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April 4, 2024 **VIA E-MAIL**

Federal Court of Appeal
ATTN: Judicial Administrator
90 Sparks Street, 5th floor
Ottawa, Ontario K1A 0H9

Dear Madam or Sir,

RE: Air Passenger Rights v. AGC/CTA (A-102-20) – Supplementary Authorities

We are counsel for the Applicant. This Application for Judicial Review is scheduled to be heard on April 17, 2024 in Vancouver. Please bring this letter to the panel hearing this matter: Chief Justice de Montigny, Laskin, and Walker JJ.A. The Applicant's Book of Authorities was filed on November 21, 2023, alongside the Application Record.

By way of this letter, the Applicant would like to bring the Court's attention to authorities that were released after the Applicant's Application Record was filed or cases that the Applicant intends to rely upon for purpose of reply.

These supplemental authorities, enclosed, deal with three topics:

1. Whether a "standard of review" applies in matters involving allegations of bias
2. Recent jurisprudence on public interest standing in similar circumstances
3. Judicial review for reasonable apprehension of bias arising from outside influences or correspondences.

Bias Allegations Do Not Lend Themselves to a Standard of Review Analysis

Ahamed v. Canada, 2020 FCA 213 (Gauthier, de Montigny (as he then was), Locke JJA.)

We draw the Court's attention to paragraph 5 of the decision:

> [5] I will deal with the bias argument first. I start by noting that bias allegations do not lend themselves to a standard of review analysis at all: *Canadian Pacific Railway Company v. Canada (Attorney General)*, 2018 FCA 69 at para. 55. If an appellant is successful in showing that a lower court's decision gave rise to a reasonable apprehension of bias, then the appeal will be allowed based on a breach of natural justice arising from that bias. On

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> the other hand, if an appellant is not successful in such an argument, then bias cannot be the basis of a successful appeal. Either way, deference is not a factor. Parties are simply entitled to an impartial decision.
>
> [emphasis added]

Canada v. Bowker, 2023 FCA 133 (Pelletier, de Montigny (as he then was), Gleason JJA.)

We draw the Court's attention to paragraph 16 of the decision:

> [16] In its most recent pronouncement on the subject, the Supreme Court has held that questions of procedural fairness are legal questions to be reviewed on the correctness standard: *Law Society of Saskatchewan v. Abrametz*, 2022 SCC 29, 470 D.L.R. (4th) 328 (*Abrametz*), at paras. 26-30. The issue in that case was whether the Law Society's conduct amounted to an abuse of process. While not every instance of procedural fairness amounts to an abuse of process, every abuse of process amounts to a breach of procedural fairness: *Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44, [2000] 2 S.C.R. 307 at paras. 151-155 (per Lebel J. dissenting, but not on this point). As a result, any debate as to whether questions of procedural fairness are questions of law reviewable on the standard of correctness – see *Hussey v. Bell Mobility Inc.*, 2022 FCA 95, 2022 C.L.L.C. 210-052 at para. 24, *Canadian Pacific Railway Company v. Canada (Attorney General)*, 2018 FCA 69, [2019] 1 F.C.R. 121 at paras. 54-56 – has been put to rest.
>
> [emphasis added]

Pothier c. Canada (Attorney General), 2024 FC 478 (Gascon J.)

We draw the Court's attention to paragraphs 37-38 and 53 of the decision. The Federal Court applied the jurisprudence from this Court and the Supreme Court and noted that the usual standards of review do not apply to procedural fairness questions such as bias.

Recent Authorities on Granting of Public Interest Standing in Similar Situations

Mercer v Yukon (Government of), 2023 YKSC 59

We wish to bring the Court's attention to paragraphs 141-158, particularly paragraph 156:

> [156] Third, the Supreme Court of Canada in *Downtown Eastside* confirmed an applicant does not need to show there is no other or even any other reasonable and effective means of bringing the matter before the court. Instead, the question to be asked is whether the

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> proposed lawsuit is, in all of the circumstances, a reasonable and effective means of bringing the matter before the court (paras. 44 and 52).
>
> [emphasis added]

Chief Justice Duncan of the Yukon Supreme Court granted public interest standing for the plaintiffs to challenge government measures that were in place during the start of the COVID-19 pandemic, between March 2020 to March 2022. Those measures were no longer in place when the matter was before the court.

International Air Transport Association et al. v. AGC and CTA (Supreme Court: 40614)

The Supreme Court of Canada (Côté, J), granted Dr. Gábor Lukács, the president of Air Passenger Rights, leave to intervene in an appeal arising from the *Air Passenger Protection Regulations*. This appeal was before this Court in A-311-19 where Dr. Lukács was also granted standing as a public interest intervener.

Hameed v. Canada (Prime Minister), 2024 FC 242

We wish to bring the Court's attention to paras. 178-183, where the Federal Court granted public interest standing to a lawyer seeking standing to challenge the Federal government's inaction in appointing judges. At paragraph 178, the Federal Court recognized the practical effect of issuing a declaration. An appeal was recently filed.

Canadian Frontline Nurses v. Canada (Attorney General), 2024 FC 42

We wish to bring the Court's attention to paras. 160-161, 173, and 186-190 where two public interest organizations (i.e., Canadian Civil Liberties Association and Canadian Constitution Foundation) were granted public interest standing despite there being another judicial review on the same subject-matter by individuals with direct standing.

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Judicial Review for Reasonable Apprehension of Bias for Outside Influence

C.D. Lee trucking Ltd. v. Industrial Wood and Allied Workers of Canada, 1998 CanLII 6678 (BC SC)

We wish to bring the Court's attention to paras. 2-3, 21, 39-40, 43-46, 50-51 and 54-58. In this case, the Supreme Court of British Columbia granted judicial review arising from a telephone call between the Board's chair and one of the parties giving rise to a reasonable apprehension of bias. In particular, the court noted that:

> [44] The issue before me is not whether Mr. Oleksiuk was actually biased, but whether the fact of his telephone conversation with Mr. Everitt, his discussion of the conversation with Ms. Junker and the appointment of a new panel almost immediately thereafter could properly cause a reasonably well informed person to have a reasonable apprehension of a biased appraisal or judgment affecting the applicant, however unconscious or unintentional the effect might be (see *CNG Transmission Corp. v. Canada (National Energy Board) (1991)*, 1991 CanLII 13583 (FC), 3 Admin. L.R. (2d) 149) (F.C.T.D.)).
>
> [45] Apprehension of bias is not restricted to any particular type of power being exercised by the Board. If a reasonable apprehension of bias arises in relation to the exercise of any of the Board's functions, judicial review is available. I refer to *Newfoundland Telephone Co. v. Board of Commissioners of Public Utilities* (1992), 1992 CanLII 84 (SCC), 89 D.L.R. (4th) 289 (S.C.C.), at page 297:
>
> > [internal quotation omitted]
>
> [46] There are objective factors which compel me to be concerned about the appearance of fairness and impartiality in this case.
>
> …
>
> [50] Without regard for any of the content, it is entirely reasonable for anyone not a party to the conversation to conclude from Ms. Junker's letter that her reassignment was, in part, at the least, a response to the improper conversation between Mr. Everitt and Mr. Oleksiuk which had the result desired by Mr. Everitt.
>
> [51] The Board is a quasi-judicial body upon which is conferred extensive jurisdiction and power to regulate labour matters. The impact of its decisions upon parties who come before it and the promotion of harmony between employees and employers require the Board to be, and objectively be seen to be, scrupulous, fair, judicious and impartial in its process and proceedings. It is of fundamental importance that justice should not only be done, but be manifestly and undoubtedly seen to be done (see *R. v. Sussex Justices; McCarthy*, Ex parte, [1924] 1 K.B. 256).

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…

[55] If the Board should be entitled to adduce evidence that the telephone conversation was inconsequential in the decision making process, it should have tendered the affidavit evidence of Mr. Oleksiuk so that the court could know of all aspects of the conversation from the evidence of a participant, rather than knowing only of the part that may have been reported to Ms. Junker (see Ringrose, supra, at page 561 per Dickson C.J.C.). No affidavit of Mr. Oleksuik was filed in the proceeding.

…

[58] The conversation between the Chair and the union official infected Ms. Junker and Mr. Johnston with the apprehension of bias virus. In the absence of judicial intervention, the virus will persist. That is particularly so given that the chair of the board is charged with the statutory responsibility for the appointment of panels. While the chair may act through a delegate, he ultimately remains responsible for the decisions with respect to the appointment of panels.

[emphasis added]

CNG Transmission Corp. v. Canada (National Energy Board) (T.D.), 1991 CanLII 13583 (FC), [1992] 1 FC 346

We wish to bring the Court's attention to the headnote, page 355, 360-361, 363 and 369-370. The Federal Court of Canada, per Cullen J., granted judicial review because the source of the idea that the Board acted upon came from an external source. The Board chair and vice-chair also attended meetings contrary to the Board's own rules and policies, and expressions an opinion on matters that the Board would be adjudicating.

Should the Court have any directions, we would be pleased to comply. A copy of this letter and supplementary book of authorities is being sent concurrently to counsel for the AGC and CTA.

Yours truly,
EVOLINK LAW GROUP
Simon Lin
SIMON LIN
Barrister & Solicitor

Encls: Supplementary Book of Authorities