

Amended pursuant to Rule 6-1(5)(a)

Original filed September 20, 2024



NO. S254494  
NEW WESTMINSTER REGISTRY

**IN THE SUPREME COURT OF BRITISH COLUMBIA**

BETWEEN:

AIR PASSENGER RIGHTS

PLAINTIFF

AND:

WESTJET AIRLINES LTD.

DEFENDANT

**RESPONSE TO AMENDED NOTICE OF CIVIL CLAIM**

**Filed by: WESTJET AIRLINES LTD. (“WestJet”)**

**Part 1: RESPONSE TO AMENDED NOTICE OF CIVIL CLAIM FACTS**

**Division 1 – Defendant’s Response to Facts**

1. The facts alleged in none of the paragraphs of Part 1 of the Amended Notice of Civil Claim are admitted.
2. The facts alleged in paragraphs 1 to 4 and 6 to 47 of Part 1 of the Amended Notice of Civil Claim are denied.
3. The facts alleged in paragraph 5 of Part 1 of the Amended Notice of Civil Claim are outside the knowledge of WestJet.

**Division 2 – Defendant’s Version of Facts**

4. In response to paragraph 1 of Part 1 of the Amended Notice of Civil Claim, WestJet denies that it has disseminated a “guideline” that has the capability or tendency to mislead passengers as alleged or at all.
5. In response to paragraph 2 of Part 1 of the Amended Notice of Civil Claim, WestJet specifically denies that passengers’ comprehensive rights to reimbursement are provided in federal statutes or incorporated into contracts of carriage. In further response to paragraph 2 of Part 1 of the Amended Notice of Civil Claim, denies that any alleged partial reimbursement made is an acknowledgement or admission of

- liability or of a failure to comply with federal laws and tariff terms. WestJet says that these conclusory statements have no basis in fact or law and are incapable of proof.
6. In response to paragraph 3 of Part 1 of the Amended Notice of Civil Claim, WestJet denies that its “guideline” purports to misinform passengers and puts the Plaintiff to the strict proof thereof. WestJet further denies that its “guideline” is contrary to the Montreal Convention or the *Carriage by Air Act* and puts the Plaintiff to the strict proof thereof.
  7. In response to paragraph 4 of Part 1 of the Amended Notice of Civil Claim and the whole of the Amended Notice of Civil Claim, WestJet says that the relief sought pursuant to section 172(3)(a) of the *Business Practices and Consumer Protection Act*, [SBC 2004] Chapter 2 (the “BPCPA”), of a restoration order to alleged “affected passengers” who are not named as plaintiffs or identified in this proceeding is not available as no action has been brought on behalf of any alleged passengers for damages pursuant to any statutory or common law causes of action. WestJet further says that the Amended Notice of Civil Claim fails to plead that the “affected passengers” have an interest in any money sought to be recovered.
  8. In response to paragraph 5 of Part 1 of the Amended Notice of Civil Claim, WestJet says that the Plaintiff is not a proper plaintiff and any pleadings made by this Plaintiff are conclusory statements that have no basis in fact or law and are incapable of proof.
  9. In response to paragraph 6 of Part 1 of the Amended Notice of Civil Claim, WestJet admits only that it is an Alberta corporation extra-provincially registered in British Columbia with an address for service in these proceedings of 2700 – 700 West Georgia Street, Vancouver.
  10. In further response to paragraph 7 of Part 1 of the Amended Notice of Civil Claim, WestJet denies that it is a commercial airline and denies that it operates domestic or international passenger flights. WestJet, an Alberta Partnership, in which WestJet is a partner, operates as a commercial air carrier.
  11. In response to paragraphs 9 to 13 of Part 1 of the Amended Notice of Civil Claim, WestJet says that Article 35 of the Montreal Convention provides that a passenger’s right to damages shall be extinguished if they do not bring an action within a period of two years, reckoned from the date of arrival at the destination, or from the date on which the aircraft ought to have arrived, or from the date on which the carriage stopped. WestJet says that the within action is not an action under the Montreal Convention.
  12. In further response to paragraphs 9 to 13 of Part 1 of the Amended Notice of Civil Claim, WestJet says that Article 19 of the Montreal Convention provides that a carrier is not liable for damages caused by delay if it took all measures that could reasonably be taken to avoid the damage or that it was impossible for it or them to take such measures.
  13. In further response to paragraphs 9 to 13 of Part 1 of the Amended Notice of Civil Claim, WestJet says that Article 29 of the Montreal Convention states that non-compensatory damages shall not be recoverable.

14. In response to paragraph 20 of Part 1 of the Amended Notice of Civil Claim, WestJet denies the allegations therein and puts the Plaintiff to the strict proof thereof.
15. In response to paragraphs 21 to 22 of Part 1 of the Amended Notice of Civil Claim, WestJet says that the content of the "Reimbursement Page" as defined has been revised. WestJet says that any revisions to the Reimbursement Page do not constitute an acknowledgement of wrongdoing of any kind or an admission of liability.
16. In response to paragraph 23 of Part 1 of the Amended Notice of Civil Claim, WestJet says that the Plaintiff's allegation that the "Guidelines purport to represent", and the Plaintiff's allegation of various items with the defined terms "Hotel Cap", "Meal Cap", "Roaming Refusal", "Prepaid Events Refusal", and "Lost Wages", have no basis in fact or law and are incapable of proof.
17. In response to paragraphs 24, 27, 30, 33 and 35 of Part 1 of the Amended Notice of Civil Claim, WestJet denies that the Reimbursement Page is contrary to Articles 19, 22, or 26 of the Montreal Convention and puts the Plaintiff to the strict proof thereof.
18. In further response to paragraphs 24, 27, 30, 33 and 35 of Part 1 of the Amended Notice of Civil Claim, WestJet says that the Montreal Convention provides passengers with a cause of action for damages caused by delay.
19. In further response to paragraphs 24, 27, 30, 33 and 35 of Part 1 of the Amended Notice of Civil Claim, WestJet say that the Montreal Convention does not govern and has no application to the information found on a website.
20. In further response to paragraphs 24, 27, 30, 33 and 35 of Part 1 of the Amended Notice of Civil Claim, WestJet says that the Reimbursement Page does not form part of a contract of carriage.
21. In response to paragraph 25 of Part 1 of the Amended Notice of Civil Claim, WestJet denies that the Reimbursement Page constitutes a breach of section 14(2) of the APPR or section 86.11(4) of the *Canada Transportation Act*. WestJet says that the APPR and the *Canada Transportation Act* do not govern compensation in situations where passengers have booked their own accommodation. WestJet further says that the APPR do not stipulate specific amounts payable to passengers for accommodations.
22. In response to paragraph 26 of Part 1 of the Amended Notice of Civil Claim, WestJet says that the Plaintiff's definition of "Hotel Cap Passengers" as passengers who "submit a request for reimbursement" is a conclusory statement that has no basis in fact or law and is incapable of proof.
23. In further response to paragraphs 26, 29, and 32 of Part 1 of the Amended Notice of Civil Claim, WestJet denies that any alleged partial payment is an acknowledgement or admission of liability.
24. In response to paragraph 28 of Part 1 of the Amended Notice of Civil Claim, WestJet denies that its Reimbursement Page constitutes a breach of section 14(1)(a) of the APPR or section 86.11(4) of the *Canada Transportation Act*. WestJet further says

that the APPR do not stipulate specific amounts payable to passengers for food and drink.

25. In response to paragraph 29 of Part 1 of the Amended Notice of Civil Claim, WestJet says that the Plaintiff's definition of "Meal Cap Passengers" as passengers who "submit a request for reimbursement" is a conclusory statement that has no basis in fact or law and is incapable of proof.
26. In response to paragraph 31 of Part 1 of the Amended Notice of Civil Claim, WestJet denies that its Reimbursement Page constitutes a breach of section 14(1)(b) of the APPR or section 86.11(4) of the *Canada Transportation Act*. WestJet says that the APPR and the *Canada Transportation Act* do not create an obligation for carriers to provide passengers with compensation for roaming charges they have incurred, stipulate amounts payable to passengers for roaming charges, or stipulate any specific means of communication that must be made available to passengers.
27. In response to paragraph 32 of Part 1 of the Amended Notice of Civil Claim, WestJet says that the Plaintiff's definition of "Roaming Refusal Passengers" as "passengers who submit a request for reimbursement" is a conclusory statement that has no basis in fact or law and is incapable of proof.
28. In response to paragraph 33 of Part 1 of the Amended Notice of Civil Claim, WestJet specifically denies that prepaid expenses are recoverable under the Montreal Convention as these are not damages caused by delay.
29. In response to paragraph 34 of Part 1 of the Amended Notice of Civil Claim, WestJet says that the Plaintiff's definition of "Prepaid Events Refusal Passengers" as passengers who "submit a request for reimbursement" is a conclusory statement that has no basis in fact or law and is incapable of proof.
30. In response to paragraph 34 of Part 1 of the Amended Notice of Civil Claim, WestJet denies that any alleged partial payment is an acknowledge or admission that out-of-pocket expenses are owing to Prepaid Events Refusal Passengers.
31. In response to paragraph 36 of Part 1 of the Amended Notice of Civil Claim, WestJet denies that lost wages are compensable under the Montreal Convention.
32. In further response to paragraph 36 of Part 1 of the Amended Notice of Civil Claim, WestJet says that the Plaintiff's definition of "Lost Wages Refusal Passengers" as passengers who "submit a request for reimbursement" is a conclusory statement that has no basis in fact or law and is incapable of proof.
33. In response to paragraphs 41 to 47 of Part 1 of the Amended Notice of Civil Claim, WestJet specifically denies that the alleged Affected Passengers (defined as the Hotel Cap Passengers, Meal Cap Passengers, Roaming Refusal Passengers, Prepaid Events Refusal Passengers, and Lost Wages Refusal Passengers) have a liquidated damages claim under the Montreal Convention or in breach of contract or in breach of the BPCPA.
34. In further response to paragraphs 41 to 47 of Part 1 of the Amended Notice of Civil Claim, WestJet says that the Plaintiff has failed to plead sufficient facts that any

alleged passengers have incurred damages or that they have an interest in any money in the hands of WestJet, as alleged or at all.

35. In further response to paragraphs 41 to 47 of Part 1 of the Amended Notice of Civil Claim, WestJet specifically denies that all alleged passengers who travelled on or after August 3, 2022, have a claim for damages. WestJet says that the within action is not an action for damages brought by passengers and does not toll any applicable limitation periods, including under the *Limitation Act*, S.B.C. 2012, c 13, or any other provincial limitation statutes.
36. In further response to paragraphs 41 to 46 of Part 1 of the Amended Notice of Civil Claim, WestJet further says that the within action is not an action under the Montreal Convention and that the commencement of an action by an individual passenger within two years of their arrival at destination is a condition precedent to suit under the Montreal Convention. WestJet says that as no action has been brought by a passenger who is alleging to have suffered damages under the Montreal Convention, any causes of action have been extinguished if no such action has been brought by a passenger within two years of their arrival at destination.

### **Division 3 – Additional Facts**

1. WestJet says that some or all of the relief sought by the proposed injunction is moot as the Reimbursement Page (as defined in paragraph 21 of Part 1 of the Amended Notice of Civil Claim) has been revised.

### **Part 2: RESPONSE TO RELIEF SOUGHT**

1. WestJet consents to the granting of the relief sought in none of the paragraphs of Part 2 of the Amended Notice of Civil Claim.
2. WestJet opposes the granting of the relief sought in all of the paragraphs of Part 2 of the Amended Notice of Civil Claim.
3. WestJet takes no position on the granting of the relief sought in paragraphs NIL of Part 2 of the Amended Notice of Civil Claim.

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

1. WestJet denies each and every allegation as set out in Part 3 of the Amended Notice of Civil Claim and puts the Plaintiff to the strict proof thereof.
2. In response to paragraph 1 of Part 3 of the Amended Notice of Civil Claim, WestJet says that the Plaintiff is not a proper plaintiff to this action.
3. In response to paragraphs 4 and 5 of Part 3 of the Amended Notice of Civil Claim, WestJet denies that it is a “supplier” and puts the Plaintiff to the strict proof thereof. WestJet says that the Plaintiff has failed to plead the necessary facts to establish that WestJet is a “supplier” under the *BPCPA*.
4. In response to paragraph 6 of Part 3 of the Amended Notice of Civil Claim, WestJet denies that its conduct is governed by the *BPCPA* irrespective of where a consumer

resides. WestJet says that the *BPCPA* does not apply to transactions between WestJet and consumers that occurred outside of British Columbia and non-residents of British Columbia are not entitled to claim under the *BPCPA*.

5. In further response to paragraphs 6 and in response to paragraph 7 of Part 3 of the Amended Notice of Civil Claim, WestJet says that the Plaintiff has failed to plead any material facts that the Affected Passengers are “consumers” under the *BPCPA*.
6. In response to paragraph 8 and 11 of Part 3 of the Amended Notice of Civil Claim, WestJet denies that it engaged in a deceptive act or practice under the *BPCPA* as alleged, or at all and puts the Plaintiff to the strict proof thereof.
7. In further response to paragraph 8 of Part 3 of the Amended Notice of Civil Claim, WestJet says that the Plaintiff has failed to plead the required elements of a deceptive act or practice as section 5 of the *BPCPA* only prohibits deceptive acts in the context of “consumer transactions”.
8. In response to paragraph 12 and 15 of Part 3 of the Amended Notice of Civil Claim, WestJet denies that it engaged in an unconscionable act or practice under the *BPCPA*, as alleged, or at all, and puts the Plaintiff to the strict proof thereof.
9. In further response to paragraph 12 of Part 3 of the Amended Notice of Civil Claim, WestJet says that the Plaintiff has failed to plead the required elements of unconscionability under section 8 of the *BPCPA*.
10. In further response to paragraph 12 of Part 3 of the Amended Notice of Civil Claim, WestJet says that the Plaintiff has failed to plead the required elements of an unconscionable act or practice as section 9 of the *BPCPA* only prohibits unconscionable acts or practices in the context of “consumer transactions”.
11. In response to paragraph 10 and 14 of Part 3 of the Amended Notice of Civil Claim, WestJet says that the claims of passengers are barred by the effluxion of time, and WestJet pleads and relies on the *Limitation Act*, S.B.C. 2012, c 13, *Limitations Act*, R.S.A. 2000, c. L-12, *Limitations Act*, S.S. 2004, c L-16.1, *Limitation of Actions Act*, C.C.S.M. c. L150; *Limitations Act*, 2002, S.O. 2002, c. 24, Sched B; *Limitations Act*, S.N.L. 1995, L-16.1; *Limitation of Actions Act*, S.N.S. 2014, c.35; *Limitation of Actions Act*, S.N.B. 2009, c. L-8.5, *Statute of Limitations*, R.S.P.E.I. 1974, Cap. S7; *Limitation of Actions Act*, R.S.N.W.T. 1988, c. L-8, *Limitation of Actions Act*, R.S.Y. 2002, c. 139, and any amendments thereto.
12. In further response to paragraphs 10 to 14 of Part 3 of the Amended Notice of Civil Claim, WestJet says that this action does not serve to toll any applicable limitation period.
13. In further response to paragraph 10a. and 14a. of Part 3 of the Amended Notice of Civil Claim, WestJet denies that any of the Affected Passengers have a right to seek damages under section 171 of the *BPCPA* as the Plaintiff has failed to plead that any of the Affected Passengers suffered damage or loss due to a contravention of the *BPCPA* and no action has been commenced under section 171 of the *BPCPA*. WestJet further says that the Plaintiff’s failure to plead reliance on any alleged deceptive act or practice is fatal to any claim under section 171 of the *BPCPA*.



14. In further response to paragraph 10b. and 14a. of Part 3 of the Amended Notice of Civil Claim, WestJet denies that any of the Affected Passengers have a right to seek damages against WestJet under the Montreal Convention as the Plaintiff has failed to plead that any of the Affected Passengers suffered damage or loss as a result of delay and no action has been commenced under the Montreal Convention.
15. In further response to paragraph 10c. and 14b. of Part 3 of the Amended Notice of Civil Claim, WestJet denies that any of the Affected Passengers have a right to seek damages against WestJet in breach of contract as the Plaintiff has failed to plead that any of the Affected Passengers suffered damage or loss as a result of a breach of contract and no action has been commenced in breach of contract.
16. In further response to paragraph 10d. and 14c. of Part 3 of the Amended Notice of Civil Claim, WestJet denies that any of the Affected Passengers have a right to seek damages against WestJet in breach of the duty of honest contractual performance as the Plaintiff has failed to plead that any of the Affected Passengers suffered damage or loss and no action has been commenced for breach of the duty of honest contractual performance.
17. In further response to paragraphs 10a., 10b., 10c., 10 d. 14a., 14a., 14b., and 14.c. of Part 3 of the Amended Notice of Civil Claim, WestJet says that these paragraphs constitute bare legal conclusions unsupported by the necessary material facts, such that there is no reasonable claim pleaded under section 171 and/or 172(3)(a) of the *BPCPA*, under the Montreal Convention, in breach of contract, or in breach of the duty of honest contractual performance.
18. In response to paragraphs 11 and 15 of Part 3 of the Amended Notice of Civil Claim, WestJet denies that a restoration order under section 172(3)(a) of the *BPCPA* is available in this action. WestJet says that there are four prerequisites for a restoration order under section 172(3);
  - (i) the court must make a declaration or injunctive order under section 172(1) before it can make an order under section 172(3);
  - (ii) the supplier must have acquired something ("money or other property or thing") because of a contravention of the legislation;
  - (iii) the beneficiary of an order under section 172(3) must have been the source of money or some other thing acquired by the supplier; and
  - (iv) the beneficiary must have an interest in the thing to be restored.
19. In further response to paragraphs 11 and 15 of Part 3 of the Amended Notice of Civil Claim, WestJet says the Amended Notice of Civil Claim fails to plead sufficient facts required for (ii) and (iii), and (iv) and that a restoration order cannot be granted as there is no pleading that WestJet has acquired anything from the proposed beneficiary of the proposed restoration order.
20. In further response to paragraphs 11 and 15 of Part 3 of the Amended Notice of Civil Claim, WestJet denies that it acquired anything from any proposed beneficiary. WestJet further denies that any proposed beneficiary has an interest in anything sought to be restored.

21. In response to paragraph 16 of Part 3 of the Amended Notice of Civil Claim, WestJet says that the “guidelines” on the Reimbursement Page have been revised, such that some or all of the relief sought in an interim or permanent injunction is now moot.
22. In response to paragraphs 17 and 18 of Part 3 of the Amended Notice of Civil Claim, WestJet denies that Article 29 of the Montreal Convention (or any other provision of the Montreal Convention) provides any rights or causes of action to the Plaintiff to bring claims under the Montreal Convention on its own behalf or on behalf of named or unnamed passengers.
23. WestJet pleads and relies upon the provisions of the:
  - (a) *Business Practices and Consumer Protection Act*, S.B.C. 2004, c. 2, and any amendments thereto;
  - (b) *Limitation Act*, S.B.C. 2012, c. 13;
  - (c) *Limitations Act*, R.S.A. 2000, c. L-12;
  - (d) *Limitations Act*, S.S. 2004, c. L-16.1;
  - (e) *Limitation of Actions Act*, C.C.S.M. c. L150;
  - (f) *Limitations Act, 2002*, S.O. 2002, c. 24, Sched B;
  - (g) *Limitations Act*, S.N.L. 1995, L-16.1;
  - (h) *Limitation of Actions Act*, S.N.S. 2014, c.35;
  - (i) *Limitation of Actions Act*, S.N.B. 2009, c. L-8.5; and
  - (j) *Statute of Limitations*, R.S.P.E.I. 1974, Cap. S7;
  - (k) *Limitation of Actions Act*, R.S.Y. 2002, c 139
  - (l) *Limitation of Actions Act*, R.S.N.W.T. 1988
  - (m) *Canada Transportation Act*, S.C. 1996, c. 10,
  - (n) *Carriage by Air Act*, R.S.C. 1985, c. C-26;
  - (o) *Interpretation Act*, R.S.B.C. 1996, c. 238;
  - (p) *Air Transportation Regulations*, SOR/88-58;
  - (q) any amendments to the above noted legislation; and
  - (r) such other legislation as counsel may advise.

WestJet asks that the Plaintiff’s action against it be dismissed with costs.

WestJet’s address for service:

Alexander Holburn Beaudin + Lang LLP  
Barristers and Solicitors



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E-mail address for service (if any): nil

Dated: December 17, 2023 Original  
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Signature of MICHAEL DERY  
Lawyer for WestJet Airlines Ltd.

Rule 7-1 (1) of the Supreme Court Civil Rules states:

- (1) Unless all parties of record consent or the court otherwise orders, each party of record to an action must, within 35 days after the end of the pleading period,
  - (a) prepare a list of documents in Form 22 that lists
    - (i) all documents that are or have been in the party's possession or control and that could, if available, be used by any party at trial to prove or disprove a material fact, and
    - (ii) all other documents to which the party intends to refer at trial, and
  - (b) serve the list on all parties of record.