

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Lewis v. WestJet Airlines Ltd.*,
2025 BCSC 1565

Date: 20250724
Docket: S162957
Registry: Vancouver

Between:

Mandalena Lewis

Plaintiff

And:

WestJet Airlines Ltd.

Defendant

Before: The Honourable Justice J. Hughes

Oral Reasons for Judgment

In Chambers

Counsel for the Plaintiff:

S.M. Alikhani

Counsel for the Defendant:

J. Lebo, K.C.
I.W. Bailey
E. Cartier

Place and Dates of Hearing:

Vancouver, B.C.
July 16-17, 2025

Place and Date of Judgment:

Vancouver, B.C.
July 24, 2025

Introduction

[1] This is the plaintiff's third application for further and better document production by the defendant, WestJet Airlines Ltd. ("WestJet"). The plaintiff seeks, among other things, disclosure of various documents in relation to WestJet's engagement of Ernst & Young LLP ("Ernst & Young") and work done pursuant to that engagement during the class period.

[2] In particular, the plaintiff seeks production of the documents listed in paragraph 1(a) of her amended notice of application filed July 14, 2025, namely:

- a) The complete record of documents that are or have been within its possession or control in relation to the engagement and work undertaken by Ernst & Yong LLP ("EY") during the Class Period (April 2016 to February 2021), including:
 - (i) all outstanding file materials, specifically the consultations and interviews and external sources referred to in appendices A and C of EY's HR Policy & Procedure Review, dated June 17, 2016 (hereinafter the "HR Policy & Procedure Review"), as set out in document demands dated May 6 and July 4, 2025;
 - (ii) any report, including supporting materials, resulting from EY's "Statement of Work - Internal Investigation and Assessment", dated March 22, 2016 (hereinafter the "Investigation Methodology & Practices Review"), as set out in document demands dated May 6 and July 4, 2025;
 - (iii) the draft investigation report of November 2016, if different from the report referred to under paragraph 1(a)(ii), above (hereinafter the "Draft Investigation Report");
 - (iv) any EY work product or opinion provided to WestJet in or around May 2018 regarding the current state of the environment with regards to Respect in the Workplace and any key areas of focus that WestJet should consider (hereinafter the "May 2018 Assignment"), as well as any other services or support EY may have subsequently provided to WestJet under the EY five-year general retainer of March 22, 2016;
 - (v) the complete record of correspondence between EY and WestJet in relation to the HR Policy & Procedure Review, the Investigation Methodology

- & Practices Review, the Draft Investigation Report, or any subsequent advisory work EY may have conducted with respect to WestJet's policies and practices regarding workplace harassment; and,
- (vi) all invoices and payment records relating to any work performed by EY, including but not limited to the work conducted in connection with the reports referred to in paragraphs 1(a)(i) to (iv), above, as per the document demand dated July 4, 2025.
- (together, the "Demanded Documents").

[3] The plaintiff also seeks determination of WestJet's assertion of privilege in respect of certain Ernst & Young documents listed in Part 4 of its list of documents, and that WestJet provide an affidavit of documents.

[4] WestJet objects to production of some of the documents sought on the basis that this application is premature. In other respects, it says the documents do not exist. Finally, WestJet asserts that some of the documents sought are subject to valid claims of privilege.

Background

[5] Ernst & Young was retained as an external, independent consultant by WestJet's counsel to evaluate and advise on WestJet's workplace policies and investigative practices from an operational and organizational perspective. The timing of Ernst & Young's retainer followed shortly after the plaintiff commenced her first claim, an individual action, against WestJet. The individual action was filed on March 1, 2016. The notice of civil claim in this action was filed approximately one month later on April 4, 2016.

[6] On March 22, 2016, McLennan Ross, WestJet's external counsel, entered into a master retainer agreement with Ernst & Young on WestJet's behalf. The agreement was for a five-year period and appended Ernst & Young's standard general terms and conditions and contemplated that Ernst & Young would prepare a statement of work describing the particular services to be provided for each project Ernst & Young agreed to undertake.

[7] That same day, March 22, 2016, WestJet, via McLennan Ross and its general counsel, and Ernst & Young entered into a document titled Statement of Work – Internal Investigation and Assessment (the “Statement of Work”). The Statement of Work provided as follows:

This Statement of Work, dated March 22, 2016 (this “SOW”) sets out the terms and conditions on which the Canadian firm of Ernst & Young LLP (“we” or “EY”) will provide certain professional services to McLennan Ross LLP (the “Firm”) in connection with the matter set out above (the “Matter”) and the Firm’s provision of legal advice to its client WestJet Airlines Ltd. (the “Company” and together with the Firm, collectively referred to herein as “Client” or “you”). This SOW is made pursuant to the Agreement dated March 22, 2016 (the “Agreement”), between EY and McLennan Ross LLP.

[8] The scope of services contemplated in the Statement of Work was broad. It provided as follows:

- Conduct internal Investigations as Instructed by the Firm;
- Assess the design and operating effectiveness of the Company’s investigation methodology in relation to alleged incidents of sexual assault and/or harassment in the workplace;
- Recommend improvements to the Company’s methodology based on the assessment;
- Identify and review the documents produced to date In respect of investigations and any relevant production orders related to the Matter and compile an Inventory of IT technology/software used by WestJet since 2008 for those purposes;
- Identify and request the electronic records to be preserved and reviewed by EY;
- Produce electronic records responsive to the Firm’s requests or to production orders received by the Company; and
- Assist with any other items as Instructed by the Firm.

[9] Given the broad scope, the Statement of Work expressly contemplated that Ernst & Young may, if requested, report separately on the services it provided, for example, on ongoing investigations or recommended improvements to internal investigative procedures.

[10] This is, in fact, what happened. Two reports were produced pursuant to the March 22, 2016 Statement of Work. The first report was titled *WestJet HR Policies*

and Procedures Review dated June 2016 (the “Policies and Procedures Review”) in which Ernst & Young provided a review of WestJet’s human resources policy and practices. WestJet does not claim privilege over this report, and it has been produced by WestJet together with the referenced documents.

[11] The second report was a November 2016 draft investigation report (the “Draft Investigation Report”). This was a second separate engagement for a confidential and privileged scope of work relating to this litigation and included a litigation hold for document preservation and preliminary investigation work. WestJet claims privilege over this report and has not produced it.

[12] Additional work or renewed engagement of Ernst & Young appears to have been contemplated in 2018, and in late 2019 or early 2020. However, WestJet says that: (a) there is no record of any retainer of Ernst & Young in 2018 and no invoices issued for any work done in that timeframe; and (b) the late 2019 or early 2020 review work appears to have been delayed on account of the pandemic such that to the extent it was eventually undertaken, it was done outside the class period.

[13] In the circumstances and on the present record, I find the plaintiff’s assertion that there are other relevant reports or documents arising from the March 22, 2016, Statement of Work that have not been produced speculative. More clarity may be brought to bear on this issue after the plaintiff receives responses to the interrogatories and requests arising from her examination for discovery of Mark Porter, WestJet’s current corporate representative, which responses I understand remain outstanding.

[14] Ernst & Young also facilitated a litigation hold on internal WestJet email and file-server data. In doing so, Ernst & Young captured approximately 2 million documents from March 22 to November 1, 2016. Ernst & Young preserved and reviewed approximately 133,000 electronic documents that were responsive to relevant search terms.

[15] Ernst & Young issued invoices to WestJet for the work it completed (the “Invoices”). WestJet asserts privilege over the Invoices on the basis that Ernst & Young has been unable to separate the privileged from non-privileged work reflected therein.

[16] The plaintiff conducted a further examination for discovery of Mr. Porter on June 25 to 28, 2025. The plaintiff concedes that some of the documents she is seeking, particularly under paragraphs 1(a)(i), (iv), and (v) of the notice of application filed July 14, 2025, are the subject of extant requests arising from Mr. Porter's examination for discovery and that the agreed-to time for responding to those requests has not yet expired. WestJet indicated that the responses to those requests may address some of the document requests in issue on this application.

[17] The plaintiff also issued a demand for documents as recently as July 4, 2025, which WestJet has responded to, explaining the basis for its assertions of privilege, noting that those requests which were premature, and advising that some of the documents did not exist. Following receipt of this response, the plaintiff amended her notice of application to withdraw her request for production of some documents and make amended requests for documents created by Ernst & Young.

[18] WestJet also made further requests of Ernst & Young to determine if there are additional records relating to the Policies and Procedures Review that ought to be produced. WestJet has not yet received a response from Ernst & Young.

[19] Further on June 13, 2025, the plaintiff delivered written interrogatories to WestJet relating to cost issues. By agreement, WestJet's response to these interrogatories is not due until July 25, 2025. WestJet says it does not expect production of further documents on this point, but the responses provided may alleviate the need for production of the Invoices or determination of some of the privilege issues.

[20] In my view, it is not a proper or efficient use of court time to consider this application for production of documents that are subject to outstanding discovery

procedures and which may, therefore, be rendered unnecessary once responses are received by WestJet from Ernst & Young and by the plaintiff from WestJet regarding the examination for discovery requests. The application is thus premature with respect to the documents sought in paragraphs 1(a)(iv), (v), and (vi) and those paragraphs have been adjourned generally on that basis.

[21] The production of documents sought in category (i) includes Ernst & Young's file and working papers for the Policies and Procedures Review. The plaintiff accepts that those documents are not in WestJet's possession, but says there are in WestJet's power or control because WestJet has an enforceable right to obtain those documents from Ernst & Young. The plaintiff says this right arises from the terms of the retainer agreement WestJet entered into with Ernst & Young. There is no dispute that this was Ernst & Young's standard-form retainer agreement.

[22] Determination of the issue of whether WestJet has power or control over these documents thus involves interpretation of Ernst & Young's standard-form retainer agreement, an issue which I find directly affects Ernst & Young. However, the plaintiff did not give notice to Ernst & Young of this application under Rule 8-1(7).

[23] I am not prepared to proceed to determine and interpret the terms of Ernst & Young's standard-form retainer in the absence of notice having been given to Ernst & Young. Paragraph 1(a)(i) of the notice of application is thus also adjourned generally.

[24] I also find it is premature to order an affidavit of documents when WestJet's document production was recently canvassed on examination for discovery and is the subject outstanding requests. Paragraph 2 of the notice of application is thus also adjourned generally.

[25] The remaining issue for determination is WestJet's assertion of privilege over the Draft Investigation Report and the Invoices. This arises from production of the documents sought in paragraphs 1(a)(ii) and (iii) and (iv) of the notice of application. WestJet confirmed that there are only two reports arising out of the Statement of

Work: the Policies and Procedures Review, which has been produced, and the Draft Investigation Report, which WestJet asserts is privileged.

[26] There is also reference in the materials to document demands made by the plaintiff on May 6 and July 4, 2025. I was not taken to either of these demands, and it is not clear if they include additional documents or not. The focus of the parties' submissions was on determination of the claim of privilege over the Draft Investigation Report and the Invoices.

[27] Turning to that issue, the evidence before me outlines the circumstances in which Ernst & Young was retained and which led to production of the Draft Investigation Report. First, Jennifer Buggie, WestJet's manager of internal investigations and previous corporate representatives in this litigation, testified that WestJet's external legal counsel and McLennan Ross retained Ernst & Young in March 2016 to "provide investigation services for the purpose of assisting external legal counsel in providing legal advice to WestJet and responding to various allegations made by the plaintiff in her actions against WestJet" and specifically the allegations that the plaintiff "had put in issue within the litigation".

[28] At the time Ernst & Young was retained, the allegations in the plaintiff's pleadings covered a wide period of time, which predated 2016, and the class period had not yet been defined. Ms. Buggie also testified that:

As part of the scope of work performed by Ernst & Young LLP for WestJet's legal counsel, Ernst & Young assisted in facilitating a litigation hold on internal WestJet email and file-server data and the resulting preservation of approximately 2 million documents. Ernst & Young LLP also assisted WestJet's external legal counsel with preparing production in this action.

[29] With respect to the Draft Investigation Report specifically, Ms. Buggie's evidence is that:

Ernst & Young provided a privileged and confidential draft report to WestJet's external legal counsel on or about November 14, 2016, that included some preliminary investigation work conducted on behalf of WestJet's external legal counsel concerning alleged incidents that occurred prior to April 4, 2014, ultimately EY LLP did not complete an investigation in respect of those complaints. The draft report also contained a list of historical complaints that

EY LLP had complied from its work on preparing some of the production in this litigation.

[30] Mr. Porter, WestJet's current corporate representative and former (now retired) Executive Vice President of People and Culture, a role which he held from October 2015 to June 2022, also gave evidence to similar effect. Mr. Porter described the Policies and Procedures Review and then discussed the Draft Investigation Report, saying this:

In 2016 and 2017, EY LLP was also directed by WestJet's legal counsel (McLennan Ross LLP) and WestJet's General Counsel at the time, Barbara Munroe, to work on a privileged and confidential scope of work relating to this litigation. This work included document preservation and performing preliminary investigation work as relating to the allegations in this litigation and historical complaints at WestJet.

[31] With respect to the Invoices, Mr. Porter testified that Ernst & Young issued monthly invoices for work done in 2016 and 2017, which did not include time entries and only referenced "independent investigate services performed". The Invoices did not differentiate between the work done for the 2016 Policies and Procedures Review and the Draft Investigation Report over which privilege is claimed.

[32] McLennan Ross subsequently requested that Ernst & Young provide more detailed invoices for its work in 2016 in an attempt to differentiate the time spent on the 2016 Policies and Procedures Review from the privileged and confidential document preservation and preliminary investigation work with respect to this litigation.

[33] In April 2025, Ernst & Young provided a spreadsheet of time-entry descriptions with dates and short narratives, but no hourly values were assigned to them for the 2016 work. Mr. Porter's evidence is that the time entry descriptions:

... do not clearly parse out or quantify time spent on the 2016 Policies and Procedures Review, and do not differentiate it from time spent on privileged and confidential document preservation and preliminary investigation work relating to this litigation.

[34] There is no evidence to the contrary. The costs of the Policies and Procedures Review are also the subject of extant interrogatories delivered by the plaintiff.

[35] In short, Ernst & Young has not been able to parse out the non-privileged work from the privileged work. Given that the Policies and Procedures Review was done in 2016, the time frame in which Ernst & Young's work will be commingled would be for the period from March 2016 to June of 2016, when that report was provided to WestJet.

Analysis

[36] WestJet asserts both solicitor/client privilege and litigation privilege in respect of the Draft Investigation Report and the Invoices. Although conceptually different, both serve a common cause: the secure and effective administration of justice according to law. In this respect, they are complementary, not competing in their operation: *Blank v. Canada (Minister of Justice)*, 2006 SCC 39, at para. 31.

Solicitor/Client Privilege

[37] Solicitor/client privilege is established where all of the following are met, *Solosky v. The Queen*, [1980] 1 S.C.R. 821 at 837, 1979 CanLII 9 (S.C.C.):

- (a) a communication between solicitor and client;
- (b) which entails the seeking or giving of legal advice; and
- (c) which is intended to be confidential by the parties.

[38] It is undisputed that the Draft Investigation Report and Invoices are not communications between WestJet and its solicitors. They are communications between its solicitors and a third-party expert. Solicitor/client privilege can extend to third-party communications, but only in very limited circumstances: *College of Physicians of B.C. v. British Columbia (Information and Privacy Commissioner)*, 2002 BCCA 665 at para. 32 [*College of Physicians*].

[39] As the Court of Appeal noted in *College of Physicians* at para. 47, citing *General Accident Assurance Company v. Chrusz*, 1999 CanLII 7320 (O.N.C.A.), 45 O.R. (3d) 321 at 323 [*Chrusz*], two principles arise from the jurisprudence: (a) not every communication by a third party with a lawyer which facilitates or assists in giving or receiving legal advice is protected by client-solicitor privilege; and (b) where the third party serves as a channel of communication between the client and solicitor, communications to or from the third party by the client or solicitor will be protected by the privilege so long as those communications meet the criteria for the existence of the privilege.

[40] Solicitor/client privilege (or legal-advice privilege) extends only to third-party communications that are in furtherance of a function which is essential to the existence or operation of the relationship between the solicitor and the client. Put differently, third-party communications are protected by legal-advice privilege only where the third party is performing a function, on the client's behalf, which is integral to the relationship between the solicitor and the client: *College of Physicians*, at paras. 48 and 50.

[41] If the third party is authorized only to gather information from outside sources and pass it on to the solicitor so that the solicitor may advise the client, or if the third party is retained to act on legal instructions from the solicitor (presumably given after the client has instructed the solicitor), the third party's function is not essential to the maintenance or operation of the client/solicitor relationship and should not be protected: *Chrusz* at para. 122, as cited in *College of Physicians* at para. 48.

[42] Applying this analysis to the Draft Investigation Report and the Invoices, I find that Ernst & Young was not performing a function on behalf of WestJet that was integral to the relationship between WestJet and its counsel. As was the case in *College of Physicians*, Ernst & Young was not authorized by WestJet to direct counsel to act or seek legal advice. Rather, Ernst & Young was retained to act on instructions from counsel to provide information and opinions concerning the plaintiff's claims.

[43] Ms. Buggie and Mr. Porter's evidence establishes that the draft investigation report was relevant to WestJet's defence of this claim, but Ernst & Young never "stood in the place of" WestJet for the purpose of obtaining legal advice. Their services were incidental to the seeking and obtaining of legal advice: *College of Physicians* at para. 51.

[44] WestJet relies on *Gower v. Tolko Manitoba Inc.*, 2001 MBCA 11. *Gower* involved direct communication between a lawyer and a client. The question was whether an investigative report prepared by a lawyer for the client was the subject of legal-advice privilege. The report contained both factual findings and legal advice and was held to be privileged. The circumstances in *Gower* were materially different than those at play here. In that case, the lawyer was conducting the investigation on behalf of the client. Here, the investigatory work was done by Ernst & Young, not WestJet's in-house or external counsel.

[45] I therefore conclude that WestJet has not established that the Draft Investigation Report is subject to solicitor/client privilege. It is not communication between WestJet and counsel and does not constitute a third party communication that is integral to that relationship.

Litigation Privilege

[46] Unlike solicitor/client privilege, litigation privilege is not directed at or restricted to communications between solicitor and client. It contemplates communications between a solicitor and third parties. Its object is to ensure the efficacy of the adversarial process, recognizing that to achieve this purpose, parties must be left to prepare their contending positions in private without adversarial interference or fear of premature disclosure; *Blank* at para. 27.

[47] The purpose of litigation privilege is to create a zone of privacy in relation to pending or apprehended litigation; *Blank* at para. 34.

[48] Litigation privilege protects documents made for the dominant purpose of preparing for ongoing or reasonably contemplated litigation even if documents are

created by third parties: *Gardner v. Viridis Energy Inc.*, 2013 BCSC 580 at para. 20, citing *Hodgkinson v. Simms*, (1988), 1988 CanLII 181 (B.C.C.A.), 33 B.C.L.R. (2d) 129 at 136.

[49] The party asserting litigation privilege, here WestJet, must establish: (a) that litigation was ongoing or reasonably contemplated at the time the documents creates; and (b) the dominant purpose of creating the document was to prepare for that litigation: *Gardner* at para. 21, citing *Dos Santos (Committee of) v. Sun Life Assurance Company of Canada* (2005), 2005 BCCA 4 at paras. 43 and 44.

[50] Applying this test to the Draft Investigation Report, I find that WestJet's assertion of litigation privilege is established.

[51] The timing of Ernst & Young's retainer, the subject matter, and the nature of the instructions given as set out in Ms. Buggie's and Mr. Porter's evidence lead me to conclude that this litigation and its predecessor individual action were ongoing or anticipated at the time Ernst & Young was retained and that the Draft Investigation Report was prepared for the dominant purpose of this litigation and is therefore subject to litigation privilege. Indeed, the plaintiff's written submissions acknowledge this to be the case, where she says that "EY was retained to act on the instructions of WestJet's counsel to provide information and opinions concerning matters at issue in this litigation".

[52] Ernst & Young was retained after the plaintiff commenced her individual action, and the Draft Investigation Report was provided in November 2016, months after this proceeding had also been commenced. At the time Ernst & Young was retained in March 2016, the plaintiff had thus filed the individual action against WestJet on March 1, 2016 and this action was filed a few weeks later, on April 4, 2016.

[53] I am satisfied, based on the evidence before me, that the dominant purpose of the Draft Investigation Report was to prepare for this litigation. The allegations in the pleadings as they then existed covered a wide period of time pre-2016 and the

class period not yet being defined. The plaintiff advanced broad allegations that WestJet had "routinely and systematically denied its female flight attendants the benefit of the anti-harassment promise, and fostered a corporate culture that *inter alia* failed to properly investigate harassment complaints".

[54] The fact that the Draft Investigation Report addressed the pre-class period allegations is reflective of the nature of the claim the plaintiff was advancing at the time of the retainer and that this does not change the dominant purpose of the report. The fact that Ernst & Young may have been reviewing WestJet's business and organizational functions also does not change the fact that it was doing so in the context of a retainer to provide opinions and advice in respect of this litigation.

[55] With respect to the Invoices, although somewhat unclear on the evidence, it appears the Invoices in issue arise from the outset of the retainer in March 2016 to some point in 2016 or 2017. Mr. Porter confirmed no invoices were issued in 2018.

[56] Given my finding that the Draft Investigation Report is privileged, I find that the Invoices issued for the work associated with that report are also privileged.

[57] As noted above, and despite WestJet's request, Ernst & Young has been unable to parse out the non-privileged work from the privileged work. The Invoices—and thus the work done and fees charged for the Draft Investigation Report—cannot be separated from the work and fees charged for the Policy and Procedures Review. The Policy and Procedures Review was completed in June 2016, but for the period from March 2016 to June 2016, the work done in respect of that report would have been commingled with the work done in respect of the privileged Draft Investigation Report.

[58] Neither party addressed the privilege issues at play as they relate specifically to the Invoices. There is no assertion that Ernst & Young invoiced WestJet directly. Presumably, Ernst & Young invoiced external counsel, who in turn included Ernst & Young's fees as disbursements in their fees charged to their client, WestJet.

[59] Neither party addressed the law that applies when privilege is claimed over legal fees or disbursements, or where privileged information is inextricably commingled with non-privileged information. Further, the plaintiff has failed to satisfy me as to how, given the commingling of work done and in the absence of any attribution of work done or fees charged to the 2016 Policies and Procedures Review or the Draft Investigation Report respectively, the Invoices or amount of fees charged is relevant to the matters in issue in this litigation.

[60] On their face, and at least to the extent that they relate to work done for the Draft Investigation Report, the Invoices represent disbursements incurred by external counsel in respect of this litigation. The plaintiff is not entitled to know the fees incurred by WestJet in defending this claim, and cannot obtain indirectly what they are not entitled to obtain directly.

[61] The plaintiff's application for production of the Invoices as set out in the July 14, 2025 notice of application at paragraph 1(a)(vi) is dismissed, with liberty to reapply following receipt of WestJet's responses to requests arising out of Mr. Porter's examination for discovery and response to the plaintiff's interrogatories dated June 13, 2025.

Conclusion

[62] Paragraphs 1(a)(i), (iv), (v), 1(c), and 2 of the notice of application are adjourned generally, with liberty to reapply.

[63] Paragraphs 1(a)(ii) and (iii) of the notice of application are dismissed. The Draft Investigation Report is privileged. WestJet is not required to produce that report, the Invoices, or any supporting materials resulting from Ernst & Young's work on that report.

[64] I understand that WestJet has produced the 2016 Policies and Procedures Review report, which is the only other report arising from the March 22, 2016 Statement of Work, and the supporting documentation to the extent it exists.

[65] Paragraph 1(a)(vi) of the notice of application is dismissed with liberty to reapply on the terms as outlined above.

[SUBMISSIONS ON COSTS]

[66] THE COURT: In the circumstances, given that the majority of the application was adjourned and, to be fair to WestJet, those aspects of the application that were considered were determined in its favour, the issue of costs will be deferred until the application is concluded on the merits. There may well be interplay between those aspects of the application that have not yet been determined, and the balance of the application, including the issue of whether the application ought to have been set down given my finding that it is premature.

[67] The parties are at liberty to make further submissions as to costs once the application has been heard in full, and if it is not heard in full, then the issue can be brought back before me, e.g. if the plaintiffs do not pursue the relief that has been adjourned.

“Hughes J.”