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In *Multani*, the Supreme Court of Canada's kirpan case, judges disagree over the proper approach to reviewing administrative action under the *Canadian Charter of Rights and Freedoms*. The concurring judges questioned the leading judgment, *Slaight Communications*, on the basis that it is inconsistent with the French text of section 1. This disagreement stimulates reflections on language and culture in Canadian constitutional and administrative law. A reading of both language versions of section 1, *Slaight*, and the critical scholarship reveals a linguistic dualism in which scholars read one version of the *Charter* and of the judgment and write about them in that language. The separate streams undermine the idea of a shared, bilingual public law. Yet the differences exceed language. The article identifies a legal culture of *droit administratif québécois*: that is, administrative law, practiced in French, within Quebec. That civilians working in French within Quebec approach public law differently than do others troubles the assumption that Canadian public law derives uniformly from British law.

Dans l'affaire *Multani* sur le port du kirpan, les juges de la Cour suprême du Canada expriment leur désaccord au sujet de l'approche adéquate au contrôle des décisions administratives en vertu de la *Charte canadienne des droits et libertés*. Les juges minoritaires remettent en question l'arrêt *Slaight Communications*, arguant que ce précédent était incompatible avec la version française de l'article premier de la *Charte*. Ce désaccord soulève des réflexions au sujet du rôle du langage et de la culture au sein du droit constitutionnel et administratif canadien. Une lecture des versions anglaise et française de l'article premier et de *Slaight* et de la doctrine révèle un dualisme linguistique par lequel les juristes lisent une seule version de la *Charte* et du jugement et les commentent en cette même langue. Cette bifurcation des approches remet en cause l'idée d'un droit public bilingue et partagé, car les différences dépassent le seul domaine de la langue. Cet article identifie une culture juridique de droit administratif québécois, c'est-à-dire de droit administratif pratiqué en français au Québec. Le fait que les civilistes travaillant en français au Québec approchent le droit public d'une manière distincte de celle adoptée ailleurs au Canada vient mettre en question la théorie selon laquelle le droit public canadien est uniformément issu du droit britannique.

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## I. INTRODUCTION

Canadians outside Quebec might have been bewildered by the fuss following the Supreme Court of Canada's unanimous decision that it was impermissible for a Montreal school board to prohibit a Sikh student from wearing a kirpan.<sup>1</sup> Within the province, *Multani* unleashed a torrent of fierce criticism: here was proof that multiculturalism had gone too far. In their worst light, the criticisms might be regarded as assimilationist, majoritarian, racist, or xenophobic prejudice. It annoyed some pundits that the claimant had left the French-language public system for an English-language private school. That withdrawal nourished a sense on the part of some that it was an open question whether the public school system had rejected Gurbaj Multani or vice versa. In their best light, the reactions might be understood as defences of a precarious secularism, however lately achieved. No sooner are the crucifixes and school prayers banished from the classroom, on this understanding, than a student seeks religion's return to the public education system—and in the form of a dangerous weapon at that! *Multani* and its reactions raise complex, perhaps uncomfortable questions about *l'identité nationale* and the boundaries of belonging. If hostility to the kirpan case within Quebec strikes outside observers as excessive, it is worth recalling that treatment of religious family arbitration in Ontario has also exposed substantial anxiety about an ostensibly secular society's relation to the multicultural other.

Remote from the television talk shows and radio phone-ins, administrative law scholars working primarily in English outside Quebec may find the judgment baffling on matters concerning them more

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<sup>1</sup> *Multani v. Commission Scolaire Marguerite-Bourgeoys*, [2006] 1 S.C.R. 256 [*Multani*].

directly. Why did the consensus on quashing the school board's decision require three sets of reasons? All nine judges agreed that the board's council of commissioners decided the matter wrongly. Yet they seem to have disagreed on much. Why was the case not a straightforward application of established method? Since *Slaight Communications Inc. v. Davidson*,<sup>2</sup> it has been understood that even where enabling legislation complies with the *Canadian Charter of Rights and Freedoms*,<sup>3</sup> administrative decisions made under it—in that judgment, a labour adjudicator's order—may themselves attract scrutiny for their constitutional compliance. Where such a decision results in a *prima facie* breach of a *Charter* right, the question arises whether it is justifiable under section 1. If authorized by statutory authority, the decision is “prescribed by law”—the phrase in section 1—and might be justifiable as a reasonable limit. If the decision fails that test, the decision maker has exceeded its jurisdiction.<sup>4</sup>

In *Multani*, Justice Charron, with the support of four colleagues, purported to follow the approach in *Slaight* and another judgment, *Ross v. New Brunswick School District No. 15*.<sup>5</sup> She held that the prohibition against the wearing of a kirpan limited Mister Multani's *Charter* right to freedom of religion. Then she tested that limit under section 1. Justice Charron concluded that it neither impaired Mister Multani's rights minimally, nor did its salutary effects outweigh its deleterious ones. This application of those earlier authorities will incite critical comment. It may disconcert some observers that the majority followed *Slaight* and *Ross* so directly, since both concerned statutory discretions which decision

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<sup>2</sup>[1989] 1 S.C.R. 1038 [*Slaight*].

<sup>3</sup>Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [*Charter*].

<sup>4</sup>In a nutshell, *Slaight* concerned a former employer's challenge to two orders made by a labour adjudicator. The *positive* order required the employer to write a letter of reference on certain terms. The *negative* order prohibited it from saying anything further about the employee. Both Dickson C.J.C. (Wilson, La Forest, and L'Heureux-Dubé JJ. concurring) and Beetz J., dissenting, adopted the methodological and theoretical analysis of interest to this article: Lamer J.'s discussion of the applicability of the *Charter* to administrative decision-making (*supra* note 2 at 1048, 1058). As for the challenged orders, the Chief Justice held both orders to limit freedom of expression contrary to s. 2(b) of the *Charter*, but justifiably under s. 1. Lamer J. examined both orders for their reasonableness in the administrative law sense, concluding the negative order to be patently unreasonable, rendering it unnecessary to consider the *Charter*. He upheld the positive order as a reasonable limit on s. 2(b). Beetz J. held both orders to be unjustifiable limits on s. 2(b).

<sup>5</sup>[1996] 1 S.C.R. 825 [*Ross*].

makers needed to exercise consistently with the *Charter*. In *Multani*, by contrast, the challenge did not target a discretionary decision under valid enabling legislation. It attacked the board's application of its *Code de vie*, itself promulgated under delegated authority, which included a rule against carrying weapons and dangerous objects. Justice Charron is explicit that "the administrative and constitutional validity of the *rule*" is not in issue, only its blunt but textually plausible application.<sup>6</sup> On some views, it should have been the rule that underwent challenge and might have proven justifiable under section 1. One might also emphasize that the school board's lawyer had initially reached an accommodation with the boy's parents, an arrangement that the board and council overruled. This disregard for local governance, and the Supreme Court's implicit annoyance with it, prompt suspicions that the case turns on subsidiarity—on respect for local solutions in public administration—as much as on fundamental freedoms. More important for present purposes, however, are the concurring reasons.

Though agreeing on the outcome, Justices Deschamps and Abella adopted a different approach for this challenge to administrative action. The obvious characterization is that this difference is methodological. Whereas the majority assessed the council's decision for its justification in limiting a *Charter* right, they tested its reasonableness under administrative law doctrines. The basis for their methodological choice, and their departure from Justice Lamer's tack in *Slaight*, was their reading of section 1 of the *Charter*. As they put it, an administrative body's decision "cannot be equated with a 'law' within the meaning of s. 1."<sup>7</sup> In their view, only norms of general application, not individual administrative decisions, can undergo direct *Charter* scrutiny. After their administrative law review of the board's decision, they declared it invalid as unreasonable.<sup>8</sup>

Beyond the plain methodological difference, the disagreement between the majority and concurring judges is also significant in a less obvious way. Early assessments report that, in disputing the scrutiny of administrative decisions under section 1, these judges "revisited the old

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<sup>6</sup> *Multani*, *supra* note 1 at para. 19 [emphasis added].

<sup>7</sup> Official headnote, *ibid.* at 260, a starker articulation of para. 112.

<sup>8</sup> This article will not address it, but LeBel J. concurred separately, tracing a middle ground between Deschamps and Abella JJ.'s "norm-decision duality" and Charron J.'s rigid application of the test from *R. v. Oakes*, [1986] 1 S.C.R. 103 (*ibid.* at paras. 150-51).

debate as to the meaning of the term ‘prescribed by law.’”<sup>9</sup> Yet is that quite right? As a puzzled reader may notice, the English version of section 1 nowhere mentions “a law,” the key term for Justices Deschamps and Abella. It includes only the phrase “*prescribed by law*.” This disjuncture between what these judges say of the *Charter* and its text invites a closer observation of language. Might it matter that all three opinions were drafted in French, ensuring that the unilingual reader of English must content herself with a translation? Indeed, Justice Lamer’s reasons in *Slaight* were themselves written in French, then translated. The disconnection vanishes when reading the *Charter* and the concurrence in *Multani* in French. A better view, then, is that the disagreement turns on language. Justices Deschamps and Abella are not denying that an administrative decision can be “prescribed by law” within the meaning of section 1. Rather, they are contending with the majority judges over the French version of section 1, which specifies that protected rights “ne peuvent être restreints que par une règle de droit.” It is in referring to the French text of section 1 that they state: “On ne peut assimiler une décision ou ordonnance d’un organisme administratif à une ‘règle de droit’ au sens de l’article premier”; in other words, an administrative body’s decision “cannot be equated with a ‘law’ within the meaning of s. 1.” “Règle de droit” is the complete term from section 1; “law” is not.

What are the layers so far? One level is the methodological debate about translating the uneasy relation between the *Charter* and administrative law into judicial practice. While, nearly twenty years on, scholars largely acknowledge as constitutional orthodoxy the relevant propositions of Justice Lamer in *Slaight*—the *Charter*’s application to administrative orders, and the possibility of directly testing them—they do not do so uncritically. The disagreement in *Multani* will doubtless stimulate further comment, though contributing to that debate is not this article’s primary ambition. A second level is interpretive and linguistic. *Multani* presents francophone judges, writing in French to decide a Quebec case, disagreeing over the implications for constitutional and administrative law of the French version of section 1 and the compatibility of *Slaight* with it. What unites the linguistic and doctrinal layers, or rather, reveals them as overlapping or connected, is

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<sup>9</sup> David Mullan, “Section 7 and Administrative Law Deference—No Room at the Inn?” (2006) 34 Sup. Ct. L. Rev. (2d) 227 at 239; see also Carissima R. Mathen, “Developments in Constitutional Law: The 2005-2006 Term” (2006) 35 Sup. Ct. L. Rev. (2d) 17 at 69.

that doctrinal debate consists largely of separate streams of English and French scholarship questioning *Slaight*, often with reference to only one language version of section 1. This article's chief objective is to explore this overlap of method and language. It may disappoint some readers that, beyond emphasizing that both must be read, the article posits no best interpretation of the two language versions of section 1. Such prescription falls outside its scope, which calls, instead, for taking *Multani* as a point of departure for reflections on language and culture in Canadian constitutional and administrative law.

The article questions two assumptions in Canadian constitutional theory. One is that constitutional law assures public law's bilingualism, at least at the federal level and in several provinces. The other is that public law in Canada has a uniformly common-law character, inherited from Great Britain. This challenge to prevailing suppositions unfolds in three parts. Part II reveals that *Slaight* and the scholarship critical of it exemplify a practice of linguistic dualism. In this practice, jurists read just one language version of the *Charter* and write about it in that language. These are not identical debates playing out in parallel. Instead, the understandings of section 1 and its implications for administrative action based on the English text, written about in English, differ from those based on the French, written about in French. The differences in the texts, judgments, and scholarship in the two languages ensure that a reading of the English translation of *Multani* alone will be an impoverished one. Yet, as Part III argues, the two language versions of the *Charter* do not subsist in total isolation. Reflections on legal bilingualism, as well as close readings of applications of section 1 in translated judgments, show some judges and scholars, sometimes, to negotiate both versions. To this point, the argument appears to turn primarily on language, possibly disturbing solely the assumption about public law's bilingualism. If discrepancies between the language versions of the constitution caused the differing ideas about the relation between the *Charter* and administrative law, amending the text might reduce or eliminate the conflict. Crucially, though, Part IV contends that disputes over language risk obscuring another, cultural dimension. The presence of a legal culture of *droit administratif québécois*, largely practiced in French, undermines the second assumption, that all Canadian administrative law derives from its British antecedents. In at least some instances, this legal culture leads its participants to approach section 1's threshold question differently than do others. A re-reading of the concurrence in *Multani*, in which the

civilian idea of *la règle de droit* is prominent, reveals the influence of this legal culture. A richer reading of *Multani*, then, attends not only to both languages, but also to more than one legal culture. Indeed, the civil law's influence on scholarly and judicial approaches to a constitutional matter implies that it is unsatisfactory to confine harmonization efforts—concerning the interrelation of federal law with provincial common law and civil law—to private law.

A caveat is in order. The suggestion that *Multani* might prove mysterious for administrative law scholars working primarily in English has implicitly invoked as foil those working chiefly in French. Likely as it is that many administrative and constitutional law scholars have, in fact, read *Multani* only in its English translation, that contrast risks resurrecting the creaky, inaccurate, and unproductive dichotomy of English-Canadian common lawyers and French-Canadian civilians. Such a binary opposition scants the rich currents of contemporary linguistic and cultural movement and *métissage*. These currents are evident not only in the practice of law in English in Montreal and in French in Moncton, but also in the study and teaching of law where the common law is taught in French and the civil law and common law are taught together in both languages. Another contrast is thus critical: *Multani* reveals internal disagreements *between* judges writing in French. Many francophone judges—to the extent the epithet is useful—have followed Justice Lamer's approach in *Slaight*. Thus the legal culture sketched in Part IV does not exert a constant influence. While it draws attention to separate bodies of legal thought in English and French, this article also reads *Multani* as illuminating internal debates among legal scholars and judges labouring in French, ones that have passed largely unnoticed in English-language scholarship.

## II. LINGUISTIC DUALISM IN THE WAKE OF *SLAIGHT*

As known by every law student, if not every child in the school yard, the *Charter's* rights are not absolute. In the much-studied words of section 1, the *Charter* guarantees its rights and freedoms “subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.” “Prescribed by law” serves a “special gate-keeper function.”<sup>10</sup> On the face of the text, possibly

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<sup>10</sup> Lorraine Eisenstat Weinrib, “The Supreme Court of Canada and Section One of the *Charter*” (1988) 10 Sup. Ct. L. Rev. 469 at 472.

unconstitutional government action that is not “prescribed by law” cannot be justified by a demonstration that it reasonably limits a right. Questions arise about what constitutes “law” in this setting and how precise and explicit a valid prescription must be. Together the verb *prescribe* and the noun *law* hint to some readers that limits on rights, to pass the threshold, must satisfy both formal and substantive criteria.<sup>11</sup> In any event, judicial accretions have superseded prolonged speculation on the implications of the bare text.

In the figurative words of two respected constitutional scholars, judges have construed the “prescribed by law” threshold as having “two limbs.” One is substantive: “the requisite degree of precision or explicitness that a law must have in order to prescribe the limitation of *Charter* rights.” The other is formal: “that the limitation be made by *law*.” Combining the two, “a law of the appropriate form actually prescribes the limitation in question.”<sup>12</sup> The debates of interest to this article flow from Justice Lamer’s explanation in *Slaight* that a delegated decision maker’s individual order satisfied this second limb.

The English translation of Justice Lamer’s reasons incorporates the vocabulary of the English constitutional text. The *Charter*, he reiterates, guarantees the right “to have such rights and freedoms subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.”<sup>13</sup> Since “prescribed by law” serves as a threshold, pronouncing a limitation to be “prescribed by law” indicates its full membership in the class of justifiable limits on rights. Justice Lamer declares that the impugned order is prescribed by law and can therefore be justified under section 1. Despite the firmness of this assertion, the explanation for why the adjudicator’s order constitutes a limit prescribed by law strikes some commentators as fragile. Frankly, Justice Lamer risks undercutting his own plain statement by writing shortly afterwards that it is “the legislative provision conferring discretion which limits the right or

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<sup>11</sup> Compare the early view that “law” targets only the “source of the power, not the manner of its exercise.” Neil Finkelstein, “Section 1: The Standard for Assessing Restrictive Government Actions and the *Charter’s* Code of Procedure and Evidence” (1983) 9 Queen’s L.J. 143 at 161.

<sup>12</sup> Sujit Choudhry & Kent Roach, “Racial and Ethnic Profiling: Statutory Discretion, Constitutional Remedies, and Democratic Accountability” (2003) 41 Osgoode Hall L.J. 1 at 8 [footnote omitted; emphasis in original].

<sup>13</sup> *Slaight*, *supra* note 2 at 1079.



freedom, since it is what authorizes the holder of such discretion to make an order.”<sup>14</sup> If the legislative provision limits the right, must it not be justified under section 1? However shaky the justification, the English translation affirms that the adjudicator’s order falls squarely within the class of rights limitations contemplated by section 1. Justice Lamer appears to demarcate the boundaries of a single set of legal artifacts that satisfy “prescribed by law.” Within that set, there are no first- and second-class members. If rights limitations imposed by primary and secondary legislation will be prescribed by law, so too can be those imposed by the administrative decisions they enable.<sup>15</sup>

If a limitation on a right resulting from an administrative decision or a more general enactment fails the test under section 1, that decision or enactment infringes the *Charter* and a constitutional remedy may be appropriate. Two explicit remedial provisions in the constitution function as alternatives. Some find it helpful to think of “two different tracks” which depend on the constitutional violation’s source. Where a law of general application—a statute, a regulation, or a common law rule—is inconsistent with the *Charter*, Track 1 is the route and section 52 provides that the law is invalid to the extent of that inconsistency. For individualized acts that violate *Charter* rights, Track 2 leads to the range of remedies available under section 24.<sup>16</sup>

The focus in *Slaight* on the *Charter* compliance of administrative orders, policed by individual remedies under section 24, likely satisfies those concerned with maintaining administrative efficacy while guarding against individual abuses of power. A number of scholars commented favourably on the treatment of the adjudicator’s order as a reasonable limit on a *Charter* right. The most extensive discussion of *Slaight* published in English assesses the application of constitutional standards directly to the discretionary decision as protecting rights adequately. Requiring more explicit legislative standards would yield “no significant benefits” and might detrimentally reduce an adjudicator’s flexibility to

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<sup>14</sup> *Ibid.* at 1080-81.

<sup>15</sup> Effectively, the Court often equates “prescribed by law” with “authorized by law”: *e.g. Eaton v. Brant County Board of Education*, [1997] 1 S.C.R. 241 at para. 3; *Slaight, ibid.* Dictionary meanings of “authorize” and “prescribe” are similar but not identical. The latter connotes a more stringent sense of constraint: “Limit, restrict; confine within bounds” and “Lay down rules.” Lesley Brown, ed., *The New Shorter Oxford English Dictionary*, 2 vols. (Oxford: Clarendon Press, 1993), s.v. “authorize,” “prescribe.”

<sup>16</sup> Choudhry & Roach, *supra* note 12 at 3-4.

respond to individual cases.<sup>17</sup> On other positive assessments, *Slaight* shows appropriate recognition of the actual operation of administrative tribunals, particularly labour boards.<sup>18</sup>

Yet *Slaight*'s holding that an administrative decision is "prescribed by law" and thus justifiable under section 1 has stimulated a number of criticisms. Coupled with the presumption that enabling legislation is constitutionally compliant, it insulates enabling legislation and spotlights individual decisions. Reliance on individual remedies under section 24 is uncontroversial when an officer operates egregiously. But the situation differs where *Charter* violations occur routinely. Persistent *Charter* violations in the implementation of a statute generate suspicions that the statute is itself to blame. Invalidating individual administrative actions, while maintaining the constitutional validity of the enabling statute, can appear unsatisfactory. The example *par excellence* is an ongoing sequence of litigation in which a gay bookstore has challenged the repeated discriminatory administration of obscenity measures. In *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*,<sup>19</sup> the majority of the Supreme Court concluded that, despite the dismal experience of implementation, the customs officers could, in theory, apply the customs legislation consistently with the *Charter*. Three dissenting judges opined that the extensive record of unconstitutional application made it imperative for the legislation to provide measures to ensure respect for *Charter* rights in its administration. Some proposals for reform reflect dissatisfaction with this judgment and with the general analytical approach taken from *Slaight*.

One proposal objects to the practice of seeking the justification of rights-limiting administrative action case by case. It argues that the justification should be pitched at the enabling norm. Sujit Choudhry and Kent Roach contend that, at least sometimes, rights limitations in the course of administration will require *Charter* scrutiny of the enabling legislation. They take as jurisprudential starting point *R. v. Therens*,<sup>20</sup> an early *Charter*

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<sup>17</sup> June M. Ross, "Applying the *Charter* to Discretionary Authority" (1991) 29 Alta. L. Rev. 382 at 417 [Ross, "Discretionary Authority"].

<sup>18</sup> A. Wayne MacKay & Dianne Pothier, "Developments in Constitutional Law: The 1988-89 Term" (1990) 1 Sup. Ct. L. Rev. (2d) 81 at 139; Patrick Macklem, "Developments in Employment Law: The 1988-89 Term" (1990) 1 Sup. Ct. L. Rev. (2d) 405 at 407.

<sup>19</sup> [2000] 2 S.C.R. 1120 [*Little Sisters*]. For the latest development, see *Little Sisters Book and Art Emporium v. Canada (Commissioner of Customs and Revenue)*, [2007] 1 S.C.R. 38.

<sup>20</sup> [1985] 1 S.C.R. 613 [*Therens*].

judgment concerning police action in relation to section 1. Writing shortly after September 11, they warn that national security measures are rife with the propensity for racial profiling. They propose that where profiling and other activities obviously endanger *Charter* rights, courts should require an explicit or necessarily implicit warrant for exercises of statutory discretion that limit *Charter* rights. In other words, legislatures intending their delegates to systematically limit *Charter* rights should stipulate that intention. Where an explicitly stated intention is not justifiable, the enabling legislation would be invalid under subsection 52(1). Such an approach would, in their view, significantly increase democratic accountability.<sup>21</sup>

While Choudhry and Roach's proposal concerns the justification of a general norm rather than that of an individual action, another bears on the relative weight of the norms that can be directly scrutinized under the *Charter* and perhaps justified as reasonable limits on rights under section 1. Lorne Sossin would enlarge the category of reviewable administrative instruments. He argues that soft law—the internal guidelines and manuals instructing bureaucrats on how to exercise statutory discretion—should in some circumstances be scrutinized for their *Charter* consistency.<sup>22</sup> Whereas Choudhry and Roach argue that unconstitutional administration reeks of a rotten statute, Sossin suggests that, likelier than not, the source of a *Charter* breach lies in departmental policies, guidelines, or manuals.<sup>23</sup> For taxonomic purposes, internal administrative rules are normative insofar as they are general and they direct conduct, but they are not “proprement juridiques.”<sup>24</sup> They are not obligatory, nor are they published and made accessible following the procedures applicable to statutory instruments.<sup>25</sup> Moreover, they are subject to informal amendment and replacement.

What matters for present purposes is not the respective merits of these proposals, but the kinds of argument they deploy. Both proposals call on pragmatic arguments.<sup>26</sup> They flow from the consequences of the

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<sup>21</sup> Choudhry & Roach, *supra* note 12 at 5-6, 33.

<sup>22</sup> Lorne Sossin, “Discretion Unbound: Reconciling the *Charter* and Soft Law” (2002) 45 *Can. Pub. Admin.* 465 at 481, 467-68.

<sup>23</sup> *Ibid.* at 474.

<sup>24</sup> France Houle, *Les règles administratives et le droit public: aux confins de la régulation juridique* (Cowansville, Qc.: Yvon Blais, 2001) at 13.

<sup>25</sup> Raoul P. Barbe, *La réglementation* (Montreal: Wilson & Lafleur, 1983) at 37-38, c. 3.

<sup>26</sup> Chaïm Perelman & Lucie Olbrechts-Tyteca, *Traité de l'argumentation: La nouvelle rhétorique*, 5th ed. (Brussels: Éditions de l'Université de Bruxelles, 1988) at 358.

approach in *Slaight*, arising in some measure from dissatisfaction with *Little Sisters*. Sossin's argument reveals a particularly pragmatic sensitivity to public administrative practices. Choudhry and Roach also engage in more conventional doctrinal argument, anchoring their proposal to *Therens* and other judgments predating *Slaight*. Other critiques of *Slaight* targeting the relation between administrative and constitutional law also deploy doctrinal argument. Important questions about the respective roles of reasonableness review in administrative law and reasonable justification under section 1 await resolution. A decade after *Slaight*, explicit inclusion of *Charter* "principles" among the constraints on the exercise of discretion in *Baker v. Canada (Minister of Employment and Immigration)*<sup>27</sup> further undermined the firm distinction in *Slaight* and *Ross* between *Charter* values and administrative law.<sup>28</sup> Justices Deschamps and Abella's suggestion in *Multani* that an administrative law analysis incorporates *Charter* arguments resonates with some of the scholarly criticisms.<sup>29</sup> As an argumentative strategy, their effort to reconcile the doctrinal implications of different Supreme Court judgments—*Slaight* and *Baker*, among others—is consistent with Choudhry and Roach's attempt to resuscitate *Therens* and hold it up to *Slaight*. In contrast, the chief reason that Justices Deschamps and Abella advance for rejecting *Slaight*'s determination that administrative decisions might be justifiable rights limitations under section 1 exemplifies an entirely different persuasive form. It is a "quasi logique" or conceptual argument, relying on the use of definitions.<sup>30</sup> Their contention turns on the text of the *Charter*'s French version.

The French version of section 1 states that the *Charter* guarantees its rights and freedoms, which "ne peuvent être restreints que par une règle de droit, dans des limites qui soient raisonnables et dont la justification puisse se démontrer dans le cadre d'une société libre et démocratique." To be justifiable, such an instrument must be "une règle de droit." "Une règle de droit" is a *formal* requirement,<sup>31</sup> and

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<sup>27</sup> [1999] 2 S.C.R. 817 at para. 56 [*Baker*].

<sup>28</sup> Geneviève Cartier, "The *Baker* Effect: A New Interface between the *Canadian Charter of Rights and Freedoms* and Administrative Law—The Case of Discretion" in David Dyzenhaus, ed., *The Unity of Public Law* (Oxford: Hart Publishing, 2004) 61.

<sup>29</sup> *Multani*, *supra* note 1 at para. 86.

<sup>30</sup> Perelman & Olbrechts-Tyteca, *supra* note 26 at 282.

<sup>31</sup> Pierre Giroux, Stéphane Rochette & Stéphane Rousseau, "L'impact de l'article 7 de la Charte canadienne en droit administratif" in Barreau du Québec, *Développements récents en droit administratif (1994)* (Cowansville, Qc.: Yvon Blais, 1994) 87 at 119.

thus a reader of the French is likely to turn to formal classifications of the legal instrument restraining a protected right. At first blush, this formal requirement provides meager support for any *substantive* requirement of reasonable precision. Yet, understood purposefully, with a view to advancing the rule of law, “une règle de droit” may imply a measure of precision and accessibility.<sup>32</sup> How does Justice Lamer treat this text in the original French of his reasons in *Slaight*?

A close reading of Justice Lamer’s original French reasons beside their English translation provides cause for unease. Aided by a jurilinguist, he makes parallel but distinct arguments. While his English translation incorporates the vocabulary of the English version of section 1, the original French incorporates the words of the French constitutional text. The *Charter*, he states, does not guarantee rights absolutely; rather, it guarantees the right “de ne pas voir ces droits ou ces libertés restreints autrement que par une règle de droit.”<sup>33</sup> Applying the French text, Justice Lamer writes that the arbitrator’s restriction on a *Charter* right “provient ... d’une règle de droit”; it comes from “une règle de droit.” The introduction of *provenir* ensures that, for a limit to be justifiable, its *being* “une règle de droit” is no longer necessary. While literalism is not the lodestar in constitutional interpretation, the French text provides a basis for at least arguing that limits on rights must actually *be* “règles de droit,” and not merely *derive from them*. It is thus unsurprising that support would later resurge for a restrictive approach by which only “règles de droit” would satisfy the test of section 1. Unlike Justice Lamer’s reasons translated into English, the original opinion in French appears to produce two distinct classes of justifiable rights limits: those that *are* “règles de droit,” and those that come from one.

That the argument in each language coheres solely with its language version of the *Charter* is not an isolated phenomenon. It exemplifies what has been called the “practice of two legal unilingualisms.”<sup>34</sup> Contrary to the loftier ambitions for legal bilingualism, the parallel arguments in *Slaight* show contentment “merely with producing legal artifacts in two languages,” each of which can be produced and used in isolation from the other.<sup>35</sup>

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<sup>32</sup> Danielle Pinard, “Les seules règles de droit qui peuvent poser des limites aux droits et libertés constitutionnellement protégés et l’arrêt *Slaight Communications*” (1991) 1 N.J.C.L. 79 at 121.

<sup>33</sup> *Slaight*, *supra* note 2 at 1079.

<sup>34</sup> Roderick A. Macdonald, “Legal Bilingualism” (1997) 42 McGill L.J. 119 at para. 42.

<sup>35</sup> *Ibid.* at para. 6.

Rather than reading both versions of section 1 together, Justice Lamer appears indifferent to discrepancies between the two authoritative texts. He does not point to them, or make an explicit effort to adumbrate the shared meaning to which both may be thought to refer. Do he and his translators write, as it were, for isolated English and French audiences, each reading a single version of the judgment and of the *Charter*? If in Quebec French and English versions of private law enactments do more than live side-by-side—they speak to each other, in one scholar’s felicitous expression<sup>36</sup>—the same does not appear consistently true of the two official renderings of the *Charter*’s first provision.<sup>37</sup> Failing to examine both language versions may create a “constitutional jurisprudence with a unilingual foundation for a bilingual Constitution.”<sup>38</sup> By framing separate arguments in each language, for each language version, rather than grappling with differences and formulating an argument to reconcile both authoritative versions, Justice Lamer’s reasons in *Slaight* and their translation set the scene for distinct streams of scholarship, bequeathing to the future the dispute in *Multani*.

Predictably, even at the time, the approach in *Slaight* provoked stringent criticisms from readers of the French version of section 1. Danielle Pinard writes that the Court evacuated the express condition that limits on rights be imposed only “par une règle de droit.”<sup>39</sup> In other words, the formal requirement in the French text makes it difficult to accept the theory that seems to have characterized the adjudicator’s order in *Slaight* as prescribed by law. The notion in that judgment appears to be that prescription or authorization by law flows down from an enabling statute so as to permit the characterization of administrative action taken under that statute as equally prescribed by law. Serge Gaudet characterizes *Slaight* as “assez étonnant” for contradicting the notion of “une règle de droit” and the spirit of *Oakes*.<sup>40</sup> He observes that the flow-down theory applies much more readily to the English than to the French

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<sup>36</sup> Nicholas Kasirer, “Dire ou définir le droit?” (1994) 28 R.J.T. 141 at 161.

<sup>37</sup> For another instance of linguistic dualism in administrative law, recall the differing interpretations arising from the respective language versions of former s. 28 of the *Federal Court Act*, R.S.C. 1970 (2d Supp.), c. 10. See also Macdonald, “Legal Bilingualism,” *supra* note 34 at 159 n. 153.

<sup>38</sup> J.P. McEvoy, “The *Charter* as a Bilingual Instrument” (1986) 64 Can. Bar Rev. 155 at 159.

<sup>39</sup> Pinard, *supra* note 32 at 116.

<sup>40</sup> Serge Gaudet, “La règle de droit au sens de l’article premier de la Charte canadienne des droits et libertés: commentaires sur l’affaire *Slaight Communications Inc. c. Davidson* [1989] 1 R.C.S. 1038” (1990) 20 R.D.U.S. 447 at 468.

text of the *Charter*. He writes: “En effet, de toute prescription qui tire sa force et sa légitimité du système légal, l’on peut aisément dire qu’elle est ‘prescribed by law.’”<sup>41</sup> By contrast, with an eye on the formal criterion in the French text, the arbitrator’s exercising statutory powers does not imply “que les actes qu’il pose sont des règles de droit au sens de l’article premier.”<sup>42</sup> Instead of attending to the qualities expected of “une règle de droit,” the majority in *Slaight* narrows its concern to the legislative source of the order.<sup>43</sup> Limiting attention in that way reflects a preference for what Gaudet identifies as the *legalist* option, preoccupied with the source of power, as opposed to the *formalist* option, concerned with the manner of its exercise. He notes disapprovingly that the legalist option, adopted by the Court, is by far the least demanding.<sup>44</sup>

While time’s passage often calms the criticisms of judgments,<sup>45</sup> objections to *Slaight* grounded on the French version of section 1 persist. The dubiety of subjecting administrative orders to the *Oakes* test remains somewhat a live issue in Quebec scholarship. At least, the leading Quebec constitutional law text—presumably the introduction for law students in the province and the practitioner’s first reference—continues to doubt that holding. Thirteen years after the judgment, Henri Brun and Guy Tremblay still declare it “surprenant” that a tribunal’s decision can be “une règle de droit au sens de l’article 1.”<sup>46</sup>

The richness of the critiques of *Slaight* springing from the French text underscores the missed opportunity for contact between scholars working in the two languages. Often, scholars publishing in English situate their arguments primarily in relation to other scholarship in that language. Consequently, commentators writing critically of *Slaight* in English may understate the extent to which that authority has been questioned.<sup>47</sup> To

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<sup>41</sup> *Ibid.* at 458 n. 18. [Trans.] “In effect, we can easily say of any prescription that draws its force and legitimacy from the legal system that it is ‘prescribed by law.’”

<sup>42</sup> Pinard, *supra* note 32 at 117.

<sup>43</sup> *Ibid.* at 133-34.

<sup>44</sup> Gaudet, *supra* note 40 at 468.

<sup>45</sup> Paul W. Kahn, *The Cultural Study of Law: Reconstructing Legal Scholarship* (Chicago: University of Chicago Press, 1999) at 117-18.

<sup>46</sup> Henri Brun & Guy Tremblay, *Droit constitutionnel*, 4th ed. (Cowansville, Qc.: Yvon Blais, 2002) at 945. By contrast, Lamer J. approves the analysis in Hogg’s leading English-language monograph (*Slaight*, *supra* note 2 at 1078-79), something noted with understandable satisfaction in subsequent editions.

<sup>47</sup> Sossin, *supra* note 22 at 479 n. 57, cites only Choudhry and Roach for scholarly challenges to the approach in *Slaight*. In highlighting the role of soft law in *Charter* breaches, he is less alone than

give one example of a missed opportunity for scholarly exchange, Choudhry and Roach's proposal, grounded theoretically on democratic accountability and the separation of powers, prescribes the same outcome as conceptual arguments anchored to the French phrase "une règle de droit." Yet those scholars, working in English, appear not to have armed themselves with the hints emerging from the French version of the *Charter* and the related literature generated in Quebec.<sup>48</sup> Since the critical scholarship in French is not just a different version of the same arguments, scholars working in English, by consulting only English materials, deprive themselves of access to additional normative resources. Of course, no scholar can achieve exhaustiveness, nor would a reader tolerate the footnotes if one tried. The interest of the observation lies not in the omission to cite published scholarship per se, but in the suspicion it raises that English-language administrative and constitutional law scholars do not attend to French-language debates on what is, in theory, a common constitution and public law. Do virtual boundaries confine the English-language scholarship critical of *Slaight*? Might it not reflect what an eminent Quebec judge identified tentatively thirty years ago as "an actual separation in legal Canada"?<sup>49</sup> At times scholarship in French demonstrates a similar insularity, though generally one of a lesser order.<sup>50</sup>

Yet it would be misleading to read *Slaight's* dominant message regarding linguistic practices as one of isolation. If attention to administrative law, international law, and constitutional law shows the

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his endnotes imply. For another argument that the customs officers' manuals caused the rights violation in *Little Sisters*, see Daniel Mockle, "Gouverner sans le droit? Mutation des normes et nouveaux modes de régulation" (2002) 43 C. de D. 143 at 150 n. 23 [Mockle, "Gouverner"].

<sup>48</sup> In linking a strict threshold requirement in s. 1 with democratic accountability, Choudhry and Roach, *supra* note 12, do not cite Pinard's argument for democratic accountability (*supra* note 32 at 104-105). They cite at 14 n. 52 an argument predating *Slaight* that "prescribed by law" should refer only to output of the state's "democratic law-making machinery" (Weinrib, *supra* note 10 at 477), but that earlier piece is silent on the French text's clues in this regard.

<sup>49</sup> Jules Deschênes, "On Legal Separatism in Canada" (1978) 12 Law Society Gazette 1 at 2. For recent evidence of scholarly separation on geographical and linguistic bases, see Marie-Claude Prémont, Book Review of *Access to Care—Access to Justice. The Legal Debate over Private Health Insurance in Canada* ed. by C.M. Flood, K. Roach & L. Sossin (2006) 21 Can. J. L. & Soc'y 201.

<sup>50</sup> Compare the rich cross-over effect when a professor at Université de Sherbrooke discusses French and English scholarship on the relationship between the *Charter* and administrative law: Geneviève Cartier, "Administrative Law: Twenty Years after the *Charter*" (2003) 62-63 R. du B. 197 (special issue).



judgment to enact what one scholar has colourfully called a “messy ménage à trois,”<sup>51</sup> *Slaight* and its successor judgments also perform a messy *pas de deux* in which French and English versions of the *Charter* interact. Disputes over the meaning of section 1 might fruitfully be understood as a synecdoche for the larger relationship between public law practiced in English and in French, one in which dualism is not the sole phenomenon observable. Brief exploration of the practice of legal bilingualism—as a theoretical matter, relating to enactments and judgments—will prepare the ground for examining the treatment of section 1 in judges’ reasons.

### III. NEGOTIATING LANGUAGE VERSIONS

The English and French versions of the constitution are “equally authoritative.”<sup>52</sup> Where there are two authoritative versions, both must be read. Reliance on a single version, it has been said, is “dangerous for the citizen and totally unacceptable for any official interpreter.”<sup>53</sup> After all, reading both and undertaking a preliminary interpretation is the only way to determine whether the two are sufficiently similar that reliance on one is permissible. Commentators are, however, conscious of the tension between the idea that official bilingualism allows unilingual citizens to function in one official language and the imperative, dictated by the authoritativeness of both versions, of reading both.<sup>54</sup> What does a sensitive reading of both versions entail?

A starting point may be attention to the choices made in drafting section 1. Strong as the case for a strictly formal reading of “une règle de droit” may appear on the face of the text, the *non-dit* of the drafters’ exclusions may also contribute to the constitutional meaning. The drafters seem to have rejected available options that would have

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<sup>51</sup> Audrey Macklin, “The State of Law’s Borders and the Law of States’ Borders” in Dyzenhaus, *supra* note 28, 173 at 186.

<sup>52</sup> *Constitution Act, 1982*, *supra* note 3, s. 57. This provision is consistent with the constitutional regime of bilingualism: *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, s. 133, reprinted in R.S.C. 1985, App. II, No. 5; *Charter*, *supra* note 3, ss. 16-20. See generally Robert Leckey & André Braën, “Bilingualism and Legislation” in Michel Bastarache, ed., *Language Rights in Canada*, 2d ed. (Cowansville, Qc.: Yvon Blais, 2004) 37.

<sup>53</sup> Ruth Sullivan, *Sullivan and Driedger on the Construction of Statutes*, 4th ed. (Markham, Ont.: Butterworths, 2002) at 77.

<sup>54</sup> *Ibid.*

narrowed the scope of the English threshold requirement or enlarged that of the French. Scholars occasionally lament that English has a single word “law,” while juridically richer languages boast *ius-lex*, *droit-loi*, *derecho-ley*, *Recht-Gesetz*, and *diritto-legge*. One should, however, avoid exaggerating the poverty of English for distinguishing individual posited laws from law *tout court*. Had they wished, the drafters of the *Charter* knew how to restrict their reference in English to enacted laws and regulations, along the lines discerned by many readers of the French text.<sup>55</sup> The French language, for that matter, has its own pitfalls. While the jurist working in English does not risk confusing law and right, French uses *droit* for both *droit objectif* (rules of conduct regulating human behaviour) and *droits subjectifs* (legal rights or prerogatives of individuals or groups).<sup>56</sup> The upshot is that while the English version of section 1 contrasts “rights and freedoms” (*droits subjectifs*) with limits “prescribed by law” (*droit objectif*), the French version uses *droit* differently in the same sentence. Nonetheless, establishing the intended usage is possible. Moreover, the drafters could have referred to legal authorization in French without fixating on form.<sup>57</sup> Intriguing as they may be, the drafters’ choices appear not to point in a single direction, directing attention to the rules for construing bilingual texts.

The shared meaning rule has long been thought the basic rule governing interpretation of bilingual enactments.<sup>58</sup> Applying it to section 1, if “prescribed by law” is a wide term, and “une règle de droit” a narrower one contained within it, the narrower idea—the common content—should prevail, barring other factors.<sup>59</sup> Today, the shared

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<sup>55</sup> The classic definition of ownership in Quebec’s 1866 Civil Code carves away from the owner’s absolute power any use “prohibited by law or by regulations” (“prohibé par les lois ou les règlements,” art. 406 C.C.L.C.). The disjunction of law and regulation unambiguously restricts “law” to statutes. For the suggestion that “règle de droit” is less narrow than some readers of the French suppose, including the common law whereas “lois” would not have, see Alain Gautron, “French/English Discrepancies in the *Canadian Charter of Rights and Freedoms*” (1982) 12 *Man. L.J.* 220 at 222.

<sup>56</sup> See discussion of *Das subjektive Recht* in English law in F.H. Lawson, *Many Laws: Selected Essays*, vol. 1 (Amsterdam: North-Holland Publishing, 1977) at 176ff.; Geoffrey Samuel, “Le Droit subjectif and English Law” (1987) 46 *Cambridge L.J.* 264.

<sup>57</sup> See e.g. the *Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, 213 U.N.T.S. 221 at 223, art. 5(1), which contemplates limits on certain rights “selon les voies légales” (“prescribed by law”), a requirement less formally evocative than “une règle de droit.”

<sup>58</sup> Pierre-André Côté, *Interprétation des lois*, 3d ed. (Montreal: Thémis, 1999) at 412-15.

<sup>59</sup> Gaudet, *supra* note 40 at 469; Pinard, *supra* note 32 at 102 n. 64.

meaning rule's weight has become controversial. On some accounts, it no longer provides the presumptive meaning,<sup>60</sup> being simply one factor among others.<sup>61</sup> Yet the shared meaning rule may prove problematic for reasons beyond the controversy surrounding its normative weight. Its evocation of a Venn diagram of crisp overlapping circles proves unobvious in practice. Contrary to such graphic precision, two versions "may point to a norm only imperfectly rendered in each."<sup>62</sup> And indeed, the legislative language is an access point for "apprehending, constructing and translating a legal norm," but it is never the actual norm.<sup>63</sup>

Scholarly discussions of the threshold requirement in section 1 model differing appreciations of the distinction between a norm and its textual expression. In their association of the threshold's formal and substantive "limbs" with the words of the English phrase "prescribed by law," Choudhry and Roach risk appearing to understand the English constitutional text as itself the rule, not one non-exhaustive verbal representation of it.<sup>64</sup> As the same requirements apply to parties pleading the French text, it is problematic to understand the requirements primarily as judicial glosses on "prescribed" and "law." Compare a Quebec constitutional text's summary of the judicial interpretations: "Une règle de droit, au sens de l'article 1, est une 'norme juridique intelligible.'" Associating the requirements identified by judges with this reformulation, rather than with the words of the French version, Brun and Tremblay announce that the idea of "norme juridique" accounts for the formal requirements, and "intelligible," the substantive.<sup>65</sup> While this presentation avoids confusing the norm with its verbal expression, it does not consider possible contributions by the norm's expression in English. Likely it is preferable to understand the threshold requirement in section

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<sup>60</sup> Pierre-André Côté, "Bilingual Interpretation of Enactments in Canada: Principles v. Practice" (2004) 29 *Brooklyn J. Int'l L.* 1067 at 1070. Compare Paul Salembier, "Rethinking the Interpretation of Bilingual Legislation: The Demise of the Shared Meaning Rule" (2003) 35 *Ottawa L. Rev.* 75.

<sup>61</sup> Assuming a divergence between English and French articulations of the threshold requirement in s. 1, the provision's derogation from the protection of rights and freedoms might militate for the narrower meaning of the two: Pinard, *supra* note 32 at 102 n. 64.

<sup>62</sup> Macdonald, "Legal Bilingualism," *supra* note 34 at para. 34.

<sup>63</sup> *Ibid.* at para. 48.

<sup>64</sup> See also discussion of "prescribed by law" in Peter W. Hogg, *Constitutional Law of Canada*, loose-leaf ed., vol. 2 (Scarborough, Ont.: Carswell, 1992) at 35-11 to 35-13.

<sup>65</sup> Brun & Tremblay, *supra* note 46 at 944-45. [Trans.] "A legal rule, in the sense of s. 1, is an 'intelligible juridical norm.'"

1 as derived jointly from “prescribed by law” *and* “une règle de droit,” or better yet, from the idea to which those two texts (imperfectly) gesture.

Two critiques of *Slaight* published in French reveal a richer understanding of the judicial enterprise as necessarily responsive to both language versions of the *Charter*. Suppositions about judicial and scholarly methodology are detectable in the observation that the Court’s conclusions regarding the legal status of the adjudicator’s order in that judgment perhaps cohere better with the English text of section 1.<sup>66</sup> In Pinard’s view, *Slaight* is not the sole judgment that seems to accommodate the English version of section 1 better than it does the French. The conclusions—in the French original of *Slaight* and in the French translations of *Cotroni* and *Ladouceur*—that, because the challenged action draws its validity or flows from a statutory provision, it is therefore “une règle de droit” echo arguments made more soundly in English about those actions being therefore “prescribed by law.”<sup>67</sup> Pinard assumes, as a matter of judicial methodology, that the judges—at least Justice Lamer, writing *Slaight* in French, if not Justices La Forest and Cory, drafting *Cotroni* and *Ladouceur* in English—read and responded to both language versions, however much, in her view, they ultimately inclined towards one. The criticism models her scholarly methodology. Pinard can only assess a judge’s evenhandedness towards the language versions of the *Charter* by reading the reasons with an eye on both. These are promising signs, though an approach based on a single language version has perhaps given way to a sense of the two versions as competing. They do not yet stand together such that each illuminates the other. The presumption persists that it is possible to read and understand the two language versions separately, rather than to seek out the meaning that emerges when reading each by the other’s light. (The shared meaning rule presumes, similarly, that the two versions are first interpreted separately and only subsequently compared.) To speak of Justice Lamer as privileging the English version over the French is not yet to consider whether the meaning of the French version is contingent on that of the English, and vice versa. Still,

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<sup>66</sup> Pinard, *supra* note 32 at 119 n. 115; see also Gaudet’s criticism reproduced above in text accompanying note 41.

<sup>67</sup> *Ibid.* at 120 n. 115, citing *United States of America v. Cotroni*; *United States of America v. El Zein*, [1989] 1 S.C.R. 1469 [*Cotroni*]; *R. v. Ladouceur*, [1990] 1 S.C.R. 1257 [*Ladouceur*].

Pinard and Gaudet avail themselves of a kind of argument foreclosed to one who reads the judgments against a single version of the constitution.

When a judge quotes the version of a bilingual enactment corresponding to the language in which she is writing, should the translation of that judgment systematically quote the corresponding version of the destination language? A Canadian scholar has submitted a strong negative answer, arguing that it is misleading to replace quotations from one language version of the *Charter* with quotations from the other if the judge did not consider the second language version.<sup>68</sup> In contrast, European jurilinguist Martin Weston affirms that “obviously” such quotations must be reproduced “exactly from the other language version.” He acknowledges that the two versions do not always correspond as closely as they might, a phenomenon that “sometimes makes the quotation of isolated words and phrases difficult.”<sup>69</sup> Yet he does not canvass situations where, as in *Slaight* and *Multani*, the legal reasoning in the original language of judgment bears especially on a word or words that simply have no equivalent in the other language version of the enactment. The best answer is likely that the judge, in the original set of reasons and the translation, should quote both language versions of the enactment. A related question concerns judicial discussion that adopts statutory or constitutional vocabulary. When translating English reasons that employ the language of the English version of the *Charter*, without quotation marks, should the translator replace those words from the English constitutional text with the corresponding words from the French version, or translate the judge’s words afresh?

While much has been written about bilingual enactments, rather less has been written about judgments published in two languages; their status appears murkier. Unlike statutes and regulations, judgments of federal courts frequently indicate which version is the original and which a translation. If it is an uphill battle convincing judges and lawyers to read both authoritative versions of a statute, few jurists—pressed for time, the client’s docket running—are likely to peruse both versions of a judgment.<sup>70</sup> Scholars writing in English typically read—certainly they

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<sup>68</sup> McEvoy, *supra* note 38 at 64.

<sup>69</sup> Martin Weston, “Characteristics and Constraints of Producing Bilingual Judgments: The Example of the European Court of Human Rights” in Jean-Claude G  mar & Nicholas Kasirer, eds., *Jurilinguistics: Between Law and Language* (Montreal: Th  mis, 2005) 445 at 458.

<sup>70</sup> On inconsistent language versions of judgments, see Leckey & Bra  n, *supra* note 52 at 128-35.

quote—all three opinions in *Slaight* in that language. They appear indifferent, at a minimum, to the fact that, while Chief Justice Dickson and Justice Beetz drafted their respective reasons in English, Justice Lamer wrote in French. Scholars writing in French typically quote all three sets of reasons in that language. While the official federal reporters dutifully publish judgments in parallel columns of French and English, those judgments are today read less in the bound volumes in law libraries than onscreen—as are statutes—where none of the online options presents the two language versions side by side.<sup>71</sup>

Ultimately the better view may be that the text is “incomplete without both,” there being just “one authoritative bilingual text in French and English.”<sup>72</sup> Or maybe the juridical truth, so far as one exists, locates itself in the white space between the parallel columns of French and English versions where they are so printed.<sup>73</sup> Whatever the optimal theory and method, the translation of judgments can collude in the practice of legal dualism, producing and sustaining parallel streams of thought and language based on the different language versions of bilingual enactments. At times, however, its effect is rather different. The translation of judgments can complicate the idea of linguistic dualism. Judicial interpretations of the threshold requirement may, in part through translation, impose the meaning of one language version on the other. This occurs when a justification made in one language, on the basis of that version of section 1, is exported via translation to the other language in which the constitutional text does not support it—a transgressive practice illustrated by close readings of *Slaight* and *Multani*, among other judgments.

Given the earlier observation that the English idea of a limit “prescribed” or “authorized by law” best coheres with the notion that legal authorization flows down from a discretion-conferring statute, it is interesting that judges and legal translators seem to have adopted the English text of section 1 as ostensibly more authoritative than the French.

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<sup>71</sup> The Supreme Court of Canada now insists that counsel provide relevant legislative provisions in both official languages where they are required by law to be so published, but the Court does not prompt the inclusion of both language versions of judgments. *Rules of the Supreme Court of Canada*, r. 42(2)(g), 44(2)(b), 44(3)-(4).

<sup>72</sup> Macdonald, “Legal Bilingualism,” *supra* note 34 at paras. 25, 48.

<sup>73</sup> Nicholas Kasirer, “L’outre-loi” in Lynne Castonguay & Nicholas Kasirer, eds., *Étudier et enseigner le droit: hier, aujourd’hui et demain. Études offertes à Jacques Vanderlinden* (Cowansville, Qc.: Yvon Blais, 2006) 329 at 339-40.

They have imported “prescribe” into French discussions of section 1. Introduction of the verb *prescrire* into French analysis draws the French text closer to the English syntax. In *Therens*, Justice Le Dain writes in English of the “requirement that the limit be prescribed by law.” The point is translated as “L’exigence que la restriction soit *prescrite* par une règle de droit.”<sup>74</sup> A verb that distances the authorizing legal rule from the rights limit—emphasizing the limit’s source at the expense of its form—has infiltrated discussion in French of section 1. A similar distance is detectable when a limit “prescribed by law” is translated as one “prévüe par une règle de droit.”<sup>75</sup> In other words, it is no longer necessary that “une règle de droit” be the instrument which limits a right. It suffices that “une règle de droit” prescribe or foresee that something else will impose a limit.

If this addition is an occasional occurrence, its effects should not be exaggerated. If it repeats often enough, suspicions may arise that the judges are saying things in English about section 1 that they cannot convincingly express using the resources of the French version. In such a case, a tacit act of constitutional amendment might have occurred. One would likely be hard pressed, for example, to express in French, using the lexicon of the French version of the *Charter*, this scholarly summary of *Slaight*: “that order is prescribed by law because the underlying statutory provision is prescribed by law.”<sup>76</sup> That an order is issued in virtue of an authorizing “règle de droit” does not make that order itself formally “une règle de droit.” What do the law reports show?

While the French constitutional text speaks of rights limited only “par une règle de droit,” judgments in French translation refer regularly to rights limitations “*prescrites* par une règle de droit.”<sup>77</sup> The slippage might indicate how at least some judges think about section 1.<sup>78</sup> Yet the

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<sup>74</sup> *Therens*, *supra* note 20 at 645 [emphasis added].

<sup>75</sup> *R. v. Grant*, [1991] 3 S.C.R. 139, *passim*, Lamer J., writing in English.

<sup>76</sup> Ross, “Discretionary Authority,” *supra* note 17 at 386.

<sup>77</sup> See e.g. *Irwin Toy Ltd. v. Quebec (A.G.)*, [1989] 1 S.C.R. 927 at 980, 983 [emphasis added]; also *Eldridge v. British Columbia (A.G.)*, [1997] 3 S.C.R. 624 at para. 84. A Quicklaw search yielded dozens of instances of “prescrites par une règle de droit” in French translations of Supreme Court judgments drafted in English. The term is much rarer in judgments drafted in French, though the search revealed instances where the statements of constitutional questions, drafted in French, used the formula “prescrire par une règle de droit.” Some occurrences are prominent: both majority and minority reasons in *Little Sisters* feature headings “Prescribed by Law” translated as “Prescrire par une règle de droit” (*supra* note 19, paras. 144-45, 221-22).

<sup>78</sup> Is it fair to expect a higher degree of consistency in the French translations approved by the francophone judges such as Lamer (*Slaight*) and La Forest (*Eldridge*)? L’Heureux-Dubé J.’s decisions

point, ultimately, is not whether the judges of the Supreme Court have deliberately approved the addition of *prescrire* to the French text. Irrespective of the underlying intentions, these transpositions present to readers of the French versions of judgments ideas of section 1 subtly but importantly different from those generated by the French text of that provision. Frequently, the judges of the Court appear not to apply a meaning of section 1 hovering between the two language versions; often enough, they seem straightforwardly to apply the English version of section 1.

The Supreme Court's translators occasionally appear embarrassed by the challenge of translating the English words designating the threshold requirement in section 1. In the English original of the majority reasons in *Little Sisters*, Justice Binnie writes of a definition's having being "sufficiently certain to be 'prescribed by law.'" The inverted commas set off language lifted directly from the *Charter*. In the French translation, "prescrire" infiltrates the inverted commas purportedly setting off canonical constitutional language: "la définition, telle qu'elle avait été interprétée, avait un caractère suffisamment certain pour être considérée comme 'prescrite par une règle de droit.'" <sup>79</sup> If "prescribed by law" are the words of the constitutional drafters, whose words are "prescrite par une règle de droit"? Admittedly, that formulation does not translate entirely what seems to be the idea understood by readers of the English text after *Slaight*. The translator of *Little Sisters* does not speak of a limit "prescrite légalement," but he or she hints that the resources of the French text alone fall short. In an earlier judgment, *Osborne v. Canada (Treasury Board)*, the translator evades all awkwardness by rendering "there is no 'limit prescribed by law'" as "il n'existe pas de restriction prescrite par une règle de droit."<sup>80</sup> Abstinence from use of inverted commas in that translation spares the hazard of acknowledging that while the English text of section 1 supplies *prescribed*, the French offers neither *prescrire* nor an equivalent. Did these translators sense themselves as deferring to a tacit constitutional amendment? Or is this

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sometimes appeared in French and English with no indication of the language of drafting. Teresa Scassa, "Language of Judgment and the Supreme Court of Canada" (1994) 43 U.N.B.L.J. 169 at 176.

<sup>79</sup> *Little Sisters*, *supra* note 19 at para. 52.

<sup>80</sup> [1991] 2 S.C.R. 69 at 94.



just one more instance of what is controversially identified as the tendency in Canadian federal law of taking the English version as the normative reference point?<sup>81</sup> From time to time, however, the French text—rather, judges and translators working with it—writes back.

In *Multani*, Justices Deschamps and Abella submit that Justice Lamer erred in *Slaight* by accepting an individualized administrative decision as justifiable under section 1. Now, one may reasonably object to the strict linguistic dualism performed by *Slaight*. But it at least delivers readers of each official language a logical argument in relation to their preferred language version of the *Charter*. Justices Deschamps and Abella in *Multani* present an argument that, patently built on the French text of the *Charter*, poses problems once translated into English.

Those judges submit that only norms of general application may be subjected to *Charter* scrutiny and potentially justified under section 1. Deploying administrative law for the review of “*décisions et ordonnances des organismes administratifs*,” they would reserve the analysis of constitutional justification for testing the validity or enforceability of a “*norme comme une loi, un règlement ou une autre règle d’application générale de cette nature*.”<sup>82</sup> The sharp distinction between decisions and norms discloses a preference for a formal taxonomic inquiry to determine which legal artifacts may be subjected directly to *Charter* scrutiny and possibly justified under section 1. On their view, only a legal artifact counting as “une règle de droit” is eligible.

Is it possible that they misread Justice Lamer’s judgment in *Slaight*? Justices Deschamps and Abella write:

Dans *Slaight*, le juge Lamer se dit d’avis qu’une ordonnance peut être analysée suivant les mêmes règles qu’une règle de droit dans le contexte d’une contestation constitutionnelle et ainsi être justifiée selon l’article premier de la *Charte canadienne*.

In *Slaight*, Lamer J. expressed the view that an order can be analysed using the same rules as are used to analyse a law in the context of a constitutional challenge, and can thus be justified under s. 1 of the *Canadian Charter*.<sup>83</sup>

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<sup>81</sup> Kasirer, “Dire ou définir le droit?,” *supra* note 36 at 168. Against preferring the English version of federal laws, see Michel Bastarache, “Les difficultés relatives à la détermination de l’intention législative dans le contexte du bijuridisme et du bilinguisme législatif canadien” in Gémard & Kasirer, *supra* note 69, 93 at 114.

<sup>82</sup> *Multani*, *supra* note 1 at para. 103 [emphasis in original].

<sup>83</sup> *Ibid.*

This account of Justice Lamer's reasons in the original French is fair. It omits the genealogical and causal link, namely, that an order could be analyzed in the same way because it came from (*provient de*) "une règle de droit," but the oversight is likely insignificant. Justices Deschamps and Abella's argument for clawing back the class of justifiable limits on rights to only those things that are, in their own right, "règles de droit" makes sense. It is readily arguable on textual grounds, with reference to the French text of the *Charter* and the French original of Justice Lamer's reasons in *Slaight*.

In contrast, the English translation of the concurrence in *Multani* is more questionable. Debatable though they may be, current translation practices generate an expectation that the phrase "une règle de droit" in a French discussion of section 1 will be mirrored by "prescribed by law" in the adjacent column of translated English. In precisely this fashion, the English translation of *Slaight* replaces the French language of the *Charter* with the corresponding English words. By contrast, the excerpt of the English translation of *Multani* reproduced above nowhere includes the talismanic language of section 1. Instead, "une règle de droit"—the crucial term of art—is rendered simply as "a law." Justices Deschamps and Abella do not only extirpate the surreptitious transplant *prescrire* from their French discussion. Adopting the French formal approach, they also expunge "prescribed by" from the English, remaking the English text in the image of the French. Translating "une règle de droit" as "a law" *tout court* eliminates the textual support for the idea of authorization flowing down. Yet section 1 nowhere refers to "a law." The French version refers to "une règle de droit"; the English refers to limits "prescribed by law." Once the French idea is translated into English, with no past participle, it will of course seem problematic to treat an administrative order as "a law." It is possible to say, in French, that Justice Lamer held that orders could be analyzed using the same rules as "règles de droit." It is trickier to say, speaking of the English text of the *Charter*, that Justice Lamer held that an order can be analyzed using the same rules as used to analyze a law. In his English translation, Justice Lamer does not analogize or equate decisions to laws. He holds that since both may legally prescribe a limit to a *Charter* right, both may thus be justified under section 1. In the English translation of *Slaight*, an order does not fall under section 1 because it "arises from" a legal artifact that is uncontroversially susceptible of justification, as was the case of the ordonnance "provenant ... d'une règle de droit." Rather, Justice Lamer holds that an order may

be a justifiable limit because, in precisely the same way as a statutory or regulatory provision, it “*is* prescribed by law.”<sup>84</sup> In the English text, the adjudicator’s order in *Slaight* falls squarely within the category of justifiable limits. There is no analogy here to the conclusion, based on the French text, that “une ordonnance” is not “une règle de droit.” Obviously an administrative decision is not “a law” in the ordinary sense.<sup>85</sup> But that is not dispositive of whether its limit on a right is “prescribed by law.”

No approach canvassed thus far—neither Justice Lamer’s dualism, nor the tacit efforts to add *prescrire* to *l’article premier* and to delete “prescribed” from section 1—lives up to the admittedly exacting aspirations of legal bilingualism and constitutional justice. But arguments based on solely the language of the text may miss an important dimension. The discrepancy may lie not in different texts, but in different readers: who reads, and where. One reason that direct and total translation is impossible is that the ostensibly equivalent term in the destination language may carry symbolic and semantic baggage different from that of the original.<sup>86</sup> At times, the difficulty with two language versions will be “at heart what we would call cultural.”<sup>87</sup> Law’s language, in particular, is cultural, “inscrite dans l’histoire.”<sup>88</sup> The phenomenon may be especially potent in law’s Canadian dominion, where two official languages and two legal traditions (or more!) interact. The idea is explored often enough in comparative private law, where the mixed sources of Quebec private law and their bilingual expression comprise a “véritable laboratoire d’acculturation.”<sup>89</sup> Yet though the cultural embeddedness of the different language versions of the *Charter* has attracted less attention, assuming that the complex relations

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<sup>84</sup> *Slaight*, *supra* note 2 at 1080 [emphasis added].

<sup>85</sup> Against assuming that “legal rules of whatever kind can be described as ‘laws,’” see Lon L. Fuller, *Anatomy of the Law* (Westport, Conn.: Greenwood Press, 1976) at 96 [Fuller, *Anatomy*].

<sup>86</sup> On the different discursive and symbolic effects of notionally identical equivalents, see Roderick A. Macdonald with Clarisse Kehler Siebert, “Orchestrating Legal Multilingualism: 12 *Études*” in Gémar & Kasirer, *supra* note 69, 377 at 387.

<sup>87</sup> James Boyd White, *Justice as Translation: An Essay in Cultural and Legal Criticism* (Chicago: University of Chicago Press, 1990) at 244.

<sup>88</sup> Gérard Cornu, *Linguistique juridique*, 3d ed. (Paris: Montchrestien, 2005) at 17, 19. See also Pierre Legrand, “Issues in the Translatability of Law” in Sandra Bermann & Michael Wood, eds., *Nation, Language, and the Ethics of Translation* (Princeton, N.J.: Princeton University Press, 2005) 30.

<sup>89</sup> Kasirer, “Dire ou définir le droit?,” *supra* note 36 at 144 [footnote omitted].

enmeshing culture and law operate only in private law may be mistaken. What if the linguistic discrepancies in section 1 function as a smokescreen, obscuring cultural differences that could survive authoritative harmonization of the texts, or, less drastic, careful reading of both versions?<sup>90</sup> Understanding Justices Deschamps and Abella's argument with the majority in *Multani* may call for sensitivity to cultural differences. Perhaps the reluctance to accept administrative orders as justifiable limits on rights, and the desire for a bright-line distinction between general norms and individual decisions, reflects cultural roots.

#### IV. BEYOND LINGUISTIC DIFFERENCE

Comparatist proponents of legal culture have examined administrative law less often than other fields, such as criminal law and civil litigation. Little effort has been expended to apply comparatist methodologies to Quebec administrative law vis-à-vis administrative law practiced elsewhere in Canada. The odd article has aimed to elucidate the principles unifying judicial review in Ontario, Quebec, and federal courts.<sup>91</sup> Other studies have occasionally shown greater interest in differences.<sup>92</sup>

Before essaying a preliminary contribution to the endeavour, it should be acknowledged that the idea of legal culture is controversial. One set of critiques targets the notion's uncertainty,<sup>93</sup> though not without provoking vigorous defences.<sup>94</sup> Assuming for the sake of argument that the notion has useful content, a more pressing matter is perhaps its politics. Culture "as an epistemological instrument" might be thought to contribute to "an epistemology of conflict"; the notion of tradition may be

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<sup>90</sup> One might conjecture that the failure of scholars outside Quebec working in English to embrace the translation of a major Quebec work (René Dussault & Louis Borgeat, *Administrative Law: A Treatise*, 2d ed., 5 vols., trans. Murray Rankin (Toronto: Carswell, 1985-1990) [Dussault & Borgeat, *Administrative Law*]) indicates a remainder of cultural difference beyond language.

<sup>91</sup> Patrick Robardet, "Le contrôle judiciaire de la procédure administrative: éléments de droit comparé, fédéral, ontarien et québécois" (1982) 23 C. de D. 651 at 653-54.

<sup>92</sup> See e.g. Roderick A. Macdonald, "La doctrine: source de droit administratif québécois?" (1984) 29 McGill L.J. 340; Robert Leckey, "Territoriality in Canadian Administrative Law" (2004) 54 U.T.L.J. 327 [Leckey, "Territoriality"].

<sup>93</sup> On the value of disaggregating culture, see Roger Cotterrell, "Comparative Law and Legal Culture" in Mathias Reimann & Reinhard Zimmermann, eds., *The Oxford Handbook of Comparative Law* (Oxford: Oxford University Press, 2006) 709 at 736.

<sup>94</sup> Lawrence M. Friedman, "The Concept of Legal Culture: A Reply" in David Nelken, ed., *Comparing Legal Cultures* (Aldershot: Dartmouth, 1997) 33; Pierre Legrand, "Comparative Legal Studies and the Matter of Authenticity" (2006) 1 J.C.L. 365 [Legrand, "Authenticity"].

preferable.<sup>95</sup> Yet here there are reasons for preferring culture, bearing in mind that culture can have a “nonessential, internally multiple character.”<sup>96</sup> An emphasis on legal traditions typically distinguishes common law from civil law. This article’s hypothesis about Quebec administrative law underscores something subtler, more latent and interstitial than interactions between traditions tracking the outmoded idea of legal systems or families. While the legal tradition of administrative law in Quebec, and across Canada, is notionally that of English public common law, a distinctive legal culture may nonetheless persist in the crannies. Though traditions “may absorb foreign elements” and embrace “internal elements of variance or dissidence,”<sup>97</sup> the tendencies identified here are not simply absorbed or contained. The working hypothesis is that, despite commonality at the broad level of legal tradition dictated by the constitutional framework, cultural elements “may make for specificity where specificity has been denied.”<sup>98</sup>

What makes the matter so intriguing is that, in formal constitutional terms, there is so little space for a distinctive Quebec culture of administrative law practiced in French. As a consequence of administrative and legislative arrangements following the conquest, and judicial interpretations of them, the civil law applies within Quebec in matters of property and civil rights. In contrast, the public law applicable throughout Canada, including administrative law, derives from English law.<sup>99</sup> English law is the “source fondamentale de notre droit administratif.”<sup>100</sup> In principle, it should be relatively uniform across the federation, although the theory of sources of law prioritizes applicable legislation and regulations before recourse to the common law. And

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<sup>95</sup> H. Patrick Glenn, “Legal Cultures and Legal Traditions” in Mark Van Hoecke, ed., *Epistemology and Methodology of Comparative Law* (Oxford: Hart Publishing, 2004) 7 at 17.

<sup>96</sup> Legrand, “Authenticity,” *supra* note 94 at 376 n. 43.

<sup>97</sup> H. Patrick Glenn, *Legal Traditions of the World: Sustainable Diversity in Law*, 3d ed. (Oxford: Oxford University Press, 2007) at 37.

<sup>98</sup> This phrase is taken from an examination of variation within a matter of federal jurisdiction: Nicholas Kasirer, “The Annotated Criminal Code en version québécoise: Signs of Territoriality in Canadian Criminal Law” (1990) 15 Dal. L.J. 520 at 525.

<sup>99</sup> On the “disordered state of legal affairs” during the English colonial period, see John E.C. Brierley & Roderick A. Macdonald, eds., *Quebec Civil Law: An Introduction to Quebec Private Law* (Toronto: Emond Montgomery, 1993) at para. 13.

<sup>100</sup> Pierre Issalys & Denis Lemieux, *L’action gouvernementale: Précis de droit des institutions administratives*, 2d ed. (Cowansville, Qc.: Yvon Blais, 2002) at 39.

admittedly, statute books in all jurisdictions show considerable legislative alteration of the administrative law inherited from the British conquerors and settlers.

The legislature of Quebec has relocated a number of the most important principles of “le droit administratif britannique” in the more precise, but also more rigid framework of the *Code of Civil Procedure*.<sup>101</sup> The codification of the prerogative writs has been viewed as “freezing them in time.”<sup>102</sup> That said, judicial review has for a long time been channelled through statutes at the federal level and in common law provinces too.<sup>103</sup> It has been argued that these particularities make Quebec administrative law original and different from the corresponding law “au Canada et au Royaume-Uni.”<sup>104</sup> Is there an irony in this detection of particularity given the influence of English law on the confection of Quebec’s original *Code of Civil Procedure*?<sup>105</sup> It would be remiss not to mention as well the entrenchment of a quasi-constitutional right. Quebec’s *Charter of Human Rights and Freedoms* guarantees every person “a full and equal, public and fair hearing by an independent and impartial tribunal, for the determination of his rights and obligations.”<sup>106</sup>

The private law re-codification in the early nineties instated a further change. Article 1376 of the *Civil Code of Québec* applies the book on obligations to the state and its bodies. The legislature has, to an extent, replaced the public common law with the civil code. Consequent to this process of “civilisation,” Quebec administrative law is said to be henceforth “imprégné” with the values of the civil law.<sup>107</sup> Important as

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<sup>101</sup> René Dussault & Louis Borgeat, *Traité de droit administratif*, 2d ed., vol. 1 (Quebec: Presses de l’Université Laval, 1984) at 28 [Dussault & Borgeat, *Traité*, vol. 1]. For the codification of the prerogative writs, see art. 846 C.C.P. Quebec courts have taken art. 33 C.C.P., which confirms the Superior Court’s “superintending and reforming power,” as authorizing a new remedy, the direct action in nullity.

<sup>102</sup> Denis Lemieux, “The Codification of Administrative Law in Quebec” in Grant Huscroft & Michael Taggart, eds., *Inside and Outside Canadian Administrative Law: Essays in Honour of David Mullan* (Toronto: University of Toronto Press, 2006) 240 at 247.

<sup>103</sup> David J. Mullan, “Reform of Judicial Review of Administrative Action—The Ontario Way” (1974) 12 Osgoode Hall L.J. 125 at 125 n. 5.

<sup>104</sup> Dussault & Borgeat, *Traité*, vol. 1, *supra* note 101 at 28. Note the implication that the law “au Canada” does not include law “au Québec.”

<sup>105</sup> Jean-Maurice Brisson, *La formation d’un droit mixte: l’évolution de la procédure civile de 1774 à 1867* (Montreal: Thémis, 1986) at 99-110.

<sup>106</sup> R.S.Q. c. C-12, s. 23.

<sup>107</sup> Denis Lemieux, “Le rôle du Code civil du Québec en droit administratif” (2005) 18 C.J.A.L.P. 119 at 121, 125, 132, 141.

this legislative change may be, a scholar had, a quarter century before article 1376's entry into force, detected a vocation for the civil law of supplying the substantive content of private law notions referred to by administrative law. Moreover, Michel Rambourg had understood that vocation as having historically produced within administrative law particularities derived from the existence of the civil law.<sup>108</sup>

Institutionally, the legislature of Quebec has created the Administrative Tribunal of Québec.<sup>109</sup> This "méga-tribunal administratif" exercises a general appellate jurisdiction larger, on one scholarly estimation, than those of the municipal courts and the Court of Québec.<sup>110</sup> This tribunal may reflect admiration for the Conseil d'État and an attempt to emulate it within (perhaps) operative constitutional constraints. Notice of the effect of these legislative modifications to administrative law within Quebec can be suitably complemented by a subtler observation.

The scholarship signals that the permeation of Quebec administrative law with values borrowed from the civil law and, specifically, from France has a life of its own beyond legislative incorporation. If administrative law scholars are not quite, as Shelley said of poets, the unacknowledged legislators of the world, they nonetheless exert a discernible influence on understandings of administrative law. Indeed, the idea of administrative law seems different in the Quebec texts published in French than in offerings published elsewhere in English. David Mullan begins his book by speaking of the "statutory and prerogative authorities that form the administrative state."<sup>111</sup> This is not necessarily the same thing as *l'Administration*, which, however plural its arms, is consistently spoken of in French-language work as a single entity: "l'ensemble des organes administratifs fédéraux et québécois."<sup>112</sup>

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<sup>108</sup> Michel Rambourg, "Notions générales sur le droit administratif canadien et québécois" in Raoul P. Barbe, ed., *Droit administratif canadien et québécois* (Ottawa: Éditions de l'Université d'Ottawa, 1969) 1 at 32-34 [Barbe, ed., *Droit administratif*].

<sup>109</sup> *An Act respecting administrative justice*, R.S.Q. c. J-3.

<sup>110</sup> Gilles Pépin, "La loi québécoise sur la justice administrative" (1997) 57 R. du B. 633 at 646, 658.

<sup>111</sup> David J. Mullan, *Administrative Law* (Toronto: Irwin Law, 2001) at 8; similarly Lord Woolf, Jeffrey Jowell & A.P. Le Sueur, *de Smith, Woolf & Jowell's Principles of Judicial Review* (London: Sweet & Maxwell, 1999) at 61.

<sup>112</sup> Dussault & Borgeat, *Traité*, vol. 1, *supra* note 101 at 60. Other definitions are similar, and the common idea of an *ensemble* is striking. Patrice Garant, *Précis de droit des administrations*

Although it should not be overstated, the English idea of the Crown and beneath it multiple ministers may contrast with the French idea of the Administration as an *ensemble*.

Administrative law and *droit administratif* do not evoke identical associations. It is far from settled that “droit administratif” in Quebec scholarship refers automatically to the heritage of British public law. At times, it seems that the point of departure is administrative law scholarship from France. The close ties of Quebec scholars to French legal sources in matters of private law have been thoroughly traced, and are unsurprising. But in administrative law they are more notable. When Dussault and Borgeat define “droit administratif,” their first three references are to sources from France.<sup>113</sup> Five different works on the administrative law of France populate the first two footnotes of a chapter by Patrice Garant on “L’Administration décentralisée.”<sup>114</sup> Another scholar provides an extended critical discussion of “Diverses conceptions du droit administratif” that dismisses Dicey’s theory as important “sur le plan de l’histoire du droit administratif anglo-saxon,” but no longer seriously defended. That commentator concludes by adopting a definition of “le droit administratif” proffered by the French jurist de Laubadère.<sup>115</sup> In a discussion titled “Caractères originaux du droit administratif québécois,” Rambourg speaks of the “[i]nfluence du droit anglais,”<sup>116</sup> as if it were an external force and not the substance of Quebec administrative law itself. A jarring disjuncture is discernable between talk of the influence of English law, which seems to understand it as, at best, a persuasive authority, and acknowledgement that following the conquest, “[l]e droit public anglais s’est imposé au Canada tout entier.”<sup>117</sup> Viewing the rise of administrative tribunals and of the federal courts as effecting a minor rapprochement between the English principle of the rule of law and “[le] ‘droit administratif

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*publiques*, 4th ed. (Cowansville, Qc.: Yvon Blais, 2005) at 3 [Garant, *Précis*]; Issalys & Lemieux, *supra* note 100 at 40.

<sup>113</sup> Dussault & Borgeat, *Traité*, vol. 1, *ibid.* at 17-18 n. 28-30.

<sup>114</sup> Patrice Garant, *Droit administratif*, 5th ed. (Cowansville, Qc.: Yvon Blais, 2004) at 99-100 n. 1, 2. Compare Canadian common law scholarship in French, e.g. Michel Bastarache & Andréa Boudreau Ouellet, *Précis du droit des biens réels*, 2d ed. (Cowansville, Qc.: Yvon Blais, 2001).

<sup>115</sup> Rambourg, *supra* note 108 at 5, 11.

<sup>116</sup> *Ibid.* at 30 [emphasis added].

<sup>117</sup> *Ibid.* [Trans.] “English public law was imposed on all of Canada.”



français”<sup>118</sup> likely presupposes an attachment to French administrative law greater than typical among administrative lawyers working in English. The point must not, however, be exaggerated: the steps towards a duality of jurisdictions are not the result of direct and systematic borrowing from the French model.<sup>119</sup> Such cautions duly registered, that “le droit administratif” *tout court* often refers to French public law, while English public law takes a qualifier—“le droit administratif anglo-saxon”—hints at a sturdy resistance on the part of some Quebec scholars working in French to the imposition of English public law, or at least a reluctance to regard it as the indigenous administrative law of Quebec.

The preference for French over English administrative law varies in the explicitness of its expression. One arresting, relatively early example is found in the assumption by Quebec scholars, in a distinguished line stretching back at least as far as Pierre-Basile Mignault, of the applicability in Quebec law of the French theory of *la dualité domaniale*. Prominent as it was in scholarship over decades, the notion that the state holds title to both public and private domains has been discredited as incompatible with the unitary Crown.<sup>120</sup> More recently, it has been common to encounter rather wistful acknowledgement that defining “le contrat administratif” is “relativement facile” in France, whereas English doctrine unanimously denies its existence.<sup>121</sup>

Delineating the ambitions of administrative law scholarship also reveals French influence. Quebec administrative law scholarship manifests a descriptive, classificatory bent not typically shared by work elsewhere in Canada.<sup>122</sup> Often it aspires to reproduce contemporary reality with exactitude.<sup>123</sup> Extensive formal classification of the

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<sup>118</sup> Geneviève Cartier & Suzanne Comtois, “La reconnaissance d’une forme mitigée de dualité de juridictions en droit administratif canadien” in H. Patrick Glenn, *Droit québécois et droit français: communauté, autonomie, concordance* (Cowansville, Qc.: Yvon Blais, 1993) 487 at 512 [Glenn, *Droit québécois*].

<sup>119</sup> *Ibid.*

<sup>120</sup> Jules Brière, “La dualité domaniale au Québec” in Barbe, ed., *Droit administratif, supra* note 108, 313.

<sup>121</sup> Dussault & Borgeat, *Traité*, vol. 1, *supra* note 101 at 602-603. For a more critical eye directed towards the notion in France and a subtler account of the situation in Quebec, see Andrée Lajoie, *Contrats administratifs: jalons pour une théorie* (Montreal: Thémis, 1984) at 11-18.

<sup>122</sup> Albert S. Abel, Book Review of *Traité de droit administratif canadien et québécois* by René Dussault (1976) 26 U.T.L.J. 121 at 122.

<sup>123</sup> This aspiration may reflect an epistemology fixed on the present, under the thrall of which European treatises take account neither of the past nor of the future. Roderick A.

emanations of the Administration has much deeper roots in French-language administrative law scholarship than in English. The French-language texts carry on a tradition of description that situates “administrative law within a global theory of the state,” locating governmental institutions “within a sophisticated, at times Byzantine, taxonomy.”<sup>124</sup> They exemplify a more general “civilian penchant for defining terms in the abstract and organizing the field rigorously in advance.”<sup>125</sup> Indeed, the primary ambition of many of the French-language texts is to impose taxonomic order on the unruly diversity of the Administration. Consequently, *le contentieux judiciaire* tends to appear much later in the monographs and manuals than judicial review appears in English-language texts.<sup>126</sup> The observation is not original to the present author, and indeed Quebec scholars are fully aware of it. Dussault and Borgeat write of their treatise’s ambition to treat administrative law within a “kind of comprehensive framework,” one devoting “as much, if not more, attention to the structures and the actual operation of the Administration as to the control which is exercised over governmental activity.”<sup>127</sup> This traditional layout of the French-language texts hints at a particular understanding of the enterprise. In what two French authors neutrally call “l’approche habituelle,” administrative law is seen from the point of view of the

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Macdonald, Book Review of *Traité de droit administratif*, 2d ed., vol. 3 by René Dussault & Louis Borgeat (1991) 34 Can. Pub. Admin. 224 at 227.

<sup>124</sup> Leckey, “Territoriality,” *supra* note 92 at 336.

<sup>125</sup> Nicholas Kasirer, “*English Private Law*, Outside-in” (2003) 3 Oxford U. Commonwealth L.J. 249 at 256. On the intellectual rigours of the French organization of administrative law treatises and the perils posed by orthodox juridical categories, see Roderick A. Macdonald, “Réorientation de la recherche en droit administratif canadien” (1987) 30 Can. Pub. Admin. 489 at 491, 495.

<sup>126</sup> Dussault & Borgeat, *Traité*, *supra* note 101, devote vol. 1 to “Le rôle du droit dans l’Administration,” “Les structures de l’Administration,” and “Les actes de l’Administration.” Volume 2 (1986) addresses “La gestion de l’Administration.” Volume 3 (1989) tackles the English-language administrative lawyer’s primary preoccupation, “Les contrôles exercés sur l’Administration.” Garant, *Précis*, *supra* note 112, follows a similar organization. Compare placement of “Le contrôle des actes de l’Administration” early in Pierre Lemieux, *Droit administratif: doctrine et jurisprudence*, 4th ed. (Sherbrooke: Les Éditions Revue de Droit de l’Université de Sherbrooke, 2006), c. 2.

<sup>127</sup> Dussault & Borgeat, *Administrative Law*, vol. 1, *supra* note 90 at vii. John S. Bell, “Comparative Administrative Law” in Reimann & Zimmermann, *supra* note 93, 1259 at 1261, notes that administrative law in the continental European traditions is concerned with the powers and organization of the executive organs of the state, while the common law use of the term is more synonymous with “administrative litigation.”

Administration. In an effort to “renew” the discipline, they propose a contrasting viewpoint, one privileging the viewpoint of the person targeted by administrative action.<sup>128</sup> Perhaps concern for the individual affected by administrative action is part of what inspires the English-language administrative law monographs—in a fashion one may associate more broadly with the common law—to focus on remedies rather than on classifications and relationships prior to litigation.<sup>129</sup>

As if the organization of the French-language texts does not reveal sufficiently their quest for order, such striving sometimes finds open expression. Garant, endeavouring to classify the administrative entities composing the Administration, seeks the simplest criteria permitting “d’ordonner la réalité toujours complexe.” Administrative law scholarship must organize the raw material offered by the legislative will and discover relationships uniting institutions and rules: “transformer en un tout intelligible l’apparent chaos du réel.”<sup>130</sup> If characterizing this ambition as Cartesian brings the comparatist perilously close to comparative law as caricature, it bears notice nevertheless. Only with this taxonomic enterprise in mind can one fully appreciate the attraction of understanding the threshold requirement in section 1 as calling for a clear, sustainable *ex ante* distinction between norms of general application and individual decisions on the basis that only the former merit the dignity of the label “règles de droit.”

Before re-reading the concurrence in *Multani*, the historically contingent and specific character of this legal culture of *le droit administratif québécois* requires attention. Three elements are likely most influential in forming that culture—the French language, the civil law, and scholarship and law from France. They are organically related and mutually enforcing such that it is impossible to isolate the causal effect of each. Furthermore, recognition of change over time is necessary. Richly revealing as it is, the example of *la dualité domaniale*, stretching back into

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<sup>128</sup> Jean-Louis Autin & Catherine Ribot, *Droit administratif général*, 3d ed. (Paris: Éditions du Juris-Classeur, 2004) at para. 38.

<sup>129</sup> Woolf, Jowell & Le Sueur, *supra* note 111, opens with, as Part 1, “The Scope of Judicial Review.” See also Mullan, *supra* note 111, of which judicial review occupies the lion’s share. For systematic exposition nearer to the apparent French tendency, see Sir William Wade, *Administrative Law*, 9th ed. by Sir William Wade & Christopher Forsyth (Oxford: Oxford University Press, 2004) Part II.

<sup>130</sup> Garant, *Droit administratif*, *supra* note 114 at 99. [Trans.] “to transform the apparent chaos of the real into an intelligible whole.”

the nineteenth century, is not proof of an historically constant association between administrative law in Quebec and in France. For the most part, the French administrative law doctrine cited by Quebec authors in the contemporary era crossed the Atlantic in the twentieth century. It did not migrate, pre-conquest, with the Custom of Paris and other *ancien droit français*.<sup>131</sup> Indeed, as recently as the mid-twentieth century, connections with English public law appeared rather stronger than they do today, and those with France rather weaker.<sup>132</sup> The point to underscore is two-fold: within the legal culture of administrative law practiced in French within Quebec, scholarship from France is strongly influential; but the culture is not static insofar as that influence has varied historically. This article cannot trace the story, but consciousness of a distinct administrative law within Quebec, attaching to France, likely intensified following the Quiet Revolution with other political, economic, and cultural developments. While re-readings of legal sources have already revealed Quebec's civilian private law to be a less homogeneous and fixed nationalist resource than is sometimes supposed,<sup>133</sup> it would be worth tracing more thoroughly the ebb and flow of various currents within the province's administrative law. In any event, the legal culture adumbrated here provides resources for a second look at the concurrence in *Multani*, one in which a number of its propositions will appear less mysterious and more anchored in a rich jurisprudential tradition.

Returning to section 1, the rigorous expectations derived from French-language administrative law intensify the frustration expressed, post-*Slaight*, with “[c]ette confusion entre la notion d’ordonnance administrative et celle de règle de droit.”<sup>134</sup> Distinguishing two contrasts will aid in understanding the differences between the majority and minority judges in *Multani*. One, as a matter of administrative

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<sup>131</sup> On historical sources of Quebec law, see John E.C. Brierley, “Quebec’s ‘Common Laws’ (Droits communs): How Many Are There?” in Ernest Caparros, ed., *Mélanges Louis-Philippe Pigeon* (Montreal: Wilson & Lafleur, 1989) 109.

<sup>132</sup> Gerald E. LeDain, “The Twilight of Judicial Control in the Province of Quebec?” (1952) 1 McGill L.J. 1.

<sup>133</sup> David Howes, “From Polyjurality to Monojurality: The Transformation of Quebec Law, 1875-1929” (1987) 32 McGill L.J. 523. In a rich historical study, Jean-Philippe Garneau, “Une culture de l’amalgame au prétoire: les avocats de Québec et l’élaboration d’un langage juridique commun au tournant des XVIII<sup>e</sup> et XIX<sup>e</sup> siècles” (2007) 88 Can. Hist. Rev. 113 at 145-46 [footnote omitted], argues that “la frontière entre les deux univers culturels est loin d’être aussi étanche qu’une lecture essentialiste de la réalité coloniale pourrait le faire croire.”

<sup>134</sup> Pinard, *supra* note 32 at 119.

classification, is that of regulation versus individual decision. Administrative law scholars working in French or English, attentive to civil or common law influences, will find common ground in this contrast, however untidy it proves empirically. The other contrast derives directly from section 1 of the *Charter*. It concerns whether a limit on a right may be subjected to *Charter* analysis and justified under section 1. From the French text, the contrast is between “une règle de droit” and not “une règle de droit.” From the English text, it is “prescribed by law” versus not “prescribed by law.” In a nutshell, the dispute between the judges in *Multani* turns on the relation of the two contrasts. In administrative law from France, and in administrative law scholarship written in French in Quebec, a regulation is “une règle de droit” and a decision is not “une règle de droit.” The two contrasts overlap perfectly. But in English-language administrative law, the classifications “prescribed by law” and not “prescribed by law” do not reliably track the categories of regulation and individual decision.

Within the classical civilian tradition, the legislature makes laws of general application; judges resolving individual disputes apply the law as it exists. “Tout juge dit le droit,” says Gérard Cornu, with lapidary elegance, of the civilian tradition; “aucun ne l’édicte.”<sup>135</sup> From a formal point of view, decided cases are not a source of law.<sup>136</sup> The classic civilian stance disdains “la casuistique, qui situe la règle de droit au niveau des cas concrets.”<sup>137</sup> A parallel distinction attracts staunch support in French-language administrative law scholarship. In an Administration properly ordained and classified according to the approach of the treatises, a regulation and an individual decision are sharply distinct, indeed, virtually

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<sup>135</sup> Gérard Cornu, *L’art du droit en quête de sagesse* (Paris: Presses Universitaires de France, 1998) at 175. [Trans.] “Every judge applies the law, none creates it.” Demonstrative of the perils of the enterprise, the appropriate translation of Cornu’s statement is not obvious. In the context, *applies* seems an appropriate translation for *dit*, although in another setting the same verb *dire*, contrasted with the more mechanical *exécuter*, signifies the French judge’s creative mission: Philippe Jestaz, *Le droit*, 5th ed. (Paris: Dalloz, 2007) at 19.

<sup>136</sup> Georges Ripert & Jean Boulanger, *Traité de droit civil d’après le traité de Planiol*, t. 1 (Paris: L.G.D.J., 1956) at para. 236. Contrast McIntyre J.’s implicit acknowledgement, while concluding that the *Charter* does not apply to private disputes, that judges nonetheless “develop the principles of the common law”: *RWDSU v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573 at 603. For comparative discussion, see Philippe Jestaz, *Les sources du droit* (Paris: Dalloz, 2005) at 51-69.

<sup>137</sup> René David & Camille Jauffret-Spinozi, *Les grands systèmes de droit contemporains*, 11th ed. (Paris: Dalloz, 2002) at para. 69. [Trans.] “casuistry, which situates the legal rule at the level of concrete cases.”

opposites. Thus French authors carefully distinguish administrative rule-making functions from the making of individual decisions.<sup>138</sup> Dussault and Borgeat spell out the distinction:

[A]lors qu'une décision a généralement pour but d'appliquer ou de préciser la loi dans une situation particulière touchant les droits ou les intérêts d'une ou de quelques personnes, une norme vise à établir un ordre juridique nouveau ou modifié, en établissant à l'avance des règles de comportement.<sup>139</sup>

The distinction is a central organizing principle of Quebec administrative law scholarship,<sup>140</sup> although scholarly treatments sometimes fail to explain its importance and to recognize it as the frequent result of judicial characterization *ex post*.<sup>141</sup>

It is now worth reproducing the core of Justices Deschamps and Abella's analysis. They write:

An administrative body determines an individual's rights in relation to a particular issue. A decision or order made by such a body is not a law or regulation, but is instead the result of a process provided for by statute and by the principles of administrative law in a given case.

They continue:

A law or regulation, on the other hand, is enacted or made by the legislature or by a body to which powers are delegated. The norm so established is not limited to a specific case. It is general in scope. Establishing a norm and resolving a dispute are not usually considered equivalent processes.<sup>142</sup>

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<sup>138</sup> Jean Rivero & Jean Waline, *Droit administratif*, 19th ed. (Paris: Dalloz, 2002) at paras. 90-94; Yves Gaudemet, *Droit administratif*, 18th ed. (Paris: L.G.D.J., 2005) at 258-64.

<sup>139</sup> Dussault & Borgeat, *Traité*, vol. 1, *supra* note 101 at 404. [Trans.] "while a decision generally has the objective of applying to one or several persons, a norm aims to establish a new juridical order or to modify one, establishing rules of conduct in advance."

<sup>140</sup> "Les Actes de l'Administration," the second half of *ibid.*, comprises three chapters: "La Décision," "Le Règlement," and "Le Contrat." In Garant, *Droit administratif*, *supra* note 114, the distinction is perhaps less foundational, though "L'Action administrative," "Le Règlement (législation déléguée)," and "Les Contrats des autorités publiques" occupy consecutive chapters each roughly a hundred pages long.

<sup>141</sup> Roderick A. Macdonald, Book Review of *Traité de droit administratif*, 2d ed., vol. 1 by René Dussault & Louis Borgeat (1985) 28 Can. Pub. Admin. 178 at 179-80.

<sup>142</sup> *Multani*, *supra* note 1 at para. 112. For concerns that the opposition between "normative law" and "administrative decisions" discounts the legal force of the decisions of statutory delegates and the variety of statutorily delegated functions, see David Phillip Jones, "Recent Developments in Administrative Law" (paper presented to the Canadian Bar Association's National Administrative Law and Labour & Employment Law CLE Conference, Ottawa, 24 & 25 November 2006) at 21.

Justices Deschamps and Abella refer to no authors when they contrast establishing a norm with resolving a dispute, but one could be forgiven for suspecting that at least Justice Deschamps had Dussault and Borgeat in mind, if not on her desk.

The distinction between making a norm and deciding an individual case receives lesser attention in contemporary English-language scholarship. Indeed, it is fashionable to eschew formalism in favour of functionalism. Yet however contestable the finer points of the distinction's operation, it is unavoidable. It is necessary for determining the application of a duty of procedural fairness and of requirements such as those in the *Statutory Instruments Act*.<sup>143</sup> The distinction rests on sound concerns about the appropriateness and legitimacy of the different processes used in the two activities.<sup>144</sup> As abhorrence for bills of attainder testifies, common law constitutional orders are alert to the distinction, central to the separation of powers, between individual adjudicative acts and enacted general norms. Invalidating as *ultra vires* (in the administrative law sense) delegated legislation that targets particular subjects, rather than announces general norms, reflects similar preoccupations. That said, in practice the distinction can prove refractory.

The experience of common law adjudication seems to unsettle the sharp distinction between enunciation of a rule and resolution of an individual dispute. Every judgment in an individual case decides the rule of law for which it is authority as against all the world (*stare decisis*) and decides the issues of fact and law between the parties (*res judicata*). The doctrine of precedent in the common law holds that "rules of law are developed in the very process of application. ... For the fundamental notion is that the law should result from being applied to live issues raised between actual parties and argued on both sides."<sup>145</sup> Admittedly, the notion that rules are developed in the process of adjudication contrasts with another view that deciding disputes simply reveals or recognizes existing customary rules. Yet even when turning from the

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<sup>143</sup> R.S.C. 1985, c. S-22.

<sup>144</sup> Different legal processes are masterfully explored in Kenneth I. Winston, ed., *The Principles of Social Order: Selected Essays of Lon L. Fuller*, rev. ed. (Oxford: Hart Publishing, 2001) Part II.

<sup>145</sup> P.J. Fitzgerald, *Salmond on Jurisprudence*, 12th ed. (London: Sweet & Maxwell, 1966) at 177. On confusions between *stare decisis* and *res judicata*, see Rupert Cross & J.W. Harris, *Precedent in English Law*, 4th ed. (Oxford: Clarendon Press, 1991) at 97.

common law to legislative enactments, a bright-line distinction can appear somewhat arbitrary. Rules of general application must still be interpreted, and much of a statute's meaning derives from "a judicial gloss on those words."<sup>146</sup>

The situation in *Multani* may indicate the functional overlap of rule-making with individual decision-making. If in principle an administrative decision lays down no norm of general application, in practice many administrative decisions affect large numbers of people. Presumably the scholastic council of commissioners in *Multani* understood their application of the *Code de vie* as prohibiting all Sikhs from wearing a kirpan. Had another Sikh student claimed this right, the board likely would not have treated that claim as a fresh issue calling for new deliberation. Discussing reasonable accommodation, Justices Deschamps and Abella write that an "administrative law analysis is microcosmic, whereas a constitutional law analysis is generally macrocosmic."<sup>147</sup> This distinction is not fully convincing. Is it not possible that, within their institutional constraints, the commissioners undertook a broad analysis, locating Gurban Multani's claim within a larger context, one partly constituted by their understanding of macro issues such as secularism and student safety?<sup>148</sup>

It would be mistaken, however, to associate exploration of these overlaps in legal functions exclusively with those working within the common law tradition, or working only in English. Civilians in France increasingly recognize that nothing precludes the emergence of general rules through the normal exercise of the adjudicative function.<sup>149</sup> And within Quebec, a scholar has admitted that "l'activité créatrice du juge en matière administrative" muddies the distinction between dictating a norm and deciding a case.<sup>150</sup> Nonetheless, within the civil law tradition,

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<sup>146</sup> Fuller, *Anatomy*, *supra* note 85 at 102.

<sup>147</sup> *Multani*, *supra* note 1 at para. 132.

<sup>148</sup> To the extent the microcosmic versus macrocosmic distinction has purchase in *Multani*, it might distinguish not administrative from judicial proceedings, but the original arrangement of reasonable accommodation, concluded between the school board's legal counsel and the boy's parents, from the board's and council's decisions that that accommodation violated the *Code de vie*.

<sup>149</sup> Jacques Ghestin & Gilles Goubeaux, *Traité de droit civil: Introduction générale*, 3d ed. (Paris: L.G.D.J., 1990) at para. 438.

<sup>150</sup> Pierre Lemieux, "Les réactions de la doctrine à la création du droit par les juges en droit administratif" (1980) 21 C. de D. 277 at 290. [Trans.] "the judge's creative activity in administrative matters." Acknowledgement of practices blurring the distinction between laws and regulations as



legislatively posited rules unquestionably enjoy a prestige not shared with the interstitial rules grudgingly acknowledged as accreting from judicial decisions.<sup>151</sup>

Whatever the difficulties of applying the regulation-decision distinction, it is a necessary one, shared by administrative lawyers working in either language. The same cannot, however, be said of the second contrast, which conscripts the respective language versions of section 1 to fashion the categories “une règle de droit”/not “une règle de droit” and “prescribed by law”/not “prescribed by law.”

Appreciating the French-language debates about the threshold requirement in section 1 requires a step beyond acknowledging the norm/decision dichotomy. It is not just that French doctrine evokes the idea. Rather, the French expression for the threshold requirement in the *Charter*, “une règle de droit,” is one of the key terms for the idea of law. A leading comparative monograph—if admittedly of an earlier generation in method and outlook—presents the “manière dont est conçue la règle de droit” as a central element assuring “l’unité de la famille” among those countries following the civil law tradition.<sup>152</sup> The “règle de droit” guarantees “le prestige qui s’attache à la science du droit,” and as if the stakes were not already high, it is codification’s “base fondamentale,” without which that endeavour is impossible.<sup>153</sup> The phrase used in section 1 is symbolically freighted in the civilian tradition. How easily is it defined, and what does it mean?

Pinard and Gaudet, in the leading critiques of *Slaight* published in French, differ as to the ordinary meaning of “une règle de droit.” For Gaudet, defining the notion “n’est certes pas facile.”<sup>154</sup> Pinard finds the task

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general and impersonal acts and individual decisions appears also in Issalys & Lemieux, *supra* note 100 at 451.

<sup>151</sup> It is an historical peculiarity of Quebec law that, following the instatement of a legislative assembly in 1791, legislated law was perceived as threatening the multiplicity of sources of existing French law. Champions of French law thus defined themselves as adversaries of parliamentary law. Obviously the worry that legislation is necessarily linked in form and substance to English law dissipated soon afterwards. Pierre Issalys, “La rédaction législative et la réception de la technique française” in Glenn, *Droit québécois*, *supra* note 118, 119 at 129. See also Brierley & Macdonald, *supra* note 99 at paras. 13-15.

<sup>152</sup> David & Jauffret-Spinozi, *supra* note 137 at para. 69. [Trans.] “the ‘way of conceiving the legal rule’ as a central element assuring ‘family unity.’”

<sup>153</sup> *Ibid.* at paras. 69-70.

<sup>154</sup> Gaudet, *supra* note 40 at 455.

much easier, since the idea has a “signification consacrée et relativement précise. Il s’agit d’une norme abstraite d’application générale.”<sup>155</sup> Consistent with the ascription of authority to administrative law scholarship from France—despite the imposition of English administrative law—their explorations of different possible constructions of “une règle de droit” cite French scholars extensively.<sup>156</sup> They do not understand the constitutional text as referring, retrospectively, to some development within the specifically Québécois or Canadian practice of administrative law, nor as intended, prospectively, to stimulate one. Despite differences along the way, Gaudet and Pinard both conclude that “une règle de droit” in section 1 means a norm of general application. One understandable reason for their conclusion that “une règle de droit” must refer to primary and secondary legislation, not individual decisions, is the term’s prominence in definitions of regulations. On one definition, “règlements” are nothing other than “règles de droit” the adoption of which Parliament or the Quebec legislature has confided to other authorities.<sup>157</sup>

To be sure, veneration for *la règle de droit* does not persist unchecked in French legal scholarship. The idea of the *règle de droit* and its centrality to civilian thinking have suffered attacks. On one recent view, the standard definition is “particulièrement critiquable,” and a functional, rather than formal, characterization may be more appropriate.<sup>158</sup> A scholar has warned provocatively against a “véritable fétichisation de la règle de Droit.”<sup>159</sup> Contemporary practices of governance have changed. The diversity of modes of governance—what Quebec scholar Pierre Issalys calls the “explosion of legal forms of public action”<sup>160</sup>—seems to indicate the inadequacy of a unitary

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<sup>155</sup> Pinard, *supra* note 32 at 101 [footnote omitted]. [Trans.] “an accepted and relatively precise meaning. It means an abstract norm of general application.” She follows a standard definition, declaring “une règle de droit” to be obligatory, general, permanent, and coercive. See e.g. Henri & Léon Mazeaud, Jean Mazeaud & François Chabas, *Leçons de droit civil: Introduction à l’étude du droit*, 12th ed. by François Chabas, t. 1, vol. 1 (Paris: Montchrestien, 2000) at paras. 3-4.

<sup>156</sup> Pinard, *ibid.* at 100-105; Gaudet, *supra* note 40 at 455-64.

<sup>157</sup> Pierre Blache, “Pouvoir réglementaire ou fonctions législatives de l’administration” in Barbe, ed., *Droit administratif*, *supra* note 108, 49 at 51.

<sup>158</sup> Denis Allard & Stéphane Rials, eds., *Dictionnaire de la culture juridique* (Paris: Presses Universitaires de France, 2003) s.v. “règle de droit” at 1326-27.

<sup>159</sup> Denys de Béchillon, *Qu’est-ce qu’une règle de Droit?* (Paris: Odile Jacob, 1997) at 13.

<sup>160</sup> Pierre Issalys, “Choosing among Forms of Public Action: A Question of Legitimacy” in Pearl Eliadis, Margaret M. Hill & Michael Howlett, eds., *Designing Government: From Instruments to Governance* (Montreal & Kingston: McGill-Queen’s University Press, 2005) 154 at 157.

conception of rules.<sup>161</sup> Jean Carbonnier speaks of a “dégradation” connected to “l’inflation du droit”: law is used no longer only for the proclamation of a general and permanent rule, but has become a means of governance or management.<sup>162</sup> Indeed, the problems may attach not just to *la règle de droit*, but to law more generally. Law seems no longer able to reflect the normative reality of the state, leading to conjecture that recourse to “outils de gouvernance” may correspond with “une stratégie de dépassement du droit.”<sup>163</sup> Thus the general and particular may no longer reflect, if ever they did, formal distinctions between rules and decisions. Such lines of inquiry may serve as proxies for larger debates on transitions from classical sovereignty to governance or governmentality.<sup>164</sup> For present purposes, what matters is not the mutating present and future of the “règle de droit,” but its past. Given the term’s doctrinal accretions, it was predictable that the reasoning in *Slaight*, by which a requirement that rights be limited only by “une règle de droit” became one that rights be limited by prescriptions flowing from “une règle de droit,” failed to secure the assent of jurists nourished on French and Quebec administrative law.

By contrast, “prescribed by law,” the English term for section 1’s threshold requirement, forms no part of standard definitions of “regulation.”<sup>165</sup> Nor, for that matter, does it have any particularly firm prior meaning. “Law” need not connote generality in contrast to a particularity which is not law. Bentham distinguished general laws from particular laws, each the fruit of a “very different sort of power,” in his words, but each “law” nonetheless.<sup>166</sup> Even the difficulties in translating into English the title of Pinard’s essay, “Les seules règles de droit qui peuvent poser des limites aux droits et libertés,” while retaining the link

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<sup>161</sup> Mockle, “Gouverner,” *supra* note 47 at 206.

<sup>162</sup> Jean Carbonnier, *Droit et passion du droit sous la Ve République* (Paris: Flammarion, 1996) at 109-10. For legal ordering distinguished from managerial direction, see Lon L. Fuller, *The Morality of Law*, rev. ed. (New Haven, Conn.: Yale University Press, 1969) at 207-13.

<sup>163</sup> Daniel Mockle, “L’évincement du droit par l’invention de son double: les mécanismes néo-réglementaires en droit public” (2003) 44 C. de D. 291 at 355, 359.

<sup>164</sup> Michel Foucault, “La gouvernementalité” in Daniel Defert & François Ewald, eds., *Dits et écrits*, vol. 3 (Paris: Gallimard, 1994) 635.

<sup>165</sup> On definitional difficulties, see Roderick A. Macdonald, “Understanding Regulation by Regulations” in Ivan Bernier & Andrée Lajoie, eds., *Regulations, Crown Corporations and Administrative Tribunals* (Toronto: University of Toronto Press, 1985) 81 at 90-92.

<sup>166</sup> Jeremy Bentham, *Of Laws in General*, ed. H.L.A. Hart (London: Athlone Press, 1970) at 80.

to the English constitutional text, are telling. They remind not only of the grammatical differences between the two language versions, but also of the fact that, since the category of “*règles de droit*” predated section 1 of the *Charter*, it is fair to ask *which* ones will count for that provision’s purposes. As the English version of section 1 essentially introduces the notion of things “prescribed by law” into Canadian public law, it would be nonsensical to ask “Which ones?” or to speak of “the only ones.” Within civilian doctrine, the distinction between those things which are “*règles de droit*” and those which are not evokes relatively certain content. It is a certain enough distinction for judges simply to apply it. “Prescribed by law,” rather differently, is a placeholder calling for adversarial argument and judicial construction.

The categories invoked by the respective language versions of the *Charter*—“*règles de droit*” and not “*règles de droit*,” “prescribed by law” and not “prescribed by law”—situate themselves differently vis-à-vis the distinction between regulations and decisions. The French constitutional text’s categories map neatly onto the administrative dichotomy. The English text leaves the matter more open. More important, however, is that the doctrinal distinction between norm-making and decision-making in French administrative law is especially well-developed. It instantiates the general taxonomic and descriptive ambitions for administrative law scholarship, matters going to legal culture. Differences of opinion arising from section 1 and brought to light by *Slaight* and *Multani* are not purely textual and linguistic. The textual differences laid out by Part III conceal deeper, arguably cultural differences.

## V. CONCLUSION

This article has neither sought to arbitrate among differing critiques of *Slaight* and conflicting interpretations of section 1, nor attempted to fix the relationship between administrative law and the *Charter*. Frankly, a number of the scholarly accounts overlook ambiguities in both language versions of the *Charter*. Though they must be read together, “prescribed by law” and “une règle de droit” are each likely more open to multiple interpretations than is often acknowledged. The article has argued that none of the linguistic approaches observable in *Slaight* and *Multani* satisfies the constitutional imperatives for bilingualism. Linguistic dualism, in which a judge and his or her jurilinguist erect parallel distinct arguments in the two official languages, each version of reasons engaging with one language version

of the *Charter*, sidesteps the challenge of setting different language versions in conversation. Taking the words of one language version and translating them afresh into the destination language, without regard for the official text in that language, effaces a version constitutionally granted equal authority. It appears that there are sound reasons for doubting the assumption that Canadians enjoy a unified bilingual constitutional order.

The article has also proposed that it is worth re-reading *Multani*—in either language, or both at once!<sup>167</sup>—against a cultural backdrop. In the case of some Quebec administrative law scholars, lawyers, and judges, this backdrop includes an instinct to refer to scholarship produced in France. To the extent that there is a legal culture of Quebec administrative law practiced in French, it probably results from intricately linked and mutually reinforcing influences: the civil law, the French language, and ideas deriving from France. The threshold requirement in section 1 of the *Charter* engages not only methodological inclinations—the preference for firm *ex ante* definitional distinctions—but also substantive ideas of “une règle de droit” as a fundamental concept of French legal order. It is not plain on the face of the text that the division between things that are and are not “prescribed by law” would mirror the division between things that are and are not “règles de droit.” What, then, of the assumption that a cultural uniformity prevails in Canadian public law?<sup>168</sup>

Canadian jurists increasingly accept the imperative of harmonizing federal law with the common law and the civil law. Admittedly, the literature reveals divergent understandings as to whether the duty lies chiefly with Parliament to harmonize with provincial law,<sup>169</sup> or whether harmonization is a two-way process

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<sup>167</sup> On reading both texts together, to avoid reading one and then interpreting the other under the sway of the first, see Nicholas Kasirer, “What Is *Vie commune*? Qu’est-ce que *living together*?” in *Mélanges offerts par ses collègues de McGill à Paul-André Crépeau* (Cowansville, Qc.: Yvon Blais, 1997) 487 at 531-32.

<sup>168</sup> For the prediction that reading the two language versions of the *Charter* together would require reconciling not only two language versions, but also two philosophies of law, transforming Canadian courts into “d’importantes écoles de droit comparé,” see R. Michael Beaupré, “Vers l’interprétation d’une constitution bilingue” (1984) 25 C. de D. 939 at 958.

<sup>169</sup> Jean-Maurice Brisson & André Morel, “Droit fédéral et droit civil: complémentarité, dissociation” (1996) 75 Can. Bar Rev. 297 at 307-10, 333-34.

entailing duties for both Parliament and provincial legislatures,<sup>170</sup> or even whether federal, civil, and common law exhaust the relevant sources.<sup>171</sup> Perhaps this article contributes two observations to ongoing debates. One is that the identification of civilian, and specifically French, influences within public law scholarship unsettles harmonization's understanding that it is a private-law undertaking and that public law, uniformly derived from British law, lies outside its purview. The French language, French scholarship, and the civil law may influence public law absent any express constitutional warrant.<sup>172</sup> While it is possible here only to gesture towards a rich avenue for future research, well-developed ideas of private law within the civilian tradition might influence the approach that some Quebec scholars apply to the constitutional distribution of legislative powers.<sup>173</sup>

The other observation concerns harmonization's typical assumption that the respective characters of the civil law and the common law are historically constant. For example, scholars may assume that while a new civil code may alter rules and vocabulary, Quebec law is always equally civilian. The extent to which a distinctly French influence on Quebec administrative law has intensified in recent decades, rather than subsisting uniformly since colonial days, invites more acute historical sensitivity and alertness to internal cultural currents. To complement the sensitive phenomenological observation that the other language and the other tradition haunt the reading of bilingual and bijural legal texts,<sup>174</sup> this article would underscore that the experience may occur in public law matters and that the intensity of the echo of the other varies temporally and qualitatively.

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<sup>170</sup> Roderick A. Macdonald, "Harmonizing the Concepts and Vocabulary of Federal and Provincial Law: The Unique Situation of Quebec Civil Law" in Department of Justice Canada, *The Harmonization of Federal Legislation with Quebec Civil Law and Canadian Bijuralism: Collection of Studies* (1999) 27 at paras. 23-31.

<sup>171</sup> Robert Leckey, "Harmonizing Family Law's Identities" (2002) 28 Queen's L.J. 221 at 257-63.

<sup>172</sup> For detection of the influence of civilian general principles of law in constitutional reasoning, see Jean-François Gaudreault-DesBiens, "Underlying Principles and the Migration of Reasoning Templates: A Trans-Systemic Reading of the *Quebec Secession Reference*" in Sujit Choudhry, ed., *The Migration of Constitutional Ideas* (Cambridge: Cambridge University Press, 2006) 178 [Choudhry, ed., *Migration*].

<sup>173</sup> For hints in this direction, see Jean Leclair, "L'impact de la nature d'une compétence législative sur l'étendue du pouvoir conféré dans le cadre de la Loi constitutionnelle de 1867" (1994) 28 R.J.T. 661; Jean Leclair, "L'interaction entre le droit privé fédéral et le droit civil québécois en matière d'effets de commerce: perspective constitutionnelle" (1995) 40 McGill L.J. 691.

<sup>174</sup> Kasirer, "L'outre-loi," *supra* note 73 at 349-51.

Whatever harmonization's character and scope, it contemplates differential interpretation of federal laws from one province to another. Tolerance for the idea that the *Charter* itself—not a federal statute but an enactment of the imperial Parliament<sup>175</sup>—might be interpreted differentially across the federation is rather lesser, though it is not difficult to imagine why it might. If, in a neglected way, private law developments influence the *Charter's* interpretation,<sup>176</sup> why would not those influences vary province to province? Even on entirely public law questions, might not their experience interpreting Quebec's *Charter of Human Rights and Freedoms* incline Quebec judges to construe the Canadian *Charter* differently than do their counterparts elsewhere? Perhaps the one idea eliminable up front is that the language versions of the *Charter* would apply separately on territory designated by political boundaries—the *version française* in Quebec, the English version elsewhere (and, on this discredited approach, both in Manitoba and New Brunswick?). Yet rejecting that error in favour of reading both language versions together does not preclude patterns of local diversity less easily mapped. It leaves intact the likelihood that a reader of *both* versions in some places might understand the *Charter* differently than do readers of *both* versions elsewhere. Practitioners of administrative law in Quebec City might broach a problem differently than would their counterparts in Montreal. Indeed, it is precisely this article's point that the unruly couplet “prescribed by law”/“une règle de droit” resonates differently for some Canadian administrative law scholars, advocates, and judges than it does for others. Perhaps it is appropriate for the Supreme Court of Canada to assure a measure of uniformity in the *Charter's* interpretation across the federation. Such an aspiration represents a choice over more locally contingent alternatives. Moreover, it would be unsatisfactory to achieve this uniformity by privileging one language version over the other. The most respectful form of legal argument attempts to persuade readers of both versions of the norms towards which the two versions gesture together.

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<sup>175</sup> As the federal *Interpretation Act*, R.S.C. 1985, c. I-21, does not direct interpretation of the *Charter*, it is academic to wonder whether the couplet “prescribed by law”/“une règle de droit” might be said to have “a different meaning in the civil law and the common law,” such that if the act applied, it would be appropriate to adopt the civil law's meaning in the Province of Quebec and the common law's meaning in other provinces.

<sup>176</sup> Robert Leckey, “Private Law as Constitutional Context for Same-Sex Marriage” (2007) 2 J.C.L. 172.

This cursory attempt to elucidate an internal legal culture of the *droit administratif québécois* should not imply a cultural neutrality on the part of those labouring in the English-language trenches, or suggest the identity of practice in the common law provinces with English administrative law. More importantly, neither should it be read as depicting an internal unity within the practice and scholarship of the *droit administratif québécois*. For example, the Quebec administrative law academy does not reveal a total refusal to rethink the way that instruments not traditionally characterized as “*règles de droit*” limit rights.<sup>177</sup> What distinguishes the more creative work along these lines emanating from Quebec from criticisms of *Slaight* and *Little Sisters* published in English is the explicit awareness of the resistance with which willingness to question “l’orthodoxie positiviste” must contend.<sup>178</sup> While the English-language threshold requirement “prescribed by law” permits of expansion, it is wise to anticipate sterner resistance on formal grounds from readers of *l’article premier* to expanding the idea of law.

Not all Quebec jurists pleading, adjudicating, or commenting on administrative law evince what Pierre Legrand would call *une mentalité française*. Some speculate that the richness of the community of Quebec administrative law scholars reflects even biographical differences, such as the venue of graduate education. Perhaps a Quebec public law professor with a D.Phil. from Oxford approaches administrative law differently than does a Paris-educated *docteur en droit*. More interesting yet, what of those with degrees from both places, who resist proclaiming fealty to a single tradition or culture? The complexities of Canadian legal history and practice show diverse tendencies and rich cross-overs.<sup>179</sup> Given how many Quebec jurists navigate different languages, genres, and cultures with aplomb, it is reassuring that, on at least one view, a study of culture need not deny their cosmopolitanism to those studied.<sup>180</sup> Multiple identities are richly evident in Canadian law. If jurilinguists are aptly regarded as “*constituted* by middleness,” linked to their experience “living

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<sup>177</sup> Mockle, “Gouverner,” *supra* note 47 at 211, 204-205, 209.

<sup>178</sup> *Ibid.* at 205.

<sup>179</sup> Indeed, Garneau, *supra* note 133 at 147, connects “la spécificité québécoise,” manifested through “la prédominance de l’amalgame,” with “la diversité culturelle qui caractérise la communauté juridique à tous les niveaux.”

<sup>180</sup> Legrand, “Authenticity,” *supra* note 94 at 390.



with different traditions and different languages,”<sup>181</sup> so too are many judges and other participants in Canadian legal order. Some Quebec administrative lawyers refer routinely to materials from France and show themselves influenced by them. Some do not. Yet the diversity is distributed unevenly across the federation. It would be difficult to identify a Canadian administrative lawyer working in English outside Quebec who turns instinctively to the *droit administratif* of France.<sup>182</sup>

Methodologically, this article has restricted its gaze to formal texts, the literary deposits in which legal ideas find written expression. Reflecting conventional lawyerly preoccupations, it has not attempted to connect textual representations of norms and cultural tendencies to deeper influences that a sociological, psychological, or political inquiry might unearth. Even in the article’s excavations within the law library, however, a lesson for comparatists may be discernible. After all, it has sought to uncover cultural reflexes, such as the citation of French doctrine, that are immune to direct regulation. A perceived connection between Quebec administrative law and French administrative law persists, and indeed has recently intensified, in unabashed defiance of imperial fiat imposing English public law. This article underscores “‘unofficial’ vehicles of transfer,” such as law books, as a promising object for further comparative research.<sup>183</sup> While the Conseil d’État is rightly proud of French administrative law’s global influence,<sup>184</sup> a methodological shift towards less explicit, and less authorized, invocation of French ideas might reveal influence more pervasive still. Comparative constitutionalists are commendably turning their attention to the “migration of constitutional ideas across legal systems.”<sup>185</sup> Perhaps this article emphasizes the value of defining such inquiries beyond officially recognized sources of law such as

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<sup>181</sup> Nicholas Kasirer, “Is the Canadian Jurilinguist—Living *entre langues et droits*—a Middle Power?” in Gémar & Kasirer, *supra* note 69, 579 at 582. See also, on the possibility of a person’s having a plural legal identity and culture, Daniel Jutras, “Énoncer l’indicible: le droit entre langues et traditions” [2000] R.I.D.C. 781 at 791.

<sup>182</sup> The asymmetry of Canadian bijuralism is underscored by Jean-François Gaudreault-DesBiens, *Les solitudes du bijuridisme au Canada: Essai sur les rapports de pouvoir entre les traditions juridiques et la résilience des atavismes identitaires* (Montreal: Thémis, 2007) at 146-48.

<sup>183</sup> G. Blaine Baker, “The Reconstitution of Upper Canadian Legal Thought in the Late-Victorian Empire” (1985) 3 L. & Hist. Rev. 219 at 220.

<sup>184</sup> Conseil d’État, *L’influence internationale du droit français* (Paris: La documentation française, 2001) at 54-57.

<sup>185</sup> Sujit Choudhry, “Migration as a New Metaphor in Comparative Constitutional Law” in Choudhry, ed., *Migration*, *supra* note 172, 1 at 13.

written constitutions and the judgments of constitutional courts. While periodically they hint at isolation, scholars' footnotes also reveal currents of unofficial normative migration.

It is ironic that *Multani*—popularly understood as concerning cultural differences, whatever law's proper response to them—must itself be read with cultural sensitivity. If, as has been suggested poetically, translation may “require the creation of a whole new idea of law, a culture in the space between cultures, resulting less in a ‘translation’ from English to French than in the invention of a new language, a new world,”<sup>186</sup> so, surely, may interpretation of a bilingual (and, to an unrecognized degree, bijural) constitution. Impossible as it may be to specify and secure the conditions to guarantee this aspiration's attainment, failure to consider the cultural specificity of Quebec public law likely impedes such world-making.

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<sup>186</sup> White, *supra* note 87 at 244.