

# In the Court of Appeal of Alberta

**Citation: Northern Air Charters (PR) Inc v Alberta Health Services, 2023 ABCA 114**

**Date:** 20230331

**Docket:** 2201-0220AC

**Registry:** Calgary

**Between:**

**Northern Air Charters (P.R.) Inc.**

Appellant  
(Applicant)

- and -

**Alberta Health Services and Can-West Corporate Air Charters Inc.**

Respondents  
(Respondents)

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**The Court:**

**The Honourable Chief Justice Ritu Khullar  
The Honourable Justice Peter Martin  
The Honourable Justice Patricia Rowbotham**

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## **Memorandum of Judgment**

Appeal from the Order of  
The Honourable Justice R.W. Armstrong  
Dated the 18th day of August, 2022  
Filed on the 27th day of September, 2022  
(Docket: 1709-00202)

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## Memorandum of Judgment

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### The Court:

[1] Northern Air Charters (P.R.) Inc. appeals the order of a chambers judge who dismissed its application for leave to admit affidavit evidence in support of Northern Air's judicial review application. For the reasons that follow we dismiss the appeal.

[2] By way of background, Northern Air alleges that Alberta Health Services (AHS) acted unfairly and breached its duty of good faith in conducting a request for proposals (RFP) process to provide aviation services for AHS's air ambulance program. Northern Air, which had been providing these services to AHS, participated in that process but was ultimately unsuccessful – the successful proponent was Can-West Corporate Air Charters Inc., one of the respondents to this appeal.

[3] Rule 3.22(a) of the *Alberta Rules of Court*, Alta Reg 124/2010, provides that the certified record of the proceedings is one of a few limited pieces of evidence that is admissible on an application for judicial review. Rule 3.22(d) provides the Court with discretion to admit other evidence. The certified record consists of over 5000 pages. Northern Air applied for leave to admit two affidavits. The first was sworn by the principal of Northern Air, Nathan Hilman. The second was sworn by Peter Sekulic, who provided an expert report and opinion on the fairness of the RFP process.

[4] The Hilman affidavit provided background to the RFP itself, and to Northern Air's proposal for the RFP. It spoke to Northern Air's rationales while creating and structuring that proposal, and identified how Northern Air had interpreted the requirements of the RFP throughout the process. The Sekulic affidavit identified four alleged flaws in the RFP process and detailed how those flaws had impacted the fairness of the process. It did so through a review of the certified record of proceedings.

[5] Northern Air argued that the two affidavits were necessary to assist the court in understanding the issues within the RFP process. It argued that the affidavits provided context about how decisions made by AHS during the RFP process impacted the fairness of that process, and specifically disadvantaged Northern Air compared to other proponents. Northern Air also contended that the affidavits provided necessary context for the aviation industry and procurement processes generally, which helped to explain why the RFP process had been procedurally unfair.

[6] The chambers judge dismissed the application. Relying primarily on the decision in *Alberta Liquor Store Association v Alberta (Gaming and Liquor Commission)*, 2006 ABQB 904, he concluded that the fairness and reasonableness of the RFP process could be sufficiently assessed

from the extensive certified record. Further, he found that the affidavits went beyond mere context and background information, and instead offered interpretations, subjective analysis, and argument. He concluded that judicial review was to be conducted according to the record before the administrative decision maker, and the affidavits did not fall under one of the exceptions to that general rule.

[7] Northern Air submits that the chambers judge erred in (1) applying the incorrect legal test for admission of additional evidence on judicial review; and (2) concluding that the affidavits were irrelevant in determining whether the RFP had been conducted fairly. The first ground is reviewed on a correctness standard while the second raises a question of the application of the law to the facts and is reviewed for palpable and overriding error.

[8] *Alberta Liquor Store* affirmed that the “general rule is that judicial review is conducted based on the Return filed by the tribunal ... additional affidavits and evidence are exceptional”: at para 40. This is because new evidence is “irrelevant to the issues before the court on judicial review”, as the court is not assessing the merits of the decision, but instead whether the decision of the administrative body is supported by the record before it, and whether that decision aligns with the rules of natural justice: at paras 43-44.

[9] The court identified four limited exceptions where extrinsic evidence may be admitted:

1. To show bias or a reasonable apprehension of bias, where the facts in support of the allegation do not appear on the record.
2. To demonstrate breaches of the rules of natural justice which are not apparent from the record.
3. Background information for other issues such as standing.
4. When the administrative decision maker makes no record, or an inadequate record: *Alberta Liquor Store* at para 41.

[10] In *Alberta Liquor Store*, the court noted that “[t]here is a limited ability to call evidence on the meaning of technical terms”; however, such evidence should not provide opinions on the ultimate issue: at para 49. The court further cautioned that despite the exceptions, “[w]henver it may be appropriate to file affidavits on judicial review applications one thing is clear: the applicants are not entitled to turn the judicial review application [into] a trial *de novo* on the merits of the issue before the tribunal”: at para 46.

[11] Northern Air urges this court to endorse a more expansive approach to the admission of extrinsic evidence than that enunciated in *Alberta Liquor Store*. It contends that the four exceptions articulated in *Alberta Liquor Store* have been expanded upon in subsequent jurisprudence. In particular, it submits that the court should endorse, as an exception, evidence

which provides necessary background and context to the judicial review. It also contends that the rules regarding admissibility of extrinsic evidence should apply differently in the context of judicial review of “administrative” decisions, as opposed to “adjudicative” decisions.

[12] In our view *Alberta Liquor Store* remains good law. It has been followed by this court as recently as 2019 in *JK v Gowrishankar*, 2019 ABCA 316 at para 60, and by the Court of King’s Bench in *Canadian Natural Resources Limited v Fishing Lake Métis Settlement*, 2022 ABQB 53 at para 28; *Mohamed v College of Physicians and Surgeons of Alberta*, 2019 ABQB 657 at para 11; and *Allergan Inc v Alberta (Justice and Solicitor General)*, 2019 ABQB 610 at para 50, aff’d 2021 ABCA 32.

[13] The cases which Northern Air relies on to support a more expansive test fall within the exceptions in *Alberta Liquor Store*. For example, paragraph 20 of *Swan River First Nation v Alberta (Agriculture and Forestry)*, 2022 ABQB 194, is cited by Northern Air for the principle that extrinsic evidence may be admitted where it provides necessary background and context to the judicial review. However, *Swan River* in turn derives that proposition from *Alberta’s Free Roaming Horses Society v Alberta*, 2019 ABQB 714. That case involved judicial review of Ministerial Orders designating portions of public land as being available for licensees to capture, confine, and transport or dispose of wild horses: at paras 1-2. As a result, the certified record contained only the relevant Orders and appendices detailing the affected land: at paras 6-7. Thus, the exception utilized in *Free Roaming Horses*, and cited in *Swan River*, falls neatly within the exception articulated in *Alberta Liquor Store* that extrinsic evidence may be admissible where there is no record, or the record is inadequate.

[14] Similarly, Northern Air cites the case of *Yuill v Alberta (Workers’ Compensation Appeals Commission)*, 2016 ABQB 369 at para 60, for the exception that extrinsic evidence may be admissible to show a complete absence of evidence before the decision maker on an essential point. However, in *Yuill*, the chambers judge admitted the affidavits in part because the applicant was a self-represented litigant and had difficulty articulating the basis for admissibility. As a result, it was held to be “necessary and fair” to admit the extrinsic affidavits, with the chambers judge stating they “may meet the above exceptions”: at para 61. Moreover, this exception is contemplated in Federal Court jurisprudence, with the Federal Court of Appeal explaining in *Bernard v Canada (Revenue Agency)*, 2015 FCA 263, leave to appeal to SCC refused, 36834 (9 June 2016) that such an affidavit “tells the reviewing court not what is in the record ... but rather what cannot be found in the record ... This can be useful where the party alleges that an administrative decision is unreasonable because it rests upon a key finding of fact unsupported by any evidence”: at para 24. Thus, *Yuill* does not demonstrate an expansion of the existing exceptions relating to admissibility of extrinsic evidence, and like *Free Roaming Horses*, the exception utilized in *Yuill* falls within the fourth exception set out by *Alberta Liquor Store*, as it relates to an inadequate record produced by the administrative decision maker.

[15] The decision of the Federal Court of Appeal in *Tsleil-Waututh Nation v Canada (Attorney General)*, 2017 FCA 116, is also referenced by Northern Air for the principle that extrinsic evidence may be admissible on judicial review where it provides general background or summaries of a complex or voluminous record. However, in *Tsleil-Waututh* the court stressed that such affidavits cannot provide argument, nor speak to the merits of the matter under review: at paras 32-36. Instead, the extrinsic evidence must be limited to “identifying, summarizing and highlighting the evidence most relevant ... the background information is merely for orienting the reviewing court, not to provide evidence as to what took place before the administrative decision-maker”: at para 38, citing *Bernard* at para 23. Moreover, the evidence contained in affidavits admitted under this exception “is not new information going to the merits. Rather, it is just a summary of the evidence relevant to the merits that was before the ... administrative decision-maker”: *Bernard* at para 23. Again, like *Free Roaming Horses* and *Yuill*, this exception also relates to the inadequacy of the record, insofar as a complex or voluminous record is inadequate when it lacks a guide or summary of the relevant evidence. Given the findings made by the chambers judge that the affidavits were both argumentative and contained new information, they would not fall within the scope of this exception.

[16] Northern Air also relies upon *Saskatchewan (Workers’ Compensation Board) v Gjerde*, 2016 SKCA 30, to support an expansion of the rules governing admissibility of extrinsic evidence on judicial review. However, that case can also be categorized under the fourth exception set out in *Alberta Liquor Store*, with the court stating that because “the Board provided no reasons or explanation for its decision ... in this case, absent the ability to supplement the record, judicial review of the Board’s decision would not be possible”: at paras 45-46.

[17] In the result, we are not persuaded that the chambers judge applied the wrong test.

[18] Turning to the second ground of appeal, the chambers judge carefully reviewed the affidavits and concluded that they were not admissible for several reasons: (1) the certified record of proceedings contained an analysis similar to reasons for the decision; (2) the proposed affidavits were not merely “context and background” but contained substantive analysis; (3) the affidavits contained information that the decision maker did not have; and (4) they contained argument and opinion on the ultimate issue. In short, they went far beyond “context and background.” They were not relevant and were unnecessary for the determination of the judicial review. Northern Air has not shown any palpable and overriding error in these conclusions.

[19] Northern Air has not demonstrated any reviewable error in the chambers judge’s decision. We dismiss the appeal.

[20] One final note about procedure. If this matter had been started by statement of claim instead of judicial review, there would not be same constraints on Northern Air to tender this type of evidence. During oral argument Northern Air explained that it consciously chose the judicial review approach because of the type of remedies available. In this appeal there is no challenge to the procedure chosen. As we have said elsewhere, this court has yet to decide whether it is

appropriate for disappointed bidders to seek judicial review of a tendering decision by a public body instead of challenging the decision by statement of claim: *Aquatech Canadian Water Services Inc v Alberta (Minister of Environment and Parks)*, 2020 ABCA 153 at paras 13-14. The appropriate procedure remains an open question.

[21] If the parties wish to make submissions as to costs, they are directed to do so in writing to a maximum of five pages. The respondents are directed to do so within 10 days of the date of this judgment and Northern Air within 10 days of the receipt of the respondents' submissions.

Appeal heard on March 6, 2023

Memorandum filed at Calgary, Alberta  
this 31st day of March, 2023

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Authorized to sign for: Khullar C.J.A.

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Martin J.A.

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Rowbotham J.A.

**Appearances:**

D. de Groot  
M. Deyholos  
for the Appellant

F. Tosto  
L. da Costa  
M. Gaber  
M. Schneider  
for the Respondent Alberta Health Services

K.E. Staroszik, KC (no appearance)  
A. Louie  
for the Respondent Can-West Corporate Air Charters Ltd.