



## TRANSPORTATION APPEAL TRIBUNAL OF CANADA

**Citation:** *Porter Airlines Inc. v. Canadian Transportation Agency*, 2021 TATCE 10 (Review)

**TATC File No.:** O-4550-80

**Sector:** Aviation

### BETWEEN:

**Porter Airlines Inc.**, Applicant

- and -

**Canadian Transportation Agency**, Respondent

**Heard by:** Videoconference on March 23, 2021

**Before:** Jennifer Webster, Member

**Rendered:** April 29, 2021

### REVIEW DETERMINATION AND REASONS

**Held:** The Canadian Transportation Agency has not proven, on a balance of probabilities, that the applicant, Porter Airlines Inc., contravened subsection 7(1) of the *Air Passenger Protection Regulations* with respect to the operation of a flight out of Halifax Stanfield International Airport on or about July 22, 2019.

The Tribunal dismisses the penalty of \$2,500 assessed against Porter Airlines Inc. in relation to this alleged contravention.

## **I. BACKGROUND**

[1] On August 27, 2019, the Canadian Transportation Agency (Agency) issued a Notice of Violation (Notice) to Porter Airlines Inc. (Porter), pursuant to section 180 of the *Canada Transportation Act* (*Act*), alleging that it had contravened subsection 7(1) of the *Air Passenger Protection Regulations* (regulations).

[2] The Notice stated (in part):

- A. On or about July 22, 2019 at Halifax Stanfield International Airport (CYHZ), Porter Airlines Inc. operated a flight from Halifax, Nova Scotia, Canada without displaying in a visible manner at the self-service machines a notice containing the following text, thereby contravening subsection 7(1) of the *Air Passenger Protection Regulations*. \$2500
- B. On or about August 7, 2019 at Québec City Jean Lesage International Airport (CYQB), Porter Airlines Inc. operated a flight from Québec City Airport, Québec, Canada without displaying in a visible manner at check-in counter a notice containing the following text, thereby contravening subsection 7(1) of the *Air Passenger Protection Regulations*. \$2500
- C. On or about August 7, 2019 at Québec City Jean Lesage International Airport (CYQB) Porter Airlines Inc. operated a flight from Québec City Airport, Québec, Canada without displaying in a visible manner at a boarding gate a notice containing the following text, thereby contravening subsection 7(1) of the *Air Passenger Protection Regulations*. \$2500

[3] On September 27, 2019, Porter requested a review of this Notice by the Transportation Appeal Tribunal of Canada (Tribunal), confirming that they did not wish to contest the violations described in paragraphs B) and C) of the Notice. The applicant confirmed this position at the beginning of the hearing and the parties agreed that only violation A) would be the subject of review.

## **II. ANALYSIS**

### **A. Legal framework**

[4] The Agency based its decision on section 180 of the *Act*, which provides that the Agency can issue a Notice (and a penalty) if a person properly designated as an enforcement officer believes that a person has committed a violation of a designated provision.

[5] In this case, the designated provision is subsection 7(1) of the *Air Passenger Protection Regulations*. At the time of the alleged violation, the provision stated, in part:

**7 (1)** A carrier operating a flight to or from an airport in Canada must display, in a visible manner at the check-in desk, self-service machines and boarding gate, a notice containing the following text:

“If you are denied boarding or your baggage is lost or damaged, you may be entitled to certain standards of treatment and compensation under the *Air Passenger Protection Regulations*. For more information about your passenger rights please contact your air carrier or visit the Canadian Transportation Agency’s website.

[...]

[6] Subsection 180.3(4) of the *Act* provides that the Agency has the burden to prove that Porter has contravened subsection 7(1) of the regulations. In order to satisfy this burden, the Agency must establish that it is more likely than not that Porter did not display the required notice at the self-service machines at Halifax Stanfield International Airport (Halifax Airport).

**B. Did Porter contravene subsection 7(1) of the regulations in relation to its operations at Halifax Airport on or about July 22, 2019?**

[7] The Agency argued that Porter had failed to display the required notice at the self-service kiosks at Halifax Airport through the direct evidence of observations by Ms. Maria LeBlanc, Designated Enforcement Officer at the Agency, during her inspection at the airport.

[8] It was Porter's position that the Agency had not met its burden to prove the violation because the Agency did not provide a photo of the Porter welcome screen to show that the required notice was missing.

[9] At the outset of the hearing, Porter stipulated that it was a carrier and that it operated flights from Halifax Airport on or about July 22, 2019. Due to these admissions, the Agency did not present evidence about these elements of the alleged violation and the Tribunal finds that they have been proven.

[10] Ms. LeBlanc testified that she attended at Halifax Airport on July 22, 2019, to conduct an inspection to verify air carriers' compliance with section 7 of the regulations. She completed an inspection report based on her observations of the airport (Agency Exhibit C-1). In her report, she identified that she had inspected two kiosks related to Porter's operations and that she had concluded that Porter had failed to comply with subsection 7(1) because the required notice was not visible "on or from the self-service machines." She also noted in her report that follow-up was required, which she described as "DEO to return to airport and confirm compliance in August." Despite this note about a follow-up, Ms. LeBlanc confirmed in cross-examination that she did not take any follow-up steps after her inspection in July 2019.

[11] The inspection report included five photographs taken by Ms. LeBlanc. The first two photographs showed the self-service kiosks with the main screen visible on each kiosk. The main screen had the title of Halifax Stanfield International Airport and the direction "Please select your airline / Choisissez votre ligne aérienne". There were four options of airlines under the title on the main screen. These four airlines were: Air Canada, Porter, Air Transat and WestJet. The photos of the self-service kiosks were accompanied with a text box in which Ms. LeBlanc had written, "The only two kiosks on which Porter was found. Notice not visible."

[12] The other photos attached to Ms. LeBlanc's report were photos which showed that Porter was in compliance with subsection 7(1) by visibly posting the required text at the check-in desk and the boarding gate.

[13] Ms. LeBlanc testified that she conducted her inspection both visually and manually. For the manual part of her inspection, she stated that she selected the icon for every carrier on every self-service kiosk in the airport. She stated that only two of the self-service kiosks were identified as being related to Porter. According to her testimony, she did not see the required

notice on or around those two self-service kiosks. She noted the lack of the notice and took the two photographs of the kiosk which she attached to her report.

[14] Although Ms. LeBlanc clarified in her testimony that another page opened when she selected the Porter icon, she confirmed in cross-examination that she did not take a photo of this page for the purposes of her report. When she was shown the welcome screen by Porter's counsel (Applicant Exhibit 2), Ms. LeBlanc agreed this screen could be the one she saw, but she was unsure because she stated that she had looked at hundreds of kiosks across Canada. She recalled that all the screens for the air carriers generally looked like Porter's welcome screen.

[15] Porter argued that, although it did not have the burden of proving compliance, it had confirmed through its evidence that the required text had been included in the welcome screen at the kiosks in Halifax Airport.

[16] Ms. Deanna Stacey provided testimony on behalf of Porter. Ms. Stacey is the Vice President of Digital Loyalty and Solution Delivery for Porter. In this role, she was responsible for directing and managing the implementation of the requirements of the regulations for Porter's website, self-service kiosks, and all aspects of the passenger experience. She explained that Porter uses self-service kiosks in the airports located in Halifax, Montreal, and Ottawa. These kiosks are administered by the airport authorities and Porter only has control of the content which appears after a user selects Porter from the main screen of a kiosk.

[17] Ms. Stacey identified a work ticket from Porter's internal system which showed that, as of July 11, 2019, Porter had completed the software upgrade to add the notice required by subsection 7(1) of the regulations to all kiosks (Applicant Exhibit 4). She also identified a screenshot of the Porter welcome screen that showed the modification which included the required notice in the lower part of the screen (Applicant Exhibit 3).

[18] Ms. Stacey stated that she became aware of the Notice of Violation on August 27, 2019, and that, after she became aware, she contacted Mr. David Hill, an analyst in her unit, to request that he follow up with the station manager at the Halifax Airport about the required text on the kiosks. Ms. Stacey provided an email thread about the interaction between Mr. Hill and the station manager (Applicant Exhibit 1). As part of this email thread, there is a response from the station manager in which he explained to Mr. Hill that there had been some technical issues with the kiosks and that most passengers had been using the check-in counter. The station manager also provided a photo taken on August 27, 2019, that showed that the notice required by subsection 7(1) of the regulations was included at the bottom of the Porter welcome screen. Ms. Stacey confirmed that Porter had not made any content changes to the kiosk software between July 11, 2019, and August 27, 2019.

[19] According to the Agency, most of the evidence submitted by Porter was hearsay. The Agency argued that the Tribunal should give limited weight to Porter's direct evidence in the form of the photo taken on August 27, 2019, because the photo's date was weeks after the date on which Ms. LeBlanc had identified non-compliance.

[20] The Tribunal finds that the Agency has not met its burden to establish the contravention. The evidence that Porter did not display the required text was limited to the testimony of

Ms. LeBlanc in which she stated that she selected the Porter icon on the kiosk and then did not see the text on Porter's welcome screen. The Tribunal notes that she did not include this description about the welcome screen when she identified the alleged contravention in her inspection report either in words or photos. She described the non-compliance in relation to the self-service kiosk as "[n]o Notice visible on or from the self-service machines" with no reference to the Porter welcome screen. In addition, she took two photos of the self-service kiosks which she included in her report. She added a caption to the two photos which stated: "The only two kiosks on which Porter was found. Notice not visible."

[21] The alleged contravention relates to Porter's failure to include the required notice at the self-service machines. Ms. LeBlanc's report and photos outlined that the required notice was not visible at the self-service machines, and that, therefore, Porter had contravened subsection 7(1) of the regulations. Her report and photos did not, however, identify that the notice was missing from the electronic screens accessed through the Porter menu at the kiosk. She did not take a photo of the Porter welcome screen to show the absence of the required text, and she did not explain any reasons as to why she did not take a photo to show non-compliance. Her failure to provide a photo of the welcome screen undermines the reliability of her testimony about non-compliance at the kiosks, particularly when she diligently documented the evidence of Porter's compliance through photos of the posted notice at both the check-in desk and the boarding gate.

[22] In addition, Ms. LeBlanc's evidence about the content of the Porter welcome screen was general and vague. She stated that she could not specifically recall the Porter welcome screen because she had seen hundreds of kiosk screens when she was conducting inspections related to compliance with subsection 7(1) of the regulations. When counsel for Porter showed her the welcome screen with the required text, she agreed that the screen could be the one she saw but that she was unsure.

[23] In her contemporaneous reporting of the inspection, Ms. LeBlanc did not identify that Porter had contravened subsection 7(1) by failing to include the text electronically in the kiosk. Rather, she described the contravention as relating to the notice not being visible without any reference to the welcome screen. While subsection 7(1) of the regulations requires that the text be visible, Ms. Simona Sasova, the Agency's Manager of Enforcement, confirmed in cross-examination<sup>1</sup> that a carrier could comply with subsection 7(1) by including the required text electronically. She also confirmed that the photos of the self-service kiosks included in Ms. LeBlanc's report did not demonstrate either compliance or non-compliance by Porter.

[24] It is the Tribunal's view that the evidence presented by the Agency did not establish that Porter had failed to comply with subsection 7(1) at the self-service kiosks. Ms. LeBlanc's evidence that the content of the Porter welcome screen was non-compliant is unreliable because she did not report about the welcome screen through photos or a description in her report. She also did not have a specific recollection of seeing Porter's welcome screen. Ms. LeBlanc would have needed to take two additional photos, being one of the welcome screens at each kiosk, in order to show that the text required by subsection 7(1) was missing. In the absence of such

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<sup>1</sup> Ms. Sasova's testimony-in-chief was primarily focused on the assessment of the penalty and is not discussed given the Tribunal's finding that the Agency has not met their burden of proving the contravention.

photos or any description of the Porter welcome screen as part of the inspection report, the Tribunal does not accept that the Agency has demonstrated that the contravention occurred.

[25] The Tribunal has found that the Agency did not meet its burden of proof. Given this finding, the Tribunal did not consider the applicant's evidence in reaching its decision in this review.

[26] The Tribunal concludes that the evidence presented by the Agency does not establish on a balance of probabilities that Porter failed to display, in a visible manner, the text required by subsection 7(1) at its self-service machines in the Halifax Airport.

### **III. DETERMINATION**

[27] The Canadian Transportation Agency has not proven, on a balance of probabilities, that the applicant, Porter Airlines Inc., contravened subsection 7(1) of the *Air Passenger Protection Regulations* with respect to the operation of a flight out of Halifax Stanfield International Airport on or about July 22, 2019.

[28] The Tribunal dismisses the penalty of \$2,500 assessed against Porter Airlines Inc. in relation to this alleged contravention.

April 29, 2021

(Original signed)

Jennifer Webster  
Member

#### **Appearances**

For the Agency: Karine Matte  
For the Applicant: Greg Sheahan