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April 24, 2013

VIA EMAIL

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

Dear Madam Secretary:

Re: Dr. Gábor Lukács v. Air Transat
Complaint about Air Transat's International Tariff Rules 5.2(a) and 5.2(b)

Please accept the following submissions as a formal complaint pursuant to ss. 111 and 113 of the *Air Transportation Regulations*, S.O.R./88-58 (the "*ATR*"), and Rule 40 of the *Canadian Transportation Agency General Rules* concerning Air Transat's International Tariff Rules 5.2(a) and 5.2(b).

The Applicant submits that the aforementioned tariff rules are unreasonable within the meaning of s. 111 of the *ATR*, because they purport to relieve Air Transat from liability for failure to operate, failure to operate on schedule, and sudden changes to its flight schedule, and they are inconsistent with the legal principles of the *Montreal Convention* (and the *Warsaw Convention*).

The Applicant notes that the impugned provisions were considered by the Agency in *Lukács v. Porter Airlines*, 16-C-A-2013, and were found to be inconsistent with the *Montreal Convention* and unreasonable.

Pursuant to s. 29(1) of the *Canada Transportation Act*, the Applicant is asking that the Agency determine the present complaint within 120 days.

ISSUES

EXHIBITS

I. Applicable legal principles

(a) Tariff provisions must be just and reasonable: s. 111(1) of the *ATR*

Section 111(1) of the *ATR* provides that:

> All tolls and terms and conditions of carriage, including free and reduced rate transportation, that are established by an air carrier shall be just and reasonable and shall, under substantially similar circumstances and conditions and with respect to all traffic of the same description, be applied equally to all that traffic.

Since neither the *Canada Transportation Act*, S.C. 1996, c. 10 (the "*CTA*") nor the *ATR* define the meaning of the phrase "unreasonable," a term appearing both in s. 67.2(1) of the *CTA* and in s. 111(1) of the *ATR*, the Agency defined it in *Anderson v. Air Canada*, 666-C-A-2001, as follows:

> The Agency is, therefore, of the opinion that, in order to determine whether a term or condition of carriage applied by a domestic carrier is "unreasonable" within the meaning of subsection 67.2(1) of the CTA, a balance must be struck between the rights of the passengers to be subject to reasonable terms and conditions of carriage, and the particular air carrier's statutory, commercial and operational obligations.

The balancing test was strongly endorsed by the Federal Court of Appeal in *Air Canada v. Canadian Transportation Agency*, 2009 FCA 95. The test was applied in *Lukács v. WestJet*, 483-C-A-2010 (leave to appeal denied by the Federal Court of Appeal; 10-A-42), and more recently in *Lukács v. Air Canada*, 291-C-A-2011 and *Lukács v. Air Transat*, 248-C-A-2012.

(b) There is no presumption of reasonableness

In *Griffiths v. Air Canada*, 287-C-A-2009, the Agency underscored the importance of applying the balancing test due to the unilateral nature of terms and conditions set by carriers, which often are based only on the carrier's commercial interests:

> [25] The terms and conditions of carriage are set by an air carrier unilaterally without any input from future passengers. The air carrier sets its terms and conditions of carriage on the basis of its own interests, which may have their basis in statutory or purely commercial requirements. There is no presumption that a tariff is reasonable. Therefore, a mere declaration or submission by the carrier that a term or condition of carriage is preferable is not sufficient to lead to a determination that the term or condition of carriage is reasonable.

The Agency applied this principle in *Lukács v. WestJet*, 483-C-A-2010 (leave to appeal denied by the Federal Court of Appeal; 10-A-42), and more recently in *Lukács v. Air Canada*, 291-C-A-2011 and *Lukács v. Air Canada*, 250-C-A-2012.

(c) Provisions that are inconsistent with the legal principles of the *Montreal Convention* cannot be just and reasonable

The *Montreal Convention* is an international treaty that has the force of law in Canada by virtue of the *Carriage by Air Act*, R.S.C. 1985, c. C-26. It governs, among other things, the liability of air carriers in the case of delay of passengers and their baggage in international carriage.

Article 26 prevents carriers from contracting out or altering the liability provisions of the *Montreal Convention* to the passengers' detriment:

> **Article 26 - Invalidity of contractual provisions**
>
> Any provision tending to relieve the carrier of liability or to fix a lower limit than that which is laid down in this Convention shall be null and void, but the nullity of any such provision does not involve the nullity of the whole contract, which shall remain subject to the provisions of this Convention.

In *McCabe v. Air Canada*, 227-C-A-2008, the Agency held (at para. 29) that a tariff provision that is null and void by Article 26 of the *Montreal Convention* is not just and reasonable as required by s. 111(1) of the *ATR*. This principle was applied by the Agency in *Lukács v. Air Canada*, 208-C-A-2009 (at paras. 38-39), in *Lukács v. WestJet*, 477-C-A-2010 (at para. 43; leave to appeal denied by the Federal Court of Appeal; 10-A-41), and most recently in *Lukács v. Porter Airlines*, 16-C-A-2013.

In *Pinksen v. Air Canada*, 181-C-A-2007, the Agency recognized that international instruments in general, and the *Montreal Convention* in particular, are persuasive authorities in interpreting domestic rules and determining their reasonableness. The same reasoning was affirmed by the Agency in *Kipper v. WestJet*, 309-C-A-2010.

In *Lukács v. WestJet*, 483-C-A-2010, the Agency used the *Montreal Convention* as a persuasive authority for determining the reasonableness of WestJet's domestic tariff provisions, and ordered WestJet to revise its tariff to provide for a limit of liability equivalent to that set out in the *Montreal Convention* (leave to appeal denied by the Federal Court of Appeal; 10-A-42).

In *Lukács v. Air Canada*, 291-C-A-2011, the Agency considered Air Canada's Rule 55(C)(7), which stated that "[s]ubject to the Convention, where applicable, carrier is not liable for loss, damage to, or delay in delivery of...". The Agency held that passengers ought to be afforded the same protection against loss, damage or delay of baggage as in the *Montreal Convention*, regardless of whether the convention applies, and disallowed the provision.

In *Lukács v. Air Canada*, 250-C-A-2012, the Agency explained the dual role of the *Montreal Convention* in determining the reasonableness of a tariff provision:

> [23] [...] Past Agency decisions reflect the two distinct ways in which the Convention might be considered: by looking at whether a tariff is in direct contravention

> of the Convention, thereby rendering the provision null and void and unreasonable [Footnote: See for example: *Balakrishnan v. Aeroflot*, Decision No. 328-C-A-2007 at para. 20 and *Lukács v. WestJet*, Decision No. 477-C-A-2010 at paras. 39-40 (Leave to appeal to Federal Court of Appeal denied, FCA 10-A-41).]; or by referring to the principles of the Convention when considering the reasonableness of a tariff provision. [Footnote: See for example: *Lukács v. WestJet*, Decision No. 313-C-A-2010 and Decision No. LET-C-A-51-2010 .]

Therefore, it is settled law that a tariff provision that is inconsistent with the legal principles of the *Montreal Convention* cannot be just and reasonable within the meaning of s. 111(1) of the *ATR*.

II. Are Air Transat's International Tariff Rules 5.2(a) and 5.2(b) reasonable?

Air Transat's International Tariff Rules 5.2(a) and 5.2(b) (Exhibit "A") state that:

> a) The Carrier will endeavor to transport passengers and baggage with reasonable dispatch. Times shown in schedules, scheduled contracts, tickets, air waybills or elsewhere are not guaranteed. Flight times are subject to change without notice. The Carrier assumes no responsibility for making connections.
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> b) Schedules are subject to change without notice. The Carrier is not responsible or liable for failure to make connections, or for failure to operate any flight according to schedule, or for a change to the schedule of any flight. However, where a routing modification subsequent to the purchase of travel results in a change from a direct service to a connecting service, the Carrier will, upon request by the passenger, provide a full refund of the unused portion of the fare paid. Under no circumstances shall the Carrier be liable for any special, incidental or consequential damages arising directly or indirectly from the foregoing (including the carriage of baggage) whether or not the Carrier had knowledge that such damages might be incurred. Notwithstanding, the Carrier will make reasonable efforts to inform passengers of delays and schedule changes and, to the extent possible, the reason for the delay or change.
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> [Emphasis added.]

The Applicant submits that the underlined provisions are blanket exclusions of liability that are inconsistent with the legal principles of the *Montreal Convention* and they are also unreasonable, because they fail to provide any protection to passengers affected by flight advancement.

The Applicant is respectfully asking the Agency to disallow the underlined provisions.

(a) Liability for delay under the *Montreal Convention*

The *Montreal Convention* is an international treaty that has the force of law in Canada by virtue of the *Carriage by Air Act*, R.S.C. 1985, c. C-26. The *Montreal Convention* governs the liability limitations for delay of passengers applicable to international carriage by air.

The regime of strict liability for delay imposed upon carriers by Article 19 is one of the cornerstones of the *Montreal Convention*:

> **Article 19 - Delay**
>
> The carrier is liable for damage occasioned by delay in the carriage by air of passengers, baggage or cargo. Nevertheless, the carrier shall not be liable for damage occasioned by delay if it proves that it and its servants and agents took all measures that could reasonably be required to avoid the damage or that it was impossible for it or them to take such measures.

Article 19 of the *Montreal Convention* provides that the carrier is liable for delay, and it can exonerate itself from liability only if it demonstrates the presence of an affirmative defense, namely, that it and its servants and agents have taken all reasonable steps necessary to avoid the delay.

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 the delay:

> [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.]

Air Transat's International Tariff Rules 5.2(a) and 5.2(b) purport to exonerate Air Transat from every and any liability for failure to operate and/or failure to operate on schedule, and in particular, it exonerates Air Transat from any liability for out-of-pocket expenses incurred by passengers in the case of delay.

Thus, it is submitted that the impugned provisions in International Tariff Rules 5.2(a) and 5.2(b) are tariff provisions tending to relieve Air Transat from liability under the *Montreal Convention* and/or fix a lower limit of liability than what is set out in the *Montreal Convention*, and as such they are null and void by Article 26.

(b) The Agency held that such and similar provisions are unreasonable

The impugned tariff provisions are virtually identical to what used to be Porter Airlines' Existing Tariff Rule 18(c), which was considered by the Agency in *Lukács v. Porter Airlines*, 16-C-A-2003, where the Agency held that:

> [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.

The Applicant submits that these conclusions are equally applicable to the impugned tariff provisions of Air Transat, and thus they are unreasonable, and ought to be disallowed.

(c) Passengers whose flight was advanced are entitled to the same protection

In Decision No. LET-A-112-2003, the Agency considered the issue of flight advancement, and held that:

> The Agency is of the opinion that, in the event of a flight advancement, the consumer should be offered alternate travel options immediately. In addition, the Agency feels it would be beneficial if Air Transat includes a tariff provision that provides for a refund, at the request of the passenger, if such passenger should wish to cancel a reservation for a flight that has been advanced.
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> [Emphasis added.]

The Agency reached the same conclusion in *Lipson v. Air Transat*, LET-C-A-59-2003.

While Rules 5.2(a) and 5.2(b) permit passengers to seek a refund in the case of a change from a direct service to a connecting service, these rules appear to be silent about the rights of passengers affected by flight advancement (e.g., changing the departure time from 10 am to 6 am).

Thus, it is submitted that the impugned provisions are also unreasonable because of the absence of tariff provisions concerning advancement of flight times, and protection of passengers affected by such events.

It is further submitted that Air Transat ought to be directed to amend its tariff to offer the same protection to passengers whose flight was advanced as to victims of delays.

(d) Conclusions

Any provision tending to relieve Air Transat from its liability under the *Montreal Convention* is null and void by Article 26.

The impugned provisions of Air Transat's International Tariff Rules 5.2(a) and 5.2(b) are tending to relieve Air Transat from liability under Article 19 of the *Montreal Convention* and/or tending to fix a lower limit of liability.

Thus, by Article 26 of the *Montreal Convention*, the impugned provisions of Air Transat's International Tariff Rules 5.2(a) and 5.2(b) are null and void, and in particular, they are unreasonable.

Air Transat's International Tariff Rules 5.2(a) and 5.2(b) are also unreasonable because of the absence of tariff provisions concerning advancement of flight times, and protection of passengers affected by such events.

All of which is most respectfully submitted.

Dr. Gábor Lukács
Applicant

Cc: Mr. George Petsikas, Air Transat

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. *Air Canada v. Canadian Transportation Agency*, 2009 FCA 95.
7. *Anderson v. Air Canada*, Canadian Transportation Agency, 666-C-A-2001.
8. *Lipson v. Air Transat*, Canadian Transportation Agency, LET-C-A-59-2003.
9. *Lukács v. Air Canada*, Canadian Transportation Agency, 208-C-A-2009.
10. *Lukács v. Air Canada*, Canadian Transportation Agency, 250-C-A-2012.
11. *Lukács v. Air Transat*, Canadian Transportation Agency, 248-C-A-2012.
12. *Lukács v. Porter Airlines*, Canadian Transportation Agency, 16-C-A-2013.
13. *Lukács v. WestJet*, Canadian Transportation Agency, 477-C-A-2010.
14. *Lukács v. WestJet*, Canadian Transportation Agency, 483-C-A-2010.
15. *Lukács v. WestJet*, Federal Court of Appeal, 10-A-41.
16. *Lukács v. WestJet*, Federal Court of Appeal, 10-A-42.
17. *McCabe v. Air Canada*, Canadian Transportation Agency, 227-C-A-2008.
18. *Re: Air Transat*, Canadian Transportation Agency, LET-A-112-2003.

Air Transat A.T. Inc.

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RULE 3. CURRENCY

All monetary amounts published in this tariff are stated in the lawful currency of Canada unless otherwise specified.

RULE 4. CAPACITY LIMITATIONS

The Carrier shall limit the number of passengers carried on any one flight at fares governed by rules making reference hereto and such fares will not necessarily be available on all flights operated by the Carrier. The number of seats which the Carrier shall make available on a given flight will be determined by the Carrier's best judgment as to the anticipated total passenger load on each flight.

(C) RULE 5. CONDITIONS OF CARRIAGE

5.1 Substitution of Aircraft:

The Carrier may without notice, and subject to any necessary approval of the CTA or government authority, substitute an aircraft of the same or any other appropriate type for the aircraft agreed upon for a flight.

5.2 **(C)** Responsibility for schedules and operations (Subject to Rule 21):

a) The Carrier will endeavor to transport passengers and baggage with reasonable dispatch. Times shown in schedules, scheduled contracts, tickets, air waybills or elsewhere are not guaranteed. Flight times are subject to change without notice. The Carrier assumes no responsibility for making connections.

b) Schedules are subject to change without notice. The Carrier is not responsible or liable for failure to make connections, or for failure to operate any flight according to schedule, or for a change to the schedule of any flight. However, where a routing modification subsequent to the purchase of travel results in a change from a direct service to a connecting service, the Carrier will, upon request by the passenger, provide a full refund of the unused portion of the fare paid. Under no circumstances shall the Carrier be liable for any special, incidental or consequential damages arising directly or indirectly from the foregoing (including the carriage of baggage) whether or not the Carrier had knowledge that such damages might be incurred. Notwithstanding, the Carrier will make reasonable efforts to inform passengers of delays and schedule changes and, to the extent possible, the reason for the delay or change.

c) Without limiting the generality of the foregoing, the Carrier cannot guarantee that a passenger's baggage will be carried on the flight if sufficient space is not available as determined by the Carrier. Notwithstanding, if the baggage does not arrive on the same flight, the Carrier will take steps to deliver the baggage to the passenger's residence/hotel as soon as possible. The Carrier will take steps to inform the passenger on the status of delivery and will provide the passenger with an overnight kit, as required.

d) If a flight is delayed for more than four (4) hours beyond scheduled departure time, the Carrier will provide the passenger with a meal voucher. If the flight is delayed more than eight (8) hours and requires an overnight stay, the Carrier will pay for an overnight hotel stay and airport transfers for passengers who did not originate their travel at that airport. If the delay occurs while onboard, the Carrier will offer drinks and snacks, where it is safe to do so. If the delay exceeds 90 minutes and if the aircraft commander permits, the Carrier will offer passengers the option of disembarking until it is time to depart.