

The Expert Tribunal

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Introduction.....	69
I. Defining the Notion of Expertise.....	70
A. Expertise—specialization enters administrative law’s precincts....	70
B. Expertise as a juridical notion.....	72
II. The Use of Expertise in the Tribunal Setting.....	78
III. The Justiciability of Expertise	81
Conclusion	86
Endnotes.....	86

Introduction

While no fully articulated theory has guided the birth and development of the administrative state in Canada, theorists who have looked upon the matter in retrospect, consistently offer the need for expert decision-making as a central preoccupation. Our administrative law history reveals, however, that little work has been done to pinpoint exactly what the concept of expertise means, both as a reality of tribunal existence or as a legal concept. Modern judicial review doctrine—focused as it is on the pragmatic and functional approach—has renewed interest in the concept of expertise. When courts discuss the factor of expertise, the terms ‘specialization,’ ‘expertise’ and ‘experience’ are all used, sometimes to refer to the same notion, sometimes with seemingly distinct meanings. There is a similar vagueness in relation to our knowledge of tribunal expertise as a concrete reality: how expertise is identified in tribunal members or is relied upon in the decision-making process are questions that remain largely unexplored. However, the usefulness of this information to the judicial review process cannot be denied.

Through this paper we attempt to define the concept of the expert tribunal both as a juridical notion and a tribunal reality. The first part is devoted to a brief overview of the movement of expertise from political theory to legal concept. Following this, we discuss the use of expertise within the tribunal, examining issues that have arisen surrounding the use of internal staff studies and official notice vis-à-vis natural justice requirements of the decision-making process. Finally, we turn our attention to the decision of the Supreme Court of Canada in *C.U.P.E. v. Ontario (Minister of Labour)* (the *Retired Judges* case).¹ This judgment offers much food for thought as it raises the question of the degree to which the expertise of individual tribunal members may be scrutinized on judicial review, in an era in which legislators are wont to stipulate the qualifications necessary for tribunal appointment.

I. Defining the Notion of Expertise

A. Expertise—specialization enters administrative law’s precincts

It is a truism that rule of law doctrine, in championing the supremacy of the common law, exhibits an antagonism to specialization in the institutions of the law. The Diceyan construct of the ‘Rule of Law,’ in its three-fold articulation, has exercised a profound influence on our constitutional order, so much so that it is now formally entrenched within it as a foundational principle of our polity.² The unifying theme of the Diceyan construct is the supremacy of the common law as developed by our courts:

- i. No one “is punishable or can be lawfully made to suffer in body or goods except for a distinct breach of law established in the *ordinary legal manner*, before the *ordinary courts* of the land;”
- ii. Everyone, regardless of rank or condition “is subject to the *ordinary law* of the realm and amenable to the jurisdiction of the *ordinary tribunals*,”
- iii. Because the general principles of the constitution are the result of judicial decisions emanating from the courts, “the constitution is the result of the *ordinary law* of the land.”³

The concept of a ‘*droit administratif*’ and of ‘*tribunaux administratifs*’ whereby the relationship between citizen and the state, and disputes between them, lie outside the sphere of the courts of general jurisdiction, to be dealt with by specialized official bodies, was for Dicey an idea “utterly unknown to the law of England and indeed fundamentally inconsistent with our traditions and customs.”⁴

As Professor Harry Arthurs has shown in his masterful study, ‘*Without the Law*,’ although this Diceyan construct has attained “a transcendent, a symbolic significance” which continues to hold those both within and without the community of law in its “grip,”⁵ it can only be fully understood in the context of “the dialectic between centralism and pluralism” which dominated nineteenth century English legal and political discourse.⁶ Arthurs has drawn aside the curtain of Diceyan rule of law theory to reveal a much more complex interplay between the hegemonic project which it epitomized⁷ and the normative reality of late 19th century England. First, pockets of specialized voluntary normative orders were firmly entrenched in that world—most notably the institution of commercial arbitration.⁸ Even more importantly, it was precisely at this time that specialized state-imposed normative ordering came into being,

as epitomized by the Inspectorate and Independent Regulatory Commissions.⁹

Thus, notwithstanding the formal antagonism between law and administration, the law and its institutions accommodated the newly emerging administrative state, which continued to burgeon steadily so as to keep pace with the inexorable advance of industrialization. Paradoxically, the law did this, not by acknowledging the administrative state's normative legitimacy, but rather, by acknowledging its administrative integrity. The rigid dichotomies which the law drew: between public and private authority; between determining matters and merely addressing them; between rights and interests; between acting judicially and acting administratively/ministerially,¹⁰ all militated towards an almost studied indifference to the workings of the administrative state. So long as administrators kept to their side of the divide between these juridical constructs, their actions escaped judicial oversight. This, coupled with judicial homage to the sovereignty of parliament, immunized the administrative state from judicial oversight so long as, in fulfilling its statutory mandate, it did not stray into the precincts of the law—i.e. attempt to interfere with those rights of which the common law took cognizance. That indifference is epitomized in the rubric applied to the administrative sphere '*Omnia praesumuntur rita esse*'—one presumes that the state has acted properly.

But in the interwar years, a new political theory began to take hold, one that envisioned the administrator not only as a 'social engineer' implementing government policy, but as a co-equal partner in shaping the normative order. Law was no longer to be the exclusive domain of the courts, but one in which the administrative agency, in both its regulatory and adjudicative forms, shared residence. Whereas classical political theory held to formal separation of powers doctrine, the new politics asserted that neither the executive, the legislative nor the judicial branch of government, each called upon to draw upon generalized knowledge within its sphere of activity, was properly fitted to master the complexities of any one aspect of social or economic regulatory ordering. By way of contrast, a specialized agency or tribunal drawing upon its specialized knowledge, promised regulation and decision-making based on mastery of the polycentric character of the particular social or economic activity to be regulated. Such a political ordering promised efficiency, assuming the agency or tribunal functioned in reality with the expertise assured in theory.

Many were wary of, even hostile to this ‘fourth branch’¹¹ of government, bridging the divide between legislative and executive, between executive and judicial.¹² Its hybrid nature has sounded in the Canadian jurisprudence—and not without controversy—most recently in the decision of the Supreme Court in *Ocean Port*.¹³ A principal concern of our courts has been the working out of a proper relationship in the normative order between the judiciary on the one hand, who as constitutional actors make law, and specialized tribunals on the other, which as “part of the executive branch of government, under the mandate of the legislature,”¹⁴ primarily fulfill a “policy-making function” even as they make law.¹⁵ The standard of review jurisprudence on judicial review of administrative action is the arena in which that relationship has been crafted, and continues to be perfected. Legislative intent is the litmus test in determining that relationship—whether the legislator intended the question to be determined by the tribunal or by the court. The Supreme Court has identified four factors, or perhaps more properly speaking, clusters of factors in any statutory scheme which assist in divining legislative intent: privative clauses and rights of appeal; relativity of expertise as between tribunal and court; the purpose of the Act as a whole, and of the particular provision under scrutiny; and, the nature of the problem as one of fact, law or mixed fact and law.¹⁶ In *Southam*, Justice Iacobucci characterized expertise as “the most important of the factors that a court must consider in settling on a standard of review,”¹⁷ re-emphasizing what had been said by the Supreme Court at an earlier date in *Bradco*.¹⁸ The focus of our discussion here is on this factor of expertise.

B. Expertise as a juridical notion

In his 1935 article entitled, “Three Approaches to Administrative Law: the Judicial, the Conceptual and the Functional,” John Willis identified what he believed to be a main impetus for tribunal creation. Finding the body that was best suited to make decisions in a particular regulatory domain required an assessment of whether existing governmental departments, the legislature or judges were in a position to make effective and efficient decisions. If the answer proved negative, the usual result was the creation of an independent agency whose expert knowledge in the area allowed its members to make decisions with expediency. At the heart of Willis’ theory is a notion that efficient, reasonable decisions require a measure of expertise and that this expertise

could not always be found in the existent arms of government. Willis termed this approach to tribunal creation “the functional approach,” indicating that the method followed in establishing tribunals was “neither one of law nor of formal logic, but of expediency.”¹⁹ Citing the example of the Commissioners under the British *Railway Act* of the 19th century, Willis noted that the creation of such tribunals was generally not met by antagonism from judges who saw the interpretation of law in a specialized area as best suited to those most familiar with the domain. In his words:

The Railway Act of 1854 ... imposed upon the courts the duty of interpreting the law as to the service or rates of a railway company, and it did this over the objection of all the judges, whose spokesman, Lord Campbell, in the House of Lords, avowed their utter incompetency to decide questions of railway management. In 1873, the duties were transferred from the courts to commissioners with expert knowledge, and there they have remained. The courts could not do the work, the body of experts could.²⁰

Most would readily acknowledge that the expert tribunal is charged with more than the interpretation of the law and other adjudicative tasks similar to those of the courts. Indeed, the work of the administrative tribunal has been said to cover, often simultaneously, most of the tasks of government itself.²¹ It performs legislative functions by making rules and regulations and developing policy in the public interest; it is similar to the executive in its implementation of policy through programs and, as indicated above, it makes determinations sometimes in individual cases and sometimes for larger public group interests. The speciality of tribunals as a class of “governmental” body, therefore, is not only found in its familiarity with particular subject areas but also in the ability to balance these different and sometimes competing functions effectively.²²

What constitutes expertise and how is expertise acquired? In *Pushpanathan*,²³ the Supreme Court of Canada gives what is perhaps its fullest expansion on the matter. We are told that the factor of expertise used in determining the appropriate amount of deference to accord to an agency decision includes several considerations. Attention must be directed to whether the tribunal has been created “with a particular expertise with respect to achieving the aims of the Act.” This expertise may take three forms: it may arise as a result of the specialized knowledge of its decision-makers, through special procedure of the agency or through non-judicial means of implementing the statute under its mandate. If any of these sources of expertise exist, it is an indication that greater deference should be accorded to the tribunal’s decisions.²⁴

As for the specialized knowledge of the decision-maker, this means of expertise was apparent in *Southam* where the composition of the Competition Tribunal was mandated by statute to include a certain number of members learned in economics and commerce.²⁵ Decision-maker expertise can also be located at the level of the tribunal as a unit, in which case it is often associated with the experience of the board or tribunal in dealing with a particular type of matter.

A useful example of specialized knowledge at the tribunal level is found in relation to the Office of the Information and Privacy Commissioner/Ontario. In Ontario, the courts have long recognized that the Information and Privacy Commissioner has acquired expertise in information systems management.²⁶ The Commissioner's expertise is said to have developed through the mixture of adjudicative and administrative functions that it is mandated to perform in regulating access to government information and balancing access with the protection of personal privacy. Indeed, the Ontario Divisional Court has held that under its enabling statutes, the Commissioner's office has responsibility for five overlapping, integrated activities. These activities are: i) reviewing government decisions concerning the dissemination of information; ii) investigating public complaints about government practices relating to the use and disclosure of personal information; iii) reviewing government practices with respect to the management of records; iv) conducting research and giving advice on access and privacy issues; and v) educating the public about these issues.²⁷ As a consequence of performing these multiple functions, the Commissioner has been described as being "at the apex of a complex and novel administrative scheme, involving the regulation of the dissemination of information in the hands of hundreds of heads of government agencies."²⁸

In order to fulfill its mandate, the Commissioner's office has been required to become specialized in the management of many kinds of government records. This is only natural as it deals with a diverse array of government ministries, boards, commissions and agencies, numbering in the hundreds.²⁹ The Commissioner's expertise also presents an example of a specialization that has been acquired over time through experience. The expertise of the Information and Privacy Commissioner's office is generally a strong factor that moves in the courts to accord it a significant degree of curial deference.

In *Pushpanathan*, by contrast, the Supreme Court's decision to accord little deference to the Immigration and Refugee Board's

interpretation of the United Nations *Convention Relating to the Status of Refugees* was related not only to the fact that the Board members were not required to be lawyers or have expertise in matters relating to human rights but also because the Board had little experience in the area.³⁰ The case was similar in *Canadian Broadcasting Corp. v. Canada (Labour Relations Board)*³¹ where the Labour Board was held to a correctness standard for its interpretation of the *Broadcasting Act*, a statute external to the one it administers normally.

Moreover, even though the expertise of an administrative body is a relative factor, determined in relation to the expertise of the reviewing court as to the particular issue being brought up on judicial review, judges who form part of a judicial council have also been held to be specialized decision-makers with “a degree of specialty not enjoyed by ordinary courts of review.”³² As a collective entity, the judges of a judicial council are possessed of “a rich and wide ranging collection of judicial expertise.”³³ The matters with which they deal are highly specialized, being in particular, the constitutional guarantees of judicial independence, the institutional protection of the judiciary as a whole and public perceptions of it. This expertise has been held to merit a high degree of deference on review.

As for special procedure or non-judicial means of implementing the statute, the Supreme Court of Canada has not yet developed the ways in which these factors demonstrate tribunal expertise. It is probable that within these categories, however, fall things such as the inquiry process used at many provincial information and privacy commissions³⁴ and the ability of certain human rights tribunals to remain seized of matters and to oversee the monitoring and implementation of their decisions.³⁵ The tribunal’s development of studies of the industry or market that it is regulating that aim to help it with its functions may also be part of this category.

Although generally the jurisprudence addresses expertise as an institutional characteristic, it implicitly presupposes expertise as a characteristic of individual tribunal members. What does it mean for an individual board member to be an expert? What is the essence of expertise? While the requirement for individual expertise is sometimes indicated in the enabling statute of a given tribunal,³⁶ answers to these two questions, which go to the heart of finding appropriate candidates, are not forthcoming. Nor have the qualities that constitute expertise been addressed in any sustained manner in the jurisprudence. Professor France

Houle has given thoughtful consideration of what it means to be an expert. She suggests that expert knowledge goes beyond merely having descriptive or factual information in an area. Experts are characterized by their ability to reason using the normative tools of their discipline in order to examine this factual and descriptive data. She states:

Quelle est la différence entre les connaissances expertes et profanes? Contrairement aux profanes, les experts partagent un ensemble de règles, d'attitudes, de postures face au savoir qu l'on peut regrouper sous le vocable modes de raisonnements ou encore connaissance normatives. Ils possèdent aussi un ensemble de connaissances descriptives (des faits juridiques, historiques, anthropologiques), mais ce qui les distingue en tant que communauté d'experts, c'est leur façon de raisonner à partir de ces faits.³⁷

The knowledge that experts acquire, she asserts further, may come from academic study of a discipline or from practical experience in the field.³⁸

The foregoing analyses of the concept of expertise are premised on a traditional model of administrative law in which the expertise of the administrative decision-making body is generated in-house through its members and to some extent through its staff. Questions arise, however, with respect to what is often called the “new governance” or public-private model of government. New governance models involve collaboration between public sector agencies and private actors.³⁹ This collaboration can take many forms. It may arise through privatization, outsourcing, implementation of administrative remedies through collaborative means, self-regulation, collaborative standard setting etc. Under the new governance model, it is possible that sources of “tribunal” expertise stem not only from in-house sources but also from private actors affiliated with the decision-making body. Common examples of such affiliated third parties include advisory councils composed of individuals or businesses from the industry being regulated. In 2006, for example, the Canadian Food Inspection Agency assembled a pool of private-sector veterinarians “to assist governments in responding to animal health emergencies such as disease outbreaks”⁴⁰ This complement of private veterinarians was created specifically to strengthen the agency’s ability to respond to infectious animal diseases such as avian influenza, in an effort to reduce animal health and social and economic costs that can arise from such disease outbreaks.⁴¹

How does the pragmatic and functional approach fare when expertise stems from a joint initiative between the public and private sector? By working in collaboration, the expertise of private actors may

have a significant impact on the decision-making of the tribunal or agency. If we consider judicial review as a means of ensuring government accountability, a question arises as to whether the standard of review doctrine—which allows significant deference for expertise—somehow shields citizens from being able to demand appropriate accountability. If deference is given for expertise but this expertise has been influenced by private parties with interests that may differ from the public interest, will the pragmatic and functional approach be enough to provide accountability?

To take the example of the Canadian Food Inspection Agency a step further, private actors may influence what constitutes a health risk by influencing the development of standards in ways that favour their own business or industry interests.⁴² A statute may declare that an agency has expertise in standard-setting, even though the standard-setting may be done through discretionary means such as the setting up of advisory panels. In such a case, if an individual receives an unfavourable agency decision based on a standard set by public-private collaboration, one wonders how far this individual will be able to go in challenging the decision on judicial review. It may be that he or she will be stopped at the stage of the standard of review analysis as a reviewing court may choose not to look behind the legislation to consider the modalities of how this expertise comes into existence. As for whether courts should deconstruct expertise on a judicial review application, this is really a question that will have to be analyzed on a case-by-case basis. Nevertheless, it would seem demonstrably unfair for litigants to be categorically stopped by an overly formalistic or superficial analysis of what expertise entails.

Our overview of judicial and scholarly interpretations of the notion of expertise also brings into focus the challenge that integrated tribunals (in which either the decision-maker is to decide on a wide range of subject matter stemming from different statutes or, as in the case of the *Tribunal Administratif du Québec*, the expertise of the decision-maker is centered on reviewing and settling disputes between the citizen and the administration)⁴³ bring to the notion of tribunal expertise. Moreover, it leads us to enquire about exactly how expertise is used within the tribunal itself.

II. The Use of Expertise in the Tribunal Setting

A significant issue that arises in relation to the use of tribunal expertise is the possible breach of natural justice principles that may occur if material developed by the tribunal is relied upon during the decision-making process without the knowledge of the parties involved. There are competing values in such a situation. Namely, the desire to have fully informed decisions, which the tribunal, as an expert body whose functions often involve research and policy development, is in an excellent position to make; and the obligation to offer a decision-making process that is perceived to be fair by the parties affected and by the general public (if we take the importance of maintaining public confidence in our administrative justice system into account). There are also the costs of providing greater measures of procedural fairness that must be considered—for example, through the provision of additional hearings to allow comment on all pieces of information used. These costs manifest themselves as both budgetary concerns and time delays.

In this light, involvement by staff in the decision-making process faces four main objections: i) that the role and influence of the advocates involved has been diluted; ii) that extra-record facts or factual impressions have been introduced; iii) that new ideas, and possibly very influential ideas given the potential expertise of tribunal staff, have been introduced to which those affected have not been given opportunity to respond and iv) that there has been “a separation of deciding from the discipline of decision-making.”⁴⁴

In 1984, the decision of *Toshiba Corp v. Canada (Anti-Dumping Tribunal)*⁴⁵ laid down the principle that staff reports prepared in advance of a hearing were a technical breach of the rules of natural justice, but that they caused no harm if the information contained within them were brought out at the hearing with the parties given full opportunity to test them. In *Toshiba*, two staff reports had been prepared. The first was a preliminary document that had been prepared to help the tribunal members to save time in approaching their work. This report contained a number of statements of fact, bearing upon the ultimate issue that the Anti-Dumping Tribunal was to decide. It was not revealed to the parties or their counsel. While the Federal Court of Appeal held that the use of such confidential documents was a “dangerous practice” and that it would have been prudent for the Tribunal to have revealed it at the outset of the proceedings, it found that the report itself was innocuous. Justice Hugessen determined that the material in the report was either general or

public knowledge or based upon facts and sources that were brought out fully in the hearing. As for the second report, this was a summary of the evidence and submissions made at the proceedings and related commentary. This he found to be entirely proper and did not need to be revealed to the parties. In the opinion of the court, such reports formed part of Tribunal's internal decision-making process and were similar to the work done by judges' law clerks.

Interestingly, the Supreme Court of Canada decision of *Baker v. Canada (Minister of Citizenship and Immigration)*⁴⁶ greatly modified the jurisprudential approach that had been laid down by *Toshiba*. The effect is quite significant insofar as assessments of potential risk for those claiming refugee status on humanitarian and compassionate grounds is concerned. It has also affected at least one decision of a different type of agency altogether. The influence of *Baker* on the duty to reveal internal documents came to the fore in *Haghighi v. Canada (Minister of Citizenship and Immigration)*.⁴⁷ At issue in this case was whether a risk assessment that had been obtained by an immigration officer should have been revealed to an applicant for refugee status before the immigration officer made his final decision. The immigration officer obtained the assessment from a post-claim determination officer (PCDO) and relied on it in reaching his conclusion that the applicant did not face significant risk of persecution in his home country. Mr. Haghighi's application to remain in Canada on humanitarian and compassionate grounds was therefore denied. The PCDO's report was not disclosed to Mr. Haghighi or his counsel. It was, however, based on material submitted by Mr. Haghighi and on other information that was publicly available.

In considering whether a breach of procedural fairness had occurred, Justice Evans determined that the law relating to the degree of fairness owed in humanitarian and compassionate (H&C) refugee claims had changed as a result of *Baker*. Whereas the content of the duty of fairness was once minimal and required that information be disclosed only if it was "extrinsic evidence," the approach now to be taken entailed examination of contextual considerations to help concretize the appropriate content of the duty of fairness. These contextual considerations include the extent to which procedural fairness will avoid the risk of an error being made in the decision-making process; the seriousness of the impact of an erroneous decision on those affected by it (a factor that has been relied upon successfully in other contexts to argue that internal reports should have been shared); the costs of the procedural right sought; the characteristics of the decision-making body and, in

particular how adjudicative it is in nature; the location of the decision within the wider statutory scheme which speaks to the amount of procedural protection that the type of decision in question normally attracts; and the agency practice.

Justice Evans held that fairness required H&C applicants to be fully informed of the content of internal risk assessments and given the opportunity to comment on them. He maintained that this principle should apply even when the report is based on information that is reasonably available to the applicant. Moreover, the potentially grave consequences for an individual who is returned to a country where there is a risk of persecution, contrary and likely due to the erroneous findings of an internal undisclosed report, justifies the administrative delays that may arise from fulfilling the duty of fairness. Evans J.A noted, however, that an opportunity to draw attention to alleged errors and omissions does not amount to an invitation to an applicant to reargue his or her case. He suggested that a relatively short time be given to applicants within which they can submit written comments on the report.

Looking more broadly at the impact that this decision will have in the administrative law context, especially given that disclosure of staff reports was not always required to provide fairness and in light also of the diversity in tribunal types and practices, Justice Evans implicitly left the door open to individual consideration on a case by case basis. He stated:

[...] I also recognize that courts have not invariably required administrative agencies that hold relatively formal hearings to disclose staff reports, especially when they contain no new information, but simply summarize the evidence and submissions of the parties or define the issues to be decided [...]

However, a full hearing also provides the participants with a greater opportunity to influence the outcome than that available to applicants under subsection 114(2). And, in other decision-making contexts staff summaries and commentary may not assume the central importance occupied by PCDO's report in subsection 114(2) cases. Further, if wrong, few administrative decisions have the capacity for inflicting such catastrophic harm on individuals as that possessed by the administrative decision with which this case is concerned.⁴⁸

The contexts in which administrative decisions have the potential to inflict harm as catastrophic as that of an H&C determination have not yet been fully explored in our jurisprudence. While *Haghighi* has been applied numerous times, only once have its principles applied to a situation outside of immigration. This decision is worthy of mention.

*Archer (c.o.b. Fairburn Farm) v. Canada (Canadian Food Inspection Agency)*⁴⁹ is a case in which a farming couple's livestock of Danish water buffalo was ordered destroyed. Shortly after mortgaging their farm in order to purchase the buffalo and obtaining a risk assessment from the Canadian Food Inspection Agency which indicated that the cattle would not pose risk to the public, came the notice to have them removed or destroyed. Once it had become known to the Agency that a native Danish cow had died of bovine spongiform encephalopathy ('mad cow disease'), its members undertook a second assessment of the risk posed by the applicants' buffalo. The applicants were not given a chance to present information that may have contradicted the Agency's findings. The Federal Court Trial Division considered the factors outlined in *Baker* and found this to be a situation in which the applicants should have been given the opportunity to participate in the decision-making process. Among other things, the Court noted the grave consequences to the applicant that would result from this decision and found similarity between their financial ruin to the risk of persecution faced in *Haghighi*. The decision was set aside.

The issues surrounding the use of internal agency staff reports is still little explored ground. It raises questions about the balancing that must go on between expertise and procedural fairness and about the types of tribunals that will face this dilemma. The use of official notice, by which tribunal decision-makers accept without proof matters to be facts due to their expert knowledge of the area, is similarly problematic.

III. The Justiciability of Expertise

In ordinary parlance expertise attaches to the person. Well known to the law is the 'expert witness,' an individual who, by training, specialized knowledge and qualification, is deemed competent to give opinion evidence so as to assist the trier of fact, whether judge or jury, in the assessment of the evidence before them. The qualifications of an expert witness are subject to proof, and where challenged, it is for the judge to determine whether the witness is qualified to give expert testimony.⁵⁰ Mere membership in the 'guild' of those considered in general to possess expertise e.g. physicians, engineers, historians, etc., does not *per se* qualify one as an expert witness, for the law does not recognize expertise on a corporate or class basis for the purpose of giving testimony at trial.

By way of contrast, expertise in the standard of review jurisprudence has traditionally been tested on an institutional basis: what is the relative expertise as between tribunal and court to make the determination which is the subject of review. Although the specialized knowledge, expertise, experience, training and formation of those who comprise the tribunal are critical elements in determining the relative expertise of the tribunal itself, traditionally courts have not required proof that the individuals comprising the tribunal actually possess the expertise asserted. In that sense expertise is determined in a notional rather than an actual sense. R.E. Hawkins has argued, that the concept of expertise in the standard of review jurisprudence is in reality ‘a proxy for reputation’ and that in making a judgment as to the relative expertise of a tribunal, courts are in essence taking judicial notice of the tribunal’s reputation for expertise based upon a congeries of factors which the individuals comprising the tribunals are presumed to possess.⁵¹ More recently, Beth Bilson has noted that, although the Supreme Court of Canada has in several of its decisions listed those traits indicative of expertise, nevertheless, to date it has not developed ‘a coherent vision’ of its ‘character’ i.e. those features of expertise which justify judicial deference.⁵²

Doubt as to the qualifications of an individual tribunal member is often heard in the larger community—e.g. the almost universal criticism of patronage appointees not generally perceived as possessing the qualifications required for the position to be held. But traditionally, comity as between the judiciary and the executive has considered it unseemly to raise such doubt in the courtroom, for underlying it is criticism of the integrity of the executive, and good faith exercise of the ministerial discretion to appoint is always presumed. But, the decision of the Supreme Court in *Baker*,⁵³ even with its restraining gloss in *Suresh*,⁵⁴ whereby the exercise of ministerial discretion was assimilated to the exercise of a statutory grant of power to an independent tribunal for the purpose of standard of review analysis, made it almost inevitable that the presumptive integrity of ministerial appointments to an expert tribunal would be challenged. In the *Retired Judges* case,⁵⁵ that very challenge was made, and successfully so.

There, two unions successfully challenged the ministerial appointment of ad hoc interest arbitrators under legislation requiring compulsory binding arbitration of interest disputes in the health care sector. The *Ontario Hospital Labour Disputes Arbitration Act*⁵⁶ (HLDAA) provides, as is common in legislation of this sort, that where

the management and labour nominees to a board of arbitration to be struck under its terms cannot agree on the appointment of a Chair, then “the Minister shall appoint as a third member a person who is, in the opinion of the Minister, qualified to act.” In 1998, the Minister, broke with the historical practice, which was to appoint individuals possessing labour relations expertise and recognition in the labour relations community as being generally acceptable to both management and labour. Rather, as a matter of conscious policy, he elected to exercise his discretion by the appointment, to the exclusion of all others, of retired superior court judges, at least some of whom lacked such expertise and general acceptability. These were not criteria considered by the Minister as necessary for appointment, and in their stead he substituted the criterion of prior judicial experience as a neutral decision-maker. Such appointment of retired judges as a matter of course was unacceptable to the unions affected, who mounted a challenge to the appointments on both natural justice and substantive grounds.⁵⁷ The application failed at the Divisional Court,⁵⁸ but succeeded at the Court of Appeal⁵⁹ on natural justice grounds.

The Supreme Court of Canada dismissed the Minister’s appeal but for reasons different than those that had been given by the Ontario Court of Appeal. It found no merit in the natural justice arguments. Instead, reaching back to the celebrated decision of Justice Rand in *Roncarelli v. Duplessis*,⁶⁰ the Court in a split decision held that, in failing to consider labour relations expertise and general acceptability to the labour relations community as relevant criteria in the exercise of his discretion to appoint, the Minister had acted in a patently unreasonable manner—the standard of review to which such exercise of ministerial discretion was held by both the majority and the minority judgments. As between Justice Binnie for the majority and Justice Bastarache for the minority the principal point of disagreement was whether that standard had been met in the circumstances.

The decision in the *Retired Judges* case opens up hitherto unexplored terrain in standard of review doctrine. The Supreme Court has served notice that it is prepared to go further than merely taking judicial notice of notional expertise in its standard of review inquiry, by probing the degree of actual expertise where challenged. True, the case before the Court was a generic challenge to the exercise by the Minister of his discretion to appoint only retired judges, but the Court explicitly stated: “that the qualifications of specific s. 6(5) appointees will, if challenged, have to be assessed on a case-by-case basis.”⁶¹ How courts

will go about doing so is still to be worked out, but several preliminary observations can be made. To begin with, although the Supreme Court broke new ground in the *Retired Judges* case, it is doubtful that outcomes of this sort—judicial quashing of ministerial appointments for lack of qualification—will become commonplace. First, assessment of qualifications will be against the stiff test of patent unreasonableness in the exercise of the ministerial discretion to appoint. Second, it must be borne in mind that the *Retired Judges* case arose within the context of a highly politicized clash between Organized Labour and the Ontario Government, which during its tenure had altered the landscape of collective bargaining quite profoundly. Recourse to the courts by the trade union movement has, as in the *Retired Judges* case, at times stymied long-term governmental objectives in reshaping that landscape.⁶² Government has sometimes struck back, and indeed in response to the intervention by the courts into its appointing power, it went so far as to oust both expertise and mutual acceptability as criteria in the appointment of arbitrators in cognate legislation in the education sector.⁶³

Governmental action such as this highlights the challenge which judicial review of ministerial discretion presents to separation of powers doctrine and to governance of the administrative state. Both the majority and the minority opinions in the *Retired Judges* case reveal an acute awareness of that challenge. Justice Binnie acknowledged that the work of the Minister in securing industrial peace in the hospital sector “should not be micro-managed by the courts,”⁶⁴ and as already noted, he accepted that the ministerial exercise of the discretionary power of appointment, when measured against the standard of review factors, merits the highest level of deference. In dissent, Justice Bastarache warned that in performing its judicial review function, particularly as it touches ministerial discretions, courts must be careful to maintain “the discipline of judicial restraint and deference,” for to quash “too readily...dilutes the value of the patent unreasonableness standard and promotes inappropriate judicial intervention.”⁶⁵ Clearly, legislative intent will continue to be the touchstone of any such inquiry. In the *Retired Judges* case, the Court, using its oft expressed expansive mode of statutory interpretation, was able to read into the baldly stated requirement ‘qualified’, the dual criteria of labour relations experience and broad acceptability to both management and labour. These “went straight to the heart of the HLDAA scheme”⁶⁶ and to ignore them was fatal to the exercise of ministerial discretion.

It is arguable that legislative schemes which articulate more fulsomely the qualifications required of ministerial appointees could invite even closer judicial scrutiny of the appointments made. Examples, as earlier noted, are the *Canadian Human Rights Act* which requires “experience, expertise and interest in, and sensitivity to, human rights” as qualifications for appointment to the Canadian Human Rights Tribunal,⁶⁷ and the *Canada Labour Code* which stipulates “experience and expertise in industrial relations” as qualifications required of the Chair and Vice-Chairs of the Canada Industrial Relations Board.⁶⁸ Yet even in such circumstances, the strict standard of review, coupled with the *caveat* that a court is not “to reweigh the factors” taken into account by the appointing minister, so long as they are in conformity with the constraints imposed by the legislation or the Constitution,⁶⁹ would indicate that quashing of a ministerial discretion to appoint on the basis of the failure of the appointee to meet the legislative qualifications will be the exception.

Pace the response of the Ontario Government to the decision of the Court of Appeal in the *Retired Judges* case, one probable outcome of the decision will be a renewed interest on the part of public policy makers in channeling, if not restraining, ministerial discretions to appoint by the introduction of protocols, whether formal or informal. Such protocols aim to ensure transparency in the appointment process and would go far to engender greater public confidence in the administrative justice system. One might want to draw upon the experience of the federal judicial appointment process, a central feature of which is the use of advisory committees, whose members are drawn from several constituencies, qualified to assist in the appointment process. In such a regime, appointments would only be made following upon announcement of a vacancy to be filled, promulgation of the qualifications sought, public solicitation for applicants, vetting of applications by the appropriate advisory committee, and a recommendation by it to the Minister of a list of qualified candidates from among whom the appointment is to be made. In 2003, the Government of Nova Scotia endorsed such a protocol for making appointments to all provincial boards, agencies and commissions.⁷⁰ The Government of Ontario has also adopted an approach along these lines, with positions advertised through the website of the government’s Public Appointments Secretariat.⁷¹ Candidates in Ontario who are being seriously considered may have to be reviewed by a legislative committee before their appointments are confirmed.⁷² An alternative, the vetting of candidates for ministerial appointment through a legislative committee similar to the American model, has been suggested

in many quarters. But such a process may be undermined more easily by a partisan agenda than in the case of a carefully structured non-partisan advisory committee. However, in either case, given separation of powers doctrine and our tradition of responsible cabinet government, coupled with the hybrid status of administrative tribunals, straddling as they do the executive/judicial divide while under legislative mandate, deference by courts to ministerial discretion in tribunal appointments will continue as a characteristic of our administrative justice system.

Conclusion

We have sketched out here the gradual transformation of expertise from a solely socio-political construct to one which enjoys, as well, juridical status. The pace of that transformation tracks that of our developing administrative law jurisprudence from its earliest articulation to its modern exegesis. David Dyzenhaus and Evan Fox-Decent have written of the “pantheon of great Canadian administrative law judgements” in the latter half of the twentieth century,⁷³ which trace the course of that development, among which they number *Roncarelli v Duplessis*,⁷⁴ *CUPE v. NB Liquor Corp.*,⁷⁵ *Nicholson*⁷⁶ and *Baker*.⁷⁷ In each, the relationship of court to administrative delegate possessed of a specialized mandate is engaged. The Supreme Court references each in its latest exploration of expertise in the *Retired Judges* case. Its lesson there as in its earlier jurisprudence confirms that expertise is central to our understanding of the administrative state, and constitutes a key juridical element in the normative framework of our administrative justice system.

Endnotes

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¹ [2003] 1 S.C.R. 539.

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- ² “Whereas Canada is founded upon principles that recognize the supremacy of God and the rule of law” – so reads the Preamble to the *Canadian Charter of Rights and Freedoms*, Part I of the Constitution Act, 1982, being Schedule B to Canada Act 1982, U.K., 1982, c.11.
- ³ A.V. Dicey, *Introduction to the Study of the Law of the Constitution*, 10th ed. by E.C.S. Wade (London: Macmillan Papermac, 1967), at 188, 193, 203 [emphasis added].
- ⁴ *Ibid.* at 203. Dicey’s grasp of French Law has been since heavily criticized. For a discussion see L.N. Brown and J.F. Garner, *French Administrative Law*, 5th.ed. (New York: Oxford University Press, 1998), at the Introduction.
- ⁵ H.W. Arthurs, *‘Without the Law’: Administrative Justice and Pluralism in Nineteenth-Century England* (Toronto: University of Toronto Press, 1985) at 5.
- ⁶ *Ibid.* at 7. This same dialectic characterizes generally the formation of the nation state in 19th century continental Europe; see E. Hobsbawm, *Nations and Nationalism Since 1780: programme, myth, reality*, 2d. ed. (Cambridge: Cambridge University Press, 1992).
- ⁷ Arthurs, *supra* note 5 at c. 2.
- ⁸ *Ibid.* at c.3
- ⁹ *Ibid.* at c.4–5.
- ¹⁰ Lord Atkin on the amenability of administrators to judicial review in *R. v. Electricity Com’rs, Ex parte London Electricity Joint Ctee Co.* (1920), [1924] 1 K.B. 171 at 205 (C.A.).
- ¹¹ The phrase comes from the American debate on the legitimacy of the administrative state. In its report, *Administrative Management in the Government of the United States* (1937), the President’s Committee on Administrative Management described at page 36 the federal administrative structure as “a headless ‘fourth branch’ of the Government, a haphazard deposit of irresponsible agencies and uncoordinated powers” which did “violence to the basic theory of the American Constitution that there should be three major branches of the Government and only three,” (as cited in J.M. Landis, *The Administrative Process* (New Haven: Yale University Press 1938) at 4).
- ¹² Paul Weiler’s study of the Supreme Court, *In the Last Resort* (Toronto: Carswell Methuen, 1974), is the most pungent critique of its jurisprudence prior to 1979 in which the Court had exhibited such a deep antagonism to the administrative state
- ¹³ *Ocean Port Hotel Ltd. v. Liquor Control and Licensing Branch* [2001] 2 S.C.R. 781 at paras 24, 32. per Chief Justice McLachlin [*Ocean Port*].
- ¹⁴ *Ibid.* at para. 32.
- ¹⁵ *Ibid.* at para. 24. On judges as lawmakers, see the remarks of The Honourable Gérard V. LaForest, formerly of the Supreme Court of Canada in “Judicial Lawmaking, Creativity and Constraints” which appears in Rebecca Johnson *et al.*,

Gérard V. LaForest at the Supreme Court of Canada, 1985–1997 (Winnipeg: Canadian Legal History Project, 2000), at 1.

- ¹⁶ There are many formulations of the relevant factors. Here we summarize that of Justice Bastarache in *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982 [*Pushpanathan*].
- ¹⁷ *Director of Investigation and Research v. Southam Inc. et al* (1997), 144 D.L.R. (4th) 1 at para. 50 [*Southam*].
- ¹⁸ *United Brotherhood of Carpenters and Joiners of America, Local 579 v. Bradco Construction Ltd.*, [1993] 2 S.C.R. 316 at 335 where Justice Sopinka wrote for the majority: "...the expertise of the tribunal is of the utmost importance in determining the intention of the legislator with respect to the degree of deference to be shown to a tribunal's decision in the absence of a full privative clause. Even where the tribunal's enabling statute provides explicitly for appellate review, as was the case in *Bell Canada*, [...], it has been stressed that deference should be shown by the appellate tribunal to the opinions of the specialized lower tribunal on matters squarely within its jurisdiction."
- ¹⁹ John Willis, "Three Approaches to Administrative Law: The Judicial, the Conceptual, and the Functional" (1935) 1 U.T.L.J. 53 at 75.
- ²⁰ *Ibid.* at 75–76.
- ²¹ As David Mullan has noted: "To write a paper on administrative tribunals in large measure is to write a paper about government. This is so because many of the bodies that Canadians think of as administrative tribunals actually perform all the major governmental functions: they legislate by developing rules and policies to be followed in their day-to-day work; they exercise discretion within the mandate laid down in either their empowering legislation or their own rules and policies; and they perform the judicial role of adjudicating on individual matters that come before them." See David J. Mullan, "Administrative Tribunals: Their Evolution in Canada from 1945 to 1984" in Ivan Bernier and Andrée Lajoie, eds., *Regulations, Crown Corporations and Administrative Tribunals* (Toronto: University of Toronto Press, 1985) at 155.
- ²² The situation in Great Britain and the United States is similar. See Landis, *supra* note 11 at 23–26; and W. Wade, *Administrative Law*, 7th ed. (Oxford: Oxford University Press, 1994) at 906–7. The challenge of balancing and reconciling competing functions in Canadian tribunals is addressed in L. Salter, "Experiencing a Sea Change in the Democratic Potential of Regulation" in F. Leslie Seidle, ed., *Rethinking Government: Reform or Reinvention?* (Montreal: The Institute for Research on Public Policy, 1993) at 129. However, the whole notion of "tribunals as government" could be modernized to take into account the increasingly collaborative nature of administrative agencies and the private sector to achieve public policy goals. This collaborative enterprise between public and private sectors is often referred to the literature as "new governance," see generally Orly Lobel "The Renew Deal: The Fall of Regulation and the Rise of

Governance in Contemporary Legal Thought” (2004) *Minn. L. Rev.* 262; Lester A. Salamon, ed., *The Tools of Government: A Guide to the New Governance* (New York: Oxford University Press, 2002) and W.A. Bogart, “The Tools of the Administrative State and the Regulatory Mix” in Colleen Flood and Lorne Sossin, eds., *Administrative Law in Context* (Toronto: Emond Montgomery, 2008).

²³ *Supra* note 16.

²⁴ *Ibid.* at para. 32.

²⁵ *Supra* note 17 at 17–18.

²⁶ See *John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 106 D.L.R. (4th) 140 (Ont. Div. Ct.) at 153-156 per Campbell J. [*John Doe*]. Campbell J.’s description of the Information and Privacy Commissioner’s expertise has been cited with approval in numerous subsequent decisions. See for example *Ontario (Minister of Health and Long-Term Care) v. Ontario (Assistant Information and Privacy Commissioner)* (2004), 73 O.R. (3d) 321 (C.A.).

²⁷ See *John Doe, ibid.* at 154.

²⁸ *Ibid.* at 153–54.

²⁹ The majority in *John Doe* noted the wide range of government bodies whose information practices are supervised by the Commissioner’s office (see *John Doe, ibid.* at 155). The Information and Privacy Commissioner/Ontario hears appeals from *inter alia* the legislative assembly, all provincial government ministries and the wide array of provincial agencies, boards, commissions and corporations (see *Freedom of Information and Protection of Personal Privacy Act*, R.S.O. 1990, c. F 31., s. 2(1) “institution” and the accompanying regulation, R.R.O. 1990, Reg. 460). At the municipal level, the Commissioner has superintending power over all municipalities, school boards, transit commissions, public library boards, boards of health and many other types of municipal body (see *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, s. 2(1) “institution” and the accompanying regulation, O. Reg. 372/91).

³⁰ *Supra* note 16 at para. 47.

³¹ [1995] 1 S.C.R. 157.

³² *Moreau-Bérubé v. New Brunswick (Judicial Council)*, [2002] 1 S.C.R. 249 at para. 51 [*Moreau-Bérubé*].

³³ *Ibid.* at para. 49.

³⁴ This process as it relates to the office of the Information and Privacy Commissioner/Ontario is described in detail in *John Doe, supra* note 26 at 154.

³⁵ See Cristie Ford, “Dogs and Tails: Remedies in Administrative Law” in Colleen Flood and Lorne Sossin, eds., *Administrative Law in Context* (Toronto: Emond Montgomery, 2008), discussing the use of this former power of the Human Rights Tribunal of Ontario; see also *Canadian Human Rights Act*, R.S. 1985, c. H-6, s. 53(2).

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- ³⁶ See, for example, *Canadian Human Rights Act*, *ibid.*, s. 48.1 with regard to members of the Canadian Human Rights Tribunal; *Canada Labour Code*, R.S. 1985, c. L-2, s. 10 with regard to neutral members of the Canada Industrial Relations Board.
- ³⁷ France Houle, « Le fonctionnement du régime de preuve libre dans un système non-expert: le traitement symptomatique des preuves par la Section de Protection des réfugiés » (2004) 38 R.J.T. 263 at 286–87.
- ³⁸ *Ibid.*
- ³⁹ See generally, on the new governance and its interplay with traditional administrative law concepts: Jody Freeman, “Private Parties, Public Functions and the New Administrative Law” (2000) 52 Adm. Law Rev. 813. Freeman outlines examples of ways in which private actors participate in agency governance, explores the advantages and perils of public-private regulation and argues the need to develop a theory of the state’s role in such mixed regimes and an accompanying theory of judicial review. See also Lobel, *supra* note 22; and Bogart, *supra* note 22. For a stringent criticism of the new governance approach, see: Harry Arthurs, “Public Law in a Neoliberal Globalized World: The Administrative State Goes to Market (and Cries ‘Wee, Wee, Wee’ All the Way Home)” (2005) 55 U.T.L.J. 797.
- ⁴⁰ See Canadian Food Inspection Agency, *Canadian Veterinary Medical Association and Canadian Food Inspection Agency establishing Veterinary Reserve* (News Release) (November 28, 2006), online: <<http://www.inspection.gc.ca/english/corpaffr/newcom/2006/20061128e.shtml>>.
- ⁴¹ *Ibid.*
- ⁴² This differs from the situation in which litigants from industry regularly and repeatedly appear before an agency in order to represent their interests. While some argue that repeat appearances before a tribunal or agency may result in “agency capture,” such litigation generally proceeds in an open forum in which there is the opportunity for adverse interests to be examined and debated publicly.
- ⁴³ In considering the TAQ model, one is reminded of Willis’ functional approach. Although Willis firmly believed that tribunals were characterized by their expertise, he also hinted that perhaps we needed a specialized body “trained in the practice of the whole law pertaining to administration” to review these administrative tribunals. See Willis, *supra* note 19 at 80.
- ⁴⁴ Hudson Janisch outlines these four objections in a case comment at (1984) 8 Admin. L.R. 188 on two Federal Court cases: *Toshiba Corp v. Canada (Anti-Dumping Tribunal)* (1984) 8 Admin. L.R. 173 (F.C.A.) [*Toshiba*] and *Trans-Quebec & Maritimes Pipeline Inc. v. National Energy Board*, [1984] 2 F.C. 432 (F.C.A.).
- ⁴⁵ *Toshiba*, *ibid.*
- ⁴⁶ [1999] 2 S.C.R. 817 [*Baker*].

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- ⁴⁷ [2000] 4 F.C. 407 (F.C.A.).
- ⁴⁸ *Ibid.* at paras. 39–40.
- ⁴⁹ 2001] F.C.J. No. 46 (T.D.) (QL).
- ⁵⁰ John Sopinka, Sidney N. Lederman and Alan W. Bryant, *The Law of Evidence in Canada* (Toronto: Butterworths, 1992) at 536–37.
- ⁵¹ R.E. Hawkins, “Reputational Review I: Expertise, Bias and Delay” (1998) 21 Dal. L.J. 5.
- ⁵² Beth Bilson, “The Expertise of Labour Arbitrators” (2005) 12 C.L.E.L.J. 33 at 41, 64.
- ⁵³ *Supra* note 46
- ⁵⁴ *Suresh v. Canada (Minister of Citizenship and Immigration)* (2002), 281 N.R. 1.
- ⁵⁵ *Supra* note 1.
- ⁵⁶ *Hospital Labour Disputes Arbitration Act*, R.S.O. 1990, c. H.-14 at s.6(5).
- ⁵⁷ The Court bifurcates its discussion of procedural fairness issues and independence and impartiality.
- ⁵⁸ (1999), 117 O.A.C. 340.
- ⁵⁹ (2000), 51 O.R. (3d) 417.
- ⁶⁰ [1959] S.C.R. 121.
- ⁶¹ *Supra* note 1 at para. 185, and see as well paras. 206–208. Beth Bilson cautions that the practice should be limited to a quantitative analysis of the arbitrator’s adjudicative experience rather than a qualitative assessment of its worth. See her study *supra* note 52 at 56.
- ⁶² See e.g. *Hewat v. Ontario* (1998), 37 O.R. (3d) 161 (C.A.); *Dunmore v. Ontario (Attorney General)* (2001), 207 D.L.R. (4th) 193.
- ⁶³ *Back to School Act (Toronto and Windsor) 2001*, S.O. 2001, c. 1, ss. 11(4) and (5).
- ⁶⁴ *Supra* note 1 at para 106.
- ⁶⁵ *Ibid.* at para. 46.
- ⁶⁶ *Ibid.* at para. 176.
- ⁶⁷ *Canadian Human Rights Act*, *supra* note 35, s. 48.1(2). In *Zundel v. Citron et al* (2001), 273 N.R. 257, the Federal Court of Appeal rebuffed a challenge to the impartiality of tribunal members premised upon the statutory qualification “sensitivity to human rights.”
- ⁶⁸ *Canada Labour Code*, *supra* note 36, s. 10(5).
- ⁶⁹ *Supra* note 1 at paras 175–76.
- ⁷⁰ The protocol was adopted as part of the settlement in a human rights complaint brought by Archibald Kaiser, a law professor, alleging discrimination in the

exercise of ministerial discretion to appoint. Kaiser had not been selected for appointment to the Criminal Code Review Board or the Psychiatric Facilities Review Board. The government of Nova Scotia's protocol is found in the *Terms of Settlement*, online: Nova Scotia Human Rights Commission <<http://www.gov.ns.ca/humanrights/publications/HRCKaiserAgreement.pdf>>.

The protocol involves advertising positions, clearly identifying qualifications, the use of advisory committees to review appointment candidates.

⁷¹ See <www.pas.gov.on.ca>.

⁷² See “Principles Governing the Appointments Process” and “Standing Committee on Government Agencies” on the Public Appointments Secretariat website, *ibid*. Additional information on the Standing Committee on Government Agencies can be found in its Terms of Reference, available on the website of the Legislative Assembly of Ontario: <http://www.ontla.on.ca/web/committee-proceedings/committees_detail.do?locale=en&detailPage=mandate&ID=142>. K. Whitaker, M. Gottheil and M. Uhlmann discuss the importance and modalities of tribunal involvement in the appointments process in their contribution to this volume, “Consistency in Tribunal Decision Making: What Really Goes On Behind Closed Doors” 351 at 358–59.

⁷³ David Dyzenhaus and Evan Fox-Decent, “Rethinking the Process/Substance Distinction: *Baker v. Canada*” (2001) 51 U.T.L.J. 193 at 193.

⁷⁴ *Supra* note 60.

⁷⁵ *Canadian Union of Public Employees v. New Brunswick Liquor Corp.*, [1979] 2 S.C.R. 227.

⁷⁶ *Nicholson v. Haldimand-Norfolk Regional Police Commissioners*, [1979] 1 S.C.R. 311.

⁷⁷ *Supra* note 46.