

The Fundamentals of Tribunal Standing and Bootstrapping in Judicial Review

By: Shaun Fluker

Case Commented On: *Ontario (Energy Board) v Ontario Power Generation Inc.*, [2015 SCC 44](#)

In *Ontario (Energy Board) v Ontario Power Generation Inc.* the Supreme Court of Canada revisits the fundamentals of standing for a tribunal in a judicial review or statutory appeal of its impugned decision. The substance of this case involves utility regulation in Ontario, and my colleague Nigel Bankes has written on that substance [here](#). The relevant facts for this comment are simply that the Ontario Energy Board disallowed certain labour costs submitted by Ontario Power Generation in its rate application to the Board. The Ontario Divisional Court dismissed an appeal by Ontario Power, but the Ontario Court of Appeal reversed this finding, set aside the Board's decision, and remitted the case back to the Board for reconsideration. The Board appealed to the Supreme Court of Canada. No doubt in response to what then appears to be the Board attempting to defend its impugned decision before the Supreme Court, the proper role of the Ontario Energy Board in these proceedings was raised and my comment here focuses on what the Supreme Court of Canada decides in this regard.

The proper role of an administrative tribunal in an appeal or review of its own decision is ultimately determined in the discretion of the reviewing court. This much has been settled in the law for some time. The crux of the matter is how the reviewing court should exercise that discretion. In particular, how much and what kind of participation is the impugned tribunal entitled to have before the court? A tribunal which vigorously defends its decision may ultimately be ordered by the court to reconsider that decision, which raises serious concerns about whether the tribunal may become a judge in its own cause in that reconsideration. On the other hand, the tribunal's participation before the court can shed important light on the specialized nature of the administrative regime and thereby assist the reviewing court in deciding whether an error in law has occurred. Traditionally, reviewing courts have been more concerned with the former than the latter and the leading authority called for a more limited role by a tribunal.

For the last several decades the leading authority on the role of a tribunal has been *Northwestern Utilities v Edmonton*, [\[1979\] 1 SCR 684](#). In that case – which ironically also involved utilities regulation - the Supreme Court emphasized the natural justice concerns and expressly limited the role of an administrative tribunal during an appeal or review of its decision to that of *amicus curiae* (friend of the court) in explaining the tribunal record. In the words of the Supreme Court back in 1979:

One of the two appellants is the Board itself, which through counsel presented detailed and elaborate arguments in support of its decision in favour of the Company. Such active and even aggressive participation can have no other effect than to discredit the impartiality of an administrative tribunal either in the case

where the matter is referred back to it, or in future proceedings involving similar interests and issues or the same parties. The Board is given a clear opportunity to make its point in its reasons for its decision, and it abuses one's notion of propriety to countenance its participation as a full-fledged litigant in this Court, in complete adversarial confrontation with one of the principals in the contest before the Board itself in the first instance.

It has been the policy in this Court to limit the role of an administrative tribunal whose decision is at issue before the Court, even where the right to appear is given by statute, to an explanatory role with reference to the record before the Board and to the making of representations relating to jurisdiction (*Northwestern Utilities* at page 709).

Of course it should be noted that *Northwestern Utilities* was issued in 1979, the same year in which the Supreme Court drastically reconfigured the fundamentals of judicial review in Canada by ruling the common law doctrines of fairness and reasonableness applied to all administrative decision-making, not just those who exercised a quasi-judicial function (see *Nicholson v Haldimand-Norfolk Regional Police Commissioners*, [\[1979\] 1 SCR 311](#) and *C.U.P.E. v N.B. Liquor Corporation*, [\[1979\] 2 SCR 227](#)). This application of the fairness and reasonableness doctrines to a wide range administrative decision-making would inevitably require the Court to revisit the rule that the participation of a tribunal in the review or appeal of its decisions be limited to representations on jurisdiction. Indeed the Supreme Court did purport to expand the role of a tribunal with its 1989 *Caimaw v Paccar of Canada Ltd.*, [\[1989\] 2 SCR 983](#) decision, holding that a tribunal could also speak to the applicable standard of review and even the reasonableness of its decision. But *Northwestern Utilities* was not expressly overruled, and the Supreme Court acknowledges in *Ontario Power Generation* (at paras 43 to 45) that Canadian courts have since struggled to reconcile *Northwestern Utilities* and *Paccar* in relation to the proper role for a tribunal in judicial review.

More recent decisions from the Alberta Court of Appeal on this subject have nonetheless cautioned against a rigid application of *Northwestern Utilities*. In *Leon's Furniture Limited v Alberta (Information and Privacy Commissioner)*, [2011 ABCA 94](#) and *1447743 Alberta Ltd. v Calgary (City)*, [2011 ABCA 84](#) the Court of Appeal endorsed a contextual approach towards establishing the proper role of a tribunal. In these decisions, the Alberta Court of Appeal held relevant considerations for a reviewing court may include applicable legislative provisions that speak to the tribunal's role in the appeal and the nature of the tribunal proceedings, the more adjudicative tribunal proceedings are the more limited its participation will be in a judicial review of its decisions.

In *Ontario Power Generation* the Supreme Court of Canada expressly endorses this contextual approach, and the Court has overruled *Northwestern Utilities* to the extent it strictly limits the tribunal role to matters concerning the record or jurisdiction:

The considerations set forth by this Court in *Northwestern Utilities* reflect fundamental concerns with regard to tribunal participation on appeal from the tribunal's own decision. However, these concerns should not be read to establish a categorical ban on tribunal participation on appeal. A discretionary approach, as discussed by the courts in *Goodis*, *Leon's Furniture*, and *Quadrini*, provides the 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 and analysis: see N. Semple, “The Case for Tribunal Standing in Canada” (2007), 20 *C.J.A.L.P.* 305; L. A. Jacobs and T. S. Kuttner, “Discovering What Tribunals Do: Tribunal Standing Before the Courts” (2002), 81 *Can. Bar Rev.* 616; F. A. V. Falzon, “Tribunal Standing on Judicial Review” (2008), 21 *C.J.A.L.P.* 21 (at para 52).

A reviewing court should first look to the tribunal’s governing legislation to see if it clearly establishes the role of the tribunal in an appeal or review of its decisions (at para 59). In cases where the participation of a tribunal is in dispute, it is likely because the legislation either does not expressly provide for the role of the tribunal or does not limit that role to strictly speaking to the record or jurisdiction. So in those cases where the governing legislation does not clearly set out the role of the tribunal, the matter is determined in the discretion of the reviewing court. Justice Rothstein sets out three factors for a reviewing court to consider in deciding what the proper role for the tribunal is in a given case (at para 59):

In accordance with the foregoing discussion of tribunal standing, where the statute does not clearly resolve the issue, the reviewing court must rely on its discretion to define the tribunal’s role on appeal. While not exhaustive, I would find the following factors, identified by the courts and academic commentators cited above, are relevant in informing the court’s exercise of this discretion:

- (1) If an appeal or review were to be otherwise unopposed, a reviewing court may benefit by exercising its discretion to grant tribunal standing.
- (2) If there are other parties available to oppose an appeal or review, and those parties have the necessary knowledge and expertise to fully make and respond to arguments on appeal or review, tribunal standing may be less important in ensuring just outcomes.
- (3) Whether the tribunal adjudicates individual conflicts between two adversarial parties, or whether it instead serves a policy-making, regulatory or investigative role, or acts on behalf of the public interest, bears on the degree to which impartiality concerns are raised. Such concerns may weigh more heavily where the tribunal served an adjudicatory function in the proceeding that is the subject of the appeal, while a proceeding in which the tribunal adopts a more regulatory role may not raise such concerns.

Concern remains over the appearance of partiality that can arise with tribunal participation in an appeal or review of its decisions, but *Ontario Power Generation* confirms that this concern does not necessarily mean a tribunal is strictly limited to a neutral role.

The Court also addresses the related matter of bootstrapping – known in this context as a tribunal attempting to add to its initial decision with additional reasons or justifications provided in argument during judicial review proceedings. One might have expected the Court to state this is clearly improper based on the principle that a tribunal should not be allowed to use judicial review to amend or supplement the impugned decision (described as the principle of finality by the Court at para 65). However Justice Rothstein does not fully close this door (at paras 68-69):

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 should they be called upon to explain them on appeal or review. A tribunal may also respond to arguments raised by a counterparty. A tribunal raising arguments of these types on review of its decision does so in order to uphold the initial decision; it is not reopening the case and issuing a new or modified decision. The result of the original decision remains the same even if a tribunal seeks to uphold that effect by providing an interpretation of it or on grounds implicit in the original decision.

I am not, however, of the opinion that tribunals should have the unfettered ability to raise entirely new arguments on judicial review. To do so may raise concerns about the appearance of unfairness and the need for tribunal decisions to be well reasoned in the first instance. I would find that the proper balancing of these interests against the reviewing courts' interests in hearing the strongest possible arguments in favour of each side of a dispute is struck when tribunals do retain the ability to offer interpretations of their reasons or conclusions and to make arguments implicit within their original reasons: see *Leon's Furniture*, at para 29; *Goodis*, at para 55.

What is or is not an 'entirely new argument' that violates the principle of finality as opposed to a proper one that is implicit in the reasons provided by a tribunal in its decision, will undoubtedly be the focus of future proceedings. And I share the discomfort expressed by Professor [Paul Daly](#) on this aspect of Justice Rothstein's judgement. However this statement on bootstrapping does appear to be somewhat consistent with other recent decisions where the Court has allowed a tribunal to supplement its initial decision with arguments it did not set out in its initial decision (See e.g., *McLean v British Columbia (Securities Commission)*, [2013 SCC 67](#)).

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