

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

AIR PASSENGER RIGHTS

PLAINTIFF

AND

WESTJET AIRLINES LTD.

DEFENDANT

APPLICATION RESPONSE

Application response of: WestJet Airlines Ltd. (the "**WestJet**")

THIS IS A RESPONSE TO the Notice of Application of the Plaintiff (the "Applicant") filed October 17, 2024.

WestJet estimates that the court can address the issue of adjournment of the Application in 90 minutes.

Part 1: ORDERS CONSENTED TO

WestJet consents to NONE of the orders set out in Part 1 of the Notice of Application.

Part 2: ORDERS OPPOSED

WestJet opposes the granting of ALL the orders set out in Part 1 of the Notice of Application.

Part 3: ORDERS ON WHICH NO POSITION IS TAKEN

WestJet takes no position on the granting of the orders set out in NONE of the paragraphs of Part 1 of the Application.

Part 4: FACTUAL BASIS

The Action

1. The Plaintiff is the Applicant in this action and is a federally registered non-profit organization.
2. WestJet is the Defendant in the underlying action and application respondent on this Application.
3. This Action is being brought solely pursuant to section 172 of the *Business Practices and Consumer Protection Act* ("BPCPA").

4. The primary subject of the within Action is the language contained on a Claims Reimbursement webpage (the "Reimbursement Page") on WestJet's website as it read at the time of the filing of the Action. The Applicant alleges that certain language on the Reimbursement Page constituted a deceptive act or practice pursuant to section 5 of the *BPCPA* or an unconscionable act or practice pursuant to section 9 of the *BPCPA*.
5. As noted in the Notice of Claim, the allegedly offending language is contained in general guidelines set out in the Reimbursement Page. The guidelines stated that in certain flight delay or cancellation situations where WestJet is unable to secure a hotel room for a passenger (or the passenger refuses to accept the hotel that WestJet has secured) and the passenger books their own hotel, WestJet would reimburse passengers for out-of-pocket hotel expenses up to \$150 CAD for Canadian destinations or \$200 CAD for outside of Canada. The Applicant has referred to this as a "Hotel Cap".
6. The guidelines also stated that in certain flight delay situations and if transportation was not available by WestJet, WestJet would reimburse the cost incurred for transportation between the airport and the hotel.
7. The guidelines also stated that in certain flight delay situations and in the unlikely event that meal vouchers are not available, WestJet would reimburse meal expenses up to a maximum of \$45 CAD per day per guest. The Applicant has referred to this as a "Meal Cap".
8. The guidelines also stated that in certain flight delay or cancellation situations, WestJet would not reimburse cellular roaming charges, missed entertainment/sporting/excursion events, lost wages or missed connections to non-partner airlines or cruises.
9. The Applicant also alleges that the Hotel Cap was contrary to section 14(2) of the APPR and Article 19 of the Montreal Convention (which is an international treaty that governs carriers' liability to passengers for flight delay if the passenger is travelling on an international itinerary).
10. The Applicant also alleges that the Meal Cap was contrary to section 14(1)(a) of the APPR and Article 19 of the Montreal Convention.
11. The Applicant also alleges that the language regarding cellular roaming charges was contrary to section 14(1)(b) of the APPR and Article 19 of the Montreal Convention.
12. The Applicant also alleges that the language regarding missed entertainment/sporting/excursion events, lost wages or missed connections to non-partner airlines or cruises was contrary to Article 19 of the Montreal Convention.

Flight Delays/Cancellations

13. The federal Air Passenger Protection Regulations (the "APPR") came into effect in 2019. In certain situations where there are flight delays or cancellations within the control of an airline (referred to as the "carrier"), the APPR obligate carriers to provide hotel accommodations, food and drink in reasonable quantities, and access to a means of communication.

14. The Canadian Transportation Agency (the “Agency”) is the principal regulator in Canada that oversees the airline industry in Canada. It acts as an independent regulator and quasi-judicial tribunal that adjudicates passenger complaints and a wide range of other matters governing commercial aviation in Canada. The Agency is also responsible for drafting regulations that govern commercial aviation, and it is the Agency that drafted the APPR.
15. Since the coming into effect of the APPR, the Agency has amended it several times. Also since the APPR came into effect, WestJet has been in near constant contact with and has been directly working with the Canadian Transportation Agency to ensure compliance with the APPR. The Agency has been very active in ensuring compliance and has conducted a number of inquiries and investigations. The Agency has also issued administrative monetary penalties to carriers for violations of the *Canada Transportation Act* and the APPR.
16. The *Canada Transportation Act* creates a comprehensive complaints resolution process for passengers to file complaints in writing with the Canadian Transportation Agency if they allege that a carrier failed to apply a condition of carriage applicable to the air service offers that is set out in a tariff. Passengers may seek compensation for expenses incurred as a result of the alleged failure.
17. The Canadian Transportation Agency describes this process as a simplified complaint process that it states is “easy to access, more efficient and uses new systems and technology to deliver faster outcomes to air passengers who submit complaints”.

Passenger Claims Reimbursement Process

18. WestJet’s website contains a webpage regarding the Air Passenger Protection Regulations at <https://www.westjet.com/en-ca/interruptions/canadian-passenger-rights>. The webpage includes a link to WestJet’s Tariffs and also to the Canadian Transportation Agency website.
19. In the vast majority of cases where guests experience a delay or cancellation within WestJet’s control, WestJet provides food and drink vouchers during the delay and arranges for hotel rooms in the event that guests are delayed overnight.
20. In some cases, even when guests are offered hotel accommodations or food vouchers, those guests refuse the offer and decide to book their own hotel accommodations, or do not avail themselves of food vouchers that are offered.
21. In approximately 95% of cases, WestJet is able to arrange for hotel accommodations for guests without guests having to incur the cost of a hotel.
22. From August 3, 2022 until August 15, 2024, the webpage on WestJet’s website <https://www.westjet.com/en-ca/interruptions/submit-expenses> contained the same or similar content (the “Claims Reimbursement Page”). At no time during this period did WestJet receive any correspondence from the Canadian Transportation Agency informing WestJet that it took issue with the content of the webpage or that the webpage constituted a violation of any applicable regulations.

23. Designated enforcement officers from the Canadian Transportation Agency periodically review airline websites for potential regulatory non-compliance.
24. The Canadian Transportation Agency has not informed WestJet that the content of the Claims Reimbursement Page is not compliant with any regulations enforced by the Canadian Transportation Agency.
25. The Claims Reimbursement Page presently indicates that in the event that a guest incurs reasonable out-of-pocket expenses, they may submit a request to WestJet for reimbursement. WestJet will review requests for reasonable qualifying expenses. Guests should keep and provide WestJet with the associated itemized receipts. Approved reimbursements will be communicated via the guest email address provided.
26. As set out on the Claims Reimbursement Page, prior to the submission of the reimbursement request, guests are asked to review several statements, including a statement that “my right to claim damages, if any, under the applicable convention or under the law, is not limited by this process”.
27. WestJet is in the process of implementing changes to its claims reimbursement process.
28. As of November 1, 2024, guests who experience a cancellation within the control of WestJet and for whom WestJet is unable to secure a hotel room will receive the attached email, informing guests that WestJet will reimburse their reasonable accommodation expenses. This email makes no reference to “caps” or limits on accommodation expenses.
29. WestJet has established an online claims reimbursement process through its website, whereby passengers who experience a delay or cancellation on their scheduled itinerary can submit a claim for compensation.
30. Once submitted, requests for reimbursement are sent to a specialized team of Guest Support agents who are all based in Alberta and who review the requests. In reviewing the requests, the Guest Support agents consider whether or not the flight delay or cancellation was within WestJet’s control or outside of WestJet’s control and whether or not the amounts claimed should be reimbursed.
31. There are a number of reasons why claims submitted by guests through WestJet’s claims reimbursement process may be ineligible for reimbursement. Examples include:
 - (a) where a delay or cancellation is outside of WestJet’s control;
 - (b) where guests fail to provide supporting documentation for the claims made;
 - (c) where guests submit claims for expenses that are unreasonable in the circumstances of the delay/cancellation; and
 - (d) where guest submit claims that are not recoverable under the APPR or under the Montreal Convention.

32. As of November 1, 2024, requests for reimbursement for hotel accommodations and meal expenses in the case of a delay or cancellation within WestJet's control are all reviewed for reasonability.
33. WestJet has provided payments for hotel and meal expenses incurred as a result of delays or cancellations outside of WestJet's control gratuitously on a case-by-case basis in the past.
34. Once a request for reimbursement is reviewed, the reviewing Guest Support agent will send an email to the guest informing them of the decision made regarding the request for reimbursement. All initial correspondence responding to the request for reimbursement will include a statement that "the reimbursement offered does not limit or reduce the guest's right to claim damages, if any, under the applicable convention or under the law".
35. If a guest is not satisfied with the reimbursement provided, the guest can file a complaint with the Canadian Transportation Agency. The Canadian Transportation Agency has implemented a simplified complaint process that it states is "easy to access, more efficient and uses new systems and technology to deliver faster outcomes to air passengers who submit complaints".

The Application

36. The Applicant filed and served this Application seeking an interlocutory injunction on October 17, 2024, with a scheduled hearing date of November 5-6, 2024 (the "Injunction Application").

Part 5: LEGAL BASIS

1. WestJet relies on:
 - (a) Rules 8-1, 14-1, and 16-1 of the Supreme Court Civil Rules;
 - (b) *The Business Practices and Consumer Protection Act*;
 - (c) *The Canada Transportation Act*;
 - (d) *The Carriage by Air Act*;
 - (e) Air Passenger Protection Regulations;
 - (f) The inherent jurisdiction of this Honourable Court; and
 - (g) Such further material as counsel may advise.

A. The Injunction Application Should Be Adjourned

2. WestJet seeks that the Injunction Application be adjourned to a later date because:
 - (a) there is no urgency;

- (b) preliminary issues must be addressed in advance of the hearing of the Injunction Application;
- (c) the Court needs to have the benefit of a full record, with a reasonable opportunity for WestJet to respond, before rendering a decision regarding an interlocutory injunction.

(i) No Urgency

3. The primary allegation in the Notice of Civil Claim involves the Claims Reimbursement Page and its references to WestJet's general guidelines regarding payment for hotel expenses, meal expenses, roaming charges, lost wages, and prepaid events expenses. There was no suggestion to passengers on the Claims Reimbursement Page (as it previously read) that guests were not entitled to further amounts or that they could not seek further amounts under applicable law.
4. The Applicant's own affidavit evidence sworn in support of this Application demonstrates that guests were aware of the availability of the courts to seek additional damages beyond the amounts provided to them by WestJet

Affidavit of Gabor Lukacs, Exhibit "X", at page 128

5. The Applicant has admitted that the Claims Reimbursement Page has since been revised and not longer contains the content the Applicant alleges constituted a deceptive act or practice under the *BPCPA*.

Affidavit of Gabor Lukacs, at paragraphs 22 and 23, and Exhibits M and N

6. At paragraph 1(a) of the draft Order attached as Schedule "A" to the Notice of Application, the Applicant only seeks an Order that the content not be reposted. The Applicant is not taking issue with the content that currently appears on the Claims Reimbursement Page.
7. WestJet has no intention of reintroducing the removed content on its website until the final disposition of this matter.
8. In the draft Order attached as Schedule "A" to the Applicant's Notice of Application, the Applicant is essentially seeking a notice campaign akin to that provided for in a certified class action under the *Class Proceedings Act* (at paragraph 1(c)). There is no basis for this relief under the *BPCPA*.
9. Based on the Applicant's Notice of Civil Claim which references passengers who travelled on or before August 2, 2022 (two years prior to the filing of the Notice of Civil Claim), it appears that the Applicant was under the incorrect impression that the filing of this Notice of Civil Claim would serve to toll any applicable limitation periods.
10. It is not WestJet's responsibility to correct the misapprehension of the Applicant and such relief cannot ground any suggestion that the Injunction Application is urgent, particularly where the Applicant's own affidavit materials demonstrate that passengers are aware of the availability of the courts. In addition, materials on WestJet's website

already make passengers aware of their ability to file complaints with the Canadian Transportation Agency.

11. As part of the relief sought in this Injunction Application, the Applicant seeks to put the onus on WestJet to inform passengers of potential limitation dates. The Applicant has cited no authority for the Order sought (which is not available in an action pursuant to section 172 of the *BPCPA* in any event).

(ii) Threshold issues must be resolved before the Injunction Application

12. Significant defects in the Notice of Civil Claim were apparent following service of the Notice of Civil Claim and WestJet's Response to Civil Claim filed and served September 20, 2024, noted these issues, including that:
 - (a) the defined terms for various groups of passengers in the Notice of Civil Claim as "passengers who submit a request for compensation" are fatally flawed as there is no basis to suggest that every passenger who makes a request for compensation is eligible for compensation, either under the APPR, or the Montreal Convention (paragraphs 22, 25, 27, 29, and 32 of Part 1 – Division 2 of the Response to Civil Claim);
 - (b) the APPR and the *Canada Transportation Act* do not govern compensation in situations where passengers decide to book their own accommodation (paragraph 21 of Part 1 – Division 2 of the Response to Civil Claim);
 - (c) the APPR do not stipulate specific amounts payable to passengers for food and drink, yet the Applicant maintains that a "cap" on meal expenses is a violation of the APPR (paragraph 24 of Part 1 – Division 2 of the Response to Civil Claim);
 - (d) the APPR does not stipulate that passengers are entitled to recover roaming charges (paragraph 26 of Part 1 – Division 2 of the Response to Civil Claim);
 - (e) passengers only have a right to damages under the Montreal Convention if they commence an action and the within action does not constitute an action under the Montreal Convention (paragraphs 11 and 36 of Part 1 – Division 2 of the Response to Civil Claim and paragraph 14 of Part 3 of the Notice of Civil Claim; and
 - (f) the Applicant has failed to plead the required material facts that WestJet is a "supplier" under the *BPCPA* that Affected Passengers are "consumers" under the *BPCPA*, and that there was a "consumer transaction" under the *BPCPA* (paragraphs 3, 5, 7, and 10 of Part 3 of the Notice of Civil Claim).
13. As set out in WestJet's Response to Civil Claim, the Applicant has failed plead to necessary facts in Part 1 of the Notice of Civil Claim to establish that WestJet is a supplier under the *BPCPA* and has failed to plead the required elements of a deceptive act or practice under section 5 or the required elements of an unconscionable practice under section 8 of the *BPCPA*. This was specifically pointed out to the Applicant in WestJet's Response to Civil Claim and the Applicant has failed to take steps to amend

the Notice of Civil Claim in advance of this Application. As such, this Application is bound to fail on the state of the current pleadings.

14. The Applicant has failed to plead the material facts for a “consumer transaction”.
15. The *BPCPA* applies to “consumers” and “suppliers” engaged in “consumer transactions”. “Consumers” are individuals who enter into consumer transactions for personal, family or household purposes. A “supplier” is a person who in the course of business participates in consumer transaction: *Seidel v. Telus Communications Inc.*, 2011 SCC 15, at para. 123. The definition of a “deceptive act or practice” or “unconscionable act or practice both require that they be made in relation to a “consumer transaction”.
16. Whether or not a transaction is a “consumer transaction” turns on the purpose of the consumer who is engaging in the transaction: See *Webster v. Robbins Parking Service Ltd.*, 2016 BCSC 1863, 2016 CarswellBC 2811 (B.C. S.C.) at para. 44. It is not whether the provider of services is a commercial operation. It is whether the purchaser is an individual purchasing for primarily personal, family or household purposes: *Nanaimo Shipyard Ltd. v. Keith*, 2008 BCSC 1150, 2008 CarswellBC 1802 (B.C. S.C.) at para. 57; *A Speedy Solutions Oil Tank Removal Inc. v. Garraway*, 2019 BCSC 1091, 2019 CarswellBC 1945, 95 B.L.R. (5th) 291, [2019] B.C.J. No. 1235 (B.C. S.C.) at paras. 73, 75 and 76.
17. *In Jones v. Bank of Nova Scotia*, 2018 BCCA 381, the court of appeal stated at paragraphs 27-28:
 - [27] Similarly, although the allegation of deceptive business practices was not expressly addressed by the chambers judge, that is also a bare plea unsupported by any relevant allegation of fact and could properly have been struck pursuant to Rule 9-5.
 - [28] There is, for example, no allegation that the deposit was a consumer transaction as defined by the *Business Practices and Consumer Protection Act*, S.B.C. 2004, c. 2. It is not alleged that the transaction was for primarily personal, family or household purposes.
18. For the same reasons as was stated in *Jones, supra*, the pleadings in their current form could be struck. This Court should not be hearing an Injunction Application based on deficient pleadings. The Applicant had an opportunity to amend the Notice of Civil Claim in advance of filing its Application materials and chose not to do so.
 - (iii) **The Court should have the benefit of a full record before determining whether an injunction is appropriate or available**
19. WestJet reasonably requires sufficient opportunity to respond to the 13 pages of narrative evidence and 141 pages of exhibit evidence that were not served by the Applicant until October 17, 2024. The Applicant has prepared an extensive record and WestJet needs to be afforded a reasonable time to marshal a response.

20. Furthermore, as set out in the Affidavit of Todd Peterson sworn in support of this Application Response, WestJet is still in the process of obtaining information that may be critical for this Court to consider before ruling on the Injunction Application.
21. In *Truong v. Wally King Holdings Ltd.*, 2015 BCSC 1759, the Applicant brought an application for an interim injunction under section 172 of the *BPCPA* restraining the defendant from contravening the *BPCPA*.
22. The court noted that the action was in its early stages and Examinations for Discovery had not been conducted. The Court declined to order interlocutory injunctive relief pursuant to the *BPCPA*, holding at paragraph 25:

[25] Again, this litigation is in its early days. The failure to grant any interim remedy would render the issue moot. I decline to order any relief on the basis of the *BPCPA*. That matter should be argued after a fuller discovery and review of the evidence where there would be absolutely no question of credibility arising. I understand Ms. Truong's argument of the defendant's actions, even if accepted as innocence would not necessarily preclude a remedy under the *BPCPA*. However, at this time, I find the consideration of that statute would be best made on the basis of better and fuller evidence, particularly given the affidavit evidence of Mr. Thind, sworn on behalf of the defendant, that it was entirely innocent in the circumstances. I appreciate it is a matter of consideration for the court at a later date, but that would be best done on the basis of a fuller evidentiary record.

23. The Applicant filed its Application materials only 12 business days before the scheduled hearing which is scheduled to take place over two days and has provided 13 pages of narrative evidence and 141 pages of exhibit evidence. Similar to the case in *Truong*, WestJet has filed evidence regarding its claims process in support of its position that there is no reasonable issue to be tried and that numerous items that are the subject of the Injunction Application are not available as compensation under the APPR and/or the Montreal Convention.
24. For the same reasons as the Court held in *Truong*, any remedy under the *BPCPA* should be made on the basis of better and fuller evidence.
25. While WestJet has taken steps to obtain as much of the necessary evidence for the hearing of this injunction application as possible, the Court will require better and fuller evidence in order to make an Order sought in this matter.

C. The Injunctive Relief is Not Available or Inappropriate

26. In the event that an adjournment of the Application is not granted, WestJet opposes the relief sought in the draft Order attached as Schedule "A" to the Notice of Application, and respectfully submits:
 - (a) the proposed order is impermissibly vague and unenforceable;
 - (b) the proposed order is overly broad;

- (c) the proposed order seeks relief unavailable under the *BPCPA*;
- (d) the proposed order seeks relief in the nature of a mandatory injunction;
- (e) the proposed order seeks relief that effectively amounts to a final determination of the action;
- (f) There is no serious issue to be tried in the application;
- (g) the orders sought would disrupt the *status-quo*, which the balance of convenience favours preserving.

(i) The proposed order is impermissibly vague and unenforceable

27. The request for an injunction as set out in the draft Order at Schedule "A" to its Notice of Application is impermissibly vague and should not be granted.

28. A party seeking an injunction must set out its terms with clarity and specificity.

Millenium Specialty Alloys Ltd. v. Sali, 2023 BCSC 914
("Millenium") at para 14, citing *JTT Electronics Ltd. v. Farmer*, 2014 BCSC 2413 at
para. 52; and *Pro Swing Inc. v. Elta Golf Inc.*, 2006 SCC 52 at para. 24

29. It is not the court's function to try and construct a sensible order from overly broad language proposed by the party seeking relief.

Natural Trade Ltd. v. MYL Trading Ltd., 2018 BCSC 1176 at para. 79

30. Where the injunction sought is impermissibly vague and lacks the clarity and specificity needed for the defendants to know exactly what has to be done to comply with the order, that alone is reason to dispose of an application.

Millenium, *supra* at para 18

31. The exercise of the court power to grant injunctions may lead, from time to time, to situations of non-compliance where it may be necessary to call upon the drastic exercise of courts' powers to impose civil or criminal penalties, including imprisonment. Therefore, proper notice to the parties of the obligations imposed upon them and clarity in defining the standard of compliance expected of them must be essential requirements of a court's intervention. Vague or ambiguous language should be strictly avoided.

Doucet-Boudreau v. Nova Scotia (Minister of Education), 2003 SCC 62, at para 97

32. In *Pro Swing Inc. v. Elta Golf Inc.*, 2006 SCC 52, the Supreme Court of Canada stated at para 24:

24 Despite their flexibility and specificity, Canadian relief orders are fashioned following general guidelines. The terms of the order must be clear and specific. The party needs to know exactly what has to be done to comply with the order. Also, the courts do not usually watch over or supervise performance. While the specificity requirement is

linked to the claimant's ability to follow up non-performance with contempt of court proceedings, supervision by the courts often means relitigation and the expenditure of judicial resources. This factor is discussed by R. J. Sharpe, in *Injunctions and Specific Performance* (2nd ed. (loose-leaf)), at para. 7.480:

From this perspective, the supervision concern differs from other criteria determining the availability of specific relief. It is based not upon the weighing of relative advantage and disadvantage to the parties but rather on the weighing of the advantage of doing justice by granting specific relief against the general cost to society of having justice administered. By way of contrast to specific relief, damage awards do hold certain advantages. A money judgment is final and enforcement is left to the administrative rather than the judicial machinery of the court. The cost of enforcement is largely borne by the parties. A decree for specific performance does involve a substantially higher risk that further judicial resources will be required. The more complex or extended the performance, the more likely further proceedings will be needed to ascertain whether the defendant has complied with his or her obligations. This fear of extended and complex litigation and the need for repeated requests for judicial intervention may be seen as a legitimate concern. The cost to society of providing the resources necessary to implement specific performance decrees is properly considered by the court when weighing the advantages the specific relief might otherwise offer.

33. In *Gonzalez v. Mulgrave Independent School Society*, 2017 BCSC 882, the Court stated at para 38:

38 The lack of particularity and vagueness of Mr. Gonzalez's claim is of concern because he is seeking an injunction. If that were granted it would have to be on the most general terms and would have the court – at Mr. Gonzalez's behest – supervise or enforce the methodology of future surveys. It would be a recipe for endless litigation.

The lack of particularity and vagueness of the claim is of concern because the Applicant is seeking an injunction. If that were granted it would have to be on the most general terms and would have the court — at the Applicant's behest — supervise or enforce the methodology of future interactions between WestJet employees and passengers. It would be a recipe for endless litigation.

34. It is clear that the draft Order proposed by Applicant's counsel, in particular paragraph 1(d), is drafted on the most general terms and would require the court to supervise or enforce the methodology of any future interactions between WestJet agents and

passengers in WestJet's claims reimbursement process. The order as drafted is inappropriate and unenforceable as WestJet's agents need to be able to reasonably assess and determine available compensation for both meritorious and meritless claims. The Order as drafted would be a recipe for endless litigation for the Court.

(ii) The proposed relief at paragraph 1(d) of the draft Order cannot be granted where there are no deceptive acts or practices or unconscionable conduct that occurs within British Columbia

35. The proposed Order seeks to regulate conduct that clearly falls outside of the jurisdiction of this Court to enforce by way of the *BPCPA*.
36. While WestJet denies all allegations in the Notice of Civil Claim and Notice of Application, WestJet can advise that the Claims Reimbursement Page was visible to B.C. residents, the page has since been revised and WestJet will not publish the removed language on the Claims Reimbursement Page until the final determination of the within action (subject to an Order or direction from the Canadian Transportation Agency to the contrary).
37. However, paragraphs 1(c) and 1(d) of the draft Order seek relief that is clearly outside of this Court's jurisdiction to grant pursuant to the *BPCPA*.
38. Paragraph 1(d) seeks to enjoin WestJet's interactions with any members of the travelling public who submit a request for reimbursement to WestJet. WestJet Guest staff who send email correspondence in relation to these requests are all located in Alberta and many passengers who submit requests for compensation are not located in British Columbia and no part of their travel itinerary involves travel to or from British Columbia. As such, while it may be arguable that the injunctive relief available under section 172 of the *BPCPA* does not require that a consumer be located in British Columbia, the *BPCPA* itself still requires that a deceptive act or practice or unconscionable conduct take place within the Province, which does not occur in the vast majority of cases with respect to the interactions noted in paragraph 1(d).
39. At paragraph 3 of Part 3 of the Notice of Civil Claim, the Applicant attempts to argue that the Supreme Court has confirmed that this Court's equitable jurisdiction allows issuing injunctions that cover conduct outside of BC, so long as the person being enjoined is within the territorial jurisdiction of this Court.
40. Respectfully, this argument ignores the fact that this action has been brought subject to section 172 of the *BPCPA*, that the *BPCPA* constitutes a complete code, and that the *BPCPA* does not apply to consumer transactions where both the supplier, the consumer, and the consumer transaction all occur outside of the province and where no deceptive act or practice or unconscionable act or practice occurred within British Columbia.

(iii) The proposed Order seeking mandatory injunctive relief is disguised as "ancillary relief"

41. At paragraph 1(c) of the draft Order, the Applicant seeks an Order compelling WestJet to send a specifically worded email, which contains significant inaccuracies in relation

to the remaining content of the draft Order, and which also mandates the sending of the pleadings filed to date in the Action.

42. There is no basis for this relief pursuant to section 172 of the *BPCPA*, and the Applicant has cited no authorities as support that this is appropriate relief under section 172(3). The Applicant has failed to point to any applicable authorities where similar relief has been awarded under the *BPCPA* because this relief is not available and is clearly an attempt to mischaracterize as “ancillary relief” what is actually mandatory injunctive relief. The Applicant has clearly characterized the relief sought in this manner to try and avoid the heightened burden that must be demonstrated in order for the Court to order mandatory injunctive relief.
43. In *British Columbia (Director of Trade Practices) v. Van City Construction Ltd.*, 2000 BCSC 79, the Director of Trade Practices sought an Order requiring the defendant to provide prospective customers with a copy of the order made in the action. The Court had already rendered its determination that the defendants had engaged in deceptive acts or practices. The defendant opposed the relief sought.
44. The Court stated at paragraphs 11 to 13:

11 The nature of the injunction in what is now section 18(1)(b) of the *Act*, however, was considered by Aikins J. in *Stubbe v. P.F. Collier & Son Ltd.*, [1977] 3 W.W.R. 493 (B.C. S.C.). At p. 512 he stated:

While I am inclined to the view that the wording of s.16(1)(b) limits the jurisdiction of the court to a negative injunction rather than a mandatory injunction, I do not think it necessary to make any firm pronouncement on this matter which would apply to any case.

12 I think it is also unnecessary to decide that issue in this case. I consider the caution expressed by Aikins J., however, to be a factor in determining whether the additional conditions sought by the Director are necessary to give effect to the injunctive remedy in s. 18(1)(b) of the *Act*.

13 Section 18 provides for a declaration that an act or practice in a consumer transaction is deceptive or unconscionable. It also provides for an injunction restraining a supplier from engaging in a deceptive act or practice. If the court grants the relief in either of those provisions it may also order publication in the media in a manner that will assure that consumers have prompt and reasonable notice of the particulars of any judgment. Those remedies are quite specific.

45. At paragraph 17, the court concluded:

17 Similarly, an order requiring the defendants to include in contracts between them and consumers a reference to

particulars of this judgment would, in my view, be a separate remedy and one not provided in the Act. Section 18(2) of the *Act* already provides for communication to consumers about a judgment in the form of advertisements in the media.

46. Based on the above noted decision, it is clear that paragraph 1(b) of the draft Order already contains the ancillary relief that may be appropriate in this case under section 172(3) of the *BPCPA*. There is no basis for the relief sought in paragraph 1(c) of the draft Order, which clearly goes well beyond the communication to consumers envisioned by section 172(3). The relief sought is analogous to the order sought in *Van City, supra*, which the Court found was unavailable under the previous section 18(b) of the *Trade Practices Act* (the predecessor to section 172 of the *BPCPA*).

47. The *BPCPA* is a “complete code” in the regulation of consumer transactions directed to both protection of consumers and fairness and consistency for all parties in the consumer marketplace.

Koubi v. Mazda Canada Inc., 2012 BCCA 310, at para 63, *Seidel v. Telus Communications Inc.*, 2016 BCSC 114, at para 63

48. As there is no basis for this Court to order the relief sought in paragraph 1(c) of the draft Order pursuant to section 172 of the *BPCPA*. This relief is unavailable on this Application.

49. WestJet maintains that paragraph 1(c) of the draft Order is actually a request for mandatory injunctive relief, which means that the Applicant must overcome an extensive review of the merits to determine whether there is a “strong *prima facie* case” in order to justify the injunctive relief sought.

R. v. Canadian Broadcasting Corp., 2018 SCC 5, at para 15

50. The Applicant also maintains that the relief sought in paragraph 1(d) of the draft Order constitutes mandatory injunctive relief. As that paragraph is drafted in an impermissibly vague manner, it remains unclear exactly how WestJet must act in order to comply with the Order. However, when the Court considers the issues alleged in this Action and in the Notice of Application, it becomes apparent that what the Applicant is actually seeking in paragraph 1(d) of the draft Order is mandatory injunctive relief.

51. In characterizing the interlocutory injunction as mandatory or prohibitive, the application judge will have to look past the form and the language in which the order sought is framed, in order to identify the substance of what is being sought, in light of the particular circumstances of the matter, and what the practical consequences of the injunction are likely to be. In short, the application judge should examine whether, in substance, the overall effect of the injunction would be to require the defendant to *do* something, or to *refrain from doing* something.

R. v. Canadian Broadcasting Corp., *supra*, at para 16

52. Paragraph 1(a) of the draft Order seeks to enjoin WestJet from reposting the statement that was previously on WestJet’s the Claims Reimbursement Page that “WestJet does

not reimburse expenses for cellular roaming charges, missed entertainment/sporting/excursion events, or lost wages” or “similar” content. This is prohibitive injunctive relief.

53. Paragraph 1(d) of the draft Order purports to prevent WestJet from representing to passengers “that WestJet does not reimburse expenses for cellular roaming charges, missed entertainment/sporting/excursion events, or lost wages” and to prevent WestJet from “referring 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 is subject to a monetary limit imposed by WestJet”.
54. However, paragraph 1(c) of the draft Order states that “WestJet was ordered by the court not to refer to or apply the guidelines that WestJet previously applied to your reimbursement request”. This clearly reveals what the Applicant actually wants (or believes this Order will accomplish), which is to prevent WestJet from denying claims for roaming charges, missed events, or lost wages. This is in effect a mandate that WestJet approve and pay claims for these types of damages.
55. It appears that the combination of paragraphs 1(c) and 1(d) of draft Order may have the effect of preventing of WestJet from denying claims for reimbursement of cellular roaming charges, missed entertainment/sporting/excursion events, or lost wages, or from refusing to pay claims for hotel expenses and meal expenses, no matter how unreasonable/unjustified/fraudulent.
56. The fact that the Applicant is seeking mandatory injunctive relief becomes evident once the Court considers paragraph 69 of Part 2 of the Notice of Application, where the Applicant states “the effect of the requested injunction is simply for WestJet to apply the uniform laws (ie., Montreal Convention and the APPR) in its reimbursement obligations to passengers”.
57. This means that the Applicant's intention with the draft Order is to force WestJet to pay out claims for reimbursement for the above noted types of claims based on its own preferred interpretation of the law. This is mandatory injunctive relief disguised as prohibitive relief. If this was not the intended effect of the Order, there would be no reason for the Applicant to include the words “or apply” in the email the Applicant wants the Court to force WestJet to send to passengers (in paragraph 1(c) of the draft Order).
58. The Court must not lose sight of what is at issue with respect to the injunctive relief sought. Paragraph 1(d) of the draft Order relates solely to WestJet's claims handling process whereby passengers (who may be ineligible for any compensation whatsoever under either the APPR or the Montreal Convention (even if they commenced an action) submit claims to WestJet. WestJet Guest Support agents then consider these claims and determine what compensation WestJet will provide based on the documentation provided.
59. If the Applicant wants an Order preventing WestJet from applying guidelines (and where one of the guidelines is that WestJet will not provide compensation for roaming charges, wage loss, or prepaid event expenses), the practical effect of this Order is

that in cases where passenger submit receipts for ineligible expenses, or advance claims for wage loss or missed prepaid events, WestJet would be unable to tell passengers why the claims are being rejected (which is because these claims are not available under the applicable law.

60. If WestJet does not refer at all to the reason why the claims are being rejected, this will simply lead to additional correspondence, with passengers pointing out that certain compensation was not provided. WestJet would then be prevented from telling passengers why the claims were rejected. If WestJet does tell the passenger why they are not being provided compensation for lost wages, WestJet could be found to be in contempt of court, based on the vague nature of the Order as drafted. In effect, the Applicant is attempting to mandate that WestJet pay these claims.
61. Furthermore, by mandating that WestJet pay (or not refuse to pay) these types of claims, the Court will effectively be rendering a final determination on the question of whether or not these amounts are payable under the APPR or the Montreal Convention. It is critical that the Court have the benefit of a full evidentiary record, and likely expert evidence, prior to rendering a determination on this issue at the trial of this matter. By enjoining WestJet from refusing to pay these amounts (effectively mandating that WestJet pay these amounts), the Court will be making a final determination, as there is no way for WestJet to recoup these amounts from passengers once paid even if the Court later confirms that these amounts are not available under the applicable law.
62. Furthermore, the Court should be cautious in ordering injunctive relief that has the potential to interfere with WestJet's ability to handle claims as required by the *Canada Transportation Act*. Section 85.01 of the *Canada Transportation Act* provides:

Carrier's Obligation

Process for claims

85.01 (1) A carrier shall establish a process for dealing with claims related to a fare, rate, charge or term or condition of carriage applicable to the air service it offers.

Period to communicate decision

(2) The process shall include an obligation for the carrier, on receipt of a written request to deal with a claim, to communicate to the claimant its decision on the claim within 30 days after the day on which it received the request.
63. The *Canada Transportation Act* requires a carrier to communicate its decision on a claim submitted by a guest within 30 days. By forcing WestJet to either include or not include information as to why a claim is being denied, the draft Order runs the risk of compelling WestJet to breach the *Canada Transportation Act* in order to avoid a contempt of court order.
64. Furthermore, there remains a question as to whether this Court has jurisdiction to order interlocutory injunctive relief under the *BPCPA* that relates specifically to

WestJet's claims reimbursement process, where this process is governed exclusively by federal legislation.

(iv) Applicant fails to demonstrate strong *prima facie* case

65. As it is apparent that the Applicant is seeking mandatory injunctive relief at paragraphs 1(c) and (d) of the draft Order, the Applicant must demonstrate a strong *prima facie* case in order to obtain interlocutory injunctive relief.

R. v. Canadian Broadcasting Corp., 2018 SCC 5, at para 15

66. The Applicant will clearly be unable to meet this burden.
67. There are critical flaws with respect to the allegations made regarding WestJet's alleged guidelines that relate to hotel expenses, meal expenses, roaming charges, lost wages, and prepaid events expenses, and with the Applicant's affidavit evidence filed in support of the Injunction Application.

(a) Hotel Expenses under the APPR

68. At paragraph 49 of Part 3 of the Notice of Application, the Applicant argues that the APPR does not place any specific monetary limit on reimbursement of hotel expenses. This allegation fails to recognize (as pleaded in WestJet's Response to Civil Claim), that the APPR does not specifically obligate carriers to reimburse passengers who choose to book their own hotel accommodations during a delay.
69. The APPR are clear that it is only in situations within the control of the carrier that airlines are obligated to provide passengers with hotel accommodations. Airlines are not obligation to provide passengers with hotel accommodations in situations outside of carrier control.
70. Furthermore, as set out in the Affidavit of Todd Peterson, in some cases passengers choose to book their own hotel accommodations rather than accept the accommodations provided to them by the airline.
71. The Agency has previously considered this exact circumstance and held that in such cases, these are not damages caused by delay recoverable under the Montreal Convention or the airline's tariff. They are due to a failure of a passenger to avail themselves of the airline's offer of a hotel room.
72. In Decision No. 286-C-A-2016, the Agency stated at paragraph 55:

[55] Moreover, the Agency is not satisfied that the damages incurred by Mr. Johnson were the result of the delay and, therefore, compensable pursuant to the Tariff and the Montreal Convention. In this case, the damages appear to have been the result of Mr. Johnson's failure to present himself, as did the other volunteers, to obtain transportation to the hotel, a room and meal vouchers. For this reason as well, Air Canada was not obligated to compensate Mr. Johnson for the expenses he incurred as a result of failing to avail himself of the accommodations offered

by Air Canada and, therefore, did not contravene the Montreal Convention or its Tariff when it offered only a goodwill payment.

73. Any passengers who do not accept hotel accommodations offered to them are not entitled to compensation under the APPR (or the Montreal Convention in the event that they commence an action) for accommodations they then book for themselves. If WestJet chooses to provide any compensation to these passengers on a gratuitous basis, it is entitled to apply a “cap” to these payments, which are not required under the applicable law.

(b) Meal Expenses under the APPR

74. At paragraph 53 of Part 3 of the Notice of Application, the Applicant argues that WestJet has attempted to impose a \$45/day meal reimbursement when the APPR expressly provides that the airline must provide food and drinks in reasonable quantities.
75. At paragraph 54, the Applicant attempts to argue that 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 reimbursement.
76. This argument is wholly without merit. The Applicant provides no authorities or guidance material regarding the meaning of “reasonable quantities” of food and drink. The Applicant has provided no evidence that \$15 per meal or \$45 per day is not “reasonable”. It was the Agency that left the interpretation of “reasonable quantities” open in the APPR by failing to provide a specific dollar amount. Therefore, there must be some discretion on the airlines to come up with a number that is “reasonable” in the circumstances. For instance, if a passenger spends \$1,000 on meals during a five-hour delay, is the airline permitted to place a cap on these expenses as they are clearly not reasonable in the circumstances?
77. In Decision No. 146-C-A-2023, the applicant alleged that he incurred meal expenses beyond the voucher value provided to him by WestJet. WestJet argued that the applicant was responsible for the additional cost resulting from his choice to purchase meal items valued higher than the vouchers. The Agency agreed, holding at paragraph 17:

[17] The Agency finds that Mr. Kamouna has not shown that the food vouchers were inadequate and insufficient in the circumstances. As a result, the Agency finds that Mr. Kamouna is not entitled to compensation for meal expenses that were beyond the voucher value.

78. In Decision No. 3-C-A-2023, the applicant alleged that he incurred expenses due to a flight delay and that the meal voucher provided to him during the delay, amounting to \$15 CAD, was not sufficient to cover the cost of a meal. The Agency noted at paragraph 20:

However, the Tariff states that the respondent must provide a meal voucher to the passenger when the delay is more than four hours, which it did.

79. In light of the above noted decisions, the Applicant will clearly be unable to show a strong *prima facie* case that WestJet only providing passengers with reimbursement totalling \$45/day for food and drink expenses constitutes an unconscionable act or practice under the *BPCPA*. Without the benefit of a trial on the merits, the Court should not take the dramatic preliminary step of ordering an injunction, particularly one as vague as the draft Order, which may have the effect of preventing WestJet from applying any discretion when it comes to dealing with food and drink expenses submitted by passengers, regardless of how exorbitant or unreasonable they may be.

(c) Roaming Charges under the APPR

80. The Applicant has put forward no authorities suggesting that the requirement to provide passengers with access to a means of communication as set out in section 13 of the APPR requires airlines to compensate passengers for roaming charges.
81. WestJet must be entitled to apply guidelines with respect to roaming charges submitted by guests. Roaming charges can be incurred for a number of reasons, unrelated to a delay or cancellation.

(d) Hotel Expenses/Meal Expenses/Roaming Charges/Wage Loss/Prepaid Events under the Montreal Convention

82. WestJet submits that any claims for damages for delay under the Montreal Convention, including hotel expenses, meal expenses, roaming charges, prepaid events missed, and wage loss, are subject to a duty to mitigate. A failure to mitigate defence is available to an airline in a claim for damages brought under the Montreal Convention.

Fares v. Air Canada, 2012 NSSC 71, at para 30, *Brown v. WestJet Airlines Ltd.*, 2023 BCCRT 456, at para

83. Furthermore, the court will consider the reasonableness of expenses incurred in an action under the Montreal Convention and expenses incurred that are not reasonable are not compensable.

Khabazian-Isfahani v. WestJet, unpublished decision of the BCPC dated July 4, 2012

84. The draft Order seeks to enjoin WestJet from conducting any analysis of reasonableness of expenses, or from considering that a passenger failed to mitigate their damages, by enjoining WestJet from referring to any cap on damages or from referring to the fact that damages are not compensable at all.
85. Furthermore, the Applicant has failed to provide sufficient support for a strong *prima facie* case that roaming charges, wage loss, and missed prepaid events are recoverable under the Montreal Convention.

i. Roaming Charges

86. In *Khabazian-Isfahani v. WestJet*, which was an action commenced by a passenger pursuant to the Montreal Convention, the claimants sought between \$50 and \$100 in roaming charges. The court did not award any compensation for roaming charges.

ii. Wage Loss

87. At paragraph 60 of Part 3, the Applicant attempts to argue that income loss is recoverable under the Montreal Convention by relying on a single decision of the Small Claims Court of Quebec. For clarity, the Applicant is not alleging that there is anything in the APPR which require a carrier to compensate a passenger for wage loss. As set out in WestJet's Response to Civil Claim, the Montreal Convention makes clear that the obligation to pay compensation under the Montreal Convention only stems from a passenger commencing an action.
88. The Applicant is asking this Court to make an injunctive order, essentially forcing WestJet to compensate passengers for wage loss, where there is no obligation for WestJet to pay for expenses under the Montreal Convention when no action has been commenced by a passenger, all on the suggestion that a single Quebec Small Claims Court decision awarded income loss in an action commenced under the Montreal Convention.
89. Lawyers are not permitted to appear in the Quebec Small Claims Court, thereby limiting the opportunity for a full consideration of all relevant authorities on particular issues before the Court. Further, the decisions of that Court cannot be appealed. Article 563 of the Quebec *Code of Civil Procedure* expressly provides that a small claims judgment only has the authority of *res judicata* between the parties to the dispute and for the amount claimed:

563. The judgment has the authority of *res judicata* only with respect to the parties to the dispute and for the amount claimed. It cannot be cited in an application between the same parties for the same cause before a different Court. Any application or proof based on the judgment must be dismissed by the Court on its own initiative or on a party's request.

Code of Civil Procedure, CQLR c C-25.01, s. 563

90. In the decision of *9101-8713 Québec inc. c. 9197-0681 Québec inc.*, the Court of Quebec confirmed that judgments from the Quebec Small Claims Court have little precedential value. The Court stated that the judgments of the Small Claims Division submitted by the Applicant had not been helpful in resolving the dispute since, among other things, they were *res judicata* only against the parties to the litigation:

Les jugements de la Division des petites créances soumis par la Demanderesse n'ont pas été utiles à la recherche d'une solution au présent litige. Au-delà du fait qu'ils n'ont autorité de la chose jugée qu'à l'égard des parties au litige et que pour le montant réclamé [...]

9101-8713 Québec inc. c. 9197-0681 Québec inc., 2020 QCCQ 5573, at para. 58

91. The Court should be extremely cautious on an interlocutory injunction application seeking to enjoin WestJet from doing something where the Applicant has failed to point to a single Canadian decision, aside from a small claims decision in Quebec, where a court has awarded lost wages under the Montreal Convention.
92. Furthermore, claims for wage loss are clearly more appropriately litigated through the court process, where airlines can request documentation substantiating income loss and documentation that should show any attempts to mitigate.

See also *Robotham v. WestJet Airlines*, 2014 ONSC 3141

iii. Missed Prepaid Events

93. At paragraph 64 of Part 3 of the Notice of Application, the Applicant argues that WestJet's representations and conduct suggesting that it is not required to reimburse for missed prepaid events are contrary to Article 19 of the Montreal Convention. The Applicant argues that there is a serious issue to be tried of whether it was deceptive or unconscionable of WestJet to represent or otherwise engage in conduct suggesting that no reimbursement is owed for missed prepaid events.
94. There is no obligation for WestJet to pay for expenses under the Montreal Convention when no action has been commenced by a passenger. In any event, there are a number of authorities confirming that no reimbursement for prepaid events is available to passengers under the Montreal Convention.
95. In Decision No. 46-C-A-2022, the applicants' flight from Ottawa to Toronto was delayed and as a result, they missed their connecting flight to Tel Aviv. They sought reimbursement for prepaid hotels and missed meals in Tel Aviv. The CTA noted that as the payments for these expenses were made prior to the delay of their flight and were not incurred as a result of the delay, the Agency has no authority to award compensation for these expenses. In conducting this exercise, the Agency was required to decide whether the respondent properly applied its tariff, which incorporated the terms and conditions of the Montreal Convention. As such, it is clear that the Agency determined that these amounts did not constitute damages caused by delay under Article 19 of the Montreal Convention.
96. Furthermore, there is Canadian case law holding that prepaid expenses are not recoverable under the Montreal Convention. In *Kent Brown et al. v. WestJet Airlines Ltd.* an unreported decision of the Court of King's Bench of Winnipeg (Small Claims), File No. SC23-01-43188, the Court held:

Any expenses incurred after the delay can be considered for compensation, but costs that were pre-decided and prepaid cannot be classified as damages arising from the delay in carriage...

...

Airlines cannot be reasonably expected to serve as insurance providers for any and all pre-booked expenses like hotels or concerts etc., especially considered the inherent nature of interruptions in air travel. Such an expectation would essentially turn airlines into unwitting insurers for all pre-booked commitments.

97. While we expect that the Applicant will argue that this decision is somehow wrongly decided and that this Court should prefer his own cited decision from the Small Claims Court of Ontario, there is no reason for this Court to prefer that decision or to determine that the Applicant has a strong *prima facie* case without any cited authority from British Columbia and in the face of court decision which held that these prepaid costs are not recoverable.
98. In handling claims for compensation when no action for damages has been commenced, WestJet should be entitled to rely on case law stating that pre-paid expenses are not recoverable under the Montreal Convention in informing passengers about the types of claims it will reimburse under its claims reimbursement process, and in not paying claims (or putting a cap on claims it will pay voluntarily without an action being commenced).

(e) Negative Effects of draft Order

99. In some cases, WestJet may choose to provide a gratuitous payment to passengers who incur expenses, even though a delay or cancellation may be outside of the control of WestJet and WestJet is not obligated to compensate these expenses under the APPR.
100. In circumstances outside of the control of WestJet, there is no obligation under the APPR to provide passengers with food and drink, hotel accommodations, or a means of communications. For international flights, WestJet is not liable for any expenses incurred if in a court action, it proves that it took all reasonable measures or that it was impossible to avoid damages caused by delay under the Montreal Convention.
101. With respect to Mr. Lukacs' Affidavit, he has failed to include evidence demonstrating that the passengers who were exchanging email correspondence with WestJet were actually entitled to recovery of the expenses sought, either under the APPR, or under the Montreal Convention.
102. For example, at paragraph 34 and Exhibit "X" of Mr. Lukacs' Affidavit, he includes email correspondence between a passenger and WestJet dated August 27, 2024. As set out in the email correspondence, this was an itinerary impacted by a labour disruption, which is a situation outside of the control of WestJet as set out in section 10 of the APPR.
103. Airlines are not obligated to provide passengers with hotel accommodations in situations outside of their control. Therefore, the provision of \$150 CAD based on an internal guideline is clearly in the nature of a gratuitous payment (as it is not required under the APPR), or a payment in recognition of potential liability under the Montreal Convention, without the passenger having to take the step of commencing an action.

104. There are numerous instances of carriers offering compensation of hotel accommodations or meal vouchers, when they are not obligated to do so as a delay or cancellation was outside of their control. These types of complaints often appear before the Agency which then determines whether or not the carrier complied with the terms of its tariff.
105. For example, in Decision No. 120-C-A-2022, the applicant was delayed from Phoenix to Thunder Bay, and arrived 18 hours later than originally scheduled. The Agency determined that the applicant was not entitled to compensation for inconvenience under the APPR and also held at paragraph 12:

In addition, the respondent provided a standard of care to the applicant in the form of hotel accommodations and meal vouchers, which it was not obligated to do in a situation where the delay was outside its control.

106. The provision of compensation for hotel and meal expenses as evidenced in the exhibits attached to Mr. Lukacs' affidavit does not prove that passengers were entitled to compensation under the APPR or the Montreal Convention. In fact, at least one of these exchanges resulted in a gratuitous payment that WestJet was not obligated to provide under the APPR.
107. The CTA decisions referenced by the Applicant in the Notice of Application are limited to their facts, and the statements contained therein cannot be extrapolated to all instances where WestJet provided a passenger with a \$150 payment for a hotel, a \$15 payment for a meal, or did not pay for roaming charges requested. As set out in the above noted examples, in many cases the Agency has determined that it is acceptable for airlines to handle claims as WestJet has, such that the actions alleged in this Notice of Application cannot constitute a deceptive act or practice or unconscionable act or practice without an examination of the handling of each individual complaint and whether or not each passenger was entitled to compensation at all.

(f) Alternatively, there is no serious issue to be tried as the pleadings should be struck

108. WestJet submits that even if the Court determines that the only injunctive relief the Applicant is seeking is prohibitive in nature, there is no serious issue to be tried in the Action, for the same reasons as set out above.
109. The evidence does not support the view that the Claims Reimbursement Page or the purported guidelines are deceptive or misleading, or that their application by WestJet was unconscionable. On the website and in response to requests for reimbursement, WestJet was informing passengers what its general guidelines were for reimbursement.
110. There are multiple avenues available to passengers if they are unsatisfied with the compensation provided, and the exhibits attached to Mr. Lukacs' Affidavit demonstrate that passengers are well aware of these options. Passengers can complain to the Agency or seek damages by way of court action (which is required in any event to

seek damages pursuant to Article 19 of the Montreal Convention). WestJet is under no obligation to provide passengers with compensation pursuant to the Montreal Convention unless an action for damages is brought by a passenger. However, the evidence shows that WestJet occasionally chooses to provide such compensation through this reimbursement process in any event.

111. It is neither a deceptive act or practice or unconscionable act or practice to tell passengers what WestJet will do and then do it. There is no evidence that WestJet ever informed passengers that they were not entitled to further relief under applicable law.
112. The Applicant is alleging at paragraphs 70 and 71 of the Notice of Application that by posting and implementing the guidelines, WestJet is admitting to breaching sections of the Air Transportation Regulations (section 110(4)) and the *Canada Transportation Act* (section 67(3)). This is a gross mischaracterization of WestJet's position as set in its Response to Civil Claim. WestJet simply stated that the Claims Reimbursement Page itself did not form part of the contract of carriage. WestJet maintains that its handling of claims is in accordance with the terms and conditions of its tariff and the contract of carriage and has not made any admission to the contrary.
113. However, in any event, WestJet maintains that the Canadian Transportation Agency continuously monitors airline websites for regulatory non-compliance. To date, WestJet has not received any communications from the Agency that the Claims Reimbursement Page as it existed was non-compliant with any regulations administered by the Agency.
114. As stated by the Court in *Dairy Bureau of Canada v. Annable Foods Ltd.*, 1993 CarswellBC 639 (BCSC), a decision upon which the Applicant relies, at paragraph

80 In *Westfair* Huddart J. examined the material at issue and concluded that it was neither deceptive nor misleading. Earlier in these reasons when dealing with the passing off misrepresentation issue I did the same. It seems to me that my conclusions on that point are equally applicable to the Applicants' allegations under the Trade Practice Act. There is no evidence before the court that average consumers are or are likely to be deceived. No regulator has intervened in support of the Applicants' contentions. In this case the regulators reviewed this new product, they required the defendants to make certain changes, i.e., by deleting the word "milk" from the package and they appear to be content to let the defendants proceed with selling Homolite products to the public. While the lack of such regulatory intervention is not conclusive with respect to the Applicants' Trade Practice Act contention, it is a factor properly to be taken into account by the court in determining whether to enjoin further sales of this product pending trial.

115. The lack of any regulatory action taken by the Canadian Transportation Agency with respect to the Claims Reimbursement Page must properly be considered by this Court

in determining whether the significant injunctive relief sought in this Application should be ordered in advance of a trial on the merits.

Part 6: MATERIAL TO BE RELIED ON

1. Affidavit #1 of Todd Peterson made October 30, 2024;
2. Affidavit #1 of Elisa Aguiar, made October 30, 2024;
3. Pleadings as filed; and
4. Such other material as counsel may advise and as this Honourable court may permit.

The Application Respondent estimates that the application will take two days and that submissions on the issue of an adjournment will take 90 minutes.

Dated: October 30, 2024



Signature of Michael Dery
 application respondent lawyer for
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