



COURT OF APPEAL FILE NO. CA51094  
Air Passenger Rights v. WestJet Airlines Ltd.  
Memorandum of Argument

**COURT OF APPEAL**

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

BETWEEN:

**AIR PASSENGER RIGHTS**

APPELLANT  
(Petitioner)

AND:

**WESTJET AIRLINES LTD.**

RESPONDENT  
(Respondent)

AND:

**CIVIL RESOLUTION TRIBUNAL and  
ATTORNEY GENERAL OF BRITISH COLUMBIA**

RESPONDENTS

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**MEMORANDUM OF ARGUMENT ON AN APPLICATION  
TO STRIKE PORTIONS OF WESTJET'S FACTUM**  
WestJet Airlines Ltd.

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1. WestJet had intended to respond to the appellant's application to strike portions of its factum in the course of the hearing, as an application respondent is entitled to do pursuant to Rule 55 and Rule 60 of the *Court of Appeal Rules*. However, the appellant has advised that it is taking the position that its application is now unopposed because WestJet lost its chance to oppose the application by not filing response materials by 4 pm on March 12, 2026. WestJet wishes to make clear that it does oppose the appellant's application and provide the following brief summary of its position to the Court.

2. The appellant seeks to strike certain portions of WestJet's factum on two bases: 1) that it is an abuse of process for WestJet to take the position on this appeal that the Civil Resolution Tribunal has no jurisdiction over claims brought pursuant to the *Air Passenger Protection Regulations* ("APPR"), when it did not challenge jurisdiction before either the CRT or the chambers judge; and 2) assuming the Court finds the chambers judge erred in ruling that the CRT did not have jurisdiction over APPR claims, this Court has no jurisdiction to adjudicate the issue of whether the delay was caused by a labour disruption because WestJet "abandoned" that issue before the chambers judge and/or was required to have filed a cross appeal in order for this Court to decide the issue.

### **Law regarding Applications to Strike Factums**

3. The court's power to strike out parts of a factum must be exercised "sparingly" and with "caution", balanced against "the necessity of maintaining the integrity of the appeal process". This includes that the division which hears the appeal should not be "deprived of full argument on the issues properly raised": *Poon v. Yuen*, 2024 BCCA 296 (Chambers) at paras. 21, 22 and 31.
4. The types of circumstances in which this Court may strike a factum are where it is "scandalous, vexatious and without merit, and unintelligible or irrelevant" to the extent that the other party is not able to discern the party's arguments and file a responsive factum (*Gould v. Sandau*, 2004 BCCA 90 (Chambers) at paras. 13-16), or where a respondent makes arguments in their factum seeking to vary an order under appeal without having filed a cross appeal (*Douglas Lake Cattle Company v. Nicola Valley Fish and Game Club*, 2019 BCCA 439 (Chambers) at para. 43.
5. No circumstances warranting a striking of any portion of WestJet's factum are present here.

### **Alleged Abuse of Process**

6. WestJet's response on this issue is two-fold: 1) it is not an abuse of process to seek to uphold the decision under appeal on an issue raised by the court; and 2)

if WestJet is not permitted to oppose the appellant's position on jurisdiction, that position will go unanswered, depriving this Court of an adversarial context.

**(a) It is not an abuse of process to seek to uphold the decision under appeal on an issue raised by the court**

7. The case law relied on by the appellant is distinguishable, as it involves parties taking positions contradictory to those taken at trial in an attempt to obtain a different result – they do not involve parties seeking to uphold the order under appeal, particularly where the issue under appeal was raised by the court. See, for example, *Argo Ventures Inv. v. Choi*, 2020 BCCA 17, and *Protection Mutual Insurance Co. v. Beaumont*, 1991 CanLII 5728 (B.C.C.A.).
8. Here, the judge was not precluded from raising the issue of jurisdiction, given her obvious concerns with whether the CRT had jurisdiction to decide the claim. As set out in para. 45 of WestJet's factum, a party's failure to challenge jurisdiction "cannot cloak the Court with jurisdiction which has not been properly engaged": *Stora Enso Publication Paper GmbH & Co. KG v. Canada*, 2009 FC 625 at para. 14. The chambers judge could not simply turn a blind eye to the issue of jurisdiction, even though the parties did not put it in issue.
9. In *Sharbern Holding Inc. v. Vancouver Airport Centre Ltd.*, 2008 BCCA 387 (Chambers), the appellants made a similar argument as the appellant in this case, arguing that the respondent was attempting to introduce an inappropriate and extraneous element in its factum that lay outside the scope of the appeal. The Court found that, in contrast, the respondent's argument represented "a legitimate attempt to support the trial judge's decision by reference to the very statute in question on an issue squarely before the Court" (at para. 10).

**(b) This court should not be deprived of an adversarial context**

10. The effect of the appellant's position is that its argument that the chambers judge erred in concluding the CRT did not have jurisdiction should go unanswered in this Court. The CRT, consistent with its role in proceedings involving judicial review of its decisions, does not take a substantive position on this point. Consequently, if

WestJet is prevented from seeking to uphold the chambers' judge's decision on jurisdiction (which the appellant admits is a question of law), the court will be deprived of an adversarial context on this issue. This would not be in the interests of justice.

11. In *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342, the Supreme Court of Canada stated that "the requirement of an adversarial context is a fundamental tenet of our legal system and helps guarantee that issues are well and fully argued by parties who have a stake in the outcome". Whether there remains an adversarial context is a significant factor in the exercise of this Court's discretion to decide whether to hear a moot appeal, and WestJet submits the same considerations apply here.

#### **Alleged Abandonment of Labour Disruption Issue/Need for a Cross Appeal**

12. WestJet also makes two points on this issue. First, it would have served no purpose for the chambers judge to decide the issue of whether the delay was caused by a labour disruption. Second, it was not open to WestJet to bring a cross appeal in this case, as it is seeking to uphold the chambers judge's order, not vary it or set it aside.

##### **(a) It would have served no purpose for the chambers judge to decide the labour disruption issue**

13. WestJet has addressed this point at paras. 66-68 of its factum. In brief, it submits that given that if the chambers judge had decided the issue, this Court would have owed her no deference, it did not serve any useful purpose for her to do so, when she had already disposed of the matter on multiple alternative bases – lack of jurisdiction, lack of standing, and invalidity of the assignment. Her reasoning on the labour disruption point would have been *obiter*, and where she had already rendered reasons not addressing it, it did not make sense for her to go back and do so. In the judicial management conference discussing her order, WestJet conveyed to the judge that, in the circumstances, it "may not be the best use of the court's time" for her to address the issue. This was not an "abandonment" of it.

**(b) WestJet could not have filed a cross appeal**

14. The authors of the *Civil Appeal Handbook* succinctly summarize the circumstances in which a cross appeal may be brought, at §4.8:

Where a party does not take issue with an order in the court below, but wishes to uphold the judgment on a basis other than the one that found favour in that court, the party is required to raise the argument in their response to the appeal, not in a cross appeal. This is underscored by [s. 14](#) of the Act, which provides that a respondent “may bring a cross appeal to request that the court vary any part of an order being appealed”, as well as [Rule 8](#), which provides that a respondent “may file a notice of cross appeal only if the respondent ... is seeking to vary the order being appealed, and ... is seeking relief from the court that is different from the relief sought by the appellant, as described in the notice of appeal”.

[Footnote omitted.]

15. WestJet does not take issue with the chambers judge’s order, which both quashes the decision of the CRT and dismisses the petition. Rather, it seeks to uphold it in its entirety. However, if this Court does not agree that the CRT had no jurisdiction, that the appellant had no standing, and that the assignment was invalid, WestJet seek to uphold the order on a different basis: that the petition should be dismissed on the basis that the CRT’s decision on the question of whether a labour disruption could begin prior to the issuance of a strike or lockout notice was correct.
16. WestJet submits that whether this Court is willing to decide this issue is not a matter of jurisdiction or that should otherwise be the subject of an application to strike its factum. Rather, the issue for the Court will be whether it is able to make any necessary findings to do so – which WestJet submits poses no difficulty, given that it is a question of law – and whether it would be in the interests of justice to remit it. It submits that it cannot be in the interests of justice to remit a matter to a chambers judge on a judicial review where the judge will not be making any findings necessary to arrive at a decision. Unlike such heavily fact-dependent matters as assessing damages in a personal injury matter where an appeal has been allowed on liability, this Court can decide the legal question in this case as

well as the chambers judge could have. To do so would minimize cost and delay for the parties, and be a more efficient use of court resources. There is no valid reason to remit the matter to the BC Supreme Court.

**Costs**

17. WestJet submits that this application was ill-advised, and seeks its costs in any event of the cause.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated at the City of Vancouver, Province of British Columbia, this 13<sup>th</sup> day of March, 2026.

A handwritten signature in black ink, appearing to be a stylized combination of the names Michael Dery and Kathryn McGoldrick, written over a horizontal line.

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Michael Dery and Kathryn McGoldrick,  
Counsel for the Respondent,  
WestJet Airlines Ltd.

### Table of Authorities

<b>Authority</b>
<i>Argo Ventures Inv. v. Choi</i> , 2020 BCCA 17
<i>Borowski v. Canada (Attorney General)</i> , [1989] 1 S.C.R. 342
<i>Douglas Lake Cattle Company v. Nicola Valley Fish and Game Club</i> , 2019 BCCA 439 (Chambers)
<i>Gould v. Sandau</i> , 2004 BCCA 90 (Chambers)
<i>Poon v. Yuen</i> , 2024 BCCA 296 (Chambers)
<i>Protection Mutual Insurance Co. v. Beaumont</i> , 1991 CanLII 5728 (B.C.C.A.)
<i>Sharbern Holding Inc. v. Vancouver Airport Centre Ltd.</i> , 2008 BCCA 387
<i>Stora Enso Publication Paper GmbH &amp; Co. KG v. Canada</i> , 2009 FC 625
<b>Secondary Sources</b>
<i>Civil Appeal Handbook (Continuing Legal Education Society of British Columbia, 2002, looseleaf, updated to April 2025)</i>