

Stand Up or Sit Down? *OEB* and the Tribunal's Role before a Reviewing Court

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Ontario (Energy Board) v. Ontario Power Generation Inc. 2015 SCC 44

- ❑ Resolves the two conflicting approaches to tribunal standing.
- ❑ *Northwestern Utilities* (sit down)
- ❑ *Paccar* (stand up)
- ❑ Adjudicative context is key.
- ❑ Tone is critical.



Recap: Northwestern Utilities [1979] 2 SCR 684 pp 708-710

- Board not a “full” party despite statute permitting it to “be heard on any argument”
- Role limited to providing submissions on jurisdiction, but not allegations of a breach of natural justice, and explaining the record.
- Full participation would “discredit the impartiality of the tribunal” if remitted back or future proceedings involve same parties or interests.



Recap: Paccar

[1989] 2 SCR 983 at p. 1014

- explain record
- show had jurisdiction to embark on enquiry
- explain why the decision is reasonable
- need submissions on specialized jurisdiction and expertise. Risk finding decision unreasonable because it lacks this information.



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Post *Paccar* and Pre *OEB*

- Will it be a *Northwestern Utilities* day?
- “only when its expertise may cast some light imperceptible to ordinary mortals on the subject that participation so potentially damaging to it could be countenanced.”
- *Ferguson Bus Lines v ATU* (1990), 68 DLR (4th) 699 (FCA) at 702-3 per Furman, J.A.



Post *Paccar* and Pre *OEB*

Or a *Paccar* day?

- If a tribunal is entitled to defend its interpretation of jurisdictional provisions then why shouldn't it be permitted to defend its interpretation of nonjurisdictional provisions? In both instances the purpose underscoring the value of tribunal participation is the same: to enable the reviewing court to make an informed decision as to why one interpretation was or should be preferred to another.
- *Carpenters v. Bransen Construction*, 2002 NBCA 27 at para 32



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Post *Paccar* and Pre-OEB

Or will everyone just ignore the elephant?

- *McLean v. British Columbia (Securities Commission)*, 2013 SCC 67
- *Ellis-Don Ltd. v. Ontario (Labour Relations Board)*, 2001 SCC 4
- *Tremblay v. Quebec (Commission des affaires sociales)*, [1992] 1 S.C.R. 952



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Resolving the Irreconcilable: Lower Courts adopt Flexible/Contextual Approach

- *Ontario (Children's Lawyer) v Ontario (IPC)* (2005), 75 OR (3d) 309 (OCA) (aka Goodis)
- *Canada (AG) v Quadrini*, 2010 FCA 246
- *Leon's Furniture v IPC (Alberta)*, 2011 ABCA 94
- *18320 Holdings Limited v Thibeau*, 2014 BCCA 494



Children's Lawyer

- a context-specific solution to the scope of tribunal standing is preferable to precise *a priori* rules that depend either on the grounds being pursued in the application or on the applicable standard of review (para 34)



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Fully Informed Adjudication

The last of these factors will undoubtedly loom largest where the judicial review application would otherwise be completely unopposed. In such a case, the concern to ensure fully informed adjudication is at its highest, the more so where the case arises in a specialized and complex legislative or administrative context.(...) In such circumstances the desirability of fully informed adjudication may well be the governing consideration. (para 44)



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Tone

- Finally, I think it important that if an administrative tribunal seeks to make submissions on a judicial review of its decision, it pay careful attention to the tone with which it does so. Although this is not a discrete basis upon which its standing might be limited, there is no doubt that the tone of the proposed submissions provides the background for the determination of that issue. (para 61)



Quadrini – no “hard and fast rules” (paras 19-20)

Consider:

- issues
- relevance and usefulness of proposed submissions
- finality and impartiality



Leon's Furniture:

Content of submissions (para 29)

- can offer interpretations of its reasons
- cannot attempt to reconfigure those reasons
- (not) add arguments not previously given or
- make submissions about matters of fact not already engaged by the record



Thibeau: balance (paras 52-53)

Impartiality more important if:

- 1. tribunal is strictly adjudicative
- 2. the matter will be referred back to the tribunal if review successful
- 3. the tribunal seeks to make arguments on review which are not grounded in or are inconsistent with its decision

Fully informed adjudication more important if:

- 1. no other respondent able and willing to defend the merits
- 2. challenge to tribunal's procedural policies or guidelines
- 3. detailed analysis of matters within the specialized expertise of the tribunal is necessary and court needs the assistance of counsel for the tribunal.



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OEB: Contextual Approach (para 52)

- Rejects categorical ban on participation on appeal
- (...) a discretionary approach provides best means of ensuring that the principles of **finality** and **impartiality** are respected without sacrificing the **ability of reviewing courts to hear useful and important information.**



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Tribunal helpful even where both sides present (para 53)

- (...) because of their expertise and familiarity with the relevant administrative scheme, tribunals may in many cases be well positioned to help the reviewing court reach a just outcome.
- For example, a tribunal may be able to explain how one interpretation of a statutory provision might impact other provisions within the regulatory scheme, or to the factual and legal realities of the specialized field in which they work. Submissions of this type may be harder for other parties to present.



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Factors informing the exercise of discretion to permit participation (para 59)

- ❑ Otherwise unopposed?
- ❑ Other parties with necessary knowledge and expertise available to fully make and respond to arguments?
- ❑ Nature of tribunal: adjudication of individual conflicts, policy maker, regulator, investigator, act in public interest?



Addressing the Merits

- Distinguish question of standing from content of permissible argument.
- Addressing merits is not forbidden but Court will balance impartiality, finality and need for fully informed adjudication when deciding whether appropriate.



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Bootstrapping or Interpreting?

- I am not persuaded that the introduction of arguments by a tribunal on appeal that interpret or were implicit but not expressly articulated in its original decision offends the principle of finality. Similarly, it does not offend finality to permit a tribunal to explain its established policies and practices to the reviewing court, even if those were not described in the reasons under review. Tribunals need not repeat explanations of such practices in every decision merely to guard against charges of bootstrapping (...). A tribunal may also respond to arguments raised by a counterparty. Para 59



Tone (paras 71-72)

- (...) urge the Board, and tribunal parties in general, to be cognizant of the tone they adopt on review of their decisions (...).
- In this case, the Board generally acted in such a way as to present helpful argument in an adversarial but respectful manner. (...) sound a note of caution about the Board's assertion that the imposition of the prudent investment test "would in all likelihood not change the result" if the decision were remitted for reconsideration (...) This type of statement may, if carried too far, raise concerns about the principle of impartiality (...).



Your Turn: SA v Ontario con't

- Disposition hearing held 16 months after the previous hearing, despite the fact that s.672.81 of the Code states that hearings must be held “not later than twelve months after making a disposition and every twelve months thereafter for as long as the disposition remains in force”.
- Board did not address the timing of the hearing in the decision.
- SA argues the decision was invalid because of legal error in the Board’s implicit interpretation of s.672.81.



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Problem

- The Board applies for standing to inform the Court of institutional realities affecting the interpretation and application of s.672.81.
- Board also asks to be permitted to give evidence on the considerations informing its conclusion that the prospective restrictions on SA's liberty, were he to be transferred to CAMH at the relevant time were not significantly offset by access to culturally-appropriate services.



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Question

- Is standing likely to be granted, and if so, what, if any, limitations are likely to be imposed on the Board's participation?**



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Costs – *Thibeau*

- A more adversarial tribunal may trigger request for costs
- BCCA says improperly arguing merits or “going too far” may result in costs. Consider whether tribunal is required to respond on merits to ensure full adjudication. (para 59)
- The closer a case is to one where there is a significant breach of procedural fairness the stronger the case for a costs award (para 69)



CAS v SVD 2016 ONSC 1688

(para 15-16)

- The CFSRB's submissions at the judicial review application were brief, focused, and were not of an adversarial nature. The submissions were primarily directed to its specialized role as an adjudicator of a child-related matter and in support of granting some latitude to a decision-maker to question witnesses in relation to the best interests of a child. Nothing in the conduct of the judicial review application by the CFSRB warrants an award of costs of that application against it.
- (...) Although the conduct of the Chair of the CFSRB did give rise to a reasonable apprehension of bias and amounted to a denial of procedural fairness, this is not a case where the conduct rises to such a level that a costs order is necessary to achieve a just result.

