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TERRITORIALITY IN CANADIAN  
ADMINISTRATIVE LAW†

I *Introduction*

Several great divisions cut deeply across Canada as a domain of state law. The first is horizontal and separates the residual jurisdiction of the provinces over property and civil rights from that of Parliament over public law matters such as the criminal law. The second is vertical. It separates the civil law of Quebec from the common law of the other provinces.<sup>1</sup> These lines are juridical, entrenched in constitutional instruments. They can be seen as boundaries existing in law's empire.<sup>2</sup> As scholars have noted, these boundaries are not impermeable. For example, at the Supreme Court of Canada, common law and civil law influence each other mutually.<sup>3</sup> Moreover, although the terms of the federal government's recent project of harmonizing federal law with the civil law of Quebec presuppose that influences move only from provincial law to federal law,<sup>4</sup> so that federal statutory law must reflect recodified provincial civil law, in practice law is more porous than that, and provincial civil law is also permeable to federal and other influences.<sup>5</sup> Nevertheless, the general assumption remains that, within the spaces delineated by these boundaries, law is more or less uniform. For example, the practice of provincial civil law throughout Quebec and the practice of public law across Canada are taken as homogeneous.

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† A review of Suzanne Comtois, *Vers la primauté de l'approche pragmatique et fonctionnelle : Précis du contrôle judiciaire des décisions de fond rendues par les organismes administratifs* (Cowansville, QC: Yvon Blais, 2003).

1 I can bracket, for present purposes, debate over the duality of federal law as federal common law and federal civil law. See Roderick A. Macdonald, 'Encoding *Canadian Civil Law*' in J.E.C. Brierley et al., eds., *Mélanges Paul-André Crépeau* (Cowansville, QC: Yvon Blais, 1997) 579.

2 I borrow this notion from Nicholas Kasirer, 'Bijuralism in Law's Empire and in Law's Cosmos' (2002) 52 *J. Legal Educ.* 29.

3 See, e.g., H. Patrick Glenn, 'La Cour suprême du Canada et la tradition du droit civil' (2001) 80 *Can. Bar Rev.* 151 at 167-70.

4 See *Federal Law-Civil Law Harmonization Act, No. 1*, S.C. 2001, c. 4.

5 See Robert Leckey, 'Harmonizing Family Law's Identities' (2002) 28 *Queen's L.J.* 221 at 231-3.

But a third crucial division troubles this assumption. This line is linguistic and cultural, and it is factual rather than legal. It is the line between the practice of law in French and the practice of law in English. It follows no geopolitical boundary. To borrow again from Kasirer, it is a boundary existing in law's cosmos. Research indicates that within the spaces constitutionally inscribed in law's empire, law is less uniform than commonly supposed. Depending on their language of work, for example, private law practitioners in Quebec rely upon different authorities.<sup>6</sup> Concerning the criminal law, Parliament enjoys exclusive legislative jurisdiction and has exercised that jurisdiction continually; moreover, the Supreme Court has frequently applied the Canadian Charter of Rights and Freedoms<sup>7</sup> in the criminal context. These two factors might lead one to expect substantial uniformity. Nevertheless, signs of territoriality emerge.<sup>8</sup>

Yet scholars have given little consideration to the extent to which linguistic, political, and other differences have produced distinct, coexisting bodies of administrative law within Canada. In administrative law, the factual line of majority language combines with Quebec's political boundary, making it difficult to separate the cumulative effects of language and of statutory law and other manifestations of state power.<sup>9</sup> While anglophone jurists in the common law provinces would likely describe administrative law uniformly throughout Canada as being simply the English common law, *mutatis mutandis*, a francophone Quebec commentator has described federal, provincial, municipal, and scholastic (school board) law more reticently as 'd'inspiration anglaise.'<sup>10</sup> There has, perhaps, been a nagging sense on the part of more enlightened anglophone common lawyers that they are missing something, but little serious scholarly comparison has taken place.<sup>11</sup> The same author also

6 See Roderick A. Macdonald, 'Legal Bilingualism' (1997) 42 McGill L.J. 119 at 155 n. 134.

7 Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [*Canadian Charter*].

8 See Nicholas Kasirer, 'The Annotated Criminal Code en version québécoise: Signs of Territoriality in Canadian Criminal Law' (1990) 13 Dalhousie L.J. 520.

9 Administrative law is, of course, practised in English within Quebec and in French in the other provinces. On constitutional requirements for the promulgation of bilingual rules of practice of quasi-judicial administrative tribunals, see Robert Leckey & André Braën, 'Bilingualism and Legislation' in Michel Bastarache, ed., *Language Rights in Canada*, 2d ed. (Cowansville, QC: Yvon Blais, 2004) 37 at 63–4.

10 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 31 ['Notions générales']. The same author defines administrative law by reference to a French jurist (at 11), citing A. de Laubadère, *Traité élémentaire de Droit administratif*, vol. 1 (Paris: L.G.D.J., 1963) at 11.

11 Willis once observed that 'the most voluminous, and probably the best' current writing on Canadian administrative law was being done in Quebec, in French: J. Willis, 'Canadian Administrative Law in Retrospect' (1974) 24 U.T.L.J. 225 at 236.

suggests that the constitutional division of powers gives rise to two distinct administrative laws: 'le droit administratif fédéral et le droit administratif provincial.'<sup>12</sup> Anglophones and their law journals have shown some interest in French administrative law, with its distinct institutions,<sup>13</sup> but not much in Quebec's.<sup>14</sup> Accordingly, the publication of Suzanne Comtois' book on the pragmatic and functional approach, a subject of prolonged and keen interest on the part of administrative law scholars working both in French and in English, prompts reflection on the extent to which signs of territoriality appear in Canadian administrative law. Such an enquiry is doubly apt because the pragmatic and functional approach developed to replace complicated inquiries as to whether or not particular questions were within the jurisdiction of administrative tribunals, itself a territorial matter.

At the outset, Comtois summarizes the trajectory she sees in Canadian administrative law over the past twenty-five years. She adopts the narrative that has become orthodoxy to anglophone administrative law scholars:

Sous l'influence conjuguée des arrêts *Syndicat canadien de la fonction publique, section locale 963 c. Société des alcools du Nouveau-Brunswick* et *U.E.S., local 298 c. Bibeault*, la Cour suprême a progressivement substitué au traditionnel contrôle des erreurs, fondé sur les concepts d'*ultra vires* et de juridiction, une approche contextuelle, dite 'pragmatique et fonctionnelle,' qui permet de mieux assurer l'autonomie décisionnelle des organismes administratifs. (1 [footnotes omitted])

She recounts this grand narrative in two parts. The first is 'Le contrôle judiciaire des erreurs de droit commises par les tribunaux administratifs : l'amorce d'un mouvement de retenue.' This part treats the coexistence of jurisdictional control and reasonableness control and the pragmatic and functional approach. Within this part, the finest section is probably Comtois' discussion of 'L'exercice du contrôle judiciaire des erreurs de droit selon la méthode pragmatique et fonctionnelle' (37–75). This section is the book's longest and most detailed. Perhaps because of the high volume of cases, it presents the most unified general survey of a wide landscape. The second part is 'Le contrôle judiciaire des décisions de nature discrétionnaire et des conclusions de fait erronées : la systématisation de l'approche restrictive.' This part considers the integration of

12 Rambourg, 'Notions générales,' supra note 10 at 21–2.

13 See, e.g., Bernard Schwartz, 'A Common Lawyer Looks at the Droit Administratif' (1951) 29 Can.Bar Rev. 121.

14 An important trilogy of English-language articles by René Dussault introduced aspects of Quebec administrative law to anglophone common lawyers: 'Relationship between the Nature of the Acts of the Administration and Judicial Review: Quebec and Canada' (1967) 10 Can.Pub.Admin. 298; 'Judicial Review of Administrative Action in Quebec: Criteria and Scope' (1967) 45 Can.Bar Rev. 35; 'Legislative Limitations on the Courts' Power to Review Administrative Action in Quebec' (1967) 13 McGill L.J. 23.

discretionary decisions into the pragmatic and functional analysis in *Baker v. Canada (Minister of Citizenship and Immigration)*;<sup>15</sup> the moderation of the intensity of control of discretionary action since *Baker*;<sup>16</sup> the attitude of deference shown towards the decisions of municipalities, school boards, and other local authorities; and the control of erroneous factual decisions according to the pragmatic and functional approach. In contrast with the first part of the book, perhaps understandably, as a function of the recentness of the developments, the second part is more a sequence of comments on half a dozen cases than a seamless overview.

Much of Comtois' work is descriptive. It will thus serve as a significant tool for practitioners and as a rich resource for other scholars seeking to craft more theoretical arguments. Comtois cites much of the more critical and theoretical literature, but is herself most interested in what the Supreme Court and Quebec courts have actually done.<sup>17</sup> Comtois' book, meticulously researched and executed, will prove a valuable aid to Quebec administrative law practitioners and scholars. Moreover, while certain features of the book's organization indicate the continuing normative influence of supposedly antiquated categories, concepts, and metaphors, Comtois' book integrates the pragmatic and functional approach more thoroughly than other monographs. While it is at times disappointing that Comtois restrains herself from pursuing her critical ideas more deeply, her comments nonetheless presaged, as demonstrated below, a couple of the Supreme Court's unfortunate recent interventionist tendencies.

One minor criticism bears mention, namely, that at times the book might have navigated more explicitly the tension between its dual objectives of presenting an historical account (the thrust of the primary title, '*Vers la primauté de l'approche ...*') and of providing a contemporary snapshot of the law (the sense of the subtitle, '*Précis du contrôle judiciaire ...*'). It is not always clear whether a statement refers to the current law or to the law at an earlier stage in the development of the pragmatic and functional approach.<sup>18</sup>

15 [1999] 2 S.C.R. 817, 174 D.L.R. (4th) 193 [*Baker*].

16 This discussion focuses on the restrictive rereading of *Baker* given in *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3, 208 D.L.R. (4th) 1 [*Suresh*].

17 By contrast, another recent scholarly contribution from Quebec, Gabrielle Perrault, *Le Contrôle judiciaire des décisions de l'administration : De l'erreur juridictionnelle à la norme de contrôle* (Montreal: Wilson & Lafleur, 2002) [*Le Contrôle judiciaire*], spends more than twenty pages critically discussing the constitutional principles underlying judicial review of administrative action.

18 For example, Comtois writes that the pragmatic and functional approach 's'applique tout autant aux questions qui, de prime abord, ont une portée juridictionnelle qu'à celles qui n'en ont pas' (39). As authority, she cites *U.E.S., local 298 v. Bibeault*, [1988] 2 S.C.R. 1048, 95 N.R. 161 [*Bibeault*]. The statement should be explicitly labelled as historical: *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1

This essay's argument is made in three parts. Part II briefly identifies several salient characteristics of administrative law and scholarship practised in French within Quebec. It assesses Comtois' book in relation to a sadly prevalent practice of linguistic insularity on the part of scholars writing in English and in French. This first level of the argument is that the characteristics noted and this insularity indicate a significant territoriality in administrative law. Part III then examines critically Comtois' account of the pragmatic and functional approach in action. It questions how well, in practice, the pragmatic and functional approach assures the autonomy of administrative tribunals. This part argues that the factors as applied, at least in some areas, seem to lead to increasing judicial intervention. Finally, Part IV draws together the argument's first two components by exploring the connections between increasing judicial intervention and a different type of territoriality, namely, the fixation with jurisdiction ostensibly extirpated from Canadian administrative law by the pragmatic and functional approach. This part examines metaphors deeply embedded in contemporary administrative law thinking – jurisdiction, error, correctness – and posits ways to loosen their conceptual hold.

## II *Quebec administrative law en français*

A searching study of the effects of the juridical division between civil law and common law and the linguistic and cultural division between French and English upon Quebec administrative law lies beyond present constraints. Indeed, on closer examination, the axes of potential difference and the subtleties multiply.<sup>19</sup> Any sustained enquiry as to whether the Supreme Court of Canada has developed distinct approaches in its administrative law judgments regarding Quebec disputes, or whether it has taken the institutional uniqueness of the Quebec administrative state into account, cannot be undertaken here.<sup>20</sup> All that is possible presently

S.C.R. 982 at para. 24, 160 D.L.R. (4th) 193 [*Pushpanathan*], abolished the notion of any question's being 'at first blush' jurisdictional; *Ivanhoe Inc. v. UFCW, Local 500*, [2001] 2 S.C.R. 566, 201 D.L.R. (4th) 577, 2001 SCC 47, essentially overruled *Bibeault*.

19 It has been suggested to me that distinctions, albeit imprecise ones, may be discernible between the work of Quebec administrative law scholars who studied in France and those who studied in Great Britain, and also between two generations of Quebec administrative law scholars, the older generation following a tradition of positivist descriptive scholarship while the younger generation engages more with the theoretical concerns of administrative law scholars outside Quebec. Administrative law in Quebec exemplifies the pluralism that stretches back centuries in Quebec law. On this pluralism see, e.g., David Howes, 'From Polyjurality to Monojurality: The Transformation of Quebec Law, 1875–1929' (1987) 32 McGill L.J. 523.

20 However, the section concerning privative clauses will note the friction between the pragmatic and functional approach's emphasis on the context and characteristics of a

is a preliminary exposure of a few characteristics of Quebec administrative law, worthy of further study, viewed from my perspective as an anglophone trained in both common law and civil law. I do not wish to exoticize Quebec administrative law or to entrench the administrative law of the other provinces or of the federal domain as normal. For most readers of this journal, however, it probably is.

The first, most important point goes to the substance of Quebec administrative law. The institutional and legal structures of administrative law in Quebec are not the same as those in the other provinces. Some of these differences stretch back to colonial history. For example, the suggestion has been made that French-Canadian Catholic parishes constituted the first true administrative units of the colonies<sup>21</sup> and that Quebec municipal law gives a 'very original' aspect to the province's administrative law.<sup>22</sup> At times, doctrinal writers have self-consciously sought to fashion a 'droit administratif québécois cohérent,' a project possibly requiring abstinence from too frequent recourse to 'foreign' precedents,<sup>23</sup> and to foster 'un droit administratif authentiquement québécois.'<sup>24</sup> Today the most striking institutional feature of Quebec administrative law is its general appeals tribunal, the Tribunal administratif du Québec (TAQ). The TAQ is the avatar of Quebec's considerable faith in administrative tribunals and its preference for decisions by provincially appointed tribunal members over judgments by federally appointed judges. Rather than exploring the political, legal, and social factors that brought about the TAQ, this section limits itself to a brief description.

The TAQ is a 'méga-tribunal administratif exerçant généralement une compétence d'appel.'<sup>25</sup> Its members include jurists and non-jurists, and they must be impartial and independent.<sup>26</sup> The tribunal consists of four divisions: Social Affairs, Immovable Property, Territory and Environment, and Economic Affairs. The enabling statute prescribes that members be

particular administrative tribunal and the Quebec legislator's wholesale deployment of full privative clauses.

21 See Louis Baudouin, *Les Aspects généraux du droit public dans la province de Québec* (Paris: Librairie Dalloz, 1965) at 316.

22 Rambourg, 'Notions générales,' supra note 10 at 31.

23 Ibid. at 33.

24 René Dussault, 'Les Contrôles sur l'administration au Québec' in Raoul P. Barbe, ed., *Droit administratif canadien et québécois* (Ottawa: Éditions de l'Université d'Ottawa, 1969) 511 at 540.

25 Gilles Pépin, 'La Loi québécoise sur la justice administrative' (1997) 57 Rev. du B. 633 at 646 ['La Loi québécoise'].

26 *Barreau de Montréal v. Québec (A.G.)*, [2001] R.J.Q. 2058, 48 Admin. L.R. (3d) 82 (C.A.), leave to appeal refused, [2002] 3 S.C.R. v [Barreau]. In that case, the Court of Appeal struck down certain provisions relating to appointment of members for failure to satisfy applicable quasi-constitutional guarantees of impartiality.

assigned to a particular division, indicating a legislative intention to develop subject matter as well as functional expertise. Nevertheless, the vast range of matters assigned to each division provokes reflection as to the degree of genuine expertise that can be acquired on the job. The TAQ replaced five administrative tribunals, and it has also been assigned a number of appeal powers formerly held by the Court of Québec and the Court of Appeal. Gilles Pépin suggests that the TAQ's jurisdiction is more important than those of the municipal courts and the Court of Québec.<sup>27</sup> This plenary jurisdiction, vested in a single organ, constitutes a 'rupture' with the former practice of multiplying the number of administrative tribunals, each mastering a narrow field of competence.<sup>28</sup> Except where otherwise specified, the TAQ has exclusive jurisdiction to exercise its powers, namely, to decide any question of law or fact related to 'recourse' from an administrative decision.<sup>29</sup> Strikingly, the TAQ wields the power not only to confirm, vary, or quash a contested decision but also to substitute the decision that, in its opinion, should have been made initially.<sup>30</sup> The TAQ's procedure is specified, but the tribunal possesses 'un remarquable ensemble de pouvoirs' exercisable during a matter to adapt those procedures.<sup>31</sup> With limited exceptions, there are no appeals from decisions of the TAQ, and it is protected by a full privative clause.<sup>32</sup> Despite its judicial powers and its exclusively adjudicative function, this tribunal is not a court and does not attract the unwritten constitutional principle of judicial independence.<sup>33</sup> The constitutionality of the TAQ has been doubted but never judicially determined.<sup>34</sup> While lack of space prevents its consideration here, the province's Human Rights Tribunal, with its expansive jurisdiction, also exemplifies a distinct approach to administrative institutions.

A second substantive distinction is that Quebec has retained the dichotomy between quasi-judicial and administrative acts. Throughout Canada, until relatively recently, two things turned on an act's characterization as quasi-judicial: first, the possibility of judicial review (frequently

27 Pépin, 'La Loi québécoise,' supra note 25 at 648.

28 Pierre Issalys & Denis Lemieux, *L'action gouvernementale : Précis de droit des institutions administratives*, 2d ed. (Cowansville, QC: Yvon Blais, 2002) at 383 [*L'Action gouvernementale*].

29 'Recours' appears in the French version of the enabling statute; the English version refers opaquely to 'proceedings brought against an administrative authority' (*An Act respecting administrative justice*, S.Q. 1996, c. 54, now R.S.Q. c. J-3, s. 14). For discussion of the legislator's studious avoidance of the over-determined terms 'judicial review' and 'appeal,' see Pépin, 'La Loi québécoise,' supra note 25 at 647–50.

30 *An Act respecting administrative justice*, *ibid.* at s. 15.

31 Issalys & Lemieux, *L'Action gouvernementale*, supra note 28 at 385.

32 *An Act respecting administrative justice*, supra note 29 at ss. 158–9.

33 *Barreau*, supra note 26 at para. 106.

34 See, e.g., Pépin, 'La Loi québécoise,' supra note 25 at 652.

*certiorari*); and, second, the application of the guarantees of natural justice. The same classification exercise served both purposes. As for the first matter, legislative amendments have typically dissociated judicial review from an act's status. As for the second, in the last twenty-five years, the Supreme Court of Canada has reformed the common law, unchaining the application of procedural guarantees from classification of a decision. Most notably, in *Nicholson v. Haldimand-Norfolk Regional Board of Commissioners*,<sup>35</sup> the dismissal of a police chief serving at pleasure led the Court to dissociate procedural fairness from the classification of an act as quasi-judicial. Nowadays David Mullan observes cheerily that, 'With the exceptions of the operation of the procedural protections of the Quebec Charter of Human Rights and Freedoms and the Ontario Statutory Powers Procedure Act, and possibly also the application of the doctrine of issue estoppel to the decisions of tribunals, this classification exercise has disappeared from our law.'<sup>36</sup>

The continuing importance of this dichotomy in Quebec administrative law shows that Mullan overstates the expiry of the classification exercise. First, as he notes, the Charter of Human Rights and Freedoms entrenches the distinction.<sup>37</sup> In applying these procedural protections, Quebec courts regularly classify proceedings as administrative or quasi-judicial, citing the old leading case on the classification for purposes of reviewability under the former s. 28 of the Federal Court Act.<sup>38</sup> Second,

35 [1979] 1 S.C.R. 311, 88 D.L.R. (3d) 671 [*Nicholson*].

36 David J. Mullan, *Administrative Law* (Toronto: Irwin Law, 2001) at 158–9.

37 R.S.Q. c. C-12, s. 23, para. 1 [*Quebec Charter*], provides that '[e]very person has a right to a full and equal, public and fair hearing by an independent and impartial tribunal, for the determination of his rights and obligations or of the merits of any charge brought against him.' Section 34 stipulates that '[e]very person has a right to be represented by an advocate or to be assisted by one before any tribunal.' Sub-paragraph 1 of s. 56 then defines 'tribunal' as including 'any person or agency exercising quasi judicial functions.'

38 *Canada (Minister of National Revenue) v. Coopers & Lybrand*, [1979] 1 S.C.R. 495, 92 D.L.R. (3d) 1 [*Coopers & Lybrand* cited to S.C.R.]. Quebec cases account for roughly one-third of some 230 citations of the case listed on Quicklaw. See, e.g., *Beaulieu c. Coopérative des propriétaires de taxi de Laval* (2003), J.E. 2003-880 (C.A.); *Centrale de l'enseignement du Québec c. Québec (P.G.)*, [1998] R.J.Q. 2897 (C.A.); 2747-3174 *Québec Inc. c. Québec (Régie des permis d'alcool)*, [1994] R.J.Q. 2440, 112 D.L.R. (4th) 553 (C.A.), rev'd, [1996] 3 S.C.R. 919, 140 D.L.R. (4th) 577; *Primeau c. Québec (Comité de déontologie policière)*, [2002] J.Q. No. 586 (Sup. Ct.) (QL); 2849-0953 *Québec inc. c. Québec (Régie des alcools, des courses et des jeux)*, [1999] J.Q. No. 4469 (Sup. Ct.) (QL); *Souscripteurs de Montréal Inc. c. Québec (Inspecteur général des Institutions financières)*, [1996] R.R.A. 828 (Sup. Ct.), varied, [2000] R.R.A. 42 (C.A.); *Québec (Commission de protection du territoire agricole) c. Beaugregard-Dalpé*, [2003] R.J.Q. 271 (C.Q.). As a result, perhaps, of their familiarity with the classification exercise and *Coopers & Lybrand* from its use in applying the Quebec Charter, Quebec judges cite that case even in other contexts more frequently than judges in other provinces: see, e.g., *Aubin c. Université du Québec à Montréal*, [1997] R.R.A. 570 (Sup. Ct.), aff'd, [2000] R.R.A. 282 (C.A.) (reviewability of statutory body); *Société financière Speedo*



although Mullan does not acknowledge this more recent statute, the *Act respecting administrative justice* also preserves the distinction, deploying it for the application of the general procedural guarantees.<sup>39</sup> Pierre Issalys and Denis Lemieux characterize the statute's distinction between adjudicative and administrative functions as 'une pièce maîtresse.'<sup>40</sup> The Quebec Charter and the *Act respecting administrative justice* ensure that the classification retains a vigorous part in Quebec administrative law. Nearly twenty years after *Nicholson*, then, the most recent edition of Patrice Garant's work treats the classification exercise traditionally and favourably.<sup>41</sup> It interests me that this apparently obsolete classification exercise occurs so frequently on Canadian soil. Quebec judges deciding administrative law cases cite *Nicholson*, but they retain a clutch on the quasi-judicial/administrative distinction. Moreover, the legislative structure requires the chief enquiry to be not what the contextual duty of fairness requires in particular circumstances, but whether the decision maker is a tribunal (Quebec Charter) or whether it is administrative or adjudicative (*An Act respecting administrative justice*). Contrary to the triumphant conclusions of English-language commentators that the classification exercise has disappeared from 'our' law, it is preserved in Quebec, not only as a matter of statutory and quasi-constitutional law but also, more profoundly, as part of the legal culture.

A third point is that the sources of administrative law in Quebec are not the same as those in the other provinces. This observation is a formal one that might arise from a glance at the bookshelves of administrative law scholars in Quebec and in another province. Whether viewed in civil law terms, as 'doctrine,' or less formally, administrative law scholarship plays a significant role.<sup>42</sup> This secondary literature tends to follow strict linguistic lines: materials published in Quebec are written in French, materials published elsewhere in English. Quebec generates its own leading monographs in administrative law.<sup>43</sup> Quebec law journals, rarely

(1993) *ltée c. Québec (Commission des transports)*, [2000] J.Q. No. 4520 (C.A.) (QL) (characterizing a tribunal as judicial for standard of review analysis); *R. c. Société des alcools du Québec*, [1998] R.R.A. 964 (C.A.) (no possibility of extra-contractual liability because board acting quasi-judicially).

39 *Supra* note 29. Title I comprises 'Rules Specific to Decisions Made in the Exercise of an Administrative Function' and 'Rules Specific to Decisions in the Exercise of an Adjudicative Function.'

40 *L'Action gouvernementale*, *supra* note 28 at 383.

41 Patrice Garant, *Droit administratif*, 4th ed., vol. 1 (Montreal: Yvon Blais, 1996) at 239–40.

42 For a discussion of the status of Quebec private law scholarship as doctrine, see Roderick A. Macdonald, 'Understanding Civil Law Scholarship in Quebec' (1985) 23 *Osgoode Hall L.J.* 573.

43 See Issalys & Lemieux, *L'Action gouvernementale*, *supra* note 28; Garant, *Droit administratif*, *supra* note 41; René Dussault & Louis Borgeat, *Traité de droit administratif*, 2d ed., 3 vols. (Québec: Presses de l'Université Laval, 1984–1989); Gilles Pépin & Yves Ouellette, *Principes de contentieux administratif*, 2d ed. (Cowansville, QC: Yvon Blais, 1982).

read by anglophones outside that province, publish frequently on administrative law, for the most part in French. Moreover, while anglophone readers in the common law provinces are likely to refer regularly to the annual surveys published in the *Supreme Court Law Review*, francophone practitioners in Quebec are equally likely to thumb the annual collections of conference papers produced by the Barreau du Québec.<sup>44</sup>

The issue is not just that francophone practitioners in Quebec read French-language versions of the books read in the other provinces. Rather, Quebec monographs tend to be quite different. They derive from a tradition of descriptive, positivistic French-language texts that situate administrative law within a global theory of the state and provide an inventory of governmental institutions, locating each within a sophisticated, at times Byzantine, taxonomy. Material is organized through a hyper-rational, symmetrical, classically French ‘plan.’<sup>45</sup> In this way, Comtois’ book comprises a Partie I and Partie II of virtually equal length; within each part, the material is subdivided further, often down to four levels of headings (*e.g.*, 3.3.2.1), so that a labelled subsection fills less than a single page. A series of cases that an anglophone writer would typically treat discursively tends, in at least a certain kind of French writing, to emerge as a set of numbered propositions or rules. These rules typically create new categories and generate their own classification exercise.<sup>46</sup> Perhaps it is the fact of written law, more than the civil law, that drives this classification. But in Canada the most codified law is found in civilian Quebec, and the point here is simply that it affects the development of administrative law within that province.<sup>47</sup> The classical French drive to organize and define can impose upon English administrative law what may be a false sense of precision – the common law is less orderly than it is made to appear.<sup>48</sup> The distillation of cases into numbered

44 See, *e.g.*, Formation permanente du Barreau du Québec, *Développements récents en droit administratif et constitutionnel* (2003) (Cowansville, QC: Yvon Blais, 2003).

45 My comments apply only to the type of formal French legal writing focused on the ‘plan.’ Obviously there is nothing necessarily ordered or rigid about French legal thinking more generally. See, *e.g.*, Jean Carbonnier, *Flexible droit : pour une sociologie du droit sans rigueur*, 10th ed. (Paris: L.G.D.J., 2001).

46 Such reasoning is typical in applying a civil code, as discussed in John E.C. Brierley & Roderick A. Macdonald, eds., *Quebec Civil Law: An Introduction to Quebec Private Law* (Toronto: Emond Montgomery, 1993) at paras. 85–93.

47 Rambourg, ‘Notions générales,’ *supra* note 10 at 32–4, suggests the impact of the civil law on Quebec administrative law. Compare the categorical view (from a Quebec anglophone) that administrative law ‘has evolved from the public law and does not rest upon civil-law antecedents’: F.R. Scott, ‘Administrative Law: 1923–1947’ (1948) 26 *Can.Bar Rev.* 268 at 269.

48 Admittedly, the francophone and civilian administrative lawyer may regard the common lawyer’s approach with some disdain. Gilles Pépin has remarked upon ‘le peu d’enthousiasme’ shown by British and American legislators for precise definitions and

propositions can seem, at least for the common lawyer, a strangely acontextual exercise. There is little room to discuss how each rule, if it can even be called such, emerged from its particular web of facts. Often the propositions are presented as coexisting simultaneously, rather than having developed one from another. I shall return below to my view that Comtois might have paid more attention to the facts in the cases.

Another aspect of the distinctness of sources of Quebec administrative law is the language of judgments. This point is a supplemental one, less significant by far than the institutional and substantive distinctiveness. Supreme Court, Federal Court, and Federal Court of Appeal cases are not identical in the two languages in which they are released. Translation is never perfect or transparent, and so the French version of a Supreme Court or Federal Court judgment is never the same as the English one.<sup>49</sup> Consider *Canadian Union of Public Employees Local 963 v. New Brunswick Liquor Corp.*,<sup>50</sup> in which Dickson J. accepted a labour board's interpretation of its enabling statute. He justified a stance of deference by reference to both the privative clause in the statute and the labour board's expertise in the delicate policy area of labour relations. The English text and the French version generate different rhetorical performances.<sup>51</sup> Of course, it is not only the judgments of the federal courts that develop

structures: 'Les tribunaux administratifs' in Raoul P. Barbe, ed., *Droit administratif canadien et québécois* (Ottawa: Éditions de l'Université d'Ottawa, 1969) 551 at 551.

49 James Boyd White outlines the general untranslatability of law beautifully in *Justice as Translation: An Essay in Cultural and Legal Criticism* (Chicago: University of Chicago Press, 1990) [*Justice as Translation*]. On the difficulties raised more specifically by bilingual judgments, see Leckey & Braën, 'Bilingualism and Legislation,' supra note 9 at 128–35.

50 [1979] 2 S.C.R. 227, 97 D.L.R. (3d) 417 [*C.U.P.E.* cited to S.C.R.].

51 One of the judgment's most famous sentences is more vivid in English than in translation: 'The courts, in my view, should not be alert to brand as jurisdictional, and therefore subject to broader curial review, that which may be doubtfully so'; 'À mon avis, les tribunaux devraient éviter de qualifier trop rapidement un point de question de compétence, et ainsi de l'assujettir à un examen judiciaire plus étendu, lorsqu'il existe un doute à cet égard' (ibid. at 233). The implication, in the French version, that judges tend to characterize things too quickly falls short of the English version's image of judges standing alertly with hot jurisdictional branding irons at hand. In contrast, another core statement in the judgment emerges more persuasively in the French version: 'The rationale for protection of a labour board's decisions within jurisdiction is straightforward and compelling'; 'On veut protéger les décisions d'une commission des relations de travail, lorsqu'elles relèvent de sa compétence, pour des raisons simples et impérieuses' (ibid. at 235). The French version engages the reader: translated back to English literally, it would read as follows: 'We want to protect the labour board's decisions within its jurisdiction for simple and imperious (or urgent) reasons.' Indeed, it has been remarked that the ambiguity existed in only one language version of the statute. See Yves-Marie Morissette, 'Le Contrôle de la compétence d'attribution : thèse, antithèse et synthèse' (1985) 16 R.D.U.S. 591 at 626 ['Le Contrôle'].

administrative law. Provincial tribunals and provincially managed superior and appellate courts contribute substantially to the jurisprudence, but administrative law practitioners and scholars seem rarely to read judgments released in the other official language.

Before assessing Comtois' book in light of these comments, it is appropriate to speculate briefly on possible connections between the formal characteristics noted respecting French-language doctrine and the substantive characteristics, notably the preservation of the classification exercise. The tendency to organize, rationalize, and classify has perhaps nourished the substance of administrative law in Quebec in developing formalist paths distinct from those of the common law provinces. The forms of classical French-language legal scholarship, as well as the classification required by a civil code, helped to preserve the classification exercise in the realm of procedural fairness. The *Act respecting administrative justice* and the Quebec Charter attest that successive Quebec legislatures have been open to entrenching substantial procedural guarantees, but that they continue to rely on firm distinctions between categories of administrative activity for delineating the application of those guarantees.

How does Comtois' book fare in light of these remarks? From a linguistic perspective, her selection of secondary sources is much less insular than that of some of her Quebec colleagues and many administrative common lawyers. Indeed, the book will introduce francophone readers to a number of significant recent English-language articles. Yet Comtois' survey of cases is restricted, but nowhere acknowledged as such. As far as I can tell, she read Supreme Court cases, Federal Court cases, Federal Court of Appeal cases, and Quebec cases. The lengthy table of jurisprudence at the end of the book lists roughly a dozen cases from outside those classes.<sup>52</sup> Even more oddly, she remarks at one point that '[c]es orientations ont été suivies par les autres cours canadiennes,' but in support of this assertion she cites only five Quebec judgments (10 n. 19). The selection of cases, then, reveals a strong territoriality in the approach to administrative law. Comtois' 'approche pragmatique et fonctionnelle' appears to be developing as a cooperative effort on the part of federal and Quebec courts, instead of as a pan-Canadian enterprise. I now turn

52 The book does not present itself as a treatise on administrative law, but I might have expected mention of the discussion of the correctness standard in *Northwood Inc. v. British Columbia (Forest Practices Board)* (2001), 86 B.C.L.R. (3d) 215, 31 Admin. L.R. (3d) 1 (C.A.), leave to appeal refused, [2001] 3 S.C.R. ix [*Northwood*]. Nor does Comtois cite *Keddy v. New Brunswick (Workplace Health, Safety and Compensation Commission)* (2002), 247 N.B.R. (2d) 284, 212 D.L.R. (4th) 84 (C.A.), leave to appeal refused, [2002] 4 S.C.R. vi [*Keddy*]. This split between Quebec's and other provinces' jurisprudence is, regrettably, a common practice. For instance, Mullan, *Administrative Law*, supra note 36, cites just five Quebec cases in his entire book, aside from Supreme Court appeals from Quebec.

to her detailed account of this initiative and the argument regarding judicial intervention under the pragmatic and functional approach.

### III *Applying the pragmatic and functional approach*

Comtois exposes the analytical framework constructed by the Supreme Court for reviewing legal determinations by administrative tribunals. She presents the three standards of review – correctness, reasonableness *simpliciter*, and patent unreasonableness – discussing the controversy spawned by the metaphor of a ‘spectrum’ of reviews as to whether intermediate standards can arise between those three. She also sets out the contextual factors for determining the standard of review for an administrative tribunal’s decision, which will be outlined presently. This contextual approach has replaced, at least in theory, the enquiry as to whether a question to be decided by a board falls within the board’s jurisdiction or outside it. Comtois’ major undertaking is to examine how the pragmatic and functional approach has operated in practice. She seeks particularly to discern tendencies in the Supreme Court’s application of the factors and to trace the extent to which the Court’s practice exemplifies or implicitly amends its pronouncements. The Court has in recent years accumulated a substantial corpus of judgments applying the approach, and it is important for scholars to attempt, as Comtois does, to make sense of it.

While this is not a large complaint, Comtois’ discussion of the cases might have paid greater attention to context. Comtois tends to read the decisions as yielding statements about the pragmatic and functional approach that can be abstracted from the factual contexts of the decisions.<sup>53</sup> For example, she discusses *Chamberlain v. Surrey School District No. 36*<sup>54</sup> several times. In that case, the appellant, a Kindergarten/Grade 1 teacher, challenged a school board’s refusal to approve three books featuring same-sex couples as supplementary learning resources for teaching the family life curriculum. The case raised complex issues, notably a tension between constitutional and societal values of non-discrimination and inclusion, on the one hand, and, on the other, the power of a local elected body to follow majoritarian preferences, including political and social views informed by religious beliefs. *Chamberlain* is a peculiar case in the sense that the decision whether to approve the books or not was clearly the school board’s to make, but the Court reviewed on a simple as opposed to patent unreasonableness standard. Comtois does not discuss how the facts were delicate ones for the Court,

53 On the importance of context in administrative law cases, see Michael Taggart, ‘Reinventing Administrative Law’ in Nicholas Bamforth & Peter Leyland, eds., *Public Law in a Multi-layered Constitution* (Oxford: Hart Publishing, 2003) 311 at 313.

54 [2002] 4 S.C.R. 710, 221 D.L.R. (4th) 156, 2002 SCC 86 [*Chamberlain*].

since the Canadian Charter has accommodated sexual orientation more comfortably than has administrative law, or the fact that, as discussed below, the board's resolution included no reasons. It is not obvious that *Chamberlain* should be taken outside its particular context, as Comtois does, as the Court's latest general pronouncement on judicial review of decisions by local elected bodies.

In any case, I now turn to a closer examination of Comtois' engagement with the jurisprudence and the approach, beginning with the contextual factors. I discuss several of the factors in some detail and will address more briefly review of discretionary decisions, a matter that has been exhaustively studied since *Baker*. This section argues that the pragmatic and functional approach appears to be permitting a degree of intervention at odds with judicial pronouncements of deference and demonstrates how Comtois' analysis predicts a couple of recent interventionist Supreme Court judgments. This intervention is observed in the discussion of expertise and discretionary decisions.

#### A THE FACTORS

Before engaging with Comtois' analysis, a brief overview of the pragmatic and functional approach is warranted. The Supreme Court of Canada's development of contextual factors for calibrating the judicial stance towards tribunal decisions began with *C.U.P.E.* In that judgment, Dickson J. enunciates the characteristics of the labour board warranting deference. This development proceeded through a number of significant decisions in the late 1980s and 1990s, perhaps culminating in the authoritative presentation of contextual factors in *Pushpanathan*. That case concerned a certified question of law, namely, whether it had been an error of law for the Immigration and Refugee Board (IRB) to exclude an individual from refugee status on the basis that he was guilty of a serious narcotics offence committed in Canada. The standard of review arose as a threshold question. On the basis of several contextual factors, the Supreme Court concluded that the IRB's determination was reviewable on the correctness standard. The contextual factors, as usually applied, are, first, the presence or absence of a privative clause and of a statutory right of appeal; second, the expertise of the decision maker in light of the question *vis-à-vis* the expertise of the court; third, the purpose of the particular statutory provision and of the statute as a whole; and, fourth, the nature of the question, whether one of fact, mixed fact and law, or law.

Comtois' examination is highly useful, drawing on the case law to sketch the Supreme Court's approach to each factor. I confess, however, to finding her presentation of the factors counter-intuitive: she separates privative clauses (41–5) from rights of appeal (58–67). (In contrast, *Pushpanathan* lumps them together and subsequent jurisprudence views them as a single factor.) She then combines the other three factors. I will

comment on her treatment of two factors: privative clauses/rights of appeal and expertise. As a preliminary matter, however, I will discuss Comtois' position regarding jurisdictional questions.

### *1 Jurisdictional questions?*

The pragmatic and functional approach ostensibly replaces the enquiry into whether or not a question is jurisdictional. In *Pushpanathan*, Bastarache J. states that 'a question which "goes to jurisdiction" is simply descriptive of a provision for which the proper standard of review is correctness, based upon the outcome of the pragmatic and functional analysis.'<sup>55</sup> In other words, 'jurisdictional' is henceforth merely a tag that attaches *ex post* to a question for which the pragmatic and functional approach indicates correctness review. This statement shows the Supreme Court trying to discourage judges from thinking that any question is *prima facie* jurisdictional. Part IV airs doubts about the success of the Court's endeavour.

Despite Bastarache J.'s pronouncement, jurisdiction as a controlling factor continues atavistically to rear its head. In *Trinity Western University v. British Columbia College of Teachers*,<sup>56</sup> at issue was the college's refusal to approve a private religious institution's request for full responsibility for a teacher education program on the basis that the institution's policy towards homosexuality was discriminatory. A threshold question arose as to whether the college had jurisdiction to consider the discrimination issue. Iacobucci and Bastarache JJ. write laconically that '[a]ll parties accepted that the standard of correctness applied to this decision because it was determinative of jurisdiction and beyond the expertise of the members.'<sup>57</sup> It is unfortunate that the point was not argued and discussed more fully, because this portion of the judgment is not readily reconcilable with the statement in *Pushpanathan* that a question's going to jurisdiction is an *ex post* qualification, not a persuasive one. A sharper example still is *Chieu v. Canada (Minister of Citizenship and Immigration)*.<sup>58</sup> That case concerned the entitlement of the IRB to consider potential hardship abroad when deciding appeals of removal orders by permanent residents. Iacobucci J. speaks of a 'jurisdictional issue' relating to the 'scope' of the delegated mandate. He appears to use 'jurisdictional' as a determining factor rather than as the *ex post* label corollary to a finding of correctness.<sup>59</sup> Accordingly, the contemporary status of the jurisdictional question is uncertain. At least two contexts highlight the uncertainty, partly stemming from the multiple usages of the term. The first is the

55 *Pushpanathan*, supra note 18 at para. 28.

56 [2001] 1 S.C.R. 772, 199 D.L.R. (4th) 1, 2001 SCC 31.

57 Ibid. at para. 14.

58 [2002] 1 S.C.R. 84, 208 D.L.R. (4th) 107, 2002 SCC 3 [*Chieu*].

59 Ibid. at para. 24.

case of a power-conferring provision, one that any judge is accustomed to regarding as *prima facie* 'jurisdictional.' How is such a characterization to factor into the pragmatic and functional approach? Will it count in the third factor, the purpose of the provision? Does *Pushpanathan* render inadmissible a judge's instinctive reaction that a particular provision confers jurisdiction and is thus 'jurisdictional'? The second point, discussed below, is the status of privative clauses, which typically refer to jurisdictional questions.

Comtois addresses the first point several times. Early on she characterizes Bastarache J.'s use of 'jurisdictional' in *Pushpanathan* as 'un peu vide' (15). She later provides a convincing reading of *Chieu* that reconciles it with *Pushpanathan* and other recent jurisprudence. She claims that the jurisdictional nature of a question – in the sense of conferring power or mandate – does not preclude the application of the pragmatic and functional approach. Rather, the approach has integrated the power-conferring character of a provision into the analysis as a factor militating in favour of judicial intervention, but not a determinative one (93). The result is that, even respecting a provision that confers jurisdiction, the reviewing court retains the possibility of selecting a standard of review other than correctness (94). Comtois' analysis, then, does not ask judges to suppress the observation that a particular statutory provision confers power but simply to tame it within the pragmatic and functional approach.

Not surprisingly, competing interpretations of Bastarache J.'s redefinition of 'jurisdictional' have arisen. Gabrielle Perrault, for example, suggests that it is inappropriate to take Bastarache J. literally.<sup>60</sup> She maintains that there are self-evident cases where a tribunal must decide whether or not it has power to pronounce on a certain subject, and that such questions are clearly 'jurisdictional' in the sense of invoking correctness review without recourse to the pragmatic and functional approach. Taking Bastarache J. literally could direct a court in certain cases, she writes, to apply a standard less strict than correctness when a highly specialized tribunal must interpret a provision of its enabling statute that draws on its expertise to decide whether or not it has power to determine the question before it (84). Perrault grasps lucidly the implications of *Pushpanathan*, but she and I disagree over whether such implications can have been intended and, more important, whether they are appropriate. A tribunal may frequently warrant deference on its interpretation of power-conferring provisions in its enabling statute. Indeed, it is only the possibility of a standard other than correctness for an agency's interpretation of its enabling statute that permits courts to escape the excessive intervention demonstrated in cases such as *Bell v. Ontario Human Rights*

60 *Le Contrôle judiciaire*, supra note 17 at 84.



*Commission*, where the courts substituted for the Commission's their view of whether certain premises constituted a 'self-contained dwelling unit.'<sup>61</sup> Many examples come to mind of terms within power-conferring provisions that would be more sensitively interpreted by their respective specialized agencies – 'grain' by a grain marketing board, 'security' by a securities commission, and so on. Accordingly, Comtois' discussion makes an important contribution to the ongoing debate.

## 2 *Privative clauses and statutory rights of appeal*

Comtois' discussion of privative clauses and rights of appeal is interesting and ought to have pressed further. She notes that neither the presence nor the absence of a full privative clause determines the standard of review. She has parsed the cases scrupulously, noting that such a position diverges from the prior suggestion that a full privative clause more or less automatically invokes patent unreasonableness (45 n. 186).<sup>62</sup> Perhaps she might have plumbed more deeply the implications of relativizing a full privative clause as just one factor in determining the standard of review, namely, its incompatibility with the notion that discovering and following legislative intent is the 'central inquiry' in determining the standard of review.<sup>63</sup> Rather, the Supreme Court appears to be countering concern with legislative intent with its own view of its 'constitutional duty to protect the rule of law.'<sup>64</sup> Moreover, where a conflict arises between the two, the Court's conception of the rule of law appears to privilege controlling the exercise of power by administrative tribunals over implementing the legislative scheme to its fullest.

Two dimensions of privative clauses as expressions of legislative intent call for analysis. The first is the problem of interpretation. Comtois reproduces a standard privative clause, which prohibits the extraordinary recourses enumerated in the Code of Civil Procedure '[e]xcept on a question of jurisdiction' (41). It would have been interesting to hear her views on what these words actually mean, now that the idea of a question of jurisdiction has largely disintegrated.<sup>65</sup> It is circular to insert Basta-

61 [1971] S.C.R. 756, 18 D.L.R. (3d) 1.

62 Comtois cites *Pasiechnyk v. Saskatchewan (Workers' Compensation Board)*, [1997] 2 S.C.R. 890 at para. 16, 149 D.L.R. (4th) 577 [*Pasiechnyk*]; she could also have mentioned Sopinka J.'s statement in *United Brotherhood of Carpenters and Joiners of America, Local 579 v. Bradco Construction Ltd.*, [1993] 2 S.C.R. 316 at 335, 102 D.L.R. (4th) 402, that expertise is the most important factor 'in the absence of a full privative clause.'

63 *Pushpanathan*, supra note 18 at para. 26. See also Binnie J.'s reference to the 'polar star of legislative intent' in *C.U.P.E. v. Ontario (Minister of Labour)*, [2003] 1 S.C.R. 539, 226 D.L.R. (4th) 193, 2003 SCC 29 [*Minister of Labour*].

64 *Dr. Q v. College of Physicians and Surgeons of British Columbia*, [2003] 1 S.C.R. 226 at para. 21, 223 D.L.R. (4th) 599, 2003 SCC 19 [*Dr. Q*].

65 I am grateful for this point to Pierre-Hugues Verdier.

rache J.'s definition of jurisdictional questions from *Pushpanathan* into the clause so as to read that a privative clause prohibits recourse except for questions reviewable on a correctness standard.<sup>66</sup> Perhaps the answer is that the full privative clause has become a symbol in its own right rather than something to be taken literally, no longer semantic but semiotic. If this is so, then, provided that all parties agreed, a letter P or an image of a fish inserted into an enabling statute could signal deference in identical fashion.

The second dimension is specific to Quebec. Comtois declares that full privative clauses are frequent in federal and Quebec laws. It would have been interesting to hear her views on how a reviewing court should treat the full privative clause adopted as boilerplate in Quebec enabling statutes. As noted, legislative intent supposedly animates the pragmatic and functional approach; where, however, the legislature has given no particular thought to the relationship between a given tribunal and the reviewing courts, does a privative clause carry the same weight? A legislature can invoke the override in s. 33 of the Canadian Charter in blanket fashion,<sup>67</sup> but, given the pragmatic and functional approach's emphasis on context, how should that analysis treat a general command for judicial deference? Can there be a general intent to immunize virtually all tribunals from judicial meddling to the extent constitutionally permitted?<sup>68</sup> The Supreme Court of Canada has not yet found a way in the pragmatic and functional approach to acknowledge the distinctiveness of the Quebec administrative state.<sup>69</sup>

As for statutory rights of appeal, Comtois' discussion follows the recent judgment in *Dr. Q*. In that case, an enquiry committee of the College of Physicians and Surgeons had found that a physician had established a sexual relationship with a patient and was guilty of infamous conduct. In the statutory appeal, the reviewing judge disagreed with the committee's

66 Similar issues arise in Quebec from the superior court's power to revise a judgment of an inferior court 'when there is want or excess of jurisdiction': art. 846(1) C.C.P.

67 *Ford v. Quebec (A.G.)*, [1988] 2 S.C.R. 712, (*sub nom. Quebec (A.G.) v. La Chaussure Brown's Inc.*) 54 D.L.R. (4th) 577.

68 Comtois notes (31–2) that the Quebec Court of Appeal does not review all decisions of the TAQ on patent unreasonableness, despite the privative clause and the evident legislative intent that the tribunal have the final say in judicial review matters: *Commission des transports du Québec c. Tribunal administratif du Québec* (31 October 2000), Montreal 500-09-008975-997, J.E. 2000-2100 (C.A.).

69 Indeed, in its first judgment relating to the TAQ, the Supreme Court sidesteps the pragmatic and functional approach entirely: *Imperial Oil Ltd. v. Quebec (Minister of the Environment)*, [2003] 2 S.C.R. 624, 231 D.L.R. (4th) 577, 2003 SCC 58. I cannot reconcile that judgment with the dogmatic pronouncement by the unanimous Court just seven months earlier that '[r]eview of the conclusions of an administrative decision-maker must begin by applying the pragmatic and functional approach' (*Dr. Q* supra note 64 at para. 25).

findings on credibility and set aside the decision. The Supreme Court reversed, clarifying that the pragmatic and functional approach applies to all reviews of administrative decision makers, by way of application for judicial review or statutory appeal.<sup>70</sup> According to the Court, a statutory right of appeal is now no more than one of the four contextual factors to be weighed in determining the standard of review. Comtois had previously criticized the assimilation of statutory rights of appeal into judicial review,<sup>71</sup> and she does not reiterate her concerns at length in this book. She is correct that while the inclusion of statutory appeals into the pragmatic and functional approach means that, in principle, a reviewing judge may choose any of the three standards, the real choice is between reasonableness *simpliciter* and correctness (67). Indeed, she remarks that in Quebec, the reasonableness standard has become essentially the default for statutory appeals (62). I will return below to the question of whether the pragmatic and functional approach presumes in all cases the potential applicability of any of the three standards.

*Dr. Q* and earlier cases are clear that a statutory right of appeal is no bar to deference. I tend to subscribe to expertise as a substantive basis for deference. The substantive rationale for deference dictates that courts should defer when there are reasons, such as agency expertise, for doing so. This substantive rationale contrasts with a formal basis, such as a legislative demand for deference manifested in a privative clause.<sup>72</sup> In *Keddy*, however, the New Brunswick Court of Appeal articulates a compelling argument for deciding statutory appeals on correctness. At issue was the standard of review for an appeals tribunal's determination that the appellant was acting in the course of her employment when injured. An affirmative finding would have eliminated any tort claim, restricting the appellant's remedy to indemnification under the workers' compensation scheme. The court concluded that it was a question of law, reviewable on correctness. Robertson J.A. queries how the legislative draftsman can signal legislative intent to displace the deference doctrine other than by including a statutory right of appeal.<sup>73</sup> He highlights factors that, while arguably relevant, have not yet found comfortable accommodation in the *Pushpanathan* factors: the possibility, despite the tribunal's expertise, that a right of appeal reflects a political compromise to satisfy competing

70 *Dr. Q*, *ibid.* at para. 21.

71 Suzanne Comtois, 'Les Méandres de la politique de retenue judiciaire à l'égard des décisions des tribunaux administratifs' in Barreau du Québec, Service de la formation permanente, *Développements récents en droits administratifs* (1995) (Cowansville, QC: Yvon Blais, 1995) 187 at 191ff.

72 The distinction is drawn by David Dyzenhaus, 'The Politics of Deference: Judicial Review and Democracy' in Michael Taggart, ed., *The Province of Administrative Law* (Oxford: Hart Publishing, 1997) 279 at 290.

73 *Keddy*, *supra* note 52 at para. 25.

interest groups, and that it may recognize that the appointment of tribunal members has been historically influenced by factors not tied to legislative objectives.<sup>74</sup> These political considerations demonstrate that even the contextual factors of the pragmatic and functional approach can become acontextual as judges pursue their ideal of deference at the expense of recognition of institutional realities. It would have been interesting to hear Comtois' views on the case.

### 3 Expertise

It is Comtois' assessment of the treatment of the factor of relative expertise that is perhaps the best part of her analysis. She provides an overview of relevant aspects of expertise that will aid future research and advocacy (46). Her most critical section is 'Une caractérisation sélective de l'expert,' in which she observes astutely that the question of relative expertise proves thorniest when the litigation turns on a question of law. Courts, she remarks, are generally willing to recognize relative expertise on the part of the tribunal when it comes to questions of fact or mixed questions of fact and law. She states correctly that when it comes to questions of law, administrative tribunals are not all treated equally: Tribunals such as labour boards are almost automatically deferred to on questions of law, while others often are not (49).

Most interesting, however, is the discussion of the diminishing scope of deference accorded to specialized tribunals on the basis of expertise. Comtois regards selection of the correctness standard in *Canada (Deputy Minister of National Revenue) v. Mattel Canada Inc.*<sup>75</sup> as signalling less deference to specialized tribunals on questions of law than previously shown (56). She is right on this crucial issue, and this assessment warrants some elaboration. *Mattel* concerned the standard of review for the Canadian International Trade Tribunal's decision respecting the value of imported goods for duty and other customs matters. The Supreme Court stated that the issue concerned 'pure questions of law that require the application of principles of statutory interpretation and other concepts which are intrinsic to commercial law.'<sup>76</sup> This statement unveils a new type of expertise for standard of review purposes. In earlier cases, the

74 Ibid. at para. 27. In the British context, Murray Hunt proposes that the posture of deference should take into account the primary decision maker's democratic accountability: 'Sovereignty's Blight: Why Contemporary Public Law Needs the Concept of "Due Deference"' in Nicholas Bamforth & Peter Leyland, eds., *Public Law in a Multi-layered Constitution* (Oxford: Hart Publishing, 2003) 337 at 351 ['Sovereignty's Blight']. Such a consideration might tackle some of Robertson J.A.'s concerns, as might consciousness of a tribunal's reputation, discussed in R.E. Hawkins, 'Reputational Review I: Expertise, Bias and Delay' (1998) 21 Dalhousie L.J. 5.

75 [2001] 2 S.C.R. 100, 199 D.L.R. (4th) 598, 2001 SCC 36 [*Mattel*].

76 Ibid. at para. 33.

expertise with which the Court concerned itself could be called substantive: the Court examined whether the board or a reviewing court possessed superior expertise regarding the topic of the decision. Thus in *Bibeault*,<sup>77</sup> it mattered that the substance of the decision related to alienation, a general concept of the civil law. The determinations that the Supreme Court has superior expertise to human rights tribunals regarding human rights and lesser expertise than the Competition Tribunal regarding competition policy turned likewise on substance.<sup>78</sup> In *Mattel*, admittedly, Major J. refers to substantive expertise when he characterizes the question as drawing on commercial law concepts. While debatable, this characterization is at least weakly plausible.<sup>79</sup> Yet when he says that the question engages ‘principles of statutory interpretation,’ he focuses on the methodological or technical expertise required to decide. This way of assessing relative expertise is novel, and it will always drive towards intervention because, appropriately or not, a court will always consider itself more expert than a board at statutory interpretation.<sup>80</sup>

This emphasis on methodological expertise in *Mattel* strains fidelity to past judgments. If present in *C.U.P.E.*, this emphasis would have militated against deference to the labour board, itself engaged in an exercise of statutory interpretation. It also undermines *Canadian Broadcasting Corp. v. Canada (Labour Relations Board)*.<sup>81</sup> That appeal concerned whether the employer had committed unfair labour practices. In the course of its adjudication, the labour board was required to interpret broadcasting legislation as well as its enabling or home statute. The Supreme Court’s judgment indicates that a board will be due less deference for interpretation of an external, as opposed to its enabling, statute. In both instances, however, a board is performing statutory interpretation, for which a court will regard itself as better suited. It is only substantive expertise that distinguishes enabling from external statutes.<sup>82</sup> Indeed, methodological expertise undermines what, as I have already noted, David Dyzenhaus calls the substantive basis for deference. It is unsurprising, then, that

77 *Supra* note 18.

78 See, e.g., *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748, 144 D.L.R. (4th) 1 [*Southam*]; *Canada (A.G.) v. Mossop*, [1993] 1 S.C.R. 554, 100 D.L.R. (4th) 658 [*Mossop*].

79 But David Mullan characterizes the issue in *Mattel* as ‘intrinsically’ a context-specific customs duty question: ‘Deference from *Baker* to *Suresh* and Beyond – Interpreting the Conflicting Signals’ in David Dyzenhaus, ed., *The Unity of Public Law* (Oxford: Hart Publishing, 2004) 21 at 48 [‘Deference’].

80 Of course, experience shows that specialized tribunals can deliver sophisticated and cogent interpretations of statutes – as did the labour board in *C.U.P.E.*

81 [1995] 1 S.C.R. 157, 121 D.L.R. (4th) 385 [*CBC*].

82 Yet the Supreme Court continues to cite *CBC*: see, e.g., *Parry Sound (District) Social Services Administration Board v. Ontario Public Service Employees Union, Local 324*, [2003] 2 S.C.R. 157 at para. 21, 230 D.L.R. (4th) 257, 2003 SCC 42.

*Mattel* has sparked criticism. Perrault regards the judgment's reasoning as incoherent;<sup>83</sup> Mullan characterizes its approach as 'fraught with danger' for the enterprise of deference to administrative tribunals determining legal questions at the core of their jurisdiction.<sup>84</sup>

A recent case, *Barrie Public Utilities v. Canadian Cable Television Assn.*,<sup>85</sup> vindicates Comtois' comment about diminishing deference and realizes Mullan's fears. At issue was the CRTC's determination that the applicable legislation empowered it to order utility companies to grant access to their power poles to cable television companies. In determining the standard of review, the majority of the Supreme Court followed *Mattel* by referring to both substantive and methodological expertise. The change in *Barrie* is that no credible argument supports the reviewing court's relative substantive expertise. Recall that in *Mattel*, there was at least an argument that what constituted a sale for export fell within the Court's general knowledge of commercial law. *Barrie*, however, is a different matter. The majority of six justices settled on correctness, largely on the basis that the question did not engage the CRTC's special expertise in the regulation and supervision of Canadian broadcasting and telecommunications. In Gonthier J.'s view, the meaning of 'the supporting structure of a transmission line' is a purely legal question, within the province of the judiciary. To him, remarkably, the phrase has 'no technical meaning beyond the ken of a reviewing court.'<sup>86</sup> Yet in interpreting the phrase, Gonthier J. relies on specialized information not part of a judge's general legal culture.<sup>87</sup> It is thus difficult to accept this statement about the reviewing court's knowledge. The rhetorical weight for finding inferior expertise on the part of the tribunal falls, therefore, on the methodological basis: that the exercise was one of 'pure statutory interpretation' for which the Court was better equipped.<sup>88</sup> Such circumstances confer unwarranted credibility on the concept of methodological expertise.<sup>89</sup>

83 *Le Contrôle judiciaire*, supra note 17 at 103.

84 'Deference,' supra note 79 at 48.

85 [2003] 1 S.C.R. 476, 225 D.L.R. (4th) 206, 2003 SCC 28 [*Barrie*].

86 *Ibid.* at para. 14.

87 See, e.g., Gonthier J.'s reliance on technical definitions to distinguish a 'transmission line' from a 'distribution line,' the former carrying electricity over large distances with minimum losses, the latter carrying less than 50kV of electricity over short distances (*ibid.* at para. 25).

88 *Ibid.* at para. 16. In fact, the CRTC's initial decision demonstrates considerable skill at statutory interpretation and legal reasoning.

89 Only Bastarache J., dissenting, remained more consistent with the Court's previous jurisprudence of deference. He observes that unlike general concepts of commercial or civil law, as in previous cases, the contentious phrase has no legal meaning outside the legislation (*ibid.* at para. 85). He points out that Gonthier J. could conclude that interpretation of the phrase required no technical knowledge only by discriminating amongst all possible interpretations, some technical, some not (*ibid.* at para. 87). For

Discussing the substantive expertise in *Mattel*, Comtois concludes that the judgment will tend to restrict the notion of a tribunal's relative expertise to the scientific or technical questions assigned it (57). But *Mattel* and *Barrie* signal more than just a narrowing of the range of questions concerning which a court will accept the agency's reasoning and its decision. Since the determination of virtually any legal question can be characterized as an exercise in statutory interpretation, the emerging emphasis on methodological expertise instantiates a more general ambivalence regarding agencies' determination of legal questions. This ambivalence could already be seen several years ago in Iacobucci J.'s statement according less deference to a tribunal when a question yields a general proposition.<sup>90</sup> It is to be hoped that the Supreme Court will correct its unacknowledged and unjustified deviance from its pattern of deference towards specialized tribunals.<sup>91</sup>

Comtois' analysis of expertise criticizes the Supreme Court's inconsistencies, but only gingerly. At times she describes the Court as having 'nuanced' the analysis, when she might justifiably have said 'confused.' Concluding her discussion, she makes the understatement that while expertise is the most important factor, assessing it in practice remains complex (57). She writes further, tactfully, that the reasons why the Court applies one standard rather than another 'ne sont pas toujours très claires' (57). Citing a string of recent cases, she queries whether the zone of autonomy and the corresponding degree of deference accorded to the diverse administrative tribunals are justified or whether, rather, they reflect a lack of consistency in the application of the *Pushpanathan* factors (74). Disappointingly she states that the parameters of the work do not permit her to answer these questions. She notes that the Court enjoys a certain discretion in applying the factors, which 's'ils peuvent donner

him, 'the broad policy context of a specialized agency infuses the exercise of statutory interpretation such that application of the enabling statute is no longer a matter of "pure statutory interpretation"' (ibid. at para. 86). Compare the statement that '[i]t will be rare indeed to find a term in a statute which does not draw some colour from the purposes and policies of the statute of which it is a part': P.W. Hogg, 'Judicial Review: How Much Do We Need?' (1974) 20 McGill L.J. 157 at 163.

90 *Southam*, supra note 78. See also *Pushpanathan*, supra note 18 at para. 38.

91 Predictably, *Barrie* has already been cited to justify correctness review on the basis of a decision maker's inferior expertise at statutory interpretation: *Telecommunications Workers Union v. Canada (Canadian Radio-television and Telecommunications Commission)* (2003), 312 N.R. 128, 233 D.L.R. (4th) 298, 2003 FCA 381; *Canadian Pacific Railway Co. v. Canada (Canadian Transportation Agency)*, [2003] 4 F.C. 558, 307 N.R. 378, 2003 FCA 271 (C.A.); *Echo Bay Mines Ltd. v. Canada (Minister of Indian Affairs and Northern Development)*, 2003 FCA 270; *Dynamex Canada Inc. v. Mamona* (2003), 228 D.L.R. (4th) 463, 305 N.R. 295, 2003 FCA 248, leave to appeal refused, File No. 29932, 4 March 2004 (S.C.C.); *Alberta Energy Co. v. Goodwell Petroleum Corp. Ltd.* (2003), 233 D.L.R. (4th) 341 (Alta C.A.), 2003 ABCA 277.

une apparence de rationalité, n'évacuent pas la nécessité d'une réflexion plus globale dans laquelle s'insèrent des choix politiques ou des jugements de valeur qui souvent d'ailleurs sont occultés' (74). I would have liked deeper analysis in this vein of the Court's veiled political choices and value judgments.

In any case, Comtois concludes Part I by wondering whether the new rules of judicial review elaborated since *C.U.P.E.* are general rules or whether, instead, they drive towards a series of particular rules varying according to the domain of application, that is, whether it is a matter of labour relations, human rights, immigration and citizenship, economic and scientific matters, and so on (75). One difficulty with developing categories of specialized boards by subject matter is that provincial legislators may structure differently boards that are functionally equivalent.<sup>92</sup> Another difficulty, namely, that human rights concerns cut across such subject-matter categories, is treated below. As discussed, *Mattel* and *Barrie* hint that the club of expert tribunals owed deference is more exclusive, perhaps arbitrarily so, than once supposed. The effect is greater intervention by courts in tribunal decision making. As the next section will demonstrate, intervention also occurs within review of discretionary decision making.

#### B DISCRETIONARY DECISION MAKING

Comtois provides a thorough discussion of the adoption of discretionary decision making into the pragmatic and functional approach. Prior to the judgment in *Baker*, in 1999, the pragmatic and functional approach had served to determine the standard of review only for tribunal determinations of law and of mixed fact and law. Discretionary decisions were subject to a different approach: They were reviewable on limited, nominate grounds for abuse of discretion, such as bad faith, improper purpose, and irrelevant considerations. In *Baker*, however, L'Heureux-Dubé J. highlighted the similarities between determination of questions of law and discretionary decision making: The former comports an element of discretion, while the latter is constrained by the enabling statute and fundamental values.<sup>93</sup> It was therefore appropriate, in her view, to extend the pragmatic and functional approach to review of discretionary decisions. In that case, she selected the intermediate standard of reasonableness *simpliciter* to review the minister's decision. *Baker* generates an internal tension between its indication that any of the three standards might be appropriate when reviewing discretionary decisions and its insistence

92 This point is noted in *Keddy*, supra note 52 at para. 21. It is appropriate to treat dissimilarly a workers' compensation board shielded with a privative clause (*Pasiechnyk*, supra note 62) from one, as in *Keddy*, disciplined by a statutory appeal.

93 Supra note 15 at paras. 53, 54.



that incorporation of discretionary decision making into the pragmatic and functional approach does not alter the traditional posture of judicial restraint.<sup>94</sup> The Supreme Court responded to this tension in *Suresh*. For present purposes, *Suresh* concerned the standard of review for ministerial decisions on whether a refugee's presence constitutes a danger to the security of Canada and whether the refugee faces a substantial risk of torture upon deportation. The Court retreated on the question of the degree of intervention in the exercise of ministerial discretion, selecting patent unreasonableness. Comtois observes that the return in *Suresh* to the nominate grounds for abuse of discretion dampens the hopes of those who read in *Baker* the beginning of a requirement of justification for the exercise of discretion (87). *Suresh* appears clear that a reviewing court must not reweigh the factors relevant to the discretionary decision maker and that ministerial discretion warrants substantial deference.<sup>95</sup> Moreover, the discussion on the standard of review appears to be a general one, transcending the delicate national security context.<sup>96</sup>

It appears, however, that the more restrictive approach in *Suresh* will not deter at least a majority of the Supreme Court from quashing a discretionary decision when so inclined. In *Minister of Labour*, all nine judges agreed that the standard of review was patent unreasonableness, relying on *Suresh*. But six members of the Court held that the minister's appointments of retired judges as labour arbitrators were patently unreasonable, on the basis that the minister had excluded relevant factors from his deliberation, specifically, general acceptability in the labour relations community. The difficulty, as the dissenting judges commented, was that the factors crucial to Binnie J. were implied ones, 'not obvious and uncontroversial.'<sup>97</sup> The dissent seems to fear, justifiably, that the majority's decision will serve as an impetus for digging into the legislative history in attempts to unearth relevant implied factors that the decision maker ought to have considered. Of course, the issue is not a novel one. More than thirty years ago, Mullan remarked upon the 'wide degree of interference' in tribunal decisions facilitated by judicial assessment of what constitute relevant and irrelevant factors.<sup>98</sup> The degree of intervention in *Minister of Labour* indicates tension between the articulated stance of judicial deference and the pragmatic and functional approach in practice.

94 Ibid. at para. 56.

95 Supra note 16 at para. 29. But Mullan, 'Deference,' supra note 79, provides a nuanced discussion of the potential tensions on this point within *Baker* and *Suresh*.

96 See especially the pointed reconstruction of *Baker* in *Suresh*, *ibid.* at para. 35.

97 *Minister of Labour*, supra note 63 at para. 36, *per* Bastarache J. The factors Binnie J. identifies were certainly not 'patently relevant,' the term used in *Suresh*, *ibid.* at para. 37.

98 David Mullan, 'The Jurisdictional Fact Doctrine in the Supreme Court of Canada – A Mitigating Plea' (1972) 10 Osgoode Hall L.J. 440 at 446.

IV *Metaphors and space*

Part II of this essay examined indications of territoriality in administrative law as between the Canadian provinces. Part III considered application of the pragmatic and functional approach, which itself emerged from acknowledgement of problems relating to the doctrine of jurisdiction in judicial review and the complexity of the administrative state. Concerning legal determinations by specialized tribunals and discretionary decisions, it observed a degree of judicial interference inconsistent with the pragmatic and functional approach's aspiration to protect the autonomy of delegated decision makers. Part IV links these two components of the argument by contending that, in a number of ways, the kind of territorial, jurisdictional thinking that has ostensibly been discarded by the pragmatic and functional approach continues to constrain judges. It discusses the related orientational metaphors of jurisdiction and error that continue to haunt judicial review in Canada,<sup>99</sup> the contradictory metaphor of correctness and its spatial categories, and, last, metaphors for the pragmatic and functional approach itself.

## A MAPPING JURISDICTION AND ERROR

Like the common law writs, the notion of jurisdiction appears to rule from the grave. The problem is that *Pushpanathan* has formally relegated the notion of jurisdictional questions to disuse without fundamentally displacing jurisdiction's orientational metaphor. If the functions of administrative tribunals and of judicial review continue to be conceived in the same spatial terms, eliminating the vocabulary of jurisdiction achieves little.

The idea of jurisdiction arose from staunchly spatial ideas of the administration of justice. The territory of the ordinary courts was coextensive with the nation-state. Legislatures then carved out domains on the map and granted them to administrative tribunals. Subject to constitutional constraints, a privative clause indicated that the ordinary courts were not to intrude into that domain. The *ultra vires* doctrine derived from the idea that the tribunal's trespassing outside its domain or province contradicted Parliament's will. Intense judicial energy focused on policing that boundary and determining whether or not questions decided by the tribunal were jurisdictional, that is, whether the determi-

99 Orientational metaphors organize a whole system of concepts with respect to one another, and most of them have to do with spatial orientation: up-down, in-out, front-back. See George Lakoff & Mark Johnson, *Metaphors We Live By* (Chicago: University of Chicago Press, 1980) at c. 4.

nation was within or outside the tribunal's protected domain.<sup>100</sup> The spatial metaphor permeated widely: courts talked of a tribunal entering into an enquiry and of irrelevant considerations taking a tribunal outside.

It bears noting that both interventionist and deferential judges can adopt a spatial approach. Commentators had excoriated two judgments, *Anisminic Ltd. v. Foreign Compensation Commission*<sup>101</sup> and *Metropolitan Life Insurance Co. v. International Union of Operating Engineers, Local 796*.<sup>102</sup> These decisions represent the high water mark of judicial intervention by identifying jurisdictional questions on which the tribunal had erred and thereby lost jurisdiction, that is, stepped out of its space. This highly interventionist approach tends to find that any error has taken the agency outside its jurisdiction.<sup>103</sup> By contrast, Dickson J. in *C.U.P.E.* favoured leaving the board space to manoeuvre, but still by means of a spatial, bright-line approach, one by which jurisdiction would be determined 'at the outset of the inquiry'.<sup>104</sup> Similarly, in *National Corn Growers Assn. v. Canada (Import Tribunal)*, Wilson J. adopted an aggressively spatial approach, advocating that, beyond assuring that the board's statutory interpretation is not patently unreasonable, courts not even peer into the tribunal's space.<sup>105</sup> Whether interventionist or deferential, however, judges acknowledged that the jurisdictional question was unworkable as a means of determining the reviewing court's position *vis-à-vis* the tribunal.

Less remarked has been the fact that the spatial metaphors – the notion that a tribunal doing its job properly occupies one space, and that improper things take it physically elsewhere – have not vanished with the language of jurisdiction. Rather, reviewing courts have found substitutes for the *verboten* term 'jurisdiction.' One is talk of a board's stepping outside its 'mandate' or the 'constraints intended by the legislature'.<sup>106</sup> A second is expertise. In discussing the application of the correctness standard, Comtois observes how much the Supreme Court justifies this standard on the basis that the question lies outside the tribunal's exper-

100 Another spatially conceived idea was the application of natural justice according to the classification of a decision-making procedure as quasi-judicial or administrative, as discussed above in the Quebec setting.

101 [1969] 2 A.C. 147, [1969] 2 W.L.R. 163 (H.L.) [*Anisminic*].

102 [1970] S.C.R. 425, 11 D.L.R. (3d) 336.

103 See, e.g., P.W. Hogg, 'The Supreme Court of Canada and Administrative Law, 1949–1971' (1973) 11 Osgoode Hall L.J. 187 at 204–5: concepts of jurisdiction and law sufficiently vague ('some would say meaningless') to permit review of any erroneous finding of fact or law.

104 *C.U.P.E.*, supra note 50 at 233.

105 [1990] 2 S.C.R. 1324 at 1347, (*sub nom. American Farm Bureau Federation v. Canadian Import Tribunal*) 74 D.L.R. (4th) 449.

106 Both flow from the pen of the chief justice in *Chamberlain*, supra note 54 at para. 15.

tise. Indeed, she queries whether the dichotomy within expertise/outside expertise has simply replaced the old jurisdictional/non-jurisdictional binary (70). Her observation that in French the same word (*compétence*) can be used for both jurisdiction and expertise is revealing (15 n. 46). It intimates that the links between expertise and jurisdiction run deep and predate the administrative science theories of specialization of governmental tasks. As discussed above, *Barrie* suggests that by reliance on what I called methodological expertise, even technical and contextual questions with significant policy implications can be characterized as outside the expertise of a specialized board.<sup>107</sup> At least, however, there are factors that can be discussed in characterizing a board's expertise; it is less of a magic show than the pre-*Bibeault* characterization of a question as jurisdictional or not. Moreover, since expertise is only one of four factors, perhaps it is possible for courts to think in subtler terms of questions drawing more or less on a board's expertise, rather than situating them spatially either inside or outside it.

The role of 'error' is intimately related to the spatial conception of jurisdiction. The idea persists that a particular type of error peremptorily 'takes' a decision 'outside' jurisdiction. The notion seems to be that a particular species of error is an immediate ticket from acceptable to unacceptable terrain. This concept spawned debates over whether, in fact, a tribunal is entitled to make errors within its jurisdiction but not errors that take it outside its jurisdiction.<sup>108</sup> The very idea that an 'error' is something that physically takes a board from appropriate to inappropriate turf is passing from Canadian administrative law, but only reluctantly. LeBel J.'s concurrence in *Chamberlain*, where he suggests that review of action by elected local bodies should examine only the legality or illegality of the action, is rooted in the physical conception. He fails to appreciate the lessons drawn from the difficulty of determining whether something is legal (within jurisdiction) or illegal (outside jurisdiction). But in *Chamberlain*, as Comtois points out, even the chief justice, writing for the majority, cleaves more closely to this idea than one might have predicted. McLachlin C.J. writes, 'If the reviewing court determines that the Board's process of decision making *took it outside the constraints intended by the legislature*, then it must find the resulting decision unreason-

107 Perhaps statutory interpretation is the new jurisdiction, in the worst sense: just as virtually any error could be branded jurisdictional, virtually any question (the agency's answer to which displeases the court) can be characterized as one of pure statutory interpretation.

108 Luc Tremblay's discussion of 'le droit à erreur' and his query of the value of an expert 'qui se trompe à l'intérieur de son champ de compétence' exemplifies the temptation to quash a decision once an 'error' has been identified: Luc B. Tremblay, 'La Norme de retenue judiciaire et les "erreurs de droit" en droit administratif : une erreur de droit ?' (1996) 56 Rev. du B. 141 at 226 ['La Norme'].

able. Where *an error of this type* occurs, the fact that the effects of a decision are relatively innocuous *cannot save it* (122 [Comtois' emphasis]).<sup>109</sup> It is the chief justice's reliance upon the idea of errors as physically catapulting a decision from safe to unsafe ground, instantly vitiating it, that permits Comtois to delineate a 'rapprochement' of the majority's and LeBel J.'s approaches and to conclude that in both sets of reasons, the test is in substance jurisdictional (121–3). Whether one drops the language of jurisdiction or not, one has not moved far if, as per *Anisminic*, identification of an error has immediate, spatial, and devastating consequences for the administrative decision. This discussion of error in *Chamberlain* indicates that the chief justice's recent statement that '[t]he nominate grounds, language of jurisdiction, and ossified interpretations of statutory formulae, while still useful as familiar landmarks, no longer dictate the journey'<sup>110</sup> is an aspiration more than a description of present understandings.

Nevertheless, a gradual shift away from the very idea of error is occurring. Comtois herself does not embrace this movement; indeed, her book's structure reinforces the emphasis on errors. It is perhaps a result of the tension mentioned earlier between the book's dual missions as a historical account and a contemporary manual, but Comtois' headings entrench the idea that judicial review concerns legal and factual errors.<sup>111</sup> Moreover, she reads *Dr. Q* and *Law Society of New Brunswick v. Ryan*,<sup>112</sup> in which a professional discipline committee's remedy was at issue, as confirming that the pragmatic and functional approach applies to errors of fact by administrative tribunals (126–30).

In contrast, I read *Ryan* as departing from the idea of errors as having any decisive effects as such at all. The question in *Ryan* is whether, viewed globally, the board has made a justifiable decision. Iacobucci J.'s concern lies with the 'basic adequacy of a reasoned decision' and 'whether the reasons, taken as a whole, are tenable as support for the decision.'<sup>113</sup> If that is the question, parties seeking review are diverted from a hunt for the error that will require the decision to be quashed.<sup>114</sup> Instead they are

109 *Chamberlain*, supra note 54 at para. 15.

110 *Dr. Q*, supra note 64 at para. 24.

111 Comtois stands in good company in organizing her work around moribund categories. Mullan's 2001 *Administrative Law*, supra note 36, includes chapters on 'Jurisdiction' and 'Error of Law and Error of Fact Review.' His 2003 casebook better reflects recent developments, with chapters on 'The Standard of Review' and 'Applying the Standard of Review': David J. Mullan, *Administrative Law: Cases, Text, and Materials*, 5th ed. (Toronto: Emond Montgomery, 2003) at c. 9, 10.

112 [2003] 1 S.C.R. 247, 223 D.L.R. (4th) 577, 2003 SCC 20 [*Ryan*].

113 *Ibid.* at para. 56.

114 Iacobucci J. writes that 'a reviewing court should not seize on one or more mistakes or elements of the decision which do not affect the decision as a whole' (*ibid.*).

forced to consider the decision's overall rationality. The point becomes not whether the board stayed within or went outside any designated space (jurisdiction, expertise, mandate, constraints), but whether or not the decision is one the court should appropriately let stand.<sup>115</sup> Deference becomes an exercise of accepting justification, rather than of tolerating errors.<sup>116</sup> The advantage of this question, as opposed to more spatial ones, is that it implicitly accepts that a board can be unsuccessful at its assigned task without necessarily encroaching on anyone else's turf and without its basic mandate being called into question.<sup>117</sup>

Admittedly, the Court has not adopted this approach entirely. Comtois notes astutely, in a footnote, that the focus on errors in the majority in *Chamberlain* differs significantly from Iacobucci J.'s contemplation in *Southam* that a board may err without being unreasonable (122 n. 219). The Supreme Court's retention in *Chamberlain* of the language of error in the context of reasonableness *simpliciter* review renders more difficult a search for satisfactory justification. But closer examination of *Chamberlain*'s context diminishes the differences between it and *Ryan*. *Ryan* speaks to the basic adequacy of a reasoned decision, but in *Chamberlain* the board's resolution rejecting the books did not provide reasons.<sup>118</sup> It is arguable, then, that the *Chamberlain* majority's reliance on error speaks less to a general retention of the traditional, spatial concepts than to a context-specific effort to quash a decision it found intuitively unpalatable, one attributable to implicit prejudice.

Recent decisions relating to the power of administrative tribunals to apply the Constitution similarly erode the view of the administrative tribunal's power as a patch of juridical terrain.<sup>119</sup> The question in this context is not whether or not a particular board's terrain 'includes' the power to consider the Canadian Charter or other constitutional matters. Rather, in those decisions the Supreme Court admits that s. 52 of the Constitution Act, 1982, which provides that any law inconsistent with the Constitution has no force, means that any organ that applies the law

115 Of course, where a statute codifies review on the basis of error, as does the *Federal Court Act*, R.S.C. 1985, c. F-7, s. 18.1(4)(d), a legitimate focus on error subsists.

116 The view of judicial restraint as validating errors is the gravamen of Tremblay's colossal essay, *supra* note 108.

117 As Roderick Macdonald argues, a full statutory appeal, as compared with review for jurisdictional error, does not fundamentally question an agency's mandate. See Roderick A. Macdonald, 'On the Administration of Statutes' (1987) 12 *Queen's L.J.* 488 at 503 n. 22.

118 See the awkward attempt to get at the reasons behind the resolution in *Chamberlain*, *supra* note 54 at paras. 50–5.

119 *Nova Scotia (Workers' Compensation Board) v. Martin; Nova Scotia (Workers' Compensation Board) v. Laseur*, [2003] 2 S.C.R. 504, 231 D.L.R. (4th) 385, 2003 SCC 54 [*Martin*]; *Paul v. British Columbia (Forest Appeals Commission)*, [2003] 2 S.C.R. 585, 231 D.L.R. (4th) 449, 2003 SCC 55 [*Paul*].

should be applying only valid law. The point that administrative tribunals and courts with their differing capacities simultaneously occupy the same space, rather than adjacent districts, is made by Bastarache J., in *Paul*, when he states that ‘the system of justice encompasses the ordinary courts, federal courts, statutory provincial courts and administrative tribunals.’<sup>120</sup>

In a fascinating recent essay, Murray Hunt argues against the spatial metaphor he sees underlying British public law. The spatial difficulty in British law, according to Hunt, is the idea that within certain areas of judgment the judiciary will defer, on democratic grounds, to the decision of the elected body or decision maker. As a result of the absence of any public law culture of calibrated deference, courts tend to abstain entirely from interfering in these areas.<sup>121</sup> Hunt contends that it is necessary to jettison the spatial approach by which one branch of government – legislative, executive, or judiciary – wields exclusive authority in particular areas, especially the idea of sovereignty. Rather, he suggests the need to recognize shared responsibility in advancing society’s fundamental values. In part this imperative arises because of what he calls the multi-textured nature of the issues that fall to be adjudicated. He writes that rights and values transcend context, meaning that ‘cases cannot be neatly classified into categories according to the kind of subject matter they raise, and then a particular standard of review applied to them.’<sup>122</sup> For example, the policy fields, such as national security or urban planning, that the British spatial approach would regard as exclusively Parliament’s may engage human rights interests of the sort classically viewed as judicial. In Canada, under the emergent pragmatic and functional approach, human rights issues tended to trigger correctness review rather crudely. In this regard, a dictum of McLachlin C.J. in *Chamberlain* shows promise of greater flexibility: ‘Different types of human rights issues do, to be sure, play out differently. So the extent to which deference is lessened by the presence of a human rights issue will vary from case to case.’<sup>123</sup>

As an alternative to the spatial conundrum, Hunt proposes ‘due deference.’ He means deference by a court to a decision maker when that decision maker earns deference by justifying its decision. He argues that in deciding how much weight it should accord to the primary decision maker’s justificatory arguments, a court should consider a variety

120 *Paul*, *ibid.* at para. 22. The territorial view of administrative tribunals in relation to the Canadian Charter is articulated most forcefully in Lamer C.J.’s dissent in *Cooper v. Canada (Human Rights Commission)*, [1996] 3 S.C.R. 854, 140 D.L.R. (4th) 193 [*Cooper*].

121 ‘Sovereignty’s Blight,’ *supra* note 74 at 345.

122 *Ibid.* at 347.

123 *Supra* note 54 at para. 11.

of different factors, including the degree of democratic accountability of the primary decision maker and the extent to which the affected interests have already had opportunities for genuine participation in a democratic process.<sup>124</sup> The factors he proposes are not the same as the contextual factors of the Canadian approach, but they are functionally similar. The Canadian experience may hold a cautionary lesson for Hunt, namely, that even explicit adoption of multiple factors does not necessarily shake the grip of the spatial metaphor. Rather, a single factor – in Canada, it appears to be expertise – can operate in binary fashion, overlaying the original spatial divide that it seeks to replace. A strong spatial pull is similarly discernible in connection with the correctness standard.

#### B CORRECTNESS

‘Correctness’ as the name for the most searching standard of review is a dead metaphor, one so worn that speakers forget it is not literal. The other standards – patent unreasonableness and reasonableness *simpliciter* – are self-evidently terms of art (particularly with the latter’s Latin tag). But ‘correctness’ has an everyday use different from the legal meaning. It is not the case that courts, as compared with administrative tribunals, always make normatively the ‘right’ determinations when substituting their answers for those of tribunals. I cannot consider correctness in detail here but will sketch two possible ways of understanding correctness review. The first is a formal or institutional approach; the second is substantive. This section will then argue for dissolving the spatial categories of questions that automatically attract correctness.

The formal approach provides an answer to the question of who decides. It presumes that certain questions are appropriately resolved by the courts. Correctness review is the means of assuring that it is the courts’ interpretations of these questions that prevail. The paradigmatic example for adherents of this view may be constitutional determinations. Since it is the constitutional role of the superior courts to interpret and enforce the Constitution, runs the argument, they must not defer to interpretations by tribunals. The orthodox view of correctness is that the court ensures that the tribunal’s decision reflects the conclusion the court would have reached had it decided at first instance. Adherents of the formal view may be sceptical as to the possibility of anyone sniffing out an inherently ‘right’ answer. Rather, they may hold that, institutionally, it will be the courts – and, if necessary, the Supreme Court of Canada – that select from the constrained range of legitimate answers to resolve the dispute and provide the rule by which individuals and governments will structure their conduct. In the formal sense, then, ‘correctness’ is a characterization applicable, *ex post*, to a determination appropriately

124 Hunt, ‘Sovereignty’s Blight,’ *supra* note 74 at 351.



made finally by a court as a result of its institutional position. It is in speaking the formal or institutional discourse of correctness that one can say that, since the abolition of appeals to the Privy Council, the Supreme Court of Canada has never erred.<sup>125</sup> The formal approach holds that the majority's interpretation of 'family status' in *Mossop*<sup>126</sup> was by definition correct. In *Mossop*, the majority of the Supreme Court applied the correctness standard and quashed a determination by a human rights tribunal that failure to allow an employee time to attend the funeral of his gay partner's father discriminated on the basis of family status. Binnie J.'s recent discussion of correctness review as approving the 'proper' answer bespeaks the institutional conception.<sup>127</sup> The formal conception suggests, to paraphrase Jeremy Waldron, that there is nothing left to argue about once some human authority claims to have had the last word.<sup>128</sup>

By contrast, the substantive conception of correctness concerns itself with finding the right answer, or, if not that, then at least the most persuasive justification and conclusion. A complex literature addresses questions of objectivity and the possibility of objectively defensible judgment. There is no time here to consider, say, Ronald Dworkin's right-answer thesis or James Boyd White's elaboration of criteria for evaluating judgments.<sup>129</sup> This discussion will merely note two indications of difficulties with the formal approach, according to which an interpretation derives its value from its pedigree.

The first indicator of trouble with the formal conception is the casual observation that the majority decision in *Mossop* failed to conclude the conversation. In fact, most people, even most lawyers, would likely find the majority's interpretation of the human rights legislation, specifically its construal of 'family status,' erroneous, and the human rights tribunal's to be 'correct' or the most compelling.<sup>130</sup> Moreover, they would base this assessment not on purely subjective preferences but, rather, on the objects of the statute. This observation suggests that, at least on an intuitive level, the substantive conception responds to people's experience of reading better and worse justifications for interpretations.

The second difficulty arises from the Supreme Court's jurisprudence concerning the jurisdiction of tribunals to determine constitutional questions. I noted above that the Court permits tribunals to consider

125 Morissette, 'Le Contrôle,' supra note 51 at 630.

126 Supra note 78.

127 *Minister of Labour*, supra note 63 at para. 164.

128 See Jeremy Waldron, 'Is the Rule of Law an Essentially Contested Concept (in Florida)?' (2002) 21 L.& Phil. 137 at 156 n. 54.

129 See White, *Justice as Translation*, supra note 49.

130 See David Dyzenhaus, 'Constituting the Rule of Law: Fundamental Values in Administrative Law' (2002) 27 Queen's L.J. 445 at 467 ['Constituting the Rule of Law'].

constitutional questions provided the agency is empowered to determine legal questions. Every time the Court concedes this power, however, it follows it with anxious caveats that a tribunal's constitutional determinations deserve no deference; rather, they will be subjected to the glaring light of correctness review.<sup>131</sup> Yet courts cannot logically be serious about reviewing tribunal constitutional determinations with zero deference. Consider Gonthier J.'s explanation in *Martin* of the value of tribunals' constitutional determinations: '*Charter* disputes ... require a thorough understanding of the objectives of the legislative scheme being challenged, as well as of the practical constraints it faces and the consequences of proposed constitutional remedies.'<sup>132</sup> This need is heightened when it becomes necessary to determine whether a violation of a Charter right is justified under s. 1: 'In this respect,' Gonthier J. writes, 'the factual findings and record compiled by an administrative tribunal, *as well as its informed and expert view of the various issues raised by a constitutional challenge, will often be invaluable to a reviewing court.*'<sup>133</sup> This acknowledgement of what a reviewing court gains from a tribunal's constitutional determinations collides with correctness review as conventionally conceived. As Dyzenhaus has argued, tribunals' legal interpretations cannot be valuable if the correctness standard requires the tribunal's interpretation to coincide with the interpretation the court would have arrived at on its own.<sup>134</sup> Rather, the passage just quoted indicates that a reviewing court should be affected, educated, and altered by the tribunal's reasons and conclusion. The court's world view will be expanded and partly reconstituted by its encounter with the tribunal's. The tribunal's view of the issues raised can be valuable only if, after reading the tribunal's reasons, the reviewing court will not necessarily approach the issues exactly as it did before.

The result is that a tribunal's interpretation can touch or affect the content of Charter rights. This is an implication of McLachlin J.'s comment, in her dissent in *Cooper*, that '[t]he *Charter* is not some holy grail which only judicial initiates of the superior courts may touch.'<sup>135</sup> In other words, as an interpretive matter, it is not only judges who may interpret the Charter, and tribunals can legitimately claim at least a measure of deference as they do so. Correctness review, in the sense of the court assuring itself of coincidental perfect identity between what it would have done on its own and what the board actually did, becomes inappropriate

131 See, e.g., *Martin*, supra note 119 at para. 31.

132 Ibid. at para. 30.

133 Ibid. [emphasis added].

134 Dyzenhaus, 'Constituting the Rule of Law,' supra note 130 at 469.

135 Supra note 120 at para. 70, adopted by Gonthier J. for the Court in *Martin*, supra note 119 at para. 29.

as an ideal. Space opens up for deference to the tribunal even in reviewing the classes of questions typically held subject to correctness.<sup>136</sup> Once this possibility of deference is acknowledged, it becomes possible to seek out the most convincing justification or approach to a problem. This becomes the substantive enquiry, not the formal one.

Several categories of question have coalesced that attract correctness review. One is the ruling on a question of law with precedential value.<sup>137</sup> Another is the human rights question. A third is the constitutional question. The Supreme Court persists in operating as if 'general questions of law' and 'constitutional questions' are monolithic categories concerning which courts are inherently more expert than tribunals. The result is a spatial on/off categorization, as formalist as the old jurisdictional method.<sup>138</sup> I have noted already the difficulty with the idea that human rights questions arise only in certain spaces, or that all require identical treatment.<sup>139</sup> I remarked too that, in *Chamberlain*, the chief justice acknowledges the varying character of human rights issues. Accordingly, the focus here is the category of constitutional questions, which, in current practice, merit the most automatic correctness review. It is unclear whether it is a formal justification (the courts' institutional role in upholding the Constitution) or a substantive one (the courts' superior ability to provide the most convincing justification) that determines the matter.

I contend that it is necessary to fragment this category and subject each constitutional question, case by case, to the pragmatic and functional approach, with attention to the decision maker's expertise. It is appropriate to acknowledge that the general institutional expertise of a superior court does not capture all constitutional questions equally. In other words, there is no overwhelming basis for assuming automatically that a superior court enjoys the same relative expertise *vis-à-vis* every kind of administrative tribunal concerning the gamut of constitutional questions, from division of powers, to equality rights, to Aboriginal rights under s. 35 of the Constitution Act, 1982. Indeed, in *Paul*, where the

136 See Dyzenhaus, 'Constituting the Rule of Law,' supra note 130 at 469 n. 46. See also, although in a jurisdictional as opposed to constitutional context, Lambert J.A.'s argument for deference to tribunals within the correctness standard in *Northwood*, supra note 52 at paras. 36, 38. See also Tremblay's suggestion that where there is a right of appeal, the standard of review should remain correctness but that the court's determination of the correct meaning of the statute depends, in part, on the weight to be given the interpretation made by the tribunal ('La Norme,' supra note 108 at 234).

137 See Mullan's criticism of automatic selection of correctness for such rulings in 'Deference,' supra note 79 at 49.

138 Perrault frames this point incisively in *Le Contrôle judiciaire*, supra note 17 at 97.

139 On the need for flexibility in approaching questions of fundamental rights to avoid excessive intervention, see *ibid.*

Supreme Court held that a forestry appeals tribunal has jurisdiction to hear a defence based on a s. 35 Aboriginal right, the composition of the tribunal indicates a richer knowledge base for questions of Aboriginal title than one would expect of a lone superior court judge. The rigid, categorical approach to constitutional questions contrasts sharply and needlessly with the rest of the pragmatic and functional approach, which is in other respects realistically cognizant of the institutional realities of the administrative state.

#### C THE PRAGMATIC AND FUNCTIONAL TOOLBOX

The final spatial metaphor concerns the pragmatic and functional approach itself. The jurisprudential development of the approach has given rise to a number of concerns, three of which are noted here. Each of these concerns is attributable to the sense that recourse to the pragmatic and functional approach to a decision necessarily means that all three standards – correctness, reasonableness *simpliciter*, and patent unreasonableness – may apply. The first concern relates to application of the approach to the decisions of elected bodies, such as municipal councils and school boards. In his concurrence in *Chamberlain*, LeBel J. frets that the pragmatic and functional approach will tempt courts to replace the decisions of local elected bodies with their own view of what is reasonable, or to become unduly involved in the management of towns, cities, and schools.<sup>140</sup> The second is the fear in *Keddy*, mentioned above, that the pragmatic and functional approach will lead to a more deferential reasonableness standard in contexts where stringent judicial review compensates appropriately for a political appointment process. The third concerns discretion, and what it means to consider discretionary decisions as reviewable in principle on a correctness basis.<sup>141</sup> Without delving into these issues, I wish merely to observe that the sense that all three standards must be present in each case may be linked to the spatial metaphor of the pragmatic and functional approach as occupying space ‘into which’ various classes of administrative decisions are ‘brought.’<sup>142</sup>

140 *Supra* note 54 at para. 205.

141 Mullan discusses possible applications of correctness to discretionary decisions in *Administrative Law*, *supra* note 36 at 112. See also Audrey Macklin, ‘The State of Law’s Borders and the Law of States’ Borders’ in David Dyzenhaus, ed., *The Unity of Public Law* (Oxford: Hart Publishing, 2004) 173 at 192. Macklin highlights tensions between the stance of deference towards discretionary decision makers and the rule in *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038, 59 D.L.R. (4th) 416, that the exercise of discretion must conform with the Charter.

142 For examples of the spatial conception of the pragmatic and functional approach, see *Baker*, *supra* note 15 at para. 55 (standard of review of discretionary decisions ‘best approached within this framework’); Mullan, *Administrative Law*, *ibid.* at 109 (‘incorporating review for abuse of discretion within the pragmatic and functional approach’).

Some of the discomfort with folding new categories of decisions ‘into’ the pragmatic and functional approach is the idea that, in Pragmatic and Functional Approach Land, the rules are constant.

A modest way of accepting greater flexibility and variance in the pragmatic and functional approach would be to reconfigure it metaphorically as a set of tools for examining various decision makers in relation to the questions before them. It would not be a matter of bringing a decision into the approach. Rather, the reviewing judge would bring the approach – whichever tools proved useful in the context – to the decision. It might then be easier to recall that to use this approach is not, in itself, to alter the deference accorded to ministerial discretion or to municipalities. For example, LeBel J. is correct in *Chamberlain* that the absence of a privative clause says nothing meaningful about the appropriate stance for the reviewing court; one would not expect to find a privative clause in an elected body’s enabling statute.<sup>143</sup> Once the pragmatic and functional approach is understood as a set of tools, rather than as a terrain to which different types of decisions are transported, it will perhaps be easier to adapt the factors more flexibly to the particular circumstances. The expansion of the pragmatic and functional approach can thus provide a general conceptual unity without imposing mechanical uniformity.

#### V Conclusion

Parts III and IV of this essay make the case for an abiding territoriality in the substance of administrative law, despite the pragmatic and functional approach. Drawing on Comtois’ careful research and descriptive account, they demonstrate the Supreme Court’s tendency to intervene in tribunal decisions by explicit and implicit reference to spatial conceptions of jurisdiction. As noted, however, some promising signs are appearing, such as a flexible approach to human rights questions and the reformulation of judicial review as a focus on the overall rationality of a tribunal’s decision, as opposed to a hunt for errors. Nevertheless, legitimate doubts arise about the extent to which the pragmatic and functional approach protects tribunal autonomy and, indeed, about the consistency of the Supreme Court’s application of the contextual factors. Comtois’ book provides the raw material to formulate these doubts but does not pursue them to their fullest extent. In some measure, this may be a formal constraint of the ‘*précis*’ in French-language legal scholarship.

For me, however, Comtois’ excellent book remains most striking as a reminder of the object of this essay’s Part II: the territoriality of Quebec administrative law. The distinctiveness of that province’s administrative

143 *Chamberlain*, supra note 54 at para. 193.

law – institutional, political, cultural, linguistic – calls for sustained further study. In particular, it would be significant to trace the application of the Supreme Court’s jurisprudence in the distinctive Quebec institutional setting, a process which might reveal that jurisprudence to be the product of a more or less unified vision.<sup>144</sup> Although Comtois has read the secondary literature in the other official language, and in this regard stands above most of her English-language peers in terms of openness of vision and understanding of the enterprise of Canadian law, she rarely cites cases not decided in federal or Quebec courts. It is ironic, particularly as anglophone administrative law scholars reflect on the unity of public law as embracing fundamental values expressed in administrative, constitutional, and international law, that these linguistic and doctrinal barriers remain within the field of Canadian administrative law.<sup>145</sup> Yet, as Audrey Macklin notes in her fascinating discussion of law’s borders and states’ borders, ‘border crossings produce rich new possibilities, hybridities and permutations unforeseen.’<sup>146</sup> Since the political and cultural boundaries in Canadian administrative law – lines in both law’s empire and law’s cosmos – appear permanent, the precondition to benefiting from these possibilities for cross-fertilization is surely greater recognition of the lines that do, in law and in fact, persist.

144 LeBel J.’s solo concurrence in *Chamberlain* and his concurrence joined by Deschamps J. in *Toronto (City of) v. C.U.P.E., Local 79*, [2003] 3 S.C.R. 77, 232 D.L.R. (4th) 385, 2003 SCC 63, hint at deeper divisions within the Supreme Court on the pragmatic and functional approach than one would have expected mere months after the unanimous judgments in *Dr. Q* and *Ryan*.

145 See David Dyzenhaus, ‘*Baker*: The Unity of Public Law?’ in David Dyzenhaus, ed., *The Unity of Public Law* (Oxford: Hart Publishing, 2004) 1 at 1.

146 *Supra* note 141 at 199.