STANDING TO APPEAR BEFORE ADMINISTRATIVE TRIBUNALS

Report and Recommendations

Prepared by

Administrative Justice Project

for the

Attorney General of British Columbia

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FOREWORD

The following report was prepared for British Columbia's Administrative Justice Project. Established in July 2001, the Project is part of the government's commitment to ensure that the administrative justice system is accessible, efficient, fair and affordable – and that it continues to provide a less formal, complex and costly alternative to the courts.

Since its inception, the Project has examined fundamental questions about the nature, quality and timeliness of administrative justice services in British Columbia. It has also set forth a series of recommendations to address the most significant challenges facing the system today.

This report discusses issues related to standing – specifically, the decision making process that determines who may appear before administrative tribunals, and under what circumstances. The term "standing" is used to define who may participate in a proceeding before a court or a tribunal, either as a party or as an intervenor. The doctrine of standing performs an important gate-keeper function in defining the degree of interest required to entitle a party to participate in a legal proceeding. The question of standing to appear before administrative tribunals is largely dependent on statutory language. It is important that statutory standing provisions are framed with sufficient clarity to identify those entitled to appear before tribunals and avoid unnecessary disputes over the scope of participatory entitlements.

The analysis and recommendations presented here support the Administrative Justice Project's White Paper. Copies of the White Paper, other background papers, reports and further information on the project are available through the Internet at: www.gov.bc.ca/ajp.

Interested readers are invited to provide comments on the White Paper and related reports before November 15, 2002 by:

Telephone: 250-387-0058
Fax: 250-387-0079
Email: ajp@ag.gov.bc.ca

Mail: Administrative Justice Project
Ministry of Attorney General
PO Box 9210, STN PROV GOVT
Victoria BC V8W 9J1

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INTRODUCTION

The law of standing is concerned with the important threshold question of a party's entitlement to seek judicial relief. The focus of standing principles is on a party's status and the degree of his or her interest in the litigation or other decision-making process. Through interest-based standing tests, the common law has sought to distinguish those with a true interest in the subject matter of the proceeding from "mere busybodies". Where a party's interest does not meet the requisite threshold, he or she is said to lack standing to proceed. In this way, the law of standing performs an important gate-keeping function, preserving scarce judicial resources and setting appropriate boundaries on the limits of judicial discretion.

Common law standing rules have been much discussed and debated, particularly in recent years with the rise of "public interest" standing rules that have expanded the range of parties afforded access to the courts. The issue of standing to appear before administrative tribunals has been subject to less scrutiny. To some extent, this lack of attention is understandable. The question of who has standing to initiate proceedings before a statutory decision maker is highly contextual and almost exclusively dependent on statutory language. At the same time, issues of standing to appear before tribunals are arising with increasing frequency, partly in response to the expansion of the requirements of procedural fairness. In this sense, issues of standing before administrative tribunals overlap with the broader need for clearly defined statutory powers and procedures.

In an administrative law context, standing rules reflect a certain tension between the goal of access to the justice system and the goals of efficiency, clarity and certainty in the decision making process. The law of standing strikes a balance between the need to ensure adequate rights of participation for persons affected by administrative decisions and the need to decide disputes efficiently within the boundaries of statutory purpose.

In providing an alternative to the courts, administrative tribunals are expected to operate on a more informal basis, providing decision-making processes that are efficient, transparent and fair. The recommendations in this report are intended to promote those goals by streamlining administrative proceedings, ensuring fair treatment of persons affected by administrative decision making and eliminating unnecessary complexity in tribunal processes.[1] These objectives suggest that legislative standing rules should be guided by the following principles:

- Standing provisions should ensure fairness and openness in administrative proceedings, without undermining statutory objectives.
- Standing provisions should promote the efficient and timely resolution of disputes within statutory boundaries.
- Standing rules should be open and transparent so that parties affected by an administrative process understand the basis on which they are entitled to participate.
- There should be consistency between tribunals in formulating standing rules, unless there is a rational basis for inconsistency.

The varied and diverse nature of tribunals in British Columbia makes it both impossible and undesirable to formulate uniform standing provisions to resolve all issues of status before a statutory decision maker. At the same time, the current degree of legislative diversity in the area of standing cannot be entirely explained on the basis that different statutory contexts require different approaches. It is possible to identify certain common principles that underlie standing rules, both under statute and at common law, and to apply those principles in a manner that achieves greater uniformity and clarity without undermining the need for a contextual approach.

COMMON LAW STANDING RULES

As noted above, issues of standing have been discussed and debated at length in the context of the common law. Some of the substance of those discussions is summarized below, as a useful

[1] Administrative Justice Project, Terms of Reference, July 27, 2001. Available online at: http://www.gov.bc.ca/ajp.

point of comparison for shaping standing policies in the context of the administrative justice system.

Broadly speaking, the question of standing before the courts is resolved through the application of common law tests encompassing two concepts: (1) standing to sue and (2) standing to intervene. Standing to sue connotes a party's status to initiate and maintain an action in his or her own right. In contrast, intervention is a procedural device which entitles an individual to participate in an existing proceeding.[2]

Standing to Sue

The doctrine of standing, both at common law and under statute, can be understood in light of underlying policy rationales. Three primary justifications have been offered for the common law restrictions on a party's entitlement to seek judicial relief.[3]

1. **Preservation of scarce judicial resources.**

   This is the most commonly-cited rationale for the common law requirement of standing. Interest-based standing tests serve the goal of efficiency by preventing courts from being overrun by a multiplicity of law suits at the behest of parties with only a marginal interest in the subject matter of the proceeding.

2. **Standing as a function of an adversarial system.**

   Standing rules ensure that issues are decided in the context of concrete factual disputes, fully argued by those parties most directly affected. Where the dispute relates to the contested rights of the parties themselves, this "sharpens the presentation" of the issues to be decided.

3. **Establishing limits on judicial discretion.**

   Finally, standing rules also help define the appropriate role of the court in resolving issues of public importance. In preventing the consideration of legal issues that are not properly before the court, standing rules assist in establishing appropriate boundaries on judicial discretion.

While standing to sue is always a prerequisite to obtaining judicial relief, in most private law cases the issue of standing is uncontroversial. A party to a contract has a clear right to seek a legal remedy in the event that the contract was breached and an individual who is injured through the

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2 Paul R. Muldoon, *The Law of Intervention* (Aurora, 1989), p. 11.

3 Thomas A. Cromwell, *Locus Standi, A Commentary on the Law of Standing in Canada* (Toronto, 1986), pp. 9-11.

fault of another can claim compensation in a personal injury action. In these circumstances, the injured party's "standing" to maintain an action is unquestioned. The issue of standing becomes more difficult where a private litigant seeks access to the courts to remedy the infringement of a public right. In these cases, common law standing tests determine a party's interest in the proceeding.

Recently, the limits on a litigant's ability to seek remedies for the infringement of a public right have been relaxed through a series of court decisions establishing a judicial discretion to grant "public interest standing". Under these principles, a private party may be granted standing to enforce a public right where:

- a serious issue is raised;
- the applicant has a genuine interest;
- there is no other reasonable and effective means to bring the issue to court.

The purpose of granting status in these circumstances is to prevent the immunization of unlawful legislation or administrative action from judicial review. In exercising the discretion to grant standing to sue to public interest groups, courts must strike a balance between ensuring access to the courts and preserving judicial resources.[4]

Intervention

The concept of intervention is an important but distinct component of the common law of standing. Unlike standing to sue, which is directed towards an individual's entitlement to initiate and maintain an action, intervention is a device that allows "strangers" to a judicial proceeding to participate in that proceeding.

While standing to sue and intervention are related concepts (both are concerned with the broad issue of status before the courts), there are important distinctions in terms of the underlying policy goals and how those goals are achieved. Four primary justifications have been identified for the court's power to grant intervention.

1. **Efficient administration of justice.**

   As with standing to sue, the prime policy rationale offered in support of intervention is that of ensuring the efficient use of judicial resources. In the context of intervention, efficiency

[4] *Hy and Zel's Inc. v. Ontario (Attorney General)*, [1993] 3 S.C.R. 675.

may require an expansive view of participation, channeling disputes into one action to avoid a multiplicity of lawsuits.

2. **Protection of absent persons' interests.**

   Intervention prevents a miscarriage of justice by permitting those who stand to be affected by a judicial decision to participate in the proceeding.

3. **A better informed court.**

   Intervenors may allow the court to become better informed about all aspects of a decision and its potential impact on those who are not parties to the proceeding. This is of particular importance in public interest cases.

4. **The court's decision is legitimized.**

   Providing those affected with an opportunity to be heard not only meets basic notions of fairness and justice, it also legitimizes the court's final decision.

In British Columbia, both the Supreme Court and the Court of Appeal have the ability to hear from intervenors in appropriate circumstances.[5] In each case, the court must consider the proposed intervenor's degree of interest in the matter and the likelihood that the intervenor will make a useful contribution to the proceeding without injustice to the original parties. The following guiding criteria have been identified:

- the nature of the group seeking intervention;
- the directness of the group's interest in the matter;
- the suitability of the issue in the case at bar.[6]

Ultimately, the granting of standing to intervene is a matter of judicial discretion. The two predominant considerations that militate against intervention are undue delay and prejudice to the parties. The other considerations include whether:

- intervention will widen the litigation between the parties;
- the interests of the applicant are already adequately represented;

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[5] Section 36 of the newly-released *Court of Appeal Rules* authorizes "any person interested" to apply for leave to intervene before the Court of Appeal. Trial courts in British Columbia have the inherent jurisdiction to permit intervention. In addition, Rule 15(5)(a)(ii) of the *Supreme Court Rules* permits the joinder of parties at trial where the party has a direct interest in the outcome of the litigation. The distinction between this authority to add parties and the Court's inherent jurisdiction to appoint intervenors is addressed in *Canadian Labour Congress v. Bhindi et al.* (1985), 61 B.C.L.R. 85 (C.A.).

[6] *Guadagni v. W.C.B. and B.C. Federation of Labour* (1988), 30 B.C.L.R. (2d) 249 (C.A.); *Canadian Labour Congress v. Bhindi et al.*, *supra*; *MacMillan Bloedel Ltd. v. Mullin et al.*, [1985] 3 W.W.R. 380 (B.C.C.A.).

- intervention will open the "floodgates" to further intervention;
- intervention will transfer the court into a political forum.[7]

Intervention is more commonly granted in cases that raise public law issues where the court's final decision can be expected to have broad impact beyond the particular interests of the parties to the proceeding.

The degree of participatory rights to be enjoyed by an intervenor is within the discretion of the court.

STANDING TO APPEAR BEFORE ADMINISTRATIVE TRIBUNALS

Although the previous points regarding the common law are relevant, it is important to note that legal issues relating to party status before administrative tribunals encompass different concepts. In a substantive sense, the law of standing is concerned with who has status to bring an appeal or review or otherwise invoke the process of a tribunal. Standing in this sense is roughly analogous to the "standing to sue" concept at common law. Intervention is also important in the administrative tribunal context, particularly in answering the question of who, as a matter of procedural fairness, should be entitled to participate in proceedings before a tribunal. Finally, the issue of standing has arisen in a unique sense for tribunals in terms of the status of decision makers to appear on a statutory appeal or judicial review of their own decisions.

Standing to Appeal/Initiate Proceedings

Many tribunals exist as a forum for resolving disputes between private parties or between a private party and a public agency. For tribunals that perform adjudicative functions, the standing of a party to initiate proceedings is an important precondition to the tribunal's substantive jurisdiction. In a party-driven administrative process, the constituent statute will determine not only what types of disputes may be brought before a tribunal for resolution but also who can bring them.

For this reason, the question of standing to bring proceedings before an administrative tribunal is not, for the most part, resolved by the application of common law tests but rather through the

[7] Muldoon, *Law of Intervention*, at p. 89.

interpretation of legislative language. Provided that the legislation is sufficiently clear, the question of who has standing should, in theory, not arise. In practice, such unambiguous standing provisions are not always possible, particularly where a tribunal's statutory mandate includes consideration of the broader public interest. In these circumstances, legislative standing provisions are frequently left open to interpretation through the use of such general descriptions as "person aggrieved" or "person affected". While the meaning of this general language must be interpreted in its statutory context,[8] courts and tribunals are frequently unable to resist the urge to borrow from judicial decisions in interpreting the scope of such standing provisions often with inconsistent results.

It is clear that the tribunals falling within the scope of the mandate of the Administrative Justice Project perform a variety of functions in diverse statutory contexts. This makes it both impossible and undesirable to attempt to formulate a uniform standing provision of general application. In addressing the issue of statutory standing provisions, tribunals can be divided by their function into three broad categories:

- bodies that perform an adjudicative or administrative function in relation to issues or disputes that primarily concern individual rights or interests, for example, workplace tribunals and residential tenancy arbitrators;
- bodies that perform an adjudicative or administrative function in relation to issues or disputes that stand to impact a broader public constituency, for example, tribunals established to hear appeals from licensing or other regulatory bodies;
- bodies that perform an inquiry function, for example, commissions of inquiry.

Statutory standing provisions in the first category are typically unambiguous. For example, standing to appeal a determination of the Director of Employment Standards under the *Employment Standards Act* is granted only to the person served with the determination.[9] The right to appeal a finding of the Review Board under the *Workers Compensation Act* is limited to the worker, the worker's dependents and the employer.[10] Under the *Residential Tenancy Act*, only the landlord and tenant may apply for the appointment of a Residential Tenancy Arbitrator.[11]

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8 See for example, *B.C. Development Corp. v. Friedmann (Ombudsman)*, [1984] 2 S.C.R. 447, discussing the meaning of "aggrieved" under the *Ombudsman Act*.

9 R.S.B.C. 1996, c.113, s. 112.

10 R.S.B.C. 1996, c.492, s. 91.

11 R.S.B.C. 1996, c.406, s. 49.

Where this type of explicit statutory definition of party status is provided, issues of standing to initiate tribunal proceedings rarely, if ever, arise.

At the other end of the spectrum, bodies that perform an inquiry function are not engaged in party/party dispute resolution. Inquiry bodies are established primarily for the purpose of fact finding and do not determine the rights of individual parties. In the course of conducting inquiries, these bodies typically (and necessarily) have broadly defined powers to hear from all interested parties.

Disputes over statutory standing most frequently arise in the middle category. Tribunals in this category are frequently left to resolve standing issues in the context of open-ended statutory standing provisions granting rights of appeal or rights of complaint to, for example, persons "affected" or "aggrieved" by statutory decisions.[12] There are difficulties with such provisions in terms of achieving the objectives of consistency in approach and transparency in tribunal processes.

First, there is a marked lack of consistency in terms of the statutory language used. Currently, there are provisions in British Columbia legislation that grant standing to:

- persons aggrieved;
- persons dissatisfied;
- persons aggrieved or dissatisfied;
- persons affected;
- persons directly affected;
- interested persons;
- any person, with leave of the tribunal.

The reason for such differences in terminology is not always clear from the statutory context.

At a more fundamental level, it must be recognized that such open-ended standing provisions create a measure of uncertainty by leaving standing issues to be resolved through an interpretive process, typically with little in the way of legislative guidance. Not only does this create uncertainty for the parties to the administrative process, the adjudication of these types of

[12] Examples of such legislative provisions are set out in Appendix A.

standing disputes has taken up a considerable amount of tribunal and court resources.[13]

Legislative reform in this area has to date proceeded on an ad hoc basis. For example, in 1997, the *Waste Management Act* was amended to provide standing to appeal to "a person aggrieved" rather than "a person who considers himself or herself aggrieved".[15] The *Liquor Control and Licensing Act* underwent a series of more specific amendments in which a broad "person aggrieved" standing provision was ultimately replaced with a provision that limited standing to statutorily defined parties. [16]

These examples of isolated legislative reform suggest that more, and more uniform, assistance could be provided to highlight the legislative intent underlying statutory standing provisions. In terms of the objectives of consistency and transparency, unambiguous standing provisions are preferable to those that leave the question of standing to the uncertainty of an interpretive process. While more general standing formulae may be necessary in some contexts, it is unclear why, for example, a statutory right of appeal from a decision to refuse or cancel a licence is available to "persons aggrieved" rather than limited to the licensee. Even where an open-ended standing provision is necessary because an administrative decision will affect a broader constituency, additional legislative guidance could be provided in the form of criteria to be considered in determining the issue of standing.[17]

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13 For example, *Howe Sound Pulp and Paper Ltd. v. British Columbia (Environmental Appeal Board)*, [1999] B.C.J. No. 978 (QL) (S.C.); *Metalux Products Ltd. v. Deputy Director of Waste Management*, Appeal No. 96/17(b) (E.A.B.); *Cook v. Environmental Health Officer*, Appeal No. 00-HEA-032(a) (E.A.B.); *Watson v. Registrar of Companies and Elizabeth Bagshaw Society*, Appeal No. CAC-9708 (C.A.C.); *Matcom Invt. Ltd. v. Gen. Manager, Liquor Control & Licensing Branch* (1987), 16 B.C.L.R. (2d) 335 (C.A.); *B.C. Chicken Marketing Board v. B.C. Marketing Board*, 2002 BCSC 610; *British Columbia (B.C. Marketing Board) v. British Columbia*, [1988] B.C.J. No. 595 (QL) (S.C.).

14 It is worthy of note that the courts themselves have at times expressed frustration at the frequency with which such ambiguous phrases as "person aggrieved" appear in statutes. In *Ealing Corporation v. Jones*, [1959] 1 Q.B. 384, the Court in construing the words "person aggrieved" voiced a "protest that Parliament continues to allow this expression to come into Act after Act of Parliament" (at p. 390).

15 *Waste Management Act*, R.S.B.C. 1996, c.482, s.44.

16 The evolution of the test for standing under the *Liquor Control and Licensing Act*, R.S.B.C. 1996, c.267, is reviewed in *Jolly Coachman Neighbourhood Pub v. British Columbia (Liquor Control and Licensing Branch, General Manager)*, [1998] B.C.L.I. No. 8 (QL) (Liquor Appeal Board), at para. 27.

17 For example, a statute could grant standing to "persons affected", but also contain a provision to following effect: "For the purposes of [the section granting the right of appeal], a "person affected" includes…".

Recommendations

In the context of tribunals engaged in party/party dispute resolution, provide, as far as possible, unambiguous statutory provisions setting out who is entitled to appeal, to file a complaint or to otherwise invoke the process of the tribunal.

Where open-ended standing provisions are necessary because tribunal decisions will affect a broad constituency, provide:

- **consistency in the language of such open-ended standing provisions;**
- **legislative guidance as to the types of interests that are intended to be captured by the standing provision.**

Tribunal Power to Add Parties/Intervenors

An important aspect of the question of standing is the power of tribunals to hear from interested parties in the course of an ongoing proceeding. Again, this is roughly analogous to the jurisdiction of the courts at common law to permit intervention in a proceeding and is premised on much the same underlying policy concerns. The power to permit intervention is an aspect of a tribunal's authority to control its own procedure. Only clearly expressed language in a tribunal's constituent statute can take away this authority and discretion.[18]

The principles of procedural fairness provide an important backdrop to the tribunal's power to hear from interested parties. The *audi alternam partem* (right to be heard) rule requires that parties directly and necessarily affected by a tribunal's decision be afforded a right of participation in the proceedings unless the governing statute expressly provides otherwise.[19] A tribunal's power to add parties and intervenors ensures adequate rights of participation for those affected and also assists the tribunal in providing a full picture of the rights and interests at stake. Since tribunals, unlike courts, do not have the inherent power to grant public interest standing,[20]

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18 *Re American Airlines Inc. and Competition Tribunal et al.* (1988), 54 D.L.R. (4th) 741 (Fed. C.A.); appeal dismissed [1989] 1 S.C.R. 236. In contrast, it may be that tribunals do not have the power to add parties (at least on an involuntary basis) unless such a power is expressly or impliedly granted in the enabling legislation: *Canadian Union of Public Employees, Local 394 v. Crozier* (2001), 84 B.C.L.R. (3d) 220 (C.A.).

19 *Telecommunications Workers Union v. Canada (Radio-television and Telecommunications Commission)*, [1995] 2 S.C.R. 781.

20 *C.U.P.E. v. Local 30 v. WMI* (1996), 34 Admin. L.R. (2d) 172 (Alta. C.A.); *Athabasca Environmental Assn. v. Alberta (Public Health Advisory & Appeal Board)* (1996), 34 Admin. L.R. (2d) 167 (Alta. C.A.);

intervention also provides a mechanism for the participation of public interest groups in a tribunal proceeding where such groups are not otherwise granted standing under the governing statute.

While provisions authorizing tribunals to hear from intervenors or "interested parties" are common in British Columbia legislation, there is a lack of consistency in the legislative approach.[21] In general terms, the statutes fall into four categories:

- statutes that provide express authority to allow participation by "intervenors" or "interested parties";
- statutes that provide express authority to allow the addition of "parties";
- statutes that provide express authority to add both "parties" and "intervenors";
- statutes that are silent on a tribunal's power to add either parties or intervenors.

In general, there is minimal legislative guidance on the distinction between an "added party" and an "intervenor", or the criteria that should be applied by tribunals in considering applications for either party or intervenor status. While some tribunals have included provisions in their published rules that address applications for intervenor or party status, few provide detailed guidance on the governing considerations. For the most part, the details are worked out on a tribunal-by-tribunal basis through the relevant jurisprudence. While such an approach may have the advantage of according tribunals a significant amount of discretion in resolving the highly contextual question of who should have status to participate, it does little to bring clarity and certainty to the process for tribunal users.

Furthermore, there is significant consistency in the approach adopted by tribunals in identifying criteria to govern applications for party or intervenor status. A tribunal's power to add a "party" is generally exercised where the applicant has a personal and direct interest in the outcome of the proceeding and is accordingly entitled to a fuller range of participatory rights.[22] Where such direct interest cannot be established, an applicant may be entitled to intervene in a hearing with a lesser

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John Keays and Paddy Goggins v. Assistant Regional Waste Manager and MB Paper, Appeal No. 97-WAS-10(a) (Environmental Appeal Board).

21 Examples of legislative added party/intervention provisions are set out in Appendix B.

22 See for example, *Forest Practices Board v. Government of British Columbia and Husby Forest Products Ltd. et al.*, Appeal No. 2000-FOR-009(b) (F.A.C.), interpreting the distinction between added parties and intervenors under ss.131(12) and (13) of the *Forest Practices Code*. This would seem to be analogous with the power of the trial courts in this Province to join parties to a proceeding under Rule 15(a)(iii), and their inherent power to grant standing to intervenors. As noted in *Canadian Labour Congress v. Bhindi et al.*, *supra*, the power to add parties under Rule 15 is limited to persons who have a direct interest in the precise outcome of the litigation between the original parties.

degree of participatory entitlement. In considering applications for interevenor status, tribunals look to common law tests, resolving such applications on the basis of the applicant's degree of interest in the proceeding and the usefulness of the proposed submissions.[23]

Given this consistency in approach, there would appear to be little disadvantage in providing tribunals with uniform powers to add parties and intervenors to an ongoing proceeding and much to be gained from the consistency and certainty that would result from a clear articulation of such powers. Such a reform could be implemented by including added party/intervenor provisions in model statutory powers legislation. These types of powers should be broadly available to tribunals acting in an adjudicative capacity particularly where tribunal decisions will potentially impact a broad constituency.

In a general sense, added party status would be available to persons directly affected by the tribunal proceedings with the added parties entitled to a full range of participatory rights. Persons having an interest in the proceeding that falls short of the requirement for party status might still be permitted to participate as intervenors with the extent of participatory rights left to the tribunal's discretion.[24]

Recommendation

Enact legislation, where appropriate, authorizing tribunals to add parties or intervenors to an ongoing proceeding and setting out the criteria on which such intervention would be permitted.

Standing of Statutory Decision Maker

A discrete issue that arises from a broad consideration of the question of standing before administrative tribunals is that of the standing of an administrative body to appear as a party on

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[23] For example, *International Forest Products Ltd. v. British Columbia and Forest Practices Board*, Appeal No. 96/02(a) (Forest Appeals Commission); *Murphy v. British Columbia (Ministry for Children and Families)*, [1999] B.C.H.R.T.D. No. 8 (QL)(Human Rights Tribunal); *Houston Forest Products Co. et al. v. Assistant Regional Waste Manager et al.*, Appeal No. 99WAS-06(b), 08(b) and 11-13(b) (Environmental Appeal Board); *Lowan (c.o.b. Corner House) Re*, [1998] B.C.E.S.T.D. No. 261 (QL) (Employment Standards Tribunal); *Re Hauchecorne [Appl. for Standing]*, Securities Commission 2000/04/27.

[24] There are precedents for "added party" and "intervenor" provisions in reform efforts in other jurisdictions. See *Proposal for an Administrative Hearings Powers and Procedures Act* (Canada – available on the Department of Justice website), Part II: Access to Proceedings; *Powers and Procedures for Administrative Tribunals in Alberta* (Alberta Law Reform Institute, 1999).

an appeal or review of its own decision. In the absence of an explicit grant of authority to fully participate in a hearing in these circumstances, a tribunal is generally limited to making submissions about jurisdictional matters including whether the tribunal lost jurisdiction through a patently unreasonable interpretation of its governing statute.[25]

Generally, standing is restricted in these cases because it would be unseemly for a decision maker to argue the correctness of its own decision. Limiting the role of a tribunal in these circumstances protects its impartiality and authority in future proceedings. Any attempt by a tribunal to argue the merits of the case between the parties appearing before it is seen to discredit the tribunal's impartiality on a re-hearing.[26]

This general restriction does not act as an absolute bar on participation by administrative decision makers on the merits of an appeal from their decisions. Where the policy concerns underlying the general rule against tribunal participation do not arise, courts have permitted administrative decision makers to speak to the merits of the decision under appeal. Frequently, the decision maker is the only party available to defend the decision in question (for example, in the licensing context) or to otherwise represent the public interest. In other cases, the successful party may not have the resources to effectively resist an application for review or appeal. In these circumstances, the decision maker may be "the only effective presenter of the other side of the case".[27] In other words, the restrictive approach to the standing of statutory decision makers has been tempered where limits on participation would prevent a full consideration of the case on appeal or review.[28]

Even where the two sides to a dispute are represented by other parties, the expertise of the tribunal may also suggest a need to temper the strict limits on its participation on judicial review.

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25 *Northwestern Utilities Ltd. v. City of Edmonton*, [1979] 1 S.C.R. 684; *C.A.I.M.A.W. Local 14 v. Paccar*, [1989] 2 S.C.R. 983.

26 "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 context before the Board itself in the first instance". *Northwestern Utilities*, at p. 709.

27 *CPR v. The Information and Privacy Commissioner et al (In the Matter of the Judicial Review Procedure Act)*, 2002 BCSC 603, at para. 66.

28 *Nycan Energy Corp. v. Energy and Utilities Board (Alta.) et al.* (2001), 277 A.R. 391 (Alta. C.A.); *Salon Salon Hair Fashions Ltd. (Re)*, [1999] B.C.J. No. 381 (QL) (S.C.).

The limits on tribunal participation might in some cases be inconsistent with the increasing deference shown by courts to the decisions of expert bodies.[29]

While courts have responded to these types of concerns on an ad hoc basis, there continues to be considerable uncertainty in the law on the standing of a tribunal on appeal or review. In the absence of explicit legislative guidance, this issue will almost inevitably arise for determination when tribunal decisions are challenged. This problem has been addressed to some extent in British Columbia legislation, primarily through provisions that give explicit party status to licensing and other regulatory bodies on statutory appeals of their decisions.[30] However, disputes over tribunal standing continue to arise where there are no explicit statutory provisions, particularly on judicial review.[31] In the absence of express legislative guidance, the judicial restrictions on tribunal standing will continue to apply.

Recommendations

Provide greater legislative guidance on the scope of tribunal standing on appeal or judicial review.

Ensure that while the general principle of restrictive standing should continue to apply, there is greater scope for participation by a tribunal on review or appeal where there is an interest, particularly the public interest, that would otherwise not be fully represented.

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29 David J. Mullan, *Administrative Law* (Toronto, 2001), suggests the adoption of a discretionary approach that would focus on the question of "whether the participation of the tribunal is needed to enable a proper defence or justification of the decision under attack" (at p. 459).

30 For example, *Environment Management Act*, R.S.B.C. 1996, c.118, s.11(12); *Commercial Appeals Commission Act*, R.S.B.C. 1996, c.54, s.1; *Forest Practices Code*, R.S.B.C. 1996, c.159, s.131(7); *Securities Act*, R.S.B.C. 1996, c.418 s.167(5).

31 See for example the recent decision in *Darryl-Evans v. Empl. Standards*, 2002 BCSC 48, where the standing of both the Director of Employment Standards and the Employment Standards Tribunal on a judicial review was discussed.

SUMMARY OF RECOMMENDATIONS

Ambiguous rules about who can participate in administrative proceedings cause unnecessary confusion, uncertainty, delay and expense for individuals who come to tribunals for decisions or for the resolution of disputes. In order to identify those entitled to appear before administrative tribunals and avoid unnecessary proceedings over the scope of participatory entitlements, it is recommended that government:

Provide, as far as possible, in the context of tribunals engaged in party/party dispute resolution, unambiguous statutory provisions setting out who is entitled to appeal, to file a complaint or to otherwise invoke the process of the tribunal.

Provide, where open-ended standing provisions are necessary because tribunal decisions will affect a broad constituency:

- **consistency in the language of such open-ended standing provisions;**
- **legislative guidance as to the types of interests that are intended to be captured by the standing provision.**

Enact legislation, where appropriate, authorizing tribunals to add parties or intervenors to an ongoing proceeding and setting out the criteria on which such intervention would be permitted.

Provide greater legislative guidance on the scope of tribunal standing on appeal or judicial review.

Ensure that while the general principle of restrictive standing should continue to apply, there is greater scope for participation by a tribunal on review or appeal where there is an interest, particularly the public interest, that would otherwise not be fully represented.

APPENDIX A

Examples of Legislative Standing Provisions

"person aggrieved"

Credit Reporting Act, R.S.B.C. 1996, c.82, s.8
Debt Collection Act, R.S.B.C. 1996, c.92, s.7
Farm Practices Board, R.S.B.C. 1996, c.131, s.3(1)
Health Act, R.S.B.C. 1996, c.179, s.8(4)
Mortgage Brokers Act, R.S.B.C. 1996, c.313, s.9
Motor Carrier Act, R.S.B.C. 1996, c.315, s.54
Waste Management Act, R.S.B.C. 1996, c.482, s.44(1)
Workers Compensation Act, R.S.B.C. 1996, c.492 (Part III – Occupational Health and Safety), ss.200 and 208

"person dissatisfied"

Assessment Act, R.S.B.C. 1996, c.20, s.50

"person aggrieved or dissatisfied"

Natural Products Marketing Act, R.S.B.C. 1996, c.330, s.8(1)

"person affected"

Financial Institutions Act, R.S.B.C. 1996, c.141, s.236(1)(b)
Trade Practice Act, R.S.B.C. 1996, c.457, c.17.1(2)
Wildlife Act, R.S.B.C. 1996, c.488, s.101.1(1)

"person directly affected"

Credit Union Incorporation Act, R.S.B.C. 1996, c.82, s.98(1)
Financial Institutions Act, R.S.B.C. 1996, c.141, ss.242(1) and 237(3)
Securities Act, R.S.B.C. 1996, c.418, s. 165(3)
"interested person"

Cemetery and Funeral Services Act, R.S.B.C. 1996, c.45, s.10

"any other person with leave of the Board"

Electrical Safety Act, R.S.B.C. 1996, c.109, s.19(2)
Elevating Safety Devices Act, R.S.B.C. 1996, c.110, ss.19(2) and 20(3)
Gas Safety Act, R.S.B.C. 1996, c.169, s.27(2)
Power Engineers and Boiler Pressure Vessel Safety Act, R.S.B.C. 1996, c.368, s.27

"any person"

Pesticide Control Act, R.S.B.C. 1996, c.360, 15(2)

APPENDIX B

Example of Legislative Authority to Add Parties/Intervenors

authority to add "intervenors"

Human Rights Code, R.S.B.C. 1996, c.210, s.36(2)

authority to add "parties"

Commercial Appeals Commission Act, R.S.B.C. 1996, c.54, s.8
Labour Relations Code, R.S.B.C. 1996, c. 244, s.140(n)
Public Service Appeal Regulation, B.C. Reg. 133/94, s.7
Criminal Code, R.S.C. 1985, c.C-46, s.672.5

authority to add "parties" and "intervenors/interested parties"

Assessment Act, R.S.B.C. 1996, c.20, ss.52(2) and (3)
Forest Practices Code, R.S.B.C. 1996, c.159, ss.131(8) and (13)

authority to hear from "interested person" or "any other person"

Agricultural Land Reserve Procedure Regulation, B.C. Reg. 452/98, s.20(c)
Natural Products Marketing (BC) Act Regulation, B.C. Reg. 328/75, s.6(8)
Environment Management Act, R.S.B.C. 1996, c.118, s.11(12)
Mental Health Regulation, B.C. Reg. 233/99, s.