



This is the 3rd affidavit
of Ciarah Machado in this case
and was made on November 13, 2024

NO. S-S-254452
NEW WESTMINSTER

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

AIR PASSENGER RIGHTS

PETITIONER

AND

WESTJET AIRLINES LTD.

RESPONDENT

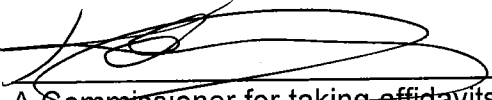
AFFIDAVIT


I, Ciarah Machado, of 2700-700 West Georgia Street, in the City of Vancouver, in the Province of British Columbia, Legal Administrative Assistant, AFFIRM THAT:

1. I am a Legal Administrative Assistant employed by the law firm of Alexander Holburn Beaudin + Lang LLP ("AHBL"), counsel for the Respondent, WestJet Airlines Ltd. ("WestJet"), and as such have personal knowledge of the matters hereinafter deposed to, save where stated to be upon information and belief where stated, I verily believe same to be true.
2. On October 25, 2024, I affirmed and filed my second affidavit in this proceeding, attaching as exhibits the pleadings in the matter of *Alexandra Fox v. WestJet*, Court File No. VLC-S-S-244546 in the Vancouver Registry, brought under the *Class Proceedings Act*, R.S.B.C. 1996, c.50 (the "*Fox Class Action*"). Attached to this affidavit and marked as **Exhibit "A"** is a true copy of my filed second affidavit.
3. On October 28, 2024, I served the filed copy of my second affidavit in this proceeding to the Petitioner. Attached to this affidavit and marked as **Exhibit "B"** is a true copy of the email I sent to the Petitioner serving my affidavit.
4. On the same date, counsel for the Petitioner responded with a letter to Mr. Dery, counsel for the Respondent, objecting to my second affidavit. Attached to this affidavit and marked as **Exhibit "C"** is a true copy of this email and letter attachment.
5. On November 4, 2024, Mr. Dery emailed Mr. Lin, advising Mr. Lin of the relevance of my second affidavit and the purpose for which my second affidavit was tendered, and stating that there is no new evidence or argument. Attached to this affidavit and marked as **Exhibit "D"** is a true copy of the email from Mr. Dery.

6. Again, on the same date, Mr. Lin wrote another letter to Mr. Dery confirming his objection to my second affidavit and his refusal to consent to same. Attached to this affidavit and marked as **Exhibit "E"** is a true copy of his email and letter attachment.

AFFIRMED BEFORE ME at Vancouver,)
British Columbia on November 13, 2024)


A Commissioner for taking affidavits for
British Columbia.)


Ciarah Machado)

KATELYN CHAUDHARY
Barrister + Solicitor
ALEXANDER HOLBURN BEAUDIN + LANG LLP
2700 - 700 WEST GEORGIA ST.
VANCOUVER, BC CANADA V7Y 1B8



This is Exhibit " A " referred to in
 the affidavit of Ciarah Machado
 sworn before me at the City of Vancouver
 this 13 day of November 20 24
[Signature]
 A Commissioner for taking Affidavits
 in and for the Province of British Columbia

This is the 2nd affidavit
 of Ciarah Machado in this case
 and was made on October 25, 2024

NO. S-S-254452
 NEW WESTMINSTER

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

AIR PASSENGER RIGHTS

PETITIONER

AND

WESTJET AIRLINES LTD.

RESPONDENT

AFFIDAVIT

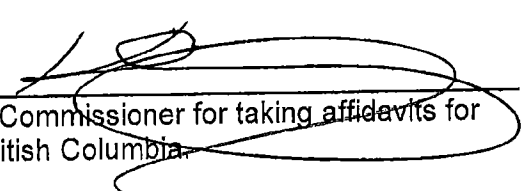
I, Ciarah Machado, of 2700-700 West Georgia Street, in the City of Vancouver, in the Province of British Columbia, Legal Administrative Assistant, AFFIRM THAT:

1. I am a Legal Administrative Assistant employed by the law firm of Alexander Holburn Beaudin + Lang LLP ("AHBL"), counsel for the Respondent, WestJet Airlines Ltd. ("WestJet"), and as such have personal knowledge of the matters hereinafter deposed to, save where stated to be upon information and belief where stated, I verily believe same to be true.
2. I have reviewed the documents in this matter and in the matter of *Alexandra Fox v. WestJet*, Court File No. VLC-S-S-244546 in the Vancouver Registry, brought under the *Class Proceedings Act*, R.S.B.C. 1996, c.50 (the "Fox Class Action") and rely on those items in affirming this affidavit.
3. Evolink Law Group, counsel for the Petitioner, acts as counsel for the Plaintiff in the *Fox Class Action*, which relates to a labour dispute between WestJet and the Aircraft Mechanics Fraternal Association in June 2024. Attached to this affidavit and marked as Exhibit "A" is a true copy of the Notice of Civil Claim filed in the *Fox Class Action* and served upon WestJet on August 12, 2024.

- 2 -

4. AHBL act as counsel for the Defendant, WestJet, in the *Fox* Class Action. Attached to this affidavit and marked as **Exhibit "B"** is a true copy of the Response to Civil Claim, filed and served upon the Plaintiff on October 4, 2024.

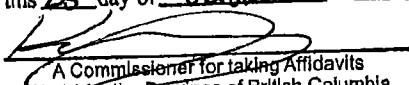
AFFIRMED BEFORE ME at Vancouver,)
 British Columbia on October 25, 2024)


 A Commissioner for taking affidavits for
 British Columbia.


 Ciarah Machado

KATELYN CHAUDHARY
 Barrister + Solicitor
 ALEXANDER HOLBURN BEAUDIN + LANG LLP
 2700 - 700 WEST GEORGIA ST.
 VANCOUVER, BC CANADA V7Y 1B8



This is Exhibit " A " referred to in
the affidavit of ciarah machado
sworn before me at the City of vancouver
this 25 day of October 20 24

A Commissioner for taking Affidavits
in and for the Province of British Columbia

1

Court File No. **VLC-S-S-244546**No.
VANCOUVER REGISTRY

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN

ALEXANDRA FOX

PLAINTIFF

AND

WESTJET AIRLINES LTD.

DEFENDANT

Brought under the *Class Proceedings Act*, R.S.B.C. 1996, c. 50**NOTICE OF CIVIL CLAIM****This action has been started by the plaintiff for the relief set out in Part 2 below.**

If you intend to respond to this action, you or your lawyer must

- (a) file a response to civil claim in Form 2 in the above-named registry of this court within the time for response to civil claim described below, and
- (b) serve a copy of the filed response to civil claim on the plaintiff.

If you intend to make a counterclaim, you or your lawyer must

- (a) file a response to civil claim in Form 2 and a counterclaim in Form 3 in the above-named registry of this court within the time for response to civil claim described below, and
- (b) serve a copy of the filed response to civil claim and counterclaim on the plaintiff and on any new parties named in the counterclaim.

JUDGMENT MAY BE PRONOUNCED AGAINST YOU IF YOU FAIL to file the response to civil claim within the time for response to civil claim described below.

TIME FOR RESPONSE TO CIVIL CLAIM

A response to civil claim must be filed and served on the plaintiff,

- (a) if you were served with a notice of civil claim anywhere in Canada, within 21 days after that service,
- (b) if you were served with the notice of civil claim anywhere in the United States of America, within 35 days after that service,
- (c) if you were served with the notice of civil claim anywhere else, within 49 days after that service, or
- (d) if the time for response to civil claim has been set by order of the court, within that time.

CLAIMS OF THE PLAINTIFF

Part 1: STATEMENT OF FACTS

Overview of this Action

1. This is a proposed class proceeding seeking compensation for inconvenience, reimbursement of out-of-pocket expenses, and/or refund on behalf of passengers affected by flight cancellations initiated by WestJet in June 2024, prior to actual work stoppage by the employees of the Aircraft Mechanics Fraternal Association. WestJet's published statements state that about 10,000 passengers were affected.
2. At the heart of this class action is a legal question of whether flight cancellations initiated by WestJet after receiving a strike notice, but before any work stoppage, would constitute a situation outside of the air carrier's control under the *Air Passenger Protection Regulations* (the "**APPR**"). The Plaintiff submits that the cancellations are WestJet's business decisions to save costs and are within WestJet's control.
3. Section 86.11(4) of the *Canada Transportation Act* provides that the *APPR* are deemed to form part of the contracts of carriage (the "**tariffs**") between WestJet and its passengers, and can be enforced as a contractual obligation.

4. Passengers' right to standardized compensation for inconvenience for flight cancellations within a carrier's control is provided for in s. 19 of the *APPR*, ranging from \$400-\$1,000 depending on the length of the delay (i.e., \$400 for delays of 3 hours or more; \$700 for delays of 6 hours or more; and \$1,000 for delays of 9 hours or more). If the passenger elects a refund, the passenger is still entitled to \$400.
5. Aside from compensation for inconvenience of the cancellation, passengers are entitled to reimbursement of out-of-pocket losses due to the flight cancellations pursuant to the *APPR*. For international flights, the *Carriage by Air Act*, RSC 1985, c. C-26, Schedule VI the *Convention for the Unification of Certain Rules for International Carriage by Air* ("**Montreal Convention**") provides a further basis for reimbursement.
6. WestJet refused to provide Class Members with the standard compensation for inconvenience, the reimbursement of out-of-pocket losses, and/or refund to original payment form, claiming that the cancellations were beyond WestJet's control despite no work stoppage. This class action seeks to enforce the Class Members' legal rights.

Parties

7. The Plaintiff, Alexandra Fox, is a resident of British Columbia, and has an address for service in this action at 237-4388 Still Creek Drive, in the City of Burnaby, in the Province of British Columbia.
8. WestJet Airlines Ltd. is a company formed under the laws of Alberta and has nominated an agent in British Columbia upon whom process may be served generally at c/o AHBL Corporate Services Ltd., 2700 – 700 West Georgia Street, Vancouver (hereafter "**WestJet**"). WestJet also has a place of business in British Columbia in the Vancouver International Airport at 3211 Grant McConachie Way, Richmond, BC.
9. WestJet is a commercial airline that operates domestic passenger flights within Canada and international passenger flights to/from Canada, pursuant to the *Canada Transportation Act*, SC 1996, c. 10 and related enactments.
10. WestJet is a large carrier under the provisions of the *APPR*.

The WestJet Initiated Flight Cancellations In June 2024

11. In the month of June 2024, WestJet engaged in collective bargaining with the Aircraft Mechanics Fraternal Association ("**AMFA**") for the union's first collective agreement.

12. On June 17, 2024, the AMFA issued a notice under the *Canada Labour Code* to inform WestJet that work stoppage would start 72-hours later on June 20, 2024 at 7 p.m. MDT (the "**First Notice**"). There was no work stoppage before this time.

13. Shortly after the First Notice, WestJet announced on June 18, 2024 that:

In response to WestJet's request, AMFA issued a 72-hour strike notification, indicating intent for a work stoppage as early as Thursday, June 20 at 7:00 p.m. MT. This 72-hour notice does not mean travel disruption will occur.

[emphasis added]

14. Later on June 18, 2024 WestJet announced that it decided to park some of their aircraft in the next 48-hours resulting in around forty (40) cancellations between June 18 to 19, 2024, impacting approximately 6,500 passengers. The parking of aircraft before work stoppage was a business decision and was within WestJet's control.

15. At or around 1 p.m. MST on June 19, 2024, WestJet announced that the cancellations were "*in preparation for labour action*" and published a list of flights that would be cancelled on June 19 and 20, 2024.

16. On June 19, 2024, AMFA rescinded the First Notice and work stoppage did not occur in accordance with the First Notice. The parties returned to the bargaining table.

17. On June 25, 2024, the AMFA issued a notice under the *Canada Labour Code* to inform WestJet that work stoppage would start 72-hours later on June 28, 2024 at 5:30 p.m. MDT (the "**Second Notice**"). There was no work stoppage before this time.

18. On June 26, 2024, shortly after the Second Notice, WestJet announced that it has decided to park some of their aircraft in the next 48-hours resulting in approximately twenty-five (25) cancellations between June 27 to June 28, 2024, impacting

approximately 3,300 passengers. The parking of aircraft before work stoppage was a business decision and was within WestJet's control.

19. The parties were unable to reach a collective agreement and a strike started on June 28, 2024 at 5:30 p.m. MDT. A collective agreement was reached a few days later.

20. This proposed class action does not relate to any flight cancellations that occurred after work stoppage pursuant to the Second Notice. This proposed class action relates to all cancellations initiated by WestJet between June 17-20, 2024 and June 25-28, 2024 before any actual work stoppage occurred.

21. The number of flight cancellations affected by WestJet's business decision to park their aircrafts, after receiving the First Notice or Second Notice, is greater than the sixty-five (65) flights that WestJet publicly announced.

22. The actual number of flight cancellations affected by WestJet's business decision is within WestJet's exclusive knowledge and will be further particularized after discovery

The Plaintiff's Circumstances

23. On or about May 27, 2024, the Plaintiff booked a trip to Calgary, Alberta with booking reference FBLGVP as follows: (a) June 14, 2024 from Vancouver to Calgary on WS 122; and (b) June 19, 2024 from Calgary to Vancouver on WS 131.

24. The Plaintiff flew to Calgary on WS 122 on June 14, 2024.

25. On the evening of June 18, 2024, the Plaintiff was informed by email that her return flight to Vancouver was cancelled and that she was rebooked on the next available flight which was an early morning flight on June 20, 2024. As compared to her original flight, this new flight would have resulted in a delay of more than 9 hours.

26. The Plaintiff preferred an afternoon flight and changed to a 1:00 p.m. flight on June 20, 2024.

27. On June 22, 2024, the Plaintiff submitted a claim pursuant to the *APPR* seeking the \$1,000 standardized compensation for inconvenience and reimbursement of out-of-pocket losses due to the delay. As a result of the delay, the Plaintiff lost one day's worth of wages/salaries.

28. On July 5, 2024, WestJet rejected the Plaintiff's claim on the basis that:

Upon review of your reservation, we are unable to approve your claim for compensation as the most significant reason for your flight interruption was due to a strike or work stoppage and outside of WestJet's control.

29. There was no actual strike or work stoppage on June 19, 2024.

30. On July 20, 2024, the Plaintiff responded to WestJet's email indicating that there was no actual strike on the day of her flight. WestJet did not respond.

The Class Members and their Circumstances.

31. The Plaintiff brings this proposed class action on her own behalf and on behalf of:

All persons, residing anywhere in the world, who had a confirmed reservation on a WestJet operated flight scheduled to depart between June 17-20, 2024 or June 25-28, 2024 that was cancelled including, but not limited:

(a) flights that were cancelled, in whole or in part, to park an aircraft before potential work stoppage; **or**

(b) flights where WestJet represented in writing to a passenger of such flights, whether at the time of cancellation or later on, that the flight was cancelled due to strike, lockout, work stoppage, or labour disruption.

(the "**Class**" or "**Class Member(s)**").

32. Based on WestJet's announcements, there are around 10,000 affected passengers.

The actual number of affected passengers are within WestJet's knowledge.

33. The Class Members are in the same or similar circumstances as the Plaintiff;

a. WestJet represented to the Class Members, whether at the time of the cancellation or when the Class Members contacted WestJet to make a

claim, that the flights were cancelled due to a strike, work stoppage, lockout, and/or labour disruption.

- b. WestJet refused to provide the Class Members the standard compensation for inconvenience under section 19 of the *APPR*.
- c. Class Members suffered out-of-pocket losses including but not limited to: hotel accommodations, meals, cell phone roaming charges, missed prepaid events, costs of alternative transportation, and/or loss of income.
- d. There was no actual strike or work stoppage during the seventy-two (72) hours immediately after the First Notice or Second Notice.
- e. WestJet refused to make whole the Class Members that incurred loss from WestJet's business decision to cancel flights.
- f. For Class Members that did not travel, WestJet has not voluntarily refunded the unused tickets.

34. WestJet sent emails to the Class, at the time of cancellation and thereafter, claiming that the cancellations were due to strike or work stoppage when it was not true. These emails were sent to cause passengers to believe that no compensation is owed.

35. All of the affected passengers are affected by at least three central legal questions that are at the heart of this proposed class proceeding:

- a. Whether decisions to cancel flights after receiving a strike notice but before work stoppage, constitutes a situation beyond control under the *APPR*.
- b. If the cancellations were not beyond WestJet's control, what are the Class Members' legal entitlements under the *APPR* and/or contract of carriage.
- c. Even if the cancellations were beyond WestJet's control, for passengers with international flights, whether WestJet is liable for out-of-pocket losses for WestJet's decision to cancel flights after receiving a strike notice.

Part 2: RELIEF SOUGHT

1. The Plaintiff claims, on her own behalf and on behalf of the Class Members the following relief.
2. An order pursuant to applicable provisions of the *Class Proceedings Act*, RSBC 1996, c 50 ("**CPA**") including, but not limited to, ss. 2, 4 and 5-8:
 - a. certifying this action as a class proceeding;
 - b. defining the class as provided in paragraph 31 of Part 1 above, or other class definition that the Plaintiff may propose and that this Court approves;
 - c. appointing the Plaintiff as the representative plaintiff for the Class;
 - d. specifying that the period for opting-out shall be thirty (30) days;
 - e. deeming the initial service of this Notice of Civil Claim as a sufficient request for compensation under s. 19(3) of the *APPR* for Class Members that do not opt-out;
 - f. specifying the relief sought by the Class is monetary compensation and/or restitution for flights cancelled before work stoppage; and/or
 - g. setting out the common issues as specified in the Plaintiff's notice of application for class action certification.
3. A declaration that WestJet:
 - a. has breached the terms of the contracts with the Class Members;
 - b. is liable for the loss and/or damages suffered by the Class Members including liability under Article 19 of the *Montreal Convention*;
 - c. is liable to the Class Members for standardized compensation under s. 19 of the *APPR*;

- d. is liable to refund the unused tickets for Class Members that have not travelled; and/or
 - e. breached ss. 52 and 52.01 of the *Competition Act*, RSC 1985, c C-34 (the "**Competition Act**") when WestJet sent e-mails to the Class stating that cancellations were due to strike or work stoppage;
4. An Order for monetary compensation and/or restitution to the Class for:
- a. the standard compensation for inconvenience in s. 19 of the *APPR*;
 - b. reimbursement of all out-of-pocket losses or expenses arising from the flight cancellations that are the subject of this action;
 - c. refund to original payment form for Class Members that did not travel;
 - d. damages for breach of the duty of honest contractual performance;
 - e. damages under s. 171 of the *Business Practices and Consumer Protection Act*, SBC 2004, c. 2 [**BPCPA**];
 - f. damages, loss, and all legal and investigation costs under section 36 of the *Competition Act*;
 - g. nominal damages for breach of contract; and/or
 - h. punitive damages;
5. An Order pursuant to s. 29 for the *CPA* for the aggregate recovery of any monetary relief (including standard compensation for inconvenience in s. 19 of the *APPR*, refunds to some Class Members, damages for breach of duty of good faith, nominal damages, and/or punitive damages), and use of any statistical evidence if necessary and permitted, and distribution to the Class.
6. An Order pursuant to s. 27 of the *CPA* directing that the determinations of the Class Members' out-of-pocket losses or expenses be determined in the most expeditious

and just manner, with all necessary directions relating to the procedures to be followed in conducting such determinations.

7. Pursuant to s. 172 of the *BPCPA*:

- a. a declaration under s. 172(1)(a) of the *BPCPA* that WestJet has engaged in "deceptive acts or practices";
 - b. an interim injunction under s. 172(1)(b) of the *BPCPA* restraining WestJet from further engaging in "deceptive acts or practices" and in particular to refrain from referring to the flight cancellations between June 17-20, 2024 and June 25-28, 2024 as cancellations due to strike, work stoppage, lockout and/or labour disruption;
 - c. a permanent injunction under s. 172(1)(b) of the *BPCPA* restraining WestJet from engaging in "deceptive acts or practices" and in particular to refrain from referring to any flight cancellations during the 72-hour notice period before a strike or lockout as cancellations due to strike, work stoppage, lockout and/or labour disruption;
 - d. an order under s. 172(3)(c) of the *BPCPA* that WestJet, at its own cost, advertise the particulars of this Court's judgment and injunction(s) including but not limited to sending an email, fax, or registered mail to notify the Class Members; and/or
 - e. an order under s. 172(3)(a) of the *BPCPA* that WestJet restore monies to the Class Members;
8. An Order pursuant to s. 13 of the *CPA* and/or s. 10 of the *Law and Equity Act* that any action, claim proceeding, and/or complaint filed by a Class Member in any court, tribunal, or regulatory body regarding the subject flight cancellation shall be stayed pending determination of this class proceeding.
9. An Order that WestJet, in communications with a Class Member in respect of the subject matter of this proceeding, shall clearly advise the Class Member of the

existence of this proposed class proceeding.

10. An Order that WestJet pay the costs of administering the plan for distribution of the monetary recovery in this proceeding.

11. An Order for pre-judgment and post-judgment interest.

12. Such further and other relief as this Honourable Court deems just.

Part 3: LEGAL BASIS

1. It is settled law that "[a] party is required to include in the pleading a summary of the material facts, but it is not necessary to plead the legal result of those facts. The pleading party may raise any argument to be made from those facts."

Canned Heat Marketing Inc. v. CFM International Inc., 1998 CanLII 6575 (BC SC) at para. 9
Battrum v. MacKenzie, 2008 BCSC 829 at paras. 29-30
Gill Tech Framing Ltd. v. Gill, 2012 BCSC 1913 at para. 256
MacKinnon v. National Money Mart Company, 2007 BCSC 348 at para. 28

2. As such, the legal grounds stated in this section is intended only to be illustrative and not exhaustive. The Plaintiff reserves the right to raise any legal argument from the aforementioned pleaded facts.

British Columbia Court's Jurisdiction over WestJet

3. WestJet is ordinarily resident in the province of British Columbia, having nominated an agent in British Columbia upon whom process may be served generally and also having a place of business in the province of British Columbia.

Court Jurisdiction and Proceedings Transfer Act, SBC 2003, c. 28, s. 7(b)(ii) and (c).

4. The courts in British Columbia have territorial competence over a person that is ordinarily resident in British Columbia.

Court Jurisdiction and Proceedings Transfer Act, SBC 2003, c. 28, s. 3(d).

5. This Court has certified class actions involving airline passengers that are subject to the same or similar tariff terms, irrespective of the passengers' residency.

Bergen v WestJet Airlines Ltd., 2021 BCSC 12 at paras. 57-60; upheld in *Trotman v. WestJet Airlines Ltd.*, 2022 BCCA 22

Standardized Compensation for Inconvenience under Section 19 of the APPR

6. Section 19 of the APPR provides that compensation for inconvenience be paid to passengers that experience a flight disruption.
7. Under the APPR, flight disruptions are categorized in three ways: (a) situations outside carrier's control; (b) situations within carrier's control but required for safety; and (c) situations inside carrier's control.
8. The Defendant bears the burden to proving the reason for cancelling a flight.

44. The APPR does not set out a procedural framework for matters to be adjudicated under it, but because the only party with knowledge of the reasons for and circumstances surrounding a cancellation is the Defendant, fairness requires the burden to shift to the Defendant to demonstrate, through evidence, that it was justified in cancelling the flight and denying compensation under the APPR. It would not be fair, especially in interpreting legislation that is designed to provide consumer protection for airline passengers, for a claimant to be required prove anything about the reasons for a cancellation.

Geddes v. Air Canada, 2021 NSSM 27 at para. 44, upheld Geddes v. Air Canada, 2022 NSSC 49
Welsh v. Flair Airlines Ltd., 2023 BCCRT 107 at para. 18
 see also s. 85.07(2) of the Canada Transportation Act

9. For large carriers, such as WestJet, the standardized compensation would be:
 - a. \$400 for Class Members that are delayed more than three hours but less than six hours;
 - b. \$700 for Class Members that are delayed more than six hours but less than nine hours;
 - c. \$1,000 for Class Members that are delayed more than nine hours; and
 - d. \$400 for Class Members that choose to obtain a refund and not travel with that airline.
10. The length of time any Class Member was delayed, or if the Class Member elected a refund, can be determined by reference to WestJet's records.

Compensation and/or Restitution for Out-of-Pocket Losses or Expenses

11. For cancellations within WestJet's control, s. 14 of the *APPR* provides that WestJet would be liable for meals, a means of communication, and hotel accommodations.
12. The *APPR* applies to both domestic and international flights.
13. In addition to the *APPR*, Article 19 of the *Montreal Convention* applies to international flights and provides that the airline is liable for all damages due to the delay:

Article 19 – Delay

The carrier is liable for damage occasioned by delay in the carriage by air of passengers, baggage or cargo. Nevertheless, the carrier shall not be liable for damage occasioned by delay if it proves that it and its servants and agents took all measures that could reasonably be required to avoid the damage or that it was impossible for it or them to take such measures.

[emphasis added]

14. Liability under Article 19 of the *Montreal Convention* does not use the three categorizations in the *APPR*. It is possible for a cancellation beyond the air carrier's control under the *APPR* to still attract liability under the *Montreal Convention*.

Boyd v. WestJet Airlines Ltd., 2024 BCCRT 640 (judicial review to BCSC pending)

Refund for Class Members that Elect Not to Travel

15. Irrespective of whether the cancellations are situations within WestJet's control or not, the Class Members that elect not to travel are entitled to a refund for service not rendered. The refund must be made to the original form of payment.
16. For domestic and international flights, respectively, sections 107(1)(n)(iii) and 122(c)(xii) of the *Air Transport Regulations* requires WestJet to state in its tariffs the terms for refund for services purchased but not used, whether in whole or in part,

either as a result of the Class Members' unwillingness or inability to continue or WestJet's inability to provide the service for any reason.

17. The *APPR* also stipulates that a refund is owed to Class Members.

Breach of Sections 52 and 52.01 of the *Competition Act*

18. WestJet's emails to the Class Members, at the time of the cancellation or at a later date in response to a Class Members' request for compensation, asserting that the cancellations were due to work stoppage or strike was not true. Such representations are false and misleading in a material respect and was made knowingly or recklessly.

19. WestJet made the false and misleading representation to further its own business interest (i.e., avoiding payment to Class Members).

20. WestJet has breached sections 52 and/or 52.01 of the *Competition Act*.

21. The Class Members are entitled to recover under section 36 of the *Competition Act*.

WestJet's Representations are a Deceptive Act or Practice under the *BPCPA*

22. WestJet's representations to the Class Members that their flight cancellations were due to strike, work stoppage, lockout, and/or labour disruption is a "deceptive act or practice" that has the capability, tendency, or effect of deceiving or misleading passengers about the true reason for those cancellations.

23. WestJet bears the burden of proving that it has not engaged in a deceptive act or practice.

BPCPA, s. 5(2).

24. The Class Members have a right to seek damages against WestJet under:

- a. section 171 of the *BPCPA*;
- b. the *Montreal Convention*;
- c. breach of contract including the contractual terms being the incorporated provisions of the *APPR*; and/or
- d. breach of the duty of honest contractual performance (*C.M. Callow Inc. v. Zollinger*, 2020 SCC 45),

25. The Class Members have an interest in the funds retained by WestJet when WestJet failed to fully compensate the Class Members. As a result, this Court could make a restoration order under s. 172(3)(a) of the *BPCPA* to restore the monies that are owing to the Class Members.

Ileman v. Rogers Communications Inc., 2015 BCCA 260 at para. 60.

Plaintiff's address for service:

Evolink Law Group
ATTN: Simon Lin
 237-4388 Still Creek Drive
 Burnaby, BC V5C 6C6

Email address for service:

simonlin@evolinklaw.com


Place of trial:

Vancouver, BC

The address of the registry is:

800 Smithe Street
 Vancouver, BC

Dated: August 12, 2024



 Signature of lawyer for plaintiff, Simon Lin

Rule 7-1(1) of the Supreme Court Civil Rules states:

(1) Unless all parties of record consent or the court otherwise orders, each party of record to an action must, within 35 days after the end of the pleading period,

- (a) prepare a list of documents in Form 22 that lists

- (i) all documents that are or have been in the party's possession or control and that could, if available, be used by any party at trial to prove or disprove a material fact, and
 - (ii) all other documents to which the party intends to refer at trial, and
- (b) serve the list on all parties of record.

APPENDIX

Part 1: CONCISE SUMMARY OF NATURE OF CLAIM:

A class action for breach of contract and/or breach of the *Air Passenger Protection Regulations* and/or *Montreal Convention*.

Part 2: THIS CLAIM ARISES FROM THE FOLLOWING:

A personal injury arising out of:

- ☐ a motor vehicle accident
- ☐ medical malpractice
- ☐ another cause

A dispute concerning:

- ☐ contaminated sites
- ☐ construction defects
- ☐ real property (real estate)
- ☐ personal property
- ☒ the provision of goods or services or other general commercial matters
- ☐ investment losses
- ☐ the lending of money
- ☐ an employment relationship
- ☐ a will or other issues concerning the probate of an estate
- ☐ a matter not listed here

Part 3: THIS CLAIM INVOLVES:

- ☒ a class action
- ☐ maritime law
- ☐ Aboriginal law
- ☐ constitutional law
- ☐ conflict of laws
- ☐ none of the above
- ☐ do not know

Part 4:

1. *Court Order Interest Act*, R.S.B.C. 1996, c. 79
2. *Air Passenger Protection Regulations*, SOR/2019-150
3. *Carriage by Air Act*, R.S.C. 1985, c. C-26



This is Exhibit " 6 " referred to in
the affidavit of Ciaran Machado
sworn before me at the City of Vancouver
this 25 day of October 20 24

[Signature]
A Commissioner for taking Affidavits
In and for the Province of British Columbia

21

19

NO. S244546
VANCOUVER REGISTRY

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

ALEXANDRA FOX

PLAINTIFF

AND:

WESTJET AIRLINES LTD.

DEFENDANT

Brought under the *Class Proceedings Act*, R.S.B.C.1996, c. 50

RESPONSE TO CIVIL CLAIM

Filed by: WESTJET AIRLINES LTD. ("WestJet")

Part 1: RESPONSE TO NOTICE OF CIVIL CLAIM FACTS

Division 1 – Defendant's Response to Facts

1. The facts alleged in none of the paragraphs of Part 1 of the Notice of Civil Claim are admitted.
2. The facts alleged in paragraphs 1 to 6, 8 to 25, and 27 to 35 of Part 1 of the Notice of Civil Claim are denied.
3. The facts alleged in paragraph 7 and 26 of Part 1 of the Notice of Civil Claim are outside the knowledge of WestJet.

Division 2 – Defendant's Version of Facts

4. In response to paragraphs 1 and 2 of Part 1 of the Notice of Civil Claim, WestJet says that the issuance of a strike notice pursuant to the *Canada Labour Code* constituted a "labour disruption" outside the control of WestJet within the meaning of section 10 of the *Air Passenger Protection Regulations*.
5. In response to paragraph 3 of Part 1 of the Notice of Civil Claim, WestJet admits only that the Plaintiff is bound by the terms and conditions (the "Terms and Conditions") of the airline passenger ticket, and the Terms and Conditions of

- 2 -

WestJet's Domestic Tariff, which together comprise the contract of carriage (collectively, the "Contract of Carriage") and limit and/or proscribe the Plaintiff's right of recovery against WestJet.

6. In response to paragraphs 4 to 6 of Part 1 of the Notice of Civil Claim, WestJet denies that the Plaintiff or any proposed class members are entitled to compensation under the APPR or the Montreal Convention, as alleged or at all, and puts the Plaintiff to the strict proof thereof.
7. In response to paragraphs 8 and 9 of Part 1 of the Notice of Civil Claim, WestJet denies that it is a commercial airline and denies that it operates domestic or international passenger flights. WestJet, an Alberta partnership, in which WestJet is a partner, is licensed to provide Domestic Air Services, International Air Services, and non-scheduled Domestic and International Air Services by the Canadian Transportation Agency (the "Agency").
8. In response to paragraph 10 of Part 1 of the Notice of Civil Claim., WestJet admits only that WestJet, an Alberta partnership, is a large carrier under the provisions of the APPR.
9. In response to paragraphs 11 to 16 of Part 1 of the Notice of Civil Claim, WestJet admits only that on June 17, 2024, the Aircraft Mechanics Fraternal Association ("AMFA") issued a strike notice to WestJet under the *Canada Labour Code* (the "First Strike Notice"). WestJet says that the issuance of the First Strike Notice constituted a "labour disruption within the carrier or within an essential service provider" within the meaning of section 10(1)(j) of the APPR.
10. In response to paragraphs 17 to 19 of Part 1 of the Notice of Civil Claim, WestJet admits only that on June 25, 2024, AMFA issued a strike notice to WestJet under the *Canada Labour Code* (the "Second Strike Notice"). WestJet says that the issuance of the Second Strike Notice constituted a "labour disruption within the carrier or within an essential service provider" within the meaning of section 10(1)(j) of the APPR.
11. In response to paragraphs 20 to 22 of Part 1 of the Notice of Civil Claim, WestJet says that any flights cancellations after the issuance of the First Strike Notice or the Second Strike Notice were outside of the control of WestJet.
12. In response to paragraphs 23 to 25 of Part 1 of the Notice of Civil Claim, WestJet admits only that on May 27, 2024, the Plaintiff booked an itinerary (PNR: FBLGVP) consisting of the following flights:
 - (a) WS122 from Vancouver to Calgary on June 14, 2024; and
 - (b) WS115 from Calgary to Vancouver on June 20, 2024 ("WS115").
13. In further to response to paragraph 25 of Part 1 of the Notice of Civil Claim, WestJet says that on June 18, 2024, WS115 was cancelled due to the labour disruption caused by the issuance of the First Strike Notice, which was still in effect at the time of the cancellation of WS115.

- 3 -

14. In response to paragraph 27 of Part 1 of the Notice of Civil Claim, WestJet denies that the Plaintiff is entitled to compensation under the APPR as the cancellation of WS115 was due to a reason outside the control of WestJet. In further response, WestJet denies that the Plaintiff suffered any loss, damage or expense, as alleged or at all, and puts the Plaintiff to the strict proof thereof. WestJet further says that compensation for allegedly lost wages/salaries are not recoverable under the APPR or WestJet's Domestic Tariff.
15. In response to paragraphs 28 to 30 of Part 1 of the Notice of Civil Claim, WestJet says that the Plaintiff's claim was properly denied as the reason for the cancellation of WS115 was due to a labour disruption outside of WestJet's control.
16. In response to paragraph 33a. of Part 1 of the Notice of Civil Claim, WestJet says that the flights of the proposed class members were cancelled due to situations outside of the control of WestJet.
17. In response to paragraph 33b. of Part 1 of the Notice of Civil Claim, WestJet denies that the proposed class members are entitled to compensation for inconvenience under section 19 of the APPR.
18. In response to paragraph 33c. of Part 1 of the Notice of Civil Claim, WestJet denies that the proposed class members are entitled to out-of-pocket expenses for hotel accommodations, meals, cell phone roaming charges, missed prepaid events, costs of alternative transportation, and/or loss of income. WestJet further says that missed prepaid events and loss of income are not recoverable under the APPR, in a breach of contract claim against an air carrier, or under the Montreal Convention.
19. In response to paragraph 33d. of Part 1 of the Notice of Civil Claim, WestJet denies that the definition of a "labour disruption" in section 10(1)(f) of the APPR is limited to an actual strike or work stoppage and puts the Plaintiff to the strict proof thereof.
20. In response to paragraph 33e. of Part 1 of the Notice of Civil Claim, WestJet denies that it owed any of the proposed class members an obligation to "make them whole".
21. In response to paragraph 33f. of Part 1 of the Notice of Civil Claim, WestJet denies that refunds are owed to proposed class members that chose not to travel.
22. In response to the whole of Part 1 of the Notice of Civil Claim, WestJet denies that the Plaintiff or proposed class members are entitled to compensation under the APPR, under the terms of WestJet's Domestic or International Tariff, or under the Montreal Convention, as alleged or at all, and puts the Plaintiff to the strict proof thereof.
23. In response to the whole of Part 1 of the Notice of Civil Claim, WestJet says that this action does not constitute an "action" under the Montreal Convention and that the Plaintiff has failed to plead the material facts necessary to constitute an action under the Montreal Convention.

Division 3 – Additional Facts

1. WestJet says that on May 16, 2023, the Canadian Transportation Agency issued a statement confirming that the issuance of a Strike Notice on May 15, 2023 to WestJet by the Air Line Pilots Association, Int'l ("ALPA") representing WestJet pilots constituted a "labour disruption" within WestJet, within the meaning of section 10(1)(j) of the APPR.

Part 2: RESPONSE TO RELIEF SOUGHT

1. WestJet consents to the granting of the relief sought in none of the paragraphs of Part 2 of the Notice of Civil Claim.
2. WestJet opposes the granting of the relief sought in all of the paragraphs of Part 2 of the Notice of Civil Claim.
3. WestJet takes no position on the granting of the relief sought in paragraphs NIL of Part 2 of the Notice of Civil Claim.

Part 3: LEGAL BASIS

4. WestJet denies each and every allegation as set out in Part 3 of the Notice of Civil Claim and puts the Plaintiff to the strict proof thereof.
5. In response to the whole of Part 3 of the Notice of Civil Claim, WestJet says that the Canadian Transportation Agency has confirmed that the issuance of a Strike Notice constitutes a "labour disruption" outside of the control of the carrier within the meaning of section 10(1)(j) of the APPR.
6. In response to paragraphs 1 to 2 of Part 3 of the Notice of Civil Claim, WestJet submits that these paragraphs are improper and should be struck.
7. In response to paragraphs 3 to 5 of Part 3 of the Notice of Civil Claim, WestJet denies that its conduct is governed by the *Business Practices and Consumer Protection Act*, S.B.C. 2004, c. 2 ("*BPCPA*") irrespective of where a consumer resides. WestJet says that the *BPCPA* does not apply to transactions between WestJet and consumers that occurred outside of British Columbia and non-residents of British Columbia are not entitled to claim under the *BPCPA*.
8. In response to paragraphs 6 to 10 of Part 3 of the Notice of Civil Claim, WestJet denies that the Plaintiff or any proposed class members are entitled to compensation under the APPR and puts the Plaintiff to the strict proof thereof. WestJet says that the onus of proof set out in section 85.07(2) exclusively applies to a complaint filed with the Agency pursuant to section 85.04 of the *Canada Transportation Act*, S.C. 1996, c. 10. It does not govern the burden of proof in a civil proceeding. The Small Claims Court decisions cited in the Notice of Civil Claim are not binding on the British Columbia Supreme Court, nor are they persuasive.

9. In response to paragraphs 11 to 12 of Part 3 of the Notice of Civil Claim, WestJet denies that the Plaintiff or any proposed class members are entitled to compensation pursuant to section 14 of the APPR and puts the Plaintiff to the strict proof thereof.
10. In response to paragraphs 13 and 14 of Part 3 of the Notice of Civil Claim, WestJet says that the within action does not constitute an action as defined in the Montreal Convention. WestJet further says that claims resulting from flight cancellations are not governed by the Montreal Convention. In the alternative, WestJet denies that the Plaintiff or any proposed class members are entitled to compensation pursuant to the Montreal Convention and pleads and relies on the Montreal Convention, including:
 - (a) Article 19, which provides that the carrier shall not be liable for damage occasioned by delay if it proves that it and its servants and agents took all measures that could reasonably be required to avoid the damage or that it was impossible for it or them to take such measures;
 - (b) Article 29, which provides that in the carriage of passengers, baggage and cargo, any action for damages, however founded, whether under this Convention or in contract or in tort or otherwise, can only be brought subject to the conditions and such limits of liability as are set out in this Convention without prejudice to the question as to who are the persons who have the right to bring suit and what are their respective rights and that in any such action, punitive, exemplary or any other non-compensatory damages shall not be recoverable;
 - (c) Article 33, which provides that an action for damages must be brought, at the option of the plaintiff, in the territory of one of the States Parties, either before the court of the domicile of the carrier or of its principal place of business, or where it has a place of business through which the contract has been made or before the court at the place of destination; and
 - (d) Article 35, which provides that the right to damages shall be extinguished if an action is not brought within a period of two years, reckoned from the date of arrival at the destination, or from the date on which the aircraft ought to have arrived, or from the date on which the carriage stopped.
11. In response to paragraph 15 to 17 of Part 3 of the Notice of Civil Claim, WestJet denies that any proposed class members that elected not to travel are entitled to a refund and puts the Plaintiff to the strict proof thereof.
12. In response to paragraphs 18 to 20 of Part 3 of the Notice of Civil Claim, WestJet denies that it made any false or misleading representations, as alleged or at all, and puts the Plaintiff to the strict proof thereof.
13. In response to paragraph 21 of Part 3 of the Notice of Civil Claim, WestJet says that the Plaintiff's claim pursuant to section 36 of the *Competition Act*, R.S.C. 1985, c. C-34 is bound to fail as the Plaintiff has failed to plead that the Plaintiff and proposed class members suffered any loss or damage as a result of any conduct contrary to Part VI of the *Competition Act*.

- 6 -

14. In response to paragraph 22 of Part 3 of the Notice of Civil Claim, WestJet denies that any alleged representations to any proposed class members constituted deceptive acts or practices as defined in the *BPCPA*.
15. In further response to paragraph 22 and in response to paragraph 23 of Part 3 of the Notice of Civil Claim, WestJet says that the Plaintiff has failed to plead the necessary facts to establish that WestJet is a "supplier" under the *BPCPA*, or that the proposed class members are "consumers" under the *BPCPA* and that the claim as pleaded is bound to fail.
16. In further response to paragraphs 22 to 23 of Part 3 of the Notice of Civil Claim, WestJet says that the Plaintiff has failed to plead the required elements of a "deceptive act or practice" as section 5 of the *BPCPA* only prohibits deceptive acts in the context of "consumer transactions", such that the claim as pleaded is bound to fail.
17. In response to paragraph 24a. of Part 3 of the Notice of Civil Claim, WestJet denies that the Plaintiff or any of the proposed class members have a right to seek damages under section 171 of the *BPCPA* as the Plaintiff has failed to plead that she, or any of the proposed class members suffered damage or loss due to a contravention of the *BPCPA*. WestJet further says that the Plaintiff's failure to plead reliance on any alleged deceptive act or practice is fatal to any claim under section 171 of the *BPCPA*.
18. In response to paragraph 24b. of Part 3 of the Notice of Civil Claim, WestJet says that the within action does not constitute an "action" under the Montreal Convention. WestJet further says that the Plaintiff has failed to plead the material facts necessary to establish a claim under the Montreal Convention. WestJet says that the Plaintiff and proposed class members do not have a claim under the Montreal Convention.
19. In response to paragraphs 24c. and d. of Part 3 of the Notice of Civil Claim, WestJet says that the Plaintiff has failed to plead the material facts necessary to establish a claim in breach of contract or in breach of the duty of honest contractual performance. WestJet denies that the Plaintiff or any proposed class member have a claim in breach of contract or in breach of the duty of honest contractual performance and put the Plaintiff to the strict proof thereof.
20. In response to paragraph 25 of Part 3 of the Notice of Civil Claim, WestJet denies that a restoration order under section 172(3)(a) of the *BPCPA* for refunds is available in this action.
21. In further response to paragraph 25 of Part 3 of the Notice of Civil Claim, and in the alternative, WestJet says that there are four prerequisites for a restoration order under section 172(3) of the *BPCPA*:
 - (a) the court must make a declaration or injunctive order under section 172(1) before it can make an order under section 172(3);
 - (b) the supplier must have acquired something ("money or other property or thing") because of a contravention of the legislation;

- 7 -

- (c) the beneficiary of an order under section 172(3) must have been the source of money or some other thing acquired by the supplier; and the beneficiary must have an interest in the thing to be restored.

WestJet says the Notice of Civil Claim fails to plead sufficient facts required for (ii) and (iii), and (iv) and that a restoration order with regard to out-of-pocket losses and/or loss of wages/salary cannot be granted as there is no pleading that WestJet has acquired anything from the proposed beneficiary of the proposed restoration order. WestJet denies that it acquired anything from any proposed beneficiary. WestJet further denies that any proposed beneficiary has an interest in anything sought to be restored.

22. WestJet pleads and relies upon the provisions of the:

- (a) *Business Practices and Consumer Protection Act*, S.B.C. 2004, c. 2, and any amendments thereto;
- (b) *Canada Transportation Act*, S.C. 1996, c. 10;
- (c) *Competition Act*, R.S.C. 1985, c. C-34;
- (d) *Air Passenger Protection Regulations*, SOR/2019-150;
- (e) *Carriage by Air Act*, R.S.C. 1985, c. C-26;
- (f) *Interpretation Act*, R.S.B.C. 1996, c. 238;
- (g) *Air Transportation Regulations*, SOR/88-58;
- (h) any amendments to the above noted legislation; and such other legislation as counsel may advise.

WestJet asks that the Plaintiff's action against it be dismissed with costs.

WestJet's address for service: Alexander Holburn Beaudin + Lang LLP
Barristers and Solicitors
2700 - 700 West Georgia Street
Vancouver, BC V7Y 1B8

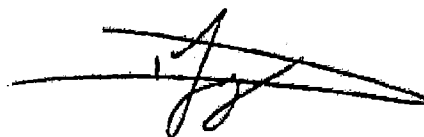
Attention: Michael Dery

Fax number address for service: 604-484-9700

E-mail address for service (if any): eaquiari@ahbl.ca, mdery@ahbl.ca,
npimentel@ahbl.ca

- 8 -

Dated: October 4, 2024



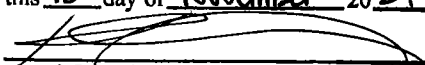
Signature of MICHAEL DERY
Lawyer for WestJet Airlines Ltd.

Rule 7-1 (1) of the Supreme Court Civil Rules states:

- (1) Unless all parties of record consent or the court otherwise orders, each party of record to an action must, within 35 days after the end of the pleading period,
 - (a) prepare a list of documents in Form 22 that lists
 - (i) all documents that are or have been in the party's possession or control and that could, if available, be used by any party at trial to prove or disprove a material fact, and
 - (ii) all other documents to which the party intends to refer at trial, and
 - (b) serve the list on all parties of record.

This is Exhibit " B " referred to in
the affidavit of Ciarah Machado
sworn before me at the City of Vancouver
this 13 day of November 20 24

29


A Commissioner for taking Affidavits
in and for the Province of British Columbia

From: MACHADO, Ciarah
Sent: Monday, October 28, 2024 9:16 AM
To: Simon Lin
Cc: Rahman, Zara CRT:EX; CRT Paralegal CRT:EX; DERY, Michael; CHAUDHARY, Katelyn;
AGUIAR, Elisa
Subject: Air Passenger Rights v. WestJet Airlines Ltd., NEW-S-S-254452
Attachments: Affidavit #2 of C. Machado - filed October 25, 2024.pdf

Good morning,

Attached for service upon you please find a copy of the Affidavit #2 of C. Machado filed October 25, 2024, on behalf of WestJet Airlines Ltd. in the above-noted matter.

Thank you,

CIARAH MACHADO
Legal Administrative Assistant
To Darryl Pankratz, Anika Garlick and Katelyn Chaudhary
she/her/hers

Tel: 604 643 2166
Fax: 604 484 9700
Email: cmachado@AHBL.CA
Social:  

 ALEXANDER
HOLBURN

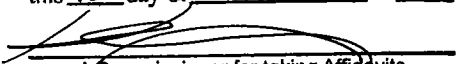
ALEXANDER HOLBURN BEAUDIN + LANG LLP
2700 - 700 West Georgia Street, Vancouver, BC, V7Y 1B8
Tel: 604 484 1700 | Fax: 604 484 9700 | Toll Free: 877 688 1351
Barristers + Solicitors | Vancouver | Kelowna | Toronto

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This is Exhibit " C " referred to in
the affidavit of Ciarah Machado
sworn before me at the City of Vancouver
this 13 day of November 20 24

30


A Commissioner for taking Affidavits
in and for the Province of British Columbia

From: Simon Lin <simonlin@evolinklaw.com>
Sent: Monday, October 28, 2024 10:33 AM
To: MACHADO, Ciarah
Cc: Rahman, Zara CRT:EX; CRT Paralegal CRT:EX; DERY, Michael; CHAUDHARY, Katelyn;
AGUIAR, Elisa
Subject: Re: Air Passenger Rights v. WestJet Airlines Ltd., NEW-S-S-254452
Attachments: 2024-10-28 LT Respondent.pdf

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



Evolink Law Group
237-4388 Still Creek Drive, Burnaby, B.C. V5C 6C6
T: 604-620-2666
F: 778-805-9830 (our fax number has changed as of May 12, 2023)

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October 28, 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 the Affidavit #2 of Ms. Ciarah Machado filed on October 25, 2024 and emailed to us this morning [**Machado Affidavit #2**]. We note that this affidavit will not be included in the Petition Record. We draw your attention to Rule 16-1(7):

No additional affidavits

16-1(7) Unless all parties of record consent or the court otherwise orders, a party must not serve any affidavits additional to those served under subrules (3), (4) and (6).

WestJet has not obtained or sought consent from the Petitioner, nor has WestJet obtained a court order to add additional affidavits beyond what WestJet had filed on August 19, 2024. Evidently, Ms. Fox's proposed class proceeding was within WestJet's knowledge prior to WestJet filing its response on August 19, 2024. There is no explanation why WestJet did not include in its August 19, 2024 filing all materials that it intends to rely on.

More fundamentally, Ms. Fox's proposed class proceeding arises from a factually unrelated issue in June 2024, which is more than one year after the facts giving rise to the claims raised by Ms. Boyd in the underlying Civil Resolution Tribunal claim. It is wholly unclear what relevance Ms. Fox's proposed class proceeding would have on this petition.

Finally, we note that it is highly unusual to have loose affidavits that are not referred to in the Petition or Response to Petition, especially in a circumstance where it is wholly unclear what relevance the Machado Affidavit #2 has on the present petition proceedings.

We also remind you that Rule 16-1(19) provides that leave of the Court is required to amend a Response to Petition to add further arguments/grounds. WestJet had already

used its “free amendment” under Rule 16-1(19)(b)(i) and, in any event, the Notice of Hearing has already been served on October 24, 2024 and any amendment requires leave of the Court or consent of the parties.

With that said, the Petitioner is open to considering whether to consent to including Machado Affidavit #2 in the Petition Record and any consequential amendments to the Response to Petition. However, WestJet has not provided any basis or reasoning for the Machado Affidavit #2. Until we receive WestJet’s basis and/or reasoning for the Machado Affidavit #2, we are unable to make an informed consideration whether to consent.

We look forward to receiving WestJet’s basis and/or reasoning for the Machado Affidavit #2 by no later than **November 1, 2024**. We reiterate again that the Machado Affidavit #2 will not be included in the Petition Record, as we stated above.

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

Yours truly,

EVOLINK LAW GROUP

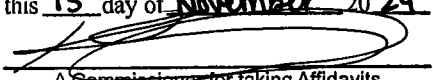


SIMON LIN

Barrister & Solicitor

simonlin@evolinklaw.com

Cc: Zara Rahman, counsel for the Civil Resolution Tribunal

This is Exhibit " D " referred to in 33
the affidavit of Ciarah Machado
sworn before me at the City of Vancouver
this 13 day of November 20 24

A Commissioner for taking Affidavits
In and for the Province of British Columbia

From: DERY, Michael
Sent: Monday, November 4, 2024 7:46 AM
To: Simon Lin; MACHADO, Ciarah
Cc: Rahman, Zara CRT:EX; CRT Paralegal CRT:EX; CHAUDHARY, Katelyn; AGUIAR, Elisa
Subject: RE: Air Passenger Rights v. WestJet Airlines Ltd., NEW-S-S-254452 [IMAN2-
IMANAGE.FID886835]
Attachments: 2024-10-28 LT Respondent.pdf

Simon,

We write in response to your attached letter. In your letter, you have objected to the delivery of Ms. Machado's second affidavit in this proceeding. The affidavit was delivered to you twenty-four days before the hearing date (on October 28, 2024).

As you will recall, the hearing of the subject Petition is scheduled to proceed on November 21, 2024. As you will have seen, Ms. Machado gives no evidence and the purpose of her affidavit is simply to put two filed pleadings before the Court (the Notice of Civil Claim and the Response to Civil Claim in the Fox proceeding).

As noted in the Petition, the Court will be asked to interpret whether the term "labour disruption" in s. 10(1)(j) of the APPR (which lists situations that are outside carrier control) includes the minimum seventy-two hour statutory notice period before a strike under the Canada Labour Code (see Petition at Part 2, paragraph 2 and 3). In the Fox class proceeding, the Court is asked to determine the same questions (see Notice of Civil Claim at Part 1, paragraph 1 and 2).

Our client is not advancing new arguments. The Fox pleadings will be referred to in the context of the arguments set out in our client's Response to Petition at paragraphs 47 to 56. We simply intend to point out that a director of Air Passenger Rights (you) is simultaneously acting as counsel on the Petition and as class counsel in a yet to be certified class proceeding.

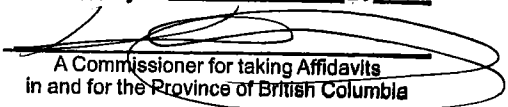
We trust the above provides you with a sufficient description of the purpose of referring to the Fox pleadings. We ask that you kindly advise as to your position after you have had a moment to consider.

Yours truly,

Michael.

MICHAEL DERY* <i>Partner</i> he/him/his	ALEXANDER HOLBURN BEAUDIN + LANG LLP Asst: Elisa Aguiar Direct: 604 643 2117 Email: eaguilar@ahbl.ca
Tel: 604 484 1742 Fax: 604 484 9742	2700 - 700 West Georgia Street, Vancouver, BC, V7Y 1B8 Barristers + Solicitors Vancouver Kelowna Toronto *Professional Law Corporation

This is Exhibit " E " referred to in
the affidavit of Ciarah Machado 34
sworn before me at the City of Vancouver
this 13 day of November 20 24


A Commissioner for taking Affidavits
in and for the Province of British Columbia

From: Simon Lin <simonlin@evolinklaw.com>
Sent: Monday, November 4, 2024 12:59 PM
To: DERY, Michael
Cc: MACHADO, Ciarah; Rahman, Zara CRT:EX; CRT Paralegal CRT:EX; CHAUDHARY, Katelyn; AGUIAR, Elisa
Subject: Re: Air Passenger Rights v. WestJet Airlines Ltd., NEW-S-S-254452 [IMAN2-IMANAGE.FID886835]
Attachments: 2024-11-04 LT Respondent.pdf

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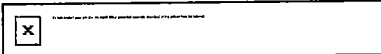
Hello Mike,

Please see enclosed.

Thank you.

Kind Regards,

Simon Lin
Barrister & Solicitor



Evolink Law Group
237-4388 Still Creek Drive, Burnaby, B.C. V5C 6C6
T: 604-620-2666
F: 778-805-9830 (our fax number has changed as of May 12, 2023)

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November 4, 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 4, 2024 (the “Email”), in response to our letter dated October 28, 2024 that requested a response by November 1, 2024.

The Email misses the point. The issue is not the length of time between the time of the delivery of the improper affidavit and the date of the hearing. The law is clear that the rules prohibiting further affidavits “applies if the [petition] has not yet taken place.”¹ This would necessarily mean that it does not matter whether the improper affidavit was provided one day before the hearing or one month before the hearing, it is still improper.

We draw your attention to *Muller v. Muller*, 2015 BCSC 370 at para. 15 where the Court confirmed that further affidavits would be admitted **sparingly**, and **only in meritorious cases** where to exclude the evidence would result in a “**substantial injustice**.”

In this case, we cannot comprehend from the Email *how* there is a “meritorious case” on WestJet’s part. It cannot be seen how counsel’s other file(s) have any relevance with his directorship in a non-profit entity. There could not be a “substantial injustice” as WestJet had ample opportunity to include all arguments and evidence in its Response to Petition.

We note that in the Response to Petition WestJet initially argued rigorously that counsel for the Petitioner had breached the *Code of Professional Conduct* in not properly swearing an affidavit. WestJet had no choice but to withdraw that argument on October 15, 2024 as an “error” when it was plain that the attack on counsel was wholly unwarranted.

It appears that WestJet is again attempting to make unfounded allegations against counsel. We draw your attention to *Groia v. Law Society of Upper Canada*, 2018 SCC 27.

¹ *Kuta-Dankwa v Pacific Quorum Properties*, 2021 BCSC 906 at para. 14.

With that said and as a professional courtesy we are writing to advise that, on July 24, 2024 the majority of directors of Air Passenger Rights, excluding the undersigned, had: (a) passed a resolution to accept the assignment of the judgment and claim from Mr. and Mrs. Boyd; and (b) passed a resolution to authorize the bringing of this judicial review.

This should put to rest WestJet's speculation about counsel's involvement in Air Passenger Rights' internal decision to proceed with this judicial review. For greater certainty, on this matter, I am acting as counsel for Air Passenger Rights and was not part of the resolutions that Air Passenger Rights passed for this proceeding. My usage of an airpassengerrights.ca domain for service is merely for internal record keeping reasons.

Finally, we appreciate you confirming that the Court is being asked to interpret a legal question in the Petition. Again, we cannot ascertain from the Email how counsel's involvement in non-profit directorships are relevant to the legal interpretation of a statute.

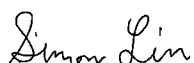
We trust that the above puts to rest WestJet's speculation about counsel's involvement.

For greater certainty, the Petitioner will not consent to the filing of further affidavits by WestJet and the Affidavit #2 of Ms. Ciarah Machado filed on October 25, 2024 will not be included in the Petition Record. If WestJet insists on bringing forward that affidavit despite the above clarifications, we trust that WestJet will bring a formal application in that regard.

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

Yours truly,

EVOLINK LAW GROUP



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Cc: Zara Rahman, counsel for the Civil Resolution Tribunal