Acquired Expertise of Administrative Tribunals and the Standard of Judicial Review: The Case of Grievance Arbitrators and Human Rights Law

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Focusing on arbitral decisions on human rights claims arising in the employment context, this paper looks at the nature of the expertise of administrative tribunals and its role in determining the standard of judicial review. The author notes that arbitrators are considered to have expertise in labour relations, and that this has been a key factor in the high level of deference generally shown by courts to their decisions. However, despite the expansion of arbitral jurisdiction over human rights matters in unionized workplaces, the courts, applying a “correctness” standard of review, have refused to grant deference to arbitrators with respect to their interpretation and application of human rights legislation, in part on the basis that they are not expert in the area. The author takes issue with this view, contending that arbitrators have in fact acquired significant expertise in interpreting human rights statutes in the context of the employment relationship, and that recognition of such expertise should lead to a reappraisal of the level of curial deference. In this regard, he argues, it would be open to the courts to deem arbitrators to possess the requisite expertise in human rights, thereby justifying a more deferential “reasonableness” standard of review.

1. INTRODUCTION

[T]he Human Rights Commission has greater expertise than grievance arbitrators in the resolution of human rights violations. In my view, any concerns in respect of this matter are outweighed by the significant benefits associated with the availability of an accessible and informal forum for the prompt resolution of allegations of human rights violations in the workplace . . .

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Moreover, expertise is not static, but, rather, is something that develops as a tribunal grapples with issues on a repeated basis. The fact that the Human Rights Commission currently has greater expertise than the [Arbitration] Board in respect of human rights violations is an insufficient basis on which to conclude that a grievance arbitrator ought not to have the power to enforce the rights and obligations of the *Human Rights Code*.

— Iacobucci J. in *Parry Sound*¹

When I began to work in the field of labour law — not so very long ago — it was already well established that arbitrators had the power to interpret and apply both the *Canadian Charter of Rights and Freedoms* and quasi-constitutional human rights statutes. *Meiorin* was hot off the presses, and labour litigators hustled off to arbitration and judicial review hearings armed with a “unified approach” to claims of employment discrimination.² Pleading human rights claims seemed to me to be a normal — even routine — part of labour law practice.

While taking a coffee break in the course of preparing arguments for an arbitration hearing, I spoke with a senior lawyer, who offered me some advice: “Always try to plead a *Charter* question,” he said, referring to the Quebec *Charter of human rights and freedoms*. “Even if you have to scratch your head to find it.” I looked at him expectantly, happy to receive pearls of wisdom from a veteran of the trenches going back to the days when judicial review was fraught with questions preliminary and collateral, and ashtrays could be found on every table in an arbitration hearing. “Plead a *Charter* question and remember to plead it last,” he continued. “Arbitrators hate dealing with the complexity of the *Charter* and they’d rather find in your favour on another argument so they can avoid dealing with it.”

Several years later, I recounted this story to a leading member of the Bar. “That’ll only work with the older arbitrators,” he commented. “The younger ones are pretty up to date on *Charter* stuff.” He went on: “But it’s still good advice. On judicial review of *Charter* questions, the correctness standard applies, so it gives you another

1 *Parry Sound (District) Social Services Administration Board v Ontario Public Service Employees Union, Local 324*, 2003 SCC 42 at para 53, [2003] 2 SCR 157.

2 *British Columbia (Public Service Employee Relations Commission) v British Columbia Government and Services Employees’ Union*, [1999] 3 SCR 3 at paras 50-55, 176 DLR (4th) 1 [*Meiorin*].

kick at the can if you don't like the outcome at arbitration. Come to think of it, it might still be a good idea to plead it last. Arbitrators hate to be quashed on judicial review and they might be inclined to find for you on other grounds, so they can stay behind the protective shield of the patently unreasonable standard."

These two anecdotes frame the issues I want to discuss in this paper. First, some arbitrators don't (or at least didn't) have the expertise to deal with human rights claims, which involve a complex and evolving area of law. Second, arbitrators are beginning to acquire that expertise (or have acquired it). Third, courts don't defer to arbitrators on their interpretation of human rights legislation, as they are not perceived to have a higher level of expertise than judges do. Finally, the dynamic of expertise and standards of judicial review has very concrete effects on how actors in labour law approach disputes, to the point of strategically mobilizing those factors for short-term advantage at the long-term expense of undermining the policy touchstone of labour arbitration: speedy, accessible and informal hearings that lead to final and binding decisions which allow parties to a collective agreement to get on with the business of working together.

This leads to me to pose the following questions, which I address in this paper: (1) What exactly is tribunal expertise in the context of the law of judicial review? (2) If arbitrators can *acquire* expertise, should this be reflected in the law of judicial review? (3) What are the consequences of a judicial policy of reviewing arbitral awards on human rights claims according to the standard of correctness? (4) Is a more deferential approach desirable or even possible?

In Part 2, I outline how the courts, particularly the Supreme Court of Canada, have dealt with the notion of expertise. I conclude that the role played by administrative tribunal expertise in standard of review analysis is far from clear, but that the most promising approach is to deem tribunals to have expertise rather than to let judicial determination of actual expertise play an independent role in the analysis. This recognizes the importance of expertise to a general theory of judicial review without requiring judges to embark on a methodologically suspect extra-statutory search for evidence of it. I then argue in Part 3 that labour arbitrators do in any event have significant expertise in interpreting human rights statutes in the context of the employment relationship, and that courts should therefore show deference to their interpretations. This deference can be justified, in

part, by applying the kind of deeming logic set out in the first part. Finally, in Part 4, I address some potential objections to granting arbitrators deference on judicial review.

2. THE NATURE OF EXPERTISE AND ITS ROLE IN DETERMINING THE LEVEL OF DEFERENCE

Though an administrative tribunal's expertise is an important factor in determining the applicable standard of review,³ the Supreme Court has had little to say about exactly what expertise is,⁴ and it is not clear how it should be taken into account as an independent criterion in determining the standard of review.

A small but detailed body of commentary has simultaneously decried the paucity of the Court's analysis of tribunal expertise and offered two helpful conceptual distinctions that can serve to guide

3 *Canada (Director of Investigation and Research) v Southam Inc.*, [1997] 1 SCR 748, 144 DLR (4th) 1, *per* Iacobucci J ("Expertise . . . is the most important of the factors that a court must consider in settling on a standard of review" at para 50); see also *Pushpanathan v Canada (Minister of Citizenship and Immigration)*, [1998] 1 SCR 982 at para 32, 160 DLR (4th) 193.

4 See Mathieu Socqué, "La notion d'expertise du décideur administratif aux fins de l'application de la méthode pragmatique et fonctionnelle" (2006) 47:2 C de D 319 ("surprisingly, the Supreme Court specifies that the factor of expertise is essential, even primordial, in the determination of the level of deference that courts should show, but the Court does not indicate, strictly speaking, what exactly tribunal expertise is" at 330) [author's translation]; David P Jones, "Standards of Review in Administrative Law" in Laverne A Jacobs & Justice Anne L Mactavish, eds, *Dialogue between Courts and Tribunals: Essays in Administrative Law and Justice 2001-2007* (Montreal: Éditions Thémis, 2008) 213. ("Unfortunately, none of the recent cases address how one determines whether a particular statutory delegate has expertise with respect to the particular issue in question" at 288); Lorne Sossin, "Empty Ritual, Mechanical Exercise or the Discipline of Deference? Revisiting the Standard of Review in Administrative Law" (2003) 27 Advocate's Q 478 ("While [the jurisprudence] describes expertise, it does not provide guidance regarding the methodology to be employed to *establish* expertise" at 490); Beth Bilson, "The Expertise of Labour Arbitrators" (2005) 12 CLELJ 33 ("the Court has not to date presented a coherent — or possibly even consistent — description of the essential features of the expertise that it would accept as justifying deference" at 41). See also *Amalgamated Transit Union, Local 1182 v Saint John (City of) Pension Board*, 2006 NBCA 70, 301 NBR (2d) 1 [*Saint John*] ("There is very little written on how one goes about assessing the expertise of an adjudicative tribunal" at para 82).

a coherent and realistic understanding of the role of expertise in judicial review.⁵

The first of these distinctions is between the expertise of individual adjudicators and the institutional expertise of tribunals.⁶ An individual adjudicator may qualify as an expert in the specialized field that the tribunal is charged with regulating. In determining the expertise of individual adjudicators, their credentials — including academic training and relevant work experience — would be salient factors.⁷ Alternatively, the tribunal *qua* institution might be characterized as expert.⁸ On this view, expertise is indicated by the tribunal's institutional structure, including rules of appointment, mechanisms for the continuing education of members and for the evaluation of their decisions, and the regular holding of full board meetings where members can share their experience and collectively reflect on jurisprudential developments.⁹

5 See Laverne A Jacobs & Thomas S Kuttner, "The Expert Tribunal" in Laverne A Jacobs & Justice Anne L Mactavish, eds, *Dialogue between Courts and Tribunals: Essays in Administrative Law and Justice 2001-2007* (Montreal: Éditions Thémis, 2008) 67; Socqué, "Notion d'expertise," *supra* note 4; R E Hawkins, "Reputational Review I: Expertise, Bias and Delay" (1998) 21:1 Dal LJ 5 at 9-26; Bilson, "Expertise of Labour Arbitrators," *supra* note 4. See also David J Mullan, "Establishing the Standard of Review: The Struggle for Complexity?" (2004) 17 Can J Admin L & Prac 59 at 68-72; Jones, "Standards of Review," *supra* note 4 at 273-293. Note that all of these articles predate the decision in *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190, in which the Supreme Court of Canada abandoned both the terminology of the pragmatic and functional approach to judicial review set out in *Union des employés de service, Local 298 v Bibeault*, [1988] 2 SCR 1048 (available on CanLII) and *Pushpanathan*, *supra* note 3, as well as the distinction between the standards of patent unreasonableness and reasonableness *simpliciter* set out in *Southam*, *supra* note 3. However, expertise is still a key factor in determining the level of deference accorded to administrative tribunals in the standard of review analysis adopted in *Dunsmuir*.

6 Jones, "Standards of Review," *supra* note 4 at 288; Socqué, "Notion d'expertise," *supra* note 4 at 326-327.

7 Socqué, *ibid* at 352-355; Hawkins, "Reputational Review," *supra* note 5 at 12-14.

8 This distinction has been taken up by the courts. See e.g. *Nor-Man Regional Health Authority Inc v Manitoba Association of Health Care Professionals*, 2011 SCC 59, [2011] 3 SCR 616 (labour arbitrators "benefit from *institutional expertise* in resolving disputes arising under a collective agreement, even if they lack *personal expertise* in matters of law" [emphasis in original] at para 53).

9 Hawkins, "Reputational Review," *supra* note 5 at 15.

There is a certain amount of overlap in the sets of features that go to determining the expertise of individual adjudicators and the institutional expertise of a tribunal. For instance, a tribunal's appointment procedure (an institutional characteristic) may ensure that its adjudicators have expertise in a particular domain (an individual characteristic).¹⁰ Furthermore, institutional expertise can be articulated in terms of the aggregate expertise of individual tribunal members.¹¹ Finally, experience — the repeated grappling with similar questions — can contribute both to individual and institutional expertise.¹²

The second helpful distinction is between a tribunal's expertise and its specialized role in the administration of a statutory scheme or regulatory regime.¹³ A tribunal may be specialized, in the sense that it has an exclusive but limited jurisdiction over a domain of activity, without its members being experts in that domain.¹⁴

Though these distinctions are analytically important, it is difficult to see how they could be taken into account in the judicial determination of expertise in the context of standard of review analysis, as that analysis is currently understood in the jurisprudence. Whether a decision was rendered by an expert is an empirical question, and yet the courts do not base their determination of expertise on evidence.¹⁵ R.E. Hawkins explains:

10 Mullan, "Struggle for Complexity" *supra* note 5 at 69 (describing Iacobucci J's reliance in *Southam*, *supra* note 3, on the provisions for recommendation and appointment to the Competition Tribunal in determining that it is an expert tribunal).

11 Jacobs & Kuttner, "Expert Tribunal," *supra* note 5 at 82.

12 Hawkins, "Reputational Review," *supra* note 5 at 14-15.

13 *Ibid* at 11-12. Socqué, "Notion d'expertise," *supra* note 4 at 329-338.

14 Socqué, *ibid* at 334-335. Someone can be an expert without having specialized knowledge. In *Ryan v Law Society (New Brunswick)*, this was found to be the case for members of the public appointed to a professional disciplinary committee. See Mullan, "Struggle for Complexity," *supra* note 5 at paras 69-70 (commenting on *Ryan v Law Society (New Brunswick)*, [2003] 1 SCR 247 and *Pushpanathan*, *supra* note 3).

15 Mullan, *ibid* ("The assessment of expertise emerging from [the jurisprudence] is an exercise which depends on a combination of considerations, most of which involve conjecture, not scientific inquiry by the courts" at 71); Socqué, "Notion d'expertise," *supra* note 4 ("In an impressionistic and totally subjective fashion, the judge . . . forms an opinion regarding the degree of expertise that might characterize the administrative decision maker . . . and then declares that the tribunal under review is an expert relative to this or that question" at 327) [author's translation].

[W]hile 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 performance. Legislation may envisage that a specialized tribunal will be established: the reality may be something else.¹⁶

One response to this would be for courts to hear evidence on the actual expertise of the adjudicator who rendered the decision under review, or on the tribunal as an institution, or on both. Indeed, some commentators have suggested this,¹⁷ and courts have occasionally referred to the credentials or experience of individual adjudicators in coming to the conclusion that they are experts for the purposes of the standard of review analysis.¹⁸ There is no reason to doubt courts' capacity to evaluate such evidence; they often do it in determining whether a witness qualifies as an expert.¹⁹ However, it is unclear whether evidence

16 Hawkins, "Reputational Review," *supra* note 5 at 12-13.

17 Socqué, "Notion d'expertise," *supra* note 4 at 348, 374-375 (arguing that administrative decision-makers ought to be required to prove their actual expertise in judicial review proceedings); Bilson, "Expertise of Labour Arbitrators," *supra* note 4 (arguing that, although there is "something disturbing" and "unpalatable" about tendering an adjudicator's *curriculum vitae*, "evidence showing the extent of an arbitrator's adjudicative experience or the length of association with a particular collective bargaining relationship may be legitimate indicators of expertise" at 56).

18 See e.g. *Tele-Mobile v Telecommunications Workers Union*, 2002 BCSC 776 (arbitrator with extensive experience in resolving disputes between the union and employer was an expert on their collective bargaining relationship); *Canadian Pacific Limited c Fraternité des préposés à l'entretien des voies*, [2003] RJDT 649 (CA) (available on QL) (arbitrator was highly specialized because he had been designated by the parties as the sole arbitrator for several years). *Contra Saint John*, *supra* note 4, Robertson JA ("Certainly, one is required to look at the tribunal's constitutive statute in search of the answer and refrain from looking at the qualifications of individual tribunal members to decide whether the tribunal possesses a relative expertise" at para 82); *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12, [2009] 1 SCR 339 ("Far from subscribing to the view that courts should be reviewing the actual expertise of administrative decision-makers, it is my position that this is the function of the legislature" at para 95).

19 The parallel is drawn in Hawkins, "Reputational Review," *supra* note 5 at 10-11.

on the actual expertise of adjudicators is admissible,²⁰ and in my view its admission is certainly not desirable.

My first reason for disallowing the parties from leading evidence of tribunal expertise is that the procedural context of judicial review hearings is simply “not conducive to developing and testing evidence.”²¹ A related objection is that judicial review proceedings are meant to be an exceptional form of recourse,²² and are in tension with the policy objectives of speed and accessibility that underlie many regimes of administrative adjudication. Allowing parties to lead evidence on expertise would add to the duration and complexity of proceedings and thereby (further) undermine those policy objectives.

The most serious objection to allowing evidence of expertise to be led in judicial review proceedings is that it would violate several principles that are taken to be fundamental to the rule of law. How can parties benefit from equality before the law if the deference that courts are to show to an administrative tribunal varies with who happened to be sitting on the panel that day? The rule of law requires that the administration of justice not be arbitrary, yet this is precisely what would be countenanced if the standard of review were to fall and rise with the ebb and flow of adjudicator rosters. This point is sharpened when we consider that the metric for determining the level of deference is not the administrative tribunal’s expertise considered in isolation, but its expertise relative to that of the court on the question that is subject to review. It would stand to reason that if evidence of the adjudicator’s credentials and experience were taken to be relevant, so would the credentials and experience of the particular judge sitting on review. Despite the

20 *Saint John*, *supra* note 4 at paras 82-83. See also Jones, “Standards of Review,” *supra* note 4 at 288 (expressing doubts as to the admissibility of evidence relating to expertise).

21 Hawkins, “Reputational Review,” *supra* note 5 at 13, n 33. But see e.g. Quebec *Code of Civil Procedure*, RSQ c C-25, art 835.3 (oral testimony may be heard in addition to affidavits in judicial review proceedings) [*CCP*].

22 See e.g. *CCP*, *ibid*, arts 834-850 (covering judicial review and the modern equivalents of the writs of *quo warranto* and *mandamus*, which are under the title “Certain Extraordinary Recourses”).

provocative assertions of some legal realists,²³ the legitimacy of the courts depends on the separation between the judge *qua* individual and *qua* actor on the legal stage. “Just as an individual must cherish dreams and illusions, so also must his judicial institutions.”²⁴

Individual judges vary immensely in their expertise. “[N]o lawyer can tell his client, before a lawsuit is begun, involving that client’s legal rights, whether those rights will be judicially determined by an excellent, a mediocre, an incompetent or an otherwise undesirable judicial officer.”²⁵ One need only attend at a courthouse on any given morning and observe the hurrying of counsel to consult the day’s roll, and their looks of satisfaction or dismay when they see which judge is assigned to their case. As pedestrian as this observation may be from the perspective of judicial anthropology, its formal recognition as having juridical consequences would be utterly incompatible with our law’s self-conception.

The Supreme Court of Canada has avoided this problem in determining expertise by applying a presumption: if the legislature has defined a specialized role for a tribunal, that tribunal’s members are deemed experts on matters within the tribunal’s jurisdiction.²⁶ Courts’ appreciation of the extent of the tribunal’s expertise may vary with the wording of the enabling statute. The more explicit the statute is in setting out the qualifications of a tribunal’s members and the mechanisms for ensuring that their expertise is institutionalized, the more courts should be inclined to conclude that it is an expert tribunal.²⁷ But whatever the conclusion with respect to expertise, it

23 See e.g. Jerome Frank, “Are Judges Human? Part One: The Effect of Legal Thinking on the Assumption that Judges Behave Like Human Beings” (1931) 80:1 U Pa L Rev 17 at 24-25; Jerome Frank, “Are Judges Human? Part Two: As through a Glass Darkly” (1931) 80:2 U Pa L Rev 233 at 247-248 [Frank, “Part Two”].

24 Thurman Arnold, “The Role of Substantive Law and Procedure in the Legal Process” (1932) 45:4 Harv L Rev 617 at 618 (arguing that judges’ legitimacy depends on their ability to appear impartial in making their decisions).

25 Frank, “Part Two,” *supra* note 23 at 240.

26 See *Pushpanathan*, *supra* note 3 at para 32; see also Hawkins, “Reputational Review,” *supra* note 5 at 11-12; Socqué, “Notion d’expertise,” *supra* note 4 at 327, 337, 346.

27 *Southam*, *supra* note 3 at paras 51-52; compare *Canada (Deputy Minister of National Revenue) v Mattel Canada*, 2001 SCC 36 at para 29, [2001] 2 SCR 100.

is arrived at by an exercise of statutory interpretation and not by the evaluation of evidence.²⁸

In British Columbia, this approach has been codified in the *Administrative Tribunals Act*: “If the tribunal’s enabling Act contains a privative clause, relative to the courts the tribunal must be considered to be an expert tribunal in relation to all matters over which it has exclusive jurisdiction.”²⁹ This bald statutory conflation of expertise and jurisdiction may share a serious flaw with the deeming approach to expertise apparently adopted by the Supreme Court: vacuity. If expertise is determined by reference to the specialized role of the tribunal and the existence of a privative clause, then it would appear to have no independent role to play in the standard of review analysis, since those two factors are *already* supposed to have been taken into account.

Recall that expertise is only one of the four factors to consider in determining the level of deference that courts ought to show toward administrative tribunals. The other factors are the existence of a privative clause, the purpose of the statute, and the nature of the question.³⁰ From the outset, it was understood that the purpose of the statute was intimately tied to the question of expertise; indeed, “purpose and expertise often overlap.”³¹ But if both examination of the privative clause and the “purpose of the statute” analysis are used in determining expertise, then it is unclear how expertise can be a

28 See Jones, “Standards of Review,” *supra* note 4 (“it is very easy to be so blinded by the gleam of ‘expertise’ that one forgets that the whole purpose of the pragmatic and functional approach from *Pushpanathan* is to determine the intent of Parliament” at 289).

29 *Administrative Tribunals Act*, SBC 2004, c 45 [B.C. ATA], s 58(1). See also a discussion on the effect of the privative clause in the old BC *Labour Code*, RSBC 1979, c 212, s 33, in Harry W Arthurs, “Protection against Judicial Review,” in Canadian Institute for the Administration of Justice, *Judicial Review of Administrative Rulings* (Montreal, Que: Yvon Blais, 1983) 149 at 152-153 [Arthurs, “Judicial Review”]. The Supreme Court of Canada has applied the B.C. ATA. See *British Columbia (Workers’ Compensation Board) v Figliola*, 2011 SCC 52, [2011] 3 SCR 422; *Moore v British Columbia (Education)*, 2012 SCC 61. However, these two decisions fail to address the conflict between the B.C. ATA and the Court’s approach to judicial review set out in *Dunsmuir*.

30 *Dunsmuir*, *supra* note 5 at para 64; *Pushpanathan*, *supra* note 3.

31 *Pushpanathan*, *supra* note 3 at para 36; see also *Southam*, *supra* note 3 at para 50.

separate category. One could reply that the factors “must be taken together,”³² and that deciding on the standard of review “is not a mechanical exercise” but is “necessarily flexible, and proceeds by principled analysis rather than categories, seeking the polar star of legislative intent.”³³ This does not resolve the problem, but merely restates it. Expertise should either be taken into account or should not be. But it makes no sense to claim *both* that expertise is a factor in determining the standard of review *and* that expertise is only ascertained by analyzing other factors.

For all the supposed clarity that was brought to the law of judicial review by the Supreme Court’s decision in *Dunsmuir*,³⁴ the method that the Court applied in determining expertise remains a mystery. The majority in *Dunsmuir* summed up as follows the notion of deference that underlies the reasonableness standard of review:

In short, deference requires respect for the legislative choices to leave some matters in the hands of administrative decision makers, for the processes and determinations that draw on particular expertise and experiences, and for the different roles of the courts and administrative bodies within the Canadian constitutional system.³⁵

Despite the shift in language and the reduction in the number of available standards of review, the majority in *Dunsmuir* proposed that the appropriate level of deference be determined by using the familiar *Pushpanathan* factors, including expertise.³⁶

Two years later, in *Khosa*,³⁷ Justice Rothstein identified the problem of the unclear relationship between expertise and the legislative grant of jurisdiction backed by a privative clause. In his concurring opinion, he described the law of judicial review as having two sources: interpretation of the enabling statute and in particular

³² *Pushpanathan*, *supra* note 3 at para 38.

³³ *Canadian Union of Public Employees and Service Employees International Union v Ontario (Minister of Labour)*, 2003 SCC 29 at para 149, [2003] 1 SCR 539.

³⁴ *Dunsmuir*, *supra* note 5.

³⁵ *Ibid* at para 49.

³⁶ *Ibid* at para 64.

³⁷ *Supra* note 18 at paras 74-75.

its privative clause, and a “common law”³⁸ of judicial review derived from basic principles of the rule of law and informed by section 96 of the Constitution.³⁹ Justice Rothstein decried the conceptual confusion that arises from conflating these two sources. In particular, he argued that the “common law” of judicial review ought not to have introduced expertise as a free-standing basis for deference.⁴⁰ Rather, expertise should only be understood as a ground for deference insofar as it is “signalled” by the legislature’s enactment of a strong privative clause:

Far from subscribing to the view that courts should be reviewing the actual expertise of administrative decision makers, it is my position that this is the function of the legislature. In my view, the discordance between imputed versus actual expertise is simply one manifestation of the larger conceptual unhinging of tribunal expertise from the privative clause. The legislatures that create administrative decision makers are better able to consider the relative qualifications, specialization and day-to-day workings of tribunals, boards and other decision makers which they themselves have constituted. Where the legislature believes that an administrative decision maker possesses superior expertise on questions that are normally within the traditional bailiwick of courts (law, jurisdiction, fraud, natural justice, etc.), it can express this by enacting a privative clause.⁴¹

Though there is certainly room to criticize Justice Rothstein’s opinion (on the basis, for instance, that it unduly restricts the grounds

38 Use of this term is problematic, given that it refers to the general public law of Canada rather than the jurisprudence-based private law in force in provinces outside of Quebec. The majority occasionally uses the more suitable expression “general law of judicial review” (see *Khosa*, *supra* note 18 at para 33).

39 *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, s 96, reprinted in RSC 1985, App II, No 5. The emergence of a general law of judicial review that interacts with the statutory interpretation of privative clauses can be traced back to *Crevier v Quebec (AG)*, [1981] 2 SCR 220 at para 19, 127 DLR (3d) 1 (total insulation from judicial review is unconstitutional because it would result in the creation of a s 96 court). Harry Arthurs described *Crevier* as “an illogical, a-historical, unnecessary and unwise extension of the authorities on section 96.” Arthurs, “Judicial Review,” *supra* note 29 at 154.

40 The turning point was *Pezim v British Columbia (Superintendent of Brokers)*, [1994] 2 SCR 557, 114 DLR (4th) 385, where the Court showed deference to the B.C. Securities Commission on the grounds of its expertise, despite the absence of a privative clause and the existence of a statutory right of appeal. *Khosa*, *supra* note 18 at paras 87-92.

41 *Khosa*, *ibid* at para 95.

on which courts can review administrative decisions,⁴² or fails to recognize that privative clauses may address issues unrelated to expertise, such as expediency and cost), it has the advantage of adding conceptual clarity. The deeming logic of expertise determination mobilized more or less implicitly in the Supreme Court's previous decisions is set out clearly and unapologetically. Justice Rothstein's approach avoids the problem of how courts are to determine expertise empirically, and reduces the confusion surrounding the role of expertise in determining the level of deference that should be afforded to administrative tribunals. It is likely for these reasons that his approach was recently endorsed by the majority of the Court in *Rogers Communications*.⁴³

In the following section, I argue that the same deeming logic can be applied to ground a finding that labour arbitrators are sufficiently expert in human rights law in the employment context to merit deference from the courts on judicial review.

3. THE EXPERTISE OF LABOUR ARBITRATORS

Labour relations has long been a paradigmatic example of a domain in which courts have imputed a high level of expertise to administrative tribunals. Many of the key moments in the evolution of the law of judicial review have occurred in matters where a party was seeking judicial review of a decision rendered by a labour relations

42 David Elliott argues that Rothstein J's view is internally incoherent insofar as he makes assumptions about expertise when he advocates deference to determinations of fact and the exercise of discretion, regardless of the wording of the privative clause, and then criticizes the majority for making assumptions about expertise when determining the standard of review on questions of law. David Elliott, "*Khosa* – Still Searching for the Star" (2009) 33:2 Man LJ 211 at 224-226.

43 *Rogers Communications v Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 35, 347 DLR (4th) 235 [*Rogers Communications*] ("By setting up a specialized tribunal to determine certain issues the legislature is presumed to have recognized superior expertise in that body in respect of issues arising under its home statute or a closely related statute, warranting judicial review for reasonableness" at para 11).

board or a labour arbitrator.⁴⁴ Generally, the purported expertise of labour tribunals, combined with the tendency for legislatures to protect them by strong privative clauses, has resulted in a high level of judicial deference toward their decisions.⁴⁵

Judicial deference to expertise of labour tribunals is grounded in the recognition that labour relations is a complex field involving institutional litigants whose interests must be carefully balanced. The ideal of industrial peace that animates the model of labour relations inspired by the Wagner Act depends on buy-in by both unions and employers to maintain its legitimacy. Consequently, the adjudicative functions of labour tribunals are necessarily related to their policy-making functions.⁴⁶ As is consistent with this coupling of expertise and policy-making function, the Supreme Court has distinguished between arbitrators and labour boards, claiming that the former fall “towards the lower end of the spectrum of those administrative tribunals charged with policy deliberations” when their role is compared to “the wide-ranging policy-making function sometimes

44 See e.g. *Canadian Union of Public Employees, Local 963 v New Brunswick Liquor Corp.*, [1979] 2 SCR 227 at 235, 97 DLR (3d) 417 (establishing the need for judicial deference); *Bibeault*, *supra* note 5 at paras 122-127 (setting out the “pragmatic and functional” approach); *Dayco (Canada) Ltd v CAW – Canada*, [1993] 2 SCR 230 at para 29, 13 OR (3d) 164 (arbitration award must be correct, and not just reasonable, when the question is one of “jurisdiction *stricto sensu*”); *Voice Construction v Construction & General Workers’ Union, Local 92*, 2004 SCC 23 at para 40, [2004] 1 SCR 609 (in the absence of a privative clause, expertise justifies the standard of reasonableness *simpliciter*); *Dunsmuir*, *supra* note 5 at para 134 (abandoning the three standards of review in favour of an analysis of deference). For overviews of the role of labour law in the development of administrative law jurisprudence, see Justice Stephen Goudge, “Punching Above Its Weight: The Influence of Labour Law on the Canadian Legal System” (2005) 12 CLELJ 111; David J Mullan, “Labour Law and Administrative Law: Still the Tail that Wags the Dog?” (2005) 12 CLELJ 213.

45 In *Dunsmuir*, both the majority opinion and Binnie J’s concurring opinion cited labour relations law as an example of a complex regulatory regime where the expertise of administrative decision-makers ought to be shown deference. *Dunsmuir*, *supra* note 5 at paras 68, 156.

46 *IWA v Consolidated Bathurst Packaging Ltd*, [1990] 1 SCR 282 at para 37, 68 DLR (4th) 524.

delegated to labour boards”⁴⁷ Nevertheless, arbitrators are routinely characterized by the Court as experts in the field of labour relations.⁴⁸

Following the framework set out in *Pushpanathan* and refined in *Dunsmuir*, the level of deference shown to arbitrators’ expertise depends, in part, on the nature of the question under review. In particular, the Court has held that arbitrators are *not* experts in human rights law. It is to this question that we now turn.

**(a) Arbitrators’ Jurisdiction over Human Rights Claims
Has Been Expanding in Recognition of Their Expertise**

The story of the gradual recognition of the jurisdiction of arbitrators over claims based on human rights statutes is well known,⁴⁹ and I will offer only a brief overview.

The Supreme Court took the first step in 1975 in *McLeod v. Egan*.⁵⁰ In that case, the Court recognized that in the exercise of their

47 *Dayco*, *supra* note 44 at para 35, *per* La Forest J. See also *United Brotherhood of Carpenters and Joiners of America, Local 579 v Bradco Construction Ltd*, [1993] 2 SCR 316 at 631-632, 102 DLR (4th) 402, *per* Sopinka J.

48 See e.g. *Blanchard v Control Data Canada Ltd*, [1984] 2 SCR 476, 14 DLR (4th) 289; *Toronto (City) Board of Education v Ontario Secondary School Teachers’ Federation, District 15*, [1997] 1 SCR 487, 144 DLR (4th) 385; *Battlefords and District Co-operatives Ltd v Retail, Wholesale and Department Store Union, Local 544*, [1998] 1 SCR 1118, 160 DLR (4th) 29; *Canada Safeway Ltd v Retail, Wholesale and Department Store Union, Local 454*, [1998] 1 SCR 1079, 160 DLR (4th) 1; *Toronto (City of) v Canadian Union of Public Employees, Local 79*, [2003] 3 SCR 77, 232 DLR (4th) 385 [*City of Toronto*]; *Dunsmuir*, *supra* note 5; *Nor-Man*, *supra* note 8.

49 For more detailed expositions of this evolution, see Karl Tabbakh, “The Standard of Review of Grievance Arbitrators When Deciding on Human Rights Issues: The ‘Magnificent Goal’ vs. ‘Industrial Peace’ ” (1998) 43 McGill LJ 261; Donald A MacIntosh, “The Charter and the Authority of Administrative Tribunals to Consider Constitutional Issues” (2005) 30 Advocates’ Q 344; Beth Bilson, “The Voice from the Trenches: Administrative Tribunals and the Interpretation of the Charter” (2006) 69 Sask L Rev 3; Gérard Notebaert, “Faut-il réformer le système de l’arbitrage de griefs au Québec?” (2008) 53 McGill LJ 103; Gilles Trudeau, “L’arbitrage des griefs au Canada: plaidoyer pour une réforme devenue nécessaire” (2005) 84 R du B 249.

50 *McLeod v Egan*, [1975] 1 SCR 517, 46 DLR (3d) 150 (*sub nom McLeod, Re*).

jurisdiction over grievances — that is, disputes over the interpretation or application of a collective agreement⁵¹ — arbitrators could determine whether the provisions of the agreement were in conformity with mandatory employment standards legislation. Insofar as a provision did not respect minimum employment standards, the arbitrator could refuse to give effect to it.

Legislators responded to *McLeod* by making explicit the power of arbitrators to (in the words of the Quebec *Labour Code*) “interpret and apply any Act or regulation to the extent necessary to settle a grievance.”⁵² It was therefore not surprising that parties began to invoke the *Canadian Charter of Rights and Freedoms*⁵³ in labour arbitration proceedings. Arbitrators’ jurisdiction to entertain such claims, and to refuse to apply statutes or collective agreements that did not conform to the *Charter*, was confirmed by the Supreme Court in *Douglas College*.⁵⁴

Arbitrators’ jurisdiction was further expanded to include the power not only to interpret and apply collective agreements in conformity with human rights legislation but to apply that legislation directly, even in the absence of a specific clause in the collective agreement. In *Weber*, arbitral jurisdiction was found to extend to any dispute that “in its essential character, arises from the interpretation, application, administration or violation of the collective agreement”;⁵⁵ “essential character” was to be determined “on the basis of the facts surrounding the dispute between the parties, not on the

51 This is the core jurisdiction of labour arbitrators across all Canadian jurisdictions. See e.g. *Canada Labour Code*, RSC 1985, c L-2, ss 57-60; *Labour Code*, RSQ c C-27, ss 1(f), 100-112; *Labour Relations Act*, 1995, SO 1995, c 1, Schedule A, ss 48-50.

52 Quebec *Labour Code*, *ibid*, s 100.12 (a).

53 *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

54 *Douglas/Kwantlen Faculty Association v Douglas College*, [1990] 3 SCR 570 (*sub nom Douglas College v Douglas/Kwantlen Faculty Association*) 77 DLR (4th) 94 [*Douglas College*]. This was one of three decisions where the Supreme Court found that administrative tribunals have jurisdiction to apply the *Charter*. See also *Cuddy Chicks Ltd v Ontario (Labour Relations Board)*, [1991] 2 SCR 5, 81 DLR (4th) 121; *Tétreault-Gadoury v Canada (Employment and Immigration Commission)*, [1991] 2 SCR 22, 81 DLR (4th) 358.

55 *Weber v Ontario Hydro*, [1995] 2 SCR 929 at para 52, 125 DLR (4th) 583.

basis of the legal issues which may be framed.”⁵⁶ The Court in *Weber* also said that the arbitrator’s jurisdiction over such disputes was *exclusive*, a position that was later nuanced to allow for concurrent jurisdiction between human rights tribunals and arbitrators in some circumstances.⁵⁷

Finally, in *Parry Sound*, the Supreme Court, following the reasoning in *McLeod*, came to the conclusion that a board of arbitration has jurisdiction over human rights claims, even where the applicable collective agreement explicitly precludes grievances based on discrimination on a statutorily prohibited ground. Justice Iacobucci, for the majority, held that the arbitrator’s jurisdiction over human rights claims was grounded in the implicit incorporation of the provisions of human rights statutes into all collective agreements.⁵⁸

One of the reasons given in the cases for recognizing arbitrators’ jurisdiction over human rights claims is that their expertise is important in interpreting and applying human rights legislation, including the *Charter*, in the particular context of employment. Those reasons are thus based not only on statutory interpretation (i.e., on the holding that when labour relations statutes gave arbitrators the power to interpret statutes, they meant to include constitutional and quasi-constitutional statutes)⁵⁹ and on principle (i.e., that arbitrators cannot

⁵⁶ *Ibid* at para 43.

⁵⁷ *Ibid* at 72. The possibility that human rights commissions might have concurrent jurisdiction over human rights claims arising in a unionized workplace had already been raised, but the Court declined to answer it at that time. *Parry Sound*, *supra* note 1 at para 15. The Court eventually confirmed that human rights commissions and grievance arbitrators enjoy concurrent jurisdiction over at least some human rights claims. See *Québec (Commission des droits de la personne et des droits de la jeunesse) v Québec (AG)*, 2004 SCC 39 at para 19, [2004] 2 SCR 185 [*Morin*]. Appeal courts in provinces other than Quebec have followed *Morin*. See e.g. *Amalgamated Transit Union, Local 583 v Calgary (City of)*, 2007 ABCA 121, 404 AR 102; *Halifax (Regional Municipality) v Nova Scotia (Human Rights Commission)*, 2008 NSCA 21, 290 DLR (4th) 577.

⁵⁸ *Supra* note 1 at para 28. However, the Court has adopted a different view in situations where statutory requirements are found to be incompatible with the collective bargaining relationship, holding that such requirements are not incorporated into collective agreements. See *Isidore Garon Ltée v Tremblay; Fillion et Frères (1976) v Syndicat national des employés de garage du Québec*, 2006 SCC 2, [2006] 1 SCR 27.

⁵⁹ *Douglas College*, *supra* note 54 at paras 75-79.

refuse to give effect to fundamental rights),⁶⁰ but also on practical considerations. For instance, in *Douglas College*, Justice La Forest explained:

There are, as well, clear advantages for the decision-making process in allowing the simple, speedy, and inexpensive processes of arbitration and administrative agencies to sift the facts and compile a record for the benefit of a reviewing court. It is important, in this as in other issues, to have the advantage of the expertise of the arbitrator or agency. That specialized competence can be of invaluable assistance in constitutional interpretation.⁶¹

Justice Iacobucci adopted a similar line of reasoning in *Parry Sound*:

As this Court has repeatedly recognized, the prompt, final and binding resolution of workplace disputes is of fundamental importance, both to the parties and to society as a whole It is essential that there exist a means of providing speedy decisions by experts in the field who are sensitive to the workplace environment, and which can be considered by both sides to be final and binding.⁶²

This overview of the expansion of labour arbitrators' jurisdiction shows how they came to have the power to interpret and apply human rights statutes, including the Canadian *Charter*, and that judicial recognition of this power was predicated in part on an assessment of arbitrators' expertise. Nonetheless, the same jurisprudence that recognized arbitrators' jurisdiction over human rights claims also limited any deference that might be shown toward arbitrators upon judicial review of their decisions on such claims. As we will see in the next section, courts have generally held that no deference is owed to arbitrators with regard to their interpretation of human rights legislation, in spite of the courts' recognition of arbitral expertise in employment-related matters.

60 *Cuddy Chicks*, *supra* note 54 at para 19. The tribunal in question was a labour relations board, but the ruling also applies to labour arbitrators.

61 *Supra* note 54 at 92. However, the Court eventually de-emphasized these "practical considerations," holding that they could not override clear statutory language depriving a tribunal of the power to decide questions of law. See *Nova Scotia (Workers' Compensation Board) v Martin*; *Nova Scotia (Workers' Compensation Board) v Laseur*, 2003 SCC 54 at paras 32, 41, 56, [2003] 2 SCR 504.

62 *Parry Sound*, *supra* note 1 at para 50.

(b) Judicial Review of Arbitral Application of Human Rights Law: Not So Much Respect for Expertise

Section 96 of the *Constitution Act, 1867* provides that judges of superior courts in the provinces are to be federally appointed. It has long been held to restrict provincial legislatures from conferring on provincially appointed administrative tribunals powers analogous to those exercised by superior courts. Even before the Canadian *Charter* came into force, the Supreme Court of Canada held that section 96 precluded even the strongest statutory privative clauses from sheltering decisions of administrative tribunals from judicial review.⁶³ After the advent of the *Charter*, the same concern arose with respect to administrative tribunal decisions that might have the effect of striking down legislation for non-compliance with the *Charter*. That concern was dealt with in these terms by Justice La Forest in *Cuddy Chicks*:

It must be emphasized that the process of *Charter* decision making is not confined to abstract ruminations on constitutional theory. In the case of *Charter* matters which arise in a particular regulatory context, the ability of the decision maker to analyze competing policy concerns is critical. Therefore, while Board members need not have formal legal training, it remains that they have a very meaningful role to play in the resolution of constitutional issues. The informed view of the Board, as manifested in a sensitivity to relevant facts and an ability to compile a cogent record, is also of invaluable assistance.

...

That having been said, the jurisdiction of the Board is limited in at least one crucial respect: it can expect no curial deference with respect to constitutional decisions.

...

At the end of the day, the legal process will be better served where the Board makes an initial determination of the jurisdictional issue arising from a constitutional challenge.⁶⁴

⁶³ See *Crevier*, *supra* note 39 at para 19; *Quebec (AG) v Farrah*, [1978] 2 SCR 638 at paras 11-13, 34 (*sub nom Farrah v Quebec (AG)*), 86 DLR (3d) 161.

⁶⁴ *Supra* note 54 at paras 16-17, 19.

Thus, the recognition of administrative tribunals' jurisdiction over constitutional claims was from the outset accompanied by an assertion of judicial supremacy: the standard of review was to be that of correctness. Indeed, one of the policy reasons cited in both *Douglas College* and *Cuddy Chicks* for recognizing the jurisdiction of administrative tribunals over *Charter* claims is that they can make "initial" determinations and compile a record of the facts that will be useful to reviewing courts. The unstated assumption here is that constitutional determinations are bound to be reviewed by a superior court, which leaves the distinct impression that administrative tribunals are seen as mere "fact-sifters," who decide what happened before the ordinary courts do the real job of legal analysis. As a colleague of mine — a professor of constitutional law — has put it: "Administrative tribunals are certainly free to give their opinions on constitutional law, but they do so at their own risk since it will always be the courts who decide."⁶⁵

After a period of uncertainty,⁶⁶ the denial of curial deference to arbitrators on constitutional issues was expanded to cover the application of quasi-constitutional statutes such as human rights legislation and the Quebec *Charter*.⁶⁷ It became trite law that arbitral interpretations of human rights statutes did not attract deference upon

65 Maxime St-Hilaire, personal communication (13 November 2010).

66 See Tabbakh, *supra* note 49 ("in the absence of clear legislative intervention, the level of curial deference toward grievance arbitrators, particularly when addressing human rights questions, remains uncertain" at 268).

67 See e.g. *Canada (Attorney General) v Mossop*, [1993] 1 SCR 554, 100 DLR (4th) 658 (the Canadian Human Rights Tribunal has no more expertise than the courts in interpreting human rights legislation or other general questions of law); *Parry Sound*, *supra* note 1 at paras 21 and 22 ("Determining whether the substantive rights and obligations of an external statute are incorporated into a collective agreement is a legal question of broad applicability that does not fall within an arbitrator's core area of expertise. Although the Board has the power to determine whether the substantive rights and obligations of the *Human Rights Code* are incorporated into the collective agreement, the Court has the power to interfere if the Board resolved the issue incorrectly").

review.⁶⁸ The justification mobilized by the Supreme Court for applying the correctness standard to decisions rendered by administrative tribunals on human rights claims is that they involve fundamental legal questions of central importance to the legal system as a whole.⁶⁹ Since these are precisely the kind of questions in which judges are supposed to be experts, the weighing of relative expertise will not favour the administrative tribunal.

68 See e.g. *McGill University Health Centre (Montreal General Hospital) v Syndicat des employés de l'Hôpital général de Montréal*, 2007 SCC 4, [2007] 1 SCR 161 (correctness standard applied, with no discussion of the standard of review); *Syndicat des employés de l'Hôpital Général de Montréal c Centre universitaire de santé McGill*, 2005 QCCA 277 at para 23 (the Court of Appeal spent a single paragraph determining that the correctness standard applied, reversing the Superior Court's earlier finding); *Syndicat des employés de l'Hôpital Général de Montréal c Sexton*, JE 2004-1617 (available on QL) (the Superior Court applied the patently unreasonable standard). See also *Hydro-Québec v Syndicat des employées de techniques professionnelles et de bureau d'Hydro-Québec, section locale 2000 (SCFP-FTQ)*, 2008 SCC 43, [2008] 2 SCR 561 [*Hydro-Québec*] (correctness standard implicitly applied, with no discussion of the standard of review); *Syndicat des employées et employés de techniques professionnelles et de bureau d'Hydro-Québec, section locale 2000 (SCFP-FTQ) c Hydro-Québec*, 2006 QCCA 150 at para 53, [2006] RJQ 426 (as in *McGill*, the Court of Appeal devoted a single paragraph to the subject in determining the standard of review to be correctness, on the ground that the arbitrator interpreted the Quebec *Charter*). But see *Commission des écoles catholiques de Québec c Gobeil*, [1999] RJQ 1883 at para 34 (an arbitrator's interpretation of the Quebec *Charter* could be shown deference if it did not play a "preponderant role" in the outcome).

69 See *City of Toronto*, *supra* note 48, LeBel J concurring ("constitutional and human rights questions and those involving civil liberties, as well as other questions that are of central importance to the legal system as a whole . . . typically fall to be decided on a correctness standard" at para 67); *Dunsmuir*, *supra* note 5 ("courts must also continue to substitute their own view of the correct answer where the question at issue is one of general law 'that is both of central importance to the legal system as a whole and outside the adjudicator's specialized area of expertise' " at para 60). But see *Canada (Canadian Human Rights Commission) v Canada (AG)*, 2011 SCC 53, [2011] 3 SCR 471 [*Mowat*] at paras 22-27 (not all general questions of law entrusted to the Canadian Human Rights Tribunal are of central importance to the legal system); *Saskatchewan (Human Rights Commission) v Whatcott*, 2013 SCC 11 at paras 166-168 (application of human rights statute in accordance with established precedent and within the expertise of the tribunal does not involve a question of law that is of central importance to the legal system).

There is, however, still a difference between “fundamental legal questions” and constitutional ones: while decisions on constitutional questions are *always* to be reviewed on the correctness standard (because of the “unique role of section 96 courts as interpreters of the Constitution”⁷⁰), “fundamental legal questions” must be *both* “of central importance to the legal system as a whole *and* outside the adjudicator’s specialized area of expertise”⁷¹ for the correctness standard to apply. This raises the question of whether it is possible for grievance arbitrators to be considered experts on human rights claims that arise in the employment context. In particular, we can ask whether arbitrators might acquire such expertise, as the Supreme Court claimed they could in *Parry Sound*.⁷²

(c) Arbitrators’ Expertise in Human Rights Claims in the Employment Context Should Result in the Application of the Reasonableness Standard

In *Parry Sound*, Justice Iacobucci stated that grievance arbitrators are experts in the field of labour relations but have less expertise than human rights commissions in respect of human rights violations. He went on to claim that expertise is not static, and to imply that over time, arbitrators will develop expertise equivalent to that of human rights commissions in such matters.⁷³ Admittedly, these arguments were made in relation to jurisdiction and not to the standard of review, but they do raise the possibility that arbitrators might acquire sufficient expertise in human rights matters to justify curial deference to their decisions. This raises the further question of exactly how courts should go about determining whether and when sufficient expertise has been acquired, especially given my claim that the courts’ determination of expertise is essentially grounded in their interpretation of enabling statutes rather than in an empirical analysis of actual expertise.

It could be argued that even if arbitrators were to acquire a level of expertise in human rights matters comparable to that of human

⁷⁰ *Dunsmuir*, *supra* note 5 at para 58.

⁷¹ *Ibid* at para 60, citing *City of Toronto*, *supra* note 48 (*per* LeBel J, emphasis added); see also *Nor-Man*, *supra* note 8 at para 35.

⁷² *Supra* note 1 at para 53.

⁷³ *Ibid*.

rights commissions, this would not in itself justify curial deference to their interpretation of human rights statutes, because human rights commissions themselves are not afforded such deference.⁷⁴ However, this argument fails to take into account that in deciding that human rights commissions do not have expertise on questions of law, the Supreme Court contrasted them with labour boards and arbitrators, which *do* have such expertise. For instance, in *Mossop*, Justice La Forest provided the following analysis:

[A] human rights tribunal does not appear to me to call for the same level of deference as a labour arbitrator. 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. As well, the arbitrator's jurisdiction under the statute extends to the determination of whether a matter is arbitrable. This is entirely different from the situation of a human rights tribunal, whose decision is imposed on the parties and has direct influence on society at large in relation to basic social values. 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.⁷⁵

74 *Dickason v University of Alberta*, [1992] 2 SCR 1103, 95 DLR (4th) 439; *Mossop*, *supra* note 67; *Gould v Yukon Order of Pioneers*, [1996] 1 SCR 571, 133 DLR (4th) 449; *Ross v New Brunswick School District No 15*, [1996] 1 SCR 825, 171 NBR (2d) 321; *Cooper v Canada (Human Rights Commission)*, [1996] 3 SCR 854, 140 DLR (4th) 193. There is a trend towards granting deference to human rights tribunals, though not when they make determinations of law that are of central importance to the legal system as a whole. See *Mowat*, *supra* note 69 (human rights tribunal's interpretation of jurisdiction to award costs reviewed on standard of reasonableness, since costs are not of central importance to the legal system as a whole). See also *Figliola*, *supra* note 29 (deference shown to a human rights tribunal's exercise of a discretionary power, even though the discretion required it to engage in statutory interpretation); *Halifax (Regional Municipality) v Nova Scotia (Human Rights Commission)*, 2012 SCC 10, [2012] 1 SCR 364 (deference shown to a human rights commission's decision to refer a complaint to a board of inquiry).

75 *Mossop*, *supra* note 67 at para 45 (La Forest J's opinion in *Mossop* was a concurring one, but the majority explicitly endorsed his reasoning on the standard of review). See also *Cooper*, *supra* note 74 at para 61; *Ross*, *supra* note 74 at para 24. In so far as La Forest J's phrase "questions of this kind" refers to substantive human rights law (such as the scope of "family status" protection at issue in *Mossop*) rather than general statutory interpretation that is not of central importance to the legal system, I submit that this passage still represents the view of the Supreme Court of Canada. See *Mowat*, *supra* note 69 at paras 20-27.

Certainly, this view of labour arbitration in *Mossop* is one of an essentially consensual form of private ordering, concerned primarily (or perhaps exclusively) with the application of collective agreements. This is not surprising, since *Mossop* was rendered before *Weber* and long before *Parry Sound*.⁷⁶ Nevertheless, there is something to be said for the distinction that Justice La Forest made in the above passage. Whether they are interpreting the “bread and butter” terms of a collective agreement, such as seniority clauses, overtime provisions and workplace discipline, or statutory provisions on human rights, employment standards and the like, arbitrators are experts in the *milieu* of employment — in what Justice La Forest termed “a narrowly restricted field.” In this respect, they are different from human rights tribunals, which apply human rights statutes in a multitude of contexts. Indeed, given the broad jurisdiction of human rights tribunals, perhaps the only thing that can be said to be common to the multiple contexts in relation to which they render decisions is that all of those contexts give rise to human rights claims. Any legal expertise that the tribunals might have is thus necessarily limited to the interpretation of human rights statutes — and, following Justice La Forest’s reasoning, that is precisely the domain in which courts are considered to be experts. Thus, even if the courts were to recognize arbitrators’ expertise in interpreting human rights statutes *in the employment context*, this would not undermine the courts’ claim to supremacy in the field of *general* statutory interpretation.

To be clear, I am not arguing that human rights tribunals do not deserve deference when interpreting those provisions in human rights statutes that are of central importance to the legal system as a whole. Perhaps they should be afforded such deference. Indeed, perhaps they should be afforded it in the employment context, which forms an important part of their caseload. But this is quite beside the point. What I am arguing is that the refusal of the jurisprudence *as it now stands* to show deference to human rights tribunals is not a good reason for refusing to defer to labour arbitrators on similar questions. In any event, in determining the appropriate standard of review,

76 Note, however, that *Cooper*, *supra* note 74, and *Ross*, *supra* note 74, confirmed the distinction between arbitral expertise and human rights commission expertise. These decisions were rendered after the Supreme Court had determined that arbitrators had the jurisdiction to apply human rights legislation.

arbitral expertise in human rights matters should first and foremost be understood in relation to the expertise of the reviewing court, and not to that of human rights tribunals.⁷⁷

When we consider the complexity of unionized work environments, it becomes apparent that arbitrators may have more expertise than the courts in interpreting human rights statutes in the employment context. Consider a situation in which an arbitrator must determine whether an employee who is the subject of *prima facie* discrimination can be accommodated without imposing undue hardship. In many workplaces there is more than one bargaining unit, each with its own collective agreement. Accommodating the employee might require her to be transferred into a position in another bargaining unit. This in turn would require establishing her seniority in the new unit, which could affect other workers, perhaps resulting in a layoff. Many parties might suffer some hardship, at least two collective agreements would have to be analyzed, and the consequences for the ongoing working relationship between the union(s) and the employer might be significant.⁷⁸ Even though the issue in this case could easily be framed as a purely legal question,⁷⁹ deciding such a matter needs an in-depth understanding of labour relations. In this sort of case, an arbitrator is better situated than a judge to interpret the governing human rights legislation.⁸⁰

77 Indeed, expertise is not determinative in tracing the jurisdictional boundaries between these two tribunals. See *Parry Sound*, *supra* note 1 at 54; *Morin*, *supra* note 57 at para 72, Bastarache J dissenting.

78 The complex interaction between accommodation claims and seniority is discussed in Christian Brunelle, *Discrimination et obligation d'accommodement en milieu de travail syndiqué* (Cowansville: Yvon Blais, 2001) at 317-346.

79 See *McGill*, *supra* note 68; *Hydro-Québec*, *supra* note 68 (involving determinations of whether the duty to accommodate has been met). On the difficulty in determining whether a question is one of law or one of mixed law and fact, see Bilson, "Expertise of Labour Arbitrators," *supra* note 4 at 54 ("In [reasonable accommodation cases] the separation between the legal and the factual, and between legal questions that lie at the heart of an arbitrator's mandate and those that do not, are not straightforward matters").

80 See *Council of Canadians with Disabilities v VIA Rail Canada*, 2007 SCC 15 at paras 96-97, [2007] 1 SCR 650 (decisions of administrative agencies are not reviewable on a correctness standard simply because they include a "human rights aspect").

Extending the judicial appreciation of arbitrators' expertise to human rights claims would recognize that interpreting human rights statutes in the employment context is now a core part of the arbitral function. In the *City of Toronto* case,⁸¹ Justice LeBel advanced the proposition that acquired expertise can ground judicial deference towards administrative decisions on general questions of law. Though he did not use the terminology of "fundamental legal questions of central importance to the legal system as a whole," Justice LeBel did suggest that arbitrators' decisions on general questions of law ought to be shown deference if they are "closely connected" to the "core" jurisdiction with respect to which they have a high level of expertise.⁸²

This is similar to the position advanced in *Dunsmuir* in a separate concurring opinion by Justice Binnie, who suggested that deference should be shown toward an administrative tribunal's interpretation not only of its enabling statute, but also of "closely related" statutes. Justice Binnie said: "It should be sufficient to frame a rule exempting from the correctness standard the provisions of the home statute and closely related statutes which require the expertise of the administrative decision maker (as in the labour board example)."⁸³

Another advantage of applying the reasonableness standard rather than the correctness standard to arbitrators' interpretation of human rights legislation is that it would solve a problem that arises when the terms of these statutes are explicitly incorporated into a collective agreement. The problem in such cases is that a reviewing court is faced with the apparent application of two different standards of review to the interpretation of a single normative text, and has no principled way to decide which standard to apply.

81 *Supra* note 48.

82 *Ibid* at paras 72-74 (questions of general law are often intertwined with labour law issues, and adjudicators should be accorded deference when these questions are connected to their core area of expertise). See also *Nor-Man*, *supra* note 8 at paras 32-34, 38 (arbitral awards that give common law or equitable remedies should not, for that reason alone, be subject to review on a standard of correctness).

83 *Dunsmuir*, *supra* note 5 at para 128. Binnie J also stated that "[l]abour arbitrators, as in this case, command deference on legal matters within their enabling statute or on legal matters intimately connected thereto." *Ibid* at para 147.

There are many reasons why unions and employers choose to explicitly incorporate human rights language into their collective agreements. Before *Parry Sound*, this strategy provided an assurance that an arbitrator would have jurisdiction over human rights claims originating in the workplace. Thus the parties to a collective agreement containing such language could be certain that someone who understood the labour relations context could decide disputes with a human rights dimension. Furthermore, since an arbitral interpretation of the terms of a collective agreement is deferred to by the courts, the parties to a collective agreement containing human rights language had some assurance that an eventual decision would be final and binding, rather than get bogged down in judicial review proceedings.

However, in such cases the jurisprudence gives no clear answer as to how courts should approach the judicial review of an arbitral decision on the human rights language in question. Since that language is in the collective agreement, an arbitral interpretation of it would normally command deference. On the other hand, if the language was not put into the collective agreement, the arbitrator would still be obliged to interpret it because it was part of the human rights statute — but an arbitral interpretation of a human rights statute is usually reviewed on the correctness standard, since those statutes are of central importance to the legal system as a whole.

The Supreme Court has been confronted twice with collective agreements that incorporate language from human rights statutes, but has failed to settle the matter.⁸⁴ In *Green Bay*, Justice Major, for the majority of the Court, asserted that two standards of review applied:

In the present appeal, both the “patently unreasonable” and the “correctness” standards of review are involved. The Board interpreted the collective agreement and the [Human Rights] Code. If the Board was incorrect but not patently unreasonable in all of its findings, the Court can only interfere on the “correctness” standard with those portions of the decision that as questions of law interpret the Code.⁸⁵

84 See *Commission scolaire régionale de Chambly v Bergevin*, [1994] 2 SCR 525, 115 DLR (4th) 609; *Newfoundland Association of Public Employees v Newfoundland (Green Bay Health Care Centre)*, [1996] 2 SCR 3, 134 DLR (4th) 1 [*Green Bay*].

85 *Green Bay*, *ibid* at para 14. Given the demise of the patently unreasonableness standard in *Dunsmuir*, the effect of this statement now would result in the application of the reasonableness standard.

Here, Justice Major begged the question, as he did not directly address what would happen if the collective agreement used exactly the same language as the human rights statute.⁸⁶ If, as I suggest, the standard of review were to be the same in each case, the problem would disappear. Having the same standard of review would also be in keeping with the objective of having a single standard applicable to the whole decision, rather than applying different standards to different aspects of it.⁸⁷

Parry Sound did not resolve this problem; if anything, it exacerbated it. In that case, the Court held that “the substantive rights and obligations of the *Human Rights Code* are incorporated into each collective agreement over which an arbitrator has jurisdiction.”⁸⁸ Thus, where the parties have explicitly included human rights language in the collective agreement, the arbitrator’s interpretation would be subject to review on the reasonableness standard, but where statutory human rights protections are merely “incorporated” into the agreement, the applicable standard of review would still be correctness.⁸⁹

(d) Acquiring Expertise

If courts are to show deference to arbitrators’ interpretation of human rights legislation, it must be in recognition of arbitral expertise. Since the case law to date has not recognized arbitrators as experts in human rights, courts could not show such deference without acknowledging that an arbitrator has *acquired* the necessary expertise.

Justice Iacobucci was right in *Parry Sound* when he said that arbitrators could acquire expertise in human rights matters. It appears

86 In *Green Bay*, *ibid*, the parties had included language prohibiting discrimination, but had not provided for the “*bona fide* occupational requirement” defence against *prima facie* discrimination. At issue was whether the arbitrator was right in allowing the employer to raise that defence.

87 *Rogers Communications*, *supra* note 43 at paras 78-87.

88 *Supra* note 1 at paras 23, 55.

89 The adjective “substantive” implies that it is the “rights and obligations,” not the language of the *Code*, that are ultimately “incorporated” into collective agreements. If that is the case, an arbitrator’s interpretation of these rights and obligations cannot be understood to be synonymous with interpretation of the language of the agreement.

that they do in fact acquire it. A cursory perusal of any Canadian arbitration reporter reveals that claims with a human rights component have for some years accounted for a significant proportion of arbitration awards. In other words, arbitrators have “grapple[d] with [these] issues on a repeated basis.”⁹⁰ This fact could well serve as the basis for a reappraisal of arbitral expertise, in which the courts would establish that, to use Justice Binnie’s formulation in *Dunsmuir*, human rights statutes are “closely related” or “intimately connected” to arbitrators’ enabling statutes.

Framing the question solely in terms of the arbitrator’s enabling statute is somewhat misleading, since arbitral jurisdiction is generally based at least in part on a collective agreement.⁹¹ However, it is precisely the quasi-consensual nature of arbitration that could serve to ground a judicial reappraisal of the idea of acquired expertise in light of developments since *Parry Sound*.

Recall that judicial determination of expertise is not an empirical question, but a legal one. Judges examine an administrative tribunal’s enabling legislation in order to determine what role the legislator has reserved for them, and to what extent that role is specialized. There is no reason that this cannot be applied *mutatis mutandis* to collective agreements. Thus, the very fact that the parties have chosen to submit a human rights question to a given arbitrator could be taken as an indicator that they perceive that arbitrator to be an expert. Taking the matter a step further, parties could include a clause in their collective agreement stipulating that they recognize the expertise of arbitrators in resolving grievances based on human rights legislation.

It might at first appear odd that judges should defer to private parties’ determination of expertise. But this is in effect what judges do when they recognize arbitrators’ expertise in interpreting collective agreements. Unlike other administrative tribunals, arbitrators have no legislated appointment procedure; other than mutual acceptability by the signatories to the collective agreement, there are no prerequisites

⁹⁰ *Supra* note 1 at para 53.

⁹¹ In Quebec, the enabling statute is the Quebec *Labour Code*, *supra* note 51. In other Canadian jurisdictions, arbitrators derive their authority from a clause in the collective agreement, or from legislation in the absence of such a clause. See e.g. *Canada Labour Code*, *supra* note 51, s 57; *Ontario Labour Relations Act*, *supra* note 51, s 48.

for being an arbitrator.⁹² In effect, judges must defer both to the legislatures (who have determined that arbitrators are to benefit both from a wide grant of jurisdiction and from a privative clause) and to the parties to the collective agreement (who have appointed the arbitrator, and by doing so, have invested him or her with presumed expertise). Given that the parties' power to choose an arbitrator is granted to them by statute, there is clear legislative intent to let them determine the issue of expertise. The courts should therefore defer to the parties' choice.

4. OBJECTIONS TO APPLYING THE REASONABLENESS STANDARD TO ARBITRAL DECISIONS ON HUMAN RIGHTS ISSUES

Giving deference to arbitral interpretations of human rights legislation is open to several objections. Here, I address the three objections that I take to be the most serious.

(a) The "Rule of Law" Objection

The first objection is that human rights statutes are so fundamental to our conception of a just society that we cannot countenance their incorrect interpretation and application by an administrative tribunal. Deference requires that a reasonable but (in a judge's opinion) wrong interpretation must stand. Would this not violate the rule of law?

One answer to this objection is that it is misleading to characterize as wrong a reasonable interpretation with which a court disagrees. A judge is simply not as well-placed as an arbitrator to determine the "correct" application of a human rights statute in the employment context; this is the whole point of deferring to expertise. In his concurring opinion in *Dunsmuir*, Justice Binnie made the point clearly:

92 Arbitrators appointed by a labour minister in the absence of agreement by the parties do have to meet certain prerequisites. See e.g. *Quebec Labour Code*, *supra* note 51, art 77; *An Act Respecting the Conseil Consultatif du Travail et de la Main-d'oeuvre*, RSQ c C-55; *Ontario Labour Relations Act*, *supra* note 51, s 49(10).

It is sometimes said by judges that an administrator acting within his or her discretion “has the right to be wrong.” This reflects an unduly court-centred view of the universe. A disagreement between the court and an administrator does not necessarily mean that the administrator is wrong.⁹³

To assert that applying the reasonableness standard to arbitral interpretations of human rights statutes would result in insulating “incorrect” decisions from review is to misunderstand the foundations of deference.

Another response to the “rule of law” objection is that even if deference were accorded to arbitrators on judicial review, this would not allow them to render decisions that were in breach of human rights legislation. After all, deference to an administrative tribunal’s reasoning does not require courts to abdicate their role in controlling the legality of the tribunal’s orders. Judicial oversight of administrative action can be maintained even when courts defer to a tribunal’s reasoning.⁹⁴ It should be noted that private (non-labour) arbitration, including the private arbitration of employment contract disputes of non-unionized workers, is subject to judicial control in the same limited way. In Quebec, for instance, the *Code of Civil Procedure* does not allow judges to review the reasoning of consensual arbitration awards on any standard, let alone correctness. A judge can only refuse to certify an award if the award itself is contrary to public order.⁹⁵

93 *Dunsmuir*, *supra* note 5 at para 125.

94 This is complicated by *Doré v Barreau du Québec*, 2012 SCC 12 at paras 57-58, [2012] 1 SCR 395, which held that a *prima facie* violation of a *Charter*-protected right caused by the exercise of statutory discretion by an administrative body should be reviewed on administrative law principles rather than on the test for justification of the violation under section 1 of the *Charter* as set out in *R v Oakes*, [1986] 1 SCR 103. Whether a given exercise of discretion violates the *Charter* will thus be determined with reference to the reasonableness of the administrative body’s decision. Furthermore, the Court has taken an expansive view of the concept of “discretion,” to the point where any process of statutory interpretation that implies a choice among a range of reasonable meanings could be seen as an exercise of discretion. Until the Court clarifies this situation (either by stating that administrative tribunals deserve deference even when they interpret the *Charter*, or by revising its conception of discretion), there will be considerable uncertainty and room for incoherence. On this last point, see Evan Fox-Decent & Alexander Pless, “The Charter and Administrative Law: Cross-Fertilization or Inconstancy?” in Colleen M Flood & Lorne Sossin, eds, *Administrative Law in Context*, 2d ed (Toronto: Emond Montgomery Publications, 2013) 407 at 445.

95 *CCP*, *supra* note 21, art 946.5.

(b) The “Arbitrators Aren’t Lawyers” Objection

A second objection to recognizing arbitrators’ expertise in human rights matters is grounded in the fact that not all arbitrators have legal training. How can we defer to the supposed expertise in statutory interpretation of someone who has no formal training in the law?

This objection misunderstands my argument. If we accept that the parties’ choice of an arbitrator is an appropriate indicator of expertise, we ought not to peruse the arbitrator’s *curriculum vitae* in search of further evidence. When lawyers appear before a Superior Court judge, they cannot question her expertise in, say, criminal law simply because she practised exclusively in, for instance, commercial law before being called to the bench. Formally, the guarantor of competence is the appointment process itself.

Furthermore, if the “arbitrators aren’t lawyers” objection holds, then it also holds for their interpretation of other legislation, including labour relations statutes. Yet deference to arbitral interpretation of these statutes is well established. If the argument is that human rights statutes are somehow special and can never be properly left to non-lawyers to interpret, then the objection is really just a variant of the rule of law objection addressed above.

Admittedly, my argument entails the notion that if — for whatever reason — parties choose non-lawyers as their arbitrators in human rights claims, that choice should be respected and the resulting decision should be insulated from judicial review. Nevertheless, we have every reason to believe that parties are likely to favour legally trained arbitrators for grievances that involve complex questions of law. Certainly there is no dearth of lawyers turned arbitrators.⁹⁶

(c) The “Individual Rights” Objection

The final objection that I want to consider is the view that since unions (rather than individual grievors) control the arbitration process, it is illegitimate to insulate decisions that affect what are

96 For example, the Quebec Ministry of Labour’s 2011 list of arbitrators includes 90 individuals, of whom 77 have an undergraduate law degree. More than a quarter of those on the list have a graduate degree. See Comité consultatif du travail et de la main-d’oeuvre, *Liste annotée d’arbitres de griefs*, online: <<http://www.conference-des-arbitres.qc.ca/ArbitratorListAnnotated.aspx>>.

fundamental individual rights from judicial review for correctness.⁹⁷ On this view, unionized employees would be a kind of second-class citizen when it came to the adjudication of their human rights.

My reply to this “individual rights” objection is that it simply has nothing to do with the standard of review of arbitration decisions. Rather, it is an objection to the *jurisdiction* of arbitrators to interpret and apply human rights statutes. The current state of the law is such that a unionized employee who does not want to have her employment-related human rights complaint dealt with in arbitration may often take that complaint to the human rights forum, as long as it is not also pursued in arbitration.⁹⁸ The argument for deference to arbitrators does not in any way suggest that they ought to have *exclusive* jurisdiction over human rights claims, but merely that once they exercise their concurrent jurisdiction, their awards should be reviewable only on a reasonableness standard.

If the “individual rights” objection had any merit, it would also hold for the adjudication of all kinds of other, non-human-rights claims that unionized employees might wish to bring — and it clearly does not hold for other kinds of claims. In those cases, the arbitrator’s jurisdiction really is exclusive, and an arbitral award will be shown a high level of deference by the courts. Insofar as this objection is particular to human rights claims, it is just a version of the “rule of law” objection.

5. CONCLUSIONS

I have argued that labour arbitrators are now sufficiently expert in the interpretation of human rights legislation that they should be accorded deference in this area by reviewing judges. How judges

97 The possibility that unions might use their control of grievances to insulate discriminatory clauses of a collective agreement from oversight was an important reason for recognizing the jurisdiction of human rights tribunals over the collective agreement negotiation process. *Morin*, *supra* note 57 at para 28.

98 This is a consequence of *Morin*, *ibid*. Since that decision, courts have routinely found that unionized employees may contest the application of a discriminatory clause in their collective agreement before human rights tribunals. See e.g. *Syndicat du transport de Montréal – CSN c Commission des droits de la personne et des droits de la jeunesse*, 2010 QCCA 165, 69 CHRR D/444. This has also led to successful human rights claims by unionized employees in the ordinary courts, at least in Quebec. See *Montréal (Ville de) c Audigé*, 2013 QCCA 171.

could apprehend this evolution in expertise in the context of determining the applicable standard of review is not entirely clear.

In *Dunsmuir*, Justice Binnie stated that “[j]udicial review is an idea that has lately become unduly burdened with law office metaphysics.”⁹⁹ Unfortunately, the Supreme Court’s attempt in that case to simplify matters by substituting a “deference” approach for the “pragmatic and functional” approach has done little to bring the law down to earth. This is true of the determination of tribunal expertise as well as the role of such expertise in the courts’ selection of the appropriate standard of review.

The distinction between the expertise of individual adjudicators and the institutional expertise of tribunals is helpful in understanding the nature of expertise, and so is the distinction between a tribunal’s expertise and its specialized role. However, the courts are likely to use these distinctions only obliquely, since determination of expertise is ultimately not a matter of fact but of (legal) fiction.

Keeping this in mind, we are not without tools to apprehend evolving expertise. First, legislators could explicitly set out what they see as the level of expertise of a tribunal in its enabling statute, as the British Columbia *Administrative Tribunals Act* does, although it remains to be seen whether dictating the resulting standard of review would pass section 96 muster on a direct challenge.¹⁰⁰ Second, courts could take judicial notice of acquired expertise by adjusting the range of statutes that are “closely related” or “intimately connected” to a given tribunal’s enabling act. Finally, in the particular case of labour arbitration, the role that the parties to a collective agreement play in selecting an adjudicator and determining her jurisdiction allows them to signal to the courts, explicitly or implicitly, the matters in which they understand the arbitrator to be an expert.

⁹⁹ *Dunsmuir*, *supra* note 5 at para 122.

¹⁰⁰ See *Crevier*, *supra* note 39. *Figliola*, *supra* note 29 and *Moore*, *supra* note 29 are not determinative of this issue. On the one hand, the Supreme Court’s application of the B.C. *ATA*, *supra* note 29, ss 58-59, could be seen as an endorsement of its constitutionality. On the other hand, the absence of any real standard of review analysis may signal the Court’s unwillingness to consider the relationship between the *ATA* and the general law of judicial review until the question is squarely raised. The Court also skirted the question in *Rio Tinto Alcan Inc v Carrier Sekani Tribal Council*, 2010 SCC 43, [2010] 2 SCR 650, deciding that a mixed question of law and fact falls between the two standards provided for by the *ATA* (correctness and patent unreasonableness) and that, in such cases, the reasonableness standard set out in *Dunsmuir*, *ibid*, applies.