David Dyzenhaus and Evan Fox-Decent* RETHINKING THE
PROCESS/SUBSTANCE DISTINCTION:
BAKER V. CANADA†

The virtue of judicial review is that it provides a forum where [threats to civil
liberties] ... can be brought out into the open, deflected and delayed, or chan-
nelled into less harmful paths. The technique of judicial restraint of the majority
is to require a clear and unambiguous legislative statement, sometimes in fact a
restatement, of its wish to offend against a fundamental principle of fairness
within the society. It is easy to envisage cases where this technique is not effective,
but experience suggests that it usually is. When it does succeed, a democracy is
richer, not poorer, for it.

— Paul Weiler

1 Introduction

The Supreme Court of Canada’s decision in Baker v. Canada² is the most
important decision in Canadian administrative law in twenty years. Madame Justice Claire L’Heureux-Dubé’s judgment for the Court puts Baker
into the pantheon of great Canadian administrative law judgments, one
occupied until now by two decisions of the Court reported in 1979 —
Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor
Corporation³ and Nicholson v. Haldimand-Norfolk Regional Board of Commiss-
ioners of Police⁴ — and by Rand J.’s 1959 judgment in Roncarelli v. Duplessis.⁵

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1 P. Weiler, In the Last Resort: A Critical Study of the Supreme Court of Canada (Toronto:
Carswell/Methuen, 1974) at 212.

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Baker arose out of an application for a stay of a deportation order on ‘Humanitarian and Compassionate’ grounds. The application was refused, and the issue before the courts on review was whether the official who made the decision was required to make the best interests of Baker’s children a ‘primary consideration.’ This language came from the Convention on the Rights of the Child,6 a convention ratified by the Canadian government but not incorporated by Parliament.

Baker will be remembered in part for several highly innovative propositions, any of which by itself would make it an important judgment: that there is a common law duty to give reasons when the effect of an administrative decision on individuals is ‘critical to their futures’; that, in general, the content of the duty of fairness will depend on the importance of the interest affected by the decision and not on whether that interest belongs to some list on the ‘rights’ side of a rights/privilege distinction; that review for abuse of discretion should be brought within the scope of the jurisprudence developed by the Court for review of a tribunal’s interpretations of the rules of the legal regime constituted by its statute; that international human rights instruments are an important source of standards for determining when an administrator has been reasonable in exercising her discretion.

But Baker’s greatness is explained not by the fact that these propositions are united in one judgment but by what lies behind that fact – the way in which it unites the paradigm opened up by CUPE with the paradigm opened up by Nicholson. In the CUPE paradigm, courts are expected to take seriously the idea that generally they should concede interpretative authority over an agency’s constitutive statute to the agency. In the Nicholson paradigm, courts are expected to consider what procedures are appropriate for agency decision making without any prejudice that certain kinds of decision making – decisions by bodies that do not operate ‘quasi-judicially’ or like a court – are intrinsically immune from review for procedural fairness. The innovative propositions are, as we will argue below, the product of the Court’s readiness to bring together these two paradigms through an overarching principle of legality, a particular understanding of the rule of law. This is the principle that was given classic expression when Rand J. stated in Roncarelli that if ‘administration according to law is superseded by action dictated by and according to the arbitrary likes, dislikes and irrelevant purposes of public officers acting beyond their duty,’ this signals ‘the beginning of disintegration of the rule of law as a fundamental postulate of our constitutional structure.’7

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7 Roncarelli, supra note 5 at 142. This statement is often cited these days by the Supreme Court, most notably in Reference Re Secession of Quebec, [1998] 2 S.C.R. 217 at 257. Below we will sketch our view that the revival of what one can think of as Rand’s common law constitutionalism does not amount to a return to Diceyan judicial supremacism. (For
Our focus in this article, however, will not be so much on an exposition of this argument, or of the principle of legality itself, but on the problems inherent in those tasks. As we will show, the problems are permutations of a process/substance distinction that judges have adopted as a legitimating basis for review. A significant source of difficulties is the ambiguity of the idea of substance. Whatever ‘substance’ or ‘substantive’ actually mean, functionally the terms serve to indicate areas in which judges are reluctant to intervene. Courts regard procedure as their domain, while substance is left to the legislature and its delegates. But there are several contenders for what counts as substantive:

1 *Outcome of a decision:* The basic idea that animates the process/substance distinction is that there is a categorical difference between the outcome of a decision and the process undertaken to arrive at the decision. Thus, a substantive right is considered a right to a particular outcome or range or outcomes and is a right that cannot be generated by a procedural entitlement.

2 *Who defines procedural fairness:* The issue of who defines the procedural protections to be used – the courts or administrative tribunals – is substantive in that it bears on the actual form and content of the procedures selected. As well, at a deeper level, the issue is substantive in that it speaks to the extent to which courts are willing to recognize the legitimacy of the administrative state.

3 *The form and content of procedural fairness:* For any procedure to exist, it must assume a particular form, such as submission of written documents, a hearing, or an ongoing consultative process. In this sense, procedural protections themselves have substantive characteristics, even if those characteristics are spelled out with little detail and in merely formal terms, such as ‘provide a hearing.’ In practice, when courts speak of the ‘content of fairness,’ they are usually referring to the form of procedural protections. As in *Baker,* this issue can manifest itself in a question about the weight that has to be attached to particular factors in the reasoning process. And one of the difficulties is then whether that question is about process or about substance, or – perhaps necessarily – about both.

a fascinating exploration of some of the issues in the idea of common law constitutionalism, see M.D. Walters, *The Common Law Constitution in Canada: Return of Lex Non Scripta as Fundamental Law* (2001) 51 U.T.L.J. 91.) It might be thought that nothing in the sketch of *Baker*’s importance should be very big news, since Canadian courts have been experimenting for over twenty years with full-fledged constitutional review of legislation. But this thought underestimates the extent to which judges who fall into the Diceyan category described below will seek to confine the reach of their constitutional document so as to avoid constitutionalizing the rest of the law, including administrative law. We discuss this issue when we deal with the partial dissent to *Baker.*
4 *The justification requirement of procedural fairness*: As we will show, imposition of procedural protections carries with it a presumption that the decision maker will take into account the reasons presented by the affected party and, in any event, will not treat the person arbitrarily. This justification requirement has substantive implications in that it constrains outcomes by subjecting the decision-making process itself to a standard of fairness, although it does not by itself guarantee the complainant a favourable decision.

5 *The political justification for procedural fairness*: This last sense of substance pertains to the argument of political morality for having fairness at all, the argument that leads to the conclusion that fairness is in some way constitutive of public authority.

Since many of these senses of substance pertain to process, it might seem that the distinction between process and substance is illusory; what we have is substance all the way down. But our view is that the distinction is not likely to disappear, since, as we have already indicated, it does at least have the function of demarcating the domains of legislation and its implementation, on the one hand, and adjudication, on the other. At its weakest, our argument is that the distinction has to be complicated, so that its use is sensitive to the demands of the principle of legality – the basis of the appropriate conception of judicial review in a democratic legal order.

The principle of legality requires the administrative state to operate under the moral regime of the rule of law while at the same time recognizing that it is for the legislature and its administrative delegates to make decisions about substance, in that it is they who should decide on particular outcomes. In other words, once judges accept that the administrative state operates or should operate in accordance with the principle of legality, they also accept the legitimacy of administration. But they cannot accept the legitimacy of administration without at the same time relinquishing, to some extent, their monopoly on interpretation of the law.

Our argument has several parts. In Part II, ‘The Drag of the Past,’ we examine the way in which ‘Diceyan’ judges understand the process/substance distinction so as to permit a compromise between themselves and the administrative state, a compromise that shaped *CUPE* and *Nicholson* despite the Supreme Court’s efforts to move away from Dicey’s hostility to the administrative state. In Part III, ‘Preserving the Distinction,’ we show how *Nicholson* was potentially an even more radical decision than *CUPE*, but also how the Court tried to put a lock on that potential. Part IV, ‘The Principle of Legality,’ brings the main part of the story to a close, showing how L’Heureux-Dubé J. finally uses *CUPE* to unlock *Nicholson*’s potential. Finally, our Conclusion briefly explores the understanding of the rule of law implicated in the principle of legality.
Both *CUPE* and *Nicholson* were radical decisions, but their scope was limited by the Court’s assumption that each decision pertained to a wholly distinct area of administrative law: substantive review, where the judicial evaluation is of the content of the decision, and procedural review, where the issue is how the decision was made. While the Court’s message to itself and other courts in 1979 was in a sense a mixed one – *CUPE*’s hands-off message on issues of substance and *Nicholson*’s hands-on message on procedural or ‘natural justice’ issues – the nature of that message seemed to provide a sound basis for judicial review.

On issues of substance, judges would respect both the fact that the legislature had granted authority to the agency by setting it up to administer and interpret its constitutive statute and the fact that the agency was staffed by officials who had an expertise lacked by generalist judges. And on procedural issues, judges could zealously police how the agencies made their decisions, since such policing did not intrude on substance. Moreover, in the procedural arena, judges are interpreting principles of fairness that fall within judicial expertise, since it was judges who crafted the principles over centuries of common law.

The basis seemed sound, in part because it did not depart too far from the compromise brokered by Diceyan judges with the legislatures that created the administrative state. In the Diceyan, common law understanding of the rule of law, the legislature has a monopoly on law-making authority, while judges have a monopoly on interpretation. This understanding is premised on a political view hostile to state intervention in private order, so that the hope of Diceyan judges is that legislation can always be interpreted in such a way that it does not disrupt the order constructed by private law values. And judicial craft is such that judges can often find enough ambiguity and lack of clarity in statutes to permit them to bring the statutes into line with the judges’ understanding of the spirit of the common law. However, the judges’ interpretive monopoly is still subordinate to the monopoly on legislation. Judicial interpretations of the law must always defer to clear expressions of parliamentary intent – the common law will give way to legislation, no matter how offensive the statute is to the values of the common law or to moral sensibilities. Indeed, the common law has ultimately the same extra-legal guarantee against legislative disruption as general moral sensibilities, for when the common law does have to give way to statute, the remedy for the disruption to its order is to be found outside the law, in the source from which the disruption emanated – in democratic politics.

The idea that there is an interpretive monopoly held by judges and a law-making monopoly held by the legislature led to what might usefully be termed Dicey's 'dualism.' This dualism arises because the two main sources of law – statute and the common law – are regarded as completely distinct. They are different in form and substance, and they are justified differently – statutes by democratic considerations, the common law because it is the repository of reason, tested within an immemorial tradition. Legislative power is limited legally only by the constraints of 'manner and form' that a supreme legislature must observe if it is to create technically valid law. And dualism results in the twists and turns in the reaction of Diceyan judges to the creation of the administrative state.

When Diceyan judges are confronted with legislation that explicitly gives authority to agencies to develop the law of their particular administrative regime by interpreting the broad terms of their constitutive statutes, their understanding of their role is severely strained. One solution is to make the logical point that the legislature must have intended that the agency's authority or jurisdiction be limited and that limits, to be effective, have to be enforced. One can then infer, as judges did, that it is judges who are the enforcers and, further, that they should retain their interpretative monopoly by reviewing agency determinations of the law on a standard of correctness.

The practice of such judges in this regard is not at all uniform, but one can divide them into two groups, using the labels coined by Martin Loughlin in a prescient article published in 1978, the year in which the Nicholson decision was handed down. 'Active formalists' are judges who will do anything to cram the administrative state into a procrustean bed of Dicey's making by treating any question of law as a question about jurisdiction or limits. In contrast, 'inactive formalists' resign themselves to the fact that, given Dicey's understanding of the rule of law, the administrative state is not internally governed by the rule of law, so that the best they can do is to police the outer limits of its operations. Thus they distinguish between questions of law, which are for the agency to determine, and jurisdictional questions about the limits of the authority.

9 See M. Hunt, Using Human Rights Law in English Courts (Oxford: Hart Publishing, 1997) at 7–11. Hunt is concerned with the dualism between domestic law and international law, but that dualism is, in our view, just one manifestation of the dualism between statute law and the normative values of the rule of law embedded in the Diceyan stance.

10 M. Loughlin, 'Procedural Fairness: A Study of the Crisis in Administrative Law Theory' (1978) 28 U.T.L.J. 215 at 220–1. Loughlin's labels were coined for the procedural domain and, it should be noted, as part of his response to the academic argument that is the subtext of Nicholson, D. Mullan, 'Fairness: The New Natural Justice' (1975) 25 U.T.L.J. 215 [hereinafter 'Fairness']. However, Loughlin clearly did not see his diagnosis of the crisis as confined to the procedural domain.
to determine the former questions, which are rule of law questions for the courts to determine.  

As a matter of fact, there is little, if any, evidence of inactive formalism in regard to judicial review of administrative decisions that interpret the law of the agency's constitutive statute. Formalists were always tempted to find that questions of law are jurisdictional questions. The legislative response was the privative clause, which made it explicit that judges should concede interpretative authority to the agency. But it was a response that formalists could easily gut using the chain of reasoning just outlined: the Legislature had to intend some legal limits on the agency's authority, these limits are set by the statute, and so any question about the law of that statute is jurisdictional.  


We must mention here two complicating factors, which would overly clutter an already complex text. First, while formalism is associated in the text with conservative or right-wing political ideology, inactive formalism can be motivated by left-wing political commitments, opposed to judicial review because it obstructs the workings of the administrative state. Left-wing inactive formalism comes about when opponents of judicial review recognize that it cannot be done away with altogether but seek to confine its operation as much as possible. For a critique of this position, see D. Dyzenhaus, 'The New Positivists' (1989) 39 U.T.L.J. 361. More important for our analysis below is that inactive formalism can also be motivated by an attitude that is in a sense apolitical, since it has to do with an understanding of sound administration instilled by one's experience as a civil servant. This attitude is well summed up by Albert Centlivres, former Chief Justice of South Africa, in a comment on L.C. Steyn, a civil servant whom the National Party government had put on the fast track to becoming Chief Justice of South Africa and who did more in that office than any other apartheid-era judge to undermine the rule of law: 'Perhaps one should be charitable ... and ascribe his failure to realise the difference between a judge and a public servant to the fact that he himself had been a public servant for so many years and a judge for so few years. It is no doubt difficult for a man whose life training was to accept without question the decisions of the Executive to throw off what had become a habit on his part.' Quoted in E. Kahn, ed., Fiat iustitia: Essays in Memory of Oliver Denys Schreiner (Cape Town: Juta & Co., 1983) at 99.  

In this regard, it is relevant to observe that there is a tradition of appointing senior civil servants to the Federal Court of Appeal.  

12 Perhaps the best evidence of an active formalist judge forced into the position of inactive formalism is to be found in Sopinka J.'s judgment in CAIMAW v. Paccar of Canada LTD, [1989] 2 S.C.R. 983 [hereinafter Paccar], where at 1017-8 he said, 'While I agree generally [with the majority] on the principles underlying the scope and standard of review of labour board decisions, I cannot agree that it is always necessary for the reviewing court to ignore its own view of the merits of the decision under review. Any adjudication upon the reasonableness of a decision must involve an evaluation of the merits. Reasonableness is not a quality that exists in isolation. When a court says that a decision under review is "reasonable" or "patently unreasonable" it is making a
CUPE first and foremost made it clear that judges had to take the privative clause seriously, and hence should not use previously popular devices in an attempt to read it out of the statute. Dickson J., writing for the Court, was careful to state the view that it was not only the formal expression of legislative intent in the privative clause that mattered but also the good reason for that formal expression – that an administrative agency is expert within its specialized area of law. Put more broadly, one can say that Dickson J.’s view on this matter marked the Court’s acceptance of the legitimacy of the administrative state, and to that extent CUPE marks the beginning of the Court’s rejection of the Diceyan paradigm, as expressed in both active and inactive formalism.

However, the Court’s rejection of Dicey was far from complete. Dickson J.’s view staked the claim for the recent jurisprudence of the Court that the privative clause is but one factor among those a court must take into account in considering what standard of deference it owes to an agency. In other words, it is now the case both that a privative clause is not necessary for deference and that the presence of such a clause is not always a sufficient basis on which to conclude that deference is due. At the same time, the Supreme Court developed the idea that the standard of deference could vary from patent unreasonableness to reasonableness depending on the combination of factors in the particular context. But it took much more than a decade for that jurisprudence to begin to

statement about the logical relationship between the grounds of the decision and premises thought by the court to be true. Without the reference point of an opinion (if not a conclusion) on the merits, such a relative statement cannot be made. ... [I]n my view, curial deference does not enter the picture until the court finds itself in disagreement with the tribunal. Only then is it necessary to consider whether the error (so found) is within or outside the boundaries of reasonableness."

Compare Sopinka J.’s willingness to intervene in Shell Canada Products LTD. v. Vancouver (City), [1994] 1 S.C.R. 231, where, in his judgment for the majority of the court, he found that the Council of the City of Vancouver had acted ultra vires when it passed resolutions that targeted Shell Canada and Royal Dutch Shell because of their business operations in South Africa during apartheid.

13 See CUPE, supra note 3 at 235–6: ‘Section 101 [the privative clause] constitutes a clear statutory direction on the part of the Legislature that public sector labour matters be promptly and finally decided by the Board. Privative clauses of this type are usually found in labour relations legislation. The rationale for protection of a labour board’s decisions within jurisdiction is straightforward and compelling. The labour board is a specialized tribunal which administers a comprehensive statute regulating labour relations. In the administration of that regime, a board is called upon not only to find facts and decide questions of law, but also to exercise its understanding of the body of jurisprudence that has developed around the collective bargaining system, as understood in Canada, and its labour relations sense acquired from accumulated experience in the area.’
develop in an explicit fashion. In the intervening period, judges regarded the presence of a privative clause as a necessary condition for deference and thus for the new standard of review of patent unreasonableness that Dickson J. created in *CUPE*.

Conversely, during this same period, courts regarded the presence of a statutory right of appeal as an explicit invitation from the legislature to review on a correctness standard. And as long as the Supreme Court maintained the stance that the formal legislative command to defer was necessary, it – and the courts below it – showed that their acceptance of the legitimacy of the administrative state was at best reluctant.

*CUPE*, it should be noted, was a unanimous decision, despite the presence of judges on the Court who had, nine years earlier, in *Metropolitan Life Insurance Co. v. International Union of Operating Engineers, Local 796*, given a decision widely regarded as the Court’s most reactionary on the topic of deference. And Dickson J. in *CUPE* did not mention, let alone overrule, *Metropolitan Life*. So it is hardly controversial to surmise that a combination of the need to bring on-side reactionary judges who had subscribed to *Metropolitan Life*’s jurisprudence with a quite usual judicial tact in regard to both the past and the future meant that Dickson J. could not be as forthright about his view of the legitimacy of the administrative state as he might otherwise have been.

However, one should not underestimate the impact of the problems inherent in a shift from a Diceyan paradigm of the rule of law to a new paradigm, even if all the judges are committed to making that shift. It is instructive here to note that Bora Laskin, more than any other judge, had paved the way for *CUPE*, and one of the paving stones – one that says something about the issue of tact mentioned above – was his judgment for the Ontario Court of Appeal that the Supreme Court reversed in *Metropolitan Life*. But Laskin C.J. also provided a basis for post-*CUPE* examples of judicial backsliding when, in giving judgment for the

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15 [1970] S.C.R. 425 [hereinafter *Metropolitan Life*]. Judgment delivered by Cartwright C.J. Present were Martland, Ritchie, Spence, and Pigeon JJ. The Court in *CUPE* was composed of Laskin C.J. and Martland, Ritchie, Spence, Pigeon, Dickson, Beetz, Estey, and Pratte JJ.

16 *Metropolitan Life*, ibid.; and see Weiler, supra note 1, c. 5, esp. at 150.
Supreme Court in 1981, he found that the superior courts have a constitutionally protected authority to review on a standard of correctness the jurisdictional limits within which a tribunal operates.\textsuperscript{17}

In short, not even judges of the stature of Dickson and Laskin were able to see their way beyond a practical compromise with the administrative state. At bottom, the only understanding of the rule of law available to them was the Diceyan one, in which judges have an interpretive monopoly on questions of law. Their recognition of the legitimacy of the administrative state, and their willingness to grant agencies some scope for protected decision making, was therefore limited. It was limited to recognition of an exceptional space where judges had given up their interpretive monopoly to the extent that they would intervene only if the agency had been patently unreasonable, or very wrong. Hence their compromise with the administrative state was practical rather than principled, since judges could not articulate a principled basis for the

\textsuperscript{17} Crevier v. Attorney General of Québec, [1981] 2 S.C.R. 220 [hereinafter Crevier]. Laskin C.J. used s. 96 of the Constitution Acts 1867–1982, which protects the federal appointing power of superior court judges, as the statutory peg for his judgment. But there is little doubt that this strained reading of s. 96 merely provided some legitimacy for what the judges would have asserted as an unwritten constitutional value, had it not been available.

A good example of the way in which Crevier was used is Beetz J.'s discussion in 1988 of one of the devices judges had used in the bad old days to read out privative clauses – the idea that there was a 'preliminary' or 'collateral' question of law that a tribunal had to get right before it earned the protection of its statute's privative clause. This entirely nebulous concept enabled active formalist judges to review on a standard of correctness any question of law a tribunal had to decide. Beetz J., in giving judgment for the Court, said the 'theoretical basis of this idea is ... unimpeachable – which may explain why it has never been repudiated: any grant of jurisdiction will necessarily include limits to the jurisdiction granted, and any grant of a power remains subject to conditions.' Union des employés de service, Local 298 v. Bibeault, [1988] 2 S.C.R. 1048 at 1086. Later in his decision he cited Crevier as authority for this general statement: 'The role of the superior courts in maintaining the rule of law is so important that it is given constitutional protection' (at 1090). Now Beetz J. was one of the most prominent judges in the Diceyan camp on the Court, and his remarks can be read as a last-ditch attempt to save some face after the academic roasting he received for his judgment four years earlier in a case in which he had, in all but name, revived Metropolitan Life: Syndicat des Employés de production du Québec et de l'Acadie v. Canada Labour Relations Board, [1984] 2 S.C.R. 412. For the roasting, see J.M. Evans, 'Developments in Administrative Law: The 1984–85 Term' (1986) 8 Sup.Ct.L.Rev. 1 at 26–41 and Brian Langille, 'Judicial Review, Judicial Revisionism and Judicial Responsibility' (1986) 17 R.G.D. 169. But both of Beetz J.'s judgments were unanimous, and, further, Dickson J. in CUPE had described the patent unreasonableness test using the vocabulary of the preliminary question: 'Did the Board here so misinterpret the provisions of the Act as to embark on an inquiry or answer a question not remitted to it?' CUPE, supra note 3 at 237. And that tells us that the Court not only would not but could not give up on the idea that the limits of the law within which an agency operates are a matter for courts to decide on a standard of correctness, whatever the Legislature says.
shift in thinking Dickson J. sought to bring about in **CUPE**. Judges remained at the apex of the interpretive hierarchy, with some accommodation made for the phenomenon of administrative decision making.\(^{18}\)

The same basic urge that led to **CUPE**—the urge on the part of progressive judges to install within the Court's jurisprudence a recognition of the legitimacy of the administrative state—also prompted **Nicholson**. The most concrete effect of Laskin C.J.'s judgment for the majority of the Court was the abolition of the quasi-judicial/administrative distinction. According to that distinction, the requirements of natural justice apply to an agency's decisions only when its decision-making process is court-like—quasi-judicial.

The test here was devised by the Lord Chief Justice of England, Lord Hewart, who set out two conditions for a body to be quasi-judicial: it had, first, to have 'legal authority to determine the rights of subjects' and, second, to have the 'superadded' characteristic of a 'duty to act judicially.'\(^{19}\) As the authors of the leading text on Canadian administrative law note, there is a 'certain irony' in the fact that Hewart devised a test that effectively immunized most administrative decision making from procedural review, for he had also authored the notorious **The New Despotism**,\(^{20}\) in which he argued that the administrative state amounted to rule by an arbitrary tyranny.\(^{21}\)

The authors point out that immunity from judicial review came about because the first condition with respect to the legal authority of the official was understood to require a final and determinative decision that affected a substantive legal right, basically a right protected by the common law. As a result, administrative decisions that preceded a final decision would not attract a duty of natural justice, nor would a final decision about a benefit that would not exist but for the statute that conferred it. And in regard to the second and more obscure condition—the superadded characteristic—it was interpreted to require a positive indication by the legislature in the constitutive statute that it intended that the decision maker be subject to natural justice.

In our view, however, the irony of a non-interventionist stance on the part of a judge opposed to the administrative state is quite easily explained. One should not throw good money after bad. Procedural protections for welfare benefits are in order only when the statute expressly

\(^{18}\) For a very clear exposition of the practical ethos of the **CUPE** Court, see The Honourable Mr. Justice G.V. La Forest, 'The Courts and Administrative Tribunals: Standards of Review of Administrative Action' in **Administrative Law: Principles, Practice and Pluralism** (Toronto: Carswell, 1992) 1.

\(^{19}\) **R. v. Legislative Committee of the Church Assembly,** [1928] 1 K.B. 411 at 415.

\(^{20}\) Lord Hewart, **The New Despotism** (London: Ernest Benn Ltd., 1929).

indicates they are in order, in which case judges will defer to the express will of the legislature. 22

We thus get a rather complex mindset in the judges whom we refer to as Diceyan, keeping in mind that a Diceyan judge combines a particular understanding of the rule of law and hostility to the administrative state in one package. Because they cannot attempt to account for the administrative state in their understanding of legal order, and, indeed, do not desire to make this attempt, that state is given free rein within certain legal limits – the limits set by determinate positive law – policed by judges on a correctness standard.

Those limits are limits to the scope of authority – the jurisdiction – of an agency. In particular, whenever an agency seems to be encroaching on the areas that courts of inherent jurisdiction consider to be within their monopoly – the interpretation of the common law, or of a statute other than the agency’s constitutive statute, or of the Constitution – there the correctness standard rules. And, while these limits might seem intrinsically to pertain to the substance of administrative decisions, the interpretation of the common law includes the interpretation of the principles of natural justice. And it is this last factor that explains why courts were and are still willing to talk of an administrative violation of natural justice as amounting to an excess of jurisdiction.

The Diceyan stance – free rein within limits – is, then, the basic practical compromise judges made with the administrative state. Dickson J.’s and Laskin C.J.’s interventions in CUPE and Nicholson chip away at the terms of the compromise, without really moving beyond it to principle. And there is as much irony in the way they do so as in the way reactionary judges or academics deal with what is, for them, the legally obnoxious existence of the administrative state, by taking a by and large hands-off approach to it.

The irony here lies in the fact that progressive judges, the Dicksons and Laskins, show their acceptance of the legitimacy of the administrative state by adopting a hands-on or interventionist role. Even though the adoption of a patent unreasonableness standard as a test for substantive review is progressive in that it shows a readiness to defer, it is also a claim that judges should take a role – a hands-on role – in policing what was before considered, at least by inactive formalists, as a realm not subject to the rule of law – the realm within the jurisdiction of the agency. For inactive formalists, correctness is the only standard that judges should use

when evaluating answers to questions of law. It follows that if correctness is not appropriate – since the legislature has given the agency authority to decide what is correct – then no standard is appropriate, and therefore the agency can do what it likes. So, while the patent unreasonableness standard is less exacting than correctness, it is imposed where before no standard was applicable if correctness was not considered appropriate.

*Nicholson* is no different in this regard. It extends procedural protections beyond the situation where an administrative decision encroaches on a common law right, so that the right/privilege or right/benefit distinction no longer divides the administrative world into the policeable and the unpolicable. And so it extends judicial supervision, though again because of a judicial sense of the legitimacy of the administrative state.

However, as we have suggested, neither decision did more than chip away at the basic terms of the Diceyan compromise with the administrative state. In substantive review, correctness remained the default standard into which a vaguely formulated patent unreasonableness test always seemed prone to collapse. More significant is that in procedural review, the correctness standard has not been directly challenged. Indeed, as we will show, the Diceyan compromise was preserved in procedural review, at the cost of principle, precisely because of the way in which the distinction between process and substance became the organizing idea in that domain.

III *Preserving the distinction*

*Nicholson* and *CUPE* are so much the bedrock of the judicial attempt to modernize Canadian administrative law that a rather striking difference between the judgments is largely forgotten. We have already noted that *CUPE* was a unanimous decision. But *Nicholson* was a close shave, five to four, with a strong dissent written by Martland J. 23

It might seem counter-intuitive that the extension of judicial review in the procedural area should meet with such resistance, while the retraction in the substantive area did not. In fact, this difference is almost intuitive for Diceyan judges, and inherent in their practical compromise with the administrative state. For their distinction between substance and process tracks the distinction between, on the one hand, legislature and law-making and, on the other, judges and law-interpreting, which is crucial to maintaining the Diceyan understanding of the rule of law in the face of its compromise with the administrative state.

A helpful analogy here, one that seems to function almost as a premise for Diceyan judges, is the attitude of such judges to the legislative state. The legislative state is the state that disrupts the private order of the com-

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23 Laskin C.J. and Ritchie, Spence, Dickson, and Estey JJ. for the majority, with Martland, Pigeon, Beetz, and Pratte JJ. in dissent.
mon law by enacting statutes that change aspects of that order, or even seek to displace it entirely. The legislative or law-making process, for Diceyan judges, is political, which means largely uncontrolled by law. It is, then, a realm devoid of the rule of law, although its boundaries are set by law. For example, in a legal order where the legislature is supreme, the legal limits on it are only those limits that pertain to the 'manner and form' that must be respected for a statute to be recognized as valid. And that is why the remedies for legislative immorality are political, not judicial. Judges supervise the legislative process, but not the content of legislative decisions.

The legislative state, of course, gives rise to the administrative state. Indeed, as Hayek pointed out in his famous polemic *The Road to Serfdom*, the two have a symbiotic relationship, since the implementation of the statutes of the legislative state requires that state to establish the agencies of the administrative state. The space opened up by the statutes disruptive of private order is filled by the discretionary decision making of administrative officials.24

Discretion, here, has pejorative connotations. It is inherently suspect and dangerous to the Diceyan or common law mind, just as legislation is. But the legal controls Diceyan judges envisage on it are not much thicker than the limits of manner and form. The standard list is that discretion is reviewable only when the applicant can show bad faith on the part of decision makers, or that the exercise of discretion was for an improper purpose, or that the decision maker was moved by irrelevant considerations. In short, for Diceyan judges, the substantive decisions of adminis-

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24 F.A. Hayek, *The Road to Serfdom* (Chicago: University of Chicago Press, 1993), esp. c. 6, 'Planning and the Rule of Law.' There is a serious tension in the libertarian position on this issue. Their argument consists of two parts: first, the stance against redistribution, and second, the claim that redistribution necessarily involves setting up agencies, which leads to arbitrary discretion. In order to maintain the integrity of that argument, libertarian theories of the rule of law are forced to oppose discretion even when it is necessary to legislative schemes that implement goals compatible with the libertarian ideal of minimal government, for example, the solution of coordination problems. Indeed, the tension is even deeper, since libertarians will sometimes find themselves opposing the constraints of legality on administration even when an agency directly infringes on a common law right. A classic example here is Martland J.'s judgment for the Court in *Calgary Power v. Copithorne*, [1959] S.C.R. 24, the decision in which the quasi-judicial/administrative distinction was given full expression in Canadian administrative law. There Martland J. found that a landowner had no right to a hearing in the face of an expropriation order because there was no statutory indication of a superadded duty to act judicially. For some recognition of the tension involved in not being able to decide whether what was legally wrong with the administrative state was its assault on laissez-faire or the fact that so much discretion was given to officials to achieve its goals, see Lord Hewart, supra note 20 at 44–6. See also F.A. Hayek, *The Constitution of Liberty* (London: Routledge, 1993) at 247–9.
trative officials are by nature more like law-making than like law-interpretation. However, it is crucial to keep in mind that what we mean by 'like law-making' here has nothing to do with making decisions that have the force of law. All it means is that the decisions are, like statutes, based on political and policy considerations.

One need look no further for support for this proposition than the fact that the courts quickly replaced the quasi-judicial/administrative distinction with a 'legislative'/everything else distinction, where the legislative category is immune from natural justice in the way that administrative decisions once were. And according to the main authority, these are decisions of a general nature — that is, decisions that affect a whole class of individuals — made by a high-ranking official, in the exercise of a subjective discretion, who can be said to be accountable without judicial supervision because he is answerable either to cabinet or to Parliament. The idea that there is a category of discretionary decisions that are legislative in nature thus puts in place a continuum of discretionary decision making ranging from cases where the decision affects just one individual to cases where the decision affects a large group.

If discretionary decision making on substance is analogized to law-making in this very limited sense of being driven by politics and policy, it does not, for the most part, fall within the province of the judiciary. And if the legislature makes an explicit choice to delegate authority to an agency to make binding determinations in regard to the interpretation of its mandate, Diceyan judges will be occupied with the question of the limits to that delegation. But they will not regard the authority that has been delegated as their own unless it is exercised in ways that require interpretation by the agency of the kinds of legal issues that judges regard as falling within their interpretive monopoly.


26 Moreover, as exemplified by Strayer J.A. in the Federal Court of Appeal, Diceyan judges today take statutory conferrals of discretion as indicia of legislative or policy decisions in which courts ought not to meddle, even if the case concerns a lone individual. See, in particular, his judgment discussed below, Baker v. Canada (Minister of Citizenship and Immigration), [1997] 2 F.C. 127 [hereinafter Baker (FCA)].
To put it differently, the law-making/law-interpreting distinction is built into the practical compromise. It is not that actual law-making authority is conceded to administrative officials or agencies. Rather, insofar as officials or agencies are involved in activity that looks more like law-making than like law interpretation because of the political/policy basis of the decisions, judges should refrain from intervening as long as it is clear that the official or agency is acting within the scope of the authority delegated by the ultimate legislative authority. But when the officials or agencies engage in law interpretation, they encroach on the judicial monopoly, and thus, insofar as this encroachment is necessary for the performance of their law-making role, the courts will police it on a correctness standard.

This compromise is both reluctant and forced, but it does not require judges to rethink their attitude of deep suspicion towards the administrative state. More accurately, it is not the hands-off part of CUPE's message that is the real problem for Diceyan judges. Many of them will have adopted the view that the administrative state is largely ungoverned by the rule of law, so the idea that the activities of that state are to a large extent beyond the reach of law is not news to them. At most, CUPE requires them to switch from active to inactive formalism. But, as we have already suggested, that switch is, in the case of the review of substantive decisions, rhetorical, since any question of law is vulnerable to judicial transmogrification into a jurisdictional issue.

Much more problematic for Diceyan judges is the positive, hands-on message of CUPE that legal standards – the standard of patent unreasonableness – apply in what they would prefer to consider the legal void within the limits set by jurisdiction. To take that message seriously, without the compulsion of legislative command, is to accept the legitimacy of the administrative state. For the message seems to require deference to an agency's interpretations of the law, which explains why Nicholson was such a contested decision.

As we will now show, the majority in Nicholson were in effect saying that judges must accept, without the prompt or compulsion of legislative command, that the administrative state is controlled by standards of legality that render its decisions legitimate. Potentially, this is a much more radical message than the one delivered by CUPE, even though the two decisions shared as their major premise the proposition not only that the public law regime of the administrative state had displaced the common law in important areas of individual interaction, but that the idea behind the displacement was sound. And this is why, or so we will argue, judges have sought to limit it by showing that it is a message that respects the process/substance distinction.

The issue in Nicholson was whether a probationary constable could lawfully be dismissed without any hearing in which he was told why his ser-
services were no longer required and given an opportunity to respond. S. 27 of the 1970 Police Act\(^{27}\) provided that no police officer could be subject to a penalty 'under this Part except after a hearing.' But it then went on to say that 'Nothing herein affects the authority of a board or council' ... 'to dispense with the services of any constable within eighteen months of his becoming a constable,' that is, within the probationary period.

Martland J. found in his dissent that the constable held his office 'at pleasure,' that is, he was in the same position as an employee at common law, where no cause for dismissal need be shown. He distinguished the leading English decisions, including *Ridge v. Baldwin*,\(^{28}\) on the basis that, in these decisions, either the office was one in which dismissal was limited to specific causes or the statute prescribed that certain procedures be followed.\(^{29}\) And he concluded that the decision of the Board was 'purely administrative,' so that there was no 'breach of any legal duty to the appellant.'\(^{30}\)

Now, Martland J. had given judgment for the Court in a decision on the limits to an agency's authority that rivalled *Metropolitan Life* in its determination to cut the administrative state down to Diceyan size.\(^{31}\) For this reason, his refusal to impose rule of law controls on that state in *Nicholson* cries out for the explanation that we have already given and which we will now illustrate through the majority judgment.\(^{32}\)

The major steps in Laskin C.J.'s reasoning reveal almost entirely the premise that divides the majority and the minority, a premise Martland J. left implicit. First, Laskin C.J. said that the Board that dismissed Nicholson had only those powers that were given to it by statute; hence, 'any attempt to measure the issue in this case by resort to the common law position of a constable is inapt.'\(^{33}\) He adduced as evidence in this regard that until 1951 the Police Act had stated that all appointments under it were 'at pleasure' but that these words had been removed in 1951, leaving the words 'at pleasure' 'behind as relics of Crown law which no longer governs the relations of police and Boards.'\(^{34}\)

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29 *Ridge*, ibid. at 332–4.
30 *Nicholson*, supra note 4 at 335.
31 See *Bell v. Ontario Human Rights Commission*, [1971] S.C.R. 756, again reversing a judgment by Laskin J. for the Ontario Court of Appeal; and for discussion, see Weiler, supra note 1 at 139–43, 151.
32 For discussion, see Weiler, supra note 1, passim. Martland J. figures in the book as one of leading reactionaries on the Supreme Court.
33 *Nicholson*, supra note 4 at 320.
34 Ibid.
Second, he stated that the idea animating the judgment of the Ontario Court of Appeal35 that a probationary constable held his office ‘at pleasure’ meant that he was given no protection against arbitrary removal. In short, the Court of Appeal’s holding meant that probationary constables were subject to ‘arbitrary power’.36

Third, Laskin C.J. made it clear that his point about the displacement of the common law regime by statute was not just a technical one but was motivated by a different understanding of employment relations:

I would observe here that the old common law rule, ... that a person engaged as an office holder at pleasure may be put out without reason or prior notice ought itself to be re-examined. It has an anachronistic flavour in the light of collective agreements, which are pervasive in both public and private employment, and which offer broad protection against arbitrary dismissal in the case of employees who cannot claim the status of office holders.37

And so he suggested that the fact that the phrase ‘at pleasure’ had been dropped from the statute showed a ‘turning away from the old common law rule even in cases where the full period of time had not fully run.’38

The fourth and final step involved Laskin C.J. pointing out that the Court of Appeal had reasoned erroneously from the fact that full natural justice could not be claimed by a probationary constable to the conclusion that he was owed nothing — that there was ‘no protection at all, no halfway house, between the observance of natural justice ... and arbitrary removal. ...’39 Even if natural justice is equated with the full panoply of procedural protections, that does not mean that one who is not entitled to natural justice is therefore to be treated arbitrarily. And Laskin C.J. evoked here the idea of fairness, which had emerged from the English authority distinguished by Martland J.40 It followed, Laskin C.J. concluded, that Nicholson should have been informed, orally or in writing, why his services were no longer required, and given the opportunity to respond; then the Board — in the light of his response — could decide ‘without its decision being reviewable elsewhere, always premising good faith.’41

Now, one way of explaining the dissent is that Martland J. just could not see the ‘halfway house’ possibility and so collapsed together the questions of (a) whether there was a duty of fairness at all and (b) the

36 Nicholson, supra note 4 at 321–2.
37 Ibid. at 323.
38 Ibid. at 324.
39 Ibid. at 321.
40 Ibid. at 325.
41 Ibid. at 328.
content of that duty. That is, since fairness was an all-or-nothing concept for him, and since Nicholson was not entitled to full fairness, Martland J. therefore concluded that Nicholson was not entitled to anything.

But that explanation fails because Martland J. had the benefit of the English judgments cited above, which distinguished the two questions, and the view of the judges on the Court who would eventually command a majority. He rejected the distinction because it is part and parcel of the major premise he rejected – that not only had the public law regime of the administrative state displaced the common law in important areas of individual interaction, but the idea behind the displacement was sound. To put it differently, the analytical distinction between the threshold question ‘Is there a duty of fairness in this particular situation?’ and the subsequent question ‘What is the content of that duty in this particular situation?’ makes sense only if one adopts the major premise of the majority in Nicholson, a premise that includes the idea that public authority is not arbitrary, that is, that it is authority that is fairly exercised.

However, there are other elements in play here that complicate our evaluation of the division in Nicholson, as well as our analysis to come. In his 1978 article, Loughlin added a third category to his categories of active and inactive formalists, that of ‘active informalists.’ The last are judges like Dickson and Laskin, who are prepared to leave behind the ostensibly bright lines of Diceyan judicial review in order to consider how rule of law standards might apply that are more variable in content and thus more sensitive to particular administrative contexts.

Loughlin commented that judges are understandably reluctant to move from a bright-line world into a messy contingent one. And we have to take into account that such reluctance – the intrinsic pull towards the formalism of bright lines – may explain some of the motivation for the dissent. Even more important, though, is Loughlin’s overarching argument that a judicial move into the messy contingent world of administrative agencies is a move into a world unfamiliar to generalist judges. Moreover, that move is one likely to backfire, however honourable, its urge to accept the legitimacy of the administrative state, as the judges’ procedural interventions interfere with the officials’ ability to exercise the substantive authority delegated to them under statute.

The judicial attempt to answer to the point about danger is implicit in Laskin C.J.’s care in emphasizing that, once the Board had Nicholson’s response, ‘it would be for the Board to decide on what action to take, without its decision being reviewable elsewhere, always premising good faith.’ More explicitly, the answer is that the distinction between process and substance is not undermined, first, because the substantive decision

42 Loughlin, supra note 10 at 220-1.
43 Nicholson, supra note 4 at 328.
– retaining Nicholson or not – is still for the Board to take; and, second, because the actual hearing that has to take place prior to that decision is left to the Board to craft, even though the Court has put in place certain minimal criteria that the hearing will have to meet.

However, the basic distinction between process and substance can ignore the fact that there are decisions to be made about the substance of process only as long as the content of process is unproblematic; as long, that is, as fair process is equated with the full panoply of procedural protections associated with the idea of natural justice and that protection is given only to substantive rights protected by the common law. It follows that the Court’s use of the basic distinction to govern its interventions becomes fraught with difficulty once questions arise about the content of fair process and about what interests deserve its protection, as well as questions about who should make the decision on either issue. Further, it is not immediately apparent in what sense courts are being neutral about the content of fairness, even if, in the first instance, they leave it to agencies to decide how to fill in the details of requirements prescribed by the courts. For it will always be open to a party the second time around to ask a court about the validity of the agency’s interpretation of those requirements.44 And that prospect might lead the agency to overcompensate by ‘judicializing’ its procedures, despite the fact that reviewing courts constantly emphasize that there is a continuum of fairness in an attempt to avoid the pitfalls involved in judicialization. Finally, even if one abstracts from the initial difficulties, the move into the era of fairness has significant substantive implications – it limits the scope of what can count as a substantive reason.

The answer implicit in Nicholson, as well as the attendant difficulties, became wholly explicit in L’Heureux-Dubé J.’s judgment for the majority of the Court in Board of Education of the Indian Head School Division No. 19 of Saskatchewan v. Knight,45 the decision that began her odyssey that ends in Baker. At the outset, it is important to note that, like Nicholson, Knight was a close shave – four votes to three. The dissent was written by Sopinka

44 The problem here was compounded by the Supreme Court’s obiter dictum in Paccar, supra note 12 at 1003–4. Here the Court proposed that no deference should be given to a tribunal’s procedural rulings unless these were explicitly protected by a privative clause. While we doubt that this dictum is consistent with the general trend in Canadian administrative law, we will not go into this issue here. However, it should also be recognized that the dicta in which courts seem to signal deference to agency determinations of appropriate procedures are in cases where the principal issue is not the content of fairness but whether the threshold for fairness has been crossed by the administrative decision. If, as seems to be the case, courts tend to use a correctness standard when they evaluate the content of administrative determinations of the content of fairness, they at least undermine the claims made at the threshold.

45 [1990] 1 S.C.R. 653 [hereinafter Knight].
J., whose approach in administrative law carried on a rearguard action for Martland J.'s jurisprudence and provided the basis for the same in the Federal Court of Appeal. But the judges who joined him in his dissent, Wilson and McLachlin JJ., are judges whose jurisprudence in administrative law would generally put them in the Laskin/Dickson camp.46

The division in the Court was not over the decision to terminate Knight’s employment as a director of education, since the majority found that he had, in the circumstances, been treated fairly. Rather, it was about whether he was owed a duty of fairness at all by the Board of Education, given that there was nothing in the education statute, nor in his particular contract with the Board, that indicated that the Board was under a duty.

For L’Heureux-Dubé J., this lack of indications was not a problem because the existence of a duty of fairness is not decided by texts – whether statutory or contractual – but on independent grounds. Indeed, she went so far as to say that “[1]ike the principles of fundamental justice in s. 7 of the Canadian Charter of Rights and Freedoms, the concept of fairness is entrenched in the principles governing our legal system.”47 It thus followed, for her, that the role of textual considerations is to show whether the free-standing entitlement to fairness is ‘either limited or excluded entirely.’ The duty to act fairly ‘does not depend on doctrines of employment law, but stems from the fact that the employer is a public body whose powers are derived from statute, powers that must be exercised according to the rules of administrative law.”48

She recognized that Knight’s employment was, at best, in the category of an office ‘held at pleasure.’ But she said that a right to procedural fairness would not convert that office into one in which dismissal had to be for just cause, since all it would require of the administrative body would be to ‘give the office holder reasons for the dismissal and an opportunity to be heard.”49

Fairness dictated such a duty, in her view, for two reasons: first, because of what we will call the principle of accuracy: the body ought to be ‘cognizant of all relevant circumstances surrounding the employment and its termination’ and the office holder was one person ‘capable of providing the administrative body with important insights’;50 and, second,
because of what we will call the principle of legitimacy, the ‘public policy argument’ that the

powers exercised by the appellant Board are delegated statutory powers which, as much as the statutory powers exercised directly by government, should be put to legitimate use. As opposed to the employment cases dealing with ‘pure master and servant’ relationships, where no delegated statutory powers are involved, the public has an interest in the proper use of delegated powers by administrative bodies.\textsuperscript{51}

In coming to this conclusion, L’Heureux-Dubé J. saw herself as completing the task set for the Court by Laskin C.J. in \textit{Nicholson}, since she was eliminating the ‘anachronistic’ distinction between an office where dismissal had to be for cause and one where dismissal could be at pleasure. But she was quick to emphasize that the distinction is eliminated only in the sense that her judgment established a duty of fairness for both offices: ‘In the case of an office held at pleasure, even after the giving of reasons and the granting of a hearing, the employer’s mere displeasure is still justification enough to validly terminate the employment.\textsuperscript{52} Her reasoning here depends on the idea that a decision about process does not have substantive implications, at least not any implications beyond the possibility that the employee might communicate facts to the decision maker that were until then unknown, and which might lead the decision maker to a different conclusion.

In other words, the duty of fairness does not affect the content of the decision because the decider can still make any decision he likes. Moreover, L’Heureux-Dubé J. was very careful to declare the Court’s neutrality on the issue of the content of fairness, saying not only that ‘the concept of procedural fairness is eminently variable and its content is to be decided in the specific context of each case’\textsuperscript{53} but that

every administrative body is the master of its own procedure and need not assume the trappings of a court. The object is not to import into administrative proceedings the rigidity of all the requirements of natural justice that must be observed by a court, but rather to allow administrative bodies to work out a system that is flexible, adapted to their needs and fair.\textsuperscript{54}

The latter statement is supposed to remove the ambiguity in the former, since the claim that the content of fairness is variable and context-dependent leaves uncertain whether it is the courts or the agencies who are to determine its content.

\textsuperscript{51} Ibid. at 675.
\textsuperscript{52} Ibid. at 676.
\textsuperscript{53} Ibid. at 682.
\textsuperscript{54} Ibid. at 685.
Sopinka J.'s dissent raises doubts about the distinction between the content of the decision and the content of fairness, and thus about the ability of the Court to use the process/substance distinction to legitimate its foray into the world of administration. In his view, if an office is held at pleasure, the 'employer can terminate the employment without cause and without giving any reason. It would therefore be inconsistent ... to require the employer to give a reason for terminating the employee's employment in order to comply with the dictates of procedural fairness.'

Sopinka J. did allow for an exception to this general rule, in which there arises the limited duty of fairness involved in requiring the employer both to allow the employee to state his or her case and to consider any representations. But the exception would arise only if the employee were 'able to identify in the statute, regulations or contractual provisions governing the relationship, provisions which expressly or by necessary implication confer upon the employee a right to be heard or to make representations.' Thus he rejected L'Heureux-Dubé J.'s approach, in which the common law determines the existence of the duty and the various texts are evidence only of its content, since that approach 'converts the exception into the rule':

The correct approach requires an examination of the statute, regulations and contract to determine whether the respondent has brought himself within the exception to the general rule that an office terminable at pleasure does not attract the duty of fairness. Those governing instruments are the framework and context of the employment to which Lord Wilberforce [in Ridge, supra note 28] refers and which must constitute the source of the indicia of a duty of fairness.

Sopinka J.'s claim in this last passage conveniently omits the premise behind similar-sounding passages in the majority's judgment in Nicholson – that judges should focus on the statute in order not to be diverted by the common law regime that the statutory scheme is supposed to supplant and that they should adopt the presumption that as a general rule public power has to be exercised in a fair fashion. Omitting this premise is exactly analogous to claiming that the only question for a judge considering the appropriate standard for substantive review is whether there is a formal command to defer, not the reasons that prompt such a command, reasons that might well exist even in the absence of a privative clause.

Moreover, in his quest to distinguish Nicholson from the situation before the Court in Knight, Sopinka J. quoted at length the passage in which Laskin C.J. discussed the significance of the fact that the phrase 'at

55 Ibid. at 688.
56 Ibid.
57 Ibid. at 690.
pleasure’ had been dropped by the Legislature from the statute before the Court. By using this quotation in the way he did, Sopinka J. wanted to suggest that Laskin C.J. thought it important to have a positive statutory indication that there was a duty of fairness. But it is, to say the least, stretching things by the lights of his own analysis to find something positive in an omission. And it is clear that Laskin C.J. was looking for some argument based in statutory considerations that would allow him to hold that Nicholson did not hold office at pleasure, so that he did not have to take the more radical step for a Court he knew to be deeply divided about the wisdom of doing away with the distinction. Nevertheless, Laskin C.J. clearly invited a later court to do exactly that, by stating his premise and the conclusion that flowed from it – that the at pleasure/for cause distinction is anachronistic.

Still, the fact that Laskin used this peg is evidence of the unease judges felt about moving away from a world where natural justice was an all-or-nothing affair that attached to only one kind of body – one that could be said to act quasi-judicially. And that same sense of unease is reflected in various aspects of L’Heureux-Dubé J.’s judgment for the Court in Knight.

First, she aligned herself with the view that there is a category of ‘legislative decisions’ that are immune from procedural fairness in the way that administrative decisions had been.58 Second, she suggested that full natural justice will be applied only to bodies that would have been categorized as quasi-judicial under the old distinction, thus suggesting that ‘privileges’ created by the legislative state do not reflect interests as weighty as the substantive interests protected by the common law.59 Finally, she wished to claim, as we have shown, that the duty of fairness did not affect substance in any sense.

This last claim is deeply problematic, as Sopinka J.’s dissent reveals. L’Heureux-Dubé J. clearly required at least the ‘communication of the broad grounds revealing the general substance of the reason for dismissal.’60 But if such communication is required, then ‘mere displeasure’ does not suffice, despite her claim to the contrary, made in her bid to maintain the process/substance distinction intact. Wholly arbitrary reasons are ruled out, at least in the sense of reasons that could trigger review for abuse of discretion, that is, reasons that reveal the bad faith of the decision maker, the exercise of discretion for an improper purpose, and the use of irrelevant considerations. So, for example, ‘I don’t like

58 See Inuit Tapirisat, supra note 25, and Knight, supra note 45 at 670.
59 Knight, ibid. at 683: ‘[T]he closeness of the administrative process to the judicial process should indicate how much of those governing principles should be imported into the realm of administrative decision making.’
60 Ibid. at 685.
your face' is ruled out. Further, it seems that if the reason for termination is personal to the individual, it must be the case that the reason offered must be one to which the employee can respond. Hence, 'I don't like the way you do your job' should not suffice, as, surely, some particulars are required if the hearing afforded the subject of the decision is not to be a completely cosmetic exercise.

In short, the reason-giving requirement affects at the same time the content of the duty of fairness and the content of the actual decision by requiring that, however the Board decides to communicate with the employee, and whatever its final decision is, that decision must be the result of a process of communication where there are limits to what counts as a good reason. If there were no limits to what counts as a good reason, so that arbitrary reasons were permitted, then the rationale for demanding reasons and a hearing would be subverted.

This rationale goes to the quick of what it means for an administrative tribunal to treat a person fairly. Procedural fairness does not always, or even often, lead to particular outcomes. While what we termed the principle of accuracy is an important one, accuracy cannot be taken to imply that there is only one accurate decision, only one decision that properly responds to all the evidence. Indeed, the principle of legitimacy is more basic than the principle of accuracy. It is a conception of the fifth sense of substance we identified above, in that it offers a political justification for procedural fairness.

L'Heureux-Dubé J.'s judgment adopts the normative premise that public authority acts legally only when it acts legitimately, that is, in accordance with standards of fairness. Fairness requires that the state, in

61 It is said that the real reason for Nicholson's termination was that the police budget did not permit keeping constables on past the probationary period. Nicholson could not, of course, respond to this reason other than by complaining that it was unfair to allow applicants to the police force to rely on an expectation that a probationary period is a genuine test of ability. The point here isn't that he had a legitimate expectation, though he may have had, but that even if there is no response available to him, the policy is brought to light in a way that is important for others.

62 As the Supreme Court has recently summed up the premise that one gets out of both Nicholson and Knight, 'In a nation governed by the rule of law, we assume that the government will honour its obligations unless it explicitly exercises its power not to. In the absence of a clear express intent to abrogate rights and obligations – rights of the highest importance to the individual – those rights remain in force. To argue the opposite is to say that the government is bound only by its whim, not its word. In Canada, this is unacceptable, and does not accord with the nation's understanding of the relationship between the state and its citizens': Wells v. Newfoundland, [1999] 3 S.C.R. 199 at 218, per Major J. Major J. affirmed in this case that the legislative function is immune from review for fairness; however, the status of this affirmation is not very clear, as in issue was the restructuring of a Public Utilities Board by statute. Major J. relied at times on an analogy between a statute and executive action, which is problematic.
its dealings with those subject to it, treat its subjects in accordance with the principle of legitimacy, a principle that must ultimately be based on the inherent dignity of the individual. That premise has implications for the other four senses of substance. The institutional expression of the principle of legitimacy is through the principle of legality: administrative officials are subject to the rule of law. It follows that an individual subject to a decision by an administrative official is not entitled necessarily to the decision she wants but only to that decision being responsive to her reasons.

L'Heureux-Dubé J.'s recognition of the principle of legitimacy turned an office at pleasure into one where dismissal had to be, if not for cause, at least for legitimate reasons. Hence she stepped over the line dividing process and substance to the extent that her judgment affected the structure of the administrative process and, moreover, affected it in a way that narrowed the range of possible outcomes. And it is this fact that explains why Sopinka J.'s dissent could attract the likes of Wilson and McLachlin JJ.

However, as we will now show, L'Heureux-Dubé J.'s failure to recognize fully the ways in which her judgment complicated the process/substance distinction made it possible for Sopinka J. to entrench his own Diceyan views in the jurisprudence of the Court on the topic of legitimate expectations, an entrenchment that was then taken further by Strayer J.A. in the Federal Court of Appeal in the judgment to which Baker responds.

IV The principle of legality

At the outset, we asserted that the various innovative propositions for which Baker is authority are not, even cumulatively, what makes it an important, even a great, judgment. Rather, what makes Baker great is what lies behind that accumulation – L'Heureux-Dubé J.'s articulation of the overarching principle of legality that comes into view once the two streams merge that had CUPE and Nicholson as their sources. That is, the idea that comes into view is that legal principles, of which the duty of fairness is an important example, control the spaces in which both the judgment of administrative tribunals and the exercise of discretion take place.

In order to establish the second proposition with respect to discretion, one has to surmount the barrier that arises from the idea that the legal

Major J. also seemed to go further along the path of ridding Canadian administrative law of the distinction between dismissal for cause and at pleasure, but his remarks on this point are obiter.
constraints on legislative authority, or on the discretionary authority delegated to the executive by the legislature, are constraints of manner and form, unless the legislature itself specifies thicker constraints. It is of course true that the constraints on discretionary authority were conceived as somewhat thicker than constraints of manner and form. As L’Heureux-Dubé J. said in Baker, the ‘rule has been that decisions classified as discretionary may only be reviewed on limited grounds such as the bad faith of decision-makers, the exercise of discretion for an improper purpose, and the use of irrelevant considerations.’ Given that courts would claim that they could not go beyond this list, review of discretion often foundered because without more — a hearing, reasons, and so on — it was impossible for a party to find evidence to support the claim that there had been bad faith, improper purpose, and so on. But to go beyond the list puts one on a slippery slope that shatters en route the idea that there is a category of legislative decisions that are immune from fairness and stops in a stark confrontation with the claim that the legislature itself is subject to the principle of legality.

As we will show, there is a sense in which L’Heureux-Dubé J.’s judgment, as she herself seems to acknowledge, is a retrieval of the jurisprudence of an ‘implied common law bill of rights,’ to use John Willis’s term. Particularly pertinent here is Rand J.’s judgment in Roncarelli, which, as we will see, L’Heureux-Dubé J. cites at a crucial stage of her judgment. Willis meant the expression ‘a common law bill of rights’ pejoratively, to signal the Diceyan tendency to use the common law to thwart, or at least to confine, the administrative state. But, as we will also try to show, that idea, when properly articulated, does not have such effects.

Our primary concern in this section is with Baker and its articulation of the principle of legality, and not with one of the issues that occupied the Federal Court of Appeal below — the place of legitimate expectations in Canadian administrative law. But the idea of legitimate expectations, either of a substantive outcome or of a particular process for arriving at outcomes, needs some mention, as the arguments to the various courts in Baker were initially framed in terms of legitimate expectations. This was because in Minister for Immigration and Ethnic Affairs v. Teoh, the majority of the High Court of Australia had held, in a situation similar to Baker's,

63 Baker, supra note 2 at 853.
64 Roncarelli, supra note 5. For discussion of Baker's debt to Rand, and in particular to Roncarelli, to which we are heavily indebted, see Mullan, 'Role of the Judiciary,' supra note 14. For Willis, see J. Willis, 'Statutory Interpretation in a Nutshell' (1938) 16 Can.Bar Rev. 1 at 17, 23.
that the ratified but unincorporated Convention on the Rights of the Child created a legitimate expectation in Teoh and his children that any decision relating to residency or deportation would treat the best interests of the child as a primary consideration.\footnote{The majority, Mason C.J., Deane and Toohey JJ., held that that expectation could be validly defeated only by informing Teoh and his children that the Convention principle would not be applied and giving them the opportunity to persuade the decision maker to change his or her mind. Note that the High Court had hamstringed itself by deciding, in Public Service Board of New South Wales v. Osmond, (1986) 159 C.L.R. 656 (H.C.A.) [hereinafter Osmond], that there was no common law duty to give reasons. For a fascinating account of that decision and its jurisprudential implications, see M. Taggart, ‘Osmond in the High Court of Australia: Opportunity Lost’ in M. Taggart, ed., Judicial Review of Administrative Action in the 1980s (Auckland: Oxford University Press, 1987) 53; and for a comparative account, see D. Dyzenhaus, M. Hunt, & M. Taggart, ‘The Principle of Legality in Administrative Law: Internationalisation as Constitution-alisation’ 1 O.U.J. Commonwealth Law [forthcoming in 2001]. One way of understanding the interplay of Osmond and Teoh is that the effect of the former on the latter is that the decision maker could sit impassively while the applicant sought to change her mind and then make a decision that was not in any way responsive to the applicant. That is, the decision maker could make a decision based on wholly arbitrary considerations. But that understanding, as we argued in our analysis of Knight, underestimates the extent to which the logical space of what counts as a reason is limited by a hearing that requires an exchange of reasons. Of course, decision makers can be duplicitous, hypocritical, and so on, but against that possibility the gods themselves contend in vain.} That decision was followed by a political uproar in Australia.\footnote{McHugh J. wrote a very strong dissent in which he argued that the separation of powers precluded giving domestic effect to a ratified but unincorporated treaty.}

Teoh must, from the beginning, have seemed like unpromising ground for adoption in Canada. Besides the political fallout from the decision, the Supreme Court had, in 1978, held in Capital Cities Communications Inc. v. Canadian Radio-Television Commission that ratified but unincorporated treaties do not give rise to any legal obligations.\footnote{[1978] 2 S.C.R. 141 [hereinafter Capital Cities].} Second, Sopinka J., in two judgments for the Supreme Court, had entrenched the view that legitimate expectations generate procedural, not substantive, rights. Further, in the second of these judgments it was argued that the Federal Government was subject to constraints arising out of an expectation that it would not introduce certain legislation without consulting the provinces that would be affected by it.\footnote{Old St. Boniface Residents’ Assn. v. Winnipeg (City) [1990] 3 S.C.R. 1170 [hereinafter Old St. Boniface] and Reference Re Canada Assistance Plan (B.C.), [1991] 2 S.C.R. 525 [hereinafter CAP].} And Sopinka J. adduced the doctrine of the separation of powers as part of his reasons for rejecting this argument.

In Baker, the issue arose as one about whether the federal immigration authorities must treat the best interests of the child as a primary consider-
atation, notwithstanding the fact that the Immigration Act does not expressly incorporate the language of Canada’s international obligations with respect to the Convention (on the rights of the child). Strayer J.A. for the Federal Court of Appeal argued that the Convention did not on its face cover the situation but that, if it did, it was impermissible to apply it in Canada. First, to apply it would result in attaching substantive rights to the legitimate expectations of Baker, which violates the Canadian law that attaches only procedural rights to such expectations. More importantly, he argued that to read in such rights would be to allow the executive to trigger a legal obligation that would limit Parliament’s grant of an unfettered discretion to the executive. While he appeared to concede that, in general, statutory language must be read so as to conform to the requirements of international law, he said that there are constitutional limits to this interpretative process. And, in his view, the doctrine of the separation of powers set firm limits.

The most striking feature of Strayer J.A.’s judgment, however, is an absence: the fact that he omitted to quote the case notes of Officer Lorenz, which were used by Officer Caden when he made the decision on Baker’s request to be allowed to stay in Canada on humanitarian and compassionate (H & C) grounds. Lorenz’s notes, which were quoted in full by the Supreme Court, read like a litany of stereotypes and prejudice, but Strayer J.A. expressed no concern about Lorenz’s

70 ‘PC is unemployed – on Welfare. No income shown – no assets. Has four Cdn.-born children – four other children in Jamaica – HAS A TOTAL OF EIGHT CHILDREN ‘Says only two children are in her “direct custody.” (No info on who has ghe [sic] other two).

‘There is nothing for her in Jamaica – hasn’t been there in a long time – no longer close to her children there – no jobs there – she has no skills other than as a domestic – children would suffer – can’t take them with her and can’t leave them with anyone here. Says has suffered from a mental disorder since ’81 – is now an outpatient and is improving. If sent back will have a relapse.

‘Letter from Children’s Aid – they say PC has been diagnosed as a paranoid schizophrenic. – children would suffer if returned –


‘Says PC had post-partum psychosis and had a brief episode of psychosis in Jam. when was 25 yrs. old. Is now an out-patient and is doing relatively well – deportation would be an extremely stressful experience.

‘Lawyer says PS [sic] is sole caregiver and single parent of two Cdn born children. PC’s mental condition would suffer a setback if she is deported etc.

‘This case is a catastrophe [sic]. It is also an indictment of our “system” that the client came as a visitor in Aug. ’81, was not ordered deported until Dec. ’92 and in APRIL ’94 IS STILL HERE!

‘The PC is a paranoid schizophrenic and on welfare. She has no qualifications other than as a domestic. She has FOUR CHILDREN IN JAMAICA AND ANOTHER FOUR BORN HERE. She will, of course, be a tremendous strain on our social welfare systems for (probably) the rest of her life. There are no H&C factors other than her FOUR
hostility toward Baker and her children. Instead, he accepted the Motion Judge’s finding that ‘the situation of the children was a “significant factor in the decision-making process” by Officer Caden.’ In accepting this finding, he concluded from the fact that it had been made that it would not advance the appellant’s cause ‘to say that the welfare of the Canadian children of the deportee must be a factor, where raised by that deportee, in any determination as to the existence of adequate humanitarian grounds for exempting him or her from deportation. No one disputes that such is the case.’ At issue for him was, he suggested, only whether the ‘best interests of the children must as a matter of law be given more weight than many other factors ... In other words the question relates to the substance of, not the procedure for, a decision as to whether humanitarian or compassionate grounds justify an exemption from deportation.’

It is unclear from Strayer J.A.’s judgment whether he meant that as a matter of fact the decision maker will take the children’s interests into account if they are presented to him as part of the package of considerations and because it is permissible to do so (that is, they are not irrelevant), or that once the interests are raised as an issue, they must be taken into account, although it is entirely up to the officer to decide how to do so. He could afford to be ambiguous, since, even if he is best interpreted as saying that the interests are a mandatory relevant consideration once they are raised, he had previously authored a decision that made it clear that he would not find a duty to give reasons in this kind of context, in part adducing considerations about the separation of powers. And that meant that prospective deportees would have to be very lucky to obtain evidence that no consideration, negative or positive, had been given to the interests of the children.

In her judgment for the majority of the Supreme Court in *Baker, L’Heureux-Dubé J.* mentioned Strayer J.A.’s separation of powers argument but did not respond to it directly, a rather stark omission, since that same argument is the basis of the partial dissent in *Baker*, written by Iacobucci J., in which Cory J. joined. Since Iacobucci J. has been the most prominent of the more recently appointed judges in developing the logic of the *CUPE* paradigm, and since Cory J. has been a stalwart among the defenders of *CUPE*, their dissent is hardly to be written off as knee-jerk

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**CANADIAN-BORN CHILDREN.** Do we let her stay because of that? I am of the opinion that Canada can no longer afford this type of generosity. However, because of the circumstances involved, there is a potential for adverse publicity. I recommend refusal but you may wish to clear this with someone at Region.

"There is also a potential for violence – see charge of “assault with a weapon.”"


72 *Williams v. Canada (Minister of Citizenship and Immigration)*, [1997] 2 F.C. 646 [hereinafter *Williams*].

73 *Baker*, supra note 2 at 831.
Diceyanism. Moreover, L’Heureux-Dubé J. relied quite heavily at various points on Sopinka J.’s judgments on the topic of legitimate expectations. Since his first judgment is a very strong statement of the Diceyan understanding of the substance/process distinction and the second provided much of the grist for Strayer’s mill, her reliance is difficult to understand other than as an attempt to limit the confrontation with the radical implications of her reasoning.\textsuperscript{74}

But the most important tactic of avoidance comes about through silence. Both L’Heureux-Dubé J.’s majority judgment and the partial dissent are marked by the absence of any mention of Teoh. The taboo on Teoh might suggest that that decision played an important role in the judges’ debates about how to justify the result and is just under the surface of much of the majority’s reasoning. It would follow that the Convention played a much more significant role in the majority judgment than it appeared to do on the surface.\textsuperscript{75}

L’Heureux-Dubé J., relying on a decision of her Court given after the Federal Court of Appeal’s decision in Baker (FCA), started by saying that the Court was not confined to deciding the question stated by the Trial Division of the Federal Court for the Court of Appeal, that is, whether the federal immigration authorities had to treat the best interests of the child as a primary consideration in assessing an application under s. 114(2) of the Immigration Act.\textsuperscript{76} She noted the fact that the H & C decision is one that provides for an exemption from regulations or from the Act. For Strayer J.A. this fact had operated to indicate the privileged nature of the discretion, and thus its immunity from review for procedures other than those explicitly provided for in the Act. L’Heureux-Dubé J., in contrast, noted the fact in order to emphasize that the point of focus for a court should be the kind of effect the decision has, and she said that an H & C decision is an ‘important’ one that affects in a fundamental way the future of individuals’ lives. In addition, it may also have an important impact on the lives of any Canadian children of the

\textsuperscript{74} Indeed, L’Heureux-Dubé J. divided up the main part of her judgment into discrete sections, one dealing with ‘Procedural Fairness’ and the other with ‘Review of the Minister’s Discretion.’ As we will show below, this division is problematic, not least because she put the duty to give reasons into the first section.

\textsuperscript{75} Indeed, one should keep in mind that the main arguments put to the Court on Baker’s behalf were Charter arguments. That the Court decided to take the administrative law rather than the Charter route to its conclusion may well have been because the interests that were the basis for Baker’s claim were the interests of her children, and it would have been difficult to find a precise place in the Charter to locate the claim that those interests had to be taken into account. It follows that the Convention, which did provide the basis, is of considerable importance. For further discussion see note 94 infra.

\textsuperscript{76} The intervening decision is Pushpanathan v. Canada (Minister of Employment and Immigration), [1998] 1 S.C.R. 982; Baker, supra note 2 at 833.
person whose humanitarian and compassionate application is being considered, since they may be separated from one of their parents and/or uprooted from their country of citizenship, where they have settled and have connections.  

Since both parties agreed that the decision, while administrative in nature, did trigger the application of the duty of fairness, the issue—following Knight—was what was the content of that duty. While various factors had to be taken into account in deciding that issue, it was important, said L’Heureux-Dubé J., to keep in mind that underlying all these factors is the notion that the purpose of the participatory rights contained within the procedural duty of fairness is to ensure that administrative decisions are made using a fair and open procedure, appropriate to the decision being made and its statutory, institutional, and social context, with an opportunity for those affected by the decision to put forward their views and evidence fully and have them considered by the decision-maker.  

She listed five factors. Here she reiterated a view she had first expressed in Knight that the closer the tribunal is in nature and operation to a court, the more likely it is that the duty of fairness will require procedural protections closer to the trial model. Second, she cited one of Sopinka J.’s judgments on legitimate expectations for the proposition that one has to look to the nature of the statutory scheme and the ‘terms of the statute pursuant to which the body operates.’ Thus greater procedural protections will be required when no appeal procedure is provided by the statute or when the decision is determinative. The third factor is the importance of the decision, and ‘the more important it is to the lives of those affected and the greater its impact on that person or those persons, the more stringent the procedural protections that will be mandated.’  

Note that this third factor introduces (or, better, makes explicit) an important ambiguity in the first. Does the label of quasi-judicial, and the full procedural protections associated with it, track the effect of the decision? Or do such protections follow from the label, which will be attached on the basis of the formal criteria associated with the quasi-judicial/administrative distinction? Clearly, the first proposition—the

77 Baker, supra note 2 at 833–5.
78 Ibid. at 837.
79 Ibid. at 838–41.
80 Supra note 45 at 683.
81 Old St. Boniface, supra note 69 at 1191.
82 Here she relied on the authority of Sedley J. in the leading UK decision on the duty to give reasons, R. v. Higher Education Funding Council, ex parte Institute of Dental Surgery, [1994] 1 All E.R. 651 at 667 (Q.B.).
one that *Baker* turns out to support – is the progressive one, while the second reacts against the potential unleashed by the move away from Diceyan formalism.

The fourth factor is the legitimate expectations of the person challenging the decision, a factor that may determine what procedures the duty of fairness requires in given circumstances. Here, following Sopinka J.'s earlier jurisprudence, L'Heureux-Dubé J. stated that '[o]ur Court has held that, in Canada, this doctrine is part of the doctrine of fairness or natural justice, and that it does not create substantive rights.' The doctrine thus works to increase procedural fairness only when a substantive promise has been made by a decision maker, or when the decision maker departs from past regular practices or fails to comply with representations about process.83

Fifth, the analysis of what procedures are required ‘must take into account and respect the choice of procedure made by the agency itself, particularly when the statute leaves to the decision-maker the ability to choose its own procedures, or when the agency has an expertise in determining what procedures are appropriate in the circumstances.'84

83 Both *Old St. Boniface* and *CAP*, supra note 69. Here she goes beyond Sopinka J.’s holding in *CAP* that a substantive commitment to an outcome does not create procedural protections; that is, that only a procedural commitment gives rise to such protections.


While we will not deal with this issue in the text, our sense is that her reasoning at this point in *Baker* contains the basis for a move away from the Court’s reluctance to defer to an agency’s procedural determinations, other than by paying lip service to this possibility when the issue is whether the threshold for fairness has been crossed and not the content of fairness itself.

In a way, L’Heureux-Dubé J. is responsible for Court’s stance in relation to the content of fairness. After all, in *Knight* she likened fairness to s. 7 of the Charter, thus implying that agency determinations of fairness should be reviewed on the same standard that the Court would in the same year hold is appropriate for agency determinations of Charter challenges to the agency’s constitutive statute, that is, correctness. See *Knight*, supra note 45 at 683; for the first decision on agency determinations of Charter challenges, see *Douglas/Kwantlen Faculty Assn. v. Douglas College*, [1990] 3 S.C.R. 570 [hereinafter *Douglas College*].

Indeed, if *Baker* does lay the basis for the Court’s reconsideration of the correctness standard, and if fairness is rightly analogized to s. 7 of the Charter, then the Court would have moved somewhat away from the majority position set out in *Canada (Attorney General) v. Moskop*, [1993] 1 S.C.R. 554 [hereinafter *Moskop*] and thus towards adopting the position set out in L’Heureux-Dubé J.’s solitary claim on dissent in *Moskop* that the Court should defer to a human rights tribunal’s expertise in interpreting its own statute. That is, since the prohibitions on human rights violations are like constitutional protections, the majority adhered to a standard of correctness, while L’Heureux-Dubé J.,
L’Heureux-Dubé J. found that she did not have to consider the issue of legitimate expectations, since the articles of the Convention did not give rise to a legitimate expectation on the part of Ms Baker to an entitlement to specific procedural rights above the normal requirement under a duty of fairness. The Convention, she said, is not ‘the equivalent of a government representation about how H & G applications will be decided ...’ Thus she left open the question of ‘whether an international instrument ratified by Canada could, in other circumstances, give rise to a legitimate expectation.’

Now, she could, at this point, have said clearly that she was leaving the answer to the stated question open, and so also the question of the Canadian stance in relation to the Convention and to Teoh. That would have permitted the minority to limit their disagreement to this part of the majority judgment. But that she did not adopt this tactic, and that the minority did not – perhaps more accurately could not – limit their disagreement, suggests the greater role for the Convention in the part of her judgment where she dealt with the review of the exercise of the Minister’s discretion.

though recognizing the analogy, did not think that that recognition entailed correctness review.

It should be noted in this regard that one issue that preoccupied the Court in Douglas College and in subsequent cases (Cuddy Chicks Ltd. v. Ontario (Labour Relations Board), [1991] 2 S.C.R. 5, and Tetraull-Gadoury v. Canada (Employment and Immigration Commission), [1991] 2 S.C.R. 22) was whether an agency’s authority to decide a Charter challenge should depend on an explicit authorization in its constitutive statute to interpret ‘the law.’ While the majority adopted the view that this formal delegation of authority was a necessary condition, Wilson and L’Heureux-Dubé JJ. disagreed in Douglas College, and L’Heureux-Dubé J., in subsequent decisions, continued to remind the Court that its stance in this respect was peculiarly formalistic. Put in terms of the analysis in the earlier sections, the Court was determined to put the brakes on its step onto the slippery slope in Douglas College by wearing the Diceyan brake shoes of explicit statutory command. This position was upheld in Cooper v. Canada (Human Rights Commission), [1996] 3 S.C.R. 854 [hereinafter Cooper]. L’Heureux-Dubé and McLachlin JJ. dissenting. In a remarkable solitary judgment, Chief Justice Lamer argued, on separation of powers grounds, that the Court had gone wrong in Douglas College and that the line of authority there established should be overruled. His view is so strongly stated that he would at least have had to join the minority judgment in Baker, but, as a matter of logic, his reasoning is of a piece with Strayer J.A.’s in Baker (FCA).

Indeed, as Lamer C.J. pointed out in Cooper, the issues here go to the soundness of Chief Justice Laskin’s statement of the Court’s position on the constitutional protection of the correctness standard for jurisdictional review in Crevier, supra note 17. And if that is right, then eventually the Court will have to reconsider steps 2 and 3 for determining whether a power is a judicial power as stated by Dickson J. in Re Residential Tenancies Act, [1981] 1 S.C.R. 714. As Katrina Wyman pointed out to us, our claim about what is involved in accepting the legitimacy of the administrative state suggests that legal norms are not within the interpretative monopoly of the judiciary in the way presupposed by Dickson J.’s distinction between judicial and non-judicial functions.

85 Baker, supra note 2 at 841.
The Convention did play what she called an indirect role in her reasoning. As we will now show, that role was to inform her analysis of the content of the duty of fairness, or, put more broadly, of the principle of legality. For, as we have suggested, for the duty of fairness to have more than minimal content in the circumstances of an H & C decision, one must first assume that that decision was made not in a legal void but in a space controlled by law.

Indeed, L’Heureux-Dubé J. overruled an earlier Federal Court of Appeal’s holding that the duty of fairness owed in these circumstances is minimal.⁶⁶ She did note two factors that argued in favour of more relaxed requirements under a duty of fairness. First, an H & C decision is very different from a judicial decision in that it involves ‘an exercise of considerable discretion and requires the consideration of multiple factors’; second, its role within the statutory scheme is as an exception to the general principles of Canadian immigration law. But, on the other hand, she said, there was no appeal procedure, only judicial review with the leave of the Federal Court – Trial Division. And what clearly weighed most for her was the ‘exceptional importance to the lives of those with an interest in its result.’ This led, she said, to the content of the duty of fairness ‘being more extensive.’ While balancing these factors did not mean that an oral hearing was always required, the circumstances did ‘require a full and fair consideration of the issues, and the claimant and others whose important interests are affected by the decision in a fundamental way must have a meaningful opportunity to present the various types of evidence relevant to their case and have it fully and fairly considered.’⁶⁷

But while L’Heureux-Dubé J. did not find that an oral hearing was required, she did find that the common law duty of fairness required the provision of reasons for the decision.⁶⁸ She noted that the traditional position at common law was that the duty of fairness did not, as a general rule, require the provision of reasons for administrative decisions and the concerns about such a requirement, namely, increased cost and delay as well a lack of ‘candour’ on the part of the decision makers.⁶⁹ She thought, however, that the reasons requirement under the duty of fairness ‘leaves sufficient flexibility to decision-makers by accepting various types of written explanations for the decision as sufficient.’ She concluded that

it is now appropriate to recognize that, in certain circumstances, the duty of procedural fairness will require the provision of a written explanation for a

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⁶⁷ Baker, supra note 2 at 842–4.
⁶⁸ And here she seemed, by implication, to overrule Strayer J.A.’s judgment for the Federal Court of Appeal in Williams, supra note 72.
⁶⁹ Citing Osmond, supra note 66.
decision. The strong arguments demonstrating the advantages of written reasons suggest that, in a case such as this where the decision has important significance for the individual, where there is a statutory right of appeal, or in other circumstances, some form of reasons should be required. This requirement has been developing in the common law elsewhere. The circumstances of the case at bar, in my opinion, constitute one of the situations where reasons are necessary. The profound importance of an H & C decision to those affected ... militates in favour of a requirement that reasons be provided. It would be unfair for a person subject to a decision such as this one which is so critical to their future not to be told why the result was reached.  

The upshot of her reasoning in this point, although she did not state this explicitly, is that in any case where a decision will have a significant impact on an individual, so that a more than minimal duty of fairness is triggered, part of the content of that duty will be the provision of adequate reasons. In other words, the default position at common law has changed from the old position where reasons had to be provided only in exceptional circumstances to a position where reasons must be provided when an administrative decision is critical to the future of an individual.

As David Mullan has noted, L’Heureux-Dubé J. here goes beyond the traditional arguments for a reasons requirement, based on correcting error and otherwise ensuring better decision making, to a claim based ‘in essence on the dignity of the individual.’ And in so doing, he says, the Court is ‘coming close to trading in “fairness” as a substantive and not purely procedural concept. ... Indeed, it serves to further emphasize that there is no bright line between procedural and substantive review.’ This statement suggests that the erosion of the process/substance distinction that L’Heureux-Dubé J. began in Knight is now altogether explicit. And it has become explicit precisely because in Baker she expressly makes the link between the content of fairness and the principle of legitimacy, which she had seemed unwilling to recognize, or perhaps just did not see, at the time of her decision in Knight.

The imposition here of the duty to provide reasons is of a piece with the Court’s holding that the discretion must be exercised reasonably.  

90 Baker, supra note 2 at 848.
92 We will not deal here with L’Heureux-Dubé J.’s finding that Officer Lorenz’s notes should be treated as the reasons, even though he was not the actual decision maker, nor with her finding that the notes disclosed bias sufficient to taint the decision. In respect of the first issue, Lorne Sossin has pointed out that the ‘danger’ in this approach to reasons is that it ‘may be perceived as casting the net too broadly in terms of what will constitute reasons. The Court clearly is mindful of the administrative burden that requiring written reasons may occasion. Indeed, this was often cited as a principal
This holding had to surmount two factors, both noted by L’Heureux-Dubé J. First, the grant of discretion to the Minister was couched subjectively – the Minister was authorized to grant an exemption where ‘satisfied that. ...’ Second, as we have seen, the general view in administrative law in Canada had been that the review of discretionary decisions was to be approached differently from the review of decisions involving the interpretation of the law. For the former, grounds had been limited to the bad faith of the decision makers, the exercise of discretion for an improper purpose, and the use of irrelevant considerations. For the latter, following the articulation of the patent unreasonableness test in CUPE, the Court had developed a spectrum of standards, ranging from correctness through reasonableness to patent unreasonableness.

With regard to the second factor, L’Heureux-Dubé J. suggested that there was no ‘easy distinction to be made between interpretation and the exercise of discretion’ – ‘interpreting legal rules involves considerable discretion to clarify, fill in legislative gaps, and make choices among various options.’ Here she assimilates discretion to legal judgment, a move that fills the discretionary void of the Diceyan conception with legal principles, which she states as follows:

[D]iscretion 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] SCR 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 SCR 1038). 93

With regard to the first factor, the subjective framing of the grant of discretion, she was careful to state that the assimilation of review of discretion to review of interpretation of rules of law should not be seen as ‘reducing the level of deference given to decisions of a highly discretionary nature.’ But whatever the degree of deference owed, and though discretionary decisions ‘will generally be given considerable respect,’ the decision had to accord with the appropriate principles, which in this

justification for why no duty to provide reasons was appropriate in the administrative sphere [citing MacDonald & Lametti, ‘Reasons for Decision in Administrative Law’ (1990) 3 Can. J. Admin. Law & Practice 123]. However, it is possible to read this aspect of Baker as an indication that the reasons requirement may be satisfied in an informal and even ad hoc fashion. This would be an unfortunate result.’ Sossin, ‘Developments in Administrative Law: The 1997–98 and 1998–99 Terms’ (2000) 11 Sup.Ct.Law Rev. 37 at 74. At 75–6, Sossin discusses decisions by lower courts subsequent to Baker, in which the written reasons requirement is treated as placing a ‘symbolic’ rather than a ‘substantive burden on government.’

93 Baker, supra note 2 at 853–4.
context supported a reasonableness standard. At this point, the notes of Officer Lorenz played an important role, since, in L’Heureux-Dubé J.’s view, they showed that he was ‘completely dismissive of the interests of Ms. Baker’s children.’ And that fact, L’Heureux-Dubé J. reasoned, showed that, in the context of the statute, the exercise of discretion had been unreasonable.

In embarking on that reasoning, she began by saying that the question of whether the exercise of discretion was reasonable given the statute required the contextual approach that is generally taken to statutory interpretation. She portrayed the Convention’s role in the analysis of discretion as one of three concrete factors informing her evaluation of whether the exercise of the discretion had in fact been reasonable. At a more abstract level, she found that one could not interpret the phrase ‘humanitarian and compassionate considerations’ without seeing that attention to such considerations would require ‘close attention to the interests and needs of children,’ since ‘[c]hildren’s rights, and attention to their interests, are central humanitarian and compassionate values in Canadian society.’ She then said that ‘indications of children’s interests as important considerations governing the manner in which H & C powers should be exercised may be found, for example, in the purposes of the Act, in international instruments, and in the guidelines for making H & C decisions published by the Minister herself.’

94 Ibid. at 856–8. Her avoidance of talk of the Convention at the point of determining the appropriate standard of review may have been prompted more by logic than by the Teoh taboo. That human rights are affected by an administrative decision will naturally tend to drive the standard away from the patent unreasonable end of the continuum. But to hold that the interests of the children are relevant at this point would be to encounter the same problem that the Charter-based arguments encountered. That is, since the Charter does not explicitly build family unity or children’s interests into any of its provisions, such provisions must be read in the light of the Convention before a Charter-protected interest can be said to be affected by the decision. This reading would reverse the logic set out in Slaight Communications Inc. v. Davidson, [1989] 1 S.C.R. 1038 [hereinafter Slaight], where it appears that international instruments become relevant only when the Charter is in play. Similarly, to hold that the Convention should inform the question of the standard of review would be to assume what has to be demonstrated – that the Convention is relevant. As we mentioned in note 75 supra, in Baker the Court explicitly declined to consider the Charter arguments put by the parties and the interveners. The Charter may nevertheless be said to have played a background role, both because of previous jurisprudence that sought to show that non-citizens get less protection under the Charter than citizens and – contrariwise – because Canadian judges have, by virtue of their experience of Charter review, a greater degree of comfort than their counterparts in the Commonwealth in finding that rights and interests limit what the executive can lawfully do.

95 Baker, supra note 2 at 859.

96 Ibid. at 860.
L'Heureux-Dubé J.'s choice of language seems deliberately vague in crucial respects, carefully avoiding the phrase used by Article 3 of the Convention – 'the best interests of the child shall be a primary consideration' – in favour of phrases that connote something similar. She also emphasized that to give the interests substantial weight is not to say that the 'children's best interests must always outweigh other considerations, or that there will not be other reasons for denying an H & C claim even when the children's interests are given this consideration.'\(^{97}\)

In addition, her claim that the Act, the international instruments, and the Guidelines are 'indications' of the children's interests as important considerations avoids saying what kinds of indications these are. Are they merely further evidence of what she had already found among the 'central values of Canadian society,' so that they were not necessary for her reasoning? Or did they provide a bridge to a claim that there is a legal obligation not only to take the children's interests into account but also to attach considerable weight to them?\(^ {98}\)

In our view, the best understanding of her reasoning is that the Act and the guidelines could serve to move the interests of the children from the status of relevant considerations – considerations that can legitimately be taken into account – to mandatory relevant considerations – considerations that must be taken into account for the decision to be legitimate. In addition, these two legal entities could support the claim that the interests should be given considerable weight. But that the interests should not only have weight but have the kind of weight that seems entailed by their description as 'best interests' that have to be 'outweighed by other considerations' is a claim that is best grounded in the language of the Convention. For that claim, to use the language of a New Zealand Court of Appeal decision on the Convention, amounts to saying that where there are children involved, the duty to give reasons will require the official who wishes to deport the individual to adopt the best interests of the children as his 'starting point.'\(^ {99}\) And if this is the case, the official will have to proceed by justifying why these interests are overridden by other factors.\(^ {100}\)

Ruled out is not only the kind of perverse decision that led to *Baker*, where the existence of children counted against Baker, but also a box-ticking exercise where the official says baldly that he has considered the

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97 Ibid. at 860–4.
98 Ibid. at 860–2.
100 Note that in *Baker* the majority, while citing *Tavita*, ibid., with approval, did not cite *Pulu’ueva v. Removal Review Authority* (1996), 2 H.R.N.Z. 510 (C.A.), an omission notable here because Keith J., in that decision, was dismissive of talk of starting points (at 524–5).
interests of the children but that they were outweighed by other factors. In order to earn the 'respect' of the reviewing court that attends the act of judicial deference, the immigration officer would have to show, as L'Heureux-Dubé J. suggested, that his decision was consistent with 'the values underlying the grant of discretion.' At this point as well, L'Heureux-Dubé J. moves away from the version of the process/substance distinction she had tried to maintain in Knight, when she claimed that the imposition of procedural fairness in that case made no substantive difference in the sense of constraining outcomes.

Iacobucci J.'s partial dissent, concurred in by Cory J., is based on his sense that the Court should have closed the door firmly shut to claims about legitimate expectations based on ratified but unincorporated treaties. In support he cited Capital Cities, which, in his view, ruled out not only direct application but also indirect application. Here he was responding directly to L'Heureux-Dubé J., who had acknowledged that the Convention was not 'part of Canadian law,' since it was ratified but not incorporated, and so expressed her agreement with the Canadian jurisprudence on this point in Capital Cities. But she then concluded that the fact of no statutory incorporation meant only that the provisions of the Convention have 'no direct application within Canadian law.'

Iacobucci J.'s concern was that 'one should proceed with caution in deciding matters of this nature, lest we adversely 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.' The result of indirect application, in his view, is that 'the appellant is able to achieve indirectly what cannot be achieved directly, namely, to give force and effect within the domestic legal system to international obligations undertaken by the executive alone that have yet to be subject to the democratic will of Parliament.' Thus he found the primacy accorded to the rights of the children in the Convention to be 'irrelevant unless and until such provisions are the subject of legislation enacted by Parliament.' Further, Iacobucci J. objected to the fact that, as he understood it, the majority had accorded 'primacy' to the rights of the children in a manner that could be properly secured only by legislation.

101 Baker, supra note 2 at 859.
102 Capital Cities, supra note 68. At 172–3, Laskin C.J., for the majority of the Court, moves from the proposition that unincorporated conventions do not bind to the proposition that they have no effect. In Baker, supra note 2, L'Heureux-Dubé J. suggested that it was authority only for the former proposition, and, indeed, one could argue that only the former was at stake in that case. For further discussion, see note 112 infra.
103 Supra note 68.
104 Baker, supra note 2 at 861.
105 Ibid. at 866.
But Iacobucci J.'s thought that the 'balance maintained by our Parliamentary tradition' would be 'adversely' affected were the Convention to be allowed this indirect effect, so that there were constitutional limits at stake as suggested by Strayer J.A., raises the following question: Why did he not also find his sense of constitutional limits affronted by two of the majority's principal findings – the finding of a common law duty to give reasons and the majority's transposition of the standards of review developed for review of interpretation of the law to discretion? Note that when Strayer J.A. decided the case where he rejected a common law duty to give reasons, he both invoked the separation of powers and said that the onus is on the party attacking a discretionary decision to show that it 'unlawful'; that is, there is no obligation on the official to demonstrate the lawfulness of his decision.\(^\text{106}\)

In other words, if the separation of powers is imperilled when judges read substantive legal limits into apparently unfettered statutory grants of discretion, why should it matter whether the source of such limits is the international human rights instruments or the common law? Indeed, this question may pose a spurious dichotomy because the maxims of statutory interpretation that require judges to interpret statutes as if they were intended to conform with international law are presumptions imposed by the common law.\(^\text{107}\) It is important to reiterate that L'Heureux-Dubé J.'s argument is ultimately based in the common law, in the idea that the legislature should be taken to intend that legal authority is to be exercised in accordance with fundamental legal principles, including principles of reasonableness and fairness. The role of international human rights instruments does not depend, for her, on their official recognition by the executive. Rather, it depends on their articulation of norms that can be used to inform an understanding of what counts as reasonable when an exercise of discretion affects human rights.\(^\text{108}\)

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106 Williams, supra note 72 at 675.
107 See R. Sullivan, Driedger on the Construction of Statutes, 3rd ed. (Toronto: Butterworths, 1994) at 330, cited at Baker, supra note 2 at 861. There is an interesting issue lurking in the debate between the majority and the minority on this point about why the minority should be so concerned about the executive triggering norms if one should take seriously Sopinka J.'s view in CAP, supra note 69, that executive decisions are best understood as by nature legislative.
108 Murray Hunt has argued that one can make a special case for this interpretive presumption with respect to human rights conventions. While in general one should, on democratic grounds, require a statute before legal effect is given to international conventions, conventions on human rights constitute one exception to this rule. They are an exception because giving them legal effect is not inconsistent with legislative supremacy, when such supremacy is grounded on democratic considerations. For it is consistent with such considerations to suppose that the legislature intends to respect human rights, in the same way that it is consistent to suppose that the legislature intends legal limits on delegated authority to be enforceable: Hunt, supra note 9 at 34–5,
Of course, if the majority judgment in *Baker* entailed the proposition that legal obligations are generated by mere executive ratification of treaties, that would make the executive into a law-making body. But even if the Convention did play the subterranean role, in *Baker*, of converting a legal obligation to take the interests of the children into account into an obligation to give those interests primacy, the legal obligation per se is not created by the Convention or by its ratification. Rather, the obligation arises out of a complex confluence of factors that led, in this case, to an overlap between the language of the statute, which is both evidence for and evidence of ‘fundamental’ Canadian values; the guidelines, which play basically the same role; and the Convention, whose sheer existence is evidence of international legal norms and whose ratification without any express reservation is an indication that it too can play the role of evidence for and of fundamental values. Ratification also can play the further role, highlighted in *Teoh* and in the New Zealand decision referred to earlier but unmentioned by the majority in *Baker* and unmentionable by them, of binding the executive to their proclamations through ratification because for judges to do otherwise would be to declare the hypocrisy of the executive. At most, it is the primacy accorded the best interests of the children that stems from the Convention and its ratification. But the judicial judgment about that issue should be no more suspect, from the point of view of Sopinka J.’s or Strayer J.A’s formalist understanding of the separation of powers, than the same judgment that the interests of the children were mandatory factors.

So, on the one hand, the majority in *Baker* cannot be accused of turning the executive into a legislature. Even if the Convention and/or its ratification played the subterranean role, that role cannot be used as a basis for an abstract proposition about treaties in general, or about human rights treaties in particular, or about the effects of ratification without incorporation, or of ratification with reservations, or of no ratification. Naturally, express reservations or express legislative statements have to be taken into appropriate account by judges. One might then conclude that *Baker* can be confined to its facts.

But, on the other hand, from the perspective of the common law of judicial review, *Baker* cannot be so confined. The very fact that this complex confluence of factors had to be taken into account, a fact that is itself framed by the duty to give reasons and the imposition of a reasonableness standard, requires administrative decision makers, judges, the executive, and, most important of all, legislatures to be alert to either very similar or very different confluences.

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109 *Teoh*, supra note 65, and *Tavita*, supra note 99.
So Iacobucci J. is surely right that the issues of direct application and indirect application are linked in the following sense. While the concern about direct application is framed as one about the executive becoming a source of binding legal norms, which should properly emanate from the Legislature, the source of that concern is that the judiciary is deriving norms from a source other than the statute. That is, the concern at its most fundamental is not that the executive is triggering binding norms but that there is no statutory source for the norms. But a judge who takes that concern seriously should logically enter more than a partial dissent to *Baker*. For every step that the Court takes in departing from the Strayer/Sopinka view that the duty of fairness is 'minimal' if the function is administrative or legislative is a step that imposes limitations on the executive in the manner the Strayer/Sopinka view considers illicit.

Indeed, the real objection to *Baker*, one that applies as much to the minority as to the majority, is the objection put by the administrative law formalist, who says that the effect of *Baker* is to collapse the single most important distinction in administrative law – the distinction between review as to the merits and review as to reasonableness. Further, in order to maintain this distinction, the threshold for reasonableness has to be set high, so that, for example, one should think in terms of patent unreasonableness rather than of reasonableness. Since *Baker* collapses the tests for interpretation and discretion, transposing the continuum of standards from correctness through reasonableness to patent unreasonableness from the former to the latter, it seems to follow that the correctness standard is available among the standards from which judges can pick and choose in reviewing exercises of discretion.

The best response to the formalist – and to the spectre of judges ever tempted to choose the most attractive standard to them (correctness) – is to emphasize the onus that is placed on government by *Baker* through the imposition of the duty to give reasons. This onus at the same time imposes a burden and confers an advantage. It imposes a burden because government has to justify its decision by showing that it has lived up to what L’Heureux-Dubé J. called underlying values. But it also confers an advantage in that, even if the values are the most fundamental legal values of the jurisdiction, judicial review should be focused on the justification for the result and not on the result alone. In other words, if the correctness standard is understood as the standard that operates when the judge determines the legal answer and then reviews only if the

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110 For a clear statement of this view, see Lord Lowry in *R. v. Home Secretary, ex parte Brind*, (1991) 1 A.C. 696 at 766–7 (H.L. (E.)). The same sorts of concerns animated Cory J.'s concerns in the Canadian Supreme Court when the move towards reasonableness review began – see his dissent in *Dayco (Canada) Ltd. v. CAW-Canada*, [1993] 2 S.C.R. 230.
government's answer differs, then that standard is off the continuum. Judges are then required to become more articulate in their response to government, since they have to address reasons given under a duty that is itself imposed in the service of publicity.

This response to the formalist avoids creating the paradoxical effects of supposing that patent unreasonableness is always appropriate in administrative law while in constitutional law, properly so called, correctness is always the appropriate standard. When a society adopts a statute that incorporates or entrenches values such as freedom of expression into its tests for the validity of law, a formalist will say that correctness rules in review when these values are directly at stake but that otherwise review remains as it was. The paradoxical effects come about because a society makes a statement about what its most fundamental legal values are, but then these do not inform the 'other branch' of public law—administrative law. And the formalist might be happy to live with these effects because to do otherwise risks constitutionalizing administrative law—importing constitutional or quasi-constitutional values, which are then reviewed on a correctness standard.

Note that in his dissent in Baker, Iacobucci J. seems to support this paradox. That he said that he might have thought differently had the appellant's claim fallen within the ambit of the rights protected by the Canadian Charter of Rights and Freedoms supports rather than detracts from this claim. His authority here was Slait Communications, which held that administrative discretion involving Charter rights should be exercised in 'accordance with similar international human rights norms.'

And the Charter itself is positive legal authority for the proposition that the Legislature intended that constraints much thicker than constraints of manner and form will limit legislative authority under certain circumstances.

But to confine the interpretive presumption to the domain of the effect of this proposition would be to establish a blinkered attitude for Canadian courts in deciding cases that fall outside the scope of the Charter. It would go further even than the Court's much-criticized holding in Dolphin Delivery that the Charter, while not applying directly to the common law, should indirectly influence the judicial understanding of how best to develop the common law.

111 Baker, supra note 2 at 866.
112 See RWDSU v. Dolphin Delivery, [1986] 2 S.C.R. 573. In Slait, supra note 94, Dickson C.J. held that if Charter-protected interests are at stake then one should first deal with the issue of the justification of the decision under s. 1 of the Charter, since administrative law will never impose a higher threshold than the Charter. He also held that the s. 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
Indeed, rather than conceive of the problem as one about constitutionalizing administrative law, it might be more accurate to speak of importing the common law methodology of administrative law into constitutional law. It is worth noting here that recent experiments in constitutionalism either entrench fundamental values but explicitly permit appropriately justified or ‘proportional’ limitations of such values, or do not entrench, thus allowing for either legislative override or requiring legislative scrutiny, or set out some combination of these mechanisms. In all these cases, fundamental values are subject to limit or override through a process of public, legally structured justification. Even in those cases where judges have the task of evaluating the proportionality of the limit, their focus is directed to the process of justification rather than to the result taken by itself. The old-fashioned or traditional standard of correctness is thus not in play. Rather, there is at stake a highly structured process of justification that will differ from case to case depending on the confluence of factors, including the importance of the constitutionally protected interest that is at stake. With the most important interests, review of the justification might be very intense or intrusive, just as a convention about the right to be free from torture might create a legal interest that requires more intrusive review than a convention on the rights of the child. But old-fashioned correctness is off the continuum as long as the focus is on justification as well as result.

This methodology is relatively novel to constitutional law, at least to constitutional law conceived on the model of the United States of America. But it is not novel to administrative law, since it is, by and large, the common law methodology in regard to the rights and interests that are protected by the common law but subject to explicit legislative override. That methodology is given more explicit expression in constitutional documents such as the Canadian Charter, or at least in the tests developed by judges as an elaboration of their constitutional role. To generalize that methodology in the common law of judicial review is undeniably to reform administrative law. Elements that were part of administrative law, but not central to it, move to centre stage. Talk of correctness or patent unreasonableness, and Dickson C.J. was clearly troubled by the idea that the standard of patent unreasonableness is not intrusive enough when Charter interests are at stake. Baker may make Slaight obsolete, since it both requires the more articulate process of justification lacking at the time of Slaight and brings to the fore a flexible reasonableness standard. And this last factor could render the majority judgment in Baker consistent with Capital Cities, supra note 69, since the middle ground between correctness and patent unreasonableness was not in view at the time Capital Cities was decided, so that it was not easy to conceive of a legal obligation short of one that led from starting point to determinate outcome. (We have not, at this stage, thought through the implications for this proposition of Blencoe v. British Columbia (Human Rights Commission), [2000] S.C.J. No. 43 (QL.).)
unfettered discretion and jurisdictional talk become gradually obsolete as they are replaced by talk of structures of justification. No hard and fast distinction between process and substance is available, as recognition grows of the inevitable substantive implications of process as well as of the fact that the justification for having process at all is in some sense substantive. We will now conclude with a brief discussion of some of the implications of this position.

Conclusion

Our thesis is that the substance of the rule of law is the principle of legality, and so we will revert at this point to the different senses of substance identified earlier, in order to clarify our claims. The primary sense in which the principle of legality is substantive pertains to the political argument for the requirement that there is a legal warrant for an official act or decision that affects the rights or interests of one subject to the law. Even the requirements of manner and form that must be met before a statute will be regarded as a valid legislative act, or the analogously thin requirements for legal validity that judges like Sopinka and Strayer are willing to impose on administrative discretion, presuppose that there is a difference between arbitrary power and legal authority. For the most unconstrained legal authority imaginable is constrained by law; indeed, the power of such an authority is constituted by law. And if we leave aside the rather peculiar conceptual arguments of contemporary legal positivists, the only way to account for the constraints is by arguing that the constraints work in the interests of the subject by making those with power accountable to the law — to publicly articulated standards. In other words, even the thinnest forms of law are forms that have a substantive justification.

It is of course the case, as we have just suggested, that the constraints are not simply constraints. At the same time as they constrain, they also

113 In the hands of contemporary legal positivists, the arguments provided to understand such constraints are either conceptual (H.L.A. Hart) or normative (Joseph Raz), but in either case they result in a conception of legal authority that is, as Lon L. Fuller termed it, a 'one way projection of authority' — an effective way of exercising power. See Fuller, The Morality of Law, rev. ed. (New Haven: Yale University Press, 1969) at 204. (Our conception of the rule of law is most indebted to Fuller.) More recently, Jeremy Waldron and Andrew Goldsworthy have revived a version of Benthamite legal positivism that provides a substantive justification for limiting constraints to constraints of manner and form. See Waldron, The Dignity of Legislation (Cambridge: Cambridge University Press, 1999), and Goldsworthy, The Sovereignty of Parliament: History and Philosophy (Oxford: Clarendon Press, 1999). For our present purposes, the interesting feature of this development is that the constraints, once they are given a substantive justification, seem inevitably to refer to the interests of the subject.
constitute or enable, for example, by making it possible to implement a policy through legislation and, further, to delegate legal authority to administrative officials to implement the policy of the statute. That the acts and decisions of those officials should themselves be subject to law is to be taken for granted, as long as the substantive justification is kept in view. And given that justification, the rationale for extending the constraints beyond those analogous to manner and form constraints is compelling. A separation of powers argument has no purchase against this rationale unless it presents a political justification different from the one that refers to the interests of the subject for the claim that there should be a separation of powers. And it is difficult, to say the least, to contradict the intuition that it is in the interests of all those subject to the law that those who wield public power should deal with them fairly, a requirement that includes both an opportunity to have input into the process of decision making and the right to have the reasons for decision publicly articulated.

There are, naturally, countervailing considerations. Indeed, these are inherent in the idea that the constraints are not just constraints, since they also enable or constitute. The specific forms that fairness, including the duty to give reasons, should take will be context-dependent, and the decision about what is most appropriate in a given context – the design – should be left, other things being equal, to the experts in that context. And it might well be appropriate in a particular context, that, as David Mullan put it in 1975, the 'content of procedural fairness ... disappears into nothingness ...'\textsuperscript{114}

The centrality of reason-giving to this picture of the rule of law is what makes it possible to deflect the charge that a decision like Baker revives the bad old days of judicial supremacism exemplified by Metropolitan Life.\textsuperscript{115} It should be noted here that in Baker L'Heureux-Dubé J. quoted with approval the view put forward by Dyzenhaus that the appropriate way to conceive of deference in this context is not in the primary Oxford English Dictionary sense of deference as submission to the administrative decisions but, rather, in the secondary dictionary meaning of deference, deference as respect. This other sense of deference 'requires not submission but a respectful attention to the reasons offered or which could be offered in support of a decision ...'\textsuperscript{116}

\textsuperscript{114} Mullan, 'Fairness,' supra note 10 at 300. Note that Mullan assumed, at that time, that one such situation would be where a minister of the crown made a 'broad, policy-oriented' decision (ibid.).

\textsuperscript{115} See note 15, supra, and accompanying text. For the charge that Baker resurrects Metropolitan Life, supra note 15, see J.L.H. Sprague, 'Another View of Baker' (1999) 7 Reid's Adm.Law 163.

\textsuperscript{116} See Baker, supra note 2 at 859, quoting from D. Dyzenhaus, 'The Politics of Deference: Judicial Review and Democracy' in M. Taggart, ed., The Province of Administrative Law
The idea of deference as respect not only gives the administration the opportunity to demonstrate that it has acted in accordance with the rule of law but cedes to it interpretative authority on that issue, in that the standard for review will not generally be the correctness one. Our position on the rule of law is thus a default one, in the sense that accountability to law in administrative law, the principle of legality, imposes a duty of fairness that is substantive, unless, on review, the executive can offer a justification why, in a particular administrative context, it is not unfair that there be no hearing, no reasons for decision, and so on. That is, the government must be prepared to offer a justification in a manner analogous to a s. 1 justification under the Charter. And if the courts find that that justification is unreasonable – one to which they cannot defer – the legislature still has the option to adopt the ‘in-your-face’ response analogous to a s. 33 override. But an in-your-face response is an explicit declaration by the legislature that it insists on departing from the standards that underpin its authority. And, as we have suggested, our thesis that such a principle of legality constrains all acts of public power in a society governed by the rule of law is independent of any claim that judges must be able to enforce that principle against a government determined to escape it. All that matters is that they are able to assert that principle, so that, as we saw Weiler say, if the majority wishes ‘to

(Oxford: Hart Publishing, 1997) 279 at 286. For qualified endorsement of this position by Canada’s present Chief Justice, see The Honourable Madame Justice Beverley McLachlin, ‘The Roles of Administrative Law and Courts in Maintaining the Rule of Law’ (1999) 12 C.J.A.L.P. 171 at 174, 186–7. For perceptive discussion, see Mullan, ‘Role of the Judiciary,’ supra note 14 at 370–6. Genevieve Cartier pointed out to us that our position seems ambiguous in the following way: it may be that the legal standards that are the basis of the legitimacy of the administrative state are imposed from the outside by judges, or it may be that the standards are created from within by administrative agencies and that the legitimacy of the latter is what is recognized by judges when they recognize the legitimacy of the administrative state. Our short response to Cartier’s point is that our position is more ambivalent than ambiguous – the source of the standards is the common law, statutes, and agency determinations.


118 Compare Lord Hoffman in R. v. Secretary for the Home Department, ex parte Simms, [2000] 2 A.C. 115 at 131 [H.L.]: ‘The principle of legality means that Parliament must squarely confront what it is doing and accept the political cost. Fundamental rights cannot be overridden by general or ambiguous words. This is because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process. In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual. In this way the courts of the United Kingdom, though acknowledging the sovereignty of Parliament, apply principles of constitutionality little different from those which exist in countries where the power of the legislature is expressly limited by a constitutional document.’
offend against a fundamental principle of fairness,’ a ‘clear and unambiguous legislative statement’ is required.\footnote{While we do not deal with the relationship between the Charter and the common law of judicial review in detail in the text, as indicated, our position on the rule of law does presuppose a view of constitutional adjudication that seeks to be more democratic in nature than that associated with the USA model, in which judges test statutes against rights whose content is conceived more or less absolutely, that is, as immune from democratic determination. In this regard, Dyzenhaus has argued that the idea of deference as respect fits within a ‘culture of justification’: D. Dyzenhaus, ‘Law as Justification: Etienne Murenik’s Conception of Legal Culture’ (1998) 14 S.A.J.H.R. 11.}

In our view, this principle presents a rich conception of the rule of law, or of legality. But that principle does not depend on judges having an ultimate review power to strike down legislation that offends fundamental values, whether legal or other.\footnote{For an extended defence of this insight as a providing a model for Charter adjudication, see Roach, supra note 117.} Rather, the rule of law depends, in the first instance, on the ability of the legal order to bring the excesses of politics to the surface and to force those who wish to violate fundamental democratic values to be explicit about it. In other words, while judicial protection of the rule of law may from time to time end in a stark confrontation between judges and legislature, there is no necessity to suppose that such protection requires, or even recommends, giving judges the last word.

It is this understanding of the rule of law that gives content to the idea of fairness, including the requirement that when important interests are at stake, there is a duty to give reasons. It is a corollary of that requirement that what makes an interest important is not its source – the common law or statute – and not whether it an interest of which an individual has been deprived. At issue is only whether the interest is one critical to the individual’s future. And in deciding on the standard of review appropriate for administrative decisions, it does not matter whether the decision about that interest is made by an official exercising a subjectively framed discretion or by a panel that has jurisdiction to decide such issues. What matters is what is appropriate, all things considered, in the particular context, with those who are closest to the context given an adequate opportunity to defend their sense of what is appropriate.

We are not prepared, at this point, to announce the total collapse of the process/substance distinction. However, we have shown that the traditional use of the distinction to justify or limit judicial review has traded on ambiguous references to substance, and also that procedural protections have substantive implications. The challenge that lies ahead involves rethinking the appropriate contours of judicial review of process, now understood to be in part substantive. That is, given that review of process implicates some review of substance, such that process can be said
by reviewing judges to conform (or not) to fairness or the principle of legality, how is this more forthright review of process to occur so that deference as respect is maintained? Moreover, given that review of process involves some review of substance, in what sense does process/substance lie at the heart of judicial review? To support the claim that the distinction must be maintained, we would have to specify the kind of substance not implicated in a full-fledged review of process. Our support for a presumption that generally the reasonableness standard is to be preferred on review to the correctness standard would do some work here, since in many cases there will be more than one reasonable outcome in the wake of a hearing for which non-arbitrary reasons can be given. It is in this sense that substance is left to be determined by administrative authority.

Our argument, at its weakest, complicates the relationship between substance and process by exposing the tensions that arise as soon as one makes the distinction, and that permits lawyers and judges to at last fulfil the hope David Mullan expressed in 1975, that once one moves away from an approach that depends on rigid classifications, one can start to ask the ‘real questions.’ If the answers take some time to come, this should be no surprise. After all, it took twenty years for the Supreme Court in CUPE and Nicholson to give some content to Rand J.’s formulation in Roncarelli of the principle of legality, and another twenty before Baker brought CUPE and Nicholson together in what, for the first time, looks like a ‘restrictive and unified theory of judicial review.’

121 Mullan, supra note 10 at 300. Some of the questions are raised by the Federal Court of Appeal in Suresh v. Canada (Minister of Citizenship and Immigration), [2000] 2 F.C. 592, in a lengthy treatment of many of the issues with which courts have to grapple after Baker. The Supreme Court will shortly be hearing the appeal against the Federal Court of Appeal’s decision in that matter, and if this appeal is not decided on some narrow ground, it will be fascinating to find out whether the Supreme Court regards the Federal Court of Appeal’s response to Baker as in its spirit.