decided to use the NewLeaf model as a basis to initiate and internal review of "whether resellers are operating air services and are therefore required to hold a licence". As part of the process, the Agency held public consultations.

The Agency had two issues to decide. First, generally speaking, whether resellers operate air services and should therefore be required to hold an air licence. Secondly, if so, whether NewLeaf is required to do so.

On the first issue, the Agency applied the often cited decision of the Supreme Court of Canada in *Rizzo & Rizzo Shoes (Re)*, [1998] 1 SCR 27 when interpreting what it means to "operate an air service". In essence, as stated by the Agency, *Rizzo* requires that in interpreting statutory language "the words are to be read in their entire context and in their grammatical and ordinary sense, harmoniously with the scheme of the legislation, the object of the legislation, and the intention of Parliament".

In applying these principles in this case, the Agency gave high regard to:

- the plain meaning and context of the statutory language;
- the history of the statutory language;
- the national transportation policy;

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Resellers of "air service" are not required to obtain a CTA licence *(cont'd)*

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- the Agency's passenger protection and Canadian ownership goals; and
- the manner in which resellers hold themselves out in public.

On the issue of ***the plain meaning and context of the statutory language***, the Agency first noted that, in drafting the *Act*, Parliament explicitly refrained from requiring entities that do not operate aircraft to hold a licence. The Agency also observed that while s. 57 of the *Act* requires the operator of an air service to hold a licence, s. 59 does not require a person selling that air service to be a licensee.

After reviewing the changes to the licensing requirements that occurred on de-regulation, the Agency concluded that Parliament did not intend for domestic licensing requirements to apply to entities that purchase air carriers' aircraft capacity (i.e. charterers) for resale by them to the public where those charterers do not operate the aircraft providing those services.

On the issue of the ***Canadian national transportation policy***, the Agency noted, from s. 5 of the *Act*, that the object of the legislation was to create and maintain "a competitive, economic and efficient national transportation system that meets the highest practicable safety and security standards." The Agency also found that regulation should, for the most part, be targeted to situations where market forces will not achieve the desired results.

The Agency concluded, on this aspect of its deliberations, that the national transportation policy is served when a reseller does not have a licence, but the partner air carrier does.

On the issue of ***passenger protection***, the Agency noted that the primary features of the *Act* that accomplish this end are requirements that operators:

- have, display and apply a clear tariff that is reasonable and not unduly discriminatory;
- meet the prescribed financial requirements, such that underfunded applicants do not enter the marketplace; and
- maintain the required minimum passenger and third party liability insurance in force.

The Agency found that, even if resellers were not required to comply with the above requirements, the public was still protected because the licenced air operator would be required by the *Act* to ensure that the above protections are in place.

Turning to the issue of ***Canadian ownership***, the Agency found that if a reseller were ever to own or control a licenced Canadian air carrier, that carrier would no longer qualify for a licence — so the protection remains. Moreover, the Agency noted that non-Canadian charterers have operated in the market for decades — and that such charterers have been reselling services of Canadian air carriers for years without any government intervention.

Turning to the issue of '***holding-out' as an air carrier operating an air service***, the Agency held that to the extent that such activity occurs, a licence would be required. The question then is how to determine whether a person is promoting himself as an air carrier. The Agency gave some examples of *indicia* of 'holding-out':

- providing images of aircraft with their livery and using business name(s) and words/ phrases that create the impression that they are an air carrier; and
- lack of clear disclosure on the reseller's website, promotional material and on the tickets it issues as to which entity is operating the service.

The Agency warned that resellers that took a passive role in clarifying their involvement in the transportation being sold could be found to be "operating an air service".

The issue then became whether, applying the above considerations, NewLeaf required a licence from the Agency. In the course of the Agency's inquiry into this matter, the following facts were found:

- initially, NewLeaf would operate as a "charter" or a "tour operator" as defined in the *ATR*s—marketing air services on its own behalf and enter into a charter arrangement with Flair;
- NewLeaf may, in the future, sell the air services as part of a bundled tour;
- NewLeaf would be responsible from the check-in counter to the jet bridge door as well as baggage handling (directly or through a third party);
- NewLeaf would not acquire, lease or operate any aircraft or other airport infrastructure; and
- although NewLeaf would make it clear that Flair would operate the air services, it was possible that Flair's livery or other infrastructure would highlight its collaboration with NewLeaf.

In the end, even though submissions were filed by another air carrier opposing the application, the Agency found that NewLeaf would not be considered to be "operating an air service" and, therefore, did not require a licence from the Agency. If, however, NewLeaf were ever to purchase Flair, NewLeaf would have to comply with the usual licensing regime.

In Re NewLeaf Travel Company Inc.,
CTA Decision No. 100-A-2016

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