BRITISH COLUMBIA SECURITIES COMMISSION
Securities Act, RSBC 1996, c. 418

Citation: Re Mark Morabito, 2025 BCSECCOM 133 Date: 20250401

Global Crossing Airlines Group Inc. (formerly known as Canada Jetlines Ltd.) and Mark Morabito

Panel	Gordon Johnson	Vice Chair
	Warren Funt	Commissioner
	Jason Milne	Commissioner
Submissions completed	March 5, 2025	
Submissions		
Matthew Smith	For the Executive Director	
Sean K. Boyle Jenna Green	For Global Crossing Airlines Group Inc.	
Robert J.C Deane Paige Burnham	For Mark Morabito	

Decision

I. Introduction

[1] The respondents apply to have the panel chair, Vice Chair Johnson, and a panel member, Commissioner Funt, recuse themselves from this panel, which has been appointed to hear applications from the respondents to dismiss the underlying proceeding as an abuse of process.

[2] Two arguments are advanced in support of the applications to have Vice Chair Johnson recuse himself. First, it is asserted that when the British Columbia Court of Appeal directed the applicants in the abuse of process applications to "start their abuse of process application afresh" the Court meant to exclude the participation of any prior panel member who had been involved in any prior aspect of the proceeding. That interpretation would preclude participation by Vice Chair Johnson, who had been a member of a panel which had previously addressed an application brought by the respondents. It is common ground among all involved in this proceeding, including among all panel members, that if the British Columbia Court of Appeal's intentions were those which are asserted by the respondents then Vice-Chair Johnson would immediately recuse himself.

[3] The second and alternative basis alleged in support of Vice Chair Johnson recusing himself is an allegation that a reasonable apprehension of bias exists because some of

the issues which will arise in the abuse of process application were addressed by the panel in the public interest application.

[4] The application for Commissioner Funt to recuse himself is based upon a reasonable apprehension of bias which allegedly exists because both Commissioner Funt and Mark Morabito (Morabito)'s counsel are members of the Law Society of British Columbia's (LSBC) Tribunal adjudicators. Morabito's counsel is a member of the LSBC's roster of lawyers and Mr. Funt is a member of that LSBC's roster of non-lawyers.

[5] Our conclusions on each issue are influenced by important contextual factors.

II. Public interest decision and subsequent Court of Appeal decision

A. Public interest decision

[6] In a notice of application dated January 7, 2021, Morabito and Susan Morabito (together, the Morabitos) sought orders:

a. For the application be heard *in camera*, and

b. Revoking, in whole or in part, the investigation order issued on August 14, 2018 (IO).

[7] The Morabitos alleged that Commission staff moved the investigation at "a glacial pace" and that the panel should infer that the investigation was "being prolonged for improper and collateral purposes, namely to induce the Applicants to seek to make a voluntary resolution." The Morabitos further alleged that staff "carried out their duties in a high-handed and aggressive manner, without regard for the jurisdictional limitations imposed by the IO, procedural fairness, common decency, and the public interest."

[8] Joseph Morabito, Morabito's father, and the Morabitos each submitted an affidavit in support of the application.

[9] After the oral hearing of the application on May 17, 2021, the applicants applied to re-open the hearing to adduce fresh evidence and an order restraining the executive director from issuing a notice of hearing until at least 60 days after the panel's decision on the application.

[10] The executive director provided a response to the application dated February 9, 2021. The executive director argued:

a. The Morabitos' application was a collateral attack on the steps taken in the investigation.

b. The applicants had failed to establish an abuse of process as they did not provide any evidence of:

i. Actual prejudice suffered;

ii. Any misconduct by Commission staff; and

iii. Any unreasonable or inordinate delay.

c. All investigative steps taken by Commission staff were within the scope of the IO.

[11] The executive director provided two affidavits in support of his submissions, including an affidavit from an RCMP officer who attended at the Morabitos' residence with Commission staff. However, the affidavits delivered provided very little information about steps taken during the investigation, and particularly very little in the way of explanation for why steps were taken or not taken.

[12] The applicants replied that Commission staff were subject to oversight by a panel even before the issuance of a notice of hearing because it is in the Commission's public interest mandate to preserve the integrity of the Commission and to ensure procedural fairness during investigations.

[13] On October 6, 2021, a panel, composed of Gordon Johnson, Deborah Armour KC, and Audrey Ho, dismissed the application (*Re Application 20210107*, 2021 BCSECCOM 394 – the Public Interest Decision). The panel agreed with the applicants that they had standing to hear the application and that the application was not a collateral attack.

[14] However, the panel agreed with the executive director that "the onus is on the Applicants to establish that it would not be prejudicial to the public interest for us to vary or revoke the Order." They stated that the evidence did not establish that:

a. the investigation had taken too long;

b. the investigation had been inactive for any unusual amount of time; and

c. there was an improper purpose for investigators to attend at the Morabitos' residence.

[15] The panel stated, at paragraph 59:

> The Applicants assert that, especially given the decision of the Executive Director to not call evidence explaining the motivation and strategy behind the home visit, it is appropriate for us to draw an inference that the motivation was improper. It is true that much of the evidence which comes before this tribunal and which has been collected from the subjects of investigations is collected in the course of formal interviews. Such interviews are often conducted in the Commission's offices with the subject of the interview accompanied by counsel and after appointments have been arranged. Having said that, it does not follow that it is improper for investigators to seek to interview

> someone at their home without an appointment. Objectively, there is not a sufficient basis in the evidence to infer an improper purpose and we do not draw such an inference.

[16] The panel concluded, at paragraph 67:

> In order to be effective, investigators need independence to follow leads and to explore new avenues which emerge as information is collected. The primary restraints on the scope of investigations are the limitation period in the Act and the parameters set by the terms of the investigation orders. There is a very significant public interest in letting investigations run their course within those authorized parameters. Implicitly, this suggests that Applicants must establish very significant competing public interest factors before the Commission should revoke an investigation order.

[17] The panel also declined an application of the applicants to adduce fresh evidence. The applicants had asked the panel to draw an inference of improper motive on the part of the executive director by issuing a notice of hearing after the initial application was heard. The panel found that the evidence of the respondents did not meet the test of being compelling because, even if the fresh evidence was admitted, it would not have caused the underlying application to be determined differently. The panel found that "there are potential legitimate explanations for the conduct in question besides bad faith and intentional misconduct; we are not compelled to infer the worst and we have not done so."

B. Court of Appeal decision

[18] The Morabitos appealed the Public Interest Decision on the basis that the panel erred in law by placing the onus on the appellants to prove that revoking the IO would not be prejudicial to the public interest. The appellants argued that the British Columbia Court of Appeal decision, *Party A v. British Columbia (Securities Commission)*, 2021 BCCA 358, reversed the onus requirement for preservation orders onto the executive director and that this reversal should also apply to investigation orders. Leave was granted in 2021 BCCA 473 and the matter was heard by the Court of Appeal in *Morabito v. British Columbia (Securities Commission)*, 2022 BCCA 279.

[19] The Court of Appeal stated, at paragraph 92:

> I reiterate that the appellants argued their case before the panel, and in this court, on the basis that it was in the public interest for the Commission to grant an order revoking the investigation order outright. As mentioned earlier, they did not contend that the order had not been properly made in the first place. Instead, they complained (in my opinion, not without some justification) about how the investigation was being carried out — that it was proceeding at a "glacial pace"; that the director's tactics, if not abusive, were heavy-handed and unprofessional; and that if the director had in fact wished to "get to the truth", he should have spoken to the Morabitos' investment advisor.

[20] The appellants argued that the lack of evidence advanced by the executive director forced them "to bear the burden of dislodging an assumption built on facts and evidence unknown to them."

[21] The executive director argued that the procedural fairness with regards to preservation orders, as was argued in *Party A*, should not be interpreted in the same manner when considering investigation orders where the duty of fairness is minimal. The executive director stated that caselaw indicated that fairness in the investigation stage did not require participation from the subjects of the investigation and that there was no duty to inform or debate the subjects about the merits of an investigation.

[22] The Court dismissed the appeal and held that the onus is with the applicant to show that the public interest will not be prejudiced by revocation of the IO. The Court noted that the onus may shift if an applicant adduces relevant evidence that is contrary to the public interest:

> [97] I have concluded that the proper balancing of these factors requires that the onus lies on the applicant for an order revoking an investigation order under s. 171. This does not mean, however, that an executive director or any other investigator should sit back in every instance and simply rely on the fact the burden of proof lies on the applicant. In cases where the applicant alleges unprofessional conduct or an abuse of some kind and adduces evidence supporting his or her case, the *evidentiary* burden may well shift to the director to respond in a meaningful way — to explain why a particular tactic was followed, for example, or why an investigation has been inordinately delayed. Respectfully, the public interest would not be served by a regulatory system that the investing public perceives to be biased, unfair or chronically inefficient.

III. Abuse of process decision and subsequent Court of Appeal decision

A. Abuse of process decision

[23] On February 15, 2023, Morabito applied to the Commission for an order staying the proceedings against him as an abuse of process.

[24] On March 2, 2023, Global Crossing Airlines Group Inc. (Global) made a similar application for a stay of the proceedings against it as an abuse of process (the abuse of process applications noted at paragraph 2).

[25] On June 23 and 27, 2023, the panel, consisting of Judith Downes, James Kershaw and Marion Shaw, heard the executive director's case and the abuse of process applications. The panel issued a decision on August 17, 2023 (the Abuse of Process Decision – 2023 BCSECCOM 405).

[26] In the Abuse of Process Decision, the panel described the procedural history of the matter, particularly disclosure applications by the respondents which the panel had ruled on in 2022 BCSECCOM 433, 2023 BCSECCOM 83, and 2023 BCSECCOM 150.

[27] The panel stated that, particularly because "a central aspect of the AOP Applications relates to the Applicants' position that the death of the Former CEO deprived them of key evidence essential to their defence", the panel would be better placed to understand and rule on the abuse of process applications if it heard all of the executive director's evidence. The panel stated that it determined that this was the best course of action to conduct the proceeding "fairly, flexibly and efficiently" and that it would not require the respondents "to present their cases unless and until the panel dismissed the [AOP] Applications."

[28] The panel reviewed the main arguments of the respondents:

a. The executive director's failure to disclose initially the illness, and then death of the former CEO.

b. The conduct of Commission staff during the investigation.

c. Failure by the executive director to provide relevant disclosure in relation to the allegations in the Notice of Hearing.

[29] The panel found that:

a. The death of the former CEO did not deprive the respondents of the right to a fair hearing.

b. The investigators' decision to not interview a number of witnesses was not an example of bias because "given the specific allegations set out in the Notice of Hearing, the choice may simply reflect staff's assessment of who might have evidence relevant to those allegations."

c. The "executive director's overall approach to disclosure in this case, and not simply our conclusion that he has now complied with his obligations, is one factor we weigh in our consideration of the Stay Applications."

d. There was no evidence of improper motive in the executive director's decision to not interview the former CEO.

e. The executive director's decision to not put the principle investigator forward for cross-examination was not improper or abusive.

[30] The panel dismissed the respondents' abuse of process applications.

B. Court of Appeal decision

[31] The respondents sought leave to appeal the Abuse of Process Decision, which was granted in *Morabito v. British Columbia (Securities Commission)*, 2023 BCCA 395.

[32] The appellants appealed on the basis that the panel:

> …committed multiple errors when it dismissed their abuse of process applications by applying an incorrect legal framework and endorsing an unfair process. With respect to the legal framework it applied, the appellants contend the Panel's analysis was too narrow, focusing on abusive delay and not abuse of process generally. With respect to procedure, the appellants submit that the Panel's approach was flawed because it: (1) prevented them from cross-examining the investigators responsible for many of the investigative decisions; and (2) in effect, prevented the appellants from adducing evidence to prove their claims of abuse of process. Relevant as well, submit the appellants, was the executive director's failure to adduce any evidence to answer at least some of the allegations, contrary to what this Court had instructed in an earlier appeal in the same case: *Morabito v. British Columbia (Securities Commission)*, 2022 BCCA 279 [*Morabito 2022*].

[33] On November 15, 2024, the Court of Appeal issued its judgment (*Morabito v. British Columbia (Securities Commission)*, 2024 BCCA 377). The Court allowed the appeal and held that the Abuse of Process Decision panel's process "was flawed and violated rules of procedural fairness" by having a blended hearing of the executive director's substantive evidence and the abuse of process applications and by failing to allow inquiry into credible objections about some the investigative tactics used by investigators.

[34] The Court found that it was procedurally unfair for the panel to permit the executive director to not call the primary investigator to be cross examined. The Court stated that in a liability hearing, "the Panel was not necessarily incorrect when it stated that the appellants were not entitled to any particular witness" but that this was confused with the abuse of process applications where the primary investigator would be the "the obvious person with first-hand knowledge of many of the incidents particularized in the notices of application." The Court held that there was evidence presented which shifted the evidentiary burden to the executive director to respond to the abuse of process applications.

[35] The Court also found that, when the panel sustained objections to the appellants questions to the executive director's witness, they were doing so "in the context of the substantive case but not in relation to the claim of abuse of process."

[36] The Court held that the panel impermissibly speculated about other possibilities "that was not available to the Panel on the evidence presented."

[37] The Court summarized the procedural errors of the panel at paragraph 80:

> In sum, the Panel adopted a procedure that: (1) compelled the appellants to elicit evidence from a witness hostile to their interests; (2) prevented the appellants from eliciting evidence to prove their allegations of abuse of process from the one witness the executive director chose to present their case; and, (3)

> impermissibly narrowed the abuse of process application such that the conduct of the investigators was protected from scrutiny. The procedure adopted by the Panel (as proposed and advocated for by the executive director) resulted in a hearing that was procedurally unfair. Blending the abuse hearing with the substantive allegations barred the appellants from a fair determination of their applications.

[38] The Court allowed the appeal for violation of the rules of procedural fairness and concluded, at paragraph 92:

> …I would allow Mr. Morabito and Jetlines' appeal, set aside the decision of the Panel, and remit the matter to a newly constituted hearing panel of the British Columbia Securities Commission to proceed with a hearing to determine the abuse of process applications in accordance with these reasons.

IV. Procedural history since the Court of Appeal decision

[39] A hearing management meeting was held on December 12, 2024, with the parties and Vice Chair Johnson. The parties were asked to provide their positions on the composition of the new panel.

[40] On December 23, 2024, counsel for Morabito sent a letter advising of his position regarding the composition of the new panel. He stated that the new panel could not have any members from the Public Interest Decision panel because the Court of Appeal wanted a panel that had not heard any of the previous evidence and the issues the Public Interest Decision panel reviewed "are inextricably bound up" with the issues reviewed by the panel in the Abuse of Process Decision. Counsel for Morabito stated that:

a. The Court of Appeal ordered a newly constituted panel for a fresh hearing and a panel that included commissioners that had heard part of the evidence could not hear the application "afresh".

b. The Public Interest Decision panel heard evidence and made findings on matters at issue in the abuse of process applications.

c. A wholly new panel is required as a matter of procedural fairness.

d. Administrative convenience cannot justify a breach of procedural fairness.

[41] On December 24, 2024, counsel for the executive director sent an email to the Hearing Office advising that the executive director did not object to the matter proceeding as suggested by Morabito's counsel.

[42] On January 14, 2025, counsel for Morabito sent an email to the Hearing Office which provided a proposed procedure for the abuse of process applications. In the email, counsel advised that he anticipated requiring the three investigators at the Commission that were investigating the matter, litigation counsel for the executive director who has

carriage of the matter, and the director of enforcement at the Commission to attend for cross-examination at the hearing.

[43] Another hearing management meeting was held on January 15, 2025. In the meeting, Vice Chair Johnson advised the parties that the Commission Chair had appointed the new panel consisting of Vice Chair Johnson as panel chair, and Commissioners Warren Funt, and Jason Milne, to hear the abuse of process applications. The Vice Chair Johnson set January 29, 2025, as the date for parties to provide any recusal applications they may bring.

[44] On January 17, 2025, a hearing notice was issued (2025 BCSECCOM 27) setting the dates for the abuse of process applications for December 8 – 12, 15 and 16, 2025.

[45] On January 29, 2025, counsel for Morabito and Global Crossing each submitted a notice of application seeking recusal of Vice Chair Johnson and Commissioner Funt from the newly constituted abuse of process panel.

[46] On February 5, 2025, the Hearing Office sent an email to the parties that had links to a number of cases and requested that they advise if they wished to supply additional submissions. That same day counsel for Morabito advised that they intended to provide further submissions.

[47] On February 12, 2025, counsel for Morabito provided their supplemental submissions. That same day, counsel for Global Crossing advised that they adopted and relied on Morabito's supplemental submissions.

[48] On February 26, 2025, counsel for the executive director provided his responding submissions on Morabito's recusal application.

[49] On March 5, 2025, counsel for Morabito and Global Crossing provided their reply to the executive director's responding submissions.

V. Positions of the applicants

A. Morabito

[50] Morabito objects to the composition of the panel and seeks the recusal of Vice Chair Johnson and Commissioner Funt on the following grounds:

a. The composition of the newly constituted panel is inconsistent with the Court of Appeal's order:

   i. Morabito states that the Court of Appeal expressly remitted "the matter to a newly constituted hearing panel" and argues that the remitted abuse of process applications concern "the same findings made by the [Public Interest Decision panel]". He states that the new panel "will be required to make findings in respect of the same evidence already heard by the [Public

Interest Decision panel] and the [Abuse of Process Decision panel]." Morabito says that it "makes no difference" if the new panel is comprised of two members or one member from the Public Interest Decision panel.

b. A new panel is required as a matter of procedural fairness:

    i. Morabito argues that "even one member of the [Public Interest Decision panel] taints the Newly Constituted Panel with a reasonable apprehension of bias and renders the hearing of the fresh abuse of process applications unfair and therefore wrong in law." He says that when the Commission Chair appointed Vice Chair Johnson to the new panel contrary to "the parties' common positions" and without reasons, it "magnifies" the concern of bias.

c. Commissioner Funt ought to be recused because he is on the same administrative tribunal as counsel for Morabito:

    i. Morabito argues that, because Commissioner Funt is a member of the LSBC's Tribunal adjudicators and that counsel for Morabito is also a LSBC Tribunal adjudicator, there is "an apparent conflict of interest" because of "how the proceedings would be perceived by a member of the public." Morabito argues that there "is no apparent reason why Mr. Funt is required to sit on the Newly Constituted Panel" if there are other Commissioners with no connection to the parties.

d. Administrative convenience can never justify a breach of the duty of procedural fairness:

    i. Morabito noted that at the December 12, 2024, and January 15, 2025, hearing management meetings, Vice Chair Johnson told the parties that there were a limited number of Commissioners available to be members of the new panel and that many of those Commissioners had limited experience chairing a panel. Morabito argues that "administrative convenience can never justify or excuse a situation which otherwise gives rise to a reasonable apprehension of bias."

[51] Morabito seeks orders recusing Vice Chair Johnson, Commissioner Funt, a direction that the new panel not include any Commissioners that have participated in this proceeding, and in the alternative, reasons for the Chair's appointment of Vice Chair Johnson and Commissioner Funt to the new panel. He submitted an affidavit in support of his recusal application.

[52] Morabito provided supplemental submissions that addressed six cases that the Hearing Office sent to the parties for consideration:

- *Natural Bee Works Apiaries Inc (Re),* 2019 ONSEC 31;

- *Ontario Securities Commission v. MRS Sciences Inc.,* 2017 ONCA 279;
- *Edmonton (Police Service) v. Furlong,* 2013 ABCA 177 (*Furlong*);
- *El-Bouji (Re),* 2019 ONSEC 33;
- *Zuk v. Alberta Dental Association and College,* 2020 ABCA 162 (*Zuk*); and
- *Walton v. Alberta Securities Commission,* 2014 ABCA 446 (*Walton*).

[53] Morabito argues that none of the cases, except *Furlong*, addressed the situation where "a court had already ordered that the matter be remitted to a newly constituted panel." Morabito states that *Furlong* supports his argument that where there are concerns about prejudging then a matter should be remitted to a new panel. He distinguishes *Walton* and *Zuk* because the Alberta Court of Appeal "specifically held that the matter could be remitted to the same panel". Morabito states that the other three cases were "not relevant to the determination of the recusal applications currently before the Commission."

B. Global Crossing

[54] Global Crossing also objected to the proposed composition of the panel and seeks the recusal of Vice Chair Johnson and Commissioner Funt. Global Crossing adopted factual basis laid out in Morabito's application but it argues:

> …Global Crossing's position and arguments at further hearings could conflict with those of Mr. Morabito, and any conflict between the parties' arguments would result in the Newly Constituted Panel having to accept the submissions of Mr. Morabito or the submissions of Global Crossing, placing Commissioner Funt in a potential conflict of interest.

[55] Global Crossing notes the Commission's Ethics and Conduct policy requires that Commissioners advise the Chair of any conflict of interest when they are asked to "participate in a tribunal proceeding". It argues that having Commissioner Funt on the panel "gives rise to a perceived conflict of interest, could give rise to a future conflict of interest, and is in not in line with the Commission's Ethics and Conduct Policy."

[56] Global Crossing seeks the same relief as Morabito and relies on the affidavit submitted in Morabito's application and its own affidavits.

[57] Global Crossing provided a reply to the executive director's responding submissions noting that "there is a chance that Commissioner Funt and Morabito's counsel could sit together" on an LSBC Tribunal and that the Commission's Ethics and Conduct Policy includes the requirement that Commissioners "must not act in an adjudicative capacity if you have an association (past or current business or personal relationship)".

VI. Position of the executive director

[58] The executive director submitted responding submissions partially agreeing with the respondents' recusal applications.

[59] The executive director agreed with the respondents "that, in the interests of fairness, the appearance of fairness, and proceeding to a hearing on the merits expeditiously, Vice Chair Johnson should recuse himself from the new abuse of process panel" but noted "there is no doubt on the part of the executive director that Vice Chair Johnson would decide the matter impartially and with the utmost fairness."

[60] The executive director argues that there may be a reasonable apprehension of bias because in "the upcoming abuse of process application, the panel will be asked to make the same findings of fact on a dispositive issue, and on the same or similar evidence, as have already been made by Vice Chair Johnson in a prior related proceeding involving one of the same parties." The executive director also argues, because the Court of Appeal's order includes a "newly constituted panel" to hear the abuse of process applications "afresh", that wording may require Vice Chair Johnson to recuse himself.

[61] The executive director disagreed with the respondents regarding the recusal of Commissioner Funt stating that the "mere fact that Commissioner Funt and counsel are both members of the 55-member Law Society Tribunal roster does not give rise to a reasonable apprehension of bias." The executive director noted that he had been unable to find any instance of Commissioner Funt and Morabito's counsel actually sitting on a LSBC Tribunal together and that there was no allegation that they had a personal relationship.

VII. Applicable legal principles

[62] Section 6 of the Act states:

> **Panels of commission**
> **6** (1) The chair may establish one or more panels of the commission, and, in matters referred to a panel by the chair, a panel has the powers of the commission.
> (2) The chair may refer a matter that is before the commission to a panel or a matter that is before a panel to the commission or another panel.
> (3) A panel consists of 2 or more members of the commission appointed by the chair.
> (4) The chair may terminate an appointment to a panel and may fill a vacancy on a panel before the commencement of a hearing.

[63] BC Policy 15-601, *Hearings*, provides further explanation of how panels are appointed and their composition:

> **2.3 Appointment and Composition of Panels** – Panels of Commissioners are appointed by the Commission chair under section 6 of the Act. It is the Commission's usual practice to appoint one panel to hear both the liability portion and, if necessary, the sanction portion of a hearing commenced by a notice of hearing. However, there may be circumstances where the original panel is unavailable to hear the sanction portion of a hearing. When that happens, the Commission chair will appoint a second panel to hear the sanction portion of a hearing and notify the parties in advance of the hearing. A panel must have at least two commissioners. Usually, a panel of three commissioners is appointed to each hearing. A panel of three can continue as a panel of two if

> the third commissioner ceases to be a member. Further, a panel member can continue to act on a panel after they have ceased to be a commissioner, if their authority to preside over that matter has been extended.

[64] A panel of the Commission addressed an allegation of a reasonable apprehension of bias in *Re Forum National*, 2020 BCSECCOM 316. In that case the grounds alleged for a reasonable apprehension of bias were based that the panel in question had ruled against the respondent on a number of procedural issues and the respondent felt those issues were not fairly decided. That type of allegation is distinct from the present case, but the *Forum* decision is still useful for its summary of some of the general principles which apply, including the following:

> [21] In *Taylor Ventures Ltd. (Trustee of) v. Taylor*, 2005 BCCA 350 (CanLII) (*Taylor Ventures*), the British Columbia Court of Appeal identified the leading case on recusal to be *Wewaykum Indian Band v. Canada*, 2003 SCC 45 (CanLII), [2003] 2 SCR 259 (*Wewaykum*) and set out the following principles from *Wewaykum* related to the reasonable apprehension of bias concept:
>
> a) a judge's impartiality is presumed;
>
> b) a party arguing for disqualification must establish that the circumstances justify a finding that the judge must be disqualified;
>
> c) the criterion of disqualification is the reasonable apprehension of bias;
>
> d) the question is what would an informed, reasonable and right-minded person, viewing the matter realistically and practically, and having thought the matter through, conclude;
>
> e) the test for disqualification is not satisfied unless it is proved that the informed, reasonable and right-minded person would think that it is more likely than not that the judge, whether consciously or unconsciously, would not decide fairly;
>
> f) the test requires demonstration of serious grounds on which to base the apprehension; and
>
> g) each case must be examined contextually and the inquiry is fact-specific.

[65] An additional and very useful summary of some key general principles is found in *Broersma v Fraser Health Authority*, 2024 BCHRT 26 (*Broersma*), where tribunal member Cousineau was addressing an application for him to recuse himself:

> [6] The Health Authority does not argue that I am actually biased in this complaint. Rather, it argues that the circumstances of my involvement in the EOV Committee creates a reasonable apprehension of bias warranting recusal. The Supreme Court of Canada explained the significance of this

position in *Wewaykum Indian Band v Canada,* 2003 SCC 45 at para. 65 as follows:

> Finally, when parties concede that there was no actual bias, they may be suggesting that looking for real bias is simply not the relevant inquiry. In the present case, as is most common, parties have relied on Lord Hewart C.J.'s aphorism that "it is not merely of some importance but is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done" … To put it differently, in cases where disqualification is argued, the relevant inquiry is not whether there was in fact either conscious or unconscious bias on the part of the judge, but whether a reasonable person properly informed would apprehend that there was. In that sense, the reasonable apprehension of bias is not just a surrogate for unavailable evidence, or an evidentiary device to establish the likelihood of unconscious bias, but the manifestation of a broader preoccupation about the image of justice. As was said by Lord Goff in *Gough*, *supra*, at p. 659, "there is an overriding public interest that there should be confidence in the integrity of the administration of justice".
>
> Of the three justifications for the objective standard of reasonable apprehension of bias, the last is the most demanding for the judicial system, because it countenances the possibility that justice might not be seen to be done, even where it is undoubtedly done **– that is, it envisions the possibility that a decision-maker may be totally impartial in circumstances which nevertheless create a reasonable apprehension of bias, requiring his or her disqualification. ...** [bolded emphasis added, citation omitted]

[7] The test for a reasonable apprehension of bias is:

> … what would an informed person, viewing the matter realistically and practically - and having thought the matter through – conclude. Would he think that it is more likely than not that [the decision maker], whether consciously or unconsciously would not decide fairly.
>
> *Committee for Justice and Liberty v. National Energy Board*, 1976 CanLII 2 (SCC), [1978] 1 SCR 369 at 394; cited in *Yukon Francophone School Board, Education Area #23 v. Yukon (Attorney General),* 2015 SCC 25 [*Yukon Francophone School*] at para. 20

[8] Members of this Tribunal are presumed to be impartial, and that presumption is not easily displaced: *Yukon Francophone School* at para. 25. The party alleging bias bears a high burden, and the evidence of bias "must be substantial": *Stein v British Columbia (Human Rights Tribunal),* 2017 BCSC 1268 at para. 155, upheld in 2018 BCCA 264; *Yukon Francophone School* at para. 26. This high threshold also guards against the "undesirable prospect of complicated and time-consuming recusal motions that introduce delay and uncertainty into the process and distorts judicial workloads": *Bizon v. Bizon*, 2014 ABCA 174 at para. 61.

> [9] Adjudicators must not be too eager to recuse themselves. Doing so may delay proceedings and damages respect for the administration of justice. As Justice Marzari has pointed out, "acceding too quickly to suggestions of bias encourages parties, and the public, to believe that a different judge would be more likely to decide in their favour": *AB v. CD and EF,* 2019 BCSC 1057 at para. 11. This undermines the integrity of the justice system: *R v. S(RD),* 1997 CanLII 324 (SCC), [1997] 3 SCR 484 at para. 113.

[66] As the British Columbia Court of Appeal ruled in *Bennett v. British Columbia (Superintendent of Brokers),* 1994 CanLII 1110 (*Bennett*), at paragraph 12, a "variety of circumstances may give rise to a concern about the possibility of bias." In this case, the grounds alleged for an apprehension of bias are (in the case of Vice Chair Johnson) prior assessment of evidence which must be addressed again in the abuse of process application and (in the case of Commissioner Funt) common membership with one of the lawyers for one of the respondents in the LSBC's Tribunal adjudicators.

[67] In *R. v. Kochan*, 2001 ABQB 346, the court undertook a review of cases addressing the interaction of prior rulings with apprehensions of impartiality. One of the courts conclusions was that determinations which do not involve the hearing of evidence crucial to the guilt or innocence of an accused, findings of fact based on such evidence, or assessments of witness credibility will rarely provide a basis for a finding of bias (paragraph 15). Another finding was that even when the prior process involved findings of fact which will again be relevant or findings of credibility, the existence of a reasonable apprehension of bias is not automatic.

[68] This Commission has on at least one prior occasion disqualified a decisionmaker based on that decisionmaker's prior decisions regarding the same individuals and evidence. In *Re Brighton*, 2005 BCSECCOM 576 (*Brighton*), a Mr. Teatro was a member of a panel of the Investment Dealers Association (IDA) which heard allegations against an individual named Thompson. Thompson's primary defense was an argument that the fault lay with his superior, Brighton, who had provided direction to Thompson about many of the acts which constituted the alleged misconduct. The panel concluded that Thompson was liable. However, the panel also found it was a mitigating factor that Thompson was acting with the full knowledge and encouragement of his employer.

[69] Meanwhile, the IDA's staff had negotiated a conditional settlement agreement with Brighton. When that settlement agreement was submitted to an IDA hearing panel for approval Mr. Teatro was included on that panel as well. The panel rejected the settlement, concluding that the settlement and the agreed facts significantly understated the nature of Brighton's default. Brighton sought a hearing and review from the Commission. The Commission agreed that a reasonable apprehension of bias existed. A key paragraph of the decision is the following:

> 78 Did the evidence, submissions and finding that impugned Brighten give rise to a reasonable apprehension of bias? Would an informed person viewing the matter realistically and practically - and having thought the matter through - reasonably perceive prejudgment on the part of Teatro, whether conscious or

> not? Are the grounds for such perception substantial? We think that they are. Teatro heard evidence and submissions that impugned Brighten. We have found that he, together with the other panel members, made a finding in the Thomson decision that impugned Brighten. The Thomson panel's finding of Brighten's complicity in, or responsibility for, Thomson's improper conduct is a serious one. Considering the broad factual context, in our view, an informed and reasonable person would reasonably perceive bias in Teatro's later participation in the Brighten hearing and decision, whether or not any prejudgment actually prejudiced Brighten.

[70] Different outcomes from the conclusion in *Brighton* can follow when there is not such a significant degree of importance to the issues which a decision maker previously addressed and which must be addressed again, or when there are differences in the substance of the prior issues and the future issues. For example, in *Bennett* (*supra*) a panel consisting of Commissioners Devine, Browne, and Lien had heard and dismissed certain applications brought by the respondents. Later it was ruled that Commissioner Devine was disqualified based on a reasonable apprehension of bias based on his role as a director of a company which was a competitor of a company connected to the respondent Doman. Applications followed seeking to disqualify Browne and Lien on the basis that they were tainted by their work alongside Devine. At that point a new panel of four Commissioners was appointed, including Browne and Devine. The respondents then gave notice that they intended to re-argue before the new panel a number of applications which had been dismissed by the prior panel (which had included Browne and Lien), and they alleged that there was a reasonable apprehension of bias against Browne and Devine. The Commission panel declined to disqualify Browne and Devine, and the respondents sought leave to appeal. Taylor JA refused to grant leave, ruling that no basis could be established for an apprehension of bias in the circumstances of the case. An appeal of the refusal to grant leave was brought before a panel of three Justices of the British Columbia Court of Appeal.

[71] The Court upheld Taylor JA's decision, and expressed the following, with a focus on some precedents which had not been cited to Taylor, JA:

> 15 The Court of Appeal noted a practice in England to have a different judge hear a new trial, although observing that the law did not exclude the first judge from sitting again. Thus, *Nolin* did not hold that there must be a different judge in every case, but that in the circumstances it was necessary. The circumstances in *Nolin* were that the judge had just ruled out the statement; he was asked to treat that ruling as part of a trial, and the ruling would have disposed of the entire case.
>
> 16 *R. v. Martin* referred to *R. v. Nolin* and other cases. The court held that a judge who had just made adverse findings of credibility against an accused, who then engaged in alleged contemptuous behaviour, ought not to conduct the contempt proceedings which followed.
>
> 17 In *Downer* a judge trying one man told the jury that it was obvious that two others had committed the crime. It was held that the judge, who had

> expressed a belief as to the credibility of the victim and the guilt of the accused, ought not to preside at the trial of the two other men.
>
> 18 I am not persuaded that Taylor, J.A. would have ruled differently if he had those cases before him. They involved prior decisions on issues which would likely affect the outcome of the inquiry. The issues which will be heard again in this case do not have that substantive quality; and, therefore, it cannot be said that the fairness of the hearing is realistically brought into question.

[72] The need to inquire into the nature of the common issues between a prior decision and a future decision is recognized in *Furlong*, *supra*, where the Court responded to an application for directions after remitting a matter back to the Law Enforcement Review Board:

> [2] When new trials are ordered, they are presumptively before a different judge: *Freyberg v Fletcher Challenge Oil and Gas Inc*., 2006 ABCA 336 at para. 5, 67 Alta LR (4th) 219, 401 AR 30; *R. v Dias*, 2011 ABCA 6, 502 AR 156; *Guarantee RV Centre Inc. v Schmidt*, 2007 ABCA 193 at para. 2, 79 Alta LR (4th) 29, 412 AR 21. To some extent this reflects the size of the trial courts, as well as the scheduling issues that arise when a single judge is seized of the matter, but the overall fairness of the process is an important consideration.
>
> [3] When a matter is remitted back to an administrative tribunal, there is no fixed rule: *Elk Valley Coal Corp. v United Mine Workers of America Local 1656*, 2009 ABCA 407, 474 AR 145, 18 Alta LR (5th) 13; *Walsh v Mobil Oil Canada*, 2012 ABQB 527 at paras. 54-5, 71 Alta LR (5th) 343. A number of factors are considered:
>
> (a) Fairness and the Appearance of Impartiality. If the original panel of the tribunal pronounced on a specific issue and was reversed, a new panel will usually be nominated to avoid any appearance of prejudging. If the issue requiring reconsideration is new or is supplementary or collateral to the issues generating the rehearing, it is sometimes appropriate for the same decision-maker to continue: *Chernetz v Eagle Copters Maintenance Ltd.*, 2008 ABCA 265 at para. 101, 96 Alta LR (4th) 222, 437 AR 104; *Interclaim Holdings Ltd. v Down*, 2004 ABCA 60, 346 AR 64. Whether the issue on which a rehearing has been directed would raise considerations of impartiality in the mind of a reasonable person is a matter of degree. [emphasis added]
>
> (b) Practicality. The size and composition of some tribunals might preclude remitting the issue back to the same panel, or alternatively it might make remission to the same panel inevitable.
>
> (c) Efficiency. If the reconsideration will involve a re-weighing of the evidence, it could be wasteful or expensive to have a new panel conduct a fresh hearing: *Chernetz* at para. 101. If the issues raised are primarily issues of law or policy, or if they can be satisfactorily resolved based on

> the evidentiary record from the first hearing, a new panel might be practical.

[73] The Alberta Court of Appeal in *Walton*, *supra*, followed the factors listed in *Furlong* and stated, at paragraph 9, that "there is no fixed rule respecting the composition of the new panel".

[74] The appropriateness of treating administrative bodies differently from the courts in assessing whether there is a reasonable apprehension of bias is well recognized. In *Brosseau v. Alberta Securities Commission*, [1989] 1 SCR 301, the facts giving rise to the reasonable apprehension of bias argument centered around the involvement of the Chairman of the Commission who received an underlying investigative report and was then designated to sit on the panel hearing the matter. The appellant argued that the Chairman's "involvement" in both the investigative process as well as the adjudicative stage gave rise to a reasonable apprehension of bias. The Supreme Court of Canada considered the nature of securities commissions, the various legislative functions they perform in regulating the securities industry, and the way investigations proceed to a hearing. In this context, the Court held that the same decision-makers would "more than likely" have repeated dealings with the same parties over time:

> [30] Certain other factors should be taken into consideration along with the question of statutory authorization. For example, in a specialized body such as the Commission, it is more than likely that the same decision-makers will have repeated dealings with a given party on a number of occasions and for a variety of reasons. It is hardly surprising, given the fact that there is only one Alberta Securities Commission, that the Commission in this case was required to deal with many aspects of the failure of Dial over a period of years.

[75] With respect to the practicality issue, there is an extensive review of the precedents in the Workers' Compensation Appeal Tribunal's decision *WCAT-2006-02462 (Re),* 2006 CanLII 63074 (*WCAT*). The weight of the authorities reviewed there suggests that administrative practicality can be considered, but where there are factors present which would otherwise support the existence of a reasonable apprehension of bias there must be a very high degree of necessity present to support the conclusion that the original decisionmaker should continue in a new panel.

[76] In *Zuk*, *supra*, certain negative findings had been made against Zuk by his professional body which were later upheld by an appeal panel. Zuk appealed further, to the Alberta Court of Appeal. The Alberta Court of Appeal overturned two of 21 findings of unprofessional conduct which had been made against Zuk and held that a third finding had been overemphasized. The matter was then remitted back and the same appeal panel reconsidered its decision and reduced the period of Zuk's suspension from practice and the amount of costs Zuk was obligated to pay. Zuk then appealed again, arguing that the members of the professional appeal panel should have disqualified themselves instead of proceeding with the reconsideration. In the course of rejecting Zuk's arguments, the Alberta Court of Appeal expressed the following conclusions:

> [27] Moreover, there were good, practical reasons why the Court sent the reconsideration back to the same Appeal Panel. As was set out in *Walton v Alberta Securities Commission*, 2014 ABCA 446 at paras 9-10, “[i]f the reconsideration will involve a re-weighing of the evidence, it could be wasteful or expensive to have a new panel conduct a fresh hearing.” Further, the “issues of sanctions [may be] remitted back because it required reconsideration in light of the decision on the merits of the charges”, as happened in this matter.
> …
> [35] We are not persuaded the Appeal Panel was permanently "invested" in its earlier reasons, to the degree that it was incapable of fairly reconsidering the matters directed by this Court. “Where a matter is remitted back, the law presumes that a tribunal will give full weight to the decision of the reviewing court”: *Walton* at para 9. As noted above, there is nothing on the record to rebut this presumption; quite the opposite. Further, whether the issue “on which a reconsideration has been directed would raise considerations of impartiality in the mind of a reasonable person is a matter of degree”: *Walton* at para 9. In light of the cogent, even-handed, transparent and considered approach of the Appeal Panel’s reconsiderations reasons, this case does not raise any considerations of impartiality.
>
> [36] In sum, there is no reason to believe that the Appeal Panel did not reconsider sanction and costs having full regard to the decision of this Court. Moreover, the Appeal Panel had the advantage of a detailed knowledge of the evidence behind the affirmed charges, and considerations of efficiency supported its continuing involvement.

VIII. Some elements of the legal context which are particularly relevant here

[77] The following principles identified in the above precedents have particular relevance in the context of this application:

a. The test for a reasonable apprehension of bias is found in *Wewaykum* and a very helpful explanation of the test is found in *Taylor Ventures*;

b. Tribunal members are presumed to be impartial, and that presumption is not easily displaced (*Yukon Francophone School*, *supra*, at para 25);

c. The party alleging bias bears a high burden, and the evidence of bias must be substantial (*Broersma*, *supra*, at para 8, and cases cited therein);

d. When a matter is remitted back after an appeal, the law presumes that the tribunal will give full weight to the decision of the reviewing court (*Walton*, *supra*);

e. When the basis of an alleged reasonable apprehension of bias is common evidence and inquiries with decisions already made, it is appropriate to look beyond the existence of common evidence and inquiries into the nature of that evidence and of those inquires. Prior adjudication on some types of issues raises greater concerns than prior adjudication on other types of issues. For example, decisions on evidence going to the final merits or on questions of

credibility have a greater impact in demonstrating a reasonable apprehension of bias. (*Bennett* and *Kochan*, *supra*);

f. When an issue is remitted back to a prior decision maker it is sometimes appropriate for the same decision maker to continue, and whether that raises considerations of impartiality in the mind of a reasonable person is a matter of degree (*Walton* and *Furlong*, *supra*)

g. Administrative practicalities can be relevant (*Walton*, *Furlong* and *WCAT*, *supra*) but there must be a very high degree of administrative necessity before such practicalities are given weight sufficient to tip the balance in a context when other factors are present which would otherwise suggest that a reasonable apprehension of bias is present. No one is suggesting, and no consideration is being given by this panel, to any proposition to the effect that a reasonable apprehension of bias exists here but should be ignored based on administrative convenience.

IX. Analysis and conclusions – Vice Chair Johnson recusal based on reasonable apprehension of bias

[78] The respondents do not allege the existence of any relationship between Vice Chair Johnson and any party or any interest in the outcome which would support a reasonable apprehension of bias. The respondents' allegation is that a reasonable apprehension of bias has been created because certain issues which will arise in the upcoming abuse of process applications have been previously addressed by Vice Chair Johnson in the course of the Public Interest Decision.

[79] The respondents' position compels the panel to examine the nature of the intersection between the evidence submitted in the Public Interest Decision and the evidence in the pending abuse of process applications. The respondents' position on this issue is illustrated, in part, by the following paragraph from Morabito's application:

> 27. The Newly Constituted Panel will be required to make findings in respect of the **same evidence already heard** by the IO Panel and the AOP Panel. Justice Winteringham recognized, for example, that the appellants rely **on the very same investigative background** that was considered by the IO Panel "to substantiate their abuse of process claims". She then reviewed all of those same circumstances – all of which were before the IO Panel and the AOP Panel.
>
> [Emphasis added]

[80] We see from this submission that the respondents seek Vice Chair Johnson's recusal both because the evidence will be the same in the new applications as it was in the Public Interest Decision and because the background facts will be the same.

[81] As is clear from the authorities set out above, in situations such as these, decision makers should not automatically accept assertions that the existence of common facts or issues is disqualifying. The analysis is always a matter of degree and requires

analysis beyond the mere existence of common facts. In addition, the character of the commonality can be important. For example, pre-existing findings of credibility regarding witnesses regarding issues which will again come before the same decision maker will be more likely to suggest that it will be difficult for the decision maker to be totally impartial. In contrast, the existence of undisputed background facts which are common to the prior application and the future application do not suggest anything about the decision maker's partiality.

[82] We would add that it is one thing for a party to assert that two applications will be based on "the same evidence already heard", but such assertions deserve some level of scrutiny. Sometimes it quickly becomes apparent that the evidence in the future application will be significantly different from the evidence in the prior application.

[83] In paragraph 8 of Morabito's application, the respondents point to specific evidence in support of their submission:

> 8. The IO Panel heard evidence concerning and made findings in its Ruling in respect of, among other matters:
>
> (a) a telephone call from counsel for the Executive Director for the stated purpose of allowing Mr. Morabito and his wife to make a proposal (para. 12);
>
> (b) Mr. Morabito's professional and family circumstances, including a family trust that was not mentioned in the Investigation Order yet assumed an outsize role in the investigation (paras. 14-16);
>
> (c) the March 2018 press release, which the IP Panel characterized as one that "contained negative news" for Jetlines (para. 17);
>
> (d) the decision by Commission investigators, including Michael Pesunti, to attend at Mr. Morabito's home after he had left for work, while his wife was home alone, accompanied by an RCMP officer (paras. 20, 55-56);
>
> (e) other steps taken by Commission investigators, including the issuance of various summonses for the production of documents (para. 20); and
>
> (f) the issuance of summonses to various witnesses to attend for examinations under oath, with the conspicuous absence of any requests to interview Mr. Morabito or anyone at all from Jetlines (para. 20).
>
> *Re Application 20210107*, 2021 BCSECCOM 394 ("IO Ruling")

[84] Items a, b, e and f above refer to summaries of undisputed facts which were, to a large extent, drawn from the evidence adduced by the respondents.

[85] Item c above references a conclusion which was reached by the panel in the Public Interest Decision. That conclusion is one which cannot reasonably be and, as far as we can tell, has not been contested by any party. The conclusion is about whether the cancellation of an airline's only existing right to use its leased aircraft would be considered bad news. Read fairly, the conclusion stated in item c above reflects an uncontroversial aspect of the general context for the investigation. In future, there will likely be considerable dispute about whether the information was "material" as that word is used in the Act, and about the relative roles of the various managers of Jetlines regarding what disclosure was required by the Act. Those are different inquiries which will involve a different body of evidence.

[86] Item d above references that there was a decision made by an investigator to make a particular visit to the Morabito home in circumstances which were alleged to be improper. Read fairly, the conclusion of the panel regarding the investigator's decision was that there may or may not have been proper reasons for the investigator's choices, but the respondents had not met the onus of proof to demonstrate an improper motive.

[87] The nature and form of paragraph 8 of Morabito's application suggests that it is the respondents' position that a reasonable apprehension of bias is conclusively established by the mere fact that some evidence was in front of the panel in the Public Interest Decision hearing which will again have some relevance in the upcoming abuse of process applications. That perspective is not consistent with the law and it is not reasonable.

[88] The law is that a decision maker's prior engagement with factual issues can in some cases lead to a reasonable apprehension of bias, but that conclusion is not always justified and it is not automatic. The need to look deeper is supported by precedents such as *Walton* which confirm that in some circumstances (which are not particularly relevant here), a decision maker's prior familiarity with the evidence can be advantageous and lead a court to direct that a panel which had prior involvement in making factual findings continue in its role, even after being reversed.

[89] Whether a reasonable apprehension of bias exists is always a fact specific, individualized assessment of the entire relevant context. The existence of some common facts between a prior application and a pending application is the starting point for analysis, it is not the end of the analysis.

[90] There is much more analysis required than the respondents provide about the connections between issues decided by the panel in the Public Interest Decision hearing and the issues which are likely to arise in the current abuse of process applications. In his responding submissions, the executive director states that the Public Interest Decision panel "made findings on questions of fact which will very likely form part of the same factual basis" in the respondents' upcoming applications such as issues of delay, the scope of the investigation, and the purpose of bringing a police officer to the respondent's home. Those points deserve a careful analysis about the extent to which the issues which have been previously decided by Vice Chair Johnson

are “the same” as the issues which may be relevant in the pending applications. The following chart addresses the degree of overlap in the issues. It should be reiterated that the executive director submitted very limited evidence at the Public Interest Decision hearing to explain the impugned conduct and that the issues were largely resolved by the Public Interest Decision panel by reference to the appropriateness of drawing inferences of improper motive given which party had the onus of proof and that this decision was upheld by the Court of Appeal with leave to appeal to the Supreme Court of Canada dismissed.

Nature of issue in the Public Interest Decision	**Corresponding potential issue in the pending application**
Morabito submitted that delay is a factor which should be considered in the balancing of other factors which would be relevant to the public interest assessment (para 48). The panel concluded that “from the evidence before us” the length of time taken in the investigation was not inappropriately long (para 52), and it would be speculation to conclude that the investigation was inactive at times based solely on outside appearances of inactivity.	The new panel will likely hear direct evidence regarding what the investigators did at what phases of the investigation, why they took the steps they did, what activities were ongoing, if any, during periods when no publicly visible steps were being taken, and what explanations exist for any periods of delay. The panel’s future assessment will be based on the evidence before it rather than an application of the onus of proof in the context of a highly limited evidentiary record.
The panel concluded that there were circumstances to justify the existence of an investigation. The panel found the investigation would logically extend to the topic of whether Morabito caused trades to be executed through accounts which he controlled even if those accounts might not have been in his names (para 53).	The new panel will likely have documents and testimony, tested by cross examinations of investigators and other witnesses, in order to assess the investigative steps. The panel’s future assessment will be based on the evidence before it.
The panel concluded, based on the limited record before it, that the mere fact of a home visit with a police escort was not sufficient to support an inference of an improper motive (para 59).	The panel’s future assessment will be based on the documents and testimony tested by cross examination, addressing issues of why a specific interview occurred and the manner in which it took place, rather than based on an application of the onus of proof in the context of a highly limited evidentiary record

[91] There is a body of evidence which the pending abuse of process applications will have in common with the original Public Interest Decision. However, the existence of common evidence is not by itself enough to establish a reasonable apprehension of bias.

[92] The primary factors which suggest that the prior work of the Public Interest Decision panel should not preclude further involvement are:

a. There will be new evidence introduced with respect to each important issue, including direct evidence from knowledgeable witnesses which will be tested by cross examination, that will go to core questions in the abuse of process application regarding why the investigators took the steps they did at the times they did;

b. The Public Interest Decision was not based on the same evidence as will be available in the upcoming applications, in fact the Public Interest Decision was primarily based on the onus of proof given the absence of evidence; and

c. The Public Interest Decision did not involve a finding of credibility adverse to the respondents. There is no circumstance present where evidence presented on behalf of the respondents was disbelieved and other evidence was accepted instead.

[93] There are some other factors present which have some relevance regarding the prior and future evidence, although to a lesser degree than the factors mentioned above. These include:

a. Other issues which did not exist at the time of the Public Interest Decision have now assumed a primary role in the upcoming abuse of process applications. The issues of the non-disclosure of the identity of a witness who has since died and the issue of delayed or non-disclosure in relation to the Notice of Hearing appeared to be central in the respondents' arguments during the Abuse of Process Decision hearing and at the Court of Appeal hearing. This is not to suggest that the arguments about the investigative phase are no longer relevant. However, the range of relevant issues has grown considerably; and

b. The nature of the legal test in upcoming abuse of process applications is different from the nature of the Public Interest Decision.

[94] We agree that there are similarities and some degree of commonality between some issues which the Public Interest Decision panel decided and issues which remain to be decided in the upcoming abuse of process applications. However, to paraphrase from the decision of the Alberta Court of Appeal in *Furlong*, the extent to which the issues decided and the issues outstanding are truly "in common" is a matter of degree. This is not a case where evidence from the respondents has been considered and rejected by Vice Chair Johnson, and now the respondents face the prospect of a new hearing on

precisely the same issues in the context of the same factual matrix. An informed person, looking realistically and practically at the nature of the prior and future evidentiary issues and thinking the matter through, would not conclude that it is more likely than not that Vice Chair Johnson would not decide the upcoming abuse of process applications fairly.

[95] There are some additional factors which need to be considered as well.

[96] First of all, there is a presumption that tribunal members are impartial. That presumption applies to Vice Chair Johnson in the present context.

[97] Second of all, there is a presumption that when an appellate court remits a proceeding to an administrative body, the administrative body will give full weight to the decision of the reviewing court. The presumption arises in the case of decision makers who have made decisions which were reversed or modified on appeal and who must now adjust from the impermissible path which they were following. This fact scenario does not apply to Vice Chair Johnson and the Public Interest Decision. In contrast, the appeal of the Public Interest Decision was dismissed, and leave to appeal to the Supreme Court of Canada was denied. We do not claim to have conducted an exhaustive search, but we have not encountered any case where a Commissioner whose decision was not reversed has been compelled to mention the presumption which is relevant here. Our conclusion is that the presumption which applies when a decisionmaker has been reversed applies with additional force to Vice Chair Johnson.

[98] Based on all of the factors mentioned above, and especially on the important distinctions which exist between the nature of the evidence heard in the Public Interest Decision hearing and the nature of the evidence which will be heard in the upcoming abuse of process hearing, we conclude that the respondents have failed to meet the test to establish a reasonable apprehension of bias.

[99] This brings us to the issue of the administrative realities faced by the Commission. We have taken care not to consider these in the analysis which has led us to our conclusion above about the absence of a reasonable apprehension of bias. However, these could be considered in any future case where the proper application of the test for a reasonable apprehension of bias is closely balanced. Then we would take the administrative realities into account.

[100] We do not mention considerations which are mere issues of convenience. We mention these issues because there are real concerns about whether the Commission's tribunal could function if the applicable standards to be applied are those advocated for by the respondents here. Their arguments suggest that any degree of evidentiary overlap is disqualifying to panel members: that is an incorrect application of the law, and implementing such a standard carries a significant risk of crippling the enforcement of securities laws under the Act

[101] To protect investors and support confidence in public markets as contemplated by the Act, the Commission must have an ability to commence enforcement proceedings and, in the absence of some compelling reason not to do so, bring those proceedings to a conclusion in the form of a fair and timely hearing on the merits.

[102] It is not uncommon for respondents in Commission proceedings to bring preliminary applications which engage factual issues which will be relevant both to the preliminary application and the eventual merits. The common factual issues might go to the credibility of certain witnesses, potentially including a respondent. It is not uncommon for respondents to bring more than one preliminary application.

[103] In every proceeding before the Commission's tribunal the pool of potential panel members is very limited. Under the Act the maximum number of Commissioners is 11, including the Chair. The Chair has an enforcement related role and does not participate in hearings. Further, historically there are many periods when only nine Commissioners, or even fewer, have been appointed.

[104] Before any Commissioner is appointed to a panel, he or she is asked conflict screening questions which sometimes reveal conflicts. As a result, it is not uncommon that, for any particular proceeding, the available pool of potential panel members is seven.

[105] Under the Act, panels must include at least two Commissioners and, generally, it is preferrable to appoint a panel of three members, in order to avoid the risk of a deadlocked panel of two.

[106] The consequence of these realities is that if the position of the respondents prevails it will follow that for any future proceeding at the Commission any panel member who hears evidence on an issue which is likely to be relevant in a future stage of the proceeding will have to recuse himself or herself. After three or possibly two applications, the tribunal would not be able to address either a procedural application or the merits of an issued notice of hearing. This would obviously create a problem in that proceeding, and it would create a significant incentive for any person under investigation to bring applications and to use any degree of factual overlap between those applications as the basis for a recusal application.

[107] To summarize once again, we reject the interpretation that the existence of overlapping evidence from an initial application to a further application inherently creates a reasonable apprehension of bias. Certain types of evidentiary duplications can be significant factors pointing to the existence of a reasonable apprehension of bias, but these require careful analysis. Upon a careful analysis of the evidentiary issues which are common between the prior Public Interest Decision and the pending abuse of process applications, including the differences between the evidentiary issues, the lack of any prior finding on credibility and the other factors we mention above, we find that the respondents have not met the high burden of establishing by substantial evidence that a reasonable apprehension of bias exists. The application for the recusal of Vice Chair Johnson on the basis of a reasonable apprehension of bias is dismissed.

[108] We would also mention that consideration has been given to the option of simply having Vice Chair Johnson recuse himself for the purpose of expediency. We read into the submissions of the executive director the assignment of some value to expediency in getting on with this proceeding. However, there are important reasons, grounded in the lines of precedent we have mentioned, why that option was rejected.

[109] Our most direct answer to the implied question "why not just have Vice Chair Johnson move aside so this proceeding can move forward without the risk of further delay" is summarized very well in the quote extracted from *Broersma*, *supra*. Recusals can delay proceedings and can damage respect for the administration of justice.

X. Analysis and conclusions – Vice Chair Johnson recusal based on Court of Appeal decision

[110] As we have noted, if the British Columbia Court of Appeal had given a direction as to the future involvement of Vice Chair Johnson in this proceeding, that is the end of the matter.

[111] The Court of Appeal directed that the respondents should begin their abuse of process application afresh. That is clear. They might have meant "afresh" in the sense of starting over in the absence of the panel whose decision the Court of Appeal was reversing. One reason to favor that interpretation is the direction for a fresh panel is not the direction commonly given by the Court of Appeal, even when remitting a matter where a decision of the Commission has been reversed. The additional step taken here appears to have been motivated by the findings of the Court of Appeal that the panel in the Abuse of Process Decision hearing had deprived the respondents of the opportunity to present their case in a fair way. That framing of the decision suggests that when the Court of Appeal specified that the respondents start afresh, they meant "afresh" from the prior panel, and not "afresh" from any Commissioner who had any prior involvement in the case.

[112] Another factor is connected to the analysis of the administrative realities as discussed above. As events happened to turn out, at the end of 2024 Commissioners Ho and Downes retired and were replaced by new Commissioners. As of November 15, 2024, the date of the Court of Appeals order, Commissioners Ho and Downes had neither retired nor been replaced. On that date, according to the conflict screening responses or positions of the Respondents which would emerge, the following Commissioners would be disqualified:

a. based on the Court of Appeals' decision as interpreted by the respondents, all of Commissioners Downes, Shaw, Kershaw, Ho, Armour and Vice Chair Johnson;

b. based on her self-reported potential conflict, Commissioner Kielty;

c. based on the position taken by the respondents, Commissioner Funt.

[113] Based on the positions taken by the respondents, the only Commissioner who would have been eligible to sit on a panel as of the date of the Court of Appeals' order was Commissioner Milne. As a result, no panel could have been formed.

[114] Based on the positions taken by the respondents and the pool of Commissioners available at the time of the Court of Appeal's order, it would have been impossible for the Commission to create a panel to hear the new abuse of process applications. The completion of, and of course the dismissal of (if justified based on the evidence and the application of the appropriate test) was a precondition to any potential continuation of the Notice of Hearing process.

[115] We do not consider it likely that the Court of Appeal wrote its decision without taking into account the ability of the Commission to form a panel as of the date of the order made. We do not consider it likely that the Court of Appeal intended to disqualify a group of Commissioners beyond the panel which the Court of Appeal concluded had not allowed the respondents a fair hearing the first time in addressing the abuse of process allegations. We do not agree with the interpretation of the Court of Appeal's decision which the respondents assert.

[116] The application for Vice Chair Johnson to recuse himself on the basis that the Court of Appeal has previously disqualified him is dismissed.

XI. Analysis and conclusions – Commissioner Funt recusal based on reasonable apprehension of bias

[117] The respondents submit that Commissioner Funt should recuse himself because both he and Morabito's counsel are members of the Law Society Tribunal's roster: Morabito's counsel as a member of the lawyer roster and Commissioner Funt as a member of the non-lawyer roster. Little is said by the respondents about why this creates a reasonable apprehension of bias. It is not unfair to suggest that the respondents attempts to express the mechanism by which an apprehension of bias arises amount to little more than assertions that such an apprehension of bias exists.

[118] We could see an issue worthy of careful consideration if Morabito's counsel and Commissioner Funt were currently sitting on a decision making panel together, whether that was a Law Society panel, an arbitration panel or some similar panel within which it might be argued that a degree of mutual trust and confidentiality exists. But there is no such close connection present here. There is no suggestion that Commissioner Funt and Morabito's counsel have any kind of relationship.

[119] There is a possibility that one day Morabito's counsel and Commissioner Funt may be offered assignments to the same Law Society Tribunal panel. It is possible that they might both accept such an assignment. It is possible that in the course of working together on such a panel a relationship will develop between Commissioner Funt and Morabito's counsel which will potentially raise a question to be considered about Commissioner Funt's ability to fairly adjudicate on a case in which Morabito's counsel

acts as counsel. Perhaps an allegation would be made at that time that based on the relationship which developed between them while they worked side by side on a Law Society panel Commissioner Funt might have an unconscious tendency to place too much trust in statements made by Morabito's counsel. If a legitimate concern arose at that time, that concern might continue for some period of time after the Law Society Tribunal panel completed its work. But no reasonable concern exists at this time, and these potential scenarios are both prospective and speculative.

[120] The application to have Commissioner Funt recuse himself is dismissed.

April 1, 2025

For the Commission

Gordon Johnson
Vice Chair

Warren Funt
Commissioner

Jason Milne
Commissioner