

THE *CHARTER* IN THE ADMINISTRATIVE PROCESS: STATUTORY REMEDY OR REFOUNDING OF ADMINISTRATIVE JURISDICTION?

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In asking whether administrative tribunals can apply the Charter, jurists have assumed that the Charter is a statutory remedy that can be applied or not, rather than consider it the basis of a general refounding of administrative jurisdiction. The result, evidenced in Nova Scotia (Workers' Compensation Board) v. Martin; Nova Scotia (Worker's Compensation Board) v. Laseur, has been an unprincipled expansion of administrative power under the Charter but also, as a response to this ruling, a general legislative withdrawal of Charter jurisdiction from administrative tribunals, as evidenced in Alberta's Administrative Procedures and Jurisdiction Act (APJA). The author argues that this ruling, along with the APJA, represent extreme solutions to a more complex problem, which finds its origins in the autonomy of constitutional and statutory interpretation. The author proposes a more integrated view of constitutional and statutory interpretation, which would, on the whole, result in broader administrative responsibility under the Charter without going as far as to allow for an "informal" declaration of unconstitutionality of primary legislation. The author explains why statutory and constitutional interpretation remain dissociated, and how they can be integrated through the presumption of constitutionality.

En demandant si les tribunaux administratifs peuvent appliquer la Charte, les juristes ont pris pour acquis que la Charte n'est qu'un remède statutaire qui peut être appliqué ou non, plutôt qu'un refondement général de la compétence administrative. En conséquence, le résultat a été une croissance démesurée des pouvoirs des tribunaux administratifs, tel que décidé dans Nouvelle-Écosse (Workers' Compensation Board) c. Martin; Nouvelle-Écosse (Workers' Compensation Board) c. Laseur, mais également leur déclin corrélatif par des loi telles la Administrative Procedures and Jurisdiction Act (APJA) en Alberta, qui de façon générale, interdit aux tribunaux administratifs d'appliquer la Charte. Comme solution, l'auteur propose une conception plus intégrée de l'interprétation statutaire et constitutionnelle, ce qui aurait pour conséquence de reconnaître aux tribunaux administratifs une responsabilité plus large en vertu de la Charte, sans pour autant aller jusqu'à autoriser un pouvoir "informel" de déclarer la législation dite "primaire" inconstitutionnelle. L'auteur explique les raisons qui ont contribué à l'isolement de l'interprétation statutaire de l'interprétation constitutionnelle et comment ils peuvent se réintégrer à travers la présomption de constitutionnalité.

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I. INTRODUCTION

Judicial review has long been the central concern of Canadian public law. To use a medical metaphor, if the public lawyer is a pathologist who determines legal deficiencies, rather than a physiologist whose task it is to also understand the functioning of government, it follows that the public lawyer's focus on judicial review should be diagnosed as cancerous. The view of public law as essentially the law of judicial review has needlessly strained debate over the problem of administrative power under the Constitution, particularly in relation to the *Canadian Charter of Rights and Freedoms*.¹ Indeed the powers of administrative authorities under the Constitution have nothing to do with judicial review.

A conventional answer to the question of whether administrative tribunals² should have the power to apply the *Charter*, for example, frames the issue as a conflict between preserving the separation of powers and protecting fundamental rights. Framed as such, the answer is a resounding “no” for those who believe that judges alone are the proper guardians of fundamental rights. Administrative tribunals have neither the institutional independence nor the legal expertise of superior courts. While administrative tribunals may serve legitimate governmental objectives, applying the *Charter* should not be one of them. On the other hand, for those who say “yes” administrative tribunals should apply the *Charter*, the answer is equally clear and simple: individual rights should be protected by all the institutions of government. Fundamental rights cannot be a concern of superior courts alone, and the ultimate safeguard of the Constitution in the judiciary cannot be a pretext for its violation by other institutions. In this respect, answers to the question of administrative power under the *Charter* might be described in Euclidian terms as a “bridge of asses” — the answer is obvious to each side of the debate, with neither side believing any further explanation is needed.

One difficulty with resolving the question of whether administrative tribunals should apply the *Charter* is that Canadian public lawyers on both sides of the debate assume the *Charter* is a statutory remedy that can be applied (or not) at will. In other words, the *Charter* is portrayed as a constitutional writ that can

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

2 The term “administrative tribunal” does not denote any specific “court-like” structure, but rather the vast array of government agencies that may or may not be under government control. In the present context, it will refer to any body created by legislation that participates in one way or another in the machinery of government.

be either granted or denied. Adopting this portrayal, the Supreme Court of Canada naturally came out in favour of having administrative tribunals apply the *Charter*. In 2003, in *Nova Scotia (Workers' Compensation Board) v. Martin*; *Nova Scotia (Worker's Compensation Board) v. Laseur*,³ the Court not only permitted but also required administrative tribunals to ignore any statutory limits on their powers, if those limits appear to be in conflict with the *Charter*. As a result, administrative tribunals possessing power—whether explicit or implicit—to apply the law are also presumed to have the power to “set aside” legislation, unless that power is excluded by a tribunal’s empowering statute. Importantly, the Court ruled that administrative tribunals do not have the power to issue formal declarations of constitutional invalidity, hence the quotation marks around “set aside.” Nevertheless, in *Martin* and *Laseur* the Court stated that administrative tribunals may declare laws to be contrary to the provisions of the Constitution, if only informally. This important development in administrative power under the *Charter* startled enough legislators in Alberta to prompt passage of the *Administrative Procedures and Jurisdiction Act* in 2005.⁴ The general purpose of this *Act* is to prohibit administrative tribunals from considering constitutional questions unless specifically authorized to do so by regulation. In other words, the *ratio* of *Martin* and *Laseur* was turned on its head by the Alberta legislature.

In light of these developments, one might well wonder whether the question of administrative power under the *Charter* has been adequately settled. This article discusses administrative power under the *Charter* with particular reference to the cases of *Martin* and *Laseur*, and to the Alberta legislature’s response in the *APJA*. Insofar as their powers are defined by both legislative and judicial branches, administrative tribunals have indeed been at the centre of a custody battle between two unrelenting parents. The central argument of this article is that neither judicial nor legislative solutions to the problem of administrative power under the *Charter* has settled this issue, and in some respects the solutions on offer have made the problem even worse. *Martin* and *Laseur* and the *APJA* have taken the law down the wrong path because both treat the *Charter* as a mere statutory remedy to be granted or withheld, rather than as the basis of a general refounding of administrative law and the powers of administrative authorities in Canada’s constitutional regime. This article proceeds by first addressing the problems created by the Supreme Court in *Martin* and *Laseur*, later taken up by the Alberta legislature’s response to that

3 2003 SCC 54, [2003] 2 S.C.R. 504 [*Martin* and *Laseur*].

4 *Administrative Procedures Amendment Act, 2005*, R.S.A. 2000 Ca-3, as am. by S.A. 2005, c. 4 [*APJA*].

ruling. Second, it will be argued that debate over administrative power under the *Charter* has been needlessly absorbed with the question of whether or not to apply the *Charter*. This is the case because public lawyers' conceptions of statutory and constitutional interpretation have not been adequately integrated. Before developing these arguments, the decision of *Martin* and *Laseur* will be summarized and the *APJA* examined in some detail.

Martin and *Laseur* and its Background

The cases of *Martin* and *Laseur* concern individuals who suffered chronic pain attributable to work-related injuries and had claimed compensation before an administrative tribunal. The Nova Scotia *Workers' Compensation Act*⁵ and its regulations⁶ provided only a four-week Functional Restoration Program, while excluding chronic-pain injuries as grounds for additional compensation normally allotted to other forms of work-related injuries. Given the constitutional validity of the legislation was clearly in doubt, the issue was whether the Workers' Compensation Appeals Tribunal had the power to set aside the *Act* and regulations in order to immediately affirm section 15(1) of the *Charter*.

In a unanimous judgment by Justice Gonthier, the Supreme Court ruled that the Appeals Tribunal was endowed with power under section 52(1) of the *Constitution Act, 1982*⁷ to consider the constitutional validity of both the *Act* and regulations. The Court also ruled that administrative tribunals with express statutory or implied powers to decide questions of law also have jurisdiction to decide the constitutional validity of legislative provisions.⁸ However, Justice Gonthier went further, declaring that administrative tribunals with power to decide questions of law under a legislative provision are "*presumed* to have concomitant jurisdiction to decide the constitutional validity of that provision."⁹ The potentially radical step of recognizing implicit administrative power to set aside legislation was, however, qualified when the Court noted that this presumption could be rebutted by practical considerations (that is, issues too difficult or time-consuming for a tribunal to deal with) not applicable in *Martin* and *Laseur*.

5 S.N.S. 1994-95, c. 10.

6 *Functional Restoration (Multi-Faceted Pain Services) Program Regulations*, N.S. Reg. 57/96.

7 Being Schedule B of the *Canada Act 1982* (U.K.), 1982, c. 11.

8 *Martin* and *Laseur*, *supra* note 3 at para. 3. See also *Tétrault-Gadoury v. Canada (Employment and Immigration Commission)*, [1991] 2 S.C.R. 22 [*Tétrault-Gadoury*] alluding to the possibility that an administrative tribunal may have implied power to apply the *Charter*.

9 *Martin* and *Laseur*, *ibid.* at para. 3 [emphasis added].

The solution in *Martin* and *Laseur* was nothing less than spectacular given the tumultuous history of administrative power under the *Charter*.¹⁰ Prior to its enactment, the Special Joint Committee of the Senate and the House of Commons on the Constitution of Canada took very little interest in administrative power under the *Charter*. When administrative tribunals were discussed, debate centred on procedural guarantees now described in section 7 of the *Charter*. The general idea was that rather than crystallize the law into the Constitution, it would be up to each jurisdiction to determine which procedural guarantees to provide administrative tribunals with.¹¹ However, one intervener before the committee foresaw the problem of administrative power under the *Charter* clearly, saying that section 52(1) of the *Constitution Act, 1982* “does not take into consideration that most of us are not as affected by laws as we are by administrative tribunals, regulations and by decisions of persons other than judges and that [the supremacy clause] should apply also to decisions of administrative tribunals and regulation under various statutes.”¹² That observation was and still is correct: judicial review, although the focus of both constitutional and administrative lawyers, is the exception rather than the rule in the administrative state.¹³ However, the intervener’s remarks were not addressed by the committee.

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- 10 See *Douglas/Kwantlen Faculty Association v. Douglas College*, [1990] 3 S.C.R. 570 [*Douglas College*] ruling that a statutory arbitrator empowered to consider any act intended to regulate employment could determine the constitutional validity of mandatory retirement provisions in a collective agreement; *Cuddy Chicks Ltd. v. Ontario (Labour Relations Board)*, [1991] 2 S.C.R. 5 [*Cuddy Chicks*] where it was ruled that a statutory Labour Relations Board with power to decide all questions of law could declare unconstitutional (although not formally) the exclusion of agricultural workers from collective bargaining legislation; *Tétreault-Gadoury*, *supra* note 8, ruling that a statutory board of referees with no explicit mandate to determine all questions of law under the *Unemployment Insurance Act* R.S.C. 1985, c. 4-1 did not have jurisdiction to consider the constitutionality of that *Act*. See Andrew Roman, “Tribunals Deciding *Charter of Rights* Questions: The Trilogy of the Supreme Court of Canada — *Douglas College*, *Cuddy Chicks*, and *Tétreault-Gadoury*” (1992) 1 *Admin. Law R.* (2d) 243. See also *Weber v. Ontario Hydro*, [1995] 2 S.C.R. 929 [*Weber*], ruling that a statutory arbitrator could constitute a “court of competent jurisdiction” for the purposes of s. 24(1) of the *Charter*.
 - 11 *Minutes of Proceedings and Evidence of the Special Joint Committee of the Senate and the House of Commons on the Constitution of Canada*, 32nd Parl. 1st sess., No. 46 (27 January 1981) at 55 (paraphrasing Roger Tassé). Jean Chrétien agrees with this position at 52, stating that the federal government had conceded a constitutional right to a fair administrative hearing to the provinces. At 53, Chrétien also stated that he was not willing to provide provincial bureaucracies with the same obligations as federal bureaucracies.
 - 12 Malek Malichi, Canadian Polish Congress, *Minutes of Proceedings and Evidence of the Special Joint Committee of the Senate and the House of Commons on the Constitution of Canada*, 32nd Parl. 1st sess., No. 9 (20 November 1980) at 114.
 - 13 In studying “The Place of Judicial Review in Administrative Law,” Stanley Alexander de Smith stated: “Judicial review of administrative action is inevitably sporadic and peripheral” in J.M. Evans, ed., *de Smith’s Judicial Review of Administrative Action* (London: Stevens & Sons, 1980) at 3.

Martin and *Laseur* explicitly overruled the earlier Supreme Court judgment of *Cooper v. Canada (Human Rights Commission)*.¹⁴ *Cooper* concerned commercial airline pilots bound by a mandatory retirement policy, who had subsequently lodged a complaint before the Canadian Human Rights Commission. In rejecting their complaint, the Commission stated that it did not have jurisdiction over the issue because the *Canadian Human Rights Act*¹⁵ excludes from its jurisdiction, claims of discrimination concerning the normal age of retirement. Justice La Forest, speaking for the majority, ruled that the Commission had neither express nor implied jurisdiction to apply the *Charter*, and that it had rightfully dismissed the complaint of the two pilots. The judgment carried with it the separate opinion of Chief Justice Lamer, who argued that administrative tribunals could not declare their empowering statutes unconstitutional because tribunals do not benefit from federal judicial guarantees of impartiality and independence required under sections 96-101 of the *Constitution Act, 1867*.¹⁶ As such, tribunals should be limited to using the *Charter* as a guide, where possible, for the interpretation of statutory language. On the other hand, the minority opinion of Justice McLachlin (with Justice L'Heureux-Dubé concurring) stated that section 52(1) of the *Constitution Act, 1982* mandates that all law and all law makers conform to the *Charter*, and opted for the solution that all tribunals with jurisdiction to determine questions of law necessarily have jurisdiction to consider *Charter* issues.

Appraisals of *Cooper* have generally been negative, siding with the minority opinion of Justices McLachlin and L'Heureux-Dubé.¹⁷ However, neither the dissenting opinion in *Cooper* nor the unanimous judgment in *Martin* and *Laseur* addresses the issue of judicial independence raised by Chief Justice Lamer. Indeed, it remains to be determined how administrative tribunals wielding unqualified power to apply the *Charter* might be understood not to be exercising judicial functions which require concomitant federal guarantees of judicial independence and impartiality under sections 96-101

14 [1996] 3 S.C.R. 854 [*Cooper*].

15 R.S.C., 1985, c. H-6.

16 (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5.

17 See Peter Hogg, *Constitutional Law of Canada*, looseleaf (Toronto: Carswell, 2007) at 34.2(g) [Hogg, *Constitutional Law*]; David Dyzenhaus, "Constituting the Rule of Law: Fundamental Values in Administrative Law" (2002) 27 Queen's Law J. 445, describing the majority opinion as a "formalist view of democracy"; see also Andrew Roman, "Case Comment: *Cooper v. Canada (Human Rights Commission)*" (1997) 43 Administrative Law Rev. (2d) 243 criticizing the overall lack of clarity concerning administrative power to deal with *Charter* issues. See also Chief Justice Beverley McLachlin, "The Roles of Administrative Tribunals and Courts in Maintaining the Rule of Law" (1998) 12 Canadian J. of Administrative Law & Practice 171.

of the *Constitution Act, 1867*.¹⁸ Justice Gonthier did specify that the powers of administrative tribunals to issue constitutional remedies are limited, and do not include the power to issue general declarations of constitutional invalidity.¹⁹ However, it is difficult to identify any practical limits on administrative power under the *Charter* in Gonthier's opinion, or to see how informal declarations of constitutional invalidity differ from formal declarations. On the other hand, constitutional supremacy must be given effect, which begs the question as to whether section 52(1) can be reconciled with judicial independence in the administrative context. Arguably it can, but the solution is in neither *Martin* and *Laseur* nor Alberta's *APJA*.

Alberta's Reaction in the *Administrative Procedures and Jurisdiction Act*

On 14 March 2005, the *Administrative Procedures Jurisdiction Act* was introduced in the Alberta legislature.²⁰ The purpose of the *Act* is to "clarify the jurisdiction of all boards and tribunals relating to questions of constitutional law,"²¹ which had been affected by the ruling of *Martin* and *Laseur*. The *APJA* essentially distinguishes among different types of tribunals and allows only those authorized by government to decide constitutional questions.

This *Act* goes much further than any other piece of legislation in Canada in qualifying the powers of administrative tribunals. The *Act* generally prohibits administrative tribunals from making any determination of questions of constitutional rights under both the *Alberta Bill of Rights*²² and the *Charter*. The *Act* applies to statutory authorities exercising administrative, quasi-judicial, and judicial functions, but does not apply to courts of civil or criminal jurisdiction.²³ The general position of the *Act* is to prevent administrative tribunals from adjudicating constitutional rights unless otherwise permitted by regulation. Section 11 of the *Act* provides: "Notwithstanding any other enactment, a decision maker has no jurisdiction to determine a question of constitutional law unless a regulation made under section 16 has conferred jurisdiction on that decision maker to do so." A question of constitutional law is defined in section 10(d) of the *Act* as "any challenge, by virtue of the Constitution of Canada or the Alberta Bill of Rights, to the applicability

18 See *Reference Re Residential Tenancies Act 1979*, [1981] 1 S.C.R. 714.

19 *Martin* and *Laseur* *supra* note 3 at para. 31. See La Forest J. in *Cuddy Chicks*, *supra* note 10 at 18.

20 Alberta, Legislative Assembly, *Hansard*, Vol. 1 (14 March 2005) at 170 (Kenneth Kowalski).

21 *Ibid.*

22 R.S.A. 2000, c. A-14.

23 *APJA*, *supra* note 4 at s. 1(c).

or validity of an enactment of the Parliament of Canada or an enactment of the Legislature of Alberta,” or “a determination of any right under the Constitution of Canada or the Alberta Bill.”

Where a tribunal has the authority to decide a constitutional issue, the party raising it must notify federal and Alberta attorneys general, as well as the party to the dispute. In such a case, the constitutional issue can nevertheless be referred by the tribunal to a superior court for an opinion or decision. Whereas the *ratio* in *Martin* and *Laseur* decides that tribunals must determine constitutional question and are authorized to give informal declarations of invalidity, the Alberta legislature generally prohibits tribunals from deciding *Charter* issues. Where they do have such power, administrative tribunals are not under a duty to exercise jurisdiction; rather, they have the option to do so if they do not refer the matter to a superior court. Regulations taken under the *APJA* list which tribunals have jurisdiction over all constitutional questions, and which have restricted constitutional jurisdiction.²⁴ Notably, the *APJA* allocates jurisdiction under the *Charter* in a manner which conspicuously favours bodies not normally concerned with fundamental rights. Entities with jurisdiction over all constitutional issues are: the Labour Relations Board, the Alberta Energy and Utilities Board, the Law Society of Alberta, and labour arbitrators. Tribunals with jurisdiction limited to division of powers issues are: the Workers’ Compensation Board, the Appeals Commission for Alberta Workers’ Compensation, and human rights panels appointed under the *Human Rights, Citizenship and Multiculturalism Act*.²⁵ One tribunal has jurisdiction over both division of powers and *Charter* issues: the Alberta Securities Commission. Finally, one tribunal has jurisdiction solely over *Charter* issues: the Law Enforcement Review Board.

In the case of the Labour Relations, and Law Enforcement Review boards, jurisdiction over *Charter* issues is natural. However, the remaining allocation of jurisdiction is bizarre to say the least. It would appear that tribunals endowed with jurisdiction over fundamental rights issues are not endowed with power to apply the *Charter* (*i.e.*, human rights panels, and the Appeals Commission for Alberta Workers’ Compensation). Conversely, tribunals where *Charter* issues are least likely to appear are endowed with jurisdiction under the *Charter* (*i.e.*, Energy and Utilities Board, and Securities Commission). It is equally unfortunate that the legislation devolves its powers to the relevant minister to designate by regulation which tribunals are endowed with constitutional

²⁴ *Designation of Constitutional Decision Makers Regulation*, Alta. Reg. 69/2006, s. 1(b).

²⁵ R.S.A. 2000, c. H-14.

jurisdiction and which not, without spelling out criteria to be used in the process of designation. Absent any criteria for designation, the *APJA* resembles the infamous “Henry VIII” clauses which allow for regulatory modification of primary legislation. In this respect, the entire scheme suffers from a lack of political and intellectual honesty. It should have been the legislature’s responsibility, not the executive’s, to spell out objectives in designating tribunals with varying jurisdiction to apply the *Charter*.

It should be pointed out that the *APJA* applies to administrative jurisdiction under both the *Charter* and the *Alberta Bill of Rights*. In this context, it is worth recalling that statutory prohibitions on administrative tribunals applying the *Charter* do not implicitly exclude the power to apply statutory bills of rights and human rights codes. In this context, *Tranchemontagne v. Ontario (Director, Disability Support Program)*²⁶ asked whether a statutory prohibition on the Ontario Social Benefits Tribunal preventing it from considering the constitutional validity of laws and regulations, impedes it from considering the operability of its powers in relation to the Ontario *Human Rights Code*.²⁷ The substantive issue was whether legislative conditions of eligibility (restricting income support to persons not addicted to alcohol) were discriminatory on the grounds of disability. A majority of the Supreme Court held that the Tribunal’s inability, under its enabling statute, to consider a *Charter* issue does not preclude it from considering the operability of legislation under the *Code*;²⁸ in fact, such consideration is required of the Tribunal. According to the Court, the reason for this conclusion, in addition to the Social Benefits Tribunal being empowered to consider questions of law, is that a declaration of constitutional invalidity is different from a declaration of inoperability under a provincial human rights code. The three dissenting judges in *Tranchemontagne* held that the prohibition on consideration of the constitutional validity of legislation implies a prohibition on declarations of legislative inoperability in relation to the *Code*.²⁹ In the view of the dissenting minority, since tribunals with jurisdiction under the *Charter* have the power to make only informal declarations of invalidity, and since informal declarations of invalidity are akin to declarations of inoperability, a tribunal prohibited from making informal declaration of invalidity is also prohibited from making declarations of legislative inoperability under a human rights code. Thus, if tribunals are prohibited from making formal declarations of constitutional

26 [2006] 1 S.C.R. 513 [*Tranchemontagne*].

27 R.S.O. 1990, C. H-19 [*Code*].

28 McLachlin C.J. and Binnie, Bastarache and Fish JJ.

29 Lebel, Deschamps and Abella JJ.

invalidity, the distinction between invalidity and inoperability is irrelevant. As a result of *Tranchemontagne*, legislation must spell out all the fundamental rights instruments administrative tribunals are not entitled to apply, as the Alberta legislature did in enacting the *APJA*.³⁰

II. PROBLEMS REGARDING THE DEFINITION OF ADMINISTRATIVE POWER UNDER THE *CHARTER* IN *MARTIN* AND *LASEUR*

An initial reaction to the *APJA* might be that it is somehow unconstitutional. This seems doubtful. First, the *Act* expressly concerns “procedure and jurisdiction,” making it difficult to argue that the legislature has exceeded its powers under section 92(14) of the *Constitution Act, 1867*. More importantly, it is difficult to argue that the *Act* is at odds with the *Charter* since *Martin* and *Laseur* puts forth the idea that it is up to each jurisdiction to decide which powers administrative tribunals should be endowed with. Indeed, the position advocated in *Martin* and *Laseur*, later taken up by the *APJA*, deserves further consideration.

However seemingly favourable to individual rights, there is much uncertainty in the positions of the Supreme Court and Alberta’s legislature. At the outset, let us be clear and honest about the *ratio* in *Martin* and *Laseur*: contrary to what many have said, this ruling does not grant a limited power of interpretation to administrative tribunals under the *Charter*, stopping short of tribunals making formal declarations of invalidity.³¹ The ruling clearly states that where a statute appears to conflict with the *Charter*, even when that conflict is clear and explicit as was the case in *Martin* and *Laseur* (and also *Cooper*), the tribunal must informally set the statute aside. The solution in *Martin* and *Laseur*, as taken up in the *APJA*, is problematic in five areas: first, the distinction between formal and informal declarations of unconstitutionality; second, the foundation of administrative power under the *Charter*; third, the general role of administrative tribunals in Canada’s Constitution; fourth, the dissociation of administrative power and responsibility under the Constitution; and fifth, the legislative power to withdraw the power to apply the *Charter*. These problematic areas, it should be noted, point toward both broader and

30 See s. 10(d) of the *APJA*, *supra* note 4.

31 See for instance: Beth Bilson, “The Voice from the Trenches: Administrative Tribunals and The Interpretation of the *Charter*” (2006) 69 *Saskatchewan Law Rev.* 3 [Bilson], commending a “new pluralism” in interpretation.

more restrained views of administrative power under the *Charter*.

Distinction between Formal and Informal Declarations of Unconstitutionality

In *Martin* and *Laseur*, the Supreme Court stressed that administrative power exercised under section 52(1) of the *Constitution Act, 1982* does not constitute a formal declaration of invalidity.³² This indicates that the Court was attempting to draw limits to administrative power under the *Charter*, but this caveat is either artificial or unclear.

Consistent authority provides that administrative decisions taken under section 52(1) are not “binding legal precedent.”³³ One might well also ask whether the decisions of administrative tribunals other than those taken under section 52(1) are binding legal precedents? Clearly, they are not.³⁴ The essence of Canadian administrative law is that ordinary courts are not bound by administrative decisions, and administrative tribunals cannot prohibit ordinary courts from controlling the exercise of government power. In light of the fact that the decisions of administrative tribunals obviously and invariably lack *stare decisis*, the Court may have meant that tribunal decisions are not binding legal *settlements*. In other words, the Court might have meant to imply that administrative decisions are not *res judicata* under the *Charter*. This interpretation raises two questions: first, are administrative decisions generally considered *res judicata*; and second, what would be implied by the absence of *res judicata* in administrative decision making?

The doctrine of *res judicata* serves to prevent the reopening of a case by any court: in short, *res judicata* means “case closed.” If a matter is *res judicata*, the courts are prevented from intervening.³⁵ Most Canadian authors argue that administrative tribunal decisions are generally *res judicata*.³⁶ The gist of this assertion is that administrative decisions bind administrative tribunals: they cannot be withdrawn or modified without the consent of the individual concerned. However, administrative tribunals function very differently from one another. To categorize all tribunal decisions as *res judicata* would be to

32 *Martin* and *Laseur*, *supra* note 3 at 530.

33 La Forest J. in *Cuddy Chicks*, *supra* note 10 at 18.

34 See for instance the dissenting opinion of Iacobucci J. in *Weber*, *supra* note 10.

35 Some argue that *res judicata* is not a substantive rule but one of evidence. See John Sopinka, Sidney Lederman & Alan Bryant, *The Law of Evidence in Canada*, 2d ed. (Toronto: Butterworths: 1999) at para. 19.51.

36 David Jones & Anne de Villars, *Principles of Administrative Law*, 4th ed. (Scarborough: Thomson Carswell, 2004) at 347.

limit an authority's ability to reopen files for otherwise legitimate reasons.³⁷ Thus, *res judicata* should concern "judicial" tribunals but not those of an administrative nature, which can reopen investigations concerning the same set of facts. Some authors contest the application of the doctrine of *res judicata* to administrative tribunals, stating that the principle of finality already covers the matter.³⁸ No doubt, a rare commonality among all administrative tribunals is that they are generally subject to judicial review. In light of this, the application of *res judicata* to administrative tribunals is neither useful nor necessary. Moreover, because other doctrines such as legitimate expectations and finality already protect relevant individual rights, adding the qualification that tribunal decisions under the *Charter* are not *res judicata* because they are subject to review, does not further constrain the powers of tribunals.

A second way to understand the non-binding character of tribunal decisions would be to hold that declarations of constitutional invalidity bind only the parties in question and have no effect on third-party rights. As the Supreme Court states: "A determination by a tribunal that a provision of its enabling statute is invalid pursuant to the *Charter* is not binding on future decision makers, within or outside the tribunal's administrative scheme."³⁹ This second understanding distinguishes declarations of constitutional invalidity by administrative tribunals as having narrower legal implications than formal judicial declarations, and as having no effect on third-party rights. In this respect, an administrative declaration of constitutional invalidity might only render inconsistent legislation inoperative for the case at hand, rather than render it generally invalid. However, in *Tranchemontagne*⁴⁰ the Court recognized that a tribunal could conceivably have its power to declare legislation invalid withdrawn, without necessarily implicating the tribunal's power to declare legislation inoperative. Thus, a statutory prohibition on declaring legislation constitutionally invalid would not automatically exclude the power to declare it inoperative. The dissent in that case seized upon this point: "The difference between invalidity and inoperability explains why, in [Justice Bastarache's] view, the legislature revoked Charter jurisdiction but not Code jurisdiction.

37 See for instance *Brousseau v. Alberta Securities Commission*, [1989] 1 S.C.R. 301.

38 Amnon Rubinstein, *Jurisdiction and Illegality: A Study in Public Law* (Oxford: Clarendon Press, 1965) at 26-9. See also Sir William Wade & Christopher Forsyth, *Administrative Law*, 9th ed. (Oxford: Oxford University Press, 2004) at 243. The reopening of an investigation, or the withdrawal of a decision, might raise a problem of legitimate expectations, although the application of *res judicata* complicates matters because it implies a return to the problematic distinction between administrative, quasi-judicial, and judicial functions (see *infra* note 80, and accompanying text).

39 *Martin and Laseur*, *supra* note 3 at para. 31.

40 *Tranchemontagne*, *supra* note 26.

This, with respect, overlooks the fact that administrative tribunals lack the power to make formal declarations of invalidity.⁴¹ Ultimately, it is not clear why future decision makers within the tribunal's scheme should not be bound by their own decisions since tribunals must treat claims consistently.⁴² It can hardly be accepted that some claims be awarded on the grounds that a statute is unconstitutional, but others rejected due to statutory limits on the tribunal's jurisdiction for exactly the same claim.

While administrative tribunals' declarations of constitutional invalidity under the *Charter* are not formal, they are nevertheless treated as such. Legislative amendments to administrative procedure in many jurisdictions now require that notice be given to the attorney general when a constitutional question is raised before an administrative tribunal. Traditionally reserved for the judicial level, notice is now required before administrative tribunals. The rationale of the notice requirement is that where legislation is under attack, the attorney general, as representative of the public interest, must be notified to provide the legislation with adequate defence. Since a judicial declaration of constitutional invalidity will affect all those concerned by the legislation, the attorney general must ensure that the public interest and legislative will is taken into account in proceedings.⁴³ This extension of notice requirements from the judicial to the administrative level, however, increases the formalization of the process of administrative adjudication.⁴⁴ Notice requirements apply regardless of whether one is challenging the constitutional validity of legislation or the application of a valid legislative provision or regulation, and regardless of whether or not a remedy is sought under section 24(1) of the *Charter*. Where individuals could once simply assert a claim that their rights have been violated before the relevant tribunal, they must now invariably obtain legal representation to try to match the resources behind the attorney general.

With the expanded role of administrative tribunals under the *Charter* have come changes to notice requirements in several jurisdictions: Ontario, British

41 *Ibid.* at para. 79.

42 S. 15(1) of the *Charter*, *supra* note 1, provides: "Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination."

43 Speaking of notice requirements in Ontario, Sopinka J. stated: "The purpose of s. 109 [of the *Courts of Justice Act*, *infra* note 45] is obvious. In our constitutional democracy, it is the elected representatives of the people who enact legislation. While the courts have been given the power to declare invalid laws that contravene the Charter and are not saved under s. 1, this is a power not to be exercised except after the fullest opportunity has been accorded to the government to support its validity." *Eaton v. Brant County Board of Education*, [1997] 1 S.C.R. 241 at para. 48.

44 See generally Barry Strayer, *The Canadian Constitution and the Courts*, 3d ed. (Toronto: Butterworths, 1988) at 73.

Columbia and Nova Scotia require notice of constitutional issues before administrative tribunals, just as they do of constitutional issues before the courts.⁴⁵ Notice is equally necessary before federal administrative tribunals, and on the same terms as before the Federal Courts.⁴⁶ In the case of federal tribunals, notice is only required for issues pertaining to the constitutional validity, applicability, or operability of either primary legislation or regulations. By contrast, all other jurisdictions limit notice requirements to disputes in court.⁴⁷ For instance, Alberta's *Judicature Act*⁴⁸ does not specify which institutions require notice for constitutional questions, although the *Act* regulates the powers of the Court of Queen's Bench and the Court of Appeal exclusively. In Quebec, it is not clear whether notice requirements apply to disputes before administrative tribunals. Quebec's *Code of Civil Procedure*⁴⁹ generally applies to judicial tribunals, except where legislation specifies to the contrary. Nevertheless, article 56(1) of the Quebec *Charter*⁵⁰ defines a tribunal as a person or organ exercising "quasi-judicial" functions. Danielle Pinard argues that administrative tribunals should have the power to decide constitutional questions, and that notice requirements should bind them as well.⁵¹ This is also the case for Peter Hogg, who also argues that notice requirements should bind administrative tribunals.⁵²

In the author's opinion, however, the extension of notice requirements to administrative tribunals conflicts with the principle that administrative interpretations under the *Charter* are not supposed to be formal. Moreover, "judicializing" administrative procedures defeats the very purpose of informal

45 For Ontario, see s. 109(6) of the *Ontario Courts of Justice Act*, R.S.O. 1990, c. C.43. Following 1994 amendments, this provision states that notice applies to proceedings before boards and tribunals as well as to court proceedings. For Nova Scotia, see *Constitutional Questions Act*, R.S.N.S. 1989, c. 89, s. 10 (1)(a), which defines "court" as including "a judge of the provincial court or an administrative tribunal." These jurisdictions require notice whenever administrative powers under either section 52(1) of the *Constitution Act, 1982* or under section 24(1) of the *Charter* are implicated.

46 S. 57(1) of the *Federal Courts Act*, R.S.C. 1985, c. F-7 [*Federal Courts Act*].

47 Manitoba: *Constitutional Questions Act*, C.C.S.M. c. C180, ss. 3, 7(2); Newfoundland & Labrador: *Judicature Act*, 1986, R.S.N.L. 1990, c. J-4, s. 57; New Brunswick: *Judicature Act*, R.S.N.B. 1973, c. J-2 s. 22(3); Northwest Territories: *Judicature Act*, R.S.N.W.T. 1988, c. J-1, s. 59(1); Nunavut: *Judicature Act*, S.N.W.T. 1998 c. 34, s. 58(1); P.E.I.: *Supreme Court Act*, R.S.P.E.I. 1988, c. S-10, s. 41; Saskatchewan: *Constitutional Questions Act*, R.S.S. 1978, c. C-29, s. 8; Yukon: *Constitutional Questions Act*, R.S.Y. 2002, c. 39, s. 2(1).

48 R.S.A. 2000, c. J-2.

49 Art. 22 C.P.P.

50 *Charter of Human Rights and Freedoms*, R.S.Q.C. C-12.

51 Danielle Pinard, "L'exigence d'avis préalable au procureur général prévue à l'article 95 du Code de procédure civile" (1990) 50 *Rev. du Barreau* 629 at 663-64 [Pinard, "Avis Préalable"].

52 See Peter Hogg, "Remedial Power of Administrative Tribunals" (2004) 25 *Supreme Court Law Rev.* (2d) 151 at 162 [Hogg, "Remedial Power"].

administrative procedures. Although legal representation is not required before administrative tribunals, one must now assume that some form of representation will be necessary where claims of a violation of an individual's rights are made (regardless of whether the violation stems from a statute or from its misapplication). Moreover, as a matter of clarity of purpose, the intervention of an attorney general would be justified only if the public interest were at stake, yet this is not supposed to be the case since tribunals lack the power to issue formal declarations of invalidity.

Foundation of Administrative Power to Apply the *Charter*

The next problem with *Martin* and *Laseur* is its ambiguity regarding the foundation of administrative power to apply the *Charter*. Conceptually, the test proposed in *Martin* and *Laseur* considers administrative tribunals to have been empowered to apply the *Charter* by section 52(1) of the *Constitution Act, 1982*. The test proposes a statutory authorization to apply the *Charter*, whether implicit or explicit. As Justice Gonthier states for the Court:

First, and most importantly, the Constitution is, under s. 52(1) of the *Constitution Act, 1982*, "the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect." The invalidity of a legislative provision inconsistent with the *Charter* does not arise from the fact of its being declared unconstitutional by a court, but from the operation of s. 52(1). ... In that sense, by virtue of s. 52(1), the question of constitutional validity inheres in every legislative enactment. Courts may not apply invalid laws, and the same obligation applies to every level and branch of government, including the administrative organs of the state.⁵³

However, he went on to define the limits of administrative power under the *Charter* as being of a statutory nature:

[O]ne must ask whether the empowering legislation implicitly or explicitly grants to the tribunal the jurisdiction to interpret or decide *any* question of law. If it does, then the tribunal will be presumed to have the concomitant jurisdiction to interpret or decide that question in light of the *Charter*, unless the legislator has removed that power from the tribunal. Thus, an administrative tribunal that has the power to decide questions of law arising under a particular legislative provision will be presumed to have the power to determine the constitutional validity of that provision.⁵⁴

The fact that section 52(1), the supremacy clause, "inheres" in every

53 *Martin* and *Laseur*, *supra* note 3 at para. 28.

54 *Ibid.* at para. 36 [emphasis in the original].

legislative enactment implies that, regardless of what a tribunal's empowering legislation says, the power to declare legislation constitutionally invalid under section 52(1) is inherent. Thus, regardless of a tribunal's composition, powers, or procedures, it could declare these provisions constitutionally invalid and go beyond the test established by Justice Gonthier. Indeed, if a tribunal's power to apply the *Charter* inheres in all legislation, then legislative parameters should not affect the tribunal's powers under the *Charter*. No doubt, the Supreme Court did not go want to go this far, but where does one draw the line and why?

If a tribunal's power to determine the constitutional validity of legislation is never formal, then it is not clear why some should have power under the *Charter* and others not. Is preventing discrimination not the business of all branches of government? Indeed, some jurisdictions have passed acts similar to the *APJA* prohibiting a range of administrative tribunals from considering the constitutional validity of legislation or regulations.⁵⁵ In addition, British Columbia has passed legislation concerning administrative power under the Constitution, although it purports to codify different types of jurisdiction rather than define the actual powers of all tribunals in the province.⁵⁶ Hogg supports this approach, stating that where a tribunal is not suited to engaging in constitutional adjudication, the only appropriate course of action is to remove its power to apply the *Charter* by explicitly barring the tribunal from considering constitutional issues.⁵⁷ To counter the problem of expertise and efficiency, Hogg concludes: "the only remedy is to amend the enabling statute to withdraw the function from the tribunal."⁵⁸ However, it is difficult to understand what the purpose and effect of such a legislative amendment is supposed to be, since administrative power to declare legislation unconstitutional is never formal and so is not supposed to affect the constitutional validity of the impugned legislation or regulation.

55 The Ontario *Ministry of Health Appeal and Review Boards Act, 1998*, S.O. 1998, c. 18, Sch. H, s. 6(3) provides: "the Board shall not inquire into or make a decision concerning the constitutional validity of a provision of an Act or a regulation." The same can be said of the Ontario Social Benefits Tribunal. The *Ontario Works Act, 1997*, S.O. 1997, c. 25, Sch. A, s. 67(2) provides: "The Tribunal shall not inquire into or make a decision concerning, (a) the constitutional validity of a provision of an Act or a regulation; or (b) the legislative authority for a regulation made under an Act. Both Ontario examples are cited from Hogg, "Remedial Power," *supra* note 52.

56 *Administrative Tribunals Act*, S.B.C. 2004, C. 45. This Act distinguishes between tribunals with jurisdiction over constitutional questions (s. 43), those without jurisdiction over constitutional questions (s. 44), and those without jurisdiction over *Charter* issues (s. 45). The Act does not define which tribunals have such powers, but sets out the procedure to be followed in each case.

57 Hogg, "Remedial Power," *supra* note 52 at 163-64.

58 *Ibid.*

Finally, it must be remembered that where a tribunal does not have jurisdiction under section 52(1), it will still be a “court of competent jurisdiction” under section 24(1) of the *Charter* if it has jurisdiction over the parties, subject matter, and remedy as spelled out in *Weber*.⁵⁹ No tribunal is completely devoid of jurisdiction under section 24(1); therefore, there should be no clear-cut distinction between tribunals with and those without the power to apply the *Charter*. However, under the *AJPA* a tribunal’s power to apply the *Charter*, including the power to grant remedies under section 24(1), can be withdrawn entirely even if granting such a remedy did not otherwise conflict with the wording of the tribunal’s empowering statute. As for tribunals with the power to apply the law, which are presumed also to have the power to apply the *Charter*, one may question whether it is even useful to distinguish between administrative power under sections 52(1) and 24(1). Indeed, a tribunal’s statutory jurisdiction is irrelevant if it has the power to apply the *Charter*, since a tribunal can simply broaden its jurisdiction if its empowering statute restricts it, as was the conclusion in both *Martin* and *Laseur* and *Cooper*.

General Role of Administrative Tribunals

The most obvious problem with the rise of administrative power under the *Charter*, which the *APJA* tries to address, concerns the general role of administrative tribunals in the constitutional framework. As the well-known argument goes, administrative tribunals are not superior courts and should not be authorized to ignore statutory limits on their powers. Authors have generally cited the opinion of Chief Justice Lamer in *Cooper* in support of this.⁶⁰ Indeed, it is open to question whether tribunal members possess sufficient independence from government to allow them to not apply unconstitutional legislation. The same question regarding the adequacy of tribunal independence was at issue in *Paul v. British Columbia (Forest Appeals Commission)*,⁶¹ a companion to *Martin* and *Laseur*. *Paul* involved the B.C. Forest Appeals Commission, membership of which is determined by section 194(6) the *Forest Practices Code of British Columbia Act*.⁶² This *Act* provides, without any further explanation, that the Lieutenant Governor in Council may determine the remuneration, reimbursement of expenses, and other

59 *Supra* note 10.

60 Gérald-A. Beaudoin, “Les tribunaux administratifs et la *Charte canadienne des droits et libertés*” (1998) 61 *Saskatchewan Law Rev.* 277; Gilles Pépin, “La compétence des tribunaux administratifs de décider de la constitutionnalité d’une loi, notamment de sa compatibilité avec la *Charte canadienne des droits et libertés*” (1991) 16 *Queen’s Law J.* 113.

61 2003 SCC 55, [2003] 2 S.C.R. 585 [*Paul*].

62 R.S.B.C. 1996, C-159.

conditions of employment of the members of the Commission. Similarly, in *Martin and Laseur* section 151 of the *Workers' Compensation Act* provides, again without any further detail, that members of the relevant board are appointed by the Governor in Council for renewable periods of up to four years.⁶³ None is required to have any legal background.

In light of these examples, it might be argued that the resolution of the question of administrative power under the *Charter* hinges on the independence of tribunals. With increased powers under the *Charter*, tribunal members require greater independence.⁶⁴ Of course, the association of justice with the courts is an old one,⁶⁵ but regardless of one's position on the merits of tribunal independence, it is important not to confuse independence with general terms of employment. It is one thing to state that administrative tribunal members have insufficient pay, inadequate job security, or are appointed on the basis of connections rather than ability. It is quite another to state that tribunal members should be insulated from political power in the same manner as superior courts.

Indeed, it has long been thought that administrative tribunals and inferior courts share similar (if not identical) powers under the Constitution, especially since there is no clear demarcation between the two. Inferior courts, namely those with jurisdiction over criminal matters, can thus be theoretically prohibited from hearing *Charter* challenges, whether proceeding under section 24(1) of the *Charter* or section 52(1) of the *Constitution Act, 1982*. While *Martin and Laseur* itself did not mention inferior courts, power to grant remedies for violation of constitutional rights under section 24(1) has been recognized as susceptible to total withdrawal from statutory authorities not qualifying as superior courts. This recognition has the potential to constrain the powers of both inferior courts and tribunals much more significantly than the traditional approach of implicit determination of jurisdiction by interpretative leeway.⁶⁶ Nevertheless, it is difficult to see how such a withdrawal is possible for courts of criminal jurisdiction.

63 S.N.S. 1994-95, c. 10.

64 Lynn Smith, "Administrative Tribunals as Constitutional Decision-Makers" (2004) 17 Canadian J. of Administrative Law & Practice 113, stating that as constitutional decision makers, some administrative tribunals will become part of the justice system and so will need stronger guarantees of independence and impartiality.

65 See David Mullan, "Tribunals Imitating Courts - Foolish Flattery or Sound Policy?" (2005) 28 Dalhousie Law J. 1. See also Robert Rabin "Legitimacy, Discretion and the Concept of Rights" (1983) 92 Yale Law J. 1174 at 1188, stating: "the impulse to judicialize the administrative process through wholesale infusion of rights analysis has been a weak one on the whole."

66 See *Weber*, *supra* note 10.

Two years before *Martin and Laseur*, the Supreme Court insisted on limiting administrative power in *Ocean Port Hotel Ltd. v. British Columbia (General Manager, Liquor Control and Licensing Branch)*, in the context of recalling a “fundamental distinction” between administrative tribunals and courts⁶⁷:

Superior courts, by virtue of their role as courts of inherent jurisdiction, are constitutionally required to possess objective guarantees of both individual and institutional independence. ... Administrative tribunals, by contrast, lack this constitutional distinction from the executive. They are, in fact, created precisely for the purpose of implementing government policy. Implementation of that policy may require them to make quasi-judicial decisions. They thus may be seen as spanning the constitutional divide between the executive and judicial branches of government. However, given their primary policy-making function, it is properly the role and responsibility of Parliament and the legislatures to determine the composition and structure required by a tribunal to discharge the responsibilities bestowed upon it. While tribunals may sometimes attract Charter requirements of independence, as a general rule they do not. Thus, the degree of independence required of a particular tribunal is a matter of discerning the intention of Parliament or the legislature and, absent constitutional constraints, this choice must be respected.

Where *Charter* jurisdiction is present, states Justice Gonthier, tribunal members have a constitutional duty to apply the *Charter*.⁶⁸ If the constitutional responsibilities of tribunal members are coterminous with their assigned powers, are we to assume that if tribunal members are obliged to informally set aside their empowering statutes, but do not do so, they might be liable for violating the *Charter*, and no longer have the protection of any “claim of right” defence provided to civil servants regarding actions taken under a statute later declared unconstitutional?⁶⁹ Moreover, much administrative activity (e.g., administrative circulars and directives) does not qualify as “law” for the purposes of the *Charter* and therefore cannot be remedied under it.⁷⁰ Without any corresponding judicial remedy, such duties provide no greater clarity either to individuals or to members of administrative tribunals and ultimately the result might be that the concept of a constitutional duty is weakened.

What of the powers of the Federal Courts under the *Charter*? Federal

67 2001 SCC 52, [2001] 2 S.C.R. 781 at paras. 23-24 [*Ocean Port*]. This position was confirmed in *Bell Canada v. Canadian Telephone Employees Association*, 2003 SCC 36, [2003] 1 S.C.R. 884.

68 *Martin and Laseur*, *supra* note 3 at para. 64.

69 See *Guimond v. Quebec (Attorney General)*, [1996] 3 S.C.R. 347.

70 *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, 2000 SCC 69, [2000] 2 S.C.R. 1120.

Courts are often referred to as “administrative courts,”⁷¹ although this does not make them administrative tribunals. Contrary to what is commonly said of the Federal Courts, they are superior courts as provided in sections 3 and 4 of the *Federal Courts Act*.⁷² However, they lack the general jurisdiction over federal and provincial matters possessed by provincial superior courts. The jurisdiction of the Federal Courts has been interpreted as statutorily limited by the *Act*, but these courts clearly have the power to apply the law. Moreover, as recognized in *Canada (Human Rights Commission) v. Liberty Net*,⁷³ Federal Courts do not have any inherent jurisdiction, a function that belongs only to courts of general jurisdiction. What is more, the Supreme Court recognizes that the Federal Courts are not full courts of competent jurisdiction for the purposes of section 24(1), and therefore cannot give all remedies pertaining to a dispute before it, even a dispute regarding the application of a federal law such as the former *Immigration Act*.⁷⁴ In contrast, this is no longer the case for administrative tribunals such as those addressed in *Martin* and *Laseur*. In *Tétrault-Gadoury*,⁷⁵ Justice La Forest stated that Federal Courts do not have the power to hear constitutional claims where the administrative authority itself does not have jurisdiction over constitutional issues. Indeed, the *Federal Courts Act* was interpreted as limiting the Federal Court of Appeal, the initial review jurisdiction, “to overseeing and controlling the legality of decisions of administrative bodies and to referring matters back to those bodies for redetermination, with directions where appropriate.”⁷⁶ As a result of this reasoning, one must assume that where a tribunal does not have jurisdiction over constitutional issues but acted in a manner contrary to the *Charter*, the Federal Courts would not have jurisdiction over the *Charter* claim. Thus, many administrative tribunals now have greater powers than the Federal Courts since the latter are still limited by their empowering statute.

Dissociation of Administrative Power and Responsibility under the *Charter*

A further problem regarding administrative power under the *Charter* is

71 Ian Bushnell, *The Federal Court of Canada: a History, 1875-1992* (Toronto: University of Toronto Press, 1997) at 168.

72 *Supra* note 46.

73 [1998] 1 S.C.R. 626.

74 *Singh v. Canada (Minister of Employment and Immigration)*, [1985] 1 S.C.R. 177. See in particular para. 78, indicating that inherent limitations in the *Federal Court Act* prevent the Federal Courts from providing the full range of remedies under s. 24(1) of the *Charter*.

75 *Tétrault-Gadoury*, *supra* note 8.

76 *Ibid.* at 37.

the traditional view of interpretation, which holds that it is for judges not governmental authorities, and even less so individuals to interpret the law, including the Constitution. The common law mind naturally frames individual rights as having been traditionally secreted through the interstices of judicial procedure, and are therefore a matter for judicial consideration. One might therefore argue that *Martin* and *Laseur* goes against this tradition by allowing some administrative tribunals to interpret the *Charter*. However, the idea that select judicial tribunals have the power to apply the *Charter* simply confirms the conventional theory of interpretation.⁷⁷

As an example, a fundamental distinction made by Justice Gonthier in *Martin* and *Laseur* is between tribunals that can apply the law and those that cannot.⁷⁸ This distinction is indeed reminiscent of the now defunct distinction between administrative, quasi-judicial, and judicial tribunals,⁷⁹ the favourite fallacy of administrative lawyers.⁸⁰ The analytical value of Justice Gonthier's distinction ultimately depends on how one defines applying the law. Indeed, it might be said that all tribunals have a law-application function because all have to take decisions, and thus interpret the law.⁸¹ What the distinction between applying the law and not applying the law seems to indicate is that some tribunals have a broader mandate than others, although the use of the term "tribunal" indicates that none is constituted as a superior court under sections 96-101 of the *Constitution Act, 1867*. Justice Gonthier, quoting from Justice McLachlin's dissent in *Cooper*, also stated in *Martin* and *Laseur* that "The *Charter* belongs to the people. All law and law-makers that touch the people must conform to it."⁸² Similarly, some have argued that there must be "one *Charter* for all."⁸³

77 There is much discussion in the United States regarding non-judicial interpretation of the Constitution. For the conventional position equating interpretation with finality of interpretation, see Larry Alexander, & Frederick Shauer, "On Extrajudicial Constitutional Interpretation" (1997) 110 *Harvard Law Rev.* 1359 [*Alexander & Shauer*]. For a more nuanced account, see Scott Gant, "Judicial Supremacy and Nonjudicial Interpretation of the Constitution" (1997) 24 *Hastings Constitutional Law Quarterly* 359.

78 *Martin* and *Laseur*, *supra* note 3 at 539.

79 *Nicholson v. Haldimand-Norfolk Regional Board of Commissioners of Police*, [1979] 1 S.C.R. 311 [*Nicholson*].

80 Wade & Forsyth, *supra* note 38 at 493. The actual quotation refers to the fallacy as appearing "almost ineradicable."

81 The distinction between administrative tribunals with powers to decide questions of law and those without has also been criticized by Hogg, *Constitutional Law*, *supra* note 17 at 34.2(g). The U.S. Supreme Court itself stated: "Interpreting a law enacted by Congress to implement the legislative mandate is the very essence of 'execution' of the law." *Bowsher v. Synar*, 478 U.S. 714 at 733 (1986).

82 *Martin* and *Laseur*, *supra* note 3 at para. 29.

83 Maureen Baird & John Kleefeld, "The Charter and Administrative Law: Applicability, Jurisdiction and the Power to Grant Remedies" at 11, online: Lawson Lundell <<http://www.lawsonlundell.com>>

This claim, however, refers to all judicial tribunals, not to all individuals in general. Indeed, the Court has insisted that the *Charter* applies only to government for purposes of section 32(1) of the *Charter*.⁸⁴ Both propositions illustrate neither more generous nor stricter views of fundamental rights, but rather the view that *Charter* interpretation is conventionally understood to be a judicial function. It is therefore not that administrative tribunals have been “forced into the realm of the judicial,”⁸⁵ but that jurists have recognized, in a rather limited way, non-judicial application of the *Charter* by select judicial-like bodies.

Such an approach to interpretation is reflected in, and arguably the product of, public lawyers’ singular focus on judicial review. This approach to interpretation is also manifest in the venerable maxim “remedies create rights.” However, this focus on the judiciary as the guardian of the Constitution has over time been transformed into a substantive rule that governmental bodies have no role to play in protecting constitutional values, no expertise in administering the Constitution. Their only connection to the Constitution is to abide by it when called upon to do so by judges, or judicial-like bodies. The tendency to focus on the remediation of *Charter* rights, rather than on the definition of the powers and responsibilities of primary decision makers, was criticized in the early days of the *Charter*. Brian Slattery, for example, argued that in focusing on remediation, the law portrayed government actors as bound by the *Charter* only if their actions were successfully reviewed under it.⁸⁶ A good example of the dissociation of power and responsibility under the *Charter* can be found in *Trinity Western University v. British Columbia College of Teachers* where Justice L’Heureux-Dubé held that a college of teachers was not a human rights tribunal and so was not required to interpret the *Charter*.⁸⁷ Later in her analysis, however, L’Heureux-Dubé went on to consider whether the teachers’ college had acted in violation of the *Charter*, concluding that it had not.⁸⁸ Such analysis reflects the dominant position in the public law literature, which defines power to apply the *Charter* independently of administrative

lawsonlundell.com/resources/theCharterandadministrativelaw.pdf.

84 See *Retail, Wholesale, and Department Store Union, Local 580 v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573; *McKinney v. University of Guelph*, [1990] 3 S.C.R. 229, *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624 [Eldrige]; *Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 442, [2000] 2 S.C.R. 307.

85 A.M. Wallace & J.T. Casey, “The March Towards Judicialization – Administrative Tribunals at the Crossroads” C.B.A. Administrative Law Update, Ottawa, 19-20 November 1999 at 11 [unpublished].

86 Brian Slattery, “A Theory of the *Charter*” (1987) 25 Osgoode Hall Law J. 701.

87 2001 SCC 31, [2001] 1 S.C.R. 772 at 828.

88 *Ibid.* at 849.

responsibility under the *Charter*. In phrasing the inquiry into the powers of administrative tribunals under the *Charter* as a question of applying or not applying the *Charter*, the Supreme Court, and most academics, marginalize the constitutional responsibilities of subordinate administrative authorities, particularly those which lack the court-like attributes which make them candidates to give effect to the *Charter*. In the author's view, administrative power to apply the *Charter* must — at the very least — match administrative responsibility defined by section 32(1) of the *Charter*, which stipulates that it applies “to the Parliament and government of Canada.” As Professor Côté writes: “Au point de vue fonctionnel, les tribunaux administratifs ne peuvent exercer leur fonction d'interprétation et d'application des lois et règlements tout en ignorant la teneur de la *Charte*: le caractère systémique du droit le leur interdit.”⁸⁹ Since judicial review implies sanctioning the improper exercise of administrative power, it is clear that every administrative tribunal falling within the scope of section 32(1), not just those exercising a judicial function, has the responsibility of applying the *Charter*. From this perspective, administrative tribunals' power to apply the *Charter* is dependent on their inclusion in the definition and scope of government in section 32(1).

What is meant by the proposition that non-judicial bodies lack the power to interpret the *Charter* is that such bodies do not have the final word in its interpretation: the decisions of administrative tribunals are not *res judicata* because they are subject to review.⁹⁰ Nevertheless, administrative bodies are part of the interpretative process, or dialogue, filling out the meaning of the *Charter*. Needless to say, this dialogue is not limited to courts and the legislative branch. Interpretation can also be seen as a structural feature of governmental action. Administrative discretion is based on the idea that governmental actors cannot function as robots. For example, actors within the administrative process must exercise their judgment in granting permits. They are not, and cannot be, brainless deliberators. In cases of ambiguity (and one might add that administrative discretion necessarily implies ambiguity), administrative authorities must necessarily interpret their powers in a manner which accords with the *Charter*. Indeed, many governmental bodies which are subject to review under the *Charter* are not judicial, but nevertheless have a stake in applying their powers in accordance with the *Charter*. To state otherwise would imply that bodies such as the hospital in *Eldridge* (which is

89 P.-A. Côté, “La recevabilité des arguments fondés sur les *Chartes* des droits devant les tribunaux administratifs” (1989) 49 Rev. du Barreau 455 at 456.

90 For a conventional account of interpretation as an exclusively judicial function, *Alexander & Shauer*, *supra* note 77.

obviously not an administrative tribunal with power to apply the law) would be able to deny a claim of entitlement to sign language interpretation, even though they would be bound by the *Charter* were they called upon to be so by a court or court-like body.⁹¹ This argument applies equally to authorities exercising discretionary powers within the conventional core of government.

Whether or not an administrative tribunal can issue remedies under section 24(1) of the *Charter* or under section 52(1) of the *Constitution Act, 1982*, the core issue is the extent to which a tribunal can interpret its powers under the *Charter*. Asking whether administrative tribunals can issue constitutional remedies ignores their primary obligation to obey the Constitution and focuses instead on the correction of constitutional violations. This is not to say that administrative tribunals should not grant remedies, but rather that the proper question is whether administrative bodies should take part in the interpretation of the law, including constitutional law, and to what extent? Thus, debate on administrative power under the *Charter* is difficult to resolve, not because there is an inherent conflict between administrative tribunals and fundamental rights, but because both sides of the debate assume that constitutional interpretation is the exclusive responsibility of the judiciary. In short, there is no primary obligation to abide by the Constitution absent judicial intervention, only a secondary obligation to abide by it when caught violating the Constitution as a result of judicial intervention. Again, the result is a dissociation of power and responsibility under the *Charter*. This point is reflected in the position that legislatures may withdraw from administrative tribunals the power to apply the *Charter*.

Legislative Power to Withdraw Power to Apply the *Charter*

A further problem with the solution proposed in *Martin* and *Laseur*, taken up by the *APJA*, is the notion that legislation can withdraw constitutional jurisdiction. Legislation might actually withdraw the power to apply the

91 *Eldridge*, *supra* note 84. The author does not believe debate about the public or private nature of the hospital to be useful for the resolution of this case. The matter can usefully be seen as one of statutory interpretation. The *Medical and Health Care Services Act*, S.B.C. 1992, c. 76 provided comprehensive coverage equally to all B.C. residents and translation services for the deaf were not listed in the exceptions of services not covered. In spite of this, La Forest J. ruled at para. 29 that the *Act* could not be interpreted as covering sign-language interpretation although he conceded the opposite: "I do not see how the *Medical and Health Care Services Act* can be interpreted as mandating that result ... [T]he legislation must be interpreted to include sign language interpretation." Thus the statute did not need to be extended to a class of person omitted from its protection through the remedy of "reading in." The appropriate remedy was a declaration under s. 24(1) to interpret the *Act* in accordance with the *Charter*.

Charter, as provided by Justice Gonthier in *Martin* and *Laseur* and later illustrated in *Tranchemontagne*. This solution is a further reflection of the dissociation of power and responsibility under the *Charter*, in that any administrative tribunal's decision can be reviewed for having violated the *Charter* in the exercise of its powers, even if the tribunal does not have the power to apply the *Charter*.⁹² In support of Justice Gonthier's position is the argument that the *Charter* cannot always be applied because there are times when *Charter* values will be superseded by other values that are also worthy of pursuit. Similarly, administrative bodies, as well as Parliament and the legislatures, are not suited to the task of determining whether a limit to a *Charter* right is justified under section 1 of the *Charter*.

Because there are other values worthy of pursuit, so the argument goes, Parliament and the legislatures must be free to violate the Charter. As a result, there would be no generalized pre-existing duty on either legislators or civil servants to apply the Charter. This argument, however, overextends the actual meaning and implication of "applying" the Charter. Applying the Charter implies allowing the claim; not applying it means denying the claim. The initial and arguably mistaken assumption is that the Charter provides absolute protection for rights, and that it is only in exceptional cases that governments violate or infringe them using section 1. Thus, in order to compensate for potential "absolutism," the Charter should not always be applied. Moreover, the absolutist position holds that Parliament and the legislatures may even violate or infringe the Charter in passing legislation. However, in this case constitutional language has been used intolerably loosely. Constitutionalists use the terms "limit" on the one hand, and "infringe" and "violate" on the other, interchangeably. However, section 1 allows for only reasonable limits, not infringements, of protected rights. Section 24(1) of the Charter provides remedies for any denial or infringement of Charter rights. In this respect, there is simply no sense in saying that Parliament or a legislature has justifiably infringed or justifiably violated an individual's rights without providing any remedy. There is no cost in declaring constitutional rights, particularly where there is no corresponding duty attached to the right.⁹³ Properly speaking, there is no constitutionally sanctioned violation or infringement of a Charter right (unless section 33 is employed). As Justice La Forest stated in *Eldridge*:

92 Some Alberta tribunals whose powers under the *Charter* have been withdrawn are also protected by a privative clause. See for instance the *Workers' Compensation Act*, R.S.A. 2000, c. W-15, s. 13.1(1). However, it has long been settled that privative clauses, however broad, cannot preclude review; they can only limit its intensity. See Hogg, *Constitutional Law*, *supra* note 17 at 7.3(f).

93 See generally: Wesley Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning* (Westport: Greenwood Press, 1978).

“it is a basic principle of constitutional theory that since legislatures may not enact laws that infringe the Charter, they cannot authorize or empower another person or entity to do so.”⁹⁴ It therefore makes more sense to say that Parliament or the legislatures may pass legislation that limits Charter rights as provided for in section 1, rather than pass legislation that infringes such rights. Such limitations are only constitutionally acceptable if they are reasonable. If they are not, they are unconstitutional. From this perspective, the Charter must always be applied, although there is no guarantee that its application in a particular instance entails allowing a claim of individual rights — either because there is no violation of individual rights, or because the limitation on rights is justified under section 1.

It might be argued that it is not within Parliament’s or a legislature’s jurisdiction to assess what is a reasonable limit under section 1. Interpreting section 1, on this argument, would be even less a legitimate task of an administrative tribunal. Of course, the corollary of this position is that this would be a court’s task. However, administrative tribunals must interpret their powers, and they must make sure they limit rights only where authorized to do so by legislation. Administrative tribunals must also ensure that they do not draw unreasonable limits in interpreting statutory conferrals of discretion. In light of the fact that some governmental actors are under a constitutional duty to verify the constitutionality of legislation,⁹⁵ legal counsel is always available to government officials as it is to members of elected assemblies.

In this respect, the venerable maxim “remedies *create* rights” must not be taken too literally: judicial power to remedy *Charter* rights confirms a pre-existing duty on the part of all public authorities designated in section 32(1) of the *Charter*. Of course, the character of such duties is different for elected assemblies than it is for civil servants, although all remain bound by the Constitution. Many *Charter* principles have been literally discovered (if not created) by courts in the first quarter century of its existence. Nevertheless, as judges and governmental authorities become more accustomed to the *Charter*, there is no reason why its application should be exclusively the task of judges

94 See *Eldridge*, *supra* note 84 at para. 35. See also Hogg, *Constitutional Law*, *supra* note 17 at 34.2(c).

95 In 1985, the *Department of Justice Act*, R.S.C. 1985, c. J-2 was amended so as to require scrutiny and report for *Charter* compliance for federal bills and regulations. This is also the case in some provinces: see Patrick Monahan & Neil Finkelstein, “The *Charter of Rights* and Public Policy in Canada” (1992) 30 *Osgoode Hall Law J.* 501. This article discusses the approaches taken at the federal level, as well as those taken in Ontario, Saskatchewan and British Columbia. Federal regulations are equally screened pursuant to s. 3 of the *Statutory Instruments Act*, R.S.C. 1985, c. S-22.

or tribunals bearing judicial attributes.

As a result, all governmental bodies must apply the *Charter*. Applying the *Charter*, in this sense (and contrary to what is often insinuated), does not necessarily mean allowing a rights claim. Rather, governmental authorities may only draw reasonable limits to *Charter* rights where such limits are compatible with empowering legislation. Conversely, where rights claimed by a litigant are not protected by the *Charter*, applying it means not allowing the claim. In light of these considerations, it is difficult to accept the proposition advanced in *Martin* and *Laseur* that administrative tribunals with powers to decide questions of law are presumed to have the power to apply the *Charter*, unless this has been explicitly or by necessary implication taken away.⁹⁶

III. RESOLVING THE CONUNDRUM OF ADMINISTRATIVE POWER UNDER THE *CHARTER* THROUGH THE INTEGRATION OF STATUTORY AND CONSTITUTIONAL INTERPRETATION

Most members of Canada's legal community consider constitutional and statutory interpretation to be distinct processes, both historically and conceptually. A useful parallel is the relationship between statute and common law: statutes (based on policy) must receive a restrictive interpretation, seeing that they are "intruders" in the terrain of the common law (based on principle).⁹⁷ In the United States, the notion that statutes live apart from the common law was criticized in the 1930s by James Landis, who stated that the common law must include statutes as an element of its fabric.⁹⁸ The "oil and water approach,"⁹⁹ criticized by Landis, is not irrelevant under the *Charter*: common law interpretation — considered the true means of interpretation — is rarely affected by the *Charter*, which might be better considered a policy consideration. Thus, to develop the metaphor, statutes (including the *Charter*) might be seen as unwelcome strangers in a foreign land insofar as they are

96 *Martin* and *Laseur*, *supra* note 3 at para. 48. The distinction between administrative tribunals with powers to decide questions of law and those without has also been criticized by Hogg, *Constitutional Law*, *supra* note 17 at 34.2(g).

97 Roscoe Pound, "Common Law and Legislation" (1908) 21 *Harvard Law Rev.* 383 at 387-88.

98 James Landis, "Statutes and the Sources of Law" (1934) *Harvard Legal Essays* 213.

99 Expression used by Jack Beatson in "The Role of Statute in the Development of Common Law Doctrine" (2001) 117 *Law Quarterly Rev.* 247 at 251.

intruders upon the common law.

A significant part of the problem of administrative power under the *Charter* comes with the confrontation between statutory and constitutional interpretation. While the *Charter* is generally credited with revolutionizing Canadian constitutional law (although it did not, of course, actually invent fundamental rights in Canada), its effect on traditional common law statutory interpretation has arguably been minimal, if not nil. This might not be surprising when it is recalled that many within Canada's legal community learned the principles of statutory interpretation before the *Charter* was introduced in 1982. Integrating administrative power with the *Charter* thus involves recognizing that statutory interpretation cannot remain as it was prior to 1982.

Separation of Constitutional and Statutory Interpretation

Even if public lawyers agree that administrative tribunals must interpret their empowering statutes in accordance with the Constitution, it has never been clear where statutory interpretation ends and statutory invalidation begins. This concern has not dissipated with the advent of the *Charter*. Not only are constitutional and statutory interpretation conceived as two distinct processes, but for the purposes of public law, statute and Constitution are themselves portrayed as distinct bodies of law (administrative and constitutional) which, separately, can be used to control the scope of administrative power. As will be seen, the differentiation of statutory from constitutional interpretation is perceived to reinforce the effectiveness of the *Charter* as a source of individual rights protection. At the same time, however, the result is a form of legal conservatism insofar as the differentiation of statutory from constitutional interpretation insulates traditional techniques of statutory interpretation from the influence of the *Charter*.

The stark distinction often made between applying the law and applying the *Charter* can be illustrated by the case of *Osbourne v. Canada (Treasury Board)*.¹⁰⁰ This case concerns the constitutional validity of legislation prohibiting certain political activities of federal public sector employees under the *Public Service Employment Act*.¹⁰¹ The majority, led by Justice Sopinka (with Justices Cory and McLachlin concurring), held that the *Act* was unconstitutional because it could not sustain any interpretation which ensured the statute's conformity

100 [1991] 2 S.C.R. 69 [*Osbourne*].

101 R.S.C. 1985, c. P-33.

with the *Charter*. As a result, the majority in *Osbourne* found “reading in” and “reading down” to be constitutional remedies not methods of interpretation. As Justice Sopinka stated:

It is argued that [reading down] was less of an intrusion into the legislative sphere than the remedy employed by the Court of Appeal. This submission is based on the notion that reading down of the statute to conform with the *Charter* does not involve a determination of invalidity of the impugned provisions. The fallacy in this reasoning is that, in order to determine which interpretation is consistent with the *Charter*, it is necessary to determine what aspects of the statute's operation do not conform. The latter determination is in essence an invalidation of the aspects of the statute that are found not to conform. This requires not only a finding that a *Charter* right or freedom is infringed but that it is not justified under s. 1. This so-called “reading down” of a statutory provision operates to avoid a finding of unconstitutionality. In a *Charter* case, this means not only an infringement of a right or freedom but one that is, as well, not a reasonable limit prescribed by law and justified under s. 1.¹⁰²

The point is not which of statutory or constitutional interpretation should have priority, but whether the presence of an unconstitutional interpretation of a statute should necessarily lead to that provision being found constitutionally invalid. Indeed, to assert as much implies that all statutory grants of discretion are ultimately unconstitutional. By contrast, Justice Wilson (with Justices L'Heureux-Dubé and La Forest concurring), argued in *Osbourne* that reading in and reading down are forms of interpretation not constitutional remedies. Thus, where the solution is to read down a statute, Justice Wilson argued these cannot be indiscriminately described as constitutional remedies:

[T]he exercise by the Court of its interpretive function [is] a first step. Once it has interpreted the impugned legislation it must decide on the basis of that interpretation whether the section is consistent or inconsistent with the citizen's *Charter* right. If it is consistent, there is no problem: the legislation is constitutional and the citizen must abide by it. If it is inconsistent, then the Court must declare it of no force or effect to the extent of the inconsistency.¹⁰³

Justice Wilson did not state that legislation needing to be read in or read down would be more appropriately struck down. Instead, she stated that these are procedures of interpretation rather than remedies for redressing unconstitutional legislation. Moreover, Justice Wilson did not state that the toolbox of remedies for the violation of individual rights should be smaller, but rather that where legislation is valid under the *Charter*, recourse to section 24(1)

102 *Osbourne*, *supra* note 100 at 277.

103 *Ibid.* at 325.

should not be necessary, unless a remedy such as a constitutional exemption is required. Moreover, reading in and reading down are translated into French by the phrases “interprétation large” and “interprétation atténuée,” making it easy to imagine the potential for misunderstanding when French and English translations are put side by side.¹⁰⁴

It should be noted that Justice Wilson’s qualification of reading in and reading down is, in fact, exceptional: it is more common among Canadian public lawyers to categorize reading in and reading down as remedies affecting legislation.¹⁰⁵ Nevertheless, some view reading in and reading down as normal aspects of statutory interpretation, which are necessarily within the jurisdiction of all administrative authorities. On this view, while they are not to be used by administrative tribunals to remedy legislation, reading in and reading down are integral components of the interpretative process which must necessarily be resorted to in cases of statutory ambiguity, and therefore do not have any incidence on judicial guarantees of independence and impartiality.¹⁰⁶ This opinion is more convincing because it is difficult to qualify reading in as extending the reach of legislation or even more as adding words to a statute. As Chief Justice Dickson stated in the early days of the *Charter*: “It should not fall to the courts to fill in the details necessary to render legislative lacunae constitutional.”¹⁰⁷ If this is true for the Supreme Court, it should also be true for administrative tribunals.

A further nuance in the debate regarding whether reading in and reading down are constitutional remedies or forms of statutory interpretation, is that some consider reading down to be a form of interpretation, while also holding that reading in is unquestionably a remedy. Furthermore, reading in has generally referred to two different situations. The first is the act of updating the meaning of a word whose reading might be termed anachronistic. For

104 Danielle Pinard, “Les sanctions d’une règle de droit législative incompatible avec la *Charte canadienne des droits et libertés*: le reading in, le reading down, l’interprétation large, l’interprétation atténuée, etc.!” (2003) 63 Rev. du Barreau 423 [Pinard, “le reading in”]. See also Danielle Pinard, “Institutional Boundaries and Judicial Review – Some Thoughts on How the Court is Going About Its Business: Desperately Seeking Coherence” (2004) 25 Supreme Court Law Rev. (2d) 213. To explore the issue of misunderstandings due to French-English translation, compare authors at *supra*, note 17 with those at *supra*, note 60.

105 See Hogg, *Constitutional Law*, *supra* note 17 at ch. 37; Kent Roach, *Constitutional Remedies in Canada* (Aurora: Canada Law Book, 1994) at para. 14.170; Roger Tassé, “Application of the *Charter of Rights and Freedoms* (Sections 30-33 and 52)” in Gérald Beaudoin & Ed Ratuschny, eds., *The Canadian Charter of Rights and Freedoms*, 2d ed. (Toronto: Carswell, 1989) 65 at 114.

106 Pinard, “le reading in,” *supra* note 104.

107 *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145.

instance, in *Rosenberg v. Canada (Attorney General)*,¹⁰⁸ the term “spouse” was read in to include same-sex partners. In other cases, however, reading in has meant severing implied prohibitions from an act. *Vriend v. Alberta*¹⁰⁹ focused on the fact that the *Individual’s Rights Protection Act*¹¹⁰ prohibited discrimination in employment, but did not list sexual orientation as a prohibited ground of discrimination. This prompted Alberta’s Human Rights Commission to dismiss the claim. The Supreme Court ordered that the defect be cured by reading sexual orientation into the statutory list of prohibited grounds of discrimination. Similarly, in *Haig v. Canada*, sexual orientation was read into the *Canadian Human Rights Act*.¹¹¹ These two scenarios illustrate the double meaning of reading in. Both recognize previously non-existing rights, but the latter approach, severing implied exclusions, is unquestionably more intrusive.

This conceptual debate elucidated, it can be seen that the separate opinion of Chief Justice Lamer in *Cooper* is undeniably closer to that of Justices McLachlin and L’Heureux-Dubé.¹¹² This interpretation of reading in and reading down would equally clarify the duty to consider the constitutional validity of legislation referred to by Justice Gonthier in *Martin and Laseur*.¹¹³ In cases of ambiguity, statutory interpretations that accord with the Constitution must be adopted over those that do not. However, by not considering the scope of interpretation and by limiting the extension of traditional functions of interpretation to select court-like bodies, many non-court-like tribunals can continue to exercise their powers in disregard of the Constitution. They might even claim to be prohibited from hearing such claims when the law so provides.

In this respect, the isolation of constitutional from statutory interpretation has polarized debate between applying and not applying the *Charter*. By drawing a clear distinction between the application of the *Charter* and the application of the law, applications of the *Charter* can be qualified as remedial and as having no place in the process of statutory interpretation. Moreover, administrative tribunals do not have variable degrees of discretion or graded

108 (1998), 38 O.R. (3d) 577 (C.A.).

109 1998] 1 S.C.R. 493.

110 R.S.A. 1980, c. I-2.

111 (1992) 9 O.R. (3d) 495 (C.A.).

112 David Mullan has sought to elucidate the relation between administrative tribunals and the *Charter* by questioning the relevance of the remedy but his approach only concerns judicial powers to determine the powers of administrative tribunals rather than their powers *per se*. See David Mullan, *Administrative Law* (Toronto: Irwin Law, 2001) at 362-63.

113 *Martin and Laseur*, *supra* note 3 at para. 63.

mandates to reconcile collective and individual interests based on the interpretative leeway inherent in every statute. Rather, they have either the power (not to mention duty) to apply the *Charter*, or they are prohibited from doing so. The result is an all-or-nothing approach to jurisdiction under the *Charter*. As Robert Richards argues,

There seems to be no convincing reason in principle to think that an administrative tribunal, which is otherwise properly authorized to consider the validity of a statutory provision, should not have resort to the full range of remedial options described in *Schachter*. Reading down, reading in, and the like are of no more legal consequence than a simple finding of invalidity.¹¹⁴

Administrative Power and the Doctrine of Jurisdiction

One important consequence of the isolation of constitutional from statutory interpretation has been the analogous isolation of *Charter* from what are conventionally termed jurisdictional issues. Before the introduction of the *Charter*, the foundation for attacking the validity of administrative action was the doctrine of *ultra vires*, also known as the doctrine of jurisdiction. This doctrine supposes that governmental bodies cannot apply their powers in a manner that exceeds what has been granted by law. However, it is now commonly said that the *Charter* enables the judiciary to look “beyond jurisdiction,”¹¹⁵ such that the jurisdiction of administrative bodies would be one issue, their powers and responsibilities under the *Charter* another. The doctrine of jurisdiction is therefore perceived as a relic of a bygone past which has no role in the new constitutional landscape.

An exception to this perception has been the test for power under section 24(1) of the *Charter*, as set out in *Weber*.¹¹⁶ However, the tendency has been to dissociate administrative power under section 24(1) from administrative jurisdiction. Hogg states that administrative power should come from section 24(1), not from the tribunal’s empowering statute. He states that this has no practical implication, but defining the issue as one of statutory interpretation could lead to unnecessary restrictions on the powers of a tribunal.¹¹⁷ However, rather than explain why principles of statutory interpretation would limit

114 Robert Richards, “*Charter* Procedure in Administrative Cases: General Principles and Concerns” (1994) 7 Canadian J. of Administrative Law & Practice 135 at 141. See also *Schachter v. Canada*, [1992] 2 S.C.R. 679.

115 Hudson Janisch, “Beyond Jurisdiction: Judicial Review and the *Charter* of Rights” (1983) 43 Rev. du Barreau 401.

116 *Weber*, *supra* note 10.

117 Hogg, “Remedial Power,” *supra* note 52 at 159-61.

administrative power, Hogg merely states that “legislative limitations on remedial power should not limit the power of . . . courts to grant a constitutional remedy.”¹¹⁸ This solution illustrates that a focus on remediation appears to be sensible, although it displaces the problem and raises many more questions regarding the powers and responsibilities of subordinate administrative authorities.

The scope of the doctrine of jurisdiction has always been controversial.¹¹⁹ Rather than divide positions on jurisdiction into broad and narrow camps, the debate on the scope of jurisdiction, more accurately stated, questions how static or dynamic the concept of jurisdiction is. For those in the static camp, jurisdiction is a territorial metaphor whose boundaries, like those of property, do not move. Problems with this view have come to light under the *Charter*. Initially, it appeared that advocating a distinction between *Charter* and administrative jurisdiction was a progressive solution to the problem of jurisdiction, as judges would no longer be limited by the doctrine in controlling administrative powers. However, the static doctrine of jurisdiction has come back to haunt the liberal constitutionalist. Since *Charter* powers have nothing to do with jurisdiction — they go beyond the old doctrine — all administrative responsibilities and powers under the *Charter* are seen as irrelevant, save for select court-like tribunals bearing adjudicative attributes. To compensate for such a concentration of administrative responsibility under the *Charter*, its application, where relevant, requires administrative tribunals to set aside primary legislation. As a result, the more one views jurisdiction as static, the more one will view administrative power under the *Charter* as an absolute that must be either fully applied or not, since the *Charter* has never been part of administrative jurisdiction.

Statutory Interpretation and the Distinction between Constitutional and Administrative Issues

A consequence of the isolation of statutory from constitutional interpretation has been that the exercise of statutory powers can be attacked as either *ultra vires* or contrary to the Constitution. Thus, constitutional issues are determined not by the nature of legislation under attack, but by the nature of the argument made by the parties. In this respect, a constitutional issue is not determined by

118 Hogg, *Constitutional Law of Canada*, *supra* note 17 at 40-33.

119 As Rubinstein at *supra* note 38 at 81 noted: “Judicial review has developed in terms of want of jurisdiction. It will be noted that this development did not have the effect of limiting the supervisory court’s superintendence but rather of inflating the meaning of ‘want of jurisdiction’ so as to meet all contingencies.”

any formal standard, but simply by the sheer assertion of constitutional rights. The consequence, however, is that constitutional argument is perceived, *in toto*, as being inappropriate in the administrative process. What courts and tribunals should distinguish, instead, is between constitutional issues in the substantive sense and constitutional issues in the formal sense. Only the latter should trigger concern regarding constitutional validity.

As conventionally used, constitutional issues differ from administrative law issues in their content. However, it is very difficult, if not impossible, to define *Charter* or other constitutional issues substantively (that is, according to their subject matter). The similarity between human rights codes and the *Charter*, as illustrated in the *Tranchemontagne* case,¹²⁰ illustrates this point well. They are different types of legislation, although the subject matter of both is the protection of fundamental rights. Needless to say, if the term “constitutional” is used substantively, human rights tribunals already address constitutional issues.

Students of constitutional law usually begin their study of a constitution by learning that the term is capable of two definitions: one substantive, the other formal. The substantive definition of a constitution refers to the principles which underlie any political organization. These are the core rules which form collective organizations. The substantive definition of a constitution is generally contrasted to the formal definition of a constitution as a document entrenched by special procedure, protecting it from easy amendment. In short, the former refers to the stew, the latter the pot. The British are known for their flexible, informal constitution. As a result, they use the term substantively rather than formally. States constituted by a formal constitutional document, federations for example, ensure that the powers of government are divided, and that such a division is respected by entrenchment. Canada, however, having an entrenched Constitution, still continues to use the term constitutional substantively, although it necessarily, but not exclusively, refers to the formal, entrenched document known as the Constitution of Canada.

An important consequence of the substantive definition of constitutional issues is the assumption that there will be no overlap between the application of the law and the application of the *Charter* if this were the case, however, it is difficult to understand what exactly is meant by applying the *Charter* in this context. Indeed, constitutional jurisdiction is generally taken to be an isolated concept that can operate as a self-contained regime. In the context

120 *Supra* note 26.

of federalism, issues such as the allocation of law-making jurisdiction over banking and navigation to Parliament and legislatures are substantively unique in that no other statute has the authority to add to the division, nor any stake in improving it. However, under the *Charter*, protection from discrimination and of free speech are not issues that benefit from such jurisdictional exclusivity: other instruments provide identical, if not broader rights.¹²¹ A government body may not be a human rights tribunal, but that is not why it might be prohibited from applying the *Charter*. Indeed, the function of fundamental rights protection is not exclusive to the constitutional document itself, nor is it the exclusive responsibility of the elected assemblies to which that document is primarily directed. It is therefore not useful to ask whether administrative tribunals can address constitutional issues, or whether they can apply the *Charter*, because many already do so (e.g., human rights tribunals) even if they have not been recognized with power under the *Charter*.

The substantive definition of “constitutional” nevertheless implies that a constitutional issue is present simply where constitutional rights are claimed, not by identifying the type of legislation or administrative action under attack.¹²² In contrast, a formal definition of constitutional questions would be relevant not when constitutional rights are claimed, but when the subject of judicial review is primary legislation. An attack on secondary or tertiary legislation, or even the constitutional validity of administrative decisions, would not qualify as a constitutional issue, in the formal sense, because primary legislation cannot authorize the violation of the Constitution. The debate might be constitutional in the substantive sense, but not in the formal sense because democracy is no more under threat than it is in ordinary instances of statutory interpretation. Canadians, however, prefer the substantive definition of constitutional law. Whether this be through an unconscious tie to the British constitution or for other reasons, it remains the case that the substantive definition of constitutional issues has contributed to an all-or-nothing approach to administrative power under the *Charter*. Protecting fundamental rights in the administrative process therefore implies one regime applicable to all legislation or no regime at all.

Thus, the question of whether administrative tribunals can apply the *Charter*

121 *Ibid.*

122 See for instance the division in the Supreme Court in *Multani v. Commission scolaire Marguerite-Bourgeois*, 2006 SCC 6, [2006] 1 S.C.R. 256; *Blencoe*, *supra* note 84. Technically, these matters qualify as the “judicial review of administrative action” and hence should fall under the “administrative law” category, but because of the rights claimed, are taken to be matters of constitutional law and perceived as a conflict between courts and legislatures.

has generally been treated as synonymous with the larger question of whether legislation, regardless of its nature, is constitutionally valid.¹²³ *Martin and Laseur* is no exception. Indeed, the ruling does not distinguish among sources of law that may violate individual rights (primary legislation passed by either Parliament or the legislatures, secondary legislation such as regulations and collective agreements, and tertiary legislation such as administrative decisions), the validity of which is associated with different levels of legitimacy. *Martin and Laseur* ruled on the compatibility with the *Charter* of primary legislation and a regulation, but not all cases concern legislation. Nevertheless, if setting aside or withdrawing a regulation, collective agreement, or bylaw for violating constitutional rights can be seen as mandated by the Constitution, such acts can also be framed as acts of legislative interpretation to avoid violation of the Constitution. As some have stated, the effects of the *Charter*, as far as administrative action is concerned, “flow through” primary legislation, rather than derive directly from the Constitution.¹²⁴ As a result, regulations, collective agreements, or administrative decisions that violate individual rights are *ultra vires* their empowering legislative instrument.¹²⁵ Setting aside such secondary and tertiary legislation should therefore pose no legitimacy concerns for administrative tribunals.

Indeed, administrative power raises a problematic constitutional issue in relation to primary, rather than secondary or tertiary legislation. There is no conflict of legitimacy where a tribunal sets aside a minister’s regulation, nor is there any conflict when a tribunal overrules a minister’s decision to grant a permit or authorization. However, many statutory authorities qualifying as final decision makers have regulatory powers, or are perceived to be bound by regulation taken under their enabling statute. Where the tribunal is endowed with regulatory powers, it would only be natural that it not have the power to violate the *Charter* in exercising its authority. It is also natural that the tribunal have the correlative duty to withdraw illegal or unconstitutional regulations in relation to classes of individuals (as opposed to withdrawal on a case-by-case basis). The question become more complex, however, where a tribunal must apply ministerial regulations taken under an act,¹²⁶ but is nevertheless qualified as a final decision maker under that same act.¹²⁷ Legislators may have intended that the tribunal be fully responsible for applying ministerial policy

123 J.M. Evans, “Administrative Tribunals and *Charter* Challenges” (1989) 2 Canadian J. of Administrative Law & Practice 13.

124 See Hogg, *Constitutional Law*, *supra* note 17 at 34.2(c).

125 *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038 [*Slaight*].

126 See for instance Alberta’s *Workers’ Compensation Act*, R.S.A. 2000 c. W-15, s. 153.

127 *Ibid.*, s. 13(1).

but it is difficult to see how a tribunal could be qualified as a final decision maker under an act, while remaining subordinate to government regulatory authority. This is certainly a question of good public administration, although it is difficult to graft a workable scheme of constitutional jurisdiction when day-to-day administrative responsibilities are not clearly assigned.

Rejection of a Presumption of Constitutionality

The isolation of statutory from constitutional interpretation has long been bridged by the presumption of constitutionality, although under the *Charter* Canadian courts and academics have stressed the presumption's anachronistic character.¹²⁸ *Martin* and *Laseur* states that administrative tribunals with power to decide questions of law are presumed to have the power to rule on the constitutional validity of their enabling statutes. This position should, however, be distinguished from the general interpretative presumption of constitutionality, which provides that "if the words of a statute are fairly susceptible of two constructions of which one will result in the statute being *intra vires* and the other will have the contrary result, the former is to be adopted."¹²⁹ Indeed, most authorities emphasize that the presumption of constitutionality has become outdated since 1982.¹³⁰ However, while it is generally noted that American administrative tribunals do not have powers as broad as their Canadian counterparts, this position ignores the greater role of the presumption in the United States.¹³¹

128 *Hogg, Constitutional Law*, *supra* note 17 at 35.5; *Manitoba (Attorney General) v. Metropolitan Stores Ltd.*, [1987] 1 S.C.R. 110 [*Metropolitan Stores*]; *Slaight*, *supra* note 125 at 1079; McLachlin J. in *Committee for the Commonwealth of Canada v. Canada*, [1991] 1 S.C.R. 139; and most recently *Bell ExpressVu Ltd. Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559 [*Bell ExpressVu*]. See generally Ruth Sullivan, ed., *Driedger on the Construction of Statutes*, 3d ed. (Toronto: Butterworths, 1994) at 317.

129 Per Cartwright J. in *McKay v. The Queen*, [1965] S.C.R. 798 at 803-04 [*McKay*].

130 Per Beetz J. in *Metropolitan Stores*, *supra* note 128. *Contra* Andrew Butler, "A Presumption of Statutory Conformity with the *Charter*" 19 *Queen's Law J.* (1993) 209; Danielle Pinard, "Le principe d'interprétation issu de la présomption de constitutionnalité et la *Charte canadienne des droits et libertés*" (1990) 35 *McGill Law J.* 305.

131 See "The Authority of Administrative Agencies to Consider the Constitutionality of Statutes," (1976-77) 90 *Harvard Law Rev.* 1682 at 1706. It is also interesting to note that in the United States, the presumption of constitutionality is the basis for declaring secondary and tertiary legislation *ultra vires* or beyond statutory jurisdiction when it results in the violation of constitutional rights. This approach of invalidating the exercise of statutory powers was initially advocated by Walter Tarnapolsky, see *Minutes of Proceedings and Evidence of the Special Joint Committee of the Senate and the House of Commons on the Constitution of Canada*, 30th Parl., 3rd sess. (12 September 1978) at 12:26-28, but was substituted by a parallel regime of unconstitutionality, separate from the doctrine of jurisdiction.

The reason for rejecting the presumption of constitutionality in Canada is based on the dual nature of the presumption as an issue of interpretation and evidence. In this respect, the presumption determines how a statute is to be interpreted, but also the burden of proof of each party. If a statute is deemed constitutional, this implies that it is for the plaintiff to demonstrate its unconstitutionality. However, it is said that under the *Charter* there is no such presumption because it is for government to demonstrably justify limitations to *Charter* rights, as provided for under section 1 (not for the individual claimant, who must only prove that there is a violation of rights).¹³² Once a rights violation has been established, the burden of proof shifts to government. In this respect, it is said that because the claimant does not have the burden of proving the unconstitutionality of a law, there is no presumption of constitutionality. This argument is difficult to understand since constitutional litigation starts with the assumption that laws bearing royal assent are legally effective; moreover, claimants must make the case for their unconstitutionality in court. Moreover, generally speaking the division of proof between claimant and government in *Charter* litigation is not unique to civil litigation: proof on the balance of probabilities implies that government necessarily has a stake in refuting the claimant's arguments (and vice versa) unless it is intent on losing its case. This implies that the distinction between *Charter* rights and their limitation under section 1 is less evidentiary than it is analytical.

The second objection to the presumption is that recognizing a general presumption would defeat legislative will, since it would enable interpretations inconsistent with statutory objectives.¹³³ It is argued that one cannot always apply the *Charter* since legislation may have mandated otherwise, and individual rights must give way to collective will.¹³⁴ However, this view misconstrues both the *Charter* as a mere statutory remedy that can be applied (or not), and also misconstrues what is meant by applying the *Charter*. If the *Charter* does not protect the rights claimed, applying the *Charter* means not allowing the claim. In turn, any individual rights which are successfully claimed might be reasonably limited by section 1, which, needless to say, is also part of the *Charter*. If there is doubt as to the constitutionality of a legislative provision, then it is for a court to raise it and determine that the statute is

132 Hogg, *Constitutional Law*, *supra* note 17 at 35.5.

133 This argument was advanced by Iacobucci J. in *Bell ExpressVu*, *supra* note 128 at para. 64: "[A] blanket presumption of *Charter* consistency could sometimes frustrate true legislative intent, contrary to what is mandated by the preferred approach to statutory construction."

134 See for instance Lamer C.J. in *Slaight*, *supra* note 125 at 1079, stating "[I]t must be presumed that legislation conferring an imprecise discretion does not confer the power to infringe the *Charter* unless that power is conferred expressly or by necessary implication."

constitutionally invalid. Courts cannot shy away from a correct interpretation of the law on the pretext that the parties have not raised a constitutional argument. To argue against a general presumption of constitutionality on the basis that legislation might have been intended to be unconstitutional is, in sum, to argue that section 1 is not part of the *Charter*. Properly speaking and absent use of section 33, legislation cannot legitimately violate or infringe *Charter* rights, whether expressly or by necessary implication.¹³⁵ If the rights claimed are not recognized, this does not mean that the *Charter* is not being applied; rather, it confirms that the *Charter* is not an unlimited guarantee of rights.

A third and final argument denies any presumption of constitutionality under the *Charter* for exactly the opposite reason: individual rights should trump collective will. Thus, there should only be a presumption of constitutionality in reading down legislation, not in cases where reading in is necessary to ensure legislation conforms to the *Charter*.¹³⁶ Thus, in cases where legislation is overbroad or overinclusive, it will be read down, if possible, to limit its effect and thus avoid a declaration of constitutional invalidity. Conversely, where legislation is underinclusive there will be no presumption of constitutionality favouring the plaintiff's claim to have been excluded from a particular piece of legislation. In reality, however, these arguments have produced exactly the opposite effect by obliging claimants to constitutionalize their arguments, rather than resolve the matter as an issue statutory interpretation. Constitutionally invalid legislation rarely discriminates in clear terms. Even if it did, the presumption would not be relevant to such a case, since there would be no ambiguity to resolve. Thus, by arguing that there is no presumption of constitutionality for cases of reading in, many have positioned themselves as defenders of individual rights, while otherwise maintaining conservative methods of statutory interpretation. However, the consequence is that rather than resolve rights violations as matters of statutory interpretation, individuals have been required to argue that a statute is unconstitutional.

Indeed, where individuals have sought to resolve violations of rights without raising *Charter* arguments by treating the violations as mere questions of statutory interpretation, they have been rebuffed by the Supreme Court. This was the case in *Canada (Attorney General) v. Mossop* where the Supreme Court ruled that the *Canadian Human Rights Act* discriminates on the basis of sexual orientation because it referred to individuals with "family status," which in

135 *Eldridge, supra.* note 84.

136 *Ibid.*

the Court's view excluded homosexual couples living in stable relationships.¹³⁷ Naturally, the remedy in this case would have been to read in family status to include gay couples living in stable relationships, rather than declare the *Act* constitutionally invalid under the *Charter*. However, in rejecting the interpretative approach because the constitutionality of the legislation had not been attacked, *Mossop* consecrated the distinction between applying the law and applying the *Charter*. *Martin* and *Laseur* perpetuates this by distinguishing between tribunals that can apply the law from those that cannot, as well as between tribunals that can or cannot apply the *Charter*.¹³⁸

In this respect, recognizing a presumption of constitutionality need not imply giving the upper hand to government, nor does it imply giving legislation a meaning that it does not actually have. A simpler solution would be to recognize that legislation can be presumed constitutional, yet the intensity of the presumption can vary according to the circumstances of the case. Where legislation interferes with individual rights, the presumption should be weaker. On the other hand, where legislation purports to enhance rights provided under the *Charter*, human rights legislation for example, the presumption of constitutionality should be stronger (as *Mossop* should have demonstrated). But the presumption should never be held to mean that legislation is immune from review.

Constitutional Interpretation and the Exercise of Statutory Power

Rather than try to reconcile constitutional and statutory interpretation, the general approach of both judicial and academic authorities has been to emphasize the isolation of statutory from constitutional interpretation. For instance, if reading in is considered a *Charter* remedy alone, the responsibilities

137 [1993] 1 S.C.R. 554 [*Mossop*]. Compare the ruling of the House of Lords (which needless to say, cannot generally invalidate or remedy primary legislation) in *Fitzpatrick v. Sterling Housing Association Ltd.*, [1999] 2 A.C. 240, indicating that "family" has been given a flexible meaning by the courts, and was not limited to legally binding relationships. The hallmarks of the relationship, the House of Lords stated, were mutual interdependence, commitment, and support. Their Lordships, in explicitly rejecting the solution in *Mossop*, stated that in considering who is capable of being members of the tenant's family, it was necessary to have regard to changes in attitude towards same-sex relationships.

138 Some authors nevertheless argue that *Martin* and *Laseur* has brought on a new era of interpretation, thus implicitly overruling cases such as *Mossop*: see Bilson, *supra* note 31. No only do we do not share this interpretation of *Martin* and *Laseur*, however desirable, but emphasise that the reasoning in these cases, rather than extend the notion of statutory interpretation, extends its function to select bodies bearing judicial attributes.

of all government actors — whether or not they have the so-called power to apply the law — can be considered to exclude the process of applying the *Charter*. Broadening the conception of reading in, however, would clarify the duty to apply the *Charter* referred to by Justice Gonthier in *Martin and Laseur*.¹³⁹ This could be achieved by integrating administrative powers and responsibilities with long standing authority to the effect that, in cases of ambiguity, statutory interpretations that accord with the Constitution must be adopted over those that do not.¹⁴⁰ Such a duty to read in, read down, or invalidate secondary and tertiary legislation, where appropriate and just, would equally clarify the role of administrative tribunals to provide appropriate and just remedies under section 24(1) of the *Charter*. Indeed, there is no reason why techniques of statutory interpretation would lead to less generous results than would framing the constitutional question as one of providing remedies. On the contrary, since the evolution of constitutional responsibilities would be across the board — from the lowly clerk to the minister and appellate tribunal — rather than limited to courts and court-like tribunals, the *Charter* would receive vertical as well as horizontal recognition by the entire administrative-executive branch of government.

Such an interpretation would not require any radical changes to Canada's administrative and constitutional structure, nor to administrative procedure. It would, however, require a reconsideration of the definition of a constitutional issue and of the limits of statutory interpretation. If public authorities were confronted with an unconstitutional regulation or decision taken under a discretion-conferring statute, they should be required to formally withdraw the regulation or decision.¹⁴¹ Moreover, where tribunals already have the power to overrule ministerial authority, they should equally be given the power to set aside regulations passed in violation of the minister's statutory powers. Thus, where an administrative body has created a *Charter* violation (that is,

139 *Martin and Laseur*, *supra* note 3 at 547.

140 This would equally clarify the problem of administrative power in relation to unwritten constitutional principles, although not the problem of knowing exactly what such principles are. Since these cannot go against the clear wording of a statute, they are ultimately interpretative constructs.

141 In *Seminary of Chicoutimi v. Quebec (Attorney General)*, [1973] S.C.R. 681, the Supreme Court of Canada held that the transfer of power to quash by-laws to inferior provincial court was unconstitutional. Such a power could only be awarded to a s. 96 court. Even though the powers of municipalities are themselves statutory, the power to annul the bylaws of their elected assemblies could not stem from another statutory body without constitutional protection of ss. 96-101 of the *Constitution Act, 1867*. See Hogg, *Constitutional Law*, *supra* note 17 at 7.3(b). However, this ruling was given at a time when courts were much more sceptical of administrative power than they are today. Moreover, the elected nature of municipal governments distinguishes them from administrative bodies with regulatory power.

one that is not justifiable under section 1) by enacting a regulation or an administrative decision that violates an individual's rights, there is no reason why that administrative body should not have the power and responsibility to set aside the regulation or decision.¹⁴² Needless to say, in such cases there is no reason why a tribunal should only invalidate the regulation (or any other piece of secondary or tertiary legislation) for the benefit of the parties at hand rather than for the public at large. Such a power might be given exclusively to appellate authorities, although subordinate authorities might also be required to exercise a variable role in the process. Finality of power may ultimately determine the scope of responsibilities under the *Charter*, but it should not determine their existence.

Such responsibilities confirm the exhaustion doctrine, which requires that individuals avail themselves of administrative means of redress before applying for judicial review. In the United States, raising a constitutional issue does not automatically preclude the application of the exhaustion doctrine.¹⁴³ The mere fact that a violation of rights is asserted should not, as postulated in Alberta and other jurisdictions, trigger the need for judicial review, but rather the verification of any interpretive leeway. In any event, the mere assertion of the violation of a constitutionally protected right does not elevate a dispute to the judicial stage. While it might appear that the *Charter* has temporarily disrupted the dynamic between administrative and judicial power, the exhaustion doctrine was only set aside where the case presented novel elements¹⁴⁴ or required immediate judicial intervention.¹⁴⁵ In this respect, there is no reason to upset the traditional rule that ambiguous statutes should receive full attention in the administrative process, while statutes with clear wording may justify the circumvention of administrative procedure to obtain a declaratory judgment, or even an interlocutory injunction of constitutional invalidity.¹⁴⁶

To summarize, challenges to primary legislation would best be resolved in superior court, although this would not be necessary should redressing the challenge simply require reading in or reading down, as was the case in

142 *Contra* G. Pépin, "Le compétence des cours inférieures et des tribunaux administratifs de stériliser, pour cause d'invalidité ou d'ineffectivité, les textes législatifs et réglementaires qu'ils ont mission d'appliquer" (1987) 47 Rev. du Barreau 509, who argues that administrative regulations and primary legislation should equally be immune from administrative control.

143 See generally Louis Jaffe, *Judicial Control of Administrative Action*, Student ed. (Boston: Little, Brown and Company, 1965) at 438.

144 See for instance *Tétrault-Gadoury*, *supra* note 8.

145 See for instance *Eldridge*, *supra* note 84.

146 As recognised in *Metropolitan Stores*, *supra* note 128.

Mossop.¹⁴⁷ This should even be possible in light of statutory restrictions on a tribunal's powers. Because notice is not required for questions of interpretation, one might even argue that notice requirements should not apply.¹⁴⁸ Conversely, where legislation is clear, as in *Cooper*, a declaration or even an interlocutory injunction of constitutional invalidity might be the best solution, since it would resolve the matter once and for all. In other cases involving the validity of secondary and tertiary legislation, there should be no impediment in the administrative process to the use of the *Charter* to grant declarations of invalidity. The power to pass secondary legislation must necessarily include the corollary responsibility to withdraw it, regardless of whether or not the administrative body has a court-like structure.¹⁴⁹ Thus, in *Douglas College* a statutory arbitrator empowered to consider any act intended to regulate employment was rightfully allowed to determine the constitutional validity of mandatory retirement provisions in a collective agreement.¹⁵⁰ The Court ruled that an arbitrator could determine the constitutionality of the collective agreement under section 52(1) of the *Constitution Act, 1982* by virtue of its final and conclusive power under the *Canada Labour Code*.¹⁵¹ Whether this power is grounded in section 52(1) or section 24(1) of the *Charter* does not matter, although in both cases statutory restrictions should not limit attacks on derived legislation. Last, where the validity of secondary legislation is at issue, if it adds no restrictions other than those already present in primary legislation, as was the case in *Martin* and *Laseur*,¹⁵² the appropriate forum is a superior court. Ultimately, if this seems unfair, legislatures and governments can always amend the powers of administrative tribunals and their procedures, or provide them with more funding.

IV. CONCLUSION

This article has argued that rather than being reserved to judicial-like bodies, the power to apply the *Charter* should be horizontally extended to authorities that are subject to judicial review, and vertically gradated according to their responsibilities. This model of understanding and regulating administrative power under the *Charter* contradicts the acclaimed solution in *Martin* and

147 *Mossop*, *supra* note 137.

148 *McKay*, *supra* note 129 at 803-804

149 The French term for this reasoning is the principle of *parallélisme des compétences*. Authority to pass regulations implies authority to withdraw them.

150 *Supra* note 10.

151 R.S.C. 1985, c. L-2.

152 *Martin* and *Laseur*, *supra* note 3.

Laseur, but arguably goes much further than that case in recognizing the role of fundamental rights in the administrative process. Such a solution also neutralizes the effect of statutes withdrawing all administrative power under the *Charter*. In this respect, while the *AJPA* appears to take a very conservative stance on administrative power under the *Charter*, both the *Act* and the Supreme Court are actually much closer because they phrase the problem identically: first, by assuming that interpretation is exclusively a judicial function that can be transferred, in exceptional circumstances, to select administrative tribunals bearing judicial attributes; and second, by assuming that constitutional and statutory interpretation are independent and isolated processes.

Rather than reassess the jurisdiction of all administrative authorities to accommodate their new responsibilities under the *Charter*, the solution offered here has been to selectively extend the judicial regime of remedial power, with the proviso that tribunals may grant only informal declarations of constitutional invalidity. However, by creating a special category of tribunals with informal power to function as superior courts, *Martin* and *Laseur*, along with the legislative backlash in Alberta, have left the law in a confused state. Such informal constitutional power recalls an episode in Dumas' *La dame de Monsoreau* in which a priest is asked to rechristen poultry as carp so that it may be eaten on Friday. The declaration of constitutional invalidity has thus been conveniently renamed to fit the occasion. Administrative power under the *Charter* has been recognized, but only by transferring the traditional judicial model of interpretation to select administrative tribunals. The cost has been the formalization of administrative procedure and, in some cases, the total withdrawal of what is conventionally termed constitutional jurisdiction from other tribunals. Provinces may follow the Alberta precedent, if they have not already done so.

It is indeed much easier to transfer the traditional judicial model of interpretation to select administrative tribunals bearing judicial attributes, than it is to reassess the concept of interpretation itself. It is equally easy to maintain that terms such as spouse or family have exactly the same meaning as they did in 1982, but that the *Charter* requires us to alter them. The *APJA* and *Martin* and *Laseur* appear to take radically different positions in defining administrative power under the *Charter*, although both maintain the traditional isolation of statutory from constitutional interpretation. Having learned the mechanics of statutory interpretation before the introduction of the *Charter*, many members of Canada's legal community maintain anachronistic positions regarding the proper role of the *Charter* in the process of statutory interpretation, regardless of their actual political positioning regarding

Charter rights and the powers of administrative tribunals under it. This view amounts to the claim that applications of the *Charter* are exclusively remedial, not interpretive. The result is a Manichean allocation of administrative power under the *Charter*: tribunals are generally presumed either to have the power to apply the *Charter* or they are completely denied any such power. The isolation of statutory from constitutional interpretation might have been a generational issue at first. However, it has been formalized into the law, and now prevents the gradual infusion of *Charter* principles into the process of statutory interpretation and administrative law as a whole.

To this extent, *Martin* and *Laseur* and its unfortunate aftermath will be just another building block in the construction of Canadian administrative law, an endeavour that remains just as much a judicial responsibility as it is one for academics and litigators. The problem of administrative power under the *Charter* cannot be resolved by asking whether or not an authority can apply the *Charter*. The *Charter* is a constitutional document but it is also, needless to say, part of the law. As one judge noted in the *Charter*'s early days: "[it] was not intended to turn the Canadian legal system upside down."¹⁵³ Nevertheless, the foundation of administrative law deserves reconsideration in Canada's *Charter* era. Venerable doctrines such as parliamentary sovereignty, or remedies create rights, are deeply ingrained, perhaps even more so than the values that are perceived to be at core of the debate on administrative power under the *Charter*. To the extent that this question continues to be framed as a conflict between fundamental rights and the separation of powers, the discord will only serve to highlight greater jurisprudential unity.

The broader issue, however, is that under the *Charter*, public law can no longer be simply perceived as the law of the judicial review. Understanding the effect of the *Charter* requires knowledge of the structure of government, and of the powers and responsibilities of the actors and bodies composing it. This knowledge is something that is not within the traditional purview of the law school. Thus, the great contribution of the *Charter* to public law has been to challenge the remedial logic that dominates its study, and to oblige jurists to look beyond the courts to the broader institutions of government. Just as war is too important to be left to the generals, public law is too great a subject to be left to the judges.

153 *R. v. Mills*, [1986] 1 S.C.R. 863 at 953.

