Bambrick, Re (Newfoundland Supreme Court, Trial Division)

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Bambrick, Re

Re The Workers' Compensation Act, S.N. 1983, c. 48 as amended and decision of Workers' Compensation Appeal Tribunal

Re JAMES J. BAMBRICK

Citation: 1992 CarswellNfld 167, 10 Admin. L.R. (2d) 112, 101 Nfld. & P.E.I.R. 181, 321 A.P.R. 181

Court: Newfoundland Supreme Court, Trial Division

Judge: Puddester J.

Heard: October 25 and 29, 1990

Judgment: September 30, 1992

Year: 1992

Docket: Doc. St. J. 2097/90

Counsel: *David G.L. Buffett*, for James J. Bambrick.

***Brian Casey*, for Workers' Compensation Appeal Tribunal.**

***Glen Roebothan* and *Susan Nickerson-Graham*, for Workers' Compensation Commission.**

Subject:

Public

Civil Practice and Procedure

Administrative Law --- Practice and procedure.

Practice and procedure -- Standing -- Workers' Compensation Appeal Tribunal -- Tribunal not being person with "an interest" under s. 21.9(4) of Workers' Compensation Act -- Tribunal having residual discretion in such procedural matters but confined by common law principles of natural justice to appearing for purposes of explaining record or where called as witness by tribunal or party to appeal -- The Workers' Compensation Act, 1983, S.N. 1983, c. 48, s. 21.9(4)..

A worker appealed to the Workers' Compensation Appeal Tribunal (the "tribunal") from a decision of the Workers' Compensation Commission (the "commission"). In a preliminary ruling, the tribunal held that the commission was entitled to be present and to participate in the proceedings as an interested party.

The worker appealed from this ruling, and the hearing of the appeal to the tribunal was adjourned pending the determination of that appeal.

Held:

The appeal was allowed and the ruling of the tribunal was set aside.

In terms of s. 21.9(4) of *The Workers' Compensation Act* (Nfld.), the commission is not "a person with an interest in the proceeding before the Appeal Tribunal" and was therefore not entitled as of right to be a party to the appeal.

By virtue of s. 3(3) of *The Interpretation Act* (Nfld.) rules for the construction of statutes not inconsistent with the provisions of the Act itself were expressly preserved. One of those common law rules of construction is

that statutory provisions are to be interpreted as not derogating from the general law, except where such an intention is manifest. While this principle of interpretation has to be read in the light of the court's obligation under s. 17 of *The Interpretation Act* to treat all legislation as remedial and to give it "such fair, large and liberal construction and interpretation as best ensures the attainment" of its "objects" "according to its true intent, meaning and spirit", nevertheless, existing common law is relevant in the discerning of legislative objectives.

In this regard, the common law position is that adjudicative tribunals such as the commission have no claim to be parties to appeals or judicial review applications to the courts from their decisions except where an issue as to their jurisdiction is raised or for the purposes of explaining the record of their proceedings.

As far as the decisions of the commission on questions of jurisdiction were subject to direct appeal to the court, there seemed little place for the principal exceptional situation to come into play in this statutory context. In addition, there was no suggestion that the commission's claim to party status could be justified on the basis of an allegation of jurisdictional error or a need to explain the record. Indeed, the role of explaining the record was one that could be undertaken as a witness rather than as a party.

There was no basis for interpreting s. 21.9(4) as including the commission in the category of those with "an interest". In particular, s. 21.9(6)'s creation of an obligation on the tribunal to notify the commission and "any person who appeared before it" of its decision on an appeal is supportive of an interpretation that s. 21.9(4) does not embrace the commission as a person with an interest entitled to appear before the tribunal. Viewed from a functional perspective, there was no reason to interpret the commission as a person having "an interest" in terms of s. 21.9(4).

The ability of the commission's board of directors to issue directives on matters of policy and interpretation before the tribunal decided an appeal and to review a tribunal decision from these standpoints after a decision has been rendered did not lead to the conclusion that the commission had "an interest" and was entitled to be heard on all appeals. Rather, these provisions could be seen as a comprehensive legislative scheme with respect to the relationship between the commission and the tribunal, a fact underscored by the undesirability of the commission's board of directors acting as a review authority over decisions of the tribunal in which the commission had participated as a party.

The fact that the commission's actions in future cases might be affected by decisions of the tribunal placed the commission in no different position from other tribunals the decisions of which were subject to reversal on appeal. Moreover, the status of the commission as the trustee of the funds out of which ◀ **workers** ▶ ◀ **compensation** ▶ was paid, while differentiating the commission from many other tribunals, did not in itself constitute a sufficient interest. The commission's financial interest was in fact given ample recognition by the directive and review powers that the statute conferred on it with respect to appeals to the tribunal.

Finally, while there might be some limited scope for commission participation in tribunal proceedings with respect to issues of jurisdiction and explanation of its record, what need or entitlement there was to such participation did not involve the categorization of the commission as having "an interest". Those interests were ones that could be represented in an amicus curiae, intervenor, or witness capacity.

The fact that the legislature conferred on the tribunal the power to make rules of procedure and evidence subject to approval by the Lieutenant Governor in Council did not preclude the existence of a general residual discretion with respect to procedural matters. Nonetheless, any such procedures, unless mandated by statute or properly promulgated subordinate legislation, had to comply with the basic principles of natural justice and fairness.

In this regard, the basic premise of the common law was opposed to the commission having standing or a right of audience with respect to appeals from its own decisions. This premise was not undercut in this context by virtue of the fact that there might not be an advocate of the employer's position or a representative of the public interest before the tribunal. In such matters, in the absence of any specific recognition of the need for such representatives or public advocacy role, the Office of the Attorney General had the capacity to fulfil that function and it was not one that could be carried out by the commission. In that capacity, the Office of the Attorney General was also in a position to present further relevant evidence not otherwise known to the tribunal or likely to be presented by the parties.

Indeed, it was difficult to concede how this "balancing" role was one that could be played by the commission in anything other than an adversarial capacity, a status that the commission itself had disavowed. Moreover, such a role was one that was not consistent with the notion of someone appearing in a matter as amicus curiae. While explanation by the commission of its record came within this concept, there was a contradiction involved in the situation of the commission acting as amicus curiae to adduce further evidence in support of its own decision. Indeed, even as a participant in relation to jurisdictional questions, the status of the commission was more in the nature of an intervenor than that of amicus curiae.

To the extent that the commission has the limited role of explaining its record and of giving evidence when

called by the tribunal or a party, it was advisable, given the supervisorial role of the board of directors, that in general those functions be fulfilled by the commission's subordinate staff and not members of the board of directors. However, individual circumstances could dictate otherwise and so a definite limitation could not be impressed on the commission's discretion in relation to such matters.

Cases considered:

Bank of Montreal v. Pedlar Industries Inc. (1980), 35 C.B.R. (N.S.) 269 (Ont. S.C.) -- *considered*

Bordeaux Maintenance Services (Maritimes) Ltd. v. White (1987), 86 N.B.R. (2d) 9, 219 A.P.R. 9 (Q.B.) -- *referred to*

Browning Harvey Ltd. v. B.F.C.S.D., Local 353 (1981), 81 C.L.L.C. 14,133, 35 Nfld. & P.E.I.R. 60, 99 A.P.R. 60 (Nfld. T.D.) -- *referred to*

Buggie v. Moncton (City) (1985), 85 C.L.L.C. 17,018, 6 C.H.R.R. D/3041, 65 N.B.R. (2d) 210, 167 A.P.R. 210, 21 D.L.R. (4th) 266 (C.A.) [leave to appeal to S.C.C. refused (1986), 65 N.R. 75 (note), 66 N.B.R. (2d) 270 (note), 169 A.P.R. 270 (note)] -- *referred to*

Canada (Labour Relations Board) v. Transair Ltd., [1977] 1 S.C.R. 722, 76 C.L.L.C. 14,024, (sub nom. *Transair Ltd. v. C.A.I.M.A.W., Local 3; Re Canada Labour Relations Board)* 9 N.R. 181, (sub nom. *Re Canada Labour Relations Board and Transair Ltd.)* 67 D.L.R. (3d) 421 -- *considered*

Castel v. Manitoba (Criminal Injuries ◀ ***Compensation*** ▶ *Board)* (1978), 89 D.L.R. (3d) 67 (Man. C.A.) -- *considered*

Crosbie Offshore Services Ltd., Re (1981), 34 Nfld. & P.E.I.R. 456, 95 A.P.R. 456 (Nfld. T.D.) -- *referred to*

Molson Companies Ltd. v. Moosehead Breweries Ltd. (1985), 63 N.R. 140, 11 C.P.R. (3d) 208 (Fed. C.A.) -- *considered*

Nokes v. Doncaster Amalgamated Collieries Ltd., [1940] A.C. 1014, [1940] 3 All E.R. 549 (H.L.) -- *considered*

Northwestern Utilities, Re, [1979] 1 S.C.R. 684, 7 Alta. L.R. (2d) 370, (sub nom. *Northern Utilities Ltd. v. Edmonton (City))* 89 D.L.R. (3d) 161, 23 N.R. 565 -- *considered*

Nova Scotia (Workmen's ◀ ***Compensation*** ▶ *Board), Re* (1976), 14 N.S.R. (2d) 693, 72 D.L.R. (3d) 246 (C.A.) -- *considered*

Pehlke, Re (1939), 20 C.B.R. 415 (Ont. S.C.) -- *considered*

Reference re ◀ ***Workers*** ▶' ◀ ***Compensation*** ▶ *Act, 1983 (Nfld.)* (sub nom. *Reference re Sections 32 & 34 of the* ◀ ***Workers*** ▶' ◀ ***Compensation*** ▶ *Act (Nfld.))* (1987), 67 Nfld. & P.E.I.R. 16, 206 A.P.R. 16, 36 C.R.R. 112, 44 D.L.R. (4th) 501 (Nfld. C.A.) [affirmed [1989] 1 S.C.R. 922, 40 C.R.R. 135, 56 D.L.R. (4th) 765, 96 N.R. 227, 76 Nfld. & P.E.I.R. 181, 235 A.P.R. 181] -- *referred to*

Statutes considered:

Evidence (Public Investigations) Act, The, R.S.N. 1970, c. 117 [R.S.N. 1990, c. P-33].

Interpretation Act, The, R.S.N. 1970, c. 182 [R.S.N. 1990, c. I-19] --

s. 3 [R.S.N. 1990, c. I-19, s. 3]

s. 3(1) [R.S.N. 1990, c. I-19, s. 3(1)]

s. 3(3) [R.S.N. 1990, c. I-19, s. 3(3)]

s. 17 [R.S.N. 1990, c. I-19, s. 16]

Public Enquiries Act, The, R.S.N. 1970, c. 314 [R.S.N. 1990, c. P-38] --

s. 3 [R.S.N. 1990, c. P-38, s. 3]

◀ **Workers** ▶' ◀ **Compensation** ▶ Act, 1983, The, S.N. 1983, c. 48 --

s. 19 [am. S.N. 1986, c. 38, s. 4]

s. 20

s. 20(1)

s. 20(2)

s. 20(3)

s. 21(1) [re-en. S.N. 1986, c. 38, s. 5]

s. 21.4(1) [en. S.N. 1986, c. 38, s. 5]

s. 21.4(2) [en. S.N. 1986, c. 38, s. 5]

s. 21.4(3) [en. S.N. 1986, c. 38, s. 5]

s. 21.4(4) [en. S.N. 1986, c. 38, s. 5]

s. 21.7 [en. S.N. 1986, c. 38, s. 5]

s. 21.7(1) [en. S.N. 1986, c. 38, s. 5]

s. 21.7(2) [en. S.N. 1986, c. 38, s. 5]

s. 21.7(3) [en. S.N. 1986, c. 38, s. 5]

s. 21.7(4) [en. S.N. 1986, c. 38, s. 5]

s. 21.7(5) [en. S.N. 1986, c. 38, s. 5]

s. 21.8(1) [en. S.N. 1986, c. 38, s. 5]

s. 21.8(2) [en. S.N. 1986, c. 38, s. 5]

s. 21.8(3) [en. S.N. 1986, c. 38, s. 5]

s. 21.9(2) [en. S.N. 1986, c. 38, s. 5]

s. 21.9(3) [en. S.N. 1986, c. 38, s. 5]

s. 21.9(4) [en. S.N. 1986, c. 38, s. 5]

s. 21.9(5) [en. S.N. 1986, c. 38, s. 5]

s. 21.9(6) [en. S.N. 1986, c. 38, s. 5]

s. 22(1) [am. S.N. 1986, c. 38, Sched.]

s. 25

Rules considered:

Newfoundland, Rules of the Supreme Court, 1986 --

R. 7

Regulations considered:

◀ **Workers** ▶ ◀ **Compensation** ▶ Act, 1983, The, S.N. 1983, c. 48 --

The ◀ **Workers** ▶ ◀ **Compensation** ▶ Appeal Tribunal Regulations,

Nfld. Reg. 119/87,

s. 5(1)

s. 5(3)

s. 5(4)

s. 7(1)

s. 10(2)

s. 12(1)

s. 13(1)

s. 13(3)

Appeal from preliminary ruling of **Workers' Compensation** Appeal Tribunal as to participatory entitlements of **Workers' Compensation** Commission in appeal from its own decision.

Puddester J.:

1 This proceeding, and another one heard at the same time raising identical issues, come before the Court by way of appeal from a preliminary ruling of the **Workers' Compensation** Appeal Tribunal (the "Tribunal").

2 James J. **Bambrick** appealed to the Tribunal from a decision of the **Workers' Compensation** Commission (the "Commission") respecting his entitlement to benefit under *The **Workers' Compensation** Act, 1983*, S.N. 1983, c. 48 and regulations made thereunder (the "Act").

3 Upon the convening of the appeal hearing before the Tribunal, the Commission was present and represented by an officer of the Commission and by counsel. The appellant objected to the Commission having any status or role at the appeal proceeding. The Tribunal ruled that the Commission was entitled to be present and to participate in the proceedings as an interested party. The appellant then requested an adjournment of the proceedings in order to consult counsel and if so advised, to take an appeal from the Tribunal's preliminary ruling. The Tribunal allowed that application, and adjourned the proceedings before it pending the outcome of such appeal, if taken.

4 The decision now, in this Court, is thus concerned with the appeal of the preliminary ruling of the Tribunal.

Preliminary Matters

1. Existence of Two Proceedings

5 Following the Tribunal's adjournment of the hearing of Mr. **Bambrick**'s appeal, and on the same day, an identical situation arose at a session of the Tribunal convened to hear an appeal brought by another worker, James J. Murphy. There as well, Mr. Murphy objected to participation by the Commission, and the Tribunal overruled the objection. That proceeding was likewise then adjourned to allow Mr. Murphy to take advice and also to bring an appeal to this Court. This was in fact done, and the matter bears Court number 1990 St. J. No. 2098.

6 Both proceedings in this Court have since been dealt with together. Particularly, with the consent of all parties, the two matters were argued at the same time. However, while the relevant facts and issues before the Court in both proceedings are identical, the matters are not consolidated under the Rules of Court. Therefore, it is appropriatethat separate reasons for judgment be filed in each proceeding. I shall provide detailed reasons for my decision now, in this first-numbered proceeding involving Mr. **Bambrick**'s appeal; the decision to be filed in matter No. 2098 will incorporate by reference the reasons set out here.

2. Timing of the Appeal

7 As noted, the matters now brought before the Court involve the appeal of a preliminary ruling made by the Tribunal. No issue was raised by any party as to the propriety of so proceeding, as opposed to awaiting the final decision or ruling of the Tribunal on the merits of Mr. ◀ **Bambrick** ▶'s appeal, and bringing to the Court any appeal then considered appropriate.

8 As will be mentioned again below, both the Tribunal and the Commission confirm the anticipated benefit generally to be derived from the decision of the Court in this matter, and from any express or implied guidance associated with it. While presumably such benefit could equally arise on disposition of an appeal brought following a final decision of the Tribunal, in the absence of any suggested improprietyin dealing with the matter now, the Court proceeds on that basis.

3. Parties Before the Court

9 The appellant, Mr. ◀ **Bambrick** ▶, was represented before the Court by his counsel. The Commission, and the Tribunal, were also separately represented, and heard in argument, through counsel. Since the essence of the appeal before the Court concerns the entitlement of the Commission to be heard on an appeal before the Tribunal, it is ironic that this same issue is one which, in theory, could be said to arise in turn with respect to the right of the Tribunal itself to be heard in this Court.

10 However, the propriety, or otherwise, of such appearance by the Tribunal was not raised by any of the participants. Indeed, in light of the nature of the written and oral submissions made, it must be taken that for purposes of the disposition of these particular appeals, all participants accepted the propriety of, and consented to, the participation of each of the other parties, including the Tribunal. Therefore the Court is not called upon to rule on the entitlement of the Tribunal to be heard here. Limited to this particular proceeding, the Court proceeds on the basis that the Tribunal is properly before it.

11 In addition to the authority of the Court under its own, separate jurisdiction (statutory and otherwise), by s. 25 of *The* ◀ ***Workers*** ▶' ◀ ***Compensation*** ▶ *Act* itself, the Court is expressly given the power

> ... to direct that any person interested, or, where there is a class of persons interested, any one or more persons as representatives of such class, shall be notified of the hearing and such persons are entitled to be heard.

Under this provision the Court ordered that notice of this proceeding be given to certain employer and employee "umbrella" organizations, and as well to the Attorney General for the Province. Although this was done, they did not appear or participate before the Court.

Issues

12 In identifying the issues, it assists to set out the basis of the appeal as contained in the Notice of Appeal filed by the appellant, together with the remedy sought from the Court. The Notice of Appeal specifies the grounds of appeal as follows:

> 1. That the Worker's [sic] ◀ **Compensation** ▶ Appeals Tribunal erred in law and/or on a question of jurisdiction when it determined that the Commission had standing before it and/or were a person or party interested and thereby were permitted to be represented at and to participate in the Appeal.
>
> 2. That the Worker's ◀ **Compensation** ▶ Appeals Tribunal ruling as it did, misinterpreted the provisions of the Worker's ◀ **Compensation** ▶ Act generally, and in particular, Section 21.9(4) of the said Act and its ruling is contrary to the provisions of the Act and the scheme of the legislation.
>
> 3. That the ◀ **Workers** ▶' ◀ **Compensation** ▶ Appeals Tribunal in ruling as it did has compromised the

integrity of and the impartiality of proceedings before it and of proceedings before the Commission.

The relief requested is set out in the following words:

> ... the Appellant will ask that the Order, decision or ruling of the Worker's [sic] ◀ **Compensation** ▶ Appeals Tribunal be reversed and request an Order or declaration to the effect that the Worker's ◀ **Compensation** ▶ Commission does not have standing at an appeal of the Worker's ◀ **Compensation** ▶ Appeals Tribunal from its own decision and an Order or declaration to the effect that the said Commission is not a party or person interested for the purposes of the hearing and is not thereby entitled to be heard at the hearing and is not an appropriateparty at or participant in the hearing for the foregoing reasons as well as for the reason that natural justice is thereby compromised.

13 The essence of the matter before the Court is whether the Tribunal erred in deciding that the Commission could appear and participate before the Tribunal in any respect as, or on a basis equivalent to, a "party". From the Notice of Appeal, the written briefs, and the arguments of the participants before the Court, this question is approachedfrom two perspectives.

14 Firstly, did the Tribunal err in law in holding that the Commission was an "interested" person within the meaning of the Act, and thus, by the Act itself, a person authorized to participate in the hearing before the Tribunal?

15 The second perspective is whether, even if the Tribunal did err in interpreting the legislation, or the law generally, as creating the Commission an "interested" person, nevertheless did the Tribunal otherwise have the authority to grant "standing" to the Commission as, or on a basis equivalent to, a "party"? (As will be mentioned again later, on this second aspect the parties are agreed that the question before the Court is whether, in principle, the Tribunal *may* grant standing to the Commission as a party. For purposes of this appeal the parties agree that the Court is not concerned with whether, if such authorityexisted, it was properly exercised *in the particular circumstances of this case*.)

16 Before turning to the facts and the law, there are two other points concerning the issues which can most usefully be set out here, and which need to be kept in mind in considering what follows.

17 Firstly, the parties have expressly restricted the scope of their submissions to circumstances of "participation" by the Commission before the Tribunal. The Court is not here called on to decide whether the Commission may otherwise "attend" before the Tribunal, as a spectator so to speak, but taking no role, evidentiary or otherwise, before that body.

18 Secondly, before the Court the parties have sometimes referred to the "standing" of the Commission. However, this has not been restricted to the formal concept of "locus standi" in the sense of the right to challenge, by way of appeal or otherwise, the decision of a lower tribunal. Indeed, in the case of the Commission's role on a hearing before the Tribunal it is meaningless to contemplate the Commission impugning its own proceedings or disposition as the lower tribunal in the process. Rather, the question before the Court here is as to the ability of the Commission in law to "be heard" before the superior tribunal.

19 As to this, and again as will be mentioned later, all three participants before the Court appear to concede that it is not appropriate for the Commission to be "heard" on an unrestricted basis, in the full sense of a "party", before the Tribunal. Thus, while the appellant submits that the Commission should not participate at all, both the Commission and the Tribunal agree that there should be some limitation on the Commission's participation when compared to that of a person traditionally considered to be a "party" in the full sense, such as, for example, the appellant Mr. ◀ **Bambrick** ▶ himself.

Relevant Facts

20 The few facts directly relevant to the disposition of this appeal are not in dispute. They can be concisely set out in the language of the affidavit filed in this proceeding by the Commission's Executive Director of Policy and Special Services. The affidavit says in part:

> 3. THAT on March 17, 1988, the Board of Directors [of the Commission] issued the following Directive:
>
> > That the Commission be represented and participate, not as advocate but as witness, at proceedings of the Appeals Tribunal with the intent to ensure, that the Tribunal receives a full account of the commission's interpretations of the case, the Commission's policies, and of the Act pertaining to the case under appeal.
>
> 4. THAT on April 27, 1988, the Board of Directors moved that the Board Directive of March 17, 1988 be rescinded due to concerns that implementation of the Directive instructing Commission representatives to appear at all Tribunal Hearings would result in the creation of an adversarial situation which is foreign to and inconsistent with Newfoundland's system of **compensation** which had been in effect since 1951.
>
> 5. THAT the **Workers' Compensation** Commission has, in practice, always been available to provide information to the Tribunal on matters of law and/or policy at the request of Panel Members.
>
> 6. THAT the present Tribunal, whose Members assumed office on or about June 16, 1989, has taken the position, as set out in the Tribunal's Third Annual Report dated 1989, that the Commission is a party to an appeal under the legislation and it is my opinion that the Tribunal wants to have Commission representatives at Tribunal Hearings. The relevant portions of the Annual Report are attached as Exhibit "C" to this my affidavit.
>
> 7. THAT the Board of Directors, in an effort to respond to the need of the Tribunal to have members of the Commission present at hearings, passed the following motion on May 2, 1990:
>
> > The preference is that the Commission be represented at Tribunal Hearings. This will be carried out with the understanding that this is subject to practical considerations and to the issues and policies under review.
>
> 8. THAT on May 10, 1990, the Commission advised the Tribunal of the Board's motion by letter stating:
>
> > The Board of Directors has directed that the Commission attend Tribunal Hearings insofar as it is practical to do so. Attendance will be on an *amicus curiae* basis for the primary purpose of providing any information or clarification that the Hearing Panel may request.
> >
> > The Commission will neither advocate for nor against the worker or employer and will not assume the role of defending its decision.

21 That portion of the Tribunal's Annual Report referred to in paragraph 6 of the Affidavit is as follows:

> **Lack of Employer Participation**
>
> It is notable that in all but very few cases neither the employer nor the **Workers' Compensation** Commission is represented. This is undoubtedlydue to the fact that employers often incorrectly perceive that the **Workers' Compensation** Commission is representing their interests at the hearing. It has been recommended by the **Workers' Compensation** Act Review Committee that an employer/worker advocacysystem might be an appropriate system for hearings particularly where the employer or the **Workers' Compensation** Commission is not represented.
>
> The Commission has declined to appear at hearings to defend their decisions, taking the position, that they would lose their impartial character if they did. The Tribunal usually is presented with appellants arguing one side of a case. It does not, generally speaking, have the benefit of hearing counter arguments. It must be understood the decisions are made in the vast majority of cases after hearings without the participation of either the employer or the **Workers' Compensation** Commission.
>
> It should be realized that the Tribunal does not have the resources to be as investigatory as the Ontario Tribunal with its immense legal, investigative and administrative staff and that while it must analyze critically the arguments that are being put forth the Tribunal cannot set itself up as an advocate with

> respect to the arguments being put forth. It must also be noted that Ontario has a worker/employer advocacy system and there may be no need for the **Workers' Compensation** Board of Ontario to have representatives at Tribunal appeal hearing [sic]. This is not the case in the Province of Newfoundland. The Tribunal takes the position that both the employer and the Commission is [sic] party to an appeal under the legislation. Both are notified of the time and location of hearings and are provided with copies of the Notice of Appeal and any other documentation registered with the Tribunal. The onus or responsibility rests with the Commission and the employers to decide if they plan to participate in the hearing. This is probably why it is more important under the Newfoundland system that there be an employer or Commission representative at appeal hearings in the absence of an employer/worker advocacy system.

The Tribunal's Ruling

22 The ruling issued by the Tribunal, and which is at the centre of this appeal, is in two parts. In oral reasons at the hearing, the Tribunal, through the Chairperson of the panel constituted to hear Mr. **Bambrick**'s appeal, ruled in the following words:

> Okay. Mr. Saunders, I would have to state that we have been advised by the Commission of late that they will be sending a representative to our Hearings, as Ms. Nickerson-Graham states, not in an adversarial role -- not to take a role adverse to the Claimant, by any means, but they're present to make clarifications, in ... in some instances, and for no other purpose; and the Tribunal accepts that.
>
> .....
>
> Mr. Saunders, the Panel has had an opportunity to discuss your concerns; and and have agreed that Sections Five and Six of the Regulations -- Section Five, specifically -- states that, "Where a person wishes to appeal a decision of the Commission to the Appeal Tribunal, a written Notice of Appeal shall be served upon the Commission, the Appeal Tribunal, and any other person interested in the decision." The ... the Panel's conclusion from that, Mr. Saunders, is that the Commission is an interested party, that they ... they have a right to be present, they have a right to be represented, and consequently, they're notified of every Hearing that ... that takes place. Now, that they've chosen in the past not to attend all Hearings has been entirely their decision, but they ... they have been welcome.

23 On the same day, the Tribunal confirmed this ruling by a letter addressed to Mr. **Bambrick**'s spokesperson and representative. The relevant portion of that letter is contained in the 3rd paragraph, which states as follows:

> We have taken this matter under advisement and it is the opinion of the Panel that the **Workers' Compensation** Commission is an interested party, as defined under the **Workers' Compensation** Act, and, therefore, has a legal standing, under the **Workers' Compensation** Act, to be present or represented at Appeal Tribunal Hearings.

Relevant Legislation

24 In considering the applicable legislation, it is necessary to consider *The **Workers' Compensation** Act* as a whole. In doing so, there are a number of parts of that statute, as brought to the attention of the Court on this application, which can in particular be looked to for an understanding of the framework in which the Tribunal operates, and as well of the statutory role of the Commission.

25 Dealing firstly with the role of the Tribunal under the scheme of the Act, from the materials filed by the parties here the following provisions appear relevant:

> 21.(1) There shall be an Appeal Tribunal known as the **Workers' Compensation** Appeal Tribunal ...
>
> .....
>
> 21.4(1) Notwithstanding the power of the Commission to reconsider a matter, where the Commission has made a final determination respecting a matter and all the procedures established by the Commission and this Act respecting a rehearing of the matter have been exhausted, the Appeal Tribunal may hear and has exclusive jurisdiction to dispose of all appeals from actions or decisions of the Commission respecting:

(*a*) an injured worker's or dependent's entitlement to ◀ **compensation** ▶ benefits;

(*b*) an injured worker's entitlement to rehabilitation services and benefits;

(*c*) provision of medical care;

(*d*) an employer's assessments;

(*e*) assignment of an employer to a particular class or group;

(*f*) an employer's merit or demerit rating.

(2) Subject to sections 21.7 and 22, an order or decision of the Appeal Tribunal is final and conclusive and is not open to question or review in a court of law and no proceedings by or before the Appeal Tribunal shall be restrained by injunction, prohibition or other process or proceedings in a court of law or be removable by certiorari or otherwise into a court of law.

(3) The Appeal Tribunal may for cause reconsider a matter that has been dealt with by it and may rescind, alter or amend a decision or order previously made by it.

(4) The decisions of the Appeal Tribunal shall be upon the real merits and justice of the case and it is not bound to follow strict legal precedent.

. . . . .

21.7(1) Where a matter to be decided by the Appeal Tribunal requires an interpretation of policy and general law prior to a decision being rendered, the Board of Directors shall review and determine the issue or interpretation of the policy and general law and the Tribunal shall consider the matter in light of the interpretation or determination of the Board of Directors.

(2) Where the Board of Directors conducts a review, it shall either hold a hearing and afford the parties likely to be affected by its determination an opportunity to make oral and written submissions or it shall permit the parties likely to be affected by its determination to make written submissions, as the Board of Directors may direct.

(3) The Board of Directors shall give its determination and direction, if any, under this section in writing together with its reasons therefor.

(4) Where the Tribunal makes a decision which in the opinion of the Commission is not consistent with established policy or the intent of this Act, the Board of Directors shall direct a review and determination as set out in subsections (1) to (3).

(5) Pending its determination, the Board of Directors, with respect to the decision that is the subject-matter of the review, may stay the enforcement or execution of the order made under the decision or may vacate the order if it has been implemented.

21.8(1) The Appeal Tribunal may, subject to approval of the Lieutenant-Governor in Council, in relation to hearings prescribe rules of procedure and evidence and may from time to time order the type and nature of information to be provided by a person to the Appeal Tribunal prior to or during a hearing and that person shall so provide the information to the Appeal Tribunal.

(2) Notwithstanding rules prescribed under subsection (1), the Appeal Tribunal or panel may receive or accept such evidence and information on oath or affirmation, affidavit or otherwise as it deems proper, whether or not that evidence or information is admissible as evidence in a court of law.

(3) For the purposes of any hearing an Appeal Tribunal, and each member thereof, has all the powers that are or may be conferred on a Commissioner under *The Public Inquiries Act*, and an Appeal Tribunal is deemed to be an "investigating body" for the purpose of *The Evidence (Public Investigations) Act*, and there shall be full right to examine and cross-examine all witnesses called and to adduce evidence in response and reply, and, without limiting the generality of the foregoing, the provisions of section 3 of *The Public Inquiries Act* shall apply to all such witnesses.

. . . . .

21.9(2) Subject to the regulations, the Appeal Tribunal shall

(*a*) notify the person appealing a decision of the Commission of the time and place of the hearing by the Appeal Tribunal;

(*b*) hear the appeal; and

(*c*) upon the conclusion of the hearing, confirm, vary or set aside the finding or decision of the Commission.

(3) For the purpose of making an appeal to the Appeal Tribunal a person may appear before the Appeal Tribunal on his or her own behalf or be represented by counsel or an agent and may accompany and appear with the counsel or agent before the Appeal Tribunal.

(4) Where a person other than a person appealing has an interest in a matter before the Appeal Tribunal, that person has the right to appear before the Appeal Tribunal either personally or as represented by counsel or an agent and shall after indicating in writing to the Appeal Tribunal of an intention to appear be notified of the time and place of the hearing.

(5) If the person appealing to the Appeal Tribunal or a person referred to in subsection (4) fails to attend, in person or by counsel or agent, the hearing of the appeal after being notified in accordance with this section, unless such failure to attend is due to circumstances beyond the person's control and that person has, by written notice, advised the Appeal Tribunal that the person wishes to so attend and sets forth, in the notice, the circumstances that prevent the attendance, the Appeal Tribunal may proceed in such absence to examine into the matter of the appeal and to hear the witnesses, if any, and adjudicate thereon.

(6) The Appeal Tribunal shall as soon as possible after hearing a matter, communicate in writing its finding or decision with reasons to the Commission and to any person who appeared before it forthwith after such finding or decision is made.

26 Turning then for a moment to the operation of the Commission itself, as distinct from the Tribunal, there are a number of provisions which should be considered. Of note, under s. 19 of the Act, the decisions of the Commission itself are also "final and conclusive", subject only to a right of appeal to the Tribunal, and to the Court. Again, like the Tribunal, the Commission has the power to reconsider any matter already dealt with by it. Also like the Tribunal, the decisions of the Commission are to be made on the real merits and justice of the case, and it, too, is excused from following strict legal precedent.

27 Section 20 is also relevant as constituting a general equivalent to the statutory "hearing" procedures applicable to proceedings of the Tribunal as set out above. It provides:

20.(1) A person interested in a decision to be made by the Commission is entitled on application to a public hearing before the decision is made by the Commission.

(2) A public hearing held under subsection (1) shall be held in such a manner and within such time as the Commission may prescribe.

(3) Any individual, corporation or body of persons appearing at a hearing shall have a right to appear and be represented.

28 Finally, turning back to the Tribunal's proceedings, a third part of the statutory framework is the regulations made under the Act. Those appearing to be most directly relevant to this appeal are some encompassed in regulations styled *The* ***Workers Compensation*** *Appeal Tribunal Regulations*, and are as follows:

5.(1) Where a person wishes to appeal a decision of the Commission to the Appeal Tribunal, a written Notice of Appeal shall be served upon the Commission, the Appeal Tribunal, and any other person interested in the decision.

. . . . .

(3) Upon receipt of a Notice of Appeal, the Appeal Tribunal shall, as soon as practicable, notify the Commission and other interested parties of the appeal and the issue in respect of which the appeal is brought and shall furnish them with copies of any written submissions made with respect to the appeal.

(4) Upon receipt of a notice under this section, the Commission shall forthwith transmit to the Appeal Tribunal copies of the Commission's records relating to the matter under appeal ...

. . . . .

> 7.(1) Where the Appeal Tribunal ascertains, on examining the Notice of Appeal and the decision appealed that the Commission failed to decide a question the Act required it to settle, it may of its own motion, issue an order to return the case to the Commission for a decision.
>
> . . . . .
>
> 10.(2) The Appeal Tribunal may seek legal advice from an adviser independent from the parties and in such case the nature of the advice shall be made known to the parties in order that they make [sic] submissions as to the law.
>
> . . . . .
>
> 12.(1) The Appeal Tribunal may appoint qualified medical practitioners as consultants and may obtain the assistance of a panel of any three of these consultants to assist it in determining any matter of fact respecting an appeal or any proceeding before the Appeal Tribunal.
>
> . . . . .
>
> 13.(1) The Tribunal may inquire into matter [sic] under appeal to determine whether the matter involves a decision of the Commission upon a medical report or opinion and, if such is the case, may, before the matter is heard by the Appeal Tribunal, require that the worker submit to an examination by a panel of three medical practitioners ...
>
> . . . . .
>
> (3) Forthwith after a panel of medical consultant examines a person pursuant to subsection (1), the panel shall report in writing to the Appeal Tribunal on the examination and the Appeal Tribunal shall, upon receiving the report of the medical panel, send a copy thereof to the parties to the appeal.

Analysis

The Interpretation of the Statute

29 It is logical to consider first the issue as to whether the Board erred in law in interpreting the legislation as, within itself, granting to the Commission the right to be heard before the Tribunal. As counsel for the Tribunal has submitted in argument, if the legislation does indeed mandate such status, it will be unnecessary in this appeal to go on to consider whether the Tribunal otherwise has the authority to grant such standing.

30 The provision of the Act most directly and centrally bearing on this issue is s. 21.9(4). For ease of reference, I set out that section again:

> (4) Where a person other than a person appealing has an interest in a matter before the Appeal Tribunal, that person has the right to appear before the Appeal Tribunal either personally or as represented by counsel or an agent and shall after indicating in writing to the Appeal Tribunal of an intention to appear be notified of the time and place of the hearing.

In my view it cannot be said that the "right to appear" granted under this provision is somehow limited to a non-participatory role, or only to that of a witness called by others. In my view, the clear intent of s. 21.9(4) is to allow those persons described in the section to participate in the hearing process, encompassing the right to tender relevant evidence themselves, to question other witnesses, and to make submissions to the Tribunal as to the appropriate disposition of the matter before it.

31 While this section is the only portion of the legislation brought to the attention of the Court which expressly addresses the issue of "standing" before the Tribunal, there are two provisions in the subordinate legislation -- *The* ***Workers*** *'* ***Compensation*** *Appeal Tribunal Regulations* -- which arguably also bear on the point. Section 5(1) of these regulations requires that the formal notice of appeal prepared by the appellant be served on the Commission, the Tribunal, and on "... any *other* person interested in the decision" (my emphasis). The Tribunal expressly refers to this part of the regulations in its oral ruling.

32 Sub-section (3) of the same regulation 5 also bears on the issue. (Although the oral ruling of the Tribunal is not quite clear on the point, it appears that this second provision may *not* have been expressly relied on by the Tribunal in making its ruling.) This provision requires the Tribunal itself, once it has received the notice of appeal from the appellant, to then notify the Commission "and *other* interested parties" (again my emphasis). The notification from the Tribunal is to be as to the fact of the existence of the appeal, and of the issues raised in it. Also, copies of any written submissions respecting the appeal and received by the Tribunal are to be given to the Commission and to other "interested parties".

33 Thus, through the use of the word "other" in ss. 5(1) and 5(3) of the regulations, expressly linking the Commission to the status of an "interested" person, or "party", respectively, it can be argued that the Commission thus falls within the scope of s. 21.9(4) of the Act itself, as a person having *"an interest in a matter before the Appeal Tribunal"*.

34 Before further considering this issue, it is here appropriate to consider a submission by the appellant as to the proper approach to be taken generally in interpreting the legislation. The appellant submits that general principle derived from case law related to the review of decisions of inferior tribunals generally, is clearly contrary to a finding that the Commission has status to appear before the Tribunal as a party on an "appeal" from its own decision. The appellant then argues that it is a central principle of the interpretation of statutes that, except in the face of the clearest language, a provision should not be interpreted so as to change the basic principle of the general law which would otherwise apply.

35 In this latter connection, the appellant cites the English case of *Nokes v. Doncaster Amalgamated Collieries Ltd.*, [1940] A.C. 1014 (H.L.). In the speech of Lord Atkin as part of the majority, the proposition is addressed in the following words at pp. 1031-32 of the report of that case:

> But it has been the duty of the Court on countless occasions to construe general words cutting down the generality to the obvious intention of the Legislature. The words of the learned author of Maxwell on Statutes, 8th ed., p. 73, appear to me to afford a true canon of construction. After saying that there are certain objects which the Legislature is presumed not to intend, and that a construction which would lead to any of them is therefore to be avoided, he continues: "One of these presumptions is that the Legislature does not intend to make any substantial alteration in the law beyond what it explicitly declares, either in express terms or by clear implication, or, in other words, beyond the immediate scope and object of the statute. In all general matters outside those limits the law remains undisturbed. It is in the last degree improbable that the Legislature would overthrow fundamental principles, infringe rights, or depart from the general system of law, without expressing its intention with irresistible clearness, and to give any such effect to general words, simply because they have a meaning that would lead thereto when used in either their widest, their usual or their natural sense, would be to give them a meaning other than that which was actually intended. General words and phrases, therefore, however wide and comprehensive they may be in their literal sense, must, usually, be construed as being limited to the actual objects of the Act. The general words of the Act are not to be so construed as to alter the previous policy of the law."

36 In the case there before it, the House of Lords was dealing with the interpretation of the phrase

> in this section the expression "property" includes property, rights and powers of every description, ...

These were the "general words" which were argued in that case to effect, by the statutory amalgamation of several employer companies, the legal transfer of the benefit of a private contract of employment, made between an employee and one of those companies, to the amalgamated group.

37 Considering the words of s. 21.9(4) of *The* ***Workers Compensation*** *Act* by themselves, can it be said that the position approved by the House of Lords in *Nokes* also properly applies to the language under consideration here, namely *"a person ... [having] an interest in a matter before the Appeal Tribunal ..."*? Certainly, these words are not in the same category of generality, nor as all-encompassing, as the words under consideration by

the House of Lords. However, the phrase "*[having] an interest*" does have aspects of generality sufficient that the concerns recognized in *Nokes* should also have application here, unless otherwise precluded.

38 While not expressly addressed by the parties, the provisions of *The Interpretation Act*, R.S.N. 1970, c. 182, as amended, are relevant in every situation in which this Court is called upon to construe legislation. By virtue of s. 3.(1), that Act applies equally to principal legislation, and to regulations enacted thereunder.

39 Section 17 provides:

> 17. Every Act and every regulation and every provision of an Act or regulation shall be deemed remedial and shall receive such fair, large, and liberal construction and interpretation as best ensures the attainment of the objects of the Act, regulation, or provision according to its true intent, meaning, and spirit.

However, this provision must be read together with s. 3.(3) of the same Act which provides:

> 3.(3) Nothing in this Act excludes the application to any Act of any rule of construction applicable thereto and not inconsistent with this Act.

40 In reviewing the decision in *Nokes*, supra, I cannot see reference to equivalent provisions governing the interpretation of the statute in that case. In any event, clearly *The Interpretation Act* must govern the Court in carrying out its duties here. But while this is so, when considering the "objects of the Act" and its "true intent, meaning and spirit" under the mandate of s. 3 of *The Interpretation Act*, I conclude that it is relevant to consider the state of the existing law.

41 Thus, turning to the general law as to the role, if any, of a primary tribunal on the hearing of an appeal from its own decision, two authorities from the Supreme Court of Canada have been brought to the Court's attention.

42 In *Canada (Labour Relations Board) v. Transair Ltd.*, [1977] 1 S.C.R. 722, in considering the role of a tribunal on a judicial review application to the court, all of the judges endorsed the concept that it was proper for the tribunal to be made a party to the court proceedings and to be heard with respect to defending its statutory jurisdiction.

43 Laskin C.J.C. (in the minority on the point) held that "jurisdiction" in this context included issues pertaining to natural justice in the proceedings before the tribunal. The Chief Justice also was of the opinion that the court, in its discretion, could properly permit the tribunal to

> ... enlarge the range of its submissions to include questions of law that are important to the discharge of its statutory functions. [p. 729]

44 However, Spence J., writing for the majority of judges on this issue, held that it was *not* appropriate for a tribunal to appear before the court to argue as to the natural justice of its procedures. Clearly, from the reasons of Spence J. and the majority, if indeed the court possessed a further discretion, it should not be exercised to permit the tribunal there to argue anything beyond issues pertaining to jurisdiction in the "strict" sense.

45 This position was generally confirmed in the subsequent unanimous decision of the Court in *Re Northwestern Utilities*, [1979] 1 S.C.R. 684. Estey J., writing for the Court there, was considering a situation in which the statutory framework clearly specified that the tribunal had a right to be heard on the appeal proceeding. At pp. 708-9 Estey J. dealt with this aspect in the following language:

> Section 65 no doubt confers upon the Board the right to participate on appeals from its decisions, but in the absence of a clear expression of intention on the part of the Legislature, this right is a limited

one. The Board is given *locus standi* as a participant in the nature of an *amicus curiae* but not as a party. That this is so is made evident by s. 63(2) of *The Public Utilities Board Act* which reads as follows:

> The party appealing shall, within ten days after the appeal has been set down, give to the parties affected by the appeal or the respective solicitors by whom the parties were represented before the Board, and to the secretary of the Board, notice in writing that the case has been set down to be heard in appeal, and the appeal shall be heard by the court of appeal as speedily as practicable.

Under s. 63(2) a distinction is drawn between "parties" who seek to appeal a decision of the Board or were represented before the Board, and the Board itself. 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 rate fixing activities of the Board. It also recognizes the universal human frailties which are revealed when persons or organizations are placed in such adversarial positions.

46 The statutory language under consideration in *Northwestern Utilities* did to some degree differentiate between the role of the tribunal there and that of other "interested" parties. In my view, the language of s. 21.9 of the Act here, referring particularly in this connection to the effect of s-ss. (4) and (6), can properly be said also to encompass a differentiation of a similar degree as was in part relied on by the court in that case. However, even if this were not the case, I conclude that the principles behind the position adopted by the Supreme Court there have equal application in this and other similar cases.

47 At pp. 709-10, the court went on to set out its own practice:

> It has been the policy in this Court to limit the role of an administrativetribunal 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 ... Where the right to appear and present arguments is granted, an administrative tribunal would be well advised to adhere to the principles enunciated by Aylesworth J.A. in *International Association of Machinists v. Genaire Ltd. and Ontario Labour Relations Board*, at pp. 589, 590:
>
> > Clearly upon an appeal from the Board, counsel may appear on behalf of the Board and may present argument to the appellate tribunal. We think in all propriety, however, such argument should be addressed not to the merits of the case as between the parties appearing before the Board, but rather to the jurisdiction or lack of jurisdiction of the Board. If argument by counsel for the Board is directed to such matters as we have indicated, the impartiality of the Board will be the better emphasized and its dignity and authority the better preserved, while at the same time the appellate tribunal will have the advantage of any submissions as to jurisdiction which counsel for the Board may see fit to advance.
>
> Where the parent or authorizing statute is silent as to the role or status of the tribunal in appeal or review proceedings, this Court has confined the tribunal strictly to the issue of its jurisdiction to make the order in question. ...

48 Estey J. went on to confirm that "jurisdiction", in the context there used by him, was limited to jurisdiction in its strict sense, and did not extend to

> ... the transgression of the authority of a tribunal by its failure to adhere to the rules of natural justice. ... To allow an administrative board the opportunity to justify its action and indeed to vindicate itself would produce a spectacle not ordinarily contemplated in our judicial traditions.

The approach adopted in the *Northwestern Utilities* case substantially supports the appellant's submission here as to the appropriateness of a restrictive interpretation of legislation in this area.

49 The position enunciated by the Supreme Court of Canada has been followed subsequently by lower courts themselves dealing with judicial review of the decisions of tribunals: see, for example, *Buggie v. Moncton (City of)* (1985), 65 N.B.R. (2d) 210 (N.B.C.A.); *Molson Companies Ltd. v. Moosehead Breweries Ltd.* (1985), 63 N.R. 140

(Fed. C.A.); *Castel v. Manitoba (Criminal Injuries* ◀ **Compensation** ▶ *Board)* (1978), 89 D.L.R. (3d) 67 (Man. C.A.); *Re Nova Scotia (Workmen's* ◀ **Compensation** ▶ *Board)* (1976), 72 D.L.R. (3d) 246 (N.S.S.C., A.D.). (I note that the case of *Bordeaux Maintenance Services (Maritimes) Ltd. v. White* (1987), 86 N.B.R. (2d) 9 (N.B.Q.B.), also cited by the appellant, appears to be an anomaly, in that it denies *any* role for an administrative tribunal before the court, even as to matters of jurisdiction.)

50 The limited role of a tribunal in defending its decision in court proceedings has been expressly recognized in our own Court as well: see *Re Crosbie Offshore Services Ltd.* (1981), 34 Nfld. & P.E.I.R. 456 (Nfld. S.C.,T.D.); *Browning Harvey Ltd. v. B.F.C.S.D., Local 353*, (N.S.C.,T.D. 1980 No. 1304, filed February 4th, 1981, unreported) [now reported 81 C.L.L.C. 14,133].

51 Thus, including from the highest judicial authority, it is clear that, in principle, the role of an administrative tribunal on the hearing of an appeal or judicial review of its own decision should be limited to questions of jurisdiction in the strict sense, coupled with (presumably where necessary) an explanation of the record which was before the tribunal itself. Even where the governing statute expressly grants a right to the tribunal to be heard on appeal or review, the courts have interpreted that right as being equally so restricted, except in the face of clear language expanding the role.

52 In the circumstances of this case, it is conceded by all parties that there is nothing in the appeal by Mr. ◀ **Bambrick** ▶ to the Tribunal which raises any issue as to the jurisdiction of the Commission in the sense contemplated by the authorities as properly resulting in a role for the Commission in the appeal process.

53 Beyond this, however, I note that the matters which may be brought on appeal to the Tribunal, enumerated in s. 21.4(1) of the Act, do not necessarily raise issues as to the "jurisdiction" of the Commission. Under s. 21.7(1), it is contemplated that the Tribunal may interpret "policy and general law", but that section requires the Tribunal to "*consider the matter in light of the interpretation or determination of the Board of Directors [of the Commission]*" on the point.

54 Further, s. 22.(1) (as amended) provides:

> 22.(1) An appeal lies to the Trial Division from any order, ruling or decision of the Commission or Tribunal involving
>
> (*a*) a question as to the Commission's jurisdiction; or
>
> (*b*) a question of law.

Notably, this section provides that an appeal with respect to the jurisdiction of the Commission lies not to the Tribunal but to this Court.

55 As a result, it can be said that the issue of jurisdiction, which appears traditionally to constitute the central basis of the "standing" of a primary tribunal before a reviewing or appellate court, has little practical significance here with respect to the role of the Commission before the Tribunal.

56 In terms of "explaining the record", again it is not suggested that this aspect actually arose before the Tribunal in this case either. Indeed, it is even arguable that such a function does not fall within the role of a "party", as distinct from that of a "witness", who can of course be called by others to give evidence as to factual matters.

57 Thus, it is not made out, nor indeed suggested, that there arose here either of the "traditional" bases (at least in court proceedings) for the Commission's participation in the appeal to the Tribunal. At the same time, and as noted earlier, the question here concerns the

ability of the Commission to play an even *broader* role.

58 The respondents point out that the authorities cited by the appellant as establishing a strictly limited role for the primary tribunal before a reviewing tribunal, arose in circumstances of appeal proceedings before courts of law. The Tribunal, in particular, submits that since none of the cited decisions deal directly with the role of one tribunal before a superior tribunal within the administrative hierarchy, the matter here can properly be approached from the perspective of general principle, not bound by pronouncements in these decisions.

59 The only authority brought to the attention of the Court which does expressly consider the position of the original tribunal before a superior tribunal within the administrative process appears to be the case of *Re Nova Scotia (Workmen's* ◀ ***Compensation*** ▶ *Board)*, supra. While the issue before the Court there ultimately concerned the standing of the primary tribunal to itself initiate an appeal to Court from a decision of the appellate tribunal, the Nova Scotia Court of Appeal in that case (although again dealing with legislation worded differently from that here) appears to have been satisfied that the principles militating against the initial tribunal's full participation, as a "party", had equal application at both levels of the appeal hierarchy. At p. 252 of the decision, the court concludes, although perhaps arguably in obiter, that

> There indeed seems something inherently wrong for a Board such as this, which performs *quasi*-judicial duties, to act in an adversary fashion to defend its decisions on appeal or, as here, to try to reinstate its decision when it has been overruled by an intermediate appeal tribunal. Even if such a Board chooses in form not to conduct proceedings before it with all the trappings and procedure of adversary proceedings in the ordinary Courts, it still has a general duty to conduct them in accordance with the rules of natural justice and to decide matters before it fairly and judicially ...
>
> For the board then to prosecute or defend an appeal from its own decision seems almost as incongruous as for a trial Judge or Magistrate to do so, which, of course, would be unthinkable. I leave aside matters where a board or Magistrate is questioned by prerogative writ on purely jurisdictional matters and then must appear or be represented before the reviewing Court.

60 It seems to me that though distinguishable on its facts, the principles enunciated by the court in *Re Nova Scotia (Workmen's* ◀ ***Compensation*** ▶ *Board)* also support the thrust of the appellant's position here as to the general law in this area.

61 It is clear that in dealing with matters of ◀ **compensation** ▶ for injury, the Commission, as the primary tribunal, performs an adjudicative function: *Reference re Sections 32 & 34 of the* ◀ ***Workers*** ▶' ◀ ***Compensation*** ▶ *Act (Nfld.)* (1987), 67 Nfld. & P.E.I.R. 16 (Nfld. S.C., C.A.).

62 As for the process of reviewing the exercise of that function, it is noted that the Tribunal may itself hear evidence. Indeed it is submitted that proceedings before the Tribunal are in essence by way of a hearing de novo, rather than by a more restrictive appeal or review process. Other requirements of the legislation and the regulations, for example the giving of notice, the holding of hearings, the right to examine and cross-examine witnesses and to adduce evidence in reply, and the very right of "interested persons" to be present and represented under s. 21.9(4) itself, illustrate that the Tribunal is itself to operate generally under the rules of natural justice. (Indeed it is perhaps difficult to suggest in this day and age that a contrary position would be appropriate.)

63 Also, the decisions of the Tribunal are in themselves "final". The enactment of a "privative clause" in this respect supports the stature and importance of the Tribunal. It is not intended to be simply an intermediate step in the decision-making chain. Indeed, as noted, its decisions may be attacked in this Court only on the basis of errors of law.

64 At the same time, as noted earlier, under the Act, the Tribunal is effectively bound to decide matters before it in accordance with enunciations of policy and law as provided by

the Commission through its Board of Directors. This is an unusual situation, since it appears to effectively preclude the Tribunal from a full independent review or appellate authority in these two areas with respect to matters such as entitlement, classification, and the like coming before the Tribunal on appeal. Clearly, in the appeal process mandated by the Act, the Tribunal's independent decision-making authority is to a degree unusually circumscribed.

65 Nevertheless, I am not convinced that the principles behind the position which has so clearly and uniformly been adopted by courts in reviewing the decisions of inferior tribunals, are properly restricted only to the process of judicial review of appeal before a superior Court, as distinct from a reviewing tribunal within the administrative framework itself. Further, in my view, the concept of general improprietylying behind the decisions enunciated in *Transair* and *Northwestern Utilities*, supra, and in the cases following them, is equally applicable to the appeal process before a tribunal which functions under such statutory procedures as does the Tribunal here. The same principles should apply, except in the face of express or clearly implied provisions to the contrary.

66 Against this background of the applicable general law in the area, I return to the question as to the interpretation of the actual words in s. 21.9(4) of the Act. I conclude that the matter should be considered from the perspective of whether there is anything in the legislation, considered from the perspective of the attainment of the objects of the Act, which either expressly or by implication, includes the Commission in the category of a "person interested" in the proceedings before the Tribunal, beyond such a degree of "interest" as would arise in connection with an explanation of the record before the Commission itself.

67 In now considering the legislation from this perspective, I note a submission made at the commencement of argument. Counsel for the Tribunal suggests that the practice in cases of appeals under federal immigration and unemployment insurance legislation, to bodies in an equivalent position to that of the Tribunal here, is that the initial decision-maker -- the equivalent to the Commission in this case -- participates actively in the appeal proceedings before the appeal tribunal. As noted when this submission was advanced, there is no other evidence before the Court here on this issue. It is not possible to determine the equivalency, or otherwise, between the statutory procedures and factual practices of the Commission and the Tribunal here, compared with those of equivalent bodies under these federal statutes.

68 However, even if such an equivalency were fully established on appropriate evidence, I am not convinced that the mere fact of the existence of a practice in other settings can be determinative, or even persuasive, as to the existence of a proper legal basis for those practices. In the absence of some cited prior authority dealing with that legal basis, such facts, in themselves, even if established, would appear to me to be of little moment in terms of the legal decision which must be made here.

69 Turning then first to the words used in the Act itself, there is nothing within s. 21.9(4) which expressly or by necessary implication defines the Commission as an interested party. As to the other provisions of the Act pertaining to proceedings of the Tribunal, the appellant firstly points to the fact that the Commission is itself separately identified by the name "Commission" in several other places. The appellantsubmits that this separate -- and generally uniform -- reference to the "Commission" throughout indicates that it is *not* included within the broader and more general category of a "person interested" referred to in s. 21.9(4).

70 Further, the appellant says that the reference to "*having an interest in the matter*" clearly can refer only to a *particular* matter, as distinguished from a particular category of matters, or indeed from all matters coming before the Tribunal. The appellant says that if indeed the Commission can be properly considered to have an "interest", then that interest is by its nature identical, and will exist in *every* matter. Again, the appellant submits that this

shows that the concept of an "interested person" referred to s. 21.9(4) does not extend to include the Commission.

71 There is also the fact that s. 21.9(4) commences with the words "*Where a person other than a person appealing has an interest ...*". In terms of the "interest" of the Commission, on the arguments advanced, again it is difficult to see how such "interest" would not exist with respect to *every* appeal. If such were indeed the case, the inclusion of the Commission within the intendment of s. 21.9(4) would seem to conflict with the opening words of the provision which seem directed more to "interests" arising from case to case, and from time to time, rather than to an interest which might be said to be "constant".

72 Finally, and still considering at this point only the wording of the Act itself, I consider the provisions of s. 21.9(5) and (6) to be of significance in the interpretation of s. 21.9(4). For ease of reference, I again set out these provisions:

> (5) If the person appealing to the Appeal Tribunal or a person referred to in subsection (4) fails to attend, in person or by counsel or agent, the hearing of the appeal after being notified in accordance with this section, unless such failure to attend is due to circumstances beyond the person's control and that person has, by written notice, advised the Appeal Tribunal that the person wishes to so attend and sets forth, in the notice, the circumstances that prevent the attendance, the Appeal Tribunal may proceed in such absence to examine into the matter of the appeal and to hear the witnesses, if any, and adjudicate thereon.
>
> (6) The Appeal Tribunal shall as soon as possible after hearing a matter, communicate in writing its finding or decision with reasons to the Commission and to any person who appeared before it forthwith after such finding or decision is made.

73 Consideration of the wording of s-s. (5) suggests that the "*person referred to in subsection (4)*" is not contemplated to be the Commission itself, because it is difficult to envisage what "*circumstances beyond the [Commission's] control*" could arise. Apart from this, the general thrust appears to show that such "persons" are contemplated as being other than officials or organizations within the administrative framework.

74 Of even more significance, in my view, is the wording of s. 21.9(6). That provision requires the Tribunal to send written reasons "*to the Commission and to any person who appeared before [the tribunal] ...*". Clearly, this draws a distinction between the Commission on the one hand, and a "*person appearing before*" the Tribunal on the other (the latter having clear reference to the category of persons set out in s. 21.9(4)). Indeed, it can be said that the wording of this section is in essence of a nature similar to the wording considered by the Supreme Court of Canada in the *Northwestern Utilities* case, supra, and which the court there found clearly distinguished between the primary tribunal, and other "parties", for purposes of the appellate hearing process.

75 Thus, from the terms of the Act itself, initially without reference to the regulations, the above-noted points, considered in light of the absence of any direct reference to the Commission in s. 21.9(4), suggest that the Commission is intended to be considered as a distinct entity, rather than being subsumed within the broader category of "interested person".

76 However, and while all parties agree that the content of regulations, as subordinate legislation, is not determinative of the meaning, intent or scope of the paramount statute, the respondents do point out that references, particularly in ss. 5(1) and 5(3) of the regulations, as set out above, are such as to support a finding, if not precluded on any other basis, that the Commission *is* in fact included within the category referred to in s. 21.9(4).

77 As earlier noted, on first glance, through the use of the word "other" in both the noted parts of regulation 5, there is an implication that the Commission itself is to be considered an "interested party", at least for purposes of the matters addressed in those regulations.

78 At the same time, however, there is nothing in either of these two regulations expressly linking their operation to the hearing process addressed in part in s. 21.9(4) of the Act. The regulations are concerned firstly with an appellant making the Commission (and indeed the Tribunal) aware that the appellant has taken an appeal from the decision of the Commission, and then with requiring the Tribunal to make the Commission aware of the basis of the appeal (arguably in itself a duplication of the purpose of regulation 5(1)), and providing to the Commission a copy of the written submissions, if any, to be argued before the Tribunal. Section 21.9(4) of the Act, on the other hand, appears to be concerned primarily, if not exclusively, with the hearing process before the Tribunal. It is only the Act itself which requires notice of the holding of the hearing, and addresses the right to appear.

79 In my view, it can be logically argued that the use of the word "other" in the two regulations does indeed recognize an "interest" by the Commission, but not in the sense, or for the purpose, of defining an "interested person" within the scope of s. 21.9(4) of the Act. As to what other purpose there might be in notifying the Commission of the existence and nature of an appeal, if not for the purpose of facilitating the Commission's participation as a party before the Tribunal, that point is surely answered by the other provisions of the Act creating what all parties acknowledge to be the unusual role for the Commission in providing written policy and legal direction to the Tribunal for application in matters before it. Given this curious, statutorily created "supervisory" role for the Commission over the Tribunal's deliberations, it can surely be concluded that, if not arguably the *only* rationale for the notice provisions to the Commission set out in regulations 5(1) and 5(3), then it is certainly a rationale which is at least equally as logical as the argument that such notice is required because of the Commission's right to appear as a "party" at the Tribunal hearings.

80 Adopting the principle from the case law that the statutory granting to a primary tribunal of a role as a party on an appeal from its own decision must be expressed in clear and unambiguous language, I conclude that the use of the word "other" in the regulations can be acknowledged and given logical scope for operation, and yet be properly limited to the concept of "interest" in the context of the limited "supervisory" role for the Commission as set out elsewhere in the statute itself. (Of course it can also be argued that the "notice" provisions in the regulations could also serve to alert the Commission to the potential need to provide an "explanation of the record". However, even viewed in that context, it does not appear to me that the language of the regulations themselves dictates that the Commission is properly to be considered as expressly brought within the concept of "interested person" addressed under s. 21.9(4) of the Act.)

81 A final point in considering the wording of s. 21.9(4) in light of the contents of regulation 5 is that again it is notable that while both regulations expressly refer to "the Commission" in terms of the scope of their operation, such a reference is conspicuously absent in the only part of the legislation, statutory or subordinate, which deals with the hearing process before the Tribunal, namely s. 21.9(4) itself.

82 Overall, therefore, on this aspect of the interpretation of s. 21.9(4), I conclude that the Commission is not directly "created" an "interested person". To the extent that the Tribunal reached a contrary conclusion, as the language of its reasons suggests it did, the Tribunal has unfortunately erred in law.

83 It is then necessary to turn to a consideration of whether, even though the language of the Act may not expressly constitute or define the Commission as an "interested person", the Commission nevertheless in fact falls within that category by virtue of its function.

84 This aspect of the interpretation of the legislation is equally governed by the principles set out in *Transair* and *Northwestern Utilities*, and the other cases cited above. However, when approached from this perspective, the question is not focused on any 'definitional' wording of the legislation itself, but more broadly on the question as to whether, considering the Act as a whole, and the roles of the Commission and the Tribunal

respectively, and their interrelationship, all as defined under the Act, the Commission properly falls within the scope of an "interested person" for purposes of having standing before the Tribunal.

85 Again, it must be kept in mind that in this case the issue concerns the "standing" of the Commission, in the broader sense of a "right to be heard". While as will be referred to in further detail later, both the Commission and the Tribunal acknowledge the necessity, and the propriety, of some restriction on the Commission's participation before the Tribunal, the issue here concerns the ability of the Commission, on its own motion, to have audience before the Tribunal.

86 On behalf of the Tribunal it is submitted that the Commission in fact does have an "interest" in appeal proceedings before the Tribunal. The Tribunal points to the fact that under s. 21.7(1) of the Act, the Commission may be obliged to review the Tribunal's own decision with respect to compliance with policy and the "general law". Secondly, the Tribunal points out that its decision will necessarily affect what the Commission itself does in other similar cases which may subsequently come before the Commission. Finally, the respondents say, the Commission has a financial interest in the outcome of the Tribunal's decision, because it is the Commission which must "fund" any ◂ **compensation** ▸ which may be ordered.

87 As to these arguments, with respect I am not convinced that they place the Commission factually, or legally, in the position of a person with an "interest" in the Tribunal's proceedings, in the sense of a person entitled thus to participate as a party in the Tribunal's decision-making process.

88 As to the point that the Commission may be called upon to review the Tribunal's decision, this is undoubtedly so, although I am not convinced that the framework established under the Act contemplates that this can only be *following* that decision. I conclude that the intention is that the Commission can provide its direction on the statutorily limited points in *advance* of the Tribunal's decision, although it clearly retains the authority to review that decision and, effectively,to stay implementation should the Tribunal not follow what the Commission considers to be its own policy and the general law.

89 However, even recognizing this peculiar inter-relationship between the Commission and the Tribunal's decision-making process, it seems to me that as the appellant submits, the legislation has itself dealt comprehensively with this aspect by specifying in some detail the mechanism by which the Commission is to interact with the Tribunal in this area. I refer particularly to the requirement that the direction be provided in writing. Such a process, mandated under the Act itself, does not appear to me to create, or to support the concept of, the Commission as a person "interested", from the perspective of then *further* participating in the deliberations of the Tribunal, as a party before it.

90 Indeed, the fact that decisions of the Tribunal may themselves ultimately come under binding scrutiny by the Commission -- the very body whose initial decision is itself "appealed from" -- makes it even more important that the Commission not have a further role as a "party of interest" in the intermediate process.

91 Should the Tribunal find it necessary to seek explanation from the Commission for anything contained in such written directions, this could be accomplished by the Tribunal's calling of evidence from Commission witnesses on the point.

92 There is nothing to suggest that the Commission should be given the broader role of appearing before the Tribunal to argue *why* the Tribunal should adopt the Commission's direction on these, or any other points. Indeed, I note that both the Commission's written policy, and as well the position adopted by the Tribunal in its submissions to the Court, impliedly, if not expressly, acknowledge the improprietyof participation by the Commission

before the Tribunal by way of direct justification, through argument, of the Commission's initial determination. However, even beyond this, the scheme of the Act contemplates that this will indeed *not* be the case, since as noted the Commission itself given an overriding role to effectively set aside and remit the Tribunal's own decision, once made, if it does not comply with the policy and legal directives of the Commission. Such procedure in itself militates against an earlier role for the Commission in attempting to persuade the Tribunal by way of submission or argument, such as would be appropriate to a party of interest.

93 As to the next submission, that the decision of the Tribunal will necessarily affect what the Commission does in other similar cases, this of course will depend on the facts in those other cases. However, I do not accept that this position, though again logical, constitutes the Commission an interested person for purposes of participating in the Tribunal's hearings and decision-making process. If indeed this were a valid argument, it would apply equally with respect to *every* subordinate tribunal whose decisions come for review, either within the administrative framework of government, or before the courts. As has been clearly established, the concept of a broad, unfettered role for a primary tribunal in an appeal of its decision is clearly contrary to basic principles.

94 Finally, as to the fact that the Commission has a financial interest in the outcome, in the sense that it must fund any order made by the Tribunal, again this is undoubtedly so. However, it must be remembered that under the scheme of the **workers' compensation** legislation, in this province as elsewhere, the Commission is intended to derive its funds from levies on employers within the province. In that sense, it may be said that it is the employers -- either individually, within categories, or as a whole -- who have the real financial interest. While it is argued that, practically speaking, it is still the Commission which ends up representing that financial interest, this is only so as a matter of convenience and practicality. Nothing has been brought to the Court's attention within the legislation which would prohibit an employer, or group of employers, from appearing on a particular applicationto the Commission, or before the Tribunal itself. Indeed it is noted that both before the Commission and the Tribunal, with respect to Mr. **Bambrick**'s application and appeal, the particular employer there concerned was provided with notice, and indeed was represented at the initial Commission proceedings.

95 Having said this, I do agree that the obligation of the Commission to be directly involved in "creating" the funding necessary to meet not only the order of the Tribunal, but the initial order of the Commission itself, does make the position of the **Workers' Compensation** Commission in that regard different from some other administrative adjudicative tribunals, where the decision of the tribunal at first instance may not then involve the tribunal itself in the implementation of its decision (other than, of course, in the sense that as an adjunct of government, a tribunal's decision may involve a necessary course of action by some other part of government in implementingthat decision).

96 On this issue of the "financial interest" of the Commission, I further note the decision of the Nova Scotia Court of Appeal in the *Workmen's **Compensation** Board*, supra. As previously noted, that case actually involved the issue of the right of the Board -- the equivalent of the Commission here -- to appeal a finding of the Nova Scotia equivalent to the Newfoundland Appeal Tribunal, to the court. There are also differences between the wording of the respective statutes, particularly in categorizing parties entitled to appeal to the Nova Scotia Tribunal as "persons aggrieved".

97 However, in that case, as here, it was submitted that the role of the Commission as "custodian" of the **compensation** fund should be held to constitute the Commission a "party" of sufficient interest to ground the commencement of the appeal process, both to the Tribunal, and to the court. In the view of the Nova Scotia Court of Appeal, this fact did not constitute the Commission there an "aggrieved person"

> ... bringing it into the stream of the appellate procedure as an appellant ... [p. 252]

98 While the words "person aggrieved" are different and perhaps more restrictive than "person interested", I find the words of the Court of Appeal in that case generally apt with respect to the position here. At p. 252 of its decision the court stated:

> Can it be said that because the Workmen's **Compensation** Board is trustee for the funds which I have mentioned, any decision of the Appeal Board increasing **compensation** results in an added burden making the Workmen's **Compensation** Board an aggrieved person and so bringing it into the stream of the appellate procedure as an appellant?
>
> In my view that would be stretching the meaning of the case beyond reason.

99 Further with respect to the argument that this aspect of the role of the Commission makes it properly a "person interested" in the appeal process before the Tribunal, again I note that under the Act itself, there is an express and detailed procedure set out in which the Commission may, in effect, give written direction to the Tribunal, as well before as after the Tribunal's deliberations, with respect not only to matters of "law", but as to the "policy" of the Commission itself. In my view this unusual avenue of supervision provides more than ample scope for the Commission to make the Tribunal aware of its concerns, including those with respect to the implications of the decision of the Tribunal on the Commission's responsibilities as "custodian" or "trustee" of the **compensation** fund.

100 Finally, and returning to the general concept of a primary tribunal as a "person interested" before an appellate body, as noted, the *Transair* and *Northwestern Utilities* cases, supra, and the decisions in lower courts following these, have acknowledged an appropriate role for the initial decision-making tribunal, on appeal from or review of its decision, with respect primarily to the defence of its jurisdiction, and an explanation of the record which was before the initial tribunal. (Here, however, and as earlier noted, the question of the Commission's jurisdiction appears to have been removed from the scope of the Tribunal's appeal jurisdiction and expressly placed, by the Act itself, in the hands of this Court.) It is interesting to note that in the *Northwestern Utilities* case, although again under somewhat different wording in the governing legislation, the Supreme Court of Canada appears to have equated both of these limited roles to the function of an amicus curiae. While that aspect will be dealt with in more detail below, in itself it suggests that such limited functions do not properly fall within the concept of the role of a "*person with an interest in the matter*" before the Tribunal, in the words of s. 21.9(4).

101 In summary, therefore with respect to the first issue, that is as to the status of the Commission as a person "interested" within the meaning of s. 21.9(4) of the Act, I have concluded that the words of the Act, even considered in light of the provisions of the subordinate legislation cited to this Court, do not constitute the Commission an interested person within the meaning of s. 21.9(4). Furthermore, considered beyond the language used itself, I conclude that neither the nature nor function of the Commission or the Tribunal is such as to create the Commission a person or party of interest within the contemplation of the legislation. In so concluding I am satisfied that giving all appropriate weight to the requirements of *The Interpretation Act*, and considering *The* ***Workers*** *'* ***Compensation*** *Act* itself as remedial, such a conclusion does not invalidate, nor hinder, the attainment of the true intent, meaning and spirit of the legislation.

102 To the extent, therefore, that the Tribunal's ruling is based, as it clearly appears to be, on a finding contrary to the above, I must conclude that the Tribunal has erred in law.

103 However, as earlier noted, apart from the issue of error of law in interpreting the provisions of s. 21.9(4) of the legislation, both the appellantand the Tribunal directly, and indirectly the Commission through its general support of and reliance on the Tribunal's arguments,have raised the issue as to the existence or absence of other authority in the Tribunal with respect to the granting of standing to the Commission in appeal proceedings.

The General Authority of the Tribunal -- "Discretion"

104 With the benefit of having heard and considered the submissions and arguments of counsel in full, together with a review of the ruling and reasons of the Tribunal, it appears that the Tribunal's decision in this particular case was substantially based on its interpretation of the legislation, and its conclusion that s. 21.9(4) granted the Commission "standing" to appear and have audience before the Tribunal, in the broad sense under consideration here.

105 However, from the evidence before the Court, the background concerns and general "policy" developed and enunciated by the Tribunal with respect to the appropriate role of the Commission before it appear to be based on matters beyond the confines of s. 21.9(4) itself. To that degree, therefore, it can be said that some broader authoritywith respect to standing could arguably form, by implication, at least part of the basis for the Tribunal's decision, whether or not apparent on the "face" of the ruling itself. The submissions of the parties here raise and address this aspect.

106 In essence, the appellant submits that the Court should find that the Tribunal has no jurisdiction, beyond the provisions of s. 21.9(4), to grant standing to the Commission. As earlier noted, the Tribunal points out that the issue of a broader authority need not be determined if the Tribunal's interpretation of the legislation as itself mandating standing for the Commission is upheld. However it goes on to argue at some length that otherwise, the Court should hold that the Tribunal does have jurisdiction with respect to the granting of standing.

107 The matter is however further complicated. The Tribunal submits that if it is found to have a general jurisdiction with respect to determining standing, and if such a determination is properly discretionary, then the Court here should not review the exercise of that function by the Tribunal, since it would not encompass either a jurisdictional question or an error of law by the Tribunal, but rather, it is submitted, only the manner of exercise of a discretionary power.

108 On this point the appellant asserts that the granting of standing to the Commission under a discretionary power, if it exists, does indeed involve an act reviewable by the Court on this appeal, since it is the appellant's position that the Tribunal's discretion with respect to standing, if one exists at all, does not in law extend to the granting of standing to the Commission under any circumstances. As noted earlier, counsel for the appellant confirmed that the appellant did not take issue with the Tribunal's ruling based on any factors particular or unique to the circumstances of this appeal. Rather, the appellant's argumentis that the tribunal could not *in principle*, by discretion or otherwise, grant standing to the Commission.

109 In its response, the Tribunal then stated that based further on this "concession" by the appellant, if the Court concludes that the Tribunal does have a discretion with respect to standing, then the Court should not in any event go further on the facts of this case, since the appellant is not seeking to challenge the actual exercise of that discretion in the particular circumstances here.

110 Having considered the submissions of the parties on this point, I conclude that the appellant has not conceded the matter to the degree argued by the Tribunal. As well, and again as earlier noted, the written and oral submissions made on behalf of the Tribunal clearly recognize and assert the propriety of some limitation on the extent and nature of the Commission's participation before the Tribunal. Indeed the Tribunal itself has expressly requested the Court to define and confirm such limits. This position in effect supports the appellant's submission that the Court should consider whether discretion in the Tribunal can extend to the granting of standing to the Commission.

111 I am also aware, both from the evidence before the Court, and as well from the submissions by counsel for both respondents, that the issue with respect to limits on the proper role of the Commission before the Tribunal has been a vexed one to this point. Both respondents are effectively requesting that this aspect be dealt with.

112 Considering these "preliminary" aspects relating to the consideration of this second issue, I conclude that, in the particular circumstances of this case, it is appropriate to deal with the matter in the sense in which it has been advanced by the appellant. In all of these same circumstances, however, I shall consider the matter only to the extent necessary to deal with the role of the Commission before the Tribunal.

113 Unfortunately, while the only authorities cited, as reviewed earlier, deal with the nature and extent of standing, none deal directly with the issue as to the existence, and nature, of the Tribunal's authority,discretionary or otherwise, in this area. Rather, the appellant simply submits that as a pure creature of statute (and an "appellate" creature at that), the Tribunal has no jurisdiction, and no discretion within that jurisdiction, other than as expressly conferred by the statute. While the respondents concede that in an inferior tribunal there is no "inherent" jurisdiction with respect to standing or right of audience, they submit that such jurisdiction may arise from express provisions in the legislation, or by necessary implication from those provisions.

114 As to this, s. 21.8(1) of the Act grants to the Tribunal, subject to the approval of the Lieutenant Governor-in-Council, the right to make rules of procedure and evidence with respect to hearings. I do not think it can be said that the existence of this rule-making power mandates, or even implies, that in the absence of a rule on a particular aspect the Tribunal does not have the authority to proceed ad hoc with respect to an individual matter before it. It is notable that the Regulations brought to the attention of the Court in this proceeding, while styled *The* ***Workers*** ***Compensation*** *Appeal Tribunal Regulations*, do not expressly refer to being created under the authorityof s. 21.8(1) of the Act, but rather purport to be enacted under the broader regulation-making authority contained elsewhere in the Act. Furthermore, these regulations do not appear to be primarily related to "hearings", nor to constitute rules of procedure or evidence per se.

115 It is not shown to the Court that there has been enacted, pursuant to the Act, subordinate legislation expressly providing for standing or a right of audience by the Commission before the Tribunal. Nor do the ruling and reasons of the Tribunal in this case purport to be so based.

116 Beyond this, the Tribunal points to the fact that under s. 21.8(3) of the Act, the Tribunal is granted all of the powers permissible under *The Public Enquiries Act*, R.S.N. 1970, c. 314. The provisions of *The Evidence (Public Investigations) Act*, R.S.N. 1970, c. 117 are also made expressly applicable to proceedings of the Tribunal. Under s. 3 of the first of these statutes the Tribunal is granted

> ... the same power to enforce the attendance of witnesses and to compel them to give evidence as is vested in any court of law in civil cases ...

It is notable, however, that under the second Act, the Tribunal does not have authority itself to punish for non-compliance with its orders made in this regard. Rather, the power remains vested in this Court, whose jurisdiction may be invoked by application on behalf of the Tribunal itself.

117 If it is argued that the provisions of these statutes constitute the Tribunal the equivalent of a "court of record", it must be noted that such is only the case in the sense of the right to require evidence to be given, and not to punish for failure or refusal to comply with such a requirement. It is not shown to me that the granting of this authority to the Tribunal itself imports a discretion in the Tribunal with respect to matters of standing or

audience.

118 Nevertheless, I conclude that the Tribunal does have the authorityto adopt procedures with respect to the hearings before it -- on an ad hoc basis -- in the absence of "Rules". However, I also conclude the law requires that those procedures, unless and until otherwise mandated by statute or properly enacted subordinate legislation, must themselves comply with the basic principles of natural justice and fairness, in the sense that these have been laid down in the authorities.

119 As earlier noted when considering the state of the law generally in this area (although in the cited authorities universally related to court proceedings), I have concluded that as a general principle, itself based on principles of natural justice it may appropriately be said that the Commission, as the initial decision-maker, should not be entitled to standing or right of audience with respect to the appeal of its decision.

120 In addition to the arguments earlier addressed as to why such a general principle should not apply here, I note further points made by the Tribunal. The Tribunal argues that it is necessary that the Commission have a role somewhat akin to that of a party, in order that the Commission may bring to the Tribunal evidence, the existence of which may not otherwise be known to, or even suspected by, the Tribunal, or indeed to or by any of the other "interested persons" appearing. As to this, the Tribunal submits that in effect its own role should be limited to the reception of such evidence as others may choose to bring before it. Interestingly, the appellant's contrary position as to this point is here supported by the Commission itself, which agreed that there *is* properly an investigatory role for the Tribunal. This seems supported by the Act, which, for example, includes broad powers respecting medical investigations, and also, as noted, invests the Tribunal with the powers of a Commission under *The Public Inquiries Act*.

121 Beyond this argument, related to the necessary receipt of evidence, the Tribunal's submission before the Court as to the "necessity" for participation by the Commission is primarily linked to a broader concern, one clearly identified in the Tribunal's own "policy" position contained in the extract from the Annual Report in evidence. A reading of that document strongly suggests that the basis for the Tribunal's expressed policy that the Commission should have the right to appear and participate of its own motion is substantially linked to the Tribunal's concern that, in the absence of a public advocacysystem on behalf of employers and the "public interest" per se, without such representation and participation by the Commission before the Tribunal, the Tribunal may be left to decide in an effectively "one-sided" proceeding.

122 This concern has indeed arisen in several of the authorities cited to the court. In the case of *Moosehead Breweries Ltd. v. Molson Companies Ltd.* (1985), 63 N.R. 140 (Fed. C.A.), the Federal Court of Appeal was acting, at the second level of the court appeal process, from a decision of the Registrar of Trade Marks. The Registrar requested to be heard on the appeal, but the court refused to permit this. Citing the *Northwestern Utilities* decision of the Supreme Court of Canada, the Federal Court of Appeal concluded that except where jurisdiction was raised, the initial tribunal could not be heard on an appeal from its own decision. At p. 141 of the reported decision, the court went on to state:

> We recognize that there may be a public interest to be represented in appeals from decisions under s. 44 of the *Trade Marks Act*. Representation of that interest is the proper function of the Attorney General of Canada, not of the Registrar of Trade Marks.

123 In a case dealing with a decision of a criminal injuries ◂ **compensation** ▸ tribunal, *Castel v. Manitoba (Criminal Injuries* ◂ ***Compensation*** ▸ *Board)* (1978), 89 D.L.R. (3d) 67, the Manitoba Court of Appeal was considering the propriety of a tribunal appearing before the court to respond to an appeal taken from the tribunal by a dissatisfied applicant.At p. 72 of the decision, the court stated:

> If an application is successful, the Board may make an order for ◀ **compensation** ▶ to be paid out of the consolidated revenue fund or by the wrongdoer. In my opinion, the Attorney-General should be notified in every case and thus be made a party to the proceedings before the Board and, where it is contemplated by the Board or by the applicant or by the Attorney-General that an order may be given against an alleged wrongdoer, the alleged wrongdoer should also receive notice. In the instant case, I think that the notice of appeal should have been directed to the Attorney-General as a respondent. He is the person who is appointed to protect the Crown's interests and the Crown's interest will certainly be affected in the event that an order for ◀ **compensation** ▶ is made.

124 Finally, in the Nova Scotia case of *Re Nova Scotia (Workmens' ◀ **Compensation** ▶ Board)*, supra, the issue of representation of the public interest in matters of this nature was also addressed, although again apparently in obiter. At p. 252 of the reported decision, the Nova Scotia Court of Appeal commented as follows:

> I should say that such a conclusion [a finding that the initial "tribunal" there had no right to initiate an appeal of the appellate tribunal's decision to the court] does not, in my opinion, work any hardship on the Workmen's ◀ **Compensation** ▶ Board if it feels aggrieved by a decision of the Workmen's ◀ **Compensation** ▶ Appeal Board because there is still the inherent right in the Attorney-General to intervene in such cases. As Lord Denning, M.R., said in *Attorney General (ex rel. McWhirter) v. Independent Broadcasting Authority*, [1973] 1 All E.R. 689 at p. 697:
>
> > It is settled in our constitutional law that in matters which concern the public at large the Attorney-General is the guardian of the public interest. Although he is a member of the government of the day, it is his duty to represent the public interest with complete objectivity and detachment. He must act independently of any external pressure from whatever quarter it may come. As the guardian of the public interest, the Attorney-General has a special duty in regard to the enforcement of the law.
>
> .....
>
> The Board, which, although a separate body corporate, is an agency of the Crown, is in connection with this issue in perhaps a different position from the municipal bodies in some of the cases discussed above. The Queen, represented by her law officer, the Attorney-General, is, I suggest, always a party in the proceedings before the Board as representative of the public interest, even though the Board may not choose to have counsel actually assigned. That party, thus sometimes invisible at the first hearing, it also a proper party in all subsequent appeals. Although it was not argued in this application, and I need not decide, the Queen thus represented by the Attorney-General could, in my view, appeal to this Court, ...

125 From these authorities, it can be seen that an argument based on the necessity of representing the public interest in the case of appeals from primary tribunals identical to or having features similar to the Commission here, has been held not sufficient to warrant the granting of status or standing to the tribunal itself as a party in the appeal process, at least before the courts. As these authorities have identified, if the public interest is involved, the intervention of the Attorney General or his designate as a party would allow the appropriaterepresentation. This would include, in my view, the presentation of evidence, even though such evidence might be called by the Attorney-General from officers or representatives of the Commission itself in some circumstances.

126 It is also interesting to note that the position of the Commission, as reflected in its own "policy" letter of May 10, 1990, is that it would "... *neither advocate for nor against the worker or employer and will not assume the role of defending its decision.*" It is difficult to conceive, as indeed has been recognized and expressed in several of the cited authorities, how the Commission, if granted standing on the basis that it is necessary to "balance" what would otherwise be a one-sided submission to the Tribunal, could in fact remain neutral and preclude itself from inadvertently falling into a role which the Commission itself identifies to be inappropriate.

127 The Tribunal points out, through its Annual Report in evidence, the fact that in other jurisdictions the position and role of a public advocateexists, whether as an express designate of the Attorney General or otherwise. However, I do not see that the absence of

such an establishedstructure of representation of the public interest before the Tribunal here justifies leaving to the Commission itself such a role, "in default" as it were.

128 The position of the Commission as amicus curiae before the Tribunal has also been raised and addressed, at least by the appellant and the Tribunal. It is also directly referred to by the Commission in its "policy" statement of May, 1990. There, the Commission, having previously grappled itself with defining its appropriate role before the Tribunal, stated

> The Board of Directors has directed that the Commission attend Tribunal hearings insofar as it is practical to do so. Attendance will be on an *amicus curiae* basis for the primary purpose of providing any information or clarification that the Hearing Panel may request.

129 This position is interesting. It is notable that the "primary purpose" identified by the Commission for its participation is not by way of adducing evidence *on its own motion*, such as is suggested in argument by the Tribunal to be the Commission's appropriate primary role, but rather to respond to requests for information directed by the Tribunal (or presumably from one of the other interested persons appearing). As earlier noted, the role of the Commission before the Tribunal as a witness, if called either by an interested person or by the Tribunal under the powers conferred by the statute, appears to me not to be contrary to any of the principles identified in the authorities earlier referred to.

130 However, presuming that the Commission itself does assert that although not a "primary" role, it may still be appropriate on occasion for the Commission to itself advance evidence of its own motion -- as a "party" so to speak -- and recognizing that this is a central basis on which the Tribunal supports the propriety of granting standing to the Commission, it is indeed interesting to note that while the Commission subsumes this role under the function of "amicus curiae", both the appellant here, and most significantly, the Tribunal itself, argue that any role for the Commission as amicus curiae is inappropriate.

131 The concept of the primary tribunal appearing as amicus curiae before the appeal body was referred to by the Supreme Court of Canada in the *Northwestern Utilities* case, supra, in describing the general nature of the position of the primary tribunal under the legislation there. At p. 708 of that decision, Estey J. states:

> Section 65 no doubt confers upon the Board the right to participate on appeals from its decisions, but in the absence of a clear expression of intention on the part of the Legislature, this right is a limited one. The Board is given *locus standi* as a participant in the nature of an *amicus curiae* but not as a party.

132 Having made this reference based on the wording of the statute there, it is interesting to note that the detailed explanation and elaboration of the role of the primary tribunal which follows in the reasons of the court is limited, as earlier noted, to that of explaining the record which was before the Tribunal in the first instance, and where applicable,to submissions with respect to the exercise of the initial tribunal's jurisdiction. No broader function under the umbrella of "amicus curiae" appears to have been considered as appropriate by the court there.

133 Here, both the appellant and the Tribunal expressly submit that because it is the very decision of the Commission which is itself under review by the Tribunal, it is improper, and indeed antithetical to the concept of amicus curiae, to allow the Commission to address the Tribunal with respect to any aspect of the propriety, or otherwise, of its decision. As put by the appellant in its written brief of law in this matter:

> How can one be an *amicus curiae* to a body whose job it is to scrutinize and look critically at the decision of he [sic] who claims to be an *amicus curiae*?

134 The only other authorities referred here to the Court which deal with the nature and functions of an amicus curiae are unfortunately not very helpful. In *Bank of Montreal v. Pedlar Industries Inc.* (1980), 35 C.B.R. (N.S.) 269 (Ont. S.C.), in a factual situation

completely distinct from that here, the court appears to consider the concept of amicus curiae as encompassing a person who is "*impartial*" and who is "*present only to assist the court*". Beyond that, the case does not offer assistance.

135 In the case of *Re Pehlke* (1939), 20 C.B.R. 415 (Ont. S.C.), the court was faced with a situation where, on considering an application for the discharge of a bankrupt, a person (apparently a solicitor acting for or otherwise associated in some way with the bankrupt) stated that he wished to be heard, as an amicus curiae rather than on behalf of the bankrupt, with respect to certain argued improprieties in procedures connected with the administration of the bankruptcy.

136 Although Urquhart J. first determined that the substance of the matters raised by the purported amicus curiae before it were in fact groundless, he did comment briefly on the concept of amicus curiae itself. At p. 421, he states:

> The words "amicus curiae" mean friend of the court; and the term is applied to one who suggests something for the information of the court. ...

Urquhart J. went on to consider the few authorities he had found on the matter. In terms of textual authority, he referred to these as follows:

> Halsbury does not deal with the matter at all. He has a heading in volume one and in this heading it says: "See criminal law". The only reference to the subject under criminal law is in Volume 9, p. 148, footnote q: where it says: "Formerly counsel were not allowed to appear for defendants on a charge of felony except to argue points of law for them ... A point of law in favour of a defendant may be suggested to the Court or argued by counsel who is not interested in the case, or by anyone else acting as amicus curiae."
>
> In the American and English Encyclopedia of Law 2nd ed., vol.2, p. 307, the term is defined. The term is generally applied to a solicitor of the Court who, being present, makes some suggestion to the court in regard to the matter before it and it is more rarely applied to counsel arguing the case ...
>
> Also the term is used of persons who have no right to appear in a suit but are allowed to protect their own interest, and finally to a stranger who, being in Court, calls the Court's attention to some error in the proceedings.

137 In the event, the court in *Phelke* concluded that in a case "*plentifully supplied with counsel ...*" the role of amicus curiae was inappropriate.

138 Again, I find this authority to be of little direct assistance in considering the point as argued here.

139 As far as I can see on the arguments which were advanced before me, the concept of amicus curiae could only have application to the Commission here in terms of the role identified by Estey J. in the *Northwestern Utilities* case with respect to an explanation of the record which was before the Commission. As earlier noted, under the legislation here, defending the exercise of the Commission's jurisdiction appears limited to proceedings in this Court. Even there, the latter role will often, if not always, involve the Commission in a "non-neutral" and "non-factual" role. For that reason, the concept of "intervenor" would arguably also be an apt description of the position of the Commission in defending its jurisdiction.

140 In light of the submissions advanced by the appellant and the Tribunal here, and in the absence of any compelling authority or reasoning advanced on behalf of the Commission to support its earlier expressed "policy" of a role as amicus curiae, it seems to me impossible to consider the role of the Commission before the Tribunal as that of an amicus curiae beyond the explanation of the record, as noted above. As also noted, this aspect is not shown to have actually arisen in Mr. ◀ **Bambrick** ▶'s appeal before the Tribunal.

141 In the result, and in summary on the second issue, I conclude that while the Tribunal

has the authority to adopt ad hoc procedures (and indeed Rules under the statute), these must conform to the requirementsof natural justice and fairness, in the absence of some contrary enactment under the statute or duly authorized subordinate legislation. This being the case, I conclude that insofar as the participation of the Commission before the Tribunal is concerned, the Commission's right to be heard does not extend beyond an explanation of the record which was before it.

142 From the submissions before the Court, it appears that it is only the Tribunal's assertion that the Commission should be entitled to give evidence generally, of its own motion, which goes beyond this restriction. Interestingly, such a role as envisaged by the Tribunal is itself substantially restricted, and less than the role of "party" or "interested person", or indeed the role of an amicus curiae in the usual sense. The Tribunal's own submission, in urging confirmation of a role essentially restricted to the adducing of evidence, itself lends support to the validity of a concern from principle, which I have found properly restricts the role of the Commission even further than that argued by the Tribunal.

143 Having reached this conclusion, there is only one other substantive point. Although the Tribunal asserts a standing for the Commission, albeit conceded to be a limited one, the Tribunal itself asks the Court to confirm that the physical presence of the Commission before the Tribunal in the exercise of that standing cannot properly be through Directors of the Commission, but rather must be through its subordinate staff.

144 The Tribunal submits that because the Directors themselves may have a duty to review the decision of the Tribunal with respect to policy and general law, it is contrary to the principles of natural justice for them to also represent the Commission in appearing before the Tribunal. Thus, the Tribunal submits, to avoid such an acknowledged impropriety, it should be only employees or other officers of the Commission who actually appear.

145 The appellant's position is, of course, that since no appearance whatsoever by the Commission before the Tribunal is appropriate, this further issue is academic. However, the appellant argues that the Tribunal's own rationale is itself flawed, since "officers" of the Commission may be directly involved in the hearing and adjudication processes of the Commission's decision at first instance.

146 For its part, the Commission submits that if the Court concludes that the Commission may appear in some capacity before the Tribunal, there is no further jurisdiction in the Court to direct the Tribunal, or the Commission, as to by whom it may be so represented.

147 In my view, the Tribunal's own submission as to the improprietyof having Directors of the Commission effectively "constitute" the Commission in proceedings before the Tribunal supports the conclusion above that it is generally inappropriate that the Commission per se appear at all. It seems to me artificial to attempt to distinguish between a decision of the Commission, even if made with the direct involvement of hearing officers, and a decision of the Commission per se. Surely the decision of the Commission, however internally processed and arrived at, is in fact and in law a decision of the Commission pursuant to the statute. The acknowledgement by the Tribunal of a difficulty in this area, related to a concern for the requirementsof natural justice, supports the conclusion that the Commission, whether represented and present through officers or Directors, cannot properly participate before the Tribunal beyond the strict limitation identified above.

148 Beyond this, if, as I have found, there is an appropriate role of the Commission before the Tribunal, but at the same time a role limited to matters of explanation of the record or, as earlier noted, to the giving of evidence as a witness called by the Tribunal or by an interested party, the fact that it is the Board of Directors of the Commission, and not its subordinate staff, which have an express supervisoryrole over the Tribunal's deliberations does suggest that ideally these Directors should not represent the Commission even in such limited appearances before the Tribunal. However, unlike the situation dealt with above

respecting the role of the Commission per se, it is not possible to say that in the circumstances of a particular case, the requirement of "best evidence" could not necessitate that with respect to a particular record or part thereof, or a particular matter of evidence to be addressed by the Commission, information might properly have to come from a Director, rather than from a staff member. It is not possible to contemplate all the various circumstances which might arise, and to encompass them within a single requirement in this regard. There could well be a situation in which necessity, or knowledge, or some other circumstance may be such that the desirability of avoiding the attendance of Directors out of concerns for natural justice may be outweighed in order to produce a just result.

149 Thus, unlike the situation pertaining to the parameters of the role of the Commission per se before the Tribunal, I conclude that the issue as to the physical *manner* of representation of the Commission, in its restricted role, cannot be held to be one where the "discretion" of the Commission, (in the "every-day" sense) and the discretion of the Tribunal (in the formal, "legal" sense) must be uniformly subject to the limit which the Tribunal here asks the Court to confirm.

Summary and Conclusion

150 Insofar as the decision of the Tribunal granting "standing" to the Commission before it in this particular case is based on the Tribunal's interpretation of the governing legislation, I conclude that its interpretation amounts to an error in law. I conclude that the Commission is not a "*person with an interest in the proceeding before the Appeal Tribunal*" within the scope of s.21.9(4) of the Act.

151 If, and insofar as, the decision of the Tribunal is based in part on the exercise of a general procedural jurisdiction with respect to its hearings, I conclude that the requirements of natural justice and fairness preclude the adoption of a procedure granting a "right to be heard" to the Commission, with the exception of the right of the Commission to appear to explain the record which was before it. The Commission may of course give evidence as a witness, at the call of the Tribunal or others, but not as a "party" on its own motion.

152 Accordingly, the decision of the Tribunal here, consisting of its preliminary ruling granting to the Commission a broader "right to be heard", beyond these restrictions, must be set aside. Mr. ◀ **Bambrick** 's appeal of course still remains before the Tribunal for disposition now through a procedure not at variance with the Court's ruling on this appeal.

153 In the Notice of Appeal the appellant as well requests a remedy by way of declaration. Rule 7 of the *Rules of the Supreme Court, 1986* contemplates that in any "proceeding" before the Court, declaratory relief may be claimed, with or without other relief. The granting of such relief is however a matter for the discretion of the Court.

154 The matter arises here in the course of a statutory appeal of an actual ruling by the Tribunal: the appellant seeks to reverse a decision already made. I am satisfied that the disposition made above, in finding an error in law, and which results in the setting aside of the existing ruling and the remission of the matter to the Tribunal for consideration in accordance with the Court's decision, provides a full remedy, in practical terms, to the appellant in this case.

155 I recognize that both the appellant and the respondents have, though from different perspectives, requested the Court's interpretation and "direction" with respect to the issue of standing and the authorityof the Tribunal in that respect, beyond the simple question as to whether the Commission is or is not an "interested party" under s.21.9(4) of the Act. I am equally satisfied that the analysis on which the Court's decision in this appeal is based provides appropriate guidance in that regard.

156 For these reasons, and considering the matter as a whole as it has been presented to the

Court in written and oral submission, I am not persuaded that this is an appropriate case in which the Court should exercise its discretion to grant the additional, discretionary remedy of a declaration. I am not satisfied that it has been shown that this will achieve any appropriate purpose beyond that met in the order already granted setting aside the ruling of the Tribunal which forms the focus of this appeal.

Costs

157 The awarding of the costs of this appeal was not pleaded or addressedby the parties. In light of the nature of the proceeding this is understandable. However, should they be so advised the parties or any of them may apply to be heard in that regard.

An Order may be Entered Accordingly.

Appeal allowed.

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