The Surprising Formalist: Justice Gonthier’s Contribution to Labour Law

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I. INTRODUCTION

During his time at the Supreme Court of Canada, Justice Charles D. Gonthier made important contributions to the development of administrative law, a field in which he saw an opportunity to advance fraternal values. In turning his formidable intellect to administrative law, he rarely lost sight of what he took to be its fundamental objective: “to establish a fair and realistic balance between administrative necessities and the rights of citizens”. His decisions reflect this and they demonstrate a nuanced view of the policy issues that drive the administrative process. Rigorous, but not formalistic, his reasoning demonstrates not only deference to the decisions of administrative tribunals, but respect for their institutional arrangements, their modes of decision-making and their approaches to statutory interpretation.

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1 Lorne Sossin, “Developments in Administrative Law: The 2002-2003 Term” (2003) 22 S.C.L.R. (2d) 21, at 22 (“While administrative law may not have been [Justice Gonthier’s] best known area of interest, his influence over the field has been significant.”).


3 Id., at 15.
Though his decisions on labour law matters were few, their impact was also significant. What is striking about these decisions, however, is neither their number nor their influence, but the reasoning that they contain. In contrast to Justice Gonthier’s administrative law judgments, his labour law decisions are decidedly formalistic.

The apparent variance between these two corpora — Justice Gonthier’s administrative law judgments and his labour law judgments — constitute an apparent paradox that lead me to dub him a “surprising formalist”. In this paper, I give examples of Justice Gonthier’s non-formalism in administrative law cases and contrast them with his formalistic reasoning in labour law cases. I conclude by canvassing ways in which we might reconcile the two approaches.

II. VARIETIES OF FORMALISM

There is no single agreed definition of legal formalism. Often, the adjective “formalist” is used simply as an epithet. To accuse someone of formalism is little more than to say that you disagree with them. But formalism cannot be reduced to a mere derogatory adjective; it refers — sometimes descriptively, sometimes critically — to a family of related views on the nature of law and on the appropriate method of legal interpretation.

As a theory of law, formalism posits an ontology, that is, an account of law’s essential nature. As the term itself suggests, a formalist theory of law is primarily concerned with law’s forms or with its formal properties. On this view, what distinguishes law from other kinds of normativity is the structure of juridical relationships, and this structure is only

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4 I am referring here to decisions in which Justice Gonthier decided questions of labour law on the merits, and not to cases where the question before the Court was the scope of a labour board’s powers or the standard of review applicable to its decisions.


6 Schauer, id., at 510 (“[F]ormalist’ is the adjective used to describe any judicial decision, style of legal thinking or legal theory with which the use of the term disagrees”). See also Paul N. Cox, “An Interpretation and (Partial) Defense of Legal Formalism” (2003) 36 Ind. L. Rev. 57, at 58 (“It is … an article of faith among most legal academics that formalism is a sin.”).

fully intelligible from an internal standpoint. Formalists are thus committed to the view that law is not just “an instrument for forwarding some independently desirable purpose given to it from the outside”, but an irreducible and interconnected system of rules and concepts that displays an “immanent rationality”.8

Formalism is also an approach to legal interpretation and in particular to statutory construction; it is what Cass Sunstein calls an “interpretative strategy”.9 The formalist interpretative strategy constrains judicial discretion by insisting on compliance with formalities and respect for the boundaries determined by legal rules:

Formalism implies a narrow approach to legal control — the use of clearly defined, highly administrable rules, an emphasis on uniformity, consistency and predictability, on the legal form of transactions and relationships and on literal interpretation.10

Evidently, the formalist interpretative strategy is not entirely divorced from the formalist theory of law. Often, those who favour the interpretative strategy do so precisely because they subscribe to the theory.11 If we take the claim of law’s immanent rationality seriously, then it requires interpreters to approach law as an autonomous body of rules whose application is determined by a deductive method “that relies on the text of the relevant law and that excludes or minimizes extratextual sources of law” 12.

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8 Weinrib, id., at 955.
9 Sunstein, supra, note 5, at 638.
10 McBarnet & Whelan, supra, note 5, at 848-49.
11 This is not always the case. Though adherence to a formalist theory of law may logically be prior to adoption of a formalist interpretive strategy, it is not necessarily antecedent as a matter of psychological fact. I suspect that many practitioners adopt a formalist interpretive strategy simply because that is what their education inculcated in them as being the very nature of “legal reasoning” and because formalism is most consonant with their experience in litigation. They may thus adhere (explicitly or implicitly) to the formalist theory because it is the most compatible with their practice. Furthermore, some functionalists may expound a formalist interpretative strategy on the grounds that it promotes some desired outcome to which legal ordering ought to strive, rather than due to the nature of legal normativity as such. On this latter point, see, e.g., Michael J. Trebilcock, The Limits of Freedom of Contract (Cambridge, MA: Harvard University Press, 1993) [hereinafter “Trebilcock”], esp. at 135-36 (arguing that “[a] clear but austere, rule of literal contract enforcement” is the best mechanism to ensure an economically efficient allocation of risk between the parties).
12 Sunstein, supra, note 5, at 639. See also Duncan Kennedy, “Legal Formalism” in Neil J. Smelser & Paul B. Baltes, eds., Encyclopedia of the Social & Behavioral Sciences, vol. 13 (New York: Elsevier, 2001) 8634, at 8635 (“Textual interpretive formalism decides by identifying a valid norm applicable to the case and then applying it by parsing the meanings of the words that compose it. Textual formalism is literalist to the extent that it refuses to vary meaning according to context, and originalist to the extent that it finds meaning only through the context at the time of enactment.”).
Just as there is no authoritative definition of formalism, there is no canonical form of anti-formalism.\(^{13}\) For instance, legal realism, Marxism, critical legal studies, and the law and economics approach are all anti-formalist in that they deny (in sometimes mutually exclusive ways) that law can be exhaustively — or even adequately — described from an internal standpoint. Anti-formalists may describe law as a predictive hypothesis about the use of force by the state,\(^{14}\) an ideological veil for class exploitation,\(^{15}\) an open-ended terrain of discursive struggle\(^{16}\) or an evolving process for the efficient allocation of risk.\(^{17}\) This diversity of anti-formalist positions demonstrates that — despite the common association of formalism with an ideology of judicial conservatism — the divide between formalists and anti-formalists is not primarily ideological.\(^{18}\)

My purpose in this section is not to provide an exhaustive typology of formalist positions, nor to provide an authoritative definition of formalism. Rather, I want to give a general idea of what I mean when I claim that Justice Gonthier’s approach to labour law is formalistic. Perhaps the best way to get at this is by evoking the following (admittedly stereotypical and incomplete) list of dichotomies:

- Formalism emphasizes the autonomy of law, rather than its embeddedness in social and economic life.
- Formalism is concerned with rules, not policies.
- Formalism relies on the letter of the law and not the spirit of the law.

\(^{13}\) Sunstein, id.


\(^{16}\) See, e.g., Duncan Kennedy, A Critique of Adjudication (fin de siècle) (Cambridge, MA: Harvard University Press, 1997).


• Formalist reasoning is (or claims to be) *deductive and syllogistic* rather than *rhetorical and discursive*.
• Formalism gives priority to *processes over outcomes*.

### III. Formalism and Labour Law

Much of modern labour law has developed as a response to excessive formalism in the judicial treatment of the employment contract. In Canada, employers routinely exploited this formalism by structuring their relationships with workers or their corporate forms in ways that allowed them to evade the application of employment standards or collective bargaining regimes. For example, workers might be hired under contracts that stipulated they were not employees but “independent contractors” and employers routinely changed their corporate configuration in order to avoid the application of union bargaining certificates.

One way in which Canadian legislatures responded to this was by enacting provisions that frame the employment relationship in functional terms that emphasize the economic and power relations between the parties, rather than particular legal forms. Thus, the definition of “employee” in labour relations statutes is generally large enough to cover so-called “dependent contractors”, notwithstanding the legal form that the parties may have used to characterize their relationship.

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19 In the United States, the *locus classicus* of formalist judicial reasoning is *Lochner v. New York*, 198 U.S. 45 (1905), in which the Supreme Court held that a New York law regulating the work week of bakers violated the due process clause of the Fourteenth Amendment because it limited the freedom to contract. For a discussion of *Lochner* and formalism, see Schauer, *supra* note 5, at 511 and ff.


22 Note that though this “turn to functionalism” is of particular importance to labour and employment law, it is by no means limited to this field. For instance, Article 9 of the United States Uniform Commercial Code, which served as the model for the various Canadian personal property security acts and, to a lesser extent, Book VI of the Civil Code of Québec, defines a security interest in purely functional terms rather than appealing to the formal legal framework out of which it arises. See Michael G. Bridge *et al.*, “Formalism, Functionalism and Understanding the Law of Secured Transactions” (1999) 44 McGill L.J. 567.

single-employer declarations and successor rights create exceptions to the privity rule and allow for the finding of an employment relationship even when the parties have not entered into a contract directly. The wording of these provisions is generally sufficiently broad to ensure that they apply regardless of the “technical legal forms of business transactions”.

These legislative responses have worked in concert with refinements of the principles of statutory interpretation, with the consequence that the interpretative strategy generally favoured by Canadian courts in labour law matters is now less formalist than in the past. Indeed, it is now a common rhetorical strategy for Supreme Court justices to tax decisions or reasoning with which they disagree as being overly formalist in contrast to a more “contextual” approach.
IV. Formalism and Administrative Law

The development of the Canadian law of judicial review can profitably be described as a continuing dialectic between formalism and some kind of anti-formalist functionalism. This dialectic proceeds as follows: a principled or policy reason is given as justification for judicial review. Operationalizing this justification results in a plethora of formal categories that eventually mask the underlying policy and raise the twin spectres of incoherence and arbitrariness. The formal categories are swept aside in favour of a single principle that is described as unifying them. The application of that principle in turn leads to a series of formal categories ... and the wheel turns.29

Justice Gonthier’s contribution to the law of judicial review can be situated at a moment of this dialectic where perceived formalism gave way to the “pragmatic and functional approach”.30 In the early 1980s, after a period of back and forth between legislatures and courts — with legislatures adopting increasingly explicit and restrictive privative clauses protecting administrative decisions from judicial review and courts nevertheless finding reasons to intervene31 — the law of judicial

29 Snapshots of the most recent episodes of this dialectic can be found in Bibeault, supra, note 26 (disavowing the formalistic analysis of the preliminary or collateral question in favour of a pragmatic and functional approach associated with the concept of a patently unreasonable error); Canada (Director of Investigation and Research) v. Southam Inc., [1996] S.C.J. No. 116, [1997] 1 S.C.R. 748 (S.C.C.) (identifying the need for a standard more deferential than correctness but less deferential than patent unreasonableness and then fulfilling that need with a new standard of “reasonableness simpliciter”); and Dunsmuir v. New Brunswick, [2008] S.C.J. No. 9, [2008] 1 S.C.R. 190 (S.C.C.) (reconsidering both the number and definitions of the various standards of review and unifying them under the rubric of “deference”). Recently, in her concurring judgment in Smith v. Alliance Pipeline Ltd., [2011] S.C.J. No. 7, 2011 SCC 7, at para 83 (S.C.C.), Deschamps J. warned “that the Court’s elaboration [in Dunsmuir] of categories of question should not be turned into a blind and formalistic application of words rather than principles”.

30 This “retreat from formalism” and attendant “triumph of pragmatism” was not a spontaneous occurrence, but the rise to dominance of an approach that had been many years in the making. See Philip L. Bryden, “Canadian Administrative Law in Transition: 1963-1988” (1988) 23 U.B.C. L. Rev. 147.

review had become a highly technical morass. Courts were required to determine whether the contested aspect of the decision under review was a question of law preliminary to the assumption of jurisdiction by the administrative tribunal or collateral to the exercise of that jurisdiction once it was properly assumed. If the answer to either of these questions was “yes”, then the court could intervene on the grounds that the legislative grant of jurisdiction — and thus the protection afforded by the privative clause — did not extend to the question of law under review. Conversely, if the question of law was found to be squarely within the jurisdiction of the administrative tribunal, then the courts were to defer to the legislator’s intent to shield its decisions from judicial scrutiny. But even then, if the decision was patently unreasonable, then courts could intervene, essentially on the grounds that no legislature could intend to grant an administrative tribunal the jurisdiction to render patently unreasonable decisions. In other words, the law of judicial review required a formalistic analysis that obscured the fundamental policy questions related to the degree of deference that ought to be accorded to administrative tribunals by courts. It was in response to this formalism that the Supreme Court adopted the pragmatic and functional approach in Bibeault:

[H]ow can one distinguish a condition which the legislator intended to leave to the exclusive determination of the administrative tribunal from a condition which limits its authority and as to which it may not err? One can make the distinction only by means of a more or less formalistic categorization. Such a categorization often runs the risk of being arbitrary and which may in particular unduly extend the superintending and reforming power of the superior courts by transforming it into a disguised right of appeal.

The formalistic analysis of the preliminary or collateral question theory is giving way to a pragmatic and functional analysis, hitherto associated with the concept of the patently unreasonable error.

32 To illustrate this point, Roderick Macdonald argued that a complete description of the various grounds for judicial review accepted by the courts in Canada required a 28-fold taxonomy. See Roderick A. Macdonald, “Absence of Jurisdiction: A Perspective” (1983) 43 R. du B. 307, at 311-12, n. 6.


34 Bibeault, supra, note 26, at paras. 119 and 123.
The pragmatic and functional approach became the Supreme Court’s mantra and it was in the context of its dominance that Justice Gonthier’s opinions were rendered.

V. Justice Gonthier’s Non-formalism and the Role of Administrative Tribunals

Justice Gonthier’s contribution to the jurisprudence on judicial review of the decisions of administrative tribunals can be characterized as non-formalist in two distinct ways. First, he demonstrated a commitment to protecting non-formalistic sites of adjudication and regulation from encroachment by the courts. Second, in at least some cases, the legal analysis that he mobilized in support of this position is itself non-formalist.

The benefits, real and imagined, of withdrawing various forms of social conflict from the jurisdiction of the law courts in favour of administrative agencies and tribunals are often rehearsed and well known. Administrative justice is said to be speedier and less costly than civil litigation, and the expertise of specialized tribunals ensures the coherent application of complex regulatory regimes that are often the result of a compromise between competing policy objectives. If we are to reap these benefits, then the decisions of administrative agencies and tribunals must be protected from judicial review. Judicial review increases costs and adds time. Furthermore, judges do not have the domain-specific expertise that characterizes administrative decision-makers. Indeed, domain-specific expertise in complex regulatory environments may justify judicial deference to administrative tribunals even when they do not benefit from a privative clause.

Justice Gonthier recognized that protecting administrative tribunals from judicial review is not only a matter of showing deference to their rulings (which was the primary focus of the pragmatic and functional approach), but also of respecting the institutional arrangements that they have set up in furtherance of legitimate policy objectives. Such institutional arrangements are often both informal (in the sense of not involving formal adjudicative hearings) and non-formalistic (in the sense of not proceeding as though formal syllogistic reasoning were the only permis-

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35 They were canvassed by Gonthier J., supra, note 2.
sible way to determine the application of legal rules). For instance, administrative tribunals may hold meetings of all of their members in order to discuss developing jurisprudence and come to a consensus regarding the underlying principles that should guide future decisions. This has the advantage of ensuring consistency in the decisions rendered, which in turn bolsters the tribunal’s legitimacy, reduces uncertainty among the subjects of regulation and promotes settlement of disputes rather than litigation.

It was precisely such a practice that was at issue in *I.W.A., Local 2-69 v. Consolidated-Bathurst Packaging Ltd.*, where the employer contested the Ontario Labour Relations Board’s practice of holding “full board meetings” in which all of the board members discussed the draft decision of a panel prior to it being rendered. This practice, according to the employer, contravened the rules of natural justice in that it impinged on the independence of the adjudicators who were to ultimately render the decision and violated the principle of *audi alteram partem*.

Justice Gonthier’s reasons demonstrate a nuanced understanding of the importance of full board meetings and recognize that labour boards are not simply “mini courts”. Though adjudication of individual disputes is a central function of a labour board, this function can only be understood as being part of a scheme of administrative governance, and it would be inappropriate to mechanically impose rules of natural justice developed in the context of litigation before the courts without taking this into account. Justice Gonthier explains:

[T]he rules of natural justice must take into account the institutional constraints faced by an administrative tribunal. These tribunals are created to increase the efficiency of the administration of justice and are often called upon to handle heavy caseloads. It is unrealistic to expect an administrative tribunal such as the Board to abide strictly by the rules applicable to courts of law.

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38 The *Labour Relations Act*, R.S.O. 1980, c. 228 gave no express statutory authority for this practice.

39 “Full board meetings” are not “full board hearings”. Though the quorum requirements for board panels constitute a minimum number, there is no maximum number. It would be thus possible for all of the members of the board to sit on the panel, hear the evidence and render the decision. This would be a “full board hearing”. In “full board meetings”, the constituted panel simply consults other members of the board during an informal meeting. See *Consolidated Bathurst, supra*, note 37, at 323, 326.

40 Id., at 323.
He continues, discussing the rationale behind the need to hold full board meetings:

The first rationale behind the need to hold full board meetings on important policy issues is the importance of benefiting from the acquired experience of all the members, chairman and vice-chairmen of the Board. ... [T]he primary purpose of the creation of administrative bodies such as the Ontario Labour Relations Board is to confer a wide jurisdiction to solve labour disputes on those who are best able, in light of their experience, to provide satisfactory solutions to these disputes ...

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The rules of natural justice should not discourage administrative bodies from taking advantage of the accumulated experience of its members. On the contrary, the rules of natural justice should in their application reconcile the characteristics and exigencies of decision making by specialized tribunals with the procedural rights of the parties.

The second rationale for the practice of holding full board meetings is the fact that the large number of persons who participate in Board decisions creates the possibility that different panels will decide similar issues in a different manner. It is obvious that coherence in administrative decision making must be fostered. ... 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. The fact that the Board’s decisions are protected by a privative clause ... makes it even more imperative to take measures such as full board meetings in order to avoid such conflicting results.41

He concludes that, understood in the institutional context of the labour board, the rules of natural justice do not require parties to be informed that there will be a full board meeting, nor that they be given the opportunity to make representations in that meeting.

Justice Gonthier also recognized that the enabling statutes of administrative tribunals ought to be interpreted in light of the policy objectives that the legislature sought to achieve in constituting the regulatory regime. Rather than a formalist “strict construction” approach, courts ought to interpret such statutes in context. This is precisely the approach that he took in Chrysler Canada Ltd. v. Canada (Competition Tribunal)42

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41 Id., at 326-28.
and in *Nova Scotia (Workers’ Compensation Board) v. Martin; Nova Scotia (Workers’ Compensation Board) v. Laseur.*

In *Chrysler,* the question before the Supreme Court was whether the Competition Tribunal had the power to hold litigants in contempt for having failed to conform to orders that it issued. In his reasons, Gonthier J. embarks on a detailed analysis of the enabling statute (the *Competition Tribunal Act*44) and concludes that, despite the apparent absence of an express grant of such a power, the Competition Tribunal did in fact have jurisdiction to punish litigants for contempt *ex facie curiae.*

What is interesting about the decision, however, is not Gonthier J.’s detailed analysis of the statute, but his insistence on reading it in the broader context of the Competition Tribunal’s functions.45 He concludes by stating:

A substantial portion of these reasons has already been devoted to showing how the Tribunal is an integral part of the framework created by the [*Competition Act*] and [*Competition Tribunal Act*]. … In the context of competition law, particularly of Part VIII CA, where the subject-matter lies largely in the realm of contractual relationships, effective enforcement of orders is essential, for fear of seeing these orders circumvented through elaborate relational arrangements which, although on the surface innocuous, effectively create the same obstacles that the orders sought to remove. Only a specialized tribunal such as the Tribunal can properly ensure the enforcement of the orders it makes.46

Similarly, in *Martin,* Gonthier J. rejected the view that an administrative tribunal’s jurisdiction can be determined formally, in favour of a contextual approach. In *Martin,* the Nova Scotia Workers’ Compensation Appeals Tribunal refused to apply regulations that provided reduced benefits for claimants afflicted with chronic pain syndrome, because, according to the tribunal, they violated section 15 of the Canadian Charter and were not justified under section 1. One of the issues before the Supreme Court was whether the Workers’ Compensation Appeals Tribunal had the power to refuse to apply regulations adopted under its

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44 R.S.C., 1985, c. 19 (2nd Supp.).

45 A fine-grained analysis of this decision, and in particular of the subtle interpretation advanced by Gonthier J. can be found in David Stratas, “A Unique Approach to Interpreting Tribunal Powers: Justice Gonthier and the cases of *Chrysler* and *Québecair*” in this volume (hereinafter “*Stratas*”).

46 *Chrysler,* supra, note 42, at 419.
own enabling statute on the grounds that they were unconstitutional, despite the absence of a specific and explicit legislative grant of such a power.

In his judgment for the Court, Gonthier J. re-affirms the power of administrative tribunals to refuse to apply unconstitutional provisions of their own enabling statutes. One of the arguments in support of this affirmation is that, “[i]n the case of Charter matters which arise in a particular regulatory context, the ability of the decision maker to analyze competing policy concerns is critical.” This deference to the policy expertise of administrative tribunals authorized the Court (according to Gonthier J.) to read the enabling statute broadly. Rather than interpreting the statute strictly to determine whether the administrative tribunal has been explicitly granted the authority to decide Charter questions, Gonthier J. asserts that the court need only determine whether it has the authority to interpret and apply the law. Furthermore, he admits that in some cases, the Court must “go beyond the language of the statute” to find such a grant.

Though I think Consolidated Bathurst, Chrysler and Martin are representative of Justice Gonthier’s approach to administrative law, it is important not to overstate the case for his non-formalism. In keeping with his concern for striking a balance between administrative efficiency and citizens’ rights, he did not abdicate what he took to be the Court’s responsibility to determine the “reasonableness” of an administrative decision, even if that required detailed analysis.


48 Martin, id., at para. 30, citing La Forest J.’s reasons in Cuddy Chicks, id.

49 Martin, id., at paras. 40-41.

VI. JUSTICE GONTHIER’S FORMALISM IN LABOUR LAW CASES ON THE MERITS

Despite Justice Gonthier’s record of protecting sites of non-formalist regulation (by shielding decisions of administrative tribunals from judicial review and by interpreting administrative tribunals’ powers in such a way as to preserve their regulatory functions), his reasoning on the merits of labour law cases suffers from the very kind of formalism that led legislators to withdraw labour matters from the jurisdiction of the courts in favour of administrative tribunals.

Two decisions in particular stand out: Béliveau St-Jacques v. Fédération des employées et employés de services publics Inc. and I.A.T.S.E., Stage Local 56 v. Société de la Place des Arts de Montréal. In both of these cases, Gonthier J.’s reasons discuss policy arguments, but ultimately end up adopting a strict and literal construction of the statute in question that hinges on a single word.

In Béliveau St-Jacques, the question before the Supreme Court was whether the exclusion of civil remedies by the Quebec workers’ compensation regime — which shields both employers and co-workers from liability based on events that gave rise to a worker’s employment injury — extends to punitive damages under the Quebec Charter of Human Rights and Freedoms. Following alleged incidents of sexual harassment, the appellant filed an action before the Superior Court of Quebec seeking compensatory and punitive damages from her former employer and a co-worker. Her suit was based on both the general civil liability regime and the Quebec Charter. She also filed a claim with the workers’ compensation commission (the Commission de la santé et de la sécurité du travail or “CSST”) and received benefits in compensation for the health consequences of the alleged harassment, which were found to fall within the definition of “employment injury”.

Justice Gonthier’s reasons in the majority judgment canvass the policy arguments in favour of protecting the integrity of the no-fault workers’ compensation regime. The heart of the decision, though, is not these policy arguments, but his interpretation of the second paragraph of section 49 of the Quebec Charter:

53 Act respecting industrial accidents and occupational diseases, R.S.Q., c. A-3.001, ss. 438 and 442 [hereinafter “AIAOD”].
54 R.S.Q. c. C-12 [hereinafter “Quebec Charter”].
The second paragraph of s. 49 clearly states that in case of unlawful and intentional interference with a protected right, “the tribunal may, in addition, condemn the person guilty of it to exemplary damages” ... . This wording clearly shows that, even if it were admitted that an award of exemplary damages is not dependent upon a prior award of compensatory damages, the court must at least have found that there was an unlawful interference with a guaranteed right ... The necessary connection with the wrongful conduct that gives rise to civil liability leads one to associate the remedy of exemplary damages with the principles of civil liability.\textsuperscript{55}

The argument hinges on the words “in addition” and is encapsulated in the following polysyllogism: (1) civil liability is extinguished by the workers’ compensation regime; (2) liability for compensatory damages under the Quebec Charter is coextensive with civil liability; (3) therefore, liability under the Quebec Charter remedy is also extinguished; (4) an award of punitive (“exemplary”) damages under the Quebec Charter is dependent on (the possibility of) an award of compensatory damages; (5) therefore, ostensible claims for punitive damages under the Quebec Charter are extinguished by the workers’ compensation regime.\textsuperscript{56} This is clearly a formalistic argument, combining a literal textual interpretation of a single article with hermetic deductive reasoning.\textsuperscript{57}

The opinion Gonthier J. rendered for the Court in \textit{Place des Arts} can be characterized as formalist in two ways. First, it characterizes the legal relationship between the parties at bar formally. Second, the decisive argument in determining the application of the statute relies on a formalist interpretation thereof.

The backdrop of the \textit{Place des Arts} decision was a long-standing labour relationship between the appellant performing arts centre (Société Place des arts or “SPA”) and the union representing its stage technicians. The union accreditation certificate operated in tandem with the collective agreement and the lease agreements between the SPA and its tenants to create a “hiring hall” regime whereby tenants were required to use the SPA’s unionized technicians. Tenants (\textit{e.g.}, the opera, the ballet, the symphony orchestra, \textit{etc.}) would communicate the number and type of

\textsuperscript{55} \textit{Béliveau St-Jacques}, supra, note 51, at para. 127 (emphasis added by Gonthier J.).

\textsuperscript{56} For a more thorough critical analysis of this case and its aftermath, see Finn Makela, “‘Tell Me Where it Hurts’: Workplace Sexual Harassment Compensation and the Regulation of Hysterical Victims” (2006) 51 McGill L.J. 27 and the works cited therein.

\textsuperscript{57} Compare L’Heureux-Dubé J.’s dissent in \textit{Béliveau St-Jacques}, supra, note 51, at para. 63, in which she arrives at the opposite result using what she describes as “a literal, contextual, logical and teleological interpretation”. 
technicians they needed for their performances — either to the SPA or
directly to the union — and pay an amount corresponding to their wages
to the SPA, who then paid the technicians. 58

In 1999, the union engaged in a legal strike in furtherance of its col-
lective bargaining demands. While the technicians were on strike, the
SPA ceased providing technical services to its tenants, and its lease
agreements were modified accordingly. The SPA’s technicians’ employ-
ment was terminated, and thereafter tenants were to arrange for their own
technicians.

Upon hearing a complaint filed by the union, the Quebec Labour
Tribunal found59 that the SPA had violated the anti-strikebreaker provi-
sion of the Quebec Labour Code, which provides, in part:

109.1. For the duration of a strike declared in accordance with this
Code or a lock-out, every employer is prohibited from

.....

(b) utilizing, in the establishment where the strike or lock-out has been
declared, the services of a person employed by another employer
or the services of another contractor to discharge the duties of an
employee who is a member of the bargaining unit on strike or
locked out;

The Labour Tribunal considered the actual working conditions of the
technicians used by the tenant (in this instance, the symphony orchestra).
The technicians had to report to the SPA’s technical director, who
informed them of the work to be done and was present during the work.
Other than setting out the orchestra’s requirements on a spec sheet, no
representative of the lessee intervened in any way in the conduct of the
work. Indeed, the orchestra’s personnel director testified to the effect that
the work done by the technicians was precisely the same as it had been
during previous performances when they were employees of the SPA.

In keeping with the contemporary jurisprudence, the Labour Tribunal
analyzed the relationships between the SPA, its tenants and the techni-
cians from a functional perspective. The Tribunal found that it would be

58 Tellingly, this description of the hiring hall regime is left entirely out of the Supreme
Court decision. I have drawn it from the Labour Tribunal judgment Alliance internationale des
employées de la scène et de théâtre, section locale 56 c. Société de la Place des Arts de Montréal,
S.C.) (“Place des Arts (Penal appeal)"), leave to appeal to the Court of Appeal refused (sub nom.
59 Place des Arts (Labour Tribunal), id.
impossible for the SPA to carry on its business without the technicians. Formally, the technicians’ contracts of employment subsequent to the modification of the leases were with the tenants, rather than the SPA, but it made little difference which legal entity employed the technicians since the benefit of their labour accrued as much to the SPA as to the tenant. The SPA’s “use” of the tenant’s technicians was thus in violation of the Labour Code.

Being found guilty of violating the anti-strikebreaker provision of the Labour Code and fined $1,000 per day of violation did not deter the SPA from continuing the practice of having tenants hire technicians to do work covered by the bargaining unit. This eventually led the union to seek a permanent injunction from the Superior Court, which applied the same reasoning as the Labour Tribunal and granted the injunction. The Superior Court’s judgment was upheld on appeal and the SPA appealed to the Supreme Court.

In his short judgment, Gonthier J. rejects both the characterization of the employment relationship by the lower courts and their determination that section 109.1 of the Labour Code applied. Instead, he finds that the SPA simply “went out of the business” of supplying technical services to its tenants. This (partial) closing of the business meant that there was no longer an employment relationship between the technicians and the SPA and, therefore, no employees whose work was being done by tenants’ technicians. Furthermore, the SPA did not “utilize” the tenants’ technicians within the meaning of section 109.1 of the Labour Code.

On the nature of the employment relationship, Gonthier J. opines:

... In my view, the approach adopted in the courts below effectively conflates the SPA and its Tenants into a single undertaking whose acts are attributable solely to the SPA. This analysis risks losing sight of the fact that the SPA and its Tenants are distinct legal persons. The various activities of the SPA and its Tenants are economically interdependent, yet they remain activities engaged in by several juridically distinct entities. Likewise, the economic risks assumed by these entities, and the benefits gained by them, are attributable to each entity individually according to the tasks each undertakes and the business choices each

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60 Alliance internationale des employées de la scène et de théâtre, du cinéma et des métiers connexes et des artistes des États-Unis et du Canada, section locale 56 c. Société de la Place des Arts de Montréal, [2001] RJDT 607, DTE 2001T-320 [hereinafter “Place des Arts (injunction proceedings)”].

61 Alliance internationale des employés de scène et de théâtre du cinéma et des métiers connexes et des artistes des États-Unis et du Canada, section locale 56 c. Société de la Place des Arts, [2001] J.Q. no 4705 (Que. C.A.) [hereinafter “Place des Arts (appeal)”].
has made. While a functional, rather than formalistic, approach is undoubtedly desirable in labour law matters, one must not take this approach so far as to ignore the actual legal and economic structure of complex organizations like the Place des Arts.  

As this excerpt makes clear, Gonthier J. was perfectly aware that a functional approach is preferable in analyzing employment relationships. However, he declined to adopt the virtually unanimous view of the lower courts, in favour of a characterization that gives primacy to legal forms. With respect, I think that Gonthier J.’s justification for adopting a more formalist perspective is weak. His concern is the “risk” that “actual” legal structure of complex organizations would be “ignored” by finding that the SPA was in violation of section 109.1. But, as I discussed above, it was precisely because employers used (and often manipulated) their legal forms to avoid the application of labour relations statutes that the functional approach to employment relationships developed. A functional approach does not “lose sight” of employers’ legal structures, nor does it “ignore” them; rather, it deliberately refuses to give primacy to legal forms when they belie the underlying economic and power relations.

It is also curious that Gonthier J. extends his concerns about respect for the legal structure of SPA’s business relationships to their economic structure. If the objective is to give effect to legal forms rather than functionally determined relationships, then the economic consequences of the forms ought to be irrelevant. Furthermore, the judgments rendered by the courts below ably demonstrate that the economic structure in which the SPA and its tenants operated was unchanged by the SPA’s decision to cease employing technicians directly. Since under the “hiring hall” regime the tenants assumed the costs of technicians at exactly the rates set out in the collective agreement, neither the SPA’s labour costs nor those of their tenants were affected by the change. In light of this, Gonthier J.’s concern appears disingenuous, especially given that his judgment does not describe the actual functioning of the tripartite relationship between the SPA, its tenants and the technicians.

Having insisted on the importance of the legal form of the SPA’s relationship, Gonthier J. goes on to analyze the wording of the anti-strikebreaker provisions found in section 109.1 of the Labour Code. This

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62 Place des Arts (SCC), supra, note 52, at para. 20 (emphasis added).

63 The functional approach was taken or ratified in Place des Arts (Labour Tribunal), supra, note 58, in Place des Arts (Penal appeal), supra, note 58, in Place des Arts (injunction proceedings), supra, note 60 and by the majority of the Court of Appeal in Place des Arts (appeal), supra, note 61.
was the first occasion that the Supreme Court had had to analyze these provisions since their adoption in 1977. The provisions are relatively unique and continue to raise many controversial questions of policy. One could therefore have reasonably expected Gonthier J. to take the opportunity to engage in a contextual and policy-sensitive analysis of the history of these provisions, their role in labour relations, and their interpretation by the specialized labour tribunals and courts in the quarter-century since their adoption. Instead, Gonthier J. devotes all of three paragraphs to the provisions, focusing on the scope of the word “utilize”. He concludes:

I agree with the SPA that the dictionary definitions … indicate that to utilize involves a positive act by the user. The language and context of s. 109.1(b) are consistent with this usage. She who merely passively benefits from a given state of affairs does not utilize anything. The SPA cannot be said to be utilizing the services of stage technicians employed by the Tenants within the meaning of s. 109.1(b). The benefit that the SPA draws from its Tenants’ business operations is not, in my view, what the legislature intended to capture with the word “utilizing” in s. 109.1(b).

The argument is brief. It is also a classically formalist one. Despite the reference to “context”, Gonthier J. declines to inquire into the policy reasons behind the provisions in order to inform his reasoning and gives no indication as to what the effects (whether beneficial or deleterious) of such a restrictive reading might be. He confines himself to an interpretation of a single word based on its dictionary definition and declares this sufficient to determine what the legislature intended.

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64 Of the 10 other jurisdictions in Canada that have adopted labour relations statutes, only British Columbia has adopted a general interdiction of replacement workers. See, Labour Relations Code, R.S.B.C. 1996, c. 244, s. 68. This section of the B.C. Labour Relations Code has never been at issue before the Supreme Court.

65 In 2011, following a protracted lockout by the Journal de Montréal during which outside journalists were used to replace striking workers, the National Assembly’s Committee on Labour and the Economy held public hearings on the various issues of labour relations policy raised by s. 109.1 of the Labour Code, supra, note 25. See Québec, Commission de l’économie et du travail, “Document de consultation sur le mandat d’initiative sur la modernisation des dispositions anti-briseurs de grève prévues au Code du travail” (January 18, 2011), online: <http://socialtravail.uqam.ca/files/2011/01/cet_doc_consultation.pdf>.

66 Place des Arts (SCC), supra, note 52, at para. 27.
Thus far, I have illustrated an apparent paradox in Justice Gonthier’s approaches to administrative law and to labour law. His administrative law decisions give careful consideration to the policy issues underlying the grant of jurisdiction to administrative tribunals and agencies and endeavour to protect these sites of non-formalist regulation from overzealous review by the courts. In contrast, his labour law decisions are characterized, at least in part, by a formalist approach to both statutory interpretation and the analysis of employment relationships. In this final section, I canvass some arguments as to how this apparent paradox can be resolved, or at least attenuated.

First, it is important to highlight that my characterization of the Béliveau St-Jacques and Place des Arts decisions as formalistic should not be taken as mere disagreement with their outcomes. I am primarily concerned here with the reasoning in those cases and not their outcomes, per se. Indeed, it would have been possible for Gonthier J. to come to the same conclusions in these judgments using a different interpretative strategy. This is confirmed by de Montigny v. Brossard (Succession), which essentially reversed the interpretation of section 49 of the Quebec Charter set out by Gonthier J. in Béliveau St-Jacques. In de Montigny, the Court found that the remedy of exemplary damages provided for by the second paragraph of section 49 of the Quebec Charter is autonomous and distinct from compensatory remedies. The exception to this is public compensation systems, which are excluded, not because of the formal structure of section 49, but for reasons of policy:

... Béliveau St-Jacques dealt specifically with the interaction between the AIAOD, a provincial statute that separates claims by victims of industrial accidents from the general system of civil liability, and the Quebec Charter. As Gonthier J. noted, the AIAOD results from a social compromise whereby workers waive the possibility of obtaining full compensation by way of a civil action while employers have to provide partial compensation in the event of an accident. By its very nature, such a complete and closed system, detached from the concept of fault or intentional acts, excludes the existence of a parallel system of liability that would hypothetically be based on s. 49 of the Quebec Charter. Since he was concerned about the long-term viability of that public system, Gonthier J. was probably seeking to maintain its financial and structural stability by ensuring that the prohibition

against bringing civil proceedings against employers contributing to the system remained effective. His comments must therefore be understood in that context.

Therefore, it is my view that the majority opinion in Béliveau St-Jacques has been given too broad a scope. That opinion excluded an action under s. 49, para. 2 only in cases involving public compensation systems, such as the system applicable to employment injuries in Quebec. 68

Thus, clearly Gonthier J. could have arrived at the same result in Béliveau St-Jacques without resorting to the formalist interpretation. The same point can be made for Place des Arts. Therefore, any attempt to reconcile Justice Gonthier’s labour law jurisprudence with his administrative law jurisprudence must not depend solely on the outcomes of the decisions.

Second, it should be noted that in both Béliveau St-Jacques and Place des Arts, the Supreme Court was unfettered by the requirement of deference to decisions rendered by administrative tribunals. It could therefore be argued that Gonthier J.’s formalist reasoning in these cases is not incompatible with his non-formalist approach to administrative law. On this view, Gonthier J. was justified in taking a formalist approach in these cases because their procedural history permitted him to apply his own view of the law, rather than to defer to that of the (putatively non-formalist) administrative tribunal. 69

The argument can be taken one step further if one posits that there is a fundamental difference between administrative adjudication and adjudication by the courts, and that this difference is reflected in their available interpretative strategies. Administrative tribunals are granted jurisdiction precisely because their members have domain-specific expertise that judges lack, and that allows them to weigh policy factors in context. Privative clauses are thus a signal to judges that they ought not to interfere with decisions that they, by hypothesis, are ill-equipped to

68 Id., at paras. 42, 45, per LeBel J., for the Court (references omitted, emphasis added).
69 This is consistent with Gonthier J.’s reasons in Barrie Public Utilities v. Canadian Cable Television Assn., [2003] S.C.J. No. 27, [2003] 1 S.C.R. 476 (S.C.C.) [hereinafter “Barrie”]. In that case, once Gonthier J. had determined that the Court owed no deference to the Canadian Radio-television and Telecommunications Commission, he proceeded with “a fairly straightforward exercise of statutory interpretation” (Sossin, supra, note 1, at 58).
render. This implies a particular conception of the role and expertise of judges. Since they lack the policy expertise of specialized tribunals, their reasoning should reflect what judges do best; textual analysis and application of legal rules.

*Béliveau St-Jacques* started as an action for damages in the Superior Court, and the question of the CSST’s jurisdiction was raised by a motion to dismiss by way of declinatory exception for lack of jurisdiction *rationae materiae*. Any error by the Superior Court on this question was subject to the normal standard of correctness applicable to appeals. *Place des Arts* also originated in the Superior Court, in this case by way of a suit for injunction. As Gonthier J. remarks in his reasons, the Labour Tribunal’s finding that section 109.1 of the *Labour Code* had been breached did not bind the Superior Court, and no deference needed to be shown to that decision since the court was not sitting in judicial review.

But this avenue is not very helpful in squaring Gonthier J.’s formalist interpretation of section 49 of the Quebec Charter in *Béliveau St-Jacques* and of section 109.1 of the *Labour Code* in *Place des Arts* with his more contextual and policy-driven approach in *Chrysler* and *Martin*. Neither *Chrysler* nor *Martin* was concerned with the standard of review of administrative tribunal decisions on the merits. Rather, they centred on the scope of the administrative tribunal’s powers. Thus, in all of these cases, no deference was owed to the administrative tribunal and Gonthier J. was free to adopt a formalist or non-formalist approach as he saw fit. The tension between the forms of reasoning he chose thus remains unresolved.

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70 This is consistent with Gonthier J.’s finding in *Bell Canada*, supra, note 36, that — even in the absence of a privative clause — curial deference should be given to the opinion of the lower tribunal on issues that fall squarely within its area of expertise. See also *Barrie*, id.
71 *Béliveau St-Jacques*, supra, note 51, at paras. 94 (judicial history of the case) and 107 (where Gonthier J. remarks that this is not a case of judicial review and that none of the parties had contested the decisions of the workers’ compensation tribunals).
72 Ironically, by the time the Supreme Court rendered the decision in *Place des Arts*, the *Labour Code* had been overhauled and the newly created Commission des relations du travail had the power to render orders in the nature of an injunction, including in cases of alleged violations of s. 109.1: *An Act to amend the Labour Code, to establish the Commission des relations du travail and to amend other legislative provisions*, S.Q. 2001, c. 26. Had the case been litigated under the new regime, the Commission des relations du travail would have heard the matter sitting as an administrative tribunal, rather than the Labour Tribunal in the context of penal proceedings, and the union would never have had to go to the Superior Court for injunctive relief.
73 *Place des Arts (SCC)*, supra, note 52, at para. 15 (“Just as [the Superior Court judge] had to determine for himself, independently of the Labour Tribunal’s finding, whether the SPA was in violation of s. 109.1(b) of the Code, the Court of Appeal and now this Court must do the same.”).
Furthermore, if privative clauses are legislative incitements to judges to defer to administrative tribunals whose expertise they should respect in any event, then *Place des Arts* poses an additional problem. The fact that the Supreme Court was not sitting in judicial review of the Labour Tribunal’s decision does not in itself justify rejecting the Labour Tribunal’s functional analysis of the relationships between the SPA, its tenants and the unionized employees in favour of a formalist “distinct legal entities” approach. Surely, if deference is grounded not only in respect for the will of legislatures to grant administrative tribunals jurisdiction over specific areas of the law, but also in respect for the expertise of the administrative adjudicators, then the decisions rendered by administrative tribunals should be afforded serious consideration by courts when interpreting the tribunals’ “home statutes”.

A final way one might resolve the paradox is to simply deny that there is one. Justice Gonthier, one could argue, mobilizes several interpretative strategies in his judgments and weaves policy considerations and formalistic textual interpretation together in his arguments. There is certainly some merit to this position. In the administrative law judgments that I have identified as non-formalist, Justice Gonthier pays close attention to the words of the statute under analysis, and the labour law judgments that I have identified as formalistic deal extensively with policy issues. But this view still fails to address a fundamental question that underlies what I called the paradox of Justice Gonthier’s surprising formalism in labour law matters. Upon which criteria is the choice made to appeal to policy or to read a statute contextually, rather than to privilege legal forms and strict construction, and vice versa?

**VIII. Conclusion**

The paradox of Justice Gonthier’s surprising formalism is not easily resolved either by a close reading of the cases or by denying its existence. Nor does Justice Gonthier appear to adhere to an underlying principle that could be used to render the approaches in his administrative law judgments and his labour law judgments consistent. It is unclear what such a principle would be and, in any event, we should not expect that his judgments or his ideas (both of which evolved over time) should...
be perfectly consistent; “foolish consistency is the hobgoblin of little minds”\textsuperscript{75} and Justice Gonthier certainly does not fit the description.

What I do think the analysis of Justice Gonthier’s judgments has shown is that describing judgments as formalistic — or judges as formalists — is a perilous exercise. This is not because formalism has many meanings (it does) nor because it is meaningless (it is not). Rather, it is because the modes of reasoning and the interpretative strategies that are mobilized by decision-makers are necessarily multiple. Formalistic reasoning will always be part of the adjudicator’s toolbox insofar as it is intrinsically linked to the very nature of rendering decisions based on a rule.\textsuperscript{76} “The real question is ‘what degree of formalism?’ rather than ‘formalist or not?’”\textsuperscript{77} The answer to this question, I think, is one of the primary problems of both administrative law and labour law.

\textsuperscript{75} Ralph Waldo Emerson, \textit{Essays} (Boston & New York: Houghton Mifflin, 1883), at 58.
\textsuperscript{76} Schauer, \textit{supra}, note 5, at 510.
\textsuperscript{77} Sunstein, \textit{supra}, note 5, at 640.