



COURT OF APPEAL FILE NO. CA51094
Air Passenger Rights v. WestJet Airlines Ltd.
Appeal Record

COURT OF APPEAL

ON APPEAL FROM the order of the Honourable Madam Justice Sharma of the Supreme Court of British Columbia pronounced on the 30th day of October 2025.

BETWEEN:

AIR PASSENGER RIGHTS

APPELLANT
(Petitioner)

AND:

WESTJET AIRLINES LTD.

RESPONDENT
(Respondent)

AND:

CIVIL RESOLUTION TRIBUNAL

RESPONDENT
(Administrative Decision Maker)

APPEAL RECORD
(Air Passenger Rights)

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	CIVIL RESOLUTION TRIBUNAL
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No. Court File No. **NEW-S-S-254452**
New Westminster Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

IN THE MATTER OF THE *JUDICIAL REVIEW PROCEDURE ACT*, RSBC 1996, c 241

BETWEEN

AIR PASSENGER RIGHTS

Petitioner

AND:

WESTJET AIRLINES LTD.

Respondent

PETITION TO THE COURT

ON NOTICE TO:

WESTJET AIRLINES LTD.

c/o AHBL Corporate Services Ltd.
2700-700 West Georgia
Vancouver BC, V7Y 1B8

AND ON NOTICE TO:

CIVIL RESOLUTION TRIBUNAL

PO Box 9239 Stn Prov Govt
Victoria, BC V8W 9J1

AND ON NOTICE TO:

ATTORNEY GENERAL

c/o Deputy Attorney General
Ministry of Attorney General
PO Box 9290 Stn Prov Govt
Victoria, BC V8W 9J7

The **address of the registry** is: The Law Courts, 651 Carnarvon Street, New Westminster, BC V3M 1C9.

The Petitioner estimates that the hearing of the petition will take **ninety (90) minutes**.

This is **an application for judicial review**.

This proceeding is brought for the relief set out in Part 1 below, by the person named as petitioner in the style of proceedings above.

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

- a. file a response to petition in Form 67 in the above-named registry of this court within the time of response to petition described below, and
- b. serve on the petitioners
 - i. 2 copies of the filed response to petition, and
 - ii. 2 copies of each filed affidavit on which you intend to rely at the hearing.

Orders, including orders granting the relief claimed, may be made against you, without any further notice to you, if you fail to file the response to petition within the time for response.

Time for response to petition

A response to petition must be filed and served on the petitioners,

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

1. The **ADDRESS FOR SERVICE** of the petitioner is:

c/o Simon Lin
 4388 Still Creek Drive, Suite 237
 Burnaby, BC V5C 6C6
 Telephone: 604-620-2666
 Email address for service: simonlin@airpassengerrights.ca

2. The name and office address of the petitioner's lawyer is:

Simon Lin
 4388 Still Creek Drive, Suite 237
 Burnaby, BC V5C 6C6

CLAIMS OF THE PETITIONER

Part 1: Orders Sought

1. The Petitioner applies for an Order: (a) setting aside the portion of the Civil Resolution Tribunal's order that dismissed the \$2,000 claim under s. 19 of the *Air Passenger Protection Regulations* [**APPR**]; and (b) granting the \$2,000 claim under s. 19 of the *Air Passenger Protection Regulations* with pre-judgment interest or, alternatively, remitting the \$2,000 claim under s. 19 of the *APPR* back to the Civil Resolution Tribunal to be decided in accordance with this Court's reasons.
2. The Petitioner seeks costs against the Respondent.
3. The Petitioner seeks any other relief that this Honourable Court may permit.

Part 2: Factual Basis

Overview

1. This judicial review involves the legal interpretation of a material provision of the *APPR*, a question of law, that is reviewed by this Court on the correctness standard under s. 56.8(2) of the *Civil Resolution Tribunal Act*, S.B.C. 2012, c. 25 [**CRTA**].
2. The statutory interpretation question is whether the term "labour disruption" in s. 10(1)(j) of the *APPR* should be interpreted to also include the minimum seventy-two (72) hour statutory notice period in the *Canada Labour Code*, RSC 1985, c. L-2 [**Canada Labour Code**] before an actual strike or lockout occurs. During this statutory notice period employees are still working and being paid by WestJet.
3. The underlying legal interpretation has significant ramifications for the rights and protections for all passengers travelling to, from, and within Canada. The Civil Resolution Tribunal [**CRT**] adopted a business-friendly interpretation of the *APPR* deeming the "72-hour notice" issued before a strike or notice to be a "labour disruption." Lockout and strike notices are issued, sometimes multiple times, for strategic reasons during the collective bargaining process. The CRT's interpretation guts most of the legal protections for air passengers when any such notice has been issued, despite no work stoppage actually occurring.
4. The CRT determined that the statutory notice period for a strike notice or lockout notice was a "labour disruption."¹ The Petitioner says the CRT erred in three ways:

¹ [Boyd v. WestJet Airlines Ltd.](#), 2024 BCCRT 640 [**CRT Decision**] at para. 18.

- a. **Core Interpretation Principle for Consumer Protection Laws:** The CRT failed to consider the purpose of the *APPR* is to protect passengers and that its terms are to be interpreted generously in favour of passengers.² Relatedly, laws for protecting passengers should not consider if it would result in an unprofitable venture for the air carrier and, to hold otherwise would effectively gut the very protection that law was intended to provide.³
 - b. **Overlooking Three Principles of Statutory Interpretation:** (i) the CRT overlooked that the focus of the interpretation was the preamble of s. 10(1) of the *APPR* on whether there were “*situations outside the carrier’s control*,” not the enumerated example of a “labour disruption;” (ii) the CRT impermissibly relied on extrinsic aids to override the plain meaning of “disruption” as covering a period when work stoppage has not yet occurred; (iii) the CRT overlooked the direct causation legislative wording that the flight disruption must be “**due to**” a situation outside the air carrier’s control.
 - c. **Deeming the Notice Period Before an Actual Strike or Lockout as a “Disruption” is Unworkable:** The statutory notice period in the *Canada Labour Code* before an actual strike or lockout is expressed as a minimum of 72 hours. The CRT’s interpretation would yield absurd results and mischiefs where the airline could pre-emptively issue lengthy or successive lockout notices (i.e., lockout in 30 days) and escape their *APPR* obligations.
5. The CRT’s interpretation should be rejected, in favour of an interpretation that protects passengers, that best attains the of passenger protection, and is consistent with Parliament’s intent in providing more robust consumer protection.

Background Facts

6. The CRT case was originally filed by Ms. Anne Boyd and Mr. Robert Boyd against WestJet for breach of contract relating to a May 18, 2023 WestJet flight to Rome.⁴
7. On May 15, 2023, WestJet and the air pilot’s union issued a lockout notice and strike notice, respectively, that would authorize a lockout or strike starting at 3 a.m. on May 19, 2023⁵, consistent with the 72-hour minimum statutory notice period under the *Canada Labour Code* before any actual work stoppage can occur.

² [Seidel v. TELUS Communications Inc.](#), 2011 SCC 15 at para. 37.

³ [Jiang v. Peoples Trust Company](#), 2017 BCCA 119 at para. 53.

⁴ [CRT Decision](#) at para. 9(a).

⁵ [CRT Decision](#) at para. 9(b)-(f).

8. It was common ground that:

- a. No actual strike or lockout occurred in accordance with associated notices.⁶
- b. Mr. and Mrs. Boyd's scheduled flight would have departed **before** the actual strike took place, although it fell within the 72-hour statutory notice period.⁷
- c. \$2,000 compensation (i.e., \$1,000/person) under section 19 of the *APPR* would be owed if the flight cancellation was within WestJet's control. Whereas, if the flight cancellation was outside of WestJet's control (as defined in s. 10 of the *APPR*), then the \$2,000 compensation is not owed.⁸

9. The parties' dispute turns on whether during the minimum statutory notice period **before** actual work stoppage may constitute a "labour disruption" that would be outside of WestJet's control, despite the WestJet employees still on the job.

10. On July 5, 2024, the CRT dismissed the claim for \$2,000 compensation under s. 19 of the *APPR* but granted the reimbursement of out-of-pocket expenses.⁹

11. On July 24, 2024, Mr. and Mrs. Boyd absolutely assigned¹⁰ to the petitioner, Air Passenger Rights [**APR**], their claims against WestJet including the right to seek judicial review of the CRT Decision and the right to receive the owing payment(s).¹¹

12. APR is a federally incorporated non-profit organization whose mandate is to advocate for the rights of air passengers.¹² During the CRT process, APR has also been assisting Mr. and Mrs. Boyd on a *pro bono* basis.¹³

13. The respondent, WestJet Airlines Ltd., has been given written notice of the absolute assignment to APR, before this Petition was filed.¹⁴

⁶ [CRT Decision](#) at para. 9(d).

⁷ [CRT Decision](#) at para. 9(a)-(c).

⁸ [CRT Decision](#) at paras. 11-12.

⁹ [CRT Decision](#) at para. 25.

¹⁰ [Law and Equity Act](#), RSBC 1996, c 253, s. 36; [Guraya v. Kaila](#), 2019 BCCA 367, paras. 15-18.

¹¹ Affidavit of Dr. Gábor Lukács on July 29, 2024 [**Lukács Affidavit**] at Exhibit B (exhibit p. 9).

¹² Lukács Affidavit at Exhibit A (exhibit p. 3).

¹³ Lukács Affidavit at para. 8.

¹⁴ Lukács Affidavit at Exhibit C (exhibit p. 9).

Part 3: Legal Basis

1. The petitioners will rely on the following: (a) *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 24; (b) *Administrative Tribunals Act*, R.S.B.C. 2004, c. 45; (c) *Civil Resolution Tribunal Act*, S.B.C. 2012, c. 25; (d) *Canada Transportation Act*, S.C. 1996, c. 10; (e) *Air Passenger Protection Regulations*, SOR/2019-150; (f) *Supreme Court Civil Rules*; and (e) inherent jurisdiction of this Court.
2. The claim before the CRT was that WestJet breached the terms of its contract of carriage (also known as tariff). The legal obligations in the *APPR* are incorporated into WestJet's tariffs, pursuant to s. 86.11(4) of the *Canada Transportation Act*.

Standard of Review of CRT Small Claims Decisions

3. A judicial review of a decision from the CRT for small claims matters is governed by s. 56.8 of the *CRTA*.¹⁵ Section 56.8 of the *CRTA* provides that:

Standard of review — other tribunal decisions

56.8 (1) This section applies to an application for judicial review of a decision of the tribunal other than a decision for which the tribunal must be considered to be an expert tribunal under section 56.7.

(2) The standard of review to be applied to a decision of the tribunal is correctness for all questions except those respecting

- (a) a finding of fact,
- (b) the exercise of discretion, or
- (c) the application of common law rules of natural justice and procedural fairness.

(3) The Supreme Court must not set aside a finding of fact by the tribunal unless

- (a) there is no evidence to support the finding, or
- (b) in light of all the evidence, the finding is otherwise unreasonable.

(4) The Supreme Court must not set aside a discretionary decision of the tribunal unless it is patently unreasonable.

(5) Questions about the application of common law rules of natural justice and procedural fairness must be decided having regard to whether, in all of the circumstances, the tribunal acted fairly.

[emphasis added]

4. The CRT's jurisdiction for small claims is governed by Part 10, Division 3 of the *CRTA*, which **does not** confer exclusive jurisdiction on the CRT, **nor** specify that the CRT has specialized expertise in small claims matters.
5. As a result, the standard of review under s. 56.7 of the *CRTA* has no application. The issue being reviewed involves statutory interpretation, a question of law, which is reviewed on the standard of **correctness** under s. 56.8(2) of the *CRTA*.

¹⁵ [Roy's Tile Installation & Decoration v Acouteria Renovations](#), 2022 BCSC 2266 at para. 16.

The CRT's Legal Interpretation of Section 10 of the APPR is Erroneous

6. The Petitioner says that the CRT's statutory interpretation of s. 10 of the *APPR* is erroneous for **any** of the following three (3) reasons:
 - a. **Core Interpretation Principle for Consumer Protection Laws:** The CRT failed to consider the purpose of the *APPR* is to protect passengers and that its terms are to be interpreted generously in favour of passengers.¹⁶ Relatedly, laws for protecting passengers should not consider if it would result in an unprofitable venture for the air carrier and, to hold otherwise would effectively gut the very protection that law was intended to provide.¹⁷
 - b. **Overlooking Three Principles of Statutory Interpretation:** (i) the CRT overlooked that the focus of the interpretation was the preamble of s. 10(1) of the *APPR* on whether there were "*situations outside the carrier's control*," not the enumerated example of a "labour disruption;" (ii) the CRT impermissibly relied on extrinsic aids to override the plain meaning of "disruption" as covering a period when work stoppage has not yet occurred; (iii) the CRT overlooked the direct causation legislative wording that the flight disruption must be "due to" a situation outside the air carrier's control.
 - c. **Deeming the Notice Period Before an Actual Strike or Lockout as a "Disruption" is Unworkable:** The statutory notice period in the *Canada Labour Code* before an actual strike or lockout is expressed as a minimum of 72 hours. The CRT's interpretation would yield absurd results and mischiefs where the airline could pre-emptively issue lengthy or successive lockout notices (i.e., lockout in 30 days) and escape their *APPR* obligations.

CRT Failed to Apply the Core Interpretation Principle of Consumer Protection Laws

7. Section 12 of the federal [Interpretation Act](#), RSC 1985, c I-21 provides that an "*enactment is deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects.*" The CRT cited this principle but incorrectly referred to the provincial *Interpretation Act*.¹⁸
8. The CRT overlooked an important statutory interpretation principle for consumer protection laws that has long been recognized by the Supreme Court of Canada:¹⁹

¹⁶ [Seidel v. TELUS Communications Inc.](#), 2011 SCC 15 at para. 37.

¹⁷ [Jiang v. Peoples Trust Company](#), 2017 BCCA 119 at para. 53.

¹⁸ [CRT Decision](#) at para. 15.

¹⁹ [emphasis added] [Seidel v. TELUS Communications Inc.](#), 2011 SCC 15 at para. 37.

[37] As to statutory purpose, the *BPCPA* is all about consumer protection. As such, **its terms should be interpreted generously in favour of consumers:** *Smith v. Co-operators General Insurance Co.*, 2002 SCC 30, [2002] 2 S.C.R. 129, and *ACS Public Sector Solutions Inc. v. Courthouse Technologies Ltd.*, 2005 BCCA 605, 48 B.C.L.R. (4th) 328. The policy objectives of s. 172 would not be well served by low-profile, private and confidential arbitrations where consumers of a particular product may have little opportunity to connect with other consumers who may share their experience and complaints and seek vindication through a well-publicized court action.

9. While the Supreme Court of Canada was dealing with the B.C. *Business Practices and Consumer Protection Act*, this interpretation principle equally applies to any laws with a consumer protection focus (i.e., for protection of weaker parties).²⁰
10. It is plain that the purpose of the *Air Passenger Protection Regulations* (i.e., *APPR*) is to enhance consumer protection for passengers and, as such, should be generously interpreted in favour of the passengers:²¹

Executive summary

Issues: Currently, Canada does not have a standardized passenger protection regime for air travel. While the Air Transportation Regulations (ATR) establish the terms and conditions that air carriers operating in Canada must address in their tariffs, air carriers are permitted to establish their own policies in these areas. This approach has not always resulted in transparent, clear, fair, and consistent policies regarding the treatment of passengers. Regulations are required to establish air carrier obligations that achieve these objectives.

...

Issues

The CTA, in consultation with the Minister of Transport, is defining in regulation air carriers' requirements to communicate clearly, as well as obligations toward passengers when issues arise, such as delayed or cancelled flights, denied boarding, tarmac delays, and damaged or lost baggage. The regulations also establish requirements regarding the seating of children under the age of 14 and require policies on the transportation of musical instruments. The new regulations ensure clearer, more consistent passenger rights by establishing minimum requirements, standards of treatment, and in some situations minimum levels of compensation that all air carriers must provide to passengers. The regulations also address other consumer-related issues such as the transportation of minors and a housekeeping charge related to air services price advertising.

[emphasis added with underline]

²⁰ [Pinto v. Revelstoke Mountain Resort Limited Partnership](#), 2011 BCCA 210 at para. 17; [Harvey v Talon](#), 2016 ONSC 370 at paras. 45-48; [Lin v. Airbnb, Inc.](#), 2019 FC 1563 at para. 57.

²¹ [Air Passenger Protection Regulations - Regulatory Impact Analysis Statement](#); [International Air Transport Association v. Canadian Transportation Agency](#), 2022 FCA 211 at para. 124.

11. Similarly, when Parliament passed the enabling provisions for the *APPR*, the Transport Minister emphasized at second reading the consumer protection goal.²²
12. It is expected that the Respondent will cite a Federal Court decision, which is currently under appeal, to argue that the statutory interpretation principle to interpret consumer protection laws generously in favour of consumers “*should not result in punishment of a service provider.*”²³
13. However, the Federal Court’s comments appear to be at odds with the guidance of the B.C. Court of Appeal that a service provider’s unprofitability should not dictate the interpretation of consumer protection laws because to hold otherwise would effectively gut the protection for consumers.²⁴
14. It is plain that merchants and consumers are on “opposite” ends with conflicting interests. A merchant would want to minimize any legal restriction so as to maximize profits. Whereas, a consumer would need protection of the laws, laws that would tend to decrease the merchant’s profitability. The Supreme Court of Canada’s guidance is clear that when such conflicts arise, the interpretation of the law must favour the consumer and not the merchant.

The CRT Overlooked Three Principles of Statutory Interpretation

i. CRT overlooked the statutory text “situations outside the carrier’s control”

15. The CRT narrowly focused on the words “labour disruption” in the enumerated example in s. 10(1)(j) of the *APPR* and lost track of the big picture of s. 10(1).

Obligations — situations outside carrier’s control

10 (1) This section applies to a carrier when there is delay, cancellation or denial of boarding due to situations outside the carrier’s control, including but not limited to the following:

...

(j) a labour disruption within the carrier or within an essential service provider such as an airport or an air navigation service provider;

[emphasis added]

²² House of Commons Debates, Vol. 148, No. 187, 42nd Parliament 1st session, p. 12059-12062 (June 5, 2017).

²³ [Lukács v. Air Canada Rouge LP](#), 2023 FC 1358 at para. 56.

²⁴ [Jiang v. Peoples Trust Company](#), 2017 BCCA 119 at para. 53.

16. From the big picture perspective, the CRT should have first asked itself whether cancellation of a flight due to a strike/lockout notice for a *possible* strike or lockout in the *future* is a “situation outside the carrier’s control.” There is no dispute that during the period of the strike/lockout notice that employees were still working, and WestJet remain legally obligated to pay salaries of those employees. It is difficult to imagine how the prospect of a *future* strike/lockout, which ultimately did not occur, would serve as a present disruption that would cause cancellation of a flight.
17. Indeed, the statutory provision that enabled passage of the *APPR* narrowly circumscribes what is to be deemed as “situations outside the carrier’s control”:²⁵

Regulations — carrier’s obligations towards passengers

86.11 (1) The Agency shall, after consulting with the Minister, make regulations in relation to flights to, from and within Canada, including connecting flights,

...
(b) respecting the carrier’s obligations in the case of flight delay, flight cancellation or denial of boarding, including

...
(iii) the carrier’s obligation to ensure that passengers complete their itinerary when the delay, cancellation or denial of boarding is due to situations outside the carrier’s control, such as **natural phenomena and security events**, and

[emphasis added]

18. The *APPR*, as delegated regulations, must be read in the context of the enabling statute (i.e., s. 86.11(1) of the *Canada Transportation Act*).²⁶
19. Under the associated words rule (*noscitur a sociis*), when two or more terms are used together, the reader is to look for a common feature amongst these terms.²⁷
20. Applying *noscitur a sociis* to the terms “natural phenomena” and “security events” found in s. 86.11(1)(b)(iii), it is apparent that these two types of events would not be within an air carrier’s ability to control, and an air carrier could not avoid these events even through expenditure of financial resources.
21. In the same vein, the twelve (12) enumerated examples in s. 10(1) of the *APPR* carries the same common feature in that even if an air carrier expends financial resources, they cannot change or avoid that event.

²⁵ [Canada Transportation Act](#), SC 1996, c 10, s. 86.11(1)(b)(iii).

²⁶ [Bristol-Myers Squibb Co. v. Canada \(Attorney General\)](#), 2005 SCC 26.

²⁷ The Construction of Statutes, 7th Ed., R. Sullivan, section 8.06 associated words (p. 229-231).

22. The cancellation of a flight during the 72-hour strike or lockout notice, when employees are still working, is not an event that an airline could not avoid through expenditure of financial resources.
 23. More specifically, during the 72-hour strike or lockout notice, the air carrier is still able to continue operations. It may be true that crews or aircraft may end up at a non-home location. That in itself is not a safety event or an event that cannot be avoided through expenditure of moneys. The air carrier could return their crews back to their home base through other carriers. The aircraft can be parked at the airport, albeit the parking fees could be higher than their home location.
 24. At its core, WestJet's cancellation of its flights during the 72-hour strike or lockout notice is more properly characterized as a business decision, a decision to minimize the financial resources necessary to return crew/aircraft to a particular location. Passengers should not have to bear the cost of these business decisions.
 25. Bearing in mind that a strike or lockout notice could be issued multiple times during the bargaining process with no actual strike or lockout occurring, it would effectively gut legal protections for air passengers if such notice would cause flight cancellations to be deemed as outside of an air carrier's control.
- ii. CRT impermissibly relied on extrinsic aids to interpret the words "labour disruption"
26. The CRT did not cite any authority that interpreted "labour disruption" as including the statutory period of notice before an actual strike or actual lockout. It is commonly accepted that "labour disruption" refers to actual work stoppage. The CRT created new law with their interpretation based on a strained extrinsic aid.
 27. The second error is that the CRT impermissibly relied on an equivocal portion of the [Air Passenger Protection Regulations - Regulatory Impact Analysis Statement \[RIAS\]](#) to directly interpret the scope and meaning of "labour disruption."²⁸

c) Labour disruptions

Air industry stakeholders feel that the regulations should explicitly indicate that labour disruptions within an airline are "outside the carrier's control" to avoid influencing collective bargaining processes. The CTA agrees that it would be appropriate to give clarity in this area and has adjusted the regulations to specify that disruptions resulting from labour disruptions within the carrier or at an essential service provider (e.g., an airport) are considered outside the carrier's control.

[emphasis added]

²⁸ [CRT Decision](#) at para. 17.

28. Use of extrinsic aids, such as Hansard, to determine the general mischief that the drafters intended to address is a totally different exercise from using extrinsic aids to specifically interpret a particular provision of an enactment. The latter should be subject to more exacting scrutiny.²⁹ Ultimately, the question is not what the Minister or drafter understood the enactment to mean, but what the enactment is, interpreted in its grammatical and ordinary sense and harmoniously with the scheme of the enactment and Parliament's intention.³⁰
29. Moreover, extrinsic aids should be reviewed with caution when the contents are equivocal and the interpretation urged to be placed upon them would dramatically change the plain words of the enactment.³¹
30. In this instance, the CRT relied on the RIAS to dramatically scale back the protections for passengers and grant air carriers immunity from most of their legal obligations during the collective bargaining process, despite no actual work stoppage. It is trite that there could be multiple strike or lockout notices in a single collective bargaining session. There is **nothing** in the RIAS suggesting that the drafter intended to allow air carriers to avoid their obligations because of a notice.
31. Indeed, more recently, the Supreme Court of Canada has stated that extrinsic aids are not more important than the legislative text and weight should not be given to the extrinsic aid unless it is "clear and consistent."³²
32. In the RIAS, the reference to "avoid influencing collective bargaining processes" is itself unclear and there is no consistency. More importantly, these were the air carriers' bald assertions and made no reference to the strike or lockout notices.
33. Similarly, the Canadian Transportation Agency's response thereto is equivocal, stating that "[t]he CTA agrees that it would be appropriate to give clarity in this area and has adjusted the regulations to specify that disruptions resulting from labour disruptions within the carrier."
34. The CRT should not have given any weight to the brief reference of "*influencing the collective bargaining process*" in the RIAS to dramatically limit protection for passengers.³³ In fact, the CRT's strained interpretation would have the capability

²⁹ [R. v. Heywood](#), 1994 CanLII 34 (SCC) at p. 787-88.

³⁰ [Murray v. British Columbia \(Superintendent of Motor Vehicles\)](#), 2013 BCCA 363 at para. 26.

³¹ [Jiang v. Peoples Trust Company](#), 2017 BCCA 119 at para. 50.

³² [R. v. Khill](#), 2021 SCC 37 at paras. 110-111.

³³ [CRT Decision](#) at para. 17.

of “influencing the collective bargaining process.” As detailed further below, it would indirectly encourage air carriers to issue lengthy or successive lockout notices for the purpose of avoiding their legal obligations under the *APPR*. There is no financial downside to issuing a lockout notice, and actually would give the air carrier the financial benefit of avoiding some obligations in the *APPR*.

iii. CRT impermissibly relied on extrinsic aids to interpret the words “labour disruption”

35. Finally, the CRT overlooked the causation element in the *APPR*. How did the strike notice or lockout notice **cause** an uncontrollable cancellation of the flight, when the employees are still working? The CRT did not consider this issue and erred.

36. Both s. 10(1) of the *APPR* and s. 86.11(1)(b)(iii) of the *Canada Transportation Act* use identical language stating that the cancellation needs to be “due to situations outside the carrier’s control.” This imports a direct causation element between the event and the cancellation.

37. Even the [Air Passenger Protection Regulations - Regulatory Impact Analysis Statement](#) specifies that there must be a causal link between the “labour disruption” and the flight disruption:

c) Labour disruptions

Air industry stakeholders feel that the regulations should explicitly indicate that labour disruptions within an airline are “outside the carrier’s control” to avoid influencing collective bargaining processes. The CTA agrees that it would be appropriate to give clarity in this area and has adjusted the regulations to specify that disruptions resulting from labour disruptions within the carrier or at an essential service provider (e.g., an airport) are considered outside the carrier’s control.

[emphasis added]

Deeming the Notice Period as a “Disruption” is Unworkable

38. The CRT failed to consider the practical consequences and potential mischiefs arising from its interpretation.

39. Firstly, under s. 87.2(1) and (2) of the *Canada Labour Code*, a strike notice or lockout notice must be given “at least seventy-two hours in advance.” If a strike or lockout does not occur on that date, section 87.2(3) specifies that “a new notice of at least seventy-two hours must be given.”

40. In other words, the *Canada Labour Code* would permit a lockout notice be issued, for example, thirty days in advance. The CRT’s interpretation would provide an

obvious incentive for air carriers to issue a lockout notice far in advance, and would indirectly serve as a “suspension” of their obligations under the *APPR* as it would be considered a “labour disruption” under the CRT’s new interpretation.

41. Secondly, the *Canada Labour Code* obviously contemplates the possibility of an actual lockout or strike not occurring, therefore the need to issue a fresh notice. Again, the CRT’s interpretation would provide an obvious incentive for air carriers to issue successive lockout notices for reasons other than collective bargaining.
42. The CRT’s interpretation that the period of time before an actual disruption would similarly be considered a disruption would also have the effect of dramatically changing some of the other enumerated examples in s. 10(1) of the *APPR*.
43. For example, s. 10(1)(c) of the *APPR* refers to meteorological conditions (i.e., weather). Imagine a situation where WestJet has a scheduled flight from its home base Calgary to Tokyo, Japan on January 3, with a scheduled flight in the other direction on January 5. There is a weather report stating that there would be significant snowfall in Tokyo on January 5. Would this “advance notice” of meteorological conditions (i.e., the weather report) suffice as a reason to cancel the January 3 flight to Tokyo, when there are no weather issues on that day?
44. It is plain that exceptions to a consumer protection law must be interpreted restrictively. Otherwise, it opens the door to obvious mischiefs and litigation.
45. It is imperative that this Court swiftly intervene to correct the erroneous CRT interpretation of what constitutes a “labour disruption.”
46. Such further legal basis as counsel may advise, and as this Honourable Court may permit.

Part 4: Materials to Be Relied Upon

1. Affidavit #1 of Dr. Gábor Lukács affirmed on July 29, 2024.
2. Such other materials as the petitioners may advise.

Date: July 29, 2024



 Signature of lawyer for petitioner
 Simon Lin

To be completed by the court only:

Order made

- ☐ in the terms requested in paragraphs of Part 1 of this notice of application
- ☐ with the following variations and additional terms:

.....

.....

.....

.....

Date:

Signature of ☐ Judge ☐ Associate
Judge



NO. S-S-254452
NEW WESTMINSTER REGISTRY

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

AIR PASSENGER RIGHTS

PETITIONER

AND

WESTJET AIRLINES LTD and CIVIL RESOLUTION TRIBUNAL

RESPONDENTS

RESPONSE TO PETITION

Filed by: WestJet Airlines Ltd.

THIS IS A RESPONSE TO the Petition filed July 29, 2024.

Part 1: ORDERS CONSENTED TO

WestJet Airlines Ltd. consents to the granting of the orders set out in the following paragraphs of Part 1 of the Petition: NONE.

Part 2: ORDERS OPPOSED

WestJet Airlines Ltd. opposes the granting of the orders set out in paragraphs 1 to 3 of Part 1 of the Petition.

Part 3: ORDERS ON WHICH NO POSITION IS TAKEN

WestJet Airlines Ltd. takes no position on the granting of the orders set out in paragraphs NIL of Part 1 of the Petition.

Part 4: FACTUAL BASIS

Background

1. The Petitioner, Air Passenger Rights, is a corporation, incorporated under the *Canada Not-for-profit Corporations Act*, with an address for service of c/o Simon Lin, registered director of the Petitioner and counsel for the Petitioner, of 4388 Still Creek Drive, Suite 237, Burnaby, BC.
2. The Respondent, WestJet Airlines Ltd., is an Alberta corporation and is extra-provincially registered in British Columbia with an address for service of 2700-700 West Georgia Street, Vancouver, BC, V7Y 1B8 ("WestJet").
3. The Petitioner seeks judicial review of a final decision of *Boyd v. WestJet Airlines Ltd*, 2024 BCCRT 640 (the "Decision") made by the British Columbia Civil Resolution Tribunal (the "Tribunal". The Petitioner is asking the Court to: (1) set aside a portion of the Tribunal's order; (2) grant the \$2,000 claim under s.19 of the *Air Passenger Protection Regulations* (SOR/2019-150) ("APPR"); or (3) to remit the claim back to the Tribunal. By doing so, the Petitioner seeks to re-litigate issues that have already been decided.

4. There is no merit to the relief sought because the Tribunal made the Decision on findings of fact.
5. The Tribunal was correct in arriving to its conclusion that the "72-hour notice" issued prior to a strike or lockout (the "Strike Notice") was a "labour disruption".
6. In the alternative, if there was an issue with respect to the interpretation of "labour disruption", which is denied, the findings of fact made by the Tribunal still apply and are not to be displaced. The question of law, as expressed by the Petitioner, does not entitle the Petitioner to the relief sought.

The Application to the Tribunal

7. Ms. Anne Boyd and Mr. Robert Boyd purchased air tickets on November 21, 2022, via a travel agent to fly on the following series of flights from Kelowna to Rome on May 18, 2023 (the "Purchasers"):
 - (a) WS 3162 from Kelowna, British Columbia to Calgary, Alberta, which was scheduled to depart at 14:00 PDT and to arrive at 16:09 MDST; and
 - (b) WS 032 from Calgary, Alberta, to Rome, Italy, which was scheduled to depart at 18:05 MDST and to arrive at 11:55 CET.
8. The Purchasers were scheduled to arrive in Rome on May 19, 2023, at 11:55am.
9. The Purchasers travelled on WS 3162 from Kelowna to Calgary, as scheduled.
10. WS 032 was cancelled due to the ongoing labour disruption involving WestJet's pilots.
11. Following the cancellation of WS 032, WestJet rescheduled the passengers on flights operated by other carriers:
 - (a) WestJet flight WS 3628 from Calgary to Portland on May 19, 2023;
 - (b) Delta Airlines flight DL 0178 from Portland to Amsterdam on May 20, 2023; and
 - (c) Italia Transporto Aero flight AZ 0107 from Amsterdam to Rome on May 20, 2023.
12. The Purchasers arrived in Rome on May 20, 2023, over 24 hours later than originally scheduled.
13. As a result of the travel delay, the Purchasers brought an application to the Tribunal and sought to recover:
 - (a) \$185.25 for a hotel in Calgary on the night of May 18, 2023;
 - (b) \$92.00 for meals purchased from May 18, 2023, to May 20, 2023; and
 - (c) \$2,000 (\$1,000 per guest) in compensation for their delay under s. 19(1) of the *APPR*
 (the "Dispute").

Contract of Carriage and the APPR

14. The Purchasers are bound by the terms and conditions (the "Terms and Conditions") of the airline passenger ticket, and the Terms and Conditions of WestJet's International Tariff (the "Tariff"), which together comprise the contract of carriage (collectively, the Contract of Carriage") and limit and/or proscribe the Purchaser's right of recovery against WestJet.
15. At the Tribunal, WestJet submitted the following:
 - (a) The Tariff, Terms and Conditions, and the APPR do not provide a basis for the \$2,000 in APPR compensation sought.
 - (b) The relief sought by the Purchasers are subject to the APPR. The APPR are included in the Tariff, along with the Terms and Conditions, which comprise the contract of carriage between WestJet and the Purchasers.
 - (c) The APPR provides that airlines are obligated to provide compensation for inconveniences incurred due to delays or cancellations in certain circumstances. Eligibility for compensation depends on (1) the cause of the delay/cancellation; and (2) the length of the resulting delay.
 - (d) When a delay is within carrier control, s. 19 compensation is generally owed. However, when a delay is outside of carrier control, compensation under s. 19 is not owed.
 - (e) The cancellation of flight WS 032 was outside of carrier control, as it occurred due to a labour disruption. The APPR is clear that a labour disruption, even those involving the carrier's own employees, is outside of carrier control under s.10.
 - (f) When s. 10 applies to a cancellation or delay, s.19 does not apply, and as such, compensation for delay is not owed.
 - (g) The Purchaser argued that because there was no active picketing by the pilots at the time of the cancellation of WS 032, there was no actual strike. In response, WestJet submitted that the APPR does not use the term "work stoppage" or "strike", but rather the broader "labour disruption".
 - (h) There is no basis upon which to find that "labour disruptions" under s.10 of the APPR require "active picketing" or a "work stoppage" in order to apply.
 - (i) A plain reading of the APPR, statements made by the Canadian Transportation Agency (the "Agency"), including the Regulatory Impact Analysis Statement ("RIAS"), and the *Burym et al v WestJet Airlines Ltd*, File #SC23-01-44117 (unreported) decision all support a finding that "labour disruptions" should be more broadly interpreted: the announcement of a strike constitutes the decisive moment when contractual obligations are suspended, and labour activities are fundamentally disrupted.
 - (j) The cancellation was outside of carrier control under s.10, and s.19(1) compensation is therefore not due.

Affidavit #1 of C. Machado at Exhibit "G"

16. At the Tribunal, it was not disputed that the cancellation of the Applicants' flight WS 032 occurred both after the Strike Notice was issued, and because of the ongoing labour dispute between the pilots and WestJet.

Labour Disruption

17. WestJet pilots are represented by the Air Line Pilots Association ("ALPA"). In May 2023, the pilots and ALPA were in the process of negotiating a new Collective Agreement with WestJet.
18. Pursuant to the Canada Labour Code, the Strike Notice was formally issued on May 15, 2023. Upon the expiry of the 72-hour period in the Strike Notice, the pilots were authorized to strike, beginning at 3:00am MDT on May 19th, 2023.

Affidavit #1 of C. Machado at Exhibit "D"

19. Ultimately, the pilots and WestJet came to an agreement at approximately 12:00am MDT on May 19, 2023.

Affidavit #1 of C. Machado at Exhibits "D", "E", and "F"

Procedural History Before the Tribunal

20. The Tribunal is British Columbia's first online tribunal. The Civil Resolution Tribunal Act [SBC 2012] Chapter 25 (*CRTA*) mandates the Tribunal to provide dispute resolution services in a manner that is "accessible, speedy, economical, informal and flexible", with a focus on electronic communication and dispute resolution.
21. Pursuant to the *CRTA*, the Tribunal has jurisdiction over small claims matters subject to its limited monetary jurisdiction of \$5,000.00.
22. A party that chooses to proceed with the Tribunal's dispute resolution process must complete an initiating document commonly known as a Dispute Notice and pay a filing fee. The Tribunal must accept a dispute if, on initial review, the claim appears to be within the Tribunal's jurisdiction.
23. If a dispute is accepted, the Tribunal will usually issue a Dispute Notice Package on all parties, which includes a Dispute Notice and instructions for responding to the Dispute Notice. Once a responding party has filed its Dispute Response, the Tribunal's formal dispute resolution process begins; it can be categorized into two (2) phases: the Case Management Phase, commonly known as facilitation, and the Tribunal Hearing Phase, commonly known as adjudication.
24. The Tribunal proceedings were commenced by the Purchasers on July 4, 2023. The Dispute Notice was issued on July 31, 2023.
25. The relief sought by the Purchasers in their Dispute Notice was compensation for delay of \$2,277.25. WestJet filed its dispute response on August 30, 2023.
26. The Purchasers and WestJet were unable to resolve the dispute and it proceeded to the adjudication phase of the Tribunal process.
27. The Tribunal has wide discretion over its procedure, including the discretion to conduct a hearing by written submissions, telephone or email: *CRTA*, ss. 38, 39. The Tribunal can

accept and admit any evidence it considers necessary and is not bound by the rules of evidence: *CRTA*, s. 42.

Affidavit #1 of C. Machado at Exhibit "A", para 4

The Decision

28. The Dispute proceeded by way of written submissions. The Tribunal determined that a written hearing was appropriate because it was of the view that it could properly assess and weigh the evidence and submissions before it and saw no reason for an oral hearing.

Affidavit #1 of C. Machado at Exhibit "A", para 4

29. The issues raised for the Tribunal were:

- (a) Are the Boyds entitled to \$2,000 in compensation for the delayed flight?
- (b) Are the Boyds entitled to reimbursement of \$277.25 for their hotel stay and meals?

30. The Tribunal made the following findings of fact in the Decision:

- (a) the incident which caused the delay was a strike;
- (b) the strike was outside of WestJet's control;
- (c) the long-standing rule of statutory interpretation applies;
- (d) the Agency's statements provide insight into the intent of the regulation's drafters intent;
- (e) the 72-hour Strike Notice qualifies as a "labour disruption"; and
- (f) the reason for the delay is outside WestJet's control.

31. The Tribunal cited the correct rule of statutory interpretation in its determination that the "labour disruption" cannot be so narrowly interpreted to mean "only" if there is a work stoppage or actual strike occurring. The legislature's chosen words are "to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament."

Affidavit #1 of C. Machado at Exhibit "A", para 14; *Rizzo & Rizzo Shoes Ltd. (Re)*, 1998 CanLII 837 (SCC)

32. The Decision cites section 8 of the *BC Interpretation Act*, [RSBC 1996] Chapter 238. Although the Petitioner is correct in asserting that it is the federal *Interpretation Act* ((R.S.C., 1985, c. I-21)), s.12 that applies, the wording in each provision is exactly the same.

33. WestJet says that the naming of the *BC Interpretation Act* rather than the federal *Interpretation Act* has no effect on the statutory interpretation exercise undertaken by the Tribunal in arriving to its conclusion that:

Section 10(1) of the APPR states a "labour disruption within the carrier" is not within the airline's control. The parties agree this dispute turns on whether a strike notice and

lockout notice qualify as a "labour dispute". If so, the Boyds' flight delay was not in WestJet's control.

Affidavit #1 of C. Machado at Exhibit "A", para 12

34. WestJet was ordered to reimburse the Boyds for their hotel stay and meals, plus interest, for a total of \$355.53.

PART 5: LEGAL BASIS

35. The Petitioner's petition ought to be dismissed on the following basis:

- (a) The Petitioner does not have standing to bring this judicial review.
- (b) The Purchaser's and the Petitioner's absolute assignment of rights is invalid at law.
- (c) The Decision was correct. There is only one correct interpretation, of which the Tribunal arrived.
- (d) The Petitioner raises arguments not raised before the Tribunal.
- (e) The Petitioner's affidavit, which is required in order to bring an action for judicial review, is inadmissible.
- (f) There is no merit to this Petition.

Petitioner Does not Have Standing

36. The Petitioner does not have standing to bring an action for judicial review.

37. Standing is a threshold issue in judicial review proceedings. Only a petitioner who can either demonstrate private interest standing or who can persuade the Court to grant public interest standing will be entitled to seek judicial review of administrative decisions.

Gonzales Hill Preservation Society v. Victoria (City) Board of Variance, 2021 BCSC 2091 at paras. 53 to 88 [Gonzales]

38. Gonzales sets out the general test for private interest standing, noting:

"that the petitioner must be "aggrieved", "affected" or suffer some "exceptional prejudice" because of the impugned decision. This test is set out in *Bradshaw v Workers' Compensation Board*, 2017 BCSC 1092 at para. 89:

[89] The authors of Brown and Evans, *Judicial Review of Administration Action in Canada* (Toronto: Carswell, 2014) v. 2, state the test in these terms at para. 4:3420:

At common law a person will have standing to seek a remedy in proceedings of judicial review if he or she is an "aggrieved person," an "affected person", or someone who is "exceptionally prejudiced" by the impugned administrative action. The requirements of any of these expressions of the common law test are two-fold: first an identification of the interest and, second, an assessment of its remoteness."

Gonzales at 60

39. To be accorded standing, a petitioner must demonstrate an interest in the proceeding. A petitioner will have an interest in the proceeding where he or she has a private right that has been infringed by the respondent, or which will cause or threaten to cause special damage which extends beyond that suffered by the general public. This interest may also be conferred by statute.

Emerman v. Association of Professional Engineers, 2008 BCSC 1186 at para. 19

40. The sufficiency of the interest of the applicant can be demonstrated by the statutory regime underlying the impugned decision.

Sandhu v. British Columbia (Provincial Court), 2013 BCCA 88 at para. 35

41. There is no provision in the *CRTA* that confers standing to any person but the applicant.
42. The proposition that a petitioner must suffer some special form of damage beyond that suffered by the general public is also addressed in *Alberta Liquor Store Association v. Alberta (Gaming and Liquor Commission)*, 2006 ABQB 904 [*Alberta Liquor*].
43. An important factor includes the relationship between the applicant and the challenged decision. If the applicant can demonstrate some interest in challenging the administrative act, but that interest is found by the court to be contrary to the objects and purposes of the administrative regime, the court will not allow the judicial review process to be used to disrupt the administrative system.

Alberta Liquor, at 9 and 15

44. There is a line of cases which holds that the applicant must itself be aggrieved, and it is not sufficient that the applicant have members that are aggrieved.

Alberta Liquor, at 19

45. To have standing, the petitioner must show that it has a particular interest or that it has suffered or will suffer injury or damage peculiar to itself. Where the petitioner is an inanimate incorporated society with a legal status separate and distinct from that of its members, it cannot be said that it, as a legal entity, has a particular interest distinct from that of other concerned citizens...:

How can it be said that it, as a legal entity, has suffered, or will suffer, injury or damage peculiar to itself? Put at its highest, the society is in the position of a concerned corporate citizen — that is not sufficient to grant standing. It may very well be that some of its members have a particular interest which would give them standing — but the society is distinct from its members. I must hold that the society lacks the necessary standing.

[Emphasis added.]

Village Bay Preservation Society v. Mayne Airfield Inc. (1982), 1982 CanLII 275 (BC SC) at 11; *Sea Shepherd Conservation Society v. British Columbia* (1984), 1984 CanLII 504 (BC SC) at 13

46. The Petitioner is a non-profit corporation and does not in itself purchase airline tickets. It can neither benefit nor suffer any direct adverse impact from the Decision.

Independent Contractors and Business Association v. Canada (Minister of Labour), 1998
CanLII 7520 (FCA) at 30

Absolute Assignment is Invalid at Law

47. The absolute assignment of the Purchasers' rights to claims against WestJet is invalid at law.
48. There are two reasons why courts do not permit the assignment of choses. The first is that contracts created obligations which were strictly personal; and the second is maintenance and champerty.

Fredrickson v. I.C.B.C., 1986 CanLII 1066 (BC CA) [*Fredrickson*] at 44

49. While the Courts of Equity did recognize and enforce assignments, there are six categories of contracts which are considered to be unassignable. They are:
 - (a) contracts which expressly by their terms exclude assignment;
 - (b) mere rights of action (assignments savouring of maintenance and champerty);
 - (c) contracts which by their assignment throw un contemplated burdens on the debtor;
 - (d) personal contracts;
 - (e) assignments void by public policy (public officers' wages or salary and alimony or maintenance agreements); and
 - (f) assignments prohibited by statutory provisions.

Fredrickson at 44; *Chitty on Contracts*, 25th ed. (1983), pp. 709-15

50. An exception to personal contracts being assigned include a cause of action for damages based on breach of contract. This is a petition for judicial review, and not a cause of action for damages.
51. All champertous agreements are forbidden and invalid. In *McIntyre Estate*, the Court of Appeal for Ontario defined maintenance and champerty as follows:

Although the type of conduct that might constitute champerty and maintenance has evolved over time, the essential thrust of the two concepts has remained the same for at least two centuries. Maintenance is directed against those who, for an improper motive, often described as wanton or officious intermeddling, become involved with disputes (litigation) of others in which the maintainer has no interest whatsoever and where the assistance he or she renders to one or the other parties is without justification or excuse. Champerty is an egregious form of maintenance in which there is the added element that the maintainer shares in the profits of the litigation. Importantly, without maintenance there can be no champerty.

[Emphasis added.]

2770095 Ontario Inc. v. Morgan, 2023 ONSC 1924 at 45

52. The Law of Contracts, 5th ed., after noting the different views on the question, concludes at p. 523 that "[t]he best approach is to avoid generalisation and to ask in each case whether *this* assignment savours of maintenance".
53. The Petitioner is a not-for-profit corporation, distinct from its members. The corporation has no interest whatsoever in the litigation of others. The Petitioner is an officious intermeddler, becoming involved in a dispute in which it has no interest. It also, through the assignment agreement, shares in the profits of the litigation, which is the very definition of champerty. This assignment savours of maintenance.
54. An assignment agreement will be held to be void, or invalid, where the court finds that the assignment savours of maintenance.
55. Further, the Petitioner essentially seeks a second chance at responding to WestJet's submissions at the Tribunal by bringing this judicial review. The Purchasers had a chance to reply, and the Tribunal considered the record of evidence and submissions in its entirety.
56. The courts allowing the Petitioner to essentially re-litigate the Decision would open the floodgates to other parties absolutely assigning their rights to other intermeddlers for the purpose of judicially reviewing decisions, so that they could obtain a second chance, if they did not receive the relief that they wanted. This would lead to further waste of court and tribunal resources.

Standard of Review

57. The *CRTA* governs judicial review of the Tribunal's decisions. The standard of review if the Tribunal has exclusive jurisdiction or specialized expertise is patent unreasonableness, the highest standard of review.

CRTA at s.56.7

58. Section 56.8 governs the standard of review of other tribunal decisions, with the exception of discretionary decisions. The Decision is a final decision.
59. The Petitioner seeks to dispute a question of law, which falls under the standard of correctness.
60. There is no dispute regarding the standard of review that applies on a judicial review of the Decision with respect to questions of law.
61. When applying the correctness standard, the reviewing court may choose either to uphold the administrative decision maker's determination or to substitute its own view of the question.

Dunsmuir v. New Brunswick, 2008 SCC 9 (CanLII), [2008] 1 SCR 190, at para. 50

62. The Decision, in its entirety, is not reviewable on the standard of correctness. The Tribunal made findings of fact, that cannot be interfered with by the court unless the Petitioner can show that there is: (1) no evidence to support the finding; or (2) in light of the evidence, the finding is otherwise unreasonable.

CRTA at s.56.8(2)

63. Where the question is one of fact, discretion or policy, deference will usually apply automatically.

Canada (Attorney General) v. Mossop [1993] 1 S.C.R. 554S(S), at pp. 599-600; *Dunsmuir* at 53

64. The deference owed to findings of fact includes primary factual findings and conclusions drawn from them, including inferences and interpretation of evidence as a whole, and credibility.

Housen v. Nikolaisen, 2002 SCC 33, [2002] 2 S.C.R. 235 at paras. 15-25

65. The Petitioner seeks relief on the basis that a labour disruption does not include a lockout notice. The labour dispute and events flowing from such was found by the Tribunal to be a labour disruption, and outside of WestJet's control. These are questions of fact, and not reviewable on the correctness standard.

CRTA at s.56.8(3)

66. WestJet further asserts that the Tribunal's reasoning was correct and consistent with the principles of statutory interpretation. The Decision ought to stand.

The Tribunal Correctly Interpreted Section 10 of the APPR

67. The Petitioners allege that the Tribunal's legal interpretation of Section 10 of the *APPR* is erroneous by:

- (a) Failing to consider the purpose of the *APPR*.
- (b) Focusing on: (i) whether there were "situations outside of the carrier's control" and not on what the "labour disruption" entails; (ii) the reliance on extrinsic aids; and (iii) the Tribunal overlooking direct causation legislative wording.
- (c) The Notice Period prior to a strike being considered a "labour disruption" or "lockout" is unworkable.

68. These arguments are without merit.

Purpose of the APPR

69. The *Canada Transportation Act*, SC 1996, c 10 ("*CTA*") is the enabling statute of the *APPR*. The *APPR* is a federal regulation.

70. Section 10(1) of the *APPR* provides that:

This section applies to a carrier when there is delay, cancellation or denial of boarding due to situations outside the carrier's control, including but not limited to the following:
[...]

- (j) a labour disruption within the carrier or within an essential service provider such as an airport or an air navigation service provider.

71. The *APPR* is clear and unambiguous with respect to the purpose of the *Act*, context, and relevant legal norms by the inclusion of "strike" and "lockout notices" within "labour disputes" under s.10.

72. The Petitioner attempts to cite a provincial consumer protection statute to conflate the provincial regulation with purpose of the *APPR*, which would, on its face, be contrary to the principles of federalism and paramountcy. The use of the federal *Interpretation Act* rather than the *BC Interpretation Act* ultimately flows from the same logic.
73. The *APPR* were created to protect passengers, and clearly sets out situations where an air carrier is liable for compensation to a passenger as well as situations in which a balance must be struck with respect to situations outside of carrier control.
74. The statutory interpretation principle to interpret consumer protection laws generously in favour of consumers ought not result in punishment of the service provider.

Lukács v. Air Canada Rouge LP, 2023 FC 1358 [Lukács] at 56

75. The Petitioner attempts to establish a gap between the BC Court of Appeal and the Federal Court. There is no such gap. Unprofitability is not the concern here, but rather, ensuring that the collective bargaining process is a fair one. If flights are cancelled, the carrier loses profitability regardless. It is not in the interests of a carrier to (1) cancel flights; and (2) conduct any action that attracts the ire of the Agency in the form of penalties and/or the public perception of the carrier itself.
76. The Agency's role includes the protection of passengers. A carrier following the instructions of the Agency ought not be punished for conducting itself in the way it was permitted.

Modern Principles of Statutory Interpretation

77. Recent Supreme Court of Canada decision, *La Presse Inc. v. Quebec*, 2023 SCC 22 ("*LaPresse*") clarified the modern principles of statutory interpretation:

[23] First, the plain meaning of the text is not in itself determinative and must be tested against the other indicators of legislative meaning — context, purpose, and relevant legal norms (*R. v. Alex*, 2017 SCC 37, [2017] 1 S.C.R. 967, at para. 31). The apparent clarity of the words taken separately does not suffice because they "may in fact prove to be ambiguous once placed in their context. The possibility of the context revealing a latent ambiguity such as this is a logical result of the modern approach to interpretation" (*Montréal (City) v. 2952-1366 Québec Inc.*, 2005 SCC 62, [2005] 3 S.C.R. 141, at para. 10).

[24] Second, a provision is only "ambiguous" in the sense contemplated in *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559, if its words can reasonably be interpreted in more than one way after due consideration of the context in which they appear and of the purpose of the provision (paras. 29-30). This is to say that there is a "real" ambiguity — one that calls for the use of external interpretive aids like the principle of strict construction of penal laws or the presumption of conformity with the Canadian Charter of Rights and Freedoms — only if differing readings of the same provision *cannot* be decisively resolved through the contextual and purposive approach set out by Driedger (*ibid.*).

[Emphasis added.]

LaPresse at 23 - 24

78. The context, "situations outside carrier control", provides clarity. *LaPresse* illustrates why one cannot isolate nor divorce the "labour disruption" from its context, which is essentially what the Petitioner seeks to do.
79. Alternatively, if "labour disruptions" are unclear as the Petitioner asserts, which WestJet denies, then extrinsic evidence, in the form of the Agency's Regulatory Impact Analysis Statement ("RIAS"), *aids* clarification.

Affidavit #1 of C. Machado at Exhibit "E"

The Agency

80. The Agency was involved in the drafting of the *APPR*. The Agency issued the RIAS, which confirms that the intent behind specifying "labour disruptions" as being outside carrier control (rather than using alternative terms such as "strike") was to avoid having the *APPR* be used as a tool to influence the collective bargaining process.
81. In the RIAS, under the heading "Clarity regarding categorization of flight disruptions", the CTA noted that:

Some stakeholders would like there to be greater specificity and clarity in the regulations as to the situations that would be considered "required for safety purposes" and "outside the carrier's control". As it is not possible or desirable to be completely prescriptive in regulation, CTA will address these comments using a combination of regulatory adjustments and guidance materials for air carriers.

Affidavit #1 of C. Machado at Exhibit "E"

82. In direct response to the Petitioner's suggestion against the use of extrinsic aids, the Federal Court stated that that a RIAS can be accepted as an extrinsic aid to interpretation, relying on the decision in *Boutcher v. Canada*, 2001 NFCA 33 (CanLII), 202 Nfld. and P.E.I.R. 243 (Nfld. C.A.), at paragraph 76.

Lukács at 29

83. In the following section under the same heading, the CTA addressed concerns of certain stakeholders regarding labour disruptions:

c) Labour disruptions

Air industry stakeholders feel that the regulations should explicitly indicate that labour disruptions within an airline are "outside the carrier's control" to avoid influencing collective bargaining processes. The CTA agrees that it would be appropriate to give clarity in this area and has adjusted the regulations to specify that disruptions resulting from labour disruptions within the carrier or at an essential service provider (e.g., an airport) are considered outside the carrier's control.

[Emphasis added]

Affidavit #1 of C. Machado at Exhibit "E" [RIAS]

84. Finally, on May 16, 2023, the CTA released a statement affirming that the WestJet labour disruption was outside of carrier control pursuant to s. 10 of the *APPR*. As such, it is WestJet's position that the labour disruption fell within s. 10 of the *APPR*, and s. 19 compensation is not applicable in the circumstances.

Affidavit #1 of C. Machado at Exhibit "F"

85. In *Burym et al v. WestJet Airlines*, File #SC23-01-44117 (unreported) ("*Burym*"), the court dismissed a claim seeking APPR compensation against WestJet as a result of the same labour disruption. The Court stated:

Ultimately, the Court's determination is that the declaration of the strike marked the onset of the labour disruption. It is the announcement of the strike that heralds the suspension of the contractual obligations and instigates a fundamental shift in labour relations thus establishing that a labour disruption was underway at the time of the claimants' flight cancellation, making it outside of carrier control.

Burym at p. 3

86. The Petitioner argues that the Tribunal overlooked the direct causation legislative wording that the flight disruption must be "due to" a situation outside the carrier's control. In direct response to this assertion, the Respondent says that this is not a question of law, but points to the findings of fact made by the Tribunal, including that the incident which caused the delay was a strike, and that the flight disruptions were due to the strike.

Petitioner's Definition would lead to Absurd Results

87. The Petitioner says that the Tribunal's interpretation would yield absurd results and mischiefs where an airline could pre-emptively issue lockout notices to escape APPR compensation.
88. The above argument is, in itself, absurd, and not the intended interpretation of "labour disputes" as provided for by the APPR and as indicated by the RIAS. To suggest that an airline would issue lockout notices to its employees for sole purpose of escaping APPR obligations is completely unrealistic and contrary to the spirit and provisions of the *Canada Labour Code*, R.S.C., 1985, c. L-2
89. Issuing a lockout notice to employees carries with it far ranging labour relations consequences and possible outcomes. There would be no economic or goodwill benefits that would result from the issuance of lockout notices in anticipation of a flight cancellation in order to avoid APPR obligations. Not only would an airline lose more profits by having to cancel flights due to a "lockout", but pre-emptively issuing lockout notices to escape APPR compensation and cancelling more flights would lead to further losses. There are other mechanisms to deal with such an issue if it were to occur, such as the Agency and the penalties the Agency can issue to carriers.
90. Further, if a Strike Notice is provided, a large carrier, such as WestJet, would need to prepare for shutting down operations prior to an actual strike occurring. There is no guarantee that discussions would lead to resolution, and in the meantime, it is necessary to ensure guest, crew, and pilot safety. Operations take time to shut down, and it cannot be done at the same moment as the strike begins, leaving many more guests and crew stranded without adequate preparation.

Arguments Not Raised Before Tribunal

91. The Petitioner seeks to simply re-litigate issues already decided. The limited scope of the court's role on judicial review gives rise to a number of specific procedural matters, including:

- (a) **No New Evidence:** Except in limited circumstances, the court sitting on judicial review of an administrative decision may not consider evidence which did not form part of the record before the decision-maker; to do so would amount to usurping the role of the decision-maker by making a new decision on the basis of different evidence, as illustrated in *Acton Transport Ltd. v. British Columbia (Director of Employment Standards)*, 2010 BCCA 272 at paras. 19-23, including:

[21] The judge made a declaration in this case, but he arrived at that decision after conducting a de novo hearing in which he received new evidence ... However, the irregular nature of the process tends to confound the principles of appellate review.

...

[23] While the Tribunal had to be correct in deciding the division of powers question, normally its decision would be reviewed on the record before it. The reviewing court usurps the role of the tribunal when it embarks upon a de novo hearing. The procedure adopted here was wrong and should not be repeated.

- (b) **No New Arguments:** Except in limited circumstances, the court may not consider as a ground for review an issue that was never raised before the tribunal; to do otherwise would undermine the integrity of the administrative scheme. If the tribunal was not asked to consider an issue, and therefore did not make a decision with respect to it, it cannot be said that the tribunal erred in law or otherwise lost jurisdiction.

Powell v British Columbia (Residential Tenancy Branch), 2015 BCSC 2046 at paras 49-51; *Alberta Teachers' Assn. v. Alberta (Information & Privacy Commissioner)*, 2011 SCC 61 at paras 22-26; and *Vandale v. Workers' Compensation Appeal Tribunal*, 2013 BCCA 391 at para 54.

92. Reduced to its essence, the role of the court on judicial review is not to hear new evidence or argument or to decide or re-decide the case; it is simply to ensure that the Tribunal (1) acted within its jurisdiction by deciding what it was directed to decide by its constituent legislation; and (2) did not lose jurisdiction by failing to provide a fair hearing or by rendering a decision outside the degree of deference owed by the reviewing court. As the standard in this case is correctness, the court's role is to ensure that the tribunal's interpretation of "labour disruption" was the correct one.
93. The Petitioner not only seeks to adduce new evidence, but also raises new arguments that were never raised before the Tribunal.

Petitioner's Affidavit is Inadmissible

94. WestJet respectfully says that the Affidavit #1 of Dr. Gábor Lukács is inadmissible (the "Affidavit").
95. The requirements for the commissioning of affidavits are set out in section 1 of Appendix A of the *Code of Professional Conduct for British Columbia*. During the COVID-19 pandemic, the Supreme Court introduced numerous notices to accommodate those suffering from COVID-19, where it is not possible or physically or medically unsafe for the deponent to physically attend before a commissioner.

96. The most recent BC Supreme Court Notice to the Profession, the Public and the Media with respect to affidavits for use in court proceedings notes that only with the approval of the Law Society of British Columbia can accommodations be made or used in any proceeding to the Supreme Court. With approval from the Law Society of British Columbia, affidavits are still subject to the discretion of the Courts to apply the best evidence requirements to their use.

Affidavit #1 of C. Machado at Exhibit "I"

97. There is concern whether the Petitioner's counsel, registered director of the Petitioner, obtained the mandatory approval prior to commissioning the Affidavit.
98. As such, the judicial review ought to be dismissed. A petition for judicial review cannot be brought without its supporting affidavit.

No Merit to this Judicial Review

99. In light of the foregoing, the Respondent respectfully submits that the Petitioner has not identified any basis upon which it can properly judicially review the Decision and the within proceeding has no prospect of success.
100. The Court is to provide deference to the factual findings of the Tribunal and the Tribunal's findings of fact are not to be disturbed.
101. The Court, in arriving at its own analysis with respect to "strike" or "lockout" notices are considered "labour disruptions" under s.10 of the *APPR* will arrive at the same answer as the Tribunal.

Costs

102. The Respondent therefore opposes all of the relief sought by the Petitioner and seeks to have the Petition dismissed with costs to the Respondent.
103. WestJet seeks its costs in the cause, payable forthwith.

PART 6: MATERIAL TO BE RELIED ON

104. Affidavit #1 of C. Machado dated August 19, 2024.
105. Such other materials as the Respondent may advise.

The Respondent estimates that the application will take 2 hours.

Dated: August 19, 2024


Signature of Michael Dery
and Katelyn Chaudhary,
lawyers for the Respondent



FORM 67

(Rule 16-1(5) and Rule 25-14(2))

No. S-S-254452

New Westminster Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

AIR PASSENGER RIGHTS

PETITIONER

AND:

WESTJET AIRLINES LTD

RESPONDENT

RESPONSE TO PETITION**Filed by:** Civil Resolution Tribunal (the "CRT" or the "Tribunal")

THIS IS A RESPONSE TO the petition filed July 29, 2024.

The CRT estimates the hearing of this petition to take one day.

Part 1: ORDERS CONSENTED TO

The CRT consents to the granting of the following of the orders set out in Part 1 of the petition: NONE.

Part 2: ORDERS OPPOSED

The CRT opposes the granting of the following orders set out in Part 1 of the petition: NONE, except to the extent that any costs are sought against the CRT.

Part 3: ORDERS ON WHICH NO POSITION IS TAKEN

The CRT takes no position on the following orders set out in Part 1 of the petition: ALL, except as noted above.

Part 4: FACTUAL BASIS

1. This petition relates to CRT dispute number SC-2023-006891. This was a CRT small claims dispute brought by Anne and Robert Boyd, the Applicants at the CRT, against the Respondent, WestJet Airlines Ltd. (“WestJet”). The dispute was about a disrupted flight.

2. The Applicants claimed that WestJet owed them compensation for delay caused by cancellation of their flight; they were rebooked on a flight that arrived a day later. They sought \$2,000 in compensation for the delay and reimbursement of \$277.25 for associated hotel and meal costs. The Respondent agreed it cancelled the flight but disputed the compensation sought. The Respondent said the cancellation was due to a labour dispute, which was a situation outside of its control.

3. The parties were unable to resolve their dispute during the negotiation or facilitation phases of the CRT’s dispute resolution process. During these phases, parties try to settle the matters at issue, and if unsuccessful, prepare the dispute for adjudication. In preparing for adjudication, CRT staff directed the parties to develop the Tribunal Decision Plan (“TDP”), which sets out the claims, evidence and arguments for the tribunal member assigned to adjudicate the dispute and provide a binding decision.

4. On July 5, 2024, Tribunal Member Amanda Binnie (the “Tribunal Member”) issued a final decision in the dispute (the “Final Decision”).¹ The Tribunal Member found that the delay was due to a labour disruption beyond WestJet’s control. So, the Tribunal Member dismissed the Applicants’ claim for compensation under the *Air Passenger Protection Regulations* (the “APPR”).² WestJet did not dispute the Applicants’ claims for hotel and meal reimbursement. So, the Tribunal Member ordered WestJet to pay the Applicants \$277.25 in debt, \$15.78 in pre-judgment interest, and \$62.50 in CRT fees, to a total of \$355.53.

¹ *Boyd v. WestJet Airlines Ltd.*, 2024 BCCRT 640.

² SOR/2019-150.

5. The Petitioner, Air Passenger Rights, is a federally incorporated non-profit corporation. The Petitioner was not a party to the dispute.

6. The details of the dispute can be found in the Final Decision and the complete record of proceedings, to be filed.

The Civil Resolution Tribunal

7. The CRT is British Columbia's first online tribunal. The *Civil Resolution Tribunal Act* (the "CRTA") mandates the CRT to provide dispute resolution services in a manner that is "accessible, speedy, economical, informal and flexible", with a focus on electronic communication and cooperative dispute resolution.³

8. The CRT currently has six areas of jurisdiction: certain types of small claims and certain claims related to strata properties, cooperative associations, societies, motor vehicle accidents, and non-consensual distribution of intimate images.⁴

9. The CRT has jurisdiction to resolve small claims disputes in the nature of the following, where the total amount of the claim is less than or equal to \$5,000:

- (a) debt or damages;
- (b) recovery of personal property;
- (c) specific performance of an agreement relating to personal property or services; and
- (d) relief from opposing claims to personal property.⁵

10. Regardless of the amount claimed, the CRT does not have jurisdiction over a claim for libel, slander, or malicious prosecution.⁶ The CRT also does not have jurisdiction over a claim against government⁷ except in certain circumstances (e.g., in matters where the CRT has exclusive jurisdiction, such as certain accident claims).⁸

³ SBC 2012, c 25, ss. 2(2)(a), 2(2)(c) and 2(3)(a).

⁴ *Ibid*, s. 2.1.

⁵ *Ibid*, ss. 118(1), 121(1), 125(1), 129(1) and 131(1).

⁶ *Ibid*, s. 119(1).

⁷ *Ibid*, s. 119(2)

⁸ *Ibid*, s. 9.

The CRT Process

i) The Solution Explorer and applying for dispute resolution

11. Before applying for dispute resolution at the CRT, a potential applicant must use an interactive information system on the CRT website called the Solution Explorer. The Solution Explorer provides free legal information and tools for the applicant to use to resolve their dispute outside the CRT. The potential applicant may then choose to proceed with the CRT's dispute resolution process by completing an application and paying a fee.

12. If, on initial review, the claim in the application appears to be within the jurisdiction of the CRT, appears on its face to disclose a reasonable claim, and otherwise meets the requirements under the *CRTA*, the CRT must initiate the proceeding by issuing a Dispute Notice.⁹

13. Once the Dispute Notice is issued by the CRT, it must be served on the respondent(s) by the applicant or by the CRT. Respondents served in BC who wish to participate in the proceeding must complete a dispute response form and pay a fee within 14 days.¹⁰ The CRT then issues a Dispute Response and emails it to the parties.

14. Once the Dispute Response is issued, the CRT's formal dispute resolution process begins. The process has two phases: the Case Management phase and the Tribunal Hearing phase.¹¹

ii) The Case Management Phase

15. The Case Management phase includes negotiation, facilitation, and Tribunal Decision Plan (TDP) preparation.¹² First, parties have an opportunity to negotiate a settlement using an online text-messaging platform. If unsuccessful, a case manager begins facilitation. The facilitation process is a flexible, contextual process, which usually

⁹ *CRTA*, *supra* note 3, s. 6(1).

¹⁰ CRT Standard Rules ("Rules").

¹¹ *CRTA*, *supra* note 3, s. 17(1).

¹² Rules, *supra* note 10 at Rule 5.1(1).

involves clarifying the claim, mediation, exchanging evidence, and, if unsuccessful, preparing for adjudication.¹³

16. In preparing for adjudication, CRT staff direct the parties to develop the TDP. The TDP sets out the claims, evidence and arguments to be put before the tribunal member who will decide the dispute. The parties upload their evidence and arguments to an online portal through which they are able to view each other's materials. Typically, an applicant uploads their evidence and arguments first, followed by the respondent, with a final reply by the applicant.

iii) The Tribunal Hearing Phase

17. When the TDP is complete, the dispute advances to the Tribunal Hearing phase of the CRT process. The CRT Chair assigns the dispute to a tribunal member for adjudication.¹⁴ The Tribunal Hearing phase is an adversarial process where the tribunal member produces a binding decision.

18. The CRT has wide discretion over its own procedure, including the discretion to conduct a hearing by written submissions, telephone, or email.¹⁵ The CRT can accept and admit any evidence it considers necessary and is not bound by the rules of evidence.¹⁶ The tribunal member must provide reasons for their decision and may make any order they consider necessary to give effect to the decision.¹⁷

Part 5: LEGAL BASIS

19. The CRT provides this response to petition in accordance with s. 15 of the *Judicial*

¹³ The facilitation process is governed by the *CRTA*, *supra* note 3, ss. 25-30.

¹⁴ *CRTA*, *supra* note 3, s. 80; Rules, *supra* note 10, Rule 9.3(1).

¹⁵ *Ibid*, s. 39(1).

¹⁶ *Ibid*, s. 42.

¹⁷ *Ibid*, ss. 46-51.

Review Procedure Act (“JRPA”).¹⁸

Preliminary Issue: Who defends the decision?

20. In general, a court sitting on judicial review of a tribunal decision has the discretion to determine what the role of the tribunal maker may be. An appropriate balance between the need to maintain tribunal impartiality and the need to comprehensively review impugned decisions must be struck.¹⁹ At minimum, the courts have deemed it appropriate for the tribunal to take an explanatory role with reference to the record before it and make representations relating to jurisdiction.²⁰

21. In this matter, the CRT takes no position on the merits of the decision under review, given the CRT is an adjudicative tribunal which may be required to reconsider the dispute. The CRT provides this Response to assist the Court with administrative law principles applicable to judicial reviews, including standing, the CRT’s jurisdiction and process, standard of review, remedy, and costs.

Preliminary Issue: Assignment

22. First, the Court may need to consider whether the Applicants may lawfully assign their rights to seek judicial review of the Final Decision to the Petitioner. This is because underlying the judicial review is a bare cause of action: the Applicants’ claim against WestJet. The common law rule against maintenance and champerty prohibits the assignment of bare causes of action.²¹

23. To be lawful, an assignee must have a genuine and substantial interest in the success of the litigation.²² An assignment may “savour of” (appear to be) maintenance if

¹⁸ RSBC 1996, c 241.

¹⁹ *British Columbia (Human Rights Tribunal) v. Gibraltar Mines Ltd.*, 2023 BCCA 168 at paras. 29 – 35

²⁰ *Ibid* at para. 29.

²¹ *Fredrickson v. Insurance Corporation of British Columbia*, (1986) 3 BCLR (2d) 145 (CA) at paras. 21 – 23, *aff’d* [1988] 1 SCR 1089 (“*Fredrickson*”), as cited in *Ma v. Ma*, 2012 ONCA 408 at para. 11.

²² *Fredrickson* (BCCA), *ibid* at para. 32.

the cause of action is not ancillary to a property right or interest, or a genuine commercial interest in taking the assignment.²³

24. As discussed by the Ontario Court of Appeal in *McIntyre Estate v Ontario (Attorney General)* (*McIntyre Estate*), the fundamental aim of the law of champerty and maintenance is the protection of the administration of justice from abuse. It is a principle of public policy.²⁴

25. In reviewing the law on maintenance and champerty, the British Columbia Court of Appeal (“BCCA”) in *Nathanson, Schachter & Thompson LLP v. Boss Power Corp* relied on the summary of the rule against maintenance as set out by the Alberta Court of Queen’s Bench (as it then was):

26 “Maintenance” is directed against those who become involved with the litigation of others in which the maintainer has no interest and for an improper motive, which may include but is not limited to “officious intermeddling” or “stirring up strife”. “Champerty” is an egregious form of maintenance where the maintainer shares in the profits of the litigation. Without maintenance, there can be no champerty. There is no maintenance if the alleged maintainer has a justifying motive or excuse.

27 *Fredrickson v. Insurance Corp of British Columbia* remains the leading case in Canada with respect to the rule against champerty and maintenance. Justice McLachlin (as she then was) referred to the general rule that a bare cause of action in tort is not assignable, noting that the “exact ambit of the rule is elusive.” She commented at para 23 that the rule is subject to a number of exceptions, and in each case:

... the court must ask itself whether the assignment can fairly be seen as prompted by a desire to advance the cause of justice rather than as intermeddling for some collateral reason ...²⁵

[Emphasis added and citations omitted.]

26. The Petition does not cite any authority supporting the assignment of rights in a case such as this one. The *JRPA* accords procedural, not substantive rights, and as such

²³ *Trendtex Trading Corp. et al. v. Credit Suisse*, [1980] 1 Q.B. 629 at 656-57, cited in *Fredrickson* (BCCA) *supra* note 21.

²⁴ (2002) 61 OR (3d) 257 (CA) at paras. 23 – 24, recently cited in *Nathanson, Schachter & Thompson LLP v. Boss Power Corp*, 2016 BCCA 1 at para. 20.

²⁵ *Nathanson*, *ibid* at para. 20.

this Court may want to consider whether the right to judicial review in particular, may not be assignable. It is also unclear how the Petitioner, a non-profit corporation, has or could have a genuine interest, commercial or otherwise, in the Applicants' compensation under the *APPR*. The purpose of the Petitioner's incorporation does not include pursuing statutory compensation on an individual basis.²⁶

27. Further, the Court may want to consider how accepting the assignment as valid may impact the CRT, both in this dispute and more broadly. Section 20 of the *CRTA* states that parties are to represent themselves in a tribunal proceeding, subject to certain limited exceptions. A tribunal member may require evidence only possessed by the original rights holder, who no longer has any interest in the dispute and assigned their rights to another person or entity.

28. Finally, the Petitioner seeks to advance arguments that were not part of the record or arguments made by the Applicants to the CRT. A reviewing court may hear arguments that were not made before an administrative tribunal only in limited circumstances, none of which are articulated in the Petition.²⁷ This Court may want to exercise caution, lest the judicial review be converted into a re-hearing of the Applicants' claim for compensation.

Preliminary Issue: Standing

29. Regardless of the Court's finding on the assignment, the Court will need to consider whether the Petitioner has standing to bring the application for judicial review.

30. The *JRPA* does not explicitly address the issue of standing to bring an application for judicial review. The common law test is as follows:

To be accorded standing, a petitioner must demonstrate an interest in the proceeding. A petitioner will have an interest in the proceeding where he or she has a private right that has been infringed by the respondent, or which will cause or threaten to cause special damage which extends beyond that suffered by the general public ... This interest may also be conferred by statute.²⁸

²⁶ Affidavit #1 of Dr. G. Lukacs, Exhibit A.

²⁷ *The Owners, Strata Plan VR 1120 v. Civil Resolution Tribunal*, 2022 BCCA 189 at para. 45.

²⁸ *Emerman v. Association of Professional Engineers*, 2008 BCSC 1186 at para. 19.

31. This Court favourably cited the common law test as stated by the authors of Brown and Evans, *Judicial Review of Administration Action in Canada*:

At common law a person will have standing to seek a remedy in proceedings of judicial review if he or she is an “aggrieved person,” an “affected person,” or someone who is “exceptionally prejudiced” by the impugned administrative action. The requirements of any of these expressions of the common law test are two-fold: first an identification of the interest and, second, an assessment of its remoteness.²⁹

32. The test for standing includes scrutiny of the legislation under which the impugned decision was made to determine whether it gives any express or implied right to non-parties to complain of the alleged unlawful act or omission.³⁰ No provision of the *CRTA* explicitly or implicitly confers standing to non-parties on judicial review. To the contrary, *CRTA* s. 20 presupposes the direct involvement of the parties involved in the dispute in the CRT process.

33. In *Sandhu v. British Columbia (Provincial Court)*, the BCCA found that the purpose of the *Small Claims Act*³¹ to resolve claims within the monetary limit in a just, speedy, inexpensive, and simple manner would not be furthered by implying a right in favour of non-parties to seek judicial review of unappealable decisions.³²

34. As previously stated, the CRT is mandated to provide dispute resolution services in relation to matters that are within its authority, in a manner that is accessible, speedy, economical, informal and flexible. This mandate is highly similar to the purpose of the *Small Claims Act*.³³ Accordingly, the Petitioner may not have standing to bring this judicial review.

²⁹ (Toronto: Carswell, 2014) v. 2 at para 4:342; see *Bradshaw v. Workers' Compensation Board*, 2017 BCSC 1092 at paras. 87-89.

³⁰ *Inland Revenue Commissioners v. National Federation of Self-Employed and Small Businesses Ltd.*, [1981] 2 All E.R. 93 at 108, aff'd in *Sandhu v. British Columbia (Provincial Court)*, 2013 BCCA 88.

³¹ RSBC 1996, c 430, s. 2(1).

³² *Sandhu*, *supra* note 30 at para 36.

³³ *CRTA*, *supra* note 3, s. 2(2)(a).

Standard of Review

35. The court's role on judicial review has been described by the BCCA as follows:

The function of a court on judicial review is supervisory. The court must ensure that a tribunal has operated within legal norms. Courts are, in a very strict sense, reviewing what went on before the tribunal. They are not undertaking a fresh examination of the substantive issues. ...³⁴

36. The court's supervisory function is subject to legislated standards of review. The standard of review describes the degree to which a reviewing court should defer to, or accept, the decision of an administrative tribunal. The standard of review for CRT decisions is set out in the *CRTA* and depends on the type of claim under review. *CRTA* s. 56.7 sets out the standard of review for claims in the CRT's specialized expertise or exclusive jurisdiction. *CRTA* s. 56.8 sets out the standard of review for all other types of claims, which include small claims disputes such as this one.

Standard of review – other tribunal decisions

56.8 (1) This section applies to an application for judicial review of a decision of the tribunal other than a decision for which the tribunal must be considered to be an expert tribunal under section 56.7.

(2) The standard of review to be applied to a decision of the tribunal is correctness for all questions except those respecting

- (a) a finding of fact,
- (b) the exercise of discretion, or
- (c) the application of common law rules of natural justice and procedural fairness.

(3) The Supreme Court must not set aside a finding of fact by the tribunal unless

- (a) there is no evidence to support the finding, or
- (b) in light of all the evidence, the finding is otherwise unreasonable.

(4) The Supreme Court must not set aside a discretionary decision of the tribunal unless it is patently unreasonable.

(5) Questions about the application of common law rules of natural justice and procedural fairness must be decided having regard to whether, in all of the circumstances, the tribunal acted fairly.

³⁴ *Air Canada v. British Columbia (Workers' Compensation Appeal Tribunal)*, 2018 BCCA 387 at para. 34.

37. Previously, the standard of review provisions of the *Administrative Tribunals Act* (“ATA”)³⁵ were applicable to the CRT. Subsequent legislative amendments incorporated the ATA terms into the *CRTA* to make interpretation of the *CRTA* consistent with the ATA.³⁶ Accordingly, the standard of review provisions of s. 56.8 of the *CRTA* are identical in all material aspects to s. 59 of the ATA. Therefore, case law regarding s. 59 of the ATA is relevant and applicable here.

38. The Petition raises no questions of procedural fairness. The following provides additional guidance on the application of the other standards of review.

(i) Correctness

39. Under s. 56.8(2) of the *CRTA*, the standard of review for a decision of the Tribunal is correctness for all questions other than a finding of fact, exercise of discretion or the application of common law rules of natural justice and procedural fairness.

40. The Supreme Court of Canada (“SCC”) provides the following guidance on the correctness standard:

When applying the correctness standard, the reviewing court may choose either to uphold the administrative decision maker’s determination or to substitute its own view: *Dunsmuir*, at para. 50. While it should take the administrative decision maker’s reasoning into account — and indeed, it may find that reasoning persuasive and adopt it — the reviewing court is ultimately empowered to come to its own conclusions on the question.³⁷

41. Where there are questions of mixed fact and law, courts should exercise caution against applying correctness review. The BCCA has said: “If there is an extricable issue of fact involved in a question of mixed fact and law, the court must defer to the tribunal in respect of that issue in accordance with s. 59(2) of the [ATA].”³⁸ Again, ATA s. 59(2) mirrors *CRTA* s. 56.8(2) so deference is owed to the CRT in these circumstances.

³⁵ SBC 2004, c. 45.

³⁶ British Columbia, Official Report of Debates of the Legislative Assembly (Hansard), 42nd Parl, 2nd Sess, Issue 107 (18 October 2021) at 3480 (Hon D Eby).

³⁷ *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 54.

³⁸ *J. (J.) v Coquitlam School District No. 43*, 2013 BCCA 67; recently applied in *K.A. v Mental Health Review Board*, 2022 BCSC 1830 at para 38.

(ii) No Evidence to Support the Finding, or in Light of all the Evidence, the Finding is Otherwise Unreasonable

42. Under s. 56.8(2) of the *CRTA*, the standard of review for a finding of fact by the Tribunal is that it must not be set aside unless there is no evidence to support the finding, or in light of all the evidence, the finding is otherwise unreasonable.

43. The Supreme Court of British Columbia (“BCSC”) considered s. 59(2) of the *ATA*, which mirrors s. 56.8(2) of the *CRTA*.³⁹ Justice MacDonald considered whether there was evidence to support a finding, noting that “a trier of fact need not advert to every piece of evidence”.⁴⁰ She also noted that “I am not to reassess [the evidence]; I am also not permitted to substitute my view of the merits for that of the Tribunal ...”⁴¹

(iii) Patent Unreasonableness

44. Under s. 56.8(4) of the *CRTA*, mirrored in s. 59(3) of the *ATA*, the standard of review for a discretionary decision of the CRT is patent unreasonableness. *CRTA* s. 56.9 provides factors to consider when evaluating a discretionary decision:

Discretionary decision – patently unreasonable

56.9 For the purposes of sections 56.7 (2) (a) and 56.8 (4), a discretionary decision is patently unreasonable if the discretion

- (a) is exercised arbitrarily or in bad faith,
- (b) is exercised for an improper purpose,
- (c) is based entirely or predominantly on irrelevant factors, or
- (d) fails to take statutory requirements into account.

45. The SCC has confirmed that “(a)ny framework rooted in legislative intent must, to the extent possible, respect clear statutory language that prescribes the applicable standard of review.”⁴² A five-justice division of the BCCA confirmed that legislated standards of review remain applicable, including the patently unreasonableness

³⁹ *Parmar v Translink Security Management Limited*, 2020 BCSC 1625.

⁴⁰ *Ibid.* at para. 53 citing *Canex Investment Corporation v 0799701 B.C. Ltd.*, 2020 BCCA 231 at para. 87.

⁴¹ *Ibid.* at para. 56.

⁴² *Vavilov*, *supra* note 37 at para. 34.

standard, despite developments in the common law.⁴³ Justice Groberman, for the Court, affirmed:

When reviewing for patent unreasonableness, the court is not to ask itself whether it is persuaded by the tribunal's rationale for its decision; it is to merely ask whether, assessing the decision as a whole, there is any rational or tenable line of analysis supporting the decision such that the decision is not clearly irrational or, expressed in the *Ryan* (*Law Society of New Brunswick v. Ryan*, 2003 SCC 20) formulation, whether the decision is so flawed that no amount of curial deference can justify letting it stand. If the decision is not clearly irrational or otherwise flawed to the extreme degree described in *Ryan*, it cannot be said to be patently unreasonable. This is so regardless of whether the court agrees with the tribunal's conclusion or finds the analysis persuasive. Even if there are aspects of the reasoning which the court considers flawed or unreasonable, so long as they do not affect the reasonableness of the decision taken as a whole, the decision is not patently unreasonable.

In other words, the standard is at the most deferential end of the reasonableness standard⁴⁴

Remedies

46. The *JRPA* provides guidance for the remedies available to this Court on judicial review. In addition to the powers to set aside a decision and refuse relief, the *JRPA* also indicates:

Powers to direct tribunal to reconsider

5 (1) On an application for judicial review in relation to the exercise, refusal to exercise, or purported exercise of a statutory power of decision, the court may direct the tribunal whose act or omission is the subject matter of the application to reconsider and determine, either generally or in respect of a specified matter, the whole or any part of a matter to which the application relates.

(2) In giving a direction under subsection (1), the court must

(a) advise the tribunal of its reasons, and

(b) give it any directions that the court thinks appropriate for the reconsideration or otherwise of the whole or any part of the matter that is referred back for reconsideration.

⁴³ *The College of Physicians and Surgeons of British Columbia v The Health Professions Review Board*, 2022 BCCA 10 at para. 122.

⁴⁴ *Ibid* at para. 129.

Effect of direction

6 In reconsidering a matter referred back to it under section 5, the tribunal must have regard to the court's reasons for giving the direction and to the court's directions.

47. If this Court accepts the assignment and remits the dispute to the CRT, the CRT seeks direction as to the status of the Applicants and the Petitioner before the CRT on reconsideration.

48. In certain limited circumstances, a reviewing court does have the discretion to decline to remit a matter when it becomes evident that “that a particular outcome is inevitable and that remitting the case would therefore serve no useful purpose ... Elements like concern for delay, fairness to the parties, urgency of providing a resolution to the dispute, the nature of the particular regulatory regime, whether the administrative decision maker had a genuine opportunity to weigh in on the issue in question, costs to the parties, and the efficient use of public resources may also influence the exercise of a court’s discretion to remit a matter ...”⁴⁵

49. Generally, an administrative tribunal is neither entitled to, nor ordered to pay costs. An order of costs should only be made against a tribunal in the face of evidence of misconduct or perversity in the proceedings before it, or an inappropriate argument on the merits of the judicial review application.⁴⁶ There is no basis in these proceedings on which to award costs against the CRT.

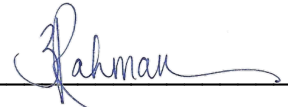
⁴⁵ *Vavilov*, *supra* note 37 at para 142.

⁴⁶ *18320 Holdings Inc. v Thibeu*, 2014 BCCA 494 at para 55.

Part 6: MATERIAL TO BE RELIED ON

1. Affidavit of the CRT, to be filed, and
2. Such further and other materials as may be required to decide the matter.

Date: August 30, 2024



Signature of () petition respondent
(X) lawyer for petition respondent

Zara Rahman

Petition respondent's address for service:

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Name of the petition respondent's lawyer, if any: Zara Rahman



FORM 68
(RULE 16-1 (8))

No. S-254452
New Westminster Registry

In the Supreme Court of British Columbia

Between

AIR PASSENGER RIGHTS

Petitioner(s)

and

WESTJET AIRLINES LTD.

Respondent(s)

NOTICE OF HEARING

To: WESTJET AIRLINES LTD.
Civil Resolution Tribunal

TAKE NOTICE that the petition of AIR PASSENGER RIGHTS

dated July 29, 2024 will be heard at

the courthouse at 800 Smithe Street
Vancouver BC

on November 21, 2024 at 10:00 AM

[Check whichever one of the following boxes is correct.]

- ☒ This matter is an application for judicial review.
☐ This matter is not an application for judicial review.

1 Date of hearing

[Check whichever one of the following boxes is correct.]

- ☒ The parties have agreed as to the date of the hearing of the petition.
☐ The parties have been unable to agree as to the date of the hearing but notice of the hearing will be given to the petition respondents in accordance with Rule 16-1 (8) (b) of the Supreme Court Civil Rules.

☐ The petition is unopposed, by consent or without notice.

2 Duration of hearing

[Check the correct box(es) and complete the required information.]

☒ It has been agreed by the parties that the hearing will take _____ one (1) day .

☐ The parties have been unable to agree as to how long the hearing will take and

(a) the time estimate of the petitioner(s) is _____ minutes, and

(b) ☐ the time estimate of the petition respondent(s) is _____ minutes.

☐ the petition respondent(s) has(ve) not given a time estimate.

3 Jurisdiction

[Check whichever one of the following boxes is correct.]

☐ This matter is within the jurisdiction of an associate judge.

☒ This matter is not within the jurisdiction of an associate judge.

Date: September 23, 2024

Simon Pak Hei Lin
53ZC9C

Digitally signed by Simon Pak Hei Lin
53ZC9C
Date: 2024.09.23 18:55:22 -07'00'

Signature of

☐ petitioner ☒ lawyer for petitioner(s)

Simon Lin

Amended pursuant to Supreme Court Civil Rule 6-1(1)(a)
Originally filed August 19, 2024

NO. S-S-254452
 NEW WESTMINSTER REGISTRY



IN THE SUPREME COURT OF BRITISH COLUMBIA

AIR PASSENGER RIGHTS

PETITIONER

AND

WESTJET AIRLINES LTD and ~~CIVIL RESOLUTION TRIBUNAL~~

RESPONDENTS

AMENDED RESPONSE TO PETITION

Filed by: WestJet Airlines Ltd.

THIS IS A RESPONSE TO the Petition filed July 29, 2024.

Part 1: ORDERS CONSENTED TO

WestJet Airlines Ltd. consents to the granting of the orders set out in the following paragraphs of Part 1 of the Petition: NONE.

Part 2: ORDERS OPPOSED

WestJet Airlines Ltd. opposes the granting of the orders set out in paragraphs 1 to 3 of Part 1 of the Petition.

Part 3: ORDERS ON WHICH NO POSITION IS TAKEN

WestJet Airlines Ltd. takes no position on the granting of the orders set out in paragraphs NIL of Part 1 of the Petition.

Part 4: FACTUAL BASIS

Background

1. The Petitioner, Air Passenger Rights, is a corporation, incorporated under the *Canada Not-for-profit Corporations Act*, with an address for service of c/o Simon Lin, registered director of the Petitioner and counsel for the Petitioner, of 4388 Still Creek Drive, Suite 237, Burnaby, BC.
2. The Respondent, WestJet Airlines Ltd., is an Alberta corporation and is extra-provincially registered in British Columbia with an address for service of 2700-700 West Georgia Street, Vancouver, BC, V7Y 1B8 ("WestJet").
3. The Petitioner seeks judicial review of a final decision of *Boyd v. WestJet Airlines Ltd*, 2024 BCCRT 640 (the "Decision") made by the British Columbia Civil Resolution Tribunal (the "Tribunal". The Petitioner is asking the Court to: (1) set aside a portion of the Tribunal's order; (2) grant the \$2,000 claim under s.19 of the *Air Passenger Protection Regulations* (SOR/2019-150) ("APPR"); or (3) to remit the claim back to the Tribunal. By doing so, the Petitioner seeks to re-litigate issues that have already been decided.

4. There is no merit to the relief sought because the Tribunal made the Decision on findings of fact.
5. The Tribunal was correct in arriving to its conclusion that the “72-hour notice” issued prior to a strike or lockout (the “Strike Notice”) was a “labour disruption”.
6. In the alternative, if there was an issue with respect to the interpretation of “labour disruption”, which is denied, the findings of fact made by the Tribunal still apply and are not to be displaced. The question of law, as expressed by the Petitioner, does not entitle the Petitioner to the relief sought.

The Application to the Tribunal

7. Ms. Anne Boyd and Mr. Robert Boyd purchased air tickets on November 21, 2022, via a travel agent to fly on the following series of flights from Kelowna to Rome on May 18, 2023 (the “Purchasers”):
 - (a) WS 3162 from Kelowna, British Columbia to Calgary, Alberta, which was scheduled to depart at 14:00 PDT and to arrive at 16:09 MDST; and
 - (b) WS 032 from Calgary, Alberta, to Rome, Italy, which was scheduled to depart at 18:05 MDST and to arrive at 11:55 CET.
8. The Purchasers were scheduled to arrive in Rome on May 19, 2023, at 11:55am.
9. The Purchasers travelled on WS 3162 from Kelowna to Calgary, as scheduled.
10. WS 032 was cancelled due to the ongoing labour disruption involving WestJet’s pilots.
11. Following the cancellation of WS 032, WestJet rescheduled the passengers on flights operated by other carriers:
 - (a) WestJet flight WS 3628 from Calgary to Portland on May 19, 2023;
 - (b) Delta Airlines flight DL 0178 from Portland to Amsterdam on May 20, 2023; and
 - (c) Italia Transporto Aero flight AZ 0107 from Amsterdam to Rome on May 20, 2023.
12. The Purchasers arrived in Rome on May 20, 2023, over 24 hours later than originally scheduled.
13. As a result of the travel delay, the Purchasers brought an application to the Tribunal and sought to recover:
 - (a) \$185.25 for a hotel in Calgary on the night of May 18, 2023;
 - (b) \$92.00 for meals purchased from May 18, 2023, to May 20, 2023; and
 - (c) \$2,000 (\$1,000 per guest) in compensation for their delay under s. 19(1) of the *APPR* (the “Dispute”).

Contract of Carriage and the APPR

14. The Purchasers are bound by the terms and conditions (the “Terms and Conditions”) of the airline passenger ticket, and the Terms and Conditions of WestJet’s International Tariff (the “Tariff”), which together comprise the contract of carriage (collectively, the Contract of Carriage”) and limit and/or proscribe the Purchaser’s right of recovery against WestJet.
15. At the Tribunal, WestJet submitted the following:
 - (a) The Tariff, Terms and Conditions, and the *APPR* do not provide a basis for the \$2,000 in *APPR* compensation sought.
 - (b) The relief sought by the Purchasers are subject to the *APPR*. The *APPR* are included in the Tariff, along with the Terms and Conditions, which comprise the contract of carriage between WestJet and the Purchasers.
 - (c) The *APPR* provides that airlines are obligated to provide compensation for inconveniences incurred due to delays or cancellations in certain circumstances. Eligibility for compensation depends on (1) the cause of the delay/cancellation; and (2) the length of the resulting delay.
 - (d) When a delay is within carrier control, s. 19 compensation is generally owed. However, when a delay is outside of carrier control, compensation under s. 19 is not owed.
 - (e) The cancellation of flight WS 032 was outside of carrier control, as it occurred due to a labour disruption. The *APPR* is clear that a labour disruption, even those involving the carrier’s own employees, is outside of carrier control under s.10.
 - (f) When s. 10 applies to a cancellation or delay, s.19 does not apply, and as such, compensation for delay is not owed.
 - (g) The Purchaser argued that because there was no active picketing by the pilots at the time of the cancellation of WS 032, there was no actual strike. In response, WestJet submitted that the *APPR* does not use the term “work stoppage” or “strike”, but rather the broader “labour disruption”.
 - (h) There is no basis upon which to find that “labour disruptions” under s.10 of the *APPR* require “active picketing” or a “work stoppage” in order to apply.
 - (i) A plain reading of the *APPR*, statements made by the Canadian Transportation Agency (the “Agency”), including the Regulatory Impact Analysis Statement (“RIAS”), and the *Burym et al v WestJet Airlines Ltd*, File #SC23-01-44117 (unreported) decision all support a finding that “labour disruptions” should be more broadly interpreted: the announcement of a strike constitutes the decisive moment when contractual obligations are suspended, and labour activities are fundamentally disrupted.
 - (j) The cancellation was outside of carrier control under s.10, and s.19(1) compensation is therefore not due.

16. At the Tribunal, it was not disputed that the cancellation of the Applicants' flight WS 032 occurred both after the Strike Notice was issued, and because of the ongoing labour dispute between the pilots and WestJet.

Labour Disruption

17. WestJet pilots are represented by the Air Line Pilots Association ("ALPA"). In May 2023, the pilots and ALPA were in the process of negotiating a new Collective Agreement with WestJet.
18. Pursuant to the Canada Labour Code, the Strike Notice was formally issued on May 15, 2023. Upon the expiry of the 72-hour period in the Strike Notice, the pilots were authorized to strike, beginning at 3:00am MDT on May 19th, 2023.

Affidavit #1 of C. Machado at Exhibit "D"

19. Ultimately, the pilots and WestJet came to an agreement at approximately 12:00am MDT on May 19, 2023.

Affidavit #1 of C. Machado at Exhibits "D", "E", and "F"

Procedural History Before the Tribunal

20. The Tribunal is British Columbia's first online tribunal. The Civil Resolution Tribunal Act [SBC 2012] Chapter 25 (*CRTA*) mandates the Tribunal to provide dispute resolution services in a manner that is "accessible, speedy, economical, informal and flexible", with a focus on electronic communication and dispute resolution.
21. Pursuant to the *CRTA*, the Tribunal has jurisdiction over small claims matters subject to its limited monetary jurisdiction of \$5,000.00.
22. A party that chooses to proceed with the Tribunal's dispute resolution process must complete an initiating document commonly known as a Dispute Notice and pay a filing fee. The Tribunal must accept a dispute if, on initial review, the claim appears to be within the Tribunal's jurisdiction.
23. If a dispute is accepted, the Tribunal will usually issue a Dispute Notice Package on all parties, which includes a Dispute Notice and instructions for responding to the Dispute Notice. Once a responding party has filed its Dispute Response, the Tribunal's formal dispute resolution process begins; it can be categorized into two (2) phases: the Case Management Phase, commonly known as facilitation, and the Tribunal Hearing Phase, commonly known as adjudication.
24. The Tribunal proceedings were commenced by the Purchasers on July 4, 2023. The Dispute Notice was issued on July 31, 2023.
25. The relief sought by the Purchasers in their Dispute Notice was compensation for delay of \$2,277.25. WestJet filed its dispute response on August 30, 2023.
26. The Purchasers and WestJet were unable to resolve the dispute and it proceeded to the adjudication phase of the Tribunal process.
27. The Tribunal has wide discretion over its procedure, including the discretion to conduct a hearing by written submissions, telephone or email: *CRTA*, ss. 38, 39. The Tribunal can

accept and admit any evidence it considers necessary and is not bound by the rules of evidence: *CRTA*, s. 42.

Affidavit #1 of C. Machado at Exhibit "A", para 4

The Decision

28. The Dispute proceeded by way of written submissions. The Tribunal determined that a written hearing was appropriate because it was of the view that it could properly assess and weigh the evidence and submissions before it and saw no reason for an oral hearing.

Affidavit #1 of C. Machado at Exhibit "A", para 4

29. The issues raised for the Tribunal were:

- (a) Are the Boyds entitled to \$2,000 in compensation for the delayed flight?
- (b) Are the Boyds entitled to reimbursement of \$277.25 for their hotel stay and meals?

30. The Tribunal made the following findings of fact in the Decision:

- (a) the incident which caused the delay was a strike;
- (b) the strike was outside of WestJet's control;
- (c) the long-standing rule of statutory interpretation applies;
- (d) the Agency's statements provide insight into the intent of the regulation's drafters intent;
- (e) the 72-hour Strike Notice qualifies as a "labour disruption"; and
- (f) the reason for the delay is outside WestJet's control.

31. The Tribunal cited the correct rule of statutory interpretation in its determination that the "labour disruption" cannot be so narrowly interpreted to mean "only" if there is a work stoppage or actual strike occurring. The legislature's chosen words are "to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament."

Affidavit #1 of C. Machado at Exhibit "A", para 14; *Rizzo & Rizzo Shoes Ltd. (Re)*, 1998 CanLII 837 (SCC)

32. The Decision cites section 8 of the BC *Interpretation Act*, [RSBC 1996] Chapter 238. Although the Petitioner is correct in asserting that it is the federal *Interpretation Act* ((R.S.C., 1985, c. I-21)), s.12 that applies, the wording in each provision is exactly the same.

33. WestJet says that the naming of the BC *Interpretation Act* rather than the federal *Interpretation Act* has no effect on the statutory interpretation exercise undertaken by the Tribunal in arriving to its conclusion that:

Section 10(1) of the APPR states a "labour disruption within the carrier" is not within the airline's control. The parties agree this dispute turns on whether a strike notice and

lockout notice qualify as a “labour dispute”. If so, the Boyds’ flight delay was not in WestJet’s control.

Affidavit #1 of C. Machado at Exhibit “A”, para 12

34. WestJet was ordered to reimburse the Boyds for their hotel stay and meals, plus interest, for a total of \$355.53.

PART 5: LEGAL BASIS

35. The Petitioner’s petition ought to be dismissed on the following basis:

- (a) The Petitioner does not have standing to bring this judicial review.
- (b) The Purchaser’s and the Petitioner’s absolute assignment of rights is invalid at law.
- (c) The Decision was correct. There is only one correct interpretation, of which the Tribunal arrived.
- (d) The Petitioner raises arguments not raised before the Tribunal.
- ~~(e) The Petitioner’s affidavit, which is required in order to bring an action for judicial review, is inadmissible.~~
- (e) ~~(f)~~ There is no merit to this Petition.

Petitioner Does not Have Standing

36. The Petitioner does not have standing to bring an action for judicial review.

37. Standing is a threshold issue in judicial review proceedings. Only a petitioner who can either demonstrate private interest standing or who can persuade the Court to grant public interest standing will be entitled to seek judicial review of administrative decisions.

Gonzales Hill Preservation Society v. Victoria (City) Board of Variance, 2021 BCSC 2091 at paras. 53 to 88 [*Gonzales*]

38. Gonzales sets out the general test for private interest standing, noting:

“that the petitioner must be “aggrieved”, “affected” or suffer some “exceptional prejudice” because of the impugned decision. This test is set out in *Bradshaw v Workers’ Compensation Board*, 2017 BCSC 1092 at para. 89:

[89] The authors of Brown and Evans, *Judicial Review of Administration Action in Canada* (Toronto: Carswell, 2014) v. 2, state the test in these terms at para. 4:3420:

At common law a person will have standing to seek a remedy in proceedings of judicial review if he or she is an “aggrieved person,” an “affected person”, or someone who is “exceptionally prejudiced” by the impugned administrative action. The requirements of any of these expressions of the common law test are two-fold: first an identification of the interest and, second, an assessment of its remoteness.”

Gonzales at 60

39. To be accorded standing, a petitioner must demonstrate an interest in the proceeding. A petitioner will have an interest in the proceeding where he or she has a private right that has been infringed by the respondent, or which will cause or threaten to cause special damage which extends beyond that suffered by the general public. This interest may also be conferred by statute.

Emerman v. Association of Professional Engineers, 2008 BCSC 1186 at para. 19

40. The sufficiency of the interest of the applicant can be demonstrated by the statutory regime underlying the impugned decision.

Sandhu v. British Columbia (Provincial Court), 2013 BCCA 88 at para. 35

41. There is no provision in the *CRTA* that confers standing to any person but the applicant.
42. The proposition that a petitioner must suffer some special form of damage beyond that suffered by the general public is also addressed in *Alberta Liquor Store Association v. Alberta (Gaming and Liquor Commission)*, 2006 ABQB 904 [*Alberta Liquor*].
43. An important factor includes the relationship between the applicant and the challenged decision. If the applicant can demonstrate some interest in challenging the administrative act, but that interest is found by the court to be contrary to the objects and purposes of the administrative regime, the court will not allow the judicial review process to be used to disrupt the administrative system.

Alberta Liquor, at 9 and 15

44. There is a line of cases which holds that the applicant must itself be aggrieved, and it is not sufficient that the applicant have members that are aggrieved.

Alberta Liquor, at 19

45. To have standing, the petitioner must show that it has a particular interest or that it has suffered or will suffer injury or damage peculiar to itself. Where the petitioner is an inanimate incorporated society with a legal status separate and distinct from that of its members, it cannot be said that it, as a legal entity, has a particular interest distinct from that of other concerned citizens...:

How can it be said that it, as a legal entity, has suffered, or will suffer, injury or damage peculiar to itself? Put at its highest, the society is in the position of a concerned corporate citizen — that is not sufficient to grant standing. It may very well be that some of its members have a particular interest which would give them standing — but the society is distinct from its members. I must hold that the society lacks the necessary standing.

[Emphasis added.]

Village Bay Preservation Society v. Mayne Airfield Inc. (1982), 1982 CanLII 275 (BC SC) at 11; *Sea Shepherd Conservation Society v. British Columbia* (1984), 1984 CanLII 504 (BC SC) at 13

46. The Petitioner is a non-profit corporation and does not in itself purchase airline tickets. It can neither benefit nor suffer any direct adverse impact from the Decision.

Independent Contractors and Business Association v. Canada (Minister of Labour), 1998
CanLII 7520 (FCA) at 30

Absolute Assignment is Invalid at Law

47. The absolute assignment of the Purchasers' rights to claims against WestJet is invalid at law.

48. There are two reasons why courts do not permit the assignment of choses. The first is that contracts created obligations which were strictly personal; and the second is maintenance and champerty.

Fredrickson v. I.C.B.C., 1986 CanLII 1066 (BC CA) [*Fredrickson*] at 44

49. While the Courts of Equity did recognize and enforce assignments, there are six categories of contracts which are considered to be unassignable. They are:

- (a) contracts which expressly by their terms exclude assignment;
- (b) mere rights of action (assignments savouring of maintenance and champerty);
- (c) contracts which by their assignment throw unanticipated burdens on the debtor;
- (d) personal contracts;
- (e) assignments void by public policy (public officers' wages or salary and alimony or maintenance agreements); and
- (f) assignments prohibited by statutory provisions.

Fredrickson at 44; *Chitty on Contracts*, 25th ed. (1983), pp. 709-15

50. An exception to personal contracts being assigned include a cause of action for damages based on breach of contract. This is a petition for judicial review, and not a cause of action for damages.

51. All champertous agreements are forbidden and invalid. In *McIntyre Estate*, the Court of Appeal for Ontario defined maintenance and champerty as follows:

Although the type of conduct that might constitute champerty and maintenance has evolved over time, the essential thrust of the two concepts has remained the same for at least two centuries. Maintenance is directed against those who, for an improper motive, often described as wanton or officious intermeddling, become involved with disputes (litigation) of others in which the maintainer has no interest whatsoever and where the assistance he or she renders to one or the other parties is without justification or excuse. Champerty is an egregious form of maintenance in which there is the added element that the maintainer shares in the profits of the litigation. Importantly, without maintenance there can be no champerty.

[Emphasis added.]

2770095 Ontario Inc. v. Morgan, 2023 ONSC 1924 at 45

52. The Law of Contracts, 5th ed., after noting the different views on the question, concludes at p. 523 that "[t]he best approach is to avoid generalisation and to ask in each case whether *this* assignment savours of maintenance".
53. The Petitioner is a not-for-profit corporation, distinct from its members. The corporation has no interest whatsoever in the litigation of others. The Petitioner is an officious intermeddler, becoming involved in a dispute in which it has no interest. It also, through the assignment agreement, shares in the profits of the litigation, which is the very definition of champerty. This assignment savours of maintenance.
54. An assignment agreement will be held to be void, or invalid, where the court finds that the assignment savours of maintenance.
55. Further, the Petitioner essentially seeks a second chance at responding to WestJet's submissions at the Tribunal by bringing this judicial review. The Purchasers had a chance to reply, and the Tribunal considered the record of evidence and submissions in its entirety.
56. The courts allowing the Petitioner to essentially re-litigate the Decision would open the floodgates to other parties absolutely assigning their rights to other intermeddlers for the purpose of judicially reviewing decisions, so that they could obtain a second chance, if they did not receive the relief that they wanted. This would lead to further waste of court and tribunal resources.

Standard of Review

57. The *CRTA* governs judicial review of the Tribunal's decisions. The standard of review if the Tribunal has exclusive jurisdiction or specialized expertise is patent unreasonableness, the highest standard of review.

CRTA at s.56.7

58. Section 56.8 governs the standard of review of other tribunal decisions, with the exception of discretionary decisions. The Decision is a final decision.
59. The Petitioner seeks to dispute a question of law, which falls under the standard of correctness.
60. There is no dispute regarding the standard of review that applies on a judicial review of the Decision with respect to questions of law.
61. When applying the correctness standard, the reviewing court may choose either to uphold the administrative decision maker's determination or to substitute its own view of the question.

Dunsmuir v. New Brunswick, 2008 SCC 9 (CanLII), [2008] 1 SCR 190, at para. 50

62. The Decision, in its entirety, is not reviewable on the standard of correctness. The Tribunal made findings of fact, that cannot be interfered with by the court unless the Petitioner can show that there is: (1) no evidence to support the finding; or (2) in light of the evidence, the finding is otherwise unreasonable.

CRTA at s.56.8(2)

63. Where the question is one of fact, discretion or policy, deference will usually apply automatically.

Canada (Attorney General) v. Mossop [1993] 1 S.C.R. 554S(S), at pp. 599-600; *Dunsmuir* at 53

64. The deference owed to findings of fact includes primary factual findings and conclusions drawn from them, including inferences and interpretation of evidence as a whole, and credibility.

Housen v. Nikolaisen, 2002 SCC 33, [2002] 2 S.C.R. 235 at paras. 15-25

65. The Petitioner seeks relief on the basis that a labour disruption does not include a lockout notice. The labour dispute and events flowing from such was found by the Tribunal to be a labour disruption, and outside of WestJet's control. These are questions of fact, and not reviewable on the correctness standard.

CRTA at s.56.8(3)

66. WestJet further asserts that the Tribunal's reasoning was correct and consistent with the principles of statutory interpretation. The Decision ought to stand.

The Tribunal Correctly Interpreted Section 10 of the APPR

67. The Petitioners allege that the Tribunal's legal interpretation of Section 10 of the *APPR* is erroneous by:

- (a) Failing to consider the purpose of the *APPR*.
- (b) Focusing on: (i) whether there were "situations outside of the carrier's control" and not on what the "labour disruption" entails; (ii) the reliance on extrinsic aids; and (iii) the Tribunal overlooking direct causation legislative wording.
- (c) The Notice Period prior to a strike being considered a "labour disruption" or "lockout" is unworkable.

68. These arguments are without merit.

Purpose of the APPR

69. The *Canada Transportation Act*, SC 1996, c 10 ("CTA") is the enabling statute of the *APPR*. The *APPR* is a federal regulation.

70. Section 10(1) of the *APPR* provides that:

This section applies to a carrier when there is delay, cancellation or denial of boarding due to situations outside the carrier's control, including but not limited to the following:
[...]

- (j) a labour disruption within the carrier or within an essential service provider such as an airport or an air navigation service provider.

71. The *APPR* is clear and unambiguous with respect to the purpose of the *Act*, context, and relevant legal norms by the inclusion of "strike" and "lockout notices" within "labour disputes" under s.10.

72. The Petitioner attempts to cite a provincial consumer protection statute to conflate the provincial regulation with purpose of the *APPR*, which would, on its face, be contrary to the principles of federalism and paramountcy. The use of the federal *Interpretation Act* rather than the *BC Interpretation Act* ultimately flows from the same logic.
73. The *APPR* were created to protect passengers, and clearly sets out situations where an air carrier is liable for compensation to a passenger as well as situations in which a balance must be struck with respect to situations outside of carrier control.
74. The statutory interpretation principle to interpret consumer protection laws generously in favour of consumers ought not result in punishment of the service provider.

Lukács v. Air Canada Rouge LP, 2023 FC 1358 [*Lukács*] at 56

75. The Petitioner attempts to establish a gap between the BC Court of Appeal and the Federal Court. There is no such gap. Unprofitability is not the concern here, but rather, ensuring that the collective bargaining process is a fair one. If flights are cancelled, the carrier loses profitability regardless. It is not in the interests of a carrier to (1) cancel flights; and (2) conduct any action that attracts the ire of the Agency in the form of penalties and/or the public perception of the carrier itself.
76. The Agency's role includes the protection of passengers. A carrier following the instructions of the Agency ought not be punished for conducting itself in the way it was permitted.

Modern Principles of Statutory Interpretation

77. Recent Supreme Court of Canada decision, *La Presse Inc. v. Quebec*, 2023 SCC 22 ("*LaPresse*") clarified the modern principles of statutory interpretation:

[23] First, the plain meaning of the text is not in itself determinative and must be tested against the other indicators of legislative meaning — context, purpose, and relevant legal norms (*R. v. Alex*, 2017 SCC 37, [2017] 1 S.C.R. 967, at para. 31). The apparent clarity of the words taken separately does not suffice because they "may in fact prove to be ambiguous once placed in their context. The possibility of the context revealing a latent ambiguity such as this is a logical result of the modern approach to interpretation" (*Montréal (City) v. 2952-1366 Québec Inc.*, 2005 SCC 62, [2005] 3 S.C.R. 141, at para. 10).

[24] Second, a provision is only "ambiguous" in the sense contemplated in *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559, if its words can reasonably be interpreted in more than one way after due consideration of the context in which they appear and of the purpose of the provision (paras. 29-30). This is to say that there is a "real" ambiguity — one that calls for the use of external interpretive aids like the principle of strict construction of penal laws or the presumption of conformity with the Canadian Charter of Rights and Freedoms — only if differing readings of the same provision *cannot* be decisively resolved through the contextual and purposive approach set out by Driedger (*ibid.*).

[Emphasis added.]

78. The context, “situations outside carrier control”, provides clarity. *LaPresse* illustrates why one cannot isolate nor divorce the “labour disruption” from its context, which is essentially what the Petitioner seeks to do.
79. Alternatively, if “labour disruptions” are unclear as the Petitioner asserts, which WestJet denies, then extrinsic evidence, in the form of the Agency’s Regulatory Impact Analysis Statement (“RIAS”), *aids* clarification.

Affidavit #1 of C. Machado at Exhibit “E”

The Agency

80. The Agency was involved in the drafting of the *APPR*. The Agency issued the RIAS, which confirms that the intent behind specifying “labour disruptions” as being outside carrier control (rather than using alternative terms such as “strike”) was to avoid having the *APPR* be used as a tool to influence the collective bargaining process.
81. In the RIAS, under the heading “Clarity regarding categorization of flight disruptions”, the CTA noted that:

Some stakeholders would like there to be greater specificity and clarity in the regulations as to the situations that would be considered “required for safety purposes” and “outside the carrier’s control”. As it is not possible or desirable to be completely prescriptive in regulation, CTA will address these comments using a combination of regulatory adjustments and guidance materials for air carriers.

Affidavit #1 of C. Machado at Exhibit “E”

82. In direct response to the Petitioner’s suggestion against the use of extrinsic aids, the Federal Court stated that that a RIAS can be accepted as an extrinsic aid to interpretation, relying on the decision in *Boutcher v. Canada*, 2001 NFCA 33 (CanLII), 202 Nfld. and P.E.I.R. 243 (Nfld. C.A.), at paragraph 76.

Lukács at 29

83. In the following section under the same heading, the CTA addressed concerns of certain stakeholders regarding labour disruptions:

c) Labour disruptions

Air industry stakeholders feel that the regulations should explicitly indicate that labour disruptions within an airline are “outside the carrier’s control” to avoid influencing collective bargaining processes. The CTA agrees that it would be appropriate to give clarity in this area and has adjusted the regulations to specify that disruptions resulting from labour disruptions within the carrier or at an essential service provider (e.g., an airport) are considered outside the carrier’s control.

[Emphasis added]

Affidavit #1 of C. Machado at Exhibit “E” [RIAS]

84. Finally, on May 16, 2023, the CTA released a statement affirming that the WestJet labour disruption was outside of carrier control pursuant to s. 10 of the *APPR*. As such, it is WestJet’s position that the labour disruption fell within s. 10 of the *APPR*, and s. 19 compensation is not applicable in the circumstances.

Affidavit #1 of C. Machado at Exhibit "F"

85. In *Burym et al v. WestJet Airlines*, File #SC23-01-44117 (unreported) ("*Burym*"), the court dismissed a claim seeking APPR compensation against WestJet as a result of the same labour disruption. The Court stated:

Ultimately, the Court's determination is that the declaration of the strike marked the onset of the labour disruption. It is the announcement of the strike that heralds the suspension of the contractual obligations and instigates a fundamental shift in labour relations thus establishing that a labour disruption was underway at the time of the claimants' flight cancellation, making it outside of carrier control.

Burym at p. 3

86. The Petitioner argues that the Tribunal overlooked the direct causation legislative wording that the flight disruption must be "due to" a situation outside the carrier's control. In direct response to this assertion, the Respondent says that this is not a question of law, but points to the findings of fact made by the Tribunal, including that the incident which caused the delay was a strike, and that the flight disruptions were due to the strike.

Petitioner's Definition would lead to Absurd Results

87. The Petitioner says that the Tribunal's interpretation would yield absurd results and mischiefs where an airline could pre-emptively issue lockout notices to escape APPR compensation.
88. The above argument is, in itself, absurd, and not the intended interpretation of "labour disputes" as provided for by the APPR and as indicated by the RIAS. To suggest that an airline would issue lockout notices to its employees for sole purpose of escaping APPR obligations is completely unrealistic and contrary to the spirit and provisions of the *Canada Labour Code*, R.S.C., 1985, c. L-2
89. Issuing a lockout notice to employees carries with it far ranging labour relations consequences and possible outcomes. There would be no economic or goodwill benefits that would result from the issuance of lockout notices in anticipation of a flight cancellation in order to avoid APPR obligations. Not only would an airline lose more profits by having to cancel flights due to a "lockout", but pre-emptively issuing lockout notices to escape APPR compensation and cancelling more flights would lead to further losses. There are other mechanisms to deal with such an issue if it were to occur, such as the Agency and the penalties the Agency can issue to carriers.
90. Further, if a Strike Notice is provided, a large carrier, such as WestJet, would need to prepare for shutting down operations prior to an actual strike occurring. There is no guarantee that discussions would lead to resolution, and in the meantime, it is necessary to ensure guest, crew, and pilot safety. Operations take time to shut down, and it cannot be done at the same moment as the strike begins, leaving many more guests and crew stranded without adequate preparation.

Arguments Not Raised Before Tribunal

91. The Petitioner seeks to simply re-litigate issues already decided. The limited scope of the court's role on judicial review gives rise to a number of specific procedural matters, including:

- (a) **No New Evidence:** Except in limited circumstances, the court sitting on judicial review of an administrative decision may not consider evidence which did not form part of the record before the decision-maker; to do so would amount to usurping the role of the decision-maker by making a new decision on the basis of different evidence, as illustrated in *Acton Transport Ltd. v. British Columbia (Director of Employment Standards)*, 2010 BCCA 272 at paras. 19-23, including:

[21] The judge made a declaration in this case, but he arrived at that decision after conducting a de novo hearing in which he received new evidence ... However, the irregular nature of the process tends to confound the principles of appellate review.

...

[23] While the Tribunal had to be correct in deciding the division of powers question, normally its decision would be reviewed on the record before it. The reviewing court usurps the role of the tribunal when it embarks upon a de novo hearing. The procedure adopted here was wrong and should not be repeated.

- (b) **No New Arguments:** Except in limited circumstances, the court may not consider as a ground for review an issue that was never raised before the tribunal; to do otherwise would undermine the integrity of the administrative scheme. If the tribunal was not asked to consider an issue, and therefore did not make a decision with respect to it, it cannot be said that the tribunal erred in law or otherwise lost jurisdiction.

Powell v British Columbia (Residential Tenancy Branch), 2015 BCSC 2046 at paras 49-51; *Alberta Teachers' Assn. v. Alberta (Information & Privacy Commissioner)*, 2011 SCC 61 at paras 22-26; and *Vandale v. Workers' Compensation Appeal Tribunal*, 2013 BCCA 391 at para 54.

92. Reduced to its essence, the role of the court on judicial review is not to hear new evidence or argument or to decide or re-decide the case; it is simply to ensure that the Tribunal (1) acted within its jurisdiction by deciding what it was directed to decide by its constituent legislation; and (2) did not lose jurisdiction by failing to provide a fair hearing or by rendering a decision outside the degree of deference owed by the reviewing court. As the standard in this case is correctness, the court's role is to ensure that the tribunal's interpretation of "labour disruption" was the correct one.

93. The Petitioner ~~not only seeks to adduce new evidence, but also~~ raises new arguments that were never raised before the Tribunal.

Petitioner's Affidavit is Inadmissible

94. ~~WestJet respectfully says that the Affidavit #1 of Dr. Gábor Lukács is inadmissible (the "Affidavit").~~

95. ~~The requirements for the commissioning of affidavits are set out in section 1 of Appendix A of the Code of Professional Conduct for British Columbia. During the COVID-19 pandemic, the Supreme Court introduced numerous notices to accommodate those suffering from COVID-19, where it is not possible or physically or medically unsafe for the deponent to physically attend before a commissioner.~~

~~96. The most recent BC Supreme Court Notice to the Profession, the Public and the Media with respect to affidavits for use in court proceedings notes that only with the approval of the Law Society of British Columbia can accommodations be made or used in any proceeding to the Supreme Court. With approval from the Law Society of British Columbia, affidavits are still subject to the discretion of the Courts to apply the best evidence requirements to their use.~~

~~Affidavit #1 of C. Machado at Exhibit "I"~~

~~97. There is concern whether the Petitioner's counsel, registered director of the Petitioner, obtained the mandatory approval prior to commissioning the Affidavit.~~

~~98. As such, the judicial review ought to be dismissed. A petition for judicial review cannot be brought without its supporting affidavit.~~

No Merit to this Judicial Review

94. ~~99.~~ In light of the foregoing, the Respondent respectfully submits that the Petitioner has not identified any basis upon which it can properly judicially review the Decision and the within proceeding has no prospect of success.

95. ~~100.~~ The Court is to provide deference to the factual findings of the Tribunal and the Tribunal's findings of fact are not to be disturbed.

96. ~~101.~~ The Court, in arriving at its own analysis with respect to "strike" or "lockout" notices are considered "labour disruptions" under s.10 of the *APPR* will arrive at the same answer as the Tribunal.

Costs

97. ~~102.~~ The Respondent therefore opposes all of the relief sought by the Petitioner and seeks to have the Petition dismissed with costs to the Respondent.

98. ~~103.~~ WestJet seeks its costs in the cause, payable forthwith.

PART 6: MATERIAL TO BE RELIED ON

99. ~~104.~~ Affidavit #1 of C. Machado dated August 19, 2024.

100. ~~105.~~ Such other materials as the Respondent may advise.

The Respondent estimates that the application will take 2 hours.

Dated: August 19, 2024



Signature of Michael Dery
and Katelyn Chaudhary,
lawyers for the Respondent



NO. NEW-S-S-254452
NEW WESTMINSTER REGISTRY

In The Supreme Court Of British Columbia

Between:

AIR PASSENGER RIGHTS

Petitioner

and:

WESTJET AIRLINES LTD.

Respondent

NOTICE OF APPLICATION

Name(s) of applicant(s): WestJet Airlines Ltd. ("Applicant")

To: The Petitioner

And to: Civil Resolution Tribunal

TAKE NOTICE that an application will be made by the applicant(s) to the presiding judge or Associate judge at the courthouse at 800 Smithe Street, Vancouver, British Columbia on November 28, 2024, at 9:45 am for the orders set out in Part 1 below.

The applicant estimates that the application will take: 40 minutes.

- ☐ This matter is within the jurisdiction of an associate judge.
- ☒ This matter is not within the jurisdiction of an associate judge.

Part 1: ORDERS SOUGHT

1. Gábor Lukács attend for cross-examination before the Court on a mutually available date on his affidavit affirmed and filed on July 29, 2024 ("Lukács Affidavit #1").
2. The Applicant be permitted following the cross-examination to tender further evidence in response to the petition seeking judicial review filed on July 29, 2024.
3. The Applicant be granted leave to include Affidavit #2 of Ciarah Machado in the Petition Record, originally served upon the Petitioner on October 28, 2024.
4. Any other relief that this Honourable Court may permit.

Part 2: FACTUAL BASIS

Background

1. The Petitioner, Air Passenger Rights, is a corporation, incorporated under the *Canada Not-for-profit Corporations Act*, with an address for service of c/o Simon Lin, registered director of the Petitioner and counsel for the Petitioner, of 4388 Still Creek Drive, Suite 237, Burnaby, BC (“APR”).
2. The Respondent, WestJet Airlines Ltd., is an Alberta corporation and is extra-provincially registered in British Columbia with an address for service of 2700-700 West Georgia Street, Vancouver, BC, V7Y 1B8 (“WestJet”).
3. This judicial review relates to a final decision issued by the British Columbia Civil Resolution Tribunal (the “Tribunal”) in *Boyd v. WestJet Airlines Ltd.*, 2024 BCCRT 640 (the “Decision”) made arising from a claim brought by Ms. Anne Boyd and Mr. Robert Boyd (the “Claimants”) against WestJet.
4. The Claimants purchased flight reservations on November 21, 2022, via a travel agent to fly on the following series of WestJet flights with service from Kelowna to Rome on May 18, 2023:
 - a. Flight WS3162 from Kelowna, British Columbia to Calgary, Alberta, which was scheduled to depart at 14:00 PDT and to arrive at 16:09 MDST; and
 - b. Flight WS032 from Calgary, Alberta, to Rome, Italy, which was scheduled to depart at 18:05 MDST and to arrive at 11:55 CET.
5. The Claimants were scheduled to arrive in Rome on May 19, 2023, at 11:55am.
6. The Claimants travelled on Flight WS3162 from Kelowna to Calgary, as scheduled.
7. Flight WS032 was cancelled due to an ongoing labour disruption involving WestJet’s pilots (the “Claim”).
8. Following the cancellation of WS032, WestJet rescheduled the passengers on flights the following flights:
 - a. WestJet Flight WS3628 from Calgary to Portland on May 19, 2023;
 - b. Delta Airlines Flight DL0178 from Portland to Amsterdam on May 20, 2023; and
 - c. Italia Transporto Aero Flight AZ0107 from Amsterdam to Rome on May 20, 2023.
9. The Claimants arrived in Rome on May 20, 2023, over 24 hours later than originally scheduled.
10. As a result of the travel delay, the Claimants brought an application to the Tribunal and sought to recover:
 - a. \$185.25 for a hotel in Calgary on the night of May 18, 2023;

- b. \$92.00 for meals purchased from May 18, 2023, to May 20, 2023; and
- c. \$2,000 (\$1,000 per guest) in compensation for their delay under s. 19(1) of the *APPR* (the “Dispute”).

11. The Tribunal ultimately rendered a decision on July 5, 2024, and made the following findings:

- a. the incident which caused the delay was a labour strike;
- b. the strike was outside of WestJet’s control;
- c. the long-standing rule of statutory interpretation applies;
- d. the Agency’s statements provide insight into the intent of the regulation’s drafters intent;
- e. the 72-hour Strike Notice qualifies as a “labour disruption”; and
- f. the reason for the delay is outside WestJet’s control.

12. WestJet was ordered to reimburse the Claimants for their hotel stay and meals, plus interest, for a total of \$355.53 (the “Reimbursement”).

The Assignment

13. On July 24, 2024, the Claimants executed an agreement to absolutely assign the Claim, including any right of action, right of appeal, and right to seek judicial review to APR, the Assignee (the “Assignment”).

Lukács Affidavit #1 at 9 and Exhibit B

14. The Assignment includes the right to seek judicial review of the Decision, and the right to accept/deposit the Reimbursement.

Lukács Affidavit #1 at Exhibit B

15. Gabor Lukács is the founder and President of APR. He is also a director. APR is a non-profit organization, formed under the *Canada Not-for-profit Corporations Act*, SC 2009 around May 2019. The purpose of APR includes the following description within its articles of incorporation:

“1. To educate air passengers and the public at large as to their rights and the means for the enforcement of these rights, by researching and making available the results of such research on the matter of the law relating to air passenger rights on domestic and international flights.”

Lukács Affidavit #1 at Exhibit A

16. Gabor Lukács executed the Assignment with the Claimants on behalf of APR.

Lukács Affidavit #1 at Exhibit B

17. No consideration flows between the Assignee to the Assignor.

Lukács Affidavit #1 at Exhibit B

Judicial Review of the Decision

18. The Petitioner filed an application for judicial review on July 29, 2024 (the "Petition").
19. The Respondent originally filed its response to the Petition on August 19, 2024, and an amended response to the Petition was filed on October 15, 2024 (the "Amended Response"). The application is scheduled to be heard on November 21, 2024.
20. As noted above, this judicial review relates to the final decision of *Boyd v. WestJet Airlines Ltd.*, 2024 BCCRT 640 (the "Decision") made by the British Columbia Civil Resolution Tribunal (the "Tribunal") arising from a claim brought by Ms. Anne Boyd and Mr. Robert Boyd against WestJet for damages arising from a flight cancellation (the "Claim").
21. In the Petition, the Petitioner asks the Court to: (1) set aside a portion of the Tribunal's order; (2) award \$2,000 CAD as originally claimed pursuant to s.19 of the *Air Passenger Protection Regulations* (SOR/2019-150) ("APPR"); or (3) to remit the claim back to the Tribunal. By doing so, the Petitioner seeks to re-litigate issues that have already been decided.
22. The Amended Response states that the Petition ought to be dismissed on the following basis:
 - a. The Petitioner does not have standing to bring this judicial review.
 - b. The Claimants and the Petitioner's absolute assignment of rights is invalid at law.
 - c. The Decision was correct. There is only one correct interpretation, of which the Tribunal arrived.
 - d. The Petitioner raises arguments not raised before the Tribunal.

The Fox Class Action

23. On August 12, 2024, a proposed class action proceeding pursuant to the *Class Proceedings Act*, R.S.B.C. 1996, c..50 was commenced against WestJet on behalf of the representative plaintiff, Alexandra Fox (the "Fox Class Action"). Counsel for the Petitioner is also counsel for the proposed class in the Fox Class Action.

Affidavit #2 of C. Machado at Exhibit A

24. In the Fox Class Action, the plaintiff seeks compensation for inconvenience, reimbursement of out-of-pocket expenses, and/or refund on behalf of passengers affected by flight cancellations initiated due to a labour dispute, prior to actual work stoppage by the employees.

Affidavit #2 of C. Machado at Exhibit A

25. The plaintiff describes the following legal question at the very heart of the *Fox Class Action*: whether flight cancellations initiated by WestJet after receiving a strike notice, prior to any work stoppage, would constitute a situation outside of the carrier's control.

Affidavit #2 of C. Machado at Exhibit A

26. WestJet's response to civil claim to the *Fox Class Action* was filed on October 4, 2024.

Affidavit #2 of C. Machado at Exhibit B

Affidavit #2 of Ciarah Machado

27. On October 25, 2024, the Applicant prepared and filed Affidavit #2 of C. Machado (the "Affidavit"). It was served to the Petitioner on October 28, 2024. On the same date, Mr. Lin, counsel for the Petitioner, wrote to the Respondent objecting to its admissibility in this proceeding.

Affidavit #3 of C. Machado at Exhibits A to C

28. The Affidavit is relevant to this judicial review. The Respondent does not seek to adduce new evidence or argument, but to put forth the filed pleadings relating to the *Fox Class Action* before the court in order to advance its assignment argument.
29. At judicial review, this 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*

Petition at Part 2, paragraph 2 and 3

30. In the *Fox Class Action*, the Court is asked to determine the same questions.

Affidavit #2 of C. Machado at Exhibit A

31. Additionally, the Affidavit confirms that a director of the Petitioner is simultaneously acting as counsel on the Petition and as class counsel in the *Fox Class Action*.

Affidavit #2 of C. Machado at Exhibit A and Affidavit #3 of C. Machado at Exhibit A

32. In response to Mr. Lin's objection, counsel for the Respondent set out in an email dated November 4, 2024, the relevance of the Affidavit and that by forming part of the petition record, it will not serve to advance new argument or evidence. On the same date, Mr. Lin wrote to the Respondent refusing to consent to inclusion of the Affidavit in the Petition Record.

Affidavit #3 of C. Machado at Exhibits D and E

Part 3: LEGAL BASIS

I. Cross-Examination on Affidavit

The Applicant relies upon Rules 1-3, 14-1 and 22-1(4) of the *Supreme Court Civil Rules* ("Rules") and the inherent jurisdiction of this Court.

(a) The Right to Cross-Examine a Deponent on an Originating Application

33. Pursuant to Rule 22-1(4), this Court has the discretion to order a deponent to attend for cross-examination on his affidavit, which reads as follows:

22-1(4) On a chambers proceeding, evidence must be given by affidavit, but the court may

- a. order the attendance for cross-examination of the person who swore or affirmed the affidavit, either before the court or before another person as the court directs,

34. The British Columbia Supreme Court has held that the “right to cross-examine is an integral part of the adversarial process.”

Telus Communications Inc v. Telecommunications Workers Union,
[2006] B.C.J. No. 30 at 2 [*Telus Communications*]

(b) The Court’s Discretion to Order the Cross Examination of a Deponent

35. In exercising its discretion under Rule 22-1(4), the court should consider the following factors:

- a. whether there are material facts in issue;
- b. whether the cross-examination is relevant to an issue that may affect the outcome of the substantive application;
- c. whether the cross-examination will serve a useful purpose in terms of eliciting evidence that would assist in determining the issue;
- d. whether the information sought is available through other means; and,
- e. whether the cross-examination would produce unreasonable delay or generate unreasonable expense.

Equustek Solutions Inc. v. Jack, 2013 BCSC 882, at 6
Stephens v. Altria Group, Inc., 2021 BCCA 396, at 5 (“*Altria Group*”)

36. The presence of directly conflicting affidavits is not a required factor. The question is not whether there are conflicting affidavits, but whether there are conflicting material facts, which may be grounded in the pleadings themselves, rather than a conflict in the evidence itself.

Altria Group at 8.

37. When exercising the court's discretion on whether to order cross-examination on affidavits under Rule 22-1(4)(a), "...it is relevant to consider whether cross-examination is necessary, whether it is relevant to the issues on the application and whether it is likely to produce any evidence that will support the side of the party seeking cross-examination..."

Dakota Ridge Builders Ltd. v. Niemela, 2015 BCSC 581 at 8

38. Cross-examinations on affidavits can be conducted before the judge hearing the petition at the hearing of the petition.

Cowichan Valley (Regional District) v. Cobble Hill Holdings Ltd.,
2015 BCSC 1995

39. It is helpful to the chambers judge to observe the deponent's demeanour when the cross-examination takes place to assess credibility. It has been held that for the cross-examination to have any useful meaning, it should be done before the Chambers judge who hears the application.

L.M.U. v. R.L.U., 2004 BCSC 95 at 48 to 49

(c) Application to the Present Case

40. In the present case, the above factors weigh heavily in favour of requiring Gabor Lukács to attend for cross-examination on his affidavit.
41. The Applicant requests that the Court direct Gabor Lukacs to attend in Court (by Teams) at the hearing of the Petition or on a mutually available date before a court reporter of the Applicant's choice.
42. There are material facts at issue, namely the reason, or purpose of the assignment. Gabor Lukács' affidavit appends the Assignment, without providing significant clarity. WestJet intends to challenge the validity of the Assignment on the basis of maintenance and champerty.
43. There are two reasons why courts do not permit the assignment of choses. The first is that contracts created obligations which were strictly personal; and the second is maintenance and champerty.

Fredrickson v. I.C.B.C., 1986 CanLII 1066 (BC CA) [*Fredrickson*] at 44

44. While the Courts of Equity did recognize and enforce assignments, there are six categories of contracts which are considered to be unassignable. They are:
- a. contracts which expressly by their terms exclude assignment;
 - b. mere rights of action (assignments savouring of maintenance and champerty);
 - c. contracts which by their assignment throw uncontemplated burdens on the debtor;
 - d. personal contracts;
 - e. assignments void by public policy (public officers' wages or salary and alimony or maintenance agreements); and
 - f. assignments prohibited by statutory provisions.

Fredrickson at 44; *Chitty on Contracts*, 25th ed. (1983), pp. 709-15

45. All champertous agreements are forbidden and invalid. In *McIntyre Estate*, the Court of Appeal for Ontario defined maintenance and champerty as follows:

Although the type of conduct that might constitute champerty and maintenance has evolved over time, the essential thrust of the two concepts has remained the same for at least two centuries. Maintenance is directed against those who, for an improper motive, often described as wanton or officious intermeddling, become involved with disputes (litigation) of others in which the maintainer has no interest whatsoever and where the assistance he or she renders to one or the other parties is without justification or excuse. Champerty is an egregious form of maintenance in which there is the added element that the maintainer shares in the profits of the litigation. Importantly, without maintenance there can be no champerty.

[Emphasis added.]

2770095 Ontario Inc. v. Morgan, 2023 ONSC 1924 at 45

46. The Law of Contracts, 5th ed., after noting the different views on the question, concludes at p. 523 that "[t]he best approach is to avoid generalisation and to ask in each case whether *this* assignment savours of maintenance".
47. A cross-examination of Gabor Lukács will elicit evidence that is material to a core issue in the application, namely whether the Assignment is valid, such that there is significant basis to support APR's ability to bring a judicial review.
48. Further, the *Fox* Class Action will be directly impacted by this judicial review, since it is brought upon the question of whether flight cancellations initiated by WestJet after receiving a strike notice (prior to any work stoppage) would constitute a situation outside of the carrier's control.
49. An assignment agreement will be held to be void, or invalid, where the court finds that the assignment savours of maintenance. In WestJet's view, the Assignment *savours* of champerty and maintenance.
50. Additionally, no consideration whatsoever flows between the Claimants and APR with respect to the Assignment.
51. Gabor Lukács' evidence will illuminate the circumstances surrounding the Assignment. Specifically, Gabor Lukács' knowledge surrounding the Petitioner counsel's involvement in the *Fox* Class Action is relevant to this proceeding. Mr. Lin is also a director of APR.
52. The cross-examination of Gabor Lukács is warranted as he has put himself forward as the director, leader and supervisor of all of APR's work. WestJet seeks to cross-examine Dr. Lukács regarding the nature of the assignment with respect to its position on (1) champerty and maintenance; and (2) standing, specifically:

- a. when APR first became aware of the Claim;
 - b. whether APR recommended that the Dispute be brought;
 - c. whether any written notes, advice, or representations were made by APR to the Claimants with respect to the Claim and in bringing the Dispute;
 - i. if so, the contents of these written communications;
 - d. what was APR's involvement in the Dispute, including what oral advice, discussions or information were made or provided to the Claimants in relation to the Claim and the Dispute;
 - e. what involvement APR had in relation to the Dispute, including the drafting of written submissions;
 - f. what advice, discussions or other information were made or provided to the Claimants in relation to the Decision;
 - g. whether APR was aware of the *Fox Class Action*;
 - h. when APR became aware of the *Fox Class Action*;
 - i. whether APR was aware that counsel is acting for the representative plaintiff with respect to the *Fox Class Action*;
 - j. whether APR has knowledge of the impact of this judicial review upon the *Fox Class Action* and upon Mr. Lin;
 - k. whether APR created or formed any internal notes, files, and meetings leading to the decision to enter into the Assignment;
 - l. what were the circumstances of APR entering into the Assignment;
 - m. why APR entered into the Assignment;
 - n. whether APR had any internal meetings with respect to the Claim, the Dispute and the Assignment;
 - o. if so, what happened at these meetings and who were a part of these meetings; and/or
 - p. whether these meetings were recorded in writing or by audio or video recording.
53. There are no alternative information sources in which the Respondent can access to clarify the circumstances leading to the Assignment.
54. The general rule is that if there are material facts in issue, then the cross-examination should be permitted.

55. The proposed cross-examination would not produce unreasonable delay or generate unreasonable expense. Similarly, the cross-examination of Gabor Lukács will not produce any unreasonable cost, as it will be confined to his Affidavit #1, and the material facts in question surrounding the Assignment.
56. The cross-examination of Gabor Lukács is a proportional, necessary and just, and will ensure that the Court has the evidence it requires to properly adjudicate the application.

II. Affidavit #2 of Ciarah Machado

57. Rule 1-3 of the *Supreme Court Civil Rules*, B.C. Reg. 168/2009 (“*Rules*”) provides the object of the *Rules*:

- (1) The object of these Supreme Court Civil Rules is to secure the just, speedy and inexpensive determination of every proceeding on its merits.
- (2) Securing the just, speedy and inexpensive determination of a proceeding on its merits includes, so far as is practicable, conducting the proceeding in ways that are proportionate to
 - (a) the amount involved in the proceeding,
 - (b) the importance of the issues in dispute, and
 - (c) the complexity of the proceeding.

58. Filing further affidavit evidence in a judicial review proceeding is permitted.

Eastside Pharmacy Ltd. v. British Columbia (Minister of Health), 2019 BCCA 60

59. The jurisprudence indicates that the exercise of the court’s discretion to admit affidavit material filed after a hearing has already commenced, but before the hearing has concluded, requires the court to balance the interests of “truth-seeking, fairness, and prejudice”. This balancing exercise should be done having regard to the following non-exhaustive factors:

- a. the relevance of the evidence to the issues before the court;
- b. the necessity or importance of the evidence to deciding the issues;
- c. whether the evidence is reasonably capable of belief;
- d. the timing of the application;
- e. whether the evidence existed prior to the commencement of the hearing;

- f. the explanation for the delay in providing the evidence;
- g. whether there is any prejudice to the opposing party by the late admission of the evidence; and
- h. whether any prejudice can be mitigated by, for example, permitting the objecting party to file responding affidavits and/or make additional submissions, or the making of a costs award.

Victoria and District Cricket Association v West Coast Cricket Organization, [West Coast] 2024 BCSC 65 at 28

60. The Court will exercise its discretion in favour of receiving information both material and relevant to the application, especially when that information originates from the objecting party and cannot possibly come as any surprise to them.

P.K.K. v A. M. K., 2003 BCSC 1056

61. In the alternative, this Court ought to consider the Affidavit and/or the pleadings relating to the *Fox Class Action* if the Affidavit does not form part of the Petition Record. A judge may be entitled to consult court records that are not directly before him or her and may be entitled to use them as evidence to decide a case. He or she should not normally do so, however, without advising the parties of his or her intentions and without giving them an opportunity to address the issue. In this way, the documents, even without formal proof, can properly be said to have become part of the evidence in the case.

Petrelli v. Lindell Beach Holiday Resort Ltd., 2011 BCCA 367

62. With respect to the above-noted factors in *West Coast*, WestJet submits the following:

- a. The pleadings attached therein ask the same question brought to the court in this judicial review, and the result of this petition will directly affect and influence the class proceeding.
- b. The Affidavit shows that Mr. Lin acts as counsel with respect to both matters, which substantiates WestJet's concern regarding a potential invalid assignment between the Claimants and APR. As a result, judicial review may not be available to the Petitioner *at all*. The Affidavit is necessary and important to aid the court in its determination of the preliminary issues raised by the Respondent.
- c. The pleadings filed in the *Fox Class Action* form the complete basis of the Affidavit, and as such, there is no question of whether the evidence is reasonably capable of belief.
- d. The application was brought at the very beginning of the petition hearing.
- e. Since counsel for the Petitioner and the Respondent are counsel in the *Fox Class Action*, and the Petitioner was the drafter of the originating claim in the *Fox Class Action*, it was not clear nor obvious to the Respondent that filing the

pleadings by way of affidavit would be a contentious issue in this proceeding prior to serving the Petitioner on October 28, 2024.

- f. There cannot be any prejudice to the Petitioner and it cannot be surprised by the same. The Affidavit was also provided sufficient time to consider the Affidavit in advance of this judicial review.
- g. The Rule respecting additional affidavits ought to be read considering the very purpose of the *Rules*.

Part 4: MATERIAL TO BE RELIED ON

- 1. Affidavit #1 of Dr. Gábor Lukács, affirmed and filed July 29, 2024.
- 2. Affidavit #1 of Ciarah Machado, affirmed and filed August 19, 2024.
- 3. Affidavit #2 of Ciarah Machado, affirmed and filed October 25, 2024.
- 4. Affidavit #3 of Ciarah Machado, affirmed and filed November 13, 2024.
- 5. The pleadings and materials filed herein.
- 6. Such further and other material as counsel may advise.

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

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

Dated: November 14, 2024

 Signature of Michael Dery
☐ applicant ☒ lawyer for applicant

To be completed by the court only:

Order made

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

☐ with the following variations and additional terms:

.....

Dated: ◆

.....
 Signature of
☐ Judge ☐ Associate Judge

APPENDIX

[The following information is provided for data collection purposes only and is of no legal effect.]

THIS APPLICATION INVOLVES THE FOLLOWING:

[Check the box(es) below for the application type(s) included in this application.]

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



No. NEW-S-S-254452
New Westminster Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

IN THE MATTER OF THE *JUDICIAL REVIEW PROCEDURE ACT*, RSBC 1996, c 241

BETWEEN

AIR PASSENGER RIGHTS

Petitioner

AND:

WESTJET AIRLINES LTD.

Respondent

APPLICATION RESPONSE

(Respondent's **Second** Application for Further Affidavits and Cross-Examination)

Application response of the Petitioner, Air Passenger Rights.

THIS IS A RESPONSE TO the notice of application of the Respondent filed January 15, 2025.

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

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. This is the Respondent's second application for essentially the same relief (i.e., cross-examination on the Petitioner's affidavit; a blanket Order for leave to file unspecified evidence; and leave to file an affidavit containing evidence not in the underlying tribunal record). The Respondent "abandoned" the first application as it contained obvious frailties on the merits. That is, the Respondent overlooked the basic legal principle that an assignment does not need consideration when under seal, and was one of the Respondent's main basis in that first application; and the timeline disclosed in that application clearly revealed an intent to create a delay.
2. On this application, the Respondent still avoids three (3) critical and fatal issues:
 - a. the amount in dispute at the Civil Resolution Tribunal [CRT] was \$2,000, and disproportionate to the amount at issue;
 - b. while the CRT *initially* repeated the Respondent's bare assertions of "champerty", the CRT appears to not support the Respondent's position any longer after the Supreme Court of Canada's decision in October 2024 ([*International Air Transport Association v. Canada \(Transportation Agency\)*](#), 2024 SCC 30 at para. 97) confirming that the claims herein are claims in "debt." Of note, at least two CRT Tribunal Members applied the Supreme Court of Canada's reasoning in similar airline cases involving the *Air Passenger Protection Regulations* claims confirming it is a claim in "debt."
 - c. It is established law for over a century that an assignment of debt cannot be champertous. The Respondent is asking the Court to ignore the law.
3. The disconnect is that the Respondent is ignoring the law, including the above SCC guidance, and misdirecting this Court with cases about assignments involving "non-debts" as *possibly* attracting the doctrine of champerty. The Respondent had been informed since September 2024 that their reasoning is legally erroneous, and even contrary to this Court's guidance. The Respondent ignored those reminders.
4. Furthermore, the Respondent also misdirects this Court with cases that deal with cross-examinations on affidavits in **non-judicial review** settings (i.e., civil cases

that are subject to the trial rules for discovery etc.). The Respondent avoided citing cases involving cross-examinations in a petition for judicial review.

5. The established case law on cross-examinations on a petition for judicial review is that it is “rare and exceptional.” The test that the Respondent would need to meet is that cross-examination “would resolve conflicts in the affidavits, and if those conflicts are resolved it might affect the outcome.” The Respondent falls far short.
6. Furthermore, in most applications seeking cross-examination on an affidavit, the issue is deferred to the Justice that hears the petition for judicial review. This is consistent with decades of authority that, if the Justice is able to decide the facts for the judicial review, no cross-examination or discovery process is needed.
7. On closer review, the Respondent’s proposed cross-examination is actually an examination for discovery in disguise. Most, if not all, of the issues the Respondent seeks to explore are irrelevant or exceeds what would normally be covered under the discovery process, or obviously attract litigation privilege or solicitor-client privilege. The Respondent is, in fact, engaging in a fishing expedition.
8. With respect to the Respondent’s request for a blanket Order for further evidence after a cross-examination, that type of Order in a judicial review is unprecedented. The Respondent cannot identify any case where this Court granted such an order.
9. Finally, the Respondent’s further affidavit does not meet the test for new or fresh evidence beyond the tribunal record. The further affidavit would not assist the Justice to decide the petition for judicial review, but rather serves as a red herring.
10. Petitioner seeks leave to file costs submissions after this application is decided. The Petitioner has materials that would be appropriate to bring to the Court’s attention only after the Court decides this application.
11. The length of this Application Response is largely due to important case excerpts, for reason of efficiency, in order to avoid flipping back and forth at the hearing.

Background of the Underlying Judicial Review Petition

12. The Petitioner, Air Passenger Rights [APR] is a non-profit organization, formed under the *Canada Not-for-profit Corporations Act*, SC 2009 on or about May 2019, to expand and continue the air passenger advocacy work that Dr. Gabor Lukacs had initiated in his personal capacity for nearly two decades. APR's purpose is:

1. To educate air passengers and the public at large as to their rights and the means for the enforcement of these rights, by researching and making available the results of such research on the matter of the law relating to air passenger rights on domestic and international flights.

2. To act as a liaison between other public interest or citizens' groups engaged in public interest advocacy.

3. To assist in and promote the activity of public interest group representation throughout Canada and elsewhere.

4. To make representations to governing authorities on behalf of the public at large and on behalf of public interest groups with respect to matters of public concern and interest with respect to air passenger rights, and to teach public interest advocacy skills and techniques.

Affidavit #1 of Dr. Gabor Lukacs made on July 29, 2024 [Lukacs Affidavit] at paras. 2 and 4
and Exhibit A

13. APR's mandate comprises of:

- a. **Enforcing Air Passenger Protections:** filing regulatory complaints with the Canadian Transportation Agency [CTA] to enforce the airlines' obligations under the laws or the airlines' tariffs, or initiating or intervening in judicial proceedings regarding airlines' obligations to passengers.
- b. **Advocating for Stronger Passenger Protections:** participating in consultations, and attending Parliamentary committees to give evidence to assist Parliament in strengthening protections for air passengers.
- c. **Sharing Information on Passenger Rights:** offering a platform for passengers to obtain information and share their travel woes.
- d. **Assisting Passengers in Enforcing Their Legal Rights:** assisting passengers pro bono by providing information and, for precedent setting matters, assisting passengers in court as permitted by the applicable rules.

[emphasis added]

Lukacs Affidavit at para. 5

14. APR is a “soliciting” non-profit corporation that has more onerous financial reporting requirements as compared to “non-soliciting” non-profit corporations.

Affidavit of Brittany Dieno made on January 22, 2025 [**Dieno Affidavit #3**] at Exhibits A-B

15. As a soliciting corporation, APR is required to have three directors, two of whom are “outside directors”, also sometimes referred to as “independent directors.”

Number of directors

125 A corporation shall have one or more directors, but a soliciting corporation shall not have fewer than three directors, at least two of whom are not officers or employees of the corporation or its affiliates.

Canada Not-for-profit Corporations Act (S.C. 2009, c. 23)

16. APR’s board of directors comprises of three individuals: Dr. Gabor Lukacs, Ms. Judit Mihala, and Mr. Simon Lin. Ms. Mihala and Mr. Lin are “outside directors” of APR and not an officer or employee, and not part of management. Outside directors are considered as acting independently to bring an objective perspective.

Dieno Affidavit #3 at Exhibits A and C

17. The underlying CRT claim involved two passengers seeking from WestJet: (a) reimbursement of out-of-pocket expenses; and (b) standardized compensation of \$1,000 per person based on the *Air Passenger Protection Regulations*. On July 5, 2024, the CRT granted Mr. and Mrs. Boyd their out-of-pocket expenses but rejected their standardized compensation on the basis that the 72-hour period before an actual work stoppage also constituted a “labour disruption.”

[*Boyd v. WestJet Airlines Ltd.*](#), 2024 BCCRT 640

18. After the CRT judgment was rendered, on July 24, 2024, Mr. and Mrs. Boyd absolutely assigned their judgment, including the \$1,000 standardized compensation, to the Petitioner APR. The assignment was under seal.

Signed, sealed and delivered, on the date
indicated above by Anne Boyd

Anne Boyd


Sealed

Anne Boyd

Signed, sealed and delivered, on the date
indicated above by Robert Boyd

Robert Boyd

Robert Boyd


Sealed

Lukacs Affidavit at Exhibit B

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19. Mr. Lin did not take part in APR's corporate decision to accept the assignment from the passengers Mr. and Mrs. Boyd.

Affidavit #1 of Brittany Dieno made on November 18, 2024 [**Dieno Affidavit #1**] at Exhibit H
(p. 31)

20. Written notice of the assignment was given to WestJet in accordance with section 36 of the *Law and Equity Act*.

Lukacs Affidavit at Exhibit C

21. This judicial review petition was filed on July 29, 2024.

Relevant Chronology for the Respondent's Application

22. On July 30, 2024, the judicial review petition and affidavits were served on the Respondent.

Dieno Affidavit #1 at Exhibit K (p. 37)

23. On August 6, 2024, Respondent's counsel confirmed that they have been retained.

Dieno Affidavit #1 at Exhibit K (p. 37)

24. On August 9, 2024, counsel for the Respondent provided their availability for a one-day hearing for the judicial review petition.

Dieno Affidavit #1 at Exhibit K (p. 37)

25. On August 19, 2024, the Respondent filed their Response to Petition and a supporting affidavit that essentially attaches the Tribunal Record. Notably, the "champerty" issue was in the Response to Petition but the Respondent did not make any request to cross-examine the Petitioner's affiant.

Dieno Affidavit #1 at Exhibit K (p. 37)
WestJet's Response to Petition on August 19, 2024

26. On September 10, 2024, the Respondent was advised that a one-day timeslot has been reserved at the Vancouver Registry for hearing the judicial review petition. Shortly thereafter, the Respondent also signed a consent order so that the petition could be heard in Vancouver rather than the home registry (New Westminster).

Dieno Affidavit #1 at Exhibit K (p. 38)
Consent Order entered September 24, 2024
Notice of Hearing filed October 15, 2024

27. On September 19, 2024, the Petitioner wrote to the Respondent indicating: (1) that their “champerty” issue is plainly without merit and rejected by this Court and the Court of Appeal; and (2) the Respondent’s assertion that the Petitioner’s affidavit was improperly commissioned remotely was obviously raised without any merit.

Dieno Affidavit #1 at Exhibit C (p. 10) and Exhibit K (p. 38)

28. On October 15, 2024, the Respondent replied to the Petitioner’s September 19, 2024 correspondence.

- a. With respect to the remote commissioning of the Petitioner’s affidavit, the Respondent **admitted** that their position “was taken in error” without any explanation how such a grievous allegation against opposing counsel was made. Notably, at this time (i.e., October 15, 2024) the Respondent still did not request to cross-examine the Petitioner’s affiant.
- b. With respect to the champerty assertion, despite the clear jurisprudence provided to the Respondent, the Respondent simply stated the following, also implicitly acknowledging the issue is to be resolved in argument without the need for any further evidence:

We disagree with your position, and we will be objecting to the assignment in argument.

Dieno Affidavit #1 at Exhibit D (p. 16) [emphasis added]

29. On October 28, 2024, after the Notice of Hearing had been served, the Respondent purported to serve a further affidavit for the judicial review petition. On

the same day, the Petitioner wrote to the Respondent indicating that this was contrary to Rule 16-1(7) and requested the Respondent to provide their basis/reasoning for including a further affidavit. The Petitioner requested a response by November 1, 2024, and the Respondent failed to respond by this date. **Notably**, by this time, there was still no indication from the Respondent that they are looking to cross-examine the Petitioner's affiant.

Dieno Affidavit #1 at Exhibit F (p. 21) and Exhibit K (p. 38)

30. On November 4, 2024, the Respondent indicated that they wish to refer to their new affidavit in the context of argument for the judicial review petition. **Again**, there was still no indication from the Respondent that they are looking to cross-examine the Petitioner's affiant.

Dieno Affidavit #1 at Exhibit G (p. 24) and Exhibit K (p. 38)

31. Immediately upon receiving the Respondent's November 2, 2024 email, the Petitioner responded on the same day that the premise underlying their new affidavit is wholly unsupported. The Petitioner also put the Respondent on notice that they would need to file a formal application to introduce their new affidavit.

Dieno Affidavit #1 at Exhibit H (p. 29) and Exhibit K (p. 38)

32. On November 8, 2024, the deadline for an bringing an application for hearing on November 21, 2024 per the service requirement in Rule 8-1(7), the Respondent did not file an application, nor indicate their intent to proceed with any application.

33. On November 13, 2024, the Petitioner wrote to the Respondent indicating that since no formal application was received, it was the Petitioner's understanding that the Respondent is no longer seeking to introduce the new affidavit.

Dieno Affidavit #1 at Exhibit I (p. 32) and Exhibit K (p. 38)

34. On **November 13, 2024** (eight days before the scheduled hearing), the Respondent indicated for the very first time that they have instructions to bring an application to cross-examine the Petitioner's affiant. The Respondent requested

an adjournment of the petition scheduled for November 21, 2024. Shortly thereafter, the Respondent delivered an unfiled Notice of Application fixing their application for November 21, 2024, the same day as the judicial review hearing.

Dieno Affidavit #1 at Exhibit J (p. 34) and Exhibit K (p. 38)

Affidavit of Brittany Dieno made on December 5, 2024 [**Dieno Affidavit #2**] at Exhibit A (p. 4)

35. On November 14, 2024, the Petitioner wrote to the Respondent indicating that the Petitioner does not consent to an adjournment, and the premise underlying the request to cross-examine is flawed. The Petitioner brought to the Respondent's attention that the appeal guidance is that, in judicial reviews, the Court decides the petition "on the record" unless there are triable issues raised and only when there are triable issues that the Court would consider measures like cross-examinations.

Dieno Affidavit #1 at Exhibit K (p. 37-42)

36. Later on November 14, 2024, the Respondent served their **first** application (for substantially similar relief as the second application filed later on January 15, 2025), without explaining why they changed the hearing date of their application from November 21, 2024 to November 28, 2024. The Respondent also did not explain why they waited **nearly three-months** and until the eve of the judicial review petition to raise a request for cross-examination.

Dieno Affidavit #1 at Exhibit L (p. 44)

37. Upon receiving the aforementioned Notice of Application, the Petitioner wrote to the respondent indicating that there is no reason why their first application cannot be heard alongside the judicial review petition considering the significant overlap. The Petitioner also requested the Respondent to be advised by November 15 at 12:00 p.m. if they still intend to move forward with their last-minute application on November 28, 2024, instead of addressing the same by way of argument on November 21, 2024. The Respondent did not respond to this email.

Dieno Affidavit #1 at Exhibit M (p. 46)

38. On November 19, 2024, the Petitioner served an affidavit that was intended to address both aspects of the Respondent's first application on November 21, 2024 at the same time as the judicial review petition. The Respondent did not indicate that they intend to advance their application separately on another date.

Dieno Affidavit #2 at Exhibit B (p. 20)

39. On November 21, 2024, no judge was available to hear the judicial review petition. The Respondent insisted on the judicial review petition being reset for two-days as, in their view, there were a number of "preliminary issues" to address.

Dieno Affidavit #2 at Exhibit C (p. 22)

40. It was apparent that the only "preliminary issues" were the Respondent's late-filed application on November 14, 2024. The Respondent already stated on October 15, 2024 that they intended to address the alleged champerty issues "in argument" within the one-day petition and therefore could not be a "preliminary issue."

41. Despite the judicial review petition having been expanded to two days at the Respondent's request, the Respondent then backtracked and indicated they would fix their first application to be heard in advance of the judicial review petition.

Dieno Affidavit #2 at Exhibit D (p. 24)

42. On November 25, 2024, the Petitioner informed the Respondent that there was no basis for hearing the Respondent's application in advance. The Petitioner requested that the Respondent to indicate by November 29, 2024 if they still wish to proceed with their application in advance. The Respondent did not respond.

Dieno Affidavit #2 at Exhibit C (p. 22)

43. On December 9, 2024, the Petitioner filed an Application Response to the Respondent's first application. The Petitioner also concurrently filed a Requisition under Rule 8-1(22) to seek directions on resetting the Respondent's first application, considering the Respondent failed to take any steps.

44. The Petitioner's application for directions was scheduled for January 13, 2025. The Respondent failed to reset their first application after December 9, 2024.

Requisition filed December 9, 2024

45. On January 13, 2025, the Petitioner's application for directions under Rule 8-1(22) was dismissed on the basis that the Petitioner cannot pre-emptively prevent the Respondent from bringing their application to be heard. At the application for directions the Respondent represented to the Court that they have a different application to be filed (i.e., this second application). The Court confirmed that all arguments are preserved, including the possibility of adjourning the Respondent's second application to the Justice hearing the petition.

PART 5: LEGAL BASIS

46. The basis for dismissing or adjourning the Respondent's second application are:

a. Application for cross-examination of the Petitioner's affiant

- i. The test for cross-examination *on a judicial review petition* is not met, and the Respondent's approach to this judicial review is highly disproportionate to the amount at issue (i.e., \$2,000).
- ii. Respondent's bald assertion of "champerty" is contrary to centuries of jurisprudence, and recent Supreme Court of Canada guidance.
- iii. Respondent's cross-examination request is akin to an examination for discovery – and is requesting the Court to allow a fishing expedition.

b. Application for a blanket Order for further evidence after the cross-examination

- i. Such Order is wholly unprecedented and effectively converts a judicial review petition into a mini-trial, without the Court even first deciding if the judicial review can itself be heard "on the record."

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- ii. Respondent fails to identify *what* further evidence they wish to bring, and *how* it would assist the Justice hearing the judicial review.
- c. **Application to introduce a further affidavit beyond the tribunal record**
- i. Other than the fact that the further affidavit is clearly contrary to the procedural rule in Rule 16-1(7), the further affidavit goes beyond the Tribunal Record.
 - ii. The further affidavit does not assist the Justice that will hear the judicial review, except to serve as a red herring.

Application for Cross-Examination of the Petitioner's Affiant

i. Test for Cross-Examination on a Judicial Review Petition Not Met

47. Cross-examination on an affidavit is a discretionary order and involves considering proportionality. In this case, the underlying *APPR* claim is \$2,000.

[*Greater Vancouver Water District v. SSBV Consultants Inc.*](#), 2014 BCSC 1148 at para. 41

48. The Respondent overlooked decades of established case law **specific** to the cross-examination on an affidavit for judicial review petitions:

4 There is no question that the statements made in the affidavits of Loudon, Stewart and Ayers to which counsel for the petitioner has directed my attention are in conflict, if not entirely, at least in part, to some of the statements made in the affidavits filed by the petitioner. **However**, cross-examination is not required simply because there is some conflict. In considering whether to allow cross-examination on these affidavits I have weighed the following:

1) The petitioner is proceeding under the *Judicial Review Procedure Act* which, by its provisions, anticipates a simplified procedure for review of decisions of public officials by means of petition and affidavits both in support and in opposition. Therefore, it would be contrary to the intention of the *Act* to permit this procedure to be disregarded in favour of the more traditional trial process unless it would be in the interests of justice to do so.

2) Is there some **basis** to expect that if cross-examination were permitted, it would resolve the conflicts which have emerged from the affidavits filed.

3) If one or more of the conflicts were resolved by cross-examination it could affect the outcome of the petition.

5 I am dismissing the petitioner's application as I have found that it does not meet the criteria which I have set forth above. It may well be that the judge hearing this matter may decide to order cross-examination on some or all of the affidavits filed. However, I am not persuaded that it is indicated at this time. In dismissing this application, the petitioner is not barred from bringing a similar application some time in the future and before the hearing of this matter.

[emphasis added]

BX Neighbourhood Pub Ltd. v. British Columbia (Minister of Labour and Consumer Services), [1990] B.C.J. No. 2946 at paras. 4-5;

see also *Morlacci v. British Columbia (Minister of Energy Mines and Petroleum Resources)*, [1994] B.C.J. No. 3300 at paras. 4 and 10-11

[*Society of Friends of Strathcona Park v. British Columbia \(Ministry of Environment, Lands and Parks\)*](#), 1999 CanLII 6169 (BC SC) at paras. 7-9; and

[*Ara Holdings Ltd. v. British Columbia \(Approving Officer\)*](#), 1999 CanLII 6412 (BC SC) at para.

49. In other words, even if there is a conflict in an affidavit, it is not sufficient to permit a cross-examination on a judicial review petition. There must be **some basis** to

expect that if cross-examination were permitted that it would resolve the conflict, and upon resolving that conflict it would affect the outcome of the petition.

50. Here, there is no conflict in the evidence whatsoever. The Respondent bases their position on bald assertions that prove nothing whatsoever. They are really asking this Court to allow a fishing expedition on the basis of their unfounded assertions:

[6] The respondent Minister of Environment opposes the application and is supported by the respondent Timberwest. The respondents argue that since there is no material conflict in the affidavit evidence, there is no basis for cross-examination and that cross-examination is not generally ordered in judicial review proceedings. The respondents argue that what the petitioner is seeking is more in the nature of an examination for discovery and there is no provision for that process in this type of proceeding.

[emphasis added]

[*Society of Friends of Strathcona Park v. British Columbia \(Ministry of Environment, Lands and Parks\)*](#), 1999 CanLII 6169 (BC SC) at para. 6

51. In *Morlacci v. British Columbia (Minister of Energy Mines and Petroleum Resources)*, [1994] B.C.J. No. 3300 at para. 4, this Court emphasized that:

4 Because the petitioners' motion included an application for an order for cross-examination on affidavits, I agreed to be seized of the hearing of the petition so that, if I concluded that cross-examination was necessary and so ordered, I would not thereby impose my view on another judge who would hear the petition: see: *Prime Realty v Superintendent of Real Estate*, [1993] B.C.J. No. 1920, unreported, (B.C.S.C.), Vancouver Registry, A921978, May 17, 1993, and *Inspiration Management Ltd. v McDermott* 36 (2d) 202 (C.A.).

[emphasis added]

52. The above approach (i.e., to defer to the Justice hearing the petition) continued to be applied.

[*Ara Holdings Ltd. v. British Columbia \(Approving Officer\)*](#), 1999 CanLII 6412 (BC SC) at para. 25; [*Society of Friends of Strathcona Park v. British Columbia \(Ministry of Environment, Lands and Parks\)*](#), 1999 CanLII 6169 (BC SC) at paras. 12-13.

53. More recently, the Court of Appeal also endorsed the leading cases above (i.e., *BX Neighbourhood Pub Ltd. v. British Columbia (Minister of Labour and Consumer Services)*, [1990] B.C.J. No. 2946; *Morlacci v. British Columbia (Minister of Energy Mines and Petroleum Resources)*, [1994] B.C.J. No. 3300) and emphasized the extraordinary and rare nature of a cross-examination on a judicial review petition:

[58] Finally, the discretion to order cross-examination in a judicial review should be guided by considerations that take into account the court's task in that context: see, for example, *BX Neighbourhood Pub Ltd. v. British Columbia (Minister of Labour and Consumer Services)*, [1990] B.C.J. No. 2946 at **para. 4** (S.C.); *Morlacci v. British Columbia (Minister of Energy Mines and Petroleum Resources)*, [1994] B.C.J. No. 3300 at **paras. 9–11** (S.C.). That task is supervisory, to ensure the legality, reasonableness and fairness of administrative processes and their outcomes: *Dunsmuir v. New Brunswick*, [2008 SCC 9](#) at para. **28**. Judicial review proceedings are conducted on the record and the court does not generally admit evidence that is not part of the record: *Sobeys West Inc. v. College of Pharmacists of British Columbia*, [2016 BCCA 41](#) at para. **52**.

[59] Thus, **absent rare or exceptional circumstances**, there is no role for the court in judicial review to investigate the facts. Even in those rare or exceptional circumstances, cross-examination must serve a useful purpose: see *Werring v. British Columbia (Attorney General)*, [1997] B.C.J. No. 2952 at para. 16 (C.A.).

[60] In my view, the chambers judge's conclusion that it was more important to "investigate thoroughly the facts" than it was "to achieve efficiency and economy" was not a relevant consideration given the presumption of regularity and the absence of evidence that the process followed by Ms. Walman did not comply with the rules of natural justice. Any cross-examination of Ms. Walman in these circumstances would not serve a useful purpose. To the contrary, permitting it would unduly prolong what is a fairly complex judicial review proceeding, in which this issue is but one aspect.

[emphasis added]

[Eastside Pharmacy Ltd. v. British Columbia \(Minister of Health\)](#), 2019 BCCA 60; see also [Cepuran v. Carlton](#), 2022 BCCA 76 at paras. 140, 152-164 [Beedie \(Keefer Street\) Holdings Ltd. v. Vancouver \(City\)](#), 2021 BCCA 160

54. Based on the foregoing, this Court should dismiss the Respondent's application for cross-examination. As detailed in the next section below, the Respondent should not be granted leave to bring their application again, nor should the application simply be adjourned to the Justice hearing the judicial review petition.

55. An application for cross-examination requires the applicant to show some particularity, more than speculation. The Court of Appeal's more relaxed approach in cross-examinations for regular civil cases (i.e., [Stephens v. Altria Group, Inc.](#), 2021 BCCA 396) does not have direct application in a judicial review. The Respondent **must still** show a conflict and that cross-examination would serve a useful purpose in resolving that conflict. There is no conflict here, and the bald assertions from the Respondent is untenable in law.

[D.K. v The Law Society of British Columbia](#), 2022 BCSC 82 at paras. 43, 57, 70, and 72

56. The Respondent's "basis" for cross-examination is clearly erroneous in law. The Respondent's entire application rests on the unfounded assertion that the underlying assignment did not involve a "debt." The Respondent avoided all of the leading authorities on this point and is misdirecting the Court.

ii. Respondent's Assertion of Champerty is Untenable in Law

57. Setting aside the fact that the Response to Petition did not raise a "lack of consideration" issue, the Respondent has started to raise "lack of consideration" in both of their first and second applications for cross-examination. This appears to be an attempt to shift to a different argument after the Respondent was advised that their "improperly sworn" affidavit was wholly without merit.

58. It is established law for centuries that a contract under seal does not require consideration. The same applies to the assignment that APR received from Mr. and Mrs. Boyd, which was under seal. An assignment, at its core, is a contract:

...Since the Assignment was signed under seal, no consideration was required to create a valid assignment....

[*Bajwa v. Habib*](#), 2018 BCSC 1822 at para. 112

59. The Court of Appeal has cautioned about such champerty arguments being a red herring when it is raised in relation to debt assignments. The Court of Appeal also noted that the concerns for champerty simply do not exist for assignments of debt.

[2] The learned judge did so on the ground raised by the respondents that certain agreements to which the petitioner, Interclaim Holdings Limited (hereafter "Interclaim"), was a party, were champertous. As will appear hereafter, I am of the opinion that the learned judge ought not to have yielded to the importunings of counsel that he address the law of champerty. **In this case, questions of champerty are simply a red herring.**

...

[26] In my opinion, McLachlin J.A., when she postulated the requirement of a "genuine pre-existing commercial interest" **was addressing only purported assignments of a non-personal tort. She was not addressing assignments of debt. I can see no objection founded on the public policy against the stirring up of litigation in the assignment of a pre-existing debt for the purpose of the assignee in the assignor's name attempting to recover whatever the debtor owes even if the assignee gets a portion. That is the very business of collection agencies.** Therefore, insofar as this petition was founded on the trade debts, it ought not to have been dismissed as against the debtors named in the assignments which I have quoted. As I have already mentioned,

those debtors do not include any of the personal respondents. See *Fitzroy v. Cave*, [1905] 2 K.B. 364 (C.A.), cited with approval in this passage of the judgment of McLachlin J.A. (as she then was) in *Fredrickson v. I.C.B.C.*, supra, at 160:

[quote omitted]

[33] **Thus, as I said at the outset, the issue of champerty or no champerty was a red herring.** To the extent any or all of the claims were claims in debt within the meaning of that word in the Act, the assignments of them to the appellant were not invalid as champertous. To the extent that any or all of the claims were claims, whether for a tort, whether personal or non-personal, or for anything else not a "debt", they could not found a petition in bankruptcy, whether by Interclaim, the co-petitioners, or anybody else, in which case the issue of the application of *Fredrickson v. I.C.B.C.*, supra, never arises.

[emphasis added]

[*Interclaim Holdings Limited v. Down*](#), 2001 BCCA 65 at paras. 2, 26 and 33

60. An assignor taking over the position of an assignee is clearly contemplated in the *Supreme Court Civil Rules* and occur on a regular basis in foreclosure chambers:

Assignment or conveyance of interest

6-2(3) If, by assignment, conveyance or death, an estate, interest or title devolves or is transferred, a proceeding relating to that estate, interest or title may be continued by or against the person on whom that estate, interest or title has devolved or to whom that estate, interest or title has been transferred.

61. This Court has confirmed that a "champerty" defense is wholly unviable in relation to an assignment of a debt or chose in action, and should not even be entertained on a pleadings amendment motion:

[16] **A cause of action in debt can be assigned, even if the debtor denies liability.** This is **as opposed to unliquidated claims**, where assignment of those claims is more doubtful: *Fredrickson* at 160.

[17] At 159-160 of *Fredrickson*, the court suggested that a claim for breach of contract may also be assignable without raising concerns about champerty:

A distinction may be drawn, however, between the assignment of a contract and the assignment of a cause of action for damages arising out of an executed contract. Some cases suggest that if a contract is not assignable, a cause of action arising out of it is similarly not assignable.... However, the rationale which supports the non-assignability of personal contracts does not apply to causes of action for damages, when all that remains is the payment of money, since the assignment of a cause of action does not confer on the assignee the right to have services performed by the party who contracted with the assignor. This suggests that the fact that a personal contract cannot be assigned should not preclude assignment of a cause of action for damages based on a breach of that contract.

[Emphasis added.]

[18] All parties agree that **a party can assign a claim in debt without violating the rule against champerty**: *Interclaim Holdings Limited v. Down*, [2001 BCCA 65](#) at para. [26](#) [*Interclaim*], leave to appeal ref'd [2001] S.C.C.A. No. 153.

[19] In *Interclaim* at para. [31](#) the court adopted the following definition of "debt":

A debt is a sum due by certain and express agreement; a specified sum of money owing to some person from another, including not only the obligation of a debtor to pay but the right of a creditor to receive and enforce payment...

[20] In *Diewold v. Diewold*, [1940 CanLII 52 \(SCC\)](#), [1941] S.C.R. 35 at 39, the court noted:

The word "debt" is defined in Stroud's Judicial Dictionary as "a sum payable in respect of a liquidated money demand, recoverable by action," and I think that this definition can be accepted as applicable here.

[21] Finally, Professor Dunlop writes in *Creditor – Debtor Law in Canada*, 2nd ed. (Toronto: Carswell, 1995) at 16 that:

One can say that the most common use of the word "debt" is to describe an obligation to pay a sum certain or a sum readily reducible to a certainty.

[22] Several courts have held that a claim relating to a deposit is a claim for debt. See *Busnex Business Exchange Ltd. v. Canadian Medical Legacy Corp.*, [1999 BCCA 78](#) at para. [15](#), where a claim for an unpaid portion of a deposit was considered a claim in debt. See also *Colby v. Burlaka* (1998), [1999] 1 W.W.R. 193, [1998 CanLII 13462](#) at para. [10](#) (S.K.Q.B.), where a claim for return of a deposit or down payment on the sale of land was found to be an action in debt or liquidated demand, irrespective of whether it was founded in contract, restitution, or equity, because it was a claim for an ascertainable sum.

[23] The deposit that Argo seeks to retain is a liquidated amount, which is forfeitable without proof of damages: *Tang v. Zhang*, [2013 BCCA 52](#) at para. [30](#).

[24] **Even if its claim is characterized as a claim for damages for breach of contract, rather than a claim for debt, Argo's claim is assignable as a legal chose in action. Section 36(1) of the *Law and Equity Act*, R.S.B.C. 1996, c. 253, permits assignments of legal choses in action as well as debts.**

[25] In *Clark v. Werden*, [2011 ONCA 619](#) at para. [16](#), the court concluded that **a debt or legal chose in action assigned pursuant to a statute was not champertous and that the criteria that might otherwise be considered in determining whether champerty existed did not apply to such an assignment.**

[26] The defendant relies on *Nathanson, Schachter & Thompson LLP v. Boss Power Corp.*, [2016 BCCA 1](#) at para. [54](#), for the proposition that the assignee must have a commercial interest in the cause of action which must pre-exist the assignment. However, that case is distinguishable as it relates to an assignment of a lawyer's right to have a bill reviewed. That is very different than a claim in debt or an assignment of a chose in action.

[27] Having regard to the authorities and the evidence in this case, I find that Argo's claim falls within the exceptions to the rule against champerty, **as it is a claim in debt or a legal chose in action. 534 Ltd. had the right to freely assign its claim and, as such, the proposed amendments are bound to fail.**

[emphasis added in bold; underline in original] *Argo Ventures Inc. v Choi*, 2019 BCSC 86

62. A debt is simply a piece of property that can be freely assigned. Courts do not inquire into the motives of the assignee or assignor in debt assignments. For example, mortgage debt assignments occur on a regular basis and debts are regularly assigned to collection agencies to pursue. The Respondent's approach would rewrite more than a century of law.

FITZROY v. CAVE. [1905] 2 K.B. 364

63. The assignment of a debt simply does not attract the doctrine of champerty.

[15] The appellant submits that this is a case where the court should apply the five-part test for the indicia of champerty and maintenance set out in the British Columbia Supreme Court case of *NRS Block Brothers Realty Ltd. v. Minerva Technology Inc.* (1997), [1997 CanLII 1274 \(BC SC\)](#), 145 D.L.R. (4th) 448, as follows: element of officious intermeddling; no previous commercial connection; the assignee is speculating on a personal gain from the lawsuit; there is a stirring up of strife; the assignee initiates or promotes the commencement of the lawsuit. **He asserts that there is evidence that Muller would not have pursued Werden on the debt, and that it was Clark who sought the assignment and the commencement of the lawsuit with no previous interest other than bad feeling toward him.**

[16] The trial judge did not address these concerns directly, because she found that this was a valid assignment of a debt in accordance and in compliance with [s. 53](#) of the [Conveyancing and Law of Property Act](#). **In my view, she made no error in her legal conclusion. The case law is clear that an assignment of a debt is not a champertous transaction and the otherwise applicable criteria do not apply to such an assignment.** In *Fitzroy* similar arguments were made. In concluding that the assignments of debts were valid and not champertous, Cozens-Hardy L.J. commented:

It is said that the plaintiff does not really desire to be paid and can take nothing for his own benefit under the judgment. For the reasons above stated, I think this is of no moment. It is further urged that his only object is to obtain a judgment which may serve as the foundation of bankruptcy proceedings, the ultimate result of which will be the removal of the defendant from his position as director of a company in which the plaintiff is largely interested. *But I fail to see that we have anything to do with the motives which actuate the plaintiff, who is simply asserting a legal right consequential upon the possession of property which has been validly assigned to him.*[Emphasis added.]

[emphasis added]

[Clark v. Werden](#), 2011 ONCA 619 at paras. 15-16, endorsed in [Argo Ventures Inc. v Choi](#), 2019 BCSC 86 at para. 25

64. On October 4, 2024, the Supreme Court of Canada confirmed that the underlying claims in a claim for *APPR* standardized compensation are not claims for “damages” (i.e., they are “debt” claims for amounts already owed):

*[97] Second, the appellants submit that, because claims for compensation under the Regulations can be vindicated in court, the Regulations do in fact give rise to “actions for damages” despite the primacy of the administrative enforcement mechanism under the CTA. But the fact that claims payable pursuant to the Regulations can be vindicated by way of an action in court does not change the nature of the compensation or the Regulations themselves. The Regulations make no provision for claims to be filed in court. And even assuming, without deciding, that judicial proceedings that seek to vindicate a claim under the Regulations amount to an “action” for the purposes of the Montreal Convention, the claim would not be for “damages”. Where such claims are filed in courts of law, the claim is **not in the nature of one for damages**, because the claim is not tied to any harm suffered by the claimant and does not require any “case-by-case assessment” or relate to “compensation for harm incurred” (International Air Transport Association v. Department for Transport, at para. 43; Zicherman, at p. 227). Instead, the claim is for payment of an amount that is **already owed** as a matter of standardized entitlements provided for under a consumer protection scheme.*

[emphasis added]

[*International Air Transport Association v. Canada \(Transportation Agency\)*](#), 2024 SCC 30 at para. 97

65. **After** the Supreme Court of Canada decision above, the CRT applied the above precisely to the same type of compensation claims that gave rise to the underlying CRT proceedings in this case. One of those cases also involved the Respondent.

[*Reshaur v. WestJet Airlines Ltd.*](#), 2024 BCCRT 1278 at paras. 17-27 under “Are APPR claims debt claims?”;

[*Pansegrau v. Air Canada*](#), 2024 BCCRT 1297 at paras. 12-17 under “APPR-based claims?”

66. There can be no tenable argument that the assignment to the Petitioner did not involve an assignment of a debt. The judgment debt of \$355.53 is clearly assignable and is not at issue on this judicial review. It is only the \$2,000 APPR claim that is at issue on this judicial review, and the Supreme Court of Canada above confirms that standardized compensation under the APPR is a debt.

67. The fact that the assignment is firmly supported by this Court’s jurisprudence was brought to the Respondent’s attention on September 19, 2024, but the Respondent simply indicated on October 15, 2024 that they disagreed.

Dieno Affidavit #1 at Exhibit C (p. 10) and D (p. 16)

[*Argo Ventures Inc. v Choj*](#), 2019 BCSC 86

68. The Respondent’s request for cross-examination is a fishing expedition to create delay, and also highly disproportionate to the amount at issue (i.e., \$2,000).

iii. Respondent is Engaging in a Fishing Expedition Beyond an Examination for Discovery

69. A cross-examination on an affidavit is limited to matters expressly set out in the affidavit and collateral question from those answers.

[Grinnell Co. of Canada Ltd. v. Retail, Wholesale and Department Store Union Local 535, C.I.O., C.I.L. et al.](#), 1956 CanLII 841 (BC CA) at bottom of page 108

70. A cross-examination on an affidavit is fundamentally different than an examination for discovery and there is not right to require the witness to search for documents or information. **More fundamentally**, for cross-examination of affidavits in a judicial review, the cross-examination is limited to the facts sworn by the affiant or other deponents.

[Ottawa Athletic Club Inc. \(Ottawa Athletic Club\) v. Athletic Club Group Inc.](#), 2014 FC 672 at para. 130

71. For the sixteen (16) topics that the Respondent seeks to “cross-examine” the Petitioner’s affiant on, they are: (a) beyond the scope of cross-examination and even beyond the scope of an examination for discovery; (b) irrelevant to the petition for judicial review; or (c) obviously covered by litigation or similar privilege.

	Proposed Topic for Cross-Examination	Petitioner’s Concern on the Topic
a)	when APR first became aware of the Claim;	1. The Respondent failed to demonstrate how this is relevant to the legal issues decided by the CRT. 2. This is a fishing expedition that goes beyond the scope of a cross-examination. 3. This is covered by litigation privilege arising from Mr. and Mrs. Boyd’s claim.
b)	whether APR recommended that the Dispute be brought;	Same as above
c)	whether any written notes, advice, or representations were made by APR to the Claimants with respect	1. There is no right to document production in a cross-examination.

	to the Claim and in bringing the Dispute; i. if so, the contents of these written communications;	2. A witness at a cross-examination is not required to inform themselves, or search for information. 3. This is covered by litigation privilege arising from Mr. and Mrs. Boyd's claim
d)	what was APR's involvement in the Dispute, including what oral advice, discussions or information were made or provided to the Claimants in relation to the Claim and the Dispute;	Same as above
e)	what involvement APR had in relation to the Dispute, including the drafting of written submissions;	1. The Respondent failed to demonstrate how this is relevant to the legal issues decided by the CRT. 2. This is a fishing expedition that goes beyond the scope of a cross-examination. 3. This is covered by litigation privilege arising from Mr. and Mrs. Boyd's claim.
f)	what advice, discussions or other information was communicated to or provided to the Claimants in relation to the Decision;	Same as above
g)	whether APR was aware of the Fox Class Action;	1. This is an obvious fishing expedition, and wholly irrelevant to the underlying claims or the debt assignment. 2. It's obvious APR knows of that case since the Respondent raised it.
h)	when APR became aware of the Fox Class Action;	1. This is irrelevant to the underlying claims or the debt assignment. 2. The Fox Class Action was obviously filed after the Petition for Judicial Review was filed, and long after the assignment was received. It is unclear <u>how</u> a future case could

		“retroactively” change someone’s motives for accepting an assignment.
i)	whether APR was aware that counsel is acting for the representative plaintiff with respect to the Fox Class Action;	1. This is a fishing expedition, and wholly irrelevant to the underlying claims or the debt assignment. 2. It’s obvious APR knows of that case since the Respondent raised it. 3. This is indirectly an attack on counsel or a disguised disqualification application.
j)	whether APR has knowledge of the impact of this judicial review upon the Fox Class Action and upon Mr. Lin;	1. This topic is wholly irrelevant. Mr. Lin is an “outside director” of APR, not an officer or employee. 2. It is unclear what basis the Respondent would use to somehow “tie” an independent director’s other professional work to APR. 3. The “profit link” between Mr. Lin’s other professional work and a corresponding financial benefit to APR is clearly speculative and baseless. The Respondent’s assertion implies that Mr. Lin will breach the <i>Code of Professional Conduct</i> and somehow share his legal fees with non-lawyers. Moreover, as a non-profit organization, any profits that APR earns must remain in the organization and not be distributed to any of its members. 4. To the extent any discussion occurred, they would in any event be subject to litigation privilege and/or solicitor-client privilege.

k)	whether APR created or formed any internal notes, files, and meetings leading to the decision to enter into the Assignment;	1. Courts for over a century have already determined that it is not permissible to inquire into the motives for assigning or receiving an assignment of a debt. 2. This is a fishing expedition. 3. To the extent any discussion occurred, they would be subject to litigation privilege and/or solicitor-client privilege.
l)	what were the circumstances of APR entering into the Assignment;	Same as above
m)	why APR entered into the Assignment;	Same as above
n)	whether APR had any internal meetings with respect to the Claim, the Dispute and the Assignment;	Same as above
o)	if so, what happened at these meetings and who were a part of these meetings;	Same as above
p)	whether these meetings were recorded in writing or by audio or video recording.	Same as above

Application for a blanket Order for further evidence after the cross-examination

72. The Respondent seeks a blanket Order for further evidence:

2. The Applicant be permitted following the cross-examination to tender further evidence in response to the petition seeking judicial review filed on July 29, 2024.

73. There is a serious issue of **proportionality** for a \$2,000 claim.

74. The Respondent failed to cite a single case where such a preemptive Order was granted in a petition for judicial review. This is, in effect, a “blank cheque” to continuously complicate a judicial review with new evidence at the Respondent’s

discretion, when the judicial review is based on a straightforward legal question of whether the 72-hour before actual work stoppage constitutes a “labour disruption” in the *APPR*.

75. The Respondent also fails to identify *what* further evidence they wish to bring, and *how* it would assist the Justice hearing the judicial review.

Application for a Further Affidavit Beyond the Tribunal Record

76. The Respondent’s further affidavit bears no relevance to the judicial review and the same red-herring to create confusion. The Respondent cannot overcome the fact that there is an assignment of a debt claim that is not champertous.

[*Interclaim Holdings Limited v. Down*](#), 2001 BCCA 65 at paras. 2 and 33

77. Rule 16-1(7) is simply the *procedural* rule on the timing of filing of affidavits. The Petitioner concedes that this Court typically varies timelines for filing of materials in chambers proceedings. The Respondents’ failure to respect this *procedural* rule is only a minor aspect of the issue. The main issue is **substantive** in nature.

78. The law is clear that “*Judicial review proceedings are conducted on the record and the court does not generally admit evidence that is not part of the record.*”

[*Eastside Pharmacy Ltd. v. British Columbia \(Minister of Health\)*](#), 2019 BCCA 60 at para. 58

79. Materials beyond the tribunal record is a narrowly limited to evidence that:

- provides “general background” information which will assist the reviewing court in understanding the issues on the judicial review;
- brings to the court’s attention procedural defects that cannot be found in the evidentiary record of the administrative decision maker; or,
- identifies or reconstructs the record that was before the administrative decision maker. This includes materials which demonstrate the “complete absence of evidence” before the administrative decision maker with respect to a particular finding.

[*Dane Developments Ltd. v. British Columbia \(Forests, Lands and Natural Resource Operations\)*](#), 2015 BCSC 1663 at para. 46

80. The Respondent’s further affidavit clearly does not fall into the last two exceptions above. The Respondent’s further affidavit is not “general background” as those

court documents illuminate nothing about the legal issue in this judicial review petition – is the 72-hour period before an actual work stoppage a “labour disruption” as that term is used in the *APPR*?

81. Moreover, additional evidence in a judicial review petition is “admissible for a limited purpose of showing lack of jurisdiction or denial of natural justice.” Clearly, the proposed evidence from the Respondent does neither.

[*Ndachena v Nguyen*](#), 2017 BCSC 2605 at para. 2; [*British Columbia \(Public Safety and Solicitor General\) v. Stelmack*](#), 2011 BCSC 1244 at para. 235; [*Maxwell v Mo*](#), 2023 BCSC 493 at para. 35

82. The Respondent is, in essence, using this application as a backdoor to “convert” this petition into an action for challenging a debt assignment, without meeting the criteria for a “conversion.” A judicial review petition is not the forum to engage in a fishing expedition to find evidence to fit into a respondent’s speculative assertions.

83. There is also **no explanation** why the Respondent failed to include their additional materials in their first affidavit, as the facts therein were known to the Respondent at that time. The circumstances and the factual record in the proceedings below has not changed in the two months thereafter (i.e., August 19, 2024 to October 28, 2024) between when the Respondent served its Response to Petition and affidavit, and when they sought to introduce a further affidavit.

84. The only change in circumstances is the Respondent, on October 15, 2024, having no choice but to withdraw their baseless allegation against Petitioner’s counsel for improperly commissioning an affidavit. It would seem to suggest that the further affidavit is nothing more than an **afterthought** in search of an alternative technical objection when the affidavit commissioning issue turned out to be untenable.

Costs

85. Petitioner seeks leave to make costs submissions after this application is decided. The Petitioner has materials that would be appropriate to bring to the Court’s attention only after the Court decides this application.

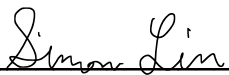
27

PART 6: MATERIAL TO BE RELIED ON

1. Affidavit #1 of Brittany Dieno made on November 18, 2024.
2. Affidavit #2 of Brittany Dieno made on December 5, 2024.
3. Affidavit #3 of Britany Dieno made on January 22, 2025.
4. Affidavit #1 of Dr. Gabor Lukacs made on July 29, 2024.
5. Notice of Application filed November 14, 2024.
6. Application Response filed December 9, 2024.
7. Requisition for Application for Direction filed December 9, 2024.
8. Application Record Index for Application for Directions on January 13, 2025.
9. The Petition to the Court.
10. The Response to Petition for WestJet.
11. The Response to Petition for the CRT.
12. Such further and other material as counsel may advise and this Honourable Court permit.

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

Dated: January 22, 2025



Signature of lawyer for application respondent, Simon Lin

Order Made After Application – the entered order will be submitted at a later date.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Air Passenger Rights v. WestJet Airlines Ltd.*,
2025 BCSC 2145

Date: 20251030
Docket: S254452
Registry: New Westminster

In the Matter of the *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241

Between:

Air Passenger Rights

Petitioner

And

WestJet Airlines Ltd.

Respondent

Before: The Honourable Madam Justice Sharma

On judicial review from: An order of the Civil Right Tribunal, dated July 5, 2024
(*Boyd v. WestJet Airlines Ltd.*, 2024 BCCRT 640).

Reasons for Judgment

Counsel for the Petitioner: S. Lin

Counsel for the Respondent: K. Chaudhary
M. Dery

Counsel for the Attendee, Civil Resolution Tribunal: Z. Rahman

Place and Date of Trial/Hearing: Vancouver, B.C.
March 24–25, 2025

Place and Date of Judgment: New Westminster, B.C.
October 30, 2025

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I. OVERVIEW

[1] This is an application for judicial review of a decision of the Civil Resolution Tribunal (the “Tribunal”) dated July 5, 2024: *Boyd v. WestJet Airlines Ltd.*, 2024 BCCRT 640 (the “Decision”).

[2] The Tribunal dismissed, in part, a claim for compensation made against the respondent WestJet Airlines Ltd. (“WestJet”) due to flight disruption. The compensation sought is established by the *Air Passenger Protection Regulations*, SOR/2019-150 [*Passenger Regulation*].

[3] That claim was brought by Anne Boyd and Robert Boyd (the “Passengers”), who are not parties to this proceeding. After the Decision was rendered, they purported to assign their claim for compensation pursuant to the *Passenger Regulation* to the petitioner.

[4] The petitioner submits that the Tribunal’s dismissal of the Passengers’ claim for \$2,000 should be set aside, and the Court should either award that compensation to it or remit the issue back to the Tribunal. WestJet submits the Decision should stand because it is correct. It also challenges the petitioner’s standing and the validity of the assignment. The Tribunal made submissions, but took no position on the relief sought.

[5] The parties disagreed about the issues that need to be addressed and in what order. The following issues arise from their submissions:

- a) Does the petitioner have standing to bring the application for judicial review in this case?
- b) Is the assignment valid and enforceable with regard to the petition for judicial review?
- c) Should the portion of the Decision denying the Passengers’ claim for compensation under the *Passenger Regulation* be set aside?

[6] In my view, the resolution of a single question is determinative of all these issues: is the Passengers' claim for compensation under the *Passenger Regulation* a debt?

[7] I conclude it is not. Given that answer, I find it necessarily follows that the petitioner does not have standing to seek judicial review because, among other things, the assignment is invalid and unenforceable.

[8] Furthermore, my conclusion that the claim for compensation under the *Passenger Regulation* is not a debt inevitably raises the question as to whether the Tribunal had jurisdiction over the Passengers' claim in the first place. In my view, a review of the governing legislation and leading case from the Supreme Court of Canada confirms it did not. Although the parties did not directly address that issue, it cannot be avoided because it is inexorably linked to the issues raised by the petition.

[9] The only remaining issue is the appropriate remedy. I have directed the parties to attend a brief appearance before me to address whether they want to make further submissions on that issue (see paras. 111–113).

II. FACTS

[10] In November 2022, the Passengers purchased WestJet tickets to travel from Kelowna, British Columbia, to Rome, Italy, on May 18, 2023. They were initially scheduled to fly from Kelowna to Calgary on May 18, 2023. From Calgary, they were scheduled to fly to Rome the same day, leaving at 18:05, arriving in Rome at 11:55 local time on May 19, 2023. The stopover in Calgary would have been two hours.

[11] WestJet pilots are unionized and represented by the Air Line Pilots Association (the "Pilots"). In May 2023, the Pilots were in the process of negotiating a new collective agreement with WestJet.

[12] The Pilots issued a strike notice on May 15, 2023, pursuant to the *Canada Labour Code*, R.S.C. 1985, c. L-2, s. 87.2(1). In response to the strike notice, WestJet issued a lockout notice. The federal legislation provides that employees can

legally strike and employers can legally lock out employees no sooner than 72 hours after the issuance of a strike or lockout notice: *Canada Labour Code*, s. 87.2(2)–(3). In this case, a legal strike and/or lockout could commence as of 3:00 am MDT on May 19, 2023.

[13] The Passengers took their scheduled flight from Kelowna to Calgary on May 18, 2023. However, their flight to Rome was cancelled due to the ongoing labour disruption. They received notification of the cancelation by email in the morning of May 18, 2023.

[14] The Passengers were rescheduled onto flights to get them to Rome, which included flights operated by other airlines. Their rescheduled journey was comprised of the following:

- a) WestJet flight from Calgary to Portland on May 19, 2023;
- b) Delta Airlines flight from Portland to Amsterdam on May 20, 2023; and,
- c) Italia Transporto Aero flight from Amsterdam to Rome on May 20, 2023.

[15] Thus, the Passengers arrived in Rome on May 20, 2023, more than 24 hours later than their originally scheduled WestJet flight.

[16] On May 19, 2023, at about 1:00 am ET, the Pilots and WestJet came to a tentative agreement, evading the strike and lockout.

[17] The Passengers made a complaint pursuant to the *Passenger Regulation* to WestJet for compensation and for their out-of-pocket expense arising from their delayed travel. WestJet's response was that the flight disruption was caused by a labour dispute and, therefore, out of their control, so no compensation was owing.

A. The Decision

[18] The Passengers filed a claim with the Tribunal on July 4, 2023. They sought a total of \$2,227.25 in compensation consisting of:

- a) \$185.25 for the hotel in Calgary for May 18, 2023;
- b) \$92.00 for meals purchased May 18, 2023, to May 20, 2023; and,
- c) \$2,000 for standardized compensation for delay under s. 19(1) of the *Passenger Regulation*.

[19] The Tribunal hearing proceeded by way of written submissions. In the Decision, the Tribunal decided that a 72-hour strike notice qualifies as a labour disruption (at paras. 13–19) and dismissed the Passengers’ claim for \$2,000 for standardized compensation. However, it granted the Passengers’ claim for reimbursement of \$277.25 for hotel and meals costs, \$15.78 in pre-judgment interest, and \$62.50 in Tribunal fees.

B. The Assignment

[20] The petitioner is a non-profit organization which advocates for air passenger rights. Its mandate includes engaging in public interest advocacy for the travelling public. Gabor Lukacs is its founder and serves as a director and president.

[21] Mr. Lukacs filed an affidavit on July 29, 2024. He deposed that the petitioner was assisting the Passengers during the Tribunal hearing and provided them with information to advance their claim.

[22] On July 24, 2024, the Passengers assigned their claims against WestJet to the petitioner. Mr. Lukacs attached to his affidavit the document that he and the Passengers signed, which purports to effect that assignment. The following extracts from that document are relevant:

BACKGROUND:

A. The Assignors have a claim against WestJet Airlines Ltd. and their affiliates for a trip from Kelowna, B.C. to Rome, Italy on or about May 19, 2023.

B. The Assignors desire to absolutely assign their Claim, including any right of action, right of appeal, and right to seek judicial review, to the Assignee.

C. The Assignee agrees to accept the absolute assignment from the assignors.

ABSOLUTE ASSIGNMENT TO ASSIGNEE:

1. The Assignor hereby assigns to the Assignee absolutely with full title of all their right, title and interest in respect of the Claim and the right to bring and defend legal proceedings (including actions, complaints, appeals and judicial review), and obtain and retain any relief recovered. For greater certainty, this assignment includes the right to seek judicial review of *Boyd v. WestJet Airlines Ltd.*, 2024 BCCRT 620 and the right to accept/deposit the \$355.53 payment from WestJet.
2. The Assignor agrees to reasonably assist the Assignee in pursuing the claim.
3. If this Assignment is to any extent invalid or incapable of being enforced, then this Assignment shall be deemed replaced with a valid and enforceable assignment under section 36 of the British Columbia *Law and Equity Act* and that comes closest to expressing the intention of such invalid or unenforceable term.
4. This Assignment and any disputes in respect of it shall be governed by and construed in accordance with the laws of British Columbia, Canada.

C. This Litigation

[23] On July 29, 2024, the petitioner filed the petition seeking orders to:

- a) set aside the portion of the Tribunal's order dismissing the \$2,000 claim; and,
- b) grant to it \$2,000 together with pre-judgment interest; or,
- c) alternatively, remit the claim back to the Tribunal to be decided in accordance with this Court's reasons.

[24] The only issue identified in the petition is the legal interpretation of the *Passenger Regulation*. Specifically, the petitioner challenges the Tribunal's conclusion that the issuance of the strike and lockout notices constituted a "labour dispute" within the meaning of the *Passenger Regulation*.

[25] In its response to petition, WestJet submitted the petition should be dismissed for, among others, the following reasons:

- a) the petitioner does not have standing;
- b) the Passengers' assignment to the petitioner is invalid; and
- c) the Decision was correct.

[26] The Tribunal takes no position on any of the relief sought. Its submissions described the Tribunal's governing legislation and processes and addressed legal principles relating to the law of assignment, standing, standard of review, and possible remedies available upon judicial review.

III. ISSUES

[27] As stated, I find all disputed issues between the petitioner and WestJet can be resolved by determining whether the compensation sought by the petitioner is a debt. To answer that question, the legislative scheme that mandates the amount of compensation for flight delay, cancellation or denial of boarding must be examined and understood.

[28] The Tribunal submits that the nature of claims under the *Passenger Regulation* and the Tribunal's "jurisdiction to resolve them were not at issue in the [Decision]; they are also not at issue in this judicial review."

[29] I do not agree. An application for judicial review seeks to invoke this Court's power as a superior court to grant relief "in the nature of" the prerogative writs, or to grant declarations and/or injunctions "in relation to the exercise of a statutory power": *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241 [JRPA], s. 2(2).

[30] Relief granted under the JRPA is discretionary and that is concerned primarily with ensuring decisions by an administrative decision-maker are only made within the strict bounds of the applicable legislation. These fundamental concepts were recently articulated by Justice Douglas in *Bennett v. Seto*, 2025 BCSC 1313 at paras. 25–30, and the following paragraphs are particularly germane:

[26] The role of the court on judicial review is to ensure that a statutory decision-maker or tribunal acted within the authority bestowed upon it by the Legislature: *Dunsmuir v. New Brunswick (Board of Management)*, 2008 SCC

9 at para. 28. Judicial review functions to maintain the rule of law while giving effect to legislative intent: *Vavilov* at para. 2.

[27] The court is not to hear new evidence or argument or to decide or re-decide the case on judicial review; rather, it is simply to ensure that the tribunal: (1) acted within its jurisdiction by deciding what it was directed to decide by its constituent legislation; and (2) did not lose jurisdiction by failing to provide a fair hearing or by rendering a decision outside the degree of deference owed by the reviewing court: *Actton Transport Ltd. v. British Columbia (Director of Employment Standards)*, 2010 BCCA 272 at paras. 19-23; *Vandale v. Workers' Compensation Appeal Tribunal*, 2013 BCCA 391 at para. 54; *Powell v. British Columbia (Residential Tenancy Branch)*, 2015 BCSC 2046 at paras. 49-51; *Alberta Teachers' Assn. v. Alberta (Information & Privacy Commissioner)*, 2011 SCC 61 at paras. 22-26.

...

[29] If the court chooses to exercise its discretion to grant prerogative relief, the appropriate remedy on judicial review is generally to set aside all or part of the decision and any accompanying order, along with a direction that the Director, or her delegate, reconsider the application for dispute resolution pursuant to s. 5 of the *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241: *Vavilov* at paras. 141-142.

[31] Thus, the legislative authority that authorizes a decision being challenged under the *JRPA* underlies every application for judicial review. It is partly for that reason that the Attorney General has the right to notice and to make submissions to the court for any petition for judicial review: *JRPA*, s. 16.

[32] As a corollary to the preceding principles, I must be satisfied that this Court has jurisdiction under the *JRPA* to grant the relief sought. The petition seeks orders based on its asserted interpretation of federal legislation. It is not clear to me in the circumstances of this case that this Court could or should opine on the correct interpretation of federal legislation, especially in the absence of the Canadian Transportation Agency. Yet, that is the primary legal basis for the relief sought in the petition.

IV. THE LEGISLATION AND ITS INTERPRETATION

[33] At the root of this dispute are the statutory provisions that instituted the standardized minimum compensation payable for delayed or cancelled flights. That compensation does not exist in isolation, but is one part of the federal government's regulation of transportation generally, including air travel. It also implicates Canada's

obligations as a signatory to the *Convention for the Unification of Certain Rules for International Carriage by Air*, 2242 U.N.T.S. 309 [*Montreal Convention*], an international convention regarding air travel. An appreciation of that regulatory context is vital to resolving the dispute raised in this litigation.

A. The Regulation of Air Travel

[34] Air transportation is regulated under Part II of the *Canada Transportation Act*, S.C. 1996, c. 10 [CTA]. The CTA continues the National Transportation Agency, now known as the Canadian Transportation Agency (the “Agency”): s. 7(1). Section 86(1) of the CTA grants general regulation-making authority to the Agency. In *Council of Canadians with Disabilities v. VIA Rail Canada Inc.*, 2007 SCC 15, the Supreme Court of Canada stated that the CTA is “highly specialized regulatory legislation with a strong policy focus”, noting that the Agency is responsible for interpreting its own legislation: at paras. 98, 100; see also *Northwest Airlines Inc. v. Canadian Transportation Agency*, 2004 FCA 238 at paras. 26, 30; *Lukács v. Canada (Canadian Transportation Agency)*, 2015 FCA 269 at para. 28; *Air Passenger Rights v. Canada (Attorney General)*, 2024 FCA 128 at para. 4; *Westjet v. Lareau*, 2025 FCA 149 [Lareau] at para. 76. The Agency’s ability to interpret its own legislation is consistent with it having specialized expertise; Its decisions are entitled to deference.

[35] Under s. 86(1)(h) of the CTA, the Agency may make regulations “respecting traffic and tariffs, fares, rates, charges and terms and conditions of carriage for international service”, including:

(iii) authorizing the Agency to direct a licensee or carrier to take the corrective measures that the Agency considers appropriate and to pay compensation for any expense incurred by a person adversely affected by the licensee’s or carrier’s failure to apply the fares, rates, charges or terms or conditions of carriage that are applicable to the service it offers and that were set out in its tariffs, if the Agency receives a written complaint and, if the complaint is related to any term or condition of carriage concerning any obligation prescribed by regulations made under subsection 86.11(1) ...

[36] The issues in this case concern amendments to the CTA, which were brought about through the enactment of the *Transportation Modernization Act*, S.C. 2018, c.

10. Among other things, those amendments included a direction that the Agency “shall ... make” regulations “respecting the carrier’s obligations in the case of flight delay, flight cancellation or denial of boarding, including (i) the minimum standards of treatment of passengers that the carrier is required to meet and the minimum compensation the carrier is required to pay for inconvenience when the delay, cancellation or denial of boarding is within the carrier’s control”: *CTA*, s. 86.11(b).

[37] It was in response to this statutory mandate that the Agency developed and enacted the *Passenger Regulation* in 2019 that is the central focus of this case.

[38] Section 86.11(4) of the *CTA* deems that the obligations imposed by the *Passenger Regulation* form the terms and conditions of the carrier’s tariff. Section 2(1) of the *Passenger Regulation* confirms that passengers are entitled to compensation according to a tariff if its terms are more favourable than those set by the regulation.

B. Process for Claiming Compensation

[39] Section 85.01(1) of the *CTA* requires carriers to establish a process for dealing with claims related to fares, rates, charges, or terms or conditions of carriage applicable to the services they provide. Section 5(1) of the *Passenger Regulation* requires carriers to make terms of carriage relating to, among other things, flight delay, flight cancellation, or denial of boarding available on all digital platforms and documents. It also dictates that those terms must be in simple, clear, and concise language.

[40] Passengers have one year following the delay, cancellation, or denial of boarding to make a claim with the carrier in writing: *Passenger Regulation*, s. 19(3). The carrier has 30 days to respond, either by issuing compensation or providing reasons for why compensation is not owed: *CTA*, s. 85.01(2).

[41] Section 85.04 of the *CTA* permits passengers to file complaints with the Agency related to tariffs:

85.04 (1) A person may file a complaint in writing with the Agency if

- (a) the person alleges that a carrier failed to apply a fare, rate, charge or term or condition of carriage applicable to the air service it offers that is set out in its tariffs;
- (b) the person is adversely affected by the failure to apply that fare, rate, charge or term or condition of carriage;
- (c) the person seeks compensation or a refund as set out in the carrier's tariffs or compensation for expenses incurred as a result of that failure; and
- (d) the person made a written request to the carrier to resolve the matters to which the complaint relates but they were not resolved within 30 days after the day on which the request was made.

[42] Section 85.02(1) requires the Agency Chairperson to delegate Agency staff to undertake the role of “complaint resolution officers” (“CR Officers”) for the purpose of managing complaints under ss. 85.04–85.12 of the CTA.

[43] A CR Officer may refuse to deal with a complaint if they are of the opinion that (CTA, s. 85.04(2)):

- a) the complaint does not meet the criteria set out in s. 85.04(1);
- b) it is clear on the face of the complaint that the carrier has complied with the *Passenger Regulation*; or
- c) the complaint is vexatious or made in bad faith.

[44] Once satisfied the complaint can be dealt with, the CR Officer first attempts to resolve the complaint through mediation, a process that must start within 30 days of the complaint being filed: CTA, s. 85.05(1). If an agreement is reached through mediation, it is enforceable as if it were an order of the Agency: CTA, s. 85.05(2). Section 33(1) confirms that orders of the Agency may be made and enforceable as an order of the Federal Court or any superior court.

[45] However, if no agreement is reached via mediation, the CR Officer will adjudicate the matter. In that case, the CR Officer must either dismiss the complaint or make an order pursuant to s. 85.07(1): CTA, s. 85.06(1).

[46] The options available to the CR Officer if the complaint is not dismissed are set out in s. 85.07(1) of the CTA:

85.07 (1) If the complaint resolution officer finds that the carrier that is the subject of the complaint has failed to apply a fare, rate, charge or term or condition of carriage applicable to the air service it offers that is set out in its tariffs, the complaint resolution officer may order the carrier to

- (a) apply a fare, rate, charge or term or condition of carriage that is set out in its tariffs; and
- (b) compensate the complainant for any expenses they incurred as a result of the carrier's failure to apply a fare, rate, charge or term or condition of carriage that is set out in its tariffs.

[47] An order made under s. 85.07(1) may be filed with the Agency, after which time it becomes enforceable as if it were an order of the Agency: CTA, s. 85.07(3).

[48] In addition, CR Officers are directed to pay heed to previous decisions of CR Officers if a complaint concerns the issue of whether a flight delay, flight cancellation or denial of boarding was within a carrier's control, was within the carrier's control and required for safety reasons, or was outside the carrier's control: CTA, s. 85.08.

[49] The CTA empowers the Agency to issue guidelines regarding the complaints filed under s. 85.04(1), as explained in s. 85.12(1):

85.12 (1) The Agency may issue guidelines

- (a) respecting the manner of and procedures for dealing with complaints filed under subsection 85.04(1); and
- (b) setting out the extent to which and the manner in which, in the Agency's opinion, any provision of the regulations applies with regard to complaints.

[50] Such guidelines are binding on CR Officers and must be published: CTA, s. 85.12(2)(3). In addition, specific details of orders made by CR officers must be made public (CTA, s. 85.14), and the Agency must indicate the number and nature of complaints filed in its annual report (CTA, s. 85.15).

[51] Section 41(1) of the CTA states that an appeal from the Agency lies with the Federal Court of Appeal on a question of law or jurisdiction if leave is obtained within one month after the date of the decision being appealed.

C. Compensation Under the *Passenger Regulation*

[52] Section 10 of the *Passenger Regulation* addresses situations where there is a delay, cancellation or denial of boarding outside the carrier's control—*i.e.*, situations where compensation is not owed by a carrier. Section 10 contains a non-exhaustive list of situations that are outside the carrier's control, including what is at issue in this case, "a labour disruption within the carrier or within an essential service provider such as an airport or an air navigation service provider": s. 10(1)(j).

[53] Section 11 sets out passengers' rights where there is delay, cancellation or denial of boarding that is within the carrier's control but required for safety reasons. Carriers are obliged to provide specific information to affected passengers and depending on the circumstances, such as when passengers were informed of a delay or cancellation and the length of any delay, carriers may be obliged to provide free-of-charge accommodation, food, drink, access to communication, and in some cases a refund or alternate travel arrangements.

[54] Section 12 addresses situations where the delay, cancellation or denial of boarding is within the carrier's control and not required for safety purposes. Sections 12(2)(d) and 12(3)(d) state passengers informed less than 14 days before departure that their flight will be delayed over three hours or cancelled are entitled to the minimum compensation set out in s. 19.

[55] Section 19 sets out the minimum compensation carriers must provide based on the size of carrier and length of delay between the passenger's arrival and the time of arrival on the passenger's original ticket. For large carriers, compensation for delays between three and six hours is \$400; between six and nine hours is \$700; and more than nine hours is \$1,000. For small carriers those amounts respectively are: \$125, \$250, and \$500.

D. The *International Air Judgment*

[56] In *International Air Transport Association v. Canada (Transportation Agency)*, 2024 SCC 30 [*International Air*], the Supreme Court of Canada interpreted the

Passenger Regulation as part of a statutory appeal brought by several air transportation associations, whose members carry approximately 82% of the world's air traffic (the “Appellants”). The Appellants challenged the *Passenger Regulation* as being in conflict with the exclusivity principle of the *Montreal Convention* and *ultra vires* the Agency's regulation-making authority under the *CTA*.

[57] The Supreme Court of Canada dismissed the challenge. In doing so, the Court addressed issues that are foundational to the dispute in this petition—namely, the proper interpretation of the *Passenger Regulation* as a compensation scheme and the role of the Agency in administering that scheme. I discuss later why I find the Court's analysis inescapably leads to the conclusion that compensation is not a debt.

[58] The Court described the government's motivation for enacting the *Passenger Regulation*:

[89] The Attorney General and the Agency submit that the *Regulations* mark an evolution in the government's approach away from a “piecemeal” system that relied on carrier-led tariff development towards one that ensures predictable payments to passengers who are inconvenienced during carriage by air to, from or within Canada. The *Regulations* were put in place, following a review of the *CTA*, with a view to correcting an “acute imbalance in market power” between air passengers and air carriers, and the ‘unusual situation’ where Canadian air passengers had to rely on foreign customer protection measures when traveling abroad” [cite omitted]. Parliament responded to this situation by directing the Agency to put in place a system of standardized compensation.

[90] The *Regulations* are, thus, best understood as providing for statutory entitlements under a consumer protection scheme. Passengers claiming under the *Regulations* need not show what harm, if any, they have suffered in order to claim compensation. The *Regulations* do not tie compensation to harm and inconvenience; rather they mandate compensation for delay, cancellation or denial of boarding based on the time by which a passenger's arrival at their ultimate destination is delayed. Unlike the *Montreal Convention*, the *Regulations* do not enable a carrier to avoid having to pay compensation otherwise due to a passenger by invoking a due diligence defence or pointing to contributory negligence. As long as the disruption in question occurred for a reason within the carrier's control and was not required for safety purposes, the compensation is fixed. Moreover, the Agency is empowered to extend a finding that compensation is owed to one passenger to other passengers similarly situated. Compensation owed under the *Regulations* for lost or damaged baggage is tied to the baggage fees charged by the carrier, not to the harm. The *Regulations* are enforced by

Agency-designated complaint resolution officers whose primary adjudicative duty consists of ensuring that carriers adhere to terms set in their tariffs.

[59] As noted in para. 90, the Court interpreted the *Passenger Regulation* as a consumer protection scheme that provides statutory entitlements, not an action in damages. What makes standardized compensation different from damages is that standardized compensation is owed identically to all claimants, irrespective of the harm they have suffered: *International Air* at paras. 42, 90.

[60] The Court also commented on the role of the Agency within the regulatory scheme, stating one of its primary functions is to adjudicate commercial and consumer transportation disputes: *International Air* at para. 6. Importantly, both the *CTA* and the *Passenger Regulation* authorize the Agency to enforce carrier compliance with the compensation provisions of the *Passenger Regulation* and extend compensation to passengers impacted by the types of disruptions enumerated in the *Passenger Regulation*: *International Air* at para. 88.

[61] In addition, the Court laid out the compensation payable by carriers under the *Passenger Regulation* for a variety of circumstances (paras. 81–85), as well as enforcement mechanisms (paras. 86–88).

V. COMPENSATION UNDER THE PASSENGER REGULATION IS NOT A DEBT

[62] The petitioner’s position is that since the carriers’ obligations set out in the *Passenger Regulation* regarding compensation for flight delays and cancellations are deemed to form part of the terms and conditions in carriers’ tariffs (*CTA*, s. 86.11(4)), the Passengers’ claim to the Tribunal was a contractual claim for debt. To support that proposition, the petitioner submits that “the Supreme Court of Canada already determined that the fixed standard compensation for delays and compensation under the Regulations is a debt”, citing paras. 89–90, 94–95, and 97 of *International Air*.

[63] That proposition is inaccurate.

[64] The Court never described the compensation payable under the *Passenger Regulation* as a debt owed by carriers to passengers. Instead, the Court held that the recent amendments to the *CTA*, including enactment of the *Passenger Regulation*, did not create an action for damages. The amendments created a “system of standardized compensation” that provides statutory entitlements where amount of compensation is not tied to harm or inconvenience suffered: *International Air* at paras. 89, 94. The amount of compensation is not based on a measure of a passenger’s loss. This promotes and is consistent with the consumer protection aims of the legislation by providing predictable payments.

[65] The petitioner also asserts that the compensation set out in the *Passenger Regulation* is a debt “written into the passenger contracts”. While the obligation might be akin to a term “written into the passengers’ contracts” by operation of statute, that does necessarily make it a debt recoverable from the Tribunal.

[66] The fundamental flaw with the petitioner’s position is to reason that since the compensation is not an action in damages, it must be a claim in debt. Logically, that result does not follow: it is based on a false dichotomy that money owed is either damages or a debt. Furthermore, the petitioner’s position disregards the comprehensive scheme created by federal government of which the *Passenger Regulation* is one part. It also ignores the context in which the Supreme Court of Canada concluded the compensation is not akin to an action in damages.

[67] In *International Air*, the Court determined that claims for compensation under s. 19 of the *Passenger Regulation* is not a claim for damages, but did not explicitly state they were not claims in debt. For the reasons explained in this judgment, I find it is inescapable that such claims cannot be pursued as claims in debt. That conclusion is the only one available if one follows the Court’s reasoning and understands the regulatory scheme created by the *CTA* and *Passenger Regulation*.

[68] The challenge in *International Air* was based on the proposition that the *Passenger Regulation* violates the exclusivity principle set out in the *Montreal*

Convention. Canada has implemented the *Montreal Convention*¹ into domestic law through amendments to the *Carriage by Air Act*, R.S.C. 1985, c. C-26, by *An Act to amend the Carriage by Air Act*, S.C. 2001, c. 31: *International Air* at para. 9.

[69] As summarized by the Court at para. 8, the *Montreal Convention* has three central objectives:

- a) to limit carrier liability related to claims for damages for death or bodily injury, damage to or loss of baggage and cargo, and for delay;
- b) to protect interests of passenger and shippers by creating presumptive liability with respect to those claims; and,
- c) to seek to have member countries create uniform rules governing claims arising from international air transportation.

[70] The Court in *International Air* went on to provide a description of the *Montreal Convention* at para. 34, including citing article 29, which codifies the “exclusivity principle, reproduced here:

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. In any such action, punitive, exemplary or any other non-compensatory damages shall not be recoverable.

[71] The Appellants argued that the creation of a schedule of compensation for, among other things, flight delays and flight cancellations, violated the exclusivity principle in the *Montreal Convention*. The Court’s analysis on that issue turned on whether the *Passenger Regulation* created an action for damages.

[72] After describing the process of making a complaint first to the carrier and then to the Agency (paras. 80–87), the Court noted that the *CTA* and *Passenger*

¹ Although not directly relevant, it is interesting to note that federal jurisdiction over air transport is anchored not within sections 91 or 92(10) of the *Constitution Act*, 1867, but as falling under both s. 132 of the (power to perform obligations relating to international treaties) and the power to make laws for the peace, order and government of Canada: *Regulation and Control over Aeronautics in Canada (Re)* [1932] A.C. 54; [1932] 1 D.L.R. 58 (JCPC).

Regulation “enforce carrier compliance with the compensation provided for in the [Passenger Regulation], and ... extend compensation owed to one passenger to others who are impacted by the same disruption” (para. 88). The Court then explained how the compensation operates as a consumer protection scheme (see para. 58 above, reproducing *International Air* at paras. 89–90), pointing out that compensation is not tied to the harm or inconvenience suffered by the passenger, but based on fixed amounts prescribed by regulation.

[73] The Court concluded that the compensation provided for in the *Passenger Regulation* is not an action for damages and, therefore, there is no conflict between the *Passenger Regulation* and the *Montreal Convention*. The compensation creates an “entitlement to standardized compensation that does not seek to measure a passenger’s loss” and as such it falls outside the scope of the *Montreal Convention*: *International Air* at para. 94.

[74] The petitioner heavily relies on the phrase “payment of an amount that is already owed” from *International Air* as supporting its position. It relies on that phrase to argue compensation for delayed flights is merely a contractual debt to which airlines are already bound once a ticket is issued. According to the petitioner, the incorporation of the *Passenger Regulation* compensation scheme into carriers’ tariffs transformed it from a statutorily created compensation to a debt enforceable at common law.

[75] That logic is flawed for several reasons.

[76] It is grounded on parsing one phrase from one sentence in a paragraph of *International Air*, which overlooks the context in which the Court made the statement. The phrase is contained in para. 97:

[97] Second, the appellants submit that, because claims for compensation under the *Regulations* can be vindicated in court, the *Regulations* do in fact give rise to “actions for damages” despite the primacy of the administrative enforcement mechanism under the CTA. But the fact that claims payable pursuant to the *Regulations* can be vindicated by way of an action in court does not change the nature of the compensation of the *Regulations* themselves. The *Regulations* make no provision for claims to be filed in court. And even assuming, without deciding, that judicial proceedings that seek to vindicate a claim under the *Regulations* amount to an “action” for the

purposes of the *Montreal Convention*, the claim would not be for “damages”. Where such claims are filed in courts of law, the claim is not in the nature of one for damages, because the claim is not tied to any harm suffered by the claimant and does not require any “case-by-case assessment” or relate to “compensation for harm incurred” (*International Air Transport Association v. Department for Transport*, at para. 43; *Zicherman*, at p. 227). Instead, the claim is for payment of an amount that is already owed as a matter of standardized entitlements provided for under a consumer protection scheme.

[77] The petitioner isolates and focusses upon the phrase “payment for amount already owed” to argue the standardized minimum compensation incorporated into the tariff is the legal equivalent of creating a debt for a fixed amount that is recoverable at common law. That reasoning ignores other portions of the paragraph inconsistent with the petitioner’s position.

[78] In the first sentence, the Court describes the Appellants’ position that compensation amounts to a claim in damages “despite the primacy of the administrative enforcement mechanism under the CTA”. The Court recognizes that “[t]he *Regulations* make no provision for claims to be filed in court”. Further, the Court’s statement that “the fact that claims payable ... can be vindicated” in court must be read together with its statement that “[e]ven if, assuming without deciding, that judicial proceedings that seek to vindicate a claim ... amount to an action”, it would not be a claim for damages.

[79] In short, I find the petitioner’s position is based on a misreading of para. 97 of *International Air*. More fundamentally, however, I also find the petitioner’s position fails to account for the juridical basis of the standardized minimum compensation. The compensation was not a contractual term to which the airlines agreed to be bound. It is a statutorily imposed scheme.

[80] Carriers’ obligations under the *Passenger Regulation* are “deemed to form part of the terms and conditions set out in the carrier’s tariffs”: CTA, s. 86.11(4). Tariff is defined in s. 55(1) of the CTA to mean the “schedule of fares, rates, charges and terms and conditions of carriage applicable to the provision of an air service and other incidental service”. However, the incorporation of the scheme into the tariff does not operate to make the carriers’ obligations to passengers contractual in

nature. That is because resolving a disagreement about whether compensation is payable is not merely a private law dispute between carriers and passengers. Determining whether compensation is payable requires interpreting and applying a federal statute and its regulations over which the Agency has expertise.

[81] Moreover, that determination turns on factors the Agency decided to incorporate into the *Passenger Regulation*, including whether the disruption was within the carriers' control; within the carriers' control, but required for safety reasons; or outside the carriers' control. The amount of compensation depends upon the amount of advance notice passengers received, the length of the delay, and the size of the carrier.

[82] Those features differentiate the compensation under the *Passenger Regulation* from employment-related statutory entitlements discussed in *International Air* at para. 95. The Court referred to Ontario case law regarding employment standards, noting that claims for statutory entitlement for termination and severance did not duplicate an action for damages by an employee, so there was no "double recovery". The Court noted those statutory "entitlements could be contrasted with damages in the employment context, which seek to correct the loss suffered by a plaintiff through monetary compensation, having regard to factors such as 'the age of the employee, the likely length of time to find another position, the actual finding of another position etc.'": at para. 95. By analogy, the Court concluded the statutory entitlements under the *Passenger Regulation* did not conflict with the limitation on damages under the *Montreal Convention*.

[83] In this case, there is no distinction between the claim the Passengers started at the Tribunal and what they could have sought from the Agency. Both depend entirely on the interpretation and application of the *Passenger Regulation*.

[84] The regulation of air transportation is complex and comprehensive. Because carriers' obligations with respect to compensation are incorporated into the tariff, a passenger's first recourse for compensation is through the carrier itself: CTA, ss. 85.01, 85.04(1); *Passenger Regulation*, s. 19(3). However, that dispute is not

entirely private because the Agency has stipulated how the carriers must approach passengers' complaints.

[85] As previously noted, carriers are obliged to create processes to handle statutory compensation claims: CTA, s. 85.01(1). The *Passenger Regulation* has explicit and very specific requirements as to how notices must be worded and made available to passengers. Carriers must provide specifically worded notice on all digital platforms and documents about the compensation available (s. 5(5)) and must display particularly worded notices at airport check-ins desks, self-service machines, and boarding gates (s. 7(1)). The *Passenger Regulation* also stipulates the timing and content of notice that carriers must give to passengers affected by delay cancellation or denial of boarding: ss. 12–13.

[86] If dissatisfied with the carriers' response, passengers may file a complaint with the Agency, and the CTA comprehensively addresses how those complaints are adjudicated, as described above (paras. 39–55). As noted above (para. 34), the Agency has the expertise on how the *Passenger Regulation* should be interpreted and applied. Moreover, it is required to keep track of complaints and publish data about them: CTA, ss. 85.14, 85.15.

[87] In other words, the processes in place have all the hallmarks of an exhaustive and comprehensive scheme to address passengers' right to compensation from carriers upon flight delay, cancellation, or denial of boarding. Nothing about that scheme suggests that the statutory compensation is merely a contractual obligation owed by carriers to be resolved privately by small claims actions.

[88] I infer the Passengers did not pursue a complaint to the Agency since there is no indication in the evidence on the record or in the Decision that they did so. Instead, they proceeded directly to the Tribunal. In doing so, the Passengers have completely side-stepped the comprehensive scheme created by the federal government. They have done so on what I have found to be the erroneous premise that WestJet owed them compensation as a matter of private contract law. In my view, that route was not available to them.

[89] For all those reasons, I find that a claim for compensation for flight delays, cancellations, or denial of boarding is not enforceable as a contractual debt and must be resolved with the Agency pursuant to the *CTA* and *Passenger Regulation*.

VI. OTHER ISSUES

[90] My conclusion that the minimum compensation mandated by the *Passenger Regulation* for, among other things, flight delay or cancellation is not enforceable as a debt has further implications for this petition.

A. Assignment is Invalid

[91] WestJet submits the petition should be dismissed because the assignment is invalid. The petitioner's response to that argument rests entirely on its position that it was pursuing a debt claim. My reasoning on that issue applies here, which defeats the petitioner's arguments on this point.

[92] However, regardless of my discussion and conclusion about whether the compensation provided for under the *Passenger Regulation* is a debt, I find the assignment is invalid. The petitioner provided no authority supporting the notion that one could assign a right to seek judicial review and only addressed the ability to assign claims in debt.

[93] Parties cannot confer, by agreement or otherwise, rights available under the *JRPA*. Those rights have evolved over centuries from their origin as an exercise of the Royal Prerogative to oversee and correct actions of Parliament against citizens. Today, that is expressed as the Court exercising a supervisory jurisdiction over administrative actors, as discussed above (paras. 29–31).

[94] The court's role in a judicial review is different than when resolving private law disputes because it is "a limited remedy, engaging the supervisory authority of the Superior Courts over the work of administrative officials and tribunals" and not "a free-standing mechanism by which the courts take it upon themselves to administer complex administrative schemes": *Lawrence v. British Columbia (Workers' Compensation Appeal Tribunal)*, 2025 BCCA 343 at para. 30.

[95] To put it another way, relief by way of judicial review does not enforce private rights between parties. It is a mechanism by which a person can seek relief from a superior court against the actions of the state. The petitioner's entire argument is based on the erroneous premise that the incorporation of the compensation scheme enacted by the *Passenger Regulation* into the tariff is merely a private, common law contractual term between passengers and airlines. For the reasons I have already given, I disagree.

[96] I conclude the assignment is invalid, which means the petition for judicial review has no legal basis.

B. Standing

[97] Independent of my conclusion that the assignment is invalid, I also find the petitioner has no standing to seek judicial review. It is well established that the right to seek judicial review is limited to a person aggrieved, affected or suffering some exceptional prejudice by the decision being challenged: *Bradshaw v. Workers' Compensation Board*, 2017 BCSC 1092 at para. 89. Justice Giaschi in *Gonzales Hill Preservation Society v. Victoria (City) Board of Variance*, 2021 BCSC 2091, provided a helpful summary of the general principles regarding standing under the *JRPA*:

[59] In *Kitimat (District) v. Alcan Inc.*, 2006 BCCA 562 at para. 47, the Court of Appeal endorsed the following quotation from Sara Blake, *Administrative Law in Canada*, 3rd ed. (Markham: Butterworths Canada Ltd., 2001), concerning standing on applications for judicial review:

Who may be heard on an application for judicial review? Generally, only persons who were parties before the tribunal or who are directly affected by the tribunal's decision may apply for judicial review. Some of the rules with respect to applications for judicial review state that any interested person may be heard. Others are silent on this point.

Any person who was a party before the tribunal may bring an application for judicial review, and is entitled to be served with notice of an application brought by another party. Also, any person who was entitled to be a party before the tribunal may be a party to an application for judicial review. Any person who is directly affected by the decision or action of the tribunal may apply for judicial review, or be a party to an application brought by another. Any person who appears to be interested or likely to be affected by the application for judicial review, should be served. A person who will be affected if the

application for review is successful, may apply for standing as a respondent to the application.

[60] The general test for private interest standing is that the petitioner must be “aggrieved”, “affected” or suffer some “exceptional prejudice” because of the impugned decision. This test is set out in *Bradshaw v Workers’ Compensation Board*, 2017 BCSC 1092 at para. 89:

[89] The authors of Brown and Evans, *Judicial Review of Administration Action in Canada* (Toronto: Carswell, 2014) v. 2, state the test in these terms at para. 4:3420:

At common law a person will have standing to seek a remedy in proceedings of judicial review if he or she is an “aggrieved person,” an “affected person”, or someone who is “exceptionally prejudiced” by the impugned administrative action. The requirements of any of these expressions of the common law test are two-fold: first an identification of the interest and, second, an assessment of its remoteness.

(See also: *Lee & Lee Enterprises Ltd. v. A.G.(B.C.) and BYO Holdings Ltd.*, 2004 BCSC 1546 at para. 18; *J.N. v British Columbia Commissioner for Teacher Regulation*, 2019 BCSC 2 at para. 93)

[61] In *Emerman v. Association of Professional Engineers*, 2008 BCSC 1186 at para. 19, Kelleher J. stated:

[19] To be accorded standing, a petitioner must demonstrate an interest in the proceeding. A petitioner will have an interest in the proceeding where he or she has a private right that has been infringed by the respondent, or which will cause or threaten to cause special damage which extends beyond that suffered by the general public (*Behr v. College of Pharmacists (British Columbia)*, 2005 BCSC 879). This interest may also be conferred by statute.

[62] The proposition that a petitioner must suffer some special form of damage beyond that suffered by the general public is also addressed in *Alberta Liquor* at paras. 8, 10, and 14, set out below.

[63] The general test has been expanded upon in that the sufficiency of the interest of the applicant can be demonstrated by the statutory regime underlying the impugned decision. Indeed, the underlying statutory regime can supplant the common law test and confer standing. This is reflected in *Sandhu v. British Columbia (Provincial Court)*, 2013 BCCA 88 at para. 35:

[35] The approach to be taken with respect to the issue of standing on a judicial review proceeding was set out in *Inland Revenue Commissioners v. National Federation of Self-Employed and Small Businesses Ltd.*, [1981] 2 All E.R. 93 at 108 (H.L.):

The correct approach in such a case is, in my opinion, to look at the statute under which the duty arises, and to see whether it gives any express or implied right to persons in the position of the applicant to complain of the alleged unlawful act or omission.

This passage was quoted with approval by this Court in *Saanich Inlet Preservation Society v. Cowichan Valley Regional District* (1983), 1983 CanLII 382 (BC CA), 147 D.L.R. (3d) 174, 44 B.C.L.R. 121 at 127-128 (C.A.).

[98] Only the Passengers or WestJet were directly affected by the Decision. Only they could seek judicial review of the Decision, which renders the petition unsustainable.

[99] The petitioner was not a party to the Decision and has no direct interest in it. Simply put, it is not entitled to seek compensation under the *Passenger Regulation* because it did not have its flight delayed or cancelled.

[100] I also find the petitioner cannot claim to have public interest standing. It seeks not only to overturn a portion of the Decision, but to receive the compensation provided for under the *Passenger Regulation*. It is attempting to enforce what it characterizes as a private remedy. However, it is not entitled to that remedy because it did not suffer the flight delay or cancellation. Public interest standing should not be extended where there are individuals more directly affected who are not before the court: *Sierra Club of Canada v. Canada (Minister of Finance) (T.D.)*, [1999] 2 FC 211, 1998 CanLII 9124.

C. The Tribunal's Jurisdiction

[101] The parties referred me to other decisions of the Tribunal, which explained its view that it has jurisdiction over claims for compensation under the *Passenger Regulation*, including those released after the Supreme Court of Canada's decision in *International Air: Reshaur v. WestJet Airlines Ltd.*, 2024 BCCRT 1278; and *Pansegrau v. Air Canada*, 2024 BCCRT 1297.

[102] Both decisions are based on the proposition that compensation pursuant to the *Passenger Regulation* is a claim for relief in the form of enforcing a contractual debt. In *Reshaur*, the Tribunal found the relief analogous to a debt since the claimant sought as "[a] specific sum of money due and payable under or by virtue of a contract [whose amount] must either be already ascertained or capable of being ascertained as a mere matter of arithmetic": at paras. 7, 19. The Tribunal decided

that ordering a carrier to pay the standard compensation is not functionally different than ordering a carrier to pay a debt.

[103] Similar reasoning was employed in *Pansegrau*, but the Tribunal also concluded that the *Passenger Regulation* did not explicitly remove a person's right to sue for a breach of contract. Therefore, that right survived and operates parallel to the *Passenger Regulation* compensation scheme: *Pansegrau* at para. 15.

[104] For all the reasons in this judgment, I find that Tribunal's conclusion that a claim for compensation under the *Passenger Regulation* is a claim for a contractual debt is incorrect. Whether WestJet was obliged to compensate the Passengers for their delayed flights was not a matter of simple arithmetic. Although the compensation amount is pre-determined, the obligation to pay depends on whether the cancellation was out of WestJet's control because of a "labour disruption" within the meaning of s. 10(1)(j) of the *Passenger Regulation*. Deciding that issue is not the same as interpreting a contractual term negotiated by the parties. It involves the interpretation and application of federal legislation over which the Agency, and not the Tribunal, has expertise.

[105] Moreover, the Tribunal's reasoning that the right to sue in debt for compensation for delayed flights can co-exist in parallel to the regulatory scheme simply because it was not explicitly removed by the *CTA* or *Passenger Regulation* is tautological. The Supreme Court of Canada noted there is no provision in the *Passenger Regulation* for seeking compensation in court: *International Air* at para. 97. Neither the Provincial Court nor the Tribunal have any original or inherent jurisdiction. They have only the jurisdiction explicitly delegated to them by the provincial legislature. Neither can assume jurisdiction by assuming there is a lacuna in federal legislation.

[106] In addition, practically speaking, permitting tribunals other than the Agency to have jurisdiction to interpret and apply the *Passenger Regulation* opens the door to conflicting interpretations across the country, which undermines the Agency's authority to administer the *Passenger Regulation* as part of its duties for the

regulation of air transportation. It is also contrary to the policy objectives of the *Passenger Regulation* and the aims of the *Montreal Convention*, which both seek to achieve uniformity in the rules governing the obligations and liability of air carriers for, among other things, delays and cancellations.

[107] After the hearing, the petitioner brought *Lareau* to my attention and sought to convene a hearing to make submissions on it (WestJet did not agree that a hearing was necessary). I declined to convene a hearing. In my view, the decision is entirely consistent with my reasoning.

[108] Apart from the legal reasoning, I add that the discussion in *Lareau* illustrates the practical disadvantages of allowing parallel proceedings. The Federal Court outlines in detail the legislative backdrop to the enactment of the *Passenger Regulation* (paras. 8–30), an endeavour that obviously benefited from that Court's inherent familiarity with the Agency and the *CTA*.

[109] For all those reasons, I conclude that the Tribunal wrongly concluded it had jurisdiction to entertain the Passengers' claim.

VII. CONCLUSIONS

[110] For the reasons stated in this judgment, I conclude:

- a) Compensation for delayed or cancelled flights under *CTA* and *Passenger Regulation* as incorporated into WestJet's tariff with the Passengers is not a debt enforceable at common law.
- b) The assignment entered into between the Passengers and the petitioner is invalid and unenforceable.
- c) The petitioner does not have standing to bring the petition.
- d) The Tribunal lacked jurisdiction to decide the Passengers' claim.

[111] The first three conclusions support a conclusion that the petition should be dismissed. However, the fourth conclusion suggests the Decision should be

quashed for the Tribunal's lack of jurisdiction. I am mindful that the no party sought to quash the Decision based on what I have concluded is the Tribunal's lack of justification. For that reason, it is my view that I should not grant any order until the parties have had an opportunity to address the issue of remedy.

[112] I have also declined at this time to address the following issue: was the disruption of the Passengers' journey to Rome due to a labour dispute meaning WestJet did not owe compensation pursuant to s. 19 of the *Passenger Regulation*? In light of this judgment, I also invite the parties to address whether this Court can or should opine on that issue.

[113] For those reasons, I direct that:

- a) Counsel for the petitioner canvas with counsel for WestJet and the Tribunal as to their availability to attend a 30-minute judicial management conference before me to be scheduled at 9:15 a.m.
- b) Counsel for the petitioner identify at least three dates when all counsel are available. Once those dates have been identified, counsel for the petitioner should complete an online Request to Appear referencing this Judgment.
- c) The purpose of that appearance is for each party to advise whether they believe it is appropriate and advisable for the Court to receive, at a later hearing, further submissions about:
 - i. what remedy should be granted in light of this judgment?
 - ii. can or should this Court express an opinion on whether the flight disruption was caused by a labour dispute and therefore out of WestJet's control such that no compensation is owed to the Passengers?
- d) In the event any party is of the view that a judicial management conference is unnecessary or inappropriate, I would ask counsel for the

petitioner to include that view when completing the online Request to Appear.

“Sharma J.”

COURT OF APPEAL FOR BRITISH COLUMBIA

FORM 1

AMENDED NOTICE OF APPEAL (RULE 6(1))



Court of Appeal File No.
(For Registry Use Only)

CA51094

Supreme Court File No.

S254452

The file number can be found on the upper right corner of the Supreme Court documents

Supreme Court Registry Location

New Westminster Registry

To the respondent(s)

A Court proceeding has been commenced against you in the Court of Appeal. See the final page of this form for details on how to respond.

1. PARTIES TO THE APPEAL

Appellant(s)

List the party(ies) appealing the Supreme Court or tribunal order. Identify their roles in the proceeding below in brackets. E.g., Jane Doe (plaintiff, petitioner, etc.)

Air Passenger Rights
(petitioner)

Respondent(s)

List the other party(ies) in the Supreme Court or tribunal order you are appealing who are affected by the appeal. Identify their roles in the proceeding below in brackets. E.g., Jane Doe (defendant).

WestJet Airlines Ltd.
(respondent)

Civil Resolution Tribunal
(tribunal whose order was under judicial review)

2. THE ORDER YOU ARE APPEALING

Is leave to appeal required?

Court of Appeal Rule 12 explains when you need leave to appeal. If you are unsure, check "Yes".

☐ Yes ☒ No

Who made the order?

Name the justice or other decision maker who pronounced the order you are appealing.

The Honourable Madam Justice Sharma

What court and/or tribunal pronounced the order(s)?

☒ Supreme Court ☐ Tribunal

Name of tribunal

Date the order was pronounced

Include the day, month and year that the order being appealed was pronounced (not the date the order was entered).

30/10/2025

DD/MM/YYYY

City where the order was pronounced

New Westminster

Length of lower court hearing

Indicate in days or hours the length of the hearing that led to the order you are appealing from. For example, if you are appealing a judgment from a trial that took two hours, enter "two hours."

2 days

What type of proceeding are you appealing from?

Check one only.

☐ Trial Judgment ☐ Order of a Tribunal
☐ Summary Trial Judgment ☒ Chambers Judgment

3. RELIEF SOUGHT

If leave to appeal is not required, fill out Part A. If you are seeking leave to appeal, fill out Part B.

PART A: LEAVE NOT REQUIRED

Part of the order being appealed

If you only want to appeal one part of an order, enter the part that is being appealed.

The entire Order is being appealed.

Order(s) you are seeking on appeal

Briefly list the order(s) you will ask this Court to make on appeal. For example: "Set aside the trial judgment and order a new trial". Include any order as to costs.

1. The appeal be allowed.
2. The petition for judicial review be granted, or alternatively remitted back to the Supreme Court with directions.
3. Costs of the appeal and the underlying petition for judicial review.
2. The judgment from the court below be set aside and substituted with the following declarations: (a) the claims were within the jurisdiction of the B.C. Civil Resolution Tribunal; (b) the absolute assignment is valid under s. 36 of the Law and Equity Act; and (c) the appellant has standing to seek judicial review of the B.C. Civil Resolution Tribunal decision.
3. Remitting the remaining issues in the interpretation of "outside control" under the Air Passenger Protection Regulations back to the Supreme Court of British Columbia to be heard de novo before another judge.
4. Costs of this appeal and the proceedings in the court below to date.
5. Any other relief that this Honourable Court deems just.

PART B: SEEKING LEAVE TO APPEAL**Part of the order being appealed**

If you are only seeking leave to appeal one part of an order, enter the part that you are seeking leave to appeal.

Grounds for leave to appeal

Be as specific as possible. For example, if you believe the trial judge used an incorrect legal test or otherwise misapplied the law, indicate that here.

4. ADDITIONAL INFORMATION**Sealing order**

Is there an order sealing any part of the trial court or tribunal file? If yes, add date(s).

☐ Yes ☒ No

Date

DD/MM/YYYY

Anonymity order/publication ban

Are there orders that protect the identity of a party or parties? If yes, add date(s).

☐ Yes ☒ No

Date

DD/MM/YYYY

Areas of law raised in the appeal

You may check more than one box if appropriate. For example, you should check "motor vehicle accidents" and "torts" for a personal injury claim involving a motor vehicle accident.

- ☒ Constitutional/Administrative
☐ Motor Vehicle Accidents
☐ Torts
☐ Divorce Act (Canada)

- ☒ Civil Procedure
☐ Municipal Law
☐ Equity
☐ Family Law Act

- ☐ Commercial
☐ Real Property
☐ Wills and Estates
☒ Other

Appeals involving children

Does this appeal involve the rights or interests of a child? E.g., Parenting order

- ☐ Yes ☒ No

5. SERVICE**Are you representing yourself?**

- ☐ Yes ☒ No

Name(s) and address(es) within BC for service of appellant(s). *If you have a lawyer, include the law firm's address; otherwise provide your own residential address.*

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

Phone number(s) of appellant(s)

604-620-2666

Email address(es) for service of appellant(s)
If you provide an email address, you are consenting to have documents served on you by email.

service@evolinklaw.com

Date form completed

Date

Original filed on 30/10/2025
 Amended on 17/11/2025

Name of lawyer or party authorizing filing of this form

Simon Lin

DD/MM/YYYY

To the appellant(s):

You must file and serve this form on each respondent named in this document within the timelines required by the *Court of Appeal Act* and Court of Appeal Rules. You must file a Notice of Hearing **not more than one year** after filing this Form 1 or your appeal will be placed on the inactive list (Rule 50(1)(a)).

To the respondent(s)

If you intend to participate in this proceeding, **you must give notice** of your intention by doing the following **not more than 10 days** after receiving this Notice of Appeal: (1) file a "Notice of Appearance" (Form 2 of the *Court of Appeal Rules*) in a Court of Appeal registry and; (2) serve the Notice of Appearance on the appellant.

If you fail to file and serve a Notice Appearance:

- (a) You are presumed to take no position on the appeal, or the application for leave to appeal (if leave is required).
- (b) The parties are not obliged to serve you with any further documents related to the appeal, including an order granting leave to appeal (if leave is required).

You are presumed to take no position if you fail to file and serve a Notice of Appearance within the time described above. The filing registries for the British Columbia Court of Appeal are as follows.

Central Registry:

B.C. Court of Appeal
Suite 400, 800 Hornby St.
Vancouver BC V6Z 2C5

Other Registries:

B.C. Court of Appeal
The Law Courts
P.O. Box 9248
STN PROV GOVT
850 Burdett Ave.
Victoria BC V8W 1B4

B.C. Court of Appeal
223 - 455 Columbia St.
Kamloops BC V2C 6K4

Inquiries should be addressed to (604) 660-2468.