



No. NEW-S-S-254494
NEW WESTMINSTER REGISTRY

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN

AIR PASSENGER RIGHTS

PLAINTIFF

AND

WESTJET AIRLINES LTD.

DEFENDANT

APPLICATION RESPONSE
(Defendant's Application to Strike)

Application response of the Plaintiff, Air Passenger Rights.

THIS IS A RESPONSE TO the notice of application of the Respondent filed July 24, 2025.

The application respondent estimates that the application will take **two (2) days**.

PART 1: ORDERS CONSENTED TO

The application respondent consents to the granting of the orders set out in the paragraphs identified below, of Part 1 of the notice of application: **NONE**.

PART 2: ORDERS OPPOSED

The application respondents oppose the granting of the orders set out in paragraphs **ALL** of Part 1 of the notice of application.

PART 3: ORDERS ON WHICH NO POSITION IS TAKEN

The application respondents take no position on the granting of the orders set out in the following paragraphs of Part 1 of the notice of application: **NIL**.

PART 4: FACTUAL BASIS

Overview and Summary

1. The underlying action is a public interest lawsuit under s. 172 of the *Business Practices and Consumer Protection Act* [**BPCPA**] filed by Air Passenger Rights [**APR**], a non-profit organization advocates for the interests of air travellers. The core dispute in the action is WestJet publicizing and/or imposing an arbitrary guideline/policy that is inconsistent with the applicable uniform laws for air travel, and WestJet's ongoing conduct harms consumers.
2. WestJet's application was not served as required by Rule 8-1(7)-(8), nor did WestJet seek short leave to truncate the timelines for service. As a result, WestJet's application cannot be heard on August 6, 2025 ([Collington Construction Ltd. v CPOS Development Corp.](#), 2019 BCSC 1716 at para. 26).
3. The trial of this action was fixed for January 19, 2026 for five days by agreement.
4. The August 6-7, 2025 hearing dates were reserved, by agreement of the parties, for addressing the Plaintiff's discovery applications. The Plaintiff's two applications are the application regarding WestJet's redacted documents (the "**Redaction Application**") and the application for objections/refusals at the examination for discovery of WestJet's representative (the "**Refusals Application**").
5. The substratum of the Defendant's application was known to them at the outset of this case. However, the Defendant has not said a word about bringing such application, despite both parties having conducted document discovery and examinations for discovery. It was only in response to the Plaintiff's Refusals Application that the Defendant pulls out their belated application to "hijack" the hearing dates for the Plaintiff's two applications. Those hearing dates were reserved two months in advance by consent, without the Defendant mentioning they intended to file an application.
6. On July 29, 2025, WestJet provided to the Plaintiff one of the CSO packages – the one that was rejected but not the one that was accepted for filing. In the rejected

package, WestJet included the rejected Requisition. It is apparent that WestJet adjusted the Requisition in order for their late application to be accepted. The change gave the reader a false impression that the Plaintiff is not objecting to the late application to be fixed on the same day as the Plaintiff's applications.

Affidavit of Brittany Dieno made on July 29, 2025 [**Dieno Affidavit #4**] at Exhibit C

The Requisition that was Actually Filed

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 9:45 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 for the hearing of other applications in the within action and the enclosed application should be heard on August 6, 2025.

The application is within the jurisdiction of an associate judge.

The Requisition that was Rejected (Dieno Affidavit #4, Exhibit C)

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.

7. The Plaintiff, Air Passenger Rights, seeks the following Directions from this Court:

- a. In accordance with PD-4, this action be referred to the Chief Justice for early assignment of a trial judge or, alternatively referring the parties to set a case planning conference for the earliest available date to request early assignment of a trial judge.
- b. The Defendant's application be adjourned to a date and time to be determined by the trial judge. The Plaintiff reserves the right to supplement or amend this Application Response to substantively respond to the issues.
- c. The Defendant forthwith provide the complete CSO package(s) they utilized for filing of this application. The Registry has robust processes to ensure that late applications are not accepted for filing in the absence of a specific Order granting short-leave. In this instance, the safeguards were bypassed. It would be important for this Court to appreciate the circumstances this occurred, so it does not occur again in this case or other cases.

The Parties to this Public Interest Action and the Impugned WestJet Conduct

8. The Plaintiff, Air Passenger Rights [**APR**], is a federally incorporated non-profit entity formed in 2019 whose mandate includes advocating for the interests of air travellers. The Defendant, WestJet Airlines Ltd. [**WestJet**], is a commercial airline.

Affidavit #1 of Dr. Gabor Lukacs made on October 16, 2024 [**Lukacs Affidavit**] at Exhibit A
Amended Notice of Civil Claim [**ANOC**], Part 1 – Statement of Facts, paras. 6-7

9. WestJet had a webpage entitled “*Submit a request for reimbursement*” found at <https://www.westjet.com/en-ca/interruptions/submit-expenses> that purports to:
- a. Place a \$150/night or \$200/night cap on hotel reimbursements to passengers for domestic and international locations, respectively, when passengers are stranded and WestJet fails to secure accommodations for them.
 - b. Place a \$45/day cap on meal reimbursements when passengers are stranded.
 - c. Represent to passengers that WestJet is not required to reimburse for cellular roaming charges, missed prepaid events, or lost wages.

(hereafter referred to as the “**Guidelines**”).
Lukacs Affidavit at Exhibit G

10. This action relates to WestJet using the Guidelines, both on WestJet’s website and behind the scenes, to mislead passengers about entitlements to reimbursement.

ANOC, Part 1 at paras. 3 and 20-36

11. The trial is currently scheduled for five (5) days starting January 20, 2026.

An Interlocutory Injunction is Issued Against WestJet

12. On January 31, 2025, Justice Gibb-Carsley issued an interlocutory injunction enjoining WestJet from engaging in the conduct complained of. The decision was not appealed. The pertinent paragraphs of that decision are reproduced below and is informative of the issues in dispute in the action, and what evidence the trial judge may need to adjudicate the matter:

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

...

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

...

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

...

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

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

...

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

...

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

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

Other Pre-Trial Steps the Parties have Taken

13. On November 29, 2024, the Plaintiff attempted to canvas dates for examination for discovery of WestJet’s representative. After multiple follow-ups, the examination for discovery of WestJet’s representative was scheduled for April 2, 2025.
14. On December 9, 2024, the Plaintiff filed an application to compel WestJet to remove redactions from the documents they had disclosed. The application was adjourned multiple times as no judge was available to hear the matter.
15. On April 2, 2025, examination for discovery of WestJet’s representative commenced and adjourned with eighty-eight (88) requests on left on the record. Amongst the eighty-eight (88) requests:

XFD Request Number	Relevance	Total
3	Relevant to restoration order under s. 172(3)(a) only	1
4, 18, 21, 22, 25, 32, 33, 34, 37, 38, 39, 40, 41, 42, 44, 46, 52, 54, 55, 77, and 85	Relevant to both: (a) restoration order relief under s. 172(3)(a); <u>and</u> (b) other relief sought (i.e., injunctions and declarations).	22
1-2, 5-17, 19-20, 23, 26-31, 35-36, 43, 45, 47-51, 53, 56-76, 78-84, and 86-88	<u>Unrelated</u> to the restoration order relief under s. 172(3)(a)	65

16. In other words, only one request relates solely to the restoration order under s. 172(3)(a). The other eighty-seven (87) requests would need to be addressed irrespective of whether the Plaintiff proceedings with the restoration order under s. 172(3)(a).

17. On April 17, 2025, counsel for the Plaintiff wrote to WestJet's counsel enclosing the list of requests that were left on the record and proposed that WestJet provide their response to the requests by May 30, 2025 and, if WestJet proposes another date to advise by April 30, 2025. At the same time, Plaintiff's counsel proposed holding a chambers hearing date to address any objections and refusals.

Affidavit #3 of Brittany Dieno made on July 17, 2025 [**Dieno Affidavit #3**] at Exhibit A

18. On April 30, 2025, WestJet's counsel responded asserting that May 30, 2025 was an "arbitrary deadline." WestJet's counsel indicated they would respond by June 30, 2025, and proposed July 14 to 17, 2025 for the chambers hearing date.

Dieno Affidavit #3 at Exhibit B.

19. On April 30, 2025, Plaintiff's counsel responded indicating that WestJet's proposed hearing date would result in one business day between WestJet's responding deadline (Jun. 30, 2025) and the deadline to file an application under Rule 8-1.

Dieno Affidavit #3 at Exhibit C.

20. On May 1, 2025, WestJet's proposed to reserve a hearing between August 5 to 9.

Dieno Affidavit #3 at Exhibit D.

21. On June 10, 2025, the monthly phone-in date for reserving long chambers, Plaintiff's counsel advised that August 6-7 was reserved in New Westminster.

Dieno Affidavit #3 at Exhibit F.

22. On June 25, 2025, the President of Air Passenger Rights (Dr. Gabor Lukacs) was examined for discovery in this action.

23. On July 4, 2025, after WestJet's proposed June 30, 2025 deadline passed without any word, Plaintiff's counsel followed-up. WestJet's counsel advised that they "were aiming to provide our response by the end of June" only. WestJet's counsel claimed that they need additional time to respond. Immediately after the above email, Plaintiff's counsel responded requesting clarity on the amount of additional time that WestJet seeks. WestJet did not respond.

Dieno Affidavit #3 at Exhibits G, H and I.

24. On July 7, 2025, the day before the next monthly phone-in date, Plaintiff's counsel advised that he would attempt to secure hearing dates in September and requested WestJet's counsel provide their availability for September.

Dieno Affidavit #3 at Exhibit J.

25. On the morning of July 8, 2025, WestJet's counsel provided two September dates only, minutes before the phone-in time, after Plaintiff's counsel followed-up again.

Dieno Affidavit #3 at Exhibits K to M.

26. On July 14, 2025, Plaintiff's counsel wrote to WestJet again to follow-up on the outstanding requests and also advised that there were no available hearing dates for September. WestJet again did not respond.

Dieno Affidavit #3 at Exhibit N and para. 16.

27. On July 21, 2025, without receiving any response to the requests or any responses from WestJet on this issue, the Plaintiff filed the application for objections and refusals for hearing on August 6-7, 2025 as agreed three months ago.

Plaintiff's Notice of Application filed July 21, 2025.

28. Without any prior notice or consultation, on July 24, 2025, WestJet filed this application and also an accompany requisition that seems to imply that the parties had agreed to have this application heard. WestJet also claimed therein that the application "will be dispositive of many of the Orders requested for document production" without giving any specific number.

WestJet's Notice of Application filed July 24, 2025 and Requisition

29. On July 28, 2025, Plaintiff's counsel wrote to WestJet noting the various deficiencies in their application, including failure to serve as required by Rule 8-1.

Dieno Affidavit #4 at Exhibit B

30. On July 29, 2025, WestJet wrote to the Plaintiff, purporting to explain how the late application was accepted for filing. Their explanation only deepened the mystery.

Dieno Affidavit #4 at Exhibit C

31. There is a material discrepancy between the Requisition that was originally filed, and rejected, as compared to the one that was ultimately accepted for filing.

32. WestJet only provided the CSO package that was rejected but not the one that was accepted for filing. It is apparent that there was an unstated reason for changing the language in the aforementioned requisitions.

33. Moreover, the change in the text gives the reader a false impression that WestJet's application is being fixed for hearing on August 6 by consent of the Plaintiff.

WestJet's Dilatory Conduct in this Case and Other Cases

34. In relation to this case, WestJet has a history of not responding to correspondences.

Air Passenger Rights v WestJet Airlines Ltd., 2025 BCSC 155 at paras. 14 and 16

35. In another proceeding involving the Plaintiff, WestJet has also used a similar tactic in filing a last-minute application to hijack the hearing dates that were reserved.

Dieno Affidavit #4 at Exhibit A

36. In an unrelated case where WestJet was represented by other counsel, Justice Hughes commented as follows on WestJet's conduct:

[12] In response to the production order, WestJet took the position that the scope of production of complaint files was limited to complaints by confirmed female class members against male pilots and has produced complaint files falling within those parameters. To

date, WestJet has produced 24 harassment complaint files. Approximately half of those were not produced until September of 2024—approximately eight months after *Document Production #1* was issued, which required production within 45 days—and only two weeks before this application came on for hearing. WestJet's internal statistics suggest that significantly more harassment complaints (including sexual harassment and sexual assault) were made during the class period than have been disclosed. For example, documentation produced by WestJet suggests 16 complaints were made in Q4 2018 and 19 in Q1 2022 alone. It is unclear how many of those complaints would have been made by class members. Nonetheless, WestJet has produced only 24 complaint files for the entire class period.

[13] The plaintiff has raised various concerns regarding the completeness of WestJet's document production in the course of this application. In my view, these concerns are not unfounded. The record before me suggests that WestJet's approach to document production to date has been dilatory and, at times, potentially adversarial in nature. It is unclear why all complaint files were not produced in accordance with the timeline required by *Document Production #1*. If WestJet was unable to produce within the time required, then it was incumbent on WestJet to seek an extension of the court-ordered timeline for production. WestJet's dilatory approach to document production was also a factor that contributed to the trial being adjourned by consent from October 2024 to October 2025.

Lewis v WestJet Airlines Ltd., 2024 BCSC 2398 [emphasis added]

PART 5: LEGAL BASIS

WestJet Failed to Comply with Rule 8-1(7)-(8) to Serve their Application

37. Rule 8-1(7)-(8) requires an application be served at least 8 business days before the hearing. “At least” means clear days that excludes the first and last days. Between July 24, 2025 and August 6, 2025, there are only seven (7) business days, as August 4, 2025 is a public holiday.

Interpretation Act, RSBC 1996, c. 238, s. 25.2 and 29 (definition of “holiday”)

38. This Court has stated that compliance with Rule 8-1(7)-(8) is mandatory in order for a chambers application to be heard.

[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.

Collington Construction Ltd. v CPOS Development Corp., 2019 BCSC 1716 at para. 26 [emphasis added]

Delay in WestJet Bringing their Application Warrants Adjournment or Dismissal

39. WestJet has not explained why it waited one-year to bring this application, despite participating in *numerous* pre-trial steps including: (a) application for interlocutory injunction; (b) document discovery; (c) opposing an application regarding improper redactions in WestJet's documents; (d) examinations for discovery of representatives of both parties; and (e) in or about April 30, 2025, committing to provide a response to the outstanding requests from the examination for discovery.

40. This Court indicated that delay in bringing such an application must be scrutinized:

[65] The plaintiffs rely on the inherent power of the Court to stay an application "to prevent a misuse of its procedure in a way that would ... bring the administration of justice into disrepute", citing *Canam Enterprises Inc. v. Coles* (2000), [2000 CanLII 8514 \(ON CA\)](#), 194 D.L.R. (4th) 648 (ONCA) at para. 55, Goudge J.A., dissenting, rev'd in [2002 SCC 63](#) citing opinion of Goudge J.A. with approval.

[66] They also rely on *Harris v. Canada*, [2001 FCT 758 \[Harris\]](#), *Morguard Real Estate Investment Trust v. ERM Canada Corp. et al.*, [2012 ONSC 4195](#) at paras. 46-48 and *Tribar Industries Inc. v. KPMG LLP*, [2009] O.J. No. 959 (ONSC) at para. 22, [2009 CanLII 9747](#) as support for the proposition that **a lengthy delay will be grounds to dismiss an application to strike**. They rely in particular on *Ross River Dena Council v. Canada (Attorney General)*, [2007 YKSC 65 \[Ross River\]](#) quoting from *Harris* at para. 25:

... A pleading should not be struck when the other party has "pleaded over" or when there is a lengthy delay between delivery of the pleading and the motion to strike ...

[67] The *Rules of Court* governing a motion to strike confronted by the Court in *Ross River* were substantially the same as those at issue in the case at bar.

Cambie Surgeries Corporation v. British Columbia (Medical Services Commission), 2015 BCSC 2169 [emphasis added]

Early Assignment of Trial Judge under PD-4

41. There is an urgent need to determine when/how to resolve WestJet's belated application. WestJet's application would result in litigation in slices. It does not resolve "many" of the eighty-eight outstanding discovery requests, except **one**. It would undoubtedly create an interlocutory appeal that would result in an adjournment of the trial. This Court recently noted in an unrelated case that WestJet had manufactured an adjournment from their own failure to comply with discovery obligations, which bears close similarities to the circumstances here.

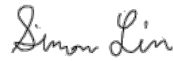
42. WestJet themselves delayed one-year before bringing the application, which is self-evident that there is no urgency in having it heard.
43. The trial judge would be best placed to determine whether or not to hear the application before the trial, or at the same time of the trial.

PART 6: MATERIAL TO BE RELIED ON

1. Affidavit #3 of Brittany Dieno made on July 17, 2025.
2. Affidavit #4 of Brittany Dieno made on July 29, 2025.
3. Affidavit #1 of Dr. Gabor Lukacs made on October 16, 2024
4. Amended Notice of Civil Claim filed November 27, 2024.
5. Amended Response to Civil Claim filed December 17, 2024.
6. Notice of Trial filed November 28, 2024.
7. Plaintiff's Notice of Application (WestJet's Improper Redactions) filed December 9, 2024
8. Plaintiff's Notice of Application (Refusals and Objections) filed July 21, 2025.
9. Such further and other material as counsel may advise and this Honourable Court permit.

[X] The application respondent has filed in this proceeding a document that contains the application respondent's address for service.

Dated: July 29, 2025



Signature of lawyer for application respondent
Simon Lin