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What gives the Agency the right (to be heard on appeal)? Lessons from WestJet v Lareau

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The Federal Court of Appeal ("Court") in *WestJet v Lareau*, 2024 FCA 77 ("*Lareau*") recently determined whether, and to what extent, subsection 41(4) ("S. 41(4)") of the *Canada Transportation Act* ("*CTA*") grants the Canadian Transportation Agency ("Agency") the right to be heard on appeals from its own decisions. In addition, the Court delineated the boundaries of permitted participation and discussed the Court's oversight role.

Section 41(4) gives the Agency the right to be heard in appeals from its decisions

S. 41(4) provides simply that the "Agency is entitled to be heard by counsel or otherwise on the argument of an appeal." The Court confirmed S. 41(4) provides the Agency the right, without leave, to participate by (a) filing memoranda, (b) making oral submissions, or (c) both[1]. However, these privileges are not equivalent to those of respondents or intervenors unless the Court expressly grants them.[2]

Traditionally, Canadian administrative decision-makers ("ADMs") are not afforded the right to be heard when their decisions are under appeal. However, as the Court noted, the *CTA* is unusual. Unlike most administrative regimes, S. 41(4) grants the Agency such a right. This reflects Parliament's intention, which prevails over any inconsistent judge-made law.[3]

Limits to the Agency's participation

The Court clarified that, while S. 41(4) guarantees the Agency's participation in appeals, participation remains subject to the Court's common law discretion to prevent, restrain, or regulate the Agency's submissions. In doing so, the Court confirmed its authority to balance the competing objectives of a fully informed adjudication and the maintenance of tribunal impartiality.[4]

Scope of inappropriate submissions

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The Court identified certain general circumstances in which the Agency will be seen to have overstepped the bounds of appropriate participation, including where the Agency:

1. "aggressively" advocates for its initial position;[5]
2. engages in "bootstrapping", a practice whereby ADMs supplement their initial decision with new reasons during the appeal process;[6]
3. makes submissions that, in substance or tone, "go too far" and impugn the Agency's ability to decide the matter if remitted for redetermination;[7] and
4. on a question of statutory interpretation, makes submissions that go beyond providing "helpful information" by offering a "particular view of how the statute should be interpreted".[8]

Each of these circumstances are examples of inappropriate submissions requiring Court intervention. In *Lareau*, the Court concluded the Agency's written submissions exceeded helpful information, instead offering a particular view of how the *CTA* should be interpreted.

Remedies to inappropriate submissions

To address inappropriate submissions, the Court confirmed it has "the full armory of remedies" available to it as are generally available in an administrative appeal, including:

1. declining to remit a matter to the Agency (a) because no other outcome is available, or (b) for another compelling public interest reason;[9]
2. remitting the matter to the Agency with a *mandamus* order forcing it to make a particular decision on the merits;[10]
3. awarding costs;[11] and
4. allowing the parties more time for oral argument than might otherwise have been provided.[12]

Redetermination remains the norm.

In *Lareau*, the Court determined the appropriate remedy for the Agency's inappropriate submissions was to provide WestJet more time for oral argument. The Court reasoned that, because the issue on appeal was pure statutory interpretation, any concerns about impartiality would be assuaged as the Court would supply the correct interpretation of the statute, leaving the Agency to apply that interpretation to the facts before it.[13]

Conclusion

The Court confirmed that, under S. 41(4), the Agency has the *right* to be heard on appeals from its decisions. However, this right is subject to the Court's discretion to constrain the Agency's participation, thus safeguarding the appearance and reality of impartiality.

Future cases on the subject will assist in understanding the boundaries of proper Agency participation on appeal, for example providing further description and/or specific examples of Agency advocacy the Court considers "aggressive" or which "go too far" in substance or tone.

In the interim, we anticipate the Agency will be following the Court's guidance to "proceed with restraint and caution"[14] in participating in appeals from its own decisions.

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Footnotes

[1] *Westjet v Lareau*, 2024 FCA 77 ["*Westjet v Lareau*"] at paras. 24-26.

[2] *Ibid* at para. 24.

[3] *Ibid* at paras. 19, 25.

[4] *Ontario (Energy Board) v Ontario Power Generation Inc.*, 2015 SCC 44 ["*Ontario Power Generation*"] at para. 57.

[5] *Westjet v Lareau* at para. 14.

[6] *Ibid* at para. 17.

[7] *Ibid* at para. 32.

[8] *Ibid* at para 38.

[9] *Ibid* at para. 32.

[10] *Ibid* at paras. 32 and 34.

[11] *Ibid* at para. 35.

[12] *Ibid* at para. 36.

[13] *Ibid* at para. 39.

[14] *Ibid* at paras. 11-13.

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