

The Standard for Judicial Intervention in Decisions of Administrative Tribunals: Curial Deference in 1993

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Since September of 1992, the Supreme Court of Canada has released seven decisions relating to the standard of review of appellate courts on review or appeal of decisions of administrative tribunals.¹ This flurry of activity is a recognition of the need that existed and, to some extent which still exists, for clarification of the role of appeal courts in decisions from administrative tribunals. In this paper, I have attempted to catalogue those decisions and provide a rationale for the continuing refinement of the principle of curial deference to the decisions of administrative tribunals and, in particular, those administrative tribunals which have specialized knowledge.

In this paper, when I use the term "curial deference", I mean a restrained judicial attitude to interference with the findings of both fact and law of administrative tribunals. It is my view that these decisions of the Supreme Court of Canada signal a moving away from considering privative clauses as the sole determinant of whether curial deference should be shown to the decisions of tribunals.

A review of the history and development of the principle of curial deference demonstrates that greater respect and a more restrained approach to judicial interference in the decisions of tribunals is being fostered by the Supreme Court of Canada. The reason given for this more restrained approach to judicial intervention is statutory interpretation, that is, a legislative direction to courts to interfere less in the business of tribunals. In fact, these decisions demonstrate a clear example of judicial policy-making. Whereas the Supreme Court of Canada always looked to the existence and wording of privative clauses to justify non-intervention, that Court is now looking at the role of the tribunal in the context of the entire statutory scheme to determine if that tribunal is assigned specialized duties or is deemed to have specialized knowledge by the legislation creating the tribunal.

In this paper, I will review the standard of judicial intervention, privative clauses, the importance of the determination as to whether a tribunal has specialized knowledge and the most recent judicial attitude to findings of fact and determinations of law by tribunals.

I. THE STANDARD OF REVIEW

The genesis of the recent decisions of the Supreme Court of Canada and in the Canadian approach to curial deference can be traced to the decision of Dickson J. (as he was) in *C.U.P.E.*²

Prior to *C.U.P.E.*, the standard for intervention by an appellate court of a decision of an administrative tribunal was usually governed, almost exclusively, by the presence of a privative clause in the legislation creating the administrative tribunal.

As is discussed below, now the matter is not quite so simple. The Supreme Court of Canada has recognized that administrative tribunals which have specialized knowledge that our courts do not have, will be subject to much less judicial interference than was previously the case. The standard that has been articulated is that a court should not interfere with the findings of fact or the interpretation and application of a specialized tribunal's constitutive legislation, unless in so doing the administrative tribunal has been patently unreasonable. This is to be compared to a standard of intervention based upon an error having been made by the tribunal in performing its function, a test which is predicated upon a standard of correctness.

Post *C.U.P.E.* until the most recent of the Supreme Court of Canada decisions, there has been no consistency in the vocabulary that was used to try and explain what was meant by the words "patently unreasonable". One of those expressions that have been used to explain what is meant by that phrase is as follows: L'Heureux-Dubé J. equates the words "patently unreasonable" with "clearly irrational".³

Courts on judicial review and appeal have used terms other than patently unreasonable. For example, it has been suggested that there should not be judicial intervention unless the decision was "not reasonable or clearly wrong"⁴ or the administrative tribunal made "a plain and visible mistake".⁵

More recently, the vocabulary has become much more consistent and judges are using the term "patently unreasonable" with greater frequency rather than justifying judicial intervention on the basis that the decision of the tribunal was not correct.

An exception to the restrained standard for intervention is the law relating to jurisdiction itself. As will be examined below, courts have consistently held that in determining its own jurisdiction, the standard for intervention is one of correctness; that is, the administrative tribunal must not err in determining its own jurisdiction.

I believe it would be helpful if there was a brief review of what is meant by the term "privative clause", where the interpretation of that privative clause fits into a judicial determination of the standard of review and a determination of whether a privative clause is necessary for a more restrained position of judicial intervention. While important, privative clauses are not the sole determinant of the standard of review. There is a requirement of restrained judicial intervention on appeal from tribunals whose constitutive legislation provides for a statutory right of appeal so long as a finding is made that those tribunals are ones with specialized knowledge.

II. PRIVATIVE CLAUSES

A privative clause is a legislative direction that the decision of an administrative tribunal is not to be interfered with by a court on review or appeal. As Sopinka J. pointed out, statutes range from those with "true" privative clauses which clearly and specifically purport to oust all judicial review of decisions, to statutes which provide for a full right of appeal on any question of law or fact and which allow the reviewing court to substitute its opinion for that of the tribunal.

Between these two positions, there can be a partial privative clause in that the words "final" or "conclusive" appear which are amenable to an interpretation that the legislature has directed courts to exercise caution in intervening in an administrative tribunal's decision.⁶ It is noteworthy that Sopinka J., unlike some of his colleagues, has not embraced with great enthusiasm the dissent

of Wilson J. in *National Corn Growers*⁷ to the effect that an administrative tribunal may be in a much better position by virtue of its specialization to interpret its constitutive legislation and to make findings of law than a court on review or appeal. Sopinka J. seems to approach the concept of curial deference from a more traditional view and as such expands the type of clauses that might be considered "privative" to achieve the same goal - a more restrained approach to judicial intervention.

The importance of the Supreme Court of Canada's decision in *C.U.P.E.* cannot be overstated. In that decision, Dickson J. (as he then was) established that the decisions of a labour board, being a specialized tribunal, acting within its jurisdiction and with the benefit of a privative clause will be subject to judicial intervention only if the tribunal acted in a patently unreasonable manner. The tribunal will not be required to be correct in its findings of fact, interpretations of law or understanding of the jurisprudence in its specialized field provided that in so doing it is rational. In *C.U.P.E.* there was a strongly worded privative clause, yet Dickson J. placed as much emphasis on the specialized knowledge and function of the Labour Board in justifying non-intervention as he did to the presence of a privative clause.⁸

The Supreme Court then moved beyond merely considering the presence or absence of a privative clause to a broader basis of statutory interpretation in determining the standard of review. This process of statutory interpretation was moved forward to a functional and pragmatic approach focusing on the intent of the legislature in the Supreme Court's decision in *Bibeault*.⁹ The Supreme Court instructed other appellate courts to consider a number of factors in determining the standard of review applicable to a tribunal's decision - the wording of the enactment conferring jurisdiction on the administrative tribunal; the purpose of the statute creating the tribunal; the reasons for its existence; the area of expertise of its members; and the nature of the problem before the tribunal.

As such, the evaluation of the standard for judicial intervention of the decision of a tribunal was expanded beyond merely the presence or absence of a privative clause to include an analysis of whether the decision of the tribunal involved specialized knowledge, and an analysis of the

entire statutory scheme and purpose of the legislation. This rationale for a standard of review was articulated by Sopinka J. in *Bradco* as follows:

The standard of review to be applied to a decision of an administrative tribunal is governed by the legislative provisions which govern judicial review, the wording of the particular statute conferring jurisdiction on the administrative body, and the common law relating to judicial review of administrative action including the common law policy of judicial deference. The remedy of certiorari at common law and statutory provisions which provide for judicial review permit review of administrative decisions for errors of law on the face of the record. Legislative provisions conferring jurisdiction upon a tribunal often purport either to broaden the scope of judicial review by providing for a statutory right of appeal or to narrow it by invoking words of preclusive effect. Determining the appropriate standard of review, therefore, is largely a question of interpreting these legislative provisions in the context of the policy with respect to judicial deference.

The legislative provisions in question must be interpreted in light of the nature of the particular tribunal and the type of questions which are entrusted to it. On this basis, the court must determine what the legislator intended should be the standard of review applied to the particular decision at issue, having due regard for the policy enunciated by this Court that, in the case of specialized tribunals, decisions upon matters entrusted to them by reason of their expertise should be accorded deference.¹⁰

Perhaps most succinctly, Sopinka J. stated that the presence or absence of a full privative clause is no longer determinative of whether judicial deference should be accorded. The issue is not so straightforward.¹¹

To determine whether curial deference should be accorded to the decision of a tribunal, the court on appeal or review must determine if the tribunal from which a review or appeal is taken is a tribunal with specialized knowledge. Even in instances where the enabling statute provides explicitly for appellate review, "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".¹² It is therefore necessary to canvas those decisions dealing with boards or tribunals

having specialized knowledge, in the absence of a privative clause, and those criteria articulated by the courts for determination of whether a board or tribunal has specialized knowledge.

III. SPECIALIZED KNOWLEDGE

If it is determined that the tribunal from which judicial review or appeal is taken is one having specialized knowledge and expertise over specialized questions, the absence of a privative or near-privative clause will not disentitle that tribunal to judicial deference.

The Supreme Court of Canada has held that an appellate court hearing a statutory appeal from a decision of an administrative tribunal that is confined to questions of law should not interfere with the decision, unless either the tribunal acted without any evidence, or no person, properly instructed as to the law and acting judicially, could have reached that particular determination. If a statutory discretion has been exercised *bona fide*, uninfluenced by irrelevant considerations and not arbitrarily or illegally, no court is entitled to interfere on appeal, even if it might have exercised the discretion otherwise.¹³

This was articulated by the Supreme Court in *Bell Canada*, a case involving a statutory right of appeal, as follows:

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

*However, within the context of a statutory appeal from an administrative tribunal, additional consideration must be given to the principle of specialization of duties. Although an appeal tribunal has the right to disagree with the lower tribunal on issues which fall within the scope of the statutory appeal, curial deference should be given to the opinion of the lower tribunal on issues which fall squarely within its area of expertise.*¹⁴

The decision in *Bell* follows the rationale in *C.U.P.E.* as expressed by Dickson J. that:

*The labour board is a specialized tribunal which administers a comprehensive statute regulating labour relations. In the administration of that regime, a board is called upon not only to find facts and decide questions of law, but also to exercise its understanding of the body of jurisprudence that has developed around the collective bargaining system, as understood in Canada, and its labour relations sense acquired from accumulated experience in the area.*¹⁵

More recently, the Supreme Court has indicated that the functional and pragmatic approach referred to above, as articulated in *Bibeault*, has evolved to the point where the nature and purpose of the tribunal and its expertise over the specialized questions involved will be the determining factors in assessing the degree of deference to be shown, in the absence of a privative or near-privative clause.¹⁶

There are general propositions which now can be taken from the most recent pronouncements from the Supreme Court of Canada in *Dayco*, *Bradco* and *Domtar* as follows:

- (a) a tribunal vested with the responsibility to oversee and develop a statutory regime, including the implementation of wide-ranging policy-making functions, is more likely to be entitled to judicial deference in its finding of law;¹⁷
- (b) the substitution by a court of its opinion for that of a tribunal on the interpretation of a legislative provision eliminates the decision-making autonomy, special expertise and effectiveness of the tribunal, and thus risks thwarting the original

intention of the legislature and avoiding the main issue - who is in the best position to rule on the impugned decision?¹⁸

While the Supreme Court of Canada has consistently found that labour relations boards can be classified as specialized tribunals, there is no doubt that there are a great number of administrative tribunals which can be classified as having specialized knowledge or expertise. For example, the Ontario High Court in *Westlake*¹⁹ found that the *Ontario Securities Act* was "remarkably similar" to the *Ontario Labour Relations Act*. If a tribunal is responsible for the regulation of a specific industrial or technological sphere or subject matter, notwithstanding the absence of a privative clause in its constitutive statute, curial deference should be accorded by courts on appeal or review.

A consequence of a determination that a board or tribunal is one that is specialized or has special expertise is a recognition by courts that they may not be as well qualified as a given agency to provide interpretations of that agency's constitutive statute. Wilson J. in *National Corn Growers* adopted the following passage by Professor J.M. Evans *et al.* in *Administrative Law*:²⁰

In administrative law, judges have also been increasingly willing to concede that the specialist tribunal to which the legislature entrusted primary responsibility for the administration of a particular programme is often better-equipped than a reviewing court to resolve the ambiguities and fill the voids in the statutory language. Interpreting a statute in a way that promotes effective public policy and administration may depend more upon the understanding and insights of the front line agency than the limited knowledge, detachment, and modes of reasoning typically associated with courts of law. Administration and interpretation go hand in glove."²¹

While to some judges it may be heretical to concede that non-lawyers might be in a better position than courts to give a reasonable interpretation to the constitutive statutes at issue, Wilson J.'s point of view in dissent articulated in *National Corn Growers*, has since been adopted by the Supreme Court of Canada by L'Heureux-Dubé J. speaking for the Court in *Domtar*.²²

The remarks by L'Heureux-Dubé J. in this case were made in the context of observing that, consistent with the continuing evolution of administrative law, the principle of the rule of law must be qualified for purposes of judicial review. There is an increasing awareness and acknowledgement by the Supreme Court of Canada of the sophistication of administrative tribunals which require a high degree of flexibility by those courts reviewing the decisions of those tribunals. Wilson J., once again in dissent, in *Lester* (Dickon, C.J.C. and Cory J. concurring) expressed the need for a greater flexibility on the part of reviewing courts as follows:

As I mentioned in National Corn Growers, there has been a tendency in the post C.U.P.E. era to return to a less stringent test for judicial review than the one established in C.U.P.E. This backsliding has been largely predicated upon a rather Dicean view of the rule of law and the role that the courts should play in the administration of government. This approach to curial review in the administrative context is, in my opinion, no longer appropriate given the sophisticated role that administrative tribunals play in the modern Canadian state. I think we need a return to C.U.P.E. and the spirit which C.U.P.E. embodies.²³

What has been absent from the more recent decisions which acknowledge the sophistication of administrative tribunals are the criteria by which one may determine whether the court will view a particular agency or tribunal as being one that should be considered "specialized" or as having "expertise" such that judicial intervention will be restricted to those occasions upon which the tribunal has acted in a patently unreasonable manner. The following are factors that courts have considered in determining whether a tribunal has specialized knowledge. I do not intend this list to be exhaustive:

1. the tribunal administers a comprehensive statute regulating a special area (for example, labour relations, telecommunications, financial markets and international economic relations);²⁴
2. the tribunal is vested with the responsibility to oversee and develop a statutory regime;²⁵

3. the tribunal is called upon to exercise its understanding of the body of jurisprudence that has developed in the area;²⁶
4. the members of the tribunal have accumulated experience and a specialized understanding of the activities they supervise by virtue of the expertise they have acquired through education, training or through repeated exposure as members of the tribunal to the same subject matter;²⁷
5. the constitutive statute of the tribunal requires the tribunal to determine questions in the context of a much larger regulatory role. For example, whereas courts determine matters in isolation and without regard to larger policy questions, the tribunal considers its decision as part of its policy as well as its adjudicative function.²⁸

IV. DEFERENCE TO FINDINGS OF FACT

One would hope that there was some consistency of reasoning in decisions with respect to the standard for appellate intervention on findings of fact, especially from courts of first instance from which one might draw some guidance when dealing with findings of fact by tribunals. Regrettably, appeal courts continue to draw fine distinctions amongst findings of fact so as to enable appellate intervention. If intervention in findings of fact is even acknowledged by the court (often it is not), there is no consistency in the way in which courts deal with this problem.

This was recently illustrated by the varying judgments of the justices of the British Columbia Court of Appeal in *Delgamuukw v. Her Majesty the Queen in Right of the Province of British Columbia et al.*²⁹ After 374 trial days before McEachern C.J.B.C., sitting as a trial judge, the appellant (plaintiff) and counsel for the Attorney General of British Columbia made submissions with respect to whether the Court of Appeal should defer to findings of fact made by the trial judge. The disparate nature of the reasons given by the two justices who gave reasons on this issue are illustrative of the lack of consistency.

Wallace J.A. found that the Court of Appeal could interfere in findings of fact having been made by the trial judge only "if it is established that the trial judge made some 'palpable and overriding error' which affected his assessment of the material facts".³⁰ By contrast, Lambert J.A. found that the Court of Appeal should not be restricted in interfering in the trial judge's findings of fact if such factual determinations were not central to the trial judge's decision and, secondly, that findings of historical facts based on historical or anthropological evidence testified to by historians and anthropologists should, "in my opinion, be given only the kind of weight that other historians or anthropologists might give to them".³¹

Lambert J.A. then extended this reasoning such that if historians agree on historical facts, then the Court of Appeal should not interfere. If, on the other hand, historians disagreed as to historical facts, then it was possible for the Court of Appeal to review the record and make its choice.

While I prefer the view expressed by Wallace J.A., which is supported by authority, I merely wish to draw attention to the fact that an issue which presumably has been settled for some period of time, namely, the judicial attitude in the Court of Appeal to a trial judge's findings of fact is, in fact, not settled at all. It is hardly surprising then that the court continues to struggle with findings of fact made by administrative tribunals.

For what it is worth, the Supreme Court of Canada has fairly recently given the following directions with respect to non-interference with trial judgments in *LaPointe v. Hôpital Le Gardeur*:³²

- (a) an appellate court should not interfere with the findings and conclusions of fact of a trial judge, failing a manifest error;
- (b) the privileged position of the trier of fact extends not only to testimony of ordinary witnesses, but of expert witnesses;

- (c) the principle of non-intervention also applies where the only issue is the interpretation of the evidence as a whole;
- (d) while an appellate court may review a trial judge's finding of fact, it is not its function to conduct a trial de novo; and
- (e) in the absence of an identifiable error by the trial judge, an appellate court should not substitute its opinion.

There are compelling reasons for concluding that courts should not interfere with factual determinations of administrative tribunals and that such intervention should be more restrained in the case of an administrative tribunal as compared to the factual findings of a trial judge. Presumably, the expertise and specialized nature of the proceeding and the tribunal before whom such proceedings take place argue in favour of greater judicial restraint.

The Supreme Court, in three recent decisions with respect to a statutory appeal from a tribunal, dealt with the question of the degree of deference that should be accorded to those decisions, in the absence of a privative clause in reference to findings of fact made during a hearing.³³ The Supreme Court has acknowledged that in cases involving decisions of human rights tribunals (*Zurich* and *Dickason*), there may be no particular expertise in the composition of the tribunal or subject matter of the decisions being made, yet human rights tribunals do have specialized fact-finding functions and courts should defer to findings of fact of these tribunals.

The basis of this is not only a general preference for deferring to a tribunal which conducts the hearing, but also that a tribunal, by virtue of its limited jurisdiction, may be able to determine the facts more quickly, efficiently and with greater reliability than a court. In the instance of human rights tribunals, the Supreme Court has prescribed two standards for intervention: the standard for judicial intervention on findings of fact is that the tribunal cannot have been patently unreasonable; with respect to the tribunal's determinations of law, the tribunal must be correct.

The application of the facts to the task at hand when dealing with a tribunal that has specialized knowledge and expertise requires even greater vigilance to the policy of non-intervention by a court in the absence of a finding that is patently unreasonable. K.C. David commented as follows, with reference to a passage from the United States Supreme Court's decision in *N.L.R.B. v. 7-Up Bottling Co.*,³⁴ in his revised text *Administrative Law Treatise*:

*The court might well have said that in fashioning law or policy, whether or not about remedies, the agency cannot be confined to the record of the one proceeding. The true distinction is not between fashioning remedies and performing other tasks; the true distinction is between finding facts about the parties and using facts for determining questions of law and policy and discretion.*³⁵

It is not only the evidence or facts that are presented before the tribunal which the tribunal may consider in arriving at its decision. It is also the "truths" known to the specialized tribunal in its area of expertise upon which the tribunal can act and use in determining the questions of law, policy and discretion which it will exercise. This has been codified in Ontario in section 16 of the *Statutory Powers Procedure Act*,³⁶ which reads as follows:

16. A tribunal may, in making its decision in any proceedings,
 - (a) take notice of facts that may be judicially noticed; and
 - (b) take notice of any generally recognized scientific or technical facts, information, or opinions within its scientific or specialized knowledge.

Within its area of expertise, unless there was no evidence to support a finding of fact made by a tribunal, or the conclusions drawn by the tribunal from the facts as found were irrational, a court should not interfere with findings of fact.

V. THE LAW RELATING TO JURISDICTION

When a tribunal is deciding upon its jurisdiction, the law has been consistent that the standard for judicial intervention is the correctness or lack thereof of the decision under review or appeal. The rationale for allowing a greater degree of judicial intervention is that the determination of jurisdiction is not a matter within the expertise of the tribunal.³⁷

Courts will often justify judicial interference by characterizing a determination by a tribunal as a matter of jurisdiction rather than a determination by the tribunal exercising its jurisdiction. For example, it is often possible to question whether a tribunal has the capacity to determine a question as opposed to questioning the way in which that capacity was exercised. As such, the way in which the question is posed for the court becomes very important.

It is not the height of cynicism to conclude that when the court wishes to intervene, it characterizes the error as jurisdictional and thus imposes a standard of correctness on a tribunal. If the court chooses not to intervene, it can avoid such intervention merely by characterizing the question as one not involving the determination of jurisdiction. Lord Denning, in explaining the difference between the decision of the Court of Appeal and the House of Lords in *Anisminic v. Foreign Compensation Commission*³⁸ recognized this judicial exercise as follows:

So fine is the distinction that in truth the High Court has a choice before it whether to interfere with an inferior court on a point of law. If it chooses to interfere, it can formulate its decision in the words: 'The court below had no jurisdiction to decide this point wrongly as it did.' If it does not choose to interfere, it can say: 'The court had jurisdiction to decide it wrongly and did so.'

*Softly be it stated, but that is the reason for the difference between the decision of the Court of Appeal in [Anisminic] and the House of Lords.*³⁹

VI. THE INTERPRETATION AND APPLICATION OF CONSTITUTIVE LEGISLATION

If a tribunal is a specialized tribunal or if its decisions are protected by a privative clause, it has the right to be wrong in its interpretation of its constitutive legislation provided, in being wrong, it is not patently unreasonable. This has been recognized recently by Sopinka J. in *Bradco*: if the determination of law to be made comes within the area of expertise of the tribunal, courts should not interfere with that determination unless it is patently unreasonable, notwithstanding the fact that a court may find that it would have made a different determination.⁴⁰

The rationale for curial deference to these determinations of law is that the specialized knowledge of a given agency may make it more qualified than a court to provide interpretations of the constitutive statute, given the broad policy context within which that agency or tribunal must work.⁴¹ Although Wilson J.'s decision in *National Corn Growers* was a dissenting judgment, this passage was adopted in the unanimous decision of L'Heureux-Dubé J. in *Domtar*.⁴² If there is an absence of a privative clause yet there is a specialized tribunal with expertise, the requirement for curial deference to decisions made within the jurisdiction of the tribunal including decisions of law within its jurisdiction was expressed by Sopinka J. as follows:

*Even where the tribunal's enabling statute provides explicitly for appellate review, as was the case in Bell Canada, supra, 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.*⁴³

VII. THE RATIONALE FOR CURIAL DEFERENCE

There are a number of reasons which justify curial deference to decisions of administrative tribunals which have a specialized jurisdiction and specialized knowledge and expertise.

The first rationale has as its basis the reason why administrative tribunals were created in the first place. They were created to deal expeditiously with complex technical and specialized matters which, in the absence of administrative tribunals, would tie up our courts.

There is no doubt that many tribunals have superior technical expertise to deal more efficiently and quickly with problems than courts. It is impractical to think that our courts could re-adjudicate the vast number of complex matters that are decided by administrative tribunals.

Tribunals are often inquisitorial and have processes that provide advantages as fact-finders and as regulators. Tribunals usually have the power to summon and enforce the attendance of witnesses which may not be called by the parties before them but which are required by the tribunal to properly adjudicate the matter. It is often necessary for tribunals, in a regulatory setting, to issue conflicting decisions.⁴⁴ Tribunals are not bound in their proceedings by the rules of evidence and, as such, may rely on relevant evidence, even when such evidence is not admissible in a court of law. As such, tribunals can gather information more quickly and from sources unavailable to courts. The information is received by a tribunal having greater expertise in a specialized area than judges.

The second rationale has as its basis a respect for legislative direction. It is interesting to consider the consequences of not deferring to the decision of a tribunal with specialized knowledge and expertise in not only its findings of fact but also in the interpretation and application of legislation. This consequence was recently articulated by L'Heureux-Dubé J. as follows:

Substituting one's opinion for that of an administrative tribunal in order to develop one's own interpretation of a legislative provision eliminates its decision-making autonomy and special expertise. Since such intervention occurs in circumstances where the legislature has determined that the administrative tribunal is the one in the best position to rule on the disputed decision, it risks, at the same time, thwarting the original intention of the legislature. For the purposes of judicial review, statutory interpretation has ceased to be a necessarily 'exact' science and the Court has, again recently, confirmed the rule of curial deference set forth for the first time in C.U.P.E., supra; Bradco, supra; Lester, supra; Bell Canada, supra; National Corn Growers, supra; Paccar, supra. In the recent decision PSAC No. 2, Cory J. noted that this was a strict test (at page 964):

It is not enough that the decision of the board is wrong in the eyes of the court; it must, in order to be patently unreasonable, be found by the court to be clearly irrational.⁴⁵

CONCLUSION

While the Supreme Court has set out guidelines for judicial intervention in labour cases, the Court has yet to set out guidelines for judicial intervention in those cases where the decision under appeal is that of a specialized tribunal. Cory J.'s guidelines from *Dayco*, are as follows:

Despite the recognition of the importance and reliability of the decision of labour boards and arbitrators, the courts must retain the ability to review their decisions. In broad terms, the review can be founded on any one of the following bases:

1. *if, during the course of its proceedings the tribunal has failed to provide procedural fairness, the court may intervene;*
2. *if the tribunal exceeded the bounds of the jurisdiction conferred upon its by its enabling legislation, intervention by the court will be appropriate;*
3. *if the tribunal acted within the purview of its enabling legislation but rendered a decision that is patently unreasonable, the court may intervene.*⁴⁶

These guidelines, while given in the context of a labour case, are consistent with both the existing appellate jurisdiction to review a specialized tribunal's decisions and the trust that must be accorded to a specialized tribunal by virtue of the legislative mandate it has received. I think that it would be appropriate if these guidelines were applied and developed by courts when dealing with decisions of administrative tribunals with specialized knowledge.

FOOTNOTES

1. *Dickason v. University of Alberta*, [1992] 2 S.C.R. 1103; *Zurich Insurance Co. v. Ontario (Human Rights Commission)*, [1992] 2 S.C.R. 321; *Domtar Inc. v. Quebec*, [1993] 2 S.C.R. 756; *Canada (Attorney General) v. Mossop*, [1993] 1 S.C.R. 554; *United Brotherhood of Carpenters and Joiners of America, Local 579 v. Bradco Construction Ltd.*, [1993] 2 S.C.R. 316; *Dayco (Canada) Ltd. v. National Automobile, Aerospace and Agriculture Implement Workers Union of Canada (CAW-Canada)*, [1993] 2 S.C.R. 230; *University of British Columbia v. Berg*, [1993] 2 S.C.R. 353.
2. *Canadian Union of Public Employees Local 963 v. New Brunswick Liquor Corporation*, [1979] 2 S.C.R. 227.
3. *Domtar*, *supra* note 1 at 775.
4. *Canadian Pacific Ltd. v. CTC* (1988), 79 N.R. 13 at 17, Urie J.
5. *Re Denison Mines Ltd. v. Ontario Securities Commission* (1981), 32 O.R. (2d) 469 at 479-480, Robins J. (Ont. Div. Ct.).
6. *Bradco*, *supra* note 1 at 331.
7. *National Corn Growers Assn. v. Canada (Import Tribunal)*, [1990] 2 S.C.R. 1324.
8. This is the interpretation of Wilson J. in *National Corn Growers*, *ibid.* at 1336-1337 of Dickson J.'s reasoning in *C.U.P.E.*, *supra* note 2.
9. *U.E.S. Local 298 v. Bibeault*, [1988] 2 S.C.R. 1048 at 1088, Beetz J.
10. *Bradco*, *supra* note 1 at 331-332.
11. *Ibid.* at 331.
12. *Ibid.* at 335.
13. *Canadian Lift Truck v. Deputy M.N.R.* (1956), 1 D.L.R. (2d) 497 at 498, Kellock J.; *Boulis v. Minister of Manpower & Immigration*, [1974] S.C.R. 875 at 877 and 885.
14. *Bell Canada v. CRTC* (1989), 60 D.L.R. (4th) 682 at 698-699.
15. *C.U.P.E.*, *supra* note 2 at 235.
16. *Bradco*, *supra* note 1 at 331-336.

17. *Ibid* at 337; *National Corn Growers*, *supra* note 7 at 1346; *CAIMAW v. Paccar of Canada Limited*, [1989] 2 S.C.R. 983 at 1003; *Dayco*, *supra* note 1 at 266.
18. *Domtar*, *supra* note 1 at 775 and 796.
19. *Westlake v. R.* (1971), 21 D.L.R. (3d) 129 (Ont. H.C.), *aff'd* (1972), 26 D.L.R. (3d) 273 (Ont. C.A.), *aff'd* (1973), 33 D.L.R. (3d) 256 (S.C.C.).
20. J.M. Evans *et al.*, *Administrative Law*, 3d ed., (1989) at 414.
21. *National Corn Growers*, *supra* note 7 at 1336-1337.
22. *Domtar*, *supra* note 1 at 800.
23. *W.W. Lester (1978) Limited v. United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry, Local 740*, [1990] 3 S.C.R. 644 at 651.
24. *C.U.P.E.*, *supra* note 2 at 424; *National Corn Growers*, *supra* note 7 at 456.
25. *Dayco*, *supra* note 1 at 266.
26. *C.U.P.E.*, *supra* note 2 at 424.
27. *Ibid*; *National Corn Growers*, *supra* note 7 at 456.
28. *Domtar*, *supra* note 1 at 799.
29. *Delgamuukw v. Her Majesty the Queen in Right of the Province of British Columbia et al.*, (25 June 1993), Vancouver Registry CA013770 [unreported].
30. *Ibid.* at 92.
31. *Ibid.* at 204-205.
32. *LaPointe v. Hôpital Le Gardeur*, [1992] 1 S.C.R. 351.
33. *Zurich*, *supra* note 1 at 338; *Mossop*, *supra* note 1 at 584; *Dickason*, *supra* note 1 at 1125.
34. *N.L.R.B. v. 7-Up Bottling Co.*, 344 U.S. 287 (1953).
35. K.C. Davis, *Administrative Law Treatise* vol. 3 (San Diego: K.C. Davis, 1980) at 211.
36. *Statutory Powers Procedures Act*, R.S.O. 1980, c. 484 s. 16.

37. *Bradco*, *supra* note 1 at 333; *Paccar*, *supra* note 17 at 453.
38. *Anisminic v. Foreign Compensation Commission*, [1969] 2 A.C. 147.
39. *Pearlman v. Keepers and Governors of Harrow School*, [1979] Q.B. 56 at 70.
40. *Bradco*, *supra* note 1 at 339.
41. *National Corn Growers*, *supra* note 7 at 1371.
42. *Domtar*, *supra* note 1 at 800.
43. *Bradco*, *supra* note 1 at 335.
44. *Domtar*, *supra* note 1 at 800.
45. *Ibid* at 775-776.
46. *Dayco*, *supra* note 1 at 307.