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TRANSPORTATION

Motion for directions under *Federal Courts Rules* (Rules), SOR/98-106, r. 54 in appeal from Canadian Transportation Agency decision — Agency not party to appeal but after parties to appeal filed their memoranda of fact and law with Court, Agency presented to Court its own memorandum of fact and law — In support of this, Agency invoked *Canada Transportation Act*, S.C. 1996, c. 10, s. 41(4) — S. 41(4) provides that Canadian Transportation Agency is entitled to be heard by counsel or otherwise on argument of appeal under Act — Agency stated it could participate as of right in appeal from its own decision — Questions regarding operation of s. 41(4) have been raised for some time — S. 41(4) giving Agency right to be heard on appeal from its own decision while under most administrative regimes, governing legislation not giving administrative decision-maker that right — Case law governing whether, extent to which administrative decision-maker can participate in appeal from or judicial review of one of its own decisions, examined — Current position is that once administrative decision-maker decides matter, giving full, adequate reasons for its decision, it is finished with matter — In judicial review of decision or appeal from decision, administrative decision-maker can apply for leave to intervene — But if leave to intervene is granted, decision-maker must proceed with restraint, caution — Restraint, caution are needed because of important concern that administrative decision-maker must be, must appear to be impartial as between parties — Thus, except in decision maker's own interlocutory, final decisions, it should not take sides or appear to take sides — Such concern remains live in judicial review or appeal since reviewing court might set aside decision, return it to administrative decision-maker for redetermination of merits, which is usual remedy — Further concern is "bootstrapping": administrative decision-makers making submissions to reviewing courts that, in reality, are new reasons supporting decisions they made — This undermines two principles being that administrative decision-makers must provide all necessary explanations in support of their decisions in their reasons; second, that after administrative decision-makers have decided matters, providing reasons, they are *functus* or finished — Act, s. 41(4) prevails over any inconsistent judge-made law unless legislative provision is constitutionally invalid — Exact meaning, scope of s. 41(4) never settled in case law; its interrelationship with Rules never discussed — Pursuant to s. 41(4), Agency can involve itself in appeal whenever it considers it necessary; Agency has right to be heard but no other rights such as those of respondent, intervener — Except for one matter, s. 41(4) not speaking to any procedural issues; therefore Agency need not ask for leave to participate in appeal — In all respects, Rules have full application to Agency in this context — S. 41(4) speaks to Agency being "entitled to be heard by counsel or otherwise"; thus it can file memorandum, make oral submissions, etc. after advising Court, parties of intention to participate — S. 41(4) not imposing any limits on what Agency may address during its participation in appeal — Nor does it say that there are no limits — Silence on the issue of limits suggesting that Court's power to regulate conduct of administrative decision-maker participating in appeal, which pre-existed enactment of s. 41(4), unaffected — S. 41(4) not speaking to remedial options Court can adopt in light of Agency's participation — Thus, full armoury of remedies available to Court in administrative appeal remaining open to it — Main issue in underlying appeal was one of statutory interpretation, application — Although Agency stated it was only providing helpful information to Court, it was going further, offering particular view of how statute should be interpreted — However, that concern lessened by fact Court would decide issues of statutory interpretation itself because standard of review on issues of statutory interpretation in appeal from Agency is correctness — Thus, after Court decides appeal, issue of statutory interpretation will be completely spent — All that

Agency may have to do in any redetermination is apply Court's view of statutory provisions to facts before it — Provided Agency stays away from that area in appeal, it would remain actually, apparently impartial in any redetermination — Motion granted: Registry shall accept Agency's memorandum of fact and law for filing; Agency may be heard at hearing of this appeal.

WESTJET V. LAREAU (A-267-22, 2024 FCA 77, Stratas J.A., reasons for order dated April 19, 2024, 12 pp.)