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September 24, 2013

VIA EMAIL

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

Dear Madam Secretary:

**Re: Dr. Gábor Lukács v. Porter Airlines
Complaint concerning International Tariff Rules 1, 3.4, 15, 18, and 20**

Please accept the following submissions as a formal complaint pursuant to ss. 111, 113, and 122(c) of the *Air Transportation Regulations*, S.O.R./88-58 (the "ATR"), and Rule 40 of the *Canadian Transportation Agency General Rules* concerning Porter Airlines' International Tariff Rules 3.4, 15, 20, and certain aspects of Rules 1 and 18.

OVERVIEW

The present complaint challenges certain unclear and/or unreasonable provisions of Porter Airlines' International Tariff with respect to the following issues: flight cancellation, schedule change, flight advancement, and denied boarding.

Flight Rights: *Code of Conduct of Canada's Airlines*

In 2008, the Government of Canada and the three major Canadian airlines (Air Canada, Air Transat, and WestJet) agreed on a voluntary code of conduct, entitled *Code of Conduct of Canada's Airlines*. The key points of this code are:

- Passengers have a right to information on flight times and schedule changes. Airlines must make reasonable efforts to inform passengers of delays and schedule changes, and to the extent possible, the reason for the delay or change.

- Passengers have a right to punctuality.
 - (a) If a flight is delayed and the delay between the scheduled departure of the flight and the actual departure of the flight exceeds 4 hours, the airline will provide the passenger with a meal voucher.
 - (b) If a flight is delayed by more than 8 hours and the delay involves an overnight stay, the airline will pay for overnight hotel stay and airport transfers for passengers who did not start their travel at that airport.
 - (c) If the passenger is already on the aircraft when a delay occurs, the airline will offer drinks and snacks if it is safe, practical and timely to do so. If the delay exceeds 90 minutes and circumstances permit, the airline will offer passengers the option of disembarking from the aircraft until it is time to depart.
- Passengers have a right to take the flight they paid for. If the flight is overbooked or cancelled, the airline must offer passengers a choice between transportation to their destination or a refund of the unused portion of the ticket.

In the trilogy of decisions *Lukács v. Air Transat*, 248-C-A-2012, *Lukács v. WestJet*, 249-C-A-2012, and *Lukács v. Air Canada*, 250-C-A-2012, the Agency clarified the obligations of carriers in the case of flight cancellation that is within the carrier's control and overbooking: in certain circumstances, the carrier is required to purchase seats for stranded passengers on flights of competitors; furthermore, passengers may also request to be transported to their point of origin and to be provided with a full refund of their fares.

The aforementioned three airlines have incorporated provisions giving effect to these rights into their international tariffs:

- Air Canada's International Tariff Rule 80(C) (Exhibit "A");
- Air Transat's International Tariff Rules 5.2(d) and 21 (Exhibits "B" and "C");
- WestJet's International Tariff Rules 75 and 100 (Exhibits "D" and "E").

Recently, Sunwing Airlines has joined these three airlines, and incorporated similar provisions into its international tariff:

- Sunwing Airlines' International Tariff Rules 15 and 15A (Exhibit "F").

On July 3, 2013, the Agency issued a "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"¹, urging carriers to voluntarily amend their tariffs to reflect the principles

¹<http://www.cta-otc.gc.ca/eng/publication/notice-industry-remedies-overbooking-cancellation>

laid down by the Agency in the aforementioned five decisions (Exhibit “G”). These principles require the carrier, at the discretion of the passenger, to:

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 [Footnote: 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.], and, when travel has already commenced, return the passenger to their point of origin, within a reasonable time at no additional cost.

For reasons known only to Porter Airlines, it chose to ignore the Notice to Industry (Exhibit “G”), and did not amend Rules 3.4 and 15 to reflect these principles with respect to flight cancellation; Rule 20 does not fully reflect these principles either in the case of delay caused by denied boarding.

In the present complaint, the Applicant is asking the Agency to direct Porter Airlines to implement these principles in its International Tariff.

Flight advancement

While the Agency recognized the importance of protecting passengers in the case of flight advancement a decade ago, Porter Airlines’ International Tariff provides no provisions that specifically address this issue.

The Applicant is asking that the Agency direct Porter Airlines to incorporate provisions protecting passengers in the case of flight advancement into its International Tariff.

Denied boarding compensation

Porter Airlines’ International Tariff Rule 20 provides for no compensation to passengers who are involuntarily denied boarding on flights that depart from Canada. This issue, as well as a number of provisions contained in Rule 20, have recently been addressed by the Agency in relation to WestJet’s International Tariff.

The Applicant is asking for the same conclusions and remedies with respect to Porter Airlines.

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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. WestJet*, 227-C-A-2013 and *Lukács v. Air Transat*, 327-C-A-2013.

(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, *Lukács v. Air Canada*, 250-C-A-2012, *Lukács v. WestJet*, 227-C-A-2013, and *Lukács v. Air Transat*, 327-C-A-2013.

(c) Tariff provisions must be clear: s. 122(c) of the ATR

Section 122 of the *ATR* states that:

Every tariff shall contain

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(c) the terms and conditions of carriage, clearly stating the air carrier's policy in respect of at least the following matters, namely,

[Emphasis added.]

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.

(d) 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), and in *Lukács v. WestJet*, 477-C-A-2010 (at para. 43; leave to appeal denied by the Federal Court of Appeal; 10-A-41).

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 .]

The principle that tariff provisions that are inconsistent with the legal principles of the *Montreal Convention* was most recently applied in *Lukács v. Porter Airlines*, 16-C-A-2013, *Lukács v. WestJet*, 227-C-A-2013, *Lukács v. Air Transat*, 327-C-A-2013, and *Lukács v. Porter Airlines*, 344-C-A-2013.

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. Rules 3.4 and 15: blanket exclusions of liability

Porter Airlines' International Tariff Rule 3.4 (Exhibit "H") states that:

The Carrier reserves the right to cancel or change the planned departure, schedule, route, aircraft or stopping places of any flight for which fares in respect of a International Service have been paid, at any time and from time to time, for any reason, without notice to any passengers affected thereby and, in connection therewith, the Carrier shall not be liable to any passenger in respect of such cancellation or change, whether or not resulting from an Event of Force Majeure; provided that, the Carrier may and reserves the right, at its sole discretion, to provide any passengers affected by such cancellation or change with:

- (a) a credit, valid for one year from the original ticket issuance date, towards the provision of a fare relating to a future flight, which credit shall be equal to the original fare (s) which was/were cancelled. When redeeming the credit toward a future booking, passenger may apply the credit toward the base fare, airlines surcharges, change fees, and government taxes and fees. Credit can be used one time only. If the total cost of the transaction to which the credit is applied is less than the value of the credit, the residual value left from its use is forfeited. Bookings using credit must be in the name of the owner of the credit. Credit may be transferred to another traveler one time only, and the credit's original expiration date shall continue to apply after any such transfer; or
- (b) to otherwise refund to such passenger, an amount which shall not be greater than the fare paid by that passenger in respect of that flight or flights if booked as a round trip and the originating sector is cancelled.

[Emphasis added.]

Porter Airlines' International Tariff Rule 15 (Exhibit "I") states that:

The Carrier reserves the right to cancel or change the planned departure, schedule, route, aircraft or stopping places of any flight for which fares have been paid, at any time and from time to time, for any reason, in connection therewith, the Carrier shall not be liable to any passenger in respect of such cancellation or change, whether or not resulting from an Event of Force Majeure; provided that, the Carrier may and reserves the right, at its sole discretion, to provide any passengers affected by such cancellation or change with:

- (a) a credit, valid for one year from the original ticket issuance date, towards the provision of a fare relating to a future flight, which credit shall be equal to the original fare which was cancelled. When redeeming the credit toward a future booking, passenger may apply the credit toward the base fare, airlines surcharges, change fees, and government taxes and fees. Credit can be used

one time only. If the total cost of the transaction to which the credit is applied is less than the value of the credit, the residual value left from its use is forfeited. Bookings using credit must be in the name of the owner of the credit. Credit may be transferred to another traveler one time only, and the credit's original expiration date shall continue to apply after any such transfer; or

- (b) to otherwise refund to such passenger, an amount which shall not be greater than the fare paid by that passenger in respect of that flight.

[Emphasis added.]

The Applicant submits that these provisions are unreasonable, because: (i) they are blanket exclusions of liability that relieve Porter Airlines from virtually any liability with respect to delays and/or failure to operate on schedule; moreover (ii) they deprive passengers of the choice of whether they wish to continue their travel or to receive a refund; and (iii) they deprive passengers of the right to be refunded if Porter Airlines is unable to transport them within a reasonable amount of time.

(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.

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?

[Emphasis added.]

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. In particular, under Article 19, carriers are liable for out-of-pocket expenses related to delays, such as meals, accommodation, and transportation.

Article 26 protects the liability provisions of the *Montreal Convention* from being contractually altered to the passengers' detriment by rendering any such provision null and void:

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 the present case, the *effect* of Porter Airlines' Rules 3.4 and 15 is that they relieve Porter Airlines from virtually every liability in the case of delay and/or failure to operate on schedule, regardless of whether Porter Airlines and its servants and agents have taken all reasonable measures necessary to avoid the delay. In other words, these provisions are blanket exclusions of liability.

The impugned provisions effectively limit Porter Airlines' liability in the case of delay to providing passengers, at Porter Airlines' sole discretion, a credit that is valid for one year or otherwise a refund of the fare paid by the passengers; in other words, the impugned provisions allow Porter Airlines to walk away from the contract of carriage without offering any protection to passengers.

Thus, it is submitted that Porter Airlines' Rules 3.4 and 15 are provisions tending to relieve Porter Airlines from liability set out in Article 19 of the *Montreal Convention* and/or tending to fix a lower limit of liability than what is set out in the convention.

Therefore, by Article 26 of the *Montreal Convention*, Rules 3.4 and 15 are null and void, and they are unreasonable. Hence, these rules ought to be disallowed.

(b) Lack of clarity: inconsistency with Rule 18

Porter Airlines' International Tariff Rule 18 (Exhibit "J"), which was established in its current form following the Agency's decision in *Lukács v. Porter Airlines*, 16-C-A-2013, imposes liability upon Porter Airlines for damage occasioned by delay that reflects Porter Airlines' obligations under Article 19 of the *Montreal Convention*.

At the same time, Rules 3.4 and 15 purport to relieve Porter Airlines from virtually every liability in the case of delay and/or failure to operate on schedule, regardless of whether Porter Airlines demonstrated the facts necessary to invoke the defense set out in Rule 18.1(i) (which reflects Article 19 of the *Montreal Convention*).

Thus, it is submitted that Rules 3.4 and 15 contradict Rule 18, and as such, they render Porter Airlines' International Tariff unclear, contrary to s. 122 of the *ATR*.

(c) Concomitant obligation of carriers to reprotect passengers

In *Lukács v. Air Canada*, 250-C-A-2012, one of the landmark decisions of the Agency on passenger rights, the Agency held that:

[25] It is clear that Article 19 of the Convention imposes on a carrier liability for damage occasioned by delay in the carriage of, amongst other matters, passengers, but a carrier will 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 it was impossible for them to take such measures. As the Agency stated in the Show Cause Decision, with a presumption of liability for delay against a carrier, there is a concomitant obligation for a carrier to mitigate such liability and address the damage which has or may be suffered by a passenger as a result of delay. [...]

⋮

[65] In both *Mohammad* and *McMurry v. Capitol Intern. Airways*, 102 Misc. 2d 720 at 722, which was also cited by the Agency in the Show Cause Decision, passengers made alternative arrangements themselves and the carrier was found liable to pay for those arrangements. In other words, the Court considered the passenger's own ability to find a flight on another carrier to be a determining factor as to whether or not the carrier had taken all reasonable measures to avoid delay pursuant to Article 19 of the Convention. The Agency finds this aspect of the cases to be relevant to the issue of reprotection.

[Emphasis added.]

Indeed, in *Mohammad c. Air Canada*, 2010 QCCQ 6858, in a case brought against Air Canada and Kuwait Airlines for joint carriage between Canada and Kuwait, it was held that:

[27] The fact that Kuwait Airways airplanes were fully booked does not in anyway, limit its obligation to transport the passengers to their destination. Kuwait Airways should have transferred the unused portion of the passengers' tickets to another carrier and rerouted them to their final destination. It was obliged to do so according to sections 19 and 40 of the Montreal Convention.

Similarly, in *Caron c. Vacances Sunwing*, 2012 QCCQ 2050, a passenger sought compensation in relation to the cancellation of his return flight from Haiti to Canada. Porter Airlines offered to either transport the passenger seven days later or provide the passenger a full refund. The passenger

was unable to accept the offer to postpone his return to Canada by a week due to his obligations in Canada, and he eventually purchased a one-way ticket on American Airlines. The court ordered Porter Airlines to compensate the passenger for all of his out-of-pocket expenses, including the costs of his alternative transportation.

Therefore, a carrier cannot avoid liability under Article 19 of the *Montreal Convention* by merely stating that its flights were fully booked. Instead, the carrier must take steps to mitigate the damage suffered by passengers as a result of the delay, and must attempt to secure seats on other carriers.

(d) Passengers are entitled to a refund if the carrier is unable to transport them in a reasonable period of time

More than 9 years ago, in Decision No. 28-C-A-2004, the Agency recognized the fundamental right of passengers to be refunded for the unused portions of their tickets if the carrier is unable to provide transportation on its services or on the services of other carrier(s) within a reasonable period of time:

By Decision No. LET-A-166-2003 dated August 7, 2003 [...] the Agency advised Air Transat that Rule 6.3 of its 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.

In the same decision, 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 to carry 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.

Most recently, in *Lukács v. Porter Airlines*, 344-C-A-2013, the Agency considered Proposed (Domestic) Tariff Rule 16(f) of Porter Airlines, and reached the same conclusion:

[88] The Agency agrees with Mr. Lukács, and finds that it is unreasonable for Porter to refuse to refund the fare paid by a passenger because of its cancellation of a flight, even if the cause is an event beyond Porter's control.

Therefore, it is submitted that the same conclusion is applicable to Porter Airlines' International Tariff Rules 3.4 and 15, namely, that they are unreasonable, because they purport to allow Porter Airlines to refuse to refund fares paid for flights that were cancelled.

(e) The choice with respect to refund lies with the passengers

In *Lukács v. Air Canada*, LET-C-A-80-2011, the Agency expressed the preliminary opinion that it is unreasonable for a carrier to retain the choice between reprotecting passengers and providing a refund, and that the choice ought to lie with the passengers:

[108] Air Canada's Tariff does allow the passenger to opt for a refund of the unused portion of their ticket. However, Air Canada also retains the right to provide a refund if it is unable to fulfill the first two options, consisting of finding alternative transportation on its own aircraft or on a carrier with which Air Canada has an interline agreement, within a reasonable time. This means that the passenger still remains subject to the decision of Air Canada regardless of what might work best for the passenger. In the event that a passenger would not want a refund of the unused portion of their ticket, Air Canada could still opt to provide this instead of securing alternative transportation for the passenger. In other words, Air Canada still retains some discretion over whether the passenger will continue travelling or receive a refund. By retaining some discretion over the selection of the choice of options from its Tariff provision, Air Canada may be limiting or avoiding the actual damage incurred by a passenger as a result of delay. The Agency also notes that with respect to this Issue, Air Canada has not demonstrated to the satisfaction of the Agency why, from an operational and commercial perspective, the choice of option could not lie exclusively with the passenger.

[109] Accordingly, the Agency is of the preliminary opinion that the subject Tariff provision is unreasonable.

In *Lukács v. Air Canada*, 250-C-A-2012, the Agency affirmed this finding, and held that:

[123] [...] the Agency finds that Tariff Rule 91(B)(3), as currently drafted, is unreasonable for failing to give the passenger sole discretion to choose to obtain a refund.

[124] The Agency also determines that Air Canada's proposal to leave the choice of option with the passenger is reasonable.

Thus, it is submitted that the choice of whether to obtain a refund or be reprotected ought to lie solely with the passenger, and any provision purporting to allow the carrier to retain that choice is unreasonable.

Therefore, Porter Airlines' International Tariff Rules 3.4 and 15 are unreasonable by failing to give the passenger sole discretion to choose to obtain a refund.

(f) In certain circumstances, passengers are entitled to transportation to their point of origin without a charge in addition to a full refund

In *Lukács v. Air Canada*, LET-C-A-80-2011, the Agency held that:

[102] Article 19 of the Convention does not specify exactly what type of damage would be compensated for in the case of delay, but some examples from the jurisprudence include expenses for accommodation and meals or the additional transportation costs that would be incurred as a result of overbooking or cancellation. [Footnote: See for example *Balogun v. Air Canada*, [2010] O.J. No. 663 (S.C.J.); *Lukács v. United Airlines Inc.*, *supra* note 5.]

[103] There is therefore a possibility that compensation for damages under the Convention would extend beyond a mere refund of the unused portion of the ticket. In fact, it is reasonable to assume that in many situations of overbooking or cancellation a passenger would expect more than a refund for the unused portion of the ticket.

[104] The subject Tariff provision in this case indicates that the Tariff may operate to leave a passenger without a flight to or from their destination and with nothing but a refund for the unused portion of the ticket. In cases where a delay or cancellation occurs at a connecting point during a trip, with the result that a passenger's travel no longer serves the passenger's purpose, the passenger could be required to pay the cost of returning to their point of origin. As Mr. Lukács submits, payment of a partial refund may force a passenger to absorb some of the costs directly associated with their delayed travel. The Agency accepts Mr. Lukács' submission that the actual costs, or damages, incurred by a passenger may exceed the mere refund of the unused ticket.

[105] Accordingly, the Agency is of the preliminary opinion that the part of Tariff Rule 91(B) that allows for a refund of the unused portion of the ticket only is unreasonable. Air Canada has not demonstrated why, given its commercial and operational obligations, it cannot refund the entire ticket cost. Furthermore, Air Canada has not addressed the question of returning a passenger to their point of origin, within a reasonable time and at no extra cost, in cases where delay or cancellation occurs at a connecting point during travel, with the result that a passenger's travel no longer serves the passenger's purpose. As Mr. Lukács argues, many situations

can be envisioned in which a passenger could be forced to absorb the cost of a flight that does not meet their needs, nor fulfill their purpose of travel, and does not coincide with the transportation for which the passenger contracted.

In the final decision in *Lukács v. Air Canada*, 250-C-A-2012, the Agency affirmed these preliminary findings (paras. 107-114).

The Applicant notes that Air Canada, Air Transat, Sunwing Airlines, and WestJet have all incorporated provisions in their tariffs that give effect to these findings of the Agency. Thus, Porter Airlines will suffer no competitive disadvantage by doing the same.

Therefore, it is submitted that Porter Airlines' International Tariff Rules 3.4 and 15 are unreasonable in that they fail to address the question of returning a passenger to their point of origin, within a reasonable time and at no cost, in cases where delay or cancellation occurs at a connecting point during travel, with the result that a passenger's travel no longer serves the passenger's purpose, and they also fail to provide for a refund of the full fare in such situations.

(g) Conclusion

Porter Airlines' International Tariff Rules 3.4 and 15 are blanket exclusions of liability tending to relieve Porter Airlines from liability under the *Montreal Convention*. As such, they are null and void by Article 26, and thus they are unreasonable.

Porter Airlines' International Tariff Rules 3.4 and 15 are also unreasonable based on a wealth of past decisions of the Agency concerning the rights of passengers in the case of flight cancellation and denied boarding.

Furthermore, Porter Airlines' International Tariff Rules 3.4 and 15 are also inconsistent with the *Code of Conduct of Canada's Airlines* and the Agency's recent Notice to Industry (Exhibit "G"); they also fail to incorporate the "right for care" provisions (meal voucher, overnight hotel, and drinks and snacks) that the three major Canadian airlines have long ago adopted, and Sunwing Airlines recently incorporated into its tariff.

Therefore, it is submitted that Porter Airlines' International Tariff Rules 3.4 and 15 ought to be disallowed, and substituted with provisions that incorporate the key points of the *Code of Conduct of Canada's Airlines*, the *Montreal Convention*, the findings of the Agency in the trilogy of decisions *Lukács v. Air Transat*, 248-C-A-2012, *Lukács v. WestJet*, 249-C-A-2012, and *Lukács v. Air Canada*, 250-C-A-2012, and the Agency's recent Notice to Industry (Exhibit "G").

III. Rule 3.4: “without notice to any passengers affected thereby”

Porter Airlines’ International Tariff Rule 3.4 (Exhibit “H”) states that:

The Carrier reserves the right to cancel or change the planned departure, schedule, route, aircraft or stopping places of any flight for which fares in respect of a International Service have been paid, at any time and from time to time, for any reason, without notice to any passengers affected thereby and, in connection therewith, the Carrier shall not be liable to any passenger in respect of such cancellation or change, whether or not resulting from an Event of Force Majeure; [...]

[Emphasis added.]

The Applicant submits that Rule 3.4 is also unreasonable because it purports to deprive passengers of the right to notice of schedule changes affecting their travel.

In Decision No. LET-A-112-2003, the Agency held in relation to Air Transat’s tariff that:

The Agency notes that Rule 5.2(b) of the tariff is devoid of any provision relating to the notification of passengers in the event of a flight delay. As such, the Agency is of the view that this provision may not be just and reasonable. 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 right of passengers to be informed about delays and schedule changes was more recently recognized by the Agency in *Lukács v. Porter Airlines*, 16-C-A-2013, in the context of Porter Airlines’ International Tariff, where the Agency held (at para. 87) that:

In this regard, the Agency notes that some Canadian carriers, including Air Canada, have tariff provisions that provide that passengers have a right to information on flight times and schedule changes, and that carriers must make reasonable efforts to inform passengers of delays and schedule changes, and the reasons for them. The Agency finds that such provisions are reasonable, and that, in this regard, the rights of passengers to be subject to reasonable terms and conditions of carriage outweigh any of the carrier’s statutory, commercial or operational obligations. The Agency therefore finds that the absence of similar provisions in Porter’s Existing Tariff Rules would render Proposed Tariff Rule 18(a) unreasonable, if filed with the Agency.

Thus, it is submitted that both the importance and the obligation of carriers to provide passengers with notice about schedule changes have long been recognized by the Agency. Indeed, in the absence of such a notice, passengers are at risk of losing the entire benefit of the itinerary for which they have paid.

Therefore, it is submitted that it is unreasonable to deprive passengers of notice about schedule changes, and any provision exempting Porter Airlines from the obligation to notify passengers ought to be disallowed as unreasonable.

The Applicant further submits that Rule 3.4 renders Porter Airlines' International Tariff unclear, because it contradicts and negates Rule 18(c) (Exhibit "J"), which states that:

Passengers have a right to information on flight times and schedule changes. In the event of a delay or schedule change, the carrier will make reasonable efforts to inform the passengers of delays and schedule changes, and, to the extent possible, the reasons for them.

Hence, it is submitted that Rule 3.4 should also be disallowed, because it renders the tariff unclear, contrary to s. 122 of the *ATR*.

IV. Flight advancement

Flight advancement occurs when a carrier changes the scheduled departure time of a flight to a time that is earlier than what has been scheduled and communicated to passengers.

While flight delays affect passengers' activities at the destination, flight advancements impact the activities of the passengers at the point of origin. For example, a departure of 8:00 pm that is advanced to 4:00 pm affects the ability of passengers to work during normal business hours on the day of departure.

(a) Right to notice: "reasonable effort" is insufficient

Porter Airlines' International Tariff Rule 18(c) (Exhibit "J") states that:

Passengers have a right to information on flight times and schedule changes. In the event of a delay or schedule change, the carrier will make reasonable efforts to inform the passengers of delays and schedule changes, and, to the extent possible, the reasons for them.

[Emphasis added.]

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.

Thus, the Applicant submits that making "reasonable efforts" sets the bar too low for Porter Airlines in the case of flight advancements. 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.]

Subsequently, in *Lukács v. Porter Airlines*, 344-C-A-2013, the Agency held that:

[64] [...] The absence of a tariff provision that imposes on Porter a requirement to "undertake" to inform passengers of flight advancements would severely limit the recourses available to passengers affected by those advancements, and would certainly be disadvantageous.

[65] The Agency is of the opinion that the commitment to make "reasonable efforts" to inform passengers, insofar as such commitment pertains to flight advancements, is unreasonable. [...]

Therefore, it is submitted that Rule 18(c) ought to be substituted with a wording that imposes on Porter Airlines the requirement to “undertake” to inform passengers of flight advancements.

(b) Right to 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.

[Emphasis added.]

The Agency reached the same conclusion in *Lipson v. Air Transat*, LET-C-A-59-2013. Recently, in *Lukács v. Air Transat*, 327-C-A-2013, the Agency held that:

[28] With regard to the matter of flight advancements, the Agency is of the opinion that such advancements may impact as negatively on those passengers as is the case with passengers whose flight is delayed, and that affected passengers should be able to avail themselves of the same remedies as those available to passengers whose flight is delayed. Therefore, the Agency finds that the absence of protection for all passengers affected by flight advancements fails to strike a balance between a passenger’s right to be subject to reasonable terms and conditions of carriage and Air Transat’s statutory, commercial and operational obligations.

The Applicant submits that the same conclusions are applicable to Porter Airlines’ International Tariff.

Therefore, it is submitted that Porter Airlines’ International Tariff is unreasonable because of the absence of tariff provisions concerning advancement of flight times, and protection of passengers affected by such events.

Hence, the Applicant is asking the Agency to direct Porter Airlines to amend its International Tariff to offer protection to passengers whose flight was advanced.

V. Rule 1: Definition of “Event of Force Majeure”

Porter Airlines’ International Tariff Rule 1 (Exhibit “K”) defines an “Event of Force Majeure” as follows:

Event of Force Majeure means an event, the cause or causes of which are not attributable to the willful misconduct or gross negligence of the Carrier, including, but not limited to (i) earthquake, flood, hurricane, explosion, fire, storm, epidemic, other acts of God or public enemies, war, national emergency, invasion, insurrection, riots, strikes, picketing, boycott, lockouts or other civil disturbances, (ii) interruption of flying facilities, navigational aids or other services, (iii) any laws, rules, proclamations, regulations, orders, declarations, interruptions or requirements of or interference by any government or governmental agency or official thereof, (iv) inability to procure materials, accessories, equipment or parts from suppliers, mechanical failure to the aircraft or any part thereof, damage, destruction or loss of use of an aircraft, confiscation, nationalization, seizure, detention, theft or hijacking of an aircraft, or (v) any other cause or circumstances whether similar or dissimilar, seen or unforeseen, which the Carrier is unable to overcome by the exercise of reasonable diligence and at a reasonable cost;

In *Lukács v. Porter Airlines*, 344-C-A-2013, a virtually identical tariff provision that Porter Airlines proposed to include in its Domestic Tariff was considered, and the Agency held that:

[108] The Agency is of the opinion that, in and of itself, the proposed definition of “Event of Force Majeure” provided under Proposed Tariff Rule 1 is unreasonable as it includes incidents that have not been determined to be of a nature to constitute “force majeure.” In addition, the event causing a flight delay or cancellation is not the determining factor in establishing whether a carrier is liable under the principles of the Convention. The Agency has determined in Decision No. 16-C-A-2013, for example, that what is vital is the manner in which the carrier reacts to those events.

[Emphasis added.]

The Applicant submits that the same conclusion is applicable to the definition of “Event of Force Majeure” in Porter Airlines’ International Tariff Rule 1.

Therefore, it is submitted that the definition of “Event of Force Majeure” ought to be disallowed and deleted from Rule 1.

VI. Rule 20: Denied boarding compensation

A copy of Porter Airlines' International Tariff Rule 20, governing the rights of passengers who are denied boarding as a result of oversale, is attached and marked as Exhibit "L".

The Applicant challenges the reasonableness and clarity of Rule 20 as a whole, because it is inconsistent with the legal principles set out by the Agency in *Anderson v. Air Canada*, 666-C-A-2013, *Lukács v. Air Canada*, 204-C-A-2013, and *Lukács v. WestJet*, 227-C-A-2013. In what follows, particularly problematic provisions of Rule 20 are surveyed.

(a) "If a passenger has been denied a reservation..."

Porter Airlines' International Tariff Rule 20 states (in part) that:

If a passenger has been denied a reserved seat in case of an oversold flight on Porter Airlines:

- (a) where the flight originates in Canada, the Carrier will:
 - i. refund the total fare paid for each unused segment; or
 - ii. arrange reasonable alternate transportation on its own services; or
 - iii. if reasonable alternate transportation on its own services is not available, the Carrier will make reasonable efforts to arrange transportation on the services of another carrier or combination of carriers on a confirmed basis in the same comparable, or lower booking code; and

[Emphasis added.]

(i) Where does the choice lie?

The Agency considered a similar provision in Air Canada's tariff in Decision No. LET-A-82-2009, and raised serious concerns about its clarity. Subsequently, Air Canada amended its tariffs to clarify that it retained the choice between a refund and alternate transportation. In Decision No. 479-A-2009, the Agency accepted this amendment for the limited purpose of its concerns about clarity; however, subsequently, in *Lukács v. Air Canada*, LET-C-A-80-2011, the Agency held that:

[108] Air Canada's Tariff does allow the passenger to opt for a refund of the unused portion of their ticket. However, Air Canada also retains the right to provide a refund if it is unable to fulfill the first two options, consisting of finding alternative transportation on its own aircraft or on a carrier with which Air Canada has an interline agreement, within a reasonable time. This means that the passenger still

remains subject to the decision of Air Canada regardless of what might work best for the passenger. In the event that a passenger would not want a refund of the unused portion of their ticket, Air Canada could still opt to provide this instead of securing alternative transportation for the passenger. In other words, Air Canada still retains some discretion over whether the passenger will continue travelling or receive a refund. By retaining some discretion over the selection of the choice of options from its Tariff provision, Air Canada may be limiting or avoiding the actual damage incurred by a passenger as a result of delay. The Agency also notes that with respect to this Issue, Air Canada has not demonstrated to the satisfaction of the Agency why, from an operational and commercial perspective, the choice of option could not lie exclusively with the passenger.

Following this finding of the Agency, Air Canada amended its tariffs to ensure that the choice lies exclusively with the passenger (see *Lukács v. Air Canada*, 250-C-A-2012, paras. 121-124).

Therefore, the Applicant submits that Rule 20 is unclear in its current form, because it fails to specify with whom the choice lies between a refund and alternate transportation. Furthermore, it is submitted that the choice between a refund and alternate transportation ought to lie exclusively with the passenger.

(ii) “reasonable efforts” and “same comparable, or lower booking code”

It is submitted that the phrase “will make reasonable efforts” renders Rule 20 unclear in that it does not impose a clear obligation upon Porter Airlines. It is submitted that “will make reasonable efforts” ought to be replaced simply with “shall.”

Rule 20 also purports to limit Porter Airlines’ obligation to secure alternate transportation on flights “in the same comparable, or lower booking code.” First, it is submitted that this phrase is unclear, because booking codes of Porter Airlines may not be comparable to booking codes of other airlines. Second, and more importantly, it is submitted that this restriction is unreasonable.

It is a common practice of airlines to reprotect passengers who are denied boarding on booking codes higher than their original reservation (such as reprotecting an economy class passenger on business class), if doing so results in mitigation of the passenger’s delay. Reprotecting passengers, on a higher booking class if necessary, is the normal and ordinary consequence of overselling a flight, and it is consistent with the carrier’s concomitant obligation under Article 19 of the *Montreal Convention* to mitigate the delay of passengers (see *Lukács v. Air Canada*, 250-C-A-2012, paras. 25 and 90).

Therefore, it is submitted that excluding the possibility of reprotecting victims of denied boarding on a booking class higher than their original booking is inconsistent with the obligations of Porter Airlines under Article 19 of the *Montreal Convention*, and as such, it is unreasonable.

(b) No refund or alternate transportation for flights originating from the US

Porter Airlines' International Tariff Rule 20 states (in part) that:

If a passenger has been denied a reserved seat in case of an oversold flight on Porter Airlines:

⋮

(b) where the flight originates in the United States, the Carrier will provide denied boarding compensation as set forth in this Rule 20 below.

A literal reading of this provision suggests that with respect to flights originating in the United States, Porter Airlines provides only monetary compensation, but has no obligation to provide a refund or to arrange for alternate transportation.

It is submitted that while this is likely not the intended meaning of Rule 20, it is obvious that Rule 20 is either unclear or unreasonable with respect to the rights of passengers departing from the US.

(c) No denied boarding compensation for passengers departing from Canada

Rule 20 is labeled as "Denied Boarding Compensation," and sets out in great detail rules governing the amount of denied boarding compensation payable to passengers departing from the United States; however, Rule 20 contains no provisions requiring Porter Airlines to pay a similar compensation to passengers departing from Canada who are denied boarding. Instead, Rule 20 is confined to reprotection of these passengers. Reprotection of passengers (i.e., alternate transportation) is not a form of compensation, but rather the belated fulfillment of the contract of carriage.

In *Anderson v. Air Canada*, 666-C-A-2001, the Agency considered the principles governing the amount of denied boarding compensation payable to passengers, and held that:

Contrary to an air carrier's policies on refunds for services purchased but not used, whereby the fare paid by a passenger is inherently linked to the design and implementation of the compensation, the fare paid by a passenger is unrelated to the amount of compensation that the passenger is entitled to receive upon being denied boarding. Further, any passenger who is denied boarding is entitled to compensation; evidence of specific damages suffered need not be provided.

[Emphasis added.]

Thus, it is submitted that compensation of victims of denied boarding has two components:

- (1) reimbursement for out-of-pocket expenses, including refunds; and
- (2) denied boarding compensation (lump sum, no evidence of specific damage is required).

This principle is recognized, for example, in *Kirkham v. Air Canada*, 268-C-A-2007, where the Agency ordered Air Canada to both reimburse the passenger for his out-of-pocket expenses, and in addition to pay the passenger denied boarding compensation.

Recently, in *Lukács v. WestJet*, 227-C-A-2013, the Agency considered the lack of tariff provisions requiring the payment of denied boarding compensation in WestJet's International Tariff, and held:

[21] As pointed out by Mr. Lukács, the Agency, in Decision No. 666-C-A-2001, held, in part, that any passenger who is denied boarding is entitled to compensation. Given that Existing Tariff Rule 110(E) does not provide for that compensation for flights to and from Canada, it is inconsistent with Decision No. 666-C-A-2001. The Agency finds, therefore, that Existing Tariff Rule 110(E) is unreasonable.

⋮

[39] Although WestJet proposes to revise Existing Tariff Rule 110(E) by deleting text that provides that denied boarding compensation will not be tendered for flights to and from Canada, Proposed Tariff Rule 110(E) only sets out compensation due to passengers who are denied boarding for flights from the United States of America. The failure to establish conditions governing denied boarding compensation for flights to and from Canada is contrary to Decision No. 666-C-A-2001. Therefore, the Agency finds that if Proposed Tariff Rule 110(E) were to be filed with the Agency, it would be considered unreasonable.

[Emphasis added.]

Therefore, it is submitted that Rule 20 is unreasonable, because it fails to impose any obligation of paying denied boarding compensation to passengers, contrary to the Agency's findings in *Anderson v. Air Canada*, 666-C-A-2001.

It is further submitted that Rule 20 ought to be substituted with a provision that implements the denied boarding compensation amounts of the US regime, so that the same amounts will apply to all international flights of Porter Airlines, regardless of the point of origin.

(d) Substitution of aircraft with one of a smaller capacity

Porter Airlines' International Tariff Rule 20 relieves Porter Airlines from the obligation to pay denied boarding compensation to passengers who are denied boarding because "a smaller capacity aircraft was substituted for safety or operational reasons."

A virtually identical provision was recently considered in *Lukács v. Air Canada*, 204-C-A-2013, where the Agency made the following key findings:

- If the carrier is able to demonstrate that the events prompting the substitution of an aircraft were beyond its control, then the carrier should have the flexibility to control

its fleet and determine when an aircraft should be substituted for operational and safety reasons (para. 41).

- The burden must rest with the carrier to establish that the events prompting the substitution were beyond its control and that it took all reasonable measures to avoid the substitution or that it was impossible for the carrier to take such measures (para. 44).
- In order to relieve itself from the obligation to pay denied boarding compensation, the carrier must demonstrate that:

- (1) substitution occurred for operational and safety reasons beyond its control, and
- (2) it took all reasonable measures to avoid the substitution or that it was impossible for the carrier to take such measures.

If the carrier fails to demonstrate both of these, then compensation should be due to the affected passengers (para. 44).

Based on these findings, the Agency concluded that, in the absence of specific language that establishes context or qualifies Air Canada's exemption from paying denied boarding compensation, Rule 245(E)(1)(b)(iv) was unreasonable (para. 45).

The Applicant submits that these conclusions are equally applicable to Porter Airlines' International Tariff Rule 20, and therefore the impugned provision of Rule 20 is unreasonable.

(e) Provisions purporting to require refusing compensation to retain the right to seek compensation in a court of law

(i) Passenger's Option

Porter Airlines' International Tariff Rule 20 states under the heading "Passenger's Option" that:

Acceptance of the compensation relieves the Carrier from any further liability to the passenger caused by the failure to honour the confirmed reservation. However, the passenger may decline the payment and seek to recover damages in a court of law or in some other manner.

This provision is virtually identical to WestJet's Existing Tariff Rule 110(G) that was considered in *Lukács v. WestJet*, 227-C-A-2013, where the Agency held that:

[28] The first part of Existing Tariff Rule 110(G) purports to relieve [...] from further liability should a passenger who is denied boarding accept the compensation offered by WestJet. The second part of Existing Tariff Rule 110(G) leaves the impression

that a passenger can only seek to recover damages in a court of law or in some other manner if the payment offered [...] is declined. [...] in Decision No. 249-C-A-2012, the Agency found a similar rule to be unreasonable because it established a limit of liability lower than that provided for under the Convention. The Agency finds, therefore, that the first part of Existing Tariff Rule 110(G) is unreasonable. With respect to the second part of that Rule, the Agency is of the opinion that even if a payment is accepted by a passenger, that passenger can still seek to recover damages in a court of law or in some other manner. The Agency finds, therefore, that the second part of Existing Tariff Rule 110(G) is unclear, contrary to paragraph 122(c) of the ATR, and unreasonable, contrary to subsection 111(1) of the ATR.

It is submitted that the same conclusion is applicable to the “Passenger’s Option” section of Rule 20, and thus the provisions under this heading are unreasonable and unclear.

(ii) Last sentence of “Method of Payment”

Porter Airlines’ International Tariff Rule 20 states under the heading “Method of Payment” that:

[...] The passenger may, however, insist on the cash/cheque payment or refuse all compensation and bring private legal action.

This provision is virtually identical to WestJet’s Proposed Tariff Rule 110(G) that was considered in *Lukács v. WestJet*, 227-C-A-2013, where the Agency held that:

[43] With respect to the clarity of Proposed Tariff Rule 110(G), the Agency agrees with Mr. Lukács’ submission that the phrasing of that Rule, without being explicit, suggests that the availability of the option of seeking payment in a court of law is predicated on the passenger first declining payment offered by WestJet. The Agency finds, therefore, that Proposed Tariff Rule 110(G) would be considered unclear if it were to be filed with the Agency given that it is phrased in such a manner as to create reasonable doubt and ambiguity respecting its application.

[44] As to the reasonableness of Proposed Tariff Rule 110(G), the Agency concurs with Mr. Lukács’ submission that the Rule seems to indicate that for a person to retain a right to legal redress, that person must first reject any payment offered by WestJet, and that a similar provision was deemed to be unreasonable in Decision No. 249-C-A-2012. The Agency finds that if Proposed Tariff Rule 110(G) were to be filed with the Agency, it would also be determined to be unreasonable.

It is submitted that the same conclusion is applicable to the last sentence of the “Method of Payment” section of Rule 20, and thus the impugned sentence is unreasonable and unclear.

(f) Cash vs. voucher

Porter Airlines' International Tariff Rule 20 states under the heading "Method of Payment" that:

Except as provided below, the Carrier must give each passenger who qualifies for denied boarding compensation a payment by cheque or draft for the amount specified above, on the day and place the involuntary denied boarding occurs. However, if the Carrier arranges alternate transportation for the passenger's convenience that departs before the payment can be made, the payment will be sent to the passenger within 24 hours. Carrier may offer free or discounted transportation vouchers in place of cash or cheque payment. The passenger may, however, insist on the cash/cheque payment or refuse all compensation and bring private legal action.

[Emphasis added.]

(i) The general rule: compensation must be in cash or equivalent

In *Lukács v. WestJet*, LET-C-A-83-2011, the Agency held that any compensation paid in accordance with the tariff is to be paid in the form of cash, cheque, credit to a passenger's credit card, or any other form acceptable to the passenger. This finding was reiterated by the Agency in *Lukács v. WestJet*, 227-C-A-2013 in the specific context of denied boarding compensation:

[37] With respect to the form of payment to be offered to passengers affected by denied boarding, the Agency concurs with Mr. Lukács' submission that WestJet's restriction of payment to either a travel credit or refund of the fare paid is inconsistent with the Agency's findings in Decision No. LET-C-A-83-2011. As such, the Agency finds that Proposed Tariff Rule 110(B) would be considered unreasonable if it were to be filed with the Agency.

(ii) Passengers' acceptance of compensation other than cash must be an informed decision

There is no doubt that passengers may agree to accept other forms of compensation. This acceptance, however, must be an informed decision, based on the passenger being fully informed of the restrictions that accepting an alternative form of compensation may entail. This principle is common to both the American and the European denied boarding compensation regimes. Indeed, 14 CFR Part 250.5(c) provides that:

(c) Carriers may offer free or reduced rate air transportation in lieu of the cash or check due under paragraphs (a) and (b) of this section, if-

[...]

(2) The carrier fully informs the passenger of the amount of cash/check compensation that would otherwise be due and that the passenger may decline the transporta-

tion benefit and receive the cash/check payment; and

(3) The carrier fully discloses all material restrictions, including but not limited to, administrative fees, advance purchase or capacity restrictions, and blackout dates applicable to the offer, on the use of such free or reduced rate transportation before the passenger decides to give up the cash/check payment in exchange for such transportation.

Similarly, Article 7(3) of *Regulation (EC) 261/2004* provides that:

The compensation referred to in paragraph 1 shall be paid in cash, by electronic bank transfer, bank orders or bank cheques or, with the signed agreement of the passenger, in travel vouchers and/or other services.

In other words, passengers are entitled to a cash (or equivalent) compensation, but may agree to accept another form of payment if they choose to. The requirement that passengers provide a written agreement confirming that they accept compensation in a form other than cash (or equivalent) underscores the principle that the standard form of compensation is by cash, and that the passengers' decision to depart from this standard must be an informed one.

(iii) Disadvantages for passengers of compensation by travel vouchers instead of cash

Although in theory, receiving a travel voucher for an amount equal to double or triple the cash denied boarding compensation may mutually benefit Porter Airlines and its passengers, in practice, the vouchers tend to be nearly worthless due to the many restrictions imposed on their use, and benefit only Porter Airlines. One of these restrictions is that vouchers seem to be valid only for Porter Airlines flights. This is a substantial restriction, because Porter Airlines does not have an extensive network.

The vast majority of passengers are not aware of the many restrictions, and it is very difficult to verify whether passengers are adequately informed about their rights by the carrier.

Even if passengers are made aware of all the restrictions and limitations of Porter Airlines' travel vouchers, they cannot make an informed decision at the airport, in a matter of minutes, as to whether to seek cash compensation or accept a travel voucher instead. Indeed, in *Lukács v. WestJet*, 252-C-A-2012 (para. 83), the Agency recognized the importance of passengers having a reasonable opportunity to fully assess their options:

The Agency is of the opinion that this Proposed Tariff Rule is unreasonable. Proposed Tariff Rule 12.5 does not provide the passenger with a reasonable opportunity to fully assess their options. Instead, the passenger must decide between two options as determined by the carrier, both of which have legal consequences on the passenger's rights without a reasonable period of time to assess the full potential of the impact of selecting one over another.

In the present case, acceptance of compensation by way of travel vouchers may have very significant disadvantages for passengers (although it undoubtedly benefits Porter Airlines), and there is a very serious concern about passengers being deprived of the ability to make an informed decision, based on considering all pros and cons, about the form of compensation that they wish to receive.

Thus, it is submitted that even if the Agency is of the opinion that paying compensation by way of travel vouchers, with the written consent of the passenger, is a reasonable alternative to a cash compensation, it is submitted that passengers ought to be able to change their minds within a reasonable amount of time, and exchange their travel vouchers to cash compensation.

(iv) Decision No. 342-C-A-2013 of the Agency

In *Lukács v. Air Canada*, 342-C-A-2013, the Agency considered the issue of appropriate method of payment of denied boarding compensation, and made the following findings:

[49] The Agency agrees with Mr. Lukács' submission that passengers must be afforded ample opportunity to determine whether they wish to choose travel vouchers in lieu of a cash payment as denied boarding compensation, and that this choice should only be made after Air Canada fully informs passengers of the conditions attached to those vouchers. The Agency finds that, in light of the ratio applicable to cash compensation versus values of travel vouchers for international carriage, the ratio of 1:3 proposed by Mr. Lukács is reasonable.

[50] In light of the foregoing, the Agency finds that the restrictions that Mr. Lukács proposes be imposed on the issuance of vouchers are reasonable, with the exception of the one-year period proposed by Mr. Lukács for persons to exchange travel vouchers for cash. The Agency is of the opinion that the proposed period is excessive, and finds that a one-month period for an exchange is more reasonable.

As a result, the Agency imposed the following restrictions on Air Canada offering denied boarding compensation by way of travel vouchers:

- (R1) carrier must inform passengers of the amount of cash compensation that would be due, and that the passenger may decline travel vouchers, and receive cash or equivalent;
- (R2) carrier must fully disclose all material restrictions before the passenger decides to give up the cash or equivalent payment in exchange for a travel voucher;
- (R3) carrier must obtain the signed agreement of the passenger, confirming that the passenger was provided with the aforementioned information, prior to providing travel vouchers in lieu of compensation;

- (R4) the amount of the travel voucher must be not less than 300% of the amount of cash compensation that would be due;
- (R5) passengers are entitled to exchange the travel vouchers to cash at the rate of \$1 in cash being equivalent to \$3 in travel vouchers within one (1) month.

The Applicant submits that these restrictions are reasonable, and strike a balance between the rights of passengers to be subject to reasonable terms and conditions and the carrier's statutory, commercial and operational obligations.

Therefore, it is submitted that if Porter Airlines chooses to offer denied boarding compensation by way of travel vouchers at all (a decision that is entirely up to Porter Airlines), then Porter Airlines ought to also be subject to the aforementioned restrictions.

Hence, it is submitted that the "Method of Payment" section of Rule 20 in its present form is unreasonable.

VII. Relief sought

The Applicant prays the Agency that the Agency:

- A. disallow Porter Airlines' International Tariff Rules 3.4 and 15;
- B. substitute International Tariff Rules 3.4 and/or 15 with provisions that incorporate the key points of the *Code of Conduct of Canada's Airlines*, the *Montreal Convention*, the findings of the Agency in the trilogy of decisions *Lukács v. Air Transat*, 248-C-A-2012, *Lukács v. WestJet*, 249-C-A-2012, and *Lukács v. Air Canada*, 250-C-A-2012, and the Agency's recent Notice to Industry (Exhibit "G");
- C. direct Porter Airlines to amend its International Tariff to contain an undertaking to notify passengers about flight advancements;
- D. direct Porter Airlines to amend its International Tariff to offer protection to passengers affected by flight advancement;
- E. disallow International Tariff Rule 1 in part, namely, the definition of "Event of Force Majeure";
- F. disallow Porter Airlines' International Tariff Rule 20 as unclear and unreasonable;
- G. direct Porter Airlines to amend International Tariff Rule 20 to reflect the Agency's findings;
- H. impose the above-noted restrictions (R1)-(R5) on Porter Airlines if Porter Airlines chooses to offer travel vouchers in lieu of denied boarding compensation.

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).

Foreign legislation

6. European Union: *Regulation (EC) 261/2004*.
7. United States: 14 CFR Part 250, as amended by 76 FR 23100.

Case law

8. *Air Canada v. Canadian Transportation Agency*, 2009 FCA 95.
9. *Anderson v. Air Canada*, Canadian Transportation Agency, 666-C-A-2001.
10. *Caron c. Vacances Sunwing*, 2012 QCCQ 2050.
11. *Griffiths v. Air Canada*, Canadian Transportation Agency, 287-C-A-2009.
12. *H. v. Air Canada*, Canadian Transportation Agency, 2-C-A-2001.
13. *Kipper v. WestJet*, Canadian Transportation Agency, 309-C-A-2010.
14. *Kirkham v. Air Canada*, Canadian Transportation Agency, 268-C-A-2007.
15. *Lipson v. Air Transat*, Canadian Transportation Agency, LET-C-A-59-2013.
16. *Lukács v. Air Canada*, Canadian Transportation Agency, LET-C-A-29-2011.

17. *Lukács v. Air Canada*, Canadian Transportation Agency, LET-C-A-80-2011.
18. *Lukács v. Air Canada*, Canadian Transportation Agency, LET-C-A-129-2011.
19. *Lukács v. Air Canada*, Canadian Transportation Agency, 291-C-A-2011.
20. *Lukács v. Air Canada*, Canadian Transportation Agency, 250-C-A-2012.
21. *Lukács v. Air Canada*, Canadian Transportation Agency, 251-C-A-2012.
22. *Lukács v. Air Canada*, Canadian Transportation Agency, 204-C-A-2013.
23. *Lukács v. Air Canada*, Canadian Transportation Agency, 342-C-A-2013.
24. *Lukács v. Air Transat*, Canadian Transportation Agency, 248-C-A-2012.
25. *Lukács v. Air Transat*, Canadian Transportation Agency, 327-C-A-2013.
26. *Lukács v. Porter Airlines*, Canadian Transportation Agency, 16-C-A-2013.
27. *Lukács v. Porter Airlines*, Canadian Transportation Agency, 344-C-A-2013.
28. *Lukács v. WestJet*, Canadian Transportation Agency, 477-C-A-2010.
29. *Lukács v. WestJet*, Canadian Transportation Agency, 483-C-A-2010.
30. *Lukács v. WestJet*, Federal Court of Appeal, 10-A-41.
31. *Lukács v. WestJet*, Federal Court of Appeal, 10-A-42.
32. *Lukács v. WestJet*, Canadian Transportation Agency, 418-C-A-2011.
33. *Lukács v. WestJet*, Canadian Transportation Agency, 249-C-A-2012.
34. *Lukács v. WestJet*, Canadian Transportation Agency, 227-C-A-2013.
35. *McCabe v. Air Canada*, Canadian Transportation Agency, 227-C-A-2008.
36. *Mohammad c. Air Canada*, 2010 QCCQ 6858.
37. *Pinksen v. Air Canada*, Canadian Transportation Agency, 181-C-A-2007.
38. *Re: Air Transat*, Canadian Transportation Agency, LET-A-112-2003.
39. *Re: Air Transat*, Canadian Transportation Agency, 28-A-2004.
40. *Re: Air Canada*, Canadian Transportation Agency, 479-A-2009.

Airline Tariff Publishing Company, Agent
**INTERNATIONAL PASSENGER RULES AND FARES TARIFF
NO. AC-2**

10th Revised Page AC-22-A
Cancels 9th Revised Page AC-22-A

RULE	AIR CANADA SECTION I - GENERAL RULES
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80	<p><u>REVISED ROUTINGS, FAILURE TO CARRY AND MISSED CONNECTIONS</u> (Continued)</p> <p>(B) <u>CHANGES REQUESTED BY PASSENGER</u> (Continued)</p> <p>(3) <u>Applicable Fare</u> (Continued)</p> <p>(b) Any difference between the fare and charges applicable under subparagraph (A) above, and the fare and charges paid by the passenger will be collected from the passenger by the carrier accomplishing the rerouting, who will also pay to the original form of payment any amounts due on account of refunds or arrange for the applicable refund by the carrier that issued the original ticket. (See also Rule 60.)</p> <p>(4) <u>Expiration Date</u> The expiration date of any new ticket issued for a change in routing, destination, carrier(s), class of service or validity will be limited to the expiration date that would have been applicable if the new ticket had been issued on the date of sale of the original ticket or Miscellaneous Charges Order.</p> <p>(C) <u>SCHEDULE IRREGULARITY</u></p> <p>+ [C] (1) Given that passengers have a right to information on flight times and schedule changes, Air Canada will make reasonable efforts to inform passengers of delays, cancellations and scheduled changes and to the extent possible, the reason for the delay or change.</p> <p>+ [C] (2) In the event of a scheduled irregularity, Carrier will either:</p> <p>(a) carry the passenger on another of its passenger aircraft + [N] or class of service on which space is available without additional charge regardless of the class of service; or, at carrier's option;</p> <p>(b) endorse to another air carrier with which Air Canada has an agreement for such transportation, the unused portion of the ticket for purposes of rerouting; or at carrier's option;</p> <p>(c) reroute the passenger to the destination named on the ticket or applicable portion thereof by its own or other transportation services; and if the fare for the revised routing or class of service is higher than the refund value of the ticket or applicable portion thereof as determined from Rule 90(D), carrier will require no additional payment from the passenger but will refund the difference if it is lower or.</p> <p>+ [C] (d) If the passenger chooses to no longer travel or if Carrier is unable to perform the option stated in (a) above within a reasonable amount time, make involuntary refund in accordance with Rule 90(D) or,</p> <p>+ [C] (e) upon request, for cancellations within Air Canada's control, return passenger to point of origin and refund in accordance with rule 90(D) (2)(a), as if no portion of the trip had been made (irrespective of applicable fare rules), or subject to passenger's agreement, offer a travel voucher for future travel in the same amount; or, upon passenger request.</p> <p>+ [C] (f) For cancellations within Air Canada's control, if passenger provides credible verbal assurance to Air Canada of certain circumstances that require his/her arrival at destination earlier than options set out in subparagraph (a) above, Air Canada will, if it is reasonable to do so, taking all circumstances known to it into account, and subject to availability, buy passenger a seat on another carrier whose flight is schedule to arrive appreciably earlier than the options proposed in (a) above. Nothing in the above shall limit or reduce the passenger's right, if any, to claim damages, if any, under the applicable Convention, or under the law when neither Convention applies.</p> <p>(3) Except as otherwise provided in applicable local law, in addition to the provisions of this rule, in case of scheduled irregularity within its control Air Canada will offer:</p> <p>(a) For a schedule irregularity lasting longer than 4 hours, a meal voucher for use, where available, at an airport restaurant or our on board cafe, of an amount dependant on the time of day.</p> <p>(b) for a schedule irregularity lasting overnight + [N] or over 8 hours, hotel accommodation subject to availability and ground transportation between the airport and the hotel. This service is only available for out of town passengers.</p> <p>(c) If passengers are already on the aircraft when a delay occurs, Air Canada will offer drinks and snacks if it is safe, practical and timely to do so. If the delay exceeds 90 minutes and circumstances permit, Air Canada will offer passengers the option of disembarking from the aircraft until it is time to depart.</p>
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(Continued on next page)

+ - Effective August 16 per CTA decision 250 - C - A - 2012

For unexplained abbreviations, reference marks and symbols see IPGT-1, C.A.B. NO. 581, NTA(A) NO. 373.

ISSUED: August 15, 2012

EFFECTIVE: September 29, 2012 (Except as Noted)

Air Transat A.T. Inc.

CTA(A) No. 4
Seventh Revised Page 10
Cancels Sixth Revised Page 10

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.

Air Transat A.T. Inc.

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Third Revised Page 47
Cancels Second Revised Page 47

RULE 21 – ADDITIONAL PASSENGER SERVICE COMMITMENTS

1. Given that passengers have a right to information on flight times and schedule changes, 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.
2. (i) Given that passengers have a right to take the flight they paid for, if the passenger's journey is interrupted by a flight cancellation or overbooking, the Carrier will take into account all the circumstances of the case as known to it and will provide the passenger with the option of accepting one or more of the following remedial choices:
 - a) transportation to the passenger's intended destination within a reasonable time at no additional cost ;
 - b) return transportation to the passenger's point of origin within a reasonable time at no additional cost;
 - c) **(C)** where no reasonable transportation option is available and upon surrendering of the unused portion of the ticket, a cash amount or travel credit (at the passenger's discretion) in an amount equal to the fare and charges paid will be refunded or provided as a credit where no portion of the ticket has been used. Where a portion of the ticket has been used, an amount equal to the lowest comparable one-way fare for the class of service paid for shall be refunded or provided as a credit in the event of a one-way booking/itinerary, and for round-trip, circle trip or open jaw bookings/itineraries, an amount equal to fifty percent of the round-trip fare and charges for the class of service paid for, for the unused flight segment(s), shall be refunded or provided as a credit.
- (ii) When determining the transportation service to be offered, the Carrier will consider:
 - (a) available transportation services, including services offered by interline, code sharing and other affiliated partners and, if necessary, other non-affiliated carriers;
 - (b) the circumstances of the passenger, as known to it, including any factors which impact upon the importance of timely arrival at destination.
- (iii) **(C)** Having taken all the known circumstances into consideration, the Carrier will take all measures that can reasonably be required to avoid or mitigate the damages caused by the overbooking or cancellation. Where a passenger who accepts option (a) or option (b) or option (c) nevertheless incurs expense as a result of the overbooking or cancellation, the Carrier will in addition offer a cash payment or travel credit, the choice of which will be at the passenger's discretion.
- (iv) When determining the amount of the offered cash payment or travel credit, the Carrier will consider all circumstances of the case, including any expenses which the passenger, acting reasonably, may have incurred as a result of the overbooking or cancellation, as for example, costs incurred for accommodation, meals or additional transportation. The Carrier will set the amount of compensation offered with a view to reimbursing the passenger for all such reasonable expenses.

Air Transat A.T. Inc.

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First Revised Page 47a
Cancels Original Page 47a

(v) The rights of a passenger against the Carrier in the event of overbooking or cancellation are, in most cases of international carriage, governed by an international convention known as the Montreal Convention, 1999. Article 19 of that Convention provides that an air carrier is liable for damage caused by delay in the carriage of passengers and goods unless it proves that it did everything it could be reasonably expected to do to avoid the damage. There are some exceptional cases of international carriage in which the rights of the passengers are not governed by an international convention. In such cases only, a court of competent jurisdiction can determine which system of laws must be consulted to determine what those rights are.

3. Given that passengers have a right to punctuality, the Carrier will do the following:
 - a) If a flight is delayed and the delay between the scheduled departure of the flight and the actual departure of the flight exceeds 4 hours, the Carrier will provide the passenger with a meal voucher;
 - b) If a flight is delayed by more than 8 hours and the delay involves an overnight stay, the Carrier will pay for an overnight hotel stay and airport transfers for passengers who did not start their travel at that airport;
 - c) If the passenger is already on the aircraft when a delay occurs, the Carrier will offer drinks and snacks if it is safe, practical and timely to do so. If the delay exceeds 90 minutes and the aircraft commander permits, the Carrier will offer passengers the option of disembarking from the aircraft until it is time to depart.
4. Given that passengers have a right to retrieve their luggage quickly, if the luggage does not arrive on the same flight as the passenger, the Carrier will take steps to deliver the luggage to the passenger's residence/hotel as soon as possible. The Carrier will take steps to inform the passenger on the status of the luggage and will provide the passenger with an over-night kit as required. Compensation will be provided as per the provisions of this tariff.
5. (C) Given that nothing in this tariff would make the Carrier responsible for acts of force majeure per Rule 5.3 or for the acts of third parties that are not deemed servants and/or agents of the Carrier per applicable law or international conventions, the Carrier will not be held responsible for inclement weather or for the actions of such third parties including governments, air traffic control service providers, airport authorities, security and law enforcement agencies, or border control management authorities.
6. In the event of a conflict between the provisions of this Rule and those of any other rule in this tariff, the provisions of this Rule shall prevail except with respect to Rule 5.3.

* 24 HOURS OF DEPARTURE.) GUESTS WHO HAVE PREVIOUSLY SELECTED
* A SEAT AND WISH TO UPGRADE TO A PLUS FARE SEAT CAN CONTACT
* OUR CALL CENTRE AT 1-888-937-8538 TO HAVE THE ORIGINAL SEAT
* SELECTION FEE REFUNDED. Passengers who have previously
selected a seat and wish to upgrade to a Plus fare seat can contact
the carrier up to 24 hours before the scheduled time of departure to
have the original seat selection fee refunded.

AREA: ZZ TARIFF: IPRG CXR: WS RULE: 0075

TITLE/APPLICATION - 70

A CARRIER CANCELLATION, CHANGE, AND REFUND TERMS (SEE RULES
60, 100, 105 AND 110 FOR ADDITIONAL INFORMATION)

(A) THE PROVISIONS OF THIS RULE ARE NOT INTENDED TO MAKE
THE CARRIER RESPONSIBLE IN ALL CASES FOR THE ACTS OF
NATURE, OR FOR THE ACTS OF THIRD PARTIES THAT ARE NOT
DEEMED SERVANTS AND/OR AGENTS OF THE CARRIER PER
APPLICABLE LAW OR INTERNATIONAL CONVENTIONS AND ALL

THE

RIGHTS HERE DESCRIBED ARE SUBJECT TO THE FOLLOWING
EXCEPTION:

THE CARRIER SHALL NOT BE LIABLE FOR DAMAGE OCCASIONED
BY OVERBOOKING OR CANCELLATION IF IT, AND ITS

EMPLOYEES

AND AGENTS, TOOK ALL MEASURES THAT COULD REASONABLY BE
REASONABLY BE REQUIRED TO AVOID THE DAMAGE OR IF IT

WAS

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GFS TEXT MENU RULE CATEGORY TEXT DISPLAY
IN EFFECT ON: 17MAY13

AREA: ZZ TARIFF: IPRG CXR: WS RULE: 0075

TITLE/APPLICATION - 70 (CONT)

IMPOSSIBLE FOR THE CARRIER, AND ITS EMPLOYEES OR
AGENTS, TO TAKE SUCH MEASURES.

(B) SUBJECT TO THE EXCEPTION STATED IN (A), IF A FLIGHT IS
OVERBOOKED OR CANCELLED, WITH THE RESULT THAT A
TICKETED PASSENGER IS NOT TRANSPORTED ON A FLIGHT FOR
WHICH HE HELD CONFIRMED SPACE, THE CARRIER WILL DEFINE
A REMEDY OR REMEDIES TO MITIGATE THE IMPACT OF THE
OVERBOOKING OR CANCELLATION UPON THE PASSENGER. IN
DEFINING THE REMEDY OR REMEDIES APPROPRIATE IN A
PARTICULAR CASE, THE CARRIER WILL CONSIDER THE
TRANSPORTATION NEEDS OF THE PASSENGER AND ANY DAMAGES
THE PASSENGER MAY HAVE SUFFERED BY REASON OF THE
OVERBOOKING OR CANCELLATION. IN CASES WHERE THE
PASSENGER IS OFFERED ALTERNATIVE REMEDIES, THE CHOICE
AMONG THE ALTERNATIVES SHALL REST WITH THE PASSENGER.
IN PARTICULAR, THE CARRIER WILL OFFER ONE OR MORE OF
THE FOLLOWING REMEDIES:

- PASSENGER'S
SERVICE
OFFERED
THE
THE
- (1) TRANSPORTATION, WITHOUT FURTHER CHARGE AND WITHIN A REASONABLE TIME, TO THE PASSENGER'S INTENDED DESTINATION ON A TRANSPORTATION SERVICE WHICH SERVICE WILL BE IDENTIFIED BY THE CARRIER;
 - (2) TRANSPORTATION, WITHOUT FURTHER CHARGE AND WITHIN A REASONABLE TIME, TO THE PASSENGER'S POINT OF ORIGIN ON A TRANSPORTATION SERVICE WHICH SERVICE WILL BE IDENTIFIED BY THE CARRIER;
 - (3) A MONETARY PAYMENT IN AN AMOUNT TO BE DEFINED BY THE CARRIER WHICH SHALL IN NO CASE BE LESS THAN THE VALUE OF THE UNUSED PORTION OF THE TICKET;
 - (4) A CREDIT, TO BE DEFINED BY THE CARRIER, TOWARDS THE PURCHASE OF FUTURE TRANSPORTATION ON A SERVICE OPERATED BY THE CARRIER.
- (C) IN IDENTIFYING THE TRANSPORTATION SERVICE TO BE OFFERED TO THE PASSENGER, THE CARRIER WILL NOT LIMIT ITSELF TO CONSIDERING ITS OWN SERVICES OR THE SERVICES OF CARRIERS WITH WHICH IT HAS INTERLINE AGREEMENTS.
- (D) IN DEFINING THE ALTERNATIVE REMEDIES TO BE OFFERED, THE CARRIER WILL CONSIDER, TO THE EXTENT THEY ARE KNOWN TO THE CARRIER, THE CIRCUMSTANCES OF THE PASSENGER AFFECTED BY THE OVERBOOKING OR CANCELLATION, INCLUDING ANY EXPENSES WHICH THE PASSENGER, ACTING REASONABLY, MAY HAVE INCURRED AS A RESULT OF THE OVERBOOKING OR CANCELLATION AS, FOR EXAMPLE, COSTS INCURRED FOR ACCOMMODATION, MEALS OR ADDITIONAL TRANSPORTATION.
- (E) IN DEFINING THE ALTERNATIVE REMEDIES TO BE OFFERED, THE CARRIER WILL MAKE A GOOD FAITH EFFORT TO FAIRLY RECOGNIZE, AND APPROPRIATELY MITIGATE, THE IMPACT OF THE OVERBOOKING OR CANCELLATION UPON THE PASSENGER.
- (F) THE RIGHTS OF A PASSENGER AGAINST THE CARRIER IN THE

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GFS TEXT MENU RULE CATEGORY TEXT DISPLAY
IN EFFECT ON: 17MAY13

AREA: ZZ TARIFF: IPRG CXR: WS RULE: 0075

TITLE/APPLICATION - 70 (CONT)
EVENT OF OVERBOOKING OR CANCELLATION ARE, IN MOST
CASES
OF INTERNATIONAL CARRIAGE, GOVERNED BY AN
INTERNATIONAL
CONVENTION KNOWN AS THE MONTREAL CONVENTION, 1999.
ARTICLE 19 OF THAT CONVENTION PROVIDES THAT AN AIR
CARRIER IS LIABLE FOR DAMAGE CAUSED BY DELAY IN THE
CARRIAGE OF PASSENGERS AND GOODS UNLESS IT PROVES THAT
IT DID EVERYTHING IT COULD BE REASONABLE EXPECTED TO

DO

TO AVOID THE DAMAGE. THERE ARE SOME EXCEPTIONAL CASES OF INTERNATIONAL CARRIAGE IN WHICH THE RIGHTS OF PASSENGERS ARE NOT GOVENED BY AN INTERNATIONAL CONVENTION. IN SUCH CASES ONLY A COURT OF COMPETENT JURISDICTION CAN DETERMINE WHICH SYSTEM OF LAWS MUST BE CONSULTED TO DETERMINE WHAT THOSE RIGHTS ARE.

(G) FOR THE PURPOSE OF THIS RULE, A PASSENGER WHOSE JOURNEY IS INTERRUPTED BY A FLIGHT CANCELLATION OR OVERBOOKING, AND TO WHOM THE CARRIER IS NOT ABLE TO PRESENT A REASONABLE TRANSPORTATION OPTION WHICH TAKES INTO ACCOUNT ALL KNOWN CIRCUMSTANCES, MAY SURRENDER THE UNUSED PORTION OF HIS/HER TICKET. IN SUCH A CASE THE VALUE OF THAT UNUSED PORTION SHALL BE CALCULATED AS FOLLOWS:

(1) WHEN NO PORTION OF THE TRIP HAS BEEN MADE, WHEN DUE TO A CANCELLATION OR DENIED BOARDING WITHIN THE CARRIER'S CONTROL, IF THE PASSENGER CHOOSES TO NO LONGER TRAVEL AND RETURN TO THE POINT OF ORIGIN, THE AMOUNT OF REFUND WILL BE THE FARE AND CHARGES PAID.

(2) WHEN A PORTION OF THE TRIP HAS BEEN MADE, THE REFUND WILL BE CALCULATED AS FOLLOWS: EITHER AN AMOUNT EQUAL TO THE ONE-WAY FARE LESS THE SAME RATE OF DISCOUNT, IF ANY, THAT WAS APPLIED IN CALCULATING THE ORIGINAL ONE-WAY FARE, OR ON ROUND-TRIP TICKETS, ONE HALF OF THE ROUND-TRIP FARE AND CHARGES APPLICABLE TO THE UNUSED TRANSPORTATION FROM THE POINT OF TERMINATION TO THE DESTINATION OR STOPOVER POINT NAMED ON THE TICKET.

AREA: ZZ TARIFF: IPRG CXR: WS RULE: 0080

TITLE/APPLICATION - 70

A APPLICATION OF FARES AND ROUTINGS
(A) GENERAL

THE PRICE OF TRANSPORTATION SHALL BE DISCLOSED AT THE TIME OF CONFIRMATION, HOWEVER FARES ARE SUBJECT TO

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GFS TEXT MENU RULE CATEGORY TEXT DISPLAY

IN EFFECT ON: 17MAY13

AREA: ZZ TARIFF: IPRG CXR: WS RULE: 0080

TITLE/APPLICATION - 70 (CONT)

CHANGE WITHOUT NOTICE.

(B) CURRENCY

ALL FARES AND CHARGES ARE STATED IN THE CURRENCY OF

THE

COUNTRY FROM WHICH THE PASSENGER WILL INITIATE TRAVEL.

(C) FARE CHANGES

**Exhibit "E" to the complaint
of Dr. Gábor Lukács**

September 24, 2013
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AREA: ZZ TARIFF: IPRG CXR: WS RULE: 0090

TITLE/APPLICATION - 70 (CONT)

- (E) DANGEROUS GOODS AS DEFINED BY TRANSPORT CANADA ARE NOT ACCEPTED FOR CARRIAGE UNDER ANY CIRCUMSTANCES.

AREA: ZZ TARIFF: IPRG CXR: WS RULE: 0100

TITLE/APPLICATION - 70

K TRAVELLER'S RIGHT PROVISIONS

- (A) IF A FLIGHT IS DELAYED AND THE DELAY BETWEEN THE SCHEDULED DEPARTURE OF THE FLIGHT AND THE ACTUAL DEPARTURE OF THE FLIGHT EXCEEDS 4 HOURS, THE CARRIER WILL PROVIDE THE PASSENGER WITH A MEAL VOUCHER.
- (B) IF A FLIGHT IS DELAYED BY MORE THAN 8 HOURS AND THE DELAY INVOLVES AN OVERNIGHT STAY, THE CARRIER WILL PAY FOR OVERNIGHT HOTEL STAY AND AIRPORT TRANSFERS FOR PASSENGERS WHO DID NOT START THEIR TRAVEL AT THAT AIRPORT.
- (C) IF THE PASSENGER IS ALREADY ON THE AIRCRAFT WHEN A DELAY OCCURS, THE AIRLINE WILL OFFER DRINKS AND SNACKS IF IT IS SAFE, PRACTICAL AND TIMELY TO DO SO. IF THE DELAY EXCEEDS 90 MINUTES AND CIRCUMSTANCES PERMIT, WESTJET WILL OFFER PASSENGERS THE OPTION OF DISEMBARKING FROM THE AIRCRAFT UNTIL IT IS TIME TO DEPART IF SAFE AND PRACTICAL TO DO SO.
- (D) THE CARRIER WILL ENDEAVOR TO TRANSPORT THE PASSENGER AND BAGGAGE WITH REASONABLE DISPATCH, BUT TIMES SHOWN IN TIMETABLES OR ELSEWHERE ARE NOT GUARANTEED AND FORM NO PART OF THIS CONTRACT.
- (E) THE AGREED STOPPING PLACES ARE THOSE PLACES SHOWN IN THE CARRIER'S TIMETABLE AS SCHEDULED STOPPING PLACES

ON

SUBSTITUTE

MAY

THE ROUTE. THE CARRIER MAY, WITHOUT NOTICE, ALTERNATIVE CARRIERS OR AIRCRAFT AND, IF NECESSARY, ALTER OR OMIT STOPPING PLACES SHOWN IN THE TIMETABLE.

(F) {X}

(G) {X}

AREA: ZZ TARIFF: IPRG CXR: WS RULE: 0105

TITLE/APPLICATION - 70

A REFUNDS

- (A) VOLUNTARY CANCELLATIONS
IF A PASSENGER DECIDES NOT TO USE THE TICKET AND

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GFS TEXT MENU RULE CATEGORY TEXT DISPLAY

IN EFFECT ON: 17MAY13

AREA: ZZ TARIFF: IPRG CXR: WS RULE: 0105

SUNWING AIRLINES INC.

CTA (A) No. 2
Original Page 29A

RULE 15 – RESPONSIBILITY FOR SCHEDULES AND OPERATIONS

(Subject to Rule 11 – Limitation of Liability, Rule 15A – Travellers Rights, Rule 18 – Refunds and Rule 19 – Denied Boarding)

(1) General

- (a) For the purposes of this Rule, the term "*Advance Flight Departure*" shall mean an advancement of the scheduled flight departure by more than the minimum period established in the Carrier's tariff for the passenger to check-in in accordance with this Rule 15(2).
- (b) The provisions of this Rule are not intended to make Carrier responsible for the acts of third parties that are not deemed employees and/or agents of the Carrier under applicable law or international conventions and all the rights herein described are subject to the following exception, namely, that Carrier shall not be liable for damage occasioned by overbooking or cancellation if the Carrier proves that it, and its employees and agents, took all measures that could reasonably be required to avoid the damage or if it was impossible for the Carrier, and its employees or agents to take such measures.
- (c) The Carrier will endeavor to transport the passenger and baggage with reasonable dispatch, but times shown in timetables or elsewhere are not guaranteed.
- (d) The agreed stopping places are those places shown in the carrier's timetable as scheduled stopping places on the route. The Carrier may, without notice, substitute alternative carriers or aircraft and, if necessary, may alter or omit stopping places shown in the timetable.
- (e) Passengers have a right to information on flight times and schedule changes. In the event of a delay, an advanced flight departure or schedule change the carrier will make reasonable efforts to inform the passengers of delays, proposed advanced flight departures and schedule changes, and, to the extent possible, the reasons for them.
- (f) (i) If the passenger's journey is interrupted by an Advance Flight Departure, a flight cancellation or overbooking, the Carrier will take into account all the circumstances of the case as known to it and will provide the passenger with the option of accepting one or more of the following remedial choices:

For example of abbreviations, reference marks and symbols used but not explained hereon, see page 2.

ISSUE DATE
June 13, 2013

EFFECTIVE DATE
June 14, 2013

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- a) reimbursement of the total price of the ticket at the price at which it was bought, for the part or parts of the journey not made, and for the part or parts already made if they no longer serve any purpose in relation to the passengers original travel plan, together with, when relevant, transportation to the passengers point of origin, at the earliest opportunity, at no additional cost;
- b) transportation to the passenger's intended destination at the earliest opportunity, at no additional cost;
- (ii) When determining the transportation service to be offered, the Carrier will consider:
 - a) available transportation services, including services offered by interline, code sharing and other affiliated partners and, if necessary, other non-affiliated carriers;
 - b) the circumstances of the passenger, as known to it, including any factors which impact upon the importance of timely arrival at destination.
- (iii) having taken all the known circumstances into consideration, the Carrier will take all measures that can reasonably be required to avoid or mitigate the damages caused by the Advance Flight Departure, overbooking or cancellation. Where a passenger nevertheless incurs expense as a result of the overbooking or cancellation, the Carrier will in addition offer a cash payment or travel credit, the choice of which will be at the passenger's discretion.
- (iv) When determining the amount of the offered cash payment or travel credit, the Carrier will consider all circumstances of the case, including any expenses which the passenger, acting reasonably, may have incurred as a result of the Advance Flight Departure, overbooking or cancellation, as for example, costs incurred for accommodation, meals or additional transportation. The Carrier will set the amount of compensation offered with a view to reimbursing the passenger for all such reasonable expenses.
- (g) Passengers have a right to retrieve their luggage quickly. If the luggage does not arrive on the same flight as the passenger, the airline will take steps to delivery the luggage to the passenger's residence/hotel as soon as possible. The airline will take steps to inform the passenger on the status of the luggage and will provide the passenger with an over-night kit as required. Compensation will be provided as set out herein.

For example of abbreviations, reference marks and symbols used but not explained hereon, see page 2.

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(h) The rights of a passenger against the Carrier are, in most cases of international carriage, governed by an international convention known as the Montreal Convention, 1999. Article 19 of that Convention provides that an air carrier is liable for damage caused by delay in the carriage of passengers and goods unless it proves that it did everything it could be reasonably expected to do to avoid the damage. There are some exceptional cases of international carriage in which the rights of the passengers are not governed by an international convention. In such cases only, a court of competent jurisdiction can determine which system of laws must be consulted to determine what those rights are.

(2) **Cut-off Times**

Check-in counters are open 3 hours prior to the scheduled departure, and will close 60 minutes before scheduled departure. Passenger(s) arriving for check-in after 60 minutes prior to the scheduled departure will not be accepted for travel.

After passenger(s) have checked in for their flight, they should be available at the gate not later than 30 minutes prior to the scheduled departure for boarding the aircraft. Passengers who arrive at the boarding gate after the gate has closed will not be accepted for travel.

Passenger(s) who arrive later than the times referred to above for check-in or at the boarding gate will not be eligible for any denied boarding compensation or refund.

(3) **Passenger Expenses Resulting from Flight Delays or Advanced Flight Departures**

Passengers will be entitled to reimbursement from the Carrier for reasonable expenses incurred as a result of a flight delay or an Advance Flight Departure, subject to the following conditions:

- (a) The Carrier shall not be liable for any damages, costs, losses or expenses occasioned by delays or advance flight departures if the Carrier proves it, and its employees and agents, took all measures that could reasonably be required to avoid the damage or if it was impossible for the Carrier and its employees or agents to take such measures;
- (b) Any passenger seeking reimbursement for expenses resulting from delays or advance flight departures must provide the Carrier with (a) written notice of his or her claim, (b) particulars of the expenses for which reimbursement is sought and (c) receipts or other documents establishing to the reasonable satisfaction of the Carrier that the expenses were incurred; and

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- (c) The Carrier may refuse or decline any claim, in whole or in part, if:
- i. the passenger has failed or declined to provide proof or particulars establishing, to the reasonable satisfaction of the Carrier, that the expenses claimed were incurred by the passenger and resulted from a delay or advanced flight departure for which compensation is available under this Rule 15; or
 - ii. the expenses for which reimbursement is claimed, or any portion thereof, are not reasonable or did not result from the delay or advanced flight departure as determined by the Carrier, acting reasonably.

Without affecting any obligation to reimburse a passenger as provided for in this tariff, the Carrier may, in its sole discretion, issue meal, hotel and/or ground transportation vouchers to passengers affected by a delay or advanced flight departure.

(4) **Baggage Delays**

- (a) The carrier cannot guarantee that the passenger's baggage will be carried on the flight if sufficient space is not available as determined by the Carrier.
- (b) Notwithstanding the foregoing, passengers whose baggage does not arrive on the same flight as the passenger will be entitled to reimbursement from the Carrier for reasonable expenses incurred as a result of the baggage delay, subject to the following conditions:
 - i. The Carrier shall not be liable for any damages, costs, losses or expenses occasioned by delays in the delivery of baggage if the Carrier proves it, and its employees and agents, took all measures that could reasonably be required to avoid the damage or it was impossible for the Carrier and its employees or agents to take such measures;
 - ii. In order to assist the Carrier in commencing the tracing of the baggage in question, the passenger is encouraged to report the delayed baggage to the Carrier as soon as reasonably practicable following the completion of the flight;
 - iii. The passenger must provide the Carrier with (a) written notice of any claim for reimbursement within 21 days of the date on which the baggage was placed at the passenger's disposal, or in the case of loss within 21 days of the date on which the baggage should have been placed at the passenger's disposal; (b) particulars of the expenses for which reimbursement is sought; and (c) original receipts or other documents establishing to the reasonable satisfaction of the Carrier that the expenses were incurred;

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- iv. The liability of the Carrier in the case of lost or delayed baggage shall not exceed 1,131 Special Drawing Rights (the "basic carrier liability" which is the approximate Canada dollar equivalent of CAD\$1,800 for each passenger, unless the passenger has declared a higher value and paid the supplementary sum in accordance with Rule 11(c) of this tariff, in which case the Carrier's liability will be limited to the lesser of the value of the delayed baggage or the declared value, up to a maximum of CAD\$3,000.
- (c) After a 21 day delay, the Carrier will provide a settlement in accordance with the following rules:
- i. if no value is declared per Rule 11(b), the settlement will be for the value of the delayed baggage or 1131 SDR (the "basic carrier liability" which is the approximate Canadian dollar equivalent of CAD\$1,800), whichever is the lesser;
 - ii. if value is declared per Rule 11(b), the settlement will be for the value of the delayed baggage or the declared sum (per Rule 11(b)) up to a maximum of \$3,000, whichever is the lesser, and
 - iii. In connection with any settlement under the subsection (c), the passenger shall be required to furnish proof of the value of the delayed baggage which establishes such value to the satisfaction of the Carrier, acting reasonably.
- (d) The Carrier may refuse or decline any claim relating to delayed baggage, in whole or in part, if:
- i. the conditions set out in subsection 15.3(b) above have not been met;
 - ii. the passenger has failed or declined to provide proof or particulars establishing, to the reasonable satisfaction of the Carrier, that the expenses claimed were incurred by the passenger and resulted from a delay for which compensation is available under this Rule 15; or
 - iii. the expenses for which reimbursement is claimed, or any portion thereof, are not reasonable or did not result from the delay, as determined by the Carrier, acting reasonably.

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RULE 15A. TRAVELLER'S RIGHTS

- (a) If a flight is delayed and the delay between the scheduled departure of the flight and the actual departure of the flight exceeds 4 hours, the Carrier will provide the passenger with a meal voucher.
- (b) If a flight is delayed by more than 8 hours and the delay involves an overnight stay, the Carrier will pay for overnight hotel stay and airport transfers for passengers who did not start their travel at that airport.
- (c) If the passenger is already on the aircraft when a delay occurs, the Carrier will offer drinks and snacks if it is safe, practical and timely to do so. If the delay exceeds 90 minutes and circumstances permit, the Carrier will offer passengers the option of disembarking from the aircraft until it is time to depart if safe and practical to do so.
- (d) The Carrier will endeavor to transport the passenger and baggage with reasonable dispatch, but times shown in timetables or elsewhere are not guaranteed and form no part of this contract.
- (e) The agreed stopping places are those places shown in the Carrier's timetable as scheduled stopping places on the route. The Carrier may, without notice, substitute alternative carriers or aircraft and, if necessary, may alter or omit stopping places shown in the timetable.
- (f) The rights do not exclude additional rights a passenger may have under this tariff or legal rights that international and trans-border passengers have pursuant to international conventions (e.g., the *Montreal Convention*) and related treaties.

For example of abbreviations, reference marks and symbols used but not explained hereon, see page 2.

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du Canada

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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^[1], 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^[2]. 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**^[3], 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^[4], 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

Website: www.otc-cta.gc.ca

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.
-

- (d) notwithstanding the above, the Carrier reserves the right to waive, in whole or part, the payment by any passenger of a cancellation fee or a change fee.

3.4 Carrier Cancellation, Change and Refund Terms

The Carrier reserves the right to cancel or change the planned departure, schedule, route, aircraft or stopping places of any flight for which fares in respect of a International Service have been paid, at any time and from time to time, for any reason, without notice to any passengers affected thereby and, in connection therewith, the Carrier shall not be liable to any passenger in respect of such cancellation or change, whether or not resulting from an Event of Force Majeure; provided that, the Carrier may and reserves the right, at its sole discretion, to provide any passengers affected by such cancellation or change with:

- (a) a credit, valid for one year from the original ticket issuance date, towards the provision of a fare relating to a future flight, which credit shall be equal to the original fare (s) which was/were cancelled. When redeeming the credit toward a future booking, passenger may apply the credit toward the base fare, airlines surcharges, change fees, and government taxes and fees. Credit can be used one time only. If the total cost of the transaction to which the credit is applied is less than the value of the credit, the residual value left from its use is forfeited. Bookings using credit must be in the name of the owner of the credit. Credit may be transferred to another traveler one time only, and the credit's original expiration date shall continue to apply after any such transfer; or
- (b) to otherwise refund to such passenger, an amount which shall not be greater than the fare paid by that passenger in respect of that flight or flights if booked as a round trip and the originating sector is cancelled.

RULE 4. RATES AND CHARGES – CARGO SERVICE

4.1 Cargo Service Rates and Charges

N/A

4.2 Bulk Cargo Service Agreement

N/A

For example of abbreviations, reference marks and symbols used but not explained hereon, see page 2.

SECTION III - RESERVATIONS

RULE 13. CONFIRMATION OF RESERVED SPACE

A reservation of space on a given flight is valid when the availability and allocation of such space is confirmed by the carrier to a person subject to payment or other satisfactory credit arrangements. A passenger with a valid confirmation number reflecting reservations for a specific flight and date on the carrier is considered confirmed, unless the reservation was cancelled due to one of the reasons indicated in Rule 14. The carrier does not guarantee to provide any particular seat on the aircraft.

RULE 14. CANCELLATION OF RESERVATIONS

Refer to **Rule 3.3 Passenger Cancellation, Change and Refund Terms** for applicable terms and conditions.

RULE 15. CARRIER CANCELLATION, CHANGE, AND REFUND TERMS

The Carrier reserves the right to cancel or change the planned departure, schedule, route, aircraft or stopping places of any flight for which fares have been paid, at any time and from time to time, for any reason, in connection therewith, the Carrier shall not be liable to any passenger in respect of such cancellation or change, whether or not resulting from an Event of Force Majeure; provided that, the Carrier may and reserves the right, at its sole discretion, to provide any passengers affected by such cancellation or change with:

- (a) a credit, valid for one year from the original ticket issuance date, towards the provision of a fare relating to a future flight, which credit shall be equal to the original fare which was cancelled. When redeeming the credit toward a future booking, passenger may apply the credit toward the base fare, airlines surcharges, change fees, and government taxes and fees. Credit can be used one time only. If the total cost of the transaction to which the credit is applied is less than the value of the credit, the residual value left from its use is forfeited. Bookings using credit must be in the name of the owner of the credit. Credit may be transferred to another traveler one time only, and the credit's original expiration date shall continue to apply after any such transfer; or
- (b) to otherwise refund to such passenger, an amount which shall not be greater than the fare paid by that passenger in respect of that flight.

For example of abbreviations, reference marks and symbols used but not explained hereon, see page 2.

SECTION VI - REFUNDS

RULE 18. RESPONSIBILITY FOR SCHEDULES AND OPERATIONS

- (a) The Carrier will endeavor to transport the passenger and baggage with reasonable dispatch, but times shown in timetables or elsewhere are not guaranteed.
- (b) The agreed stopping places are those places shown in the carrier's timetable as scheduled stopping places on the route. The Carrier may, without notice, substitute alternative carriers or aircraft and, if necessary, may alter or omit stopping places shown in the timetable.
- (c) Passengers have a right to information on flight times and schedule changes. In the event of a delay or schedule change, the carrier will make reasonable efforts to inform the passengers of delays and schedule changes, and, to the extent possible, the reasons for them.

18.1 Passenger Expenses Resulting from Delays

Passengers will be entitled to reimbursement from the Carrier for reasonable expenses incurred as a result of a delay, subject to the following conditions:

- i. The Carrier shall not be liable for any damages, costs, losses or expenses occasioned by delays if it, and its employees and agents, took all measures that could reasonably be required to avoid the damage or if it was impossible for the Carrier and its employees or agents to take such measures;
- ii. Any passenger seeking reimbursement for expenses resulting from delays must provide the Carrier with (a) written notice of his or her claim, (b) particulars of the expenses for which reimbursement is sought and (c) receipts or other documents establishing to the reasonable satisfaction of the Carrier that the expenses were incurred; and

For example of abbreviations, reference marks and symbols used but not explained hereon, see page 2.

iii. The Carrier may refuse or decline any claim, in whole or in part, if:

- A. the passenger has failed or declined to provide proof or particulars establishing, to the reasonable satisfaction of the Carrier, that the expenses claimed were incurred by the passenger and resulted from a delay for which compensation is available under this Rule 18; or
- B. the expenses for which reimbursement is claimed, or any portion thereof, are not reasonable or did not result from the delay, as determined by the Carrier, acting reasonably.

In any case, the Carrier may, in its sole discretion, issue meal, hotel and/or ground transportation vouchers to passengers affected by a delay.

18.2 Baggage Delays

- (a) The carrier cannot guarantee that the passenger's baggage will be carried on the flight if sufficient space is not available as determined by the Carrier.
- (b) Notwithstanding the foregoing, passengers whose baggage does not arrive on the same flight as the passenger will be entitled to reimbursement from the Carrier for reasonable expenses incurred as a result of the baggage delay, subject to the following conditions:
 - i. The Carrier shall not be liable for any damages, costs, losses or expenses occasioned by delays in the delivery of baggage if the Carrier, and its employees and agents, took all measures that could reasonably be required to avoid the damage or if it was impossible for the Carrier and its employees or agents to take such measures;

For example of abbreviations, reference marks and symbols used but not explained hereon, see page 2.

**Exhibit “J” to the complaint
of Dr. Gábor Lukács**

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- ii. The passenger must have complied with the check-in requirements set out in Rule 21 of this tariff;
 - iii. In order to assist the Carrier in commencing the tracing of the baggage in question, the passenger is encouraged to report the delayed baggage to the Carrier as soon as reasonably practicable following the completion of the flight;
 - iv. The passenger must provide the Carrier with (a) written notice of any claim for reimbursement within 21 days of the date on which the baggage was placed at the passenger’s disposal, or in the case of loss within 21 days of the date on which the baggage should have been placed at the passenger’s disposal; (b) particulars of the expenses for which reimbursement is sought; and (c) receipts or other documents establishing to the reasonable satisfaction of the Carrier that the expenses were incurred;
 - v. The liability of the Carrier in the case of lost or delayed baggage shall not exceed 1,131 Special Drawing Rights (the “basic carrier liability” which is the approximate Canadian dollar equivalent of CAD\$1,800) for each passenger, unless the passenger has declared a higher value and paid the supplementary sum in accordance with Rule 11(c) of this tariff, in which case the Carrier’s liability will be limited to the lesser of the value of the delayed baggage or the declared value, up to a maximum of CAD\$3,000.
- (c) After a 21 day delay, the Carrier will provide a settlement in accordance with the following rules:
- i. if no value is declared per Rule 11(c), the settlement will be for the value of the delayed baggage or 1131 SDR (the “basic carrier liability” which is the approximate Canadian dollar equivalent of CAD\$1,800), whichever is the lesser, and

For example of abbreviations, reference marks and symbols used but not explained hereon, see page 2.

- ii. if value is declared per Rule 11(c), the settlement will be for the value of the delayed baggage or the declared sum (per Rule 11(c)) up to a maximum of \$3,000, whichever is the lesser.
 - iii. In connection with any settlement under this subsection (c), the passenger shall be required to furnish proof of the value of the delayed baggage which establishes such value to the satisfaction of the Carrier, acting reasonably.
- (d) The Carrier may refuse or decline any claim relating to delayed baggage, in whole or in part, if:
- i. the conditions set out in subsection 18.2(b) above have not been met;
 - ii. the passenger has failed or declined to provide proof or particulars establishing, to the reasonable satisfaction of the Carrier, that the expenses claimed were incurred by the passenger and resulted from a delay for which compensation is available under this Rule 18; or
 - iii. the expenses for which reimbursement is claimed, or any portion thereof, are not reasonable or did not result from the delay, as determined by the Carrier, acting reasonably.

RULE 19. REFUNDS

(a) **Voluntary Cancellations**

If a passenger decides not to use the ticket and cancels the reservation, the passenger may not be entitled to a refund, depending on any refund condition attached to the particular fare.

For example of abbreviations, reference marks and symbols used but not explained hereon, see page 2.

PORTER AIRLINES INC.

Carrier means Porter Airlines Inc.;

Child means a person at least 2 years of age and under the age of 12 years at the time of commencement of travel. Proof of age must be provided;

Circle Trip means any trip, the ultimate destination of which is the point of origin, but which includes, at least, a stop at one other point, and which is not made via the same routing in both directions;

Class of Service means the compartment of the aircraft in which the passenger is entitled to be transported pursuant to the general schedule of the carrier;

Convention means either Montreal Convention or Warsaw Convention, whichever is applicable;

Credit Shell means a record with a payment but no flight used to hold a credit or credits for future flights;

Department of Transportation means U.S. Department of Transportation.

Destination means the point to which the passenger(s) to be transported on a flight is bound.

Event of Force Majeure means an event, the cause or causes of which are not attributable to the willful misconduct or gross negligence of the Carrier, including, but not limited to (i) earthquake, flood, hurricane, explosion, fire, storm, epidemic, other acts of God or public enemies, war, national emergency, invasion, insurrection, riots, strikes, picketing, boycott, lockouts or other civil disturbances, (ii) interruption of flying facilities, navigational aids or other services, (iii) any laws, rules, proclamations, regulations, orders, declarations, interruptions or requirements of or interference by any government or governmental agency or official thereof, (iv) inability to procure materials, accessories, equipment or parts from suppliers, mechanical failure to the aircraft or any part thereof, damage, destruction or loss of use of an aircraft, confiscation, nationalization, seizure, detention, theft or hijacking of an aircraft, or (v) any other cause or circumstances whether similar or dissimilar, seen or unforeseen, which the Carrier is unable to overcome by the exercise of reasonable diligence and at a reasonable cost;

For example of abbreviations, reference marks and symbols used but not explained hereon, see page 2.

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(b) Involuntary Cancellations

In the event a refund is required because of the Carrier's failure to operate or refusal to transport, the refund will be made as follows:

If the ticket is totally or partially unused, the total fare paid for each unused segment will be refunded. No refund will be available if the flight is cancelled prior to the commencement of the flight and the provisions of Rule 16 and 18 will apply.

RULE 20. DENIED BOARDING COMPENSATION

General

For the purposes of this Rule 20, “alternate transportation” means air transportation with a confirmed reservation at no additional charge (by a scheduled airline licensed by Canada or another appropriate country), or other transportation accepted and used by the passenger in the case of denied boarding.

If a passenger has been denied a reserved seat in case of an oversold flight on Porter Airlines:

- (a) where the flight originates in Canada, the Carrier will:
 - i. refund the total fare paid for each unused segment; or
 - ii. arrange reasonable alternate transportation on its own services; or
 - iii. if reasonable alternate transportation on its own services is not available, the Carrier will make reasonable efforts to arrange transportation on the services of another carrier or combination of carriers on a confirmed basis in the same comparable, or lower booking code; and
- (b) where the flight originates in the United States, the Carrier will provide denied boarding compensation as set forth in this Rule 20 below.

Volunteers and Boarding Priorities

If a flight is oversold (more passengers hold confirmed reservations than there are seats available), no one may be denied boarding against his/her will until the Carrier’s personnel first ask for volunteers who will give up their reservations willingly, in exchange for such compensation as the Carrier may choose to offer. If there are not enough volunteers, other passengers may be denied boarding involuntarily, in accordance with the Carrier’s boarding priority.

For example of abbreviations, reference marks and symbols used but not explained hereon, see page 2.

In determining boarding priority, the Carrier will consider the following factors:

- whether a passenger is traveling due to death or illness of a member of the passenger’s family, or,
- age of a passenger, or
- whether a passenger is an unaccompanied minor, or
- whether a passenger is a person with a disability, or
- the fare class purchased and/or fare paid by a passenger

Compensation for Involuntary Denied Boarding (Applicable only on flights originating in the United States)

If you are denied boarding involuntarily on a flight originating in the United States, you are entitled to a payment of “denied boarding compensation” from Carrier unless:

- you have not fully complied with the Carrier’s ticketing, check-in and reconfirmation requirements, or you are not acceptable for transportation under the Carrier’s usual rules and practices; or
- you are denied boarding because the flight is cancelled; or
- you are denied boarding because a smaller capacity aircraft was substituted for safety or operational reasons; or
- you are offered accommodations in a section of the aircraft other than specified in your ticket, at no extra charge, (a passenger seated in a section for which a lower fare is charged must be given an appropriate refund); or
- Carrier is able to place you on another flight or flights that are planned to reach your final destination within one hour of the scheduled arrival of your original flight.

Amount of Denied Boarding Compensation

Passengers traveling from the United States to Canada with a reserved seat on Porter Airlines who are denied boarding involuntarily from an oversold flight originating at a U.S. airport are entitled to:

- (a) No compensation if the Carrier offers alternate transportation that is planned to arrive at the passenger's destination or first stopover not later than one hour after the planned arrival time of the passenger's original flight;
- (b) 200% of the fare to the passenger's destination or first stopover, with a maximum of \$650 USD, if the Carrier offers alternate transportation that is planned to arrive at the passenger's destination or first stopover more than one hour but less than four hours after the planned arrival time of the passenger's original flight; and

For example of abbreviations, reference marks and symbols used but not explained hereon, see page 2.

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- (c) 400% of the fare to the passenger's destination or first stopover, with a maximum of \$1,300 USD, if the Carrier does not offer alternate transportation that is planned to arrive at the airport of the passenger's destination or first stopover less than four hours after the planned arrival time of the passenger's original flight.

0 to 1 hour arrival delay	No compensation.
1 to 4 hour arrival delay	200% of one-way fare (but no more than \$650 USD).
Over 4 hours arrival delay	400% of one-way fare (but no more than \$1,300 USD).

For the purpose of calculating compensation under this Rule 20, the “fare” is the one-way fare for the flight including any surcharge and air transportation tax, minus any applicable discounts. All flights, including connecting flights, to the passenger’s destination or first 4-hour stopover are used to compute the compensation.

Method of Payment

Except as provided below, the Carrier must give each passenger who qualifies for denied boarding compensation a payment by cheque or draft for the amount specified above, on the day and place the involuntary denied boarding occurs. However, if the Carrier arranges alternate transportation for the passenger’s convenience that departs before the payment can be made, the payment will be sent to the passenger within 24 hours. Carrier may offer free or discounted transportation vouchers in place of cash or cheque payment. The passenger may, however, insist on the cash/cheque payment or refuse all compensation and bring private legal action.

Passenger’s Option

Acceptance of the compensation relieves the Carrier from any further liability to the passenger caused by the failure to honour the confirmed reservation. However, the passenger may decline the payment and seek to recover damages in a court of law or in some other manner.

RULE 21. CHECK-IN REQUIREMENTS

In addition to any other check in requirements set out in this tariff, the following check-in requirements must be complied with:

For example of abbreviations, reference marks and symbols used but not explained hereon, see page 2.

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