



No. NEW-S-S-254494  
NEW WESTMINSTER REGISTRY

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN

**AIR PASSENGER RIGHTS**

PLAINTIFF

AND

**WESTJET AIRLINES LTD.**

DEFENDANT

**NOTICE OF APPLICATION**

(Application for an Interlocutory Injunction under section 172 of the *Business Practices and Consumer Protection Act*)

**Name of applicant:** Air Passenger Rights (the “**Applicant**”)

**WITH NOTICE TO:** the Defendant, and their solicitors

TAKE NOTICE that an application will be made by the applicant to the presiding judge at the courthouse at 651 Carnarvon Street, New Westminster, B.C. **on November 5-6, 2024 at 10:00am** for the order(s) set out in Part 1 below. This timeslot was reserved with BCSC Scheduling.

The applicant estimates that the application will take **two (2) days**.

This matter is NOT within the jurisdiction of an associate judge.

**Part 1: ORDERS SOUGHT**

1. An interlocutory injunction under s. 172 of the *Business Practices and Consumer Protection Act* in the form attached as **Schedule A.**
2. Costs of this application in any event; and
3. Such other relief as this Honourable Court deems just.

**Part 2: FACTUAL BASIS**

**Background of this Application**

4. The underlying action is a public interest lawsuit under s. 172 of the *Business Practices and Consumer Protection Act* [**BPCPA**] filed by Air Passenger Rights [**APR**], a non-profit organization that represents the interests of air travellers. The core dispute in the action is WestJet publicizing and/or imposing an arbitrary guideline/policy that is inconsistent with the applicable uniform laws for air travel. WestJet's arbitrary guideline/policy is plainly inconsistent with the applicable uniform laws for air travel, and WestJet's ongoing conduct harms consumers.
5. On July 26, 2024, prior to filing this court action, APR attempted to resolve the issue informally, through a cease-and-desist letter to WestJet, and was ignored. On August 9, 2024, just after the filing of this action, APR provided WestJet a draft order for an interlocutory injunction (substantially in the same form as **Schedule A**), requesting a response by September 6, 2024. WestJet did not respond by that time.
6. On September 20, 2024, WestJet filed the Response to Civil Claim in this action asserting for the first time that the WestJet webpage containing the arbitrary guideline/policy has changed, and thus the interlocutory injunction would be moot. Upon APR's further investigation, it became apparent that the WestJet webpage was changed on or around August 16, 2024, but WestJet never responded to APR.
7. WestJet has been applying the arbitrary guideline/policy behind the scenes and continues to do so even after WestJet quietly changed its website.
8. This injunction is not moot for two reasons. Firstly, there is no undertaking or commitment from WestJet to refrain from re-introducing the arbitrary guideline/policy on its website. Secondly, the interlocutory injunction relates not only to WestJet's webpage but also their **conduct** in applying and relying upon that arbitrary guideline/policy behind the scenes, which continues after the website was changed.
9. Finally, considering WestJet's position in its Response to Civil Claim, there is an **urgency** in notifying the affected passengers that experienced the arbitrary guideline/policy so they can immediately file a claim to preserve their interest.

**The Parties to the Underlying Public Interest Action**

10. The Plaintiff, Air Passenger Rights [APR], is a federally incorporated non-profit entity formed in 2019 whose mandate includes advocating for the interests of air travellers.

Affidavit #1 of Dr. Gabor Lukacs made on October 16, 2024 [Lukacs Affidavit] at Exhibit A.

11. The Defendant, WestJet Airlines Ltd. [WestJet], is alleged to be a commercial airline that operates passenger flights to, from, and within Canada.

Notice of Civil Claim [NOCC], Part 1 – Statement of Facts, paras. 6-7

12. WestJet is ordinarily resident in the province of British Columbia, with a place of business in Richmond, B.C.

Lukacs Affidavit at Exhibits B-C; *Court Jurisdiction and Proceedings Transfer Act*, SBC 2003, c 28 [CJPTA], ss. 7(b)(ii) and (c).

13. While WestJet denies that it operates a commercial airline, it has admitted that it is a partner of a partnership entitled “WestJet” that operates as a commercial airline. WestJet Airlines Ltd. also admitted that it is a partner (presumably a general partner) within that partnership. In any event, according to documents filed at the Canadian Intellectual Property Office, WestJet Airlines Ltd. continued to use the trademarks associated with operating a commercial airline until at least May 2024. In addition, WestJet Airlines Ltd. continues to have control over the [www.westjet.com](http://www.westjet.com) website.

Response to Civil Claim, Part 1 – Division 2, paras. 6-7  
Lukacs Affidavit at Exhibits D-F

**The Impugned WestJet Webpage and WestJet Conduct**

14. WestJet had a webpage entitled “*Submit a request for reimbursement*” found at <https://www.westjet.com/en-ca/interruptions/submit-expenses> that purports to:

- a. Place a \$150/night or \$200/night cap on hotel reimbursements to passengers for domestic and international locations, respectively, when passengers are stranded and WestJet fails to secure accommodations for them.
- b. Place a \$45/day cap on meal reimbursements when passengers are stranded.

- c. Represent to passengers that WestJet is not required to reimburse for cellular roaming charges, missed prepaid events, or lost wages.

(hereafter referred to as the “**Guidelines**”).

Lukacs Affidavit at Exhibit G

15. On July 26, 2024, the Plaintiff wrote to WestJet to request correction of the aforementioned (mis)representations by August 2, 2024. APR also outlined in detail why WestJet’s position is contrary to two uniform laws relating to airlines’ obligations:

Lukacs Affidavit at Exhibits H and I

- a. The *Montreal Convention* is an international convention applicable to international travel and forms part of domestic law under the *Carriage by Air Act*, RSC. 1985, c. C-26 [**Montreal Convention**]. Airlines are prohibited from applying a lower compensation limit than provided in the *Montreal Convention*.

*International Air Transport Association v. Canada (Transportation Agency)*, 2024 SCC 30 at para. 34

- b. The *Air Passenger Protection Regulations*, SOR/2019-150 is a consumer protection regime passed in 2019 that applies to both international and domestic travel [**APPR**]. The *APPR* addresses the imbalance of power between passengers and airlines, and the *APPR* provisions are deemed to be part of the contract of carriage and airlines cannot contract out of it.

*International Air Transport Association v. Canada (Transportation Agency)*, 2024 SCC 30 at paras. 86-89

16. WestJet did not respond at all to the Plaintiff’s letter regarding the concerns.

Lukacs Affidavit at para. 15

### **The Filing of this Public Interest Action and Relevant Procedural History**

17. On August 6, 2024, after not having received any response from WestJet, the Plaintiff filed the underlying action as a public interest plaintiff pursuant to s. 172 of the *BPCPA*.

Notice of Civil Claim  
*Seidel v. TELUS Communications Inc.*, 2011 SCC 15 at para. 36 detailing the public interest nature of a s. 172 *BPCPA* action

18. On the same day as filing the action, APR wrote to WestJet's solicitor requesting that they accept service for WestJet, since their office also acts as the appointed agent for service in the B.C. company registry. WestJet's solicitor refused to accept service.

Lukacs Affidavit at Exhibit J

19. On August 7, 2024, the Notice of Civil Claim was duly served at the office of WestJet's appointed agent for service.

Lukacs Affidavit at para. 17

20. Shortly after the filing of the underlying action, APR gave notice to the Director of Consumer Protection that this action has been filed, as required by s. 173 of the *BPCPA*. On August 7, 2024, the Director of Consumer Protection acknowledged service of the Notice of Civil Claim for this action.

Lukacs Affidavit at Exhibit K

21. On August 9, 2024, APR wrote to WestJet indicating APR's intent to bring an application for an interlocutory injunction under s. 172 of the *BPCPA*. APR provided a draft Order for the interlocutory injunction. APR requested a response by September 6, 2024, and WestJet did not respond by the requested date.

Lukacs Affidavit at para. 21 and Exhibit L

### **WestJet Surreptitiously Changed its Website**

22. Between August 10 to August 16, 2024, WestJet made changes to the webpage titled "Submit a request for reimbursement" found at <https://www.westjet.com/en-ca/interruptions/submit-expenses> and quietly removed the Guidelines from that page.

Lukacs Affidavit at Exhibits N to O (historical versions of the page on August 10 and August 16)

23. Although the parties were in correspondence around September 11, 2024, WestJet **did not** suggest that its website changes would have any impact on the proposed injunction application.

Lukacs Affidavit at para. 23 and Exhibit O

24. On September 11, 2024, the parties were also in correspondence regarding setting a timetable for exchange of application materials. WestJet was requested to provide a proposed timetable, but WestJet did not propose anything until October 4, 2024.

Lukacs Affidavit at Exhibits O and P

**WestJet Applied Arbitrary Guideline/Policy Before and After the Website Changes**

25. Prior to WestJet's aforementioned change to its website to remove reference to the Guidelines, WestJet was invoking and using the Guidelines in their correspondences with passengers, **and** also applying the Guidelines.

Lukacs Affidavit at Exhibits Q to W

26. After WestJet's aforementioned change to its website to remove reference to the Guidelines, WestJet has **continued to** invoke and use the Guidelines in their correspondences with passengers, **and** also applied the Guidelines.

Lukacs Affidavit at Exhibits X to Z and paras. 34-38

**WestJet Filed its Response to Civil Claim on September 20, 2024**

27. On September 20, 2024, WestJet filed its Response to Civil Claim. The pertinent sections of the Response to Civil Claim for the purpose of this application are:

- a. WestJet asserted that its "*Submit a request for reimbursement*" found at <https://www.westjet.com/en-ca/interruptions/submit-expenses> was amended, and asserted that changing the webpage was not an admission of wrongdoing.

Response to Civil Claim, Part 1, Division 2, para. 15

- b. WestJet admitted that the "*Submit a request for reimbursement*" found at <https://www.westjet.com/en-ca/interruptions/submit-expenses> is not part of WestJet's contract of carriage with passengers.

Response to Civil Claim, Part 1, Division 2, para. 20

- c. WestJet asserted that the underlying action "*is not an action for damages brought by passengers and does not toll any applicable limitation periods.*" (In

other words, by WestJet's assertion, each passenger that may be affected should promptly be notified so those passengers can protect their interest.)

Response to Civil Claim, Part 1, Division 2, paras. 35-36

28. On September 24, 2024, APR wrote to WestJet regarding obvious defects in the Response to Civil Claim, and also to follow up on APR's letter on August 9, 2024 requesting WestJet's position on the proposed interlocutory injunction.

Lukacs Affidavit at Exhibit AA

29. On October 4, 2024, WestJet wrote to APR stating that:

*In further response to your letter, as stated in WestJet's Response to Civil Claim, the Reimbursement Page on WestJet's website has already been revised and WestJet takes the position that there is no basis to proceed with the application for an injunction.*

Lukacs Affidavit at Exhibit P

30. On October 4, 2024, APR immediately responded stating that:

*We have not received any substantive response from WestJet to our August 9, 2024 letter enclosing a draft Order for the proposed injunction. We disagree that WestJet's change of its website renders the proposed injunction moot. There is no commitment from WestJet that it would not re-introduce misleading contents to its website. In any event, paragraph 1 of the proposed injunction consists of more than just the website contents.*

[emphasis added] Lukacs Affidavit at Exhibit BB

31. On October 9, 2024, WestJet acknowledged that the injunction application is not moot:

*While we acknowledge that the draft Consent Order you previously provided seeks relief beyond the removal of the language on the Claims Reimbursement Page, the Consent Order as drafted contains relief that is now moot. You have provided us with no information as to how you intend to revise the Consent Order in light of the revisions to the Claims Reimbursement Page. As such, the fact that you previously provided us with a Consent Order in August 2024 (that will now require significant amendment) does not mean that the timelines under the SCCR are sufficient, especially when you consider that this matter has been set for a full two-day hearing.*

[emphasis added] Lukacs Affidavit at Exhibit CC

32. For ease of reference, APR has provided a tracked changes document comparing the Draft Order sent to WestJet on August 9, 2024 seeking their position, and the Schedule A that is attached to this Notice of Application. The two main changes are:

- a. Para. 1(a)-(b) changed the “removal” language to “shall not repost” to capture the fact that WestJet has removed the contents in question, but has not committed to not reposting the same contents or substantially similar contents.
- b. Para. 1(c) is newly added and does not deal with WestJet’s website changes that occurred between August 10-16, 2024. Rather, this addresses a potential issue raised in WestJet’s Response to Civil Claim asserting that each affected passenger must file their own individual claim. Those passengers must be promptly informed to take steps to avoid prejudice to their claims.

Lukacs Affidavit at Exhibit DD

### **Part 3: LEGAL BASIS**

#### **A. Three Preliminary Issues for this Interlocutory Injunction Application**

33. Section 172 of the *BPCPA* empowers public interest plaintiffs to bring actions such as the present one, in the public interest, to correct improper corporate conduct:

*[36] As to the statutory context, s. 172 stands out as a public interest remedy (i.e. it is available whether or not the self-appointed plaintiff “is affected by a consumer transaction that gives rise to the action”) as compared with s. 171 (where the plaintiff must be “the person who suffered damage or loss”). The difference in the personal stake (or lack of it) required of a plaintiff is scarcely accidental. Section 171 confers a private cause of action. Section 172 treats the plaintiff as a public interest plaintiff intended to shine a spotlight on allegations of shabby corporate conduct, and the legislative intent thereby manifested should be respected by the court. This appeal falls to be determined on the meaning of s. 172 of the BPCPA, not on general theories of the desirability of commercial arbitration.*

*Seidel v. TELUS Communications Inc.*, 2011 SCC 15 at para. 36

34. Although WestJet has not raised the constitutionality of the *BPCPA*, this Court and the Court of Appeal have confirmed a decade ago that the *BPCPA* applies to the conduct of federally-regulated airlines, such as WestJet.

*Unlu v. Air Canada*, 2012 BCSC 60, upheld in 2013 BCCA 112, leave to appeal to SCC denied.



35. WestJet is ordinarily resident in B.C. and this Court has territorial jurisdiction over WestJet. Firstly, WestJet admitted that it has extra-provincially registered with the BC Company Registry to do business in B.C. and nominated an agent in B.C. for service of process. Secondly, WestJet has a place of business in Richmond B.C.

Response to Civil Claim, Part 1, para. 9  
Lukacs Affidavit at Exhibits B-C  
*Court Jurisdiction and Proceedings Transfer Act*, SBC 2003, c 28 [CJPTA], s. 7(b)(ii) and (c)

36. The Supreme Court of Canada has confirmed that this Court's equitable jurisdiction allows issuing injunctions that cover conduct outside of B.C., so long as the person being enjoined is within the territorial jurisdiction of this Court.

*Google Inc. v. Equustek Solutions Inc.*, 2017 SCC 34 at para. 38

37. While section 18 of the **former** *Trade Practices Act* (i.e., the predecessor of the current *BPCPA*, s. 172) contains language suggesting that the reach of the injunction is limited to protection of "consumers in the province," this limitation has since been **removed** in the current s. 172 of the *BPCPA* to clarify the broad reach of such an injunction.

British Columbia (Director of Trade Practices) v. Ideal Credit Referral Service Ltd., 1997 CanLII 4134  
(BC CA) at paras. 7-11

38. The current definition of "consumer" under the *BPCPA* expressly includes individuals both inside and outside of British Columbia.

*"consumer" means an individual, whether in British Columbia or not, who participates in a consumer transaction, but does not include a guarantor;*

*BPCPA*, s. 1(1)

### **B. Legal Test for an Interlocutory Injunction under Section 172 of the BPCPA**

39. An interlocutory injunction in the B.C. courts requires consideration of three factors: (a) there is a serious issue to be tried; (b) the applicant will suffer irreparable harm if the application is refused; and (c) the balance of convenience favours the applicant.

*Yu v. 16 Pet Food & Supplies Inc.*, 2023 BCCA 397 at para. 17 citing *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311

40. An interlocutory injunction under s. 172 is subject to a **relaxed** test under s. 172(5):

- a. The Court “*must give greater weight and the balance of convenience to the protection of consumers than to the carrying on of the business of a supplier.*”
- b. Typically, an applicant is required to post a bond or give an undertaking as to damages. However, this is not required from the public interest plaintiff.
- c. The applicant is not required to establish irreparable harm will be done to the applicant, consumers generally, or any class of consumers.

*Westfair Foods Ltd. v. Jim Pattison Industries Ltd.* 1989 CarswellBC 830, [1990] B.C.W.L.D. 111 at paras. 1 and 3-8 (upheld in *Westfair Foods Ltd. v. Jim Pattison Industries Ltd.* 1990 CarswellBC 87, [1990] 5 W.W.R. 481); see also *Dairy Bureau of Canada v. Annable Foods Ltd.* 1993 CarswellBC 639, [1993] B.C.W.L.D. 566 at para. 78

41. As such, APR would need to satisfy the following requirements for a s. 172 injunction:  
(a) there is a serious issue to be tried; and (b) the balance of convenience favours issuing the injunction, with greater weight given to the protection of consumers than the carrying on of the business of a supplier.

42. Paragraphs 1(a), 1(d), and 2 of the draft order in **Schedule A** contain the interlocutory injunctive relief that APR is proposing. These paragraphs are clearly of a prohibitive nature, not a mandatory nature. As such, APR need only demonstrate a “serious issue to be tried” and need not show a “strong *prima facie* case.”

*Uber Canada Inc. v Surrey (City)*, 2020 BCSC 173 at para. 27 citing *R. v. Canadian Broadcasting Corp.*, 2018 SCC 5 at para. 16

43. Paragraphs 1(b) and 1(c) of the draft order in **Schedule A** relate to **ancillary relief** that is specifically provided for under the advertising/notice provisions in s. 172(3)(c) of the *BPCPA* in the event that the court grants injunctive relief.

### **C. APR Has Demonstrated a Serious Issue to Be Tried for All Five Grounds**

44. In showing a “serious issue to be tried,” APR primarily relies on ss. 4-5 of the *BPCPA*, or alternatively ss. 8-9 of the *BPCPA*.

#### **Deceptive acts or practices**

4(1) In this Division:

"**deceptive act or practice**" means, in relation to a consumer transaction,

- (a) an oral, written, visual, descriptive or other representation by a supplier, or
- (b) any **conduct** by a supplier

that has the capability, tendency or effect of deceiving or misleading a consumer or guarantor;

"**representation**" includes any term or form of a contract, notice or other document used or relied on by a supplier in connection with a consumer transaction.

(2) A deceptive act or practice by a supplier may occur before, during or after the consumer transaction.

(3) Without limiting subsection (1), one or more of the following constitutes a deceptive act or practice:

...

#### **Prohibition and burden of proof**

5(1) A supplier must not commit or engage in a deceptive act or practice in respect of a consumer transaction.

(2) If it is alleged that a supplier committed or engaged in a deceptive act or practice, the burden of proof that the deceptive act or practice was not committed or engaged in is on the supplier.

...

[emphasis added]

45. The aim of an interlocutory injunction is to preserve the *status quo* while the Court can adjudicate the claim on its merits.

46. APR's request for injunctive relief regarding the Guidelines is two-fold.

47. **Firstly**, WestJet posted the Guidelines on its website. While WestJet changed its website **after** the action was filed and **after** they were put on notice that an injunction would be sought, an injunction for this this first branch remains necessary.

- a. APR has adjusted paragraph 1(a) of the draft order to reflect language stating that WestJet shall not "repost" instead of "remove." WestJet has expressly stated that it is **not** acknowledging that the Guidelines were misleading and, as such, it remains open for WestJet to re-introduce the Guidelines on its website.

- b. Even if WestJet *now* offers an undertaking not to re-post the Guidelines, that is not sufficient to protect passengers. An undertaking is of a private nature and passengers would remain in the dark about the existence of such an undertaking, and would be nearly impossible to enforce. The Plaintiff should not be required to look over WestJet's shoulders in each and every correspondence to ensure that WestJet complies with an undertaking. Whereas, if the Courts make an explicit order that is made public, enforcement thereof would be straightforward.

see *Law Society of Ontario v. Mikhailitchenko*, 2024 ONLSTH 100 at paras. 18-20 comparing the effectiveness of a private undertaking vs. a public order

48. **Secondly**, both **before and after** WestJet changed its website to remove the Guidelines, WestJet engaged in conduct involving representations and applications of the Guidelines, as confirmed in WestJet's own correspondences with passengers. In other words, mere removal from WestJet's website is not sufficient as WestJet's conduct is simply continuing behind the scenes, even after WestJet represented that its website had been changed. The only way to protect passengers is an injunction.

*i. Serious Issue to Be Tried Regarding the Hotel Costs Cap/Limit*

49. Neither the *APPR* nor the *Montreal Convention* places any specific monetary limit on reimbursement of hotel expenses incurred when a passenger is stranded, although the *Montreal Convention* has an overall \$9,804.56/passenger for the airlines liability due to delay. Article 26 of the *Montreal Convention* expressly prohibits airlines from imposing limits. Section 86.11(4) of the *Canada Transportation Act* similarly provides that the *APPR* cannot be undermined by the airlines' own contract terms.

*International Air Transport Association v. Canada (Transport)*, 2024 SCC 30 at paras. 34 and 86.

50. WestJet's arbitrary limit of \$150/night was already rejected by the Canadian Transportation Agency [**CTA**] as not legally binding. WestJet's continued reliance on an arbitrary limit that has already been rejected is questionable:

[24] The respondent argues that it fulfilled its requirements under the APPR when it partially compensated the applicants for their hotel accommodation expenses, and submits that they should not be provided with further compensation. The respondent also argues that it has a maximum CAD 150 policy on hotel accommodation. However, these terms and conditions do not form part of

*the Tariff, and the applicants are not bound by them. In addition, under paragraph 12(3)(b) and subsection 14(2) of the APPR, the respondent must offer passengers faced with an overnight delay a reasonable hotel accommodation, and this standard of treatment is incorporated into the Tariff in Rule 100.*

*[25] The Agency finds that the applicants' expense of CAD 223.42 for their hotel accommodation was reasonable and that the applicants are entitled to a reimbursement of the expense that they incurred as a result of the flight cancellation. The Agency finds that the applicants are entitled to the remaining amount of CAD 73.42.*

[emphasis added]

*Yanyk v. WestJet*, CTA Decision No. 122-C-A-2022 at paras. 24-25

51. More recently, in a case before the Civil Resolution Tribunal, WestJet attempted to again argue an arbitrary limit of \$250/night for reimbursement of hotel expenses. The Tribunal again rejected WestJet's limit as arbitrary and not consistent with the *APPR*:

12. First, the hotel. Mrs. Prinz submitted a receipt for \$937.18 for 3 nights' accommodation at a downtown Vancouver hotel. WestJet does not deny that it must pay Mrs. Prinz for reasonable accommodation costs under the *APPR*, but says Mrs. Prinz failed to provide a receipt in accordance with its reimbursement guidelines. WestJet also says Mrs. Prinz could have stayed in a less expensive hotel but elected not to. It says Mrs. Prinz's reimbursement should be limited to \$750.

13. To the extent that WestJet says more affordable hotel options were available, I find this unproven. WestJet provided a notice to Mrs. Prinz when her flight was cancelled that specifically says it tried to secure accommodations for its guests, but that "due to market availability", it could not secure enough rooms. **While the notice said WestJet would reimburse up to \$250 per night, I find this limit is arbitrary, and not consistent with the *APPR*.**

14. ***APPR* section 14(2) requires a carrier to offer "reasonable" accommodation, free of charge, if the passenger is required to wait overnight due to a flight delay. There is no \$250 per night limit, as WestJet is trying to apply.....**

[emphasis added]

*Prinz v. WestJet Airlines Ltd.*, 2024 BCCRT 980

52. In light of the CTA decision and the Civil Resolution Tribunal decision, there is clearly a serious issue to be tried on the topic of whether it was deceptive or unconscionable for WestJet to represent or otherwise engage in conduct suggesting a maximum daily cap/limit for hotel reimbursements.

*ii. Serious Issue to Be Tried Regarding the Meal Costs Cap/Limit*

53. WestJet has attempted to impose, by way of the Guidelines, a \$45/day meal reimbursement, when the *APPR* expressly provides that the airline must provide food and drinks in reasonable quantities.

54. There is clearly a serious issue to be tried on the topic of whether it was deceptive or unconscionable for WestJet to represent or otherwise engage in conduct suggesting a maximum daily cap/limit for meal reimbursements.

iii. Serious Issue to Be Tried Regarding the No Reimbursement of Roaming Costs

55. WestJet's representation and conduct suggesting that it is not required to reimburse roaming costs are contrary to **both** the *Montreal Convention* and the *APPR*.

56. Prior to the *APPR*, the Canadian Transportation Agency ruled that reimbursement of telephone and roaming charges falls within article 19 of the *Montreal Convention*.

*Brine v. Air Canada*, CTA Decision No. 55-C-A-2014 at para. 38.

57. More recently, the Supreme Court of Canada confirmed the breadth of art. 19 of the *Montreal Convention* in that it imposes **presumptive liability** on airlines for delay, without reference to a limitation to any specific type of expense. Article 26 of the *Montreal Convention* also prohibits airlines from derogating from setting a limit that is lower than what is in the *Montreal Convention*.

*International Air Transport Association v. Canada (Transportation Agency)*, 2024 SCC 30 at paras. 33-34

58. As for the *APPR*, WestJet argued in paragraph 26 of its Response to Civil Claim that s. 14(1)(b) of the *APPR* provides that the airline must provide "access to a means of communication" but does not specify a particular means of communication (i.e., roaming on one's cell phone). WestJet's argument begs the question of what means of communication WestJet actually offers to passengers. In this day and age, pay phones are a rare commodity when almost every individual has a cell phone in hand.

59. There is clearly a serious issue to be tried on the topic of whether it was deceptive or unconscionable for WestJet to represent or otherwise engage in conduct suggesting that no reimbursement is owed for roaming charges.

iv. Serious Issue to Be Tried Regarding the Reimbursement of Lost Wages

60. WestJet's representation and conduct suggesting that it is not required to reimburse lost wages is arguably contrary to the presumptive liability under art. 19 of the *Montreal Convention*.

61. At least one Canadian court that considered this issue has awarded lost wages arising from a delay in air transportation.

Zikovsky c. Air France, 2006 QCCQ 948

62. In addition, the Supreme Court of Canada has noted that courts should pay close attention to international jurisprudence in interpreting the *Montreal Convention*. Courts in other jurisdictions that are signatories to the *Montreal Convention* have awarded lost wages under art. 19 of the *Montreal Convention*.

*International Air Transport Association v. Canada (Transportation Agency)*, 2024 SCC 30 at para. 50  
*The Montreal Convention: A Commentary*, by George Leloudas (Editor), Paul S. Dempsey (Editor), Laurent Chassot (Editor), s. 19.29 – 19.30

63. There is clearly a serious issue to be tried on the topic of whether it was deceptive or unconscionable for WestJet to represent or otherwise engage in conduct suggesting that no reimbursement is owed for lost wages.

iv. Serious Issue to Be Tried Regarding the Reimbursement of Missed Prepaid Events

64. WestJet's representation and conduct suggesting that it is not required to reimburse for missed prepaid events is arguably contrary to the presumptive liability under art. 19 of the *Montreal Convention*, for the same reason as in the above section.

65. At least one Canadian court that considered this issue has awarded lost wages arising from a delay in air transport.

Morrow v. Air Canada, Ontario Superior Court of Justice File No.: SC-18-0182

66. There is clearly a serious issue to be tried on the topic of whether it was deceptive or unconscionable for WestJet to represent or otherwise engage in conduct suggesting that no reimbursement is owed for missed prepaid events.

**C. Balance of Convenience Favours Issuing the Injunction**

67. As noted in s. 172(5)(a) of the *BPCPA*, the court “*must give greater weight and the balance of convenience to the protection of consumers than to the carrying on of the business of a supplier.*” In the current case, it bears noting that the requested injunctive relief does not prevent WestJet from carrying on its business. WestJet can continue to transport passengers. The injunction merely prevents WestJet from engaging in conduct or making representations that have a tendency to deceive consumers, such as the Guidelines and its contents, or is otherwise unconscionable.

68. In essence, WestJet’s excuse to avoid reimbursing passengers really boils down to WestJet’s unwillingness to pay based on a **self-imposed** “guideline.” It is not much different than WestJet simply stating, “I will not reimburse you, as I do not want to,” with the Guidelines added as a false sense of legitimacy to deceive passengers.

69. The effect of the requested injunction is simply for WestJet to apply the uniform laws (i.e., *Montreal Convention* and the *APPR*) in its reimbursement obligations to passengers. There is no perceivable inconvenience to WestJet in that regard.

**D. Other Considerations for the Interlocutory Injunction**

70. In assessing the application, the Court should not lose sight of the fact that WestJet has **admitted** that the reimbursement webpage containing the Guidelines does not form part of the contract of carriage with passengers (i.e., para. 20 of Part 1 of the Response to Civil Claim).

71. WestJet’s admission is significant in that it is plain from the evidence before this Court that WestJet has applied Guidelines to the passengers’ requests for reimbursement. In other words, WestJet has applied terms that are not part of the contract of carriage (i.e., conduct that is arguably a violation of the applicable federal laws providing that an air carrier must not apply any term that is not in the contract of carriage). This may be pertinent in assessing whether WestJet’s conduct is deceptive or unconscionable under the *BPCPA*.



72. It is expected that WestJet will argue that it is not possible to distinguish between “consumers” (e.g., those that travel for a primarily leisure or personal purpose) and “business travellers” (e.g., those that travel for a primarily business purpose). This is easily answered in two respects.

73. Firstly, WestJet has a specific section of its website that is designated for business travel. As such, WestJet can easily identify from its own records which passengers book from the travel section of WestJet’s website.

Lukacs Affidavit at Exhibit EE

74. Secondly, and in any event, the underlying laws in question are the *Montreal Convention* and the *APPR*, which apply to consumers and business travellers alike. APR is invoking the *BPCPA* to advance the position that WestJet cannot use deceptive representations or conduct in their dealing with consumers. The fact that some non-consumers in the periphery will also receive protection should not deprive the consumers from the legal protections that are available in law.

#### **E. Giving Notice to the Affected Passengers**

75. As noted above, s. 172(3) of the *BPCPA* provides that if the Court grants interlocutory relief, then the Court may also require that the decision be advertised or published in some public fashion in order to give notice to consumers.

76. Paragraph 1(b) of Schedule A is “forward looking” in that it gives notice to prospective passengers that seek reimbursement to be on the lookout for WestJet attempting to apply the Guidelines behind the scenes.

77. Paragraph 1(c) of Schedule A is somewhat “backward looking” and is only made necessary because of WestJet’s objection in paragraphs 35-36 of their Response to Civil Claim where WestJet claims that it is not sufficient for this action to be filed but, essentially, each affected passenger must file a separate individual claim. As such, due to WestJet’s own assertions, it becomes necessary for those affected passengers to be notified so those passengers can take the necessary steps to protect their own interest and preserve their claims.

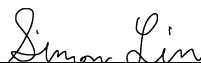
**Part 4: MATERIAL TO BE RELIED ON**

1. Affidavit #1 of Dr. Gabor Lukacs made on October 16, 2024.
2. The pleadings in this action.
3. Such further and other materials as counsel may advise.

TO THE PERSON RECEIVING THIS NOTICE OF APPLICATION: If you wish to respond to this notice of application, you must, within 5 business days after service of this notice of application or, if this application is brought under Rule 9-7, within 8 business days after service of this notice of application,

- (a) file an application response in Form 33,
- (b) file the original of every affidavit, and of every other document, that
  - i. you intend to refer to at the hearing of this application, and
  - ii. has not already been filed in the proceeding, and
- (c) serve on the applicant 2 copies of the following, and on every other party of record one copy of the following:
  - i. a copy of the filed application response;
  - ii. a copy of each of the filed affidavits and other documents that you intend to refer to at the hearing of this application and that has not already been served on that person;
  - iii. if this application is brought under Rule 9-7, any notice that you are required to give under Rule 9-7(9).

Date: October 17, 2024

  
 \_\_\_\_\_  
 Signature of lawyer for applicant, Simon Lin

**To be completed by the court only:**

Order made

in the terms requested in paragraphs ..... of Part 1 of this notice of application

with the following variations and additional terms:

.....

Date: .....

.....  
Signature of  Judge  Associate Judge

**APPENDIX**

**THIS APPLICATION INVOLVES THE FOLLOWING:**

- an application for an interlocutory injunction



Our general guidelines are<sup>1</sup>:

- *Hotel costs: in situations where WestJet was unable to secure a hotel room, or you did not accept the hotel re-accommodation option WestJet has offered (and you book your own hotel), WestJet will reimburse you up to \$150.00 CAD (\$200.00 CAD for non-Canadian destinations) per night/per reservation. In-room movie costs, tips/gratuities and long distance telephone charges will be excluded*
- *Meals: In the unlikely event meal vouchers are not available during a controllable delay, we will reimburse meal expenses to a maximum of \$45 CAD per day/per guest. Alcoholic beverages and tips/gratuities will be excluded.*
- *Transportation: if transportation was not available by WestJet, we will reimburse the cost incurred for transportation between the airport and the hotel*
- *WestJet does not reimburse expenses for cellular roaming charges, missed entertainment /sporting/excursion events, lost wages or missed connections to non-partner airlines or cruises*

b) Pursuant to section 172(3)(c) of the *BPCPA*, the Defendant WestJet Airlines Ltd. shall prominently post the following message on the Reimbursement Pages with any necessary language translations:

***By Order of the Supreme Court of British Columbia, WestJet Airlines Ltd. was ordered by the court not to re-post the guidelines for reimbursements previously posted on this page, until trial or further Order of the Court. The passengers' right to reimbursement is provided by applicable laws.***

c) Pursuant to section 172(3)(c) of the *BPCPA*, the Defendant WestJet Airlines Ltd. shall bring the email below to the attention of each passenger that travelled on or after August 3, 2022 and submitted a request from the Reimbursement Page and received a rejection in whole or in part based on WestJet's guidelines. The email shall be sent from the WestJet email address that WestJet used to communicate with the passenger on their request, with

the Notice of Civil Claim, Response to Civil Claim, and the Court's Order enclosed.

**Subject Line:** *Important Information About Your Previous Reimbursement Request to WestJet*

**Content of Email:**

***This email is sent by the Order of the Supreme Court of British Columbia. WestJet Airlines Ltd. was ordered by the court not to refer to or apply the guidelines that WestJet had previously applied to your reimbursement request. The action was filed by a public interest plaintiff. No final determination has been made on the case and WestJet is disputing the allegations.***

*In the meantime, the Court has ordered that we bring the enclosed Order, Notice of Civil Claim, and Response to Civil Claim to the attention of potentially affected passengers.*

*Your attention is drawn to paragraphs 35-36 of Part 1 of the Response to Civil Claim. You should seek legal advice from your own lawyer and decide whether you need to file your own separate action in the interim to preserve your claim.*

- d) The Defendant, WestJet Airlines Ltd., its affiliates, employees, contractors, and/or agents are enjoined from representing to passengers, directly or indirectly, the contents that must not be reposted as part of subparagraph 1(b) of this Order. For greater certainty, WestJet Airlines Ltd., its affiliates, employees, contractors, and/or agents shall not refer to any guidelines or similar documents in any written or oral communications with passengers that have the effect or tendency to cause a passenger to believe that their request for reimbursement is subject to a monetary limit imposed by WestJet Airlines Ltd., other than a limit provided by applicable laws.
2. The Defendant, WestJet Airlines Ltd., shall forthwith bring this Order to the attention of its current affiliates, employees, contractors, and/or agents, and shall forthwith bring this Order to the attention of any person that becomes a new affiliate, employee, contractor, or agent of WestJet Airlines Ltd.

3. Pursuant to section 172(5)(b) of the *BPCPA*, the Plaintiff is not required to give an undertaking as to damages.
4. The parties may amend this Order by application to the Court under Rule 8-1 or by written consent.
5. The Plaintiff shall be awarded costs for this application in any event of the cause.

THE FOLLOWING PARTIES APPROVE THE FORM OF THIS ORDER AND CONSENT TO EACH OF THE ORDERS, IF ANY, THAT ARE INDICATED ABOVE AS BEING BY CONSENT:

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Simon Lin  
Counsel for the Plaintiff

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Michael Dery  
Counsel for the Defendant

BY THE COURT:

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Registrar