Aspects of Canadian Administrative Law: To Review or Not To Review?

In commenting on the importance of the test of comparative qualifications, an early exponent of the potential role of he Administrative process in the U. S. A. concluded: "If the extent of the judicial review is shaped, as I believe it should be, by reference to an appreciation of the qualities of expertness in decision making that the administrative agency may possess, important consequences follow." What important consequences do you believe he had in mind? Is this insight helpful in explaining the role of the courts in reviewing substantive decisions in contemporary Canadian Administrative law?

Expertness in decision-making refers to the qualifications of the decision makers in the various administrative agencies. Expertness is intended to reflect the specialized nature and knowledge or skill derived from the experience or training of these agencies and their decision-makers as compared with generalist courts. It means that generally speaking the courts are experts in the interpretation of the law and the tribunals are experts in relation to facts. The consequences that generally flow from the shaping of judicial review by reference to expertness are firstly, the courts would not become involved in policymaking and the traditional separation between the executive, the legislature and the judiciary would be maintained. This is because agencies are generally set up as part of the legislative arm of

government and as such are largely involved in policymaking. These kinds of decisions are as such generally speaking inappropriate for the courts. Secondly, these agencies as indicated are for the most part specialist agencies that require intimate and specialized knowledge of a particular subject matter or area such as labour relations, securities or immigration matters. The experience and knowledge required therefore goes beyond classical law or legalese and sometimes require a more sympathetic approach so that for example Madame Justice L'Heureux-Dube in Baker said that the decisions are individualized, rather than decisions of a general nature and that in the circumstances they require the sensitivity and understanding of those making them.[1] In these circumstances it may be inappropriate for generalist courts to hear these applications especially since they are so individualized. It is the individualized nature of these matters that also lend support to the argument that it would be an inappropriate allocation of resources for Courts to divert their time to the making of decisions that have limited impact and which do not go to the advancing of the general law. Thirdly and more specifically in terms of the allocation of scarce resources some of the decisions also involve claims for very small sums such as in the case of social security benefits. It is a misallocation of public resources to process these through the courts. Fourthly, for the litigants time may

be of the essence. The informal processes associated with these specialist tribunals mean that the matters are handled more expeditiously and reduces the need for legal representation as well as expense for the litigants; a poor litigant will not be placed at a comparative cost disadvantage in terms of pursuing his claim for example an employee versus his big company employer. In addition to that the mass and diversity of cases dealt with by the tribunals especially in the era of procedural fairness are so context specific and are best handled by these specialized agencies. Fifthly, in the era of procedural fairness numerous agencies have come under review that hitherto would not have been caught under this umbrella. These agencies deal with diverse areas and in particular with facts and questions of fact cannot be appropriately dealt with in the summary processes involved in reviewing these decisions. The summary process is more suited to a review of questions of law and in these circumstances questions of fact or decisions on questions of fact are best left to the specialist agencies. A concentration on expertness however, has a downside it renders the statutory right of appeal a mere nullity.

In getting at the pith and substance of this insight in terms of whether it is helpful in explaining the role of the courts in reviewing substantive decisions in

contemporary Canadian Administrative law a good starting point is to appreciate that the modern approach to the standard of review is shaped by a pragmatic and functionalist analysis. The pragmatic and functional approach was articulated in the Bibeault[2] case, Beetz J writing for the court said that in addition to the wording of the constituting statute it is important to consider *the purpose of the statute creating the tribunal, the reason for its existence, the area of expertise and the nature of the problem before the tribunal*. The pragmatic and functional approach is used for statutory interpretation and requires a weighing of factors none of which are conclusive but each of which provides an indication falling on a spectrum of the proper level of deference to be shown to the decision in question. The pragmatic and functional approach suggests a departure from original procedure where the courts allocated decision-making power between reviewing courts and administrative agencies that were protected by preclusive clauses by distinguishing between those questions that were within the agencies' jurisdiction and those that were either preliminary to the exercise of the agency's jurisdiction or collateral to the merits of the decision. This was the pre-CUPE[3] approach to jurisdiction issues and review as between the court and the agency. The presence of a preclusive clause is intended to limit the court's supervision of administrative action. In the pre-CUPE era the court could intervene in the administrative process if it found that some condition precedent to the exercise of

jurisdiction was not satisfied and the standard of review in such a case was on the basis of correctness. The problem however, was that any error of law that was within the agency's jurisdiction, being a part of the merits of the case, was immune from judicial scrutiny irrespective of the error, because of the preclusive clause[MSOffice1]. In the circumstances the focus on preliminary and/or collateral questions produced unsatisfactory results and so in CUPE Dickson J. dispensed with the need for this inquiry and formulated what came to be considered to be the appropriate question "Did the legislator intend the question to be within the jurisdiction conferred on the tribunal?"[4]

This paved the way for the courts to review the decisions of tribunals even in the presence of a strong privative clause where the agency acted ultra vires on account of a misinterpretation of the general law or of a provision of its constituting statute, if it places a patently unreasonable interpretation on those provisions of its enabling statute which the legislature intended to be intra vires the agency and where the privative clause does not fully preclude judicial review do not provide complete protection from judicial review.

In determining the standard of review under this new approach the central issue is to determine the legislative intent in conferring jurisdiction of the tribunal. In so doing the courts undertake an analysis which includes a consideration of the role and function of the tribunal, whether or not there is a privative clause and whether

or not the question affects the jurisdiction of the relevant tribunal. The one thing that I have found it difficult to reconcile is the real reason for the change in the approach to determining the circumstances in which the court would review a decision. I find it problematic because with the change the issue is being discussed as if it was one of jurisdiction and that with CUPE the issue of jurisdiction would go through the window. The more I read the cases, the more I became convinced that even under the new approach jurisdiction is still a live issue and which means that that was not the real problem so that CUPE did not intend to get rid of jurisdictional issues. It sought to get away from the approach to jurisdictional issues as it caused injustices and prevented the Courts from performing "their constitutional role as interpreters of the written law and expounders of the common law and rules of equity",[5] of providing everyone with access to the courts and let's face it, it did lead to unjust results where tribunals with no expertise in law were in a position to make final determinations on issues of law. The real problem therefore was that tribunals were able get away with making errors of law under the old approach because it was in their jurisdiction as not being a collateral or preliminary question. The change smacks of a recognition that specialist tribunals were not to be allowed to trespass on the jurisdiction of generalist courts in their area of expertise that is, interpretation of issues of law. It seems to me that the concern was to ensure that courts perform

their constitutional role of supervising the tribunals and that in the determination of comparative qualifications the characterization of matters in terms of fact and law was an important step in determining if deference was to be accorded to the tribunal and in allocating the standard of review. It meant that the determination of the standard of review was not simply a matter of the expertise of the tribunal but the comparative expertise in the context of issues of fact and issues of law – who is best qualified to deal with issues of fact and of law. The change was intended to define the respective roles of generalist courts and specialist tribunals without eroding the concept of deference or the basis or purpose for establishing specialist tribunals. It was intended to preserve the role of the courts as guardians of the constitution.

A pragmatic and functionalist analysis must start out from this basic premise that in terms of comparative qualifications the courts are experts on law and the tribunals are experts on the facts. It must as a first step characterize issues in terms of fact and law, while recognising that there is no bright line. It must acknowledge that generally speaking the courts are more deferential in terms of the tribunals' findings of fact so that if review becomes necessary then the standard would be on the basis of patent unreasonableness whereas if the error alleged were of law then it would have to be on a correctness basis. From this basic premise review is then to be shaped in the context of Beetz J's four

categories in Bibeault.[6]

In Southam, Iacobucci J. said that expertise is “the most important of the factors that a court must consider in settling on a standard of review”.[7] Evans J. A. in the Superior Propane case also adopted this formulation when he said that the ultimate issue in determining the standard of review is “whether the legislature should be taken to have intended the specialist tribunal or the courts to bear the primary responsibility of determining the question in dispute”[8] and in this context he urged “it must be understood that “expertise” is not an absolute concept”.[9] The relativity of expertise makes it necessary to assess several considerations such as whether a tribunal has been constituted with a particular expertise to achieve the aims of its constituting Act, either because of the specialized knowledge of its decision makers, special procedure or non judicial means of implementing the Act. In either case more deference will be accorded. The considerations that come into play when assessing the relative expertise of the tribunal are firstly, the characterization of the tribunal, is it an adjudicative body or is it a multifunctional tribunal in the nature of securities commissions in many provinces “which typically have wide powers to match their mandate. Secondly, the expertise may be assessed by reference to the composition of the tribunal and in this respect regard can be had to the statutory requirements.

In the Pezim[10] case where the central issue relates to the appropriate standard of review for an appellate court reviewing a decision of a securities commission *not protected by a privative clause* when there exists a *statutory right of appeal* and the case turned on a question of statutory interpretation Iacobucci J., in dealing with the issue of characterization of the tribunal said that if the tribunal plays a role in the development of policy then a higher degree of deference will be accorded to it with respect to "its interpretation of the law" and in support of this he cited the majority of the Court in United Brothers of Carpenters and Joiners of America, Local 579 v. Bradco Construction Ltd. [1993] 2 S. C. R. 316 at pp. 336-7:

> …a distinction can be drawn between arbitrators, appointed on an ad hoc basis to decide a particular dispute arising under a collective agreement, and labour relations boards responsible for overseeing the ongoing interpretation of legislation and development of labour relations boards responsible for overseeing the ongoing interpretation of legislation and development of labour relations policy and precedent within a given labour jurisdiction. *To the latter, and other specialized tribunals responsible for the regulation of a specific industrial or technological sphere, a greater degree of deference is due to their interpretation of law notwithstanding the absence of a privative clause.* [Emphasis added]

Having said this he characterized the role of the tribunal as being to apply and

administer the *Securities Act* and playing a large policy development role. This latter was cited as an additional reason for deference. He then concluded, "…. on precedent, principle, and policy, I conclude as a general proposition that the decisions of the Commission, falling within its expertise, warrant judicial deference. In terms of the second factor that is the nature of the constituting statute and the composition of the tribunal the learned Justice stated that the Securities Act is regulatory in nature and as such has an elaborate framework indicative of the specialized activity in which its decision-makers are required to engage and as such "requires specific knowledge and expertise in what have become complex and essential capital and financial markets".[11] Having said this what standard of review did he apply and was it influenced or shaped by this expertness?

In determining the standard of review the learned Judge felt that it was appropriate to examine the general principles of judicial review. He felt that the central question in determining the standard [MSOffice2]of review is "to determine the legislative intent in conferring jurisdiction on the administrative tribunal". The court recognised the multiplicity of factors to be taken into account in determining the appropriate standard and accordingly the Courts developed a spectrum that ranged from reasonableness to correctness. In determining the place of the

tribunal on this spectrum the court has formulated a principle of deference for the facts found to exist by the tribunal and also to the *legal questions as found to exist by the tribunal in the light of its role and expertise.* Tribunals that have a full or true privative clause, that act within their competence and where there is no statutory right of appeal are located at the reasonableness end of the spectrum and as such are accorded a high degree of deference. On the other hand deference on legal questions is at its lowest at the correctness end of the spectrum and relates to cases where the issues concern a tribunal's interpretation of a provision that limits it's jurisdiction, regarded as a jurisdictional error or where there is a statutory right of appeal which means that the reviewing court can substitute its own opinion for that of the tribunal and where in terms of comparative qualifications the tribunal has no greater expertise than the court on the issue in question such as in the area of human rights.

Iacobucci J added a third category which was somewhere in between reasonableness and correctness, which he subsequently refined in the Southam case and referred to as the reasonableness simpliciter standard and that it was necessary because on the one hand the court was dealing with a statutory right of appeal pursuant to the Securities Act and on

the other a highly specialized tribunal on an issue which *arguably* goes to the core of its regulatory mandate and expertise. The dictum of Gonthier J writing for the court in the Bell Canada[12] case was found to be useful in underscoring the factors relevant to the standard of review:

It is trite to say that the jurisdiction of a court on appeal is much broader than the jurisdiction of a court on judicial review. In principle, a court is entitled, on appeal, to disagree with the reasoning of the lower tribunal.

However, *within the context of a statutory appeal from an administrative tribunal, additional consideration must be given to the principle of specialization of duties.* Although an appeal tribunal has the right to disagree with the lower tribunal on issues which fall within the scope of the statutory appeal, *curial deference should be given to the opinion of the lower tribunal on issues which fall squarely within its area of expertise.*

In this context the court found that even where there is no privative [MSOffice3]clause and where there is a statutory right of appeal, *the concept of specialization of duties requires that deference be shown to decisions of specialized tribunals on matters which falls squarely it the tribunals expertise.*[13]

In this case the decision was clearly based on expertness in that the matter in issue was at the core of their statutory or regulatory mandate

notwithstanding the characterization of the issue as one of pure law.

The reasonableness simpliciter standard is a standard more deferential than correctness but less deferential than “not patently unreasonable”. In applying the four categories the considerations which most favoured deference were that the dispute was over a question of *mixed law and fact*, the fact that the role or purpose of the Competition Act is broadly economic and so is better served by the exercise of economic judgment and the fact that the application of the principles of competition law fall squarely within the area of the Tribunal’s expertise. At the other end of the spectrum the factors that favoured a less deferential standard were in the nature of the existence of an unfettered statutory right of appeal from the decisions of the Tribunal and the presence of judges on the tribunal. It is because there is a need to balance these considerations that that he formulated this middle ground. The most important point however, is that the learned judge said, “Because the expertise of the Tribunal, which is the most important consideration, suggests deference, a posture more deferential than exacting is warranted.”[14]

Here, even though the court had the green lights of the absence of the privative clause and the statutory right of appeal the court still searched for a middle ground. It seems to me that this middle ground was necessary if the continued assertion that ‘expertness’ is the ultimate factor shaping judicial review

is to mean anything. This is very important when viewed against the background that patent unreasonableness is a jurisdictional issue and as such a matter of law, which therefore stands to be examined on the basis of correctness. The jurisdictional issue was also not a live one in Southam in light of the statutory right of appeal. In terms of the test for comparative advantage as it relates to whom the legislature can be said to entrust the duty of deciding the question the Iacobucci J said "Presumably if Parliament entrusts a certain matter to a tribunal and not (initially at least) to the courts, it is because the *tribunal enjoys some advantage that judges do not.* For that reason alone, the review of the decision should often be on a standard more deferential than correctness."[15] It is here that one can argue that expertness played an important role in the shaping of contemporary Canadian Administrative Law but at the expense of the statutory right of appeal. It was responsible for the formulation of a middle ground on the spectrum of review, and formed the basis of the Court's decision to adopt a deferential posture in the absence of a privative clause and the face of a statutory right of appeal. The point is made clear by an examination of the factors in the Southam and Pezim cases, which eventually led to this middle ground. In Pezim the court was dealing with the securities commission whose tasks are required to be executed with sensitivity and to enhance capital market efficiency, in Southam the appeal involved the decision of the Tribunal, one of whose tasks was

recognize and in its own way promote the efficiency of the Canadian economy[16]. In Pezim and Southam the appeals from decisions of the securities commission lay as of right. In Pezim however, the question was characterized as pure law whereas in Southam it was characterized as of mixed law and fact although Iacobucci J was of the view that the difference is not so great as the characterization of issues of law in the Pezim case is not so strong. It is this difference that is of fact or law and mixed fact and law and the 'pre-eminence' of expertise in shaping review that set the stage for a consideration of the next case the Superior Propane case.[17]

In Superior Propane Evans J. A. did not feel that expertise of the tribunal nor the degree of 'indeterminacy inherent in the word "effects" indicates that the court should review the Tribunal's decision on this issue on a standard other than that of correctness".[18] In terms of comparative qualifications he adopted the dictum of Iacobucci J in Southam at pages 774-5, where judges are required to sit on the competition tribunal "Clearly it was Parliament's view that questions of competition law are not altogether beyond the ken of judges".[19] Evans J. A. was of the view that this dicta was equally applicable to the judges of the Federal Court of Appeal. He took this view after correctly, intuitively making the point that judges of the Court of Appeal do not defer to the judges of the trial division

on questions of law, a fortiori why should they differ to a tribunal even though the composition of the tribunal indicates a considerable level of expertise. In essence Evans J. A. treated the question of mixed law and fact as essentially what is was a question of law, and therefore subject to a correctness standard as a matter of statutory interpretation, and a question of fact. This set the stage for him to find that the tribunal erred in law so that an expert tribunal can interpret the facts properly but nevertheless make an error of law. He seems to be saying that fact and law are to be kept separate. It therefore means that one provision or decision or statute can be the subject of differing standards of review depending on whether the error arose out of a misinterpretation of facts or of law.

The application for leave to appeal to the Supreme Court of Canada was refused in this matter. I submit that he has placed things into perspective in terms of the traditional distinctions between review of fact and law. I think he is saying that the fact that judges sit on the tribunal is a recognition by the legislature that there is no comparative advantage or expertise of the tribunal over judges and that it is time to move back to the traditional distinctions between review of facts and review of law. This meant that on appeal the court would treat the facts deferentially as being in the area of expertise of the tribunal, except where there is a jurisdictional error or where there is a patently unreasonable error and the law would be reviewed on the basis of the correctness standard. It seems to be saying that in these circumstances a middle ground is unnecessary. A middle ground

blurs the distinction between the review of fact and law and assigns to the tribunal an expertise that it does not possess and a deference that is not given to trial court judges that is on issues of law this is clear when you take into account his statement

"In my opinion, although expeditious decision-making is undoubtedly important in the review of mergers, the existence of an unrestricted right of appeal on questions of law, and a modified right of appeal on questions of fact, must be entered as a factor indicative of Parliament's intention that the Tribunal's determination of questions of should be reviewable on appeal on a correctness standard."[20]

If this submission is accepted it does place us in a better position to accept expertise as a relative concept not in terms of shifting objectives or definitions when applied to one subject matter or the other but relativity in terms of who is more qualified to deal with issues *characterized* as fact or issues *characterized* as law. So here I submit that it can be inferred that the learned judge is saying that expertise is important but we must allocate it properly as between the tribunal and the courts and as such deference will only be accorded to the tribunal on questions of fact, subject to the caveat aforesaid and courts are free to review law on the basis of a correctness standard.

This approach differs from that of Iacobucci J in Southam on the issue of the

priority of the categories in an assessment of the comparative qualifications. Evans J. A. took the absence of the privative clause and the statutory right of appeal seriously, for what they were a green light to review on whatever basis is found relevant after applying the pragmatic and functional approach. He did not use expertise to restrict his approach. This judge was able to do so because of what in my view is an appropriate *characterization* of the issue in terms of review of fact and law, he accorded expertise its rightful place as opposed to using it to blur the distinction to appeals on issues of fact and issues of law as did Iacobucci J. in Pezim. Expertise is important but is restrictive it blurs issues of jurisdictional competence in terms of who is more qualified to deal with an issue, issues which arise in the context of the Charter make this very clear.

One difficulty in making an assessment of comparative qualifications lies in tensions between the characterization of issues in terms of fact and law (which can be derived from the nature of the problem) and the characterization of the tribunal in terms of whether it has expertise or not. I think that the two are irreconcilable. Are we to focus our attention on the nature of the problem to see if it raises issues of law or are we to focus our attention on the composition and nature of the body? I think that the approach to review is best dealt with by starting out with the basic premise of characterizing matters as fact or law, which must then be analysed in the context of the pragmatic and functional approach. I

am aware that a part of the problem is that there is no bright line between issues of fact and issues of law. In Mossop[21] where the issue concerned the non appellate review of questions of law the focus was on the nature of the body as being a human rights tribunal which is made up of ad hoc bodies, no experience or specialized training and therefore characterized as having no expertise as distinct from a labour board to which deference would be accorded it being a specialized tribunal having regard to its composition and the nature of its work. But what if it was dealing with a question of fact? This is the real problem in Pezim the focus was on the nature and composition of the body, so too in Southam and that is why it is submitted that the distinctions between fact and law could be blurred that is why a middle ground had to be sought. Superior Propane by characterizing issues as fact or law shifted the standard from a characterization of the body in terms of its expertness or its role to a characterization of the issues in terms of the comparative expertise of the decision makers, that is the agency or judges. Who is better able to deal with issues characterized as law? This latter approach truly accepts expertise as a relative concept to be weighed under the pragmatic and functional approach in order to arrive at the standard of review. If matters are characterized as fact or law and dealt with in accordance with the relative expertise of the agency and the court in respect of each then there would be no difference or the difference would be greatly minimised between review on

appeal where the court can substitute its own finding and review where there is no right of appeal[MSOffice4]. The contextual approach, which rests on a concentration of expertise means that the law in the area develops without cohesion and is unpredictable, a more concise and uniform approach is required and I submit that the approach of Evans J. A. in Superior Propane is the better one.

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[1] Baker v. Canada (Minister of Citizenship and Immigration) [1999] 2 S. C. R. 817 at para. 47.

[2]UES, Local 963 v. Bibeault [1988] 2 SCR 1048 extracted in J.M. Evans, H. N. Janisch, David Mullan and R. C. B. Risk: Administrative Law: Cases, Text, and Materials 4th ed at page 828.

[3] Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corporation [1979] 2 S. C. R. 227 (NB) extracted J. M. Evans, H. N. Janisch, David J. Mullan, R. C. B. Risk: Administrative Law Cases, Text and Materials 4 ed at 821.

[4] J.M. Evans, H. N. Janisch, David Mullan and R. C. B. Risk: Administrative Law: Cases, Text, and Materials 4th ed at page 832

[5] Janisch page 819

[6] supra

[7] Canada (Director of Investigation and Research, Competition Act) v Southam [1997] 1 S. C. R. 748 at paragraph 50

[8] Canada (Commissioner of Competition) v. Superior Propane Inc., 2001 FCA 104, [2001] F. C. J. No. 455 at para 47 citing dictum from United Brotherhood of Carpenters & Joiners of America, Local 579 v. Bradco Construction Ltd., [1993] 2 S. C. R. 316 at page 335.

[9] ibid

[10] Pezim v. British Columbia (Superintendent of Brokers), [1994] 2 S. C. R. 557 (B. C.)

[11] J.M. Evans, H. N. Janisch, David Mullan and R. C. B. Risk: Administrative Law: Cases, Text, and Materials 4th ed at page 784

[12] Bell Canada v. Canada (Canadian Radio-television and Telecommunications Commission) [1989] 1 SCR 1722 at 1744-5

[13]See note 7 at page 785.

[14] Canada (Director of Investigation and Research, Competition Act) v. Southam [1997] 1 S. C. R. 748 at para. 54

[15] Ibid para 55

[16]Hudson Janisch's Administrative Law Supplement para 58 at page 126

[17] Canada (Commissioner of Competition) v. Superior Propane Inc., 2001 FCA 104, [2001] F. C. J. No. 455 extracted in Hudson Janisch's Administrative Law Supplement, 128.

[18] Ibid at para 70

[19] Ibid at para. 71

[20] Ibid at para 68

[21] Canada (Attorney General) v. Mossop [1993] 1 S. C. R. 554 (Can.) extracted at page 760

[MSOffice1]The P and F approach meant that the repective allocation of expertise in terms of fact and law was made not in relation to the subject matter but as it relates to the nature or characterization of the issue

[MSOffice2]What is the difference between the central question and the ultimate question.

[MSOffice3]Analyse later the purpose of the privative clause and how its absence should be construed as a green light but because of the expertise then deference as a part of your argument that the central issue is expertise and where there is a statutory right of appeal bearing in mind that the statutory right of appeal is also a light which allows them to subsititute there own opinion

[MSOffice4]I don't know if this is an accurate statement to review – appeal or review and privative clause