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April 25, 2014

VIA EMAIL

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

Dear Madam Secretary:

Re: Dr. Gábor Lukács v. Porter Airlines
Complaint concerning Domestic Tariff Rule 18 (Denied Boarding Compensation)
File No.: M 4120-3/14-01414
Answer to the motion of Porter Airlines dated April 21, 2014

Please accept the following submissions in relation to the above-noted matter as an answer to Porter Airlines' 81-page motion dated April 21, 2014.

BACKGROUND

1. On March 9, 2014, the Applicant brought a complaint to the Agency concerning Porter Airlines' Domestic Tariff Rule 18, governing the rights of passengers who are involuntarily denied boarding. The Applicant asked the Agency to disallow Rule 18 as being unreasonable, and substitute it with other provisions.

2. In its answer, dated April 1, 2014, Porter Airlines admitted that its Domestic Tariff Rule 18 requires revisions, and made certain representations about its reasons for not having revised Rule 18 earlier. Porter Airlines is also asking in its answer:

    (a) that it be permitted to deliver proposed amendments to Rule 18 for review and consideration by the Agency as to clarity and reasonableness; and

(b) leave to deliver submissions in response to any submissions the Complainant may deliver concerning any proposed amendments hereafter delivered by Porter pursuant to (a) above.

3. In his April 5, 2014 reply, the Applicant welcomed Porter Airlines' admission that Rule 18 required revisions, but objected to Porter Airlines' requests on the basis that they constitute an abuse of process and unnecessarily delay the proceeding. It was in this latter context that the Applicant submitted that:

   (a) there was nothing to prevent Porter Airlines from delivering proposed amendments to Rule 18 together with its April 1, 2014 answer;

   (b) thus, Porter Airlines' unnecessary request for permission to deliver proposed amendments to Rule 18, for which Porter Airlines knew perfectly well that no permission was required, is a mere attempt to delay the proceeding; and

   (c) Porter Airlines' request to propose amendments to Rule 18 is disingenuous: Porter Airlines had more than 6 months since the Agency issued Decision No. 342-C-A-2013 to revise Rule 18 on its own, but according to Porter Airlines' own admission, the airline has made the informed and deliberate decision to not do so.

4. On April 21, 2014, more than two weeks after the filing and service of the Applicant's reply, Porter Airlines brought the present 81-page motion, asking the Agency:

   (a) to strike out the Applicant's reply dated April 5, 2014 on the basis that it is scandalous, vexatious and unduly prejudicial to Porter Airlines;

   (b) direct the Applicant "to refrain from further scandalous, inflammatory and prejudicial statements"; and

   (c) alternatively, for leave to permit Porter Airlines to file a Surreply to the Applicant's reply.

ARGUMENT

Porter Airlines' motion is a troublesome attempt to deprive the Applicant of his most fundamental procedural right of making submissions, and to suppress the Applicant's reply dated April 5, 2014 that exposed legitimate and serious concerns about Porter Airlines' failure to comply with the *Air Transportation Regulations* and amend its domestic tariff in a timely manner to reflect the principles articulated in the Agency's Decision No. 342-C-A-2013.

As explained below, the aforementioned concerns became relevant to the present proceeding only due to Porter Airlines' procedural requests contained in the airline's April 1, 2014 answer. These procedural requests unnecessarily prolong the determination of the proceeding, and frustrate the ultimate goal of the proceeding, which is to ensure that the travelling public is subject to reasonable terms and conditions.

Porter Airlines' submissions in relation to the present motion contain a litany of irrelevant complaints and allegations that attack the Applicant personally, his character, and his conduct, much in the style of a family law case. These *ad hominem* attacks against the Applicant, which do not assist in resolving the substantive issues before the Agency, refer to past proceedings that have already been determined with finality by the Agency or the Federal Court of Appeal. Notably, the Agency has found no fault in the Applicant's conduct in these proceedings, and the Federal Court of Appeal even went as far as praising the Applicant for his "very articulate submissions."

Thus, Porter Airlines is effectively asking the Agency to act like a Star Chamber, make findings about matters that are outside the present proceeding and the Agency's mandate (such as certain Twitter posts), and label the Applicant as a litigant lacking civility—all this for the Applicant's submissions that Porter Airlines' procedural requests constitute an abuse of the Agency's process.

For the reasons presented below, it is submitted that Porter Airlines' motion to expunge the Applicant's reply of April 5, 2014 or portions of it is devoid of any merit, and it is arguably a further attempt by Porter Airlines to delay the present proceeding.

It is further submitted that Porter Airlines' request that the Agency direct the Applicant to "refrain from further scandalous, inflammatory and prejudicial statements" is not only devoid of any merit, but it is also a vexatious and unduly prejudicial attempt to intimidate and muzzle the Applicant, and to interfere with the Applicant's ability to make submissions to the Agency.

With respect to Porter Airlines' request to be permitted a Surreply, a request that may have some merit, the Applicant submits that it ought not be granted because no new issue was raised in the Applicant's reply, Porter Airlines delayed making the request, and granting the request would cause undue further delay.

I. Clarification: no personal attack on Mr. Sheahan

The Applicant asks the Agency to interpret all his submissions as concerning Porter Airlines, and not as attacking Mr. Sheahan personally in any way.

The Applicant understands that being an in-house counsel, Mr. Sheahan is, in spite of his many years of experience, figuratively speak, no more than a small cog in a large machine. The Applicant sympathizes with the situation of Mr. Sheahan who, being an in-house counsel for Porter Airlines, is part of a large organization, which may not always act in the most commendable way. The Applicant also appreciates that in certain situations, Mr. Sheahan's hands may be tied by the chain of command of which he is part.

Thus, the Applicant would like to clarify at the outset that his submissions concerning Porter Airlines' conduct in relation to the present proceeding and its failure to revise Rule 18 in a timely manner are not directed at Mr. Sheahan personally in any way. Indeed, the present proceeding concerns Porter Airlines and not Mr. Sheahan personally, whose conduct is regulated by the Law Society of Upper Canada (LSUC), and not the Agency.

II. Irrelevant submissions and material omissions by Porter Airlines

Paragraphs 9-19 of Porter Airlines' motion as well as Exhibits 1-13 to the motion address previous proceedings before the Agency and the Federal Court of Appeal. These proceedings have been concluded, are no longer pending, and the Agency is *functus officio* with respect to them.

Porter Airlines had no complaint about the conduct or submissions of the Applicant in these past proceedings, and neither the Agency nor the Federal Court of Appeal expressed any concern about the Applicant' conduct during these past proceedings. On the contrary, the Applicant was substantially successful in these proceedings before the Agency, and the panel of the Federal Court of Appeal hearing the appeal in File No. A-460-12 commended the Applicant for his "very articulate submissions" (*Lukács v. Canada (Transportation Agency)*, 2014 FCA 76, para. 16).

In these circumstances, it is submitted that the Agency has no jurisdiction to review allegations concerning the Applicant's conduct in these past proceedings, especially since the Agency chose to be an active party in the appeal before the Federal Court of Appeal. Furthermore, even if the Agency had jurisdiction to do so, it would not be appropriate to do so in proceedings that have already been determined with finality.

Thus, the Applicant submits that paragraphs 9-19 of Porter Airlines' motion as well as Exhibits 1-13 to the motion are irrelevant, and ought not be considered by the Agency in the present motion.

Porter Airlines has not simply brought some irrelevant materials into the present motion, but its submissions also contain numerous material misrepresentations and omissions in relation to these past proceedings, which could be prejudicial to the Applicant. Without burdening the Agency with correcting these one by one, the Applicant would like to provide only a few examples:

(a) Contrary to Porter Airlines' submission at paragraphs 13-15, the Applicant was not appealing the decision of the Agency concerning an extension (LET-C-A-92-2012), but rather a subsequent decision (LET-C-A-126-2014), the main issue being that the decision was issued without a proper quorum of two Members of the Agency.

The appeal in question did not delay the determination of the matter by the Agency. Indeed, the Agency issued Decision No. 16-C-A-2013 while the appeal was pending before the Federal Court of Appeal. The appeal itself became moot because the Agency retracted its "internal policy" that purported to allow sole members to make decisions.

(b) In paragraph 19(a) of its submissions, Porter Airlines takes exception with the Applicant's criticism of Porter Airlines having omitted relevant parts of its tariff in its submissions in the proceeding that led to Decision No. 16-C-A-2013.

What Porter Airlines did not mention in this context is that the Agency agreed with the Applicant, and was equally critical of Porter Airlines' conduct in Decision No. 16-C-A-2013:

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

[Emphasis added.]

(c) In paragraph 19(d) of its submissions, Porter Airlines complains about the Applicant's letter addressed to Porter Airlines' officers, in which the Applicant expressed his dismay over the failure of Porter Airlines to abide by Decision No. 31-C-A-2014 of the Agency, which required the airline to make changes to its tariff by February 28, 2014.

Porter Airlines erroneously refers to this email, a copy of which was not attached as an exhibit, as "Lukács email to Cathy Murphy dated March 28, 2014" (footnote 18); instead, as the text quoted by Porter Airlines clearly demonstrates, this email was addressed to Mr. Sheahan and Mr. Deluce, and not to Ms. Murphy.

At any rate, the email in question was written with a great deal of restraint, and with particular care to avoid attacking Mr. Sheahan or Mr. Deluce personally.

The Applicant submits that these and other similar submissions about past proceedings before the Agency are not relevant for the purpose of the present motion, and serve the sole purpose of creating prejudice against the Applicant, and attacking the character of the Applicant.

III. Freedom of speech and the *Charter*

At paragraph 26 of its submissions, Porter Airlines takes exception to the Applicant's post on Twitter provided as Exhibit 14 to the motion (which, unfortunately, Porter Airlines misquoted by omitting the colon, the link, and the hashtag appearing as part of the "tweet"—all these being inherent parts of communication in social media).

Reviewing the propriety of "tweets" or other public expressions of citizens is not within the mandate or jurisdiction of the Agency, and to the best of the Applicant's knowledge, not within the mandate or jurisdiction of any other governmental body in Canada.

A governmental body scrutinizing the posts of citizens in the way that Porter Airlines invites the Agency to do is inconsistent with the values of a free and democratic society, and would violate the rights of citizens to freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication, and would be contrary to section 2(b) of the *Charter*.

Thus, the Applicant submits that these submissions of Porter Airlines and Exhibit 14 have been inappropriately placed before the Agency and ought not be considered. Furthermore, in light of the constitutional protection of freedom of speech, including "other media communications," paragraph 26 of Porter Airlines' submissions and Exhibit 14 ought to be struck from the record.

IV. Clarification of the issue and position taken by the Applicant in his reply

In its April 1, 2014 answer, Porter Airlines' conceded that Domestic Tariff Rule 18 must be revised, but asked for leave to deliver proposed amendments to Rule 18, and leave to deliver a surreply to the Applicant's reply to these amendments.

Since Porter Airlines agrees with the Applicant's position that Domestic Tariff Rule 18 must be revised, the issue is no longer the reasonableness and clarity of Rule 18. The only question is how Rule 18 would be revised.

Thus, the (new) issue is Porter Airlines' request for leave to deliver proposed amendments to Rule 18 and leave to deliver a surreply to the Applicant's reply to these amendments. It is these two requests that the Applicant's April 1, 2014 reply was chiefly addressing.

Therefore, Porter Airlines' submissions at paragraphs 2 and 42 are misguided and misstate the issue that the Applicant was addressing in his reply.

The Applicant also objects to the characterization of his position at paragraphs 3 and 25 of Porter Airlines' motion, which (quite possibly inadvertently) misrepresent the position taken by the Applicant, and attribute to him a position that he did not take:

(a) The Applicant never suggested that Porter Airlines had an obligation to deliver amendments to Domestic Tariff Rule 18 as part of its answer.

Rather, the Applicant's position is that if Porter Airlines chooses to deliver proposed amendments before the Agency issues a final decision (a choice that is entirely up to Porter Airlines), then:

i. Porter Airlines must do so during the pleadings, as part of its answer, as per section 42 of the Agency's *General Rules* (see also *Lukács v. WestJet*, LET-C-A-83-2011, p. 1);

ii. Porter Airlines does not need leave to deliver proposed amendments as part of its answer (although proposing amendments alone, without taking a position on the merits of the complaint, may not constitute an answer).

In these circumstances, Porter Airlines' request for leave to deliver proposed amendments, when such leave is known to be unnecessary (instead of simply delivering the amendments together with Porter Airlines' answer), constitutes dilatory tactics, and thus an abuse of process.

(b) The Applicant also did not argue that the failure of Porter Airlines to revise its domestic tariff rules concerning denied boarding compensation following the release of Decision No. 342-C-A-2013 of the Agency was, in and on its own, an abuse of process.

Rather, the Applicant submitted that Porter Airlines' failure to revise the tariff provisions in question even several months after it became aware of Decision No. 342-C-A-2013, combined with Porter Airlines' continued use of a method of compensation that has been held to be unreasonable in Decision No. 342-C-A-2013, supports the finding that Porter Airlines has an interest in maintaining the *status quo* as long as possible, and its unnecessary procedural request is an abuse of process.

(c) The Applicant further took an exception to the timing of Porter Airlines seeking leave to file a surreply to the Applicant's reply to its proposed amendments (when filed), which puts the Agency into an unfair and difficult position: if the Agency denies the leave, Porter Airlines may change its mind, not file its proposed amendments before the Agency's final decision, and thus prolong the period during which passengers are subject to unreasonable terms and conditions.

The Applicant's position has been and remains that the proper time for seeking leave to file a Surreply would have been after the Applicant filed his own reply to Porter Airlines' proposed amendments, at which point the Agency would have been in the position to determine whether any new issues were raised that warrant allowing a Surreply to be filed.

V. Should the Applicant's April 5, 2014 reply be struck in part or in whole?

The Applicant submits that his reply of April 5, 2014 does not "prejudice, hinder or delay the fair conduct of the proceeding," and contains only submissions that are relevant and necessary to adequately respond to Porter Airlines' procedural requests made as part of Porter Airlines' April 1, 2014 answer. Furthermore, the Applicant submits that the submissions contained in his April 5, 2014 reply are supported by the admissions of Porter Airlines in its answer dated April 1, 2014.

In the alternative, even if the Agency finds that certain portions of the Applicant's reply are not relevant, these portions ought not be struck, because Porter Airlines has failed to demonstrate how the Applicant's reply may prejudice Porter Airlines or may hinder the fair determination of the issues in the proceeding.

Thus, the Applicant submits that Porter Airlines' motion to strike the Applicant's April 5, 2014 reply in part or in whole is devoid of any merit, and ought to be dismissed.

(a) Clarification

With respect to the phrase "dubious" used at the bottom of page 5 of the Applicant's April 5, 2014 reply, the Applicant intended it to mean of questionable merit or devoid of merit. The Applicant regrets if his choice of words were construed to imply anything more in that specific context.

(b) The Agency's jurisprudence

The wording of section 14(3)(b) of the Agency's *General Rules* substantially differs from Rule 221 of the *Federal Court Rules* or Rule 25.11 of the Ontario *Rules of Civil Procedure*, and the Agency has been applying this rule differently than the courts.

In *Lukács v. Air Transat*, 327-C-A-2013, the Agency considered the motion of the Applicant to strike out certain submissions and email correspondence from Air Transat's answer, which were defamatory, irrelevant, and prejudicial to the Applicant, and attributed ulterior motives to the Applicant. The Agency dismissed the Applicant's motion to strike:

> [5] The issue before the Agency in this matter is whether certain existing and proposed tariff provisions are consistent with the Convention and are reasonable. Air Transat's submissions respecting Air Transat's interaction with Mr. Lukács and the motives that may underlie the filing of his complaint are irrelevant to the Agency's consideration of the issue. As such, they have not been considered by the Agency in reaching its determinations.
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> [6] With respect to Mr. Lukács' request that certain material be expunged from the record, as the Agency does not expunge its public record of irrelevant material, the motion of Mr. Lukács to expunge the record is denied. [Emphasis added.]

The Applicant submits that the Agency ought to apply the same principles to determine the present motion as those that were used in Decision No. 327-C-A-2013 to dismiss the Applicant's motion to strike out irrelevant, prejudicial, and defamatory statements made by Air Transat about the Applicant.

(c) Relevance

Porter Airlines addresses the wrong question at paragraph 42 by stating that the Applicant's April 5, 2014 reply contains allegations that are not relevant to the clarity and reasonableness of Rule 18.

The relevance of a reply depends on the issues in dispute. The clarity and reasonableness of Rule 18 are no longer issues in dispute, as Porter Airlines admitted that Rule 18 requires revisions.

In its April 1, 2014 answer, however, Porter Airlines raised a new issue, namely, its procedural requests for leave to propose amendments for Rule 18, and to file a surreply to the Applicant's reply to these amendments.

The Applicant was entitled, as a matter of procedural fairness, to address these procedural requests of Porter Airlines in his April 5, 2014 reply, and this is precisely what he did.

Thus, the correct question to be asked is whether the submissions contained in the Applicant's April 5, 2014 reply are relevant to the Applicant's opposition to Porter Airlines' answer of April 1, 2014, and specifically to the factual admissions and procedural requests contained therein. The Applicant submits that this question is to be answered in the affirmative.

As noted earlier, Porter Airlines made an entirely unnecessary request for leave to deliver amendments to Rule 18, which it could have done anyway, without any leave, at the time it filed its April 1, 2014 answer. Moreover, the direct consequence of the request was delaying the proceeding.

In these circumstances, the amount of time that Porter Airlines had been aware of the need to revise Rule 18 and its failure to nevertheless revise Rule 18 are directly relevant to determining whether the unnecessary request of Porter Airlines is a mere inadvertent error, or dilatory tactics amounting to an abuse of process, which in turn may be a basis for denying the request.

Similarly, Porter Airlines' explanation for why it did not revise Rule 18 is relevant to deciding whether the unnecessary request of Porter Airlines is a mere inadvertent error, or dilatory tactics amounting to an abuse of process. By extension, the credibility of Porter Airlines' explanation for not revising Rule 18, even though Porter Airlines was fully aware of the Agency's Notice to Industry (July 3, 2013) and Decision No. 342-C-A-2013 of the Agency, is relevant to the Applicant's submission that Porter Airlines' request ought not be granted, because it is an abuse of process serving a collateral purpose, namely, delaying the revision of Rule 18.

Therefore, the Applicant submits that the allegations contained in his April 5, 2014 reply were relevant to the submissions and requests made in Porter Airlines' April 1, 2014 answer.

(d) Evidence: Porter Airlines' own admissions

In paragraph 3 of Porter Airlines' answer of April 1, 2014, Porter Airlines admitted that it was aware of subsection 107(1)(n)(iii) of the *Air Transportation Regulations* ("*ATR*") and the obligation to set out its policies with respect to denied boarding compensation (i.e., payment of compensation) to passengers who are involuntarily denied boarding.

As Porter Airlines conceded, Domestic Tariff Rule 18 does not meet this legislative requirement, and requires revisions.

Consequently, while Porter Airlines was aware of the requirements under subsection 107(1)(n)(iii) of the *ATR*, it nevertheless maintained a non-compliant Rule 18. Undoubtedly, Porter Airlines is entitled to the benefit of the doubt with respect to this non-compliance until summer 2013, and the Applicant assumes that until summer 2013 this was an inadvertent oversight.

According to paragraph 4 of Porter Airlines' answer of April 1, 2014, Porter Airlines began to implement overbooking in summer 2013, and adopted the interim practice of providing $500 travel vouchers to victims of denied boarding, pending the outcome of the proceeding that resulted in Decision No. 342-C-A-2013.

While there is nothing untoward in adopting such an interim compensation, one is left wondering why Porter Airlines did not update its Domestic Tariff Rule 18 to reflect its actual policy, as required by subsection 107(1)(n)(iii) of the *ATR*; nevertheless, even on this point, Porter Airlines is entitled to the benefit of the doubt, and the Applicant assumes that it was another oversight on the part of Porter Airlines.

What is inexplicable and inexcusable is that Porter Airlines continued to provide denied boarding compensation by way of travel vouchers only, and did not update its Domestic Tariff Rule 18 even after August 29, 2013, when the Agency released its Decision No. 342-C-A-2013, which specifically addressed the question of domestic denied boarding compensation in general and by travel vouchers in particular. On this point, Porter Airlines is not entitled to the benefit of doubt, because it admitted at paragraph 5 of its April 1, 2014 answer that it was aware of the Agency's Decision No. 342-C-A-2013.

Even in the face of the Agency's clearest findings in Decision No. 342-C-A-2013, Porter Airlines continued to offer only $500 travel vouchers as denied boarding compensation. At this point in time, Porter Airlines was no longer acting based on a genuine oversight, and Porter Airlines knew that its denied boarding policy was unreasonable, and contrary to the statutory requirements.

As Porter Airlines admitted at paragraph 5 of its April 1, 2014 answer, the decision to not change its denied boarding compensation policy nor to update its Domestic Tariff Rule 18 was a deliberate one, and not the result of an unfortunate, albeit genuine, oversight.

Porter Airlines' excuse for not changing its domestic tariff, which was known at this point in time to be unreasonable (in light of Decision No. 342-C-A-2013), is that its international tariff was being challenged by the Applicant before the Agency. It is this excuse that the Applicant has referred to in his April 5, 2014 reply as "dubious representations about its reasons for not having revised Rule 18 earlier."

The Applicant maintains that this excuse is not credible, and no reasonable person acting in good faith would conduct themselves in this manner. The Applicant submits that airlines have to be proactive in complying with their statutory obligations to have reasonable tariffs. Consequently, when an airline discovers that its policy is unreasonable, it has a statutory obligation to immediately change it and update its tariff accordingly, at least on an interim basis, until it receives further guidance from the Agency. In particular, awaiting guidance from the Agency does not exempt Porter Airlines from the obligation to maintain a reasonable tariff.

The aforementioned obvious and logical principle of "first comply, then ask" was articulated recently in the Agency's *Notice to Industry - Enforcement of the All-Inclusive Air Price Advertising Regulations*:

> [...] in cases where the alleged offender chooses to request an exemption from the application of the regulations, the monetary penalty may be applied for each day of non-compliance starting with the compliance date stated on the original warning letter up to and including the date of the Agency's decision in regard to the exemption. This includes the period during which the request for exemption is being considered by the Agency. Additionally, given the nature of an exemption, a penalty may be applied during this period even if the Agency grants the exemption.

The fact that Porter Airlines' international tariff provisions were being challenged by the Applicant and reviewed by the Agency has no bearing on Porter Airlines' obligation or ability to update its domestic tariff. Indeed, it is worth noting that Porter Airlines did not immediately change its domestic tariff following the release of Decision No. 31-C-A-2014 either.

In these circumstances, the Applicant submits that there is ample evidence to substantiate the Applicant's allegation that Porter Airlines made a deliberate and calculated decision to disobey the law by not changing its Domestic Tariff Rule 18 even after Decision No. 342-C-A-2013 was released.

The Applicant submits that it is through this lens that Porter Airlines' subsequent unnecessary request for leave to propose amendments to Rule 18 must be viewed: for more than 6 months, Porter Airlines has been maintaining a tariff rule that was known to be unreasonable, and when faced with a challenge, Porter Airlines made an unnecessary request instead of either proposing amendments or simply letting the Agency impose new rules (either of which would have been perfectly reasonable to do).

(e) Conclusion

All submissions contained in the Applicant's April 5, 2014 reply are relevant to the position and requests put forward by Porter Airlines in its April 1, 2014 answer.

Even if the Agency finds that some of these submissions are not relevant, the Agency's practice, as articulated in Decision No. 327-C-A-2013, is not to strike irrelevant materials, but to simply not consider them, and Porter Airlines will not suffer any prejudice as a result of these submissions.

The aforementioned submissions are far from being scandalous, and they are supported by the admissions Porter Airlines itself made on April 1, 2014.

Whether these admissions are sufficient for concluding that Porter Airlines has engaged in an abuse of process is for the Agency to decide; however, failure to persuade the Agency that, on a balance of probabilities, Porter Airlines has engaged in abuse of process does not render the allegation scandalous, nor should such allegations be struck. Indeed, it is part and parcel of litigation that parties do not always succeed at proving all their allegations.

Therefore, it is submitted that Porter Airlines' request to have the Applicant's reply of April 5, 2014 struck in whole or in part ought to be dismissed.

VI. Should the Agency instruct the Applicant to "refrain from further scandalous, inflammatory and prejudicial statements"?

The Applicant submits that this portion of Porter Airlines' motion is vexatious and scandalous, and serves the sole purpose of embarrassing the Applicant before the Agency and potentially in public, and as such it should be dismissed by the Agency.

While there is no doubt that the Agency can strike out documents on a case-by-case basis, it is unclear to the Applicant whether the Agency has jurisdiction to make such a direction as sought by Porter Airlines. Even if the Agency has jurisdiction to do so, it is submitted that such a preemptive, sweeping, but vague directive would inappropriately interfere with the ability of a party to make submissions freely, without fear of retribution.

The Applicant has been unable to find any judicial decision where a court issued such a sweeping and prejudicial directive as Porter Airlines is seeking; courts have refrained from issuing such directives even in extreme situations, such as the one described in *Groia* (cited by Porter Airlines), and have properly left issues of civility to the appropriate regulatory body (LSUC in that case). It is submitted that the Agency ought to follow the same course of judicial restraint.

There is no doubt that courtesy and civility are of great importance among counsels who represent parties to bitter conflicts, because counsel are free of the negative emotions of the parties, and are thus able to discuss disputes rationally. Such discussions and communications among counsel are, undoubtedly, hindered by lack of civility or courtesy.

Civility, however, is not a basis for suppressing evidence or submissions, as Porter Airlines effectively asks the Agency to do. Counsels are entitled to make submissions about questionable actions of a party (for example, seek damages for fraud); they can also cross-examine witnesses, and suggest that a witness or a party testifying as a witness is dishonest or not credible. None of these would be considered as lacking civility. For example, it was noted in *Law Society of Upper Canada v. Joseph Peter Paul Groia*, 2012 ONLSHP 94, at paragraph 42, that:

> Mr. Fisher, the first recipient of the Marvin Katzman civility award, testified that he had seen and used sarcasm many times. He considered sarcasm to be part of the lawyer's arsenal, as he engages in the art of litigation.

There is no justification for depriving a self-represented party, under the pretext of civility, of using the same tools that are available to lawyers, as Porter Airlines invites the Agency to do. Furthermore, it would be unreasonable and unfair to hold lay litigants to the code of conduct of the legal profession when they are not trained in it.

In the present proceeding, the Applicant has made no submissions that could be interpreted as personally attacking Mr. Sheahan, counsel for Porter Airlines. Indeed, the Applicant has clarified at the outset of these submissions that none of the allegations concerning Porter Airlines' conduct are directed in any way against Mr. Sheahan personally.

Thus, while the Agency may eventually find that Porter Airlines did not engage in abuse of process, the Applicant's submissions were not lacking civility, and were properly questioning Porter Airlines' actions, and not those of Mr. Sheahan.

Therefore, Porter Airlines' submissions based on civility are misguided, and are based on an erroneous interpretation of the notion of civility described in the authorities cited by Porter Airlines in support of its submissions.

VII. Should Porter Airlines be granted leave to file a Surreply?

This portion of Porter Airlines' motion may have some merit. Nevertheless, the Applicant submits that the Agency ought to deny the motion for a number of reasons:

1. Normally, a surreply is warranted if the reply raises new issues. In the present case, it was Porter Airlines' answer of April 1, 2014 that raised new issues, and the Applicant's reply of April 5, 2014 simply responded to them by opposing Porter Airlines' procedural requests based on the facts pleaded in Porter Airlines' answer.

2. Even though Porter Airlines is familiar with the Agency's procedures, it made the strategic choice of putting forward its procedural requests in its April 1, 2014 answer, and not as part of a motion filed earlier, before filing its answer.

3. Porter Airlines did not seek to file a Surreply in a timely manner, but waited more than two weeks to do so.

4. Allowing Porter Airlines to file a Surreply with respect to its procedural requests would further and unnecessarily delay the proceeding, and would further frustrate the ultimate goal of the proceeding, which is to ensure that Porter Airlines' Domestic Tariff Rule 18 is revised as soon as possible.

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. *Canadian Charter of Rights and Freedoms*.

3. *Canadian Transportation Agency General Rules*, S.O.R./2005-35.

Case law

4. *Law Society of Upper Canada v. Joseph Peter Paul Groia*, 2012 ONLSHP 94.

5. *Lukács v. Air Transat*, 327-C-A-2013.

6. *Lukács v. WestJet*, LET-C-A-83-2011.