

DISCOVERING WHAT TRIBUNALS DO: TRIBUNAL STANDING BEFORE THE COURTS

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“We like to picture to ourselves the field of the law as accurately mapped and plotted. We draw our little lines, and they are hardly down before we blur them. As in time and space, so here. Divisions are working hypotheses, adopted for convenience. We are tending more and more toward an appreciation of the truth that, after all, there are few rules; there are chiefly standards and degrees.”

— Benjamin Cardozo, *The Nature of the Judicial Process*
(New Haven: Yale U. Press, 1921) 161.

In matters of both substance and procedure, a general shift from formalism to functionalism has characterized the administrative law jurisprudence emanating from our Courts over the past fifty years. Yet, within the particular sphere of the discourse between courts and tribunals it is not immediately apparent that the Courts have embraced the functional over the formal in determining of whether to grant tribunals standing on judicial review of their own decisions. Formalism continues to predominate in the cases on tribunal standing, a perennial issue for the Courts. In this article, the authors examine the caselaw and suggest that a more pragmatic and functional approach to tribunal standing might provide a better framework of analysis and a more coherent jurisprudence. Both structural and evidentiary issues are explored. The article suggests Courts articulate more explicitly an integrated theory of tribunal standing, one cast in terms of a pragmatic and functional approach. Such an approach is most likely to enhance the relationship between courts and tribunals.

En ce qui concerne les questions de substance ainsi que celles de procédure, notre jurisprudence de droit administratif, surtout au fil des cinquante dernières années, se caractérise par un mouvement privilégiant la fonction sur la forme. Néanmoins, quand elles tranchent la question de la qualité pour agir des tribunaux administratifs dans les instances de contrôle judiciaire de leurs propres décisions, il n'est pas clair que les cours adoptent une approche fonctionnelle. Pour ce qui est de la jurisprudence sur les questions entourant la qualité pour agir des tribunaux administratifs,

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questions qui reviennent souvent devant les cours, le formalisme continue de prévaloir et les causes sont difficiles à réconcilier. Dans cet article, les auteurs examinent cette jurisprudence et suggèrent qu'une approche pragmatique et fonctionnelle de cette question de locus standi offre un meilleur cadre d'analyse et peut amener une jurisprudence plus cohérente. Des questions structurelles et de preuve sont considérées. Les auteurs concluent que, si les cours articulaient plus explicitement une théorie intégrée de la qualité des tribunaux administratifs pour agir devant les cours supérieures, théorie basée sur une approche pragmatique et fonctionnelle, les relations entre les cours et les tribunaux seraient améliorées.

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I. Introduction

*UES Local 298 v. Bibeault*¹ heralded the beginning of the 'pragmatic and functional' approach to judicial review. Justice Beetz's insight into the need to move from the formalistic analysis of whether a matter addressed by a tribunal is a collateral question or within its jurisdiction, to a more purposive inquiry that focuses on the intention of the legislator, sparked the beginning of a trend. Since *Bibeault*, we have seen use of the pragmatic and functional approach take flight from the discrete issue of the reach of a tribunal's jurisdiction to an expansive determination of legislative intent animating its enabling legislation. It is the approach now taken to determine the appropriate standard of review, as in *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*², as well as compliance generally with the duty to act fairly. Indeed, as regards fairness, the pragmatic and functional approach adopted by the courts was said to be 'close to empiric' in *Knight v. Indian Head School Division No. 19*³, and, as we have seen in *Baker v. Canada (Minister of Citizenship and Immigration)*⁴, it assists in fleshing out a broad spectrum of fairness issues. These include

¹ [1988] 2 S.C.R. 1048 [hereinafter *Bibeault*].

² [1998] 1 S.C.R. 982 [hereinafter *Pushpanathan*].

³ [1990] 1 S.C.R. 653 per Justice L'Heureux-Dubé at 682.

⁴ [1999] 2 S.C.R. 817 [hereinafter *Baker*].

participatory rights, reasonable apprehension of bias and the duty to give reasons. Moreover, *Baker* extends the pragmatic and functional approach to embrace review of the exercise of administrative discretion.

This trend may offer a hint of navigational guidance in charting the still murky waters of the interaction between tribunals and courts when recourse is had to the latter in order to review the workings of the former. Should tribunals have standing before courts on judicial review of their own decisions? And if so, to what issues should tribunals be allowed to speak? How, if at all, may they present evidence to the court? Taking a pragmatic and functional approach to these and related issues might well further the development of a jurisprudence which assists the courts both in discovering what it is that tribunals do, and in assessing their competence and expertise as they undertake their statutory mandates.

On matters of both substance and procedure, a general shift from formalism to functionalism has characterized the jurisprudence emanating from our Courts over the past fifty years. This is the lens through which we propose to explore the important issue of the relationship between courts and tribunals in the realm of administrative law. Our goal is not so much to provide answers as it is to raise questions about that relationship as played out in the arena of judicial review of administrative action. We address first the vexing question of tribunal standing on an application for judicial review, one which can be characterized as *the* critical structural issue that undergirds any discussion on the discourse between courts and tribunals. In addition, we explore a series of evidentiary questions touching on how tribunals might best convey to courts what it is that they do. We conclude that a pragmatic and functional approach to both the structural and the evidentiary issues raised is most likely to enhance the relationship between courts and tribunals, and so further their common quest 'to render justice according to law'.

II. Tribunal Standing Generally⁵

A. *The cases*

Although there are earlier cases that deal with the issue, an examination of the modern law on the standing of tribunals necessarily starts with *Northwestern*

⁵ Despite the ubiquity of the standing issue in practice before the courts, it has received surprisingly little notice in the legal literature. A brief reference is made in T. Cromwell, *Locus Standi* (Toronto: Carswell, 1986) at 107, fn. 27. The principal Canadian monographs on administrative law treat the issue more fully. S. Blake devotes several paragraphs with reference to the principal cases in *Administrative Law in Canada*, 3rd ed. (Toronto: Butterworths, 2001) at 171-72; D. Jones and A. de Villars give a case review in footnote form in *Principles of Administrative Law*, 3d ed. (Toronto: Carswell, 1999) at 580, fn. 114; D. Mullan gives a thoughtful critique of the cases in *Administrative Law* (Toronto: Irwin Law, 2001) at 454-59; the treatment by R. Reid and H. David in *Administrative Law and Practice*, 2d ed. (Toronto: Butterworths, 1978) c.10 at 293-98 precedes the principal modern cases.

Of the looseleaf services, D. Brown and J. Evans, *Judicial Review of Administrative Action in Canada* (Toronto: Canvasback Publishing, 1998) discuss the topic, providing

*Utilities Ltd. v. City of Edmonton*⁶. Here, Justice Estey found that a statutory delegate which had standing to participate in an appeal of its decision by virtue of the Alberta *Public Utilities Board Act*⁷ should only have the limited role of: i) explaining the record; and ii) making representations on its jurisdiction to make the order in question.

Ten years later, our Supreme Court revisited the issue of tribunal standing in *CAIMAW v. Paccar of Canada Ltd*⁸. The right to participate on judicial

extensive case and statutory citations at vol.2, c.4:4210, at 4/49-55 and R. Macaulay and J. Sprague address the issue in *Practice and Procedure Before Administrative Tribunals* (Toronto: Carswell, 2001) at vol. 3, c. 28.17, at 28/47-51.

Journal articles are sparse. On tribunal standing in Canada, we found of assistance F. Aquin and D. Chénard, "Les tribunaux administratifs devant les cours supérieures: étude des principes juridiques applicables à leur qualité pour agir", (1986) 16 R.D.U.S. 781; H. Janisch, "Standing of the Decision Maker in Proceedings for Judicial Review", in I. Feltham, ed., *International Trade Dispute Settlement: Implications for Canadian Administrative Law*, (Ottawa: Centre for Trade Policy and Law, 1996) at 11; D. Mullan, "Recent Developments in Nova Scotian Administrative Law", (1978) 4 Dalhousie L.J. 467 at 486 and M. Picher, "Adjudicator, Administrator or Advocate? The Role of the Labour Board in Judicial Review Proceedings", (1984) 62 Can.Bar Rev. 22. As regards Australia, see E. Campbell, "Appearances of Courts and Tribunals as Respondents to Applications for Judicial Review", (1982) 56 Australian L.J. 293.

We earlier outlined our approach to tribunal standing on judicial review in L. Jacobs and T. Kuttner, "The Quagmire of Tribunal Standing" (2001), 30 Admin. L.R. (3d) 71, a case comment on *Alberta v. Alberta (Labour Relations Board)* (2001), 30 Admin. L.R. (3d) 24 (Alta. Q.B.).

⁶ [1979] 1 S.C.R. 684 [hereinafter *Northwestern*].

⁷ R.S.A. 1970, c. 302, s.65.

⁸ [1989] 2 S.C.R. 983, *sub nom. CAIMAW Local 14 v. Canadian Kenworth Co.* [hereinafter *Paccar*]. The intervening decision of the Supreme Court in *Bibeault v. McCaffrey*, [1984] 1 S.C.R. 176, where the tribunal was allowed standing to argue a natural justice issue, is an anomaly which was distinguished almost into oblivion by Justice LaForest in *Paccar*. Justice LaForest held that, insofar as the right to be heard in *Bibeault v. McCaffrey* was statutorily entrenched, the matter was jurisdictional. In *Bibeault v. McCaffrey*, the statutory provisions of the Quebec *Labour Code* were unclear as to whether an employee could be heard before a labour commissioner conducting an investigation. Justice Lamer (as he then was) had framed the issue as relating to the scope of the provision of the *Labour Code* that outlined who was an "interested party". In this way, the issue before the reviewing court was whether the tribunal had given a patently unreasonable interpretation to the statutory right to be heard, such as to occasion loss of jurisdiction. Its jurisdiction being disputed in that way, the tribunal was "entitled to appeal in order to defend it." (per Justice Lamer at 191). In *Paccar*, Justice LaForest reconciled *Bibeault v. McCaffrey* with *Northwestern* by implying that the main issue in the former was whether the decision-makers had interpreted the statute in a patently unreasonable manner. If so, then a loss of jurisdiction would result. Denial of natural justice, however, was only an ancillary consequence of the act of interpreting the statute. The situation in *Bibeault v. McCaffrey* was distinguished from fact situations in which a decision-maker had allegedly denied natural justice to a party absent such a statutory overlay, in which case on the authority of *Northwestern* it would not be heard. Is the presence of a statute enough of a shield to protect this case from application of the rule against a tribunal making submissions to defend against an alleged breach of natural justice? Or, is this simply another constructed way of allowing the tribunal to speak in a situation where it seems appropriate? See the discussion below in section B. *Jurisdiction and Natural Justice*.

review was developed, this time at common law, as no statutory right to appeal was involved.⁹ The tribunal in *Paccar* was not only given the right to make submissions explaining the record before the Court, but also to show that it had jurisdiction to embark on the inquiry and that it had not lost that jurisdiction through a patently unreasonable interpretation of its powers. In explaining why fuller participation would be improper, i.e. arguing on the merits 'that the decision of the board was correct', the Court referred to Justice Estey's *dicta* in *Northwestern*, and adopted as well the reasons of Justice Taggart in the then recent decision of the British Columbia Court of Appeal, *BCGEU v. Industrial Relations Council*¹⁰. It is useful to set out the relevant passages from *Northwestern*, *Paccar* and *BCGEU* in full, since they have come to be known as the traditional basis for limited tribunal standing:

The Board has a limited status before the Court, and may not be considered as a party, in the full sense of that term, to an appeal from its own decisions. In my view, this limitation is entirely proper. This limitation was no doubt consciously imposed by the Legislature in order to avoid placing an unfair burden on an appellant who, in the nature of things, must on another day and in another cause again submit itself to the [...] activities of the Board. It also recognizes the universal human frailties which are revealed when persons or organizations are placed in such adversarial positions... Such active and even aggressive participation [presenting detailed and elaborate arguments in support of its impugned decision] 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. (Justice Estey in *Northwestern* at 708-9).

In my view, the Industrial Relations Council has standing before this Court to make submissions not only explaining the record before the Court, but also to show that it

⁹ Starting with the judgement of Justice Estey in *Northwestern*, *supra* note 6, we see that there has been a convergence of judicial approach through which the extent of the participatory right of a tribunal on judicial review and on statutory appeal have come to be treated in the same way. In *Northwestern*, a statutory appeal case in which the right to appear was also granted to the tribunal by statute, Justice Estey relied on earlier decisions, including *Saskatchewan (Labour Relations Board) v. Dominion Fire Brick and Clay Products Limited*, [1947] S.C.R. 336 [hereinafter *Dominion Fire Brick and Clay*] and *New Brunswick (Labour Relations Board) v. Eastern Bakeries Ltd.*, [1961] S.C.R. 72 [hereinafter *Eastern Bakeries*], both of which were initiated through the process of judicial review. This convergence explains the ease with which both *Northwestern* and *Paccar* are nowadays cited as authoritative, irrespective of which of the two routes is used to bring the matter before the superior court.

¹⁰ (1988), 26 B.C.L.R.(2d) 145 [hereinafter *BCGEU*].

had jurisdiction to embark upon the inquiry and that it has not lost that jurisdiction through a patently unreasonable interpretation of its powers. (Justice LaForest in *Paccar* at 1014).

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. (Justice Taggart in *BCGEU* at 153.)

Yet, despite the fact that *Paccar* and the decisions underlying it are cited regularly by the courts, the law on tribunal standing remains far from clear.

B. *Jurisdiction and Natural Justice*

One source of difficulty arises in defining the notion of jurisdiction. We know that a tribunal has standing to show that it had 'jurisdiction to embark on the inquiry' but jurisdiction can be a deceptive concept. This becomes apparent when 'jurisdiction' is used in its broader sense. Thus, when a tribunal has committed a breach of natural justice or flagrant error of law, it was at one time, and arguably still is said to have lost its jurisdiction. Justice Dickson expressed this view in his celebrated dissent in *Harelkin v. University of Regina*¹¹, stating that "where there has been a denial of natural justice (and hence a lack of jurisdiction) *certiorari* will issue..."¹². The Supreme Court of Canada has debated whether to allow a tribunal to have standing in such cases. In *Northwestern*, Justice Estey expressly stated that jurisdiction for the purposes of standing on judicial review did not include "the transgression of the authority of a tribunal by its failure to adhere to the rules of natural justice"¹³. He drew upon the remarks of Justice Spence in *Canada (Labour Relations Board) v. Transair Ltd*¹⁴, "that the finding that an administrative tribunal has not acted in accord with the principles of natural justice ... is a mere matter of technique in determining the jurisdiction of the Court to exercise the remedy of *certiorari* and is not a matter of the tribunal's defence of its jurisdiction"¹⁵ on which it

¹¹ [1979] 2 S.C.R. 561 [hereinafter *Harelkin*].

¹² *Ibid.* at 608.

¹³ *Supra* note 6 at 710.

¹⁴ [1977] 1 S.C.R. 722 [hereinafter *Transair*].

¹⁵ *Ibid.* at 746-47.

would otherwise have standing. For his part, Chief Justice Laskin disagreed sharply, stating: "I do not find anything in this provision to alter my view that the Board was entitled to make submissions as a party on any question going to its jurisdiction, including a question of natural justice under s. 28(1)(a) [of the *Federal Court Act*]." ¹⁶ But, he could attract only Justice Judson to this view, the majority siding with Justice Spence on this point.

However, there are more recent decisions in which the natural justice issue has arrived at the Bench cloaked behind a point that is seen to be more seemly for the tribunal to argue. In these cases, the tribunal itself has been granted standing to address the natural justice issue. This was the situation in *Re Consolidated-Bathurst Packaging Ltd. and International Woodworkers of America, Local 2-69 et al.* ¹⁷, where the Ontario Divisional Court was asked to determine whether a long-standing procedure adopted by the Ontario Labour Relations Board [OLRB] violated the principle of natural justice that 'he or she who hears must decide'. The Court found that, since it was the ordinary procedure followed by the Board generally in matters before it that was under attack, rather than its discrete conduct in a particular case, it was appropriate for the Board's counsel to make submissions in defence of its practice. Accordingly, counsel for the Board was given full latitude to answer the submissions of the applicant. ¹⁸ In a sense, this is all the more strange, since in its decision on reconsideration below ¹⁹ the Board had in fact taken the "clear opportunity to make its point in its reasons for its decision" on the natural justice issue. It is to be recalled that having had such an opportunity is the very rationale given by Justice Estey in *Northwestern* to forestall appearance by a tribunal before a court on review to argue its own case.

Perhaps one way to reconcile *Consolidated Bathurst* with the restricted approach to tribunal standing taken in *Northwestern* is to carve out an exception for what Justice Estey would call "a clear expression of intention on the part of the Legislature" ²⁰. Indeed, both Justice Rosenberg for the majority, and Justice Osler in dissent, distinguished *Northwestern* on this basis. ²¹ Each adverted to the fact that, since the *Ontario Judicial Review Procedure Act* ²² vested in the Board a right to be a party on an application for judicial review, the extent to which the Board would be entitled to participate became a rule of court instead of a rule of law. But surely it would have been preferable to recognize that it was

¹⁶ *Ibid.* at 730.

¹⁷ (1985), 20 D.L.R. (4th) 84 (Ont. Div. Ct.) [hereinafter *Consolidated Bathurst*]; rev'd on the merits (1986), 15 O.A.C. 398 (Ont. C.A.), aff'd [1990] 1 S.C.R. 282.

¹⁸ Neither the Court of Appeal nor the Supreme Court of Canada, before both of which the OLRB appeared and argued fully, addressed the standing issue, leaving undisturbed the ruling of the Divisional Court below.

¹⁹ [1983] OLRB Rep. (Dec.) 1995.

²⁰ *Supra* note 6 at 708.

²¹ Justice Rosenberg for the majority, *supra* note 17 at 91; Justice Osler in dissent, *ibid.* at 102.

²² R.S.O. 1980, c.224, s. 9(2).

necessary for the Board to present on its procedure for the simple reason that there was no one else in as good a position to explain the practice of full Board consideration of the broad policy implications stemming from a case heard by one of its panels, and the justifications underlying that practice. Justice Osler seemed to move in that direction when he noted that in the circumstances, “the Board was not here attempting to support a particular decision on the merits, but limited its submission to supporting its procedure so that the particular peril to be guarded against does not appear in the present case.”²³ This is the pragmatic and functional approach tailored to the requirements of the moment. Indeed, the ease with which courts have given standing as a matter of course to tribunals to defend their standard procedures when under assault—see for instance *Tremblay v. Quebec (Commission des affaires sociales)*²⁴, and most recently *Ellis-Don Limited v. Ontario (Labour Relations Board)*²⁵, in neither of which the matter is even broached, much less discussed—indicates that as one moves from the particular to the general one avoids what Justice Estey had castigated in *Northwestern* as “a spectacle not ordinarily contemplated in our judicial traditions”,²⁶ that of a decision-maker arguing the merits of its own decision.

The decision of the Federal Court in *Canada (Attorney General) v. Canada (Human Rights Tribunal)*²⁷, exemplifies a more pragmatic and preferable approach. There, an issue arose as to whether the Canadian Human Rights Commission [CHRC], granted standing as an intervener under the *Federal Court Rules*, should be entitled to make representations on its alleged breach of the rules of natural justice. Referring to the rule as it was formulated in *Northwestern*, Justice Reed, who found that the CHRC should have standing to do so, employed a pragmatic, functional and purposive analysis:

While that statement is framed in a very categorical way, I cannot believe that it was meant to be applied automatically in all cases of judicial review without some assessment of the nature of the tribunal in question and the grounds on which the decision is being challenged, such assessment to be undertaken in the context of the purpose behind the rule that accords tribunals only a limited role on judicial review applications.²⁸

Emphasizing that the rationale behind the limited standing rule is “to preserve, to the extent possible, the Tribunal’s image of impartiality” in the event the matter on review were remitted back to it for reconsideration, Justice Reed went on to note that procedural questions “such a [sic] using legal advisors to review decisions, the discussion of general questions of policy development by all members of the tribunal [and] whether an adequate number of days of notice has been provided” do not engage the merits of the particular tribunal

²³ *Supra* note 17 at 101.

²⁴ [1992] 1 S.C.R. 952 [hereinafter *Tremblay*].

²⁵ [2001] 1 S.C.R. 221 [hereinafter *Ellis-Don*].

²⁶ *Supra* note 6 at 710.

²⁷ (1994) 76 F.T.R. 1 (TD) [hereinafter *AG Canada v. CHRT*].

²⁸ *Ibid.* at para. 49.

decision.²⁹ Consequently, the CHRC was given the right to respond fully in a manner comparable to that of a party with respect to the natural justice issue raised in the application) the reasonable expectations doctrine.³⁰ More recently, in *City of Montreal v. CUPE Local 301*³¹ the Québec Conseil des services essentiels was granted standing, without comment, to argue fully its alleged breach of natural justice by its inadvertent failure to ensure the production of a transcript of a hearing by way of recording.

What can we draw from these cases? Obviously, there is a tension between the apprehension of partiality that could arise on one hand, were the tribunal to take on the role of litigant, and, on the other, the Court's need to acquire information as to its workings – information which may only be in the possession of the tribunal. If the *ratio* in *A-G Canada v. CHRT* is correct, then deciding when to grant standing on a natural justice question should be done on a case by case basis, taking into consideration the statutory framework and language, the nature of the tribunal, the grounds on which the decision is being challenged, the purpose of the traditional rule limiting tribunal representation and, finally, practicality. It is also probable that the type of natural justice issue and the point in time at which its alleged breach is said to have occurred will drive the analysis.

It is important to note that on the whole, these cases engage the first pillar of the natural justice doctrine: *audi alteram partem*. Thus, in *Consolidated-Bathurst*, the issue was the possibility of a decision being made by those who had not heard the case but who, as a matter of routine, considered its policy implications. Similarly, this was also the case in *Tremblay* and most recently in *Ellis-Don*. In all three cases, as in *A-G Canada v. CHRT*, where the processing of files in the ordinary course was at issue, the alleged breach was not one unique to the case actually being litigated. Had the question at issue before the Court in any of these cases centered on whether the tribunal had treated a particular litigant fairly during the course of its proceedings in a particular manner not usually followed by it, then the balancing of the factors determinative of whether standing should have been granted to the tribunal would have become a much more delicate task.

It would appear that the more particularized the factual instance giving rise to an alleged breach of natural justice, the less likely it is that standing will be

²⁹ *Ibid.* at para. 52.

³⁰ We are unfortunately unable to deal in depth here with the particular topic of the standing of investigatory commissions in contradistinction to that of adjudicative tribunals on judicial review proceedings. See, for example, on the federal side, *Canadian Human Rights Commission v. Canada (Attorney General) and Bernard* (1994), 164 N.R. 361 (F.C.A.), and on the provincial side, *Dairy Producers Co-operative Ltd. v. Human Rights Commission (Sask.) et al.* (1993), 117 Sask.R. 68 (Sask. Q.B.), in both of which the issue is touched upon in the human rights setting. Likewise, in the workers' compensation context, see *Skyline Roofing Ltd. v. Alberta (Workers' Compensation Board)* (2001), 292 A.R. 86 (Alta. Q.B.).

³¹ [1997] 1 S.C.R.793 [hereinafter *City of Montreal*].

given to the tribunal to defend its conduct. This is perhaps a distinguishing characteristic of *Northwestern*, and on Justice Spence's view, of *Transair* before it. But the issue is arguable, (*vide* Chief Justice Laskin's observations to the contrary in *Transair*³²), for the boundary between general procedure applicable to all, and individuated conduct applicable to one, is not always easily drawn.

C. *The Reasonable Apprehension of Bias Cases*

A similar tension can be seen in the cases dealing with bias. When asked to recuse for apprehension of bias, whether in the personal or the institutional sense, a tribunal or one of its members is immediately put to an election: either to rule on the issue itself, or demur in favour of its resolution before a judge.³³

³² *Supra* note 14 at 730.

³³ Contrast, for instance, *British Columbia Government Employees' Union v. British Columbia (Labour Relations Board)* (1986), 2 B.C.L.R. (2d) 66 [hereinafter *BCGEU v. BCLRB*], where the tribunal made a determination, with *Committee for Justice and Liberty v. National Energy Board*, [1978] 1 S.C.R. 369 [hereinafter *Committee for Justice and Liberty*], where the tribunal referred the matter to the Federal Court of Appeal by way of stated case. In a similar manner, a tribunal may adjourn to allow a party to bring the matter up before a court by way of judicial review. Interesting parallels can be drawn with cases in which a member of an appellate court is challenged for reasonable apprehension of bias and asked to recuse himself or herself. Ought the challenged judge to rule on the issue, or the full Bench? If it is the latter, who should deliver the ruling? There is no set practice in the common law jurisdictions, as G. Lester notes in his article, "Disqualifying Judges for Bias and Reasonable Apprehension of Bias: Some Problems of Practice and Procedure", (2001) 24 Adv. Q., 326 at 338-41. In Quebec, under the Quebec *Code of Civil Procedure*, R.S.Q., c. C-25 as amended, the grounds and procedure governing recusal are fully laid out in Book II, Title IV, Chapter V: Recusation, (arts. 234-42). The judge whose recusal is sought is given an opportunity to respond to such a motion in writing, but in the event of refusal to recuse, the matter is referred to the Court to be heard and determined in the absence of the judge challenged (arts. 237-41). The Supreme Court practice varies. Recently, Chief Justice Lamer converted a motion originally made to him to disqualify Justice Bastarache from sitting on a minority language school rights case, into a motion of recusal which he then referred directly to Justice Bastarache for determination. The latter gave his ruling dismissing the motion at the commencement of the proceedings, in open court and in the company of the full Bench although his colleagues did not formally participate in the proceedings on the motion (*Arsenault-Cameron v. Prince Edward Island*, [1999] 3 S.C.R. 851; we have drawn on the annotation by B. Crane and H. Brown, *Supreme Court of Canada Practice 2000*, 2001 Supplement (Toronto: Carswell 2001) at 54-5 in our discussion of the facts surrounding the disposition of this motion for recusal). Justice Major subsequently opined extra-judicially that an appeal could have been taken from Justice Bastarache's ruling to the other members of the panel seized of the case as "a sort of in-house solution" (*Toronto Globe and Mail*, 22 Nov. 1999). Given that Chief Justice Lamer himself had noted that the Supreme Court Rules "are not very clear [...] as to how one deals with a court of last resort in a situation such like this", it probably would have been preferable for him to have referred the motion to the full panel and had a judge other than Justice Bastarache give the ruling for the Court. This was the procedure followed by the Ontario Divisional Court in interlocutory proceedings brought in *Ellis-Don v. Ontario (Labour Relations Board)* (1992), 98 D.L.R. (4th) 762, where Justice Adams participated

In either case, a question of tribunal standing to defend against an allegation of partiality often arises when the matter is subsequently brought up on judicial review. And, the diverging jurisprudence on this matter shows that there is no certainty that the tribunal will be allowed to speak, regardless of the route chosen.

It is evident from a review of the case law that *Northwestern* signalled a turning point in judicial contemplation of the issue of tribunal standing in cases where allegations of reasonable apprehension of bias had been made. Cases predating *Northwestern* show a tendency to allow the member challenged for bias to appear on judicial review. In *Committee for Justice and Liberty v. National Energy Board*³⁴, the source of our modern jurisprudence on bias, the Chair of the National Energy Board was challenged for reasonable apprehension of bias due to his earlier role as President of the Canada Development Corporation, an interested party in the very matter before the Board. The Board elected not to make a ruling and instead referred the matter to the Federal Court of Appeal for determination. It was granted standing to argue the matter in full before both the Federal Court of Appeal and the Supreme Court of Canada, without comment by either of these two courts. Another example can be found in *Tomko v. Nova Scotia (Labour Relations Board)*³⁵, where the Board appeared before the Nova Scotia Court of Appeal to defend *inter alia* against an allegation of bias.

More characteristic of the approach taken since the decision in *Northwestern* is the case of *Black & McDonald Ltd. v. Construction Labour Relations Association of British Columbia*³⁶. There, the British Columbia Labour Relations

in proceedings on a motion to recuse made against him, but the ruling was made by another member of the panel on behalf of the full Bench. Another procedure was followed by Chief Justice Laskin in *Morgentaler v. R.* (S.C.C. Motion No. 13504 [2 October 1974], reproduced as Appendix A to J. Webber, "The Limits to Judges' Free Speech: A Comment on the Report of the Committee of Investigation into the Conduct of the Hon. Mr. Justice Berger", (1983-84) 29 McGill L.J. 369 at 405) There, speaking for the Court, Chief Justice Laskin dismissed a motion brought to have Justice de Grandpré recuse himself for personal views on abortion that he had publicly expressed while serving as president of the Canadian Bar Association. Justice de Grandpré did not participate in the proceedings at all, a practice which mirrors the procedure for recusal under the Quebec *Code of Civil Procedure*. By contrast, *Re Pinochet*, (1998) 237 N.R. 201 (H.L.) presents a highly unusual approach. Here, a newly struck panel of entirely different Law Lords set aside an earlier order of the House adverse to the interests of the challenging party. This occurred when disqualifying conduct on the part of a member of the original panel was discovered after the original ruling had been issued. On the subject of judicial recusals generally, see G. Lester, *supra* as well as the recent study by P.L. Bryden, "Legal Principles Governing the Disqualification of Judges", prepared for the National Judicial Institute's Continuing Education Seminar for Appellate Judges Vancouver, 10 April 2002. Of interest also is *Taylor v. Lawrence*, [2002] 2 All E.R. 353 (C.A.), one of the most recent English cases on the subject in which the English Court of Appeal offers guidance to trial judges, cautioning against over scrupulousness in applying the 'reasonable apprehension' standard.

³⁴ *Ibid.*

³⁵ (1974), 9 N.S.R. (2d) 277 (N.S.C.A.), affirmed on appeal, [1977] 1 S.C.R. 112.

³⁶ (1985), 19 Admin. L.R. 43 (B.C.L.R.B.).

Board (BCLRB) on an application for reconsideration, itself gave expansive reasons rejecting the submission of reasonable apprehension of bias on the part of a member of a Board Panel struck to hear a matter raising important issues as to the boundary between construction and maintenance work. When the matter came up for judicial review,³⁷ the Court of Appeal denied the Board standing on the *Northwestern* principle.

The same reluctance to grant standing to a tribunal against which bias is alleged is evident again in the ongoing saga of Bell Canada and the Canadian Telephone Employees Association, in which the Canadian Human Rights Tribunal is alleged to be institutionally incapable of providing a fair and impartial hearing due to its legislative connections with the Canadian Human Rights Commission. The tribunal had concluded that it had jurisdiction to consider the question of its independence and decided not to refer the question to the Court. Its finding was that it possessed the necessary independence to provide a fair hearing. Upon seeking to intervene in the further judicial review proceedings taken before the Federal Court, in *Bell Canada v. C.E.P.U. of Canada et al.*³⁸, the President of the Human Rights Tribunal was refused intervener status. Referring to *Northwestern*, the Federal Court Trial Division was of the opinion that, even if it could be assumed that the question of the Tribunal's independence relates to jurisdiction, "it would be impossible for the President of the Tribunal to make submissions on that issue without becoming enmeshed in the merits of the case."³⁹

But if this jurisprudential divergence manifests itself generally in a pre/post *Northwestern* temporal divide, it manifests itself with even greater acuity and less reconcilability in the New Brunswick jurisprudence. In the decision of the New Brunswick Court of Appeal in *SCFP Section Locale 1378 v. Résidences Mgr. Chiasson Inc.*⁴⁰, although affidavits sworn by both the Chair and a member of an Arbitration Board were accepted into evidence before the Court, it is clear from the judgement of Justice Bastarache that standing would have been denied to either had it been sought. Yet, only weeks before that decision had issued, Justice Turnbull of the New Brunswick Court of Queen's Bench had received an affidavit and granted standing to a Commissioner to defend not only his jurisdiction but also against an allegation of reasonable apprehension of bias in *Irving Oil v. Industrial Inquiry Commission* (1996).⁴¹ And, several years earlier Justice McIntyre of that Court, in *048545 NB Ltd. v. Sheet Metal Workers Assn, Local 437*⁴², who had received there in evidence an affidavit sworn by a Vice-Chair of the New Brunswick Industrial Relations Board, filed in response

³⁷ (1986), 27 D.L.R. (4th) 676, 19 Admin. L.R. 73 (B.C.C.A.), *sub nom. Refrigeration Workers Union, Local 516 v. British Columbia (Labour Relations Board)* [hereinafter *Refrigeration Workers Union, Local 516*].

³⁸ (1997), 143 F.T.R. 24 [hereinafter *Bell Canada*].

³⁹ Per Justice McGillis, *ibid.* at para. 9.

⁴⁰ (1996), 172 N.B.R. (2d) 308 (N.B.C.A.) [hereinafter *Résidences Mgr. Chiasson*].

⁴¹ (1996), 173 N.B.R. (2d) 279 (N.B.Q.B.) [hereinafter *Irving Oil*].

⁴² (1993), 132 N.B.R. (2d) 394 (N.B.Q.B.) [hereinafter *SMW Local 437*].

to an allegation of reasonable apprehension of bias, also allowed the Board to appear and make argument on the issue. Several months later Justice Turnbull of the same Court did likewise in *Loch Lomond Villa Inc. v. NBGEU, Local 5*.⁴³

In other jurisdictions, too, standing has been granted in such cases. Thus, in *UFCW Local 1252 v. CAW - Canada*⁴⁴, the Prince Edward Island Court of Appeal upheld two decisions of Chief Justice MacDonald of the Trial Division⁴⁵. There, a reasonable apprehension of bias was held to be well founded arising out of the fact that a business agent of a trade union, who sat as well part-time as an employee member of the Board, took part in proceedings and appeared as a witness before a Panel of the Board in two cases. Some members of the Panel seized were also members, together with the union business agent appearing, of other Panels of the Board in unrelated matters then pending before it. There too standing was given to the Board to appear and defend on the bias issue.

*Great Atlantic & Pacific Co. of Canada v. Ontario (Human Rights Commission)*⁴⁶, where both institutional and individual bias was alleged, epitomizes the tension in the jurisprudence. There, the one-person Board of Inquiry had retained counsel to defend against the allegations. The Ontario Divisional Court criticized her for doing so, noting that "[g]enerally speaking", they considered it "wrong for individual adjudicators to so retain counsel."⁴⁷ Nevertheless, "[i]n the unusual circumstances" of the case, the Court exercised its inherent discretion and granted the adjudicator standing to argue the bias issue "in order to expedite the hearing before us and to avoid unnecessary argument."⁴⁸ However, the adjudicator there was made liable jointly and severally with the Human Rights Commission in costs amounting to \$10,000 due equally to each of two parties) a sobering consequence which should serve to warn any tribunal which seeks too vigorously to defend for want of impartiality.

It would appear that three lines of jurisprudence intersect in cases dealing with a challenge for bias. First, there is the old principle that failure to raise an objection of disqualifying apprehension of bias, immediately upon the circumstances becoming known to the parties below, will constitute waiver of any right to do so later on judicial review, as was articulated in *Ghirardosi v. British Columbia*⁴⁹.

Second, there is the more recently developing jurisprudence that has adapted to jurisdictional challenges on administrative law principles, the

⁴³ (1993), 139 N.B.R. (2d) 167 (N.B.Q.B.) [hereinafter *Loch Lomond Villa*].

⁴⁴ (1988), 31 Admin. L.R. 196 (P.E.I.S.C. App.Div.) [hereinafter *UFCW Local 1252*].

⁴⁵ (1988), 31 Admin. L.R. 200; 213 (P.E.I.S.C.T.D.) sub nom. *UFCW Local 1252 v. Labour Relations Board of Prince Edward Island*.

⁴⁶ (1993), 13 O.R.(3d) 824 (Ont. Div. Ct.) [hereinafter *Great Atlantic & Pacific Co. of Canada*].

⁴⁷ *Ibid. per curiam* at 833.

⁴⁸ *Ibid.*

⁴⁹ [1966] S.C.R. 367 at 372.

practice of the Supreme Court on *Charter* challenges to jurisdiction articulated in *Attorney General of Manitoba v. Metropolitan Stores (MTS) Ltd.*⁵⁰. These are not to be made by way of interlocutory motion, which was the earlier practice, but rather only after the hearing of the case on the merits by the tribunal below. The decision of Chief Justice Scott of the Manitoba Court of Appeal in *Tyndall v. Sheet Metal Workers', Local 511* is representative of the trend:

Experience teaches that there are many legitimate pragmatic reasons which, save for most exceptional circumstances, operate to discourage courts from accepting requests to become involved prior to the conclusion of administrative proceedings.⁵¹

Finally, there is Justice Estey's observation in *Northwestern* that, because it is given a clear opportunity to respond to challenges as to the legality of its actions in its reasons for decision, a tribunal ought not to participate as a full-fledged litigant before the Courts on judicial review. This would explain the reluctance of the Courts in *Refrigeration Workers Union, Local 516* and in *Great Atlantic & Pacific Co. of Canada* to grant standing to a tribunal to argue on the bias issue, as in each the tribunal had itself fully addressed the matter. The tribunals had not had that opportunity in the several New Brunswick cases addressed here—*SMW Local 437*, *Loch Lomond Villa*, *Irving Oil*, and *Résidences Mgr. Chiasson*. In each of these, the tribunal was allowed to explain itself on the bias issue by way of affidavit filed before the reviewing Court, and in the Queen's Bench cases by way of appearance to argue as well. *Résidences Mgr. Chiasson Inc.* takes a much more restrictive view on the standing question. In light of the intersection of these three types of cases, one could argue that on an allegation of reasonable apprehension of bias, it is acceptable, and even desirable, for the tribunal to address the issue on the merits rather than remit it immediately for determination by the courts. This way, the tribunal has at least one opportunity to be heard.

We would suggest that as on the fairness side of natural justice doctrine, so too on the bias side, the decision as to whether to grant standing to the tribunal on judicial review should be assessed on a case by case basis, taking into consideration the statutory framework and language, the nature of the tribunal, the grounds on which the decision is being challenged, the purpose of the rule limiting tribunal representation and the practicalities of the situation. Again, the more individuated is the characterization of the apprehension of bias, the less likely it is that standing should be given to the tribunal to defend itself. Cases such as *Great Atlantic & Pacific Co. of Canada* and *Résidences Mgr. Chiasson Inc.*, where standing was not granted, would fall within this class. By way of contrast, where the bias allegation touches the structural integrity of the tribunal in a more general sense and so goes beyond the particularities of a single case, it may be appropriate to grant the tribunal standing to explain itself. Cases such

⁵⁰ [1987] 1 S.C.R. 110.

⁵¹ (1998), 156 D.L.R.(4th) 569 at 576 (Man. C.A.), and cf. *BCGEU v. BCLRB*, *supra* note 33 to the same effect.

as *Tomko*, *SMW Local 437*, *Loch Lomond Villa* and *UFCW Local 1252*, in all of which standing was granted, would fall within this category. So too would *Refrigeration Workers Union, Local 516* where arguably standing ought not to have been denied to the tribunal. On this analysis, an integrated pragmatic and functional approach would be taken on the standing issue in both the bias and the fairness cases.

D. *Jurisdiction and Constitutional Challenges*

Despite the clear language of entitlement to defend jurisdiction found in *Paccar*,⁵² the cases reveal some lingering doubt with respect to challenges touching the jurisdiction of a tribunal in the constitutional sense, whether on division of powers or *Charter* grounds. Thus, in *Ferguson Bus Lines v. Amalgamated Transit Union, Local 1374*⁵³, where the Canada Labour Relations Board [CLRB] had determined that the labour relations of a portion of the enterprise were federal, it was allowed to be heard on the issue of “whether it had lost jurisdiction through a patently unreasonable interpretation of its powers”, but not on the division of powers issue, “since it had ample opportunity to express itself in its decision.”⁵⁴ In support, the Court cited extensively from the then recently released decision of the Supreme Court in *Paccar*. For his part, Justice Mahoney in concurring reasons for decision remonstrated as to:

[t]he unaccountable persistence of the Canada Labour Relations Board in seeking to be heard by this Court when its jurisdiction is in no way in issue and when there are no ‘considerations rooted in [its] specialized jurisdiction or expertise... which may render reasonable what would otherwise appear unreasonable to someone not versed in the intricacies of the specialized area.’⁵⁵

He then went on to chastise the Board in unusually forceful language for the “monotonous regularity” with which it pressed for the right to appear on judicial review concluding that:

... a challenge to the legislative jurisdiction of Parliament is not a challenge to the Board’s jurisdiction within the contemplation of *Northwestern Utilities*. The Board had no right to be heard on the constitutional issue. Should the public interest require representation in such a case, it is the right and the responsibility of the Attorney General, not the Board.⁵⁶

⁵² *Supra* note 8.

⁵³ (1990), 68 DLR (4th) 699 (F.C.A.) [hereinafter *Ferguson Bus Lines*].

⁵⁴ *Ibid.* at 708 per Justice Desjardins.

⁵⁵ *Ibid.* at 702, citing *Paccar*.

⁵⁶ *Ibid.* at 703. The persistence of the CLRB in seeking to appear on all applications for judicial review before the Federal Court had been severely criticized by it earlier in *Vancouver Wharves Ltd. v. International Longshoremen’s Union, Local 514* (1985), 60 N.R. 118; and again in *Canadian Pacific Airlines Ltd. v. Canadian Airline Pilots’ Association*, [1988] 2 F.C. 493.

This strict reading of *Paccar* and *Northwestern* still continues to predominate in the Federal Court system.⁵⁷

However, on the constitutional point, it is a reading of Justice Estey's judgement in *Northwestern* apparently not shared even by him. In 1983, Justice Estey participated in two cases in which the CLRB was given standing to argue jurisdictional questions with constitutional overtones. First, in *Canada Labour Relations Board v. Paul L'Anglais Inc.*⁵⁸, the CLRB appeared as appellant both to defend its jurisdiction on division of powers grounds and to challenge the continuing jurisdiction of the Superior Court of Quebec to issue a writ of evocation against it. Shortly thereafter, in *Northern Telecom Canada Ltd. v. Communication Workers of Canada*⁵⁹, the CLRB was granted standing by way of a stated case to defend its decision refusing to take jurisdiction on division of powers grounds, with Justice Estey authoring the judgement for the majority. In both cases, the Attorney General for Canada was also granted standing to argue the constitutional points raised, but in neither was the CLRB's standing to argue the division of powers and related issues of curial jurisdiction questioned. Moreover, since the decision of the Federal Court of Appeal in *Ferguson Bus Lines*, the Supreme Court has maintained its earlier practice where the jurisdiction of a labour board is challenged on constitutional grounds. So, for example, in division of powers cases such as *Ontario Hydro v. Ontario Labour Relations Board*⁶⁰ the OLRB appeared as respondent to defend its jurisdiction, and the Attorney General for Ontario as intervener in support. Similarly, in *Cuddy Chicks Ltd. v. OLRB*⁶¹, where the OLRB again appeared as a respondent to defend its jurisdiction to entertain a *Charter* challenge with the Attorney General for Ontario appearing in support, Justice LaForest assimilated the constitutional cases generally to those in which a jurisdictional challenge in the administrative law sense is made.

These cases also highlight an ancillary issue – that of the role of the Attorney General vis-à-vis a tribunal on judicial review. As a general rule, it would be a mistake to assimilate the interest of the Attorney General in any of these matters with that of the tribunal. Even if one were to concede that the public interest, which in our constitutional order the Attorney General alone represents, and the interest of the tribunal in defending its jurisdiction are coterminous – a doubtful proposition, to say the least, where Government action is the subject of a tribunal's inquiry – resolving the standing issue by way of granting standing to the Attorney General to advance the interest of the tribunal is merely a technique to circumvent the problem, which one commentator has likened to “a

⁵⁷ We discuss the Federal Court practice *infra* notes 79-83 and accompanying text.

⁵⁸ [1983] 1 S.C.R. 147.

⁵⁹ [1983] 1 S.C.R. 733.

⁶⁰ [1993] 3 S.C.R. 327.

⁶¹ [1991] 2 S.C.R. 5.

smokescreen”⁶². Cases such as *Refrigeration Workers Union, Local 516*, in which the Court made a point of precluding counsel from making submissions on behalf of the Board, but allowed him to do so on behalf of the Attorney General — the same counsel having been retained to represent both — would in our view confirm the accuracy of that assessment. That case may be profitably contrasted with the decision of the Nova Scotia Court of Appeal in *Tomko*, where in similar circumstances, common counsel appeared for both the Attorney General and the Board on judicial review in a mixed constitutional/administrative law case, though admittedly one arising before the articulation of the *Northwestern/Paccar* rule. The simple fact remains that, whether the Attorney General is present or not, the rationale for tribunal standing articulated in the jurisprudence must stand on its own, and the existence of cases in which both have appeared would tend to confirm this observation.

E. *Standard of Review*

Already in *Paccar* we see an important gloss put onto *Northwestern* which blurs even further the distinction between ‘merits’, on which the tribunal is not to be heard and ‘jurisdiction’, on which it may. This is Justice LaForest’s expansion of the jurisdictional integrity of a decision, upon which a tribunal is free to make submissions, to include “that it has not lost that jurisdiction through a patently unreasonable interpretation of its powers” or as the trade union would have had it: “submissions...in support of the reasonableness of its decision.”⁶³

This aspect of *Paccar* raises important questions. Does the decision in *Paccar* open the door for a tribunal to speak to the standard of review to be applied by the court? To what extent can the tribunal speak to the reasonableness of its decision? Moreover, in light of the development in recent years of the pragmatic and functional approach to determining the appropriate standard of review, coupled with the identification and christening of an additional standard along the traditional spectrum (i.e. reasonableness *simpliciter*), one wonders how the approach to tribunal standing enunciated in *Paccar* should be interpreted today.

Paccar and *BCGEU* certainly give indication that a tribunal should be allowed to speak to the applicable standard of review. In *Paccar*, Justice LaForest noted that the Industrial Relations Council argued that the Court of Appeal had erred by applying the wrong standard of review to its decision. The Council was of the opinion that the Court of Appeal should have reviewed for reasonableness instead of reviewing for correctness. Justice LaForest accepted that the Council had standing to make this argument but unfortunately without elaboration. “Before this Court”, he wrote,

⁶² D. Mullan, “Recent Developments in Nova Scotian Administrative Law”, *supra* note 5 at 496.

⁶³ *Paccar*, *supra* note 8 at 1014.

the Industrial Relations Council confined its submissions to two points. It first argued that the Court of Appeal erred in applying the wrong standard of review to the decision of the board. It submitted that the Court of Appeal reviewed for correctness instead of for reasonableness. As I have already indicated, I agree that the Court of Appeal erred in adopting such an approach. [...] The Council had standing to make all these arguments, and in doing so it did not exceed the limited role the Court allows an administrative tribunal in judicial review proceedings.⁶⁴

Similarly, in *BCGEU*, at issue was whether a decision made by the British Columbia Labour Relations Board was so patently unreasonable that it could not be supported by the relevant legislation, thus requiring intervention by the reviewing court. Counsel for the tribunal argued that it had standing to make submissions as to what the relevant test should be, such submissions by their nature presumably entailing participation in the discussion over the appropriate standard of review. The British Columbia Court of Appeal agreed with this argument, although confirming that in the case of the correctness standard, the Board would be constrained by the stricture on arguing merits.

Later jurisprudence, however, has not always shared this point of view. For example, in *Neill v. British Columbia (Expropriation Compensation Board)*⁶⁵, the British Columbia Court of Appeal held that submissions made by the Chair of the Expropriation Compensation Board at the Court below should be restricted to questions of jurisdiction and to issues regarding what constitutes the record. The Court of Appeal further specified that “[i]t would not have been proper for him to make representations on either *the applicable standard of review* or the merits of the substantive issues.”⁶⁶ But, as noted in a later case,⁶⁷ *Neill* does not refer to either *Paccar* or *BCGEU* in coming to this conclusion.

As for the ability to make representations on the reasonableness of its decision, it had been made quite clear in *Paccar* that a tribunal may do so when the standard of review is patent unreasonableness, so long as it does not stray into defending the merits of its decision.⁶⁸ That this may be a delicate balancing act was pointed out by Justice Marshall, speaking for a majority of the Newfoundland Court of Appeal in *Construction General Labourers, Rock and Tunnel Workers, Local 1208 v. North West Co.*⁶⁹ when he wrote:

It must be acknowledged that it was somewhat difficult for the Board’s counsel to navigate within the strictures of his client’s entitlement to be heard, without straying into the merits and seemingly participating as a full-fledged litigant in this Court. This is because his mission of supporting the Board’s jurisdiction in this case necessarily

⁶⁴ *Ibid.* at 1016-17.

⁶⁵ (1996), 15 B.C.L.R. (3d) 325 (B.C.C.A.) [hereinafter *Neill*].

⁶⁶ *Ibid.* at para. 7, emphasis added.

⁶⁷ *International Forest Products Ltd. v. British Columbia (Forest Appeals Commission)* (1998), 12 Admin. L.R. (3d) 45 (B.C.S.C.) [hereinafter *International Forest Products*], discussed below. See text accompanying note 76.

⁶⁸ *Supra* note 8 at 1014.

⁶⁹ (2000), 186 D.L.R. (4th) 616 (Nfld C.A.) [hereinafter *Rock and Tunnel Workers, Local 1208*].

entailed representations disputing the union's challenge as patently unreasonable the majority holding of lack of jurisdiction because of insufficient membership support accompanying the application on its filing. It was, therefore, a narrow line on which counsel was called upon to tread in arguing his client's jurisdiction to make the order issued following the majority's decision, without straying impermissibly into the merits of the case.⁷⁰

Moreover, during the post-*Paccar* development of the pragmatic and functional approach to standard of review, the jurisdictional error of 'patently unreasonable interpretation of tribunal powers', for which Justice LaForest in *Paccar* had held that a tribunal should have standing, along with its sibling error of 'loss of jurisdiction through the rendering of a patently unreasonable decision', experienced a certain extinction. In *Director of Investigation and Research v. Southam*⁷¹, jurisdictional errors were said to be irrelevant in cases where a statutory right to appeal exists. Justice Bastarache went even further in *Pushpanathan*, cautioning that terminologically:

a question which "goes to jurisdiction" is simply descriptive of a provision for which the proper standard of review is correctness, based upon the outcome of the pragmatic and functional analysis. In other words, "jurisdictional error" is simply an error on an issue with respect to which, according to the outcome of the pragmatic and functional analysis, the tribunal must make a correct interpretation and to which no deference will be shown.⁷²

Use of the jurisdictional test and the related jurisdictional errors have thus been subsumed into the more universal pragmatic and functional approach to determining the appropriate standard of review.

Development of the pragmatic and functional approach has not only had the effect of redefining the concept of 'jurisdictional error', it has also resulted in the identification of an additional standard of review, reasonableness *simpliciter*, which was first enunciated in *Southam* by Justice Iacobucci for the Supreme Court. Briefly stated, a reasonable decision is one that is supported by reasons that "can stand up to a somewhat probing examination."⁷³ We will recall that the Court in *BCGEU* had found that there was a powerful policy reason in favour of allowing submissions by the tribunal when the matter at issue was whether its decision was patently unreasonable. This lies in the unique position of the tribunal to point out the "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."⁷⁴ It would seem logical that, as in the case of patently unreasonable error, a tribunal should also be allowed to speak when the standard of review is reasonableness. And again, as in the case where the older jurisdictional test was

⁷⁰ *Ibid.* at para 143.

⁷¹ [1997] 1 S.C.R. 748, at paras. 32 and 55 [hereinafter *Southam*].

⁷² *Supra* note 2 at para. 28.

⁷³ *Supra* note 71 at para. 56.

⁷⁴ *Supra* note 10 at 153 and accompanying text.

used, if the standard of review should be determined to be reasonableness *simpliciter*, one can only too easily see a paradox arising when a tribunal is permitted to explain the expert considerations that led to its decisions while being cautioned not to defend its decision on the merits.⁷⁵

Nevertheless, in cases where: (i) there is a statutory right of appeal (rendering the concept of patently unreasonable jurisdictional error irrelevant); (ii) the pragmatic and functional approach has been used to determine the applicable standard of review; and (iii) the issue of tribunal standing has arisen, the scope of the submissions that a tribunal may make remains unclear. There is some case law suggesting that a tribunal can speak to the appropriate standard of review to be applied in a court's review of its decision and that it may make only limited submissions on the reasonableness of its decision whether the standard of review is patent unreasonableness or reasonableness *simpliciter*. However, as the issue has not been addressed very frequently, the jurisprudence in this area is not well developed.

An example is found in *International Forest Products*.⁷⁶ Here, the Forest Appeals Commission sought standing on the standard of review and the reasonableness of its decision. This is the first reported case in which a tribunal sought standing to make submissions on the standard of review since the pragmatic and functional approach had solidified. The Forest Appeals Commission was found to have standing on both issues although the court noted that its submissions echoed those of the other respondents. The standard of review was determined to be reasonableness *simpliciter* using the pragmatic and functional approach. In holding that it was appropriate to grant standing, Justice Bauman relied heavily on the findings in *Paccar* and *BCGEU*.⁷⁷

In such situations, it would seem that using a pragmatic and functional approach in the same way that the overall standard of review would be determined, to decide first whether the tribunal should be allowed to make representation and, second, the issues to which it should be allowed to speak, would provide a requisite amount of flexibility and predictability. In this way, without even referring to the case law as was done in *International Forest Products*, one could argue that it should generally be acceptable for a tribunal to make submissions on the applicable standard of review and be sensitive to the jurisdiction/merits divide which still appears to pervade the jurisprudence. For, leaving aside the 'nature of the question', the principal elements of the standard of review analysis – the expertise of the tribunal as demonstrated by the statute,

⁷⁵ Brown and Evans suggest that where challenged on jurisdictional grounds, a tribunal may submit in argument that its decision was correct: *supra* note 5 at c. 4:4221, 4-52. In *United Brotherhood of Carpenters and Joiners of America, Local 1386 v. Bransen Construction*, (2002) 39 Admin. L.R. 1 (N.B.C.A.) [hereinafter *Bransen*], the New Brunswick Court of Appeal opens the door more widely to tribunal standing on an intervenor basis to present argument on grounds of both merits and jurisdiction, which could present problems. On *Bransen*, see also *infra* note 83.

⁷⁶ *Supra* note 67.

⁷⁷ *Ibid.* at paras 64-72.

the nature of the statute (polycentric or other), the presence or absence of a privative clause – generally do not lend themselves to a discussion of the merits of the decision. In any event, our view is that the jurisdiction/merits divide itself should give way to a pragmatic and functional analysis of those issues on which a tribunal should be allowed to speak, however categorized.

Nonetheless, at least in the federal jurisdiction, whether or not a tribunal will be allowed to speak to standard of review remains a debatable issue. The *Federal Court Rules*, at Rule 303, now preclude a tribunal from participating as a party in proceedings before the Federal Court, and limit tribunal status, if at all, to that of intervener on leave. Tribunal standing in the common law sense can be attained only by express statutory provision of another Act of Parliament. For instance, in the case of the Canada Industrial Relations Board, the recently amended *Canada Labour Code* now provides it the right to be heard,⁷⁸ expressly conferring on the Board *locus standi* to make submissions both on standard of review and jurisdiction. Otherwise, little leeway is afforded a tribunal seeking standing before the Federal Court.

Difficulties in obtaining standing in the Federal Court were recently illustrated in *Hoechst Marion Roussel Canada v. AG Canada*.⁷⁹ This case consolidated two motions to intervene in proceedings before the Court in which allegations of institutional bias *inter alia* were made against the Patented Medicine Prices Review Board. The Prothonotary granted limited intervener status to the Board “[to] explain the roles of the Board Chairperson and Board Staff in carrying out the Board’s dual mandate under its governing legislation and pursuant to Board rules and policy.”⁸⁰ Cautioning that the Board needs to be circumspect, the Prothonotary expressly enjoined it from addressing either the applicable standard of review or the extent to which it may have met it.⁸¹ In the companion motion, which dealt squarely with its specialized jurisdiction, although the Board was allowed to address the record and its jurisdiction, the same restrictions were imposed, largely on the premise that the Attorney General could represent the Board’s interest adequately as per Rule 303.⁸² Moreover, in neither motion was the Board afforded a right of appeal.⁸³

⁷⁸ R.S.C. 1985, c. L-2 at ss. 22(1.1), as amended by S.C. 1998, c.26, s.9.

⁷⁹ [2002] 1 F.C. 76 (T.D.).

⁸⁰ *Ibid.* at para. 64.

⁸¹ *Ibid.*

⁸² *Ibid.* paras 66-67.

⁸³ More generally, at common law, the standing of a tribunal on appeal following judicial review is a separate and distinct matter. The anastrophe of the old common law rubric, ‘if fit to be heard upon an appeal, *a fortiori* fit to be heard in the first instance’ [per Justice Willes in *Cooper v. The Board of Works for Wandsworth District* (1863), 143 E.R. 414 at 419] has long been the approach of the Supreme Court of Canada. All of the judges in *Transair* (*supra* note 14) were in agreement that the Board was entitled to appeal from an adverse ruling below, tracing the law back to the Court’s decision *Dominion Fire Brick and Clay Products Limited*, *supra* note 9. There, Chief Justice Rinfret, Justices Kerwin and Estey grounded their respective decisions on the issue solely in common law principle

Here one is reminded of the Federal Court of Appeal's earlier resistance to tribunal participation in proceedings before it, and indeed much reliance was placed by the Prothonotary on its decision in *Ferguson Bus Lines*. Certainly, we are far from the pragmatic and functional approach championed by Justice Reed in *AG Canada v. CHRT* which has almost definitely been superseded by the later Federal Court jurisprudence.

III. Evidence Before the Court

A. What is the Record?

Under the *Northwestern/Paccar* rule, standing on judicial review is granted to a tribunal not only on jurisdictional issues but also to explain the record before the Court. How is 'the record' defined? At common law, the record of a tribunal brought up on *certiorari* was bare, and traditionally consisted of "the document which initiate[d] the proceedings; the pleadings, if any; and the adjudication; but not the evidence, nor the reasons, unless the tribunal [chose] to incorporate

(S.C.R. at 339 and 344), whereas Justices Kellock and Rand found further support for the proposition in the governing judicature legislation (S.C.R. at 341).

As a subsidiary matter, whether appearance on the original application is a condition precedent to appearance on appeal has not been specifically addressed by a court to date. It would appear to be counterintuitive to insist that that be the case. To deny standing on appeal solely on this basis would penalize those tribunals that take a cautious approach to appearing when their decisions are challenged, and reward those that attempt to do so whenever challenged, even where their presence is not *prima facie* necessary to further the process. Of interest are the remarks of Justice Wilson in *Société des Acadiens du Nouveau-Brunswick Inc. et al. v. Minority Language School Board No.50 et al.*, [1986] 1 S.C.R. 549: "Appeals launched by persons not party to the original action were not uncommon in the Courts of Chancery." [at para. 96]. Accordingly, inasmuch as the New Brunswick Court of Appeal exercised the jurisdiction of the Chancery Courts, it had an inherent jurisdiction "based on the ancient practice of the High Court of Chancery in England to grant leave to appeal to a non-party in a proper case." [at para. 124]. There appears to be no principled reason then, why a tribunal should be barred from pursuing an appeal, much less simply appearing on one, although not having participated in judicial review proceedings below.

However, although intervenor standing on appeal was granted to the New Brunswick Labour and Employment Board in *Bransen*, *supra* note 75, the Board not having appeared below, the Court did not address the issue of its previous non-appearance explicitly. Despite the decision of the Supreme Court of Canada in *Eastern Bakeries*, *supra* note 9, where Chief Justice Kerwin, adopting the approach of the Court in *Dominion Fire Brick and Clay*, *supra* note 9, held that the New Brunswick Labour Relations Board had a right to be heard on judicial review, the standing of the Board before the Court in *Bransen* was said to be not that of a party as of right, but that of an intervenor as of grace under the *New Brunswick Rules of Court* governing intervenor status, Rule 15.03. This mirrors the approach taken in the Federal Court structure, although there the *Federal Court Rules* at Rule 303 expressly exclude tribunal standing as a party and moreover require leave to appeal from a decision of the Federal Court to be sought from that Court by a tribunal granted intervenor status before it, Rule 109. See also *supra* note 75. *Bransen* is discussed in more detail in L. Jacobs, "Recent Developments in Tribunal Standing" Case Comment, forthcoming in (2002) Admin. L.R.

them.”⁸⁴ Until the *City of Montreal* case the jurisprudence was unsettled as to whether at modern common law the record excluded the evidence before the tribunal. The Supreme Court in *City of Montreal* confirmed that this was still the case, stating that in the absence of an express statutory requirement, the evidence does not have to be presented to the court upon review.⁸⁵ On reasons for decision, *Baker* has now quieted the earlier debate as to both their need and sufficiency in any particular case by incorporating the issue into the general principles of fairness, using the pragmatic and functional approach.⁸⁶

In any event, for the most part statutory provisions have now been enacted in the common law jurisdictions to expand significantly the contents of the record for purposes of judicial review so as to include the evidence, the exhibits filed and reasons for decision, if any.⁸⁷ That such expansion has contributed greatly to the robustness of judicial review as an institution in our constitutional order cannot be denied. No longer must judges operate in the dark, so to speak. Just as they no longer hesitate to consult *Hansard*, – the remark of Lord Denning in *Davis v. Johnson*⁸⁸ that his doing so had “thrown a flood of light on the position” is telling – so too, they routinely review the full record below. Such access by a court to the full proceedings of the tribunal brought up before it on judicial review – its reasons for decision and the evidence upon which it came to its conclusions – can be similarly enlightening. But in an era of deference to the expert tribunal in the carrying out of its functions, it can have its dangers too.

This was Justice Wilson’s lament in *National Corn Growers Association v. Canada (Import Tribunal)*⁸⁹, that the Court “may be wavering in its commitment to *CUPE*” by measuring the conclusions reached by the tribunal below against the standard of patent unreasonableness, thereby engaging “in the kind of detailed review of a tribunal’s findings that this Court’s jurisprudence makes clear is inappropriate.”⁹⁰ But for the majority, Justice Gonthier defended such detailed review and retorted “With respect, I do not understand how a conclusion can be reached as to the reasonableness of a tribunal’s interpretation of its enabling statute without considering the reasoning underlying it [...]”⁹¹ Shortly thereafter in *W.W.*

⁸⁴ *R. v. Northumberland Compensation Appeal Tribunal*, [1952] 1 K.B. 338 (C.A.) per Denning L.J. at 352.

⁸⁵ *Supra* note 31 at 839.

⁸⁶ *Supra* note 4 at para. 43.

⁸⁷ See for instance the Alberta *Rules of Court*, Rule 753.13(1); the New Brunswick *Rules of Court*, Rule 69.08; 69.10, *Federal Court Rules*, Rules 309, 310 and 317. Analogous statutory provisions expanding the record in other jurisdictions are noted by Macaulay and Sprague. *supra* note 5 at c. 28.19(c), 28-56.4. Under such provisions, not only reasons for decision, but dissenting reasons too are considered part of the expanded record – cf. *Graphic Communications Union, Local 41M v. The Ottawa Citizen* (1999), 22 Admin. L.R. (3d) 287 (Ont. Div. Ct.) at 298 [hereinafter *The Ottawa Citizen*].

⁸⁸ [1978] 1 All E.R. 841 (CA) at 851.

⁸⁹ [1990] 2 S.C.R. 1324 [hereinafter *National Corngrowers*].

⁹⁰ *Ibid.* at 1346; 1348.

⁹¹ *Ibid.* at 1383.

*Lester (1978) Ltd. v. UA, Local 740*⁹², Justice McLachlin attracted the majority of her colleagues to a similarly searching review of a tribunal's findings of fact on the record, in the course of quashing its decision reached for patent unreasonableness. Justice Wilson, again in dissent but this time supported by Justice L'Heureux-Dubé, now characterized the approach taken as "backsliding", pleading for a "return to *CUPE* and the spirit which *CUPE* embodies."⁹³ That spirit calls for deference on the part of Courts, rooted in the legislator's entrusting of the matter under review to an expert decision-maker, and this should be the case particularly in reviewing tribunal findings of fact.

Searching review of the evidence as in *National Corngrowers* or *Lester* is only possible if there is a transcript of the evidence before the tribunal, in turn calling for the recording of proceedings before it. The modern practice varies. For instance, it is commonplace for Boards of Inquiry under human rights legislation, but almost unheard of for Arbitrators under collective bargaining legislation. Whereas it was once the norm for Labour Boards under labour legislation, they have on the whole since abandoned the practice for policy reasons, citing expedition of process, avoidance of delay, informality of procedure and the relationship of the Boards to the Courts as underlying the change in practice.⁹⁴ That the common law does not require the maintaining of a transcript of the proceedings was reaffirmed in the *City of Montreal* case,⁹⁵ yet in the absence of such a transcript how is the evidence upon which a tribunal acted to be brought to the attention of the court?

For instance, can one go so far as to argue that the notes taken by tribunal members in the course of the proceedings fall within the rubric of "all things touching the matter as fully and entirely as they remain in your custody" as *per* the Notice under the *Alberta Rules of Court*⁹⁶ so as to comprise part of the record returnable on an application for judicial review? The matter has been surprisingly often litigated at the instance of counsel eager to find jurisdictional error, but just as often rejected as an untenable extension of the modern concept of record. The Alberta Court of Queen's Bench was of this view in *Alberta (Labour Relations Board) v. IBEW, Local 1002*⁹⁷, and rebuffed an argument that access to the notes of the tribunal members came within the rubric of the Rule. A similar case is *Yorke v. Northside-Victoria District School Board*⁹⁸, where the notes of an Arbitrator were sought to be brought up as part of the record on judicial review under statutory language identical in thrust to that of the Alberta Rule. There too, the majority held that the notes comprised "a personal and unreliable record of

⁹² [1990] 3 S.C.R.644 [hereinafter *Lester*].

⁹³ *Ibid.* at 651.

⁹⁴ The labour board practice and its rationale is addressed fully by the NB Labour and Employment Board in *Re Burman and Fellows Electrical Contracting Co. Ltd.* ⁹⁵ CLLC case no. 220-049 at 143,441-43.

⁹⁵ *Supra* note 31 at 838-43.

⁹⁶ *Supra* note 87, Rule 753.13(1).

⁹⁷ (1991), 5 Admin. L.R. (2d) 301 (Alta. Q.B.).

⁹⁸ (1992), 90 D.L.R. (4th) 643 (N.S.C.A.).

the evidence”⁹⁹ and did not fall under the statutory rubric — they formed no part of the record under the Rule. More recently, in analogous proceedings, the Federal Court of Appeal in *Privacy Commissioner (Canada) v. Canada Labour Relations Board*¹⁰⁰, has determined that the notes of members of the CLRB cannot be said to be under its control for purposes of the Federal *Privacy Act*¹⁰¹, noting that such “are not part of the official records of the Board.”¹⁰² In both decisions the independence of tribunal members in their adjudicative capacity grounded the exclusion of personal notes from the record.¹⁰³

By the same token, earlier drafts of tribunal decisions form no part of the record. In *Consolidated Bathurst* the Ontario Divisional Court was unanimous in rejecting an attempt by counsel for the applicant to enter same by way of affidavit, a draft decision having come his way ‘in a plain brown envelope’. Justice Rosenberg for the majority noted that “[I]t would be a dangerous precedent to require any tribunal to produce draft decisions.”¹⁰⁴ Concurring on this point, Justice Osler noted that the domino effect, were the Court to do so, would be “incalculable” — if a full draft, why not memoranda prepared in contemplation of same; if memoranda, why not notes taken in the course of hearing, or in executive session?¹⁰⁵ How then is the record to be supplemented?

B. *When is Affidavit Evidence Admissible to Explain the Record?*

*Keeprite Workers’ Independent Union v. Keeprite Products Ltd.*¹⁰⁶ is the *locus classicus* for the principle that, in the absence of a transcript, affidavit evidence is admissible to augment the record on judicial review. But the window of opportunity is a narrow one: such affidavit evidence can only be used to demonstrate complete absence of evidence on an essential point. This is a serious error on which a party would be entitled to argue, regardless of the standard of review. The rule in *Keeprite* has held its ground. Recently, the New Brunswick Court of Queen’s Bench cited *Keeprite* in *Grand Lake Timber Ltd.*

⁹⁹ *Ibid.* at 648.

¹⁰⁰ (2000), 257 N.R. 66 (F.C.A.).

¹⁰¹ R.S.C. 1985, c. P-21.

¹⁰² *Supra* note 100 at 69.

¹⁰³ *Quaere* whether the decision of the Supreme Court in *City of Montreal* opens up the possibility of introducing the notes of a tribunal to supplement the record in situations where affidavits filed as to the evidence which was before it have been shown to be unreliable. In *Newfoundland (Treasury Board) v. Newfoundland and Labrador Assn. of Public and Private Employees*, [2000] N.J. No.216 (Nfld. S.C.T.D.) this was determined to be the effect of *City of Montreal* on the jurisprudence, and the notes of an arbitrator were held to form part of the record, or at least comprise ‘relevant material’ of assistance to the Court on judicial review.

¹⁰⁴ *Supra* note 17 at 90.

¹⁰⁵ *Ibid.* at 100.

¹⁰⁶ (1980), 29 O.R. (2d) 513 (Ont. C.A.) leave to appeal to the S.C.C. denied 35 N.R. 85 [hereinafter *Keeprite*].

v. *CEP, Local 104*¹⁰⁷, describing the complete lack of evidence as a situation which “constitutes the one exception where transcripts or affidavit evidence had been received, even though they do not form part of the record for review”¹⁰⁸, and the same was held in *TNL Industrial Contractors Ltd. v. IBEW, Local 424*¹⁰⁹. There, the Alberta Court of Queen’s Bench excluded affidavit evidence sought to be brought before it, as it only reiterated what was already on the record and could not be used to supplement it. These are both cases in which a party before the tribunal below sought to lead evidence by way of affidavit before the Court.

May the parties go further and force the tribunal to condemn itself ‘out of its own mouth’ so to speak, by insisting that tribunal members submit, in effect, to discovery? This was an issue addressed by the Ontario Divisional Court in interlocutory proceedings in *Ellis-Don*¹¹⁰, and the short answer to the question is ‘no’. There, a member of the tribunal had leaked an earlier draft decision of a Board Panel favourable to *Ellis-Don* following issuance of the Panel’s final decision unfavourable to it in the outcome. The final decision had been drafted consequent upon a meeting of the full Ontario Labour Relations Board called to review the draft in accordance with its practice earlier sanctioned in *Consolidated Bathurst*¹¹¹. Immediately upon receipt of the earlier draft, *Ellis-Don* sought judicial review alleging that the change in outcome could only be explained by an inappropriate consideration by the full Board of the factual findings of the Panel contrary to the *Consolidated Bathurst* rule, and hence in breach of natural justice. Because *Ellis-Don* chose not to seek reconsideration,¹¹² the Board did not have an opportunity to explain its practice

¹⁰⁷ (2001), 233 N.B.R. (2d) 121 (N.B.Q.B.) [hereinafter *Grand Lake Timber*].

¹⁰⁸ *Ibid.* at para. 49.

¹⁰⁹ (1999), 240 A.R. 279 (Alta. Q.B.).

¹¹⁰ *Ellis-Don v. Ontario (Labour Relations Board)* (1994), 110 D.L.R. (4th) 731 (Ont. Div. Ct.), reversing the decision of the Motions Judge reported at (1992), 95 D.L.R. (4th) 56 (Ont. G.D.); leave to appeal to Ont. C.A. refused (1994), 118 D.L.R. (4th) vi; leave to appeal to S.C.C. refused [1995] 1 S.C.R. vii.

¹¹¹ *Supra* note 17.

¹¹² In its later decision on the merits in *Ellis-Don*, *supra* note 25, the Supreme Court of Canada has held that failure to seek reconsideration where available is not necessarily fatal to an application for judicial review, although it is a relevant factor in the reviewing court’s determination of whether to exercise its discretion to grant such review. See the closing remarks of Justice LeBel to this effect at para. 57. In *BCGEU v. BCLRB*, *supra* note 33, the British Columbia Court of Appeal held that the reviewing Judge had properly exercised his discretion to deny judicial review to an applicant who had not first sought reconsideration by the BCLRB of the challenged decision. Applying the *Hareldkin* principle, the Court determined that, in the circumstances reconsideration would have afforded an adequate alternative remedy to judicial review and should first have been sought [at 73-79]. The reconsideration power of labour boards has been said to be “of the widest discretion” *per* Justice Laskin (as he then was) in *R. v. O.L.R.B. ex parte Nick Masney Hotels Ltd.* (1970), 13 D.L.R. (3d) 289 at 296 (Ont. C.A.), particularly where, as in the Ontario legislation, the Board may exercise it *ex proprio motu*. Cf. *Labour Relations Act, 1995*, S.O. 1995 c.1, s.114(1). *Quaere* whether upon being served with an application for judicial review a tribunal enjoying such reconsideration power could exercise it to bolster a challenged decision prior to the matter coming on before the Court.

in the particular case as it had in *Consolidated Bathurst*. Instead, Ellis-Don sought to have the Chair of the Panel and several members of the Board and its staff summoned for examination under oath before an official examiner¹¹³ to explain what had occurred and so establish the evidentiary basis upon which its allegation of improper tampering by the full Board with the decision of the Panel would be grounded.

The Divisional Court reversed the original ruling of the Motions Judge who had granted a motion compelling attendance. Underlying the Divisional Court's determination on the amenability to discovery issue was its concern to maintain the principle of deliberative secrecy in the adjudicative process, itself an important safeguard to the independence of administrative decision-makers.¹¹⁴ In the context of a multi-panel tribunal, deliberative secrecy plays an additional role: enhancing administrative consistency by way of institutional consultation on the *Consolidated Bathurst* pattern.

Ellis-Don arose under the umbrella of a statutory grant of immunity from process given to the Board, its members and officers under the *Ontario Labour Relations Act, 1995*¹¹⁵. But its rationale applies equally at common law, absent statutory clothing. Indeed, in *The Ottawa Citizen*¹¹⁶, the Ontario Divisional Court struck out an affidavit of a member of an Arbitration Board sought to be entered before it *inter alia* on deliberative secrecy grounds, its reception opening the member to cross-examination and so, in the circumstances, risking breach of that principle. Twelve years earlier, Justice Campbell of that Court had quashed several summonses issued to tribunal members on the same grounds in *Agnew v. Ontario Association of Architects*.¹¹⁷

C. When May the Tribunal File Affidavit Evidence?

In *The Ottawa Citizen* the Divisional Court noted that it has long been acknowledged that there are circumstances in which, of its own accord, a tribunal may give evidence by way of affidavit on an application for judicial review. First, as that Court had noted many years earlier in *Re Canadian Workers Union and Frankel Structural Steel Ltd. et al*¹¹⁸, the filing of an affidavit is the standard procedural mechanism whereby a tribunal whose decision is being challenged on judicial review files its record before the Court. There the Registrar of the Ontario Labour relations Board had filed the affidavit of Board record with the Court. As Justice Reid observed there, such an affidavit

¹¹³ Rule 34.10 of the *Ontario Rules of Civil Procedure* provides for this process, one akin to discovery, which at common law was unavailable in proceedings under the prerogative writs.

¹¹⁴ *Supra* note 110 at 744-47.

¹¹⁵ *Supra* note 112, s. 117.

¹¹⁶ *Supra* note 87.

¹¹⁷ (1987), 64 O.R. (2d) 8.

¹¹⁸ (1976), 12 O.R. (2d) 560 (Ont. Div. Ct.) [hereinafter *Frankel*].

is more in the nature of a certificate as to the formal documentation below, filed to facilitate the judicial review proceedings and “it is not ‘to be used’ in the usual sense, which implies use as testimony and justifies cross-examination.”¹¹⁹ The Court denied a request to cross-examine the Registrar on the record.

But the cases go further still and, where appropriate, allow for the filing of affidavits by tribunal members and staff on both jurisdictional and natural justice grounds. Thus, a record already filed may be supplemented by additional explanatory material in affidavit form, filed by a tribunal member to clarify a decision or explicate the proceedings before the tribunal, as was the case in *The Ottawa Citizen*. In *Tomko*, evidence was led by way of affidavit sworn by the Chief Executive Officer of the Board, on which cross-examination was allowed. In like manner, in *IUOE Local 946 and LIUNA v. Teamsters Canada et al*¹²⁰, the New Brunswick Court of Queen’s Bench allowed the filing of an affidavit by the Chief Executive Officer of the Labour and Employment Board in explication of the processing of a file before it. That was on an application for judicial review in which *inter alia* costs were sought against the Board for delay in the issuance of its reasons for decision. Moreover, in *Irving Oil*, the Court received in evidence the affidavit of the tribunal Commissioner himself. It explained in detail the manner in which he had conducted the inquiry on which he had been challenged on a mix of natural justice and jurisdictional grounds. As to the admissibility of such affidavits on review, both New Brunswick cases would seem to fall within the embrace of Justice Bastarache’s ruling for the New Brunswick Court of Appeal in *Résidences Mgr. Chiasson Inc.* There, on an application for judicial review, he accepted as admissible the affidavits sworn by the Chair and a member of an Arbitration Board [it is unclear by whom they were filed], citing *Northwestern* in support of his ruling that:

I believe that this [Justice Estey’s acceptance of a tribunal’s right to appear in ‘an explanatory role with reference to the record before the Board’] is a clear indication that the explanations relating to what took place are admissible, although the board has no authority to defend its conduct and to show that it is not contrary to the principles of natural justice. A reading of the affidavits made by the two members does not disclose any argument or justification.¹²¹

Here we have an interesting interweaving of ‘speaking to the record’, on which tribunal standing is permitted, and ‘defending on a natural justice challenge’ which is less clear. But a word of caution is required as such an affidavit may indeed attract cross-examination. Thus, as the Court in *The Ottawa Citizen* noted, one may have to restrict that cross-examination so as not to offend the deliberative secrecy rule by seeking to “penetrate the mental process” used by the tribunal member.¹²²

¹¹⁹ *Ibid.* at 575.

¹²⁰ [2000] NBJ No. 135.

¹²¹ *Supra* note 40 at 314.

¹²² *Supra* note 87 at 295.

Can this problem be avoided by a tribunal introducing evidence sworn by a party or witness before it instead of by filing an affidavit sworn by one of its own members? A case in point is the *City of Montreal*. There, without comment, the Supreme Court accepted as appropriate the filing by the Québec *Conseil des services essentiels* of affidavits sworn by witnesses who had appeared before it, so as to counter the allegation that it had made findings unsupportable by the evidence.¹²³ It is to be recalled that in this case, by inadvertence, no recording had been made as in the ordinary course, and hence no transcript of the proceedings was available. Cross-examination on such an affidavit would of course not raise the deliberative secrecy problem, and hence perhaps the attraction of this avenue for supplementing the record.

We suggest, then, that the jurisprudence discussed here offers strong support for the proposition that, just as in the case of jurisdictional challenge, so too in the case of explaining the record. One should take a pragmatic and functional approach to a tribunal seeking to tender evidence by way of affidavit filed before a reviewing court. Each case must be assessed on its own strengths, taking into consideration a variety of factors, including the statutory framework and language under which the tribunal functions; the nature of the evidence sought to be tendered; the party seeking to enter it; the reason for which it is being entered; the purpose of the rule limiting affidavit evidence; and the particularities of the circumstances.

IV. Conclusion

Underlying the contradictory jurisprudence in the tribunal standing cases, is the general difficulty in drawing sharp dichotomies in the field of administrative law, a difficulty marvelously captured in the two seminal decisions of the Supreme Court which have driven developments in the field over the past twenty years or so:

“... the classification of statutory functions as judicial, quasi-judicial or administrative is often very difficult, to say the least;”

— Per Chief Justice Laskin in *Nicholson v. Haldimand Norfolk Regional Board of Commissioners of Police*.¹²⁴

“The question of what is and is not jurisdictional is often very difficult to determine. The courts, in my view, should not be alert to brand as jurisdictional, and therefore subject to broader curial review, that which may be doubtfully so.”

— Per Justice Dickson in *Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corporation*.¹²⁵

The *Northwestern/Paccar* rule presents us with similar dichotomies that defy bright line distinctions: merits vs. jurisdiction; jurisdiction vs. natural

¹²³ *Supra* note 31 at 843.

¹²⁴ [1979] 1 S.C.R. 311 at 325.

¹²⁵ [1979] 2 S.C.R. 227 at 233.

justice, judicial review vs. statutory appeal. To borrow from our constitutional tradition, it would be misleading to construe such constructs rigidly as 'water-tight compartments'. Rather, we should recognize that these "obviously cannot be construed as having been intended to embody the exact disjunctions of a perfect logical scheme."¹²⁶ Treating the borders between them as fluid and permeable assists greatly in arriving at thoughtful and purposive resolutions to the recurring questions related to tribunal standing before the courts. In his most recent treatment of the issue, David Mullan observes:

Obviously, this is a domain fraught with uncertainty for any statutory authority evaluating whether or not it should attempt to defend itself in judicial review proceedings. Obviously also, there is a need for a fundamental rethinking of the whole issue.¹²⁷

He concludes his discussion with the suggestion that the principle of judicial deference to tribunal expertise, which now dominates the jurisprudence, would counsel an approach to tribunal standing on judicial review "far better conceived of in terms of judicial discretion than as a set of precise rules."¹²⁸

We do not purport here to have undertaken such a fundamental rethinking; ours is more a prolegomenon to that undertaking. We suggest that the cases be approached within the context of the general shift in the jurisprudence from formalism to functionalism, as epitomized in the pragmatic and functional approach now characteristic of administrative law decisions across a broad band of issues. Within the particular sphere that we are addressing here — the discourse between courts and tribunals in the arena of judicial review — it is not immediately apparent that the courts have embraced the functional over the formal. Perhaps the time has come for them to articulate more explicitly, in much the same way that they have done in both the *CUPE* and the *Nicholson* line of cases, an integrated theory of the interaction between courts and tribunals, cast in terms of a 'pragmatic and functional approach'.

¹²⁶Per Viscount Haldane, speaking of ss. 91 and 92 of the *Constitution Act, 1867* in *John Deere Plow Co. v. Wharton*, [1915] A.C. 330 (P.C.) at 338.

¹²⁷*Administrative Law*, *supra* note 5 at 457.

¹²⁸*Ibid.* at 459.