WHO IS BEST SUITED TO DECIDE?
THE RECENT TREND IN STANDARDS OF JUDICIAL REVIEW

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Since the C.U.P.E. *decision in 1979, the position of the Supreme Court of Canada, at least in theory, has been that some administrative tribunals deserve deference, and a more restrained standard of review, with respect to their determinations of some questions of law. Which tribunals and which questions remained something of a mystery, cloaked by the code words "jurisdictional or intrajurisdictional?".*

In 1993 and 1994 the Court has attempted to supply some concreteness, or at least some identifiable criteria, to the task of choosing a deference position in a given case. It has taken the jurisdictional/ intrajurisdictional distinction out of the realm of judicial instinct and provided lawyers and policy-makers with a look at what goes into making that determination.

This paper examines the extensive list of deference criteria referred to by the Court in these decisions. It chronicles the often tortuous route undertaken by the Court on its way to a coherent deference test. An examination of the recent decisions is not complete without referring to the legislation considered in each. Often, unmentioned provisions provide clues to the Court's deference stance with respect to the particular statutory body. Finally, the paper asks what lessons these cases provide for legislators responsible for creating or revising administrative bodies and for litigators faced with challenging or defending their decisions.

Depuis l'arrêt Syndicat canadien de la Fonction publique *rendu en 1979, la position de la Cour suprême du Canada a été, en théorie du moins, de considérer que certains tribunaux administratifs méritaient qu'on fasse preuve de retenue à leur égard et qu'on applique une norme de contrôle plus mesurée à leurs décisions concernant certaines questions de droit. La question de savoir quels sont ces tribunaux et ces questions est demeurée en quelque sorte une énigme, qui doit être déchiffrée grâce aux mots « juridictionnel ou intrajuridictionnel ».*

En 1993 et 1994, la Cour a essayé de fournir des éléments concrets, ou du moins des critères reconnaissables, permettant de choisir l'étendue de la retenue judiciaire dont on doit faire preuve dans un cas particulier. Elle a évacué la distinction entre « erreur juridictionnelle et erreur intrajuridictionnelle » du domaine de l'instinct judiciaire et donné un aperçu aux avocats, aux avocates et aux responsables de l'élaboration des politiques de ce qui est pris en considération pour établir cette distinction.

L'auteur de cet article examine la longue liste des critères de retenue judiciaire qui ont été mentionnés par la Cour dans ces décisions. Il décrit le chemin souvent tortueux que la Cour a suivi pour établir un test de retenue judiciaire cohérent. Un examen des décisions récentes est incomplet s'il ne fait pas référence à la loi examinée dans chaque cas. Il arrive souvent que des dispositions non mentionnées donnent des indices sur la position de la Cour quant à la retenue dont on doit user envers un organisme particulier constitué en vertu d'une loi. Enfin, l'auteur se demande quelles leçons ces arrêts donnent aux législateurs qui sont responsables de la création et de la révision des organismes administratifs et aux avocats et avocates qui doivent contester ou défendre ces décisions.

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I. Introduction

Are administrative tribunals better placed than the courts to determine certain questions of law? That would appear to be the thesis behind the new test for standards of judicial review which is being developed by the Supreme Court of Canada.

1993 and 1994 have seen a series of cases out of the Supreme Court which illustrate, to a more or less consistent extent, a new emphasis on the characteristics of tribunals, their purpose, and the matters they are called upon to decide, as important factors in setting the standard for judicial review of their decisions. While this trend appears, encouragingly, to indicate a greater judicial sensitivity to the context within which administrative decision-making operates, its advent necessitates new strategies for both litigators and legislative policy makers. Fortunately, the various, often lengthy, judgments rendered by the Court in these cases provide some insight into the factors which will influence standards of review for particular administrative tribunals.

Bodies accorded deference will apparently now be those which are expert, both because of their composition and as a result of the powers they are called upon to exercise. A body will be deferred to when the legislature has given it some elevated status in the statutory scheme – the power to administer the statute, formulate policy, make regulations. The problem at issue remains very important – does it come squarely within the expertise and specialized field of the body (as defined by the court) or is it a matter which *ought*, for some reason, to be left to the courts to determine? Finally, but no longer exclusively, deference will be shown where the legislature has indicated expressly that it should be shown, *i.e.* where the body enjoys the protection of a *full* privative clause.

What are the implications of this new approach? Where does it come from? The discussion which follows will attempt to do three things: briefly describe what seems to be the intention of this test for standards of review; examine, in some detail, the 1993-94 cases and the legislation the Court interprets; and summarize the deference criteria applied by the Court in these cases and their implications for both legislation and litigation.

II. The New Test

Judicial review of administrative action is founded on the principle that the limits of the powers of public authorities are determinable not by those authorities themselves, but by the courts. Traditionally, the courts considered all questions of law, particularly questions which had an even indirect bearing on the tribunal's own jurisdiction, as matters on which they themselves were the most suitable and skilled decision-makers. Administrative agencies were treated as junior courts open to correction.[1]

However, there are often good reasons for legislators to attempt to shield the legal determinations of administrative bodies from judicial review. These include expedition and cost-effectiveness, certainty that decisions will be final, the expertise and context-

[1] See *e.g. Anisminic Ltd.* v. *Foreign Compensation Commission*, [1969] 2 A.C. 147, [1969] 1 All E.R. 208 (H.L.); *Metropolitan Life Insurance Co.* v. *International Union of Operating Engineers, Local 796*, [1970] S.C.R. 425, 11 D.L.R. (3d) 336; and *Bell* v. *Ontario (Human Rights Commission)*, [1971] S.C.R. 756, 18 D.L.R. (3d) 1.

sensitivity possessed by the tribunal as opposed to the courts and the need for consistency in the interpretation of a regulatory scheme.

The courts' resistance to any attempt to limit their review jurisdiction is best illustrated by their treatment of what are known as "privative clauses" – provisions which purport to render a tribunal's decision "final" or which give it "exclusive jurisdiction" to decide particular issues. Such provisions have never succeeded in removing the courts' power to determine whether a tribunal has acted within its jurisdiction. And what constitutes a "jurisdictional" question remains open to interpretation by the court in any given case.

The advent of a more deferential attitude towards tribunals, marked by the decision in *Canadian Union of Public Employees, Local 963* v. *New Brunswick Liquor Corp.*,[2] meant that review of legal errors *within* the tribunal's jurisdiction became less exacting. However, the jurisdictional/intra-jurisdictional distinction was still all-important. Without a concrete test for determining when a decision would be considered to go to jurisdiction, courts remained free to intervene whenever they considered a legal error by the tribunal to be sufficiently serious.

The vagueness of this distinction, and the lack of guidance for lawyers and clients attempting to predict deference levels for tribunals, led to the development of the "pragmatic and functional" approach to determining the appropriate standard of review, first outlined by Beetz J. in *U.E.S., Local 298* v. *Bibeault*.[3] That decision provided the following question, to be asked in each situation: "Did the legislator intend the question to be within the jurisdiction conferred on the tribunal?"[4] The factors to be considered in answering this question are:

> not only the wording of the enactment conferring jurisdiction on the administrative tribunal, but the purpose of the statute creating the tribunal, the reason for its existence, the area of expertise of its members and the nature of the problem before the tribunal.[5]

Bibeault should have led to a closer analysis of the connection between the legal problem involved and the expertise and purpose of the tribunal in determining the level of deference that its decisions should attract. Subsequent cases, however, showed only mixed results on this issue.[6]

With the line of cases discussed below, the Supreme Court has attempted to supply some concreteness, or at least some identifiable criteria, to the task of choosing a deference position in a given case. The Court has taken the jurisdictional/ intra-jurisdictional distinction out of the realm of judicial instinct and provided lawyers and policy-makers with a look at what goes into making that determination.

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[2] [1979] 2 S.C.R. 227, 97 D.L.R. (3d) 417.

[3] [1988] 2 S.C.R. 1048, 95 N.R. 161 [hereinafter *Bibeault* cited to S.C.R.].

[4] *Ibid.* at 1087.

[5] *Ibid.* at 1088.

[6] See *e.g. C.A.I.M.A.W.* v. *Paccar of Canada Ltd.*, [1989] 2 S.C.R. 983, 32 D.L.R. (4th) 523, Sopinka J.; *National Corn Growers Assn.* v. *Canada (Import Tribunal)*, [1990] 2 S.C.R. 1324, 74 D.L.R. (4th) 449, Gonthier J.; *Lester (W.W.) (1978) Ltd.* v. *United Assn. of Journeymen and Apprentices of the Plumbing and Pipefitting Industry, Local 740*, [1990] 3 S.C.R. 644, 76 D.L.R. (4th) 389; and *Canada (Attorney General)* v. *Public Service Alliance of Canada*, [1991] 1 S.C.R. 614, 80 D.L.R. (4th) 520 [hereinafter *Econosult* cited to S.C.R.].

The result is a detailed and highly subjective list of deference criteria. The Court says in these cases that the goal of a standards of review analysis should be the search for what Parliament or the provincial legislature intended in the way of deference for a particular tribunal. While this language is not new, the change is that the Court seems prepared to look much more deeply into the statutory scheme, and the context within which it operates, to discern that intention.

The next section discusses the recent cases, with a focus on the criteria by which the Court establishes both an intention on the part of the legislature to grant unsupervised jurisdiction over particular subjects and the capacity of the tribunal to accept that jurisdiction. This analysis requires an examination, not only of the judgments themselves, but of the legislation under which each of the reviewed bodies was established.

III. Standards of Deference: The 1993-94 Cases

A. Canada (Attorney General) *v.* Mossop[7]

1. *Facts*

The complainant, a federal government employee, was denied bereavement leave to attend the funeral of his homosexual partner's father. The collective agreement between Treasury Board and the union provided for leave upon the death of a member of the employee's "immediate family", including the parents of a common law spouse, but only if the spouse was of the opposite sex. The Canadian Human Rights Tribunal concluded that the collective agreement discriminated against the complainant on the basis of "family status". The Supreme Court of Canada reversed this decision on judicial review, issuing five different written judgments. For six members of the Court, the standard of review for a human rights tribunal interpreting a provision of the *Canadian Human Rights Act*[8] is correctness. For one it is patent unreasonableness.

2. *Criteria*

The two majority judgments in this case present somewhat different approaches to the question of standard of review. For the Chief Justice, writing for himself and Sopinka and Iacobucci JJ., the fact that there is no privative clause in the *Act* means that the Court has a duty to intervene in the tribunal's decision on any error of law, no matter how "understandable".[9] He admits that, "[a]bsent a privative clause, the courts have shown curial deference vis-à-vis certain specialized tribunals when interpreting their own Act." However, based on *Zurich Insurance Co.* v. *Ontario Human Rights Commission*,[10] he concludes that human rights tribunals do not have "the kind of expertise that should enjoy curial deference on matters other than findings of fact."[11]

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[7] *Canada (Attorney General)* v. *Mossop*, [1993] 1 S.C.R. 554, 100 D.L.R. (4th) 658 [hereinafter *Mossop* cited to S.C.R.].

[8] R.S.C. 1985, c. H-6.

[9] *Mossop, supra* note 7 at 577, citing the reasons of Marceau J. in the Federal Court of Appeal.

[10] [1992] 2 S.C.R. 321 at 338, 93 D.L.R. (4th) 346 [hereinafter *Zurich* cited to S.C.R.].

[11] *Mossop, supra* note 7 at 578.

In *Zurich Insurance*, Sopinka J. for the majority gave the standard of review a relatively brief treatment. The deciding factor for him was the fact that the Ontario *Human Rights Code* provided a very wide-ranging appeal provision, under which the matter had been brought to court. Sopinka J. concluded that the legislature was not of the opinion that the conclusions of the board of inquiry should be given great deference as a result of accumulated expertise or specialized understanding.[12] He also referred to the absence of a privative clause.

Neither Lamer C.J. in *Mossop*, nor Sopinka J. in *Zurich* give any additional reason for finding that "deference will not apply to findings of law in which the board has no particular expertise".[13] The Chief Justice goes on to say, however, that "if any additional reasons need be given for our having come to that conclusion, I would adopt in that regard the reasons of my colleague Justice LaForest in this case."[14] These words of the Chief Justice, as well as the concurring reasons of Cory and McLachlin JJ., result in Mr. Justice LaForest's analysis of the standard of review for the human rights tribunal in *Mossop* being, in effect, the majority view.

LaForest J. effectively divides the analysis of the appropriate standard of review into two. Having failed to locate a privative clause in the tribunal's statute, he states that "[i]n the absence of other provisions indicating a disposition to limit judicial review, the normal supervisory role of the courts remains."[15] By "normal supervisory role" he appears to mean a review for correctness, at least on questions of law. It is only at this point that he goes into an analysis of the relative expertise of the tribunal. The result of this approach is to use the presence or absence of a privative clause as the means for establishing a presumption for or against deference. The rest of the "pragmatic and functional" approach from *Bibeault* is then used as a potential means of rebutting the presumption.

LaForest J.'s analysis of the tribunal's expertise is crafted in response to the case made for deference by L'Heureux-Dubé J. in dissent. He emphasizes that while the Human Rights Commission helps to educate, inform and advise on matters of human rights, these functions of the Commission, and the expertise they illustrate, cannot benefit the adjudicative tribunals established by the Commission. The tribunals themselves are "*ad hoc* bodies established to settle a particular dispute."[16] [Emphasis in original] In other words, because of the administrative separation between the Commission and the tribunals, the policy role of the former cannot inform the deference standard applicable to the latter.

Further, human rights tribunals also compare unfavourably, in terms of the appropriate level of deference, with labour arbitrators. The latter operate in a narrowly restricted field and are selected by the parties to arbitrate under voluntary agreements. Their jurisdiction under statute extends to determining whether a matter is arbitrable.

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[12] *Zurich, supra* note 10 at 337.

[13] *Ibid.* at 338. Nor does Lamer C.J.C. refer to the fact that the *Mossop* case was a judicial review application, not an appeal, or that the *Canadian Human Rights Act* does not contain a similar appeal provision to that considered in *Zurich*.

[14] *Mossop, supra* note 7 at 578.

[15] *Ibid.* at 584.

[16] *Ibid.* at 585.

In contrast, a human rights tribunal's decisions are "imposed on the parties" and have "direct influence on society at large in relation to basic social values".[17] The important aspect of this latter factor would appear to be the "influence on society at large", rather than the involvement of "basic social values". The requirement to weigh social values and benefits can be seen as a context-laden exercise, more appropriately done by statutory tribunals in some situations.[18] Whether the requirement to consider such issues leads to more or less deference seems to depend on the size of the context. Mr. Justice LaForest concludes that the superior expertise of human rights tribunals relates not to "general questions of law such as the one at issue in this case" but to "fact-finding and adjudication".[19] Consequently, only a standard of correctness is appropriate in this case.

Dissenting, L'Heureux-Dubé J. engages in a much more lengthy and comprehensive analysis of the powers, functions and expertise of a human rights tribunal. Starting with the position that deference to administrative tribunals should be the presumption, regardless of the presence or absence of a privative clause, she then proceeds to address the apparently simple issue from *Bibeault*: "Who should answer this question, the board or a court?"[20] In response to this query she provides a long list of relevant factors relating to the legislation, the characteristics of the board and the nature of the question. Some are cast in general terms, others appear only when she turns to her detailed analysis of the *Act*. Her list need only be reproduced in bullet form to establish its comprehensiveness and complexity:

The Legislation:

- what is the purpose of the board?
- to what social needs is it responding?
- what is the scope of its powers and are they defined in broad or narrow terms?
- does the board have policy making powers?
- is there language suggesting deference? is there a privative clause?
- for example, does the legislation provide for internal review and rehearing of decisions?

The Board:

- is it "specialized"? (not defined)
- does it have a developed body of jurisprudence for guidance and precedent?
- does it have functions which would inevitably lead to an accumulation of expertise and specialized understanding of the relevant issues?
- is it required, for example, to review Acts of Parliament and offer advice and recommendations to ministers?

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[17] *Ibid.*

[18] See *e.g.* the deference expressed in *PSAC, infra* note 27, to the PSSRB, given its sensitivity to the "intricacy" and "delicate balance" of labour relations.

[19] *Mossop, supra* note 7 at 585.

[20] *Ibid.* at 604.

- how are its members selected, and how do they participate in decision-making?
- does the context within which the members work provide them with field-sensitivity or other advantages?

The Problem:

- does the matter fall within the powers of the board, (squarely or by implication)? for example, how closely connected are the questions of law to questions of fact?
- does it require specialized knowledge to answer?
- is it best decided in a context specific setting, or is it a question of general application?
- does the problem have a variety of reasonable answers, or only one "correct" one? for example, are the terms to be considered defined by the legislation or left open?
- does the integrity of the administrative scheme require that the problem be answered by the board?
- would a court be better suited to deal with it? or should a court deal with it anyway because it involves constitutional interpretation?[21]

Applying these criteria to the human rights tribunal, L'Heureux-Dubé J. finds that the standard of review of its ruling on the meaning of "family status" in the *Act* should be one of patent unreasonableness.

3. *Legislation*

Given the criteria enunciated in the various *Mossop* judgments, what does this tell us about the deference level suggested by the *Canadian Human Rights Act*? First, LaForest J. does not take issue with L'Heureux-Dubé J. on the importance of the extensive policy and complaints role of the Human Rights Commission, set out in sections 27, and 41 through 48. If it were the Commission itself who had the adjudicative role, these factors would be relevant to the level of deference it enjoyed.

However, the majority departs from the dissent on the issue of the relevance of these provisions to the decisions of the human rights *tribunal* established under section 49 of the *Act*. The tribunal is appointed by the President of the Human Rights Tribunal Panel, all of whose members are appointed by the Governor in Council (s. 48.1). Consequently, it is completely independent from the Commission, whose only role is to request its establishment in any given case. This is enforced by section 49(3) which prevents any member, officer, employee or investigator of the Commission from serving on a tribunal. Tribunals are, as LaForest J. suggests, appointed on an ad hoc basis to deal with individual cases and are then disbanded.

Because of their independence from the Commission, human rights tribunals cannot benefit, according to the majority, from the policy functions and expertise of the

[21] *Ibid.* at 605 and 609-10.

Commission. Tribunal members do not get to examine statutes and make recommendations to ministers; their role is limited to the adjudication of complaints. Their remedial powers relating to this task are fairly narrow, being defined in some detail in sections 53 and 54 (although their decisions may be given the status of Federal Court orders through registration with that Court (s. 57)).

The level of deference applicable to decisions of the tribunals, therefore, must depend entirely on their own, limited powers. There is nothing else in the *Act*, such as selection criteria for tribunal members or an express power to determine questions of law, which would indicate a high level of expertise. As a result, human rights tribunals will apparently have to be "correct" in their interpretations of statute.

B. Université du Québec à Trois-Rivières *c.* Larocque[22]

1. *Facts*

Two research assistants engaged by the university were dismissed on the grounds of "lack of funds", although the real reason was their inferior work. The researchers grieved. The arbitrator refused to allow the university to introduce evidence of their poor work. The issue before the Supreme Court of Canada was whether the arbitrator had exceeded his jurisdiction by refusing to hear relevant or admissible evidence. It was concluded that there was a breach of natural justice and, consequently, that the arbitrator had exceeded his jurisdiction.

2. *Criteria*

The issue of the standard of review arose in connection with the arbitrator's power to determine the scope of the issue presented in the grievance, and consequently the range of relevant evidence. For himself, LaForest, Gonthier and Iacobucci JJ., Lamer C.J. held that the arbitrator was entitled to deference on this issue and to review only for patent unreasonableness. The factors he examined were, first, that in order to determine the scope of the issue presented to him the arbitrator had primarily to interpret the collective agreement and the wording of the grievances. Interpretation of such documents is clearly within the arbitrator's exclusive jurisdiction.

Second, (and he does not make these observations until he deals with the actual breach of natural justice) interventionist supervision of an arbitrator's decisions on admissibility of evidence would be "incompatible with the very wide measure of autonomy which the legislature intended to give grievance arbitrators in settling disputes within their jurisdiction."[23] Finally, he notes the arbitrator's "privileged position" in assessing the relevance of evidence.[24]

These factors establish a position of deference, from which the Chief Justice examines first the decision on the scope of the issue, which he upholds, and then the decision to exclude the evidence. Cautioning that all refusals to admit relevant evidence

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[22] [1993] 1 S.C.R. 471, 101 D.L.R. (4th) 494 [hereinafter *Larocque* cited to S.C.R.].

[23] *Ibid.* at 490.

[24] *Ibid.* at 491.

should not necessarily be considered breaches of natural justice, and therefore jurisdictional, he nevertheless finds such a breach in this case.[25]

For L'Heureux-Dubé J., the arbitrator's decision not to admit the evidence was a clear breach of the rules of natural justice. Consequently, despite the presence of a privative clause indicating a high standard of deference, his decision cannot stand.

3. *Legislation*

The Québec *Labour Code*[26] indicates that grievance arbitrators are usually agreed upon by the parties to a collective agreement (s. 100). Failing agreement, the Minister of Labour may appoint an arbitrator *ex officio* from a list drawn up annually by the Minister after consultation with the Conseil consultatif du travail et de la main-d'œuvre (s. 77). An arbitrator has immunity from suit for acts done in good faith in the performance of his duties (s. 100.1). He or she may summon witnesses and compel compliance with the summons (s. 100.6), and may proceed in accordance with such procedure and mode of proof "as he deems appropriate" (s. 100.2). The arbitrator may interrogate witnesses (s. 100.7). Other powers include: the power to interpret and apply any Act or regulation, the power to confirm, amend or set aside any disciplinary decision of the employer and the power to "render any other decision intended to protect the rights of the parties" (s. 100.12). The arbitration award is without appeal and binds the parties and any concerned employee (s. 101).

Section 101's rather limited privative language is backed up by section 139 of the *Code*. That section states that no "extraordinary recourse" (*i.e.* judicial review) shall be taken against any "court of arbitration" (which, by s. 100, includes a single arbitrator).

The legislation therefore reveals more detailed grounds than those listed by the Chief Justice for concluding that the legislature intended for arbitrators to enjoy a "very wide measure of autonomy". These provisions, particularly the privative clauses, must have contributed to the high degree of protection from judicial review accorded to the arbitrator in this case. As will be seen in the discussion of *Dayco* below, the Court is prepared to take a very different view of arbitrators operating under the Ontario *Labour Relations Act*.

C. Canada (Attorney General) *v.* Public Service Alliance of Canada[27]

1. *Facts*

In 1985 the federal government approved the "Workforce Adjustment Policy" (WAP) to protect the employment status of indeterminate employees from the consequences of major changes to the public service. This policy was subsequently incorporated as part of the master collective agreement between Treasury Board and PSAC.

The Department of National Revenue, Customs and Excise contracted out the work performed by 270 data processors in an attempt to reduce their person years. PSAC filed

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[25] *Ibid.*

[26] R.S.Q., c. C-27, as am. by S.Q. 1983, c. 22.

[27] [1993] 1 S.C.R. 941, 101 D.L.R. (4th) 673 [hereinafter *PSAC* cited to S.C.R.].

a reference to the Public Service Staff Relations Board (PSSRB) pursuant to section 99 of the Board's *Act* alleging that these actions were contrary to the WAP and to the collective agreement. Section 99 allows an employer or bargaining agent to refer a matter to the PSSRB where the obligation at issue is not one which could be enforced through an individual employee's grievance.

The Board held that it had jurisdiction to hear the reference and ruled for PSAC, finding that bringing in the contract employees was contrary to the collective agreement. Before the Supreme Court of Canada the issues were whether the board had jurisdiction and whether its decision was patently unreasonable. The Court unanimously upheld the board's decision but split on the appropriate standard of review for the first issue – defining the board's jurisdiction.

2. *Criteria*

Cory J. wrote for four judges of a seven person court. Following *Bibeault*,[28] Cory J. begins with the position that where the Board is interpreting statutory provisions defining its own jurisdiction, then regardless of the presence or absence of a privative clause or other indicia of expertise, if the Board made a simple error, it has exceeded its jurisdiction. He resorts to the pragmatic and functional approach only for determining whether this "simple error" has been made. However, with respect to matters within jurisdiction the standard for review of error of law by "specialized administrative tribunals" should be one of patent unreasonableness.[29]

Cory J. consequently divides the list of criteria proposed by L'Heureux-Dubé J. in *Mossop*[30] into two sets. The first set, referring to the legislation and the Board, are relevant to establishing whether the PSSRB is a "specialized tribunal", and worthy of deference for matters falling within its jurisdiction. The second set, relating to the issue to be determined by the Board (and to some extent the purpose of the legislation) is applicable to whether the Board has made a "simple error" in assuming jurisdiction under its statute in a given case. In other words, Cory J. declines to use the pragmatic and functional test for considering whether the legal determination here is, in fact, jurisdictional in nature and, hence, for establishing the standard of review of that decision.

The criteria examined by Cory J. to establish the PSSRB's "specialization" are: a broadly worded privative clause, broad powers to consider and resolve a wide variety of problems in the field of labour relations, wide powers to make regulations on a number of important issues, the fact that the Board is composed of "experts" representative of both labour and management, and the necessity that its decisions be speedy and final. He mentions the "intricacy" of labour relations and the "delicate balance that must be preserved between the parties". The experts on the Board "will often have earned by their merit the confidence" of the parties and the community at large – a confidence which every interference by the Court will diminish.[31]

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[28] *Supra* note 3.

[29] *PSAC, supra* note 27 at 961-62.

[30] *Supra* note 7.

[31] *PSAC, supra* note 27 at 962.

The standard of review for the substantive decision, the interpretation of the WAP, is therefore patent unreasonableness. This term is further defined by Cory J. as requiring the determination to be "clearly irrational".[32] The Board easily satisfies this test.

However, despite his willingness to defer to the Board on substantive questions, Cory J. is still of the view that "the courts are eminently well suited for determining whether the Board has exceeded the jurisdiction which is granted to it by its enabling statute."[33] Consequently, the Court's examination of the Board's jurisdictional decision extends to determining whether the interpretation was correct. The factors here are whether the intended beneficiaries of the WAP are bargaining units as a whole or individual workers. If the former, the matter should be determined by the Board under section 99; if the latter, it should not (because it could be the subject of an individual grievance). In the result, the Board was correct in finding that it had jurisdiction in this case.

For L'Heureux-Dubé J., section 99 of the statute is capable of being interpreted two ways: as making the "who benefits" question external to the jurisdiction of the Board, and as confiding that question to the Board within its jurisdiction. Given this ambiguity, she advocates using the pragmatic approach to determine whether the question is jurisdictional or not.

The criteria relied on by L'Heureux-Dubé J. for this analysis are the same factors which led Cory J. to a determination of deference on the substantive question: the privative clause and the expertise of the Board and its members. She also considers the nature of the question to be answered, noting that, "The question of 'to whom' an obligation is owed cannot be meaningfully separated from the question of whether or not the obligation itself exists."[34] She concludes that the same "skills" that enable the Board to make the latter determination would assist them in deciding the former – both questions lie at the centre of their specialized expertise. Therefore, the issue of whether the matter is properly brought under section 99 is within the jurisdiction of the Board and should only be reviewed for patent unreasonableness.

The disagreement here is on the application of the pragmatic approach to judicial review of statutory interpretation where the provisions interpreted bear on the Board's own jurisdiction. Although she continues to use the "jurisdiction" language, L'Heureux-Dubé J. really seems to be saying that the same approach should inform review of statutory interpretation determinations, regardless of the type of provision being interpreted. Cory J. prefers to stick to the more rigid, traditional division between "provisions defining jurisdiction" and other relevant statutory provisions.

3. *Legislation*

The privative clause contained in section 101 of the *Public Service Staff Relations Act*[35] (*PSSRA*) gets prominence in the deference analysis of both Cory and L'Heureux-Dubé JJ. Not only did this clause contain the usual "final, no review" language, but it purported, in subsection (2), to remove all right to pursue prerogative writ proceedings

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[32] *Ibid.* at 964.

[33] *Ibid.* at 962-63.

[34] *Ibid.* at 978.

[35] R.S.C. 1985, c. P-35.

in any court. Interestingly, despite the sweeping nature of section 101, it was not successful in limiting review of the PSSRB by the Federal Court,[36] although in *Econosult*,[37] as well as in this decision, the Supreme Court of Canada seemed to set a much higher value on the protection afforded by the clause.

Section 101 was removed by the *Public Service Reform Act*[38] in 1993. It will be very interesting to see what effect the removal of this clause has on the deference analysis of the courts with respect to the PSSRB.

Other provisions of the *PSSRA* which are relevant to the analysis in this case are the appointment and qualification requirements for members. Members are appointed for a fixed term (s. 12) and are not permitted to hold an office or employment under either the employer (the federal government) or a union (s. 13). They are selected from a list of eligible persons, prepared by the Chairperson in consultation with the employer and the bargaining agents (s. 14).

The credentials of Board members are thus established through the consultation process involving the Chairperson of the Board and employer and employee representatives. This seems to be enough for Cory J. to consider them "experts", despite the fact that no specific experience or professional qualifications are provided.

Also of relevance are the powers and facilities of the Board. The Board may hire conciliators and other "experts" to assist it in an advisory capacity (s. 20). The Board's powers are described in very broad terms as being to "administer" the *Act* and to exercise all powers conferred on it "or as may be incidental to the attainment of the objects" of the *Act* (s. 21). It has general regulatory powers to govern labour relations in the federal public sector (s. 22) as well as the power to investigate and adjudicate complaints, grievances and certification applications. Its evidentiary powers are those of a superior court of record (s. 25).

Are these provisions sufficient to form the basis of Cory J.'s conclusions that members "are aware of the intricacy of labour relations" or that they "will often have earned by their merit the confidence of the parties"?[39] Or has the Court relied on other, external evidence here? If so, it would be interesting to know what evidence would be admissible and convincing on this point.

Clearly, even without a privative clause, there would be a strong argument for recognizing the expertise of the PSSRB. This is reinforced by the Court's apparent willingness to look beyond the words of the statute when making conclusions about the expertise of Board members. The effect of *removing* the privative clause, in this context, may consequently not be as important to future review applications as might otherwise be the case.

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[36] See *e.g. Canada (Attorney General)* v. *Canada (Public Service Staff Relations Board)*, [1977] 2 F.C. 663, 14 N.R. 257.

[37] *Econosult, supra* note 6 at 659 and 661.

[38] S.C. 1992, c. 54.

[39] *PSAC, supra* note 27 at 962.

D. Dayco (Canada) Ltd. *v.* C.A.W. - Canada[40]

1. *Facts*

Dayco closed its Hamilton plant in 1985. The collective agreement which had been signed by Dayco and C.A.W. provided benefits for retirees. The shut down agreement provided for termination of benefits, but only referred to current employees. Following the shut down, Dayco sought to terminate benefits to retirees. C.A.W. grieved. Before the arbitrator, Dayco argued that since the collective agreement had expired, the arbitrator had no jurisdiction.

The arbitrator confirmed his jurisdiction, holding that the collective agreement continued to apply to the grievance. The decision was overturned on judicial review but upheld on appeal.

The Supreme Court of Canada dismissed Dayco's appeal. The issues were: whether the arbitrator was acting within his jurisdiction or deciding upon his jurisdiction in determining whether the collective agreement applied, and whether his conclusion on that point was correct. Judgments were written by LaForest and Cory JJ. and by Lamer C.J. The dispute centred, not on the outcome, but on the method of analysis.

2. *Criteria*

LaForest J., writing for himself, Sopinka, Iacobucci, Gonthier and McLachlin JJ., begins by recognizing that the Ontario *Labour Relations Act*[41] expressly gives an arbitrator jurisdiction to decide whether or not a matter is arbitrable. He makes a fundamental distinction, however, between an arbitrator interpreting a collective agreement in order to decide this point, and a case such as this in which he is called upon to determine whether the collective agreement continues to exist. The former is within the arbitrator's jurisdiction, the latter is not.

His analysis turns, first, on his interpretation of the privative clause protecting "arbitrability" decisions. Section 44 of the *Act* characterizes that decision as "final and binding upon the parties". In a sort of reverse application of the *Bibeault* test, LaForest J. comments that such wording should not be read as determinative without an examination of its context and the structure of the statute. The purpose of the provision is "to empower the arbitrator to deal with differences between the parties relating to the agreement."[42] The arbitrator's expertise lies in this area – application of the facts to the agreement as he or she interprets it. This is not true of a determination of whether the collective agreement governs the rights and obligations of the parties, for which it is said "the arbitrator has no benchmark".[43]

LaForest J. develops this theme with reference to the role of the arbitrator under the statutory scheme. Historically, he notes, arbitrators were unwilling to consider the kind of question dealt with in this case. Until 1961 the Ontario Labour Relations Board had exclusive jurisdiction to determine whether a collective agreement was in operation.

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[40] [1993] 2 S.C.R. 230, 102 D.L.R. (4th) 609 [hereinafter *Dayco* cited to S.C.R.].

[41] R.S.O. 1980, c. 228.

[42] *Dayco, supra* note 40 at 260 (emphasis in original).

[43] *Ibid.*

After that provision was repealed, arbitrators continued to defer on such issues to the Board. In his discussion of this point, LaForest J. demonstrates that evidence of expertise (or its lack) can be gleaned from beyond the statutory framework.

These observations lead LaForest J. into a comparison of the roles of the Labour Board and the arbitrator under the *Act*. The Board has a strong privative clause (s. 108), which is to be contrasted with the simple "final and binding....between the parties" language in section 44. In the view of LaForest J., section 44 has only a "limited privative effect",[44] and respect should be given to the legislature's decision not to bring the arbitrator under the shelter of section 108. As an aside, he also compares the words of section 44 unfavourably with the "final and conclusive" language considered in *National Corn Growers Assn.*,[45] although he attributes the deference accorded in that case chiefly to "the relative expertise of the administrative tribunal over the specialized questions involved."[46]

This last point gives a hint as to how LaForest J. himself came to downgrade the effect of section 44, in light of the failure of the arbitrator to meet the expertise criteria he discusses further on in the decision. Given this policy-laden method of statutory interpretation, it seems a bit unfair for him to criticize the Court of Appeal in this case for relying on a policy of judicial deference to "elevate statutory words to a privative status not intended by the legislature".[47] Surely it is the intention of the legislature which all these judges are seeking through the application of policy to the words of the statute. This point is developed more expressly in the *Bradco* decision.[48]

This relativist view of the privative language is a real departure. The Court does not usually base its refusal to recognize a privative clause on the language used. The emphasis has generally been on the fact that such clauses do not catch jurisdictional error, no matter how broadly worded. In this case LaForest J. seems to be suggesting that the language of the privative clause may be of assistance in determining which errors, and how many of them, will be considered jurisdictional, rather than having the nature of the error determine whether the clause will be respected.

His view is further explained by his review of the purpose of arbitration and the expertise of arbitrators. Their expertise lies in the interpretation of collective agreements and the resolution of factual disputes. It is "in a limited sense" also related to labour relations policy, but falls short of the wide ranging policy-making functions given to labour boards, in particular the Ontario Labour Relations Board. Unlike the Board, the arbitrator's role "is confined to the resolution of grievances under a collective agreement." Consequently, "an arbitration board falls towards the lower end of the spectrum of those administrative tribunals charged with policy deliberations to which the courts should defer."[49] It is interesting to speculate on the degree to which this conclusion is influenced, as well, by the historical position of arbitrators as inferior decision-makers to the Labour Board.

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[44] *Ibid.* at 263.

[45] *Supra* note 6, referring to s. 76 of the *Special Import Measures Act*, S.C. 1984, c. 25.

[46] *Dayco, supra* note 40 at 265.

[47] *Ibid.* at 264-65.

[48] *Infra* note 61.

[49] *Dayco, supra* note 40 at 266.

Finally, LaForest J. considers whether the question at hand falls within the area of expertise he has circumscribed for the arbitrator. He concludes that the concepts in play – "vesting" and accrued contractual rights – are analogous to common law notions and consequently fall outside the tribunal's sphere of exclusive expertise. He admits that arbitrators "tap into" common law principles every day in the course of their decision-making, but claims that they have "no exclusive or unique" claim to expertise in such areas. As a result, in deciding whether a collective agreement continues to determine the rights and obligations between the parties, the arbitrator is required to be correct.[50]

While LaForest J.'s judgment refers to a whole series of factors, it seems to be this last which really drives the conclusion. In terms of the criteria set out by L'Heureux-Dubé J. in *Mossop*,[51] he seems convinced that the question of whether a collective agreement continues to govern the parties is susceptible of a single "correct" answer, and one which the courts should always be allowed to give. An added consideration, perhaps, is that such a determination may have ramifications beyond the immediate dispute which is the subject of the arbitration.

Absent that important factor, many of the other criteria mentioned could possibly have gone either way, particularly when one compares the reasoning here with that of *Larocque*[52] and *PSAC*.[53] Labour arbitrators, no less than labour boards, operate within the "delicate balance" of labour relations. Their experience will allow them to interpret collective agreements and legislation in a way which preserves that balance. For them, too, the confidence of their public is essential. Speed and finality are also overriding considerations. The limited effect of their decisions, extending only to the parties who have selected them, has been cited in other decisions as a reason for extending deference. And it is hard to see, in terms of the required skills, how the analysis of whether a collective agreement continues to govern certain employees after its expiry date differs from the analysis of whether certain employees or interests are governed by a collective agreement.

These themes are pursued in Cory J.'s concurring judgment. On the one hand, Cory J. agrees, without a "pragmatic and functional" analysis, that since the arbitrator's jurisdiction was in issue, his ruling on the interpretation of the statute had to be correct. On the other, however, he takes issue with LaForest J.'s analysis of the standard of review of arbitrator's decisions, which Cory J. describes as being directed to review of decisions "on the merits".[54] (In fact, as LaForest J. points out, his analysis is limited to the review of the jurisdictional point.)

Cory J. feels that the high standard of curial deference applicable to labour tribunals should also apply to arbitrators acting in the same field. He cites the "volatile and sensitive" nature of the field and the fact that an arbitrator is selected by the parties. He vigorously opposes LaForest J.'s downgrading of the privative effect of the phrase "final and binding", saying that it will defeat the aim of the legislators, who cannot be supposed to have been so particular in choosing "final and binding" over "final and conclusive"

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[50] *Ibid.* at 267.

[51] *Supra* note 7.

[52] *Supra* note 22.

[53] *Supra* note 27.

[54] *Dayco, supra* note 40 at 309.

when framing the privative clause.[55] The Chief Justice, in a one paragraph judgment, concurs with Cory J. on this issue, which he characterizes as the "quasi-privative clause".[56]

In fact, while Cory J. decries the complexity of dividing privative clauses into different categories, it is LaForest J.'s approach to the statutory language which is probably more consonant with the pragmatic and functional approach. It allows the Court to evaluate a number of factors simultaneously, rather than having the privative clause establish a presumption of deference which the other factors must outweigh.

In general, the difference between the two judges seems to crystallize along the line between the traditional and pragmatic approaches. While both use the term "jurisdiction" to describe matters which should be reviewed on a correctness standard, the essential distinction is that LaForest J. uses the pragmatic approach to determine whether the arbitrator's decision should be considered jurisdictional in this case – to decide, in other words, whether the arbitrator or the court is best suited to decide this particular issue. This approach is to be contrasted with that of Cory J., for whom no such analysis is needed to recognize the question here as jurisdictional and hence, fully reviewable.

3. *Legislation*

It is interesting to compare the arbitration provisions of the Ontario *Labour Relations Act*[57] with the equivalent provisions of the Québec *Labour Code*.[58] It will be remembered that in *Larocque*, the Court accorded a Québec arbitrator a high standard of deference, referring to the legislature's intent that arbitrators should enjoy a "very wide measure of autonomy".[59]

Some of the provisions governing Ontario arbitrators are similar to the Québec statute. Thus, arbitrators have the power to summon and enforce the attendance of witnesses and accept such evidence as they consider proper (s. 44(8)). Their decisions are declared to be binding, not only on the parties, but on affected or implicated employers and employees (s. 44(10)), and may be enforced through the Supreme Court of Ontario (s. 44(11)).

There are some important distinctions, however, particularly in the appointment of arbitrators and in their powers. The Ontario statute also contemplates a list of approved arbitrators established by the Minister, but the power to establish it is discretionary. Similarly, for the purpose of advising him as to qualified candidates, the Minister *may* constitute a labour management advisory committee (s. 45(10)). Most importantly, there does not seem to be any statutory requirement that the list of candidates be consulted when arbitrators are appointed by the Minister. These discretionary aspects of the appointment scheme distinguish it from section 77 of the Québec *Labour Code*.

As for the arbitrator's powers, the significant difference is the lack of any mention of a power to interpret legislation. Nor are the Ontario arbitrators' remedial powers expressed in the same broad terms.

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[55] *Ibid.* at 311.

[56] *Ibid.* at 239.

[57] *Supra* note 41.

[58] *Supra* note 26.

[59] *Supra* note 22 at 490.

Finally, of course, as mentioned by LaForest J., the Ontario arbitrator's privative clause is quite meagre when compared with either section 108 of the Ontario legislation (the Labour Relations Board's privative clause) or section 139 of Québec's *Labour Code*.

The fact that virtually all of the missing powers and qualifications of the Québec statute are conferred, in later provisions of the Ontario *Labour Relations Act*, on the Ontario Labour Relations Board likely clinched the relative deference question for the Supreme Court.

As in the case of the PSSRB, recent changes to the *Labour Relations Act*, brought about by Ontario's controversial Bill 40,[60] may alter the deference status of arbitrators under the *Act*'s regime. Probably the most significant changes are contained in the new subsections 45(8) and 45(8.1) of the statute. In a foresighted response to LaForest J., the chapeau of subsection (8) provides that an arbitrator shall make a "final and *conclusive*" settlement of the differences between the parties. [Emphasis added] The privative clause has consequently become less "quasi". However, no alteration was made to section 108 of the *Act*, so the Labour Board continues to enjoy a broader privative protection.

Subsections 45(8) and 45(8.1) of the new legislation go on to list a much more impressive range of determinative and remedial powers for arbitrators. They include, in particular, the all-important power to determine "all questions of fact or law that arise", as well as the power to "interpret and apply the requirements of human rights and other employment-related statutes, despite any conflict between those requirements and the terms of the collective agreement."

Unlike LaForest J., the authors of the new legislation do not seem to feel that an arbitrator "has no benchmark" for legal analysis which goes beyond the confines of the collective agreement. It will be interesting to see if the Supreme Court now agrees with them.

E. United Brotherhood of Carpenters and Joiners of America, Local 579 *v.* Bradco Construction Ltd.[61]

1. *Facts*

The appellant union represented the respondent's employees. Bradco is closely affiliated with another, non-union company, Dobbin. The latter hired non-union carpenters for work on a big project. The union grieved on the basis that this was a breach of its collective agreement with Bradco. Interpreting the closed shop provision of the agreement, and relying on a report written in 1986 on which the provision was based, the arbitrator found for the union.

The decision was upheld on judicial review but reversed by the Newfoundland Court of Appeal. The Supreme Court of Canada allowed the appeal. The issues were: the appropriate scope of judicial review, the extent to which arbitrators may rely upon extrinsic evidence, and whether the arbitrator erred in a reviewable manner.

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[60] *An Act to amend certain Acts concerning Collective Bargaining and Employment*, S.O. 1992, c. 21.

[61] [1993] 2 S.C.R. 316, 102 D.L.R. (4th) 402 [hereinafter *Bradco* cited to S.C.R.].

2. *Criteria*

Sopinka J. wrote for himself, L'Heureux-Dubé, Gonthier and McLachlin JJ. He begins with the privative clause, which the Court of Appeal had suggested was less than "full", consisting only of a characterization of the arbitration decision as a "final settlement". Sopinka J. takes issue with the Court of Appeal's conclusion that in the absence of a full privative clause, no judicial deference is accorded the decision of an administrative tribunal. The standard of review is to be governed by the wording of the statute and "the common law policy of judicial deference".[62]

He sets up a scheme in which judicial review clauses must be interpreted in light of the nature of the particular tribunal and the questions entrusted to it. Sopinka J. describes a spectrum of such clauses, ranging from provisions purporting to oust all judicial review, to clauses providing for a full right of appeal. The provision at issue here apparently falls somewhere in the middle. Whether or not the use of the word "final" should be interpreted as privative requires a consideration of the purpose, nature and expertise of the tribunal, as was done in *Dayco*.[63]

The factors leading to a privative effect in this case are: the goal of efficient and cost-effective dispute settlement, the expertise of the arbitrator in interpreting collective agreements, and the fact that the questions here involved the interpretation of the collective agreement and its application to particular facts. When these factors are combined with the wording of the privative clause, the resulting standard of review is one of patent unreasonableness. Once again this standard is characterized as the tribunal having "the right to be wrong".[64]

Applying this standard, Sopinka J. concludes that the arbitrator was not patently unreasonable in admitting the extrinsic evidence, nor in his interpretation of the collective agreement.

Cory J. concurs with the majority judgment, with an explanation. He writes two pages explaining why he had taken umbrage with LaForest J.'s creation of the "quasi-privative clause" in *Dayco*, which he felt would undermine judicial restraint. Now, however, since he is still in the minority in this view, he decides to "loyally follow the reasoning of the majority".[65]

This decision, therefore, employs the pragmatic and functional criteria to inform the analysis of the privative clause. This approach would seem to be closer to the intention of the *Bibeault*[66] decision than that of Lamer C.J. and LaForest J. in *Mossop*[67] and Cory J. in both *PSAC*[68] and *Dayco*. In those judgments the privative clause (or its absence) is examined first and in relative isolation for the purpose, apparently, of establishing a presumption for or against deference. The other *Bibeault* factors must then be measured against such a presumption. Sopinka J.'s analysis here, and that of LaForest J. in *Dayco*,

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62 *Ibid.* at 331-32.
63 *Supra* note 40.
64 *Bradco, supra* note 61 at 340.
65 *Ibid.* at 350.
66 *Supra* note 3.
67 *Supra* note 7.
68 *Supra* note 27.

represent a more unified application of the criteria which does not allow one factor to assume overriding importance.

3. *Legislation*

The Newfoundland *Labour Relations Act*, 1977[69] contains very few of the "specialization" provisions which apply to arbitrators under the Québec *Labour Code*. Indeed, it does not seem to provide even the level of expertise provided by the R.S.O. 1980 version of the Ontario *Labour Relations Act*. There are no eligibility or appointment criteria, no list of arbitrators drawn up by the Minister in consultation. The powers of Newfoundland arbitrators are similar to those of their Ontario colleagues (ss. 84 and 86). And the privative clause is, if anything, less protective (s. 88).

In short, the decision in *Bradco* is likely based on the limited question to be determined by the arbitrator and the fact that he had only to apply the collective agreement.

F. University of British Columbia *v.* Berg[70]

1. *Facts*

A student suffering from recurrent controllable depression was studying for her master's degree at the U.B.C. School of Family and Nutritional Sciences. The School moved to a new building to which Berg was denied a key while the other students were granted keys. A faculty member refused to complete a rating sheet on Berg's behalf due to Berg's behaviour and apparent problems.

A complaint was brought to a member-designate of the British Columbia Council of Human Rights that Berg had been discriminated against and denied services on the grounds of her mental disability. The member found that the school had contravened section 3 of the provincial *Human Rights Act*.[71] The school sought judicial review. The B.C. Supreme Court set aside the Council's decision on the grounds that the provision of a key and a rating sheet did not constitute services "customarily available to the public" as provided in section 3 of the *Act*. The Supreme Court of Canada allowed the appeal.

The issues were: the standard of judicial review of the member-designate's decision, whether the services offered to an already-enrolled student are "customarily available to the public", and whether discretionary services come within the protection afforded by section 3 of the *Act*.

2. *Criteria*

The majority decision was written by the Chief Justice. Major J. dissents only on the substantive issue of the proper interpretation of section 3.

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69 S.N. 1977, c. 64.

70 [1993] 2 S.C.R. 353, 81 D.L.R. (4th) 497 [hereinafter *Berg* cited to S.C.R.].

71 S.B.C. 1984, c. 22.

Lamer C.J. cites LaForest J. in *Mossop* for the proposition that "the superior expertise of a human rights tribunal....does not extend to general questions of law".[72] He considers that the question of what constitutes a service customarily available to the public is a general question of law. He also mentions that the issue has "wide social implications". The conclusion is that the Council has no particular expertise to deal with this question and that there is "no reason why deference should be given to the Council", except with respect to the factual component of the member-designate's decision.[73] A review for correctness is consequently undertaken and the decision is upheld.

Here, again, the nature of the problem at issue seems to be the overriding consideration. As in *Mossop*, the criterion of "wide social implications" takes the matter outside of the narrow context in which tribunals are entitled to claim specialization. This factor appears to be the chief obstacle to deference for human rights tribunals. By definition, their decisions will almost always have "wide social implications", which apparently belies any claim by the tribunal to superior expertise or field sensitivity.[74]

3. *Legislation*

An examination of the brief 1984 British Columbia *Human Rights Act* reveals little to support a claim of expertise by the Council. There are no appointment criteria. The Council's role is limited to investigating complaints, reporting the results to the Minister and, in some cases, the disposition of complaints (ss. 11-14). There is an alternative procedure for the disposition of more serious complaints by the considerably more powerful and court-like "board of inquiry" (ss. 16-17).

In contrast to the board of inquiry, the Council has no special procedural powers beyond the ability to require the disclosure of information (s. 12). It apparently has no policy making or advisory role of any kind. There is consequently little evidence that the legislature intended the Council to have protection from review for its legal determinations.

G. Domtar Inc. *v.* Québec (Commission d'appel en matière de lésions professionnelles)[75]

1. *Facts*

The appellant, Roland Lapointe, was injured on the job three days before a temporary plant closure and was unable to work for fourteen days. Because of the closure he was only paid for the first three days and complained to the Commission de la santé et de la sécurité du travail (CSST). The complaint was dismissed.

The appellant was successful upon appeal to the Commission d'appel en matière de lésions professionnelles (CALP) which interpreted section 60 of the *Act respecting Industrial Accidents and Occupational Diseases* (*A.I.A.O.D.*)[76] as excluding the layoff period from consideration. Domtar brought an unsuccessful motion in evocation to the

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[72] *Berg, supra* note 70 at 369.

[73] *Ibid.*

[74] For more on this point see A.H. Young, "Human Rights Tribunals and the Supreme Court of Canada: Reformulating Deference" (1993) 13 Admin. L.R. (2d) 206 at 215-16.

[75] [1993] 2 S.C.R. 756, 105 D.L.R. (4th) 385 [hereinafter *Domtar* cited to S.C.R.].

[76] R.S.Q., c. A-3.001.

Québec Superior Court. The Québec Court of Appeal allowed the appeal. Mailhot J.A. pointed to the Labour Court case of *Commission de la santé et de la sécurité du travail* c. *B.G. Chéco International Ltée.*,[77] which arrived at a competing interpretation of section 60. He concluded that inconsistent tribunal decisions should not be allowed to stand, even absent patent unreasonableness.

The Supreme Court of Canada allowed the appeal. The issues were: whether the decision of the CALP was patently unreasonable, and whether conflicting decisions by administrative tribunals automatically give rise to judicial review.

2. *Criteria*

At last L'Heureux-Dubé J. gets to write for the majority, in fact for a unanimous Court of seven, Sopinka and Major JJ. not being present. Her first step, in determining the appropriate standard of review, is to deal with the question of jurisdiction. She quickly points out that the determination of whether an issue is jurisdictional must "take into account both the desirability of curial deference and the ease with which a question can be incorrectly characterized as one of jurisdiction". In short, the question comes back to "who is in the best position to rule on the impugned decision".[78]

Turning to the CALP, she finds that the legislature's intention to give the Commission the power to rule finally on the meaning and scope of section 60 is "not open to question".[79] The criteria applied are:

- the CALP is an appellate administrative tribunal, hearing and disposing exclusively of appeals under the *A.I.A.O.D.* and occupational health and safety legislation
- it has exclusive jurisdiction to confirm, quash or remake decisions brought before it
- its members are subject to "specific obligations" set out in the *Act* (see below), have all the powers necessary to perform their functions and may rule on any question of law or fact
- CALP must publish its decisions, may make recommendations to the Minister and has authority to review or revoke its decisions for cause
- CALP decisions are final and without appeal, are protected by a full privative clause and can be enforced through the courts
- the problem here employs concepts at the core of its area of expertise: disability, employment injury and the compensation system[80]

She concludes that the objective sought by the legislature was that this appellate administrative tribunal should give a final interpretation of its enabling statute. Only review for patent unreasonableness would consequently be appropriate.

The decision is upheld under this test. As for the inconsistency question, L'Heureux-Dubé J. disputes the Court of Appeal's position, characterizing the "controversy" at issue

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77 [1991] T.T. 405 (Qué).

78 *Domtar, supra* note 75 at 772 (emphasis in original).

79 *Ibid.* at 773.

80 *Ibid.* at 773-74.

between the two decisions as both doubtful and premature. And she rejects, in general, the notion that inconsistency in administrative interpretations of statutes will create an additional ground for review in cases where the legislature clearly intends that the administrative tribunal have exclusive jurisdiction to determine the question.[81]

3. *Legislation*

The *A.I.A.O.D.* is among the most sophisticated and detailed of the statutes considered in these cases in its delineation of the appointment, obligations and powers of commissioners. It provides for the establishment, by regulation, of a procedure for selecting commissioners to sit on the CALP, including the creation of a selection committee for that purpose (s. 371). Even part-time commissioners are appointed from a list created by the president of the Commission and approved by the government (s. 379). Commissioners are required to take an oath of office, in the case of the president and vice-presidents, before a judge of the Court of Québec (ss. 372-373). They are to devote themselves exclusively to the duties of their office (s. 375) and are instructed expressly to submit to the supervision of the president of the Commission (s. 381). The *Act* also contains a detailed conflict of interest prohibition and provides for a code of ethics to be established (ss. 384-385). Like arbitrators under the Québec *Labour Code*, commissioners are given immunity from suit for duties performed in good faith (s. 387). The CALP is to establish a "central bank of jurisprudence and a computerized minute book", to be made available to all commissioners and, in the case of the bank of jurisprudence, to the public (s. 390). Its decisions are published (s. 391).

The CALP is protected by privative clauses: a "final and without appeal" provision (s. 405), and a prohibition against bringing proceedings for extraordinary recourse against the CALP "except on a question of jurisdiction" (s. 409).

Together with the extensive powers listed by L'Heureux-Dubé J., most notably the power to rule on questions of law or fact, these provisions appear to establish a body which lies well along the deference spectrum described by Sopinka J. in *Bradco*.[82] Indeed, the detail in this statute comes close to describing a statutory court. This raises an interesting legal policy dilemma. There seems to be a danger that, in order to signal that a body should enjoy judicial deference, so much detail will be put into the constituent statute that the flexibility and informal structure usually desired for administrative agencies is lost. This issue will be among those discussed in the concluding section of this paper.

H. Canadian Pacific Air Lines Ltd. *v.* Canadian Air Line Pilots Assn.[83]

1. *Facts*

The pilots' union brought an application before the Canada Labour Relations Board requesting a declaration that the respondent airlines, Canadian and Québécair, were now a "single employer" or that there had been a sale of a business. During its investigation in preparation for the hearings, the Board purported to use its power under section 118(a)

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[81] *Ibid.* at 783 and 797.

[82] *Supra* note 61.

[83] [1993] 3 S.C.R. 724, 108 D.L.R. (4th) 1 [hereinafter *Canadian Pacific* cited to S.C.R.].

[now s. 16(a)] of the *Canada Labour Code*[84] to compel the production of certain documents and information from the respondents. The respondents applied for judicial review from the Federal Court of Appeal and were successful. The union appealed.

The Supreme Court of Canada dismissed the appeal, L'Heureux-Dubé J. dissenting. The issues were: the standard of review of the Board's interpretation of section 118(a), and whether that section gave the Board power to compel the production of documents before the commencement of an oral hearing.

2. *Criteria*

Gonthier J. wrote for the majority of himself, the Chief Justice, LaForest and Iacobucci JJ. He spends only one sentence on the standard of review: "As the issue goes to the jurisdiction of the Board, the standard governing the judicial review of the Board's order is one of correctness."[85] He cites *Dayco*[86] as one of the authorities for this proposition, but in contrast to *Domtar*[87] and *Dayco* does not engage in any functional analysis of why this question should be considered jurisdictional. He does emphasize that the meaning of section 118(a) is clear, both from the words used and from the structure and nature of the provision (which he categorizes as "judicial").

On the merits, Gonthier J. finds that the Board's power to compel evidence and documents is dependent on the power to summon and enforce the attendance of witnesses and cannot be exercised apart from an oral hearing.

In dissent, L'Heureux-Dubé J. agrees that the standard of review is correctness, but insists that before reaching that conclusion "there must be a functional analysis, however brief, of what Parliament intended".[88] She begins by setting out the impressive extent of the jurisdiction and powers of the Board in the field of federal labour relations, noting in particular what she calls a "sweeping privative clause".[89]

However, all this proves to be irrelevant in this case because, as L'Heureux-Dubé J. admits, "the nature of the problem here in question is decisive as to the applicable standard of review."[90] The main reason for this is that the problem is not one of industrial relations or labour law, but simply requires defining the means of exercising the power conferred by section 118(a). Because arbitrators, conciliation boards and other decision-makers are given the section 118 powers of the Board, defining its scope is not considered a matter within the core expertise of the Board. The conclusion is a review for correctness.

Applying this standard, however, L'Heureux-Dubé J. takes issue with the literal, category-driven analysis of section 118 adopted by Gonthier J.[91] In the end, applying an interpretation which really looks more like patent unreasonableness review, she concludes that the Board's interpretation was correct.

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84 R.S.C. 1985, c. L-2.

85 *Canadian Pacific, supra* note 83 at 735.

86 *Supra* note 40.

87 *Supra* note 75.

88 *Canadian Pacific, supra* note 83 at 754.

89 *Ibid.* at 755.

90 *Ibid.* at 756.

91 See *Chrysler Canada Ltd.* v. *Canada (Competition Tribunal)*, [1992] 2 S.C.R. 394, 92 D.L.R. (4th) 609.

3. *Legislation*

The privative clause in question here, section 122 of the *Canada Labour Code*, which L'Heureux-Dubé J. describes as "sweeping", actually admits of the possibility of judicial review in section 122(1), but limits it to the grounds enumerated in section 28(1)(a) of the *Federal Court Act*:[92] breaches of natural justice and excess of jurisdiction. While review for excess of jurisdiction is, of course, possible under any privative clause, this express exclusion may have made it easier for the Court to assume it was called on to supervise closely any interpretation of a power-conferring provision by the Board.

However, the chief determinant of the standard of review in this decision seems to be that the particular power being interpreted is "judicial", and therefore within the Court's, not the arbitrator's, exclusive expertise.

I. Commission scolaire régionale de Chambly *v.* Bergevin[93]

1. *Facts*

In 1983 three Jewish teachers employed by the respondent School Board took a day off teaching to celebrate Yom Kippur. The Board forced them to take the day as leave without pay. They filed a grievance with a labour arbitration board which found the school calendar discriminatory in effect. The arbitration award indicated the Board had not taken reasonable steps to accommodate the teachers and ordered the Board to pay the teachers for Yom Kippur, pursuant to the collective agreement. The agreement provided for payment of teachers who were absent for a variety of reasons and contained an agreement by the Board that its actions would "provide for" the full exercise by every teacher, without discrimination, of the rights and freedoms affirmed in the Québec *Charter of Human Rights and Freedoms*.

The Supreme Court of Canada upheld the arbitrator's award. The issues were the appropriate standard of review to be applied to a labour arbitration board in this case and whether or not there had been discrimination within the meaning of the collective agreement and the Québec *Charter*.

2. *Criteria*

Cory J. wrote for the Court, with L'Heureux-Dubé J. adding concurring reasons. As in his judgments in *Dayco*[94] and *PSAC*,[95] Cory J. begins his analysis with the effective privative clause contained in the Québec *Labour Code*. He then recites his "clearly irrational" standard from *PSAC* as the applicable review standard in the face of such a clause. But he notes that there is a further question raised in this appeal – whether an arbitration board must nonetheless be correct, as opposed to not irrational, when interpreting the provisions of the Québec *Charter*. However, rather than deal with this interesting issue, he quickly adds:

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92 R.S.C. 1985, c. F-7.

93 [1994] 2 S.C.R. 525, 115 D.L.R. (4th) 609 [hereinafter *Chambly* cited to S.C.R.].

94 *Supra* note 40.

95 *Supra* note 27.

> In this case, that question need not be answered since, in my view, the arbitration board was correct in its application of the Québec *Charter*.[96]

Cory J. then spends seventeen pages performing a discrimination analysis under the Québec *Charter* and applying it to the facts of this case. He finds that there was discrimination, and a lack of reasonable accommodation. The arbitration board's decision was consequently correct and, he repeats on page 28, it is unnecessary to consider whether the board had to be correct when interpreting the Québec *Charter*.

We can only speculate as to why it was so important to sidestep the issue of the appropriate standard of review in this case, when the Court had recently expended considerable energy and ink wrestling with much more difficult standard of review problems. Following *Mossop* and *Berg* it would seem to be an uncontroversial point that administrative tribunals who interpret human rights statutes can expect little deference from the courts. Even the presence of an effective privative clause would not have prevented the Court from finding that where the arbitrator was interpreting not the collective agreement, but the terms of the Québec *Charter*, it was operating outside the core of its expertise and jurisdiction and consequently had to be correct.[97]

One possible explanation for the Court's eagerness to avoid the deference analysis in this case stems from the fact that the Québec *Charter* was actually incorporated in the collective agreement. Only a year previously, in *Larocque*, the Court had held that labour arbitrators under the Québec *Labour Code* are entitled to be reviewed only for patent unreasonableness when they interpret collective agreements. Since the collective agreement incorporated the Québec *Charter*, which was actually being interpreted here? To apply a correctness test simply because the *Charter* rights were referred to in the agreement could result in a disincentive for future collective agreements to recognize those rights expressly.

Whatever the reason, the result of Cory J.'s judgment is in many respects the same as if he had simply concluded that a correctness standard was appropriate and had gone on to apply it. One of the purposes behind a deferential position towards administrative bodies is the legislature's intention, as found by the Court, that the tribunal be the one to provide the context-sensitive, expert, specialized interpretation of the provision in question. To the extent that this sensitivity to context affects not only the answer to the question, but the analysis undertaken to reach that answer, presumably the point of the deference position is that it is the tribunal who is to establish whatever "jurisprudence" applies to the interpretation of a particular provision, not a court. What Cory J. does, in the remainder of *Chambly*, is substitute the Supreme Court of Canada's view of the collective agreement and its effect for that of the arbitration board. From now on the clear authority for interpretation of this set of provisions will be Mr. Justice Cory's judgment. The board's analysis has not been preserved by Cory J. sidestepping the issue of the appropriate standard of review.

Surprisingly, Madam Justice L'Heureux-Dubé's concurring judgment provides only a little more consideration of the standard of review issue. Citing the recent jurisprudence, she begins from her customary premise of deference for a tribunal ruling

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[96] *Chambly, supra* note 93 at 539, Cory J.

[97] As was done in *Dayco* with respect to the "vested rights" issue.

on "questions which the legislature has clearly intended to leave for its consideration."[98] She notes the privative clause, and is prepared to give it teeth. However, she too refuses to enter into an analysis of how that privative clause should operate when the matter before the arbitrator involves the Québec *Charter*. Her method of getting around the problem is to make a distinction between the "application of a clear and uncontested provision of an Act such as the Québec *Charter*" and its "interpretation".[99]

According to L'Heureux-Dubé J. the only point which the arbitration board had to decide was whether and on what conditions, in the circumstances of this case, it was possible under the collective agreement to accommodate the Jewish teachers. This process amounts only to *applying* the requirements of the collective agreement, and therefore the *Charter*, not *interpreting* them. This analysis is within the jurisdiction of the arbitrator and the courts can only interfere if the decision is patently unreasonable. However, she adds, if the board were to conclude that the collective agreement did not permit such accommodation, then it would have to consider the duty to accommodate according to the Québec *Charter* and its decision would have to be correct. She concludes by applying a patent unreasonableness test and determining that the board's decision was "far from unreasonable".

To remark that L'Heureux-Dubé J.'s analytical distinctions seem to be fine, at best, would appear to be an understatement. If the standard of review is to depend on a court of first instance having to determine whether the decision-maker has "interpreted" or merely "applied" a particular provision, then a large element of uncertainty would be added to an already highly subjective list of deference criteria. Arguably, little predictability is added by making the test for "application" over "interpretation" hang on whether the particular provision is "clear". The "interpret/apply" distinction does not appear in any of the other recent decisions, either in the judgments of L'Heureux-Dubé J. or in those of the other judges. Until it receives more consideration, it is questionable whether this factor should be given the status of a standard of review determinant.

3. *Legislation*

The Québec *Labour Code* was considered above in connection with the *Larocque*[100] decision. It does not seem to have been the *Code*, but the involvement of the Québec *Charter* which effected the standard of review in this case. Despite the selection process and powers of arbitrators, and despite the sweeping privative clause, the fact that the arbitrator was called upon to consider discrimination under the *Charter* resulted in what turned out to be a correctness review of his decision.

J. Pezim *v.* British Columbia (Superintendent of Brokers)[101]

1. *Facts*

The respondents were senior managers of two related companies trading on the Vancouver Stock Exchange. The Superintendent of Brokers instituted proceedings

98 *Chambly, supra* note 93 at 553, L'Heureux-Dubé J.

99 *Ibid.* at 553-54.

100 *Supra* note 22.

101 [1994] 2 S.C.R. 557, 114 D.L.R. (4th) 385 [hereinafter *Pezim* cited to S.C.R.].

against the respondent alleging violations of the disclosure and insider trading provisions of the B.C. *Securities Act*.[102] The Securities Commission found that they had contravened the *Act* by failing to disclose "material changes" in their business. The respondents were suspended from trading in shares for one year and required to pay part of the costs incurred by the Commission. The B.C. Court of Appeal, on an appeal provided for under the *Securities Act*, overturned the Commission's decision.

In the Supreme Court of Canada the issues centred around the appropriate standard of review for a statutory appeal from a decision of a securities commission.

2. *Criteria*

Mr. Justice Iacobucci wrote for a unanimous court. The factors he relies on in determining the standard of review are the regulatory nature of the B.C. *Securities Act*, the fact that securities regulation is a highly specialized activity, the public protection function of the Securities Commission, the breadth of its powers under the *Act*, its policy development function, the tradition of deference towards decisions of securities commissions by the courts and the nature of the questions of law at issue. In this case all these factors favour deference, and outweigh the fact, as found by the Court, that the legislature has not protected the Securities Commission with a privative clause and has provided for a statutory appeal to the courts. In other words, the more substantive criteria from the new cases here support a standard of review which basically thwarts the remedy apparently chosen by the legislature.

Drawing from the analysis in *Domtar* and *Bradco*, Iacobucci J. sketches out the deference spectrum, defining the "correctness" end as cases where the issues concern interpretation of a provision limiting the tribunal's jurisdiction or where there is a statutory right of appeal *which allows the reviewing court to substitute its opinion for that of the tribunal* [emphasis added], as well as cases involving human rights issues. The "reasonableness" end is occupied by cases where there is a "true" privative clause, no statutory right of appeal and the matter is within the tribunal's jurisdiction. The case at bar, he says, falls between these two extremes.

He comments on the breadth of the Commission's expertise and specialisation, as reflected in the legislation. The Commission is identified as being responsible for the administration of the *Act*, it has broad investigation, audit, hearing and remedial powers. It can vary and revoke its decisions and enforce them through the courts. It not only has broad powers to make decisions in the public interest, some of them very intrusive in terms of their effect on stock exchanges and securities traders, but has full discretion to determine, without limiting criteria, what the public interest is in this area.

Another crucial factor in *Pezim* is the nature of the regulated area. If human rights adjudication is the paradigm of the "non-specialized" fields of inquiry, financial market control seems to claim pride of place among the highly specialized. The Court cites the complexity of the "larger regulatory framework" and the complicated and essential nature of capital and financial markets themselves. A moral overlay, which is alluded to in a quote from *Brosseau* v. *Alberta Securities Commission*,[103] is the role of securities regulation in the protection of the investing public. The suggestion seems to be that,

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[102] S.B.C. 1985, c. 83.

[103] *Pezim, supra* note 101 at 592-93, citing *Brosseau*, [1989] 1 S.C.R. 301.

given the complexity of the field, a strong and expert Securities Commission is the only means of ensuring honesty and fair dealing. Overly strict review by the courts might be seen to undermine the reputation and therefore the effectiveness of these bodies.

Finally, Iacobucci J. turns to the nature of the questions of law at issue. He considers that the aspect of the case which challenges the quantum of costs and the other remedies ordered against the respondents concerns matters which lie squarely within the jurisdiction of the Securities Commission.[104] And he finds that the notions of "material change" and "material fact", and the extent of the disclosure responsibilities under the *Act* in general are all issues which go to the heart of the regulatory expertise and mandate of the Commission. Therefore, "considerable deference is warranted".[105]

Pezim is a good example of the freedom from traditional constraints and pigeonholing the new approach to judicial review brings. The finding that there was no privative clause, even the presence of an apparent legislative intent for review by an appellate court, does not prevent a careful analysis of the appropriate standard of review, using many of the specialization and broader context factors developed in the previous cases. In an area such as securities regulation, where specialization and the regulatory framework are all-important, even the legislature's choice of an appeal over judicial review will not preclude deference.

3. *Legislation*

The B.C. *Securities Act* clearly describes a body upon whom the legislature has conferred a high degree of status and responsibility. The public interest, policy and remedial powers of the Commission, set out in sections 14, 144, 147 and 153, are considerable. An interesting omission, however, for such a highlyspecialized body, is the lack of any appointment criteria. Members achieve their "expert" status simply by virtue of their appointment and service on the Commission.

In addition to the substantive and procedural powers pointed out by Iacobucci J., the Commission also enjoys the powers of the B.C. Supreme Court to summon and compel witnesses and records (ss. 154.1 and 128) and the power to impose conditions on their decisions (s. 154). Further, despite the finding by Iacobucci J. that "there is no privative clause",[106] subsection 152(1) of the *Act* provides:

> 152. (1) No action or other proceeding for damages lies *and no application for judicial review under the Judicial Review Procedure Act shall be instituted against the commission*, a member of the commission, an officer, servant or agent of the commission ... for any act done in good faith in the
> (c) performance or intended performance of any duty, or

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[104] Although he does not expressly say so, Iacobucci J. seems to recognize that, while the *content* of such orders should be the subject of deference by the Court, questions concerning the *extent* of the power to make such awards will be a matter going to the jurisdiction of the Commission and, consequently, subject to a correctness review. He describes the standard to be applied to these issues by saying that a reviewing court should not disturb the orders, if the power has not been exercised capriciously or vexatiously, "unless the Commission has made some error in principle in exercising its discretion" (*ibid.* at 607).

[105] *Ibid.* at 598-99.

[106] *Ibid.* at 599.

> (d) exercise or the intended exercise of any power,
> under this Act or the regulations, or for any neglect or default in the performance or exercise in good faith of that duty or power. [Emphasis added]

The main intention of this clause seems to be to confer immunity from suit, and that is how its heading reads in the statute. Nonetheless, the highlighted words do purport to give protection from judicial review and must, to that extent, be intended to have a privative effect. Their presence clearly bolsters the Court's view that the legislature intended considerable deference for the Commission.

That this should be true even with respect to a statutory right of appeal may not be immediately obvious, but a closer examination reveals that the appeal power conferred by the *Securities Act* is somewhat unusual. Subsection 149(4) provides the remedy which the Court of Appeal may exercise following a successful appeal under subsection (1):

> (4) Where an appeal is taken under this section, the Court of Appeal may direct the commission to make a decision or to perform an act that the commission is authorized and empowered to do.

This wording limits the Court's remedial powers to something similar to the remedies available on judicial review.[107] It does not mandate the Court to substitute its own decision for that of the Commission or to take the decision the Commission ought to have taken. By Iacobucci J.'s definition, therefore, this may not be the type of appeal which places a body at the correctness end of the review spectrum. In this respect section 149(4) provides an interesting contrast to section 147(4), which empowers the Commission, on review of a decision of the Superintendent to "confirm or vary the decision under review or make another decision it considers proper."

In other words, while this is a decision in which a statutory right of appeal was limited by the requirements of deference, the case does not involve either an ordinary right of appeal, or an ordinary body being appealed from. Some caution should therefore be exercised before concluding that *Pezim* has completely broken down the old boundaries between the remedies available on judicial review and those enjoyed by an appellate tribunal.

IV. Conclusions

1. The first question that emerges from this review of the case law is what exactly are the deference criteria? The preceding discussion has referred to such a diverse and novel series of factors that a concise catalogue would seem to be in order.

A good starting point for the classification of criteria is the categories enunciated by L'Heureux-Dubé J. in *Mossop*.[108] The relevant factors consequently have been grouped by their reference to the legislation, the tribunal and the question to be determined.

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[107] Compare *e.g.* paragraph 18.1(3)(a) of the *Federal Court Act, supra* note 92.

[108] *Mossop, supra* note 7.

The Legislation:

- what is the purpose of the board? for example, are cost-effectiveness and speed important?
- to what social needs is it responding?
- what is the scope of its powers and are they defined in broad or narrow terms? does it have the power to rule on questions of law?
- does the board have policy making powers?
- is there language suggesting deference? is there a privative clause? how is the privative clause worded?
- does the legislation provide for internal review and rehearing of decisions?

The Board:

- is it "specialized"? (not defined)
- does it have a developed body of jurisprudence for guidance and precedent? does it have a history of declining to deal with particular issues in favour of a more authoritative body?
- does it have functions which would inevitably lead to an accumulation of expertise and specialized understanding of the relevant issues? is it required, for example, to review Acts of Parliament and offer advice and recommendations to Ministers, or to consider and resolve a wide variety of problems in its particular field?
- how do its powers compare with other bodies created under the same statute or operating in the same area? is it an "appellate" tribunal or one of first instance? how broad are its remedial powers?
- how are its members selected, and how do they participate in decision-making? is there evidence that they have earned the confidence of their community?
- does the context within which the members work provide them with field-sensitivity or other advantages? does it require the balancing of interests in an intricate area of human interaction?

The Problem:

- does the matter fall within the powers of the board, (squarely or by implication)? for example, how closely connected are the questions of law to questions of fact?
- does it require specialized knowledge to answer? for example, does it require a labour arbitrator to interpret a collective agreement?
- is it best decided in a context specific setting, or is it a question of general application? does it have "wide social implications"?
- does the problem have a variety of reasonable answers, or only one "correct" one? for example, are the terms to be considered defined by the legislation or left open?
- does the integrity of the administrative scheme require that the problem be answered by the board?

- would a court be better suited to deal with it? for example, does it employ "common law" concepts or otherwise tap into the courts' own area of expertise? or should a court deal with it anyway because it involves constitutional interpretation, or other human rights documents?

2. The second question is what can we learn from this list of factors and the way they have been applied by the Court? How can we craft litigation and legislative strategies to achieve the desired level of deference for particular tribunals on particular issues? The choice of strategy will depend, of course, on whether the end in sight is deference or full review. It is wise to keep in mind that each, at different times, can form the goal of the legislator or advocate.

2.1 To begin with legislation, under the Court's new test all the powers of the tribunal become very important. Deference flows from express powers to determine questions of law, broad decision-making and remedial powers, the power to reconsider decisions, and the power to enforce decisions, for example through the courts.

"Expert" bodies have more detailed appointment procedures. There may be a pre-existing list of eligible candidates, consultation with the regulated community, or objective qualifications, such as experience or membership in a profession.

The privative clause, while not as determinative as it once was, remains a useful way of communicating the appropriate level of deference. In fact, the "spectrum" of privative clauses from *Dayco* and *Bradco* may make this a more subtle tool, capable of indicating more or less deference through the choice between "final and binding between the parties" or "final and conclusive". For greater deference, more than finality is now needed. Examples include the "no recourse" language from the Québec statutes and the old *PSSRA*.

One of the best ways to establish an intention of deference is to give the adjudicative body some elevated status in the statutory scheme. Examples include appellate tribunals, bodies with a specific policy role, and agencies which are involved in the administration of the statute or regulatory scheme. It should be noted, however, that such involvement may limit the tribunal's institutional independence, as was the case in the 1985 *MacBain*[109] case in the Federal Court. The rigid separation between the Canadian Human Rights Commission and the tribunals, noted by LaForest J. in *Mossop*, is a product of the *MacBain* decision. The court in that case held that the previous legislative scheme, whereby the Commission itself appointed the tribunals, was contrary to the *Canadian Bill of Rights*[110] as producing institutional bias. Consequently, under the subsequent

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[109] *MacBain* v. *Lederman*, [1985] 1 F.C. 856 (C.A.), (sub. nom. *MacBain* v. *Canada (Human Rights Commission)*) 22 D.L.R. (4th) 119. See the discussion of the case and the legislative amendments it prompted in R. Dussault & L. Borgeat, *Administrative Law: A Treatise*, vol. 4, 2d ed. (Toronto: Carswell, 1990) at 328-30. The decision was based, to a large extent, on the fact that, in addition to its policy role, the Commission initiated, investigated and sought settlement of complaints, thus giving it a prosecutorial role. However, the "broader picture" role of many agencies in the administration of a particular regulatory scheme clearly runs the risk of involving their members in a full range of prevention, compliance and enforcement issues.

[110] R.S.C. 1970, Appendix III.

amendments to the *Canadian Human Rights Act*, tribunals do not have any opportunity to share in the broader policy functions of the Commission.

What if the drafter's goal is to encourage review, for example for a body which is not intended to be the final word on questions of law? The easiest route appears to be to reduce the body's status in the statutory scheme. Its decisions can be made subject to review by another administrative body or court (although a statutory right of appeal may not automatically reduce the level of deference after *Pezim*). It can, in other ways, pointedly be given fewer powers or a lower status than another body under the same statute. It can be excluded from any policy role and from the protection of a privative clause.

Similarly, omission of appointment criteria and limited decision-making and remedial powers will place the body at the low end of the deference spectrum. In general, a narrow, closely-defined jurisdiction seems to indicate a lack of deference on legal issues, particularly if the terms the body does have to interpret are fully defined (hopefully with clarity) in the statute.

The use of these techniques by drafters can raise some important legal policy issues which should be flagged. In general, there seems to be a trade-off to be made between administrative flexibility in the appointments, structure and procedure of a tribunal, and the degree of deference it is to enjoy before the courts. How "court-like" do we want to make a body in order to achieve deference? The competing goals of deference, independence and flexibility will continue to provide drafters with a continuum (or, perhaps, a multi-dimensional model) on which each new or revised administrative body must be located.

2.2 What about litigators, who are presented with an existing statutory scheme and must do their best to establish the desired degree of deference in a given case? The above factors will provide a starting point, if they can be located in the legislation. However, these cases demonstrate that legislation establishing administrative agencies varies enormously in terms of the amount of detail devoted to questions like appointment, powers and enforcement. What is interesting about these decisions is that they give some indication, albeit in a fairly haphazard fashion, that litigators may now be able to go beyond the text of the statute to find deference criteria.

Most notable in this respect is *Dayco*, in which LaForest J. refers to the history of the legislation and of Ontario arbitrators' treatment of issues concerning the operation of a collective agreement. Because of the tendency of arbitrators to refer this issue to the Labour Board, he concludes that it should not be considered within their specialized jurisdiction. Another set of comments which illustrate resort to sources beyond the legislation is Cory J.'s characterization of the PSSRB in *PSAC* as being composed of members "aware" of the intricacy of labour relations who "will often have earned by their merit the confidence" of the parties. It is not clear where Cory J. gets his evidence for these points, but they do not seem to derive simply from the language of the legislation.

Some elements of the "beyond the statute" analysis suggested by these decisions will be familiar. For example, the nature of the problem to be determined remains of the first importance. To establish that deference is appropriate on a given issue, the most effective approach would now appear to be to show that specialized knowledge and context-sensitivity are required to deal with the issue properly. As preparation for

judicial review, boards should be encouraged to illustrate this point in their reasons, drawing on their experience to show why a particular interpretation is necessary for the statutory scheme to function. It will help if the term being interpreted can be shown to be undefined or unclear. To reverse the *Dayco* reasoning, it may also be relevant that the tribunal has a significant history in dealing with this issue or provision.

Narrow problems are more likely to attract deference for the decision-maker than those with "wide social implications". If possible, it should be established that the impact of the interpretation is not likely to go beyond the particular context or statutory regime.

Broader factors, too, can be sought beyond the confines of the legislation. Cory J.'s analysis in *PSAC* invites litigators to situate the board or tribunal, show the complexity or novelty of the field in which it operates and the need for specialized knowledge.[111] The classic example of this is the extensive national framework of securities regulation relied upon in *Pezim*.

The history and traditions of the board are apparently relevant, as well as the "confidence" of the parties. In addition to formalized or ad hoc consultation procedures, the latter may also be susceptible to illustration through external sources such as industry journals or the board's judicial review record.

These issues lead finally to the question of the expertise of the members themselves. Here is the most controversial element of the "beyond statute" review. Courts are unlikely to resort to a pile of *curricula vitae*. However, short of that extreme, the experience or qualifications required of appointees, the practice of the board in assigning members, the frequency with which they sit or decide similar issues, the size of the member panel, and the facilities placed at the disposal of members to assist them may all be of relevance in establishing expertise. Also of interest, perhaps, would be the opportunities for training and internal exchanges of information and experience enjoyed by members.

It should also be noted, however, that a lack of expertise requirements of the members of some bodies should not go unchallenged as a mark *against* deference. There are some tribunals where expertise is considered to be a liability at appointment, where the appointee is expected to learn and grow into the job or where the qualities sought are simply community sensitivity, honesty or common sense. If the issues reviewed involve those skills, should not the courts be encouraged to respect Parliament's choice of decision-maker in the same way they would an "expert" in a technical field?[112]

In light of these more detailed criteria, arguments encouraging review should also be easier to craft. Any suggestion of a jurisdictional content to the question being decided remains highly relevant. Showing a broad impact beyond the regulated community or the involvement of "general questions of law" or human rights issues will also assist in reducing deference.

More questionable is whether the "confidence of the parties" factor can or should be reversed. Is it wise to establish that the body has a bad judicial review record, for

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[111] See *e.g.* the excellent deference analysis in *John Doe* v. *Ontario (Information & Privacy Commissioner)* (1993), 13 O.R. (3d) 767 at 779-83, 106 D.L.R. (4th) 140 at 152-56. One of the interesting aspects of the decision is its use of the Commissioner's Annual Report to show the diversity and complexity of his information management expertise.

[112] For more on this perspective, see A.H. Young, *supra* note 74.

example? A safer approach would be to emphasize that its decisions are "imposed" on the parties in contrast to, for example, consensual arbitration.

Pointing out a lack of expertise attracts the same concerns. However, it seems fair to focus on the particular matter at hand and show that it either does not require any specialized knowledge, or that the reasons given in this case do not display the application of that expertise.

Caution is clearly necessary. Discrediting a board or tribunal for the purpose of one case may result in limitations on arguments to be made when seeking deference in the next case. There are also the potential dangers of delay, invasion of the privacy of members and interference with the internal processes of the tribunal. From a government lawyer's perspective, there are competing client interests involved. It may be important to overturn a particular agency ruling, but the Crown as a whole presumably has an interest in preserving the on-going role of the agency as an entity of the executive government.

3. The stated goal of the Court's new approach to judicial review standards is to determine and implement the will of the legislature. These cases provide both legislators and litigators with a wide range of factors for establishing the level of deference intended for each body. What is significant about the analysis conducted in these cases is the explicit recognition that the status, expertise and scope of jurisdiction of a tribunal are matters which must be determined by reading the statute as a whole in the factual and cultural setting in which it is intended to operate. This then provides an invitation to those crafting and interpreting legislation to use the *whole* statute, not just a privative clause, to illustrate the type of tribunal they are dealing with in each case, and the matters on which it is intended to have the primary jurisdiction.

However, as was mentioned in the introduction, the long list of new factors provided by these cases is a highly subjective one. Consequently, there are no guarantees that a particular mix of these criteria will result in deference in any given case. The question of the standard of review remains one for the discretion of the court. All that can be said of this new approach is that it provides more tools to encourage judicial restraint, and a more varied and vivid palette for designing a body which is "best suited to decide" the issues entrusted to it by Parliament.