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Laverne Jacobs*

I. INTRODUCTION

In the 2005-2006 and 2006-2007 terms, the Supreme Court of Canada was called upon to decide many complex issues that not only developed the jurisprudence in administrative law but furthered simultaneously principles of methodology and substance in other areas of law, particularly human rights.¹

Fleshing out the appropriate relationship between judicial review on administrative and constitutional law grounds was a dominant preoccupation of the Court in the 2005-2006 term. The relationship between constitutional and administrative law principles was revisited in the 2006 decision of Multani v. Commission scolaire Marguerite-Bourgeoys,² shedding new light on continuing debates. Multani dealt with the appropriate methodology to be used when a decision made by an administrative body may violate Charter rights.³

After a very intense term examining questions of exclusive and concurrent jurisdiction in 2004-2005, the Supreme Court of Canada continued its discussions in two decisions dealing with jurisdiction in the 2005-2006 term: Tranchemontagne v. Ontario (Director, Disability


³ In 2007, Charkaoui v. Canada (Citizenship and Immigration), [2007] S.C.J. No. 9, 2007 SCC 9 [hereinafter “Charkaoui”], provided perspective on the relationship between constitutional and administrative law from another angle. Through an analysis of whether s. 7 Charter relief could be gained for ex parte review of certificates of admissibility on grounds of national security (and an ultimate holding that such relief was warranted), the Supreme Court provided precision on the concept of “fundamental justice” in an administrative (immigration) context. Charkaoui is not discussed in the present article. It is examined in the article on constitutional law developments by C. Mathen and M. Plaxton in this volume.
Support Program); and Bisaillon v. Concordia University. In Tranchemontagne, the Court formulated some guiding principles on the method for deciding between concurrent administrative decision-making fora. The issue in Tranchemontagne was who, between a human rights tribunal and a social benefits tribunal, should have jurisdiction to decide whether a legislative provision complies with the provincial human rights code. Concordia University pushed further the question of exclusive jurisdiction that had plagued the Court in the 2004-2005 term, this time with respect to whether the Québec Superior Court should exercise its exclusive jurisdiction to hear a potential labour class action suit.

Standard of review was the third major issue addressed by the Court. In the 2006-2007 term, two important cases were decided: Lévis (City) v. Fraternité des policiers de Lévis Inc.; and Council of Canadians with Disabilities v. Via Rail Canada Inc. Each addressed the issue of when multiple standards of review versus one standard should apply to an administrative decision.

Overall, the 2005-2006 and 2006-2007 terms were periods in which the Court opened debates that had deeply entrenched and often tangled roots in its administrative law jurisprudence. This article examines these three major issues addressed by the Court in the 2005-2006 and 2006-2007 terms — namely: (1) the relationship between administrative law review and review under the Charter; (2) exclusive and concurrent jurisdiction; and (3) standard of review. Through this article, the new points of guidance

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provided by the Court will be reviewed and the ways in which these current cases further the principles of past administrative law jurisprudence will be discussed.

II. THE RELATIONSHIP BETWEEN ADMINISTRATIVE LAW REVIEW AND REVIEW UNDER THE CHARTER

1. Introduction: Revisiting the Foundational Cases of Slaight Communications and Ross

Multani is a decision that deals with the appropriate methodology for judicial review of an administrative body’s decision when that decision allegedly violates constitutional or quasi-constitutional rights. The central debate in Multani concerns the relationship between administrative and constitutional law approaches to judicial review when an exercise of administrative discretion affects Charter rights and freedoms. This debate first surfaced in 1989 with the Supreme Court of Canada decision in Slaight Communications Inc. v. Davidson. Although the concerns underlying it have deep consequences on more than one level — i.e., for administrative and constitutional law theory and, more importantly, for the individuals whose constitutional rights and freedoms may be affected, this debate has remained unresolved in Supreme Court jurisprudence. In order to situate the issues in Multani within their theoretical framework, it is useful to briefly set out four decisions that provide the context for these concerns over judicial review methodology. These cases are: Slaight Communications; Ross v. New Brunswick School District No. 15; Trinity Western University v. British Columbia College of Teachers; and Chamberlain v. Surrey School District No. 36.


In Slaight Communications, a labour arbitrator determined that an employee of a radio station had been wrongfully dismissed.\(^{13}\) As part of a discretionary remedy, the arbitrator ordered the employer to write a reference letter and he specified the content. He also ordered the employer to respond to inquiries about the employee uniquely with this letter. Among the pieces of information that the arbitrator had directed to the employer to include in the letter were the employee’s sales performance results, the degree to which he had met or surpassed his quotas and the fact that an adjudicator had found his determination to be an unjust dismissal. The employer sought judicial review, arguing that the letter infringed its freedom of expression guaranteed under the Canadian Charter.

At the Supreme Court, given the relative newness of the Charter at the time, a question arose as to the relationship between administrative law review and review under the Charter. The majority of the Court agreed with the approach taken by Lamer J. in his minority concurring decision. Justice Lamer first examined the arbitrator’s two orders to see whether they fell outside of the jurisdiction granted to him by the enabling statute. He found one order to be outside of the arbitrator’s jurisdiction and therefore, patently unreasonable (using the terminology and understandings of that time); the other was within the arbitrator’s jurisdiction and therefore not unreasonable. Having completed the administrative law component of his review, Lamer J. continued by subjecting the order that he found to be reasonable on administrative law grounds (i.e., that had been decided within the arbitrator’s statutory jurisdiction) to an analysis under the Charter. The order that he found to be unreasonable was simply set aside.

Slaight Communications offers two elements to the debate over how to review alleged Charter violations that occur with an administrative context. It provided the methodology that was used by Lamer C.J. — i.e., to begin with an administrative law review, applying a Charter justification analysis to any parts of the administrative decision that still remained valid. In addition, Dickson C.J. offered his general prediction that the “precise relationship between the traditional standard administrative law review of patent unreasonableness and new constitutional standard of review will be worked out in future cases”.\(^{14}\)

\(^{13}\) Slaight Communications is discussed in J.M. Evans, “Developments in Administrative Law: The 1988-89 Term” (1990) 1 S.C.L.R. (2d) 1, at 24-34.

\(^{14}\) See Slaight Communications, supra, note 9, at para. 11.
Decided in 1996, Ross essentially adopted the approach used in Slaight Communications. However, it added some precision to the way that the administrative law and constitutional law standards were to be applied. In Ross, the Court held that the two standards were not to be collapsed into one. If Charter values were invoked by the decision under review, the section 1 analysis was the more appropriate analysis to use. Administrative law review was only necessary if no Charter values were at play. Moreover, the Court in Ross asserted that if an administrative decision could withstand the section 1 analysis then it was unlikely that it would also be found to be patently unreasonable on administrative law grounds. Conversely, an administrative law decision found to be unconstitutional under section 1 analysis would not need to be subjected to administrative law review — there is no question that an unconstitutional decision exceeds the jurisdiction of any administrative decision-maker. Interestingly, despite the fact that the standard of review jurisprudence had progressed, by the time Ross was decided, still only the standard of patent unreasonableness was incorporated into the test.

Finally, Chamberlain and Trinity Western are two recent cases in which an administrative decision engaged Charter values, although not necessarily the Charter itself. In both cases, the Supreme Court reviewed the decision using solely an administrative law approach. In Multani, the question of the appropriate way to engage administrative and constitutional review was once again addressed — this time against the backdrop of the evolution of the administrative law standard of review jurisprudence.

2. Multani v. Commission scolaire Marguerite-Bourgeoys

In Multani, a Sikh student alleged that his freedom of religion, guaranteed by sections 2(a) of the Canadian Charter of Rights and Freedoms and section 3 of Québec’s Charter of human rights and freedoms, had been infringed by the decision of a school board commission. The school board commission rendered its decision further to the discretion granted to it under the Education Act. A central question

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17 R.S.Q. c. C-12 [hereinafter “Québec Charter”].
18 R.S.Q. c. I-13.3, ss. 12, 76.
Gurbaj Singh Multani was an orthodox Sikh who wore a kirpan, a small religious object made of metal that is shaped like a dagger and is worn under clothing. In November 2001, Gurbaj Singh accidentally dropped his kirpan in the schoolyard. The school board sent his parents a letter which authorized their son to wear his kirpan to school provided that he comply with certain conditions to ensure that it was sealed inside his clothing. The school board considered this to be a reasonable accommodation. Gurbaj Singh and his parents agreed to the conditions.

The school’s governing board, however, refused to ratify the agreement. They found that wearing a kirpan violated the school’s code of conduct as it prohibited weapons and dangerous objects from the school. Upon appeal by the Multanis to the school board’s council of commissioners (the “council”), the council upheld the decision of the governing board. The council was prepared to permit the wearing of a symbolic kirpan in the form of a pendant or in another form, provided that it was made of a material that rendered it harmless.

Gurbaj Singh’s father sought a declaratory judgment and interlocutory injunction in the Québec Superior Court. His motion asked the court to declare the council’s decision of no force or effect and to declare that Gurbaj Singh had a right to wear his kirpan if sealed and sewn up in his clothes. He argued that wearing the kirpan in such a way represented a reasonable accommodation of his son’s religious freedom and equality rights. An interlocutory injunction was granted which authorized Gurbaj Singh to wear his kirpan provided that he comply with the conditions initially set by the school board until a final decision was rendered in the case. Ultimately, the Superior Court declared the council’s decision null and of no force or effect and authorized Gurbaj Singh’s right to wear his kirpan under certain conditions. The Québec Court of Appeal reversed this decision.

The majority concurring judges framed the standard of review question as a preliminary issue. See Multani, supra note 2, at paras. 15ff.

See Québec (Procureur-général) v. Singh (Multani), [2004] Q.J. No. 1904 (C.A.). The Québec Court of Appeal reasoned that the kirpan was, in essence, a dagger and as such, was an inherently dangerous object. The Court held (at paras. 87 and 89) that while banning any object capable of causing harm would be unreasonable, it was within reasonable limits to prohibit the possession of an intrinsically dangerous object like the kirpan:

This regulation from the Code of Conduct cannot go so far as to prohibit the possession of any object which can cause injury; indeed, even a pencil can be used to inflict injury.
then appealed to the Supreme Court of Canada. The Supreme Court held that the decision of the school board had infringed Gurbaj Singh's freedom of religion. Regardless of whether they opted to use the Oakes test or to review on administrative law grounds, no member of the Court was convinced that the absolute prohibition of the kirpan was necessary. The Court was not persuaded by the respondent’s arguments that the kirpan is a symbol of violence, that allowing kirpans in school would promote their use for violence and undermine the goal of safety in schools, or that allowing Sikh students to wear kirpans would lead to perceptions of a double standard. The Court of Appeal decision was therefore set aside and the council’s decision was declared to be null.

The Court’s decision presents three concurring sets of reasons with strong points of divergence. The primary point of disagreement dealt with the correct way to view the matter: as a constitutional question with administrative law aspects or as an administrative action that may have violated a constitutional right. Overall, the discussion between the majority and minority judges revisits and develops the jurisprudential debate started earlier with Slaight Communications over the control of administrative discretion when that exercise of discretion affects Charter rights and freedoms. This important aspect of administrative law had not been addressed since Slaight Communications and Ross. The plurality of views presented by the Court shows that this issue is one fraught with difficulty, especially in light of the evolution of the administrative law jurisprudence that had occurred in the interim.

(a) Majority Concurring Reasons: Chief Justice McLachlin and Bastarache, Binnie, Fish and Charron JJ.

The majority began by discussing whether a standard of review analysis should apply to the review of a constitutional question that arises within an administrative decision-making context. The issue of standard of review had been raised for the first time at the Court of Appeal which had held that the appropriate standard was reasonableness simpliciter. Nevertheless, a reasonable line must be drawn, and an inherently dangerous object falls beyond that line.

The Court of Appeal’s standard of review analysis sought to find an appropriate medium between the two ways of viewing the case before it. Multani presented a strong human rights element as well as concern regarding the regulation of the school environment, including safety within the school. Considering the Supreme Court of Canada’s jurisprudence holding that less deference should be owed to administrative bodies determining human rights questions because of the comparable, if not greater, expertise in human rights possessed by the courts, and keeping an ear tuned to decisions such as R. v. M. (M.R.), which emphasized the experience and knowledge of school authorities not shared by the courts, the Quebec Court of Appeal found that reasonableness simpliciter struck a correct balance between judicial intervention and restraint. Reasonableness simpliciter was also the standard adopted by the majority of the Supreme Court of Canada in Chamberlain — a school board case that similarly involved a human rights dimension.

At the Supreme Court, the majority concurring opinion held that the administrative law standard of review was not applicable at all. The majority asserted that a section 1 analysis is the only test for determining if an infringement of protected rights is constitutional. Justice Charron’s reasons for preferring a constitutional justification analysis were anchored on three main points. First, she reasoned that using administrative law standards could, at the very least, cause confusion between constitutional and administrative law principles. At worst, they could reduce fundamental rights and freedoms to mere administrative law principles. Referring to Dickson C.J. in Slaight Communications, Charron J. asserted that constitutional justification offered a more sophisticated and structured analysis that was preferable to the inadequacy of the standard of review analysis.

Justice Charron’s second main reason centred on the insignificance of “validity” to the current decision. From a reading of her reasons, it is clear that “validity” is a term that refers solely to whether the council had made its decision within the jurisdiction given to it by statute. Justice Charron pointed out that the validity of the rule against weapons that the school board had adopted had not been challenged at all. The complaint


22 Although in Chamberlain, supra, note 12, while Charter values were at play, the Court was not asked to determine if the school board had complied with the Charter itself.

23 This is discussed below.
was based entirely on the potential violation of a constitutional freedom. An administrative law analysis was therefore inappropriate.

Finally, without much discussion of this point, Charron J. asserted that the standard of review was irrelevant because it had been established in *Nova Scotia (Workers’ Compensation Board) v. Martin*\(^2\) that the correctness standard would always apply in the judicial review of an administrative decision that was “based on the application and interpretation of the *Canadian Charter*”.\(^3\) The implication here seems to be that, ultimately, under the correctness test, the Court’s decision based on a section 1 analysis could replace that of the school board council. Spending time determining the appropriate standard of review was therefore unnecessary.

**(b) Minority Concurring Reasons: Justices Deschamps and Abella**

In contrast to the majority, Deschamps and Abella JJ. were of the opinion that the analysis of the issues in *Multani* should be completed within the framework of an administrative law review. Determining the standard of review was therefore an essential first step. Justices Deschamps and Abella provided two major reasons in support of this opinion. Their first argument was based on a distinction between a “norm” and a “decision”. The characteristic of a norm is that it is a principle or rule of general application such as those created by a legislature through statutes or delegated legislation; by contrast, a decision is generally understood to be the result of the application of a norm to a particular set of facts.\(^4\) They asserted that constitutional justification had been designed to analyze the validity or enforceability of norms only. When it comes to assessing the validity of an administrative decision, the constitutional justification analysis cannot be easily transferred to administrative decisions.

In elaborating their reasons, Deschamps and Abella JJ. developed these ideas. They questioned the “unified analysis” that Lamer J. had introduced in his minority decision in *Slaight Communications*. The unified approach proposes that an order or decision can be analyzed in the same way as a law and should be subject to constitutional analysis if Charter values are at play. Justices Deschamps and Abella noted that the case


\(^3\) See *Multani*, supra, note 2, at para. 20.

\(^4\) Justices Deschamps and Abella outlined most clearly the distinction between a norm and a decision or order in *Multani, id.*, at para. 112.
law is not settled on this issue. For example, the majority in *Slaight Communications* itself may not have agreed with the unified approach, holding only that the appropriate relationship between administrative law review and constitutional review would have to be “worked out in future cases”. Moreover, in Deschamps and Abella JJ.’s view, this comment has been interpreted in an ambivalent fashion since that time. In *Ross*, for example, the majority’s comment in *Slaight Communications* was interpreted to favour a constitutional analysis whenever constitutional values are at issue, whereas in the more recent cases of *Trinity Western* and *Chamberlain*, the Supreme Court of Canada went the other way and used administrative law principles despite the fact that Charter values were involved.

Beyond the unsettled nature of the jurisprudence, they also had several practical reasons for being wary of including administrative decisions in the concept of “law”. Given that section 1 uses “reasonable limits as prescribed by law” as the boundary to circumscribe guaranteed rights and freedoms, incorporating decisions which are individualized in nature and based on the outcome of norms applied to specific fact situations would prevent litigants and administrative bodies from knowing in advance the status of fundamental rights. Justices Deschamps and Abella pointed out, however, that if a norm such as the code of conduct or one of its provisions had been challenged, then a section 1 constitutional analysis would have been appropriate.

Moreover, including decisions within the section 1 concept of “law” would have implications for the role of the administrative decision-maker. On the one hand, an administrative body in the process of producing its decision would be subject to a “bifurcated obligation”. It would have to turn its mind to being able to justify some parts of its decision on administrative law principles and other parts on constitutional law grounds. On the other hand, using the section 1 analysis could introduce problems relating to the burden of proof. There would be problems in the administration of justice relating to the nature of evidence that would have to be adduced by administrative decision-makers in order to justify their decisions. Although their reasons are not entirely clear, Deschamps and Abella JJ. seem to be suggesting that administrative decision-makers

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27 See *Slaight Communications*, supra, note 9, at para. 11.
29 The idea of a bifurcated obligation is discussed by Deschamps and Abella JJ. in *Multani*, *id.*, at para. 111.
and, in particular, those with quasi-judicial functions may need to rely on the government to present their positions. However, reliance on the government would have to be tempered by an appreciation of the tribunal’s role as independent of government, and the government may not, in any event, have all the information necessary to justify the decision made. Finally, it would blur the role of the administrative decision-maker by forcing it to justify its decision in relation to section 1 of the Charter before the reviewing court. If this were done, the tribunal would conceptually gain an interest in the dispute before it and take on the role of a party to it. The roles of decision-maker or arbiter and party would thus become imprecise.

Their second major argument was that an administrative decision that violates the Canadian Charter would not be able to withstand judicial review on administrative law grounds. Justices Deschamps and Abella argued that the standard of review approach was demanding enough to render invalid any decision of an administrative body that fails to consider constitutional values. Since cases like *Baker* had held that an administrative law analysis incorporates Charter principles, it was unnecessary to resort to a constitutional justification. Overall, keeping with an administrative law analysis would avoid blurring the distinction between principles of constitutional justification and principles of administrative law and would keep pure the analytical tools developed for each of these fields.

Unlike the majority, Deschamps and Abella JJ. framed the issue in *Multani* as being whether the school board’s decision was valid in light of the offer of accommodation made by the father and the student. They determined that reasonableness was the appropriate standard of review. Applying this standard, they held that the school board did not sufficiently consider Gurbaj Singh’s freedom of religion or the accommodation measures that he and his father had proposed. Instead, the school board had simply applied the code of conduct literally. In so doing, the school board made an unreasonable decision.

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30 See *Multani*, *id.*, at para. 111.
31 This is discussed in *Multani*, *id.*, at para. 123.
32 See *id.*, at paras. 126-28, and paras. 85-86.
33 The issue is framed this way by Deschamps and Abella JJ. in *Multani*, *id.*, at para. 92.
(c) Minority Concurring Reasons: Justice LeBel

Lastly, LeBel J. in a brief, concurring decision of his own, argued for a much more nuanced approach to the entire debate over whether to use administrative or constitutional law principles of review. He agreed that it was better to start by attempting to solve a problem such as the one in Multani through the use of administrative law principles. He stated that it is not always necessary to resort to a Charter analysis (or analysis under the Québec Charter) if a decision can be reached using general administrative law principles or the specific rules governing the exercise of a delegated power. At the same time, however, he noted that a constitutional analysis is sometimes unavoidable due to the context of the dispute.

To a certain extent, LeBel J. agreed with the analysis of Deschamps and Abella JJ. He thought it unquestionable that under the approach proposed by Deschamps and Abella JJ., the decision of the council would be quashed. However, he added that if the decision were quashed because of the violation of constitutional standard then it would become necessary to do a constitutional analysis to determine if the violation of the constitutional right or freedom was justifiable. At that stage, it is necessary to consider the constitutional rights in issue and how they have been applied.

Ultimately, LeBel J.’s discussion suggests that while he is in favour of constitutional analysis in appropriate circumstances, he does not believe that the current section 1 justification analysis provides all that needs to be assessed. In particular, the current section 1 analysis does not deal with the content of rights or with competing rights and how they should be reconciled.

Justice LeBel also expressed concern with the norm-decision dichotomy proposed by Deschamps and Abella JJ. He found that it would present many problems in application. He also indicated that he shared the same concerns as the majority — namely, that regardless of whether the infringement of rights and freedoms stems from a normative rule or from the application of that normative rule, the effect on the complainant is the same.34 From the perspective of the complainant, all that matters is that the violation, if there is one, be rectified.

Overall, LeBel J.’s proposed framework maintains that it is valid to start with administrative law principles in order to determine whether an

34 See Multani, id., at paras. 20 and 151.
administrative act is consistent with the powers delegated by legislation to the administrative body. If the act is authorized, the body’s actual exercise of discretion should then be assessed in light of constitutional guarantees and their values. However, unlike the rest of his colleagues, when it came to the analysis of the potential infringement of constitutional rights, LeBel J. turned first to the question of how to reconcile competing constitutional rights if a conflict exists. For this he had two possible approaches. The first would involve defining the rights and considering how they should relate to each other. The second would involve using a section 1 analysis to see if the infringement could be justified. As for the application of the *Oakes* test, LeBel J.’s analysis became even more nuanced. He opined that certain steps of the *Oakes* test may not be necessary in certain situations. For example, if the statutory authority under which an administrative body makes its decision has not been challenged, a review of the objectives of the statute would not be necessary. In such a situation, the elements of the *Oakes* test that will be used are those relating to proportionality, including any issues of accommodation.

Because of the facts in *Multani*, LeBel J.’s first approach — namely, that of defining rights and their relationship was not relevant — in *Multani* there were no competing rights. Instead, his second approach — a section 1 analysis — was used. Justice LeBel found that the school board did not meet its burden of proof. It had not convinced the Court that prohibiting Gurbaj Singh’s kirpan altogether was a reasonable limit on the constitutional guarantee of freedom of religion. As a result, he agreed with the conclusion and remedy proposed by his colleagues.

(i) Commentary

Unquestionably, the main point preventing the majority and LeBel J. from agreeing with Deschamps and Abella JJ. is that the former set of judges were not convinced that an administrative law approach would provide an appropriate or effective evaluation of constitutional values. For Charron J. and the majority, the necessity of using a constitutional justification analysis arises whenever the constitutional question can be seen to be the “dominant” question at issue in the matter under review. As for LeBel J., although he agreed with the minority that starting an analysis with an administrative law approach was valid, he also believed that it was necessary to go further. Once a decision had been found to be invalid on administrative law grounds, it was necessary to conduct a constitutional analysis in order to decide if constitutional rights or freedoms
had been unjustifiably infringed. For LeBel J., however, the current constitutional justification under section 1 of the Charter did not offer a satisfactory tool of analysis.

From the standpoint of administrative law theory, one wonders if it is possible to link the current standard of review analysis with a section 1 justification. While this will not fully address LeBel J.'s concerns, it might address the concerns of Charron J. and the majority. Such a link could broadly be drawn through the concept of “reasonable limit” in section 1. A decision that is a reasonable limit imposed by law should not only be made within the boundaries of the deference that it is appropriate to show to the decision-maker but should also be valid on Charter grounds. A very good argument can be made that a decision that violates the Charter and is therefore unconstitutional should attract no deference whatsoever. Nevertheless, there is some merit to the idea of employing the checks and balances of administrative review when the impugned decision has been made through a process that the legislature has designated. Determining the appropriate standard of review will also help to establish the remedial route that should be taken. Administrative law’s remedies are not always to substitute the decision of the court but may be to return the matter for reconsideration by the administrative body. What I propose is that the section 1 constitutional justification be integrated more explicitly within the administrative framework of analysis.

Similar to the approach taken by Deschamps and Abella JJ. in Multani, the proposed linkage would take place at the stage of applying (as opposed to determining) the standard of review. Each of the three standards could serve as a way to open the door to deciding when a constitutional justification analysis is needed. For example, if the standard of review is determined to be patent unreasonableness, then courts could determine that a potential Charter violation is a patent enough error to attract review. The review of this potential Charter violation would then be done using a section 1 analysis, with the result that an unjustifiable violation could cause the decision to be returned. As for the standard of reasonableness, if the reasons given in an administrative decision cannot support the conclusion reached (Southam) because there appears to be an infringement of a Charter guarantee, then a section 1 analysis can assist in determining whether the standard of reasonableness has been met. Clearly, an unjustifiable Charter infringement will render any decision unreasonable. Finally, correctness is perhaps the easiest standard to apply. If, based on a constitutional justification analysis, the decision shows an unjustifiable
Charter infringement, the decision can be quashed with the court substituting its reasons for those given by the administrative decision-maker.

Linking Charter justification and administrative law review in this way not only offers the opportunity for more thorough constitutional review within an administrative context, it also respects the expertise and responsibilities that have been entrusted to administrative actors by the legislature. As well, the majority’s reasoning seems to have been motivated by the concern that administrative law principles will not yield as just a result as constitutional principles. Infusing the administrative framework with the constitutional justification analysis in cases of review of administrative discretion may address this.

However, beyond the narrow perspective of administrative law theory lays a much more disconcerting concern: should the constitutional and administrative law approaches yield similar, if not the same, results? If the risk that the two approaches will provide such different results is so significant that it has caused such divides in the Court, then this signals a fundamental disconnect between the paths of law and justice. Certainly, for the average litigants such as Mr. Multani and his son, there is a reasonable expectation that a just result will ensue regardless of whether their case is presented as one of constitutional or administrative law. Moreover, given the greater amount of Charter responsibility given to tribunals as confirmed in Martin, one can envision many more constitutional matters coming through administrative channels. It is still debatable whether Martin stands for the proposition that constitutional questions decided by tribunals will always be decided on a correctness standard. It is also debatable whether the courts will continue to maintain three standards of review (discussed below). Nevertheless, regardless of these uncertainties, it would be encouraging, from the perspective of access to justice, to see more uniformity in the Court’s results.

On a similar note, one cannot help but notice the comments of the majority on using reasonable accommodation principles developed under statutory human rights regimes to aid in the section 1 analysis. There is a rich literature on the use of Charter principles in the development of jurisprudence under statutory human rights regimes — much of it weaves a cautionary tale. It will be interesting to see how the inverse approach to human rights law cross-fertilization, started in Multani, will develop.

35 See, for example, Leslie Reaume, “Postcards from O’Malley: Reinvigorating Statutory Human Rights Jurisprudence in the Age of the Charter” and Andrea Wright, “Formulaic Comparisons: Stopping the Charter at the Statutory Human Rights Gate”, in Fay Faraday, Margaret Denike and
Finally, one very surprising aspect of the decision in Multani stems from the majority and LeBel J.’s presentation of the concept of “validity” in the administrative law sense. In their view, validity dealt only with whether or not the administrative decision-maker had made its decision within the boundaries of the jurisdiction set out in its constituent legislation. Often referred to as the patently unreasonable test, this approach of reviewing for excess of jurisdiction for various reasons including bad faith, deciding for improper purposes, etc. was traditionally used for the review of discretionary decisions.

However, this understanding of the validity of decisions in administrative law has evolved considerably as part of the development of the standard of review jurisprudence in the past several years. Most notably, in Baker v. Canada (Minister of Citizenship and Immigration) the majority of the Court made a concerted effort to have the standard of review for both discretionary and non-discretionary decisions decided by way of the pragmatic and functional approach. It is surprising that despite these parallel developments of the Supreme Court, the patently unreasonable test was the only test for validity considered by the majority of the Court in Multani.

The relationship between the administrative law standard of review and constitutional standard of review under the Charter is an issue that has certainly not been settled by Multani; if anything Multani has introduced many more aspects of the debate that need to be confronted and examined critically. I have addressed a few in these comments but there are certainly others, such as the norm-decision dichotomy, that the Court will likely revisit in the future.

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36 See, for example, Charron J.’s perspective which is outlined quite clearly in Multani at para. 19 where she states:

There is no suggestion that the council of commissioners did not have jurisdiction, from an administrative law standpoint, to approve the Code de vie. Nor, it should be noted, is the administrative and constitutional validity of the rule against carrying weapons and dangerous objects in issue. It would appear that the Code de vie was never even introduced into evidence by the parties. Rather, the appellant argues that it was in applying the rule, that is, in categorically denying Gurbaj Singh the right to wear his kirpan, that the governing board, and subsequently the council of commissioners when it upheld the original decision, infringed Gurbaj Singh’s freedom of religion under the Canadian Charter.


III. EXCLUSIVE AND CONCURRENT JURISDICTION

During the 2004-2005 Supreme Court term, the Court’s decisions showed a preoccupation with questions relating to exclusive and concurrent jurisdiction. The Court’s primary concern at that time was to establish appropriate methodologies for determining the correct decision-maker to decide a matter when more than one decision-making body seemed capable of receiving it. In my analysis of the 2004-2005 cases, I suggested there were still many unanswered questions and much room for development of the jurisprudence regarding exclusive and concurrent jurisdiction. It seemed almost inevitable that questions of exclusive and concurrent jurisdiction would continue to plague the Court. In the 2005-2006 term, the Court had occasion to revisit and develop further the principles it had established earlier. Two cases dealing with jurisdiction were decided that term. *Tranchemontagne* dealt with the concept of concurrent jurisdiction — that is, with the question of how to decide which administrative decision-making body should take subject matter jurisdiction when more than one decision-maker can theoretically receive the matter and none exhibits express legislative indications of exclusivity. The second, *Concordia University*, revisited the debates surrounding exclusive jurisdiction and the use of the *Weber* test. *Concordia University* is significant because it shows two decision-making fora, each with elements of exclusivity, pitted against each other: labour arbitration and class-action proceedings of the Superior Court.

1. *Tranchemontagne v. Ontario (Director, Disability Support Program)*

   At issue in *Tranchemontagne* was whether the Social Benefits Tribunal (“SBT”) of Ontario had jurisdiction to determine that a provision of one of its enabling statutes was inconsistent with the Ontario *Human Rights Code* and therefore inapplicable. In addition to questions of concurrent jurisdiction, *Tranchemontagne* also raised the question of the extent to which the principles in the Supreme Court’s 2003 decision of *Martin*, which allowed tribunals to decide that provisions of their enabling statutes were unconstitutional under the Charter and decline to apply them, could be extended to the realm of quasi-constitutional enactments.

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Robert Tranchemontagne and Norman Werbeski applied for income support under the *Ontario Disability Support Program Act, 1997* (“ODSPA”) in 1998 and 1999 respectively. The *ODSPA* provides income support payments to individuals with disabilities. However, section 5(2) of the *ODSPA* precludes eligibility for support if the applicant is addicted to alcohol. At first instance, the applications of Mr. Tranchemontagne and Mr. Werbeski were considered by the Director of the Ontario Disability Support Program who concluded that the applicants had an addiction to alcohol and were therefore not eligible for income support. Tranchemontagne and Werbeski appealed this decision to the Social Benefits Tribunal. Before the tribunal, they argued that subsection 5(2) of the *ODSPA* contravened the Ontario *Human Rights Code* (“Code”) because alcoholism was a form of disability. They argued that subsection 5(2) was therefore contrary to section 1 of the Code which provides that “every person has a right to equal treatment with respect to services, goods and facilities, without discrimination because of ... disability”. Given that subsection 47(2) of the Code indicates that the Code has primacy if there is a conflict between it and any other Act or regulation, the applicants contended that the SBT should find that subsection 5(2) of the *ODSPA* was of no effect. The SBT did not decide the question as it held that it did not have jurisdiction to apply the *Human Rights Code* in a way that rendered provisions of its enabling statutes inoperable.

On appeal to the Ontario Divisional Court, the decision of the SBT was upheld. In brief, oral reasons, the Court held that a tribunal must

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40 S.O. 1997, c. 25, Sch. B.
41 Subsection 5(2) of the *ODSPA* states:
5(2) A person is not eligible for income support if,
(a) the person is dependent on or addicted to alcohol, a drug or some other chemically active substance;
(b) the alcohol, drug or other substance has not been authorized by prescription as provided for in the regulations; and
(c) the only substantial restriction in activities of daily living is attributable to the use or cessation of use of the alcohol, drug or other substance at the time of determining or reviewing eligibility.
42 See ss. 14(1) of the regulations under the *ODSPA*, O. Reg. 222/98, as am.
44 Unless the Act or regulation states specifically that it is to apply irrespective of the Code.
45 Subsection 47(2) of the Code reads:
47(2) Where a provision in an Act or regulation purports to require or authorize conduct that is a contravention of Part I, this Act applies and prevails unless the Act or regulation specifically provides that it is to apply despite this Act.
find its jurisdiction in its enabling legislation and is limited by its enabling legislation. In the Court’s opinion, the two statutes specifying the jurisdiction of the SBT — namely, the ODSPA and the Ontario Works Act, 1997 (“OWA”) — did not grant it jurisdiction to decide the issue of the Code’s paramountcy. The Court maintained that while the Tribunal could use the Ontario Human Rights Code to interpret its legislation, it could not find authority in the Code to ignore its enabling legislation. As part of its reasons for dismissing the appeal, the Court held that there was no evidence indicating that the Social Benefits Tribunal had the expertise to address human rights issues. The Court asserted that the issue of whether alcoholism was a disability and whether, by virtue of the Code, subsection 5(2) should be held inoperable “should be determined by a court or other tribunal with jurisdiction, expertise and procedure sufficient to develop a full record and analysis to adequately address the issue”.

Moreover, the tribunal’s procedures did not appear to be appropriate for resolving such issues.

Messrs. Werbeski and Tranchemontagne appealed to the Ontario Court of Appeal where their appeal was once again dismissed. In expansive reasons, the Court of Appeal offered a two-part analysis. First, the Court determined that the tribunal had implicit jurisdiction to decide questions of law and that this jurisdiction included the power to decide matters that fall under the Human Rights Code. In this regard, the Court of Appeal was extending the principles laid down by the Supreme Court in Martin. Martin had held that tribunals with express or implied jurisdiction to decide questions of law also have the jurisdiction to decide Charter matters, unless that power has been excluded by the legislature. Interestingly, the Court of Appeal offered no explicit reasons to explain its application of the principles relating to the Charter developed in Martin to the quasi-constitutional domain (i.e., to the Code). Second, the Court of Appeal found that despite the tribunal’s implied power to consider issues under the Code, the tribunal had acted appropriately in declining this jurisdiction. In the Court of Appeal’s view, the Ontario Human Rights Commission was a more appropriate forum for resolving the dispute. This part of the Court’s reasoning was based on its analysis of Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Quebec (Attorney

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46 S.O. 1997, c. 25, Sch. A.
47 See Werbeski, supra, note 45, at para. 6.
Supreme Court Law Review (2007), 38 S.C.L.R. (2d)

General) (“Morin”)49 and Quebec (Attorney General) v. Quebec (Human Rights Tribunal) (“Charette”),50 two key decisions on jurisdiction that the Supreme Court had decided around the time of the Court of Appeal decision. In Morin and Charette, the Supreme Court of Canada had taken into consideration which tribunal was the “best fit” as part of its determination of which tribunal should have jurisdiction.51 In both Morin and Charette, a human rights tribunal was one of the bodies before which the litigant wished to present its complaint. Although these two cases differed from Tranchemontagne in that they dealt with competing administrative regimes where one regime had a legislative claim to exclusive jurisdiction, the Court of Appeal did not seem to take this into consideration.

The arrival of the appeal before the Supreme Court therefore left one wondering about the narrow issue of whether the SBT had the power to consider the human rights question and whether it had the ability to decline its jurisdiction as the Ontario Court of Appeal had determined. Most importantly, however, for many seeking more concrete guidance for determining matters of exclusive and concurrent jurisdiction after the 2004-2005 term, one also wondered about the proper application, if any, of Morin and Charette to the present appeal, as this was the first time that the Supreme Court was faced with deciding which of two administrative bodies with concurrent jurisdiction over a matter should take jurisdiction (as opposed to deciding between two decision-making fora, where one of the two appeared to have exclusive jurisdiction).

The majority of the Supreme Court held that the SBT had jurisdiction to decide the human rights matter and that it erred by not doing so. The case was remitted to the SBT to rule on the applicability of subsection 5(2) of the ODSPA. The majority judges were represented by McLachlin C.J., Binnie, Bastarache and Fish J.J., with reasons written by Bastarache J. The dissenting opinion by LeBel, Deschamps and Abella J.J., was penned by Abella J.

(a) The Majority

Writing for the majority, Bastarache J. viewed the issue in Tranchemontagne as being whether the SBT is obligated to follow

51 An in-depth discussion of Morin and Charette can be found in Jacobs, supra, note 39.
The respondent argued that the ODSPA and the OWA restricted the tribunal’s power to determine questions of law so that it could not determine matters under the Code. In particular, subsection 29(3) of the ODSPA prevented the tribunal from making decisions on appeal that the Director could not have made in the first instance. The respondent argued that since the Director could not possibly use the Code to deny an application under the ODSPA (and it is unclear how the respondent came
to this conclusion), the tribunal also did not have the authority to consider the Code. In rejecting the respondent’s argument, Bastarache J. drew a conceptual distinction between a “decision” and a “power” of the tribunal. In his view, subsection 29(3) dealt only with decisions, yet, using the Code to inform an eligibility determination was not a decision but simply a power that the tribunal may possess. Moreover, Bastarache J. observed that the ODSPA speaks of powers possessed by the SBT but not the Director. The possibility that the SBT may consider the Code was therefore not caught or precluded by subsection 29(3).

The respondent argued further that subsection 67(2) of the OWA, which provides that the SBT cannot determine the constitutional validity of a provision or regulation, prevented the SBT from considering the Code. This seemed to be a stronger argument for the respondent. Justice Bastarache interpreted the respondent’s argument as premised on the idea that the scrutiny required to determine if a provision is discriminatory and therefore inapplicable under the Code is analogous to the kind of scrutiny required to examine the constitutional validity of a provision. However, he did not find this analogy tenable.

Justice Bastarache observed that the primacy provision of the Code has both similarities and differences to section 52 of the Constitution. Both serve to eliminate the effects of inconsistent legislation with the result that the impugned provision will not be followed and, for the purposes of that particular application, it is as if the legislation had never been in effect. Yet, Bastarache J. found that differences between the primacy provisions of the Code and the Constitution were far more important than the similarities. As Bastarache J. put it:

... it is one thing to preclude a statutory tribunal from invalidating legislation enacted by the legislature that created it. It is completely different to preclude that body from applying legislation enacted by that legislature in order to resolve apparent conflicts between statutes.54

Justice Bastarache held that a declaration of invalidity under the Constitution implies that the impugned provision had not been enacted validly. Section 52 of the Constitution basically indicates that the legislature

53 Subsection 67(2) of the OWA also states that the tribunal cannot determine the legislative authority for making a regulation. This section reads:

67(2) The Tribunal shall not inquire into or make a decision concerning,
(a) the constitutional validity of a provision of an Act or a regulation; or
(b) the legislative authority for a regulation made under an Act.

54 Tranchemontagne, supra, note 4, at para. 31.
had no authority to pass the provision in question. By contrast, section 47 of the Code does not require the decision-making body to make any statement regarding the provision’s validity. Section 47 implies that the legislature had the power to enact the impugned provision; an issue only arises because the legislature also enacted another law that takes precedence over the impugned provision. Put another way, the analysis under section 47 of the Code does not require a tribunal or court to “look behind the law” to consider a provision’s validity. The tribunal or court is not declaring that the legislature was wrong to enact the section in the first place. In Bastarache J.’s view, when a tribunal or court applies section 47 of the Code, “it is simply applying the tie-breaker supplied by, and amended according to the desires of, the legislature itself”.

The respondent’s final argument was based on the similarity between section 1 of the Code and section 15 of the Charter. The respondent argued that if an issue should be carved out of the tribunal’s jurisdiction because it is sufficiently complex to be a Charter issue, the same issue could also be carved out of the tribunal’s jurisdiction for constituting an issue under the Code. This argument was also dismissed by Bastarache J. He held that asking the tribunal to determine if a question was really a Charter question forced the tribunal to engage in a very complex analysis. At the heart of this complex analysis would be the issue of whether the Charter should apply followed by an inquiry into the comparative advantages of using the Code over the Charter. In Bastarache J.’s opinion, if one is to reason that the tribunal has been prevented from dealing with the Charter because Charter issues are complex, it is hard to maintain simultaneously that the legislature has conferred upon the tribunal the necessity to enter into a similarly complex analysis in order to determine its own jurisdiction.

In place of the respondent’s arguments, Bastarache J. put forth two reasons of his own to support the conclusion that the tribunal has jurisdiction under the Code despite its lack of jurisdiction under the Constitution. First, he pointed out that the legislature had not only indicated that the Code is to have primacy but had also provided instructions for how the application of the Code could be avoided. In particular, the Code is to apply unless another Act or regulation has provided expressly that it is to apply despite the Code. This is the only way that the Code’s

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55 Id., at para. 36.
56 Id., at para. 37.
primacy could be disrupted. The legislature did not use this method with respect to the SBT.

Second, Bastarache J. discussed the non-exclusive jurisdiction of the Ontario Human Rights Commission. He noted that while at one time exclusive jurisdiction had been given to human rights boards of inquiry to determine contraventions under the Code, the legislature had since altered its regime, allowing for concurrent jurisdiction between the Human Rights Commission and other decision-making bodies. He also noted that the Ontario Human Rights Commission could decline jurisdiction where the matter would be best adjudicated by another decision-making regime. Under the current version of the Human Rights Code, there is therefore no requirement that human rights matters go through the Human Rights Commission process. Moreover, Bastarache J. referred to Parry Sound (District) Social Services Administration Board v. O.P.S.E.U., Local 324 and Charette for the proposition that human rights legislation be determined through a collection of administrative actors in order to foster a general culture of respect for human rights in the administrative justice system.

Justice Bastarache finished his decision by turning his attention to whether the tribunal should have declined to exercise its jurisdiction in this case. The respondent argued that in cases where it is possible for two administrative bodies to have jurisdiction over an issue, the decision regarding which should have jurisdiction should hinge in part on an analysis of which of the two bodies would offer a better forum for resolving the dispute. Justice Bastarache noted that the respondent’s argument sought to apply the approach developed for cases of exclusive jurisdiction to cases of concurrent jurisdiction as well. Justice Bastarache held that, in order for the respondent’s argument to succeed, it would be important for the legislature to have granted the SBT the power to decline jurisdiction once seized of the matter. However, through an examination of the enabling statutes of the SBT and by comparison to other regimes in which the legislature had provided a court or administrative body the discretion to decline to hear an issue, Bastarache J. determined that the legislature had not granted this power to the SBT. This was enough to decide the appeal.

Yet, although the lack of statutory power to decline jurisdiction was enough to determine the matter, Bastarache J. went on to comment on

57 Code, supra, note 43, s. 34(1)(a).
the salutary aspects of having the SBT decide both the social benefit and human rights issues. He was very quick to stress, however, that despite the coincidence that the SBT happened to be the best forum in this case, the appropriateness of the tribunal was in no way determinative of its jurisdiction. The jurisdiction of administrative tribunals derives solely from legislative intent and has no regard to factors like expertise and practical constraints.

Nevertheless, as for the salutary effects of the SBT, Bastarache J. was of the opinion that the SBT was the best place to resolve the question of discrimination and whether section 5(2) of the ODSPA should be applicable. He noted that it is almost inescapable that applicants who have been denied financial assistance under the ODSPA will find themselves before the SBT. Pursuing alternate routes such as the process under the Human Rights Code may not be feasible in terms of time or resources. There was also no guarantee that the applicants’ concern would be heard by the Human Rights Tribunal. Justice Bastarache took into account that litigation concerns such as this one could involve a long process during which the applicants would receive no benefits. Overall, Bastarache J.’s reasons centred on the need to avoid creating barriers to human rights remedies, especially when dealing with vulnerable litigants.

In completing his discussion, Bastarache J. offered some cautionary advice to tribunals. He asserted that when an administrative tribunal is properly seized of an issue by way of statutory appeal, and particularly an appeal in which a vulnerable applicant is attempting to defend his or her human rights, it would be rare for that tribunal not be the most appropriate forum to hear the entire dispute. Indeed, Bastarache J. went further, virtually closing the door to the possibility of a tribunal ever passing off the human rights arguments to another forum. He stated:

I am unable to think of any situation where such a tribunal would be justified in ignoring the human rights argument, applying a potentially discriminatory provision, referring the legislative challenge to another forum, and leaving the appellant without benefits in the meantime.\footnote{Tranchemontagne, supra, note 4, at para. 50.}

Finally, Bastarache J. offered a warning to tribunals that may be tempted to argue that their practical constraints (such as efficiency) will prevent them from taking on matters outside of their direct expertise. In Bastarache J.’s opinion, a tribunal ought not avoid cases because they have assumed that the legislature did not provide them with sufficient

\footnote{Tranchemontagne, supra, note 4, at para. 50.}
tools for determining the issues. Stated flatly, tribunals cannot ignore matters that the legislature intended them to consider if the legislature has not granted them the power to decline jurisdiction.

(b) The Dissent

Similar to Bastarache J., Abella J. made an effort to draw away all of the humanitarian aspects of this case in order to reveal it as strictly a case of statutory interpretation. In Abella J.’s words, Tranchemontagne “is not about access, about the applicability of human rights legislation, or about whether the government is entitled to refuse to provide disability benefits to individuals whose only substantial impairment is an alcohol or drug dependency. It is about the scope of the legislature’s intention when it enacted a statutory provision depriving an administrative tribunal of jurisdiction to decide whether any of its enabling provisions were ultra vires or violated the Canadian Charter of Rights and Freedoms”. More particularly, for Abella J., this case sought to determine in which forum a party could legally bring a challenge about the compliance of the ODSPA with the Code and whether such a challenge could be made before the Director of the Disability Support Program and/or the SBT. However, unlike the majority, the dissenting judges were of the opinion that the ODSPA’s provision prohibiting the SBT from determining the constitutional validity of its enabling legislation also prevented the tribunal from determining the compliance of its enabling statutes with the Code. Generally, the dissent’s reasons were based on an idea drawn from Martin that the legislature may intend to exclude a broad category of legal questions from the scope of issues that can be addressed by a tribunal.

The points of difference between Abella and Bastarache JJ. present quite a stark contrast. Indeed, Abella J.’s dissent focuses on three distinct aspects of the case: (i) the nature of subsection 47(2) of the Code; (ii) the reason for enactment of subsection 67(2) of the OWA (prohibiting consideration of constitutional validity); and (iii) practical considerations.

60 Id., at para. 56.
61 Id., at para. 69.
62 See Tranchemontagne, id., at paras. 59-60. The dissenting judges drew this analogy from Martin, supra, note 24, at para. 42 when the Supreme Court held:

The question to be asked is whether an examination of the statutory provisions clearly leads to the conclusion that the legislature intended to exclude the Charter, or more broadly, a category of questions of law encompassing the Charter, from the scope of the questions of law to be addressed by the tribunal.
rebutting the presumption that the SBT could determine the operability of provisions in its enabling legislation.

As to the nature of subsection 47(2) of the Code, the dissenting judges saw this provision as one that promoted the values and rights expressed in the Code as being fundamental in nature. They pointed out that subsection 47(2) of the Code does not confer jurisdiction on any decision-maker — it does nothing more than announce the primacy of the Code. Subsection 47(2) assumes that when a body with the authority to make decisions regarding the Code is asked to apply it, it will conduct its task so that the Human Rights Code prevails over any other inconsistent statutory provision. The section outlining the Code’s primacy is therefore only of interpretive assistance; it is not meant to grant jurisdiction to any particular decision-making body as the majority would maintain.63

Justice Abella also discussed the reason why the section prohibiting the tribunal from considering the constitutional validity of a provision or the legislative authority of a regulation was enacted. She noted that this provision, subsection 67(2), was enacted after a former version of the SBT had granted itself jurisdiction to decide Charter matters through an interpretation of its legislation.64 Justice Abella looked at the provision broadly. In her view, it was clear that the primary legislative aim in creating subsection 67(2) was that the legislature did not want the SBT to be able to refuse to apply provisions of its enabling statute by finding them to be inoperable. She asserted that if one accepts this legislative aim, then it becomes difficult to accept the majority’s opinion that the SBT can render provisions of its enabling statute inoperable through the interpretation of some legislation, like the Code, but not through the interpretation of others such as the Constitution.65

What is the difference between a tribunal rendering a provision constitutionally invalid and therefore inoperable under the Constitution on the one hand, and rendering a provision inapplicable by a quasi-constitutional enactment, on the other? Justice Bastarache put heavy stock in this distinction but, on close analysis, the distinction is very hard to maintain. Justice Abella brought this question to the fore in her decision. She challenged that tribunals had never had the power to declare legislation invalid under the principles in Martin, but had been given only the jurisdiction to decline to apply a provision. Therefore, the majority’s

63 See Tranchemontagne, id., at paras. 72-73.
64 Id., at para. 78.
65 Id., at para. 80.
suggestion that the prohibition set out in subsection 67(2) does not extend to finding inoperability under the Code because the remedies under the Charter and Code are different, is difficult to sustain. Put another way, whether the challenge is brought under the Charter or under the Code, the only remedy that a tribunal can offer is to refuse to apply the impugned provision. To bring an additional element into the equation — namely, that the tribunal’s analysis under the Charter requires a determination of invalidity — does not make the argument stronger in favour of the tribunal’s ability to decide matters under the Code.

Referring to the principles set out in *Martin*, Abella J. looked also for any practical reasons why the tribunal should not be able to determine Code issues. In terms of the SBT’s institutional characteristics, she found that neither the Director nor the SBT had the capacity to decide complex, time-consuming legal issues. For example, the Director does not hold hearings or receive evidence beyond what is filed by the applicant. (This presumably speaks to the impossibility of having broader public participation in the decision-making process through interveners, etc.) Similarly, the SBT’s process is informal and private with hearings that last no longer than 1 1/2 hours. Moreover, Abella J. noted the SBT’s backlog of cases in the year that Mr. Tranchemontagne and Mr. Werbeski’s applications had been submitted.

It was obvious that asking the SBT to consider Code compliance would have an impact on its ability to fulfil its responsibility to ensure the payment of monetary benefits. The SBT would also not have the expertise to deal with complex and nuanced human rights determinations, unlike the Human Rights Commission. Moreover, unlike the statutory human rights regime, the disability benefits process does not provide the checks and balances to protect the integrity of the Code, the integrity of human rights adjudication, the interests of the public and that of the parties. Finally, Abella J. noted the express commentary made in the Legislative Assembly of Ontario during second reading of the *OWA*, indicating that constitutional questions were removed from the SBT’s jurisdiction because they are complex legal issues, with potentially far-reaching consequences that the legislators believed to be better addressed by the courts.

(i) Commentary

What is striking about the decision in *Tranchemontagne* is that both the majority and the dissent take a postural stance of deference to the legislature and classify their approach as pure statutory interpretation.
Yet, the two interpretive methods used are vastly different. One is tempted to classify the majority’s approach as formalist and the minority’s approach as functionalist. For the majority, pure statutory interpretation is an exercise of interpreting the Code and enabling statutes of the SBT. This exercise leads ultimately to the question of how to understand the provision of the Code asserting its primacy. The majority view is that primacy implies jurisdiction to give effect to this primacy on the part of any administrative body faced with a question that could fall under the Human Rights Code. Moreover, the majority comes to this conclusion, as Abella J. notes, despite the fact that there is no explicit indication in the statute that any other body should have jurisdiction under the Code and, arguably, despite clear indications in the statutes and elsewhere that Code issues were to be excluded from the jurisdiction of the social benefits process. This conclusion is not entirely convincing.

As for the dissenting judges, inspiring their analysis from the methodology set out in Martin allows them to infuse their statutory interpretation with the practical considerations that are so compelling in this case. Yet, like the majority, the dissenting judges also try to focus solely on interpretation and remove all humanitarian aspects.

However, with respect to both the majority and the dissent, trying to remove the issues in Tranchemontagne from its larger contextual aspect and placing it uniquely within a quest to validate legislative intent is problematic in itself. The decision leaves unaddressed and unanswered perennial problems such as administrative backlog, lack of resources and training, and decisions that are to be determined by decision-making bodies without the expertise in human rights to handle them. If the decisions on jurisdiction in the 2004-2005 term showed a battle between expert decision-making and expediency (i.e., having all legal questions decided in one forum) in which expediency was gaining ground, the 2005-2006 term showed the triumph of neither. Some have argued that it would be useful for the concept of the rule of law to be used to bring about change to the administrative inefficiencies of the system. While this is a progressive idea, in light of the Supreme Court’s decision on access to justice and rule of law decided in the 2005-2006 term, it does

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66 See Lorne Sossin, “Jurisdiction or Access to Administrative Justice? How the Supreme Court of Canada Missed the Point in Tranchemontagne”, online at: <http://www.thecourt.ca/category/case-name/tranchemontagne-2006/).

not seem that these fundamental concepts are gaining as much leverage as they could at the court.

Moreover, although “pure statutory interpretation” is the stated objective of the majority approach, there is still much “impure non-statutory” discussion that circulates in *Tranchemontagne*. Unlike past years, the Court is very clear to state in its decision that it is relegating this discussion to a non-determinative realm. Yet, it is hard for the reader to ignore the human aspects of this case and the elements of administrative efficiency when they are nevertheless brought into the text. They are in some ways the most compelling aspects of the case and certainly do not become less so by the way in which they are introduced into the decision. For example, Bastarache J. began this discussion with a bit of legislative, factual and contextual history. He noted that it had been almost five years since Mr. Tranchemontagne and Mr. Werbeski were denied income support payments by the director. He further recognized the human aspect of the case by stating that if the appellants were ultimately successful in proving discrimination, they would have lived five years without the assistance they were owed. He further stated that no amount of interest could negate this fact. Justice Bastarache acknowledged as well that it is important that the Social Benefits Tribunal operate efficiently: it would be unfortunate to place interpretive demands on the tribunal if these demands resulted in slowing down the application process for the great bulk of applicants. However, whereas in past years, where the exclusive and concurrent jurisdiction cases were unclear about how such policy concerns should fit into the overall analysis to determine the appropriate jurisdiction, Bastarache J. is quick to clarify their place in *Tranchemontagne*. These considerations of practicality for the applicants and the efficient machinery of tribunal decision-making are to take second place to the pure pursuit of legislative intent. Justice Bastarache held: “Ultimately, this appeal is not decided by matters of practicality for applicants or matters of expediency for administrative tribunals. It is decided by following the statutory scheme enacted by the legislature.” Once again, as in the 2004-2005 term, we are in a situation where the objective is to pursue legislative intent. But, whether in practice, legislative intent removed from all other considerations can be the sole guide for deciding matters of jurisdiction will remain debatable questions within the legal and tribunal communities.

Nonetheless, Bastarache J.’s commentary on the significance of practical considerations in decisions regarding concurrent jurisdiction is useful. It provides more explicit guidance on the theoretical place of practical and policy considerations, such as lack of resources by a tribunal
to determine human rights matters and the desirability of asking potentially vulnerable applicants to bring their matters in two distinct fora, in determining questions of jurisdiction. Unlike the cases of exclusive jurisdiction from the 2004-2005 term, where policy considerations were brought into the discussion but where the Court was less clear in outlining the weight and value that these considerations should have in an analysis of determining the proper forum, the majority in *Tranchemontagne* points out firmly that policy considerations are not to be determinative at all of which of two potentially concurrent bodies should have jurisdiction over an issue. As Bastarache J. points out, if the matter has been brought properly before an administrative decision-maker, the question of whether it should transfer the matter to another administrative decision-maker is answered primarily by seeing if there are legislative indications that the matter is to be transferred, including a statutory power to decline jurisdiction by the body that has been seized of the matter.

The majority also declares different approaches for concurrent and exclusive jurisdiction. It would appear that when a case deals with concurrent jurisdiction between administrative bodies, the question of whether one body represents a more appropriate forum than another is not a valid one. The answer to the jurisdiction question stems solely from an analysis of the relevant legislation. With respect to exclusive jurisdiction, the methodological analysis is quite different. When the issue is which of two bodies should have jurisdiction over matter and one body has an exclusivity clause (or has implied exclusivity over the matter), the analysis involved is the search for the “essential character” of the dispute. While the question of which forum is most appropriate may arise, asking the question explicitly may not always be relevant. The next case, *Concordia University*, shows the discussion of appropriateness implicit in the analysis of the essential character. *Concordia University* is also an interesting case because it is a decision in which both possible fora had elements of exclusivity.

2. *Bisaillon v. Concordia University*

*Concordia University* is the only case decided by the Supreme Court of Canada in the past two terms that deals with exclusive jurisdiction. This is quite a contrast to the 2004-2005 term where the Court spent a significant amount of energy on the question of exclusive jurisdiction. The cases of 2004-2005 were the first in almost a decade to advance vigorously the principles of methodology to be used in determining which
of competing decision-making bodies (including at times the courts) should have jurisdiction when one body could make a claim to exclusivity. Concordia University moves the discussion a step further. It addresses the exclusive jurisdiction of labour arbitrators in a case that pits them against the exclusive jurisdiction of the superior courts to take on class action suits. The result is a case that pushes forward the boundaries of not only jurisdiction in the administrative law context of labour law but simultaneously provides guiding principles on class action suits and civil procedure.

At issue in Concordia University was whether a unionized employee of the university could institute a class action against the university in order to contest certain decisions that the university had made with respect to the administration and use of a supplemental pension plan. In particular, Mr. Bisaillon alleged that the university had used the funds inappropriately in order to pay for contribution holidays, cover administrative costs and to finance early retirement packages. The pension plan had been established by Concordia University for its employees and had more than 4,100 members. Over 80 per cent of the members were unionized employees covered by nine collective agreements that Concordia had concluded with its nine certified unions. In each of the nine collective agreements, there was direct or indirect reference to the pension plan.

By instituting a class action, Mr. Bisaillon hoped to obtain a declaration that the changes that the university had made to the plan were null. He also sought to compel Concordia to pay back the money it had taken from the pension fund. Eight of the unions supported and financed Mr. Bisaillon’s attempt to institute a class action. The ninth union, CUFA, agreed to the changes made by the university. CUFA and Concordia University therefore opposed Mr. Bisaillon’s application for a class action suit.

In the Québec Superior Court, CUFA, supported by Concordia, submitted that the Superior Court lacked jurisdiction to authorize a class action as the dispute dealt with collective bargaining and the implementation of the collective agreement. Because these matters lay within the exclusive domain of the certified unions, CUFA and Concordia argued that Mr. Bisaillon was bound to use the grievance procedure in order to attempt to resolve any disputes with Concordia regarding the plan.

The Superior Court agreed with this. They allowed the request for declinatory exception sought by CUFA and Concordia and dismissed Mr. Bisaillon’s motion. The Superior Court held that the disputes dealt
with the application of the collective agreement since the pension plan was a benefit within it. As such, based on the Supreme Court decision in *Weber v. Ontario Hydro*, the Court held that the question lay within the exclusive jurisdiction of the labour arbitrators appointed under the collective agreement. The Superior Court noted also that Mr. Bisaillon did not have rights that were distinct from the collective agreement and that Mr. Bisaillon had conceded that his class action was part of a negotiation strategy with the eight unions which, collectively, were trying to negotiate improvements to the pension plan.

On appeal to the Québec Court of Appeal, the decision of the Québec Superior Court was overturned. The Court of Appeal found that the pension plan existed independently of any collective agreement. In the Court’s opinion, the case had nothing to do with the collective agreement that applied to Mr. Bisaillon and therefore did not fall within the jurisdiction of the grievance arbitrator. Moreover, the Court expressed concern that not one grievance arbitrator would have authority to hear all the claims raised in the class action. He or she would only be able to hear the claims of those who fell within the collective agreement over which he or she had jurisdiction. The result of leaving the matter to grievance arbitration was the possibility of several contradictory decisions stemming from the decisions of many arbitrators. The Court of Appeal held that the best result was for the Superior Court to exercise its residual jurisdiction to authorize a class action suit.

The narrow issue before the Supreme Court was therefore whether a class action suit was appropriate in this case or whether grievance arbitration was the correct forum. Determining this issue, however, required the Court to revisit and expand upon the principles relating to exclusive jurisdiction that they had set out in *Weber* and developed most recently in *Morin* and *Charette*. *Concordia University* is also of particular importance because it brings the notion of *in personam* jurisdiction to the Supreme Court’s jurisprudence on exclusive jurisdiction. The Court held that grievance arbitration was the correct forum for this dispute. However, there was a narrow split of 4-3 among the justices of the Supreme Court of Canada. Justices LeBel, Deschamps, Abella and Charron were the four judges who formed the majority. Their reasons were written by LeBel J.

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The dissenting reasons of McLachlin C.J., Bastarache and Binnie JJ. were penned by Bastarache J.

(a) Majority

Justice LeBel framed the issue in *Concordia University* as being whether a class action suit could be used to bypass the representation and grievance resolution mechanisms that had been established within Québec labour law. Justice LeBel approached the analysis of this question by looking at four distinct aspects of the legal framework governing the issue: the nature of the class action suit, the collective representation system in Québec labour law, the jurisdiction of grievance arbitrators and the statutory framework governing supplemental pension plans.

With respect to the nature of class action suits, over which the Québec Superior Court has exclusive jurisdiction, LeBel J. noted that although legislation on class actions should be construed flexibly and generously, class actions are a procedural vehicle that cannot modify or create substantive rights. In other words, a class action proceeding does not provide parties with a legal proceeding that they would not otherwise have on an individual basis. Moreover, the legal rules governing who has subject matter jurisdiction are not changed by the choice of procedure. Using a class action procedure does not have the effect of granting jurisdiction on the Superior Court when the subject matter would otherwise fall within the jurisdiction of another court or tribunal.

As for collective representation, LeBel J. outlined some basic concepts. He pointed out that the Québec *Labour Code*\(^71\) gives certified unions a set of rights. The most important of these rights is the monopoly of representation. A certified union has the exclusive power to negotiate conditions of employment for all members of the bargaining unit. Once the collective agreement has been put in place, the union also has exclusive representation of rights with respect to its implementation and application. The union’s monopoly on representation has significant impact on employee rights. For example, employees are precluded from negotiating their individual conditions of employment directly with their employer. In return, employees improve their position vis-à-vis the employer, which usually has the greater balance of power. They also reap greater protection of their interests. The employer is also affected by the union’s monopoly of representation. On the one hand, the employer becomes obliged to

enter into good-faith collective bargaining with the union. On the other, the
employer derives various benefits, such as the right to peace and stability
in the workplace and an expectation that disagreements stemming from
the collective agreement will be negotiated with the union or settled
through the grievance arbitration process.

Justice LeBel pointed out that there are two faces of a grievance
arbitrator’s jurisdiction. The first is subject matter jurisdiction which
includes the power to grant an appropriate remedy. A pre-condition to
exercising subject matter jurisdiction is that the grievance arbitrator have
jurisdiction over the “essential subject matter of the dispute” so that he
or she can grant an appropriate remedy. Justice LeBel referred to the
analytical approach adopted by the Supreme Court in *Weber* which held
that a grievance arbitrator has exclusive jurisdiction when “the dispute,
in its essential character, arises from the interpretation, application,
administration or violation of the collective agreement”\(^\text{72}\). Identifying the
essential character of a dispute is an exercise that involves taking into
account all the facts surrounding the dispute between the parties. Once
the factual context has been determined, it must be examined to see
whether the collective agreement explicitly or implicitly applies to it.
Referring to cases such as *Regina Police Assn. Inc. v. Regina (City)
Board of Police Commissioners*;\(^\text{73}\) *Parry Sound (District) Social
Services Administration Board v. O.P.S.E.U., Local 324*;\(^\text{74}\) and *St. Anne
Nackawic Pulp & Paper Co. v. Canadian Paper Workers Union, Local
219*,\(^\text{75}\) LeBel J. stressed that the Supreme Court has repeatedly gi-
given grievance arbitrators generous exclusive jurisdiction over issues related
to conditions of employment so long as there is some connection to the
collective agreement. He held:

This Court has considered the subject-matter jurisdiction of grievance
arbitrators on several occasions, and it has clearly adopted a liberal
position according to which grievance arbitrators have a broad exclusive
jurisdiction over issues relating to conditions of employment, provided
that those conditions can be shown to have an express or implicit
connection to the collective agreement…\(^\text{76}\)

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\(^{72}\) *Weber*, *supra*, note 68, at para. 52.


\(^{76}\) *Concordia University*, *supra*, note 5, at para. 33.
Using this as a springboard, LeBel J. reasoned that the provisions of the collective agreement relating to pension plans could also fall within the exclusive jurisdiction of grievance arbitrators. He pointed out that the Québec Court of Appeal had held arbitrators to have exclusive jurisdiction over such issues on numerous occasions. He noted, as well, that there was a recent trend in the Québec Court of Appeal to grant grievance arbitrators exclusive jurisdiction even when there is no reference to the pension plan in the collective agreement. He referred to two cases: Hydro-Québec v. Corbeil; and Association provinciale des retraités d’Hydro-Québec v. Hydro-Québec. In Corbeil, for instance, the Court found that the pension plan formed part of the employee’s remuneration and conditions of employment. As a consequence, it was held to be an integral part of the collective agreement. In a similar vein, LeBel J. noted that commentators on the issue have also argued that general clauses such as those recognizing employers’ management rights could confer jurisdiction over issues dealing with the application and implementation of benefits, including those in a pension plan.

The second aspect of a grievance arbitrator’s jurisdiction is in personam jurisdiction. In personam jurisdiction encapsulates the idea that the arbitrator must have jurisdiction over the parties to the dispute. If the collective agreement does not apply to parties bringing the claim, then the arbitrator has no jurisdiction to hear the claim of those parties. Justice LeBel indicated that the ordinary courts retain jurisdiction over a dispute when grievance arbitrators lack jurisdiction. Issues of in personam jurisdiction sometimes occur when third parties are involved. Arbitrators do not have to ensure that their decisions will have no effect on third parties as third parties who are affected by arbitration decisions will not be legally bound by them. But, as LeBel J. asserted, “there is nothing to prevent third parties from voluntarily and expressly submitting to a grievance arbitrator’s jurisdiction, thereby bestowing jurisdiction upon him or her”.

Justice LeBel finished his discussion on the jurisdiction of grievance arbitrators with commentary on the residual jurisdiction of the Superior Court. He repeated that in cases where a grievance arbitrator lacks the authority to grant the remedy required to resolve the dispute, the courts retain residual inherent jurisdiction. Justice LeBel asserted, however,

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79 Concordia University, supra, note 5, at para. 40.
that this special jurisdiction of the Superior Court was not an issue in the present case.

Finally, LeBel J. analyzed statutory framework governing supplemental pension plans. He noted that the administration and operation of pension plans is overseen by the Régie des rentes du Québec, the governing body that ensures compliance with the Supplemental Pension Plans Act. Justice LeBel noted that while the Régie des rentes is not a tribunal and is not designed to resolve disagreements over the interpretation of pension plans, it does establish a consensual arbitration process for certain disputes. Justice LeBel pointed out that the case at bar was not covered by the arbitral powers of the Régie des rentes.

In light of these general principles, LeBel J. asserted that Mr. Bisaillon’s position “undermine[d] two pillars of our collective labour relations system: the exclusivity of the arbitrator’s jurisdiction and the collective representation system”. As for the exclusivity of the arbitrator’s jurisdiction, LeBel J. criticized the Québec Court of Appeal for adopting the wrong methodology and therefore reaching an incorrect result. In his opinion, the Court of Appeal should have started its inquiry by determining if a grievance arbitrator had jurisdiction to rule on the individual proceeding between Mr. Bisaillon and Concordia. It should have then considered the nature of the individual claims of the majority of the group and the in personam jurisdiction of the arbitrator with respect to those claims. Because the Court of Appeal did not do this, it ended up removing individual proceedings over which the arbitrator had jurisdiction from the grievance arbitration process to the Superior Court. Yet, the Superior Court had no jurisdiction over the parties or the subject matter and could not acquire jurisdiction simply because the motion for class action had been filed. More generally, LeBel J. was of the view that the Court of Appeal should not have focused as it did on determining whether the grievance arbitrator had jurisdiction over every potential member of the group covered by the class action.

Justice LeBel held that labour arbitrators would have exclusive jurisdiction over the subject matter of this dispute. The facts of the case dealt with unilateral amendments made by the university to the pension

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81 For example, it provides for arbitration when there is disagreement over amendments to pension plans that confirm the employer’s right to appropriate surplus assets to the payment of employer contribution. See Supplemental Pension Plans Act, R.S.Q. c. R-15.1, s. 146.5 and Concordia University, supra, note 5, at para. 43.
82 Concordia University, supra, note 5, at para. 46.
plan and their validity. Moreover, the collective agreement provisions referred to the pension plan. In LeBel J.’s opinion, Mr. Bisaillon’s issues were implicitly and perhaps even explicitly linked to the collective agreements and their application. Finally, LeBel J. opined that a grievance arbitrator would have the necessary jurisdiction to declare the employer’s decision null and to issue an appropriate remedy. As such, this was not a case in which the Superior Court could validly exercise its exceptional residual jurisdiction. The Québec Superior Court was correct to declare that it lacked jurisdiction to hear the case.

Justice LeBel finished his decision with comments on the problem of potentially conflicting multiple decisions arising from arbitration awards made in respect to the many bargaining units. LeBel J. held that the possibility of conflicting decisions was not enough to justify a conclusion that the Superior Court had jurisdiction instead of grievance arbitrators. Justice LeBel wrote:

Although I am of the view that the trial judge correctly concluded that the Superior Court lacked jurisdiction in the instant case, I must admit that this solution is not free of procedural difficulties, particularly because of the multiplicity of possible proceedings and of potential conflicts between separate arbitration awards in respect of the different bargaining units. However, the potential difficulties are not sufficient to justify referring the matter to the Superior Court and holding that it has jurisdiction.\(^{83}\)

In LeBel J.’s opinion, it had not been demonstrated that a real possibility of chaos resulting from contradictory decisions could exist. Justice LeBel theorized that there were various options under the rules of labour law that could be used to prevent multiple arbitration proceedings. For example, he indicated that many of the unions could decide to come to an agreement with the employer to submit the various grievances to a single arbitrator. He felt that this should have been the preferred approach for all parties involved and that it would be difficult for the employer to oppose this approach. Justice LeBel also noted that if one arbitrator decided a grievance by one of the unions in favour of that union, all the employees would benefit indirectly from the award. This is because all the money wrongfully taken from the pension plan would be returned. This was a point with which the dissenting judges took great issue. Furthermore, in LeBel J.’s view, once one grievance had been decided, all

\(^{83}\) Id., at para. 58.
the other grievances filed by the other unions would, in practice, become moot. At worst, in the wake of contradictory or incompatible arbitration awards, Concordia University could probably resolve any conflicts by complying with the award least favourable to it. In sum, multiple proceedings could be avoided by tools of civil procedure in addition to tools of labour law. Moreover, LeBel J. did not see anything to infer that holding labour arbitration as the appropriate forum would permit the unions to benefit more greatly than the employer by encouraging them to file multiple grievances and forcing the employer to abide by the award most unfavourable to it.

(b) Dissent

Unlike the majority, the dissenting judges (McLachlin C.J.C., Bastarache and Binnie JJ.) held that labour arbitrators did not have exclusive jurisdiction over Mr. Bisaillon’s claim. They held that the Québec Superior Court had jurisdiction to entertain Mr. Bisaillon’s application for a class action proceeding and that an application to the Québec Superior Court was the only procedure available that could settle conclusively the question of the university’s financing of the pension fund. In reaching this conclusion, Bastarache J. for the dissent added that their decision was not intended to indicate whether Mr. Bisaillon’s class action should be certified or whether he had “sufficient interest” to proceed with the claim without his union — these issues were for the Québec Superior Court to decide.

*Concordia University* shows us an interesting change of roles in the court. Chief Justice McLachlin and Bastarache and Binnie JJ. all held very strong opinions in the cases on exclusive jurisdiction in the 2004-2005 term. In *Concordia University* they came together to counter the decision of LeBel J. and the majority. The dissent in *Concordia University* centred on two main points made by the majority: (a) whether there was a sufficient nexus between the pension plan and the collective agreement to maintain that the collective agreement was a valid source of the labour arbitrator’s jurisdiction; and (b) the degree to which there was the possibility of multiple incompatible arbitration decisions and the degree to which such multiple proceedings could be problematic.

Justice Bastarache agreed with many aspects of LeBel J.’s decision. However, he indicated that where he parted views with LeBel J. was with respect to his conclusion. In Bastarache J.’s opinion, an analysis of the facts of this case under the *Weber* principles did not lead to the conclusion
that the pension dispute could be traced back to the collective agreement. Indeed, a clear indication that *Weber* had been *misapplied* was that different courts and arbitrators, all gaining jurisdiction from different collective agreement and employment contracts, could come to mutually incompatible positions on how the university should administer the plan. As Bastarache J. put it:

> With respect, however, I believe the risk of inconsistent decisions is symptomatic of a misapplication of *Weber*. I cannot agree that *Weber* allows for the same party to be bound by inconsistent directions from different courts and arbitrators, all claiming — rightfully, according to my colleague — to have jurisdiction over the essential character of the dispute. The fact that this possibility exists here confirms that the essential character of this appeal arises out of something other than the collective agreement: the Plan itself.  

Justice Bastarache pointed out that there are limits to the idea that labour arbitrators have exclusive jurisdiction. *Weber* did not stand for the proposition that labour arbitrators always have exclusive jurisdiction when a dispute arises relating to the conditions of employment of unionized employees. Indeed, there are many aspects of the employer-employee relationship that do not stem from the collective agreement. *Morin* was an example of a case in which the essential character of the dispute was determined to be a human rights matter that did not stem from the collective agreement. There, the issue to be determined was whether the addition of a new term of collective agreement discriminated against certain employees. The Supreme Court of Canada held that labour arbitration was not the only forum and that having the matter decided by the Human Rights Tribunal was a better fit.

Justice Bastarache was of the opinion that *Concordia*, too, is a case in which labour arbitrators do not have exclusive jurisdiction. Justice Bastarache interpreted *Weber* as indicating that the matter must arise out of “a single collective agreement, concluded between a single union and the employer” in order to be subject to a labour arbitrator’s exclusive jurisdiction. For Bastarache J., the fact that the pension plan represented one indivisible patrimony was a very big element that deserved more attention than LeBel J. had given it. The pension fund transcended any one collective agreement. A necessary implication of this was that every beneficiary of the plan, regardless of the collective agreement with which

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84 *Id.*, at para. 69.
85 *Id.*, at para. 76.
he or she was affiliated, was affected by the changes to the plan of which the respondent complained. Viewed in light of these attributes, the respondent’s claim could not logically be located in any one collective agreement. There was a connection that linked all of the beneficiaries of the pension funds, however, that came from the way that the changes to the fund affected all of the beneficiaries and the resulting claim that they wished to make. While the collective agreement served as the reason why the respondent had an interest in the financing of the pension fund, this was not enough to say that the essential character of the respondent’s claim stemmed from the collective agreement. Justice Bastarache also noted that identifying the essential character of the dispute as arising from the collective agreements would result in various parties dictating the management of the fund for every other beneficiary by labour arbitrators including beneficiaries over whom a particular labour arbitrator may not have jurisdiction.

Justice Bastarache argued that the labour arbitrator did not have *in personam* jurisdiction. While LeBel J. had limited the parties to the respondent and Concordia University, Bastarache J. reasoned that it was more accurate to recognize that all beneficiaries of the fund could claim to be involved and that a labour arbitrator would not have jurisdiction over all these parties.

Finally, unlike the majority, Bastarache J. was of the opinion that the possibility of inconsistent decisions merely confirmed that the essential character of Mr. Bisaillon’s claim arose out of the plan itself and not the collective agreement.86

Justice Bastarache held that the risk of contradictory rulings in this case was inevitable in both theory and practice. As a practical matter, Bastarache J. pointed out that Lebel J. had himself identified the incentive for employees to bring multiple claims. Justice Lebel had noted that: “Assuming the worst, if there were contradictory or incompatible arbitration awards, Concordia could probably, subject to the limited possible grounds for judicial review by the Superior Court, resolve any conflict by complying with the award least favourable to it.”87 Although Lebel J. saw this as a reason for conflicting judgments to work themselves out, Bastarache J. was of the opinion that this was the catalyst for a constant reopening of the dispute over financing of the pension fund. Justice Bastarache reasoned that so long as the arbitrator rendered a decision that was unsatisfactory

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86 *Id.*, at para. 69 and see *supra*, note 84 and accompanying text.

87 *Id.*, at para. 60.
to one of the remaining eight unions, it would be inevitable that the dispute would be reopened.

But Justice Bastarache found it even more worrisome that there was a risk of contradictory rulings in *theory*. Here, his concern centred on clarifying the proper application of the *Weber* test. Justice Bastarache emphasized very strongly the unusual nature of the contradictory claims that would arise from the majority’s conclusion that the essential character of the dispute could be located in the collective agreements and employment contracts. Unlike many situations of inconsistency that arise in legal interpretation,\(^\text{88}\) the majority’s holding would lead to the situation where the same indivisible pension fund would be set to contain a certain amount of money by one arbitrator in a different amount of money by another. Justice Bastarache noted that this is the kind of inconsistency “that purports to resolve the *same, singular claim* in different ways”.\(^\text{89}\)

In Bastarache J.’s opinion, it would be impossible to reconcile contradictory orders of this nature. He noted that the jurisdictional absurdity of the situation that was sure to ensue from the majority’s disposition was aggravated by two additional factors. First, the university would be bound by all the arbitration decisions, including the contradictory ones. Second, he took a precursory appreciation of the standard of review, observing that it was likely that the various arbitrators’ decisions would merit some deference. As a consequence, resorting to judicial review to reconcile contradictory arbitral orders would not necessarily be a successful task as each order may escape being overturned by being sufficiently reasonable.

Justice Bastarache completed his analysis with a comment on the *Weber* test and the notion of the essential character of the dispute. He held that the notion of an essential character cannot be given such a broad meaning as to allow a single dispute to arise out of many different sources simultaneously, with each yielding jurisdiction for different forums. If the *Weber* test is applied in this way, as was done by the majority, its insight will be defeated.

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\(^\text{88}\) For example, situations in which a legislative provision is interpreted differently or in which the same legislative provision is applied differently by different arbitrators to a similar set of facts.

\(^\text{89}\) See *Concordia University, supra*, note 5, at para. 93.
IV. STANDARD OF REVIEW

In 2007, two decisions dealing with standard of review were released by the Supreme Court, City of Lévis and Via Rail. Both dealt with determining when multiple standards of review, as opposed to one standard of review, should apply to the decision or order of an administrative body.

1. Lévis (City) v. Fraternité des policiers de Lévis Inc.

City of Lévis is a decision that deals with issues of standard of review, statutory interpretation, municipal law and police discipline/ethics. In City of Lévis, a municipal police officer charged with criminal conduct was dismissed by the municipality. His union filed a grievance on his behalf which led to many levels of judicial review of an arbitrator’s decision.

Rendering the case somewhat complex is the fact that two statutes govern the discipline of municipal police officers in Québec: the Police Act and the Cities and Towns Act. Moreover, the two Acts come into conflict respecting the sanctions they provide to discipline police officers charged with criminal offences.

More specifically, section 119 of the Police Act provides for automatic dismissal of any police officer found guilty of an offence under the Criminal Code. Paragraph 2 of section 119 allows for an exception to

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91 R.S.Q. c. P-13.1 [hereinafter “Police Act”].
92 R.S.Q. c. C-19 [hereinafter “Cities and Towns Act”].
93 R.S.C. 1985, c. C-46. Section 119 of the Police Act, supra, note 91, states:

119. Any police officer or special constable who is found guilty, in any place, of an act or omission referred to in subparagraph 3 of the first paragraph of section 115 that is triable only on indictment, shall, once the judgment has become res judicata, be automatically dismissed.

A disciplinary sanction of dismissal must, once the judgment concerned has become res judicata, be imposed on any police officer or special constable who is found guilty, in any place, of such an act or omission punishable on summary conviction or by indictment, unless the police officer or special constable shows that specific circumstances justify another sanction.

(Emphasis added)

This section relates to s. 115(3) of the Police Act, id., which reads:

115. To be hired as a police officer a person must meet the following requirements:

(3) not have been found guilty, in any place, of an act or omission defined in the Criminal Code (Revised Statutes of Canada, 1985, chapter C-46) as an offence, or of an offence referred to in section 183 of that Code under one of the Acts listed therein;
this general sanction. This exception was created to allow for less stringent discipline of police officers in cases where dismissal would be disproportionately harsh. It requires the police officer to demonstrate that another sanction should apply. In addition to the Police Act, the Cities and Towns Act also provides sanctions for municipal police officer misconduct. Subsection 116(6) of the Cities and Towns Act provides that individuals who have been convicted of an act that is punishable under a law of the Parliament of Canada or the Québec legislature and that entails a year’s imprisonment or more shall be disqualified from being an officer of the municipality. The disqualification lasts for five years. Furthermore, the disqualification applies only if the offence committed by the individual relates to the municipal office or employment that he or she holds. Because Mr. Belleau, the officer in question in City of Lévis, was a municipal police officer, both statutes could apply.

The labour arbitrator who heard Mr. Belleau’s grievance was therefore faced with two major issues to determine. The first was the question of determining whether the Police Act or the Cities and Towns Act should apply to the conduct of Mr. Belleau. A second question of the appropriate sanction to discipline Mr. Belleau’s conduct then had to be addressed. On judicial review, a further issue arose regarding whether these interrelated questions should attract two distinct standards of review.

The labour arbitrator held that the Police Act was the applicable law. His reasoning was based on the theory of statutory interpretation that maintains that a special law prevails over a general law when two laws are in conflict. As a consequence, the arbitrator determined that section 119, paragraph 2 had rendered subsection 116(6) of the Cities and Towns Act inapplicable to municipal police officers. In terms of applying the Police Act, the arbitrator determined that he had jurisdiction to consider the

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94 Subsection 116(6) of the Cities and Towns Act, supra, note 92, provides:

116. The following persons shall not be appointed to or hold any office as an officer or employee of the municipality:

. . . . .

(6) a person convicted of treason or of an act punishable under a law of the Parliament of Canada or of the Legislature of Québec, by imprisonment for one year or more.

Such disqualification shall continue for five years after the term of imprisonment fixed by the sentence, and, if only a fine was imposed or the sentence is suspended, for five years from the date of such condemnation, unless the person has obtained a pardon;

. . . . .

Disqualification from municipal office or employment under subparagraph 6 or 7 of the first paragraph shall be incurred only if the offence is in connection with such an office or employment.
circumstances surrounding the criminal acts and to determine if they
negated the requirement of a dismissal.\textsuperscript{95} He held that there were indeed
special circumstances warranting a lesser sanction. The arbitrator therefore
set aside the municipality’s decision and ordered that the officer be
reinstated without compensation. In essence, the arbitrator’s order
amounted to a 16-month suspension without pay. Mr. Belleau had been
charged with offences relating to the careless storage of firearms in his
home. In the arbitrator’s view, these were “technical” offences. The
arbitrator took into consideration, in reaching its conclusion, that Mr.
Belleau had recently moved into the house where he was living, that it
was undergoing extensive renovations and that there was no place in the
house where firearms could have been safely stored. As regards Mr.
Belleau’s violence towards his spouse and the breach of his undertaking
not to communicate with her, the arbitrator held that although these
offences are serious, the expert medical opinion that he was in a morbid
state due to family problems and that he was intoxicated should be taken
into account. Finally, as for public perception, the arbitrator determined
that the public had been misinformed by the media of the circumstances of
the officer’s case. He was also of the opinion that the officer’s supervisors
and colleagues would regain confidence in him once they were informed
of the true circumstances. These attenuating factors helped the arbitrator
to reach the conclusion that Mr. Belleau should be reinstated but that he
should undergo a period of suspension without pay.\textsuperscript{96}

At the Superior Court of Québec, Lemelin J. determined that one
standard of review, patent unreasonableness, should apply to the entire
arbitral decision. Justice Lemelin held that the arbitrator’s decision that
the Cities and Towns Act was inapplicable constituted a reviewable error.
In his opinion, there was no indication by the legislature that it intended
to exclude municipal police officers from the reach of the Cities and
Towns Act. Justice Lemelin held that the Cities and Towns Act applied
and should have led the arbitrator to dismiss Mr. Belleau from his duties.
The Superior Court also found the arbitrator’s application of section 119,

\textsuperscript{95} In reaching this conclusion, the arbitrator held that his jurisdiction under s. 119, para. 2
was equivalent to an arbitrator’s jurisdiction in relation to disciplinary matters under the Québec
Labour Code, R.S.Q. c. C-27, s. 100.12(f).

\textsuperscript{96} The arbitrator considered other attenuating factors as well. These included the length of the
officer’s employment with the municipality, the lack of any previous disciplinary problems,
testimony by his ex-spouses that he was not a violent man by nature, the fact that the officer was off
duty when the offences occurred, the fact that he did not cause physical harm to his wife and that
there was no evidence of physical violence. Moreover, the arbitrator considered that Mr. Belleau had
recovered from his family and alcohol problems and that there was little risk of him re-offending.
paragraph 2 of the Police Act to be patently unreasonable. Justice Lemelin was of the view that the expert opinion led by the officer on the issue of his alcoholism was not convincing and should not have been accepted. He held that since the arbitrator’s conclusion on this point was central to his decision, it rendered his entire decision patently unreasonable.97

The union and the police officer appealed from the Superior Court decision to the Québec Court of Appeal,98 where the Court held that two different standards of review were necessary as the arbitrator’s decision raised separate questions. In the Court’s opinion, the question of whether the Cities and Towns Act and the Police Act are compatible attracted a reasonableness standard of review. The arbitrator’s decision rendered under section 119 of the Police Act, on the other hand, should be evaluated on a standard of patent unreasonableness. In reviewing the arbitrator’s decision, the Court of Appeal held that the arbitrator had not committed any reviewable errors. Like the arbitrator, the Court of Appeal was of the opinion that the two statutes were in conflict and that the Police Act should prevail. Its analysis was based on two presumptions of statutory interpretation: the first being that a new law is intended to prevail over an old law; the second being that a special law is intended to take precedence over a general one. As regards the application of the Police Act, the Court of Appeal was of the view that the arbitrator was entitled to consider the technical nature of the firearm offences and the officer’s family crisis in determining if any specific circumstances existed. The Court of Appeal held that the arbitrator’s finding regarding Mr. Belleau’s alcoholism did not play a central role in the arbitrator’s decision and was not in itself patently unreasonable. In the end, the Court of Appeal restored the arbitrator’s award.

The city appealed to the Supreme Court of Canada. The issues before the Court were the question of the appropriate standard or standards of review to apply, whether the arbitrator had chosen the correct statutes to govern the municipal police officer’s discipline and whether the arbitrator had committed a reviewable error in finding that the officer should receive a sanction other than dismissal under section 119, paragraph 2 of the Police Act. The majority of the Court held that this was a case in which more than one standard of review should apply. Moreover, it was held that the Cities and Towns Act and that the Police Act were in conflict and that the Police Act should take precedence in this case. Finally, the

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majority held that the arbitrator failed to take into account the gravity of the offences and the effect that they would have on public confidence. Consequently, the arbitrator committed a reviewable error in reaching the conclusion that there were specific circumstances warranting a sanction less serious than dismissal. Although all the justices were in agreement that the arbitrator’s decision could not be sustained, they presented three sets of concurring decisions. Justice Bastarache wrote the majority opinion in which MacLachlin C.J., Binnie and Charron JJ. concurred. Separate concurring reasons were penned by Deschamps and Fish JJ. Finally, Abella J. provided concurring reasons as well.

(a) Majority Concurring Reasons: Chief Justice McLachlin and Bastarache, Binnie and Charron JJ.

Writing for the majority, Bastarache J. started his analysis by addressing the standard of review. He held that two distinct standards of review were required for the separate concerns that arose in this case. Using the pragmatic and functional approach, Bastarache J. determined that the conflict of law question attracted a standard of correctness while the interpretation and application of the applicable law was reviewable on a standard of reasonableness.

Justice Bastarache offered useful theoretical guidance on how to determine when multiple standards of review should apply. He observed that the pragmatic and functional approach may lead to different standards of review for separate findings, although this is not always the case. Most frequently, administrative decision-makers called upon to construe statutes that are external to their enabling legislation, may face a different standard of review for the interpretation of the external question of law. On many occasions, interpretations of external legislation have been reviewed on a standard of correctness. However, Bastarache J. pointed out that this is not a hard and fast rule and that the appropriate standard of review will depend on a proper application of the pragmatic and functional approach.99

As a general principle, Bastarache J. indicated that the presence or absence of a privative clause will likely have the least influence on determining whether more than one standard of review are applicable.

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99 Although Bastarache J.’s comments on multiple standards of review in City of Lévis, supra, note 90, at para. 19 at times referred to the situation of arbitrators specifically, he appears to have been making observations that apply to administrative decision-makers generally.
This is because the presence or absence of a privative clause is generally the same for all aspects of an administrative decision. More important to the analysis of determining whether multiple standards apply, is whether there exist questions of different natures and whether those questions engage the decision-maker’s expertise and the legislative objective in different ways.

Ultimately, the question of determining whether more than one standard of review applies to a decision comes down to a question of balancing. Justice Bastarache warned that the possibility of multiple standards “should not be taken as a licence to parse an administrative decision into myriad parts”.\textsuperscript{100} On the other hand, reviewing courts must be careful not to envelop distinct questions into one broad standard of review. As well, while it may not always be easy to separate individual questions from the entire decision, multiple standards of review should be adopted “when there are clearly defined questions that engage different concerns under the pragmatic and functional approach”.\textsuperscript{101}

Once the majority had determined the appropriate standard of review, the more substantive questions regarding the appropriate law to apply to the municipal police officer was addressed. In reaching the conclusion that section 119, paragraph 2 of the \textit{Police Act} and subsection 116(6) of the \textit{Cities and Towns Act} conflict, the majority was of the opinion that there is a clear zone where the practical effect of the two statutory provisions could not be reconciled. For many of the same offences, the \textit{Police Act} might allow a police officer to maintain his employment with the municipality if he or she can show specific circumstances where the \textit{Cities and Towns Act} cannot. Justice Bastarache held that the application of the \textit{Cities and Towns Act} would necessarily preclude the application of the exception in the \textit{Police Act}. As a consequence, this situation is one in which “one enactment says ‘yes’ and the other says ‘no’”.\textsuperscript{102}

In determining that the \textit{Police Act} should prevail, the majority sought to ascertain the legislature’s intent. Because there was no express indication of which law should prevail, the majority also relied on the two presumptions of statutory interpretation: that more recent laws should prevail over earlier laws and that special laws should take precedence over general ones. The \textit{Police Act} was both more recent and more specific.

\textsuperscript{100} \textit{City of Lévis}, \textit{id.}, at para. 19.

\textsuperscript{101} \textit{Id.}

Furthermore, the majority noted from the legislative debates that the exception for specific circumstances was created to meet the concerns of police associations who believed that it may not always be fair to dismiss a police officer convicted of a hybrid offence. Applying subsection 116(6) of the Cities and Towns Act to municipal police officers who have committed hybrid offences would undermine this objective.\(^{103}\)

As for whether “specific circumstances” existed in this situation, the majority held that they did not. The majority asserted that in determining whether specific circumstances exist, it is important to take into account the special role of police officers and the effect of a criminal conviction on their capacity to carry out their functions. The majority did not share the arbitrator’s opinion that the firearm offences could be attributed to Mr. Belleau’s personal problems or characterized as technical offences. More important in the majority’s view was Mr. Belleau’s breach of undertaking with the court not to communicate with his spouse. This showed a lack of respect for the judicial system of which he was an integral part. In sum, the arbitrator failed to weigh properly the effect of the police officer’s criminal conduct on his ability to carry out his duties as a police officer. This had a negative impact on the rationality of the arbitrator’s decision. Moreover, the arbitrator failed to take into account the seriousness of the offences committed by the police officer and the effect that they would have on public confidence. In sum, the arbitrator’s

\(^{103}\) Justice Bastarache dismissed three arguments made by the city as to why the Cities and Towns Act should prevail. The first was that the Police Act contained no express exclusion of the Cities and Towns Act. The Cities and Towns Act had been modified several times after the Police Act had been enacted. However, on none of these occasions did the legislature modify the application of ss. 116(6). Justice Bastarache did not find this line of reasoning persuasive. In his opinion, since there was no express legislative intent whatsoever, it could just as easily be said that s. 119 of the Police Act was intended to apply to all police officers without distinction. The second argument was that the legislative debates surrounding s. 119, para. 2 of the Police Act did not mention ss. 116(6) of the Cities and Towns Act. The city argued that this was also evidence that the Cities and Towns Act was to take precedence over the Police Act. By contrast, Bastarache J. held that this seemed to be further evidence that the legislature intended s. 119, para. 2 of the Police Act to apply equally to all police officers. He reasoned that if municipal police officers were to be excluded, one would expect that this point would have been raised in the legislative discussions. Finally, the city argued that allowing the Police Act to prevail over the Cities and Towns Act would create two classes of municipal employees with municipal police officers being treated more leniently than other municipal employees. In Bastarache J.’s view, however, this was an unfounded concern. It did not speak to the fact that the opposite situation allowing the Cities and Towns Act to prevail would also create two classes of police officers which may be contrary to the intention behind s. 119 of the Police Act. He also noted that municipal police officers were treated differently from other police officers before the enactment of s. 119, para. 2 of the Police Act because ss. 116(6) specified that disqualification would only be incurred if the offence was in connection with the municipal office held. He also disagreed that municipal police officers would be treated more leniently if the Police Act were to prevail since they are required to show specific circumstances.
conclusion that the specific circumstances raised by the officer were sufficient to satisfy the exception in section 119 of *Police Act* was unreasonable.

(b) *Minority Concurring Reasons: Justices Deschamps and Fish*

Justices Deschamps and Fish agreed with Bastarache J.’s conclusion that the *Police Act* applied to the facts of the case. Implicitly, they also agreed with the standards of review proposed by Bastarache J. However, they did not agree that the *Police Act* and the *Cities and Towns Act* conflict.

In the opinion of Deschamps and Fish JJ., this was not a situation in which one enactment says “yes” and the other says “no”. It was possible to reconcile the two statutes, especially when there are no specific circumstances to justify a sanction other than dismissal.104

(c) *Minority Concurring Reasons: Justice Abella*

Justice Abella agreed with Bastarache J.’s conclusion that the *Police Act* and the *Cities and Towns Act* conflict and that the *Police Act* should prevail in these circumstances. She took issue, however, with Bastarache J.

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104 Justices Deschamps and Fish offered the following three scenarios as a full answer to the contention that s. 119, para. 2 of the *Police Act* and ss. 116(6) of the *Cities and Towns Act* could not apply concurrently (see *City of Lévis*, supra, note 90, at para. 91):

1. Where a municipal police officer commits an indictable offence. In such a case, the first paragraph of s. 119 P.A. provides that dismissal from the police force is automatic. Section 116 C.T.A. imposes a five-year disqualification from employment by the municipality except where the offence is not in connection with the office or employment. (This exception implicitly does not apply to police officers because there will generally be a connection between the commission of an indictable offence and employment as a police officer.) After five years, the dismissed officer is still ineligible, under s. 115 P.A., to be rehired as a police officer, but can be hired as a municipal employee in any other capacity. There is no conflict under this scenario, and both laws can apply concurrently.

2. Where a municipal police officer commits a crime that is a hybrid offence punishable by imprisonment for one year or more and there are no specific circumstances that justify a sanction other than dismissal. Both laws can apply concurrently in the same manner as in scenario (1).

3. Where a municipal police officer commits a crime that is a hybrid offence punishable by imprisonment for one year or more but there are specific circumstances that justify a sanction other than dismissal from employment as a police officer. In this case, the officer is not dismissed from the municipal police force but, in light of s. 116 C.T.A., is nonetheless disqualified for five years from employment by the municipality. After five years, however, the officer requalifies as an employee of the municipality. During the five years of disqualification, the officer can work as a police officer for the Sureté du Québec or as a special constable, or can work for a municipality in any capacity where the offence is not in connection with the office or employment. The two laws can apply concurrently.
J.’s analysis and conclusion regarding the standard of review. In Abella J.’s opinion, only one standard of review should apply to both the arbitrator’s decision regarding which law to apply and to his application of the law.

Unlike Bastarache J., who held that the absence or presence of a privative clause will assist little in an analysis of whether more than one standard is necessary, Abella J. placed significant emphasis on the privative clause in determining the appropriate standard(s) of review. Justice Abella pointed out that the Labour Code contained an unequivocal privative clause that bound the parties with no appeal. She noted also that an arbitrator acting within his or her jurisdiction under the Labour Code had the power to “interpret and apply any Act or regulation to the extent necessary to settle a grievance”. In Abella J.’s opinion, these were clear legislative indications that should be taken into account in any assessment of the degree of deference owed to an arbitrator. Moreover, she considered that the expertise of the arbitrator in labour disputes and the legislative intent of having them resolved quickly and with finality were factors that militated towards an integrated standard of review.

Justice Abella warned against the unduly interventionist approach that could result from the desire of reviewing courts to parse routinely the mandate of administrative decision-makers. In her opinion, such an interventionist approach was more in line with the older doctrine of collateral question than with the more modern and deferential approach espoused by the pragmatic and functional approach. She asserted that issues that are legitimately and necessarily intertwined with an adjudicator’s mandate and expertise should lead to the decision being reviewed as a whole “not as a segmented compilation subject to an increased degree of scrutiny and intervention”. On the other hand, legal issues that are genuinely external to the adjudicator’s mandate or expertise and easily differentiated from other issues in the case may legitimately attract heightened scrutiny.

In this particular case, however, the labour arbitrator’s mandate and expertise entitled him to a single deferential standard of review. This standard, which she seems to agree was reasonableness, should apply both to his decision regarding the scope of the relevant legislation and its application. The question of parsing administrative decisions to determine

105 See supra, note 71.
106 See City of Lévis, supra, note 90, at para. 108 where Abella J. cites ss. 100.12(a) of the Labour Code.
107 Id., at para. 112.
if multiple standards of review should apply is one that was taken up again in *Council of Canadians with Disabilities v. Via Rail Canada Inc.*

### 2. *Council of Canadians with Disabilities v. Via Rail Canada Inc.*

Decided the day after *City of Lévis*, *Via Rail* also addressed the question of when a single standard of review should apply. This time, however, unlike *City of Lévis*, it was held that one single standard of review should apply although the decision in question arguably contained several parts. *Via Rail* is a rich decision that addresses standard of review, human rights (specifically, the duty to accommodate passengers with abilities) and the validity of voluntary codes within administrative contexts. This discussion will restrict itself to the primarily administrative law debate that took place over how to decide when multiple standards of review should apply.

*Via Rail* dealt with the review of a decision of the Canadian Transportation Agency (“CTA”, “agency”). The agency had held that Via Rail’s purchase of a new set of rail cars (the “Renaissance cars”) had not been properly modified to meet accessibility standards for persons with disabilities. Under the 1998 *Code of Practice—Passenger Rail Car Accessibility Terms and Conditions of Carriage by Rail of Persons with Disabilities* (“Rail Code”), a voluntary code of conduct that Via Rail (“VIA”) had negotiated and to which it agreed, new rail cars undergoing major refurbishment were required to be designed to allow passengers with disabilities to use their personal wheelchairs on the train. The Council of Canadians with Disabilities applied to the agency under the *Canada Transportation Act*. It argued that 46 features of the Renaissance cars constituted undue obstacles to the mobility of persons with disabilities. The Council relied in part on VIA’s alleged non-compliance with the Rail Code.

VIA argued that the Rail Code standards that were relevant were those applicable to *existing* cars. VIA submitted that the Renaissance cars met these standards and that it was not required to retrofit them to improve accessibility. Throughout the agency’s inquiry, VIA was less than cooperative, filing incomplete data and rendering the agency’s inquiry difficult to accomplish. On March 27, 2003, the agency issued a preliminary decision that took the form of a “show cause” order. Through this order, VIA was asked to show cause by May 26, 2003, why obstacles

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109 S.C. 1996, c. 10 [hereinafter “*Transportation Act*”], s. 172. See also s. 5.
that the agency had identified as undue obstacles were not in fact undue obstacles. In April 2003, VIA sought leave to appeal from the preliminary order. In August 2003, VIA indicated to the agency that it did not intend to comply with its preliminary order. VIA asked the agency for an oral hearing, if necessary, or for the agency to render its decision in final form.

The agency rendered its final decision on October 29, 2003 based on the record it had before it. The agency ordered Via Rail to implement six remedial measures, five of which involved making physical changes to the Renaissance cars. Via Rail appealed to the Federal Court of Appeal. With its application for appeal, it submitted a commissioned cost estimate dated less than 40 days after the agency’s final decision.

The majority of the Federal Court of Appeal was of the opinion that more than one standard should apply.\textsuperscript{110} For what was termed the “jurisdictional question”, the majority held that correctness was the appropriate standard. The question was whether the CTA possessed the authority to inquire into whether undue obstacles exist when no disabled individual had in fact encountered an undue obstacle to mobility. All factors of the pragmatic and functional test militated towards less deference being shown to the agency. Although there was no privative clause \textit{per se}, the Court of Appeal relied on its past jurisprudence which had held that a lower level of deference is necessary for questions coming through the statutory right of appeal available for the CTA. The relative expertise of the agency was less than that of the Court on this, a question of statutory interpretation. Moreover, the provisions of the \textit{Canada Transportation Act} to be interpreted had a human rights aspect which did not fit naturally with the agency’s primary function of implementing regulatory provisions. Finally, as the nature of the question was statutory interpretation, less deference was to be owed.

With respect to the interpretation of the \textit{Canada Transportation Act}, the question of whether the obstacles were undue and the balancing of interests to be done as part of this analysis was held to attract a very high level of deference. The Federal Court of Appeal was unanimous that the standard of patent unreasonableness should apply. Applying the pragmatic and functional approach, the agency was held to have more expertise in regulatory matters; the nature of the question was polycentric;

\textsuperscript{110} Justice Evans concurred with the majority that the standard of patent unreasonableness should apply to the interpretation of the statute. He made no comment on whether a separate standard should apply to the question of whether the agency’s jurisdiction was limited to concrete fact situations.
there was a strong privative clause and the questions addressed were of mixed fact and law.

In Via Rail, Abella J., who had asserted her ideas about the dangers of courts routinely segmenting administrative tribunal decisions and applying different standards of review to their component parts in City of Lévis, garnered the support of the majority on this point. Writing on behalf of McLachlin C.J. and Bastarache, Lebel and Charron JJ., Abella J. held that the agency’s decision as a whole was most appropriately decided on a patent unreasonableness standard. In the majority’s view, the issue of whether the agency had the power to determine if an undue obstacle existed without an underlying factual basis was not a preliminary jurisdictional question falling outside of the agency’s expertise. Consequently, Abella J. held that this question should not be subject to a different standard of review.

(a) Commentary

Justice Abella’s analysis is particularly refreshing in its re-assertion of an approach to determining standard of review that privileges legislative intent. Justice Abella reasons that labelling as “jurisdictional” and subjecting to a correctness standard a decision of an administrative body when that decision flows naturally from provisions of its enabling statute, will only lead to diminishing the role of tribunals to fact-finding. For Abella J., this approach threatens the specialized expertise which is foundational to tribunals and to the deference that they are owed.111 In this regard, Abella J. cautions that such an approach “has the capacity to unravel the essence of the decision and undermine the very characteristic of the Agency which entitles it to the highest level of deference from a court — its specialized expertise”.112 Adopting such a stance of wide curial review also encourages courts to overlook the expertise that a tribunal may bring to the exercise of interpreting its enabling legislation and defining the scope of its statutory authority.113

111 Via Rail, supra, note 108, at para. 88.
112 Id.
At the same time, one can foresee difficulties in applying Abella J.’s approach. For example, while the approach works very well in situations like Via Rail where the human rights related provisions are embedded in the enabling statute, it may be more difficult to demonstrate that the interpretation of the provisions that are inextricably linked with a decision-maker’s decision that stem from a different piece of legislation should share the same degree of deference.114 This issue is raised at a particularly interesting time in light of the decision of Tranchemontagne115 discussed earlier. To use Tranchemontagne as an example, the majority held that any administrative body should be able to determine if a provision of its enabling statute that it is mandated to administer is discriminatory under the Ontario Human Rights Code. There will be situations similar to Tranchemontagne where this question (whether the provision restricting admissibility for social benefits) is intimately linked the overall finding of the case (whether benefits should be awarded). Should such a question be subject to a correctness standard as a preliminary jurisdictional issue or is it so connected to the work of the social benefits tribunal in that particular decision that one could argue for integrated standard of review?

As well, there is the more obvious and practical challenge of reconciling this case with City of Lévis, decided just the day before Via Rail. In City of Lévis, the majority of the Court had supported the use of multiple standards of review. Unfortunately, the two decisions do not refer to each other, leaving their eventual reconciliation to future case law.

Undoubtedly, questions surrounding integrated versus multiple standards of review and when each one should be applied are certain to recur. This issue is also timely as it connects with other questions relating to standard review, such as the question raised by Lebel J. in Toronto (City) v. C.U.P.E., Local 79116 about whether three standards are necessary or whether two will suffice. Like exclusive and concurrent jurisdiction, the issue of integrated versus multiple standards of review raises questions of the appropriate way to discern and follow legislative intent.

114 This question has been discussed in the past. See, for example, Canadian Broadcasting Corp. v. Canada (Labour Relations Board), [1995] S.C.J. No. 4, [1995] 1 S.C.R. 157.
115 See supra, note 4.
V. CONCLUSION

Human rights matters have played a significant role in driving the developments in administrative law over the past two terms. By far, there was a strong emergence of cases in the 2005-2006 and 2006-2007 terms that touched on the relationship between administrative law and human rights principles. As well, questions of exclusive and concurrent jurisdiction continued to plague the court. Finally, particularly in the 2006-2007 term, one saw a stringent debate arise over whether integrated or multiple standards of review best served the purpose of pursuing legislative intent.