EXPERTISE IN ADMINISTRATIVE LAW: INSTITUTIONAL OR INDIVIDUALIZED ASSESSMENT?

Michael Stephens

Introduction

Administrative law concerns the principles which govern the various decisions made by government officials and agencies in fulfillment of a statutory mandate, and the available remedies for the challenge to such decisions. Statutory decisions cover a vast expanse of subject matter and extend into almost every facet of modern life. These decisions can be in the form of rules, bylaws or policies; or may be the result of a lengthy adjudication after the hearing of witnesses, much like the decision of a judge after hearing a civil trial. Such decisions have the ability to impact people’s lives directly and profoundly. For this reason, the study and understanding of administrative law is of considerable practical importance. Administrative law is that branch of law which governs decisions of this sort and regulates the scope and effect of such decisions.

Expertise is a preoccupation of administrative law. However, the true nature of expertise has largely gone unexplored. As noted by Jacobs and Kuttner, “[o]ur administrative law history reveals…. 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.”

The purpose of this paper is to provide an overview of how expertise matters in the field of administrative law. This paper will particularly seek to address whether, when analyzing expertise, courts take an institutional approach or an individual approach; and, if an institutional

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1 Legal Counsel, Hunter Litigation Chambers Law Corp. I would like to thank Suzanne Grant (a summer student) and Eileen Patel, an associate at our office, for their helpful assistance with this paper.
2 And thus, in certain circumstances, attract the constraints imposed by the Canadian Charter of Rights and Freedoms.
approach, whether evidence beyond that which can be inferred from the tribunal’s constating statute is relevant to the assessment of tribunal expertise.

In brief, my conclusion is that:

(a) the jurisprudence speaks resoundingly to the taking of an institutional approach to expertise, analyzed primarily with reference to the nature of the tribunal as inferred from the statutory scheme;

(b) however, courts at times do seek to ground a finding of expertise in the reality of the tribunal’s existence with reference to extra-legislative considerations or inferences which seek to confirm that expertise in theory amounts to expertise in fact; but

(c) a consideration of the particular qualifications of a tribunal member (e.g., with reference to the member’s curriculum vitae) is not relevant to an inquiry into expertise in the standard of review context.

Policy underlying the system of administrative justice

It may be said that there are at least two aspects to the policy behind the system of administrative justice. In the first instance, administrative justice is an illustration of the collective decisions of legislatures to delegate the governmental decision-making of certain matters to separate tribunals designed for that purpose, as opposed to adjudicating such matters in courts or leaving them to high level ministerial determination. Such tribunals often possess expertise which is of assistance to the adjudication of the dispute at issue, as illustrated in a leading competition law decision.\(^4\)

The particular dispute in this case concerns the definition of the relevant product market -- a matter that falls squarely within the area of the [Competition] Tribunal’s economic or commercial expertise. Undeniably, the determination of cross-elasticity of demand, which is in theory the truest indicium

\(^4\) Canada (Director of Investigation and Research, Competition Act) v. Southam Inc., [1997] 1 S.C.R. 748 at paras 52–53.
of the dimensions of a product market, requires some economic or statistical skill. But even an assessment of indirect evidence of substitutability, such as evidence that two kinds of products are functionally interchangeable, needs a variety of discernment that has more to do with business experience than with legal training. Someone with experience in business will be better able to predict likely consumer behaviour than a judge will be. What is more, indirect evidence is useful only as a surrogate for cross-elasticity of demand, so that what is required in the end is an assessment of the economic significance of the evidence; and to this task an economist is almost by definition better suited than is a judge.

53 All of this is not to say that judges are somehow incompetent in matters of competition law. Significantly, Parliament mandated that the Tribunal should include judicial members, and that the Chairman should always be a judge. See Competition Tribunal Act, s. 4. Clearly it was Parliament’s view that questions of competition law are not altogether beyond the ken of judges. However, one of the principal roles of the judicial members is to decide such questions of pure law as may arise before the Tribunal. Over those questions they have exclusive jurisdiction. See supra at s. 12(1)(a). But over questions of fact and of mixed law and fact, the judicial members share their jurisdiction with the lay members. … Thus, while judges are able to pronounce on questions of the latter kind, they may do so only together with the lay members; and, in a typically constituted panel, such as the one that sat in this case, the lay members outnumber the judicial ones, so that in the event of a disagreement between the two camps, the lay members as a group will prevail. This makes sense because, as I have observed, the expertise of the lay members is invaluable in the application of the principles of competition law. [underlining added]

A second facet of the policy of administrative law is that, having so delegated the workings of government and adjudication of disputes, resultant decisions of tribunals and officials must be overseen by courts to ensure such decisions are made within the bounds of the statutory jurisdiction conferred on tribunals. The Constitution does not allow for the complete insulation of administrative decisions from judicial review. The question of the relative expertise of tribunals as compared to courts has historically militated toward a stance of deference by a court toward a decision of a tribunal, but the courts retain a supervisory role nonetheless. It is in this way that administrative law seeks to ensure that when administrative justice is implemented justice is truly done. In this way, and as developed further below, expertise is a central factor in the assessment of whether and when a reviewing court can intervene with the decision of a statutory tribunal or other decision-maker.
This second rationale – maintaining the rule of law -- was expressed as follows in *Dunsmuir v. New Brunswick.*

[27] As a matter of constitutional law, judicial review is intimately connected with the preservation of the rule of law. It is essentially that constitutional foundation which explains the purpose of judicial review and guides its function and operation. Judicial review seeks to address an underlying tension between the rule of law and the foundational democratic principle, which finds an expression in the initiatives of Parliament and legislatures to create various administrative bodies and endow them with broad powers. Courts, while exercising their constitutional functions of judicial review, must be sensitive not only to the need to uphold the rule of law, but also to the necessity of avoiding undue interference with the discharge of administrative functions in respect of the matters delegated to administrative bodies by Parliament and legislatures.

[28] By virtue of the rule of law principle, all exercises of public authority must find their source in law. All decision-making powers have legal limits, derived from the enabling statute itself, the common or civil law or the Constitution. Judicial review is the means by which the courts supervise those who exercise statutory powers, to ensure that they do not overstep their legal authority. The function of judicial review is therefore to ensure the legality, the reasonableness and the fairness of the administrative process and its outcomes.

The thesis that tribunals must act within the scope of their statutory powers is easily stated but gives rise to a wide variety of legal and practical problems, which is a chief pre-occupation of administrative law practitioners. When determining whether a tribunal has acted within the scope of its powers a court must first determine the appropriate standard of review to be applied to the tribunal. The question of the appropriate standard of review is in essence the regulator of when it is appropriate for a court to intervene and overturn an administrative decision, to maintain the rule of law. The correct assessment of tribunal expertise, tied as it is to the appropriate standard of review (as discussed further below) thus has a connection to the maintenance of rule of law.

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Why Expertise Matters: Administrative Law Theory

The system of administrative justice is premised on the delegation of a variety of statutory decision-making to tribunals and other government officials. Where a specific tribunal is constituted to hear and decide cases affecting statutory rights and responsibilities, members of such tribunals can be chosen with background and experience which provide a specialized expertise to the work of the tribunal. In addition, once constituted, such a tribunal will have the benefit of regular dealing with the subject statutory scheme, and the attendant policy basis for such a scheme, so as to develop particular expertise in this subject matter. This principle of specialization of duties was acknowledged by Binnie J. in Canada v. Khosa:

[25] …. Dunsmuir recognized that with or without a privative clause, a measure of deference has come to be accepted as appropriate where a particular decision had been allocated to an administrative decision-maker rather than to the courts. This deference extended not only to facts and policy but to a tribunal’s interpretation of its constitutive statute and related enactments because “there might be multiple valid interpretations of a statutory provision or answers to a legal dispute and that courts ought not to interfere where the tribunal’s decision is rationally supported” (Dunsmuir, at para. 41). A policy of deference “recognizes the reality that, in many instances, those working day to day in the implementation of frequently complex administrative schemes have or will develop a considerable degree of expertise or field sensitivity to the imperatives and nuances of the legislative regime” (Dunsmuir, at para. 49, quoting Professor David J. Mullan, “Establishing the Standard of Review: The Struggle for Complexity?” (2004), 17 C.J.A.L.P. 59, at p. 93). Moreover, “[d]eference may also be warranted where an administrative tribunal has developed particular expertise in the application of a general common law or civil law rule in relation to a specific statutory context” (Dunsmuir, at para. 54). [emphasis added]

Thus, the premise of much administrative law, certainly that branch which concerns specialized tribunals overseeing a particular statutory scheme, is founded on the existence of expertise.

The courts initially took an unforgiving and interventionist attitude to the decisions of administrative decision-makers. As Wilson J. explained in some detail in her dissenting reasons

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6 Canada (Citizenship and Immigration) v. Khosa, 2009 SCC 12.
in National Corn Growers Association v. Canada (Import Tribunal), the early view was heavily influenced by English legal theorist A.V. Dicey’s description of the rule of law. Dicey’s view was that the rule of law required the supervision of state officials by the courts, much in the same manner that courts supervised the actions of individuals. The realities of the complex administrative state, in which the legislature delegated powers to increasingly specialized tribunals with increasing frequency, demanded a more deferential approach.

The notion of expertise has driven the court’s rationale for deferring to administrative tribunals since C.U.P.E. v. N.B. Liquor Corporation. Dickson J. (as he then was) explained the rationale in the context of labour relations boards:

The rationale for protection of a labour board's decisions within jurisdiction is straightforward and compelling. 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. [at 235-236]

Dickson J. went on to explain that expertise is not just a result of the creation of a specialized body; it is also the manifestation of statutory intent. The goals of the statute in question, simultaneously maintaining public services and a system of collective bargaining, required “[c]onsiderable sensitivity and unique expertise” on the part of the Board members.

The relative expertise of a tribunal in relation to the question at issue, in comparison with that of the court, has been at the heart of standard of review approaches taken by the Court in the years since Dickson J.’s decision in C.U.P.E. v. N.B. Liquor Corporation. Since the Supreme Court has consistently paid tribute to the idea of judicial deference in the face of expertise: see, e.g., Telecommunication Workers Union v. British Columbia Telephone Co.; and Bell Canada v. Canada (Canadian Radio-television and Telecommunications Commission).

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9 See also S.A. de Smith, *Judicial Review of Administrative Action* (London: Oceana Publications, 1959), at 9-10
11 Ibid., at 236.
Why Expertise Matters: Standard of Review Practice

As noted above, expertise has historically been a central consideration in the determination by a court of the appropriate standard of review. This is reflected in the formal doctrinal rule, in which standard of review is assessed with reference to a series of factors, expertise amongst them:

[64] The [standard of review] analysis must be contextual. As mentioned above, it is dependent on the application of a number of relevant factors, including: (1) the presence or absence of a privative clause; (2) the purpose of the tribunal as determined by interpretation of enabling legislation; (3) the nature of the question at issue, and; (4) the expertise of the tribunal. In many cases, it will not be necessary to consider all of the factors, as some of them may be determinative in the application of the reasonableness standard in a specific case.14 [emphasis added]

Indeed, in 1997 the Supreme Court of Canada reiterated that expertise was the most important factor in the standard of review analysis:

50 Expertise, which in this case overlaps with the purpose of the statute that the tribunal administers, is the most important of the factors that a court must consider in settling on a standard of review. This Court has said as much several times before, though perhaps never so clearly as in the following passage, from United Brotherhood of Carpenters and Joiners of America, Local 579 v. Bradco Construction Ltd., [1993] 2 S.C.R. 316, at p. 335:

. . . 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.15

[emphasis added]

14 Dunsmuir v. New Brunswick, 2008 SCC 9; see also para 49.
15 Southam, supra.
Given that the factor of expertise can militate toward a stance of deference (reasonableness) instead of correctness, it is a consideration of great practical importance in administrative law. The outcome of a judicial review case may turn on the court’s conclusion of the appropriate standard of review; hence, a consideration of the nature of expertise, a central driving factor in the standard of review analysis, is of keen interest to administrative law scholars and practitioners.

What is expertise?

It is somewhat ironic that despite its critical importance in the standard of review assessment, little has been written on the true nature of expertise. Jacobs and Kuttner note that the Supreme Court of Canada gave perhaps its most fulsome explanation on the matter in *Pushpanathan*:

> ...We are told [from that case] that the factor of expertise used in determining the appropriate standard of defence 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.

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. 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.

Other forms of expertise giving rise to deference include: expertise arising from the specialization of function, such as the use of judicial council for disciplining judges; expertise in the choice of sanctions; expertise of lay persons about the general public’s perception; expertise

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from experience in the repeated application of the statute, regulations, guidelines or policy in question; expertise of a specialized administrative tribunal which possesses considerable expertise over the subject of its jurisdiction; and expertise of fact finders with respect to findings of fact.\textsuperscript{18}

\textbf{Institutional or Individualized Assessment of Expertise}

A question arises whether, when assessing expertise, a reviewing court should be permitted to refer to the skill set or other particular material qualifications of the decision-maker on review. In other words, ought courts search for expertise \textit{in fact} or expertise \textit{in concept}. After all, if a theory of judicial review seeks to defer to those decisions made by expert tribunals, why would the particular factual skill set of the decision-maker not be relevant to determine if the person is truly expert?

That was not the approach taken by the Supreme Court of Canada in the \textit{Southam} decision. There, Iacobucci J. analyzed the relative expertise of the Competition Tribunal with reference to the nature of the tribunal as discerned from the constituting statute.\textsuperscript{19} However, the issue as to whether an individualized assessment could also be undertaken was not addressed by the Court.

A series of decisions of lower courts in Canada have followed the trajectory of the \textit{Southam} case, and have considered squarely the whether the particular characteristics of the members of the tribunal or other decision-making body are relevant to the expertise assessment in deciding the standard of review. These decisions make clear that an individualized factual assessment of expertise is neither doctrinally appropriate nor desirable in a standard of review analysis.

The issue arose in \textit{A.I. et al v. Giesbrecht},\textsuperscript{20} a judicial review of a decision of a Director under the Ontario \textit{Child and Family Services Act} to conduct of review of a decision of a Children’s Aid Society to refuse to place a child with applicants for adoption. Before the Court, the applicants

\textsuperscript{18} St. John (City) Pension Board v. New Brunswick (Superintendent of Pensions), 2006 NBCA 70 at para 83 (per Robertson J.A.) referring to David P. Jones, \textit{Standards of Review in Administrative Law} (June 2005).

\textsuperscript{19} See \textit{Southam}, supra at paras 50-51. See also a discussion of this and subsequent Supreme Court of Canada cases on the expertise factor: David J. Mullan, \textit{Establishing the Standard of Review: The Struggle for Complexity?} (2004), 17 CJALP 59 at 68ff.

\textsuperscript{20} \textit{A.I. et al. v. Giesbrecht} (an appointed Director pursuant to section 144 of the Child and Family Services Act) et al. (2005), 75 O.R. (3d) 663 (S.C.J – Div Court).
challenged the suitability of the appointment of statutory decision-makers. The Court dismissed such considerations from a standard of review analysis, cautioning it would lead to “invidious inquiries and findings of competence on an individual basis requiring evidence of an intrusive and problematic nature”.

The Court stated that it was important to recognize that the assessment of expertise in the pragmatic and functional analysis is not intended to measure the personal suitability of a particular appointee to make a decision confided to him or her, and explained instead the legislative intent and statutory scheme should be the preeminent focus:

84  …Rather, it is part of the effort to determine the legislative intent as to the finality of the decision in question vis-à-vis supervision by the courts. Accordingly, it is legitimate to look at the tasks confided to the Director by the statute as indicating the level of expertise anticipated by the Legislature and, therefore, casting light on this issue… [para 84; emphasis added]

The Court continued:

85  …. I think that, in seeking a balance between inferring the necessary expertise from the statute on the one hand, and considering the evidence as to the institutional competence of the tribunal on the other, both practical and case law considerations lead to a focus on the legislative structure, since legislative intent is what we seek to understand. The practical considerations include the uncertainty created by a focus on the available panel, or possibly each adjudicator, the invidious nature of the inquiries required, the cost to the parties of procuring the necessary evidence, the lengthening of the administrative review process and the intrusion into the life of the adjudicator thereby created. From a case law point of view, it seems to me that if the Supreme Court wanted the personal characteristics of the adjudicator to be prominent, the Court would have said so long ago, and I do not think that they should have more than a very minor place in the analysis. Nevertheless, the court must examine to some degree the administrative realities by which the legislative intent is sought to be implemented.

[emphasis added]
Notably, the Court was prepared to assume that persons suitable for the position as Director, whose responsibilities are articulated by the statute, would in fact be appointed by the Minister for this position, and would likely have relevant hands-on experience:

[86] The degree of deference should be assessed, as to the expertise factor, with reference to the statutory requirements, the permanence of the appointment, the history of the office, the breadth of the responsibility given to the office, the administrative arrangements to support the legislated goals, and, at least in the absence of egregious circumstances, a working assumption that the Minister will carry out her duty by appointing persons who are suitable for such responsibilities. …

[91] … I conclude that, on the whole, persons entrusted by the Minister with the extensive powers accorded to Directors under the CFSA are likely to have “hands-on” expertise not possessed by the court, and this tends toward deference, but that they will not have greater expertise than the court in the mixed fact and law issue of determining the best interests of the Child. … [emphasis added]

A primarily institutional assessment of expertise was also applied by the New Brunswick Court of Appeal on a consideration of essentially the same issue in *St. John (City) Pension Board v. New Brunswick (Superintendent of Pensions)*. This was a judicial review of a decision of the Labour and Employment Board deciding a matter under the *Pension Benefits Act*, S.N.B. 1987, c.P-5.1. When considering the factor of expertise, the majority of the court stated that the fact that the Board’s constating statute did not require that Board possess legal qualifications was not a sufficient basis to rule that the Board lacked a relative expertise with regard to any or all interpretative decisions. Notably, the majority of the court took notice of the fact that the practice of the Board is to have lawyers on the Board (as Chair and Vice-Chair) and that the court expected that those members would typically be involved in deciding matters concerning questions of law:

81 As a general proposition, the Board's interpretations of the *Industrial Relations Act* and the *Public Service Labour Relations Act* are subject to the review standard of patent unreasonableness. … This is true notwithstanding the fact that the *Labour and Employment Board Act* does not require potential appointees to possess a legal expertise. Indeed, we know that most Board members are non-lawyers. Typically, they are representative of the Board's two

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21 *Supra*, note 18 (para 80).
constituent audiences: employers and employees. But we are also cognizant of the fact that historically the Chair and Vice-Chair have been lawyers and, thus, it has come to be expected that cases involving questions of law will be chaired by the legally trained appointee. It is his or her deemed expertise that is to inform the opinions of those who lack legal training. In the present case, the Superintendent's ruling was dealt with by a single member of the Board, who happens to be its Chairman and a lawyer. This is how Canadian labour tribunals have traditionally functioned and why, historically speaking, the decisions of such tribunals have been accorded deference on interpretative issues falling within their presumed expertise because of the insular qualities of the full privative clause inevitably found in the tribunal's enabling legislation. One needs only revisit CUPE, Local 963 v. New Brunswick Liquor Corp., [1979] 2 S.C.R. 227 to confirm this understanding of the law. In conclusion, the fact that a labour tribunal's enabling statute does not require appointees to have a legal expertise is not a sufficient basis for concluding that the tribunal lacks a relative expertise when it comes to addressing an interpretative issue. … [emphasis added]

Robertson J.A. (speaking for the majority of the court) then went on to consider the expertise question and commented specifically that it would be inappropriate to analyze the specific qualifications of the individual tribunal members whose decision is on review:

82 There is very little written on how one goes about assessing the expertise of an adjudicative tribunal. Certainly, one is required to look at the tribunal's constitutive statute in search of the answer and refrain from looking at the qualifications of individual tribunal members to decide whether the tribunal possesses a relative expertise. Regrettably, New Brunswick does not have the equivalent of s. 58(1) of the British Columbia Administrative Tribunals Act, S.B.C. 2004, c. 45. That provision states that if a tribunal's enabling statute contains a privative clause the tribunal is deemed to be an expert tribunal in relation to all matters over which it has exclusive jurisdiction. In the absence of such a provision, what reviewing judges must look for is institutional expertise. [emphasis in the original]

To similar effect is the decision of the Federal Court of Appeal in Gillis v. Canada (Attorney General). This was a judicial review of a decision by an adjudicator dismissing a complaint brought by a member of the RCMP who was dissatisfied with the denial of a promotion. In the

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22 Which provides: “58 (1) If the tribunal's enabling Act contains a privative clause, relative to the courts the tribunal must be considered to be an expert tribunal in relation to all matters over which it has exclusive jurisdiction.”

23 2007 FCA 112.
court below, the applications judge appeared to consider as relevant the qualifications of the adjudicator:

22 The expertise of the Adjudicator is not entirely clear. On cross-examination the Respondent's witness was asked as to the expertise of the particular individual and was unable to give any helpful answer. The Standing Order simply describes an "Adjudicator" in section 1 as an officer or senior manager designated by the Commissioner. It appears that an Adjudicator is not a full time position and not one for which there must be specialized qualifications. This points to lower deference.\footnote{Gillis v. Canada (Attorney General), 2006 FC 568. For additional cases in which an individualized assessment was taken when considering the issue of judicial deference, see Zaytoun v. Canada (Canadian Food Inspection Agency), 2008 FC 502 at para 63 (curriculum vitae reviewed), rev’d (but not commenting on this point) 2009 FCA 17; and Charles River Consultants Corp. v. Coombs, 2006 NLTD 174 at para 20.} [underlining added; italics in the original]

The Federal Court of Appeal disagreed with such an individualized assessment of expertise. Instead, Evans J.A. followed the A.I. v. Giesbrecht decision, and held that expertise in administrative law is determined on an institutional basis:

25 Third, adjudicators are RCMP officers or senior managers. In my respectful opinion, the Applications Judge erred when, in assessing expertise, he appeared to regard as relevant the experience of the particular adjudicator whose decision he was reviewing: para. 22.

26 For standard of review purposes, the expertise of the administrative decision-maker under review must be assessed by reference to the office or institution, not the curriculum vitae of the decision-maker under review: see, for example, A.I. v. Ontario (Director, Child and Family Services Act) (2005), 75 O.R. (3d) 663 (S.C.J. Div. Ct.) at paras. 81-82. [emphasis added]

The Court then proceeded to analyze the expertise factor institutionally, with reference to the RCMP Administrative Manual, and concluded there was institutional expertise and therefore considerable deference was appropriate:

27 More relevant are the qualifications for adjudicators set out in the D.3.b. of the Administration Manual quoted above, which provides that persons appointed as adjudicators should have legal training, or training or experience as an adjudicator. Even though these provisions are not contained in a statutory order, they were developed to guide the exercise of discretion by the senior officer
whom the Commissioner designated under subsection 5(2) of the *RCMP Act* to appoint adjudicators.

28 The fact that adjudicators are members of the RCMP, and should have legal or directly relevant training or experience in adjudication, indicates that they have knowledge of the internal administration of the RCMP and of the process of adjudication.

29 The crucial question is whether the administrative decision-maker is better equipped than the reviewing court to decide the issues in dispute. Even though adjudicators are senior managers or officers of the RCMP, not independent external arbitrators, the relative expertise factor favours considerable deference in this case.

In the jurisprudence subsequent to *Southam*, David Mullan has observed that expertise is analyzed in terms of statutory qualifications, sometimes as a positive and sometimes as a negative indicator.\(^{25}\) He notes that the fact that members of a tribunal are practicing lawyers was treated as a positive indicator of a tribunal’s expertise with respect to contemporary standards of conduct *Ryan v. Law Society of New Brunswick*\(^{26}\); and the fact that only ten per cent of a Board’s members were required to be lawyers was indicative of a lack of expertise in relation to matters of general importance in the realm of human rights adjudication *Pushpanthan*.\(^{27}\) However, he also notes that an absence of statutory qualifications is not determinative against the recognition of expertise, since expertise can exist in the form of an accretion of expertise by members over the course of the members’ term of appointment: *Deputy Minister of National Revenue v Mattel Canada Inc.*\(^{28}\)

Mullan concludes that the judicial analysis of expertise is an amalgam of statutory criteria and matters of conjecture:

> The assessment of expertise emerging from all of this is an exercise which depends on a combination of considerations, most of which involve conjecture, not scientific inquiry by the courts. This conjecture is built upon the nature of any statutory qualifications and assumptions about the kind of experience that is likely to be developed in carrying out the tribunal’s mandate and how each of those factors matches up against the nature of the particular issues that are before the court by way of judicial review or statutory appeal. To this point, despite Wilson


\(^{26}\) *Law Society of New Brunswick v. Ryan*, 2003 SCC 20 at paras 30-34; *Pushpanthan*, supra note 16 at paras. 45-47.

\(^{27}\) Supra, note 16 at paras 45-47

\(^{28}\) *Canada (Deputy Minister of National Revenue) v. Mattel Canada Inc.*, 2001 SCC 36 at paras 28-33.
J.’s perhaps reliance upon the actual qualities of the then Trade Tribunal in *National Corn Growers*, there is little warrant for the inquiry to go further than this into the details of what qualities a particular decision-maker or particular panel of decision-makers brings to the table in the terms of the relevant inquiries. As yet, it is still a largely generalized inquiry and not one assisted by the filing of affidavit evidence setting out the *curricula vitarum* of the deciding members of the tribunal under review.  

**The concept of acquired expertise**

It is evident that courts generally approach expertise from an institutional and not individual standpoint. That analysis might be open to criticism for failing to come to terms with the reality of the tribunal’s work, and whether expertise in theory is justified by expertise in fact. Jacobs and Kuttner state on this point:

> 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, 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.…

As has been adverted to above, courts have developed a theory of acquired expertise which may be said to partially bridge the disconnect between expertise in theory, and expertise in fact. An example of this can be seen in *Khosa*. There, Binnie J. noted that deference to expertise in administrative law is a concession to the reality that tribunals have day to day familiarity of matters which are the subject of their mandate, and thus may develop institutional expertise:

> [25] … A policy of deference “recognizes the reality that, in many instances, those working day to day in the implementation of frequently complex administrative schemes have or will develop a considerable degree of expertise or field sensitivity to the imperatives and nuances of the legislative regime” (*Dunsmuir*, at para. 49, quoting Professor David J. Mullan, “Establishing the Standard of Review: The Struggle for Complexity?” (2004), 17 *C.J.A.L.P. 59*, at 70-71.

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Moreover, “[d]eference may also be warranted where an administrative tribunal has developed particular expertise in the application of a general common law or civil law rule in relation to a specific statutory context” (Dunsmuir, at para. 54). [emphasis added]

A similar proposition was advanced by Iacobucci J. in Parry Sound (District) Social Services Administration Board v. OPSEU, Local 324:31 “expertise is not static, but, rather, is something that develops as a tribunal grapples with issues on a repeated basis”. And in Mattel, supra Major J. said this in the context of the Canadian International Trade Tribunal:

30 ... Wilson J. observed in National Corn Growers Assn. v. Canada (Import Tribunal), [1990] 2 S.C.R. 1324, at p. 1336, that “[c]areful management” of sectors like “international economic relations” “often requires the use of experts who have accumulated years of experience and a specialized understanding of the activities they supervise”. Section 3(1) of the Canadian International Trade Tribunal Act requires a chair, two vice-chairs and not more than six other permanent members to be appointed by the Governor in Council. Permanent members are appointed to hold office for a term not exceeding five years (s. 3(3)). Being permanent appointments, members of the CITT acquire experience in the questions they consider over the course of their appointments. Depending on the nature of the question at issue, members of the CITT acquire experience and expertise that courts do not. This is also consistent with Wilson J.’s characterization of the predecessor to the CITT as being “staffed by experts familiar with the intricacies of international trade relations who are in the business of dealing with a large volume of trade related cases” (National Corn Growers Assn., supra, at p. 1348). [emphasis added]

Has expertise been presumed and subsumed in the ‘home statute rule’?

I would be remiss, in a paper of this sort, to not point out that in a recent decision of the Supreme Court of Canada there was a suggestion that in a great many instances the explicit and detailed analysis of expertise may no longer be necessary or, at the very least, of reduced importance.

The proposition originates in the ‘home statute’ rule which emanates from paragraph 54 of the majority judgment in Dunsmuir, supra, where the Court said: “[d]eference will usually result

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31 Parry Sound (District) Social Services Administration Board v. O.P.S.E.U., Local 324, 2003 SCC 42, at para 53. Cf. St John’s (City) v. Newfoundland Power Inc., 2010 NLTD(G) 171 at para 35 (panel not part of legislated scheme where it had developed an expertise in the subject matter before it).
where a tribunal is interpreting its own statute or statutes closely connected to its function, with which it will have particular familiarity”.

In the subsequent case of *Smith v. Alliance Pipeline Ltd.*, a majority of the Supreme Court of Canada appeared to articulate this home statute rule in unqualified terms, without regard to whether the tribunal actually possessed expertise in dealing with the matter at hand under its home (or closely related) statute:

[25] … reviewing judges can usefully begin their analysis by determining whether the subject matter of the decision before them for review falls within one of the non-exhaustive categories identified by *Dunsmuir*. Under that approach, the first step will suffice to ascertain the standard of review applicable in this case.

[26] Under *Dunsmuir* … reasonableness is normally the governing standard where the question: (1) relates to the interpretation of the tribunal’s enabling (or “home”) statute or “statutes closely connected to its function, with which it will have particular familiarity” (para. 54);… [emphasis added]

The majority of the Court decided in *Smith v. Alliance Pipeline Ltd* that since the Committee was interpreting its home statute, “this will usually attract a reasonableness standard of review” (para 28).

Deschamps J., in a minority judgment, did not agree with the proposition advanced by the majority in this regard. Her judgment emphasized that there was “no presumption of experience or expertise flowing from the mere fact than an administrative tribunal is interpreting its enabling statute” (*Smith, supra* at para 80). Instead, relying on the *Dunsmuir* authority, Deschamps J. stated that an “administrative decision-maker actually needs to have particular expertise or experience in interpreting its home statute or statutes closely connected to its function” (para 87).

The majority and minority opinions in the *Smith v. Alliance Pipeline Ltd* case raised legitimate questions as to whether an assessment of expertise would continue to be of significance in the standard of review assessment, where a home (or closely related) statute is involved.

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However, in a more recent decision, released just prior to the completion of this paper, there is an indication the Supreme Court of Canada wishes to retain the importance of expertise in the standard of review analysis, even where a home statute decision is at issue. In *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, the Court referred to the ‘home statute’ rule and suggested that the rule of deference will only apply if the question at issue on review is within the tribunal’s expertise:

…In substance, if the issue relates to the interpretation and application of its own statute, is within its expertise and does not raise issues of general legal importance, the standard of reasonableness will generally apply and the Tribunal will be entitled to deference.³³ [emphasis added]

This recent opinion from the Supreme Court of Canada gives good cause to believe that, despite the apparent formulation of the home statute rule in *Smith v. Alliance Pipeline Ltd*, expertise will continue to retain its central significance in the fabric of administrative law standard of review jurisprudence.

**Conclusion**

Administrative law is an important branch of the law in Canada. This is because of the sheer scope of the delegation of statutory functions to government officials and tribunals, and the fact that such decisions can affect the rights and obligations of Canadians in a direct and profound manner. The role of the courts on judicial review is to supervise the legality of the decisions so made against the backdrop of the appropriate standard of review, and maintain the rule of law in the modern administrative state.

Expertise is an important component in determining the standard of review and its proper assessment in determining the standard of review is, by extension, relevant to the maintenance of the rule of law. When assessing expertise, courts primarily refer to the statutory scheme to infer

³³ *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2011 SCC 53, at para 24 per LeBel and Cromwell JJ.
whether the tribunal is expert, and take guidance from the proposition that expertise can be acquired from the day to day handling of matters by a tribunal. Reference to the particular qualifications of a tribunal member whose decision is on review is generally eschewed.

Nevertheless, the existing jurisprudence suggests that courts do seek to ground the analysis of expertise in the reality of the tribunal’s existence, for by example: the drawing of an inference that a member will be appointed with hands on experience relevant to the role of the decision-maker as discerned from the statute (A.I. v. Giesbrecht); by referring to the practice of appointing tribunal members with legal training, even when the constating statute does not require the appointment of lawyer members (St. John (City) Pension Board v. New Brunswick (Superintendent of Pensions); and by reliance on a review of a procedural manual which directs that the decision-maker possess legal training or training and experience as an adjudicator (Gillis v. Canada (A.G.)). In these ways, while formally eschewing a factual inquiry into the specific qualifications of a tribunal member, courts do appear prepared to move in a measured way from a purely conceptual notion of expertise as discerned from a legislative scheme toward a notion of expertise as practiced on the ground.