



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 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 November 14, 2024.

The application respondent estimates that the application will take **half day** if heard separately from the judicial review petition and thirty (30) minutes if heard alongside the judicial review petition.

**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**

1. The Respondent is bringing this application for the purpose of manufacturing a delay of the hearing of the judicial review on its merits, similar to the situation in [\*Quebec \(Director of Criminal and Penal Prosecutions\) v. Jodoin\*](#), 2017 SCC 26 where an application that was plainly without merit and was filed to create a delay.
2. The judicial review petition was scheduled to be heard on November 21, 2024 for one day, a date and length that was canvassed and agreed upon by all the parties.
3. On November 14, 2024, the Respondent filed a last-minute application to adduce further evidence for the judicial review petition and to cross-examine the petitioner's affiant. The unfiled Notice of Application indicated that the hearing was set for November 21, 2024 but the filed version was changed to November 28, 2024, likely because the Respondent failed to meet the Rule 8-1(7) 8-business days service requirement. The premise of the Respondent's application is that they claim that the assignment the Petition has received was somehow champertous.
4. On September 19, 2024, the Respondent was informed with clear supporting legal authorities that their champerty assertion is wholly without merit. The Respondent ignored the Petitioner's letter on the merits of their champerty assertion.
5. On November 21, 2024, the judicial review petition could not be heard as there was no judge available. The Respondent insisted on resetting the application for two days to address their various "preliminary issues" (i.e., their application). After having expanded the judicial review hearing for two days, the Respondent then claims they are looking to have their application heard in advance.
6. After filing this response, the Petitioner will be filing a requisition to seek directions under Rule 8-1(22) that the Respondent's application be heard by the presiding judge at the same time as the judicial review scheduled on March 24-25, 2025.
7. Petitioner seeks leave to file costs submissions after this application is decided.

**Relevant Chronology for the Respondent's Application**

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

Affidavit #1 of Brittany Dieno made on November 18, 2024 [**Dieno Affidavit #1**] at Exhibit K  
(p. 37)

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

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

10. 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)

11. On August 19, 2024, the Respondent filed and served their Response to Petition and a supporting affidavit. Notably, the "champerty" issue was stated in the Response to Petition but the Respondent did not make any request, nor indicate, that they intend to cross-examine the Petitioner's affiant.

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

12. 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

13. 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 untenable.

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

14. 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." Notably, at this time the Respondent still did not make any indications that they are looking 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:

*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]

15. 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)

16. 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)

17. 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)

18. 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.

19. 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)

20. On November 13, 2024, 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 petition 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)

21. 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 fatally flawed. The Petitioner brought to the Respondent's attention that the Court of Appeal guidance is that, in the context of judicial review petitions, 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 such as cross-examinations.

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

22. Shortly after the aforementioned letter, the Respondent served a Notice of Application for November 28, 2024, 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)

23. Upon receiving the aforementioned Notice of Application, the Petitioner wrote to the respondent indicating that there is no reason why the 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)

24. On November 19, 2024, the Petitioner served an affidavit that was intended to address both aspects of the Respondent's 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, rather than on November 21, 2024.

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

25. 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)

26. 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."

27. 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 application to be heard in advance of the judicial review petition.

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

28. 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)

## **PART 5: LEGAL BASIS**

29. It is apparent from the timeline above that:

- a. There never was and there is no real intention to cross-examine the Petitioner's affiant, when the Respondent was silent on this between August 6, 2024 until November 12, 2024.
- b. The Respondent only raised the prospect of cross-examination one week before the petition hearing to manufacture an adjournment.
- c. The Court's availability (i.e., the lack of a judge on November 21, 2024) is being exploited to delay the judicial review petition.

30. The Petitioner seeks a direction that the Respondent's application be heard by the presiding judge at the same time as the judicial review petition scheduled for March 24-25, 2025. The Petitioner is also bringing a requisition for directions under Rule 8-1(22) to that effect.



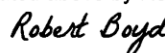
31. The three premises that underlie the Respondent's application obviously overlaps significantly with the judicial review petition and also plainly without merit: (a) the assignment failing for allegedly lacking consideration; (b) the assignment being

allegedly champertous; and (c) cross-examination on an affidavit can be sought in advance before the Court even considers if there is a triable issue.

### **The Assignment Allegedly Lacking Consideration**

32. Setting aside the fact that the Response to Petition never raised this “lack of consideration” assertion, the Respondent is clearly raising this to create confusion.

33. The assignment was obviously signed under seal:

Signed, sealed and delivered, on the date indicated above by Anne Boyd	}	Signed, sealed and delivered, on the date indicated above by Robert Boyd	}	
<i>Anne Boyd</i>		<i>Robert Boyd</i>		Sealed
				
Sealed		Sealed		
_____ Anne Boyd		_____ Robert Boyd		

34. It is established law for centuries that a contract under seal does not require consideration. The same applies to an assignment (which is, at this core, also 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

### **The Assignment Allegedly Being Champertous**

35. The assignment seeks to assign two debts: (a) a judgment debt of \$355.53; and (b) a *Air Passenger Protection Regulations* claim for a liquidated amount of \$2,000.

36. 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 Choi](#), 2019 BCSC 86



37. 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.

[\*Interclaim Holdings Limited v. Down\*](#), 2001 BCCA 65 at paras. 2, 21-26 and 33

38. The judgment debt of \$355.53 is clearly a debt that is assignable.

39. The Supreme Court of Canada's recent guidance on the *Air Passenger Protection Regulations* confirms that the liquidated claims under that regulation is debt. The CRT also adopted the Supreme Court of Canada's approach in that regard.

[\*International Air Transport Association v. Canada \(Transportation Agency\)\*](#), 2024 SCC 30 at para. 97  
SC-2024-006024 CRT Default Decision and Order

40. The Respondent's request for cross-examination is nothing more than a fishing expedition to create delay.

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

### **Cross-Examination on an Affidavit Before the Court Finding a Triable Issue**

41. Rule 16-1(18) confirms that Rule 16-1 is effectively a "complete code" in respect of petition proceedings. The Court retains the discretion to apply other provisions of the *Supreme Court Civil Rules*, such as cross-examination on affidavits, as the presiding judge deems necessary.

42. Judicial review petition is a unique species of petition proceedings that is typically heard "on the record" (i.e., based on affidavit evidence) on a summary basis. Cross-examinations and other fact-finding steps are highly unusual. Typically, the Court would order cross-examinations or other fact-finding steps only when there is a triable issue that cannot be resolved "on the record."

[\*Cepuran v. Carlton\*](#), 2022 BCCA 76 at paras. 140, 152-164  
[\*Beedie \(Keefer Street\) Holdings Ltd. v. Vancouver \(City\)\*](#), 2021 BCCA 160

43. It is plainly without doubt that there is no "triable issue" since the assignments are of debts that have been permitted for over a century.

**Respondent's Further Affidavit is Contrary to Rule 16-1(7)**

44. The Respondent failed to explain why they had not included their further affidavit evidence as part of their response affidavit. The circumstances and the factual record in the proceedings below has not changed in the two months (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.
45. 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 argument when the affidavit commissioning issue turned out to be baseless.
46. In any event, the Respondent's further affidavit bears no relevance to the judicial review proceeding and nothing more than another red-herring to create confusion.

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

**Costs**


47. Petitioner seeks leave to make costs submissions after this application is decided.

**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 #1 of Dr. Gabor Lukacs made on July 29, 2024.
4. The pleadings and proceedings filed within.
5. 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: December 9, 2024



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Signature of lawyer for application respondent, Simon Lin