



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**

(Redaction of Documents Disclosed in Document Discovery)

**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 January 13, 2025 at 9:45am** for the order(s) set out in Part 1 below.

The applicant estimates that the application will take **forty-five (45) minutes**.

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

**Part 1: ORDERS SOUGHT**

1. Documents 1.33-1.36 from the Defendants’ list of documents be produced to the Plaintiff without any redactions within five (5) business days of this Court’s Order;
2. For Documents 1.03-1.28 from the Defendants’ list of documents, the Defendants shall provide greater specificity on the nature of the privileged being asserted in the redacted portions of this documents along with proper descriptions in accordance with *Gardner v. Viridis Energy Inc.*, 2013 BCSC 580;
3. Costs of this application in any event; and
4. Such other relief as this Honourable Court deems just.

**Part 2: FACTUAL BASIS**

**Background of this Application**

5. 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.
6. In compliance with the timelines in Rule 7-1, the Plaintiff served its list of documents and copies of those documents by November 1, 2024. The Defendant sought a three-week extension to the document discovery deadline, which the Plaintiff consented to.
7. On November 22, 2024, the Defendant served a list of documents but demanded that Plaintiff's counsel and the Plaintiff provide further "acknowledgments" on top of the implied undertakings that apply to every civil case. Counsel for the Defendant knew that counsel for the Plaintiff will be out of town starting November 28, 2024. Despite the Plaintiff's immediate response to the requested "acknowledgments," the Defendant delayed until November 27, 2024 to provide copies of the documents.
8. Upon receipt of the documents, counsel for the Plaintiff wrote to counsel for the Defendant regarding two sets of redactions: (a) documents 1.33-1.36 were redacted for "relevance"; and (b) documents 1.03-1.28 were redacted for "privilege" without any specificity being provided on what "privilege" is being asserted.

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

9. 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. The Defendant, WestJet Airlines Ltd. [**WestJet**], is a commercial airline.

**The Impugned WestJet Webpage and WestJet Conduct**

10. 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

11. The underlying action relates to WestJet allegedly using the Guidelines, both on WestJet’s website and behind the scenes, to mislead passengers on their entitlements to reimbursement.

AN OCC, Part 1 at paras. 3 and 20-36

**Document Discovery in this Action**

12. On October 31, 2024, the Plaintiff served its list of documents and documents, within the deadline under Rule 7-1.

Affidavit #1 of Brittany Dieno made on December 5, 2024 [**Dieno Affidavit #1**] at Exhibit A (p. 5)

13. On November 1, 2024, the Defendant requested a three-week extension for document discovery (i.e., November 22, 2024). The Plaintiff consented to this extension.

Dieno Affidavit #1 at Exhibit B (p. 7-8)

14. Of note, the parties were scheduled to appear on an application on November 5-6, 2024 and the Plaintiff is seeking an interlocutory injunction regarding the Guidelines. The application is scheduled to continue on December 9, 2024.

15. On November 22, 2024 at 4:16 p.m., the Defendant served a list of documents. Alongside the list of documents, the Defendant requested “*an acknowledgement in writing confirming your agreement*” to various propositions that do not appear to be complete or accurate at law in regards to implied undertakings.

Dieno Affidavit #1 at Exhibits C and D (p. 11 and 13)

16. First thing in the morning on the following business day, the Plaintiff wrote back to the Defendant stating that:

*Thank you for your note. Counsel and the plaintiff are fully aware of the implied undertaking to the Court which WestJet has reproduced (in bold) at the last page of the List of Documents form. For greater certainty, we are not acknowledging or agreeing to anything that goes beyond the existence of the implied undertaking to the Court.*

*The assertion in your letter that "implied undertaking continues to bind the parties and their counsel even after settlement of a lawsuit into perpetuity" is not quite accurate or complete on the state of the law on implied undertakings. For example, the implied undertaking is significantly diminished when it has been used at trial.*

*Please provide copies of the documents as soon as possible. Thank you.*

Dieno Affidavit #1 at Exhibit E (p. 21)

17. Counsel for the Defendant responded the following business day stating “[w]e *will forward a link to you today so that you can download the documents.*” Counsel for the Defendant did not provide the documents that day despite follow-up. Counsel for the Defendant knew that counsel for the Plaintiff would be out of town on November 28, 2024, in light of their dealings in another file.

Dieno Affidavit #1 at Exhibits F-G (p. 23 and 26)

18. Counsel for the Defendant finally provided the documents on November 27, 2024.

Dieno Affidavit #1 at Exhibit H (p. 27-191)

19. On November 29, 2024, counsel for the Plaintiff wrote to counsel for the Defendant noting concerns about various redactions in the Defendants’ documents:

- a. Documents 1.33-1.36 being redacted for “relevance.” Plaintiff’s counsel proposed that the Defendants could provide the unredacted documents for “counsel’s eyes only” to avoid the need for a court application.

- b. Documents 1.03-1.28 were redacted for “privilege” without any specificity being provided on what “privilege” is being asserted.

Dieno Affidavit #1 at Exhibit I (p. 193-195)

20. On December 5, 2024, counsel for the Defendants responded as follows:

- a. For documents 1.33-1.36, Defendants’ counsel insisted that the Plaintiff must bring an application without any real explanation why it cannot simply be resolved with a “counsel’s eyes only” basis review.
- b. For documents 1.03-1.28, Defendants’ counsel offered unredacted copies for review without waiver of privilege. As of the time of filing this Notice of Application (i.e., December 9, 2024 at around 9:45 a.m., the Defendants have yet to provide the unredacted copies as proposed).

Dieno Affidavit #J at Exhibit J (p. 197)

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

21. The documents in question on this application are all listed in Part 1 of the Defendant’s list of documents. In other words, the Defendant acknowledges that those documents could be used to prove or disprove a material fact.

22. Once a document is listed in Part 1 of the list of documents as a document that goes to prove or disprove a material fact, the whole of the document should be produced, unless the Court orders otherwise in exceptional circumstances.

[0878357 B.C. Ltd. v. Tse](#), 2012 BCSC 516 at para. 28  
[Este v. Blackburn](#), 2016 BCCA 496  
[North American Trust Co. v. Mercer International Inc. \(1999\)](#), 1999 CanLII 4550 (BC SC)  
[Lewis v. Petryk](#), 2005 BCSC 77

23. Significant portions of documents 1.33-1.36 were redacted for reasons of “relevance.” There are no exceptional circumstances in this case warranting the redaction. The Defendant should be ordered to disclose documents 1.33-1.36 in their entirety.

Dieno Affidavit #1 at Exhibit I (Docs. 1.33-1.36 at p. 107-191)

24. Documents 1.03-1.28 were redacted based on the Defendant's assertion of "privilege." The Defendant failed to identify what privilege is being asserted. There is no way for the Court and the Plaintiff to assess what ground of privilege is relied upon. It is also contrary to the Court of Appeal guidance that a proper note must be made when a party seeks to redact a portion of a document.

[\*Este v. Blackburn\*](#), 2016 BCCA 496 at para. 20

25. The Defendant should be ordered to provide greater specificity on the nature of the privileged being asserted in the redacted portions of this documents in compliance with [\*Gardner v. Viridis Energy Inc.\*](#), 2013 BCSC 580.

26. Considering the Defendant already had a lengthy extension to prepare its list of documents, the small number of documents in question, and the redactions based on assertions of "privilege" in documents 1.03-1.28 appear to be of a similar or identical nature, it is expected that the Defendant would not require significant time to comply with this Court's Order. The Plaintiff submits that five (5) business days is more than sufficient.

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

1. Affidavit #1 of Dr. Gabor Lukacs made on October 16, 2024.
2. Affidavit #1 of Brittany Dieno made on December 5, 2024.
3. The pleadings in this action.
4. 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: December 9, 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

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**APPENDIX**

**THIS APPLICATION INVOLVES THE FOLLOWING:**

- an application relating to document discovery