1993 CarswellQue 145, 49 C.C.E.L. 1, 15 Admin. L.R. (2d) 1, 154 N.R. 104, (sub nom. Domtar Inc. v. Québec (Commission d'appel en matière de lésions professionnelles)) [1993] 2 S.C.R. 756 , 55 Q.A.C. 241, 105 D.L.R. (4th) 385, [1993] 2 S.C.R. 756, J.E. 93-1309, 41 A.C.W.S. (3d) 463, [1993] C.A.L.P. 613, EYB 1993-67877

Domtar Inc. c. Québec (Commission d'appel en matière de lésions professionnelles)

Roland Lapointe (Appelant) c. Domtar Inc. (Intimée) et Commission d'appel en matière de lésions professionnelles; Comission de la santé et de la sécurité du travail (Mises en cause)

Supreme Court of Canada

Lamer C.J.C., La Forest, L'Heureux-Dubé, Gonthier, Cory, McLachlin and Iacobucci JJ.

Heard: April 1, 1993
Judgment: une 30, 1993
Docket: Doc. 22717

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Counsel: Laurent Roy, for appellant.

René Delorme and Martin Roy, for respondent.

Claire Delisle, for mise en cause CALP.

Jean-Claude Paquet, Louise Chayer and Berthi Fillion, for mise en cause CCST.

Subject: Labour and Employment; Public

Employment Law --- Workers' compensation legislation — Compensation — Computation of amount

Employment Law --- Workers' compensation legislation — Judicial review

Workers' compensation — Judicial review — Standard of review — Standard of review of decision of Commission d'appel en matière de lésions professionnelles interpreting s. 60 of Act respecting Industrial Accidents and Occupational Diseases being whether decision patently unreasonable — Existence of conflicting jurisprudence on interpretation not being reason to abandon curial deference — Act respecting Industrial Accidents and Occupational Diseases, R.S.Q., c. A-3.001, s. 60.

L, an employee of D Inc., was injured in an industrial accident and was unable to work from December 18, 1985 until January 2, 1986. Prior to the accident, D Inc. had announced that the plant where L worked would be closed from December 21, 1985 to January 2, 1986. D Inc. refused to compensate L under s. 60 of the Act re-

specting Industrial Accidents and Occupational Diseases (Que.) for the days when the plant was closed.

L complained to the Commission de la santé et de la sécurité du travail ("CSST"), arguing that he was entitled to an income replacement indemnity covering the entire period of his disability. The CSST dismissed the complaint. The compensation branch of the CSST affirmed that decision.

L filed an application for review with the Bureau de révision paritaire of the CSST. The original decision was affirmed whereupon L appealed to the Commission d'appel en matière de lésions professionnelles ("CALP"). The CALP found that because of his employment injury and in accordance with s. 60 of the Act, L was entitled to be compensated for each day on which, according to his usual work schedule, he would have worked between December 22, 1985, when the plant closed, and January 1, 1986. The CALP found that the words "would normally have worked" in s. 60 could not be separated from the words "had he not been disabled", which immediately followed it. Accordingly, it considered that, in interpreting s. 60, no account could be taken of factors or circumstances extrinsic to the worker's inability to carry on his employment by reason of his employment injury.

D Inc. brought a motion in evocation to the Quebec Superior Court from the decision of the CALP. The motion was dismissed on the ground that the decision was not unreasonable and the CALP had not exceeded its jurisdiction.

The Quebec Court of Appeal allowed D Inc.'s appeal, granted the motion in evocation and reversed the CALP decision. The court noted that there were conflicting decisions on s. 60 of the Act and stated that it was in the interest of justice for the conflict to be resolved at once, regardless of traditional curial deference because such deference, while ordinarily leading to dismissal of the application for evocation, did not resolve the unstable legislation. The court felt that it was desirable that the intention of the legislature should prevail.

L appealed.

Held:

The appeal was allowed.

The interpretation of s. 60 was within the CALP's jurisdiction. CALP decisions were protected by a full privative clause. The standard of review applicable to a CALP decision was whether it was patently unreasonable. The decision in this case was not patently unreasonable.

It was doubtful whether there was a "conflict" with respect to the interpretation of s. 60. The Court of Appeal's conclusion on this point was based on a single conclusion of the Labour Court in a penal matter and failed to take into account the numerous decisions of the CALP, which had always adopted the same interpretation. The situation created by an isolated decision at variance with a consistent line of authority cannot *a priori* be characterized as a true "jurisprudential conflict". Even assuming that there was such a conflict, it did not constitute an independent basis for judicial review. When decisions made within jurisdiction are not patently unreasonable, the principles underlying curial deference should prevail.

Cases considered:

Béland et Mines Wabush (le 27 novembre 1986), n° 00138-09-8604 (C.A.L.P. Qué.) — referred to

Bell Canada v. Canada (Canadian Radio-television & Telecommunications Commission), [1989] 1 R.C.S. 1722, 38 Admin. L.R. 1, 60 D.L.R. (4th) 682, 97 N.R. 15 — referred to

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Berg v. University of British Columbia, [1993] 2 R.C.S. 353, 79 B.C.L.R. (2d) 273, 152 N.R. 99, 26 B.C.A.C. 241, 44 W.A.C. 241, 102 D.L.R. (4th) 665 — referred to

C.A.I.M.A.W., Local 14 v. Canadian Kenworth Co., [1989] 2 R.C.S. 983, 40 Admin. L.R. 181, (sub nom. C.A.I.M.A.W. v. Paccar of Canada Ltd.) [1989] 6 W.W.R. 673, 40 B.C.L.R. (2d) 1, 62 D.L.R. (4th) 437, 89 C.L.L.C. 14,050, 102 N.R. 1 — referred to

C.J.A., Local 579 v. Bradco Construction Ltd., [1993] 2 R.C.S. 316, 93 C.L.L.C. 14,033, 153 N.R. 81, 102 D.L.R. (4th) 402, 106 Nfld. & P.E.I.R. 140, 334 A.P.R. 140 — referred to

Canada (Attorney General) v. Mossop, [1993] 1 R.C.S. 554, 46 C.C.E.L. 1, 93 C.L.L.C. 17,006, 149 N.R. 1, 100 D.L.R. (4th) 658, 17 C.H.R.R. D/349 — referred to

Canada (Attorney General) v. P.S.A.C., [1991] 1 R.C.S. 614, 91 C.L.L.C. 14,017, 48 Admin. L.R. 161, 80 D.L.R. (4th) 520, (sub nom. Canada (Procureur général) c. A.F.P.C.) 123 N.R. 161 — referred to

Canada (Attorney General) v. P.S.A.C., [1993] 1 R.C.S. 941, 93 C.L.L.C. 14,022, 11 Admin. L.R. (2d) 59, 150 N.R. 161, 101 D.L.R. (4th) 673 — referred to

Collins & Aikman Inc. et Dansereau, [1986] C.A.L.P. 134 (Qué.) — referred to

Commission de la santé et de la sécurité du travail c. B.G. Chéco International Ltée, [1991] T.T. 405 (Qué.) — referred to

Consolidated Bathurst Packaging Ltd. v. International Woodworkers of America, Local 2-69, (sub nom. I.W.A. v. Consolidated-Bathurst Packaging Ltd.) [1990] 1 R.C.S. 282, 42 Admin. L.R. 1, 105 N.R. 161, 68 D.L.R. (4th) 524, 90 C.L.L.C. 14,007, 38 O.A.C. 321, [1990] O.L.R.B. Rep. 369 — referred to

Cuddy Chicks Ltd. v. Ontario (Labour Relations Board), [1991] 2 R.C.S. 5, 91 C.L.L.C. 14,024, 50 Admin. L.R. 44, 122 N.R. 361, 81 D.L.R. (4th) 121, [1991] O.L.R.B. Rep. 790, 47 O.A.C. 271, 4 C.R.R. (2d) 1 — referred to

Dayco (Canada) Ltd. v. C.A.W., (sub nom. Dayco (Canada) Ltd. v. CAW-Canada) [1993] 2 S.C.R. 230, 152 N.R. 1, 63 O.A.C. 1, (sub nom. Dayco v. N.A.W.) C.E.B. & P.G.R. 8141, 93 C.L.L.C. 14,032, 102 D.L.R. (4th) 609 — referred to

Desmeules et Entreprises B.L.H. Inc., [1986] C.A.L.P. 66 (Qué.) — referred to

Douglas/Kwantlen Faculty Assn. v. Douglas College, [1990] 3 R.C.S. 570, [1991] 1 W.W.R. 643, 52 B.C.L.R. (2d) 68, 77 D.L.R. (4th) 94, 118 N.R. 340, 13 C.H.R.R. D/403, 50 Admin. L.R. 69, 2 C.R.R. (2d) 157, 91 C.L.L.C. 17,002 — referred to

Halifax Longshoremen's Assn. v. Nauss, (sub nom. Canada (Labour Relations Board) v. Halifax Longshoremen's Assn.) [1983] 1 R.C.S. 245, 46 N.R. 324, 83 C.L.L.C. 14,022, 144 D.L.R. (3d) 1 — referred to

Hydro-Québec c. Québec (Conseil des services essentiels) (1991), 41 Q.A.C. 292, [1992] R.D.J. 171 — referred to

Lambert et Vic Métal Corp., [1986] C.A.L.P. 147 (Qué.) — referred to

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Létourneau et Électricité Kinston Inc., [1986] C.A.L.P. 241 — referred to

National Corn Growers Assn. v. Canada (Canadian Import Tribunal), [1990] 2 R.C.S. 1324, 45 Admin. L.R. 161, 114 N.R. 81, 74 D.L.R. (4th) 449, (sub nom. American Farm Bureau Federation v. Canadian Import Tribunal) 3 T.C.T. 5303 — referred to

New Brunswick Liquor Corp. v. C.U.P.E., Local 963, [1979] 2 R.C.S. 227, 25 N.B.R. (2d) 237, 51 A.P.R. 237, 26 N.R. 341, 79 C.L.L.C. 14,209, 97 D.L.R. (3d) 417, N.B.L.L.C. 24,259 — referred to

Produits Pétro-Canada Inc. c. Moalli (1986), 16 C.C.E.L. 18, [1987] R.J.Q. 261, 26 Admin. L.R. 64, (sub nom. Ferris c. Produits Pétro-Can.) 6 Q.A.C. 114 — considered

Québec (Commission des affaires sociales) c. Tremblay, [1992] 1 R.C.S. 952, 3 Admin. L.R. (2d) 173, 135 N.R. 5, 90 D.L.R. (4th) 609, 47 Q.A.C. 169 — referred to

S.E.I.U., Local 204 v. Broadway Manor Nursing Home (1984), 48 O.R. (2d) 225, 13 D.L.R. (4th) 220, 5 O.A.C. 371, 12 C.R.R. 86 (C.A.) [leave to appeal to S.C.C. refused (1985), 8 O.A.C. 320 (S.C.C.)] — considered

Syndicat canadien de la Fonction publique c. Commission des écoles catholiques de Québec (le 20 décembre 1989), n° 200-09-000463-866 (C.A. Qué.), J.E. 90-176 — referred to

Syndicat des communications graphiques, Local 509M c. Auclair (1989), [1990] R.J.Q. 334, (sub nom. Syndicat des communications graphiques, Local 509M (Québec) c. Syndicat des travailleurs de l'entretien du Soleil (C.S.N.)) 36 Q.A.C. 81 — referred to

Syndicat des employés professionnels de l'Université du Québec à Trois-Rivières c. Université du Québec à Trois-Rivières, [1993] 1 R.C.S. 471, 11 Admin. L.R. (2d) 21, (sub nom. Université du Québec à Trois-Rivières v. Larocque) 93 C.L.L.C. 14,020, 101 D.L.R. (4th) 494, 148 N.R. 209, 53 Q.A.C. 171 — referred to

Syndicat national des employés de la commission scolaire régionale de l'Outaouais v. Union des employés de service, Local 298, (sub nom. Union des employés de service, Local 298 v. Bibeault) [1988] 2 R.C.S. 1048, 35 Admin. L.R. 153, 95 N.R. 161, 89 C.L.L.C. 14,045, 24 Q.A.C. 244 — considered

Tétreault-Gadoury v. Canada (Employment & Immigration Commission), [1991] 2 R.C.S. 22, 36 C.C.E.L. 117, 91 C.L.L.C. 14,023, 50 Admin. L.R. 1, 126 N.R. 1, 81 D.L.R. (4th) 358, 4 C.R.R. (2d) 12 — referred to

Tousignant et Hawker Siddeley Canada Inc., [1986] C.A.L.P. 48 (Qué.) — referred to

United Steelworkers of America, Local 14097 v. Franks (1990), 75 O.R. (2d) 382 (Div. Ct.) — considered

W.W. Lester (1978) Ltd. v. U.A., Local 740, (sub nom. Lester (W.W.) (1978) Ltd. v. U.A., Local 740) [1990] 3 R.C.S. 644, 48 Admin. L.R. 1, 76 D.L.R. (4th) 389, 91 C.L.L.C. 14,002, (sub nom. Planet Development Corp. v. U.A., Local 740) 123 N.R. 241, 88 Nfld. & P.E.I.R. 15, 274 A.P.R. 15 — referred to

Statutes considered:

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Industrial Accidents and Occupational Diseases, Act respecting, R.S.Q., c. A-3.001 —

art. 1

art. 44

art. 60

art. 349

art. 350

art. 358 [mod. 1992, ch. 11, art. 31]

art. 373 et suiv.

art. 391

art. 396 [mod. 1986, ch. 58, art. 114]

art. 397

art. 400

art. 405

art. 406

art. 407

art. 409

art. 429

art. 458 [mod. 1990, ch. 4, art. 35]

art. 473 [mod. 1990, ch. 4, art. 38]

art. 589

Code of Penal Procedure, R.S.Q., c. C-25.1.

Labour Code, R.S.Q., c. C-27 —

art. 112

Employment Standards Act, R.S.O. 1980, c. 137 [R.S.O. 1990, c. E.14] —

s. 40a [R.S.O. 1990, c. E.14, s. 58]

Inflation Restraint Act, 1982, S.O. 1982, c. 55 —

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s. 13(b)

Labour Standards, Act respecting, R.S.Q., c. N-1.1 —

art. 97

art. 124

Occupational Health and Safety, Act respecting, R.S.Q., c. S-2.1 —

art. 37.3

art. 193

APPEAL from judgment reported at [1991] R.J.Q. 2438, 39 Q.A.C. 304 (Que. C.A.) allowing appeal from judgment reported at [1987] C.A.L.P. 254 (Que. S.C.) dismissing motion in evocation reported at [1986] C.A.L.P. 116.

The judgment of the court was delivered by L'Heureux-Dubé J.:

1 This appeal raises questions which lie at the core of the institutional relationship between courts of law and administrative tribunals. The issue is whether, in the absence of a patently unreasonable error, conflicting decisions by administrative tribunals may give rise to judicial review. The provision at issue here (s. 60 of the *Act respecting Industrial Accidents and Occupational Diseases*, R.S.Q., c. A-3.001 ("A.I.A.O.D.")) reads as follows:

> 60. The employer of a worker at the time he suffers an employment injury shall pay him, if he becomes unable to carry on his employment by reason of his injury, 90% of his net salary or wages for each day or part of a day the worker would normally have worked had he not been disabled, for fourteen full days following the beginning of his disability.
>
> The employer shall pay the salary or wages referred to in the first paragraph to the worker at the time he would normally have paid them to him if the worker has furnished the medical certificate contemplated in section 199.
>
> The salary or wages referred to in the first paragraph constitute an income replacement indemnity to which the worker is entitled for fourteen full days following the commencement of his disability and the Commission shall reimburse the amount thereof to the employer within fourteen days of receipt of his claim, failing which it shall pay him interest determined in accordance with section 323 from the first day it is late.
>
> If the Commission subsequently decides that the worker is not entitled to the whole or part of the indemnity, the Commission shall claim reimbursement from the worker in accordance with Division I of Chapter XIII.

I — Facts

2 At about 11:30 a.m. on December 17, 1985, the appellant, a joiner permanently employed by the respondent Domtar Inc., was injured in an industrial accident. As a consequence of his employment injury, he was unable to carry on his employment from December 18, 1985 until January 2, 1986. In the days preceding the acci-

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dent, Domtar had planned and announced the temporary closure of its newsprint plant for the period from 4 p.m. on December 21, 1985 to 8 a.m. on January 2, 1986.

3 Domtar compensated the appellant for the day of December 18 and for the days of December 19 and 20. Citing the temporary closure of the plant, Domtar refused to compensate the appellant for more than those three days. On January 6, 1986, in a complaint submitted to the mis en cause Commission de la santé et de la securité du travail ("CSST"), the appellant argued that he was entitled to an income replacement indemnity covering the entire period of his disability, that is a period of 14 days ending on January 2, 1986. On January 24, 1986, the CSST dismissed the complaint and confirmed that Domtar had paid the correct amount. On January 30, 1986, the appellant asked the compensation branch of the CSST to issue a payment order against Domtar. On February 10, 1986, the compensation branch affirmed the CSST's original decision and denied the application for an order.

4 On February 21, 1986, the appellant filed an application for review with the Bureau de révision paritaire ("BRP") of the CSST. On April 10, 1986, a majority of the C.S.S.T. affirmed the original decision. The appellant then appealed to the mis en cause Commission d'appel en matière de lésions professionnelles ("CALP"). On November 27, 1986, the CALP found that on account of his employment injury and in accordance with s. 60 A.I.A.O.D., the appellant was entitled to 90 percent of his net salary or wages for each day or part of a day on which, according to his usual work schedule, he would have worked between December 22, 1985, the date on which the plant closed, and January 1, 1986. The CALP accordingly reversed the decision of the BRP and ordered Domtar to pay the appellant this amount.

5 On December 23, 1986 Domtar brought a motion in evocation to the Quebec Superior Court from the decision of the CALP. By judgment dated June 30, 1987, the motion in evocation was dismissed. This decision was appealed to the Quebec Court of Appeal. By a unanimous judgment dated September 11, 1991, that court allowed the appeal, granted the motion in evocation and reversed the CALP decision.

II — Legislation

6 The mechanism set up by the legislature to implement the A.I.A.O.D. comprises several decision-making bodies.

7 The CSST, established by the Act respecting Occupational Health and Safety, R.S.Q., c. S-2.1, is the body responsible for administering the Act respecting Industrial Accidents and Occupational Diseases (s. 589). Section 349 A.I.A.O.D. gives it jurisdiction to decide any question contemplated by the Act:

> 349. The Commission has exclusive jurisdiction to decide any matter or question contemplated in this Act unless a special provision gives the jurisdiction to another person or agency.

8 Decisions of the CSST are subject to the following privative clause:

> 350. Except on a question of jurisdiction, no proceedings under article 33 of the Code of Civil Procedure (chapter C-25) nor any extraordinary recourse within the meaning of the said Code may be taken, nor any provisional remedy be ordered against the Commission by reason of an act performed or decision rendered pursuant to an Act under its administration.

9 The BRP is an intermediary level of jurisdiction. A person aggrieved by a decision of the CSST may ask

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this body to review it. Section 358 A.I.A.O.D. reads as follows:

> 358. A person who believes he has been wronged by a decision rendered by the Commission under this Act may, within 30 days of notification of the decision, apply for review thereof by a review office established under the Act respecting occupational health and safety (chapter S-2.1).
>
> However, a person may not apply for the review of any matter of a medical nature in respect of which the Commission is bound under section 224 or of any decision of the Commission rendered under section 256 or the first paragraph of section 365.2, or for the review of a refusal by the Commission to reconsider its decision pursuant to the first paragraph of section 365.

10 BRP decisions are not protected by a privative clause.

11 The CALP is the body to which BRP decisions may be appealed. Under s. 397 A.I.A.O.D., the CALP has exclusive jurisdiction to hear and dispose of appeals brought under ss. 37.3 and 193 of the *Act respecting Occupational Health and Safety* and the A.I.A.O.D. Section 400 further provides:

> 400. The board of appeal may confirm the decision or the order brought before it; it may also quash the decision or the order and shall in that case render the decision or make the order that should have been given initially.

12 CALP decisions are final and not subject to appeal and they are protected by a full privative clause:

> 405. Every decision of the board of appeal must be in writing and substantiated, signed and notified to the parties and to the Commission.
>
> Decisions are final and without appeal and every person contemplated in the decision shall comply therewith without delay.
>
> 409. Except on a question of jurisdiction, no proceedings under article 33 of the Code of Civil Procedure (chapter C-25) nor any extraordinary recourse within the meaning of the said Code may be taken, nor any provisional remedy be ordered against the board of appeal or one of its commissioners acting in his official capacity.
>
> A judge of the Court of Appeal may annul summarily, upon a motion, any action granted, any writ, order or injunction issued or granted contrary to this section.

13 The Labour Court was established by the Quebec *Labour Code*, R.S.Q., c. C-27, s. 112. Penal proceedings under the A.I.A.O.D. are brought before it. Section 473 reads as follows:

> 473. Proceedings pursuant to this chapter are instituted before the Labour Court created by the Labour Code (chapter C-27) and sections 181, 121, 124 to 128 and 133 to 136 of that Code apply.
>
> No proceedings may be brought except by the Commission or by a person generally or specially designated by it for that purpose within one year after the Commission becomes aware of the offence.

14 A breach of s. 60 A.I.A.O.D. is dealt with in s. 458:

> 458. Every employer who contravenes the first paragraph of section 32 or 33, section 59, the first or second

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> paragraph of section 60 ... is guilty of an offence and liable to a fine of not less than $500 nor more than $1 000 in the case of a natural person and to a fine of not less than $1 000 nor more than $2 000 in the case of a legal person.

15 Decisions of the Labour Court may be appealed to the Superior Court under the *Code of Penal Procedure*, R.S.Q., c. C-25.1.

III — Judgments

Bureau de révision paritaire, [1985-86] B.R.P. 505

16 The majority summed up the issue as follows (at p. 506):

> [TRANSLATION]
>
> The issue raised before the Bureau de révision paritaire is whether the worker was entitled to more than two days' compensation for his period of disability from December 19, 1985 to January 2, 1986.

17 It added (at p. 507):

> [TRANSLATION]
>
> In order to answer the question raised it must be determined whether, *had he not been disabled*, the worker would *normally* have worked during the 14-day period following the beginning of his disability. Specifically, if the worker had not suffered the industrial accident on December 17, 1985, would he have worked during that 14-day period?
>
> In our opinion, the closure of the plant must be regarded as normal in this case as it was scheduled, and even if the worker had not suffered an accident he would only have received two days of his wages, that is up to December 20, 1985, as indeed most of the workers did. [Emphasis in original.]

18 In the absence of evidence establishing that the appellant intended to use his seniority right during the layoff period to bump another employee with less seniority, the majority concluded that the application should be dismissed (at p. 507):

> [TRANSLATION]
>
> We accordingly believe that had he not been disabled, and based on the evidence presented, Mr. Lapointe would normally have worked only 2 days, namely December 19 and 20, during the 14-day period following the beginning of his disability.
>
> The original decision is accordingly upheld.

19 In the opinion of the dissenting member, Mr. Tardif, there was no doubt that the appellant intended to use his seniority right. Being of the view that, had the appellant not been disabled, this seniority right would have enabled him to work during the layoff period, Mr. Tardif would have overturned the CSST's decision and ordered Domtar to compensate the appellant for each day or part of a day he would have worked during the fourteen days following the beginning of his disability. (The dissenting member's reasons are not reported in the B.R.P.)

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Commission d'appel en matière de lésions professionnelles, [1986] C.A.L.P. 116

20 After reviewing the wording and purpose of s. 60 A.I.A.O.D., the CALP found that the expression "would normally have worked" could not be separated from the words "had he not been disabled" which immediately follow it. Accordingly, it considered that, in interpreting this provision, no account whatever could be taken of factors or circumstances extrinsic to the worker's inability to carry on his employment by reason of his employment injury. The CALP referred to its own decision in Tousignant et Hawker Siddeley Canada Inc., [1986] C.A.L.P. 48 (Que.), to the effect that the suspension or breach of an employment contract by a layoff has no effect on the worker's inability to carry on his employment as a result of an employment injury. Applying these principles to the facts of this case, it added (at p. 119):

> [TRANSLATION]
>
> In the present case, the appellant was employed by the party concerned on December 17, 1985, the date on which he suffered an employment injury. By reason of this employment injury the appellant was unable to carry on his employment until January 2, 1986.
>
> Under s. 60 of the *Act respecting Industrial Accidents and Occupational Diseases*, the party concerned was therefore obliged to pay the appellant, regardless of the plant closure, 90 percent of his net salary or wages for each day or part of a day he would normally have worked, according to his usual work schedule, had it not been for his inability to carry on his employment by reason of his injury for the first 14 full days following the beginning of that disability.

21 It concluded that Domtar should pay the appellant 90 percent of his net salary or wages for each day or part of a day he would normally have worked according to his usual work schedule, regardless of the plant closure.

Superior Court, [1987] C.A.L.P. 254

22 Summarizing the CALP's conclusion in this case and in *Tousignant et Hawker Siddeley Canada Inc.*, supra, Masson J. recalled the purpose and wording of the A.I.A.O.D. Even if the CALP's decision was wrong, he was of the view that the CALP had nevertheless acted within its general jurisdiction (at p. 257):

> [TRANSLATION]
>
> We are of the view that, by acting in this way, the respondent Commission d'appel carried out one of the duties imposed on it by law and acted within its general jurisdiction.
>
> The decision of the Commission d'appel may be wrong, but it was nonetheless made within the limits of its jurisdiction.

23 Adding that the CALP's decision was not unreasonable, Masson J. concluded that the CALP had not exceeded its jurisdiction and he accordingly dismissed the motion in evocation.

Court of Appeal, [1991] R.J.Q. 2438

Mailhot J.A.

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24 Mailhot J.A. first reviewed ss. 405 and 409 A.I.A.O.D., which exclude, respectively, all appeals from decisions of the CALP and extraordinary remedies, except on a question of jurisdiction. She noted that, for the CALP's decision to be reversed, it had to be shown that the CALP had [TRANSLATION] "exceeded its jurisdiction or given the provision in question an interpretation so unreasonable that it could not be rationally supported on the relevant legislation" (p. 2441).

25 Recalling the wording of s. 60 A.I.A.O.D. and the arguments of the parties, Mailhot J.A. considered that the application of the patently unreasonable error test would not satisfactorily dispose of the case. In this regard, she cited the Labour Court's decision in *Commission de la santé et de la sécurité du travail c. B.G. Chéco International Ltée*, [1991] T.T. 405 (Que.), where it was held that s. 60 raised a reasonable, significant and insurmountable doubt as to an employer's duty in the event of a layoff occurring within the 14-day period mentioned in that provision. Mailhot J.A. also referred to the Court of Appeal's decision in *Produits Pétro-Canada Inc. c. Moalli* (1986), [1987] R.J.Q. 261, and observed that it was in the interest of justice for the conflict to be resolved at once, regardless of traditional curial deference, because such deference, while ordinarily leading to dismissal of the application for evocation, did not resolve the unstable situation. Although there were two possibilities which could be rationally defended, in her opinion the ideal of justice, which promotes the rule of law, was not really served. She therefore felt it desirable that the intention of the legislature should prevail.

26 Concluding that the issue could only be resolved by the exception indicated in *Moalli*, supra, Mailhot J.A. noted that the legislative intent was not to treat injured workers differently from other workers as regards the first fourteen days covered by s. 60. In her view, the words "for each day or part of a day the worker would normally have worked" are intended to ensure that the injured person is treated like other workers, in other words, that he is entitled to the salary or wages to which he would have been entitled if the employer had work to give him and could do so, if these days were part of his regular schedule or if his contract was still in effect. Finally, Mailhot J.A. noted that this interpretation is fairer to everyone and is consistent with the other provisions of the *Act respecting Industrial Accidents and Occupational Diseases*. She concluded that, as there is no obligation to pay a salary or wages when there is a plant closure, strike, lockout, layoff, unpaid leave and so on, there can be no obligation on the employer to pay 90 percent of the net salary or wages during these periods.

27 Mailhot J.A. accordingly would have allowed the appeal and granted the application for evocation.

Baudouin J.A. (concurring)

28 While concurring in Mailhot J.A.'s conclusion, Baudouin J.A. was of the view that, even though the wording of s. 60 may be open to several interpretations, it does not automatically follow that no interpretation can ever be patently unreasonable. He disposed of the appeal in the same way as Mailhot J.A. (at p. 2446):

> [TRANSLATION]
>
> Like my colleague, I am of the view in this case that the function of this Court is to resolve the conflict between the two administrative agencies, a conflict which creates uncertainty and is not in the interests of effective justice. Accordingly, without necessarily finding that the interpretation given by the Commission d'appel is *patently* unreasonable (even though it seems illogical to me, given a rational interpretation of the Act read as a whole, and inconsistent with the resulting philosophy), I believe that this situation is identical to that confronting this Court in *Produits Pétro Canada Inc. v. Moalli*. [Emphasis in original.]

IV — Issues

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29 As I said at the outset, this appeal raises questions which lie at the core of the institutional relationship between courts of law and administrative tribunals: was the CALP's decision patently unreasonable? If so, it is open to judicial review. If not, does the fact that there were, at least apparently, divergent interpretations of the same legislative provision by two administrative tribunals give rise to judicial review?

V — Analysis

30 While the first question raises issues which this Court has already had an opportunity to decide on several occasions, the second raises a problem which has been the subject of some controversy. A review of the principles laid down by this Court in recent years will, first, provide the background against which this appeal must be analysed. This review will indicate the principles underlying the standard of review applicable to the CALP's decision and clarify the real issues presented here by the Court of Appeal's intervention.

A. Applicable Standard of Review

31 Although the Court of Appeal recognized that, strictly speaking, the interpretation of s. 60 was within the CALP's jurisdiction, a functional analysis of the Act, however brief, seems desirable if not essential to decipher the legislative intent (see Dayco (Canada) Ltd. v. C.A.W. (sub nom. Dayco (Canada) Ltd. v. CAW-Canada), S.C.C., No. 22180, May 6, 1993 [reported at [1993] 2 S.C.R. 230], at p. 25 (per La Forest J.); Canada (Attorney General) v. P.S.A.C., [1993] 1 S.C.R. 941 ("PSAC No. 2"), at pp. 965 (per Cory J.) and 977 (per L'Heureux-Dubé J.); Syndicat des employés professionnels de l'Université du Québec à Trois-Rivières c. Université du Québec à Trois-Rivières, [1993] 1 S.C.R. 471, at pp. 485-486 (per Lamer C.J.); Canada (Attorney General) v. P.S.A.C., [1991] 1 S.C.R. 614 ("PSAC No. 1"), at pp. 628 (per Sopinka J.) and 657 (per Cory J.); C.A.I.M.A.W., Local 14 v. Canadian Kenworth Co., [1989] 2 S.C.R. 983, at p. 1002; and Syndicat national des employés de la commission scolaire régionale de l'Outaouais v. Union des employés de service, Local 298, (sub nom. Union des employés de service, Local 298 v. Bibeault) [1988] 2 S.C.R. 1048, at p. 1088). Determining the legislative intent as to the standard of review applicable to the decision of an administrative tribunal involves recognizing that, within its area of expertise, its decision-making autonomy may be of prime importance. Conversely, failing to go through the process of rejecting the correctness standard may conceal the real meaning of judicial intervention that falls outside the limits of the jurisdiction of an administrative agency. An initial conclusion that, for purposes of judicial review, the legislature admits several possible and rational constructions of the same legislative provision thus becomes of primary importance. This conclusion, while constituting the necessary starting-point of a discussion of the powers of supervision and control of courts of law, is ultimately the guiding principle for analysing the appropriateness of judicial review.

32 In Bibeault, Beetz J. summarized the principles governing judicial review of decisions of an administrative tribunal, emphasizing its area of jurisdiction (at p. 1086):

> 1. if the question of law at issue is within the tribunal's jurisdiction, it will only exceed its jurisdiction if it errs in a patently unreasonable manner; a tribunal which is competent to answer a question may make errors in so doing without being subject to judicial review;
>
> 2. if however the question at issue concerns a legislative provision limiting the tribunal's powers, a mere error will cause it to lose jurisdiction and subject the tribunal to judicial review.

33 The initial step advocated by this Court must therefore focus primarily on the concept of jurisdiction. This step must, however, take into account both the desirability of curial deference and the ease with which a

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question can be incorrectly characterized as one of jurisdiction (see New Brunswick Liquor Corp. v. C.U.P.E., Local 963, [1979] 2 S.C.R. 227, at p. 233, and Halifax Longshoremen's Assn. v. Nauss, (sub nom. Halifax Longshoremen's Assn. v. Canada (Labour Relations Board)) [1983] 1 S.C.R. 245, at p. 256). Bibeault explained the meaning of the concept of jurisdiction in the context of judicial review as follows (at p. 1090):

> Jurisdiction stricto sensu is defined as the power to decide. The importance of a grant of jurisdiction relates not to the tribunal's capacity or duty to decide a question but to the determining effect of its decision. As S. A. de Smith points out, the tribunal's decision on a question within its jurisdiction is binding on the parties to the dispute. ... The true problem of judicial review is to discover whether the legislator intended the tribunal's decision on these matters to be binding on the parties to the dispute, subject to the right of appeal if any. [Emphasis added.]

34 This amounts to asking "Who should answer this question, the administrative tribunal or a court of law?" It thus involves determining who is in the best position to rule on the impugned decision. According to Beetz J., at p. 1088, in order to deal adequately with the question [at p. 1087] "Did the legislator intend the question to be within the jurisdiction conferred on the tribunal?", a court of law:

> ... examines not only the wording of the enactment conferring jurisdiction on the administrative tribunal, but the purpose of the statute creating the tribunal, the reason for its existence, the area of expertise of its members and the nature of the problem before the tribunal.

35 The legislature's intention to give the CALP the power to make a final ruling on the meaning and scope of s. 60 A.I.A.O.D. is not open to question. As an appellate administrative tribunal, the CALP hears and disposes exclusively of appeals brought under ss. 37.3 and 193 of the Act respecting Occupational Health and Safety and the A.I.A.O.D. (s. 397). It has exclusive jurisdiction to "... confirm the decision or the order brought before it; it may also quash the decision or the order and shall in that case render the decision or make the order that should have been given initially" (s. 400). Its members are subject to specific obligations set out in ss.373 et seq. of the Act, they have all the powers necessary for the exercise of their jurisdiction and may rule on any questions of law or of fact (s. 407). In addition to these significant powers, the CALP has an obligation to publish its own decisions (s. 391), the authority to make recommendations to the Minister (s. 396) as well as the authority to review or revoke its own decisions for cause(s. 406).

36 Several provisions are designed to ensure that CALP decisions are effective. The decisions are final and without appeal and every person contemplated in the decision must comply with them without delay (s. 405). They may be filed in the office of the prothonotary of the Superior Court of the district in which the appeal was brought and such filing makes them executory as if they were final judgments of the Superior Court without appeal, and with all the effects thereof (s. 429). CALP decisions are also protected by a full privative clause, which I reproduce here for the sake of convenience:

> 409. Except on a question of jurisdiction, no proceedings under article 33 of the Code of Civil Procedure (chapter C-25) nor any extraordinary recourse within the meaning of the said Code may betaken, nor any provisional remedy be ordered against the board of appeal or one of its commissioners acting in his official capacity.
>
> A judge of the Court of Appeal may annul summarily, upon amotion, any action granted, any writ, order or injunction issued or granted contrary to this section.

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37 Finally, the nature of the problem presented here raises questions on which the CALP is eminently qualified. Section 60 A.I.A.O.D. is not only one of the legislative provisions on which the CALP has the express power to rule, it employs concepts which are at the core of its area of expertise, namely disability, employment injury and the complex system of compensation set up by the Quebec legislature. The interpretation of s. 60 by the CALP is, thus, a function directly relating to the objective sought by the legislature: to permit an administrative tribunal to issue a final ruling on decisions of first instance by giving a final interpretation of its enabling statute.

38 Since the interpretation of s. 60 A.I.A.O.D. is, strictly speaking, within the jurisdiction of the CALP, the standard of review applicable here is whether the decision is patently unreasonable. In New Brunswick Liquor Corp. v. C.U.P.E., Local 963, supra, Dickson J. formulated the question which courts of law must constantly keep in mind in such circumstances (at p. 237):

> Did the board here so misinterpret the provisions of the Act as to embark on an inquiry or answer a question not remitted to it? Put another way, was the Board's interpretation so patently unreasonable that its construction cannot be rationally supported by the relevant legislation and demands intervention by the court upon review? [Emphasis added.]

39 The patently unreasonable error test is the pivot on which judicial deference rests. As it relates to matters within the specialized jurisdiction of an administrative body protected by a privative clause, this standard of review has a specific purpose: ensuring that review of the correctness of an administrative interpretation does not serve, as it has in the past, as a screen for intervention based on the merits of a given decision. The process by which this standard of review has progressively been accepted by courts of law cannot be separated from the contemporary principle of curial deference, which is, in turn, closely linked with the development of extensive administrative justice (see Cory J.'s reasons in PSAC No. 1 and PSAC No. 2, supra; and National Corn Growers Assn. v. Canada (Canadian Import Tribunal), [1990] 2 S.C.R. 1324 (per Wilson J.)). Substituting one's opinion for that of an administrative tribunal in order to develop one's own interpretation of a legislative provision eliminates its decision-making autonomy and special expertise. Since such intervention occurs in circumstances where the legislature has determined that the administrative tribunal is the one in the best position to rule on the disputed decision, it risks, at the same time, thwarting the original intention of the legislature. For the purpose of judicial review, statutory interpretation had ceased to be a necessarily "exact" science and this Court has, again recently, confirmed the rule of curial deference set forth for the first time in New Brunswick Liquor Corp. v. C.U.P.E., Local 963: C.J.A., Local 579 v. Bradco Construction Ltd., S.C.C., No. 22023, May 19, 1993 [reported at [1993] 2 S.C.R. 316]; PSAC No. 2, supra; W.W. Lester (1978) Ltd. v. U.A., Local 740, (sub nom. Lester (W.W.) (1978) Ltd. v. U.A., Local 740) [1990] 3 S.C.R. 644; Bell Canada v. Canada (Canadian Radio-television & Telecommunications Commission), [1989] 1 S.C.R. 1722; National Corn Growers Assn. v. Canada (Canadian Import Tribunal), supra; and C.A.I.M.A.W., Local 14 v. Canadian Kenworth Co., supra. In the recent decision PSAC No. 2, Cory J. noted that this was a strict test (at p. 964):

> It is not enough that the decision of the Board is wrong in the eyes of the court; it must, in order to be patently unreasonable, be found by the court to be clearly irrational.

B. Is the CALP's Interpretation Patently Unreasonable?

40 While agreeing with the interpretation adopted by the Court of Appeal, Domtar argues that the court should have concluded that the CALP's decision in the case at bar was patently unreasonable. The CALP inter-

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preted s. 60 A.I.A.O.D., which I reproduced earlier, as follows (at p. 118):

> [TRANSLATION]
>
> That section imposes on the employer with whom the worker is employed when he suffers an employment injury an obligation to pay him, as an income replacement indemnity on account of his employment injury, 90 percent of his net salary or wages for each day or part of a day the worker would normally have worked had he not been unable to carry on his employment by reason of his injury, for the first 14 days following the beginning of his disability.
>
> The Commission d'appel concluded in this regard that the words "would normally have worked" used in s. 60 should not be separated from the words "had he not been disabled" which immediately follow them, so that no account should be taken of factors or circumstances extrinsic to the worker's inability to work by reason of his employment injury in determining what period he would have worked, in the usual way and had he not been disabled, during the first 14 days following the beginning of his disability.
>
> The Commission d'appel accordingly concluded that under s. 60 of the Act respecting Industrial Accidents and Occupational Diseases, the employer must pay the worker 90 percent of his net salary or wages for each day or part of a day on which he would normally have worked had he not been disabled by reason of his injury, regardless of any extrinsic cause, such as plant closure, which had no connection with the worker's inability to carry on his employment by reason of his employment injury. [Emphasis added.]

41 The CALP, therefore, concluded that the respondent had to pay the appellant 90 percent of his net salary or wages for each day or part of a day on which he would normally have worked according to his usual work schedule, regardless of the plant closure.

42 In my opinion, this decision cannot be said to be patently unreasonable. This is also the conclusion reached by the Superior Court and the Court of Appeal. It is one thing to argue, as Domtar does, that the CALP's interpretation unduly favours workers who suffer occupational injuries over employees who receive no salary or wages during a strike, lockout or layoff; it is quite another to conclude that this decision is clearly irrational. In order to show that the CALP's interpretation is unreasonable, Domtar in its factum emphasized the difficulty of determining the frequency of the services provided by the worker prior to an injury for purposes of the phrase "would normally have worked":

> [TRANSLATION]
>
> Thus, what does this "habit" signify for a worker who suffers an employment injury after working for the same employer for ten years? Is the habit to be assessed on the basis of the entire period or only part of it? Should we only take into account the last year, the last month or the last week? If a collective agreement was signed on the day a worker suffers an employment injury and that collective agreement increases a worker's work week from four to five days a week, what happens according to the interpretation proposed by the CALP? And if a worker suffers an employment injury on the day he is hired, can the employer successfully contend that he owes the worker no income replacement indemnity under s. 60 of the A.I.A.O.D.?

43 Without ruling on the merits of these hypotheses, I am of the view that, even if these problems arose in connection with the compensation system created by the Act, it would be for the CALP, and not a court of law, to dispose of them in a final fashion under its jurisdiction stricto sensu for the purposes of the A.I.A.O.D. This

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jurisdiction necessarily includes some room to manoeuvre, avoiding the need to anticipate all the legal consequences that may result from a given decision. In the case at bar the CALP did not go beyond the limits laid down by the legislature. The purpose of the A.I.A.O.D. is summarized in s. 1, which reads as follows:

> 1. The object of this Act is to provide compensation for employment injuries and the consequences they entail for beneficiaries.
>
> The process of compensation for employment injuries includes provision of the necessary care for the consolidation of an injury, the physical, social and vocational rehabilitation of a worker who has suffered an injury, the payment of income replacement indemnities, compensation for bodily injury and, as the case may be, death benefits.
>
> This Act, within the limits laid down in Chapter VII, also entitles a worker who has suffered an employment injury to return to work.

44 The entitlement of a worker who has suffered an employment injury to an income replacement indemnity is further dealt with in s. 44. This provision reads as follows:

> 44. A worker who suffers an employment injury is entitled to an income replacement indemnity if he becomes unable to carry on his employment by reason of the injury.
>
> A worker who is no longer employed when his employment injury appears is entitled to the income replacement indemnity if he becomes unable to carry on the employment he usually held.

45 In concluding that the effect of the application of s. 60 was not to deprive the worker who suffers an employment injury of the right conferred on him by s. 44, the CALP did not render a patently unreasonable decision. The argument put forward by Domtar that the CALP's conclusion overlooks several important aspects which are peculiar to the general system of compensation may well be correct. This is not, however, a basis for judicial intervention as, in my view, this would simply be an error of law within jurisdiction. Since the evidence that the appellant suffered an employment injury on the relevant dates has never been disputed, the CALP's decision can be rationally defended both on the facts and on the law.

46 In principle, this conclusion should suffice to dispose of this appeal. This was not a case in which the CALP was deciding a general point of law, to which, in the absence of a privative clause, this Court has held that there is no reason to show deference (Berg v. University of British Columbia, S.C.C., Nos. 22638 and 22640, May 19, 1993 [reported at [1993] 2 S.C.R. 353]; C.J.A., Local 579 v. Bradco Construction Ltd., supra; Dayco (Canada) Ltd. v. C.A.W., supra; Canada (Attorney General) v. Mossop, [1993] 1 S.C.R. 554). Similarly, since the interpretation of s. 60 A.I.A.O.D. does not raise constitutional questions here, the rule of curial deference clearly cannot be excluded on this ground (Douglas/Kwantlen Faculty Assn. v. Douglas College, [1990] 3 S.C.R. 570; Cuddy Chicks Ltd. v. Ontario (Labour Relations Board), [1991] 2 S.C.R. 5; Tétreault-Gadoury v. Canada (Employment & Immigration Commission), [1991] 2 S.C.R. 22). Finally, as I pointed out earlier, the intention of the legislature to confer on the CALP the power to make a final ruling on the meaning and scope of s. 60 A.I.A.O.D. is not open to question. As the interpretation of this provision is at the core of its specialized jurisdiction, the rule of curial deference should in principle apply.

C. Court of Appeal's Intervention

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47 Against this background, the intervention of the Court of Appeal may now be considered. Though it properly concluded that the CALP's decision was not patently unreasonable, the court was of the view that to apply this standard of review would not satisfactorily resolve the issue. According to Mailhot J.A. (at p. 2443):

> [TRANSLATION]
>
> In fact, it is clear that if this Court dismissed the appeal based on a finding that the C.A.L.P.'s interpretation was not unreasonable, the difficulties would not be resolved. This is well illustrated by a recent judgment of the Labour Court filed by the appellant. In Commission de la santé et de la sécurité du travail du Québec v. B.G. Chéco international ltée, supra, the C.S.S.T. brought penal proceedings against an employer which refused to pay a worker 90 percent of his net salary or wages for seven days, and the employer gave as its defence the fact that four days before suffering an employment injury the worker had been given a layoff notice for a temporary lack of work, a layoff which took effect three days after the injury. After a carefully reasoned analysis, the Labour Court judge acquitted the employer. [Emphasis added.]

48 In the case referred to above by the Court of Appeal [Commission de la santé et de la sécurité du travail c. B.G. Chéco International Ltée, [1991] T.T. 405 (Que.)], the Labour Court was of the view (at p. 411) that:

> [TRANSLATION]
>
> Though we are dealing here with remedial legislation the aim and purpose of which are to compensate workers who suffer industrial accidents and occupational diseases, the Court must necessarily ask itself whether, despite recourse to this rule of interpretation, there is nevertheless a reasonable doubt as to the meaning or scope of the text, in which case it must acquit the defendant.

49 After undertaking its own analysis of several provisions of the A.I.A.O.D., the Labour Court held that s. 60 raised [TRANSLATION] "a reasonable, significant and insurmountable doubt" as to the obligation on an employer in the event of a layoff occurring during the 14-day period mentioned in that provision (at p. 412). The Labour Court therefore concluded that, in such circumstances, the employer should be acquitted (at p. 412):

> [TRANSLATION]
>
> In such a case, the Court has no choice but to give the defendant the benefit of the statutory interpretation most favourable to it, as in the circumstances such an interpretation is at least equally justifiable. As pointed out in Maxwell [Maxwell on the Interpretation of Statutes (12th ed. 1969), at p. 239]:
>
>> 'If there is a reasonable interpretation which will avoid the penalty in any particular case', said Lord Esher M.R., 'we must adopt that construction. If there are two reasonable constructions we must give the more lenient one. That is the settled rule for the construction of penal sections.'

50 Citing its precedent in Produits Pétro-Canada Inc. c. Moalli, supra, the Court of Appeal held that it was in the interest of justice to resolve the conflict at once, abandoning the curial deference which would otherwise be required here. Mailhot J.A. concluded that she was faced with "two possibilities that could be rationally defended" and summed up the situation created by the interpretation of the CALP, on the one hand, and that of the Labour Court, on the other (at p. 2444):

> [TRANSLATION]

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It is true that in the instant case the fate of the parties does not depend on the identity of a member of the administrative tribunal. However, the uncertainty will remain, and the outcome of the proceedings will not be satisfactorily resolved since the C.S.S.T., which has adopted the interpretation of s. 60 imposed by the C.A.L.P., is obliged to take action against employers who refuse to accept the C.A.L.P.'S interpretation and who, ultimately, benefit from acquittals as a result of the (probably justified) application of the theory of reasonable doubt "in view of two conflicting possibilities that could be rationally defended", whether in an administrative proceeding or a penal proceeding. The interpretation adopted by the C.A.L.P. thus leads to a dead end. The ideal of justice, which promotes the rule of law, is not really served. It is certainly desirable that the intention of the legislature should prevail. What therefore is that intent? Despite the fact that the wording used may be open to two not unreasonable interpretations, can it be determined?

51 To rectify this situation, the Court of Appeal decided to intervene to impose its own interpretation of s. 60. Again according to Mailhot J.A. (at p. 2445):

[TRANSLATION]

With respect for the contrary view, I am of the view that the intention of the legislature in this matter was not to treat injured workers differently from other workers as regards the first fourteen days mentioned in s. 60. In my opinion, if the legislature intended that the entire first fourteen days following the beginning of the disability be paid for by the employer, it would not have added the words "for each day or part of a day the worker would normally have worked". These words are intended to ensure that the injured person is treated like other workers, in other words that he is entitled to a salary or wages as he would be if the employer had work to give him and could do so, if these days were part of his regular schedule or if his contract was still in effect, and so on — in short, if he had worked as usual, had he not been disabled.

This interpretation is fairer to everyone and consistent with the other provisions of the A.I.A.O.D. Even if it is accepted that the statute is remedial and seeks to compensate the victim of an employment injury, it is still general legislation and is not intended, in my opinion, to make more favourable provision for such a victim compared with other employees, who may be subject to the ups and downs of the labour market, including the choice to go on strike or the obligation to be subject to a lockout. [Emphasis in original.]

52 She came to the following conclusion, concurred in by her colleagues (at p. 2446):

[TRANSLATION]

I therefore conclude that when in s. 60 the legislature requires the employer to pay a victim of an employment injury 90 percent of his net salary or wages, it means payment of the salary or wages to which the victim would logically have been entitled if he had worked as usual. As generally there is no obligation to pay a salary or wages when there is a plant closure, strike, lockout, layoff, unpaid leave and so on, there can be no obligation to pay 90 percent of the net salary or wages during these periods.

I therefore propose that the appeal be allowed with costs, the application for evocation be granted with costs, the C.A.L.P.'s decision be quashed and the court declare that the appellant has paid Mr. Roland Lapointe the indemnity to which he was entitled under s. 60 of the *Act respecting Industrial Accidents and Occupational Diseases*.

53 There are thus two aspects to the Court of Appeal's intervention. First, it concluded that there was a juris-

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prudential conflict between two administrative jurisdictions as to the same legislative provision. Second, the Court of Appeal relied on an independent ground for judicial review, namely that where there is a conflict of this kind, curial deference should yield to review based on the correctness of the administrative interpretation. I shall examine the two aspects of this intervention in turn.

1. The Conflict

54 The Court of Appeal relied on a single judgment of the Labour Court in a penal matter, Commission de la santé et de la sécurité du travail v. B.G. Chéco International Ltée, supra, in concluding that there were conflicting decisions. This conclusion calls for two observations.

55 First, as counsel for the appellant pointed out, this conclusion fails to take into account the large number of decisions rendered by the CALP since the A.I.A.O.D. came into force on August 19, 1985. With reference to s. 60, that tribunal has always adopted the same interpretation (see inter alia Tousignant et Hawker Siddeley Canada Inc., supra; Desmeules et Entreprises B.L.H. Inc., [1986] C.A.L.P. 66 (Que.); Béland et Mines Wabush, C.A.L.P., No. 00138-09-8604, November 27, 1986 (Que.); Collins & Aikman Inc. et Dansereau, [1986] C.A.L.P. 134 (Que.); Lambert et Vic Métal Corp., [1986] C.A.L.P. 147 (Que.); and Létourneau et Électricité Kinston Inc., [1986] C.A.L.P. 241 (Que.)). The Labour Court, for its part, had apparently never had occasion to rule on the scope of s. 60 before B.G. Chéco. As I see it, the situation created by an isolated decision at variance with a consistent line of authority cannot a priori be characterized as a true "jurisprudential conflict". Moreover, counsel for the CSST noted that the Court of Appeal had taken the Domtar case under advisement on February 14, 1991. The decision of the Labour Court in B.G. Chéco was not rendered until March 18, 1991. Besides being doubtful in strictly quantitative terms, the "controversy" at issue here therefore also seems to be premature.

56 Furthermore, apart from this quantitative and temporal aspect, the Court of Appeal was concerned here with two bodies interpreting the same legislative provision, but in the particular context of each one's jurisdiction, in the one case a penal one and, in the other, an administrative one. Before concluding that a jurisprudential conflict existed, some consideration should, therefore, have been given to the distinction between the duty of a tribunal sitting in a penal proceeding to give an accused the benefit of a reasonable doubt and that of an appellate administrative tribunal responsible for making a final ruling on its enabling legislation so as to give effect to that legislation. Can it be said that these two jurisdictions, in deciding on matters where the ground rules are completely different, have created a conflict in the jurisprudence? I am far from sharing the categorical assertion of the Court of Appeal on this point. It should be noted, in this connection, that the CALP decisions can be filed in the office of the prothonotary of the Superior Court for the district in which the appeal was brought, in order to make them executory as if they were final civil judgments of the Superior Court not subject to appeal (s. 429). The Court of Appeal's conclusion that the CALP's interpretation leads to a "dead end" does not take into account the existence of this civil remedy, parallel to the penal remedy, which is in keeping with the twofold nature of the A.I.A.O.D. Furthermore, the fact that the Labour Court's judgment, unlike decisions of the CALP, can be appealed to the Superior Court under the Code of Penal Procedure further mitigates the allegedly irreconcilable "conflict" between these two tribunals.

57 For discussion purposes, however, I am prepared to assume, without deciding the point, that the interpretation of s. 60 A.I.A.O.D. by the CALP on the one hand and the Labour Court on the other creates a conflict in the jurisprudence. This leads me to discuss the standard of judicial review applicable to such a situation.

2. Consistency of Precedent and Judicial Review

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58 The ground of judicial review referred to by the Court of Appeal should be seen in its proper academic and judicial context. This background will clarify the issues and indicate the relevance of the guiding principles outlined earlier.

59 While the analysis of the standard of review applicable in the case at bar has made clear the significance of the decision-making autonomy of an administrative tribunal, the requirement of consistency is also an important objective. As our legal system abhors whatever is arbitrary, it must be based on a degree of consistency, equality and predictability in the application of the law. Professor MacLauchlan notes that administrative law is no exception to the rule in this regard:

> Consistency is a desirable feature in administrative decision-making. It enables regulated parties to plan their affairs in an atmosphere of stability and predictability. It impresses upon officials the importance of objectivity and acts to prevent arbitrary or irrational decisions. It fosters public confidence in the integrity of the regulatory process. It exemplifies "common sense and good administration"

(H. Wade MacLauchlan, "Some Problems with Judicial Review of Administrative Inconsistency" (1984) 8 Dalhousie L.J. 435, at p. 446.)

60 In the same vein Professor Comtois writes:

> [TRANSLATION]
>
> ... it [consistency] helps to build public confidence in the integrity of the administrative justice system and leaves an impression of common sense and good administration. It might be added, as regards administrative tribunals exercising quasi-judicial functions, that the specialized nature of their jurisdiction makes inconsistencies more apparent and tends to harm their credibility.

(Suzanne Comtois, "Le contrôle de la cohérence décisionnelle au sein des tribunaux administratifs" (1990) 21 R.D.U.S. 77, at pp. 77-78.)

61 This consistency requirement has led some writers to defend the idea of judicial review of administrative inconsistency. Thus, Dean Morrissette has dealt with the problem of jurisprudential conflicts within administrative jurisdictions as they affect curial deference: "Le contrôle de la compétence d'attribution: thèse, antithèse et synthèse" (1986) 16 R.D.U.S. 591. At p. 631, he asks the following question:

> [TRANSLATION]
>
> But is an irrational or unreasonable interpretation the only possible form of excess of jurisdiction after C.U.P.E. v. N.B.L.C.?

62 After giving the example of an administrative tribunal that rules on a constitutional question or misinterprets a provision conferring jurisdiction, Dean Morrissette adds (at pp. 632-633):

> [TRANSLATION]
>
> Finally, the theory of reasonable interpretation leaves room for intervention by the superior courts when several well-reasoned and apparently rational interpretations are given by the same administrative jurisdiction and their consequences are inconsistent. The matter can be illustrated by the example of an arbitrator

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> sitting pursuant to s. 124 of the *Act respecting Labour Standards*. Two arbitrators sitting in different cases may well decide the same legal problem arising on similar facts in opposite ways, which are nevertheless rational and well-reasoned. The fate of the complainant, when discrepancies of this type occur, depends on the identity of the arbitrator hearing the complaint. This result is difficult to reconcile with the notion of equality before the law, which is one of the main corollaries of the rule of law, and perhaps also the most intelligible one. Where discrepancies of this type exist, whether within the same administrative jurisdiction, between different jurisdictions on the same level or between different levels of jurisdiction in the same specialized field, the superior courts will intervene to standardize the law even though each of the diverse interpretations seems to be reasonable. [Emphasis added.]

63 Dean Morrissette considers that these objectives of equality, security and uniformity in implementing the law are consistent with the ultimate purpose of judicial review (at p. 634):

> [TRANSLATION]
>
> On reflection, however, this is undoubtedly a basic form of rationality. As the primary purpose of judicial review is to prevent arbitrariness, what objection can there be to a principle which requires the superior courts to intervene, not in the name of meticulous legalism but in the interests of rationality? Imposing an interpretation one believes to be "correct" because, owing to its consequences or for some similar reason, one does not share some other otherwise rational interpretation is difficult to justify in terms of judicial review, unless of course one assumes that appeals and judicial review are one and the same thing. Imposing the interpretation one believes to be "correct" (or "the most rational") when one is confronted with contradictory but rational interpretations on the same point is fully justified in light of the rule of law, as this is the very kind of arbitrariness that principle is designed to prevent. [Emphasis added.]

64 In an article published in 1982 Professor Mullan also defends the idea of some form of judicial review of inconsistent decision-making (David J. Mullan, "Natural Justice and Fairness — Substantive as well as Procedural Standards for the Review of Administrative Decision-Making?" (1982) 27 McGill L.J. 250). Rather than concentrating on the situation created by inconsistency between two well-reasoned and rational interpretations, Professor Mullan emphasizes the principle that similar cases should be given similar treatment. In the interest of justice, fairness and equality in the application of the law, administrative inconsistency would thus require intervention by the courts (at pp. 285-286):

> Given the prevalence of this principle of consistency of treatment in the development of most legal systems as well as within the various substrata of legal systems, there is a strong case for branding as reviewable those cases where statutory authorities inexplicably fail to act consistently. To do so without reason or without thinking would seem to be the height of arbitrary behavior. It is also worth remembering that judicial review of administrative action has from its earliest days been concerned with the appearance of the proper administration of justice. If the law is prepared to countenance a rule to the effect that a reasonable apprehension of bias will affect the validity of a decision in order to safeguard the reputation of the law, there is also clearly room for condemning unexplained or inexplicable inconsistencies in the administration of statutory discretions from which the law's reputation will suffer as much. [Emphasis added.]

65 Finally, Professor Comtois, supra, at p. 88, discusses the same constraints as the preceding writers, emphasizing the emergence of a "flexible" rule of consistency in administrative law:

> [TRANSLATION]

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A flexible rule, in the sense that it should not be interpreted as an obligation to follow precedents or amount to a strict application of the stare decisis rule, but one which may nevertheless receive judicial sanction when the court finds that fairness or respect for the rule of law requires its intervention to put an end to the uncertainty created by contradictory decisions rendered by different tribunals on the same point. [Emphasis added.]

66 The requirement of consistency in the application of the law is unquestionably a valid objective and so a persuasive argument. For litigants to receive diametrically opposite answers to the same question, depending on the identity of the members of administrative tribunals, may seem unacceptable to some and even difficult to reconcile with several objectives, including the rule of law. Yet, as the courts have held, consistency in decision-making and the rule of law cannot be absolute in nature regardless of the context. So far as judicial review is concerned, the problem of inconsistency in decision-making by administrative tribunals cannot be separated from the decision-making autonomy, expertise and effectiveness of those tribunals.

67 Courts have had the opportunity to consider the advisability of intervening to resolve conflicting decisions by administrative tribunals. In S.E.I.U., Local 204 v. Broadway Manor Nursing Home (1984), 48 O.R. (2d) 225 (C.A.), faced with two inconsistent inter pretations of s. 13(b) of the Inflation Restraint Act, 1982, S.O. 1982, c. 55, by the Labour Relations Board on the one hand and the Education Relations Commission on the other, the Ontario Court of Appeal (at pp. 237-238) adopted the comments of Galligan J. of the Divisional Court (now of the Court of Appeal):

> I cannot for one moment suggest that either's interpretation of the Act was patently unreasonable. The decisions of the two tribunals are careful, thoughtful, well-reasoned and persuasive. One of my many problems with this case is that as I read each decision I am persuaded by it. The extension of curial deference to each of them would lead to unacceptable results.
>
> It seems to me that the curial deference demanded by authority ought only be extended to a tribunal when it is interpreting its Constitution or home statute. By that I mean curial deference need only be granted to the Labour Relations Board when it interprets the Labour Relations Act, and to the Education Relations Commission when it interprets the Boards and Teachers Negotiations Act. The Act is a statute that applies not only to workers and employers who are governed by the Labour Relations Act and the Boards and Teachers Negotiations Act but to many others. While it is legislation that applies only to what can loosely be called the public sector of Ontario, and not to the population of Ontario at large, I think the Act is more akin to a "general public enactment" as that term was used by Laskin C.J.C. in McLeod et al. v. Egan et al., [1975] 1 R.C.S. 517 ... than it is to the specialized and particular Labour Relations Act and Boards and Teachers Negotiations Act.

[Emphasis added.]

68 It concluded (at p. 239):

We agree with the decision of Galligan J. in this regard. The theory underlining the concept of curial deference has no application here. The Act is, in every sense, a general public enactment. It is not one with which either the Ontario Labour Relations Board or the Education Relations Commission was integrally or closely involved nor over which they could be said to profess any particular expertise. [Emphasis added.]

69 Domtar referred to Broadway Manor Nursing Home in support of its position. That case cannot be inter-

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preted as adopting the existence of conflicting decisions as an independent basis for judicial review. The Ontario Court of Appeal was actually concerned with the nature of the statute which was the subject of the conflict in question. By characterizing the *Inflation Restraint Act, 1982* as a general public enactment which neither the Labour Relations Board nor the Education Relations Commission had the function of interpreting as part of their particular expertise, it simply held that, owing to this lack of expertise, the principle of curial deference did not apply. Since the Act, the interpretation of which was at issue, was not at the core of the specialized jurisdiction of either of the administrative tribunals, any error of law was immediately subject to strict judicial review and not to the patently unreasonable interpretation test.

70 This reading of *Broadway Manor Nursing Home* seems to be confirmed by a later judgment, *United Steelworkers of America, Local 14097 v. Franks* (1990), 75 O.R. (2d) 382. In that case, the Ontario Divisional Court was confronted with two inconsistent interpretations of s. 40a of the *Employment Standards Act*, R.S.O. 1980, c. 137. Reid J. first noted the crucial importance of determining the applicable standard of review (at pp. 385-386):

> *We have two reasonable, but conflicting, interpretations.* (I use the term "reasonable" as a more convenient expression than the traditional but awkward phrase "not patently unreasonable".) It follows that, if the standard of review on this application is reasonableness, the application should be dismissed. If, on the other hand, the standard is correctness, only one may stand and we must choose between them. *Two conflicting interpretations of the same statutory provision might be reasonable, but they cannot both be correct. The issue of standard of review is thus critical.* [Emphasis added.]

71 Reid J. distinguished *Broadway Manor Nursing Home*, noting that, in that case, the administrative tribunal was not interpreting its enabling Act, unlike in the case before him (at 386). After underlining the existence of a privative clause, he concluded as follows (at pp. 387-388):

> *The dismissal of this application will leave in place two conflicting interpretations of equal legal stature of a statutory provision. We are informed that it has since been amended, but even if that were not so there does not appear to be any basis on which the court may intervene to resolve the conflict.* The doctrine of stare decisis which prevails in the courts tends to the avoidance of conflict in their decisions and such conflict as does occur may be resolved by the mechanism of appeal. But the doctrine of stare decisis does not apply to referees, or arbitrators, or, for that matter, to administrative tribunals generally, nor are referees, or arbitrators, or administrative tribunals generally (there are exceptions) subject to appeal. These are characteristics of tribunals which legislators have created to provide what they believe to be for certain purposes more appropriate forums for decision-making than the courts. The references I have made above confirm that *the courts' supervisory role on judicial review is very limited. There is no authority for extending that supervision in the way proposed nor any rationale for doing so.* [Emphasis added.]

72 The Quebec Court of Appeal in turn considered conflicting decisions in *Produits Pétro-Canada Inc. c. Moalli*, supra. Noting that there was a serious and unquestionable conflict in interpreting ss. 97 and 124 of the *Act respecting Labour Standards*, R.S.Q., c. N-1.1, it observed that this resulted in an unacceptable situation (at p. 267):

> [TRANSLATION]
>
> For many years the fate of litigants has depended largely on the identity of the arbitrator hearing the dismissal complaint. Positions have hardened. Two separate and inconsistent rules of law are definitely being

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applied. Does this situation justify intervention by the Superior Court?

73 The court considered that [TRANSLATION] "in view of the seriousness of the conflict of interpretation that has resulted, this is a case in which sooner or later the superior courts will have to intervene" (at p. 268). Accordingly (at p. 268):

[TRANSLATION]

The instant appeal clearly raises this problem of interpretation, as to which there are "diametrically opposed" opinions. Its importance for legal practice in this area of labour relations cannot be denied. At this point, it appears that we are confronted with one of those exceptional situations in which, contrary to the general rule of curial deference, the superior courts must intervene to arrive at an interpretation of the law and avoid having litigants subject to two different legal rules, and possibly even the unpredictable appointment of arbitrators ... [Emphasis in original.]

74 The Court of Appeal thus pointed to the existence of an extremely serious case law conflict which had not been [translation] "solved since the *Act respecting Labour Standards* came into force" (p. 267), and went on to develop its own interpretation of the provisions in question. Since the Court of Appeal and Domtar both referred to *Moalli* in arguing in favour of an independent basis for judicial review of decision-making inconsistency by administrative tribunals, it becomes necessary to consider the scope of that decision.

75 To begin with, it appears that, from the outset, the standard of review applicable in that case was the correctness of the arbitrator's interpretation, not whether his decision was patently unreasonable. The Court of Appeal held that the question of the applicability of s. 97 of the *Act respecting Labour Standards* to s. 124 of that Act was a question of jurisdiction. Thus, in the view of LeBel J.A. (at p. 266):

[TRANSLATION]

Section 124 requires that certain conditions be met for the arbitrator to hear the dismissal proceeding. One of these is continuous service for the same employer for five years. From this standpoint, the application and interpretation of s. 97 raise a jurisdictional question properly speaking, within the meaning given to that term by Beetz J. in *Syndicat des employés de production du Québec et de l'Acadie v. Canada Labour Relations Board*. The arbitrator would certainly have the right and even an obligation to deal with this question. However, his error, even a reasonable error, would be subject to judicial review. [Emphasis added.]

76 In her comment on *Moalli* Ms. Ouimet expands on this initial description:

[TRANSLATION]

In any case, we have to admit that by characterizing this question as within jurisdiction, the *Pétro-Canada* decision would have been completely different and LeBel J.A. would only have had to rule on the reasonability of the two schools of thought without at the same time settling the matter. Accordingly, it may be thought that he "chose" to characterize this question as jurisdictional in order to rule on the correctness of the interpretation of the arbitrator Moalli, rather than on his reasonableness, in which case we are back at square one.

(Hélène Ouimet, "Commentaires sur l'affaire Produits Pétro-Canada c. Moalli" (1987) 47 R. du B. 852, at p.

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858.)

77 Another writer is of the view that this characterization did not disappear in favour of an independent ground of judicial review:

> [TRANSLATION]
>
> ... in the view of LeBel J.A., who wrote the reasons, the question before the arbitrator in that case was "properly jurisdictional". Specifically, the applicability of s. 97 of the *Act respecting Labour Standards* to s. 124 of that Act, which requires continuous service for the same employer for five years for there to be a complaint of dismissal, was a jurisdictional question on which the arbitrator could not err. *In other words, the question was from the outset, and always has been, a question of jurisdiction in the strict sense, not a question within jurisdiction which lost that characterization because of a dispute.* [Emphasis added.]

(Jean-François Jobin, "Le contrôle judiciaire des erreurs de compétence ou dites proprement juridictionnelles: où en sommes-nous?" (1990) 50 R. du B. 731, at pp. 748-749.)

78 Similarly, in *Moalli* the Court of Appeal referred to *Broadway Manor Nursing Home*, supra. After citing the reasons of Judge Galligan which I reproduced above, LeBel J.A. continued (at pp. 267-268):

> [TRANSLATION]
>
> I would hesitate to apply this aspect of the reasoning without qualification in the case at bar ... In some cases the interpretation of the wording of general legislation is a necessary function of the arbitrator or lower court. It is part of what they do and is protected by the usual attitude of curial deference. *In any case, the problem does not seem to arise here on account of the jurisdictional characterization which I apply to the problem of interpreting and applying ss. 124 and 97 A.L.S.* [Emphasis added.]

79 In the present case, on the contrary, there could be no question that the CALP was acting within its jurisdiction. The Court of Appeal does not seem to have made this distinction in referring to *Moalli*.

80 Furthermore, since *Moalli*, apart from the case at bar, the Quebec Court of Appeal has not to my knowledge thought it proper to intervene on the ground that there were conflicting decisions between administrative tribunals: *Hydro-Québec c. Québec (Conseil des services essentiels)* (1991), 41 Q.A.C. 292; *Syndicat canadien de la Fonction publique c. Commission des écoles catholiques de Québec*, C.A. Québec, Doc. 200-09-000463-866, December 20, 1989, J.E. 90-176; and *Syndicat des communications graphiques, Local 509M c. Auclair*, [1990] R.J.Q. 334. In this last case, Tourigny J.A. further clarified the meaning of *Moalli* as follows (at p. 340):

> [TRANSLATION]
>
> It might be argued that *Produits Pétro-Canada Inc. v. Moalli* created an exception to the generally accepted rule that courts intervene only where there are patently unreasonable errors. In that case, LeBel J.A. came to the conclusion that the Superior Court could have been justified in intervening in cases where, despite the reasonableness of the error of law, it was in the public interest to put an end to divergent opinions among lower tribunals. However, the wording used in that case should be examined more closely. LeBel J.A. speaks of the "... reality and seriousness of a case law conflict which has not been solved since the Act ... came into force" and of "... two separate and inconsistent rules of law". This language suggests that review

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> in such circumstances should be reserved for cases in which there are significant conflicts in the decisions of the lower tribunals.
>
> That is not the case here.

81 In *Syndicat canadien de la Fonction publique c. Commission des écoles catholiques de Québec*, Dussault J.A. rejected as follows the argument that the existence of two diverging lines of arbitral decisions justified intervention by the courts (at pp. 12-13):

> [TRANSLATION]
>
> In my view, the judgment of this Court in *Produits Pétro Canada Inc. v. Moalli* ... must be considered with the greatest circumspection. It was rendered in response to the entirely exceptional circumstances of that case, when the differing interpretations related to the Act itself. It seems to me to be misguided if not dangerous to apply the rule of intervention by the courts every time one arbitrator takes a different approach from the others in interpreting a provision of a collective agreement and so to provide an automatic right of appeal disguised in the form of evocation.

82 In short, although, strictly speaking, *Moalli* can be interpreted as saying that the existence of a significant conflict in decisions is an independent basis for judicial review, it must be noted that its impact is both ambiguous and limited. While its scope has been qualified by subsequent decisions of the Quebec Court of Appeal, this restrictive interpretation does not of itself resolve the questions that remain regarding judicial review. The problem presented by the standard of review applicable to an arbitrator's decision seems to me to be unavoidable. If the question before the arbitrator in *Moalli* was jurisdictional in nature, he could not err without being subject to judicial review. If, on the other hand, the question was within jurisdiction, only a patently unreasonable interpretation would call for judicial review. The fact that, in that case, the Court of Appeal held that it was departing from the rule of curial deference does not, strictly speaking, in any way alter the following observation: an initial conclusion that, for judicial review purposes, the legislature itself admits several possible and rational constructions of the same legislative provision is the guiding principle without which, in theory, there can be no judicial review in the event of conflicting decisions.

83 This guiding principle was well delineated by Reid J. in *Franks*, supra: like the standard of review applicable to the impugned decision, the context in which several contending values conflict, here as there, is crucial. The issue is between the expertise and effectiveness of administrative tribunals and curial deference, on the one hand, and consistency and predictability in the application of the law, on the other. The advisability of judicial intervention in the event of conflicting decisions among administrative tribunals, even when serious and unquestionable, cannot, in these circumstances, be determined solely by the "triumph" of the rule of law. Where decisions made within jurisdiction are not patently unreasonable, the issue instead turns on whether the principles underlying curial deference should give way to other imperatives. In my opinion, the answer is no.

84 First, dealing with a case of administrative inconsistency and solving it means altering the already delicate institutional relationship between administrative tribunals and courts with reference to the impugned decision. As Professor MacLauchlan notes, supra, at p. 441:

> It is a matter of applying rules, or principles, to facts. The essence of the matter is not to determine in some scientific fashion whether a decision is consistent with a claimed precedent but to determine *who should decide*. [Emphasis in original.]

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85 At p. 445, the author adds: "[r]eview for inconsistency, so far from being neutral or disengaged, invites full judicial reconsideration of the administrative decision". A jurisprudential conflict must necessarily be found. In order to solve it, courts must proceed to examine the merits of the decisions in question. As Professor Mullan himself points out, supra, at p. 282:

> The determination of whether there has been inconsistency will seldom, if ever, come down to a case of different treatment of two persons in precisely the same situation. Rather, it will generally involve the court in making judgments as to whether A's situation was sufficiently dissimilar to B's to make their differential treatment justifiable. "Is refusing induction qualitatively the same as the situations previously dealt with by the Commission?" As soon as the determination of such questions becomes the court's function, the judge will be involved in substantially the same assessment task as the statute has confided to the Commission. [Emphasis added.]

86 In my opinion, there is a real risk that superior courts, by exercising review for inconsistency, may be transformed into genuine appellate jurisdictions. Far from being neutral, the concept of consistency is an elusive parameter which, varying depending on the objective sought, may distort the very nature of judicial review. The arbitrariness which the judicial sanction is designed to remedy may, thus, become the result. In Bibeault, supra, Beetz J. commented as follows on the use of the theory of preliminary or collateral questions as a means of arriving at judicial review (at p. 1087):

> The concept of the preliminary or collateral question diverts the courts from the real problem of judicial review: it substitutes the question "Is this a preliminary or collateral question to the exercise of the tribunal's power?" for the only question which should be asked, "Did the legislator intend the question to be within the jurisdiction conferred on the tribunal?" [Emphasis added.]

87 In my opinion, questions as to the advisability of resolving a jurisprudential conflict avoid the main issue, namely, who is in the best position to rule on the impugned decision. Substituting one's opinion for that of an administrative tribunal in order to develop one's own interpretation of a legislative provision eliminates its decision-making autonomy and special expertise. Since such intervention occurs in circumstances where the legislature has determined that the administrative tribunal is the one in the best position to rule on the disputed decision, it risks, at the same time, thwarting the original intention of the legislature. Any inquiry into decision-making inconsistency where there is no patently unreasonable error thus diverts courts of law from the fundamental question which the legislature has in any case already answered.

88 Moreover, limiting this type of review to serious and unquestionable jurisprudential conflicts would not, by itself, remove all difficulty. There are undoubtedly clear cases of inconsistency where the dictates of equality and consistency in the application of the law will have full effect. I am far from certain, however, that only those cases will come before the courts. The case at bar is a striking demonstration of this: is the fact that two bodies interpret the same legislative provision differently, but in the particular context of the jurisdiction of each, one in a penal and the other in an administrative matter, a "conflict in decisions"? What about an isolated decision conflicting with a consistent line of authority? Must a jurisprudential conflict "continue" before being brought to the attention of the courts? If so, how is the quantitative and temporal threshold to be determined? Professor Ouellette has voiced these concerns:

> [TRANSLATION]
>
> Now we know at least that the concept of "serious or significant conflict of decisions" must be strictly inter-

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> preted, but it remains a source of confusion and difficult to apply. How many differing opinions or persons affected, assuming that they can be quantified, must there be to justify review on evocation of a decision not otherwise patently unreasonable?

(Yves Ouellette, "Le contrôle judiciaire des conflits jurisprudentiels au sein des organismes administratifs: une jurisprudence inconstante" (1990) 50 R. du B. 753, at p. 757.)

89 The principle that decisions of administrative tribunals remain effective is accordingly decisive. While answers diametrically opposed according to the identity of the members of an administrative tribunal certainly would seem to be unacceptable, what is the position of the litigant in whose favour the same administrative tribunal has ruled but who sees this decision challenged (with all the costs, delays and so on involved), perhaps needlessly, on the ground of an alleged inconsistency? The first situation is relatively rare and can be resolved outside the judicial arena. The legislature is in that category. Similarly, the administrative body can play a role of primary importance. As Professor MacLauchlan noted, supra, at p. 437:

> The proper response to administrative action which is ostensibly inconsistent but which falls short of traditional jurisdictional grounds of review is not judicial oversight, but the exertion of pressure in the political dynamic, of which the administrative decision-maker forms a vital element.

90 Similarly, it is important to note the internal mechanisms developed by administrative tribunals to ensure the consistency of their own decisions: *Consolidated Bathurst Packaging Ltd. v. International Woodworkers of America, Local 2-69*, (sub nom. *I.W.A. v. Consolidated-Bathurst Packaging Ltd.*) [1990] 1 S.C.R. 282, and *Québec (Commission des affaires sociales) c. Tremblay*, [1992] 1 S.C.R. 952. In *Tremblay*, Gonthier J. noted that "the objective of consistency responds to litigants' need for stability but also to the dictates of justice" (at p. 968). In *Consolidated-Bathurst*, Gonthier J. spoke of the importance for an administrative tribunal to maintain a high level of quality and consistency in its decisions (at pp. 327-328):

> It is obvious that coherence in administrative decision making must be fostered. The outcome of disputes should not depend on the identity of the persons sitting on the panel for this result would be [TRANSLATION] "difficult to reconcile with the notion of equality before the law, which is one of the main corollaries of the rule of law, and perhaps also the most intelligible one": Morrissette, Le contrôle de la compétence d'attribution: thèse, antithèse et synthèse (1986), 16 R.D.U.S. 591, at p. 632. *Given the large number of decisions rendered in the field of labour law, the Board is justified in taking appropriate measures to ensure that conflicting results are not inadvertently reached in similar cases.* [Emphasis added.]

91 This Court has also recognized that the search for consistency is not an absolute one. Thus, in the foregoing case it was held that the members of an administrative tribunal were not bound by any stare decisis rule (at p. 333). Similarly, as Gonthier J. pointed out in *Tremblay*, the consistency objective must be pursued in keeping with the decision-making autonomy and independence of members of the administrative body (at p. 971):

> We have seen that the justification for institutionalizing decisions lies primarily in the need to ensure consistency in decisions rendered by administrative tribunals. Whether the latter make decisions with a high policy component or not, those decisions must be consistent with the requirements of justice. *A consultation process by plenary meeting designed to promote adjudicative coherence may thus prove acceptable and even desirable for a body like the Commission, provided this process does not involve an interference with the freedom of decision makers to decide according to their consciences and opinions.* [Emphasis added.]

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92 Finally, in the same case, the Court noted that administrative tribunals could render contradictory decisions (at p. 974):

> Ordinarily, precedent is developed by the actual decision makers over a series of decisions. The tribunal hearing a new question may thus render a number of contradictory judgments before a consensus naturally emerges. This of course is a longer process; but there is no indication that the legislature intended it to be otherwise. Bearing this in mind, I consider it is particularly important for the persons responsible for hearing a case to be the ones to decide it. [Emphasis added.]

93 Though they were part of a discussion centering on the rules of natural justice, these remarks indicate that certainty of the law and decision-making consistency are chiefly notable for their relativity. Like the rules of natural justice, these objectives cannot be absolute in nature regardless of the context. The value represented by the decision-making independence and autonomy of the members of administrative tribunals goes hand in hand here with the principle that their decisions should be effective. In light of these considerations we must conclude that, for purposes of judicial review, the principle of the rule of law must be qualified. This is consistent with the continuing evolution of administrative law itself. The process by which curial deference has progressively become established in courts of law was analyzed by Wilson J. in National Corn Growers Assn. v. Canada (Canadian Import Tribunal), supra (at p. 1336):

> Canadian courts have struggled over time to move away from the picture that Dicey painted toward a more sophisticated understanding of the role of administrative tribunals in the modern Canadian state. Part of this process has involved a growing recog nition on the part of courts that they may simply not be as well equipped as administrative tribunals or agencies to deal with issues which Parliament has chosen to regulate through bodies exercising delegated power, e.g., labour relations, telecommunications, financial markets and international economic relations. Careful management of these sectors often requires the use of experts who have accumulated years of experience and a specialized understanding of the activities they supervise.
>
> Courts have also come to accept that they may not be as well qualified as a given agency to provide interpretations of that agency's constitutive statute that make sense given the broad policy context within which that agency must work. [Emphasis added.]

94 This process has led to the development of the patently unreasonable error test. If Canadian administrative law has been able to evolve to the point of recognizing that administrative tribunals have the authority to err within their area of expertise, I think that, by the same token, a lack of unanimity is the price to pay for the decision-making freedom and independence given to the members of these tribunals. Recognizing the existence of a conflict in decisions as an independent basis for judicial review would, in my opinion, constitute a serious undermining of those principles. This appears to me to be especially true as the administrative tribunals, like the legislature, have the power to resolve such conflicts themselves. The solution required by conflicting decisions among administrative tribunals thus remains a policy choice which, in the final analysis, should not be made by the courts.

VI — Conclusion

95 For all these reasons, I would allow the appeal and dismiss the motion in evocation, the whole with costs throughout.

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Appeal allowed.

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