

CANADIAN TRANSPORTATION AGENCY

BETWEEN:

GÁBOR LUKÁCS

Complainant

- and -

PORTER AIRLINES INC.

Respondent

ANSWER OF PORTER AIRLINES INC.

PART I - OVERVIEW

1. In these proceedings, the complainant Gábor Lukács asks that the Canadian Transportation Agency (the “Agency”) disallow Rule 16 of Porter Airlines Inc.’s Domestic Tariff (“Current Rule 16” or “Current Rule”, copy attached hereto as Appendix “A”), in whole or in part, on the grounds that the Rule is unreasonable.

2. Notably, Mr. Lukács’s Complaint challenges as unreasonable only certain provisions of Rule 16, namely sub-Rules 16(c), 16(e), 16(g) and the force majeure provision following 16(g). Mr. Lukács does not state that the remaining Sub-Rules are unreasonable, nor otherwise assert any basis upon which those provisions should be disallowed.

3. Porter Airlines Inc. (“Porter”) acknowledges that the Current Rule 16 requires revisions to reflect the standard of reasonableness established by the jurisprudence of the Agency. However, Porter denies that the Current Rule should be disallowed in its entirety.

4. Rather, Porter proposes to retain those portions of the Current Rule 16 which are not challenged (which are in any event reasonable), while amending the Rule to (a) delete those portions acknowledged by Porter to require revisions, and (b) supplement with additional provisions setting out Porter’s liability to passengers in accordance with the principles of the *Montreal Convention*. As such, Porter has delivered with this Answer a proposed amended Rule 16 (“Proposed Rule 16” or the “Proposed Rule”, copy attached hereto as Appendix “B”) for the Agency’s consideration in connection with the within Complaint.¹

5. Thus, Porter asks that the Agency:

(a) dismiss Mr. Lukács’s Complaint with respect to sub-rules 16(a), 16(b) and 16(d) of Current Rule 18;² and

(b) confirm that the Proposed Rule 16 remedies any deficiencies as to reasonableness in Current Rule 16, or, alternatively, provide directions as to further

¹ In addition, Porter has delivered a proposed addition to Rule 1 (Definitions) of its Domestic Tariff.

² Due to an inadvertent clerical error, Sub-Rule 16(f) of Current Rule 16 is a verbatim duplicate of Sub-Rule 16(d), and Porter accordingly does not propose to retain this redundant Sub-Rule.

revisions which may be required prior to the filing by Porter of its Proposed Rule 16 with the Agency.

PART II - APPLICABLE LEGAL PRINCIPLES

6. For the purposes of the within Complaint, Porter does not dispute:
 - (a) Mr. Lukács's submissions as to the balancing test applicable to the determination of the reasonableness of tariff provisions;
 - (b) that there is no presumption of reasonableness with respect to the provisions of a carrier's tariffs; and
 - (c) that the principles of the *Montreal Convention* regarding a carrier's liability for delays in flights or the delivery of baggage are persuasive authority for the purpose of determining the reasonableness of domestic tariff provisions.

PART III - PORTER'S CURRENT RULE 16

A. Current Sub-Rules 16(a), 16(b), and 16(d) are not alleged to be, and are not, unreasonable

7. Although Mr. Lukács requests the disallowance of Rule 16 "in whole or in part", he has declined to advance any challenge to certain of its provisions.
8. Mr. Lukács does not state or suggest that any of Sub-Rules 16(a), 16(b) and 16(d) is unreasonable, nor assert any basis upon which they may be disallowed. Indeed, the Agency has expressly confirmed the reasonableness of the contents of those Sub-Rules in its prior decisions.

1. Sub-Rule 16(a)

9. Sub-Rule 16(a) of Porter's Current Rule 16 reads as follows:
 - (a) 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.

10. The Agency has previously considered the reasonableness of identical tariff provisions in previous complaints advanced by Mr. Lukács, and in each instance found them to be reasonable.

11. In *Lukacs v. Porter*, 16-C-A-2013, the Agency addressed an identical provision in Porter's international tariff (which it had also considered in *Lukács v. Westjet*, 252-C-A-2012), and found as follows:

[42] In Decision No. 252-C-A-2012, the Agency addressed the same provision as in the present matter. In that Decision, the Agency found that Mr. Lukács had failed to explain why the failure to include departure and arrival times as part of WestJet's contract of carriage is contrary to the principles of the Convention. The Agency also found that Mr. Lukács had not explained how the Convention could be read to compel carriers to assume the onerous obligation of guaranteeing precise departure and arrival times as part of the contract of carriage.

[43] ...The Agency finds that Mr. Lukács has not explained how the Convention could be read to compel carriers to assume the onerous obligation of guaranteeing precise departure and arrival times as part of the contract of carriage. The Agency finds that the Existing Tariff Rules at issue are not inconsistent with the Convention, and are therefore not unreasonable.

[...]

[48] The Agency therefore finds that the Existing Tariff Rules at issue are reasonable.

12. In the absence of any submissions whatsoever challenging the reasonableness of Current Sub-Rule 16(a), Porter submits that there is no basis for deviating from the Agency's prior findings that the contents of Sub-Rule 16(a) are reasonable.

2. Sub-Rule 16(b)

13. Also in *Lukacs v. Porter*, 16-C-A-2013, the Agency declined to disallow a provision in Porter's international tariff identical to Current Sub-Rule 16(b), in the absence of any substantive challenge by Mr. Lukács.

14. Sub-Rule 16(b) of Porter's Current Rule 16 reads as follows:

(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.

15. The Agency found in *Lukacs v. Porter*, 16-C-A-2013 that the impugned provision retained its meaning despite the disallowance of certain other provisions in the same Rule, and accordingly should not be disallowed (See paras. 70-71).

16. In light of these prior determinations by the Agency, and in the absence of any substantive challenge to the identical Current Sub-Rule 16(b), Porter submits that there is no basis for disallowing this Sub-Rule.

3. Sub-Rule 16(d)

17. Tariff provisions identical to Sub-Rule 16(d) have likewise been found to be reasonable by the Agency in previous proceedings.

18. Sub-Rule 16(d) of Porter's Current Rule 16 reads as follows:

(d) Without limiting the generality of the foregoing, 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.

19. Considering the same language in *Lukacs v. Porter*, 16-C-A-2013, the Agency found that the provision was reasonable:

[57] In Decision No. 252-C-A-2012, the Agency, considering a provision identical to that of Existing Tariff Rule 18(d), stated that:

[109] Proposed Tariff Rule 12.12 recognizes that situations may arise where, because of insufficient space on the aircraft, WestJet is unable to carry a passenger's baggage on the flight on which the passenger is being transported. The Agency does not agree with Mr. Lukács' submission that the Rule represents an exemption from liability. The Agency finds that, in accordance with the principles of the Convention, WestJet would remain liable for any damages incurred by a passenger to whom this provision may apply.

[58] The Agency is of the opinion that Mr. Lukács has not introduced any submissions in the present matter that would persuade the Agency to reach a finding different from that rendered in Decision No. 252-C-A-2012. The Agency does not agree that Existing Tariff Rule 18(d) represents an exemption from liability under Article 19 of the Convention, and finds that Porter would remain liable for any damages incurred by a passenger to whom this provision may apply. The Agency therefore finds that Existing Tariff Rule 18(d) is reasonable.

20. Mr. Lukács has made no submissions as to why the identical Sub-Rule 16(d) of the Current Rule should be disallowed in the context of the within Complaint. Consistent with the Agency's previous determinations, the Sub-Rule is reasonable and should not be disallowed.

B. Sub-Rule 16(f)

21. Porter acknowledges that Sub-Rule 16(f) is duplicative of Sub-Rule 16(d), and proposes to eliminate this redundancy in its forthcoming amendments.

C. Porter concedes that Current Sub-Rules 16(c), 16(e) and 16(g) and the Current force majeure clause are inconsistent with the principles of the *Montreal Convention*

22. In light of the Agency's determinations with respect to similar tariff provisions, Porter acknowledges that the second sentence of Current Sub-Rules 16(c), Sub-Rules 16(e) and 16(g), and the language following the latter Sub-Rule may have the effect of excluding liability in a manner inconsistent with the *Montreal Convention*. Accordingly, Porter does not propose to maintain those provisions in Rule 16 of its domestic tariff.

23. In order to expedite the resolution of these proceedings, Porter has filed with this Answer, at Appendix “B” hereto, a proposed amended version of Rule 16 (“Proposed Rule 16” or the “Proposed Rule”, previously defined).

24. Proposed Rule 16 removes those clauses which may exclude liability that Porter is required to assume (and which it has already, in practice, assumed) pursuant to the principles of the *Convention*, reflects the liability regime for delay and the process for making claims in that regard, and clarifies that its force majeure clause does not exonerate Porter from such claims.

25. Porter states that the Proposed Rule 16 remedies any deficiencies as to reasonableness in the Current Sub-Rule 16.

PART IV - PORTER’S PROPOSED RULE 16

26. In order to facilitate and expedite the necessary updates to Current Rule 16, Porter proposes to file its Proposed Rule 16 (attached at Appendix “B”) with the Agency for publication.

27. In drafting Proposed Rule 16, Porter has taken account of prior Agency rulings indicating that carriers’ tariffs, including their domestic tariffs, must reflect the carrier’s liability as set out in the *Montreal Convention*. In particular, Porter has incorporated the findings and orders of the Agency relating to its similar proposed Rule 18 filed in *Lukács v. Porter*, 16-C-A-2013.

28. Porter submits that its Proposed Rule 16 reflects Porter’s liability as required, and is reasonable. The Proposed Rule:

(a) includes those provisions from Current Rule 16 addressing the scope of the carrier’s obligation to adhere to scheduled flight times, which the Agency has previously affirmed as reasonable (Proposed Sub-Rules 16(a), 16(e), 16(f) and 16.2(a));

(b) supplements these with additional provisions, including from the Agency’s Sample Tariff, which further clarify the scope of the carrier’s obligations and provide

information and recommendations to assist passengers to mitigate the impact of schedule changes (Proposed Sub-Rules 16(b) and 16(d));

(c) sets out those circumstances in which passengers will have recourse to relief in the case of delay, including the procedures for making such claims, all in accordance with the Agency's interpretation and application of the *Montreal Convention* and the *ATR* (Proposed Sub-Rules 16.1 and 16.2); and

(d) revises the existing force majeure clause to specifically 'carve out' the carrier's liability for delay pursuant to the principles of the *Montreal Convention* (Proposed Sub-Rule 16(g)).

29. Further, the Proposed Rule 16 does not purport to limit or foreclose other remedies which may be available to passengers at law, other than by its limits of \$1,800 and \$3,000 with respect to lost baggage, which limits the Agency has previously found to be reasonable.

A. Proposed Sub-Rules 16(a) and 16(e)

30. Proposed Sub-Rules 16(a) and 16(e) reproduce the contents of Current Sub-Rules 16(a) and 16(b):

(a) 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.

31. Porter repeats and relies on its submissions in paragraphs 9-16 above with respect to the reasonableness of Proposed Sub-Rules 16(a) and 16(e).

B. Proposed Sub-Rule 16(b)

32. Proposed Sub-Rule 16(b) contains language taken from Rule 90(B)(2) of the Sample Tariff published by the Agency, and Porter submits that it is reasonable in light of the Agency's findings in *Lukacs v. Porter*, 16-C-A-2013. It reads as follows:

(b) Schedules are subject to change without notice, and the carrier assumes no responsibility for the passenger making connections. The carrier will not be responsible for errors or omissions either in timetables or other representation of schedules.

33. In *Lukacs v. Porter*, 16-C-A-2013, the Agency found that the statement that "Schedules are subject to change without notice" was reasonable:

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

[...]

[48] The Agency therefore finds that the Existing Tariff Rules at issue are reasonable.

34. Porter acknowledges, however, that when considering the same language in the context of Porter's proposed amended Rule in that proceeding, the Agency also held that additional language was required stating that the carrier "will make reasonable efforts to inform passengers of delays and schedule changes, and the reasons for them." Porter has accordingly included the latter language in the Proposed Rule 16 at Proposed Sub-Rule 16(c).

35. Porter accordingly submits that the statement that "Schedules are subject to change without notice" in Proposed Sub-Rule 16(b) reflects the Agency's reasoning and findings in *Lukacs v. Porter*, 16-C-A-2013, and is therefore reasonable. This statement serves to inform the passenger that notice from the carrier may not reach the passenger despite the carrier's reasonable efforts, thus reducing the possibility that passengers will place undue reliance on the expectation that they will necessarily receive prior notice in all instances.

Accordingly, passengers may more frequently (but are not required to) take steps to independently ascertain their flights' status, thus reducing the likelihood that they will be unaware of schedule changes and increasing their opportunity to mitigate the impact thereof.

36. The balance of Proposed Sub-Rule 16(b) reflects the Agency's repeated findings that timetables do not form part of the contract of carriage, such that undue reliance by passengers on stated departure times is unreasonable. Further, to the extent that this provision is contained in the Agency's Sample Tariff, Porter submits that this is *prima facie* evidence of its reasonableness.

C. Proposed Sub-Rule 16(c)

37. Proposed Sub-Rule 16(c) states: "The Carrier will make reasonable efforts to inform passengers of delays and schedule changes and, to the extent possible, the reasons for them."

38. The Agency has found that this reasonable efforts undertaking properly balances the passenger's right to information on schedule changes (*Lukacs v. Porter*, 16-C-A-2013, para. 87).

D. Proposed Sub-Rule 16(d)

39. Proposed Sub-Rule 16(d) contains language taken from Rule 90(B)(5) of the Agency's Sample Tariff. It reads as follows:

- (d) It is always recommended that the passenger communicate with the Carrier either by telephone, electronic device or via the Carrier's Web site or refer to airport terminal displays to ascertain the flight's status and departure time.

40. To the extent that this provision does not create any obligation on the part of the passenger, nor limit the obligations or liability of the carrier, Porter submits that it is reasonable. Indeed, it operates similarly to the warning that schedules may change without notice, insofar as it precludes undue reliance on notice from the carrier – which, again, may not reach the passenger in all instances despite the carrier's efforts – and increases the likelihood that passengers will be informed of any schedule changes and thus be better positioned to mitigate the impact thereof.

E. Proposed Sub-Rule 16(e)

41. As indicated above, Porter acknowledges that the provision following Current Sub-Rule 16(g) in the Current Rule, which is in effect a “force majeure” clause, may have the effect of excluding liability in a manner inconsistent with the *Montreal Convention*.

42. Porter accordingly proposes to replace the impugned clause with Proposed Sub-Rule(e), which provides as follows:

- (g) Except with respect to compensation available to passengers under this Rule 16, the Carrier will not guarantee and will not be held liable for cancellations or changes to scheduled flight times due to an Event of Force Majeure. (emphasis added)

43. As discussed further below, the subsequent Proposed Sub-Rules 16.1 and 16.2 specifically incorporate the principle that passengers are entitled to compensation unless the carrier took all reasonable and possible measures to avoid the damage. Thus, even in the case of a delay due to force majeure, passengers will have recourse to reimbursement for their resulting damages where the conditions of the *Montreal Convention* are satisfied.

44. Although Mr. Lukács suggests in his Complaint that provisions which purport to exclude liability on the carrier’s part are unreasonable in and of themselves, an examination of the Agency’s jurisprudence demonstrates that this is not the case. Rather, where the Agency has disallowed such exclusionary clauses as unreasonable, it has consistently done so by reason of their inconsistency with the liability principles set forth in the *Montreal Convention*.

45. As the Agency stated in *Air Canada*, 291-C-A-2011, “it is accepted by the Agency that air carriers have the flexibility to establish their terms and conditions of carriage... subject to any Convention which may apply and the carrier's terms and conditions must be clear, just and reasonable and be otherwise consistent with the *ATR* and any other applicable legislative and regulatory instruments” (at para. 33).

46. On those occasions when the Agency has disallowed exclusionary clauses as unreasonable, it has repeatedly found that it was those provisions’ inconsistency with the *Montreal Convention’s* liability regime that determined their unreasonableness and not their character as exclusion clauses *per se*.

47. In *McCabe v. Air Canada*, 227-C-A-2008, the Agency considered a tariff provision purporting to exclude the carrier's liability for loss, damage, or delay in the delivery of certain items contained in passengers' baggage. Although the Agency distinctly addressed (a) the extent to which the provision reflected the principles of the *Convention*, and (b) whether the provision was just and reasonable as required by the *ATR*, the Agency found that the former was determinative of the latter:

Does the first sentence of Rule 230AC(B)(2) of the Tariff relieve Air Canada from liability in a way that is contrary to Article 26 of the Convention, thereby rendering this tariff provision null and void?

[...]

[27] The Agency finds that the first sentence of Rule 230 AC(B)(2) of Air Canada's Tariff fixes a limit of liability that is lower than that which is provided for in Article 22 of the Convention.

[28] Therefore, the Agency finds that, pursuant to Article 26 of the Convention, the first sentence of Rule 230AC(B)(2) of Air Canada's Tariff is null and void as it is contrary to the Convention.

If the first sentence of Rule 230AC(B)(2) of the Tariff is null and void, is the first sentence of the same Rule just and reasonable as required by subsection 111(1) of the ATR?

[29] Because the first sentence of Rule 230AC(B)(2) of the Tariff is null and void, the Agency finds it not just and reasonable as required by subsection 111(1) of the ATR. (emphasis added)

48. In *Suttner v. Air Transat*, 362-C-A-2004, the Agency considered a tariff provision purporting to relieve the carrier of any liability attributable to "mechanical failure, loss, destruction or accident". The Agency found the provision to be unreasonable for the sole reason that it did not require the carrier to prove that it and its agents had taken all necessary measure to avoid the damage or that it was impossible for it to take such

measures, *i.e.* it did not incorporate the liability regime prescribed by the *Montreal Convention* (at para. 35).

49. As noted by Mr. Lukács, in *Lukács v. Porter*, 16-C-A-2013, the Agency disallowed several exclusionary provisions in Porter's international tariff on the sole basis that they were "inconsistent with the Convention, and... therefore unreasonable" (at paras. 65-66, emphasis added; see also para. 51).

50. In deciding the foregoing case, the Agency relied on its decision in *Air Canada*, 291-C-A-2011, wherein it similarly found an exclusionary clause to be unreasonable due only to its inconsistency with the *Montreal Convention*:

In that Decision [291-C-A-2011], the Agency noted that the effect of the provision was to create a blanket exclusion of liability which relieves Air Canada from all liability regarding loss, damage and delay of baggage containing certain items. The Agency concluded that the provision was inconsistent with the principles of the Convention, and as a result, disallowed that provision. (*Lukács v. Porter*, 16-C-A-2013 at para. 65, emphasis added)

51. Porter is not aware of any Agency decision in which a force majeure clause has been disallowed as unreasonable for any reason other than its failure to allow for the application of the liability regime prescribed by the *Montreal Convention*. Porter submits that it is reasonable, in balancing the rights of the carrier and passenger, to exclude liability for events beyond the control of the carrier, subject always to the carrier's strict liability for damages resulting from delay, irrespective of the cause of the delay.

52. Proposed Rule 16(e) corrects the defect in Current Rule 16's force majeure clause by specifically subjecting it to the liability regime whereby Porter will be liable for delay unless it demonstrates the limited defense set forth in Article 19 of the *Convention*. Accordingly, Porter submits that the Proposed Sub-Rule is reasonable.

F. Proposed Definition of "Event of Force Majeure"

53. As the new Proposed Rule 16(e) makes reference to a "Force Majeure Event", Porter has filed with this Answer a definition of that term which it proposes to add to Rule 1 (Definitions) of its domestic tariff. The proposed definition provides that a "Force Majeure

Event” is an occurrence “which are not within the reasonable control of the Carrier”, and sets forth a number of examples of situations which may constitute force majeure events, subject always to the qualification that such event was beyond Porter’s reasonable control.

G. Proposed Sub-Rule 16.1

54. Porter’s Proposed Sub-Rule 16.1 clearly sets out the circumstances in which Porter will be liable to passengers for expenses resulting from delays, in accordance with the principles of the *Montreal Convention*. The contents of its various provisions were considered and determined to be reasonable in *Lukacs v. Porter*, 16-C-A-2013.³

55. Consistent with the Agency’s ruling in *Lukács v. Air Canada*, File No.: M4120-3/09-07287, Proposed Sub-Rule 16.1 states plainly that Porter will be liable to reimburse passengers in the circumstances set out therein (See LET-C-A-29-2011, paras. 65-66); there is no suggestion that liability will only adhere in exceptional circumstances. Indeed, consistent with Article 19 of the *Montreal Convention*, the circumstances where liability will not adhere are specifically presented as the exception:

16.1 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:

- (a) 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;

(emphasis in original)

56. Proposed Sub-Rule 16.1 goes on to set out, in clear and understandable terms, the process passengers must follow in order to pursue their claims for reimbursement:

- (b) 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

³ To the extent that the Agency ordered Porter to make certain deletions or modifications to its corresponding proposed sub-rules in that proceeding, the Proposed Sub-Rule 16.1 filed by Porter herein reflects all such changes, which were vetted and approved by the Agency and published by Porter pursuant to the findings and orders made in 16-C-A-2013.

reasonable satisfaction of the Carrier that the expenses were incurred; and

(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 for which compensation is available under this Rule 16; or
- ii. 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 vouchers and/or travel vouchers to passengers affected by a delay.

57. Porter does not, in Proposed Sub-Rule 16.1, confer upon itself any discretion to deny claims outside the parameters of the *Montreal Convention*, as it has been applied by the Agency. So long as passengers follow the reasonable process described in Proposed 16.1, the reasonableness of the expenses for which reimbursement is claimed will govern.

58. In addition, the final paragraph of Proposed Sub-Rule 16.1 puts passengers on notice that Porter may offer specific compensation such as meal and/or hotel vouchers in certain instances, at its discretion.

59. Finally, nothing in Proposed Sub-Rule 16.1 (or Proposed Rule 16 as a whole) purports to exclude or limit passengers' recourse to any other remedies they may have as against Porter at law or in equity.

60. Porter relies on the Agency's consideration and approval of substantially similar provisions in *Lukacs v. Porter*, 16-C-A-2013, which, subject to certain changes ordered by the Agency and incorporated in the Proposed Sub-Rule filed herein, were found to be reasonable.

H. Proposed Sub-Rule 16.2

61. Proposed Sub-Rule 16.2 addresses Porter's liability under the tariff for delayed delivery of a passenger's baggage. The Sub-Rule's contents are substantially identical to those found to be reasonable in *Lukács v. Porter*, 16-C-A-2013.⁴

62. Proposed Sub-Rule 16.2(a) reproduces the wording of Current Sub-Rule 16(d), and Porter repeats and relies on its submissions in paragraphs 17-20 above in support of its reasonableness.

63. Consistent with the *Montreal Convention's* liability principles, Proposed Sub-Rule 16.2(b) positively states that, notwithstanding that concurrent baggage delivery is not guaranteed, Porter will be liable for delays in the carriage of baggage except in the circumstances set out therein. As with Proposed 16.1(i) ff., Proposed 16.2(b) reproduces the exception to liability contained in Article 19 of the *Montreal Convention*, and sets out a reasonable process by which passengers may submit claims for compensation to Porter.

64. In Proposed Sub-Rule 16.2(c), Porter provides notice to passengers of compensation which will be available to them from Porter, including that:

- (a) Porter will reimburse passengers for the loss of her bag after 21 days, subject to limits of:
 - (i) 1131 SDR, expressly stated to be approximately equivalent to CAD \$1,800, where no excess value has been declared, and
 - (ii) CAD \$3,000, where the passenger has declared an excess value of the lost item.

In addition, passengers are again required to deliver evidence of the value of their claims under this sub-rule.

⁴ To the extent that the Agency ordered Porter to make certain deletions or modifications to its corresponding proposed sub-rule in that proceeding, the Proposed Sub-Rules 16.2 filed by Porter herein reflect all such changes, which were vetted and approved by the Agency and published by Porter pursuant to the findings and orders made in 16-C-A-2013.

65. The Agency has previously found similar provisions – including as to clarity, limits of liability and requirement of proof of value – to be reasonable. (See *Lukács v. WestJet*, 418-C-A-2011 at paras. 22, 36, 42 and 46-47)

66. As with Proposed Sub-Rule 16.1, Proposed Sub-Rule 16.2 permits Porter to deny otherwise eligible claims only where the passenger has failed to follow the reasonable process set out therein, or where the expenses claimed are not reasonable.

67. Again, nothing in Proposed Sub-Rule 16.2 purports to foreclose any other claims passengers may have as against Porter in connection with delayed delivery of baggage.

68. Based on the foregoing, Porter states that Proposed Rule 16 would, if filed with the Agency for publication, be considered reasonable.

I. Mr. Lukács’s submissions concerning damage to or destruction of baggage

69. In his Complaint, Mr. Lukács has made submissions concerning the carrier’s liability in the case of damage or destruction of baggage or cargo. However, such liability is not the subject matter of Rule 16, which addresses Porter’s obligations concerning schedules and operations.

70. Porter’s liability for damage to or destruction of baggage is dealt with in Rule 9 of its domestic tariff, which is not before the Agency in these proceedings. As such, Porter submits that Mr. Lukács’s submissions on these issues is irrelevant to the instant proceeding.

71. In any event, Porter notes that Rule 9(c) substantively reflects that Porter will only be exonerated for such damage where the damage results from “the inherent defect, quality or vice of the baggage, or, in case of delay, that the carrier, its agents, and servants took all measures that could reasonably be required to avoid the damage or that it was impossible to take such measures”.

PART V - CONCLUSION

72. In summary, Porter respectfully submits that the only portions of Current Rule 16 which may be properly subject to suspension or disallowance by the Agency are (i) the

second sentence of Current Sub-Rule 16(c); (ii) Current Sub-Rule 16(e); and Current Sub-Rule 16(g), which may operate to exclude liability in a manner inconsistent with the *Montreal Convention*.

73. Mr. Lukács has advanced no basis for the disallowance of Current Sub-Rules 16(a), 16(b) or 16(d), which Sub-Rules are in any event reasonable as confirmed by the Agency's approval of identical provisions in 16-C-A-2010.

74. As such, Porter requests that Mr. Lukács's complaint be dismissed with respect to the provisions identified in the immediately preceding paragraph.

75. Porter states further that its Proposed Rule 16 is reasonable and appropriate for filing and publication by virtue of (a) the deletion of the provisions in Current Rule 16; (b) the addition of provisions which clearly indicate the circumstances in which passengers are entitled to compensation under the tariff for losses arising from delay; and (c) the Agency's approval of substantially similar provisions as reasonable, including in particular in *Lukács v. Porter*, 16-C-A-2013.

76. Porter asks that the Agency confirm the reasonableness of Proposed Rule 16 or, alternatively, that it provide directions as to further revisions which may be required prior to its formal filing with the Agency.



Greg Sheahan
Porter Airlines Inc.

APPENDIX "A"

Rule 16 to Porter's *Tariff Containing Rules Applicable to Services for the Transportation of Passengers and Baggage or Goods between Points in Canada* "Current Rule 16"

RULE 16 – RESPONSIBILITY FOR SCHEDULES AND OPERATIONS

- (a) The Carrier will endeavour to transport the passenger and baggage with reasonably dispatch, but times shown in timetables or elsewhere are not guaranteed and form no part of this contract.
- (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) 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.
- (d) Without limiting the generality of the foregoing, 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.
- (e) 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.
- (f) 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.
- (g) The Carrier will not provide or reimburse passengers for expenses incurred due to delays or cancellations of flights or be responsible for any special, incidental, direct or indirect, or consequential damages arising out of such delays or cancellations of flights whether or not the carrier had knowledge that such damages might be occurred.

Notwithstanding any other terms or conditions contained herein, the Carrier shall not be liable for failure in the performance of any of its obligations due to:

- i) Act of God.
- ii) War, revolution, insurrection, riot, blockade or any other unlawful act against public order or authority including an act of terrorism involving the use or release or threat thereof, of any nuclear weapon or device or chemical or biological agent.
- iii) Strike, lock-out, labour dispute, or other industrial disturbance whether involving the Carrier's employees or others upon whom the Carrier relies.

- iv) Fire, flood, explosion, storm, lightning or adverse weather conditions generally.
- v) Accidents to or failure of the aircraft or equipment used in connection therewith including, in particular, mechanical failure.
- vi) Non-availability of fuel at the airport of origin, destination or enroute stop.
- vii) Others upon whom the Carrier relies for the performance of the whole or any part of any charter contract or flight.
- viii) Government order, regulation, action or inaction.
- ix) Unless caused by its negligence, any difference in weight or quantity of cargo from shrinkage, leakage or evaporation.
- x) The nature of the cargo or any defect in the cargo or any characteristic or inherent vice therein.
- xi) Violation by a consignee or any other party claiming an interest in the cargo of any of the terms and conditions contained in this tariff or in any other applicable tariff including, but without being limited to, failure to observe any of the terms and conditions relating to cargo not acceptable for transportation or cargo acceptable only under certain conditions. Improper or insufficient packing, securing, marking or addressing.
- xii) Acts or omissions of warehousemen, customs or quarantine officials or other persons other than the Carrier or its agents, in gaining lawful possession of the cargo.

APPENDIX "B"

Proposed Amended Rule 16 to Porter's *Tariff Containing Rules Applicable to Services for the Transportation of Passengers and Baggage or Goods between Points in Canada* "Proposed Rule 16"

RULE 16 – RESPONSIBILITY FOR SCHEDULES AND OPERATIONS

- (a) The Carrier will endeavour 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.
- (b) Schedules are subject to change without notice, and the carrier assumes no responsibility for the passenger making connections. The carrier will not be responsible for errors or omissions either in timetables or other representation of schedules.
- (c) The Carrier will make reasonable efforts to inform passengers of delays and schedule changes and, to the extent possible, the reasons for them.
- (d) It is always recommended that the passenger communicate with the Carrier either by telephone, electronic device or via the Carrier's Web site or refer to airport terminal displays to ascertain the flight's status and departure time.
- (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) Except with respect to compensation available to passengers under this Rule 16, the Carrier will not guarantee and will not be held liable for cancellations or changes to scheduled flight times due to an Event of Force Majeure.

16.1 Passenger Expenses Resulting from Delays

- (a) Passengers will be entitled to reimbursement from the Carrier for reasonable expenses incurred as a result of a delay, subject to the following conditions:
 - (d) 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;
 - (e) 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

(b) 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 for which compensation is available under this Rule 16; or
- ii. 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.

16.2 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;
 - ii. The passenger must have complied with the check-in requirements set out in Rule 20 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 CAD\$1,800 for each passenger, unless the passenger has declared a higher value and paid the supplementary sum in accordance with Rule 9(a) 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 9(a), the settlement will be for the value of the delayed baggage or CAD\$1,800, whichever is the lesser, and
- ii. if value is declared per Rule 9(a), the settlement will be for the value of the delayed baggage or the declared sum (per Rule 9(a)) 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 16.2(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 16; 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.

APPENDIX "C"

Proposed Addition to Rule 1 (Definitions) of Porter's *Tariff Containing Rules Applicable to Services for the Transportation of Passengers and Baggage or Goods between Points in Canada*

Event of Force Majeure means an event, the cause or causes of which are not within the reasonable control of the Carrier, which may include, but are 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.