P2390102408

IN THE MATTER BETWEEN:

DUONG YEE

Plaintiff

and

WESTJET, AN ALBERTA PARTNERSHIP AND ITS PARTNERS,
WESTJET AIRLINES LTD. AND 2222304 ALBERTA CORP.

Defendants

CLOSING SUBMISSIONS OF THE PLAINTIFF

KITCHEN WELLS LLP

203-304 Main Street S, Suite 224
Airdrie, AB T4B 3C3

230-1210 Summit Drive, Suite 429
Kamloops, BC V2C 6M1

Jody Wells
jody@kwllp.ca
250-319-1175

Counsel for the Plaintiff

1. This case is not about a policy, nor the reasonableness of a policy, nor a pandemic, nor the struggle of a business to survive a pandemic. This case is about the wrongful dismissal of an employee, which does not cease to be wrongful on account of her employer's discrimination.

THIS COURT HAS JURISDICTION

2. Mrs. Yee's claim is for wrongful dismissal.

3. This Court has jurisdiction to hear wrongful dismissal claims so long as the damages do not exceed the $100,000 limit prescribed by regulation:

> **Jurisdiction**
> **9.6(1)** The Court has, subject to this Act, the following jurisdiction:
> (a) for the purposes of Part 4,
> to hear and adjudicate on any claim or counterclaim
> (i) to hear and adjudicate on any claim or counterclaim
> …
> (B) for damages, including damages for breach of contract, if the amount claimed or counterclaimed, as the case may be, exclusive of interest payable under an Act or by agreement on the amount claimed, does not exceed the amount prescribed by the regulations;[1]
>
> **Monetary limit**
> **2** For the purposes of section 9.6(1)(a)(i) of the Act, $100 000 is prescribed as the amount in respect of which the Court has jurisdiction to hear and adjudicate on any claim or counterclaim referred to in section 9.6(1)(a)(i) of the Act.[2]

4. That which this Court lacks jurisdiction to do is enumerated,[3] and adjudicating a claim for wrongful dismissal if caused by discrimination does not appear on the list.

5. Neither does the jurisprudence suggest that wrongful dismissal actions are limited by what caused the wrongful dismissal.

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[1] *Court of Justice Act*, RSA 2000, c C-30.5.
[2] *Court of Justice Civil Procedure Regulation*, Alta Reg 176/2018.
[3] *Court of Justice Act*, section 9.6(2).

6. Plenty of case law confirms the courts lack jurisdiction to adjudicate claims for discrimination ***in the absence of*** a cause of action.

7. *Harun-ar-Rashid v Canada (Royal Canadian Mounted Police)*[4] involved discrimination but no actionable claim such as wrongful dismissal. In fact, paragraph 56 finds the Court evaluating whether wrongful dismissal might be made out in an effort to resuscitate the claim. This militates against the idea that the Court is unable to adjudicate wrongful dismissal claims in the event the termination is the result of discrimination.

8. Similarly, the claim in *Hamilton v Rocky View School Division No. 41*[5] fails because "[t]here is an action for wrongful dismissal but not for wrongful failing to hire".[6]

9. *Fakhri v Canadian Natural Resources Limited*[7] does no better. Mr. Fakhri was attempting to claim constructive dismissal, but evidently the Court found his skill and behaviour deficits to be the reasons he was passed over for promotions. Whether a constructive dismissal claim resulting from discrimination might have been actionable had there been any proof Mr. Fakhri had been constructively dismissed is not decided in the case.

10. What *is* supposed in *Fakhri* is that had the claimant been passed over for a promotion based on race, such a case would be within the ambit of the Alberta Human Rights Commission, not a civil claim.[8] That, however, is of no assistance, because being passed over for a promotion is not a cause of action. Similar to *Hamilton*, *Fakhri* would be, under the circumstance described by the Court, more the "fail to hire" species of case.

11. *Seneca College v Bhadauria*,[9] another "fail to hire" case, discloses that the Court is not at liberty to make up new torts or adjudicate claims that disclose no cause of action:

> On the facts here, taken as provable, there was a refusal to recruit for employment and, certainly, a refusal to employ. However, a refusal to enter into contract relations or perhaps, more accurately, a refusal even to

[4] 2019 ABQB 54.
[5] 2009 ABQB 225 [*Hamilton*] aff'd in 2010 ABCA 217.
[6] *Hamilton* at para 18.
[7] 2023 ABKB 483 [*Fakhri*].
[8] *Fakhri* at para 10.
[9] [1981] 2 SCR 181, 1981 CanLII 29 [*Seneca*].

consider the prospect of such relations has not been recognized at common law as giving rise to any liability in tort.

12. The foregoing being the scant offerings of the Supreme Court and the Alberta courts relating to the issue of jurisdiction, perhaps the best course of action is to look to alternative jurisdictions.

13. The Court of Appeal for British Columbia put paid to the notion that a cause of action accompanied by discrimination ousts the Court's jurisdiction in *Lewis v WestJet Airlines Ltd.*:[10]

> 29 This view of the matter finds support in decided cases. In *Alpaerts v. Obront* (1993), 46 C.C.E.L. 218 (Ont. C.J.), Spence J. refused to strike a statement of claim that alleged constructive dismissal arising from sexual harassment and resulted in the plaintiff's inability to continue with employment. The defendants contended that the claim properly should be brought under Ontario's *Human Rights Code*, R.S.O. 1990, c. H.19. The judge distinguished *Seneca College of Applied Arts & Technology v. Bhadauria*, [1981] 2 S.C.R. 181 [*Seneca*], as follows:
>
> [5] With respect to the Ontario *Human Rights Code* as a barrier to the plaintiff proceeding in Court, the defendants rely on the decision in *Seneca College of Applied Arts & Technology v. Bhadauria*, [1981] 2 S.C.R. 181, 22 C.P.C. 130 and on certain other cases. In *Seneca*, the Court determined that "the Code forecloses any civil action based directly upon a breach thereof" and "any common law action based on an invocation of the public policy expressed in the Code". In *Seneca*, the plaintiff had no cause of action apart from the Code, but, in the instant case, the plaintiff alleges facts which disclose a cause of action for constructive dismissal, which distinguishes *Seneca*.
>
> 30 I agree with this reasoning. The plaintiff's civil action, in this case, is not based directly on the breach of statutory rights like *Seneca* or *Macaraeg*; the plaintiff does not argue that WestJet's failure to fulfil the Anti-Harassment promise is, in and of itself, a discriminatory act.
> …
> 43 This is not a case of exclusive jurisdiction. It does not involve competing statutory jurisdiction like *Regina Police*. It does not involve mandatory arbitration under a collective agreement like *Weber* and *Ferreira*. It no longer involves issues within the exclusive jurisdiction of the Workers' Compensation Board. The cases relied on by WestJet do not demonstrate that the combined effect of the *CLC* and *CHRA* is to oust the

[10] 2019 BCCA 63.

> jurisdiction of the courts in relation to an otherwise recognized cause of action (breach of contract) either expressly or by necessary implication. Nor do they support the proposition that where the court's jurisdiction is not ousted, and no necessary jurisdictional issue is raised, the court should nevertheless treat a breach of contract claim as if it is in reality an attempt to enforce statutory rights.
>
> 44 This case involves a claim that, given its substantive legal character, falls within the jurisdiction of the courts as well as alleging facts that could ground a complaint before the Canadian Human Rights Tribunal. The issue then is whether there is some basis to infer that the *CHRA* ousts the jurisdiction of the courts.
>
> 45 I am unable to discern a basis to oust the jurisdiction of the courts in a case alleging breach of an employment contract engaging discrimination or harassment. Neither statute has an exclusive jurisdiction clause applicable to this case. The breach of contract claim could be advanced even if the *CHRA* was never enacted. If Parliament intended the *CHRA* to oust the court's jurisdiction over matters otherwise subject to its jurisdiction, I would expect it to do so expressly. It has not.
>
> 46 Further, I am not persuaded that it is plain and obvious that the *CHRA* ousts the jurisdiction of the courts by necessary implication. Recognizing that the legislation creates an administrative regime that is intended to be flexible, efficient, and expeditious, suggests that Parliament intended to create statutory rights capable of being vindicated by an administrative tribunal. Alone, this is not enough in my view to support an argument that by creating such a scheme Parliament intended to deprive plaintiffs of access to the courts they would otherwise enjoy.

14. Similarly, the Ontario Court of Appeal has found that discrimination causing wrongful dismissal does not somehow oust the jurisdiction of the courts.

15. *L'Attiboudeaire v Royal Bank of Canada*[11] states:

> 8 In my view, the motions court judge in the present proceeding erred in applying Bhadauria. The present case is unlike Bhadauria in that the cause of action alleged in it is not based upon a breach of the Canadian Human Rights Act, nor is it "based on" an invocation of the public policy expressed in that Act - in the sense that the action in Bhadauria was based on the Ontario Human Rights Code. The plaintiff in the present case had been in an employment relationship with the defendant and, in order to prove conduct on the part of the defendant which amounted to constructive

[11] [1996] OJ No 178, 1996 CanLII 1411 [*L'Attiboudeaire*].

dismissal (generally, a fundamental breach of the terms of the employment contract) he does not need to invoke the policy of the Canadian Human Rights Act. This does not mean that its terms could not be relevant factors to take into account in assessing the defendant's conduct.

9 Positive precedential support for this action may be found in the judgment of this court in MacDonald v. 283076 Ont. Inc. (1979), 26 O.R. (2d) 1 which upheld the validity of an action for wrongful dismissal from employment based on the fact that the plaintiff was a woman. At p. 2, Wilson J.A. said for the court:

We think the learned trial Judge erred in finding that the statement of claim disclosed no cause of action for the reason given by him. In our view, the issue whether or not the Ontario Human Rights Code gave rise to a civil cause of action was not the determinative issue before him. The determinative issue was whether, assuming the facts as outlined in the statement of claim to be true, they could give rise to a cause of action for wrongful dismissal. We are all of the view that they could, since dismissal because of sex alone would not be "cause".

10 I refer, also, to the decision of Spence J. in Alpaerts v. Obront (1993), 46 C.C.E.L. 218 (Ont. Ct. (Gen. Div.)) in an action for constructive dismissal based on sexual harassment. At p. 220 Spence J. said:

With respect to the Ontario Human Rights Code as a barrier to the plaintiff proceeding in Court, the defendants rely on the decision in Seneca College of Applied Arts & Technology v. Bhadauria, [1981] 2 S.C.R. 181, 22 C.P.C. 130 and on certain other cases. In Seneca, the Court determined that "the Code forecloses any civil action based directly upon a breach thereof" and "any common law action based on an invocation of the public policy expressed in the Code". In Seneca, the plaintiff had no cause of action apart from the Code, but, in the instant case, the plaintiff alleges facts which disclose a cause of action for constructive dismissal, which distinguishes Seneca.

16. About a decade on, the Ontario Court of Appeal came to the same conclusion in *Gnanasegaram v Allianz Insurance Co of Canada,*[12] citing with approval *L'Attiboudeaire*:

8 The law is clear since the Supreme Court of Canada's decision in Board of Governors of Seneca College of Applied Arts & Technology v. Bhadauria (1981), 124 D.L.R. (3d) 193 that no cause of action lies for

[12] [2005] OJ No 1076, 2005 CanLII 7883.

> breach of the Ontario Human Rights Code or at common law based on an invocation of the public policy expressed in the Code.
>
> 9 In this case as in L'Attiboudeaire the plaintiff had been in an employment relationship with the defendant. To prove conduct on the part of the defendant which amounted to constructive dismissal she does not need to invoke the policy of the Ontario Human Rights Code or the Canadian Human Rights Act. However, to quote from L'Attiboudeaire: **This does not mean that its terms could not be relevant factors to take into account in assessing the defendant's conduct.** [Emphasis added.]
>
> 10 For the purposes of pleading discriminatory conduct as a basis for a wrongful dismissal claim I see no principled basis for distinguishing between allegations of direct discrimination aimed at the plaintiff and allegations of systemic racism which target a class or group of which the plaintiff is a member. In either case the allegation is one of discrimination against the plaintiff offered to support the wrongful dismissal claim.

17. The Ontario Court of Appeal has extended the principle to non-employment cases, lending credence to its resilience and universality. *Jaffer v York University*[13] states:

> 42 For example, this court has expressly upheld pleadings that contained allegations of discrimination in constructive dismissal claims. In *L'Attiboudeaire v. Royal Bank of Canada* (1996), 131 D.L.R. (4th) 445, this court was satisfied that the cause of action alleged was not based upon a breach of human rights legislation or on an invocation of the public policy expressed in that legislation. Morden A.C.J.O. explained that in order to prove conduct that amounted to constructive dismissal, the plaintiff did not need to invoke the public policy of the *Canadian Human Rights Act*. This did not mean that the Act's terms could not be relevant factors to take into account in assessing the defendant's conduct. See also *Andrachuk v. Bell Globe Media Publishing Inc. (c.o.b. Globe and Mail)* (2009), 71 C.C.E.L. (3d) 224 (Ont. S.C.).

18. There is no question that claims for nothing other than discriminatory treatment absent any cause of action belong at the human rights tribunals. But that is a world apart from the proposition that a wrongful dismissal claim cannot be adjudicated if the wrongful dismissal was caused by discrimination. To date, no case has been offered to buttress the latter proposition, and court of appeal cases decided in other jurisdictions directly rebut it.

[13] 2010 ONCA 654.

19. Even the Defendant can be found agreeing that Mrs. Yee's wrongful dismissal claim falls within the ambit of labour/employment, and not human rights. The Defendant stated this explicitly:

> 1. WestJet objects to the hearing of this Complaint before the Canadian Human Rights Commission (the "Commission") on the basis of section 41(1)(b) of the *Canadian Human Rights Act* (the "*CHRA*"), which sets out that the Commission shall deal with any complaint filed with it unless it appears that "the complaint is one that could more appropriately be dealt with, initially or completely, according to a procedure provided for under an Act of Parliament other than this Act..."
>
> 2. The Complainant, Duong Yee, alleges WestJet discriminated against her on the basis of religious belief, a ground protected in Canadian human rights law. She alleges this discrimination resulted in the improper termination of her employment.
>
> 3. As the Federal Court has recognized, human rights allegations in the context of a complaint of unjust dismissal of employment may be properly addressed pursuant to section 242(4)(c) of the *Canada Labour Code*, R.S.C. 1985, c. L-2 ("the *CLC*"). The *CLC* is the proper venue for redress where human rights violations are the alleged basis for dismissal.[14]

20. If in fact a matter is properly within the ambit of the Canada Industrial Relations Board pursuant to the *Canada Labour Code*,[15] as the Defendant can be seen arguing in its response to Mrs. Yee's initial human rights complaint, that same matter is properly within the ambit of this Court. This is because it is open to a claimant to opt for a common law remedy though the civil courts in *lieu* of a labour remedy, which both the *Canada Labour Code* and the jurisprudence make explicit.

21. The *Canada Labour Code* provides at section 246: "No civil remedy of an employee against his employer is suspended or affected by sections 240 to 245". Sections 240 through 246 are the Division XIV "Unjust Dismissal" provisions which apply to non-management employees of federally regulated companies who have service of at least one year.

[14] Agreed Exhibits at 9.
[15] RSC 1985, c L-2.

22. The Supreme Court of Canada decides in *Wilson v Atomic Energy*:[16]

> [U]nder s. 246, dismissed employees may choose to pursue their common law remedy of reasonable notice or pay in lieu in the civil courts instead of availing themselves of the dismissal provisions and remedies in the *Code*…"If successful in a civil action, an employee is entitled to damages equivalent to whatever compensation he or she would have received if the employment contract had been allowed to run its natural course — that is, for whatever period of notice would have been 'reasonable'. If an employer has been unfair or high-handed in carrying out the discharge, the employee may be awarded additional damages".[17]

23. Mrs. Yee was not passed over for a promotion and Mrs. Yee was not a victim of discrimination confined to the hiring pool—neither of which is an independent cause of action. Mrs. Yee was wrongfully dismissed, which is a cause of action. The Alberta cases offered by the Defendant are eminently distinguishable.

24. None of the *Court of Justice Act*, *Court of Justice Civil Procedure Regulation*, or *Alberta Rules of Court*[18] purports to limit this Court's jurisdiction depending on the reason for a wrongful dismissal; neither does the *Canada Labour Code* provide any reason to question this Court's jurisdiction.

25. The best available case law is analogous and on-point, speaking directly and unequivocally to the issue of jurisdiction, and leaving little doubt of this Court's ability to decide Mrs. Yee's claim—which makes sense: a termination for any unlawful reason is *categorically* a wrongful termination.

MRS. YEE'S TERMINATION WAS WRONGFUL

26. Religious abstention from vaccination does not justify termination with cause.

27. The Defendant had a duty to accommodate Mrs. Yee, which required a procedural and a substantive component, once Mrs. Yee discharged her burden under the *Amselem* test, which required her to demonstrate that her beliefs are sincerely held, that her beliefs have

[16] 2016 SCC 29 [*Wilson*].
[17] *Wilson* at para 64.
[18] Alta Reg 124/2010.

a nexus to religion, and that vaccination would interfere with her beliefs in a manner that is more than trivial or insubstantial.

28. Mrs. Yee discharged her burden. The Defendant failed to discharge its burden and purported to terminate Mrs. Yee with cause.

The *Amselem* Test

29. The Supreme Court has defined religion, affirming its conduct-governing nature, and declared religion an immutable characteristic. The Court states in *Syndicat Northcrest v Amselem*[19] a person will establish a protected religious belief if the person has a practice or belief, having a nexus with religion, **which calls for a particular line of conduct**, **either** by being objectively or **subjectively obligatory or customary**, or by, in general, **subjectively engendering a personal connection with the divine** or with the subject or object of an individual's spiritual faith, **irrespective of whether a particular practice or belief is required by official religious dogma or is in conformity with the position of religious officials**; and…is sincere in his or her belief.[20]

30. Religious belief governs conduct, and religious infringement is established when a condition or requirement interferes with conduct-governing beliefs in a way that is beyond trivial or insubstantial.[21] Such infringement triggers the duty to accommodate to the point of undue hardship. The Supreme Court crystallizes the point in *Amselem*, but *Amselem* is not the first Supreme Court case to embed religious conduct in the definition of "religion". Some twenty years prior to the *Amselem* judgment, the Supreme Court connected the "practice" to the "belief", deciding that freedom of religion is "the right to declare religious beliefs openly and without fear of hindrance or reprisal, and the right to ***manifest religious belief by worship and practice*** or by teaching and dissemination".[22]

31. Notably, a claimant need not satisfy any sort of "objective" test in demonstrating sincere, conduct-governing religious belief under the *Amselem* test. The SCC couches the

[19] 2004 SCC 47 [*Amselem*].
[20] *Amselem* at para 56. [Emphasis added.]
[21] *Amselem* at paras 56, 74.
[22] *R. v Big M Drug Mart Ltd.*, [1985] 1 SCR 295, 1985 CanLII 69 (SCC) at para 94.

language of religious belief not only in subjectivity, but also individuality. *Amselem* is clear that no confirmation of the belief or practice by a religious leader is necessary;[23] no proof of the established practices of a religion is necessary;[24] no mandatory doctrine of faith supporting the belief is necessary;[25] neither a government body nor a tribunal is in a position to interpret the content of an individual's subjective understanding of his or her religious obligations;[26] even the role of a tribunal is to assess mere sincerity of belief, not validity of belief;[27] and sincerity of belief simply implies an honesty of belief.[28] *Amselem* also declines to endorse an objective standard and speaks to the appropriate nature of the inquiry: "[C]laimants seeking to invoke freedom of religion should not need to prove the objective validity of their beliefs in that their beliefs are objectively recognized as valid by other members of the same religion, nor is such an inquiry appropriate".[29]

32. *Amselem* further rejects the conception of the religious as extricable from the personal, characterizing religion as inherently involving "personal convictions or beliefs", "personal choice and individual autonomy", "personal or subjective conception", "personal autonomy", "personal sincerity", "personal choice of religious beliefs", "personal notions of religious belief", "voluntary expressions of faith", "profoundly personal beliefs", "intensely personal" beliefs and "personal religious 'obligations'".[30] *Amselem* discloses that religious belief is *personal* belief.

Religion's Status as Constructively Immutable

33. Religion is also an immutable characteristic. The Supreme Court states in *Corbiere v Canada (Minister of Indian and Northern Affairs)*[31] that religion is "constructively immutable" because it is "changeable only at unacceptable cost to personal identity" and again affirms this principle in *Quebec (Attorney General) v A*.[32] The *Quebec* court also

[23] *Amselem* at para 56.
[24] *Amselem* at para 54.
[25] *Amselem* at para 49.
[26] *Amselem* at para 50.
[27] *Amselem* at para 52.
[28] *Amselem* at para 51.
[29] *Amselem* at para 43.
[30] *Amselem* at paras 39-43, 47, 49, 54.
[31] [1999] 2 SCR 203, 1999 CanLII 687 [*Corbiere*] at para 13.
[32] 2013 SCC 5 [*Quebec*] at para 335.

states that constructively immutable characteristics are not a "true choice"[33] in any legislative context,[34] and that even if they were, choice cannot justify discriminatory treatment.[35] As the Supreme Court observes in *Lavoie v Canada*[36] and subsequently affirms in *Quebec*, "the fact that a person could avoid discrimination by modifying his or her behaviour does not negate the discriminatory effect".[37]

34. It is worth noting that it is possible to discriminate against only one person, while not discriminating against other persons. It is no answer to say that other people were awarded religious exemptions, therefore the Defendant could not have discriminated. Discrimination can occur in a variety of different ways, to a variety of different groups, to an assortment of different persons, or just to one.

Mrs. Yee's Religious Claim

35. Both Mrs. Yee's application for religious exemption and her testimony before this Court made plain that Mrs. Yee's religion is Christianity, which is to say, Mrs. Yee is a Christian.

36. Both Mrs. Yee's application for religious exemption and her testimony before this Court made plain that as a matter of her Christian belief, practice and worship—her connection with the Divine—Mrs. Yee places her trust in the healing power of Christ.

37. Both Mrs. Yee's application for religious exemption and her testimony before this Court made plain that according to Mrs. Yee's sincerely held, conduct-governing Christian beliefs, vaccination is a betrayal of her Christian faith. Mrs. Yee was explicit on this point when filling out the Respondent's religious exemption application form, stating:

> Based on sincerely held beliefs as a bible believing Christian, the vaccine is betrayal of faith to my healer, Lord and Saviour Jesus Christ…Jesus is my healer, I do not cannot rely on the use of vaccinations or medicines created artificially in order to prevent sickness. Jesus speaks of seeking out a

[33] *Quebec* at para 336.
[34] *Quebec* at para 335.
[35] *Quebec* at para 337.
[36] 2002 SCC 23 [*Lavoie*].
[37] *Lavoie* at para 5; *Quebec* at para 337.

> doctor when one is sick, not well. I have no need of a vaccine in order to maintain my health…The bible tells us to present our bodies as a living sacrifice, holy, acceptable unto God (Romans 12:1) If there is any sick among us, let us seek the elders, the prayers the righteous will heal the sick (James 5:14) The Lord is our refuge and fortress then no pestilence or plague or evil shall come near our dwelling (Psalm 91) God forgives all our iniquities and heals "all" our diseases (Psalm 103) We ought to obey God rather than men (Acts 5:29)[.][38]

38. Despite the Supreme Court's clear direction that no confirmation of the belief or practice by a religious leader is necessary;[39] no proof of the established practices of a religion is necessary;[40] no mandatory doctrine of faith supporting the belief is necessary; no proof of the objective validity of the claimant's beliefs is necessary; no proof that the claimant's beliefs are objectively recognized is necessary; and no proof that such beliefs are seen as valid by other members of the same religion is necessary—or *appropriate*[41]—Mrs. Yee agreed to provide such endorsement,[42] which confirmed Mrs. Yee's stated Christian beliefs, however unnecessary such confirmation is on the *Amselem* test.

39. Mrs. Yee did everything she could to help the Respondent understand her sincere Christian beliefs preventing vaccination, even taking steps the Supreme Court has declared unnecessary and inappropriate to demand, splaying out the most intimate details of the most intimate relationship of her life—her relationship with Christ. The Defendant responded by ignoring the *Amselem* test, insulting Mrs. Yee's integrity, and firing her.

40. Mrs. Yee further declared on the exemption application form and in her testimony that she does not use any other vaccines or medications,[43] irrespective of whether she opines they are safe. Mrs. Yee made clear that "safety" is not her reason for abstention, rather obedience to God.[44]

41. The Defendant wrote to Mrs. Yee:

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[38] Agreed Exhibits at 148-9.
[39] *Amselem* at para 56.
[40] *Amselem* at para 54.
[41] *Amselem* at para 43.
[42] Agreed Exhibits at 140-1.
[43] Agreed Exhibits at 149-50.
[44] Trial Transcript dated February 24, 2025 ("Transcript 1") at 13-4.

> [T]he information you provided to WestJet casts doubt on religion being the grounds for your application. You have written in your application form that you consider the vaccine unsafe. It is therefore reasonable to consider that you are philosophically/personally opposed to mandatory vaccine, which means you are seeking accommodation for secular reasons, not religious. We respect your opinion, but personal preference is not a Protected Ground.[45]

42. Nothing in *Amselem* prescribes that a religious person cannot be a whole person, which would itself be discriminatory. Nothing in *Amselem* forecloses the religious adherent having thoughts and opinions. Nothing in *Amselem* dictates that a thought or opinion displaces a belief. Nothing in *Amselem* imposes the impossible, discriminatory standard the Defendant imposed on Mrs. Yee.

43. The idea that a person is incapable of at once holding a thought and a religious belief is as illogical as it is bigoted. Imagine thinking a person could not at once believe smoking defiles her body as God's temple *and* opine that it causes emphysema. Imagine thinking a person could not at once believe excessive liquor consumption is a scourge on society *and* opine that it causes cirrhosis of the liver. Imagine thinking that a person could not at once believe pornography desecrates the soul *and* that it degrades women. This is the cartoonish version of religious believers wrought by the Defendant's idea of religion. The reality and the law tell an entirely different story.

44. Similarly, the futility of asking political questions on a form meant to elicit religious beliefs in an attempt to trap the religious believer into offering an "opinion" cannot be overstated, for a number of reasons, not the least of which is that for the religious adherent, many political issues intersect with religion. Imagine a Christian person at a political protest holding an anti-abortion sign. Now imagine thinking that religious person's political position had nothing to do with the scriptural prohibition on murder. Does that seem likely?

45. Imagine trying to distinguish as between the political portion of that belief, the philosophical portion of that belief, the personal portion of that belief, and the religious

[45] Agreed Exhibits at 158-9.

portion of that belief. If that seems like an impossible task, that is because it is. And that is precisely why the Supreme Court in *Amselem* instructs that the only substantive considerations when determining religious claims are sincerity and nexus to religion.

46. The testimony of the Defendant's witness, Lauren Sawchyn, was the Defendant's opportunity to demonstrate to the Court that it did not discriminate, by explaining how Mrs. Yee's transparent and open declaration and testimony concerning her religious beliefs failed to meet the test for religious accommodation.

47. Most of Ms. Sawchyn's testimony revolved around invoking phrases like "roundtable discussion" and "legal team"— words that provide no insight into whether the Defendant's decision to deny Mrs. Yee's religious exemption was made lawfully.

48. Asked how the Defendant managed to separate the sacred from the profane in arriving at its decision to fire Mrs. Yee rather than accommodate her protected characteristic, the Defendant's witness eventually admitted that "our legal team helped us determine the final outcome of these -- of all these requests". Ironically, this does not instill confidence concerning the lawfulness of the decision. Rather, it makes the decision seem contrived, particularly when the witness refuses to explain any criteria, methodology or otherwise.

49. The Defendant's witness further refused to disclose why certain questions were included on the exemption application form; how the questions on the exemption application form would need to have been answered in order for an exemption to be granted; and whether there were reasons for denying Mrs. Yee's exemption request other than Mrs. Yee's opinion about vaccine safety, a question to which the witness changed her answer six times.[46]

50. At a certain point, Ms. Sawchyn stated, "We didn't give all of the reasons that we adjudicated -- at the end of the day, it boiled down to -- we ***had to say this was the reason*** in the letter" and "There's many things that went in to determining ***how it was going to be communicated***".

[46] Transcript 1 at 95, 98-9.

51. Ms. Sawchyn here describes what sounds like a manipulated as opposed to a good faith process, and her refusal to be forthcoming cements the idea of that sort of process.

52. It is safe to say whether there were reasons other than the one ill-founded reason stated in the rejection letter to Mrs. Yee remains unknown. This is disquieting, given a protected and immutable characteristic is the focus.

53. In alternating between testifying that the claimant's opinion about the safety of the vaccines was the only reason the Defendant denied her exemption application and testifying that there were other undisclosed reasons for denying the application—and refusing to disclose them—the Defendant undercut its own defence and deprived the Court of any meaningful chance to evaluate its defence to the discrimination claim.

54. The Defendant's witness refused to disclose to the Court how the Defendant arrived at the decision that Mrs. Yee was not Christian enough to deserve a religious exemption.

55. While the Defendant has a right to invoke solicitor-client privilege, the tactical decision to do so, presumably to conceal the method by which it decided Mrs. Yee did not qualify for religious exemption, has the effect of leaving the Court with no insight as to whether it lawfully determined the claimant's religious status.

56. Weighed against Mrs. Yee's open, transparent and credible testimony concerning her sincerely held, conduct-governing religious beliefs, and applying decades of established law, there is only one lawful conclusion at which this Court can arrive: the Defendant wrongfully dismissed Mrs. Yee for discriminatory reasons.

57. There can be no question that Mrs. Yee discharged her burden by demonstrating the nexus between her beliefs and her religion, being Christianity, the sincerity of her Christian beliefs, and the substantial interference with her Christian beliefs vaccinating would have imposed.

58. The Defendant was at that point obligated to begin the process of accommodation.

THE DEFENDANT HAD A DUTY TO ACCOMMODATE, NOT AN EXCUSE TO TERMINATE

59. Irrespective of whether a protected characteristic is possible to accommodate substantively, the **procedural** accommodation process is requisite to discharging the duty.

60. Various courts have weighed in on the procedural component of the duty to accommodate. The SCC discloses in the seminal case of *Meiorin*[47] that a standard cannot be deemed reasonably necessary unless and until the organization has fully considered alternative accommodations that might allow the affected individual to continue in the employment. The companion case of *Grismer*[48] imported the principles of *Meiorin*, an employment case, to the service provision context. The SCC has found that procedurally, an organization has a duty to inquire as to the specific circumstances of a person requiring accommodation before taking adverse action against him.[49]

61. The Ontario Divisional Court has held that a full exploration of the nature of the protected ground, consideration of the extent to which carefully managing the challenges around the protected ground and examination of the roles and responsibilities of various staff in monitoring the situation are required;[50] undue hardship cannot be established by relying on impressionistic or anecdotal evidence, or after-the-fact justifications;[51] and in assessing whether the organization has met the duty, its efforts must be assessed at the time of the alleged discrimination.[52]

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[47] *British Columbia (Public Service Employee Relations Commission) v BCGSEU*, 1999 CanLII 652 [*Meiorin*].
[48] *British Columbia (Superintendent of Motor Vehicles) v British Columbia (Council of Human Rights)*, 1999 CanLII 646 [*Grismer*].
[49] *Stewart v Elk Valley Coal Corp*., 2017 SCC 30 [*Stewart*] at paras 127, 133; *Canadian National Railway Company v Teamsters Canada Rail Conference*, 2018 ABQB 405 [*Teamsters*]. See also *Grismer*.
[50] *Adga Group Consultants Inc. v Lane*, 2008 CanLII 39605 [*Adga*] at para 109.
[51] *Adga* at para 118.
[52] *Adga* at para 108. See also *Gourley v Hamilton Health Sciences*, 2010 HRTO 2168 at para 8, wherein the adjudicator stated: "It is the respondent who bears the onus of demonstrating what considerations, assessments, and steps were undertaken to accommodate…to the point of undue hardship…". See also *Lane v ADGA Group Consultants Inc.*, 2007 HRTO 34 at para 150, wherein the HRTO held that a failure to meet the procedural dimensions of the duty to accommodate is a form of discrimination in itself because it "denies the affected person the benefit of what the law requires: a recognition of the obligation not to discriminate and to act in such a way as to ensure that discrimination does not take place"—confirmed on appeal in *Adga*.

62. The Ontario Court of Appeal has described satisfaction of the procedural component of the duty thus:

> The procedural component typically involves the identification of the process or procedure to be adopted in providing accommodation to the person who would be subject to the discriminatory standard: see *Lane v. ADGA Group Consultants Inc.* (2008), 295 D.L.R. (4th) 425 (Ont. Div. Ct.), at para. 106; *Roosma v. Ford Motor Co. of Canada (2002)*, 164 O.A.C. 252 (Div. Ct), at para. 210, per Lax J. (dissenting, but not on this point). Because it requires an understanding of the person's needs, and requires the person to provide information, procedural accommodation is sometimes referred to as the "accommodation dialogue": see *Liu v. Carleton University*, 2015 HRTO 621, at para. 18. Once the institution has an understanding of the claimant's specific needs, it must ascertain and seriously consider possible accommodations that could be used to address those needs, including the option of undertaking an individualized assessment in the case of a discriminatory standard: see *Grismer*, at para. 42; *ADGA*, at para 106. The substantive component of accommodation can refer to the steps taken to implement the accommodation to the point of undue hardship. It involves the consideration of what was actually done in the accommodation process to meet the individual's needs: see *Roosma*, at para. 210.[53]

63. Where the organization has failed to take any of the steps it could have taken in order to assess and pursue the question of accommodation, and failed to learn what it could have learned had it only made appropriate enquiries, it will not have discharged its procedural duty to accommodate.[54]

64. The Defendant took no steps to accommodate Mrs. Yee's protected characteristic, which is discrimination, and proceeded to fire her, which is wrongful dismissal.

THE TERMINATION CLAUSE DOES NOT APPLY

65. The termination clause in Mrs. Yee's employment contract states:

> WestJet may terminate your employment after successful completion of the probationary period, **for a reason that does <u>not</u> constitute <u>just cause</u>**, by providing you with advance working notice, or pay in lieu of notice and

[53] *Longueépée v University of Waterloo*, 2020 ONCA 830 at para 70.
[54] *Adga* at paras 126-7.

> severance pay in accordance with the statutory minimums provided for in the *Canada Labour Code*. In addition, you would be paid your pro rata Salary up to your last day of work, and any outstanding expenses, overtime and accrued vacation pay. Your entitlement to benefits and other WestJet perquisites would cease on your last day of active employment, regardless of the reason for cessation, and regardless of whether or not advance notice is given. You agree that **provided WestJet terminates your employment without just cause in accordance with the provisions of this paragraph**, that you have no additional claim against WestJet for any additional severance or termination compensation.[55]

66. A termination clause that attempts to contract out of the *Canada Labour Code* is void, and a non-management employee of a federally regulated employer with a tenure of at least one year cannot be terminated without cause.[56] Additionally, a termination clause that is unclear or ambiguous will be interpreted in favour of the employee.[57] Further, any unlawful termination provision wipes out all of the termination provisions, and a severability clause will not save any of them.[58]

67. The first problem with the termination clause is that it appears to attempt to contract out of the *Canada Labour Code*, Division XIV of which makes it unlawful to terminate the employment of non-management employees with one year of service absent just cause.[59]

68. The entire purpose of the *Canada Labour Code* is to protect non-union federal employees from being dismissed without cause,[60] and labour arbitrators have overwhelmingly treated the Unjust Dismissal scheme thus, with at most 28 adjudications out of over 1,740 breaking away from the adjudicative path that an employee could only be dismissed for just cause.[61]

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[55] Agreed Exhibits at 83.
[56] *Wilson* at paras 39-69.
[57] *Waksdale v Swegon North America Inc.*, 2020 ONCA 391 [*Waksdale*]; *Gracias v Dr David Walt Dentistry Professional Corp*, 2022 ONSC 2967 aff'd 2023 ONSC 2052; *Sewell v Provincial Fruit Co Limited*, 2020 ONSC 4406; *Lamontagne v J.L. Richards & Associates Limited*, 2021 ONSC 2133; *Ojo v Crystal Claire Cosmetics Inc.*, 2021 ONSC 1428; *Perretta v Rand A Technology Corporation*, 2021 ONSC 2111; *North v Metaswitch Networks Corporation*, 2017 ONCA 790; *Bryant v Parkland School Division*, 2022 ABCA 220; *Bertsch v Datastealth Inc.*, 2024 ONSC 5593.
[58] *Waksdale* at paras 9-14.
[59] *Wilson* at para 47.
[60] *Wilson* at paras 39, 44.
[61] *Wilson* at paras 59-60.

69. The implication is that any non-management employee with a tenure of one year cannot be subject to the "without cause" termination clause in the employment contract or any "without cause" termination clause.

70. Cases such as *Egan v Harbour Air Seaplanes LLP*[62] and *WestJet, an Alberta Partnership v Employees in the service of WestJet*[63] are distinguishable. The *Egan* claimant was Vice President of Maintenance Operations, which is to say a manager;[64] accordingly, the Unjust Dismissal provisions of the *Canada Labour Code* did not apply, meaning it was lawful to terminate Mr. Egan absent just cause. Additionally, in contrast to the present case, the employer in *Egan* did not purport to terminate the employee ***with cause***. The *WestJet* case involved a Division IX Group Termination, which took place under that division and was subject to entirely different provisions.

71. Perhaps the most significant problem with the termination clause is that it simply does not apply to Mrs. Yee's dismissal.

72. The language of the clause is clear. It begins by qualifying under what circumstance the attendant termination occurs—"**for a reason that does <u>not</u> constitute <u>just cause</u>**", explains that under that circumstance, *Canada Labour Code* statutory minimums are in play, and ends by embedding a couple of conditions for itself: "**<u>provided</u> WestJet terminates your employment <u>without just cause</u>**" and "**in accordance with the provisions of this paragraph**".

73. This clause plainly contracts out of common law notice/severance under one circumstance and one only: the Respondent terminates the employment **without cause** and **provides the notice and/or severance:** "by providing you with advance working notice, or pay in lieu of notice and severance pay in accordance with the statutory minimums provided for in the *Canada Labour Code*".

[62] 2024 BCCA 222 [*Egan*].
[63] 2021 CanLII 58975 [*WestJet*].
[64] *Egan* at para 1.

74. Every witness for the Defendant testified that the Defendant purported to dismiss Mrs. Yee **with cause**, not without. The termination letter Mrs. Yee received purported to terminate her **with cause**, not without.[65] Mrs. Yee received no working notice, pay in lieu of notice, or severance pay.

75. As the circumstance built into the termination clause was not in play and none of the conditions built into the termination clause was satisfied, the termination clause cannot apply to Mrs. Yee.

MRS. YEE DID NOT FAIL TO MITIGATE

76. Proving failure to mitigate requires proving the Plaintiff could have found comparable employment, which the Respondent will be hard pressed to do, given its own rigidity concerning employing unvaccinated staff.

77. The expectation that any other employer looking to hire a new employee would require less of Mrs. Yee than her employer of over a decade is unreasonable.

78. The Defendant's witness, Keri Whyte, testified that Mrs. Yee was a competent employee, that it would be difficult for the Defendant to fill her position, and Mrs. Yee's training was company and industry specific, and that Mrs. Yee does not hold an accounting designation.[66] Finding comparable employment was never going to be easy for Mrs. Yee, with or without a vaccination requirement.

79. Mrs. Yee did encounter vaccination requirements attendant with every job posting she viewed. Given that vaccination was a condition of employment, on that basis alone, Mrs. Yee did not qualify for the positions she sought.

80. Complicating matters further was the fact that Mrs. Yee does not hold any accounting designation. She earned an accounting diploma and all of her training took place during her tenure in the Respondent's specialized accounting department.

[65] Agreed Exhibits at 165.
[66] Trial Transcript dated February 25, 2025 ("Transcript 2").

81. Lauren Sawchyn testified that the vaccination mandates were suspended approximately October 31, 2022[67]—nearly a year after Mrs. Yee was dismissed. Mrs. Yee claims a 12-month common law notice period. Accordingly, the Respondents' suggestion that Mrs. Yee somehow failed to mitigate her losses by not re-applying during the notice period is without merit.

82. More significantly, the onus is on the Defendant to demonstrate that there existed a comparable position Mrs. Yee would likely have landed.

83. The employer bears the onus of proving that the employee failed to take reasonable steps to attempt to mitigate his/her losses. In order to successfully assert a failure to mitigate, the employer must prove that the employee **would likely have found a comparable position** reasonably adapted to his or her abilities and that the employee failed to take reasonable steps to find that comparable position: *Link v Venture Steel Inc*.[68] The employer must show that the dismissed employee's conduct was unreasonable, not in one sense, but in all senses: *Furuheim v Bechtel Canada Ltd.*[69]

84. The burden to prove failure to mitigate is on the employer, it is onerous, and it involves a two-part test. *Plotnikoff v Associated Engineering Alberta Ltd.*[70] is a case wherein the ACJ considered whether the Plaintiff, in his "rather leisurely" efforts to find comparable employment, had failed to mitigate his damages. There is generally a **two-part test for whether an employee has failed to mitigate** reasonable notice damages, and an employer needs to satisfy **both parts**: (1) did the employee fail to take reasonable steps to find comparable employment? (2) **If they had taken reasonable steps, would they likely have found it?** If the answer to **both these questions** is "yes", the employee has failed to mitigate.

85. Justice Higa found that the Plaintiff had failed to take reasonable steps to mitigate his damages. However, the defendant had not demonstrated that ***had he taken reasonable***

[67] Transcript 1 at 83-4.
[68] 2010 ONCA 144 at para 73.
[69] [1990] OJ No. 746.
[70] 2023 ABCJ 200 at paras 42-53.

steps to mitigate he would likely have found a comparable position. There was therefore no reduction in the reasonable notice.

86. *Kafka v Allstate Insurance Co of Canada*[71] states:

> 27 The **burden to prove a failure to mitigate rests with the employer**. This will "often require the employer to demonstrate that the employee acted unreasonably in refusing to accept an altered position as a temporary means of avoiding losses." (Echlin and Fantini at p. 38). [Emphasis added.]

87. *Lake v La Presse*[72] states:

> [11] The leading authority is *Red Deer College v. Michaels*, 1975 CanLII 15 (SCC), [1976] 2 S.C.R. 324. The duty to mitigate is based on the premise that the defendant is not responsible for losses that a plaintiff could reasonably have avoided. If it is the defendant's position that the plaintiff could reasonably have avoided some part of the loss claimed, *"it is for the defendant to carry the burden of that issue, subject to the defendant being content to allow the matter to be disposed of on the trial judge's assessment of the plaintiff's evidence on avoidable consequences*": at p. 331. The burden is on the defendant to show the plaintiff *"either found, or, by the exercise of proper industry in the search, could have procured other employment of an approximately similar kind reasonably adapted to his abilities":* at p. 332. **The burden is "*by no means a light one, for this is a case where a party already in breach of contract demands positive action from one who is often innocent of blame*"**: at p. 332.
>
> [12] While a terminated employee has a duty to take reasonable steps to mitigate, the **onus is on the defendant to demonstrate that the plaintiff could reasonably have avoided a loss** or that she acted unreasonably in failing to do so: *Gryba v. Moneta Porcupine Mines Ltd.* (2000), 2000 CanLII 16997 (ON CA), 5 C.C.E.L. (3d) 43 (Ont. C.A.), at para. 57. The defendant must prove: (1) that the plaintiff failed to take reasonable steps to mitigate her damages; and (2) **that if she had done so she would have been expected to secure a comparable position reasonably adapted to her abilities**: *Link v. Venture Steel Inc.*, 2010 ONCA 144, 79 C.C.E.L. (3d) 201, at para. 73.

[71] 2011 ONSC 2305.
[72] 2022 ONCA 742.

88. The **employee's perception of what is reasonable** is generally given more weight by the courts than that of the employer. The duty to mitigate may not require an employee to accept a job for which he/she is overqualified: *Luchuk v Starbucks Coffee Canada Inc.*

89. *Hookimawillile v Payukotayno James and Hudson Bay Family Services*[73] states:

> 66 As a general principle, an employee has a duty to mitigate his or her damages. The court shall take into consideration a number of factors such as the age and qualifications of the employee as well as the market for services analogous to those performed under the term of the employment contract: *Potter v. New Brunswick (Legal Aid Services Commission)*, [2011] N.B.J. No. 361 at para. 69-71.
>
> 67 The employee is entitled to refuse employment that is not comparable in salary or responsibility without being penalized for failing to mitigate, or if she accepts this form of employment her damages may not be reduced: *MacKenzie v. 1785863 Ontario Ltd. (c.o.b. Alex Wilson Coldstream Ltd.)*, [2018] O.J. No. 3177, para 13.
>
> 68 **It is well-established that the defendant employer had the onus of showing that the employee's mitigation efforts were unreasonable and that similar employment was available if a proper effort had been made.** [Emphasis added.]

90. *Clark v Township of Otonabee-South Monaghan*[74] states:

> [19] The law relating to an employee's duty to mitigate damages is described as follows in *Evans v Teamsters Local Union No. 31*, 2008 SCC 20 (CanLII), [2008] 1 S.C.R. 661, at paras. 99f:
> In *Red Deer College*, at p. 332, the Court held that **the burden of proving that an employee has failed to mitigate his or her damages lies with the employer.** Laskin C.J. cited Cheshire and Fifoot's The Law of Contract (8th ed. 1972), to explain the nature of the burden:
>
> **the burden which lies on the defendant of proving that the plaintiff has failed in his duty of mitigation is by no means a light one, for this is a case where a party already in breach of contract demands positive action from one who is often innocent of blame.** [p. 599]
>
> As this passage suggests, **the burden of proof is onerous.** This is consistent with the approach to [page705] mitigation as a principle in

[73] 2019 ONSC 3514.
[74] 2019 ONSC 6978.

damages more generally. As Waddams observed: "*In case of doubt, the plaintiff will usually receive the benefit, because it does not lie in the mouth of the defendant to be over-critical of good faith attempts by the plaintiff to avoid difficulty caused by the defendant's wrong*" (15.140).
An **employer alleging a failure to mitigate must prove two things:** that the employee did not make a reasonable effort to find new work **and that had the employee done so, he or she would likely have been able to obtain comparable alternative employment.** In other words: that the loss was avoidable.

[20] While I agree that the plaintiff's **efforts at mitigation seem, at least on the surface, to be somewhat lacklustre, this may very well be a factor of the limited availability of comparable jobs** where he lives, and has worked. In any event, there is **no evidence to suggest that the plaintiff could have obtained comparable alternative employment had he put more effort into the search.**

[21] In the result, I find that the defendant has failed to satisfy its onus of proving that the plaintiff has failed in his duty of mitigation. [Emphasis added.]

MORAL DAMAGES

91. A dismissal marked by bad faith, for example where an employer has been untruthful, misleading or unduly insensitive in the course of the dismissal, will attract moral damages.[75] Employers are obligated to be candid, reasonable, honest and forthright in the manner of dismissal.[76] Importantly, no separate cause of action is required.[77]

92. Attacking the employee's reputation by declarations made at the time of dismissal and misrepresentation regarding the reason for the decision are both behaviours inviting compensable damages.[78]

93. There can hardly be any greater display of unduly insensitive behaviour than to openly deny a person's protected and immutable characteristic; imply that she is not what she claims to be; impugn her motives for claiming it; and imply that if she is what she claims to be, this will necessarily have retarded her as a human being in other ways.

[75] *Honda Canada Inc. v Keays*, 2008 SCC 39 [*Keays*] at para 57.
[76] *Keays* at para 58.
[77] *Keays* at para 59.
[78] *Keays* at para 59.

94. There can hardly be any more untruthful or misleading behaviour than to refuse to disclose to this person how such conclusions were drawn; to craft an obfuscatory response to her good faith efforts to explain her protected and immutable characteristic; to reward her truthfulness and vulnerability with a harsh and mocking tone; and to hide behind the lawyers who helped to devise the discrimination against her.

95. Whether intentionally or unintentionally—and where discrimination is concerned, it makes little difference which—this is how the Defendant treated Mrs. Yee.

96. The Defendant's unduly insensitive behaviour was on full display when it responded to Mrs. Yee's genuine, vulnerable and religiously motivated request for accommodation by stating, "[T]he information you provided to WestJet casts doubt on religion being the grounds for your application…you are seeking accommodation for secular reasons, not religious". In one fell swoop, the Defendant accused Mrs. Yee of lying about her immutable characteristic of religion; denied that she possesses it; and impugned her motives for claiming it. Thus began the march toward Mrs. Yee's untimely dismissal from employment.

97. The Defendant further displayed unduly insensitive behaviour in its statement, "You have written in your application form that you consider the vaccine unsafe…[it] is therefore reasonable to consider that you are philosophically/personally opposed to mandatory vaccine, which means you are seeking accommodation for secular reasons, not religious", which is just another way of saying that if Mrs. Yee has thoughts and opinions—in other words, if Mrs. Yee is a whole person complete with a mind and the power to reason—then she cannot be an authentically religious person. This deeply condescending, insulting, bigoted and clearly false accusation was injurious to Mrs. Yee's dignity, as would it be injurious to any person possessing a protected characteristic.

98. Imagine for a moment denying a disabled person's ability to think and feel and process, for no reason other than his or her status as disabled. Imagine for a moment denying a transgender person's ability to reason solely on the basis of that person's protected characteristic of gender identity. Now imagine that the there is no hierarchy of human

rights, and that it is every bit as unlawful to treat Mrs. Yee in this fashion on account of her immutable characteristic of religion. The reality is, that is what the law says.

99. The Defendant next saw fit to mock Mrs. Yee's protected and immutable characteristic, referring to it, absent support, as a "personal preference" and stating that "personal preference is not a Protected Ground".

100. As if trying to outdo itself, the Defendant continued its unduly insensitive behaviour when it authored its letter terminating Mrs. Yee's employment, stating, "You were advised that your employment was in jeopardy if you were not fully vaccinated"—which is just another way of saying that Mrs. Yee was advised her employment was in jeopardy if she failed to change that which is changeable only at unacceptable cost to her identity.

101. The closing paragraph of the termination letter further mocks Mrs. Yee's immutable characteristic by stating that if she decides to change that which is changeable only at unacceptable cost to her identity, she can reapply for employment with the Defendant: "If you become compliant with WestJet's Covid-19 Vaccination Policy, you may apply for future WestJet postings".

102. This is tantamount to telling a gay person he can reapply to work at the company if he decides to quit being a homosexual. It is unconscionable.

103. The sheer fact that the Defendant framed the dismissal as being with just cause, after denying, insulting and impugning Mrs. Yee's protected and immutable characteristic, is untruthful, misleading, unduly insensitive, egregious, and an attack on her reputation, integrity, dignity and identity.

104. The Respondent's behaviours attacked more than Mrs. Yee's reputation; they attacked the core of her very identity. Recall that the Supreme Court has acknowledged constructively immutable characteristics as changeable only at unacceptable cost to personal identity. Unable to pay such "unacceptable cost to personal identity", Mrs. Yee stood firm; but the Respondent stole what Mrs. Yee could not pay, attacking her dignity without so much as a second thought.

105. This is precisely the sort of behaviour moral damages are intended to address.

ABSTENTION FROM VACCINATION IS NON-CULPABLE BEHAVIOUR

106. As detailed above, Mrs. Yee possesses an enduring faith that compelled her to abstain from vaccination, even on pain of dismissal from her employment. There can be no question that the discriminatory termination of Mrs. Yee's employment constitutes wrongful dismissal.

107. However, it is far from clear that abstention from vaccination is culpable behaviour with or without an immutable characteristic preventing vaccination, as there is no jurisprudence from the courts lending any real certainty to the matter.

108. *Parmar v Tribe Management Inc.*[79] does not get the job done, as it does not deal with termination of employment. Neither do the slew of labour arbitration precedents engaging with indefinite leaves of absence and vaccination policies generally, but not terminations or rigid enforcement of vaccination policies.

109. *Purolator Canada Inc. v Canada Council of Teamsters*[80] affirms the line of arbitral cases rejecting the legitimacy of with-cause termination of those who abstain from vaccination and other interventions, but it is merely a judicial review.

110. *Croke v VuPoint System Ltd.*[81] is about as distinguishable as a case gets, given that it "considers the applicability of the doctrine of frustration to an employment contract that was terminated on the basis of the employee's COVID-19 vaccination status and the **mandatory vaccination policy implemented by the respondent's <u>dominant client</u>**"[82] wherein "being able to work for Bell and **enter the home of Bell customers was a fundamental part of the appellant's employment** and…his failure to become vaccinated resulted in his **<u>complete inability</u> to perform the duties of his position**"[83]

[79] 2022 BCSC 1675.
[80] 2025 BCSC 148.
[81] 2024 ONCA 354 [*Croke*].
[82] *Croke* at para 1.
[83] *Croke* at para 5.

because “customers may not want unvaccinated installation technicians entering their homes”.[84]

111. Nothing remotely like *Croke* was in play in the case at bar: no inflexible third-party policy, no absolute requirement to enter people’s homes or even a public office space, no complete inability to perform duties.

112. Even the Transport Canada regulations eased up as of the end of October 2021 where employees who could work at home were concerned. Moreover, they always contemplated and gave ample space for exemptions.[85]

113. Of note, Mrs. Yee was an employee whose duties were eminently performable from home; she had, after all, been performing then from home for 6 months. Kerry Whyte testified that Mrs. Yee would have been able to continue performing her duties from home for at least another 3-4 months, as the return to the company offices was delayed into March of 2022.[86]

114. Neither would reclassification of Mrs. Yee’s position as a full-time, work-at-home position been impossible, according to the testimony of Lauren Sawchyn, who acknowledged the Respondent had already undertaken to create, and organize its prodigious staff into, six different classifications.[87]

115. A variety of labour arbitration precedents are potentially useful, but it is essential to navigate them critically. Some are much more analogous than others.

116. Decisions ***necessarily*** concerned with transmissibility of pathogens are only analogous to the extent an opportunity ***must necessarily exist*** for the transmission of pathogens. Examples are the school setting in *Toronto District School Board v Canadian Union of Public Employees, Local 4400*,[88] the multiple workplace setting described in *Bunge*

[84] *Croke* at para 38.
[85] Agreed Exhibits at 46-56.
[86] Transcript 2.
[87] Transcript 1 at 85-6.
[88] 2022 CanLII 22110.

Hamilton Canada, Hamilton, Ontario v United Food and Commercial Workers Canada, Local 175,[89] and cases involving on-site employees of hospitals ("Hospital Cases").

117. It is worth noting that without exception, the Hospital Cases are explicit in pointing to five factors justifying a termination response to refusal to vaccinate: exposure of vulnerable patients; employees already subject to routine vaccination by virtue of their chosen profession; the essential nature of health care services; the necessarily inflexible requirement to attend at work in person; and fears around retaining healthcare staff during a public health emergency.[90] None of these factors applies to an accounting clerk at an airline or most employees generally, which is probably why absent the foregoing considerations, labour arbitration precedent has rejected refusal to vaccinate as grounds for just cause dismissal.

118. Even non-hospital cases finding that with-cause termination is an acceptable response to abstention must be viewed in context, with an eye to discerning their distinguishing features. For example, *Henrikson v WestJet, an Alberta Partnership*[91] is distinguishable in terms of discrimination and otherwise: Mr. Henrikson did not apply for an exemption on a protected ground; and Mr. Henrikson did not occupy a position performable on a remote basis, rather, one would need to have been created for him. Such differences should not be overlooked.

119. Notwithstanding the extraordinary circumstances found in a handful of Hospital Cases, the preponderance of the most recent labour arbitration precedent adjudicates abstention from vaccination as non-culpable behaviour, particularly where any alternative to termination is a possible method of maintaining health and safety.[92]

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[89] 2022 CanLII 43 [*Bunge*] at paras 19-20.
[90] See for example *London Health Sciences Centre v Unifor Local 27*, 2024 CanLII 48714 at paras 43, 45, 47, 48, 48-54.
[91] 2024 CIRB 1157.
[92] See *Humber River Hospital v Teamsters Local Union No. 419*, 2024 CanLII 19827; *Consumers' Co-operative Refineries Ltd v Unifor, Local 594*, 2023 CanLII 88216 [*Consumers' Co-operative*] at paras 113-33; *Quinte Health v Ontario Nurses Association*, 2024 CanLII 14991. See also *William Osler Health System v Canadian Union of Public Employees and its Local 145*, 2024 CanLII 76299, where the terminations were considered "just" under the collective agreement but the employees were nevertheless entitled to severance under the legislation.

CONCLUSION

120. Mrs. Yee's wrongful dismissal reasonably entitles her to severance equivalent to 12 months. Mrs. Yee had 11 years of service with the Defendant, during which she filled a unique position in the Defendant's accounting department. Mrs. Yee does not hold an accounting designation; she was trained in-house by the Defendant. Her position was industry-specific and difficult to fill. Difficulty finding a comparable position would be expected. Throughout the notice period, Mrs. Yee failed to qualify for every job she searched, not only because of the uniqueness of her role with the Defendant, but also on account of her vaccination status.

121. The termination clause in the employment contract is inapplicable for several reasons, not the least of which is the clause specifically and solely applies to terminations without cause, and the Defendant purported to fire Mrs. Yee with cause.

122. Mrs. Yee is also entitled to moral damages, given the Defendant's lack of good faith in the manner of her termination, as described above.