

4-1-1998

## Reputational Review I: Expertise, Bias and Delay

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### Recommended Citation

Robert E. Hawkins, "Reputational Review I: Expertise, Bias and Delay" (1998) 21:1 Dal LJ 5.

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# Articles

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R.E. Hawkins\*

Reputational Review I:  
Expertise, Bias and Delay

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*Expertise, bias and delay arguments are shifting the focus of judicial review from the legality of administrative decisions to the reputation of administrative decision-makers. These grounds measure the skill, objectivity and efficiency characteristics that define administrators' reputations. They make it possible for courts to consider these reputations, even if only by way of unarticulated judicial notice, when deciding judicial review applications. After setting out the theory of expertise, bias and delay implicit in recent Supreme Court of Canada decisions, the author concludes that courts must use less impressionistic measures in judging these concepts, lawyers must present more concrete reputational evidence in arguing them, and administrators must become more sensitive to their impact on public opinion.*

*Des arguments de compétence, de préjugé et de délai sont en train de modifier l'approche traditionnelle à la révision judiciaire, de la légalité des décisions administratives à la réputation des décideurs administratifs. Ces facteurs mesurent les traits caractéristiques de l'habilité, de l'objectivité et de l'efficience qui précisent tous la réputation des administrateurs. Ils permettent aux tribunaux de réfléchir à ces réputations, même si ce n'est que par moyen d'avertissement judiciaire non articulé, lorsqu'on décide des applications de révision judiciaire. Après avoir établi la théorie de compétence, de préjugé et de délai implicite dans les décisions récentes de la Cour suprême du Canada, l'auteur ne peut que conclure d'abord que les tribunaux utilisent des démarches qui sont moins subjectives lorsqu'on juge ces concepts, ensuite que les avocats doivent présenter des preuves concrètes relatives à la réputation du décideur en question et finalement, que les administrateurs doivent s'efforcer à être plus sensible par rapport à l'influence qu'ils ont sur l'opinion publique.*

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\* Faculty of Law, University of Western Ontario. I would like to thank David Shoemaker, Jason Kroft, Michael McConnell and Christine Tabbert who provided research assistance and Frances Andrews, William Bargeman and Nancy Hawkins who provided support services. A companion article, "Reputational Review II: Administrative Agencies, Print Media and Content Analysis," forthcoming in the *Canadian Journal of Administrative Law and Practice*, builds on the theoretical framework set out in this article by exploring the reputations of three large administrative agencies in the press.

### Introduction

Judicial deference is not the dominant administrative law ideology it was a decade ago.<sup>1</sup> The *CUPE*<sup>2</sup> “patently unreasonable” standard of review must now compete with the *Bibeault*<sup>3</sup> “correctness” standard. A judge, depending on his or her inclination in a particular case, can either be cautious not “to brand as jurisdictional . . . that which may be doubtfully so,”<sup>4</sup> or aggressive in asserting the “renewed emphasis on the superintending and reforming function of the superior Courts.”<sup>5</sup> The *Canadian Charter of Rights and Freedoms* [hereinafter *Charter*] has accustomed courts to making policy interventions of a kind once thought to be the preserve of the legislative and executive branches. Fewer governmental resources and a laissez-faire ideological climate have conditioned the public to smaller bureaucracies and a measure of deregulation. In this anti-bureaucratic environment, less curial deference to administrators hardly seems politically incorrect.

This article takes a different tack. It posits that what has changed is not so much the intensity but the focus of judicial review. The older sort of review, conducted on grounds of jurisdiction, error of law, and procedure, focused on the legality of the decision. The newer sort, conducted on grounds of expertise, bias, and delay, focuses on the reputation of the decision-maker.

It is not strictly correct to think of expertise, bias, and delay as new grounds. Rather, reputational review is a regrouping of different aspects of the original jurisdictional and procedural grounds. In the past, expertise has been considered under the rubric of jurisdiction; bias and delay as part of natural justice. It is clear, however, that expertise is not

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1. See for example, *Canada (Attorney-General) v. Mossop*, [1993] 1 S.C.R. 554, 100 D.L.R. (4th) 658 [hereinafter *Mossop* cited to D.L.R.] and *Gould v. Yukon Order of Pioneers*, [1996] 1 S.C.R. 571, 133 D.L.R. (4th) 449 [hereinafter *Gould* cited to D.L.R.]. This is not to say that the trend is entirely against deference: see for example *Pezim v. British Columbia (Superintendent of Brokers)*, [1994] 2 S.C.R. 557, 114 D.L.R. (4th) 385 [hereinafter *Pezim* cited to D.L.R.]; *Canadian Broadcasting Corp. v. Canada (Labour Relations Board)*, [1995] 1 S.C.R. 157, 121 D.L.R. (4th) 385 [hereinafter *Goldhawk* cited to D.L.R.]; and *Director of Investigation and Research v. Southam Inc. et al.*, [1997] 1 S.C.R. 748, 144 D.L.R. (4th) 1. Rather, it is the inconsistency in the Court’s approach that creates the impression that the Court is more activist.

2. *C.U.P.E., Local 963 v. New Brunswick Liquor Corp.*, [1979] 2 S.C.R. 227, 97 D.L.R. (3d) 417, Dickson J. [hereinafter *CUPE* cited to D.L.R.].

3. *Syndicat national des employés de la commission scolaire régionale de l’Outaouais v. U.E.S., local 298*, [1988] 2 S.C.R. 1048, 35 Admin. L.R. 153 (*sub nom. U.E.S., local 298 v. Bibeault*) [hereinafter *Bibeault* cited to Admin. L.R.].

4. *CUPE*, *supra* note 2 at 422.

5. *Bibeault*, *supra* note 3 at 195.

jurisdictional in the same sense as is statutory interpretation. Nor are bias and delay procedural in the same sense as is the right to cross-examine. Moreover, increasing emphasis is being placed on expertise, bias and delay to the point where it may be time to break them out of the traditional three grounds and classify them in their own right.<sup>6</sup>

Review on grounds of expertise, bias and delay links agency reputation to judicial deference in two ways. First, expertise, bias, and delay are nebulous, relative concepts that put agency character traits in issue. Expertise is a test of skill: “Who has the best qualifications to do this job?” Bias is a test of impartiality: “Who has the appropriate degree of open-mindedness for this job?” Delay is a test of efficiency: “Who has the best management ability to get this job done?” The legislature intended that final decisions would be left to administrators where their skill, motive and efficiency better suited them than judges to the task.<sup>7</sup>

Second, one purpose of judicial review is to maintain public confidence in administrative decision-makers. Reputation is a measure of that confidence. Thus, expertise is about maintaining confidence in the skill of administrators who discharge public responsibilities; reputation is a factor in determining whether a tribunal is “expert.” Impartiality is about maintaining confidence in the disinterestedness of administrative decision-makers; reputation is a factor in determining whether there exists a “reasonable apprehension of bias.” Delay is about maintaining public confidence in the management of agency justice; reputation is a factor in determining what length of delay causes “prejudice.” For example, a securities commission that enjoys a public reputation for regulating in an efficient, even-handed and timely manner may find that courts show deference to its decisions.

This process has a compounding effect. A court examines an agency’s existing public reputation. It reaches conclusions that further shape the agency’s image in the eyes of the regulated community and the broader public. It writes reasons that affect the agency’s reputation in the eyes of other judges and lawyers. The degree of judicial deference accorded an agency on grounds of expertise, bias, and delay will not only be influenced by, but will influence, an agency’s reputation for skill, impartiality and efficiency.

Two questions need to be answered. First, what reputation is the relevant reputation for judicial review? Is it an agency’s reputation with

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6. The Dominion Law Reports, under the heads in its administrative law index, has already done this. It is interesting to note the exponential increase in the number of cases recorded under these heads in the index of those Reports, particularly with respect to bias.

7. See *Bibeault*, *supra* note 3 at 193 and 195.

the general public, with the constituencies that it serves or regulates, with the legal community appearing before it, or with the interest and lobby groups working in its area? This article will show that in theory any reputational image could, through the aegis of expertise, bias and delay, have an impact on judicial deference. The more broadly based the reputation, the more likely it will provide an objective view of the agency's character and a more accurate read of public confidence in the agency's work. In any particular situation, empirical research is needed to demonstrate which reputations, associated with which agencies, will matter to which courts.<sup>8</sup>

The second question is related. How do judges determine, or become aware of agency reputations? Do they operate in an ad hoc way on the basis of personal hunch, or preference, or do they take unspoken, and perhaps unconscious, judicial notice of unidentified reputational sources? Reputational facts are not the subject of evidentiary submission, submissions which would in any event be difficult to develop given the nature of judicial review proceedings. It is doubtful that agency reputation is raised in legal argument before the court, and reasons for decision do not expressly mention it. Indeed, as will be discussed below, reasons for decision on judicial review tend to treat expertise, bias and delay in an assertive fashion with little evidence, reputational or otherwise, marshalled in support of conclusions. Elsewhere, I propose to argue that the judges sitting on the judicial review applications involving the three agencies studied likely were familiar with the press images of the agencies that shaped their public reputation. The images were pervasive and notorious. The press sources were selected for study because of the probability that they counted the judiciary amongst their readership. It will be incumbent on empirical researchers studying particular situations to show not only which agency reputation is relevant to a particular court, but also to demonstrate how that reputation enters the judicial consciousness.

The identification of a possible link between reputation and deference underlines the need for clearer thinking on the real influences that affect judicial review. What are the criteria for measuring expertise? What kinds of partisan activities and associations constitute bias? How much time makes delay prejudicial? Identification of the link also has consequences for those involved in judicial review. If reputation is potentially

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8. See R.E. Hawkins & D.M. Shoemaker, "Reputational Review II: Administrative Agencies, Print Media and Content Analysis" forthcoming C.J.A.L.P. This article suggests that for the three agencies studied the reputation that matters on judicial review is their general public reputation as shaped by several wide circulation press sources of varied editorial viewpoint.

influential, judges are under an obligation to treat it in their reasons expressly rather than considering it surreptitiously. Lawyers are under an obligation to file reputational evidence relating to the skill, impartiality and efficiency of agencies. Administrators can be expected to take care that the way in which they exercise their mandate does not alienate public opinion. Whether by greater transparency, accountability, polling, or better public relations, administrative agencies will want to tend to their reputations.

### I. Expertise

Courts defer to tribunal expertise.<sup>9</sup> A specialist tribunal is entitled to deference in its interpretation of law within its expertise and, in particular, in its interpretation of its home statute.<sup>10</sup> A non-specialist tribunal is entitled to deference only in its findings of fact, the same deference that is accorded to all triers of fact who have had the “signal advantage” of seeing and hearing witnesses.<sup>11</sup> In *CUPE*, expertise provided a reason for restraint;<sup>12</sup> in *Bibeault*, lack of expertise provided a justification for intervention.<sup>13</sup>

Other factors, apart from expertise, affect the intensity of judicial review. These include legislative intent as to who should have the final say on the matters in issue,<sup>14</sup> the practical need for speedy and efficient

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9. See *C.J.A., Local 579 v. Bradco Construction Ltd.*, [1993] 2 S.C.R. 316, 102 D.L.R. (4th) 402 at 412 [hereinafter *Bradco* cited to D.L.R.] where Justice Sopinka stated that “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. See *Mossop*, *supra* note 1, especially Lamer, J. for the majority; and *Gould*, *supra* note 1.

11. See *Mossop*, *ibid.*, especially L’Heureux-Dubé in dissent; *Zurich Insurance Co. v. Ontario (Human Rights Commission)*, [1992] 2 S.C.R. 321, 93 D.L.R. (4th) 346 at 373 [hereinafter *Zurich* cited to D.L.R.], L’Heureux-Dubé in dissent; *Gould*, *ibid.*; and *Dickason v. Governors of the University of Alberta*, [1992] 2 S.C.R. 1103, 95 D.L.R. (4th) 439 at 450 [hereinafter *Dickason* cited to D.L.R.].

12. See *supra* note 2 at 424, where the court observed that, “The rationale for the 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.”

13. See *supra* note 3 at 194, where Justice Beetz observed that, “At this stage, the Court examines not only the wording of the enactment conferring jurisdiction on the administrative tribunal, but the purpose of the statute creating the tribunal, the reason for its existence, the area of expertise of its members and the nature of the problem before the tribunal.”

14. *Ibid.* at 195: “[T]he true problem of judicial review is to discover whether the legislator intended the tribunal’s decision on these matters to be binding on the parties to the dispute . . .”

administration in high-volume areas,<sup>15</sup> the need to preserve the coherence of an agency's jurisprudence, and the "integrity of certain administrative processes."<sup>16</sup> In the final analysis, however, these factors are, as Justice La Forest observed, "so intertwined as to be most conveniently considered in one analysis."<sup>17</sup> They form a "mélange" which has, at its base, the level of expertise of the administrative decision-maker.<sup>18</sup>

The rationale behind the court's deference to administrative expertise is, in Justice Wilson's words, "grounded . . . on good common sense."<sup>19</sup> When a legislature entrusts a job to an expert tribunal, the legislature is, for reasons of efficiency, relying on that expertise to give effect to legislative policy.<sup>20</sup> The court defers when the legislature establishes a tribunal that "by virtue of its specialized expertise . . . is uniquely suited" to do the job.<sup>21</sup> The issue before the court, therefore, is how to identify which administrators should be qualified as expert.

The theory of expertise used by the court to do this is the same as that used by the court to qualify expert witnesses. In the latter case, the court identifies the witness's expertise, defines the issue and asks whether the expertise is relevant to the issue. In the former case, the court identifies the tribunal's expertise by describing the "role of the tribunal." It then defines the issue by analyzing the "nature of the question."<sup>22</sup> Finally, it considers the relevance of the expertise by asking whether the nature of the question falls within the role of the tribunal. It is easy to turn the "role of the tribunal," "the nature of the question," and the description of the proximity between the two, into labels that hide the real reasons why the

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15. See *Telecommunication Worker's Union v. British Columbia Telephone Co.*, [1988] 2 S.C.R. 564, 54 D.L.R. (4th) 385 at 399 [hereinafter *B.C. Tel.* cited to D.L.R.] where Justice L'Heureux-Dubé identified "efficiency" as the reason for deferring to labour tribunals and arbitrators. See also *Consolidated Bathurst Packaging Ltd. v. I.W.A., Local 269*, [1990] 1 S.C.R. 282, 68 D.L.R. (4th) 524 [hereinafter *Consolidated Bathurst* cited to D.L.R.]; *Tremblay v. Quebec (Commission Des Affaires Sociales)*, [1992] 1 S.C.R. 952, 90 D.L.R. (4th) 609 [hereinafter *Tremblay* cited to D.L.R.]; *Canada (Attorney-General) v. Public Service Alliance of Canada*, [1993] 1 S.C.R. 941, 101 D.L.R. (4th) 673 at 683 [hereinafter *PSAC #2* cited to D.L.R.].

16. *Consolidated Bathurst, ibid.*; *Tremblay, ibid.*; *Mossop, supra* note 1 at 686.

17. *Dayco (Canada) Ltd. v. C.A.W.-Canada*, [1993] 2 S.C.R. 230, 102 D.L.R. (4th) 609 at 631 [hereinafter *Dayco* cited to D.L.R.].

18. *Ibid.* at 631-2.

19. *W.W. Lester (1978) Ltd. v. U.A., Local 740*, [1990] 3 S.C.R. 644, 76 D.L.R. (4th) 389 at 392 [hereinafter *W.W. Lester* cited to D.L.R.].

20. *Gould, supra* note 1 at 490-1.

21. *Goldhawk, supra* note 1 at 401. See also *Bradco, supra* note 9 at 412.

22. In *Bradco, ibid.*, Justice Sopinka stated at 412 that "The legislative provisions in question must be interpreted in light of the particular tribunal and the type of questions which are entrusted to it."

court decides that the tribunal is, or is not, expert. This tendency to label will be considered by examining each of the above three steps in the theory of expertise.

The first step is to determine the “role of the tribunal.” This is done by interpreting the tribunal’s enabling legislation. The court assumes that the more specialized the task assigned to the tribunal, the more expert the tribunal. In *Dayco*, Justice LaForest states this expressly: “In my view, the relative expertise of board members and arbitrators must be presumed to be commensurate with the scope of the divergent statutory mandates.”<sup>23</sup> Role determines expertise: experts are people who perform specialized roles.

This can be illustrated with two examples. In *Gould*, Justice L’Heureux-Dubé deduced that a human rights tribunal was expert from the role assigned to it by its enabling legislation:

I observe that human rights legislation has, as one of its main purposes, the creation of a comprehensive scheme for the enforcement of human rights: . . . In order to carry out this purpose, the Act establishes a specialist tribunal . . .<sup>24</sup>

Similarly, in *Pezim*, Justice Iacobucci relied on the empowering statute to “prove” the expertise of the B.C. Securities Commission:

The breadth of the Commission’s expertise and specialization is reflected in the provisions of the *Securities Act*. Section 4 of the Act identifies the Commission as being responsible for the administration of the Act. The Commission also has broad powers with respect to investigations, audits, hearings, and orders. Section 144.2 provides that any decision of the Commission filed in the registry of the Supreme Court of British Columbia has the force and effect of a decision of that court. Finally, pursuant to s.153 of the Act, the Commission has the power to revoke or vary any of its decisions. Sections 14 and 144 are of particular importance as they reveal the breadth of the Commission’s public interest mandate.<sup>25</sup>

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23. *Supra* note 17 at 632.

24. *Supra* note 1 at 492-3.

25. *Supra* note 1 at 407-8. Other cases that rely heavily on a statutory analysis of the tribunal’s role and powers to deduce expertise include *British Columbia Telephone Co. v. Shaw Cable Systems (B.C.) Ltd.* [1995] 2 S.C.R. 739, 125 D.L.R. (4th) 443 [hereinafter *Shaw* cited to D.L.R.]; *Goldhawk*, *supra* note 1; *Domtar Inc. v. Quebec (Commission d’appel en matière de lésions professionnelles)*, [1993] 2 S.C.R. 756, 105 D.L.R. (4th) 385 [hereinafter *Domtar* cited to D.L.R.]; *Mossop*, *supra* note 1; and *Canada (Attorney-General) v. Public Service Alliance of Canada*, [1991] 1 S.C.R. 614, 80 D.L.R. (4th) 520 [hereinafter *PSAC #1* cited to D.L.R.]. For examples where statutory analysis of role and powers lead to the conclusion that the tribunals in question were “non-specialist” see *Dickason*, *supra* note 11, and *Zurich*, *supra* note 11.



In order to determine which roles are specialized, the court considers whether the agency's work includes a complex and technical dimension, as in telecommunications or energy regulation,<sup>26</sup> a broad policy dimension, as in securities regulation,<sup>27</sup> or an obligation to oversee and develop a statutory regime, as in the regulation of labour relations.<sup>28</sup> The court also considers whether the task assigned to the tribunal is limited to regulating the affairs of the parties before it or whether it also includes developing policies that have a more general public impact.<sup>29</sup> People assigned complex tasks having broad impact are considered expert.

The court's use of role as the primary determinant of expertise does not go far enough for three reasons. First, the line between specialist and non-specialist roles, between tasks that the legislature wanted done by trained experts using specialized knowledge, and those that it preferred be left to ordinary citizens relying on community values,<sup>30</sup> is not always evident. There is no question that it takes an expert tribunal to license the operation of a nuclear reactor; it is not so clear that a specialist is required to recognize discrimination.

Second, the definition of tribunal expertise risks becoming tautological if it is limited to the nature of the tribunal's role. In *Bradco*, Justice Sopinka considered the matter from the opposite point of view. Instead of defining expertise by reference to role, he defined the tribunal's role by reference to its expertise.<sup>31</sup> However, if role determines expertise and expertise defines role - if a specialized task is work done by an expert and an expert is someone who does a specialized task - the reasoning is circular. The solution is to break the circularity by broadening the inquiry to include other factors in determining expertise.

Third, while it is not unreasonable to assume that the legislature intended specialized tasks to be performed by expert tribunals, whether the tribunal performing the task is expert or not is an empirical matter. Legislatures do not usually write job descriptions for tribunal members, or define in detail how they are to be chosen, or choose them, or train them, or require them to collect precedents, or evaluate their perfor-

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26. See *British Columbia (Milk Board) v. Grisnich*, [1995] 2 S.C.R. 895, 126 D.L.R. (4th) 191 at 199 [hereinafter *Grisnich* cited to D.L.R.]. See also *Shaw*, *ibid.*

27. See *Pezim*, *supra* note 1 at 409-10. See also *Dayco*, *supra* note 17.

28. See *Dayco*, *supra* note 17 and *PSAC #1*, *supra* note 25.

29. See *Pezim*, *supra* note 1; *Mossop*, *supra* note 1; and *Dayco*, *supra* note 17.

30. In other words, what a jury is to civil and criminal law.

31. *Supra* note 9 at 414 where Justice Sopinka stated that "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."

mance.<sup>32</sup> Too heavy a reliance on deductions from statutory analysis, something that judges do well naturally, and an insufficient reliance on actual evidence, an area where judges are at the mercy of lawyers<sup>33</sup>, will result in the court deferring to *de jure* as opposed to *de facto* expertise. Legislation may envisage that a specialized tribunal will be established; the reality may be something else. The operative assumption must be that a legislature with a specialized task to be performed only intends deference to a tribunal with actual expertise: only that kind of proven expertise can efficiently give effect to legislative policy. This means that the court, in identifying expertise, must broaden the inquiry beyond statutory analysis.

In principle, the court acknowledges this.<sup>34</sup> In practice, however, its conclusions tend to be unsupported by evidence.<sup>35</sup> A broader inquiry into expertise would consider evidence in five categories. First, evidence of the method of tribunal appointments is relevant. How are appointments made? Are they open and advertised, or made in secret? By whom are they made? Is there a detailed job description? Does security of tenure exist, or are the appointments at pleasure? Are appointments staggered to preserve a reservoir of expertise? Justice Cory cited some evidence of this kind in relation to the Public Service Staff Relations Board:

There are a number of reasons why the decisions of the Board made within its jurisdiction should be treated with deference . . . [R]ecognition must be given to the fact that the Board is composed of both labour and management. They are aware of the intricacy of labour relations and the delicate balance that must be preserved between the parties for the benefit of society. These experts will often have earned by their merit the confidence of the parties . . . .<sup>36</sup>

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32. There are some exceptions. The Commission d'appel en matière de lésions professionnelles [CALP] has an obligation under s.391 of the *Act respecting Industrial Accidents and Occupational Diseases*, R.S.Q., c. A-3.001 to publish its own decisions; see also *Domtar*, *supra* note 25 at 398.

33. Lawyers rarely present evidence on these matters to court, in part because it has never been done, but also because judicial review and appeal procedures are not conducive to developing and testing evidence.

34. See, for example, the call of the reviewing court to consider a wide number of indicia in *Goldhawk*, *supra* note 1 at 420 and *Mossop*, *supra* note 1 at 690. The difficulty is that evidence is rarely called and no facts are proven that would indicate these functional considerations are actually being considered.

35. See *e.g.* *supra* note 1 and *supra* note 25.

36. *PSAC #2*, *supra* note 15 at 689. Compare this statement with the following bald statement in *Grisnich*, *supra* note 26 at 199 on the appointment of Milk Board members: "Their members are specifically chosen because they possess expertise in this area, not because they are familiar with jurisdictional issues."

Second, evidence of the credentials — training and experience prior to appointment — is essential for judging expertise. Aside from a reference to the “special skills” of members of the Public Service Staff Relations Board, “who are experienced and knowledgeable in the field of labour relations generally and particularly as [to] labour relations issues existing between the Public Service and the Federal Government,”<sup>37</sup> and a reference to members of the Canadian Import Tribunal as, “experts familiar with the intricacies of international trade relations,”<sup>38</sup> the Supreme Court of Canada cases since 1979 reviewed for this article simply assume that board members possess the appropriate job credentials without specifying exactly what those credentials are or requiring proof of them.

Third, evidence of the accumulated “on-the-job” experience at the tribunal should be taken into account in assessing expertise. Do members sit on hearings on an “ad hoc” or an “ongoing” basis?<sup>39</sup> When sitting, do they have a meaningful opportunity to participate in decision-making?<sup>40</sup> Do they have other regular involvement, such as through mediation or education activities, with the regulated community? In her dissent in *Mossop*,<sup>41</sup> Justice L’Heureux-Dubé discussed the expertise gained in dealing with particular issues and communities as “field sensitivity”.<sup>42</sup>

A related consideration is the connection of the board to the context. That is, even a body made up of “non-specialists” may develop a certain “field-sensitivity” where that body is in a position of proximity to the community and its needs. Where the question is one that requires a familiarity with and understanding of the context, there is a stronger argument that a higher degree of deference may be appropriate.

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37. *PSAC #1*, *supra* note 25 at 552.

38. *National Corn Growers Assn. v. Canada (Canadian Import Tribunal)*, [1993] 2 S.C.R. 1324, 74 D.L.R. (4th) 449 at 465 [hereinafter *Corn Growers* cited to D.L.R.].

39. In *Bradco*, *supra* note 9 at 416 and in *Shaw*, *supra* note 25 at 452, labour arbitration boards were held to be ad hoc panels when compared with the ongoing work of members of labour relations boards or boards like the Canadian Radio-Television & Telecommunications Commission. In *Mossop*, *supra* note 1, the same distinction was made when comparing human rights tribunals and the Human Rights Commission. The validity of this distinction is discussed below.

40. For example, what is the role of sidespeople? Who chairs the decision-making conferences? Who writes the decisions? Are there wider consultation procedures such as full board procedures? See *Consolidated Bathurst*, *supra* note 15; R.E. Hawkins, “Behind Closed Doors I: The Substantive Problem - Full Boards, Consensus Tables and Caucus Cabals” (1996) 9 C.J.A.L.P. 267.

41. *Supra* note 1 at 693. Justice L’Heureux-Dubé held that the Canadian Human Rights Commission, “would inevitably accumulate expertise and specialized understanding of human rights issues, as well as a body of governing jurisprudence.” This conclusion, while correct, would be stronger if some evidence was presented to support it.

42. *Ibid.* at 685.

Fourth, evidence of the institutional support available to tribunal members is important for determining expertise. Is the tribunal guided by an explicit set of objectives,<sup>43</sup> or by an analytic and workable framework for applying its statute?<sup>44</sup> Does it have a developed and published body of jurisprudence?<sup>45</sup> Is the tribunal organized in such a way that members' duties and responsibilities are clearly understood? Are there organizational charts and job descriptions? Are tribunal operating rules known and applied in a professional manner? Do tribunal members receive training, and of what kind, prior to beginning their job and on an ongoing and systematic basis? Are institutional manuals, both procedural and substantive, available? Are library facilities and research support given any priority? Are a sufficient number of professional and other staff available to support the work of the tribunal? Many of these factors are never overtly mentioned by the court in examining expertise, let alone proven.

Fifth, evidence of evaluation methods and promotion policies provides a peer-group measure of expertise. Are there regular performance evaluation for tribunal members?<sup>46</sup> Is there appropriate progress through the ranks, for example to vice-chair and chair positions? What is the tribunal's judicial review record?

Too heavy a reliance on statutory deductions relating to the role of the tribunal, coupled with too narrow an inquiry into actual expertise, have made the classification of tribunals by degree of specialization highly subjective. A hierarchy has developed.<sup>47</sup> Labour, telecommunications and securities commissions, are considered most specialized. Courts are prepared to defer to these bodies so long as the laws that they interpret are within their area of expertise and their interpretations are not patently unreasonable. Labour arbitrators are considered less specialized but are shown deference in the interpretation of collective agreements. Human rights boards of inquiry are considered non-specialist and are only accorded deference on their findings of fact.

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43. *B.C. Tel.*, *supra* note 15 at 400.

44. *Goldhawk*, *supra* note 1 at 398 and 400; *Dayco*, *supra* note 17 at 632.

45. *Goldhawk*, *ibid.* at 401; *Domtar*, *supra* note 25 at 398; *Mossop*, *supra* note 1 at 686; *CUPE*, *supra* note 2 at 424.

46. Not, of course, an evaluation of decisions in order to enforce 'the party line' or to discourage dissent, but rather evaluation of work habits and quality of work, much as a university professor is evaluated.

47. See the comments of Justice L'Heureux-Dubé in *Mossop*, *supra* note 1 at 683: "On the other hand, there is a great variety and diversity among administrative bodies and not all administrative bodies are specialized or have equal expertise."

However, individual judges disagree on these expertise rankings. In *Dayco*, a labour arbitrator had to decide whether benefits paid to retirees survived the expiry of the collective agreement. The court held that the standard of review, correctness, had been met. Justice La Forest, writing for the majority, made the following comment:

An arbitrator's expertise is in a limited sense related to labour relations policy, but it must be conceded that it falls short of the wide-ranging policy-making function sometimes delegated to labour boards, . . . In short, an arbitration board falls towards the lower end of the spectrum of those administrative tribunals charged with policy deliberations to which the courts should defer. Similarly, tribunals vested with the responsibility to oversee and develop a statutory regime are more likely to be entitled to judicial deference.<sup>48</sup>

Justice Sopinka, in *Bradco*<sup>49</sup>, a case decided two weeks after *Dayco*, expanded on Justice La Forest's comment:

... a distinction can be drawn between arbitrators, appointed on an ad hoc basis to decide a particular dispute arising under a collective agreement, and labour relations boards responsible for overseeing the ongoing interpretation of legislation and development of labour relations policy and precedent within a given labour jurisdiction. To the latter, and other similar specialized tribunals responsible for the regulation of a specific industrial or technological sphere, a greater degree of deference is due their interpretation of the law notwithstanding the absence of a privative clause.

In his dissent in *Dayco*, Justice Cory did not accept that an arbitrator was less specialized in dealing with labour relations matters, and so entitled to less deference, than a labour board. He stated:<sup>50</sup>

It is particularly appropriate that this high standard of deference should be applied to administrative decisions made in the field of labour relations, whether they be made by tribunals, boards or arbitrators. In this volatile and sensitive field, the decision of either an arbitrator selected by the parties or of a labour board, which is often composed of representatives of both labour and management with wide experience in the field, should be final and binding unless the decision is indeed patently unreasonable.

Arbitrators are appointed on an ad hoc, case-by-case basis while board members enjoy an ongoing appointment. But this fact must be measured against other evidence. Arbitrators are usually professionals with extensive training, experience, or both. An arbitrator with long service in a particular industrial sector will have a better understanding of the impact

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48. *Supra* note 17 at 631-2.

49. *Supra* note 9 at 416. The court deferred to an arbitrator's interpretation of a collective agreement.

50. *Supra* note 17 at 664.

of labour law provisions on labour-management relations in that sector than board members. An examination of actual evidence of expertise might have avoided the divergence in ranking expertise in the above two cases.

The categorization of human rights boards of inquiry is open to the same criticism. In *Mossop*, Justice La Forest noted that these boards, like labour arbitrators, were ad hoc bodies. Although he was prepared to defer to the latter's interpretation of a collective agreement, he was not prepared to defer to the former's interpretation of human rights legislation. He reasoned as follows:

A labour arbitrator operates, under legislation, in a narrowly restricted field, and is selected by the parties to arbitrate a difference between them under a collective agreement the parties have voluntarily entered . . . This is entirely different from the situation of a human rights tribunal, whose decision is imposed on the parties and has a direct influence on society at large in relation to basic social values.<sup>51</sup>

Justice L'Heureux-Dubé, dissenting, saw things differently. Although she acknowledged that human rights boards of inquiry were, "not as 'specialized' as some other administrative bodies such as labour boards,"<sup>52</sup> she held that such boards were specialists and should be accorded deference when interpreting their "home statutes."<sup>53</sup> She extended her conclusion to human rights commissions as well:

As for the Commission itself, Parliament unquestionably intended to create a highly specialized administrative body, one with sufficient expertise to review Acts of Parliament and, as specifically provided for in the Act, to offer advice and make recommendations to the Minister of Justice. In the exercise of its powers and functions, the Commission would inevitably accumulate expertise and specialized understanding of human rights issues, as well as a body of governing jurisprudence. The work of the Commission and its tribunals involves the consideration and balancing of a variety of social needs and goals, and requires sensitivity, understanding and expertise.<sup>54</sup>

There is a lack of consistency in all of this. If ad hoc labour arbitrators are sufficiently expert to be shown deference in their interpretation of

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51. *Supra* note 1 at 675.

52. *Dickason*, *supra* note 11 at 450.

53. *Mossop*, *supra* note 1 at 693-4 and *Gould*, *supra* note 1 at 493. The Justice has made it clear that she is not about to defer to the majority on this point despite a pointed remark by the Chief Justice in *Mossop* about her dissent. In a recent speech she stated the following: "Although I have not yet succeeded in persuading my colleagues that the expertise of human rights tribunals can also extend to the interpretation of their statute . . .". [See The Honourable Madam Justice Claire L'Heureux-Dubé, "Volatile Times: Balancing Human Rights, Responsibilities and Resources" (Address to the CASHRA Human Rights Conference, 3 June 1996)].

54. *Mossop*, *ibid.* at 675.

collective agreements, why are not ad hoc boards of inquiry sufficiently expert in their interpretation of human rights legislation? It may be a question of the breadth of the impact of their decisions, those of the labour arbitrator being limited to the parties before them, those of the boards of inquiry having a “direct influence on society at large in relation to basic social values.”<sup>55</sup> However, other agencies such as labour boards and securities commissions make decisions with broad social impact and they are shown deference. It may be that labour board and securities commission decisions are considered technical and complex. If that is the criteria, then evidence beyond the fact that human rights commissioners “would inevitably accumulate expertise . . . as well as a body of governing jurisprudence” will be necessary to convince a court of the existence of specialization in human rights matters.<sup>56</sup> If confusion is to be avoided, more hard evidence is needed that the people performing these roles are actually expert.

There may be good reasons for deferring to labour boards but not to human rights commissions. Those reasons, however, will not be made clear by an inquiry into expertise that is limited and impressionistic. The “role of tribunal” approach has resulted in inconsistency in the way that the same judges treat different tribunals and different judges treat the same tribunal. It does not help predict in advance which tribunals will be considered specialist, and accorded deference, and which will not. In order to test *de facto* institutional competence in a less impressionistic way, the court must broaden its inquiry to examine expertise across a full range of indicators.

In deciding whether or not to show deference, it is not enough for the court to conclude that the person performing the role is expert. It must also conclude that the role requires expertise to be performed. The second step in the court’s theory of expertise aims to achieve this by examining “the nature of the question.” It requires that the issue before the tribunal be examined. The court determines the nature of the question by selecting a label from one of eleven categories ranging across the law/fact dichotomy.<sup>57</sup> Five of those categories tend to be fact oriented—fact, agreed

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55. *Ibid.*

56. *Ibid.*

57. Although the court has not collectively referred to all of these categories in any one case, each category is specifically referred to as a central factor in determining the nature of the question in the various cases cited below.

fact,<sup>58</sup> social fact,<sup>59</sup> viva voce evidence,<sup>60</sup> no evidence,<sup>61</sup> and inference from fact.<sup>62</sup> Four are more legally oriented: eneral questions of law,<sup>63</sup> policy,<sup>64</sup> technical matters,<sup>65</sup> and matters of general public importance<sup>66</sup> (or, matters with far-reaching consequences).<sup>67</sup> One, application of law to fact,<sup>68</sup> is a hybrid and one, factual and legal elements inseparable,<sup>69</sup> questions the utility of the exercise.

This is pure labelling, entirely result-driven. Judges disagree on “the nature of the question” and case outcomes are irreconcilable. This has gone on for a long time.<sup>70</sup> It happens because, as Justice L’Heureux-Dubé observed, the fact/law distinction, “is not always clear,”<sup>71</sup> factual and legal elements sometime being “inseparable.”<sup>72</sup> The distinction between law and fact is difficult to sustain. Professor Cory recognized this in 1936:

It has been stated that these two steps [determine the facts/ apply the statute] are separate and distinct; that the well-drawn statutes have a single literal or contextual meaning which can be discovered in advance of applying the statute, and that, once that has been determined, the question whether a particular set of facts is within that meaning is not of interpretation at all but a question of application. If words have single, definite meanings, this separation is possible in theory. But no judge ever begins the process of judging until he knows the facts upon which he is to decide. Then he begins at once to think of the statute in relation to those facts and they inevitably colour his interpretation. If he says the meaning of the statute is clear, it is because it speaks plainly about his facts. In considering

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58. *Gould*, *supra* note 1 at 455, 492, and 494; *Ross v. New Brunswick School District No. 15*, [1996] 1 S.C.R., 133 D.L.R. (4th) 1 at 14 [hereinafter *Ross* cited to D.L.R.]; *University of British Columbia v. Berg*, [1993] 2 S.C.R. 353, 102 D.L.R. (4th) 665 at 677 (2d) 141 [hereinafter *Berg* cited to D.L.R.]; *Dickason*, *supra* note 11 at 449; *Surich*, *supra* note 11 at 365.

59. *Gould*, *ibid.* at 456 and at 493, the latter citing *Dickason*, *supra* note 11 at 451-2.

60. *Dickason*, *ibid.*

61. *W.W. Lester*, *supra* note 19 at 423.

62. *Gould*, *supra* note 1 at 455-6; *Ross*, *supra* note 58 at 14-15; *Zurich*, *supra* note 11 at 372-3.

63. *Gould*, *ibid.* at 455 and 491; *Goldhawk*, *supra* note 1 at 402; *Berg*, *supra* note 58 at 677; *Dickason*, *supra* note 11 at 494; *Bibeault*, *supra* note 3 at 202; *Syndicat des employés de production du Québec et de l'Acadie v. Canada (Labour Relations Board)*, [1984] 2 S.C.R. 412, 14 D.L.R. (4th) 457 at 465.

64. *Gould*, *ibid.* at 492-4; *Dickason*, *ibid.* at 451.

65. *Gould*, *ibid.* at 491.

66. *Goldhawk*, *supra* note 1 at 429.

67. *Ibid.*

68. *Gould*, *supra* note 1 at 491-2.

69. *Ibid.*

70. This is the same as the “yes/no” kind of reasoning adopted in the “high-mark of judicial intervention” case, *Bell v. Ontario (Human Rights Commission)*, [1971] S.C.R. 756, 18 D.L.R. (3d) 1, effectively criticized by Paul Weiler, *In The Last Resort: A Critical Study of The Supreme Court of Canada* (Toronto: Carswell/Methuen, 1974) at 139-54.

71. *Mossop*, *supra* note 1 at 686.

72. *Gould*, *supra* note 1 at 494.



his decision, he goes back and forth from facts to statute and from statute to facts, and the processes of interpretation and application are telescoped together in a manner which defies separation. Those who make the distinction admit that the process is not finished when the meaning is found. The application of the law to the facts may be difficult and may require the use of the judicial attitudes of strict and liberal construction. If the application of the law can still be doubtful, the distinction does not seem to serve any practical purpose.<sup>73</sup>

Nowhere is this problem more pervasive, and nowhere is there more inconsistency, than in the Supreme Court's recent treatment of discrimination cases. In all of these cases the basic issue is the same: does the act complained of amount to discrimination within the meaning of the statute? The nature of the question is both factual and legal although courts have spent considerable energy attempting to label it either as "fact" or "law."

A comparison of two 1996 cases is useful. In the first case,<sup>74</sup> Madeline Gould was refused membership in the male-only Yukon Order of Pioneers, an order which, apart from its social activities, collected Yukon history. Gould alleged that her exclusion amounted to discrimination contrary to the Yukon *Human Rights Act*.<sup>75</sup> The board of inquiry found discrimination; ultimately, the Supreme Court of Canada held that the standard of review was correctness and quashed the board decision.<sup>76</sup>

In the second case,<sup>77</sup> David Atlas complained to the school board when Malcolm Ross, a teacher of one of the Atlas children, was permitted to remain in the classroom despite having made anti-Jewish statements outside of it. The school board did not remove Ross. Atlas alleged that this failure to remove Ross amounted to discrimination contrary to s.5(1)(b) of the New Brunswick *Human Rights Act*,<sup>78</sup> which prohibited discrimination on the basis of "race, colour, religion, national origin, ancestry, . . .".<sup>79</sup> The board of inquiry found that Ross's comments and the school board's failure to discipline him were both discriminatory. The same Supreme Court judges who decided that no deference was due the board of inquiry in the *Gould* case unanimously held that deference should be shown the board of inquiry in the *Ross* case.

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73. J.A. Cory, "Administrative Law and the Interpretation of Statutes" (1935-36) 1 U.T.L.J. 286 at 290-1.

74. *Gould*, *supra* note 1.

75. *Human Rights Act*, R.S.Y. 1986, c.11 (Supp.), s.8A.

76. *Gould*, *supra* note 1. Iacobucci J. wrote for the majority (Lamer C.J.C., Sopinka, Gonthier, Cory and Major JJ. concurring); LaForest J. wrote concurring reasons; L'Heureux-Dubé and McLachlin JJ. dissented, each writing their own reasons.

77. *Ross*, *supra* note 58.

78. *Human Rights Act*, R.S.N.B. 1973, c.H-11.

79. *Ibid*, s. 5(1)(b).

In both cases, it was necessary for the Boards of Inquiry to analyze the facts to see if they fell within the meaning of human rights statutes. This issue contained elements of both fact and law. In *Gould*, for the majority, Justice Iacobucci held that all of the evidence was agreed and nearly all was in written form. In the circumstances, he concluded that the issue was, “not the facts themselves but rather the inferences to be drawn from agreed facts.”<sup>80</sup> He concluded that no deference was warranted where the tribunal had not “seen and heard” witnesses. Justice La Forest agreed that no deference was necessary but for different reasons.<sup>81</sup> He held that the issue of “services available to the public” was a matter of statutory interpretation and as such a general legal question. Justice L’Heureux-Dubé, dissenting, held that the impugned findings were “primarily factual in nature.”<sup>82</sup> She pointed to a finding that the Lodge’s discriminatory membership policy had an impact on the quality of its historical work. She also pointed out that “the board’s finding that the Lodge’s activities fell within this definition [of “service to the public”] involves the application of the law to the facts.”<sup>83</sup> The issue being factual, the board, in her judgment, was entitled to deference.<sup>84</sup>

In *Ross*, the unanimous court deferred to the board of inquiry holding as follows:<sup>85</sup>

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80. *Gould*, *supra* note 1 at 456.

81. Justice LaForest cited *Berg*, *supra* note 58. This was a discrimination case in which the issue was nearly identical. In *Berg* the member-designate of the British Columbia Council of Human Rights held that there had been discrimination. Chief Justice Lamer, writing for the majority, held that the interpretation of the Act was a question of law on which no deference would be shown. Nevertheless, he held that the member-designate’s interpretation was correct and the finding of discrimination should be upheld. Justice L’Heureux-Dubé joined the majority, writing separate reasons, presumably because she agreed with the result and not, given her dissents in *Mossop* and *Gould*, because she felt that Human Rights Tribunals should be held to a standard of correctness in interpreting their empowering statute. Still, one worries about result-driven labeling.

82. *Gould*, *supra* note 1 at 492.

83. *Ibid.*

84. Justice L’Heureux-Dubé, who held that deference was owed to the Board, labeled the nature of the question differently. These included “considerations of human rights policy which preclude its [the issue’s] classification as a general question of law” (*ibid.*) and an issue where the “factual and legal elements are inseparable” (*Gould*, *supra* note 1 at 494). *Gould* is not the only discrimination case in which the majority and minority parted company on how the nature of the question should be labeled: see *Zurich*, *supra* note 11.

85. *Supra* note 58 at 15. This cite seems to support Justice L’Heureux-Dubé’s dissent in *Dickason*, *supra* note 11 at 449, where she commented that “discrimination cases such as this are fact-driven, and . . . outcome will vary with the evidence submitted.” It also seems to contradict Justice Iacobucci’s position in *Gould*, *supra* note 1 where inferences drawn from albeit agreed facts were distinguished from fact-finding and accorded no deference: see *Gould*, *ibid.* at 455-56.

A finding of discrimination is impregnated with facts, facts which the Board of Inquiry is in the best position to evaluate. The Board heard considerable evidence relating to the allegation of discrimination and was required to assess the credibility of the witnesses' evidence and draw inferences from the factual evidence presented to it in making a determination as to the existence of discrimination. Given the complexity of the evidentiary inferences made on the basis of the facts before the Board, it is appropriate to exercise a relative degree of deference to the finding of discrimination, in light of the Board's superior expertise in fact finding, a conclusion supported by the existence of words importing a limited privative effect into the constituent legislation.

The only real difference between the two cases was in the form of the evidence. In *Gould* it was written; in *Ross* it was viva voce. In both cases the court had to draw inferences from the evidence. For that, the form of the evidence should not have been determinative. Nevertheless, in *Gould* the Court intervened; in *Ross* it deferred. The decision in *Ross* was not "purely factual": the statute did not apply itself. Legal issues in the case included whether the school board was liable for human rights violations of its teachers outside the classroom, whether "poisoned environment" should be incorporated into the definition of discrimination, and whether an in-classroom remedy was appropriate for out-of-classroom violations.

The point is not that one judge got the labelling right and the other got it wrong. The point is that the fact/law dichotomy does a very poor job of explaining why the court defers in one case and not in the other. In both cases the issue is the same, the expertise of the boards of inquiry is presumably the same, and the boards are making the same determination as to whether, on the facts, discrimination in law has taken place. The fact/law distinction does not reconcile the divergent results by telling us why deference is due in one case and not the other.

Once the nature of the question has been analyzed and a descriptive label chosen, the final step for the court in deciding how much deference to show is determining whether the tribunal's expertise, if any, is relevant to the issue at hand. It does this by comparing the role of the tribunal, and inevitably also the role of the court, with the nature of the question. This is an exercise in cartography. A series of mapping labels are used to describe the outcome of this comparison. The question is found to be "within"<sup>86</sup> or "outside"<sup>87</sup> the tribunal's expertise, or more poetically, is

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86. See *Gould*, *supra* note 1 at 489 and *Shaw*, *supra* note 25 at 454-5.

87. See *Gould*, *supra* note 1 at 491; *Shaw*, *supra* note 25 at 454-5; *Goldhawk*, *supra* note 1 at 429; and *Dayco*, *supra* note 17 at 632.

or is not at the “centre,”<sup>88</sup> “core,”<sup>89</sup> or “heart”<sup>90</sup> of its expertise, or is “squarely”<sup>91</sup> within that expertise or an “integral part” of that expertise.<sup>92</sup>

Where there is agreement amongst the judges on the expertise of the tribunal and on the nature of the question, there is generally agreement on whether to defer to the tribunal. This is usually the case where the tribunal is expert in administering a technical or highly specialized regulatory regime. Thus, in *Pezim*, the question of what constitutes “material change” for disclosure purposes under the British Columbia *Securities Act* is, “an issue which goes to the ‘heart’ of the regulatory expertise and mandate of the Commission, *i.e.*, regulating the securities market in the public interest.”<sup>93</sup> Similarly, in *Domtar*, the issue of compensation for time off work after an industrial accident involves concepts that are at the “core” of the expertise of the Commission d’appel, namely disability and the complex system of compensation contained in the Commission’s enabling statute.<sup>94</sup>

The problem is that judges frequently disagree on the extent of a board’s expertise and on the nature of the question before it.<sup>95</sup> As a result, they have trouble agreeing on whether board expertise is relevant to the question. *Mossop* illustrates this. Justice La Forest, for the majority, concluded that the issue of discrimination on the basis of “family status” was a question that fell outside the board’s expertise. He held:

The superior expertise of a human rights tribunal relates to fact-finding and adjudication in a human rights context. It does not extend to general questions of law such as the one at issue in this case. These are ultimately matters within the province of the judiciary and involve concepts of statutory interpretation and general legal reasoning which the courts must be supposed competent to perform.<sup>96</sup>

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88. See *PSAC #2*, *supra* note 15 at 677.

89. See *Domtar*, *supra* note 25 at 398; *Goldhawk*, *supra* note 1 at 422; *Dayco*, *supra* note 17 at 627.

90. See *Pezim*, *supra* note 1 at 411; *Goldhawk*, *supra* note 1 at 400 and 429; and *CUPE*, *supra* note 2 at 424.

91. See *Bradco*, *supra* note 9 at 414, Sopinka J.; *Gould*, *supra* note 1 at 491 and 494, L’Heureux-Dubé J.; *Bell Canada v. Canadian Radio-Television & Telecommunications Commission*, [1989] 1 S.C.R. 1722, 60 D.L.R. (4th) 682 at 699 [hereinafter *Bell Canada* cited to D.L.R.].

92. See *Goldhawk*, *supra* note 1 at 401, Iacobucci J.

93. *Pezim*, *supra* note 1 at 411, Iacobucci J.

94. *Supra* note 25 at 398-9, L’Heureux-Dubé. See also *Bradco*, *supra* note 9 at 417-18 for what was at the ‘core’ of the labour arbitrator’s expertise.

95. See the disagreement between the majority and the minority in *Goldhawk*, *supra* note 1.

96. *Supra* note 1 at 675-6.

In dissent, Justice L'Heureux-Dubé held that the issue of interpreting family status was at the “core” of the tribunal’s jurisdiction. She reached the opposite conclusion on relevance:

As to the matter of the problem at issue, tribunals appointed under the Act have a mandate to determine whether or not a given practice or policy has discriminated against a complainant on the basis of one of the enumerated grounds set out s. 3 of the Act. The enumerated grounds of discrimination are not defined within the Act and, as is clear later in these reasons, it was the intention of the legislature that, in the event of any ambiguity, the Commission and its tribunals would have the task of determining the meaning and scope of these concepts. This is at the core of the board’s jurisdiction.<sup>97</sup>

In the final analysis, the court’s theory for determining the expertise of administrative agencies, and so for determining the degree of deference that they will be shown, falls apart under its own subjectivity. In terms of measuring expertise, the focus on the “role of the tribunal” is too narrow an inquiry to yield a true appreciation of the agency’s degree of specialization. In terms of the relevance of expertise, the description and mapping of the “nature of the question” is too much based on result-driven labelling to provide a satisfactory answer to the question of who does what best and why. In the result, the degree of judicial scrutiny of administrative decisions appears to depend on little more than judicial preference for certain tribunals and particular outcomes.

However, this is only the court’s announced theory of expertise and rationale for deference. There is reason to look beyond what the court says it is doing to what it actually does. When the court talks about a specialized board, it is not examining the absolute level of the board’s expertise. Rather, it is forming an impression about the board’s relative expertise as compared to the court’s. Justice Sopinka, in *Bradco*,<sup>98</sup> stated that, “a lack of relative expertise on the part of the tribunal vis- à-vis the particular issue before it as compared with the reviewing court is a ground

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97. *Ibid.* at 693-4. Justice L'Heureux-Dubé also disagreed with the majority on the relevance of the Human Rights Tribunal’s expertise in *Gould*, *supra* note 1. The majority saw the issue as a general question of law. She held at 494 that “the resolution of these and other factual issues falls squarely within the Board’s specialized mandate . . . .”

Although this difficulty agreeing on the relevance of a tribunal’s expertise primarily arises with human rights tribunals, the problem surfaces elsewhere as well. In *Dayco*, *supra* note 17 the issue of the relative expertise of arbitrators arose. Justice LaForest, for the majority, concluded at 632: “the question to be decided requires consideration of concepts that are analogous to certain common law notions — “vesting” and accrued contractual rights — that fall outside the tribunal’s sphere of exclusive expertise.” Justice Cory, in dissent, held that labour arbitrators ought to be shown deference.

98. *Supra* note 9.

for a refusal of deference.”<sup>99</sup> The board’s public reputation for competence will influence a judge when this comparison of expertise is made. This link is made possible in part because expertise is a vague and impressionistic concept. Thus, the stronger the board’s reputation, the more the relative expertise balance will favour the board and the more likely the court will defer to board decisions. The weaker the board’s reputation, the more the relative expertise calculation will suggest to the court that it has an obligation to review substantively the board’s rulings.

The court takes a special interest in issues it considers of general public importance or far-reaching consequence.<sup>100</sup> The court will not defer on such issues unless the relative expertise calculation clearly favours the board. This will not be the case if the board’s reputation is weak. The problem is not that a board is unspecialized, although the court will question its expertise; the problem is not that the nature of the question is insufficiently factual, although the court will label it a general question of law; the problem is not that the issue is distant from the core of the board’s mandate, although the court will map it outside the boundary. The problem is that the court will not leave a question that it regards as being of significant public importance to an agency whose reputation for competence is suspect.

Next to constitutional matters, the Supreme Court regards human right matters as having an overriding importance.<sup>101</sup> The Court’s interest may in part be historical given the traditional role that the common law court has played in protecting individual liberty, may in part be constitutional given the court’s unsatisfactory experience with the old *Bill of Rights* and its activist experience under the *Charter*, and may in part be hierarchical given the Court’s claim, as the highest judicial organ, to treat the most serious questions. If public confidence in human rights agencies is weak, and their reputation clouded, a one-person human rights board of inquiry will lack the necessary legitimacy to resolve controversial moral issues having broad social impact. That person will not have the same moral authority, or strong reputation, as a nine-judge Supreme Court. In that

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99. *Ibid.* at 414-5.

100. These phrases are taken from Justice McLachlin’s dissent in *Goldhawk*, *supra* note 1. The CBC’s obligations under the *Broadcasting Act*, R.S.C. 1985, c.B-9, and the standard of conduct of the CBC, were considered matters of general public importance.

101. In *Berg*, *supra* note 58 at 677, the Chief Justice referred to “the unique nature of human rights legislation,” its “privileged status,” and referred to *Ontario (Human Rights Commission) v. Simpsons-Sears Ltd.*, [1985] 2 S.C.R. 536, 23 D.L.R. (4th) 321 at 329 rev’ing 138 D.L.R. (3d) 133, 3 C.H.R.R. D/1071 (C.A.), aff’ing 133 D.L.R. (3d) 611, 3 C.H.R.R. D/796 (Div. Ct.) where such legislation was held to be “not quite constitutional but certainly more than the ordinary.”

sense he or she is less qualified to resolve finally questions raising diverse issues that go to the very nature of our society. It is in these circumstances that the court feels relative expertise favours the judges.

On the other hand, where a board's reputation is strong the Court is content to leave substantive decisions on important matters with the administrators. This is so, for example, with securities commissions that enjoy a broad public interest mandate and policy development role<sup>102</sup> and labour boards responsible for overseeing the development of a sophisticated statutory regime.<sup>103</sup> So long as no crisis develops, these boards tend to enjoy public confidence, in part because the complexity of what they do makes it difficult for the public to second guess them.<sup>104</sup> In these circumstances, reputation and relative expertise favours the administrators. Despite the far-reaching consequences of board decisions in these areas, judges will show little interest in becoming involved so long as the public remains confident that the administrators are qualified to do their job.

Expertise is not the only word in the judicial review lexicon that is capable of acting as a proxy for reputation. The idea of bias, like the idea of expertise, is a vague, impressionistic factor that affects reputation. It is also an idea capable of providing camouflage for a judge minded to review the decisions of an agency that lacks legitimacy because of the low public esteem in which it is held.

## II. Bias

Bias refers to the mental capacity of a decision-maker to be persuaded by rational argument. States of mind<sup>105</sup> span a spectrum from judicial impartiality<sup>106</sup> to prejudice. An impartial or open mind is one capable of dispassionately considering the evidence,<sup>107</sup> of relying on no other

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102. See *Pezim*, *supra* note 1 at 407-8.

103. See *Dayco*, *supra* note 17 at 632-3.

104. So long as affordable gas flows in the pipeline, the public is unlikely to challenge the conduct of the hearings that produced that result.

105. *Valente v. The Queen*, [1985] 2 S.C.R. 673, 24 D.L.R. (4th) 161 at 169 [hereinafter *Valente* cited to D.L.R.], cited in *Ruffo v. Conseil de la Magistrature*, [1995] 4 S.C.R. 267, 130 D.L.R. (4th) 1 at 19 [hereinafter *Ruffo* cited to D.L.R.].

106. *Valente*, *ibid.* at 169. See also *Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities)*, [1992] 1 S.C.R. 623, 89 D.L.R. (4th) 289 at 298 [hereinafter *Nfld. Tel.* cited to D.L.R.], citing *Szilard v. Szasz*, [1955] S.C.R. 3, 1 D.L.R. 370, Rand J. [hereinafter *Szilard* cited to D.L.R.]. See also *R. v. Lippé*, [1991] 2 S.C.R. 114, 64 C.C.C. (3d) 513 at 535 [hereinafter *Lippé* cited to C.C.C.].

107. See *Sivaguru v. Canada (Minister of Employment & Immigration)* (1992) 16 Imm. L.R. (2d) 85 at 102, 139 N.R. 220 (Fed. C.A.) [hereinafter *Sivaguru*]; see also *Nfld. Tel.*, *supra* note 106 at 300.

authority but the law, and of deciding solely on the basis of one's own conscience and opinion.<sup>108</sup> It is a disinterested mind,<sup>109</sup> the mind of a decision-maker who has no personal stake in the outcome.<sup>110</sup> A prejudiced or closed mind is one that has so pre-judged the matter, and is so incapable of change,<sup>111</sup> that any representation to the contrary would be futile.<sup>112</sup> The question on judicial review is whether, and to what degree, an administrative decision-maker must be amenable to persuasion; whether, and to what extent, the taint of personal interest will be tolerated.<sup>113</sup>

Courts have historically defined bias by categorizing it in accordance with the nature of the decision-maker's personal interest in the outcome of the case.<sup>114</sup> It is possible to think of these categories as categories of temptation and these personal interests as irrelevant motives. Is there a danger in a given context that would close the decision-maker's mind to persuasion and would constrain his or her ability to decide freely according to conscience?

The categorization of bias has proceeded tentatively with mistakes being made and later corrected. *Energy Probe* identified pecuniary and non-pecuniary interests as sources of temptation. The latter included "kinship, friendship, partisanship, particular professional or business relationship with one of the parties, animosity towards someone interested, predetermined mind as to the issue involved, etc."<sup>115</sup> In other words, the non-pecuniary category encompassed every interest, every temptation, but money.

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108. See *Consolidated Bathurst*, *supra* note 15 at 563.

109. See *Canadian Cable Television Ass'n v. American College Sports Collective of Canada Inc.* (1991), 81 D.L.R. (4th) 376 at 399, 4 Admin. L.R. (2d) 61 (Fed. C.A.) [hereinafter *Sports Collective* cited to D.L.R.], citing *Re Gooliah and Minister of Citizenship and Immigration* (1967), 63 D.L.R. (2d) 224 at 227-8, 59 W.W.R. 705 (Man. C.A.).

110. See *Consolidated Bathurst*, *supra* note 15 at 532.

111. *Old St. Boniface Residents Assn. Inc. v. Winnipeg (City)*, [1990] 3 S.C.R. 1170, 75 D.L.R. (4th) 385 at 409 [hereinafter *Old St. Boniface* cited to D.L.R.].

112. *Ibid* at 409.

113. *Singh v. Canada (Minister of Employment and Immigration)*, [1985] 1 S.C.R. 177, 17 D.L.R. (4th) 422 at 464, cited in *Idziak v. Canada (Minister of Justice)*, [1992] 3 S.C.R. 631, 97 D.L.R. (4th) 577 at 596 [hereinafter *Idziak* cited to D.L.R.], and *Pearlman v. Manitoba Law Society Judicial Committee*, [1991] 2 S.C.R. 869, 84 D.L.R. (4th) 105 at 115 [hereinafter *Pearlman* cited to D.L.R.].

114. *Re Energy Probe and Atomic Energy Control Board*, [1985] 1 F.C. 563, 15 D.L.R. (4th) 48 at 62-3 (C.A.), leave to appeal refused (1985), 15 D.L.R. (4th) 48n (S.C.C.) [hereinafter *Energy Probe* cited to D.L.R.].

115. *Ibid.* at 61.



The motions judge in *Energy Probe* attempted to distinguish between pecuniary interests and reasonable apprehension of bias. Justice Marceau, of the Federal Court of Appeal, correctly observed that such a distinction would be “difficult to defend logically since it would present no basis for comparison, one group being identified by the nature of the interest, the other by the possible reaction the presence thereof may inspire in the mind of the public.”<sup>116</sup> Pecuniary is a category of interest; reasonable apprehension of bias, as will be discussed below, is a standard of proof. Curiously, Justice Marceau went on to make his own error. He held that an interest of a pecuniary nature, “does not raise a question of apprehension of bias.”<sup>117</sup> However, even where a decision-maker has a possible pecuniary interest in the outcome, there is no reason why actual bias must be proven. Reasonable apprehension of bias should be enough to merit disqualification.<sup>118</sup>

A categorization difficulty also arose in *Valente*. The Court, following certain academic commentary, made a distinction between impartiality—a “state of mind”—and independence—a “status or relationship to others.”<sup>119</sup> In *Lippé*, the Chief Justice referred to independence as “the cornerstone, a necessary prerequisite, for judicial impartiality.”<sup>120</sup> In fact, independence is a category of bias. A decision-maker who is dependent on others with an interest in the proceedings will not be able to bring an open state of mind to the task of adjudication.<sup>121</sup>

The law has now evolved to the point where it is possible to identify four different categories of personal interest that risk closing a decision-maker’s mind to the merits of the parties’ arguments. Each category originates in a different aspect of the decision-maker’s personality. Each

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116. *Ibid.* at 63.

117. *Ibid.* at 64.

118. Justice Sopinka so held in *Old St. Boniface*, *supra* note 111. See also *Szilard*, *supra* note 106, cited in *Nfld. Tel.*, *supra* note 106 at 298 where Justice Rand held as a requirement of “judicial impartiality” that each party was entitled to a “sustained confidence in the independence of mind” of those who sit in judgment of him.

119. *Valente*, *supra* note 105 at 169-70.

120. *Lippé*, *supra* note 106 at 530, cited in *Ruffo*, *supra* note 105 at 19.

121. *Lippé*, *ibid.* provides further evidence of the court working out the content of the categories or, in this case, subcategories of bias. The Chief Justice, writing in the minority at 529-30, would have limited judicial independence to relationships with government understood as any agency that could exert pressure through the authority of the state. The majority, at 540, citing *R. v. Beauregard*, [1986] 2 S.C.R. 56, 30 D.L.R. (4th) 481 [hereinafter *Beauregard* cited to D.L.R.], saw a potential danger to independence arising out of any relationship - be it government, pressure group, individual or even another judge.

poses a particular temptation.<sup>122</sup> Each may be present alone, or in various combinations, in different factual settings.<sup>123</sup>

The first category of personal interest originates in the decision-maker’s ties to others. Lack of independence may result from the decision-maker’s past<sup>124</sup> or present<sup>125</sup> connections to others or from outside interference. That outside interference may come from either inside<sup>126</sup> or outside of the decision-maker’s agency. If outside the agency, the interference may have its source in a state authority,<sup>127</sup> such as a

122. The following chart maps the categories and sub-categories of bias discussed in this article. “Personal interest” refers to the nature of the decision-maker’s potential personal interest in the outcome of the case — the influence or temptation that could potentially close the decision-maker’s mind to relevant arguments. “Antidote” refers to countervailing factors that neutralize any potential personal interest that the decision-maker might have in the outcome. Antidotes can apply to any of the categories of bias but are most commonly associated with one category.

| Personal Interest       | Category of Bias      | Sub-Category of Bias                                                                                                                                                                                                                                | Antidote to Reasonable Apprehension of Bias                               |
|-------------------------|-----------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|---------------------------------------------------------------------------|
| 1. One’s relationships  | Independence          | <ul style="list-style-type: none"> <li>• from within one’s agency</li> <li>• from governmental entities</li> <li>• from non-governmental entities</li> <li>• from past personal connections</li> <li>• from present personal connections</li> </ul> | Objective Safeguards (i.e. oaths, tenure, arms-length relationships etc.) |
| 2. One’s needs          | Conflict of Interest  | <ul style="list-style-type: none"> <li>• pecuniary</li> <li>• non-pecuniary</li> </ul>                                                                                                                                                              | Remoteness (trivial)                                                      |
| 3. One’s preconceptions | Partisanship          | <ul style="list-style-type: none"> <li>• with respect to individuals</li> <li>• with respect to issues</li> <li>• with respect to law</li> </ul>                                                                                                    | Nature & function of tribunal; words and conduct of tribunal              |
| 4. One’s involvement    | Multiplicity of Roles | <ul style="list-style-type: none"> <li>• investigator</li> <li>• complainant</li> <li>• prosecutor</li> <li>• judge in first instance</li> <li>• appellate judge</li> </ul>                                                                         | Legislation                                                               |

123. In *Leshner v. Ontario (Deputy Attorney-General)* (1992), 96 D.L.R. (4th) 41, 10 O.R. (3d) 732 (Div. Ct.), the decision-maker was held to have created a reasonable apprehension of bias because he had a reporting relationship to the respondent (relationship - personal connection), an interest in vindicating himself (conflict of interest - non-pecuniary), and had acted as both complainant and adjudicator (multiplicity of roles). No antidotal countervailing factor was present to relieve the reasonable apprehension of bias.

124. *Committee For Justice and Liberty v. National Energy Board*, [1978] 1 S.C.R. 369, 68 D.L.R. (3d) 716 [hereinafter *Comm. For Justice* cited to D.L.R.].

125. *Dulmage v. Ontario (Police Complaints Commissioner)* (1994), 120 D.L.R. (4th) 590 at 598, 21 O.R. (3d) 356 (C.A.) [hereinafter *Dulmage* cited to O.R.] (bias found); *Leshner, supra* note 123 (bias found).

126. *Consolidated Bathurst, supra* note 15 (no bias found); *Tremblay, supra* note 15 (bias found).

127. In the judicial context see *Canada (Minister of Citizenship & Immigration) v. Tobias*, [1997] S.C.C.A. No.61 (QL).

member of the government, or in a private body,<sup>128</sup> such as a pressure group or corporate entity. The pressure may take the form of dictation or may be more subtle.

Second, conflict of interest, originating in a decision-maker's own needs, creates bias. That conflict may be of a material kind, most commonly pecuniary,<sup>129</sup> or may be of an ethereal, but no less powerful, nature.<sup>130</sup> Desire for promotion is an example.

Third, partisanship, originating in the decision-maker's personal beliefs, threatens an open mind. Partisanship may be evident in respect of people,<sup>131</sup> especially a party to the proceedings, and in respect of issues raised by the proceedings.<sup>132</sup> It may be manifest through words or conduct.<sup>133</sup> Whether partisanship will close the mind, and amount to legal bias, will depend on the strength of the decision-maker's commitment to a particular position, the degree and timing of any public advocacy of that position, and the extent to which the position is particularized in a manner that resembles the specifics of the issue in the case.<sup>134</sup> It is clear that predetermined positions with respect to the law are not considered a partisan interest that would amount to legal bias.<sup>135</sup>

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128. See *Beauregard*, *supra* note 121 at 491 where the "broader understanding" of "judicial independence" was adopted:

no outsider - be it government, pressure group, individual or even another judge - should interfere in fact, or attempt to interfere, with the way in which a judge conducts his or her case and makes his or her decision.

Cited by Gonthier, J. in *Lippé*, *supra* note 106 at 540.

129. *Energy Probe*, *supra* note 114 (no bias found).

130. *Leshner*, *supra* note 123; *Great Atlantic & Pacific Co. v. Ontario (Human Rights Commission)* (1993), 13 O.R. (3d) 824, 109 D.L.R. (4th) 214 (Div. Ct.) [hereinafter *A & P* cited to O.R.].

131. *Re Golomb and College of Physicians and Surgeons of Ontario* (1976), 68 D.L.R. (3d) 25 (H.Ct.J.) [hereinafter *Golomb*]; *Sivaguru*, *supra* note 107.

132. *Nfld. Tel.*, *supra* note 106; *Old St. Boniface*, *supra* note 111; *Save Richmond Farmland Society v. Richmond (Township)*, [1990] 3 S.C.R. 1213, 75 D.L.R. (4th) 425; *Large v. Stratford (City)* (1992), 92 D.L.R. (4th) 565 (Ont. Gen. Div.) [hereinafter *Large*].

133. "Two refugee board members sacked: Pair giggled, passed notes during Iranian's torture testimony," *The [Toronto] Globe and Mail* (7 March 1992) A6; "Sexist notes found, refugee lawyer says: Board officials accused of comments," *The [Toronto] Globe and Mail* (17 February 1992) A8.

134. *Nfld. Tel.*, *supra* note 106; *Large*, *supra* note 132; *Ellis-Don Ltd. v. Ontario (Labour Relations Board)* (1992), 95 D.L.R. (4th) 56, 6 Admin. L.R. (2d) 318 (Div. Ct.), rev'd (1994), 110 D.L.R. (4th) 731, 24 Admin. L.R. (2d) 122 (Div. Ct.), leave to appeal to C.A. refused, [1994] 6 O.L.R.B. Rep. 801 (C.A.), leave to appeal to S.C.C. refused (1995), 118 D.L.R. (4th) vi (note), 24 Admin. L.R. (2d) 122n (S.C.C.).

135. K.C. Davis, *Administrative Law Treatise*, 2d ed., Vol. III (San Diego: K.C. Davis, 1980) at 372-7; *Comm. For Justice*, *supra* note 124 at 739-40.

Fourth, multiplicity of roles, originating in the decision-maker's prior involvement in the matter, poses a danger of bias. The various potentially conflicting roles include: investigator, party to the proceeding, prosecutor, trial judge, and appeal judge.<sup>136</sup>

The legal rule against bias is expressed in the Latin phrase *nemo iudex in causa sua debet esse* — no man should be judge in his own cause.<sup>137</sup> A “judge in his own cause” has a personal stake in the outcome of the cause, one that exhibits all four of the personal interests described above. He or she lacks independence, has an obvious conflict of interest, is naturally partisan and plays the role of both party and judge. That is why Justice Marceau, in *Energy Probe*, felt it “trite to say that the most obvious and most easily perceived practical application of [the bias principle] is that no one should be permitted to be judge in his own cause.”<sup>138</sup>

This situation arose in *A & P*.<sup>139</sup> The adjudicator in a case of alleged systemic sex-discrimination being prosecuted by the Human Rights Commission was herself a complainant represented by the Commission in an ongoing case of alleged sex-discrimination. In other words, her decision as adjudicator risked becoming a precedent in her own cause. Despite the fact that the adjudicator's role as complainant in the ongoing complaint was attenuated and remote — she was one of 120 complainants and a 12-person steering committee and the complaint was inactive — the Divisional Court held that her descent, “personally, as a party, into the very arena over which she [was] appointed to preside in relation to the very same issues she has to decide,” created a reasonable apprehension of bias.<sup>140</sup>

Without the confidence of the public, administrative agencies and officials would find it difficult to implement government policy. Biased administrators forfeit confidence, in part because they have breached the public trust by preferring their own self-interest to that of the public, in

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136. *Law Society of Upper Canada v. French*, [1975] 2 S.C.R. 767, 49 D.L.R. (3d) 1; *Re W.D. Latimer Co. Ltd. and Bray* (1974), 52 D.L.R. (3d) 161, 6 O.R. (2d) 129 (C.A.) [hereinafter *Latimer*]; *Brosseau v. Alberta Securities Commission*, [1989] 1 S.C.R. 301, 57 D.L.R. (4th) 458 [hereinafter *Brosseau*]; *E.A. Manning Ltd. v. Ontario Securities Commission* (1995), 23 O.R. (3d) 257, 125 D.L.R. (4th) 305 (C.A.), leave to appeal to S.C.C. refused (1995), 125 D.L.R. (4th) vii (note), 32 Admin L.R. (2d) 1 (S.C.C.).

137. *Pearlman*, *supra* note 113 at 115.

138. *Supra* note 114 at 61.

139. *Supra* note 130.

140. *Ibid.* at 834. In *Pearlman*, *supra* note 113, where the allegation was conflict of interest alone, and the matter was remote and involved ‘minuscule’ amounts, the appropriate conclusion was reached. In *Leshner*, *supra* note 123 at 44, bias was also found where the decision-maker “had an interest in vindicating himself.” He was also in a reporting relationship with the respondent.

part because they have undermined the possibility of meaningful citizen input by asking for submissions when their mind is already closed to persuasion. In such circumstances, the public will find it difficult to accept any administrative decision. As Justice Laskin pointed out in *Comm. For Justice*, public confidence in the impartiality of adjudicative agencies is required to further the public interest.<sup>141</sup>

Given the importance of public confidence for effective administration, proof of bias must not be made too difficult. Simply doing justice will not guarantee public confidence; rather, “justice. . . should manifestly and undoubtedly be seen to be done.”<sup>142</sup> Where the preservation of public confidence is at stake, the need to ensure the appropriate level of impartiality requires that one err on the side of caution by lowering the standard of proof.

The court makes it easier to prove bias in three ways. First, it is not necessary to prove that a particular decision-maker was actually biased: it is sufficient that he or she give the appearance of bias to a reasonable person.<sup>143</sup> Justice de Grandpré, in his dissent in *Comm. For Justice* formulated the test as follows:

[T]he apprehension of bias must be a reasonable one, held by reasonable and right-minded persons, applying themselves to the question and obtaining thereon the required information. In the words of the Court of Appeal, . . . that test is “what would an informed person, viewing the matter realistically and practically—and having thought the matter through—conclude.”<sup>144</sup>

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141. *Comm. For Justice*, *supra* note 124 at 733. See also Justice Cory’s comment on this observation in *Nfld. Tel.*, *supra* note 106 at 298.

Where the administrative agency is performing an adjudicative function, the observation of Justice Le Dain in *Valente*, *supra* note 105 on the importance of public confidence in the functioning of the courts applies equally to the functioning of administrative agencies. He stated at 172:

Both independence and impartiality are fundamental not only to the capacity to do justice in a particular case but also to individual and public confidence in the administration of justice. Without that confidence the system cannot command the respect and acceptance that are essential to its effective operation.

142. *Consolidated Bathurst*, *supra* note 15 at 562, where Gonthier J. cites the well known maxim from *R. v. Sussex Justices*, [1924] 1 K.B. 256 at 259.

143. *Tremblay*, *supra* note 15 at 627. See also *Re Canada (Anti-Dumping Tribunal)*, [1972] F.C. 1078 at 1101 (T.D.) where Justice Cattanach refers to “tests [that] depend upon an appearance of bias rather than its presence in actuality” and observes that “[a]rances dominate the tests.”

144. *Supra* note 124 at 735, also cited in *Valente*, *supra* note 105 at 169. Note that in *Comm. For Justice* the reasonable apprehension of bias test was being applied to determine if the decision-maker’s past relationships would compromise his independence in the eyes of a reasonable man.

Justice Cory, in *Nfld. Tel.*, provided the justification for the reasonable apprehension standard of proof test:

The duty to act fairly includes the duty to provide procedural fairness to the parties. That simply cannot exist if an adjudicator is biased. It is, of course, impossible to determine the precise state of mind of an adjudicator who has made an administrative board decision. As a result, the courts have taken the position that an unbiased appearance is, in itself, an essential component of procedural fairness. To ensure fairness the conduct of members of administrative tribunals has been measured against a standard of reasonable apprehension of bias. The test is whether a reasonably informed bystander could reasonably perceive bias on the part of an adjudicator.<sup>145</sup>

Second, it is not necessary to prove that the particular decision-maker was biased: it is sufficient to prove that the administrative system is structured in such a way as to create a reasonable apprehension of bias on an institutional level.<sup>146</sup> If systemic bias can be established “in a substantial number of cases,” there is no need ever to deal with it on a case-by-case basis.<sup>147</sup> Chief Justice Lamer modified the reasonable apprehension of bias test to apply on the institutional level as follows:

Having regard for a number of factors including, but not limited to, the nature of the occupation and the parties who appear before this type of judge, will there be a reasonable apprehension of bias in the mind of a fully informed person in a *substantial number* of cases?<sup>148</sup>

Third, it is not necessary in proving bias to engage in an objective inquiry into the decision-maker’s subjective state of mind. It is sufficient to identify objective indicators that act as concrete indicia of bias. In considering particular decision-makers, the reasonable member of the public will consider objective guarantees of independence such as security of tenure and financial security,<sup>149</sup> objective safeguards such as voluntary attendance at full board meetings,<sup>150</sup> provable relationships such as kinship<sup>151</sup> or professional contact,<sup>152</sup> identifiable pecuniary<sup>153</sup> or

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145. *Supra* note 106 at 297.

146. *Lippé, supra* note 106 at 531.

147. *Ibid.* at 534.

148. *Ibid.* [italics in original]

149. See e.g. *Valente, supra* note 105 at 170-5.

150. See *Consolidated Bathurst, supra* note 15 at 563 and *Tremblay, supra* note 15. See also *Ruffo, supra* note 105 at 43 where the safeguard was the judicial oath and occupational skill of the decision-maker.

151. *Spence v. Prince Albert (City) Commissioners of Police* (1987), 25 Admin. L.R. 90, 53 Sask. R. 35 (C.A.), leave to appeal to S.C.C. refused (1987), 58 Sask. R. 80 (note) (S.C.C.).

152. See *Comm. For Justice, supra* note 124.

153. See *Energy Probe, supra* note 114 and *Pearlman, supra* note 113.

non-pecuniary gain,<sup>154</sup> specific words<sup>155</sup> or conduct,<sup>156</sup> and documented past activity.<sup>157</sup> In dealing with institutional bias, the reasonable member of the public will consider the “objective status”<sup>158</sup> of the tribunal as evidenced by recruitment and appointment of members, institutional structures defined by statute and regulation,<sup>159</sup> operating rules,<sup>160</sup> codes of conduct<sup>161</sup> and oaths,<sup>162</sup> and the pattern of case results. All of these attributes are observable, and so capable of proof, in a way that the metaphysical operation of the mind is not.

Justice de Grandpré defined the reasonable person in the apprehension of bias test as an “informed person” who had obtained “the required information.”<sup>163</sup> In applying the test, that person would take all relevant factors into account.<sup>164</sup> In some cases, an informed person would not apprehend bias on the basis of one factor. In other cases, an informed person would consider a number of factors taken together before concluding that there was bias: the whole is more than the sum of the parts.<sup>165</sup>

In some cases, one factor taken alone may create the apprehension of bias but the countervailing factors may neutralize that impression. There are four such factors, each applicable to any of the four categories of bias but each generally associated with one of the categories. First, a reasonable member of the public would be aware of any safeguards that would

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154. See *Leshner*, *supra* note 123 at 44 where a decision-maker’s reporting relationship to the respondent made it inappropriate for him to determine issues of credibility between the respondent and the applicant. See also *A & P*, *supra* note 130 where the decision-maker’s decision could have become a precedent in her own cause.

155. *Golomb*, *supra* note 131; *Sivaguru*, *supra* note 107.

156. *Ibid.* See also *Begum v. Canada (Minister of Citizenship and Immigration)*, [1995] F.C.J. No. 382 (T.D.).

157. See *MacBain v. Canada (Canadian Human Rights Commission)* (1985), 62 N.R. 117, 22 D.L.R. (4th) 119 (Fed. C.A.) [hereinafter *MacBain* cited to D.L.R.] and *Re Toronto (Metropolitan) Police Complaints Board*, [1987] O.J. 1966, Action No. # 1191-85 (Ont. Div. Ct.) [unreported].

158. See *Lippé*, *supra* note 106 at 531.

159. See *MacBain*, *supra* note 157 and *Lippé*, *ibid.*

160. See *Tremblay*, *supra* note 15 and *Glengarry Memorial Hospital v. Ontario (Pay Equity Hearings Tribunal)* (1993), 110 D.L.R. (4th) 260, 18 Admin. L.R. (2d) 287 (Ont. Div. Ct.), *rev’d* (1995), 124 D.L.R. (4th) 82, 80 O.A.C. 261, leave to appeal to S.C.C. refused (1995), 126 D.L.R. (4th) vii (note) (S.C.C.).

161. See *Lippé*, *supra* note 106 at 537-8.

162. See *Lippé*, *ibid.* at 536 and *Ruffo*, *supra* note 105 at 42.

163. *Comm. For Justice*, *supra* note 124 at 735.

164. The relevant factors will depend on the facts of the case. An example of a list of various factors in an independence case can be found in Justice Moldaver’s decision in *Dulmage*, *supra* note 125 at 598.

165. *Ruffo*, *supra* note 105 at 49. Similar logic was used in *Syncrude Canada Ltd. v. Michetti* (1994), 120 D.L.R. (4th) 118, 28 Admin. L.R. (2d) 155 (C.A.), with respect to cumulative procedural errors relative to the *audi alteram partem* rule.

counter the danger of bias, especially bias caused by a lack of independence.<sup>166</sup> The nature of such “protective devices”<sup>167</sup> will vary depending on the threat of bias and the level of impartiality deemed appropriate in the circumstances.<sup>168</sup> They include security of tenure, financial security, immunity from prosecution, codes of ethics, oaths of office, arms-length relationships and the professional experience of the adjudicator.<sup>169</sup> Where a collegial decision-making process has been adopted, anything that preserves the ability of a decision-maker to decide according to his or her conscience and opinion—voluntary consultation, no recorded minutes, no vote taking—safeguards independence.<sup>170</sup>

Second, a reasonable member of the public would consider whether the threat of bias was too “remote,” too “contingent,” too “alien,” too “speculative” or too “attenuated” to close the decision-maker’s mind to persuasion.<sup>171</sup> The test for bias is not administered by someone with a “very sensitive or scrupulous conscience.”<sup>172</sup> Remoteness as a countervailing consideration arises most frequently in conflict of interest situations. In *Comm. For Justice*, Chief Justice Laskin did not accept that the decision-maker was a “stranger” to the pipeline application given his previous involvement in preparing the application with one of the parties.<sup>173</sup> On the other hand, in *Energy Probe*, the possibility that a member of the Atomic Energy Control Board might realize a future profit from contracts dependent on a licensing application currently under consideration was too alien to constitute pecuniary bias.<sup>174</sup> Similarly, in *Pearlman*, the “minuscule” gain realized by the Manitoba Law Society

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166. *Lippé*, *supra* note 106 at 534.

167. *Tremblay*, *supra* note 15 at 625.

168. See *Valente*, *supra* note 105 at 175, where Le Dain, J. states:

It would not be feasible, however, to apply the most rigorous and elaborate conditions of judicial independence to the constitutional requirement of independence in s.11(d) of the Charter, which may have to be applied to a variety of tribunals.

169. See *Valente*, *ibid.*; *Lippé*, *supra* note 106, and *Ruffo*, *supra* note 105 at 42. In *Ruffo*, the fact that the conseil de la Magistrature inquiring into a Judge’s conduct, “was for the most part made up of judicial professionals...whose functions essentially require them to be able to decide dispassionately between positions that are diametrically opposed” was a safeguard.

170. See *Consolidated Bathurst*, *supra* note 15 at 562-3 and *Tremblay*, *supra* note 15 at 624-5.

171. *Energy Probe*, *supra* note 114 at 62-3; *Pearlman*, *supra* note 113 at 122.

172. *Comm. For Justice*, *supra* note 124 at 736.

173. *Ibid.* at 731-2.

174. *Supra* note 114 at 63.



from cost awards in discipline cases did not create a bias, actual or perceived.<sup>175</sup>

Third, a reasonable member of the public would take into account the nature of, and function performed by, the administrative agency. Such considerations are crucial where partisanship represents a potential danger. Greater degrees of impartiality are demanded as one moves from more policy-oriented functions to more adjudicative ones,<sup>176</sup> from elected boards to appointed bureaucrats, and from matters of less serious to more serious consequence.<sup>177</sup> For example, a reasonable member of the public would not expect the same degree of neutral objectivity from an elected municipal planning commission as from a medical college discipline panel.

Fourth, a reasonable member of the public would take into account any legislation authorizing the decision-maker's involvement in multiple roles in the matter in question. Legislation can authorize any overlap in investigative, prosecutorial or adjudicative function that would otherwise raise an apprehension of bias.<sup>178</sup>

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175. *Supra* note 113 at 122-3. Remoteness issues also arise in partisanship cases: for example, see *A & P*, *supra* note 130 and the factors that Justice Moldaver took into account in considering the claim of bias against Ms. Douglas in *Dulmage*, *supra* note 125 at 364 especially the following: "What was the nature of the issue being discussed in the statements? Did the comments relate to the critical issue or issues which the board was required to decide or were they directed to peripheral, less consequential or general matters?"

176. The existence of a continuum was identified by Justice de Grandpré in *Comm. For Justice*, *supra* note 124 at 736:

The question of bias in a member of a Court of Justice cannot be examined in the same light as that in a member of an administrative tribunal entrusted by statute with an administrative discretion exercised in the light of its experience and of that of its technical advisors.

It was fully described by Justice Cory in *Nfld. Tel.*, *supra* note 106 at 299:

It can be seen that there is a great diversity of administrative boards. Those that are primarily adjudicative in their functions will be expected to comply with the standard applicable to courts. That is to say that the conduct of the members of the Board should be such that there could be no reasonable apprehension of bias with regard to their decision. At the other end of the scale are boards with popularly elected members such as those dealing with planning and development whose members are municipal councillors. With those boards, the standard will be much more lenient. In order to disqualify the members a challenging party must establish that there has been a prejudgment of the matter to such an extent that any representations to the contrary would be futile. Administrative boards that deal with matters of policy will be closely comparable to the boards composed of municipal councillors. For those boards, a strict application of a reasonable apprehension of bias as a test might undermine the very role which has been entrusted to them by the legislature.

See also Justice Sopinka in *Old. St. Boniface*, *supra* note 111 at 408-9.

177. As where reputation and livelihood are at stake, see *Ruffo*, *supra* note 105 at 53 and *Dulmage*, *supra* note 125 at 363.

178. See *Latimer*, *supra* note 136 and *Brosseau*, *supra* note 136.

Behind these four countervailing factors lies a recognition that impartiality is only one of several, sometimes competing, values that administrative law must accommodate. The need to get the regulatory job done efficiently, with limited resources, means that it would not be “feasible” to require “the most rigorous and elaborate conditions of judicial independence” in every situation.<sup>179</sup> The need for “adjudicative coherence” across a large number of cases, in order to reinforce the value of equal justice, means that the purest form of impartiality may not be attainable.<sup>180</sup> The need for expertise on decision-making panels means that adjudicators who might otherwise present the appearance of bias must be accepted.<sup>181</sup> The need for the participation of interest groups, and even popularly elected politicians, in order to better reflect community values in administrative decision-making, makes it necessary to compromise impartiality values in favor of democratic ones.<sup>182</sup> Safeguards, remoteness, tribunal function and legislation are relevant factors to the reasonable person because they embody values that co-exist with the concern to avoid bias.

Reasonable apprehension of bias is a reputational test that relates to public opinion. Reputation, defined by the Oxford Dictionary of Current English as “what is generally . . . believed about a person’s or thing’s character,”<sup>183</sup> is a measure of public trust. The bias test, a standard of proof meant to insure that administrators act in the public rather than their private interest, is the same kind of measure of public trust. Dussault and Borgeat have written, “appearance dominates the [bias] tests.”<sup>184</sup> Justice Sopinka explicitly linked the proof of bias to public opinion:

[T]he appellant only has to establish an appearance of bias in order to oust the tribunal’s jurisdiction. For this purpose the law adopts the fiction of the well-informed person as a means of referring to public opinion concerning

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179. *Valente*, *supra* note 105 at 175.

180. *Consolidated Bathurst*, *supra* note 15 at 562.

181. See *Large*, *supra* note 132 at 572 where Justice Campbell stated that: “To exclude everyone [from human rights inquiry boards] who ever expressed a view on human rights issues would exclude those best qualified to adjudicate fairly and knowledgeably in a sensitive area of public policy.”

182. See *Nfld. Tel.*, *supra* note 106 at 297-9. This is especially evident with the composition of tripartite panels.

183. J.B. Sykes., ed., *The Concise Oxford Dictionary of Current English*, 7th ed. (Oxford: University Press, 1983) at 884.

184. R. Dussault & L. Borgeat, *Administrative Law: A Treatise*, 2d ed. (Toronto: Carswell, 1990), vol. 4 at 300. See also *Tremblay*, *supra* note 15 at 625 where Justice Gonthier, talking about countervailing factors states, “Such protective devices are important when, as here, what is at issue is also to determine whether there was an *appearance of bias or lack of independence*” [italics in original].

the credibility of these proceedings. If there is an appearance of bias, neither the public nor the parties can trust the findings of the inquiry.<sup>185</sup>

Public opinion feeds on itself. The stronger an agency's reputation for impartiality, the less likely the agency will appear to the public to be biased in any particular case and, as a result, the less chance the court will intervene on reasonable apprehension of bias grounds. The weaker an agency's reputation for impartiality, the less confidence public opinion will have in the impartiality of its proceedings. The public will view the conduct of an immigration board more suspiciously if the board is already notorious for its aggressive behaviour and intemperate comments during past hearings. A human rights commission widely reported to have been partisan in its dealings with one of the groups before it is more likely to have its decisions viewed by the general public with an apprehension of bias than a commission with a reputation amongst all of its constituents for even-handedness.<sup>186</sup> Once the test is stated in terms of the *appearance* of bias, once the standard is informed public opinion, and once the goal is to maintain public confidence in the decision-maker's motives, any inquiry into bias will be influenced by the reputation of the agency in question.

### III. Delay

After unreasonable delay, courts stay proceedings, or reduce the weight given to "stale" evidence, in order to prevent the administrative justice system from being brought into disrepute.<sup>187</sup> Justice Vancise, of the

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185. *Ruffo*, *supra* note 105 at 53.

186. The case of the Ontario Human Rights Commission is instructive. Catherine Frazee, Chief Commissioner between 1989 and 1993, acknowledged that investigating officers were initially sympathetic to complainants and that this lack of neutrality "keeps getting us into trouble." She also advocated that the Commission "push the envelope" and "take the borderline cases forward." These comments received significant media coverage appearing, respectively, in: T. Boyle, "Radical Changes urged by rights commission" *The Toronto Star* (1 May 1992) A36.; "The new rights frontier" *The [Toronto] Globe & Mail* (6 March 1993) D6; M. G. Crawford, "Human Rights Commissions: Politically Correct Predators?" *Canadian Lawyer* (October 1991) 16. Her successor admitted that there was a perception that the Commission was the enemy of the private sector and spoke of the need to regain a reputation for neutrality. See J. Beaufoy, "Chief commissioner defends OHRC's delay-riddled record" *Law Times* (14-20 February 1994) 3.

187. Several competing interests are affected by the way in which delay is handled. The complainant will insist on his or her "day in court," particularly where there is only one forum available for asserting one's rights. See *Simms v. Seetech Metal Products* (1993), 20 C.H.R.R. D/477 at D/481 (Ont. Bd. Inquiry) [hereinafter *Simms*]; *Seneca College of Applied Arts and Technology v. Bhadauria*, [1981] 2 S.C.R. 181, 124 D.L.R. (3d) 193. The respondent will object to having an allegation "hang indefinitely over one's head" and will be concerned about

Saskatchewan Court of Appeal, described this interest in a case that challenged the timeliness of proceedings brought under the Saskatchewan Human Rights Code:

One last comment is required concerning the prejudice to society caused by the delay. There is a social value in having proceedings like this dealt with in an efficient and expeditious manner. A failure by the commission to initiate proceedings under the appropriate sections of the Code will reduce respect and confidence in the administration of justice. A failure to vigorously pursue complaints of this kind and other violations will inevitably lead to a diminution of rights sought to be provided and protected under the Code.<sup>188</sup>

An agency with a public reputation for delay puts public “respect and confidence in the administration of justice” in jeopardy. Reputation is the measure of that confidence. In considering whether public confidence had been breached, a judge will be influenced by the agency’s reputation for efficient management of its operations. A poor reputation will contribute to a finding that delay in a particular case was unreasonable. By such a finding, the court sends a powerful signal that delay is bringing the administrative system into disrepute and that the underlying causes of delay, be they mismanagement, lack of resources, increased demand for services, an excessively adversarial process, or lack of will to enforce the agency’s mandate, no longer provide an adequate excuse. The court is saying that reform measures must be undertaken in order to restore public confidence in, and the agency’s reputation for, managerial competence.

The test for determining whether delay is unreasonable is the same in civil,<sup>189</sup> criminal,<sup>190</sup> and administrative law.<sup>191</sup> It depends on the answer

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the continuing availability of exonerating evidence. He or she has an interest in “being able to respond to the allegations in the complaint and in ensuring that any findings of a contravention of the Code are made on a basis of sufficient certainty . . .” (*Simms, ibid.*). Together with its interest in maintaining public confidence by proceeding in a timely manner, society has an interest in having its regulatory codes enforced. In the human rights context, adjudicator Backhouse has written: “At the core of the public interest is the vindication of those rights identified by the Code as human rights.” See *Meissner v. Swiss Chalet (506756 Ontario Ltd.) (No.1)* (1989), 11 C.H.R.R. D/94 at D/94 (Ont. Bd. Inquiry) [hereinafter *Meissner*]; also cited in *Ghosh v. Domglas Inc.* (1991), 16 C.H.R.R. D/16 at D/24 (Ont. Bd. Inquiry) [hereinafter *Ghosh*]; and *Hall v. A-1 Collision and Auto Service (No.2)* (1992), 17 C.H.R.R. D/204 at D/215 (Ont. Bd. Inquiry) [hereinafter *Hall*].

188. *Saskatchewan (Human Rights Commission) v. Kodellas* (1989), 60 D.L.R. (4th) 143 at 196, 10 C.H.R.R. D/6305 (Sask. C.A.) [hereinafter *Kodellas* cited to D.L.R.].

189. *Allen v. Sir Alfred McAlpine & Sons Ltd. et al.*, [1968] 1 All E.R. 543 at 561 cited in *MacPhee v. Barristers’ Society of New Brunswick* (1983), 1 D.L.R. (4th) 156 at 162, 50 N.B.R. (2d) 61 (Q.B.) [hereinafter *MacPhee* cited to D.L.R.].

190. *R. v. Mills*, [1986] 1 S.C.R. 863, 29 D.L.R. (4th) 161 [hereinafter *Mills* cited to D.L.R.]; *R. v. Askov*, [1990] 2 S.C.R. 1199, 74 D.L.R. (4th) 355.

191. *Kodellas, supra* note 188. *Nisbett v. Manitoba (Human Rights Commission)* (1993), 101 D.L.R. (4th) 744, 14 Admin. L.R. (2d) 216 (Man. C.A.) [hereinafter *Nisbett* cited to D.L.R.].

to three questions: was the delay inordinate; was it excusable; did it substantially prejudice the respondent? Each of these questions invites a nebulous response. Each requires a judgment call, one that would permit agency reputation to be taken into account, if not expressly by reference to public confidence, then implicitly by unacknowledged judicial notice.

Whether a delay is inordinate is an imprecise estimation made using common sense and comparisons with the length of time taken to process similar cases both inside the agency and out, and within the geographic jurisdiction and without. The nature of the complaint, its complexity, the existence of investigative or evidentiary difficulties, and the intervention of outside factors such as simultaneous proceedings or unforeseen events, must be considered. A court or board may hold an agency with a public reputation for tardiness to a higher standard of performance by reducing the time that it has for dealing with cases.

Whether an inordinate delay will be excused, and the normal time frames waived, will depend on the kinds of reforms that the court or board feels are necessary and possible. An inattentive or mismanaged bureaucracy<sup>192</sup> is not the same as an overworked or underfunded one. A court or board might be less inclined to accept accidental inattentiveness as a valid excuse when considering an agency with a reputation for inefficiency. This is an area in which an agency could adopt its own reforms. On the other hand, a court or board might be more inclined to accept insufficient resources as an excuse, particularly where funding was beyond agency control. This would not be the case, however, if the court or board wished to send a signal to government that underfunding was the indirect cause of the agency's reputation eroding to the point where the public was starting to lack confidence in its operations. Whether such a signal is sent will depend on the extent of the loss of public confidence and on the perceived willingness of the funding authority to act on the message.

It will also depend on the severity of the prejudice caused by the delay. Agency reputation could become a factor in judging that severity. In terms of the scope of prejudice, an agency with a reputation for tardiness might find included within the ambit of prejudice not only the effect of delay on witnesses' memories but also its effect in heightening the stress

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192. See *Shreve v. Windsor (City) (No.2)* (1993), 18 C.H.R.R. D/363 at D/370, 93 C.L.L.C. ¶17,024 (Ont. Bd. Inquiry) [hereinafter *Shreve* cited in C.H.R.R.], where the adjudicator noted that most of the five year delay "was taken up while the file was apparently sitting on the desk of someone at the Human Rights Commission awaiting further attention."

and stigma faced by the respondent.<sup>193</sup> In terms of the weight of prejudice, an agency with a reputation for mismanagement might find that potential witness memory loss is not treated as a matter of mere inconvenience, but rather as a matter of abuse of process.<sup>194</sup> In terms of the proof of prejudice, an agency with a reputation for inefficiency might find a respondent relieved of the burden of actually having to prove specific prejudice in favour of an irrefutable presumption that lengthy delay creates prejudice.<sup>195</sup>

If the test is met, and delay is found to be unreasonable, one of two remedial approaches must be chosen. The “stay approach” treats unreasonable delay as an abuse of process that will result in proceedings being halted on natural justice grounds. The “evidentiary approach” treats unreasonable delay as a matter going to the weight to be given evidence and so to the eventual outcome of the case. The approach favoured will depend on the relative importance attached to the competing interests of the complainant, the respondent and society as a whole. The “stay approach” focuses on the prejudice suffered by the respondent and society’s interest in ensuring that operational mismanagement does not bring the agency into disrepute.<sup>196</sup> The “evidentiary approach” favours

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193. In *Hall*, *supra* note 187 at D/213, delay-induced psychological stress and stigma was not treated as coming within the scope of prejudice. A similar result was reached in *Nisbett*, *supra* note 191 at 754-5. The opposite conclusion was adopted in *Kodellas*, *supra* note 188 at 152.

194. In *Simms*, *supra* note 187 at D/479, memory loss was considered not to establish such prejudice as to warrant bringing proceedings to an end but rather was “[to] be taken into account in assessing the credibility of witnesses.” Similarly in *Gohm v. Domtar Inc. (No.1)* (1989), 10 C.H.R.R. D/5968 at D/5970 (Ont. Bd. Inquiry) [hereinafter *Gohm*], delay did not constitute an abuse of process even where evidence had gone “stale.” However, in *Ontario (Ministry of Health) v. Ontario (Human Rights Commission)* (1993), 105 D.L.R. (4th) 333 at 340 (Ont. Gen. Div.) [hereinafter *Ministry of Health*], delay resulting in memory loss was a factor in proceedings being brought to an end.

195. Actual proof of specific prejudice was required in *Hyman v. Southam Murray Printing* (1982), 3 C.H.R.R. D/617 (Ont. Bd. Inquiry) [hereinafter *Hyman*] but a lengthy passage of time gave rise to an irrebutable presumption of prejudice in *MacPhee*, *supra* note 187 at 162.

196. See *Kodellas*, *supra* note 188, where in a human rights case the Saskatchewan Court of Appeal adopted this approach. For a series of discipline cases that adopts this approach, see *MacPhee*, *ibid.*; *Misra v. College of Physicians & Surgeons of Saskatchewan* (1988), 52 D.L.R. (4th) 477 at 490, 36 Admin. L.R. 298 (Sask.C.A.) [hereinafter *Misra* cited to D.L.R.]; *Harvey v. Law Society of Newfoundland* (1992), 88 D.L.R. (4th) 487, 2 Admin. L.R. (2d) 306 (Nfld. T.D.); but see *Hammond v. Association of B.C. Professional Foresters* (1991), 47 Admin. L.R. 20 (B.C.S.C.); *Bennett v. British Columbia (Securities Commission)* (1991), 82 D.L.R. (4th) 129 (B.C.S.C.), *aff’d* (1992), 94 D.L.R. (4th) 339 (B.C.C.A.), appeal to S.C.C. refused (1992), 97 D.L.R. (4th) vii (note) (S.C.C.); and *R.(J.) v. College of Psychologists (B.C.)* (1995), 33 Admin. L.R. (2d) 174 (B.C.S.C.) [hereinafter *R.(J.)*].

the complainant's interest in having the claim adjudicated and society's in having its codes enforced.<sup>197</sup>

In the criminal context, the Supreme Court of Canada has decided that the "stay approach" will only be adopted in the "clearest of cases."<sup>198</sup> The Court has yet to consider which approach should be favoured in the administrative context. Until that happens, the remedial implications of administrative delay will likely continue to be dealt with in a somewhat inconsistent way. Given the reluctance to deny a complainant access to an adjudicative forum for reasons totally unrelated to the actions of the complainant, stays in administrative matters will probably also be reserved for the "clearest of cases." These might include situations in which the respondent's ability to defend, or the public's confidence in the integrity of the administrative process, were clearly threatened. In other words, an agency's reputation for mismanaging its operations would have to be clearly bad to warrant granting a stay of proceedings.

The treatment of delay by human rights boards of inquiry provides an example of the reluctance to use stays. The evidentiary approach is almost always adopted. There are two reasons for this. First, the "quasi-constitutional" importance of protecting human rights makes it difficult to block the complainant from proceeding in the only forum in which those rights can be enforced. Second, human rights commissions tend to deal with high volumes of complaints. A stay in one case creates a precedent for all other cases that have been delayed in similar circumstances for the same or longer periods of time. Such a stay threatens to bring the work of the commission to a standstill while it deals with the backlog and retools case management procedures. The same factors that contribute to the

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197. See *Nisbett*, *supra* note 191 where in a human rights case the Manitoba Court of Appeal chose this approach. For a series of human rights cases that took this approach see *Simms*, *supra* note 187; *Meissner*, *supra* note 187; *Ghosh*, *supra* note 187; *Hall*, *supra* note 187; *Hyman*, *supra* note 195 *Quereshi v. Central High School of Commerce* (1987), 9 C.H.R.R. D/4527 (Ont. Bd. Inquiry); *Morin v. Noranda Inc.* (1988), 9 C.H.R.R. D/5245 (Ont. Bd. Inquiry) [hereinafter *Morin*]; *Gohm*, *supra* note 194; *Munsch v. York Condominium Corp. No. 60* (1992), 18 C.H.R.R. D/339 (Ont. Bd. Inquiry); *Lampman v. Photoflair Ltd.* (1992), 18 C.H.R.R. D/196 (Ont. Bd. Inquiry); *Crane v. McDonnell Douglas Canada Ltd.* (1993), 19 C.H.R.R. D/422 (Ont. Bd. Inquiry); *Brock University v. Ontario (Human Rights Commission)* (1996), 36 Admin. L.R. (2d) 267, 91 O.A.C. 71 (Div. Ct.), leave to appeal to C.A. refused (1996), 36 Admin. L.R. (2d) 267 (Ont. C.A.) [hereinafter *Brock* cited to Admin. L.R.]; but see *Re Commercial Union Assurance v. Ontario (Human Rights Commission)* (1987), 59 O.R. (2d) 481, 38 D.L.R. (4th) 405 (Div. Ct.), aff'd (1988), 63 O.R. (2d) 112, 47 D.L.R. (4th) 477 (C.A.) leave to appeal to S.C.C. refused (1988), 65 O.R. (2d) x (note), 51 D.L.R. (4th) vii (note) (S.C.C.) [hereinafter *Commercial Union* cited to O.R.]; *Shreve*, *supra* note 192; *Ministry of Health*, *supra* note 194.

198. *R. v. O'Connor*, [1995] 4 S.C.R. 411, 130 D.L.R. (4th) 235; *R.(J.)*, *supra* note 196.

delay make the stay remedy impractical. Both the access argument and the volume argument discourage the granting of stays against high-volume agencies doing remedial work.

A respondent could always seek judicial review of a board decision refusing a stay. The difficulty is with timing. If the challenge is brought before the board reaches a final decision, the court will likely reject it as premature.<sup>199</sup> However, after the board has reached a final decision, the number of respondents prepared to seek judicial review on delay grounds will be limited. Those who were found not to have breached the Code have no interest in such a challenge. Those who were found in breach may be reluctant to incur further delay, and possibly more prejudice, by pursuing the matter. This will be all the more likely given the board's adverse decision on the merits<sup>200</sup> and the divided jurisprudence over the appropriate remedial approach to delay.

A bi-product of using a stay to protect the respondent's interest in a timely process is the protection of society's interest in the efficient operation of its agencies.<sup>201</sup> A stay is, in part, a sanction aimed at a slow-moving, inefficient bureaucracy. When boards hearing preliminary motions, and courts sitting on judicial review, systematically refuse to grant stays for delay, one of the checks that helps to maintain public confidence in administrative agencies disappears.<sup>202</sup>

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199. For cases where applications for stays were rejected as being premature, see: *Latif v. Ontario (Human Rights Commission)* (1992), 4 Admin. L.R. (2d) 227, 17 C.H.R.R. D/198 at D/198 (Ont. Gen. Div.); *Brantford Police Service Board v. Ontario (Human Rights Commission)* (1992), 19 C.H.R.R. D/384 at D/384 (Ont. Gen. Div.); *Ontario College of Art v. Ontario (Human Rights Commission) (No. 1)* (1992), 11 O.R. (3d) 798 at 799, 99 D.L.R. (4th) 738 (Div. Ct.); *A & P*, *supra* note 130; *Hughes v. College of Physicians and Surgeons of Ontario* (1994), 112 D.L.R. (4th) 253 (Div. Ct.). But the rule against premature applications, while frequently cited, is not absolute: *Gage v. Ontario (Attorney General)* (1992), 90 D.L.R. (4th) 537 (Div. Ct.) states at 553, "[i]f there is a prospect of real unfairness through denial of natural justice or otherwise, a superior court may always exercise its inherent supervisory jurisdiction to put an end to the injustice before all the alternative remedies are exhausted"; and *Ministry of Health*, *supra*, note 194 adds, at 341, "as a general rule . . . applications for judicial review should not be brought until the tribunal has completed its hearings and rendered its decision . . . , but the court has a discretion and may intervene at an earlier stage, where justice requires that it do so."

200. What Justice Dickson referred to as the "dynamic of ascending rigidity" in his dissent in *Re Harelkin and University of Regina*, [1979] 2 S.C.R. 561, 96 D.L.R. (3d) 14 at 32 (S.C.C.).

201. In *Mills*, *supra* note 190 at 217, Justice Lamer noted that protection of the societal interest in the prompt prosecution of criminal cases, and hence public confidence in the criminal justice system, was a bi-product of the accused's right to be tried within a reasonable time. See also *ibid*, cited in *Kodellas*, *supra* note 188 at 176-77.

202. An example is provided in *Shreve*, *supra* note 192 at D/374, where a Board of Inquiry did stay proceedings because delay aggravated the effect of other procedural irregularities. The adjudicator commented:



There are two other ways, more subtle than simply granting a stay on grounds of delay alone, to signal the need for agency reform where administrative slowness is a problem. The first arises in situations where delay is only one of several factors that interact to create an abuse of process. In these circumstances, the unique combination of grounds means that a stay can be granted without it becoming a generalizable precedent that risks bringing agency work to a halt.

Several examples can be cited. In *Commercial Union*, the Human Rights Commission's failure to give the respondent an opportunity to be heard prior to taking a reconsideration decision, the Commission's knowledge of without prejudice settlement proposals, and the death of a key witness during an "inordinate delay," combined to create prejudice. That decision was upheld by the Court of Appeal:

However, having regard to the delay and resulting prejudice and to the admitted procedural unfairness of the first reconsideration, the respondent has good reason to fear that a fair decision cannot be arrived at by the same body and that a second reconsideration will inevitably result in unfairness, in the circumstances.<sup>203</sup>

In *Shreve*, a board of inquiry used the interactive effect of several errors to justify a stay. It held that unreasonable delay and the bias of the investigating officer did not, on their own, sufficiently prejudice the respondent, but their combined effect was to make inadequate disclosure incurable, and so fatal.<sup>204</sup>

In several professional discipline cases a series of procedural errors, including delay, "taken together" added up to substantial prejudice. In *Misra*,<sup>205</sup> reasonable apprehension of bias was created when a medical college registrar dictated a motion suspending a doctor before the

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I think the combination of circumstances in this case carries the prejudice to the Respondents beyond the point of tolerance. The only consolation I can offer to the Complainant is that a decision such as this may have some effect in reforming the process of the Commission to the benefit of Complainants, as well as Respondents. While the Frawley affidavit indicates the Commission is already taking significant steps in the direction of such reform, there is no assurance that this reform will endure. A legal ruling demonstrating that the Commission's processes can actually defeat the objective of securing compliance with the Code should reinforce the impetus to reform.

203. *Supra* note 197 at 114. A similar decision was reached in *Ministry of Health*, *supra* note 194 where the Ontario Divisional Court followed *Commercial Union*. Human Rights proceedings in *Ministry of Health* were stayed because of the Commission's failure to follow statutory procedural requirements in making a reconsideration decision (especially in not giving the respondent notice) and because of a seven to nine year delay.

204. *Shreve*, *supra* note 192 at D/374. The reasoning is somewhat circuitous. If delay makes the necessary disclosure impossible, then delay has prejudiced the respondent's ability to defend.

205. *Supra* note 196.

discipline hearing had taken place. This, plus long delay, made it oppressive and unfair to pursue the charges. In *Lang v. Ramsay*,<sup>206</sup> the improper application of the required standard of proof by a police misconduct hearing, plus a five-and-a-half year delay, resulted in a holding of misconduct being quashed.

Second, courts on applications relating to delay, and boards on similar motions, frequently dismiss the applications or motions but take the opportunity to admonish the agencies concerned if they have reputations for delay and mismanagement. While not as draconian as stays, these written tongue-lashings by an impartial authority—the equivalent of an unfavorable external performance review—send a signal to the agencies concerned and to those to whom they are accountable. Because respondents' delay applications are dismissed, the rebukes do not stop complaints from being adjudicated.

Courts have chosen the following words of admonition: “inordinate delay;”<sup>207</sup> “extraordinary and unacceptable;”<sup>208</sup> and “appalling and inexcusable.”<sup>209</sup> In *A & P*, Justice Carruthers made the following comment about the Human Rights Commission bureaucracy:<sup>210</sup>

For some years now, this court has found it necessary, on occasion, to express its concern for the extent of the delay involved in proceedings under the Code. This concern is apparently shared with others. In its reasons for its First Interim Decision, the Board states, “The cumbersome delays attendant upon human rights investigative process are a matter of public record.” The material contains a copy of the presentation which the then Chief Commissioner of the Commission made to the Ontario Human Rights Code Task Force on April 30, 1992. It contains the following:

The present complaint process under the code is structured in such a way as to inevitably create delay . . . . What is needed is a fundamentally different process . . . .

In the present case, the delay is inordinate and borders on the inexcusable. Nearly eight years have gone by without a resolution of the issues raised in the Gale Complaint, and it may be some time yet before this might happen.

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206. (1992), 11 O.R. (3d) 190 at 201, 96 D.L.R. (4th) 594 (Div. Ct.).

207. *Commercial Union*, *supra* note 197 (two-and-a-half years).

208. *Motorways Direct Transport Ltd. v. Canada (Canadian Human Rights Commission)* (1991), 43 F.T.R. 211, 50 Admin. L.R. 222 (four years).

209. *Brock University v. Ontario (Human Rights Commission)* (1996), 36 Admin L.R. (2d) 267, 91 O.A.C. 71 (Div. Ct.) leave to appeal to C.A. refused (1996), 36 Admin. L.R. (2d) 267n (Ont. C.A.) (nine years).

210. *Supra* note 130 at 832. The delay argument was rejected as premature but the application was successful on bias grounds.

Ontario Human Rights Boards of Inquiry, perhaps because of their reluctance to sanction delays by granting stays, have been very vocal in disapproving Commission tardiness, particularly when unexplained. They have used the following adjectives: “undue delay;”<sup>211</sup> “most regrettable;”<sup>212</sup> “egregious;”<sup>213</sup> “excessively long;”<sup>214</sup> “very concerned that a period of four years transpires before the hearing of the complaint;”<sup>215</sup> and “regrettable.”<sup>216</sup> These words are not meant to be gratuitous. The Board in *Simms* added the following comment:

Having dismissed the motion to dismiss for reason of delay, I mention as an aside that I have considerable sympathy for both the respondents and the complainant in having to suffer with any system that takes seven years to get a legal dispute resolved by a tribunal of first instance. It should be possible to develop a dispute resolution mechanism that could at minimal cost make binding determinations on human rights issues expeditiously, while reserving the right of appeal for a hearing *de novo* where contentious issues remain or important points of law need to be determined.<sup>217</sup>

The words of admonition may have had an effect. Both the Canadian Human Rights Commission, and its Ontario counterpart, have recently reported efficiency gains. The former indicates that in 1993-94 it took 21 months to get a case through the system; by 1997 that figure was down to 9 months. Ontario reports that by 1997 only 150 complaints, out of a total caseload of 2,900, were 3 years old, a number down considerably from 1993. More sobering, the average case in the Ontario system still takes 15 to 17 months.<sup>218</sup>

There is concern that the limited use of the stay, or the overuse of the rebuke, makes these sanctions hollow and easily ignored. The need to provide an effective judicial check to ensure agency efficiency, and so to

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211. *Morin v. Noranda Inc.* (1988), 9 C.H.R.R. D/5245 (Ont. Bd. of Inquiry) (nearly three years).

212. *Ghosh v. Douglas Inc.* (1991), 16 C.H.R.R. D/16 (Ont. Bd. of Inquiry) (five years).

213. *Coubrough v. Brantford (City) Commissioners of Police* (1992), 19 C.H.R.R. D/386 (Ont. Bd. of Inquiry) (six years).

214. *Shreve*, *supra* note 192 (six years).

215. *Daccash v. Richards* (1992), 20 C.H.R.R. D/208 (Ont. Bd. of Inquiry); also *Baptiste v. Napanee & District Rod & Gun Club* (1993), 19 C.H.R.R. D/246 (Ont. Bd. of Inquiry) (five years).

216. *Simms v. Seetech Metal Products* (1993), 20 C.H.R.R. D/477 (Ont. Bd. of Inquiry) (seven years).

217. *Supra* note 187 at D/481 [italics in original].

218. J. Hampton, “OHRC sees light at the end of its backlog tunnel” *The Lawyers Weekly* (10 January 1997) 7, 12.

maintain public confidence in the administrative system, is real. Where more measured sanctions are not being taken seriously, the more powerful shock of a stay may be necessary to end unreasonable delay. In the past, especially in human rights cases, stays may have been underutilized, with the resultant unchecked damage to the reputation of the agencies concerned.

### *Conclusion*

Agency reputation and judicial review are connected under the rubric of expertise, bias and delay. Where agency reputation is strong, courts will be disinclined to intervene. Deference will be accorded when an agency is expert, *i.e.*, when the public is confident that the agency is qualified to do its job; when an agency raises no reasonable apprehension of bias, *i.e.*, when the public is confident that the agency will not use public power to further private interests; and, when an agency discharges its responsibilities without prejudicial delay, *i.e.*, when the public is confident that the agency is being managed efficiently.

The possibility of reputational review has several implications for the actors concerned. Unless it is to be reduced to a matter of impression, courts are going to have to develop a more systematic approach when considering reputational grounds. Measures of agency capability, and performance appraisal, are going to have to be articulated and applied; objective criteria for determining the appropriate degree of impartiality, and performance codes governing adjudicative conduct, are going to have to be elaborated; realistic and consistent time frames for dealing with the effect of delay on memory will have to be adopted. Lawyers bringing review applications on reputational grounds will have to lead evidence to assist courts with the increased scope of their inquiry. Reputational review should be neither ad hoc review, nor a beauty contest.

Administrative agencies that wish to avoid judicial interference would do well to tend to their reputation. At its worst, this could become a popularity contest with agencies retaining public relations firms in order to manipulate public opinion on their behalf. But puffery need not defeat substance. At its best, the care of reputation would see agencies becoming more democratically responsive to public views about the way in which public business is to be conducted.

This article does not claim that reputation is the only unarticulated variable that may influence the degree of judicial deference shown an administrative agency. Deference may be shown for no other reason than that the subject matter in question is complex, technical and daunting.

Energy regulation comes to mind. Judicial intervention may occur more frequently simply because the subject matter in question is politically interesting or juridically familiar. Human rights matters, especially those closely related to *Charter* issues, suggest themselves. Judges may harbour a natural sympathy for certain kinds of complaints, instinctive antipathy for some respondents and may identify with some adjudicators more than others. Criminal injury compensation complaints, stock promoters accused of regulatory offences, and law society discipline committees provide some possible examples. A judge's own sympathies—a kind of personal assessment of reputation—may be a factor where a judge is familiar from past experience with how the agency works. If these kinds of considerations are influencing judges' thinking on judicial review, they deserve to be brought out from behind the judicial rhetoric of jurisdiction and given a proper legal basis, or discredited. That would enable all players in administrative adjudication to know where they stand and to govern their actions accordingly.

Legal doctrine may make a link between reputation and deference theoretically possible; it will take empirical research to confirm that such a link actually exists. A necessary first step is to demonstrate that administrative agencies have in fact a public reputation, a public profile. This task will be attempted in an article to follow. Through print media content analysis, that article will show that it is possible to measure the public esteem in which administrators are held.