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COMPUTER, INTERNET, ELECTRONIC COMMERCE AND ARTIFICIAL INTELLIGENCE LAW

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From a single volume as first published in 1989 to the present eight volumes of detailed, comprehensive coverage, this publication has become the foremost Canadian authority on the law of computers, the Internet and Electronic Commerce and is frequently referred to and applied by the courts.

What's New in this Update

This release includes updates to Appendix B5:1. *Copyright Act* – Amended by 2024, c. 26; 2024, c. 27. This release also features updates to Appendix F. Consumer Protection F1. British Columbia including updates to § F1:1 *Business Practices and Consumer Protection Act*, S.B.C. 2004, c. 2 – Amended by 2022, c. 43, s. 550 [Not in force at date of publication.]; 2023, c. 10, ss. 42-44; 2023, c. 13, s. 43, 2024, c. 26, s. 256 [Not in force at date of publication.]; R.S.B.C. 2024, c. 1 [Rev. Sched. 2], s. 1, and the addition of case law annotations to the *Business Practices and Consumer Protection Act*, S.B.C. 2004. This release also includes updates to Appendix § J1:1. *Trademarks Act* - 2018, c. 27, ss. 215-217, 219, 221-223, 225-228 came into force April 1, 2025. This release also features updates to the Appendix N. Remedies Table – Misuse of Confidential Information.

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Highlights

- ***Business Practices and Consumer Protection Act*—Section 4—Deceptive Acts or Practices—**Justice Gibb-Carsley explained that the issue to be tried concerned whether WestJet was 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. Justice Gibb-Carsley was satisfied that WestJet was a "supplier", and that the passengers and the Affected Passengers were "consumers" and the subsequent transactions were "consumer transactions". Justice Gibb-Carsley was satisfied that the information contained on the Original Reimbursement Webpage and the direct and indirect communication to passengers of the fixed limits on reimbursements of expenses incurred were capable of constituting "representations". Justice Gibb-Carsley was also satisfied that APR had established that there was a *prima facie* case to be tried at the Underlying Action. There was merit to APR's assertion that WestJet knowingly made representations, or turned a blind eye to representations, that were 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*. As there was merit to the Underlying Action, the low threshold of a "serious question" to be tried had been met. However, in Justice Gibb-Carsley's view, it fell below the strong *prima facie* test. First, the Original Reimbursement Webpage clearly indicated that the WestJet Guidelines were "our general guidelines" meaning they were a general guideline created by WestJet and not by a statute or third party. The modifier "our" indicated that the Guidelines were internal to WestJet. The modifier "general" indicated that the Guidelines were not universal, and thus not a fixed limit applied to all claims for reimbursement. As the onus lay with APR, Justice Gibb-Carsley did not conclude that APR had established that it had a strong *prima facie* case for an interlocutory mandatory injunction. However, Justice Gibb-Carsley was satisfied that there was a serious issue to be tried in considering whether a prohibitive interlocutory injunction was warranted: *Air Passenger Rights v. WestJet Airlines Ltd.*, 2025 CarswellBC 243, 2025 BCSC 155 (B.C.S.C.).
- **Remedies Table—Misuse of Confidential Information—Damages—**The damages awarded by the trial judge were reduced from $1,534,000 to $77,000, plus pre- and post-judgment interest. As Justice Pfuetzner had explained, there was no fiduciary relationship between Marsh and PRM and the trial judge erred in principle in so concluding. It was clear that his damages award was based on fiduciary principles. Assessing damages on the basis that a breach of fiduciary duty took place was an error in principle and no deference was owed to the trial judge's award. It was also apparent that the trial judge had a strong distaste for Marsh's business tactics. Justice Pfuetzner repeated the apt observation of Justice Binnie in *Cadbury Schweppes* that "[m]oral indignation is not a factor that is to be used to inflate the calculation of

a compensatory award". In Justice Pfuetzner's view, the breach of confidence found by the trial judge had a contractual flavour as illustrated by the significant overlap in his analysis of the claims in breach of confidence and breach of contract. While it was not possible to know precisely how events would have played out in the absence of the breach of confidence, Justice Binnie noted that courts are "free to draw inferences from the evidence as to what would likely have happened 'but for' the breach". In the present case, there could be no dispute that Marsh was entitled to compete with PRM for its clients after their relationship terminated. However, PRM was entitled to expect that Marsh would not use the schedule of values in doing so. The trial judge's adoption of PRM's expert's calculation of damages — providing a full indemnity of lost profits — effectively granted to PRM a restrictive covenant prohibiting competition that ended only because PRM was sold to BFL. The advantage that Marsh had from misusing the schedule of values was a springboard that gave it a head start in contacting the insured members and gathering the information necessary to place insurance on their behalf. Justice Pfuetzner noted there was evidence that Marsh could have contacted the insured members without using the confidential information. Indeed, Marsh's pre-existing relationships with Gould and with other contacts in the Manitoba agricultural sector would have allowed it to do so with relative ease. Marsh's expert calculated PRM's damages to be its lost profits from the insured members that stayed with Marsh during the period of time it would have taken Marsh to create the confidential information on its own. The expert's opinion was that Marsh could have gathered the necessary data and approached the insured members in one to three months. He estimated the lost profits to PRM during this time to be in the range of $26,000 to $77,000: *Prairie Risk Management Inc. v. Marsh Canada Ltd.*, 2025 CarswellMan 20, 2025 MBCA 6 (Man. C.A.).

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