Standing: The Role of Administrative Tribunals on Judicial Review

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Introduction

Most jurisdictions require that notice of applications for judicial review be served on the tribunal whose exercise of power is challenged, and some tribunals' constituent legislation addresses their participation on appeals or judicial reviews of their decisions.[1] However, once served, and unfortunately for judges, and for the tribunal counsel and other parties who appear before them, the extent to which an administrative tribunal may participate in a judicial review of its decisions may be quite different, depending on the jurisdiction.

Understanding the permissible scope of tribunal participation in applications for judicial review first requires a review of the two leading and seemingly conflicting Supreme Court of Canada decisions on the subject: *Northwestern Utilities Ltd. v. Edmonton* and *CAIMAW, Local 14 v. Paccar of Canada Ltd*.[2] A review of the treatment of these cases must then be carried out in each province, in order to determine how the law has evolved in the jurisdiction in question.

In very general terms, the various jurisdictions have adopted either a restrictive approach, or a more relaxed, contextual approach to the granting of standing to administrative tribunals, although more recently there does appear to be a general shift in the jurisprudence towards the contextual approach.

The Origins of the Debate: *Northwestern Utilities* and *Paccar*

The two leading Supreme Court of Canada decisions on tribunal standing are the 1979 decision in *Northwestern Utilities* and the 1989 decision in *Paccar*.

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[1] *Federal Court Rules*, 1998, SOR/98-106 [*Federal Court Rules*], r. 304 (1)(b)(i), B.C. *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241 [BC *JRPA*], s. 15; *Alta. Rules of Court*, Alta. Reg. 390/1968, r. 753.09(1)(a); *Sask. Queen's Bench Rules*, r. 669(1); Ont. *Judicial Review Procedure Act*, R.S.O. 1990, c. J.1 [ON *JRPA*], s. 9(2); N.B. *Rules of Court*, N.B. Reg. 82-73, r. 69.05(1)(b); N.S. *Civil Procedure Rules*, r. 56.03(3)(b); P.E.I. *Judicial Review Act*, R.S.P.E.I. 1988, c. J-3, s. 7(4); Nfld. *Rules of the Supreme Court*, S.N.L. 1986, c. 42, Sch. D., r. 54.03(3)(b); *Rules of the Supreme Court of the Northwest Territories*, N.W.T. Reg. 010-96, r. 597(1)(a); *Rules of the Supreme Court of Nunavut*, r. 597(1)(a); Yukon *Rules of Court*, r. 54(6)(b)); Qc. *An Act Respecting Administrative Justice, R.S.Q.*, c. J-3, s.101.

[2] *Northwestern Utilities Ltd. v. Edmonton*, [1979] 1 S.C.R. 684 [*Northwestern Utilities*] and *CAIMAW, Local 14 v. Paccar of Canada Ltd.*, [1989] 2 S.C.R. 983 [*Paccar*].

Northwestern Utilities involved a dispute about an interim gas utility rate payable by Northwestern Utilities Ltd. ("Northwestern") ordered by Alberta's Public Utilities Board (the "Utilities Board"). The City of Edmonton appealed the Utilities Board's decision to the Appellate Division of the Alberta Supreme Court (as it then was), which set aside the order and remitted the matter to the Utilities Board to reconsider. Both the Utilities Board and Northwestern appealed to the Supreme Court of Canada.

On appeal, the Utilities Board presented what the Court described as "detailed and elaborate" arguments in support of its decision.[3] Section 65 of the *Public Utilities Board Act* provided that the Utilities Board was entitled "to be heard ...upon the argument of any appeal", and section 66 of the Act protected the Utilities Board from liability for costs with respect to an appeal.[4] Nevertheless, the Court described the Utilities Board's right to participate on the appeal as "a limited one", stating that:

> Clearly upon an appeal from the Board, counsel may appear on behalf of the Board and may present argument to the appellate tribunal. We think in all propriety, however, such argument should be addressed not to the merits of the case as between the parties appearing before the Board, but rather to the jurisdiction or lack of jurisdiction of the Board. If argument by counsel for the Board is directed to such matters as we have indicated, the impartiality of the Board will be the better emphasized and its dignity and authority the better preserved, while at the same time the appellate tribunal will have the advantage of any submissions as to jurisdiction which counsel for the Board may see fit to advance.

Ten years later, the Supreme Court of Canada again addressed the proper role of a tribunal on judicial review in *Paccar*, a review of a decision of the BC Labour Relations Board ("BCLRB"), then known as the Industrial Relations Council ("the Council").

Following a large number of layoffs, the employer in *Paccar* issued a notice to terminate its collective agreement with its union, and the parties entered into unsuccessful negotiations regarding a new agreement. The employer then discontinued negotiations, terminated the collective agreement, and unilaterally imposed terms and conditions of

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[3] *Ibid*. at p. 709.
[4] *Public Utilities Board Act*, R.S.A. 1970, c. 302, ss. 65 & 66.

employment. The union applied to the Council alleging a violation of the *Labour Code*,[5] and requesting a determination of whether a collective agreement was in full force and effect. The Council initially found in favour of the employer, although the union sought and was granted a re-consideration. On the re-consideration, the Council upheld its original decision, albeit for different reasons. The union was successful on judicial review to the BC Supreme Court, and the BC Court of Appeal dismissed the employer's appeal.

On appeal to the Supreme Court of Canada, the Council argued that the Court of Appeal had applied the wrong standard of review, and made submissions with respect to the reasonableness of the decision under judicial review. The Council argued that it had: considered each of the union's arguments; had given reasoned and rational rejections of those arguments; had carefully reviewed the relevant authorities; had made a decision that was within its exclusive jurisdiction; and that the decision was a reasonable approach for it to adopt. The union objected to the Council's position, arguing that while the Council had standing to argue that it had the jurisdiction to embark on the enquiry that it did, it could not argue that it had not lost that jurisdiction through a patently unreasonable decision.

Justice LaForest, on his own behalf and on behalf of Chief Justice Dickson, disagreed with the union, and found that the Council had not overstepped its role.[6] He noted that the Council had not argued that the decision was correct, and said that it had standing to make submissions not only explaining the record before the Court, but also to show that it had jurisdiction to embark on the enquiry and that it had not lost that jurisdiction through a patently unreasonable interpretation of its powers.[7] The Court also agreed with the Council's submission that the Court of Appeal had adopted the wrong standard of review.[8]

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[5] *Labour Code*, R.S.B.C. 1979, c. 212.
[6] L'Heureux- Dubé J. dissented in the result but concurred on the standing issue. The other reasons, written by Sopinka J. on his own behalf and on behalf of Lamer J. (concurring), and by Wilson J. (in dissent), did not comment on the standing issue.
[7] *Paccar*, *supra* note 2 at paras. 35, 40
[8] *Ibid* at para. 40. Some subsequent decisions, discussed below, do not read *Paccar* as allowing tribunals to make submissions on the standard of review.

Justice LaForest arguably expanded a tribunal's role on an application for judicial review to include speaking to the reasonableness of its decision, provided that in so doing it does not speak to the merits:

> In *British Columbia Government Employees' Union v. Industrial Relations Council* [(1988), 26 B.C.L.R. (2d) 145 (C.A.)]…Taggart J.A. for the Court made the following statement with which I am in complete agreement, at p. [153]:
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> > The traditional basis for holding that a tribunal should not appear to defend the correctness of its decision has been the feeling that it is unseemly and inappropriate for it to put itself in that position. But when the issue becomes, as it does in relation to the patently unreasonable test, whether the decision was reasonable, there is a powerful policy reason in favour of permitting the tribunal to make submissions. That is, the tribunal is in the best position to draw the attention of the Court to those considerations, rooted in the specialized jurisdiction or expertise of the tribunal, which may render reasonable what would otherwise appear unreasonable to someone not versed in the intricacies of the specialized area. In some cases, the parties to the dispute may not adequately place those considerations before the Court, either because the parties do not perceive them or do not regard it as being in their interest to stress them. [9]

Courts have interpreted the interplay between *Northwestern Utilities* and *Paccar*, and thus the appropriate scope of tribunal standing, differently, and some have specifically noted the tension between the two cases.[10] Some Courts have interpreted *Paccar* as relaxing the *Northwestern Utilities* restrictions, while others have not.[11] Still others have adopted a case-

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[9] *Ibid*, at para. 40.

[10] See for example *U.B.C.J.A., Local 1386 v. Bransen Construction Ltd*., 2002 NBCA 27 [*Bransen*] and *Ontario (Children's Lawyer) v. Ontario (Information and Privacy Commissioner*), 75 O.R. (3d) 309 (C.A.) [*Children's Lawyer*].

[11] See for example *Ferguson Bus Lines v. A.T.U. Local 1374*, [1990] 2 F.C. 568 (C.A.) [*Ferguson Bus Lines*], *Skyline Roofing v. Alberta (Workers Compensation Boar*d), 2001 ABQB 624 and *Alberta (Human Rights Commission) v. Brewer*, 2008 ABCA 160 [*Brewer*], which adopt a restrictive approach to tribunal participation based on *Northwestern Utilities*, as contrasted with *British Columbia (Securities Commission) v. Pacific International Securities Inc*., 2002 BCCA 421 [*Pacific International Securities*], where the BC Court of Appeal said that the vitality of the rule in *Northwestern Utilities* "has been sapped only slightly" (para. 39). See also *British Columbia Teachers' Federation v. British Columbia (Information and Privacy Commissioner)*, 2005 BCSC 1562 [*Teacher's Federation*] at paras. 27, 32, 44, *Lang v. British Columbia (Superintendent of Motor Vehicles)*, 2005 BCCA 244 [*Lang*], where the BC

specific, discretionary, contextual approach to tribunal standing.[12] As such, there is currently no consistent approach to tribunal standing on applications for judicial review across the various Canadian jurisdictions. The approach taken by the Courts in each province will be discussed below.

The Federal Courts

Rule 304(1)(b)(i) of the *Federal Courts Rules* provides that an applicant for judicial review of a federal tribunal's decision must serve the notice of application on the tribunal.[13] However, Rule 303(1)(a) precludes a tribunal from participating as a respondent in Federal Court judicial review proceedings. Therefore, tribunals do not have standing to participate as a party as of right, unless such standing is specifically granted by their enabling legislation.[14] Rather, tribunals must apply for leave to participate as intervenors on judicial review, and the Federal Courts have traditionally taken a somewhat restrictive approach to tribunal participation.

By way of example, in *Canada (Human Rights Commission) v. Canada (Attorney General)* [15], the Canadian Human Rights Commission applied to the Federal Court of Appeal to be added as a party to a judicial review of its decision exercising its discretion to allow a complaint to proceed even though it had been filed outside the one-year time limit for filing. The Federal Court of Appeal refused to add the Commission as a party, stating that the proper course was for it to apply for intervenor status.

Court of Appeal said that the traditional restriction against tribunal's arguing the merits "has been relaxed somewhat" by *Paccar* (para. 50), and *Buttar v. British Columbia (Workers' Compensation Appeal Tribunal)*, 2009 BCSC 129 [*Buttar*], where the BC Supreme Court said that the scope of tribunal standing was "expanded considerably" (para. 45).

[12] *Children's Lawyer*, *supra* note 10; *Pacific Newspaper Group Inc., a Division of CanWest Mediaworks Publications Inc. v. Communications, Energy and Paperworkers Union of Canada, Local 2000*, 2009 BCSC 962 [*Pacific Newspaper Group*]; *Canada (Attorney General) v. Quadrini*, 2010 FCA 246 [*Quadrini*].

[13] *Federal Court Rules*, *supra* note 1.

[14] For example, s. 22(1.1) of the *Canada Labour Code*, R.S.C. 1985, c. L-2 provides that the Canada Industrial Relations Board has standing to appear "for the purpose of making submissions regarding the standard of review to be used with respect to decisions of the Board and the Board's jurisdiction, policies and procedures".

[15] *Canada (Human Rights Commission) v. Canada (Attorney General)*, [1994] 2 F.C. 447 (C.A.)

In coming to this conclusion, Justice Décary acknowledged that tribunals may be granted standing for certain purposes, for example to explain the record or to make representations with respect to jurisdiction. It was his view, however, that had Parliament intended to grant the Commission full party status in a case where it had not initiated the complaint or where the decision was its own, it would have done so expressly. Relying on *Northwestern Utilities*, the Court also said that provisions granting tribunals standing to appear where their decisions are under review were exceptional, and should be interpreted restrictively.

In her concurring reasons, Justice Desjardins expressed concern about the potential for an appearance of partiality on the part of the tribunal, noting that:

> …the word party in a strict sense has a strong connotation of "taking sides". Since the appearance of the Commission as an impartial tribunal can never be discredited considering that the matters in dispute are often returned to it in a judicial review proceeding and, also, in view of the necessity of protecting its public image in future cases, I do not think it can properly be added as a party….[16]

Also relying on *Northwestern Utilities*, the Federal Court Trial Division expressed similar concerns with respect to the need for administrative tribunals to maintain their impartiality in *Bell Canada v. Canadian Telephone Employees Assn.*[17] There, the Court denied the President of the Canadian Human Rights Tribunal's application for leave to intervene to make submissions on whether it was an independent quasi-judicial body capable of providing a fair hearing because adverse effect that the tribunal's intervention would have on the need for the tribunal to maintain the appearance of impartiality, which the Court said was essential for it to discharge its statutory mandate. Based upon the materials filed by the parties, the Court was further of the view that the Tribunal would be able to add little, if anything, of relevance to assist the Court in making its decision.[18]

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[16] *Ibid*. at para. 13.
[17] [1997] F.C.J. No. 1783 (F.C.T.D.) (QL).
[18] *Ibid* at paras. 9-10.

In accordance with Rule 109(1)(b) of the *Federal Courts Rules*, tribunals wishing to participate on a judicial review must describe in their Notice of Motion the nature of their proposed participation, and explain how that participation will assist the determination of a factual or legal issue related to the proceeding. The factors the Court will consider in determining whether to exercise its discretion to allow a tribunal to intervene include whether:

- the proposed intervenor is directly affected by the outcome;
- a justiciable issue and a veritable public interest exist;
- there is an apparent lack of any other reasonable or efficient means to submit the question to the Court;
- the position of the proposed intervenor is adequately defended by one of the parties to the case;
- the interests of justice are better served by the intervention of the proposed third party; and
- the Court can hear and decide the cause on its merits without the proposed intervenor.[19]

Applying these factors, the Court in *Mielke v. Canada (Attorney General)* granted the Canadian Human Rights Commission leave to intervene in an application to address whether it had a duty to give reasons for its decisions and its rights and obligations when it receives legal advice, which the Court described as being "akin to or part and parcel of defending the Commission's jurisdiction".[20]

The Federal Courts may not grant leave to intervene where the tribunal will be merely restating what others will be arguing, or where the existing parties may adduce all of the

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[19] *Canadian Union of Public Employees (Airline Division) v. Canadian Airlines International Ltd.*, [2000] F.C.J. No. 220 (F.C.A.) (QL); *Chrétien v. Attorney General*, 2005 FC 591 [*Chrétien*] at para. 20.
[20] 2003 FC 914 [*Mielke*]. Also see for example *Thamotharem v. Canada (Minister of Citizenship and Immigration)*, 2006 FCA 261, where the Immigration and Refugee Board was granted limited leave to intervene, and *Eli Lily and Co. v. Apotex Inc*., 2005 FCA 203 [*Eli Lily*], where the Commissioner of Competition was granted limited leave to intervene.

relevant evidence. Rather, the tribunal must have something to add to the proceedings by bringing an additional or a different perspective.[21]

One area where a tribunal may add to the proceedings is where submissions on issues within its specialized expertise will assist the Court in its deliberations. [22] For example, in *Chrétien v. Attorney General*, the Commissioner of the Sponsorship Inquiry applied for leave to intervene in the petitioner's judicial review of the Commissioner's decision refusing to recuse himself.[23] While granting the Commissioner leave to intervene, the Federal Court restricted the scope of the intervention to submissions regarding the Commission's scope and mandate as set out in its Terms of Reference, and the jurisdiction and procedural discretion of the Commission in relation to the Commission Rules, the calling of witnesses and admissibility of evidence. Citing the need for impartiality identified in *Northwestern Utilities* and other cases, the Court refused to allow the Commissioner to address the standard of review, or to make submissions on the law regarding the apprehension of bias or the law on the recusal, as any such submissions would be self-interested and not helpful to the Court.[24]

In *Montreuil v. Canada (Canadian Forces)*, the Chairperson of the Canadian Human Rights Tribunal was granted leave to intervene in a judicial review of his decision refusing to authorize a Tribunal member seized of a matter to complete the case and render a decision after the expiration of the member's appointment.[25] The Chairperson was permitted to present written and oral argument with respect to any legal or factual argument relating to the context of the decision, the impact of the findings of the application for judicial review on the allocation of work among Tribunal members, and the management of its internal affairs. The Chairperson was also allowed to address the question of whether he had a duty to comply

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[21] See the discussion *Hoechst Marion Roussel Canada v. Canada (Attorney General)*, 2001 FCT 775 and *Chrétien, supra* note 20. See also *Mielke, ibid.* at para. 4, and *Eli Lily, ibid* at para. 9.

[22] However, a tribunal's expertise will not automatically permit participation if all of the information is already before the Court. For example, in *Ferguson Bus Lines, supra* note 11, the Court of Appeal was highly critical of the Canada Labour Board's submissions and said, "it is only when its expertise may cause some light imperceptible to ordinary mortals on the subject that participation so potentially damaging to it should be countenanced" (para. 57). However, subsequently the *Canada Labour Code* was amended to permit the Canada Industrial Labour Board's participation on judicial review: see *supra* note 14.

[23] *Chrétien, supra* note 20.

[24] *Ibid*. at para. 37. See also *Eli Lily, supra* note 21.

[25] Decision on the merits reported at 2009 FC 22.

with the rules of natural justice and procedural fairness including whether he had a duty to hear the parties when exercising the discretion conferred on him by subsection 48.2(2) of the [*Canadian Human Rights*] *Act*.[26]

Although the decision allowing the intervention does not appear to have been reported, the Court must have been satisfied that, when balanced against concerns with respect to partiality, the Chairperson of the Tribunal had something of value to add to the proceedings beyond that of the parties and that, therefore, his intervention would be of assistance.

While the Federal Courts have traditionally taken a fairly restrictive approach to tribunal participation on applications for judicial review, the Federal Court of Appeal's decision in *Canada (Attorney General) v. Quadrini*[27] suggests a move towards the more liberal, contextual approach to tribunal participation taken in provinces such as Ontario.

In *Quadrini*, the tribunal in question, the Public Service Labour Relations Board, had a statutory right to intervene before the Federal Court of Appeal. At issue was the scope of the arguments that the Board would be allowed to advance.

The Federal Court of Appeal noted that a tribunal's submissions on an application for judicial review from one of its decisions must not only be relevant to the issues on the application and useful to the reviewing Court, they are also subject to careful regulation based on the principles of finality and impartiality. After reviewing the jurisprudence from across the country, the Court observed that the principles set out in these cases did not amount to hard and fast rules, but rather general considerations that should inform the exercise of judicial discretion in light of the particular circumstances of the case in question.

[26] *Ibid* at para. 9.
[27] *Supra*, footnote 12.

The Court added that it was unnecessary to articulate all of the factors relevant to the exercise of that discretion, observing that these factors would "emerge from future decisions involving particular circumstances".[28]

The Federal Court of Appeal also observed in *Quadrini* that it is incumbent on the tribunal seeking to intervene to assist the Court in exercising its discretion by providing a fairly detailed description of the submissions that the tribunal proposes to make and an explanation of how these submissions will assist the determination of the factual or legal issues in the judicial review.

Having regard to the facts of the case before it, including the fact that Mr. Quadrini did not have legal representation, the Court ultimately concluded that it should not "unduly restrict" the scope of the Board's intervention, allowing it to address the implications of the application for judicial review on its ability to hear matters in a just, timely and orderly fashion. However, the Court prohibited the Board from amending, varying, qualifying or supplementing its reasons, or from defending its decision on the merits, as this would run counter to the principles of finality and impartiality.[29]

It could be argued that the Federal Court of Appeal did not really expand the scope of tribunal participation in that it merely applied subsection 51(2) of the *Public Service Labour Relations Act*, above, which allows the Board to make submissions relating to its "jurisdiction, policies and procedures". Still, the fact remains that the Court's analysis did not focus on the Board's statutory right to intervene. Rather, the Court embraced the contextual approach to tribunal participation in applications for judicial review, and its reasoning is equally applicable to cases where the statute does not expressly provide for such a right.

Ontario

As a result of the Ontario Court of Appeal's 2005 decision in *Children's Lawyer*, the Courts in Ontario now take a discretionary and contextual approach to the issue of Tribunal

[28] *Ibid.* at para. 21.
[29] *Ibid.* at paras. 28-31.

standing.[30] This decision has also been influential in a number of other jurisdictions, and is attractive to some legal commentators.[31]

Children's Lawyer involved a judicial review of the Information and Privacy Commissioner's order that the Office of the Children's Lawyer for Ontario disclose certain documents requested by an individual it had represented in three legal proceedings (one child protection case and two motor vehicle accident cases). The Children's Lawyer filed a preliminary objection to the Commissioner's factum, arguing that the Commissioner should be denied standing to participate in the application, or, in the alternative, should at least be prohibited from arguing that her decision was correct. The Ontario Divisional Court dismissed the objection on the basis that subsection 9(2) of the Ontario *JRPA*[32] gives the Commissioner the right to be a party to the judicial review and the Court was satisfied that it ought not to exercise its discretion to limit the Commissioner's participation because the Court would deny itself the benefit of legitimate and helpful submissions.

On appeal, the Ontario Court of Appeal began its analysis by noting that while there has been an increasingly sophisticated body of law governing the Courts' supervision of tribunals, the law concerning the extent of a tribunal's role in judicial review proceedings lacked consistency.[33] After reviewing what it called the "rather clouded jurisprudential backdrop", the Court said that the scope of standing must begin with subsection 9(2) of the Ontario *JRPA*, which provides that on a judicial review, a person who is authorized to exercise a statutory power may be a party to an application for judicial review of the decision.[34] The Court rejected a categorical approach to the issue, stating that cases like *Northwestern* and *Paccar* did not "dictate the use of precise rules", and were instead best

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[30] *Children's Lawyer*, *supra* note 10. See also for example *Enbridge Gas Distribution Inc. v. Ontario (Energy Board)*, [2006] O.J. No. 1355 (C.A.) (QL); *Stetler v. Agriculture, Food and Rural Affairs Appeal Tribunal*, [2005] O.J. No. 2817 (C.A.) (QL) at para. 92; *United Food and Commercial Workers International Union v. Rol-Land Farms Ltd*., [2008] O.J. No. 682 (QL) at paras. 76-77; and *Canadian Centre for Ethics in Sport v. Russell*, [2007] O.J. No. 2234 (QL) at paras. 83-85.

[31] D.J. Mullan, *Essentials of Canadian Law: Administrative Law*. (Toronto: Irwin Law, 2001) at p. 453-460.

[32] ON *JRPA*, *supra* note 1.

[33] *Children's Lawyer*, *supra* note 10 at para. 18.

[34] *Ibid*. at paras. 25-26.

viewed "as sources of the fundamental considerations that should inform the Court's discretion in the context of a particular case".[35]

Rather, as part of its task of ensuring that its procedures serve the interests of justice, the Court must exercise a context-specific discretion to determine the scope of tribunal standing. The considerations that should guide the Court in the exercise of its discretion include the following:

- as noted in *Paccar*, the importance of having a fully informed adjudication of the issues before the Court. Because of its specialized expertise, particularly where there is no other party to knowledgably respond, submissions from a tribunal may be essential to achieve this objective;[36]

- as noted in *Northwestern Utilities*, the importance of maintaining tribunal impartiality. Factors to be taken into account include whether:

  - the matter may be referred back to the tribunal;

  - similar issues may arise in the future;

  - the tribunal serves a defined and specialized community;

  - the tribunal resolves personal disputes between two litigants where the perception of favouring one side over the other may be felt more acutely; and

  - the nature of the issue. For example, if the question is whether a particular litigant has been treated fairly, impartiality may suggest a more limited standing than if the allegation is that the structure of the tribunal itself compromises natural justice.[37]

- Any other considerations relevant in a particular case.[38]

Applying those principles, the Ontario Court of Appeal upheld the Divisional Court's ruling with respect to the scope of the Commission's participation. The Court emphasized that

[35] *Ibid*. at paras. 34- 35, 43.
[36] *Ibid*. at para. 3, 43-44.
[37] *Ibid*. at paras. 38-40, 43.
[38] *Ibid*. at paras. 41, 45.

because the person who had requested the documents was not participating in the application for judicial review, there would be "nobody charged with defending the decision under review" unless the Commission was allowed to participate.[39] Moreover, the Commissioner's expertise with the specialized statutory scheme in issue provided "an important assurance of a fully informed adjudication".[40] The nature of the tribunal, which was not akin to a court-like model; the nature of the issues, namely statutory interpretation; and the integrity of the tribunal's decision-making did not preclude the granting of full participatory rights to the tribunal.

Alberta

Alberta Courts have historically taken a fairly restrictive approach to the granting of standing to administrative tribunals on applications for judicial review, although there are signs that in this province, too, things may be changing.

An example of the traditional approach is found in the Alberta Court of Appeal's decision in *Alberta (Human Rights Commission) v. Brewer*[41], where the Court was critical of other Court of Appeal decisions which had departed from the narrower test in *Northwestern Utilities*.

In *Brewer*, a complainant whose human rights complaint was dismissed by the Alberta Human Rights and Citizenship Commission successfully petitioned for judicial review. Both the respondent to the human rights complaint and the Chief Commissioner filed appeals, and the Chief Commissioner's factum argued the merits of the case. The complainant took issue with the Chief Commissioner's standing before the Court of Appeal, and the Court agreed that the Commissioner had overstepped his bounds by arguing the merits of the case, and that the Commissioner could not bring his own appeal. The Court described Justice LaForest's comments in *Paccar* with respect to allowing tribunals to speak to the applicable standard of review as *dicta*, noting that three of the six judges deciding *Paccar* did not mention the issue of standing. The Court further stated that there was no authority which would allow a tribunal

[39] *Ibid*. at paras. 48, 57.
[40] *Ibid*. at para. 49.
[41] S*upra* note 11 at para. 33.

to argue the merits of one of its decisions.

Indeed, the Court was quite wary of tribunal participation, stating:

> The statutory tribunal should be patently neutral. It cannot do that if it dons the uniform of one army, still less if it enters that army's front line and joins its bayonet charge.[42]

In a subsequent decision, the Court of Appeal awarded $10,000 in costs against the Chief Commissioner. Leave to appeal the standing decision was refused by the Supreme Court of Canada.[43] Thus, based on *Brewer*, administrative tribunals in Alberta may make submissions on the record and with respect to their jurisdiction, but the Courts in Alberta were less likely than Courts in other jurisdictions to entertain submissions with respect to the reasonableness of a tribunal decision, and may not even be willing to hear from tribunal counsel with respect to the applicable standard of review. Indeed, Courts in subsequent Alberta cases followed *Brewer* and restricted tribunal standing to explaining the record and speaking to jurisdiction.[44]

That said, the Alberta Court of Appeal's more recent decision in *Leon's Furniture Ltd. v. Alberta (Information and Privacy Commissioner)*[45] suggests that, like the Federal Courts, Alberta courts are also moving towards a more contextual approach to tribunal standing.

In *Leon's Furniture*, the Alberta Privacy Commissioner sought standing to make submissions on an appeal from a finding that the appellant had collected private information from its customers in violation of privacy laws. The Court of Appeal squarely addressed its prior decision in *Brewer*, noting that *Brewer* adopted the restrictive *Northwestern Utilities* approach in

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[42] *Ibid*. at para. 37.
[43] *Alberta (Human Rights Commission) v. Brewer*, 2008 ABCA 285. Leave to appeal to the Supreme Court of Canada denied [2008] S.C.C.A. No. 290 (QL).
[44] See for example *University of Alberta v. Alberta (Information and Privacy Commissioner)*, 2009 ABQB 112 and *Boardwalk Reit LLP v. Edmonton (City)*, 2008 ABCA 220, both of which adopted a restrictive approach. But see *Osteria De Medici Restaurant Ltd. v. Yaworski*, 2009 ABQB 563, which distinguished *Brewer*.
[45] 2011 ABCA 94.

"absolute terms". This approach, the Court said, constituted *obiter dictum* and "appear[ed] to be inconsistent" with prior jurisprudence from the Court.[46]

The Court also noted that the restrictive approach advocated in *Northwestern Utilities* was "easiest to apply" in cases where an applicant and respondent are "participating fully" in the proceedings, thereby creating little need for tribunal participation.[47] The Court went on to observe, however, that not all tribunals play an adjudicative role, and that in some cases the original complainant does not, and is not expected to participate in judicial review proceedings. In such cases, the Court held that "the applicability of the [restrictive] *Northwestern Utilities* principle is less obvious".[48]

Referencing the Supreme Court's decision in *Paccar*, the Court held that "some flexibility is required when defining the proper role of tribunals in judicial review proceedings".[49] The Court also noted the reasoning of the Ontario Court of Appeal in *Children's Lawyer*, stressing that "[r]igid rules should be avoided"[50], and recognizing that "[a] more flexible approach has also been suggested in other provinces."[51]

The Court concluded by observing that:

> [T]he law should acknowledge the multifaceted roles of many modern administrative tribunals, and the realities of the situation. The *Northwestern Utilities* case should be used as a "source of the fundamental considerations". Its principle will often be applied with full vigour to administrative tribunals that are exercising adjudicative functions, where two adverse parties are present and participating. While the involvement of a tribunal should always be measured, there should be no absolute prohibition on them providing submissions to the court. Whether the tribunal will be allowed to participate, and the extent to which it should participate involves the balancing of a number of considerations.[52]

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[46] *Ibid,* at para. 19 The Court was referring to its "earlier uncited decision" in *Rockyview (Municipal District No. 44) v. Alberta (Planning Board)* (1982), 22 Alta. L.R. (2d) 87, 40 A.R. 344 (C.A.).
[47] *Ibid.* at para. 20.
[48] *Ibid*. at para. 21
[49] *Ibid.* at para. 24
[50] *Ibid*. at para. 26.
[51] *Ibid*. at para. 27.
[52] *Ibid.* at para. 28 [emphasis added].

Leon's Furniture thus clearly marks a move towards the adoption of a more contextual approach to tribunal intervention by the Alberta Courts.

Québec

In Québec, section 101 of the *Act Respecting Administrative Justice*[53] specifically provides that the administrative authority whose decision is being reviewed is a party to the proceedings:

> 101. The parties to a proceeding are, in addition to the person and administrative authority or decentralized authority directly interested therein, any person so designated by law.

The *Act Respecting Administrative Justice* also establishes the Administrative Tribunal of Québec (TAQ), which is the adjudicative tribunal before which decisions of administrative bodies can be challenged.[54] There exists a right of appeal of the TAQ's decisions to the Court of Québec.[55] In judicial review proceedings before the Courts, the administrative decision-maker will generally appear as a party, whereas the TAQ will only have intervenor status (if any). For the purposes of this discussion, "tribunal" refers interchangeably to either the TAQ or the original administrative decision-maker.

The leading decisions from the Québec Court of Appeal suggest that a restrictive approach is generally taken to questions of tribunal participation in applications for judicial review in that province.

The first major decision on the issue following the Supreme Court's *Northwestern Utilities* and *Paccar* rulings was *Lancup v. Québec (Commission des affaires sociales)*[56], which predated the *Act Respecting Administrative Justice*. In *Lancup*, the Régie de l'assurance automobile had revised Mr. Lancup's indemnity

[53] *An Act Respecting Administrative Justice*, *supra* note 1.
[54] *Ibid.*, ss.14 and following.
[55] *Ibid.*, s.159.
[56] [1993] J.Q. no 1086 (C.A.) [*Lancup*].

payments. Mr. Lancup appealed the decision to the Commission des affaires sociales (the tribunal), which ruled against him, and the case then made its way to the Court of Appeal.

On the issue of the Tribunal's participation in the appeal, the Court stressed that the Tribunal was a quasi-judicial body, and should thus exercise restraint and not conduct itself like a true party ("*véritable partie*") to the proceedings. Relying on *Northwestern Utilities* and *Paccar*, the Court concluded that this was necessary in order to preserve the public's "indispensable" confidence in the administrative justice system.[57] The Court concluded that the tribunal's intervention should be limited to questions of jurisdiction (in the strict sense of the term), and that the Tribunal should not be allowed to address the merits of its decision.[58]

This remains the guiding approach to the issue of tribunal standing in Québec. In *Conseil de Presse c. Québec (Commission d'accès à l'information)* [59], the Court of Appeal adopted the reasoning in *Lancup* and emphasized the need for adjudicative tribunals to remain – and to be seen to remain – impartial. Interestingly, the Court also cited the Ontario Court of Appeal's decision in *Children's Lawyer*[60] for the proposition that intervening tribunals should exercise restraint so as not to be perceived as a 'constant and systematic adversary' ("*adversaire constant et systématique*").[61] The Court in *Conseil de Presse* did not, however, adopt the contextual approach for which *Children's Lawyer* is often cited elsewhere in Canada.

The Québec Court of Appeal again adopted a restrictive approach to tribunal standing in *Commission de la protection du territoire agricole*, where it described the Tribunal's appeal as 'completely inappropriate' ("*tout à fait inapropriée*") given its

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[57] *Ibid.* at paras. 20-22; see also *Ganotec Mécanique inc. c. Commission de la santé et de la sécurité du travail*, 2008 QCCA 1753 at paras. 89, 101 [*Ganotec*].
[58] Ibid. at para. 23; see also *Montréal (Ville de) (Service de police de la Ville de Montréal/SPVM) c. Tribunal des droits de la personne*, 2009 QCCA 22 at paras. 32, 37.
[59] 2006 QCCA 1282 at para. 22 [*Conseil de Presse*].
[60] *Supra* note 10.
[61] *Ibid.* at para. 21.

quasi-judicial adjudicative function.[62] The Court went on to cite *Paccar* in concluding that the Tribunal's active participation in the appeal discredited its impartiality. Relying upon *Northwestern Utilities*, the Court held that the Tribunal's participation should be limited to submissions relating to its jurisdiction.[63]

Finally, in the 2009 decision in *Commission des transports du Québec c. Villeneuve*[64], Justices Rochette and Doyon, on the one hand, and Justice Rochon on the other, discussed the issue of tribunal standing, with all of the judges ultimately adopting a restrictive approach to the issue. They concluded that the Commission des transports was limited to making submissions on its jurisdiction, in accordance with the principles articulated in *Northwestern Utilities* and *Paccar*.[65]

Justices Rochette and Doyon added that the tribunal's role was similar to that of an *amicus curiae,*[66] and Justice Rochon noted that the Ontario Court of Appeal's decision in *Children's Lawyer* enabled courts to determine the scope of a tribunal's intervention in cases where the legislation specifically provides that the tribunal whose decision is being reviewed is a party to the proceedings.[67]

Thus, the jurisprudence from the Québec Court of Appeal, from *Lancup* in 1993 to *Villeneuve* in 2009, suggests that the Province's courts have adopted a restrictive approach to the question of tribunal participation in applications for judicial review of their decisions. Interestingly, even when the Québec Courts refer to the more flexible *Paccar* and *Children's Lawyer* cases, they do so, not to broaden the scope of tribunal standing, but for the proposition that tribunals must maintain their impartiality and that judges have some flexibility when addressing the issue.

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[62] *Tribunal administratif du Québec c. Commission de protection du territoire agricole du Québec*, 2008 QCCA 330 at paras. 4-6 [*Commission de protection du territoire agricole*].
[63] *Ibid.* at paras. 6-8.
[64] 2009 QCCA 1558.
[65] *Ibid.* at paras. 39, 85.
[66] *Ibid.* at para. 45; see also *Ganotec*, *supra* note 38 at para. 90.
[67] *Ibid.* at paras. 105-06.

British Columbia

The situation in British Columbia is different than in some of the provinces discussed above. Pursuant to s. 15(1) of the *Judicial Review Procedure Act*[68], statutory decision makers in BC must be served with applications for judicial review of their decisions, and may choose to be a party if they wish. It is, however, sometimes difficult to predict the reception that tribunal counsel will get, once they are in Court. In general, most BC Courts have followed *Paccar*,[69] although they are wary when, in their view, a tribunal strays too close to defending the merits of the decision under review.[70]

For example, in *Lang v. British Columbia (Superintendent of Motor Vehicles)*[71], the issue was whether costs should have been awarded against the Office of the Superintendent where its decision denying a review of administrative driving prohibitions had been quashed on judicial review. The BC Court of Appeal noted that an exception may be made to the general rule that costs are not awarded against an administrative tribunal where the tribunal has argued the merits of its own decision.

In discussing what constitutes an 'argument on the merits', the Court said that the "the traditional restriction against the tribunal's arguing the merits of its own decision" set out in *Northwestern Utilities* has been "relaxed somewhat" by *Paccar*, which permits tribunals to demonstrate that their decisions are not patently unreasonable.[72] The Court said:

> While the line between arguing the merits and explaining the record is somewhat blurry when the test is patent unreasonableness, there remains a boundary which must be observed. It will be up to the judgment of the reviewing judge in each case to determine if the tribunal, or the Attorney General on its behalf, has gone too far.[73]

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[68] BC *JRPA*.
[69] Prior to *Paccar*, the BC Court of Appeal found that in *B.C.G.E.U. v. British Columbia (Industrial Relations Council* (1988), 26 B.C.L.R. (2d) 145 [*B.C.G.E.U.*] that there "is a powerful policy reason" in favour of permitting the Labour Relations Board to make submissions on reasonableness, which Justice LaForest cited with approval in *Paccar, supra* note 2 at para. 39.
[70] See for example *Pacific International Securities, supra* note 14, where, relying on *Northwestern Utilities*, the Court of Appeal found that the Securities Commission ought not to have defended the merits of its decision.
[71] *Lang*, *supra* note 11.
[72] *Ibid*. at para. 50.
[73] *Ibid*. at para. 54. This passage from *Lang* was also cited with approval in *Downs Construction Ltd. v. British Columbia (Workers' Compensation Appeal Tribunal)*, 2013 BCCA 13 at para. 14.

This approach was subsequently confirmed in *Whetung v. British Columbia (Workers' Compensation Appeal Tribunal)*, where the Court of Appeal referred to *Lang* as forming part of "a long line of authority in this Province to the effect that the ambit of [the Workers' Compensation Appeal Tribunal]'s participation in judicial review proceedings is circumscribed".[74]

In *Buttar*, the BC Supreme Court was faced with determining whether the blurry line between explaining the record and speaking to the merits had been crossed.[75] A taxi driver and taxi company applied for judicial review of a decision of the Workers' Compensation Appeal Tribunal ("WCAT"), the effect of which was to permit an individual struck by a taxi to seek damages in a civil action. They argued that WCAT's decision was either unreasonable or patently unreasonable. Counsel for WCAT appeared and made submissions regarding a number of matters, including the reasonableness of the decision. Relying on *Lang*, the petitioner objected to WCAT's participation, arguing that it had gone too far and strayed into the merits of the case. WCAT argued that it was entitled to make submissions on the statutory and policy framework of the Workers' Compensation scheme, the standard of review, and to review the record to demonstrate that WCAT did not lose jurisdiction by rendering a patently unreasonable decision, submitting that it was not speaking to the merits.

The BC Supreme Court held that WCAT had standing by virtue of the BC *JRPA*, and said that its specialized knowledge and expertise "weighs in favour of greater, albeit not unfettered, participation in the judicial review proceedings".[76] The Court said that it would be of little assistance if counsel for WCAT simply recited the standard of review, but was not permitted to illustrate from the facts why the decision was not patently unreasonable.[77] After reviewing WCAT's written submissions in some detail, the Court was satisfied that the line had not been crossed. Consequently, the Court dismissed the petitioner's preliminary objection, stating that:

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[74] 2012 BCCA 119 at para. 29; see also *Henthorne v. British Columbia Ferry Services Inc.*, 2011 BCCA 476 at para. 38; *Pacific Newspaper Group Inc., a division of Canwest Mediaworks Publications Inc. v. Communications, Energy and Paperworkers Union of Canada, Local 2000*, 2011 BCCA 373 at para. 34; *Westgaard v. British Columbia (Registrar of Mortgage Brokers)*, 2011 BCCA 256 at para. 22.
[75] *Buttar*, *supra* note 11.
[76] *Ibid*. at para. 33.
[77] *Ibid*. at para. 46.

> [T]he written submissions filed by counsel for WCAT are meant to show that the vice-chair of WCAT considered each of the petitioner's submissions before it and provided reasoned, rational rejections to each of the arguments. The argument before this Court emphasizes that WCAT made a careful review of the relevant authorities and made a decision that was within its exclusive jurisdiction. At no point does counsel for WCAT argue that the decision in issue is correct; rather counsel argues that it was a reasonable approach for the tribunal to adopt. WCAT has standing to make all these arguments, and in doing so does not exceed the limited role an administrative tribunal is permitted to take in a judicial review of its own decision.
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> In my view the submissions advanced have not stepped over the somewhat blurry line described by Mr. Justice Donald in *Lang*. Ms. Berkey does not address the merits or correctness of the decision on each issue.[78]

The case law in British Columbia indicates that in addition to speaking to the record of proceedings, jurisdiction, the standard of review and a decision's reasonableness[79], administrative tribunals may be permitted to speak to a number of other matters. For example, they may make submissions regarding the evidence that is admissible on judicial review, which arises as a necessary incident to the right to make submissions regarding the record;[80] they may draw on their expertise to explain the statutory scheme;[81] and they may make submissions with respect to the available relief.[82]

Some British Columbia Courts have endorsed a more discretionary, contextual approach to the issue of tribunal standing. For example, in *Teachers' Federation*[83], the BC Privacy Commissioner ordered the Federation to disclose certain records regarding an investigation of a teacher. The BC Supreme Court dismissed the petitioners' preliminary objection to the

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[78] *Ibid*. at paras. 61-62.
[79] See for example *International Forest Products Ltd. v. British Columbia (Forest Appeals Commission)*, [1998] B.C.J. No. 1314 (S.C.) at para. 71; *British Columbia v. Bolster*, [2007] B.C.J. No. 192 (C.A.); *Workers' Compensation Act (Re.) and O'Donnell*, 2008 YKCA 9 at para. 61; *Vancouver Rape Relief Society v. Nixon*, 2005 BCCA 601 at paras. 60-66; *Carter v. Travelex Canada Limited*, 2008 BCSC 405 [*Carter*] at para. 45, aff'd 2009 BCCA 180; and *Teachers' Federation*, *supra* note 10 *v. British Columbia (Information and Privacy Commissioner)*, 2005 BCCS 1562 at paras. 48, 52-53, *Buttar*, *supra*, note 14.
[80] See for example *Canadian Pacific Railway Co. v. British Columbia (Information and Privacy Commissioner)*, 2002 BCSC 603 at paras. 22-39; *Foglia v. Edwards*, 2007 BCSC 861; *British Columbia v. Crockford*, 2005 BCSC 663 at paras. 34-35, appeal allowed on other grounds 2006 BCCA 360; and *Husby Forest Products Ltd. v. British Columbia (Minister of Forests)*, 2003 BCSC 1978.
[81] See for example *Buttar*, *supra* note 11.
[82] See for example *Carter*, *supra* note 79.
[83] *Supra* note 11.

Commissioner's standing. While not explicitly applying a contextual approach, the Court said that the following factors weighed in favour of greater, but not unfettered, participation: those who had sought the records did not participate in the judicial review; the role of the Commissioner within the statutory scheme, that is to balance and resolve the public interest in access to information with individual interests in personal privacy; the inquisitorial nature of the Commission's process; and the Commission's special knowledge and expertise.[84] The Court concluded that the Commissioner had not overstepped the "somewhat blurry line" described in *Lang* because it did not address the merits.[85]

Subsequently, in *Global Securities Corp. v. British Columbia (Executive Director, Securities Commission)*, the BC Court of Appeal said that *Children's Lawyer* provides support for the view that to the extent that *Northwestern Utilities* has been taken as an invariable rule, it "may be due for a re-evaluation".[86]

In *Pacific Newspaper Group*[87], the BC Supreme Court held that there had been a "rejuvenation" of *Northwestern Utilities* in the jurisprudence, but, at the same time, it noted that the Court has discretion with respect to the granting of standing to an administrative tribunal based on decisions such as those in *Children's Lawyer* and *Teacher's Federation*. The BC Labour Board was restricted to making submissions explaining the record and with respect to jurisdiction, and was denied standing to make submissions on the standard of review or whether its decision was patently unreasonable. This was because the Court found that the factors that favoured full or increased participation, namely, the lack of representation of a party, specialized knowledge and expertise on the part of the tribunal, the necessity to ensure a fully informed adjudication and no real concern about impartiality, were not present.[88] Rather, there was a participant (the union) adverse to the petitioner who was well-positioned and motivated to present opposing arguments, thus ensuring a fully informed adjudication. Moreover, there was a "real risk" that "full-fledged participation by the Board ...

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[84] *Supra* note 14 at paras. 35-38, 45.
[85] *Ibid*. at para. 53.
[86] *Global Securities Corp. v. British Columbia (Executive Director, Securities Commission)*, 2006 BCCA 404 at para. 60.
[87] *Supra* note 12 at paras. 12, 29, 19, 40-41.
[88] *Ibid*. at para. 40.

would undermine future confidence in its objectivity" because the matter would be referred back to the Board if the judicial review was successful, the Board served a defined community, and both the petitioner and union appeared frequently before it.[89]

New Brunswick

The New Brunswick Court of Appeal considered the tension between *Northwestern Utilities* and *Paccar* in *U.B.C.J.A., Local 1386, v. Bransen Construction Ltd.*[90] There the Court said that the restriction with respect to the ability of an administrative tribunal to address the merits of its decision in *Northwestern Utilities* was too broad, and that where a tribunal has something to contribute beyond that expected of the parties, it should be permitted to participate as an intervenor and to address the merits, provided it does not attempt to "bootstrap" its decision contrary to the principle of impartiality.[91] In *Bransen*, where the central issue involved interpretation of the *Industrial Relations Act*, the Court said that the Labour and Employment Board had something to contribute beyond that expected of the parties that was tied to its specialized jurisdiction and expertise, and that the approach taken by the tribunal had maintained the necessary air of impartiality.[92]

The approach in *Bransen* (decided before *Children's Lawyer*), has been cited in a number of other New Brunswick cases.[93] It was recently endorsed by the New Brunswick Court of Appeal in *Smith v. New Brunswick (Department of Public Safety),* which held that the Supreme Court of Canada's decision in *Northwestern Utilities* remained the "lead decision" in this area.[94] Although the Court in *Smith* did mention the decision in *Children's Lawyer*, it only referred to it

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[89] *Ibid*. at para. 41.
[90] *Bransen, supra* note 10.
[91] *Ibid*. at paras. 32-37.
[92] *Ibid*. at para. 37.
[93] See *New Brunswick (Attorney General) v. Pembridge Insurance Company*, [2010] N.B.J. No. 173 (C.A.) (QL) at para. 4; and *UnitedSteelworkers of America, Local 1-306 v. Fortis Properties Corporation*, 2006 NBCA 99. *New Brunswick (Attorney General) v. Pembridge Insurance Company*, [2010] N.B.J. No. 173 (C.A.) (QL) at para. 4; and *United Steelworkers of America, Local 1-306 v. Fortis Properties Corporation*, 2006 NBCA 99.
[94]2012 NBCA 41 at para. 23 [*Smith*]; see also *Sanford v. New Brunswick (Workplace Health, Safety and Compensation Commission)*, 2012 NBCA 86 at para. 17.

"generally", noting that no further comment on the standing issue was required because neither party objected to the Commission being made a party to the proceedings.[95]

Manitoba

The Courts in Manitoba have historically also taken a restrictive approach to tribunal standing[96]. However, as elsewhere, there are indications that this may be changing.

In *Rowel v. The Union Centre Inc. et al* [97], the Manitoba Court of Queen's Bench, after considering the decisions in *Northwestern Utilities*, *Paccar* and *Children's Lawyer*, allowed the Manitoba Human Rights Commission to play a "significant role" in an application for judicial review of a Commission decision where the petitioner had alleged that the Commission had breached the principles of natural justice and that its investigative process was tainted.

In allowing the Commission to participate in the application for judicial review, the Court in *Rowel* had regard to the fact that the other respondent did not have access to information about the Commission's investigative processes in general, or how the specific investigation in issue had in fact been carried out. Thus, the Court appears to have taken into account the Commission's specialized expertise and the lack of another party to assist the court with respect to matters before it in deciding to allow the tribunal to participate in the application for judicial review of one of its decisions.

Other Jurisdictions

The Courts in several Newfoundland, Nova Scotia and Saskatchewan cases have taken a restrictive approach to tribunal standing, although it should be noted that at least some of these cases pre-date the decisions in *Children's Lawyer*, *Quadrini* and other such cases.[98]

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[95] *Ibid.* at para. 24.

[96] See, for example, *Convergys Customer Management Inc. v. Luba*, 2005 MBCA 29 at paras. 24-26.

[97] 2008 MBQB 116 at paras. 54-60, appeal dismissed 2010 MBCA 23.

[98] See for example *Construction General Labourers, Rock and Tunnel Workers, Local 1208 v. North West Co.*, 2000 NFCA 24 at paras. 140-141; *Bambrick (Re)*, (1992) 101 Nfld. & P.E.I.R. 181; *Workers'*

The Northwest Territories Supreme Court cited *Children's Lawyer* in *Graham v. Northwest Territories (Workers' Compensation Board)* and said that tribunal standing involved an exercise of the Court's discretion in the circumstances of the particular case. However, the Court nevertheless expressed some reservations about the scope of tribunal participation in applications for judicial review.[99]

In contrast, the decision in *Bargen v. Northwest Territories (Medical Board of Inquiry)*[100] did not cite either *Graham* or *Children's Lawyer*, relying instead on *Northwestern Utilities* and *Brewer*. The Northwest Territories Supreme Court held in *Bargen* that the "governing rule" was that, in the absence of statutory provisions as to standing, an adjudicative tribunal whose decision is under review or appeal could not appear and argue the merits of the case. Rather, it should be confined to arguments as to its jurisdiction or explanations regarding the record.

After referring to *Northwestern Utilities* and *Children's Lawyer*, the Yukon Territory Supreme Court said in *Faro (Town) v. Carpenter*[101] that a tribunal's role on judicial review should be limited because the central issue on the application was whether the tribunal had treated the petitioner fairly, the matter could be returned to the tribunal for re-determination or the Petitioner could be a party in other matters. As a consequence, the Court allowed the tribunal only limited standing to refer to cases on the issue of bias and the test to be applied.

Compensation Act (Newfoundland) (Re) (1993), 109 Nfld. & P.E.I.R. 19 (N.S.C.T.D.); *Nova Scotia Inc. v. Clark*, (1994), 136 N.S.R. (2d) 110 at p. 121; but see *Kimberly-Clark Nova Scotia v. Nova Scotia Woodlot Owners and Operators Assn. - Central Wood Suppliers Division* (1998), 175 N.S.R. (2d) 34 at paras. 8-24, where the Court said where there is a privative clause or as a result of the defined role and function of a specialized tribunal, *Paccar* "clearly permits the Board to support the reasonableness of its approach" (para. 24); *Saskatchewan (Labour Relations Board) v. Saskatchewan (City)* (1994), 123 Sask. R. 1 (C.A.) at paras. 75-79; *P.R. Developments Ltd. v. Bridgewater Condominium Corp*. (1997), 158 Sask. R. 123 (C.A.); *Saskatchewan v. Saskatchewan Government and General Employees Union* 2008 SKQB 341 (Q.B.) at para. 810; *Sterling Newspaper Group, a Division of Hollinger Inc. v. Newspaper Guild Canada/Communication Workers of America CLC, AFL-CIO, IFJ*, 2003 SKQB 14 at paras. 5-11; *Hollinger Canadian Newspapers, LP (c.o.b. The Saskatoon Star-Phoenix Newspaper) v. Communications Energy and Paperworkers' Union of Canada*, 2001 SKQB 439 at para. 27; *Convergys Customer Management Inc. v. Luba*, 2005 MBCA 29 [*Convergys*] at paras. 24-26.

[99] 2007 NWTSC 54 at paras. 54-60, aff'd 2008 NWTCA 7.

[100] 2009 NWTSC 5 at para. 13, aff'd 2010 NWTCA 6.

[101] 2007 YKSC 33.

Conclusion

The ability of an administrative tribunal to participate in an application for judicial review of one of its own decisions will depend, in part, on the statutory regime in place in the jurisdiction in question.

Nevertheless, while there has been an historic reluctance to allow tribunals to participate in such applications, or to limit their participation to the making of submissions on jurisdiction or explaining the record, the more recent jurisprudence suggests that a more case-specific approach to the question may be appropriate so as to ensure that the reviewing Court has the benefit of the most helpful submissions possible in arriving at its ultimate decision.

That said, once the issue of standing is decided and the scope of the tribunal's participation determined, close attention must be paid to tribunal counsel's submissions in order to ensure that they stay within the permissible boundaries, and do not cross the often blurry line between appropriate and inappropriate arguments in a particular case. As we have seen, this is often not an easy task.

Appendix A – Other Resources

Blake, S. *Administrative Law in Canada, 4th ed.* (Markham Ontario: LexisNexis, 2006) at p. 187-190.

Brown, D.J.M, Q.C. & Evans, J.M., *Judicial Review of Administrative Action in Canada*, loose-leaf vol. 2 (Toronto: Canvasback Publishing, 2009) at 4-54 - 4-62.

Falzon, F.A.V., "Tribunal Standing on Judicial Review" (Paper presented to the Continuing Legal Education Society of British Columbia, Administrative Law Conference, November 29, 2007).

Jacobs, L.A. & T.S. Kuttner, "Discovering What Tribunals Do: Tribunal Standing Before the Courts" (2002) 81 Can. Bar Rev. 616.

Mullan, D.J. *Essentials of Canadian Law: Administrative Law*. (Toronto: Irwin Law, 2001) at p. 453-460.