Analyzing Problems of Exclusive and Concurrent Jurisdiction

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Introduction

Jurisdiction, as most students of civil procedure will tell us, refers to the power and authority of a tribunal, whether a court or an administrative decision-maker, to hear and resolve a dispute brought before it. Typically, jurisdictional issues arise when one party to the dispute contests the plaintiff or applicant's choice of forum. To resolve this threshold question, the tribunal must determine whether it possesses jurisdiction over the parties (personal jurisdiction) and jurisdiction over the class of case into which the dispute falls (subject matter jurisdiction).

This essay focuses on subject matter jurisdiction. It does so by a close reading of two Supreme Court of Canada cases, *Tranchemontagne v. Ontario (Director, Disability Support Program)*[1] and *Bisaillon v. Concordia University*,[2] both rendered during the Court's 2006 term. Its aim is to unpack these cases for what they can teach us about the Supreme Court's evolving approach to analyzing jurisdictional issues.

To this end, this paper proceeds in three parts. Part I provides an overview of the two Supreme Court cases and their respective holdings. Parts II and III then evaluate the reasoning in *Tranchemontagne* and *Bisaillon* and attempt to draw out implications for the future. Finally, the paper briefly concludes.

Given the shortcomings and uncertainties of the approaches in *Tranchemontagne* and *Bisaillon*, these cases will not likely be the last word from the Supreme Court on the subject of how to analyze problems of exclusive and concurrent jurisdiction. Rather, they represent only one phase in the Court's evolving post-*Weber*[3] jurisdictional jurisprudence.

I. An Overview of the Cases

In *Tranchemontagne*, the Supreme Court held that Ontario's Social Benefits Tribunal possessed concurrent jurisdiction to consider and apply the Ontario *Human Rights Code*[4] as part of its adjudication of whether the applicants were entitled to benefits. By contrast, in *Bisaillon*,

the Court ruled that the Quebec Superior Court lacked jurisdiction to hear the plaintiff's complaint concerning the university's alleged maladministration of its pension fund. Below, I examine the procedural background and judicial reasoning of each case in turn.

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

The appellants, Tranchemontagne and Werbeski, applied to the Ontario Disability Support Program for financial support on grounds of disability (back pain, alcoholism and seizures on the part of Tranchemontagne; alcohol and drug dependencies along with various psychological conditions on the part of Werbeski). Under s. 5 of the *Ontario Disability Support Program Act*,[5] ("the Act") both were denied support because of their dependency on alcohol.

Following an unsuccessful internal appeal, they appealed to the Social Benefits Tribunal ("SBT"), arguing that, under Ontario's *Human Rights Code*,[6] alcoholism was a disability, that denying them support because of their dependency constituted disability discrimination, and that the Code should be given primacy over the Act. The Tribunal rejected their appeals, holding that it had no jurisdiction to interpret and apply the Code. And the Divisional Court agreed.[7]

A unanimous panel of the Court of Appeal affirmed the result reached in the Divisional Court but offered different reasons.[8] While deciding that the Tribunal had power to declare a provision of the Act inapplicable if it was discriminatory, the Court of Appeal nevertheless held that the Tribunal was not the most appropriate forum in which to determine the Code issue.

The Supreme Court reversed. Writing for the majority,[9] Justice Bastarache held both that the SBT possessed the jurisdiction to apply the *Human Rights Code* and that it ought to have exercised this jurisdiction in the circumstances. To determine the jurisdictional issue, he turned to the text of the Tribunal's enabling legislation. In the legislation, he found that the Tribunal possessed the power to decide legal questions, a conclusion confirmed by the fact that an appeal lay to the Divisional Court on a question of law.[10] From this ability to decide points of law flowed a presumption that the Tribunal could apply any legal source, even if external to the enabling legislation, in order to decide the dispute before

it. In Justice Bastarache's view, fragmentation of legal sources was not desirable.[11]

According to Justice Bastarache, the presumption was not displaced either by the fact that the Tribunal was limited to making decisions originally open to the Director or because the SBT lacked the power to consider *Charter* issues.[12] Had the legislature wanted to restrict the SBT from applying the Code, he reasoned that it would have done so explicitly, as it had done in the case of the *Charter*.[13] He noted that the legislature itself made the Code supreme over other legislation and removed the Human Rights Tribunal's exclusivity over human rights adjudication.[14] Once a matter fell within the SBT's jurisdiction, Justice Bastarache held that it could not decline to decide the matter as the legislature provided no statutory mechanism to decline jurisdiction.[15]

Justice Abella dissented.[16] She began from the position that it was significant that the legislature had specifically excluded constitutional issues from the SBT's jurisdiction.[17] In her view, this evinced an intention on the part of the legislature to exclude from the SBT's consideration all matters relating to the inoperability of provisions in its enabling legislation. She emphasized that the case was not about the primacy of the Code but, rather, about the forum in which to initiate a challenge based on the Code.[18] It was not fatal that the statute did not mention the Code, as the Code and the *Charter* overlap, both remedially and conceptually.[19] Moreover, Abella J. observed that the Director and the SBT are not institutionally well placed to decide such questions[20] and that increasing the jurisdiction of the SBT may well frustrate its ability to achieve its statutory mandate.[21]

B. *Bisaillon v. Concordia University*

At the heart of *Bisaillon* was the pension established by Concordia University in 1977 to replace the pension schemes existing at the university's predecessor institutions. Bisaillon, a unionized employee, alleged maladministration relating to contribution holidays, administrative charges and early retirement provisions, as well as changes through which the university made claims to the surplus assets of the plan upon termination.[22] The pension covered both unionized employees (in nine separate bargaining units) and non-unionized employees alike.[23] In seeking to institute the class action, Bisaillon wanted to force Concordia to pay back some $71 million in allegedly wrongfully appropriated funds.

One of the nine unions, Concordia University Faculty Association (CUFA), had come to an agreement with the university over the impugned pension measures. Consequently, CUFA moved before the Superior Court for an order dismissing the action for want of jurisdiction. According to CUFA, the dispute was within the exclusive jurisdiction of a grievance arbitrator and the proposed class action interfered with the certified unions' representative function. Accordingly, CUFA argued that Bisaillon had to use the grievance mechanism provided for by the applicable collective agreement to resolve his complaint. Agreeing that the pension plan was a benefit provided for by the collective agreement, the Superior Court acceded to CUFA's motion.[24]

The Court of Appeal reversed.[25] The Court of Appeal noted that the pension plan did not depend on any one collective agreement. According to the court, even a grievance arbitrator appointed under a collective agreement would not have the necessary jurisdiction to hear all the claims raised in the class action, given the presence of eight other collective agreements as well as non-unionized employees. The Court of Appeal reasoned that, in the circumstances, the Superior Court should have exercised its residual jurisdiction. Furthermore, the Court of Appeal noted that the Superior Court had exclusive jurisdiction over class actions.

On further appeal, the Supreme Court reversed. Writing for the majority, Justice LeBel[26] began by observing that the class action legislation is purely procedural and not jurisdiction conferring.[27] He agreed with lower court precedent that issues relating to a pension scheme referenced in a collective agreement at least implicitly arose out of a collective agreement where the employer had agreed to continue a particular plan.[28] The possibility that the identical issue would arise under multiple agreements, LeBel J. held, was not in itself sufficient to trigger the exceptional residual jurisdiction of the superior court[29] To permit the action to proceed in a representative capacity, he reasoned, would offend the exclusive nature of the arbitrator's jurisdiction and the union's monopoly on representation.[30] Thus, for employees in each of the bargaining units, the complaints of pension maladministration fell under the exclusive jurisdiction of an arbitrator. As the pension was a condition of employment, they could not act on an individual basis, independent of the union.[31]

Justice Bastarache dissented.[32] While the majority focussed on the form of the action and fundamentals of labour law, the dissent concentrated on the specific features of the particular plan. According to

Bastarache J., a labour arbitrator would have exclusive jurisdiction over the dispute only "if the essential character of the respondent's claim can properly be reduced to a matter arising out of a single collective agreement, concluded between a single union and the employer."[33] Bastarache J. observed that it is possible for a unionized employee to have employment-related rights that did not fall within an arbitrator's exclusive jurisdiction.[34] He insisted that more than a simple link to the collective agreement needed to be shown.[35] Here, the pension plan was a single, indivisible entity that was not the result of bilateral negotiation between a union and the employer.[36] In fact, the plan predated the collective agreements. The essence of the dispute, Bastarache J. concluded, resulted from the plan and its terms, not a particular collective agreement or set of agreements.[37] To hold otherwise, he maintained, would create the spectre of multiple proceedings and inconsistent results.

What implications flow from these two Supreme Court decisions? I take up this question in the remainder of the paper.

II. Concurrent Jurisdiction and *Tranchemontagne*

I want to focus attention on two aspects of *Tranchemontagne*. First, we need to scrutinize the consequences of a presumption associated with the ability of a statutory delegate to decide questions of law—namely, that in addition to the enabling statute, the delegate may apply external legal sources relating to the dispute. This presumption is the source of the concurrency in the case. Second, we need to look at the tools that *Tranchemontagne* leaves available to manage the concurrency that results from the presumption.

A. The Presumption Associated with the Power to Decide Legal Questions.

Bastarache J. set out the task before him in seemingly straightforward terms when he pronounced:

> Ultimately, however, 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.[38]

The task he set for himself was to examine and logically follow the statutory scheme. Justice Abella too framed her project in terms of legislative intent:

> It [the case] is about statutory interpretation. Specifically, 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*.[39]

Although both judges purported to be in search of legislative intent, they parted company over the method to employ to discern the legislature's intent. These differences are reflected in their respective approaches to the presumption associated with the ability to decide legal questions and, more particularly, in the circumstances they each require to displace the effects of the presumption.

Under Justice Bastarache's approach to analyzing the jurisdictional issue, much of the heavy lifting is accomplished through the use of the presumption. From the ability to decide questions of law comes the presumption to apply external legal sources relating to the dispute. Justice Bastarache was no doubt motivated by good intentions. When the Supreme Court rendered its decision, the appellants had waited over five years to have their claims for disability support finally adjudicated. In the circumstances, timely, one-stop adjudication of the issues relating to their claim for benefits has some appeal.[40] After all, human rights protection should be accessible and effective.[41]

This approach has problems, however. First, the presumption has far-reaching consequences. Under it, every administrative decision-maker with adjudicative functions can be expected to possess the ability to decide questions of law. These agencies, which cover a myriad of contexts, would have the ability to consider and apply a wide range of external legal sources, yet this result is achieved without any particularized inquiry into the expertise and institutional features of these agencies. Applying the presumption so mechanically ignores crucial differences in agency design and practice. By treating all these agencies similarly when it comes to deciding questions of law, this approach departs from typical administrative law analysis which is particularly sensitive to such concerns.[42]

Moreover, Justice Bastarache's approach to implementing legislative intent—the presumption coupled with express subtractions from it[43]—does not fit comfortably with the text of many other statutes. As Justice Abella noted in dissent, statutes like the *Fire Protection and Prevention Act, 1997*[44] and the *Labour Relations Act, 1995*[45] expressly

confer on their decision-makers jurisdiction to consider external legal sources.[46]

Justice Bastarache reached the following conclusions respecting legislative intent:

> Thus the argument based on s. 67(2) is defeated because the legislature could not possibly have intended that the Code be denied application by analogy to the Constitution. While it clearly prohibited the SBT from considering the constitutional validity of laws and regulations, it equally clearly chose not to invoke the same prohibition with respect to the Code. In the context of this distinction, I must conclude that the legislature envisioned constitutional and Code issues as being in different "categor[ies] of questions of law"…[47]

For Justice Bastarache, then, only an explicit provision ousting Code jurisdiction would have sufficed to displace the presumption.

Thus, Justice Bastarache was able to distinguish between constitutional analysis and Code analysis in these terms:

> A provision declared invalid pursuant to s. 52 of the *Constitution Act, 1982* was never validly enacted to begin with. It never existed as valid law because the legislature enacting it never had the authority to pass it. But when a provision is inapplicable pursuant to s. 47 of the Code, there is no statement being made as to its validity. The legislature had the power to enact the conflicting provision; it just so happens that the legislature also enacted another law that takes precedence.[48]

My concern with Justice Bastarache's approach is that he combined a low threshold to invoke the presumption with a high threshold (an express statutory provision) to displace it. In my opinion, it would have been preferable to look at the structural features of the statutory scheme involved in order to determine the reach of the presumption. For example, Justice Abella identified structural features that made it inappropriate for the SBT to entertain human rights issues: the director does not grant oral hearings;[49] the decisions of the SBT are not public; and the SBT hearings are informal and often short.[50] She compared these features to those of the human rights process which provides for adversarial hearings and pre-hearing disclosure.[51] The SBT, it would appear, is not set up to handle the complexity of human rights issues. Moreover, assigning it this additional task might contribute to its backlog.[52]

Finally, Justice Bastarache's reliance on the provision establishing the primacy of the code is misplaced. He described the provision as follows:

> This section [s. 47(2)] provides not simply that the Code takes primacy over other legislative enactments, but that this primacy applies "unless the [other] Act or regulation specifically provides that it is to apply despite this Act [the Code]." Thus the legislature put its mind to conflicts between the Code and other enactments, declared that the Code will prevail as a general rule and also developed instructions for how it is to avoid application of Code primacy. Given that the legislature did not follow the procedure it declared mandatory for overruling the primacy of the Code, this Court is in no position to deduce that it meant to do so or that it came close enough. This is especially so given that the consequence of this deduction would be that the application of human rights law is curtailed.[53]

But as Justice Abella observed, the case is about where the challenge should be brought, not whether it can be brought.[54] All section 47 does is create a hierarchy among legal sources. It does not speak to the issue of who is responsible for enforcing the hierarchy. It is difficult to see how the provision supports Justice Bastarache's analysis of legislative intent or the appropriate reach of the presumption associated with the power to decide questions of law.

B. Managing Jurisdictional Overlap

Justice Bastarache's approach creates procedural difficulties. Because he could not find an express provision permitting the SBT to stay its process in favour of another forum, he concluded that the tribunal lacks such discretion:

> Accordingly, important as they may be to applicants and administrative bodies, factors like expertise and practical constraints are insufficient to bestow a power that the legislature did not see fit to grant a tribunal.[55]

Observe that Bastarache J. located the source of the procedural problem in the legislation itself.

The result is ironic. The concurrent jurisdiction in the case arises from the operation of a judicially created presumption associated with the ability to decide questions of law, not an express statutory provision. In the circumstances, it seems a bit surprising to insist that there must be an express power to stay proceedings. If the concurrency stems from a

judicial creation, the mechanism to deal with the overlap should likewise be a judicial creation. Bastarache J. could easily have concluded that the tribunal possessed an implied power to regulate its own process, which would include the power to stay its proceedings in favour of another forum.

Equally troubling are Justice Bastarache's comments on how an express stay provision should be interpreted, if such a provision were present. He commented:

> But tribunals should be loath to avoid cases on the assumption that the legislature gave them insufficient tools to handle matters within their jurisdiction. In those instances where the legislature does grant a tribunal the power to decline jurisdiction, the scope of this power should be carefully observed in order to ensure that the tribunal does not improperly ignore issues that the legislature intended it to consider.[56]

At one level, the statement can be taken to mean simply that the power to stay should be exercised with care so as not to frustrate legislative objectives. But the point is that there should be discretion, to be decided on a case-by-case basis, to determine the convenient forum. But Bastarache J. would seem to prejudge the exercise of such discretion when there is a vulnerable applicant:

> Where a tribunal is properly seized of an issue pursuant to a statutory appeal, and especially where a vulnerable appellant is advancing arguments in defence of his or her human rights, I would think it extremely rare for this tribunal to not be the one most appropriate to hear the entirety of the dispute.[57]

But this is discretion in name only since the tribunal's hands are essentially tied. Once again, the approach leaves no room for consideration of the relative expertise of the competing fora or other contextual factors typical of administrative law analysis.

In the end, the majority in *Tranchemontagne* endorsed an approach that gave rise to jurisdictional overlap but deprived administrative decision-makers of the tools with which to manage the overlap meaningfully.

III. Exclusive Jurisdiction and *Bisaillon*

A critical reading of *Bisaillon* reveals both the importance of deploying procedural concepts with care and the value of the procedural

perspective. I want to show how Procedure can provide useful insights into the Court's treatment of both the jurisdictional issue and the problem of multiple proceedings.

A. The Court's Jurisdictional Analysis

Consider, first, the manner in which LeBel J. stated the core issue in the case:

> This appeal raises the issue of the compatibility of the class action with collective representation mechanisms in labour law, with the system for applying collective agreements and with the procedure for resolving labour disputes through grievance arbitration. In short, can the class action be used to bypass the representation and grievance resolution mechanisms established under Quebec labour law?[58]

Framing the issue in this way conflates two distinct procedural questions: (1) whether the Superior Court has jurisdiction over the case as an initial matter and (2) whether the case should be brought in a representative capacity. Jurisdiction (the first question) precedes consideration of the form of the action (the second question). Until the Superior Court grants leave to proceed in a representative capacity, all Bisaillon has is an individual action, and he must establish jurisdiction on that basis. If he cannot establish subject-matter jurisdiction, the court has no ability to authorize a class action.

Next, consider the Court's characterization of the test from *Weber*. Although both the majority and dissent claimed fidelity to the *Weber* two-step test, they embraced markedly different conceptions of its reach. LeBel J. viewed *Weber* and its progeny expansively:

> 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.[59]

By contrast, Bastarache J. took a restrictive approach to the *Weber* line of cases:

> [T]he simple fact a dispute arises out of an employee's conditions of employment is insufficient to trigger the exclusive jurisdiction of the labour arbitrator. What is more, even where elements in a dispute arise specifically out of the collective agreement, the exclusive jurisdiction of

> the labour arbitrator will not arise unless the essential character of the claim arises out of the collective agreement. It is not enough to say that the employee would not be here but for this collective agreement. If the appellants are to succeed in the present appeal, they will need to go further than showing a mere connection between the respondent's claim and the provisions of the collective agreement.[60]

Here too Procedure can provide much needed insight. Both the majority and the dissent acknowledged that all of Concordia's enrolled employees, whether unionized or not, had a joint entitlement to participate in the pension plan. They merely differed as to the consequences that flowed from this fact. Neither group drew the connection to the law of joinder. For example, Under Rule 5 of the Ontario *Rules of Civil Procedure*[61] and its counterparts in other provinces, all "necessary parties" must be joined to a civil proceeding. Persons jointly entitled to the same property are the textbook examples of necessary parties. Careful consideration of the principles of compulsory joinder could have assisted in defining the contours of *Weber* and would have provided considerable support to Justice Bastarache's position.

B. The Court's Treatment of Multiple Proceedings

LeBel J. identified the following three options as ways to handle the problem of multiple proceedings and inconsistent results: (1) voluntary submission of the dispute to a single arbitrator by all the unions and the University; (2) mootness; and (3) compliance by the University with the most restrictive outcome.[62] None of these options is satisfactory.

First, it is unrealistic to rely on voluntary cooperation among the parties to a civil proceeding in order to resolve a jurisdictional problem. In *Bisaillon* specifically, it was unrealistic to expect cooperation among all the parties given the existing split among the unions as to the appropriate forum. Moreover, jurisdictional rules are necessary precisely in situations where, as here, the parties cannot agree on forum.

Second, it is hard to see how mootness can be an answer to the problem of multiple proceedings. LeBel J. argued that if a first arbitration ruled that the University had illegally taken money from the plan, subsequent arbitrations would become moot as the university would be forced to return the funds. That is not necessarily so. Suppose a second union not a party to the first arbitration contests not the substantive ruling pertaining to the lawfulness of the funds removed but the quantification of

damages awarded. Under these circumstances, there would still be an incentive for the second union to arbitrate. The incentive would only be removed if the first arbitrator awarded the largest possible sum.

Finally, the suggestion that the University should simply follow the most restrictive arbitral ruling does nothing to address the concern that the University not be twice vexed in relation to the same allegedly wrongful conduct. In this connection, the following statement from Justice LeBel is puzzling:

> There are a number of tools of civil procedure that can be used to resolve the problems caused by multiple proceedings. I see nothing from which to infer that arbitration could give rise to abuses of right through which the various unions would profit excessively from the procedure available to them.[63]

The situation, however, does not fit easily into the category of either issue estoppel or abuse of process. With respect to issue estoppel, although the Supreme Court has extended the doctrine to the administrative context,[64] it has insisted on the mutuality of the parties as a necessary requirement to invoke the doctrine. It would be difficult to argue that the nine separate unions should be treated as mutual parties. Nor does the case fall comfortably into the category of abuse of process. Thus far, the Court has used the doctrine to prohibit arbitrations that would bring into doubt the correctness of a prior criminal conviction.[65] To handle the problem of the multiplicity of proceedings resulting from the ruling in *Bisaillon* would involve expansion of the doctrine beyond its present confines.

The problem of multiplicity is increased by two other factors. First, strictly speaking, an arbitral ruling does not have precedential force; at best, its ruling would be persuasive.[66] Second, each arbitral award would be entitled to the highest degree of curial deference. In the past, the Supreme Court has held that the mere fact that two administrative decisions conflict will not justify judicial intervention under this standard.[67]

Justice LeBel downplayed the problem of multiple proceedings:

> The respondent has not demonstrated that a real possibility of such procedural chaos exists. It is not a foregone conclusion that confirming the jurisdiction of grievance arbitrators would automatically lead to multiple arbitration proceedings.[68]

As a result, LeBel J. found no need to have resort to the Superior Court's residual jurisdiction. With respect, this sets the standard too high. It is not clear how Bisaillon or another moving party in the same circumstance could meet this requirement. Such an evidential inquiry in the context of a jurisdictional motion is out of place, especially in jurisdictions where evidence is limited on jurisdictional motions. Whether in fact there will be multiple proceedings will turn on the intentions of the other parties and their respective strategies. Such information is not within the knowledge of the moving party. It would simply have been better for the Court to infer on the basis of the case pleaded whether there was a real possibility of inconsistent rulings, for that is the only way to safeguard the integrity of the civil justice system.

Conclusion

Both *Tranchemontagne* and *Bisaillon* create serious procedural problems. The result in *Tranchemontagne*, the majority reasoned, followed from the presumption associated with the ability to decide questions of law. As a consequence, the majority may have expanded the mandates of tribunals vested with the power to decide questions of law without giving thorough consideration to the institutional and resource limitations of such bodies. More perplexingly, the majority held that the tribunal had no discretion to decline jurisdiction. Thus, the majority created a situation of jurisdictional overlap but deprived the administrative tribunal of the very tools necessary to manage the overlap effectively.

Bisaillon, too, may produce unexpected consequences. For each unionized employee, the majority held that exclusive jurisdiction rested with an arbitrator under the terms of the applicable collective agreement, giving rise to the possibility of multiple proceedings and inconsistent awards. The majority correctly characterized the applicable class action legislation as procedural and not jurisdiction-conferring. However, the majority at times mistakenly conflated the issue of jurisdiction with the issue of whether the action should be brought in a representative capacity. The proposed class action, the majority emphasized, was inconsistent with basic labour law principles. But consideration of jurisdiction should precede the issue of forum. The majority, without any reference to authority, insisted that civil procedure possesses the necessary tools to sort out the problems of conflicting judgments. But procedure is not so equipped. Neither *stare decisis* nor *res judicata* provide a way out of the

dilemma caused by contradictory decisions. Consequently, resolution of the procedural problems from *Tranchemontagne* and *Bisaillon* will have to await the next phase in the Supreme Court's jurisdictional jurisprudence.

Endnotes

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[1] [2006] 1 S.C.R. 513 [*Tranchemontagne*].

[2] [2006] 1 S.C.R. 666 [*Bisaillon*].

[3] In *Weber v. Ontario Hydro*, [1995] 2 S.C.R. 929, the Supreme Court held that in order to determine whether a matter fell within a labour arbitrator's exclusive jurisdiction, one must consider the essential character of the dispute in its factual context and the language of the collective agreement in question. The scholarly commentary precipitated by the decision and its progeny is extensive. See the bibliographical note compiled by Garry D. Watson *et al.*, *Holmested and Watson: Ontario Civil Procedure*, looseleaf, vol. 3 (Toronto: Carswell, 1984) at 21–60 (commentary on Rule 21). On *Tranchemontagne*, *supra* note 2, and *Bisaillon*, *ibid.*, in particular, see Laverne Jacobs, "Developments in Administrative Law: The 2005–2006 and 2006–2007 Terms" (2007) 38 Sup. Ct. L. Rev. (2d) 55 at 71ff.

[4] R.S.O. 1990, c. H.19 [*Code*].

[5] *Ontario Disability Support Program Act, 1997*, S.O. 1997, c. 25, Sch. B, s. 5(2).

[6] *Supra* note 4.

[7] See *Werbeski v. Ontario (Director, Disability Support Program)*, [2003] O.J. No. 1409 (Div. Ct.) (QL).

[8] See *Werbeski v. Ontario (Director, Disability Support Program*) (2004), 72 O.R. (3d) 457 (C.A.).

[9] McLachlin C.J.C., Binnie and Fish JJ. concurred with Bastarache J.

[10] *Tranchemontagne*, *supra* note 1 at para. 23.

[11] *Ibid.* at para. 26.

[12] *Ibid.* at paras. 23–30.

[13] *Ibid.* at para. 3.

[14] *Ibid.* at paras. 38–39.

[15] *Ibid.* at para. 45.

[16] Joining with her were Le Bel and Deschamps JJ.

[17] *Tranchemontagne*, *supra* note 1 at para. 56.

[18] *Ibid.* at para. 69.

[19] *Ibid.* at paras. 82, 86.

[20] *Ibid.* at para. 87.

[21] *Ibid.* at para. 91.

[22] *Ibid.* at paras. 3, 8.

[23] *Ibid.* at para. 3.

[24] See *Bisaillon c. Concordia University*, J.E. 2003-1294, [2003] J.Q. No. 4279 (S.C.) (QL).

[25] See *Bisaillon c. Concordia University*, J.E. 2004-853, [2004] J.Q. No. 3238 (C.A.) (QL).

[26] Deschamps, Abella, and Charron JJ. joined with LeBel J. to form the majority.

[27] *Bisaillon*, *supra* note 2 at paras. 7, 22.

[28] *Ibid.* at para. 37.

[29] *Ibid.* at para. 41.

[30] *Ibid.* at para. 46.

[31] *Ibid.* at para. 56.

[32] McLachlin C.J.C and Binnie J. joined Bastarache J. in dissent.

[33] *Bisaillon*, *supra* note 2 at para. 78.

[34] *Ibid.* at para. 72.

[35] *Ibid.* at para. 73.

[36] *Ibid.* at para. 80.

[37] *Ibid.* at para. 88.

[38] *Tranchemontagne*, *supra* note 1 at para. 12.

[39] *Ibid.* at para. 56.

[40] *Ibid.* at para. 48.

[41] *Ibid.* at para. 47. In this regard, Justice Bastarache was also motivated by the Supreme Court of Canada decision in *Nova Scotia (Workers' Compensation Board) v. Martin*, [2003] 2 S.C.R. 504.

[42] See, for example the extensive standard of review jurisprudence of the Supreme Court which it recently reviewed and significantly reformulated in *Dunsmuir v. New Brunswick,* 2008 SCC 9.

[43] *Tranchemontagne*, *supra* note 1 at paras. 40–41.

[44] S.O. 1997, c. 4, s. 53(9)(j).

[45] S.O. 1995, c. 1, Sch. A, s. 48(12)(j).

[46] *Tranchemontagne*, *supra* note 1 at para 94.

[47] *Ibid.* at para. 32.

[48] *Ibid.* at para. 35.

[49] *Ibid.* at para. 88.

[50] *Ibid.* at para. 89.

[51] *Ibid.* at para. 2.

[52] *Ibid.* at para. 90.

[53] *Ibid.* at para. 38.

[54] *Ibid.* at para. 69.

[55] *Ibid.* at para. 47.

[56] *Ibid.* at para. 50.

[57] *Ibid.*

[58] *Bisaillon*, *supra* note 2 at para. 13.

[59] *Ibid.* at para. 33.

[60] *Ibid.* at para. 73.

[61] *Ontario Rules of Civil Procedure*, R.R.O.1990, Regulation 194, rule 21 "Determination of an Issue before Trial."

[62] *Bisaillon*, *supra* note 2 at para. 60.

[63] *Ibid.* at para. 61.

[64] See *Danyluk v. Ainsworth Technologies Inc.,* [2001] 2 S.C.R. 460.

[65] See *Toronto (City) v. C.U.P.E., Local 79*, [2003] 3 S.C.R. 77.

[66] The arbitral award of Professor Bora Laskin, as he then was, in *Brewers' Warehousing Co. Ltd. and Int'l Union of Brewery, Flour, Cereal, Malt, Yeast, Soft Drink & Distillery Workers of America, Local 278C* (1954), 5 L.A.C. 1797 is the classic statement of the principle.

[67] See *Domtar Inc. v. Quebec (Commission d'appel en matière de lésions professionnelles)*, [1993] 2 S.C.R. 756.

[68] *Bisaillon*, *supra* note 2 at para. 60.