



**This is the 4th Affidavit
of Brittany Dieno in this proceeding
and was made on July 29, 2025**

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

Affidavit #4 of Brittany Dieno

I, Brittany Dieno, paralegal, of 101-5553 16th Avenue, in the City of Delta, in the Province of British Columbia, SOLEMNLY AFFIRM THAT:

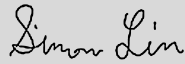
1. I am Brittany Dieno, contract paralegal to Simon Lin, (counsel for the Plaintiff) and as such I have personal knowledge of the matters hereinafter deposed to, except where stated to be on information and belief and, where so stated, I verily believe those matters to be true.
2. Attached and marked as **Exhibit "A"** is a copy of a letter from Simon Lin to Michael Dery, at Alexander Holburn Beaudin + Lang LLP, dated November 14, 2024, from another matter.
3. Attached and marked as **Exhibit "B"** is a copy of an email from Simon Lin to Elisa Aguiar, Michael Dery, and Nicolas Pimentel, attaching a letter dated July 28, 2025, from Simon Lin to Michael Dery, at Alexander Holburn Beaudin + Lang LLP, sent on July 28, 2025.
4. Attached and marked as **Exhibit "C"** is a copy of an email from Nicolas Pimentel, to Simon Lin, Michael Dery, and Elisa Aguiar, with copies of the attachments of Simon

5. I acknowledge the solemnity of making a solemn declaration and acknowledge the consequences of making an untrue statement.
6. I was not physically present before the person before whom this affidavit was affirmed but was in that person's presence using video conferencing.

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Doc ID: 46f0418f653661754449255b894a79fccc32a428

This is **Exhibit “A”** to the Affidavit of Brittany Dieno
affirmed before me on July 29, 2025

A handwritten signature in black ink that reads "Simon Lin". The signature is written in a cursive style with a horizontal line extending from the end of the name.

Simon Lin

November 14, 2024

VIA EMAIL

Alexander Holburn Beaudin + Lang LLP

ATTN: Michael Dery

2700-700 West Georgia

Vancouver BC, V7Y 1B8

Dear Mr. Dery,

RE: Air Passenger Rights v. WestJet Airlines Ltd., NEW-S-S-254452

We confirm receipt of your email on November 13, 2024 (the “**Email**”), requesting an adjournment for the reason that you have just received instructions to apply to cross-examine Dr. Lukacs and/or to admit the second affidavit of Ms. Machado. As noted in our response earlier today, the Petitioner does not consent to an adjournment.

We just learned from CSO that WestJet unilaterally filed an application for November 28, 2024, after the hearing of the Petition and without canvassing dates with the undersigned. In any event, the undersigned is not available on November 28. Your office should be aware from another file that also involved WestJet that the undersigned will be out of town.

We outline the history of this petition proceeding for ease of reference:

1. **July 30, 2024:** The Petition and the Affidavit of Dr. Lukacs was served on WestJet.
2. **August 6, 2024:** Your office confirmed that you have been retained by WestJet. On the same day, your office indicated that:

I am not in a position to provide a time estimate for the hearing as we have not yet finished our review of the matter and we have not yet finished our response materials. Once that is done, I will provide you with time estimates and availability for a hearing.

3. **August 9, 2024:** Your office provided availability for a one-day hearing, which would suggest that your office has done the necessary reviews.
4. **August 19, 2024:** Your office filed and served a Response to Petition and Affidavit #1 of Ms. Machado. There was no request, nor any indication, that your client intended to cross-examine Dr. Lukacs.

5. **September 10, 2024:** Our office advised that the hearing has been reserved for one-day in November 21, 2024 at the Vancouver Registry.
6. **September 11, 2024:** Your office indicated that your client has “no issue on our end with having the hearing in Vancouver” and even signed an Order to that effect.
7. **September 19, 2024:** Our office wrote to you regarding four topics: (a) WestJet’s improper objection to the remote commissioning of Dr. Lukacs’ affidavit; (b) the Petitioner’s position regarding the absolute assignment with supporting case authorities; (c) the Petitioner’s standing, as it relates to the assignment; and (d) WestJet’s bald assertion of new evidence and new arguments being raised. Our client provided a lengthy period of time for WestJet to respond (i.e., October 15).
8. **October 15, 2024:** Your office withdrew the objections regarding the absolute assignment (i.e., issue (a) above) and simply stated that you disagree with our reasoning on issues (b)-(d) without any elaboration or reasoning. Your office did not raise the prospect of filing further affidavits or cross-examining Dr. Lukacs.
9. **October 28, 2024:** Your office purported to serve the second affidavit of Ms. Machado. On the same day, we brought to your attention that the new affidavit is contrary to Rule 16-1(7) and requested that WestJet provide their basis/reasoning for the affidavit by November 1, 2024 so our client can consider whether to consent. WestJet did not respond to our letter by November 1, 2024.
10. **November 4, 2024:** Your office wrote to us claiming that the second affidavit of Ms. Machado “will be referred to in the context of the arguments set out in our client’s Response to Petition at paragraphs 47 to 56.” Your office also made allegations that the undersigned is somehow acting improperly for being counsel in an unrelated action. Again, there was no mention of seeking to cross-examine Dr. Lukacs.
11. **November 4, 2024:** Our office responded to your email from the same date confirming that WestJet’s assertions are wholly unsupported and there was no basis to include the second affidavit of Ms. Machado. We **specifically** put WestJet on notice that should they wish to include the second affidavit of Ms. Machado, that WestJet would need to bring a formal application to that effect.

12. November 8, 2024: The deadline for bringing an application to adduce further affidavits expired (i.e., the eight business day timeline under Rule 8-1).

13. November 13, 2024: Our office wrote to you confirming our understanding that WestJet is no longer wishes to include the second affidavit of Ms. Machado, since no application has been received. Shortly thereafter, your office responded stating that they now wish to seek an adjournment to bring an application to introduce the second affidavit of Ms. Machado and also to cross-examine Dr. Lukacs.

We address each of WestJet's two applications in the two sections below.

Application to Cross-Examine Dr. Lukacs

We first note that your office **never** raised the request to cross-examine Dr. Lukacs until the last minute, despite having had Dr. Lukacs's affidavit for more than three months and even filed a Response to Petition. This belated request appears to be dilatory and a backdoor attempt at adjourning the petition hearing.

WestJet overlooked that the Petition is brought under Rule 16-1 and, at the hearing of the petition, the Court is tasked with deciding whether there is sufficient materials before it to decide the issues relevant to the petition. If the Court finds that all relevant issues for the petition can be decided on the record, there would be no need for cross-examination. As such, it is not even necessary to bring a distinct application for cross-examination.

We draw your attention to a five-judge panel decision that elaborated on this issue:¹

[154] On its face, R. 16-1(18) allows the court to pick and choose to apply in a petition proceeding any number of procedures that apply in actions, such as discovery of witnesses or discovery of documents. For example, in *Liu v. Du*, 2021 BCCA 221, this Court in Chambers held that R. 16-1(18) can be relied upon to order production of documents in a petition proceeding without first converting the petition to an action (para. 32). Given that these procedures usually are only necessary to employ where an issue is in dispute, in my view R. 16-1(18) changes the landscape considerably from that considered by the authorities relied upon in *Saputo*.

¹ [emphasis added] [Cepuran v. Carlton](#), 2022 BCCA 76 at paras. 154-160.

[155] Rule 22-1(4) is also relevant. Among other things, it permits cross-examination on affidavits in Chambers applications. In *Beedie (Keefer Street) Holdings Ltd. v. Vancouver (City)*, [2021 BCCA 160](#), this Court noted that R. 22-1(4) applied to petitions. Justice Newbury distinguished the proposition in *Saputo* as not applying to petitions brought seeking judicial review under the [Judicial Review Procedure Act](#), R.S.B.C. 1996, c. 241 [*JRPA*]. Justice Newbury noted that the court typically has a supervisory function in judicial review matters, as opposed to adjudicative, and the record is limited (paras. 75– 79). These are good reasons for not referring all triable issues to trial in a petition proceeding brought under the *JRPA*.

[156] However, it must be recognized that there are some judicial review matters, including those involving complex constitutional challenges, that require the judge to make findings of fact based on contested evidence. Even in those types of judicial review proceedings, it may still be appropriate to hear the matter within the petition proceeding: see, for example, *L'Association des parents de l'école Rose-des-Vents v. Conseil scolaire francophone de la Colombie-Britannique*, [2011 BCSC 89](#) [*Conseil scolaire*].

[157] The [JRPA](#) is one of several enactments that allow an application to be brought to the court (s. 2(1)). As mentioned, R. 1-2(4) provides that where an enactment authorizes an application to the court, it must be brought by petition. The [PPA](#) is another enactment that allows an application to be brought to the court.

[158] It should be kept in mind that the starting point for those matters that are properly brought by way of petition is that the Rules contemplate that a summary procedure will be appropriate: *Conseil scolaire* at paras. 29–30. This is different than the starting point for an action. There should be good reason for dispensing with a petition's summary procedure in favour of an action. The mere fact that there is a triable issue is no longer a good reason.

[159] The modern approach to civil procedure, as encouraged in *Hryniak*, is to allow parties and the trial courts to tailor the pre-trial and trial procedures to a given case, in the interests of proportionality and access to justice, while preserving the court's ability to fairly determine a case on the merits. In my view, R. 16-1(18) and R. 22-1(4) work to reflect this modern approach within a petition proceeding.

[160] To summarize, I am of the view that a judge hearing a petition proceeding that raises triable issues is not required to refer the matter to trial. The judge has discretion to do so or to use hybrid procedures within the petition proceeding itself to assist in determining the issues, pursuant to R. 16-1(18) and R. 22-1(4). For example, the judge may decide that some limited discovery of documents or cross-examination on affidavits will provide an opportunity to investigate or challenge the triable issue sufficiently to allow it to be fairly determined by the court within the petition proceeding, without the need to convert the proceeding to an action and refer it to trial.

In other words, by default, petitions for judicial review are conducted on the affidavit and record before the Court. It is only when there is a triable issue that the Court would consider allowing cross-examinations on the affidavits. It would be putting the cart before the horse, and undermining R. 16-1(18) for a distinct application to be brought in advance.

As such, our position is that the request for an adjournment in order to apply to cross-examine Dr. Lukacs is **unnecessary** for two reasons. Firstly, it is a belated application. Secondly, and most importantly, it would be up to the presiding judge hearing the petition to decide if there is even any triable issue that would warrant a cross-examination.

For greater certainty, it is open for WestJet to argue at the hearing that there is a triable issue and to request the Court to employ Rule 16-1(18).

Application to Adduce Second Affidavit of Ms. Machado

We note that on November 4, 2024, we already brought to WestJet's attention that they would need to bring a formal application to introduce the second affidavit of Ms. Machado. However, WestJet failed to file an application within the timelines under Rule 8-1.

To the extent WestJet intends to bring the application on short notice at the commencement of the petition hearing on November 21, 2024, WestJet clearly does not meet the requirement for making an "urgent" application.

We draw your attention to [O'Callaghan v Hengsbach](#), 2017 BCSC 2182 where the Court confirmed that a party's own failure to prepare their file in a timely way is not a reason for allowing applications to be heard on short notice.

Conclusion

We trust the above satisfactorily addresses WestJet's adjournment request. The Petitioner intends to proceed on November 21, 2024 as all parties had previously agreed.

We reserve the right to bring this letter to the Court's attention.

Yours truly,
EVOLINK LAW GROUP

A handwritten signature in black ink that reads "Simon Lin".

SIMON LIN
Barrister & Solicitor
simonlin@evolinklaw.com

Cc: Zara Rahman, counsel for the Civil Resolution Tribunal

This is **Exhibit “B”** to the Affidavit of Brittany Dieno
affirmed before me on July 29, 2025

Simon Lin

Simon Lin

Subject: Re: Air Passenger Rights v WestJet Airlines Ltd. [IMAN2-IMANAGE.FID886835]



Simon Lin <simonlin@evolinklaw.com>

📧 10:59 (5 hours ago)

to AGUIAR, Elisa, PIMENTEL, Nicolas, DERY, Michael ▾

Good morning,

Please see the enclosed letter.

Thank you.

Kind Regards,

Simon Lin

Barrister & Solicitor

evolink LAW

Evolink Law Group

237-4388 Still Creek Drive, Burnaby, B.C. V5C 6C6

T: [604-620-2666](tel:604-620-2666)

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On Thu, Jul 24, 2025 at 3:01 PM AGUIAR, Elisa <eaguiar@ahbl.ca> wrote:

Good afternoon,

Please find attached correspondence on behalf of Mr. Pimentel.

Kind regards,

ELISA AGUIAR

Legal Administrative Assistant

To Michael Dery and Nicolas Pimentel

she/hers/her

Tel: [604 643 2117](tel:604-643-2117)

Fax: 604 484 9700

Email: eaguiar@ahbl.ca

Social:



**ALEXANDER
HOLBURN**

ALEXANDER HOLBURN BEAUDIN + LANG LLP

2700 - 700 West Georgia Street, Vancouver, BC, V7Y 1B8

Tel: 604 484 1700 | Fax: | Toll Free: 877 688 1351

Barristers + Solicitors | Vancouver | Kelowna | Toronto

July 28, 2025

VIA EMAIL

Alexander Holburn Beaudin + Lang LLP

ATTN: Mr. Michael Dery

2700-700 West Georgia

Vancouver BC, V7Y 1B8

Dear Mr. Dery,

RE: Air Passenger Rights v. WestJet Airlines Ltd., NEW-S-S-254494 – Defendant's Belated Application

We write in respect of the Defendant's application filed July 24, 2025, specifically: (a) the service requirements under Rule 8-1(7)-(8) were not met; (b) the time estimate of two hours is plainly inaccurate; and (c) on cursory review, there is *res judicata* against WestJet.

Requirements under Rule 8-1(7)-(8) were Not Met

We draw your attention to Rule 8-1(7)-(8) providing that service must be completed at least 8 business days before the date set for the hearing:

Service of application materials

(7) The applicant must serve the following, in accordance with subrule (8), on each of the parties of record and on every other person, other than a party, who may be affected by the orders sought:

(a) a copy of the filed notice of application;

(b) a copy of each of the filed affidavits and documents, referred to in the notice of application under subrule (4) (d), that has not already been served on that person;

(c) if the application is brought under Rule 9-7, any notice that the applicant is required to give under Rule 9-7 (9).

Time for service

(8) The documents referred to in subrule (7) of this rule must be served,

(a) subject to paragraph (b) of this subrule, **at least 8 business days** before the date set for the hearing of the application, or

(b) in the case of an application under Rule 9-7, at least 12 business days before the date set for the hearing of the application.

In this instance, “at least 8 business days” from July 24, 2025 is August 7, 2025, since August 4 is a holiday. As such, the date indicated on the face of the Notice of Application for an August 6, 2025 hearing should not have been accepted for filing to begin with.

We draw your attention to [*Collington Construction Ltd. v CPOS Development Corp.*](#), 2019 BCSC 1716 at para. 26:

*[26] Rule 8-1(7) deals with service of the notice of application. It provides that the applicant must serve, on each party of record, a copy of the filed notice of application and a copy of each filed affidavit and document referred to in the notice of application. It is my view that the requirement to serve the notice of application is a procedural step towards having the application heard. The application is made when the notice of application is filed. However, in order for the application to be heard, the applicant **must** fulfill the other procedural requirements of Rule 8-1, including service.*

Given WestJet’s failure to meet the procedural requirements of Rule 8-1, including service in accordance with Rule 8-1(8), WestJet’s application cannot be heard on August 6, 2025.

Relatedly, the accompanying requisition seems to imply that the Plaintiff somehow consented to WestJet’s application being heard on August 6, 2025. We understand the Registry has a robust process to ensure that only applications that meet the timelines are accepted for filing. The ambiguous requisition appears to be the reason the Notice of Application was accepted, despite the failure to comply with Rule 8-1(7)-(8).

We remind you that the two-days of hearing on August 6-7, 2025 was explicitly reserved, by agreement of the parties, for addressing the discovery issues in relation to WestJet. It is not for WestJet to hijack those dates with a belated application.

We request that you forthwith provide a copy of the CSO filing package, including notes your office conveyed to the Registry, and any Registry notices that were issued in relation to that filing. Should you refuse to provide, we will seek Directions from the Court to inquire into why an obviously belated application was accepted for filing.

Two Hour Time Estimate is Wholly Inadequate

There is no need to look further than the Notice of Application to see that the two (2) hour hearing estimate cannot remotely be accurate. By our conservative estimate, WestJet’s application will require a minimum of 1.5 days of hearing time. We are open to scheduling WestJet’s application for a mutually-convenient time on the New Westminster long chambers list in October 2025, so long as it does not affect the January 2026 trial dates.

The Application May be *Res Judicata*

We note that before the Honourable Justice Gibb-Carsley in 2024, WestJet also argued that the Notice of Civil Claim be struck out for various reasons. The Court did not accede to those arguments. Justice Gibb-Carsley's decision was not appealed.¹ The doctrine of *res judicata* (or the related doctrines of issue estoppel, etc.) would bar repetitive hearings on an issue that could have or should have been raised.²

In any event, as a professional courtesy, we note that paragraphs 14-18 of WestJet's Notice of Application is highly misleading.

Firstly, at paragraph 14, WestJet cites *Seidel* from the Supreme Court of Canada, but neglected to note that WestJet was citing the comments from the dissent, not the majority.

Secondly, WestJet omitted other parts of *Seidel* where the Supreme Court of Canada endorsed the "restore to any person any money or other property or thing" being brought by public interest litigants, such as the Plaintiff here.

Finally, we note that WestJet also failed to cite binding appeal guidance on what the four prerequisites are for a restoration order (excerpted below).³ WestJet's omission is all the more puzzling when WestJet themselves admitted in Part 3, paragraph 18 of the Response to Civil Claim that these are the four requirements for a statutory restoration order under s. 172(3)(a) of the *BPCPA*.

[53] As I read s. 172(3)(a), there are four prerequisites to the granting of a restoration order:

- a) The court must make a declaratory or injunctive order under s. 172(1) before it can make an order under s. 172(3) – this requirement is set out in the opening words of s. 172(3);
- b) The supplier must have acquired something ("money or other property or thing") because of a contravention of the legislation – this requirement is explicit in s. 172(3)(a);
- c) The beneficiary of an order under s. 172(3) must have been the source of money or some other thing acquired by the supplier – this requirement is a necessary implication of the use of the word "restore"; and
- d) The beneficiary must have "an interest" in the thing to be restored – this requirement is explicit in s. 172(3)(a).

¹ [*Air Passenger Rights v WestJet Airlines Ltd.*](#), 2025 BCSC 155.

² [*1141536 B.C. Ltd. v Main Acquisitions*](#), 2019 BCSC 1689 at paras. 12-13.

³ [*Ileman v. Rogers Communications Inc.*](#), 2015 BCCA 260 at para. 53.

WestJet also overlooked the explicit text of s. 172(3) providing that:

(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;

Firstly, s. 172(3)(a) clearly refers to restoring to “any person”, not just a plaintiff or a party to the action. If the legislature intended to remedy to be limited to a plaintiff only, the legislature would have utilized similar language as s. 171 (e.g., “*the person who suffered damage or loss may bring an action against a...*” rather than “any person”). Indeed, the public interest restoration remedy does not require a s. 171 damages claim to be advanced at the same time in order to be viable.⁴ In other words, s. 172(3)(a) can be advanced on a standalone basis.

Secondly, where the legislature intended the remedy to be available to the Director only, the legislature would use explicit language like in s. 172(3)(b) above. WestJet’s position seems to be inviting the Court to augment s. 172(3)(a) with additional text that is not there.

Conclusion

We trust that WestJet will reset their application for long chambers on a mutually agreeable date, should WestJet still insist on proceeding with their application.

WestJet is inviting the Court to ignore binding legal guidance and statutory text, and attempt to misdirect the Court to ignore the clear text of s. 172 of the *BPCPA*. We reserve the right to seek special costs should WestJet insist on continuing with the application.

For greater certainty, the Plaintiff intends to proceed with the Plaintiff’s applications regarding discovery on August 6-7, 2025. We expect WestJet to promptly serve its filed response materials for our application. While the deadline to do so is July 28, 2025 under the *Supreme Court Civil Rules*, we are open to extending that to July 30, 2025.

Yours truly,

EVOLINK LAW GROUP



SIMON LIN, Barrister & Solicitor

⁴ [Sandhu v. HSBC Finance Mortgages Inc.](#), 2016 BCCA 301 at paras. 86-88.

This is **Exhibit “C”** to the Affidavit of Brittany Dieno
affirmed before me on July 29, 2025

A handwritten signature in black ink that reads "Simon Lin". The signature is written in a cursive style with a horizontal line extending from the end of the name.

Simon Lin

Brittany Dieno

From: PIMENTEL, Nicolas <npimentel@AHBL.CA>
Sent: July 29, 2025 8:23 AM
To: Simon Lin
Cc: DERY, Michael; AGUIAR, Elisa
Subject: RE: Air Passenger Rights v WestJet Airlines Ltd. [IMAN2-IMANAGE.FID886835]
Attachments: 2025-07-28 LT Defendant.pdf; Notice of Application.pdf; Requisition - General(14664689.1).pdf; CSOSummaryReport.pdf

Hi Simon,

We write in response to your attached letter. We attach the original Notice of Application and Requisition that we attempted to file with the Court and the Registry Notice. It appears that the Registry took issue with the fact that the Notice of Application included a start time of 9:45 a.m. while the Requisition indicated a start time of 10:00 a.m. This was corrected in our materials that were accepted for filing. We had no further correspondence with the Registry beyond the attached.

You have taken issue with our time estimate and the fact that hearing our application on August 6 does not provide eight clear days between the service of the Notice of Application and the hearing of the application. We note that having our application heard on August 7 would provide eight clear days between the filing of the Notice of Application and the hearing on August 7.

We are prepared to file a Requisition changing the date of the hearing of our application to August 7 and changing the time estimate to one day. We expect that our Application Response will simplify the issues to be determined on your Notice of Application filed July 21, 2025, and served on us on July 22, 2025. In any event, we note that you have already made two separate applications returnable on August 6-7 with a total time estimate of three days, which already exceeds the time scheduled with the court. We will maintain at the hearings on August 6-7 that our Notice of Application should be heard first. We are willing to provide you with an extension until August 1, 2025 to provide us with your Application Response.

In your letter you state that the deadline for our Application Response was July 28, 2025. As we were not served with the filed Notice of Application until July 22, 2025, the deadline for our Application Response is July 29, 2025. In any event, we thank you for the extension to provide our filed Application Response by June 30, 2025.

We disagree with the remainder of the positions taken in your letter. The issues raised in our Notice of Application were not before Justice Gibb-Carsley on your application for an injunction and the issues of *res judicata* and issue estoppel clearly do not apply.

Yours truly,

Nicolas.

NICOLAS V. PIMENTEL <i>Partner</i> Tel: 604 484 1745 Fax: 604 484 9745	ALEXANDER HOLBURN BEAUDIN + LANG LLP 2700 - 700 West Georgia Street, Vancouver, BC, V7Y 1B8 Barristers + Solicitors Vancouver Kelowna Toronto
---	--

From: Simon Lin <simonlin@evolinklaw.com>
Sent: Monday, July 28, 2025 11:00 AM

To: AGUIAR, Elisa <eaguiar@ahbl.ca>

Cc: PIMENTEL, Nicolas <npimentel@AHBL.CA>; DERY, Michael <mdery@AHBL.CA>

Subject: Re: Air Passenger Rights v WestJet Airlines Ltd. [IMAN2-IMANAGE.FID886835]

CAUTION: This email originated from outside of the organization. Do not click links or open attachments unless you recognize the sender and know the content is safe.

Good morning,

Please see the enclosed letter.

Thank you.

Kind Regards,

Simon Lin
Barrister & Solicitor



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On Thu, Jul 24, 2025 at 3:01 PM AGUIAR, Elisa <eaguiar@ahbl.ca> wrote:

Good afternoon,

Please find attached correspondence on behalf of Mr. Pimentel.

Kind regards,

ELISA AGUIAR
Legal Administrative Assistant
To Michael Dery and Nicolas Pimentel
she/hers/her



Tel: 604 643 2117
Fax: 604 484 9700
Email: eaguiar@ahbl.ca
Social:

ALEXANDER HOLBURN BEAUDIN + LANG LLP
2700 - 700 West Georgia Street, Vancouver, BC, V7Y 1B8
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Barristers + Solicitors | Vancouver | Kelowna | Toronto

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July 28, 2025

VIA EMAIL

Alexander Holburn Beaudin + Lang LLP

ATTN: Mr. Michael Dery

2700-700 West Georgia

Vancouver BC, V7Y 1B8

Dear Mr. Dery,

RE: Air Passenger Rights v. WestJet Airlines Ltd., NEW-S-S-254494 – Defendant's Belated Application

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Time for service

(8) The documents referred to in subrule (7) of this rule must be served,

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(b) in the case of an application under Rule 9-7, at least 12 business days before the date set for the hearing of the application.

In this instance, “at least 8 business days” from July 24, 2025 is August 7, 2025, since August 4 is a holiday. As such, the date indicated on the face of the Notice of Application for an August 6, 2025 hearing should not have been accepted for filing to begin with.

We draw your attention to [*Collington Construction Ltd. v CPOS Development Corp.*](#), 2019 BCSC 1716 at para. 26:

*[26] Rule 8-1(7) deals with service of the notice of application. It provides that the applicant must serve, on each party of record, a copy of the filed notice of application and a copy of each filed affidavit and document referred to in the notice of application. It is my view that the requirement to serve the notice of application is a procedural step towards having the application heard. The application is made when the notice of application is filed. However, in order for the application to be heard, the applicant **must** fulfill the other procedural requirements of Rule 8-1, including service.*

Given WestJet’s failure to meet the procedural requirements of Rule 8-1, including service in accordance with Rule 8-1(8), WestJet’s application cannot be heard on August 6, 2025.

Relatedly, the accompanying requisition seems to imply that the Plaintiff somehow consented to WestJet’s application being heard on August 6, 2025. We understand the Registry has a robust process to ensure that only applications that meet the timelines are accepted for filing. The ambiguous requisition appears to be the reason the Notice of Application was accepted, despite the failure to comply with Rule 8-1(7)-(8).

We remind you that the two-days of hearing on August 6-7, 2025 was explicitly reserved, by agreement of the parties, for addressing the discovery issues in relation to WestJet. It is not for WestJet to hijack those dates with a belated application.

We request that you forthwith provide a copy of the CSO filing package, including notes your office conveyed to the Registry, and any Registry notices that were issued in relation to that filing. Should you refuse to provide, we will seek Directions from the Court to inquire into why an obviously belated application was accepted for filing.

Two Hour Time Estimate is Wholly Inadequate

There is no need to look further than the Notice of Application to see that the two (2) hour hearing estimate cannot remotely be accurate. By our conservative estimate, WestJet’s application will require a minimum of 1.5 days of hearing time. We are open to scheduling WestJet’s application for a mutually-convenient time on the New Westminster long chambers list in October 2025, so long as it does not affect the January 2026 trial dates.

The Application May be *Res Judicata*

We note that before the Honourable Justice Gibb-Carsley in 2024, WestJet also argued that the Notice of Civil Claim be struck out for various reasons. The Court did not accede to those arguments. Justice Gibb-Carsley's decision was not appealed.¹ The doctrine of *res judicata* (or the related doctrines of issue estoppel, etc.) would bar repetitive hearings on an issue that could have or should have been raised.²

In any event, as a professional courtesy, we note that paragraphs 14-18 of WestJet's Notice of Application is highly misleading.

Firstly, at paragraph 14, WestJet cites *Seidel* from the Supreme Court of Canada, but neglected to note that WestJet was citing the comments from the dissent, not the majority.

Secondly, WestJet omitted other parts of *Seidel* where the Supreme Court of Canada endorsed the "restore to any person any money or other property or thing" being brought by public interest litigants, such as the Plaintiff here.

Finally, we note that WestJet also failed to cite binding appeal guidance on what the four prerequisites are for a restoration order (excerpted below).³ WestJet's omission is all the more puzzling when WestJet themselves admitted in Part 3, paragraph 18 of the Response to Civil Claim that these are the four requirements for a statutory restoration order under s. 172(3)(a) of the *BPCPA*.

[53] As I read s. 172(3)(a), there are four prerequisites to the granting of a restoration order:

- a) The court must make a declaratory or injunctive order under s. 172(1) before it can make an order under s. 172(3) – this requirement is set out in the opening words of s. 172(3);
- b) The supplier must have acquired something ("money or other property or thing") because of a contravention of the legislation – this requirement is explicit in s. 172(3)(a);
- c) The beneficiary of an order under s. 172(3) must have been the source of money or some other thing acquired by the supplier – this requirement is a necessary implication of the use of the word "restore"; and
- d) The beneficiary must have "an interest" in the thing to be restored – this requirement is explicit in s. 172(3)(a).

¹ [*Air Passenger Rights v WestJet Airlines Ltd.*](#), 2025 BCSC 155.

² [*1141536 B.C. Ltd. v Main Acquisitions*](#), 2019 BCSC 1689 at paras. 12-13.

³ [*Ileman v. Rogers Communications Inc.*](#), 2015 BCCA 260 at para. 53.

WestJet also overlooked the explicit text of s. 172(3) providing that:

(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;

Firstly, s. 172(3)(a) clearly refers to restoring to “any person”, not just a plaintiff or a party to the action. If the legislature intended to remedy to be limited to a plaintiff only, the legislature would have utilized similar language as s. 171 (e.g., “*the person who suffered damage or loss may bring an action against a...*” rather than “any person”). Indeed, the public interest restoration remedy does not require a s. 171 damages claim to be advanced at the same time in order to be viable.⁴ In other words, s. 172(3)(a) can be advanced on a standalone basis.

Secondly, where the legislature intended the remedy to be available to the Director only, the legislature would use explicit language like in s. 172(3)(b) above. WestJet’s position seems to be inviting the Court to augment s. 172(3)(a) with additional text that is not there.

Conclusion

We trust that WestJet will reset their application for long chambers on a mutually agreeable date, should WestJet still insist on proceeding with their application.

WestJet is inviting the Court to ignore binding legal guidance and statutory text, and attempt to misdirect the Court to ignore the clear text of s. 172 of the *BPCPA*. We reserve the right to seek special costs should WestJet insist on continuing with the application.

For greater certainty, the Plaintiff intends to proceed with the Plaintiff’s applications regarding discovery on August 6-7, 2025. We expect WestJet to promptly serve its filed response materials for our application. While the deadline to do so is July 28, 2025 under the *Supreme Court Civil Rules*, we are open to extending that to July 30, 2025.

Yours truly,

EVOLINK LAW GROUP



SIMON LIN, Barrister & Solicitor

⁴ [Sandhu v. HSBC Finance Mortgages Inc.](#), 2016 BCCA 301 at paras. 86-88.

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 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.

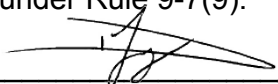
Part 4: MATERIAL TO BE RELIED ON

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.

FORM 17

(Rules 4-6(1), 5-4(1), 8-1(21.1) and (22),
9-4(1), 13-3 (25), 16-1(16.1) and (17),
20-5(3), 23-1(9) and 23-3 (10))

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

REQUISITION - GENERAL

Filed by: the Defendant, WestJet Airlines Ltd. (the "Filing Party")

Required: Pursuant to Rule 8-1, the enclosed application filed July 24, 2025, be set for hearing be set for hearing on August 6, 2025, at 10:00 a.m. at the New Westminster Law Courts;

The application seeks an Order to strike portions of the Amended Notice of Civil Claim on the basis of standing.

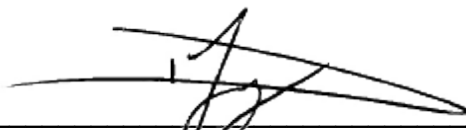
The time estimate is two hours. The Plaintiff has already reserved August 6-7, 2025 through BCSC Scheduling with respect to two of its own applications.

The application is within the jurisdiction of an associate judge.

This requisition is filed by Michael Dery, the counsel for the Filing Party in this proceeding, whose address for service is as follows:

Alexander Holburn Beaudin + Lang LLP
2700 - 700 West Georgia Street
Vancouver, BC V7Y 1B8

Dated: July 24, 2025



Signature of Michael Dery
☒ lawyer for Filing Party

**Court Services Online****Registry Notice****Package ID: 4014800****Submission Date: July 24, 2025**

Account ID: 30690

Client ID: 87335

Alexander Holburn Beaudin + Lang LLP
2700 - 700 West Georgia Street
Vancouver, BC
V7Y 1B8

Court Case File #: NEW-S-S-254494

Client File #: 1162472

Documents:

1	Notice of Application	Rejected
2	Requisition	Rejected

Registry Reasons:

Reason 1: Rejection

24-JUL-2025

Good afternoon,

Please note that your package was rejected because the Notice of Application and Requisition have conflicting dates for the desired appearance time. Please amend your documents accordingly and resubmit.

Thank you,
KC

Please keep a copy of this report for your records.