

FORM 67 (Rule 16-1(5) and Rule 25-14(2))

> No. S-S-254452 New Westminster Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

AIR PASSENGER RIGHTS

PETITIONER

AND:

WESTJET AIRLINES LTD

RESPONDENT

RESPONSE TO PETITION

Filed by: Civil Resolution Tribunal (the "CRT" or the "Tribunal")

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

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

Part 1: ORDERS CONSENTED TO

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

Part 2: ORDERS OPPOSED

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

Part 3: ORDERS ON WHICH NO POSITION IS TAKEN

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

Part 4: FACTUAL BASIS

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

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

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

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

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

² SOR/2019-150.

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

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

The Civil Resolution Tribunal

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

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

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

- (a) debt or damages;
- (b) recovery of personal property;

(c) specific performance of an agreement relating to personal property or services; and

(d) relief from opposing claims to personal property.⁵

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

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

⁴ *Ibid*, s. 2.1.

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

⁶ *Ibid*, s. 119(1).

⁷ *Ibid*, s. 119(2)

⁸ Ibid, s. 9.

The CRT Process

i) The Solution Explorer and applying for dispute resolution

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

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

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

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

ii) The Case Management Phase

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

⁹ CRTA, supra note 3, s. 6(1).

¹⁰ CRT Standard Rules ("Rules").

¹¹ CRTA, supra note 3, s. 17(1).

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

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

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

iii) The Tribunal Hearing Phase

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

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

Part 5: LEGAL BASIS

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

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

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

¹⁵ *Ibid*, s. 39(1).

¹⁶ *Ibid*, s. 42.

¹⁷ *Ibid*, ss. 46-51.

Review Procedure Act ("JRPA").¹⁸

Preliminary Issue: Who defends the decision?

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

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

Preliminary Issue: Assignment

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

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

¹⁸ RSBC 1996, c 241.

¹⁹ British Columbia (Human Rights Tribunal) v. Gibraltar Mines Ltd., 2023 BCCA 168 at paras. 29 – 35 ²⁰ Ibid at para. 29.

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

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

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

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

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

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

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

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

[Emphasis added and citations omitted.]

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

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

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

²⁵ Nathanson, ibid at para. 20.

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

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

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

Preliminary Issue: Standing

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

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

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

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

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

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

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

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

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

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

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

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

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

³¹ RSBC 1996, c 430, s. 2(1).

³² Sandhu, supra note 30 at para 36.

³³ CRTA, supra note 3, s. 2(2)(a).

Standard of Review

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

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

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

Standard of review – other tribunal decisions

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

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

(a) a finding of fact,

(b) the exercise of discretion, or

(c) the application of common law rules of natural justice and procedural fairness.

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

(a) there is no evidence to support the finding, or

(b) in light of all the evidence, the finding is otherwise unreasonable.

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

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

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

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

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

(i) Correctness

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

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

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

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

³⁵ SBC 2004, c. 45.

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

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

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

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

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

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

(iii) Patent Unreasonableness

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

Discretionary decision – patently unreasonable

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

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

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

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

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

⁴¹ *Ibid.* at para. 56.

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

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

When reviewing for patent unreasonableness, the court is not to ask itself whether it is persuaded by the tribunal's rationale for its decision; it is to merely ask whether, assessing the decision as a whole, there is any rational or tenable line of analysis supporting the decision such that the decision is not clearly irrational or, expressed in the *Ryan (Law Society of New Brunswick v. Ryan,* 2003 SCC 20) formulation, whether the decision is not clearly irrational or otherwise flawed to the extreme degree described in Ryan, it cannot be said to be patently unreasonable. This is so regardless of whether the court agrees with the tribunal's conclusion or finds the analysis persuasive. Even if there are aspects of the reasoning which the court considers flawed or unreasonable, so long as they do not affect the reasonableness of the decision taken as a whole, the decision is not patently unreasonable.

In other words, the standard is at the most deferential end of the reasonableness standard \dots^{44}

Remedies

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

Powers to direct tribunal to reconsider

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

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

(a) advise the tribunal of its reasons, and

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

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

⁴⁴ *Ibid* at para. 129.

Effect of direction

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

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

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

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

⁴⁵ Vavilov, supra note 37 at para 142.

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

Part 6: MATERIAL TO BE RELIED ON

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

Date: August 30, 2024

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

Zara Rahman

Petition respondent's address for service:

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