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January 31, 2016

VIA EMAIL

The Secretary
Canadian Transportation Agency
Ottawa, ON K1A 0N9

Dear Madam Secretary:

Re: Wrong information on the Agency's website about the rights of air passengers

It has been brought to my attention that the Agency's webpage entitled "[Delays, cancellations and schedule changes](#)" contains wrong information about the rights of passengers, and its content is inconsistent with the Agency's own rulings.

I am respectfully requesting that:

- (a) the Agency review and revise the webpage in question so that it reflects the state of the law in Canada and the Agency's own jurisprudence in particular; and
- (b) pending the review of the webpage, the Agency remove it from its website to avoid further confusion and damage to the public.

In order to assist the Agency in revising the webpage, I am pleased to provide below a number of examples of incorrect and/or outdated information that are currently being displayed.

I. Passengers are entitled to notice about schedule changes

(a) The Agency's website incorrectly states that:

Schedules are subject to change without notice [...]

[Emphasis added.]

(b) The Agency's jurisprudence

In Decision No. LET-A-112-2003, the Agency held that:

The Agency notes that Rule 5.2(b) of the tariff is devoid of any provision relating to the notification of passengers in the event of a flight delay. As such, the Agency is of the view that this provision may not be just and reasonable. The Agency is of the opinion that Air Transat should undertake to notify passengers of all schedule irregularities, not just flight advancements.

[Emphasis added.]

In *Lukács v. Porter*, [Decision No. 16-C-A-2013](#), the Agency held (at para. 87) that:

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

In *Lukács v. Porter*, [Decision No. 31-C-A-2014](#), the Agency held that:

[45] The Agency finds that the absence of a provision in Existing Tariff Rule 3.4 requiring Porter to provide notice to passengers regarding schedule changes renders that Rule unreasonable within the meaning of subsection 111(1) of the ATR. The Agency therefore finds that Existing Tariff Rule 3.4 fails to strike a balance between the passengers' rights to be subject to reasonable terms and conditions of carriage and Porter's statutory, commercial and operational obligations.

[Emphasis added.]

II. Airlines are responsible for missed connections

(a) The Agency's website incorrectly states that:

[...] air carriers assume no responsibility for ensuring that their passengers make their connections to other flights.

(b) The Agency's jurisprudence

In *Lukács v. Porter*, [Decision No. 16-C-A-2013](#), the Agency held that:

[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.

[50] Article 19 of the Convention provides that:

The carrier is liable for damage occasioned by delay in the carriage by air of passengers, baggage or cargo. Nevertheless, the carrier shall not be liable for damage occasioned by delay if it proves that it and its servants and agents took all measures that could reasonably be required to avoid the damage or that it was impossible for it or them to take such measures.

[51] Existing Tariff Rule 18(c) is silent on the matter of the liability assumed by Porter should a flight be delayed, and Porter is unable to provide the proof required by Article 19 of the Convention to relieve itself from such liability. The Agency finds that the absence of a provision to this effect renders Existing Tariff Rule 18(c) inconsistent with Article 19 of the Convention, and that Rule is therefore unreasonable.

In *Lukács v. Porter*, [Decision No. 344-C-A-2013](#), the Agency reached the same conclusion (paras. 22-26).

In *Lukács v. British Airways*, [Decision No. 10-C-A-2014](#), the Agency held that:

[90] As for the provision in Rule 85(A) that provides that British Airways assumes no responsibility for the passenger making connections, the Agency agrees with Mr. Lukács' submission that that provision is inconsistent with Article 19 of the Montreal Convention to the extent that the Rule does not set out British Airways' liability when British Airways is unable to provide the proof required under Article 19 to escape liability for delay.

III. Liability for delay is not determined by whether it is “beyond the control” of the airline

(a) The Agency’s website incorrectly states that:

While air carriers are not liable for costs incurred as a result of flight delays or cancellations which are beyond the carriers’ control [...]

(b) The Agency’s jurisprudence

In *Lukács v. United*, [Decision No. 467-C-A-2012](#), the Agency held that:

[40] [...] the Agency directs the parties to the phrasing in the first sentence of Article 19: “The carrier is liable for damage occasioned by delay in the carriage by air of passengers, baggage or cargo.”

[41] [...] In short, the first sentence of Article 19 states clearly that the carrier is liable for delay. Article 19 only brings the carrier’s servants and agents into play in terms of avoidance of liability when it has proven that these personnel took all measures that could reasonably be required to avoid the damage or that it was impossible for it or them to take such measures.

[42] Accordingly, what is at issue, in terms of avoiding liability for delay, is not who caused the delay but, rather, how the carrier reacts to a delay. In short, did the carrier’s servants and agents do everything they reasonably could in the face of air traffic control delays, security delays on releasing baggage, delays caused by late delivery of catered supplies or fuel to the aircraft and so forth, even though these may have been caused by third parties who are not directed by the carrier?

[Emphasis added.]

In *Lukács v. Porter*, [Decision No. 16-C-A-2013](#), the Agency reiterated the same reasons and conclusion (at paras. 103-105).

In *Lukács v. Porter*, [Decision No. 344-C-A-2013](#), the Agency reached the same conclusion again (para. 85).

In *Lukács v. Porter*, [Decision No. 31-C-A-2014](#), the Agency also held (at para. 25) that:

The Agency indicated in Decision No. 16-C-A-2013 that it is how the air carrier reacts to the delay that will determine the liability, and not who caused the delay.

[Emphasis added.]

IV. Airlines are liable for loss of income, stress, and inconvenience caused by delay

(a) The Agency's website incorrectly states that:

Carriers are not responsible for damages such as stress, inconvenience, loss of income or loss of enjoyment as a result of a schedule irregularity.

(b) The Agency's jurisprudence

In *Lukács v. United*, [Decision No. 467-C-A-2012](#), the Agency held that:

[62] [...] Although the Agency notes that there is no provision in the Montreal Convention specifying that “mental injury damages” are excluded, the Agency is of the opinion that the issue of whether “mental injury damages” are recoverable under the Montreal Convention is an issue for the courts to decide, not the Agency.

(c) Canadian jurisprudence

Damages for loss of income caused by delay:

- *Zikovsky c. Air France*, [2006 QCCQ 948](#)

Damages for stress, inconvenience, and loss of enjoyment caused by delay:

- *Bensimon c. Agence de voyages Travelocity.ca*, [2008 QCCQ 12778](#) (paras. 74-84)
- *Daoust c. Royal Jordanian Airline*, [2009 QCCQ 5934](#) (para. 23)
- *Neudorfer c. Swiss International Air Lines, s.a.*, [2011 QCCQ 8664](#) (paras. 89-90)
- *Yalaoui c. Air Algérie*, [2012 QCCS 1393](#) (paras. 89-122)
- *Mercier c. Agence de voyages Sears*, [2012 QCCQ 7879](#) (para. 40)
- *Langlois c. Royal Air Maroc*, [2012 QCCQ 14365](#) (para. 23)
- *Chagas c. Air Canada*, [2013 QCCQ 1009](#) (para. 37)
- *Agnaou c. United Airlines inc.*, [2013 QCCQ 13763](#) (paras. 50-53)
- *Fahas c. Air Algérie*, [2015 QCCQ 2011](#) (paras. 33-38)
- *Mbaïrewaye c. Air Transat*, [2015 QCCQ 3001](#) (paras. 29-30)
- *Provost c. Westjet Airlines Ltd.*, [2015 QCCQ 7426](#) (paras. 73-74)
- *Auguste c. Air Transat*, [2015 QCCS 3923](#) (paras. 52-53)
- *Ouanes c. Royal Air Maroc*, [2016 QCCQ 10](#) (paras. 24-27)

(d) European jurisprudence

The European Court of Justice held in *Walz v. Clickair SA*, [Case C-63/09](#) (paras. 29 and 40) that:

It follows that the term ‘damage’, referred to in Chapter III of the Montreal Convention, must be construed as including both material and non-material damage.

⋮

The term ‘damage’, which underpins Article 22(2) of the Convention for the Unification of Certain Rules for International Carriage by Air, concluded in Montreal on 28 May 1999, that sets the limit of an air carrier’s liability for the damage resulting, inter alia, from the loss of baggage, must be interpreted as including both material and non-material damage.

Courts in France, Spain, and Italy awarded moral damages or compensation for mental injury under Article 19 of the *Montreal Convention* in each of the following cases:

- *Air France c. M. X...*, 07-16102, Supreme Court of France (Cour de cassation)
- Court of Appeal in Barcelona: Section 15, rolls 645/07 2a Judgment 270¹
- Court of Appeal in Valencia: Section 9, Rec. 182/08; 22 May 08; [EDJ 2008/117346]²
- *Lobianco Osso v. Iberia*, Tribunal of Paola, Judgment of June 26, 2008³

I trust that you will find the wealth of authorities provided here helpful in revising the Agency’s webpage. Should you have any questions or concerns, please do not hesitate to contact me.

Sincerely yours,

Dr. Gábor Lukács

Enclosed: “Delays, cancellations and schedule changes,” Canadian Transportation Agency

¹Reported in G. N. Tompkins, ‘The 1999 Montreal Convention: Alive, Well and Growing’. *Air and Space Law* 34, no. 6 (2009): 421-426.

²*Ibid.*

³*Ibid.*

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Delays, cancellations and schedule changes

Times shown in timetables or elsewhere are approximate and are not guaranteed. Schedules are subject to change without notice and air carriers assume no responsibility for ensuring that their passengers make their connections to other flights. Flights can also be delayed or cancelled for various reasons.

While air carriers are not liable for costs incurred as a result of flight delays or cancellations which are beyond the carriers' control, they often arrange alternate transportation to enable you to reach the next destination named on your ticket. If this is not possible, you may be entitled to a refund of the unused portion of your ticket. However, if you decide to make your own arrangements, the carrier will not be required to compensate you for any of your additional costs. Carriers are not responsible for damages such as stress, inconvenience, loss of income or loss of enjoyment as a result of a schedule irregularity.

In cases of long delays, some carriers will give vouchers for food and overnight accommodation upon request. Some major Canadian carriers have additional service commitments describing how they should treat passengers in the event that a flight is delayed, overbooked or cancelled, as well as other related passenger rights incorporated as terms and conditions of carriage in their tariffs and which are enforceable by the Agency. This includes where a lengthy delay requires an overnight stay or the flight is delayed on the tarmac. Review your carrier's tariff for its policy regarding delays, cancellations and schedule changes.