



NO. NEW-S-S-254494
NEW WESTMINSTER REGISTRY

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

AIR PASSENGER RIGHTS

PLAINTIFF

AND

WESTJET AIRLINES LTD.

DEFENDANT

NOTICE OF APPLICATION

Names of applicants: The Defendant, WestJet Airlines Ltd. ("WestJet")

To: The Plaintiff, Air Passenger Rights

And to: Its Solicitor

TAKE NOTICE that an application will be made by the Applicant to the presiding judge or associate judge at the courthouse at 651 Carnarvon Street, New Westminster, British Columbia on August 6, 2025, at 9:45 a.m. for the orders set out in Part 1 below.

The Applicant estimates that the application will take two hours.



This matter is within the jurisdiction of an Associate Judge.



This matter is not within the jurisdiction of an Associate Judge.

Part 1: ORDERS SOUGHT

1. An Order pursuant to Rule 9-5 that the pleadings related to a restoration Order and claims for damages for a group of non-plaintiffs defined as the "Affected Passengers" (paragraphs 4, 41 to 47 of Part 1, paragraphs 1d. and f. of Part 2, and paragraphs 10, 11, 14, 15, 17 and 18 of Part 3 of the Amended Notice of Civil Claim) (the "Representative Claims") be struck out, without leave to amend.
2. Costs of this application payable by the Plaintiff to the Defendant in any event of the cause; and
3. Such further and other relief this Honourable Court deems just.

Part 2: FACTUAL BASIS

1. The Applicant, WestJet Airlines Ltd. ("WestJet") is the Defendant in this action. The Plaintiff is the Respondent to this Application, and is a federally registered non-profit organization.
2. The Plaintiff purports to bring the underlying action in a representative capacity under section 172 of the *Business Practices and Consumer Protection Act* ("BPCPA") as on behalf of a designated class of consumers, defined as the Affected Passengers. This action is being brought solely pursuant to section 172 of the BPCPA as set out in paragraph 1 of Part 1 of the Amended Notice of Civil Claim.
3. The primary subject of the within action is the language contained on a Claims Reimbursement webpage (the "Reimbursement Page") on WestJet's website. 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.
4. The general guidelines on the Reimbursement Page 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".
5. 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". 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.
6. The Applicant also alleges that the Hotel Cap was contrary to section 14(2) of the *Air Passenger Protection Regulations*, SOR/2019-150 (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).
7. 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, that the language regarding cellular roaming charges was contrary to section 14(1)(b) of the APPR and Article 19 of the Montreal Convention, and 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.
8. The Applicant also alleges that WestJet applies the guidelines in practice when passengers submit a request for reimbursement.
9. The Applicant alleges that WestJet's publication or dissemination of the guidelines is a representation 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*. The Applicant further alleges that WestJet's application of the guidelines to reject or limit reimbursement is an unconscionable act or practice under the *BPCPA*.

10. The Applicant alleges that the Court could make a restoration order under section 172(3)(a) of the *BPCPA* on the basis that the Affected Passengers have an "interest" in funds retained by WestJet. The "interest" alleged is a right to seek damages under section 171 of the *BPCPA*, under the Montreal Convention, in breach of contract (the contractual terms incorporating the APPR), and in breach of the duty of honest contractual performance.
11. In Part 2 of the Amended Notice of Civil Claim, the Plaintiff seeks declaratory and injunctive relief. At paragraph 2d., he also seeks an Order under section 172(3)(a) that WestJet restore monies to the Affected Passengers including a referral to an associate judge, registrar or special referee to inquire, assess or account for those monies.
12. The action brought by the Plaintiff (who is the only named Plaintiff), seeks relief in the form of liquidated damages and/or a restoration Order on behalf of a group of "Affected Passengers", based on private causes of action (section 171 of the *BPCPA*, under the Montreal Convention, in breach of contract, and in breach of the duty of honest contractual performance).
13. The following pleadings confirm that this action is being brought in a representative capacity by the Plaintiff on behalf of the Affected Passengers:
 - (a) paragraph 4 of Part 1 of the Amended Notice of Civil Claim in which the Plaintiff seeks an Order under section 173(3)(a) of the *BPCPA* that WestJet restore to the Affected Passengers monies owed to them
 - (b) paragraphs 41 through 47 of Part 1 of the Amended Notice of Civil Claim alleging that the Affected Passengers have a claim for liquidated damages;
 - (c) paragraphs 1d. and f. of Part 2 of the Amended Notice of Civil Claim seeking an Order under section 172(3)(a) of the *BPCPA* that WestJet restore monies to Affected Passengers and interest;
 - (d) paragraphs 10 and 14 of Part 3 of the Amended Notice of Civil Claim alleging that the Affected Passengers have a right to seek damages under section 171 of the *BPCPA*, the Montreal Convention, in breach of contract, and in breach of the duty of honest contractual performance;
 - (e) paragraphs 11 and 15 of Part 3 of the Amended Notice of Civil Claim alleging that the Affected Passengers have an interest in funds retained by WestJet such that the Court could make a restoration order under section 172(3)(a) of the *BPCPA* to restore monies owing to Affected Passengers; and

- (f) paragraphs 17 and 18 of Part 3 of the Amended Notice of Civil Claim alleging that section 172 of the *BPCPA* allows persons other than the affected consumers to seek relief on behalf of those affected consumers, in reference to the claims of Affected Passengers under the Montreal Convention.
- 14. In its Response to Civil Claim filed September 20, 2024, WestJet specifically pleaded that the relief sought pursuant to section 172(3)(a) of the *BPCPA* (a restoration order to Affected Passengers who are not named as plaintiffs) is not available as no action has been brought on their behalf for damages pursuant to any statutory or common law causes of action.

Part 3: LEGAL BASIS

- 1. The Applicant relies on Rules 1-3, 9-5(1), 14-1, and 20-3 of the *Supreme Court Civil Rules*, BC Reg. 168/2009 (“*SCCR*”), Practice Direction PD-50, sections 171 and 172 of the *BPCPA*, section 18 of the former *Trade Practices Act*, RSBC 1996, c. 457 (the “*TPA*”), and the *Class Proceedings Act*, RSBC 1996, c 50 (the “*CPA*”).
- 2. The Plaintiff does not have standing under section 172 of the *BPCPA* to bring the Representative Claims or seek a restoration Order pursuant to section 172(3)(a) of the *BPCPA* on behalf of the Affected Passengers who are not plaintiffs in the action. The Applicant does not seek a determination of a question of law relating to issues in the action (which are whether or not WestJet committed deceptive or unconscionable acts or practices in the publication or dissemination of the guidelines). As such, this Application seeks an Order striking pleadings on the issue of standing, which is within the jurisdiction of an Associate Judge of the Court under Practice Direction PD-50 (*Arbabi v McLelland*, 2024 BCSC 91).

I. Striking Pleadings, Generally

- 3. The Applicants rely on Rules 9-5(1) and 14-1 of the *Supreme Court Civil Rules*, BC Reg. 168/2009, and submit the Representative Claims in the Amended Notice of Civil Claim ought to be struck on the basis that they disclose no reasonable claim; they may prejudice, embarrass, or delay the fair trial or hearing of the proceeding; and they are otherwise an abuse of the process of the court.
- 4. The test under Rule 9-5(1)(a) is whether it is “plain and obvious” that the Plaintiff’s claim discloses no reasonable cause of action (*Hunt v. Carey Canada Inc.*, [1990] 2 SCR 959 at 980, *Nevsun Resources Ltd. v. Araya*, 2020 SCC 5, at paras 64-66).
- 5. On an application to strike pleadings under Rule 9-5(1)(a), no evidence is admissible and the pleadings are assumed true. However, this does not apply to allegations based on assumptions and speculation or facts alleged that are obviously incapable of proof (*McDaniel v McDaniel*, 2009 BCCA 53 at para. 22).
- 6. The power to strike out claims that have no reasonable prospect of success is a valuable housekeeping measure essential to effective and fair litigation. It unclutters the proceedings, weeding out the hopeless claims and ensuring that those that have some chance of success go on to trial. Rule 9-5 provides authority to cull pleadings

without striking the entire claim (*R. v. Imperial Tobacco Canada*, 2011 SCC 42, at para 19, *Lund v. Black Press Group Ltd.*, 2007 BCSC 559, at para 5).

7. If it is plain and obvious that even if redrafted a pleading is bound to fail because it does not raise an arguable issue (that is, it is without legal foundation), a party will not be granted the opportunity to redraft (*Strata Plan LMS3259 v. Sze Hang Holding Inc.* 2009 BCSC 473, at para. 40).
8. Standing can be addressed as a preliminary matter under Rule 9-5(1)(a). Standing is about “the appropriateness of the court’s dealing with a particular issue presented at the instance of a particular party, and is concerned about the nature of the issue in the context in which it is raised”. If the plaintiff lacks standing, there can be no cause of action, and the pleadings may be struck (*Yahgulaanaas v Canada (Attorney General)*, 2025 BCSC 986, at para 39, *MacDonald v. British Columbia*, 2022 BCCA 381, at para 11 leave to SCC ref’d, 40551 (1 June 2023).
9. It is open to the court to decide questions of law and to consider issues of policy in arriving at a decision under this subrule. It is not uncommon for courts to resolve complex questions of law and policy (*McGauley v. British Columbia* (1990), 44 B.C.L.R. (2d) 217 at 221, *Atlantic Lottery Corp. Inc. v. Babstock*, 2020 SCC 19, at para 19).
10. Two questions are to be kept in mind in relation to striking a pleading: what are the plaintiffs trying to do and are they entitled by law to do it (*H.M.B. Holdings Limited v. Replay Resorts Inc.*, 2021 BCCA 142, at para 53).

II. Claims for damages or a restoration order cannot be brought in a representative capacity under section 172 of the *BPCPA*

11. Actions in a representative capacity can be brought under section 172(1) of the *BPCPA* for a declaration or an injunction. Actions under the *BPCPA* for a restoration order under section 172(3)(a) of the *BPCPA* based on private causes of action cannot be brought in a representative capacity, as confirmed by section 172(2) of the *BPCPA* and a number of appellate authorities.
12. While the Plaintiff has not explicitly brought this action as a representative proceeding (either under Rule 20-3 of the *SCCR* or otherwise), it clearly advances claims on behalf of Affected Passengers who are not plaintiffs in the action. The Plaintiff is clearly attempting to bring an action in a representative capacity by advancing claims for Affected Passengers for liquidated damages under section 171 of the *BPCPA*, the Montreal Convention, in breach of contract, and in breach of the duty of honest contractual performance) and claims for a restoration order to Affected Passengers pursuant to section 172(3)(a) of the *BPCPA* based on an argument that the “interest” of those Affected Passengers is one or more of these causes of action. As set out in paragraph 1d. of Part 2 of the Amended Notice of Civil Claim, the Plaintiff seeks an order under section 172(3)(a) of the *BPCPA* that WestJet restore monies to the Affected Passengers including a referral to an associate judge, registrar or special referee to inquire, assess or account for those monies.

13. Furthermore, the Plaintiff admits that it is attempting to bring a representative action at paragraphs 17 and 18 of Part 3 of the Amended Notice of Civil Claim when it alleges “that section 172 of the *BPCPA* enables persons other than the affected consumers to seek relief on behalf of those affected consumers” in reference to its ability to bring claims on behalf of Affected Passengers under the Montreal Convention.
14. The Supreme Court of Canada in *Seidel v. TELUS Communications Inc.*, 2011 SCC 15, the Supreme Court of Canada discussed section 172 of the *BPCPA* at paragraph 132:

[132] The final aspect of the *BPCPA* that we must discuss is the nature of the action provided for in s. 172(1). Subsection 172(1) authorizes the director to bring an action for declaratory or injunctive relief, but it also authorizes any person other than a supplier to do so. In this sense, s. 172(1) creates a representative action. In the case of an action brought by the director, any ambiguity in this respect is removed by s. 172(2). As for an action brought by a person other than the director, the fact that the person need not have been affected by the consumer transaction, together with the potentially representative nature of the available remedies — declaratory and injunctive relief — makes his or her representative capacity just as evident.

15. However, actions cannot be brought in a representative capacity on behalf of unnamed plaintiffs for a restoration order under section 172(3)(a) of the *BPCPA* based on private causes of action (damages under section 171 of the *BPCPA*, under the Montreal Convention, in breach of contract, and in breach of the duty of good faith contractual performances).
16. Under the former *TPA*, which was replaced by the *BPCPA*, consumer protection organizations could bring claims on behalf of consumers generally or on behalf of a designated class of consumers in British Columbia. Section 18 of the *TPA* provided:

18 (1) In an action brought by the director, or any other person whether or not that person has a special, or any, interest under this Act or the regulations, or is affected by a consumer transaction, the court may grant either 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 is a deceptive or unconscionable act or practice;

(b) an interim or permanent injunction restraining a supplier from engaging or attempting to engage in a deceptive or unconscionable act or practice in respect of a consumer transaction.

...

(3) In an action under subsection (1), any person, including the director, may sue on the person's own behalf and, at the person's option, on behalf

of consumers generally, or a designated class of consumers, in British Columbia.

(4) In an action for a permanent injunction under subsection (1) (b), the court may restore to any person who has an interest in it any money or property that may have been acquired because of a deceptive or unconscionable act or practice by the supplier.

17. This ability for “any person” to sue on another’s behalf was specifically removed in section 172 of the *BPCPA*, which provides that only the Director of Consumer Protection can bring an action on behalf of consumers generally or a designated class of consumers:

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;

18. The distinction between section 18(3) of the *TPA* and section 172(2) of the *BPCPA* was specifically addressed by the Court of Appeal in *Knight v. Imperial Tobacco Canada Limited*, 2006 BCCA 235:

[10] It seems to me doubtful that it could be said that a proceeding under s. 172 of the *BPCPA* could properly be described as that type of action that could be brought in a representative capacity. There is no provision in this section that is similar in effect to s. 18(3) of the *TPA*. While an individual may bring an action under s. 172 without having a special interest or indeed any interest under the statute, I do not consider that the section provides for the individual bringing the action to act as a representative of anyone else. Section 172 merely provides that the individual bringing the action does not have to have a specific interest in the consumer transaction that might give rise to an action...

19. The Supreme Court of Canada in *Seidel, supra* also considered the effect of sections 18(3) of the *TPA* and section 172(2) of the *BPCPA*:

[49]...However, under the *BPCPA*, only the director may bring a representative action. Ms. Seidel may not do so. While consumer activists may bring actions despite the fact that they have not personally suffered any damage, such actions cannot be brought as representative actions under the *BPCPA*. This is to be contrasted with the situation under the now repealed *TPA*, where s. 18(3) allowed consumer-brought representative actions....

20. In *Bosworth v. Jurock*, 2013 BCCA 4, the Court of Appeal upheld the decision of the chambers judge who relied on *Knight*:

[26]...He referred to paras. 23–24 of the reasons of Newbury J.A., where she wrote:

... Like Hall J.A. in *Knight*, I do not consider that the section by its terms provides for the applicant to act as the representative of anyone else. In other words, nothing in the wording of s. 227 contemplates a "declaration made expressly by the court, or implicitly by the statute, at the front end of the proceeding that the complainant's action will govern the rights and obligations of the members of [a] specifically-defined representative class." (*Stern*, para. 68.)

21. The hallmark of an action "brought in a representative capacity" under a statute is a declaration made expressly by the court, or implicitly by the statute, at the front end of the proceeding that the complainant's action will govern the rights and obligations of the members of a specifically defined represented class (*Jellema v. American Bullion Minerals Ltd.*, 2010 BCCA 495, at para 16, citing *Stern v. Imasco Ltd.* 1999 CanLII 14934 (ON SC), at para 71).
22. That is exactly what the Plaintiff is attempting to do here. It is arguing that the Court should make a declaration and that such declaration should be the basis for a restoration Order, which would govern the rights of the Affected Passengers, despite the fact that the above noted appellate authorities that confirm that the Plaintiff cannot bring claims on behalf of the Affected Passengers in a representative capacity.
23. The Plaintiff is essentially attempting to bring this action as a representative proceeding, rather than as a class proceeding, without invoking Rule 20-3 of the *SCCR*. It appears it has done so on the basis that it is aware that a representative proceeding is not available (*Hwlitsum First Nation v. Canada (Attorney General)*, 2017 BCSC 475 at para 515 (affirmed on appeal, 2018 BCCA 276).
24. However, that does not change the fact that the Plaintiff has admitted in its own pleading that it is attempting to advance claims on behalf of unnamed plaintiffs in a representative capacity under sections 171 and 172(3)(a) of the *BPCPA*, under the Montreal Convention, in breach of contract, and in breach of the duty of good faith contractual performance. The claims advanced and relief sought in the Amended

Notice of Civil Claim in this regard are improper and wholly unavailable under section 172 of the *BPCPA* and must be struck.

III. Court does not have jurisdiction to order relief sought in paragraph 2d. of Part 2 of the Amended Notice of Civil Claim.

25. The Plaintiff has pointed to no provision in the *SCCR* or the *BPCPA* or cited any authorities authorizing the appointment of associate judge, registrar, or special referee for “account for monies owing” as sought in paragraph 2d. of Part 2 of the Amended Notice of Civil Claim. The relief sought appears to presume that Affected Passengers would be automatically entitled to restoration of monies under section 172(3)(a) of the *BPCPA* in the event a declaration or injunction is ordered.
26. At paragraphs 11 and 15 of Part 3 of the Amended Notice of Civil Claim, the Plaintiff alleges that the Affected Passengers have an “interest” in funds retained by WestJet, which is required for a restoration order under section 172(3)(a) of the *BPCPA*. Paragraphs 10 and 14 of Part 3 of the Amended Notice of Civil Claim identify the “interest” as a right to seek damages under section 171 of the *BPCPA*, the Montreal Convention, in breach of contract based on a violation of the APPR (which are incorporated into the contract of carriage by virtue of WestJet’s tariffs), or in breach of the duty of honest contractual performance.
27. However, proving each claim will require a claim to be advanced by each Affected Passenger as a plaintiff. None of the Affected Passengers are plaintiffs in the action.
28. Section 171 damages may only be sought by “the person who suffered damage” (*Seidel, supra* at para 32).
29. In any claim advanced by an Affected Passenger as a plaintiff under the Montreal Convention for damages occasioned by delay, WestJet would avoid liability if it proved that it took all reasonable measures to avoid the damage or that it was impossible for it to take such measures.
30. Claims in breach of contract (based on an obligation under the APPR) will also require an Affected Passenger as a plaintiff to demonstrate that the reason for their flight delay/cancellation was not a situation outside of carrier control. A carrier is not obligated to provide meals, accommodations, or access to a means of communication is not owed in situations outside of carrier control, by operation of sections 10 and 14 of the APPR. Similarly, any claim for breach of the duty of honest contractual performance will require each Affected Passenger as a plaintiff to prove their entitlement to meals, accommodations, roaming charges, lost wages, or missed prepaid events, either under the APPR or the Montreal Convention, as set out above.
31. Essentially, if the Order sought in paragraph 2d. was granted, an associate judge, registrar, or special referee would be required to conduct an individual trial for every single Affected Passenger. The Court only has this jurisdiction for the determination of individual issues on a certified class proceeding under section 27 of the *Class*

Proceeding Act, RSBC 1996, c 50. It is clearly not available or appropriate in the within action.

IV. Conclusion

32. The Applicant submits the Representative Claims in the Amended Notice of Civil Claim (paragraphs 4, 41 to 47 of Part 1, paragraphs 1d. and f. of Part 2, and paragraphs 10, 11, 14, 15, 17 and 18 of Part 3) should be struck out without leave to amend. Costs should be awarded in any event of the cause on the basis that the claims are advanced are wholly improper and an abuse of process.
33. The Applicant takes the position that this Application should be heard in advance of the Plaintiff's Application to compel responses to discovery requests filed July 21, 2025 as it will be dispositive of many of the Orders requested for document production.

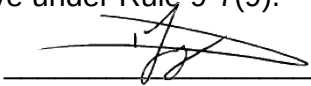
Part 4: MATERIAL TO BE RELIED ON

1. Notice of Civil Claim filed August 6, 2024;
2. Response to Civil Claim filed September 20, 2024;
3. Amended Notice of Civil Claim filed November 27, 2024; and
4. Amended Response to Civil Claim filed December 17, 2024
5. Such further and other material that counsel may advise.

TO THE PERSONS RECEIVING THIS NOTICE OF APPLICATION: If you wish to respond to this notice of application, you must, within 5 business days after service of this notice of application or, if this application is brought under Rule 9-7, within 8 business days after service of this notice of application,

- (a) file an application response in Form 33,
- (b) file the original of every affidavit, and of every other document, that
 - (i) you intend to refer to at the hearing of this application, and
 - (ii) has not already been filed in the proceeding, and
- (c) serve on the applicant 2 copies of the following, and on every other party of record one copy of the following:
 - (i) a copy of the filed application response;
 - (ii) a copy of each of the filed affidavits and other documents that you intend to refer to at the hearing of this application and that has not already been served on that person;
 - (iii) if this application is brought under Rule 9-7, any notice that you are required to give under Rule 9-7(9).

Dated: July 24, 2025



Signature of Michael Dery, lawyer for the Applicant

To be completed by the court only:

Order made

☐ in the terms requested in paragraphs [specify] of Part 1 of this notice of application

☐ with the following variations and additional terms:

Dated:

Signature of

☐ Judge ☐ Master

APPENDIX

THIS APPLICATION INVOLVES THE FOLLOWING:

- ☐ discovery: comply with demand for documents
- ☐ discovery: production of additional documents
- ☐ other matter concerning oral discovery
- ☐ extend oral discovery
- ☒ amend pleadings
- ☐ add/change parties
- ☐ summary judgment
- ☐ summary trial
- ☐ service
- ☐ mediation
- ☐ adjournments
- ☐ proceedings at trial
- ☐ case plan orders: amend
- ☐ case plan orders: other
- ☐ experts.