New Westminster

09-Dec-24

REGISTRY

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FORM 17
(RULES 4-6 (1), 5-4 (1), 8-1 (21.1) AND (22), 9-4 (1), 13-3 (25), 16-1 (16.1) AND (17), 20-5 (3), 23-1 (9) and 23-3 (10))

No. S-254452

New Westminster Registry

In the Supreme Court of British Columbia

Between

AIR PASSENGER RIGHTS — Petitioner

and

WESTJET AIRLINES LTD. — Respondent

Add Additional Parties

REQUISITION - GENERAL

[Rule 22-3 of the Supreme Court Civil Rules applies to all forms.]

Filed by: the Petitioner

Required: The Petitioner is applying for directions under Rule 8-1(22) to reset the hearing of the Respondent's Application filed on November 14, 2024. The Petitioner seeks a direction that the application be heard by the presiding judge hearing the judicial review petition on March 24-25, 2025.

The Petitioner estimates that this application for directions would require fifteen (15) minutes.

The Petitioner will bring this application for directions on January 13, 2025 at 9:45 a.m. at the New Westminster Registry.

This application for directions is within the jurisdiction of an Associate Judge.

This requisition is supported by the following:

[*Include a description of supporting document(s). Each affidavit included on the list must be identified as follows:* "Affidavit #.....[*sequential number, if any, recorded in the top right hand corner of the affidavit*]..... of ..... [*name*]....., made .....[*date*]....."."]

1 Application Response filed December 9, 2024 Delete

2 Notice of Application filed November 14, 2024 Delete

Add

Date: 09/Dec/2024

[date]

Simon Pak Hei Lin 9QIYYS

Digitally signed by Simon Pak Hei Lin 9QIYYS
Date: 2024.12.09 09:39:52 -08'00'

Signature of

☐ filing party ☒ lawyer for filing party(ies)

Simon Lin

[*type or print name*]

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 <u>in argument</u>.*

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 <u>for the very first time</u> 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 <u>unfiled</u> 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 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.

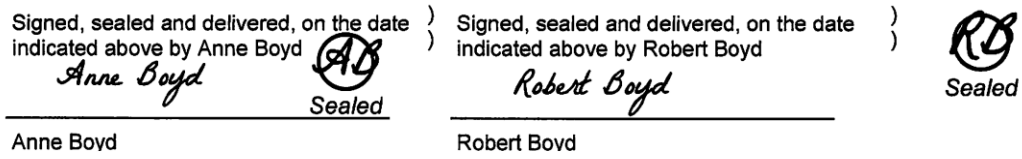
31. The three premises that underlie the Respondent's application obviously overlaps significantly with the judicial review petition and also plainly without merit: (a) the assignment failing for allegedly lacking consideration; (b) the assignment being

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 Assigment 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:



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 Assigment 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.

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

Dated: December 9, 2024 Simon Lin

Signature of lawyer for application respondent, Simon Lin

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…"

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.

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

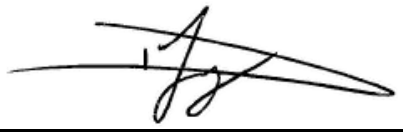
(c) serve on the applicant 2 copies of the following, and on every other party of record one copy of the following:

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.