By Christopher Rootham

By now, lawyers with even a passing familiarity with administrative law have memorized the tired refrain of the “pragmatic and functional approach”: the level of judicial deference in any case of judicial review or statutory appeal by a court must be determined by reference to four factors: the presence or absence of a privative clause, purpose of the statute and the provision in particular, the nature of the problem, and the relative expertise of the decision maker.

Memorizing the test is easy: applying it is always problematic.

The most problematic of the factors is the “relative expertise” factor. None of the recent SCC administrative law judgments have conclusively addressed how one determines whether a particular decision maker has expertise with respect to the particular issue in question. In fact, there appear to be two competing views on how to assess expertise, both of which were applied in Law Society of New Brunswick v. Ryan, 2003 SCC 20. The first is that expertise is assessed by reference only to the statutory scheme. Where the statute mandates certain requirements or qualifications to be a decision maker, then this indicates expertise. The second view is that expertise is accumulated by repetition. In Ryan, the professional discipline committee generated expertise by “repeated application of the objectives of professional regulation.”

In Ryan, there was no conflict between these two views: both indicated expertise in the issue under review. However, these two views are often in conflict, in particular where the statute is silent as to the relative expertise of the decision maker. Is repeated application sufficient to override statutory silence with respect to expertise, and, if so, how does one demonstrate this expertise?

This debate can be seen in the majority and dissenting judgments in Barrie Public Utilities v. Canadian Cable Television Assn., [2003] 1 S.C.R. 476. The majority concluded that the appropriate standard of review was “correctness”, in part because it did not consider the Canadian Radio-Television Commission more of an expert than the court in interpreting the Telecommunications Act. The majority limited its consideration of expertise to the statute: in particular, section 7 which charged the CRTC with the implementation of Canada’s telecommunication policy.
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Therefore, the CRTC was not expert in statutory interpretation – even of its own statute – and should not be accorded deference.

Justice Bastarache, on the other hand, took a broader view of the source of expertise. He considered the CRTC's role in policy development and its accumulation of own body of law and policy as significant. More interestingly, he referred to the renewable five-year terms of CRTC members and concluded that this created "not only institutional but also personal experience on the part of individual members that accumulates during the CRTC's work." Justice Bastarache concluded that the CRTC did have expertise, and consequently that its decision should be reviewed on the more deferential "reasonableness" standard.

Although lower courts have not expressly come to grips with the contradictions between the two views of expertise, they appear to be applying the broader view of expertise espoused by Justice Bastarache. There are three interesting examples of this approach: two from the Federal Court and one from Ontario.

The first Federal Court case is Anderson v. Canada (Customs and Revenue Agency), [2003] F.C.J. No. 924. The Canada Customs and Revenue Agency Act requires the Canada Customs and Revenue Agency (CCRA) to establish a program governing staffing, including recourse for employees who apply for but are not appointed to vacancies. The statute is then silent on the form of that recourse. The CCRA has developed a three-stage recourse system. In Anderson, the applicant was turned down for a position because he did not meet the prerequisites for the position. As a result, he could only access the first stage of the recourse system: "Individual Feedback," or a meeting with the manager responsible for filling the vacancy. The Individual Feedback session did not result in any change to the decision of that manager; therefore, Anderson applied for judicial review.

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The Federal Court Trial Division applied the patent unreasonableness standard of review. Notwithstanding the complete absence of any statutory indication of expertise, it concluded that CCRA managers "must regularly be called upon to make findings" with respect to the qualifications of applicants for vacant positions. This was sufficient to support a conclusion that these managers were "expert" and deserved deference.

There was no evidence provided indicating the actual expertise of the manager in this case or whether he had ever been responsible for running a job competition before. The Federal Court was willing to presume expertise in this case.

In Echo Bay Mines Ltd. v. Canada, [2003] F.C.J. No. 996, the Federal Court of Appeal concluded that the Minister of Indian and Northern Affairs had no expertise in the interpretation of the term "depreciable assets" in the Canada Mining Regulations. Although the Court of Appeal eventually concluded that the appropriate standard of review was correctness, it did indicate that it would take a broad view of expertise. First, while the Minister himself or herself has no particular expertise in mining, the Court was willing to take into account the "institutional expertise in the Minister's department" and recognized that the decision was probably delegated to somebody with expertise. In other words, the actual decision maker does not need any expertise so long as they can ask somebody who does.

Second, there was no statutory reason why the Minister's staff would have this expertise: the court just assumed (again without evidence either way) that this staff would have expertise.

Finally, in Griffin v. Ontario (Minister of Transportation), [2004] O.J. No. 54 the Ontario Superior Court demonstrated a willingness to take a broad view of the sources of "expertise." In that case, the Registrar of Motor Vehicles suspended the applicant's driver's license for medical reasons. The judge concluded that the standard of review was reasonableness and, in light of the competing medical opinions, the Registrar's decision was reasonable. In considering the expertise of the Registrar, the Court also took an "institutional" view of expertise. In other words, the Registrar himself did not need medical expertise, but it was sufficient that he "had available" more expertise than is enjoyed by the court. Since the Registrar could consult medical experts, he himself was an expert deserving of some deference.

At this time, I do not believe it is possible to resolve this conflict by reference to any particular authoritative jurisprudence. I would simply suggest that this conflict is a reflection of a perhaps more fundamental dispute over the purpose behind judicial deference. The first purpose is to seek the "polar star" of legislative intent as Justice Binnie put it in CUPE v. Ontario (Minister of Labour), [2003] 1 S.C.R. 539: in other words, only give deference where indicated by the legislation. The second purpose is "the effectiveness and fair implementation of state policy" in a particular field. The view is that the more expert the decision maker, the more effective and fair the decision will be. This is the view enunciated by Justice L'Heureux-Dube in CUPE, Local 301 v. Montreal (City), [1997] 1 S.C.R. 793, and adopted by Bastarache J. in the Barrie Public Utilities case. Depending upon which of these two purposes is paramount in the court's mind, it may take a narrow or broad view of the sources of expertise.

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