

Conclusions

David MULLAN*

My initial exposure to many of the papers in this volume came at several of the Roundtables, both national and regional, staged by the Canadian Institute for the Administration of Justice. On a number of those occasions, I acted as rapporteur charged with bringing together the various strands of the proceedings and desirably providing added value through insights and perspectives. I always found that a difficult assignment. That was no fault of the papers that formed the basis for the Roundtable. They were invariably excellent—rich in data, analysis and prescription. Rather, the challenge was that of distilling not only the authors' presentations but also the insightful and, on occasion, provocative interventions that had enlivened and enriched the proceedings.

The challenge in writing the concluding essay to this accumulation of those papers is of a rather different order. They cover a wide swath of current issues in administrative law and process. Common themes and organizing principles do not come readily to mind. That is in no way to criticize the endeavour. Indeed, it would be hard to find a better illustration of the range of the challenges and opportunities that characterize early 21st century Canadian administrative law and process, not to mention the variety of approaches that current “practitioners” bring to their work in this field, as well as the maturation and increased sophistication of scholarship in this whole area. After a lengthy hiatus, it is also very reassuring to see in the paper by Lorne Sossin and France Houle, “Tribunals and Policy-Making,” the first signs of a rebirth of collaborative research, in traditional and general administrative law and process, between scholars from Quebec and the rest of Canada.

In the 1970s, as part of the important work performed by the Law Reform Commission of Canada in its original incarnation, administrative law scholars and practitioners prepared a series of reports on how federal regulatory agencies and tribunals actually functioned. It was also during this period that Philip Anisman produced his monumental catalogue and distillation of federal discretionary powers.¹ All of this seemed to augur well for the future of empirical research on the functioning of the

administrative process. However, at least in the case of general administrative law scholars, and particularly in English Canada, this form of research was sporadic.²

One notable exception was France Houle, and her study of the functioning of the Documentation Centre at the Immigration and Refugee Board.³ This presaged an academic career in which she has most successfully managed to combine the three elements that are core to the understanding and development of administrative law and process as a viable, self-contained discipline: the theoretical, the empirical and the doctrinal.

While Professor Houle's paper with Lorne Sossin is more theoretical and doctrinal than empirical in its orientation, this volume does contain one very significant contribution that not only is the product of empirical research but also provides valuable insights on designing empirical studies for assessing the performance of an aspect of the administrative process. This is Philip Bryden and William Black's "Designing Mediation Systems for Use in Administrative Agencies and Tribunals—The B.C. Human Rights Experience"⁴ and is the second article that these two have authored based on the study of the operations of an imaginative innovation in the delivery of mediation services.⁵

Too often, I suspect, any sense whether a particular administrative process is functioning effectively and to maximum advantage depends on a combination of random experience, anecdotal evidence, and informed intuition. Obviously, all three of these are a poor substitute for real understanding as garnered through reliable social science empirical methodology. Dean Bryden and Professor Black are only too conscious of that. As a consequence, their work is not only presumably of considerable value to those with responsibility for the effective functioning of mediation systems within human rights regimes but also instructive and encouraging for those who similarly recognize the importance of such research.

Bryden and Black are modest in assessing what they have accomplished:

Our goal has been to use this specific study to provide information that would help inform a broader discussion of the use of mediation in the administrative process. However, it also reveals additional questions to be resolved and the need for further research. It certainly demonstrates the complexity of designing and assessing a mediation system and the need for careful design and implementation.⁶

While such qualifications are understandable and almost certainly wise in the instance of pioneer work such as this, they in no way detract from the fact that this is a study and set of insights into empirical methodology that will be of value to those administrative law scholars inclined to follow the authors' lead and, indeed, other administrative tribunals and agencies anxious to test systematically the appropriateness of not just their mediation processes but procedures generally.

Whitaker, Gottheil and Uhlmann's "Consistency in Tribunal Decision Making: What Really Goes On Behind Closed Doors..."⁷ is also an empirical study though not in the sense of analysis based on the application of social science research methods. The empiricism here is the acquired knowledge of three persons with considerable administrative process experience as to how tribunals actually cope with the problem of achieving/encouraging consistent decision-making among their various members. In this domain, it is asserted that the full board meeting encountered and endorsed in *I.W.A. v. Consolidated-Bathurst Packaging Ltd.*⁸ is "only the tip of the iceberg" of techniques deployed within tribunals for achieving consistency. Rather, for the authors, critical in the development of effective mechanisms has been the internal culture of administrative tribunals:

Consistency cannot be simply obtained by requiring adjudicators to attend full board meetings. Rather, it is something to which all adjudicators must voluntarily commit. This commitment is achieved by building up over time, an internal adjudicative culture that values consistency twinned with the free and open exchange and expression of competing views.⁹

The authors then go on to detail the various aspects of tribunals that contribute to the achievement of an appropriate balance between encouraging consistency on the part of all members while, at the same time, protecting the sometimes countervailing underlying values recognized in *Consolidated-Bathurst*, those of the adjudicative independence of individual members and the natural justice entitlements of parties to particular proceedings.

Indeed, Laverne Jacobs also emphasizes the importance of understanding how particular tribunals actually operate in making any evaluation of the actual independence of their individual members. In her paper, "Tribunal Independence and Impartiality: Rethinking the Theory after *Bell and Ocean Port Hotel*—A Call for Empirical Analysis,"¹⁰ Professor Jacobs laments what she sees in the recent adjudicative

independence case law of a movement away from making assessments of how the tribunal actually operates in practice, as advocated most cogently by Sopinka J. in his partially dissenting judgment in *Canadian Pacific Ltd. v. Matsqui Indian Band*.¹¹ Jacobs observes:

Yet, when it comes to the place of empirical information about tribunal workings, our jurisprudence which once was quite assertive about its need to contemplate a tribunal's operational context has lately seemed to have moved the spotlight to a position that overlooks the necessity of empirical information focusing more heavily instead on legislative scheme as gleaned from the enabling statute.¹²

Building on earlier work by Houle¹³ and DesRosiers,¹⁴ Professor Jacobs argues that we can only understand whether tribunal and agency members are truly independent if we have empirical knowledge of how the particular tribunal functions in practice. This empirical information includes detailed knowledge of institutional culture and practices of the kind described by Whitaker, Gottheil and Uhlmann. It also requires testing in particular contexts the efficacy of the three standard criteria of tribunal and member independence: security of tenure, financial security, and day-to-day administrative independence, as well as evaluating the impact of other contextual factors such as tribunal funding and chair control of discretionary matters such as case assignment and travel.

Since Professor Jacobs originally presented this paper, a draft of a foundational chapter in her doctoral dissertation, she has in fact been engaging in and testing the empirical approach that she urges. This engagement forms the basis of a very recent presentation at the January 2008 University of Toronto Faculty of Law Conference "The Future of Administrative Justice." In her paper, "Reconciling Tribunal Independence and Expertise—Empirical Observations,"¹⁵ Professor Jacobs provides data and analysis from her study of the impact on independence of the practices of three agencies—one federal, and two provincial (Ontario and Quebec). On the strength of these two papers, the final product of her doctoral studies promises much.

As well as endorsing the centrality of empirical research in understanding how the administrative process actually works and in providing sensible and likely workable solutions to perceived problems, these three papers in the collection also deal with issues that are among the most frequently discussed and intransigent in Canadian administrative law and process.

High volume jurisdiction tribunals continue to struggle with the issue of how to encourage consistent decision-making on the part of their members. Indeed, the Supreme Court has made it clear that this is a responsibility that is primarily that of the tribunals themselves. In *Consolidated-Bathurst*, the Court presented tribunals with the alternative of full board meetings as a way of dealing with the problem and then, in *Domtar Inc. v. Québec (Commission d'appel en matière de lésions professionnelles)*,¹⁶ held that it would aid neither tribunals nor parties in the accomplishment of this end by enshrining any species of review for inconsistency.

Since then, in *Ellis-Don v. Ontario (Labour Relations Board)*,¹⁷ the Court has reiterated its support of the full board meeting as a consistency-encouraging mechanism. However, the Court of Appeal for Ontario has been equally firm in not allowing any deviation from the principle that inconsistency is not a freestanding ground of judicial review.¹⁸ For their part, tribunals have tried to develop other mechanisms for achieving both procedural and substantive consistency with varying levels of success when challenged in the courts. Thus, the Immigration and Refugee Board's lead case strategy did not pass judicial scrutiny though not in such a way as to completely foreclose variations on this technique.¹⁹ On the other hand, in *Thamotharem v. Canada (Minister of Citizenship and Immigration)*,²⁰ the Board's use of policy guidelines to encourage (as opposed to compel) consistency on an important procedural matter (the order in which claimants were questioned) did pass muster in the Federal Court of Appeal.

As already described, the Whitaker, Gottheil and Uhlmann paper provides an interesting sense of more informal ways that can encourage a culture committed to consistency where possible and appropriate. In their paper, Sossin and Houle argue that, among the underlying values that tribunal guidelines may very usefully promote, are those of predictability and consistency.

However, this is only part of Sossin and Houle's much larger and controversial exercise, that of providing a theoretical construct within which guidelines and informal ones in particular can operate legitimately in the eyes of courts, tribunals, and stakeholders. As the judgments of Evans and Sharlow J.J.A. in *Thamotharem* illustrate graphically, there is a jurisprudential lacuna (or perhaps, more accurately, lack of agreement) on the legal status of guidelines. Professors Sossin and Houle also provide

an account of the uncertainties created by existing case law in this field and convincingly make the case that:

...as long as opposing approaches (binding/non-binding) to the issue dominate the administrative law debate, a coherent, principled and pragmatic approach to tribunal policy-making appears to be an elusive goal.²¹

As far as stakeholders are concerned, the authors have a qualified commitment to legitimacy through various forms of formal and informal and direct and indirect consultation on policy development and change. At the same time, they posit that:

...tribunals, courts and citizens view the legitimacy and capacity of tribunal policy-making from different but equally important perspectives.²²

Indeed, in this critical area of administrative law, this begs the question: Is this dissonance the root cause of the whole problem with the traditional jurisprudential view that informal policies are some form of inferior soft or non-law? When the lived experience of both statutory authorities and stakeholders is that much of the real law governing the operation and substantive judgments of tribunals, agencies and central department decision-making is contained in internal manuals, informal policies, or even readily accessible policy instruments of dubious legal pedigree, is it not time to recognize that there must be a greater congruence of theory and reality? If so, should the courts also not bring their conception of the status of informal policies more into line with that of tribunals and citizens?

Professors Sossin and Houle have made an invaluable contribution to an understanding of this whole problem and identified the critical issues that must be addressed along the way to a satisfactory resolution of this theoretical conundrum.

As scholars such as Willis,²³ Ison²⁴ and Arthurs²⁵ all urged, administrative law is at root all about process and the design of decision-making mechanisms that promote the objectives of the substantive programmes that the legislature has entrusted to tribunals, agencies and other statutory decision-makers. At the same time, of course, it is an exercise that must also be attentive to basic human rights, as well as values inherent in a commitment to the rule of law and procedural and substantive fairness.

What is, however, happening more frequently in the study of administrative law and process is that the articulation of theory and the development of principle are taking place within a process design context. Putting this another way, writing on administrative law is more commonly informed by a greater awareness of process dimensions and the tremendous variety of decision-making contexts that represent the subject base of our discipline. There is more of a symbiotic relationship between theory and process design, and theory is less frequently being imposed on process from a rarefied or highly abstracted level.

The papers in this collection that I have already highlighted, notably those on policy-making, consistency, and designing mediation systems, all provide graphic evidence of this phenomenon. The same can also be said of the joint papers of Professors Jacobs and Kuttner albeit that they are more directly concerned with the rules governing two further controversial and much litigated and discussed aspects of judicial review: the relevance of the concept of expertise to the principles of judicial review, and the related issue of the standing of decision-makers before the courts on appeals or applications for judicial review. In an elegant essay, Jacobs and Kuttner detail, from the perspectives of both theory and the case law,

...the gradual transformation of expertise from a solely socio-political construct to one which enjoys, as well, juridical status.²⁶

Indeed, it seems clearly the case that expertise as a theory or socio-political construct was as much the product of a process oriented conception of administrative law as it was of a coherent, overall conception of the administrative state.

One only has to read the authors' account of *C.U.P.E v. Ontario (Minister of Labour)*,²⁷ (the *Retired Judges* case), to realize the extent to which this remarkable judgment of the Supreme Court of Canada was based on the Court buying in to the process values of the interest arbitration system that were alleged to have been undercut by the Ministerially-imposed changes that were the subject of the judicial review application. Those values had very much to do with the Court's refusal to countenance what was characterized by those challenging the new regime as a transformation from a system of expert, stakeholder acceptable interest arbitration to one lacking stakeholder consensus and potentially involving inexpert, albeit retired judge arbitrators.

Process considerations also inform Jacobs and Kuttner's arguments for a more liberal recognition of the status of decision-makers

in appeals or judicial review applications from their decisions. In some situations, administrative tribunals will have insights about their operations, both substantive and procedural, that are different from, more informed than, or not likely to be advanced by parties in judicial review and statutory appeal proceedings. In those situations, respect for those tribunals and their processes and accumulated expertise provides a convincing reason for allowing them to speak to and, in some cases, actively defend their position as parties or interveners. For the purposes of deciding whether and, if so, to what extent the courts should recognize tribunal standing, the authors advocate the deployment of a “pragmatic and functional approach” rather than the categorical approach that the case law has generally espoused on this issue.²⁸

“Pragmatic and functional” is, of course, a term that the authors borrow from the Canadian principles governing the intensity of judicial review. Based on an accepted list of “pragmatic and functional” factors, what standard of review should a court bring to bear in assessing the challenged aspect or aspects of a statutory authority’s decision?

While Alobe Chatterjee does not explicitly use the term “pragmatic and functional,” his critical analysis of two recent Supreme Court of Canada duelling jurisdiction judgments is developed from the perspective of the practical realities of tribunal functioning and the rules of civil procedure.²⁹ From the time of *Weber v. Ontario Hydro*,³⁰ the Court has struggled to provide a coherent account of the appropriate assignment of jurisdiction when there appears to be an overlap of authority not only as between tribunals or agencies, and the courts but also as between different agencies and tribunals. Among the issues that have surfaced in a quite diverse group of cases are: the reach of compulsory arbitration clauses in collective agreements,³¹ the ability of tribunals to deal with constitutional (including *Charter*) issues,³² and discrimination complaints based on the provisions of human rights legislation and the domain of specialized human rights tribunals.³³

With respect to the ability of statutory authorities to take on board constitutional, *Charter* and statutory human rights issues, my own preference has always been for the courts, where possible, to afford statutory authorities considerable latitude as long as the issues are relevant to the determination of matters otherwise properly before them. At the same time, courts should recognize the process and other limitations that might make the actual exercise of that authority problematic either in a particular case or generally. In practice, this should result in judicial

recognition that tribunals and agencies have a broad discretion to decline jurisdiction and defer to other appropriate processes. Moreover, the courts, in a spirit of deference, should be extremely reluctant to interfere with any such exercise of discretion.

I was therefore reassured to see that Chatterjee, in his succinct and pointed criticism of *Tranchemontagne*, has provided at least partial support for that position. In essence, his argument is that such matters should depend on a

...a consideration of the relative expertise of the the competing fora or other contextual factors typical of administrative law analysis.³⁴

That consideration should itself be the primary or initial responsibility of the tribunal or agency seized of the matter as part of a set of “tools” for the management of its own processes.

At a time when it is unclear whether the concept of a jurisdictional question has any meaning or content in the Canadian law of judicial review of administrative action, it is also fascinating to see Chatterjee, a civil procedure and litigation specialist, characterizing without apology the issues that arise in this group of cases as jurisdictional. Could this be one of the few remaining outposts of jurisdictional discourse in the rarefied world of judicial review theory? Do these cases involve issues that are *a priori* jurisdictional and, as a consequence, not susceptible to or even requiring the otherwise mandatory standard of review analysis?³⁵

Standard of review is the subject of David Phillip Jones’ contribution to this volume.³⁶ His paper is encyclopedic in its coverage and frequently devastatingly critical of perceived inconsistencies and incoherence that characterize some of the Supreme Court’s analysis and application of the “pragmatic and functional” factors. In so doing, his view of “expertise” as a consideration in defining the scope of review might at first blush appear to be the polar opposite of that of Jacobs and Kuttner:

To the extent that there is a robust scepticism about the existence, scope and mesmerizing qualities of expertise, it may signal a greater willingness of courts to perform their historic, constitutional and legitimate responsibility of supervising the legality of government action.³⁷

However, it is clear that Jones does not totally reject the relevance of expertise. His main criticism is what he regards as the tendency of reviewing courts to see expertise as a stand-alone justification for restraint

or deference. For Jones, expertise can only be relevant as part of determining legislative intent, a process that is the entire objective of standard of review analysis by reference to the pragmatic and functional factors. This leads him to a conception of expertise that excludes reference to empirical evidence on exactly how expert the particular tribunal in fact is.

Rather, with justification, he sees the inquiry about expertise in the context of establishing a standard of review as at its most legitimate when posed in terms of legislative designation. Thus, the courts should automatically treat a tribunal as expert in relation to any substantive issue protected by a privative clause. Of course, if that is all, expertise loses much, if not all of its real purchase in this area, and is merely an *ex post facto* mode of describing or characterizing questions that, on the basis of some other analysis, are within the zone of questions protected by a privative clause.

More generally, David Phillip Jones shares the concerns expressed by many and varied observers of the state of Canadian judicial review law.

Given the considerable conceptual and practical difficulties in using the pragmatic and functional approach to identify and apply the applicable standard of review—and the realization that this approach is not applicable to all issues in administrative law—the question is: Where do we go from here?³⁸

In answering this question, he professes some attraction to the Justice LeBel position³⁹ that there should be two rather than three standards of review and that patent unreasonableness should be the deferential standard that “withers away.” However, he also wonders whether it might be possible to replace both of the existing deferential standards with a differently articulated standard.

In fact, I am writing this conclusion on the very day that David Phillip Jones’ wishes came true, at least partially. On March 7, 2008, in *Dunsmuir v. New Brunswick*,⁴⁰ the Supreme Court of Canada, in a judgment delivered by Bastarache and LeBel JJ., accepted that there should henceforth be only two standards of review (correctness and unreasonableness) and that, in the determination of which of those standards applied in any specific context, the mechanistic form of analysis imposed by the pragmatic and functional analysis should be replaced by a rather more fluid, situation sensitive range of contextual factors. It remains to be seen whether this will put an end to the “considerable

conceptual and practical difficulties” that have bedeviled this aspect of judicial review law for so long.

While this collection of papers covers a diverse range of topics from a variety of perspectives, there are nonetheless some overarching themes that emerge. Indeed, from the breadth of the subjects covered and the diversity of approaches deployed comes a sense of the richness of the current state of the study of administrative law and process in Canada and an appreciation of the difficult but fascinating issues that dominate the discourse among judges, tribunal members, practitioners, and scholars. However, there are also a number of themes that transcend the individual papers. These include an emphasis on the centrality of empirical research in both understanding the operations of the Canadian administrative state and in the sensible development of both tribunal processes and judicial review doctrine. More generally, many of the papers, in their process-oriented approach, underscore the sometimes overlooked or underestimated fundamental that administrative law is at root about the operational rules of statutory and prerogative authorities. At the very least, evolution in the principles of judicial review must pay heed to the imperatives of the law of tribunals, agencies, and government departments. The collection also covers many, if not most of the cutting edge issues in Canadian administrative law and process: the development of alternative dispute resolution mechanisms in tribunal and agency settings, the meaning and content of independence for administrative tribunals and agencies, the role of expertise as an informing concept in the development of principles of judicial review and tribunal participation in judicial review applications and statutory appeals, the legal status of internal or informal policies, the resolution of issues of capacity in situations involving duelling jurisdictions, and the ever present issue of the standards that the courts should apply in hearing applications for judicial review and statutory appeals.

Through its Administrative Law Roundtables, the presenters at those Roundtables who have revised their papers for publication, and the editorial efforts of Professor Laverne Jacobs and Justice Anne Mactavish, the CIAJ has become responsible for an important collection of papers on Canadian administrative law and justice.

Endnotes

* Professor *Emeritus*, Queen’s University, March 7, 2008.

-
- ¹ Philip Anisman, *A Catalogue of Discretionary Powers in the Revised Statutes of Canada, 1970* (Ottawa: Law Reform Commission of Canada, 1975).
 - ² This is no sense meant to claim that this kind of research was not going on in discrete fields of the administrative process such as labour law, immigration law and welfare law. It was! Rather, it is a more limited assertion—that generalist Administrative lawyers were not engaged regularly or systematically in this form of research.
 - ³ See France Houle, “The Use of Official Notice in a Refugee Determination Process” (1993) 34 C. de D. 573 and “The Credibility and the Authoritativeness of the Documents of the Documentation, Information and Research Branch of the Immigration and Refugee Board” (1994) 6 Int’l J. Refugee. L. 6.
 - ⁴ See Philip Bryden and William Black, “Designing Mediation Systems for Use in Administrative Agencies and Tribunals—The B.C. Human Rights Experience,” in this volume at 157 [Bryden and Black, “Designing Mediation Systems”].
 - ⁵ It follows on Philip Bryden and William Black, “Mediation as a Tool for Resolving Human Rights Disputes: An Evaluation of the B.C. Human Rights Commission’s Early Mediation Project” (2004) 37 U.B.C.L. Rev. 73.
 - ⁶ See Bryden and Black, “Designing Mediation Systems” *supra* note 4 at 198.
 - ⁷ See Kevin Whitaker, Michael Gottheil and Michael Uhlmann, “Consistency in Tribunal Decision Making: What Really Goes On Behind Closed Doors...,” in this volume at 351 [Whitaker et al., “What Really Goes on Behind Closed Doors”].
 - ⁸ [1990] 1 S.C.R. 282 [*Consolidated-Bathurst*].
 - ⁹ See Whitaker et al., “What Really Goes on Behind Closed Doors” *supra* note 7 at 355.
 - ¹⁰ See Laverne A. Jacobs, “Tribunal Independence and Impartiality: Rethinking the Theory after *Bell* and *Ocean Port Hotel*—A Call For Empirical Analysis” in this volume at 43 [Jacobs, “Tribunal Independence and Impartiality: Rethinking the Theory”].
 - ¹¹ [1995] 1 S.C.R. 3 at para. 123 (cited by Jacobs *ibid.* at 53).
 - ¹² See Jacobs, “Tribunal Independence and Impartiality: Rethinking the Theory” *supra* note 10 at 60.
 - ¹³ France Houle, « Indépendance et impartialité des organismes de régulation économique : droit positif et droit prospectif – étude sur la Commission du droit d’auteur » dans Ysolde Gendreau, dir., *Institutions administratives du droit d’auteur* (Cowansville, QC: Yvon Blais, 2002).
 - ¹⁴ Nathalie DesRosiers, “Toward an Administrative Model of Independence and Accountability for Statutory Tribunals” in Gene-Ann Smith & Hélène Dumont, eds., *Justice to Order—Adjustment to Changing Demands and Co-ordination Issues in the Justice System in Canada* (Montréal: Thémis, 1999).
 - ¹⁵ Laverne Jacobs, “Reconciling Tribunal Independence and Expertise—Empirical Observations” (Paper presented to the Future of Administrative Justice Conference, University of Toronto, Faculty of Law, 17–18 January

-
- 2008), online: University of Toronto, Faculty of Law <http://www.law.utoronto.ca/documents/conferences/adminjustice08_Jacobs.pdf>.
- ¹⁶ [1993] 2 S.C.R. 756.
- ¹⁷ [2001] 1 S.C.R. 221.
- ¹⁸ *National Steel Car Ltd. v. United Steelworkers of America, Local 7135* (2006), 278 D.L.R. (4th) 345 (Ont. C.A.).
- ¹⁹ *Geza v. Canada (Minister of Citizenship and Immigration)*, [2006] 4 F.C.R. 377 (C.A.).
- ²⁰ 2007 FCA 198; see also *Benitez v. Canada (Minister of Citizenship and Immigration)*, 2007 FCA 199.
- ²¹ See France Houle and Lorne Sossin, “Tribunals and Policy-Making: From Legitimacy to Fairness,” in this volume at 128.
- ²² *Ibid.* at 142.
- ²³ Starting with “Three Approaches to Administrative Law: the Juridical, the Conceptual, and the Functional” (1935) 1 U.T.L.J. 53.
- ²⁴ See T.G. Ison, “The Sovereignty of the Judiciary” (1986) 26 C. de D. 502.
- ²⁵ See e.g. Harry Arthurs, “Rethinking Administrative Law: A Slightly Dicey Business” (1979) 17 Osgoode Hall L.J. 1.
- ²⁶ See Laverne A. Jacobs and Thomas S. Kuttner, “The Expert Tribunal” in this volume at 86.
- ²⁷ [2003] 1 S.C.R. 539.
- ²⁸ Indeed, Goudge J.A., in delivering the judgment of the Court of Appeal of Ontario, in *Ontario (Children’s Lawyer) v. Ontario (Information and Privacy Commissioner)* (2005), 75 O.R. (3d) 309 (C.A.), endorses this approach as outlined in an earlier printing of this paper: “Discovering What Tribunals Do: Tribunal Standing before the Courts” (2002) 81 Can. Bar Rev. 616, though rejecting the use of “pragmatic and functional” as an appropriate characterization of the standards.
- ²⁹ See Aloke Chatterjee, “Analyzing Problems of Exclusive and Concurrent Jurisdiction,” in this volume at 333 [Chatterjee, “Exclusive and Concurrent Jurisdiction”].
- ³⁰ [1995] 2 S.C.R. 929 [*Weber*].
- ³¹ As in *Weber* itself and *Bisailon v. Concordia University*, [2006] 1 S.C.R. 666, critiqued by Chatterjee in his paper in this volume. See also *Québec (Commission des droits de la personne et des droits de la jeunesse) v. Québec (Attorney General)* [2004] 2 S.C.R. 185 [*Morin*].
- ³² See e.g. *Okwuobi v. Lester B. Pearson School Board*, [2005] 1 S.C.R. 257.
- ³³ Once again, as in *Weber* and *Tranchemontagne v. Ontario (Director, Disability Support Program)*, [2006] 1 S.C.R. 666 discussed by Chatterjee in “Exclusive and Concurrent Jurisdiction” *supra* note 29. See also *Quebec (Attorney General) v. Quebec (Human Rights Tribunal)*, [2004] 2 S.C.R. 223 [*Charette*].

³⁴ See Chatterjee, “Exclusive and Concurrent Jurisdiction” *supra* note 29 at 343.

³⁵ In fact, in *Dunsmuir v. New Brunswick*, 2008 SCC 9 [*Dunsmuir*], the Supreme Court has breathed new life into the concept of “jurisdictional error.” At para. 59, Bastarache and LeBel JJ. (delivering the judgment of the majority) state:

Administrative bodies must also be correct in their determinations of true questions of jurisdiction or *vires*.

They then go on to provide description and examples. The duelling jurisdiction cases seem to be covered. See para. 61 and the reference to “jurisdictional lines between two or more specialized tribunals” and citing *Regina Police Assn. Inc. v. Regina (City) Board of Police Commissioners*, [2000] 1 SCR 360 and *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Quebec (Attorney General)*, [2004] 2 SCR 185.

³⁶ See David Phillip Jones, “Standards of Review in Administrative Law,” in this volume at 213.

³⁷ *Ibid.* at 310.

³⁸ *Ibid.*

³⁹ As articulated in conjunction with Deschamps J. in *Toronto (City) v. C.U.P.E., Local 79*, [2003] 3 S.C.R. 77 and repeated in *Voice Construction Ltd. v. Construction & General Workers’ Union, Local 92*, [2004] 1 S.C.R. 609.

⁴⁰ *Dunsmuir supra* note 35.