

JUDICIAL DEFERENCE

NOTES FOR REMARKS BY THE HONOURABLE
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Judicial Deference*

Introduction

I would like to begin today by paying tribute to all of you for the outstanding work that you do as representatives of the many decision makers in our legal system. In my ten years as a judge, I have come to admire and respect administrative boards, agencies and tribunals, as I have trial judges. Yours is not an easy task, contending with heavy caseloads, diminishing resources, and increasingly complex issues. Yet your role is essential to the administration of justice.

The judicial expression of this respect and admiration is the doctrine of judicial deference. The amount of deference a reviewing court is willing to grant to a decision of an administrative body determines the standard of review to be applied by the court. And it is judicial deference that I want to speak to you about today. As you know, it is a much debated topic. In the speech given to this conference last year, Chief Justice Roy McMurtry made reference to a paper by Leah Price, arguing to put it mildly that the Supreme Court's jurisprudence on deference was difficult to comprehend and follow.¹ Chief Justice McMurtry also noted the frustration of tribunals and appellate courts in dealing with this jurisprudence.² These remarks confirmed my desire to speak to you about deference and share with you some thoughts on how it is we have arrived at the current position regarding deference.

I believe it was Justice Douglas who said that the U.S. Supreme Court was not a Supreme Legislature but a Supreme Court. I must confess to saying this nearly everyday of my judicial life, particularly in the era of the *Charter of Rights and Freedoms*. But, apart from the *Charter*, there is another reason for me to remember Douglas's injunction which I should like to discuss with you today. Let me elaborate.

The expectation of parties entering the Supreme Court Building is well captured by two statutes flanking the staircase, proclaiming *Truth* and *Justice*. But truth and justice must be understood in context: close to the Court, along the Ottawa river, lies Parliament and, in every provincial and territorial capital its legislative counterpart. Truth and justice must therefore always be situated within the dialogue between the legislature and the Court. And it is the particular dialogue regarding the place of administrative boards and agencies within Canada's legal topography that has begotten the recent, and somewhat controversial, *Southam* case.³

Southam concerned a decision of the Competition Tribunal ordering Southam to sell one of its community newspapers as it found that Southam's recent acquisitions had resulted in a substantial lessening in competition in the relevant real estate print advertising market. At issue was whether the Court should show deference to this decision. The decision involved a question of mixed law and fact and the *Competition Act* grants a statutory right of appeal from decisions of the Tribunal, suggesting that an appellate court is free to substitute its own understanding for that of the Tribunal. The Court deferred to the Tribunal despite these factors, and despite stating:

It is possible that if I were deciding this case *de novo*, I might not dismiss so readily as the Tribunal did what is admittedly weighty evidence of inter-industry competition.⁴

Why? Because the decision fell within the Tribunal's expertise and was not unreasonable.

Southam therefore stands for the proposition that even when Parliament has granted a statutory right of appeal from the decision of an administrative body, and even when the Court thinks that the decision of this body is not one the Court would have made, the Court will defer to the expertise of that body. If the Supreme Court is not a Supreme Legislature, neither is it a Supreme Policy Administrator.

Critics of *Southam* ask: What then has become of truth and justice when the highest court in the land defers to what looks like an incorrect interpretation of the law?⁵ However, truth and justice are not mere abstract concepts, but the concrete goals of our legal system. As such, their attainment depends upon legal decisions being made by those who are in the best position to do so. Some of this depends upon having adequate procedures in place. But expertise also plays an integral role in the achievement of truth and justice, as expert decision makers are more likely to make the right decision than non-experts. Therefore judicial deference to specialized expertise does not subvert truth and justice, it is *required* by truth and justice.

Even less than a century ago, this statement was unthinkable. Less than a century ago, apart from not being born, I could not have delivered a speech on judicial deference to administrative interpretations of the law, for it simply did not exist. To understand what has changed in the intervening years, it is necessary to go back to Albert Venn Dicey, whose

description of the Rule of law⁵ has had an enormous impact on the development of administrative law in this country.

It is Dicey's vision that informed Lord Hewart's famous statement:

Between the Rule of Law⁶ and what is called Administrative law⁶ (happily there is no English name for it) there is the sharpest possible contrast. One is substantially the opposite of the other.⁶

It is from Dicey's vision that Canadian courts have been turning away, a process recognized by the Supreme Court in 1979 with its important decision in *CUPE*, and continued in *Southam*. The fulcrum for this shift, I will endeavour to explain, has been the role of specialized expertise in the modern administrative state.

From Dicey to CUPE

The rule of law, Dicey wrote in 1908, is a fundamental principle of the English constitution, and has three meanings. I quote:

It means, in the first place, the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power....

It means, again, equality before the law, or the equal subjection of all classes to the ordinary law of the land administered by the ordinary law courts....

The Rule of law,⁷ lastly, may be used as a formula for expressing the fact the constitution is the result of the ordinary law of the land.⁷

The second meaning is particularly important in the context of the role of deference in administrative law, since Dicey argued that it implied

there can be with us nothing really corresponding to the Administrative law⁸ (*droit*

administratif) or the Administrative tribunals (*tribunaux administratifs*) of France. The notion which lies at the bottom of the Administrative law known to foreign countries is, that affairs or disputes in which the government or its servants are concerned are beyond the sphere of the civil courts and must be dealt with by special and more or less official bodies. This idea is utterly unknown to the law of England, and indeed is fundamentally inconsistent with our traditions and customs.⁸

One of Dicey's chief concerns, therefore, was equality before the law. For him, this meant the government and its servants did not possess special rights, privileges, or prerogatives as against private citizens which were to be determined according to different standards from the considerations which fix the legal rights and duties of one citizen towards another.⁹ It also meant that the government and its officials could not be free from the jurisdiction of the ordinary courts.¹⁰

Nonetheless, Dicey recognized the principle of parliamentary sovereignty, which I will refer to in our more familiar language of parliamentary supremacy.¹¹ His vision therefore required the reconciliation of parliamentary supremacy and the rule of law, a reconciliation that was often effected through the courts presuming that Parliament did not intend to contravene the rule of law. This then provided courts with an interpretive tool: unless a statute explicitly stated otherwise, gaps, silences and ambiguities were to be interpreted so as to conform to the rule of law.¹²

This vision also imposed upon the legal system an interpretive hierarchy, with courts at its apex. Law was ordinary law as administered by ordinary law courts. There could be no differing standards of review for different legal decisions; ordinary courts were obligated by the

rule of law to hold administrative tribunals to a standard of correctness, as determined by the court, in order to uphold the principle of equality before the law.

Under this model, administrative tribunals were given the task of implementing the law as passed by Parliament, but courts were the final arbiters of the legislative intent behind a statute and kept administrative officials within the bounds of their enabling statute. Specialized agencies, boards and tribunals received no special position in this model and no judicial deference to their decisions when such decisions involved legal interpretation.

However, as we entered an era of the administrative state, in which government increasingly saw its role as provider of social programs and relied upon specialized boards, agencies and tribunals to implement aspects of this new agenda, Dicey's vision became unworkable. The difficulty was that administrative bodies often had to interpret the law in order to implement the statutory regime they were to administer. Moreover, such interpretations often involved complex policy determinations in which such administrative bodies were supposed to be expert. Judicial intervention undermined their role and their effectiveness.

Parliament responded to such intervention by inserting privative clauses into the constitutive statutes of administrative boards and agencies, seeming clearly to oust judicial interpretive supervision. But this placed courts in a dilemma, for they were forced to reconcile a clear legislative command not to interfere with the general presumption that, in delegating power to these agencies, the legislature meant for the agencies to stay within the bounds of the law. The

rule of law seemed to dictate that courts should determine the law and keep administrative agencies within it.

What resulted was a struggle to define the jurisdiction of the administrative agencies whose constitutive statute included a privative clause so that courts could police the boundaries of their delegated power while at the same time give effect to the privative clause. There were inevitable difficulties and growing pains.¹³ In *PSAC*, Justice Cory referred to this time as

marked by the extent of control of the so-called inferior tribunals exercised by the courts. This was manifested by their eagerness to substitute their opinions for that of the administrative board ... They took the position that a definition of jurisdictional error should include any question pertaining to the interpretation of a statute made by an administrative tribunal. In each case this Court substituted its own opinion of the correct interpretation of the statute for that of the administrative tribunal.¹⁴

In other words, courts could not get beyond the idea that legal interpretation had to be correct according to judicial standards of correctness in order for administrative bodies to remain within their jurisdiction.

Nevertheless, in 1979 the Supreme Court of Canada began to undo Dicey's legacy and announce a new vision of the rule of law that was not hostile to, but rather embraced, the modern administrative state. In a landmark case commonly referred to as *CUPE*, Justice Dickson, as he then was, held that courts should defer to what administrative boards or tribunals think is reasonable within their own context and special expertise, even if this included statutory interpretation.¹⁵

In support of this proposition, Justice Dickson pointed to the privative clause found within the governing statute, which clearly stated that any ruling by the board or tribunal in question was final and not to be questioned or reviewed in any court. More importantly, he noted that there were compelling reasons to protect the decisions of the labour board that fell within its jurisdiction: the board was a specialized body that administered a comprehensive statute and had developed an understanding of the relevant jurisprudence through its accumulated experience in the area.¹⁶ Furthermore, Justice Dickson added, the Public Service Labour Relations Board was given broad powers

to supervise and administer the novel system of collective bargaining created by the Public Service Labour Relations Act. The Act calls for a delicate balance between the need to maintain public services, and the need to maintain collective bargaining. Considerable sensitivity and unique expertise on the part of Board members is all the more required if the twin purposes of the legislation are to be met. ... The interpretation of [the impugned provision] would seem to lie logically at the heart of the specialized jurisdiction confided to the Board. In that case, not only would the Board not be required to be correct in its interpretation, but one would think that the Board was entitled to err and any such error would be protected from review by the privative clause.¹⁷

Given all of this, the only question the Court should ask is whether the Board's interpretation [was] so *patently unreasonable* that its construction cannot be rationally supported by the relevant legislation and demands intervention by the court upon review.¹⁸

The question of jurisdiction did not disappear. Rather, Justice Dickson cautioned:

The question of what is and is not jurisdictional is often very difficult to determine. The courts, in my view, should not be alert to brand as jurisdictional, and therefore subject to broader curial review, that which may be doubtfully so.¹⁹

What Justice Dickson recognized, then, was more than the need to take legislative commands, such as privative clauses, seriously. To do this is simply to recognize the supremacy of parliament, a principle that was never in question. But what had troubled the courts for so long was reconciling parliamentary supremacy with the rule of law. What *CUPE* changed was not this concern, but rather Dicey's vision of administrative bodies as intrinsically in tension with the rule of law. Central to Justice Dickson's revision was an understanding of the role of expertise in the modern administrative state, because it was an appreciation of specialized expertise that allowed Justice Dickson to acknowledge that judges were not always in the best position to interpret the law.

But this should not be understood as a retreat from Dicey's concern regarding equality before the law. Rather, administrative bodies today do not raise Dicey's particular concerns. The unique status of these bodies is not that they treat government servants differently from ordinary citizens, but that they implement government policy in unique contexts such as labour relations and financial markets to mention two examples. The legal recognition of unique policy contexts is consonant with the recognition of the equality of all and the rejection of special rules for government servants. Furthermore, courts have retained their supervisory role and may still, albeit cautiously, brand a decision as outside the jurisdiction of the administrative body.

To summarize the story of deference so far, I want to invoke a peculiarly Canadian political analogy. If the legal system were a state, then pre-*CUPE* it would have been a centralized state with the courts at its core. Post-*CUPE* that state became a federation where

courts share decision-making jurisdiction with administrative agencies. Within this federation, judicial deference has become the mechanism through which to adjudicate questions regarding the division of powers.

From CUPE to Southam

The question is therefore not whether a court should defer to an administrative body's incorrect interpretation of the law, but whether a court is in the best position to determine what is correct. And in answering this question, as the Court stated in *Southam*, A[ex]pertise ... is the most important of the factors that a court must consider.²⁰ Or, as Justice Wilson, as she then was, stated in *National Corn Growers*:

Canadian courts have struggled over time to move away from the picture that Dicey painted toward a more sophisticated understanding of the role of administrative tribunals in the modern Canadian state. Part of this process has involved a growing recognition on the part of courts that they may simply not be as well equipped as administrative tribunals or agencies to deal with issues which Parliament has chosen to regulate through bodies exercising delegated power, e.g., labour relations, telecommunications, financial markets and international economic relations. Careful management of these sectors often requires the use of experts who have accumulated years of experience and a specialized understanding of the activities they supervise.

Courts have also come to accept that they may not be as well qualified as a given agency to provide interpretations of that agency's constitutive statute that make sense given the broad policy context within which that agency must work.²¹

Since *CUPE*, therefore, courts have recognized that the special expertise of administrative boards and agencies gives them an important voice in articulating truth and justice within our legal system. In many contexts in the modern administrative state it is these expert decision

makers who are more likely to make the best decision. They are simply closer to the issues and immersed within the considerations needed to resolve these often complex questions.

In endeavouring to articulate the basis for different standards of review in the wake of *CUPE*, the Court has been developing a nuanced view of the kinds of expertise at stake in the administrative state. Justice Wilson's statement in *Corn Growers*, from which I just quoted, alludes to the specialized understanding of policy contexts. Another aspect of expertise is the fact that many agencies, boards and tribunals administer comprehensive and complex statutory schemes and accumulate considerable expertise through this exercise. As I stated in *Canadian Broadcasting Corporation*:

The CLRB must develop a coherent and workable structure for the application of the numerous provisions which govern the labour relations of the employers and employees whose operations fall within federal jurisdiction. In order for these workers and their employers to receive rapid resolution of their disputes in a manner which can be rationalized with their other rights and duties under the Canada Labour Code, the decisions of the Board cannot be routinely overturned by the courts whenever they disagree with the Board's treatment of an isolated issue.²²

But not all specialized tribunals will evidence the same type of expertise, and so courts must take into account a wide range of factors in determining the *particular* kind of expertise of any board, agency or tribunal. For example, in *Bradco* our Court held that labour relations boards require a higher degree of deference than labour arbitrators because such boards are responsible for overseeing the ongoing interpretation of legislation and development of labour relations policy and precedent within a given labour jurisdiction²³ as opposed to arbitrators who are appointed on an *ad hoc* basis to decide a particular dispute arising under a collective

agreement@.²³ Therefore, while labour arbitrators and labour boards both share specialized knowledge about labour disputes and labour policy, the fact the labour boards are standing bodies charged with administering a comprehensive regime accords them additional deference from courts.

The legal context for various interpretations of the law is also important in understanding why our Court has held that human rights tribunals must be correct in their interpretations of the law. Human rights tribunals are not protected by privative clauses, so there is no clear statutory command that court not intervene. Nonetheless, such tribunals are entrusted to decide human rights cases in the first instance. This is why, in *Mossop*, Justice LaForest described the expertise of human rights tribunals as relating to fact-finding and adjudication in a human rights context@.²⁴

The Court declined, however, to extend this expertise to general questions of law. Justice LaForest noted that human rights tribunals were *ad hoc* bodies established to settle a particular dispute@ but whose decisions influenced *A*society at large in relations to basic social values@. The kind of reasoning engaged in by such tribunals also is of a kind that courts regularly perform. Thus courts do not defer to the statutory interpretations of human rights tribunals because the interpretive expertise of tribunals is shared by the courts, and because human rights determinations involve values shared by the legal system as a whole. Ensuring consistency within this wide legal context goes to the heart of the jurisdiction of the courts and takes us away from the unique policy contexts that give administrative bodies their special jurisdiction, especially

when such bodies are constituted on an *ad hoc* basis. For similar reasons courts will not defer to administrative bodies on issues of *Charter* interpretation. Nonetheless, the Supreme Court has said that administrative bodies play a role in determining such issues, particularly with respect to building a record for the appellate courts.²⁵

If I may again invoke a federalism analogy, what we are saying is that both courts and administrative bodies have the jurisdiction to determine human rights and *Charter* rights. However, in the case of conflict, the court's interpretation is paramount.

This understanding of expertise just outlined, involving aspects of specialized knowledge and systematic decision-making within a specialized context, yields a different view of judicial deference from that of Dicey's model of the rule of law. For Dicey, judicial deference to the expert decision of an administrative tribunal could only mean a begrudging submission to a legislative command not to interfere with an incorrect decision. Given this, it is not surprising that courts went to great interpretive lengths to avoid deference. The alternative to this is what Professor Dyzenhaus of the University of Toronto calls the principle of deference as respect.²⁶ According to this view, a court must treat the reasoning [of the tribunal] with respect by asking whether that reasoning did in fact and also could in principle justify the conclusion reached.²⁷

This concept of deference is not foreign to judicial reasoning. Appellate courts have always deferred to the findings of fact made by a trial judge. Courts recognize that trial judges are in the best position to assess the facts, for factual findings in trials most often turn on the

credibility of witnesses and it is the trial judge who hears and see these witnesses. As was described by Justice Ritchie, as he then was, in the case *Stein v. AKathy K® (The Ship)*,

... the accepted approach of a court of appeal is to test the findings [of fact] made at trial on the basis of whether or not they were clearly wrong rather than whether they accorded with that court's view of the balance of probability.²⁸

In other words, an appellate court, when reviewing a trial judge's factual findings, does not ask itself whether those findings are wrong, but whether they are *clearly* wrong. The appellate court takes an approach of deference. In *Southam*, the Court noted that the 'clearly wrong' test is like that standard of reasonableness employed in reviewing some decisions of administrative bodies.²⁹

Different decisions call for different degrees of deference for many reasons, although expertise is of paramount importance. Other considerations include the statutory signals with respect to deference, which vary greatly between different constitutive statutes. Sometimes there is a privative clause, sometimes a full right of appeal, sometimes something in between. Sometimes a tribunal is composed completely of expert lay members, other times membership includes judges. The type of dispute is also important. Disputes can involve questions of fact, policy, law, or some more complex hybrid. Some decisions clearly engage specialized expertise, others do not. In *Pezim* the Court held that a consideration of these various factors yielded a spectrum of standards of review. I quote:

Having regard to the large number of factors relevant in determining the applicable standard of review, the courts have developed a spectrum that ranges from the standard of reasonableness to that of correctness. Courts have also enunciated a principle of deference that applies not just to the facts as found by the tribunal, but also to the legal questions before the tribunal in the light of its role and expertise. At the reasonableness

end of the spectrum, where deference is at its highest, are those cases where a tribunal protected by a true privative clause, is deciding a matter within its jurisdiction and where there is no statutory right of appeal....

At the correctness end of the spectrum, where deference in terms of legal questions is at its lowest, are those cases where the issues concern the interpretation of a provision limiting the tribunal's jurisdiction (jurisdictional error) or where there is a statutory right of appeal which allows the reviewing court to substitute its opinion for that of the tribunal and where the tribunal has no greater expertise than the court on the issue in question, as for example in the area of human rights....³⁰

However, just as there were growing pains as the judicial imagination stretched to accommodate specialized expertise and articulate a place for deference to administrative bodies, there are growing pains as we in fact learn to share our legal authority. The concern of critics is that, under the guise of deference, courts in fact continue to measure the decisions of administrative bodies against their own sense of what would be a correct interpretation. As Professor Dyzenhaus has stated:

We have ... the idea that administration is at least in principle and often in practice rational. Taking this to be true leads to paradox because to recognise rationality in practice is always at the same time to begin to measure a practice against standards of rationality. To date the only model of rationality with which the courts have generally been comfortable is one which approximates the way in which judges think decisions should be made. The recognition of the rationality of administration thus seems to carry with it the risk of the imposition of judicial standards of rationality. And that means that a return to Diceyan type judicial review is an ever present danger.³¹

This is a reminder to judges not to distort questions of jurisdiction or the standard of review in order to attack unjustifiably decisions of administrative bodies simply because these decisions

raise concerns to the reviewing courts.

The Supreme Court has certainly been criticized in how it actually uses the various standards of review.³² I am not suggesting that the shift from Dicey's vision to *CUPE's* vision is always easy in practice. However, I think that in both *Pezim* and *Southam* the Court has taken significant steps towards enunciating workable tests that do not embroil us within Professor Dyzenhaus' paradox. For example, the strongest deferential stance is found in the 'apparently unreasonable' test, which in *Southam* we stated meant that 'the defect is apparent on the face of the tribunal's reasons'.³³ I may disagree with many legal interpretations and consider them to be incorrect without being able to say that they are so evidently defective.

The standard of reasonableness, which was applied in both *Pezim* and *Southam*, is somewhat less deferential. To find a decision 'unreasonable' requires more searching to find the defect. In *Southam* we stated that

[a]n unreasonable decision is one that, in the main, is not supported by any reasons that can stand up to a somewhat probing examination. Accordingly, a court reviewing a conclusion on the reasonableness standard must look to see whether any reasons support it. The defect, if there is one, could presumably be in the evidentiary foundation itself or in the logical process by which conclusions are sought to be drawn from it. An example of the former kind of defect would be an assumption that had no basis in evidence, or that was contrary to the overwhelming weight of the evidence. An example of the latter kind of defect would be a contradiction in the premises or an invalid inference.³⁴

Even on a standard of reasonableness, there is considerable room for disagreement. For example, so long as an expert tribunal considers all the relevant factors pertaining to an issue, its decision will be reasonable despite the fact that other decision makers might have weighed these factors

differently and come to a different result.

At bottom, the question of deference is a question of what weight to accord to expert opinions. In *Southam*, I agreed with the following remarks of Kerans:

Experts, in our society, are called that precisely because they can arrive at well-informed and rational conclusions. If that is so, they should be able to explain, to a fair-minded but less well-informed observer, the reasons for their conclusions. If they cannot, they are not very expert. If something is worth knowing and relying upon, it is worth telling. Expertise commands deference only when the expert is coherent. Expertise loses a right to deference when it is not defensible. That said, it seems obvious that [appellate courts] manifestly must give great weight to cogent views thus articulated.³⁵

It is expertise that allows us to arrive at the Atruth@ in many contexts and therefore a court that does not recognize expertise, and defer to it, cannot be said to uphold truth and justice.

Conclusion

In conclusion, I wish to add that hopefully the era of antagonism between the courts and the administrative state is now at a close as courts understand that they are no longer the sole caretakers of truth and justice. In outlining the contours of our new partnership, may we provide to other countries, as Canada already does in other spheres, a model of decision making that allows power and authority to be shared and differences accommodated, if not openly embraced. If we do that then the real beneficiaries will be our citizenry and the society we all serve and for which the rule of law exists.

Endnotes

* I should like to record my thanks to my law clerk, Lisa Austin, for her excellent assistance in the preparation of these remarks.

1. The Honourable R. Roy McMurtry, Chief Justice of Ontario, Address (Conference of Ontario Boards and Agencies, 20 November 1997) [unpublished] at p.10.

2. *Ibid.* at p.11.

3. *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748.

4. *Ibid.* at 787.

5. See C.J. Michael Flavell and Christopher J. Kent, *The Canadian Competition Law Handbook* (Toronto: Carswell, 1997) at 202-3 and 211.

6. Rt. Hon. Lord Hewart of Bury, *The New Despotism* (reprint 1929 ed. London: Ernest Benn, 1945) at 37.

7. A.V. Dicey, *The Law of the Constitution, 10th edition* (London: MacMillan & Co., 1959) at 202-3.

8. *Ibid.*

9. *Ibid.* at 336-7.

10. *Ibid.* at 337-8.

11. *Ibid.* at Chapter 13.

12. See, for example, *Cooper* (1863, Eng. CP) where Byles J. states that if the statute is silent, then the justice of the common law will supply the omission of the legislature.

13. For example, a 1970 decision of the Supreme Court of Canada, *Metropolitan Life*, has been described as the high water mark of activist review in Canada as the Court quashed a labour

board decision to grant certification despite the presence of a privative clause in the governing legislation. See *Metropolitan Life Insurance Co. v. International Union of Operating Engineers, Local 796*, [1970] S.C.R. 425; Discussed in Evans et al, *Administrative Law*, 3rd edition (Toronto: Emond Montgomery, 1989) at 565.

14. *Canada (Attorney General) v. P.S.A.C.* [1993] 1 S.C.R. 941 at 953.

15. *Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corp.*, [1979] 2 S.C.R. 227.

16. *Ibid.* at 235-6.

17. *Ibid.* at 236.

18. *Ibid.* at 237, emphasis added.

19. *Ibid.* at 233.

20. *Southam*, *supra.* note 3 at 773.

21. *National Corn Growers Assn. v. Canada (Import Tribunal)*, [1990] 2 S.C.R. 1324 at 1336.

22. *Canadian Broadcasting Corporation v. Canada (Labour Relations Board)* [1995] 1 S.C.R. 157 at 179-80.

23. *United Brotherhood of Carpenters and Joiners of America (CJA), Local 579 v. Bradco Construction Ltd.*, [1993] 2 S.C.R. 316 at 336-7.

24. *Canada (Attorney General) v. Mossop*, [1993] 1 S.C.R. 554 at 585. See also *Gould v. Yukon Order of Pioneers*, [1996] 1 S.C.R. 571.

25. See *Douglas/Kwantlen Faculty Assn. v. Douglas College*, [1990] 3 S.C.R. 570; *Cuddy Chicks Ltd. v. Ontario (Labour Relations Board)*, [1991] 2 S.C.R. 5; *Tétreault-Gadoury v. Canada (Employment and Immigration Commission)*, [1991] 2 S.C.R. 22.

26. David Dyzenhaus, "The Politics of Deference: Judicial Review and Democracy" In Michael Taggart (ed.) *The Province of Administrative Law* (Oxford: Hart Publishing, 1997) at 286.

27. *Ibid.* at 304.

28. *Stein v. Kathy K (The Ship)*, [1976] 2 S.C.R. 802 at 806. Cited in *Southam*, *supra.* note 3 at 778.

29. *Southam*, *supra.* note 3 at 778.

30. *Pezim v. British Columbia (Superintendent of Brokers)*, [1994] 2 S.C.R. 557 at 590.

31. Dyzenhaus, *supra*. note 26 at 289.

32. See, for example, Dyzenhaus, *supra*. note 26; Allison Harvison Young, A Human Rights Tribunals and the Supreme Court of Canada: Reformulating Deference@ 13 Admin. L.R. (2d) 206; J.M. Evans, A Jurisdictional Review in the Supreme Court: Realism, Romance and Recidivism@ 48 Admin. L.R. 255.

33. *Southam*, *supra*. note 3 at 777, emphasis added.

34. *Southam*, *supra*. note 3 at 776.

35. R. P. Kerans, *Standards of Review Employed by Appellate Courts* (1994) at 17. Cited in *Southam*, *supra*. note 3 at 780.