SCC Court File Number: _____

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE BRITISH COLUMBIA COURT OF APPEAL)

B E T W E E N:

WESTJET AIRLINES LTD.

APPLICANT
(*Appellant)*

- and –

MANDALENA LEWIS

RESPONDENT
(*Respondent*)

APPLICATION FOR LEAVE TO APPEAL
(WESTJET AIRLINES LTD., APPLICANT)
(Pursuant to Section 40 of the *Supreme Court Act*, RSC 1985)

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TABLE OF CONTENTS

4. Documents Relied Upon

PART I – OVERVIEW OF POSITION AND STATEMENT OF FACTS

1. This case, a proposed class action, relates to a matter of significant public interest in Canada: addressing sexual harassment and discrimination in the workplace. The decision below of the B.C. Court of Appeal has opened the door for employees to avoid the comprehensive federal human rights regime established by Parliament and bring human rights claims directly to the courts.

2. Permitting a claim which is, at its core, for statutory human rights violations to bypass the human rights regime and proceed in the courts is contrary to this Honourable Court's jurisprudence. In both *Bhadauria v. Seneca College of Applied Arts & Technology*[1] ("***Bhadauria***") and *Keays v. Honda Canada Inc.*[2] ("***Keays***"), the Supreme Court of Canada held that:

- human rights legislation provides a comprehensive scheme for the treatment of claims of discrimination; and
- a common law action based on an invocation of the public policy expressed in human rights legislation cannot constitute an actionable wrong in the Courts.

3. The Respondent Plaintiff is a former employee of the Applicant, WestJet Airlines Ltd. ("**WestJet**"), and seeks to bring this proposed class action against WestJet on behalf of all former and current WestJet female flight attendants (the "**Proposed Class**"). The Plaintiff claims that the Proposed Class were exposed to sexual harassment by male WestJet pilots in the workplace, in breach of WestJet's alleged "*Anti-Harassment Promise*" term contained in its employment contracts with the Proposed Class.

4. This case raises the following questions of national and public importance:

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[1] *Seneca College of Applied Arts & Technology v. Bhadauria*, [1981] 2 SCR 181 (SCC) [***Bhadauria***], at para. 27

[2] *Keays v. Honda Canada Inc.*, 2008 SCC 39, Majority Reasons for Judgment of Bastarache J. [***Keays*, Majority Reasons**] at para. 64

- Can a federally regulated employer's sexual harassment policy (which must be implemented pursuant to the *Canada Labour Code*)[3] give rise to a claim for breach of contract?
- Do the Canadian Human Rights Commission and Tribunal have exclusive jurisdiction over claims of sexual harassment in a non-unionized, federal employment context, when the plaintiff has not pleaded a claim for constructive dismissal?
- In a proposed employment class action, can pleading the novel remedy of "restitutionary disgorgement" of profits sustain a cause of action when there is otherwise no valid claim for compensable damages?

A. Federal Legislation at Issue

5. The *Canadian Human Rights Act*[4] ("***CHRA***") is the human rights legislation applicable to discriminatory practices, including sexual harassment, within federally regulated workplaces.[5] As the Supreme Court of Canada endorsed in *Robichaud*,[6] the *CHRA* is designed to be remedial, not punitive. The wide range of remedies available under the *CHRA* also serve the broad purpose of preventing future discrimination by acting as both a deterrent and an educational tool.[7]

6. Federally regulated employers are required under the *Canada Labour Code*[8] ("***CLC***"), to make every reasonable effort to ensure that no employee is subjected to sexual harassment,[9] and to ensure that employees know about their rights under the *CHRA*. Pursuant to the *CLC*, a federal employer must implement a sexual harassment policy within its workplace that includes:

> a) a definition of sexual harassment that is substantially the same as the definition in section 247.1 of the *CLC*;

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[3] *Canada Labour Code*, RSC 1985, c L-2 [***CLC***] at s. 247.4
[4] *Canadian Human Rights Act*, RSC 1985, c H-6 [***CHRA***]
[5] *CHRA* at s. 14(2)
[6] *Robichaud v. Canada*, [1987] 2 SCR 84 (SCC) [***Robichaud***] at para. 9
[7] *First Nations Child and Family Caring Society of Canada and Canada (Attorney General), Re*, 2016 CHRT 10, 2016 TCDP 10 at para. 17
[8] *Canada Labour Code*, RSC 1985, c L-2
[9] *CLC* at ss. 247.2, 247.3

b) a statement that every employee is entitled to employment free of sexual harassment;

c) a statement that the employer will make every reasonable effort to ensure that no employee is subjected to sexual harassment;

d) a statement that the employer will take such disciplinary measures as the employer deems appropriate against any person under the employer's direction who subjects any employee to sexual harassment;

e) a statement explaining how complaints of sexual harassment may be brought to the attention of the employer;

f) a statement that the employer will not disclose the name of a complainant or the circumstances related to the complaint to any person except where disclosure is necessary; and

g) a statement informing employees of the discriminatory practices provisions of the *Canadian Human Rights Act* that pertain to rights of persons to seek redress under that *Act* in respect of sexual harassment.[10]

7. It is not in dispute that WestJet complied with its statutory obligations under the *CLC* and *CHRA*, by taking the step of incorporating a sexual harassment policy into its workplace and into its terms of employment.

B. Human Rights Class Action

8. In this proposed class action, the Plaintiff claims that WestJet's sexual harassment policy gives rise to a freestanding, common law cause of action for breach of contract. The Plaintiff alleges that WestJet's sexual harassment policy forms an "*Anti-Harassment Promise*" term within WestJet's employment contracts and that WestJet breached the "*Anti-Harassment Promise*" by not implementing its sexual harassment policy appropriately.

9. The Plaintiff has expressly conceded in these proceedings that she does not seek relief in the form of compensatory damages on behalf of the proposed class, and that the claim does not include constructive dismissal claims or claims for personal injury. Instead, the Plaintiff seeks a

[10] *Ibid* at s. 247.4(2)

novel form of relief: the equitable remedy of "restitutionary disgorgement".[11] The Plaintiff claims that: WestJet improperly profited from failing to effectively implement its own sexual harassment policy; that WestJet ought not benefit from its improper conduct; and that the pleading of this equitable remedy can therefore sustain a common law cause of action for systemic breach of contract.

10. This proposed class action is an attempt by the Plaintiff to bring a human rights class action, based purely on violations of the *CHRA*.

11. It is clear that in employment law, employees can bring claims for breach of contract when human rights violations give rise to *constructive dismissal*. What is unclear is whether an employee can validly bring a common law action for breach of contract arising from sex-based discrimination when constructive dismissal is not pleaded.

12. The Plaintiff's claims for "breach of contract" would in fact be identical to claims for breaches of the statutory rights provided under the *CHRA*, because the "*Anti-Harassment Promise*" term alleged is identical to the statutory requirements for WestJet's sexual harassment policy under the *CLC* and *CHRA*.

13. The "*Anti-Harassment Promise*" alleged by the Plaintiff must necessarily be subsumed within the statutory rights provided under the *CLC* and *CHRA*, as under the legislation an employer cannot validly:

- implement a sexual harassment policy that does not entitle an employee to a harassment free workplace;[12] or
- otherwise refuse to incorporate the sexual harassment policy into its terms of employment.[13]

14. If an employee can simply bring a court action for an breach of employment contract in respect of public policy conferred by statute, the result is that the jurisdiction of the Canadian

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[11] *Lewis v. WestJet Airlines Ltd.*, 2019 BCCA 63, Reasons for Judgment of the Honourable Mr. Justice David C. Harris dated February 21, 2019 [**Harris Decision**] at para. 50, Application for Leave ("**Application**") Tab 2C
[12] *CLC* at s. 247.2
[13] *CHRA* at s. 10

Human Rights Commission and Tribunal is relegated to a lesser status than that of other human rights forums in Canada, for example in Ontario, where a plaintiff is precluded from pursuing a common law remedy when the allegations are, at their core, for human rights violations.[14]

15. This case provides a key opportunity for the Supreme Court of Canada to clarify the scope of *Bhadauria* and the statutory jurisdiction of the *CHRA.*

C. Background

16. The Applicant, WestJet, is a Canadian company founded in 1996 that has grown into a successful international airline. WestJet is a federally regulated employer in Canada. There are approximately 2,700 flight attendants included in the more than 11,000 people presently employed by WestJet.

17. The Respondent Plaintiff, Mandalena Lewis, was employed by WestJet as a Flight Attendant from March 2008 until January 12, 2016, when her employment was terminated for cause by WestJet.

18. This proposed class action, filed in the Supreme Court of British Columbia on April 4, 2016, concerns alleged systemic sex-based discrimination and harassment of female WestJet Flight Attendants employed by WestJet:

> "*This claim asserts that despite their employment contracts, WestJet has routinely and systemically denied its female Flight Attendants the benefit of the Anti-Harassment Promise*".[15]

19. The Plaintiff also filed a Notice of Civil Claim against WestJet in a separate action (the "**Individual Action**") on March 1, 2016.[16] In that action the Plaintiff alleges, *inter alia*, negligence, breach of contract and wrongful dismissal. The Individual Action has been stayed pending the outcome of this action.

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[14] *Rivers v. Waterloo Regional Police Services Board,* 2018 ONSC 4307 [***Rivers***] at paras. 53 to 57

[15] Notice of Civil Claim filed by Mandalena Lewis on April 4, 2016 Application Tab 4A, Part 1 at para. 5

[16] Notice of Civil Claim filed by Mandalena Lewis on March 1, 2016, Application Tab 4B

20. The Plaintiff seeks to bring this proposed class action on her own behalf and on behalf of a proposed class, consisting of all present and former female Flight Attendants employed by WestJet (the "**Proposed Class**").

21. The Plaintiff's claims, as pleaded in the Notice of Civil Claim, included claims for "harassment", "discrimination", "differential treatment" and injuries. WestJet brought an application to strike the Plaintiff's claims pursuant to Rule 9-5(1) of the *Supreme Court Civil Rules*, BC Reg 168/2009.

22. The Plaintiff conceded at the hearing of the Application that her pleaded claims and remedies concerning personal injuries would not be part of the claim. She clarified that the claim would be brought purely as a systemic breach of contract action, and that the remedy sought would be the restitutionary disgorgement of WestJet's profits it had improperly obtained by not effectively implementing its contractual "*Anti-Harassment Promise*" in the workplace.

23. WestJet argued that the Plaintiff's remaining claims were, at their core, claims for human rights violations under the *Canadian Human Rights Act*, and that pursuant to the Supreme Court of Canada's reasoning in *Bhadauria*,[17] a plaintiff is precluded from pursuing a common law remedy when human rights legislation contains a comprehensive enforcement scheme for violations of the statutory rights at issue.

D. The Decisions Below

24. In her Reasons for Judgment dated December 15, 2017, Humphries J. (the "**Chambers Judge**") stated:

> "WestJet's position is that the Plaintiff's attempt to characterize the present claim as solely a claim for breach of contract is a fiction. This has some validity when the [Notice of Civil Claim "**NOCC**"] is considered as a whole."[18]

25. The Chambers Judge ordered that a number of the Plaintiff's pleaded claims outside of her claim for breach of contract should be removed, specifically pleaded claims relating to

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[17] *Bhadauria* at para. 27

[18] *Lewis v. WestJet Airlines Ltd.*, 2017 BCSC 2327, Reasons for Judgment of the Honourable Madam Justice Mary A. Humphries dated December 15, 2017 [**Humphries Decision**] at para. 49, Application Tab 2A

personal injuries, discrimination, and arising general and nominal damages.[19] The Chambers Judge declined however to strike the Plaintiff's claim for systemic breach of contract.[20]

26. WestJet appealed the decision of the Chambers Judge to decline to strike the Plaintiff's remaining claims to the British Columbia Court of Appeal. The British Columbia Court of Appeal dismissed the appeal and declined to strike the Plaintiff's cause of action.

27. In doing so, the British Columbia Court of Appeal inferred that, if Parliament had intended for the Plaintiff to be precluded from pursuing a common law remedy in circumstances where the *CHRA* otherwise contains a comprehensive enforcement scheme for the allegations, then Parliament would have included an exclusive jurisdiction clause in the *CHRA*, which the Court found it had not.[21]

28. The British Columbia Court of Appeal further held that, even if the drafting of WestJet's sexual harassment policy exactly mirrored its statutory obligations under the federal legislation for what must be included in the policy, so long as the policy formed part of the terms of WestJet's employment contracts (as alleged by the Plaintiff), that alone could ground a claim for breach of contract, without any need for the Plaintiff to plead constructive dismissal:

> While I am sympathetic to the argument that WestJet finds itself subject to the court's jurisdiction because it has incorporated its statutory human rights obligations into its employment contracts, that does not avoid the fact that these obligations are now terms of the contracts and can be relied on as such both by WestJet and its employees.[22]

29. With respect to the remedy of restitutionary disgorgement, the British Columbia Court of Appeal held that it did not wish to be drawn into a discussion of whether it might be possible for the Plaintiff to quantify restitutionary damages or whether it would be possible to prove those circumstances that would justify resorting to the remedy. The Court stated that this claimed remedy might stand or fail on the evidence the Plaintiff can adduce if this action is certified.[23]

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[19] *Ibid* at para. 50, Application Tab 2A
[20] *Ibid* at paras. 55 to 58, Application Tab 2A
[21] Harris Decision at para. 45, Application Tab 2C
[22] *Ibid* at para. 47, Application Tab 2C
[23] *Ibid* at para. 51, Application Tab 2C

30. There are good reasons to doubt the correctness of the decision below. Employees can now avoid the Canadian Human Rights Commission and Tribunal, and bring a claim for sex discrimination in the Courts clothed as a "breach of contract", so long as the employer has a sexual harassment policy (as required under federal legislation). The jurisdiction and mandate of the Canadian Human Rights Commission and Tribunal has effectively been nullified. That could not have been the intent of Parliament when those institutions were created.

31. The British Columbia Court of Appeal's decision is also in conflict with the jurisprudence in Ontario, where Courts have held that a plaintiff is precluded from pursuing a common law remedy when the allegations are, at their core, for human rights violations.[24]

32. Review by this Court is therefore a matter of national importance and will have significant value beyond the interests of this party and this particular dispute.

PART II – QUESTIONS IN ISSUE

33. WestJet submits that the following issues warrant the review of this Honourable Court:

Issue #1: What scope of jurisdiction do the Canadian Human Rights Commission and Tribunal have over claims of sexual harassment in the course of employment?

Issue #2: Can the incorporation of a statutorily required sexual harassment policy into terms of employment give rise to a valid cause of action for systemic breach of contract, in a case where constructive dismissal is not pleaded by the claimant?

Issue #3: Can pleading the novel remedy of "restitutionary disgorgement" ground a cause of action in a proposed employment class action when there is otherwise no valid claim for compensable damages?

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[24] *Rivers* at paras. 53 to 57

PART III – ARGUMENT

***Issue #1*: The Policy and Jurisdiction of the CHRA**

Purpose of Human Rights Regime

34. This Honourable Court in *Saskatchewan (Human Rights Commission) v. Whatcott* noted that "human rights legislation 'provides accessible and inexpensive access to justice' for disadvantaged victims to assert their right to dignity and equality."[25] Any interpretation of the law that could impact jurisdiction involving the *CHRA* ought to be consistent with Parliament's objective of creating an inexpensive and expeditious process. The decisions below fail to consider that by expanding the forums in which complainants can address human rights matters to include the courts, it risks negatively affecting effective and timely access to justice.

Conflict with Supreme Court Jurisprudence

35. The issues in this case will have a significant impact on how sexual harassment in the workplace is adjudicated in Canada. The British Columbia Court of Appeal's judgment, in declining to strike the Plaintiff's cause of action, is contrary to the reasoning of the Supreme Court of Canada in *Bhadauria*, *Keays,* and *Robichaud*. The Plaintiff's purpose in seeking to bring this action in the courts is inappropriate because it seeks to expressly avoid the remedial nature of the applicable statutory scheme.[26]

36. Bastarache J. and LeBel J., for the majority and dissent respectively in *Keays*, grappled with the extent of the restrictions in *Bhadauria* over claims resembling human rights violations at common law. In keeping with *Bhadauria* and *Keays*, a plaintiff is precluded from pursuing a common law remedy when human rights legislation contains a comprehensive enforcement scheme for violations of the rights at issue. The "*Anti-Harassment Promise*" contractual term alleged by the Plaintiff is simply a recital of WestJet's statutorily mandated obligations to be included in its sexual harassment policy under the *CLC*. This is therefore an action in respect of purely statutory rights.

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[25] *Saskatchewan (Human Rights Commission) v. Whatcott*, [2013] 1 SCR 467, 2013 SCC 11 at para. 105

[26] *Keays*, Majority Reasons at para. 63

37. In his dissenting reasons in *Keays*, LeBel J. was critical of how far the Supreme Court of Canada had gone in *Bhadauria* in precluding all common law actions based on all forms of discriminatory conduct:

> in my opinion Laskin C.J. went further than was strictly necessary in *Bhadauria*. The main thrust of the decision was that Ms. Bhadauria did not have a legally protected interest at common law that had been harmed by the defendant's allegedly discriminatory conduct (pp. 191-92). However, rather than stop there, Laskin C.J. went on to hold that The Ontario *Human Rights Code* "foreclose[s] any civil action based directly upon a breach thereof [and] also excludes any common law action based on an invocation of the public policy expressed in the *Code*" (p. 195). These conclusions imply (and have been interpreted to mean) that any allegations resembling the type of conduct that is prohibited by the *Code* cannot be litigated at common law. The *Code* covers a broad range of conduct in promoting the goal of equality. Yet the conduct at issue in *Bhadauria* was limited to the facts of that case. It would have been sufficient to simply conclude that the interest advanced by Ms. Bhadauria was not protected at common law. It was not necessary for this Court to preclude all common law actions based on all forms of discriminatory conduct.[27]

38. The scope of *Bhadauria* requires clarification from the Supreme Court of Canada. The Supreme Court of Canada clarifying those issues in this case would provide certainty in the law for employees, employers and human rights bodies throughout Canada.

Conflict with Ontario Jurisprudence

39. The British Columbia Court of Appeal's decision that the *CHRA* does not provide an exclusive code to address the Plaintiff's claims is also at odds with the jurisprudence in Ontario. Like the *CHRA*, Ontario's *Human Rights Code*[28] permits broader, valid causes of action which include discrimination under the *Code* (e.g. constructive dismissal) to proceed in the courts.[29] In contrast to the recent decision of the British Columbia Court of Appeal however, Courts in Ontario have held that a plaintiff is precluded from pursuing a common law remedy when the

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[27] *Keays v. Honda Canada Inc.*, 2008 SCC 39, Dissenting Reasons for Judgment of Lebel J. [**Keays, Dissenting Reasons**] at para. 91

[28] *Human Rights Code*, RSO 1990, c H.19 [***Ontario Code***]

[29] *Ontario Code* at s. 46.1 (1)

allegations are, at their core, substantively equivalent to allegations of human rights violations under the *Code*.[30]

40. The Ontario jurisprudence holds that the legislative initiative of the *Code* itself forecloses a civil cause of action based upon a breach of the *Code*, as well as an action based on an invocation of the public policy expressed in the *Code*.[31] Courts in Ontario look at the substance of the allegations in this jurisdictional analysis, regardless of how the allegations are characterized in the pleadings.[32] In line with this reasoning, the Ontario Court of Appeal also recently reaffirmed that there is no tort of harassment, due to the fact that there was no reason to justify the creation of a new legal remedy for harassment in the workplace.[33]

41. The present conflict between the jurisprudence of British Columbia and Ontario on this issue demonstrates the national importance of this case.

42. Unintended consequences for both employees and employers will likely arise from the British Columbia Court of Appeal's judgment. As a result of the decision below, a federal jurisdiction employer is now in a "Catch-22 situation". If the employer does not incorporate a comprehensive sexual harassment policy into its conditions of employment, it is in breach of the *CLC* and *CHRA*. If the employer does incorporate a comprehensive sexual harassment policy, it exposes itself to the potential for an additional cause of action at common law for matters that ought to fall in the exclusive jurisdiction of human rights tribunals.

43. The decision of the British Columbia Court of Appeal is hostile to improving human rights in the workplace. As a result of the decision, sexual harassment policies will be drafted in vague or incomplete language, in order for an employer to attempt to avoid:

- purportedly "exceeding the statutory minimum" requirements for a sexual harassment policy; or
- incorporating the policies into the terms of employment.

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[30] *Chapman v. 3M Canada Inc*. [1995] O.J. No. 4564 (ON SC) at para. 44, affirmed [1997] OJ No 928 (ON CA) at para. 4
[31] *Ibid*
[32] *Rivers* at para. 57
[33] *Merrifield v. Canada (Attorney General)*, 2019 ONCA 205 at para. 43

44. Employers should be encouraged to develop robust policies that reflect and reinforce their statutory obligations for the benefit of their employees. Fulsome policies should not inadvertently provide an additional forum for litigation when the statutory scheme was intended to be comprehensive.

45. The Supreme Court of Canada's guidance on this conflicted state of the law would benefit employees, employers and statutory bodies throughout Canada.

***Issue #2**: Breaches of Contract in Cases of Legislated Harassment Policy and Absence of Constructive Dismissal*

The Legislated Requirements for an Employer's Sexual Harassment Policy

46. The Plaintiff's claim is that WestJet's sexual harassment policy was not implemented properly, resulting in female employees being subjected to a working environment permissive of the very sexual harassment that WestJet's policy set out to prevent. The Plaintiff claims that WestJet was not required to actually incorporate the terms of its sexual harassment policy into its employment contracts and by doing so it gives rise to a freestanding claim for breach of contract.

47. WestJet could not have validly avoided incorporating its sexual harassment policy into its employment contracts, because under the *CHRA*, an employer cannot enter into an employment contract that deprives a class of individuals of any employment opportunities on a prohibited ground of discrimination:

> 10 It is a discriminatory practice for an employer, employee organization or employer organization
>
> (a) to establish or pursue a policy or practice, or
>
> (b) to enter into an agreement affecting recruitment, referral, hiring, promotion, training, apprenticeship, transfer or any other matter relating to employment or prospective employment, that deprives or tends to deprive an individual or class of individuals of any employment opportunities on a prohibited ground of discrimination.[34]

48. Pursuant to the *CLC*, WestJet's definition of "sexual harassment" within its policy was required to be the following:

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[34] *CHRA* at s. 10

> sexual harassment means any conduct, comment, gesture or contact of a sexual nature:
>
> a. that is likely to cause offence or humiliation to any employee; or
>
> b. that might, on reasonable grounds, be perceived by that employee as placing a condition of a sexual nature on employment or on any opportunity for training or promotion.[35]

49. A breach of WestJet's sexual harassment policy connects directly to the jurisdiction of the *CHRA*, because under the *CLC* WestJet was required in its sexual harassment policy to:

> inform employees of the discriminatory practices provisions of the [*CHRA*] that pertain to rights of persons to seek redress under that Act in respect of sexual harassment.[36]

50. The "sexual harassment" at issue under WestJet's sexual harassment policy is therefore identical to sexual harassment that is addressed under the discriminatory practice provisions of the *CHRA*. The Plaintiff's claims are an invocation of the public policy expressed in the *CHRA*.

51. The interpretation of these federal provisions is not tied to the facts of this case. It is a question of national importance whether under these provisions, a federal employer can validly avoid incorporating its sexual harassment policy into its terms of employment.

Suing for Breach of Contract in the Absence of Constructive Dismissal

52. In circumstances such as the present case, where a federal entity has incorporated a sexual harassment policy into terms of employment, it remains unclear whether this gives rise to a valid cause of action for systemic breach of contract where constructive dismissal is not pleaded by the plaintiff.

53. While employees can bring claims for breach of contract when human rights violations give rise to constructive dismissal, the fundamental difference between constructive dismissal claims, and the Plaintiff's proposed cause of action in this case, is that in cases of constructive

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[35] *CLC* at s. 247.1
[36] *Ibid* at s. 247.4(2)(g)

dismissal the claimant alleges a repudiation of the employment contract itself. No such repudiation is alleged here.

54. As held by this Court in *Potter v. New Brunswick,*[37] the nature of the cause of action of constructive dismissal is as follows:

> When an employer's conduct evinces an intention no longer to be bound by the employment contract, the employee has the choice of either accepting that conduct or changes made by the employer, or treating the conduct or changes as a repudiation of the contract by the employer and suing for wrongful dismissal.

55. An employee electing to allege repudiation of the employment contract based on harassment is what gives rise to a common law breach of contract action outside of the scope of human rights legislation.

56. The Plaintiff in this case neither wishes to accept the alleged breach of contract, nor treat the employment contract as repudiated. The sexual discrimination alleged by the Plaintiff is therefore within the statutory jurisdiction of the *CHRA.*

57. If any alleged breach of an employment contract for harassment can be litigated in the courts however, there may no longer be a need for the doctrine of constructive dismissal in the context of harassment-based breach of employment contract actions. Clarification of the law by the Supreme Court of Canada is necessary.

***Issue #3**: Can Restitutionary Disgorgement Ground a Doubtful Cause of Action?*

58. The Supreme Court has sent a clear message in *Hryniak v. Mauldin*[38] that inefficient, unnecessarily complex civil proceedings are no longer acceptable. To characterize improper causes of action as unsettled, "exceptional" law and to permit them to proceed to trial is neither in the best interests of the parties, nor a proper use of judicial resources.

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[37] *Potter v. New Brunswick (Legal Aid Services Commission)*, 2015 SCC 10 at para. 30
[38] *Hryniak v. Mauldin*, 2014 SCC 7 at paras. 1-2, 28-30.

59. The Plaintiff has argued in these proceedings that the Proposed Class ought to be able to choose the remedy that best suits their interests.[39]

60. Instead of focusing on the effect of the alleged discriminatory practice on the complainants,[40] which is the focus Parliament intended for issues of sexual discrimination[41] in the workplace, the Plaintiff in this action seeks instead to focus on the alleged improper gain WestJet obtained from denying the Proposed Class the benefit of the "*Anti-Harassment Promise*".

61. The Plaintiff claims this is an "exceptional case", where restitutionary disgorgement damages could be awarded for breach of contract, instead of compensatory damages, due to the fact that compensatory damages:

i. are not readily quantifiable;
ii. would allow WestJet to breach employment contracts with impunity; or
iii. are otherwise inadequate due to the Plaintiff's legitimate interest in preventing WestJet's profit-making activity in relation to the subject of the breach.

62. The Plaintiff states her claim rests on an allegation that WestJet benefits from not having to expend necessary funds to set up a proper anti-harassment investigative system, and from not having to terminate offending pilots and train new ones. The Plaintiff claims WestJet also benefits in its recruitment of employees because of its promise of a safe place to work.[42]

63. The only reason that compensatory damages are not quantifiable or available to the Proposed Class is because the Plaintiff has intentionally sought to avoid the statutory forums that would otherwise provide adequate remedies. The following remedies are available in response to discriminatory practices under the jurisdiction of the *CHRA* and Canadian Human Rights Tribunal:

a. an order that the rights, opportunities or privileges that were denied as a result of the practice be provided on the first reasonable occasion;

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[39] Humphries Decision at para. 43, Application Tab 2A
[40] *Robichaud* at para. 9
[41] *CHRA* at s. 14(2)
[42] Humphries Decision at para. 44, Application Tab 2A

b. compensation for lost wages or any other expenses resulting from the discriminatory practices;

c. general damages;

d. special damages in cases of egregious discriminatory practices;[43]

e. costs (including on a solicitor-client basis);[44]

f. ordering systemic remedies such as the implementation of an employment equity program;[45]

g. ordering that all personnel attend a sensitivity training program;[46]

h. ordering an employer to conduct workshops on human rights legislation, with mandatory management attendance, and to provide confirmation to the Commission that the training has been provided;[47]

i. ordering a party to cease and desist a behavior in order to prohibit harassment, with a requirement for periodic reports to the Canadian Human Rights Commission;[48]

j. ordering an employer to draft and implement new human rights policies to prevent further discrimination on the basis of sex;[49] and

k. ordering an employer to take directed steps in order to ensure the employer's human rights policies are in fact effectively implemented.[50]

64. At common law, the remedy of restitutionary disgorgement has never been awarded in a dispute involving a contractual employment relationship that contains neither fiduciary duties, nor any other elevated duties of trust or fidelity. The remedy is ill-suited for basic employment relationships, as Courts have only resorted to restitutionary disgorgement in instances where remedies of expectation damages, specific performance, injunctions, characterization of contractual obligations as fiduciary, or statutory relief (in the form of damages, specific

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[43] *CHRA* at s. 53 (Appendix C)
[44] *Nkwazi v. Canada (Correctional Service) (No. 4),* (2001), 41 CHRR D/109 (CHRT) at para. 34
[45] *Green v. Canada (Public Service Comm.),* (1998), 34 CHRR D/166 (Can Trib) [***Green***] at paras. 183-187; affirmed *Green v. Canada (Public Service Commission)*, [2000] 4 FC 629 at para. 80
[46] *Tahmourpour v. Royal Canadian Mounted Police*, (2008), 64 CHRR D/448, 2008 CHRT 10 at para. 253
[47] *National Capital Alliance on Race Relations v. Canada (Health and Welfare),* (1997), 28 CHRR D/179 (CHRT) at paras. 199-202
[48] *Canadian National Railway v. Canada (Canadian Human Rights Commission)*, [1987] 1 S.C.R. 1114 (SCC) at paras. 14-15, 51
[49] *Cole v. Bell Canada*, (2007), 60 CHRR D/216, 2007 CHRT 7 at para. 89
[50] *Green* at para. 187

performance or injunctions) would not provide an adequate response to a breach of contract.[51] All of those remedies are available to employees under human rights legislation (as detailed above).

65. The Chambers Judge expressly acknowledged that it would be difficult for the Plaintiff to actually prove her claim for restitutionary disgorgement, but declined to strike it on the basis that it was capable of "being articulated as an arguable claim."[52] The British Columbia Court of Appeal stated that for its purposes, while the remedy of restitutionary disgorgement is "exceptional",[53] it did not wish to be drawn into a discussion of whether it might be possible to quantify restitutionary damages or whether it would be possible to prove the circumstances that would justify resorting to the remedy.

66. It remains unclear whether the remedy of "restitutionary disgorgement" could ever be applied to an employment class action, in such a way that the statutory regimes otherwise applicable to an employment dispute can be avoided by the complainant. This case presents a key opportunity for this Court to clarify the nature of the remedy of "restitutionary disgorgement", and whether it can apply to an employment relationship that contains neither fiduciary duties, nor any other elevated duties of trust or fidelity.

Conclusion: These Issues Are Far Reaching

67. Recently in *TELUS Communications Inc. v. Wellman*,[54] this Honourable Court ruled that class action court proceedings for business claims subject to an arbitration clause ought to be stayed in favour of arbitration. The following week in *J.W. v. Canada (Attorney General),*[55] the Court ruled that there is a high bar for judicial intervention in the context of a negotiated settlement of individual and class action lawsuits relating to the operation of residential schools.

68. A common emerging thread from this recent jurisprudence is that courts are to be circumspect in intervening in matters that are governed by an existing comprehensive scheme. The decision of the Court of Appeal below goes against trend and accordingly this case provides

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[51] *Attorney General v. Blake*, [2000] UKHL 45, [2001] 1 AC 268 at p. 967
[52] Humphries Decision at para. 57, Application Tab 2A
[53] Harris Decision at para. 50, Application Tab 2C
[54] *TELUS Communications Inc. v. Wellman*, 2019 SCC 19
[55] *J.W. v. Canada (Attorney General)*, 2019 SCC 20

an opportunity for this Honourable Court to consider whether courts are generally to take a hands off approach to matters governed by human rights legislation.

69. Furthermore, the judgments below make it clear that this is not a case restricted to its facts. The British Columbia Court of Appeal has made wide reaching findings regarding the statutory jurisdiction of federal legislation, including the *CHRA*. By hearing this appeal, the Supreme Court of Canada would provide clarity to the law on the proper forum for systemic sexual harassment allegations, as between human rights bodies and class actions in the Courts.

PART IV – SUBMISSIONS CONCERNING COSTS

70. That the application for leave to appeal be granted with costs.

PART V – ORDERS SOUGHT

71. The Applicant, WestJet asks that leave be granted with costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED, this 18th day of April 2019.

Don Dear, Q.C.
Joyce A. Mitchell
Iain W. Bailey

PART VI – TABLE OF AUTHORITIES

Jurisprudence

	Case	**Factum Paras.**
A.	*Attorney General v. Blake*, [2000] UKHL 45, [2001] 1 AC 268	64
B.	*Canadian National Railway v. Canada (Canadian Human Rights Commission)*, [1987] 1 SCR 1114 (SCC)	63
C.	*Chapman v. 3M Canada Inc*. [1995] O.J. No. 4564 (ON SC), affirmed [1997] OJ No 928 (ON CA)	39, 40
D.	*Cole v. Bell Canada*, (2007), 60 CHRR D/216, 2007 CHRT 7	63
E.	*First Nations Child and Family Caring Society of Canada and Canada (Attorney General), Re*, 2016 CHRT 10, 2016 TCDP 10	5
F.	*Green v. Canada (Public Service Comm.)*, (1998), 34 CHRR D/166 (Can Trib); affirmed *Green v. Canada (Public Service Commission)*, [2000] 4 FC 629	63
G.	*Hryniak v. Mauldin*, 2014 SCC 7	58
H.	*J.W. v. Canada (Attorney General)*, 2019 SCC 20	67
I.	*Keays v. Honda Canada Inc.*, 2008 SCC 39	2, 35, 36, 37, 38
J.	*Merrifield v. Canada (Attorney General)*, 2019 ONCA 205	40
K.	*National Capital Alliance on Race Relations v. Canada (Health and Welfare)*, (1997), 28 CHRR D/179 (CHRT)	63
L.	*Nkwazi v. Canada (Correctional Service) (No. 4)*, (2001), 41 CHRR D/109 (CHRT)	63
M.	*Potter v. New Brunswick (Legal Aid Services Commission)*, 2015 SCC 10	54
N.	*Rivers v. Waterloo Regional Police Services Board*, 2018 ONSC 4307	14, 31, 40
O.	*Robichaud v. Canada*, [1987] 2 SCR 84 (SCC)	5, 35, 60
P.	*Saskatchewan (Human Rights Commission) v. Whatcott*, [2013] 1 SCR 467, 2013 SCC 11	34
Q.	*Seneca College of Applied Arts & Technology v. Bhadauria*, [1981] 2 SCR 181 (SCC)	2, 15, 23, 35, 36, 37, 38
R.	*Tahmourpour v. Royal Canadian Mounted Police*, (2008), 64 CHRR D/448, 2008 CHRT 10	63

S.	*TELUS Communications Inc. v. Wellman*, 2019 SCC 19	67

PART VII – STATUTORY PROVISIONS

Canada Labour Code, RSC 1985, c L-2, ss. 247.1, 247.2, 247.3, 247.4

Code canadien du travail, LRC 1985, c L-2, ss. 247.1, 247.2, 247.3, 247.4

Canadian Human Rights Act, RSC 1985, c H-6, ss. 10, 14(2), s. 53 (Appendix C)

Loi canadienne sur les droits de la personne, LRC 1985, c H-6, 10, 14(2), s. 53 (Appendix C)

Human Rights Code, RSO 1990, c H.19, s. 46.1 (1)

Code des droits de la personne, LRO 1990, c H.19, s. 46.1(1)