

**CANADIAN TRANSPORTATION AGENCY**

BETWEEN:

GÁBOR LUKÁCS

Complainant

- and -

PORTER AIRLINES INC.

Respondent/Moving Party

**REPLY OF THE MOVING PARTY PORTER AIRLINES INC.**

**A. OVERVIEW**

1. A party may thoroughly address all issues relevant to a tariff complaint – including interlocutory requests for procedural relief – without resorting to pejorative remarks and implications, allegations of disrespect for the Agency and the law, or baseless imputations of wrongful intent. Thus, this motion, if granted, would not have the effect of depriving the Applicant Gábor Lukács of the right to make relevant submissions in this or any future proceedings before the Agency.<sup>1</sup>

2. While Mr. Lukács continues to allege an intention by Porter to delay these proceedings, Porter submits that it is Mr. Lukács's resort to such unfair and prejudicial submissions which has necessitated this interlocutory motion, and thus caused any delay that may result herefrom.<sup>2</sup>

3. Porter's submissions relating to Mr. Lukács's conduct are relevant to this motion insofar as they provide necessary context concerning Porter's actual reasons for requesting procedural relief in its Answer, and thus further illustrate that Mr. Lukács's bare allegations as to Porter's motives are inaccurate, unfair and prejudicial, and should be struck.

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<sup>1</sup> Answer of Gábor Lukács dated April 25, 2014 ("Motion Answer"), p. 3.

<sup>2</sup> Lukács Motion Answer, p. 3.

4. Mr. Lukács's Motion Answer illustrates that his allegation of a "deliberate and calculated decision to disobey the law" by Porter is based on the erroneous proposition that a carrier must "immediately" update its tariff following the release of the Agency's decision concerning another carrier's tariff. In fact, while such decisions provide useful guidance, they do not bind other carriers, and in any event the Agency's own practice of providing carriers reasonable timelines to implement ordered revisions to tariff provisions belies Mr. Lukács's overreaching interpretation of the law.<sup>3</sup>

5. Mr. Lukács also suggests in the Motion Answer that Porter has "failed to demonstrate how the Applicant's reply may prejudice Porter Airlines". On their face, the Reply depicts Porter as disrespectful of the Agency, heedless of its procedures and orders, and unwilling to comply with the law, all based on Mr. Lukács's unsupported suppositions. Porter submits that the prejudice resulting from these scandalous and unsupported allegations is self-evident.<sup>4</sup>

6. Finally, Mr. Lukács's characterization of Porter's Answer as having shifted the issues in dispute from the clarity and reasonableness of Rule 18 to the merits of Porter's request for procedural relief supports Porter's submissions at para. 48 of its Motion to the effect that such requests in a responding pleading are akin to an "originating process" in respect of that relief, and thus justify an order permitting Porter to deliver submissions in 'reply' to Mr. Lukács's responding submissions with respect thereto, which appear in his Reply (to the extent the Agency may decline to strike it in whole or in part).<sup>5</sup>

7. Mr. Lukács's Motion Answer contains a number of "clarifications" that may have the effect of softening his allegations against Porter in his Reply. However, any such clarifications – being part of the record of this motion rather than the pleadings in the main Complaint – do not ultimately justify the lack of restraint on display in the Reply, nor mitigate the prejudicial effect of the scandalous allegations therein. The Reply should be struck out in full.<sup>6</sup>

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<sup>3</sup> See Motion Answer at p. 11; In connection with its findings that a tariff rule is unclear or unreasonable, the Agency will often identify an implementation date in the future and suspend the disallowance of that rule and the publication of ordered amendments in the interim.

<sup>4</sup> Motion Answer at p. 8.

<sup>5</sup> Motion Answer at pp. 6 and 9.

<sup>6</sup> See Motion Answer at pp. 4, 6 and 8.

## **B. RELEVANCE OF SUBMISSIONS IN PORTER'S MOTION**

8. In his Reply, Mr. Lukács sought to put in issue the intent underlying Porter's request in its Answer for leave to deliver draft amendments to its impugned tariff rule and leave to respond to any submissions Mr. Lukács may make with respect thereto – alleging that Porter was motivated by a desire to delay the resolution of these proceedings. Porter's submissions concerning Mr. Lukács's escalating incivility are relevant to the relief sought in this motion, as:

- (a) they illustrate Porter's actual motives for taking the approach that it did in its Answer, and accordingly illustrate – together with the absence of any factual foundation – that Mr. Lukács's bare imputations of improper intent are scandalous and prejudicial; and
- (b) to the extent the Agency may decide not to strike out the Reply in whole or in part, these submissions demonstrate that Porter has a fair and reasonable response to Mr. Lukács's allegations which it ought to be permitted to put before the Agency in the main Complaint by way of Surreply.

9. Mr. Lukács appears to have understood Porter's submissions concerning his appeal to the Federal Court of Appeal as an attempt by Porter to re-open the matters disposed of therein. Rather, Porter submits that Mr. Lukács's positions taken in those proceedings, including his specific request to set aside and have redetermined interlocutory motions decided by the Agency in the underlying complaint proceedings, are inconsistent with his position in the latter and in these proceedings: namely that a party's pursuit of a remedy which may cause a delay supports a presumption that delay is the purpose driving that party's conduct.<sup>7</sup>

## **C. ALLEGED OMISSIONS AND MISREPRESENTATIONS**

10. Mr. Lukács alleges that Porter has made "numerous material misrepresentations and omissions" in its Motion, but remarkably declines to enumerate them, instead opting to provide "only a few examples" (which in any case do not withstand scrutiny, as discussed below). In any event, Porter submits that it is improper for Mr. Lukács to make such a broad suggestion of

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<sup>7</sup> See Motion Answer at p. 3.

impropriety without identifying each alleged instance so that Porter may have an opportunity to respond thereto. This vague allegation should be disregarded.<sup>8</sup>

11. With respect to the three examples of “misrepresentations” or “omissions” Mr. Lukács does identify, Porter responds as follows:

- (a) Contrary to Mr. Lukács’s allegations, Porter’s description of the appeal at para. 14 of its Motion is accurate:

Mr. Lukács brought a motion for review of the decision granting Porter an extension of time, and subsequently appealed the Agency’s dismissal of that motion to the Federal Court of Appeal.

In any event, Mr. Lukács did seek to have referred back to the Agency his motion for a review of the interlocutory decision granting Porter an extension of time to deliver its answer with draft amendments.<sup>9</sup>

- (b) Concerning Mr. Lukács’s allegation in 16-C-A-2013 that Porter’s excerpting of its tariff rule and use of “[...]” in connection therewith, the Agency did note Porter’s omission from that excerpt, but was not “critical” of that omission as Mr. Lukács suggests. In fact, the Agency accepted Porter’s submissions in relation to both the portion of its then Rule 18(c) included in its excerpt and its express acknowledgement later in its submissions that it proposed to delete the portion omitted from the earlier excerpt. Thus, the Agency’s decision, in Porter’s respectful submission – in no way reflects any acceptance or endorsement of Mr. Lukács’s scurrilous allegation that Porter “deliberately and mischievously omitted” the latter portion – which, again, Porter expressly acknowledged as requiring revision.

Concerning the portion admitted to require revision and the excerpted portion Porter proposed to maintain, the Agency held as follows:

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<sup>8</sup> Motion Answer at p. 4.

<sup>9</sup> Motion Answer at p. 5; Porter Motion at para. 13 (emphasis added); Notice of Appeal dated November 1, 2012, Exhibit 6.

*[33] ...Porter states that while Existing Tariff Rule 18 contains an exclusion in the latter portion of Existing Tariff Rule 18(c), Porter does not propose to maintain this language, such that following its deletion that Rule would be reasonable per the Agency's analysis in Decision No. 252-C-A-2012.*

*[...]*

*[43] The Agency finds that the cases cited by Mr. Lukács are not persuasive, and that he has not demonstrated why the Agency should find that Existing Tariff Rule 18(a) and the portion of Existing Tariff Rule 18(c), providing that schedules are subject to change without notice, are unreasonable.*

*[...]*

*[160] With respect to Porter's Existing Tariff Rules:*

***Issue 1:***

*The Agency has determined that Existing Tariff Rule 18(a) and the portion of Existing Tariff Rule 18(c) providing that schedules are subject to change without notice are reasonable.*

*The Agency has determined that the portion of Existing Tariff Rule 18(c), disclaiming liability for failure to make connections, to operate any flight according to schedule, or for changing the schedule for any flight is unreasonable.*<sup>10</sup>

- (c) While Porter acknowledges its error in identifying Mr. Lukács's email as having been addressed to the Agency and copied to Messrs. Sheahan and Deluce when in fact the latter were addressees (per the quoted body of the email) and the former copied, Porter maintains its submissions that it was improper to make

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<sup>10</sup> 16-C-A-2013.

such a demand of Porter on behalf of, and by email sent to, the Agency. A copy of the relevant email is attached as an exhibit hereto.<sup>11</sup>

12. Mr. Lukács's continued deployment of precipitous and ultimately unjustified allegations of misrepresentation and suggestions of deceptive intent is accordingly without merit.

#### **D. FREEDOM OF SPEECH AND CHARTER ISSUES**

13. Porter is not asking that the Agency "scrutinize" Mr. Lukács's tweets, but rather merely suggests that the Agency may take account of this prejudicial conduct and statements as further demonstrating his unnecessarily combative approach to his dealings with Porter.

14. For clarity, Porter's request for the relief identified in paragraph (c) of its prayer for relief in the Motion is intended to be restricted in scope to Mr. Lukács's filings with the Agency and communications with Porter in connection with Agency proceedings or other matters within its jurisdiction.

15. Notwithstanding the foregoing, Porter notes that defamation is not protected speech under the *Charter*.

#### **E. OTHER PROPOSITIONS RELIED ON BY MR. LUKÁCS**

16. At page 7 of his Motion Answer, Mr. Lukács states that a carrier seeking to deliver proposed amendments before the Agency issues a final decision "must do so during the pleadings, as part of its answer, as per section 42 of the Agency's *General Rules* (see also *Lukács v. WestJet*, LET-C-A-83-2011, p. 1." Neither of the authorities cited by Mr. Lukács support this proposition:

- (a) Nowhere in Rule 42 of the *General Rules* is the delivery of draft amendments – including the timing thereof – addressed.
- (b) Further, LET-C-A-83-2011 concerned proposed policy revisions submitted by WestJet after all parties had delivered the submissions the Agency had granted them leave to file, which themselves were permitted after (i) the prior adjudication of an Agency proceeding addressing the policies in issue, and (ii) the Agency

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<sup>11</sup> Lukács email to Greg Sheahan and Robert Deluce, copying Cathy Murphy, dated March 28, 2014.

having reached an initial decision and made a show cause order inviting further submissions. If anything, LET-C-A-83-2011 confirms the Agency's practice of permitting carriers to propose solutions after it has considered and preliminarily determined the issues based on the parties' initial pleadings. (Moreover, the Agency nonetheless accepted WestJet's proposal for consideration.)

In fact the Agency has frequently directed carriers to propose amendments to their tariffs after its initial determination as to the clarity and/or reasonableness of the carrier's existing rules. Further, the Agency has also concurrently made orders as to the delivery of subsequent submissions in connection therewith.

17. In the Motion Answer, Mr. Lukács clarifies that his allegation that Porter "made a deliberate and calculated decision to disobey the law" (which allegation he maintains) is based on the proposition that a carrier that becomes aware of an Agency decision against another carrier must "immediately change it and update its tariff accordingly, at least on an interim basis, until it receives further guidance from the Agency."<sup>12</sup> This is clearly not the case. More particularly:

- (a) Even upon the Agency's determination that an impugned tariff rule is unclear and/or unreasonable, the Agency does not immediately disallow the impugned rule nor require immediate revisions to the carrier's tariff. Rather, the Agency typically permits a reasonable period of time to permit compliance with and implementation of its orders, during which time the rule found to be unclear and/or unreasonable may remain in effect.<sup>13</sup>
- (b) The Agency has otherwise specifically acknowledged that decisions made in respect of one carrier's tariff do not bind other carriers, notwithstanding that the principles elucidated in such decisions may provide guidance to the latter's applicable policies. For example, in its Notice to Industry following its 2012 decisions concerning remedies for overbooking and cancellation, the Agency noted that "these rulings do not apply to all air carriers" and that the Agency

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<sup>12</sup> Motion Answer at p. 11 (emphasis added).

<sup>13</sup> See, e.g., 31-C-A-2014 at para. 182.

would accordingly “take measures to encourage carriers to voluntarily amend their tariffs” to reflect the principles developed in the decisions.<sup>14</sup>

- (c) Indeed, the Agency’s “Notice to Industry - Enforcement of the All-Inclusive Air Price Advertising Regulations” cited by Mr. Lukács is easily distinguishable, as it dealt with obligations arising from regulations, which do in fact bind all carriers.

This makes eminent sense, given that many tariff revisions require the implementation of complex and far-reaching policies, training of relevant personnel, retention of third-party suppliers, etc.

18. In connection with Porter’s request for procedural relief in its Answer to the main Complaint, Mr. Lukács states that Porter has put the Agency in “an unfair and difficult position: if the Agency denies the leave, Porter Airlines may change its mind, not file its proposed amendments before the Agency’s final decision, and thus prolong the period during which passengers are subject to unreasonable terms and conditions”, and that “the proper time for seeking leave to file a Surreply would have been after the Applicant filed his own reply to Porter Airlines’ proposed amendments, at which point the Agency would have been in the position to determine whether any new issues were raised that warrant allowing a Surreply to be filed.” With respect, these stated positions are difficult to reconcile with the fact that the Agency retains the power and discretion to:

- (a) direct the expedited delivery of draft amendments with concurrent directions as to further submissions, which may obviate the further delay involved in a subsequent motion for leave to deliver a surreply; or
- (b) deny Porter’s request and direct specific revisions to Porter’s Rule 18 without considering any proposed amendments, which would also obviate an additional motion.

19. Mr. Lukács relies on 327-C-A-2013 in support of the proposition that the Agency ought not to strike out or otherwise expunge the Reply. In Porter’s submission, that case is

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<sup>14</sup> “Notice to Industry: Initiative to level the playing field among carriers and increase rights and remedies for passengers delayed because of overbooking and cancellation of flights” issued by the Agency, as last modified 2013-07-03.



distinguishable, as the applicable portion of the record was deemed to be irrelevant but not scandalous and prejudicial, and appears to have been easily “excisable” from the Agency’s consideration of the record as a whole. Moreover, the Agency has seen fit to expunge portions of submissions filed by a party. In this case, the prejudicial allegations are pervasive throughout the Reply, and it is submitted that they fit squarely within the Agency’s power to strike out prejudicial pleadings as contemplated by *General Rule 13(4)*.<sup>15</sup>

**F. PROPOSED AMENDMENTS WOULD RAISE NEW ISSUES JUSTIFYING SURREPLY**

20. In the Motion Answer, Mr. Lukács characterizes Porter’s request for procedural relief in its Answer as raising “new issues”, at which his Reply submissions are generally directed. In light of this admission, Porter submits that it is just and reasonable that Porter be permitted to ‘reply’ to any submissions in Mr. Lukács’s Reply that may not be struck out in this motion, as such submissions effectively constitute an answer to Porter’s prayer for relief in its Answer in the main Complaint.

All of which is respectfully submitted,



April 29, 2014

Gregory Sheahan  
General Counsel  
Porter Airlines Inc.

Respondent

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<sup>15</sup> See, e.g., LET-C-A-92-2012.

**List of Exhibits:**

15. Lukács email to Greg Sheahan and Robert Deluce, copying Cathy Murphy, dated March 28, 2014
16. Notice to Industry: Initiative to level the playing field among carriers and increase rights and remedies for passengers delayed because of overbooking and cancellation of flights” issued by the Agency, as last modified 2013-07-03.

**List of Authorities**

1. Canadian Transportation Agency General Rules, SOR/2005-35
2. *Lukács v. Porter Airlines Inc.*, 16-C-A-2013
3. *Lukács v. WestJet*, LET-C-A-83-2011
4. *Lukács v. Porter Airlines Inc.*, 31-C-A-2014

# **EXHIBIT 15**

## Greg Sheahan

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**From:** Gabor Lukacs  
**Sent:** Friday, March 28, 2014 7:36 PM  
**To:** Greg Sheahan; Robert Deluce  
**Cc:** Cathy Murphy  
**Subject:** RE: Porter Airlines' ongoing refusal to comply with Decision No. 31-C-A-2014

Mr. Sheahan and Mr. Deluce:

It appears that after four attempts and 4 weeks after deadline set by the Agency in Decision No. 31-C-A-2014, Porter Airlines may have succeeded at finally complying with the Decision.

You and your colleagues at Porter Airlines are educated and intelligent people, who knew perfectly well what the Agency expected of you.

Nevertheless, Porter Airlines kept filing and publishing tariffs that you and your colleagues knew perfectly well or should have known were not compliant.

I invite you to take a moment to reflect upon the waste of valuable public and judicial resources that Porter Airlines' conduct has caused.

I urge you to reflect upon Porter Airlines' actions and to have Porter Airlines apologize to the Agency and its staff for having wasted their valuable time by not complying with the Agency's Decision in a timely manner.

Sincerely yours,  
Dr. Gabor Lukacs

On Fri, 28 Mar 2014, Greg Sheahan wrote:

> Mr. Lukacs,  
>  
> The updated tariff has been published:  
> [https://s3.amazonaws.com/porterweb/Content/Documents/International\\_Tariff\\_2014\\_03\\_27\\_EN.pdf](https://s3.amazonaws.com/porterweb/Content/Documents/International_Tariff_2014_03_27_EN.pdf)  
>  
> Regards,  
> Greg  
>  
> -----Original Message-----  
> From: Gabor Lukacs [mailto:dr.gabor.lukacs@gmail.com] On Behalf Of  
> Gabor Lukacs  
> Sent: Wednesday, March 26, 2014 3:57 PM  
> To: Greg Sheahan  
> Cc: Cathy Murphy  
> Subject: RE: Porter Airlines' ongoing refusal to comply with Decision No.  
> 31-C-A-2014  
>

# **EXHIBIT 16**



Canadian  
Transportation  
Agency

Office  
des transports  
du Canada

Canada

## Canadian Transportation Agency

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Notice to Industry: Initiative to level the playing field among air carriers and...

# Notice to Industry: Initiative to level the playing field among air carriers and increase rights and remedies for passengers delayed because of overbooking and cancellation of flights

Air carriers are required by law to have and apply a tariff<sup>[1]</sup>, and their terms and conditions of carriage in the tariff must be clear, just and reasonable. The Agency has the authority to suspend, disallow or substitute a term or condition of carriage it deems unclear, unjust or unreasonable.

Based on this authority, the Agency, in June, 2012, issued five final decisions on the reasonableness of international and domestic tariff provisions of some carriers about overbooking and cancellation of flights<sup>[2]</sup>. The rulings significantly increased the rights and remedies of the passengers travelling with the air carriers named in the decisions. However, as these rulings do not apply to all air carriers, not all passengers can benefit from the same rights and remedies.

The Agency is of the opinion that if all air carriers were to apply the rulings on overbooking and cancellation, it would further enhance consumer protection while ensuring a level playing field among air carriers.

Accordingly, the Agency will take measures to encourage carriers to voluntarily amend their tariffs to reflect the following two principles.

If a passenger is delayed due to the overbooking or cancellation of a flight **within the carrier's control**<sup>[3]</sup>, at the passenger's discretion, the carrier will:

1. **rebook the passenger on alternate transportation** to the passenger's intended destination, at no additional cost to the passenger and within a reasonable time, using:
  - a. its own service;
  - b. the services of carriers with which it has an interline agreement; or
  - c. where possible and necessary, the services of carriers where no interline

agreement exists, or:

2. if the purpose of the passenger's travel is no longer valid because of the delay incurred, **provide the passenger with a full refund**<sup>[4]</sup>, and, when travel has already commenced, **return the passenger to their point of origin**, within a reasonable time at no additional cost.

In addition, the Agency considers it good practice for carriers to always assess the needs of the passengers on a case-by-case basis, and take into account all known circumstances to avoid or mitigate the disruptions caused by the overbooking or the cancellation of flights.

Agency staff is available to work with carriers and provide guidance to help them incorporate these principles into their tariffs. Rules [90](#), [95](#) and [125](#) of the Agency's [Sample Tariff](#) reflect these principles and provide carriers with text that they can choose to add to their terms and conditions of carriage.

The Canadian Transportation Agency is an independent, quasi-judicial tribunal and economic regulator of the Government of Canada. It makes decisions and determinations on a wide range of matters involving air, rail and marine modes of transportation under the authority of Parliament, as set out in the *Canada Transportation Act* and other legislation.

#### **For further information:**

Telephone: 1-888-222-2592

TTY: 1-800-669-5575

E-mail: [info@otc-cta.gc.ca](mailto:info@otc-cta.gc.ca)


Website: [www.otc-cta.gc.ca](http://www.otc-cta.gc.ca)

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## Notes

- 1 A tariff is a schedule of fares, rates, charges and terms and conditions of carriage applicable to an air service.
- 2 The Agency ruled that overbooking and cancellation that are within the control of the carrier constitute a delay.
- 3 The Montreal Convention (Article 19) states that an air carrier is always liable for damage occasioned by delay in the carriage of passengers and their baggage. However, for delays outside the control of the carrier, the Montreal Convention provides that the carrier cannot be held liable if it proves that it took all measures that could reasonably be required to avoid the damage or if the carrier proves that it was impossible to take such measures.
- 4 The passenger is entitled to a full refund even if travel has commenced, if the passenger has suffered a loss of purpose for the travel.

Date Modified :  
2013-07-03

  
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