

**CANADIAN TRANSPORTATION AGENCY**

B E T W E E N :

GÁBOR LUKÁCS

Applicant

- and -

PORTER AIRLINES INC.

Respondent

**ANSWER OF PORTER AIRLINES INC.**

September 3, 2015

**Respondent:**

Porter Airlines Inc.  
Billy Bishop Toronto City Airport  
Toronto, Ontario  
Canada M5V 1A1

Tel: + 1 647.826.7258  
Fax: + 1 416.203.8150

**Counsel to Respondent:**

**NORTON ROSE FULBRIGHT CANADA LLP**  
Royal Bank Plaza, South Tower, Suite 3800  
200 Bay Street, P.O. Box 84  
Toronto ON M5J 2Z4

**Orestes Pasparakis LSUC#: 36851T**  
**Rahool P. Agarwal LSUC#: 54528I**

Tel: + 1 416.216.3943  
Fax: + 1 416.216.3930

[orestes.pasparakis@nortonrosefulbright.com](mailto:orestes.pasparakis@nortonrosefulbright.com)  
[rahool.agarwal@nortonrosefulbright.com](mailto:rahool.agarwal@nortonrosefulbright.com)

TO: Gábor Lukács  
Air Passenger Rights

Halifax, NS

lukacs@AirPassengerRights.ca

**CANADIAN TRANSPORTATION AGENCY**

B E T W E E N :

GÁBOR LUKÁCS

Applicant

- and -

PORTER AIRLINES INC.

Respondent

**ANSWER OF PORTER AIRLINES INC.**

**A. Overview**

1. This Application arises in connection with an outdated statement concerning Porter Airline Inc.'s (**Porter's**) baggage delay compensation policy (the **Policy**) appearing on Porter's website ([www.flyporter.com](http://www.flyporter.com)).
2. The Application is unnecessary and ought to be dismissed. The Applicant alerted Porter of his concerns days before initiating this Application.<sup>1</sup> He received a personal response from Robert Deluce, Porter's President and Chief Executive Officer, indicating that steps were being taken to address his concerns. As a result of Porter's quick and decisive action, the issues raised in this Application are moot:
  - (a) the webpage at issue was immediately amended to properly reflect Porter's policy as reflected in its tariffs (the **Tariffs**);
  - (b) Porter has refreshed its training of its employees to ensure the continued correct application of the Policy; and
  - (c) Porter has undertaken to contact passengers that may have been affected by confusion regarding the Policy and will invite them to make claims for compensation in accordance with the Tariffs.

---

<sup>1</sup> Affidavit of Luis Gonzalez, sworn September 3, 2015 at para 13 [**Gonzalez Affidavit**].

3. Given the steps taken by Porter, there is no need for further action by the Canadian Transportation Agency (the **Agency**). Indeed, the steps taken by Porter go far beyond and are far more effective than the remedies sought by the Applicant in this proceeding.
4. Despite knowing that Porter was taking steps to address his concerns, the Applicant commenced this Application anyway, misusing the Agency's valuable time and resources.
5. Notwithstanding the absence of any need for Agency intervention, the Application has questionable merit. It is based on a narrow set of evidence that is inconclusive and that was largely elicited by the Applicant through deceit. The evidence falls far short of demonstrating the Applicant's broad-sweeping allegations of systemic non-compliance with Porter's Tariffs, or any actual losses to Porter's customers.
6. Accordingly, Porter requests that the Agency dismiss the Application in its entirety, with costs to Porter.

## **B. Relevant Facts**

### **i. Porter's baggage delay policy**

7. Porter's policy with respect to delayed baggage is that it will reimburse passengers for reasonable expenses incurred as a result of the delay up to \$1,800 CAD on domestic itineraries<sup>2</sup> or 1,131 Special Drawing Rights on international and transborder itineraries (the **Policy**).<sup>3</sup>
8. Although it is not obligated to do so, Porter also provides passengers with a \$25 travel voucher for each 24 hour period in which a bag is delayed (up to five days/\$125 in vouchers) as a complimentary customer service gesture.<sup>4</sup>

---

<sup>2</sup> Rule 16.2, Tariff Containing Rules Applicable to Services for the Transportation of Passengers and Baggage or Goods Between Points in Canada, Effective Date: 3 October 2006, Gonzalez Affidavit at Exhibit B [**Domestic Tariff**].

<sup>3</sup> Rule 18.2, Tariff Containing Rules Applicable to Scheduled Services for the Transportation of Passengers and Baggage or Goods Between Points in Canada on the One Hand and Points Outside Canada (Except the United States) On the Other Hand, Effective Date: 19 October 2014, Gonzalez Affidavit at Exhibit A [**International Tariff**]; Rule 80(F), Canadian General Rules Tariff No CGR-1, Effective Date: 19 October 2014, Gonzalez Affidavit at Exhibit C [**Transborder Tariff**].

<sup>4</sup> Gonzalez Affidavit at para 7.

9. Porter's Tariffs have incorporated the Policy as part of their terms and conditions since February 2013 (international and transborder flights) and September 2013 (domestic flights).<sup>5</sup> However, as a matter of practice, Porter has compensated passengers for reasonable expenses incurred as a result of delayed baggage since Porter commenced operations in 2006.<sup>6</sup>
10. The Applicant suggests<sup>7</sup> that Porter only amended its Tariffs in response to Agency Decisions No. 16-C-A-2013<sup>8</sup> and No. 344-C-A-2013.<sup>9</sup> That is incorrect. Those decisions were in respect of complaints brought by the Applicant while Porter was already in the process of amending its Tariffs to conform with its actual practices. In fact, his complaints had the effect of delaying the Tariff amendments while they were being assessed by the Agency. Any suggestion that Porter has historically been non-compliant with the Canada Transportation Act (**CTA**), the Air Transportation Regulations (**ATR**) or decisions of the Agency with respect to baggage delay is false.
11. The processing of claims for compensation under the Policy are generally handled by either Porter's Baggage Department or Customer Relations.<sup>10</sup> Other customer-facing departments, like the Porter Call Centre, direct baggage delay inquiries to the Baggage Department or Customer Relations for review and processing in accordance with the Policy.<sup>11</sup>
12. Since 2014, the Baggage Department and Customer Relations have paid out \$46,777.40 in compensation for expenses incurred by passengers as a result of delayed baggage.<sup>12</sup> The Applicant's suggestion that Porter has a "general policy"<sup>13</sup> of

---

<sup>5</sup> Gonzalez Affidavit at para 6.

<sup>6</sup> Gonzalez Affidavit at para 12.

<sup>7</sup> Application of Dr. Gábor Lukács against Porter Airlines before the Canada Transportation Agency (10 August 2015) at paras 5-16 [**Application**].

<sup>8</sup> *Gábor Lukács v Porter Airlines Inc* (16 January 2013), Decision No 16-C-A-2013, online: <<https://www.otc-cta.gc.ca/eng/ruling/16-c-a-2013>>.

<sup>9</sup> *Gábor Lukács v Porter Airlines Inc* (29 August 2013), Decision No 344-C-A-2013, online: <<https://www.otc-cta.gc.ca/eng/ruling/344-c-a-2013>>.

<sup>10</sup> Gonzalez Affidavit at para 8.

<sup>11</sup> Gonzalez Affidavit at para 10.

<sup>12</sup> Gonzalez Affidavit at para 11. Records of compensation paid to passengers in relation to delayed baggage for 2013 are not available because they have been disposed of in accordance with Porter's document retention policy.

<sup>13</sup> Application at para 18.

not compensating for expenses or incidentals related to delayed baggage is clearly contradicted by the facts.

**ii. Porter's website**

13. On August 4, 2015, the Applicant notified Porter that a statement relating to the Policy on its website was incorrect.<sup>14</sup>
14. Mr. Deluce responded personally to the Applicant. He informed the Applicant that immediate steps were being taken to address the outdated statement:

Dear Gabor,

Thank you very much for bringing this outdated web page to our attention. As you have pointed out, the summary on our web page is inconsistent with Porter's actual baggage delay policy, as reflected in in [sic] our tariffs. This was an unfortunate oversight on our part but for clarity, I want you to know that Porter has consistently applied the latter policy as reflected in our amended tariff and not that reflected on the outdated web page.

[...]

We are in the process now of preparing revisions to the indicated page (English and French), which we will publish shortly. I will ask Greg to let you know once that has actually been amended but I am hopeful that the changes will go live this week.<sup>15</sup> [emphasis added]

15. The web page was amended on August 6, 2015 and now reads as follows:

Where applicable, reimbursement for reasonable expenses or incidentals incurred as a result of the delayed luggage will be provided to the affected passenger in accordance with our tariff.<sup>16</sup>

---

<sup>14</sup> Gonzalez Affidavit at para 13.

<sup>15</sup> Gonzalez Affidavit at Exhibit D.

<sup>16</sup> Gonzalez Affidavit at Exhibit E.

16. Notwithstanding Porter's decision to amend the website, the Applicant's assertion that the website was "false and/or misleading"<sup>17</sup> is overstated. At worst, the web page was unclear.

17. The incorrect statement read as follows:

No additional sums shall be paid for expenses or incidentals incurred as a result of the delayed luggage.<sup>18</sup>

18. However, the same page also informed customers that Porter's liability for delayed baggage is determined in accordance with the Tariffs:

Porter will not be liable for any claim or action unless a written report is filed in accordance with the terms set out in the tariff. [emphasis added]<sup>19</sup>

19. The Tariffs are accessible from any page on Porter's website, and state explicitly that passengers are entitled to recover reasonable expenses incurred as a result of a baggage delay:

...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 [...]<sup>20</sup>

20. The specific statement the Applicant points to was unclear, but the web page and the remainder of the website nevertheless contained correct information advising passengers that reasonable expenses were eligible for reimbursement.

21. In short, the Applicant has latched on to one statement on one page on a website which contains thousands of pages and which also contains correct information about the Policy.

---

<sup>17</sup> Application at para 26.

<sup>18</sup> Application at Document No 7, p 30.

<sup>19</sup> Application at Document No 7, p 30.

<sup>20</sup> Rule 16.2(b), Domestic Tariff, Gonzalez Affidavit at Exhibit B; Rule 18.2(b), International Tariff, Gonzalez Affidavit at Exhibit A; Rule 80(F)(2) Transborder Tariff, Gonzalez Affidavit at Exhibit C.

22. In any event, as of August 6, 2015, Porter's website no longer contains the statement which forms the subject matter of this part of the Application.<sup>21</sup>

**iii. Steps taken by Porter**

23. After the Applicant first alerted Porter to the error on its website on August 4, 2015, Porter immediately began a process to determine how best to resolve concerns arising from the web page error.

24. First, Porter acknowledges that it is possible that the information previously appearing on its baggage delay web page or communicated by its agents may have dissuaded some passengers from making claims under the Policy. To address this possibility, Porter has reviewed its records and has initiated a process to contact customers who had delayed baggage between February 19, 2013 and August 6, 2015, informing them of the website issue and inviting them to make claims for compensation.<sup>22</sup> Porter believes the vast majority of travellers with delayed baggage will be contacted directly in this way.<sup>23</sup> Contrary to the Applicant's allegations, Porter's intention was never to deny its customers' legitimate claims and Porter is committed to ensuring that its passengers are properly compensated in accordance with the Policy.

25. Second, Porter has taken several steps to ensure that the Policy will continue to be correctly communicated to the public:

(a) as discussed above, Porter modified its baggage delay web page to explicitly state that passengers with delayed bags are entitled to recover reasonable expenses,<sup>24</sup>

(b) Porter refreshed its training of employees who manage customer inquiries to ensure that they are clear on the precise terms of the Policy and that they will direct all customer reimbursement claims to the Baggage Department or Customer Relations, which has consistently carried out the Policy in accordance with the Tariffs;<sup>25</sup> and

---

<sup>21</sup> Gonzalez Affidavit at Exhibit E.

<sup>22</sup> Gonzalez Affidavit at para 15. See also: Gonzalez Affidavit at Exhibit G.

<sup>23</sup> Gonzalez Affidavit at para 15.

<sup>24</sup> Gonzalez Affidavit at para 14.

<sup>25</sup> Gonzalez Affidavit at para 15.



- (c) Porter issued Airport Operations Bulletin #15-018 on August 7, 2015, reminding employees of the terms of the Policy and that “it is critical that all agents are able to provide the correct information on compensation guidelines, or direct the passenger to the appropriate information.”<sup>26</sup>

**iv. The Applicant’s evidence**

26. The steps taken by Porter, and Mr. Deluce personally, since receiving notice of the web page issue demonstrate that Porter is committed to abiding by the CTA and the ATR, and to ensuring that its passengers are properly compensated in accordance with the Tariffs.
27. However, these steps should not be understood as an admission of the Applicant’s allegations in this proceeding. The Application is supported by sparse evidence that is unclear and ambiguous and which does not conclusively demonstrate a misapplication of the Policy.

**1. The Applicant’s phone calls with Porter agent Darryl**

28. To support his allegations that Porter misled the public about the terms of the Policy and misapplied the Policy, the Applicant relies on two phone calls with a Porter Call Centre agent named Darryl. In both calls, the Applicant misrepresents himself as a passenger with delayed baggage.
29. The transcript from the first phone call demonstrates that Darryl acted in accordance with Porter’s protocols. He advised the Applicant that his “best option” was to contact the Baggage Department and gave the Applicant the relevant contact information:

**Porter Agent Darryl:** So you have some baggage that has been delayed?

**Dr. Lukács:** Yeah.

**Porter Agent Darryl:** Okay. Have you been – your best option would be to follow up with our baggage department. Have you been corresponding with them?

**Dr. Lukács:** No, unfortunately not. I have been trying to get through to them but I am just getting a voicemail there.

---

<sup>26</sup> Gonzalez Affidavit at Exhibit F.

**Porter Agent Darryl:** Okay. The other option – we always recommend doing both the telephone and the email. Do you have a pen and paper with you?

**Dr. Lukács:** Absolutely.

**Porter Agent Darryl:** Okay. Just let me know when you are ready.

**Dr. Lukács:** Yes, I am ready.

**Porter Agent Darryl:** So that is [YTZ.baggage@flyporter.com](mailto:YTZ.baggage@flyporter.com).<sup>27</sup>

30. Notwithstanding Darryl's direction that the Applicant contact the Baggage Department, the Applicant pushed Darryl to give him an answer regarding the Policy:

**Porter Agent Darryl:** And if you send an email as well, they monitor that email and you would want to just kind of touch base with them to follow up on the status of the delayed baggage.

**Dr. Lukács:** Well, what I would like to do first is – you know, should I just go out and buy some stuff or what will the airline reimburse me for?<sup>28</sup>

31. It is apparent that Darryl was uncomfortable providing the Applicant with a definitive answer about the Policy, which is consistent with Porter's evidence that a Call Centre agent, like Darryl, would not have the authority to administer the Policy beyond referring a caller to the correct department. Darryl advised the Applicant that he would receive a Porter voucher (consistent with Porter's protocols), but then asked again whether the Applicant had been in touch with Baggage Department:

**Porter Agent Darryl:** Okay. The way it works in regards to the delay is basically we do start – if the baggage has not been returned to you after a full 24 hours, you will be issued a voucher worth \$25 per 24-hour period for up to five days after the initial delay.

**Dr. Lukács:** Hm-humm.

---

<sup>27</sup> Application at Document No 8, p 32.

<sup>28</sup> Application at Document No 8, p 33.

**Porter Agent Darryl:** But usually – usually most delays, they are rectified within a few hours. So to clarify, I know I asked you this at the beginning of the call, so you haven't touched base with anyone from baggage just yet?

**Dr. Lukács:** Well, I completed a --

**Porter Agent Darryl:** Well, besides the voicemails, right.

**Dr. Lukács:** Yeah, yeah.<sup>29</sup>

32. The Applicant continued to press Darryl. In response, Darryl spoke to what he believed Porter “usually” does:

**Dr. Lukács:** I am just trying to understand, you know, in terms of – I mean I need to buy some clothes. Will you reimburse me for that?

**Porter Agent Darryl:** Usually they would not, unfortunately. Basically, beyond the delayed voucher of \$25 per 24-hour period, they don't issue any kind of compensation.<sup>30</sup> [emphasis added]

33. The Applicant called the Call Centre again just 9 minutes after the first phone call, again posing as a passenger with delayed baggage:

**Dr. Lukács:** Hi. I am wondering about your policy with respect to delayed baggage. My baggage was delayed and I need to buy some clothes. How do I get reimbursed for those expenses?<sup>31</sup>

34. Darryl answered the call. Darryl suspected that it was the Applicant, but the Applicant misrepresented himself as a different person:

**Porter Agent Darryl:** Okay, sure. To clarify: were you and I speaking a few moments ago? I mean, it is just a very similar call.

**Dr. Lukács:** I don't believe so.<sup>32</sup>

---

<sup>29</sup> Application at Document No 8, p 33-34.

<sup>30</sup> Application at Document No 8, p 34.

<sup>31</sup> Application at Document No 9, p 36.

<sup>32</sup> Application at Document No 9, p 36.

35. Notwithstanding the clearly suspicious nature of the call, Darryl, as with the first call, followed Porter's protocols and asked whether the Applicant had contacted the Baggage Department:

**Porter Agent Darryl:** ...So in regards to delayed baggage, basically – have you corresponded with our baggage department just yet, or no?

**Dr. Lukács:** I just – we are talking about something that happened sometime in June – July 22nd.

**Porter Agent Darryl:** Okay. So this is a couple of weeks old now. Okay.

**Dr. Lukács:** Yeah.<sup>33</sup>

36. Darryl inquired further as to whether the Applicant had been advised of any forthcoming compensation by the Baggage Department. The Applicant said no. Only after that did Darryl comment on the Policy:

**Porter Agent Darryl:** Were you advised of any forthcoming compensation?

**Dr. Lukács:** No.

**Porter Agent Darryl:** No? Okay. Our general policy is that we don't actually issue any kind of compensation for those kinds of costs incurred, unfortunately [...] <sup>34</sup> [emphasis added]

37. Darryl then went on to accurately describe the process for escalating a complaint about delayed baggage to Customer Relations:

**Porter Agent Darryl:** ...If you did want to pursue it though just to see, although they would likely not issue anything either; if you would want to actually go to our customer relations department online, you would either want to fill out a feedback form or a complaint form and just follow up with an agent from that department, inquiring as to whether or not any kind of compensation would be issued.<sup>35</sup>

---

<sup>33</sup> Application at Document No 9, p 36.

<sup>34</sup> Application at Document No 9, p 36-37.

<sup>35</sup> Application at Document No 9, p 37.

38. The phone calls with Darryl are thus ambiguous:
- (a) the Applicant elicited the evidence through deceit;
  - (b) Darryl attempted to direct the Applicant to the responsible departments, consistent with Porter's training and protocols;
  - (c) notwithstanding Darryl's suggestion to contact the relevant department, the Applicant pressed him for more information for the obvious purpose of obtaining evidence for this proceeding; and
  - (d) Darryl was clearly uncomfortable speaking about the details of the Policy and, in any event, did in fact provide accurate information to the Applicant.
39. Notably, the Applicant has not tendered any evidence of communication with the Baggage Department or Customer Relations, despite Darryl's repeated suggestions to do so. Porter's records contain no indication of any such communications.<sup>36</sup> Had the Applicant contacted the correct department, the Applicant would have received complete and accurate information about the Policy, similar to the numerous Porter passengers who have been compensated more than \$46,770 for baggage delay related expenses over the last two years.
40. It is also not clear whether the Applicant placed other phone calls to the Call Center, in which he may have received different information about the Policy. Given that he placed two phone calls 9 minutes apart, it is quite possible that he may have done so.

## **2. The Natalie Bambury complaint**

41. The documents attached to the Application refer peripherally to a Porter passenger with delayed baggage named Natalie Bambury. The Application refers to (a) an email sent to Ms. Bambury from a Porter agent and (b) a phone conversation between the Applicant, Ms. Bambury, and a Porter Call Centre agent named Britney.
42. The email is irrelevant to the present proceeding as it only contained information which is consistent with the Policy. It states Porter's policy of providing a complementary travel voucher for every 24 hours a bag is missing, and indicates that

---

<sup>36</sup> Gonzalez Affidavit at para 16.

customers should reach out to the Customer Relations department if they have further concerns.

43. The phone call with Britney has very little probative value, for two reasons. First, Ms. Bambury spoke with the Call Centre on two previous occasions, and those phone calls demonstrate that Ms. Bambury received accurate information about baggage delay claims prior to her call with Britney.
44. On July 23, 2015, Ms. Bambury spoke with a Porter Call Centre agent named Floreen about the loss of her bag.<sup>37</sup> Floreen advised Ms. Bambury that she should contact the Baggage Department, and that the representatives at Porter outstations were not the appropriate departments to field such questions:

**Ms. Bambury:** [...] Can you look into [my lost bag] or is there a number in St. John's airport for Porter for baggage lost that I can call or look into myself?

**Porter Agent Floreen:** Okay, now for me directly I would go through them. So I can provide you with the baggage line.

**Ms. Bambury:** Okay.

**Porter Agent Floreen:** And you can contact them. It is the head office...so the head office. So there is no line in St. John's that requires baggage inquiry, or picks baggage inquiry, but there is one in Toronto that all baggage irregularity information [...] <sup>38</sup>

45. Ms. Bambury then told Floreen that she had contacted the Baggage Department and states, "they told me because they're in Toronto that they could not help me."<sup>39</sup> Given Porter's internal protocols for dealing with baggage irregularities, it is extremely unlikely that the Baggage Department would have refused to help a passenger with a baggage related complaint.<sup>40</sup> It is possible that Ms. Bambury was advised that there was nothing further the Baggage Department could do to locate her bag because all

---

<sup>37</sup> Gonzalez Affidavit at Exhibits H and J.

<sup>38</sup> Gonzalez Affidavit at Exhibit J, p 3.

<sup>39</sup> Gonzalez Affidavit at Exhibit J, p 4.

<sup>40</sup> Gonzalez Affidavit at para 19.

possible efforts were being made, and that Ms. Bambury simply misunderstood what she was being advised.<sup>41</sup>

46. Next, Floreen reiterated that “baggage claims is only in Toronto” and that “everything goes through Toronto”, and then directly connected Ms. Bambury with the Baggage Department to speak with a supervisor.<sup>42</sup>
47. On July 30, 2015, Ms. Bambury spoke with a Porter Call Centre agent named Jade.<sup>43</sup> Jade correctly advised Ms. Bambury to contact the Baggage Department and, further, that she should forward her receipts for baggage delay related expenses to the Baggage Department:

**Ms. Bambury:** Okay, and actually maybe you might be able to help me with this. With my luggage lost, where would I forward the receipt to exactly for everything I had to replace?

[...]

**Porter Agent Jade:** Actually, you know what, this is actually the e-mail here that I need to give you.

**Ms. Bambury:** Okay

**Porter Agent Jade:** Yes. It's ytz...

**Ms. Bambury:** ytz, yes.

**Porter Agent Jade:** [.baggage@flyporter.com](mailto:.baggage@flyporter.com)

**Ms. Bambury:** Okay, and what should I report there, like, the receipts, or...

**Porter Agent Jade:** Correct, so the receipts, and like I said, they'll need the confirmation number or they'll need to verify you by the credit card number.<sup>44</sup>

---

<sup>41</sup> Gonzalez Affidavit at para 19.

<sup>42</sup> Gonzalez Affidavit at Exhibit J, p 6.

<sup>43</sup> Gonzalez Affidavit at Exhibits I and K.

<sup>44</sup> Gonzalez Affidavit at Exhibit K, p 2, 5.

48. The phone calls with Floreen and Jade show that, by July 30<sup>th</sup>, Ms. Bambury knew that (a) baggage delay inquiries should be made to the Baggage Department, not the Call Centre or Porter outstations, and (b) baggage delay-related expenses should be submitted to the Baggage Department.
49. Nevertheless, on August 6<sup>th</sup>, she and Dr. Lukács obtained contact information for the Halifax station and spoke with Britney, who is not a Call Centre Agent, to inquire about baggage delay expenses. In that context, the value of the phone call with Britney as evidence of a misapplication of the Policy is highly questionable.
50. Second, although the information provided by Porter Agent Britney on the phone call was not completely accurate, the audio recording and the transcript make clear that the call was unclear and confusing, and the reliability of the call should be viewed through that lens.
51. The Applicant began the call inquiring about Ms. Bambury's World Tracer number and the status of Ms. Bambury's bags:

**Dr. Lukács:** Hi. I am calling concerning baggage irregularity report that was completed on July 22nd --

**Porter Agent Britney:** Okay.

**Dr. Lukács:** -- and we are really puzzled because it is not clear to us what is the World Tracer number or what is the status of it. I am wondering if you will be able to help us with this.

**Porter Agent Britney:** I can give it a shot here. What is the name?<sup>45</sup>

52. Soon after, the Applicant abruptly changed topics to compensation for expenses relating to delayed bags. Britney was clearly confused by the Applicant's sudden change of topic:

**Dr. Lukács:** So I am wondering also what happens with the expense that Natalie incurs, you know, for replacement items while the baggage is being delayed?

**Porter Agent Britney:** Pardon me?<sup>46</sup>

---

<sup>45</sup> Application at Document No 10, p 39.



53. Similar to his calls with Darryl, the Applicant continued to push Britney to explain the terms of the Policy. As he was asking the questions, the Applicant and Ms. Bambury were speaking over each other, making it difficult for Britney to understand the questions being asked:

**Dr. Lukács:** But is that the only compensation you provide?

**Porter Agent Britney:** That is correct.

**Dr. Lukács:** Okay.

**Ms. Bambury:** What about the --

**Dr. Lukács:** Natalie --

**Porter Agent Britney:** I'm sorry. It is hard to understand when you have me on speaker phone with two people. I just -- I can't hear both of you when you start talking.<sup>47</sup>

54. In addition to the confused nature of the call, the evidence is also suspect because it appears that the Applicant manipulated Ms. Bambury's complaint as a way to secure evidence for this proceeding. Ms. Bambury's sole concern on the call was the location of her bag. At no point during the call did Ms. Bambury herself inquire about reimbursement for delay-related expenses, presumably because she had already been advised to submit claims to the Baggage Department. It was the Applicant, not Ms. Bambury, that was focused on the application of the Policy.
55. Since the Application was commenced, Ms. Bambury's complaint has been resolved in accordance with the Tariffs and the Policy. Her bag has been returned to her and Porter has issued a cheque to her as compensation for delayed baggage related expenses.<sup>48</sup>

### **C. Issues**

56. The Application raises the following issues for consideration by the Agency:

---

<sup>46</sup> Application at Document No 10, p 41.

<sup>47</sup> Application at Document No 10, p 42.

<sup>48</sup> Gonzalez Affidavit at para 20.

- (a) whether Porter's website contains false or misleading information which requires the Agency's intervention;
- (b) whether Porter has applied terms and conditions not set out in its Tariffs and/or failed to apply the terms and conditions set out in its Tariffs, requiring the Agency's intervention; and
- (c) if intervention by the Agency is required, what is the appropriate remedy.

**D. Submissions**

57. The Agency should find that an order is not required in the present case for three reasons:

- (a) first, Porter's website no longer contains false and/or misleading information;
- (b) second, there is no evidence that Porter has misapplied the Policy such that passengers have not received compensation in accordance with the Tariffs; and
- (c) third, the remedies which the Applicant is seeking are inappropriate and, in any event, Porter has already taken sufficient measures to address and remedy any violations of the CTA or ATR.

**i. Porter Airlines' website does not contain false and/or misleading information which requires the Agency's intervention**

58. Porter acknowledges that its website contained unclear information about the Policy. The website has been amended and as such, the Applicant's complaint under s. 18(b) of the ATR is moot and there is no need for action by the Agency.

59. The Agency's order in *Gábor Lukács v United Air Lines, Inc.*, is instructive on this issue. The Agency found that United's signage was "misleading" because it misstated United's baggage liability under its tariff, but concluded that it was unnecessary to take further action because United had removed the offending signage by the time the complaint was adjudicated:

The Agency finds that on July 29, 2011, United displayed signage at its airport check-in counter in Winnipeg which contained a broad exclusion of liability for damage to or loss of protruding parts on baggage. This statement was misleading in

that it misstates United's liability for baggage as set out in Article 17(2) of the Convention. Based on the evidence, however, the Agency accepts that such signage has been removed from United's airport check-in counters. The Agency therefore contemplates no further action respecting the matter of signage at those counters.<sup>49</sup> [emphasis added]

**ii. The Applicant has failed to prove a misapplication of the Policy and the Tariffs**

60. To demonstrate that Porter has failed to apply the terms of its Tariffs as alleged, the Applicant must prove his allegations on a balance of probabilities and “by a fair preponderance of credible evidence.”<sup>50</sup> As the Agency stated in *Katalin Enisz v Air Canada*:

In determining whether Air Canada properly applied its Tariff in this matter, the Agency examines the evidence put before it by the parties. As for the burden of proof, the rule is that the complainant, in this case Ms. Enisz, is required to prove, on a balance of probabilities, that Air Canada has failed to properly apply, or has inconsistently applied, the terms and conditions of carriage set out in the Tariff.

The applicant must prove their case by a fair preponderance of credible evidence. The central test is the need to balance conflicting values to the extent of the complainant's burden of proof. If at the close of a case the evidence is equally balanced, the applicant will have failed their burden.<sup>51</sup>

61. The Applicant has failed to meet this standard for two reasons.
62. First, the Applicant's evidence is questionable and the Agency should be very cautious in assigning it any weight or probative value:
- (a) the evidence is hearsay – the Applicant is relying on the prior statements of Porter agents for the truth of their contents, *i.e.*, to prove that the Policy is/was

---

<sup>49</sup> *Gábor Lukács v United Air Lines, Inc* (16 May 2012), Decision No 182-C-A-2012, online: <<https://www.otc-cta.gc.ca/eng/ruling/182-c-a-2012>> at para 23 [Decision No 182-C-A-2012]. See also: *Gábor Lukács v United Air Lines, Inc* (29 May 2012), Decision No 200-C-A-2012, online: <<https://www.otc-cta.gc.ca/eng/ruling/200-c-a-2012>> at para 11.

<sup>50</sup> *Dr. Frank Fowlie v Air Canada* (18 February 2010), Decision No 57-C-A-2010, online: <<https://www.otc-cta.gc.ca/eng/ruling/57-c-a-2010>> at para 23; *Katalin Enisz v Air Canada* (23 January 2015), Decision No 18-C-A-2015, online: <<https://www.otc-cta.gc.ca/eng/ruling/18-c-a-2015>> at paras 27-28 [Decision No 18-C-A-2015].

<sup>51</sup> Decision No 18-C-A-2015 at paras 27-28.

misapplied, in circumstances where the agents have not proven the statements; and

(b) the evidence is manufactured – despite having been referred to the proper department, the Applicant’s calls with Porter agents Darryl and Britney were based on fictitious circumstances manufactured by the Applicant for the obvious purpose of supporting this Application.

63. Second, the evidence, notwithstanding its unreliability, does not support the Applicant’s conclusions. He has advanced no evidence of any misapplication of the Policy, even in a single instance. At best, the Applicant’s evidence suggests that the Policy may have been miscommunicated by two Porter agents on two occasions, and only to one *bona fide* Porter passenger who had already been repeatedly advised that such inquiries were appropriately directed elsewhere. There is no evidence in the record that even one passenger did not claim compensation for baggage delay-related expenses in reliance on a statement from a Porter agent or the website, or made a claim for compensation but was improperly denied.
64. Furthermore, the Applicant is asking the Agency to infer that his manufactured phone calls are evidence of a systemic problem.<sup>52</sup> The evidence does not support such a speculative inference. Porter’s records show that it has paid out over \$46,770 in compensation for delayed baggage since the beginning of 2014.<sup>53</sup> Further, the evidence is that Porter’s practice has been to provide such compensation since Porter first launched in 2006.<sup>54</sup>
65. Even if the Agency finds the Applicant’s evidence supports his allegations, that evidence would, at most, only represent an exception to Porter’s general practices as established by the evidence.
66. Finally, there is no practical need for the Agency’s intervention, given the extensive measures taken by Porter to date which address the issues raised in the Application.

---

<sup>52</sup> Application at para 40.

<sup>53</sup> Gonzalez Affidavit at para 11.

<sup>54</sup> Gonzalez Affidavit at para 12.

### iii. The Agency should not grant the remedies sought by the Applicant

67. The Agency should decline to grant the remedies sought by the Applicant for three reasons.
68. First, as discussed above, Porter has proactively and promptly enacted a series of measures which precludes the need for the Agency to order any further action.
69. Second, it would be excessive and inappropriate to order the “corrective measures” sought by the Applicant in the present case.<sup>55</sup>
70. The Agency has never directed a carrier to take corrective measures of the nature requested by the Applicant. The Agency’s previous decisions indicate that the corrective measures remedy has only ever been used for: (1) accessibility complaints, to require carriers to take steps to accommodate passengers with disabilities,<sup>56</sup> and (2) cases of alleged fraud by travel agencies, to require carriers to reimburse identified passengers for unused tickets.<sup>57</sup>
71. Further, the Applicant’s assertion that the corrective measures power was created for the purpose of granting systemic remedies is baseless.<sup>58</sup> The Agency has never used corrective measures to order such a remedy. Moreover, there is nothing in the drafting history of s. 67.1(1)(c) of the CTA<sup>59</sup> and s. 113.1(a) of the ATR<sup>60</sup> which states, or suggests, that the legislators intended for these sections to exist for that purpose.

---

<sup>55</sup> Application at paras 38-41.

<sup>56</sup> See, for example: *Louise Bartlett v Air Canada* (26 June 2008), Decision No 336-AT-A-2008, online: <<https://www.otc-cta.gc.ca/eng/ruling/336-at-a-2008>> at paras 340-345; *Margaret Tatlock v Air Canada* (11 June 2010), Decision No 245-AT-A-2010, online: <<https://www.otc-cta.gc.ca/eng/ruling/245-at-a-2010>> at paras 13, 81.

<sup>57</sup> *In the Matter of the refusal by Northwest Airlines, Inc and KLM Royal Dutch Airlines to honour tickets issued by Travel Way Services Inc* (29 April 2003), Decision No 232-A-2003, online: <<https://www.otc-cta.gc.ca/eng/ruling/232-a-2003>> at p 1, 6, 9-10 (affirmed in *Northwest Airlines Inc v Canadian Transportation Agency*, 2004 FCA 238); *Mohammed Omar Satari v Lufthansa German Airlines* (22 June 2005), Decision No 388-C-A-2005, online: <<https://www.otc-cta.gc.ca/eng/ruling/388-c-a-2005>> at para 36 (reversed on other grounds in *Lufthansa German Airlines v Canadian Transportation Agency*, 2007 FCA 28).

<sup>58</sup> Application at para 40.

<sup>59</sup> See: Bill C-26, *An Act to Amend the Canada Transportation Act, the Competition Act, the Competition Tribunal Act and the Air Canada Public Participation Act and to amend another Act in Consequence*, 2nd Sess, 36th Parl, 1999.

<sup>60</sup> See: *Regulations Amending the Air Transportation Regulations*, SOR/2001-71, s. 4; *Regulations Amending the Air Transportation Regulations and the Canadian Transportation Agency Designated Provisions Regulations*, SOR/2009-28, s. 1.

72. Rather, previous decisions of the Agency establish that remedies for the misapplication of a tariff have been limited to ordering carriers to:
- (a) amend their tariffs;<sup>61</sup>
  - (b) apply their tariffs differently on a go-forward basis;<sup>62</sup>
  - (c) cease the contravening actions;<sup>63</sup> and
  - (d) provide compensation where an identifiable party has sought compensation for proven losses.<sup>64</sup>
73. In cases where a carrier has already taken steps to remedy and prevent the future misapplication of its tariff, the Agency has held that further action by the Agency is not required.<sup>65</sup> There is simply no basis in fact or law to order corrective measures in this case.
74. Third, the Applicant has no basis to seek an order requiring Porter to “compensate passengers for expenses incurred in relation to delayed baggage.”<sup>66</sup> The Agency has stated that its compensatory powers under s. 67.1(b) of the CTA and s. 113.1(b) of the ATR are limited to remedying “out-of-pocket expenses if these arose as a direct result of the carrier’s failure to respect its tariff.”<sup>67</sup> The Applicant has not provided evidence of any expenses incurred, either by himself or anyone else, as a result of delayed baggage which were not compensated by Porter.

---

<sup>61</sup> See, for example: *Ayopo Odunuga v Lufthansa German Airlines* (5 June 2008), Decision No 305-C-A-2008, online: <<https://www.otc-cta.gc.ca/eng/ruling/305-c-a-2008>> at paras 23-24; Decision No 182-C-A-2012 at paras 44-48, 50.

<sup>62</sup> See, for example: *Gábor Lukács v WestJet* (20 November 2014), Decision No 420-C-A-2014, online: <<https://www.otc-cta.gc.ca/eng/ruling/420-c-a-2014>> at para 23.

<sup>63</sup> See, for example: *Scott McKenzie v West Wind Aviation Limited Partnership* (27 June 2010), Decision No 316-C-A-2010, online: <<https://www.otc-cta.gc.ca/eng/ruling/316-c-a-2010>> at para 31; *Vladimir Kouznetchik v American Airlines, Inc* (31 March 2011), Decision No 99-C-A-2011, online: <<https://www.otc-cta.gc.ca/eng/ruling/99-c-a-2011>> at para 78.

<sup>64</sup> See, for example: *Karen Kipper v WestJet* (21 July 2010), Decision No 309-C-A-2010, online: <<https://www.otc-cta.gc.ca/eng/ruling/309-c-a-2010>> at paras 23-26, 37; *Shahid Saleem v Air Canada* (21 June 2007), Decision No 319-C-A-2007, online: <<https://www.otc-cta.gc.ca/eng/ruling/319-c-a-2007>> at paras 42-43.

<sup>65</sup> *Danny Yehia v Air Canada* (3 April 2003), Decision No 185-C-A-2003, online: <<https://www.otc-cta.gc.ca/eng/ruling/185-c-a-2003>> [**Decision No 185-C-A-2003**]; *Nicole McKelvey v Air Canada* (22 November 2007), Decision No 590-C-A-2007, online: <<https://www.otc-cta.gc.ca/eng/ruling/590-c-a-2007>> at paras 22-23, 25.

<sup>66</sup> Application at para 45.

<sup>67</sup> Decision No 185-C-A-2003 at p 9.

75. Furthermore, rather than providing evidence of actual damages, the Applicant has provided a logically unsound estimate of damages in an attempt to unfairly enhance the gravity of his complaint.<sup>68</sup>
76. If passengers were not properly compensated as a result of the improper application of Porter's Tariffs, then the relevant parties for the purpose of estimating damages would be limited to passengers who:
- (a) had delayed baggage during the relevant time periods;
  - (b) consulted Porter's website or a Porter agent regarding compensation for expenses incurred as a result of delayed baggage, and received incorrect information; and
  - (c) decided not to seek compensation for reasonable expenses in reliance on the incorrect information (passengers who made claims for compensation notwithstanding receiving incorrect information would have had their claims processed in accordance with the Policy by the Baggage Department or Customer Relations).
77. However, the Applicant's estimate includes his estimate of the total number of passengers who had delayed baggage during the relevant time periods, which incorrectly includes passengers who (a) did not consult the website, (b) consulted the website and decided to make a claim in any event, or (c) did not make a claim for other reasons, including, *e.g.*, that their bags were promptly returned and they did not incur any compensable expenses.
78. Given that Porter's evidence unequivocally demonstrates that it is impossible that all passengers with delayed baggage were not properly compensated,<sup>69</sup> the Applicant's estimate of damages cannot be relied upon and must be disregarded as baseless speculation. Furthermore, the Applicant's estimate of the average out-of-pocket expenses per claim is arbitrary and similarly unproven.<sup>70</sup>

---

<sup>68</sup> Application at para 34.

<sup>69</sup> Gonzalez Affidavit at para 11.

<sup>70</sup> Application at para 34.

79. In any event, the Agency should not order any of the remedies sought by the Applicant. Porter's decision to contact passengers directly is the most effective way of giving potentially affected passengers the ability make a claim for compensation. Contacting potentially affected passengers directly will ensure that no passengers were denied compensation they were entitled to under the Tariffs.

**E. The Agency should award costs to Porter**

80. The Applicant should not receive costs from this proceeding pursuant to s. 25.1 of the CTA, as he has faced no "special or exceptional circumstances" in bringing his Application.

81. The Agency has held that "[a]s a general rule, costs are not awarded,"<sup>71</sup> and that costs should only be awarded "in special or exceptional circumstances."<sup>72</sup> The Applicant faced no such circumstances in this case: the complaint was not complex, there will be no oral hearing, Porter acted efficiently and complied with the timelines under the ATR, and the Applicant has not incurred any extraordinary costs in preparing the Application.<sup>73</sup>

82. Instead, Porter requests that the Agency consider awarding costs to Porter.

83. The Applicant has acted unreasonably. The Applicant raised his concerns with Porter and he received a prompt, action-driven response by the Chief Executive Officer and President.<sup>74</sup> Ignoring the line of communication which had been opened and the many alternatives to formally adjudicating the issues, the Applicant has been careless and inconsiderate of the time and resources of the Agency and Porter in his wilfully blind pursuit of an allegation based on underwhelming and inconclusive evidence, and his own baseless suppositions.

---

<sup>71</sup> *Motion by Karen Kipper* (26 January 2011), Decision No 20-C-A-2011, online: <<https://www.otc-cta.gc.ca/eng/ruling/20-c-a-2011>> at para 10 [**Decision No 20-C-A-2011**].

<sup>72</sup> *Gábor Lukács v WestJet* (30 November 2011), Decision No 418-C-A-2011, online: <<https://www.otc-cta.gc.ca/eng/ruling/418-c-a-2011>> at para 49. See also: Decision No 20-C-A-2011 at paras 10-11; *Raymond Paul Nawrot, Kristina Marie Nawrot and Karolyne Theresa Nawrot v Sunwing Airlines Inc* (15 November 2013), Decision No 432-C-A-2013, online: <<https://www.otc-cta.gc.ca/eng/ruling/432-c-a-2013>> at paras 128-136; *Gábor Lukács v Air Canada* (27 May 2013), Decision No 204-C-A-2013, online: <<https://www.otc-cta.gc.ca/eng/ruling/204-c-a-2013>> at para 77.

<sup>73</sup> The Applicant seeks compensation for the costs of transcribing his telephone conversations with Porter Call Centre agents. However, these costs were unnecessarily and voluntarily incurred by the Applicant, considering that it is unlikely that Porter would have disputed the contents of the audio recordings.

<sup>74</sup> Gonzalez Affidavit at paras 13-14. See also: Gonzalez Affidavit at Exhibit D.



84. The CTA should not be used as a forum for unreasonable complaints in circumstances where the carrier has already taken reasonable steps to address concerns. The Applicant's conduct should be sanctioned.

**F. Relief Sought**

85. Porter requests that the Agency dismiss the Application, with costs to Porter.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 3rd day of September, 2015.

*Norton Rose Fulbright Canada LLP*  
**NORTON ROSE FULBRIGHT CANADA LLP**  
Lawyers for the Respondent 

## SUPPORTING DOCUMENTS

- 1 Affidavit of Luis Gonzalez, sworn September 3, 2015
  - Exhibit A – Excerpt from Porter’s International Tariff (not applicable to travel to the United States)
  - Exhibit B – Excerpt from Porter’s Domestic Tariff
  - Exhibit C – Excerpt from Porter’s Transborder Tariff (Canada-US travel)
  - Exhibit D – Emails between Dr. Lukács and Robert Deluce, dated August 4, 2015 to August 5, 2015
  - Exhibit E – Screenshot of Delayed Baggage web page on Porter’s website
  - Exhibit F – Porter Airport Operations Bulletin #15-018, dated August 7, 2015
  - Exhibit G – Email sent to Porter passengers, dated September 3, 2015
  - Exhibit H – Recording of phone conversation between Ms. Natalie Bambury and Porter Agent, dated July 23, 2015
  - Exhibit I – Recording of phone conversation between Ms. Natalie Bambury and Porter Agent, dated July 30, 2015
  - Exhibit J – Transcript of phone conversation between Ms. Natalie Bambury and Porter Agent, dated July 23, 2015
  - Exhibit K – Transcript of phone conversation between Ms. Natalie Bambury and Porter Agent, dated July 30, 2015