IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Air Passenger Rights v. WestJet Airlines Ltd.*, 2025 BCSC 155

Date: 20250131
Docket: S254494
Registry: New Westminster

Between:

Air Passenger Rights

Plaintiff

And

WestJet Airlines Ltd.

Defendant

Before: The Honourable Justice Gibb-Carsley

Reasons for Judgment

Counsel for the Plaintiff:	S. Lin
Counsel for the Defendant:	M. Dery N. Pimentel
Place and Dates of Hearing:	New Westminster, B.C. November 5-6 and December 9, 2024
Place and Date of Judgment:	New Westminster, B.C. January 31, 2025

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I. INTRODUCTION

[1] Ostensibly, the plaintiff, Air Passenger Rights ("APR") applies for an interim interlocutory injunction pursuant to s. 172(1)(b) of the *Business Practices and Consumer Protection Act*, S.B.C. 2004, c. 2, [*BPCPA*] to prohibit the defendant, WestJet Airlines Ltd. ("WestJet") from posting on WestJet's website, or communicating to WestJet passengers that there are fixed limits on claims passengers can make for expenses those passengers incur when WestJet flights are delayed or cancelled.

[2] However, APR's application goes further and seeks additional relief under s. 172(3)(c) of the *BPCPA* that WestJet post on WestJet's website that the Court made this injunctive order and also to communicate directly with WestJet passengers who travelled on or after August 3, 2022 and submitted a reimbursement request and received a rejection (the "Affected Passengers"), to, among other things, bring APR's legal proceedings against WestJet to their attention. This included APR asking that the Court order WestJet to provide the notice of civil claim to the Affected Passengers. APR also seeks an order mandating that WestJet modify its internal reimbursement policies based on what APR views is a fair and reasonable interpretation of legislation that governs how airlines address reimbursement claims.

[3] APR asserts that WestJet's conduct and communications surrounding its hotel reimbursement policy, meal cost cap limit, reimbursing roaming costs, reimbursing lost wages, and reimbursing of missed prepaid events are deceptive and unconscionable contrary to ss. 4 and 5 of the *BPCPA*, or alternatively ss. 8 and 9 of the *BPCPA*.

[4] The injunction sought by APR occurs in the wider context of an underlying action filed by APR on August 6, 2024, also brought under s. 172 of the *BPCPA* (the "Underlying Action"). In the Underlying Action, APR alleges that WestJet has engaged in deceptive or misleading conduct and is in contravention of the *BPCPA* by misleading passengers as to the actual reimbursement policies WestJet is

entitled to utilize pursuant to airline-specific legislation designed to protect travellers who incur expenses resulting from flight delays or cancellations. The trial of the Underlying Action is scheduled to be heard in January, 2026.

[5] In essence, in the Underlying Action, as it does in this application, APR asserts that WestJet has been engaging in deceptive practices by representing to passengers that there are fixed predetermined limits on reimbursements for hotel and meal expenses. APR contends that legislation requires WestJet to apply a case by case reasonableness approach to reimbursing those expenses and any conduct that amounts to communicating to passengers that there are fixed limits on hotel and meal or other expenses amounts to a deceptive business practice.

[6] I wish to emphasize that the ultimate issues of whether WestJet's practices in respect to reimbursing passengers and whether its application and communication of those practices are unfair or deceptive and contrary to the *BPCPA* will be decided at the hearing of the Underlying Action in January 2026. While I am required to assess the merits of APR's claim that WestJet's actions are improper as part of the test for considering whether an injunction is warranted, I do so only on a threshold basis and not on a full factual record or upon full submissions as will be before the Court at the hearing of the Underlying Action. My conclusions are not binding on the Court hearing the Underlying Action.

[7] It is also important to recognize at the start of these reasons that WestJet, after this application was filed by APR, removed what APR initially argued was the offending language from WestJet's website. Further, WestJet agreed to enter into an undertaking to not repost that information until the Underlying Action is resolved. APR refused WestJet's offer. In my view, WestJet's offer tends to lessen the strength of APR's application for an injunction and raises questions of mootness.

[8] While I have concluded that the application is not moot, I wish to be clear that by agreeing to remove the alleged offending language from its website and enter into an undertaking not to repost that information, WestJet has not conceded it ever offended the *BPCPA* or to any other wrongdoing. As was clear on the arguments

raised before me, WestJet's position is that the manner in which it determines limits for passengers' reimbursements for expenses incurred due to flight delays or cancellations on hotel, food, and other expenses for passengers when flights are delayed or cancelled is reasonable, justified and does not offend governing legislation generally or specifically amount to a deceptive practice under the *BPCPA*. The ultimate determination of the propriety of WestJet's actions, policies, and behaviours will be the subject of the Underlying Action not APR's application now before the Court.

[9] In these reasons for judgment, I will first provide some background of the parties, and the underlying petition filed by APR under the *BPCPA*. I will then turn to the legal principles I must apply and the test that APR must meet for the Court to grant an injunction. Finally, I will provide my analysis and support for my determination.

II. BACKGROUND

A. The Parties and APR's Complaints about WestJet's Reimbursement Policy and Website

[10] APR is a non-profit organization that represents the interests of air travellers. APR's mandate is to engage in public interest advocacy for the travelling public. Some of APR's purposes include:

> 1. To educate air passengers and the public at large as to their rights and the means for the enforcement of the rights, by researching and making available the results of such research on the matter of the law relating to air passenger rights on domestic and international flights.
> 2. To act as a liaison between other public interest or citizens' groups engaged in public interest advocacy.
> 3. To make representations to governing authorities on behalf of the public at large and on behalf of public interests groups with respect to matters of public concern and interests with respect to air passenger rights, and to teach public interest advocacy skills and techniques.

[11] WestJet is a commercial airline carrying on business throughout Canada, but headquartered in Calgary, Alberta. WestJet is registered as an extra provincial

company in the BC Registries and Online Services and operates from Richmond, British Columbia.

[12] On or about July 26, 2024, APR became aware that on WestJet's website ("WestJet's Website") there was a page titled "Submit a request for reimbursement" (the "Original Reimbursement Webpage"). The Original Reimbursement Webpage included the following instructions for passengers seeking reimbursement:

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

[13] As I will describe below, APR takes issue with five aspects of what is stated in the Original Reimbursement Webpage: (i) that there is an upper limit for reimbursements of hotels; (ii) that there is an upper limit for reimbursements of meals; (iii) that WestJet is not required to reimburse roaming costs; (iv) that WestJet is not required to reimburse lost wages; and (v) that WestJet is not required to reimburse for missed prepaid events (collectively, the "WestJet Guidelines").

[14] On July 26, 2024, APR attempted to resolve the issue informally, through a cease-and-desist letter to WestJet. The cease and desist letter did not resolve the issues between APR and WestJet.

[15] On August 6, 2024, APR filed the Notice of Civil Claim which commenced the Underlying Action (the "NOCC"). In the NOCC, APR seeks the following relief:

1. A declaration under s. 172(1)(a) of the *BPCPA* that WestJet has engaged in "deceptive acts or practices" and/or "unconscionable acts or practices";

2. An interim or permanent injunction under s. 172(1)(b) of the *BPCPA* restraining WestJet from further engaging in "deceptive acts or practices" and/or "unconscionable acts or practices" and in particular to remove the WestJet Guidelines from the WestJet Reimbursement Page and to enjoin WestJet from applying the WestJet Guidelines in response to passenger requests for reimbursement;

3. An order under s. 172(3)(c) of the *BPCPA* that WestJet, at its own cost, advertise to the public the particulars of this Court's judgment and injunction(s) including but not limited to sending an email, fax, or registered mail to notify the Affected Passengers;

4. An order under s. 172(3)(a) of the *BPCPA* that WestJet restore monies to the Affected Passengers;

5. Special costs or, in the alternative, costs; and

6. Interest pursuant to the *Court Order Interest Act*, R.S.B.C. 1996, c. 79.

[16] On August 9, 2024, APR provided WestJet a draft order for an interlocutory injunction which is substantially in the same form as what is sought in this application, requesting a response by September 6, 2024. WestJet did not respond by September 6, 2024.

[17] Sometime between August 10-16, 2024, WestJet changed the language of the Original Reimbursement Webpage to be replaced with the following language:

> Guests may be entitled to food and drink in reasonable quantities and access to means of communication.
>
> When recovery from a flight cancellation involves an overnight stay, guests may be entitled to a hotel or comparable accommodation within a reasonable distance from the airport and transportation between the airport and the accommodations (depending upon the circumstances and applicable legislation).

> These services are provided by WestJet as long as they do not cause further delays to your travel.
>
> In the event a guest incurs reasonable out-of-pocket expenses for such items, 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.
>
> …
>
> Please review the following before submitting your reimbursement request:
>
> …
>
> - My right to claim damages, if any, under the applicable convention or under the law, is not limited by this process.

(the "Revised Reimbursement Webpage")

[18] Notably, the Revised Reimbursement Webpage no longer references the WestJet Guidelines, and specifically, any fixed limits for amounts of hotel and meal expense reimbursement claims or that WestJet is not required to reimburse for roaming costs, lost wages, and missed prepaid events.

[19] On September 20, 2024, WestJet filed the Response to Civil Claim in the Underlying Action, asserting that the Original Reimbursement Webpage had changed, and thus, the interlocutory injunction would be moot.

[20] APR provided an additional affidavit sworn on November 6, 2024. In that affidavit it provided an email sent by WestJet on November 3, 2024, to a passenger regarding her claim for reimbursement for a flight from Los Angeles to Calgary on July 2, 2024 (the "November Email"). The passenger stated in the email to WestJet that she was seeking reimbursement of $6,885.77 for expenses plus $7,000 for inconvenience. She described the expenses as being "incurred during and after [the] WestJet strike which cause[d] cancellations and re-booking of our flight twice that led us with no choice but to stay in Los Angeles for 5 days". The passenger's claim was made in Canadian currency.

[21] In the November Email, WestJet stated that it evaluated the passenger's claim and provided a reimbursement of US$291.97. In refusing to provide the

passenger with further reimbursement, the November Email contained the following language:

> As we have reviewed your request according to our guidelines, we are unable to further assist with out-of-pocket expenses.

[22] As I will discuss below, APR asserts that the November Email is proof that WestJet, despite replacing the Original Reimbursement Webpage with the Revised Reimbursement Webpage, continues to reference the WestJet Guidelines when assessing passengers' requests for reimbursement and also continues to set "arbitrary" reimbursement amounts.

III. THE PARTIES' POSITIONS

[23] APR alleges that although WestJet has taken down the Original Reimbursement Webpage, WestJet continues to apply the arbitrary WestJet Guidelines and is relying on a policy of setting fixed limits on expense claims behind the scenes. Put another way, APR asserts that WestJet is not adhering to its obligations to passengers to consider each claim on its own merits and on a case-by-case basis to determine what losses are reasonable for each passenger. This, says APR, runs afoul of international conventions that govern how airlines are to assess passenger complaints, and therefore, misrepresents WestJet's obligations and constitutes an unconscionable and/or a deceptive act or practice under the *BPCPA* in breach of ss. 4, 5, 8 and 9. I will discuss that governing legislation below.

[24] In this application, APR seeks the following orders:

1. Pursuant to s. 172(1)(b) of the *BPCPA*, an interlocutory injunction to enjoin WestJet from posting the WestJet Guidelines, or substantially similar content, on WestJet's Website.

2. Pursuant to s. 172(3)(c) of the *BPCPA*, WestJet shall prominently post the following message on the Revised Reimbursement Pages with any necessary language translations:

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

3. Pursuant to section 172(3)(c) of the *BPCPA*, WestJet shall send the following email to each of the Affected Passengers:

> Subject Line: Important Information About Your Previous Reimbursement Request to WestJet
>
> Content of Email:
>
> This email is sent by the Order of the Supreme Court of British Columbia. WestJet Airlines Ltd. was ordered by the court not to refer to or apply the guidelines that WestJet had previously applied to your reimbursement request. The action was filed by a public interest plaintiff. No final determination has been made on the case and WestJet is disputing the allegations.
>
> In the meantime, the Court has ordered that we bring the enclosed Order, Notice of Civil Claim, and Response to Civil Claim to the attention of potentially affected passengers.
>
> Your attention is drawn to paragraphs 35-36 of Part 1 of the Response to Civil Claim. You should seek legal advice from your own lawyer and decide whether you need to file your own separate action in the interim to preserve your claim.
>
> (the "Proposed Email Message").

4. WestJet, its affiliates, employees, contractors, and/or agents are enjoined from representing the WestJet Guidelines to passengers, directly or indirectly.

5. WestJet shall forthwith bring this Order to the attention of its current affiliates, employees, contractors, and/or agents, and shall forthwith bring this Order to the attention of any person that becomes a new affiliate, employee, contractor, or agent of WestJet.

[25] WestJet raises several arguments in opposition to APR's application.

[26] First, WestJet contends that the application now before the Court should be adjourned because there is no urgency to resolve these issues before the hearing

and resolution of the Underlying Action which will be determined on a full evidentiary record in the trial that is scheduled to commence in January 2026.

[27] Part of the basis for WestJet's assertion that there is no urgency and that APR's application is moot is grounded in WestJet having replaced the language on the Original Reimbursement Webpage with what is contained on the Revised Reimbursement Webpage. Specifically, the Revised Reimbursement Webpage contains no reference to the WestJet Guidelines initially complained of by APR. Further, and in response to APR's allegations that WestJet, despite changing its Website, continues to communicate with passengers that there are fixed limits on hotel and meal amounts, provided affidavit evidence which set out the following:

> WestJet has changed its processes to ensure that email communications sent by WestJet's Guest Support team in response to all requests filed by guests for claims reimbursement (including for flights delayed or cancelled due to situations outside of the control of WestJet) and webpage for submitting of expenses for reimbursement indicate that:
>
> 1. WestJet will consider reasonable requests for expenses incurred due to the subject flight disruption; and
> 2. The guest's rights to claim damages, if any, under the applicable convention or under the law, is not limited by WestJet's reimbursement process.

[28] If the Court does not adjourn APR's application, WestJet asserts that the relief sought by APR is impermissibly vague and unenforceable, overly broad, unavailable under the *BPCPA*, and that APR seeks relief that effectively amounts to a final determination of the Underlying Action.

[29] WestJet also submits that the orders sought by APR amount to mandatory relief, not prohibitive relief, and effectively compels WestJet to take certain steps to deal with its customers all before the issue is determined at the Underlying Action. As mandatory injunctive relief, WestJet argues that APR must overcome an extensive review of the merits to determine whether there is a "strong *prima facie* case" to justify the order, which, WestJet asserts, it has failed to demonstrate.

[30] Second, WestJet contends that APR has failed to raise even a serious triable issue because its policies of determining the amount of reimbursement for meals,

hotels, and other expenses when its flights are cancelled or delayed due to an issue in its control is reasonable. Additionally, WestJet asserts that the evidence does not support that the WestJet Guidelines are deceptive or misleading, or that their application by WestJet was unconscionable, because if a passenger is dissatisfied with WestJet's reimbursement decision, the passenger has a remedy of seeking compensation either through the Canada Transportation Agency or court – an option referenced on the Revised Reimbursement Webpage. WestJet articulates in its Application Response at para. 111 as follows:

> 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 the applicable law.

[31] WestJet stressed in submissions and in affidavit evidence put before the Court in this application, in respect of hotel reimbursement, that in approximately 95% of cases in which a passenger requires a hotel due to a cancelled flight that was within WestJet's control, WestJet finds hotel accommodation for that passenger without the passenger having to incur the cost of a hotel. As such, at least regarding hotel reimbursement, WestJet argues that the focus of APR is on a small minority of passengers who must find their own accommodation or are unwilling to accept the accommodation offered by WestJet.

[32] Finally, WestJet argues that APR asks this Court, under the guise of an interlocutory prohibitive injunction, to impose a mandatory injunction requiring WestJet to take specific action. As set out above, these actions include a requirement that WestJet send out the Proposed Webpage Post and the Proposed Email Message regarding this application and its reimbursement policy to all passengers who travelled since August 2022 and to assess the amount of reimbursement for each passenger on a case-by-case basis as suggested by APR. WestJet argues that this latter requirement seeks to mandate WestJet's business decisions of how it addresses passenger reimbursement requests which would disentitle it from establishing some form of internal corporate reasonableness standard for reimbursement that provides consistency and certainty to customers.

IV. ISSUE

[33] I must determine whether APR has satisfied the test such that an interim statutory injunction under s. 172(1)(b) of the *BPCPA* should be issued and, if so, what is the proper scope of that injunction.

[34] This analysis will engage a consideration of the common law tests to be applied by a court in assessing whether to grant an injunction, as modified by the statutory requirements of s. 172(5) of the *BPCPA*.

[35] If I conclude that an interim statutory injunction under s. 172(1)(b) of the *BPCPA* should be issued, I must also determine if it is justified to order that pursuant to s. 172(3)(c), that WestJet communicate with Affected Passengers regarding the injunction and to require WestJet employees and affiliates to cease from referring to the WestJet Guidelines when responding to passengers' claims for reimbursement. I note that the opening words of s. 172(3) of the *BPCPA* require that a court must make a declaratory or injunctive order under s. 172(1) before it can make an order under s. 172(3) of the act: *Gomel v. Live Nation Entertainment, Inc.*, 2023 BCCA 274 at para. 102.

V. DISCUSSION

A. Legislative Framework

[36] Section 172 of the *BPCPA* is a public interest remedy that permits any person to act as a public interest plaintiff to enforce laws to protect consumers. The public interest plaintiff is not required to have any special interest or any interest under the *BPCPA*: *Seidel v. TELUS Communications Inc.*, 2011 SCC 15 at paras. 32-36; *Ileman v. Rogers Communications Inc.,* 2015 BCCA 260 at para. 52. Put simply, s. 172 of the *BPCPA* empowers public interest plaintiffs to bring actions, in the public interest, to correct improper corporate conduct.

[37] For convenience I reproduce the relevant portions of ss. 4,5,8,9, and 172 of the *BPCPA*:

Deceptive acts or practices

4 (1) In this Division:

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

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

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

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

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

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

(a) a representation by a supplier that goods or services

> …
>
> (iv) are available for a reason that differs from the fact,
>
> (v) are available if they are not available as represented,
>
> (vi) were available in accordance with a previous representation if they were not,
>
> (vii) are available in quantities greater than is the fact, or

…

Prohibition and burden of proof

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

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

…

Unconscionable acts or practices

8 (1) An unconscionable act or practice by a supplier may occur before, during or after the consumer transaction.

(2) In determining whether an act or practice is unconscionable, a court must consider all of the surrounding circumstances of which the supplier knew or ought to have known.

(3) Without limiting subsection (2), the circumstances that the court must consider include the following:

> (a) that the supplier subjected the consumer or guarantor to undue pressure to enter into the consumer transaction;

> (b) that the supplier took advantage of the consumer or guarantor's inability or incapacity to reasonably protect the consumer or guarantor's own interest because of physical or mental infirmity, ignorance, illiteracy, age or inability to understand the character, nature or language of the consumer transaction, or any other matter related to the transaction;
>
> (c) that, at the time the consumer transaction was entered into, the total price grossly exceeded the total price at which similar subjects of similar consumer transactions were readily obtainable by similar consumers;
>
> (d) that, at the time the consumer transaction was entered into, there was no reasonable probability of full payment of the total price by the consumer;
>
> (e) that the terms or conditions on, or subject to, which the consumer entered into the consumer transaction were so harsh or adverse to the consumer as to be inequitable;
>
> (f) a prescribed circumstance.

Prohibition and burden of proof

9 (1) A supplier must not commit or engage in an unconscionable act or practice in respect of a consumer transaction.

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

…

Court actions respecting consumer transactions

172 (1) The director or a person other than a supplier, whether or not the person bringing the action has a special interest or any interest under this Act or is affected by a consumer transaction that gives rise to the action, may bring an action in Supreme Court for one or both of the following:

> (a) a declaration that an act or practice engaged in or about to be engaged in by a supplier in respect of a consumer transaction contravenes this Act or the regulations;
>
> (b) an interim or permanent injunction restraining a supplier from contravening this Act or the regulations.

(2) If the director brings an action under subsection (1), the director may sue on the director's own behalf and, at the director's option, on behalf of consumers generally or a designated class of consumers.

(3) If the court grants relief under subsection (1), the court may order one or more of the following:

> (a) that the supplier restore to any person any money or other property or thing, in which the person has an interest, that may have been acquired because of a contravention of this Act or the regulations;

> (b) if the action is brought by the director, that the supplier pay to the director the actual costs, or a reasonable proportion of the costs, of the inspection of the supplier conducted under this Act;
>
> (c) that the supplier advertise to the public in a manner that will assure prompt and reasonable communication to consumers, and on terms or conditions that the court considers reasonable, particulars of any judgment, declaration, order or injunction granted against the supplier under this section.
>
> (4) The director may apply, without notice to anyone, for an interim injunction under subsection (1)(b).
>
> (5) In an application for an interim injunction under subsection (1)(b),
>
> (a) the court must give greater weight and the balance of convenience to the protection of consumers than to the carrying on of the business of a supplier,
>
> (b) the applicant is not required to post a bond or give an undertaking as to damages, and
>
> (c) the applicant is not required to establish that irreparable harm will be done to the applicant, consumers generally or any class of consumers if the interim injunction is not granted.
>
> [Emphasis added.]

B. The Test for an Interim Injunction Under s. 172 of the *BPCPA*

[38] In the case of an application for an interlocutory injunction brought under s. 172 of the *BPCPA*, the Court is to apply the conventional three element test for interlocutory injunctive relief as modified by the considerations set out under s. 172(5) of the *BPCPA*.

[39] The first element of the conventional test involves a consideration of the merits of the plaintiff's claim where the applicant must show that there is a serious question to be tried. The second element of the analysis focuses on whether the applicant would suffer irreparable harm if the injunction were not granted. The third element of the test involves a consideration of the balance of convenience as between the applicant and the respondent, so as to identify which party would suffer greater harm from the granting or refusal of the interlocutory injunction pending a decision on the merit: *R. v. Canadian Broadcasting Corp.*, 2018 SCC 5 [*CBC*] at para. 12, citing *RJR-MacDonald Inc v Canada (Attorney General)*, [1995] 3 S.C.R. 199.

[40] The elements of the conventional test are not necessarily a checklist or a series of independent hurdles. They are intended to be considered together in assessing the central issue of the relative risks of harm to the parties resulting from granting or withholding interlocutory relief: *Vancouver Aquarium Marine Science Centre v. Charbonneau*, 2017 BCCA 395, at para. 38, citing *Potash Corp. Of Saskatchewan Inc. v. Mosaic Potash Esterhazy Limited Partnership*, 2011 SKCA 120 at para. 26; *Cambie Surgeries Corporation v. British Columbia (Attorney General)*, 2019 BCCA 29, at para. 19; *British Columbia (Attorney-General) v. Wale* (1986), 9 B.C.L.R. (2d) 333, at 346–7, 1986 CanLII 171 (C.A.), aff'd [1991] 1 S.C.R. 62, 1991 CanLII 109.

[41] It is not required that all factors be satisfied before injunctive relief is granted – the strength of one factor may compensate for weakness in another: *Matsqui-Abbotsford Impact Society v Abbotsford (City)*, 2024 BCSC 1902 at para. 47, citing *Cambie Surgeries* at para. 19 and *Wale* at 346–347. The fundamental question is "whether the granting of an injunction is just and equitable in all of the circumstances": *Vancouver Aquarium* at para. 37.

[42] As referenced above, the consideration of an application for an interlocutory injunction brought under s. 172 of the *BPCPA* are modified by ss. 172(5)(a), (b) and (c). The modifications I must apply are as follows:

a. the court must give greater weight and the balance of convenience to the protection of consumers than to the carrying on of the business of a supplier;

b. the applicant is not required to post a bond or give an undertaking as to damages; and

c. the applicant is not required to establish that irreparable harm will be done to the applicant, consumers generally or any class of consumers if the interim injunction is not granted.

[43] I will now turn to my analysis of each of the elements under the common law test for an injunction as modified by s. 172(5) of the *BPCPA*.

1. Threshold Question

a) Serious Question to be Tried or Strong *Prima Facie* Case?

[44] APR asserts that, because the interlocutory injunctive relief they are proposing is of a prohibitive nature, it need only demonstrate a "serious issue to be tried", which it asserts has been met. On this standard, APR would only be required to show that the underlying claim is neither frivolous nor vexatious: *CBC* at para. 13. This threshold is relatively low: *Taseko Mines Limited v Tsilhqot'in National Government*, 2019 BCSC 1507, at para. 32.

[45] In contrast, WestJet argues that APR is seeking both prohibitive and mandatory injunctive relief, and, as such, APR is required to meet the higher threshold of demonstrating a strong *prima facie* case: *CBC* at para. 15. This higher standard places a burden on the applicant to satisfy the application judge that there is a strong likelihood on the law and the evidence presented that, at trial, the applicant will ultimately be successful in proving the allegations set out in the originating notice: *CBC* at para. 17-18.

[46] The Supreme Court in *CBC* acknowledged the difficulties in distinguishing between mandatory and prohibitive injunctions: at para. 16. Justice Brown, writing for a unanimous Court, summarized the distinction as "whether, in substance, the overall effect of the injunction would be to require the defendant to *do* something [mandatory], or to *refrain from doing* something [prohibitive]": at para. 16 (emphasis in original). In making a determination, the application judge must "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" and consider "what the practical consequences of the … injunction are likely to be": at paras. 16-18.

[47] In my view, the relief sought by APR has both prohibitive and mandatory elements. Specifically, the proposed interlocutory injunction to enjoin WestJet from posting the WestJet Guidelines, or substantially similar content, on WestJet's Website or requiring WestJet not to communicate with passengers that it utilizes the

WestJet Guidelines is prohibitive in nature. In contrast, ordering that WestJet distribute the Proposed Website Message, the Proposed Email Message, and requiring WestJet to engage in a specific method of how it assesses reimbursement claims are forms of mandatory relief.

[48] While enjoining WestJet from communicating with passengers that WestJet applies internal guidelines for its reimbursement policies appears to be prohibitive in nature, WestJet argues in its Response that the practical consequences of prohibiting WestJet from communicating about its policies creates mandatory requirements:

> 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. <u>In effect, the Applicant is attempting to mandate that WestJet pay these claims</u>.
>
> [Emphasis added.]

[49] I find some merit in WestJet's concern, especially in respect of the portion of the Original Reimbursement Website that indicates that WestJet will not provide reimbursement for those expenses incurred related to missed entertainment events, lost wages or roaming charges. I will return to this specific issue below in my analysis. Despite this concern, I conclude that I must strike a balance between interfering with WestJet's ability to determine the quantum of reimbursements and to inform passengers the reasons that reimbursements are made or refused against what may be misleading statements that WestJet's predetermined and fixed limit reimbursement guidelines are immutable and supported by legislation. That said, with the exception of the missed entertainment expenses, lost wages and roaming

charges, I disagree with WestJet's assertion that an interlocutory prohibitive injunction will, mandate that WestJet pay the claims. As I will describe below, the concern is that WestJet is representing to passengers that there are fixed limits on various reimbursement claims. Nothing in a prohibitive order would prevent WestJet from evaluating the claims and determining that some, all or none of the claim should be reimbursed on the specific merits of the claim.

[50] I also note that, in my view, APR seeks relief in this interlocutory application before that is sought in the Underlying Action. The applicable standard when the relief sought for an interlocutory injunction is equivalent to that of the underlying action is outlined in *Taseko:*

> [33] There is a more stringent "strong arguable case" standard which applies when granting an interlocutory injunction is tantamount to granting the relief sought in the main action or amounts to a final determination of the action. The justification for this higher standard is because of the potential unfairness in resolving an action at an interlocutory stage, and effectively disposing of the case prior to a trial, without a full adjudication on the merits: *West Moberly First Nations v. British Columbia*, 2018 BCSC 1835 at para. 229. As stated in *RJR-MacDonald* at 338, this higher standard also arises when "the result of the application will impose such hardship on one party as to remove any potential benefit from proceeding to trial".

[51] In summary on the threshold issue, in respect of the prohibitive relief sought by APR – seeking to stop WestJet from reposting the information contained in the Original Reimbursement Webpage that referenced reimbursement limits under the WestJet Guidelines, and communicating that same information to passengers in other forms - I conclude that to be successful, APR must persuade me that there is a serious question to be tried.

[52] In respect of whether APR should be granted the mandatory relief it seeks, I conclude that it would require me to find that it has raised a "strong *prima facie*" case in the Underlying Action: *CBC* at para. 15. To the extent APR seeks injunctive relief similar to what it ultimately seeks in the Underlying Action, I must be persuaded that APR has a "strong arguable case": *Taseko* at para. 33.

b) Analysis

[53] At its heart, the Underlying Action concerns whether WestJet's past and current reimbursement policies contravene ss. 4-5 of the *BPCPA*, or alternatively, ss. 8-9 of the *BPCPA* by deceptively expressing to customers a policy of limiting or denying reimbursements that offends legislation that governs air carriers' responsibilities to passengers. This legislation includes the *Convention for the Unification of Certain Rules for International Carriage by Air 1999* [*Montreal Convention*] and the *Air Passenger Protection Regulations*, SOR/2019-150 [*APPR*].

[54] The *Montreal Convention* is an international convention applicable to international travel. Canada is a signatory to the *Montreal Convention* and it forms part of Canadian domestic law under the *Carriage by Air Act,* R.S.C. 1985, c. C-26*.* Among other things, it establishes airline liability in cases of delay, damage, or loss of baggage and cargo. The *Montreal Convention* is designed to be a single, universal treaty to govern airline liability around the world which unifies different international treaty regimes covering airline liability.

[55] Article 26 of the *Montreal Convention* provides that airline carriers are prohibited from applying a lower compensation limit than provided in the *Montreal Convention*: *International Air Transport Association v. Canada (Transportation Agency)*, 2024 SCC 30 [*International Air*], at para. 34. The *Montreal Convention* sets no limits for compensation. As such, a strict interpretation of the application of the *Montreal Convention* results in the conclusion that an airline cannot set any predetermined limit on compensation. Of course, this does not mean that a claim for reimbursement cannot be refused by an airline, it is the *predetermination* of limits which is not sanctioned by the *Montreal Convention*.

[56] The *APPR* is a consumer protection regime that applies both to international and domestic travel. The *APPR* regulations concern flights to, from, and within Canada, with respect to a number of areas, notably including carriers' obligations in case of flight delay, flight cancellation or denial of boarding, and lost and damaged baggage: *International Air* at paras. 10-12.

[57] Section 14 of the APPR provides that in certain circumstances in which a passenger's flight is delayed or cancelled, the air carrier must offer, "free of charge, hotel or other comparable accommodation that is reasonable in relation to the location of the passenger, as well as transportation to the hotel or other accommodation and back to the airport." Section 16 of the *APPR* outlines that, in the case of denial of boarding that is within the air carrier's control, the airline must provide "food and drink in reasonable quantities", and provide a passenger to access a means of communication. In the case where a passenger must wait overnight, s. 16 of the *APPR* provides that the air carrier "must offer, free of charge, hotel or other comparable accommodation that is reasonable in relation to the location of the passenger." I emphasise that these sections of the *APPR* invoke the use of the word reasonable. It is axiomatic that much judicial ink has been spilt in disagreements over what is reasonable.

[58] While I stress that the issue may be framed differently in the Underlying Action or interpreted differently by the Court hearing that proceeding, I find that the issue to be tried, and thus considered in this application, concerns whether WestJet is entitled to, as a matter of setting its business practices, determine some form of limit as to what amounts are reasonable for hotels or meals and how it is to make that determination and communicate those decisions to passengers. Put simply, in the Underlying Action, the Court may be required to consider if the manner in which WestJet reimburses passengers both under the methodology it used with the Original Reimbursement Page, and currently, accords with the *Montreal Convention* and the *APPR*.

[59] I expect the Court will engage in some form of analysis of how WestJet determines what is reasonable in respect to a passenger's expenses. This may require a consideration of whether it is reasonable for WestJet to set some form of internal policy about how it determines what reimbursement is reasonable in the circumstances of a claim when a passenger incurs out of pocket expenses on food, accommodation or other expenses when their flights are delayed or cancelled.

[60] APR points to a recent decision before the Civil Resolution Tribunal, in which the Tribunal found that WestJet's limit of $250 per night for hotel expenses is arbitrary and not consistent with the *APPR* as "*APPR* section 14(2) requires a carrier to offer "reasonable" accommodation, free of charge, if the passenger is required to wait overnight due to a flight delay. There is no $250 per night limit, as WestJet is trying to apply": *Prinz v. WestJet Airlines Ltd*., 2024 BCCRT 980 at paras. 13-14.

[61] The ground for finding that an act or practice is deceptive were outlined by Justice Fleming (as she then was) in *Sutherland v. Electronic Arts Inc*, 2024 BCSC 2202:

> [197] The BPCPA broadly defines a deceptive act or practice to include a representation or conduct, which has the "capability, tendency or effect of deceiving or misleading a consumer". An omission or non-disclosure of a material fact is sufficient to constitute a representation: *Stanway CA* at para. 80. The case law provides that alleged breaches of ss. 4-5 turn on whether a representation is "capable of deception" and do not require assessments of whether deception has in fact occurred: *Knight* at para. 26.

[62] I am satisfied that WestJet is a "supplier", and that the passengers and the Affected Passengers are "consumers" and the subsequent transactions were "consumer transactions". I am satisfied that the information contained on the Original Reimbursement Webpage and the direct and indirect communication to passengers of the fixed limits on reimbursements of expenses incurred are capable of constituting "representations". I am also satisfied that APR has established that there is a *prima facie* case to be tried at the Underlying Action.

[63] There is merit to APR's assertion that WestJet knowingly made representations, or turned a blind eye to representations, that are contrary to the *APPR* and the *Montreal Convention*. To the extent that the representations communicated that WestJet had predetermined fixed limits on the reimbursement of expenses, those representations may be found to have had "the capability, tendency or effect of deceiving or misleading a consumer." Put a different way, these representations may be found to have amounted to a "deceptive act or practice" under s. 4(1) of the *BPCPA*.: see *Live Nation Entertainment, Inc. v. Gomel*, 2023 BCCA 274 paras. 60-70.

[64] As there is merit to the Underlying Action, the low threshold of a "serious question" to be tried has been met. However, in my view, it falls below the strong *prima facie* test for the reasons I will now outline. I reiterate however, that parties may raise these same issues at the trial of the Underlying Action and my preliminary conclusions on the issues are only in relation to a consideration of the threshold issue of the merits of the case.

[65] First, the Original Reimbursement Webpage clearly indicated that the WestJet Guidelines were "our general guidelines" meaning they were a general guideline created by WestJet and not by a statute or third party. The modifier "our" indicates that the Guidelines were internal to WestJet. The modifier "general" indicates that the Guidelines were not universal, and thus not a fixed limit applied to all claims for reimbursement.

[66] As such, it may be that WestJet is ultimately found to be entirely permitted to set internal business practices of establishing parameters for reimbursements. While this will be an issue for the Underlying Action, it may be that setting corporate "general" guidelines is both a sound business practice for a large organization and provides consumers with increased consistency and transparency. However, the methodology will need to accord with WestJet's obligations under the *Montreal Convention* and the *APPR* not to set arbitrary limits and approach each claim for reimbursement fairly and using common sense and reasonableness.

[67] Second, I wish to reference APR's reliance on the November Email, which it argues shows that despite removing the Original Reimbursement Webpage, WestJet continues to reference the WestJet Guidelines and arbitrary limits to passengers' claims for reimbursement. In my view, the November Email is helpful to illuminate some of the issues in contention between the parties.

[68] In the November Email, WestJet, in my view, evaluated the passenger's claim and provided an amount it believed was reasonable. It was not a fixed amount of $150 or $200 per night for a hotel, and instead was the amount of US$291.97. This is some evidence that WestJet reviewed the passenger's claim and determined what

it considered to be a reasonable amount of reimbursement in the circumstances. While WestJet references that they have come to the conclusion "according to our guidelines" and that they cannot provide further reimbursement this statement does not strike me as arbitrary or misleading. Indeed, I would expect that any large organization would and should have some form of internal policy to provide consistent treatment of customers.

[69] In its submissions, counsel for APR repeatedly argued that what it sought through the seeking of the injunction was that WestJet would approach each claim for reimbursement fairly and consider them on the merits and not in an arbitrary or pre-determined manner. In my view, based on the limited information provided in the November 2024 email, WestJet appears to have approached this specific claim for reimbursement in a non-arbitrary manner. It considered the passenger's claim for reimbursement and reimbursed an amount it thought was reasonable. The passenger, as she is entitled to do, disagrees with WestJet's decision. I find that APR's reliance on this particular reimbursement claim conflates the result with the conduct. The focus of an application under s. 172 of the *BPCPA* is to curtail offending conduct of a business not on guaranteeing certain results for consumers.

[70] Based on the evidence before me of WestJet's framing of the WestJet Guidelines as internal general guidelines, and the November Email in which WestJet arguably approaches this specific claim for reimbursement in a non-arbitrary manner, I am not satisfied that there is a strong likelihood that, at trial, APR will be ultimately successful in proving the allegations set out in the NOCC.

[71] As the onus lies with APR, I do not find that it has established that it has a strong *prima facie* case for an interlocutory mandatory injunction. However, as set out above, I am satisfied that there is a serious issue to be tried in considering whether a prohibitive interlocutory injunction is warranted.

2. Would APR Suffer Harm If the Injunction is Not Granted?

[72] While the second element of the common law test for an injunction is whether the APR will suffer irreparable harm, s. 172(5)(c) of the *BPCPA* provides that I am

not to consider whether there is irreparable harm. However, in my view, there must be some establishment that the applicant would suffer some harm if the injunction is not granted, otherwise there would be no need for an injunction.

[73] Under the Original Reimbursement Webpage, a consumer who viewed the information posted by WestJet could be deceived into believing that WestJet was entitled to set fixed limits on hotels and meals contrary to legislation. A consumer may not understand that the limit was an internal guideline and that the passenger would have the ability to challenge that limit either to WestJet or at the Canadian Transportation Agency, in court or before a tribunal.

[74] I conclude that APR has established that passengers would suffer harm if WestJet continued to post what was on the Original Reimbursement Webpage or to communicate that same information to passengers in other forms.

3. Balance of Convenience

[75] The final element of the test is the balance of convenience, which asks which of the parties would suffer the greater harm from granting or refusing the injunction pending a decision on the merits of the case: *Vancouver Island University v. Kishawi*, 2024 BCSC 1609 at para. 82.

[76] As set out above, this element is modified by s. 172(5)(a) of the *BPCPA* in that the Court must give greater weight and the balance of convenience to the protection of consumers than to the carrying on of the business of a supplier.

[77] For similar reasons to my conclusion that a passenger would suffer harm if WestJet were permitted to repost the information contained on the Original Reimbursement Webpage, I conclude that the balance of convenience favours ordering that WestJet be enjoined from reposting that information that references the WestJet Guidelines and that it not communicate information of a similar nature to passengers.

[78] I conclude that being prohibited from reposting or communicating the information from the Original Reimbursement Webpage WestJet will not be

inconvenienced. Indeed, as mentioned above, WestJet voluntarily removed reference to the WestJet Guidelines in August 2024 when it replaced that webpage with the Revised Reimbursement Webpage.

[79] In my view, the balance of convenience in this application favours imposing an injunction to prevent WestJet from reposting the information contained in the Original Reimbursement Webpage and not communicating that information to passengers until further order of the Court.

4. Conclusion – Test for Injunction

[80] Based on the foregoing I conclude that APR has satisfied the requirements such that the Court should grant a prohibitive injunction enjoining WestJet from posting the content contained in the Original Reimbursement Webpage, or substantially similar content, on WestJet's Website and from communicating that information to passengers seeking reimbursement. Put in terms articulated by our Court of Appeal, I find that the granting of an injunction in the circumstance of this case, crafted in a manner that limits its scope, is just and equitable in all of the circumstances: *Vancouver Aquarium* at para. 37.

[81] I will now turn to the limits on the injunctive relief I will impose, which is a significant departure for the injunctive relief sought by APR.

[82] As set out above, I determined that APR did not meet the threshold of establishing that it has a *strong prima facie* case against WestJet. As such, I will not grant APR's requested orders that I have consider would impose a mandatory injunction on WestJet. As such, I decline to make any order beyond ordering the prohibitive injunction to prevent WestJet from reposting the information from the Original Reimbursement Webpage on its website and enjoining WestJet and its employees from communicating to passengers information of a similar nature as it relates to fixed limit amounts of reimbursement for meal and accommodation expenses as contained in the Original Reimbursement Webpage.

[83] In essence, my injunction maintains the *status quo* that was established once WestJet voluntarily removed the information from the Original Reimbursement Webpage and replaced it with the Revised Reimbursement Webpage, with the addition that WestJet and its employees are prohibited from communicating that same information to passengers in other forms.

[84] In coming to my conclusion, I wish to be clear that I am reluctant to interfere significantly with WestJet's ability to apply internal business policies and communicate with its passengers regarding reimbursement. As a large sophisticated organization, setting some form of standardized business approach to addressing claims appears both reasonable and necessary. Further, I am not satisfied that the law is settled as to whether either the *Montreal Convention* or the *APPR* require that an air carrier reimburse a passenger for lost wages or the expenses of missed entertainment or excursions occasioned by a delay or cancellation of a flight. As such, I will limit the injunction only to WestJet's representations of the predetermined limits for amounts of reimbursement for meals and accommodations.

[85] Further, as referenced above, prohibiting WestJet from informing passengers that it does not reimburse passengers for lost wages or entertainment expenses incurred, in effect is mandating WestJet to provide some reimbursement or at least preventing them from informing the passenger that WestJet does not reimburse those types of expenses. As just stated, I am not satisfied that it is settled law that legislation requires WestJet to reimburse passengers for those types of expenses and so will not enjoin WestJet from advising passengers of its policy. Again, I expect that issue will be revisited at the trial of the Underlying Action.

[86] To reiterate, the issue before me, as a threshold issue and what will be before the Court at the Underlying Action, is whether WestJet's representations to passengers regarding its policies for reimbursement were deceptive. In my view, by removing the Original Reimbursement Webpage, the threat of deception or misleading communication is significantly if not entirely removed. However, I acknowledge that APR may wish to have had this matter resolved in the more public forum of a courtroom with a published decision as opposed to an agreement by

WestJet and also that APR held concerns whether WestJet would, despite removing the information from its website, continue to communicate the same information contained on the Original Reimbursement Webpage to passengers seeking reimbursement

[87] As set out above, in August 2024, WestJet removed and changed the language contained on the Original Reimbursement Webpage and offered to enter into an undertaking not to repost that information until the Underlying Action was resolved. Further, affidavit evidence put before the Court from WestJet sets out that going forward, "WestJet will consider reasonable requests for expenses incurred due to the subject flight disruption". I mention these facts because while I am ordering the injunction I find that WestJet appears to be taking the allegations made against it seriously and wishes to resolve the matter appropriately and in accordance with what it views are its obligations under the law.

[88] I will now provide a summary of my orders.

VI. SUMMARY OF ORDERS AND CONCLUSION

[89] In summary, I order the following:

1. Pursuant to section 172(1)(b) of the *Business Practices and Consumer Protection Act*, S.B.C. 2004, c. 2, an interlocutory injunction is granted on the terms below until the conclusion of the trial in this proceeding or further Order of this Court, and shall take effect ten (10) business days after this Order is pronounced:

    i. The defendant, WestJet Airlines Ltd., shall not repost the content excerpted below, or substantially similar content, that was originally posted on the defendant's website at the URL https://www.westjet.com/en-ca/interruptions/submit-expenses and any localized versions thereof:

> Hotel costs: in situations where WestJet was unable to secure a hotel room, or you did not accept the hotel re-accommodation option WestJet has offered (and you book

> your own hotel), WestJet will reimburse you up to $150.00 CAD ($200.00 CAD for non-Canadian destinations) per night/per reservation. In-room movie costs, tips/gratuities and long distance telephone charges will be excluded
>
> Meals: In the unlikely event meal vouchers are not available during a controllable delay, we will reimburse meal expenses to a maximum of $45 CAD per day/per guest. Alcoholic beverages and tips/gratuities will be excluded.
>
> WestJet does not reimburse expenses for cellular roaming charges, missed entertainment /sporting/excursion events, lost wages or missed connections to non-partner airlines or cruises.

ii. The defendant, WestJet Airlines Ltd., its employees, affiliates, contractors or agents shall not communicate, in any form, to passengers seeking reimbursement for expenses that there is a predetermined fixed dollar amount limit in respect of hotel costs or meal expenses claimed by passengers.

iii. This order shall not prohibit WestJet Airlines Ltd. from making determinations as to what reimbursements, if any, it will provide to passengers for meal, accommodation or any other expenses claimed by passengers.

[90] Costs of this application shall be in the cause.

[91] I thank counsel for APR and WestJet for their well-prepared, organized and argued submissions.

"Gibb-Carsley J."