Constituting the Rule of Law: Fundamental Values in Administrative Law

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Recent administrative law decisions from the Supreme Court of Canada have renewed the idea that there are unwritten principles embedded in the Canadian constitutional landscape. The author argues that the reasoning in these judgments presupposes a particular vision of constitutionalism that is incompatible with the Court's previous jurisprudence. The Court traditionally supported a formal vision of the separation of powers which categorically reserved the interpretation of law to the judiciary, but it has recently taken a more democratic view of the separation of powers which recognizes the role of administrative tribunals in determining fundamental legal values.

The author discusses recent decisions of the Supreme Court of Canada which exemplify the formal and democratic visions of constitutionalism. In Cooper v. Canada (Human Rights Commission), the Court had to decide whether human rights tribunals could grant Charter remedies as a matter of constitutional principle. The majority, taking a formalistic view, concluded that the judiciary has exclusive constitutional authority to declare legislation invalid. The minority favoured the more democratic view that the tribunal's power to decide questions of law necessarily includes the determination of constitutional issues unless the legislature has explicitly removed that power. This democratic vision of constitutionalism was elaborated in the majority opinion in Baker v. Canada (Minister of Citizenship and Immigration), where the Court replaced the traditional standard of judicial review with a more deferential approach to a tribunal's reasons for decision.

The author proposes that the basis for the exercise of any authority should be the protection of fundamental values, rather than formalistic constitutional rules on institutional structure. In this sense, determining the content of our constitutional law calls for a reciprocal relationship between the legislature and the citizen. Indeed, the democratic vision of constitutional interpretative authority promotes not only the viability of the rule of law in our society, but the future legitimacy of the Canadian administrative state.

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Although judicial review is necessary to preserve important constitutional values, in a democracy like Canada it is inherently controversial, because it confers on unelected officials the power to question decisions which are arrived at through the democratic process. For this reason, in my view, as a matter of constitutional principle that power must be reserved to the courts and should not be given over to bodies that are mere creatures of the legislature, whose members are usually vulnerable to removal with every change of government, and whose decisions in some circumstances are made within the parameters of guidelines established by the executive branch of government.

I fear that in seeking to give the fullest possible effect to the Charter's promise of rights-protection, the previous judgments of this Court may have misunderstood and distorted the web of institutional relationships between the legislature, the executive and the judiciary which continue to form the backbone of our constitutional system, even in the post-Charter era. This distortion has been achieved by giving administrative tribunals access to s. 52. But in my opinion, s. 52 can only be used by the courts of this country, because the task of declaring invalid legislation enacted by a democratically elected legislature is within the exclusive domain of the judiciary.

Lamer C.J., concurring in the result reached by the majority judgment in Cooper v. Canada (Human Rights Commission),¹ his emphasis.

¹ Professor of Law and Philosophy, University of Toronto. I thank Geneviève Cartier, Sujit Choudhry, Evan Fox-Decent, Audrey Macklin, David Mullan, Kent Roach, Lorne Sossin, Mark Walters and Katrina Wyman for their comments on a draft of this paper. Boris Nevelev provided initial research assistance as well as excellent comments. Mary Liston provided final research assistance along with a remarkable set of comments designed to force my argument to the surface. While she takes no responsibility for my failings in this regard, things are a lot better for her help. Two anonymous referees provided challenging critiques and in respect...
In my respectful view, the majority approach depreciates the language of s. 52 of the Constitution Act, 1982, makes it more difficult for the Human Rights Commission to fulfill its mandate, and places burdens on the victims of discrimination in their fight for equality that Parliament cannot have intended. If this is the clear effect of the Act and the law, then these results, however illogical, unjust and inconvenient they may be, must be accepted. But, unlike the majority, I do not find this to be the clear effect of the law. In my view, every tribunal charged with the duty of deciding issues of law has the concomitant power to do so. The fact that the question of law concerns the effect of the Charter does not change the matter. The Charter is not some holy grail which only judicial initiates of the superior courts may touch. The Charter belongs to the people. All law and law-makers that touch the people must conform to it. Tribunals and commissions charged with deciding legal issues are no exception. Many more citizens have their rights determined by these tribunals than by the courts. If the Charter is to be meaningful to ordinary people, then it must find its expression in the decisions of these tribunals. If Parliament makes it clear that a particular tribunal can decide facts and facts alone, so be it. But if Parliament confers on the tribunal the power to decide questions of law, that power must, in the absence of counter-indications, be taken to extend to the Charter, and to the question of whether the Charter renders portions of its enabling statute unconstitutional.

McLachlin J., dissenting, in Cooper v. Canada (Human Rights Commission).¹

Introduction

In 1999, the Supreme Court gave its most important decision in administrative law in twenty years – Baker v. Canada.² Madame Justice L’Heureux-Dubé, writing for the majority of the Court, found a general duty in the common law on administrative officials to give reasons for their decisions, imposed the grid of standards developed for review of agencies’ interpretations of

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their statutes on review of officials’ decisions made in the course of exercising a discretion, and held (with two judges dissenting) that unincorporated human rights conventions can provide an important source of evidence in evaluating whether an exercise of discretion has met the appropriate standard.

Baker was not decided on constitutional grounds, nor was there any explicit discussion of such issues in the majority’s judgment. Nevertheless, the administrative law findings just listed presuppose a very particular vision of constitutionalism, one that might be in tension with other Supreme Court jurisprudence. In this article, I will explore the constitutional implications of Baker, in particular its implications for the Court’s renewed endorsement of the idea that there are unwritten constitutional principles, in effect a common law Constitution.

The idea of a common law Constitution is alluded to in the majority’s judgment in Baker. When L’Heureux-Dubé J. imposed the grid of substantive review standards – ranging from patent unreasonableness through reasonableness to correctness – on discretion, she cited as her authority one of the Canadian sources for the idea that there is an implicit constitutional bill of rights in Canada’s common law – Rand J.’s judgment in Roncarelli v. Duplessis. My thesis is that the imposition of the grid of substantive review standards, as well as the other important findings, presuppose the idea of the common law Constitution hinted at by L’Heureux-Dubé J.’s citation of Roncarelli.

At first sight, this thesis might not seem to amount to much, given that the Supreme Court had already revived and approved the idea of a common law Constitution. However, in the Provincial Judges Reference, the idea of a common law Constitution is invoked in support of a vision of “formal”

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constitutionalism, one at odds with the “democratic” vision elaborated by L’Heureux-Dubé J.’s judgment in Baker.

The formal vision underpins the dissent in Baker, despite the fact that Cory and Iacobucci JJ. objected only to the finding about the role of human rights conventions. Their objection was, it should be noted, put in constitutional terms, as Iacobucci J. warned that the “indirect influence” the majority accorded to an unincorporated (though ratified) convention threatened to affect the “balance maintained by our Parliamentary tradition, or inadvertently grant the executive the power to bind citizens without the necessity of involving the legislative branch.”

Their objection, underpinned as it is by the formal vision, should extend to the whole of the majority’s judgment. It should also extend to many of the progressive developments in administrative law since 1979, the year in which the Supreme Court, in two important antecedents to Baker, signaled to the judiciary that it was high time to recognize the legitimacy of the administrative state. The formal vision is at odds with those developments, capable at most of unstable compromises with the administrative state. The Supreme Court is torn between the democratic and the formal visions of constitutionalism, and is thus unsure of the basis of judicial review.

I must note at the outset that my choice of labels for these visions is controversial. Proponents of formalism argue that their vision is democratic. The rigid doctrine of the separation of

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6. Baker, ibid. at para. 80. This division in the Court seems to have surfaced again in 114957 Canada Ltée (Spraytech, Société d’arrosage) v. Hudson (Town) (2001), 200 D.L.R. (4th) 419, where L’Heureux-Dubé J. found for the majority that the “precautionary principle” of international law that environmental measures should anticipate damage to the environment, assisted her conclusion that a by-law dealing with pesticides was a valid exercise of authority. LeBel J.’s minority judgment, concurred in by Iacobucci and Major JJ., specifically excluded, though without giving reasons, reliance on international instruments for reaching the same conclusion.

powers which they espouse is designed to ensure that it is only legislators with a democratic mandate who make law, since the doctrine confines judges to interpretation of the law and the executive to its implementation. Constitutionalism for formalists is identical with maintaining the rigid separation of powers. Thus, while the most fervent proponents of formalism recognize that only a degree of rigidity is attainable in practice, the rigid doctrine remains the benchmark for which judges should strive. We will see that this benchmark leads either to incoherence and instability or to paradox.

Formalism is formal in that it requires judges to operate with categories and distinctions that determine results without the judges having to deploy the substantive arguments that underpin the categories and distinctions.\(^8\) Since those categories and distinctions must take on a life of their own in order to operate in this detached way, they are capable of determining results that contradict the very arguments for these categories and distinctions. In this situation, formalism becomes incoherent. In addition, formalism also can become unstable, which leads to a kind of normative free-fall. This happens because formalism requires judicial obedience to legislative command and the command in question might require the rejection, at least within a limited area, of formalism. Finally, formalism can also lead to paradox when judges take a stand against the legislature on the substantive values that they think underpin formalism. So there is reason to withhold the label "democratic" from the formalist vision - it can sustain neither democracy nor itself on its own terms.

More important than formalism's failings are the positive reasons for fixing the label "democratic" to the other vision

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8. In administrative law, the distinction between quasi-judicial and administrative decisions is a prime example of formalism, as is the distinction that replaced it between administrative and legislative decisions. For an excellent discussion of formalism and the separation of powers in Canadian administrative law, see H. Wade MacLauchlan, "Judicial Review of Administrative Interpretations of Law: How Much Formalism Can We Reasonably Bear?" (1986) 36 U.T.L.J. 343.
pronounced in *Cooper*. The terms of its understanding of democracy are more attractive and in tune with the times than formalism’s because it builds into the idea of democracy a commitment both to human rights and to the legitimacy of the administrative state. These terms are not only built into the idea of democracy but into an understanding of the rule of law, so that the terms are explicitly part of the process of determining the content of the law. While this last point might seem to raise concerns about judicial activism, we will also see that the democratic vision has a far less exalted view of the role of judges than its formalist rival. Indeed, part of what makes that vision democratic is that it does not attempt to reserve an interpretative monopoly over the law to judges. Legislatures and administrative tribunals have a role in the determination of the values considered fundamental to the Canadian social, political and legal order, as do the parties who challenge the state to show that its exercises of public power are accountable to these underlying values.

Finally, the democratic vision is a vision of constitutionalism – a vision of how in a rule-of-law state fundamental legal values condition the exercise of political power. In other words, constitutionalism is equated with a project of achieving fundamental values or principles, so that the separation of powers is useful only to the extent that separation serves the project. Hence, judges have to share interpretative authority over those values with others so that partnership serves the project, which requires blurring the lines of separation between the powers.9

Part One of the article analyzes the doctrine of the separation of powers as it relates to the administrative state. The disagreement in the Supreme Court’s decision in *Cooper* exemplifies rival normative visions of this relationship. Section A excavates the

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roots of this disagreement in **CUPE**, a decision which departs from the rigid doctrine of the strict separation of powers. Section B reviews a subsequent trilogy of decisions that take the departure one step further and greatly expand the scope of authority for administrative agencies. Section C then looks at the Court's return to pre-CUPE jurisprudence in *Canada (Attorney General) v. Mossop*. I argue that the majority of the Court, led by Lamer C.J. and La Forest J., sought to confine, as far as possible, the jurisdiction of tribunals by using a strict separation of powers doctrine. In particular, the Court sought to cut rival human rights tribunals down to size by subjecting tribunal interpretations of law to a correctness standard, thereby exhibiting less deference to these decisions. I also argue that the dissents in *Mossop* act as an early counterpoint to the formalist view. Section D examines the majority's embrace of formalism in *Cooper*. Here the application of the rigid separation of powers entailed that courts should have exclusive jurisdiction over constitutional issues. Lamer C.J. in particular left the **CUPE** legacy in doubt because of the way in which he invoked the formal version of the idea of an unwritten or common law Constitution. The instability of this formalist vision and its resort to unwritten constitutional norms is explored in Section E, which examines the expression of that vision in the *Provincial Judges Reference*. I conclude that the formalist vision leads to paradox and a crisis of legitimacy when judges stand against legislatures on the substantive values that they think underpin formalism.

Part Two suggests that the way out of this crisis is to rethink the institutional relationship. The chief criterion for the exercise of any authority should be the protection of fundamental values, rather than constitutional rules about institutional structure. I argue that the constitutionalization of the legal order which *Baker* represents is neither judicial supremacism nor imperialism, but is fundamentally democratic in nature for two reasons. First, *Baker* ends the idea of judicial monopoly over interpretation of the law. Section A shows that the end of

monopoly requires dropping altogether the old style correctness standard – where the test is whether the tribunal’s interpretation coincides with the court’s – and replacing it with a standard that even at its most intrusive is still deferential in that the court focuses on the adequacy of the tribunal’s reasons for its interpretation.

Second, Section B shows how the Charter makes more explicit the fundamental values already present in the common law Constitution. These values include international human rights norms, parliamentary democracy and the common law. Therefore, the Charter is not an intrusion into the Canadian legal order so much as a more explicit and in many respects novel statement of fundamental values, a statement which presupposes continuity rather than radical change. The determination of the content of law is viewed in terms of a relationship of reciprocity between legislature and subject, and therefore interpretative authority is shared between the institutions of the legal order and the citizen. Judges have a provisional final word because of their part in this justificatory exercise. Their say is provisional both because they share interpretative authority and because their decisions are subject to legislative override. Finally, the administrative state is not thwarted or delegitimated by being required to act as a rule-of-law state. Rather, it is regarded as fit to be held to the high standards of the rule of law, indeed, because it is a public actor, to higher standards than private actors.

I. The Separation of Powers and the Administrative State

The key section of this part is devoted to a discussion of Cooper. Cooper dealt with the authority of human rights tribunals to find that a provision in their enabling statute was of “no force or effect” by virtue of section 52(1) of the Charter. The general issue of the authority of tribunals to make such findings had been thoroughly canvassed by La Forest J. for the Court in a trilogy of
that decided in favour of tribunals having such authority. However, La Forest J. also delivered the majority judgment in Cooper, finding that the Canadian Human Rights Commission had no authority to make this kind of decision. McLachlin and L’Heureux-Dubé JJ. dissented vigorously, in effect arguing that the majority’s decision undermined the Court’s prior jurisprudence on the issue of tribunals’ authority to interpret the Charter. Even more vigorous was Lamer C.J.’s judgment, which concurred in the result, but on the basis that the prior jurisprudence was not only wrongly decided but constituted such a threat to the Canadian legal order – in particular to the doctrine of the separation of powers – that it should be overruled.

As one can see from the epigraphs, the dissenting judges and the Chief Justice both thought that fundamental differences about the constitutional basis of judicial review were at stake in Cooper. In order to appreciate these differences, I need to explain the trend in administrative law that made the trilogy possible, the trilogy itself and the roots of the conclusion of the majority in Cooper that human rights commissions should be seen as an exception to the logic of the trilogy. I will show that these roots were firmly planted by La Forest J. in the trilogy and why they can only grow into an unstable and incoherent vision of constitutionalism.

A. Departing from the Rigid Doctrine of the Separation of Powers

An administrative tribunal is created by its enabling statute to implement the regime of that statute, and as such is part of the executive branch of government. As soon as the tribunal’s task of implementing the statute requires it to interpret the law, whether by implication or by express statutory authorization, a problem arises for the rigid doctrine of the separation of powers. The

central features of this doctrine were succinctly stated by Dickson C.J. in a 1985 dictum which we will see is the leitmotif of Lamer C.J.’s judgment in Cooper:

There is in Canada a separation of powers among the three branches of government - the legislature, the executive and the judiciary. In broad terms, the role of the judiciary is, of course, to interpret and apply the law; the role of the legislature is to decide upon and enunciate policy; the role of the executive is to administer and implement that policy.12

The problem for the rigid doctrine of the separation of powers becomes worse when legislatures seek explicitly to protect tribunals from attempts by courts to confine the tribunals’ role to the determination of facts and thus to whether the law, as interpreted exclusively by the courts, applies to the facts. The main vehicle for such protection is the privative clause, a statutory provision that seeks to exclude judicial review of a tribunal’s interpretations of the law.

The leading case in this regard - one of the two 1979 administrative law decisions of the Supreme Court referred to in the Introduction - is CUPE. Here the tribunal was a Public Service Staff Relations Board, whose decisions were protected against judicial review by a privative clause, and which had to grapple with a badly-worded provision in its enabling statute where the issue was whether management could do the work of employees during a strike. The New Brunswick Court of Appeal held that the Board’s expertise had to do with the application of the law to the particular facts of the dispute, so that the Board’s interpretation of the provision had to be correct - that is, in accordance with the reviewing judge’s understanding. However, Dickson J. for the Supreme Court held that the interpretation of this provision was at “the core” of the Board’s expertise and

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12. Fraser v. Public Service Staff Relations Board, [1985] 2 S.C.R. 455 at 469-470, quoted in Cooper, supra note 1 at para. 10. In the context of the judgment, this statement of the separation of powers is not - as Lamer C.J. used it in Cooper - lapidary; it is, as it were, tacked on to the point that there are limits to the extent to which a federal civil servant may criticize the government.

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therefore could be reviewed only if it were patently unreasonable, which it was not.

CUPE departs from the rigid doctrine of the separation of powers because it involves a judicial concession that the executive branch of government has authority to interpret the law. Of course, that concession is in a sense forced by the fact that the branch of government with authority to “decide upon and enunciate policy” has decided not only to set up tribunals with the authority to interpret the law, but has sought to protect formally, via the privative clause, those interpretations from judicial review. In short, the rigid separation of powers, the formal division of authority between the branches of government, has been disrupted by the legislature but, formally speaking, the legislature is entitled to create this disruption.

It is important to see that CUPE involves more than concession. There is also a judicial cession of interpretative authority to the tribunal, within the scope of its expertise - the area of jurisdiction protected by the privative clause. The cession is not total - the tribunal cannot be patently unreasonable. But to adopt the language later used by the courts to describe the position, the cession is of considerable significance since it requires that judges “defer” to the administration’s interpretations of the law, except on jurisdictional issues.

The question then arises as to how this concession, and the cession that accompanies it, can be rendered consistent with section 96 of the Constitution Act, 1867, which reserves the power of appointment of superior court judges to the federal government. Section 96 has been interpreted by courts as protecting quintessentially judicial functions, or at least those regarded as such at the time the Constitution Act, 1867 was enacted, from legislative encroachment.

Crevier v. Québec (Attorney-General)\textsuperscript{15} dealt with that question. Laskin C.J. held for the Court that a privative clause in provincial legislation achieves the right balance between the legislature and the "courts as ultimate interpreters" of section 96 and of the Constitution, as long as "issues of jurisdiction which are not far removed from issues of constitutionality" are not shielded from review.\textsuperscript{16}

In sum, one could say that the Supreme Court regarded section 96 as preserving the separation of powers, though not altogether rigidly. Courts would recognize that they should defer to tribunals' interpretations within jurisdiction. Tribunals would have, on occasion, to decide on the limits of their jurisdiction, but this class of constitution-like decisions could not be shielded from correctness review.

In other words, the separation of powers is preserved sufficiently as long as correctness review is preserved for constitution-like interpretations, and by implication, as long as review is not precluded altogether for other interpretations of the law. In this second respect, the fact that courts often talked of a patently unreasonable interpretation as one that involved a loss – or stepping outside – of jurisdiction, implied that a privative clause could not validly shield a tribunal against patent unreasonableness review of its interpretations within jurisdiction.

The question faced in the first decision in the trilogy was whether, when a provision of the tribunal's enabling statute was challenged as being inconsistent with the Charter, the

\textsuperscript{15} [1981] 2 S.C.R. 220 [hereinafter Crevier]. Laskin C.J., writing for the Court, reacted adversely to an attempt by the Québec legislature to create a "Professions Tribunal" with exclusive appellate jurisdiction over the discipline committees of most of the statutory professional bodies in Québec and to make the decisions of the tribunal "final" or not subject to judicial review. He held that a provincial legislature is not permitted to create a non-section 96 court whose main task is to act as a section 96 court would in reviewing administrative action. He also held that section 96 provides a constitutional guarantee of judicial – that is, a section 96 court – review of provincial statutory authorities for jurisdictional error.

\textsuperscript{16} \textit{Ibid.} at 237-238.
interpretation of the Charter was included in the constitution-like interpretations that tribunals had to make.17

B. The Trilogy

In the trilogy, the Supreme Court decided that when decision-making tribunals are bound to apply the “law of the land”, since “the law” by definition includes the Charter as the supreme law of Canada, such tribunals are bound to apply the Charter. It followed that such administrative tribunals, no less than courts, were obliged to decide whether, in terms of section 52 of the Charter, there was an inconsistency between the Charter and a provision in the tribunal’s enabling statute such that that provision was of no “force or effect”.

In the first of these cases, the Court noted that the fact that tribunals were created in part to facilitate specialized and speedy decisions militated against introducing the complexity of constitutional argument into the tribunal process. It also noted that the constitutional structure in Canada was not based on a “rigid separation of powers” doctrine and that the expert judgment of a tribunal about the application of the Charter in the specialized context of the tribunal’s operation would mean that, should the matter be taken on review, the reviewing court would

17. There was some precedent here since the Supreme Court had previously decided that a tribunal may assume jurisdiction in order to answer a challenge that its jurisdiction violates sections 91 or 92 of the Constitution Act, 1867, that is, the sections which demarcate the distribution of legislative powers between the Federal and the Provincial legislatures. See e.g., Northern Telecom Ltd. v. Communication Workers of Canada, [1980] 1 S.C.R. 115 and Northern Telecom Canada Ltd. v. CWOC (No 2) [1983] 1 S.C.R. 733. (Relevant to the discussion below is that in the first of these decisions, the Court held that the tribunal is under a duty to establish a factual record sufficient for adjudication by a reviewing judge.) However, the constitutional issue raised through a Charter challenge is of a different order when the tribunal is asked to invalidate a provision in its enabling statute (or even to read in a provision) in order to make its statute conform to the Charter. For discussion see D.J. Mullan, Administrative Law (Toronto: Irwin Law, 2001) at 80-81 and 352-354.
not decide in a vacuum because the informed view of a tribunal would be invaluable. 18

The Court stated certain safeguards. First, it accepted that curial deference should not be given to such constitutional determinations. In other words, a reviewing court would review on a correctness standard. Second, it leaned heavily on the claim that a tribunal would only have this authority if it were the case that the enabling statute expressly assigned the tribunal a general authority to interpret “the law”. 19 In imputing authority to the tribunal to interpret the Constitution, the Court has the clear legislative authorization of the legislature that created the tribunal, since that legislature gave a general authority to the tribunal to interpret “the law” relevant to its statutory mandate. Third, the Court also limited its judgment to a tribunal’s authority to make declarations of inconsistency in terms of section 52 of the Charter, 20 saying that the fact that a tribunal could make no formal declaration of invalidity meant that there was no violation of section 96 of the Constitution Act, 1867. 21

The trilogy is arguably consistent with section 96, even though the class of decisions is not constitution-like, but clearly constitutional. Not only is the Charter in issue, but also it is invoked to avoid the application of a provision in the very statute from which the tribunal gets its authority. However, the legislature has formally given the authority to interpret the law in general to the tribunal. The Court thus says that it is conceding authority to the tribunal to interpret the Charter, but it does not cede any of its own authority, as it will review on a correctness standard.

18. Douglas College, supra note 11 at 605.
19. Ibid. at 593-595.
20. Ibid. at 594-595. It thus left open the question whether a tribunal could be a “court of competent jurisdiction” and thus capable of granting Charter remedies in terms of section 24 (1) of the Charter. In Weber v. Ontario Hydro, [1995] 2 S.C.R. 929, the Court decided that a tribunal could be a court of competent jurisdiction.
It is important to note in respect of the formal legislative grant of authority that Wilson and L’Heureux-Dubé JJ. stated in *Douglas College* that they would prefer to leave the question open in regard to the second safeguard of formal delegation of authority. They thus intimated that a court should determine whether the legislature intended a tribunal to have such authority on the basis of the tribunal’s substantive characteristics, rather than on the somewhat artificial ground that there was a clear expression of statutory intent. That is, their view was that an explicit statement by the legislature that a tribunal has authority to “interpret the law” is neither sufficient nor necessary to qualify the tribunal for the task of interpreting the *Charter*. And here one can see the issue that was to be forced to the surface in *Cooper* — whether the characterization of the issue as one about expertise requires deference. This particular division in the Supreme Court persisted in the two following cases of the trilogy.

None of the tribunals considered in the trilogy was a human rights tribunal. However, La Forest J., who gave the majority judgment in each decision, had said in the first that the interpretation and application of the *Charter* is not “vastly different from the applications of ordinary statutes for which arbitrators are responsible” and that there is “little difference” between the *Charter* and “certain provisions of the Human Rights Codes which arbitrators may hold to override provisions in collective agreements.” In other words, he found that the fact that tribunals were given authority to interpret statutory provisions quite similar to the provisions of the *Charter* suggested that in Canada tribunals were often considered to have the kind of skills necessary to interpret the *Charter*.

This last finding should entail that human rights tribunals — tribunals specifically constituted to hear complaints about violations of human rights codes — have the skills to interpret the *Charter*, since they are presumably more expert in interpreting their own enabling statutes than an arbitrator whose authority

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comes from a different statute. Indeed, it seems that the stronger conclusion should follow, that such tribunals have more expertise than an arbitrator when it comes to the Charter. After all, human rights tribunals were in the human rights business before the enactment of the Charter, and their jurisprudence, especially in regard to the right to equality, provided an initial resource for judges in their interpretations of section 15 of the Charter. In Cooper the majority of the Supreme Court defied this logic, but, as I will now show, the seeds of that defiance had already been firmly planted in Mossop.

C. Cutting Human Rights Tribunals Down to Size 24

In Mossop, the majority of the Court held that the appropriate standard of review of a human rights tribunal’s interpretations of the law is correctness and that in this case the tribunal had been wrong to infer that a prohibition against discrimination on the basis of “family status” protected a gay couple. In her dissent, L’Heureux-Dubé J. held that the standard of review should be patent unreasonableness and that the tribunal’s decision met this standard. McLachlin and Cory JJ. agreed with the majority that the correctness standard was appropriate, but asserted that L’Heureux-Dubé J.’s evaluation of the tribunal’s reasoning demonstrated that the tribunal had met this standard.

There is no privative clause in the enabling statute in issue in both Mossop and Cooper — the Canadian Human Rights Act (CHRA). 25 But before Mossop, the Court had already begun to set out the position, now firmly established in administrative law,

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24. The best general treatment of this topic, written before Mossop, is A. Harvison Young, “Keeping the Courts at Bay: The Canadian Human Rights Commission and its Counterparts in Britain and Northern Ireland: Some Comparative Lessons” (1993) 43 U.T.L.J. 65. Particularly pertinent to my own argument here is Harvison Young’s very perceptive as well as prescient treatment of the rivalry Canadian judges felt once they were given a competing human rights jurisdiction by the Charter.
that the expertise of the tribunal might require deference even in the absence of a privative clause.

However, La Forest J. in his concurring judgment in Mossop, approved by Lamer C.J. in his judgment for the majority of the Court, said that the default position in administrative law is that in the absence of a privative clause, courts should assume that their “normal supervisory role” remains. He distinguished between the position of a labour arbitrator and a human rights tribunal on the basis that the former is selected by the parties to arbitrate under a collective agreement in a “narrowly restricted field”, while the latter’s decision “is imposed on the parties and has direct influence on society at large in relation to basic social values.” He concluded:

The superior expertise of a human rights tribunal relates to fact-finding and adjudication in a human rights context. It does not extend to general questions of law such as the one at issue in this case. These are ultimately matters within the province of the judiciary, and involve concepts of statutory interpretation and general legal reasoning which the courts must be supposed competent to perform. The courts cannot abdicate this duty to the tribunal. They must, therefore, review the tribunal’s decisions on questions of this kind on the basis of correctness, not on a standard of reasonability.

L’Heureux-Dubé J., in contrast, argued that the default position is one of deference, “rooted in part in a respect for governmental decisions to create administrative bodies with delegated powers.” She also held that “it can be presumed that the legislature intended that more deference would be shown to bodies with broad powers than to bodies with highly circumscribed powers.” In respect of the Commission, she found (relying on language taken from CUPE) that at the “core of its jurisdiction” was the interpretation

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26. It is worth noting that Iacobucci J. was the only judge of the majority who signed on to La Forest J.’s concurring judgment rather than on to Lamer C.J.’s.
27. Supra note 10 at 584.
28. Ibid. at 585.
29. Ibid. See Lamer C.J. at 577-578.
30. Ibid. at 596.
31. Ibid.
of the enumerated grounds of discrimination in its enabling statute and thus the resolution of any ambiguities in such phrases as "family status".\textsuperscript{32} It followed for her that the applicable standard was patent unreasonableness.

In adopting correctness review as the default position for tribunals in general, the majority returned to the pre-CUPE mode of reasoning that seeks to confine as far as possible the role of tribunals to fact finding, in accordance with the rigid doctrine of the separation of powers. Lamer C.J. evaded this issue by arguing that there was no ambiguity in the statute. He relied heavily on the fact that the legislature had not put "sexual orientation" on the list of prohibited grounds of discrimination at the time that it added "family status", despite the fact that the Commission had recommended that sexual orientation be added.\textsuperscript{33} That Parliament had "specifically excluded" sexual orientation meant that its intent was "clear".\textsuperscript{34} It followed that the only way for Mossop to achieve his end – a course of action rejected by his lawyers – was to mount a Charter challenge to the constitutionality of the omission of sexual orientation from the prohibited grounds of discrimination.\textsuperscript{35} Lamer C.J. added that if there were ambiguity, then the courts should adopt the interpretation "more in conformity with the Charter".\textsuperscript{36}

But, as L'Heureux-Dube J.'s reasoning on interpretation shows, the issue of selecting a default stance on the legitimacy of the administrative state cannot be separated from selecting an interpretative approach. If one's default stance is that tribunals have a legitimate role in interpreting the law, one has to accept that the terms of the legal task delegated to them by the legislature are not so much ambiguous as open-textured. In other words, open-textured terms are terms that a tribunal is supposed to give content to and which it is better placed to give content to because

\begin{itemize}
  \item \textsuperscript{32} Ibid. at 611-612.
  \item \textsuperscript{33} Ibid. at 580.
  \item \textsuperscript{34} Ibid. at 580, 581-582.
  \item \textsuperscript{35} Ibid. at 579-580, 581-582.
  \item \textsuperscript{36} Ibid. at 582.
\end{itemize}
of its expertise in its specialized context. Indeed, as L’Heureux-Dubé J. argued, the very task given to human rights tribunals as implementers of fundamental values militates in favour of treating the terms of their statutory mandate as even more open-textured than usual.

As she pointed out in Mossop, the jurisprudence of the Court had established that because of its “quasi-constitutional nature”, human rights legislation is to be given a “large, purposive and liberal interpretation” – that is, in accordance with the values the legislation seeks to achieve. She also said that Parliament, in using a vague or undefined phrase such as “family status”, had delegated interpretation of that phrase to the Commission, and that the “living tree” doctrine of Canadian constitutional law tells courts that the intentions of the actual legislators about the scope of constitutional values – if these can be determined – are not decisive. On the issue of the values the legislation seeks to achieve, she said that the Act,

in prohibiting certain forms of discrimination, has the express purpose of promoting the value of equality which lies at the centre of a free and democratic society. Our society is one of rich diversity, and the Act fosters the principle that all members of the community deserve to be treated with dignity, concern, respect and consideration, and are entitled to a community free from discrimination.

McLachlin and Cory JJ. must be taken to agree with this part of L’Heureux-Dubé J.’s judgment, for it opens up the issue which the majority had sought to close by arguing that there was a fact of the matter as to legislative intent. They must also agree that Parliament had delegated interpretation of “family status” to the tribunal, though they seem to differ from her on the standard of review to be applied in evaluating how the tribunal has gone about its task. Indeed, even the majority has to agree with her at one level that there is such a delegation, subject to the discipline

37. Ibid. at 559.
38. Ibid. at 615-616, 623-624, 639.
39. Ibid. at 615.
of correctness review. I say "at one level" because the layers of both disagreement and agreement on constitutional issues in Mossop are quite complex. And while Cooper helps to bring these layers to the surface, a preliminary account is useful.

The majority has to accept that the tribunal has to interpret the particular prohibited ground of discrimination in order to apply that ground to the facts. But the concession that there is this delegation is not followed by any cession of interpretative authority, because the tribunal's interpretation has to be correct, coinciding with the interpretation that the Court would have reached in "a vacuum".

This understanding of correctness, "old style correctness" (OSC), signifies the pre-CUPE judicial attitude that sought to confine the administrative state to the task of law-application. The question arises however, whether the resurgence of OSC with respect to human rights commissions can be confined or whether, as La Forest J. seems to indicate in Mossop, the Court's view is that OSC prevails unless the legislature indicates that it does not. And so the difference between L'Heureux-Dubé J. and the majority is in part about the constitutional status of the administrative state, since she holds that the default position of courts is deference.

L'Heureux-Dubé J. did suggest, following Crevier, that the default position of deference is rebuttable, for example, in respect of the class of issues covered by the trilogy. But she also quoted with approval an academic opinion that all Crevier entrenches is "some degree of review". That view of section 96 suggests that on other constitution-like issues, for example, issues that would be categorized as jurisdictional in nature, correctness or OSC is not necessarily or even usually the appropriate standard of review. Indeed, in order to explain the fact that Cory and McLachlin JJ. were able to use a correctness standard to uphold a result reached

40. Ibid. at 599-601.
41. Ibid. at 601 quoting from J.H. Grey, "Sections 96 to 100: A Defense" (1985) 1 Admin. L.J. 3 at 11 [emphasis in original]. Grey's early account of the way in which section 96 should be reconciled with progressive trends in administrative law has unfortunately not had the influence it deserves.
by a tribunal whose interpretative methodology presupposed that it had interpretative authority, one needs an understanding of correctness that differs from OSC. That different understanding of correctness – one which presupposes a strict but still deferential standard - is the one that makes better sense of the trilogy.

As we can see from L'Heureux-Dubé J.'s dissent, the question of whether there is ambiguity, or scope for interpretation, depends not only on a certain stance in relation to the administrative state, but also on a prior judgment about the reach of the Charter. L'Heureux-Dubé J. regards the Charter, especially the values of equality and dignity, as expressing the fundamental values of the Canadian legal order. When the statute in question is one that either aims to secure such values, or that affects such values, the intent of the statute should not be determined by some positivistic test for “plain meaning”, but in accordance with the purposive or liberal techniques suitable in a legal order committed to such values.

Two components of L'Heureux-Dubé J.'s stance justify the major premise of the trilogy's syllogism: when decision-making tribunals are bound to apply the “law of the land”, since “the law” not only by definition includes the Charter, but the Charter is the supreme law of Canada, such tribunals are bound to apply the Charter.

First, there is the idea that the effect of fundamental values on the interpretative process is triggered not by legal ambiguity but by their nature. Statutes are to be read in light of these values because of an overarching commitment by the state. Second, if tribunals are legitimate interpreters of these values, then their interpretations have to be given more weight than the correctness standard implies.

It is important to draw attention to the feature of L'Heureux-Dubé J.'s judgment that made it possible for McLachlin and Cory JJ. to maintain that, even on a correctness standard, the tribunal’s decision should be upheld. L'Heureux-Dubé J. tracks the tribunal’s reasoning quite closely, an approach made possible

42. Mossop, ibid. at 623-624, 629-630.
by the fact that its decision was well constructed. Indeed, it was so well constructed that once one had made the initial interpretative call that "family status" was an ambiguous or open-textured term for the tribunal to interpret, it would be very difficult to find fault with the reasoning, whatever standard one said was appropriate.

In order, therefore, to invalidate the Tribunal's decision, one had to find, as the majority did, that there was "one right answer" to the question of statutory interpretation, one that judges could reach in a vacuum. The correctness standard the majority deployed - OSC or correctness in a vacuum - is only in name the same standard as the one employed by McLachlin and Cory JJ. In concurring with L'Heureux-Dubé J. on the issue of interpretation, they must assume that there is a delegation of interpretative authority to the tribunal. They should then also be committed to the proposition that the tribunal's reasons offered in justification of the way it exercised its authority are the reviewing Court's primary focus.

As L'Heureux-Dubé J. recognizes, if the legislative delegation of authority is to be properly respected, one has to go beyond concession to cession, just as the Court decided in the wake of CUPE that tribunals should be ceded authority to interpret the law, not because the legislature had made it plain that tribunals had such authority, but because tribunals have a legitimate role in interpretation. One can appreciate why it was a minority that insisted throughout the trilogy that the question whether a tribunal is fit to interpret the Charter should depend on the substantive characteristics of the tribunal, and not on whether there is a formulaic phrase in the enabling statute about authority to interpret the law.43

Since L'Heureux-Dubé J.'s position in Mossop is required in order to justify the trilogy, it follows that not only substantive characteristics rather than formulaic legislative intent should determine whether a tribunal had authority over Charter

43. For a critique of the trilogy, see K. Roach, Constitutional Remedies in Canada (Aurora: Canada Law Book Inc., 1999) at 6-10.
interpretation, but courts should defer to such authority. One might quibble with her understanding of the level of deference, though at the time Mossop was decided, the Supreme Court was operating with only two standards of review, patent unreasonableness and correctness. Perhaps a more intrusive standard, reasonableness or the one suggested by McLachlin and Cory JJ., is appropriate.44

But one should not underestimate the significance of the fact that La Forest J. - the author of the trilogy - stated in Mossop that the default general position for review of tribunals' interpretations of the law - including the law of their enabling statutes - is OSC. Insisting on OSC is the mark of concession rather than cession, of bending to legislative command rather than recognizing the legitimacy of the administrative state.

La Forest J. found himself caught in the trilogy between the options of concession and cession. He tried to couch the decision to cede to tribunals the authority to interpret the Charter in the language of command and plain meaning, neglecting to mention in the first of the decisions that the enabling statute in that case antedated the Charter.45 At the same time, he cited as a reason for

44. See, however, L’Heureux-Dubé J.’s dissent in Trinity Western University v. British Columbia College of Teachers, [2001] 1 S.C.R. 772. L’Heureux-Dubé J. employed a standard of patent unreasonableness with respect to BCCT’s decision that students in the teacher education program at TWU, a religious institution promoting a Christian worldview, should complete a year of training under the supervision of Simon Fraser University to ensure that TWU students were exposed to diversity and its values before teaching in a classroom environment.

45. See Lamer C.J. in Cooper, supra note 1, where he argued that it is illogical to confer on tribunals a power to interpret the Charter, and refuse to apply laws that violate the Charter, on the basis that one could infer a legislative intent to give the tribunal authority to interpret the “general law”. As he pointed out, many of the tribunals that have authority to interpret the general law were created before the enactment of the Charter and so this authority could not have been “within the contemplation of Canada’s legislatures.” He asserted that the inference of intention here is illogical because it entails that the legislature had “knowingly passed a constitutionally suspect law” since without this assumption there would be no need to have a tribunal with this authority. Further, even if a legislature enacted an unconstitutional law it would not “plant within that law the seeds of its own demise.” Ibid. at paras. 7-8.
giving tribunals first crack at interpreting the Charter that the
reviewing court will have the benefit of the “invaluable”
understanding of the tribunals’ interpretations of the law in their
area of expertise. But these interpretations cannot be invaluable if
the appropriate standard is OSC, the standard that requires the
tribunal’s interpretation to coincide with the interpretation the
court would have arrived at on its own.46

46. It is of course the case that the arguments put by counsel to the court are in
some sense invaluable, but these lawyers do not exercise authority to make a
decision about the best interpretation of the law. My claim here might seem odd
since it implies that a tribunal’s interpretation of general law, including the
Charter, should weigh more heavily with the Supreme Court than the
interpretation of the law by a Court of Appeal. But I do not find this claim odd.
For example, if a labour board has to decide whether there has been a “sale” of
assets in terms of a bankruptcy statute in order to determine whether an
employer is a “successor employer” in terms of its enabling statute, and thus
bound by a collective agreement entered into by the original company, the
board’s interpretation of “sale” should, in my view, be deferred to, since the
context of a labour dispute is one in which it is expert. The issue of whether the
board’s decision met the appropriate standard of review is not, however, one over
which any of the levels of superior courts which might review it are more expert
than the others. The Supreme Court’s authority to overturn the Court of
Appeal’s judgment, and the Court of Appeal’s to overturn the reviewing court’s
judgment, come from their place in the judicial hierarchy, not from their greater
expertise, and they differ as between each other on a correctness standard. It
follows that the fact that there is no duty in the common law for judges to give
reasons for their decisions should not count against the argument that there is a
common law duty on tribunals to give reasons.

As David Mullan has pointed out to me, Lambert J.A. of the British Columbia
Court of Appeal has, in two recent decisions, begun to rethink the idea of
correctness review along lines not dissimilar to my own suggestions. See
Northwood Inc. v. British Columbia (Forest Practices Board), [2001] B.C.J. No. 363,
2001 B.C.C.A. 141, especially para. 36, and Van Unen v. British Columbia
(Workers Compensation Board) [2001], B.C.J. No. 672, 2001 B.C.C.A. 262,
especially para. 25. Lambert J.A.’s first argument is that in difficult matters of
statutory interpretation, there is often (even usually) no right answer, just the
interpreter’s opinion. When an appeal court is considering the interpretation of
the court below, as long as the opinion of the court below is as reasonable as any
alternative, and even though the standard to be applied is correctness, the appeal
court should defer to the opinion of the court below as to which of the equally
reasonable interpretations to pick. By analogy, even when the standard of review
The tensions in La Forest J.'s position, and indeed in the general position of the Court after CUPE, come fully into view in Cooper. In combination, Mossop and Cooper make it clear that the majority of the Supreme Court is determined to keep human rights tribunals at the margins of its general jurisprudence in administrative law, and, to the extent possible, in the pre-CUPE era, where the formal vision of constitutionalism deals with the administrative state by confining its tribunals to fact finding, thus preserving a judicial monopoly on interpretation of the law. It is difficult, however, even impossible, to confine such marginalization to one particular agency. For the basis of the marginalization suggests a more general stance on the constitutional relationship between courts, legislature and administrative state, and this stance threatens a return to the pre-CUPE era.

for a tribunal's interpretation of the law is correctness, a reviewing court should defer to the interpretation, if it is reasonable in this sense. His second argument is that the expertise of the tribunal gives a court an extra reason for deference to tribunals, even when the standard is correctness.

It follows that Lambert J.A. would reject the sharp distinction I made above between the court-court relationship and the court-tribunal one, in that for him the former looks more like the latter, or, which is to say the same thing, appeal looks more like review. If I am right about this difference, I'm not sure for the moment what to make of it.

I merely want to note that it follows from both our positions that the view of Canadian courts that tribunals should only be able to defend themselves on review or appeal when the issue is their jurisdiction, and then only by making arguments to the effect that their interpretations were not patently unreasonable, has to be rethought. Indeed, the courts' stance in this regard seems incoherent. The rationale for permitting tribunals to defend themselves is their expertise. However, the scope of what they are permitted to defend is limited to issues over which they are said to have no expertise superior to the courts', except in so far as the issue is jurisdictional in the sense that the tribunal is said to have “stepped outside of its jurisdiction” through making a patently unreasonable decision. See Mullan, Administrative Law, supra note 17 at 454-459, discussing in particular La Forest J.'s judgment in CALMAW, Local 14 v. Paccar of Canada Ltd., [1989] 2 S.C.R. 983 [hereinafter Paccar].
D. Formalism Rampant

Cooper arose out of a complaint by airline pilots that a compulsory retirement age of 60 constituted age discrimination. Since section 15(c) of the CHRA\(^{47}\) expressly permitted such discrimination, the complaint could succeed only if that section was invalid because it violated section 15 of the Charter. Further, a Human Rights Tribunal Panel of the Commission could be appointed to consider a complaint only once the Commission had concluded an inquiry was warranted. For the pilots to reach the stage of a hearing before an adjudicative tribunal, they needed a preliminary determination by the Commission that the Charter-based argument had some prospect of success. The question before the Court was whether the Commission has the authority to determine the constitutionality of a provision of its enabling statute.\(^{48}\)

The process put in place by the CHRA created a logical problem for the majority and the dissent. In order for the complaint to reach the stage of adjudication by a human rights panel, the Commission had to make the administrative decision that the inquiry was warranted. If the human rights panel had the requisite authority to decide a challenge to its enabling statute, one could not logically deny the authority to the Commission to make a preliminary determination of the same issue.

La Forest J. suggests that he could not find that the human rights panel had the requisite authority, since that would contradict his finding that the Commission did not. He naturally wished to avoid letting the tail do all the wagging, so he argued that the tribunal on its own merits did not have the requisite authority.

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47. Supra note 25.

48. The Commission concluded that it had such authority but dismissed the complaints on the ground that McKinney v. University of Guelph, [1990] 3 S.C.R. 229 upheld mandatory retirement and therefore the “normal age of retirement” scheme permitted by section 15 of the Canadian Human Rights Act.
There was no section in the CHRA which specifically granted the tribunal authority to interpret “the law”. La Forest J. did not rest his argument on this point, as he found that it was “implicit in the scheme of the Act that a tribunal possess a more general power to deal with questions of law.”\textsuperscript{49} Rather, his argument seems to rest on the fact that, on the authority of the passage quoted above from his own judgment in Mossop, tribunals charged with answering “general questions of law,” including constitution-like or constitutional questions, “receive no deference from the courts”.\textsuperscript{50}

However, on the basis of his own jurisprudence in the trilogy, this fact does not argue for precluding the tribunal from making the finding of section 52 constitutionality, only for reserving correctness as the appropriate standard for judicial review of that finding. At least, the fact does not argue in this direction, unless it expands to include the claim that there is something constitutionally suspect, even unconstitutional, about tribunals answering such questions at all. Further, in order for the grant of authority to be constitutionally suspect, it must be the case that the grant is one of authority, not merely of task. In other words, what makes a grant of authority suspect is that entailed in the grant is that the courts, whatever standard they adopt for review, must avoid OSC. Conversely, if a deferential standard is required, tribunals must be stripped altogether of interpretative authority.

Such expansion is hinted at in the conclusion to La Forest J.’s judgment. He said that he would “add a practical note of caution with respect to a tribunal’s jurisdiction to consider Charter arguments”, since this list of factors was found outweighed in the trilogy by the advantages of having tribunals make such determinations.\textsuperscript{51} Far more significant is that the passage from

\begin{footnotesize}
\begin{enumerate}
\item Coopera super note 1 at para. 64.
\item Ibid.
\item Ibid. at para. 65. La Forest J.’s list of factors follows:
  \begin{itemize}
  \item First, as already noted, a tribunal does not have any special expertise except in the area of factual determinations in the human rights context. Second, any efficiencies that are \textit{prima facie} gained by avoiding the court system will be lost when the inevitable judicial review proceeding is brought in the Federal
\end{itemize}
\end{enumerate}
\end{footnotesize}
Mossop\textsuperscript{12} on which he relied can be plausibly interpreted, in the light of its place in his judgment in Cooper, as a claim about the constitutional necessity of the courts’ retaining exclusive jurisdiction over constitutional issues. Here “exclusive” means not that tribunals which consider such issues will be held to a correctness standard, but that tribunals should be excluded altogether from considering such issues, which is precisely the stance of Lamer C.J.\textsuperscript{53}

According to Lamer C.J., judges must have “exclusive jurisdiction” over the constitutional review of legislation, because only they have the requisite independence to undertake such review, an independence which they have in virtue of the doctrine of the separation of powers formally guaranteed in the Canadian Constitution by section 96 of the Constitution Act, 1867.\textsuperscript{54} He asserted that he was “well aware” that the Supreme Court has held that the separation of powers under the Canadian Constitution is not strict for two reasons. First, “judicial functions, including the interpretation of law, may be vested in non-judicial bodies such as tribunals, and that conversely the judiciary may be vested with non-judicial functions.”\textsuperscript{55} Second, the “rise of the administrative

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Court. Third, the unfettered ability of a tribunal to accept any evidence it sees fit is well suited to a human rights complaint determination but is inappropriate when addressing the constitutionality of a legislative provision. Finally, and perhaps most decisively, the added complexity, cost, and time that would be involved when a tribunal is to hear a constitutional question would erode to a large degree the primary goal sought in creating the tribunals, i.e., the efficient and timely adjudication of human rights complaints. \textit{Ibid.}

52. The passage quoted reads:

The superior expertise of a human rights tribunal relates to fact-finding and adjudication in a human rights context. It does not extend to general questions of law such as the one at issue in this case. These are ultimately matters within the province of the judiciary, and involve concepts of statutory interpretation and general legal reasoning which the courts must be supposed competent to perform. \textit{Ibid.}


54. \textit{Ibid.} at para. 11.

state has been marked by the creation of institutions other than the courts on whom the legislature has conferred the power to interpret law, a function who had hitherto been performed by the judiciary." 56

Nevertheless, he emphasized that "the absence of a strict separation of powers does not mean that Canadian constitutional law does not recognize and sustain some notion of the separation of powers", finding this to be "most evident in this Court's jurisprudence on s. 96 of the Constitution Act, 1867." 57 He furthered remarked:

Although the wording of this provision suggests that it is solely concerned with the appointment of judges, through judicial interpretation - an important element of which has been the recognition that s. 96 must be read along with ss. 97-100 as part of an integrated whole - s. 96 has come to guarantee the core jurisdiction of the superior courts against legislative encroachment. 58

Clearly what drives this reasoning is Lamer C.J.'s vision of constitutionalism. I call this vision formal since it depends on the application of the categories of the rigid doctrine of the separation of powers which he expressly approved: "the role of the judiciary is, of course, to interpret and apply the law; the role of the legislature is to decide upon and enunciate policy; the role of the executive is to administer and implement that policy". 59

56. Ibid.
57. Ibid. at para. 11.
58. Ibid.
59. Ibid. at para. 10. I avoid the label "conservative" because this vision of constitutionalism is often the common ground between groups on the left and the right wings of Canadian politics. In addition, I do not mean the label to imply that formalist judges will necessarily read the provisions of the Constitution, including the Charter, restrictively. As we can already see, formalism has led to an ever more expansive reading of section 96. Moreover, it would be consistent to hold both that judges should give the provisions of the Charter as expansive an interpretation as possible and that judges have a monopoly on such interpretation. Indeed, one might believe - as I think Lamer C.J. did - that the second proposition follows from the first, though I regard them as merely consistent.
This vision regards the Charter as a document that already does much to upset the separation of powers, and thus judges must seek to confine its reach in order to limit the upset. Hence, Lamer C.J. argued that the decisions of his Court that had found that tribunals could under certain conditions consider a section 52 challenge to a provision in their enabling statutes had gone beyond the tolerable limits to the relaxation of the separation of powers. In addition, he found that the trilogy was an affront to democracy, since it led to the position where

the executive can defeat the laws of the legislature. On each occasion that this occurs, a tribunal has disrupted the proper constitutional relationship between it and the legislature. Indeed, I would go so far as to say that a tribunal has, in these circumstances, unconstitutionally usurped power which it did not have.  

Thus Lamer C.J. made it plain that it would be unconstitutional for a legislature to declare a tribunal of any sort to be a body with access to section 52. It follows that he would find a legislative attempt to shield a human rights tribunal's interpretations of its enabling statute via a privative clause unconstitutional.

Indeed, it might even be a consequence of his position that a technically valid process to amend the Constitution so as to achieve either of these ends would be unconstitutional - an unconstitutional constitutional law - because ultimately his position, while it appeals to section 96 and to Crevier, rests on the idea of the unwritten, common law Constitution. While he referred to both section 96 and Crevier, he also explicitly recognized that section 96 seems rather a slim peg on which to hang so much, since all it does is secure the federal authority to

60. Ibid. at para. 25. In amplification of his argument on the separation of powers, he suggested that there is not much to the safeguard put in place by the trilogy that tribunals are denied the authority to make formal declarations of invalidity - they merely refuse to apply the offending section (at paras. 17-19). The safeguard is effective only if there is no doctrine of precedent in terms of which a decision by one tribunal does not bind another. Although there is no formal doctrine of precedent, there is the informal doctrine arising out of the endeavour of tribunals to achieve consistency.
appoint the judges of superior courts. As is the case in the general tradition of the common law, he sees the written texts of the law as but evidence of the more fundamental common law, so that in the absence of such texts judges may have direct recourse to fundamental principles. However, the principles to which he resorts are themselves formal, in that they are not principles about the fundamental legal values of Canadian society, but about the judicial role according to the rigid doctrine of the separation of powers.

61. See the discussion of Provincial Judges Reference below. Section 96 and the sections that follow it, ss. 97 - 101, are but part of a package which brought to Canada the dispensation of the Act of Settlement, 1701 that secured judicial independence in Britain, with the difference that the Act of Settlement was not a constitutional statute. (The Act left the authority to appoint judges in the hands of the executive (the King), but guaranteed the judges' independence during good behaviour (quamdiu se bene geserint) by securing life tenure for them in making their removal from office a decision by both Houses of Parliament and in requiring that their salaries be "ascertained and established". For discussion, see W.R. Lederman, "The Supreme Court of Canada and the Canadian Judicial System", in Lederman, Continuing Canadian Constitutional Dilemmas: Essays on the Constitutional History, Public Law and Federal System of Canada (Toronto: Butterworths, 1981) 175.

My own view of section 96 is that it is not only a slim peg, but that if it had not existed, the course of Canadian constitutional history in respect of jurisprudence on judicial independence might have been little different. Without it, the Supreme Court would have simply asserted an authority on the basis of its inherent common law jurisdiction to maintain the rule of law. Put differently, section 96 is just a convenient basis for the judges' sense that they are the ultimate guardians of the "supreme ideas and principles" of the unwritten constitution. (See Lederman, ibid. at 188.) Note that the House of Lords has asserted an even more extensive, constitutionally protected review authority against the British Parliament without ever referring to the Act of Settlement. The more extensive review came about because of the gloss placed by the House of Lords in R v. Lord President of the Privy Council, ex parte Page, [1993] A.C. 682 on Anisminic Ltd. v. Foreign Compensation Commission, [1969] 2 A.C. 147. While Anisminic could be interpreted as holding that a preclusive or privative clause could not totally exclude judicial review, Page has been interpreted as emptying such clauses of all meaning. For discussion, see M. Elliot, The Constitutional Foundations of Judicial Review (Oxford: Hart Publishing, 2001) at 152-163.
I call the vision of constitutionalism expressed in the second epigraph to this article, taken from McLachlin J.’s dissent, “democratic” because, in her view, if judges have such exclusive jurisdiction, then the Charter is put out of reach of the people whom it serves in part, as it is before tribunals rather than courts that most people are likely to contest their rights. This more expansive vision of constitutionalism goes hand in hand with a less exalted place for judges; they are not to be seen as a priestly caste with privileged access to a holy document.62

McLachlin J. amplified her vision of the Charter by arguing that if Parliament conferred a general authority on a tribunal to interpret the law, but expressed no intent to exclude Charter issues, it would be an act of “judicial fiat” to exclude them, that it was the Constitution Act, 1982 that stated that laws are invalid to the extent of their inconsistency with the Charter without making that statement turn on the “action of a particular court”, and that it was a “corollary” of the main line of reasoning in the trilogy that “no express term conferring upon the tribunal the power to entertain constitutional questions is required for the tribunal to apply the Charter.”63

She then found that the Commission had been given authority to interpret the law. For example, the Canadian Human Rights Act gave it authority “to consider suggestions and requests on human rights and report to Parliament on the advisability of changes”, which meant that it had the “power to interpret and consider the validity of the laws Parliament has already put in place.”64 She said that if the Commission could not be forbidden to interpret the law in discharge of its duties in relation to

62. I have already suggested, and will argue again below, that courts, if they are to complete this democratic vision, must rethink their understanding of correctness review. In Cooper, supra, note 1, McLachlin J. was silent about the possible consequences of this thought for the issue of standard of review. But there is no doubt that if pushed, she would have affirmed the correctness standard. See the majority’s judgment, L’Heureux-Dubé J. dissenting, in Trinity Western University v. British Columbia College of Teachers, supra note 44.

63. Cooper, supra note 1 at paras. 81, 83, 89.

64. Ibid. at para. 95.
complaints if it was required to interpret the law for other purposes.\textsuperscript{65}

Finally, after noting that it was clear that the tribunal had the same power, she said that it could not be the case that the tribunal was permitted to consider questions of law which its “gatekeeper” could not, for then the Constitution would be used by the respondents as a “shield, while rendering it impossible for complainants to challenge the validity of statutory defences.”\textsuperscript{66}

It is clear from the tone of McLachlin J.’s dissent that she regarded the majority’s and Lamer C.J.’s judgments as not very different in substance, since in her view La Forest J.’s judgment subverted entirely the spirit of the trilogy. It is not often one will find one judge accusing others of bringing about “illogical, unjust and inconvenient” effects\textsuperscript{67}; and the practical problems which La Forest J. suggested attend a finding that the human rights tribunal had section 52 authority were all problems that militated against granting any tribunal such authority.

One cannot justify the majority’s judgment in Cooper by saying that human rights tribunals constitute an exception to the trilogy. The formal vision of constitutionalism which excludes all tribunals from interpreting section 52 is also, as La Forest J.’s judgment in Mossop suggests, at odds with CUPE’s departure from the rigid doctrine of the separation of powers.

Further, what would prevent the Supreme Court from adopting the following line of argument, and indeed why is it not required by the logic of Cooper? Since guardianship of fundamental values could be argued to be one of the functions of a superior court in 1867, the very establishment of human rights tribunals is constitutionally suspect, as the tribunals are given a function that should be exclusively reserved to superior courts. To adopt such an argument would of course not only put the Court into direct confrontation with both provincial and the federal legislatures, but would make it look like an opponent of the realization of

\begin{footnotesize}
\textsuperscript{65} Ibid. at paras. 98, 101.
\textsuperscript{66} Ibid. at para. 102.
\textsuperscript{67} Ibid. at para. 70.
\end{footnotesize}
human rights. However, my point is that the formal vision might well seem logically to support this argument or, at any rate, it cannot explain why the argument stops where it does in cutting human rights tribunals down to size. Indeed, one of the Supreme Court decisions that is principally responsible for reviving the idea of the common law Constitution shows that the formal vision is inherently unstable.

68. Note that in his judgment for the Court in Pushpanathan v. Canada (Minister of Citizenship and Immigration), [1998] 1 S.C.R. 982, Bastarache J. said that interpretation of the human rights provisions in the enabling statutes of human rights tribunals was at the “core” of their expertise, he approved L’Heureux-Dubé J.’s argument in Mossop that the more general the legal authority given to a tribunal, the more judicial deference is warranted, and he suggested that the question of the standard of review for such tribunals was not closed by Mossop. Moreover, while he was adamant that the correctness standard had to be retained for review of certain decisions, he relegated the status of the idea of jurisdiction to that of an after the fact label.

Some provisions within the same Act may require greater curial deference than others, depending on the factors which will be described in more detail below. To this extent, it is still appropriate and helpful to speak of “jurisdictional questions” which must be answered correctly by the tribunal in order to be acting intra vires. But it should be understood 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. In other words, “jurisdictional error” is simply an error on an issue with respect to which, according to the outcome of the pragmatic and functional analysis, the tribunal must make a correct interpretation and to which no deference will be shown. Ibid. at para. 28.

(Cory and Major JJ. dissented, but not on the issue of standard.)

Other judges are also engaged in the attempt to keep the standard of review question open. Most notably, in a decision of the Trial Division of the Federal Court, Attorney General of Canada v. Public Service Alliance of Canada, [2000] 1 F.C. 146 at paras. 73-84, Evans J. stated that the correctness standard had been established by Mossop, but he suggested — relying on CUPE and Pushpanathan — that there was still a class of interpretations of principles in the enabling statute that were more within a tribunal’s expertise than a court’s. In addition, at para. 100, he relied on exactly the interpretative “living tree” methodology adopted by L’Heureux-Dubé J. in Mossop, though without citing her dissent. And he found, at para. 89, that while he could “give no deference to the Tribunal’s views on the interpretation of the legislation, this does not mean that I should be unwilling to be educated by their reasons for decision”.

D. Dyzenhaus
E. The Instability of the Formal Vision

The Provincial Judges Reference dealt with a number of issues surrounding the independence of provincially appointed judges, who were not protected by section 96 of the Constitution Act, 1867, and who could only claim protection under section 11(d) of the Charter in so far as they exercised jurisdiction in relation to offences. Lamer C.J. for the majority determined the issues on the basis of section 11(d), and his lengthy discussion of the common law of judicial independence is obiter. That discussion, however, attracted the concurrence of five judges, as well as an express reservation by La Forest J., who also dissented in part on some of the substantive findings. In addition, that discussion formed part of the basis of the Court's judgment in the Secession Reference, so it has a good claim to be the present view of the Court. If that assumption is correct, then the status of Lamer C.J.'s minority judgment in Cooper is problematic. He clearly understood it to be part of a seamless whole with his judgment in Provincial Judges Reference, as he at many points wove his reasoning in Cooper into the fabric of the majority decision in Provincial Judges Reference. Uniting most of these points is his claim that the independence of the judiciary is "definitional to the Canadian understanding of constitutionalism" and that such independence "reflects a deeper commitment to the separation of powers".

Judicial independence is at root an unwritten constitutional principle, in the sense that it is exterior to the particular sections of the Constitution Acts. The

69. As La Forest J. noted, "[if] the Chief Justice's discussion were of a merely marginal nature - a side-wind so to speak - I would abstain from commenting on it. After all, it is technically only obiter dicta. Nevertheless, in light of the importance that will necessarily be attached to his lengthy and sustained exegesis, I feel compelled to express my view." Supra note 4 at para. 302.

70. Lamer C.J. discusses the "internal architecture" of the Constitution of which the unwritten, underlying principles, including judicial independence and the rule of law, are its "lifeblood" and are clearly implicit in the very nature of a Constitution. Ibid. at paras. 49-54.

71. See e.g. ibid. at paras. 93, 108, 124, 319.

72. Ibid. at para. 108, 125, referring to Cooper, supra note 1 at paras. 11, 13.
existence of that principle, whose origins can be traced to the Act of Settlement of 1701, is recognized and affirmed by the preamble to the Constitution Act, 1867. The specific provisions of the Constitution Acts, 1867 to 1982, merely “elaborate that principle in the institutional apparatus which they create or contemplate”: Switzman v. Elbling [1957] S.C.R. 285, at p. 306, per Rand J. 73

He went on to say that the interpretation of sections 96 and 100 “has come a long way from what those provisions actually say” and that the only way to explain this phenomenon is “by reference to a deeper set of unwritten understandings which are not found on the face of the document itself.” 74 On a cautionary note, he stated that there were reasons to prefer a written constitution over an unwritten one, such as “the promotion of legal certainty and through it the legitimacy of judicial review”, because it is “of the utmost importance to articulate what the written source of those unwritten norms is”. 75 This he found in the preamble of the Constitution Act, 1867, which, again quoting from Rand J., he said articulates “the political theory which the Act embodies”. 76 This theory, he found, includes the ideas of the rule of law, of constitutional democracy, and of judicial independence. 77

The relevant sentence of the preamble says simply that the Constitution Act, 1867 is “similar in Principle to that of the United Kingdom.” 78 But Lamer C.J. said, “[t]he preamble identifies the organising principles of the Constitution Act, 1867, and invites the courts to turn those principles into the premises of a constitutional argument that culminates in the filling of gaps in the express terms of the constitutional text.” 79 Thus he acknowledged that the appeal to “written source” is of little help

73. Ibid. at para. 83 [emphasis in the original].
74. Ibid. at para. 89 [emphasis in the original].
75. Ibid. at para. 93.
76. Ibid. at para. 95.
77. Ibid. at paras. 96-108. In support of the claim about constitutional democracy, he cited at para. 100 Rand J.’s judgment in Saumur v. City of Quebec [1953] 2 S.C.R. 299 at 330.
78. See Preamble, supra note 13.
when that source is then taken to stand for large unwritten principles. In conclusion to this part of his judgment he stated “[j]udicial independence is an unwritten norm, recognized and affirmed by the preamble to the Constitution Act, 1867.”

In his partial dissent, La Forest J. took the formalist anxiety about the legitimacy of judicial review in the absence of “express written authority” to its logical conclusion. “The consequence of parliamentary supremacy”, he said, is that “judicial review of legislation is not possible”. Such review is legitimate only when it “involves the interpretation of an authoritative constitutional instrument.” Its legitimacy is “imperiled ... when courts attempt to limit the power of legislatures without recourse to express textual authority.” Thus, while he left open the question whether the theory of an “implied bill of rights” permitted judges to limit a supreme parliament, he rejected the idea outright that the preamble to the Constitution Act, 1867 “contains implicit protection for judicial independence”. In his view, the express provisions of the Constitution should not be seen as elaborations of unwritten principles to be found in the Preamble “On the contrary, they are the Constitution. To assert otherwise is to subvert the democratic foundation of judicial review.”

This division between Lamer C.J. and La Forest J. illustrates the point that the formal vision has to resist disruption at some point

80. Ibid. at para. 109.
81. Ibid. at para. 309.
82. Ibid. at para. 315.
83. Ibid. at para. 316.
84. Ibid. at para. 318.
85. Ibid. at para. 319. La Forest J. stated that the Constitution provided sufficient protection for judicial independence through section 96, for superior courts, and through section 11(d), for all courts exercising criminal jurisdiction. Should these provisions be found wanting, it is possible that protection for the independence for courts charged with determining the constitutionality of government action inheres in s. 24(1) of the Charter and section 52 of the Constitution Act, 1982. It could be argued that the efficacy of those provisions, which empower courts to grant remedies for Charter violations and strike down unconstitutional laws, respectively, depends upon the existence of an independent and impartial adjudicator. Ibid. at para. 325.
if it is not to become incoherent. La Forest J. wished to avoid asserting a common law bill of rights as the basis for the legitimacy of judicial review. That assertion in itself was anti-democratic, on his view, and so statutory or constitutional text was all-important. He thus asserted the orthodox position of English judges: the claim that judicial review is legitimate only when it can be represented as implementing the intention of the legislature.

The result for judicial review of administrative action is the ultra vires doctrine that courts act legitimately when they confine administrative agencies to the boundaries of the authority delegated to them by the legislature, the area of their jurisdiction. But that doctrine, with its plain meaning understanding of legislative intent, cannot justify review in the face of a privative clause, or even the imposition of the requirements of natural justice or fairness on administrative agencies.86

In addition, the formal vision does not give guidance once its rigid understanding of the separation of powers is disturbed. It asserts a monopoly on legislative authority for the legislature that requires judicial submission to clear statutory command and therefore the virtue of judicial independence is reduced to fidelity to the content of such command.87 When the command disturbs

87. See M. Shapiro, “Judicial Independence: The English Experience” (1977) 55 North Carolina L. Rev. 577. In this essay on judicial independence, Shapiro argued that in the seventeenth century English judges simply swapped masters, exchanging their dependence on the Crown for a dependence on Parliament. According to Shapiro, seventeenth and eighteenth century judges could claim they were independent only because they had built up a “substantial autonomy based on the institutional incapacities of Parliament and the marvelously impenetrable lump of lore-ridden common law, common lawyers and common law courts.” But by the nineteenth century, a more effective Parliament had broken up that lump, returning judges to “a faithful subordination”. In the twentieth century judges found themselves subordinated not only to Parliament, but to the “discipline of an administrative state”. Indeed, “[t]he process of both
the formal understanding of the separation of powers, it can offer no guidance, only *ad hoc* compromises that will differ from judge to judge. This arbitrariness explains why La Forest J., having found in the trilogy that tribunals are by a certain form of words commanded to apply section 52, could then backtrack to the extent that he did in *Cooper*.

Judges who adopt the formal vision will have different degrees of tolerance for the strain they are prepared to accept on disruption of its understanding of the separation of powers. Lamer C.J. had clearly reached the limits of his tolerance in *Cooper*. The question then arises for the judges as to what basis they will claim when they decide to make their stand against disruption. It is here that judges have to move beyond form to substance.

To some extent, the formal vision can rely on a claim about structural coherence: in order to maintain coherence, there must be some principle or set of principles that holds the components together, something exterior to the structure. But the principles have to be given substance from somewhere, and that is why the implied common law constitution comes into view.

For La Forest J., the substance provided by the unwritten bill of rights is at most the formalist's conception of democracy, by which he means the supremacy of the legislature, and thus judicial obedience to all legislative commands. For Lamer C.J., the substantive basis is there primarily to support the role for judges which his formal vision contemplates and it establishes judges as supreme over the legislature. The distinction between these two reflects the either/or mentality that has bedeviled attempts to justify judicial review, and the instability of the formal vision manifests itself in the way judges shuttle endlessly between the options of legislative and judicial supremacy.88

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88. Note that in *Cooper*, Lamer C.J. said that he agreed with La Forest J. that the Canadian Human Rights Commission had the authority to determine whether complaints fall “within federal jurisdiction according to the division of powers”. *Supra* note 1 at para. 20. He added, following his own judgment in *Mossop*, that if
La Forest J.'s option for the supremacy of the legislature leaves judges with no principled way of dealing with disruptions to the rigid doctrine of the separation of powers; however, at least there is space for the administrative state. Lamer C.J.'s option for judges as supreme has significant constitutional implications, as it is at odds with the judicial recognition since 1979 of the legitimacy of the administrative state. Indeed, it might well be at odds with sections 1 and 33 of the Charter, which give to legislatures a legitimate role - within section 1 - in justifying limits on Charter values and in using section 33 to override judicial determinations that a limit cannot be justified. Thus there is much to the view that the assertion of this substantive basis is part of a trend to Americanize the Canadian Constitution by introducing the understanding of the separation of powers dominant in the United States.

However, the most serious defect in the formal vision is that the principles in its substantive basis come into view only when disruption of the vision has stretched judicial tolerance to the breaking point, but they are then submerged, to resurface when necessary. Hence, the principles play no role in informing interpretation of the positive law.

A different understanding of the unwritten constitution emerges from Mark Walters' recent magisterial survey of the idea. He argues that the return to prominence of the idea of the unwritten

there is some ambiguity in a statute the tribunal is under a duty to interpret it in the manner most consistent with the values underlying the Charter; in this sense, there is a "general duty to interpret statutes in light of Charter values" Ibid. at para. 21.

89. See K. Roach, "Constitutional and Common Law Dialogues Between the Supreme Court and Canadian Legislatures", supra note 9, for an elaboration of how sections 1 and 33 fit within the democratic vision. Lorraine Weinrib's recent account of Canadian constitutionalism seems to me to be uncomfortably perched between the formal and the democratic visions, asserting with Lamer C.J. the formal understanding of the separation of powers while suggesting that the unwritten constitution infuses the legal order as a whole. See L. E. Weinrib, "The Supreme Court of Canada in the Age of Rights: Constitutional Democracy, The Rule of Law and Fundamental Rights Under Canada's Constitution" (2001) 80 Can. Bar Rev. 699.
constitution can be explained by the return of political conditions that make it appropriate to assert at one and the same time the supremacy of both the common law and parliament:

[T]he line between the functions of legislation and adjudication is blurring, and a sort of parliament-court conversation has developed about the fundamental principles that all legislation should respect. In other words, perhaps the conditions are right for the return of lex non scripta as justiciable fundamental law.\(^90\)

This argument is more in line with the democratic vision, since the plausibility of the idea of the common law constitution is said to be premised on a blurring of the divisions between the powers. Walters, in his concluding comments, suggests that the idea of a common law constitution is more about the protection of fundamental values and less about constitutional rules relating to institutional structure, including the separation of powers. Hence, unless a violation of such structure “also amounts to the violation of basic human rights,” structure should not be asserted as part of the unwritten constitution.\(^91\) In a similar vein, David Mullan has suggested that we should turn to Rand J.’s jurisprudence on the implied bill of rights to show how the Supreme Court’s “more recent pronouncements on underlying constitutional values intersect with the accepted policy of deference to the expertise and statutory mandate of not only tribunals but also discretionary decision-makers of all stripes.”\(^92\)

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91. Ibid. at 140-141. Note that in the Provincial Judges Reference, L. a Forest J. left open the question whether the “attractive” idea is legally sound that there is an unwritten constitutional protection of those rights - mainly freedom of expression - necessary to “safeguard the democratic accountability of Parliament”. His only objection was to the idea that there is an unwritten protection of judicial independence. Supra note 4 at para. 317.
It follows that tribunals are to be added to the participants in the conversation. This idea is demonstrated by L’Heureux-Dubé J.'s judgment in *Baker*, which shows that there is a need to drop OSC in favour of a new standard which even at its most intrusive is still deferential. Her judgment also shows the need for the interaction of that standard with the democratic vision of constitutionalism, the idea that the separation of powers is instrumental to the realisation of fundamental values.

**II. Democratic Constitutionalism**

The relevance of *Baker* to these issues may not seem immediately obvious. Recall that in *Baker* the dissenting judges were concerned not only that the majority’s judgment upset the “balance maintained by our Parliamentary tradition”, but also that it may “inadvertently grant the executive the power to bind citizens without the necessity of involving the legislative branch.”93 This concern is driven by the same rigid doctrine of the separation of powers that we saw in *Cooper*. However, the real constitutional issue in *Baker* is buried; it pertains to the use of the idea of the unwritten Constitution in the part of the judgment which did not attract any explicit dissent.

In 1995 the authors of the leading text on Canadian administrative law commented that even if one interprets *Crevier* so as to give it the broadest possible scope, “it would always be open to a legislature to reduce the incidence of judicial intervention by granting administrative agencies broader statutory discretionary powers.”94 *Baker* can then be seen as one more step along the section 96 constitutional path, because the Court as a whole imposed the discipline of the common law conception of the rule of law on a statutory grant of discretion, which in the past would have been regarded, as it was by the Federal Court of

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93. Supra note 3 at para. 80.
Appeal below, as “unfettered”, or subject to very minimal constraints. As L'Heureux-Dubé J. stated:

[Discretion must ... be exercised in a manner that is within a reasonable interpretation of the margin of manoeuvre contemplated by the legislature, in accordance with the principles of the rule of law (Roncarelli v. Duplessis, [1959] S.C.R. 121), in line with general principles of administrative law governing the exercise of discretion, and consistent with the Canadian Charter of Rights and Freedoms (Slaight Communications Inc. v. Davidson, [1989] 1 S.C.R. 1038).]

If Baker is seen in this light, one might be able to explain an initial puzzle about a resurgence of judicial interest in common law constitutionalism, well into the second decade of judicial experience of the Charter. Why should judges armed with the extensive firepower of the Charter wish to rediscover the common law Constitution? The puzzle may be solved if judges, who are comfortable with that power, have started to extend it into those areas of the legal order which are not directly affected by the Charter. In other words, the judiciary has now begun the process of constitutionalizing the legal order as a whole, including administrative law. There is then a combination of judicial supremacism – the formalist idea that judges are at the apex of the legal order as sole guardians of its fundamental values – with judicial imperialism – the idea that the judges should subject the legal order as a whole to the discipline of those values.

However, Baker’s contribution is a different solution – a democratic vision of constitutionalism made up of two central and intimately related ideas. First, Baker drops the idea of a judicial monopoly on interpretation of the law and hence deflects the charge of judicial supremacism. Second, Baker presupposes that the legal situation is not one in which the Charter is a deus ex machina that gives judges a license to subject legislatures to the discipline of fundamental constitutional values in cases that fall within the Charter’s scope, so that they can use that license as a platform to impose fundamental values in cases that fall outside

95. Supra note 3 at para. 53.
that scope. Rather, the Charter is understood as a document that makes more explicit the fundamental values that were already part of the common law Constitution — the legal order was subject to the reign of these values prior to the enactment of the Charter. Moreover, the Charter is best understood not only as an extension of the substantive values of the common law Constitution, but as continuing, through sections 1 and 33, the methodology of the common law Constitution, a methodology which does not entail the judicial monopoly on interpretation of the law.

A. A New Standard of Deference

In Baker, the issue between the judges was whether the Convention on the Rights of the Child,96 ratified by the Canadian government but not incorporated into law, had any legal effect on the question whether an individual subject to a deportation order should be granted an exemption on “humanitarian and compassionate grounds”.97 Article 3 of the Convention required that in “all actions concerning children”, including those of “administrative authorities”, the “best interests of the children shall be a primary consideration” and it seemed from an immigration official’s notes that the fact that Ms. Baker had Canadian born children counted against her.98 Two decisions of the Supreme Court were directly relevant here. In Capital Cities Communications Inc. v. Canadian Radio Television Commission,99 the Court had decided that in the absence of incorporation there could be no legal effect. In Slaight Communications Inc. v. Davidson,100 the Court had decided that when an administrative discretion affects rights and interests protected by the Charter, the discretion should be exercised in accordance with similar international human rights norms. In

97. Supra note 3 at para. 4.
98. Ibid.
100. [1989] 1 S.C.R. 1038 [hereinafter Slaight].
Slaight the convention in issue – the International Covenant on Economic, Social and Cultural Rights – was ratified but not incorporated.

Since the majority in Baker did not decide the matter on Charter grounds, the question for the Court was in part how to reconcile Capital Cities and Slaight with its judgment. The dissent took the view that the Court could properly consider the role of the Convention only if Ms. Baker’s claim fell within the “ambit of rights” protected by the Charter.101 The majority held that Capital Cities only prevented the “direct application” of the Convention “within Canadian law”, and that in general “the values reflected in international human rights law may help inform the contextual approach to statutory interpretation and judicial review”.102

There are three ways of reconciling the majority’s judgment in Baker with Capital Cities and Slaight. First, in Capital Cities, Laskin C.J. for the majority of the Court moved from the proposition that unincorporated conventions do not bind to the proposition that they have no effect.103 In Baker, L’Heureux-Dubé J. suggested that Capital Cities was authority only for the former proposition, and arguably only the former was at stake in that case, so the proposition that unincorporated conventions have no effect was obiter.

Second, in Slaight, Dickson C.J. affirmed the view he had expressed in an earlier decision that “the Charter should generally be presumed to provide protection at least as great as that afforded by similar provisions in international human rights documents which Canada has ratified”.104 Hence, one can argue that human rights conventions have a special status in contrast to the kind of convention that was at play in Capital Cities, which was concerned with a convention on radio communications.

101. Supra note 3 at para. 81.
102. Ibid. at paras. 69-70.
103. Supra note 99 at 172-173.
This second way of course has to cope with the dissenting judges’ point that *Baker* was not decided on *Charter* grounds, and that point then leads to one that seems to undermine the first way. It is only when judges are already operating in a realm where they have the explicit, legal authority of the *Charter* to test the validity of legislation that they should countenance giving either direct or indirect effect to ratified but unincorporated conventions. Put differently, the *Charter* has explicitly altered the “balance maintained by our Parliamentary tradition”, but judges have no authority to go beyond the explicit terms of that alteration. So the dissent seems driven by the very same vision of constitutionalism that we saw articulated by Lamer C.J. in *Cooper*, one which understands the *Charter* as an intrusion into the Canadian legal landscape which must be confined to the greatest extent possible – in the sense of not leaking into other areas of law – if it is not to undermine parliamentary democracy and the separation of powers.

The third way combines the first two and has significant constitutional implications. It regards the *Charter* along with the common law and international human rights instruments as sources of what L’Heureux-Dubé J. referred to as the “fundamental values” of Canadian society. The *Charter* is not an intrusion into the Canadian legal order. Rather, it is a much more explicit and novel statement of fundamental values, so it represents continuity rather than radical change. It is also significant in that the fundamental values infuse the legal order, so an exercise of official discretion that affects interests which fall within the scope of those values must be exercised reasonably – in a manner which can be adequately defended as an application of the relevant values.

106. As pointed out above, it is not that judges who adopt the formal vision must constrain the reach of the *Charter* within what they regard as its proper field of application. Indeed, the formal vision can permit both a very bold and a very restrained interpretation of *Charter* values.
107. In her restatement at para. 56 in *Baker*, supra note 3, of the constraints on discretion, first set out in para. 53.
The majority’s position requires one to see that whatever Laskin J. thought at the time of Capital Cities, his conclusion that unincorporated conventions had no legal effect was *obiter* because he could not foresee how the legal landscape was to change. At the time that case was decided, the Court was working with an all-or-nothing view of legal authority, and could not conceive of a legal obligation short of one that dictated a solution.  

L’Heureux-Dubé J., in contrast, contemplates a kind of obligation whose force is that it has to be a factor in the reasoning of the legal authority’s decision if that decision is to be regarded as authoritative. And depending on a range of factors in a given context, in particular the nature of the interest affected by the decision, the obligation will be more or less weighty, and the delegate will have to show that it figured in her decision in the right kind of way. But the issue for a reviewing court is not whether it would have performed the exercise in the same way, but whether the way the delegate performed the exercise was adequate to justify the decision. L’Heureux-Dubé J.’s finding in *Baker* of a general duty on administrative decision makers to give reasons when the decisions affect important interests of the individual is thus intimately related to her understanding of both the relationship between courts and the administrative state and of the kinds of values that must inform the officials of that state.

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108. The judicial inability to grasp this understanding of obligation persists: See e.g. Nadon J.’s judgment in *Legault v. Canada (Minister of Citizenship and Immigration)*, [2001] 3 F.C. 277 (T.D.), arguing that *Baker* has to be understood substantively, as requiring review on the merits, rather than procedurally. Indeed, the Supreme Court’s own difficulties in dealing with the idea of obligation that transcends the process/substance distinction are graphically illustrated by the judgments in *Mount Sinai Hospital Centre v. Quebec (Minister of Health and Social Services)*, [2001] S.C.J. No. 43; 2001 SCC 41. Perhaps one of the reasons for the Supreme Court having opted in *Baker* to decide the case in accordance with the common law of judicial review rather than on *Charter* grounds is that the latter course would have required the imposition of a correctness standard. As my argument suggests, it might be time for the Court to reconsider its understanding of the correctness standard, even when the issue is the interpretation of the *Charter*. See also my discussion of Lambert J.A.’s recent observations on the correctness standard, *supra* note 46.
The measure of performance is not the decision, taken by itself, but whether the reasons given by the delegate adequately justify that decision.\textsuperscript{109} The potential of the shift in focus, from decision to reasons for decision, has not been fully realized in Canadian administrative law because of two conflicting judicial attitudes which lead to the same result. To appreciate both, we have to go back to the change brought about by \textit{CUPE}.

Dickson J.'s judgment in \textit{CUPE} was understood as giving rise to two standards for review: correctness for jurisdictional issues and patent unreasonableness for issues that fell within jurisdiction. He preserved formalism for what we can call, following \textit{Crevier}, constitution-like issues while introducing a new standard for the rest. The category of the rest, however, was highly amorphous. It was unclear whether it included the common law or a statute other than the tribunal’s constitutive statute. In addition, it was very unclear what the application of the patent unreasonableness standard involved. Some of the judges who are closely associated with the attempt to be true to the spirit of \textit{CUPE} believed that judges, if they were to be properly deferential to tribunals, should avoid too close an evaluation of the tribunal’s reasoning.\textsuperscript{110} This left them with something like Oliver Wendell Holmes’s criterion for review: if the decision makes you want to “puke”, review it, but otherwise not.

\textsuperscript{109} For a similar view, see R. P. Kerans on the demonstration of expertise in \textit{Standards of Review Employed by Appellate Courts} (Edmonton: Juriliber, 1994) at 17 cited by Iacobucci J. in \textit{Canada (Director of Investigation and Research, Competition Act) v. Southam}, [1997] 1 S.C.R. 748 at para. 62:

Experts, in our society, are called that precisely because they can arrive at well-informed and rational conclusions. If that is so, they should be able to explain, to a fair-minded but less well-informed observer, the reasons for their conclusions. If they cannot, they are not very expert. If something is worth knowing and relying upon, it is worth telling. Expertise commands deference only when the expert is coherent. Expertise loses a right to deference when it is not defensible. That said, it seems obvious that [appellate courts] manifestly must give great weight to cogent views thus articulated. [Emphasis added].

A set of related difficulties attends such a criterion. First, even when more politely worded, it cannot be publicly articulated, since it describes a reaction and not a reflective response. Moreover, when that reaction is warranted it will appear ad hoc if the judges feel required to go out of their way to avoid appearing to evaluate the reasons for decision. Second, since some issues demand more than the “puke” test (for example, when constitutional or quasi-constitutional interests are at stake), the correctness standard or OSC is preserved for that class. However, both because that class is amorphous, and because any interpretation of the law is susceptible to classification as jurisdictional, the class is highly vulnerable to judicial expansion, as the story of judicial discipline of human rights tribunals illustrates. The criterion’s utility depends, as Dickson J. recognized in CUPE, on judges accepting that they should be reluctant to expand the class.111

Finally, the criterion and its companion in the correctness standard are innately resistant to a standard in between correctness and patent unreasonableness. A reasonableness standard demands evaluation of the reasons – a “somewhat probing examination” – as Iacobucci J. put it in the decision in which this standard was first properly articulated.112 Since that standard is on a continuum between patent unreasonableness and correctness, its adoption entails that the patent unreasonableness standard also requires evaluation of the reasons, albeit less probing. It is therefore difficult to distinguish between patent unreasonableness and reasonableness. Further, if reasonableness review should be more intrusive when the interest affected by the decision is constitutional or quasi-constitutional than when the interest is an economic interest (for example, the interest in fair competition), it becomes difficult to distinguish reasonableness review at its most intrusive from the correctness standard. Patent unreasonableness review shades into “reasonableness simpliciter”

111. CUPE, supra note 7 at 233.
112. Southam, supra note 109 at para. 56.
review, which then shades into OSC, if OSC is in fact the extreme point at one end of the continuum of standards of review.

The first judicial attitude that gets in the way of realizing CUPE's potential is one that wishes to avoid judges getting involved in any kind of evaluative exercise that risks shading into imposition of a correctness standard. That attitude requires preserving a poorly corralled OSC standard. It admonishes judges not to be too quick to brand issues as jurisdictional, but relies on the dubious distinction between jurisdictional and other issues. In this sense it preserves the risk of subverting itself.  

The other judicial attitude reacts in fright to the full implications of developing the jurisprudence of CUPE, a development which puts flesh on the central idea that judges should recognize the legitimacy of the administrative state. Fright arises when judges sense that a shift in focus from decision to reasons for decision shears the correctness standard off the continuum of review. In other words, they see that even the most probing evaluation is to some extent deferential, since they should operate with a presumption that the reasons offered by the tribunal for its decision could justify a decision, which is not necessarily the decision that the court would have reached had it operated in a vacuum. As La Forest J. suggests in the trilogy, filling the vacuum is not desirable because of some natural abhorrence. Rather, the very idea that without the tribunal's decision the court would be operating in a vacuum requires judges first to suppose that the tribunal is expert when it comes to interpretation of the law in its own specialized context. If that is true, then there is no correctness or OSC review, whether tribunals are engaged in constitution-like or constitutional interpretation It is just this standard that McLachlin and Cory JJ. must have applied in their dissents in Mossop.

113. This risk of subversion is dramatically illustrated by Iacobucci J.'s judgment in Southam, ibid. at paras. 35-37 suggesting that the more general the proposition of law for which a tribunal's decision stands, the less deference a reviewing court should give. That would add to the Crevier list of constitution-like issues precisely the kinds of interpretative issues which in CUPE were said to be at the core of the tribunal's jurisdiction.
That idea does not so much strain the formal vision of constitutionalism as shatter it; hence the idea is beyond the limits of what formalist judges are prepared to tolerate. When they reassert correctness as a signal that they have reached the limits of tolerance, they also assert OSC. They thus reassert a vision of constitutionalism that undermines the judicial attempt to craft a theory of review that recognizes the legitimacy of the administrative state.

The irony is that the judicial attitude that preserves "correctness" as a standard because the dichotomy correctness/patent unreasonableness is thought necessary to maintain a high level of judicial deference on most questions, also preserves OSC. And to preserve OSC is to preserve the standard that is the hallmark of the formal vision of constitutionalism and thus the place of that vision in the legal order.

The effects of this preservation go well beyond Cooper. Most notably they are found in the jurisprudence in respect of Nicholson - CUPE's companion decision of 1979 and the other antecedent to Baker which signaled judicial acceptance of the legitimacy of the administrative state.114 Nicholson signaled such legitimacy by imposing a duty of fairness on administrative decision-making which had previously been thought to attach only to a mysterious "quasi-judicial" category of decisions. Now the imposition of such a duty might seem far from the deferential message of CUPE. But the thought that the administrative state is not lawless but subject to the rule of law, including the legal value of fairness, is a thought that includes the administrative state in the legal order in a way antithetical to the formal vision. The thought entails that bodies that are not courts must make decisions in accordance with values that were previously thought to apply only to courts or court-like - "quasi-judicial" - bodies. Moreover, Nicholson held that the content of fairness will vary according to context, and implied that the administrative decision-

114. As suggested in supra note 46, another site where these issues crop up has to do with the question of when it is appropriate for a tribunal to defend its decisions before a reviewing court.
maker is the body best equipped to judge what is appropriate to context. CUPE-style deference to tribunals' judgments on appropriate procedure seemed to be in the cards.

However, the prevailing trend is that courts will no more defer to a tribunal's procedural judgment than they will to its constitution-like or constitutional judgments. The very idea that the value of fairness is a fundamental value of the legal order, so that it is constitution-like, in the light of Crevier, Mossop and Cooper must have the result that judges should impose a correctness standard when reviewing a tribunal's interpretation of what fairness requires. Thus the judge who first explicitly argued that the way to understand Nicholson is in terms of a judicial recognition of fairness as a "freestanding", constitution-like value sowed the seeds for judicial imposition of a correctness standard.

Since that judge was L'Heureux-Dubé J., one should infer that these seeds were not deliberately sown. Further, in Baker she said that "important weight must be given to the choice of procedures made by the agency itself and its institutional constraints", thus affirming – against the general trend of the Supreme Court – that deference is appropriate even on constitution-like issues.

My earlier claim that the Court is now torn between two visions of constitutionalism rests in part on the fact that this dictum of L'Heureux-Dubé J.'s occurs in the section of her judgment in Baker which did not attract any dissent. For the dictum is consistent with her own and McLachlin J.'s dissents in Mossop, and with her own dissent in Cooper. But my claim that the merit of the dissents in Mossop and Cooper is presupposed by the majority's judgment in Baker rests on more than the dictum on deference to procedural determinations. The claim rests on an understanding of the rule of law as meaning the rule of the fundamental values or principles of the legal order.

115. See Paccar, supra note 46 at para. 38.
117. Baker, supra note 3 at para. 27.
B. The Rule of Law as the Rule of Fundamental Values

The general view of the rule of law as the rule of fundamental values which documents like the Charter articulate without exhausting — the idea that there is a substantive common law Constitution — underpins the whole of L'Heureux-Dubé J.'s judgment. Conversely, the objection put by the dissent to reliance on an unincorporated human rights convention in a non-Charter context presupposes the formal vision of constitutionalism, and thus applies with as much if not more force to the Court's holding that there is a common law duty to give reasons and that the exercise of discretion had to be reasonable.

The democratic vision is primarily about the rule of law as the rule of fundamental values, so that the question of the institutional realization of those values is a pragmatic one, which does not demand anything like a rigid doctrine of the separation of powers. In contrast, the formal vision is primarily about the separation of powers, where judges are given exclusive jurisdiction over interpretation of the law. It is asserted when judges feel that their position in legal order is threatened, rather than when fundamental values are under threat. This may explain why the courts have been so wary of human rights commissions, and have been constantly ready to cut them down to a judicially approved size. It is precisely the fact that human rights commissions were put in place in order to realize such values, thus delegating interpretative authority over fundamental values to a "mere creature of the legislature," that leads to judicial jealousy.

It is perhaps possible to design a legal order in a way that respects a rigid doctrine of the separation of powers and to deal with the administrative state by establishing a separate system of both the law that governs the administration and the tribunals

118. See supra note 8.
119. Lamer C.J. in Cooper, supra note 1 at para. 13.
120. See supra note 24, for analysis both of this phenomenon and of its implications for review of procedural fairness.
that interpret that law. And there is perhaps no structural reason why this kind of administrative state should be less constrained by rule of law values than any other.

But there is surely something to the idea of the common law tradition that those who wield public power are subject to the general order of rule of law values that are considered to be the fundamental or constitutional values of the society. Any attempt to elaborate this idea has to take into account that it has been used to thwart the administrative state in ways that have justified charging judges with being either mainly concerned with preserving their sense of place in the legal order or with being determined to obstruct progressive social change. Indeed, often judges want to preserve their place in the legal order to resist such change. But the distance between the democratic vision and either judicial imperialism or judicial supremacism, or a combination of the two, is established by the practice of reason-giving – of justification in terms of the application of the values to the particular problem – and by a focus by the reviewing court on reasons for the decision, rather than on the decision in itself.

To go back to the sketch of the vision in the dissent in Cooper, as McLachlin J. wrote in the second epigraph to this article, the values of the Charter (and by inference any other constitution-like values) are not a “holy grail which only judicial initiates of the superior courts may touch”. The corollary of L’Heureux-Dubé J.’s dissent in Mosop, together with her judgment in Baker, is that the legitimate role of tribunals in the interpretation of fundamental values requires that deference is due to those interpretations, when they are adequately justified by reasons.¹²¹

¹²¹ Indeed, it seems appropriate to understand Baker as at least to some extent rendering Slaight, supra note 100, obsolete. Dickson C.J. held that if Charter-protected interests are at stake, one should first deal with the issue of the justification of the decision under section 1 of the Charter, because administrative law will never impose a higher threshold than the Charter imposes. He also held that the section 1 analysis presented a much better articulated process than had been developed by judges in the common law of judicial review. But it must be kept in mind that at that time the Supreme Court had not yet gone beyond the dichotomy of either correctness or patent unreasonableness, and Dickson C.J.
Moreover, those fundamental values are to be seen as the interpretive backdrop of the administrative state, against which its statutes must be interpreted, rather than as potential sources for resolving ambiguity.

No one will deny that statutory provisions can be ambiguous in the sense of being susceptible to two or more interpretations, for the simple reason that no matter how precise we try to be in our communications, it is a feature of language that ambiguity is unavoidable. As Thomas Hobbes pointed out in 1651, the more language one uses in an attempt to attain precision, the more one multiplies the occasions for ambiguity. But much more interesting from the perspective of administrative law is deliberate ambiguity, or better put, the deliberate use of open-textured language by the legislature in order to permit its interpretative delegates to develop the law in accordance with their expert understanding of how it is best applied to particular circumstances, including circumstances that could not have been anticipated or which have simply changed over time. Since a change in circumstances can render unclear what at one time seemed clear, no hard and fast distinction can be drawn between deliberate and inadvertent open-texturedness.

was clearly troubled by the idea that the standard of patent unreasonableness is not intrusive enough when Charter interests are at stake. Baker might then make Slaight obsolete both because it requires the more articulate process of justification lacking at the time of Slaight and because it brings to the fore a flexible reasonableness standard. If that is right, then there is something to the argument about the relationship between administrative law and the Charter put by LeBel J. in his partial dissent to Blencoe v. British Columbia (Human Rights Commission), [2000] 2 S.C.R. 307. See, e.g., his statement regarding s. 7 and administrative law:

Assuming that the Charter must solve every legal problem would be a recipe for freezing and sterilizing the natural and necessary evolution of the common law and of the civil law in this country. In the present appeal, the absence of a Charter remedy does not mean that administrative law remedies could not have been identified and applied, as we have seen above. Ibid. at para 189.

Formalists do not deny that, as Hobbes put it, "All Laws, written and unwritten, have need of Interpretation."\[123\] They merely assert the claim of judges to have a monopoly on the determination of what the best interpretation is. They will divide on the issue of what makes an interpretation best. For some, judges have unique access to interpretation of the law. But then formalism ceases to be formal – it becomes rule by judges. For others, there is in fact no criterion of best other than the fact of the termination by judicial decision of what I called earlier normative free-fall: the judge’s decision constitutes anew the authority of law when the writ of law, on the formal conception of that writ, has run out. To adapt McLachlin J.’s description slightly, this difference within the formalist camp is between judges who believe that there is a “holy grail” of law and that they are its “initiates” and judges who believe that they are “initiates” even when the quest for the “holy grail” has come up empty.

In the democratic vision, the open textuedness of law does not present a problem – a kind of legitimacy crisis for judges. That crisis is in fact the product of the assumption, built into the rigid doctrine of the separation of powers, that the law of the legislature is a fully worked out product – as Lon L. Fuller put it, a “one-way projection of authority originating with government and imposing itself on the citizen”,\[124\] though one to whose content judges have privileged access. Instead, the determination of the content of law is viewed in terms of a relationship of reciprocity between legislature and subject, so that interpretative authority is shared between the institutions of the legal order, including the subject who as citizen contests the law within the domain of its application to him. Ultimately, judges might have the final say as to the best interpretation of the law. But if that is the case, the authority of their decisions is not constituted by the fact that they spoke, nor by their unique access to the law. Rather, it is because they have entered into the justificatory

\[123\] Ibid.
exercise of reason-giving that the democratic vision regards as an essential component of the rule of law.\textsuperscript{125} Further, the democratic vision does not require that judges have such a final say. It can be given to the legislature, as section 33 of the \textit{Charter} does, or to some specialized tribunal, such as an administrative appeals tribunal over which the superior courts have minimal or no jurisdiction. What matters most for the democratic vision is that the reason-giving practices of law are given institutional expression rather than any particular model.\textsuperscript{126}

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\textsuperscript{125} This exercise is well illustrated by the Ontario Court of Appeal’s decision in \textit{Lalonde v. Ontario (Commission de restructuration des services de santé)}, [2001] O.J. No. 4767. Here the Court followed \textit{Baker} and found that the Commission’s decision to reduce substantially the services of the only French-language hospital in Ontario was invalid, in part because the decision did not take into account relevant unwritten constitutional values, namely the principle of respect for minorities, which the \textit{Secession Reference} had stated to be one of the norms of Canadian society. See especially paras. 180-187. The fact that the Court suggested that it would have deferred to a decision of the Commission that made a genuine attempt to understand the impact of its decision on constitutional values shows both that it understands those values as infusing legal order and that agencies have authority — indeed a duty — to interpret such values. Note that in para. 186, the Court said that because the Commission had failed utterly to deal with these issues, it did not have to consider the issue of standard of review, as the Commission’s decision failed even on the most deferential standard. However, the Court did say that where “constitutional and quasi-constitutional rights or values are concerned, correctness or reasonableness will often be the appropriate standard”. This dictum suggests a significant departure from the formalist view that correctness or OSC is always appropriate.

\textsuperscript{126} The fact that section 33 is rarely used does not undermine its significance. To use it is to override the fact that, in the nature of things, government lawyers have already failed to convince a court that there are reasons under section 1 to justify a departure from fundamental values. That override will then have to be justified in the arena of politics and then rejustified to an electorate that seems to have become committed to the \textit{Charter} and its structure, or else the override would not have to surmount such a high threshold.
\end{flushright}
Conclusion

It is very significant that in *Baker* the person who received the protection of the rule of law was a highly vulnerable “overstayer” in Canada, someone whose continued residence in Canada depended entirely on whether an official would decide to make an exception for her on “humanitarian and compassionate grounds”. In order for her to obtain the protection of the rule of law, the Court had to consider her not as someone in a virtually lawless void – at the mercy of the state – but as an individual entitled to treatment in accordance with the values that Canadians regard as constitutional – as constitutive of public order. This shows that the common law Constitution provides protection even when there is no explicit or positive source for such protection, at the same time as our understanding of its content is influenced by positive sources, most notably the *Charter*.

The administrative state is not thwarted or delegitimated by being required to act as a rule-of-law state. Rather, it is regarded as fit to be held to the high standards of the rule of law, and indeed, because it is a public actor, to higher standards than private actors. These standards might require expensive education and training, and they certainly require a debate – which has already started – about the appropriate conditions of independence of members of tribunals.127 That debate cannot be confined to tribunals, since a

127. See the Ontario Court of Appeal’s recent decision in *Canadian Union of Public Employees et al. v. Minister of Labour for Ontario* (2001), 194 D.L.R. (4th) 265. The Supreme Court has now emphatically stated that courts should not use the criteria of common law constitutionalism for judicial independence to override legislatively determined criteria for tribunal independence: see *Ocean Port Hotel Ltd. v. British Columbia (General Manager, Liquor Control and Licensing Branch)* (2001), 204 D.L.R. (4th) 33. See also K.M. Wyman, “The Independence of Administrative Tribunals in an Era of Ever Expansive Judicial Independence” (1991) 14 Can. J. Admin. L. & Prac. 61. However, McLachlin C.J.’s judgment for the Court seems to leave open the possibility that things might be different if the tribunal’s proceedings engage a *Charter* right under ss. 7 or 11(d) – see para. 29. The problem here is that her reasoning reproduces the same kind of dichotomy demonstrated by the majority judgments in *Mossop* and *Cooper* and so it might be at odds with her own dissent in the latter case.

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reconsideration of the values of the rule of law and of the best understanding of the separation of powers must extend to a reconsideration of the substance of the idea of judicial independence. But however that debate might turn out, it will be most fruitfully conducted once framed by the democratic vision of constitutionalism.

Postscript

After this article was completed, the Supreme Court of Canada handed down its decision in Suresh v. Canada (Minister of Citizenship and Immigration).128 Suresh was eagerly awaited because of its potential to clarify Baker, as it dealt with review of ministerial discretion in regard to national security, and common law courts have traditionally given the executive an unfettered discretion in such matters. If there is any acid test for a judiciary’s commitment to a common law Constitution, it is the willingness of judges to find that the rule of law has to be observed even when the executive claims that its determinations of security justify violations of the liberty of the subject or of other fundamental values. The events of September 11, 2001 made the legal community even more eager, since it was correctly anticipated that the Court might use the decision as an occasion to reflect on the impact of those events on the Canadian legal order.

The review was of the Minister of Immigration’s decision to deport a Convention refugee when he had been determined to be a danger to the security of Canada because of his membership in a terrorist organization, despite the fact that he faced a substantial risk of torture on his return to his native country of Sri Lanka.

128. [2002] S.C.J. No. 3, online: QL (SC)); 2002 S.C.C. 1 [hereinafter Suresh]. I am indebted here to discussion of this decision with Mike Taggart during our course on the “Internationalization of Domestic Law,” offered as an intensive graduate course by the University of Auckland Faculty of Law in February, 2002. The students, all government lawyers, helped immensely in our attempts to come to grips with this decision. I find it disquieting, given their experience, that they agreed on the pessimistic understanding of the effects of the decision.
Section 53(1) of the Immigration Act provided that no person determined to be a Convention refugee or eligible for such determination shall be removed from Canada to a country where the person's life or freedom would be threatened for reasons of race, religion, nationality, membership in a particular social group or political opinion unless...(b) the person is a member of an inadmissible class...and the Minister is of the opinion that the person constitutes a danger to the security of Canada.\textsuperscript{129}

The Court took the relatively rare step of speaking in one impersonal voice in order to affirm its commitment. While it stated its recognition of the legitimacy of a new legislative response to terrorism, it also said:

\begin{quote}
\[\text{It would be a Pyrrhic victory if terrorism were defeated at the cost of sacrificing our commitment to those values ... values that are fundamental to our democratic society - liberty, the rule of law, and the principles of fundamental justice - values that lie at the heart of our Canadian constitutional order and the international instruments that Canada has signed/.}\textsuperscript{130}
\end{quote}

While it rejected arguments that the terms "danger to the security of Canada" and "terrorism" are unconstitutionally vague and that sections of the Immigration Act violated Charter guarantees of free expression and association, it found "that to deport a refugee to face a substantial risk of torture would generally violate section 7 of the Charter. The Minister must exercise her discretion to deport under the Immigration Act accordingly."\textsuperscript{131} In this regard, the Court took account of the international perspective that various unincorporated international instruments offered on the principles of section 7.\textsuperscript{132}

\textsuperscript{129} R.S.C. 1985, c. 1-2 ss.53(1)(b),(c).
\textsuperscript{130} Suresh, supra note 128 at para. 4.
\textsuperscript{131} Ibid. at para. 5.
\textsuperscript{132} Ibid. at paras. 59-75, especially at para. 60. However, the Court departs from both Slaight and the majority in Baker in its avoidance of the idea in Slaight that the Charter should be presumed to give at least as much weight to its values as is accorded to similar values in human rights conventions.
Since Suresh had “made a prima facie case to show a substantial risk of torture if deported”, his hearing did not “provide the procedural safeguards required to protect his right not to be expelled to a risk of torture or death”, and his case was thus remanded to the Minister for reconsideration.\footnote{Suresh, supra note 128 at paras. 39-41.}

The decision represents a victory for the rule of law, though a mixed one. On the one hand, the Court signaled its advance approval of the Canadian’s government’s highly contestable claim that new legal tools are needed to combat terrorism, and strongly affirmed Baker’s jurisprudence on the courts’ procedural review jurisdiction.\footnote{Suresh, supra note 128 at paras. 34-35, 37. For the Federal Court of Appeal, see Baker v. Canada (Minister of Citizenship and Immigration) [1997] 2 F.C. 127.} On the other hand, the Court undermined Baker’s jurisprudence on substantive review, because the Court followed Lord Hoffman’s abject dictum in Secretary of State for the Home Department v. Rehman that September 11th underlined the need to give ministers an unfettered discretion when it comes to the determination of national security.\footnote{135. \cite{ibid.} at para. 62; Suresh, supra note 128 at para. 39.} The Court thus held, contrary to the majority’s reasoning in Baker, that L’Heureux-Dubé J. had left the issue of the weight to be accorded to the legally relevant factors entirely to the Minister. Suresh puts forward an understanding of weight and the role of the courts on review that is driven by the same formal understanding of the separation of powers expressed by Iacobucci J.’s dissent in Baker, as well as by Strayer J.A.’s judgment for the Federal Court of Appeal in the same case.\footnote{136. Suresh, ibid. at paras. 34-35, 37. For the Federal Court of Appeal, see \cite{Baker} at para. 33.}

The Court did hold that the Minister’s decision was still reviewable on the continuum of standards developed in the wake of CUPE. But it suggested strongly that the fact that the review was of discretion automatically required the application of the patent unreasonableness standard.\footnote{137. Suresh, supra note 128 at paras. 39-41.} Since Baker required a reasonableness standard despite the fact that the interest affected

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135. \cite{ibid.} 3 W.L.R. 877 at para. 62; Suresh, supra note 128 at para. 33.
137. Suresh, \textit{supra} note 128 at paras. 39-41.
by the decision was not a Charter protected interest, it should have followed that the standard in Suresh would be at least as intrusive. It is also contrary to the post-CUPE jurisprudence on the need for a pragmatic and functional test to hold that the mere fact that a decision is categorized as discretionary automatically requires a particular standard. Suresh largely pays lip service to Baker on review of substance, since it diminishes scrutiny of substance to a check list of factors which the minister has to take into account, and it restores in all but name the distinction between review of administrative interpretation of the law and review of discretion.

However, in holding that once a person is determined to be a threat to security, the balance of considerations will “usually come down against expelling [the] person to face torture elsewhere”, the Court to some extent took with one hand what it had given with the other. In addition, the Court followed Baker in holding that the “greater the effect on the life of the individual by the decision, the greater the need for procedural protections to meet the common law duty of fairness and the requirements of fundamental justice under section 7 of the Charter.” While a full oral hearing was not required, Suresh was entitled to the material on which the decision would be based and to an opportunity to contest the government’s case against him. This opportunity includes the ability to argue that, despite association with a terrorist organization, the person’s continued presence in Canada “will not be detrimental to Canada” and to contest the basis for assurances given by the native country that it will not torture that person. In addition, the Minister has to provide reasons for her decision that “articulate and rationally sustain” her findings.

Finally, the Court rejected the government’s argument that a violation of Suresh’s procedural rights was justified as a reasonable limit under section 1 of the Charter. The fact that the purpose of combating terrorism provided a valid exception to section 53(1) of

138. Ibid. at para. 58.
139. Ibid. at para. 118.
140. Ibid. at paras. 121-126.
the Immigration Act did not "justify the failure of the Minister to provide fair procedures where this exception involves a risk of torture upon deportation."141

While both the provision of material and of reasons were said by the Court to be subject to privilege and valid reasons for reduced disclosure,142 the Minister will not be able to resist review by a bald declaration as to a person's threat to security or as to the situation in the person's native country. She will have to justify her conclusions, and to the extent that she wishes to withhold portions of her reasons because of security concerns, those concerns will have themselves to be justified. These requirements suggest that security is not a matter for executive say-so, and thus the Court in these parts of its judgment does not altogether follow Lord Hoffmann. In effect, the Court displaces the action from substance to procedure, but the procedural requirements can be interpreted as bringing substance into view in order to facilitate judicial scrutiny. Thus while Suresh does retreat from Baker and from its commitment to the common law Constitution, the retreat could be seen as a strategic one to the procedural ground where judges traditionally feel more at home. In this regard, the Court was anxious to stress that its reliance on Baker in a case where a constitutionally protected interest was at stake did not amount to a constitutionalization of the common law, but that the common law was being "used to inform the constitutional principles that apply to this case . . . "[A]s is the case for the substantive aspects of s. 7 in connection with deportation to torture," the Court said, we look to common law factors not as an end in themselves, but to inform the s. 7 procedural analysis."143

Whether the Court's stand for the rule of law on procedural grounds turns out to be the Maginot Line of our judges will depend on how these rather obscure utterances are elaborated in the future, as the Court responds to the government's new legislative tools. In particular, matters will turn on the Court's

141. Ibid. at para. 128.
142. Ibid. at paras. 122, 126.
143. Ibid. at para. 114.
willingness to use procedure for substantive ends, thus undermining the sense one gets from the substantive part of its judgment that all the Minister has to do is tick each relevant factor for the Court to uphold her decision. Unfortunately, Suresh might turn out to be best interpreted as affirming the dichotomies between the Charter and the rest of the law and between process and substance from which Baker suggested we might escape.