FINANCIAL AND CONSUMER SERVICES tribunal DES SERVICES FINANCIERS ET DES SERVICES AUX CONSOMMATEURS

Citation: *Sellars v. New Brunswick (Superintendent of Insurance)*, 2019 NBFCST 2

PROVINCE OF NEW BRUNSWICK
FINANCIAL AND CONSUMER SERVICES TRIBUNAL
IN THE MATTER OF THE *INSURANCE ACT,* R.S.N.B. 1973, c I-12

Date: 2019-01-11
Docket: INS-001-2018

BETWEEN:

James Edward Sellars,

Appellant,

-and-

Superintendent of Insurance,

Respondent.

DECISION

PANEL:	Judith Keating, Q.C., Chair of the Tribunal
	Raoul Boudreau, Vice-Chair of the Tribunal
	Mélanie McGrath, Member of the Tribunal
DATE OF HEARING:	Hearing in writing
WRITTEN REASONS:	January 11, 2019.

I. DECISION

1. The Superintendent of Insurance is granted standing on the appeal, with certain limits on her participatory rights, as set out in our reasons below.

II. OVERVIEW

2. This proceeding involves an appeal by Mr. Sellars of the Superintendent of Insurance's January 23, 2018 decision granting him an accident and sickness insurance agent licence with certain terms and conditions. Mr. Sellars alleges in his *Notice of Appeal* that he is unable to work due to the onerous nature of the terms and conditions.

3. At a November 26, 2018 case conference in this matter, counsel for the Superintendent of Insurance advised that he intended to call witnesses to testify at the hearing, including the Superintendent of Insurance. Counsel also advised that he had requested additional documentation from Mr. Sellars and might be presenting additional evidence at the hearing of the appeal.

4. This marked the first time before the Tribunal, that a regulator indicated that he or she would testify and call witnesses to testify on an appeal of its decision.

5. On November 29, 2018, the Tribunal issued a *Notice of Hearing of Motion* requesting that the parties address, in the context of a pre-hearing motion, a preliminary legal issue being the scope of the Superintendent of Insurance's participation on appeal of her decision. All the Tribunal is seeking on this pre-hearing motion is that the parties provide the state of the law and their positions on the standing and participation of the Superintendent on appeal of her decision.

III. ISSUES

6. The issue on this motion is the scope of the Superintendent of Insurance's participation on appeal of her decision, which raises the following sub-questions :

    a) Can the Superintendent of Insurance testify at the hearing of the appeal?

    b) Can the Superintendent of Insurance bring other witnesses to testify at the hearing of the appeal?

    c) Can the Superintendent of Insurance present documentary evidence to supplement the *Record of the Decision-making Process*?

    d) Are there any constraints on the type of legal arguments that may be made by the Superintendent of Insurance on appeal of her own decision?

7. The Superintendent has raised three other issues in her written submissions :

a) Was the Superintendent of Insurance's right to procedural fairness breached on this pre-hearing motion due to the lack of specificity in the *Notice of Hearing of Motion* and the fact that the hearing is in writing?

b) Was the motion raised prematurely?

c) Is Part 5 of the *Rules of Procedure ultra vires* the *Insurance Act*, R.S.N.B. 1973, c I-12 [*Insurance Act*]?

8. We will deal first with the issues raised by the Superintendent.

IV. ANALYSIS

A. Has the Superintendent's right to procedural fairness been breached?

9. The Superintendent submits that she was denied procedural fairness on this pre-hearing motion due to the lack of specificity in the *Notice of Hearing of Motion* and the fact that the hearing format is in writing. The Superintendent is alleging a breach of *audi alteram partem* rule, or the right to know the case and to reply. In support of her argument, the Superintendent argues that the Tribunal has not provided any facts in support of the motion, the legal grounds upon which an order might be founded, and the relief that is requested. According to the Superintendent, this information is essential to allow her to prepare a full and appropriate response to the pre-hearing motion.

10. It is trite law that all administrative decision-makers must provide procedural fairness and that the level of fairness required is variable and case specific: *Baker v. Canada (Minister of Citizenship & Immigration)*, [1999] 2 S.C.R. 817; *Moreau-Bérubé v. New Brunswick (Judicial Council),* 2002 SCC 11 at para. 75 (S.C.C.).

11. In raising a preliminary legal issue, the Tribunal has identified an issue that must be resolved before the hearing on the merits can occur, in this case the scope of participation of the Superintendent of Insurance on the appeal. All the Tribunal is seeking, on this pre-hearing motion, is the state of the law and the position of the parties relative to such.

12. The Tribunal finds that there is no merit to the Superintendent's allegation that she was denied procedural fairness because the Tribunal did not provide the facts, the grounds, or the relief sought in the *Notice of Hearing of Motion* and *Amended Notice of Hearing of Motion*.

13. The Tribunal is not a party to this motion nor to the broader appeal proceedings. As a quasi-judicial administrative body, the Tribunal does not provide evidence, grounds nor relief sought when raising a preliminary legal issue that must be addressed in the context of a pre-hearing motion.

14. The preliminary legal issue to be addressed by the parties was very clearly identified in the sub-

questions set out in the *Amended Notice of Hearing of Motion*. The Superintendent was also provided with the caselaw the Tribunal wanted the parties to address and informed that she could provide additional submissions. The Superintendent did in fact file the *Affidavit* of Angela Mazerolle and an initial *Statement of Position* on December 13, 2018. She also filed a *Supplementary Statement of Position* on January 7, 2019. The Superintendent of Insurance knew precisely the legal issue that the Tribunal wanted the parties to address, namely her standing and the scope of her participatory rights, and was provided two opportunities to respond to that issue. In addition, the Superintendent was afforded the same opportunity as the appellant to present arguments on the legal issue. Consequently, there was no breach of the *audi alteram partem rule*, or the right to know the case and to reply. We are of the view that the Superintendent was given ample opportunity to participate in a meaningful manner on this motion.

15. In addition, the choice of hearing format is a discretionary decision. There has been no departure from the Tribunal's processes or common practice in proceeding by way of a hearing in writing in regard to this motion. The choice by the Tribunal of the hearing in writing to dispose of a preliminary issue or pre-hearing motion is not without precedent :

    - *Fredericton Police Association v. Superintendent of Pensions*, 2018 NBFCST 6
    - *Fredericton Police Association v. Superintendent of Pensions*, 2018 NBFCST 5
    - *Crandall v. Investment Industry Regulatory Organization of Canada*, 2018 NBFCST 4
    - *Crandall v. Investment Industry Regulatory Organization of Canada*, 2018 NBFCST 3
    - *New Brunswick (Financial and Consumer Services Commission) v. Pierre Emond and Armel Drapeau*, 2016 NBFCST 4
    - *New Brunswick (Financial and Consumer Services Commission) v. Pierre Emond and Armel Drapeau*, 2016 NBFCST 3.

16. The duty of fairness does not always require an oral hearing, particularly where all the relevant information is in writing and the issues raised can be considered in their entirety in a fair manner on the basis of the written submissions and the record alone. [*Baker v. Canada (Minister of Citizenship & Immigration*), [1999] 2 S.C.R. 817 at para. 33-34.] Absent credibility issues or contested issues requiring findings of fact, the duty of fairness does not ordinarily require an oral hearing. Further, where the issues are legal or based on policy, a tribunal may be justified in proceeding on the basis of written submissions. [*Khan v. University of Ottawa* (1997), 34 O.R. (3d) 535 (Ont. C.A.) at para. 21-22]

17. Turning now to the within matter, we find that proceeding by way of a hearing in writing on a request for legal arguments from the parties on this pre-hearing motion did not breach the Superintendent's right to procedural fairness. Once again, the preliminary issue raised by the Tribunal is a purely legal issue, namely, the scope of the Superintendent of Insurance's participation on an appeal of her decision. There are no credibility issues in this matter nor are there issues requiring findings of fact. The Superintendent provided two detailed written submissions regarding this matter. These submissions fully canvassed the legal issue raised by the Tribunal.

18. In addition, efficiency and timeliness are of key importance in this matter as Mr. Sellars alleges that

he is unable to work as a result of the Superintendent's decision. There is an overriding public interest concern in containing costs as well as in expeditious decision-making.

B. Is the Motion Premature?

19. The Superintendent argues that the Tribunal raised the issue of the scope of her participatory rights prematurely. According to the Superintendent, the Tribunal lacks a sufficient factual basis for concluding whether or not the evidence the Superintendent intends to submit is required for the purposes of the hearing on the merits. The Superintendent adds that the appropriateness of evidence is determined following an objection to an attempt to submit evidence during a hearing. The Superintendent argues that attempting to pre-emptively delineate what can and cannot be submitted by the Superintendent at the merits hearing is tantamount to deciding an issue in a vacuum.

20. We find there is no merit to the Superintendent's argument.

21. The purpose of this motion is not to determine the admissibility of evidence in advance of the hearing on the merits, as argued by the Superintendent, but rather to determine standing of the Superintendent on the appeal and the scope of her participatory rights.

22. Administrative tribunals are the masters of their own procedures and are entitled to devise flexible procedures adapted to their needs in order to "*achieve a certain balance between the need for fairness, efficiency and predictability of outcome*": *Knight v. Indian Head School Divison No*. 19, [1990] 1 S.C.R. 653 at 685. See also *Prassad v. Canada (Minister of Employment and Immigration*), [1989] 1 S.C.R. 560.

23. The *New Brunswick Court of Appeal* has recently recognized that the Tribunal has the "inherent right" to control its processes, subject to legislative constraints and the principles of procedural fairness. The Court of Appeal has found that this includes the ability of the Tribunal to raise preliminary legal issues that should be dealt with before the hearing on the merits. [*Financial and Consumer Services Commission v. Emond et al*., 2017 NBCA 28 at para. 15-16]

24. This ability of an administrative tribunal to control its processes has also been found to include the control over the submissions it receives from an administrative decision-maker on appeal of its decision: *Springfield Capital Inc. v. Grande Prairie (Subdivision and Development Appeal Board*), 2018 ABCA 203 at para. 21.

25. In our view, the preliminary issue of the Superintendent's standing and participatory rights must be dealt with before the start of the hearing on the merits. Raising the issue during the hearing would unnecessarily delay the outcome of the appeal as it would require an adjournment to permit the parties to consider the issue and present arguments. In addition, Mr. Sellars alleges in his *Notice of Appeal* that he is unable to work as a result of the Superintendent of Insurance's decision. Given Mr. Sellars' allegations, the Tribunal is of the view that raising this issue at the hearing of the appeal is

unacceptable as it will occasion further delay. Raising the preliminary issue on a pre-hearing motion was the best way to ensure that the hearing of the appeal proceeds as expeditiously as possible.

C. Is Part 5 of the Rules of Procedure *ultra vires* the *Insurance Act*?

26. The Superintendent alleges that Part 5 of the Tribunal's *Rules of Procedure*, setting out the procedure for appeals to the Tribunal, is *ultra vires* the *Insurance Act.* According to the Superintendent, subsection 12(1) of the *Insurance Act* which stipulates that an applicant for a licence « may appeal » to the Tribunal a decision of the Superintendent to refuse to issue a licence indicates the appeal must be conducted as a true appeal. The Superintendent argues that in so far as Part 5 of the Tribunal's *Rules of Procedure* sets out a procedure amenable to a hybrid appeal, it is *ultra vires* the *Insurance Act.*

27. This argument is irrelevant to the legal issue the Tribunal asked the parties to address, which was the standing of the Superintendent on appeal of its decision to the Tribunal. The type of appeal that is conducted is a separate issue that exceeds the context of this motion. The issues of the type of appeal that should be conducted under the *Insurance Act* and standing are two separate issues.

28. In addition, we are of the view that it is not appropriate to deal with the arguments relating to the type of appeal that should be conducted and whether Part 5 is *ultra vires* the *Insurance Act* as they have not been properly fleshed out and might require evidence such as the Legislative Debates. In addition, the analysis of the type of appeal requires a detailed analysis of the whole of the applicable legislative scheme, which includes not only the *Insurance Act*, but also the *Financial and Consumer Services Commission Act*, S.N.B. 2013, c. 30 [*Financial and Consumer Services Commission Act*]. This has not been canvassed in the Superintendent's written submissions and it would therefore not be appropriate to deal with it in the context of this pre-hearing motion dealing with standing.

29. However, purely as *obiter*, the Tribunal has difficulty conceiving how the *Rules of Procedure,* which were adopted under the authority of the *Financial and Consumer Services Commission Act*, can be *ultra vires* a completely separate act, being the *Insurance Act.*

30. While we will not be dealing with the Superintendent's argument, we do feel it necessary to address her assertion that the Tribunal's *Rules of Procedure* have no force and effect as they are neither legislation nor a regulation. The Superintendent is incorrect. The Tribunal's current *Rules of Procedure* were adopted on January 23, 2018 as a rule. This rule has the same effect as a regulation: *Financial and Consumer Services Commission Act*, subsections 59(2) and 59(9). Moreover, subsection 38.1(1) of the *Financial and Consumer Services Commission Act* provides legislative authority for the adoption of procedural rules by the Tribunal Chair.

D. Should the Superintendent Have Standing on the Appeal?

31. We finally turn to the substance of the preliminary issue raised by the Tribunal.

32. The Superintendent argues that she should have standing on the appeal due to her expertise in the regulation of the insurance industry. The Superintendent submits that in a hybrid appeal she has all the rights as any party, which includes the right to testify, to adduce new evidence, to present witness evidence and argue the merits of the case.

33. On the other hand, Mr. Sellars is of the view that the Superintendent should not be permitted a role on the appeal as this would taint the impression of independence and suggest bias to the detriment of the overall appeal process.

34. Again, this decision marks the first time the Tribunal considers the issue of standing of a regulator on appeal of its decision. This issue has not been canvassed in previous appeals before the Tribunal.

35. The leading case on the scope of participation of an administrative decision-maker on appeal of its decision is *Ontario (Energy Board) v. Ontario Power Generation Inc*., 2015 SCC 44 [*Ontario (Energy Board*)]. The *Supreme Court of Canada* states that, in the absence of a statutory provision specifying the extent of an administrative decision-maker's participation on appeal of its decision, a discretionary and contextual approach should be applied to determine standing. In the exercise of this discretion, courts must strive to balance the need for fully informed adjudication against the need for maintaining the administrative decision-maker's impartiality [para. 57].

36. The following non-exhaustive factors are considered relevant to the exercise of the court's discretion in relation to tribunal standing [*Ontario (Energy Board)*, para 59]:

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

37. As recognized by Justice Rothstein in *Ontario (Energy Board)* at paragraph 55: « *Canadian tribunals occupy many different roles in the various contexts in which they operate. This variation means that concerns regarding tribunal partiality may be more or less salient depending on the case at issue and the tribunal's structure and statutory mandate* ». Justice Rothstein recognizes a distinction between the Energy Board and « *similarly situated regulatory tribunals* » and tribunals that adjudicate

individual conflicts between two or more parties. For these latter tribunals, the impartiality concern dealing with « *the importance of fairness, real and perceived, weighs more heavily against tribunal standing* ». [para. 56]

38. Justice Rothstein went on to find, after analysis of the three contextual factors, that it was appropriate for the Energy Board to have standing, particularly in light of the nature of utilities regulation as concerns about the appearance of partiality are muted in that context. Justice Rothstein adds: *« It remains to consider whether the content of the Board's arguments was appropriate* », following which he turns to his discussion on bootstrapping. [para. 62]

39. While the standing issue concerns whether the administrative decision-maker can appear or participate on appeal of its decision, it also concerns the types of argument an administrative decision-maker can make on appeal of its decision. [*Ontario (Energy Board)*, para. 63]

40. The caselaw recognizes that an administrative decision-maker that is granted standing on appeal may present the following arguments on appeal of its decision:

    - its established policies and practices and may respond to arguments raised by a counterparty. [*Ontario (Energy Board)*, para. 68]

    - interpretations of its reasons that are compatible with its original decision or present arguments that are implicit in its reasons [*Leon's Furniture Ltd. v. Alberta (Information & Privacy Commissioner),* 2011 ABCA 94 at para. 29 as cited in *Ontario (Energy Board*) at para. 65]

    - assist this Tribunal by the elucidation of the issues informed by its specialized position as opposed to aggressive participation typical of an adversary. [*Ontario (Energy Board)*, para. 61.]

    - draw the reviewing court or tribunal's attention to aspects of the Record for the purpose of creating a complete picture of what the decision-maker considered in reaching its decision. [*The Hospital v. X.P.,* 2018 BCSC 2079 at para 51].

41. In addition, where an appeal would go unopposed without the decision-maker's participation and the decision-maker's role is regulatory, it may be appropriate for a decision-maker to be granted status and to present arguments on the merits of the decision. [*Ontario (Energy Board)* at para. 60*;* see also *Bransen Construction Ltd. v. C.J.A., Local 1386,* 2002 NBCA 27]

42. There appears to be some confusion in the caselaw as to whether a decision-maker may address the issue of procedural fairness of its own procedures on appeal. In decisions pre-dating *Ontario (Energy Board*), the *Supreme Court of Canada* held that an administrative tribunal could not make submissions on appeal about whether it adhered to procedural fairness requirements. [*Northwestern Utilities Ltd.*

v. City of Edmonton, [1979] 1 S.C.R. 684; *Caimaw v. Paccar of Canada Ltd.*, [1989] 2 S.C.R. 983]. We question whether this rationale still applies given the Supreme Court's decision in *Ontario (Energy Board*) which allows for greater tribunal participation on appeal where the appeal would go unopposed and the proceeding below was of a regulatory nature. The Supreme Court did not discuss procedural fairness in that decision. We agree with the approach in *Mayden v. British Columbia (Workers' Compensation Appeal Tribunal), 2015 BCSC 693* where the British Columbia Supreme Court allowed the Workers' Compensation Appeal Tribunal to address the issue of fairness where there was no one appearing to respond to the application.

43. Turning to the matter before us, neither the *Insurance Act*, R.S.N.B. 1973, c I-12 nor the *Financial and Consumer Services Commission Act* nor the Tribunal's *Rules of Procedure* address standing nor the scope of participation of the Superintendent of Insurance on an appeal of her decision. We must therefore resort to the contextual, discretionary approach in determining whether the Superintendent of Insurance should have standing on an appeal of her decision.

44. The application of the three factors set out in *Ontario (Energy Board)* clearly favours granting the Superintendent standing on the appeal.

45. With respect to the first and second factors, the appeal would be unopposed if the Superintendent of Insurance is not granted standing. This is not an appeal between two adversarial parties. We agree with Justice Robertson's comments in *Bransen Construction Ltd. v. C.J.A., Local 1386*, 2002 NBCA 27 at paragraph 9 that « *[…] in some tribunal settings there is no one to defend the tribunal's decision other than the tribunal or the Attorney General acting on its behalf. The classic example is the tribunal that refused to issue licence. In such cases, no one should question the right of the tribunal to participate as a party to any review proceedings*. » In addition, the Tribunal would benefit from submissions of the Superintendent due to her specialized jurisdiction and expertise in insurance legislation and licensing matters.

46. The third factor looks to the Superintendent of Insurance's function. Statutory provisions addressing the structure, processes and role of the Superintendent of Insurance are key aspects of this analysis, as different impartiality considerations may apply depending on the function. [*Ontario (Energy Board)*, para. 55]. Pursuant to section 3 of the *Insurance Act,* R.S.N.B. 1973, c. I-12 [*Insurance Act*], and subject to the direction of the Financial and Consumer Services Commission, the Superintendent of Insurance is responsible for the general supervision of the business of insurance in New Brunswick, which includes ensuring laws relating to the business of insurance are enforced and obeyed.

47. An important function of the Superintendent of Insurance is granting various types of licences and assessing suitability for such licences in light of the public interest, which is a regulatory role. The Superintendent of Insurance in granting a licence or imposing terms and conditions on a licence is not adjudicating individual conflicts between two adversarial parties, but rather serving a regulatory role and acting on behalf of the public interest, which would normally be indicative that impartiality concerns weigh less heavily than in an adjudicative matter between two adversarial parties. [*Ontario*

(Energy Board), para 59]. However, the granting of an agent's licence to an individual is significantly different from utilities regulation which was the subject of the *Ontario (Energy Board*) decision. In our view, the principle of impartiality should be afforded more importance in this matter because we are dealing with an individual's ability to work and earn a livelihood. In addition, on licensing appeals to the Tribunal, the Tribunal may remit the matter back to the Superintendent for reconsideration or other action. This, too, weighs in favour of affording added importance to the principle of impartiality. Our concerns regarding impartiality will be discussed in further detail in our reasons concerning bootstrapping.

48. For these reasons, we grant the Superintendent of Insurance standing on appeal of her decision, subject to the limitation on her participation as discussed below.

E. Are there Limits on the Superintendent's Participatory Rights?

49. The Superintendent submits that in a hybrid appeal she has all the rights as any party, which includes the right to testify, to adduce new evidence, to present witness evidence and argue the merits of the case. The Superintendent argues at paragraph 4 of her first *Statement of Position* that it is not clear that the law regarding bootstrapping applies to hybrid appeals. The Superintendent then argues at paragraph 26 and 45 that she should be permitted full involvement in the hearing on the merits, except for evidence falling within the ambit of bootstrapping. The Superintendent argues that Part 5 of the Tribunal's *Rules of Procedure* recognizes the Superintendent as a party to the appeal and dictates that parties are entitled to submit evidence in various formats at the hearing of an appeal. The Superintendent further argues that subsection 38(6) of the *Financial and Consumer Services Commission Act* permits the admission of any evidence, so long as the Tribunal considers the evidence to be relevant. According to the Superintendent, given that she is a party to the appeal and the considerable leeway afforded by subsection 38(6) in terms of the admission of relevant evidence, the Superintendent is entitled to call evidence at the hearing of an appeal of her decision.

50. In her *Supplementary Statement of Position*, the Superintendent takes another position, which seems to suggest that the bootstrapping principle does not apply. The following excerpt of its *Supplementary Statement of Position* summarizes her position:

> 74 . In arguing in favour of its prior decision, now under appeal, a Regulator is not arguing on its own behalf. It is not attempting to bootstrap its prior decision or otherwise justify its conclusions. It is in fact continuing the mandate with which it was entrusted by its governing legislation, namely protecting the public interest and fostering public confidence in the insurance marketplace.
>
> 75. The interests sought to be defended by the Superintendent of Insurance at the appeal hearing in the present matter are not its own, but the interests of society and the consumers of insurance products in New Brunswick, in general, and the appellant's current and potential future clients, specifically.

> 76. The Superintendent's role as a Regulator is an important one, as discussed in the Superintendent's prior submission. In defending its prior decision, the Superintendent continues its mandate of protecting the public by ensuring only suitable candidates are granted insurance agent licences. Preventing the Superintendent from participating fully in the appeal hearing is equivalent to preventing her from complying with her statutory obligations.

51. We are unable to reconcile the Superintendent's position with the caselaw. Her position completely disregards the fact that she is an administrative decision-maker on appeal of her decision whose own decision is being appealed. Her position futher suggests that her public protection mandate allows her to override the Tribunal's role which is to ensure that the decision of the regulator is in keeping with the basic rules of administrative law as well as the public interest.

52. The law is clear that administrative decision-makers cannot bootstrap their decisions. An administrative decision-maker engages in bootstrapping when it seeks to defend his or her decision on a ground that it did not rely on (either explicitly or implicitly) in the decision under appeal. [*Ontario (Children's Lawyer) v. Ontario (Information and Privacy Commissioner)* (2005), 75 O.R. (3d) 309 (C.A.), at para. 42, as cited in *Ontario (Energy Board)* at para. 64]. Thus, an administrative decision-maker cannot use an appeal as a chance to change, qualify or supplement his or her reasons. [*Canada (Attorney General) v. Quadrini*, 2010 FCA 246 at para. 16 as cited in *Ontario (Energy Board*) at para. 65]

53. The issue of "bootstrapping" is closely related to the issue of standing. As previously discussed, the standing issue concerns what types of argument an administrative decision-maker can make on appeal of his or her decision. The bootstrapping issue, however, « concerns the content of those arguments. ». [Ontario (Energy Board), para. 63]

54. Bootstrapping is based on the principle of finality that dictates that once a decision-maker has made its decision, it has spoken finally on the matter, subject to a power to vary its decision or to rehear the matter [*Ontario (Energy Board*) at para. 65]. It is also based on the principle of impartiality in ensuring that the decision-maker whose decision is under appeal remains impartial in the eventuality the matter is remitted to him or her for reconsideration. [*Bransen Construction Ltd. v. C.J.A., Local 1386*, 2002 NBCA 27]

55. We reject the Superintendent's argument that the concept of bootstrapping may not apply to hybrid appeals. In our view, the applicability of the bootstrapping concept is not dependant upon the type of appeal. In *Bransen Construction Ltd. v. C.J.A., Local 1386,* 2002 NBCA 27, Justice Robertson was unequivocal in stating that bootstrapping applies to all administrative decision-makers :

> *33 No tribunal should be permitted to bootstrap its decisions. If the tribunal fails to provide a rational explanation for its interpretative decision, why should it be given a second opportunity to do so? Those that fail to provide sufficient reasons to support their interpretative decisions runs the risk of having the matter*

remitted to them for reconsideration. […]

[…]

35 […] In my experience, <u>tribunals accept that the principle of impartiality limits their ability to engage fully in the adversarial process.</u> [our emphasis]

56. Justice Rothstein stated similarly in *Ontario (Energy Board)* that decision-makers do not have an « unfettered ability to raise entirely new arguments on judicial review. » They were limited to arguments that were explicit or implicit in their decision. [para. 69]

Evidence

57. We could find no caselaw on the issue of standing and bootstrapping that clearly discusses the issue of the presentation of new evidence by the decision-maker on appeal of its decision. The caselaw deals with « submissions » or « arguments ». [*Ontario (Energy Board)*; *Northwestern Utilities Ltd. and al. v. Edmonton,* [1979] 1 SCR 684; *Caimaw v. Paccar of Canada Ltd.*, [1989] 2 SCR 983]. However, in our view, and, as a general rule, the Superintendent cannot present any new evidence on appeal of its decision to supplement the record below. This evidence would serve no purpose other than to bootstrap her decision by changing, supplementing or qualifying her reasons.

58. We feel two exceptions are warranted and do not constitute bootstrapping: (1) where the appellant or the Tribunal raises a ground of appeal that is not covered by the contents of the *Record of the Decision-making Process*; and (2) where the Tribunal needs additional evidence in order to clarify and properly adjudicate an issue.

59. The Superintendent of Insurance was obligated, when served with Mr. Sellars' *Notice of Appeal*, to prepare a *Record of the Decision-making Process.* Rule 5.3 of the Tribunal's *Rules of Procedure* sets out the content of the *Record* as follows :

a) A cover page
b) A table of contents
c) The decision or order under appeal
d) The application or other document by which the decision-maker's process was commenced
e) <u>All evidence and documents provided to the decision-maker during the decision-making process, subject to any privilege or any limitation expressly imposed by any statute or regulation</u>
f) Any written submissions made to the decision-maker by the parties before the decision or order was made,
g) <u>Subject to any privilege, all written or digital communication exchanged in the course of the decision-making process between the decision-maker or staff assisting the decision-</u>

maker and the applicant,

h) Any transcript of oral evidence given at the hearing before the decision-maker, and

i) Any interim orders made in the decision-making process or the proceeding. [our emphasis]

60. Some context is required to explain the exhaustive requirements relative to the content of the *Record of the Decision-making Process.* The Tribunal's current *Rules of Procedure* were adopted on January 23, 2018. The requirements under its predecessor, *Local Rule 15-501: Proceedings before the Tribunal* were quite different, most notably with respect to evidence, documents and correspondence. Under *Local Rule 15-501*, the decision-maker had to provide « any documentary or other evidence considered in the decision-making process », subject to certain limitations. There was no requirement to produce correspondence. This resulted in the Tribunal having an incomplete picture of the proceedings below. The Tribunal remedied this deficiency in adopting its new *Rules of Procedure* by requiring the decision-maker to produce « all evidence and documents provided to the decision-maker » as well as « all written or digital communication exchanged in the course of the decision-making process between the decision-maker or staff assisting the decision-maker and the applicant ».

61. Given the requirements relative to documents and correspondence in rule 5.3 of the *Rules of Procedure*, there should be no need for the Superintendent of Insurance to present additional evidence, subject to the two exceptions discussed above.

62. We agree that the Superintendent's role under the *Insurance Act* is an important one. She is mandated to protect the public interest by ensuring only suitable persons are licenced within the parameters of her authority.

63. As mentioned earlier, we disagree with the Superintendent's argument that preventing her from participating fully in the appeal is equivalent to preventing her from complying with her statutory obligations.

64. If that were the case, this would give the Superintendent *carte blanche* to do whatever she wants in the name of the "public interest". This is not compatible with the principles of administrative law.

65. In our view, on an appeal of her decision, the Superintendent is no longer playing a regulatory role. Rather, on an appeal, it is the decision of the Superintendent that is under review and therefore the Tribunal must determine whether the Superintendent's decision was made in the public interest based on the evidence the Superintendent had at the time she made her decision and according to the principles of procedural fairness.

66. We also reject the Superintendent's argument that Part 5 of the Tribunal's *Rules of Procedure* and subsection 38(6) of the *Financial and Consumer Services Commission Act* allows the Superintendent to submit evidence in various formats at the hearing of the appeal.

67. The Tribunal hears appeals under 14 statutes. These statutes cover a wide range of topics such as pensions, real estate agents, loan and trust companies, credit unions, pre-arranged funerals and insurance. Consequently, its *Rules of Procedure* are necessarily drafted in broad strokes. For example, Part 5 which deals with appeals makes a distinction between a « party » and the « decision-maker ». Rule 5.3 imposes an obligation on the « decision-maker » to produce the *Record of its Decision-making Process*. Rules 5.5 and 5.6, in relation to the presentation of evidence, apply to « the parties ». The use of different terminology was deliberate and affords the Tribunal flexibility to hear appeals under 14 statutes. Some of these appeals involve multiple parties, such as under the *Pension Benefits Act*, while others involve only the appellant and the decision-maker, such as on licensing appeals. Given the lack of harmonization in the appeal provisions across financial and consumer services legislation, it would be impossible for the *Rules of Procedure* to provide different appeal procedures for each statute.

68. In addition, certain mechanisms were inserted in the *Rules of Procedure* to allow the Tribunal to tailor its procedures to the specific matter before it. An example would be rule 1.3(4) which allows the Tribunal to waive or vary any provision of the *Rules*, if it is of the opinion that to do so would ensure the fair and equitable determination of the matter before it. The Tribunal must be flexible in the application of its *Rules of Procedure,* while being respectful of the applicable substantive law, such as the principle of bootstrapping. Therefore, rule 5.5 and 5.6 must be applied in a manner to be consistent with the principle of bootstrapping.

69. As for subsection 38(6) of the *Financial and Consumer Services Commission Act,* it relaxes the rules of admissibility of evidence and confers upon the Tribunal the authority to receive in evidence anything that the Tribunal deems relevant to the matter before it, regardless of whether the evidence would be admissible in a court of law. The provision is meant to invest authority in the Tribunal to determine the admissibility of evidence; it does not confer a right upon the Superintendent to adduce evidence on an appeal of her decision. It also does not displace the principle of bootstrapping. The subsection is inapplicable to the determination of the scope of the Superindent's participatory rights on an appeal of her decision.

70. After review of the *Notice of Appeal* and *Record of the Decision-making Process* in this matter, the Tribunal raised three potential procedural fairness issues to be addressed at the hearing of the appeal. These issues were added to the *Notice of Hearing* served upon the parties and are :

    1. In the circumstances of this case, is the failure to immediately renew Mr. Sellars' licence pending the outcome of the investigation a breach of procedural fairness?

    2. Was there a breach of Mr. Sellars' right to know the case and reply when the Superintendent of Insurance obtained additional evidence after the opportunity to be heard meeting on November 23, 2017 and used this in her decision without providing Mr. Sellars an opportunity to respond?

3. Was Mr. Sellars' sponsoring insurer provided an opportunity to be heard given the consequences of the terms and conditions for the sponsor? If not, and in light of the circumstances, should the sponsoring insurer have been provided the opportunity to be heard?

71. The Superintendent of Insurance filed her *Record of the Decision-making Process* on November 2, 2018. She also filed a second volume on December 5, 2018 after discovering that certain correspondence was inadvertently not included in the initial *Record*.

72. In our view, the *Notice of Appeal* filed by Mr. Sellars does not raise any issues that would warrant allowing the Superintendent to adduce evidence in addition to that set out in the *Record of the Decision-making Process.* Mr. Sellars essentially alleges in his *Notice Appeal* that « *[t]he decision was arrived at following a 6 month investigation by staff where they concluded that I should be issued a licence for life and accident insurance sales* » with terms and conditions. Mr. Sellars adds that *« the onerous nature of the supervision and sponsorship requirements imposed by the terms and conditions prevent them from taking on such rigorous obligations and responsibilities. These terms and conditions on my licence are unwarranted and effectively deny me the ability to continue to work in this field for which I have been duly licenced and bonded for over 20 years without any incident.* »

73. With respect to the first issue, it appears that the *Record of the Decision-making Process* contains some evidence regarding the issue of delay. However, the Tribunal might require some particulars pertaining to the delay. In light of this, the Tribunal will allow the Superintendent to present additional documentary and oral evidence. This evidence must be limited to the period before the opportunity to be heard meeting of November 23, 2017.

74. The second issue raised by the Tribunal can also be dealt with on the basis of legal arguments and the evidence in the *Record of the Decision-making Process*, and more specifically the correspondence. Therefore, the Superintendent cannot present additional evidence on this issue.

75. As for the third issue, dealing with whether Mr. Sellars' sponsoring insurer was provided an opportunity to be heard given the consequences of the terms and conditions for the sponsor, this evidence would likely not be included in the *Record* as it is not required by rule 5.3 of the *Rules of Procedure*. As a result, the Tribunal will allow the Superintendent to present additional documentary and oral evidence. Once again, this evidence must be limited to the period before the opportunity to be heard meeting of November 23, 2017.

Arguments

76. We turn now to the issue of whether there are any restrictions that must be imposed on the arguments that can be made by the Superintendent on the appeal of her decision. We previously discussed, under the heading of standing, the type of arguments that the Superintendent may make on appeal of her decision.

77. However, the Superintendent cannot present arguments that qualify, bolster or supplement her decision as those would constitute bootstrapping. [*Canada (Attorney General)* v. *Quadrini*, 2010 FCA 246 at para. 16 as cited in *Ontario (Energy Board*) at para. 51]. The Superintendent must exercise caution and refrain from descending « too far, too intensely or too aggressively into the merits of the matter » as this may disable her from conducting an impartial redetermination of the merits of the matter if it is remitted back to her. [*Canada (Attorney General)* v. *Quadrini*, 2010 FCA 246 at para. 16 as cited in *Ontario (Energy Board*) at para. 51].

V. CONCLUSION

78. The Superintendent of Insurance has standing on the appeal of her decision and she can present documentary and oral evidence in relation to issues one and three set out in paragraph 70 above. However, that evidence must be limited to the period before November 23, 2017.

79. Given the above, the Superintendent shall have unitl January 16, 2019 to amend her list of witnesses and summaries of the witnesses' anticipated testimony and the additional documents she intends to submit at the hearing of the appeal.

DATED this 11th day of January, 2019.

Judith Keating, Q.C.
Judith Keating, Q.C. Tribunal Chair

Raoul Boudreau
Raoul Boudreau, Vice-Chair of the Tribunal

Mélanie McGrath
Mélanie McGrath, Tribunal Member