IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Lewis v. WestJet Airlines Ltd.,* 2024 BCSC 111

Date: 20240111
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:	K. Brooks, K.C. J. Harman L. Koerner-Yeo
Counsel for the Defendant:	J. Mitchell, K.C. I.W. Bailey
Place and Dates of Hearing:	Vancouver, B.C. November 17 & 30, 2023
Place and Date of Judgment:	Vancouver, B.C. January 11, 2024

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[1] **THE COURT:** In this certified class action, the representative plaintiff, Ms. Lewis, claims that WestJet has systematically breached its employment contracts with flight attendants by failing to have an anti-harassment program in place and respond to and investigate harassment complaints (the "Anti-Harassment Promise").

[2] The plaintiff's claim is framed entirely in breach of contract. She alleges that WestJet derived financial benefit from its systemic breach of contract by way of cost savings resulting from its failure to fulfill the Anti-Harassment Promise and seeks disgorgement of the costs saved by WestJet.

[3] This action was certified as a class proceeding by the Court of Appeal in April 2022. The certified common issues material to this application are:

1) During the Class Period, was the Anti-Harassment Promise, as defined in the Amended Notice of Civil Claim, a term of WestJet's employment contract with each Class Member?
2) Did WestJet fail to implement and enforce the Anti-Harassment Promise throughout the Class Period and, in doing so, breach Class Members' employment contracts?
3) If yes, did WestJet save costs through its deficient performance of the Anti-Harassment Promise during the Class Period?

[4] In November 2023, the class definition was amended to revise the class period to run from April 4, 2014, to February 28, 2021.

Background

[5] This application arises from the parties' opposing views about the proper scope of document production required in light of the claim framed by the plaintiff and certified common issues.

[6] In support of certification, the plaintiff relied on a methodology for identifying components of and assessing WestJet's compliance with its anti-harassment program set out in an expert report of Rachel Turnpenney (the "Turnpenney report"). The Turnpenney report identified various types of information relevant to this assessment, including:

a) whether complaints are investigated or not, processes for conducting investigations, who conducts the investigations, mandates provided to investigators;

b) how information regarding WestJet's anti-harassment program is disseminated in the workplace, what training is provided and to whom;

c) WestJet's operational capacity to implement its anti-harassment program, including by way of financial resources or costs; and

d) whether WestJet collects, monitors, and analyzes data associated with its anti-harassment program.

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[7] The plaintiff's document requests are, in large part, framed with a view to obtaining information that the Turnpenney report identified as necessary to assess WestJet's anti-harassment program. The plaintiff sent an initial document request in September 2022. In December 2022, the parties agreed to a discovery plan. The plaintiff requested updates on WestJet's document production in December 2022 and March 2023. WestJet produced a list of documents on April 28, 2023. The plaintiff says many of the documents requested in her September 2022 correspondence were not produced in this list.

[8] On May 31, 2023, the plaintiff issued a demand pursuant to Rule 7-1(1) and (11) of the *Supreme Court Civil Rules*, B.C. Reg. 168/2009, to mandate production of 37 class documents or classes of documents (the “May 23 Demand”). On June 23, 2023, WestJet provided a list of documents in response to the plaintiff's May 2023 Demand. WestJet also provided its position in response to various classes of documents.

[9] On July 28, 2023, the plaintiff served an unfiled notice of application containing as Schedule “A” 21 requests from the May 2023 Demand that she asserted remained outstanding. The parties made continued attempts to resolve the production issues. WestJet took the position that some of the plaintiff's requests were unclear. This prompted the plaintiff to provide further particularization or

clarification of the requested categories of documents, which she did in August 2023.

[10] This application was filed in September 2023, and WestJet filed an application response on September 29, 2023, which included a modified version of the plaintiff's Schedule “A” outlining WestJet's position in response to the classes of documents sought.

[11] In October of 2023, in response to WestJet's position that it required further particularization in order to respond to some of the plaintiff's requests, the plaintiff provided additional clarification of the requests in issue, including to specify that the documents sought related to harassment or sexual harassment issues within the class period. WestJet delivered a further list of documents on November 1, 2023.

[12] The application came on for hearing on November 17, 2023. The application materials were voluminous, comprising in excess of 1,600 pages and approximately 150 pages of written submissions from the parties. It was apparent at the outset of the hearing that the one-day time estimate was insufficient in light of the breadth of documents sought and volume of materials filed. A continuation was required, and the plaintiff narrowed the application to nine classes of documents, which were determined to be representative of the various classes in issue.

[13] The expectation is that findings on these classes of documents with assist the parties in resolving outstanding issues regarding the remaining classes of documents. The classes of documents in issue here with reference to Schedule “A” of the plaintiff's notice of application are as follows:

1) A3: copies of any initial or annual acknowledgment signed by employees relating to WestJet's “Core Policies”—which I understand to include WestJet's Business Code of Conduct and Respect in the Workplace Policy among others—and different versions of those acknowledgments if they have changed during the class period;

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2) A5: curriculum vitae ("CV") or resumes or training profiles of trainers providing on-boarding training and including training relevant to the anti-harassment program;

3) B6: documents regarding exit interviews in which the Core Policies or anti-harassment program was discussed or reporting complaints or workplace culture were discussed;

4) B7: records of any follow-up arising from concerns around the anti-harassment program identified in the exit interview process;

5) C8: records and documents relating to settlements that included non-disclosure agreements relating to harassment, discrimination or sexual harassment or issues that would fall under the program in the class period;

6) C9: records including aggregates of settlement monies for damages paid by WestJet to harassment, discrimination, or sexual harassment complainants within the class period;

7) D11: records of how many investigators were used internally or retained externally per year, from what regions in Canada, the nature of the complaints, and how long the investigations took from receipt of complaint to receipt of investigation report;

8) D12: records of all external investigators or other consultants, including mediators who were hired during the class period in respect of harassment, discrimination, or sexual harassment matters and at what cost, and an understanding of the mandates provided (i.e., fact finding or fact finding and application of policies or laws); and

9) D13: copies of redacted investigation reports, both internal and external investigations in relation to harassment or sexual harassment complaints under the anti-harassment program during the class period.

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[14] The plaintiff also sought additional relief in her written submissions that was not included in the notice of application. WestJet objected on the basis of having had an inadequate opportunity to respond. I declined to entertain the application for a leave other than that set out in the notice of application.

[15] Documents in issue include documents pertaining to individual complainants who have made allegations of harassment and WestJet's responses to those complaints. WestJet says the plaintiff's position on this application is inconsistent with the basis upon which she obtained certification of this action, namely that examination of individual complaints or allegations of harassment would not be necessary at the common-issues trial.

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Issues

[16] The over-arching question for determination on this application is whether the documents demanded by the plaintiff ought to be produced. This in turn requires a determination of whether the requested documents are relevant, and with respect to the settlement documents articulated in C8 and C9, whether an exception to settlement privilege applies.

Applicable Legal Principles

[17] The plaintiff brings this application for production of documents pursuant to Rule 7-1(1) and 7-1(11). The applicable legal principles are summarized in the class action context at paras. 17 to 20 of *Jiang v. Peoples Trust Company*, 2021 BCSC 2193, as follows:

> [17] Where a party demands additional documents or classes of documents from the listing party that are not material, but that relate to any or all matters in question in the action, the demanding party must satisfy the requirements of Rule 7-1(11) and show the existence and possible relevance of the additional documents beyond a "mere possibility": *Przybysz v. Crowe*, 2011 BCSC 731 at para. 32, 45; *Kaladjian v. Jose*, 2012 BCSC 357 at paras. 60, 62, 64.
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> [18] In *Jones v. Donaghey*, 2011 BCCA 6 at para. 18 the Court of Appeal clarified the distinction between a material fact and a relevant fact as follows:
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>> … a material fact is the ultimate fact, sometimes called "ultimate issue", to the proof of which evidence is directed. It is

> the last in a series or progression of facts. It is the fact put "in issue" by the pleadings. Facts that tend to prove the fact in issue, or to prove another fact that tends to prove the fact in issue, are evidentiary or "relevant" facts.
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> [19] The burden on a party seeking documents under Rule 7-1(11) is not a high one and as long as there is some "air of reality between the documents and the issues in the action", the court will order the documents produced: *Lonking (China) Machinery Sales Co. Ltd. v. Zhao*, 2017 BCSC 2154, at paras. 19-20, 30-33, 43, 45; *Biehl v. Strang*, 2010 BCSC 1391 at para. 29.
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> [20] Further, by applying the proportionality principle in Rule 1-3(2), the court should attempt to balance the burden of producing additional documents against their materiality and probative value: *Marsh Canada Limited v. BFL Canada Insurance Services Inc.*, 2014 BCSC 1171 at para. 66.

[18] Relevance is the animating principle and will be governed by the certified common issues as informed by the pleadings and subject to the principles of proportionality that apply alongside the principles that govern class action proceedings: *Jiang* at para. 22, citing *Coburn and Watson's Metropolitan Home v. Bank of America Corporation*, 2017 BCSC 686; see also *Coburn and Watson's Metropolitan Home v. Bank of Montreal*, 2018 BCSC 897, aff'd 2018 BCCA 432; *Stanway v. Wyeth Canada Inc.*, 2013 BCSC 369, leave ref'd 2013 BCCA 256.

[19] The intent of Rule 7-1(11) is to inform the opposing party of the basis for the broader disclosure request with sufficient particularity so that there can be a reasoned answer to the request: *Ackert v. At Nature's Door Owners' Association*, 2021 BCSC 778 at para. 20.

Analysis

Preliminary procedural point

[20] At the outset, I deal with a preliminary point. In response to the plaintiff's demands for production, WestJet takes the position that the requests are overly broad, not framed with sufficient specificity, that relevant records have been produced, or that further particulars are required to enable WestJet to determine if additional documents ought to be produced. In response, the plaintiff attempted to

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further particularize the document requests by expressly noting her demands for documents with respect to the anti-harassment program and during the class period.

[21] WestJet then argued on this application that the plaintiff's attempts to particularize resulted in impermissible modification of the document demand to seek broader categories of documents than outlined in the May 2023 Rule 7-1(11) Demand, and in some instances, requests that were broader than those sought in the notice of application. The plaintiff confirmed that her intention is only to clarify, not to seek broader form of document production.

[22] In my view, the plaintiff's attempt to clarify the production sought largely narrowed the classes of documents and stated what was already obvious based on the pleadings, namely that the demands are for documents in respect of the program during the class period. In the circumstances, I find the plaintiff's demands were made with reasonably specificity or particularity to meet the requirements of Rule 7-1(11) so as to enable WestJet to respond. This is particularly the case when those demands are considered in light of the pleadings and of the common issues.

[23] Indeed, in many instances, WestJet's response to the plaintiff's demands is that the requested records had been produced and further particulars were required if the plaintiff's position remained that documents were missing. In this instance, I refer by way of example to categories A5, B6, and C9. I am not satisfied that the plaintiff has improperly broadened the scope of production being sought through her attempts to particularize or clarify the classes of documents in response to the positions taken by WestJet in its response to the initial demand and Schedule “A” of the notice of application.

[24] I thus decline to dismiss the application on the basis that the plaintiff has failed to comply with the procedures set out in Rule 7-1(11) to (13) such that WestJet has not had sufficient time as provided for in Rule 7-1(12) to respond to the plaintiff's May 2023 Demand as particularized by her August 2023 correspondence.

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[25] I will now deal with each of the categories of documents sought on this application.

A3: Core Policy Acknowledgments

[26] The plaintiff seeks production of any initial or annual acknowledgments signed by employees relating to the Core Policies and different versions of those acknowledgments if they have changed between 2014 and 2021, i.e., during the class period. WestJet says records responsive for this request for the relevant time period have been produced and identifies one document—a redacted 2016 electronic policy acknowledgment form regarding WestJet's Code of Business Conduct, Acceptable-Use Policy, Alcohol and Drug Use Policy, and Corporate Information Security Policy. This document does not appear to address WestJet's Respect in the Workplace Policy or Workplace Violence Prevention Policy.

[27] WestJet objects to production of each individual employee acknowledgment, noting that this would comprise approximately 10,000 individual acknowledgments, but indicated in oral submissions that it was not opposed to producing statistics regarding the number of employees who sign such acknowledgments. I am satisfied that this category of documents is relevant based on the pleadings and common issues. In particular, these documents are relevant to common issue #2 and WestJet's adherence, or lack thereof, to its policy and procedures aimed at addressing harassment in the workplace.

[28] However, in my view, ordering production of each individual acknowledgment signed during the class period for each employee is not proportional in light of their apparent materiality and probative value at present. Accordingly, WestJet is ordered to produce unsigned copies of all versions of initial or annual acknowledgments relating to the Core Policies during the class period together with statistical information demonstrating the number of employees who signed such acknowledgments and their job titles, classifications, or categories.

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A5: Training Documents

[29] The plaintiff seeks production of CV's or resumes or training profiles of the trainers providing the on-boarding training, including training relevant to the program. WestJet objects on the basis that the plaintiff's initial request did not seek CVs or resumes for the actual trainers employed by WestJet. This latter objection is, in my view, without merit. The plaintiff's demand, reasonably interpreted, clearly seeks production of documents pertaining to the trainers providing the on-boarding training.

[30] WestJet also says that it has responded to this request by producing "job summaries" for these positions. These documents appear to be akin to job descriptions or job postings. They contain no information regarding whether the position was, in fact, filled, by whom, the compensation paid, or what that person's qualifications or skill set comprises. I am satisfied that the plaintiff has established an air of reality that this category of documents is relevant based on the pleadings and common issues—again, particularly with respect to common issue #2, which deals with WestJet's adherence, or lack thereof, to its policies and procedures aimed at addressing harassment in the workplace.

[31] To the extent that such documentation may also contain information about the salary or fees paid to such individuals, then they are also relevant to common issue #3 regarding the cost incurred—or not—by WestJet in its alleged deficient performance of the Anti-Harassment Promise during the class period. Accordingly, WestJet is ordered to produce the A5 class of documents.

B6 & B7: Exit Interview Documents

[32] The plaintiff seeks two classes of documents arising from employee exit interviews. First, B6: documents relating to exit interviews in which WestJet's Core Policies or the program or complaints or workplace culture were discussed; and B7: records of any follow-up arising from concerns under the program identified in the exit interview process.

[33] WestJet takes the position that records responsive to B6 have been produced and that B7 is overly broad. WestJet points to its production of three policies (Respect in the Workplace Policy, Respect in the Workplace Procedure, and Progressive Discipline Policy) as responsive to this request. I am satisfied that this plaintiff has established an air of reality that this category of documents is relevant based on the pleadings and common issues—again, particularly with respect to common issue #2.

[34] With respect to category B6, I am satisfied that to the extent that WestJet's Core Policies, the program, or workplace culture were raised within the context of the Anti-Harassment Promise as alleged in the plaintiff's claim and framed in common issue #1 and #2, and in turn, discussed in exit interviews or captured in notes, correspondence or other documents resulting therefrom, such documentation is relevant within the meaning of Rule 7-1(11).

[35] With respect to B7, I do not agree with WestJet that this demand is overly broad. In the same manner as B6, if documentation exists evidencing follow-up steps taken or correspondence exchanged regarding issues raised in exit interviews relevant to the Anti-Harassment Promise, then it is likewise relevant.

[36] The documents described in B6 and B7 are relevant not for the purpose of determining whether the allegations of harassment made—if any—in exit interviews were meritorious or substantiated, but rather with respect to WestJet's knowledge of such allegations and steps taken in response thereto, if any.

[37] To the extent that additional documents falling within classes B6 and B7 exist, they are relevant, and WestJet is ordered to produce them. For clarity, this includes documents pertaining to WestJet's exit interviews generally, together with those arising out of individual exit interviews as applicable.

C8 & C9: Settlement Documents

[38] The plaintiff seeks two classes of documents consisting of settlement documentation in the production of, with respect to class C8, information on

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settlement agreements that included non-disclosure agreements; and C9, regarding the amount paid in general damages or notice or enhanced notice. I have summarized these classes of documents in more detail above.

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[39] In May 2023, the plaintiff revised these two categories of demands in the notice of application to seek “records and documents” rather than “information on settlements” and “records including aggregates” instead of the “amount paid in general damages” respectively. Procedurally, WestJet takes issue with the change in the scope of these demands from the May 2023 Demand to the revised language contained in the notice of application. Substantively, it resists disclosure of the settlement documents on the basis that these documents are presumptively protected by settlement privilege.

[40] The plaintiff does not dispute that settlement privilege presumptively applies to C8 and C9, but says they are producible under an exception to the privilege, namely because she is not seeking to use these documents to establish WestJet's liability for the conduct at issue in the settlement documents, and the public interest in addressing harassment in the workplace outweighs the public interest in promoting settlement.

[41] *Sable Offshore Energy Inc. v. Ameron International Corp.*, 2013 SCC 37 [*Sable*] is the leading decision on settlement privilege. All communications made in an attempt to effect a settlement, including contents of a concluded settlement agreement, are protected by a presumption of privilege: *Sable* at paras. 12 to 18.

[42] The purpose of the privilege is to promote the resolution of disputes in a manner that avoids personal and public expense and time involved in litigation: *Sable* at para. 11. Settlement is a class privilege. The test for determining whether an exception exists is that a party seeking an exception to settlement must show, on a balance of probabilities, the competing public interest outweighs the public interest in encouraging settlement: *Sable* at para. 19.

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[43] The same test applies in the context of class proceedings: see e.g. *Sandhu v. HSBC Finance Mortgages Inc.*, 2016 BCCA 301, at paras. 27 to 31. The question is not simply whether the settlement documents would assist the demanding party in proving its case against the settling party. As the Supreme Court of Canada stated in *Sable* at para. 30:

> [30] A proper analysis of a claim for an exception to settlement privilege does not simply ask whether the non-settling defendants derive some tactical advantage from disclosure, but whether the reason for disclosure *outweighs* the policy in favour of promoting settlement. …
>
> [Emphasis in original.]

[44] The bar is high, and "an exception should only be found where the documents sought are both <u>relevant</u> and <u>necessary in the circumstances of the case</u> to achieve either the agreement of the parties to the settlement, or another compelling or overriding interest of justice" (emphasis in original): *Dos Santos v. Sun Life Assurance Co. Of Canada*, 2005 BCCA 4, at para. 20.

[45] Traditional exceptions include allegations of misrepresentation, fraud, or undue influence, or to prevent overcompensation: *Sable* at para. 19. Additional exceptions include mutual waiver or where the settlement substantially changes the adversarial landscape of the litigation.

[46] It is common ground that none of these exceptions apply here. Rather, the plaintiff asserts that a different exception applies, namely that settlement privilege does not apply because disclosure is sought for a purpose other than establishing a party's liability for the conduct that was the subject of the settlement negotiations. This exception has been articulated as follows:

> Where material related to a settlement or its negotiation is relevant to the litigation apart from establishing one party's liability for the conduct that is the subject of the negotiations and apart from showing the weakness of one party's claim with respect to those matters, settlement privilege does not bar production.

Robert W. Hubbard and Katie Doherty, *The Law of Privilege in Canada* (Markham: Thomson Reuters Canada, 2023) at §12:77, citing *Mueller Canada Inc.*

v. State Contractors Inc. (1989), 41 C.P.C. (2d) 291 (Ont. H.C.J.), 1989 CanLII 4117 and *I. Waxman & Sons Ltd. v. Texaco Canada Ltd.*, [1968] 1 O.R. 642, 1968 CanLII 178 (H.C.J.), aff'd [1968] 2 O.R. 452, 1968 CanLII 327 (C.A.).

[47] The plaintiff also relies on *Sabre Inc. v. International Air Transport Association*, 2009 CanLII 9452 (Ont. S.C.J.) [*Sabre*] where the Court applied the exception to settlement privilege as it pertains to a third party in the litigation (at paras. 21 to 22) and said the same result ought to follow here. I disagree. In my view, *Sabre* is not binding on me, and it does not, in any event, assist the plaintiff.

[48] First, *Sabre* predates *Sable* and thus was determined in the absence of consideration of the public interest required by *Sable*. Second, it has never been applied in British Columbia. Third, *Sabre* has not been followed widely by in other contexts or courts. It only appears to have cited twice, and both of those instances are distinguishable on their facts from the case at bar.

[49] First, in *Gowing Contractors Ltd v. Walsh Construction Company Canada*, 2023 ONSC 4407 [*Gowing*], Justice Wiebe applied *Sabre* in ordering disclosure of a settlement agreement in circumstances where the defendant had put the settlement documents at issue in its pleadings, and the Court concluded that resolution of the issues that formed the subject of the settlement, was highly relevant to the case at bar apart from any admission against interest in the settlement.

[50] WestJet has not put the settlement documents in issue by way of its pleadings in this action. Nor in my view are the settlement agreements similarly highly relevant to determination of the common issues certified in this action. I also find that the precedential value of *Gowing* is limited given that the Court does not appear to have referred to *Sable* or turn its mind to the public-interest test set out therein.

[51] Second, in *McDiarmaid Estate v. Alberta (Infrastructure)*, 2023 ABKB 14, Justice Loparco considered *Sabre* and ordered disclosure of the settlement agreement at issue because the Court of Appeal had previously determined it was

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relevant and material to the action, and had sent the matter back for reconsideration: at paras. 38 to 41. The substantive analysis in support of this conclusion is sparse and appears to have turned on a lack of prejudice to the disclosing party rather than the public interest: see e.g. para. 39. Regardless, no such prior judicial determination of relevance arises here so as to mandate disclosure on that basis.

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[52] In advocating in favour of an exception to the settlement privilege, the plaintiff repeatedly emphasized that the settlement documents are likely the best evidence of WestJet's alleged breaches of the Anti-Harassment Promise and are thus key documents that she requires to prove her case. That may well be true. However, settlement privilege will not be waived simply because upholding the privilege will deny a third-party plaintiff important evidence and admissions to prove its case: *The Trustees of the Drywall Acoustic Lathing and Insulation Local 675 Pension Fund v. SNC Group Inc.*, 2013 ONSC 6297 at paras. 84-85 [*SNC Group*]; and *National Squash Academy Inc. v. Parc Downsview*, 2016 ONSC 60 at paras. 31-32 [*National Squash*].

[53] In *SNC Group*, the Court recognized that the settlement documents in issue may contain the best evidence that SNC engaged in bribery, and that it would be difficult or impossible for the plaintiff to secure evidence by other means, but nonetheless did not find an exception to settlement privilege had been made out. Rather, the Court concluded that these were not sufficient public policy reasons for abrogating settlement privilege in the interests of justice: see *SNC Group* at paras. 84, 85, 87, as cited in *Singh v. Progressive Conservative Party of Ontario et al*, 2017 ONSC 4168, at para. 109.

[54] Here, the plaintiff seeks disclosure of settlement documentation, including settlement agreements between WestJet and its employees arising out of individual allegations of harassment to establish that WestJet engaged in a systemic course of conduct, whereby it improperly tolerated or overlooked harassment and then bought complainants' silence by way of settlement and cash payment in exchange for

non-disclosure agreements. The jurisprudence does not, in my view, support an exception to settlement privilege on this basis.

[55] In this respect, the plaintiff's arguments are similar to those that were rejected in *SNC Group*, *Singh*, and *National Squash*, namely that the “justice of the case” required disclosure of communications that were *prima facie* protected by settlement privilege: see e.g. *Singh* at para. 109, *National Squash* at para. 33, and *SNC Group* at paras. 84, 85, and 87. The reasoning in *National Squash* at para. 33 is instructive on the point that a party's ability to more easily prove its case will not outweigh the public interest in encouraging settlement:

> [33] What the plaintiff is seeking to do through the introduction of the settlement communications is bolster its argument that the defendant “did the plaintiff wrong” by failing to carry out the development plans which formed the basis of the alleged pre-contractual representations. Even if this was accurate (and I make no finding on this issue at this stage), it does not outweigh the public interest in encouraging settlement. Accordingly, I find that the contents of those negotiations are protected by settlement privilege and ought not to form part of the evidentiary record on this motion.

[56] Nor does the fact that a case may involve matters of public importance mean that there should be a free-standing exception to settlement privilege: *Singh* at paras. 111 to 112. The Court in *Singh* refused to find such an exception, even where matters of significant public importance were in issue. As explained in *Singh* at paras. 111 and 112:

> [111] In my view, the points of distinction raised by Singh do not detract from the application to this case of the principles expressed in *SNC-Lavalin*. With respect to the first and third points (that both relate to the public element of this case), the fact that the application by Singh and his campaign involves allegations of voter fraud at the nomination meeting, a matter of public importance, as opposed to financial fraud of the type that that was alleged in *SNC-Lavalin*, is not, in my view, a sufficient reason not to give effect to settlement privilege. Simply because a given case involves a matter of public importance does not mean that there should be a free-standing exception to settlement privilege. If that were the case, a government that is a party to litigation involving a matter of public importance would not engage in settlement discussions for fear that any statements made as part of an open and frank negotiation could be used against it in the litigation. Such a broad, free-standing public policy exception would, in my view, have a chilling effect on settlement negotiations in disputes involving matters of public importance and would run roughshod over the public policy reasons expressed in Sable

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> for encouraging settlements. I do not regard the second and fourth points of distinction raised by Singh to be material ones.
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> [112] The court's reasoning in *SNC-Lavalin* for refusing to give effect to the requested exception to settlement privilege in order to allow a party to more easily prove serious allegations, in that case, allegations of bribery, applies directly to this case. Here, Singh seeks to pierce the veil of confidentiality afforded by settlement privilege by introducing into evidence communications made during the course of the Meeting. I do not agree that he is able to do so for the same reasons as were given by Perell J. in *SNC-Lavalin* for rejecting an exception to the settlement privilege in that case.
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> [Emphasis added.]

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[57] In my view, the same reasoning applies equally here. The fact that settlement documents may be key evidence of WestJet's alleged breaches of the Anti-Harassment Promise is insufficient on its own to establish an exception to settlement privilege. The plaintiff must show that a competing public interest outweighs the public interest in promoting settlement as articulated in *Sable*. This is a high bar to meet. As noted in *Heritage Duty Free Shop Inc. v. Attorney General for Canada*, 2005 BCCA 188, at para. 25, exceptions to settlement privilege "are…narrowly defined and seldom applied". I am not satisfied that she has done so.

[58] The plaintiff says that public concern over harassment in the workplace is well established, and says disclosure is warranted because settlement agreements could be used by employers to silence complainants. The plaintiff points to various reports and articles in legal journals—one of which is a commentary on this proceeding—in support of this assertion.

[59] I accept that addressing harassment in the workplace, particularly sexual harassment, is a matter of public concern. This concern is documented in various reports, including that by the Honourable Louise Arbour, C.C., G.O.Q.'s May 2022 *Report of the Independent External Comprehensive Review of the Department of National Defence and Canadian Armed Forces*. However, in my view, the public concern and recognition of the need to address harassment in the workplace does not rise to the level of a public interest in disclosure that is sufficient to outweigh the public interest in promoting settlement.

[60] Nor do I find the plaintiff's submission that disclosure is warranted because settlement agreements containing non-disclosure agreements could thus be used by employers to silence complainants instead of proactively addressing harassment, sufficiently compelling or well established on the record before me, to outweigh the public interest in promoting settlement.

[61] Finally, a concern regarding privacy interests also arises in respect of C8 and C9 settlement documentation. Privacy rights of third parties are not an absolute bar to production, but are one of several interests to be considered and balanced in determining the proper ambit of document discovery, once relevance has been established: *Richard v. British Columbia*, 2009 BCCA 77, at para. 29.

[62] Individual class member files were ordered produced in *Richard*. However, protections that were in place in that case are not present here. Notably, the *Class Proceedings Act*, R.S.B.C 1996, c. 50, s. 19 notice in *Richard* specifically addressed confidentiality issues and contained comprehensive written confidentiality agreements that the Court of Appeal found provided "extensive and explicit protection for third party information produced…in the course of this litigation" and had been entered into by class counsel, their staff, and anyone else who may have access to such information.

[63] In the present circumstances, the implied undertaking of confidentiality applies, but no similar notice has been given or confidentiality agreements entered into. Moreover, the plaintiff concedes that the counterparties to the settlement documentation captured by C8 and C9 have not been given notice that a waiver of privilege is sought.

[64] In the result, I conclude the plaintiff has not met the burden of showing that "a competing public interest outweighs the public interest in encouraging settlement" so as to warrant an exception to settlement privilege in respect of the settlement documents. The plaintiff's application for production of classes C8 and C9 is dismissed.

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D11, E12 & E13: Investigation Documents

[65] The plaintiff seeks production of three classes of documents related to WestJet's investigation of allegations of harassment: D11, E12 and E13.

[66] The plaintiff particularized these requests in August 2023 to make clear that the documents sought were in respect of allegations of harassment or sexual harassment during the class period. WestJet takes issue with the inclusion of the term "discrimination" in E11. I find that this does not improperly expand the scope of production when the demand is interpreted in light of the pleadings and the common issues.

[67] As was the case in *Richard* (see e.g. at para. 21), production of these categories of documents gives rise to the tension between systemic allegations of breach of contract pleaded by the plaintiff and individual allegations of harassment that may or may not have been made. Justice Humphries' observations about the complexities of the interaction between allegations of systemic negligence and evidence of individual instances of abuse in *Rumley v. British Columbia*, 2002 BCSC 1653 at paras. 9 and 13 are equally apt here in respect of the plaintiff's claim of systemic breach of contract.

[68] These observations are, in my view, illustrative of why the classes of documents the plaintiff seeks to have produced need to be considered on a case-by-case basis. In *Richard*, individual class members' files were ordered produced. The production order was upheld on appeal, where the Court of Appeal rejected a similar argument to that being advanced by WestJet here (at para. 16), namely that by choosing to limit their claim to common issues of systemic breach of contract, the plaintiff similarly limited the ambit of discovery to the extent that individual class members' files were irrelevant.

[69] That being said, *Richard* does not stand for the broad proposition advocated by the plaintiff, namely, that individual class members' files will always be producible in class actions that plead systemic claims. This determination remains one to be

made on a case-by-case basis in light of the pleadings, the certified common issues and the particular category or class of documents being sought.

[70] Nor does para. 49 of Justice Horsman's decision on the certification application in this proceeding support the proposition that documentation pertaining to individual allegations of harassment is irrelevant. Justice Horsman framed the plaintiff's claim as engaging the issue of WestJet's alleged systemic failure to meet its contractual promise to implement policies and practices that would adequately address harassment in the workplace, not individual instances of workplace harassment.

[71] However, by framing the claim as she did, Justice Horsman did not make any pronouncement on the scope of document production or predetermine whether documents pertaining to individual allegations of harassment ought to be produced.

[72] As was the case in *Rumley*, no issues of individual allegations of harassment will be before the Court for determination on the merits at the common-issues trial in this action. Nevertheless, whether individual reports of harassment were made and how they were handled by WestJet may need to be considered, including as part of the factual context in which the plaintiff's claim of breach of the Anti-Harassment Promise arises. This is particularly the case in relation to common issue #2.

[73] The investigation documents captured in D11, E12, and E13 may reveal conduct and response by WestJet that shed light on the policies and procedures in place to address harassment that underpin the plaintiff's claim that the Anti-Harassment Promise was a term of their employment contract and breached by WestJet's failure to have in place or adhere to policies and procedures aimed at addressing harassment in the workplace. Findings may need to be made about whether individual reports of harassment were made and how they were handled in order to address the common issues #1 through #3.

[74] In this respect, information in the investigation documents may lead to a train of inquiry respecting the policy and procedures WestJet had in place, WestJet's

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capacity to implement existing policies and procedures, and whether they were, in fact, implemented or enforced during the class period. Thus, as in *Rumley* (at para. 9), the fact that reports of harassment were or were not made, and were or were not responded to, is arguably relevant to the common issues, whereas the substantive merits of individual instances of alleged harassment themselves are not.

[75] Put differently, WestJet's knowledge of alleged instances of harassment and steps taken in response thereto—not whether individual allegations themselves were substantiated or not—are relevant to the claim pleaded and certified common issues.

[76] Accordingly, I am satisfied that the plaintiff has shown an air of reality and more than mere possibility that the investigation documents are relevant and ought to be produced. I thus order that documents D11, E12, and E13 be produced.

Conclusion

[77] In the result, the orders sought in part 1, paragraph 1 of the notice of application as it relates to the following class of documents identified by Schedule "A" are granted, that is: A3, A5, B6, B7, D11, E12 and 13.

[78] The plaintiff's application for production of the settlement documents captured by classes C8 and C9 is dismissed.

[79] A delivery of an amended list of documents together with copies of the documents contained therein will be made by WestJet within 45 days of today's date, subject to agreement between the parties or a further court order.

"Hughes J."

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