



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 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

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.

*University of British Columbia v. James A. Rice Ltd.*,  
[1995] B.C.J. No. 15 ("*UBC v Rice*") at 10

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.