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May 31, 2013

VIA EMAIL

The Secretary
Canadian Transportation Agency
Ottawa, Ontario, K1A 0N9

Attention: Ms. Sylvie Giroux, Analyst

Dear Madam Secretary:

Re: Dr. Gábor Lukács v. Porter Airlines
Complaint about Porter Airlines' Domestic Tariff Rule 16
File No. M 4120-3/13-01412
Reply

On March 6, 2013, the Applicant filed a complaint with the Agency concerning the unreasonableness of a number of provisions contained in Porter Airlines' Domestic Tariff Rule 16, including a 2-page long unnumbered provision (the "Current force majeure clause") starting with "Notwithstanding any other terms or conditions contained herein..." on 3rd Revised Page 31 and ending with the words "No refund will be available" on Original Page 33 of Porter Airlines' Domestic Tariff.

On May 24, 2013, Porter Airlines filed its answer, in which it conceded that its Current Rules 16(c), 16(e), 16(g), and force majeure clause are inconsistent with the principles of the *Montreal Convention*. It also conceded that Current Rule 16(f) duplicated Current Rule 16(d), and agreed to eliminate it. At the same time, Porter Airlines proposed a wealth of amendments to Rule 16 and an addition to Rule 1 (the "Proposed Rules 16 and 1").

Please accept the following submissions in related to the above-noted matter as a reply to Porter Airlines' answer of May 24, 2013.

ISSUES

I. Material misrepresentations by Porter Airlines about its Current Rule 16

Appendix "A" to the May 24, 2013 answer of Porter Airlines purports to be the Current Rule 16 of Porter Airlines' Domestic Tariff.

This is clearly not the case, and Appendix "A" grossly misrepresents the provisions of Porter Airlines' Current Rule 16 in that it omits the contents of 1st Revised Page 32 and Original Page 33 of Porter Airlines' Domestic Tariff. Copies of these pages are part of Exhibit "A" to the Applicant's March 6, 2013 complaint.

The Applicant submits that this is a material omission and misrepresentation, especially because Rule 16 ends with the following blatant blanket exclusion of liability:

> Upon the happening of any of the foregoing events, the Carrier may without notice cancel, terminate, divert, postpone or delay any flight whether before departure or enroute. If the flight, having commenced is terminated, the carrier shall refund the unused portion of the fare and shall use its best effort to provide alternate transportation to the destination for the passengers and baggage at the expense and risk of the passenger or shipper. If the flight has not commenced prior to termination, the carrier will provide a credit equal to the paid fare which will be available for use in the purchase of a new ticket on the same terns for a period of one year from the date of termination. No refund will be available.

The Applicant is asking the Agency to expunge Appendix "A" to the May 24, 2013 answer of Porter Airlines for being incomplete, and thus misleading.

II. Clarification of the scope of the present complaint

In paragraph 5(a) of its May 24, 2013 answer, Porter Airlines is asking that the Agency:

> dismiss Mr. Lukács's Complaint with respect to sub-rules 16(a), 16(b) and 16(d) of the Current Rule 18;
>
> [Emphasis added.]

The Applicant would like to clarify that Current Rule 18 was not challenged in the Applicant's March 6, 2013 complaint, and thus its reasonableness is not before the Agency in the present proceeding. The Applicant strongly suspects that the aforementioned paragraph contains a typo and "18" should read "16".

The Applicant would like to further clarify that, as Porter Airlines correctly noted, the Applicant presented no arguments to challenge the reasonableness of Current sub-rules 16(a), 16(b), or 16(d), and indeed, he did not challenge these provisions.

The reason that the Applicant asked the Agency to "disallow Porter Airlines' Domestic Tariff Rule 16 in its entirety, or in part" was to ensure that the unnumbered 2-page long provision (starting with "Notwithstanding any other terms or conditions contained herein..." on 3rd Revised Page 31 and ending with the words "No refund will be available" on Original Page 33 of Porter Airlines' Domestic Tariff) does not evade scrutiny in the present proceeding.

Finally, in paragraphs 69-71 of its May 24, 2013 answer, Porter Airlines argues that Current Rule 16 does not affect Porter Airlines' liability with respect to baggage. The Applicant respectfully disagrees, because the unnumbered 2-page long provision in Current Rule 16 states that:

> Notwithstanding any other terms or conditions contained herein, the Carrier shall not be liable for failure in the performance of any of its obligations due to:
>
> [...]
>
> Upon the happening of any of the foregoing events, the Carrier may without notice cancel, terminate, divert, postpone or delay any flight whether before departure or enroute. If the flight, having commenced is terminated, the carrier shall refund the unused portion of the fare and shall use its best effort to provide alternate transportation to the destination for the passengers and baggage at the expense and risk of the passenger or shipper. If the flight has not commenced prior to termination, the carrier will provide a credit equal to the paid fare which will be available for use in the purchase of a new ticket on the same terms for a period of one year from the date of termination. No refund will be available.
>
> [Emphasis added.]

Not only do these provisions explicitly refer to baggage, but they also purport to relieve Porter Airlines from all its obligations, including with respect to delivery of baggage to the passenger.

The Applicant notes that in light of Porter Airlines' admission that these provisions are inconsistent with the principles of the *Montreal Convention*, this point may well be moot.

III. Porter Airlines' Current Rule 16

In paragraph 22 of its May 24, 2013 answer, Porter Airlines conceded that Current Rules 16(c), 16(e), 16(g) and the unnumbered 2-page long force majeure clause are inconsistent with the principles of the *Montreal Convention*. As such, it is submitted that these provisions are unreasonable. In the absence of any objection from Porter Airlines, the Agency ought to find these provisions unreasonable, and ought to disallow them.

As noted earlier, the Applicant did not challenge or intend to challenge Current Rules 16(a), 16(b), or 16(d), and as such, the Agency does not need to rule on their reasonableness.

IV. Is Porter Airlines' Proposed Rule 16 clear?

Sections 107(1)(n) and 122(c) of the *Air Transportation Regulations*, S.O.R./88-58 (the "*ATR*") provide that the tariff of every carrier must set out the terms and conditions of carriage, which are a collection of the carrier's policies with respect to a wealth of enumerated issues. The *ATR* also provide that the tariff provisions must be clear.

The legal test for clarity has been established by the Agency in *H. v. Air Canada*, 2-C-A-2001, and has been applied more recently in *Lukács v. WestJet*, 418-C-A-2011, *Lukács v. WestJet*, 249-C-A-2012, and *Lukács v. Porter Airlines*, 16-C-A-2013:

> [...] the Agency is of the opinion that an air carrier's tariff meets its obligations of clarity when, in the opinion of a reasonable person, the rights and obligations of both the carrier and passengers are stated in such a way as to exclude any reasonable doubt, ambiguity or uncertain meaning.
>
> [Emphasis added.]

The Applicant submits that certain provisions of Proposed Rule 16 fail to be clear, contrary to s. 107(1)(n) of the *ATR*.

(a) Part of Proposed Rule 16(b) contradicts and negates Proposed Rule 16(c)

The relevant portion of Proposed Rule 16(b) reads as follows:

> (b) Schedules are subject to change without notice, [...]
>
> [Emphasis added.]

At the same time, Proposed Rule 16(c) states that:

> (c) The Carrier will make reasonable efforts to inform passengers of delays and schedule changes and, to the extent possible, the reason for them.

The Applicant submits that these two provisions contradict each other or would appear as contradicting each other to a reasonable person, because the phrase "without notice" in Proposed Rule 16(b) purports to relieve Porter Airlines of any obligation to inform passengers of delays and schedule changes, and thus negates the obligation stated in Proposed Rule 16(c).

Thus, it is submitted that Proposed Rule 16 is ambiguous with respect to the obligations of Porter Airlines to inform passengers of delays and schedule changes.

(b) Proposed Rule 16(d) is unclear

Proposed Rule 16(d) states that:

> It is always recommended that passengers communicate with the Carrier either by telephone, electronic device or via the Carrier's Web site or refer to airport terminal displays to ascertain the flight's status and departure time.

In paragraph 39 of its May 24, 2013 answer, Porter Airlines noted that this provision was taken from the Agency's Sample Tariff; however, Porter Airlines omits to acknowledge that the Sample Tariff is provided to carriers together with the following warning:

> **Important Qualifiers**
>
> This Sample Tariff has been prepared by Agency staff and does not represent an Agency endorsement or approval of its terms. If a carrier chooses to adopt the Sample Tariff as its own, in whole or in part, it can still be subject to Agency review and complaints filed pursuant to the CTA or the ATR. The Agency, upon investigating a complaint or on its own motion, could find a carrier's tariff provision to be unreasonable and require a carrier to amend its tariff accordingly even if the carrier's tariff reflects the wording of the Sample Tariff.

Thus, the Applicant submits that the fact that this provision was included in the Agency's Sample Tariff does not speak either to its clarity or the reasonableness of any provision.

In the case of Proposed Rule 16(d), the Applicant challenges its clarity, because Proposed Rule 16(d) does not convey any obligation of either the passenger or the carrier. The possibility of a misunderstanding of the meaning of a "recommendation" that is included in the tariff is not remote at all, but rather very real and substantial, as the case *McIntyre v. Air Canada*, 54-C-A-2006 demonstrates (para. 14):

> Air Canada indicates that the recommended check-in time set out in its Tariff for flights within Canada is 60 minutes in advance of a flight and that failing to meet this requirement will result in the cancellation of a passenger's reservation.
>
> [Emphasis added.]

The Agency disagreed with Air Canada, and held (para. 27):

> The recommendation that passengers be available for check-in 60 minutes prior to the schedule departure is not an enforceable Tariff provision.

However, the damage was already done to the passengers, who were not allowed to travel even though the Agency found that they presented themselves in time for check-in.

As this case demonstrates, recommendations are not enforceable tariff provisions, they do not convey rights or obligations of either the passengers or the carrier, and the misunderstandings that they may cause can lead to substantial damage.

Thus, the Applicant submits that while a carrier is entitled to display various travel tips and recommendations on its website, such recommendations do not and cannot form part of the contract of carriage, they are not terms and conditions of carriage, and as such they ought not be included in the carrier's tariff.

Therefore, the Applicant submits that Proposed Rule 16(d) fails to be clear, and ought not be included in Porter Airlines' tariff as it contains no "terms and conditions of carriage" or any other information that a tariff is to contain pursuant to s. 107(1) of the *ATR*.

The Applicant would like to emphasize that he finds nothing untoward in Porter Airlines posting Proposed Rule 16(d) on its website among its travel tips and recommendations.

V. Are Porter Airlines' Proposed Rules 16 and 1 reasonable?

Porter Airlines proposed to amend its Rule 16 and Rule 1 in its May 24, 2013 answer (Appendix "B"). The Applicant does not challenge the reasonableness of Proposed Rules 16(a) and 16(e), but has misgivings of varying degrees about the other provisions of Proposed Rule 16 and 1.

(a) Proposed Rule 16(b): responsibility for making connections – *res judicata*

Proposed Rule 16(b) states, among other things, that:

> (b) [...] the carrier assumes no responsibility for the passenger making connections.

Although Porter Airlines made numerous submissions about other portions of Proposed Rule 16(b), it did not make any submissions in support of the reasonableness of this provision, and there is a good reason for it.

In *Lukács v. Porter Airlines*, 16-C-A-2013, the Agency considered Porter Airlines' International Tariff Rule 18(c) that contained a similar disclaimer of liability with respect to making connections, and concluded that:

> [49] As noted by Mr. Lukács in his submission, Porter neglected to mention that a provision appearing in Existing Tariff Rule 18(c) exempts Porter from liability for failure to make connections, to operate any flight according to schedule, or for changing the schedule of any flight.
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> ⋮

> [51] Existing Tariff Rule 18(c) is silent on the matter of the liability assumed by Porter should a flight be delayed, and Porter is unable to provide the proof required by Article 19 of the Convention to relieve itself from such liability. The Agency finds that the absence of a provision to this effect renders Existing Tariff Rule 18(c) inconsistent with Article 19 of the Convention, and that Rule is therefore unreasonable.

Since this issue was fully argued in the aforementioned case before the Agency by the same parties and Porter Airlines provided no reasons to question the correctness of that decision, the Applicant submits that the doctrine of *res judicata* applies, and Porter Airlines is bound by the conclusion of the Agency in *Lukács v. Porter Airlines*, 16-C-A-2013.

Furthermore, the Applicant notes that courts have consistently held that a carrier cannot relieve itself from liability for missed connections; not only missed connecting flights, but also other modes of transportation can trigger liability. For example, in *Assaf c. Air Transat A.T. Inc.*, 2002 CanLII 3662 (QC C.Q.), passengers missed a boat they were supposed to board at their destination because of a flight delay. The carrier refused to provide the passengers with seats on another airline's flight that would have enabled the passengers to board the boat at a later port. The passengers missed four days of their cruise as a result of the carrier's actions. The court considered Articles 19, 20(1), and 23 of the *Warsaw Convention* (the predecessor of the *Montreal Convention*), and held that the carrier failed to take "all measures that could reasonably be required" to avoid the passengers' damage.

Therefore, it is well established that the impugned portion of Proposed Rule 16(b) is inconsistent with the principles of the *Montreal Convention*, and as such, it is unreasonable.

(b) Proposed Rule 16(b): responsibility for errors or omissions in timetables or other representations

Proposed Rule 16(b) also provides that:

> (b) [...] The carrier will not be responsible for errors or omissions either in timetables or other representations of schedules.

The Applicant submits that this provision is unreasonable, because it relieves Porter Airlines from the duty of due diligence to provide accurate information to passengers about its timetables and schedules. This duty is independent of Porter Airlines' right to change its schedule.

While the Agency recognized in *Lukács v. Porter Airlines*, 16-C-A-2013 that carriers should have the latitude required to *amend* flight schedules based on commercial and operational obligations (para. 44), it also recognized the passengers' fundamental right to be informed about schedule changes that affect their itinerary and their ability to travel (para. 87).

As the following example demonstrates, Proposed Rule 16(b) would relieve Porter Airlines from liability even in a case where a passenger misses his flight due to Porter Airlines providing grossly inaccurate information about its schedule.

Example. A passenger purchases a ticket on a Porter Airlines flight departing at 10:30 am on June 23, 2013. The day before the flight (June 22, 2013), the passenger phones Porter Airlines (as per the "recommendation" set out in Proposed Rule 16(d)) to confirm the departure time of his schedule. The Porter Airlines' agent informs the passenger that his flight was rescheduled to depart two hours later, at 12:40 pm. Based on this information, the passenger presents himself for check-in only at 10:40 am (2 hours before the new departure time), and is told that he was provided incorrect information on the phone: the flight left at 10:35 am.

While common sense dictates that in such a situation, Porter Airlines is liable for the passenger having missed his flight due to incorrect information that Porter Airlines itself provided, Proposed Rule 16(b) purports to relieve Porter Airlines from such a liability, and leaves the passenger without any recourse, even if the passenger suffers a substantial delay.

Thus, it is submitted that this portion of Proposed Rule 16(b) is unreasonable because it purports to relieve Porter Airlines from liability for the consequences of providing inaccurate information to passengers, including liability for delay that follows as a result of the misinformation.

Therefore, it is submitted that the impugned portion of Proposed Rule 16(b) is also unreasonable because it is inconsistent with the legal principles of the *Montreal Convention*.

(c) Proposed Rule 16(c): are "reasonable efforts" always sufficient?

Proposed Rule 16(c) states that:

> The Carrier will make reasonable efforts to inform passengers of delays and schedule changes and, to the extent possible, the reasons for them.

While the Applicant acknowledges that this proposal is an improvement compared to the current state of affairs, the Applicant submits that making "reasonable efforts" sets the bar too low for Porter Airlines in some circumstances. Indeed, in *Re: Air Transat*, LET-A-112-2003, the Agency held, under the heading "Passenger Notification," that:

> The Agency is of the opinion that Air Transat should undertake to notify passengers of all schedule irregularities, not just flight advancements.
>
> [Emphasis added.]

The Applicant agrees with the Agency's view expressed in this decision, and submits that the phrase "will make reasonable efforts" ought to be replaced with the more onerous "undertakes."

While in the case of flight delays, failing to notify passengers usually causes only inconvenience, in the case of advancement of flight schedules, the failure of Porter Airlines to inform passengers about the schedule change will likely result in passengers not being able to travel at all, because they miss the check-in cut-off times.

Example. A passenger purchases a ticket on a Porter Airlines flight departing at 10:30 am on June 23, 2013. Porter Airlines decides to advance the flight's departure to 8:20 am for operational reasons, but due to shortage of staff, it is unable to call the passenger and inform him about the schedule change. The passenger presents himself for check-in at 8:30 am (two hours before what he believes to be the scheduled departure time), and finds out that his flight was advanced and left at 8:20 am.

Under Proposed Rule 16 in general, and Proposed Rule 16(c) in particular, the passenger is left without any rights or remedies; however, if the word "undertakes" appeared in Proposed Rule 16(c), then the passenger would have a recourse, because Porter Airlines did not notify him about the flight advancement.

Thus, it is submitted that Proposed Rule 16(c) unreasonably deprives passengers of any remedy and relieves Porter Airlines from liability if Porter Airlines fails to notify the passenger about schedule change, and this failure results in the passenger's inability to travel (e.g., missing the flight).

Therefore, it is submitted that Proposed Rule 16(c) is unreasonable, and the Agency ought to direct that Porter Airlines substitute "will make reasonable efforts" with "undertakes" in it.

(d) Proposed Rule 16(f) is unreasonable

Proposed Rule 16(f) states that:

> Except with respect to compensation available to passengers under Rule 16, the Carrier will not guarantee and will not held liable for cancellations or change to scheduled flight times due to an Event of Force Majeure.

In addition to the Applicant's misgivings about Porter Airlines' proposed definition of "Event of Force Majeure" (which are spelled out below), the Applicant submits that Proposed Rule 16(f) is unreasonable for a number of reasons.

(i) *Montreal Convention:* What matters is how Porter Airlines reacts to the Event, not the cause of the Event

As the Agency explained in *Lukács v. Porter Airlines*, 16-C-A-2013, what determines liability for delay is not the cause of the delay, but rather how the airline reacts to events that may cause delay, even if these events may have been caused by third parties that are not directed by the carrier:

> [105] Accordingly, what is at issue, in terms of avoiding liability for delay, is not who caused the delay but, rather, how the carrier reacts to a delay. In short, did the carrier's servants and agents do everything they reasonably could in the face of air traffic control delays, security delays on releasing baggage, delays caused by late delivery of catered supplies or fuel to the aircraft and so forth, even though these may have been caused by third parties who are not directed by the carrier?
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> [Emphasis added.]

Since Proposed Rule 16(f) deals with flight cancellations and schedule changes, it is difficult to understand what kind of liability, other than liability for delay, this provision aims to contract out. Indeed, Porter Airlines provided no explanation or examples of scenarios where it may wish to invoke Proposed Rule 16(f), but which do not already fall within the scope of "delay."

Thus, it is submitted that Proposed Rule 16(f) is an attempt to limit or exclude Porter Airlines' liability in the case of delay due to flight cancellation or schedule change based on the cause, rather than Porter Airlines' reaction, and as such it is inconsistent with the legal principles of the *Montreal Convention*.

Therefore, it is submitted that Proposed Rule 16(f) is inconsistent with the legal principles of the *Montreal Convention* in that it incorrectly focuses on the *cause* of the cancellations or schedule change, rather than on how Porter Airlines *reacts* to events.

(ii) In the case of failure to operate, passengers are entitled to a refund

Porter Airlines seems to suggest in paragraph 51 of its May 24, 2013 answer that the *Montreal Convention* is the only reason that the Agency disallowed provisions dealing with the rights of passengers in the case of flight cancellation and schedule changes. This is clearly not the case.

In Decision No. 28-A-2004, the Agency considered in great detail the rights of passengers for protection in the case of events that are beyond the passengers' control:

> By Decision No. LET-A-166-2003 dated August 7, 2003, the Agency advised Air Transat that it was not satisfied that Air Transat had shown cause as to why the Agency should not, pursuant to paragraph 113(b) of the ATR, substitute another tariff or portion thereof to make the tariff acceptable to the Agency. The Agency advised Air Transat that Rule 6.3 of Air Transat's tariff was not just and reasonable within the meaning of subsection 111(1) of the ATR, in that it does not provide adequate options to passengers affected by a schedule irregularity, and does not protect passengers from events that are beyond the passengers' control, and, therefore, does not allow passengers any recourse if they are unable to connect to other air carriers or alternate modes of transportation such as cruise ships or trains. [...]
>
> With respect to involuntary rerouting and passenger notification, the Agency advised Air Transat that the Agency found paragraphs (b) and (e) of Rule 5.2 to be

> not just and reasonable, as they do not provide the passenger with any recourse if the carrier can not arrange any reasonable transportation in the event of an involuntary rerouting. [...]
>
> [...]
>
> On September 30, 2003, Air Transat further advised the Agency that it was prepared to accept the principle of refunding the unused portion of a ticket in the event of a delay exceeding a certain amount of time, i.e., 36 hours.
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> [...] the Agency is of the opinion that Air Transat has not proven to the Agency's satisfaction, that it is reasonable to have a time limit in the event of a delay of 36 hours or more, after which Air Transat would refund the unused ticket or portion thereof.

Finally, the Agency substituted Air Transat's International Tariff Rule 6.3(d) with the following provision:

> 6.3(d) If the Carrier is unable to provide reasonable alternative transportation on its services or on the services of other carrier(s) within a reasonable period of time, then it will refund the unused ticket or portions thereof.

As this decision of the Agency demonstrates, passengers do have a fundamental right to a refund of their fares if the carrier is unable to transport them for any reason that is outside the passengers' control. This right exists regardless of the cause of the carrier's inability to transport passengers, as long as the reason is outside the passengers' control. (Obviously, no carrier is responsible for a passenger's failure to check-in on time, or for carrying adequate travelling documents.) In particular, the carrier cannot keep the fare paid by passengers and refuse to provide a refund on the basis that its inability to provide transportation was due to certain events.

Therefore, it is submitted that Proposed Rule 16(f) is unreasonable in that it fails to provide passengers with the right to seek a full refund if the carrier is unable to transport them within a reasonable amount of time.

(e) Proposed Rules 16.1 and 16.2: omission of the phrase "the carrier proves that"

The Applicant acknowledges that the vast majority of these provisions are reasonable; however, the Applicant submits that the phrase "the Carrier proves that" ought to be inserted into Proposed Rule 16.1(a)(d) [or more correctly, Proposed Rule 16.1(a)(i)] and Proposed Rule 16.2(b)(i) before "the Carrier and its employees and agents" in order to reflect the wording of Article 19 of the *Montreal Convention*. The purpose of this phrase is to ensure that the burden of proof of the affirmative defense is on the carrier, which is a central feature of the *Montreal Convention* that has been widely recognized by the courts in Canada (see, for example, *Lukács v. United Airlines et al.*, 2009 MBQB 29).

(f) Proposed addition to Rule 1: definition of "Event of Force Majeure"

Porter Airlines proposes to remedy the Applicant's complaint with respect to its Current unnumbered 2-page long Force Majeure clause by moving the definition of an "Event of Force Majeure" into Rule 1. The Applicant submits that this is no more than a cosmetic cure for a defect that requires a substantial surgery.

While there is no doubt that a number of the examples provided in the proposed definition of "Event of Force Majeure" are commonly and reasonably classified as such, the Applicant takes exception to paragraph (iv) of the definition, which lists numerous events that have been held by Canadian courts to *not* be Force Majeure.

In *Quesnel c. Voyages Bernard Gendron inc.*, [1997] J.Q. no 5555, the court held that:

> [15] [...] Certes, le transporteur aérien demeure tributaire des phénomènes atmosphériques. En revanche, il doit escompter la possibilité de bris mécaniques et prévoir pour cette raison des solutions efficaces de rechange afin d'assurer le service promis. Ce devoir s'accentue davantage lorsque ce transporteur effectue ce transport à partir de son principal établissement.

The same principal was cited with approval and applied in *Lukacs v. United Airlines*, 2009 MBQB 29 (leave to appeal denied; 2009 MBCA 111):

> [32] The court held that the airline must take into consideration the possibility of mechanical failures and provide for efficient solutions to assure the service contracted with the public. I agree.

Similarly, in *Lambert c. Minerve Canada*, 1998 CanLII 12973 (QC C.A.), the Quebec Court of Appeal held that:

> le bris mécanique de l'appareil n'est pas [...] dans les circonstances de l'espèce, constitutif de force majeure.

In the same vein, in *Elharradji c. Compagnie nationale Royal Air Maroc*, 2012 QCCQ 11, the court cited with approval a commentary on tourism law in Quebec (at para. 13):

> [...] les bris mécaniques ne sont généralement pas considérés comme une force majeure [...]

These Canadian decisions are consistent with the opinion of the European Court of Justice in *Wallentin-Hermann v. Alitalia*, Case C-549/07 (paras. 25-26), a decision that was cited with approval by the Agency in *Lukács v. Air Canada*, 204-C-A-2013.

Thus, most events of the type listed under paragraph (iv) of the proposed definition of "Event of Force Majeure" are not considered to be force majeure by Canadian courts or international author-

ities. Thus, it is submitted that the proposed definition of "Event of Force Majeure" is misleading and may prejudice passengers' ability to enforce their rights.

Furthermore, in light of the language of Article 19 of the *Montreal Convention*, which is already incorporated in Rule 16, it is difficult to see the purpose of introducing this cause-and-event based definition, which unnecessarily complicates the simple and straightforward liability regime of Article 19.

Therefore, the Applicant submits that the Proposed definition of "Event of Force Majeure" is unreasonable, and it ought to be disallowed.

All of which is most respectfully submitted.

Dr. Gábor Lukács
Applicant

Cc: Mr. Robert Deluce, President and CEO, Porter Airlines
Mr. Greg Sheahan, Counsel, Porter Airlines

LIST OF AUTHORITIES

Legislation

1. *Air Transportation Regulations*, S.O.R./88-58.
2. *Canada Transportation Act*, S.C. 1996, c. 10.
3. *Canadian Transportation Agency General Rules*, S.O.R./2005-35.
4. *Carriage by Air Act*, R.S.C. 1985, c. C-26.

International instruments

5. *Montreal Convention: Convention for the Unification of Certain Rules for International Carriage by Air* (Montreal, 28 May 1999).

Case law

6. *Assaf c. Air Transat A.T. Inc.*, 2002 CanLII 3662 (QC C.Q.).
7. *Elharradji c. Compagnie nationale Royal Air Maroc*, 2012 QCCQ 11.
8. *H. v. Air Canada*, Canadian Transportation Agency, 2-C-A-2001.
9. *Lambert c. Minerve Canada*, 1998 CanLII 12973 (QC C.A.).
10. *Lukács v. Air Canada*, Canadian Transportation Agency, 204-C-A-2013.
11. *Lukács v. Porter Airlines*, Canadian Transportation Agency, 16-C-A-2013.
12. *Lukács v. United Airlines et al.*, 2009 MBQB 29.
13. *Lukács v. WestJet*, Canadian Transportation Agency, 418-C-A-2011.
14. *Lukács v. WestJet*, Canadian Transportation Agency, 249-C-A-2012.
15. *McIntyre v. Air Canada*, Canadian Transportation Agency, 54-C-A-2006.
16. *Quesnel c. Voyages Bernard Gendron inc.*, [1997] J.Q. no 5555.
17. *Re: Air Transat*, Canadian Transportation Agency, LET-A-112-2003.
18. *Re: Air Transat*, Canadian Transportation Agency, 28-A-2004.

19. *Wallentin-Hermann v. Alitalia*, European Court of Justice, Case C-549/07.