

# Developments in Administrative Law: The 2004-2005 Term

Laverne Jacobs \*

## I. INTRODUCTION

The 2004-2005 Supreme Court term was marked by the Court's emphasis on respect for legislative intent and for the administrative processes developed by the state. This dual theme manifested itself in various ways and was apparent in all the cases decided this term. However, if there was consensus on the aspiration to be achieved, the Court was far from unanimous in deciding on the best method to realize this objective, making for a very lively term of administrative law decision-making.

During the 2004-2005 term, the Supreme Court addressed four major issues. The Court revisited the issue of exclusive and concurrent jurisdiction, revealing deep divides in its opinion of the correct approach to be taken to determine which adjudicative body has jurisdiction when more than one appear capable of being seized of a matter. On the subject of exclusive and concurrent jurisdiction, there have been four key cases. In *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Quebec (Attorney General)*;<sup>1</sup> *Quebec (Attorney General) v. Quebec (Human Rights Tribunal)*<sup>2</sup> and *Canada (House of Commons) v. Vaid*,<sup>3</sup> the Court considered the competing jurisdictions of human rights tribunals and another statutory regime. In *Okwuobi v. Lester B. Pearson School Board*,<sup>4</sup> the Court examined the issue of the residual remedial

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\* B.A. (Hons.) (McGill), LL.B., B.C.L. (McGill); Ph.D Candidate, SSHRC Canada Graduate Scholar, Osgoode Hall Law School. Thanks to Lorne Sossin and Thomas Kuttner for their comments on a draft of this article.

<sup>1</sup> [2004] S.C.J. No. 34, [2004] 2 S.C.R. 185 [hereinafter "*Morin*"].

<sup>2</sup> [2004] S.C.J. No. 35, [2004] 2 S.C.R. 223 [hereinafter "*Charette*"].

<sup>3</sup> [2005] S.C.J. No. 28, 2005 SCC 30 [hereinafter "*Vaid*"].

<sup>4</sup> *Okwuobi v. Lester B. Pearson School Board; Casimir v. Quebec (Attorney General); Zorilla v. Quebec (Attorney General)*, [2005] S.C.J. No. 16, [2005] 1 S.C.R. 257 [hereinafter "*Okwuobi*"].

jurisdiction of superior courts to provide relief in constitutional matters over which a tribunal has exclusive jurisdiction. The Court looked at the relationship between the exclusive jurisdiction of the Administrative Tribunal of Quebec and the Superior Court with respect to the power to grant constitutional remedies and offered guidance in this respect. By far, the most significant amount of the Supreme Court's administrative law energy was spent last term on questions relating to exclusive and concurrent jurisdiction. Given the unsettled nature of the law in this area and the many questions left unanswered, issues relating to exclusive and concurrent jurisdiction will undoubtedly continue to plague the Court in the future.

Additional administrative law issues addressed by the Supreme Court this term include the right to independent adjudication, discussed in *Vaughan v. Canada*;<sup>5</sup> the standard of review at a secondary level of appellate review, explored in *Mugesera v. Canada (Minister of Citizenship and Immigration)*<sup>6</sup> and another look at expertise and deference in *Monsanto Canada Inc. v. Ontario (Superintendent of Financial Services)*.<sup>7</sup>

While the number of administrative law cases decided this term has not been numerous, the decisions rendered have been rich, provocative and telling of the areas where the Court is unified and of those where it will have to return to solidify its guiding principles. This article discusses the seven administrative law cases decided during the 2004-2005 term,<sup>8</sup> examining them along the lines of the four major issues addressed by the Court: (1) Exclusive and Concurrent Jurisdiction, (2) The Right to Independent Adjudication, (3) Standard of Review and (4) Expertise and Deference.

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<sup>5</sup> [2005] S.C.J. No. 12, [2005] 1 S.C.R. 146 [hereinafter "*Vaughan*"]. It should be noted that *Vaughan* is a case that also deals with exclusive and concurrent jurisdiction. The importance of the case to the administrative law jurisprudence relating to procedural fairness and independent adjudication has led to its placement in a separate category.

<sup>6</sup> [2005] S.C.J. No. 39, 2005 SCC 40 [hereinafter "*Mugesera*"].

<sup>7</sup> [2004] S.C.J. No. 51, [2004] 3 S.C.R. 152 [hereinafter "*Monsanto*"].

<sup>8</sup> Two of these, the companion cases of *Morin* and *Charette*, were decided a few weeks before the end of the 2003-2004 term.

## II. EXCLUSIVE AND CONCURRENT JURISDICTION

It has been 10 years since the decision in *Weber v. Ontario Hydro*.<sup>9</sup> However, the fire raging around the issues of concurrent and exclusive jurisdiction continues to flare. In *Weber*, the Supreme Court addressed the question of whether the arbitration process established through labour relations regimes precludes courts of common law from addressing the same matters. Mr. Weber, a unionized worker, had attempted to sue his employer in tort and for breach of his Charter rights over a work-related dispute. The employer succeeded in having the actions dismissed on the ground that the province's *Labour Relations Act*<sup>10</sup> and the terms of the collective agreement together created an exclusive system of arbitration. As a result of this exclusive jurisdiction, any disputes which, in their essential character, arose expressly or inferentially from the collective agreement were foreclosed to the courts. In adopting the exclusive jurisdiction model for the unionized labour context, the Supreme Court rejected the overlapping and concurrent models.<sup>11</sup> Since *Weber*, several cases have upheld the exclusive jurisdiction of labour arbitrators. In addition, the principles of *Weber* have expanded beyond the labour context to other legislated decision-making schemes. They have also extended beyond jurisdictional conflict between courts and tribunals to address questions of jurisdictional conflict between tribunals as well.<sup>12</sup>

In the past year, the Supreme Court furthered the debate started in *Weber* by revisiting the issue of exclusive and concurrent jurisdiction in four noteworthy cases: *Morin*, *Charette*, *Vaid* and *Okwuobi*.

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<sup>9</sup> [1995] S.C.J. No. 59, [1995] 2 S.C.R. 929 [hereinafter "*Weber*"].

<sup>10</sup> R.S.O. 1990, c. L.2.

<sup>11</sup> For a discussion of *Weber*, see Philip L. Bryden, "Developments in Administrative Law: The 1994-1995 Term" (1996) 7 S.C.L.R. (2d) 27.

<sup>12</sup> Literature on the impact of *Weber* includes: Bernard Adell, "Jurisdictional Overlap Between Arbitration and Other Forums: An Update" (2000) 8 C.L.E.L.J. 179; Ray Brown and Brian Etherington, "*Weber v. Ontario Hydro*: A Denial of Access to Justice for the Organized Employee?" (1996) 4 C.L.E.L.J. 183; Donald D. Carter, "Looking at *Weber* Five Years Later: Is it time for a New Approach?" (2000) 8 C.L.E.L.J. 231; Richard MacDowell, "Labour Arbitration — The New Labour Court?" (2000) 8 C.L.E.L.J. 121.

## 1. Determining Jurisdiction *Ratione Materiae* Between Competing Tribunals: *Morin*, *Charette* and *Vaid*

*Morin* and *Charette* raise important questions about the manner of determining legislative intent when dealing with competing administrative regimes. In particular, the Court reveals significant disagreements over the application of the “essential character” test — the test that figures centrally in administrative law to determine legislative intent when there are competing jurisdictions. These cases are followed by *Vaid*, which takes a much more subdued approach to the same issue, although leaving many of the unanswered questions untouched. All three cases deal with a Human Rights Tribunal as one of the competing administrative schemes, which also makes one wonder about the effect of these cases on statutory human rights regimes.

This section presents a detailed and critical overview of these cases, focusing on the debates between members of the Court.

### (a) *Morin*

In 1997, several teachers’ unions entered into a modification of a collective agreement that they held with the province of Quebec. The modification discounted experience acquired during the 1996-1997 school year, with the result that the 1996-1997 year would not be credited in calculating salary increments or seniority. A minority group made up of younger and less experienced teachers were the only ones affected by the modified term. They complained to the Quebec Human Rights Commission that the newly negotiated term was discriminatory. The Commission brought the matter before the Quebec Human Rights Tribunal, asking for a declaration that the terms of the collective agreement violated the equality provisions of the Quebec *Charter of human rights and freedoms*.<sup>13</sup>

The Human Rights Tribunal’s jurisdiction was questioned at the hearing. The Attorney General of Quebec along with the school boards and the unions filed preliminary motions arguing that labour arbitrators had exclusive jurisdiction over the dispute and requesting the Human Rights Tribunal to decline hearing the matter. Although the Human

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<sup>13</sup> R.S.Q. c. C-12 [hereinafter “*Quebec Charter*”].

Rights Tribunal rejected the motion,<sup>14</sup> on appeal to the Quebec Court of Appeal, it was held that the proper forum for resolving this dispute was the process of arbitration set up under the collective agreement.<sup>15</sup> At issue, therefore, before the Supreme Court was whether the legislature intended the Human Rights Tribunal or labour arbitration to be the forum in which this type of dispute would be heard and the test that should be applied to resolve such conflicts of jurisdiction.

The Supreme Court of Canada held that the Human Rights Tribunal had jurisdiction over the dispute. However, their decision contained majority and dissenting reasons. The majority was represented by McLachlin C.J. and Iacobucci, Major, Binnie and Fish JJ. Their reasons were authored by McLachlin C.J. The dissenting judges were Bastarache and Arbour JJ. with reasons written by Bastarache J.

(i) *The Majority*

Chief Justice McLachlin framed the issue in this case as being whether the Human Rights Tribunal should be barred from hearing a complaint of discrimination because the labour arbitrator has exclusive jurisdiction over the dispute.<sup>16</sup> She confirmed that the approach to be taken in the labour context to decide which of two possible tribunals should hear a dispute derives from *Weber* and clarified the propositions for which *Weber* stands in her view. First, *Weber* indicates that there are three models of jurisdiction: concurrent, overlapping, and exclusive, and that all three models are legally possible. Chief Justice McLachlin emphasized explicitly that *Weber* does not stand for the proposition that labour arbitrators always have exclusive jurisdiction in employer-union disputes. She also reminded us that it is not possible to stand back and theoretically classify cases into categories of matters that will and will not fall within the exclusive authority of arbitrators.

Second, on a more general level, in order to determine which of the three models should prevail in a given situation, *Weber* holds that it is important to consider “the governing legislation, as applied to the dispute viewed in its factual matrix.”<sup>17</sup> As she proceeded through her

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<sup>14</sup> [2000] J.T.D.P.Q. no. 24.

<sup>15</sup> [2002] Q.J. No. 365 (C.A.).

<sup>16</sup> *Morin*, *supra*, note 1, at para. 1.

<sup>17</sup> *Id.*, at para 11.

reasons, the Chief Justice offered a two-step test for conducting this analysis. The first step involves examining the relevant legislation and what it says about the arbitrator's jurisdiction. The second calls for scrutiny of the nature of the dispute to see whether the legislation suggests that this particular dispute should fall exclusively to the arbitrator. At this stage, the dispute is to be examined in its full factual context, which requires disregarding the dispute's legal characterization. The fact that a dispute has been labelled a tort claim, a human rights claim or any other type of claim by the parties *etc.*, is not a determinative indication of which body has jurisdiction. By contrast, one must look for the "essential character" of the dispute — that is, the nature of the dispute informed by its full factual matrix — to see if it falls within the legislated province of an arbitrator's exclusive jurisdiction.<sup>18</sup>

Examining the provisions of the two relevant pieces of legislation — the Quebec *Labour Code*<sup>19</sup> and the Quebec Charter, McLachlin C.J. determined that the arbitrator possessed jurisdiction to resolve all disagreements arising over the interpretation or application of a collective agreement. She noted that in *Weber*, this jurisdiction was found to be exclusive. The Human Rights Tribunal, on the other hand, had vast jurisdiction over human rights matters in Quebec and the power to apply the Quebec Charter in a wide range of circumstances. Its decision-making authority over human rights violations could not be said to be exclusive, though, as it was clear from the way that the Quebec Charter had been drafted that the legislator envisaged jurisdictional concurrency with other adjudicative bodies.<sup>20</sup>

As for the essential character of the dispute, McLachlin C.J. held that the essential character is discrimination in the context of negotiating a collective agreement. As this is a matter that fell outside of the scope of labour arbitration, the Human Rights Tribunal was entitled to exercise its jurisdiction. Chief Justice McLachlin's conclusion rests primarily on the finding that the facts of the dispute did not deal with the *interpretation or application* of the collective agreement — the domain over which the arbitrator has exclusive jurisdiction according to the Quebec *Labour Code*. Rather, the issue in dispute dealt with alleged discrimination during the period of *negotiation* of the modified term, a

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<sup>18</sup> *Id.*, at para. 20.

<sup>19</sup> R.S.Q., c. C-27.

<sup>20</sup> *Supra*, note 1, at para. 19.

period preceding the establishment of the agreement itself. In other words, while it is clear that the *Labour Code* provides that the arbitrator has jurisdiction over all grievances arising from the “interpretation or application” of the collective agreement, the dispute in this case did not arise from either the interpretation or the application of the agreement but during a stage that predated the agreement itself. As McLachlin C.J. observed:

[e]veryone agrees on how the agreement, if valid, should be interpreted and applied. The only question is whether the process leading to the adoption of the alleged discriminatory clause and the inclusion of that clause in the agreement violates the *Quebec Charter*, rendering unenforceable<sup>21</sup>

In her view, the main fact animating the dispute was that the modified term treated the complainants less favourably than more senior teachers. Its essence was potential discrimination in the process of negotiation and in the inclusion of the term in the collective agreement. Chief Justice McLachlin held that the Tribunal had the power to deal with this matter. The matter fell outside of the scope of the arbitrator’s exclusive jurisdiction and the Human Rights Commission and Tribunal were created by the legislature to resolve precisely these sorts of issues.

The Chief Justice completed her reasons by addressing a final argument that had been raised to contest the Tribunal’s jurisdiction. It had been argued that the complainants could have had their concerns heard by asking the union to bring a grievance to arbitration under the collective agreement. Chief Justice McLachlin rejected this argument on three grounds. First, she repeated that the dispute could not be characterized as a grievance under the collective agreement since the claim was not that the agreement was violated, but that the nature of the agreement itself was discriminatory. She added that it might be possible for an arbitrator to consider such questions as an incidental matter to a dispute that arose under the collective agreement, but that in this particular dispute, the complainants could not be faulted for pursuing their claim at the Human Rights Commission and Tribunal. Moreover, McLachlin C.J. pointed out that the unions and the complainants were opposed in interest in this matter since the union was affiliated with one of the parties

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<sup>21</sup> *Id.*, at para. 24.

that negotiated the agreement. It is possible that the union would not have chosen to file a grievance on the complainants' behalf. If that had occurred, there would have been no effective recourse for the affected teachers to bring their complaint. Relying on the grievance process would have provided the complainants with only the hope but not the guarantee of resolving their dispute.

Finally, McLachlin C.J. asserted that the Human Rights Tribunal was a "better fit" for this dispute, a comment which garnered significant reaction in the dissenting opinion. The Chief Justice reasoned that because the challenge had widespread implications, affecting hundreds of teachers, the Human Rights Tribunal was a better suited forum than the appointment of an arbitrator to deal with a single grievance within the framework of the *Labour Code*.

**(ii) *The Dissent***

Justice Bastarache's dissenting reasons centre on two main subjects: the exclusive jurisdiction of arbitrators and the integration of fundamental rights into the arbitration process. He also offered policy reasons for why exclusive arbitral jurisdiction should be fostered. Justice Bastarache was very clear to set out his starting premise — namely, that exclusive arbitral jurisdiction is a well-established principle in Quebec law in the context of labour relations. From this perspective, he viewed the issue to be resolved in *Morin* as whether the principle of exclusive jurisdiction should be abandoned in favour of a statutory human rights regime in cases where the labour dispute raises a human rights issue. His conclusion was that the dispute in *Morin* should have remained within the exclusive jurisdiction of labour arbitration. He found that the matter in dispute was one relating to the application of the collective agreement, since its essential character concerned pay and the reimbursement of lost wages resulting from the refusal to recognize experience. Most interesting is his analysis, which brings to light some very deep and critical disagreements in the Court over the primacy of the exclusive jurisdiction model and the nature and application of the essential character test. In order to best view these divergences and their significance, it is useful to organize and consider his analysis along three themes: (A) models of jurisdiction (B) the essential character test and (C) the incorporation of human rights into labour arbitration.

## (A) MODELS OF JURISDICTION — THREE MODELS OR ONE?

Perhaps the most surprising statement to come out of the decision in *Morin* is the majority's holding that *Weber* stands for the proposition that all the three models of jurisdiction — exclusive, concurrent and overlapping — are possible and that exclusive arbitral jurisdiction was never meant to be the standard model used in employer-union disputes. There is no presumption of arbitral exclusivity *in abstracto*; it is always a question of determining whether the arbitrator has exclusive jurisdiction over the dispute in light of the factual context and relevant legislation.<sup>22</sup> The majority also implied that other tribunals may possess exclusive jurisdiction in a labour dispute, depending on the legislation and the nature of the dispute.<sup>23</sup> This interpretation seems to go against the principles developed in *Weber* itself, principles which the Supreme Court has since held consistently, as illustrated by key decisions such as *New Brunswick v. O'Leary*,<sup>24</sup> *Regina Police Assn. Inc. v. Regina (City) Board of Police Commissioners*<sup>25</sup> and *Parry Sound (District) Social Services Administration Board v. Ontario Public Service Employees Union, Local 324 (O.P.S.E.U.)*.<sup>26</sup>

Justice Bastarache was quick to disagree with the majority, whom he perceived to have abandoned its own precedent. He pointed out that the "Court has, on numerous occasions and in a variety of legislative contexts, recognized that arbitrators have exclusive jurisdiction over issues arising from the interpretation, application, administration or violation of a collective agreement."<sup>27</sup> In *Weber*, the exclusive jurisdiction model had been adopted for three reasons. It continued the path of earlier jurisprudence, the statutory language provided for exclusive jurisdiction, and it helped promote the speedy, economic, final, and enforceable resolution of labour disputes. In his opinion, McLachlin C.J. abandoned the exclusive jurisdiction model (and the essential character

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<sup>22</sup> *Id.*, at para. 14.

<sup>23</sup> *Id.*, at para. 11.

<sup>24</sup> [1995] S.C.J. No. 60, [1995] 2 S.C.R. 967 [hereinafter "*O'Leary*"]. This was the companion case to *Weber*.

<sup>25</sup> [2000] S.C.J. No. 15, [2000] 1 S.C.R. 360 [hereinafter "*Regina Police*"].

<sup>26</sup> [2003] S.C.J. No. 42, [2003] 2 S.C.R. 157 [hereinafter "*Parry Sound*"].

<sup>27</sup> *Morin*, *supra*, note 1, at para. 43.

test that accompanies it) for the “best fit approach”, an approach which he argued had been rejected already in *Weber*.<sup>28</sup>

What is one to make of the Supreme Court’s change in position? Chief Justice McLachlin’s reasons seem to suggest that *Weber* should simply be read more narrowly than it has been in the past. She noted that exclusive arbitral jurisdiction was found in *Weber* because the language of the statute indicated exclusivity over certain matters and the facts fit within this reach. Yet, the reasons offered in *Weber* for finding exclusive jurisdiction were based not only in the statutory language, but also on broader policy reasons such as fostering the resolution of all labour disputes in one dispute resolution process so that they can be done quickly and economically. Strangely, as Bastarache J. pointed out,<sup>29</sup> it was McLachlin C.J. herself who enounced this principle in *Weber*, holding that the exclusive jurisdiction model “satisfies the concern that the dispute resolution process which the various labour statutes of this country have established should not be duplicated and undermined by concurrent actions.”<sup>30</sup>

Chief Justice McLachlin also asserted that there is no principle of exclusivity *in abstracto* as Bastarache J. had held with respect to arbitral jurisdiction. But Bastarache J. placed much emphasis on defending the idea that the Quebec *Labour Code* is an exclusive and comprehensive decision-making scheme designed by the legislature to govern all aspects of labour relations in unionized contexts. He referred to provisions of the *Labour Code* to illustrate that the legislator’s intent was to create such an exclusive and comprehensive scheme. He highlighted that the *Labour Code* mandates that “every grievance” be submitted to arbitration and that this is similar in spirit to the Ontario *Labour Relations Act*, examined in *Weber*, which required “all differences” to be sent to arbitration. Since the Ontario Act was found to attract the exclusive jurisdiction model in *Weber*, the *Labour Code* should have the same result too. That *Morin* will undoubtedly have practical ramifications for labour relations is clear, for as Bastarache J. and the Court of Appeal in *Morin* point out, many years of jurisprudence have been

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<sup>28</sup> *Id.*, at para. 45.

<sup>29</sup> *Id.*, at para. 43.

<sup>30</sup> *Weber*, *supra*, note 9, at para. 58. See as well the *dicta* of McLachlin J. (as she then was), at para. 46 of *Weber*.

built on the original *Weber* principles, including much of the labour jurisprudence in Quebec.<sup>31</sup>

Viewed from another perspective, the change in position in *Morin* could be seen as an attempt by the Court to champion the primacy of legislative intention while reducing judicial policy development in matters mandated to the administrative state. If this is the case, it fits quite well within the broader movement of the Supreme Court to privilege legislative will. Seen most acutely in cases like *Ocean Port Hotel Ltd. v. British Columbia (General Manager, Liquor Control and Licensing Branch)*,<sup>32</sup> the drive to establish and follow the will of the legislature has also become quite prevalent in other areas of administrative law, most notably in the standard of review jurisprudence.<sup>33</sup>

But if McLachlin C.J.'s goal is indeed to keep within the framework of the legislator's intention, then it is hard to reconcile this with her final reason for holding that the Human Rights Tribunal was the correct forum. As noted, McLachlin C.J. added that the Human Rights Tribunal is a "better fit" for the dispute since the dispute has implications for hundreds of other teachers. A finding of the most appropriate forum based on legislative intent would presumably rest solely on the legislation and the facts. It may be that the collective aspect is an implicit legislative goal, but certainly the fact of relying on this goal as existing implicitly would need to be expressed more clearly in order to avoid the criticism that Bastarache J. makes that choosing the forum that the Court sees as best suited was denounced back in *Weber*.<sup>34</sup> It will be interesting to see how the court balances legislative intent with judicial policy making as it develops its jurisprudence on jurisdiction *ratione materiae* in the future.

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<sup>31</sup> See *Morin*, *supra*, note 1, at para. 51 and the Court of Appeal decision, *Québec (Commission des droits de la personne et des droits de la jeunesse) c. Québec (Procureure générale)*, [2002] J.Q. no. 365, at paras. 106 and 107.

<sup>32</sup> [2001] S.C.J. No. 17, [2001] 2 S.C.R. 781 [hereinafter "*Ocean Port*"].

<sup>33</sup> See for example, *Canadian Union of Public Employees Local 963 v. New Brunswick Liquor Corp.*, [1979] 2 S.C.R. 227; *U.E.S., Local 298 v. Bibeault*, [1988] 2 S.C.R. 1048 [hereinafter "*Bibeault*"]; *Pezim v. British Columbia (Superintendent of Brokers)*, [1994] S.C.J. No. 58, [1994] 2 S.C.R. 557; *Director of Investigation and Research v. Southam Inc. et al.* (1997), 144 D.L.R. (4th) 1 and *Pushpanathan v. Canada (Min. of Citizenship)*, [1998] S.C.J. No. 46, [1998] 1 S.C.R. 982.

<sup>34</sup> One could even take Bastarache J.'s argument further by observing that the recent reversal of the Supreme Court's position on the ability of tribunals to decide Charter matters marks a more recent denunciation of the view that the appropriate way to determine the correct fora for disputes is by simple judicial evaluation of which forum is best suited.

## (B) THE ESSENTIAL CHARACTER TEST

Both the majority and dissent formulate the essential character test in a similar way. The test requires an examination of the nature of the dispute to determine if it falls within the realm of matters over which the legislature has granted the arbitrator exclusive jurisdiction. In establishing the essential character, one is to analyze the facts giving rise to the dispute and take guidance from them. The majority and the dissent also agree in principle that legal characterization should not be a determinative factor. Nevertheless, despite the similarity in their manners of formulating the test, the majority and dissent reach quite opposite results about the essential character of the teachers' claim in *Morin*.

Unlike McLachlin C.J. for the majority, Bastarache J. had no difficulty seeing the facts of this case as an instance of the *application* of the collective agreement. In his view, the essential character of the dispute dealt with pay and the recognition of teaching experience, two issues at the heart of working conditions. Justice Bastarache asserted further that the issue in this case concerned the reimbursement of lost wages stemming from lack of recognition of the teaching experience in question. This, too, were within the scope of the collective agreement.

Moreover, Bastarache J. criticized the majority for misapplying the test. He noted a change of course in the way that the majority had analyzed the issue in this case. In his view, they took into account the legal characterization of the matter as being important though non-determinative of the matter.<sup>35</sup> Justice Bastarache was of the opinion that McLachlin C.J. relied too heavily on the nature of the right invoked: she merely characterized the grievance as the assertion of a Quebec Charter right and concluded that such an assertion, in its essential character, did not arise from the interpretation or application of the collective agreement.<sup>36</sup>

As for the Chief Justice's holding that the phase during which a collective agreement is negotiated does not fall within an arbitrator's jurisdiction, Bastarache J. made two counterpoints. First, the negotiation of a collective agreement is not the same as the creation of a contract before the collective agreement is signed. In the latter case, Canadian courts have held that arbitrators do not have jurisdiction if the matter is not

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<sup>35</sup> *Morin*, *supra*, note 1, at para. 46.

<sup>36</sup> *Id.*, at para. 55.

related to the collective agreement. Here, the negotiation was closely linked to the application of the agreement. Second, it is not a simple matter to separate negotiations from the collective agreement itself. Under the *Labour Code*, a collective agreement represents a collection of provisions negotiated by the parties. In this case, it was not the negotiations that caused the alleged harm but the effect of the negotiations — that is, the provision resulting from the modification. Overall, Bastarache J. found that the essential character of the dispute related to the application of the collective agreement and, as such, fell within the exclusive jurisdiction of the arbitrator.

Justice Bastarache's analysis of the essential character raises questions about the framework within which we are to work when determining the essential nature of the dispute. Are we to look at the "facts surrounding the dispute" or the "facts giving rise to the dispute"? Both expressions have been used in the Supreme Court case law<sup>37</sup> and while the difference in wording seems minor, the effect can be significant. In the case of *Morin*, the dissenting judges considered the facts surrounding the dispute and this led to a much broader scope of potentially relevant facts. They looked not only to what has happened in the past but also to the purpose and result of the application before the Court:

In the case at bar, an examination of the factual context shows that the dispute, in its essential character, concerns pay and the taking into account of experience gained during the 1996-1997 school year for the purpose of setting pay. Such issues form the very foundation of a contract and working conditions. More specifically, this application concerns the reimbursement of lost wages resulting from the refusal to recognize experience gained over the 1996-1997 school year, an issue that is clearly within the scope of the collective agreement.<sup>38</sup>

The approach of the dissent contrasts with that of the majority judges who searched for the *catalyst* of the disagreement. Drawing a distinction between *Morin* and *Weber*, for example, McLachlin C.J. wrote:

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<sup>37</sup> The expression "the facts surrounding the dispute between the parties" can be found in *Regina Police*, *supra*, note 25 and in the dissent in *Morin*, *id.*, at paras. 53 and 56. Both *Regina Police* and the dissent in *Morin* were authored by Bastarache J. who seems to favour this formulation: "the facts giving rise to the dispute" is employed; *Weber*, *supra*, note 9, at para. 29 and in *Vaid*, *supra*, note 3, at para. 93. The idea is used in the majority decision in *Morin*.

<sup>38</sup> *Morin*, *id.*, at para. 57 (emphasis added).

[...] the critical difference between *Weber* and this case lies in the factual context that gave rise to the dispute.

In *Weber*, the dispute clearly arose out of the operation of the collective agreement. It was basically a dispute about sick-leave, which became encumbered with an incidental claim for trespass. In these circumstances, the majority of the Court concluded that it fell squarely within s. 45 and should be determined exclusively by the labour arbitrator.

Here, the same cannot be said. Taking the dispute in its factual context, as *Weber* instructs, the main fact that animates the dispute between the parties is that the collective agreement contains a term that treats the complainants and members of their group — those teachers who had not yet attained the highest level of the pay scale who were typically younger and less experienced — less favourably than more senior teachers.<sup>39</sup>

The discussions of both the majority and the dissent lead one to ask about the guideposts that should be used to help discern the essential character of a matter. Justice Bastarache's description of the facts goes as far as to include the remedies sought, while McLachlin C.J.'s interpretation of the factual matrix sticks very closely to the incidents that occurred. Is one approach more acceptable than another? Should there be limitations to what constitutes facts? Given the malleability of the findings regarding essential character seen in *Morin*, as well as in *Charette* and *Vaid* discussed below, one wonders if such determinations are being made most effectively through primary reliance on the test for essential character as it currently exists.

### (C) INCORPORATING HUMAN RIGHTS INTO LABOUR ARBITRATION

Justice Bastarache, in dissent, held that every collective agreement implicitly incorporates the substantive human rights and obligations provided by human rights legislation. This principle is drawn from *Parry Sound*. Justice Bastarache noted that not only are human rights and obligations incorporated implicitly into all collective agreements but that in this case, the rights and obligations guaranteed by the Quebec Charter had actually been expressly incorporated into the collective

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<sup>39</sup> *Morin, id.*, at paras. 21-23.

agreement.<sup>40</sup> As a consequence, Bastarache J. held that even if the dispute's essential character was found to be a human rights issue in this case, it still should have been rightfully addressed through arbitration.

Justice Bastarache finished his judgment by offering a set of primarily policy-based reasons for courts to find that labour arbitrators should take on, as often as possible, human rights matters that are incidental to their mandate. He indicated that we need a single entity to address all issues because it fosters the development of a general culture of respect for human rights in Quebec's administrative system. In his view, such an approach is consistent with the will of the Quebec legislature, which has not made jurisdiction over human rights matters exclusive to the Human Rights Tribunal. Having arbitrators decide incidental human rights matters is also logical, as the arbitrator will be in a good position to make determinations that take a holistic view of the repercussions for the rest of the collective agreement. Finally, in addition to reducing the difficulties of deciding when matters should be removed to another forum, exclusive jurisdiction avoids causing violence to the comprehensive statutory scheme created to govern labour matters and works to ensure that citizens can have Charter issues resolved in a prompt, inexpensive and informal way.

The value of having administrative bodies other than human rights tribunals decide incidental human rights matters in the course of their mandated work is a theme that Bastarache J. developed further in the companion case of *Charette*.

(b) *Charette*

Ms. Charette was a recipient of a social assistance benefit provided to low income families with children. This benefit was provided through the Parental Wage Assistance Program established under the *Act respecting income security*<sup>41</sup> and administered by the responsible Minister. Conditions for obtaining the benefit included that the applicant be receiving income from employment. Ms. Charette became pregnant and

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<sup>40</sup> The collective agreement incorporated the right of teachers to the full and equal exercise of the rights and freedoms guaranteed by the Quebec Charter. See *Morin, id.*, at para. 66.

<sup>41</sup> R.S.Q. c. S-3.1.1, replaced on October 1, 1999 with the *Act respecting income support, employment assistance and social solidarity*, R.S.Q. c. S-32.001 [hereinafter "the Act", "*Income Security Act*"].

took maternity leave. During her leave, the Minister discontinued her benefits. She was told that the employment insurance that she would receive during her maternity leave did not constitute the employment income required to qualify her for the Parental Wage Assistance Program. Under the Act, Ms. Charette had the right to challenge the Minister's decision at the Commission des affaires sociales ("CAS") (now part of the Administrative Tribunal of Quebec ("ATQ")). Instead of doing so, she lodged a complaint at the Quebec Human Rights Commission alleging that the Parental Wage Assistance Program discriminated against women, particularly pregnant women, in violation of sections 10 and 12 of the Quebec Charter. The Commission then referred her complaint to the Human Rights Tribunal.

The Attorney General of Quebec brought a motion before the Human Rights Tribunal asking it to decline to hear the matter on the ground that the CAS held exclusive jurisdiction over the dispute. The Human Rights Tribunal rejected the motion<sup>42</sup> and the Attorney General's requests for judicial review and suspension of the Tribunal's proceedings were rejected by the Superior Court.<sup>43</sup> However, the Quebec Court of Appeal reversed these orders.<sup>44</sup> It held that the CAS had exclusive jurisdiction and that Ms. Charette's only recourse was to ask for review under the administrative scheme provided in the Act.<sup>45</sup> The issues raised before the Supreme Court, therefore, were the narrow question of determining which administrative body the legislature intended to resolve Ms. Charette's claim and the broader issue of the appropriate method to be used to analyze cases in which there are potential conflicts of jurisdiction among administrative schemes. Unlike the case in *Morin*, the Court found here that the Commission des affaires sociales, not the Human Rights Tribunal, had jurisdiction over the question of discrimination. Given the vastly different results in two cases that both allege discrimination, the Supreme Court's method of analysis in addressing issues of jurisdiction *ratione materiae* becomes particularly interesting.

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<sup>42</sup> [2000] J.T.D.P.Q. no. 6.

<sup>43</sup> [2000] Q.J. no. 5646.

<sup>44</sup> [2002] J.Q. no. 369, [2002] R.J.Q. 583.

<sup>45</sup> The Court of Appeal also added that if her request before the CAS should fail she would not have the option of later making a complaint to the Human Rights Tribunal. In other words, the CAS' remedy was the sole remedy available.

The Supreme Court was far from unanimous in its result. The majority decision to dismiss the appeal in this case was split with separate concurring reasons by two sets of two justices each. Justices Bastarache and Arbour form one group; Binnie and Fish JJ. form the other. Justice Bastarache and Binnie J. are the respective authors. There is also a dissent by McLachlin C.J., Iacobucci and Major JJ., penned by McLachlin C.J.

(i) *The Dissent*

(A) CHIEF JUSTICE MCLACHLIN, IACOBUCCI AND MAJOR JJ.

Chief Justice McLachlin and Bastarache J. have switched roles in this case, with Bastarache J. in the majority and the Chief Justice dissenting. As well, sounding unusually like Bastarache J. in his dissent in *Morin*, McLachlin C.J. framed the issue in *Charette* as being “whether the Quebec Human Rights Tribunal is *deprived* of jurisdiction to decide an issue of alleged discrimination, on the ground that the legislature has conferred exclusive jurisdiction on a different tribunal...the Commission des affaires sociales.”<sup>46</sup> She repeated this issue as being a question of the possible *ousting* of the jurisdiction of the Quebec Human Rights Tribunal because exclusive jurisdiction had been conferred on the CAS.<sup>47</sup> Curiously, although the Chief Justice parted company with Bastarache J. in *Morin* for starting his analysis from a presumption of jurisdictional exclusivity on the part of one deciding body, here her approach is not far from his. That is to say that, in lieu of analyzing the essential character of the facts of the case and then determining which decision-making body the legislature intended to decide the dispute, she presumed, by the nature of the claim (*i.e.*, discrimination) that the Human Rights Tribunal had jurisdiction (albeit not exclusive) and that the question was to determine if its jurisdiction was to be removed.

Chief Justice McLachlin continued with the notion of three possible jurisdictional models that she had asserted in *Morin*. In her opinion, the question was which of the three *Weber* models had been chosen by the legislature. To decide this, one must consider the legislation and the essential nature of the dispute in its factual context. Examining the legis-

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<sup>46</sup> *Charette, supra*, note 2, at para. 1 (emphasis added).

<sup>47</sup> *Id.*, at para. 5.

lation and the nature of the dispute should ensure two things: consistency with the legislative regimes and that the tribunal with the best fit will have jurisdiction.

Upon examining the *Income Security Act* and the CAS Act, McLachlin C.J. determined that the jurisdictional model chosen by the legislature was exclusive as opposed to overlapping or concurrent. The CAS had exclusive jurisdiction to hear contestations of ministerial decisions relating to income security. She also found that the CAS had the power to interpret and apply the Charter (presumably based on its ability to decide questions of law coupled with a strong privative clause) although it had no expertise in human rights matters.

As for the essential character of the dispute, the Chief Justice asserted that we must look at whether “the dispute, viewed in its factual matrix and not formalistically” is one over which the legislature intended the CAS to exercise its exclusive jurisdiction. In her view, Ms. Charette’s claim dealt essentially with discrimination. She provided three reasons to support her conclusion. First, to characterize Ms. Charette’s claim as simply a claim for benefits under the *Income Security Act* as the Attorney General had done eliminated the essence of the claim, which is that the Act and the Parental Wage Assistance Program violated the equality rights guaranteed by the Charter. Second, the collective aspect of Ms. Charette’s complaint would be lost if it was viewed as a claim for benefits. The complainant was seeking a declaration not only in respect to the violation of her own equality rights but also in respect to the rights of all pregnant women treated in the same way. Finally, the significance of the claim would be diminished if it had been treated simply as a claim for benefits. Viewed as such, the implication was that the complaint dealt with the improper application of the law instead of with the validity of the law itself. Chief Justice McLachlin also made an analogy with *Morin*, pointing out that as in *Morin*, there was no dispute over the way in which the benefits program was interpreted or applied. The true dispute was over the validity of the program itself. In McLachlin C.J.’s opinion, while the *Income Security Act* gave exclusive jurisdiction over appeals from rulings on security benefits, it did not give it jurisdiction over a matter that in its essential nature, was about gender discrimination. This was a matter for the Human Rights Tribunal. In McLachlin C.J.’s words: “The Income Security Act does not give the CAS exclusive jurisdiction over a dispute that, viewed in its full factual matrix, is essentially a human rights claim about the validity of a law that affects Ms. Charette and

many others in her situation.”<sup>48</sup> Repeating the stance that she took in *Morin*, McLachlin C.J. added that the Human Rights Tribunal was the best fit for this dispute.<sup>49</sup>

**(ii) The Majority**

**(A) JUSTICES BASTARACHE AND ARBOUR**

Writing for himself and Arbour J., Bastarache J. saw the issue in this case as dealing with the essential character of a dispute. More specifically, the issue concerned “the manner of determining the essential character of a dispute when, at first glance, there appear to be two administrative bodies that could claim jurisdiction over the matter, but one ... has an exclusivity clause in its enabling statute.”<sup>50</sup> It is interesting that his focus was on developing the correct approach to questions of jurisdiction. Certainly this is a helpful step in providing guidance for administrative bodies and lower courts that will have to grapple with these issues in the future.

Justice Bastarache’s approach is very similar to the one he took in *Morin* and he once again expressed disagreement with McLachlin C.J. over many of the same concerns. In particular, he believed that McLachlin C.J.’s analysis of the essential character had been largely influenced by the legal characterization of Ms. Charette’s claim. He also did not agree that the possibility of a human rights violation should have resulted in setting aside the CAS’s exclusive jurisdiction. Picking up on a theme he had started to develop in *Morin*, Bastarache J. reminded us that tribunals that can determine matters of law also have the ability to determine Charter matters unless the legislature indicates otherwise. Relying on *Nova Scotia (Workers’ Compensation Board) v. Martin*; *Nova Scotia (Workers’ Compensation Board) v. Laseur*,<sup>51</sup> Bastarache J. asserted that the CAS should have the power to declare the Minister’s decision discriminatory and any provision of the *Income Security Act* that contravenes the Charter to be of no force or effect.

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<sup>48</sup> *Charette, supra*, note 2, at para. 18.

<sup>49</sup> She also observed that there would be no duplication of work (*Charette, id.*, at para. 20). Although McLachlin C.J. was not explicit on which of the models would exist, it seems that this would be one of overlapping jurisdiction.

<sup>50</sup> *Charette, supra*, note 2, at para. 22.

<sup>51</sup> [2003] S.C.J. No. 54, [2003] 2 S.C.R. 504 [hereinafter “*Martin/Laseur*”].

As he did in *Morin*, Bastarache J. again insisted that all aspects of a dispute should be decided in one forum. Many of the policy concerns he expressed in the last part of *Morin*, resurface more forcefully in *Charette*. He stressed that the resolution of a Charter question related to a legislative scheme requires a thorough understanding of the objectives of the scheme and of the practical implications of proposed remedies.<sup>52</sup> The expertise of the tribunal in dealing with the administration of the Act is undoubtedly useful in resolving Charter matters. Moreover, when it comes to the Quebec Charter, Bastarache J. asserted, both in *Morin* and here in *Charette*, that the Quebec legislature “has stipulated that administrative bodies not specializing in human rights nevertheless have a duty to enforce those rights in their decisions.”<sup>53</sup> The goal of the legislature was to foster a general culture of respect for human rights throughout Quebec’s entire administrative system. Lastly, he pointed to the additional policy reason of making the Charter meaningful and accessible by having tribunals conform to it in their decision-making.

Justice Bastarache was not explicit on how he reached this conclusion about the legislated obligation imposed on administrative bodies other than the Human Rights Tribunal to enforce human rights. He did not make reference to any explicit stipulation in the Quebec Charter. Based on an overall reading of his reasons, however, it may simply be that Bastarache J. derived this obligation from the power given to many tribunals to decide all questions of law, a power which was confirmed last term in *Martin/Laseur* to incorporate the power to decide constitutional questions as well.<sup>54</sup> Interestingly, he made no express reference to the fact that he was expanding the case law by applying the principles of *Martin/Laseur* so that they dealt with not only constitutional but also with quasi-constitutional enactments. He also did not discuss the underlying principles that he relied on to make this expansion.<sup>55</sup> As a result, there has been a seamless transferral of the principles established in

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<sup>52</sup> *Charette*, *supra*, note 2, at para. 27.

<sup>53</sup> *Charette*, *supra*, note 2, at para. 28; See also *Morin*, *supra*, note 1, at para. 68.

<sup>54</sup> See *Martin/Laseur*, *supra*, note 51.

<sup>55</sup> The expansion was very likely based on the idea that quasi-constitutional enactments of-ten also signal their primacy over other legislation enacted in their jurisdiction. The Quebec Charter at s. 52, for example, prohibits derogation from it unless done expressly. See also the decision of Lamer J. (as he then was) in *Insurance Corp. of British Columbia v. Heerspink*, [1982] 2 S.C.R. 145 [hereinafter “*Heerspink*”] where he expressed this idea as judicial principle.

*Martin/Laseur* for constitutional questions to the realm of quasi-constitutional questions as well.<sup>56</sup>

Finally, Bastarache J. noted that the Human Rights Tribunal would have ended up making an order on the legality of the Minister's decision about benefits and may have potentially substituted its own decision. Such actions would certainly violate the integrity of the established legislative scheme.

Justice Bastarache concluded that the dispute essentially dealt with Ms. Charette's eligibility for the Parental Wage Assistance program and was a matter that fit within the explicit mandate of the CAS. Unlike McLachlin C.J., the fact that the claim may affect a group instead of only one person was of minimal importance to Bastarache J. In his opinion, this fact did not serve to alter the essential nature of the dispute. Moreover, in past cases in which the Court had found exclusive jurisdiction, such as *Weber* and *Parry Sound*, the collective aspect was no less present.

Integrated decision-making is obviously an important and central concern to Bastarache J. in his decisions on jurisdiction. It will be interesting to see if he manages to push it further by capturing more of the support of the Court in future cases. It will also be interesting to see if integrated decision-making will be limited to instances where the incidental matter to be decided by the administrative body is a constitutional or quasi-constitutional right or if incidental matters in other subject areas will figure in future debates as well.<sup>57</sup>

#### (B) JUSTICES BINNIE AND FISH

Justice Binnie provided yet a third perspective on the issue presented in *Charette*. More similar in nature to Bastarache J.'s perception of the issue than to that of McLachlin C.J., Binnie J. held that the task before the Court was twofold. On the one hand, the Court had to

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<sup>56</sup> This transferral has been adopted in later Supreme Court decisions of the 2004-2005 term and has already been picked up by lower courts. See for example, the Court's analysis in *Okwuobi* and *Vaid* decided this term and discussed below. See also the Ontario Court of Appeal decision in *Tranchemontagne v. Ontario (Director, Disability Support Program)*, [2004] O.J. No. 3724, 72 O.R. (3d) 457 [hereinafter "*Tranchemontagne*"].

<sup>57</sup> On the question of integrated decision-making of a human rights matter see *Tranchemontagne, id.*, which was decided by the Ontario Court of Appeal shortly after *Morin* and *Charette* were released. This case is scheduled to be heard by the Supreme Court during the 2005-2006 term.

examine two legislative schemes to determine which of the potential adjudicative bodies the legislature intended to resolve Ms. Charette's claim. If more than one adjudicative body had a claim to jurisdiction, then the Court had to determine also how this conflict of jurisdictions should be resolved.<sup>58</sup> Like Bastarache J., Binnie J. is interested in the appropriate method of analysis to resolve jurisdictional conflict. His focus was on discerning the intention of the legislature. He believed the dissenting judges chose the correct test but erred by allowing their evaluation of the essential nature of the dispute to trump the legislature's clear intention to have income security benefits determined by the CAS.

Justice Binnie held that it was important to separate the factual and legal contexts in which the dispute arose from the legal character of the alleged wrong. It is the legislative and factual contexts, "not the legal character of the alleged wrong, that is crucial to the allocation of jurisdiction."<sup>59</sup> In Binnie J.'s opinion, the facts that gave rise to this dispute were the Minister's discontinuance of an income security benefit and "Ms. Charette's claim to get it back under an administrative scheme that the legislature in plain words has channelled directly to the CAS."<sup>60</sup> He had no difficulty in defining the essential character of the dispute. He noted that the legal wrong in this case could be characterized as a Charter complaint but that this should not necessarily lead to the conclusion that the Human Rights Tribunal had jurisdiction over the matter.

Justice Binnie focused on the fact that there was a clearly established administrative appeal route set out by the legislature. Pointing to the statute, he observed that the legislature had indicated the appeal route to be exclusive and that, where there are intended exceptions to this exclusivity, the legislature signalled those explicitly.<sup>61</sup> It is clear that the legislature intended the CAS to have exclusive jurisdiction over disagreements like the one concerning Ms. Charette's discontinued benefits. Moreover, Binnie J. criticized McLachlin C.J. for outlining and relying on what he saw as several policy considerations favouring the jurisdiction of the Human Rights Tribunal. In his opinion, the legislature had already designated a forum and it was for the courts to respect that

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<sup>58</sup> *Charette*, *supra*, note 2, at para. 35.

<sup>59</sup> *Id.*, at para. 37.

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*, at para. 39.

choice. Later in his reasons, he reiterated his views on the importance of respecting the separation of powers when he held that it was irrelevant that Ms. Charette's claim had the potential to affect many others. Justice Binnie noted that this was a factor endemic to all Charter claims and undoubtedly, one that the Quebec legislature took into account when it decided to grant exclusive jurisdiction to the CAS.<sup>62</sup>

Finally, Binnie J. offered an interesting analysis of the differences between *Morin* and *Charette*. His comments highlight why, in his view, the Human Rights Tribunal was determined to possess jurisdiction *ratione materiae* in *Morin*, but not in *Charette*. Justice Binnie provided several reasons. He recalled, first, that in *Morin*, the nature of the dispute could not be characterized as a grievance under the collective agreement (it dealt with negotiation of the agreement itself), whereas Ms. Charette's claim fell clearly under the *Income Security Act* and the CAS was competent to deal with it. Secondly, he noted the absence of a conflict of interest in this case. In *Morin*, the Court held that the union that the complainant would approach to bring her grievance may be opposed in interest and disinclined to do so. There was no case of conflict in *Charette*. Justice Binnie also noted that the CAS had jurisdiction over all the relevant parties in *Charette*, whereas in *Morin* the grievance arbitrator did not. For his final point, Binnie J. indicated that a collective element is present in all Charter claims. This element will always militate toward a finding that the Human Rights regime is most appropriate. However, Binnie J. noted that the Quebec legislature likely took this into account in deciding to grant exclusive jurisdiction to the CAS. Justice Binnie held:

Fourth, while the dispute here potentially affects many individuals other than Ms. Charette, as was the case in *Morin* and is a characteristic of *Charter* claims generally, this factor will always favour the Commission or a Human Rights Tribunal in turf wars with other branches of the provincial government. It is a factor which the Quebec legislature inevitably took into account when it gave exclusive jurisdiction over income security benefits to the CAS including the power to adjudicate *Charter* arguments (subject to judicial review by the ordinary courts).<sup>63</sup>

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<sup>62</sup> *Id.*, at para. 42.

<sup>63</sup> *Id.*, at para. 42.

This final point is perplexing and does not seem to support his thesis at all that there are differences that generated the results in *Morin* and *Charette*. It may be that Binnie J. was indicating that there is greater room to consider the collective aspect of a claim, a factor which points toward the jurisdiction of a human rights tribunal, when the competing adjudicative body is not a branch of provincial government. If so, that is a strange comment to make as it goes against his own finding in *Charette*. It is also unclear why such a distinction should be made. Presumably, the potential for conflict with the Human Rights Tribunal, if indeed thought through systematically at the stage of legislative development, would have been considered for all decision-making bodies designed by the provincial legislature, whether a branch of provincial government or not. A question that may be worth further exploration in the competing jurisdiction cases, however, is whether the legislature indeed anticipated and thought through such conflicts at the time of drafting the relevant pieces of legislation.

The cases dealing with jurisdiction have thus far dealt with the Quebec human rights regime and its interplay with other legislative schemes within the Quebec administrative law system. Two additional cases addressing the question of concurrent and exclusive jurisdiction were also decided last term: *Vaid* and *Okwuobi*. The next case, *Vaid*, is interesting because of its very unencumbered treatment of the jurisdictional question. It also provides a further glimpse of the Court's treatment of quasi-constitutional, human rights legislation.

(c) *Vaid*

*Vaid* is a case with constitutional law, administrative law and human rights dimensions. Mr. Vaid was a chauffeur to the Speaker of the House of Commons. He believed he had been constructively dismissed for reasons of discrimination and harassment and lodged a complaint with the Canadian Human Rights Commission. The House of Commons and the Speaker raised a preliminary objection, arguing that Parliamentary privilege allowed the Senate and the House of Commons to conduct their employee relations free from interference from the Canadian Human Rights Commission or any other body outside Parliament itself. A large portion of the Supreme Court's judgment was therefore devoted to

the constitutional question of whether the parliamentary privilege claimed could be said to exist.<sup>64</sup> The Supreme Court decision was unanimous. Justice Binnie, writing for the Court, held that the privilege claimed did not exist and that the appellants could not succeed on that ground. He then moved on to address the administrative law issue. Specifically, this was the question of whether the Canadian Human Rights Commission and Tribunal had jurisdiction to hear Mr. Vaid's complaint of harassment and discrimination or whether his complaint was a matter for the grievance process established under the *Parliamentary Employment and Staff Relations Act*.<sup>65</sup>

Examining the relevant statutory provisions of the *Canadian Human Rights Act*,<sup>66</sup> Binnie J. first addressed the question of whether Parliamentary employees fell within the application of the Act. With reference to modern principles of statutory interpretation which require, among other things, that legislation be given fair, large and liberal construction to ensure that it attain its goals,<sup>67</sup> principles which Binnie J. asserted apply with special force in the application of human rights laws,<sup>68</sup> Binnie J. held that the *Human Rights Act* applied to employees of Parliament. In his view, it was not necessary for the Act to indicate expressly that Parliamentary employees are included within the scope of its application; it is simply enough that the language of the statute show no indication that it intends to exclude them from it.

Justice Binnie then examined the question of whether Mr. Vaid's claim was within PESRA's exclusive authority. He found that the complaint was essentially just a grievance raising a human rights issue and that PESRA's exclusivity clause<sup>69</sup> ousted the jurisdiction of the bodies established under the *Canadian Human Rights Act*.

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<sup>64</sup> The Human Rights Tribunal held that they did possess jurisdiction over the matter. On judicial review, the Federal Court, Trial Division, upheld the decision of the Human Rights Tribunal. On further appeal to the Federal Court of Appeal, the decision was affirmed. (See *Vaid v. Canada (House of Commons)*, [2001] C.H.R.D. No. 15, affd [2001] F.C.J. No. 1818, [2002] 2 F.C. 583 (T.D.), affd [2002] F.C.J. No. 1663, [2003] 1 F.C. 602 (C.A.)).

<sup>65</sup> R.S.C. 1985, c. 33 (2nd Supp.) [hereinafter "PESRA"].

<sup>66</sup> R.S.C. 1985, c. H-6.

<sup>67</sup> Justice Binnie relied on the *Interpretation Act*, R.S.C. 1985, c. I-21, s. 12; *Bell ExpressVu Limited Partnership v. Rex*, [2002] S.C.J. No. 43, [2002] 2 S.C.R. 559; *R. v. Sharpe*, [2001] S.C.J. No. 3, [2001] 1 S.C.R. 45 and Elmer A. Driedger, *Construction of Statutes*, 2d ed. (Toronto: Butterworths, 1983). See *Vaid, supra*, note 3, at para. 80.

<sup>68</sup> *Vaid, id.*, at para. 80.

<sup>69</sup> This clause, PESRA, s. 2, reads:

As with the two cases emanating from Quebec, it is extremely fascinating to note how the jurisdictional issue was resolved in this decision. The Court took the test for competing jurisdiction from McLachlin C.J. in *Morin*:

[...]the question in each case is whether the relevant legislation applied to the dispute at issue, taken in its full factual context, established that the labour arbitrator has exclusive jurisdiction over the dispute.<sup>70</sup>

But the problem with this formulation of the test is that it does not present a symmetrical approach to determining the question. In its purest form, a general approach to competing jurisdictions, whether involving a labour dispute or not, should simply be to examine which of two or more decision-making bodies was intended to have jurisdiction, given that the three models exist. The McLachlin formulation in *Morin* was given as more of a *réplique* to Bastarache J.'s idea of exclusivity than a general approach. Exclusivity on the part of one decision-making body, whether explicit or presumed, will not always be a factor to consider in the analysis.

As well, the essential nature of the dispute was not a contentious issue at all in this case. The Court had no difficulty classifying Mr. Vaid's complaint as a workplace complaint that raised an incidental human rights issue. One reason for this ease of classification stemmed from the ability to compare this case to the facts of *Morin* and *Charette*, which were also human rights cases. As the test and process of analysis have not gotten any easier, however, it would not be surprising for divisions in the court to arise again in future cases. As Binnie J. observes: "[t]his is not an area of the law that lends itself to overgeneralization."<sup>71</sup>

A curious aspect of the case is that the facts giving rise to the dispute are taken from the complaint filed by Mr. Vaid at the Human Rights Commission. It is probably anomalous that the complainant's facts were written in such a way as to lead him away from being granted

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[...] except as provided in this Act, nothing in any other Act of Parliament that provides for matters similar to those provided for under this Act and nothing done thereunder, whether before or after the coming into force of this section, shall apply to or in respect of or have any force or effect in relation to the institutions and persons described in this section.

<sup>70</sup> Vaid, *supra*, note 3, at para. 92, citing McLachlin C.J. in *Morin*, *supra*, note 1, at para. 14.

<sup>71</sup> Vaid, *supra*, note 3, at para. 95.

the forum of his choice. But, certainly this is a reminder to litigants to do as much as possible to present the facts in a way that will appeal to the court to grant them the forum desired.

Finally, the analysis in *Vaid* raises a couple of additional points for reflection. Firstly, the Court's holding indicates implicitly that the wording in section 2 of PESRA is sufficient to displace the requirements of quasi-constitutional, human rights legislation. The Court did not discuss the matter directly. However, it noted from cases like *Heerspink* that "express and unequivocal language"<sup>72</sup> to the contrary is necessary to be certain of the legislature's intent that a human rights enactment is not to supersede all other laws. Secondly, *Vaid* is the last of three cases on competing forum this term, all of which involved one body with express or implied exclusivity. It will be interesting to see how the Court's approach changes, if at all, when faced with two bodies possessing concurrent jurisdiction.

(d) *Determining Jurisdiction Ratione Materiae — Reflections*

Almost immediately upon reading *Morin*, *Charette* and *Vaid* one notes that the Court has struggled in defining the test to be applied and, by extension, the method of analysis for determining the legislator's intention for the applicable forum. Perhaps the cases on exclusive and concurrent jurisdiction can be classified as a struggle for the best way to determine legislative intent. A few approaches have emerged from the cases this term. In some instances, it seems that the judges look for an indication that the legislature intended to remove the matter at hand from the body that on its face would appear seized of it. This is the approach taken by Bastarache J. in *Morin* and *Charette* and to a large extent also McLachlin C.J. in her dissenting opinion in *Charette*. Other approaches are more neutral. In *Morin*, we see the Chief Justice propose that the relevant legislation and the facts be examined to determine the nature of the jurisdiction — exclusive, concurrent or overlapping — the legislature intended for the particular dispute (although arguably this is not the approach she actually uses). There are to be no presuppositions about the existence of exclusivity or other models of jurisdiction simply because of past jurisprudence or the wording of the statute alone. Justice

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<sup>72</sup> See *Heerspink*, *supra*, note 55, and *Vaid*, *id.*, at para. 26.

Binnie also presents a more neutral, balanced approach. Faced with conflicting jurisdictions, he asked simply which body the legislature intended to resolve the dispute. In *Charette* and *Vaid*, for example, he focused primarily on the language of the statute without becoming too encumbered in defining the essential character of the dispute.

But mixed in with these approaches are more normatively driven policy perspectives held by some that interfere, rightly or wrongly, with the pure pursuit of legislative intent. An example is to have all matters arising from one dispute decided in one place; another is the belief that widespread, collective remedies are best-suited for human rights violations. Justice Bastarache, for example, is a strong supporter of the idea that tribunals have the right to decide human rights matters either under the power conferred by *Parry Sound* or by the principles derived from *Martin/Laseur* giving tribunals Charter jurisdiction.

This mixture of legislative intent and policy represents a tension between two values that have become central in the administrative state. Essentially, this is a contest between expertise and expediency and based on these cases, it is a contest in which expediency often wins. One cannot help but experience difficulty in deciding who is correct in cases like *Morin* and *Charette*, as evidenced by the many divides in the decisions themselves. Chief Justice McLachlin's approach to the problems before her emphasizes the importance of valuing specialized bodies for the expertise they can bring to the matter and for their capacity to fashion appropriate remedies — for example, the ability of human rights tribunals to fashion systemic remedies. Her reasoning implies that it is because of their expertise that the legislature has created these bodies and that we should turn to them to provide the most suitable remedy. In this way, deference is shown to the will of the legislature in the larger sense of the term. It is not just that the words of two enabling statutes are examined to determine legislative intent; deference is shown to the fact that the legislature has designed an overall set of bodies, each with its own area of expertise and function within the administrative state. Given that expertise is a hallmark of tribunal existence — one of the reasons that tribunals were often created<sup>73</sup> and certainly, as articulated by the Supreme Court, the most important reason for which deference should be granted to a tribunal in determining the appropriate standard

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<sup>73</sup> On historical reasons for establishing tribunals see John Willis, "Three Approaches to Administrative Law: The Judicial, the Conceptual, and the Functional" (1935) 1 U.T.L.J. 53.

of review<sup>74</sup> — there is a very strong basis for the legitimacy of this approach.

The opposing view tends to see more value in expediency. We know that the administrative justice system has been designed to provide inexpensive, faster, efficient results for the litigant.<sup>75</sup> Requiring an individual to go to more than one tribunal to have a dispute settled seems contrary to these goals. These ideas are reflected in the decisions rendered by Bastarache J. Yet, it is difficult to conceive of speed and convenience as goals more worthy of pursuit than providing experience and expertise in decisions rendered. Such a perspective overlooks the qualitative value of the tribunals themselves. It is not just quick, convenient resolutions that the individual litigant seeks, but the most appropriate resolution possible to a specific problem. This leads to a final point in the debate between expertise and expediency: the role of the individual in the battle over jurisdictional conflict. It seems unusual that not much emphasis has been placed on the desire of the litigant to have his or her dispute heard in a particular forum. We have seen how difficult it is to find the one essential character of a dispute. Cases like *Morin* and *Charette* simply reinforce that a dispute often has a multiplicity of character rather than one essential character. In such situations, one would think that the individual litigant's way of seeing the dispute would be useful to determining the correct forum. Questions about jurisdictional conflict are not about disputes and legislative will in the abstract. They are disputes over something that has happened to an individual about which the individual would like to complain in a specific way. It may be a personal matter, as in a workplace disagreement, or it may be a matter for which the main point of complaining is to prevent the same thing from happening to others, such as in a case of alleged discrimination. If more than one fora are possible, the courts cannot simply redesign the facts to fit into one forum or the other. The search for essential character

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<sup>74</sup> See *Director of Investigation and Research v. Southam Inc. et al.* (1997), 144 D.L.R. (4th) 1, at para. 50 and *United Brotherhood of Carpenters and Joiners of America, Local 579 v. Bradco Construction Ltd.*, [1993] S.C.J. No. 56, [1993] 2 S.C.R. 316, at 335. See also, on expertise generally, Laverne Jacobs & Thomas Kuttner, "The Expert Tribunal", paper presented at the National and Regional Roundtables for judges and tribunal members on *Tribunal Expertise*, sponsored by the Canadian Institute for the Administration of Justice (2003), online: <<http://www.ciaj-icaj.ca/english/publications/papersarticles/theexperttribunalpaper.pdf>>.

<sup>75</sup> See for example, Ontario, Agency Reform Commission *Everyday Justice: Report of the Agency Reform Commission on Ontario's Regulatory and Adjudicative Agencies* (Toronto: Queen's Printer for Ontario, 1998).

must be anchored in the litigant's view, otherwise the essence of the dispute risks being diminished. This is McLachlin C.J.'s point in *Charette*. One could also take the point further and note that to redesign the dispute in such a way not only risks diminishing the dispute, it also risks disempowering the litigant.

On a practical level, as these problems work themselves out, questions remain regarding how a litigant is to know which tribunal is the correct one to address his or her concern. Tribunal decision-makers are also sure to be concerned over the challenge of making correct first-level decisions to accept or decline jurisdiction. With all the separate concurring reasons and various approaches, the law on the question of jurisdiction *ratione materiae* offers support for many diverging propositions, making the law uncertain both in the jurisprudence and as a practical reality for tribunal members and users.

From a theoretical and policy perspective, we have seen a shift in the Supreme Court's jurisprudence, highlighted in other cases as well, like *Ocean Port*, in which the Court has emphasized the will of the legislature. However, at the same time, one does not hear much talk of empirical evidence that the creation of tribunals across any level of government has been done in a systematic way, with emphasis on avoiding conflicts. The exclusive jurisdiction jurisprudence may be seen as a call to legislators and policy-makers to dedicate more attention to foreseeing problems of jurisdictional conflict and to be clearer in identifying legislative intent. More unification in the legislative process may be necessary. Finally, the notion of "jurisdictional analysis" began its decline with the line of cases starting with *Bibeault*<sup>76</sup> which introduced a pragmatic and functional approach and touted the importance of discerning legislative intent. It is somewhat of a paradox that today, in the process of searching for legislative intent, we have once again entered a strong debate over matters of jurisdiction.

With the next case, *Okwuobi*, we move further along the spectrum of jurisdictional interaction. At this point, we are moving away from conflicts between administrative regimes to revisit the question of the appropriate balance of judicial intervention and restraint in the interaction between courts and tribunals.

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<sup>76</sup> *Bibeault*, *supra*, note 33.

## 2. Residual Remedial Jurisdiction of the Courts: Okwuobi

*Okwuobi* forms part of a trilogy of cases in which the Court determined whether a provision of the Quebec *Charter of the French language*<sup>77</sup> violated the rights to equality guaranteed by the *Charter of human rights and freedoms*<sup>78</sup> and the *Canadian Charter of Rights and Freedoms*.<sup>79</sup> While the trilogy predominantly addresses constitutional law issues,<sup>80</sup> *Okwuobi*, the third case in the series, examines the ability of the superior courts to supplement the jurisdiction of an administrative body that has been given exclusive authority over a matter but may not be able to provide the remedy sought. The case is significant because it provides guiding principles for determining when a superior court can intervene to provide injunctive relief and hear direct constitutional challenges. At the same time, however, the Supreme Court's guidance is extremely vague, leaving the judgment somewhat disappointing. The holding in *Okwuobi* was that supplementary remedial assistance was not required from the Court. The facts of *Okwuobi*, therefore, do not enable us to glean a picture of precise situations when supplementary remedial jurisdiction will be granted. The Court also offered no examples. As a result, we must wait and see how the question will be handled by the lower courts and whether the Supreme Court will ultimately approve.

The decision in *Okwuobi* comprises an appeal by three appellants, heard jointly at the Supreme Court. As mentioned, it is a case dealing with entitlement to minority language education in Quebec. After the Minister of Education denied English language instruction to the children of the appellants, each applied to the Superior Court for declaratory and injunctive relief on the grounds that the *Charter of the French language* violated the Canadian Charter. In taking this route, the appellants bypassed the administrative appeal process that had been established under the *Act respecting administrative justice*.<sup>81</sup> For two of the appellants, the Superior

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<sup>77</sup> R.S.Q., c. C-11.

<sup>78</sup> *Supra*, note 13.

<sup>79</sup> Part I of the *Constitution Act, 1982*, being Sched. B to the *Canada Act 1982* (U.K.), 1982, c. 11.

<sup>80</sup> The first two cases in the trilogy, *Solski (Tutor of) v. Quebec (Attorney General)*, [2005] S.C.J. No. 14, [2005] 1 S.C.R. 201 and *Gosselin (Tutor of) v. Quebec (Attorney General)*, [2005] S.C.J. No. 15, [2005] 1 S.C.R. 238 are discussed in the article on constitutional law developments by C. Mathen in this volume, at 89.

<sup>81</sup> R.S.Q., c. J-3.

Court declined to hear the matter, holding that the ATQ had exclusive jurisdiction over their appeals. These judgments were upheld at the Court of Appeal. In the case of the third appellant, the Superior Court held that it possessed jurisdiction over the matter. At the Court of Appeal, this decision was reversed.

The Supreme Court held that the ATQ had exclusive jurisdiction over appeals from decisions regarding eligibility for minority language instruction. The Court also relied on *Martin/Laseur* and *Paul* to conclude that the ATQ's explicit power to decide questions of law empowered it to consider incidental constitutional questions. The Court held that the claimants could not circumvent the administrative appeal process set up through the ATQ. The legislature intended the ATQ's jurisdiction to be exclusive and courts should respect the intention of the legislature. The appellants had argued that the ATQ did not have jurisdiction over all the parties and that it could grant neither an injunction nor a declaration of constitutional invalidity. The Court found, by contrast, that the ATQ had express authority to implead parties necessary for complete resolution of the dispute. It also noted that the ATQ had been granted broad remedial powers under its enabling statute that may have the potential to be used in a manner similar to a formal injunction. The only remedy sought that the ATQ could not grant was a declaration. Nevertheless, the Court held that absence of this remedy was not a reason to circumvent the administrative process. In the Court's opinion, judicial review is always available and the party can seek a declaration at that time.

A principle that emerges from this case is that a litigant does not have the right to bypass an administrative scheme simply because the scheme does not provide a remedy sought. This is an admonition to both litigants and courts. The Supreme Court emphasized its opinion that courts must respect the intention of the legislature. Throughout the decision, one finds a related and equally strong theme — namely, that the courts should not use their powers to weaken the administrative process, but only to complement it. Consequently, we see that with respect to providing injunctive relief, the Court held that judicial discretion to do so should only be exercised to “fill in the cracks in the administrative process.”<sup>82</sup> Recourse to urgent injunctive relief should remain a rare

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<sup>82</sup> *Okwuobi, supra*, note 5, at para. 52.

exception and should not be used to avoid a tribunal's exclusive jurisdiction or to obtain a review of its decision.<sup>83</sup>

Similarly, with respect to the ability of superior courts to entertain direct constitutional challenges, the Court held that the superior courts should only act when required to "fill the remedial vacuum."<sup>84</sup> Superior courts possess inherent jurisdiction to ensure that there is adherence to the Constitution. Their remedial function is therefore particularly pertinent when dealing with constitutional remedies. However, superior courts should play a role in providing remedies only in situations where the legislature has endowed an administrative body with the power to decide constitutional questions but not the power to grant the most appropriate and just remedy. It is only in such situations that the superior courts can step in. *Okwuobi* was not such a case. Unfortunately, the Court does not go further in describing the situations in which a direct application to the superior court for constitutional remedy would be acceptable. All the Court says for certain is that it would not be one in which the applicants were trying to bypass the administrative scheme altogether. How much of a remedy is needed before the superior court can step in and how the most appropriate remedy will be determined in such cases — for example, whether it will simply be a question of what is provided in the courts or whether some aspects of the administrative scheme will be incorporated — are questions left for another day.

On another level, *Okwuobi* is interesting because the Court is unanimous in its analytical approach to the question of jurisdiction. Yet, the entire "essential character" test is bypassed, not even mentioned. In its place, the only tests applied were those dealing with the constitutional jurisdiction of tribunals derived from *Martin/Laseur* and *Paul*. It is difficult to know how to reconcile this with the earlier jurisprudence, as the Court has not been clear in distinguishing the situations in which to apply the essential character test from those in which to apply the jurisprudence dealing with the constitutional jurisdiction of tribunals. One way of reconciling the case law on concurrent and exclusive jurisdiction is to note that the question in cases like *Okwuobi* deal with whether the tribunal in *fact* had the powers necessary to fulfill the mandate given to it in *theory*.

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<sup>83</sup> Here, the Court cited with approval G.-A. Gendreau *et al.*, *L'injonction* (Cowansville: Yvon Blais, 1998), at 201.

<sup>84</sup> *Id.*, at para. 54, citing Lamer J. (as he then was) in *Mills v. The Queen*, [1986] S.C.J. No. 39, [1986] 1 S.C.R. 863, at 882.

It was clear that the Quebec legislature had granted the ATQ the power to determine language entitlement appeals. It was also undisputed that this was a language entitlement appeal. The question at issue was whether, in the course of deciding such appeals, the ATQ could also decide necessary constitutional matters such as the validity under the Charter of provisions of the statute it was handling. To answer this question, the Court needed only to apply the jurisprudence on the constitutional powers of tribunals: namely, *Martin/Laseur* and *Paul*. It was not necessary to enter into the essential character test in *Okwuobi* as it had been in previous cases like *Weber*, *Morin* and *Charette*, because the debate in *Okwuobi* was not about fitting a dispute within the relatively uncontested powers of a tribunal. This is one possible way of reconciling the approaches taken to exclusive and concurrent jurisdiction; there are undoubtedly others. Hopefully, the Supreme Court will take an opportunity to clarify the situations in which the different tests apply in the near future.

Finally, *Okwuobi* is also useful for its in-depth review of the ATQ's powers, structure and, in particular, its overview of the ATQ's ability to deal with Canadian Charter matters.

### III. THE RIGHT TO INDEPENDENT ADJUDICATION: *VAUGHAN*

*Vaughan* is one of those engaging cases that deal with the relationship between courts and tribunals. At issue in *Vaughan* was whether courts should show deference to a statutory scheme when that scheme does not provide a right to third-party independent adjudication. Decided the same month as *Okwuobi*, *Vaughan* adds another chapter to the Supreme Court's discussion of when courts should and should not step in to supplement dispute resolution processes designed by the legislature.

*Vaughan* concerns labour relations and has a very similar feel to *Weber*. Mr. Vaughan was a federal employee who brought an action in negligence in an effort to have the issue of whether he was entitled to Early Retirement Incentive ("ERI") benefits resolved through independent adjudication. Under the *Public Service Staff Relations Act*<sup>85</sup> ("PSSRA") employee benefits were divided into two types. The first type of benefit included those negotiated as part of the collective agreement; the second included those the government has provided unilaterally by regulation.

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<sup>85</sup> R.S.C. 1985, c. P-35 [now repealed] [hereinafter "*PSSRA*", "the *Act*"].

The Act provided that negotiated benefits were arbitrable while those provided unilaterally were grievable but could not go to third-party arbitration. ERI benefits were unilaterally conferred by regulation. For these benefits, there was a multi-level internal grievance process which allowed the grievance to be pursued up to the level of the Deputy Minister. However, the Act did not provide for arbitration after this last level of grievance.

The case before the Supreme Court originated in a preliminary motion to strike out the action in negligence.<sup>86</sup> The motion had been granted by a Prothonotary of the Federal Court, who held that the jurisdiction of the courts was ousted by the PSSRA's statutory scheme. This decision was then affirmed at all levels of the Federal Court.<sup>87</sup> At issue was whether the courts should offer a concurrent forum to resolve matters relating to unilaterally provided employee benefits because the scheme created under the PSSRA did not provide for adjudication of these matters by an independent third party. The question was therefore one related to procedural fairness. If an administrative decision-making process does not provide the guarantees of procedural fairness required at common law and the legislation does not specify that this process is to be exclusive, should the lack of procedural fairness be understood as an indication that the legislature intended the administrative scheme to be concurrent with the courts?

It was anticipated that the decision in *Vaughan* would explain the role that the right to procedural fairness should play in determining whether the legislature has implicitly intended an administrative scheme to have concurrent jurisdiction with the courts. In cases where the enabling legislation does not indicate expressly that an administrative body is to have exclusive or concurrent jurisdiction over a matter, it becomes necessary to see if such legislative intent can be inferred. Drawing inferences of legislative intent involves, among other things, examining the statute(s) as a whole and considering the manner in which the administrative process operates in practice. However, at the time that *Vaughan* arose in the courts, the jurisprudence was not clear on how determinative a finding of lack of procedural fairness on the part of an administrative scheme should

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<sup>86</sup> Consequently, the Court did not have any evidence before it. See *Vaughan, supra*, note 5, at para. 3.

<sup>87</sup> See *Vaughan v. Canada*, [2000] F.C.J. No. 144, 182 F.T.R. 199, affd [2001] F.C.J. No. 1734 (T.D.), affd [2003] F.C.J. No. 241 (C.A.).

be. The Supreme Court had not yet addressed the question and, as Evans J.A. of the Federal Court of Appeal noted in his thorough review of provincial and federal court decisions, the question had not been directly addressed by the appellate courts either.<sup>88</sup> What was expected by many in *Vaughan* was guidance on a pressing question raised at the Federal Court of Appeal — namely, in cases where legislative intent must be inferred, should the fact that an administrative scheme does not provide common law guarantees of procedural fairness be enough to indicate that exclusive jurisdiction was not intended by the legislature?

Unfortunately, *Vaughan* did not answer this question. The majority's holding was that there should be judicial restraint — that is, that the courts should defer to the PSSRA grievance procedure in this case. The Court's reasons relied on statutory interpretation but were based quite heavily on normative and practical considerations as well. With respect to the statute, the Court held that while the language of the PSSRA was not strong enough to oust the jurisdiction of the courts, courts should nevertheless defer to its grievance process. Without much explanation, Binnie J. stated that the statutory language sent a clear signal that the decision reached at the end of the grievance process is to be final.<sup>89</sup> He also noted that the grievance procedure was effective, in the sense that it provided a remedy and could be used to resolve the particular dispute at issue. On a more normative level, Binnie J. opined that courts should not jeopardize the comprehensive dispute resolution process contained in the statute by allowing routine access to the courts.<sup>90</sup> He disagreed with the argument that decision-making schemes that do not provide for third-party adjudication are not worthy of deference. He noted that lack of adjudication is a consideration outweighed by greater clues that Parliament intended to create a comprehensive scheme. Justice Binnie pointed out as well that Mr. Vaughan's argument implied conflict of interest and bias on the part of the department whose officials may have had an interest in denying eligible employees ERI

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<sup>88</sup> See the decision of Evans J.A. in *Vaughan v. Canada*, [2003] F.C.J. No. 241 (C.A.) [hereinafter "*Vaughan FCA*"]. Actions in tort can be brought against the Crown in the provincial superior courts as well as the Federal Court of Canada. This concurrent jurisdiction has existed since 1993 (*Federal Courts Act*, R.S.C. 1985, c. F-7, ss. 17(1)).

<sup>89</sup> *Vaughan*, *supra*, note 5, at paras. 33-34. See also paras. 27-29.

<sup>90</sup> Here, Binnie J. draws a distinction between the general situation of a labour dispute and the special case of "whistle-blowers". For the Court's discussion on whistle-blowers, see *Vaughan*, *id.*, at paras. 18-26.

benefits, but that he did not accept this argument.<sup>91</sup> Finally, Binnie J. outlined two practical reasons why deference should be accorded by the courts. The first was that the labour dispute resolution process was faster and less costly; the second was that the dispute was straightforward and “essentially an administrative matter best left to the administrators.” Given the number of federal public service employees, the floodgates of litigation could be opened by opening the door to this type of dispute. Overall, the majority’s decision is somewhat disappointing — none of the reasons presented have much support or delve very deeply into the issue.

Justice Bastarache and McLachlin C.J. formed the dissent in this case. In contrast to the majority, they took the general approach that the courts “should refrain from preventing access to independent adjudication in the absence of a clear manifestation of Parliament’s intent in this regard.”<sup>92</sup> They held that there was concurrent jurisdiction between the courts and the grievance system set up under the PSSRA. A particularly interesting aspect of their dissent is that they develop and discuss factors to consider in determining whether the legislature intended a labour dispute resolution process to be exclusive. They concluded:

In sum, although s. 91 of the PSSRA creates a comprehensive and efficient dispute resolution regime, the unavailability of independent adjudication, combined with the absence of mandatory language in the wording of the statute and lack of expertise of the employer-appointed decision maker, points away from a finding of exclusive jurisdiction. Consequently, employees should not be precluded from commencing an action in the courts.<sup>93</sup>

Although the dissent listed the unavailability of independent adjudication, the absence of mandatory language in the wording in the statute and lack of expertise of the employer-appointed decision-maker as the factors to consider, they also considered others in their analysis. These

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<sup>91</sup> Justice Binnie’s reason for not accepting the bias argument was that the facts of Mr. Vaughan’s case “did not show a more particular and individualized conflict problem” (*Vaughan, id.*, at para. 37). It is unusual that the majority did not offer a fuller analysis here, referring to the role of legislative intent (as described in *Ocean Port, supra*, note 32) and using the traditional test for bias, derived from cases like *Committee for Justice and Liberty v. Canada (National Energy Board)*, [1978] 1 S.C.R. 369 and *R. v. Lippé*, [1991] S.C.J. No. 128, [1991] 2 S.C.R. 114.

<sup>92</sup> *Vaughan, id.*, at para. 44.

<sup>93</sup> *Vaughan, id.*, at para. 73.

include the comprehensiveness of the dispute resolution scheme and the availability of a remedy. Particularly noteworthy in terms of remedy is that the dissenting judges did not find that judicial review was an adequate substitute for independent adjudication of the claims on their merits. They also stressed that it is not just the fact of independence in the dispute resolution process that is important but that the independent decision-maker have expertise. While these factors have been developed within the labour context and in dissent, they certainly provide food for thought as to the considerations that should be relevant generally in establishing which of the three models of jurisdiction (concurrent, overlapping or exclusive) the legislature intended when the legislation is not explicit.

At first blush, it is also surprising to find Bastarache J. in the dissenting minority in *Vaughan*. He had unwaveringly defended the concept of the exclusivity of arbitral jurisdiction in *Morin* and, in *Charette*, had championed the idea of tribunals deciding incidental human rights matters in the course of their work in order to keep as many aspects of a dispute as possible in one forum. To then support concurrent jurisdiction between courts and the federal labour relations regime established for public servants seems completely out of step. However, Bastarache J.'s apparent change of heart highlights an aspect of his prior arguments that had not been obvious. Central to his support for exclusive jurisdiction in the labour relations regime is the fact that it promises independent adjudication in the form of an expert arbitrator. For Bastarache J., access to an independent expert adjudicator is a crucial pre-condition to finding deference for structures of labour resolution.<sup>94</sup> The dissenting judges admit that if the legislature is clear in asserting that it has preferred a decision-making system that provides for decision-making without third-party adjudication at its culmination then the courts are obliged to respect this choice. However, they held that in this case, the statute does not present an unequivocal statement to this effect.

Justice Bastarache's conclusion casts a pall over the legitimacy of such state designed processes, especially since he also implies that judicial review is not a sufficient remedy for processes in which independent adjudication does not exist. In contrast to Binnie J., his reasoning may be interpreted as inferring a perception of bias in such processes.

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<sup>94</sup> See, in particular, *Vaughan, id.*, at para. 65.

Finally, one also cannot help but notice the link between this case and the recent jurisprudence on the requirements for tribunal independence. *Vaughan* could also be seen as a case regarding the degree of independence required by a tribunal, in which case the issue would turn on whether the legislature was clear in its intention to make a decision-making process without independent adjudication.<sup>95</sup> Indeed, the judges who wrote the majority concurring reasons at the Federal Court of Appeal discussed the issue from this perspective and they found that the legislation was clear in indicating that the model of no arbitration was to be the final and exclusive forum.

#### IV. STANDARD OF REVIEW: *MUGESERA* AND SECONDARY LEVELS OF APPELLATE REVIEW

The case of *Mugesera* dealt primarily with substantive elements of immigration and criminal law. A high profile case, *Mugesera* considered the issue of whether a political figure in Rwanda, Léon Mugesera, had incited murder, genocide and hatred and committed a crime against humanity in Rwanda through a speech he delivered. The content of the speech led the Rwandan authorities to issue the equivalent of an arrest warrant against him and he fled the country, eventually taking up permanent residence in Canada. In 1995, the Minister of Citizenship and Immigration commenced deportation proceedings under the *Immigration Act*,<sup>96</sup> on the ground that Mr. Mugesera had committed a criminal act or offence prior to being granted permanent residency. Mr. Mugesera was ordered deported by an adjudicator on July 11, 1996. He received a hearing *de novo* by the Immigration and Refugee Board (Appeal Division) (“IAD”), which upheld the decision of the adjudicator.<sup>97</sup> On judicial review, the Federal Court, Trial Division, reversed the decision in part. The Trial Judge found that there was no basis for the allegations of crimes against humanity and misrepresentation but that the allegations regarding incitement to murder and incitement to genocide and hatred were valid. He afforded great deference to the IAD’s

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<sup>95</sup> See the reasons of Sexton J.A. in *Vaughan FCA*, *supra*, note 87. Justice Evans for the minority did not find that the legislation had clearly shown this intention at all.

<sup>96</sup> R.S.C. 1985, c. I-2.

<sup>97</sup> [1998] I.A.D.D. No. 1972.

findings of fact, reviewing on a standard of patent unreasonableness.<sup>98</sup> The Federal Court of Appeal allowed Mr. Mugesera's appeal. In reaching this outcome, however, the Court of Appeal re-evaluated the findings of fact made by the IAD.<sup>99</sup>

From an administrative law perspective, the Supreme Court's decision in *Mugesera* is interesting for its discussion of the applicable standard of review by a court conducting a secondary level of appellate review. In *Mugesera*, this describes the situation of the Federal Court of Appeal in its review of the Immigration Appeal Division decision. The Supreme Court held that the Federal Court of Appeal had "exceeded the scope of its judicial review function when it engaged in a broad-ranging review and reassessment of the IAD's findings of fact."<sup>100</sup> It had implicitly applied a standard of correctness and reviewed the evidence as if it were the trier of fact. The Supreme Court reminds us that "[i]n a judicial review process, it is not open to the reviewing court to reverse a decision because it would have arrived at a different conclusion."<sup>101</sup>

While the Supreme Court's holding in this case is not new, it is a useful reaffirmation of the principles relating to the appropriate relationship between courts and tribunals on judicial review.

## V. EXPERTISE AND DEFERENCE: *MONSANTO*

*Monsanto* deals with the concept of the core expertise of an administrative tribunal, the expertise for which deference will be shown under the pragmatic and functional analysis used to determine the appropriate standard of review. It also discusses the ability of the parties to influence the degree of deference to be chosen by reviewing courts.

The main issue in *Monsanto* concerned the obligations that exist on employers upon a partial wind up of a pension plan. More specifically, the question addressed was whether subsection 70(6) of the Ontario *Pension Benefits Act*<sup>102</sup> requires an actuarial surplus to be distributed to plan members when a pension plan goes through only a partial wind up. After the Superintendent of Financial Services, the provincial pension

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<sup>98</sup> [2001] F.C.J. No. 724. See also *Mugesera*, *supra*, note 6, at para. 29.

<sup>99</sup> [2003] F.C.J. No. 1292, [2004] 1 F.C.R. 3 (C.A.).

<sup>100</sup> *Mugesera*, *supra*, note 6, at para. 36.

<sup>101</sup> *Id.*, at para. 40.

<sup>102</sup> R.S.O. 1990, c. P.8.

regulator, refused to approve the partial wind up report of Monsanto Canada Inc. because it did not provide for distribution of surplus assets, the matter came before the Financial Services Tribunal (“the Tribunal”). The Tribunal held that subsection 70(6) of the Act did not require distribution. On appeal, the Ontario Divisional Court overturned the Tribunal’s decision and the Ontario Court of Appeal upheld the Divisional Court decision.<sup>103</sup>

At the Divisional Court level, the Court reviewed the Tribunal decision on a standard of reasonableness and the Court of Appeal held that the Divisional Court was correct in doing so. Before the Supreme Court, the parties submitted an agreement that the standard of review should be reasonableness. The Supreme Court held, however, that because the standard of review is a question of law, it cannot be determined by agreement of the parties.<sup>104</sup> Moreover, applying the four factors of the pragmatic and functional test, the Court determined, unlike the lower courts, that correctness was the appropriate standard of review. The Court held, in particular, that the factors dealing with relative expertise of the tribunal and the nature of the problem signalled that less deference should be owed. Under its enabling statute, the Tribunal had responsibility for adjudicating in more than one area and it was primarily adjudicative. As well, its members did not necessarily arrive with expertise in pensions although the statute advised that in appointing members to the Tribunal and assigning panels “to the extent practicable, expertise and experience in the regulated sectors should be taken into account.”<sup>105</sup> In the Court’s opinion, there was “little to indicate that the legislature intended to create a body with particular expertise over the statutory interpretation of the Act.”<sup>106</sup> The Court held also that the nature of the problem was a “pure question of law” that was not at the core of the tribunal’s expertise.<sup>107</sup>

It is very difficult to comprehend how the act of interpreting a question about pension wind up is not within the core expertise of a body set up to decide pension appeals, even if there are other subject matters that

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<sup>103</sup> See *Monsanto Canada Inc. v. Ontario (Superintendent of Financial Services)* (2000), 3 B.L.R. (3d) 99, revd [2001] O.J. No. 963 (Div. Ct.), affd [2002] O.J. No. 4407 (C.A.).

<sup>104</sup> *Monsanto*, supra, note 7, at para. 6.

<sup>105</sup> *Id.*, at para. 11.

<sup>106</sup> *Monsanto*, *id.*, at para. 12.

<sup>107</sup> *Id.*, at paras. 8, 16.

the Tribunal handles as well. However, the decision in *Monsanto* seems to form part of a trend. According less deference to tribunal interpretations of provisions of their statutes which also may have a common law meaning has been the result in other recent Supreme Court cases. In addition to *Monsanto*, one finds a similar finding on deference in recent cases like *Barrie Public Utilities v. Canadian Cable Television Assn.*<sup>108</sup> where it was held that no deference is owed to the CRTC in its interpretation of what constitutes “the supporting structure of a transmission line” under the *Telecommunications Act*.<sup>109</sup> This trend is somewhat disconcerting. As I have argued elsewhere, the decisions made by tribunals — in individual cases, vis-à-vis the public interest or in their delegated rule-making functions — are part of the development of governmental policy aimed to regulate the social or economic industry they have been called upon to manage.<sup>110</sup> Their interpretations of the statutes they administer are necessarily informed by the experiences they have acquired in the management of their sector. One would imagine that the tribunal’s interpretation of the provisions of these statutes should attract *some* deference, even if these provisions may also have an ordinary meaning at common law, for in creating the tribunal, the legislature has made the choice to allow this decision-maker instead of the courts to determine the meanings appropriate to the regulation of an industry. An important part of what shapes the tribunal’s interpretation are experiences that stem from the daily operational context of administering its legislation, a context that the legislature has entrusted the tribunal to develop in order to effectively regulate its sector.<sup>111</sup> As Dickson J. (as he then was)

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<sup>108</sup> [2003] S.C.J. No. 27, [2003] 1 S.C.R. 476 [hereinafter “*Barrie Public Utilities*”]. For another example of the correctness standard being applied to a tribunal interpretation of its legislation see *Canada (Deputy Minister of National Revenue — M.N.R.) v. Mattel Canada Inc.*, [2001] S.C.J. No. 37, [2001] 2 S.C.R. 100.

<sup>109</sup> S.C. 1993, c. 38.

<sup>110</sup> See Laverne A. Jacobs, “Recent Developments in Tribunal Standing: *Bransen Construction Ltd.* and Tribunal Impartiality” (2003) 50 Admin. L.R. (3d) 123, at 131.

<sup>111</sup> The theory that the internal operational context and normative ordering of the tribunal are essential to a proper understanding of the decision-making process of administrative bodies has been furthered by influential theorists including, in Canada, Roderick A. Macdonald (see in particular, R.A. Macdonald, “On the Administration of Statutes” (1987) 12 Queen’s L.J. 48 and “The Acoustics of Accountability — Towards Well-Tempered Tribunals” chapter 6 in András Sajó (ed.) *Judicial Integrity* (Leiden: M. Nijhoff Publishers, 2004), at 141-80); and in the United States, Jerry L. Mashaw of Yale Law School (see e.g., Jerry L. Mashaw, “Between Facts and Norms: Agency Statutory Interpretation as an Autonomous Enterprise” (2005) 55 U.T.L.J. 497).

held in *Canadian Union of Public Employees Local 963 v. New Brunswick Liquor Corp.*:<sup>112</sup>

The labour board is a specialized tribunal which administers a comprehensive statute regulating labour relations. In the administration of that regime, a board is called upon not only to find facts and decide questions of law, but also to exercise its understanding of the body of jurisprudence that has developed around the collective bargaining system, as understood in Canada, and its labour relations sense acquired from accumulated experience in the area.<sup>113</sup>

Although he was speaking of the labour board, these ideas are generally applicable. However, the Supreme Court's analysis in *Monsanto* suggests that the concept of a tribunal administering a statute disappears in situations where the tribunal has been set up to review decisions made in more than one regulatory sector. It presupposes that the administration of a statute only occurs when a tribunal has been established to take care of one unique statute and to do so as a primary decision-maker. But there is no reason to believe that review-oriented bodies do not have expertise in the statutes over which they have jurisdiction. Can regulating a sector under a statutory regime realistically be parsed in the manner suggested by the Supreme Court? Moreover, the Court's general approach of deference to the Administrative Tribunal of Quebec, a review body with wide-ranging powers over several statutes, as seen in other cases this term such as *Okwuobi* is also hard to reconcile with *Monsanto*.

The decision of the Ontario Court of Appeal in *Monsanto* reflects these considerations and offers an approach that pays respect to both legislative intention and administrative law practicalities:

The Act gives the Tribunal the central adjudicative role in the specialized administrative structure set up to regulate pensions in

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<sup>112</sup> [1979] 2 S.C.R. 227, at 235-36.

<sup>113</sup> This idea was picked up by Bastarache J. who stated in his dissenting opinion in *Barrie Public Utilities*, *supra*, note 105, at para.78:

Gonthier J. suggests that the CRTC's special expertise in the regulation and supervision of Canadian broadcasting and telecommunications does not apply to statutory interpretation of the Act. In contrast, I am more inclined to think that interpretation of enabling legislation by a specialized tribunal is more akin to administration of that statute, a core part of the tribunal's mandate.

Ontario. While the Tribunal deals with other regulated sectors in addition to pensions, the *Financial Services Commission of Ontario Act* requires that, to the extent practicable, members are appointed with experience and expertise in the regulated sectors and that they are assigned to cases which draw on that experience and expertise. Hence the Tribunal must be seen as having a relative expertise in adjudicating questions relating to pensions.<sup>114</sup>

Overall, the trend signalled by *Monsanto* highlights some of the possible dangers of interpreting too narrowly legislative intent with respect to expertise.

## VI. CONCLUSIONS

In conclusion, the 2004-2005 Supreme Court term saw intense activity centred on the exercise of determining legislative intent. Most of the Court's attention was focused on deciding questions of jurisdiction *ratione materiae*. The deep divides among members of the Court regarding the most appropriate method to use when dealing with two competing administrative tribunals led to a revisitation of the *Weber* principles and has invited us to consider the need to incorporate parameters and guiding factors into the "essential character" test. In what I have termed a contest between expertise and expediency, the cases decided this term on exclusive and concurrent jurisdiction between tribunals have shown an unfortunate tendency to favour convenient process at the expense of experienced decision-making. Considering the wishes of the individual litigant and whether there should be limitations on the nature of the facts to be examined in the "essential character test" would be useful. Generally, the tests to be used leave many unanswered questions and much room for development in the jurisprudence. It is more than likely that the issues the Court has faced surrounding exclusive and concurrent jurisdiction this term will resurface in the future.<sup>115</sup> All told, one cannot help but note the resurgence of jurisdictional type questions

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<sup>114</sup> See *Monsanto Canada Inc. v. Ontario (Superintendent of Financial Services)*, [2002] O.J. No. 4407, at para. 29 (C.A.) per Goudge J.A.

<sup>115</sup> As well, some had argued that *Weber* caused confusion on a practical level as the exclusive arbitral model does not always mesh with the statutes of other decision-making bodies. (See e.g., Andrew K. Lokan & Maryth Yachnin, "From *Weber* to *Parry Sound*: The Expanded Scope of Arbitration" (2004) 11 C.L.E.L.J. 1). *Morin's* opening of the door to the three possible jurisdictional models will hopefully help resolve this problem in the future.

this term; or to note that the search for legislative intent that was created to take administrative law away from “jurisdictional” or “collateral” questions has ironically led to a renewed examination of jurisdiction, this time couched within the context of legislative intent. After a very intense term, one looks forward to following the path of development that the administrative law jurisprudence will take next term.

