File No. 20250379

Before the Canadian Human Rights Commission

Between:

Shannon Wylie

Complainant

and

WestJet Airlines

Respondent

Complainant's Response to Commission's Notice of Section 40/41 Issue

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OVERVIEW

1. The Complainant, Shannon Wylie, requests that the Canadian Human Rights Commission advance her complaint against the Respondent, WestJet Airlines, to a hearing on the merits before the Canadian Human Rights Tribunal.

2. This submission responds to the Commission's requirement for additional information described in its September 25, 2025 communication entitled "Notice: Section 40/41 Issue to be Determined" (the "Notice").

BACKGROUND ON CLAIM

3. The authoritative case on religious freedom claims is *Syndicat Northcrest v Amselem*,[1] wherein the Supreme Court of Canada set down the definitive test for demonstrating a protected religious belief.

4. Religion consists of subjective, personal, individual, sincere, religious beliefs which govern the religious adherent's conduct.[2]

5. Under the *Amselem* test, which, to be clear, is the only test that matters, the Complainant easily discharged her burden of demonstrating her protected characteristic and the Respondent's infringement thereof.

6. The attached "WESTJET COVID 19 VACCINE ACCOMODATION REQUEST FORM" ("Accommodation Request"), which the Complainant completed and submitted to the Respondent on December 22, 2021, is beyond what is required to ground her religious claim and need for accommodation.[3]

7. The Complainant's objection to covid vaccination is plainly grounded in her Christian faith, which is clearly sincere, and which is all that is required of her in advancing her religious claim.

8. No intersection of "secular" or "philosophical" beliefs[4] with the Complainant's religious beliefs concerning covid vaccination displaces her religious beliefs concerning covid vaccination. This is made clear in *Amselem*, and this is further made clear in a recent case which appropriately followed *Amselem*: *Yee v WestJet*.[5]

9. The *Yee* court explicitly clarifies two *Amselem* principles applicable to the present matter: (1) Deference is owed to a claimant's sincere, subjective, religious beliefs and objection to vaccination;[6] and (2) Secular objections do not override religious objections, and in the specific case of WestJet, questions on the WestJet form probing ostensibly *secular*

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[1] 2004 SCC 47 [*Amselem*].
[2] *Amselem* at paras 39-43, 47, 49, 50-2, 54, 56.
[3] See Complainant's Accommodation Request.
[4] See Respondent's letter of January 4, 2022 denying Complainant's Accommodation Request.
[5] 2025 ABCJ 87 [*Yee*].
[6] *Yee* at para 72.

objections to vaccination cannot be used to disqualify a claimant's stated *religious* objections to vaccination.[7]

10. Notwithstanding the frequent attempts of administrative decision makers to temper, modify or outright pervert the *Amselem* test, *Amselem* is unflinching on the foregoing points. That which departs from *Amselem* is incorrect at law and cannot be expected to hold up on judicial review.

11. Religious discrimination occurred, and that religious discrimination was never put right. There is nothing trivial, frivolous, vexatious or marked by bad faith in the Complainant insisting her religious discrimination claim be adjudicated. While no grievance process can be said to have completed, that state of affairs is not attributable to the Complainant, who did not fail to complete any reasonably available grievance process within the meaning of sections 41 and 42 of the *Canadian Human Rights Act*.

12. The page limitation prevents full submissions on the meritorious religious discrimination claim. <u>If the merits of the religious discrimination claim are to be considered in any way in this section 40/41 inquiry, the Complainant takes the position that she must be extended the opportunity to place full submissions on the merits before the Commission prior to the section 40/41 determination.</u>

13. By no fault of the Complainant, her meritorious religious claim has not been adjudicated, creating a profound injustice the Commission is well positioned to remedy.

INQUIRY IN THE MAIN: SECTIONS 41 AND 42

Overview

14. The Notice contains an explicit requirement to respond to questions dealing with two propositions in two categories contained in the Preliminary Issues Information Sheet 2021: "The Complainant failed to complete an available grievance process or other review procedure (section 41(1)(a)/42(2) of the Act)" ("**Issue A**"); and "The allegations in the complaint were already dealt with through another process (section 41(1)(d) of the Act)" ("**Issue B**").

15. Several of the questions contained in those categories are not applicable to the present matter. Those which remain can be answered only with reference to certain facts surrounding the grievance process.

Relevant Facts

16. After the Respondent's January 4, 2022 refusal to begin the accommodation conversation with the Complainant pursuant to her December 22, 2021 Accommodation Request, the Complainant began pursuing the grievance process.

[7] *Yee* at para 73, 75.

17. On January 10, 2022, the Complainant requested that her collective bargaining agent, the Canadian Union of Public Employees (“CUPE”) grieve the refusal of accommodation, which CUPE refused on January 13, 2022.

18. The Respondent scheduled a meeting for January 19, 2022 to discuss the situation, but the Complainant was unable to attend as she was scheduled to work a 12-hour shift at her second job, which could not be covered. The Complainant requested that the meeting be moved to a day off, which the Respondent apparently could not do.

19. On January 21, 2022, the Respondent fired the Complainant for “non-compliance” with its covid vaccination policy.

20. On February 3, 2022, the Complainant requested that CUPE file a grievance for the termination of her employment, which CUPE agreed to do on February 14, 2022.

21. On March 3, 2022, CUPE signed a completed grievance form on behalf of the Complainant, alleging that the Respondent terminated her employment without “just cause” and listing the potential remedies of reinstatement, leave of absence, and compensation for lost wages, seniority, and benefits.

22. Between March 14 and 18, 2022, CUPE advised the Complainant of its “intent” to bring the file to arbitration, yet placed the file in “abeyance” against the Complainant’s wishes.

23. On June 20, 2022, the Government of Canada suspended its covid vaccination requirements. The Respondent followed suit, suspending its covid vaccination policy.

24. On October 10, 2022, CUPE advised the Complainant that the Respondent was offering to settle her grievance and suggested a meeting to discuss the memorandum of settlement (“MOS”).

25. On October 27, 2022, the Complainant requested that CUPE negotiate certain amendments to the MOS which were necessary in order for the Complainant to sign it, and stated her conditional acceptance of the MOS on this basis.

26. On October 28, 2022, the Complainant filed a complaint with the Canadian Human Rights Commission as a means to preserve her legal rights, since the deadline was approaching. At all times, however, the Complainant intended to exhaust her remedies with the labour process.

27. On November 2, 2022, CUPE advised the Complainant that because of her opportunity to sign the MOS, her grievance was withdrawn and CUPE would take no further action on her behalf, which the Complainant could appeal by December 16, 2022.

28. On November 9, 2022, CUPE followed up about the Complainant’s request for amendments to the MOS. Changes included adding the accrual of time to retirement and converting the one-day suspension to a warning. However, several problematic statements remained which would have a) compelled the Complainant to lie by affirming that neither

the Respondent nor CUPE had violated her human rights; and/or b) coerced the Complainant to relinquish her right to participate in a separate, ongoing legal matter.

29. On November 14, 2022, the Complainant notified CUPE of her intention to appeal CUPE's decision to withdraw her grievance.

30. On November 16, 2022, the Complainant filed a partial appeal of CUPE's decision to withdraw her grievance.

31. On November 18, 2022, the Complainant attended CUPE's appeal board meeting via Microsoft Teams and submitted a written submission the same day.

32. On November 28, 2022, the Complainant forwarded additional submissions to the appeal board.

33. On November 29, 2022, the CUPE appeal board declined the Complainant's appeal. CUPE offered to amend the MOS by removing the paragraph stating that the Complainant was "fully and fairly represented by the union", but not the clauses of substantial concern to the Complainant, i.e. those compelling her to lie and coercing her to agree to abandon her other separate claim against the Respondent.

34. On December 15, 2022, CUPE granted the Complainant an open-ended extension due to circumstances beyond her control, i.e. the escalation of unrelated criminal harassment events to which the Complainant had been victim.

35. On February 28, 2023, shortly after the capture of the Complainant's stalker, the Complainant contacted CUPE to revisit the conversation around the MOS.

36. On March 9, 2023, CUPE advised the Complainant that her file had been closed one to two weeks beforehand. To her knowledge, the Complainant received no notice of the file closure. CUPE had not responded to the Complainant's last counteroffer addressing the necessary amendments to the MOS, nor had CUPE answered any of her questions.

37. On March 13, 2023, CUPE, upon conferring with the Respondent, advised the Complainant that the MOS was still available, but that no further amendments would be made.

38. On April 19, 2023, CUPE reached out to the Complainant inquiring whether she intended to sign the MOS. The Complainant responded on May 1, 2023, requesting more time.

39. On May 9, 2023, the final draft of the MOS was forwarded to the Complainant. CUPE confirmed once again that there was no room for negotiation.

40. On May 12, 2023, CUPE advised it would give the Complainant until May 26, 2023 to accept the MOS, and that it would close the Complainant's file in the absence of a reply.

41. On May 26, 2023, the Complainant informed CUPE that, as a Christian, she could not in good conscience sign the MOS, which purported to compel her to agree to lies as truth, as well as forfeit her legal rights in another completely separate, ongoing legal matter.

42. For further certainty, at the time, the Complainant was a) already part of an ongoing harassment case against the Respondent (the "WestJet Harassment Class Action"); and b) considering adding to that claim against the Respondent an additional claim of sexual assault, concerning which she had thus far remained silent for fear of retaliation by the Respondent. Desiring to continue seeking justice in the harassment case and to seek justice for the sexual assault incident, the Complainant was unwilling to execute the MOS, which at last draft, in the Complainant's understanding, required her to forfeit her right to access justice with regard to both of those matters.

43. Neither was the Complainant able to sign a document affirming the lie that the Respondent never violated her religious rights, when in fact it had done, by refusing to grant her religious exemption to vaccination and begin the legally required accommodation process.

44. On May 26, 2023, CUPE withdrew the Complainant's grievance and closed her file against her wishes.

45. On August 23, 2023, the Complainant filed a duty of fair representation claim against CUPE, which the Canadian Industrial Relations Board ultimately dismissed.

46. To date, the Complainant's religious discrimination claim has never been resolved.

Analysis

47. Section 41(1)(a) of the *Canadian Human Rights Act*[8] states: "Subject to section 40, the Commission shall deal with any complaint filed with it unless…the alleged victim of the discriminatory practice to which the complaint relates ought to exhaust grievance or review procedures otherwise reasonably available".

48. Section 42(2) states: "Before deciding that a complaint will not be dealt with because a procedure referred to in paragraph 41(a) has not been exhausted, the Commission shall satisfy itself that the failure to exhaust the procedure was attributable to the complainant and not to another".

49. Section 41(1)(d) states: "Subject to section 40, the Commission shall deal with any complaint filed with it unless…the complaint is trivial, frivolous, vexatious or made in bad faith".

50. Two principles emerge from the foregoing sections of the Act: (1) Where a grievance procedure is not reasonably available, the Commission will accept the Complainant's complaint; and (2) Where, by no fault of the Complainant, a grievance procedure does not complete, the Commission will accept the complaint.

[8] RSC, 1985, c H-6.

51. The Complainant takes the position that the grievance process did not complete—section 41(1)(a); that the failure of the grievance process to complete is not attributable to the Complainant—section 42(2); and that given the grievance process did not complete by no fault of the Complainant, the complaint is not vexatious—section 41(1)(d).

No Reasonably Available Process Left Incomplete by Complainant

52. The process which ought to have been available to the Complainant to address the allegations raised in the complaint is the grievance process ordinarily culminating in either settlement or labour arbitration.

53. The Complainant asked CUPE to grieve two instances of religious discrimination: the Respondent's denial of her request for religious accommodation; and the Respondent's termination of her employment for her religious inability to participate in covid vaccination. CUPE drafted a grievance which did not mention the Complainant's human rights. The Complainant both persistently mentioned the religious discrimination to CUPE, and diligently pursued the grievance it filed, at one point attempting to participate in settlement negotiations, during which the Complainant pointed out that the religious discrimination was not addressed therein. The settlement never came to fruition primarily because one of the settlement terms required the Complainant to affirm the lie that the Respondent had never breached her human rights, which she could not do. Additionally, the settlement agreement purported to foreclose the Complainant's continued participation in the WestJet Harassment Class Action.

54. The rejection of a settlement is not one of the section 41 or 42 reasons for the Commission to prematurely dispose of a complaint. Even if it were, settlements must be on fair terms, which a settlement including unconscionable terms could never be.

55. As a victim of sexual assault owing to the WestJet work culture and a litigant in the WestJet Harassment Class Action, any terms of the settlement agreement purporting to wrest from the Complainant her opportunity to seek justice for those wrongs cannot be construed as reasonable.

56. The Complainant made clear precisely which terms of the MOS were a stumbling block for her: the terms compelling her to adopt the lie that the Respondent had never discriminated against her on the ground of religion; and the terms forfeiting her legal rights beyond and outside of the present grievance.

57. The Respondent refused to amend those terms. Accordingly, the Complainant was unable to execute the settlement agreement. CUPE withdrew its representation of the Complainant, refusing to advance the grievance to arbitration in the aftermath of the unsuccessful settlement attempt.

58. Hence, while labour arbitration *could have* provided a remedy that presumably would have resolved the allegations, access to that remedy was outside the Complainant's control. The grievance process is no longer available because the union made the decision

to terminate the process despite the Complainant's desire to see her grievance through to arbitration.

59. The Complainant is neither solely responsible, nor responsible in any way for the termination of the grievance process and foreclosure of the labour arbitration remedy. The Complainant did everything she possibly could to access that remedy. The sole reason the grievance process did not complete and no remedy issued is that the union refused to advance the grievance to arbitration and terminated the process.

60. **Irrespective** of whether CUPE's actions constitute fair representation, the fact remains they were **outside the Complainant's control.** The grievance procedure cannot fairly be considered "reasonably available" at that point, and the Complainant cannot be faulted for it. Plainly, CUPE was withholding the procedure at that juncture.

61. The Commission offers guidance and explanation concerning the circumstances under which it will step in and resolve a meritorious complaint that has first been subjected to an alternate process such as a grievance procedure.[9]

62. The Commission states: "After a final decision is made in the other process, the Complainant can ask the Commission to consider their complaint if they believe that the other process did not address the human rights issues in it. At that time, the Commission will decide whether the allegations in the complaint were dealt with through the grievance or other review procedure".

63. The Complainant's human rights were never addressed in the grievance process, save the odious attempt to compel her to affirm the lie that no discrimination occurred.

64. The Commission states:

> If the Complainant believes that the other process is no longer reasonably available to them, they can ask the Commission to consider their complaint. The Commission will determine if the other process is no longer available…If the Commission decides that the other process is not available, it will decide what role, if any, the Complainant had in that outcome.

65. The Complainant pleads that the other process is no longer available and that the Complainant bears no responsibility for the discontinued availability of that process, and asks the Commission to consider her complaint.

66. The Commission states: "If the other process is no longer available because the Complainant failed to use or complete the other process, including choosing to withdraw their grievance, the Commission may decide not [to] deal with the complaint".

67. The Complainant diligently sought relief by way of the other process. Not only did she not withdraw her grievance; she was dismayed to learn that CUPE had withdrawn it. The Complainant remains persuaded of the strength and merit of her complaint.

[9] Preliminary Issues Information Sheet 2021.

68. The Commission states: “The Commission can also refuse to deal with a complaint if a Complainant uses another process, but does not raise their human rights allegations”.[10]

69. The Complainant diligently pursued her human rights allegation relating to the Respondent’s religious discrimination and failure to accommodate from the outset, which is to say, from the point the Respondent refused accommodation of her protected characteristic—notwithstanding that CUPE refused to bring that grievance. The Complainant has always and consistently demonstrated an intention to pursue and cooperate with the labour process.

Human Rights Allegations Not Resolved by Any Other Process

70. It is crucial to note that notwithstanding the Complainant’s constant mention of the religious discrimination to which she sought a resolution, CUPE never acknowledged or attempted to deal with that human rights aspect of her claim, nor resolved it.[11]

71. The legal opinion CUPE received from its lawyer made no mention of the Complainant’s religious discrimination claim. The file closure correspondence made no mention of the Complainant’s religious discrimination claim. The attached documents disclose that the grievance process did not even acknowledge the Complainant’s human rights claim, let alone attempt to deal with it, let alone resolve it.

72. The Complainant diligently pursued and participated in a grievance process, during which she constantly referred to her human rights allegation and concern, including a good faith attempt to negotiate a settlement which was ultimately unsuccessful, after which the Complainant implored the union to advance her grievance to arbitration, which it refused to do, thereby withholding any possibility of a remedy.

73. “Deal with” means resolve. This is clear from the language the legislators chose to refer to what the Commission will do with a complaint once it has determined the complaint cannot be dismissed on the 40/41 inquiry: section 41(1) states, “the Commission shall **deal with**”; section 42(2) states, “Before deciding that a complaint will not be **dealt with**”. By the plain wording of the legislation, “dealing with” complaints is something the Commission does **after** it decides **not** to prematurely dismiss them. In other words, prematurely dismissing a complaint does not count as “dealing with” it. A decision not to dismiss the complaint on a preliminary basis pursuant to the 40/41 inquiry is a decision to **resolve** it.

74. This is important, because the Commission specifically uses the phrase “dealt with” in Issue B: “The allegations in the complaint were already ‘dealt with’”. “Dealt with” must be defined consistently; therefore, in both cases, it means “resolved”. The question for the Commission to decide is whether the Complainant’s matter has in fact already been **resolved**, as distinct from some common parlance usage or lay meaning of *dealt with*. No resolution to the abuse of the Complainant’s human rights has occurred.

[10] Preliminary Issues Information Sheet 2021.
[11] See correspondence between Complainant and CUPE.

75. Notably, one of the reasons the Commission cites for eliminating dual processes is that "[i]n some cases, it would be unfair for a Respondent to have to answer to the same allegations in more than one process".[12] Importantly, the Respondent has not yet answered the allegations of discrimination in any process. That no final decision was rendered and no remedy applied to address the Respondent's discriminatory practice, despite the Complainant's best efforts to avail herself of the appropriate process, is precisely why the Commission should advance the complaint to the Tribunal for a hearing.

76. The Commission's mandate is to extend human rights protections to Canadians. While such remedies are appropriately provided by labour arbitrators in the context of a collective agreement, where that process is terminated prior to resolution by no fault of the Complainant, the concurrent jurisdiction of the Commission operates to ensure the Complainant has access to justice in the area of human rights, which is paramount, no matter how achieved.

77. The legislation requires that the grievance process be "reasonably available". A process that is terminated immediately after a proposed settlement collapses—or as it appears in the present case, prior even to that, does not evince a process either reasonably available or reasonably complete. Notwithstanding the Commission's treatment of Issue A and Issue B as separate questions, the section 41 and 42 legislative provisions, properly understood, ***eliminate the possibility that a process <u>not reasonably available</u> could ever be deemed complete or constitute <u>resolution</u>***. For this reason also, the Complainant's complaint was not "dealt with" elsewhere.

The Leading Case Is Horrocks

78. The authoritative case on the question of jurisdiction as between the labour arbitrator and the human rights adjudicator is *Northern Regional Health Authority v Horrocks*.[13]

79. The starting point is that normally matters arising in a union context vest with a labour arbitrator. The *Horrocks* court repeats this no fewer than **sixty** times.[14]

80. Only in one heavily caveated paragraph does *Horrocks* disclose that, <u>in the absence of concurrent jurisdiction</u>, a claimant may "be left without a forum for resolution"[15] in the event a union unilaterally withdraws a grievance. Before the paragraph closes, the Court clarifies that legislative intent to confer concurrent jurisdiction is a complete answer to this rare problem, with the Court "bound to give effect" to that "legislative choice".[16]

81. In light of the Commission's concurrent jurisdiction, there is no reason to believe *Horrocks* stands for the proposition that the Commission should dismiss a complaint the

[12] Preliminary Issues Information Sheet 2021.
[13] 2021 SCC 42 [*Horrocks*].
[14] *Horrocks* at paras 1, 3-6, 13-22, 24-30, 32-3, 35-6, 39-40, 43-4, 47, 50-1, 54-5. See also *Gillespie v Canada (Revenue Agency)*, 2025 FC 1 [*Gillespie*] at para 35.
[15] *Horrocks* at para 38.
[16] *Horrocks* at para 38.

union abandoned. The *Horrocks* court is absolutely clear that the opposite is prescribed by the conferral of concurrent jurisdiction.[17]

82. Disallowing human rights complaints in favour of labour arbitration is a principled decision based on respecting the jurisdiction of the labour arbitrator. There is no reason to believe said labour arbitrator's jurisdiction could be violated where no labour arbitration is in the offing. The Complainant's matter has not yet been resolved. Were the Commission/Tribunal to resolve it, no violence would be done to labour law. No arbitrator is champing at the bit to decide this case. The Tribunal has concurrent jurisdiction. All that is achieved by refusing to adjudicate this complaint is a denial of justice to the Complainant.

83. Other case law addressed to this particular jurisdiction issue discloses that circumstances wherein the Commission refuses to take complaints because of an incomplete grievance process are attended by **clear fault on the part of the grievor:**[18] failure to cooperate in information sharing;[19] failure to engage in an ongoing accommodation process;[20] failure to participate in an internal process.[21]

84. That such clear fault on the part of a grievor would attend a refusal on the part of the Commission is to be expected, given the wording of the legislation, which explicitly assists Complainants who have not been at fault for an incomplete grievance process.

85. The substantive rights and obligations under human rights legislation are paramount over the substantive rights and obligations in any other statute. While the procedures established by human rights legislation for enforcing those substantive rights and obligations are not necessarily prescribed, the enforcement of *the rights* is still paramount.[22] No procedure of any kind has operated to enforce the Complainant's human rights.

86. In the context of concurrent jurisdiction, the Commission is in a position to, and should, advance the complaint to a hearing before the Tribunal.

June 1, 2026

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[17] *Horrocks* at paras 32-3.
[18] *Gillespie* at para 35.
[19] *Mulligan v Canadian National Railway Company*, 2015 FC 532 at para 37.
[20] *Bergeron v Canada (Attorney General)*, 2013 FC 301 at para 41.
[21] *Andrews v Canada (Attorney General)*, 2015 FC 780 at para 62.
[22] *Horrocks* at para 35.

LIST OF ATTACHED DOCUMENTS

	DOCUMENT
1.	2021 - Preliminary Issues Information Sheet 2021
2.	2021-12-22 - WESTJET COVID 19 VACCINE ACCOMODATION REQUEST FORM
3.	2022-01-04 Accommodation Response
4.	2022-01-10 – Complainant request that CUPE grieve the refusal of accommodation
5.	2022-01-21 – Email RE June 19 meeting
6.	2022-01-21 – Termination letter
7.	2022-02-03 – Completed Grievance Form
8.	2022-03-14 – CUPE email RE “abeyance”
9.	2022-10-10 – CUPE email with offer to settle
10.	2022-10 Memorandum of Settlement
11.	2022-10-27 – Email from Complainant RE amendments to the MOS
12.	2022-10-28 – Complaint filed with the Canadian Human Rights Commission
13.	2022-11-02 – CUPE email withdrawing grievance
14.	2022-11-03 – CUPE’s Legal Opinion
15.	2022-11-16 – Complainant filed a partial appeal of CUPE’s decision to withdraw her grievance
16.	2022-11-28 – Additional submissions to the appeal board
17.	2022-11-29 – CUPE appeal board declined the Complainant’s appeal.
18.	2022-12-02 –2023-03-13, - CUPE emails RE extension and conversation around MOS
19.	2023-04-19 –2023-05-26 – CUPE emails RE MOS and withdrawal of grievance

LIST OF AUTHORITIES

TAB	AUTHORITY
1.	*Andrews v Canada (Attorney General)*, 2015 FC 780
2.	*Bergeron v Canada (Attorney General)*, 2013 FC 301
3.	*Canadian Human Rights Act,* RSC, 1985, c H-6.
4.	*Gillespie v Canada (Revenue Agency)*, 2025 FC 1
5.	*Mulligan v Canadian National Railway Company*, 2015 FC 532
6.	*Northern Regional Health Authority v Horrocks,* 2021 SCC 42
7.	*Syndicat Northcrest v Amselem*, 2004 SCC 47
8.	*Yee v WestJet,* 2025 ABCJ 87