



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

APPLICATION RESPONSE

Application response of: WestJet Airlines Ltd. (“WestJet”)

THIS IS A RESPONSE TO the Notice of Application of the Plaintiff dated December 9, 2024.

Part 1: ORDERS CONSENTED TO

1. WestJet consents to the relief sought in none of the paragraphs of Part 1 of the Notice of Application.

Part 2: ORDERS OPPOSED

2. WestJet opposes the relief sought in all of the paragraphs of Part 1 of the Notice of Application.

Part 3: ORDERS ON WHICH NO POSITION IS TAKEN

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

Part 4: FACTUAL BASIS

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.
13. The Applicant alleges that WestJet applies the Guidelines in practice when passengers submit a request for reimbursement.
14. The Applicant alleges that WestJet's publication or dissemination of the Guidelines is a representative that has the capability, tendency, or effect of deceiving passengers

about their legal entitlements to reimbursement and is a deceptive act or practice under the *BPCPA*.

15. The Applicant further alleges that WestJet's application of the Guidelines to reject to limit reimbursement is an unconscionable act or practice under the *BPCPA*.
16. On November 22, 2024, WestJet provided the Applicant with its List of Documents.
17. On December 20, 2024, WestJet provided the Applicant with unredacted copies of Documents 1.3-1.28.
18. Documents 1.33 – 1.36 are internal policy documents accessible only by WestJet personnel and for whom their contract of employment includes provisions that prevent the release of such internal documents outside WestJet. These documents including internal procedures for verification of information, fraud protection mechanisms, internal processes showing how refunds and re-accommodations are processed, instructions for how bookings made through travel agents are modified and processed, instructions for how itineraries related to vacation package bookings are processed, instructions for how interline recovery and re-accommodations are processed, and instructions for how downgrades are processed.
19. These documents contain technical, procedural, and commercially sensitive information that is proprietary in nature.
20. It could be harmful to WestJet if the information contained in these documents became available for review by competitor airlines or other third parties. For example, competitor airlines could use the information in the documents to create their own claims handling processes and own internal mechanisms in competition with WestJet.
21. The redacted information has no relevance to the very specific issues in this Action which are the publication and application of the purported Guidelines, which have been produced and have not been redacted.
22. On December 18, 2024, Global News published an article titled "Airline watchdog applauds B.C. tribunal decision over compensation". The article discussed a recent ruling by the B.C. Civil Resolution Tribunal ("CRT") with respect to a WestJet passenger who filed a claim with the CRT for compensation following an airline delay. WestJet had argued that the tribunal should refuse to hear the dispute as it was outside its jurisdiction.
23. The article stated that "While there are no precedents set at the CRT, Lukács said his group is posting the submissions on its website to assist with other passengers looking to apply to the tribunal" and contained a hyperlink to the Air Passenger Rights website.
24. The hyperlink to the Air Passenger Rights website showed that the submissions of both the Applicant and WestJet in the CRT proceeding had been uploaded to the Air Passenger Rights website and were publicly available for access.

25. The CRT's Information Access and Privacy Policy is available on its website and states:

Information that we don't share with members of the media or the public:

- Negotiation discussions between the participants (these are confidential, and we won't share them unless all participants agree to the disclosure or we are required by law to disclose)
 - Evidence or arguments
 - Records other than CRT Dispute Notices, responses, and publicly available decisions
26. Air Passenger Rights has publicly shared arguments submitted to the CRT, in a proceeding in which it was not a party, which are not shared by the CRT with members of the media or the public.

Part 5: LEGAL BASIS

1. WestJet relies on Rules 1-3, 7-1(14), 8-1, and 14-1 of the *Supreme Court Civil Rules*.
2. WestJet submits that Documents 1.33-1.36 contain material that is irrelevant to these proceedings and that there is a good reason why the parts redacted should not be produced.
3. WestJet will provide unredacted copies of Documents 1.33-1.36 for the Court to review at the hearing of the Application.
4. In the context of document disclosure in civil actions under the *Supreme Court Civil Rules*, parties may redact information from documents if the information is "clearly not relevant" and there is "good reason" not to disclose it. An example given of good reason is that it is "apparent in the private nature of the affairs of a company recorded in the minutes of its directors' meetings".

Duhamel v. Financial Institutions Commission, 2018 BCSC 601 at para 26, *North American Trust Co. v. Mercer International Inc.* (1999), 71 B.C.L.R. (3d) 72 (S.C.) at paras. 11 and 13, *Este v. Blackburn*, 2016 BCCA 496 at paras. 19-20, *BNSF Railway Company v. Teck Metals Ltd.*, 2015 BCSC 797 at para. 67.

5. Where the redacted portion of a document is both irrelevant in the sense of not capable of proving or disproving a material fact and the objecting party asserts some commercial harm from its disclosure, the court should err on the side of redaction.

BNSF Railway v. Teck Metals Ltd., 2015 BCSC 797, at para 67

6. WestJet has provided sworn evidence that production of the redacted information could harm its commercial interests if accessed by competitor airlines or third

parties. This is sufficient to justify the redaction where the information redacted is clearly irrelevant to the proceedings.

7. The implied undertaking rule is not sufficient to protect WestJet's interests such that the Court should order production irrelevant information. The implied undertaking rule does not fully protect litigants from the concern that information may be gained by a competitor and used to its disadvantage as documents that are produced in litigation may be referred to in open court or attached to an affidavit without breaching the implied undertaking rule. Furthermore, the implied undertaking cannot require receiving parties to disabuse their minds of the insight they may acquire in the disclosure process.

McCaw's Drilling & Blasting Ltd. v Greenfield Construction Ltd., 2019 BCSC 2244, at para 35

8. As noted in email correspondence from Plaintiff's counsel, he fully acknowledges the weaknesses in the implied undertaking rule. He acknowledges that "the implied undertaking is significantly diminished when it has been used at trial".

Affidavit #1 of Brittany Dieno, Exhibit "F", page 24

9. If the implied undertaking offered sufficient protection, there would be no need for the balancing exercise set out in *North American Trust* and approved by the Court of Appeal in *Este*. As Mr. Justice Lowry said at paragraph 13 of *North American Trust*:

In controlling its process, the court will not permit one party to take unfair advantage or to create undue embarrassment by requiring another to disclose part of a document that could cause considerable harm but serve no legitimate purpose in resolving the issues.

McCaw's, supra, at para 36

10. WestJet has valid concerns that the Plaintiff will not abide by the implied undertaking rule or may make documents covered by implied undertaking rule publicly accessible by some other means.
11. The Plaintiff has published on its own webpage arguments submitted by WestJet in a CRT proceeding that the Plaintiff was not a party to and that the CRT itself does not make publicly available or provide to members of the media or members of the public. WestJet urges the Court to take this conduct into consideration as a valid reason why WestJet does not believe that the Plaintiff, or its counsel, should have access to information that is irrelevant to these proceedings and the production of which could cause WestJet to suffer commercial harm.
12. Furthermore, the same concern expressed by the court in *McCaw's* that the implied undertaking rule cannot require receiving parties to disabuse their minds of the insight they may acquire in the disclosure process is evident here where the Plaintiff is a consumer organization with regular dealings and communications with WestJet passengers.

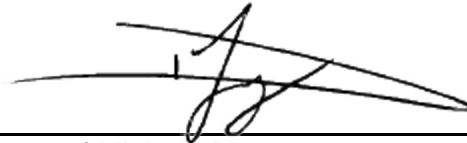
Part 6: MATERIAL TO BE RELIED ON

1. Affidavit #1 of Brittany Dieno sworn December 5, 2024;
2. Affidavit #2 of Elisa Aguiar sworn December 20, 2024;
3. Affidavit #3 of Todd Peterson, sworn December 20, 2024; and
4. The pleadings filed herein.

WestJet Airlines Ltd. estimates that the application will take 1 hour.

- The application respondent has filed in this proceeding a document that contains the application respondent's address for service.
- The application respondent has not filed in this proceeding a document that contains an address for service. The application respondent's ADDRESS FOR SERVICE is:

Dated: December 23, 2024



Signature of Michael Dery
lawyer for Application Respondent, WestJet Airlines
Ltd.